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
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 Plaint 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 expences, 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 Prothonotary, Register, and Clerk of the Crown, as there is no Person in this Colony properly qualified for such office.
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 Superintendant 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 Diemen'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 apprize 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
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 Attornies.

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 Ocr., 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 it's first formation, and which the Composition of it's 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 it's 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 adviseable 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.

Inability to adopt suggestions.

Objections to proposed trial by jury.

Reasons for maintaining office of judge advocate.

Reasons for declining revision of charter.

Charter to be amended on separation of Tasmania.
1815.
11 Dec.

Issue of government and general orders by governor.

Status of deputy judge-advocate in court of appeals.

Necessity for support of governor by deputy judge-advocate.

Salary of E. Bent.

avail themselves: But, until that moment, I rely upon the Continuance of that Exertion on your part, which has enabled you to overcome difficulties far greater than those which you at present anticipate.

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
you of any Emoluments of which you had previously been in the Receipt; and I will not fail to take the Subject into Consideration, as soon as I shall receive from you an Account of the fees received by you previous to your Brother's Appointment, and those which have been paid to you since that date. As it is intended to make a general Arrangement with respect to the fuel and lodging money, heretofore allowed to different Persons in the Colony, I shall reserve my decision upon these points to a future period, assuring you however that, in directing the Retrenchments which have been made on this Subject, I had no intention of interfering with any Emoluments which you might, on proceeding to the Colony, have been led to expect.

I have, &c.,

Bathurst.

Under Secretary Goulburn to Mr. Justice 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 Jany., 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 Jany., 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 Jany., 1816.

Dear Sir,

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.,

Jno. 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 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, I entreat 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,

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
180 HISTORICAL RECORDS OF AUSTRALIA.

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.

20 Feb.
Refusal of J. H. Bent to pay tolls.

[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.

24 Feb.
Appointment of F. Garling as acting deputy judge-advocate.

[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,

25 Feb.

My Lord, 25th Feby., 1816.

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-
BENT TO BATHURST. 1816. 25 Feb.

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 President 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 of
1816.
25 Feb

Duties of
E. Bent in
civil court.

Causes tried in
civil court.

Testimony in:
favour of
E. Bent.

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 Regis-
strar, 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 obvi-
ous 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 Coun-
try, 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 2,839 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 Advoc-
cate 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 what-
ever 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 illegaliestes 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 encreased 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 expences 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
WYLDE TO GOULBURN.

respective 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.
1816. 7 March.

Seizure of schooner Traveller.

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.

I have, &c.,

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.

My Lord,

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.
Sydney, New South Wales,
16th March, 1816.

My Lord,

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
Attornies 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 Attornies 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-
mainning 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
nominated; 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' acquaintance; or that such a Man as Mr. Garling, who is literally 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 myself, Mr. Abbott, the Judge Advocate of Van Diemen's Land, had not offended; But the passing over that Gentleman makes it most 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. Garling 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 Governor's Court in any other Circumstances have been abrogated.

My Lord, It is endeavoured to set up a Defence to this appointment 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 knowledge 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 surprising 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 conversation 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 reliance upon his word and the Character he gave, was the Inducement to my recommendation of Mr. Garling to your Lordship, 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. Garling 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.

Incacity of F. Garling in criminal court.

Permanent appointment expected by F. Garling.

Advice to naval officer re schooner Traveller.

Incapacity of F. Garling in criminal court.

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 establishment, having made a seizure of this American, as acting in breach of our Navigation and Plantation Laws, Governor Macquarie 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 instigate 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 to a Court Martial for so doing; Though there are very great doubts whether he is amenable to such a Jurisdiction, and, before 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 Country, And that without any intimation of displeasure, any opportunity for explanation or any hearing, or even without consultation with myself, to whom I may say Mr. Moore is more peculiarly amenable. Upon hearing of this Step being in contemplation, 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,
1816.
16 March.

Alleged motives of action against W. H. Moore.

Powerful influence of L. Macquarie.

Loan offered to W. H. Moore by J. H. Bent.

Appeal on behalf of W. H. Moore.

Effect of wording of commissions to colonial officials.

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 Attorneys, 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 Attorneys; 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 circumstanceed 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.
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
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.

---

22 March.

Sentence of court-martial on Revd. B. Vale.

MR. JUSTICE BENT TO EARL BATHURST.

Sydney, New South Wales.

My Lord,

22nd 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-mand, 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 Emolument 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
1816.
11 April.

so fortunate as to obtain his recommendation, and therefore beg
leave to elect the Ship Elizabeth for my passage; though, if the
Vessel quit the Country on the 26th Inst. as suggested, it will
be perfectly impossible for me to take my Baggage with me, and
I must be under the necessity of requesting to have my Tonnage
in a Vessel next following, as under any Circumstances of pri-


deputy judge-advocate wylde to under secretary goulburn.
foreign and colonial office, wedn. noon.

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 Coun-
try, 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 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
gen erally 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 Indul-
gence 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.
1816.
12 June.

Illegality of prohibition by L. Macquarie.

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 publicly whipped here, and sent to the Coal River and publicly 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.
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 asked 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.

SER. IV. VOL. I—O

* Note 110.
1816.
12 June.

Deposition by D. Read re flogging inflicted by order of L. Macquarie.

NEW SOUTH WALES,
To Wit.

DAVID 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
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.

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.
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.

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.

MR. W. H. MOORE TO EARL BATHURST.

Sydney, New South Wales, 16th November, 1816.

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.

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.

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.
Request for nomination of judge in vice-admiralty.

1816.

2 Dec.

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.

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.

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.

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
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.

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.
Sir,

I beg leave most humbly to submit to your Excellency a Request for Petition, which I most earnestly crave your Excellency will be pleased to take into your most serious Consideration.

In submitting this paper to your Excellency, I cannot forbear remarking how much I lament that I should have found myself under the imperious necessity of troubling your Excellency so much at length as I have unavoidably been obliged to do; but I trust your Excellency will be of Opinion that no part of my Petition is either impertinent or inapplicable to the Circumstances of my Case or in any shape to have been avoided in my very distressing situation.

If it should be my good fortune that your Excellency would be pleased in forwarding my Petition to England to grant it the aid of your powerfull support, I need not say how grateful an impression it cannot but make upon me.

From the Correspondence which has already taken place with some of my friends at home, I have every reason to hope that a favourable impression may have already been Created in my favour; and I trust that Your Excellency's generous aid will assist me in an effort to enable me to avoid passing the few remaining years, which may be permitted me, in that indigence which cannot but overtake me if the severe measures now projected are carried into effect. With the most respectful Consideration I have, &c.,

GEO. CROSSLEY.

Answr.—The Govr. will have no objection to forward Mr. Crossley's Memorial Home per the Kangaroo for the favorable consideration of His Majesty's Prinl. Secry. of State for the Colonies on his sending in the said Meml. in Triplicate; but the Govr. cannot, after the orders* he has already received on that head in a late Dispatch, recommend that Mr. Crossley shall be permitted to practice as an Attorney in the Courts of Civil Judicature in this Colony.

Govt. House, Sydney, 18 Feby., 1817.

GEO. CROSSLEY.

Whereas the Lands in this territory are generally freehold, which may be so secretly transferred or conveyed from one Person to another that such as are ill disposed have it in their Power to commit frauds, by means whereof Persons, who may have been Enabled to purchase lands, or to lend Money on Land

* Note 117.
Security, may be afterwards undone in their Purchases and Mortgages by prior and secret Conveyances and fraudulent Incumbrances.

And whereas many freeholders have frequent Occasion to Borrow Money upon their Estates for conducting and managing their other Business and Concerns, and may find it more Easy to give satisfactory security in respect thereof, if a proper Register and Public Office for the Registration of all Deeds, Mortgages and Conveyances be duly appointed and Established within this Territory, by means whereof the general Interests and Trade of this Colony may be much advanced, and the welfare and success of private Families and Individuals much promoted and Secured.

And whereas, for the preservation of Title, Security of Possession, and due fulfilment of private Agreements and Engagements, it becomes of Public as well as of private Importance and Consideration that all Conveyances, Deeds, Mortgages and all other Instruments, with regard to or touching the transfer and Conveyance of freehold Property within this Territory, should be more formally and properly than heretofore, according to and in Due Course of Law, drawn, executed and registered; and for this End, that certain Directions and Provisions as to the Registering of Deeds and Conveyances, as now in force in some parts of England, should partially and in a Certain Degree be introduced and have Effect within this Territory.

It is hereby Ordered and declared, by the Authority aforesaid, that all Deeds and Conveyances which from and after the twenty fifth Day of March, next Ensuing the Date of this present Proclamation, shall be made and Executed of or concerning, or whereby any Houses, Lands, Tenements or Hereditaments in the said territory may be any way affected in Law or Equity, may, at the Election of the Party or Parties concerned, be Registered in such manner as is hereinafter directed, and that every such Deed or Conveyance that shall, at any time after the said 25th Day of March next, be made and Executed, shall be adjudged fraudulent and void against any subsequent Purchaser or Mortgagee for valuable Consideration unless such Deed shall be Registered, as by this present Proclamation is directed, before the Registering of the Deed or Conveyance under which such subsequent Purchaser or Mortgagee shall claim.

And whereas the Judge Advocate’s Office in this Territory has hitherto, and for a long time back, been voluntarily and generally used within the same as an Office of Registry,* and in order to settle and Establish the same, as such on a certain method with proper Rules and Directions for Registering such Deeds and

* Note 66.
Conveyances as aforesaid, it is hereby further Ordered and directed, by the authority aforesaid, that one Public Office for Registering all such Deeds and Conveyances of and concerning any Lands, tenements or Hereditaments, that are situate, lying and being within this Territory, shall be Established and Kept at the Judge Advocate's Office at Sydney, within this Territory, to be managed and executed by the Honourable the Judge Advocate, or his sufficient Deputy by him Appointed.

And it is hereby further Ordered and declared, by the Authority aforesaid, that all and every deed and Conveyance, so to be Entered and Registered, shall be brought by the Grantors or Grantees (to be identified and verified as such on Oath) of such Deed or Conveyance to the said Judge Advocate, and one at least or more of the Witnesses, to the Execution of such Deeds or Conveyances, shall upon his Oath before the said Judge Advocate prove the Signing and Sealing of such Deed or Conveyance. And the said Judge Advocate shall enter in Register Books, to be kept for such purpose, a memorial of every such Deed or Conveyance, so attested as aforesaid, which shall contain the Day of the Month and the Year when such Deed or Conveyance Bears date, and the Names and Additions of all the Parties to such Deed or Conveyance, and of all the Witnesses to such Deed or Conveyance, and the Places of their Abode, and shall Express and mention the Lands, Tenements or Hereditaments, contained in such Deed or Conveyance, and the Names of all the Counties or Places within this Territory, where such Lands, Tenements or Hereditaments are lying or being, that are given, granted or conveyed or any ways affected or changed by any such Deed or Conveyance, or to the same Effect. And the said Judge Advocate or his sufficient Deputy at the time, when every such Deed or Conveyance is so produced to be Registered, and of Entering such Memorial, shall Endorse a Certificate on every such Deed or Conveyance, and therein mention a certain Day, Hour and time, on which such Memorial is so Entered or Registered, Expressing also in what Book, Page and Number the same is Entered, and, charging and receiving for such Registry, and Certificate of Registry, as heretofore, the usual and customary fee of five Shillings and no more, which said Certificate, when so Indorsed, shall be signed by the said Judge Advocate, which Certificate shall be taken and allowed as Evidence of such respective Registries in all Courts whatsoever within this Territory.

And it is hereby further Ordered and Declared, by the Authority aforesaid, that no Judgement, which shall be Obtained or Entered into, after the said 25th day of March next, shall Affect or bind any Lands, Tenements or Hereditaments, situate,
lying and being within this Territory, but only from the time that a proper Memorial of such Judgment shall be duly Entered at the said Judge Advocate’s Office.

LACHLAN MACQUARIE.

EARL BATHURST TO THE ATTORNEY AND SOLICITOR-GENERAL.

Gentlemen,

Downing Street, 25th Jany., 1817.

I have the honor to transmit to you herewith a Copy of a dispatch from Governor Macquarie, communicating the intelligence of his having thought it necessary to bring the Colonial Chaplain Mr. Vale to a Court Martial; and I have to request that you would take the same into your consideration and report to me your opinion whether Governor Macquarrie was justified in point of Law in bringing Mr. Vale to Trial before such a Tribunal on the charges preferred against him. A Copy of Mr. Vale’s Commission and of the charges upon which he was tried are also enclosed for your information. I have, &c.,

BATHURST.

[Enclosures.]

[These papers will be found on pages 42 et seq. and 48, volume IX, series I.]

MESSRS. GARROW AND SHEPHERD TO EARL BATHURST.

My Lord,

2 Lincolns Inn, 28th January, 1817.

We are honoured with your Lordship’s Letter of the 25th Instant, transmitting to us the Copy of a Dispatch received from Governor Macquarie, communicating the intelligence of his having thought it necessary to bring the Colonial Chaplain Mr. Vale to a Court Martial: and your Lordship is pleased to request that we would take the same into our consideration, and report to your Lordship our opinion whether Governor Macquarrie was justified in point of Law in bringing Mr. Vale to Trial before such a tribunal on the charges preferred against him.

In obedience to your Lordship’s commands, we have considered the same, and have the honor to report that it is matter of considerable doubt whether this appointment of Mr. Vale to be Assistant Chaplain to His Majesty’s Settlements in New South Wales could be considered as such a Military Commission of Chaplain to his Majesty’s Forces or any part of them as to bring him within the provision of the Mutiny Act or Articles of War, notwithstanding the concluding paragraph* of that appointment. But, if it were, we beg to observe that the Articles of War, by Section 1, Articles 4 and 5, specify particular offences for which

* Note 118.
a commissioned Chaplain may be brought to a Court Martial, and the mode in which he is to be punished, if his Offence falls within such as are thereby designated. Absence from duty is to be punished according to the discretion of the Court Martial. Drunkenness or other scandalous or vicious behaviour derogating from the sacred character with which he is invested, upon due proof before a Court Martial, is to be punished by dismissal. To fall within this latter enumeration of Offences, we think the Offence committed by a Chaplain must be one of vice or turpitude reflecting on his moral character, and that Mr. Vale was not liable to be brought before such a tribunal upon the charges exhibited against him.

We have, &c,

W. GARROW.
S. SHEPHERD.

EARL BATHURST TO GOVERNOR MACQUARIE.

6th February, 1817.

[In this despatch, Earl Bathurst stated the illegality of the court-martial on the Revd. Benjamin Vale; see page 206, volume IX, series I.]

PUBLIC NOTICE.*

One Hundred Pounds Sterling Reward.

Whereas it has been Currently reported, and evidently with the design of injuring my Character, that I did Myself Subscribe, and that I also aided and assisted in obtaining the Signatures of others, to a Paper purporting to be an Address to the House of Commons and Containing Matter that I disapproved of, which is understood to have been forwarded to England in Charge of the Revd. Benjn. Vale, and which lay for some time in the Office of Mr. Solicitor Moore for Signature.

Now, I hereby declare that I never did Subscribe Myself, Solicit or ask any other Person whatever to subscribe the said Paper; but, on the Contrary, I did earnestly endeavour to dissuade others from Signing or Subscribing it, deeming it to be an improper Paper.

And I do hereby Offer the above Reward of One hundred Pounds Sterling to any Person or Persons, who shall discover and enable me to prosecute to Conviction the Author or Authors of the said false Scandalous and Infamous Report.

SAM. TERRY.

Sydney, 11th February, 1817.

* Note 119.
1817.
12 Feb.

Charter for bank of N.S.W.

26 Feb.

Request of G. Crossley for support from L. Macquarie.

1 March.

Arrival of B. Field.

A rrears of business in supreme court.

Official residence for judge.

HISTORICAL RECORDS OF AUSTRALIA.

CHARTER GRANTED TO BANK OF NEW SOUTH WALES.

12th February, 1817.

[A copy of this charter will be found on page 223 et seq., volume IX, series I.]

GEORGE CROSSLEY TO SECRETARY CAMPBELL.

Sir, Sydney, 26th February, 1817.

In availing myself of His Excellency's kind permission to have my Memorial, which I have now the honor to enclose to you in triplicate, forwarded to His Majesty's Government at home, I beg leave to request that you will render me the assencial service of submitting to His Excellency my most earnest Solicitation that he will be pleased, in Consideration of my Age, my long and arduous occupation in this Colony, the embarrassments which the present measure of excluding me from my profession, and the consequent ruin which it involves me in, cannot but draw upon me, I venture to hope that under these unhappy Circumstances His Excellency will not withhold from me the entire weight of his powerful assistance.

I have, &c.,

GEO. CROSSLEY.

MR. JUSTICE FIELD TO UNDER SECRETARY GOULBURN.

Sir, Sidney, New South Wales, 1 March, 1817.

I have the honour to inform you that I arrived here on the 24th Ulto., and was not a little surprised to find that the Supreme Court of Judicature had never yet been opened* for business, for reasons of which Earl Bathurst has doubtless been informed by His Excellency the Governor. The arrears of business is therefore (as I understand) very great; but I hope, as soon as I shall have settled the rules of practice in the various jurisdictions of the Court, which rules have never yet been formed, to reduce that arrear, and restore to the Colony the benefit of a legal tribunal for the trial of causes of above £50 in dispute, of which it has been these two years and a half deprived.

Permit me now, Sir, to address you upon a subject of a personal nature. You are aware that my predecessor, Mr. Jeffery Bent, being an unmarried man, was provided with no house here belonging to His Majesty's Government, but lived with his Brother, the late Mr. Ellis Bent, in the Judge Advocate's House. This single state does not happen to be my case; and you will, I trust, recollect that, in all the conversations, which I had the honour to hold with you upon the subject of the Appointment, which has been entrusted to me, it was fully understood

* Note 120.
that His Majesty's Government would either build or hire a House for me. I find it expressly stated in my Letter to You of 14th May, 1816, from which, to save you the trouble of referring to it, I take the liberty of subjoining an Extract of the Terms upon which I was allowed to accept of the Office; and, in our last conversation upon the subject, you were pleased to assure me that Instructions had been sent to His Excellency the Governor to provide me a House, by the Ship which conveyed hither my friend the Judge Advocate. I should therefore have been greatly disappointed to find, upon by arrival here, that, in the hurry or multifariousness of your despatches, those Instructions had not reached His Excellency, (who has even hitherto heard nothing from Home upon the subject) had not my necessity in this respect been most kindly prevented by the Governor, who has, in addition to that handsome reception of me, which I have perhaps in no inconsiderable degree to attribute to your private letter of introduction, taken upon himself to provide me with a House for present residence.

Having presumed to refer you to the abovementioned Extract from a former letter of mine, you will perceive that it also mentions the allowance of rations, or a payment in lieu thereof, and in the conversations I had the satisfaction to hold with you, I understood that this allowance was to extend to my family and convict servants; but I find, upon communication with the Governor, that His Excellency has received the general directions of His Majesty's Government to suspend all such allowances to the civil Officers of the Colony, in which number I am of course included. I have therefore further to request of you that you will have the goodness either to exempt my family from this general suspension, or to make me that pecuniary compensation for rations, which you were pleased to tell me it was in the contemplation of His Majesty's Government to do towards all His Majesty's Officers, or otherwise to take the same into your favourable consideration. I have, &c.,

BARRON FIELD.
Judge of the Supreme Court, N.S.W.

[Enclosure.]

EXTRACT FROM LETTER TO UNDER SECRETARY GOULBURN.
“Sir,

“Temple, 14 May, 1816.

“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 of New South Wales, and have now to acquaint you that I do myself the honour of accepting it, as suggested by
1817.
1 March.
Terms of acceptance.

you, at the present salary of £800 per annum and a suitable House to reside in, together with the allowance of rations or a payment in lieu thereof, not however without the hope that the salary will, ere long, be increased, and a pension upon meritorious services allowed. . . .

"I have, &c.,
"B. Field."

DEPUTY JUDGE-ADVOCATE WYLDE AND MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.

Sir,
Judge Adv.’s Office, Sydney, 10th March, 1817.

Previously to our leaving England to proceed on the Appointments we have the Honor respectively to hold in this Colony, we requested to be favored by His Majesty’s Government with Instructions as to the Determination adopted by the Government with respect to the application of certain persons, arriving in the Colony as Convicts, to be admitted to practise as Attornies in the Courts of Law here. In answer, we were altogether referred on the subject by the Secretary of State to your Excellency “to whom, it was added, that full Instructions* on the point had been already communicated.”

We beg leave therefore to request that your Excellency will be pleased to furnish us with Instructions upon this Subject, that we may dispose of certain Petitions now before us in that respect in conformity with the Directions and Pleasure of His Majesty’s Government as made known to your Excellency.

We have, &c.,

JNO. WYLDE, Judge Adv., N.S.W.
BARRON FIELD, Judge of the Supreme Court.

INSTRUCTIONS TO W. SORELL AS LIEUT.-GOVERNOR OF TASMANIA.

20th March, 1817.

[A copy of these instructions will be found on page 183 et seq., volume II, series I.]

DEPUTY JUDGE-ADVOCATE WYLDE TO GOVERNOR MACQUARIE.

Judge Advocate’s Office, Sydney,

Sir,

Your Excellency having been pleased to approve of the suggestion that, in order to occasion as little as may be of Inconvenience and Expense, public and private, in giving Effect to the Administration of the criminal Jurisdiction under the colonial Charter with respect to Van Diemen’s Land,† four determinate Periods should be fixed for the assembling of the criminal

* Note 121. † Note 122.
Courts; and, having obtained the Information conveyed in the inclosed Letter as to the general Seasons for the passage, I beg leave to submit to your Excellency's consideration the under Scale of Periods for the Terms and Assembly of all the Courts in the Territory, as that, which has been arranged by Mr. Justice Field and Myself as best suited, under all the Circumstances to be had in consideration, to the public Exigencies and private Convenience of all concerned in the Judicature of the Colony—

Governor's Court. | Supreme Court. | Criminal Court.
---|---|---
1st Jany. | 15th Feby. | 15th March.
1st April. | 1st May. | 1st June.
1st July. | 15th Augt. | 15th Sepr.
1st Octr. | 1st Novr. | 1st Deer.

I have, &c.,

JNO. WYLDE, Judge Adv., N.S.W.

[Enclosure No. 1.]

DEPUTY JUDGE-ADVOCATE WYLDE TO LIEUTENANT JEFFREYS.

Sir,


It being in contemplation to fix four determinate Periods in the Year for holding the Courts of Criminal Jurisdiction, I have to request the favor that you will inform me what periods in your Judgment would be most suitable with regard to the facilities of bringing up those Offenders, who may be committed for Trial in Van Diemen's Land.

I have, &c.,

JNO. WYLDE, J.A.

[Enclosure No. 2.]

LIEUTENANT JEFFREYS TO DEPUTY JUDGE-ADVOCATE WYLDE.

H.M. Brig Kangaroo,


I have to acknowledge the receipt of your Letter of yesterday's Date, requesting that I would inform you what periods in my Judgment would be most suitable for bringing up Offenders from Van Dieman's Land.

In answer thereto, I beg to state that, from the Experience I have had on this Coast, I conceive that a Vessel may at all times of the Year reckon on a three weeks' Passage from the River Derwent to this place; but, from Port Dalrymple, it will ever be an Uncertainty from the difficult Navigation of that River and the adjacent Isles.

That, with respect to the fixing the periods for holding the Criminal Courts, etc., my opinion is that it will be advisable that those periods should be March, June, September, and December for these reasons:—A Vessel may sail in January or February
from Sydney and return the Middle of March; she may sail early in May and return in June; she may sail on the 1st of August and be up about the end of Sept.; or beginning of October; she may sail early in November and be up sometime in December; That is, the average of a Vessel from the Derwent, provided she has no unusual Delays, is about seven weeks.

It must be remembered that the Difficulty does not lay from but in going to the Derwent, as from the Middle of May to the 1st week in Augt. it is impossible for a Ship to make even a tolerable Passage from the strong Southerly winds which then prevail.

I have, &c.,


Deputy Judge-Advocate Wylde to Under Secretary Goulburn.

(Despatch marked "Private.")

Sir,

Sydney, New South Wales, 31st March, 1817.

My sense of the various highly important duties and matters of Office, that devolve upon you, would have precluded me from trespassing upon you with the present communication, had I not in recollection of your positive Injunction personally laid upon me in the Interview, I had the Honor of having with you previous to my leaving England on my present appointment, to submit to you any Considerations connected with my office or the affairs and Interests of the Colony, which in my Judgment might deserve public Observation and attention, or require on my own part your Direction and Instruction; with this impression, I beg leave to address you with all possible Conciseness and brevity upon some few Subjects, relative to the public and private Measures that have been adopted, and Incidents that have occurred, since my arrival as Judge Advocate of this Colony.

On taking my seat in the Governor's Court, having found in the Judge Advocate's Office certain printed Rules of Practice and Proceeding, drawn up and arranged by my Predecessor Mr. Ellis Bent, although his decease a very short time afterwards had afforded himself but little opportunity of proving their expediency or fitness, I deemed it of public advantage, as well as of proper respect to his Talents and memory, to continue the course of Practice and Proceedings, which had the Benefit, in suggestion even, of his experience and Judgment, and which had altogether obtained in the Court during the whole period of Mr. Garling's Appointment as Acting Judge Advocate, who had acted in this, as indeed every other point of the Official Duty
and general Arrangement upon similar motives of Delicacy and consideration. I very soon however had reason to believe that, if my Predecessor had been spared any very short period longer to his useful exertions in this Colony, he would have come with me to the opinion that a more summary and simple Procedure might give more effect to the Jurisdiction of his Court under the Charter, and put an end to the high and expensive Costs, which necessarily belonged to the existing practice, and which had now become matter of serious grievance and loud public Complaint. After the first Term therefore, and on Communication with and with the Approval of His Excellency the Governor and the Members of my Court, I originated a Practice, which is yet not so perfectly settled in all its parts, from my desire of adopting a System in common, as far as may be, with that of the Supreme Court, as to Allow me now to present the Analysis of, but of which it will be my care at a future opportunity to afford the consideration, while, as to the Comparative Scale of Fees and Costs, the Inclosed Bills of the Charges and Fees in a suit under the former and present practice, will afford decisive means of Judgment. I need hardly add that so great a reduction in the Expenses of the law proceedings has given great public satisfaction in the Colony.

In consequence of the Instructions* of His Majesty's Government not to admit as Attornies of the Court persons arriving as Convicts in the Colony, certain representations were very soon made to The Governor, in the first Instance by Messrs. Crossley and Eager (who you may perhaps be aware had long acted as Attornies in the Court of Civil Jurisdiction previously to the New Charter), stating themselves to be considerably in advance with their Clients upon fees paid in suits already then commenced and in different Stages of Procedure in the Courts, and the great Loss and hardship that would arise to them from their immediate, absolute exclusion. His Excellency was pleased to consider the subject as more properly belonging to my Consideration and Decision, and I have only to hope that the resolve, it occurred to me to adopt under all the Circumstances, with the Governor's Approbation and of the Members of the Court, may also now be approved as Consonant with Justice to the particular Individuals interested, and not inconsistent with the spirit of the public Instructions in question, and which permitted those, who had so long without objection been permitted to practice, to finish the suits already commenced in the Governor's Court, provided their Clients respectively petitioned the Court that they might so continue their Attornies and that the Suits were brought as speedily to Judgment as possible. Not

* Note 121.
1817. 31 March.

Ex-convicts permitted to act as attorneys in suits commenced in governor's court.

Branch offices and half-yearly sessions of governor's court at Parramatta and Windsor.

Defect in charter of justice.

being satisfied, however, that the latter condition was had in due regard by one of them, After the first subsequent Term, Notice was given that, after the then next Term which will close with the sittings of the present Week, the Instructions upon this subject could no longer in any respect be relaxed towards them. All the suits are now in fact disposed of, except some 6 or 8 only, I believe, waiting for trial, so as hereafter to oppose no obstacle on any private Consideration to a full observance of the public Instructions received in this respect.

Having observed upon the taxation of Bills of Costs that some of the heaviest Charges made were in respect of the attendance of Witnesses, where the parties and Cause of Action arose at a distance from Sydney, while general Communication and Complaint and very short personal Observation indeed informed me that one of the drawbacks upon the Welfare of the Country Settlers in their Agricultural Occupations, as upon the moral improvement and Contentment of the servants and others in their employ, was to be found in the expense, dissolute Indulgencies, improper Connections and loss of time, occasioned by their frequent Attendance as Suitors or Witnesses in the civil Court, I have thought, upon these Considerations, that it would prove of some advantage and relief to the Colony in this respect and have accordingly arranged with His Excellency's perfect Approbation that Sub-Judge Advocate Offices for the Conduct of proceedings up to the time of Trial, and that the Governor's Court itself shall Assemble twice in the year at least at Windsor and Paramatta for the Trial of such Causes, as shall be entered for or shall arise within certain Distance of those respective places; Considering also that the Assembly of the Courts in the interior might perhaps be productive of some little General Improvement in the views and manners of Settlers, otherwise so much estranged from such General Intercourse. The first circuit has been delayed on Account of the late unfortunate Inundations from the Hawkesbury, but will take place in the next Month, and thus afford me the means on the of more fully making up and hereafter communicating the necessary Arrangements.

The Law Charter, last granted to the Colony, has of course, Sir, been necessarily much under my review, and although I would not appear, as it were, ungraciously to return upon the Government considerations upon it of Comparatively Minor Difficulty, Construction or even perhaps of partial Inefficacy as to all the purposes of Advantage to the Colony in its Contemplation, still there is one of such main Importance to its beneficial and evidently intended operation, that I am urged unwillingly
thus to submit to you, and, if you think proper, to the Secy. of State for the Colonies or other the Law officers of the Government, one subject of serious doubt, which very soon certainly occurred to my mind upon it and was suggested to the Governor, whether any person but one actually resident in the Colony, at least at the Commencement of the Action, can maintain suit in either of the Courts of Civil Jurisdiction established in the Colony, and consequently whether any debts are recoverable here, unless both the parties and not merely the defendant to the Action are Actually personally resident in the Colony at the Commencement of the Suit. This Objection, it is true, though of course it has been very frequently heretofore open, has never yet in any case been taken; but, as I cannot flatter myself that, with whatever Caution I may have the opinion in prudent reservation, it will long escape the superior professional Sagacity and Penetration of the present Practisers in the Courts here, I would if possible be prepared and forearmed with the certain Authority of an official opinion upon a question, in which the Colonial Mercantile Interests are so deeply involved. I need not indeed but allude to the mischievous consequences upon the present or future trade and Commercial views of the Colony (without taking into consideration any consequent effect upon Judgments already pronounced), if it should at length appear that the Jurisdiction, so long exercised, is not in fact given to the Courts under the powers granted by the Charter of their Constitution. It is not Certainly to be doubted, but that it was the Intention of His Majesty's Government to establish open Courts of general Jurisdiction and to admit as Suitors any person, whether resident or not, who had Cause of Action against any other person, residing or being in the Territory at the Commencement of it. If this indeed were even uncertain upon the general Policy, views and Measures of His Majesty's Government with respect to the Colony, it would clearly be developed in the Terms of the Preamble and indeed in the provisions of the Act of the 54th G. 3, c. 15, entitled "an Act for the more easy recovery of Debts in New South Wales," which recites and clearly Contemplates that both "the Plt. and Defendant" may reside in great Britain and as such may have produced as Evidence in the Courts here affidavits made in England touching the cause of Action pending in the Courts. The Act of Parliament, however, I should consider, cannot indirectly give any power or Jurisdiction that remains unsupported by the original Charter, which must wholly stand or fall by itself. I shall not be so forgetful as to intrude on you a law Argument, especially as it is my purpose, if opportunity be allowed me before the
Kangaroo sails for England, to prepare a Case upon the point, provided you shall deem it necessary to take the Matter into public Consideration. Yet I may be allowed perhaps to observe that, if the objection be well founded, it is not at all difficult to trace and thus Account for the limited Jurisdiction only, which, as it seems to me, can be duly exercised under the Charter: for, in 1797, when the first Charter was granted, so little of, if any, of foreign Commerce or Dealings prevailed in the Colony, that it was not thought necessary or perhaps expedient that other "Provision should" be made "than for the recovery of Debts and determining of private causes between party and party in the place aforesaid," and for a summary Determination of all Causes of suit upon Complaint to the Courts thereby established "by any person or persons against any other person or persons residing, or being within the said place." Such a Charter therefore, as my Predecessor observes in his public Dispatch,* dated 19th Octr., 1811, 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." But when, as again observed by Mr. Bent, "that state of Society was passed, the free and respectable population much more numerous, the commercial Dealings between this Colony and other parts of the world, particularly India, of very considerable extent" (at this period of 1817 amazingly increased) "when cases of great legal difficulty were daily arising and Complex Questions of Account, involving large masses of Property forming the frequent subjects of Deliberation of the civil Judicature, and when, in the terms of the new Charter itself, in consequence of the increased population of the Territory, the Court of civil Jurisdiction had been found insufficient for the purpose of administering Civil Justice to His Majesty's subjects, residing within the Territory and its dependencies, and for determining private Causes between party and party within the same," and when, to obviate the particular evil suggested and effect the remedy, the Charter of 1813 was granted to the Colony and constituted three Courts of civil Jurisdiction within the same, certain it is, nor is it for me to determine, whether designedly or from what cause or consideration, the same identical terms of Constitution word for word are adopted, and the very same Course of summary proceedings ordained in each of the Courts, as in the first original Charter, which could not have in Contemplation, it would seem, but the immediate residents in the Colony; if this be correct, no extent of Jurisdiction or new powers in that respect could possibly be acquired under the new

* Note 123.
Charter, which thus only divided between two Courts that administration of Justice which had before been committed to, and was now considered too 'burthensome' for the one.

On Mr. Field's arrival in the Colony, I deemed it advisable to communicate with him on the subject, and he agrees with me as to the necessity and expediency of thus submitting the Question to your Consideration. I will only add that, if the objection be taken, before I have the sanction of an official opinion from Home, I shall defer all determination upon its validity and await that decision, upon which alone a Question so momentous to the first Interests of the Colony should justly be considered to depend.

However painfully invidious, I feel it my Duty also here to suggest that I cannot but entertain strong Apprehension, that the Charter, as to the Jurisdiction of the Supreme Court, will too soon be found altogether insufficient, upon any modifications of Practice or proceedings, in its intended beneficial Operation to the Dep'y of Van Diemen's Land from the Delay, the necessarily very heavy expenses, Personal Inconveniences and Losses, the nature, difficulty and uncertainty of the only Communication, and the various casualties and Circumstances attendant upon the proceedings of a Court of so distant an Establishment: while it is too certain and perhaps may account amongst other Causes for the present unfortunate state of that Dependency, that the Inhabitants bear with any Invasion upon their property and frequently their persons* sooner than incur the certain personal Inconveniences and Consequences of bringing the Offenders here before the Court of Criminal Jurisdiction. It has been suggested and certainly would prove (as I have an opportunity of Judging from having, very soon after arrival, yielded to the wish of the Governor to preside at the Weekly Bench of Magistrates here) of beneficial and wholesome Provision, if the Justices of V. D. Land, and indeed even in this Territory, were enabled legally to form and Act as a sort of Sessions for the Cognizance of Petty offences; but it appears to me that all the criminal Jurisdiction of and in the Territory and its Dependencies belongs only to and can be exercised only by the Court of Record erected by the Charter, except so far as given to Magistrates summarily under particular acts of Parliament.

In order to introduce a more efficient and safe Practice than had hitherto prevailed of Conveying and transferring Property in the Colony, as well as to afford a security to Title and from Fraud, I suggested and His Excellency the Governor has been pleased to establish the Judge Advocate's Office, which had always been voluntarily and partially used as such, a public

* Note 124.
Register office for Deeds, as in the Register Counties in England, and as far as the general Information and nature of the Colony seemed in the first formation to permit that system to be prudently adopted.

In my Letter of Novr. 17, 1816, I took the Liberty of cursorily making remark on the subject of the then state of the Colonial Currency* and the Number of suits dependent thereon at that time in the Court. I very soon afterwards had to discover that, to give effect and validity to any of the Currency Notes, for the non-payment of which actions were brought, it would be necessary altogether to overlook and dismiss from the Consideration of the Court in Judgment several colonial Regulations and orders,* not only of old but of very recent date, which declared all such Notes as in question and their negociation to be absolutely illegal and void; such a determination, however, would have operated with some most unjustly and oppressively and to others have afforded an evasion from fair bona fide Debts and Obligations. The discussion of this subject with the Governor, having adjourned the Court for this purpose, gave rise to a public Indemnity in that respect, and informed me also of His Excellency's decided opinion that the Colonial Currency was altogether prejudicial to the true Interests of the Colony, and that he had therefore ever been, though hitherto in vain, desirous of its abolition. At his particular Instance, and depending more upon His Excellency's Experience and Judgment† than on the applicability, in my own very limited knowledge of the Colony of any general Principles of the impolicy, uncertainty and almost inevitable final consequences of such a fictitious Capital and circulating medium, wherever it for a time prevails, I did not hesitate readily to lend myself, though not in my direct course of duty, to those proceedings and Conference with the Merchants and others of this place, which at length terminated in general public resolutions for the immediate substitution of a Sterling for Colonial value in all negotiable Instruments, an average reduction in the price of Labor and articles of Trade and Dealing, a Sterling Consideration in all Agreements and Bargains, and in the Establishment of a Colonial Bank upon a funded subscription Capital, on which indeed all the other parts of the system proposed were universally acknowledged to depend. In a Community this, no great public confidence can perhaps even be expected for some Years to be found and no Contributions could have been obtained for a common Stock, but on the strongest Government and legal Assurance of personal Indemnity from all general liability or Partnership Risk. Such an Indemnity could only and reasonably satisfy, and such,
it appeared to me, could only be afforded, as in the one usual way, in the grant of Letters of Incorporation and the Constitution of a Joint Stock Company. I am not aware, and indeed it will be matter of serious Regret to find myself in this mistaken, that such an establishment HERE is contrary to the spirit or the Letter of any public Act of Parliament, conflicts with any of those great public Principles of general Policy and public Advantages, upon which such Institutions have been permitted and encouraged in the Mother Country, or can be productive of any results, but such as in the end must prove beneficial to the Colony, and in this consistent with the views, worthy of the Approbation and sure of the Assistance and Sanction of His Majesty's Government.

If the public feeling and circumstances of the time and Project would have permitted of the delay, I should have found satisfaction and relief in advising the Governor immediately, in the first instance, to refer the Measure to His Majesty's Ministers; but its adoption depended upon the almost momentary Promptitude and boldness of decision, with which the Governor exercised the prerogative, that only could extend perfect Immunity in the Grant of Corporation, Charter and Franchise under proper limitations, and which it was conceived, although not specifically denominated and particularized, could not but belong to the powers of a Commission,* which allowed the Governor to raise boroughs, create Turnpikes and Tolls, impose port duties and Imposts; determine from time to time the legal Tender, regulate the value of the Sterling Medium and of the Public Money and Interest thereon, establish and direct public Markets, and to dispose at discretion of the Crown lands in the Territory. The Measure, so salutary as it has been esteemed here to the Welfare and best prospects of the Colony, has not been effected without labor nor without opposition of course from party views and selfish Interest. The Anxiety now only remaining is for that approbation on the part of the Government, which will prove the most certain Assurance of its Expediency, establishment and success.

It is not without some feelings of partial distress that I advert even (for I shall do no more) to the Circumstances that have of late taken place here as to the late Judge of the Supreme Court and the widow of the late Judge Advocate. His Excellency will have, I presume, the disagreeable task of communicating them to Governmt. and I have only to hope that, inasmuch as I am connected with them, they will reflect only those principles, purposes and conduct either in my private or public Capacity, which a due Consideration to myself, my Office and

* Note 126.
1817.  
31 March.

Difficulties created by J. H. and Mrs. E. Bent.

Concessions promised to J. Wylde.

the public Welfare of the Colony not only justified but peremptorily demanded. I will not enter into the little Indignities and petty aspersions, which have been thrown upon me personally, the Conduct of my Court and its business, the inferiority and subjection* of its Jurisdiction to the Supreme Court publicly declared and even at length Assumed in public Letters to the Governor and the present Judge, or in the general opposition given to all the public measures, which have been proposed or supported by me; all has been Speculative, illegal, unjust, impolitic, oppressive and Contrary to the Views and Directions of His Majesty’s Government, and unfortunately the Influence and estimation, which the late Judge Advocate possessed (and worthily as I am willing to believe), has with a sort of grateful Generosity, I can hardly forbear thinking, been so far extended to the Brother, as to give a weight to his opinions and suggestions, which they would not otherwise perhaps be considered or allowed to possess. What little of Correspondence I could suffer to take place immediately between us I have the Honor to enclose the Copy of. Towards the Governor however, for whose private Honor and feelings as well as for the Character and authority of his public Government, I have had to feel infinitely more than for any Interest of my own in such a cause, I should Consider myself as behaving both as a private friend and public Officer, as ungratefully and dishonestly, if I forbore on any occasion to declare my fixed opinion and Judgment, that Mr. Bent (The Lady one really cannot descend to observation on) has acted with the most gross effrontery, insolence, insincerity, impropriety and perverseness, and Contumaciously, though not perhaps inadvertently, brought upon himself that measure of public removal and Animadversion, which consideration to his rank and respectability of appointment here and most unexampled forbearance and self Government would not suffer to fall upon personal and Continued Intemperance of private Insult and provocation.

May I be allowed in Close to remind you of the suggestion, Sir, you were pleased personally to make, that Tonnage in small Quantities would not on occasion be denied my friends on my Account and of the general liberty given me of addressing Letters to my own immediate family through the colonial Office. In so distant a separation from Country and friends, which no one perhaps can feel more sensibly than myself, and, amidst duties so laborious and difficult of Management as to claim at least at present the surrender of almost every hour and hitherto even a due regard to health, I need not suggest what pleasure and relief such favorable accommodation may in many respects

* Note 127.
afford. The Intercourse of a Colony like this, even at the best, can have to one, situated as I am, little Gratification to bestow and a public appointment like mine, while escape from positive obloquy requires peculiar Caution and Delicacy, must be exposed to more than the ordinary Measure of public odium and Jealousy; but I would not seem to be forgetful of the kind public Consideration I have already to acknowledge.

It remains to me only to express my hope, that you may be pleased to consider the subjects of this communication as not improperly needlessly or prolixly observed upon; or at least that the intention of Complying with your Commands will furnish an excuse for an Intrusion so ventured upon your time and consideration.

I have, &c.,

JNO. WYLDE,
Judge Adv., N.S.W.

[Enclosure No. 1.]

DEPUTY JUDGE-ADVOCATE WYLDE TO MRS. BENT.

8 Macquarie Place, Sydney,

Monday, 11th Novr., 1816.

Madam,

His Excellency the Governor having been pleased to give me an opportunity of perusing the late Correspondence,* between himself and the Honorable Mr. Justice Bent, I have been obliged painfully and unwillingly to come to the conclusion, that, in due regard to my own personal consideration, it has become necessary to address yourself only and immediately as to the period of your continued Occupation of the House belonging to that Office, the late Mr. Ellis Bent so honorably and usefully filled in this Colony. And however much or sincerely I may have in Consideration your particular situation or circumstances, it is not to be reasonably expected that I should be able prudently to surrender to such a sentiment, however worthy, all regard to the claims or Convenience of myself and Family, much less the facilities of performing those public Duties, which my appointment imposes on me and which are much more Connected with the possession of the House than you are perhaps aware of. Having already been in possession of the House for 12 Months, during which time it must have been naturally supposed that a new appointment would take place and remove you from a possession which could not on any private grounds have been withheld from the Person, who filled it, and having already continued that possession from the 5th Ultimo, the date of my arrival, I cannot but think that you will do me the justice of giving Credit for all proper consideration towards you and yours, when I request that the House may be

* Note 128.
1817.
31 March.

Request for vacation by Mrs. Bent of residence of deputy judge-advocate.

Vacated and given up to my use on or before this day Month; a period, I assure you, which puts me for the time to the continued endurance of no slight Inconveniences, Trouble, and Expences, but which the expected arrival of Mr. Justice Field, to whom I must then give up the Chambers, at present used for the Judge Advocate's Office but set apart for the Judge of the Supreme Court, will not allow me on any private Consideration to extend.

I should feel sincere regret, if I had been obliged to fix a period, within which it might have been apprehended that you could not have conveniently made any arrangements as to removal, but the time suggested will, I trust, give you every opportunity in that respect, which convenience or Interest may require.

I have to request further the favor of an answer in a day or two, whether it will be necessary for you to take the whole time suggested or to give me an earlier possession, in order for me to make known your answer in this respect to His Majesty's Principal Secretary of State for the Colonies, to whom I have to make an Official Communication by the Ships about immediately to proceed to England. I am, &c,

JNO. WYLDE,
Judge Adve., N.S.W.

[Enclosure No. 2.]

Mrs. Bent to Deputy Judge-Advocate Wylde.

Sir,

I am much surprised at the stress you appear to lay upon the circumstances of my having occupied my present Residence for 11 Months previous to your arrival; For, though it was to be supposed a new appointment would take place. It did by no means appear improbable that Mr. Justice Bent might not succeed to the vacancy, And, had my departure from this Colony taken place long ago, Mr. Justice Bent would have continued in the occupation of the House, and would have thought his removal being pressed by any one indecorous under existing Circumstances, and would have expected to remain unmolested, 'till his departure from this Country, that step not being unreasonably delayed.

Though I may not be aware of the measure of Inconvenience you are now sustaining in the execution of your official duties, I am well aware that it cannot exceed that sustained by any predecessor, nor at all come near to the Inconvenience sustained by the late Mr. Judge Advocate Bent for a period of above
three Years; And when I consider you are indebted to his exertions and those of His Brother, for even the Common Conveniences of Office, of the Court, and of a Private Residence and for the Honorable Rank and consideration to which the office has been raised, I must think that the Inconveniences you have to sustain trivial, when compared with those of my late Husband, by whose private expenditure you are so much to profit, might have been endured without mention, even for a period of three months, which is all the time I was likely to require; and more particularly when you brought the official Intelligence of your own Appointment, and when the arrival of Mr. Justice Field cannot in possibility add any thing, but on the Contrary will diminish the Evils of which you complain.

From the early applications made for the House, I did not expect much Indulgence on your part; But Professions, freely lavished and which I looked upon as more than mere complimentary expressions, in some degree removed the impression; yet at the period when the Master of the Elizabeth, notwithstanding the number of workmen to be had at any moment in Sydney, had stated that he could not fit up the Births for my Children, an objection which to me seemed equal to a refusal to take us, The Anxiety displayed that it should appear that we declined his offer, rather than that the insurmountable objection, raised by him, prevented our departure by his ship, induced me to think, and I was not singular in the Sentiment, that a plausible ground was sought for, on which to found an immediate demand for the House; and the event proves I have not been mistaken in my idea of what was to follow.

I should not think this matter as of moment sufficient to trouble a Principal Secretary of State with any Communication; But, if you mean to forward some Complaint, Have the goodness to state that my late Husband expended £1,500 of his own money on a Public Residence, all the advantage arising from which His Successor must reap, and which you are impatient to enjoy, and to save yourself some slight expence and some inconvenience too trifling to be mentioned. For my own part, I do not fear any attempts to injure, from those who have not the heart to oblige.

As a final Reply to your letter, I have to state that I occupy the House by the permission of Governor Macquarie; any Communication therefore, as to the period of my Quitting my present Residence (to which you give an unusual appellation) must come from that authority. I am, &c.,

Eliza Bent.
31 March. DEPUTY JUDGE-ADVOCATE WYLDE TO GOVERNOR MACQUARIE.

Sir,

Macquarie Place, 14th Novr., 1816.

I have the Honor to transmit to your Excellency, for your perusal, a copy of a Letter from myself to Mrs. Bent as to the occupation of the Judge Advocate's House and her Answer thereto; and, as Mrs. Bent declines privately to communicate with me on the subject, I am under the disagreeable Necessity of requesting the favor that you will take the subject between us into Consideration, and give such directions therein, as to your Excellency may seem meet; on my part assuring your Excellency that, with your perfect Knowledge of all the circumstances, I shall be perfectly satisfied with any Determination that you judge consistent with my Character as a Gentleman and my Claims as Judge Advocate of the Colony.

I have, &c.,

JNO. WYLDE,

Judge Adve.

GOVERNOR MACQUARIE TO EARL BATHURST.

3rd April, 1817.

[With this despatch, Governor Macquarie transmitted lengthy correspondence re the custody of the letters patent, the official residence of the deputy judge-advocate, the exercise of functions of the supreme court by J. H. Bent, and detainers lodged against J. H. Bent; see page 276 et seq., volume IX, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

5th April, 1817.

[With this despatch the custody of the letters patent, the official residence of the deputy judge-advocate, the exercise of functions of the supreme court by J. H. Bent, and detainers lodged against J. H. Bent; see page 276 et seq., volume IX, series I.]

MR. JUSTICE BENT TO EARL BATHURST.

My Lord, Sydney, N. S. Wales, 5th April, 1817.

I have the Honor of acknowledging the Receipt of your Lordship's Letter† of the 12th April, 1816, announcing my Recall from the Office of Judge of the Supreme Court in this

* Note 127. † Note 129.
Colony, and I must with every possible deference observe that it seems a little unfair to charge the suspension of the Courts of Justice (which it is stated to be the motive of Recall) upon me, since your Lordship will find, on reference to the correspondence on that Subject, that it was on my part put only as an alternative, in case the illegal degradation of the Court, and the resolution to convert it into a forum for Debate and for personal attack, was persisted in; and I did most certainly expect that your Lordship would have ascribed the suspension of the Courts to that source, and would have directed the displeasure of His Majesty's Government rather against those whose obstinacy in persisting (in what your Lordship has admitted to be improper measures) caused the suspension than against my perseverance in support of the Honour and Integrity of the Court, and my opposition to irregular and unusual interference.

Having before my departure from England brought the subject under your Lordship's view, and endeavoured to procure such Directions as would have prevented a difference, which I foresaw the Policy of Governor Macquarie might otherwise occasion, I do feel myself hurt that I should be sacrificed for acting according to Legal Decisions and from Honourable Motives in a Matter, wherein I had every reason to suppose myself supported by your Lordship's expressed opinion.

Had it been explained to me, as I had every right to know, in the first Instance, to what particular Policy it was expected I should submit in this Colony, I never would have requested nor accepted the Office I was then going out to fill; Had I knowingly placed myself in the Situation, I should have been highly blame worthy; But my Understanding on the Subject was directly the reverse.

In confirmation of my sentiments formerly communicated to your Lordship, as to what would be the subsequent step to the attempt to force upon me the Convict Attorneys, I have now to state, for your Lordship's Information, that, at the first meeting of the Supreme Court, at which my Successor, Mr. Field presided, Governor Macquarie associated with the Judge one Person, who had been a transported Felon, and another a notorious Highwayman, as the two members* of the Supreme Court, to the astonishment, the ridicule and finally the Dismay of the whole Colony.

If it were ever expected that the Judge of the Supreme Court should submit to such association, I am not sorry that I am prevented by a recall from the necessity of opposition, as the other alternative is one which I could not on any terms have embraced;
1817.
5 April.

Defence of his conduct by J. H. Bent.

I do not envy my successor his apathy on this occasion, nor most certainly should I ever wish to have remained in my office subjected to such associates.

Your Lordship has censured me as acting indiscreetly for myself and the Colony. My conduct may perhaps have been detrimental to my own interests; but, on an occasion where the Honour of the Station I filled was in question, Motive of Interest had with me, and I trust ever will have, little weight; and with regard to the Colony, I may say, I have never been accused of acting without consideration for the Public good by any class of the Inhabitants; They well knew, whatever might be the first appearance the contest put on, It was a struggle to render the Courts of Justice in their decisions independent of ye necessity of paying any attention to the caprice, or personal favour, or animosity of the Governor; and I do not believe that any condemnation of my conduct could be procured even from that class of the Inhabitants, who apparently must be the most interested against it.

I feel it, however, a Duty I owe to myself and to my Family to put my whole conduct in this Colony in its fair point of view before my Friends, before the Public, and my Sovereign; and, as a necessary step to that end, I trust, on my arrival in England, that I shall be enabled satisfactorily to justify myself in your Lordship's estimation.

I will further avail myself of this opportunity to mention that I had hoped that your Lordship would not have left me exposed to every indignity, which the rancorous disposition of Governor Macquarie might chuse to put upon me, and which, from the Letters I had the honour to forward, It might have been surmised I should have to sustain: I had looked, also, that accommodation would have been provided for the Judge's returning home, similar to that furnished to the Judge's arriving out; That not being the case, I am obliged to provide a passage to England at the (to me) ruinous Expence of a Thousand Pounds, independent of the expences at the Ports where we may touch; fortunate too in this, that I can avoid the unhealthy climate of Batavia, and am compelled to return by way of Bengal only.

From the 1st January to the 5th October, 1816 (at which last period my Salary was stopped), I received £563, and no more in right of my Office from any source whatever, out of which sum I had to support a style of Living but decently suitable to my Rank in the Colony, and also the widow and children of my deceased Brother the late Judge Advocate for the above time and until my embarkation, being a period of Sixteen Months;
and further to provide a passage to England, for them, for
myself and for my Clerk by the circuitous and expensive Route
of Calcutta, at the price I have mentioned. Had I not fortu-
nately possessed other resources besides those derived from my
Office, your Lordship must be convinced of the absolute impossi-

bility of my ever returning: But I am confident that, upon this
Point, I need not urge more your Lordship's consideration.

I have, &c.,

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

DEPUTY JUDGE-ADVOCATE WYLDE AND MR. JUSTICE FIELD TO
UNDER SECRETARY GOULBURN.

Sir, Sydney, New South Wales, 5th April, 1817.

In considering the Charter of Justice, under which the
Courts of Civil Judicature are established in this Colony, we
have been brought to entertain doubts, whether any person can
sue or be sued therein unless he be resident within the Territory
or its Dependencies at least at the Commencement of the Action.
Although a different practice has prevailed and the objection has
not in any case hitherto been taken, there is however every reason
to believe that the objection will be taken, and, as the Question
is of the utmost Importance to the Commercial Interests of the
Colony, we have felt it our duty to submit a Case for your
Consideration, or, if you think proper, for the opinion of the
Law Officers of the Crown in this respect, as also whether Con-
vict prisoners, even though in the employ of Government, cannot
sue and be sued in the Courts here under the General terms of
the legal Charter.

We have, &c.,

JNO. WYLDE; Judge-Adv., N.S.W.
BARRON FIELD, Judge of the Supreme Court.

[Enclosure.]

CASE.

In the Letters patent for establishing Courts of Judicature in
New South Wales, dated the 2nd day of April in the 27th Year
of his present Majesty, it is (Amongst other things) set forth,
“That, Whereas it was found necessary that a Colony and Civil
Government should be established in the place to which such
Convicts should be transported, and that sufficient provision
should be made for the recovery of Debts and determining of,
private Causes between *party and party* in the place aforesaid.” And in the Second Charter of Justice, granted to the Colony, dated 4th February, 54 G. 3, it is (Amongst other things) further set forth, “That, Whereas in consequence of the increased population of the said Territory and its dependencies, the Court of civil Jurisdiction, as constituted by the former Letters patent, had been found insufficient for the purpose of Administering Civil Justice to our subjects residing within the said Territory and its dependencies, or for determining private causes between *party and party* within the same, and in order to provide for the better Administration of Civil Justice within the said Colony of New South Wales and its dependencies it was ordained, directed and appointed that there should be, within the said Territory and its Dependencies, 3 Courts of Civil Jurisdiction to be respectively called the Governor’s Court, the Supreme Court, and Lieut. Governor’s Court; it was (Amongst other things) the will and pleasure of his Majesty that the Governor’s Court (constituted as therein mentioned) should have full power and authority to hold Plea of and to hear and determine in a summary way all Pleas concerning Lands, Tenements, Heredit's and all manner of Interest therein and all Pleas of Debt, Account or other Contracts, Trespasses, and all other Manner of personal pleas whatsoever, where the sum in dispute should not exceed £50 Sterling, or where the value of the Lands, Tenements or Heredit’s, or the Interest therein, or the subject matter of the suit should not exceed the said value of £50 sterling, excepting only such as should arise between *Party and Party* resident in the Island of Van Diemen’s Land, which shall be determined as thereinafter provided; And it was His Majesty’s further Will and Pleasure, and he did by those presents for himself, his 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 against any other Person or persons residing or being within any part of the Territory of New South Wales, (save and except always the Island of Van Diemen’s Land) of any cause of suit, the said Court should or might issue a Warrant in Writing, etc. And it was His Majesty’s further will and pleasure that the said Supreme Court, constituted as aforesaid, should be and thereby was constituted a Court of record, and was thereby authorised to hold Plea of and to hear and determine all Pleas Concerning Lands, Tenements, Heredit’s, and all manner of Interests therein, and all Pleas of Debt, Account or other Contract, Trespass, and all manner of other personal Pleas whatsoever (except where the cause of
Action should not exceed £50 Sterg.). And he did by those presents for himself, his 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 Person or Persons whomsoever then residing or being, or who at the time, when such cause of Action did or shall accrue, did or shall reside or be within our Territories in New South Wales or its dependencies or in the Island of Van Diemen's Land, of any of the Causes of suit aforesaid, unless the cause of suit should not exceed the value of £50 Sterg., the said Court should and might issue a Summons, etc. And it was His Majesty's further Will and pleasure that the said Lieut. Governor's Court, constituted as aforesaid for His Majesty's said Island of Van Diemen's Land, should have full power and authority to hold plea of and to hear and determine in a summary way all pleas, etc., whatsoever within the Island of Van Diemen's Land, where the Sum in dispute, etc., should not exceed the value of £50. And it was his Majesty's further will and pleasure that, upon Complaint to be made in writing by any Person or Persons against other Person or Persons residing or being within His Majesty's said Island of Van Diemen's Land of any cause of suit, the said Court should, etc." It is to be remarked that the Clause, constituting each Court under the second Charter, is word for word, in respect of the proceedings and Jurisdiction, the same as in the first original Charter of 1797, and that it seems to follow that no additional powers or extended Jurisdiction whatever are, is or can be given beyond what belonged to the first Charter. From a Consideration therefore of the particular place and peculiar Persons, for whose advantage the Courts of Judicature were in the first instance established, of the probable limited Jurisdiction only in fact intended in the first instance to be granted under the first Charter, of the introductory Matter to both Charters, of the particular terms of the Constitution, made use of in the creating clauses set forth, and also of the local Jurisdiction only given to the Lieut. Governor's Court in Van Diemen's Land, doubts have arisen whether the words "residing or being within our Territory of New South Wales" Apply to both the Terms "Any person or persons" and "any other Person or Persons," or only the latter: that is, whether the Plt. as well as the Deft. to suits in the Courts of New South Wales and its Dependencies must reside and be, at least at the commencement of a suit, in the Territory or its Dependencies; And whether even a party resident in New South Wales can recover a Debt within the Jurisdiction of the
Lieut. Governor’s Court, due from a party residing in Van Diemen’s Land or Vice Versâ. And further whether even a Convict prisoner, actually under the sentence of the Law, without ticket of leave, emancipation or any other Colonial relief from the consequences of that sentence, cannot under the Charter claim a right to sue, and be sued, in the Courts of Judicature. It will be perceived that, in the Supreme Court, the Complaint may be made not only by, but “on the behalf of any Person”; but the additional words, which immediately follow and regulate the practice of that Court, “or who at the time when such cause of Action did or shall Accrue, did or shall reside,” etc., seem to Account for that superaddition to the power of Plaintiffs in the Supreme Court, and give very strong ground to infer that only a party residing in the Territory can at all obtain a right of Action in the Colonial Courts. The practice of the Colony has been to admit Plts. resident out of the Territory to sue even in the Governor’s Court; and it is apprehended that to decide otherwise would prove ruinous to the Commercial Credit of the Colony. It is observable that, by an Act of Parl. of date immediately subsequent to that of the Charter (Vizt., 54th Geo. 3, c. 15) entitled “An Act for the more easy recovery of debts in New South Wales,” and reciting “that his Majesty’s Subjects, trading to and residing in the Colony, lay under great difficulties for want of more easy methods of proving, recovering and levyng of debts, due to them within the said Colony,” it is Contemplated that both the “Plt. and the Def.” in the Courts of New South Wales may “reside in Great Britain,” and their Affidavit or affirmation made there in any suit brought in the Colonial Court is directed to be received in evidence by those Courts.

Under the natural construction of the words of the Charter, this Act of Parl. would only enable the Plt. in the Supreme Court, who resided in the Territory when the Action Accrued, to go to England and there if necessary make his Affidavit of debt or other matter; for, as to the Deft., by the words of the Charter the Plt. in the Govrs. Court cannot proceed to trial without Oath that he (the Deft.) was in the Territory at the time of Complaint; And in the supreme Court the Charter makes the Deft.’s Appearance or arrest necessary, and is silent as to what is to be done if he cannot be found, although it is expressly declared that both the ordinary and Equitable Jurisdictions of that Court are over only Defendants resident in the Territory or its dependencies. It has not been the practice of the Courts to suffer Prisoners remaining exactly in the same Convict Condition, as upon leaving England, to sue or be sued,
but to transfer them to _summary determination before the Magistrates_; but no objection has been raised against Men possessing the _Governor's ticket of Leave_, which is a dispensation _from all Governmt. Labour_. At the same time, even Convict-prisoners (unless Assigned to Masters) work _only for the Governmt._ until 3 o'Clock _every day_ and devote the remainder to obtaining their Livelihood in any private way they please, the Governmt. Allowance from the stores being insufficient. In this respect debts may accrue and become Chargeable to them.

The Opinion of His Majesty's Government is therefore respectfu ly requested by the Judge Advocate and the Judge of the Supreme Court of New South Wales as to the proper construction of the above words of the Charter of Justice, in order that their meaning may if possible be reconciled with the liberal understanding and wise policy of the Above Act of Parlt. And whether Convict Prisoners, upon a true Construction of the Charter, Cannot sue, and be sued, in the Courts of Civil Jurisdiction in the Colony.

---

**UNDER SECRETARY GOULBURN TO MR. W. H. MOORE.**

Sir, Downing Street, 22nd April, 1817.  

I am directed by Lord Bathurst to acknowledge the receipt of your letter of the 13th March, 1816, stating various grievances under which you considered yourself to labor, and requesting that you may be reinstated in the situation from which you had been displaced by Governor Macquarie in consequence of seizing an American Ship on account of Mr. Vale; I am directed to acquaint You that, as His Lordship considers you to have acted merely in the Capacity of an Agent for and by direction of Mr. Vale, his Lordship has directed the Governor to reinstate you as one of the Solicitors of the Colony, trusting that your future conduct will prove you to have been worthy of this indulgence and that you will not again become the willing instrument of Acts done in opposition to the Governor of the Colony.

With respect to your statement as to the inadequacy of the Grant of Land assigned to you, I am directed further to acquaint you that it appears to Lord Bathurst to be more than is proportioned to the rank, which you hold in the Colony, or to any reasonable expectation you could have formed on your departure from this Country.

I am, &c.,  
HENRY GOULBURN.
MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.

(A private letter.)

Dear Sir, George St., 29th April, 1817.

My Clerk, Mr. John Gurner, has the honour of attending you with the Rules and Table of Fees of the Supreme Court, to be approved by Your Excellency and affixed in the Court, as they are required to be by the Charter.

With respect to the Fees, I hope your Excellency will not think them too high, when I assure you that the whole amount of them, both on the part of the plaintiff and defendant for the trial of a cause under £100, will not come to £6. In proportion as the sum in dispute rises, your Excellency will see that I have adopted the principle of charging a small additional fee for writs only; and I hope your Excellency will approve of this principle, begun as it is in your own Court, in which as the public reap the benefit of it in the price of the writ for small sums, it is but fair that the Courts should indemnify themselves in the price of the Writ for large ones. Besides the presumption is that the more important the suit is, the more intricate and long will the trial be; and the better therefore should the Court be fed. As it is, I am informed by Mr. Foster that my fees upon writs for large Sums are not one quarter of what was charged by the late Mr. Judge Advocate Bent, when he had jurisdiction of such matters. I will only add that my Table has not been framed without the advice of the Judge Advocate, who is content that, upon the principle to which I have alluded, my Court should benefit in return for the sufferings of his.

Your Excellency will also observe that I have carried this principle into the Ecclesiastical Jurisdiction, which hitherto (I am informed) received the fee of £4 for every probate or administration. Now there are estates, where £4 is too much to be paid, although others can well afford to pay much more. I have therefore begun at £2, and, though I go as high as £20, yet your Excellency must be informed that the estate above £5,000 (upon which that fee is set) is calculated only upon personally, and does not include real property, so that a few persons, who die in the Colony with above £5,000 besides their real property, can well afford to pay £20.

I shall have great pleasure in waiting upon you, if you require further satisfaction; and in the mean time, as I know your goodness towards all the Colonists will lead you to notice my Clerk, now he is before you, by entering into his circumstances, permit me to recommend him to your Excellency as a small settler, for he is a very respectable man and has a very nice wife, about to be confined. He was promised a Government salary of
GOULBURN TO MOORE.

£80 per annum on his appointment as my Clerk at the Colonial Office, and rations as a civil officer; but he has yet received nothing. I mean to give him a 6th part of the whole of my fees; and I have also taken Mr. Foster into my office, upon the promise of giving him such other Clerk's situation, as the progress of business shall shew to be necessary.

I beg to apologise for trespassing so long upon your attention, and to subscribe myself, &c.,

B. FIELD.

MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.
(A private letter.)

Sir, George Street, 30th Apl., 1817.

I know not how to thank you for the very handsome manner, in which you have accompanied your approval of my fees; and, as for the Rules, I assure you they have undergone a good deal of consideration, but nothing but practice can prove their applicability. However the Charter required something to be affixed in Court and wisely provides for their alteration at any time, subject always to your approbation. So, if we find the fees too heavy in practice, we can always mitigate them.

I thank you for your intended bounty to my Clerk, who will attend your Excellency's commands.

And, for myself, I shall have the greatest pleasure in waiting upon you today before 5.

I have, &c.,

B. FIELD.

UNDER SECRETARY GOULBURN TO MR. W. H. MOORE.

Sir, Downing Street, 14th July, 1817.

I am directed by Lord Bathurst to acknowledge the receipt of Your letter of the 16th November, 1816, complaining of the conduct of Governor Macquarie towards you and requesting to be reinstated in the Situation from which you had been dismissed, and I am to acquaint you in reply that His Lordship, previously to the receipt of your letter, had given directions for your being reinstated to your office under the impression that your misconduct was more the effect of error than of intention; Lord Bathurst however regrets to observe that your subsequent conduct, as detailed by yourself in your letter, should have been so little conformable to the situation, which you hold in the Colony or to the indulgence which his Lordship has been induced to extend to you; and he has directed me to impress upon your mind that, although he forbears in the present instance to alter
1817.
14 July.

250 HISTORICAL RECORDS OF AUSTRALIA.

the decision which he has already communicated to Governor Macquarie respecting you, Yet he shall no longer have any hesitation, in the event of any future complaint against you, or of any similar misconduct on your part in removing you from your Situation.

I am, &c.,
HENRY GOULBURN.

MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.

Sir,
Sydney, 14 July, 1817.

Our Charter of Justice directing the process of the Supreme Court, which extends its jurisdiction over Van Diemen’s Land, to be served by “the Provost Marshal” generally, (not the Provost Marshal of N. S. Wales exclusively), and Mr. Martin Timms holding a Commission* from His Majesty (as I was informed) to act as Provost Marshal of Van Diemen’s Land, I have thought it right, as Judge of the Court, to address the process of it against parties resident in that part of the Territory to such Provost Marshal; but he has judged it proper to return me those writs unexecuted, and to “decline acting under the authority of the Supreme Court, from an idea that it forms no part of his duty as Provost Marshal in Van Diemen’s Land.” I have, therefore, respectfully to request your Excellency to teach him that he is mistaken in that idea, and, if he do not immediately, upon the writs being again sent to him, comply with their requisitions, either to suspend him from his office and appoint a temporary Provost Marshal of V. Diemen’s Land, till His Majesty’s pleasure shall be known, or to appoint a new Officer to execute the Process of the Supreme Court in Van Diemen’s Land, wch. I am of Opinion Your Excellency is empowered to do under the words of the Judicial Patent: “the Provost Marshal, or such other Officer as shall be appointed by Our Governor.”

I have, &c.,
BARRON FIELD.

MR. R. BENT TO EARL BATHURST.

My Lord,
88 Great Portland Street, 18 Augst., 1817.

Hearing by chance of the Lords of the Treasury having been pleased to grant to Mrs. Bent, the widow of my much lamented son Mr. Ellis Bent, late Judge Advocate of New South Wales, £200, say Two hundred pounds a year, by way of Pension, maintenance for Herself and family. She ought certainly (I must say) to be very thankful to their Lordships thro’ your Lordship’s recommendation, for this grant. Yet your Lordship

* Note 131.
will give me leave to say, this is a small yearly sum for the Maintenance of the widow (she being otherwise entirely destitute) and five children of the Man, who exerted himself so much for the Colony, of such known and approved Justice and Integrity, of such worth and goodness, and who it may be said as on the Field of Battle, perished at his Post, or in other words in the Trenches.

Having no one to speak for me, will your Lordship be compassionate enough to get this grant increased; it will be doing a great good to part of a Family, who have seen better days, and who are, now, totally unable to assist her.

I hope your Lordship will excuse the liberty I have taken.

I am, &c.,

Robert Bent.

UNDER SECRETARY GOULBURN TO SECRETARY ADDINGTON.

Sir, Downing Street, 25th August, 1817.

I am directed by Lord Bathurst to acquaint you that, under the very peculiar circumstances of Mr. John Wylde, the Judge Advocate of New South Wales, being separated from his Family, and in consideration of the Impossibility of his being able to make any Remittance from that Country for their support during the current Year, his Lordship has consented that one half of his Salary for the Year 1817 may at the Expiration of the Six and Twelve Months be issued to Mr. Charles Knight, Solicitor, No. 26 Basinghall Street, acting under a General Letter of Attorney for Mr. Wylde; I am, therefore, to desire that you will take the necessary Steps for issuing the same on the Application of Mr. Wylde.

