TRUSTY and Well Beloved We Greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well beloved Saxe Bannister, Esquire, We have thought fit hereby to authorise, and require you forthwith to cause Letters Patent to be passed under the Seal of our Colony of New South Wales constituting and appointing him the said Saxe Bannister Our Attorney General of Our said Colony to have, hold, exercise and enjoy the said Office unto him the said Saxe Bannister during Our Pleasure together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging or appertaining, in as full and ample manner as he ought of Right to hold and enjoy the same. And you are to cause to be inserted in the said Letters Patent a Clause or Proviso obliging him the said Saxe Bannister to actual Residence within Our said Colony, And to execute the said Office in his own Person except in case of Sickness or Incapacity, and all such other Clauses and Provisoes as are requisite and necessary in this Behalf. And for so doing this shall be your Warrant. Given at Our Court at Carlton House the First day of August, 1823. In the Fourth Year of Our Reign.

By His Majesty's Command,

BATHURST.

To Our Trusty and Well Beloved Sir Thomas Brisbane, Knight Commander of the Most Honble. Military Order of the Bath, Our Governor and Commander in Chief of Our Colony of New S. Wales, and its Dependencies, or in his absence to Our Lieut. Governor or Officer Administering the Govt. of our Said Colony for the time being.

WARRANT FOR COMMISSION FOR ATTORNEY-GENERAL IN TASMANIA.

1st August, 1823.

[A copy of this warrant will be found on page 475, volume IV, series III.]

PETITION FROM RESIDENTS IN TASMANIA TO EARL BATHURST.

2nd August, 1823.

[A copy of this petition, praying for the legal and commercial independence of Tasmania, will be found on page 475 et seq., volume IV, series III.]
Earl Bathurst to Sir Thomas Brisbane.

4th August, 1823.

[In this despatch, Earl Bathurst announced the appointment of F. Forbes as chief justice and the recall of J. Wylde and B. Field, and transmitted the statute, 4 George IV, cap. xcvi; see page 102, volume XI, series 1.]

Mr. Saxe Bannister to Under Secretary Horton.

Sir, Lincoln's Inn, 9 August, 1823.

In considering of the duties of the office to which I have the honor to be appointed in New South Wales, I have found advantage in consulting the papers relating to colonial legislation, preserved in the Books of the Board of Trade. Recently the papers have been kept at the Colonial Department; and I beg to submit to you that it will materially assist the legislature of New South Wales to avoid errors, if furnished with copies of the opinions which have been given by the Law officers of the crown at home, upon points of public interest in other Colonies during a certain number of years past.

I think also that I may derive much benefit myself by being allowed to take notes from the books in the Colonial department, relative to the Government at Quebec before 1791, when under a legislative council, and afterwards when under an Assembly.

I have, &c.,

S. Bannister.

Under Secretary Horton to Revd. T. H. Scott.

Sir, Downing Street, 16th August, 1823.

I am directed by Lord Bathurst to apply to you,† as having been late Secretary to the Commission of Mr. Bigge on a subject connected with the act which has lately passed the Legislature, a copy of which I herewith enclose.

You will perceive in clause 24 that a Council‡ of advice is to be appointed, and as the decision on this point has been taken since the departure of Mr. Bigge for the Cape, Lord Bathurst has no means of ascertaining from that Gentleman his opinion as to the principle, which should direct the selection of Individuals to be appointed members of the Council. I am therefore directed to apply to you for your opinion to this point.

It will be necessary at the same time to inform you that the constitution of the new Court of Justice in New South Wales has made it necessary to appoint three Individuals as Sheriff, Master, and Registrar, who will therefore add to the number of persons holding official situations in the Colony, from whom it may be desirable to select some individuals as members of the

* Note 201. † Note 228. ‡ Note 229.
Council to be appointed. Lord Bathurst is disposed to think that the principle of Seniority will be the best that can be adopted with respect to any Magistrates who may be appointed Members of the Council; and he invites your opinion on that point.

You will oblige me by taking an early opportunity of answering this letter.

I have, &c.,

R. WILMOT HORTON.

EXTRACT of a letter from Major Goulburn, dated 16th August, 1823.

One of the various duties imposed on my situation is the Office of Registrar to the Courts of Appeal and Vice Admiralty. It is a duty interfering very much with my other avocations and, so far from having any natural connection with the Office of Secretary, jars with it upon many occasions. Their junction commenced in the infant age of the Colony, when each public Office practised every trade; but, at present, the duties of each department are so various that it must be a good horse which can carry double.

In the course then of my business as Registrar of the Court of Appeal, a notice was presented at my Office on the 27th of August, 1822, stating that one Mr. Campbell intended to appeal to the King in Council against a decree given in favor of Mr. John McArthur on the 16th day of the same month; security was tendered on the 29th: when I said, to prevent the competency of the security becoming a matter of future litigation, it would be advisable for the Solicitors on each side to agree amicably together upon the persons to be named. However, I found afterwards, that Mr. McArthur would not agree to any one proposed, and therefore, when the other side tendered two Gentlemen of unquestionable substance, the one being Proprietor of several large houses, and the other owner of an immense Steam Mill, I considered it necessary to accept these without Mr. McArthur's consent.

The amount of Security to be taken was the subject next to be considered, whether it was to be double Mr. Macarthur's demand against Mr. Campbell, or Mr. Campbell's demand against Mr. Macarthur. This point however I deemed to be one whereupon Mr. Macarthur was little concerned. On referring to the practice of the Court of Appeal, I found it was usual for a certificate, appended to the other papers to be forwarded to the Privy Council stating that due Bail had been given. By altering this expression so as to affirm that Bail had been given for six thousand pounds, it left the question whether this was due Bail or
not entirely to the decision of the Privy Council. If the Bail was insufficient, the whole appeal would be invalid, which might be a ground of complaint for Mr. Campbell, but could not possibly be raised into a real grievance by Mr. Macarthur.

I found, by searching further into the practice of the Court of Appeal, that the only manner in which the Governor's approval had ever been signified was by affixing to the proceedings the Great Seal of the Territory. Having this Seal in my possession, to be used at my discretion, I accordingly fixed it to the whole Bundle, and then agreeably also to custom gave the papers into the possession of Mr. Campbell's solicitor.

Had I considered there was any point in all this likely to become the subject of future dispute, it would have been my bounden duty to take the orders of the Governor before every step; but, as I deemed it then and still do deem it a matter of mere Office routine, I considered it useless to trouble His Excellency with a recital of what had been done. In fact, if I occupied his attention on the one day of the week he visits Sydney* with a detail of every particular, which had occurred during the preceding six, that day would never be long enough to enable me to obtain his commands on those cases, upon which it is absolutely necessary to receive them.

I now forward to you the whole correspondence without any further comment except that you will perceive a windfall from Judge Field, which arrived most unexpectedly. With the rules of Court established by the Privy Council, I profess myself unacquainted, and with the notice which they may require to be given to Mr. Macarthur, that the appeal had been forwarded to England; but I maintain that this notice can never be required to be given by the registrar of the Lower Court, but by the Appellant's Solicitor. I think I have a right to complain of a want of Official reserve in an individual for whom I feel the highest regard, but who has committed me, if I am committed.

WARRANT FOR CHARTER FOR SUPREME COURT IN TASMANIA.
18th August, 1823.

[A copy of this warrant† will be found on page 478 et seq., volume IV, series III.]

MR. JAMES STEPHEN, JR., ON DUTIES OF MASTER, SHERIFF AND REGISTRAR.

It is proposed that the Master of the Supreme Court of New South Wales should be charged with the following duties:—

First. He will have to tax the costs of all proceedings in actions at law, in Suits in Equity, in ecclesiastical suits, and upon criminal Informations.

* Note 230. † Note 231.
Secondly. He will be the Officer to whom the Court will entrust the duty of investigating all accounts. In suits in Equity he will further be required to investigate and report to the Court upon all disputed questions of fact, with the exception of those which may be proved by depositions in the cause, or those which the Court may see fit to refer to a jury.

Thirdly. He will be required to prepare, for the approbation of the Court, all conveyances, leases and other Instruments of a legal nature, which the Court may require any of the parties to a suit to execute.

Fourthly. All the details as to the management of the Estates of Minors, lunatics, and other persons, whose property is under the control of the Court will be committed to him, Subject to an appeal to the Court itself.

Fifthly. He will act as Examiner, that is, he will take the depositions of all witnesses who by law are to be examined not vivâ voce, in open court, but upon written interrogations.

Finally, he will be bound to attend, as often as may be required in Court, in order to assist the Judge with information as to the practice and proceedings of the Department of the Court over which he is to preside.

The functions of the Sheriff of New South Wales will be exactly analogous to those of the Sheriffs in English Counties. He will have to execute by himself or his deputies all the judgements, Decrees, and orders of the Court more particularly.

In criminal proceedings he will by himself or his Deputy receive the bodies of Offenders for safe custody till trial. He will make returns of all prisoners to the Court on the first day of every term. He will be present at all Sittings for the trial of Offenders. He will carry into execution by himself or his Deputies the Sentence of Death, or any minor sentence which may be pronounced.

In civil proceedings, he will serve upon the defendants the process of the Court to compel an appearance. He will arrest those, who are to be held to bail; in default of bail he will keep them in custody till judgement is had in the action. He will seize and put up to sale the goods and estates of Defendants against whom judgement may be given. He will at the first day of every term make a return to the Court of all the Writs and orders he has received, and of the manner in which he has executed and obeyed them.

In revenue matters, he will superintend all enquiries as to the property of the Crown, by executing Extents, etc. He will
seize all escheated property, and will preside at Inquests as to
damages done to the Lands of the Crown, the banks of rivers,
etc.

He will discharge the duties of Coroner and those of the
Marshal of the Admiralty. That is he will enquire into the
causes of any sudden deaths, and will seize and hold subject to
the Order of the Court all ships and maritime property, which
may be the subject of litigation.

The Registrar of New South Wales will be charged with the
following duties:—

First. In his Office, all Writs will be served out, and prepared
for the signatures of the Judge. He will receive and record
all declarations, pleas and other written pleadings, both at Law
and in Equity. He will be charged with the custody of these
records. He will prepare and issue official copies of them.

Secondly. He will always be present in Court at all Civil
proceedings. He will take a précis verbal of all that passes. He
will draw up from the Notes thus taken all Judgements, Decrees,
Orders and Sentences—that is to say the adjudications of the
Court in its different jurisdictions, as a Court of law and of
Equity, as a Criminal and as an ecclesiastical Tribunal.

He will of course be assisted by clerks, who with leave of the
Court may sit for him when he is engaged in his private Office,
but will not (I apprehend) be allowed to act by Deputy.

REVEREND T. H. SCOTT TO UNDER SECRETARY HORTON.

Sir,

Whitfield, 22d August, 1823.

I have the honor to acknowledge the receipt of your
letter dated in this month, by which I am informed that, in the
absence of Mr. Commr. Bigge, Lord Bathurst requires my
opinion upon the principle which should direct the selection of
individuals to be appointed Members of the Council† about to
be established in New South Wales, and also on the expediency
of selecting one or more from the three Civil Officers which the
Constitution of the New Court of Justice will cause to be
appointed; upon the former point, I perceive that Lord Bathurst
"is disposed to think that the principle of Seniority will be the
best that can be adopted," and in this very equitable mode I
perfectly coincide with his Lordship taking it in a general and
enlarged point of view. But in the particular case under con­
sideration I take the liberty of submitting to you to lay before
his Lordship my reasons for presuming to doubt the expediency
of adopting that principle.

* Note 229.
Upon reference to the Proclamation* of Sir Thomas Brisbane, bearing date the first of December, 1821, and appearing in the Sydney Gazette of the 8th of that month, appointing the Magistrates of the Colony, and in the order of Seniority, with the exception of the Colonial Secretary and two other Gentlemen of whom I have no knowledge, I see but Six persons qualified for so important a Station, and one of them being the Principal Surgeon of the Colony, whose medical avocations being so numerous, it is a matter of doubt whether he could spare time for the discharge of any other duty; and of the remaining five, who appear to me eligible, some stand very low in the order of Seniority, and amongst their Seniors I am disposed to think Lord Bathurst would consider some unfit upon a reference to Mr. Commissioner Bigge's Report.

If Lord Bathurst should think it adviseable to extend the appointment beyond the Magistracy and carry it amongst the Proprietors of Land, a selection might be made from that class of valuable, and, as it appeared to me when in the Colony, very judicious and sensible men.

I would however beg leave to submit to his Lordship that neither the amount of Stock nor the quantity of Land held would form any criterion by which he could Select persons qualified for a Council, many, to whose names the largest portions of both Stock and land appear attached, have not acquired the whole, or even more than a very small portion, by grant from the Crown, and, if the remainder has been acquired by purchase, the generality of those purchases have been made by a class of persons, who have been and are still retailers of the chief article of consumption, Spirits, and other merchandize consumed in the Colony, under circumstances of a very questionable nature.

Neither did it appear to me when in the Colony, and naturally considering in my own mind the question of a Council, that the Mercantile class were of that description, either as to talents and experience or as to Capital, from which a selection could well be made. Some who possessed a considerable Share of the two former were very much deficient in the last; and it certainly did so happen that those, to whom report gave a competency of the last, were lamentably deficient in the two former.

The Duties of the Chaplains would perhaps be an objection to any Selection from that body.

Upon the remaining point to which your letter calls my attention, the selection from the additional officers, which the Constitution of the New Court of Justice will create, and to be denominated Sheriff, Master, and Registrar, I beg leave

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* Note 232.
respectfully to submit that, as the Legislature has constituted the Members of the Council Justices of the Peace, it would be incompatible with the functions of a Sheriff to act as such, and therefore, more especially as I presume the appointment of Sheriff will not be annual, I conclude he could not be a member of the Council.

If it be intended that the Chief Justice should have a Seat in the Council, then I apprehend any other legal person might be dispensed with; and, if it Should be desireable for a person possessing legal knowledge to be of the Council and it be considered inexpedient for the Chief Justice to be selected, it would then be necessary to appoint persons as Master and Registrar with legal habits and acquirements. Lord Bathurst can best decide whether the Station, which either of these officers will hold in the Colony, would be of a nature to entitle them to such a distinction.

I should be presuming too far were I to offer any opinion as to the other officers of the Colony, from whom a selection might be made as Members of the Council, since it is a point on which Lord Bathurst must be so much better qualified to determine; and, as it is not adverted to in your letter, I have refrained from entering upon it.

I have, &c.,

T. H. Scott.

**Commission of G. Arthur as Lieut.-Governor of Tasmania.**

22nd August, 1823.

[A copy of this commission will be found on page 181, volume IV, series III.]

**Earl Bathurst to Sir Thomas Brisbane.**

28th August, 1823.

[In this despatch, Earl Bathurst gave instructions for the extension of the powers of the Lieut.-Governor in Tasmania; see page 109 et seq., volume XI, series I.]

**Mr. William Dealty to Mr. James Chapman.**

My dear Sir, Wiggerston, York, 1st September, 1823.

Mr. Attorney General at my Suggestion made some Verbal alterations in the Drafts of the Charter for New South Wales and Van Diemen's Land after the Warrant had been Sent to the Patent Office, and those alterations have been since made in the Warrant and in the King's Bills.

It has Since occurred to me that one or two of the alterations in the Charter for Van Diemen's Land (tho' apparently of
merely a formal nature) might be giving a power to the Lieutenant Governor of that Island, which it was intended to give to the Governor of the whole Colony, and which I am not aware that there would be any objection to give to such Governor, if that was particularly intended. Not having the Warrant at this place, I am unable to refer you to the page in which the alterations occur; but the Draft has been divided by my Clerk into folios, and the first alteration alluded to is in folio 20 in regard to the appointment of Officers of the Court, where the words "Governor and Acting Governor for the time being of our Said Colony" have been altered to "Governor Lieutenant Governor or Acting Governor for the time being of our Said Island."

At a short distance afterwards in the Same paragraph the words "under the hand of Such Governor or Acting Governor" have been altered to "under the hand of Such Governor Lieutenant Governor or Acting Governor."

In regard also to the appointment of a Sheriff (folio 29), a similar alteration of "Governor or Acting Governor for the time being of the said Colony" has been made to "Governor, Lieutenant Governor or Acting Governor for the time being of the Said Island," as it appeared to me from the subsequent part of the clause that the original appointment of the Sheriff was intended to be by the Lieutenant Governor of the Island, and not by the Governor of the whole Colony.

In folio 60, the alteration of the word Colony to Island* makes a more material variation in the effect of the passage than I was aware of.

Should you have reason to think that the words, which have been thus altered, were corrected purposely, and not from inadvertently copying the form of the New South Wales charter, and that the proposed alterations would vary the Constitution intended by Government in the cases in question, I take the liberty of requesting you would have the goodness to take such steps, or give my clerk such directions, as you may think necessary, for the purpose of restoring the Warrant and King's Bill to the form in which the Draft originally stood.

If you think that the alterations are proper or immaterial in point of substance do not give yourself further trouble on the Subject.

I trust that you will excuse my troubling you upon this Subject, but am desirous that no incorrectness should find its way into the Charter thro' my instrumentality.

I am, &c.,

WILLIAM DEALTY.

* Note 233.
MR. JAMES STEPHEN, JR., RE THE LAW COURTS.

Sir,

Colonial Office, 1 September, 1823.

In reference to the Order in Council for the regulation of the proceedings in the Courts of New South Wales and Van Diemen's Land, I have to request Lord Bathurst's Instructions upon the points, which it is my present object to bring under your consideration.

The New South Wales Act* of the last Session of Parliament has committed to the Crown two distinct duties, in reference to the structure of the Judicial System.

First. Letters Patent are to pass the Great Seal for erecting the Courts.

The draft of this instrument has been prepared by me, and approved of by the Attorney and Solicitor General, and the Letters Patent are now in progress through the various departments.

Secondly. An Order in Council is to be made for regulating the mode of proceeding, the duties of the various Officers attached to the Courts, the duties of Advocates and Attornies, and the fees and emoluments of the various officers. The draft of this instrument has been prepared by me, after frequent consultations with the Gentlemen† appointed to the situations of Chief Justices and Attornies General in New South Wales and Van Diemen's Land. It has unavoidably extended to a great length, and will be transmitted to you, for Lord Bathurst's consideration, within a very short time. I am, however, unable to complete the draft for his Lordship's perusal, until I shall have obtained his decision upon a question of considerable importance connected with it.

The Act of Parliament has invested the Attorney General of each Settlement with a most important authority. All Criminals are to be proceeded against by information. The Attorney General will, therefore, have to discharge the whole duty which is performed in England by the Grand Jury. The Act has as clearly, though less directly, imposed on this Officer the task of preparing and advising the Governor upon the drafts of all legislative Acts. For these Acts requiring the Sanction of the Chief Justice as not being repugnant to the Law of England, they must, of course, be primarily considered by some persons conversant with the principles of law. To these duties, which are peculiar to the Attorney General in this Colony, will be added the various functions, which belong to the same Officer in all Colonies; that is, he will be the general adviser of the Local Government in all legal questions, and he will have to institute the necessary proceedings for the protection of the revenue, and rights of the Crown.

* Note 201. † Note 234.
In describing the fees of the different public Officers, it becomes necessary to lay down the rule, which is to govern the case of the Attorney General, and what this rule should be is a question which I am not able to answer.

I observe that a Salary of £600 a year has been voted to the Attorney General of New South Wales, and half that sum to the Attorney General of Van Diemen's Land; but whether those Salaries are intended as a compensation for the whole of the duties to be performed by these Officers, or, if not, what portion of their duties is to be performed in consideration of their Salaries, are questions which I conceive will be required to be solved before the Order in Council can be properly drawn.

As far as I am able to judge, the Salaries in question are too small a compensation for the whole of the Attorney General's professional Services, if regard is had to the profits of the profession of the law in the Colony. I understand from the private information I have received from Mr. Gellibrand (the Attorney General of Van Diemen's Land) that for some years past a private Solicitor of Sydney has been receiving a professional income of £4,000 per annum; and the Statements in Mr. Bigge's report as to the very high scale of fees induce me to believe the information is correct. I presume that Lord Bathurst conceives with Mr. Bigge in thinking, that there ought to be a considerable reduction in these fees. Suppose them to be reduced so as to diminish the highest professional income in the Colony to £2,500. The maximum of the gains of a private lawyer can hardly be more than a sufficient remuneration for the whole of the time and services of the Official head of the profession of the Law. From these considerations, I infer that the Office of Attorney General should be so regulated as that the holder of it shall, by the united produce of his public and private employments, receive an annual income of £2,500. Now the private practice of the Attorney General will be less in proportion as his public employment will be greater. I think it cannot be doubted that the Official business of this Officer will occupy at least half his time. I conceive therefore that the profits of that business should be at least one half the sum (already mentioned) of £2,500. In other words, I think he should receive from the public at least £1,200 per annum. Therefore I should submit to you for Lord Bathurst's consideration that the Order in Council should contain a proviso, declaring that the fees of the Attorney General should be paid in addition to his Salary, and that a table of such fees should be prepared upon the principle of giving in this shape to the Attorney General emoluments equal in amount to his Official Salary. The
Problem of practice to be allowed to attorney-general.

1823.
1 Sept.

Prohibition proposed of practice as private attorney.

Instructions requested.

whole Official income of the Attorney General of New South Wales would then be £1,200, and of the Attorney General of Van Diemen's Land £600 per ann.

Immediately connected with this Subject is the further question whether the Attorney General should be permitted to practise as a Private Attorney? or, whether he should not rather be restricted in his private practice to the functions of an Advocate. It is necessary to decide this question, as the Gentlemen, proceeding in these situations to the Colony, consider it a point of great importance to their interests. Mr. Gellibrand especially has informed me that he is already the private Attorney of Mr. Lord, and of many other proprietors in Van Diemen's Land; and this appears to be among his principal inducements for emigrating to the Colony. Now there would certainly appear formidable objections to this combination of characters. The Official advisers of the Government, and the person through whose intervention all State prosecutions are to take place, ought as far as possible to be removed from the private cabals of the small society in which he is placed, and exempt from personal interests and partialities. But no situation can be conceived more calculated to involve a man in controversy, or in intimate connections with the Colonists, than that of a private Attorney. Mr. Gellibrand indeed states to me that he is proceeding to Van Diemen's Land with the express intention of recovering no less a sum than £60,000, which is due from a multitude of the poorer Settlers to his client, Mr. Lord. Such a mission can scarcely fail to place him in a hostile relation with the mass of the inhabitants, nor can I imagine anything more likely to embarrass him in the exercise of his Official duties whenever the persons, for whom or against whom he may then be employed, may become the Subjects of public prosecution. Of course I do not make this remark with any peculiar reference to the case of Mr. Gellibrand, but because that case is an illustration of the inconvenience to be anticipated from the union in the same person of the two Offices of a private Attorney and of Attorney General. I should therefore submit to you, for Lord Bathurst's consideration, my opinion that the Order in Council should contain a declaration interdicting the Attorney General in each Colony from practicing as a Private Attorney; and I should conceive that the interdiction ought to extend to preventing the Attorney General from forming a partnership with any Private Attorney.

In conclusion, I have to request Lord Bathurst's Instructions upon the two questions, to which I have thus adverted. First, whether the Attorneys General of the two Settlements should
not receive fees for their public duties in addition to the Salaries voted by Parliament? and, if so, whether the fees should be regulated so as to render the whole of the Official income of those Officers £1,200 in the larger, and £600 in the smaller Settlement? or, according to what other rate should those fees be fixed?

Secondly, whether the Attornies General should be permitted as private lawyers to act both as Barristers and Attornies, or whether they are to be confined to the single duty of Advocates.

I have, &c.,

Js. Stephen, Junr.

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UNDER SECRETARY HORTON TO MR. JAMES STEPHEN, JR.

Sir,

Downing Street, 8th Sept., 1823.

I have laid before Lord Bathurst your Report of the 1st inst., requesting his Lordship's instructions upon certain points connected with the proceedings of the Courts in New South Wales and Vandiemens Land, for which it will be necessary in your opinion to introduce provisions of regulation in the order in Council, which you are preparing upon that subject; and I am directed by his Lordship to acquaint you in reply that, with respect to fees, he wishes that provision be made for allowing them to the Attorney General in addition to his fixed Salary. Permission should also be given to that Officer to act as an Advocate, but under the restrictions observed in this Country; and he should be positively prohibited from acting as an Attorney.

I am, &c.,

R. Wilmot Horton.

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MR. JAMES STEPHEN, JR., ON NEW SOUTH WALES CHARTER.

Dear Sir,

Great Missenden, Bucks, 22d Sept., 1823.

I take the liberty of returning a private answer to your public letter on the Subject of the Omission of the word "not" in the draft of the New South Wales Charter, because the Subject is not one upon which I know how to write in a more formal style.

Mr. Chapman very correctly states the following facts, vizt. that the word "not" was inserted in my original draft, was afterwards expunged, and was afterwards by my advice restored when Mr. Chapman consulted me on that Subject.

I now, however, for the first time learn that the word was expunged by the Attorney General, and that he made the correction deliberately and advisedly. Had I known this, I should not have presumed to interfere further on the subject. I thought
that the correction originated with the Clerk of the Patents. As the case stands, there is I conceive no possible room for doubt, and I should submit that directions should be given to Mr. Dealty, or rather to Mr. Poole, to restore the draft to the state in which the Attorney General left it, by expunging the monosyllable in question.

I am, &c.,

JS. STEPHEN, Junr.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir, Lincoln’s Inn, 22 Septr., 1823.

In compliance with your directions, I have perused Mr. Banister’s letter to you, of the 16th Instant, In which that Gentleman repeats his request to be permitted to take copies of the Opinions of the Successive legal Advisers in the Colonial Department, to assist him in the discharge of his duties as Attorney General of New South Wales; and I am to report to you the opinion I have formed as to the consequences which might follow from acceding to this request.

You will allow me to observe that this is a subject in which I have a peculiar personal Interest. My predecessors in Office appear to have thought that their duty would be performed most advantageously for the public Service, by confining themselves to a very short expression of their opinions whether particular Acts were objectionable in point of Law or not, avoiding any detailed explanation of the grounds on which their Judgment proceeded. It has appeared to me, on the other hand, more convenient to explain at length the reasons for every opinion, which I have had the honor to submit to Lord Bathurst or yourself; and, as you are aware, my Reports have therefore in many cases extended to a considerable length. I am therefore responsible for almost every legal opinion recorded in your office, in which any discussions of Colonial Law occur. Mr. Banister is fully aware that I feel the strongest personal disinclination to the communication of these opinions to himself, or indeed to any one, except my Official Superiors, for whose assistance they have been written. As a Barrister, he must be aware that no member of our common profession would willingly expose to the criticism of the Public every legal opinion he may have had occasion to write; and you, Sir, would probably agree with me in thinking that a Counsel, who has the honor of being consulted by the Secretary of State, is not less entitled to protection against
the unnecessary publication of his opinions, than Barristers who are consulted merely by private clients. Altho' I am conscious of having spared no exertion to avoid material errors in the opinions I have written under the direction of yourself and your predecessor, yet, in so large a series of reports, embracing a period of Ten years, I may probably have fallen into many minor mistakes, the publication of which might essentially (and I will presume to say, unfairly) injure my professional reputation.

I am too well aware of your habitual consideration for the feelings of your Inferiors in Office to think it necessary to apologise for thus plainly referring to my personal wishes on this Subject. On public grounds, however, it seems to me there are conclusive objections to the request, which Mr. Banister has preferred.

I can conceive no reason why you should refuse to the Attorney General of every other colony the indulgence you might grant to Mr. Banister. There will then be more than Thirty persons, who, if this precedent be admitted, will have a fair pretension to peruse and copy the legal opinions of the Counsel to your Department. It would be quite superfluous to point out to you the mischiefs, which such a disclosure might occasion. Nor indeed would those mischiefs be much, if at all, diminished by confining this communication to Mr. Banister himself. Giving him credit for perfect integrity in not disclosing the opinions to others, what security could be found against Accidents, or want of caution, or against the misconduct of persons who might be employed in his Office, or, in the event of his death, against the heedlessness of those into whose hands his Papers might fall? Among the numerous opinions I have written, some have been adopted by Lord Bathurst, while on the other hand his Lordship has seen cause on some occasions to dissent from my conclusions, or to adopt practical measures in direct opposition to them. I cannot conceive that his Lordship would think it expedient that the various parties, who may have been affected by his decisions, should have the opportunity of tracing in my written Reports the History of a part of those private deliberations, which have more or less influenced his Judgment. In illustration of this remark, I would more particularly refer to two general topics, which have formed the very frequent subjects of my opinions:— (viz. Laws made for the Government of Slaves, and for settling private Estates. The present certainly is not the season in which, I conceive, you would choose to publish to the world the Documents in your Department relating to Slavery); and the Publication at any time of observations which I have had occasion to make on private Acts would involve numerous families in
extreme embarrassments, if not absolute ruin. Indeed, there is not one single report of mine objecting to any Colonial Law, the publication of which would not probably wound the feelings of those by whom the Law was framed, or induce expostulations from the Colonists affected by them. If it were necessary to say more on this head, I might refer to an injunction, which several years ago I myself received from Lord Bathurst, and which I have constantly borne in mind, to receive as strictly confidential every communication which might pass between myself and his Office on these topics.

Mr. Banister's argument in favor of his application is that these opinions would form a convenient guide to the Legislature of New South Wales. Mr. Banister, however, can scarcely require to be reminded that an opinion is of little or no value when disconnected with the statement of facts to which it refers. If then, he would have the premises as well as the conclusions, he must be furnished with copies of as many manuscript volumes as would alone constitute a Library of no inconsiderable extent. Further, In order to use my opinions as a guide for the Legislature of New South Wales, he must be informed which of them have been adopted by my Superiors in Office; and which have been confirmed, or set aside, or corrected by the judgment of the Law Officers of the Crown. In other words, he must be provided with a complete History of my Official life and proceedings, and of this branch of the Administration of His Majesty's Colonial Government during the last Ten years. Now I may take the liberty of suggesting with some confidence, that an application leading to such consequences is one which no person except a Member of His Majesty's Cabinet could have any reasonable pretension to make.

I have, &c.,


MR. JAMES STEPHEN, JR., ON LEGAL PROCEDURE.

Dear Sir,

Great Missenden, Bucks, 23 Sepr., 1823.

I will, with your leave, answer your questions seriatim, rather than send a copy of a part of the Order in Council, which I have not at this place any copyist to transcribe. But in limine I must say that I am not aware that I have any better means of solving the problems you propose to me than you yourself possess. Your questions are:

First. "What is to be the mode of appointment” of the Sheriff, Master and Registrar of N. S. Wales and Van Diemen's Land? Not having at hand any copy of the Charter of Justice,
I cannot confidently say whether the question is or is not answered in it. When I saw Mr. Wilmot Horton at Leamington, I think I told him that the mode of appointment was yet to be decided, and he then informed me that there were inconveniences in making appointments under the Sign Manual, and that it would be most expedient to make them in some other form. I then advised that the Governor of the Colony should be instructed to issue Warrants or Commissions under the Colonial Seal, appointing to the Situations in question such persons as Lord Bathurst might nominate; the appointments being made to continue during pleasure, and those of the two Sheriffs being annual, renewable however de anno in annum, except in case of misconduct. So far as respects the case of the Sheriffs, this I know is the provision of the Charter, as settled by the Attorney General. But, as I have already said, I doubt whether that Instrument, when speaking of the two other Officers, does not mention their appointments as being to be made under the "royal Sign manual of Us, our heirs and Successors." If so, this is conclusive, unless the Attorney General sees fit to alter it. Will you have the goodness to look at the drafts of the Charters, and satisfy yourself on this head?

Secondly, you ask what are the Fees of these Officers? I answer that I propose to advise Mr. Wilmot Horton to introduce into the Order in Council a provision directing the Chief Justice of the Courts to prepare tables of fees on such a Scale as (regard being had to the probable amount of business) will probably afford the Registrar a clear annual income of £ , the Master a clear annual income of £ , and the Sheriff a clear annual income of £ . The filling up these blanks is a point, upon which I do not feel that I have any pretension to interfere, and on which (so far as I know) Lord Bathurst has not yet formed any decision.

Thirdly, you ask "How are the fees to be regulated?" To this enquiry, I should say that, in addition to the regulation already mentioned, I propose to advise a clause, referring each of the three Officers in question to file an affidavit on the first day of the Sitting of the Court in each year, shewing the amount of their gross receipts, of their expences, and of their net profits during the preceding year on pain of incapacity to act or to receive any fees unless and until the affidavit is so filed. I would also propose to authorize the Judge to augment the fees, if they should appear to have fallen below the regulated sum, and to diminish them if they should appear to have exceeded it by the sum of £.
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23 Sept.

Duties and salaries of judicial officers.

Salary of S. Bannister.

Fees for S. Bannister.

Salary and fees for J. T. Gellibrand.

Emoluments proposed for attorneys-general.

Fourth, to your enquiry "What are the Salaries?" I answer that (as I understand) there are none.

Fifth. You enquire "What are the Duties?" On this point, will you allow me to refer you to Mr. Wilmot Horton's correspondence with me on this subject, where you will find as full an answer as I can give to this question?

Sixth. As to Mr. Bannister's fix'd Salary. The Ho. of Commons has voted for this year, £600, and I know of no other salary.

Seventh. The next question regards "Mr. Bannister's fees." On this head I would refer you to my letter* to Mr. Wilmot Horton, and to his answer to it. You will see that I advised a prohibition as regards practising as an Attorney or Solicitor, and an allowance of fees, and that I suggested that the fees should be so regulated as probably to equal the amount of the Salary. Mr. Wilmot Horton's answer* is in substance that Lord Bathurst assents to the Prohibition of practising as an Attorney, and to the allowance of fees, but the amount of the income from fees Mr. Wilmot Horton does not mention. I presume, because he did not think it necessary for my Government in drawing the Order to know the amount, but only the principle of the proposed remuneration.

Eighth. The next question respects the amount of Mr. Gellibrand's Salary and fees. The Ho. of Commons has voted for this purpose £300, and as to the fees, I understood that his case will be exactly similar to that of Mr. Bannister, except as I presume (for Mr. Wilmot Horton has never given me any information on this precise point) that his official income will fall short of that of the Attorney Genl. of N. S. Wales.

If my advice were asked as to the emoluments of the two Attornies General, I should be able only to say that, as Parliament has fix'd the Income of the Cf. Justice of N. S. Wales at £3,000, and that of the Cf. Justice of V. D. Land at £1,200 per annum, we have data whence to infer that the official emoluments of the inferior officer (the Atty. Genl.) should be materially below those Sums. As I have already mentioned, I suggested such fees as would make the Attorney Genl. of N. S. Wales receive on the whole (Salary and fees included) £1,200 pr. annum, and the Atty. Genl. of V. D. Land £600. But, on the precise question of amount, I have already said, I have no instructions.

I am, &c.,

Js. STEPHEN, Junr.

I hope you have received my Solution of the question about the monosyllable "Not" in the N. S. Wales and V. D. Land Charters.

* Note 235.
CHARTER OF JUSTICE.

CHARTER ESTABLISHING COURTS OF JUDICATURE IN NEW SOUTH WALES.

GEORGE THE FOURTH by the Grace of God of the United Kingdom of Great Britain and Ireland King Defender of the Faith, etc., etc. To all to whom these presents shall come Greeting.

Whereas by an Act passed in the fourth year of our Reign intituled "An Act* to provide until the 1st 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 Van Diemen's Land and for the more effectual Government thereof and for other purposes relating thereto" It was enacted that it should be lawful for us our Heirs or Successors by Charters or Letters Patent under the Great Seal of our United Kingdom of Great Britain and Ireland to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively which should be styled the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land and that each of such Court respectively should be holden by our Judge or Chief Justice and should have such Ministerial or other Officers as should be necessary for the Administration of Justice in the said Courts respectively and for the Execution of the Judgments Decrees Orders and Process thereof and it was enacted that the said Judges should from time to time be appointed by us our Heirs and Successors and that, the said Ministerial and other Officers of the said Courts respectively should from time to time be appointed to and removed from their respective Offices in such manner as we our Heirs and Successors should by such Charters or Letters Patent as aforesaid direct and that the said Judges should be respectively entitled to receive such reasonable salaries as we our heirs and Successors should approve and direct which salaries should be in lieu of all fees or other Emoluments whatsoever. Now know ye that we upon full consideration of the premises and of our especial Grace certain knowledge and mere motion have in pursuance of the said Act of Parliament thought fit to grant direct ordain and appoint and by these presents do accordingly for us our heirs and Successors grant direct ordain and appoint that there shall be within that part of our Colony of New South Wales situate in the Island of New Holland a Court which shall be called the Supreme Court of New South Wales and we do hereby create direct and constitute the said Supreme Court of New S. Wales to be a Court of Record.

II. And we do further will ordain and appoint that the said Supreme Court of New South Wales shall consist of and be holden by and before one Judge who shall be and be called the

* Note 201.  
† Note 236.
Chief Justice of the Supreme Court of New South Wales which Chief Justice shall be a Barrister in England or Ireland of not less than five years standing to be named and appointed from time to time by us our heirs and Successors by Letters Patent under our and their great Seal of the United Kingdom of Great Britain and Ireland and such Chief Justice shall hold his Office during the pleasure of us our Heirs and Successors and not otherwise.

III. And we do hereby give and grant to our said Chief Justice rank and precedence above and before all our Subjects whomsoever within the Colony of New South Wales aforesaid and the Islands Territories and Places dependant thereupon excepting the Governor or acting Governor for the time being of the said Colony and excepting all such persons as by Law or usage take place in England before our Chief Justice of Kings Bench.

IV. And we do further grant ordain and appoint that the said Supreme Court of New South Wales shall have and use as occasion may require a Seal bearing a Device and Impression of our Royal Arms within an exergue or label surrounding the same with this inscription "The Seal of the Supreme Court of New South Wales" And we do hereby grant ordain and appoint that the said seal shall be delivered to and kept in the Custody of the said Chief Justice.

V. And we do further grant ordain and declare that the said Chief Justice so long as he shall hold his Office shall be entitled to have and receive a Salary of Two Thousand Pounds Sterling by the year and our Governor or acting Governor for the time being of the said Colony is hereby directed and required to cause such Salary to be paid to the said Chief Justice by four quarterly payments at the four most usual days of payment in the year in Bills of Exchange to be drawn by such Governor or Acting Governor as aforesaid on the Lords Commissioners of our Treasury in England payable to or to the order of such Chief Justice and which bills shall by our said Governor or Acting Governor be accordingly delivered to the said Chief Justice.

VI. And we do further grant ordain and declare that the said Salary shall commence and take place in respect to any person who shall be resident in Great Britain or Ireland at the time of his appointment upon and from the day on which any such person shall thereupon embark or depart from Great Britain or Ireland for New South Wales to take upon him the execution of the said Office and that the Salary of any such Chief Justice who shall at the time of his appointment be resident in New South Wales aforesaid shall commence and take place from and
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after his taking upon him the execution of such his Office and that such Salary shall be in lieu of all fees of office perquisites emoluments and advantages whatsoever and that no fee of Office perquisite emolument or advantage whatsoever other than and except the said Salary shall be accepted received or taken by such Chief Justice in any manner or on any account or pretence whatsoever. Provided nevertheless that it shall be lawful for the said Chief Justice to occupy and inhabit any Official House or residence within the said Colony of New South Wales which hath been or may hereafter be provided for his residence and occupation without paying to us our heirs and successors any rent for the same and without being obliged to repair uphold or maintain any such house or Official Residence at his own Costs and Charges.

VII. And we do further grant appoint and declare that no Chief Justice of the said Supreme Court of New South Wales shall be capable of accepting taking or performing any other office or place of profit or emolument on pain that the acceptance of any such other Office or Place as aforesaid shall be and be deemed in Law de facto an avoidance of his Office of Chief Justice and the Salary thereof shall cease and be deemed to have ceased accordingly from the time of such acceptance of any such other Office or place.

VIII. And we do hereby constitute and appoint our Trusty and well beloved Francis Forbes* Esquire to be the first Chief Justice of the said Supreme Court of New South Wales the said Francis Forbes being a Barrister in England of five Years standing and upwards.

IX. And we do hereby ordain appoint and declare that there shall be and belong to the said Court the following Officers that is to say a Registrar a Prothonotary a Master and a Keeper of Records and such and so many other Officers as to the Chief Justice of the said Court for the time being shall from time to time appear to be necessary for the administration of Justice and the due execution of all the powers and authorities which are granted and committed to the said Court by these our Letters Patent. Provided nevertheless that no New office shall be created in the said Court unless the Governor or Acting Governor for the time being of our said Colony shall first signify his approbation thereof to our said Chief Justice for the time being in writing under the hand of such Governor or Acting Governor as aforesaid and we do further ordain and direct that all persons who shall and may be appointed to the several offices of Master Registrar Prothonotary or Keeper of records of the said Supreme Court of New South Wales or to any Offices in the

* Note 200.
said Court whereof the duties shall correspond to those performed by the Master Registrar Prothonotary or Keeper of Records of any or either of our Courts of Record at Westminster shall be so appointed by us our Heirs and Successors by warrant under our or their Royal Sign Manual and that all persons who shall and may be appointed to any other office within the said Supreme Court of New South Wales shall be so appointed by the Chief Justice for the time being of the said Court. And we do further direct and appoint that the several officers of the said Court so to be appointed as aforesaid by us our heirs and Successors shall hold their respective offices during our and their pleasure and that the several Officers of the said Court so to be appointed as aforesaid by the Chief Justice thereof be subjected to be removed by the said Court from their Officers therein upon reasonable cause.

X. And we do hereby authorize and empower the said Supreme Court of New South Wales to approve admit and enrol such and so many persons having been admitted Barristers at Law or Advocates in Great Britain or Ireland or having been admitted Writers Attorneys or Solicitors in one of our Courts at Westminster Dublin or Edinburgh or having been admitted as Proctors in any Ecclesiastical Court in England to act as well in the character of Barristers and Advocates as of Proctors Attorneys and Solicitors in the said Court and which persons so approved admitted and enrolled as aforesaid shall be and are hereby authorized to appear and plead and act for the Suitors of the said Court subject always to be removed by the said Court from their station therein upon reasonable cause and we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the Supreme Court of New South Wales for and on behalf of such Suitors or any of them Provided always and we do ordain and declare that in case there shall not be a sufficient number of such Barristers at Law Advocates Writers Attorneys Solicitors and Proctors within the said Colony competent and willing to appear and act for the Suitors of the said Court then and in that case the said Supreme Court of New South Wales shall and is hereby authorized to admit as many other fit and proper persons to appear and act as Barristers Advocates Proctors Attorneys and Solicitors as may be necessary according to such general rules and qualifications as the said Court shall for that purpose make and establish Provided that the said Court shall not admit any person to act in any or either of the characters aforesaid who hath been by due course of Law convicted of any crime which according to any
law now in force in England would disqualify him from appearing and acting in any of our Courts of Record at Westminster.

XI. And we do hereby ordain and declare that the Governor or acting Governor for the time being of the said Colony of New South Wales shall yearly on the first Monday in the month of January in each year by Warrant under his hand and seal nominate and appoint some fit and proper person to act as and be the Sheriff for our said Colony of New South Wales and its dependencies other than and except the Island of Van Diemen’s Land for the year ensuing which Sheriff when appointed shall as soon as conveniently may be and before he shall enter upon his said office take an oath faithfully to execute his Office and the oath of Allegiance before the Governor or acting Governor who are hereby authorized to administer the same and such Sheriff shall continue in such his Office during the space of one whole year to be computed from the said first Monday in the month of January and until another shall be appointed and sworn into the said Office and in Case such Sheriff shall die in his Office or depart from our said Colony of New South Wales then another person shall as soon as conveniently may be after the death or departure of such Sheriff be in like manner appointed and sworn in as aforesaid and shall continue in his Office for the remainder of the year and until another Sheriff shall be duly appointed and sworn into the said Office and we do further order direct and appoint that the said Sheriff and his Successors shall by themselves or their sufficient deputies to be by them appointed and duly authorized under their respective hands and seals and for whom he and they shall be responsible during his or their continuance in such office execute and the said Sheriff and his said Deputies are hereby authorized to execute all the writs summonses rules orders warrants commands and process of the said Supreme Court of New South Wales and make return of the same together with the manner of the execution thereof to the Supreme Court of New South Wales and to receive and detain in prison all such persons as shall be committed to the Custody of such Sheriff by the said Supreme Court of New South Wales or by the Chief Justice of the said Court and we do further authorize our Governor or acting Governor for the time being of the said Colony of New South Wales to reappoint the same person to fill the Office of Sheriff from year to year if it shall appear to our said Governor or acting Governor expedient so to do So nevertheless as that such appointment shall be annually renewed and be not ever made for more than one year Provided nevertheless and we do hereby require our said Governor or Acting Governor of our said Colony in the selection of any
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person or persons to fill the said office of Sheriff of New South Wales, to conform himself to such directions as may from time to time be given in that behalf by us our heirs and Successors through one of our or their Principal Secretaries of State.

XII. And we do further direct ordain and appoint that whenever the said Supreme Court of New South Wales shall direct or award any process against the said Sheriff or award any process in any cause matter or thing wherein the said Sheriff on account of his being related to the parties or any of them or by reason of any good cause of challenge which would be allowed against any Sheriff in England cannot or ought not by law to execute the same in every such case the said Supreme Court of New South Wales shall name and appoint some other fit person to execute and return the same and the said process shall be directed to the person so to be named for that purpose and the cause of such special proceedings shall be suggested and entered on the records of the said Court.

XIII. Provided always and we do hereby ordain and declare that the said Supreme Court of New South Wales shall fix certain Limits beyond which the said Sheriff shall not be compelled or compellable to go in person or by his Officer or Deputies for the execution of any process of the said Court and when the process of the said Court shall be to be executed in any place or places beyond the limits so to be fixed We grant ordain and direct that the said Supreme Court of New South Wales shall upon motion direct by what person or persons and in what manner such process shall be executed and the terms and conditions which the party at whose instance the same shall be issued shall enter into in order to prevent any improper use or abuse of the process of the said Court and the said Sheriff shall and he is hereby required to grant his special warrant or deputation to such person or persons as the said Court shall direct for the execution of such process and in that case we direct and declare that the said Sheriff his executors or administrators shall not be responsible or liable for any act to be done in or in any way respecting the execution of such process under and by virtue of such special warrant and that any person or persons being aggrieved under or by pretence of such special warrant shall and may seek their remedy under any security which may have been directed to be taken upon the occasion and which the said Court is hereby authorized to direct to be taken.

XIII. And whereas in the said Act of Parliament it is enacted that the said Courts shall have cognizance of all Pleas Civil Criminal or Mixed and the Jurisdiction of the said Courts in all such cases is thereby settled and ascertained and it is
thereby enacted that the said Courts shall be Courts of Ecclesiastical Jurisdiction and shall have full power and authority to administer and execute within New South Wales and Van Diemen's Land and the Dependencies thereof such Ecclesiastical Jurisdiction and authority as shall be committed to the said Supreme Courts by our Charters or Letters Patent. Now we do hereby for us our Heirs and Successors grant ordain establish and appoint that the said Supreme Court of New South Wales shall be a Court of Ecclesiastical Jurisdiction with full power to grant Probates under the seal of the said Court of the last wills and testaments of all or any of the Inhabitants of that part of the said Colony and its Dependencies situate in the Island of New Holland and of all other persons who shall die and leave personal Effects within that part of the said Colony and to commit Letters of Administration under the seal of the said Court of the Goods Chattels credits and all other effects whatsoever of the persons aforesaid who shall die intestate or who shall not have named an executor resident within that part of the said Colony and its Dependencies or where the Executor being duly cited shall not appear and sue forth such probate annexing the will to the said Letters of Administration when such persons shall have left a will without naming any executor or any person for Executor who shall then be alive and resident within that part of the said Colony and its Dependencies and who being duly cited thereunto will approve and sue forth a Probate thereof and to sequester the goods and Chattels credits and other effects whatsoever of such persons so dying in cases allowed by Law as the same is and may be now used in the Diocese of London and to demand require take hear examine and allow and if occasion require to disallow and reject the accounts of them in such manner and form as is now used or may be used in the said Diocese of London and to do all other things whatsoever needful and necessary in that behalf Provided always and we do hereby authorize and require the said Court in such cases as aforesaid where Letters of Administration shall be committed with the will annexed for want of an executor appearing in due time to sue forth the Probate to reserve in such Letters of Administration full Power and authority to revoke the same and to grant Probate of the said Will to such Executor whenever he shall duly appear and sue forth the same And we do hereby further Authorize and require the said Supreme Court of New South Wales to grant and commit such Letters of Administration to any one or more of the Lawful next of kin of such person so dying as aforesaid and being then resident within the Jurisdiction of the said Court and being of the age of twenty one
years and in case no such person shall then be residing within the Jurisdiction of the said Court or being duly cited shall not appear and pray the same to the Registrar of the said Court or to such person or persons whether creditor or creditors or not of the deceased person as the Court shall see fit. Provided always that Probates of Wills and Letters of Administration to be granted by the said Court shall be limited to such money goods chattels and effects as the deceased person shall be entitled to within that part of the said Colony situate within the Island of New Holland.

XV. And we do hereby further enjoin and require that every person to whom such Letters of Administration shall be committed shall before the granting thereof give sufficient security by Bond to be entered into to us our Heirs and Successors for the payment of a competent sum of money with one two or more able sureties respect being had in the sum therein to be contained and in the ability of the sureties to the value of the estates Credits and effects of the deceased which Bond shall be deposited in the said Court among the Records thereof and there safely kept and a Copy thereof shall be also recorded among the proceedings of the said Court and the Condition of the said Bond shall be to the following effect “That if the above bounden Administrator of the goods chattels and effects of the deceased do make or cause to be made a true and perfect Inventory of all and singular the Goods Credits and effects of the said deceased which have or shall come to the hands possession or knowledge of him the said Administrator or to the hands or possession of any other person or persons for him and the same so made do exhibit or cause to be exhibited into the said Supreme Court of New South Wales at or before a day therein to be specified and the same goods chattels credits and effects and all other the goods Chattels credits and Effects of the deceased at the time of his death or which at any time afterwards shall come to the hands or possession of such Administrators or to the hands or possession of any other person or persons for him shall well and truly administer according to law and further shall make or cause to be made a true and just account of his said Administration at or before a time therein to be specified and afterwards from time to time as he she or they shall be lawfully required and all the rest and residue of the said goods chattels credits and effects which shall be found from time to time remaining upon the said Administration accounts the same being first examined and allowed of by the said Supreme Court of New South Wales shall and do pay and dispose of in a due
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And in case it shall be necessary to put the said Bond in suit for the sake of obtaining the effect thereof for the benefit of such person or persons as shall appear to the said Court to be interested therein such person or persons from time to time giving satisfactory security for paying all such costs as shall arise from the said Suit or any part thereof such person or persons shall by order of the said Court be allowed to sue the same in the name of the Attorney General for the time being of the said Colony and the said Bond shall not be sued in any other manner and we do hereby authorize and empower the said Court to order that the said Bond shall be put in suit in the name of the said Attorney General.