I am, &c.,

Henry Goulburn.

OPINION OF DEPUTY JUDGE-ADVOCATE WYLDE ON LIABILITY OF CIVIL OFFICERS TO TRIAL BY COURT-MARTIAL.

17th September, 1817.

[A copy of this opinion will be found on page 555 et seq., volume IX, series I.]

MR. JUSTICE FIELD TO UNDER SECRETARY GOULBURN.

Sir, Sydney, N. S. Wales, 1st Decr., 1817.

Having now had the benefit of nine months' experience in the office of Judge of the Supreme Court of this Territory, and understanding that His Majesty's Ministers have it in contemplation again to alter our Judicial Charter, I think it

1817.

18 Aug.

Request for increase of pension.

25 Aug.

Payment of salary of J. Wylde.

17 Sept.

Liability of civil officers to court-martial.

1 Dec.

Proposed alteration of charter of justice.
right to submit, for the consideration of Earl Bathurst, the limited result of that experience of the past, and the humble opinion I have therefrom been able to form of what may be advisable for the future.

Our present Charter (as most other voluminous and extensively operative Patents and Acts of Parliament will be found to be) is pregnant with several difficulties and ambiguities of construction, upon one or two of which the Judge Advocate and I have thought it necessary to solicit the opinion of His Majesty's Law Advisers, and upon all of which we have in the mean time acted according to the best of our judgment and the most liberal equity of construction, in favour of the intention and spirit of the Charter. If I were asked whether it were worth while again to renew a Charter, so recently renewed, for the sake of removing these difficulties and ambiguities, I should say No; and indeed my opinion upon the whole Charter, with reference to the Civil Justice of the Territory (in which light alone it falls within my province to regard it) is that, in a short time, it will work very well. That I am not thus against remodelling it from interested motives will be perfectly apparent to you, when I assure you that (notwithstanding the Colony had, by the closure of my Court till my arrival, been for two years deprived of any tribunal for the trial of causes of above £50 in dispute), I have in the nine months, for which it has now been open, tried only 28 causes, although 193 actions had been commenced, so that my interest lies on the side of any change, which would give me more business and consequently more fees.

It should seem from this that the Colony is at present by no means in that solvent and flourishing state, which induced the late Judge Advocate (Mr. Bent) to complain of the great number of heavy causes which he had to try, and to ask for the assistance of another Judge.

The crying Civil evil of the Charter is certainly the compulsion of trying all Van Diemen's Land Causes of above £50 at Sydney, a compulsion which thus forces, in some cases, the parties, and, in almost all, the witnesses, to make a fortnight's voyage (the passage is often longer, and sometimes very perilous); but, if only 28 or even 50 causes per annum arise for trial in New South Wales before the Supreme Court, it cannot be expected that His Majesty's Government should yet incur the expense of a Judge and a Supreme Court for so small a dependency as Van Diemen's Land.

None of the few Van Diemen's Land causes, which have been instituted in my Court, have yet come to trial, owing to the difficulty of bringing a new system to work, to there being no
Attorneys in Van Dieman's Land, and to the distance and uncertainty of communication between that Island and this Settlement; but I have no doubt that they will be soon brought to trial, and I shall be then better able to judge of the expense and practicability of such trials.

I am not apprized of any specific mode in which it may now be the intention of His Majesty's Ministers to remodel the Charter; but I learn from Governor Macquarie's despatch to the Earl Bathurst of 28th June, 1813, that His Excellency then recommended that the Judge Advocate (under another title) and the other Judge of the Colony should together try all causes of above £50 instead of their being tried by that other Judge and two Magistrates, as then projected by His Lordship, and now adopted by the Patent. The inconvenience of this recommended alteration was no doubt seen by His Majesty's Ministers, since the number 2 affords no majority, where causes are not to be tried by Jury; and, in causes to be so tried (in the event of trial by Jury being introduced here), how are the Jury to be charged, when the Judges differ in opinion in point of law? Any alteration of the Charter, founded on this basis, would therefore incur the expense to His Majesty's Government of a third Judge, and would entail upon the Judges a still further division of fees of Court, already too inconsiderable to operate as an inducement to Gentlemen of the Bar to relinquish their friends and prospects in England for a residence in so remote and peculiarly-peopled a Colony, at the small Salary of £800 or £1,200 Per annum.

I have, &c.,

Barron Field,
Judge of the Sup. Court, N.S.W.

Sir John Jamison to Under Secretary Goulburn.

Sir,

Sydney, New South Wales, 12th December, 1817.

Previously to my leaving England for this Colony, I had the honor of being recommended to you by my friend Colonel McMahon for Earl Bathurst's favourable consideration to be appointed a Member of the Council* to the Government in the event of his Lordship giving effect to the recommendation of the Committee* of the House of Commons on that Head.

The increasing Population and consequence of this Colony makes a Council to the Government very desirable, as the quiet protests of the Members would make His Majesty's Minister for the Colonies well acquainted with the best interests of this fast rising Colony.

I have written to the Lords Commissioners of the Admiralty for general leave of absence to reside here until my services

* Note 132.
shall be called for. From my extensive local knowledge of this Colony and the policy of its more judicious Government, together with the valuable extent of my Property in it, I trust it may be allowed that I am a qualified Candidate for being appointed a Member of the Council, when such an arrangement takes place.

By the next opportunity, I will furnish my Lord Bathurst with my opinions at length of the very impolitic levelling measures* of this Government (meaning rising those who had been Convicts to the rank of Magistrates and Officers). The free born Child of Convict Parents looks on itself as very superior to its Parents; But, if the moral torpitude of the Parents' Crimes is to be without retrospect and forgotten, what a dangerous encouragement to the rising generation. I have, &c.,

JN. JAMISON.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.
(Despatch marked "Private and Confidential.")
Judge Adv.'s Office, Sydney, N.S.W.,
14th December, 1817.

Sir,

In the liberty I take of marking as above this Communication, I trust to stand excused from favorable regard to the Motives and Object, that alone influence and can only be deducible, I am persuaded, from the Tenor and Subject of it.

It is with somewhat of pain and real regret that I feel it as a Duty to mention to you, reposing the fact entirely in your Discretion, that the most perfect Understanding unfortunately does not prevail at present between the Judge of the Supreme Court and myself. It is cause of pain, because I am not insensible of the public Consideration that urged you personally to do me the Honor of paying so much attention to my application in his behalf;† and of regret that I cannot hold the Judge privately quite in that respect and estimation that once I had the gratification of having him. It is the more unfortunate because the Division has chiefly, though not altogether unconnected with Matters of private Intimacy, arisen upon differences of Opinion in public Questions and Points, on which I have felt, whether justly or not, that the Judge, or whether correct or not in opinion, has conducted himself generally with an hauteur and tone of dictatorial Superiority (perhaps in unison only with the general Opinion here, that the Judge of the Supreme Court in name and character of Jurisdiction must have precedency)‡ that could not, though for a time, be patiently or prudently, even on public Grounds of Duty, constantly brooked or overlooked. In certain degree of proof of this, I would point even to the language of the Letters

* Note 133.  † Note 134.  ‡ Note 127.
addressed by him to me with respect to the Ship Chapman, though I personally and by Letter urged my wishes and the propriety of abstaining from any communication of opinion, till all the evidence had been received; and his Non-compliance with the Suggestion, it will appear, occasioned such a Change of Determination in truth, though superficially glossed over, as to the results and Effect of the entire Investigation.*

It has also particularly proved Matter of discordant Opinion and Discussion as to the true Construction to be put upon the Charter of Justice in several points as applicable to our respective Courts and the most beneficial Procedure to be adopted in carrying its Objects into effect; we have, it seems, resolved and act indeed upon a different Principle. I have considered, that, in such a Colony and the present State of it, the most simple forms and proceedings are best suitable to the Charter, whence Jurisdiction is derived to make awards "according to Justice and Right," "or Law and Equity," and have been disposed to disfavor rather all of pleading and technicality, but such as prove actually essential to the proper and grave Conduct of Business as in and before a Court of Justice. In the Supreme Court, though the words of Constitution are the same, the practice seems entirely in spirit and too much in Proceedings to conform as much as may be to the Practice and Decisions on it of the English Law Courts, and to which I cannot but consider the legal Talent of the Colony at present altogether unequal, even if the Interests in care of the Court could thus be best conducted and adjudged of. And in this respect, as I am uncertain whether the Judge may or may not communicate with you, I deem it advisable to inclose the Copy of a Letter purporting to be addressed to you, and sent to me for perusal by the Judge as about to be transmitted, as also a Copy of my Letter to him in consequence.

I have only to add the Assurance, that, as far as possible, I will still sacrifice private feeling on every occasion, when in conflict with public Cooperation and Matter of official Concert and communication. With regard to the Subject itself of the Ship Chapman, I can only say that it is not perhaps for any one to have a just Idea of the personal Vexation and sort of hostile and painful Conflict it has occasioned Me; it will appear strongly enough, I fear, in the public Communications to be transmitted; but, from the very strong Opinion entertained by the Governor on the subject as also of the Secretary, it was certainly of hard Endeavor and scarcely in my power to bring the Matter to a close without affecting private feelings and Consideration; but I am happy to say that in the end I did not fail in the Object, I

* Note 135.
1817. 14 Dec.

Relations between L. Macquarie and J. Wylde.

Difficulties in Investigation re ship Chapman.

Labours of J. Wylde.

had so much at heart, and that the Governor and myself, I have every reason to believe, continue on the same good terms of cordial Cooperation and perfect Understanding, that have remained in every way unbroken in upon since my arrival in the Colony; and I flatter myself, that I stand as high officially in the Governor's consideration, as any one can, whom he believes not entirely devoted as strongly as himself to what is termed here the convict Interest and System. On my part I have endeavored to act upon and never to lose sight of the Assurance, I personally gave in your Office, that no one under the Government should be more duly subject than myself, provided I stood independent in my judicial Character; and over this no shade of Influence has ever passed.

In respect of the Ship Chapman, as a Public Question it seems fit to leave all explanation to the official Statements and Communications to be referred by the Governor, I understand, to The Secretary of State; it will at least I hope appear, that I have taken all pains of inquiry possible, though, in a Matter not immediately perhaps belonging to my office, to attain a just Decision as to the real Circumstances, and at the same time had sufficiently in proper and discreet regard to the public Interest, opinion and bearings, as involved in the Measures thereon suggested.

Confiding in as bespeaking your liberal and kind Consideration, I venture to express myself without reserve as to my office here and the future hopes I would seek the Gratification and relief of indulging under all its labor and disagreeables. No one, I believe, and certainly not if not on the spot, can have any Idea as to the multifarious harassing and continued Duties. I have had to perform since my arrival, and which I have only accomplished (I beg to affirm in serious Assurance) by devoting much of the Night as well as Day to the object and by the sacrifice of every single private pursuit. The business of my Court would be comparatively easy; but, when to this is to be added the presiding over the Court of criminal Jurisdiction 4 times at least in the Year, the business of which is increased to so serious weight, and here of such personal Toil and responsibility, as the reports will shew and the Sittings of the Court for 4 or 5 weeks from Day to day, the attending of two or three rather heavy Courts-Martial, the Duty I have undertaken upon public Grounds and on the Instance of the Governor to preside and generally act as a Magistrate, and particularly the continued, the almost daily Communication as to and reference of Matters connected with the government or of a public Nature, and the great Difficulty and responsibility of advising under such a
state and climacterick period, as this Government seems to me now to have arrived at, I am sure you will be satisfied that I am endeavoring all in my power to deserve the Approbation and ensure to myself the favorable Consideration of His Majesty's colonial Department. May I then be permitted just to express the Hope that the time will come, when my Exertions here may be considered as of sufficient Desert to approve of the bestowment of an Appointment of higher consideration in His Majesty's judicial Appointments, where the Means of making future Provision for my family may open upon me; and above all, I may at least have the relief of more frequent and certain Communication, if not of actual and personal Union with my Children.

I presume not to intrude on you further.

I have, &c.,

JNO. WYLDE,
Judge Adv., N.S.W.

[Enclosure No. 1.]

[This was a copy of the letter from Mr. Justice Field to under secretary Goulburn, dated 1st December, 1817; see page 251.]

[Enclosure No. 2.]

DEPUTY JUDGE-ADVOCATE WYLDE TO MR. JUSTICE FIELD.

Sir, Judge Adv.'s Office, Sydney, 12th Decr., 1817.

Pressure of engagement in my Office has prevented me sooner accomplishing the purpose already intimated to you of communicating, with all due consideration and delicacy, the reasons upon which it certainly would appear proper and expedient to me that such a public Letter Home, with regard to the Charter of Justice as that you did me the favor to allow the perusal of, should at present be withheld, or upon which at least, as it seems to me, an opinion and conclusions very different to those you express yourself as entertaining in that respect would be warranted and obtain.

I certainly am not aware myself that His Majesty's Ministers have it in contemplation again to alter our judicial charter, and I apprehend certainly not till the general interests of Van Diemen's Land as a Colony are considered sufficiently important to require a separate and independent judicial Establishment; and, whether this may be the present state or not of that Dependency, it is not for me to know or determine; but I cannot help being perfectly assured that the present Charter must prove altogether ineffectual in a general sense, if not wholly inoperative as to that Settlement, owing in some, though not perhaps in a
very great degree, "to the difficulty of bringing a new System to work" as you express the cause, but principally, I conceive, from the natural course of the proceedings and customary Practice in the Court itself; which, with every possible expedient and relief on so many occasions and so many instances and stages of the procedure in Suits, and at least always upon the trial, must require the personal attendance of the Sureties, Defendants and witnesses, as also from the ruinous consequences, that cannot but result from such a necessity, inducing the parties to submit at this time, in discretion to avoid the evils, to any mode of private arrangement rather than indulge at such cost the preference of appealing to the legal tribunal of the Court.

And, although it may be justly remarked that the commencement as the Defence of Suits in the Supreme Court remain in that discretion of the Parties themselves, which can measure and determine the expediency and advantages or probable consequences of such a course, still the Question recurs, can the present Charter, under such circumstances and difficulty of approach, and by which the Parties taking advantage of it expose themselves to such unusually heavy Expenses and personal Hazard and Inconveniences, afford that benefit or be of that effect as in the Liberal Policy and care of the Government are presumed to belong to and arise from every Court of Justice, erected on its authority alone for such end and views. That a greater Pressure on this point of Jurisdiction under the Charter certainly seems to be upon the witnesses to be brought up before the Supreme Court from Van Diemen's Land, whose losses hence cannot, I apprehend, be satisfactorily or even justly reimbursed or made good by any the most full allowance of the Court; compulsorily in attendance upon the Subpœna of the Court, they have to sacrifice every private Interest of their own; while the very apprehension of incurring such a risk must have, I should be apt to think, a considerable effect upon a proper mercantile Spirit and general cooperation and aid in the way of Trade, Negotiation and Contract. And if from some recent and present instances of parties brought up from that place as witnesses on Courts Martial, I have had particular reason to observe and regret how much of Difficulty and Grievance without any actual power of relief were in truth necessarily thus occasioned, and become subject of loud complaint.

It is not perhaps for me to know how far the Supreme Court may be able to propose and adopt means of carrying its Jurisdiction into full and due effect; but I have yet personally doubts to remove, how in very many various cases, belonging even to the
ordinary course of Suits, as well as in matters of actual custody upon attachments, and especially proceedings in Equity, the same can be at all enforced or at least so without committing so much to Officers under appointment from the Court, as will leave little of actual jurisdiction to exercise, and which little perhaps might be also then without any serious Injury conducted and disposed of in the same way.

I suggest so much observation upon you on this point only to submit whether, even upon this ground alone, the Charter with reference to the Civil Justice of the Territory can be safely pronounced "as certain in a short time to work very well"; and if it be questionable whether it would not be advisable to wait the actual trial of some of the causes from Van Diemen's Land, when, as you observe, you will then be better able to judge of the expense and practicability of such trials before you communicate any such positive opinion, as arising from experience, to His Majesty's Government.

But further in consideration, the present Charter appears to you, as certainly to myself, pregnant with several difficulties and ambiguities of consideration, though I cannot have the satisfaction of agreeing with you that it would not be worth while again to renew the Charter for the sake of removing them. In this respect, I beg leave just very shortly to advert to some of those difficulties and ambiguities, upon the nature of which the whole question seems to depend, and the very uncertainty of the only authoritative decision upon certain points, jointly solicited by us, seems to me strongly to urge the propriety of present forbearance from the expression of any positive personal judgment on the Subject.

It has been deemed questionable by both of us whether the Jurisdiction of either of our Courts, constituted by the Charter, can extend but to parties making the Complaint as to Defendants except at the time residing in the Territory, as also, whether under the specific terms and from the objects intended by it, it is applicable to all or any particular descriptions only of persons resident in the Colony. You are too perfectly aware that in my consideration the Supreme Court is altogether without Jurisdiction, altho' in several instances under your Direction it has exercised it, in any case (for there is and can be therefore, I apprehend, no exception as authorized by the Charter), when it awards to the party bringing Suit damages in amount less than £50; and if indeed, as when personally present the other Day as a Witness in a complaint for a Libel, the Supreme Court can duly award
1817.
14 Dec.

Difference in opinion re jurisdiction of supreme court.

Is. damages and pronounce that such amount in such a case necessarily carries costs, there seems to me an end of the Jurisdiction of the Governor's Court, and the spirit and intention of the Charter itself to entirely fail, inasmuch as there would be at the same time two concurrent Jurisdictions in the Courts here over the same amount, which alone is the criterion on which the Jurisdiction of either is regulated and solely depends. If it should be judged expedient, that the Judicial Establishment should remain unaltered, and the Supreme Court have Jurisdiction in Actions as to unliquidated damages to any amount, it would be well that it should appear express and certain in the terms of the public Record of its constitution. Not to enter now however upon any argument on the Subject, I would just suggest that it appears to me that, if the Supreme Court has put the proper and intended construction in this respect upon the term "Cause of Action," it seems to me necessarily to follow that any person bringing Suit must, upon parity of reasoning and principle, have a right to appeal in any case where he may think fit to lay his Damages at an Amount exceeding £300; and thus every important limitation intended to be raised, and justly in my opinion by the Charter, will be wholly avoided unless the Court of Appeals, with which it rests as to the allowance, shall entertain a different Judgment upon both points and check all further proceedings; but, if the Charter in such respects, as well as many other points of practice connected with the construction of it in either Court (not of equal consideration or difficulty and therefore not requiring particular notice and remark) raised, in a place like this, such doubt and difference of opinion, I am not aware, I confess, of any such difficulties attending or to arise from the renewal of it, as could render it advisable more determinately and clearly to express its Tenor, Object and proper application.

With regard to what may be the specific mode in which the Charter may or may be intended to be remodelled, I would on this occasion venture no observations, satisfied that the Government will adopt that which will most effectually conduce to the public advantage and Interest; certainly however agreeing with you that, if there were but one Supreme Court of Civil Judicature in the Territory, and the Judge was to confine himself entirely to the duties belonging to that Office, he would stand in no need of the Assistance of any other Judge, at least in respect of any divided Jurisdiction and business likely to belong to it, however much it might perhaps be considered desirable that such a Court should not be left in the charge and upon the sole responsibility of any single Judge.
I have been obliged to suggest these remarks with haste and under some other personal inconveniences, and would request in aid of them your candor and liberal consideration.

I have, &c.,

J. NO. WYLDE,
Judge Adv., N.S.W.

GOVERNOR MACQUARIE TO UNDER SECRETARY GOULBURN.
(A private despatch.)

15th December, 1817.

[This despatch contained a reply to the petition to the house of commons; see page 732 et seq., volume IX, series I.]

MR. W. H. MOORE TO EARL BATHURST.

My Lord,

Sydney, 15th December, 1817.

It is not without very considerable regret that I feel myself under the unavoidable necessity of again troubling your Lordship. But I trust the circumstances, under which I am unfortunately placed, will be considered by your Lordship as a sufficient apology for the liberty which I now take.

The letter, which I was honored with from Mr. Goulburn by your Lordship's commands, dated 22nd April, 1817, would I had most anxiously hoped have induced Governor Macquarie to view my conduct in the same point of view, in which your Lordship was pleased to consider it. I did myself the honor therefore to address His Excellency on the subject on the 29th September last, a copy of which letter I have the honor to inclose your Lordship herewith, marked No. 1. To this letter, I received an answer from Mr. Secretary Campbell, a copy of which I have also the honor to inclose your Lordship marked No. 2. I felt it due to myself to reply thereto as per copy enclosed marked No. 3.

Your Lordship will see by Mr. Secretary Campbell's letter in reply marked No. 4 that this application was as fruitless as the former one. I therefore considered it to be utterly useless to trouble his Excellency further on the subject, until after Mr. Goulburn's last letter dated 14th July, 1817, had arrived which reached me on the 22nd November last.

In consequence of the arrival of that communication, I addressed to his Excellency the Governor at the time of their respective dates the two letters numbered 5 and 6 copies of which I also submit to your Lordship as well as a copy of Mr. Secretary Campbell's letter in answer thereto marked No. 7. To this letter I replied as your Lordship will perceive by the letters marked No. 8 and 9 to neither of which letters I have received any answer whatever.
1817.
15 Dec.

I have troubled your Lordship with these inclosures, as I could not better explain all that has transpired upon this occasion than by transmitting to your Lordship the whole of the Correspondence that has taken place, and your Lordship will be in possession of the whole Circumstances of the Case by a perusal of these Documents.

I trust your Lordship will see the grievous mortification I have endured and the great inconveniences of a pecuniary nature which I have been and still am labouring under from my Salary having been so long withheld from me. I need not state to your Lordship that, surrounded as I am by a family dependant entirely upon my exertions for Support, limited as are my professional resources not more from other circumstances than from the Cloud, which Governor Macquarie's personal hostility to me cannot fail (in a Colony constituted as this is) to cast over me, have involved me in difficulties to a very considerable extent.

Your Lordship will see from one circumstance alone how fatal in a professional point of view the enmity of the Governor of this Colony invariably proves. On a late Trial,* in which I was concerned for the Reverend Samuel Marsden, principal Chaplain of the Territory, against Mr. Secretary Campbell for a libel upon my Client and the Missionary Societies, of which he is the Agent, published in the Sydney Gazette, a professional Gentleman, who has but lately arrived here was retained to cooperate with me (as is the Custom in England) in advocating the plaintiff's Cause. On the Night previous to the Trial, this gentleman, although perfectly independant of the Governor's Will, and who holds no public Situation whatever, was so apprehensive of the Consequences which might result to him from the exercise of his professional Talents, when opposed to a person so nearly connected with the Governor, that he declined acting in the Cause and left me solely to conduct it, extensive and voluminous as it was.

Your Lordship has, I doubt not, had the Accounts of the receipts and expenditures of the Police fund transmitted to you from time to time, and I have no doubt your Lordship will have perceived how often Sums of Money have been paid as remuneration to Colonial Officers and other persons, where circumstances may require such a disposition of the Public Money; how far my Case (in being deprived of my rations and every other indulgence usually extended to persons holding Situations under Government) may lead me to hope your Lordship may consider me entitled to any indulgence of that kind I entirely leave to your Lordship's Consideration.

* Note 136.
If your Lordship should have an interview with Mr. Riley, the Magistrate, late principal Merchant of this place and owner of the Ship Harriet, by which vessel this letter is conveyed to your Lordship, he can explain to your Lordship in some degree my pecuniary embarrassments, as well as the heavy obligations I am under to him in consequence of the suspension of all the resources, I conceived I could with certainty calculate upon for now very nearly two years.

I very sincerely thank your Lordship for the favorable consideration, which your Lordship was pleased to bestow upon my former appeal to your Lordship and for the promptitude with which your Lordship condescended to answer it; and I have now only to throw myself upon your Lordship protection on the present occasion and most earnestly and humbly to entreat that your Lordship will be pleased to honor me by taking such further steps as in your Lordship's judgment the peculiar hardship of my case may seem to merit. I have, &c.,

W. H. Moore.

[Enclosure No. 1.]

Mr. W. H. Moore to Governor Macquarie.

George Street, Sydney, 29th Sept., 1817.

I have been favor'd thro' Your Excellency with a letter from the Secretary of States Office (a copy of which I have no doubt has been forwarded to you), informing me that my Lord Bathurst had done me the justice to look upon my conduct in its real light, and had therefore directed Your Excellency to reinstate me as one of the Solicitors of the Colony.

I should have written to Your Excellency before this upon the subject, but, being aware that Your Excellency's time was occupied by much public business, I was unwilling to trouble Your Excellency until I conceived you were more at leisure.

I have to request Your Excellency will do the favor to inform me, when I shall wait upon Your Excellency for an order to the Treasurer of the Police Fund to receive the arrears of my salary, or whether Your Excellency will forward the same to him, and when I may wait on him to receive them.

I am, &c.,

W. H. Moore.

[Enclosure No. 2.]

Secretary Campbell to Mr. W. H. Moore.

Sir, Secretary's Office, 30th Sept., 1817.

I have it in command to inform you that His Excellency the Governor has received your letter of yesterday's date on the subject of one, which he had recently transmitted to you.
from the Secretary of State's Office. His Excellency is apprized of the contents of the Letter alluded to, in yours of yesterday, and has also received instructions in conformity therewith from the Right Honble. Earl Bathurst, H.M. P. Secretary of State for the Colonies; but, notwithstanding the high deference he entertains, as well from duty as from personal motives towards his Lordship, he feels it incumbent on him to suspend the carrying those instructions into effect until such time as His Lordship shall have received and conveyed hither his sentiments on a more recent communication,* which your later seditious conduct has imposed the necessity on His Excellency to make to His Lordship.

I am, &c.,

J. T. CAMPBELL, Secy.

[Enclosure No. 3.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

3d November, 1817.

Your Excellency,

It is with the utmost regret I feel myself under the necessity of addressing Your Excellency in reply to a letter, which I have received from Mr. Secretary Campbell, and I hope Your Excellency will, in justice to my private feelings as well as my professional character, indulge me with your attention to what I have now the honor to submit to you.

Mr. Secretary Campbell is pleased to state that he has it in command from Your Excellency to inform me that it is Your Excellency's pleasure to suspend the carrying the Instructions of the right Honble. Earl Bathurst, his Majesty's principal Secretary of State for the Colonies, into effect as to the payment of my salary as one of the solicitors, appointed by His Majesty's Government to this Colony, until such time as His Lordship shall have conveyed hither his sentiments upon a more recent communication, which my later seditious Conduct had imposed on Your Excellency the necessity of making to His Lordship.

Anxious in every point of view as I am and must be to clear myself from such a charge, I beg leave to entreat Your Excellency will permit me to explain the nature of my conduct on the occasion alluded to, and which I cannot but understand (although it is not mentioned by Mr. Secretary Campbell) to be relative to a petition, which was some time since transmitted to the House of Commons from this Country.

His Majesty's Government have only done me justice in attributing my motives on the occasion of the American Ship Traveller to their true and only cause, namely, my having acted professionally only, and I beg leave to assure Your Excellency that I was actuated by no other on the occasion of the petition.

* Note 137.
In this view of the subject, I most earnestly request Your Excellency will be pleased to consider the latitude, which is always allowed to all professional Men in the exercise of their profession, even in cases of High treason. His Majesty's own Counsel frequently act as Advocates for the Accused and certainly with no diminution of their Loyalty, Honor, or Attachment to their Sovereign; so in this Case. Your Excellency will allow me to disclaim with every abhorrence any thing, which could in the smallest degree be construed into sedition or even disrespect of Your Excellency's high and important authority.

Under these Circumstances, I trust Your Excellency will be pleased to reconsider the subject; after having given up a lucrative and highly respectable practice at home and involved myself in a very heavy expence here, trusting alone to that Salary, which His Majesty's Government bestowed as a remuneration for the sacrifices I was about to make in embarking myself and family for this distant Colony, I need not say how serious will be the inconvenience and how much I cannot but suffer, should Your Excellency deprive me of that pecuniary resource the importance of which I am confident Your Excellency will be fully aware of.

I remain, &c.,

W. H. MOORE.

[Enclosure No. 4.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir, Secretary Office, Sydney, 5th November, 1817.

I have it in command, in reply to your letter of the 3rd Instant, addressed to and yesterday received by His Excellency the Governor, to refer you to my official communication of the 30th September for his Excellency's unalterable determination on the subject in question.

I am, &c.,

J. T. CAMPBELL, Secy.

[Enclosure No. 5.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

Your Excellency,

24th November, 1817.

I beg to inform Your Excellency that I have received Per Ship Larkens a letter from Henry Goulburn, Esqre., under the directions of Earl Bathurst, His Majesty's principal Secretary of State for the Colonies, acknowledging the receipt of my letter to him of 16th November, 1816, and by which I am informed that His Lordship is pleased to forbear altering the decision, which he had before communicated to your Excellency respecting my reinstatement in the situation he had
appointed me to fill. I shall therefore feel obliged by Your Excellency's informing me, when I may wait on the Treasurer of the Police Fund for the arrears of my Salary, one year and three quarters of which became due yesterday.

I am, &c.,

W. H. Moore.

[Enclosure No. 6.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

Your Excellency,

27th November, 1817.

I had the honor to address Your Excellency on the 24th instant, in consequence of a letter I was honor'd with by the Ship Larkens from Henry Goulburn, Esquire, by order of Earl Bathurst; his Lordship has been pleased to consider my conduct in the same point of view, in which I very anxiously hope it will appear to Your Excellency, that I have never acted in any other than my professional capacity.

Under these circumstances, I very humbly solicit that Your Excellency will be pleased to order me to receive the arrears of my salary, which at this moment is of infinite consideration to me, as, in consequence of the death of a near relative and the great urgency of my private affairs thereon, I shall be obliged to dispatch my Brother to England by the Ship Harriet.

These circumstances will I trust induce Your Excellency to favor me with Your favorable consideration to the present application.

I have, &c.,

W. H. Moore.

[Enclosure No. 7.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir,

Secretary's Office, 28th November, 1817.

I have it in command to inform you that Your Letters of the 24th and 27th Instant, addressed to Governor Macquarie, have been received; and I have his Excellency's authority to refer you for his determination as conveyed to you in my letter of the 5th Instant, as also in the former one of the 30th September last, respecting Your Salary as a Solicitor.

I am, &c.,

J. T. Campbell, Secy.

[Enclosure No. 8.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

Your Excellency,

28th November, 1817.

I have this moment received a letter from Mr. Secretary Campbell in answer to my two letters to Your Excellency of
the 24th and 27th Instant respectively, and am perfectly at a loss to understand the meaning of Your Excellency's intention with respect to my salary. The first letter (of 30th September last), which I received from Your Excellency through the medium of Your Secretary on the subject of my reinstatement, informed me that Your Excellency felt it incumbent on you to suspend carrying the Instructions of The right Honble. Earl Bathurst into effect until such time as his Lordship should have received and conveyed hither his sentiments on a more recent communication which my conduct had imposed the necessity on Your Excellency to make to His Lordship; in consequence of a subsequent letter which I had written to Your Excellency on the subject. I received a short Note, dated 5th November last from the Secretary, referring me to his former letter as Your Excellency's unalterable determination on the subject. Since that period Earl Bathurst (having received the more recent communication alluded to) has conveyed hither his sentiments upon the subject by saying that he forbears in that instance to alter the decision, which he had already communicated to Your Excellency respecting me.

In consequence of this communication I wrote to Your Excellency the two letters alluded to, of the 24th and 27th instant, and the Note from Mr. Secretary Campbell, which has just come to hand, again refers me for Your Excellency's determination as conveyed to me in his letter of the 5th instant and of the 30th September last.

As this Note in some measure acknowledges that Your Excellency has received Earl Bathurst later communication, I am greatly at a loss to understand why I am again referred to the Secretary's former letters, as I was naturally led to hope, from the Secretary's first letter, that Your Excellency was only waiting for further instructions from Earl Bathurst on the subject.

Under these circumstances, I should feel honored by Your Excellency's informing me whether you have yet received Earl Bathurst's expected Communication, or whether Your Excellency still awaits the arrival of it.

If that Communication has reached Your Excellency I must humbly beg and insist on being reinstated in the enjoyment of those privileges, which I was led by His Majesty's Government to expect I should have received, and which I have been so long deprived of.

I have, &c.,

W. H. Moore.
[Enclosure No. 9.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,
3rd December, 1817.

Your Excellency,

Fearing Your Excellency may not yet have received Earl Bathurst’s late dispatch respecting my conduct, I beg leave to inclose Your Excellency a Copy of the letter* I received from Mr. Goulburn on the subject, and as I am perfectly conscious of never having given Your Excellency any the Slightest Offence (excepting in the two instances in which Your Excellency has reported me to His Majesty’s Ministers), I hope Your Excellency will pay that deference to his Lordship’s opinion on the subject, as to take my case into Your earliest consideration, and that Your Excellency will condescend to favor me with an Answer as soon as You can find leisure so to do.

I am, &c.,
W. H. MOORE.

THE HUMBLE PETITION of George Crossley, of Sydney, in the Territory of New South Wales, Gentleman,

To the Right Honorable Earl Bathurst one of His Majesty’s Principal Secretary’s of State.

Most respectfully sheweth,

That your Petitioner came to this Territory in the ship Hillsborough and arrived here in the Month of July, one thousand, seven hundred and Ninety nine, and became free in the year one thousand eight hundred and two, and having signified to the then Governor Your Petitioner’s intention to settle in the Territory, and your Petitioner having been a practising Attorney in all the Courts of Law and Equity at Westminster Hall for the Term of twenty years and upwards, and, in the year of One thousand, eight hundred and three, many of the Principal Inhabitants together with the then Commissary, but now Assistant Commissary General, John Palmer, requested of His Excellency, the then Governor King, to authorize your Petitioner to practice as an Attorney in their affairs, and which the said Governor was pleased to sanction, but your Petitioner was not sworn nor was there then any sworn Attornies practising in the Colony.

And from that time Your Petitioner was a Practising Solicitor in New South Wales from the year of one thousand, eight hundred and three to the time of the revolution in this Territory in January, one thousand, eight hundred and eight, and as such was employed as the Attorney of every principal person living

* Note 138.
PETITION OF CROSSLEY.

in the Territory, and was applied to for advice, and employed by and with the Magistrates, and of Council with and attended the Governor and Magistrates in the latter end of one thousand eight hundred and seven, and beginning of one thousand eight hundred and eight to suppress Rebellion; and in those troublesome time Your Petitioner was acting in giving legal advice to the said then Governor and Magistrates of his Council assembled to oppose the rebel party; and, by reason of your Petitioner’s attachment to His Majesty’s Government at the time the Government was seized, Your Petitioner was also imprisoned (by the rebel party for his joining with and defending of the regal Government) two years wanting eleven days, and until he was relieved from Confinement by the arrival of Governor Macquarie and the establishment of regal Government in this Territory.

That during the rebellion Your Petitioner’s property greatly suffered; and your Petitioner gave an account of his losses as ascertained by the Neighbouring Settlers to Admiral Bligh, after he had been superseded in the Government, with design that he should lay them before His Majesty’s Government, and the Admiral promised Your Petitioner to lay his case before the British Administration, and use his interest to get your Petitioner a remuneration for such losses; but your Petitioner has had no account whether that was done or not; but Your Petitioner’s losses by the rebellion exceeded Nine thousand pounds besides the illegal imprisonment of his person.

That, upon the establishment of the regal Government, Your Petitioner practised in all the Courts in this Territory from thence until the Month of July, one thousand, eight hundred and fourteen, at which time a New Patent arrived superseding the powers of the former Courts and establishing the present Courts of the Colony.

That, from the time of his first practising in the Colony, Your Petitioner never had his Character called in Question in the profession on any occasion in this Territory; but on the contrary Your Petitioner had the Management of the legal concerns of Nine tenths or more of every respectable person in the Territory, and was always deemed, taken and considered as a Man of integrity and upright Conduct.

That, upon the coming of the New Patent, an objection was made by Jeoffrey Hart Bent, the then Judge of the Supreme Court, and he declared his resolution not to admit any person to practice in the Courts, who had first come to this Territory as a Prisoner, and in consequence of the conviction had been struck off the roll of Attornies in the Courts of Law in England.
That this resolution of the then Judge went to deprive all the former practising Attornies in this Colony of the mode of getting a livelihood in the way of their profession, and was considered by all the inhabitants in the Colony a case of great hardship and unpresided injustice.

That His Excellency Governor Macquarie was pleased by letter to the Judge to recommend the former practising Attornies, whose Characters had no blemish in this Colony, should be continued and admitted to practice in the New Courts; but this recommendation was refused to be complied with.

And most of the Magistrates and principal inhabitants express'd a desire that your Petitioner, who had for a number of years conducted their legal affairs, should be admitted in the New Courts; but these applications were refused to be complied with by the Judge, and the Supreme Court was shut up by the Judge for near two years, a cause of distress and injury to the Colony in general.

That, upon the death of Ellis Bent, Esquire, the late Judge Advocate, an acting Judge Advocate was appointed by His Excellency the Governor, and Your Petitioner was thereupon allowed to practice in that Court until the coming of the present Judge Advocate John Wylde, Esquire.

That, on the fourth of January, one thousand, eight hundred and seventeen, Your Petitioner received a letter from the Judge Advocate's Clerk stating that he had received directions from the Judge to acquaint Your Petitioner that he was to consider the then next Term as only allowed to him to bring to Trial those Suits in which he had been a Solicitor, and that, beyond that period, the Court would not sanction his appearance in any Cause, but upon the Terms that the same could not be brought to Trial in the time of that Communication.

That, without any Cause whatever, your Petitioner has been in this way deprived of his living, and as he conceives contrary to justice and right and to the great injury of those persons, whose affairs were under his Management.

That, being sent for by His Excellency Governor Macquarie, Your Petitioner was informed that; altho. His Excellency had strongly recommended your Petitioner's Case with the other practising Attornies of the Colouy, who had come out in the Capacity of Prisoners but had become free, to their being continued to practice in the Courts here, Your Lordship had been pleased to direct the Contrary; And His Excellency the Governor further stated that he would forward any application your Petitioner might think fit to make to Your Lordship on the
subject; but, without a direction from Your Lordship, he could not any further interfere however hard he considered Your Petitioner's case.

That Your Petitioner at this time was Solicitor for the Crown for the recovery of Debts due to His Majesty, that were contracted during the time Mr. Commissary Palmer was Principal Commissary in this Territory, and acted as his Attorney from the year one thousand, eight hundred and three up to the said Month of January, One thousand, eight hundred and Seventeen, and for the greater part of the most respectable Inhabitants. And, in all his practice in this Territory, not a single person ever made any complaint as to your Petitioner's Conduct in their legal Concerns.

Your Petitioner most humbly prays Your Lordship to give directions to His Excellency the Governor that, if in his Judgment there be no other objection to Your Petitioner being admitted to practice as an Attorney than the Circumstance of his original Conviction, Your Petitioner, having for eleven Years after that Conviction been allowed to practice in this Colony, Your Petitioner may be admitted to practice as an Attorney and Solicitor in the Courts in this Territory. And that your Petitioner may have such other relief as to Your Lordship shall seem meet.

And your Petitioner will ever pray, &c.,

GEO. CROSSLEY.

Sydney, 18 Decr., 1817.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sir, Sydney, New South Wales, 19th Decr., 1817.

Subsequent letters to those already enclosed having passed between the Judge of the Supreme Court and myself, I feel it proper also to transmit also copies of the same, as of the legal argument therein referred to, with the few marginal remarks made at the moment, and which the time only allowed. With respect to the subject matter of the Argument, I would just observe that the Objection in the first Instance, as on two or three occasions since, was taken by the Solicitor in the Supreme Court, and that any consideration it may be deemed worthy of need not even have in view any personal Interest, I may have in the Jurisdiction of the Governor's Court, which will be scarcely affected while the Judge confines the Jurisdiction of the Supreme Court to cases for unliquidated Damages.
I have to confess my sincere regret at the occasion of troubling you at all upon such a subject, and my certain hope of standing excused in your judgment as to the reasonable necessity in doing so.

I have again taken the liberty of availing myself of your kind Permission to transmit my private Letters through the Colonial Office, and shall feel greatly indebted, if intimation be allowed to be given by any of the Messengers that a Packet as addressed is lying for delivery at the Office.

I have, &c.,
Jno. Wylde,
Judge Adve., N.S.W.

[Enclosure No. 1.]

ARGUMENT OF THE JUDGE.*

To come at the meaning of the Charter, which gives the Governor's Court jurisdiction under, and the Supreme above £50, we must look at the language of each empowering the Courts being thus far connected that where the jurisdiction of one ends the other begins. The Charter first says that the Governor's Court shall have jurisdiction of all trespasses and all manner of other personal pleas, where the sum in dispute shall not exceed £50. The Charter then gives the Supreme Court jurisdiction except where the cause of action or suit shall not exceed £50. The phrases sum in dispute and cause of action are thus used to convey the same meaning, and are convertible as far as may be required to come at meaning. I am therefore of opinion that wherever the Supreme Court shall think the Plaintiff had bona fide cause (for anything that appeared to him, that is, where he was bona fide ignorant of the good defence that afterwards reduced his cause of action) to sue the Deft, for above £50, that Court has jurisdiction even tho' the result of its Judgment shall reduce the debt or damages below £50. In the case of Action for unliquidated damages, the Court will doubtless allow the Plaintiff a more liberal estimation of the damages sustained by

* Note 139.

† Marginal note.—If so the whole argument is subverted; for it is quite clear, if the Supreme Court give under £50, the Governor's Ct. might have entertained the cause, and had jurisdiction; and upon this hinges, it is presumed, the unavoidable conclusion against the Supreme Court having in such case any; for then there wd. be two concurrent jurisdictions over the same cause of action, which from the terms and extent of the Charter is impossible.—J.W.

‡ Marginal note.—If the sum in dispute is as ascertained by the Judgment of the Court, then the Jurisdiction of the Court depends upon the sum so found; and to construe the term as applicable only to the amount demanded or sought to be recovered or recoverable, is to leave the Jurisdiction of the Court entirely at the pleasure of the party makg. complt., whh. is absurd as applied to Qns. of Jurisdiction. —J.W.
a wrong, which he who feels is too apt naturally to magnify, and
the extenuation of which perhaps only the Defendant can feel,
and the Court when they know it after hearing his defence.

The Court of Conscience at home has been instanced as an-
alogous* to the Jurisdiction of the Governor's Court here; but
the analogy appears to me not to apply, for here both Courts
have Jurisdiction of trespasses and all manner of other personal
pleas, which the inferior Courts alluded to have not; and even
if an Action be brought in a superior Court in England for a
debt, of which the Court of Conscience has Jurisdiction, all that
can be done is to take away from the Plaintiff or to give to the
Defendant the Costs under special Acts of Parliament. These
Acts of Parliament don't annihilate the Superior Court's Juris-
diction as is contended for here; and see what a monstrous
demand is made on the Supreme Court; they are to try a cause
in order to find out whether they have Jurisdiction or not; and
then, if they can't find damage above £50, the Cause† (pray who
is to pay the Plaintiff's Costs of thus discovering the Jurisdic-
tion?) is to go down to the Governor's Court and be tried again,
with all the Plaintiff's case exposed, and his Witnesses open to
the Deft.'s tampering with, he knowing exactly how far they
will swear. If it be not permitted to pray in aid of the con-
struction of the Charter the language of the Governor's Court
Jurisdiction wherewith to explain that of the Supreme Court, I
think the words "Cause of Action" enough for the purposes‡ of
this opinion. The Verdict does not find what was the cause but
what is the effect of the Action: a plaintiff§ may have very good
cause of Action for more than £50 till the Deft.'s case is known,
and then the Court decide what shall be the effect or result; one
party has still good cause or reason to bring his Action, but the
other has good cause to defend as in many cases can only appear
by Trial. Upon this principle, the Deft. is never allowed in
England to suggest the Court of Conscience acts where the
Verdict is reduced within their Jurisdiction by set off or tender.||
It is true he is allowed to suggest it where in point of law no
more than the small sum is found due then, although more by

* Marginal note.—Not analogous further than as to the true meaning of the term
"Cause of Action"! and how the amount giving Jurisdiction to those Courts is
ascertained by Verdict and not that which may be claimed for; if the Verdict.
find less than £5 due though he went for £200, the Deft. may move for the suggestion.—
J.W.
† Marginal note.—Every cause tried is exactly in the same predicament and
proceeds till the Court ascertain that it has upon the facts or law no Jurisdiction;
and if not, the Plt. must pay costs for unwarrantably or unduly bringing Suit.—J.W.
‡ Marginal note.—May not a strong Distinction belong to the terms—"Sum in
dispute" and "Cause of Action"—at least the latter have as sound legal meaning.—
J.W.
§ Marginal note.—This reasoning as applied is deemed irrelevant.—J.W.
|| Marginal note.—No—because set off and tender rebut not the amt. but suggest
Satisfaction.—J.W.
1817. 19 Dec.

Argument re respective jurisdictions of supreme and governor's courts.

the terms of an agreement was thought to be due, and would soon be due. In that case the Plaintiff was under a legal mistake as to his cause of action. It was not the Deft.'s cause of defence that reduced the Verdict; it was the Plaintiff that had no cause of Action. This principle may be illustrated by the defence of the Statute of limitations, which (it is expressly held) does not extinguish the Plaintiff's cause of Action, but only suspends or takes away the remedy. Hence I argue that a Plaintiff may have cause of Action, and a Deft, at the same time cause of defence. If the Verdict is to be the test of the cause of Action, then the Jurisdiction of the Supreme Court ceases in every case as soon as a Deft. reduces a Plt.'s demand below £50 by set off or tender,* which is going beyond the contended for analogy of the Court of Conscience Jurisdiction; and yet they, who contend that it is the Verdict of the Court which finds what is the cause of Action, must necessarily be driven this length, and removed far beyond their analogy of the Court of Conscience. But the language of the Courts in England, in deciding that none of the Courts of Conscience acts extends to cases where the Sum recovered is reduced under the limited sum by means of a set off or tender, is also decisive that the words cause of Action must be construed demands and not Verdict;† for the word in the Court of Conscience acts is debt, which is much nearer to meaning what the Court finds due than the words cause of Action; and yet that word debt has been construed demand in all the following which are the only cases on the Subject: Pitt v. Carpenter, 2 Strange 1,191, and 1 Wilson 19, “on a Trial at Guildhall, the Plaintiff proved £4 15s. 3d. to be due to him; the Defendant by a set off discharged £3 2s. so the Verdict was only for £1 13s. 3d. The Deft. moved to suggest the Court of Conscience act; but the Court held he was not entitled to the benefit of it, tho’ the damages were under 40s., for it is plain that the real demand was above 40s. and how could the Plaintiff tell whether the Defendant would set off any thing in that action so as to be bound to chuse that Jurisdiction, Besides he has‡ in effect recovered £4 15s. 3d. because a debt, which he must otherwise have paid, is now satisfied. Here are two causes determined both of them of greater value than is within the inferior Jurisdiction. Suppose there are mutual demands of £10,000 between Merchants, and upon the balance there should happen not to be

* Marginal note.—No—exceptions—exactly as in the Cases under the Ct. of Conscience Acts.
† Marginal note.—The opposite Conclusion as resulting is conceived to be better reasoning.—J.W.
‡ Marginal note.—This is, it is presumed, the true principle and is admitted as not affectg. the Jurisd. of the Supreme Ct. in any Cases, where the Cause of Action is so reduced.—J.W.
above 40s. due, the Court of Conscience would have Jurisdiction in that case, if we should allow this." See also 2 Wilson 68, and in Gross v. Fisher, 3 Wilson 48, the Court said, "there is a difference between the case of mutual debts subsisting where the Plaintiff's demand is more than 40s., the Defendant's demand at the time of the commencement of the action reducing it to a less sum, and the case where the Plaintiff's original demand was more than 40s., and the Defendant before the commencement of the Action hath, by payment in part, reduced it to less than 40s. In the first case, the Plaintiff must sue lure or lose part of his demands, because he doth not know whether the Defendant can or will set off any demand against him; but, in the latter case, the Plaintiff, well knowing that he hath been paid such part of his original demand as reduces it to less than 40s., hath no right to come to this Court and demand more than 40s. but must go to the County Court." In the case of McCollom v. Carr, 1 B and P 223, the C.J. asked, "Is there any case where the ultimate balance of an account only being under 40s. the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in account between Merchant and Merchant might by this means come to be decided before a County Court. It seems to me that the original demand ought to be under 40s." There cannot be the least doubt, that this is the principle that must be applied to the Jurisdiction* here in all actions for liquidated damages. Of actions for unliquidated damages, the Courts of Conscience have no cognizance, as the Governor's Court here has; but if they had the same principle, which has decided, that that shall be considered a debt above £5 under the Statute, which at the time of Action brought in a rightful demand for more than that sum, would doubtless decide that, in cases of unliquidated damages that should be considered a Plaintiff's rightful demand, at which (without knowing the defence) he bona fide estimates his damages. See in how many cases a Plt. may therefore bona fide mistake the Court‡ in which he is to bring his action, if the Supreme Court shall not be permitted to give a Verdict under £50! In all Actions of trespass and personal injury he will most naturally over estimate his

* Marginal note.—The Charter in consideration makes no difference as to actions of any sort; the same Construction as to Jurisdiction, and its extent or applicant, applies generally and universally. Amount alone is the line of division and distinction.—J.W.

† Marginal note.—This conclusion, as the whole reasoning on wch. it depends, is considered unsound and controvertible and at best only hypothetically put.—J.W.

‡ Marginal note.—The construction of Jurisdiction cannot bend to circes. of such conson.; if it produce Grievance and Inconvenience even, the only escape must be found in a new Charter or additl. Powers, though it is conceived the limitation of Jurisdiction in the Supreme Court is beneficial to counteract the Disposition and consequences of over-estimating damages.—J.W.
Damages and find himself saddled with costs and exposed in Court, because he estimated his injury at £60, and the Court think it only worth £50. In all Actions to recover Money due upon Contracts, when it bona fide appears upon the face of a P't.'s accounts* that more than £50 is due to him, he cannot do otherwise than sue in the Supreme Court; and yet it shall be allowed to a Defendant to turn him out of Court by merely pleading (non constat that he will prove) a set off or tender. As soon as the Defendant pleads either of those defences the Plaintiff goes to Trial at his peril; for, if he do and the Deft. makes his defence good, there is an end of the cause; the suit drops, as it is contended, and the Plaintiff must pay all his Costs. But the cases I have cited satisfactorily prove that the Supreme Court must be allowed in cases of balancing accounts to give Verdicts† under £50; and if they may balance accounts even below the Amount of the sum, the Original demand of which gives them Jurisdiction, why may they not‡ upon hearing a defence, which pares down a demand of damages for a trespass to the person or property, balance injuries? It would be very impolitic and hard upon Defts. to force a Court to strain a point of damages§ in order to maintain its Jurisdiction; and the enabling all persons to sue in the Supreme Court for unliquidated damages by laying them above £50 would work no impolicy or hardship upon Defts., since, whenever the Supreme Court should see that such Action is wantonly brought in the more expensive Court, they could Punish the Plaintiff by giving even less damages than it is probable the other Court would have given, or by giving no damages at all, or even Costs to the Deft.||

A true Copy:—Jno. Wylde, Judge Adv., N.S.W., 17 Decr., 1817.

* Marginal note.—This is not so, if the Verdict be only for £50, which defines the Cause of Action; the Question is as to the extent of Powers in either Court; how it may affect the parties can only be argued with effect when it proves that such Jurisdn. as contended for must have been given, or it only extends to shew that one Court of Civil Judicature in the Colony wd. be better and more free fm. Difficult? than 2 of divided Jurisdn.—J.W.
† Marginal note.—and only in such cases.—J.W.
‡ Marginal note.—It is not whether they may but whether they can; they may Modify in any way Jurisdn. found and given, but the Court itself is not found but within the strict limits of its Jurisdn.
§ Marginal note.—Damages depend upon the law and Equity of the Case not the consequences of the Decision.
|| Marginal note.—If this Argument prevail, every Suit in the Colony, it is conceived, upon the same reasoning, must be allowed by the Supreme Court, if the party claim above £50, for Jurisdn. is then immediately given, altho' on the opening of the Cause the party may give up all Cause of Action above £10; and because the Ct. may "punish" as it is termed the Plt., how is the Jurisdiction of the Governor's Ct. maintained, wh. is the only Question at Issue.

If demand too is the criterion of the Cause of Action, if dams. be laid at £301, right of Appeal on the same Ground is obtained, and thus every object and limitation of the Charter become confounded and subverted.
Mu. JUSTICE FIELD TO DEPUTY JUDGE-ADVOCATE WYLDE.  

Sir,  

Sydney, 15th December, 1817.  

I beg to acknowledge the receipt of your Letter* dated 12th Inst.  

My only reason for writing home my opinion of the Charter, as far as I had been yet able to form one, was the impression that you had been long engaged in sketching a new Charter, which, from your high situation, I thought might be adopted without consulting me.  

If you assure me you have not thus written home, I will not only take your advice, and wait for the trial of the Van Diemen’s Land cases. Otherwise I must put in my humble claims to be consulted, so far as my experience has gone, and particularly as your strongest objections to the present Charter rest upon a conflict of Jurisdiction between us, upon which subject I have not had the benefit of reading your answer to my legal argument proving that the Charter is in that respect well enough.  

When I said the other day that Is. Damages carried costs, I meant by the Law of England, considering it decided by the Court, and acquiesced in by the Deft.’s Attorney that that was a case well laid above £50. Since if the Plf. had failed in his action against the publisher, the Court would have given more than £50 damages against the printer. If the Court had not thought so, they would have given costs to the Dft. to punish the Plf. for not suing in the Governor’s Court. I am, &c.,  

B. FIELD.  

[Enclosure No. 3.]  

DEPUTY JUDGE-ADVOCATE WYLDE TO MR. JUSTICE FIELD.  

Judge Adve.’s Office, Sydney,  

Sir,  

Wednesdy Morning, 9 O’ 16th Decr., 1817.  

I have the honor to acknowledge the receipt of your Letter of yesterday, the tenor of which is of such a nature as to urge me to the opinion, that it is advisable for me not in any way to interfere with any course of official procedure you may think proper to adopt upon the subject to which it refers.  

I am perfectly unaware of your having any justifiable grounds for asserting that “my strongest objections to the present Charter rest upon a conflict of Jurisdiction between us.” I have never certainly thought the point of so serious consideration, and, if I had, should at least have felt greater regret in having been unable from other more important official engagements to answer what you are pleased to term your legal argument, proving that the Charter is in that respect well enough. I must in candor confess that, in some respect, in personal consideration to * Note 140.
yourself, I have felt disinclined, to observe upon a legal argument which seems in so many points irrelevant, and so little to affect what appears to me so plain and obvious even upon the natural sense and object of the Charter, as scarcely perhaps to render an argument necessary. So far am I from entertaining the opinion of this being the strongest objection to the Charter (what the principle and only influence therefore of my Conduct as to the Charter or its renewal), your apprehension is perfectly perceptible, that I never should have considered it even an ambiguity or difficulty but in deference to your opinion.

I am certainly not able to devise, what upon a question of strict Jurisdiction can be meant in the suggestion of giving costs to the Defendant to punish the Plt. for not suing in the Governor's Court; nor well to account for your considering it decided by the Court and acquiesced in by the Defendant's Attorney, that that was a case well laid above £50, as whatever reference, though I saw none, might have been previously and privately made to the Members of the Court, the Defendant's Solicitor, so far from acquiescing, declined more than once in any way interfering with the discretion of the Court upon the case, and afterwards immediately stated that he should move for costs, if not for a nonsuit. The point of fact, however, remained altogether unaltered, that in a case, where 1s. Dams. were given, you thought proper to direct that it should necessarily carry costs, what only was at all asserted on the subject.

I have, &c.,

Jno. Wylde, Judge Adve., N.S.W.

1818.
23 Feb.

Validity of duties imposed by L. Macquarie.

Deputy Judge-Advocate Wylde to Under Secretary Goulburn.

Sydney, New South Wales.

Sir,

The Judge of the Supreme Court here having thought fit to make public in the Sydney Gazette of yesterday (inclosed) his opinion and the Grounds of it as to the Jurisdiction of that Court in cases, where a Verdict may be given for a Sum under £50, it may be considered perhaps only fair, after the Communication already forwarded to you on the Subject, to place the Argument so published entire in your possession, by which it appears, that Jurisdiction is now generally assumed to that
Court even for liquidated, and not merely unliquidated Damages, as previously only asserted and which has been confirmed subsequently to the particular Case reported by three or four Decisions to that Court.

It is not my Intention from public Considerations, whatever my private feeling, to take further Notice of the Matter, than in the reference to yourself and perhaps not even thus much, but that serious Questions may possibly arise before me in another place, if the process of the Court should be resisted with violence by any party against whom an execution on a Judgment for less than £50 may be issued; an occurrence, I am not without reason for believing not very unlikely to take place, and, when the Jurisdiction of the Court, as it stands limited on the Charter, the only Organ as speculum of its Authority must be taken into Consideration.

I must in truth confess that my own Opinion is most decisively in conflict with that of the Judge’s, whose very argument would have dispelled all Doubt, if any had obtained on the Subject; he has long been aware of that Impression and is now too well known to me to flatter myself with any Idea of bringing him to any change of Determination upon a point he believes himself, I have certainly no doubt, as completely and conscientiously satisfied on good Grounds as myself. I shall not therefore hazard even any further Communication upon it at present; nor indeed have I any Anxiety personally that it should have any consideration with you, unless you deem it in a public Sense of any sufficient Import and Interest, perfectly assured that you will readily do Justice to the motives that influence me on the occasion.

I shall take the Opportunity of transmitting this by the hand of Mr. Fairfowl, Surgeon R.N., late Superintendent on board the Ocean Convict Transport, and, as he immediately goes on board for the Ship to sail, I have only the power—further—to tender my personal respects and Consideration.

I have, &c.,

JNO. WYLDE, Judge Adve., N.S.W.

[Enclosure.]

EXTRACT FROM SYDNEY GAZETTE FEB. 28, 1818.

Supreme Court.

First Term, 1818.—Marsden, Clerk, v. Howe.

The Court, after hearing Mr. Garling for the Defendant, discharged the Rule to stay proceedings, which had been obtained upon the ground that the verdict being under £50, the jurisdiction of the Court ceased. On this occasion, the Learned Judge (Field) delivered the following opinion, upon the construction of our Charter of Justice:

"To come at the meaning of the Letters Patent, which give the Governor’s Court jurisdiction under, and the Supreme Court above, £50, we must look at the language of each empowering part, the Courts being thus far connected, that where the jurisdiction of one ends that of the other begins. The Charter first says that the Governor’s Court shall have jurisdiction of all trespasses, and all manner of other
1818.
2 March.

Report in Sydney Gazette of judgment by R. Field.

HISTORICAL RECORDS OF AUSTRALIA.

personal pleas where the sum in dispute shall not exceed £50. It does not say, the sum adjudged to be due, or even the sum to be recovered; but where the plaintiff disputes, the defendant, demands his DAMAGES, or wrongs him; or questions whether he is right or wrong, or questions whether the Court is for him or against him. It is therefore plain, from the words of that part of the Charter which constitutes the Governor's Court, that (at any rate) that Court has no jurisdiction where more than £50 is, at the outset, disputed. But then it is said that the Supreme Court has no jurisdiction, whenever less than £50 is found at the trial to be due—that the words which define the Jurisdiction of that Court are not sum in dispute, but cause of action—that it is the verdict which discovers what was the cause of action; and that the Supreme Court cannot give a verdict under £50. Now I deny that it is the verdict which discovers, in the sense in which these words are used in the Letters Patent; and will shew that, for that reason, as well as from the spirit of the whole Charter, the Supreme Court must have the power of giving a verdict under, although the Governor's Court cannot give a verdict above, £50. The words of the Charter, which limit the Supreme Court's jurisdiction, are these: 'except where the cause of action or suit shall not exceed £50.' The phrases sum in dispute in the former clause, and cause of action in the latter, are thus used to convey the same meaning, and are convertible as far as may be required to come at meaning. I am therefore of opinion, that whenever the Supreme Court shall think the plaintiff had bona fide cause (for anything that appeared to him—that is, where he was bona fide ignorant of the good defence, which at the trial reduced his cause of action) to sue the defendant for above £50, in other words, whenever he might fairly think that he had a right to dispute a sum above £50, and therefore could not, by the words of the Charter, sue in the Governor's Court; or, in other language, plead for 'any reasonable or probable cause of action' (which it is necessary for a defendant to negative before he can bring an action for a malicious arrest or prosecution), then the Supreme Court has jurisdiction, even though the result of its judgment shall reduce the debt or damages below £50. In the case of an action for unliquidated damages, the Court will doubtless allow the plaintiff a more liberal estimation of the damages sustained by a wrong, which he who feels is too apt naturally to magnify, and the extenuation of which perhaps only the defendant can feel, and the Court, when they know it, after hearing his defence.

"The construction of this Charter can be made by little other light than that which shines within its own clear breast; for in England there are no other jurisdictions, which are limited as to the value of their suits than the County Courts and the Courts of Conscience, the analogy between which and the Governor's Court here does not hold good; for both our Courts have jurisdiction of trespasses and all manner of other personal pleas, which the Courts of Conscience have not; and, even if an action be brought in a superior Court in England for a debt, of which the Court of Conscience has jurisdiction, all that can be done is to take away from the plaintiff, or give to the defendant, costs, under special Acts of Parliament, which Acts of Parliament do not annihilate the superior Court's jurisdiction* as is contended for here. And see what a monstrous demand is made upon the Supreme Court! It is to try a cause, in order to find out whether it has jurisdiction or not; and then if it cannot find damage above £50 the suit (pray who is to pay the plaintiff his costs of thus discovering in what Court he ought to have sued, if in many cases he may have been innocently and invincibly ignorant, as in the case of the value of a horse or other chattel, the worth of which is in a great measure matter of opinion?) the suit is to go down to the Governor's Court, and to be tried over again, with all the plaintiff's case exposed, and his witnesses open to be tampered with by the defendant, he knowing exactly how far they will swear.

"No reckoning made, but sent to his account
With all his imperfections on his head.

"Surely this could never be the intention of Letters Patent, granted for the public benefit by a King who is supposed to have all the principles of law written in his heart—one of the first of those maxims being that the law abhors circuity of action, and delights in terminating strife; and one of the second being that all ordinances for the public good shall be construed liberally.

"But I am content to construe the words in question of this Charter of Justice literally and insolutely: and even if it be not permitted me to pray, in aid of the construction of the whole Charter, the language of the Governor's Court, wherewith to explain that of the Supreme Court. I think the words 'cause of action' enough for the purposes of this opinion; and I deny that the verdict finds what was the cause—it rather finds what is the effect—of the action, in the popular sense in

* I find three exceptions to this position, viz., the Westminster, the Tower Hamlet, and the Isle of Ely Acts, which it has been held may therefore be pleaded in bar, or may nonsuit upon the general issue. 3 T.R. 452; 2 H.B. 350; 1 East. 392. See the conclusion of this opinion for the reasons why our Letters Patent cannot be pleaded in bar: but perhaps upon the authority of these cases, the Supreme Court would be bound to nonsuit, where the plaintiff goes for under £50.
which the words are used in the Charter: And ever in point of Law, it does not necessarily find or touch the cause of action, as I will prove bye and bye. A plaintiff may have very good cause of action for more than £50 till the defendants' case is known; and then the Court decide what shall be the effect or result. One story is good (to use a vulgar proverb) till another is told. One party had still good cause or reason to bring his action; but the other party had good cause to defend, as, in many cases, can appear only by trial. If it were the verdict which finds what is the cause of action, as has been the case in the Supreme Court under the Charter, the Supreme Court would have no power of giving a verdict for the defendant, which the Charter expressly empowers it to do: for what does such a verdict find, but that, according to the construction contended for (and it often has the legal effect of finding, though not always, as will be shewn hereafter), the plaintiff had no cause of action at all? Then, if he had no cause of action, his cause of action was under £50, and he ought to have sued in the Governor's Court: where, to be sure, a verdict could have been given for the defendant, as well as the Court of Conscience jurisdiction by set-off, the very reason given by the Court for refusing to suffer the Act of Parliament to be suggested was, that the verdict might be without any other than a circuitous, expensive, and exposing remedy in such cases; an inconvenience which the Charter could never intend, and which the law will never permit; for then it may be said that the plaintiff has no cause of action? No: that he shall take nothing by his writ. Hence it is, I argue, that a plaintiff may have cause of action, and a defendant at the same time, cause of defence. If the verdict is to be the test of the cause of action, then the jurisdiction of the Supreme Court must cease in every case is known; and then the Court decide what shall be the result. One Report in Sydney Gazette of judgment by R. Field.

1818.
2 March.

The principle which construes the words cause of action, as they must be construed for the purpose of giving effect to this Charter, is recognized in England, where a defendant is never allowed to suggest the Court of Conscience Acts, when the verdict is reduced within their jurisdiction, by set-off or tender; and it may be illustrated by the defence of the Statute of Limitations, which (it is expressly held) does not extinguish the plaintiff's cause of action, but only suspends or takes away the remedy. So it is where a debt is barred by infancy or bankruptcy or where the promise is void for want of writing, by the Statute of Frauds. The language of pleading in the case of bankruptcy expressly admits the plaintiff's cause of action, but says he 'ought not to maintain it, because after the making of the promise, if (gif, give, grant) any such were made, the defendant became a bankrupt, and that the said supposed cause of action (here we have the very words of our Patent) if any such there (what? were? no) be (be now) accrued to the plaintiff before the defendant became a bankrupt.' These are the exact words of a plea in bar of bankruptcy; which (says Mr. Justice Denison) is not a plea to the defendant, but only a personal discharge; 1 Wilson, 90. And yet the defendant would be entitled to a verdict upon it, without disputing the plaintiff's cause of action, to mean, whenever the words are used in the Charter:

"The principle which construes the words cause of action, as they must be construed for the purpose of giving effect to this Charter, is recognized in England, where a defendant is never allowed to suggest the Court of Conscience Acts, when the verdict is reduced within their jurisdiction, by set-off or tender; and it may be illustrated by the defence of the Statute of Limitations, which (it is expressly held) does not extinguish the plaintiff's cause of action, but only suspends or takes away the remedy. So it is where a debt is barred by infancy or bankruptcy or where the promise is void for want of writing, by the Statute of Frauds. The language of pleading in the case of bankruptcy expressly admits the plaintiff's cause of action, but says he 'ought not to maintain it, because after the making of the promise, if (gif, give, grant) any such were made, the defendant became a bankrupt, and that the said supposed cause of action (here we have the very words of our Patent) if any such there (what? were? no) be (be now) accrued to the plaintiff before the defendant became a bankrupt.' These are the exact words of a plea in bar of bankruptcy; which (says Mr. Justice Denison) is not a plea to the defendant, but only a personal discharge; 1 Wilson, 90. And yet the defendant would be entitled to a verdict upon it, without disputing the plaintiff's cause of action, to mean, whenever the words are used in the Charter:

"The principle which construes the words cause of action, as they must be construed for the purpose of giving effect to this Charter, is recognized in England, where a defendant is never allowed to suggest the Court of Conscience Acts, when the verdict is reduced within their jurisdiction, by set-off or tender; and it may be illustrated by the defence of the Statute of Limitations, which (it is expressly held) does not extinguish the plaintiff's cause of action, but only suspends or takes away the remedy. So it is where a debt is barred by infancy or bankruptcy or where the promise is void for want of writing, by the Statute of Frauds. The language of pleading in the case of bankruptcy expressly admits the plaintiff's cause of action, but says he 'ought not to maintain it, because after the making of the promise, if (gif, give, grant) any such were made, the defendant became a bankrupt, and that the said supposed cause of action (here we have the very words of our Patent) if any such there (what? were? no) be (be now) accrued to the plaintiff before the defendant became a bankrupt.' These are the exact words of a plea in bar of bankruptcy; which (says Mr. Justice Denison) is not a plea to the defendant, but only a personal discharge; 1 Wilson, 90. And yet the defendant would be entitled to a verdict upon it, without disputing the plaintiff's cause of action, to mean, whenever the words are used in the Charter:

"The principle which construes the words cause of action, as they must be construed for the purpose of giving effect to this Charter, is recognized in England, where a defendant is never allowed to suggest the Court of Conscience Acts, when the verdict is reduced within their jurisdiction, by set-off or tender; and it may be illustrated by the defence of the Statute of Limitations, which (it is expressly held) does not extinguish the plaintiff's cause of action, but only suspends or takes away the remedy. So it is where a debt is barred by infancy or bankruptcy or where the promise is void for want of writing, by the Statute of Frauds. The language of pleading in the case of bankruptcy expressly admits the plaintiff's cause of action, but says he 'ought not to maintain it, because after the making of the promise, if (gif, give, grant) any such were made, the defendant became a bankrupt, and that the said supposed cause of action (here we have the very words of our Patent) if any such there (what? were? no) be (be now) accrued to the plaintiff before the defendant became a bankrupt.' These are the exact words of a plea in bar of bankruptcy; which (says Mr. Justice Denison) is not a plea to the defendant, but only a personal discharge; 1 Wilson, 90. And yet the defendant would be entitled to a verdict upon it, without disputing the plaintiff's cause of action, to mean, whenever the words are used in the Charter:
and the verdict, is the very hinge upon which the cases of set-off and tender turn; and therefore, they who contend that the verdict finds the cause of action, cannot be allowed to avail themselves of the reason for which they would admit the verdict of the Supreme Court to be reduced under £50 by set-off or tender, in conformity with the principle of inferior Courts in England, since that very reason expressly drives them from their contention, that it is the verdict which finds the cause of action. This appears to me to be demonstrative; and I have not the least doubt that it is the principle which must be applied to the jurisdictions here, in all actions for liquidated damages. Of actions for unliquidated damages, the Courts of Conscience have no cognizance, as the Governor's Court here has; but if they had, the same principle which has decided that that shall be considered a debt above £5 under the statute, which, at the time of action brought, is a rightful demand, for more than that sum, would doubtless decide that, in cases of unliquidated damages, that sum should be considered a plaintiff's rightful demand, at which (without knowing the defence) he bona fide estimates his damages.

"See in how many cases a plaintiff may therefore bona fide mistake the Court in which he is to bring his action, if the Supreme Court shall not be permitted to give a verdict under £50. In all actions of trespass and personal injury, he will most naturally over-estimate his damages, and find himself saddled with costs and exposed in Court, because he valued his injury at perhaps £60, and the Court think it worth only £30. In all actions to recover money due upon contracts, when it bona fide appears upon the face of a plaintiff's account that more than £50 is due to him, he cannot do otherwise than sue in the Supreme Court; and yet it shall be allowed to a defendant to turn him out of Court by merely pleading (in many cases that he will prove), a set off or tender sufficient to bring the sum within £50; for as soon as the defendant pleads either of these defences, the plaintiff goes to trial at his peril: since, if he do, and the defendant make his defence good, there is an end of the cause—credit quæstio—the suit drops, as it is contended; and the plaintiff must pay all costs. But the cases I have cited satisfactorily prove that the Supreme Court must be allowed, in cases of money accounts, to give verdicts under £50: and if it may balance such accounts, even below the amount of the sum, the original demand of which gives it jurisdiction, why may it not, upon hearing a defence, which pares down a demand of damages for a trespass to the person or property, weigh injuries?

"It would be very impolitic, and hard, even upon defendants, to force a Court to strain a point of damages in order to maintain its jurisdiction; and the enabling all persons to sue in the Supreme Court for unliquidated damages, by laying them above £50 would work no impolicy or hardship upon defendants, since whenever the Bench should see that such action is wantonly brought in the more expensive Court, they could at the trial punish the plaintiff by giving him even less damages, than it is probable the other Court would have awarded, or by giving him no costs; and if, upon the equity of its judgment: for the Charter contemplates the power of the Supreme Court to 'award costs to the plaintiff' or not: or they could even before trial stay proceedings, wherever, although the damages were laid above, it plainly appeared upon motion that the real demand was below £50. 1 B.R. 495; 5 T.R. 51; 2 Black Rep. 754; or the plaintiff must pay all costs. But the cases I have cited satisfactorily prove that the Supreme Court must be allowed, in cases of money accounts, to give verdicts under £50: and if it may balance such accounts, even below the amount of the sum, the original demand of which gives it jurisdiction, why may it not, upon hearing a defence, which pares down a demand of damages for a trespass to the person or property, weigh injuries?

Reverend Benjamin Vale to Earl Bathurst.

My Lord,

3 Fleet St., Ap. 16, 1518.

I have been induced to address the following particulars to you from a mere sense of imperative duty. When I had the honor to hold a situation by your Lordship's appointment at N. S. Wales, I had very good opportunities to be minutely acquainted with the circumstances I am about to detail, and on my leaving that Colony I was particularly urged by several of the most respectable inhabitants to submit them to your Lordship, which hitherto I have forborne to do lest I should appear

1818.
2 March.

Report in Sydney Gazette of judgment by D. Field.
troublesome or obtrusive; lately however I have received further information and solicitations to the same purpose, and on consulting with some very grave and pious friends, I have been induced to consider the subject in the point of view above stated. I trust therefore that your Lordship will not misunderstand me, and, however these particulars may seem to reflect upon the present Governor, that your Lordship will see that my object is not so much to complain of him as to procure redress to the settlers at large, and that the only aim I have in pointing out the faults of the present government is to assist as far as may be in preventing them for the future.

The general plan* pursued under the present government is not to raise the convict to the rank of the free settler but to degrade the free settler to the rank of a convict. In confirmation of this, I need only state that there is the same general order respecting the free settler as there is respecting the convicts. If they have business at the stores, they must both come on the same day and at the same hour. If they have petitions to present, and nothing can be done without them, they must both attend on the same day at the same hour. If there is to be a general muster, they must both attend on the same day and at the same hour. The same system is universally pursued, and it has happened, that a Gentleman Magistrate and his emancipated convict, after being raised to the magistracy, have been associated together in the same colonial employment. In all things too the Convict has been indulged in preference to the free settler, and the recommendation of a convict Magistrate has been found to prevail in the most desperate cases, when that of the most worthy and universally lamented Magistrate, the late Ellis Bent, Esqr., has proved ineffectual. In illustration of this article I may state to your Lordship that Convicts, at the recommendation of D'Arcy Wentworth, have had as great allowances of Spirits as Ellis Bent, Esqr., himself, altho' those convicts were still in a menial capacity. Individuals also, on whom the sentence of the Law was pronounced, recommended to mercy by Ellis Bent, Esqr., were suffered to be executed, while others not recommended to mercy were pardoned who committed more murders after their restoration to society than before their conviction. On the contrary, many persons really reformed, at the instance of D'Arcy Wentworth, have been persecuted and punished for nominal crimes, while others of the most abandoned character have escaped. Instances of the former will be given lower down; One of the latter which occurred at the time of my leaving Sydney will be sufficient to state for the present. George Wakeman, alias Parsons, was many years ago an accomplice with

* Note 133.
D'Arcy Wentworth in the most nefarious practices and has been transported three times: yet this man was pardoned by Governor Macquarie at the request of D'Arcy Wentworth, and actually left the Colony in the Ship in which I took my passage for England. It is evident that such inducement to convict magistrates are sufficiently strong to buy them over to the Governor’s views, however dishonourable or unjust they might be.

In order the more effectually to depress the free settler and to secure not only a monopoly of power but also a monopoly of interest, the Governor was used to apply to foreign markets, and to encourage foreign shipping, and in order to disguise the motive for this traffic it has been laid down as a general maxim that the Governor never receives a present nor any thing for which he does not pay at least the prime cost. Those however that have been on the spot, that have been familiar with the parties concerned, cannot but see the consummate cunning of such a plan and the more than mischievous tendency of it. Political traders, whose interests it is to have the patronage of the executive government, understanding the general maxim which is laid down, take care to bring an investment suited to the taste of the Governor and invoiced at a price so low as to be a very considerable present. In this manner they insure a large praemium on their remaining investment and find it worth their while to come from America and India to pay their court to N. S. Wales, while no one in the Colony is benefitted except the Governor. A more flagrant instance of this perhaps I need not point out than the trade to India for wheat, when the Colony is able to provide not only for home consumption but even for exportation. Even at the very period, 1813, that the Governor published proclamations in Sydney and compelled the Clergymen to read them in their Churches, stating that the Colony was in a state of starvation, Mr. H. Baldwin, Mr. H. Kable and others offered to procure any quantity, if the Governor would promise to receive it into the stores, to prevent the necessity of applying to a foreign market; but the monopoly of the sale of Spirits, allowed by the Governor to the Indian Merchants, enabled them to furnish a supply of wheat cheaper than it could be grown in the Colony, and this is said to be the foundation of all the misery which the poor settlers have ever since suffered, and, in one communication which I have received on this head, it is said “that the Governor had a present of Ten thousand Gallons of Rum by the Governor General of India, as a return for Two hundred tons of Coals”; and in another communication, “that the contract* for the Hospital, which was connected with the monopoly of the sale of spirits, secured to each contractor at least Ten thousand Pounds.”

* Note 72.
Besides this oppression of general nature, there are others extending to individuals. The Governor whips* some free persons without the formality of a trial, imprisons others with as little ceremony, and in some instances prevents persons* from marrying without assigning any lawful impediment. In confirmation of these particulars I will take the liberty in this place to transcribe part of a very important letter which was addressed to me a little before my departure; "You know the breach in the Government wall was actually left open as a trap to catch people. You know that the reward of two bottles of rum is great enough to tempt two bad men, such as the most of our police are, to condemn innocent persons. You know the innocent circumstances under which the poor blacksmith was seized and unheard imprisoned, whipt, and fined. You know that decent and reformed men have more than once, without a trial or even a charge on oath, been exposed to the same treatment, and how even some poor free settlers have been tortured whose character was never so much as tinged with a trial. You remember also the case of Mr. Philip O'Connor a Gentleman yet in the British confidence and bearing arms in his Majesty's service. You know that he came from India to this place to fulfil an honourable engagement in a religious manner. You know that his Banns of Marriage were published on Sunday, May 12, 19, and 26, after being refused a Licence without any lawful impediment assigned, and yet that he was forcibly detained on board the Brig Tweed from May 21 or 22 till that Brig sailed for no other reason whatever than to prevent the solemnization of an honourable union and which was thereby prevented."

Besides these individual cases I can certify your Lordship of other monstrous improprieties which affect both the public Character of the Colony as well as its private Character.

Anthony Best and Mrs. Powell are now living together in unauthorised wedlock because the Governor would not allow them to be married, considering that the woman was too old for the man. I was also particularly requested by the postmaster at Sydney to say how much he felt oppressed in his situation by the conduct of the Governor in always opening the mail himself and taking what letters he pleased out before the postmaster had them to deliver, by which he bore the blame of many things of which he was entirely innocent. The credit of Deputy Commissary General Allan has been most foully blasted by insinuations of the Governor through the Sydney Gazette, and he must have sustained an injury for which perhaps nothing can compensate. Mr. Commissary Palmer's Son has been most illiberally and unjustly persecuted by the Governor on the subject of a piece of...

* Note 141.
ground, with the particulars of which as Government is concerned, I think your Lordship ought to be acquainted. The Governor succeeded to some property* of one Andrew Thompson, an emancipated convict, among which was a brewery and a certain piece of ground. This brewery and ground the Governor offered to Mr. Palmer in exchange for a certain hill which Mr. P. declined. The Governor then offered 100£ as a more valuable consideration, but threatened at the same time, in case of non-compliance, to take it by force on the part of the crown. Mr. G. T. Palmer however declined accepting the 100£ and the Governor deserted his original plan for the following: The Governor bought the brewery and ground, which was his own property, for Government at the enormous sum of 500£, which was afterwards sold by auction for a mere trifle. The whole of the correspondence respecting this affair was transmitted to me like the other particulars to state to your Lordship, if I happened on an opportunity: the original correspondence can therefore no doubt be easily procured. The dates of the letters are April 5, 1815; April 14, 1815; August 7, 1815; March 25, 1816, and March 27, 1816. I have known one hundred or more convicts sent to Van Dieman's Land, I believe by that Captain Jeffries who lately returned, but certainly by Captain Forster of the Emu, without the least partition to separate the males from the females and when the females only were furnished with beds; so that the strongest inducements were even held out to immorality. It is true that some of the worst of the population of N. S. Wales are compelled to attend Divine Service, but the encouragement held out to those who are likely to reform is extremely inconsiderable. There is but one church at Sydney, where the bulk of the convicts are, and there is no accommodation in it for the greater part of those who are not compelled to attend, much less for those emancipated: and, except at Parramatta, the rest of the Clergy are either placed in situations where there are no people to reform, as Mr. Fulton, or where there is little or no accommodation for the discharge of their duties, as in Liverpool and Van Dieman's Land: and these are then likely to be removed from place to place, as I was for three months at a time, by the will of the Governor, or be commanded on the most unpleasant duties at the most remote distances without sufficient notice to provide for personal or family safety and without any remuneration for the extraordinary expences which the performance of those duties must incur; besides which, their proper influence is prevented by the dread of martial Law in all places; and at Van Dieman's Land now, by the example of the Governor who attends on Divine Service, when it is performed, with a kept woman on his arm.

* Note 142.
What poor encouragements there are to virtue, are more than overbalanced by such incentives to vice and absolute oppression as I have now mentioned; for the instances I have quoted are far from being solitary or the worst. I understand there is no place of separate confinement for females sentenced to Sydney Jail: but this I certainly know, that so contracted is the provision for the accommodation of female convicts in general, that the greater part are compelled to prostitute themselves in order to find a place for their nightly shelter; a case even worse than any of these occurred while I was at Sydney. Two thoughtless girls of honest repute who were sauntering about with their mistress or mothers’ children stepped over a part of the wall belonging to the government domain, (which is a full quarter of a mile from the government house, and was not above seven or eight inches high occasioned by a breach in the wall which had been there to my knowledge several weeks) merely as they said to shew the children the pretty daisies, were seized by two constables and conveyed to Sydney Jail, where they were received without any ceremony. The constables received two bottles of rum for their exertions, and the poor girls were compelled to spend a night or two in that Jail, exposed to all the insults which the worst of convicts chose to offer them. Mr. Moore, Senr., had his land taken away after he had bought a horse, cart, etc., for improving it, because he filed an information in the supreme Court against an American Vessel trading unlawfully to that Colony to the aggrandizement of the Governor and the oppression of the settlers; Mr. Moore, junr., has lately had his land taken away because he signed a petition stating these or some of these grievances to the House of Commons and praying their assistance. I never had any land until the day before I left the Colony. At that late period the Governor, who had used me so cruelly all the time of my residence there, gave me a certain portion which I left in the hands of an agent to get cultivated, etc., according to the terms of receiving it. This has since I understand been taken away for me, because I was supposed to have had a hand (as the Governor said) in that petition; and by letters which I have received many are said to have been oppressed in a similar manner.

Besides the interference with Church matters, as in the case of Marriages, the Clergy are obliged to read a variety of proclamations* in the midst of the church service, which in some instances are exceedingly burdensome. Some of these pass high encomiums upon the greatest oppressors of the people, who are both immoral and unjust in their deportment. Some of these have wholly a reference to the black natives respecting their
1818.
16 April.

Inability to petition parliament.

Rejection of requisitions.

Prayer for acceptance of private petition.

Ignorance in England of colonial conditions.

carrying waddies, etc., and some of these referred to the sale, the price, etc., of spirituous liquors and licences to public houses.

Many a time have the people wished to petition parliament for some relief, especially for a council to act in concert with the Governor, but the dread under which they lie will not permit them to do that publicly. Requisitions even for things of less moment, common market place meetings signed by the most sensible and pacific among the people, stating their object before hand to the Governor, have been most ungraciously rejected. The effort, which a few lately privately made, I am informed has not succeeded because it was made privately. In the moral government of the world, God accepts a man's person according to what he has and not according to what he has not, and I trust your Lordship sees the propriety of acting on the same rule. The obligations these people have laid on me compel me to intercede for them in this respect. If they cannot send a public petition, surely a private one ought to have some weight, till arrangements can be made for the more proper execution of such an instrument. Let me then entreat your Lordship to give the weight of your sanction to the best endeavours of which the people are at present capable, being confident of this, that they seek only what is the subject of our continual prayers, the good of the Church, the safety honor and welfare of our Sovereign and his Dominions.

I will take the liberty of subjoining one more quotation from a letter to me, which will perhaps inform your Lordship more nicely of the general wishes of the people, and of the justice of the remarks which I have made. "The Government at home is no doubt deceived, grossly deceived. Strangers come here whose interest it is to please the Governor, and whom to please the Governor finds his interest. They pass away and tell a tale little according with the woeful experience of the more stationary. It might be worth the consideration of the British Government to give encouragement to the export of Agriculture and to Distillation and to the maritime speculations of N. S. Wales. For want of exports our youths, devoid of more suitable employment here, are drained from the Colony, by which means, the Colony loses the benefit which would otherwise be derived to it from their knowledge of the soil and the advantages or disadvantages of certain localities. If exports were encouraged, Men might be employed in procuring Tobacco, Flax, Timber, Grain of every description, Oil, Skins, Sandal Wood, etc., etc., and this might be done by the Convicts sent from England, who would, in proportion as the consequence and opulence of the Colony increased, be taken from the ships and employed in this way by the persons engaged in such speculations. The Colonists would thus be
improving the circumstances of their situations and be remunerated, at the same time that they saved Government the expense of the Colony after they had once landed the convicts. But all these things are only consistent with a much greater degree of liberty than we at present enjoy. There ought to be some arrangement for the security of private property, that is, landed property, so as to protect it from arbitrary invasion, and we trust, that we shall not long be permitted to be subject to the oppressive fiat of one bad man."

Having suggested these particulars to your Lordship, I shall not, having satisfied my conscience, attempt the least commentary upon them. They all admit of the most lucid confirmation and seem to call for the most prompt correction. If this suggestion should be the means of making our oppressed fellow creatures more comfortable in their worldly circumstances, more willingly obedient to those in authority, and more at liberty and encouraged to cultivate piety and virtue, I shall think myself happy, and be your Lordship's obliged servant, more on this account than on that which formerly brought me so much honor.

I am, &c,

BENJAMIN VALE.

EARL BATHURST TO THE ATTORNEY AND SOLICITOR GENERAL.

Gentlemen, Downing Street, 4th May, 1818.

I have the Honor to transmit to you herewith the Copy of a Letter,* which has been addressed to my Under Secretary by the Judge Advocate and Judge of the Supreme Court of the Colony of New South Wales enclosing a Case for Consideration, vizt., whether by the present Charter of Justice, under which the Courts of Civil Jurisdiction are established in the Colony, any person can sue or be sued therein, unless he be resident within the Territory or its Dependencies at least at the Commencement of the Action; as also, whether Convict Prisoners, even tho' in the Employ of Government, cannot sue and be sued in the Courts there under the general Terms of the Legal Charter; and I am to request that you will take the same into Consideration and favour me with your report on the Cases in question.

I am, &c,

BATHURST.

EARL BATHURST TO GOVERNOR MACQUARIE.

12th May, 1818.

[In this despatch, Governor Macquarie was censured for resenting the petition to the house of commons; see pages 761 and 762, volume IX, series I.]

* Note 144.
13th May, 1818.

[A copy of this opinion in reply to Earl Bathurst's letter, dated 4th May, will be found on page 820, volume IX, series I.]

MR. W. H. MOORE TO EARL BATHURST.

16th May, Sydney, 16th May, 1818.

My Lord,

It is with infinite regret I find myself again under the unavoidable necessity of intruding upon your Lordship, but the peculiar Circumstances, under which I am placed, will I trust be considered a sufficient apology.

Since my writing to your Lordship on the 15th December last, I addressed his Excellency Governor Macquarie to request again that he would restore to me my Salary and the indulgences, which the favor of his Majesty's Government had conferred upon me, hoping that the time, which had elapsed, would have softened his Excellency's feelings upon the subjects which had unfortunately given him offence; I beg leave to inclose to your Lordship Copies of the whole of the Correspondence which ensued; they are marked in regular succession from A alphabetically onwards; and, by a perusal of them, your Lordship will see that I have done every thing which could possibly have been expected of me short of so lowering myself in the public estimation that my professional ruin would have been the inevitable consequence.

I beg leave to have the honor to submit to your Lordship that, in a Colony constituted as this is, the tone, which his Excellency is pleased to adopt towards any Individual, carries with it such effect that few persons have the hardihood to employ a person on whom the misfortune of his Excellency's displeasure may fall; nor does this feeling shew itself alone in the public mind, it extends even to the highest Official Situations. I have fully felt this evil. I am loth to trouble your Lordship with Complaints as to the injurious consequences, which have ensued from his Excellency's continued publicly shewn dislike to me. Although they have been most destructive to me in my professional pursuits, yet I trust that your Lordship and his Majesty's Ministers will, upon perusal and due consideration of the enclosed papers, Sanction my conduct with your approbation and make such communication with his Excellency Governor Macquarie, as may be the means of inducing his Excellency to receive the ample atonement I have offered and to reinstate me in the enjoyment of those Advantages I was led to expect.
I cannot close this letter without invoking your Lordship's serious consideration of the very disagreeable situation in which my family and myself are placed at an immeasurable distance from my Native Country and friends; deprived of those resources which your Lordship and his Majesty's Government were pleased to confer on me, suffering under the severe resentment of his Excellency the Governor, by which my professional exertions are, as your Lordship will at once imagine, almost totally frustrated, I have no hope but in the generous protection of your Lordship, upon which I humbly throw myself, confidently relying on your Lordship's Justice and kindness.

I have, &c.,

W. H. Moore.

[Enclosure A.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

Your Excellency, 13th April, 1818.

I take the liberty of again addressing Your Excellency, and, notwithstanding the unfavorable manner in which it has been my misfortune that Your Excellency has been pleased to receive my former applications, I am still not without hopes that on the present occasion I may be more fortunate.

Your Excellency is aware of the manner in which His Majesty's Government at home has been pleased to reply to my communication on the subject of your Excellency having taken such Umbrage at my conduct as to consider it necessary to suspend the issue of my Salary.

In that communication, I fully explained to His Majesty's Ministers, as I have already done to your Excellency, and which assertion I now beg leave to repeat and to request that Your Excellency will believe me to be sincere in, that on no occasion whatever had I ever acted out of the immediate line of my profession, or with any reference, or consideration, or Views beyond it.

I have already in my former letters said every thing to Your Excellency, which I had hoped would have induced Your Excellency to have ceased acting with resentment towards me; and I had anxiously supposed that the time which has passed, and the inconvenience, which I have been subjected to in consequence, would have softened Your Excellency's recollections on the subject, particularly after the just but certainly kind manner in which His Majesty's Government at home was pleased to view my conduct. It is, therefore, with this view of the subject that I am induced once more to intrude myself upon Your Excellency and to solicit that Your Excellency will be pleased to take My
unpleasant situation into your most serious consideration; and I trust that the acknowledgements, I have so repeatedly made, how sincerely I lament that my conduct should have been so much misunderstood, added to the serious injuries I have suffered since I had the misfortune to incur Your Excellency’s displeasure, will be sufficient to induce Your Excellency to order me to receive my Salary which I assure Your Excellency has become an object of the most serious importance to me.

I further beg leave to request Your Excellency will be pleased to grant unto me the usual portion of Land, which Your Excellency has been pleased to give to persons of the same station and rank in the Colony with myself, or such an one as Your Excellency may conceive I may be entitled to.

I have, &c.,

W. H. Moore.

[Enclosure B.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir,

Secretary’s Office, Sydney, 20th April, 1818.

In Answer to Your letter of the 13th Instant to His Excellency the Governor soliciting to be restored to the salary of a solicitor, which on strong grounds has been withheld from you for some time past, I have it in command to say that Your repeated applications to this effect, so long as they continue to convey no expression of sorrow or regret for the Conduct which led to that result, can only serve to aggravate the highly reprehensible and Factious conduct, which then merited a much stronger mark of his Excellency’s displeasure than what he was pleased to bestow on it, and which, for the sake of example and the well being of society, can never be too severely reprobated.

But, in order to shew in the clearest light that His Excellency has not been actuated towards you by any motives other than those of a public nature, I am instructed to inform You that, if you will write and deliver into my hands, in duplicate for publication in the Sydney Gazette, an Ample Apology and submission for Your conduct in the Two particular instances, first of the seizure of the American Schooner Traveller, and secondly of the memorial to the House of Commons complaining of His Excellency’s Administration of this Government, His Excellency will receive it favorably, considering it as the only atonement in Your power at this time to offer.

In framing an Apology suitable to the occasion, it will necessarily be expected that You express Your unfeigned regret at the line of conduct you were induced to pursue in assisting and cooperating with the Reverend Benjamin Vale in the seizure
of the American Schooner Traveller and her Cargo in contraven- 
tion of his Excellency's paramount authority, previously granted 
for that Vessel's Cargo being brought to entry in conformity 
with the standing usage and practice of this Colony in regard 
to American Shipping from the period of its foundation to that 
Date, and that in so doing You are sensible You acted on prin-
ciples unwarrantably in opposition to His Excellency's authority.

And, in regard to the active part You took in procuring and 
affixing the names of certain Individuals to a memorial to the 
Honble. the House of Commons, purporting  to be for a redress 
of grievances, but in fact containing animadversions on the con-
duct and administratn. of His Excellency, you are sensible You 
transgressed the bounds of Your Duty as a good and faithful 
subject, and, in lending Your assistance and influence to a party 
and to statements founded on factious and insubordinate prin-
ciples, You have most justly incurred His Excellency censure 
and reprehension, and more particularly so, from the con-
sideration that You then possessed a Salary from this Govern-
ment as a Solicitor appointed by His Majesty's Government.

To a concession and acknowledgement of this Nature and 
embracing these objects, You will be expected to add, Your con-
sent to its being made public through the medium of the Sydney 
Gazette and such other channels as his Excellency may  deem 
expedient. And I have only to add that such an apology can 
alone secure a favorable reception.

I am, &c.,
J. T. CAMPBELL, Secy.

[Enclosure C.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney, 22nd April, 1818.

I have to acknowledge the receipt of Mr., Secy. Campbell's 
letter by Your Excellency's command of the 20th Instant.

I am sorry that Your Excellency should have so much mis-
understood my repeated Applications to Your Excellency, which 
of course I cannot but attribute to my not having sufficiently 
clearly expressed that sorrow and regret, which I have ever 
avowed and must ever feel for having had the misfortune of 
incurring Your Excellency's displeasure.

The candour and sincerity, with which I make this avowal, 
will I trust obtain for me Your Excellency's permission to add 
that I never did wilfully adopt any measure, which I con-
ceived could have possibly been construed to be out of the
Participation in seizure of schooner Traveller;

and in petition to house of commons.

immediate line of my profession, and that, if unfortunately it has been so taken, I now beg leave to express my extreme regret and sorrow for the same.

Your Excellency has been pleased to mention the two occasions on which my conduct unhappily gave offence: In regard to the first I can have no hesitation in at once avowing in the most ample terms my unfeigned regret that the line of conduct I was induced to pursue, when the Reverend Benjamin Vale thought proper to Seize the American Schooner Traveller, should have subjected me to Your Excellency's displeasure, and this for many reasons; and first, because in so doing I never did either directly or indirectly assist or cooperate with Mr. Vale in such seizure, but when he applied to me, as a professional man merely to assist him in a legal capacity, I did so without the least intention of giving Your Excellency offence; and secondly because I declare in the strongest manner that I was not informed that Mr. Vale was acting in contravention of Your Excellency's Orders, for I must ever disavow any the most remote intention of undertaking a measure, which I either knew or could have conceived to be in violation of Your Excellency's Authority. Your Excellency will I hope permit me to state, in further extenuation of my conduct in this particular, that the King's Counsel at home are constantly retained to defend persons against prosecutions at the suit of the Crown, and indeed the liberality of this is obvious, because, as the King's Counsel generally include the most brilliant talents at the bar, were they not at liberty to accept retainers against the Crown, persons accused would be subjected to the greatest disadvantages in their Defence. These considerations will, I trust, weigh in Your Excellency's mind favorably in my behalf, and will induce Your Excellency to overlook any inadvertency Yr. Excellency may consider me to have been guilty of in Accepting Mr. Vale's retainer to Act for him professionally in that affair. In regard to the Memorial presented to the house of Commons, I beg leave to assure Your Excellency that my conduct relative thereto has been extremely misrepresented; it was not prepared by me, I was never consulted thereon, nor did I ever take any Active part in procuring and affixing Names thereto except in the single instance of My Brother; so far I very unfortunately acted therein, And am free to acknowledge, on a reflection on the circumstances and consequences, which have resulted from it, that I feel sincerely sorry such a proceeding ever took place. This avowal and acknowledge ment will, I trust, be considered by Your Excellency sufficient to restore me to the privileges and advantages that have now been so long withheld from me, and which were the principal
inducements to my leaving my connexions in England; And I put it to Your Excellency's generosity to consider whether the explanation, I now make, is not as much as I can do compatibly with the situation in Society, which I now do and ever have held, and without lowering myself to such a Degree in the Opinion of the World that I feel confident Your Excellency is of too liberal a mind to wish to involve me in consequences so fatal.

Your Excellency is pleased to express a wish that my acknowledgement and concession should appear in the Sydney Gazette. I can have no urgent objections to Your Excellency giving every publicity, which Your Excellency may consider my Conduct upon any occasion my meet; but I trust Your Excellency will waive every circumstance of that kind, when I assure Your Excellency that I have always acted from the purest motives and without any feelings of a personal nature; and I appeal to Your Excellency how far such a proceeding may be considered necessary after the very handsome and liberal manner in which His Majesty's Ministers at home have been pleased to decide upon my conduct on a similar explanation made to them.

I have, &c.,

W. H. Moore.

[Enclosure D.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir,

Secretary's Office, 23rd April, 1818.

I have it in command to acknowledge receipt of Your Letter of Yesterday's date addressed to His Excellency the Governor in continuation of the subject on which I had made a communication of His Excellency's sentiments on the 20th Instant.

His Excellency has now to remark that, had you justly appreciated the obedience and respect due to the head of this Government and to the personal feelings of His Excellency, You would not have assisted in any shape or character whatever in the seizure of the American Schooner Traveller under the circumstances of that Case, whether at the instance of Mr. Vale or any other of the insulting Faction concerned therein; neither would You have given Your own and still much less the signature of any other person or persons whatever to the false libellous and seditious petition to the House of Commons, wherein His Excellency's personal character and administration were in the most public manner traduced and vilified. These are instances of such flagrant and insubordinate conduct as require to be atoned for by acknowledgement of their impropriety and regret for having been guilty of such dereliction of Duty.

The bare expression of regret at having Acted a part in those two Cases may be easily assigned to the consequences attending
1818. 16 May.

Apology required.

The wanton and malignant expressions thrown on His Excellency's Administration being as public as the Case could possibly admit, it is fitting and indispensable that the atonement, when made, should have equal publicity. And His Excellency on this consideration will require an Apology, in terms and effect tantamount to those proposed in my letter of the 20th Inst., be made to him for publication.

This being His Excellency's determination, He will yield to no importunity whatever to relinquish such just satisfaction and reparation of the insult offered and injury attempted to be done him, And he desires that You do not further address him on the subject unless by transmitting an apology as ample as that already suggested.

I am, &c.,

J. T. Campbell, Secy.

[Enclosure E.]

MR. W. H. Moore to Governor Macquarie.

George Street, Sydney,

Your Excellency,

27th April, 1818.

I should not presume to address Your Excellency after the prohibition contained in the last letter of Mr. Secretary Campbell, but that I trust Your Excellency will give me leave to reply to certain passages, therein contained, in the earnest hope that Your Excellency will be pleased to allow me to remove that misinterpretation which unfortunately appears to be put upon the sentiments conveyed in my last letter.

I beg leave to assure Your Excellency that, in offering the explanation I have done, I was actuated by no such base and sordid motives, as Your Excellency is pleased to ascribe to me, but that I did so solely with a view of removing the bad intentions Your Excellency imputes to me, as also the unfavorable impressions made upon Your Excellency's mind; and I certainly had supposed that Your Excellency would in consequence have been induced to forget the past and to restore me to those advantages, which His Majesty's Government at home had conferred on me, without which inducements I certainly would not have quitted my native country. I knew of no faction nor of any one individual being concerned in the Seizure of the American Schooner Traveller but Mr. Vale; nor did I know, when he employed me, that I was acting in contradiction or opposition even to Your Excellency's pleasure; surely then Your Excellency will not continue so severely to blame me for this Affair
professionally, and I cannot but say innocently, as I was involved in it. In regard to the petition to the House of Commons, I readily acknowledge that I have not the same extent of excuse to offer; my conduct on that occasion has not met with the approbation either of his Majesty's Ministers or Your Excellency. I have therefore expressed, and still do, my sorrow and regret that I ever had anything to with it. I must ever disclaim having been guilty of any flagrant Act of misconduct or impropriety, and therefore submit to Your Excellency whether I can in justice to my own Character accede to the Terms held out in Mr. Secretary Campbell's letters of 20th and 23rd Instant, or go further than I have already done, for certainly the Public would then justly entertain the Opinion expressed in Mr. Secy. Campbell's last letter, that nothing but the basest and most sordid views and consciousness of Guilt could have produced so abject a concession. But one more point remains for me to intrude upon Your Excellency, the publishing my acknowledgement in the Sydney Gazette. I beg leave to assure Your Excellency that, at the moment I expressed my sentiments, I wished them to be made as public as Your Excellency might think proper, and, however Your Excellency may be pleased to decide upon my request, I shall not the less on all occasions be ready to avow them; it is not therefore to their being made public, but to the manner of its being done that I objected.

I remain, &c.,

W. H. Moore.

[Enclosure F.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir, Secretary Office, 28th April, 1818.

I have it in command to acknowledge the receipt of Your letter addressed to His Excellency the Governor under date of yesterday and to convey his Excellency's final determination and sentiments on the subject of the present most unnecessary protracted Correspondence.

His Excellency still retains unaltered the Opinion that your conduct in the particular instances of the seizure of the American Schooner Traveller and of your signing for yourself and others, and procuring the signature of others, to the false libellous petition sent to the House of Commons from this Country, was not only highly disrespectful to him as Governor in chief but insubordinate and seditious in a most reprehensible degree by its aim and tendency, manifesting a disposition to subvert his Excellency's authority: Nevertheless as His Excellency is far from blending feelings of private resentment for injuries,
attempted against him with the necessary Acts of His Government, and to shew that the line of conduct adopted towards You in the withholding of your Salary was a just and necessary one to repress and punish the gross insult, you had offered him on those two occasions in his capacity of Governor of this Territory, His Excellency now repeats that he is disposed on certain conditions to restore to You the Salary, which has been withheld from You, and to extend the other indulgences which he had intended for You. For this purpose, His Excellency has directed that the accompanying paper containing an Apology in express terms be transmitted to You; and I am to inform You that, if You give it Your signature and consent to its being published in the Sydney Gazette, his Excellency will accept of such expression of Your sorrow and contrition for Your insulting and insubordinate conduct towards him in the instances alluded to, as the only atonement now in Your power to make, and will thereon restore You to the possession of the Salary of a Solicitor, etc.

I have merely to add that, unless the apology now sent meets Your signature, it is His Excellency's desire that all further Correspondence on the subject shall cease.

I am, &c.,

J. T. CAMPBELL, Secy.

[Enclosure G.]

FORM OF APOLOGY.

I, WILLIAM HENRY MOORE, of Sydney in New South Wales, Solicitor, having incurred the displeasure of His Excellency Governor Macquarie for the part I took in being employed by and with the Reverend Benjamin Vale in seizing the American Schooner Traveller, and in subsequently signing myself and procuring the signatures of others to a certain Petition, sent home from this Country to the House of Commons in 1816 in charge of the said Reverend Benjamin Vale: I do hereby declare on my word and honour that, in the first instance, I was not actuated by any motive of hostility or disrespect towards the Governor, And was not at that time aware that I was acting in Opposition to his orders or authority, but considered myself as acting merely in my professional Capacity as a solicitor employed by the Reverend Benjamin Vale. I do further declare on my word and honour that I am now sincerely sorry for having affixed my own name and my Brothers, and for having aided and assisted in procuring the signatures of other persons to the petition alluded to, which on due reflection I now do acknowledge was a highly improper act of insubordination and disrespect towards His Excellency's person and Authority, And for which
Act I hereby desire to express my unfeigned sorrow and regret, and request that His Excellency will be pleased to accept these Sentiments of contrition and sorrow as my Apology, which I hereby consent to be published in the Sydney Gazette.

[Enclosure H.]

MR. W. H. MOORE TO GOVERNOR MACQUARIE.

George Street, Sydney,

Your Excellency, 8th May, 1818.

I have the honour to acknowledge the receipt of Mr. Secretary Campbell’s letter by Your Excellency’s command of the 28th Ultimo.

I beg leave to assure Your Excellency that I have great satisfaction in finding that Your Excellency is pleased to consider the circumstances, which unfortunately gave Your Excellency offence in the same point of view in which they have appeared to His Majesty’s Ministers and to give credit to my assurance that, however I may have offended Your Excellency, it never was my intention so to do.

I have not the least hesitation in signing the paper transmitted to me by Mr. Secretary Campbell with a few very trifling alterations principally as to points of fact, which I trust Your Excellency will be pleased to approve of, as they do not in the least alter the spirit but merely the letter of it, except in the passage wherein it would appear that I had myself signed and procured the signatures of others to the petition to the House of Commons, whereas I give Your Excellency my word of honour that my name is not affixed thereto, nor did I use any influence with other persons to sign the same; Your Excellency will therefore see that the alterations I have made are chiefly the correction of errors of fact. I once more earnestly entreat of Your Excellency to consider the fatal consequences that cannot but ensue from my signing my consent to this paper appearing in the Sydney Gazette, the concluding few words to that effect I have therefore omitted; indeed they are totally unnecessary for in placing this paper in Your Excellency’s hands as I now do it is intended to be entirely at Your Excellency’s disposal.

I have already troubled Your Excellency very much at length with my reasons for requesting that this may not occur, and I think I may safely entreat that Your Excellency will not insist upon a measure which I am sure Your Excellency will see would be destructive in every way to my professional interests.

I have, &c.,

W. H. Moore.
[Enclosure I.]

APOLOGY BY W. H. MOORE.

I, WILLIAM HENRY MOORE of Sydney in New South Wales, Solicitor, having incurred the displeasure of His Excellency Governor Macquarie for the part I took in being employed by the Reverend Benjamin Vale in seizing the American Schooner Traveller, and in subsequently attaching my Brother's name to a certain petition sent home from this Country to the House of Commons in 1816, in charge of the said Benjamin Vale.

I do hereby declare, on my word and honour, that, in the first instance, I was not actuated by any motives of hostility or disrespect towards the Governor, and was not at that time aware that I was acting in opposition to His orders or authority, but considered myself as acting merely in my professional capacity as a Solicitor employed by the Reverend Benjamin Vale.

I do further declare, on my word and honour, that I am now sincerely sorry for having affixed my Brother's name to the Petition alluded to, which on due reflection I now do acknowledge was a highly improper Act and for which I do hereby desire to express my unfeigned sorrow and regret, and request that His Excellency will be pleased to accept these sentiments as my Apology for the same.

(Signed in Duplicate),

W. H. MOORE.

[Enclosure J.]

SECRETARY CAMPBELL TO MR. W. H. MOORE.

Sir, Secretary's Office, 9th May, 1818.

In answer to Your letter of yesterday's date to His Excellency the Governor I have it in command to inform You that, as the circumstance of your having or not having Yourself signed the obnoxious Memorial to the House of Commons, must be but known to Yourself, And as you have declared that You did not sign it, His Excellency of course relinquishes his suggestion on that point in the Apology; but His Excellency can not admit for one instant that the person, in whose house or Office the said Memorial lay for, and received signatures, was not aiding, abetting and promoting the object of said Memorial in as effectual a manner as could be imagined: Neither will His Excellency yield to any suggestion in regard to the withholding the Apology, when once made, from the press, nor permit that circumstance from constituting a part of the Apology itself: the publicity and Notoriety of the transaction requiring that the Apology for it, wherein His Excellency's Government and Administration have been arraigned, should have equal publicity.
I now send you a correct form of Apology for your consideration, and am desired to add that no further communication will be held on this business with You, unless it be perfected without any alteration or omissions whatever.

I am, &c,

J. T. CAMPBELL, Secy.

[Enclosure K.]

FORM OF APOLOGY.

I, WILLIAM HENRY MOORE, of Sydney in New South Wales, Solicitor, having incurred the displeasure of Governor Macquarie for the part I took in being employed by, and with, the Reverend Benjamin Vale in seizing the American Schooner Traveller, and in subsequently signing Myself, and procuring the signature of others, to a certain Petition sent home from this Country to the House of Commons in 1816 in charge of the said Benjamin Vale.

I do hereby declare on my Word and Honour that, in the first instance, I was not actuated by any motives of hostility or disrespect towards the Governor, and was not at that time aware that I was acting in opposition to His Excellency's orders or Authority, but considered myself as acting merely in my professional Capacity as a Solicitor employed by the Revd. Benjamin Vale.

I do further declare on my word and honour that I am now sincerely sorry for having affixed my Brother's signature, and for having aided and abetted the said Memorial in permitting it to lay in my Office (or House) for the signature of other persons, which, on due reflection, I now do acknowledge was a highly improper Act of insubordination and disrespect towards His Excellency's person and authority, And, for which Act, I hereby desire to express my unfeigned sorrow and regret, and request that his Excellency will be pleased to accept these sentiments of contrition and sorrow as my Apology, which, I hereby consent to be published in the Sydney Gazette.

Sydney, May, 1818.

WARRANT BY GOVERNOR MACQUARIE FOR DEPORTATION OF REV'D. JEREMIAH FLYNN.

19th May, 1818.

[A copy of this warrant will be found on page 804, volume IX, series I.]
1818.
18 June.

Claim of
J. H. Bent for compensation.

UNDER SECRETARY GOULBURN TO MR. J. H. BENT.

Sir,

Downing Street, 18th June, 1818.

I took an early opportunity of making known to Lord Bathurst the wish which you expressed to me some days ago to ascertain his Lordship's Opinion with respect to your Claim to consideration for the Loss, which you have sustained in consequence of your Removal from New South Wales.

I have received his Lordship's Directions to acquaint you that, although, upon a Reconsideration of the Circumstances under which your Removal took place, he sees no reason to change his opinion of it's necessity, and cannot therefore consider himself in any degree responsible for the loss to which you have been exposed in consequence, he nevertheless cannot but feel that there are some circumstances, altogether unconnected with the merits of the Case, which, as they have made your Removal more than ordinarily expensive, give you some claim to Remuneration.

His Lordship has therefore submitted to The Lords Commissioners of the Treasury the Propriety of making a moderate Allowance for the passage of Mrs. Bent, her Family and yourself to this Country, and has directed me to acquaint you that, notwithstanding your Removal from New South Wales, he will not consider you as ineligible to some other legal Situation in the Colonies when proper opportunity offers.

I am, &c.,
HENRY GOULBURN.

MR. J. H. BENT TO UNDER SECRETARY GOULBURN.

Sir,

Brighton, 25th June, 1818.

I have to acknowledge the receipt of your Letter of the 18th Instt. and regret I am under the necessity to intrude on your time upon the same Subject.

Allow me to state that, previous to my embarking for New South Wales, I endeavoured to ascertain the Sentiments of His Lordship with regard to the practise of the Convict Attornies and the appointment of Persons, who were of disgraced Characters, to fill the Situation of Magistrates; and I was given to understand that, although Information to that effect, from a variety of private Sources, had reached the Office, as it did not come in any Official Shape, you could not act upon it, and upon my stating that the words of My Lord Bathurst in his despatch to Governor Macquarie, viz., “That He saw no necessity to appoint convicts as Magistrates” were not sufficiently decisive, I was informed, That, as Governor Macquarie had adopted that Policy, without acquainting His Majesty's Government, that he
had done so; Lord Bathurst thought that those words would be a sufficient Hint to him to withdraw from it, and that it would be fair to give him that opportunity of silently altering his System. Though I doubted, from Governor Macquarie's known obstinacy of Character, whether any thing less than a positive Command would be attended to, I thought it my Duty not to urge the matter farther contrary to His Lordship's Judgment.

On my arrival in New South Wales, I little thought that I should have to encounter a personal Hostility and Hatred, on the part of the Governor, for refusing to demean myself by associating with the Vile Characters, he thought proper to patronize; or that the Governor would stir up those Convicts, who had been Attornies, to a measure, which they would never have had the Impudence to bring forward, had it not been personally urged by Governor Macquarie.

Supported by a solemn decision of all the Twelve Judges, actuated by a regard for the welfare and Interests of the fair Suitors of the Courts, and conceiving myself possessed upon this Point of His Lordship's opinion and sanction, I refused their admission; and became immediately subjected to every Insult, obloquy and injurious treatment and (no doubt misrepresentations) of Governor Macquarie. If in this, My Conduct was reprehensible, I am entitled to know in what particulars it is so. If the Colony, as you have stated, is considered a mere Penitentiary, I should have had it explicitly stated to me that I was going to a condemned Spot, and must reduce myself to the level and practises and an association with those transported there; an association which, from the very foundation of the Colony till Governor Macquarie's arrival, had never taken place; and Indeed, if the Colony is considered a mere Penitentiary, It would be a novel Idea even in such an Institution, and destructive of their first principles, to appoint the penitents to offices of Inspection and trust in the establishment: But a Colony, that raises a Revenue of Twenty four Thousand Pounds per annum in Port Duties alone, and whose Governor can expend in building Houses and forming Gardens and Parks for his own personal convenience and Luxury, a Sum exceeding Seventy Thousand Pounds Stg. (besides the Sum for their annual maintenance) of the Public money, can not by any means be looked upon as a Penitentiary, but as a Colony where the British Laws should prevail, and where the Judges should be entitled to a respect at least proportioned to that given to the Governors;

Again, After a known and solemn decision of all the Judges, I must have stultified myself as a Lawyer, Had I pursued a different Conduct; and I certainly have fair reason to complain

*Note 133.
that I was allowed to depart without full and explicit Information upon so material a point, wherein a decided Line of Policy was so necessary; And this necessity for decision still exists; For, though His Lordship has directed that Convict Attorneys shall not be admitted to practise, Governor Macquarie, in direct defiance of the Spirit of such Instructions, appointed a Notorious Highwayman and a Convicted Felon to sit as Members* of the Supreme Court; and, if my Successor (Mr. Field) had considered the dignity of His Office, The Character of his Profession, or his own Honour, as much as he did the Profit of His Place, My Lord Bathurst would have been again placed in the disagreeable Alternative of taking more effective means to subdue the Obstinatey of Governor Macquarie, or else of removing the Second Judge, for the same cause that He removed the first: A Court so formed never entered into the contemplation of the most visionary Theorist, and is unexampled in the History of the World; Such a Court was the ridicule of the Convicts themselves, though at the same time It excited a just dread for every Man knew it would be little less than a Miracle for any one obnoxious to the Governor to have even common justice from a Court so constituted: I will here observe that no Regiment from the Marines and New South Wales Corps to the present Garrison ever admitted Persons, who had been Convicts, to their Mess; and that Dissentions† prevailed on that account between the 46th Regt. and the Governor, and do still prevail to a great extent between him and the 48th Regt. the present Garrison, because Governor Macquarie will still persist in forcing upon them a Society which is degrading and repugnant to every honourable feeling.

Sir, When I quitted my Profession to fill the office of a Judge, I certainly never supposed I was to be viewed as standing upon lower Ground, than a Judge in Canada or in the Island of Jamaica, or that I was giving up the future advantage of my Professional pursuits without a fair certainty of retaining my Office; It has not been the Custom of more modern times, from sound constitutional reasons, to remove Judges, who hold their Offices during Pleasure, for any reasons except those that would justify the removal of a Judge holding his office during good behaviour; and I never supposed that I should have been subjected to a removal without that reference to a Privy Council, which has almost uniformly taken place in similar Cases; and there is no Barrister, to whom the Circumstances have been mentioned, who does not think me in this respect to have been most hardly dealt by, more especially when it is considered, that I left my Profession at a time fruitful in those changes, which

* Note 130. † Note 133.
lead to the advancement and Profit of its Junior Members; But, omitting to say any thing more upon the Cause of my Removal, I will come to its consequences which are more strictly personal.

From the month of October, 1816, I have been left without any Emolument, to find a passage to Europe under every disadvantage and accumulation of expence, waiting many months before I could procure one.

In most other branches of the Public Service, Remuneration by Half pay or otherwise is continued, till the party is replaced in the Situation whence He was taken; But Judges in general being looked upon as holding Offices permanent, till they resign for their own convenience, have not been considered as needing that provision. And herein is my great grievance; That I have been removed for no malversation in Office, and have wasted nearly two years of my Life, before it is in my Power to return to my Profession and then I have to return under every disadvantage of long absence from among my Contemporaries, and without that fair Prospect of Success, I had before. I may here observe with regard to the intimation you gave that Sir J. McIntosh had returned to the Profession, that on enquiry I find that He has never appeared as a Barrister in Westminster Hall; But, if he had so returned, His Case does not apply; For, with a Pension of £1,200 a year, It is of little moment to him in a pecuniary way, whether he succeeds or no; With me, the case is widely different; All the Bar know that I have filled a Judicial Office; But they are not all aware of the Cause of my removal; I cannot return to the Bar under the apparent disgrace of a Removal without some explanation; Can His Lordship think for a moment that I can silently sit down under such Impression on the minds of the Profession? Before I can resume my former avocations with any fair prospect of consideration or Success, I must first set myself right in the esteem of my Friends, of the Profession to which I belong, and the Public.

For these last two Years, I have been losing much valuable time, and wasting my means in order to return to Europe, and place myself again in a Situation, to earn Subsistence by Professional exertions; and, even now, must wait a considerable time before I can resume the Gown I had laid aside: It is not enough, in my humble Judgment, for His Lordship to declare me not ineligible for some other Office; My Subsistence must be provided for, till such appointment shall occur; For I cannot consent to waste my remaining means in expectation of an indefinite period, which may never arrive; and I cannot return to the Bar, without obviating the Impression my Removal, unexplained, may give against me.
I expected, upon my notifying my arrival in England, immediately to have been informed, without solicitation, what course was meant to be pursued towards me; and I think it a little unfair that I should have been left for a moment in any uncertainty as to my future Provision, after I had already of necessity lost so much valuable time without any remuneration; at Present there remains for me but this Alternative; I must either be set right in the opinion of my Profession and the Public by having some other similar office conferred upon me, or by other Provision till that can be given; thereby shewing that my removal arose from political expediency alone, or else obliged by necessity to resume my Profession. I must, in order to ensure a fair prospect of Success, place myself in a proper light by publicly shewing that my Removal proceeded from unusual and political causes alone, and not from any I have reason to disavow, or that should cause my friends to be ashamed of their countenance and support; Upon this, whatever decision His Lordship may form, It is most essential to my Interests that I should have explicit Information and a clear understanding, in order that my time may not be consumed in illusive expectations; But, if I am to depend upon my professional exertions, that I may take every means to ensure my future success, which depends upon an immediate early application of them.

I trust therefore I shall stand excused in requesting an early removal of my present suspense and uncertainty.

With regard to the Expence attending my Return to Europe, for which you have done me the Honour to say Lord Bathurst had recommended a moderate allowance to be made, I have to state That, for myself Mrs. Ellis Bent and five Children and Servants, (without reckoning the expence attending a forced Residence of four months in Calcutta), I have expended the Sum of £2,000 and upwards, for which I can produce the receipts and other Vouchers of the Parties, to whom it has been paid, and of those who have made the necessary advances to me; and I should hope His Lordship will recommend the payment to me of the Sum, which I can make proof has been actually and bona fide expended in our return to Europe. And here, I must be excused mentioning that the Young Man, whom I took out with me as Clerk to the Judge of the Supreme Court, was superseded on my removal by a Person brought out by my Successor; Though provided with no means of return myself nor provision till that return took place, I have been under the necessity (as It was impossible I could leave him destitute in a remote Country) to provide him with the means of Subsistence, with the
means of return, and with Provision till he can do something for himself; and that (though more than with my small means, I could afford to do) is but a poor recompense for having left his native Country under the Impression that he was going to fill a respectable and a permanent office, whence he might in reason hope to realize some Provision for the future and for having those reasonable hopes blasted. This Expence certainly in any view of the Subject ought not to be defrayed by me.

It now only remains for me to apologize for the length of this letter, in which, prolix as it may appear, I beg you to believe that I have omitted much (to me of importance) that had I gone fully into the various Subjects I should have presumed to urge; relying then upon your early consideration I have, &c.

JEFFERY HART BENT,
late Judge of the Supe. Ct., N. S. Wales.

UNDER SECRETARY GOULBURN TO SIR JOHN JAMISON.

Sir,

Downing Street, 2d July, 1818.

I have to acknowledge the receipt of your letter of the 12th December last requesting to be a Member of the Council of New South Wales* in the Event of one being established, and I have the Honor to acquaint you in reply that there is not any Intention of appointing a Council in that Colony.

I have, &c.,
HENRY GOULBURN.

UNDER SECRETARY GOULBURN TO MR. J. H. BENT.

Sir,

Downing Street, 7th July, 1818.

I have received and laid before Lord Bathurst your letter of the 23d Inst. in which, after adverting to what you consider to be the vindication of your Conduct during your Residence in New South Wales, you urge the necessity of making known the Causes of your Removal, and of receiving from Lord Bathurst an explicit Assurance as to your future Employment in the Colonies, and as to the pecuniary Allowance to be made to you for the Expence of your Passage to England.

In replying to your Communication, Lord Bathurst has directed me to confine myself to the more immediate Objects of your application; and I must therefore forbear entering into any discussion, which I might otherwise have thought necessary, with respect to the various Observations you have incidentally

* Note 132.
made as to my personal Communications with you as to the Governor's Conduct, or as to the General Administration of the Colony.

I have therefore to acquaint you that Lord Bathurst does not feel that he can more clearly make known to you the Causes of your Removal from New South Wales than by transmitting to you a Copy of his Letter* of the 12th April, 1816, in which he announced to you your Recall, nor can his Lordship give you any other Assurance as to your future Employment than that which I was directed to convey to you in my letter of the 18th Instant.

With respect to the Expences of your Voyage to England, Lord Bathurst must leave it to The Lords Commissioners of the Treasury to decide as to the Amount, which it may be reasonable to allow you, nor can his Lordship undertake to say how far the Sum, which may be awarded, will satisfy or fall short of your Expectation.

I have,

HENRY GOULBURN

MR. J. H. BENT TO UNDER SECRETARY GOULBURN.

Sir,

Great Portland Street, 25th July, 1818.

I have the honour to acknowledge the receipt of your letter of the 7th Inst., and I must be excused expressing my astonishment that the Suspension of the Courts† in New South Wales should be charged upon me and upon me only.

When I received my letter of Recall, in which that was stated as the Reason, I addressed my Lord Bathurst upon the Subject, to which letter* I beg leave to refer you; I there denied that I ever suspended the Courts, or did more than refuse to sit, if the members persisted in their intention of subjecting me to listen to insulting harangues in a place which was not a Forum of Debate, and on a matter which had been fully discussed in writing between us; I was then and am still at a loss to conceive why I am to be exclusively charged with the effect whatever it might be of a mutual difference; or why it should be expected that I should have yielded the point in dispute to others, rather than they to me.

I have been acknowledged even by my Lord Bathurst's subsequent Instructions to have been right in the Principle and Practice I contended for, and I was most clearly right in point of Law; and yet my perseverance, in not abandoning what was right in Principle and right in Law, has been exclusively punished, while the obstinacy of Governor Macquarie and his Creatures, who were confessedly in the wrong, and to whom

* Note 145. † Note 146.
alone ought to be imputed the consequence of the Dispute, has been scarcely, if at all, reprimanded, and has never been visited with the Severity shewn to me; If they were only equally to blame, an equal punishment ought to have been meted out; but I must ever contend that they alone were entirely in fault, because they alone were wrong in every principle of Practise and every Rule of Law; It would seem, from your statement of the Suspension of the Courts, that I had suspended the Courts of Justice in the full tide of business to the great Detriment of the Colony; so far from that being the Case, I must recall to your recollection that the Supreme Court was a new Court, vested with powers very different from the former Civil Court, and expected and directed to proceed with more regard to the Rules observed by the Courts at home, and that it was the first Court of Equity established there; so that, instead of the Suspension of the Court, It was the non-organization that was the Consequence of the Dispute, and so far was the Court from being pressed with business that, though the Patent directed that all Causes depending on the old Court should be transferred to the New in the state, in which they should happen to be, There was not a single Cause remaining in the old Court to be transferred; and not a single Complaint was ever made to me of any inconvenience sustained by any one; For every Person in the Colony was aware that the real Question was the Independence of the Courts of Justice, and all were anxious to see them freed from improper interference; nay I will venture to say that there was but one Individual in the Colony, who professed to have experienced any inconvenience from the Consequence of the Dispute, which had arisen, and that Person, as I can clearly prove, had no real or substantial ground for the assertion, and in point of fact never took even the first and most simple step, directed by the Charter, to bring his Causes, if he had any ground of action, before the Court. But, Sir, if the Suspension of the Court is viewed in so serious a light, how comes it to pass That Governor Macquarie should escape blame or punishment after causing an intermission in the meetings of every Civil Court in the Colony from the month of July, 1814, to the month of May, 1815, a period of near nine months, by not providing a Court Room for their reception, and this at a time, when He was expending the Labour of the Government Servants and the Public money upon Buildings of Luxury for himself and Palaces for his favourites; and at last The Room, when provided, was in a most disgraceful state from Dirt and Vermin, and scarcely accessible from Lumber of every description. If, Sir, the Interruption of the Assembling the Supreme Court, charged so unjustly upon me, is to be
1818.
25 July.

Reasons for statement.

Public opinion on removal of J. H. Bent.

visited with such Severity, why was the Offence spared from Punishment when clearly committed by the Governor? I should not have addressed you, Sir, again upon the Subject, But I could not allow myself to be charged so exclusively with a consequence, which arose entirely from others obstinately persisting in the wrong; and I wished to shew that, with regard to that charge, I was prepared, with reasons sufficient, (if argument could avail) to exonerate me from all blame.

Indeed every Person, who has been made acquainted with my Removal, the Causes which lead to it, and the Consequences which have followed, has allowed me to have been unjustly, uncandidly, and ungenerously treated; Unjustly, inasmuch as I have been charged with a consequence not fairly to be imputed to me or at least not exclusively. My perseverance in right Principle and sound Law has been punished with extraordinary Severity; while obstinacy in the wrong and principles unsupported by any Law, to which every blameable consequence ought to be imputed, have been entirely unvisited by Censure.

Because, instead of referring the Proceedings to the decision of the Privy Council, as in similar cases, I have been removed without the same opportunity of defence being given to me as to other Judges, holding similar Commissions, and against whom Complaints better founded and of a worse nature have been preferred; I have been Considered as treated uncandidly, in explicit information not having been given me of the approval or disapproval of Governor Macquarie's unexampled policy; and the ground of dispute not being removed in the first Instance by Declaration to Governor Macquarie, similar to the one since made; Because every Information as to my removal, and the reasons on which it was founded, was kept back, and no opportunity afforded my Friends in England of apprizing me of the measure in Contemplation, or of themselves defending my Conduct, or of stating anything in mitigation of the severe punishment, so hastily adjudged for a consequence so unjustly imputed solely to me.

I am considered as ungenerously used, Because without any idea of the severities to be inflicted on me, without any previous information of my removal being decided upon, I was left unprovided with any passage from that distant Country, unprovided with the means of subsistence there till a Passage home could be procured on reasonable terms, to struggle against every Insult, every injurious and scandalous treatment, which Governor Macquarie (whose personal Hatred was always excited by difference of Opinion), assisted by the well-known malice of His Secretary Campbell, could devise; no Step being taken to
secure me decorous treatment, or even to prevent my Personal Freedom from being violated; but, abandoned as it were to the mercy of a Governor, of whose lawless abuse of Power My Lord Bathurst has been furnished with many and well attested Proofs.

With this statement of the general Sentiments entertained by my Friends upon my removal, I will close my Correspondence with you on this Subject, adding only that I had hoped that you yourself would, where there existed any reasonable ground of Defence, though it might not be deemed entirely sufficient to clear from all blame, have given me your exertions to preserve from total subversion the prospects of one, who in earlier days had expectations much beyond the having recourse of professional avocations for subsistence, and more particularly when the Infant Family of a deceased Brother, and meritorious Servant of the Crown, were looking up to me for that Education, the Mother's Pension could not by any means afford.

Malversations in office or even evil Intentions have not been charged against me; The utmost of the offence (admitting for a moment that I was entirely and exclusively to be blamed) was an Error in Judgment; and that not as to the Law, or as to Judicial Conduct, but as to the Political Course to be pursued in absolutely unexampled Circumstances. And yet while other Errors in Judgment affecting even the national Honour and national welfare have remained unscathed, mine (for admitting the worst construction it is no more) has been visited with the Punishment severest Punishment that it was in the Power of His Majesty's Government to inflict.

In my late letter to you, I called your attention to the truly hard case of the Young Man, who went out in the Situation of Clerk to the Judge of the Supreme Court, which apparently you have overlooked; I have been obliged to find him a passage to England at my own Expence, and he has been, ever since the loss of his Office, and is at this moment depending on me for his Subsistence; In my present state of uncertainty, I can not afford any Expence of that nature, and I beg leave again to put forward his Case for your consideration.

Being now also called upon for the payment of demands, arising from my late Voyage to England, I am of course anxious to know the amount of the Sum which is intended to be given in reimbursement of the Expences, I have unavoidably incurred, and shall be obliged by a Communication upon the subject, as early as your Convenience will permit, after a determination has been come to upon it.

I have, &c,

J. H. BENT,
late Judge of the Supreme Court, N. S. Wales.
EARL BATHURST TO GOVERNOR MACQUARIE.

26th July, 1818.

[A copy of this despatch re the court-martial on the Revd. Benjamin Vale will be found on page 824, volume IX, series I.]

EARL BATHURST TO THE ATTORNEY AND SOLICITOR GENERAL.

Gentlemen,  

Downing Street, 29th July, 1818.

I have the honor to transmit to you herewith the Copy of a letter, which has been addressed to me by the Judge Advocate of New South Wales on the subject of a Conviction, which had taken place in that Colony of two Offenders for forging and uttering, knowing to be forged, a Store Receipt purporting to be drawn by the Commissariat Clerk stationed at Windsor, and passed by him on the Government account, and I am to request that you will take the case as stated in the Judge Advocate's Letter into your Consideration and favor me with your opinion on the Subject that the same may without delay be forwarded to New South Wales. 

I have, &c,

BATHURST.

UNDER SECRETARY GOULBURN TO MR. J. H. BENT.

Sir,

Downing Street, 3d August, 1818.

I have had the honor of receiving your letter of the 25th Instant. After the Correspondence which has already passed between us on the subject of your Removal from New South Wales, I trust you will excuse me for not again entering into any further detail upon that subject.

With respect to the other part of your letter, I have to acquaint you that Mr. Roberts, the person who proceeded to New South Wales as your Clerk, has himself addressed a letter to Lord Bathurst on the subject of Compensation for his Losses, and, as soon as I receive his Lordship's Directions, I shall not fail to communicate them to you. The Question of your receiving an Allowance for your Passage to this Country has been some time since referred to the Consideration of the Treasury, by whom as I have already acquainted you the Amount of it must be decided, and I have not failed, in compliance with the wish which you have expressed, to call their Attention again to the subject and to press for an early decision.

I have, &c.,

HENRY GOULBURN.
MR. J. H. BENT TO EARL BATHURST.

My Lord, 88 Great Portland Street, 3d August, 1818.

Having understood that considerable changes are about to take place in the Colony of New South Wales, I put forward my Pretensions to be considered by your Lordship on the occasion; I do not know, whether, in the changes contemplated, there would be any Situation in the Judicial Department that I could with a proper regard to myself accept, after holding the Office, from which (to the surprise of the respectable Colonists of all Classes) I was removed; But I should hope That (all things being taken into account) Your Lordship would think it right to offer them, (if there be any such) for my refusal; Report says, likewise, that a Change in the Government of the Colony is about to take place; On this Head I will presume to state That The Colony of New South Wales will never enjoy tranquillity, until the different official Departments and the management of the Colony are brought into a form and mode of action more analogous to those in the Mother Country. The Governors, taken from the Naval Service, governed the Settlement as they would have done a Man of War; The Governors, chosen from among the Military, have ruled it as if they commanded a Regiment; and when, from different Causes, Settlers and free Inhabitants of every class encreased in a very considerable degree, and became equal if not much superior in numbers to the Convicts, but little respect was paid by either the Governors of the Naval or Military orders to the feelings of Men, unused to the Discipline of the two Services, or to the degrading though necessary Severity of the Hulks; nay, even the Judges and Civil Officers of the highest Ranks were treated with an haughtiness of Demeanour and a Servility Conduct was expected from them, which (speaking for myself) a Gentleman and a Barrister of standing could very hardly brook.

From thence, in a great measure, have sprung all the Disorders of the Colony; Difference of Opinion, even expressed in a public capacity, was looked upon as a Crime, and visited even upon those, whose long Service and personal and professional Characters might have called for other Rewards, with the extremest personal Hatred; Moderation was thought a Virtue, which a Governor was under no necessity to practice; and the Distance from the Mother Country precluded the public opinion and feelings from being heard or considered. To put a stop to these Evils, and to introduce a better System, and founded the experience and practice in the Mother Country, I will venture to say that a Person, drawn from Civil Life, is absolutely
necessary as a Governor in that Country: Such an one will not
resort to force to carry a measure, unaccompanied with Law and
with Reason, but will abandon those military maxims, which are
so unsuited to our Characters and our Constitution.

Though, certainly, I do not greatly wish for Office in any
manner out of my own Professional Sphere, I do not feel it to
be any great Presumption to aspire to a Government, which was
given to General Macquarie, when a Lieutt. Colonel only, more
particularly as I can without vanity say, That no Man in this
Country possesses more knowledge of the Colony, its local Re-
sources and advantages than myself; and I can engage not only
to do but to point out how any other person may so act as, with-
out detriment to the Settlers, to reduce the Expences of the
Colony, in two years, Forty Thousand Pounds per annum below
their present amount; and this by means so simple and clear
that it would require only Honesty of Conduct in any one to
accomplish it.

The Lamented Death of Mr. Henry Alexander (a Gentle-
man to whose Merit I must bear my humble testimony from
experience of his worth and amiability) has created a vacancy
in the Office of Secretary to Government at the Cape of Good
Hope; Professional acquirements have not been considered a
disadvantage in a Gentleman chosen to fill that office; Mr.
Alexander was himself a Barrister and had practised.

Begging leave to submit the above, together with my Claims
and pretensions to your Lordship's Judgment and favour, I will
trespass upon your Lordship so far only, as to avail myself
of this opportunity of repeating my Request for an Interview
whenever convenient to your Lordship; In my present peculiar
Situation, It appears to me necessary to put a period to the
suspense under which I at present labour, as to the future dis-
posal of myself.

I have, &c.,

J. H. BENT,
late Judge of the Supe. Ct., X. S. Wales.

EARL BATHURST TO THE ATTORNEY AND SOLICITOR GENERAL.

6 Aug.

Submission of charter of bank of N.S.W. to counsel.

Gentlemen,

Downing Street, 6th August, 1818.

I have the Honor to transmit to you herewith a Copy of
the Charter of a Bank, which has been lately established in
New South Wales by Governor Macquarie, also Copies of the
Governor's Commission and Instructions; and I have to request
that you will favor me with your opinion whether he was legally
empowered to grant such a Charter without Instructions from His Royal Highness The Prince Regent, and whether there is any Power in the Crown to alter the Conditions under which it has been granted.

I have, &c.,

BATHURST.

EARL BATHURST TO THE ATTORNEY AND SOLICITOR GENERAL.

Gentlemen, Downing Street, 6th August, 1818.

I have the Honor to transmit to you herewith the Copy of a letter* from Governor Macquarie, dated 11th December, 1817, containing a Question as to the Legality of trying the Surgeons on the New South Wales Establishment by General Court Martial, and enclosing an opinion of the Judge Advocate of that Colony in the Case of Mr. D'Arcey Wentworth, the Principal Surgeon, against whom Charges had been preferred, a Copy of the Charges in question and of the usual Commission is also enclosed; and I am to request that you will take the same into Consideration and favor me with your opinion whether the Surgeons in New South Wales are amenable to Martial Law for Offences of the Nature of that imputed to Mr. D'Arcey Wentworth by Lieutenant Colonel Molle in the Charges brought against him.

I have, &c.,

BATHURST.

UNDER SECRETARY GOULBURN TO MR. W. H. MOORE.

Sir, Downing Street, 18th August, 1818.

I am directed by Lord Bathurst to acknowledge the receipt of your letter of the 15th December, 1817, stating the difficulties under which you laboured, and also that Governor Macquarie had declined to reinstate you in the Situation of Solicitor to the Colony of New South Wales notwithstanding his Lordship's Instructions to that Effect; and I have in reply to acquaint you that his Lordship, having taken into Consideration the extreme Impropriety of your Conduct in having affixed to a Petition to The House of Commons the name of a Person without his Authority or Consent, and regarding this Offence as more particularly deserving Animadversion in a person of your Profession and Situation in the Colony, has thought proper to approve the discretion which Governor Macquarie has exercised in respect to your Case, and has confirmed your Removal from the Office of Solicitor to the Colony.

I am, &c.,

HENRY GOULBURN.

* Note 147.
MESSRS. SHEPHERD AND GIFFORD TO EARL BATHURST.

My Lord,

Serjeants Inn, 29th August, 1818.

We have had the honor to receive Your Lordship's Letter of 29th July transmitting to Us the Copy of a letter, which has been addressed to Your Lordship by the Judge Advocate of New South Wales on the subject of a Conviction, which had taken place in that Colony of two Offenders for forging and uttering, knowing to be forged, a Store Receipt, purporting to be drawn by the Commissariat Clerk stationed at Windsor and passed by him in the Government account; and requesting that we would take the case as stated in the Judge Advocate's Letter into our consideration.

The Judge Advocate in his letter states it as his opinion that the offence, with which the parties are charged and of which they have been found guilty is not a felony and that the crime of forgery committed in South Wales can only be punished as a Misdemeanor at Common law.

He appears to have founded this opinion on a supposition that the enactments in the 45 Geo. 3rd are specifically confined to Great Britain, and that the law making forgery a capital felony in England depends upon that Act; but, looking at the former statutes upon the subject, as well as considering the preamble and the words of the 8 Sect.* of the 45 Geo. 3rd itself, we are of opinion this Act is not to be construed as confining either the provisions of the former Acts, making felony a capital crime or the enactment of this Statute itself to Great Britain, but as extending all the provisions of the former Acts to every part of Great Britain, many of which did not at the time extend to one part namely Scotland.

The first Act recited in the 45 Geo. 3rd is the 2 Geo. 2nd, Chap. 25; this makes the forgery of certain instruments therein enumerated a capital felony, but it specifically provides that it shall not extend to that part of Great Britain called Scotland; the 7 Geo. 2nd and the 31 Geo. 2nd were passed, the one to supply omissions of, and the other to remove doubts that had arisen, upon the 2d Geo. 2nd; and, being made with reference to and as amendments of the former Act, they did not extend to Scotland in consequence of the proviso contained in such former Act; on referring to the title as well as the preamble of the 45 Geo. 3rd, it is obvious that the main object of that Act was to extend the provisions of the former Statutes relative to forgery to Scotland, and therefore it reenacts almost in specific terms such Acts of forgery as were already capital offences in England, and then enacts that the clauses and provisions of that Act shall extend

* Note 148.
to every part of Great Britain. No new felony is created by this Statute nor is any former Act thereby repealed; it merely re-enacts the provisions of former Statutes for the purpose of extending them to Scotland. We are therefore of opinion the 45 Geo. 3rd does not restrain the operations of any former Act, nor of that Act itself to Great Britain, but specifically extends both the one and the other to every part of Great Britain for the purpose of including Scotland.

This being so, the question, as far as it relates to the present case, is whether forgery would be a capital felony in New South Wales, if the 45 Geo. 3rd had contained no enactment relative to its extending to every part of Great Britain.