XVII. And we do further will order and require that the said Court shall fix certain periods when all persons to whom probates of wills and Letters of Administration shall be granted by the said Court shall from time to time until the Effects of the deceased person shall be fully administered pass their accounts relating thereto before the said Court and in Case the Effects of the deceased shall not be fully administered within the time for that purpose to be fixed by the said Court then or at any earlier time if the said Court shall see fit so to direct the person or persons to whom such probate or administration shall be granted shall pay deposit and dispose of the balance of money belonging to the Estate of the deceased then in his her or their hands and all money which shall afterwards come into his her or their hands and also all precious Stones Jewels Bonds Bills and Securities belonging to the Estate of the deceased in such manner and unto such persons as the said Court shall direct for safe custody and we require that the said Court shall from time to time make such order as shall be just for the due Administration of such Assets and for the payment or remittance thereof or any part thereof as occasion shall require to or for the use of any person or persons whether resident or not resident in the said Colony and its dependencies who may be entitled thereto or any part thereof as Creditors Legatees or next of kin or by any other right or title whatsoever and we further order and direct that it shall be lawful for the said Court to allow to any Executor or Administrator of the effects of any deceased person (except as herein mentioned) such Commission or percentage out of their assets as shall be just and reasonable for their pains and trouble therein Provided always that no allowance whatever shall be made for the pains and troubles of any Executor or
Charter of justice for N.S.W.

Interest to be charged against executors and administrators.

Power to appoint guardians of infants and lunatics.

Right of appeal to privy council from decisions of court of appeals.

Procedure in appeals to privy council.

Administrator who shall neglect to pass his accounts at such time or to dispose of any money goods chattels or securities with which he shall be chargeable in such manner as in pursuance of any general or special rule or order of the said Court shall be requisite. And moreover every such Executor or Administrator so neglecting to pass his accounts or to dispose of any such money goods chattels or securities with which he shall be chargeable shall be charged with Interest at the rate then Current within the said Colony and its dependencies for such sum and sums of money as from time to time shall have been in his hands whether he shall or shall not make Interest thereof.

XVIII. And we do hereby authorize the said Supreme Court of New South Wales to appoint Guardians and Keepers of Infants and their Estates according to the order and Course observed in that part of our United Kingdom called England and also Guardians and Keepers of the persons and Estates of Natural Fools and of such as are or shall be deprived of their understanding or reason by the act of God so as to be unable to govern themselves and their Estates which we hereby authorize and empower the said Court to enquire hear and determine by inspection of the Person or by such other ways and means by which the truth may be best discovered and known.

XIX. And whereas it is by the said Act enacted That it shall and may be lawful for us by our said Charters or Letters Patent respectively to allow any person or persons feeling aggrieved by any Judgment decree order or sentence of the Court* of appeals of the Colony of New South Wales to appeal therefrom to us in our Privy Council in such manner within such time and under and subject to such rules regulations and limitations as we by any such charters or Letters Patent respectively should appoint and prescribe. Now we do hereby direct establish and ordain that any person or persons may appeal to us our heirs and Successors in our or their Privy Council in such manner within such time and under and subject to such rules regulations and limitations as are hereinafter mentioned that is to say in Case any such Judgement Decree Order or Sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of two thousand pounds Sterling or in Case such Judgment Decree Order or Sentence shall involve directly or indirectly any claim demand or question to or respecting property or any Civil right amounting to or of the value of two thousand Pounds Sterling or in Case the said Court of Appeals should by any such Judgment Decree Order or Sentence reverse alter or vary any Judgment Decree Order or Sentence of the said Supreme Court of New South Wales the

* Note 237.
person or persons feeling aggrieved by any such Judgment Decree Order or Sentence of the said Court of Appeals may within fourteen Days next after the same shall have been pronounced made or given apply to the said Court of Appeals by Petition for leave to appeal therefrom to us our Heirs and Successors in our or their Privy Council and in Case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any sum of money or perform any duty the said Court of appeals shall and is hereby empowered either to direct that the Judgment Decree Order or Sentence appealed from shall be carried into execution or that the execution thereof shall be suspended pending the said appeal as to the said Court may appear to be most consistent with real and substantial justice and in case the said Court of Appeal shall direct such Judgment Decree Order or Sentence to be carried into execution the person or persons in whose favor the same shall be given shall before the Execution thereof enter into good and sufficient security to be approved by the said Court of Appeals for the due performance of such Judgement or order as we our heirs or successors shall think fit to make thereupon or in case the said Court of appeals shall direct the execution of such any Judgment Decree Order or Sentence to be suspended pending the appeal the person or persons against whom the same shall have been given shall in like manner and before any order for the suspension of any such execution is made enter into good and sufficient security to the said Court of Appeals for the due performance of such Judgement or order as we our heirs or successors shall think fit to make thereupon and in all cases we will and require that security shall also be given by the party or parties Appellant to the satisfaction of the said Court of Appeals for the prosecution of the Appeal and for the payment of all such costs as may be awarded by us our Heirs and Successors to the party or parties Respondent and if such last mentioned Security shall be entered into within three months from the date of such Petition for leave to appeal then and not otherwise the said Court of Appeals shall allow the Appeal and the party or parties Appellant shall be at liberty to prefer and prosecute his her or their appeal to us our Heirs or Successors in our or their Privy Council in such manner and under such rules as are observed in Appeals made to us from our Plantations or Colonies.

XX. And we do hereby reserve to ourself our Heirs and Successors in our or their Privy Council full Power and Authority upon the humble petition at any time of any person or persons aggrieved by any Judgement or determination of the said Court
of Appeals to refuse or admit his her or their Appeal therefrom
upon such terms and upon such limitations restrictions and
regulations as we or they shall think fit and to reverse correct
or vary such Judgement or Determination as to us or them shall
seem meet.

XXI. And it is our further will and pleasure that in all cases
of Appeal allowed by the said Court of Appeals or by us our
heirs or Successors the said Court of Appeals shall certify and
transmit to us our heirs or Successors in our or their Privy
Council a true and exact Copy of all evidence proceedings judg­
ments decrees and orders had or made in such causes appealed
so far as the same have relation to the matter of appeal such
Copies to be certified under the seal of the said Court.

XXII. And we do further direct and ordain that the said
Supreme Court of New South Wales shall in all cases of Appeal
to us our heirs or Successors conform to and execute or cause
to be executed such Judgements and orders as we shall think fit
to make in the premises in such manner as any original Judg­
ment Decree or Decretal order or other Order or Rule by the
said Supreme Court of New South Wales should or might have
been executed.

XXIII. And we do hereby strictly charge and command all
Governors Commanders Magistrates Ministers Civil and Mili­
tary and all our liege Subjects within and belonging to the said
Colony that in the execution of the several Powers jurisdictions
and Authorities hereby granted made given or created they be
aiding and assisting and obedient in all things as they will
answer the contrary at their Peril.

XXIV. Provided always that nothing in these presents con­
tained or any Act which shall be done under the authority shall
extend or be construed to extend to prevent us our Heirs and
Successors to repeal these presents or any part thereof or to
make such further or other provision by letters Patent for the
Administration of Justice Civil and Criminal within the said
Colony, and the places now or at any time hereafter to be
annexed thereto as to us our heirs and Successors shall seem
fit in as full and ample a manner as if these presents had not
been made these presents or any thing herein contained to the
contrary thereof in anywise notwithstanding. In Witness
whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster, the Thirteenth Day of
October in the Fourth Year of Our Reign.

By Writ of Privy Seal.

BATHURST.
In compliance with your directions, I have perused and considered the "Warrant appointing the Lieutenant Governor of New South Wales, the Lieutenant Governor of Van Dieman's Land, the Chief Justice of New South Wales, the Colonial Secretary and the principal Chaplain, to be the Members of the Legislative Council of the Colony";* and I am to express to you, for Lord Bathurst's information, my opinion "whether, in the case of the death or resignation or dispossession of any of the Individuals named in the Warrant, the Governor can appoint a Successor, to be subsequently confirmed by the Crown, but who, in the intermediate time, will have full power to act as a Member of the Council."

I have therefore to state that the thirty third clause† of the Statute, 4 Geo. 4th, c. 96, expressly confers this power on the Governor in the three cases of the death, absence and permanent incapacity of any member of the Legislative Council. The cases of "resignation" and "dispossession" are not provided for in express terms; but, should either of those cases occur, I think that the Governor would be entitled to fill up the vacancy until the royal pleasure should be signified, because he, who should resign the Office, or who should be lawfully removed from it, would become "permanently incapable" of discharging its duties.

I am further directed to express my opinion whether, during the residence of the Lieutenant Govr. of Van Dieman's Land in that Island, the dispatch of business must not be suspended until a written Summons to attend a meeting of the Council had been delivered to him. I have therefore to state that the nomination of this Officer as a member of Council will, as I apprehend, induce this consequence, and that such an appointment might therefore, upon any urgent and sudden emergency, occasion a serious and insuperable difficulty.

I have, &c.,

JAS. STEPHEN, Junr.
The Act provides for the manner in which the Summons should be issued, but it does not say that they must have been so delivered before the Council can proceed. Lord Bathurst doubts whether under the Act all the Members of the Council must not be present, and he desires to know what is the legal construction of an Act, which provides that a Council (no matter of what description) shall consist of a given number, but does not provide what shall be the number requisite to constitute a legal meeting of such Council.

I am, &c,

R. Wilmot Horton.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir,

I have had the honor to receive your letter of yesterday's date, in which, with reference to my letter of the 21st Octr. last, you state that Lord Bathurst is not quite convinced that the Act of the 4th Geo. 4th, c. 96, provides that the writ of Summons must have been actually delivered to all the Members, before the Council of New South Wales can proceed to business; and you observe, that the Act provides for the manner in which the Summons should be issued, but does not say that the Summons must have been so delivered before the Council can proceed.

With reference to this part of your letter, I have humbly to submit to you, for the consideration of Lord Bathurst the following remarks. The words of the 24th Section* of the Act are as follows:—"Provided always that no law or ordinance shall be passed or made, unless the same shall first by the said Governor or Acting Governor be laid before the said Council at a meeting for that purpose, convened by a written Summons under the hand of such Governor or Acting Governor to be delivered to or left at the usual place of abode of the members of such Council respectively."

This clause appears to me to admit no other interpretation than the following. A condition is prescribed, without compliance with which "no law or ordinance shall be passed or made." That condition, as I apprehend, involves seven distinct requisites. First, that the law be introduced by the Governor. Secondly, that it be laid by him before his Council. Thirdly, that this proceeding shall take place not by a separate communication to each Councillor, but at a meeting. Fourthly. That the Meeting shall be convened for this express purpose. Fifthly.

* Note 238.
That it be convened by a written Summons. Sixthly. That the Summons shall be under the hand of the Governor; and Lastly, That it shall be delivered to the Members of Council respectively, or left at their places of abode. If the mere grammatical structure of the Sentence be regarded, I can perceive no sufficient ground for thinking that any such distinction is made between these seven distinct requisites, as to render any one of them directory merely, and not strictly essential to the enactment of a law. If the object of a legislature in enacting this clause be regarded, I think the same conclusion will follow. When it is said that the regulations as to the delivering written notices is made not with the view of establishing an indispensible condition, but merely for the sake of affording a convenient and useful rule, I would humbly answer that it is not usual in the language of legislation to lay down rules without providing a sanction to secure obedience to them, and no sanction is provided by this Act for enforcing compliance with the rule under consideration and the neglect of it will not form an obstacle to the legal proceeding of the Council. Further, I would observe that the rule itself is highly important, since, had it not been made, laws might have been passed by the majority of the Council without any notice being given to members whose expected opposition it might be the wish of the Governor to avoid. Here, however, I assume that the majority of the Council would legally constitute a quorum for the dispatch of business; a point upon which also, I understand from your letter, Lord Bathurst entertains a doubt, I proceed therefore to express my opinion upon this point.

You observe that Lord Bathurst doubts whether under the Act all the Members of the Council must not be present; and you state that his Lordship desires to know, what is the legal construction of an Act, which provides that a Council (no matter of what description) shall consist of a given number, but does not provide what shall be the number requisite to constitute a legal meeting of such Council?

In answer to the enquiry thus proposed to me, I would state that this precise question was decided in the Court of King's Bench in the year 1795, with reference to an Act of Parliament, passed in the 4th year of Henry the Seventh for regulating the proceedings of the Corporation of Northampton. The case to which I refer is, The King v. Miller, reported in the 6th Volume of the Term Reports p. 268. The Act of Parliament in that case created a definite body to which the power of doing certain corporate Acts was committed, but it did not state what
proportion of that body should be present when the Acts in question were done. The Court of King's Bench laid it down, as a general Rule of law, that, where there is a definite number, there must be a majority of that definite number to make a legal Assembly, and it was decided that, under the Act of Henry the Seventh, a majority of the Corporation of Northampton must be present at a meeting to give validity to its corporate Acts.

On the authority of this decision (in aid of which it would be easy to cite many similar cases), I am of opinion that the Council of New South Wales is competent to pass laws in the absence of some of their members, if the majority of the whole Council be present.

I have, &c.,

Js. Stephen, Junr.

MR. JAMES STEPHEN, JR., TO MR. G. BAILLIE.

Dear Sir,

Lincoln’s Inn, 22 Novemr., 1823.

I am desired by Mr. Wilmot Horton, in his note of the 19th inst., which has just reached me, to inform you, what are the Salaries attached to the Offices of Master, Registrar and Sheriff in New South Wales and Van Diemen’s Land. Mr. Wilmot Horton states that he once had a memorandum in my handwriting on this subject. I certainly have no recollection of ever having written such a memorandum, but I will now supply you with such views as have occurred to me on this question.

There are two considerations to be borne in mind. First. Any person sent from this Country to fill those Offices may, I think, reasonably expect to derive from them such an income as will enable him to support a respectable appearance in the Colony. I am too little acquainted with the expense of living there to know how much is necessary for this purpose. But, Secondly, there are certain data furnished by the allowances made for the Chief Justices, which may furnish a guide for Lord Bathurst’s decision upon this Subject. The Chief Justice of New South Wales receives £2,000 per ann.; the Chief Justice of Van Diemen’s Land, £1,200 per ann. Now, from this I infer that an income of £2,000 at Sydney, and of £1,200 at Van Diemen’s Land, must be regarded as a large and liberal provision, and that all other official incomes, connected with the administration of Justice, must fall very decidedly short of these Salaries. The Sheriff must, however, I conceive be well paid, for he will have much to do. He will, unavoidably be in the receipt of much property, and he will have to bear a heavy responsibility. I
think, therefore, that he ought hardly to have less than £1,000 per ann. in New South Wales, and £800 per ann. in Van Diemen's Land. The Registrar is the next officer in importance; and in the multiplicity of engagements, if not in rank, I would propose to allow him £800 per ann. at Sidney, and £600 per ann. in Van Diemen's Land. The Master will have less to do, although in some respects his duties will be more difficult. If he receive £600 per ann. in New South Wales and £400 per ann. in Van Diemen's Land, I think his services will not be at all overpaid. Indeed, I am much mistaken if such an income would be more than a very bare maintenance. But then I conceive that he would have time to spare for other pursuits, and perhaps it would be right that he should be expressly permitted to practice (supposing him to be qualified to practice) as a Barrister and Solicitor in the Criminal Court. In that Court, he will have nothing to do in his character as Master, and it would therefore perhaps be hard to refuse him the opportunity of improving his income in this manner.

If my estimate should appear high, I would observe that it is real economy to make an adequate provision for effective Servants of the Public; but that these Colonies are by no means cheap places of residence, and that the Sums I have mentioned are certainly not higher than corresponding functionaries receive in many of our West India Islands, which are far less able to afford such an expenditure.

I am, &c.,

JAS. STEPHEN, Junr.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Dear Sir,

Lincoln's Inn, 29 Novr., 1823.

I have received from you a public letter, in which I am directed to answer several enquiries proposed to by Mr. Thos. Harrison of Bucklersbury, on the Subject of the law for registering of Mortgages at Van Diemen's Land. As Mr. Harrison does not apply in any Public or official character, but merely for his own private satisfaction, I submit to you, whether it is not best to answer him by saying, that there are no documents in Lord Bathurst's Department, which would enable you to supply him with the information he requires. As far as I am aware, the laws of New South Wales have never been transmitted* for confirmation at home. In fact, there are reasons why it might be inconvenient to pledge yourself to any point respecting the law of this Settlement.

* Note 239.
In my opinion, they have no law at all which can properly be recognized as such. This is a doctrine however, which I presume you will think best not to broach upon your own official authority, and therefore it seems to me best that I should not write for Mr. Harrison's information a public letter maintaining such a proposition.

I am, &c.,

JAS. STEPHEN, Junr.

WARRANT FOR COMMISSION OF MASTER OF SUPREME COURT.

Trusty and Wellbeloved We Greet you Well Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Wellbeloved William Carter, Esquire, We have thought fit hereby to authorise and require you forthwith to cause Letters Patent to be passed under the Seal of Our Colony of New South Wales constituting and appointing him the said William Carter, Our Master of the Supreme Court of Our said Colony to have hold, exercise and enjoy the said Office unto him the said William Carter during Our Will and Pleasure together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging or appertaining in as full and ample manner as he ought of right to hold and enjoy the same and you are to cause to be inserted in the said Letters Patent a Clause or Proviso obliging him the said William Carter to actual residence within our said Colony and to execute the said Office in his own person except in case of Sickness or Incapacity and all such other Clauses and Provisoes as are requisite and necessary in this Behalf. And for so doing this shall be your Warrant Given at Our Court at Carlton House the First day of December, One thousand Eight hundred and Twenty three, In the Fourth year of Our Reign.

By His Majesty's Command,

BATHURST.

To Our Trusty and Wellbeloved Sir T. Brisbane, Knight Commander of the most Honble. Military Order of the Bath, M. Genl. of our Forces, Captn. Genl. and Govr. in Chief in and over our Territory of New S. Wales and its dependencies or to the Lt. Governor or Commander in Chief of the said Territory for the time being.

[Similar warrants, bearing the same date, were issued for George Mills as registrar of the supreme court in N.S.W., and for Joseph Hone as master and E. Butler as registrar in Tasmania.]
Mr. James Stephen, Jr., to Mr. G. Bailie.

My dear Sir,

Lincoln’s Inn, 4 Decemr., 1823.

Will you have the goodness to Communicate to Mr. Wilmot Horton the following remarks upon the papers, which you have sent me, relative to the situation of Master and Registrar at New South Wales.

I find, from these Papers, that I am answerable for the following apparently contradictory statements and recommendations.

First. In the pencil Memorandum I have put down a higher allowance for the Master than for the Registrar. But

Secondly. In the letter, which I wrote to you on the 22d of November, I have inverted this order.

Thirdly. I stated to Mr. Wilmot Horton that the Master was the person, who would require the greater share of professional knowledge and habits, and yet

Finally, I have stated in my letter to you that the Registrar is the higher officer of the two in importance and in the multiplicity of engagements, if not in rank.

Do not think it lawyer craft, if I say, that I do not think there is any real inconsistency between the views, which I have deliberately taken of this Subject at different times.

With respect to the pencil memorandum, although I see it was written by myself, yet I have to say that it was written without one minute for consideration. I made those pencil figures, while Mr. Wilmot Horton was conversing upon this Subject, merely with the view of seeing my first ideas upon paper. I had not supposed that it would ever have been regarded as a deliberate estimate, or indeed that the paper itself would have been kept. I think one is entitled to say, as a kind of general rule, that a man never is responsible for anything that he writes with a pencil.

Discarding this memorandum therefore, I adhere to my last recommendation, which was a deliberate one. I still think, that more law and more habits of business will be required of the Master than of the Registrar, and yet I am of opinion that the latter should receive the higher Salary. I have already explained my reasons. The Registrar can do nothing else than...
his official business. In whatever character the Court is acting, whether as a criminal or a civil tribunal, he must attend by himself or by a clerk, to record its proceedings and decisions. The Master will be officially connected only with the Civil proceedings of the Court. Being from the nature of his office a man of legal habits and knowledge, he may therefore be a candidate for business in the Criminal Court. My doctrine then is simply this. A man of inferior qualifications, who gives you his whole time, may deserve a better Salary than a person of a higher order who gives you but half his time. In the particular case I am satisfied that Mr. Hone would rather take the Mastership with £400 a year, with the privilege of pursuing his profession as a criminal lawyer, conveyancer and Chamber Counsel, than the Office of Registrar which would cut him off from all these pursuits.

For these reasons, I conclude that the appointments may stand as they have already been made, without any prejudice to the person who receives the Smaller Salary.

I am, &c.,

JAS. STEPHEN, Junr.

DEPUTY JUDGE-ADVOCATE WYLDE TO COLONIAL SECRETARY GOULBURN.

Sir, Judge Adv. Office, 4 Decr., 1823, 5 o'clock P.M.

Within the last 5 minutes the Messenger from your Office has delivered your Letter of this Day's Date with the Precept enclosed, under the hand and Seal of the Governor, dated 2nd Instant, appointing as Members of the Governor's Court Robert Campbell and Warham Jemmet Browne, Esqrs., in substitution of John Nicholson and Robert Howe, Esqrs., the former appointed under Precept, bearing date 30 May, 1822, and the latter, with the former again, under Precept, dated 2 Octr., 1822.

Having countermanded the Notice, which had been already given to these Members to be in attendance upon the monthly Sittings of the Court taking place tomorrow morning at 10 o'clock, I shall immediately cause the present Members to be warned of their Appointment.

I have, &c.,

JNO. WYLDE, J.A.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Dear Sir,

Colonial Office, 8 Decr., 1823.

Mr. Gordon has shown me your note on the Subject of the New South Wales appointments. May not the whole case be thus resolved?
Let Mr. Mills be appointed Registrar at New South Wales with the Salary of £800, and Mr. Carter, Master with the Salary of £600. Mr. Carter, who is a lawyer, may improve his income by private practice. Mr. Mills, who is not a lawyer, will have the better official income, and will give his whole time to his Office.

At Van Diemen’s Land, Mr. Hone, I know, prefers the Mastership with the smaller Salary and liberty to practice. Mr. Butler, who is not a lawyer, will of course prefer the Office of Registrar with the better salary.

Then the Appointments will stand thus:—N. S. W.: Registrar, Mr. Mills, £800; Master, Mr. Carter, £600. V. D. Land: Registrar, Mr. Butler, £600; Master, Mr. Hone, £400.

The Master in each Settlement being allowed to practice in the Criminal Courts.

I think you must make the appointments, and not leave the Governor to make them, if you wish to retain this patronage in future.

I am, &c,


Under Secretary Horton to Mr. T. Harrison.

Sir,

Downing Street, 9th Decr., 1823.

I have laid before Lord Bathurst your letter of the 15th ulto., on the subject of the Registration of Mortgages executed in this Country upon Property situate in Van D. Land, and I am directed to express to you his Lordship’s regret that there are not documents in his Department, which can enable him to furnish you with the information you are desirous of obtaining.

I am, &c,

B. W. Horton.

Deputy Judge-Advocate Wylde to Colonial Secretary Goulburn.

Sir,


With reference again to your Letter of the 26th Instant and from personal communication this day with the Master of the Ship Medina, as to probable Arrival of the Ship Guildford, and as to other points connected with my official removal hence, not feeling myself at Liberty to attempt even to make arrangement for my Departure by the Ships, first to sail direct for England, I beg to express my readiness to hold a Court of criminal Jurisdiction, as early as the Governor may determine it fit to convene the same.

At the same time I beg further to suggest, that two several Notices in the Gazette have been usually given and are, I consider, necessary for general Intimation to the Magistracy and
the Colony; while there are now, in the Calendar, cases of Commitment from Port Macquarie, Newcastle and Bathurst, which will require that Interval, or longer indeed, for the appearance of the Witnesses before the Court. So that, at all events, the earliest fit Day for convening the Court would seem to be on or about Monday the 19th Instant.

The number of Cases for Trial, about 20, are certainly not so numerous, as to render it actually requisite at present, or even immediately upon the Arrival of the expected Chief Justice, to convene a criminal Court. I took occasion therefore to submit to the Governor, whether it might not be advisable, that no Precept should immediately be issued, so as to leave it to be determined upon the Arrival of the Judge, whether a convention of the Court should take place, previously to the public Notification of his Commission of appointment, upon any Grounds of Exigency then in force, and if he should desire such an Opportunity of acquainting himself, as the Attorney General with him, of the procedure of the Court, whose practice will be so little altered under the new Charter, or otherwise, as soon afterwards, as it might prove convenient to hold a Court under the Operation of the new Charter.

This alternative seemed to me less free from Objection, as, whenever the new Charter of Justice shall be received, I have already felt it my Duty to submit to the Governor that the Suits actually, at the time of so receiving it, commenced in the Governor's Court, should be allowed to be brought to a hearing before the Court on the first Friday in the then next following Month, before proclamation of the Charter be made; because whatever provision may be made therein as to Suits surviving in the new Court, erected under it, it is not to be expected, that any such simple and summary Procedure will obtain, as now adopted in the Governor's Court; where upon cause of Action the only Process is a Summons to the Defendant to appear before the Court to answer the same on the first Friday in the then following Month; so that otherwise it would seem to result that the Suitors will lose the fees paid, as chargeable upon their Suits in commencement, have their Verdicts postponed at least for some time and be put to Costs under the Jurisdiction of the new Court. There are Suits already entered for the first Friday in February; should the new Charter be received in the Interim, the business of the Criminal Court could be disposed of before that time, so as thus to leave the Governor's, as well as that Court free from all arrears under the existing Charter.

Wholly unconscious at least of any private Motive or Interest inducing to these Considerations, I have only again to bespeak
Myself as duly ready to attend in my place upon the Criminal Court, whenever the Governor shall be pleased to issue precept for its convention.

I have, &c.,

JNO. WYLDE, J.A.

EARL BATHURST TO SIR THOMAS BRISBANE.

5th January, 1824.

[Copies of four despatches, announcing the appointments and defining the duties of the registrars and masters of the supreme courts of N.S.W. and Tasmania, will be found on page 192 et seq., volume XI, series I, and on page 102 et seq., volume IV, series III.]

EARL BATHURST TO SIR THOMAS BRISBANE.

19th January, 1824.

[A copy of this despatch, enclosing the mandamus for appointing members of council, will be found on page 195, volume XI, series I.]

MR. JUSTICE FIELD TO COLONIAL SECRETARY GOULBURN.

Sir, Sydney, 19th January, 1824.

My Lord Bathurst informs me that His Excellency the Governor has received instructions to provide myself and family with a passage to England, as soon as I shall be desirous of returning thither; and, the new Charter and Judicial Officers being daily expected in the Ship Guilford, I am sure his lordship will excuse my not losing the direct opportunity of this year's woolships.

I have therefore the honour to inform you that I have taken my passage on board the ship Competitor for the sum of two hundred and fifty pounds St. l., finding my own table, if His Excellency feels himself authorized to allow me any further payment on that score, upon the principle that myself and family were victualled hither by His Majesty.

I have also to say that I shall embark on Monday next, the 26th instant at 11 o'clock in the forenoon; and that, in a day or two afterwards, I shall send the key of my official residence to Major Ovens.

I have, &c.,

BARRON FIELD,
Judge Sup. Court.

EARL BATHURST TO SIR THOMAS BRISBANE.

20th January, 1824.

21st January, 1824.

[Copies of these despatches, containing instructions for the erection of courts of requests, and the appointment of a solicitor-general, will be found on pages 197 et seq., volume XI, series I.]
1824.
21 Jan.

Opposition of B. Field to executive.

22 Jan.

Duties of sheriff.

31 Jan.

Establishment of supreme court and supercession of J. Wylde.

12 Feb.

Appointment of commissioner of court of requests.

SIR THOMAS BRISBANE TO EARL BATHURST.

21st January, 1824.

[A copy of this despatch, reporting the opposition of B. Field to the executive, will be found on page 199, volume XI, series I.]

EARL BATHURST TO SIR THOMAS BRISBANE.

22nd January, 1824.

[A copy of this despatch, detailing the duties of a sheriff, will be found on page 200, volume XI, series I.]

DEPUTY JUDGE-ADVOCATE WYLDE TO EARL BATHURST.

Sydney, New South Wales, 31 Jan., 1824.

My Lord,

I have the Honor to acknowledge the receipt on the 17th Instant of your Lordship’s Communication, acquainting me that the functions of the Court, in which I now preside, are about to be superseded by His Majesty’s Institution in the Colony of a Supreme Court of criminal and civil Jurisdiction, and that a Chief Justice was then immediately about to proceed hither to enter upon the Duties of his Appointment.

As the Chief Justice has not as yet arrived, I have not felt myself at Liberty, from regard to the criminal and civil Jurisdiction still therefore in my Charge, to make Preparation for availing myself of Your Lordship Intimation and Provision as to my Passage home by the Ships immediately about to leave the Port for England.

Upon the arrival of the Chief Justice, it will be my anxious Endeavour to take advantage of an early fit Opportunity, with so numerous and young a family, of returning direct to England, so as to present myself as soon as possible to your Lordship and to implore that favorable Consideration for the attainment of which I have so ardently struggled in the laborious Duties of my present Appointment, and on which my future Prospects and resources must continue to be so wholly dependent, restraining myself from all further Observations of a personal Nature.

I have, &c,

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

DEPUTY JUDGE-ADVOCATE WYLDE TO COLONIAL SECRETARY GOULBURN.

Sir, Judge Adv. Office, 12 Febry., 1824, 2 o’clock P.M.

Having just now observed in the Sydney Gazette of this Day’s Date, a Government and General Order of His Excellency The Governor, appointing Henry Grattan Douglass, Esquire, to be Commissioner of the Court of Civil Jurisdiction to be called
"The Court of requests," enacted to be instituted, from time to time, in the Colony of New South Wales by an act of Parliament passed on the 19th July, 1823, I deem it incumbent upon me, in virtue of the Act 27 Geo. 3, ch. 2, of His late Majesty’s Letters Patent, dated 4th February, 1814, and of my official Appointment, to enquire, whether the appointment of the Commissioner is to be taken and understood as altogether prospective, or not, and to be carried into Effect only as to actual Administration of Justice in the Court of requests, when, as soon as the Act passed on the 19th July last shall be, in this respect, duly in force within the Territory.

I have, &c.,

JNO. WYLDE.

EARL BATHURST TO LIEUT.-GOVERNOR ARTHUR.

17th February, 1824.

[A copy of this despatch, defining the duties of the sheriff, will be found on page 119 et seq., volume IV, series III.]

DEPUTY JUDGE-ADVOCATE WYLDE TO COLONIAL SECRETARY GOULBURN.

Sir,

Judge Adv. Office, 10 March, 1824.

In perfect knowledge of the serious Consideration, which the subject of opening for a time to the Colony the Jurisdiction of the Supreme Court has already obtained with the Colonial Government, and after the personal Communication thereon I had the Honor yesterday of holding with the Governor in Chief, as heretofore with the Chief Justice Forbes, I can no longer feel Myself justified in delaying to tender Myself to the Government as willing to lend my judicial Services to that Court, under His Excellency’s Commission of Appointment, as Judge of the same.

I beg to add that, as to the payment of the Salary affixed to the office of the Judge of the Supreme Court, it may wholly remain, if the Governor should so think fit, in the future Consideration of His Majesty’s principal Secretary of State for the Colonies, on my part again declaring Myself ready to undertake the office under His Excellency’s Commission of Appointment.

I have, &c.,

JNO. WYLDE.

DEPUTY JUDGE-ADVOCATE WYLDE TO COLONIAL SECRETARY GOULBURN.

Sir,


With reference to my Communication of yesterday as to the opening of the Supreme Court under the Governor’s Commission to the Judge, I have presumed, allow to me to suggest, that
Legality of proposed commission as judge.

the Provision is not unknown under the Statute, 22 Geo. 3, ch. 75, S. 3, making it lawful for the Governor and Council of any Colony or Plantation, then or at any time thereafter belonging to the Crown of Great Britain, to give leave of absence to any person exercising an office granted by patent: and in such Case, as likewise in the case of Vacancy occasioned by Death or Amotion, to provide for the due Discharge of the Duties of such office, until the King's Pleasure shall be known.

In virtue of this Statute principle as also of that, ever admitted as extending, I am impressed, to protect and indemnify Colonial Governments as to acts of immediate Necessity or Expediency in cases of unexpected local Emergency, such an Appointment on the part of the Governor, it would seem to me, would be well warranted in the present State of the judicial Interests committed to the Supreme Court.

The Jurisdiction of the Court, thus brought into Exercise, could no where come, it is to be observed, into serious Question, but in Cases of Appeal home and the Courts there, as again then only as against the Judge, who had exercised Jurisdiction under the Governor's Commission: the only personal Question upon which, to be possibly raised, it would appear therefore, with respect to the Governor, remaining with His Majesty's Government as to the Necessity and fitness of the Appointment itself.

I have, &c.,

JNO. WYLDE, J.A.

17 March.

Proclamation drafted by F. Forbes.

DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.


Having had communication with the Chief Justice, since I had the Honor of a personal Interview with your Excellency, I beg leave to mention that the Notification, to be prepared by the Chief Justice for the Gazette, was, it seems, the proclamation required by the Act to precede the opening of the Court, he is afterwards to preside over, and has no reference whatever to the Supreme Court, as I was impressed, under the present Charter and intended now to be opened for a Time; for which purpose, it will only be necessary that your Excellency should issue the Commission of appointment, as suggested by the Chief Justice himself and now in your Excellency's hands.

I have, &c.,

JNO. WYLDE.

20 March.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir, Lincoln's Inn, 20th March, 1824.

In compliance with your directions, I have perused and considered a proclamation* which, on the 20th of August last,

* Note 241.
was issued by the Governor of New South Wales on the subject of the annual General Muster in that Colony; and I am to express to you, for Lord Bathurst's information, the opinion I have formed as to the legality of that proclamation. I have therefore to state that, as I apprehend, the Governor of New South Wales has not any right to promulgate or to enforce obedience to such a Law as the present. The object of it is to take a perfect census of the existing population, and, for this purpose, all the Inhabitants, without exception, are required to attend at certain places, which are enumerated in the Proclamation. If any one should think proper to disobey this requisition, I conceive that no punishment could be legally inflicted. The prerogative of the Crown does not extend to such a measure as this.

Assuming however the competency of the Governor to establish such a Law, I am further of opinion that the particular provisions of it are open to great objection. In the case of persons "whose terms of transportation have expired," or who have "obtained free or conditional pardons," disobedience to the proclamation is to subject the Offenders to be treated "as Prisoners of the Crown," and to be "remanded to Government employment." How long they are to be thus treated and employed is not stated. This enactment is I think wholly at variance with the spirit and principles of the Law of England. Persons, who have borne the whole punishment of their crimes, or who have received the royal pardon, cannot legally be regarded as a distinct and separate class of Society, against whom laws may be framed with greater Severity than against their fellow subjects. Neither is it consistent with English Law to expose men to the degrading punishments of felons for neglecting to comply with a regulation, in which neither the safety nor the peril of Society depends. The penal clause,* even if otherwise unobjectionable, would, I should conceive, be unfit to receive His Majesty's approbation, from the absence of provision as to the extent and duration of the punishments denounced by it.

In the case of "all persons of whatever description" neglecting to attend at the appointed time and place of the Muster, it is declared, that "such Indulgences as may have been extended to them by the Crown will be resumed, and existing regulations enforced." This enactment is liable to the same objection of vagueness and uncertainty. It is indeed scarcely possible to collect its meaning. If, however, by "Indulgences" is intended any grant which may have been made of any property or civil right, it would plainly be contrary to law and justice thus retrospectively to subject the Grantees to a condition which was not

* Note 241.
expressed in the original Grant itself. In addition to which it may be observed that the penalty is most unequal; since the "Indulgences" (whatever may be meant by that term) of one man may be comparatively more valuable than those of his neighbour, and yet the very same Act is indifferently to work a forfeiture of each.

I have, &c,

JAS. STEPHEN, Junr.

DEPUTY JUDGE-ADVOCATE WYLDE TO COLONIAL SECRETARY GOULBURN.


In acknowledging the receipt of your Letter of yesterday's Date, I beg leave to transmit, to be filed in your office, my Oath of office as Judge of the Supreme Court, a due Notification* of which for insertion in the next Gazette for general Information on the occasion, I beg to submit also as enclosed.

I have, &c,

JNO. WYLDE.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir, Lincoln's Inn, 30 March, 1824.

I have had the honor to receive your letter of the 26th inst., transmitting to me the copy of a letter† from Messrs. Buckle, Bagster and Buchanan, Merchants, relative to a duty of twenty shillings per gallon, levied on seven gallons of spirits, and four gallons of wine shipped for the use of the crew of the English Brig "Woodlark," on her clearing out at Sidney in New South Wales, for the port of St. Stephens, and I am to report to you, for Lord Bathurst's information, the opinion I have formed as to the legality of the duty imposed by the Government of New South Wales, under the circumstances stated in Messrs. Buckles Baxter and Buchanan's letter.

I have therefore to state that, in my opinion, the duty imposed by the Government of New South Wales is illegal. It would be superfluous to refer to the general principle of law on this subject, since the several Acts of Parliament indemnifying Governor Macquarie for having levied duties by his own authority, sufficiently show (if indeed there was any room for doubt) that the Governor of New South Wales has no power to impose any tax on the trade of the Colony.

I have, &c,

JAS. STEPHEN, Junr.

MESSRS. COPLEYS AND WETHERELL TO EARL BATHURST.

My Lord,

Lincoln's Inn, 1st May, 1824.

We have had the honor to receive a Letter from Mr. Wilmot Horton, stating that he was directed by Your Lordship

* Note 242.   † Note 243.
to transmit to us an enclosed copy of a Bill, intituled, "A Bill for granting certain powers and authorities to a Company to be incorporated by Charter, to be called 'The Australian Company of London,'* for the cultivation and improvement of Waste lands in the Colony of New South Wales, and for other purposes relating thereto," which is intended to be brought into Parliament as a Public Act by His Majesty's Government; and that he was to request that we would settle the draft, and report to Your Lordship our opinion, whether it is properly adapted to give effect to the objects with a view to which it is framed.

In compliance with Your Lordship's request, We beg leave to report that we have perused the said Bill and are of opinion that it is properly adapted to give effect to the objects with a view to which it is framed.

We have, &c.,


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DEPUTY JUDGE-ADVOCATE WYLDE TO SIR THOMAS BRISBANE.

Sir, Judge Adv. Office, 10th May, 1824.

In a Communication addressed to me on the 14th Ultimo by the Colonial Secretary, I had the Satisfaction of having expressed to me officially the Sense your Excellency was pleased favorably to entertain "as to the cordiality of the cooperation received from me in prolonging, agreeably to the wish of the local Government, the Duration of the old Supreme Court."

Acting wholly upon the same Principle, and advertting to the special Provisions and powers involved in the Constitution, Jurisdiction and Proceedings of the Supreme Court to be erected in the Colony under the recent Act of Parliament, which may yet perhaps make it appear advisable that the present existing Courts should not immediately cease and determine, I would seek just so far only to interpose on a Subject so entirely, I am aware, in better Discretions as to declare a perfect Willingness on my part to prolong the Exercise of my judicial Services in those Courts as long as may be found expedient, as a readiness at the same time to retire from drawing and further Salary here either as Judge Adv. of the Territy., or as the Judge of the Supreme Court.

I have delayed hitherto thus to bespeak myself only on the probable Expection, that by this time the opening of the new Court might have been so freed as to full Operation from all Cause of Embarrassment as to have superseded all occasion for the Tender of Services now submitted to your Excellency.

I would beg further to observe only that the Solicitors have given me to understand, that the lapse of two or three more

* Note 244.
Weeks would have allowed them to bring to Issue a number of depending Suits now in different Stages of Procedure, and thus most conveniently and with the least Delay to have proceeded to Trial on the opening of and before the new Supreme Court.

I have, &c.,

JNO. WYLDE.

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MR. JUSTICE FORBES TO COLONIAL SECRETARY GOULBURN.

Sir,

Sydney, 14th May, 1824.

I have to request that you would move His Excellency the Governor to appoint two persons to act, the one as prothonotary and the other as registrar of the Supreme Court, about to be opened, until the arrival of officers from home, or His Majesty's pleasure may be communicated.

I have, &c.,

FRANCIS FORBES,
C. J., New South Wales.

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ATTORNEY-GENERAL BANNISTER TO UNDER SECRETARY HORTON.

Dear Sir,

Sydney, 24 May, 1824.

It is scarcely deserving the formality of a public letter to state to you a determination I have made relative to my practice in the Criminal Court here. If, however, you think proper to mention it to Lord Bathurst, this communication will be sufficiently specific for that purpose. As the new act of parliament did not alter the law with respect to the costs of prosecution, I have at this first session of the court found it necessary to decide what cases should be carried on at the expense of the crown, and which at the expense of private parties. In one case left to the private prosecutor, I was offered a retainer, and refused it. I thought it important that the decision, which it is necessary for me to make, should not be made under the slightest suspicion; and, if the consequence of the refusal of the assistance of the crown were to give the Attorney General briefs, it would be difficult for him perhaps always to act with sufficient purity; but undoubtedly his motives would in political cases be suspected. Hereafter it may be found expedient to transfer this initiating judicial office from the Attorney General to the Judges, as in some cases it is done in England in regard to the Master of the Crown Office; but, in the mean time, I think I can perceive considerable advantage to the Officer's position here, from the course I have adopted. To what extent the fees, which might be expected from the private briefs, will now be lost to the Attorney General, I cannot yet judge. If I
find at the end of the year that the amount enters very considerably into the sum, which, it was anticipated in England, would be received by me from private practice, I am quite assured that a proper representation of the loss will be duly attended to. I am also as well assured that you will not think that I wish to repine upon the arrangements which I make here. I feel it, indeed, of the first importance to assist in placing the jarring elements, we are in the midst of, upon firm foundations; and to do this not only is impartiality necessary, but the opinion that we shall not be partial.

I am, &c.,

S. BANNISTER.

6 July, 1824.

We have just closed a criminal Session of 40 Cases; and I have more than once felt the advantage of the determination mentioned in this letter.

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COMMISSION OF PEACE.

George the Fourth by the Grace of God of the United Kingdom of Great Britain and Ireland, King Defender of the Faith, etc., etc., etc.

THOS. BRISBANE.

To—

John Harris, Esquire. Donald MacLeod, Esquire.
Frederick Goulburn, Esquire. Peter Murdoch, Esquire.

GREETING.

Know Ye, that We have assigned you jointly and severally and every one of you Our Justices to keep our peace in our Colony of New South Wales, and to keep and cause to be kept
all Ordinances and Statutes for the preservation of the peace and for the quiet government of our people, made in all and singular their Articles in our said Colony, according to the form and effect of the same, and to punish all Persons offending against the said Ordinances or Statutes or any of them in the said Colony.

And to cause to come before you, or any of you, all those who, to any one or more of our people concerning their Bodies or the firing of their Houses, have used threats, to find sufficient Security for the peace, or their good behaviour towards us and our people, and if they shall refuse to find such Security, then them in our prisons, until they shall find such Security, to cause to be safely kept.

We have also assigned you and every two or more of you our Justices to enquire by lawful means the truth of all Felonies, Trespasses and Extortions whatsoever, and of all and singular other Crimes and offences, of which the Justices of our peace ought lawfully to enquire, by whomsoever and after what manner soever, in the said Colony done or perpetrated or which shall be done or attempted.

And also of all those, who in the aforesaid Colony in Companies against our peace in disturbance of our people, with armed force, have gone, or hereafter shall go, and who also of those who have there lain in wait, or hereafter shall lie in wait, to maim or cut or kill our people.

And also of all Victuallers and all and singular other persons, who in the abuse of weights or measures or in selling victuals against the Ordinances and Statutes, or any of them therefore made for the common benefit of the said Colony, have offended or attempted or hereafter shall offend or attempt.

And also of all Sheriffs, Constables, Keepers of Gaols and other Officers, who in the execution of their Offices about the Premises or any of them, who have unduly behaved themselves, or hereafter shall presume to behave themselves unduly in our aforesaid Colony.

And of all and singular Articles and Circumstances and of all other things whatsoever that concern the Premises, or any of them, by whomsoever and after what manner soever, in our aforesaid Colony done or perpetrated, or which hereafter shall there happen to be done or attempted, and in what manner soever.

And to inspect all Indictments whatsoever, so before you or any of you taken or to be taken, and to make and continue processes thereupon, against all and singular the Persons so indicted, or who before you hereafter shall happen to be indicted, until they can be taken, surrender themselves or be outlawed.
And duly and lawfully to hear and determine all and singular the Felonies, Trespasses, Extortions, unlawful assemblies, indictments aforesaid, and all and singular other the Premises.

And the same offenders and every of them for their offences to punish by Fines, Forfeitures and other means, as according to Law it ought to be done.

Provided always that, if a Case of difficulty upon the determination of any of the Premises before you, or any two or more of you, shall happen to arise, then let the Judgment in no wise be given thereon, before you or any two or more of you, unless in the presence of our Chief Justice of the said Colony.

And therefore We command you and every of you that to keeping the Peace, Ordinances, Statutes, and all and singular other the Premises you diligently apply yourselves, and that at certain days and places to be hereafter appointed for these purposes, into the Premises Ye make enquiry, and all and singular the Premises hear and determine and fulfill, doing thereon what to Justice appertains, according to Law, saving to Us the Americas and other things to Us therefrom belonging.

And We command our Sheriff or Provost Marshal of the said Colony, at certain days and Places to be hereafter appointed as aforesaid, to be aiding by all lawful means in the performance and due execution of the Premises.

In Testimony whereof We have caused these our Letters to be made Patent and the Great Seal of our said Colony to be hereunto affixed.

Witness our trusty and well beloved Sir Thomas Brisbane, Knight Commander of the Most Honorable Military Order of the Bath, Our Governor and Commander in Chief of our Colony of New South Wales and its Dependencies, the Twenty sixth day of May, 1824, in the Fifth year of our Reign.

By His Excellency's Command!

FREDK. GOULBURN.

EARL BATHURST TO THE ADVOCATE, ATTORNEY AND SOLICITOR GENERAL.

Gentlemen, Downing Street, 23rd June, 1824.

It has been decided by His Majesty's Government to erect an Archdeaconry in the Colony of New South Wales, and the Revd. Thomas Hobbes Scott* will be appointed the first Archdeacon. It is intended that his authority should for the present extend over the whole Colony of New South Wales, including under that description, the Island of Van Diemen's Land. I am

* Note 228.
further to apprize you, that it is decided to invest the Archdeacon of New South Wales with Ecclesiastical powers and Jurisdiction as ample as, according to the Canons and Usages of the Church of England, can be lawfully committed to any person holding an office of that nature.

For this purpose it may perhaps be necessary that he should receive the further appointment of Commissary from the Bishop of the Diocese,* to which the Archdeacon will belong. You will therefore understand that it is proposed for the present to unite the Archdeaconry of New South Wales to the Diocese of London.

By Letters Patent erecting the Bishop's See of Calcutta, the Territories, under the Government of the United Company of Merchants of England trading to the East Indies, are constituted the Bishopric of Calcutta. By the Patent appointing the present Bishop of Calcutta, the Diocese is extended over the whole of the Territories within the limits of the Company's Charter.

If these terms be not considered so comprehensive as to embrace the Colony of New South Wales, it will be necessary to make provision for obviating any doubt on that point and for placing beyond dispute the Ecclesiastical superiority of the Bishop of London over this Colony.

It will also be necessary to reserve to His Majesty the power of recalling the Archdeacon, and the power of nominating at all times the person that is to hold that Office.

I am therefore to desire that you would proceed to frame the Drafts of such Instruments as may be necessary to give full effect to the Intentions of His Majesty's Government, as they have been already explained; and, if His Majesty should not be able by the exercise of his Royal Prerogative, to carry these Intentions into full effect, you will report to me by what other means they can be most effectually accomplished.

I am, &c.,

Bathurst.

SIR THOMAS BRISBANE TO EARL BATHURST.

1st July, 1824.

DEPUTY JUDGE-ADVOCATE WYLDE TO EARL BATHURST.

Sydney, New South Wales,

5 July, 1824.

My Lord,

Your Lordship has been already apprized, I understand, by Mr. Justice Forbes, as to the Causes, which delayed the opening of the Supreme Court here under the recent Act of Parliament, until the 18th May last.

* Note 246.
BANNISTER TO HORTON.

The arrangement and delivery over of the Muniments, records, etc., of the Courts subsisting under the former Charter have, in conformity with the 18th Section subsequently taken place, so as to leave me now at liberty, to take Advantage, under your Lordship’s permission, of the first fit opportunity of a return passage for myself and family to England.

As possibly it may be some time, however, before that opportunity may occur, and, as I am desirous of avoiding all Cause of Embarrassment to the Colonial Government from a protracted Occupation of my official residence here, it is my intention to vacate its possession in about fourteen Days, and to retire with my family, for the Interval, wholly into the Country.

I would pray leave to add only that, relying with perfect confidence on that Justice, which your Lordship will be disposed, I am assured, readily to extend to the consideration of the laborious and very trying Duties, I have had for eight Years to perform under my present appointment, I shall be most anxious to make my return home within as short a Period as possible, thus to accelerate the fulfilment of that Expectation, upon which I was most strongly induced to accept of such an Appointment, as thus insuring to myself, with your Lordship, in a few Years, a Title to a higher official Station in your Lordship’s Department.

I have, &c.,

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

ATTORNEY-GENERAL BANNISTER TO UNDER SECRETARY HORTON.

Dear Sir,

In London I was requested to permit myself to be named as the sole Agent in a power of Attorney for the recovery of a Debt due by a person in New South Wales to one in London. Having had a clause inserted in the power to enable me to substitute another name for my own, if on mature consideration I should think it right so to do, I consented. It is a matter of some importance with reference to the intention of Government as to the practice of the law Officer here, and I beg leave to state to you my impression now, and to request that you will take the subject into consideration. It is my desire as well as my Duty to endeavour to put the practice, I may begin, upon a footing that may prove permanent.

I had a doubt on the subject, which is now removed in my mind; it arose from the words of Lord Bathurst’s* Letter to Sir Thos. Brisbane relative to me. The instruction in that letter on this point refers to the character of an English Advocate; it

* Note 247.
Interpretation of instructions.

Power to act as agent under power of attorney.

1824.
6 July.

intends to remove the Attorney General from the practice of a Solicitor usually added to his other avocations in the Colonies; and the intention of the Government is, I believe, to withdraw the office, as much as can conveniently be done, from representing private persons, whenever that might tend to the public disadvantage. It is important therefore to consider if it be consistent with this intention, and with the instruction, that he should be named in a power of Attorney for general and special purposes. I think it is.

I made inquiry on the subject before leaving England amongst experienced Barristers and Solicitors, and my present view was confirmed by them. A Barrister at home is frequently placed in situations of the like nature with that of an Agent under powers of Attorney; and, in New South Wales as in England, he will in the usual manner employ subordinary agents in details. An ordinarily prudent person will not by such business be mixed up with the concerns of the inhabitants in a degree that can be mischievous.

The chief advantages that have weighed with me in accepting the power, or rather those which have determined my opinion abstractedly, are, first; that it will give considerable emoluments to the Attorney General; secondly, that it will occasion great satisfaction to Absentees. Both these heads rest on public grounds. In proportion as the Officer can be liberally provided for, competent persons will be candidates for the Post. But the second, namely, the satisfaction of the Public, I have considered of at least equal importance.