The criminal law of England is the law, by which crimes committed in New South Wales and the nature of their punishment are to be ascertained and decided; for without resorting to the general principle that in all new settled Colonies, not acquired by Conquest or Cession, the settlers carry the law of England with them, The Act of Parliament* of 27 Geo. 3rd Chap. 2, by which his Majesty is empowered to establish a Court of criminal jurisdiction for the trial and punishment of offences enacts that such Court is to be established for the trial and punishment of all such outrages and misbehaviours, as, if committed within this Realm, would be deemed according to the laws of this Realm to be Treason or misprision thereof Felony or Misdemeanor; and, by the Charter of Justice* granted by his Majesty under this Statute, a Court is established which is “to try and punish all Treasons, Misprision of Treason, Murders, felonies, forgeries and other crimes committed in New South Wales, such punishment to be inflicted, being according to the laws and Customs of that part of Great Britain called England as nearly as may be”; whatever question might arise whether a felony created since the 27 Geo. 3rd would become a felony in New South Wales, unless the provisions of the Act were in terms extended to the Colonies or to the particular Settlement of New South Wales, it is clear that all criminal laws, which were in force in the 27th Year of the King extend to New South Wales unless repealed. The 45 Geo. 3rd repeals none of the former Acts relative to forgery; it merely repeats the enactments of former subsisting statutes and extends them all to the parts of Great Britain to which some of them did not before extend.

We are therefore of opinion that the law of England making forgery a capital crime in the cases enumerated in the Statutes in force in the 27 Year of his Majesty applies to the Colony of New South Wales in the same manner as it applied to that Colony before the 45 Geo. 3rd. And that, if the forged receipt

* Note 149.
Mr. Justice Field to Secretary Campbell.

Sir, George Street, Saty. afternoon, 12 Sept., 1818.

I have to apologize for the trouble I have given His Excellency and you by not sufficiently explaining the proposed addition to the Proclamation, which will by no means operate retrospectively; for it provides that the act of meddling must be committed within 6 months after the date of the Proclamation, in order to be punishable under it. It is true, it includes deaths before the Proclamation; but only orders that nobody shall convert, after the proclamation, the property of persons who died before it. If they have so converted such property before the proclamation, the Order does not affect them. Therefore it is not retrospective. Should His Excellency, now that I have more clearly explained this alteration, think proper to insert it, the Proclamation will run thus:

"Be it and it is hereby Ordered that every person, who shall after the date of this Proclamation administer the personal estate, or any part thereof, of any deceased person, without proving the Will of the deceased, or taking out letters of administration in the Supreme Court of Ecclesiastical Judicature of this Territory, within six calendar months after the death of the person so dying, or if the said person shall have died before the date of this proclamation within 6 calendar months after the said date, shall forfeit and pay the sum of £50," etc., etc.

I have again to apologize to His Excellency for not advertting to this little addition before I presumed to propose the Sketch of this Proclamation, and to you, Sir, for the trouble of this correspondence; and am,

Sir, &c.,
B. Field.

P.S.—I beg you will not trouble yourself to reply to this Letter, as I shall be perfectly satisfied with His Excellency's Proclamation, to whatever extent he may think proper to confine it. I only thought it my duty to explain what I should have done at your House, if I had had a copy of Draught with me.

[Note on original letter.]

Addl. passage proposed by Mr. Justice Field (and in his own handwriting) to be inserted in Proclamation of 12 Sepr., 1818, but not approved by His Excellency the Governor.
“All persons dying after the date of this proclamation” or having died before the date of this proclamation, who shall not within six calendar months from the date of this proclamation.

PROCLAMATION.

12th September, 1818.

Whereas, upon the death of divers of His Majesty’s Subjects in the territory of New South Wales and its dependencies, many Persons have possessed themselves of the Goods and Chattels of the Persons so dying as Executors of their own wrong, or, being lawful Executors, or next of Kin of such deceased Persons, have omitted to prove their Wills, or to take out Letters of Administration of their Personal Estate in the Supreme Court of Ecclesiastical Judicature of this Territory.

And whereas it is enacted, by the Statute of the 37th year of the reign of His Majesty George the third, Chapter 90th, Section 10th, that every Person, who shall administer to the Personal Estate of any Person dying after the passing of that act or any part thereof, without proving the will of the deceased, or taking out of Letters of Administration of such Personal Estate, within six Calendar Months after the death of the Person so dying, shall forfeit and pay the sum of Fifty Pounds to be recovered as therein mentioned; and that one Moiety of such Penalty or Forfeiture shall, if sued for within the space of Six calender months, be to His Majesty, His Heirs or Successors, and the other Moiety thereof to the Person or Persons who shall Inform and sue for the same.

And whereas the said Statute does not Extend to His Majesty’s Territory of New South Wales and its dependencies.

Be it therefore, and it is hereby ordered that every Person, who shall, in the said Territory of New South Wales and its dependencies, administer to the Personal Estate or any part thereof of any Person dying, after the Proclamation of this Order, without proving the Will of the deceased or taking out Letters of Administration of such Personal Estate in the aforesaid supreme Court of Ecclesiastical Judicature of this Territory within Six Calender Months after the death of the Person so dying, shall forfeit and pay the sum of Fifty pounds, to be recovered in the Governor’s Court for Offences committed in New South Wales, and in the Lieutenant Governor’s Court for Offences committed in Van Diemen’s Land, and that one Moiety of such Penalty or Forfeiture shall, if sued for within the Space of Six Calender Months, be to His Majesty, His Heirs or Successors, and the other moiety thereof to the Person or Persons, who shall sue for the same.

LACHLAN MACQUARIE.

* Note 150.
MESSRS. SHEPHERD AND GIFFORD TO EARL BATHURST.

My Lord,

Serjeant's Inn, 13th October, 1818.

We have had the honor to receive Your Lordship's Letter of 6th August, transmitting to Us a Copy of the Charter* of a Bank, which has been lately established in New South Wales by Governor Macquarie, also Copies of the Governor's Commission and Instructions, and requesting that we will give Your Lordship Our opinion whether he was legally empowered to grant such a Charter without instructions from His Royal Highness the Prince Regent, and whether there is any power in the Crown to alter the conditions under which it has been granted.

We beg leave to report to Your Lordship that we are of opinion the Governor was not legally empowered either by his Commission or instructions to grant such a Charter and that it is therefore null and void.

We have, &c.,

S. SHEPHERD.

R. GIFFORD.

MESSRS. SHEPHERD AND GIFFORD TO EARL BATHURST.

My Lord,

Serjeant's Inn, 13th October, 1818.

We have had the honor to receive your Lordship's Letter of 6th August, transmitting to us the copy of a Letter† from Governor Macquarie, dated 11th December, 1817, containing a question as to the legality of trying the Surgeons on the New South Wales Establishment by General Courts Martial, and enclosing an opinion† of the Judge Advocate of that Colony in the case of Mr. D'Arcy Wentworth, the principal Surgeon, against whom charges had been preferred and enclosing copy of the charges in question and the usual Commission; and Your Lordship is pleased to request that we would take the same into consideration and state our opinion whether the Surgeons in New South Wales are amenable to Martial Law for offences of the nature of that imputed to Mr. D'Arcy Wentworth by Lieutenant Colonel Molle in the charges brought against him.

We have the honor to report to your Lordship that we are of opinion the Surgeons of the Settlement of New South Wales, appointed under such Commissions, are not amenable to military law under the Mutiny Act and Articles of War.

We have, &c.,

S. SHEPHERD.

R. GIFFORD.

* Note 151. † Note 152.
FIELD TO GOULBURN.

To

DEPUTY JUDGE-ADVOCATE WYLDE.

Sir,

Downing Street, 10th November, 1818.

Lord Bathurst having given directions that a Copy of your Letter of the 14th May, 1817 (representing the doubts which had arisen in your mind whether Forgery committed in New South Wales was punishable otherwise than as a Mis­demeanour at Common Law) should be referred for the opinion of His Majesty's Attorney and Solicitor General; I am directed by his Lordship to enclose for your Information the Copy of the reply which has been received on the subject in question.

I am, &c,

HENRY GOULBURN.

MR. JUSTICE FIELD TO UNDER SECRETARY GOULBURN.

Sir,

New South Wales, 13th Novr., 1818.

I think it my duty to trouble you with a Copy of an Official Communication, which I felt it proper to make to Gov­ernor Macquarie, on the Subject of certain Duties that were intended to be sued for in the Court, in which I have the honor to preside, And in the truth of which Communication, the Gov­ernor was pleased to acquiesce: And, if the Act of Parliament alluded to* be not already passed, I am sure the Earl Bathurst will see the Necessity of an early Consideration of the Subject, since our Duties are now so high that the practice of Smug­gling is already begun, and it is not to be wished that such a Community as this should know that the law is impotent to enforce the payment of those duties.

While such a bill is in hand, it may be as well also to re­member that no Act of Parliament has ever passed to enable His Majesty to grant us our Charter of Civil Justice: the Act of 27th Geo. 3, c. 2, relates only to the criminal part of our Charter. And though I do not mean to say that His Majesty could not grant such a Charter without an Act of parliament, Yet the East India Charter of Justice (and I believe those of other colonies) is preceded by an Act of Parliament; And, as our present Civil Charter takes away from His Majesty's Subjects their Constitutional right of Appealing to the King in Council, Unless the Matter in dispute be above £3,000, I cannot help thinking (as a lawyer) that such Charter had better have been Authorized by an Act of the legislature.

It is not for me to discuss the policy of our present or any future Charter of Justice, which His Majesty's Ministers may be pleased to advise, particularly as I have said, and still think, that our present Charter will answer every purpose of justice

1818.
10 Nov.

Transmission of counsel's opinion.

1818.
13 Nov.

Mr. Justice Field to Under Secretary Goulburn.

Necessity for statute legalising duties.

* Note 153.
in the existing State of the Colony; And, with a view to render it equally beneficial to Van Dieman's Land, I am about to make an early voyage to that Island for the purpose of trying causes there. But, if it should be the intention of His Majesty's Ministers to Alter our Charter, there is one part of it, the effect of which (I am certain) could not have been adverted to by the framers of it, or it would never have stood as it does; And that part is the same, which I have just alluded to, Namely the taking away the right of Appeal to the King in Council in all causes under £3,000, the consequence of which is that from the sum of £300 (under which the verdict of the Supreme Court is final) to that of £3,000, the absolute right to give or take away, without appeal or responsibility, is in the breast of one man; for our Governor is the sole Judge of our Appeal Court, we having no Council; and, although Governor Macquarie has exercised this power without reproach, and although I speak of this Matter as a pure question of Speculation (for he has affirmed every judgment of mine), Yet I am sure the Earl Bathurst will see the abstract impropriety of placing so vast a power in the hands of any single human being.

What I would humbly suggest is that where the Sentence of the Appeal Court Shall over-rule the opinion of the Judge of the Supreme Court, the subject shall have a right to appeal to the King in Council, though the Sum should be under £3,000; where on the Contrary, the judgment of the Governor Shall affirm the Opinion of the Judge, Such judgment shall still be final.

I shall not presume to add a word more; perhaps I ought to Apologize for having (uninvitedly) said so much.

I have, &c,

BARRON FIELD,
Judge of the Sup. Court.

[Enclosure.]

MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.

Sir,

Sydney, 24th Feby., 1818.

Your Excellency having commanded several suits to be instituted in the Court, in which I have the honor of presiding, the defences to which will probably involve the question of the legality of the imposition of duties in this Colony without an act of parliament, I have taken that question into my most serious Consideration, And, as I cannot Cherish the least doubt that we must (and as I understand we soon Shall) have an Act of Parliament in order to legalize those duties, which You have thought it expedient to impose, May I be forgiven if an anxiety to prevent the public discussion of a question, on which I might
be perhaps forced to give an official opinion against the present legality of those duties, induces me to request you will instruct the Solicitor to forbear proceeding in these suits for the present?

My Opinion is founded upon one of the first principles of the English Constitution, which declares that no Subject of England can be constrained to pay any aids or taxes, but such as are imposed by his own Consent, or that of his representatives in Parliament; and, upon a recognition of this great principle by the legal advisers of the Crown in the Year 1772, when the Attorney and Solicitor General (Sir Philip Yorke and Sir Clement Wearge) gave it as their opinion that no tax could be imposed upon the inhabitants of the Colonies but by their several legislative assemblies, or (if they had none) by an Act of parliament; And Your Excellency will recollect that the great contest of the Americans was that the Colonies could be taxed only by their legislative assemblies, and that all the Crown then contended for, and enforced, was that the British legislature (not the King alone) Could also tax them. But here it is the King alone (through the Medium of Your Excellency) that imposes duties, which by the British constitution and law cannot be.

The Opinion of the above law advisers of the Crown was adopted and acted upon by no less a Chief Justice than the Earl of Mansfield in the Year 1774.

I think it right to add that my opinion goes only to the Case of King's duties or taxes; as for port duties or market or turnpike tolls, the King alone can impose them, in consideration of making the port, Market or road; And therefore your Excellency (as his Majesty's representative) has equal Authority in those Cases. And indeed the power of appointing Markets and ports is expressly given in Your Commission, which that of imposing duties is not, only the power of "disposing of such publick monies as shall be raised," it does not say how, and therefore it must be presumed the commission meant by lawful authority, which that of the King alone is not for duties and taxes, other than port, market or turnpike tolls.

I have, &c.,

BARRON FIELD,
Judge of the Sup. Court.

PROCLAMATION.

21st November, 1818.

WHEREAS their Excellencies the Governors of this Colony for the time being have, by various Government and General Orders or Proclamations at different times, imposed and may hereafter
by similar means impose certain fines and Penalties for the breach of the colonial and other Regulations hereby established or Ordained, or hereafter so to be.

And whereas doubts have been Entertained whether the Magistrates of this Colony are sufficiently Empowered by the said Government and General Orders to Enquire into the breach of the same, and levy the said Fines and Penalties in a summary way.

Be it therefore, and it is hereby Ordered, declared, and directed, by the authority aforesaid, that, from and after the day of the date of this Proclamation, all and every of the pecuniary fine or fines, penalty or penalties, which have been heretofore, or which may be hereafter imposed by any of the said Government and General Orders or Proclamations shall be recoverable before any one of the Justices of the Peace, in and of this territory, on proof of the offence, either by voluntary confession of the party or parties accused, or by the oath of one or more credible witness or witnesses, and one Moiety of every such Penalty or Penalties shall be payable to His Excellency the Governor of this territory for the time being, to be applied as His Excellency shall think proper, and the other Moiety thereof to the Informer or Informers prosecuting for the same; and, in case of non Payment, the said Justice shall, by warrant under his hand and Seal, cause the same to be levied by distress and Sale of the Offenders' Goods and Chattels, and the Overplus (if any) of money raised, after deducting the Expence of the distress and Sale, shall be rendered to the Owner, and shall also commit the Offender to Gaol, there to remain until the said Penalty or Penalties, and the reasonable charge of taking the said distress and making sale thereof, shall be levied by such distress and Sale as aforesaid, or until the same be paid or satisfied by such Offender; and it shall be lawful for such Justice of the Peace by his warrant to cause such Offender to be apprehended and brought before him to answer to any charge or complaint for or in respect of any such penalty or penalties, and to commit such Offender to Gaol as aforesaid, until the hearing of any such charge or complaint, unless he or she shall enter into Recognizance before such Justice with sufficient surety or sureties in a sufficient sum to be ordered by such Justice to appear at the hearing of such charge or complaint; Provided always and it is hereby further Ordered and declared that no Person so committed to Gaol shall be imprisoned or detained in such Gaol for any longer space of time than three Months.

LACHLAN MACQUARIE.
Whereas, by a Government and general order, bearing date the seventh day of December in the year of our Lord 1816, his excellency the Governor was pleased to direct and order certain rates and assessments of wages and certain prices of labour, to be paid to the male and female convicts of this colony, as in the said Government and General order mentioned.

And whereas it may be doubtful whether the statute* of the 20th year of the reign of his late majesty King George the Second, Chapter 19th, applies to this colony.

Be it and it is hereby ordered, declared and directed, by the authority aforesaid, that, from and after the day of the date of this Proclamation, all complaints, differences and disputes, which shall happen or arise between Masters, Mistresses or Employers, and servants in husbandry, Artificers, handicraftsmen, mechanics and labourers of what kind soever employed for any certain time, or in any other manner, and whether the said servant, artificer, mechanic or labourer, shall be a convict transported hither and still under the sentence of the law, or a Free Man or Woman, shall be heard and determined by one or more Justice or Justices of the Peace of the district where such master, mistress, or employer shall inhabit; or, if there be no resident magistrate in such district, then of the next adjoining district, where said Justice or Justices is; and are hereby impowered to examine upon oath any such servant, artificer, handicraftsman, mechanic or labourer, or any other witness or witnesses, touching such complaint, difference or complaint, and to make such order for payment of so much wages, or the price of so much rations to such servant, artificer, handicraftsman, mechanic or labourer as to such Justice or Justices shall seem just and reasonable, provided that the sum in question do not exceed ten pounds; and, in case of refusal or non-payment of such sum so ordered for the space of one and twenty days, next after such determination, such Justice or Justices shall and may issue forth his and their warrant under his or their hand or Seal to levy the same by distress and sale of the goods and chattels of such master, mistress or Employer of such servant, handicraftsman, mechanic or labourer rendering the Overplus (if any) to the owners after payment of the charges of such Distress and sale.

And it is hereby further ordered and directed by the authority aforesaid that it shall and may be lawful to and for such Justice or Justices upon application or complaint made upon oath by any master, mistress or employer, against any such servant, artificer, handicraftsman, mechanic or labourer, touching or concerning

* Note 154.
any misdemeanor, miscarriage, or ill behaviour in such his or her Service or Employment, which oath such Justice or Justices is and are hereby Empowered to administer, to hear, examine and determine the same, and to punish the offence by commitment to Gaol, notwithstanding he or she shall be a free man or free woman, there to remain, and to be corrected and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by abating some part of his or her wages or Rations, or by discharging such servant, Handicraftsman, artificer or labourer from his or her labour or Employment.

And, in like manner also, it shall and may be lawful to and for such Justice or Justices, upon any complaint or application upon oath by any such servant, artificer, handicraftsman, mechanic or labourer against such Master, mistress or employer, touching or concerning any misusage, refusal of ration or necessary provision, cruelty or other ill treatment, of, to or towards, any such servant, artificer, handicraftsman, mechanic or labourer, to summon such master, mistress or employer to appear before such Justice or Justices at a reasonable time to be prefixed in such summons; and such Justices or Justice shall and may examine into the matter of such complaint, whether such Master, or mistress or employer shall appear or not, proof being made upon oath of his or her being duly Summon'd, and upon proof thereof, made upon oath to his or her Satisfaction, to discharge such Servant, Artificer, handicraftsman or labourer of and from his or her said service or Employment which discharge shall (in the case of a free man or woman) be given under the hand and Seal or Hands and Seals of such Justice or Justices.

LACHLAN MACQUARIE.

EARL BATHURST TO THE ATTORNEY AND SOLICITOR GENERAL.

Gentlemen, Downing Street, 23d Decr., 1818.

I have the Honor to transmit for your consideration the Copy of a dispatch* from Governor Macquarie, inclosing an opinion of Mr. B. Field, the Judge of the Supreme Court in New South Wales, relative to the illegality of raising the Taxes, which have from time to time been imposed in those Settlements and I have to request that you would report to me your opinion whether the Governor can legally enforce the payment of those Taxes, which have been heretofore paid in that Colony almost from its first establishment, and whether he can under the instruction of His Royal Highness The Prince Regent, acting in the Name and on the behalf of His Majesty, impose from time to time such additional duties as may be necessary to defray

* Note 154.
the internal expenses of the Colony. I have also upon this point to call your attention to the distinction drawn by Mr. Field between what he has denominated King’s Duties and those which he describes as Port Duties or Market or Turnpike Tolls with a view of ascertaining the Specific Duties, the levy of which Mr. Field asserts to be free from objection. I have further to request that, in the event of your considering the levy of duties as heretofore by the Governor under His Majesty’s instruction to be illegal and unauthorized, you would report to me your opinion as to the form in which it would be proper to legalize the duties, which at present exist, and those which it may be thought necessary hereafter to impose.

The Governor’s Commission and Instructions are herewith transmitted.

I am, &c.,

BATHURST.

MR. J. H. BENT TO EARL BATHURST.

Rotting Dean, near Brighton, 27th Decr., 1818.

I am induced again to bring my Case before your Lordship, and concisely to urge circumstances, which seem to me to entitle me to your Lordship’s attention and consideration.

When I left this Country in the Office of Judge of the Supreme Court in New South Wales, I never was given to understand, nor could any one suppose, that I was to be subjected to a treatment different from that used towards the Judges of any other Colony, nor that I should have to oppose the Introduction of those Persons into a Court of Justice, to prevent which the Courts themselves were framed; For Your Lordship must be aware that, on the first Foundation of the Colony, the Trial by Jury was denied the Colony from the Legal and Moral unfitness of Persons convicted as Felons to be Jurors.

In consequence of the Dispute, which arose from the personal attempts of Governor Macquarie to force those Persons into the Supreme Court, as Officers and Members, without the Assent, concurrence and even against the opinion of His Majesty’s Government, resulted my Determination, not to sit unless that attempt, and also another on the part of the Members, to outrage me on the Bench were abandoned. Your Lordship has decided my opposition to be right, for you have put a stop* to that endeavour on the part of Governor Macquarie, and yet you have removed me for a measure, which your Lordship ought to have imputed to those, by whose continued obstinacy in the wrong, it was forced upon me: Yet I alone have been punished; nay, the very Magistrates, who would have grossly and personally insulted

* Note 155.
me, publickly on the Bench, were left still in the Commission; and, while Your Lordship has declared me right in the principle and right in point of Law, you have punished me for the faults and perverseness of others: It may not be amiss here to state that the Judges of England have actually been hearing solemn arguments, and doubting whether a convicted Felon, though pardoned, was even entitled to sue in his own right; while Governor Macquarie has raised them to the Magistracy, has appointed them Members of the Supreme Court, and has attempted to force them as practisers into the Courts of Justice.

In what an unparalleled situation have I been placed? Solicitors are sent out by the Crown with Salaries to prevent that practise, which Governor Macquarie would introduce without the Shadow of an argument in its favour. Your Lordship has even very lately expressed your opinion that a person, who ignorantly and without evil intention put the name of another* to a petition, was unfit to practise in the Courts; and that Governor Macquarie did right to take away his Salary; while Governor Macquarie does not scruple to recommend publicly and officially a Person convicted of Perjury to the practise of the Courts, and I am removed for opposing it. Had I yielded to Governor Macquarie's wishes, what answer could I have made to the complaints of the Solicitors, sent out by your Lordship? what Defence could I have had for acting so contrary to Your Lordship's Sentiments? (which from every thing I had heard, nay, from Your Lordship’s own expressions, I could not infer to be different from my own) and to the unanimous decision of the Twelve Judges?

No Judge was ever before so placed, or ever expected before (as it appears I have been) to surrender every principle of Law and Honour, and to abandon every Sentiment of what was due to himself personally, and to his Rank officially.

I gave up my Professional avocation for a Judicial office, usually considered permanent, never expecting to encounter either different personal treatment, or different practice, or anything unusual to other Colonial Judges. I have been removed from this Office, and, though Your Lordship has declared me not ineligible for a similar Office, I have been above 2 years deprived of all Emolument, or even the means of obtaining anything by my professional exertions; I have been obliged to defray my own expences home, for the Sum, Your Lordship has recommended to be given, would not be sufficient to bring home the same number of Convicts; they would have cost Government more than has been allowed for a deceased Judge's family and myself.

* Note 156.
I am thrown upon the world to commence my professional career anew, without any provision being offered for my maintenance, till I had, at least, been placed in the same situation from which I had been taken.

Four years of my Life have been wasted, to my great eventual professional disappointment, and absolutely to my pecuniary Loss.

I have been punished as far as it was possible for punishment to go; because Governor Macquarie chose to be perverse; because he chose to adopt a course, which Your Lordship (whatever blame may be imputed to me) must disapprove, a conduct which few will attempt to justify, which no Judge ever dreamed he should have to oppose, or should be removed for opposing.

I trust, Your Lordship, looking at the whole, the unprecedented Situation in which I was placed, the hardships I have sustained, in the Loss of Office, the Slur upon my character consequent thereon, the Loss of my time, the Loss of my professional prospects, the pecuniary Loss and great Expence I have suffered, will upon consideration deem it but fair to indemnify me by a similar Office, an adequate Provision otherwise, or by fully satisfying the pecuniary losses, which I have incurred in consequence of having accepted a Judicial Office under the Crown.

I have, in all my public Conduct in New South Wales, endeavoured to act from honourable and upright principles; Men of all Classes in that Country will unite in giving me that praise; and it is peculiarly hard to feel that, had I acted a dishonourable part, and complied with Governor Macquarie's attempts, though contrary to Law, though contrary to your Lordship's Sentiments, as shewn by other Attornies being appointed with Salaries by the Crown, I should perhaps have retained my appointment, while, for acting honourably, legally and uprightly, I have been deprived of my Office, and, as Governor Macquarie has thought proper to say, been disgraced.

I trust that your Lordship will not allow honourable Intentions, supported by the greatest legal decisions, to be subjected to longer punishment, nor let it be said that, had I never known your Lordship's favour, I had never met my Ruin:

In the Hope that your Lordship will view the whole in the Light in which it appears to myself and my Friends, I look for Your Lordship's favourable determination.

And I have, &c.,

J. H. BENT,
late Judge of the Supe. Ct., N. S. Wales.
Messrs. Shepherd and Gifford to Earl Bathurst.

My Lord,

Serjeant's Inn, 15th February, 1819.

We have had the honor to receive your Lordship's letter of the 23rd December, 1818, transmitting for our consideration the Copy of a dispatch received from Governor Macquarie, enclosing an opinion of Mr. B. Field, the Judge of the Supreme Court in New South Wales, relative to the illegality of raising the Taxes, which have from time to time been imposed in those Settlements; and your Lordship is pleased to request that we would report to you our opinion, whether the Governor can legally enforce the payment of those Taxes, which have been heretofore paid in that Colony almost from its first Establishment, and whether he can, under the Instructions of His Royal Highness the Prince Regent, acting in the name and on the behalf of His Majesty, impose from time to time such additional duties as may be necessary to defray the internal expenses of the Colony; your Lordship is also pleased, upon this point, to call our attention to the distinction drawn by Mr. Field between what he has denominated "King's duties," and those which he describes as Port duties, or Market and Turnpike Tolls, with a view of ascertaining the specific Duties, the levy of which Mr. Field asserts to be free from objection; and your Lordship is pleased further to request that, in the event of our considering the levy of duties as heretofore by the Governor under His Majesty's Instructions to be illegal and unauthorized, we would report to you our opinion, as to the form in which it would be proper to legalize the duties which at present exist, and those which it may be thought necessary hereafter to impose.

We have taken the Several questions stated in your Lordship's letter into our consideration, and beg to report to your Lordship; That the part of New South Wales possessed by His Majesty, not having been acquired by conquest or cession, but taken possession of by him as desert and uninhabited, and subsequently colonized from this country, We apprehend His Majesty by his Royal Prerogative has not the right either by himself or thro' the medium of his Governor to make laws for the levying of taxes in such Colony; but that such Taxes can only, under the present circumstances of that Colony, be imposed by the Parliament of the United Kingdom. Even if the power of imposing such Taxes were in the King, or in those to whom he should delegate such power, the imposition of them by the Governor (in this case) was not warranted, because his Commission does not invest him with any such authority. If however his Majesty had a right by virtue of his prerogative to impose taxes in a Colony of this sort, the defect in the present imposition
might speedily have been remedied by an Order of his Majesty in Council; and future taxes (when thought adviseable) might be imposed by a similar Order. But we think, as we have before observed, that the only mode of legalizing the taxes in this Colony is by an Act of the United Parliament, and that future taxes can only be imposed by the same Authority, as the law now stands, the colony having no representative assembly of its own by which such Taxes can be imposed.

Whether considering the peculiar circumstances of this Colony, and the nature of a large portion of its population, Parliament would invest his Majesty in Council with a power to impose such duties, as might be deemed necessary for the better support of the expences of the Colony, or for the attainment of the beneficial objects stated in the Governor's letter, is a question on which we cannot venture to form a conjecture; but, if it will not, the United Parliament appears to us to be the only constitutional authority, which can legalize the past or impose future imposts.

With respect to the distinction taken by Mr. Field between duties which he denominates King's taxes and port duties or Market and Turnpike Tolls; we apprehend that, if the King erects a new port, or a Market, or Fair, or opens a highway in or over his own soil, he may, as owner of the soil, legally demand and receive from the persons availing themselves of the advantage thus open to them, a reasonable Sum for Anchorage, or Toll, in order to compensate him for the expence he has been at in making the port and keeping it in repair, and for the use of his land, etc., for the purposes of a Market or Fair, or of a Highway; so as such reservation of duty or toll be coeval with the erection of the port Market, or Fair, or with the original opening or use of the Highway; but even in such cases we think the right should be cautiously exercised.

We have, &c.,

S. SHEPHERD.
R. GIFFORD.

MR. JUSTICE FIELD TO EARL BATHURST.

Sydney, New South Wales, 17th February, 1819.

Having now returned from a Circuit* to Van Diemen's Land for the purpose of trying causes in the Supreme Court of this Territory, in which I have the honour to preside, whereby I have saved the suitors and their witnesses the trouble and expense of a voyage out and home of 1,200 miles and an absence

* Note 157.
from their property of 3 months, I think it my duty to lay before your lordship a report of the success of this measure, and the advantages to the Dependancy, with which it has been attended, the inhabitants of the Island having for 15 years been in effect lawless* as to all debts above £50. Lieut. Govr. Sorell will confirm this account of the beneficial results of the Circuit; and I have now the honour of submitting for your lordship's consideration the expediency of making it an annual one, as I am prepared to do, upon being indemnified for the personal hazard, inconvenience and expense attending it. Passage I could always obtain, if your lordship would authorize the Governor to place the best ship-accommodation, which shall then be in the harbour at my service and that of the officers and solicitors of my Court. On the past occasion, the Provost Marshall and two Solicitors, who went the Circuit, were obliged to find their own passage; and consequently did not arrive at Van Diemen's Land till long after me. For myself, I went and returned with my friend, Lieut. King, R.N., who had occasion to make a survey on the coast of that Island. But your lordship must be well aware that such a voyage and public visit of two or three months cannot be accomplished without a considerable expense, and may I be permitted to propose that, in order to meet this expense, and to indemnify me for the risque, trouble and disquiet of this Annual Circuit, my Salary should be raised from £800 to an equality with that of the Judge Advocate of New South Wales, vizt., £1,200 per annum? Thus remunerated, I should, in return be able to save the Crown all the heavy expense now incurred in bringing up prisoners, prosecutors and witnesses from Van Diemen's Land to Port Jackson for criminal trial, a necessity which discourages the prosecution of crime, and induces the settler at Van Diemen's Land to bear with robbery, as a less evil than the trouble and expense of a three months' voyage and absence from his property. And this object could be effected without altering our present Charter of Justice, otherwise than by the necessary Act of Parliament for creating the Criminal Court at Van Diemen's Land, to consist of the Supreme Judge of New South Wales (the Judge Advocate† there not having been bred a lawyer) and four officers of His Majesty's sea or land service (as was the constitution‡ at Norfolk Island), and by an additional Commission, appointing me the Judge of that Court.

This is the proposal, which I humbly submit, through the favorable consideration of your lordship to the gracious determination of His Royal Highness the Prince Regent. Should your lordship have anticipated the judicial wants of the Colony

* Note 158. † Note 63. ‡ Note 159.
by a new Charter of Justice, with which this project is incompatible, I have only to leave any indemnification for the extra service to the Colony, which I have thus had the satisfaction of performing, to the pleasure of your lordship.

I have, &c.,

BARRON FIELD,
Judge of the Sup. Court of New South Wales.

GOVERNOR MACQUARIE TO EARL BATHURST.

1st March, 1819.

[In this despatch, Governor Macquarie replied to the censure passed on his actions re W. H. Moore and the petition to the house of commons; see page 16 et seq., volume X, series I.]

---

GOVERNOR MACQUARIE TO EARL BATHURST.

22nd March, 1819.

[With this despatch, a petition* for the redress of grievances was transmitted; see page 52 et seq., volume X, series I.]

---

GOVERNOR MACQUARIE TO EARL BATHURST.

22nd March, 1819.

[With this despatch, the port regulations,† as revised by deputy judge-advocate Wylde, were transmitted; see page 70 et seq., volume X, series I.]

---

EARL BATHURST TO GOVERNOR MACQUARIE.

4th August, 1819.

[With this despatch, the statutes, 59 George III, cap. cxiv and cxxii, were transmitted; see page 196, volume X, series I.]

---

EARL BATHURST TO GOVERNOR MACQUARIE.

10th August, 1819.

[With this despatch, the statute, 59 George III, cap. lx, for ordination of clergy for service in the colonies, was transmitted; see page 198, volume X, series I.]

---

LIEUT.-GOVERNOR SORELL TO GOVERNOR MACQUARIE.

30th November, 1819.

[In this despatch, lieut.-governor Sorell requested instructions re the deportation of unauthorised immigrants; see page 128, volume II, series III.]

* Note 160. † Note 161.
GOVERNOR MACQUARIE TO EARL BATHURST.

22nd February, 1820.

Appointment of W. Redfern to magistracy.

[Note: A copy of this despatch on the appointment of W. Redfern to the magistracy will be found on page 214 et seq., volume X, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

23rd February, 1820.

Request for act of indemnity.

[Note: In this despatch, Governor Macquarie requested the passing of an act of indemnity for duties imposed; see page 246 et seq., volume X, series I.]

GOVERNOR MACQUARIE TO UNDER SECRETARY GOULBURN.

29th February, 1820.

Reinstatement of W. H. Moore.

[Note: In this despatch, Governor Macquarie reported his reconciliation with W. H. Moore; see page 292, volume X, series I.]

MR. JUSTICE FIELD TO GOVERNOR MACQUARIE.

Sir,

Sydney, 11th March, 1820.

Our Charter of Justice giving the Court power, with the approbation of Your Excellency, to alter and vary our Rules and Fees from time to time.

I have the honor of transmitting to Your Excellency an amended Code of Rules and a reduced Table of Fees of the Supreme Court, for that approbation.

The principal fees are reduced one half from what they have hitherto been, and others one fourth.

I have, &c.,

BARRON FIELD, Judge.

GOVERNOR MACQUARIE TO MR. JUSTICE FIELD.

Govt. House, Sydney,

Sir,

15th March, 1820, Wednesday Noon.

I have the honor to acknowledge the receipt of your Letter of the 11th Inst., accompanied by an amended Code of Rules, and reduced Table of Fees, suggested by you on the part of the Supreme Court for my sanction and approbation.

I should have answered your Letter sooner, but that I was very busily employed in making up my Dispatches for the Derwent, when it came to hand, and being obliged to go up to Parramatta on particular business early on Monday, whence I am only returned to Sydney this morning.

As I know it to form a prominent feature in the Instructions of the Honble. The Commissioner of Enquiry† to investigate all

* Note 162.  † Note 163.
matters relating to the Courts of Civil and Criminal Judicature in this Colony, and being extremely anxious to avail myself of his high authority and legal information on this particular subject, previous to my making any alteration in Matters of such serious importance, I must decline, for the present, giving my Sanction and approbation to the amended Code of Rules and Reduced Table of Fees for the Supreme Court you sent me, and which I therefore return you herewith.

I have, &c.

L. MACQUARIE.

Mr. Justice Field to Governor Macquarie.

Sir, Sydney, 16th March, 1820.

I have the honour to acknowledge the receipt of Your Excellency’s Letter of yesterday’s date, in which You are pleased to decline making any alteration in the Rules and Fees of the Supreme Court, till you can avail yourself of the Commissioner of Enquiry’s authority and information on the subject.

And, to prevent all possible misunderstanding in matters, which Your Excellency considers of such serious importance, I beg to suggest (although the point seems not to have escaped Your Excellency’s observation, since it is certainly implied in your Answer) that the present Code and Table, as approved by Your Excellency, will necessarily continue in operation, till the new Ones shall be confirmed by your sanction.

I have, &c.,

BARRON FIELD, Judge.

Governor Macquarie to Mr. Justice Field.

Government House, Sydney,

Sir, 17th March, 1820, Friday Morning.

I have had the honor to receive your Letter of yesterday’s date, in reply to mine of the 15th Instant.

In answering your Letter of the 11th Instant, I was fully aware that the present Code of Rules and Table of Fees for the Supreme Court, as approved by me, must necessarily continue in operation, till the new ones shall be confirmed by my Sanction.

I have, &c.,

L. MACQUARIE.

Deputy Judge-Advocate Wyld to Governor Macquarie.


Having received the inclosed Letter and List of Magistrates some days since from Mr. Secy. Campbell, I beg leave,
submitting the same to your Excellency for more full Explanation with reference to the "Notification therein contained of what precedence shall henceforth take place amongst the Magistrates of the Territory and its dependencies," to suggest to your Excellency that I am unaware of any title to or ground of precedence as at all existing amongst the Justices in England except as to and from Seniority of appointment; where, indeed, except perhaps as to order of signature, more under the influence of a Sense of private Decorum than of any positive regulation, no distinction whatever seems to arise or to have been admitted, each acting upon independent and equal Jurisdiction and the whole in assembly in Sessions or otherwise through a Chairman elected and specially chosen amongst themselves, without regard to seniority, for that Duty. I am unable therefore to point out to your Excellency any mode of appointment, by which on certain occasions some of the colonial Magistrates could take precedence by reason of seniority, which at other would be to be surrendered and not in force.

It seems to me therefore that it will remain only to your Excellency to determine whether the Magistrates for the Territory* and its dependencies are to be considered as generally entitled to precedence from greater extent of Jurisdiction, when it would seem unnecessary to include them in the Commission now in contemplation, or whether all the Magistrates ever appointed by your Excellency shall take Seniority according to the actual Date of such their respective Appointments. If your Excellency think fit merely to give Jurisdiction over the County to those Magistrates at present holding only Jurisdiction in particular Districts, the figures, appertaining to the List of Magistrates' Names as marked across, point out those already possessed of full Jurisdiction and whom it will be unnecessary to include in the new Commission, except as to any question of fit Seniority amongst particular Magistrates, which may arise to your Excellency's Consideration; while, if your Excellency should hold it proper that the Magistrates should hold it proper that the Magistrates should preserve the seniority of their original Commissions as in the List from the Secretary, I would submit it as advisable that the new Commission should include all the Names therein mentioned, appointing them generally, with any special exception however you may approve, Magistrates of the Territory instead of the County, which will leave unaffected the Jurisdiction of certain of those Magistrates over the dependencies of the Territory.

Your Excellency is thus, I trust, fully possessed of the subject, while the delay of thus communicating my Views on it will I

* Note 164.
CIRCULAR TO MAGISTRATES.

A Printed Circular

To the Magistrates within the Territory of New South Wales.

Gentlemen,

I have it in Command to convey to you His Excellency the Governor's Instructions on the several Points herein-after alluded to, and to call your Attention to them in the future Discharge of your Magisterial Functions.

1st. No Convict or Prisoner of the Crown is to be transported to Newcastle or elsewhere, otherwise than by the Sentence of the Criminal Court, or by a Bench of Magistrates, which must at all Times consist of at least two Justices of the Peace; and the Sentence of such Bench must limit and define the Term of such Transportation, calculated from the Day on which Sentence was pronounced; and it is on no Occasion to be left open (as is frequently the Case at present) for "the Governor's Pleasure," or to refer to any Interposition of His Excellency thereon.

2. No Magistrate is, by Virtue of his Authority as such, to grant Permission to any Convict whatever to retire from his assigned Service, unless on well founded Complaint of ill Usage; and, in that Case, such Convict is to be assigned afresh to some other Master; but on no Account is a Magistrate to dispense with the Government Work of a Convict, by granting him or her a Ticket of Liberty to employ him or herself at their own Will or Pleasure, or for their own Benefit. And in all and every Case where such Ticket of Liberty has been heretofore so unauthorizely granted, it is forthwith to be called in and cancelled; and the Person, holding it, to be assigned in due Form as a Government Servant to such proper Person as may require his or her Service. And it is further required that you cause strict Enquiry to be made, within your respective Districts, in Regard to Persons residing therein, holding Tickets of Liberty from Magistrates, or other Persons to whom their Services had been duly assigned; and you are to call in all such Persons, and assign their Services in a due and regular Manner, reporting at the same Time to His Excellency, through the Medium of this Office, the Names and Places of Residence of all those Persons to whom the said Convicts' Services had been assigned, and by whom such Dispensation from Service and Duty had been unwarrantably
made, to the great Prejudice of the Public Service and in Violation of that Authority, which is solely vested in His Excellency, in Regard to extending Indulgence to well-behaved Convicts.

3. It being deemed essential to the general Improvement of the Police of the Colony that no Constables or other Peace Officers be appointed by any local Authority of the Magistrates, until after Recommendation shall have been first made to His Excellency, and his Approbation obtained for such Appointment, His Excellency hereon desires that no Person be appointed to act as a Constable or other Peace Officer, until such Nomination shall have been first approved by Himself, on the Recommendation of one or more Magistrates: in which Case the Appointment will be duly announced to the Public as a Government and General Order, through the Medium of the Sydney Gazette. It is however to be clearly understood that the Mode of appointing Constables or other Peace Officers, as herein prescribed, is by no Means to control the Exercise of the Power of suspending such Officers by the Magistrates as heretofore; His Excellency only requiring to be informed of the Cause of such Suspension at the same Time that a fresh Nomination, instead of the Person so suspended, shall be submitted for his Approval.

4. On all Occasions of your finding it necessary to withdraw Tickets of Leave granted by His Excellency, you will be pleased to report the Circumstances, by the earliest Opportunity, through the Medium of this Office. I have, &c.,

J. T. CAMPBELL, Secy.

P.S.—I have to add the request that you will favour me, as soon as possible, with the Names of all the Constables under Your immediate direction, in Order to their being published in the Sydney Gazette.

J.T.C.

EARL BATHURST TO GOVERNOR MACQUARIE.

10th July, 1820.

[In this despatch, Earl Bathurst censured Governor Macquarie for his appointment of W. Redfern* to the magistracy; see page 310, volume X, series I.]

UNDER SECRETARY GOULBURN TO LIEUT.-GOVERNOR SORELL.

24th July, 1820.

[In this despatch, authority† was given to lieut.-governor Sorell to locate lands to settlers; see page 39, volume III, series III.]

* Note 161. † Note 165.
MR. J. AMOS TO EARL BATHURST.

27 Hoxton Square, 27 July, 1820.

My Lord,

I take the liberty of asking Your Lordship to inform me, whether you have received from the Honble. Commissioner Biggs any report relative to the dismissal* of my Brother, Mr. Thomas Sterrop Amos, lately deceased, from practising as an Attorney in the Courts of Judicature in the Territory of New South Wales.

If Your Lordship have, I shall rest satisfied that His Majesty's Ministers will take the affair into consideration, and, under that conviction, I shall not again obtrude myself on Your Lordship's notice, unless new facts come to my knowledge.

But if you have not, I shall feel it my duty to present to Your Lordship the copy I have received of a memorial on the subject, and to press the business on Your Lordship's attention.

Your Lordship may perhaps expect that I should assign some reason for my present application; in doing which I must advert to the main allegations in the Memorial,* and for the sake of brevity I shall assume that Your Lordship has received the report, the sensation excited in the Colony by the affair; and the following extracts from a letter from the Executor of the late Mr. Amos will I trust justify such assumption:

"Sydney, 29 Feb'y., 1820.

"I am sure under the melancholy circumstances of Mr. Amos' Case, it will be great consolation and satisfaction to you, Sir, and to Mr. Amos' friends to know that the extraordinary injustice and tyranny with which he was treated by Mr. Justice Field was most fully understood by the public at large in the Colony, that his character suffered nothing whatever from the false and foul imputations made upon it by Mr. Field, whose tyranny, personal hostility, and total absence of even the forms of justice in his treatment of poor Mr. Amos have drawn upon him (Mr. Field) the abhorrence of every independent man in the Colony. There is no doubt that it was the unjust conduct of Mr. Field towards him that broke his heart and spirits and brought him to the grave. It pressed on his mind so much that it was the continual subject both of his lucid and delirious moments, and the last words he uttered were 'the unjust Judge! the unjust Judge!' meaning Mr. Justice Field. I am most happy to be able to inform you that his remains were attended to the grave by the Governor's Secretary, the principal Magistrates, and Gentlemen of the town, and a great number of most respectable inhabitants. Indeed there was a general feeling of respect for him and disapprobation of Mr. Field's conduct evinced on the occasion. Mr. Field was not satisfied with breaking Mr. Amos' heart, but, on the very

* Note 166.
1820.
27 July.

Memorial to J. T. Bigge.

Employment of G. Crossley as clerk.

Practise of T. S. Amos.

day of and before the interment of the body, sent his (Mr. Field's) Solicitor to me, demanding the payment of a Bill for fees due or alleged to be due to him of Mr. Amos, and threatened forthwith to proceed against me at Law for the same which he has since done. The inclosed is copy of a memorial* from Mr. Amos, in his lifetime, to the Commissioner of Enquiry here. Nothing was done upon it previously to Mr. Amos' death. Immediately after I waited on the Commissioner, as Executor, and insisted on having the inquiry prosecuted; it has accordingly been prosecuted before him and all the facts in the memorial substantiated; but as his Commission is merely to inquire not to determine, nothing more than inquiry can be done here. You may rest assured all the facts can be most fully proved here."

The memorial states that, from May, 1817, to 16 August, 1819, the day on which His Honour the Judge, Barron Field, Esqr., pronounced sentence, upwards of £1,200 had become due to him for fees from Mr. Amos, and that at the latter period upwards of eighty suits were pending under Mr. Amos' care as Attorney, which shews that his business was of such magnitude as no individual could possibly conduct by himself, and that consequently he was obliged to trust to others, and more particularly to one George Crossley, whom it appears he had engaged as his principal clerk† with the express approbation of His Excellency the Governor. This George Crossley had originally been sent out to the Colony as a Convict and had afterwards established himself in considerable business as an Attorney, practising in the Courts there, until he was suspended by a general order from England, which prohibited persons in such situations from practising in the Courts as Attorneys; George Crossley being strongly recommended to Mr. Amos, he engaged him, and it is not improbable that, in the proceedings relating to the suits under Mr. Amos' care, many serious irregularities may have occurred, which might have justified the Judge in severely censuring him, as the only person known by the Court, he being responsible for the due and faithful conducting of the suits, tho' personally he might have been blameless; for even in the Courts held at Westminster, where the facilities of transacting business must be infinitely greater than at Sydney, such neglect both of Counsel and Attorneys frequently occurs as to provoke the Judges to severe animadversions on their conduct; but, as there are gradations in crime, so there ought to be gradations in punishment, and not only must that crime be great which should deprive the perpetrator of his property and professional business and doom him to perpetual poverty and disgrace, but the case

* Note 166. † Note 167.
ought to be extremely urgent which shall justify an immediate punishment on an exparte statement, without giving the unhappy victim an opportunity of disproving the accusations. After giving the memorial as dispassionate a consideration as the natural prepossession in favour of a Brother will allow me, I am the more inclined to think some irregularities (darkly expressed in the sentence of the Judge by the words "and other causes in the hearts of the members") had occurred, because it seems scarcely credible that a man, educated as a Gentleman and deemed, for his unsullied character and eminent abilities, fit to preside in the supreme court of Judicature in a distant colony and consequently free from all controul, should so far forget himself as to act in so precipitate and seemingly unjust a manner as Barron Field, Esqre., is represented to have acted towards Mr. Amos; indeed such conduct would be completely incredible if history did not sufficiently attest the irrepressible tendency of power to vitiate the heart and to generate a vindictive and tyrannical spirit even in those who may have been previously distinguished by their benevolence and moderation.

Therefore if the sole object now in view were justice to Mr. Amos, before I would take the least step to obtain that justice, I would make much stricter inquiry into his professional conduct during his short career in the colony than I at present possess the means of doing, for under such circumstances I should think it right not to act on the mere exparte statement even of a Brother; but Mr. Amos is dead, and justice to him personally is no longer possible.

And as to rescuing Mr. Amos' memory from that cloud in which the striking his name from the Rolls might seem to involve it, that is quite unnecessary, because it has been stated to me by many persons, lately arrived from the Colony, that he was almost universally respected and that it was the general opinion he died broken-hearted, a victim to the perfidy of his clerk George Crossley and to the irritability and vindictiveness of that clerk's zealous friend, Barron Field, Esqre., Judge of the supreme court of Judicature.

The cruel sacrifice of Mr. Amos' property as represented in the memorial might alone be deemed sufficient to induce this application. The property, that Mr. Amos took with him and received from England subsequently to his arrival at Sydney, may be calculated at near Two thousand pounds, the greater part advanced to him by myself; in less than six weeks after his arrival his business was sufficient to employ four clerks and of a very profitable nature, which his letters to me sufficiently attest; his profits have been stated to me at near four thousand pounds
a year, and he had a grant of seven or eight hundred acres of land; and yet such has been the sacrifice of his property, thro' the order of the Judge, Barron Field, Esqre., that his Executor writes to me, there are not sufficient assets to pay his debts; that the Judge has commenced an action against him for £500 for fees, and that his late clerk Geo. Crossley claims £5,555! five thousand five hundred and fifty-five pounds! tho' Mr. Amos in his memorial states the said Geo. Crossley to be largely indebted to him.

But, My Lord, these causes (tho' each in itself sufficiently powerful) have not generated that feeling which impels me to this application; no, I am actuated by another motive, by a sense of public duty; a regard for the common weal; by a sympathy with the sufferings of fellow-men, who, meeting with insuperable difficulties (arising from the state of society) to maintain themselves on their native soil, are compelled to seek resources in distant climes. And tho' it would ill become me to give here an opinion on the policy of encouraging the emigration of British subjects of property to the distant parts of His Majesty's dominions, since all the arguments that can be adduced on either side of the question must immediately crowd on Your Lordship's mind, whenever the subject is mentioned, yet I trust, I may be allowed to assume from recent legislative acts that His Majesty's Ministers are disposed to remove all obstacles to it. Now, My Lord, one great obstacle opposed to emigration to the British Colonies is a notion of the total absence of all moral restraint on the constituted authorities, and the consequent insecurity of the persons and property of private individuals who may unintentionally give offence; to what extent this notion prevails, I cannot pretend to say; but that it does prevail in some degree, I can aver, because it has come under my own observation; even within these few days, an Individual, who emigrated to America last year, and is lately returned to England for the purpose of selling the remainder of his property consisting of land, assured me that he and others have fixed on the United States for their future country in preference to British Colonies for no other reason than that they considered their persons and property would be protected by laws impartially administered in the former, and would be exposed to the caprice of despotic Governors in the latter.

Under the circumstances here stated, the conduct of Barron Field, Esqre., becomes a real public grievance; for it appears by the memorial that he and George Crossley actually conspired together to ruin an individual, regularly appointed an Officer of the Court; and what motives could lead to such an anomalous
union as that of a Judge and a convicted felon, whose character I will not attempt to delineate, lest I should be hurried into that warmth of expression which I wish to avoid, it is not for me to determine; but no man possessing the least knowledge of the human heart will be at a loss to discover what might have been the motives.

His Honour the Judge visits Mr. Amos with the severest vengeance of the Law for the alledged offence of allowing George Crossley, a convict, to practice in his name, which (if it did take place) must necessarily have been under the responsibility of Mr. Amos, and yet the Judge afterwards admits the said George Crossley to practise in his own name.

The Judge seems to have thought that George Crossley was too great a rogue to be allowed to act as a subordinate under the control of a superior, but quite honest enough to act as a principal without any control whatever.

How the Judge will be able to reconcile these, as they appear to me, glaring contradictions, I am at a loss to imagine; and as a perseverance in such a line of conduct on the part of the colonial Judges may be prejudicial to the best interests of the country, by effectually diverting the stream of emigration from the British Colonies to the United States of America, and as I am perhaps the only private Individual who have received a copy of the memorial, I feel it to be my duty respectfully to inquire, whether His Majesty’s Government have received any report from the Honble. Commissioner Biggs on the subject. In the hope therefore of receiving the favour of an answer from Your Lordship.

I remain, &c.,

JNO. AMOS.

GOVERNOR MACQUARIE TO EARL BATHURST.

1st September, 1820.

[In this despatch, Governor Macquarie stated his reasons for delay in fulfilling Earl Bathurst’s instructions to annul the charter of the bank of N.S.W.; see page 347 et seq., volume X, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

1st September, 1820.

[This despatch discussed the civil status of emancipists; see page 351 et seq., volume X, series I.]

COMMISSION AND INSTRUCTIONS FOR SIR THOMAS BRISBANE.

3rd and 5th February, 1821.

[Copies of these two documents* will be found on page 589 et seq., volume X, series I.]

* Note 168.
1821.
20 July.

Reply to letter by H. Grey Bennett.

My Lord, Sydney, New South Wales, 20th July, 1821.

Certain mistatements with respect to my conduct on a
certain particular occasion towards the Revd. Samuel Marsden,
the principal Chaplain on our Colonial Establishment, having
appeared in the Appendix to the Public Letter* addressed to
your Lordship on the occasion of these Colonies under date of
1 June, 1820, are published by The Honble. H. Grey Bennett,
M.P., I have to pray Your Lordship's excuse for the Liberty,
which, a natural as fit Desire, I trust your Lordship will be
disposed to think of counteracting any possible Effect or Impres­
sion of such Misrepresentations, has urged me to take of placing
in your Lordship's hands the paper of Questions and Answers
enclosed, appertaining to the Circumstances alluded to in that
Revd. Gentleman's Letter as published.

The unaffectedly strong Surprise, I could not but feel when
it first occurred to me to have a sight of the Letter in question,
pressed as strongly upon me the necessity of losing no time in
taking the only means open to me of endeavouring to prove the
Incorrectness of the Statement there made as to the real occur­
rence; and the same day therefore, (though not before the pub­
lication, as I afterwards found, was known, and my object in
the reference perfectly perceived by the party, to whom it was
made), I sent my Clerk with the Queries ready prepared in my
own hand-writing, as in the authenticated Copy enclosed, to a
Mr. Oakes at Parramatta, who was chief Constable there at the
time of the Transaction, to which they refer, and who, although
the Gaoler, a prisoner of the Crown I believe, might have been
somewhere on the Spot, was alone, as far as my recollection can
carry me, privy to what actually took place on the occasion. As
I had always understood that Mr. Oakes had, for many years,
possessed himself of Mr. Marsden's good opinion, and indeed
in some way or other experienced much kindness at his hands,
I trust your Lordship will perceive that this course of Conduct
on my part exposed me to no little risk (as far indeed as the
Matter can allow of such a Term) as that, while the Queries,
thus without Communication of any kind proposed, are as bold
and particular in respect of the Circumstances involved in them,
as honourable motive and fair Purpose could possibly suggest
or require; the answers given bespeak a cautious and retiring
Apprehension on the part of the respondent, just keeping indeed
to the Truth, rather than the whole truth within his Knowledge.

As the Commissioner of Enquiry was absent at this time from
this place, I took an opportunity, on his return sometime after­
wards, of shewing to him the Statement, as enclosed to your

* Note 169.
Lordship; not at all presuming, as an Examination with regard to Mr. Marsden's resignation* as a Colonial Magistrate had then already previously taken place, that he would think proper to take the Trouble of making it (as he did, I am aware, though not of what transpired in consequence), a subject of any further subject of Enquiry. I must be free to confess, however, that as a Matter affecting my Character in a private, as well as a Public Sense, I should have considered myself and trust your Lordship will conceive me to have been warranted, in my knowledge of the parties and of the general principle and Bias of their conduct on party Questions, to take the most speedy and effectual Means of contradicting and subverting Calumny so industriously nurtured and for mere party views so publicly cast upon me. Thus only could I hope at least to find Protection from so public and foul a Scandal in quarters, where I was interested to preserve my good Name, and which the Commissioner's report might never, or at least so tardily and remotely reach, even if in the end, which I could not anticipate, he should have thought fit to let such a Subject find place.

I shall not suffer myself to occupy your Lordship's time upon so personal a Topic. I have already had the pain of negativing to the Commissioner of Enquiry the whole Tenor of Mr. Marsden's Statement, unfounded, as in truth it is, in all the personal Insinuations, with which it is replete, and obvious as the Spirit and Object, which could alone excite to their Indulgence or Expression. It would prove matter of Satisfaction indeed too, even if this had been the only Subject or occasion on which I had been imperiously called to refute aspersions and defend myself against secret Attacks of a Nature made, I regret to find cause for believing, under the Influence of a similar unworthy party Spirit and disingenuous want of Candour.

In the same public Letter amid other observations, made certainly in the writer's own Words under confession and Qualification "I do not know if my Information be correct, as I have only received as yet the report of one party," upon the subject of the Trial in the Criminal Court here upon the Information exhibited for a Libel† on Mr. Marsden in the Sydney Gazette, Mr. Bennet has been induced to take upon himself to state what was said by me at the time of declaring, as he expresses himself, "the Judgment of the Court" on that Case. Upon a statement thus deliberately and publicly made, under whatever sanction or weight may duly belong on such a subject to the parliamentary Information as public personal Authority of the writer, confessedly upon an exparte report, reflecting, in the spirit and tenor of the author's own terms and feeling, so seriously upon my

* Note 170.  † Note 171.
official Character as entitling me “practically to enjoy that confidence in my fairness and Impartiality which it is necessary I should possess for the furtherance of public Justice; with having given to the Revd. Prosecutor in that Case and others in his situation the consolation of knowing that the Law, as administered in England, is not my rule and Guide, as having a distinct Authority in New South Wales to exert it according to my own personal Discretion”: upon such a statement, My Lord, as to the Injustice and impropriety of which, at that time, against my Personal Judicial Character here, to which perhaps some regard upon the British Legal Principle might even by Mr. Bennet have been paid, although I will not permit myself to express any Impression or Opinion, I would feel persuaded of standing excused by your Lordships, in few words, tendering the explanation, that on the occasion alluded to, the Verdict only and not the Judgment, as it would be understood in application to the Practice in the English Courts, was declared in Court: and although the language imputed to me may possibly be correct in general Tenor of Expression (though not delivered I rather think in quite so summary a Manner), yet two small words, of no slight Import however in the particular juncture, are designedly, or accidentally I know not, though in fact I am most confident and may positively and deliberately affirm, omitted, which would have at once accounted at least, if not satisfied as to the reason that influenced me to adopt so cautious a line of observation upon and at that state of the Proceedings, I mean the words “AT PRESENT”; for I certainly well remember to have said in effect, “I do not think it proper to make any observations AT PRESENT on the Case”; for, considering as I did, and of which your Lordship will be more particularly aware from the matter of the examination taken on this subject by the Commissioner of Enquiry, that a Majority of the Members of the Court had found and imposed upon me to pronounce an erroneous Verdict upon the Evidence adduced in support of the Prosecution, and that there was, in fact, every probability that the Defendant’s Solicitor would therefore move the Court in Arrest of Judgment (rendered unnecessary afterwards in the waiver of Mr. Marsden as to any Sentence from the Court), I was impressed certainly that it was not only in common Justice to the Defendant, but as the most prudent and proper course, that could be adopted, not to make known, at that time at least on a case of such a kind and between such parties, my own private or legal opinion. To this point alone, however, I must have confined any other public remarks, as it has and had never been the practice of the Court to animadvert upon the

* Note 171.
Circumstances or Merits of the Case or conduct of the party, of which Mr. Bennet seems not to have been informed, until the Defendant was or should be on some future Day, after the Conviction, brought before the Court for Sentence: In conformity indeed with the Practice of the Courts at home in the like similar respective stages of the proceedings, under Criminal Informations, of Verdict and Judgment.

In this simple Explanation of facts, I will leave with your Lordship to determine whether "a strong party feeling, no less submitted to than real 'Ignorance' of the delicate Question to be canvassed, has not led a self created Tribunal, with all due deference to the discretion," on which the authoritative opinion has been so laboriously promulgated, "to take an erroneous view of the Case," as whether the Discretion on my part and on the occasion was "sound," or otherwise: for as to the term "legal" as adopted by the Honorable Writer, I really am unable in the place and mode of application to understand the force of the expression. Upon the Authority of such an Opinion, broached upon such facts, at such a time, under such circumstances of peculiar personal and relative situation, I may have just cause of little anxiety perhaps in leaving "the common sense of the English Public" even, much less your Lordship's liberality of Mind and Sentiment to determine, whether it has justly or unjustly, rashly or discreetly, from public or party Spirit and motive been asserted that my general practice, when "presiding at the head of the Criminal Court," has been influenced by "worldly" motives; whether it has been my habit, "because forsooth the Defendant was in Authority, had the power to injure and committed an Injury, to make no Comment on his conduct," and, whether in this Case, (however much of gross misrepresentation and misconception has taken place in certain Quarters, not unwillingly perhaps in all), or in any other, "Doctrines have been promulgated, that would have been thought strange in the Court of King's Bench in England," or that have not been "practically useful to the administration of public Justice" in these Colonies.

I have, &c.,

JNO. WYLDE,
Judge Adv., N.S.W.

[Enclosure marked A.]

Copy of a Letter from Mr. Samuel Marsden to Alexander Riley, Esqr., dated Sydney, May 19th, 1818.

"WHEN I came away I was resolved, as the Governor would not allow me to resign.* I would not give him an opportunity of refusing a second time. I therefore resolved the first insult I

*Note 170.
1521.
20 July.
Causes of resignation of Revd. S. Marsden as magistrate.

received, to act no longer. An opportunity soon occurred; The Judge Advocate came to Parramatta, visited our Gaol; we had some desperate fellows at that time in our Gaol gang. The fellows complained to the Judge of the Magistrates. I found the Judge more inclined to attend to their lies than he was to my statement of facts. As I told him all their characters and their crimes, I saw what his object was; viz., to court the good opinion of the vilest of men at the expence of the authority of the Magistrates. The Judge took down the names of all the men who applied to him; and, in a few days afterwards, an order came in the Governor's own writing, addressed to the Gaoler and constables, without any reference to the committing Magistrate to discharge all the Judge had recommended to the Governor.

"I wished you to know the truth of my being out of Office, as the Governor may allege some other reason at home, which may come to your knowledge. I was not going to have my authority destroyed as a Magistrate, either by the Judge or the Governor, or both together, to please them, and therefore resigned in a moment.

[Enclosure marked B.]

QUERIES SUBMITTED TO F. OAKES BY DEPUTY JUDGE-ADVOCATE WYLDE.

Q. Do you recollect the Judge Advocate visiting the Gaol at Parramatta when Mr. Marsden happened to be present in the early part of the year 1818? A. I do.

Q. Were you present during the whole time of his inspection of the Gaol and particularly of the Gaol Gang? A. I was.

Q. About what number of prisoners did the Gang consist of? A. I do not recollect the number, but it will appear by the Books of record in the Court or at the Gaol.

Q. Had many of them been so for long, any above 6 Months? A. I do not know.

Q. Were you near enough to hear all that was said by the Judge Advocate or Mr. Marsden to the Men in the Gang? A. I am.

Q. Did any of the Prisoners make Appeal on their respective Cases to the Judge Advocate? A. I do not recollect any particular Appeal to the Judge Advocate on that occasion. There was a conversation with Mr. Marsden and The Judge Advocate about the Prisoners.

Q. Did the Judge Advocate refer himself to Mr. Marsden upon these Cases, or did he seem rather to pay more attention to the Prisoners and their Complaints? A. The Judge Advocate referred himself to Mr. Marsden, and they had a conversation on the different Cases of the Prisoners. I do not recollect that the Judge Advocate paid any particular attention to the Prisoners, no further than hearing the case.

Q. Did the Judge Advocate signify his Intention or make any promise to any favorable Interference on his part in his particular Case: or did he on the contrary seem to convey to the Men his reliance upon the account shortly given by Mr. Marsden as to the nature of their Offences? A. I do not know that the Judge Advocate made any Promise to any Prisoner in the Gaol.
Q. Did the Judge Advocate take down the name of any one or more Prisoners for the purpose of recommendation or Interference? A. I do not recollect that the Judge Advocate took down any of the Prisoners' names at that time.

Q. Did the Judge Advocate seem to you to act upon the feeling of being satisfied with Mr. Marsden's report or of courting the good opinion of the Prisoners? A. There was nothing transpired, that could make me believe that the Judge Advocate was dissatisfied with the reports made by Mr. Marsden.

Q. Was any one present on the occasion but yourself? A. I am not aware that there was any one but the Keeper of the Gaol—James Cullen.

Q. Did you receive any Instructions from the Judge Advocate as to a return of the Prisoners? A. The Judge Advocate did request a return to be made, which was done and forwarded to him by myself.

Q. How soon afterwards did you send in such return? A. In two or three Days.

Q. Have you now the means of reference so as to furnish a Copy? A. I have not.

Q. Had you at the time of the Inspection, or have you ever had since any Communications whatever with or from the Judge Advocate as to the Inspection, etc., on the Day alluded to? A. The Judge Advocate never mentioned the Circumstances to me in his life.

I do hereby certify that the above mentioned fifteen Question have been clearly and distinctly read over to me and that the fifteen Answers written to them are true in matter of fact, As Witness my hand this 27th Day of December, 1820.

F. Oakes.

Parramatta.
A true Copy:—Jno. Wylde, Judge Adv., N.S.W.

DEPUTY JUDGE-ADVOCATE WYLDE TO EARL BATHURST.

My Lord, Sydney, New South Wales, 23 July, 1821.

Under the Impression, that the Commissioner of Enquiry into the State of these Colonies may possibly have made his report thereon to His Majesty's Government before the Communication, that I have, at his Instance, addressed and shall by the present Opportunity transmit to him on the subject of the Judicial Establishment at this place, shall have come into his hands, I have deemed it incumbent on me, in due Consideration to your Lordship, to furnish a duplicate Copy of the same, and of some other Letters to him on that Topic, which I have now the Honor of forwarding by His Majesty's Ship Coromandel, about immediately to sail hence for England direct.

I have, &c.,
Jno. Wylde, Judge Adv., N.S.W.
[Enclosure No. 1.]

DEPUTY JUDGE-ADVOCATE WYLDE TO MR. J. T. BIGGE.

Judge Adv.’s Office, Sydney,

Sir,

20th Decr., 1820.

I beg to take the Liberty of communicating to you the enclosed Letter addressed to me this morning by His Excellency The Governor, and, referring to its Tenor as to the necessity of so early a departure* on my part for Van Diemen’s Land, I beg to enquire whether under these circumstances I may be allowed to postpone the consideration of some of those several subjects, in which you have deemed it fit to call for my opinion or statements,* till the period of my return from the Circuit proposed, without any apprehension of your having already proceeded to England and of thus therefore appearing to have failed in that personal as well as official attention I am so justly disposed, I trust, you are perfectly satisfied, to pay to that Commission, under which the matters of enquiry have been suggested, I would persuade myself that you are already not unaware of the personal Engagement, which has in the Court of Criminal Jurisdiction and its collateral Duties so entirely absorbed the interval of time that has taken place, since I had the favor of the communication from you, which have been alluded to, while the few days that remain will I fear not allow me in some few necessary arrangements of a public, as well as of a private nature, but partially to effect what I am duly anxious entirely to accomplish. As I shall make return from Van Diemen’s Land as soon as the business of the Court will possibly allow me to take advantage of the first fit passage, I can have little hope of any opportunity of taking any other matters into consideration, while I would presume thus certainly to reckon upon my return by the end of February or very early in March. I beg only to add that I have no desire but to attend either Duty, which in your Judgment may seem to require on public Grounds my primary Consideration.

I have, &c.,

JNO. WYLDE, J.A.

A true Copy:—JNO. WYLDE, Judge Adv., N.S.W.

[Enclosure No. 2.]

MR. J. T. BIGGE TO DEPUTY JUDGE-ADVOCATE WYLDE.

Sir,

Sydney, 20 Decr., 1820.

I have the honor to acknowledge the receipt of your letter of this Date, enclosing one that has been addressed to you by Governor Macquarie, informing you of the Terms as well as Period of Departure of the Ship Caledonia for Van Diemen’s

* Note 172.
Land, and fixing the Latter on the 1st January of the next year, and I also have had reference to the consideration you have been pleased to give to the time that your late numerous and important occupations have prevented you from Devoting to the questions proposed to you in a letter* that I lately have had the honor of addressing to you, requesting your opinion and answer upon several points connected with the Improvements and alteration of the Criminal Judicature of the Colony. Altho' I should feel reluctant to terminate my enquiries on this point without the benefit that I am entitled to expect from your experience and judgment, yet I am so deeply Impressed with the Importance of the Duty that you have been called upon to perform and of proceeding to Van Diemen's Land without Delay in the execution of it, that I cannot hesitate to release you from all further consideration of the Demand that my Letter may have occasioned upon your Time and stay in this Part of the Territory; and I will content myself with expressing my hope that your occupations in Van Diemen's Land may neither be so urgent or so protracted, as to prevent from giving the Consideration that I am sure it is your wish to give to the matters, I have submitted to you, or myself from having the satisfaction of seeing you again in this Part of the Territory, previous to my Departure for England.

I have, &c.,

JOHN THOMAS BIGGE.

A true Copy:—JNO. WYLDE, Judge Adv., N.S.W.
answers required, you considered it fit, as you expressed yourself, not to hesitate as to releasing me from all further Consideration of your Letter on the subject for the time, contenting yourself with the hope of hearing from me while at Van Diemen’s Land or on my return hither previously to your Departure.

You are already aware, Sir, how immediately on my arrival in that Dependency the Court proceeded to Business. Its first Sittings were in fact concluded so as to have allowed, personally, of my Departure thence so early as the middle of February. At that time from accounts received there, you were understood already to have left for England and the Governor was expected in a few Days after the Dromedary had sailed from the Port to leave this place for those Settlements. To make report of the many Capital Convicts under the Sentence of the Criminal Court, it seemed proper under this Impression, as well as to obtain Precepts under the Governor’s Signature for the ensuing Sittings here of the Criminal and Governor’s Court, to await His Excellency’s arrival; had there even been immediate Accommodation as to a Ship and I had not, in regard of it, kept to the arrangement proposed as to returning at the same time with the Judge of the Supreme Court, where the local Sittings had hardly then commenced.