The difficulty to distant Claimants in recovering their debts renders it desirable that an individual, so free from private influence as the Attorney General is, should be at their service in a qualified respect, and the only question is, if he will be thereby involved improperly here in the personal concerns of the people.

It may be remarked that his position, in one point of view, as an Agent under a power of Attorney for Persons having adverse claims on Colonists, will oppose him to the latter, rather than tend to weaken his character by their influence, or affect the performance of his Duty to the Crown.

I have endeavoured to exercise a Sound Discretion upon this point, in which conflicting circumstances are to be considered, and such a line should be drawn as will best secure the public Interest, as intended to be protected by the arrangement of Lord Bathurst; and, after confirming my impressions by observation, I have concluded that the advantages of the Attorney General acting under such powers outweigh the disadvantages of it.
COUNSEL TO BATHURST.

It is, however, a subject on which different views may be entertained, and I shall only act upon my own so long as they are not corrected by you.

In my Colonial Commission, framed by Mr. Forbes, the restriction is expressed to be against my acting as an Attorney, Solicitor or Proctor. These terms are explanatory of the views of the Government I think, and confirm my own.

I am, &c.,

6 July, 1824.

S. Bannister.

My further experience convinces me the more that it will be impolitic to restrict the Attorney General from acting under Powers. S.B.

MESSRS. ROBINSON, COLEY AND WETHERELL TO EARL BATHURST.

My Lord,

Doctors' Commons, 26th July, 1824.

We are honoured with your Lordship's Commands signified in your Letter of the 23rd Ultimo to the effect following.

[Here followed a copy of Earl Bathurst's letter, dated 23rd June, 1824; see page 541.]

And We are further directed by Your Lordship's Letter of the 17th Instant to alter that part of the appointment, which made the Archdeaconry subject to the Bishop of London, and to leave it under the Jurisdiction* of the Bishop of Calcutta as extended to all places within the limits of the Charter of the East India Company.

In Obedience to your Lordship's Commands We have the honor to report That We submit the enclosed Draft of appointment of an Archdeacon of New South Wales as providing for all the objects explained to us in the above instructions.

We have, &c.,

CHRIST. ROBINSON. CHS. WETHERELL.

J. S. Copley.

[Enclosure.]

DRAFT OF LETTERS PATENT.

GEORGE THE FOURTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To all to whom these presents shall come, Greeting.

WHEREAS the Doctrine and Discipline of the United Church of England and Ireland are professed and observed by a considerable part of our loving Subjects resident within Our Colony or Settlement of New South Wales and its Dependencies including Van Dieman's Land.
AND WHEREAS it is expedient to make further provision for the due regulation and Order of Persons duly ordained to officiate as Ministers of the United Church of England and Ireland within the same Colony or Settlement. We have determined to constitute within the said Colony or Settlement one Archdeaconry subject during Our pleasure to the Jurisdiction, Spiritual and Ecclesiastical, of the Bishop of Calcutta for the time being.

AND We do hereby erect, found and constitute one Archdeaconry in and over the British Territories within the said Colony of New South Wales and its Dependencies, To be styled the Archdeaconry of New South Wales, and to be subject and Subordinate during our pleasure to the Bishop of Calcutta and his Successors as aforesaid, according to the Ecclesiastical Laws of this Realm.

AND, to the end that this Our Intention may be carried into due effect, We, having full Confidence in the Piety, Learning, Morals, Prudence, of Our well beloved Thomas Hobbes Scott,* Clerk, Do name and appoint him, the said Thomas Hobbes Scott, to be Archdeacon of the Archdeaconry of New South Wales as aforesaid; so that He, the said Thomas Hobbes Scott, shall be and be taken to be in all things Archdeacon of the said Archdeaconry of New South Wales and by virtue of this Our Nomination alone,† enter into, and fully and absolutely possess and enjoy the said Office of Archdeacon within the said Archdeaconry subject to the power of revocation and resignation hereinafter more particularly expressed. And we do hereby signify to Our right, trusty and well beloved the Right Reverend Father in God the Lord Bishop of Calcutta that We have nominated the said Thomas Hobbes Scott, Clerk, so to be Archdeacon of New South Wales and to be subject and subordinate during our pleasure to Him and his Successors as aforesaid.

And, for a Declaration of our Royal Will and pleasure in regard to the Duties and Functions to be exercised by the said Archdeacon and his Successors, We do hereby declare that the said Archdeacon shall be within the said Archdeaconry assisting to the Bishop of Calcutta in the exercise of His Episcopal Jurisdiction and Function according to the Duty of an Archdeacon by the Ecclesiastical Laws of Our Realm of England, and, in as full as ample manner as the same are or may be lawfully exercised by any Archdeacon within Our Realm of England, save as hereinafter excepted. And We do further Will, ordain, and

* Note 228.
† Marginal note.—This alteration from the Letters Patent of Colombo making the nomination and appointment of the Crown absolute without Institution was introduced by direction of Lord Bathurst communicated to the King's Advocate by Mr. Gordon.
declare, that the said Archdeacon shall within his Archdeaconry be and be taken to be without further appointment the Commissary of the said Bishop and his Successors and shall exercise Jurisdiction in all matters aforesaid according to the Duty and Function of a Commissary of the said Ecclesiastical Laws.

And We do further direct that, during the Vacancy of the said Archdeaconry, or until the Person, who shall be appointed by Us to fill the same shall arrive and take on him the Duties of the said Office and Certify the same in Writing to the Governor of Our said Colony or Settlement, the said Duties shall be performed by some discreet Minister in Priest’s Orders of the Church of England, who shall be nominated, as the Case may be, for that purpose by Our Governor for the time being of the said Colony or Settlement of New South Wales as aforesaid.

And Moreover We Command and, by these Presents, for Us, our Heirs and Successors, strictly enjoin all and singular Our Governors, Judges, and Justices, and all and singular Chaplains, Ministers, and Other, our Subjects within the Territories aforesaid, that they and every of them be in and by all lawful ways and means aiding and assisting to the said Archdeacon and his Successors in the execution of the Premises in all things. And We do further will and direct that the said Archdeacon and his Successors may and shall from time to time appoint a proper and sufficient Person in the said Archdeaconry to act as Registrar thereof, and, in Case of no Registrar being so appointed, or the Registrar being unable to Act during any Vacancy of the said Archdeaconry, We will and direct that the Person officiating as such, as above directed, may appoint any sufficient Actuary to do all Acts and Things to the said Office of Registrar appertaining. And We do further Ordain that the Supreme Court of Judicature in New South Wales shall have such and like Jurisdiction and power of interfering by Writ of Prohibition or Mandamus subject to the same Laws, Restrictions and Rules of Practice, as is or has been exercised by Our Court of King’s Bench at Westminster in regard to Proceedings in the Ecclesiastical Courts of England, regard being had nevertheless to any Special Provisions or exceptions contained in these our Letters Patent, or to any other Laws and Regulations specially applicable to or concerning our Colony or Settlement of New South Wales as aforesaid.

Moreover it is Our Royal Will, and We do hereby declare and ordain that nothing herein contained shall extend, or be construed to extend to repeal, vary, or alter, the Provisions of Our Charter, whereby Ecclesiastical Jurisdiction was given to
1824.  
26 July.  

Draft of letters patent for erection of archdeaconry.

Archdeacon to be a body corporate.

Legal powers of archdeacon and successors.

the said Court of Judicature,* so far as the same does not relate to the Correction of Clerks or the Spiritual Superintendence of Ecclesiastical Persons or to give to the Said Archdeacon or his Successors any Authority or Jurisdiction whatsoever in causes, Testamentary and Matrimonial, and in matters now cognizable in the said Court except as herein last before excepted.

Moreover We will and grant by these Presents that the said Archdeacon be a Body Corporate; and do ordain, make and constitute him to be a perpetual Corporation, and to have perpetual Succession; And that he and his Successors be for ever hereafter called and known by the name of Archdeacon of New South Wales; And that he and his Successors by the Name aforesaid shall be able and capable in the Law and have full power to purchase, have, take, hold, and enjoy, such Manors, Messuages, Lands, Rents, Tenements, Annuities and Hereditaments, of what nature or kind soever in fee and in perpetuity, or for term of Life or Years as by Grant or Licence from Our said Governor, He or they shall at any time be authorized to take, hold or enjoy within our Territories in the said Island or Settlement: And all and all manner of Goods, Chattels and Things Personal whatsoever of what nature or value soever; And that he and his Successors, by and under the said Name may prosecute, claim, plead and be impleaded, defend and be defended, Answer and be answered, in all manner of Courts of Us, Our Heirs and Successors, and elsewhere, in and upon all and Singular Causes, Actions, Suits, Writs and Demands, Real, Personal, and Mixed as well Temporal as Spiritual, and in all other Things, Causes, and matters whatsoever.

And We do hereby declare that if We, Our Heirs or Successors, shall think fit to revoke or recall the appointment of the said Archdeacon or his Successor for the time being, and shall declare Our Such or their pleasure by Letters Patent under the Great Seal of the United Kingdom, then every such Archdeacon shall, from and after the notification thereof in such manner as in the said Letters Patent shall from time to time be directed to the said Archdeacon, to all intents and purposes cease to be Archdeacon as aforesaid.

And, for removing doubts, with respect to the validity of resignation of the said Office of the said Archdeacon, it is our further Will and pleasure that, if the said Archdeacon or His Successors, shall by Instrument under his Hand and Seal, delivered to Us or to the Governor of our said Colony or

* Marginal note.—It is presumed that the Supreme Court has Jurisdiction by charter in the Cases described on the same principle that the Provision was adopted with respect to Colombo. This should be ascertained.
STEPHEN TO BATHURST.

Settlement for the time being, and duly accepted and registered, resign the Office of Archdeacon aforesaid, such Archdeacon shall forthwith cease to be Archdeacon to all intents and purposes, but without prejudice to any responsibility to which he may be liable in Law or Equity in respect of his Conduct in his Office.

And further, to the End that all the Things aforesaid may be firmly holden and done, We will and grant to the aforesaid Thomas Hobbes Scott, Clerk, that He shall have Our Letters Patent under Our Great Seal of Our United Kingdom duly made and Sealed.

In Witness whereof, &c.,

CHS. R.

J.S.C.

C.W.

Mr. James Stephen, Jr., to Earl Bathurst.

My Lord,

In obedience to Your Lordship's Commands, signified to me by Mr. Wilmot Horton, I have perused a Letter addressed to Mr. Wilmot Horton, by The Reverend Thomas Hobbes Scott, the Archdeacon of New South Wales relating to the appointment of a Board of Trustees by Royal Charter, for the Administration of any Funds which may be reserved for the support of the Church and School Establishments at New South Wales, and I am directed, in case I see no legal objection to the appointment of Trustees, in the way pointed out by Mr. Scott, to prepare the Draft of an Instrument for that purpose.

I have therefore prepared, and have the honor now to transmit to your Lordship, the Draft* of a Warrant for His Majesty's Sign Manual, authorizing the Governor of New South Wales to constitute, under the Great Seal of that Colony, a Body Corporate for the purposes mentioned by Mr. Scott.

To assist your Lordship in reviewing the provisions contained in this Draft, I enclose an Abstract of it, explaining the object of each of the successive Clauses.

I have, &c.,

James Stephen, Junr.

[Enclosure.]

Abstract of the Clauses contained in the proposed Warrant for incorporating Trustees for the management of the Clergy and School Lands in New South Wales.

First. The Instrument itself is not a Charter of Incorporation, but a Warrant from His Majesty for passing such a Charter in the Colony. A Charter, under the Great Seal of Great Britain,
would have induced great expense and delay, and, in the event of future alterations becoming necessary, extreme inconveniences would have arisen in revoking an Instrument of so high and solemn a nature.*

Second. It is proposed to erect this Corporation by a Charter under the Great Seal of New South Wales. And it seems to me that such an Act ought not to be done with any lower sanction than that of a Warrant under the Sign Manual. This I believe to have been the course in parallel cases, and the analogous proceeding in effecting similar Grants in this country seems to require the observance of this solemnity.

Third. The Warrant contains a reservation to the King of the right to revoke or alter the Charter at pleasure, a power without which the proposed Institution might become the source of great mischief, and the excuse for disorderly proceedings of a political nature in the Colony.

Fourth. The division of the whole Colony into Counties of about forty square miles each, and the subdivision of such Counties into Hundreds and Parishes, was recommended by Mr. Bigge,† and is provided for by this Warrant, because, without such a measure, the allotments to the Church could not conveniently be made.

Fifth. For this purpose Commissioners are to be appointed by the Governor, of whom the Surveyor-General is always to be the Chief.

Sixth. In making the division of Counties, the Commissioners are to have regard to all natural divisions of the Country, so as to render the Boundaries fixed and certain.

Seventh. Reports are to be made by the Commissioners to the Governor of their Surveys, which are to be enrolled in the Supreme Courts of both Settlements.

Eighth. In the event of a difference of opinion amongst the Commissioners as to the proper Boundaries of any County, the report in which the Surveyor General may concur is to be adopted.

Ninth. If the reports are approved by the Governor, he is to issue Proclamations erecting into Counties the Districts pointed out for that purpose by such reports, and the Proclamations are to state with all practicable accuracy the divisions of each county.

* Marginal note.—In case it should appear to your Lordship more expedient to pass an Order in Council, than to obtain the royal Sign Manual for this purpose, I am not aware that such a charge would be open to any objection or technical difficulty; but in that case the language of this Instrument must be altered throughout.

† Note 249.
Tenth. If such Reports are disapproved, no such Proclamations are to issue till the Royal pleasure is made known.

Eleventh. Similar Commissions are to issue for dividing the Counties into Hundreds, and the Hundreds into Parishes, which last division, however, is not to be made till the County is sufficiently settled and inhabited.

Twelfth. Each County is to contain [ ] Hundreds and each Hundred [ ] Parishes.

Thirteenth. All Proclamations erecting any County, Hundred or Parish, are to be enrolled in the Supreme Court.

Fourteenth. In each County the Commissioners are to mark out and allot a part of the Waste Lands as a Clergy and School Estate.

Fifteenth. The Estate is, in each County, to consist of one continuous and unbroken tract, if possible; and the Land allotted is to be of an average quality and goodness, and is to enjoy a fair proportion of all natural Advantages of situation, water carriage, etc.

Sixteenth. The Clergy and School Estates are to comprise one equal [ ] part in extent of each County throughout the Colony.

Seventeenth. The Commissioners are to report to the Governor the Bounds and Descriptions of the Clergy Estates, and all these Reports are to be enrolled in the Supreme Court.

Eighteenth. If any County to be erected in Districts already Settled shall not contain ungranted land enough to make up the Clergy Estate in that County, the deficiency is to be taken out of the next adjoining County.

Nineteenth. It being necessary to make provision for the management of these Estates, the Governor is commanded to issue, under the Great Seal of the Colony, a Charter* of Incorporation in the words prescribed in the following Clauses of the Warrant.

Twentieth. By that Charter a Body Corporate, to be called "The Trustees of the Clergy and School Lands in the Colony of New South Wales" is established.

Twenty first. The Corporation is to consist of the Governor, as President, the Archdeacon as Vice President, the Chief Justice, for the time being, all the Members of the Council, The Attorney General, the Solicitor General, and all the Chaplains or Incumbents of Livings in the Colony.

Twenty Second. The Company is to have perpetual succession, a Common Seal, the power of suing and being sued, and of holding and alienating lands in the Colony.

Twenty Third. The Governor may suspend, and the King remove, at pleasure, any member of the Corporation.

* Note 248.
20th. General Courts of the Corporation are to be held four times in the year, on fixed days, notice of such meetings being always duly given by advertisements.

25th. The Governor may convene, by advertisements, special General Courts.

26th. The General Courts may make Bye Laws, and repeal or alter them, and such laws, when approved by the Governor, are to be binding on the Corporation.

27th. No Bye Law may be repugnant to the General Law of the Colony, and the King may allow any Bye Law which the Governor has disallowed, or disallow any, though allowed by him.

28th. General Courts may be adjourned, but may not be continued by adjournment for more than two days in the whole, and the adjourned Court must be held within three days from the adjournment.

29th. Committees may be appointed, but not for more than three months, and no Committee is to consist of more than nine or less than five Members.

30th. General Courts are not to proceed to the dispatch of business unless seven members at the least are present.

31st. Committees not to proceed to business unless three members at least are present, nor till a Chairman is chosen.

32nd. All questions are to be decided by the majority in number actually present, the President having a casting vote at all General and Special General Meetings.

33rd. The Corporation may appoint all necessary Clerks and Agents and dismiss them.

34th. The Public Treasurer of the Colony is to be the sole Treasurer of the Corporation, and no other Treasurer is to be appointed.

35th. The Public Office is to be kept at some convenient place in the Colony, and not to be removed except by the Order of a General Court.

37th. The Corporation is to manage the Clergy and School Estates, and is to employ Farmers, Bailiffs, etc., and to erect Agricultural buildings.

38th. The Corporation may sell one third of the lands granted to them, retaining always two thirds.

39th. The Public Treasurer is to receive all the purchase money of any lands thus sold, and he alone is to give receipts for it, and the amount is to be applied to the use of the Corporation and accounted for to the King.

40th. The Corporation may grant Leases for a number of years not exceeding fifty, but is not to covenant for the renewal or further extension of any such leases, nor to take any Fines.
Forty first. The rents received are to be payable and paid to the Treasurer only.

Forty second. The Treasurer is to keep an account with the Corporation; carrying to their credit all his receipts from the sales, or from the rent of Lands.

Forty third. The Treasurer is to issue money only in pursuance of written Orders, made by the Corporation, and signed by three members, and by the President or Vice President.

Forty fourth. The Corporation may borrow money on Mortgage of their Lands, provided that not more than one third of the whole Estate in any one County be mortgaged, and that no mortgage be made for more than fifty years.

Forty fifth. The Company may not contract Debts, in addition to their Mortgage Debts, to an extent of more than one thousand pounds, on pain of forfeiting their Charter, on actions being brought for the recovery of any such Debts.

Forty sixth. The primary application of all the money received from the Estates is to be towards the satisfaction of all costs and expenses incurred in the management and improvement of them.

Forty seventh. The Treasurer is to render an annual Account to the Corporation of all his receipts and payments, which account is to be referred to a Committee to be audited, and the Committee after inspecting all the Books and Papers of the Treasurer, is to report upon his accounts to the General Court, which is to allow them or otherwise as may be right.

Forty eighth. The Treasurer's net balances at the end of each year are to be divided into three equal parts; and for this purpose the Treasurer is to open three distinct accounts with the Corporation.

Forty ninth. One of the three accounts last mentioned is to be called "The Improvement Account"; another "The Clergy Account," and the last "The Building and School Account."

Fiftieth. One third part of the Net balance of each year is to be carried to the credit of each of these accounts.

Fifty first. The money standing to the credit of the "Improvement Account" is to be expended in the clearing or permanent improvement of the Estates.

Fifty Second. The money standing to the Credit of the "Clergy Account" is to be applied in paying the Stipends of the Clergy, and in so doing the Bishop (if hereafter appointed) is to be paid first, and then the Archdeacon, and then the inferior Clergy according to the seniority of Appointment.

Fifty third. The money standing to the credit of "The Building and School Account" is to be expended in the erection of
Churches, Parsonages and School houses, and in the mainte-
ance of Schools and Schoolmasters. The Fund being first applied
to the building of Churches, and then to the erection and sup-
port of Schools, with a power to postpone the former to the latter
object, Provided that a School be never built in any Parish until
a Church shall be erected first in it.

Fifty fourth. If any of these funds are more than adequate
to its object, the excess is to be applied in aid of either of the
other Funds at the discretion of the Corporation.

Fifty fifth. The Schools are to be subject to the direction and
Superintendance of the clergyman of the Parish.

Fifty sixth. The Bishop, or in his absence, the Archdeacon is
to be the Visitor of all the Schools.

Fifty seventh. The Corporation with the consent of the Bishop
may endow any Church with Lands adequate to the support of
the Clergyman.

Fifty eighth. The Corporation is to transmit once in every two
years to His Majesty a full account of the State of their Lands,
of the progress of cultivation, of the amount of their expenditure,
and of the number and description of the Buildings and Churches
erected, and of the manner in which the income of the Corpora-
tion has been applied.

Fifty ninth. A power is reserved to the King to dissolve the
Corporation by any Order in Council, if it shall seem expedient,
in which case the lands are to revert to the Crown, to be applied
in such manner as may seem best adapted to the maintenance of
Religion and Education.

Sixty. A power is reserved to the King to alter any of the
provisions of this Charter, or to make new provisions as occa-
sion may require, by Warrant under the Sign Manual.

Sixty first. When all the objects of the Corporation are ful-
filled, the residue, if any, of the Lands are to be applied as the
King may direct.

Sixty second. The Governor is to grant to the Corporation, in
fee simple, in free and Common Soccage, all the Church and
School Estates as they may from time to time be marked out by
the Commissioners.

ATTORNEY-GENERAL BANNISTER TO UNDER SECRETARY HORTON.

dear sir,

sydney, 16 augt., 1824.

Mr. Forbes has mentioned a point with regard to the
Black Natives, which I most cordially agree with him upon.
They have not that sense of religion, which authorises the taking
of an oath by any form. The consequence is a very frequent
ABBOTT TO BATHURST.

denial of Justice to them. I have no doubt of the present disturbance* in the mountains and near Bathurst being most to be attributed to a gross case of this kind.

The remedy will be in an Act of Parliament enacting that, from certain persons, evidence may be taken without oath. The religious sanction is one only of many, and with these people it does not exist in this shape. Without the passing of such an act as this, the Act of Parliament* of last year with respect to the New Zealanders and others will in many instances be perfectly inoperative.

The impropriety of the rule of law cannot be shewn more strongly.

I am; &c.,

S. BANNISTER.

10 Nov., 1824.—It has, since the writing of this letter, occurred to me that the council here might pass a local act on the subject with a special clause of suspension, inasmuch as the change of principle is considerable.

MR. E. ABBOTT† TO EARL BATHURST.

My Lord,

Rio Janeiro, 22 August, 1824.

I deem it my duty to inform Your Lordship, by the earliest opportunity, that the Lieutenant Governor's Court, of Civil Judicature, which I had the honor to form and preside at for a great many years (having been honored with my appointment from Your Lordship in February, 1814) closed its functions the 10 of May last, the day on which the Supreme Court established for Van Diemen's Land, opened its sittings, and that all muniments and other papers were handed over to the new Court; this arrangement has of course annulled my own appointment and those of the other Officers of the late Court; but we confidently rely on Your Lordship's protection and favor for an adequate provision.

I continued performing some other duties destined for the Court until 11th of June following, and, having taken my passage with a part of my family in the Ship Guildford to return to England, I embarked on the 13th of the same month, and arrived at this place this day.

It also becomes my duty to inform Your Lordship, that I have drawn a set of bills on the Honble. Warwick Lake, Colonial Agent, for 300£ being for my accommodation and passage on board of the Guildford, which I hope Your Lordship will be pleased to sanction.

I have, &c.,

E. ABBOTT.

* Note 250. † Note 63.
1824.
30 Aug.

Opinion re charter for A.A. company.

MESSRS. COLEY AND WETHERELL TO EARL BATHURST.

My Lord,

Lincoln’s Inn, 30th August, 1824.

We have had the honor to receive Your Lordship’s letter transmitting to us the Draft of a Charter, which it was proposed to grant in compliance with the provisions of an Act passed in the last Session of Parliament, intituled, “An Act for granting certain powers and authorities to a Company to be incorporated by Charter, to be called The Australian Agricultural Company, for the cultivation and improvement of the Waste Lands in the Colony of New South Wales, and for other purposes relating thereto”; and Your Lordship was pleased to desire that we would take the Same into Our consideration, and report to Your Lordship whether in our opinion any alterations or additions might be advisable for carrying into effect the objects contemplated in the Act of Parliament above mentioned.

In compliance with Your Lordship’s directions, We beg leave to report that we have taken the same into our consideration and that in our opinion no alterations or additions are necessary or advisable for carrying into effect the objects of the above mentioned Act.

We have, &c.,

J. S. COLEY. CHS. WETHERELL.

2 Sept.

Opinion re papers in case of H. G. Douglass.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir,

Lincoln’s Inn, 2nd September, 1824.

I had the honor to receive your Letters of the 15th and 17th of July last, enclosing various documents, which had been transmitted from New South Wales on the subject of the proceedings which have taken place in that Colony, in the case of Doctor Douglas,† a magistrate, accused of immoral conduct towards his female servant, Ann Rumsby; and I am to report to you, for Lord Bathurst’s information, my opinion how far the conduct of the several persons implicated in those proceedings was or was not consistent with Law.

A recapitulation of the facts of this case must necessarily precede the statement of any opinion upon the question proposed to me.

It appears then that Ann Rumsby was transported to New South Wales in a Ship, called the Mary Ann, of which Dr. Hall was the Surgeon Superintendant. She was only nineteen years of age, and is said, by Doctor Douglas, to have once lived in infamy, though never in “open prostitution.” It is a fact, not immaterial to mention, that this Female, in the judgment of all the persons who have interfered on this occasion, possesses

* Note 244. † Note 251.
considerable personal attractions. Doctor Douglas, a Magistrate of the Colony, and Superintendent of the Female Factory, by his own authority, as it would appear, removed her from that Establishment, and placed her in his own family. Doctor Douglas is a married man, and, as I apprehend, is also the Father of a Family.

It appears that, on the 31st of July, 1822, Doctor Hall, accompanied by Sir John Jamison, called at the house of Doctor Douglas in Parramatta. On this occasion Doctor Douglas was absent from home, and some conversation took place at his house between Doctor Hall and Ann Rumsby. Doctor Hall then quitted the house, and proceeded on the road leading to Sydney. At a particular place in this Road, Doctor Hall was joined by this Female. Some conversation then took place between them, after which she returned to the house of Doctor Douglas. So far the facts are undisputed. With respect to the character and object of these communications between Doctor Hall and Ann Rumsby, there is a most important contradiction. On the one side Doctor Hall asserts that Ann Rumsby, on this occasion, said that her Master, Doctor Douglas, had made many attempts to seduce her; that she even declared that Doctor Douglas had made frequent attempts to force her to comply with his wishes; that she stated certain particulars in Doctor Douglas’s conduct towards her of gross indecency, and which could not possibly have had any other object than that of compelling her to yield to his lewd desires. Doctor Hall further represents Ann Rumsby to have entreated him, as her only friend in the Colony, to have her removed from Doctor Douglas’s house, saying that “She was sure he, Doctor Douglas, would be her ruin.” On the other hand, the Governor, in his Dispatch* to Lord Bathurst, recapitulates the Facts of the Case in a manner the most unfavorable to Doctor Hall himself. He represents that the interview between Doctor Hall and Ann Rumsby, at the house of Doctor Douglas, lasted about three minutes; that their subsequent interview on the road was solicited by Doctor Hall, who hired and dispatched a person to desire Ann Rumsby to join him; and that they remained together on the public road but for a little while. The Governor proceeds in these words: “They,” that is, Ann Rumsby and Doctor Hall, “retired from the road into some Brushwood, where they remained about Twenty Minutes. They afterwards returned to the Road together, where they separated, when the girl, coming back to her home, was questioned as to what had been passing, and said that Doctor Hall had been making her promises, and had given her a ten shilling note.” The meaning of this passage, especially when connected with others which

* Note 251.
follow it, is too obvious for doubt. Perhaps I may be permitted to observe that it is to be regretted that, in his communication to Lord Bathurst, as well as in some other of the Papers written by his order in reference to the case, the Governor should have adverted to the conduct of Doctor Hall in terms of indirect insinuation and sarcasm, rather than in plainer and more direct language. Although Sir Thomas Brisbane has not, in so many words, expressed his opinion, it is yet beyond question that he means to impute to Doctor Hall himself the very heinous crime of first seducing this young woman under the mask of Friendship and Religion, and then falsely exhibiting himself to the World as the Protector of her virtue against the seduction and violence of Doctor Douglas. A higher strain of wickedness it would be difficult to imagine, and the accusation, if made at all, ought, I submit, to have been preferred in the most distinct and solemn manner.

Without, however, pausing in this place to investigate the truth of this imputation against Doctor Hall, I proceed to state that, on the very day on which these interviews took place, that is, on the 31st of July, 1822, Doctor Hall repeated to The Reverend Samuel Marsden, a Magistrate, all the expressions of which he states Ann Rumsby to have made use in reference to Doctor Douglas. Doctor Hall expressed to Mr. Marsden his wish that Ann Rumsby might be removed to the Family of Mr. Field, the Judge, and requested Mr. Marsden to pay a special attention to her, and if necessary, to afford her protection. Mr. Marsden assured him that he would take care to have the girl removed. Doctor Hall then informed Mr. Marsden that he, Doctor Hall, would write to Ann Rumsby, and inform her that he had made her situation known to Mr. Marsden, and that the latter would interfere in her behalf, if she had occasion to apply to him. In fact, Doctor Hall did write a letter to this effect on the 2nd of August. This letter was delivered open by Doctor Hall to Sir John Jamison. By the latter it was delivered to Mr. Marsden, who sealed it, and sent it by the Chief Constable to the Woman herself. I attach much importance to these facts, since the Letter, which will be found at length in the accompanying Papers, is of such a description as would, in my own mind at least, excite a strong prejudice against Doctor Hall, if the fact had been that it was sent without the sanction of any one besides himself. It is a Letter containing, what I cannot but think, very misplaced and injudicious allusions to the personal Beauty of the Female Convict, to whom it is address'd, and there is a certain familiarity and warmth of expression in it, which are scarcely consistent with strict propriety. Considering,
however, that this letter was shewn to two Gentlemen, for their previous approbation, and that one of them, a clergyman and a Magistrate, himself despatched it, I think it merely justice to infer that the writer could not have had any bad intention, and that the peculiarity of his style is to be accounted for by supposing him deficient in delicacy and justness of Feeling, rather than in moral purity. A man, conscious of a criminal connection with this Woman, would, I think, have observed infinitely greater caution in a Letter, which he had laid before two Gentlemen for their perusal and approbation. The general object of it is to exhort her to perseverance in Virtue; to point out Mr. Marsden as her Protector, in case of need; and to obtain from her a written statement of her complaints against her master. Mr. Marsden himself applied to the lady of Mr. Justice Field to know whether she would take this Female into her service, but Mrs. Field had no opportunity of employing her. Mr. Marsden then called upon Doctor Douglas and recommended him, as Mrs. Field did not want the girl, to send her to the Factory, observing that he had very strong reasons for giving him that hint.

Ann Rumsby still continuing in Doctor Douglas's employment, the Banns of Marriage were published between her and a convict named Bragge by Mr. Marsden. It would seem that Doctor Douglas was a second time advised by Mr. Marsden to send the Woman out of his house to the Factory; but that the particular reason of this advice was not communicated by Mr. Marsden, and that Doctor Douglas did not follow it.

It does not appear that Doctor Douglas was aware, before the 13th of August, of the communication which had taken place between his Servant, Ann Rumsby, and Doctor Hall on the 31st of the preceding month. On the 13th of August, however, Dr. Douglas apprized Mr. Hannibal McArthur that he had discovered what had passed. At his request, Mr. MacArthur questioned Ann Rumsby, in private, in order to ascertain what she might have to complain of. She answered that her only complaint was that she was about to be married to Bragge, contrary to her own wish, and added that, when she said to Doctor Hall that she would be ruined by remaining in Doctor Douglas's family, she had alluded to this circumstance. Mr. MacArthur therefore considered the matter as a subject of trifling importance, but advised Doctor Douglas, who appeared annoyed at the imputation against his character, to lay the case before a Bench of Magistrates, whenever three or four might be met together. Doctor Douglas, instead of following this advice, wrote Letters, both to Mr. Marsden and Doctor Hall, desiring to see them at his House at Parramatta. Doctor Hall declined.
this interview, and, on the 14th of August, addressed an official letter to Mr. Marsden, as a Magistrate, calling on him to interfere to prevent the apprehended ruin of this Female, and, for that purpose, to send for her in order that she might be examined as to the particulars of the case. On the following day, the 15th, Mr. Marsden informed Doctor Douglas that he had received this communication, and, on the same day, Mr. Hannibal MacArthur advised Doctor Douglas to meet the accusation calmly, and, in the mean time, to send the woman out of his house. Doctor Douglas would seem to have, at first, acquiesced in the propriety of this measure, but, on the same day, he changed his determination. He expressed to Mr. MacArthur in very warm terms his resolution not to submit to any investigation before the Magistrates, and would seem to have spoken of them and of their authority with very little respect.

On the following day (the 16th of August) a meeting of four Magistrates took place, Mr. Marsden and Mr. MacArthur being of the number. Before this body, Mr. Marsden produced the letter addressed to himself by Doctor Hall. A message was accordingly sent to Doctor Douglas requesting his attendance. It appeared, however, that Doctor Douglas and Ann Rumsby had both quitted Parramatta on that morning for Sydney, and that Ann Rumsby had slept, the preceding night, in the house of the Chief Constable, Mr. Thorn. The Magistrates accordingly adjourned all further enquiry into the case until a future day. Before their adjournment, however, they resolved that, as Doctor Douglas had been informed by Mr. Marsden and Mr. MacArthur of the intention of the Magistrates to meet on that day for the investigation of the Complaint, he had, by withdrawing himself from the Town, without any intimation of his intention to the Magistrates, and sending off the Woman, treated the Magistrates assembled with disrespect and contempt. And this resolution proceeded to say "that they should not do justice to their feelings, did they not express, in the most decided manner, their sense of the great impropriety of such conduct towards them, by which they are brought to a determination no longer to associate or act with him as a Magistrate."

In the meantime, the Woman was produced at Sydney before the Governor, and in his presence declared that she had no complaint to make against her Master, but had always been treated by him with the greatest kindness. Upon this, the Governor permitted her to return to Parramatta.

After the breaking up of the Meeting of Magistrates, at Parramatta, on the 16th of August, Doctor Hall repaired to Sydney, and applied to Mr. Wylde, the Judge Advocate, to afford
his assistance to promote the investigation of Doctor Douglas's Conduct. The Judge Advocate referred Doctor Hall to the Superintendant of Police. The latter Gentleman, however, declined to interfere, on the ground that the subject was under the cognizance of another Magistrate, viz. the Colonial Secretary. Doctor Hall then applied to the Colonial Secretary, by whom he was desired to send a written statement of the case, which he, the Colonial Secretary, promised to lay before the Governor. Doctor Hall did accordingly on the same day draw up and transmit this statement to Major Goulburn. He also addressed a letter to the Judge Advocate, calling on him, as the Chief Criminal Judge of the Colony, to interfere in order that Ann Rumsby might be placed in a situation, where she would be free from the power and influence of Doctor Douglas. The Judge Advocate immediately addressed a letter to the Colonial Secretary, desiring to be informed where Ann Rumsby was to be found. This letter was instantly answered by a Note from Major Goulburn, informing the Judge Advocate that the Woman was with Mr. Thorn, the Chief Constable. The Judge Advocate then addressed a letter to the Bench of Magistrates at Parramatta, transmitting to them a copy of Major Goulburn's Note, and stating that "as the obstruction to their proceeding with the case seemed to be removed, he, the Judge Advocate, left to them to adopt the fit further proceeding upon Doctor Hall's complaint."

On the following day, viz., the 17th of August, another meeting of the Magistrates was held, when the whole of the preceding correspondence between Doctor Hall, the Judge Advocate and Major Goulburn was laid before them. They accordingly sent the constable to produce Ann Rumsby, who, it appeared, was still in the house of Doctor Douglas. This Gentleman, however, was not at home, and Mrs. Douglas would not, in her husband's absence, permit the attendance of her servant. A warrant was accordingly issued to compel her attendance, and she was accordingly brought up and lodged in the Orphan house, until Doctor Douglas should appear to hear and answer the complaint against him. Mr. Marsden then, by the desire of the Magistrates, wrote a letter to Doctor Douglas, informing him that the investigation of the Complaints against him would take place at ten o'clock on the 19th of that month. A letter was also written by the Magistrates to the Governor, inclosing their resolution on the Subject of Doctor Douglas. In answer to Mr. Marsden's letter, Doctor Douglas wrote to that Gentleman, on the 19th of August, a Letter declining to attend the Magistrates, lest his presence should, in any degree, influence...
Ann Rumsby’s statements, but desiring that the Examination might be reduced to writing, in order that he might make such observations upon it, that he might afterwards think proper.

On the 19th of August accordingly, the Investigation proceeded in the absence of Doctor Douglas. Doctor Hall produced an Affidavit, sworn by himself, to prove that Ann Rumsby had actually made to him the Complaints and representations so often referred to. The Woman was then examined at very great length, and, in her examination, distinctly and repeatedly asserted that she had not accused her Master, Doctor Douglas, of the conduct in question. She admitted using the expression that “she would be ruined if she remained in her Master’s family,” but she declared that Doctor Hall had misapprehended her meaning, and that the “ruin” to which she adverted consisted in the apprehended marriage with Bragge. She further asserted that her Master and Mistress had always treated her very kindly; that Doctor Douglas had always behaved very well to her; and that he had never taken indecent liberties with her. With respect to Doctor Hall himself, she no less acquitted him of having been guilty of any improper conduct towards her, stating that his general conduct to her had been “like that of a Father.” It must, however, be remarked, in illustration of this very singular case, that, in answer to questions proposed by Dr. Hall himself, Ann Rumsby communicated some information, which would strongly corroborate the opinion, that this Gentleman is singularly deficient in delicacy of Feeling, and of conduct. He asks her this question, “Was Doctor Hall in the habit of kissing some of the young women, after punishing them, if they were sorry for their offence?” The question refers to the voyage to the Colony, in which Doctor Hall was Surgeon Superintendent. Her answer to this question is “Yes.” The result of the whole investigation appears to have surprized the Magistrates, who conducted it. They proceeded to express their conviction of the propriety of Doctor Hall’s conduct, and their abhorrence of the conduct of Ann Rumsby, and declared themselves to have the fullest conviction that she had been guilty of wilful and corrupt perjury. They, therefore, sentenced her to be imprisoned, until an opportunity should offer of sending her to Port McQuarrie, where she was sentenced to be kept during the remainder of her term of Banishment.

Contemporaneously with these proceedings, a Correspondence was proceeding, between the Colonial Secretary and Doctor Hall. Major Goulburn writing by the direction of the Governor, on the 17th of August, called upon Doctor Hall for a variety of information, in explanation of the Letter of complaint, addressed
by the latter to the Governor. In one passage of this letter, an
insinuation is obviously conveyed that Doctor Hall had given
money to this young woman from impure or improper motives.
This letter was accordingly answered by Doctor Hall in terms
of vehement indignation.

The result of the whole transaction was that the Governor, on
the 21st of August, informed the Magistrates that, if they per-
severed in their resolution not to act with Doctor Douglas, they
might adopt the alternative of transmitting their own resigna-
tion. To this letter the Magistrates, on the 22nd of August,
wrote an Answer, in which they adhered to their determination
to act no longer with Doctor Douglas, transmitting at the same
time a Copy of the Examinations taken before them in the case
of Ann Rumsby. On the 23rd of August, a General Meeting of
Magistrates took place at Parramatta, which was attended by
the Judge Advocate (Mr. Wylde), the Judge of the Supreme
Court (Mr. Field) and six other Gentlemen, who had not
attended the proceedings in Ann Rumsby’s case; and these
Gentlemen came to a resolution, expressing, in very warm terms,
their approbation of the conduct and character of their Brother
Magistrates. These Gentlemen were, however, removed by the
Dismissal of
Governor from the Commission of the Peace, and the Punish-
ment, to which Ann Rumsby was sentenced, was, as I collect,
remitted; the Magistrates themselves having made an applica-
tion in her favor, on the ground of the undue influence of
Doctor Douglas, under which they conceived her to have acted.

Such, as far as it is to be collected from the numerous Papers
before me, is in general the state of this case. I now proceed
to express my opinion on how far the several parties, concerned
in this transaction, were right, or in error, in the conduct which
they severally adopted.

With respect to the Magistrates, I am very clearly of opinion
that the measures taken by them were equally illegal and in-
judicious. Lord Bathurst will probably be disposed to make
great allowance for the peculiarity of the situation and of the
state of Society, in which these gentlemen are placed. Nor do I
apprehend that his Lordship would deem it just to exact the same
scrupulous adherence to the forms of Justice in New South
Wales, as is observed in England, provided that nothing be
done substantially unjust. But, even after giving the utmost
possible weight to these considerations, still the conduct of the
Magistrates cannot, I think, be vindicated. They resolved to
decide acting in future with Doctor Douglas, for his disrespect
in not attending their meeting, and thereby they passed the
highest censure, in their power, on his conduct. This they did,
1824.
2 Sept.

Opinion re illegal and injudicious actions of magistrates.

without hearing his explanation of the cause of his absence, without even enquiring whether any such explanation could be given, and without ever having issued any formal Summons requiring his attendance. But their judicial Sentence against Ann Rumsby seems to me more repugnant to the clearest maxims, both of Law and of moral Justice. They convicted her of Perjury, although she had not been brought before them upon any accusation of that nature, or indeed upon any accusation at all. They convicted her upon the contradiction of a single witness, whereas nothing is more plainly equitable than the rule of Law that the concurrent testimony of two witnesses is necessary to convict anyone of Perjury. They convicted her without calling upon her for her defence, or even giving her any intimation that so grave an offence was imputed to her. They passed a sentence which, in any case, would have been excessively severe, and far exceeding what the Law of England authorizes. She was ordered to be imprisoned, and to be banished among the very worst class of convicts at Port Macquarie, for several years. And, at last, I cannot but think it exceedingly doubtful whether she was, in fact, guilty of false swearing. Doctor Hall asserted that she had used various expressions, some of which she admitted, and others of which she denied. Without imputing to either of them the crime of Perjury, the contradictions between their statements may, in great part, be accounted for by supposing, not that he misquoted her expressions, but that he misunderstood the meaning of them.

With regard to Doctor Douglas, I think it would not be just, or reasonable, to conclude that he was guilty of the Offence laid to his charge. The accusation rests wholly upon Doctor Hall's report of a private conversation with the Female Servant. But that very Servant has, upon her oath, repeatedly and distinctly denied both that Doctor Douglas was guilty of the Offence, and that she had even accused him of it. In effect, therefore, there is no evidence whatever against him, for the only witness, who was called to prove his guilt, positively asserted his perfect innocence. I, however, submit to you that Dr. Douglas's conduct was, at least, injudicious. A man, perfectly free from all consciousness of guilt, ought rather to have courted the most public enquiry, than to have resisted it to the utmost of his power. A due jealousy for his own reputation would also have suggested the propriety of removing this young woman from his house and influence, as soon as the imputation against himself became known to him. Finally, I think that a just sense of what was due to his Brother Magistrates would have led him to conduct himself towards them with more forbearance and courtesy. Yet
I cannot think that this Gentleman ought to incur any severe censure for these failures in prudence and self command, considering how exquisitely painful and embarrassing were the circumstances in which he was placed.

With respect to the conduct of Doctor Hall, I must observe that it would be difficult to find language strong enough to describe the infamy of his conduct, if it were really true that he was himself the seducer of Ann Rumsby. I have already observed that the Governor plainly insinuates his opinion that such was the case. In support of this opinion, he transmits the Affidavits of two of Doctor Douglas's Servants, with the Affidavits of two persons named Matthew Finnegan and John Farley. Three of those persons are Convicts, and two of them are unable to write. Upon what occasion these Affidavits were taken is not stated. Still less does it appear that the contents of them have been communicated to Doctor Hall. They are not, therefore, entitled to very much regard. It must, however, be stated that three of these persons prove, First, that Ann Rumsby did not voluntarily go to speak to Doctor Hall on the Sydney Road; but that Doctor Hall sent for her to join him; and two of them have sworn that these parties retired from the public road into a Wattle or Copse adjoining it, where they remained alone for about Twenty Minutes. It is quite clear that the Deponents mean to insinuate that this was done for an improper purpose. I should hold it highly unjust to adopt any conclusion to the prejudice of Doctor Hall's character, founded on evidence which he does not appear to have had an opportunity of repelling. I should the rather hesitate to adopt any such conclusion, because Doctor Hall appears to have conducted himself, in every part of the transaction, with great apparent openness, and because, from the two instances already pointed out, it may be collected that his ordinary manner and address are greatly deficient in decorum and delicacy, a defect which is not only compatible with purity and virtuous conduct, but which may also afford a satisfactory explanation of facts which, in characters of greater refinement, could have but one meaning. A Man, who solicited the attention of a Bench of Magistrates to the fact that he had been in the habit of kissing the young Female Prisoners under his charge, as a reward for their penitence, and who delivered to a Clergyman a Letter to be forwarded to this female Servant containing frequent allusions to her personal beauty, may have possibly been unconscious of the flagrant impropriety of sending for that Servant from her Master's house, and retreating with her, from the public road, into a place of secrecy and retirement. I am further induced to submit to you these suggestions in favor of
Doctor Hall's conduct, because I hold it unreasonable, without the strongest evidence, to believe any man guilty of such extraordinary wickedness, as to begin by debauching a young unprotected woman, who had been placed under his care, and then to assume the character of her religious counsellor, in order to fix upon an innocent man the very offence of which he himself had been guilty. If such really was the conduct of Doctor Hall, I presume Lord Bathurst would feel it his duty to prevent his ever being employed again in His Majesty's Service. But, till Doctor Hall's answer to the Affidavits against him be known, it would, I submit, be premature to take any measures respecting him.

With regard to the part which was taken by the Governor in this transaction, it is for Lord Bathurst alone to decide whether the offence of the Magistrates was such as to require their removal from Office, or whether milder methods might not have been properly adopted; and whether it may not now be expedient to reinstate these gentlemen, whose services appear to be highly valuable to the Colony. I have, however, to observe that there are two circumstances of a very peculiar kind connected with the Governor's conduct, to which it may be necessary for Lord Bathurst to advert. It is distinctly asserted by Mr. MacArthur and by Captain King that Sir Thomas Brisbane was made acquainted with the whole of the proceedings against Doctor Douglas during their progress, and that the Governor actually informed both of these gentlemen, that "he was not only perfectly satisfied with, but also highly approved of the conduct of Mr. MacArthur on the occasion, and particularly so, since Mr. MacArthur had assured him, both officially and privately, that the refusal of the Bench to act with Doctor Douglas was not meant either disrespectfully to him, the Governor, or to his Authority." This Language Captain King states to have been used by the Governor to himself. Mr. MacArthur states that the Governor "gave him repeated assurances of his satisfaction of the conduct of the Magistrates." Mr. MacArthur adds that he therefore acted throughout in reliance to the Governor's assurances of his perfect approbation. The same statement is, in substance, repeated by Mr. Marsden. All these gentlemen, therefore, declare that their subsequent dismission from office was a matter of the most perfect surprize and astonishment. Mr. Marsden adds that the Governor even went so far as to instruct the Crown Solicitor to prosecute the Magistrates for a conspiracy against Doctor Douglas, for having done these very Acts which he himself had sanctioned and expressly approved. In what manner the Governor answers this charge does not appear. But
STEPHEN TO HORTON. 567

upon the Papers before me, it would seem impossible to avoid the conclusion that his behaviour was marked with extreme inconsistency, if not with an actual breach of good faith. In connection with the same subject, I must observe that the narrative, which the Governor transmitted to Lord Bathurst, is not fully borne out by the Documents which accompany it. Sir Thomas Brisbane must have had before him some communications, either written or oral, from Doctor Douglas, which he has not transmitted, many parts of this Despatch relating to the motives and private conduct of Doctor Douglas in particulars, which are not noticed in any other part of these papers. The Dispatch is not, I think, an impartial representation of the Facts of the case. It omits much which is highly important, and communicates only such occurrences as are favorable to Doctor Douglas. Nevertheless, I think that a more full and equal representation of the case would, in fact, have afforded a far better vindication of that Gentleman's conduct.

I have, &c.,
JAMES STEPHEN, Junr.

MR. J. STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir, Lincoln's Inn, 22nd Sepr., '24. 22 Sept.

In compliance with your directions, I have prepared and have the honour herewith to transmit to you the Draft of a Warrant to be issued under His Majesty's Sign Manual upon the appointment of any Chaplain, who may hereafter be sent to the Colony of New South Wales. I have, &c.,
JAMES STEPHEN, Junr.

[Enclosure.]

DRAFT OF WARRANT.

GEORGE THE FOURTH, By the Grace of God, of the United Kingdom of Great Britain and Ireland, King Defender of the Faith, and so forth. To Our Trusty and Well beloved Sir Thomas Brisbane, Knight Commander of Our Civil and Military Order of the Bath, Governor and Commander in Chief in and over our Colony of New South Wales, Greeting.

Know ye, That We have nominated and appointed, and Do hereby nominate and appoint, Our trusty and well beloved A—— B——, Clerk, Master of Arts (or as the case may be) to be one of Our Chaplains within Our said Colony, He the said A—— B—— being a Priest in Holy Orders of the Established Church of England and Ireland; and we have granted, and Do hereby grant, to the said A—— B—— a Salary of £—— Sterling
British Money, by the year, such salary to commence and be computed from the day on which he, the said A—B—shall actually depart from the United Kingdom aforesaid to take upon him the duties of such his Office. And it is Our Will and Pleasure that the said salary shall be paid to the said A—B—by the Public Treasurer of Our said Colony, in pursuance of Warrants to be, by you, issued for that purpose on the 24th day of June, and on the 25th day of December in each year, from and out of such Public Money as shall then be in the hands of the said Treasurer lawfully applicable to that purpose. And it is Our further will, that the said A—B—shall hold such his Office during our pleasure and no longer. And We do further direct and Command, that the said A—B—so long as he shall retain his said Office, shall officiate as a Minister of the Established Church aforesaid, at such places or place within Our said Colony, as the Venerable the Archdeacon for the time being of the said Colony shall, from time to time, appoint, it being Our will and pleasure That the said Archdeacon shall commit to the said A—B—such spiritual charge within Our said Colony as the said A—B—shall appear to him best qualified to execute, and as may most effectually tend to the advancement of Religion and Virtue within Our said Colony.

Given at Our Palace of this day of in the year of Our Reign.

By His Majesty's Command,

Bathurst.

ATTORNEY-GENERAL BANNISTER TO UNDER SECRETARY HORTON.

Dear Sir, Sydney, 1 October, 1824.