Under the Influence of these reasons, I was detained* at Hobart Town on account of the Indisposition of the Governor and the consequent Delay of his Departure hence from Day to Day, as well as indeed from a complication of various succeeding Incidents and Circumstances, with which it seems unnecessary to trouble you on this occasion from time to time to the 24th April following, when only the Governor made his so long expected arrival at that place.

The state of the Dependency at that time was such as to Bushrangers at large in different parts of the Country as to induce the Governor to urge upon me the Duty of proceeding to Launceston previously to my departure from the Settlement with a view of holding a Criminal Court on the Spot for several public Considerations; and, acceding on my part to a Measure deemed of so great Importance, the period of my actual Departure was so much extended from period to period as to allow me to make good my return hither with the Governor only yesterday by the Ship Caroline.

During the interval of my so long protracted residence in Van Diemen’s Land, it may reasonably be presumed, I cannot but anticipate, that I could not but have had full opportunity of realizing your Expectation, as to giving to the subject-matter referred to me such Consideration as would allow me to be fully

* Note 173.
prepared for the first opportunity, that might occur, of communicating with yourself in result; but, so natural an Expectation was in fact, I am sorry to say, in fact wholly defeated, most unwillingly on my part, in consequence of some Papers and Documents not being forwarded to me while there, which had been necessarily felt behind for a certain public Purpose connected with them; from the disappointment thus occasioned under a continual Impression here, as well as on my own part, of my immediate return from time to time, until I proceeded over to Launceston, I was unable to make references, which appeared necessary for answering on certain points of Enquiry, while on others all power of reference was lost to me as to Law Books of required Authority, and where in Aid of my purpose no set of the Statutes even was to be found.

Thus situated, I had no means of escaping from the Delay, which has to my regret occurred in the Performance of a Duty I should have been, equally in submission to your requisition, as in Interest of my Office in the Colony to have sooner accomplished. Although I can hardly venture to hope that the timely arrival of the Coromandel may yet anticipate disappointment of the Purposes altogether, which you may have had in View on the occasion, I have still been anxious to place within your knowledge the Circumstances I have thus in explanation taken the Liberty of submitting to you. I have, &c.,

JNO. WYLDE, J.A.

A true Copy:—JNO. WYLDE.

[Enclosure No. 4.]

DEPUTY JUDGE-ADVOCATE WYLDE TO MR. J. T. BIGGE.

Sir,

Sydney, New So. Wales, 16 July, 1821.

In adverting to your Letter,* dated 23d Novr. last, requiring my "deliberate and written Opinion upon the subject of the Charter of Justice, under which the present Courts are constituted, as upon certain points of a judicial nature, that have been brought under discussion, since my arrival in the Colony," I would incline to the persuasion, that I have already satisfied, in the reasons submitted to you in a distinct Communication, as to the unavoidable Causes of delay, which have prevented me, most unwillingly on my part, from sooner attending to so important a Call upon my attention and deliberation. I trust at least, as I confidently hope to have the power of forwarding this by the Coromandel, about to sail almost immediately, direct to England, it may arrive in time for any purposes you may have had in view with respect to the reference you have done me the honor to make to me on this occasion.

1821.
23 Julv.

Explantion of delay in submitting report.
Immediately directing my attention therefore to the subjects in question, I must confess, that in their Consideration I have been naturally drawn, in the first Instance, to have in comparative Observation the present State of the Colony and its Inhabitants with that, which prevailed, when the original Charter of Justice* was given, in order in some degree to ascertain, whether the Impression so naturally arising to my mind, at least upon the comparison, be well founded that the Judicial System, which could be adapted to this Colony in its first so peculiar formation, can be possibly found suitable to and equal to the exigencies of its present increased population and Interests. For surely, a priori, it may seem to be doubtful, whether the same System of summary and simple procedure in the administration of civil and Criminal Justice, the conduct of which was committed to the few civil and military Officers in 1789, who, in conjunction with a population of 900 Souls, were to witness and become interested alone in its operation, can be fitted to or supply the means of full and effective Justice to a population, increased to the number of 35,000 Souls in a period of 35 years, during which private property has been industriously acquired, commercial relations and Interests established, local and municipal regulations become necessary and obtained, and when the public colonial revenue has increased, in this Colony and its Dependencies, to the amount of £30,000 P. Annum.

In the first formation of the local Judicial Establishment at this place little more seemed necessary indeed, than to protect from personal outrage, violence and fraud, and to secure, from the influence of bad and dishonest principle, in respect of justly recovering Debts in a Court, of Arbitration almost "intended only," as remarked† by my immediate able and excellent Predecessor, "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."

A Court of Criminal Judicature to be composed of Military or Naval Officers (for no other Members could even if it had been an object of desire have been found) to proceed in the most summary way, and to exercise Jurisdiction upon the Spur of the occasion, seemed requisite for the Intimidation and due restraint of an Inhabitancy chiefly made up of convicted felons—little legal knowledge, or experience was, scarcely, required for the Direction of its decisions, while the Officer, who filled the only legal place at this species of military tribunal, as it

* Note 174.
† Marginal note.—Letter to Lord Bathurst 19th Octr., 1811, by J. A. Bent (see note 175).
appeared, was considered as equal to the Duties of almost like summary Jurisdiction, imposed upon the only judicial Member of the civil Court.

It cannot of course have escaped me, that his late Majesty was, in favor, pleased, after a lapse of 27 Years, to bestow upon the Colony a new Charter of Justice: but in looking into or for any new Modifications, there introduced, it will be obvious, that no material Change whatever as to the constitution, powers, functions and proceeding to Judgment in the Civil Courts was provided; while the Constitution of the Criminal Court, whose exercise of Jurisdiction must ever affect the first Interests of the Colony, remained entirely unaltered. As to the civil Jurisdiction indeed “in order to obviate the embarrassments arising from the number of causes,” as observed in the official letter† dated 23rd Novr., 1812, addressed to Governor Macquarie on the occasion of its transmission to the Colony for promulgation, “it was rendered expedient to divide the labor” between the two Courts then constituted for that purpose—and seemingly for that purpose only—altho’ one is rather at a loss, perhaps, to account for so simple and, in a legal Sense, jejune judicial System having been continued under the Impressions stated in that communication to have obtained; that “the Establishments in the Courts of Judicature, which were originally introduced, were perhaps as good as any, which could have been at that time recommended, but that the settlement appeared then to have outgrown them, while the Inconveniences, which possibly were at that time not very severely felt, were likely to increase and occasion serious embarrassments.” In the growing prosperity of the Colony, it may surely after the lapse of such a period of time and in a population of such extent be, at this time at least, naturally presumed, “that civil Causes may arise, involving property to a considerable amount, in many instances complicated in their nature and difficult in their bearings, as to the civil rights of the parties, and the questions, into which they must revolve themselves”; and that the decisions of the Courts established for so inferior a population and such comparative inconsiderable public Interest may be “too summary” and “not sufficiently conclusive,” “inapplicable in construction satisfactorily to discharge the Duties imposed” upon a fit administration of Justice—in so advanced a state of the public colonial property, Rights and Interests.

* Note 174. † Note 175. ‡ Marginal note.—Letter to Earl Bathurst from J. A. Bent 19th Octr., 1811 (see note 175). § Marginal note.—Letter to Govr. Macquarie 27th Novr., 1812 (see note 175).
1821.
23 July.

Necessity for change in charter due to altered conditions.

But even if it were considered unnecessary to revert to the first Design, Scope and subsequent fit alterations in, and of the legal Establishments here, or, within the limits of the enquiries intended for my consideration, to look backward beyond their operation and efficiency during the time of my own official Experience, I cannot but feel impressed that I should very imperfectly perform the Duty charged upon me, if in determining the question as to the necessity and propriety of any alterations or modifications in our Colonial legal Charter, I did not carry my view to the effect and changes, which the lapse of a certain limited number of years may, and must bring with them in influence upon the public state of the Colony in all its relations, Interests and resources, so, as justly to decide upon the adequacy of its provisions for the satisfactory Administration of its public Justice at least for an extended period of time in all its probable growth and Increase of Population, wealth, and enlargement of commercial Enterprize.

Entering, with such a view, into the subject of Investigation, and directing my opinions upon the bearings, thus brought upon it, the extent, in a very few years, of the Colonial Interests upon a comparative scale and ratio of advancement with the lapse of those, that are just gone by, as involved in and concluded by the legal Charter and its Establishments, become most seriously increased; and reasonably lead to the conclusion* "that the commercial dealings between this Colony and other parts of the World, particularly India, will be of very considerable Extent; cases of great legal Difficulty may be daily arising, and complex questions of account, involving large Masses of property form the frequent subjects of Deliberation of the Court of Civil Judicature."

In combination with those increasing Interests subject to the controul and Decision of the Colonial judicial Tribunal, whatever be the nature or mode of its administration and Jurisdiction, a professional refinement and subtlety of knowledge, advancing indeed pari passu in the practice and business of the Court, must be looked for; for as the best legal advice will necessarily be sought for and found upon questions of great risk in value and importance to the parties, legal practitionerers will become multiplied, in proportion to the enlarged Mass of the public and private concerns and transactions, which will be unavoidably thrown into all the various causes. "in every possible degree of complexity," of controversy and litigation. Neither to disappoint therefore "the expectations of the Government or the public, much less to defeat the ends of Justice,"

* Marginal note.—Letter to Earl Bathurst from J. A. Bent 19th Octr., 1811 (see note 175).
the Courts of Judicature should find in its Constitution those faculties, that may bestow, if not a more than, at least an equal strength in competition with any professional powers that may discuss and question its judicial Decisions, while to ensure such happy results as to the fit and impartial Administration of Justice, it is too trite almost to remark, that not only must those, who are appointed to sit in Judgment, be competent as to professional knowledge, but they must stand beyond suspicion of Influence, private Interest, or Dependency. In this, we well know, the constitution of the English Courts exhibits the happiest feature: the independency of the Judges, secure alike from corruption as from error, directs the Issues of determination, even upon questions of fact, and renders unalienable to the English people the benefits of the great Establishment in the System of Jury trial.

Under such considerations I have felt it incumbent upon me to examine the enquiry put to me, whether any inherent Defects appear in the present Constitution and Character of the Civil Colonial Courts—not recurring to immediate Instances only, in which such defects may have been actually found to have had operation but adverting to any deficiency, or the exercise of any possible power, in the nature, extent, or application of Jurisdiction, which may give rise to those mischievous consequences, ever to be found resulting from any imperfect or unsatisfactory Administration of colonial Civil Justice.

Upon this point I should do great Injustice to the disquisition if I did not avail myself of a reference to the very forcible objections, entertained by my Predecessor Mr. Judge Adve. Bent, as submitted to His Majesty's Government in his nervous and well digested Communication* in 1811 upon the scope and fit operation of the original Charter, unvaried in any essential Character, as already observed, in the new one, under which the present Courts of Judicature are constituted—and which I am persuaded will not pass unheeded at the present Crisis—satisfied in the mere reference as to the detail of the defects and Inconveniences there pointed out, weighty as they are, other additional inherent Causes of inaptitude and deficiency appear to me, yet cognizable in the instrument of judicial Jurisdiction, and of which I will generally, and, as concisely as may be, make mention. It is dissonant with those fixed Principles of arrangement, which regulate our public legal rights, and may be of doubtful expediency, in the first place, that it should remain at the pleasure of the Governor, when, where, and how often the Colonial Courts of Criminal, as well as Civil Jurisdiction shall be convened. It is obvious that such a power might be used—doubtless

* Note 175.
under an improper exercise (the comparative perfection of a judicial System however takes not upon trust the purity of those, to whom its Jurisdiction stands committed, but, as far as may be in human foresight and provision, labors to foreclose from the possibility of private motives or control); public Injury might thus at least be occasioned by an unseasonable or hasty convention of the Courts, in a suspension of proceedings, at any moment, in the criminal Court at least, and in the Civil Courts, by all the consequences, that might arise of a change of Members, appointed also at the Governor's pleasure, in cases in hearing and awaiting the Decision of the Courts of Civil Judicature. The time indeed has been, when this appointment by the Governor of the Members in all the Colonial Courts has been matter of actual public apprehension; while it is certain at least, that a most fearful power is thus vested in his authority, if any improper Influence were suffered to interfere in the nomination of the Members in the Criminal or Civil Courts, where life, liberty, property and character may be placed in Jeopardy. The Members of the Supreme Court as Magistrates exist at present, it is indisputable, but in the Governor's continued Approbation; while the Members of the Criminal Court, as Military Officers in every subordinate rank, and in actual Service within the Colony, are in point of fact particularly under his positive Command and in many ways subject, in a personal Sense, to its disposal: while Experience has shewn, that the performance of the peculiar Duty, unknown to the Military profession but in this Colony, and rendered without the least remuneration (naturally considered irksome and painful in its nature), has been found very inconveniently to interfere with the Garrison Duty of the place, an Inconvenience, which must be constantly increasing with the probably increasing number of commitments for the Criminal Court.

But if the legislature has, in its wisdom, humanely provided that life and liberty in the Mother Country shall be liable to be Sacrificed to public Justice only upon the unanimous Sentence of twelve competent Jurors, it may seem too of hard and severe Jurisdiction, that in our Courts the concurrent Judgment of four Members will doom to, and of five may execute on the Offender the utmost rigour of the law; while no legal Objections, that may arise in the mind of the Judge Advocate, may avail with the Court or the Governor to suspend the Sentence in the latter case, or, in cases of less severe Judgment, the suffering of the party, to whom, at least, any mitigation or reversal of them may come by the order of His Majesty in Council.

Another material feature, that has ever belonged to our public Courts at home, may be mentioned as wanting, in a right of Challenge to the Members in Array, or individually, for any
cause, in any, or either of the Colonial Courts; as the Court, if it entertained the objection, can do no more than, under the present constitution, submit it to the decision and pleasure of the Governor.

With respect to the Office of the Judge Advocate, while not omitting to allude to the observations of the late experienced Judge Advocate (Bent) on this head as to the nature and delicacy of his Duties in the Courts, it remains to be had in much more serious Consideration perhaps, that in his hands rest all the powers vested by the English Constitution in the Grand Jury at home; while it is to be determined, whether, if he should decline from whatever motive to exhibit the Charge to the Court, the Criminal Justice of the Country may so far become suspended for a period, that may allow of such redress, as may be obtainable from, and put in force by the Governor at home, indeed, in effect of any particular representation or remonstrance; a remedy, which such a necessary lapse of time will render comparatively weak perhaps, if not, in many Cases, that might be contemplated, totally inefficient. Such a power in a single Officer of the Crown, be his title what it may, his integrity however secure, his ability, however great, is of most jealous exercise, as anomalous to the Spirit and Genius of those English Constitutional principles, which give and regulate the rights of Accusation, as of free trial. The responsibility and invidiousness belonging to the exercise of such a power at least, every Officer, I should think, would seek personal relief from, as His Majesty's Government would be desirous of relieving, if any more constitutional System could be fitly carried into effect for the better protection of such important colonial Interests. In respect of the Duty imposed upon the Judge Advocate, as a Member of and in the Criminal Court, I cannot but conscientiously agree in opinion with my late highly-independent predecessor, that it is hardly possible for the Judge Advocate, on the probable bias of the preliminary steps of every prosecution, to free his mind from some degree of bias against the Innocence of the Prisoners; and that his opinion must necessarily have great weight with the other Members of the Court: while he has and ought perhaps to sit in Judgment in point of fact, almost alone, and in public opinion is presumed, although perhaps unjustly, in certain Cases, to do so, upon any legal objections, which may be taken to the Information exhibited to the Court, or in arrest of Judgment: unless indeed the Members decide against his Opinion, even upon questions of professional and technical Difficulty, of which their habits can have so little accustomed them to the consideration. It may be said

1821.
23 July.
and perhaps with reason that in such a Court Objections of such a nature should be little countenanced and rarely allowed; the Charter however forecloses them not, and, if made, the Determination, under such Influence as the opinion of the Judge Advocate, upon the charge exhibited by himself, may or not obtain with the members, must wholly rest with the Court as constituted, and the Court alone. In this respect too, The Judge Advocate, as the organ of the Court, may be placed in the difficult situation of pronouncing legal decisions contrary to his own Opinion, or relieving himself in that confession, so far in some degree weakening the Authority and Character of the Court in the public respect and confidence. Such an alternative has not been without occurrence certainly in my own experience.

One great Argument in favor of the present System has, as to Military Officers forming the Court, rested upon the independence of such Members, as to all personal local Interests in the Colony. Whatever force or advantage may be justly ascribed to this principle, considerable drawback seems to be found in certain important points of counteraction. The continual change of Members upon, to them, so novel and extraordinary Duty (for the only mode of trial, with which they can be expected to be conversant, must be, if at all, on Charges before Court Martial, differing in point of actual practice and of Principle so much in truth from that of all other Courts of Justice) necessarily makes, on many occasions, the business of the Court heavy in procedure and Dispatch, while their want of Interest in the Colony may, unavoidably in human feeling, create a comparative Indifference as to the commission of Offences, which may seriously affect the welfare of the Colonists. As the only qualification, required as a Member, is the being an Officer in His Majesty's Land, or Sea Service, the youngest Officer in Age, on mere casual Detachment Duty in the Colony, may be nominated, totally unacquainted with the character of the place or people—undue prejudice, either way, may, with the most honourable Disposition and Intentions, prevail: he must lose at least the advantage of that knowledge, as to the Character of the Witnesses produced on the trial, which to one, having had the power of longer acquaintance with the place, might lead to more just conclusions upon the Evidence. Whatever weight may be justly due to the principle, that prejudices and partiality, in the trial of right, may affect Jurors coming out of the immediate Neighbourhood, a total absence of local knowledge and parties may, on the other hand, render the administration of public Justice less perfect and effective, than our experience proves it to be, in the English Courts of Law, assisted by experienced
and, in a local or personal point of view, intelligent Jurors. With such Members at least I have ever found also a compassionate Bias towards the Prisoner, not only in respect of Judgment, but particularly of Sentence upon conviction. To, and in such a Court, while the decision of fact might be safely entrusted, it might be questionable, whether, with equal efficiency of just administration, should remain the whole Jurisdiction of penal punishment. Cases too may again, as they have indeed occurred, when the Court has been called to try their Brother Officers for felonies or Misdemeanors, and the occurrence, far from impossible, that the Officer in immediate Command of the Regiment may be brought in Judgment before the Court. The delicacy and painfulness of such a predicament of not only finding facts, but apportioning punishment, need not be discussed. It is immediately felt in all the force of deduction and consequent alienation of Mind.

It cannot be forgotten that particular Cases have occurred in various periods of the past history of the Criminal Court, when strong sensations have originated, and greatly disturbed the public feeling of the Colony, not only as to the appointment of the Members, but as to the Decisions of the Court itself. In this, I am led also to acknowledge, that I am not unaware of the opinion, in favor of the present System of Criminal Judicature, entertained by many as respectable as intelligent land proprietors and residents in the Colony; but whatever respect may be due to such impressions, in such a quarter, I must confess myself laboring rather under the apprehension, that such opinions are formed at too great a Distance from all idea of personal Hazard in such a Summary Jurisdiction even as to matter of comparatively slight criminal Charge; and as the operation of the Jurisdiction takes effect chiefly upon a class of culprits, so far removed from themselves, and from any Claim to especial Consideration, as to sanction, at once, the conclusion that any System however summary, and the more so, the more effective perhaps here, satisfies every claim, that can be raised by such Offenders in respect of Justice and fair trial. The trembling felon at the bar of the Court stands or falls however in its Jurisdiction, and although his opinion as to the fitness and justice of the System cannot be had in regard, yet, upon such questions, it is well to bring the subject home in visitation to our own particular cases. If in the irritability and infirmity of our Natures we should render ourselves liable to be called before such a tribunal on a Charge of having committed Murder, who would not feel that his fate, in England dependent on the concurrent Voices of 12 Jurors, here rested upon those of four
1821.
23 July.

Public opinion re constitution of criminal court.

Testimony in favour of military members of courts.

Summary of objections to constitution, practice and procedure of criminal court.

only as to Guilt, and of five only as to inevitable Execution (for the Governor cannot pardon or mitigate except on extraordinary occasions) of the utmost rigour of the law. Less serious consequences may result upon convictions on Charges of an inferior delinquency, but it cannot but be observed that, wherever a Case has occurred in the Court, since its establishment, involving the feelings and Interests of any of higher comparative rank or station in the Colony, strong manifestation of public feeling, and still more of jealous scrutiny and distrust, has attended or pursued the determination of the Court. Such an Observation will not appear invidious merely, or unfounded, if the recollection turn back to the Cases, specified in the Margin,* occurring at various periods, relating to Individuals of different Classes, and giving birth to public Impressions for and against the Judgments of the Court, now in favor of the conviction, and again, now of acquittal.

I cannot however suffer myself to pass from the Consideration of the inherent Defects, which appear to me in the present constitution of the Criminal Court without repeating here, what I have more than once publicly asserted in Court as my Opinion and belief, that, as far as honorable and incorrupt Intention to do public Equity and Justice may affect, no Members could, in a general Sense, be found more free from prejudice, partiality or Interest, than the Military Officers, who have so long assisted the Colonial Court and that the only drawback upon the efficiency of their highly useful public Services to the Colony arise in their personal and respective situation, compassionate feelings, professional habits and anomalous functions in awarding punishment, as Judges of the law as well as of fact.

Yet again, Sir, I cannot free myself from the force of the objections I have already submitted in prevalency with me as to the present constitution of the Criminal Court, which I beg leave to recapitulate, as existing in the complicated Duties of the Judge Advocate† “at once committing Magistrate, public prosecutor and Judge”; in the unavoidable “Bias of his opinion against the Innocence of the Prisoners, and its effect upon the other Members of the Court; in the analogy of the constitution of the Court to that of a Court Martial, and the public Impression that it is so; in free and respectable Inhabitants of the Colony being rendered amenable to a Jurisdiction, originally intended for the summary Investigation of the Crimes of

* Rex v. McArthur, Esqr.; Rex v. Gore; Rex v. Crossley; Rex v. Palmer; Rex v. O'Connor and McNaughton for Murder; Rex v. Drummond; Rex v. Sanderson; Rex v. Campbell, Esqr., on the prosn. of The Revd. S. Marsden; Rex v. Brand; Rex v. Edwardson (see note 176).

† Marginal note.—Letter to Earl Bathurst from J. A. Bent, 11th Octr., 1811 (see note 175).
Prisoners, and established at a time, when there were no others, but Military or Naval Officers, proper to be appointed to act as Members of a Court of Justice”; in the power of the Governor, at pleasure, to convene or dissolve the Sittings of the Court; in the Governor’s nomination of the Members, and the Influence, that might be exercised under such an Authority, especially of Officers under his immediate Military Command and personal Disposal, as to Duty; in the Irksomeness and tediousness of the attendance upon the Court to the members themselves, seriously interfering also with the performance of Garrison Duty, and still likely to be increased in operation, from the increasing business of the Court; in the power of four Members to convict, and of five to execute the utmost rigour of the law; and in Judgments of less severity to punish, without any means to the party of timely reversal of the Sentence, however illegal and unjust; in the want of a right of Challenge to the Members; in the unconstitutional possession by the Judge Advocate of those rights, which English Law has placed in the Grand Jury; in the absence of all timely, or speedy redress, in case of Injustice in him as public Prosecutor, and consequent suspension of the Colonial Criminal Justice; in the power of the Members to determine and sentence against the legal Opinion of the Judge, or of the Judge to decide upon the validity of objections taken against the Informations exhibited by himself; in the task upon the Judge Advocate, as the organ of the Court, to deliver Judgments of the Court against his own Opinion, or in its expression, to weaken the public respect and confidence in the Court; in the comparative Indifference, from want of personal Interest, or local knowledge, of Officers, as to the prevention of certain Offences of serious Mischief to the colonial weal; in the total ignorance of the Members to the character of the Witnesses produced and in the natural Influence of compassion towards Offenders in the minds of Officers on a temporary Duty; in the hazard of the Members being called not only to try, but punish their brother and superior Officers; and in the sensations of jealousy and distrust, with which the proceedings of the Court are visited, when any Individual of more than ordinary rank and station in the Community has been brought before the Court.

I am not unaware certainly, that many of the Defects pointed out might be without Difficulty removed, as that others might remain, more or less, in force, under any legal Establishment perhaps that could be given to the Colony; but in order to relieve at once from the most invidious pressure, that, at present, belongs to the constitution of the Criminal System, such views
1821.
23 July.
Proposal for constitution of grand jury:

and considerations, I will no longer restrain myself from avowing at once though I may find occasion again to recur more fully to this part of the subject, lead me to the sanguine and anxious Hope, that, "His Majesty in solicitude for the future prosperity and security of this Colony will lay claim to those sensations of grateful Acknowledgment," with the great bulk of the population, with which the constitution of a Grand Jury would be hailed: a Measure which, I have firmly persuaded myself, may without Difficulty, (abstractedly considered), be safely and beneficially adopted, and take effect throughout these Colonies.

In adverting too here to your enquiry, whether in case "His Majesty's Government should think fit to continue the same form of criminal Judicature, as now exists, I am aware of any Improvement of its Constitution, that would render the Court more efficient or more popular, I cannot but be impressed that both these ends would be in a degree advanced, if the Members of the Court were appointed in some such manner from the respectable Inhabitants of the Colony, as those of the Civil Courts, under the precept of the Governor, or especially of the Governor in Council; no new exercise of power would be created, but its direction only enlarged in respect of the classes, from which its Members would then be taken. I am not aware of any reasonable Objection, that could be raised indeed, not at present in equal force against the authority in exercise by the Governor, and I should not, in my knowledge of so many really respectable and conscientious residents in the Colony, deem it fitting to combat any, that would cast a stigma upon the moral Character or faithful Discharge, in such hands, of such a public and solemn Jurisdiction. No ground of just apprehension seems to arise as to Influence of that personal Interest or want of one Independence, which may be more justly suspected as likely to arise upon similar functions as Members of the Civil Court; while it is difficult to conceive the existence of any combined general feeling in toleration of felony or public Misdemeanor, or that individual partialities or prejudices can occasion serious effect upon the just administration of the general Jurisdiction, while, on the other hand, if the Interest were too strong the other way, and induced to severity of punishment, the power of the Governor to pardon, remit, or at least reprieve on extraordinary occasions, might be brought to operate in effectual counteraction.

A Court so formed, I can well perceive, would assimilate itself in a striking Degree to a Jury, having law as well as fact in their Jurisdiction; and the enquiry still remains therefore, whether the limited means, that the Colony appears even now to furnish for fit Jurors, as also whether the public Interests
of the Colony have arrived to such a state of Importance and advance, as to call for and allow of distinct Tribunals in the Court for the determination of the law and of the fact on the principles and practice of the English law.

I am at this juncture of the enquiry therefore urged summarily, in distinct consideration of the public criminal Jurisdiction alone, to express the opinion, that I would hope, if there be no other or further alteration in the Criminal Tribunal of the Colony, it will appear expedient to His Majesty's Government, that one Supreme Court of criminal, as of general legal Jurisdiction (for reasons about to be submitted) should be established in New South Wales, consisting of three or at least two Judges appointed under His Majesty's Sign Manual: any one or either of whom should preside judicially at every trial before the Court; that all questions of law should be determined by the Court, and of fact, by the Members appointed under the Precept of the Governor, as already suggested (if there be no Jury); and that the Sentence of punishment, upon conviction, should be awarded and remain wholly with, and in the discretion of the full judicial Court: That there be appointed a public Office, the Attorney General of the Colony, by whom, and in whose name, if there be no grand Jury of the place, all informations should be exhibited to the Court: that, in cases where he shall refuse, or decline without direction of the Court to exhibit, the party may apply to a single Judge, who at a private hearing shall determine, whether the Information shall be quashed or otherwise, but who shall not sit upon the trial of that particular Case; and that, in like manner, if any party shall feel himself aggrieved in respect of an Information filed, it may be competent to him to move for a private hearing, in like manner, before a single Judge, who shall make such order thereon, as shall seem fit, upon the Attorney General shewing Cause as to the Grounds and merits of the information filed against the party. Before I enter at length however into the reasons, which, in connection with other points of Jurisdiction belonging to the legal Establishment, influence me in submitting to your Consideration the propriety and advantage of a full judicial Court, I feel it imposed upon me to pursue the invidious task of pointing out in leading particulars, what appears to me defective in the present Charter of Justice in respect of the Jurisdiction committed to, and its administration in the Courts of Civil Judicature.

The Governor's Court, you are already aware Sir, consists of The Judge Advocate and two Members, who are appointed under the Precept of the Governor; a power of appointment, which evidently might, under an improper Influence, be tortured

1821.
23 July.
1821.
23 July.

Objections to constitution of governor’s court.

Proposal for deputy judge-advocate to form majority in decisions.

Objections to acting as members of court.

Reasons for comments on supreme court.

Inadequacy in constitution of supreme court.

so, as to become a public Grievance in respect of the civil Interests involved in the Jurisdiction of the Court, as its decisions remain with the Majority of the Members, and, in any Case therefore, the Matter of complaint may be determined, without appeal or redress, against and contrary to the opinion of the Judge Advocate, either as to the Merits or the law affecting them.

Under a presumption so violent however as to any abuse of the power given to the Governor and in Consideration of the Jurisdiction given to the Courts extending only to Cases, where “the Sum in dispute shall not exceed £50,” slight cause of comparative apprehension or objection may seem hence to arise; and although it may seem of doubtful expediency, that it should not have been provided as to the legal Member of the Court, in all Cases, forming one of the Majority with whom Judgment should remain, yet in a Court of such simple procedure, as I have considered it to be in its constitution, and most carefully, with a view to public Advantage, since I have filled my present Office in the Colony, have preserved it in its practice; passing by too, at present, the notice of a few defective provisions in the Charter as to the course of actual proceedings in the Cause, I will content myself with remarking upon the personal aversion to this Duty, which I have constantly found to prevail with the Members, on their appointment to the Court, and my persuasion, that it would prove matter of public satisfaction, if cases were up to so small amount summarily decided by the two, or still more by the three Judges alone.

With regard to the effective operation of the Jurisdiction committed to the Supreme Court, and any alteration, that may be found suggested in the course of its proceedings and Practice, I should certainly have felt disposed to have left the subject, beyond one or two general Comments perhaps, entirely to the report* of my Colleague, the Judge who presides in it, but for the duty imposed on the Judge Advocate by the Charter in the Court of Appeals, where he is called upon “to assist the Governor” as Judge in his Determinations, and where necessarily the proceedings of the Court below must come under particular Consideration.

With all due deference therefore to the experience and opinion of my Colleague, of which opinion I am not at all aware and whatever it may prove, I cannot conceal my Impression, that the present Constitution of the Court is not equal to the proper and satisfactory Administration of its Jurisdiction.

The course of its proceedings is not unknown to you, as entirely different from the simple and summary procedure in

Note 177.
the Governor’s Court and as partaking, as nearly as may be for the professional means of the Court, of those rules of practice and legal forms in pleading, which obtain in the King’s Courts at Westminster. As the same precise terms almost are used in the Charter for the actual constitution of both the civil Courts, and very little variation appears discernible in the mode of proceeding to Judgment before either, I am led to the Inference, that the present professional System of practice and procedure has been found necessary, and adopted to bring Causes, involving Questions of such Importance and value, (as certainly have and must come before that Tribunal for decision), with proper certainty, precision and solemnity, before the Court, while it is to be observed that, on the equity side of the Court, the Charter itself directs, that Justice be administered “in a summary manner according or as near as may be to the rules and proceedings of the High Court of Chancery in Great Britain.” In this however appears to me one of the main deficiencies in the constitution of the Court to carry into full Spirit and effect the object of its establishment, and thus to satisfy the ends of that civil Colonial Justice and Jurisdiction, which were intended to be committed to its charge.

The complexity and variety of legal technical proceedings, in their most simple state, ever affects an unprofessional mind with doubt and uncertainty; and where the Judgment of the Court rests entirely, as in Demurrers, upon the pleadings in the Cause, legal information and habits are, almost necessarily perhaps, requisite for, at least, proper decision. However, respectable for and in the Duty the Magistrates of the Colony, who alone you will have in perfect recollection are qualified to be appointed Members of this Court, may be in other respects, yet it would be deemed surely a mockery to bespeak them as qualified to sit as Judges in a Court, where a strictly professional practice prevailed, difficulties of a legal nature and construction would, and must continually arise, and where Questions upon the Tenor, Covenants, and Provisions of legal Deeds, Instruments and agreements, in all their variety as to the security, transfer and Gift of freehold and personal property, Debts, Mortgages, Contracts and other numerous Mercantile or personal Obligations (which must be necessarily drawn up in legal forms and context) must be determined, and resolve the titles of the parties, the Interests of the Suit, however Important, and the Distribution of the property at stake in the Judgment, however considerable. But if it be doubtful, whether the Members may be duly qualified in point of necessary legal knowledge for the administration of such a Jurisdiction, no little Delay at
least of Justice seems to arise in the effect of the power given to
the Members, as a Majority, in that Court, also to determine the
Case before the Court against the Opinion and without the con-
currence of the Judge; whose protest in every Case gives indeed
the party a power of Appeal to the Governor himself; while, if
the Judgment has passed upon technical grounds, arising upon
the pleadings only, one of two consequences must follow, either
that the Magistrates have left the Decision of the points to the
Judge alone, when the Charter intended to give the Benefit to
the Suitors of the Opinion, that might be entertained by three
Judges on the merits of each particular Cause; or that the Magis-
trates have made the Decree of the Court at variance with the
Opinion of the only legal Member, who seems best competent
justly to determine such a Matter in question.

It is true, that in the words of the Charter, “if either party
shall find himself aggrieved by any Judgment or Decree in any
Case whatever where the Judge of the said Court shall have
differed in Opinion with the Magistrates acting with him, or
where the Debt or Thing in demand shall exceed the value of
£300 he may appeal to the Governor,” a power, it may be just
observed by the way that, if the Supreme Court, under the
Direction of the Judge, has justly so long exercised the Jurisdic-
tion of giving Judgments in Cases for Sums of less amount than
£50, would give the party a right of appeal upon a Case, where
one farthing Damages only may have been awarded by the
Court, provided the Judge only protests against the Determina-
tion, which the Members may have thus made against his
opinion. But here in the appeal Court, I must candidly confess,
under a sense of Official Duty, that I find equal Difficulties as
to the Capacity of the Court for the Decision of such Questions
as may come in Appeal; and in respect of which the Observa-
tions, already submitted, in respect of the Members, may, with-
out any indelicacy or want of due respect, I trust, be thought
with much force to apply to the Judge of this Court, in whose
decision the whole Jurisdiction is vested. The Judge Advocate
has in the Court no judicial Voice—the assistance he is to render
is wholly undefined—the Governor may seek, or decline it, and
the Judge Advocate has no Discretion but to offer “assistance”
in the way only; and to the Degree it may be sought of him;
but at least whatever the opinion or decision of The Judge
Advocate might prove on the Case in Appeal, and whether it
was to be pronounced upon circumstantial Merits, legal Dis-

Objections to
governor sitting as
court of
appeal.
of legal and technical questions upon Deeds and special Instruments brought into the Suit between the parties (as the matter in appeal might happen to prove), the Judgment of the Governor alone, hitherto ever a Military or Naval Officer, has the disposal without Appeal of Property in Suit to the amount of £3,000.

If the Governor be therefore not of professional legal habits, one of two things seems necessarily to arise in the exercise of his Jurisdiction, either that he must give up his conscience to the opinion of the Judge Advocate, if the decision turns upon points entirely of legal refinement and Investigation (the Impression with himself perhaps at the same time, as to strict abstract Justice between the parties to the appeal, be against that Decision upon the law as affecting, unavoidably perhaps, the nature of the proceedings in the Court below); or that the Governor, acting upon the dictates of his Conscience only, is directed by all the lights he can bring to the points in conflict of consideration, may feel himself bound to decide against the opinion of the Judge Advocate, and, in this again, that of the Judge in the Supreme Court: thus rendering vain the legal opinions of the highest, if not the only legal authorities in the place, on all questions relating to property to the value of £3,000.

Above the Sum of £3,000 an Appeal to His Majesty in Council is given; but when Jurisdiction is given, without appeal, to so large a Court, where the local distance of the Court, to which appeals may be made in Cases of greater Value, produces so many civil consequences as to the rights of the parties and the Execution of the civil Administration of Justice, it would seem at least of happy provision, that the tribunal should be made not only just and honorable, but possessing as many other requisite Qualifications, as can be brought to render its Jurisdiction able, efficient and satisfactory.

It may be said perhaps that the Courts in His Majesty's other Colonies are generally of the same nature, and subject to a like line of observations; but although I am not particularly acquainted, whether more generally or otherwise the Governor determines alone or in Council, this is certain; that the Inconveniences of delay can no where be so severely felt, as by the Suitors here on account of the greater Distance, that separates this place, more than any other, from His Majesty's Court of Appeal in Council; while the Delay, necessarily thus occasioned, renders the Appeal itself a means of evading Justice in the Insufficiency of the Security taken, when the Appeal is lodged, and from natural Casualties likely to occur in so long an Interval, as that of twenty four Months; which is a fair average time, I should apprehend, as to the decision of Appeal Cases.
Appeals in suits involving government.

Necessity for elaboration of charter.

Jurisdiction of supreme court in Tasmania.

Members of supreme court.

Inadequacy of supreme court in Tasmania.
be considered, that any local Jurisdiction for all causes of Action would give to the Inhabitants a more advantageous and preferable legal System: an Impression, I must confess, that I personally feel the force and Justice of, especially if an Appeal in cases, above a certain Amount, were to be given to an efficient judicial Court at this place.

I am perfectly advised, that the Difficulty is within your personal knowledge that has occurred in the Court, as to the appointment of a Master in Chancery, so as to preclude any necessity for the Judge to take that Duty on himself, and thus save to the Suitors the benefit of his Judgment, which otherwise cannot of course be had, as well as of the Members, upon any report, that may be made by such an Officer of the Court; as also of the Court having in point of fact expressed an opinion, that it had no Jurisdiction in Qui-tam actions, where part of the fruits are to go to the King and to the Governor.

The only remaining Court in this part of the Territory to refer to is the Admiralty Jurisdiction, of which I hold a Commission, as Judge, from the High Court of Admiralty at home; under what Authority the Court itself has been established, I am not perfectly aware; The Governor has a Commission also as Vice Admiral, but as this Court has never attempted, of course, to act but as an Instance Court, it may be worthy of consideration, whether it would not be expedient and of great public advantage, from the increasing property of the Colonial Interests, that Admiralty Jurisdiction should be given to the Supreme Court at this place, as to the Courts in India.

I will detain you, Sir, on the subject of the present Charter only to remark, that, as there is no other legal Jurisdiction in force here but under its authority, (except what may be exercised under the Commission of the Governor to the local Magistrates) it would seem, under the terms of that Instrument, that the Courts or the Judges are without power to issue writs of Habeas Corpus—that there is no general power of appeal against any orders made on summary convictions of Magistrates, however doubtful the exercise of their Authority under the, or any particular legislative statute provisions—no immediate means of enforcing the maintenance of natural born children, or for that general exercise of summary control over Officers and others for misfeasance, or matters of contempt, which is generally reposed in a local Court of legal Jurisdiction.

In reference to the query† "whether I have experienced any and what Difficulty in applying the provisions of the Statute and common law of England to any description of Offences committed in this Colony, and the grounds upon which I have

* Note 179.  † Note 172.
hesitated so to apply them”; it does not seem incumbent on me, in this communication, to do more than unfold the principle, upon which certainly, as to several Statutes, I have not been able to free myself from the hesitation alluded to, and the Grounds may be explained in very few words. The Court of Criminal Jurisdiction under the terms of the Statute, 29 G. 3 ch. 2, is to be “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.”

By force of this enactment it is clear, as observed by His Majesty’s Attorney and Solicitor General in their communication* to Earl Bathurst upon a case of this nature referred to them, dated 29th August, 1818, that “all criminal laws, which were in force in the 27th year of the late King extend to New South Wales unless repealed” “Whatever question might arise whether a felony since the 27th G. 3 would become a felony in New South Wales.”

But the question still remains whether the commission of an Act in New South Wales must necessarily become triable, as a felony, before the colonial Court, because the same Act, committed in England, has been declared by Statute to be a capital felony. If the legislature has provided, previously to the 27th Year of His late Majesty, without confinement to the actual place of commission or any other local or peculiar restriction, any particular Offence to be a capital felony, then the Offender, committing a like Offence in this Territory, would be subject to the Jurisdiction of the Criminal Court here. It may explain, to adduce Instances of the Question, by reference to positive Statutes in point. The Stat. 12 Ann, Stat. 1 ch. 7, S. 1 enacts, that any person, who shall steal goods of the value of 40s. or more, being in a Dwelling House, although not actually broken, etc., shall be absolutely debarred of Clergy. Under the 27 of G. 3 the Court could clearly try, and capitally convict any person, who had been adjudged Guilty of stealing above the value of 40s. from a Dwelling House in the Territory. But if a charge was exhibited by the Judge Advocate here against a prisoner under the 43 G. 3, ch. 58 (and no statute provisions can be of more important and serious operation in the Colony) the Matter of difficulty arises; for it is enacted that, if “any person or persons shall either in England or Ireland wilfully and maliciously shoot at any of His Majesty’s Subjects, or present, point or level any kind of loaded fire-arms at any of His Majesty’s Subjects, etc., with intent to obstruct them, resist or

* Note 180.
passing by any question, that may arise, as to this enactment taking effect at a period subsequent to the Act giving criminal Jurisdiction to the Colonial Court here, it appears to me, that to shoot at or stab any of His Majesty's Subjects in New South Wales, or within the local Jurisdiction of our Court, cannot be adjudged a capital felony under this Act; for the Offence is not committed at the place, where only, if committed, it is declared a capital felony, such an Offence therefore here cannot be deemed and taken "according to the laws of this realm" to be a felony, to which, if committed at certain other particular specified places, the punishment of Death is affixed. In short such an offence committed in this Colony would not, upon conviction in the English Courts, render the party liable to suffer Death—it is a capital Crime in England and Ireland, but not in Scotland even, nor any where else.

There are several other Statutes to which reference might be made involving the like question but trusting that I have already made myself fully understood, at least as to my views and doubts on this subject, it may be unnecessary, on this occasion, to enter further into the Discussion.

In yielding, Sir, to your request as to furnishing you with the reasons upon which I am disposed to maintain, that the Supreme Court is precluded* from giving a Verdict under the Sum of £50 in Actions brought to recover a larger Amount, it has occurred to me, as more suitable and convenient to make this matter of enquiry, the subject of a distinct Communication, not only because its discussion would run into some length of legal argumentation, so little connected immediately with general views upon the fit and beneficial operation of our present Charter, which I have submitted to your consideration; but because also I cannot but entertain the hope, that the Establishments of our Civil Judicature will, in a short time, certainly become so far changed, as to put an end to that question of Jurisdiction, which I do conceive, however, has for the last three or four years, and continues to be so unduly exercised in that Court under the powers, created and intended only to be created by the Letters Patent in the erection here of the Civil Jurisdiction given to the Supreme Court: "to hear and determine all pleas concerning Lands, Tenements, Hereditaments and all manner of Interests therein, and all pleas of Debt, account, Contract, Trespasses and all manner of private pleas whatever except where the Cause of Action shall not exceed £50."

* Note 181.
Having now, Sir, committed to you the sentiments and general Impressions, which a consideration of the legal Charter, now in force here, gives rise to in my mind as to efficiency and fitness of the legal System it develops for the present effectual and satisfactory administration of criminal and Civil Justice in these Colonies, I have to proceed, in compliance with your request, to submit the modifications and Improvements in my apprehension, which, as a measure not only of present but of future operation for a certain indeterminate period of time, might not fitly and safely take effect in our Judicial Institutions; and which, thus rendered adequate to the wants of this place, would, I am induced to believe, fully satisfy all the ends of Justice, and, in this, the expectation and desire of His Majesty’s Government and the public.

With all due deference, I would propose then, that one Court of Judicature be established in this Colony, as a Court of record, to be called “The Supreme Court” to be composed of a Chief Justice and two puisne Judges, to be appointed by Commission under His Majesty’s Sign Manual; that such Court should have full power and authority to exercise and perform all Civil, Criminal, Admiralty, and Ecclesiastical Jurisdiction;* that such Court and the Judges thereof should have similar powers, privileges and precedence with the Judges of the Court of King’s Bench in England; that they should be empowered to form and establish such rules of practice and such rules for the process of the Court, 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, which by the Charter of Justice shall, or may be granted and committed to the Court; to appoint proper Officers and Clerks, with such reasonable Salaries, as shall be approved of by the Governor; to “fix their and other fees, subject to the consent, approbation, alteration and amendment of His Majesty in Council, or of the Governor; that the Court should have a general Control over the Jurisdiction exercised by the Magistrates and any orders, they may make as such; that it should be a Court of Equity and also have the granting of probates of wills and letters of Administration; that sitting as a Court of Civil Judicature, the decision of the Majority should be final; 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 His Majesty in Council; That the puisne Judges should, one or other indifferently, as the Case

* Marginal note.—Letter addressed to Earl Bathurst by Judge Adv. Bent, Esqr., late Judge of the Supreme Court of N. So. in the year 1815. (See note 175.)
might arise, act as Master and Examiner on the Equity side of the Court, and make report to the other Judges of the Court, who shall make such final decree or order thereon, as may seem fit."

I would propose also, that there should be a Court established in the Colony for the recovery of all sums not exceeding £10; to consist of any one of the Judges of the Supreme Court and two Magistrates, and of two fit and proper Inhabitants in common, to be appointed from time to time by the Governor for the trial in a Summary way, at monthly Sittings, at such place, within the Territory, as from time to time may be appointed by the Supreme Court, of all personal pleas, not exceeding that amount; from the Judgments of which Court there should be power of Appeal, by summary motion, to the Supreme Court.

If the establishment of a Court with three Judges should be, on any account or reason, considered too extensive for the Colony and its Interests (an Impression, in the sincerity of my official concern for the welfare of the Colony, I should very earnestly deprecate and regret), I would propose, that the Supreme Court should consist of a Chief Justice and one puisne Judge, as in the Supreme Court at Ceylon; and that, when sitting, as a Court of Civil Judicature, it should consist of the two Judges and the Officer, who may be appointed to act in the Court as Master in Chancery.

It should be, I consider, provided as not competent for the Court to entertain and exercise Jurisdiction in any Suit, Action or Criminal Information (except for treason or felony) against the Governor, Lieutenant Governor, the King's Judges, or any of the Council (if such should hereafter be) for or on account of any Act or order done in their public capacity. That all fees received, under the Jurisdiction of the legal Charter, should go to the Colonial Revenue, and that the Court should have the power to issue precept to the Officers, Clerks and Ministers of the Court to make return, on oath, of the fees received: That the Chief Justice and Judges should take no fees of office or perquisites of any kind; that such yearly salaries, as shall be affixed to their respective Appointments, shall become payable to the Judges, in lieu of all former advantages or emoluments whatsoever; That the Court shall be directed to be bound by, and to regulate their Decisions by such rules and Ordinances, as shall from time to time be made and put in force throughout the Territory by the Governor, or Governor in Council, as the Case may be; that, if the Office of the Chief Justice become vacant, by Death or otherwise, the senior puisne, if there be two, or the puisne Judge shall succeed to his Office, and the Governor shall appoint any fit person, in his opinion, to act as a puisne Judge,
and to have a general Power of filling any Judicial Vacancy, until His Majesty's pleasure be known; and that the Supreme Court, as that of Ceylon, have power to determine, in all Cases, unprovided for by the legal Charter, touching the Administration of local public Justice.

The Supreme Court should be directed, I presume, to hold four terms or sittings in the year, of not less than 28 Days each; and as the establishment of a petty Sessions here would be attended with great public Advantage, I conceive, as to prompt and summary punishment of offences, and in relief of the business and Duties to be attached to the Supreme Court in its Criminal Jurisdiction, it would prove a highly salutary public measure, that one of the Judges of the Court should also preside at four quarterly petty-Sessions to be established and assembled, in such parts of the Colony, as from time to time may be appointed by the Court, for the trial of petty Offences and Misdemeanors, upon the Information of and to be exhibited by an Officer, to be appointed His Majesty's Attorney General of and for the Territory, by such Judge and not less than four Magistrates in Association.

I have already, Sir, taken the liberty of suggesting my opinion, as to the total inadequacy, in effective operation, of the present charter, as to the extension of the Jurisdiction of the Supreme Court to the Settlements in Van Diemen's Land, and venture therefore to propose, that there should be established at this place an entirely independent civil legal Jurisdiction, except as to power of Appeal, in certain Cases or involving in a certain fixed Amount, to the Supreme Court of New South Wales. This advantage arising in so ready and speedy a mode of Appeal to such a Court, as the exercise of its Jurisdiction by three independent Judges would certainly, I should trust, render the Court proposed to be erected here, seems to sanction the recommendation of no very complex Judicature for the administration of the immediate local Civil Justice throughout that Dependency. The Civil Interests of the place, as of the Inhabitants, would, I am impressed, be perfectly protected and satisfied in a Court of Civil Judicature to have some such appellation as "The Court of Civil Jurisdiction in Van Diemen's Land" and to consist of a Judge to be appointed by a Commission under His Majesty's Sign Manual and of two Magistrates, or of two fit and proper Persons residing within the Settlements, in common; and in Cases, brought for the recovery of, or where the subject matter of the Suit should exceed the value of £100 of four magistrates or fit and proper Inhabitants in common, whose decisions should be regulated by
and pronounced as to the Major part of the Members, composing the Court, should seem meet; with a power of appeal to the Supreme Court, where the Court below shall have awarded in Judgment, or where the subject Matter of the Suit shall exceed the Sum or Value of £200, and in all Cases, where the Judge shall have protested in Writing, upon record, against the Determination of the Court. An Appeal to His Majesty in Council also to be reserved, as to Cases involving amounts above £3,000.

It remains to me, Sir, I have much in mind to fill up the outline of the Judicial System proposed as to proper administration in these Colonies, of the Criminal Jurisdiction—and I am fully conscious of the Difficulty imposed in the advocacy of that measure, from which, in due regard to the official, as well as personal Interest I cannot but have in the general Welfare of the Settlement and the satisfactory Constitution of its courts of Public Justice, I cannot suffer myself nevertheless to retire. I allude to the adoption in part, and under peculiar Modifications of the principle and System of Trial by Jury. I would premise that, but for the certain persuasion of the great and, in a very few years, the very great Increase in the Colonial population and in the number consequently of fit and proper free Jurors, (within the short space even of two years, much less of the next ensuing years), so as to dispel all doubt from my mind as to the sufficiency of means for the full and easy operation of that System, I should have still felt more apprehension in presuming to give recommendation to the erection, at the present time, of any such Establishment at this place; considering this result however as sure, and impressed that any Alteration by His Majesty's Government in the legal Colonial System will necessarily remain in force and effect here for a certain number of years to come, and more especially being still of determinate opinion, "That the constitution of a Grand Jury in New South Wales would be very practicable," I am urged to communicate the method, by which the advantages so anxiously sought, and so universally allowed to that mode of trial may, I think, be safely bestowed, and the Jurisdiction exercised by fit and proper Jurors, as petty Juries, without giving Colour or weight to the doubts, which you justly remind me in suggesting the Enquiry "may reasonably be entertained of the success of any project, that would involve a Departure from the principles and practice of the English Law."

If however I should not be so fortunate as to convince of the justness and validity of the Views and opinion I have been brought to entertain, and it shall be considered still premature to sanction the Introduction of that great constitutional System,
even as to the Jurisdiction of a Grand Jury, much more of petty Juries, (whose benefits His Majesty’s Government would take the earliest fit opportunity, we are assured, of imparting to British Subjects resident in a Colony, so distant from the Mother Country); even in that Case, I still would trust, that it may seem expedient to erect and establish the Supreme Court as proposed, and to be provided in the Charter of Justice, that the Court of Criminal Jurisdiction should consist of any one of the Judges of that Court, together with eight fit and proper persons, residing in the Territory and appointed from time to time by the Governor; that Charges in writing against Offenders should be exhibited by His Majesty’s Attorney General of the Territory, subject to the application thereon, already suggested, to any Judge of the Court, and that the Verdict of “Guilty” or “Not Guilty,” after trial on those charges, shall abide the unanimous opinion of the persons composing the Court: but that the Sentence, in every case of conviction whether of capital punishment or of punishment not extending to life or limb, should be, and be determined and pronounced by and as to the Judges of the Supreme Court shall seem meet.

Reverting then, Sir, to the Consideration urged upon me to be kept in view, as involved in the formation and function of a Grand Jury at this place, and having with due attention weighed them in their various bearings and effect upon the Question, I must confess myself still to entertain the belief that if not less than fifteen of the persons in the list, now furnished at your instance (By English law twelve, we know, need only be positively sworn on the Duty in which case all must agree, however, to find the Bill), be deemed a sufficient number for appointment by the Governor, or Governor in Council (if any), as a Grand Jury for the then ensuing Sittings of Criminal Jurisdiction, that no such cause of public or private Dissatisfaction in feeling, or any detriment of Interest can or will arise, as to render the adoption of the measure, in a public or private point of view, inexpedient or disadvantageous, with respect to any Impression with the committing Magistrate on particular Cases before the Grand Jury, on which they may serve, in as much as the number appointed might always be more than twelve, while that number only need find a “true Bill”; all objection would be removed by those particular Magistrates not joining in the return made on those particular cases; even if it be doubtful, whether such Magistrates, from their acquaintance with the Case and the Offenders, may not, in truth, under the Sanction of an Oath, be the better qualified for the just performance of the Duty imposed on a Grand Jury.
The appointment of Grand Juries might be placed under the control of the Governor, or of the Supreme Court, as may seem most expedient, while the functions, I am persuaded, would be undertaken with alacrity, as satisfactorily performed with proper Justice.

Adverting to the returns* made to you by the Magistrates of free persons, residing on their own Estates, with which you have done me the favor to furnish me, I would beg leave to call to mind, that the qualifications of persons for serving on petty Juries has been regulated, in English Law, by several Changes of principle as to personal Qualification in property: that at the present day, at Westminster and in the City of London, in point of practice, although by Statute it is required that such persons should have personal Estates at least to the Value of £100, every householder is in turn called to the Jury Box of the Courts.

Upon such a qualification here alone being required, I need not but mention, how much the return of qualified Jurors would be increased, and still again the materials afforded in increasing ratio, from time to time furnishing ample supplies, I should conceive, for constituting and changing the panels returned for the Sittings of the Court. To judge of the surprizing rapidity, with which the numbers of free persons will probably increase in the next immediate years, it is but necessary to look back upon those immediately past, as also to have in recollection, that the numerous Sons of the first Settlers and residents in this Country are just bursting into independent personal Settlement in life and character: facts, so much more perfectly, Sir, within your more intimate knowledge and calculation, that it behoves me to leave them in their effect to their proper and more adequate conclusions in your own mind. While however upon these considerations I find no difficulty as to the Materials afforded in numbers, I cannot be insensible of the peculiar general Character of our Colonial population; and under the Influence, thus brought to the subject, I should not feel myself justified in at once recommending an admission to the full and unshackled operation here of the System of Jury Trial, as in the Mother Country.

Keeping in due regard and view therefore the principles of the English Law in the Jurisdiction given by various acts of Parliament† over the returns, service, qualifications and relief of Jurors, I trust, it will not justly appear as much out of the line of procedure thus marked out to suggest, that in the first

---

* Note 182.
† Marginal note.—3 Hen. 8 ch. 12. 7 and 8 W. 3 ch. 32. 3 and 4 Ann ch. 15.
Instance the lists of the names of persons qualified to serve on Juries (to be taken in such a way, as may be considered effectual and expedient) should be left in the Judgment and Discretion of the Governor, or the Governor in Council, (if any), and the Supreme Court in conjunction, by whose order a Book should be prepared with entry of Jurors deemed qualified, to be kept by the Clerk of the Peace, much in the manner as Persons considered qualified for Special Juries* in England are entered in the freeholders' Book: That it should be competent to the Supreme Court, previously to the several quarterly Sittings of the Criminal Court to issue their Precept to the Provost Marshal of the Territory, or other proper Officer, to summon such number of persons from amongst those, whose names are entered in the Juror Book of the Colony, as shall be considered sufficient for the business and trials of the ensuing Court; and that the Officer make return, at least eight days before the Session of the Court, in a list containing their Christian and Surnames, additions and places of abode: the list so made to be publicly hung up in the Office of the Clerk of the Peace; and “the persons so named and afterwards duly summoned, or a competent number of them, as the Judge or Judges” of the Supreme Court respectively shall direct,† and no other, shall be named “in every Panel” returned for the Trial of Cases in such Sessions respectively.

The Lists of Jurors (to be increased from time to time in respect of Members as, to the Governor and the Supreme Court, may seem requisite) should remain for some definite period from the Date of the legal Charter, or until the System shall be ordered to take effect in all its parts and operation, as in the Mother Country, entirely under the control of the Supreme Court which shall be empowered,‡ as the Quarter Sessions in England, to order, in discretion, any name or names to be struck out of the lists, and such person, whose name has been erased, shall be deemed without qualification to serve as a Juror.

The attendance of Jurors summoned may be enforced or dispensed with; the amendment of the panels, in any respect, at the time of the Sessions, and the formation of the Jury on trial may, without difficulty, I conceive, be regulated, almost identically in the same manner, as in the English Courts.

With respect to the degree of Service to be required of each particular Juror, I am led to consider that the lists, thus to be made and furnished, would afford even in the first year such a Number, as to render it unnecessary to summon any particular Juror for Service above once in that year, and not even then

* Marginal note.—3 G. 2 ch. 25. 6 G. 3 ch. 37.
† Marginal note.—3 Hen. S c. 12. 7 and 8—3 ch. 32. 3 G. 2 ch. 25 S. 10 q. 11.
‡ Marginal note.—3 Hen. 3 G. 2 ch. 25. S. 102.
for the whole period of the Session; while the Supreme Court might be charged to make such regulations and orders of practice and proceeding in this particular, as may be considered fit and necessary “for preventing abuses.”

The question, I am sensible, will still remain, whether such a System in operation may not occasion Injury to the Colonial Interests by withdrawing the Jurors from their own private concerns in necessary attendance upon the Courts: and this consideration will be so much more clearly open to the greater knowledge in your present intimate acquaintance, Sir, with the Means, on which that question will be dependent, that I will refer only to the public colonial Petition,* which has been laid at the foot of the Throne, for the allowance and establishment of the System by those, who will have to bear the burden of its operation, which, however I cannot hesitate to believe, will, in the increased number of Jurors, be soon as little, or less perhaps felt, in private inconvenience or loss, than in many of the English Counties. But if any doubt be justly entertained as to sufficiency of numbers for the formation, on the panels returned, of full Jurors as in England, it is not departing from the principle of its law, which in many Instances has varied the formation of Juries to competent number, to permit and sanction, in the Colonial Courts, a Jury of less number than twelve; and the advantages of the System would, in effect, be given to the Colony, if eight Jurors be deemed and become a competent Jury.

Such a number, when compared with the present Court of Criminal Jurisdiction, in which so few as four Members control and determine the Verdict, will at least not tend to diminish the public Security, I should presume, as to fair Trial in the Courts.

It has not occurred to me that any impediment under the modifications proposed would arise as to the exercise of the right of Challenge, except as to qualification, in determining on all such matter of objection according to and in conformity with the principles obtaining in the English Courts.

I have thus endeavoured, Sir, however imperfectly perhaps, to pursue the System in all its parts and general mode of operation which, at your Behest, without becoming justly obnoxious, I trust, to a charge of temerity or inconsiderateness I would submit to your Consideration and Judgment, while, if the System of Jury trial, under such, or any modification be suffered to become established here, it would seem that in Civil Cases also “where the points in dispute could be reduced to one or more plain issues of fact,” it might be made competent to the Supreme

* Note 183.
Court to order a Jury to be struck in the cause in the same manner of proceeding, as upon a Special Jury Panel in the English Courts.

In providing for the administration of Criminal Jurisdiction in Van Diemen's Land, it seems in place here to propose, that, as a measure of vital Interest and Importance to the due Security and legal Protection of His Majesty's Subjects in that Settlement, a distinct separate Court should be established within the Settlement; where, from the great number of free persons,* in comparison of population with this Colony, the Difficulty as to trial by Jury seems indeed diminished; and where, I apprehend, Grand and Petty Juries might with facility be formed and called in Action; while, from the less Degree of Duty probably arising from the Court, the performance would be, in a private Sense, less burthensome, and in public feeling, equally grateful, as in this Colony.

If the Jury System be put in force there, the verdict on Trial, I presume, would remain with the Jury, and the Sentence, on conviction, with the Judge, who, if any doubt arise upon any legal objection taken upon the Case, might refer himself to the Judges of the Supreme Court. If on the contrary the System be not admitted, or if it be considered unfit to leave with the Judge of the Court the power of adjudication, in all Cases, as to the Sentence, the Court might consist of the Judge and eight fit and proper persons of the place appointed under the precept of the Lieutenant Governor for the time being: and if no Grand Jury exist, the Charges might be exhibited to the Court by an Officer of the Crown, appointed by His Majesty's Government for such Duty.

The establishment in these Colonies of such a Judicial System could not but lead to promote and secure the best colonial Interests in the public and private Confidence, that assuredly, I cannot but flatter myself, would thus be engendered, not only within the Territory, but in Influence upon that spirit of emigration, which has of late been so strongly directed towards the Colony; while I am not at all aware of any such additional Expense in carrying it into effect, as would at all become matter of serious question with His Majesty's Government in anxiety for the prosperity and advancement of the colonial Interests. The fees arising upon civil process would go to the local revenue and make up, in a great Degree for the Salaries of the Judges; while the Service of the puisne Judges, instead of other Officers otherwise necessarily to be especially appointed as Masters in Chancery and as Commissioners in the summary Court of requests, would extend in part satisfaction of the additional

* Note 184.
Expense of Salary to the third Judge of the Court. Various as important are the Duties, I propose, to be administered by the Supreme Court, and while its Constitution would give effect and security to its Judgments and administration, as a British Court of Justice; its strength in combination would, on the one hand, uphold the powers of the local Government against licentiousness and insubordinacy on the part of the people, and on the other hand place before the people the strongest shield of the British Constitution against any Act of Oppression or injustice upon their rights and liberties by the Government.

One other topic of Enquiry at your hands, Sir, alone remains, a topic, however, involving in its Discussion, and still more final Determination, no slight sensation and Influence here, as affecting the Interest of no less a portion of the Colonial Community, than Individuals. I shall be doubtless anticipated, as referring to the restoration of general civil rights, and herein, of qualification to sit on Juries, to those, who, under Criminal convictions, have at one wholly forfeited that valued and envied privilege of the British Freeman. After the publicity and consideration, in a legal point of view, given to the effect of the Governor's remission of the term of Transportation in the case of Bullock (v) Dodd (the full report of which in the Court-Books renders it wholly unnecessary to do more than refer to it on every point connected with the subject in question), the real state of civil condition, in which so many here stand, could no longer be concealed or misunderstood; and the result struck as painfully, as unexpectedly, I certainly believe, on the whole class, whom the decision affects; while it is certain too, whatever relief or advantage to them may arise from the insertion of the names of any, to whom that remission has been given, in any future general Pardon under the Great Seal, the King's Pardon will not remedy the Defect, as to incompetency of sitting as a Juryman, "which the operation of Justice has created." This principle has so long been allowed to have prevalency in the British Judicature, that it would sound of professional presumption almost to call its Justice or propriety into question. The object at least, in terrorem criminis, cannot be mistaken or undervalued, as deterring from the Commission of infamous Offences on pain of forfeiting every Civil Capacity. But for this indeed, it might seem of rather strange and hard Decision, that the King's pardon should render the pardoned a competent Witness in Courts of Justice, where his testimony on Oath may affect the life, or ever so deeply the civil Interests of the party before the Court, but yet that he should remain excluded from the Jury-Box of the Court, where his Judgment would be
Problem of civil rights of emancipists and expirees.

1821.
23 July.

The restoration however is nowhere to be found, we know, but in the civil omnipotency of Parliament. In its wisdom and favor alone can be obtained the Act of Grace, which it appears will be humbly sought for this place.

In aid of such a plea as locally and personally confined, many considerations will not fail to arise and influence, that might not operate, or be allowed to have weight on the general question of change or modification in the legal principle of excluding those once convicted of infamous crimes from the Jury Box in the English Courts of Judicature; and, while there it might seem possibly unwise, impolitic and dangerous to loosen, in any the least degree, the Check and restraint thus imposed on the Commission of Crime, the relaxation here to certain particular Individuals in that condition, under an Act of Grace, might, at this period and state of the Colony, seem perhaps of less mischievous consequence and apprehension, as admitting to the Jury in the legal Courts only of the Colony where the Cases of Peers, or others similarly situated, would from time to time so continually be discussed and determined, in the general subject matter of whose business and administration they have ever been more or less so much interested, and in which, ever since their Establishment, they have been suffered, in like manner and in common with the Free, to appear as Suitors, as well as Defendants.

From this land of royal mercy, as it may be designated, whose Settlements were first formed at least in gracious View of those becoming useful Members of Society by reform and Improvement, who had, in violating its Interests, brought upon themselves the Sentence of Transportation in all its original rigour and severity of labor, and privations personal and general, however wholesome in the object or salutary in effect; and where after expiration or remission of the Term the Governor in Chief is instructed by His Majesty’s Principal Secretary of State to grant portions of land, as to the means of cultivating which, he was also to furnish assistance, as again to be at liberty to enlarge afterwards such Grants to “well deserving Individuals” of that particular description; where they have been allowed
and encouraged, for so long a period, to acquire Property of every kind so considerable, after endurance of those privations—never to occur again—which the first Establishment of the Settlements so peculiarly, it may be justly perhaps again remarked, imposed; to the public prosperity of which they have, it must be acknowledged, so much conduced, as to the advantage in common also of the free population, and in this, to have advanced, in a degree, the Interests of the State in the advancement and prosperity of these Colonies as a possession of the Crown, "its Improvement in Wealth and the means of properly reforming the Convicts being essential to the progress of each other,"* where the principle of a Governor, who has had so long and so faithfully at heart the public Colonial Interests committed to him, has been so long back in 1812 approved with satisfaction and sanctioned by a Committee of the British Parliament* anxious to express their opinion in concurrence with him, "that long tried good conduct should lead a Man back to that rank, in Society, which he had forfeited, and do away as far, as the Case will admit, all retrospect of former bad conduct, as appearing to them, as to the Governor the greatest Inducement, that can be held out towards the reformation of the manners of the Inhabitants and as warranting the presumption that, when the liberal views of the then present Governor (Major General Macquarie) shall have had time to operate, the best effects were to be expected"; where association with the free part of the Community in every possible social link of natural and circumstantial connection, and community of Interest, public and private, has softened down, in so extensive a degree, the Distinctions of, as well as the feeling as to civil rank and conditions. In such a land as this, where the Royal Prerogative, as the rainbow of constitutional Mercy, has so long shone in happy and genial Effulgency, such a Cause and Prayer, may it not justly be expostulated? might haply find hearing and regard, if the Grace sought reflected not on the purity of the English Judicature, and more especially affected not, in serious degree, at all the rights and Interests of His Majesty's free Subjects in the Colony.

I have been not irreverently, I trust it will appear, led to these observations, Sir, by your enquiry† "whether my experience has confirmed me in the belief, entertained by my Predecessor Mr. Ellis Bent, that the distance between the convicted and unconvicted portions of the Community in this Colony are sufficiently done away to admit of the impartial consideration by a Jury,

---

* Marginal note.—report of the Committee of 1812 (see note 185). † Note 172.
Civil rights to be restored by act of grace.

Probable influence of jurors from emancipist and expiree classes.

1821.
23 July.

The impression with me thus far will have been obvious, I should presume, that none should be permitted to act as Jurors in the Courts here but in the English legal principle. If however the defect be taken away from any in the convicted Portion of the Population by Parliamentary restoration, under an Act of Grace, to civil Capacities and rights, no cause of challenge of course, in respect of former conviction, could be maintainable, as the principle per pures would, legally speaking, thus be made applicable in full force.

The Difficulty of giving any positive Opinion as to the influence of private Motives or prejudice under a System, which has never been put into action, must be at once perceivable: but as far as combination and community of Interests, local, personal, and with relation to the effective administration in the public Courts of the civil and criminal Justice and rights, can extend and influence, convict Jurors (as for the occasion they may be termed) cannot, as a body, possibly find or make, I conceive, separate Cause from the free; while as to individual feeling (from which no adequate protection, even in a perfect state of Jury trial, could be afforded) no great Injury, in a general public Sense, could in such matter or power perhaps be occasioned. No measure would tend probably so much or so gradually to reduce that Spirit of separation (if the term may be allowable) and Division between the Classes, which with the free of course is stronger in Influence than the other Class who are naturally disposed in any and every way to lower it, while the certain excess in Numbers of the free Jurors would, in a very short space of time, keep the convict Class almost from sight, or at least particular Notice, as to any Influence upon the Verdicts of the Courts. As far as I can bring in aid of the question my judicial experience in the Courts here, I cannot but confess in truth and candor, that I have remarked no difference of Impression with the Courts, either of Civil or Criminal Jurisdiction as to any greater degree of credit as to the evidence given by either class independently considered; while there is not a case perhaps brought forward in which Witnesses of either Class in common are not produced and examined. The testimony of either is alike, in first Impression, received as far as the mere civil condition of the Witness is considered; while the evidence is constantly and ever displaying the convict Class in question, to be employed in the most serious, intimate, and confidential concerns of the free, and indeed of the Race. In an English Court of Justice such a Witness would be sure almost, we know, to be found useless, in the record of conviction, that would
instantly on his appearance most probably be produced, but in
the Colonial Courts, from the nature of its mixed population,
from natural and civil local causes, and from the unavoidable
necessity of taking advantage of and into use the only means it
affords for certain ends and energies, a stranger would be able
to trace perhaps, in the proceedings of the Court and the causes
in general litigation, no material or immediate perceptible Dis­
tinction of state and condition, and I am unable, I confess, to see
any sufficient reason for suspecting or believing, that the Con­
victs, as Jurors, could be tempted, or induced to feel any such
Interest to violate their Oaths, to which, AS WITNESSES, they are
not open; or could have power more seriously to injure, if in
desire, the public rights involved in legal proceedings of the
Courts, than what they can exercise, if there be the purpose, in
the Evidence, upon which the Causes there of the free so mainly
depend. With respect to any such Influence of “compassion for
the criminality of others of his class, that would interfere with
the directions of a Judge, or the rigid calls of Justice in the
criminal Jurisdiction of the Country,” I am inclined to be im­
pressed, there would be no cause for apprehension as to the
existence of any such general feeling or Influence, The Interest
involved and at stake would be so much stronger, I conceive,
than Pity. The Cattle Stealer, the House-breaker, as Thief,
the Highway-robber, much less the Murderer, makes every one,
in regard to personal safety, his enemy at least as to conviction,
with which alone, as Jurors, they would have any concern or
control; and where generally perhaps compassion in such cases
at all commences to be interested, as to lighter crimes, if it
should prevail, though like observations in a degree apply, the
consequences would be less serious though in every case almost
every such feeling, I should be apt to believe, would be coun­
teracted by the other Jurors of the free class, or at least free
from any such presumed Bias, considering the comparative
number of the two Classes, from which the Jury Panels would
be made up, while after all perhaps rigidity, rather than softness
would, in the end and in fact, characterize the Impressions most
likely in this instance to have force.