The duties of my office are so much connected with the Emoluments of it that I need not scruple to request you will be pleased to consider and to lay before Earl Bathurst, if you think proper, the following Statement. I have been unwilling to write an expressly official Letter on a subject so personal to myself. The Office being new and upon an experimental plan, I will unreservedly express my doubts of the prudence of the present arrangement of it. For various reasons, it was settled in England that the private practice should be that of a barrister only; the consequence is that I lose the largest part of the Colonial Crown lawyer's usual Advantages. When discussing the question of a fit remuneration with Mr. James Stephen in Downing Street, I believe that we both thought that the Attorney General in the smallest Colonies made upwards of £2,000 a year.
and we agreed that their situation must regulate that of the law officer in New South Wales. I certainly distrusted the extravagant statements I heard in conversation on the subject, but I relied on the income being, by ordinary diligence at the least, of that amount yearly. Upon being asked what besides the private fees as a barrister would be a sufficient Salary, I expressed myself strongly that a large one would be necessary. I was then asked if I thought that £1,500 a year would be a proper government remuneration; I said, with a reserve as to the possibility of judging accurately in England of so new a thing as to the extent of mere barrister’s practice in a small Colony, that it might be sufficient. It was not then stated to me that I was not to have the court of requests, pursuant to Mr. Bigge’s recommendation. I had heard, but on no authority, that I was to have it. The present arrangement, however, I admit to be a more useful one for the Colony, inasmuch as it brings another Barrister hither. But it is an arrangement prejudicial to the Attorney General, both as to the appointment which he has not, and as it has brought one competitor more than was expected for private practice. I also assumed (without any stipulation indeed, but I think Mr. James Stephen assumed with me) that a house would be provided. I had a general expectation of other Advantages. The Office was in some degree new, but I succeeded to many of the duties of the Judge Advocate as well as to those of other Officers; and some things of considerable importance I have to do, not before requiring attention; I thought therefore (without making stipulation) I might prudently rely on receiving an income approaching to that of the Judge Advocate. But I believe that mine of £1,200 a year does not amount to scarcely one third of it. Besides his salary and fees, he had a house and separate offices, Coals, rations, grants of Land both in Country and Town, with Cattle to a considerable amount. He had also to assist him in preparing Cases for trial an acting Clerk of the Peace at £100 a year, who received fees, an Officer I am now paying for myself, or whose duty I must do. I hope not to be understood to speak personally of Mr. Wylde. I mention his Office, inasmuch as I have succeeded to many of his duties, having, however, many things to do which he had not. The source of income, which was expected to have made my post equal to the same in other Colonies, has hitherto absolutely failed. In six months, I have not made twenty pounds as a barrister, independently of a small sum receivable eighteen months hence for acting under a power for a person in England. The opinion that £1,200 a year would be a sufficient Salary being founded on an expectation which has failed, that the Attorney
General might make upwards of £800 a year by private practice, ought I think to be reconsidered; either he should be allowed to practice here as elsewhere in small Colonies as an Attorney, or his fixed income should be increased. I am not prepared to say which I think the wiser course. By the restraint he is secured from some influences, a point of frequent anxiety in the government of other Colonies; but he is thus deprived of considerable means of experience. If these remarks are just, they may suggest a change for the future. Besides which, for the past I think I am entitled to compensation for the time during which my income has been and will continue to be so much below what was expected by Lord Bathurst and by you. The disappointment has arisen I conceive either from Mr. Bigge's misapprehension of the law practice of the Colony, or from an experiment in confining the Attorney General to barrister's practice, of the prudence of which I always expressed doubts. Perhaps both circumstances have concurred.

It has been necessary to arrange the most conveniently and safely the criminal prosecutions. After waiting for a few months in order to have the benefit of some experience, and after trying upwards of one hundred prisoners, I reported to His Excellency the Governor that I considered a Clerk of the Peace unnecessary for the Criminal Court, altho' at present indispensable to the Magistrates in Sessions; but I stated that a Copying Clerk would be necessary to the Attorney General. His Excellency however thinks that his instructions restrain him from allowing me such a person. If this is correct, and I am to pay upwards of £100 a year to a Clerk, and more than £150 for a house, the post I occupy will be inferior to those of equal rank in any other part of the World; and the public business of my department will be done more cheaply than that of any other in His Majesty's dominions. The Colonial Secretary is next below myself in precedence, if the American Colonies regulate this; and he has two houses and an Office. The other Officers of Government, except those who are recently arrived, have also houses, which are the more wanted by strangers to the Country coming to it for a few years, as they have not the ordinary advantage in respect of rent, either by building or taking long leases. The expence of living, to those who are not allowed to have land (which indeed is now much occupied near Sydney), is great. My Establishment is on the lowest possible scale, and I live in much seclusion; yet I am quite sure that £800 a year will be expended without the common proprieties of my situation being exceeded. To accumulate something is not less important to me than to the mass of prudent lawyers; but the more pressing
circuit of having made engagements depending on an authorized anticipation induces me to enter into details, which I would willingly have spared you the trouble of considering. I do not wish to speak of my own exertions, when I state that for six months I have been incessantly and anxiously occupied, and within the last fortnight an important collection of documents, the laws of the Colony from its foundation, have been put into my hands by His Excellency for revision. I expected my office to be laborious; and I have no intention of avoiding what is at the least the means of improvement. But the contrast is remarkable between the perfect fulfilment of so much of my anticipations as related to the task to be performed and the failure of the expected reward.

If, upon reflection, you should consider that £1,200 a year may be permanently relied on as a sufficient Salary to induce competent lawyers to accept the post I have the honor to fill, I beg the favor of your stating to Lord Bathurst that I shall be glad to serve the King in Ceylon, in the Isle of France, or at the Cape of Good Hope, or wherever the Climate may be thought to render much higher incomes proper. It may happen in the distribution of public Officers that this offer can be accepted; the splendid atmosphere of New South Wales may present inducements to others, which I shall be content to forego.

I think I may venture to hope that such reports, as you may have received of my official and general Conduct here, will not have disqualified me for posts of an equal rank to that, of which it has been no inconsiderable gratification to me to have been thought worthy.

I am, &c.,
S. BANNISTER.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Dear Sir,
Lincoln's Inn, 15th October, 1824.

I forgot to mention to you yesterday, amongst other New South Wales subjects, that of the Commutation of Punishment in the case of John Cahill.* This case was referred to me, I presume, through inadvertence. Cahill was convicted of a Burglary and Assault, and condemned to die, and his Sentence was commuted for that of Banishment for life to Port Macquarie. Upon this case I am not aware that any question arises upon which I have any right to express an opinion. Whether Cahill was properly convicted or not upon the Evidence before the Court is a question, which it would be unusual and most inconvenient to agitate, as his life is not in jeopardy. If Lord

* Note 252.
Bathurst or Mr. Peel should undertake to review Trials in which the result is not a Capital Punishment, they would scarcely have leisure for any other occupation.

With respect to the Commutation of Punishment, the case forms one of that class of cases, respecting which I understand Mr. Peel has already intimated his opinion to your Office. Unless I am mistaken, a communication was made to Lord Bathurst that Mr. Peel disapproved of the habit of commuting punishments, which has prevailed to a very great extent in the Colony. If Lord Bathurst concurs in Mr. Peel’s view of this subject, I presume that General Instructions will issue accordingly, and if so, the case of Cahill will be disposed of by establishing the General principle. When, as in his case, commutations have actually been made, I take for Granted that they will be sanctioned, although the system should be checked in future.

I am, &c.,

JAS. STEPHEN, Junr.

ORDER IN COUNCIL.

19th October, 1824.

[A copy of this order, authorizing judges in N.S.W. and Tasmania to prescribe rules and orders of court, will be found on page 426 et seq., volume XI, series I.]

LIEUT.-GOVERNOR ARTHUR TO EARL BATHURST.

20th October, 1824.

[A copy of this despatch re the duties of the master of the supreme court will be found on page 197 et seq., volume IV, series III.]

LIEUT.-GOVERNOR ARTHUR TO EARL BATHURST.

28th October, 1824.

[A copy of this despatch re proposed members of council for Tasmania will be found on page 225 et seq., volume IV, series III.]

SIR THOMAS BRISBANE TO EARL BATHURST.

1st November, 1824.

[Copies of these two despatches, suggesting the names of proposed members of council, and reporting the first meeting of council, will be found on page 406 et seq., volume XI, series I.]
BANNISTER TO BATHURST.

WARRANT APPOINTING MEMBERS OF COUNCIL IN N.S.W.

16th November, 1824.

[A copy of this warrant will be found on page 424 et seq., volume XI, series I.]

COLONEL SORELL TO EARL BATHURST.

26th November, 1824.

[A copy of this letter, transmitting a petition praying for a separate government* in Tasmania, will be found on page 576 et seq., volume IV, series III.]

EARL BATHURST TO SIR THOMAS BRISBANE.

21st December, 1824.

[A copy of this despatch, detailing the erection of an archdeaconry, will be found on page 419 et seq., volume XI, series I.]

EARL BATHURST TO SIR THOMAS BRISBANE.

1st January, 1825.

[A copy of this despatch, giving instructions for the subdivision of the lands of the colony, and enclosing the draft charter for the management of the church and school estates, will be found on page 434 et seq., volume XI, series I.]

EARL BATHURST TO SIR THOMAS BRISBANE.

6th January, 1825.

[A copy of this despatch, conveying instructions for the administration of the government† by the lieut.-governor, assisted by two members of council, will be found on page 465 et seq., volume XI, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

8th February, 1825.

[A copy of this despatch, enclosing queries submitted by the attorney-general for decision, will be found on page 495 et seq., volume XI, series I.]

ATTORNEY-GENERAL BANNISTER TO EARL BATHURST.

Sydney, New South Wales,

My Lord,

I have the honor to lay before Your Lordship a packet of papers, relative to my office and the emoluments of it; Upon which I have the utmost confidence that my statement will not be thought unreasonable, in regard to my personal interests, unless I have absolutely misunderstood the nature of my duties.

* Note 253. † Note 254.
It is in the same confidence of not being deprived here or elsewhere of a fair reward for my willing past and future services, that I now state my inability to continue to serve His Majesty, if a permanent change be not made in the emoluments of my post.

I have not had time to draw up these papers in the manner I could have wished; and I am sorry that neither Mr. Forbes nor Mr. Stephen have been able to add their experienced views to mine on this subject. The time afforded them has been too short to admit of its being done pursuant to my enclosed request to His Excellency.

I accepted my office upon an expectation that it would be at the least as advantageous to me as similar posts are to other Crown officials elsewhere; and I trust that my fulfilment of its duties, if done with ordinary judgement and abilities, will entitle me to that Compensation for the past and the future, which I have persuaded myself the nature of my services justify in asking.

I may take the liberty to give your Lordship a very decided opinion that, so long as it is thought good that the Governor of New South Wales and the Secretaries should not be persons of some legal experience, the duties of the Attorney General will be increased rather than lessened with the enlargement of the Colony. I by no means presume to offer a sentiment now on the proper qualifications of a Governor and these officers, but I state my impressions as to the prospect for my own post.

During many years to come also, the Commercial Calendar of the Supreme Court must continue great, and the Crown Civil law business cannot fail to increase. I have been unwilling to enter rashly into suits, not however doubting that recourse to law will be unavoidable on many points; but I have thought it my duty to wait a few months that the effect of some which are pending could be ascertained, before others perhaps equally important should be commenced. The new Courts are scarcely in operation, but no doubt I believe exists of their value here.

Under any Governor, the Attorney General's occupation as a draughtsman for the legislature will long be laborious; and hitherto the few political cases, I have carried into the courts of law, show I think that this part of my duty may, by a very slight failure of judgement, lead to much anxiety and difficulty.

I trust I do not seem to your Lordship to exaggerate what I have a personal interest in. I am sure I feel myself to be far from disposed to do more than represent the case which actual circumstances produce.
I have the satisfaction of adding that these papers, altho' resting for their accuracy on my own responsibility, are sent home with the full concurrence of His Excellency Sir Thomas Brisbane.

S. Bannister.

[Enclosure.]

THE DUTIES OF THE ATTORNEY GENERAL OF NEW SOUTH WALES.

His commission.

Guide to his duty.

Outline of what Mr. Bannister has done.

1st. as to advice given to the Governor.
2. as to direct communication with Magistrates and heads of departments.
3. as to Actions or any legal arrangements on that advice.
4. as to the business of the
   \{ Criminal Court.
   \} charge supported.
5. As to Civil Crown suits.
6. As to local legislation.
7. As to originating questions and Accusations.
8. Accessibility.

The result.

THE DUTY OF ATTORNEY GENERAL IN NEW SOUTH WALES, AS DONE BY MR. BANNISTER SINCE APRIL, 1824.

My Commission.—My Commission* is general, and similar to that held by Crown officers in other Colonies, and I think not different from that of the Attorney General at home; but by the instructions accompanying it, I am restricted to private practice as a barrister only.

Guides to my duty.—In considering what course of duty to pursue, I have been guided by such law books and precedents as shewed how the same officer has been occupied either in England or in the Colonies. Having a salary without fees for Crown business, I have considered myself bound to do for the Crown, whatever I should have been, by usage, entitled to have put into my hands as crown-business, if any emolument had arisen from fees and charges, and not from a Salary.

Outline of what I have done.

1st as to advice given to the Governor.—In regard to giving advice to the Governor; I have considered myself bound to state my opinion in writing upon whatever case His Excellency should send to me, and to attend him in consultation personally,

* Note 255.
whenever sent for, being responsible only for my advice which the Governor might ask or not, or might follow or not upon his own responsibility.

I have not thought it competent to me to make any distinction on the occasions upon which I should be so called upon; whether they should be purely upon acts of His Excellency's own devising, or upon matters in which he might have been applied to by other persons. If they related to the public service, in which the Governor of the Colony or its dependencies has had a public duty to perform, I have thought myself liable to be asked an opinion upon them.

Thus I have had to give opinions, and to draw papers and arrange Law Cases upon matters concerning Van Diemen's Land, the Islands in the South Seas, and the new jurisdiction raised in New South Wales by the third and nineteenth Sections* of the Act of Parliament of 1823.

Perceiving very early after my arrival that, in respect of this part of my duty, viz.: my opinions to the Governor, my advice would be required upon subjects suggested in three different ways, I addressed a letter to His Excellency upon a mode of practice appearing to me to be of great importance.

My advice would be required:

1st. By the Governor himself originally finding it necessary to himself.

2dly. by private parties wishing to have something done by the Governor, which His Excellency would require a legal opinion upon before consenting to do it.

3dly. by Magistrates and heads of departments requiring advice in their respective Offices.

Upon the 1st and 2d Classes there seemed to be no question as to the propriety of a general rule that such cases should come to me direct from His Excellency.

Direct communication with Magistrates and heads of departments.—But upon the 3d I was very early induced by the necessities of business to state to him that, in order to prevent circuity and loss of time, direct communication between myself and various heads of departments and the Magistrates appeared to me to be indispensable, reports being always to be made by me at least to His Excellency on any important matters arising in such direct communication. Sir Thomas Brisbane approved of this suggestion; and I have no doubt that, if this direct course be not pursued under prudent restrictions by the law officers, public business will on many occasions be extremely embarrassed.

* Note 256.
There seems to be no doubt that Magistrates and public officers are entitled to the advice and assistance of the Governor in cases which they may think difficult; and the Governor must in some direct the law officers to afford both to them. To such cases as these, therefore I have confined the communications I am now describing.

After ten months' trial, I do not find that the facility thus given to business has occasioned a frequency of frivolous applications, or that it is inconsistent with any safe principles. Sometimes an interruption to me is caused by a personal call, which a written reference to the Governor would prevent. But the business of this kind is generally done by letter, and explanations by word of mouth are frequently wanted for a clear understanding of the matters in question. Indeed personal interviews with parties, although not usual to the ordinary barrister in England, cannot be avoided by a law officer of the Crown abroad. Occasionally they must be had by the Attorney General in England. An Attorney General has a duty to perform for the Crown (and it is very frequently exercised in Colonies) similar to that which a private attorney performs for his client. He has to examine facts as an agent, prior to their being reduced to cases fit for his own and his colleagues consideration as Lawyers.

In small communities, this must happen every day; they do not supply materials for that separation of duties, which makes the practice of the law in London very much subdivided.

It seems to be unnecessary to refer to authorities on this subject; they abound in the State Trials, the Parliamentary History, in incidental passages in the reports, and in such books as Chalmers' collection of opinions; and I have taken for my guide the course which in these various books the Crown Lawyers both in England and in the Colonies may be seen pursuing during the last two hundred years.

As to Actions or any legal arrangements on the advice.—After giving advice to His Excellency the Governor, to public Officers and to Magistrates, I have considered myself bound to do for all whatever that advice recommended a lawyer to be employed to do, or whatever a lawyer should be required on the part of the Crown to do in the matters in question.

If deeds or commissions were to be drawn, or actions, civil or criminal to be commenced, I have acted, sometimes after requesting specific instructions from His Excellency, some times according to circumstances, upon the discretion which I have presumed to be reposed in myself; the pressure or the plainness of the circumstances have governed me in these respects.
An instance will illustrate my view of the discretion reposed in my office. The Master of a Merchant ship had violently insulted a public Officer, because he thought a report by that Officer on a survey of his ship unjust. The Officer applied to me; and the Criminal Court was sitting. I had no doubt of the case being fit for a prosecution, but should in ordinary circumstances have given my opinion to the Governor; but the ship was to sail the next morning. Therefore I did not hesitate to take out a subpoena against the Master to answer a Criminal Information in five days. If I had waited for an answer from His Excellency or any report of this simple case, the Offending party would have been at sea. But, by acting on my own opinion, the case was tried, and a violent man was duly checked by a verdict against him.

As to Criminal Court.—The business done by the Attorney General for the criminal side of the Supreme Court, and in criminal matters generally, is as follows:—A change is I think necessary in it.

Into his hands, all the Criminal Charges, not decided upon in a summary way, come either from the Magistrates, the Coroners, the Public Officers, or from private prosecutors. His first duty is to consider if any probable case at all is made against the party accused. If the Subject is one fit for the Quarter Sessions, he is relieved from many difficulties, and sends the charge to the Grand Jury. But many circumstances prevent the selection being easy; and, with the Sessions Cases, the Attorney General may have to deal afterwards on Certioraris, etc. If the subject is fit for the Supreme Court and not for the Quarter Sessions, the Attorney General fills the place of the Grand Jury (as he does at home in some cases of informations); and, upon the cases already examined by the Magistrates and Coroners as well as upon those urged by public officers or by private prosecutors, or arising on his own view and suggestion, he must decide upon such principles as guide Grand Juries. If, in the last three classes of cases, viz. in those brought to him by public officers and private prosecutors or upon his own views, he cannot suitably have a previous examination before Magistrates, as must some time happen, a most painful and delicate task arises, from which he will not easily arrive at safe conclusions. I have had several cases of this kind, of which four stand for Trial, viz. 1, 2, 3, 4 of the list marked A annexed to this paper; seven I have rejected, viz. 5, 6, 7, 8, 9, 10, 11 of that list; one is settled by an apology, viz. 13; one by a disclaimer of every intention and by an apology, viz. 14; two others are now pending, viz. 12 and 15.
In some of these cases I have thought it right to give the parties an opportunity of stating to me why they should not be harrassed with a public prosecution. In doing this I have followed English and Irish antient and modern precedent; but I have most cautiously warned those parties that I have no authority to call on them for defence, or any disclosure, or even for any communication to me; but I give them notice only of the intended charge, leaving them at liberty to decline making me any answer at all.

This course seems to be consistent with principle and usage, and avoids the evils, which have sometimes occasioned imputations against the Crown Officers in England and Ireland, for having carried the practice to some thing like a summons.

If any disclosures should be made by the parties accused, and I should still think the case proper for public prosecution, I should abstain from appearing personally against the accused, and thus be able to avoid taking a hard advantage of a disclosure so made. In such a case, I should request the Solicitor General to conduct the prosecution. In regard to such cases of this class, as have been clearly of private interest; as assaults, libels and some perjuries, I have avoided disclosures by referring the management of the cases to the private prosecutor, declining a brief myself.

The responsibility of such an office of inquisition is greater than that of any other part of my duty; but, having it imposed on me by the act of Parliament, I have endeavoured to place myself as much out of influence, or of the opinion of influence from pecuniary advantages as possible; and hitherto I do not seem to have excited any angry feelings in the subjects of the cases, of which a list is in paper A annexed to this report.

As to deciding whether Cases are to be conducted at the public or at the private expense.—Having determined that a Case is fit to be proceeded in, the Attorney General must determine further whether the public is to prosecute or not. In some cases, as in common assaults and libels between private parties, no difference of opinion exists on the subject. In such Cases peculiar circumstances alone would throw the burthen on the public; and, where in such cases I have left the prosecution to the parties absolutely, I have thought it right, as before stated on a similar principle, not to receive a brief in the case.

As to cases for public prosecution.—If a public prosecution is chosen, as happens in the great majority of cases at present, since the former practice of the Colony has in this respect been continued (and I think for reasons stated elsewhere in a report to Sir Thomas Brisbane on the subject that for many years it

1825. 8 Feb.

Practice of attorney-general in criminal jurisdiction.
Public prosecutions.

must be so continued), the Attorney General fills up the Subpoenas for the Witnesses, marshals them, takes his notes from the depositions as a brief, draws the informations, arranges the coming on of the cases daily, gives the accused notice of Trial, receives casual information from the prosecutors, and conducts the charges in Court. He should I think always pass over the depositions to the Judge the day, at least, before the Trial.

If he is assisted by the Solicitor General or by any other advocate, he explains the case, or gives notes, or sends the depositions to him.

If the assisting advocate conducts the case alone, the Attorney General does all that is above stated except himself conducting the case in Court; and, in all cases if any points of Law be reserved, he would argue them. He would appear also and lead in all important cases, only requiring assistance in Larcenies and such small offences as involved no great interests. This assistance he should have only when pressed with other business, which can be less conveniently apportioned than the briefs in particular trials. I have no doubt that, if his office were properly furnished with clerks, he would not require this assistance, when in health, or at all for some years to come, until Courts are held in distant places at the same time.

Change suggested.—I think that the Attorney General ought to be relieved from all the mechanical parts of these arrangements, after his judgment has been exercised upon the propriety of bringing cases into Court at all, and whether by a public or by a private prosecutor; and, in order to enable a Clerk of the peace or Crown Solicitor, or his own clerks, to arrange the intermediate matters between that decision and settling the information and going into Court, he should fill up a paper book of which the following is a specimen:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A.B. &amp;c.</td>
<td>Stealing a Cow</td>
<td>D. &amp;c., E. &amp;c., F. &amp;c.</td>
<td>A.B. found by D. driving the Cow from the paddock of C. at midnight through D.'s brush; offered the cow for sale at $\frac{1}{2}$ the market value—denied to G. the servant of C. that the cow belonged to his master and instantly sent her over the mountains.</td>
</tr>
<tr>
<td></td>
<td>property of C.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

With such an entry, any Case could be taken up at the opening of the Criminal Sessions; and, as the depositions are usually sent to the Attorney General soon after the committal of the parties, he has an opportunity of considering if the evidence be defective, and of suggesting further enquiries, as well as of immediately causing the prisoner to be discharged, if any gross error appears in the proceedings. As a Grand Jury, the Attorney General is, by the present Constitution of the Criminal
Jurisdiction here, always sitting. This is a satisfactory set-off against the extremely delicate trust, otherwise reposed in his hands in this point.

If, in the Cases in which the Attorney General does not think it his duty to file an information, the party is not discharged before the opening of the Criminal Sessions, the usual course by proclamation is pursued.

After the Common trials, he has to fill up and sign for the witnesses a certificate of their having been subpoenaed, which is passed to the Judge, if they have conducted themselves properly; if the Attorney General thinks they have not conducted themselves properly, to state this to the Court to prevent their expenses being allowed, upon which statement the Judgment of the Court is given.

As to Civil suits.—In civil suits for the Crown, a similar course of procedure is to be gone through by the Attorney General from the beginning to the end of the case, with this important Distinction that the previous inquiries are more troublesome, that he is not assisted by Magistrates, and that the pleadings are more prolix.

Local legislation.—In addition to these various duties, I have also not hesitated to obey the Governor's directions with regard to preparing materials, both of opinions and drafts, for an improvement or confirmation by His Excellency in Council, of the Colonial Orders.

As to originating questions and accusations.—I have also thought it to be my duty to be the mover of points, and to suggest, either to His Excellency the Governor, or to others the public Officers, or to the Magistrates, any which might have appeared to me wanting or erroneous in their proceedings.

To do this, without occasioning greater inconveniences than advantage to the public service, is not easy; but, on repeatedly reflecting on it, I have no doubt of its being the duty of the Attorney General to endeavour to perform the part of a legal monitor. If inconveniences arise greater than the good he anticipates, he has failed I think in the mode of performing the duty, not that it ought not to have been attempted to be done.

A branch of the duty I have considered to be in the examination of the decisions of the Magistrates, particularly with reference to the new Act of Parliament relating to New South Wales.

Accessibility.—I have also thought it to be my duty never at proper hours to shut my door against any applicant to see me. If their business is improperly brought to me, the few minutes spent in ascertaining this fact are lost; but a refusal would involve infinitely greater evils.
The result.—The result is that my occupations for the Crown absorb the whole of my time; and the paper B, shewing the emoluments arising from these occupations, will explain the situation in which I now stand.

I do not complain of this result of the arrangement made in England, because it was made experimentally, and because I rely on an equivalent being made to me for the failure of that arrangement, which was established against my express opinion. Its object was wise, but all experience was against its success. If that object of withdrawing the Crown Lawyer from private Solicitor’s practice in a small community, and the further object of thereby preventing his being unduly influenced by private interests, are thought proper to be persevered in, I have no doubt of an Attorney General preferring the Crown practice without that inferior business. But, if his Crown practice is to occupy him entirely, he must be paid equivalently to the labor he performs and the station he fills.


Sydney, 7 Febly., 1825.

[Appendix A.]

Return of prosecutions.

1. The King v. Polack.—Perjury on the prosecution of Jacob Josephson.
2. Smithers.—Perjury on my own suggestion.
3. Ward.—Bigamy.
4. James.—Smuggling, disobedience of Statutes.
5. Hart.—Stealing a Copper and some fruit Trees, on the prosecution of J. T. Campbell.
6. Brooks J.P.—Stealing a Bullock of Dr. Redfern’s.
7. Close J.P.—Perjury, on the prosecution of V. Jacob.
8. Wells.—Gross immorality in seducing and concealing the wife of Fearly, Prosecutor.
10. Hindron.—Case of Court Practice, but without foundation.
11. De Mestre.—Smuggling, disobedience of Statutes, on my own suggestion.
13. Jacob.—Slander on the prosecution of Mr. Close the defendant in No. 7.
14. Jacob and Reid.—Conspiracy to degrade Capt. Gillman a Magistrate. Mr. Jacob solemnly disclaimed any such intention. Mr. Reid apologised to Capt. G.
15. Bell.—1. For inciting the Master Attendant to fight a duel. 2. To break the peace. 3. Degraded in his office. Guilty on the 2d Charge, on the prosecution of the Master Attendant.