Whatever may be, or might prove however the just conclusion
as to principle and its Influence, while the recovery surely of
Juror Capacities would excite, as to the preservation of char­
acter, renewed anxiety and impulse, little cause of apprehension
perhaps would justly arise at all on the subject, in the actual
operation of the Jury System as proposed to be established in our
local Courts. The various Checks, that would have effect in the
Jurisdiction of the Supreme Court over all Panels returned to

No evil expected from introduction of jury system.
it; in the Jury lists; in the right of peremptory Challenge, and of Challenge for cause, in Criminal Cases, and of reducing the list, in civil Causes, where a Jury may be allowed to be struck between the parties, seem to warrant the expectation, that the application of this distinguished feature of the British Constitution “might without such personal exceptive reservation belong to our Colonial Judicature without serious variance with the great principle, upon which the Institution itself is founded.”

One single Observation more, which Equity as feeling seems to suggest on this part of the Subject, and I will intrude no longer, Sir, on your attention.

The legal exclusion from Juror Privilege applies, we know, to all convictions, to which Infamy of character, in a legal Sense, attaches. But in such a Country as this, in knowledge of the benevolent Interest and views entertained by the British Nation in the grand Object, which led to and has supported its Establishment, will not the Public Judgment, as individual Feeling, make Distinction, as to the question and fitness of relaxation of so severe a Principle, in continuance (however just and expedient in general operation it might be esteemed) between those, who in so much offending against the laws of the Country have yet fallen so differently as to degree of moral Turpitude? between those, who have only just escaped from the utmost rigour of the law and those who have unhappily lost themselves and liberty in offences of less civil and moral criminality? To look in extremes at the proposition—shall the legal convict, who (acting under a Sense of Honor, which the Law condemns, however much countenanced by Habit and the World) has unfortunately, under such an Influence, brought himself to banishment in all its suffering, know, at no time, difference or change of lot and civil condition from the Highway-man and the Housebreaker? Shall Misdemeanor and Felony here, where national Encouragement and Promise have taken up abode for ever with reform, fall heavily alike on all in civil forfeitures and consequence? If the moral Principle, on the Influence of which alone England justly boasts of Jury-Institutions, be not equally degraded, be less deeply contaminated, can no visitation of public Clemency be allowed to interfere with, and soften that legal severity of exclusion from participation in the exercise of civil rights and Duties, where the force of that principle alone will approve the beneficial extent and results of their Efficacy and Virtue!

I know not, Sir, that I could convey my own feelings at this time more justly and certainly not more strongly, than in taking advantage of the language* used by my so “much respected” predecessor Mr. Ellis Bent on a like occasion, for truly “I have

* Note 175.
now only to express my fear that I have trespassed too much on your attention, and yet failed in the due illustration of the topics I have ventured to discuss. I will not therefore detain you longer than merely to add, that in the observation I have taken the liberty to make upon the Judicial System of this Colony, and in the plan I have humbly suggested for its improvement, I entreat you 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 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 Settlements require."

I have, &c.
JNO. WYLDE,
Judge Adv., N.S.W.

Mr. Justice Field to Earl Bathurst.

My Lord,
Sydney, 1 August, 1821.

I think it my duty to lay before you the enclosed Opinion, touching the respective powers of the Governor and Lieutenant Governor of New South Wales, in consequence of a very unsightly circumstance of conflicting Orders between those two high Officers, which your lordship will see in the public Gazettes.

While Governor Macquarie and the Judge Advocate were absent at Van Diemen's Land, Major Goulburn, the Colonial Secretary, called upon me to draw up an urgent Bye-law for the prevention of accidents from the removal of Gunpowder in too large quantities. Nobody here having any doubt of the Lieutenant Governor's authority* to do this, in the absence of the Governor, I simply applied the English Act of Parliament to this Colony in the shape of a Proclamation;† and it was issued by the Lieut. Governor as a matter of course.

Governor Macquarie, as soon as he returned, without taking the opinion of the Judge Advocate in writing, and without condescending to consult me upon the subject, although it was well known that I drew the Bye-law, and therefore was responsible for its legality, was pleased to repeal it† in the very awkward and illogical manner, which your lordship will lament to see in the Gazettes, to the injury of public confidence in the judicial opinion and to the great scandal of His Majesty's Government all over the Colony.

Fortunately however for public authority, the private understanding between Govr. Macquarie and Lt. Govr. Erskine was

* Note 186. † Note 187.
 Reasons for submission of opinion.

390 HISTORICAL RECORDS OF AUSTRALIA.

1821.
1 Aug.

Reasons for submission of opinion.

too good to permit a quarrel between them; but, as this may not be the case with a future Governor and Lieut. Governor, I have thought it my duty to submit this question of authority to the decision of your lordship, more especially since I, the innocent draughtsman of the Proclamation, am the only person who has suffered between the high military parties, Govr. Macquarie having treated me and my opinion with neglect, and Lieut. Govr. Erskine having written me a Letter, in which he accuses me of lowering myself and want of manliness, because, for a reason I am sure your Lordship will approve, when you come to read the enclosed correspondence, I declined to give him my opinion in writing upon this point. I would have given it however to Governor Macquarie, had he condescended to ask for it, as freely as I now enclose it for your lordship's consideration; but it was not for me to thrust it in his Excellency's face and force a public difference of opinion.

Since the return of the Governor, I have in vain endeavoured, through the negotiation of a friend, to obtain the least explanation of the derogatory Letter,* which Lt. Govr. Erskine had written to me. I am restrained by my judicial situation from demanding the satisfaction, which a private would seek under the charge of want of manliness; and my next impulse was to complain to the Criminal Court of the letter, as a libel and provocation to a breach of the peace; but, having publicly recommended to the Commissioner of Enquiry, that Governors, Lieut. Governors and Judges should be hereafter exempted by statute from criminal information for misdemeanour, I do not think it would become me to take advantage of the defective state of the present law in this colony, and be the first to prosecute such an information. I am also influenced by the consideration that the Members of the present Court consist entirely of Officers of Col. Erskine's Regiment, and by a general repugnance to disturb the public mind in the present unsettled state of affairs, looking forward, as we all are, with anxiety to the too-long-protracted arrival† of Sir Thomas Brisbane, the Report of the Commissioner of Enquiry, and a total change of system, and having acted (as I have) four years and a half with the present Governor and Lt. Governor without any public difference. But I do hope your lordship will give me credit for great forbearance under this insult upon one of His Majesty's Judges however humble; and will do me that justice, which I shall, in this Colony, refrain either from taking into my own hands or asking of the laws of my country.

I have, &c.,

BARRON FIELD,
Judge of the Supreme Court.

* Note 188. † Note 189.
I am of opinion that, when the Governor absents himself from the Seat of government to Van Diemen’s Land (which is geographically included by his commission in New South Wales), and does not remove the government thither, but leaves the Lieutt. Governor of the Territory of New South Wales at the seat of government to administer the government in his own name, and allows the Lieutt. Governor of Van Diemen’s Land to continue to administer that government in his own name, it amounts to an “absence out of the Territory and its Dependancies” within the meaning of the Governor’s Commission;* and that the Lieutt. Governor of the Territory of New South Wales has then the power by his Commission, even with no more oaths than those originally taken, to do whatever is absolutely necessary to carry on the Colonies both of New South Wales and Van Diemen’s Land. It is not the Governor but the King that creates the Lieutt. Governor. Governor Macquarie allows the Lieutt. Governor’s right to appoint constables; and yet such acts are not more absolutely necessary than a Law and Regulation to prevent the loss of life and property by the explosion of gunpowder, and they are expressly gubernatorial acts within the words of the Commission. If nobody is authorized to make any Law and Regulation, while the Governor is at sea within the Territory, how long is New South Wales to wait without necessary Laws and Regulations (suppose Martial Law, for instance) in the case of the Governor’s non-arrival at the Dependancy for which he sailed, or non-return home by stress of weather or perils of the seas? In either of these cases, the Dependancy of Van Diemen’s Land would have a Lieutt. Governor, and the parent colony none for perhaps six Months. Necessity has no law; and I am of opinion that Lieutt. Governor Erskine had power to issue the Proclamation to regulate the keeping and removing of Gun-powder, and that, if Governor Macquarie did not approve of its extension to that part of New South Wales called Van Diemen’s Land, he could there have restrained it, as a necessary Regulation by the Lieutt. Governor of New South Wales in the absence of the Governor.

As for the Lieutt. Governor’s power to appoint Members of the Courts, the Charter of Justice expressly gives him this “in the absence of the Governor,” without saying “from the Territory and its Dependancies.” But in both cases, the word “absence” must be construed secundum subjectam materiam. In the last case, there is no question; and the question in the

* Note 190.
first case is, whether this is an absence to the intent and purpose of carrying on the state, which Governor Macquarie does not deny his late absence of three Months was; for he allowed the Lieutt. Governor to appoint and dismiss constables, to receive returns and reports, etc., nor does he dispute the "imminent risk," which called forth the Regulation in question from the Lieutt. Governor's "zeal for the service." He only asserts "Ita lex scripta est: as long as I am geographically within the vast latitude and longitude of the Territory, either on land or at sea, nobody else can make Laws and Regulations for the Colony." This is a question, which I think a new commission should set at rest.

BARRON FIELD,
Judge of the Supreme Court.

[Enclosure No. 2.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSEKINE.

Sir,

Sydney, 27 June, 1821.

Having received a request from the Judge Advocate's Office, and being fully convinced that, unless it is complied with, the Port Regulations of His Excellency The Governor cannot be carried into effect, and being legally of opinion that your Honour, as Lieut. Governour, has not only sufficient power to make the necessary Order, but that your abstaining from the issuing of such order would be defeating the Port Regulations of the Governor in Chief, I have taken the liberty of drawing up such absolutely necessary Government and General Order for your honour's authorization, and respectfully request it may be dated this day, to meet the two cases which stand for today, and another which is fixed for next Saturday.

I have, &c.,

B. FIELD,
Judge Sup. Court.

[Enclosure No. 3.]

GOVT. AND GENL. ORDER.

Colonial Secy.'s Office,
27th June, 1821.

Whereas by the 42d Port Regulation established by Proclamation of His Excellency The Governor of date, the 6th February, 1819, all persons are required previously to sailing from Port Jackson to procure a Certificate from the Judge Advocate's Office that no detainers are in force against them for breaches of the peace, or any matter of penalty, forfeiture or offence, or for debts, claims or demands, which detainers are to be received, allowed, adjudged of and discharged as the Judge Advocate shall direct.

And Whereas by reason of the absence of the Judge Advocate from this part of the Territory, such detainers for offences, penalties, debts, claims and demands, cannot be adjudged of.
His Honour The Lieutenant Governor of New South Wales in the absence of His Excellency The Governor has been pleased to authorize the Judge of the Supreme Court, in the absence of The Judge Advocate, to receive, allow, adjudge of, and discharge such detainers, and to declare that his orders touching the same shall have equal force in the Judge Advocate’s Office and elsewhere till the return of the said Judge Advocate.

By Authority of His Honour,

Colonial Secretary.

DEPUTY JUDGE-ADVOCATE WYLDE TO EARL BATHURST.

My Lord,
Sydney, New South Wales, 15 Augt., 1821.

I take the Liberty of submitting to your Lordship certain Queries, as enclosed, with respect to the amount of Fees received by my predecessor in office, the late Mr. Ellis Bent, and am the more particularly urged upon this Subject to intrude upon your Lordship’s attention, because from a Memorandum put on a similar Document, laid before the Commissioner of Enquiry during his late general Investigation here, it seems to have been, I know not how, in Apprehension that the Amount of £2,300 per annum, therein referred to, was inclusive and not exclusive of Salary which however is put out of all Doubt, your Lordship will perceive at once, by the Communications (copies of which are also enclosed) that passed immediately upon my discovery of the observation thus made by Mr. Bigge after my departure hence for Van Diemen’s Land.

From the returns, made to the Commissioner of Enquiry, of the fees received since the time of my arrival, your Lordship will be apprized also how much from various Causes, into which from due Consideration to your Lordship I cannot suffer myself to enter, the official income has become reduced; while the manifold Services attached to the Appointment have been, except in the Governor’s Court, where fees alone to any Amount could have arisen in truth and fact (whatever Impression may possibly obtain in the Means of common general Observation) increased in bulk, I venture very confidently to assert to a treble, or even quadruple comparative ratio.

I feel no little reluctance and Hesitation, my Lord, in further venturing even a single remark upon so personal a Subject; yet in your Lordship’s liberality of attention towards judicial officers on the Colonial Establishment, it may be forgiven me, I trust, just to observe, that in England, previously to my departure, I had been informed that the Income of Mr. Bent was much larger indeed than it in truth proved, and that, although I have held the Appointment since 1st Jany., 1816, yet with the extraordinary Expenditures belonging to a residence at this place,
with so large a family as mine of eight Children (five of whom still remain in England for education), my earnest Endeavours in office have been urged and mainly encouraged in the Hope that my Services might possibly obtain me that Consideration with your Lordship which might open a prospect of attaining more sufficient Means, not only for present immediate Provision but especially for a respectable official retirement upon return to my native Country.

I have, &c.,

JNO. WYLDE,
Judge Adv., N.S.W.

[Enclosure No. 1.]

DEPUTY JUDGE-ADVOCATE WYLDE TO MR. J. FOSTER.

Sir,

Sydney, 13th August, 1821.

I beg leave to enclose you the Copy of an Answer you were so good some time to give to an enquiry on my part as to the amount of *fees* received in the Judge Advocate's Office during the time of the late Mr. Ellis Bent, and although it may seem superfluous upon the clear terms adopted by you, that any possible misapprehension could arise as to the amount being clearly exclusive of his Official Salary, I shall feel obliged, if you would do me the favor to add that in terms to the original answer.

I am, &c.,

JNO. WYLDE, J.A.

[Enclosure No. 2.]

**QUERIES ANSWERED BY J. FOSTER.**

Q. Having been clerk to Mr. J. A. Bent from February, 1812, to October, 1815, have you any certain knowledge, and if so how, of what was about the annual Amount of fees taken in respect of his Office during that period?  

A. Having received all Fees taken in the Judge Advocate's Office during the period mentioned, and paid over the same to the late Judge Advocate Bent, I am enabled to say that the entire sum received annually for fees was about Two thousand three hundred pounds (£2,300) same being exclusive of his Salary.

18th Octr., 1819.

JAMES FOSTER.

18th Octr., 1819.*

Q. Having been clerk to Mr. J. A. Bent from Feb., 1812, to Oct., 1815, have you any certain knowledge, and if so how, of what was about the annual amount of fees taken in respect of his Office during that period?  

A. Having received all fees taken in the Judge Advocate's Office during the period mentioned and paid over the same to the late Judge Advocate Bent, I am enabled to say that the entire sum received annually for fees was about £2,300.

J. FOSTER.

Q. What as nearly as you can tell was during that time the average number of complaints entered for hearing at the quarterly sittings of the Governor's Court?  

A. About Two Hundred Causes entered for trial.

J. FOSTER.

* Note 191.
Q. What was about the average number of Charges exhibited to the Court of Criminal Jurisdiction during the above period? A. About Twelve. J. Foster.

Q. Are the fees chargeable in respect of proceedings before the Governor's Court in a greater or less ratio now than in October, 1816, when Judge Advocate Wylde arrived, and in what proportion of comparative Amount? A. The Average in Mr. Garling's time would be in my opinion about £9 at Judge Adve. Wylde's time about £5. J. Foster.

A true Copy:—Jno. Wylde, Judge Adv., N.S.W., 13 Augt., 1821.

LIEUT.-GOVERNOR ERSKINE TO EARL BATHURST.

My Lord, N. S. Wales, Sidney, 15th Sep., 1821.

Mr. Field, Judge of the Supreme Court, having in a letter to me, dated 2nd August, acquainted me that he had transmitted to you a Correspondence, which had taken place between him and myself, I feel it necessary with a view of saving you perhaps some trouble to explain the circumstances out of which this Correspondence has arisen. Nothing else, I beg leave to say could have induced me to trespass upon your time.

It was thought necessary during the absence of Governor Macquarie in Van Dieman's Land to issue a Proclamation respecting the Storage of Gun Powder, which was drawn up by Mr. Field and which I was prevailed upon as Lieut. Governor to sanction. When The Governor had a Knowledge of it, he was pleased to express himself in strong terms of Dissatisfaction of My Assumption of power, and that it should be annulled and repealed, which it accordingly was. I was certainly very much hurt and distressed at the time, and told Major Goulburn the Colonial Secretary, who was with me when I received The Governor's letter, indeed handed it to me, that it was quite impossible I could act again except in the little Minor Matters of the Colony, in which he seemed fully to agree. Major Goulburn, without any knowledge or wish of mine, told Mr. Field of the Governor's displeasure. Mr. Field accordingly comes forward in his letter of the 27th June, No. 1, unsolicited by me in any shape whatever expressing his readiness to give me his opinion. I expressed my thanks and told him that I should, in a few days perhaps, ask him for it. In the meantime, he urged me very much to sanction an Order that he drew up. I told him that in consequence of what had occurred I would not interfere. He then asked me for an official answer, which I gave him dated 30th June.

I wrote to him on the same Day requesting his opinion as he had volunteered to give me, and to my utmost surprize received
his answer of 30th June No. 5, which struck me to be the most trifling production I ever read; He never entered into any sort of condition with me, for, if he had, I would at once have declined it. It struck me also to be a most designing work, for, if I had acted as he urged me to do, I must have flown in The Governor's face, who had so lately reproved me for assuming any power during his absence. He is on the worst terms with the Governor and has publicly condemned His Excellency's Measures; taking every thing therefore into calculation, I felt Mr. Field had lowered himself in my estimation, and under such impression I wrote him my letter of the 1st July fully determined to decline every sort of correspondence with him.

I have, &c,

JAMES ERSKINE,
Lt. Governor, N.S.W.,
Colonel, 48 hg.

[Enclosure No. 1.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSKINE.

My Dear Colonel, Macquarie Place, 27th June, 1821.

I did myself the honour of waiting upon you this morning, in consequence of what Major Goulburn communicated to me as to The Governor's dissatisfaction with Your acting as Lt. Governor during his absence. I shall be happy and proud to furnish you with any Legal opinions in writing, which such of those acts, as I had any thing to do with, may require for Your honour's justification either here or else where, as also for the enclosed Govt. and General Order, to which the objection of its being a Proclamation does not apply, and which will expire of itself, the Moment the Governor and the Judge Advocate arive.

Your honour will see that it is strictly necessary that the power of judging of detainers* should be given to somebody; or else the Detainer law of the Colony (a Measure of Governor Macquarie's) must cease till the return of the Judge Advocate, for his Office cannot receive detainers, if there is nobody to say whether they are just or unjust.

In short this power is one of such obvious necessity that, if Your honour declined to Authorize Major Goulburn to issue this order, I shall (after writing a public letter and receiving your official refusal) take upon myself to act without, as indeed I have been obliged to act already, or else the Judge Advocate's office must have been closed.

I have, &c,

B. FIELD.

* Note 192.
ERSKINE TO BATHURST.

[Enclosure No. 2.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSKINE.

My Dear Colonel, Macquarie Place, Thursday Evg.

I have dated the G. and G. O. back to Monday, in hopes you will authorize it. You are not required to sign it. Major Goulburn will confirm that it is of the strictest necessity insomuch that you will have great difficulty in refusing me officially in a letter, which I must send home; shall be most happy to give you the fullest official opinion you may require; but I have incurred responsibility too, and one good turn deserves another.

Your's with great respect,
B. Field.

[Enclosure No. 3.]

LIEUT.-GOVERNOR ERSKINE TO MR. JUSTICE FIELD.

Sir, Sydney Barracks, 30th June, 1821.

His Excellency Governor Macquarie having been pleased to express himself in terms of marked dissatisfaction at my having in His Excellency's absence sanctioned the Issuing of a Proclamation relative to Gun Powder and drawn up by you as the Legal Officer of the Crown; and, as His Excellency has acquainted me that He will on his arrival cause the said Proclamation to be repealed and annulled, I have to request you will be good enough to furnish me with your opinion in writing whether or not I have gone beyond the Spirit of the power placed in my hands as Lt. Governor during the Absence of Governor Macquarie in Van Dieman's Land.

I have, &c,
James Erskine.

Written in consequence of Mr. Field's unsolicited offer to furnish me with his advice contained in No. 1.

[Enclosure No. 4.]

LIEUT.-GOVERNOR ERSKINE TO MR. JUSTICE FIELD.

Sir,

In reply to your letter of the 27th Inst., only received yesterday, I beg to say I cannot interfere in any measure whatever of difficulty, which the following extract from His Excellency Governor Macquarie's letter to me, Dated Hobart Town, 15th June, 1821, will explain "No one being authorized to make Laws and regulations for the Colony, excepting the Governor in Chief, while He is alive and in any part of the Territory."

I have, &c,
James Erskine,
Lt. Governor, N.S.W.
[Enclosure No. 5.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSKINE.

Sir, Sidney, 30th June, 1821.

I have the honour to acknowledge the receipt of your two letters of this day's date, the one in reply to my letter of the 27th and the other asking for my opinion in writing, whether your honour has gone beyond the Spirit and the power placed in your hands as Lieut. Governor, in issuing a Proclamation for regulating the keeping and removing of Gunpowder.

As to the first letter, the reason of my Official application’s not being sent till a few days after its date is that the Order, which I wished your honour to issue, is one of such plain necessity and so little difficulty that I felt confident you would have Authorized it, upon the private communications, I had as early as the 27th Inst. the pleasure to hold with you. It is no “law or regulation” of the Colony, but the mere necessary supplying of Somebody to do an act of Justice in the Judge Advocate’s Absence, which cannot wait for his return.

As to the second letter, since Your honour refuses to Act upon my legal opinion in the above mentioned instance in order to protect me in an act, which I have taken upon myself the responsibility (if responsibility it can be called) of performing, I must beg leave in my turn to decline to furnish your honour with My opinion in writing upon the legality of the Proclamation, which you have incurred the responsibility of issuing.

I have, &c.,

B. FIELD.

[Enclosure No. 6.]

LIEUT.-GOVERNOR ERSKINE TO MR. JUSTICE FIELD.

Sir, Sidney Barracks, 1st July, 1821.

It was with no small degree of Surprize I perused Your letter of Yesterday’s date; because I really could not have Sup­posed that Judge Field would have lowered himself so much as to write in a Style so diametrically opposite to the Manly character of his profession.

I now perceive quite enough to rest satisfied without Your opinion, which I regret I was weak enough to ask for.

A further correspondence on this Subject would be extremely disagreeable, I must therefore decline entering into it.

I have, &c.,

JAMES ERSKINE.
Sir, Sidney, 2nd July, 1821.

I have the honour to acknowledge the receipt of your letter of Yesterday's date.

It is impossible you could have perused my letter, to which it was a reply, with Surprize, and it is unjust that you should reproach me with want of manliness, because I always made known to you in my private notes upon the subject that I should not give my opinion in your case unless you would act upon it in my less strong case, and really it does seem too much for you to say to me, "I will not act upon your opinion to protect you, but give me the same opinion to sanction me." It is no part of my office to give legal advice; nor can any be expected to write his opinion, where it is asked with an avowed determination not to act upon it. You refuse me your protection as Lt. Governor in carrying into effect the necessary Port Regulations of His Excellency the Governor in Chief, and accuse me of lowering myself because (reasoning having no effect) I meet your refusal with a show of just and consistent retaliation. I shall not however carry this principle so far, as to accuse you of having lowered yourself.

You add that you now perceive quite enough to rest satisfied without my opinion; you might have perceived it long before: my retaliation is only nominal: for I never made any secret of my opinion that Your Proclamation is perfectly legal; nor am I afraid of the responsibility of having drawn it, with all my want of that Manliness, which should rather belong to your profession than to mine; altho' I did think it due myself, under the above mentioned circumstances to decline furnishing you with the written opinion which you could not consistently ask for.

I have, &c.,
B. Field.

Sir, Sidney, 13th July, 1821.

The return of His Excellency Governor Macquarie having relieved you from the Administration of the Government, and rendered you amenable to the law for any Excess of your Authority, I beg leave to call upon you for an Explanation of the charges of "lowering myself" and "want of Manliness," which you thought proper in your letter of 1st Inst. to apply to me, as one of His Majesty's Judges, however humble, and to assure you that they are charges I will not sit down under, but
(if not satisfactorily done away with) shall lay before the next Criminal Court, as a libel and provocation to a breach of the Peace.

I have, &c.,
B. Field,
Judge Sup. Court.

[Enclosure No. 9.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSKINE.

Sir, Sidney, 23rd July, 1821.

Further not having been honoured with any answer to my letter of the 13th Inst., requesting an Explanation of yours of the first, I have taken the liberty to Authorize my Friend Mr. Oxley to wait upon you for the purpose of asking You whether you duly received that letter, in Order that I may shew the Commander in Chief and the Secretary of State for the Colonies that I omitted no means that might prevent the painful Necessity to which I must, upon your refusal of any Explanation have recourse in vindication of the high Office I have the honor to fill.

I have, &c.,
B. Field,
Judge Sup. Court.

[Enclosure No. 10.]

MR. JUSTICE FIELD TO LIEUT.-GOVERNOR ERSKINE.

Sir, Sidney, 2nd August, 1821.

Inability to obtain such an explanation of your libellous letter to me of the 1st July as would have been becoming in you to give, and in me to receive. In that hope, I am disappointed: and I must therefore attribute your refusal of the least explanation to a consciousness that my judicial situation prevents me, in this Colony at least, from seeking that satisfaction, which under other Circumstances I should have been entitled to demand.

The appeal which I had intended to make to the law, I have upon further consideration declined to institute, not from a fear that it would have been unavailing, but among other reasons, from a feeling of the delicate situation, in which the honourable Officers composing the Criminal Court would be placed, as having to sit in Judgment upon the Misdemeanor of their Commanding Officer.

I have therefore contented myself with transmitting the whole of our Correspondence to the Secretary of State, together with the opinion in writing, which I thought proper to refuse you.

I have, &c.,
B. Field.
Extract of a Letter from Mr. William Henry, Missionary, and Magistrate at Taheite, addressed to Govr. Macquarie, and bearing date 27th Sept., 1821.

Your Excellency will recollect that I have once or twice written for permission to resign my Office of Magistrate, but your Excellency gave me no answer on that subject. I now take the liberty of most respectfully resigning that office, your Excellency were pleased to honor me with, and with this transmit to your Excellency my Commission;* And, I shall be much obliged by your Excellency’s ordering my Resignation to be inserted in the Sydney Gazette.

W. Henry.

True Extract:—L.M.

Governor Macquarie to Earl Bathurst.

22nd October, 1821.

[With this despatch, Governor Macquarie transmitted a petition from emancipists praying an alteration in their civil status; see page 549 et seq., volume X, series I.]

Commission of the Peace.

By His Excellency Sir Thomas Brisbane, K.C.B., Captain General, Governor, and Commander in Chief of His Majesty’s Territory of New South Wales, and its Dependencies, etc., etc., etc.


Greeting.

Whereas, by Letters Patent of His present Majesty, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing Date at Westminster, the Third day of February,
in the Second Year of the Reign of His present Majesty King George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, His said Majesty was graciously pleased to constitute and appoint Me, Sir Thomas Brisbane, to be His said Majesty's Captain General and Governor in Chief in and over His said Majesty's Territory, called New South Wales; and did therein and thereby, amongst other Things, also Authorise and Empower Me, the said Sir Thomas Brisbane, to constitute and appoint Justices of the Peace, and other necessary Officers and Ministers in His Majesty's said Territory and its Dependencies, for the better Administration of Justice and putting the Law in Execution; and to Administer, or cause to be Administered, such Oath and Oaths, as are usually given for the Execution and Performance of Offices and Places; Now Know Ye, that I, Sir Thomas Brisbane, Captain General and Governor in Chief, as aforesaid, By Virtue of the Powers and Authorities so in Me Vested, by and in Pursuance of the said Royal Letters Patent as aforesaid, Have assigned, and, By these Presents, Do assign You jointly and severally, and every One of You, Justices of Our Lord the King, to keep His Majesty's Peace in and throughout the Territory of New South Wales; and to keep and cause to be kept All Ordinances and Statutes for the good of the Peace and for the Preservation of the Same and for the quiet Rule and Government of His Majesty's People, made, in All and Singular their Articles, in His Majesty's said Territory, according to the Force, Form, and Effect of the same; doing therein what to Justice appertains according to the Law and Custom of England, Saving to His Majesty the Amerciaments and other Things to His said Majesty therefrom belonging.

Given under my Hand and Seal, at Government House, Sydney, this First Day of December, in the Year of Our Lord, One thousand Eight Hundred and twenty-one.

THO. BRISBANE.

DEPUTY JUDGE-ADVOCATE WYLDE TO GOVERNOR MACQUARIE.

Sir,

Judge Advocate's Office, 1st December, 1821.

In reference to your Excellency's Enquiry how far your Commission of Appointment may authorize you in giving Effect to your desire to consider certain Offenders, now in Gaol upon capital convictions and otherwise, Objects of mercy* upon the occasion of your Successor being this day sworn into the Government, I beg leave to observe that, although upon some of those

* Note 193.
cases the proceedings have necessarily been referred to His Majesty in Council in respect of 4 members only of those, composing the criminal Court at the time of Trial, concurring in adjudging the offenders respectively guilty, it would yet appear to me that, notwithstanding such reference, the Exercise of the Prerogitive under the Commission would remain in force, and consequently that your Excellency has full power and authority to remit, where you shall see cause, all such Offences; treason and Wilful Murder only excepted.

JNO. WYLDE, Judge Adv., N.S.W.

DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.

Sir, 23rd Jany., 1822.

I have already been favored with your Excellency's ready attention to the Suggestions I felt it incumbent on me to submit, with respect to attendance upon the Sittings of the Court of criminal Jurisdiction being the only Duty, to which the officers of the Regiment, who from time to time compose the Court, should, during the period of its Convention, be subject. Under a like Anxiety to render the Administration of the criminal Justice of the Country as free as may be possible from any Influence that might, in any the least degree, unduly from whatever cause, affect it, I am again urged to communicate to your Excellency that, at and with every Court, if not generally, at least with some of the Members, I have ever found it Matter more or less of very painful Impression and Expectation that they would be required in the Begiment to see the Execution of those capital Sentences, which, during the sittings of the particular Court, had been pronounced by themselves. How far such a feeling may or might be suffered to extend in operation upon and during the trial of capital Offenders, it is not for me or at all necessary perhaps to calculate or premise; but from the continual and so general Mention, during the proceedings, of the Sentiment, and under the Influence of those personal Observations which hardly with due Effect perhaps can be given in detail, I certainly am most desirous of strongly impressing your Excellency with my conviction that unless the public Security peremptorily require every officer at Head Quarters to be with his Begiment, when called out to attend, where the utmost Rigour of the Law is to be carried into Effect (a Circumstance, from the number of the Officers and the nature of the Duty I am not at all, I must confess, at all prepared to anticipate), it would seem to me highly desirable and fitting, considering the Interests committed to the
Mr. Justice Field to Earl Bathurst.

My Lord,

New South Wales, 4th Feb., 1822.

I take the liberty of enclosing your Lordship the Duplicate of a Letter, which I did myself the honour to address to you on the 1st August last, together with my legal Opinion touching the respective powers of the Governor and Lieutt. Governor of this Colony; and I hope your Lordship will not fail to lay the latter before His Majesty's Law Advisers, and speedily communicate the result of their Opinion to Sir Thomas Brisbane; for I am sorry to say that he has been influenced by General Macquarie, under the mere verbal opinion of my Colleague, the Judge Advocate, in opposition to mine, in some degree publicly to sanction the arbitrary views of his predecessor on this subject; and, in the probable event of the absence of Sir Thomas Brisbane at the other Settlements, we may have nothing but division among the highest Officers of the Colony.

For myself, I have resolved henceforth to confine myself strictly to the duties of my office, and to give no more legal advice, that there may be no future confliction of opinion between my Colleague and me; and I pray heartily for that consolidation of our Courts under one Judge, which I recommended* to the Commissioner of Enquiry, even though it should remove me as the junior.

I understood from Mr. Bigge that the Attorney and Solicitor General decided my difference* with Mr. Wylde, upon the construction of the Charter of Justice, as to the present division of the Courts in my favour; but I have never been honoured with any communication from your Lordship's Office upon the subject; and as to the other public question,* upon which I had the misfortune to differ with Mr. Wylde, I saw that decided in my favour by the commitment of the prisoners for trial for murder on board the Chapman Convict ship.

I am pretty confident of being equally right on this point of gubernatorial authority; but it will be much more for the benefit of the Colony, that its future government should have only one Judge, or at least one legal adviser.

I have, &c,

Barron Field,
Judge Sup. Court.

* Note 194.
FIELD TO BATHURST.  

[Enclosure No. 1.]

PROCLAMATION.

BY His Honor James Erskine, Esquire, Lieutenant Governor of New South Wales, in the absence of His Excellency Lachlan Macquarie, Esquire, Captain General and Governor in Chief in and over His Majesty's Territory of New South Wales and its Dependencies, etc., etc., etc.

WHEREAS, in order to prevent the great mischief which may arise from explosions occasioned by the keeping and carrying Gunpowder in too great quantities, or in an improper manner, the same ought to be regulated by Law; And Whereas the Statute of 12th Year of the Reign of His late Majesty King George the Third of blessed Memory, Chapter 61, is Confined to Great Britain.

Be it, and it is hereby ordered, declared and directed, by the authority aforesaid, that from and after the fourteenth day of May next, no Person or Persons shall have or keep at any one time, being a Dealer or Dealers in Gunpowder, more than Two hundred pounds of Gunpowder, and not being such, more than Fifty pounds of Gunpowder, in any house, Storehouse, warehouse, shop, cellar, yard, wharf, or other building or place occupied by the same person or persons (all buildings and places adjoining to each other, and occupied together being to be deemed one house or place), or on any River or other Water (except in Carriages loading or unloading, or passing on the land, or in Ships, Boats, or Vessels, loading or unloading, or passing on any River or other Water, or detained there by the Tide or bad weather), within any Town in this Territory or its dependencies, or one Mile of the same, on pain of forfeiting all the Gunpowder beyond the quantity hereby allowed to be kept, and the Barrels in which such Gunpowder shall be, and also Two shillings for every pound of Gunpowder beyond such allowed quantity.

And it is hereby further ordered and directed, that no person or persons shall have or convey at any one time, more than Twenty five Barrels of Gunpowder, in any Waggon, Cart or other Carriage by Land, or more than Two hundred Barrels of Gunpowder in any large Boat or other Vessel by Water (except in Vessels with Gunpowder imported from or to be exported to any place beyond the Sea, or within the Territory); and all Gunpowder, conveyed on Land or Water (excepting such Vessels for Importation or Exportation) shall be in Barrels close joined and hooped, without any Iron about them, and so secured that no part of the Gunpowder be scattered in the passage, and each Barrel shall contain no more than One hundred pounds of Gunpowder, and when conveyed by Land shall be entirely enclosed in a Leathern Bag, or a Bag commonly called a Saltpetre Bag, and every carriage, in which Gunpowder shall be conveyed by Land, shall have a complete covering of wood, painted cloth, Tarpaulin, or Wadmill Tilts, over all the Gunpowder therein contained, and also no Gunpowder shall be conveyed in any Barge, Boat or other Vessel by Water (except in Vessels with Gunpowder imported or to be exported in manner aforesaid) that hath not a close deck, and as soon as any Gunpowder is put on board such Vessel, all such Gunpowder shall be covered with raw Hides or Tarpaulins; and all Gunpowder which shall be carried or conveyed within any part of the Territory, in greater quantity or in other manner, than is herein before prescribed, and the
Proclamation regulating the keeping and carriage of gunpowder.

Barrels in which such Gunpowder may be, shall be seized by any person or persons, who shall have the same authority to remove such Gunpowder and Barrels, and to use for that purpose, during the space of Twenty four hours after seizure, the Carriage or Vessel in which such Gunpowder shall be seized, and the Tackling, Beasts, and deck and equipment, belonging thereto, on the terms of paying a recompense for the use thereof and to detain such Gunpowder and Barrels as is herein after given to Persons searching under a Warrant of a Justice of the Peace. And such seizure shall be for his, her, or their own use, on Conviction of the Offender or Offenders.

And it is hereby further ordered and directed by the authority aforesaid that no person or persons, having the care or management of any Waggon, Cart or other Carriage, used for the Conveyance of Gunpowder by Land, shall after beginning to place or load therein any quantity of Gunpowder, exceeding One hundred pounds weight, or beginning to unload the same thereout, stop or stay at any place of Loading, or in the loading or unloading, suffer any longer time to pass, than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading; and no person or persons having the charge or care of any Barge, Boat or other Vessel, used for the Conveyance of Gunpowder by Water (except in the case of Vessels loading for Importation or exportation) shall, after beginning to load or unload any quantity of Gunpowder exceeding One hundred pounds weight, stop or stay at any Wharf, Quay, or other Place of Loading, or in the Loading or Unloading thereof suffer any longer time to pass, than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading not exceeding Eighteen hours, unless hindered by the Weather; and every such Barge, Boat or Vessel (except such Vessels as aforesaid) having so completed her loading shall depart from the place of Loading on her Course the first ensuing Tide, unless hindered by stress of Weather or other just impediment; and no person shall load, take in, carry or convey in any Waggon, Cart, or other Land carriage, laden with above One hundred pounds weight of Gunpowder, or in any Barge, Boat or Vessel laden with the like quantity of Gunpowder on any River (except as aforesaid) any other Lading of any kind whatsoever. And all and every person and persons offending against any of the aforesaid Provisions for loading and unloading, shall, for each offence, forfeit the sum of Ten pounds.

And for the more easy discovery of the keeping and carriage of Gunpowder, contrary to the provisions hereinafter made, Be it, and it is hereby further ordered and directed, that it shall be lawful for any Justice of the Peace, on Demand made, and a reasonable cause assigned upon Oath, by any person or persons to issue a Warrant or Warrants under his Hand and Seal, for searching in the day time any House, Storehouse, Warehouse, Shop Cellar, Yard, Wharf, or any carriage, Boat, or Vessel, in which such Gunpowder is suspected to be kept or carried contrary to this proclamation; and that all Gunpowder found upon such search to be kept or carried contrary to this Proclamation, and also the Gunpowder Barrels, shall be immediately seized by the Searcher or Searchers, who shall, with all convenient speed after the seizure, remove such Gunpowder, and the Barrels in which it shall be, to such proper places, as they, in conformity to the restrictions of this Proclamation, shall think fit; And in the case of any
such Gunpowder seized in any carriage or Vessel, may use for the purpose of removal, during the space of Twenty four Hours after seizure, such Carriage or Vessel, with the Tackling, Beasts, and Accoutrements belonging thereto (paying afterwards to the Owner or Owners thereof, a sufficient recompence for the use thereof, to be settled by the Justices before whom the Complaint shall be heard after the seizure; And in case of non-payment immediately after settlement by such Justices, to be recoverable by distress and Sale of the parties Goods and Chattles, as is herein after directed concerning the pecuniary penalties of this Proclamation), and may detain such Gunpowder, and the Barrels in which it shall be, 'till it shall be adjudged on a Hearing, before any two or more such Justices, whether the same shall be forfeited.

And be it Lastly, and it is hereby ordered and directed, that all Penalties created by this Proclamation, shall be recoverable before two or more Justices of the Peace, on proof of the Offence by the Oath or Oaths of one or more credible Witness or Witnesses, or on the confession of the Offender; and one moiety of each penalty shall belong to His Majesty, His Heirs or Successors, and the other Moiety thereof to the Informer or Informers, prosecuting for the same; and where the penalty shall be pecuniary, in case of non payment it shall be levied by distress and Sale of the Offenders' Goods and Chattles by Warrant under the hands and Seals of such Justices, and the Overplus of the Money raised, after deducting the penalty and the expences of the distress and Sale, shall be rendered to the Owner, and for want of sufficient distress, the Offender shall be imprisoned by such Justices for any time, not exceeding Six Months nor less than three Months, as such Justices shall think proper.

Provided always and it is further ordered and directed, that this Proclamation shall not extend to the keeping of Gunpowder at any Storehouse or Magazine belonging to His Majesty, his Heirs or Successors, or to the Carriage of Gunpowder to or from the King's Magazines or with Forces on their March.

Given under my Hand at the Barracks, Sydney, in New South Wales, this Fourth day of May, 1821.

JAMES ERSKINE,
Lieutenant Governor.

By His Honor's Command,
F. GOULBURN,
Colonial Secretary.

God Save the King!

[Enclosure No. 2.]

GOVERNMENT PUBLIC NOTICE.

Colonial Secretary's Office,
12th May, 1821.

His MAJESTY's Magazines, at Fort Phillip, will continue open for the reception of Gunpowder from private Dealers, from Ten in the Morning until Five in the Afternoon of Monday next; for which due receipts will be given by the Ordnance Serjeant in Charge of that Magazine.

It is to be clearly understood, that any Gunpowder intended to be stored in the above Magazine, must be removed thither with all the
precautions, recited in the Proclamation of the 4th Instant, that any Loss or Accident, occurring during the time of its continuing so stored, is to be borne by the Individual to whom it belongs, that a Permit must always be obtained from the Secretary's Office and delivered over to the above mentioned Ordnance Serjeant before any Gunpowder can be admitted into or withdrawn from the said Magazine; and that before any Permit, for the withdrawing any part of the said Gunpowder, so stored can be obtained, a charge of Two pence per week, on every 100 lbs. of Gunpowder about to be withdrawn, will have to be paid into the hands of the Colonial Secretary, to be credited by him to the Police Fund.

By authority of His Honor
The Lieutenant Governor,
F. Goulburn,
Colonial Secretary.

[Enclosure No. 3.]

GOVERNMENT PUBLIC NOTIFICATION.
Colonial Secretary's Office,
Friday, 13th July, 1821.

Revocation of CERTAIN Orders and Regulations having been issued and published under the Form and Title of a Proclamation, bearing date at Sydney the 4th day of May last, whilst His Excellency the Governor in Chief was on a Tour of inspection in that part of the Territory called Van Diemen's Land “with respect to the keeping and removing Gunpowder from or within any Town in the Territory or its Dependencies,” and certain penalties and Forfeitures, on proof of breach thereof, having been thereby created and directed to be enforced before two or more Justices of the Peace, the said Justices being therein also directed and ordered, for want of a sufficient distress for the satisfaction of the pecuniary penalty to imprison the Offender “for any time not exceeding six Months, or less than three Months,” His Excellency the Governor from due consideration of the powers and Authority vested by His Majesty in Him solely, as Captain General and Governor in Chief of this Territory and its Dependencies, has deemed it fitting and necessary, in order to guard against, and prevent any attempt to enforce the Execution of any part of the said Proclamation to declare and notify, And he does hereby make this public declaration and Notification, that the said Proclamation so issued and published, during His Excellency's late public Tour of Inspection in the Southern part of this Territory called Van Diemen's Land, is wholly without Force or Authority; And although His Excellency most highly approves of the laudable zeal for the public service, whereby His Honor the Lieutenant Governor was actuated in issuing the said Proclamation, in order to protect against the imminent risk from the keeping of large quantities of Gunpowder throughout the Town of Sydney and the other Towns within the Territory aforesaid, yet for the reasons hereinbefore assigned, He hereby declares, that the said Proclamation is, to all intents and purposes, whatsoever, within the said Territory and its Dependencies, null and void and of no Effect.

By His Excellency's Command,
F. Goulburn,
Colonial Secretary.
1822.

My Lord,

Having been furnished under the Indulgence of your Lordship's Order, with the Statutes at large, up to the 56th Year of his late Majesty's Reign for the Use of the Court of criminal Jurisdiction and for general reference on the public Colonial Exigencies, I take the Liberty of submitting to your Lordship that it would prove matter of great Convenience, if your Lordship would sanction the remaining Statutes extant to the present time to be furnished on and for the like public Service, as also the Index Volume to the same.

I have, &c.,
JNO. WYLDE,
Judge Adv., N.S.W.

SIR THOMAS BRISBANE TO EARL BATHURST.

2nd May, 1822.

[In this despatch and its enclosures, Sir Thomas Brisbane reported the action of deputy judge-advocate Wylde in disallowing a proclamation granting magistrates jurisdiction in disputes re wages; see page 633 et seq., volume X, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

3rd May, 1822.

[In this despatch, Sir Thomas Brisbane reported the remon- strance of deputy judge-advocate Wylde re the constitution of the governor's court; see page 648, volume X, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

15th July, 1822.

[In this despatch, Sir Thomas Brisbane reported the claim of the colonial secretary to the custody of the court records; see page 663 et seq., volume X, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

31st August, 1822.

[This despatch dealt with procedure in the court of appeals; see page 725 et seq., volume X, series I.]
Commission of the Peace.*

By His Excellency Sir Thomas Brisbane, K.C.B., Captain General, Governor and Commander in Chief of His Majesty's Territory of New South Wales and its Dependencies, etc., etc., etc.

To D'arcy Wentworth, Esquire.
Thomas Moore, Esquire.
William Cox, Esquire.
James Mileham, Esquire.
John Thomas Campbell, Esquire.
Robert Lowe, Esquire.
Revd. Henry Fulton, Clerk.
Richard Brooks, Esquire.
John Brabyn, Esquire.
John Piper, Esquire.
John Harris, Esquire.
William Lawson, Esquire.
William Howe, Esquire.
Archibald Bell, Esquire.
Frederick Goulburn, Esquire.

Edward Riley, Esquire.
Thomas McVitie, Esquire.
Charles Throsby, Esquire.
Henry Grattan Douglass, Esq., M.D.
Revd. Thomas Reddall, Clerk.
William Wemyss, Esquire.
John Oxley, Esquire.
James Bowman, Esquire.
Henry Colden Antill, Esq.
William Browne, Esq.
Alexander Berry, Esq.
Edward Wollstonecraft, Esq.
John McHenry, Esquire.
Donald McLeod, Esqre., M.D.

GREETING.

Whereas, by Letters Patent of His present Majesty, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Third day of February in the second Year of the Reign of His present Majesty King George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, His said Majesty was graciously pleased to constitute and appoint me, Sir Thomas Brisbane, to be His said Majesty's Captain General and Governor in Chief in and over His said Majesty's Territory called New South Wales, and did therein and thereby, amongst other things, also authorize and empower me, the said Sir Thomas Brisbane, to constitute and appoint Justices of the Peace and other necessary Officers and Ministers in His Majesty's said Territory and its Dependencies for the better administration of Justice and putting the Law in execution; and to administer or cause to be administered such Oath and Oaths as are usually given for the Execution and performance of Offices and places.

Now Know Ye, that I, Sir Thomas Brisbane, Captain General and Governor in Chief as aforesaid, by virtue of the powers and authorities so in Me vested, by and in pursuance of the said Royal Letters Patent as aforesaid, have assigned, and by these Presents do assign you, jointly and severally, and every One of you, Justices of our Lord the King, to keep His Majesty's peace.
in and throughout the Territory of New South Wales, and to keep and cause to be kept all Ordinances and statutes for the good of the peace, and for the preservation of the same, and for the quiet Rule and Government of His Majesty's People, made in all and singular their Articles in His Majesty's said Territory according to the Force, Form and Effect of the same, doing therein what to Justice appertains, according to the Law and Custom of England, saving to His Majesty the Amerciaments and other things of His said Majesty therefrom belonging.

Given under my Hand and Seal, at Government House, Sydney, this Twentyninth day of August in the Year of our Lord One thousand, Eight hundred and Twenty Two.

THOS. BRISBANE.

SIR THOMAS BRISBANE TO EARL BATHURST.

6th September, 1822.

[In this despatch, Sir Thomas Brisbane reported the charges made by J. Hall against H. G. Douglass, the inquiries thereon and the dismissal of the magistrates; see page 744 et seq., volume X, series I.]

EARL BATHURST TO SIR THOMAS BRISBANE.

9th September, 1822.

[With this despatch, the statute 3 George IV, cap. xcvi, imposing duties, was transmitted; see page 792, volume X, series I.]

MR. F. GARLING TO COLONIAL SECRETARY GOULBURN.

Sir, Sydney, 7th Octr., 1822.

I beg leave to acknowledge your Letter of this day's date, communicating His Excellency Sir Thomas Brisbane's desire to be advised what legal steps should be pursued in consequence of the Provost Marshall (having advertized for Sale) having advertized for Sale by Public Auction certain Grants of Land, in which the Clauses* providing against the Alienation of the Estates within a limited number of years are still in force, from an impression that the Provost Marshall cannot legally take in Execution that which it is conceived cannot by reason of the Clauses referred to be legally sold.

Whether the sale of such an Estate by the Provost Marshall, who acts under the authority of a Writ of Fieri Facias, and is therefore not the Voluntary conveyance of the Grantee but proceeds from the Compulsory Mandate of a Court, would be deemed

* Note 196.
a forfeiture or not, is a subject of considerable moment in this Colony, and involves such an important Question of Law, as would induce me to hesitate in giving a sudden Opinion upon; I, however, do not collect that you desire specific advice on that part of the question; but I would beg to refer for your guidance the Opinion of Mr. Justice Field lately given in the Supreme Court as to whether, if an Estate be forfeitable to the Crown, the executive and judicial Authorities in that Country have at present power to enforce the forfeiture.

The Judge observed "that he was glad of an opportunity of declaring the law on the subject. In the case of a conditional Grant, tho' the Condition be unperformed, the King cannot regrant without Office found by Stat. 18 Henry 6, c. 6, that is without the inquest of a Jury to ascertain whether the condition be performed or not, Sav. 70, 12 East 105. And so too it is even in the case of Lands escheating to the Crown for want of Heirs or Corruption of Blood by 8 Henry 6, c. 16, and the former Statute Shandford Prerog. Reg. 54a, 12 East 112. If it were not so, all the Grants of the Colony would be mere Tenancies at the will of the Crown. Should the Crown ever please to take advantage of the unperformed Conditions in the Grants of the Colony, it must first appoint a Commission of Escheat or Inquest of Office."

Whatever ulterior Intention the Government may have as to enforcing or foregoing their right to resume the forfeited Estates, I think it would be particularly adviseable that an Official Communication should be made from the Colonial Secretary’s Office to the Provost Marshall intimating the expediency of his Notifying to the Public at the time of his sales that the purchasers of Estates take them with all the risks (if any), attendant on the conditions of the Grants been either unperformed or violated.

I have, &c.,

FREDERICK GARLING.

VALIDITY OF STATUTE, 20 GEORGE II, c. 19, IN THE COLONY.

A.

By the Statute 20th Geo. 2nd Cap. 19, various regulations are made for the better and more easy recovery of the wages due to Servants, and for the correction in certain cases of their misconduct. For these purposes, any one Justice of the Peace is invested with a summary jurisdiction. From his determination, an appeal lies to the next General Quarter Sessions.

It appears for a considerable time past, the Statute of Geo. 2nd has been considered to be in force in the Colony of New South Wales. By a proclamation* issued by Governor McQuarrie,
COUNSEL'S OPINION.

dated 21st Novr., 1818, it is, however, recited that it may be doubtful whether this Statute does or does not apply to the Colony. The Proclamation then proceeds, not to settle that doubt by declaring the Act to be in force, but to lay down various regulations upon the Subject of Servants' wages, which are principally but not entirely borrowed from the English Statute.

Mr. William Howe, a Justice of the Peace in New South Wales, under the authority either of the Act of Geo. 2nd, or of the Governor's Proclamation, issued a warrant of distress against one Burns, at the instance of Thomas Dowse, a labourer in Burns' employment. By this Warrant, Edward Fletcher, a constable, was directed to levy upon the goods of Burn the Sum of £3 16s. 0d., that being the amount of the wages due by Burn to Dowse, and of the compensation awarded for the costs and loss of time incurred by the latter in prosecuting the demand. The Warrant was executed. Burn then brought an action in the Supreme Civil Court of the Colony, called the Governor's Court, against Mr. Howe, the Magistrate, for issuing, and against Fletcher, the Constable, for executing it. In this action three Legal questions were to be decided:—First, whether the Statute of George 2nd was in force in the Colony; Secondly, whether the Governor's Proclamation was legal and binding on the inhabitants; Thirdly, whether the particular case fell within the meaning either of the Act or of the Proclamation.

On the last of these questions, the Court does not seem to have pronounced any decision. But on the two former points, the Judge Advocate decided in favor of the Plaintiff, declaring first, that the Act of George the 2nd did not extend to the Colony; and, secondly, that the Governor had no legal authority, by his Proclamation, to confer this jurisdiction on the Magistrates.

This decision appears to have excited great alarm in New South Wales, and the Justices assembled at a public meeting have signed* and transmitted to the Governor an earnest protest against it. The important question therefore, which arises for the consideration of His Majesty's Government, is whether the opinion of the Judge Advocate was right, and if so, what would be the effect of that opinion upon the constitution and future Government of the Colony.

With reference to these points, I incline to think that the Judge Advocate was right in holding that the statute of Geo. 2 is not in force in the Colony of New South Wales. That Act did not propose to make the Justices of the Peace the final Judges of the questions, which it brought within their jurisdiction. It

* Note 193.
1822. gave to either party a right of Appeal to the Quarter Sessions. In New South Wales no Quarter Sessions are held; and therefore, if the Act were considered to be in force there, it would arm the Magistrates with the power of deciding without appeal, a power which the legislature did not deem it expedient to confer in this Country.

The question respecting the validity of the Governor's Proclamation is more important than the former, in proportion as the consequences involved in it will be the more extensive. In support of the right of legislation thus asserted by the Governor, it is argued that the constitution of the Colonies depends upon the Commissions issued by the King to the Governors, and upon the Instructions accompanying them; that the King has in many cases delegated to the Governors of Colonies the power of making local Ordinances, not repugnant to the laws of England, and that what has been done in other cases may legally be repeated in that of New South Wales.

To these arguments, it is answered that, according to the first principles of the Constitution, the King cannot make laws binding on his subjects, except with the consent of Parliament; that the only exceptions to this rule are, first, the case of foreign Settlements acquired by His Majesty's arms, where he exercises a legislative power as conqueror, and Secondly, the case of Settlements ceded to the Crown, in which, at the time of the Cession, there existed a lex loci adapted to the habits and wants of civilized Society, in which case, it is said, the King succeeds to the legislative rights, whatever they may have been, of the former Sovereign. It is denied, however, that New South Wales falls within either of these exceptions. Since that colony was acquired neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land. It is insisted that His Majesty's subjects settling in a country thus acquired, carry with them the Law of England, so far as it is adapted to their peculiar circumstances; that the invariable usage in all such cases has been to require the Governor to convene an Assembly elected by the freeholders within the Colony; that thus the Colonists have lived under the constitution of England, varied only, so as to meet the new circumstances in which they have been placed; and that for His Majesty to confer a legislative power on the Governor alone, and without the control of a local Assembly, would be to deprive the Colonists of the constitution and laws which, it is admitted, they are to carry with them.

To the best of my judgment, this reasoning is well founded; and, supposing the present question confined to the single point, whether the Governor of New South Wales has or has not the
power to make laws binding on the King’s subjects within that Settlement, I should venture to express my opinion that in general he has no such authority.

The validity of the Proclamation of the 21st of Novr., 1818, may perhaps however be defended on a different ground. I conceive that it is the prerogative of the Crown to create Courts for the administration of the law in the Colonies, provided that the constitution of such Courts does not deviate from that of the corresponding tribunals in England, further than the peculiar circumstances of the Colony may require. Now it may be said that, by conferring on the Magistracy in the case of servants’ wages, a jurisdiction similar to that with which Justices of the Peace are invested in similar cases in England, the Governor was only calling into exercise this branch of the royal prerogative. To this argument, I do not know that a satisfactory answer could be given, had the Governor been authorized by his Commission to exercise this power. I conceive, however, that his Commission did not contain any authority to constitute Courts of Justice, and therefore that his proclamation cannot be successfully defended upon this ground.

Upon the whole, therefore, I incline to think that the Statute, 20th Geo. 2nd, c. 19, is not in force in New South Wales, and that the Governor’s Proclamation was not valid or binding. I therefore think that the judgment of the Judge Advocate was right. That judgment, however, may, I conceive, be sufficiently defended otherwise, since the Magistrate, Mr. Howe, awarded the party complaining a compensation of his loss of time, which neither the proclamation nor the act of parliament authorizes the Justices to allow.

JURISDICTION OF LT. GOVERNOR OF N. S. WALES IN GOVERNOR’S ABSENCE.

B.

On the 4th of May, 1821, a Proclamation* was issued by the Lieutenant Governor of New South Wales for preventing the mischiefs likely to arise from keeping Gunpowder in an improper manner. On the 12th of the same month, a second Proclamation was issued by the Lieutenant Governor, explanatory of the first. It appears that, at the time of issuing these Proclamations, the Governor in Chief was on a tour of inspection at Van Diemen’s Land. On his return to New South Wales, he issued a Notification, dated 13th July, 1821, declaring that the Lieutenant Governor had no authority to promulgate any such orders, and that therefore the proclamations of the 4th and 12th days of May, 1821, were absolutely null and void.

* Note 199.
It appears that the two last mentioned proclamations had been drawn by Mr. Barron Field, the Judge of the Supreme Court of the Colony; and this Gentleman considers himself much aggrieved, first, by the Governor not having consulted with him before he proceeded to promulgate his notification of the nullity of these Orders, and Secondly, by a reproach which it would seem was addressed to him by the Lieutenant Governor for an alleged want of manliness in not giving to him (the Lt. Governor) a written opinion as to their Validity. Whether Mr. Barron Field has or has not ground to complain of want of courtesy on the part of Governor Macquarie or of positive disrespect on the part of Lieutenant Governor Erskine, are questions involving no point of law, and upon which, therefore, it is not within my province to enter.

Mr. Field has, however, transmitted for Lord Bathurst's consideration a Written Paper,* in which he distinctly expressed his opinion that, while the Governor of New South Wales is at Van Diemen's Land, or is at sea on his Voyage to or from that Dependency, the Lieutenant Governor, who is left in Command at New South Wales, may lawfully promulgate all such ordinances as might have been enacted by the Governor himself if present. On the other hand, it appears to be Governor Macquarie's opinion that no legislative act can emanate except from the Governor in Chief, so long as that officer is within the limits of his Government, or in transition from one part to another. The question arising on these Papers therefore is, which of these two opinions is right.

To answer these questions, it must be assumed that the King has conferred, and has power to confer, a legislative authority on one or both of these Officers. That being assumed, the question is reduced to this point, viz. In what terms, and subject to what instructions, has this Authority been in fact conferred? I do not certainly collect from any of the papers before me, what are the precise terms of the Commission held by General Macquarie, and by the Lieutenant Governor respectively. It should seem, however, that the Lieutenant Governor was authorized by it to do all such acts as might legally have been done by the Governor in Chief, in case the latter officer should happen to be absent from the territory of New South Wales "and its Dependencies." If Mr. Field (who quotes these words as the language of the Commission) is accurate, it seems to follow that Governor Macquarie's powers remained entire, while he was in the dependant territory of Van Diemen's Land; but that, while he was at Sea in his passage thither and on his return, the whole of those powers were transferred to the Lieutenant Governor.

* Note 199.
It is not, perhaps, at the present time of much importance to consider whether this is an accurate solution of the question, discussed by Mr. Field in the year 1821. The practical inconvenience arising from the existence of doubts on such a subject is manifest that, if the Commission of the present Governor is expressed in the same language as that of his predecessors, it would seem expedient to remove all further difficulty, by signifying His Majesty's pleasure, whether in future the Governor's authority in New South Wales is or is not to be suspended from the time of his quitting that Colony for the dependent Settlement of Van Diemen's Land. On this, which is merely a question of policy, I of course do not presume to suggest any opinion.

JAS. STEPHEN,* Junr.

Points for consideration in proposed New South Wales Bill,† by F. FORBES.*

Heads of points for consideration, preparatory to the same being submitted to parliament.

1. The last indemnity act‡ to be revised, and such parts selected as it may be proper to re-enact; and these parts sub-divided into such as it may be necessary to make perpetual, and such as should be renewed only for a limited time.

The Magistrates in New South Wales have passed sentences upon persons convicted, which have been rendered necessary by circumstances, but which have not been sanctioned by law; it is therefore proposed,

2. To empower the Magistrates to pass sentence of punishment on persons convicted of offences in the Country, as has been heretofore practised in New South Wales; and to give retrospective effect to all such sentences as have been already passed, and indemnity to the Magistrates and all other persons acting in pursuance of their orders, in consequence thereof; it is deemed preferable to commence and carry on the Colonial Sentence after the original sentence has expired.

The Statute, 30 Geo. 3, Chap. 47, authorizes the Crown to empower the Governor of N.S.W. to remit the sentences of persons under transportation, as he may deem proper, such remission to have the effect of a sign manual pardon only; the Governor it appears has exercised this power, without any authority from the Crown; and the limited interpretation,§ which has been given by the Courts to the Governor's pardon, places the parties emancipated in a state of legal disability which appears to be incompatible with the intention of the legislature. Again, the

* Note 200. † Note 201. ‡ Note 202. § Note 203.
Remission of sentences by governor.

Rules and ordinances to be proclaimed by governor on recommendation of magistrates.

act goes on to direct that a duplicate of every instrument of remission should be transmitted to England, in order that the parties emancipated might be included in the next general pardon; but impediments have arisen in carrying this part of the Act into effect. To remove all improper disabilities and at the same time to restrain persons whose sentences may be unexpired, from returning to England, it is proposed,

3. That the Governor’s pardon should be always liable to the allowance, or disallowance of the Crown, to be expressed thro’ His Majesty’s Principal Secretary of State for the Colonies; and, in case of no express disallowance within three years from the date of such pardon, the same to be considered as allowed. The pardon, so given, to have the effect and to restore all the rights and competencies of a pardon under the Great Seal, so long as, and not longer than, the party receiving such pardon shall continue to reside bonâ-fide in New South Wales or its dependencies; in all other cases, the Governor’s pardon to have the effect of a sign manual pardon only. All pardons heretofore granted by Governors of N.S.W. to rest upon the same footing as pardons hereafter granted, and to be deemed so far valid, altho’ there may have been no express authority from the Crown to grant the same.*

4. To vest in the Governor,† at the recommendation and with the consent of the Magistrates at ——— or a majority thereof, consisting of not fewer than ——— of such Magistrates, whose recommendation and consent shall be formally expressed in writing and respectively signed by them, a power of passing and proclaiming such rules and ordinances for the regulation and good order of N.S.W. and its dependencies, or any parts thereof, as may from time to time be found expedient and necessary, and shall not be repugnant to the laws of England; such rules and ordinances to be subject to the allowance or disallowance of H.M. in Council; and in the mean time to have the effect of by-laws, and as such to be recognized by all the Courts in the Colony; and in case of no express disallowance within three years from the time of passing the same, to be signified thro’ His Majesty’s Principal Secretary of State for the Colonies, to be considered as having received the royal assent.

* Marginal note.—It will be necessary to declare that Convicts, who have not had the punishment of death commuted for Transportation, and whose sentence has been satisfied, are to be considered as Free Men both in N.S.W. and England after the termination of their sentence.

† Marginal note.—The Govr. must have a joint right of initiation—a clause that if the Governor has not the Majority of Magistrates upon an Order initiated by himself, still that if he has one third of the Magistrates with him, such bench of Magistrates not being fewer than ——— in number, he shall have the authority to pass the order, making special report to the Govt.
5. To prevent the abuse of indulgence and preserve the public decency, the Governor to be invested with the power, when he shall see occasion, of ordering and removing out of the Colony any turbulent and factious convicts, who may have been emancipated,* every such order or act of removal to be subjected to the approbation or disapprobation of His Majesty and in the mean time to attach in responsibility upon the Governor.

It is considered that by reason of the fundamental principle of English law that, however the Crown in exercise of its prerogative may institute Courts of Justice, such Courts must proceed according to the course of the common law, it may be necessary to obtain Parliamentary sanction for some parts of the new Charter or constitution of the Supreme Court in N.S.W.; therefore it is proposed to embody such of the recommendations in

6. Provisions defining the powers and jurisdiction of the Supreme Court, and to incorporate a short system of insolvent law, upon the principle of the judicature act† for Newfoundland (49 Geo. 3, Chap. 27).

[The marginal notes are inserted in a different handwriting.]

SUMMARY of the law as it stands at present, with regard to persons who have been adjudged guilty of crimes which induce the forfeiture of estates, and legal disabilities, and also with regard to the efficacy of pardons, and the endurance of punishment, in removing such disabilities.

Of forfeitures and disabilities.

In treason and murder, the offender forfeits all his estates and goods to the Crown; his blood is corrupted and loses its heritable quality; he cannot sustain any suit in any Court of Justice; and he is incompetent to serve as a juror or a witness.

In all Capital felonies (other than treason or murder) whether they be such at common law or created by statute, the offender forfeits the profits of his real estates during his life, and all his goods absolutely, to the Crown; he cannot sustain any suit in any Court of Justice; and he is rendered incompetent to serve as a juror or a witness.

In all cases of felony, and other crimes which render a person infamous, he is disqualified from serving as a juror or a witness, except in petty larceny alone, which by a particular statute, does not incapacitate the party convicted from being a witness.‡

---

* Marginal note.—or who may remain in the Colony after the term of their confinement.
† Note 204.
‡ Marginal note.—31 Geo. 3, Cap. 35.
Of pardons, and endurance of punishment.

Pardons may be classed under three different heads, namely, pardon by act of parliament, pardon by exercise of the King's prerogative, and pardon by endurance of punishment.

First, of pardon by act of Parliament.—This class of pardons is only mentioned for the sake of order, since it is universally known that the effect of such pardons is only limited by the intention of the legislature; they may be general or special, absolute or conditional, and may remove every kind of disability whatsoever.

Secondly, of pardon by exercise of the prerogative.—An absolute pardon under the Great Seal restores the party, to whom it is extended, to credit and competency as a man, to all intents and purposes, except in the corruption of blood, which, as it affects other parties, can only be removed by act of parliament; and also except the capacity of serving as a juror, as is contended by some authorities, among which is Sir Matthew Hale, and denied by others, among which is Lord Coke; And also where the disabilities form part of the express punishment inflicted by Statute.

A sign manual pardon does not remove any disability, and is revocable at pleasure; it holds out a prospect of full pardon, and in the mean time operates as a suspension of punishment, but it is not pleadable as a pardon.

Thirdly, of pardon by operation of punishment.—At common law, the endurance of the punishment assigned to an offence, did not restore the offender to any forfeited right, or remove any disability consequent upon his crime. Regularly this effect could only be wrought by a pardon under the great seal. The clergy assumed the power, by penance and purgation, of removing the stain of guilt, and restoring the offender to his former character. This is technically called the benefit of clergy. When the legislature interposed and abolished the religious ceremony of purgation, it substituted another mode of punishment, and such punishment was held by the temporal courts to work all the consequences of clerical absolution. As such an effect could only be accomplished by the power of parliament, pardons obtained in this way are held to be statutable pardons. They may also be considered in the light of conditional pardons, because they are annexed to specific offences, and because their efficacy is made to depend upon the party's enduring the full measure of the punishment imposed by the law. Hence arise two important points:

1st. That transportable offences, which may not come within any description of crime to which such statutable pardons are
expressly limited, are not expiated so as to remove the legal disabilities consequent thereupon, by merely suffering the punishment of transportation.

2dly. That persons, who may not have endured the full measure of their punishment, or served the whole time of transportation, are not within the benefit of the enabling statutes, or in other words are not pardoned.

Of the class of crimes, from which the consequences of guilt are not removed by the fact of transportation and service, the safest view will be taken by referring to the specific offences, enumerated in the acts of parliament, for which transportation is made equivalent to pardon.

By the 4th Geo. I, Cap. 11, Sect. 1, persons convicted of grand or petit larceny, or any felonious stealing or taking of money or goods, and who by law shall be entitled to benefit of clergy, and liable only to the penalty of burning in the hand or whipping, are made liable to be transported; and where any such offenders shall be transported, and shall have served their respective terms, according to the order of the Court, such services shall have the effect of a pardon to all intents and purposes.

By the 8th Geo. 3, Cap. 15, Sect. 1, persons convicted of crimes from which they are by law excluded from the benefit of clergy, are liable to transportation in the manner pointed out by the act, and such transportation shall have the effect of a pardon under the great seal.

Hence, it must follow, that persons convicted of offences which do not fall under the above specification, that is to say, whose offences are neither grand nor petty larceny, nor feloniously stealing money or goods within the benefit of clergy, nor by law excluded from the benefit of clergy, such persons, altho' subject to transportation and having served their terms, are not restored to their legal credit or competency. One or two examples will serve to illustrate the offences herein alluded to:

A. was indicted under 41 Geo. 3, Cap. 39, for feloniously having in his possession, without authority, certain moulds, frames and instruments for making paper, and on conviction was sentenced to fourteen years' transportation. He has served his term, but it is considered that he is not restored to competency either as a witness or juror.

B. was convicted under the 42 Geo. 3, Cap. 107, for feloniously killing deer in a chase, and was sentenced to seven years transportation. He has served his time, but is not thereby restored to his competency as a witness or juror.

The case of persons, who, altho' transported for offences within the benefit of pardon, have not earned such pardon, may arise in
many ways; such as by remission by the Crown; but the most usual is that which arises upon the act of the Governor of New South Wales, in remitting the sentences of transported convicts, in pursuance of the Stat. 30 Geo. 3, Cap. 47. Persons, whose sentences have been so remitted, are placed by the same statute upon the footing of those who have sign manual pardons only. Consequently the situation of such persons must depend upon the nature of the crimes for which they have been transported. If, for capital felonies, they lie under all the disabilities of such crimes; they cannot acquire any right of property for themselves, nor maintain proceedings in courts, nor appear as jurors or witnesses. If for felonies not capital, they are still disabled from being witnesses or jurors.

London, 1st Jan., 1823.

FRANCIS FORBES.

Observations by Mr. Wilmot upon the Papers* drawn up by Mr. Forbes and Mr. Eagar.

It might be extremely proper with reference to the evident intention of the Legislature, who passed the Act of the 30 G. 3, C. 47, now to provide by an Act of Parliament, to be passed in the ensuing Session, that all Remissions of Sentence of Transportation, which have been issued by Governors of N. S. Wales from the year 1790 up to the period of the passing of the Act (or any other specified period), should be valid to all intents and purposes, as if the names of the Individuals had been inserted in a General Pardon under the Great Seal, and that a General Pardon should forthwith be issued for the purpose of this special remission; but it might be further necessary to provide that it was not in any degree intended now or for the future to take out of the Prerogative of the Crown the power of withholding Grace and favor in the Act of Pardoning; and, if any Individuals should be excepted by name in the General Pardon forthwith to be issued, their Remissions would not be confirmed.

The Act might possibly then provide that General Pardons under the Great Seal should be annual, and that the names of remitted Convicts should for the future be regularly inserted therein as provided by the Statute of the 30th G. 3, C. 47; but it is to be remarked that of course the Crown would retain the power of excepting to any Individual Name being inserted, if special reasons existed for such exception, for a case might occur, in which the Crown might approve the remission of the Sentence of Transportation, though it might not choose to confer on the Individual the additional favor of relieving him.

* Note 205.
from all civil incapacities, still adhering to him, by allowing the insertion of his name in a General Pardon. Probably, such a distinction might seldom if ever be made, but it is considered that the power should exist, if in any special case it were deemed necessary to exercise it.

With respect to the palpable anomalies of the existing Law, as detailed in Mr. Forbes' Paper, whether they ought to be corrected or not is a question of general legislation, which it is not necessary to consider with reference to any particular legislative Measure relating to N. S. Wales, which may take effect in the ensuing Session.

R.W.

Mr. Justice Field to Earl Bathurst.

My Lord,

Sydney, 15th January, 1823.

The Commissioner of Inquiry on the Colony of New South Wales having in his Report* to your Lordship recommended an Act of Parliament to be passed, which in my opinion unnecessarily tampers with the common law of England, I think it my duty to address a few words to you, for the consideration of the Committee of the House of Commons and His Majesty's legal advisers, before so useless and difficult a Bill is framed.

I am perfectly sensible that if your lordship were to listen to the explanation of every individual, whose name is mentioned in the honorable Commissioner's Report, your whole time would be consumed in a fruitless labour. I shall therefore avoid (as becomes me) any reply upon the honorable gentleman's report of my judicial conduct,* and confine myself simply to the task of proving the unnecessariness, the insufficiency and the difficulty of Mr. Bigge's proposed Bill; I shall rely principally upon the first of these, namely the unnecessariness; and I am sure, that, if I succeed in that point, your lordship's reverence, both hereditary and acquired, for the common law of England is too great to permit you to consent to any wanton and uncalled for disturbance of its self-purifying stream.

It is a principle of the common law of England that * Right of convicts and emancipists to sue or be sued.

convicts of felony cannot sue, though they may be sued. In New South Wales, down to my time, it was thought they could neither sue nor be sued till their sentence of transportation was expired or remitted by the Governor, and the sentence of the notorious George Crossley was accordingly remitted† by Governor King with the sole view of bringing him before the Civil Court. It is even now a part of the bye laws of the Colony that convicts, before expiration or remission of term, must complain to the

* Note 206.  † Note 207.
Magistrates, if they have any civil cause of action, and that, if there is any suit against them, Government is not to be deprived of their services by arrest or imprisonment. It was I, who first propounded the principle of law, by which they could not be prevented from suing in this Colony, namely, that the only admissible evidence was the record of their conviction, and a copy of that could not be procured without at least a twelve-months' time. And this I did early in the year 1818, in a note to a judgment* in a case of Doe v. Pearce, which I published in the Sydney Gazette; for that paper used to insert such bombastic and incorrect law reports that I have generally sent the printer my own notes of judgment. This point of colonial law being very important and growing naturally out of the judgment in Doe v. Pearce, I added it by way of annotation at the foot of that judgment. Then came the case of Bullock v. Dodd in England in 1819, which first called my attention to the nature of the Governor's remissions of sentence, and led me, when I came last year to reprint the note upon my judgment for the purpose of correcting the misrepresentations which the Convicts had artfully spread abroad, to strike out the words "or the Governor's," for I had found in the interim that the Governor's pardon was not equal to the King's in restoring right of suit. The Commissioner says, "he shall not comment upon my motives for making this omission in my report of the case"; but this is not done with the honorable gentleman's usual candour. It was no part of a report of a case; it was a mere foot-note, referred to from the report of the case by an asterisk. I surely had the power to correct a legal annotation. My only motives for making the omission could be those of correctness. I had originally added the note to the case too hastily, without looking into the Governors' Remission Act. If it had been part of my judgment, I should have considered it better.

But in this colony, it is of no consequence whether the Governor's remission must be confirmed by the King's pardon or not, under the principle I have just mentioned, unless the Courts should be mad enough to give every opposite party time to send home for the record of the suitor's or witness's conviction; and, even if a Judge and two Magistrates should be so indiscreet, the suitor or witness has the same time to procure the King's pardon, which restores him. So that the utmost evil that could happen would be a twelve-months' delay of justice. The only grievance, under which the persons calling themselves "emancipated colonists" labour, is in Courts of Justice at home, where the records of conviction can be procured before the opposite

* Note 208.
party has notice to neutralize them by providing himself with the King’s pardon; And in England, Mr. Bigge’s Bill does not propose to remedy the grievance. Here I maintain the bill is unnecessary; for the simple reason above mentioned, not to mention how much preferable to passing a new act of parliament it would be, to comply with the directions of the old one, and transmit the names of remitted convicts home for insertion in the annual King’s Pardon, together with which, how easy it would be to get the names of expirees included! And thus would they all be made new men, and enabled to sue and attest anywhere, as the Lord Chief Justice hints that Bullock should procure a pardon with words of restitution, before he came again. His lordship had no idea of Mr. Bigge’s policy of defrauding remittees or expirees of their property accruing anywhere else but in the colony. And this brings me to the second branch of my argument, namely the insufficiency of the honorable commissioner’s measure for the purpose of protecting remittees and expirees in the enjoyment of their property, as he admits they should be protected, or, in other of his words, “for the purpose of their fully enjoying the benefits of a state of freedom.” By Mr. Bigge’s Bill, their rights will be less than by the law, as it at present stands; for now the King’s pardon, which is held out to them as a consequence of the Governor’s remission, and which His Majesty’s Secretary of State for the Home Department would not refuse to any expiree, enables them to sue in all the King’s Courts, in respect of property accruing anywhere, whereas, under the honorable gentleman’s bill, these emancipated convicts, with their rights perfected and their freedom restored, by his bill, as he calls them, cannot recover debts due to them in England or India at all, or even here unless upon a certificate of their continued residence in the colony; so that their English or Indian agents may lawfully retain the produce of their flocks or of their herds; and, if they go to either Country to settle their affairs, their property here is at the mercy of the public. They may recover verdicts if resident here; but, if the defendant escapes pending the suit, they cannot sue upon their judgments abroad. If the Defendant goes home before the suit is commenced leaving property here, they may bring foreign attachment here; but, if appearance is put in by the garnishee, the property attached may be made away with, and they cannot sue upon their judgment abroad. So that in two of the most Common Cases, of consignees of their produce abroad, and creditors with effects only here, they are not protected in the enjoyment of their property, their rights are not perfected, nor do they enjoy
the benefits of a state of freedom. By the new law, transports for seven or fourteen years are restricted for ever from suing except where both they and the property in question actually are; whereas, under the old law, transports for life, with their sentences absolutely remitted, and their names inserted in a King's pardon, could sue in all the King's Courts, personally present or not, for rights or property accruing in any of His dominions.

Again, upon the subject of convicts being witnesses, to which the same law applies as that of suitors, the Commissioner's Report is silent, so that "judicial discretion," as he calls it, would be, under his Bill, just where it was before; for the Court could stop any suit for twelve months, upon the suggestion that the witness was a felon convict.

I would have pointed out all these consequences to the honorable gentleman, had he consulted me upon his project; but I thought I had satisfied him of what I maintain to your lordship, namely the absence of any grievance and the unnecessariness of any remedy; and I was not aware that he considered himself sufficiently master of the legal question, to propose to tamper with the common law of England by half measures, for the purpose of soothing all parties. I was not aware that he had condescended to go out of his way to "correct," as he calls it, the resolutions of the emancipated colonists, and that is what makes him so sore at my calling them false and absurd; and yet in the very same page of the honorable gentleman's report* he himself says that these persons "have magnified in their resolutions their relative importance in the colony, as well as the extent of the grievance, under which they found themselves to labour," and, in the next page but one, he says that "the effects of the Governor's remission (which, like the convicts, the honorable gentleman always confounds with pardon) upon the possession and transmission of real property were both mistaken and magnified by the emancipated convicts in their resolutions." Is not this very much like being "false," and is it not "absurd" in these people to say that "they are possessed of the larger moiety of the property of the colony?" So much for Mr. Bigge's "correcting" these resolutions! He then undertakes to state the effects of the Governor's remission legally, but is incorrect in the outset. He says that, by the statute of 54th Geo. 3d, c. 145, corruption of blood and forfeiture of real property are taken away. He should have said escheat of real property. A lawyer should know that forfeiture is to the King and is consequent upon attainder, and that forfeiture, except for treason, is only for a year by magna charta, whereas it is escheat to the lord of the

* Note 206.
fee that follows corruption of blood, and it is only that that is taken away by the statute. He then adds, after stating the consequences of this law from my judgment:

“...It appears therefore that that portion of property only that is held or has been transmitted by emancipated convicts, guilty of treason or murder, and of persons attainted for felony prior to the passing of the statute, 54th Geo. 3, is liable to the forfeiture created by attainder and is not inheritable by their children.”

He should have said “is liable to the escheat consequent upon corruption of blood.” He goes on:

“...The property of attainted convicts, acquired by them since that period, remains subject to the claims of the crown for profits during their life-time, but has been and is now descendible to their children.”

He should have said “the property of convicts attainted since that period.”

“Your Lordship will observe (he continues) that this defect of title arises solely from the claim and prerogative of the crown [he should have added, or of the lord of the fee, if the property is in England]; and that therefore the titles of persons in the situations just described, or of those who have purchased from them, are not impeachable on other grounds. It may be questionable even whether, as to grants of land made to attainted convicts by its own authority, or by its own servants, the crown even can reclaim its own gifts, where there is no breach of any condition annexed to them.”

Upon this I observe that it would not be a reclaimer of a gift; the land would still vest in the crown by operation of law, in case of treason by forfeiture, and in case of murder by escheat. If the King grant land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking the grant. Bro. Ab. Patent 62. Finch L. 110. So if the King grant land to corrupted blood, it will not operate as a pardon, and enable the grantee to retain and transmit.

“But (he concludes) as all the consequences arising from attainder, as affecting the property of convicts acquired by them both previous to the 27th July 1814 and subsequent to it, may be removed by a pardon under the great seal, having special relation to rights acquired and transmitted in the interval, no legislative authority will be necessary for that purpose.”

Mr. Bigge here catches a glimpse of the truth; but, if the Convict is dead, the King’s pardon will come too late to remove the consequences; and does not the honorable gentleman see
that a pardon under the great seal will equally remove disability to sue; and that therefore no legislative authority will be necessary for that purpose? And yet we shall presently find that, as the honorable commissioner recommends that no other restriction should be imposed upon the alienation of lands by traitors and murderers than the permission of the Surveyor General, legislative authority will be necessary to extend the statute, 54th Geo. 3, to those who were so carefully excluded from it by that act. And so much for Mr. Bigge's statement of the law.

Upon the subject of future grants of real property to attainted convicts, the Commissioner proposes that the alienation of remitted convicts should be declared in the remissions to be void, without the permission of the Surveyor General, and that the same restriction should apply to expirees. This is a bettering of the condition of traitors and murderers, and a lowering of that of all other felons, from what it is at present; for since the statute 54 Geo. 3, which abolishes escheat except for treason or murder, the Lord can do nothing except in case of murder, and except in case of treason; all the Crown can do is to take the profits as they arise for the convict's life, or till he is pardoned. Does Mr. Bigge's word "alienate" include "devise"? May they make their wills without consulting Mr. Oxley? In the case of expirees, who are thus lumped with remittees, the restriction must be inserted in the grant, or else an act of parliament must in this particular lessen the present rights as to land of felon-convicts transported for years, as there must be an act to increase those of traitors and murderers transported for life, who were so strongly excluded by the legislature from the stat. 54 Geo. 3.

The permission of the Surveyor General! I suppose the honorable Commissioner means the permission of the Governor. And even then what a dangerous absolute power over real property, to be placed in the discretion of one breast. If Mr. Bigge's object be only publicity, surely an absolute colonial registration law would be quite sufficient for that purpose; but to impose the Surveyor General's permission, before a remittee or expiree can even mortgage his land, is a serious aggravation of the old condition not to assign within the first five years. However these matters of policy are not for me. My only business is with the law; and I think these few observations will be sufficient to convince your lordship of the many difficulties, which always attend upon any meddling with the course of the common law of England. More difficulties upon the construction and operation of Mr. Bigge's Act would doubtless arise when it should come to be drawn and put in practice; and my main contention
before your lordship is, that the working of the common law will always in this Country render such an act utterly unnecessary, not to say insufficient and mischievous.

I have, &c.,

BARRON FIELD,
Judge of the Supreme Court of New South Wales.

P.S.—In further elucidation of this subject, I take the liberty of enclosing a copy of my public letter* to the Commissioner of Enquiry on the defects and improvements of our present Charter of Justice.

B.F.

Mr. E. Eagar to Under Secretary Wilmot.

3 Francis Street,

Sir, Mecklenburgh Square, 25th February, 1823.

You were good enough some months since to say that, as soon as His Majesty's Government had determined upon the Measure to be adopted on the Petition of the Emancipated Colonists of New South Wales, you would communicate the same to me as the Agent† of that body of Colonists. I now take the liberty of most respectfully requesting the promised communication on behalf of the Petitioners who are naturally most anxious to obtain the Sentiments of His Majesty's Government on the Case.

I have, &c.,

EDWARD EAGAR.

Abstract of Mr. Bigge's letter‡ addressed to Earl Bathurst, dated 11th Feby., 1823.

Mr. Bigge's letter embraces the two offices of Lt. Govr. of Van Diemen's Land, and Lt. Govr. of New South Wales. The first he thinks too limited in powers, and the second he considers useless. The following is the substance of his remarks:

First. Of the Lt. Govr. of Van Diemen's Land.—This Officer cannot undertake any new work, in which the public funds are to be expended, or the state convicts employed, without the previous sanction of the Govr. in Chief. The whole of the expenditure in Van Diemen's Land, and the accounts thereof, are submitted to the inspection and approval of the Govr. in Chief, before they are made public in the Hobart Town Gazette.

Limited as the Lt. Governor's authority is, it is ousted altogether in Port Dalrymple, where all the minor details of the public works, and a variety of other subjects, are placed under the immediate direction of the Govr. in Chief.

* Note 209. † Note 210. ‡ Note 211.
Hence Mr. Bigge concludes "that, for the exercise of the chief branches of authority, and such as require early decision," the sanction of a distant person is required, while Port Dalrymple is "specifically excepted" from the Lt. Govr.'s authority, limited as such authority is.

Mr. Bigge alludes to the unfavorable impressions, which this state of dependency was calculated to send abroad, of a preference shewn to one settlement, and a jealousy felt towards the other; and states that, altho' specific orders may prevent the recurrence of neglect, and supply the deficiency of power, it is his opinion the two governments should be separated. In the spirit of this measure, he recommends that the Lt. Govr. of Van Diemen's Land should be immediately invested with the power of ordering execution in cases of capital sentence, and of pardoning or commuting the punishment of all offences committed within his government.

Secondly. Of the Lt. Govr. of New South Wales.—This office Mr. Bigge thinks to be useless, and recommends in its stead that the officer, next in military rank to the governor, should succeed to the administration, upon the death or absence of the Governor in Chief.

Observation.—I take the liberty of adding one or two general observations, which occurred to me on reading Mr. Bigge's letter. It was a principle early laid down, and I believe generally acted upon, in the government of the first colonies, that whatever was necessary for the convenience of the governed, should be independent, so far as it could be; but, subject to this principle, such dependencies of one government upon another were created, as suited the convenience of His Majesty's government at home. Thus for example, Nova Scotia has a separate and independent legislature, which makes laws for the colony without any connexion with any other province; but the Lt. Governor of Nova Scotia is subordinate to the Gov. General of North America in all matters of general concern, as the disposition of troops, etc.

It has also occurred to me, in aid of Mr. Bigge's suggestion of conferring on the Lt. Govr. of V. D. Land a power of ordering execution and pardoning local offences, that, as there will be entirely separate and distinct courts of judicature, so much of the governmental power, as may be necessary to give effect to the independence of the Courts, should be conveyed to the Governor of Van Diemen's Land; without the very essential and important powers of punishment and mercy, the machinery of the court is defective—the local judicature is, in fact, not complete.

28th Feby., 1823.
UNDER SECRETARY WILMOT TO MR. E. EAGAR.

Downing Street, 4th March, 1823.

I have laid before Lord Bathurst your letter of the 25th ulto., requesting to know to what determination His Majesty's Government had come respecting the Petition of the Emancipated Convicts of New South Wales; and I am directed to acquaint you that, whenever the Clauses in the proposed Bill affecting the Emancipated Convicts are finally prepared, you will be made acquainted with the substance of them according to promise.

I am, &c.,

B. WILMOT.

MR. F. FORBES TO UNDER SECRETARY WILMOT.

Sir, 6th March, 1823.

Herewith I have the honor to inclose Mr. Bigge's letter upon the subject of the condition inserted in the new grants of land in New South Wales, together with Mr. Hobhouse's notes upon the Commissioner's Reports, and suggestions* relative to the new bill.

Upon the first, I beg to observe that the point seems to be this:—Mr. Bigge in his first report† (page 161) advised that grants of land should be made in proportion to the number of convicts to be employed, and Sir Thomas Brisbane, in giving effect to the same principle, caused a proviso‡ to be inserted in all new grants of land, requiring the grantee to take off one convict for every hundred acres of land granted. Mr. Bigge observes, upon this condition, that it will be unequal in its operation, inasmuch as some land in New South Wales is of more value than other land; that the greater the distance from Sydney or other settled place, the more expensive the subsisting of a convict, and the less valuable the produce of his labor. Mr. Bigge would seem to object to any general condition to be inserted in all grants, but to let the terms of each specific proviso be regulated according to the circumstances of each particular case. He also objects, upon grounds of general inexpediency, to the condition that the convicts, assigned with the grant, should not be transferrable to other purposes than the cultivation of the granted land.

In reference to Mr. Hobhouse's letter, I observe but one point, which is not either provided for by the bill, or is not within the legal exercise of the Crown's prerogative, and that is empowering the Surgeon on board a Convict transport to inflict corporal punishment, which he modifies by recommending the concurrence of the Master of the Ship. I beg to call to your notice

* Note 212. † Note 213.
two points in Mr. Hobhouse’s letter:—the first occurs in which Mr. Peel entertains the opinion expressed in my note opposite the clause relating to the incontinence of the sailors on board of female convict vessels, and the second goes to the manner in which Mr. Peel thinks the confirmation of Governor’s Remission should be made, which he thinks should be “compendious and simple,” my reasons for concurring are given in the notes to the bill which Mr. Barnard will this day lay before you.

I have, &c.,

FRANCIS FORBES.

Points for consideration in framing instructions for carrying into effect the New South Wales Act.*

In the draft of the N.S.W. Bill, it is provided that the Supreme Court shall administer justice according to the laws of England, so far as they can be applied; and the local ordinances of the Governor, so far as those ordinances may not be repugnant to the laws of England. The Bill also empowers the Governor, with the assent of the Magistrates, to make ordinances, in certain specified cases, which shall not be repugnant to the laws of England.

From this view of the contemplated law, it will be seen that the Supreme Court will be called upon to sit in judgment upon the acts or ordinances of the Governor, and to determine whether such acts are lawful or not, a situation of evident difficulty to both parties, and one that, with the very best feelings on both sides, may lead to a conflict of opinions which however amicably enforced cannot fail to be attended with embarrassment. The principle indeed is not new in itself, but it will be called into peculiar action in New South Wales. It is part of the constitution of all the regular colonies that the acts of the local legislatures should not contravene the laws of the parent country; and I have heard of instances, in which the Courts have held such acts to be void, as impugning the fundamental articles of the colonial constitution. But, from the composition of the governments of the elder colonies, and their analogy to that of England, difference of opinion upon abstract principles of law can seldom lead to any animosity of individual feeling; in New South Wales, from the infancy of its institutions and the peculiar energy which the government is sometimes called upon to exert, the case is different; and it is with the view of guarding as much as possible against differences between the Governor and the Chief Justice upon points of duty (assuming that both the Governor and Chief Justice will be actuated by

* Note 201.
the best feelings of private concord) that the following suggestions are thrown together for the consideration of government.

The local regulations of the Governors of N.S.W. are to be regarded in two points of view, as respects the past, and the future. A number of rules and ordinances are at present enforced in the Colony, which however useful or indispensable in themselves, have no other foundation than the fiat of the Governor. The Governor is protected from personal consequences, by the acts of indemnity which are annually passed by Parliament—which acts, by the very fact of their being passed, go the whole length of a parliamentary declaration that the ordinances themselves are illegal. Should a case arising upon them be brought before the Courts at Westminster—a suit upon a judgment recovered in New South Wales, for instance—there can be no question but it would fail. And it must also fail in New South Wales, unless the Judge should take upon himself to substitute his opinion of necessity for the laws of the land, and declare that to be law which he knows not to be law. And experience enables me to say that a judge is never safe, who looses himself from the fast ground of the law; he cannot foresee the consequences to which it may lead him; and no compensation of present expediency can be sufficient to justify the danger of the precedent. It seems to me to be of the first necessity to adopt some measures in reference to this subject, which shall bring the Governor and the Judge into a unity of opinion upon the lawfulness of every ordinance before it shall be promulgated as law in the Colony, and enforced in the Courts.

It appears to me that there should be an instruction, which should be regularly drawn and transmitted with the law, in which the Governor should be required, before he should promulgate any local ordinance, to have the same laid before the Chief Justice for his opinion in writing, whether such ordinance is, or is not repugnant to the laws of England, or in other words whether he should feel it to be consistent with his duty to maintain and enforce such ordinance in the Supreme Court if a question of its validity should be argued before him; and that if the Chief Justice should be of opinion that it is repugnant to law, such an opinion should have the effect of a suspending clause, until the ordinance together with the opinion should be transmitted, under the joint hands of the Governor and the Judge, for the decision of His Majesty in Council, or some other mode in which it may be deemed convenient to take the sense of government.
I do not know of any legal or constitutional objection to the Judge's giving his opinion upon the principle of lawfulness or unlawfulness, before he is called upon to apply it to any positive case. In England it is the usual practice for the Lord Chancellor and the Chief Justice of King's Bench to sit as legislators in the House of Peers; and in the Colonies the Judges almost universally have seats in the Council, which represents the House of Peers. It might be abstractedly better that the person, who is to interpret the law, should not be concerned in the framing; but all speculative principles must be controlled by expediency, in their adaptation to practice.

It may probably be suggested that cases of immediate necessity may require the Governor to make a regulation, and take upon himself the responsibility of enforcing it, altho' its lawfulness may be questioned by the Judge; but I am at some difficulty to anticipate such a case; and even were such to arise, it is fairly questionable how far any expediency, short of that over-ruling necessity which supersedes all law, and which perhaps has never occurred but in the revolutions of society, should be held a sufficient reason to justify a departure from the rules of law; and at last, the difficulty re-presents itself in after stage, for how can that be carried into complete execution as law, which the tribunals declare not to be law?

Assuming that the measure herein suggested may meet with the approbation of Government, it will be necessary to observe that as respects the future it will be easy in the adoption; as regards the past, it will be necessary, in order to give it effect, that the Governor should be required, by instruction, to collect and arrange in order all the local ordinances, which have from time to time been made by the Governors of New South Wales now in operation and to cause the same to be laid before the Chief Justice, for his opinions in writing and in detail upon their validity with reference to the laws of England, as before explained. If the Chief Justice should find any existing ordinances so repugnant to the laws of England, he should deliver his objections in writing to the Governor, who, if he should be unwilling to accede to the annulment or alteration of such ordinance with a view to its continuance, must transmit the mutual opinions of the Chief Justice and himself for the decision of the Secretary of State, and in the mean time I apprehend the Judge could not be held to "deny right or justice to any man," if he were avowedly to suspend his opinion upon any case involving such ordinances until the question of its lawfulness or unlawfulness should be decided by the Govt.
I must also add that an instruction, under which the Governor and the Chief Justice of the Colony should be led into a quiet discussion of the lawfulness of any contemplated measures, would not only prevent collision, but would tend to establish a general harmony of opinion upon all other points connected with the administration of the Colony.

In my anxiety to prevent any possible embarrassment, I have put the supposed case upon its extreme ground; should it however unfortunately happen that the Chief Justice should be unavoidably called upon to decide upon the legality of any ordinance of the Governor, and should I be required to say in what spirit the Chief Justice should decide, I should unhesitatingly say in the spirit, rather than the letter of English law, and, where circumstances would fairly allow, with a leaning towards the ordinance, aware that the end of all law is the preservation of order in society; that

[The conclusion of this paper is not available.]

Mr. F. Forbes to Under Secretary Wilmot.

My dear Sir, 10 Upper Spring Street, 13th March, 1823.

I give this communication a private form, because I am desirous not to trouble you unnecessarily with official papers; it relates to one or two points connected with the N.S.W. Bill, and is intended for your own information.

I have made the alterations or explanations, which seemed to be required in the draft of the bill. There are two, however, to which I must recall your attention; the first you will find in an explanation at the foot of the page facing folio 7, which I omitted until I read the bill at home, and had my recollection refreshed upon what appeared to me a very important point to submit to Lord Bathurst; the second is a short marginal explanation on page 27, relating to the issue of execution after the judgment of the Supreme Court may be affirmed by the Court of Appeals, notwithstanding an appeal to His Majesty in Council, and which appears to me to require a little reconsideration.

While I am upon the subject of appeals to the Privy Council, I hope you will not think it out of the way if I say a few words upon that subject. It appears to me that, in framing the law as well as any instructions which may accompany it, regard should always be had to the Lords of Appeal, as a necessary part of the machinery of justice. A practical case will perhaps best explain what I intend to say. It was the custom of the Supreme Court, in Newfoundland, never to allow any objection to mere form, to prevail against the proceedings of the Surrogate Courts,
and for obvious reasons. In a great case, which had originally gone before the Surrogates, and was afterwards appealed to the Supreme Court, the Chief Justice expressly refused to send back the parties upon points of irregularity; the same case was afterwards appealed to the Privy Council, and was reversed for mere irregularity of proceeding. The evil did not stop at the single case; it touched a long list of important and heavy cases, and unsettled the rights of parties to such an extent, that it was at one time in contemplation to get a quieting act of parliament passed if possible. I inclose the printed case, which will explain itself, and may be worth your perusal; the judgment of the Supreme Court, with marginal points will be found at page 9 of the printed case of Bennett and others in appeal agst. Baine and others. It was complained by English creditors that the Chief Justice had been too tender in reference to the proceedings of the inferior Courts; he knew they were irregular, and should have reversed them at once, and have commenced proceedings ab initio in Newfoundland. But I will say, had the Chief Justice once reversed a case for irregularity alone, he must have reversed every case that came before him by appeal, without a single exception; and what would have been said of this? You will perceive that the Chief Justice did not sit upon “a bed of roses.” The reason that I allude to this case is, to shew that with whatever liberality we colonial lawyers may regard colonial proceedings, yet when they come under the severe scrutiny of the Cockpit, they are treated as rigorously as if they had taken place at a Court of County Sessions; the consequence naturally is that the colonial court is blamed, loses its character, and becomes the subject of complaint; and what perhaps is of more consequence, a course of decision gets unsettled and the private rights of persons disturbed. A skilful pilot will, I think, be able generally to steer through in safety; but you will have perceived, which is all I wish, that the situation of a Chief Judge in the Colonies is one of difficulty, and should be regarded with indulgence.

May I beg of you to minute at the end of every suggestion on the N.S.W. Bill, whether approved or not, as it will be my guide, in putting it into form for Parliament.

I have nothing further to add but that

I remain, &c.,

FRANCIS FORBES.

MR. JAMES STEPHEN, JR., TO EARL BATHURST.

My Lord,

Lincoln’s Inn, 20th March, 1823.

I have had the honor to receive Mr. Wilmot’s letter of the 15th instant, enclosing a letter* from Sir Thomas Brisbane (with

* Note 214.
STEPHEN TO BATHURST. 437

By virtue of his Commission* (which is under the Sign Manual, and dated the 30th of June, 1820), Major Goulburn claims the custody of the Records of the Criminal Court. This claim is resisted by the Judge Advocate, who asserts that the Court is entitled to the custody of its own Records.

To solve the question thus agitated between these public Officers, it appears to me sufficient to refer to the language of the royal commission* of the 7th of April, 1787, under which the Criminal Court was constituted, and under the authority of which its jurisdiction is at present exercised. The language of that Commission is as follows:—“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.” Now, among the “powers incident to a Court of Record,” the custody of its own Records is one of the most indisputable and essential. For this reason alone, I should consider the claim advanced by the Colonial Secretary as unfounded; but, in support of the same conclusion, I have further to remark that the Colonial Secretary is not, so far as I am aware, the Keeper of the Records of the Courts of criminal justice in any one of His Majesty’s Colonies where the Law of England is in force; that great inconvenience would arise if the Records were in any other custody than that of the Courts where they originate.

It may not be immaterial to remark (altho’ the observation does not necessarily arise out of the present Dispatch) that the Office of Secretary and Registrar, with which Mr. Goulburn has been invested, not being an Office known to the Law of England, has no definite duties, rights, or emoluments attaching to it; and that some Legislative Act seems necessary for effectually defining them. In the Island of Jamaica, more than twenty Acts of Assembly have been passed for this purpose.

Which is humbly submitted to the consideration of your Lordship by Your Lordship’s, &c.,

JAS. STEPHEN, Junr.

* Note 214.
Mr. James Stephen, Jr., to Earl Bathurst.

My Lord,

Lincoln's Inn, 24th March, 1823.

In obedience to your Lordship's Commands, signified to me by Mr. Wilmot, I have perused a dispatch* from Sir Thomas Brisbane to your Lordship, enclosing a correspondence between himself and the Judge Advocate of New South Wales as to the course, which ought to be pursued with respect to Offenders capitaly convicted before the Court of Criminal Jurisdiction; and, in compliance with your Lordship's directions, I am to express my opinion, as to the difference which exists on this point between the Governor and the Judge Advocate.

After repeated consideration of Sir Thomas Brisbane's Dispatch and its enclosures, I yet feel some doubt whether I distinctly understand what is the precise point in dispute between these Public Officers. If, however, I have accurately collected the meaning of their correspondence, they differ on the following point: The Governor considers that the Judge Advocate is bound to draw up, and to transmit to him, a written report of the proceedings in all cases of capital conviction, in order that he, the Governor, may form his own decision as to the propriety of issuing a Warrant of Execution. The Judge Advocate, on the contrary, contends that he is not bound to prepare any written report of the proceedings of his Court. He concedes, however, as I understand him, that it is his duty to wait on the Governor in person, and to make to him an oral communication as to the proceedings, which may have taken place on each Trial.

Assuming that such is the state of the controversy, I have to submit to your Lordship my opinion that the Judge Advocate is in error, and that it is his duty to lay before the Governor a written report of the proceedings of his Court in all cases of capital conviction. The reasons, which I have to offer in support of this opinion, are as follows:—

By the Commission† for establishing Courts of Judicature, in New South Wales, dated the 2nd of April, 1787, it is required that the Governor shall grant his warrant for the execution of every Sentence of Death pronounced by the Court, and that execution shall not be done in any capital case without his consent. The Governor therefore has to sustain the whole responsibility of carrying into execution, or of suspending every Sentence of Death. In order to discharge this duty, it is essential that he should have the most exact information of every circumstance, which occurs at the trial. Such information can be given with precision in no other mode but that of a written report. The course, which is pursued in cases of capital conviction at the Old Bailey, is perfectly analogous to this. The Recorder of

* Note 215. † Note 214.
London makes to His Majesty a written report; and the Royal Warrant of Execution is never signed until this document has been carefully considered by the Official advisers of the Crown. Both the reason of the case and the practice of England may therefore be relied upon in support of Governor Brisbane's opinion.

The objections of the Judge Advocate, as I collect them from his letter to Major Goulburn of the 24th of June, 1822, are reducible to three. First, he argues that the Commission of the 2nd of April, 1787, requires the transmission of a written report to England in all cases where five members of the Court do not concur in the Sentence, but does not make mention of any other written report in any other case; whence the Judge Advocate infers that, in no other case, is any such document required. To this reasoning, I should make the following answer. Where the analogy of the English Practice would be a Guide, as in the case of communications between the Judge and the Governor, the commission is silent as to the particular mode of that communication. Where, on the contrary, the analogy of English proceedings fails, as in the case of communication with Europe, there the Commission prescribes the manner in which the communication is to be made.

Secondly, the Judge Advocate contends that, his Court being a Court of Record, its proceedings are to be known only from its Records, and that therefore he is not bound to take any written minutes of them. Without enquiring how far this reasoning may be supported by certain theoretical maxims of law, I conceive it sufficient to say that these maxims have become obsolete in practice; as in fact they would be totally unsuited to the existing state of Society and public feeling, both in this country, and in His Majesty's Colonies.

Finally, I understand the Judge Advocate to insist that His Majesty's Secretary of State has directed the Governor that, in forming his judgment as to the expediency of carrying into execution the capital Sentences of the Court, he is to "regulate his conduct by the general rule of adopting the report of the Judge as the guide of his decision upon any application for an extension of mercy." Hence, as I understand him, the Judge Advocate infers that a written report is unnecessary, inasmuch as the Governor is to be guided not by his own view of any particular case, but rather by such advice as he, the Judge Advocate, may give. In answer to this, it may be observed, that the Instruction from the Secretary of State was obviously framed not with a view of exonerating the Governor from the responsibility of executing Capital Sentence, but merely for the sake...
1823.
24 March.
Deputy judge-advocate to submit written reports.

of directing him to pay to the Judge Advocate's reports the same
deference as in England is paid to the report of the presiding
Judge.

I should humbly conceive therefore that your Lordship might
deem it expedient to confirm the View, which the Governor has
taken of the relative duties of Judge Advocate and himself with
respect to preparing written reports in all cases of capital con-
viction.

It will not escape your Lordship's observation that, in pur-
suance of a clause in the Commission of the Courts of Judica-
ture, the Governor, in his present dispatch, requests His
Majesty's direction as to the cases of three men, named Carroll,
Redding and Rogers, who were capitally convicted, but whose
execution has been suspended until the royal pleasure shall be
known.

All which is humbly submitted to the consideration of your
Lordship by

Your Lordship's, &c,
JAS. STEPHEN, Junr.

—

EARL BATHURST TO SIR THOMAS BRISBANE.

29th March, 1823.

[In this despatch, Earl Bathurst notified the abolition* of the
offices of judge-advocate and judge of the supreme court and the
creation of new legal offices; see page 64, volume XI, series I.]

—

EARL BATHURST TO SIR THOMAS BRISBANE.

30th and 31st March, 1823.

[In these despatches, Earl Bathurst discussed the validity of
the ordinances and proclamations of the governor; see page 65
and 67, volume XI, series I.]

—

EARL BATHURST TO SIR THOMAS BRISBANE.

31st March, 1823.

[In this despatch, Earl Bathurst gave instructions re the cus-
tody of court records; see page 69, volume XI, series I.]

—

EARL BATHURST TO SIR THOMAS BRISBANE.

31st March, 1823.

[This despatch contained instructions re procedure in the court
of appeals; see page 70 et seq., volume XI, series I.]

* Note 216.
Mr. Edward Eagar to Earl Bathurst.

London, 3rd April, 1823.

My Lord,

The Report* of the Commissioner of Enquiry, on the Judicial establishments of New South Wales and Van Diemen's Land, having been laid before your Lordship and subsequently printed by order of the House of Commons, wherein the Commissioner enters at some length into the present state of those establishments, and recommends various alterations in them, not quite consonant to the earnest wishes and expectations of the Inhabitants of those Colonies, I beg leave most respectfully to submit to your Lordship's consideration the following facts and circumstances relative to this subject. And I am the more especially induced to do so, as I had the honor of being appointed to act as Secretary† to the General Meetings of the Inhabitants, which took place in the Colony on the 27th Jany. and 12th February, 1819, and in that character drew up the Petition that was then addressed to His Royal Highness the Prince Regent, and transmitted to your Lordship; and in answer to which, His Royal Highness was graciously pleased to communicate, thro' your Lordship, His intention of taking the matters, prayed for in the petition, into his most serious consideration.

There are a variety of topics necessarily introduced into the Report, relative to the Conduct and proceedings of the various Courts and Judges, which it is now unnecessary for me to notice, in as much as the Commissioner recommends the alteration and abolition of them, and more particularly in consequence of the change that has taken place as to the person filling the office of Judge of the Supreme Court, a circumstance which has relieved me from addressing your Lordship at some considerable length in complaint of the personal, Judicial, and extrajudicial conduct of the gentleman, who, for the last six years, has filled the office of Judge of the Supreme Court. I shall now therefore confine myself to the allegations, contained in the Petition‡ of 12th February, 1819, relative to the Court of Criminal Jurisdiction and Trial by Jury, and to the constitution and conduct of the Supreme Court.

With respect to the signatures to this Petition, it is allowed (page 36 of the Report) "that they are numerous and comprise the most respectable and most opulent of the Inhabitants of the Colony," but it is observed that some, who signed it, declared to the Commissioner that they did not join in the wish that had been expressed for the Trial by Jury. Now, my Lord, Trial by Jury was the first, most prominent, and considered as far the most important subject introduced into the Petition. Indeed it was the principal object of the Petitioners, and the other

* Note 206. † Note 210. ‡ Note 217.
Prayer in petition for introduction of trial by jury.

Objections to criminal court stated in petition.

subjects, contained therein, were considered as merely of secondary interest and importance. There were two public Meetings held; at the first, on the 27th January, the subject was proposed and the resolutions agreed upon. The Meeting was adjourned to the 12th February, in order to ascertain the real opinion of the Colonists upon the subject. Circulars were transmitted to the Magistrates and the respectable Inhabitants in the several districts inviting their consideration to, and requesting their opinions upon, the Trial by Jury. The committee, appointed to prepare the Petition, was composed of thirteen Gentlemen of the first respectability and property. The Magistrates, upon request of the Committee, made returns of the number of persons in their respective districts in their opinions eligible to become Jurors. The adjourned Meeting was numerously and respectably attended. The Petition was sent to the various districts for signature. It was full two months before the signatures were closed. There was neither influence or inducement of any kind exercised or held out to obtain the Signature of any person, and there was sufficient time and opportunity for every person duly to consider the subject matter of the Petition before he signed it. If, under such circumstances, any Gentleman signed this Petition, while he disapproved of the main and principal matter it contained, he did so without reason or motive for such conduct; and any opinion given by a person, so weak or so unprincipled, upon the Colony being ripe or not ripe for the introduction of Trial by Jury, can be held in no very high estimation. I do assure your Lordship that in few Petitions addressed to the Throne, has there been more caution and consideration exercised than in this Petition from N. South Wales. It was not hastily got up at a clamorous popular Meeting. It was prepared by a Committee of most respectable Colonists. It underwent discussion at two public Meetings. Many alterations were made in the original Draft. And it remained two Months for signature. And I do not vouch too much when I assert that, with the exception of one retired Naval and one retired Military officer, it met with the unanimous approbation, support and Signature of every respectable Individual in the Colony.

The Commissioner correctly states (page 19 of the Report) that the grounds of objection to the Criminal Court, as contained in the petition, were first, The combination in the person of the Judge Advocate of the duties of Magistrate, who commits the Prisoner upon investigations conducted by himself; of Prosecutor; of Juryman; and of Judge. The Second—The Military character of the Court, to the members
of which there is no right of Challenge, and from whose decisions there is no right of Appeal. And the actual occurrence of cases wherein the accuser of the Prisoner, the party complaining of the offence and against the offender, was Member of the Court. Thirdly, the repugnance of the form and proceedings of the Court to the proceedings and institution of the Mother Country, and to the habits and feelings of Petitioners as Englishmen; The general incapacity and unfitness of a Court, so constituted, to administer impartial Justice or to command veneration, awe or respect, And lastly, the conviction of the Petitioners that the Lives and Liberties of the Inhabitants could not be so well secured as they ought to be under such a Court, nor the Law of England be administered with sufficient purity and impartiality.

The Commissioner states that he held communications with Sir John Jamison and with Mr. Eagar upon the allegations of the Petition, and felt it his duty to enter into an examination of the cases to which either the one or the other referred him for proof. What communications the Commissioner held with Sir John Jamison, I know not. But, with Mr. Eagar, the Commissioner never held any communication relative to the allegations of the Petition, nor did he require Mr. Eagar to state, or to refer, to any cases in proof of these allegations. If the Commissioner had, and, in expectation that, according to repeated verbal and written promises, he would, Mr. Eagar was quite prepared, and informed the Commissioner that he was so prepared, to state and to refer to several cases in proof of the allegations of the Petition. But, as the Commissioner did not call on Mr. Eagar for those cases, I shall take this opportunity of submitting them to your Lordship's Consideration.

The first objection to the Criminal Court, namely the union in the person and office of Judge Advocate of the anomalous and inconsistent offices of committing Magistrate, Grand Jury, Prosecutor, Juror, and Judge, is admitted to have been well founded, and the evil consequences and imputations necessarily resulting from, and affecting the character of the Judge, the Court, and the administration of Justice, under the exercise of such various and irreconcilable duties by one and the same officer, is quite manifest in the Case of Marsden and Campbell for Libel, so fully reported* by the Commissioner. There your Lordship has seen the difficulties and perplexities this officer, from the nature of his various functions, was placed in, and the discredit and suspicion that the exercise of these functions brought upon the Court of Criminal Judicature, and the administration of Justice in the Colony.

* Note 218.
There was another case tried before the Criminal Court, not reported or alluded to by the Commissioner, which serves to shew the influence under which the Judge Advocate must come to the Trial of every case. It was that of Pearson and Walker, two Men tried for Murder and Burglary under aggravated circumstances in October, 1817. When brought up for Trial, the Men stated that they were not ready to go to Trial as their witnesses were not in attendance. That they had retained as their Solicitor a person, allowed by the Court to act in that capacity, and instructed him to summons certain persons, who they stated could prove their innocence of the offence charged upon them. That they had given this Solicitor Money to pay for the summons. That he had spent the Money, neglected to take out the Summons, or to procure the attendance of their Witnesses. That they were not aware of this circumstance until they were brought into Court; and they earnestly entreated that the trial might be postponed only for two days, to allow them time to procure their Witnesses, who had lived at a considerable distance. The answer of the Judge Advocate from the Bench was in these words, “You gave no time to the Man you murdered in cold Blood; you had no mercy on his entreaties; the Trial must go on now.” The Trial was proceeded in. The unfortunate men made no defence but protested their innocence, and repeating the circumstance about the Witnesses. They were convicted and executed. And lamentable to state, within a few days after, it was clearly proved that they were totally innocent of the Murder. The real Murderers were discovered, confessed the fact, and were tried and executed for it. And the principal Witness against the innocent men confessed the falsehood of the Evidence he had given on the Trial, was tried and transported for the perjury, and stung by remorse of conscience destroyed himself. In this melancholy case, the Lives of two innocent Men were sacrificed to those previous impressions, which it is impossible but the Judge Advocate, from the nature of his various duties, must have upon every case that comes to be tried in the Criminal Court.

The second ground of objection to the Criminal Court, namely, the Military character of the Court, the absence of the right of Challenge to the Members upon any ground, or of appeal from the decisions of the Court, as well as the actual occurrence of cases wherein the accuser, the party complaining, was Member of the Court, needs, as to the former part, no other proof than the mere reading of the Charter, which clearly shews that the character of the Court is Military; and that there is not reserved to the accused either right of challenge to the Members or appeal...
from the decisions of the Court. The Members are appointed by the Governor. They attend in full Military uniform. They are sworn only once at the commencement of the Sessions, and not on each individual Trial. And their Judgment is final and conclusive in every case. In reference to the fact of the accuser being a Member of the Court, the Commissioner mentions one case (Report page 34) wherein Captain Gill, the Prosecutor and principal Witness, was a Member of the Court, and, as such, actually decided upon the case in which a Verdict of Guilty was found; but which Verdict (the Court, before whom the Man was tried, having been dissolved before sentence was pronounced) a subsequent Court declined carrying into effect, and the man never received sentence and was in fact discharged. There was also another case tried before the Criminal Court in 1813, which I was prepared to refer the Commissioner to, if he had called upon me for proof. It was that of one Coates for stealing promissory notes of the value of £85, the Property of Captain Cowen, of the 73rd Regiment. Captain Cowen, owner of the property stolen, and accuser in the cause, was Member of the Court, sat on the Trial, assisted the Judge Advocate in conducting the prosecution, and united with the other Members, his brother officers, in the Verdict. The Man was found Guilty, received Sentence of death, but which was commuted for transportation by the Governor under the special circumstances of the case. These circumstances, I respectfully submit to your Lordship, fully justify the second ground of objection to the Criminal Court; indeed the Commissr. admits them to have been well founded.

The third ground of objection to the Criminal Court (as contained in the Petition of the Colonists) is the repugnance of the forms and proceedings of the Court to the proceedings and institutions of the Courts in the Mother Country. The general incapacity and unfitness of a Court so constituted to administer impartial Justice, or to command veneration awe or respect, And the conviction of the Petitioners, that the Lives and Liberties of the Inhabitants could not be so well secured as they ought to be, under such a Court, nor the Laws of England be administered with sufficient purity and Impartiality; The propriety of these grounds of objection will, I respectfully submit to Your Lordship, appear from the following facts and circumstances:

The Members of the Court must be six officers of His Majesty’s Sea or Land Forces appointed by the Governor; He is bound by no rule in the appointment. He can, and he does appoint whom he chooses, and is subject to no controul therein. He exercises
hers own mere will and pleasure as to the appointment of the Members, and the time and place when and where the Court shall assemble and be held. The persons from whom the selection of members is necessarily made, hold offices under the Crown, are paid by the Crown, and, in their professional, as well as in their Judicial Situations, are entirely dependant upon the Governor, their commanding officer.

The probability of the Court being under the influence of the Governor, and the facility afforded for making it an engine of oppression and injustice, must be obvious at the first glance.

There being no right of challenge upon any ground whatever, reserved to the accused, renders the Court far worse than a Court Martial. In Courts Martial, the accused can challenge and object to any Member upon cause shewn. In the Criminal Court of New South Wales, altho', as has been more than once the case, the officer, called to exercise the functions of Judge and Juror, should be the very Prosecutor himself, yet the accused cannot object to him; and what is more, the Member, if he wished to decline the unnatural and unjust office of Judge and Juror in his own cause, cannot do so, for the appointment by the Governor is imperative upon him; he cannot decline the office; if he presumed to do so, he would himself be tried by Court Martial, and cashiered for disobedience of Orders. The situation of the accused under such circumstances needs no comment.

Another circumstance is the unfitness of Naval and Military Men for the performance of the duties thus imposed upon them. The habits and feelings of Military Men, and more especially of Naval Men, are not those best fitted for determining on the various and critical points of Criminal Law, or the nature of Evidence, and the shades and distinctions of Guilt. That patience, calm and minute attention, and absence of all personal feeling, so requisite in Judges and Jurors, is not too prevalent among Military Men, and in a Colony where Military Men consider themselves as at the head of Society, and aim at giving the tone to it, that esprit du Corps, so universally prevalent among them, has too often been carried into the Courts and administration of Justice, and has been found to operate in a manner, and to a degree, in no way creditable to either.

The Commissioner alludes to three Trials that have taken place in the Criminal Court, from which he admits these objections to its structure may be inferred. The Commissioner's Report of these cases is so very short, and the circumstances belonging to them are so conclusive in fully proving the correctness of the third ground of objection to the Criminal Court.
that I trust your Lordship will see the necessity of my entering
more fully into them; and also of submitting to your Lordship's
consideration a few other Trials, that seem not to have been
brought to the notice of the Commr.

The first Trial alluded to by the Commissioner, report page 33,
is that of two officers* of the Regiment, then quartered in Sydney,
for the murder of one Holness. The facts proved on the Trial
were shortly these. Those two officers, having disguised them­selves in coloured Cloths, went out of their Barracks into the
Town at a late hour in the evening. They rudely accosted a
respectable Young Woman; she wished to avoid them and retired
into the House where she resided. They followed her, struck
the young Man with whom she was walking, and endeavoured to
enter the House by force, using Language extremely indecent
both to the Young Woman and to the Wife of Holness. The
Deceased, the Owner of the House, came up; the same Language
was repeated to him. The officers attempted to force open the
Door of the house; the deceased opposed their enterance. Both
officers assaulted him with Bludgeons, and killed him on the spot
before his own Door. It was proved that the deceased was a
Man of an inoffensive quiet temper, and that he had no Weapon
whatever at the time. The Medical men, who examined the
Body, proved that no external mark of violence was visible on
it, but that there was a violent effusion of Blood from the lungs,
which must have caused instant death. Upon this evidence the
Court, composed of the brother officers of the Prisoners, acquitted
them of the Murder, found them Guilty of Manslaughter, and
sentenced them to pay a fine of one Shilling, and be imprisoned
for six Months. This Trial most assuredly produced a con­
siderable sensation in the Colony, and caused the Inhabitants
generally to feel considerable alarm at being placed under the
Jurisdiction of such a Court. It was considered that those
persons was either not Guilty at all, or else Guilty of Murder,
and that the reducing such a deliberate wanton and unprovoked
homicide to Manslaughter could only have occurred in a Court,
where the members were so united in feeling with and com­
passion for the Prisoners. The impression certainly was that no
Jury whatever could have found such a Verdict. The Governor,
General Macquarie, was so convinced of the Guilt of the Pris­
oneers that he reported them to His Royal Highness, the com­
mander-in-chief; in consequence of which they were both dis­
missed the service. And he also thought it necessary to issue a
general order on the subject, wherein he says, "He feels it
incumbent on him, uninfluenced by partiality or prejudice, and
solely actuated by that paramount sense of public duty, which no

* Note 219.
rank or profession in the delinquents shall ever induce him to swerve from, to express his most decided reprobation of all the circumstances leading to the melancholy catastrophe, and to mark in the strongest terms, his indignation at an occurrence so disgraceful to the Military Character."

The next case alluded to by the Commissioner is that of an officer of the Garrison tried for a violent assault. The facts were as follows. Captain Saunderon had employed a Mr. Greenaway, an artist, to paint a Freemason's apron; some delay took place in the execution of the work, at which Captain Saunderon signified his dissatisfaction to Greenaway. Mr. Greenaway wrote a Letter of explanation, which Captain Saunderon considered as impertinent. He sent for Greenaway, who came to his quarters at the Barracks, and there, in the midst of the Soldiery and several of the officers, Captain Saunderon, who is a powerful athletic man, gave Greenaway a most severe horsewhipping.

Greenaway made his complaint of the assault before the Judge Advocate, who communicated to Captain Saunderon, in the most polite and delicate manner, the necessity of his taking his Trial at the next approaching Criminal Court. Captain Saunderon felt much offended with the Judge Advocate for attending at all to Greenaway's complaint, and declared his intention of horsewhipping Greenaway again, wherever he met with him. Greenaway thereupon made a further Complaint to the Judge Advocate, and claimed that Captain Saunderon might be held to bail to keep the peace towards him. The Judge Advocate thereupon insisted upon Captain Saunderon's giving Sureties of the peace. Capt. Saunderon was tried before the Court composed of the officers of his own Corps, two of the Members of which were his Bail. Greenaway retained a Solicitor to conduct the prosecution. In the course of his opening, the Solicitor made some remarks upon the conduct of Captain Saunderon relative to the assault. The officers on the Court immediately took fire, reproved the conduct of the Solicitor in presuming to make any remarks upon the conduct of an officer, and ordered him to desist therefrom. The Judge Advocate interfered and informed the Court that the Solicitor had a right to adopt the course he was pursuing. The officers denied the right, and wished to retire into their private Room to consult upon it. The Judge Advocate refused to retire, asserted the right, and declared the Solicitor should have his protection in exercising it. The officers were obliged to give way, but they openly, on the Bench, and with considerable violence, reproved the conduct of the Solicitor, and threatened him with personal consequences. The Trial proceeded in the same spirit. One of the Officers, a
Member of the Court, who was present at the assault, was examined on the part of the prosecution. His Evidence did not appear to be very candid; he denied that a certain conversation took place between himself and Captain Saunderson relative to the assault. But, after the whole case was closed, this officer expressed his wish to put a private question to the Judge Advocate. The Judge Advocate said any question put to him must be public. The Officer then asked, whether, by the tenor of the Oath administered to him, he was bound to reveal what he considered as a friendly and confidential communication of his Brother officer. The Judge Advocate of course explained the nature of the oath. And then this officer admitted that the conversation he had before denied had taken place, and stated that he denied it in the first instance, under the impression, that he was in honor bound not to reveal the communication of his Brother officer under any circumstances. The Judge Advocate thought it necessary to make some remarks upon such a feeling, and the result was that this very officer publicly insulted him. The case was so clear that the Court was compelled to find Captain Saunderson Guilty, and fined him ten Pounds. But the Military Members compelled the Judge Advocate, in pronouncing the Judgment, to state, “that it was the opinion of the Court that the Judge Advocate had acted with unnecessary and ungentlemanly harshness, in compelling Captain Saunderson to give Sureties of the peace, and in allowing the Prosecutor’s Solicitor to pursue the course he did. That the conduct of the Solicitor was ungentlemanly and exceedingly improper. And, although they were in strictness of Law compelled to find Captain Saunderson Guilty, yet that his conduct was that which, as an officer and a Gentleman, he was perfectly justifiable in.” This censure upon himself and eulogy upon the Prisoner, the Judge Advocate did pronounce. This display of Military Justice was exhibited to a crowded Court, and deeply impressed the public with a sense of what was to be expected from such a Tribunal, as well as the degradation a British Judge was obliged to undergo.

The third case alluded to by the Commissioner, in which the particular feelings of the Members of the Criminal Court were manifested, was in the amount of a fine imposed by them for an assault. It was the case of Brooks and Reiby. Mr. Brooks, a Young Man of about seventeen Years of Age, having some quarrel with Mr. Reiby, a Young Man of the same Age, made use of a very coarse and insulting epithet to Reiby. Reiby demanded satisfaction, which Brooks refused to give. Reiby the next day met Brooks in the street, and attacked him with a whip; both lads fought it out, and Brooks got a good drubbing.
The Brother-in-Law of Brooks, an officer of the Regiment, and Mr. Brooks, Senr., a Magistrate, took the matter up, and young Reiby was brought to Trial for this assault. Brooks' Brother-in-Law was a Member of the Court; although the offence given by Brooks to Reiby was insulting in the highest degree, and the whole affair was a mere Boy's quarrel and scuffle, Reiby was convicted, and, as the Judge Advocate expressed it, to mark the Court's reprobation of Reiby's conduct in presuming to treat Mr. Brooks, who they considered as his superior in rank, in such a manner, he was, tho' a Minor, fined £100, which his Mother, a Widow with a large family, had to pay to save her son from a Jail. This Trial produced a very considerable sensation of disgust with the Court, particularly among the native youths of the Colony, who agreed to raise the fine by subscription among themselves, and then it was, the Judge Advocate recommended the Governor to remit half the fine.

I shall now submit to your Lordship's consideration some account of two or three other Trials that took place in the Criminal Court, and which I conclude were not brought to the notice of the Commissioner, but which, if called upon by him, I was prepared, in the Colony, to submit to his Enquiry.

The cases of Messrs. Mountgarrett and Smith was a prosecution for cattle stealing, tried also in January, 1816. Major McKenzie of the 46th Regiment, the prosecutor, was commandant at the out settlement of Portdarlrymple, where Messrs. Mountgarrett and Smith were also officers of the Medical department. Considerable disputes took place between the Commandant and those Gentlemen. The Commandant preferred the charge of Cattle Stealing, took various depositions against Mountgarrett and Smith, and sent them up for trial from Portdarlrymple to Sydney, whither, having been relieved from his command, he proceeded to prosecute them. Messrs. Mountgarrett and Smith were tried by the Criminal Court, composed of the brother officers of Major McKenzie, the prosecutor. The defence of Messrs. Mountgarrett and Smith was conducted by a Solicitor. Major McKenzie was examined as a Witness for the prosecution. Upon the Prisoners' Solicitor commencing the cross examination of Major McKenzie, by putting a question, which went to weaken his examination in Chief, the Military Members of the Court, against the opinion of the Judge Advocate, would not suffer Major McKenzie to be cross examined at all, as they considered it was an imputation on his honor as an officer to suppose that he would not declare the whole truth in his direct examination. The Prisoners' Solicitor insisted on his right of cross examination, but was not allowed it, and Major McKenzie
was not cross examined. On the examination of the witnesses for the defence, the Military Members decided, against the opinion of the Judge Advocate, that they would take the examination into their own hands. They compelled the Prisoners' Solicitor to sit down, and the Senior Military Member, Captain Saunderson, actually bullied the Judge Advocate, would not suffer the Prisoners' Solicitor to examine a single Witness, even for the defence, but took the examination of the whole into his own hands. Notwithstanding this strange procedure, the case was so clearly unfounded* and malicious that the Prisoners were acquitted.

Another case was that of Mr. Matthews, tried the 24th June, 1819, for an assault upon a Centinel. The facts were these: Mr. Matthews, a Gentleman of respectability, had occasion to go on board a Ship, laying close to the Wharf at Sydney, to look at the accommodations, intending to proceed in the Vessel as a Passenger to England. His servant Woman, who was a Young Woman born in the Colony, by desire of Mrs. Matthews, who, from ill health, was unable to go herself, accompanied Mr. Matthews to examine the accommodations. The Centinel on duty informed Mr. Matthews the Woman was not to go on board; the Woman in consequence retired. Mr. Matthews was proceeding alone up a Plank, which communicated from the Wharf to the Ship. The Centinel stopped him, and put the point of his Bayonet to Mr. Matthews breast, who remonstrated, observing he was not a Woman. The Centinel at the point of the Bayonet persisted in obstructing Mr. Matthews. Mr. Matthews thereupon drew a small Pistol from his Pocket, and informed the Centinel, that, unless he withdrew the Bayonet from his breast, he would shoot him. The Centinel withdrew the bayonet, and Mr. Matthews retired, loudly exclaiming against the assault committed upon him by the Centinel. Mr. Matthews proceeded to the Commanding officer's quarters to report the conduct of the Centinel, but, the officer not being at home, he did not see him. In the mean time the Centinel, by order of the officer of the Guard, lodged a complaint against Mr. Matthews before the Police Magistrate, and he came to be tried before the Criminal Court for the alleged assault. The Centinel, upon his examination, swore that he held the point of his Bayonet to Mr. Matthews' breast at least four minutes before Matthews took out his Pistol. He also swore that the woman had retired, upon his first signifying that she must not go on board. Upon this evidence of the Prosecutor, Mr. Matthews contended that the Centinel had assaulted him, and not he the Centinel. He also contended that the Centinel had no right to obstruct him, at

* Note 220.
noon day upon a public Wharf, from going on board a Ship lying alongside that Wharf. And further, that no order prohibiting women, either free or convict, from going on board ship, had been ever published or known to exist. However, the Court thought differently, and Mr. Matthews was convicted of the assault and fined £50. The Judge Advocate, in pronouncing the verdict, declared that there was a regimental order that the Centinels should prevent convict women from going on board ship; that every woman must be taken to be such, until the contrary appeared; And that the Centinel, acting in obedience to such an order, was justifiable in stopping Mr. Matthews, even at the point of his Bayonet. Mr. Matthews again objected that no such order had been ever made public, or any evidence thereof given on the Trial; to which the Judge Advocate replied, by holding up in his hand, not reading, a piece of paper, which he said was the order; and which, in fact, after the Trial had concluded, and the Members retired to consider upon their Verdict, was brought up from the inner wall of the Guard House, where it was pasted up, and carried in to the Members, without having been read in Court, or at all submitted to the inspection of the Prisoner. It was really nothing more or less than a mere regimental notice, without date or signature, pasted up on the wall of an inner Room of the main Guard house. Under these circumstances, and for the alleged breach of such an order, I say alleged, for the woman did not, after the very first intimation, proceed to go on board, was Mr. Matthews, a most respectable Gentleman, convicted of an assault, and fined £50. The Inhabitants deemed this as a most extraordinary stretch of power in the Criminal Court, and considered it of the most alarming nature, as it subjected them to new and unknown offences, created by unpublished and unknown Regimental orders. Mr. Matthews was charged with having acted in contravention of an unpublished regimental order. He was tried by a Military Court, composed of the officers of that Regiment, convicted and fined £50, as an example to others.

These cases do, I most respectfully submit to your Lordship, fully warrant and bear out the allegations, contained in the Petition of 1819, That the Criminal Court, constituted of Military officers, was both unfit and incapable of administering Justice with sufficient purity and impartiality or of commanding veneration, awe or respect, and that, in fact, the Lives and Liberties of the Inhabitants, under such a Court, were not, and could not be, so well secured as they ought to be, and as the Lives and Liberties of British Subjects are in all other parts of the world.
With respect to the Supreme Court of Civil Judicature in New South Wales, the Commissioner reports, page 10, that the principal objections he perceived to exist against it were founded upon:—The influence the Judge exercised over the opinions of the Members; The eagerness with which his own were delivered; The want of deliberate consideration in the Judgments of the Court; and the great expence of the proceedings. These certainly were some, but not all, the objections to the Supreme Court. The others were:—The appointment of the members by the Governor; The very small number of persons from among whom the appointment must be made; and the rules framed by the Court for the form of its proceedings.

The Supreme Court consists of the Judge and two Magistrates appointed from time to time by the Governor, any one of whom, with the Judge, makes up the Court. The appointment of the Magistrate Members of the Court rests entirely with the Governor, subject to no control whatever, as well as the appointment of the periods when, and the places where, the Court shall assemble and transact business. The Court has hitherto always been held at Sydney, and in no instance have any of the Country Magistrates been appointed Members, as it would be exceedingly inconvenient, if not impossible, for them to give their attendance at Sydney. The selection has therefore necessarily been always confined to the Magistrates resident at Sydney. The number of Magistrates resident at Sydney, from the period of the opening of the Supreme Court in 1817, down to 1822, has not at any time been more than five; indeed for some time there were only three. The Magistrates have been the principal Graziers and Merchants, connected with most persons in the Colony in the way of Trade, and have themselves large interests therein. From among these three or five Magistrates then, were the two Members of the Supreme Court always necessarily selected. No Suitor, Plaintiff or Defendant has any right of challenge to the Members upon any ground of objection whatever. One party in the cause could not make it matter of objection to a Member of the Court trying the cause that he was the other party therein. And, in point of fact, there has scarcely been a Court convened, where one or both of the Magistrate members have not been parties in suits depending before it. Some instances have been seen wherein members have been Plaintiffs and Defendants in causes tried before themselves. A Member, sitting on the Bench, has been seen to assist in conducting a number of causes wherein he was Deft. Members, parties in the cause, have been seen to consult and consider with the Judge and the other Member of the Court upon the Verdict.
to be given. In short, my Lord, circumstanced as the Magistrates who usually compose the members of the Supreme Court are, their very small number, and their extensive dealings and business in the Colony, it is impossible but they must be directly interested in a great variety of instances in the causes depending before them, and that they have more or less feelings of interest or friendship for many parties suitors in the Court.

Another most material objection to the Supreme Court was, the rules of practice framed, and the fees ordered to be paid to the Judge of the Court. The Supreme Court, by its Charter, is authorised “to frame such rules of practice, subject to the approbation of the Governor, as shall be found necessary for the administration of Justice.” Upon the opening of the Court in 1817 under Mr. Justice Field, he submitted to the associate Magistrates a code of rules previously drawn up by himself, and to which he had already obtained the approbation of the Governor. One of the Members, Mr. Wentworth, declined giving any opinion upon them, and the other Member, Mr. Lord, decidedly refused his assent to their adoption. Notwithstanding this refusal of the Court to sanction the code of rules (and I would observe the Charter authorises the Court, not the Judge, to frame the rules), they were acted upon and carried into full effect by the Judge, exactly the same as if they had been regularly and, in the terms of the Charter, duly framed and sanctioned by the Court. The nature and effect of these rules was, in the first place, to introduce into the practice of the Court all the special pleading, and consequent delay, complexity and expense, of Law Proceedings in the Superior Courts in England; and this, in a Court which, by its Charter, is directed “to administer Justice in a summary manner.” Several of the rules were in direct opposition to the terms of the Charter. The very first rule ordered “that every suit and proceeding should be conducted only by some one of the Solicitors of the Court,” Whereas the Terms of the Charter are “That, upon complaint made in Writing to the said Court, by or on the behalf of any person or persons whomsoever.” Another rule ordered, that, whenever any Defendant made default in filing his appearance, plea, rejoinder, or other pleading by a day specified, the cause should thereupon (without liberty to the Defendant to make any appearance or defence) be set down, heard and determined exparte. Whereas the words of the charter are, “Direct and authorise the said Court to proceed to the matter and cause of complaint, upon the oath or oaths of any Witness or Witnesses, as shall be produced by either party, Plaintiff or Defendant, and thereupon it shall be lawful for the said Court to give Judgment.” By the rules
of the Court, the complaint in writing, mentioned in the Charter, was transformed into a formidable declaration, and all the varieties of Special Declarations, Pleas, Replications, Rejoinders, Rebutters, etc., duly and regularly introduced as the mode of proceeding in the Court. The practice of the former Court of Civil Judicature was so plain, simple, speedy and intelligible, and the practice introduced into the Supreme Court was so complex, unintelligible, difficult, and dilatory, and so plainly and palpably in contradiction, in its main points, to the terms of the Charter; and the manner, in which the rules were introduced, contrary to and against the opinion of the associate Members of the Court, as altogether rendered them extremely obnoxious to the public, who found the application of them (in a Court and Colony, where all transactions are of the most simple nature, and where there are no persons skilled in the Science of Special pleading to render their assistance) excessively vexatious, and embarrassing to a most inconvenient degree.

At the same time that Mr. Justice Field submitted his code of rules to the Court (at its opening in 1817), he also prepared a Table of fees, upon which Mr. Wentworth, one of the members, declined giving any opinion, and Mr. Lord, the other member, positively objected to it. Notwithstanding Mr. Justice Field adopted them, and carried them vigorously into operation. The Supreme Court is by its Charter authorised to appoint "all necessary Clerks and officers, and that a Table of fees to be allowed to such Clerks and officers, shall be settled by the Court, with the consent and approbation of the Governor." The objection to those fees were three fold; first, The establishment of them by the mere authority of the Judge, without the consent of one, and against the consent of the other member of the Court. Your Lordship will observe the Court was to settle the Table of fees, and then it was to be submitted to the Governor for his approbation. The fact was, Mr. Justice Field, before ever the Court was convened or constituted, settled the Table of fees, obtained the Governor's approbation thereto, and then submitted it to the Court, which did not sanction it. Yet the fees specified in this Table were rigorously required by and paid to the Judge, from that period until the year 1820, when Mr. Eagar first raised objections to them. The second objection was that the fees were payable and paid, not to the Clerks and officers of the Court, but to the Judge, and for acts which must necessarily be done by him in the performance of his Judicial duties. It is true that it was not specifically mentioned in the Table, to whom, or to what officer, the fees were to be paid. But it is equally true that, with the exception of one fee of 2s. 6d. in each
cause, all the acts and services, for which the fees were ordered to be paid, were acts and services, which could only be done and performed by the Judge alone, and which, in fact, he only did and performed. And the pitiful subterfuge that was afterwards resorted to, when the legality of the payment of fees to the Judge was questioned, namely, that these fees were neither due nor payable to the Judge, but to his Clerk, was quite unworthy the character of purity and veracity, which a British Judge should ever maintain; more especially, when the same Judge could not but admit, as was the fact, that, under whatever name or pretence these fees were demanded and received, the whole of them went into his own Pocket, with the exception of one sixth part, which he relinquished to his Clerk, the officer to whom they were pretended to be payable, and by whom they were said to be received.

The third objection to these fees was, their excessive amount, and this objection my Lord has been fully born out by the fact; It appears that, in three years (April, 1817, to June, 1820), the number of causes tried and entered in the Supreme Court was 144 only (the Commissioner states 165, but that number includes those down to December 1820). The amount of fees, received by the Judge during that period upon suits entered and tried, appears to have been, by his own returns to the Commissioner, £3,576 13s. 9d., making an average of £24 16s. 9d. fees on each cause. Now, my Lord, the mere statement of this fact is quite sufficient. It could not possibly but have happened that the exorbitancy of such fees must have been universally felt and as universally reprobated as extortionate in the extreme. And, when it was seen that those most exorbitant and oppressive fees were imposed by the Judge alone, without any legal authority, without the sanction of the Court, against the opinion of his fellow Members, for his own private emolument, and for Acts which, by his office of Judge, he was bound to perform, and for which he received a Salary from the Crown, Your Lordship will not be surprised to hear that it not only subjected the character of the Judge to no small degree of odium, but that it excited so universal a dislike to him, such suspicion of the purity of the Court over which he presided, and such distrust of the administration of Justice therein, as to render both the one and the other in a great measure useless, and to a great degree hateful and odious to the Inhabitants, and to raise an universal outcry from one end of the Colony to the other against such a system of arbitrary, selfish and oppressive extortion.

The amount of fees paid to the Judge in some particular Causes was enormous. In a Cause, Cooper vs. FitzGerald and
others, the sum charged by and paid to the Judge for his fees, amounted to £272 4s. 10d., and that in a Cause, the subject matter of which was an old Mare and her progeny of the entire value of about £120, and which was finally settled by arbitration out of Court. In another cause, Crossley and Allan, the fees charged by and paid to the Judge, on the part of the Plaintiff alone, amounted to the sum of £89 7s. 5d.; In another cause, Mileham and Campbell, £72 1s. 1½d.; In another cause, Terry and Ritchie £51 8s. 4½d.; and nearly as large a sum in a variety of other cases. The amount of fees paid by one of the Solicitors of the Court to the Judge in one Year was £790 4s. 1d. From which circumstances, I am led very much to doubt the correctness of the returns of the amount of fees received, made by the Judge to the Commissioner; my own opinion, formed upon some facts and documents in my possession, is that a far larger sum was received by him. However what he himself admits without question to have received, amounts only to the comfortable sum of £1,369 13s. 10d. per annum, a most convenient addition to his salary from the Crown. The Commissioner states that the fees taken in the Supreme Court have been considerably reduced, since the objections raised by Mr. Eagar to them. But I beg leave to assure your Lordship, with all deference to the Commissioner, that in this statement he is not quite correct, for, with the exception of a small reduction in the fees demanded in the ecclesiastical proceedings of the Court, the other fees have not been reduced one farthing in aggregate amount. It is true some alterations have been made in the fees, and some new ones introduced, the result of which is neither more or less than that the fees in the aggregate have been increased and not diminished.

With regard to the other objections to the Supreme Court, namely, The influence the Judge exercised over the opinions of the Members, The eagerness with which his own were delivered, and the want of deliberate consideration in the Judgments of the Court, they are admitted by the Commissioner. Indeed they were so notorious to the most superficial observer as to put them beyond all contradiction. But in as much as the change, that has taken place in the office of Judge of the Supreme Court, renders it now unnecessary to trouble Your Lordship with any detail of instances wherein these circumstances have taken place, I shall forbear doing so.

The defects in the present Courts of Justice in New South Wales being admitted by the Commissioner, he proceeds to recommend a new constitution of the Judicial Establishment, declaring his objections to the introduction, at present, of Trial
Objections by J. T. Bigge to introduction of trial by jury.

Persons available to sit as jurors.

by Jury, and sketching out a plan of Judicial procedure differing nothing in principle, and not very materially in practice, from the system at present prevailing there.

The Commissioner's objections to the introduction of Trial by Jury appear to be, first, The insufficient number of respectable persons resident in the Colony from among whom to select Juries; Secondly, the prevalence of party feelings and animosities to such a degree as to render the impartiality of Juries doubtful; and thirdly the inconvenience of attending to serve on Juries. Upon the first point, the insufficient number of persons fit to be put on a Pannel, he states: that, from returns communicated to him by the Magistrates, it appeared that, in June, 1820, there were two hundred and forty two persons, who had come free to the Colony, and eighty seven born there, and then above twenty one years of age, in all three hundred and twenty nine resident upon their own property, who might be fairly considered as competent to exercise the office of Jurors. He further states that the number of males transported to New South Wales, whose terms of service had either expired or been remitted, and who were resident on their own property, amount to five hundred and eighty seven, from among whom may be fairly selected one hundred Individuals fit to be Jurors, making an aggregate of four hundred and twenty nine persons in N. S. Wales at that time (January to June, 1820) competent to discharge the office of Jurors. The Commissioner does not state the number of persons resident in the towns of Sydney, Parramatta, and Windsor, possessed of Landed estates, and engaged in the occupations of Trade, and mercantile pursuits, the number of whom is considerable. Nor does he include Van Dieman's Land in his statement.

The returns thus made by the Magistrates to the Commissioner do not appear to be correct. From the general Census of the Inhabitants taken in November, 1820, it appears that the number of male persons, who came free to the Colony, and were resident on their properties, was two hundred and eighty one, of whom two hundred and sixteen were possessed of fifty Acres of Landed estate and upwards, and sixty five were possessed of Landed estates of between twenty and fifty Acres. That the number of Males born in the Colony, then above the age of twenty one years and resident upon their own Estates, was one hundred and thirty two, of whom ninety two were possessed of fifty Acres of Landed estate and upwards, and forty were possessed of from twenty to fifty acres of Landed estate and upwards. The number of Emancipists (or persons transported to New South Wales and become
free by Service or Pardon) resident upon their own properties, was one thousand one hundred and two, of whom, five hundred and four were possessed of fifty acres of Landed estate and upwards. And five hundred and ninety eight were possessed of Landed estates less than fifty acres; from among whom, there certainly could not be selected more than two hundred persons, if so many, fit to become Jurors, making in all a Pannel of six hundred and upwards. And I conceive this to be about the correct estimate at that period, because, by the returns made by the District Magistrates to the Committee, who prepared the Colonial Petition of 1819, the number of persons fit to be Jurors is made to be six hundred and fifty five. In these certainly were included persons who, altho' possessed of Landed estates, and some of them of very large ones, did not reside upon their Estates, but in the towns of Sydney, Parramatta and Windsor, engaged in mercantile and other pursuits, and who are fully as eligible, if not generally more so, to act as Jurors, as those Freeholders who reside upon their Estates; and this probably will account for the difference between the returns made to the Commissioner, and those made to the Committee, and the general Census.

It appears then that, in June, 1820, a Pannel of six hundred persons might have been made up after all fair deductions. But, since that period, a considerable addition has been made to the respectable free Inhabitants; and, before the System of Trial by Jury, if established, could be brought into operation, suppose January, 1824, a still greater addition will be made to the respectable free Population; and that in the very way, which the Commissioner contemplates as the certain means of rendering the introduction of Trial by Jury innocuous, namely the increasing number of Emigrants from England Settling in the Colony. From September, 1820, to September, 1822 (down to which period the latest accounts from the Colony came), I find that twenty five Vessels had arrived at New South Wales, having taken out five hundred and ninety eight Passengers, consisting of three hundred and ninety Settlers with one hundred and three Women, and one hundred and five Children. In the course of the year 1822, twenty other Vessels sailed from England and Scotland to the Colony, but had not arrived when the last accounts came away, carrying out two hundred and one Settlers, with ninety eight women, and one hundred and four Children. Up to the 1st April of the present year 1823, six Vessels will have sailed with ninety one Settlers, with Thirty six Women and twenty nine Children, makeing the number of Settlers actually arrived in, and on the way to N. S. Wales.
460 HISTORICAL RECORDS OF AUSTRALIA.

1823.
3 April.

Persons available to sit as jurors.

Objection by J. T. Bigge re possible influence of party feeling on juries.

to be six hundred and eighty two, besides Women and Children; One half of whom at least have and will settle at N. S. Wales. Here then is an addition of three hundred and forty one unexceptionable Jurors to be added to the Pannel in N. S. Wales. I say unexceptionable, because, by the regulations of Your Lordship's office, every Settler proceeding to N. S. Wales must be possessed of property to the amount at least of £500. The actual number of fit and eligible persons, that could now be placed on a Jury pannel in N. S. Wales, is most certainly not less than one thousand, four fifths, if not more, of whom were never in the condition of Convicts. And besides, the pannel will be continually increasing, as well from the growth to maturity of the Native born Population, as from the increasing arrival of Emigrant Settlers from England, there being no Country to which Emigration from England at present prevails so much, or that offers such advantages to Emigrants, as N. S. Wales. Upon these facts, I do therefore most confidently submit to your Lordship that there is in N. S. Wales such a number of free respectable Inhabitants, Freeholders, as will be sufficient to compose a numerous Jury pannel; so enlarged as to obviate all possible objections as to the influence of improper prejudices or partialities.

With reference to Van Dieman’s Land, upon this point, the facts are still stronger. By the before mentioned Census of 1820, it appears that the number of Emigrant Settlers, then resident in Van Dieman’s Land, and possessed of Landed estates, was one hundred and eighty one; That the number of Native born Settlers was one hundred and twenty four, possessed of Landed estates, and the number of Emancipist Settlers, likewise possessed of Landed estates, was three hundred and forty two, of whom one hundred and ninety eight possessed Estates of fifty acres and upwards. And the number of Settlers, already arrived from England, and that will arrive by the end of the year 1822, is three hundred and forty one. Of the Emancipist Settlers not more than one hundred would be eligible for Jurors, so that, after all fair deductions, a pannel of upwards of seven hundred Jurors may be made up in Van Dieman’s Land and will be enlarging; a number quite sufficient to secure all that impartiality and absence of improper feeling, which the Commissioner so much fears.

The second objection, made by the Commissioner, is the prevalence of party feelings and animosities to such a degree, as to render the impartiality of Juries doubtful. He states, “that until those feelings shall have subsided, which have lately exasperated the two Classes, from whom Juries would most
naturally be selected, he should think it equally dangerous and
inexpedient to submit the property or life of either Class to the
Verdict and Judgment of a Jury composed of the other. Now
my Lord, in order to rightly to ascertain the weight of this
objection, it is necessary to enter a little into an examination
of the causes which have produced, and the degree in which
those feelings have existence.

Your Lordship is aware that the free Population of New
South Wales consists of two Classes of persons: The one class,
composed of persons who have emigrated to, and settled in New
South Wales, and generally there called "Emigrants"; The
other class, composed of those persons, who, having been trans­
ported to N. S. Wales, are become free by pardon or service of
their Terms of transportation, and generally called "Emanci­
pists." At the time that General Macquarie assumed the
Government in 1810, the Class of Emancipist Settlers was both
numerous and respectable, and composed then the Majority of
the free Population. Governor Macquarie adopted it as a prin­
ciple in his administration, as respected the Emancipists, "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 would admit, all retrospect of former bad Conduct." This
principle was fully approved of by the Parliamentary Committee
on Transportation* of 1812, in whose report it is stated, page 13,
"Your Committee see, with satisfaction, that Governor Mac­
quarie adopts these principles, in which they cordially concur;
and are the more anxious to express their opinion as under a
former Governor, Transports, whatever their conduct might be,
were in no instance permitted to hold places of trust or confi­
dence"; and I need not remind your Lordship that this prin­
ciple received the sanction of His Royal Highness the Prince
Regent, communicated to Governor Macquarie by your Lordship.

The operation of this principle in the Colony was most bene­
ficial, for it not only proved the most powerful stimulus to
reformation and good conduct in the class to which it was
applied, but also met with the concurrence of the other class of
Inhabitants. and tended most effectually to allay those irritable
feelings that necessarily arose from the suspension of Governor
Bligh's administration. In proof of this, I beg leave respect­
fully to submit to your Lordship a passage contained in a public
address, adopted at a public Meeting of the respectable In­
habitants and presented to Governor Macquarie on the 1st
January, 1813, three years after he had assumed the Gov­
ernment. It was in these words, "When we reflect on your liberal,
humane, and philanthropic exertions to banish the narrow,
Historical Records of Australia.

1823. illiberal policy of invidious distinctions, so long the bane of the Colony, we cannot sufficiently appreciate the blessings we enjoy under your administration." The Committee, appointed to prepare and present this address, was composed of thirteen Gentlemen, seven of whom were Emigrants of the first respectability, and the remaining six respectable Emancipists; the very union of which persons in such a Committee, and in the adoption of such language in their address, itself proves the fact, and puts the truth of it beyond the suspicion of being the language of a party, for all parties united in declaring it.

This general union and harmony between the Emigrant and Emancipist Classes continued unabated and undisturbed until the end of the year 1819, down to which time they were cordially united in the formation, conduct, and management of every public measure and institution of the Colony. It was more particularly manifested at the General Meetings of the Inhabitants, which took place in January and February, 1819, and who addressed to the Throne, at that time, the Petition, before alluded to, respecting Trial by Jury. That Meeting and Petition, your Lordship is aware, was promoted, supported, and signed, alike by all the respectable Emigrants and Emancipists in the Colony; and, upon reference thereto, it will be found that they united in making the following statement to their Sovereign therein, Viz. "And humbly shew that the state and intercourse of society is much improved and daily improving among us. That passions and prejudices are almost entirely softened down and dying away; and that ties and connections have been formed, and are daily forming, which unite man to man, and strengthen the bonds and union of society," a statement, which, if not perfectly true in point of fact, there was no inducement to make, and which the Petitioners (composed as they were of the supposed hostile classes) could not, and would not, have united in making unless the fact was so. This fact. I respectfully submit to your Lordship, shews that, down to that period at least, those feelings of hostility and exasperation, mentioned by the Commissioner, had no existence. I shall now proceed to shew how those feelings in any degree arose.

The excessive amount of fees demanded in the Supreme Court, and the complex and dilatory nature of the rules and proceedings therein, became the general subject of murmur, dissatisfaction and complaint, and were, in fact, considered as having been framed, not for the purposes of the inexpensive and speedy administration of Justice, but for the emolument of the Judge and Solicitors of the Court. The matter had arrived to such a degree, and was so generally felt, that it was determined to make
an effort to obtain some remedy for the evil; and, as the Commissioner of Enquiry had just arrived in the Colony, that was deemed the most fit and proper opportunity, as thereby his attention would be regularly called to it. And it was also considered that, in common fairness, application should be regularly made to the Court itself, in the first instance, to rectify or to remedy the objectionable rules and fees, before recourse was had to any other authority or measure. Accordingly a Suitor took opportunity of regularly moving the Court to reconsider and rescind its first rule, by which parties were prohibited from appearing in Court, and were obliged to commit their causes to the conduct of a Solicitor, it being contended that such a rule was contrary to the Law of England, as well as to the express words of the Charter of the Court. Upon this motion, the Court took time to consider, and at length altered the rule. But, in delivering the Judgment of the Court thereon, Mr. Justice Field thought proper to evince a very great degree of personal warmth of temper, and to make use of some extremely invidious personal remarks. Shortly after another suitor, Mr. Eagar, took occasion to make a motion to the Court, objecting to the fees as being excessive in amount, oppressive in their effects, imposed without the authority of the court, and not of right demandable by the officer to whom (the Judge himself) or the business for which, his duties, they were imposed and paid. The Court overruled the motion. But this suitor, being convinced that the demand of these fees was entirely illegal, persevered in his objection to the payment of them, and the immediate result, as to him, was a Judgment against him for £554 for the debt of another person, together with £130 Costs.

From the manner in which this motion relative to the fees was disposed of in the Supreme Court, the question of right upon them was left undetermined; and the above-named Suitor thought it right to bring the question to some Issue, and to obtain the opinion of the other Court, the Governor’s Court, and of the other Judge, Judge Advocate Wylde, upon it. Accordingly he instituted an action in the Governor’s Court against Mr. Justice Field to recover back the fees paid to him; and it was to this Action Mr. Justice Field put in that obnoxious plea, which really and in truth alone occasioned that disunion, dissatisfaction and irritation of feeling in the Emancipists, which it was unfortunately too well calculated to produce. The Plaintiff in this action against Mr. Justice Field had been a Transport, but had received an absolute remission, or, as it was up to that period considered, Pardon from the Governor, pursuant to the Act of Parliament, 30 Geo. 3, Chap. 47. The nature of
Mr. Justice Field's plea was that the disabilities and incapacities, consequent upon attainder, were not removed by such a Pardon, and that, therefore, the Plaintiff was not in a capacity to maintain any action whatever in a Court of Justice. This plea the Governor's Court allowed. The same Suitor had another action depending before the Supreme Court, of which Mr. Field was the Judge, and the Defendant in this last mentioned Action, following the example of Mr. Justice Field, put in a similar plea, and it was allowed there also.

The number of persons affected by this new doctrine, of the inefficacy of the Governor's Pardon to remove disabilities, was considerable, and among them was to be found the most respectable of the Emancipists; and they were most seriously and justly alarmed, upon finding that, by this new construction put by the Judges upon the Instruments of Pardon granted by the Governor, Instruments that up to that period had never been questioned or doubted as conferring all the benefits of Pardon, their property as well as their personal liberty was put in jeopardy.

Mr. Justice Field, in pronouncing his Judgments upon these questions, the fees, rules of the Court, and nature of pardons, unfortunately indulged himself in a degree of warmth and invective, very unbecoming the character of a Judge, and that could not but be most provoking and offensive to the class to whom it was applied; for that Gentleman not only threw the utmost obloquy upon the individuals immediately before the Court, but upon the entire class, Delivering it as an axiom from the Bench, "Convict once, Convict for ever." And when, my Lord, it was seen that this novel doctrine was adopted and carried into effect by the Judges, in order to protect themselves from the consequences of their own alleged misconduct; and that they assumed the power of allowing or not allowing the privileges of pardon and the rights of property to a numerous, respectable and wealthy class of the Inhabitants, who had theretofore enjoyed both, undisturbed and undisputed; and that these doctrines were enforced with an extreme degree of personal feeling, and of contempt towards that Class: then it was that they felt it imperative upon them to unite together for their common protection, and to seek that redress from the proper authorities, to which they considered they had some just claim; and accordingly they addressed the humble Petition to His Majesty upon the Subject. And then also it was that the Judges, particularly Mr. Justice Field, making the most active use of that influence, which their Station naturally gave them in so confined a Society, gathered round them a few other gentlemen, particularly the members* and connections of a certain family,
celebrated in the history of the Colony for their opposition to every Governor as well as every humane and liberal feeling, and formed a party determinedly hostile to the Emancipists and their hitherto undoubted, undisputed rights and privileges. This, my Lord, was the real state of parties and of feeling in the Colony. On the one hand were united the Judges with a few of the old Emigrant Settlers (I say a few, for, in point of fact, the general body of the Emigrant Settlers disapproved entirely of the doctrine advanced by the Judges, and the persons, who had united with them, were only two Individuals, exclusive of the family before alluded to), determined, and avowing their determination, to reduce the Emancipists in reference both to character and property to a state of dependance upon the sole discretion of the Courts, or rather of the Judges; And on the other hand, were united the whole body of Emancipists, and the majority of the Emigrant Settlers, in a natural and determined resolution of seeking for relief and redress in all lawful and proper ways.

Your Lordship will perceive that the exasperation of feeling alluded to by the Commissioner, as to its cause, has solely and entirely arisen from the before mentioned novel doctrine of the Judges, and is confined, as between the persons by whom it is entertained, almost entirely to the two Judges and their few immediate connections on the one hand, and the body of Emancipists on the other. Now, my Lord, as, fortunately for the Colony, the Judges have been or are about to be, removed, and as, it is humbly hoped, measures will be adopted to remedy any unintentional defect that may belong to the Governor's Pardon, the cause and occasion of all hostile feeling will be entirely removed, and the persons, by whom it was excited, and against whom only it pervails, will be no longer in the Colony either as the promoters or objects of it. There will then in fact be nothing in dispute, which can cause irritable and hostile feeling; there will then be no obnoxious individuals against whom it would apply, or by whom it could be excited; and it must necessarily cease to exist, for want of matter or objects to keep it alive.

If, my Lord, the feelings of parties be so exasperated as they are represented, how comes it to pass, that all those parties unite in anxiously wishing for Trial by Jury, as it is admitted by the Commissioner they do. If such a degree of enmity prevails, why should they wish for the establishment of that system, which would afford to the opponents of each party such facilities for carrying their enmity into operation. It is admitted, on all hands, that the proportion of one class, the Emigrants, in comparison with the other, the Emancipists, as to the number
Deductions drawn from universal desire for trial by jury.

Inconvenience of and aversion to service on juries.

of persons fit and likely to be impanneled as Jurors, is as four to one in favour of the former; How could the latter be so anxious for the establishment of that system, which must give the former so great a preponderance, if those irritable feelings prevailed generally among them, or at all extensively. If there be really such enmity as is represented, how comes it to pass that the weaker party are so very desirous of the adoption of a measure, that must so enormously encrease the power and the triumph of their opponents. Is it consistent with the common sense, with the common feelings of our nature, that men, uninfluenced by any object or motive, that could be beneficial to them, should, against their own interests, feelings and prosperity, seek for the establishment of that which would most surely gratify and afford triumph and power to their Enemies. My Lord it is incredible. And the fact of the Emancipists earnestly and heartily uniting with the Emigrants, in seeking for the establishment of Trial by Jury, does in itself, I most respectfully submit, unequivocally prove that the feelings of hostility, said to prevail in N. S. Wales, have been much, very much misrepresented and exaggerated, and that the prevalence of such feelings does not approach to any thing like a reasonable, nay a probable, I would say a possible objection to the fair and impartial operation of the Jury system.

The Commissioner's third objection to the Jury system is the inconvenience to the Settlers of attending to serve upon Juries, a duty that would, in his opinion, be attended with incalculable injury and expence to them. It certainly is true that few are to be found, who will volunteer their services as Jurors. Serving on Juries is a duty that people in general rather wish to avoid than to perform. I believe most of the Gentlemen, whose names are on the pannels of the several Counties of England, would be much gratified at having their services dispensed with; and no doubt it occasions them in general both expence and inconvenience to attend. And, in many of the larger Counties, both the expence and the inconvenience must be very considerable. But, my Lord, is this a good objection to Trial by Jury? Would the people of England be willing to forego all the benefits and advantages of Trial by Jury in consequence of the inconvenience and expence attending it? To take an extreme case. Would the people of the County of York be willing to forego trial by Jury, because they found it both personally expensive and inconvenient? Nay, I would ask, is there one Individual in England, even among those upon whom the inconvenience and expence principally falls, that would give up the one for the other? I am sure there is not. And I am equally sure that
there is not an Individual in New South Wales who would do so. In fact, the inconvenience and expence cannot take place in N. S. Wales to the extent that it does in almost the smallest County in England. The Commissioner properly recommends that sittings and Sessions of the Court, in N. S. Wales, should be occasionally held at Windsor and Parramatta as well as at Sydney, And, in Van Dieman’s Land, at Launceston as well as at Hobart Town. Now by the beforementioned Census and returns it appears that, in the Windsor and adjacent Districts, comprising only a distance of seven miles in one direction, and ten Miles in the other, from the Town of Windsor, there were resident in 1819 no less than three hundred and seven Freeholders eligible to be impanneled as Jurors; In Parramatta and the neighbouring districts, not extending at the farthest point above fifteen Miles from that town, one hundred and sixty eight Freeholders eligible to be impanneled as Jurors; And in the Town and Districts of Sydney, two hundred and one, the numbers of which have been since nearly doubled, as before shewn. It is also certain that, as the Population of Van Dieman’s Land is pretty equally divided between the two Settlements of Hobart Town and Launceston, that the inconvenience of attending to serve as Jurors at those places will be quite as little as at the principal settlements in New South Wales. And I do therefore submit, my Lord, that in point of fact the inconvenience and expence of attending to serve upon Juries in those Settlements will not be nearly so great as it is generally in England; and that, if it was by very many degrees greater than it possibly can be, it cannot afford the shadow of a sound objection to the establishment of a System, so fraught with the most advantageous consequences as Trial by Jury.

In place of the Courts at present existing in New South Wales and Van Dieman’s Land, the Commissioner recommends, That one Court, having Criminal and Civil Jurisdiction, shall be established in N. S. Wales, and a similar Court established in Van Dieman’s Land; A Judge to preside over each Court; In the Criminal Jurisdiction, all Trials to be had before seven officers of the Sea or Land forces, appointed from time to time by the Governor, to any of whom there shall be no right of challenge, except on the ground of interest alone. And in the civil Jurisdiction, that all Trials should be by two Magistrates, also appointed by the Governor, reserving no right of challenge, except where both parties to the cause united in applying to the Court for Trial by Jury on mere questions of fact. To this system of Judicature, I shall beg leave most respectfully to submit to your Lordship’s consideration the following objections,
first observing that the minor alterations recommended by the Commissioner in the separation of the Offices of committing Magistrate, Grand Jury, Prosecutor and Juror, from that of the Judge, appointing an Attorney General, and enlarging the powers and Jurisdiction of the Court, are, in themselves, absolutely necessary and most fit and proper, and, therefore, the objections to this proposed system are confined to the Military Jury in the Criminal Jurisdiction, and to the Jury of two Magistrates in the Civil Jurisdiction.

The Commissioner assigns as his reason for recommending a Military Jury, "That the exercise of an independent and impartial Judgment might be more reasonably expected from such members of the Criminal Court than from any selection of Juries that could be made from the Individuals then resident in the Colony." Now, my Lord, with all due deference to the opinion of the Commissioner, I contend that the history of the Criminal Court of New South Wales proves the exact converse of his proposition; and that, in his Report of some trials before that Court, he has furnished full Testimony against himself. Where was the independant and impartial Judgment of the Military Members in the Trial between Marsden and Campbell, when they resolved, contrary to the opinion of the Judge, to receive and did receive illegal evidence, Report page 25. Where was the independant and impartial Judgment of the Military Members in the case of their two brother officers tried for the murder of Holness. Where was the impartial independant Judgment of the Military members in the case of their brother officer, Captain Saunderson, tried for an aggravated and violent assault. Where was the impartial independant Judgment of the Military members, in the case of young Reiby, tried for an assault upon the Brother-in-Law of one of the Members. In the one Case, that of Captain Saunderson their Brother officer, they inflicted a fine of £10 for a most gross violent and unmanly assault. In the other case, a fine of £100 upon a boy, for a boy's quarrel with another boy. Where was the impartial independant Judgment of the Military members in the case of Mr. Matthews, fined £50 because he did not suffer a Centinel to Bayonet him for alleged disobedience of a Regimental military order, that was never published, and not known to have existed. Where was the impartial and independant Judgment of the Members, When, on the Trial of Messrs. Mountgarrett and Smith, at the prosecution of one of their Brother officers, the members, against the opinion of the Judge, would not permit the prosecutor to be cross examined at all on the part of the Prisoner, and when they took the examination of the Prisoners' Witnesses and the conduct of
their defence out of the hands of their Solicitor. These, my Lord, with several other facts of a similar nature that have taken place in the Military Criminal Court of N. S. Wales, have been so indelibly impressed upon the Inhabitants of that Colony, as to render them very doubtful of the impartiality, independ­ance, or absence of improper feeling in Military Men, when coming to act as perpetual Members of a Court of Criminal Justice.

The number of Military officers usually stationed at head quarters has been comparatively but small. For the last twelve years, the greatest number at any period was twenty-one, and the least fourteen; the general number has been from fifteen to twenty, and for the last three years not more than seventeen; and, unless the Military establishment shall be considerably increased at N. S. Wales, the number of officers will not be greater. Now, my Lord, from this small number of persons, some of whom, as has been always hitherto the case, are likely to be minors, will the proposed Military Jury have to be selected by the Governor. The Military Gentlemen have always considered themselves as at the head of Society in N. S. Wales, and have aimed at giving the tone to it. They have always mixed in the Society of the Colony, and many of them have been engaged in Colonial pursuits. The very circumstance of being made the perpetual members of the Criminal Court, of having the Lives and Liberties of the Inhabitants placed in their hands, gives them a Station and feeling, and causes them to assume a tone and demeanour, and to consider themselves as placed in circum­stances relative to the Colonists, which otherwise they could not be in. And they consequently and very naturally mix themselves up with the internal policy, general business, and private transactions of the Colony. The Inhabitants also feel that the officers are their perpetual Judges, and the higher classes, with whom they associate, pay them a degree of Court, and endeavour to obtain an influence, which has been very frequently perceived and felt. Military Men are, I presume, as susceptible of passions and prejudices as other men, and quite as much influenced by their feelings. Indeed there are some feelings, not at all friendly to the cool, calm, patient and comparatively dilatory proceedings, which ought to govern a Court of Justice, to which Military men, by their education and habits, must necessarily be more subject than other men. And the same esprit du Corps, that prevails among them all over the world, has influenced, and will influence them in New South Wales upon all questions where the Military, their friends or connections, shall come to be at all directly or indirectly concerned. I do therefore most respectfully
submit to your Lordship that the experience of the Criminal Court of N. S. Wales, the particular circumstances in which the Military officers by such a system must be placed, as well as those peculiar views and feelings which Military men necessarily have, all serve to demonstrate, that a Jury of seven officers, appointed solely at the will and at the discretion of the Governor, necessarily confined in the selection to no greater number than twenty, some of whom are certain to be minors, and against whom no right of challenge is to be allowed, except on the ground of interest alone, are infinitely less calculated, impartially and independantly to administer the Justice of the Country than a Jury of twelve respectable Freeholders, selected from a pannel of above one Thousand, and where each party would have full right of challenge upon every ground of objection, whether of interest, feeling, or prejudice.

The Commissioner would restrain the right of Challenge to the Military members to the sole ground of Interest. Interest is of all others the motive which, perhaps, would have least influence upon Military men. It is where their peculiar feelings were concerned, where their notions of rank and consequence, and their ideas of strict discipline and obedience come into play, in short, where the esprit du Corps, on what they consider the point of honor, is called into exercise, that Military men are least fitted for Jurors, and most open to bias and partiality; and those must operate with greater force in a Community so confined as that of N. S. Wales, and where the Military officers necessarily occupy, as they do in all Colonies, a peculiar character and influence. Besides, what would be considered as the interest of one Military officer, all experience has proved, would be considered as the Interest of all his Brother officers; and, if the Challenge was to be allowed in its full extent, there could be no Trial at all had, no uninterested Jury could be selected from so small a number as fifteen or twenty officers, all of the same Garrison. The feelings, motives, and circumstances, here stated, are not matters of supposition or probability of what may happen, but matters of fact that have actually happened and been severely felt, and the continuance of which cannot but be as dissatisfactory to the Colonists, as they have been unfavourable, to use no harsher expression, to the character and administration of Justice in the Colony. It is somewhat singular, if, according to the Commissioner's opinion, Military officers are the description of persons best calculated to serve as Jurors in New South Wales, that none of the Judges, who ever presided in the Criminal Court there, recommended the continuance of the system. The opinion of the late Mr. Judge Advocate Bent
(a Gentleman whose administration of Justice, in the difficult and anomalous duties of Judge Advocate, was matter of general satisfaction to the Colonists, as his death was that of universal regret) upon the nature of the Criminal Court is well known to your Lordship. He emphatically states that, from its Military construction, it did not command that veneration awe or respect, which ought ever to attend upon a Court of Justice. Mr. Judge Advocate Wylde, after seven years' experience of Military members, does not recommend a continuance of them under the character either of Judges or Jurors. And it really is a little too much for the Commissioner to set up his own single opinion upon this point, in opposition to the facts stated by himself, to the opinion of the Judges of the Court, whose experience and opportunity of forming a correct Judgment must have been greater far than his, and to the acknowledged wishes and feelings of the Colonists at large.

With respect to the Civil Jurisdiction of the Court, wherein the Commissioner recommends that all Trials should be by two Magistrates appointed by the Governor acting as a sort of Jury, with the exception of cases wherein both parties to the cause unite in applying to the Court for Trial by Jury, Your Lordship will perceive that the objection, made to the Military Jury in the Criminal Jurisdiction, will apply with still greater force, both as to the number and persons from among whom the selection must be made, and the motives and feelings by which they will be influenced. From the opening of the Supreme Court in 1817 down to and including the Year 1821, the number of Magistrates at Sydney has not been more than five, and is now only nine. It has been before stated that the Magistrates resident in the Country districts never have been appointed, and never can attend to this duty. Of these nine Gentlemen, three are Government officers, Commissary General, Principal Surgeon, and Naval Officer. The remaining six are extensively engaged in Trade and agriculture, and are, of all persons in the Colony, the most widely and extensively concerned in dealing and business with the Colonists. The Magistrates have hitherto considered themselves, and they have been considered by the Inhabitants, as the standing Arbiters of the property of the Country. They will unquestionably have the same power and the same feelings under the proposed system. They are either immediately connected with and dependant upon the Government, or largely concerned in dealings with the people, and must naturally be subject to all the feelings of interest, of friendship, and of office, which govern mankind. Men will naturally be influenced by, and endeavour to influence, those to whom, and by whom, service can be
Objections to proposed constitution of supreme court in civil jurisdiction.

rendered. And, in such a Community as that of N. S. Wales, to limit the number of Jurors to two, selected by the Governor out of only nine persons, all of whom cannot but be subjected to and influenced by motives of interest, friendship or office, and are placed in circumstances, which require no ordinary integrity and discipline of mind to resist, and to correct the improper bias of our nature, I say, my Lord, so to limit the Civil Jurisdiction of the Court of Justice in a community, where above one thousand respectable Freeholders can be impanneled, all of whom are equally competent with those nine Magistrates to perform the functions of Jurors, and from among whom, certainly, there would be no difficulty, on any possible question, to select a Jury of twelve uninterested, un influenced, impartial Men, is a circumstance that would seem to require some very extraordinary and peculiar state of things to Justify. Now, my Lord, I respectfully submit no such state of things has been shewn, nor indeed could be shewn, to exist. There is nothing in the state of society in N. S. Wales to make it either politic or popular, to commit the administration of civil Justice to the nine Gentlemen composing the Magistracy of Sydney, and, without meaning any thing invidious, I may be allowed to say that neither is there anything in the character, rank or talents of those nine Gentlemen, as so highly to exalt them above their fellow Colonists, or to render them peculiarly worthy of being the sole Arbiters upon the property and character of the Inhabitants. To whatever degree it is contended that feelings of irritation and acerbity exist in New South Wales, without doubt some of the Magistrates partake of those feelings, and have been actively concerned in the circumstances that have produced them in a far greater measure than any other portion of the Inhabitants; and, if the alleged prevalence of those feelings be a good or a valid ground of objection against the present introduction of Trial by Jury, I contend it is a still stronger ground of objection to the proposed System. If improper feelings do really prevail, surely confining the selection of Juries to a pannel of nine individuals, among whom those feelings must prevail, cannot secure a more impartial and unprejudiced administration of Justice than the enlarging the pannel to one thousand Individuals, among whom those feelings, from the mere enlargement of the number of persons, must be very considerably neutralized; and a great proportion of which pannel would be composed of persons, who had not been in the Colony, when these feelings were excited, and who can have no interest or sympathy in them.

The Commissioner further recommends that, if Trial by Jury should be at all established in the Civil Jurisdiction of the Court,
it should be limited to questions of fact, and where both parties to the cause united in requiring the Court to grant it. The Colonists, by their Petition of 1819, pray for Trial by Jury in the civil Jurisdiction, only in all cases of questions of fact, and at the request of either party to the Cause. If the granting of a Jury Trial be only where both parties to the Cause unite in applying for it, it will be obvious to your Lordship that this regulation will prevent Trial by Jury taking place in the very precise causes where it ought to take place. Suppose a Member of the Court has some interest or feeling directly or indirectly in the cause, suppose one of the parties has some peculiar connection with, or influence over the Member, in short, suppose either party to the Cause has some private or particular reasons to prefer the Cause being tried by the Members; in such cases both parties would not unite in making the application for a Jury, and precisely in such cases would a Jury be most proper and necessary. In the event of the conduct of a Magistrate or of any Civil officer coming before the Court, composed as it would be of Magistrates and Civil Officers, it would be absolutely necessary to an impartial Trial to have a Jury; and, in such an event, both parties would not unite in the application. In short, my Lord, such a limitation to Trial by Jury would have the precise effect of preventing it in all cases, where it would be most necessary and proper. If, on the other hand, trial by Jury was granted on all issues of fact, upon the application of either party to the Cause, an impartial Trial upon all matters of importance and interest would be secured; and all matters of common occurrence and general business might then be safely committed to the Jury of two Magistrates. I will beg leave most respectfully to state to your Lordship two cases, which lately occurred in the Supreme Court of New South Wales, that will place the foregoing reasoning in a clear light.

The one was the case, Henry vs. Eagar; it was an action of trover, relative to the possession of some property of very considerable value. The Plaintiff instituted Criminal proceedings against the Defendant before the Bench of Magistrates at Sydney, who on the examination of the Complaint were unanimous, with the exception of one Magistrate, in dismissing it as unfounded and frivolous. The Plaintiff then instituted his Action in the Supreme Court. The same Magistrate, who differed with the other Magistrates in the Criminal proceeding, and who had warmly expressed an opinion on the case, was one of the Members of the Court on the Trial of the civil proceeding, and his verdict was given accordingly. Now, my Lord, in such a case, there could be no challange to this Magistrate upon the proceedings.
1823.  
3 April.  
Necessity for full right of challenge.

Ground of interest. It is true he had previously made up his mind on the case one way. It is equally true that the other Magistrates had also their opinions upon the subject matter. It is evident that similar cases may occur every day, and, upon the system of the Jurors being selected only from among the Magistrates, it is clear there could not be an unprejudiced Trial. And it is equally evident no party, conscious that any members of the Court entertained a favourable opinion of his case, would be very willing to unite with his opponent in requesting that it might be submitted to a more impartial tribunal.

The other was the case of Oxly against Hall, in an action for a Libel tried in the Supreme Court. The Defendant made a Complaint to the Governor of the misconduct of the Plaintiff, who is the Surveyor General of Lands, in the location of Land, and as having given an improper preference to certain individuals as to the choice of situation. The complaint did not come to determination. The Plaintiff brought his action for damages against the Defendant. One Magistrate Member of the Court was the particular and most intimate friend of the Plaintiff; the other Magistrate was one of the very persons to whom the Plaintiff was charged with having given the improper preference, and who was besides on very unfriendly terms with the Defendant. The result was that, altho' the alleged libel was a complaint regularly preferred against this officer to the Governor, and had not been determined on by the Governor, and no special damage either laid or proved, Yet a Verdict was given against the Defendant for large damages. Now, my Lord, in this case the Defendant could not challenge the Members on the ground of interest. Yet what could have been more improper than either of them being Jurors in the cause. The System recommended by the Commissioner is not calculated to provide for or to prevent the recurrence of such circumstances. And cases of this nature, as they frequently have happened, will again happen in New South Wales, and serve most clearly to shew the impropriety of restricting Trial by Jury in the way recommended by the Commissioner.

Expectations of trial by jury in N.S.W.

Upon a review of all the circumstances belonging to N. S Wales, I respectfully hope your Lordship will see that, on the one Hand, the objections, that have been made to the establishment of Trial by Jury, have been founded on circumstances that have been much misconceived and magnified, and, on the other, that there exist many and cogent reasons for its immediate establishment. Most assuredly the hopes, wishes and anxious expectations of all classes of the Colonists are fixed upon the attainment of this object. They are particularly anxious the
Jury System should be established in the Colony at so early a period, as that the rising Generation may become acquainted with and accustomed to it. They wish to be able to educate their children in the practical knowledge, and thereby effectually secure all the benefits, of what, altho' removed to the other side of the Globe, they still consider as the inheritance of their ancestors, as the birthright of Englishmen. They see the Jury system established in every other British Colony, however small its Population, however confined its society. They see it prevails in all their Sister Colonies in the West Indies, in many of which the entire free White Population, male and female, adult and Infant, is not equal in number to the pannel that may be made out in New South Wales. They see it established among the Hindoos and Cenglese of the East, the latter of whom are eligible to serve and have served as Jurors. They see its benefits extend to the Hottentot in Africa, and the Negro Slave in the West Indies, And they do naturally expect that New South Wales, a peculiarly English Colony, wherein is no admixture either of Foreigners or people of colour, Wherein are so many thousand British born Subjects, will not now be refused that valued priviledge of Englishmen, enjoyed in every other British Colony and Dependancy in the World.

The experience, which the Colonists of New South Wales have had of a Military Court, has been such as that they never can, and never will be reconciled to the administration of the Law by such a Court under any modification. While the Court has the least appearance of, or approach to, a Military character, instead of exciting the respect and confidence of the people, it will assuredly meet with their contempt and hatred. Any system being military in its basis cannot but fail in securing the respect of the Inhabitants, and in administering Justice with that dignity and weight that ought to belong to a Court of Justice. I do most conscientiously believe, and I speak advisedly on the subject, that no other than the Jury System will give satisfaction to the Colonists, or excite their respect and confidence. That any other System will be productive of little, if any, good, most probably of much evil, certainly of great disappointment and dissatisfaction; and that the continuance of any Military feature or character in the Courts of Justice will be considered on the one hand as in itself a positive evil, and on the other, as the denial of a most valuable and important public right. The Colonists are aware that His Majesty's Government can have no object, in the formation of the Courts of Justice, adverse to the best and truest interests of the Colony. They have humbly addressed their Petition to His Majesty, expressing their views
and hopes upon this important subject, and they trust that such facts and circumstances have been submitted, as will satisfy His Majesty's Government that trial by Jury may be now established without any reasonable apprehension of its proving injurious to the Colony, And with every reasonable probability of its proving of the most essential service to its improvement and prosperity, and to the peace and security of the Colonists, in their Lives, Liberties and Property.

Most respectfully trusting that Your Lordship will consider the importance of this subject, and the Situation I happen to bear in reference to it, and the Colony of New South Wales sufficient apology for this address, I beg leave to subscribe myself, with the utmost respect, etc., etc.,

EDWARD EAGAR.

MR. JAMES STEPHEN'S CRITICISM OF NEW SOUTH WALES BILL.

Sir,

Lincoln's Inn, 10th May, 1823.

I have had the honor to receive the draft of a "Bill* for the better administration of Justice in New South Wales and Van Diemen's Land," together with your directions to revise and settle it, for the consideration of the law officers of the Crown. With a view to the discharge of this duty, I am desirous to receive your instructions upon some points respecting which doubts have occurred to me.

1. From what you stated when I had the honor of a conversation with you upon this subject, I should infer that the draft transmitted to me does not comprise all the subjects, which you propose to include in the Bill to be laid before Parliament. That you may be the better able to ascertain whether I am correct in this supposition, I will briefly recapitulate what the contents of the present draft are. It embraces eight distinct subjects. They are as follows:—

1st. A provision is made respecting the mode in which the benefit of the Royal Pardon is to be extended to convicts, who have already obtained, or who may hereafter obtain, a remission of their sentences in the Colony.

2. The case of transported felons, who shall afterwards be convicted of felony in the Colony, is provided for, by rendering such persons incapable of acquiring any Civil Rights.

3. A declaration is made as to the effect of induring the whole punishment of transportation, as being equivalent to a royal pardon in certain cases of chargeable felonies.

* Note 201.
4. A power is given to the Crown to exclude trading vessels from all places which may hereafter be appointed for the reception of convicts.

5. Provision is made for the administration of Justice, and the constitution of the various Courts of Civil, Criminal and Ecclesiastical Law.

6. The distribution of Insolvent Estates is the next subject treated of in the Act.

7. A clause is introduced to prevent ships from carrying away convicts from the Colony.

8. The Statute of Geo. II respecting Merchant Seamen is extended to New South Wales.

I have conceived that there are some objects in Lord Bathurst's contemplation beyond the eight, which I have thus enumerated, but whether that supposition is correct I am, of course, unable to state.

II. You are aware that the Stat. Geo. 3, 47, authorized the Governor of New South Wales to remit the term of transportation in any case which he might think deserving that favor, and directed that all such remissions should be inserted in the first general pardon which should pass under the Great Seal. You are also aware that many punishments have been thus remitted in the Colony, but that the parties have never been included in any general pardon. This draft therefore proposes to cure this neglect, by making the remission, whenever it has hitherto been granted, equivalent to a pardon under the Great Seal. It proposes, however, to give the Crown the power of excluding from the benefit of this pardon any person who may be thought unworthy of it. Now it appears to me doubtful whether Mr. Forbes can correctly have understood Lord Bathurst's intention upon this point; since, to refuse the benefit of an absolute pardon to any person whose sentence has already been remitted in the colony would, in effect, be to violate the solemn pledge of His Majesty and the Two Houses of Parliament. I should apprehend, therefore, that you would not deem it right to submit to Parliament a clause which is, in effect, to enable the Crown to violate a parliamentary engagement.

III. It is proposed in this Draft to continue, in future, the system which was adopted by the statute already referred to; that is to say, to render the validity of the Governor's remission dependant upon the name of the remitted convict being inserted in the next general Pardons.

To this proposal I should in the first place venture to object that it is very unusual at once to acknowledge in an Act of
Objection to future confirmation of remissions by general pardon.

Separate act proposed re status of expirees.

Declaration re legality of indictments.

Parliament the past inefficacy of a legislative provision, and then to re-enact it in the very same terms; and secondly that the provision itself is open to the following objection:—Before the next general pardon passes the Great Seal, the remitted convict may have died. In that case, he could not properly be the subject of pardon. I have therefore humbly to suggest, whether the more convenient course would not be to declare any remission of sentence, if His Majesty's approbation of it should at any time be signified through one of His principal Secretaries of State, to be of itself equivalent to a pardon under the Great Seal.

IV. The enactment declaring that transportation and service during the term shall in all cases have the legal effect of a pardon, does not, as it seems to me, properly fall within the scope of the present Bill. It is an alteration of the general criminal law of the country, and perhaps, therefore, would more properly be included in a separate Act of Parliament, since it is highly inconvenient to introduce considerable changes in the general law, into Acts which, in their main scope respect only one particular and detached Colony.

V. The Draft contains a declaration that no part of any indictment is to be deemed matter of substance except the crime laid, and that no defect of form shall be considered a sufficient ground for setting an indictment aside. Upon this clause I have to observe that it seems to me rather to raise a question than to establish a rule what is "matter of form?" and what is meant by the "crime laid?" If this clause is interpreted to mean that every indictment, however inaccurate, loose and unintelligible, shall be sufficient, it may be objected that such an enactment is oppressive on the parties to be tried, and tends to encourage the utmost negligence in the Officers charged with preparing the indictment. On the other hand, if the matters of form referred to are such matters of forms only as are wholly immaterial to the precision and clearness of the accusation, then it may be objected that such is substantially the state of the law at present. But whatever may be the more probable interpretation of the clause, it would, in my judgment, be a sufficient objection to it that, upon a subject of all others the most important, it confides so much to the discretion or rather to the caprice of the Judge.

VI. In civil cases the trial is to be by Jury, if both the parties desire it, but not otherwise. On this clause it is to be remarked that it will probably prevent the trial by jury altogether. It scarcely ever will happen that both parties will desire that mode of trial. In cases the most peculiarly proper for a jury, such, for example, as depend upon local usages, the wrongdoer will of
course avail himself of his power to prevent a jury being convened. The mere wish of one party to introduce a jury would of itself be a sufficient reason with his opponent for refusing it. Further, in the actual trial of actions, either party might labour under an unjust prejudice. He who desired a jury would be represented to the Judge and his assessors as having wished to evade their jurisdiction. He who declined a Jury would be represented as having shirked from that mode of trial from a consciousness that his claims were not such as Judges taken from the Vicinage could sanction. Would it not be more reasonable that the Judge should have power to direct a trial by Jury, on the application of either party, whenever, upon hearing both parties, he might deem that mode of trial most conducive to substantial Justice? In favor of this course the daily practice of Courts of Equity in England may be cited. These Courts continually direct the trials of facts by Jury, whenever that mode of trial seems to them necessary or expedient.

VII. A Power is given to the Governor to banish from the Colony for life any person guilty of “factious,” “turbulent” or “disorderly” conduct. Without presuming to express an opinion as to the wisdom of intrusting so formidable a power to any individual, I would observe that so serious a punishment as banishment for life can hardly, without an extreme deviation from all ordinary principles, be inflicted except for some offence known to and defined by the law. The Criminal Code of England has not defined what is meant by “factious,” “turbulent,” or “disorderly” conduct. Would it not be more expedient to adhere to established legal terms, and to enact that any person guilty of sedition, whether by Acts, or by words, written or spoken, should, on such acts or words being proved on the oath of two or more credible witnesses, be liable to be banished: and that such banishment should be temporary or perpetual according to the degree of aggravation of each particular case? If this power of banishment is to be confided to the Governor, should not this extraordinary authority be limited to those cases only where he may deem the instant and immediate exercise of it essential to the peace and safety of the Colony? Should it not in all other cases be inflicted according to the regular course of law? And, finally, should not the Governor be required upon every such exercise of authority, to transmit a narrative of the case, with authenticated copies of all the proceedings, by the first opportunity for His Majesty’s consideration?

I have, &c.,

JAS. STEPHEN, Junr.
DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.

Sir,

With reference to the personal Communication I had the Honor to hold this morning with your Excellency on the Subject, I beg leave to inform your Excellency that one of the present Members* of the Governor’s Court, Mr. John Nicholson, was appointed under the Precept, dated 30 May, 1822, and the other Member, Mr. Robert Howe, under that dated 2nd October, 1822, since which period no Precept has been issued.

I have, &c.,

Jno. WYLDE, J.A.

MR. F. FORBES TO UNDER SECRETARY HORTON.

Sir,

I avail myself of the permission you were so obliging as to give me, of addressing a few observations to you upon the alteration which is proposed of that part of the draft of the New South Wales bill prepared by me, which relates to the legislative powers to be exercised in future by the Governor of New South Wales. As the draft stands at present, it confers upon the Governor a power to make local regulations upon certain defined subjects, with a proviso that such regulations shall not be repugnant to the laws of the realm. As I understand the proposed alteration, it is to give the Governor an undefined and general power, with the approval of any six magistrates of the Colony, to make laws upon any subject matter, and to any extent, provided such laws shall not be repugnant to the laws of the parent state, and shall not be disapproved by His Majesty in Council.

I do not, Sir, presume to question the expediency of so large and undefined a legislative power in New South Wales; but I must be permitted, under shelter of the liberty you have allowed me, to express what occurs to me as grounds of objection to the measure, and affording pretexts for opposition to it.

You will observe, Sir, by referring to the Commissioner’s Judicial Report (page 46, 3d paragraph) that he only recommends a power of regulating the police, to be conferred upon the Governor with the assistance of the Magistrates; and in page 52 (5th paragraph), he particularly enumerates the several subjects upon which the Governor had hitherto found it necessary to make regulations. He does not once suggest the necessity of enlarging the power heretofore exercised, under the exigencies of the Colony; but rather throws a doubt upon the expediency of some of the measures adopted by the Governor, under the necessary but assumed authority of the legislator.

* Note 222.
The proviso, that the Governor's enactments shall not be repugnant to the laws of England, is the common restraint upon all colonial acts, and nothing more; to give a general legislative power, and to restrain it merely by this proviso, is to confer upon the Governor of New South Wales, and any six gentlemen holding their office at his will, a power as ample as the Governor's Council and Assembly of Jamaica, or any other Colony in the West Indies; for, by the common constitution of the colonial legislature, they cannot make any law repugnant to the laws of England.

If I understand the case then, the Governor and any six Magistrates may create new felonies, may raise taxes, and in fact may do all and every thing that the Governors Council and Assembly of Jamaica may; for it is to be borne in mind that all acts of colonial assembly are subject to the approval or disapproval of His Majesty in Council, and, by merely referring to any index of colonial laws, it will be seen how very loose and limited is the restraint of not being repugnant to the laws of England.

As it appears to be the intention of His Majesty's Government to encourage the investment of English capital and employment of British industry in the colony of New South Wales, it may be worthy of consideration how far the existence of so unlimited a control over the fortunes and persons of settlers as it is in contemplation to convey, may not operate to the disadvantage of the plan in view of encouraging settlement. The case is without a precedent in the other colonies, properly British, and as it appeared to me to involve, in its departure from antient precedent, very important consequences, I have submitted a few of the most obvious objections to your consideration.

I have, &c,

FRANCIS FORBES.

MR. E. EAGAR TO UNDER SECRETARY HORTON.

3 Francis Street,

Mecklenburgh Square, 31st May, 1823.

Sir,

I have the honor to acknowledge the receipt of the extract from the New South Wales Bill, containing the 8th, 29th, 30th, 31st and 35th Clauses* thereof, for which I beg leave to return my respectful thanks.

With respect to the 8th, 29th, 30th and 31st clauses, they are quite satisfactory. But with respect to the 35th clause, empowering the Governor to remove persons from the Colony, I hope, Sir, you will agree in the reasonableness of the two provisoes I respectfully beg leave to submit to your consideration.

31 May.

Clauses of N.S.W. bill received.

1823.

Note 223.
The common justice and propriety of communicating to the Accused the nature and particulars of the Accusation, and affording him an opportunity of defence is so evident that I am sure I need do no more than suggest it in order to its adoption. And when the great distance of New South Wales from England is considered, and the most serious if not ruinous consequences that must follow the removal of a Man so far from his family, his property, and, above all, from his means of defence, I trust Sir, that you will consider the second proviso, suspending the removal, upon Bail, until the opinion of His Majesty's Government be obtained upon the Case, as both just and reasonable in itself, and at the same time as sufficient to secure the object of the measure in providing for the peace and security of the Government.

I have, &c.,

EDWD. EAGAR.

[Enclosure.]

PROPOSED AMENDMENT.

Provided also, that in every such case such Governor or acting Governor shall first Cause true Copies of such Affidavit or affidavits to be furnished to the person or persons accused, and shall hear all and whatsoever such person or persons shall or may offer in denial or defence of the charge or charges so preferred against him or them. And shall also Cause a true Copy of the Written Statement of the particulars and grounds of such order as aforesaid to be also furnished to such person or persons previously to his or their removal from the Colony as aforesaid.

And Provided also that, in every case where any person or persons, so charged and Accused as aforesaid, shall give good and sufficient Security of the peace and good behaviour for seven years, Such person or persons, giving Security as aforesaid, shall not be removed from the said Colony until an order of His Majesty, His Heirs and Successors, in Council for that purpose be first had and obtained.

DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.

Sir,

At your Excellency's suggestion, after personal Communication upon the Subject of the very unusual period of Time that the present Members* of the Governor's Court had stood appointed, I had the Honor of addressing your Excellency thereon on the 13th Ultimo, and, as the Court sits again on the 6th Instant, I beg leave to recal the Matter to your Excellency's recollection and Consideration.

I have, &c.,

JNO. WYLDE, J.A.

* Note 222.
REMARKS ON B. FIELD'S LETTER.

REMARKS UPON Mr. Justice Field's letter* to Earl Bathurst touching certain parts of Commissioner Bigge's Report, dated at Sydney 15th Jany., 1823.

Mr. Justice Field considers Mr. Commissioner Bigge's recommendation of an Act of Parliament, as "unnecessarily tampering with the common law of England." The best way to examine the charge will be to look at the facts of the case.

Some hundreds, if not thousands, of persons are at this moment in the colony of New South Wales, who have received instruments of remission of sentence of transportation, which instruments, by the plain directions of an act of parliament,† should have been immediately transmitted to England, in order that the names of the parties, receiving such remissions, should be inserted in a general pardon under the great seal. It is understood that no general pardon under the great seal has been issued, since the passing of the statute in 1790, and that in fact the remittees stand in no better condition, in respect of property and civil right, than if no such remission had ever been granted to them. Many of the persons, to whom remissions have been given, are since dead. To apply a general remedy, the Commissioner thinks an act of Parliament most effectual; and in the spirit of what appears to have been intended by Parliament to be done, but has not been done, the framers of the intended act, under the direction of Earl Bathurst, have sought to place the parties, if living, or their descendants and assignees if dead, in precisely the same situation in which they would have stood, if the provisions of the law had been strictly complied with. Such is the measure, which Mr. Justice Field thinks unnecessary, and describes as tampering with the common law of England. Mr. Justice Field's own remedy is as follows:

Assuming the broad principle of law, that convicted felons cannot sue, he takes credit to himself for being "the first who propounded the principle,"‡ that they could not be prevented from suing in the colony, because the only admissible evidence was the record of conviction, and a copy of that record could not be procured without at least a twelvemonths' time." How this mere absence of evidence, which a given time it is admitted could supply, was to work the important consequence of restoring competency to the convict to sue, he explains by supposing that, as the suitor will have the same time to obtain a pardon with restitution of rights, he will be enabled to meet the record of conviction, with a pardon under the great seal. His Majesty's Secretary of State for the Home Department, it is assumed, would not refuse such pardon. Again, Mr. Field finds additional security for remitted convicts, in the assumption that "the

* Note 224. † Marginal note.—30 Geo. 3, c. 47. ‡ Note 208.
Courts would not be mad enough to give every opposite party time to send home for the record of the suitor's conviction." In what principle of law it has been discovered that Courts may adopt different rules of justice, in reference to different suitors, it is not stated; but the Commissioner's reports* supply one case, in which a party was allowed to turn round his adversary by alleging conviction of felony, as a bar to the action, and that party was Mr. Field himself.

Without offering any opinion how far the remedy said by Mr. Justice Field to exist at present, and to be sufficient for any grievance, is or is not so sufficient, it is obvious to remark that, by law, a convicted felon is rendered incapable of sustaining any suit in a Court of justice; and that the only legal mode of removing such disability is by obtaining a pardon, or that which is made by law equivalent to a pardon, from the Crown. While such is the law, every attempt to evade it is to say the least, very uncourtlike; nor is the objection to the evasion suggested in Mr. Field's letter, the less, from the disclosure that to be discreetly, it must be exercised with partiality. For after the broad, unqualified manner in which the Governor's Court permitted Mr. Field to allledge Mr. Eagar's conviction as a bar to his action, it is difficult to suppose a case in which any other party could be prevented from using the same plea, without exposing the Court to an imputation of something more than madness or indiscretion.

The remaining parts of Mr. Justice Field's letter relate to verbal inaccuracies in the Commissioner's report, and some difference of interpretation upon the Statute usually called Romilly's Act.† They are immaterial to the bill now pending, or any matter at present under consideration in reference to New South Wales. Mr. Justice Field has explained the reasons of his having corrected a note to the case of Doe v. Pearce, alluded to by the Commissioner,‡ and seemingly in a very candid and satisfactory way.

12th June, 1823.

Mr. Justice Bent to Under Secretary Wilmot.

Sir, Grenada, 3d July, 1823.

I have the honour of addressing you, in order to correct an error§ in Mr. Bigge's Report on New South Wales, which considerably affects myself.

In page 152, Mr. Bigge makes me commit the gross absurdity of refusing to admit the Convict Attornies to practice; at the

* Marginal note.—Commissionrs. 1 Report 133 (see note 225).
† Marginal note.—54 Geo. 3, c. 14.
‡ Marginal note.—Commissionrs. 1 Report, pages 131-137. § Note 226.
same time proposing, in their room, the admission of Mr. Foster, who was also a Convict, and then acting as Clerk to my Brother Mr. Ellis Bent, then Judge Advocate. Such an absurdity was never committed by me. I proposed the admission of my Brother’s Clerk, indeed, but mentioned no one by name; the Clerk I alluded to was a free Person, who left England with my Brother in 1809, and was with him some years, and retired from that Duty having married a Person of some property and become engaged in Agricultural pursuits. His name is Woodhouse.

Mr. Foster, to whom Mr. Bigge has been lead to suppose I alluded, did not arrive in New South Wales as a Convict till 1812. And I am much surprized Mr. Bigge should fall into so great a mistake; for it would have furnished so decisive an argument against myself that it would be impossible to suppose those opposed to me would have overlooked it, or that it should be left, after all the differences it occasioned, and voluminous correspondence, to be now found out by him; And I should have thought that consideration alone would have been sufficient to guard Mr. Bigge against a mistake so hurtful to me, in a matter which never was in my view, and was contrary to every principle that I set out with upholding, and the correctness of which subsequent experience has justified.

I shall feel much obliged, should any discussion arise on this point, by your setting this matter right; and also by your forwarding the enclosed to Mr. Bigge at some convenient opportunity.

I have, &c,

Jeffery Hart Bent, Ch. Justice of Grenada.

MR. JAMES STEPHEN, JR., ON OFFICERS OF THE COURTS.

Dear Sir,

I mentioned to you this morning that it would be necessary to create new Offices in New South Wales and Van Diemen’s Land, for the purpose of properly carrying into execution the provisions of the New South Wales Act. In compliance with your wish, I now proceed to state what the functions of the Officers who are to be appointed will be.

First. It will be necessary to appoint some person to be the Registrar of the Court. His duty will be to be constantly present during the Sittings, to take down minutes of all judicial Acts and proceedings, to draw up all decrees and judgments, and to deliver authenticated copies of them.

Secondly. A person must be appointed to the Office of Sheriff, whose duty it will be to carry into execution all the Orders and judgments of the Court.
1823.
21 July.

Duties of
master;
and of
accountant.

Officers
required in
N.S.W. and
Tasmania.

Appointment of
officers.

Thirdly. It will further be essential to appoint a Master, who
will be charged with the taxation of Costs, the investigation of
complicated accounts, and generally with the same occupations
as those which are performed by the Masters in Chancery, and
the Masters of the Court of King's Bench in England.

Fourthly. An Officer must likewise be appointed, whose duty
it will be to issue all Writs, and in whose office all the written
pleadings of the Court will be filed, and who will be the Keeper
of the Accounts of the Court.

All these Officers must exist both in New South Wales and
Van Diemen's Land. They would, I conceive, be paid, as in
England, by fees.

It may, perhaps, be convenient to consolidate some of these
Offices, for the purpose of diminishing the Number, and in­
creasing the emoluments of the persons to be appointed. For
example, the same person might be Registrar and Keeper of Re­
cords. I should conceive however, that three persons at least
must be attached to each of the Courts, and I think that the
Offices should be kept distinct, even though united, for the
present, in the same person.

All these appointments, I apprehend, must be made by the
Crown. The inferior situations of ushers, cryers, and court­
keepers would I presume be in the gift of the Judge.

I am, &c.,
JAMES STEPHEN, Junr.

23 July.

Opinion re
prosecution
under port
regulations.

Illegality of
regulations.

Invalidity of
bond.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY WILMOT.

Sir, Lincoln's Inn, 23 July, 1823.

In compliance with your directions, I have perused the
letter* addressed to you by Lieutenant Governor Sorell, dated
the 16th November, 1822, with its enclosures, and I am to report
to you my opinion, whether the penalty incurred by a breach of
the Port regulations at Van Diemen's Land can be legally
enforced in this country.

I am of opinion that the penalty in question cannot be legally
enforced. First, I think that the Proclamation of Governor Mac­
quarie of the 6th February, 1819, establishing these Port Re­
gulations, is itself illegal. That Proclamation is, in effect, a legis­
lative Act imposing various fines and penalties, and the Governor
of New South Wales had no authority to promulgate or to
enforce any such law.

Secondly, the Bond itself is framed in such a manner as, in
my judgment, renders it invalid. The security is entered into,

* Note 227.
not with the King, His Heirs and Successors, but with "His Majesty and His Officers holding places of trust and responsibility at home and abroad in any part of the British Dominions, and the Honourable East India Company, and their Officers aforesaid, at any place within the Honourable Company's territories."

If an Action were brought on this Bond, it must be brought in the name of the King and the East India Company, and of every individual in Office in India or in the British dominions.

I have, &c.,

Jas. Stephen, Junr.

DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.

Sir,


Two respective Sittings of the Governor's Court having taken place, since the Colonial Secretary informed me that "having submitted my Letter dated 4 June to the Consideration of your Excellency, he was directed to acquaint me, that any change in the Members* of the Governor's Court was deemed for the present inexpedient," I feel myself urged, again, under a Sense of Duty to submit, with some reluctance, the Grounds, upon which it seems incumbent on me very cogently to advise your Excellency, as I am impressed, that such Change, previously to the ensuing Sittings, has become fit and expedient.

Without entering at length into those general reasons and Views, which, on this subject, have heretofore been submitted to your Excellency's consideration, I beg to recall to recollection only that from the publication of the present legal Charter, as certainly on my own Knowledge from the Year 1816 up to the time of your Excellency's succession to the Government, the Members of the Court, acting as a Sort of Jury, were selected from the most respectable Inhabitants, independent of all Government Office and Salary, and most generally (the Exceptions were as rare, I believe, under particular Circumstances, as unintentional on general Principle) changed at the then every quarterly Sittings of the Court. The persons considered qualified were at that time comparatively but few, now increased perhaps at least to a sextiple ratio, and were by turns inserted in the precepts by a sort of roster course of Duty in order thus to equalize the burden ever felt to be imposed in the Appointment.

With regard to the mere Practice, that obtained within that period, as to the persons actually nominated as Members from time to time, the immediate Change was made by the Governor always in communication with myself; or the precepts were signed

* Note 222.
and transmitted by the Governor in blank for the Members to be filled in by myself. A nearly similar Practice, your Excellency may be aware, still prevails indeed as to the appointment of new Members to the Supreme Court as also to the Lieutenant Governor's Court in Van Diemen's Land: the Judge of the former transmitting fresh Precepts for each distinct Term of the Court with the Names of the new Members already inserted, and the Deputy Judge Advocate in the latter, suggesting the Names to be filled in.

Renouncing utterly however on my own part all desire of interference in this respect, the Charter of Justice leaves the appointment of the Members clearly with the Governor; with whom also rests entirely of course what Consideration or Courtesy as towards the Judges may or not be consistent with his exercise of the Jurisdiction.

In this particular View, with reference to myself, as the appointment of the principal Clerks of the Colonial Secretary and of the Dy. Commy. General of the Territory as the two joint Members of the Court by precept, dated April, 1822, could not be allowed to be waived or altered even as to retaining either one only of the two Members upon those peculiar points of remonstrance, I felt myself imperiously called upon at the time to submit to your Excellency's consideration. I have consequently from that time, thus admonished and having thus seemed to satisfy any official responsibility on my own part, as well as under a due sense of official Delicacy to your Excellency, left wholly in your Excellency's Pleasure as to the fit periods for changing by Precept the existing Members of the Court.

The Subject however had become accidentally, in personal Communication, Matter of observation on two or three Occasions before 13 May last, as again on that particular Day, when your Excellency requested me, as seeming fully satisfied of the propriety of no longer delaying to issue a fresh Precept for the Court, to address a written Communication to your Excellency, so as to prevent the point from longer escaping official Notice.

I addressed a Letter accordingly on that Day to your Excellency, informing him that Mr. John Nicholson, the Master Attendant of the Dock Yard, had then sat as a Member of the Court from 30 May, 1822, and Mr. Robert Howe, the Government Printer, from 2 October, 1822.

On the 4 June last, having in the meantime understood that Mr. Nicholson, at his own Instance and Application, had been favoured with an Assurance both from your Excellency and the Colonial Secretary that a fresh Precept would certainly be issued before the then ensuing Court, and both Members having before
expressed a Desire to me in Court of being relieved from a Duty they had so long undergone, I again by letter recalled the Matter to your Excellency's recollection and Consideration and on the 6th June following received the Answer I have before adverted to that no change was for the present deemed expedient.

At the last Sittings in the present Month, no new precept in the meantime having been issued by your Excellency, several cases, I beg to apprise your Excellency, were brought before the Court at the Suit of the Colonial Secretary upon Bonds given for the payment to the Colonial Government of a quarterly allowance upon the assignment of convict Mechanics. On the hearing and on the Evidence of the only Witness produced to prove the execution of the bonds, a vital Question seemed to arise upon that particular point; and the Court, being disposed to afford every Opportunity to the Solicitor for the Crown of fully proving the Merits, as of considering the point of Law suddenly mooted, so as to prevent the Necessity of a Nonsuit on so meritorious a Cause of Action, and with the Consent of the Defendants, who alleged Merits also in Defence, but whose Witnesses were not then in attendance, allowed the Cases to remain in the paper for determination at the next Sittings of the Court commencing on the first Proximo. I make mention only of these cases, however, to communicate to your Excellency a further fact that occurred on the Occasion, which I cannot justify myself in conscience from not making known to your Excellency, the fact, I beg to avow, that both Members suggested themselves not to be without feeling of a certain Degree of personal Embarrassment from the Connection their Offices seemed to place them in with the Government, as their regret indeed that the so long expected new Precept had not previously relieved them from their Duty in the Court.

I should certainly have addressed your Excellency on this, in my apprehension, serious point, sooner after the Adjournment of the Court, but that, as it was suggested by both Members, I believe, but assuredly by one, that applications would be made on their own parts to be relieved from the Duty, I could not but anticipate that I should thus be wholly spared the Duty on my own part of the present Communication: but, as no precept has been issued as to the ensuing Sittings so shortly about to take place, I have again, deprecating with your Excellency, as I may so justly and conscientiously do, all Idea of any intentional undue Interference with your Excellency's Powers and Authority under the Charter, or the Influence indeed of any but in my own Impression, of just and fit judicial Motives, to submit to your Excellency the propriety and expediency, at the present especial
1823.
24 July.

Non-official members proposed.

Juncture, of appointing new Members for the ensuing Sittings (one of the present Members having served fourteen and the other nine Months), as generally of returning to the former Practice of issuing a fresh Precept, if not for every Sittings of the Court, at periods not longer than of three Months' Interval, while the Members so appointed from time to time, or at least one of them should be selected. I beg to advise further, with all due Defer­ence from the residents at Sydney holding no office under or receiving Salary from the Government, and of whom there is so competent a Member for the Duty: a measure at least, I will only observe, which would leave the Jurisdiction of the Court not only free from any possible actual, but even the appearance of any Undue Influence, Bias or Prepossession upon Questions, in which the colonial Government may in any way seem to be interested.

I have, &c.,

JNO. WYLDE, Judge Adv., N.S.W.

LIEUT.-GOVERNOR ARTHUR TO UNDER SECRETARY HORTON.

28 July. 28th July, 1823.

Administrative reforms proposed in Tasmania.

[A copy of this letter, suggesting alterations in the administra­tion of Tasmania, will be found on page 78 et seq., volume IV, series III.]

UNDER SECRETARY HORTON TO H.M. ATTORNEY AND SOLICITOR GENERAL.

29 July.

Submission of draft of charter of justice to counsel.

Gentlemen, Downing Street, 29th July, 1823.

I herewith transmit to you Drafts of the letters Patent for establishing Courts of Judicature in New South Wales and Van Diemen's Land, in pursuance of the provisions of an Act passed in the last Session of Parliament entitled, "An Act to provide until the first day of July, 1827, and until the end of the next Session of Parliament for the better administration of Justice in New South Wales and Vandiemen's Land, and for the more effectual Government thereof, and for other purposes."

I am to desire that you will take the same into your con­sideration and report to me your opinion whether the clauses contained in the Charters herewith enclosed are unobjectionable in point of Law, and whether they will be effectual for carrying into execution the provisions of the Act above-mentioned.

I am, &c.,

R. WILMOT HORTON.