[Appendix B.]

Return of net income.

<table>
<thead>
<tr>
<th>Description</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross income yearly</td>
<td>£1,200</td>
</tr>
<tr>
<td>I pay to a clerk yearly</td>
<td>£150</td>
</tr>
<tr>
<td>I am liable to pay the rent of a house, in which my family lives, and in which I have my offices. It is totally unbecoming my station</td>
<td>£120</td>
</tr>
<tr>
<td>My half pay merged on my appointment</td>
<td>£130</td>
</tr>
<tr>
<td>Total</td>
<td>£800</td>
</tr>
</tbody>
</table>

My professional income, inasmuch as now private practice is inconsistent with my public duties, and the limitation of my practice to that of a barrister, except for the Crown, prevents my making the arrangements usually made by Crown officers in the Colonies. Still I have so much Solicitor’s business to do for the Crown that Clerks are necessary to me.
Dear Sir,

Sydney, 8 Febly., 1825.

I am not aware of more than one point upon which I ought to be desirous to explain my conduct to you and to Earl Bathurst. It is on what is called here the Jury Question. Having to execute the Act of Parliament whenever circumstances brought its enactments under my immediate attention, the first occasion for consideration of its provisions occurred in May last. Two cases were sent to me by His Excellency the Governor, both of which in my opinion were proper for the Quarter Sessions. I therefore suggested that the commissions of the Justices should be drawn with the ordinary powers. It then became necessary to consider by what means the Quarter Sessions for freemen should judge of facts. In May and since, I have had but one opinion of the point that a Jury must be had. I had no doubt that the Governor was bound to establish Sessions, and that for the trial of Free men these Sessions must have Juries. I was of opinion that the only safe construction of the Act led to these conclusions. The questions are purely legal, and certainly I am anxious to hear from home whether this construction is held by the more experienced to be the true one.

Being of this opinion, I took what I trust will be thought to have been the usual and proper steps, to have the Act executed. An Act, made so recently and with so much care as this was, could not be presumed to be passed erroneously. Nothing but a case of legal necessity could justify a departure from it.

The next question was, from what classes the Jurors were to be drawn. I prepared myself with an opinion on that point. I felt it to be full of difficulty, and confined myself solely to considerations of law. The expediency of the line to be drawn in this matter I have always thought would be settled, and be best settled in England, and it is a very obvious principle which has governed me, never to go away from legal principles to expediency principles. Waiting till I should be asked questions on this subject, I was prepared to answer such as the following:

1st. What is the effect of Judgment of Felony?
2. What is the effect of the service of a term of transportation for infamous judgments?
3. What is the effect of the Governor’s pardon of persons transported upon infamous judgments?
4. By what evidence is the infamous judgments to be proved in New South Wales?
5. What classes do you advise to be on the Juries?

* Note 257.
I think it is doubtful whether the Sheriff is bound himself to make up the Jury lists, or whether the Acts of Parliament apply to New South Wales, which direct lists to be provided for him; the difference is not very material, and, for conformity at least, there was no impropriety in the arrangement, which took place, of the Constables being ordered to make these lists. I had expected, upon the preparation for these lists, to be asked for answers to all the foregoing questions. But to my surprise the Magistrates confined themselves to what in fact involved the 1st, 2d, and 3d only. I was greatly relieved by this course, and had only to take care to let them quite understand the difficulties of the subject, as they occurred to me; and, in determining to exclude the class familiarly called the Emancipists, the Justices acted without my advice, except taking my written opinion that in England a pardoned felon could not sit on a Jury. Whatever my opinion therefore may be on the subject, I have never yet been bound to state it.

I give this explanation inasmuch as it has been said here that the emancipists are excluded by my advice. In reply, I have only to say that hitherto it has not been my duty to give such advice, and it would be in the last degree imprudent to volunteer it.

I have written to Mr. Brougham that, as a friend of mine, I could wish him to see the paper sent to Lord Bathurst, upon my duties here. If there is not an irregularity in it, and he should apply to you, I beg the favor of a copy being shewn to him.

I am, &c.,
S. BANNISTER.

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

Sydney, New South Wales,

My dear Sir,

As every thing, which transpires here, and is likely to become the subject of discussion in England, cannot fail to be interesting, and, as I fear the official channel of communication may not provide you with the most detailed account of what is passing, I have interpreted it to fall within the license you honored me with of addressing you confidentially, to give you all the information within my own power, and to make those remarks upon what I see around me, which I think may be useful in enabling you to meet statements, which may reach you either privately, or in your official place in the house of Commons. The "jury question" is gone by, as I anticipated; the experiment has succeeded, so far as it has been tried here; and I have recommended that, for the present, it should not be
interrupted, but suffered to remain in statu quo, until the pleasure of Government may be known. I have also suggested an ordinance in Council to suspend the introduction in Van Diemen's Land, until the same fiat may be given.

You will be invaded by contrary statements respecting the seizure* of a ship called the Almorah, with a freight of dollars, grain, tea and other articles, from Batavia, on account of government. The true state of the whole case is as follows:—In the month of September last, there was a scarcity of wheat and flour in the colony, and, from the long continued drought, serious apprehensions were felt that there would be a failure of the expected harvests, which come on here, wheat, in November and December, and maize, in February and March. I believe wheat, which, when I arrived, was as low as four shillings p'r bushel, had at one time risen to twenty five, and even higher. In the apprehension of this contemplated scarcity, the Governor authorized the chief officer of the commissariat to send for a cargo of rice, flour, and other similar articles to Batavia, the nearest port at which it was hoped to obtain a seasonable supply; and accordingly a ship called the Almorah was chartered and sent on the voyage. I heard that there was a strong sensation excited by the measure, both among the settlers or agriculturists and the merchants, the former deprecating the measure as interfering with their productions, and the latter as trenching upon their profits on such foreign importations as, in the event of necessity, they considered should pass thro' their hands. It seems there is a proclamation of some governor, prohibiting the importation of corn into the colony, except by special license, which is still held up in terrorem to private speculators; however the exigencies of state may have induced the government to relax it in favor of the commissariat supplies. I informed the Governor of what I had heard, and he assured me that he had only sanctioned the importation of rice, to be used in the settled districts only in the event of the anticipated failure of the harvests being realized. I did not think the moment a prudent one to send for foreign supplies, because the harvest would be in before the vessel could return from Batavia, and it would then, and not before, become certain whether there was to be a failure of grain or not; if there were not, there would be no necessity to import grain; and if there were, the quantity required would be ascertained, and the best of reasons given for opening the ports of the colony to the importation of corn. The Ship, however, had been already chartered, and it was determined to send her on. I have occasion to know, both from what the Governor assured me, and from the power which he officially

* Note 258.
1825.  
24 March.  
Report on seizure of ship Almorah.

gave to Mr. Marsden, the acting president of the Agricultural Society, that he did not contemplate anything else being sent for but rice, and perhaps wheat. It was rumoured that the Commissary had sent for a large amount of dollars, but the Governor publicly declared that he had not signed any bills for such purpose, and was ignorant of any such measure. The Almorah sailed; the harvests came in, and without being sufficient, yet upon the whole not very deficient; and the Almorah returned with about five thousand bushels of rice, tea, sugar, and upwards of one hundred thousand dollars in specie. The merchants were doubly displeased at the misinformation, which they had received, and at the depreciation which the dollars in circulation must suffer from this large and unexpected supply; you are aware that, from the want of exportable articles, treasury bills are the main course of remittances to England for the manufactures and other merchandize of that country; they gave information to Capt. Mitchell of His Majesty's Ship Slaney, which was lying in the harbour of Sydney, and required him to seize the Almorah for a breach of the India Company's Charter in importing tea without a license as required by law. Capt. Mitchell, whose ship belongs to the Indian station, feeling himself thus called upon, and perhaps too tempted by the rich prize offered to him, accordingly seized both Ship and cargo. Unfortunately the Attorney and Solicitor General were required to defend the interests of government, and the seizing officer was under the necessity of having recourse to Dr. Wardell and Mr. Wentworth,* gentlemen of very respectable legal talents and knowledge, but a little inclining against the powers that be; a long negotiation was entered into between the respective counsellors, which led to nothing, and report said that Capt. Mitchell intended to carry the ship to India for adjudication, it being doubted whether the Court here had jurisdiction to try the question. In this state of things, I suggested to the Governor to write personally to Capt. Mitchell, and tender security on the part of government to abide the events of adjudication when and wheresoever the case might be tried, and to receive the articles belonging to the Crown subject to such stipulation. Capt. Mitchell appeared to accede to this proposal, but I fear his advisers were hostile to any measures of accommodation, and, while the treaty was on foot, the Almorah was removed from the harbor to the entrance of the port. In this stage of the transaction, the Attorney General conceived that the Crown had a right to repossess itself of its own (I use I believe his own words to the Governor), and obtained a warrant from the Police office to go and seize the crown property on board the ship; to prevent abuse,
he went himself to see the warrant executed; on approaching the Almorah, they were warned off, and, on persisting to board that vessel, they were fired at by a party of the Slaney's company, and compelled to return to Sydney. At night, the Almorah was got under weigh, and proceeded to Calcutta under the charge of Lieut. Matthews and a company from the Slaney, the Master being the only person besides, who was suffered to go in the prize. Thus began and has ended the res gestae of this very extraordinary proceeding, which was founded in mistaken policy and has been followed by measures still more mistaken on all sides. On the afternoon of the same day that the Almorah sailed from Sydney, the Attorney General filed an information against Capt. Mitchell, charging him with being accessory to the felony in firing upon the officers of justice in the execution of their duty, and obtained a bench-warrant to apprehend him. As I came into the drama here, I shall, together with this private account, transmit an official copy of the proceedings in the Supreme Court, to enable you to refer them to the law officers if necessary, and to defend them if required; I shall only say, in this place, that I issued the warrant as of course, it being certified to me, in the regular way that there was an information for a felony on the files of the Court against Capt. Mitchell; he was arrested soon after, but, as he was merely charged as accessory, and the principal was gone beyond the jurisdiction of the Court, I admitted him to bail, as by law I was bound to do. In a few days after, the Attorney General commenced an action of trespass against Capt. Mitchell for seizing the property of the Crown unlawfully; and Capt. M. brought an action against the Assistant Commissary Wemyss and his Deputy Clements (who went to Batavia and transacted the business there) under the Act of Parliament which gives a penalty in double the value of all property unlawfully engaged in trade, contrary to the Company's charter. The question of jurisdiction will be raised incidentally in these actions, and it is intended to bring them to trial in the course of next month, in order that the principal actors, Mitchell and Wemyss, may be at liberty to repair, the one to India to join his station, the other to England to answer for his conduct in sending to a foreign colony for so large an amount of specie, for the use of the public, without the grace of even intimating his intentions to the Commander in Chief. This is the first great blot in the transaction; the original policy of the measure was a question of discretion; but I conceive it was a great contempt of the government of the colony, in the Commissary, to send for specie without its sanction or knowledge. The next false step was in
Capt. Mitchell’s removing the Almorah after the offer of security on the part of the government; and this was followed by the gross outrage upon the laws of the Colony by the King’s Officers within its jurisdiction, in ordering the crew on board the Almorah to fire upon the officers of the police; whether the warrant were legal or illegal does not alter the violence of such a measure. Capt. M. might with equal propriety refuse to pay his tavern bill, and, upon a writ being sent on board of the ship under his command to arrest him, cause his marines to fire upon the sheriff’s officers. The example of such a proceeding will not be lost in this country, where the mass of the people are only kept in subjection by the power of the law. I may by possibility have occasion to determine the legality of the warrant taken out by the Attorney General to reseize the Almorah’s cargo, and therefore I shall say nothing as to that point; but I am less scrupulous about the information for a felony, upon which he had Capt. Mitchell arrested. That was a strong measure, and, considering that the Attorney General had made himself (unintentionally but de facto) a personal party by going with the officers to execute the warrant, I should have hesitated before I should have ex officio, and without any previous examinations before a magistrate, charged an officer of rank in His Majesty's Navy with being accessory to a capital felony. The powers of an Attorney General in this Colony are, from the mode of proceeding by information in all cases of crime whether capital or otherwise, very great, and require a corresponding caution in the exercise; a charge of felony, preferred in the deliberate form of an information in the Supreme Court, is not easily wiped out of a gentleman’s life; and, however reprehensible the conduct of Capt. Mitchell might be in refusing terms with the government, that should not sanction an improper course of proceeding against him, altho’ it might make his case less entitled to consideration. Having now given you the state of facts, as well as my opinion upon the relative merits of the parties, I think it will save you trouble briefly to point out so much of the law upon the case, as will enable you to form an accurate view of the whole subject.

The act, 4 Geo. 4, Chap. 80, S. 3, enables His Majesty’s subjects to carry or trade in all articles, except tea, and with all places, except China, within the limits of the Company’s charter, that is between the Cape of Good Hope and Cape Horn; and the 9th Sect. contains a similar proviso against trading in the article tea, or with China, except by means of a license from the Company. The same act continues the penalties imposed by two previous acts of Parliament, 33 Geo. 3, Ch. 52, and 53 Geo. 3,
Ch. 155, and extends the same to all vessels, except the Company's, trading within the Company's limits and not having complied with the directions of the new act. Now there are two points, which arise upon so much of the several acts: first, whether supplies imported by government, paid for by government, and never intended for other than the use of government, can be considered as trading within the meaning of the acts. The case of the "Swift," a vessel seized at Jamaica for trading to the Honduras contrary to the Navigation acts, and condemned there, but restored by Lord Stowell upon Appeal, is in many respects like the case of the Almorah; it is reported in the first vol. of Dodson's Admiralty Reports. The second point is whether the act itself authorises a seizure under the circumstances of the Almorah; the 17th section, under which the seizure was made, imposes the penalties set out in the act therein referred to, which are forfeiture of vessel and cargo upon all vessels trading within the company's limits, and "not having complied with the directions of that Act"; now, unless the provisos in the act, that "nothing therein contained should authorize the trading in tea," can be considered as a "direction of the act," the penalty would not seem to attach in any case; nor would the company then be without remedy; they may still bring their private action for breach of their chartered rights. Such is the law, upon which I give no opinion at present. The point of jurisdiction to try the original seizure will not of course be raised, as the vessel is out of the reach of the Court; but I fear it will be raised incidentally in the actions by and against Capt. Mitchell; but they will not give you concern, and therefore it will be unnecessary to trouble you with them. Before I conclude, I must call your attention to the Act of Parlt. referred to in the last Indian Act* (namely 57 Geo. 3, ch. 1, continued by subsequent acts until the 5th of July next), which authorizes His Majesty in Council to regulate the trade of this Colony in common with the others therein mentioned. If any order have been made, it has not been transmitted to the government. I merely wish to apprize you of this fact; the order would make no difference in the Almorah case, even if such be in existence, as the act contains an express reservation of the rights of the East India Company.

There is another subject connected with the foregoing, which I trust I shall be pardoned for bringing under your private notice. The last ship registry act* requires that the vessels of this colony should be registered by the Governor and the "Collector and Comptroller of the Customs within the Colony"; we have no such officers here, and every coasting vessel in the

* Note 260.
Colony is liable to seizure and confiscation. You will find, upon referring to Mr. Huskisson's registry act, that this is the only country within the King's widely extended dominions, from Great Britain down to Heligoland, and not excepting the proprietary government of India, in which it is impossible to register a ship. Perhaps, by appointing the present Naval Officer, Collector of the Customs here, the practical impediment may be successfully got over; he is an old and deserving officer, and his removal from his present situation as chief officer of the customs would be universally regarded with feelings of regret.

It is possible that, by the present opportunity, you will hear something of the necessity, which exists for appointing another judge in the Supreme Court, from the great pressure of business and the still more pressing demands of the legislative council upon my time and attention.* I do verily believe that Lord Eldon himself, with his Herculean powers of business, could not get through the manifold duties which at present devolve upon me. The criminal calendar is nearly as much as one judge can conveniently get through; besides which the amount of civil business is gradually increasing; and the very loose state, in which the local regulations* of the Colony are now placed, requires immediate and considerable attention. There is but one opinion upon this head in the whole colony; but is there any authority in the Governor to appoint an assistant judge, and who should be that assistant? these are the sticking places. I am determined to give no opinion; but I must drive on as hard as I can; and, if I fall under it, I will not ask or even advise assistance. The Attorney General was desired by the Governor to prepare a digest of our laws, but he has made little progress hitherto; and we are so nice in Council, that do his best, and he saves us no trouble; we pull his bills to pieces, and they come out so altered that he does not recognize his own again. In truth law making requires something more than the hand of the draftsman. Major Goulburn is very cautious and very independent, and I believe scrupulously upright in the discharge of his legislative duties. Messrs. Oxley and Bowman have both much local and useful knowledge. I am the Elder of the Council; without me they will not even sit, and, as I am anxious to preserve the utmost harmony amongst our limited body, I never fail to attend when I can be spared from the judicial duties of my office, which I consider paramount in obligation, tho' not perhaps in importance, at the present crisis. Thus you see, my dear Sir, that you have not sent me here to slumber amidst the noiseless shades of Australia; tho' far out of sight,
I am not reposing on a sinecure; and I believe at this moment that, taking the weight and variety of my duties, the little help that the nature of things here affords, the extremely delicate course I have to pursue, and the enervating climate I have to contend with, there will not be found one office on this side of the Cape of greater difficulty to execute with satisfaction to the government and the public. How I may have succeeded, I must leave to other reporters; but I feel that I cannot hold out very long. I have lately had one alarming attack of cholera, the disease of this part of the globe, brought on by too long and continued sittings in Court.

I have been compelled to alter the criminal sittings of the Court, and, instead of having quarterly assizes, I have found it would be more economical to the revenue and beneficial to the public, as well as salutary to myself, to sit a certain time in every month in the year, to deliver the gaol, and dispose of the criminal business of the colony, as fast as it arises.

Excepting the case of the Almorah, nothing has occurred since I addressed you last to disturb the peace or afford topic for discussion in the colony. "The Australian,"* the Morning Chronicle of New South Wales, keeps us all in high order; but, as the Editors are setting the very laudable example of moving for leave to file informations for libellous publications in the cotemporary paper, it is probable that other people may follow it, and then we shall probably be left to pursue our libertine habits without the wholesome restraint which is just now held over us. I believe an opposition paper is considered by many here as an unwholesome exotic; if you should think so, I trust the strong arm will be put forth in England; we are not equal to it here, because we are not sufficiently apprised of the wishes or assured of the support of our masters at home.

I beg, &c,

FRANCIS FORBES.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HORTON.

Sir, Whitehall, 27th March, 1825.

In compliance with your directions, I have perused the Commission and General Instructions under which the Government of the Colony of New South Wales is at present administered by Sir Thomas Brisbane; and I have considered how far the recent changes in the Law and system of Government of that Colony require that the Commission and Instructions to be issued to General Darling should differ from those of his

* Note 262.
1825.  
27 March.  
Necessity for modification of general instructions to governor.

Predecessor. After frequent personal communications with General Darling, it has appeared to me necessary to lay before you, for Lord Bathurst's Consideration, all the details of this Subject before the Draft of the Commission and Instructions is prepared for his Lordship's perusal. Since Sir Thomas Brisbane attained the Government of New South Wales, the changes in its fundamental Laws and Instructions have been so considerable, that I am not aware that any part of the Instructions, under which he is acting, would be applicable to the altered circumstances of the Colony. They appear to have been transcribed, with little variation from the Instructions originally prepared in the first formation of the Settlement, a period at which New South Wales was regarded exclusively as a receptacle for convicts, when military discipline formed the only rule of the Colonial Government, and when the chief care of the Officer in command was to procure from the Fisheries, and from an imperfect agriculture, the Subsistence of the persons under his superintendence. It would be useless to point out how entirely the course of events has changed the character of the Settlement, and how inapplicable at the present day would be the Instructions which the early Governors of the Colony received.

Omitting therefore any particular comment upon the Instructions to the preceding Governors of New South Wales, I will proceed to consider what Instructions it may now be proper to issue, arranging the remarks which I shall have occasion to offer under the various heads of Executive Government; Legislation; Revenue; Crown Lands; Judicial Affairs; Ecclesiastical Affairs and Education; Police; Convicts; Native Inhabitants; and New Settlements.

I. Executive Government.—With regard to the Governor himself, there would seem to be no reason why the rules generally observed throughout the Colonies regarding the Oaths of Office should not be transferred to New South Wales, except that I presume it would not be thought expedient to call upon the Governor of that Colony to take the Oath* for enforcing obedience to the Laws respecting Trade and Plantations, an oath which indeed would be inapplicable to his situation, since the Laws of Trade affecting the old Colonies do not apply to those lying to the Eastward of the Cape of Good Hope.

The Office of Lieutenant Governor appears to be on a different footing in New South Wales from that on which it is placed in the rest of His Majesty's Colonies. In general, this Office has neither any functions to perform, nor any emolument to receive, except during the absence of the Governor in Chief. In New South Wales, the Lieutenant Governor has not, as far as

* Note 263.
I can learn, any duty attached to his Office, so long as the Governor remains in the Colony, but he appears even during that period to receive his Salary.

In providing for the temporary Administration, the Lt. Governor is usually first mentioned in the Commission as next in Succession to the Governor, although it may not be intended immediately to fill up the appointment. Unless such an appointment should at some after period be thought advisable, the administration will of course be assumed by the person next pointed out in the Commission. It may be necessary to consider whether this is to form a part of the permanent establishment of the Colonial Government. If the Office of Lieutenant Governor is to be maintained, it will be necessary to declare that, on the death or absence of the Governor in Chief, the Government is to devolve on him. If the Office were abolished, it must be declared, that, in either of those events, the Office is to devolve upon some other person.

There is still, however; another case to be provided for, which is the death or absence both of the Lieutenant Governor and of the Governor in Chief.* Lord Bathurst will have the goodness to signify to me his decision whether in that contingency the Government shall devolve upon the Senior Member of the Council, according to the General rule prevailing in the Old Colonies, or upon the Military Officer of the highest rank on the Station, as is the case in the Colony of the Cape of Good Hope, the Mauritius, Saint Lucia and Ceylon.

The Office of Colonial Secretary falls within this general division of the Subject, and with respect to the duties of that Officer it appears necessary that Some general rule should be laid down. It is not, I think, quite immaterial to consider what should be the Official designation of the Secretary, that is, whether he should be styled, as at present, the Colonial Secretary, or Secretary to the Governor. The latter expression is more in conformity to the ordinary usage in parallel cases, and, I think, points out more accurately the nature and general duties of the Office itself.

The "Secretary to the Governor" is, I conceive, his personal or private Secretary, and he also sometimes has a military secretary upon a similar footing.

The Colonial Secretary is the Officer of the Civil Government, and in most of the Colonies this appointment embraces the duties of the Registrar and Clerk of the Council. In his Office, all the proceedings of the Government are deposited and recorded, and he is the proper medium of Official Communication with the Governor. The mode of carrying on the public business is
therefore not subject to variation, whatever change may take place with respect to the person holding the administration. It would not, perhaps, be easy more specifically to describe the assistance which the public Secretary is to afford to the Governor. But, in addition to the documents which are regularly committed to his custody, the Governor ought to lodge in his hands on leaving the Colony all official correspondence and communications, which may be useful or necessary for the information and guidance of his Successor. This is too frequently neglected.*

But whatever may be the Secretary's designation, I think it highly important to lay down, in an authoritative manner, some general rule by which the nature of his duties may be defined. That general rule, I apprehend to be, that he is to conduct, under the Governor's direction, all the Official Correspondence in the Colony; and that he is to act on all occasions as the general medium of communication through which the Orders of the Government are to be signified. In general, I presume, he would be directed to render to the Governor his assistance in the administration of the Government, on every occasion on which it might be required, and in whatever manner the Governor might think fit to prescribe.

Intimately connected with the general subject of the Executive Government is the question of erecting an Executive Council. In pursuance of the Act of Parliament, a Legislative Council has been established in the Colony; and it is almost superfluous to say that the functions of this body are essentially different from those usually confided to an Executive Council. The two bodies, though bearing in common the name of "Council," are perfectly distinct Institutions; formed for different purposes; proceeding by different rules; and not seldom composed of different persons. Now, from various letters which have been recently written to the Colony, I infer it is Lord Bathurst's intention that, in many acts of mere Executive Government, the Governor should be assisted (if not rather controlled) by the advice of an Executive Council. If such is his Lordship's intention, I would humbly submit that an Executive Council ought to be established by the Governor's Instructions. Such has been the established method of proceeding in former times, and such was the method recently pursued in the case of the Cape of Good Hope and the Mauritius. As to the constitution of this Council, the number of its Members, the manner of their appointment, and their mode of proceeding, it belongs to his Majesty alone, by force of his prerogative, to lay down such rules as he may think proper. This subject having recently undergone consideration in the case of the Cape of Good Hope,

* Note 265.
I know of no reason why the rules established in that Settlement might not be transferred to New South Wales, as this is an arrangement, which does not greatly depend upon the different circumstances of different Colonies.

Among the powers assumed by the Executive Council of New South Wales has been that of creating Corporations under the Great Seal of the Colony. There are accordingly two Banks under the Government of Corporate Bodies* erected in this manner. I confess that I have not been able to discover by what authority these Grants were made, since the former Governors had certainly no express power to make them. On the other hand, I am not prepared to express an opinion that the King cannot constitutionally delegate such a power to a Colonial Governor. On the contrary, I conceive that this may lawfully be done. Assuming that this is within the range of the Royal Prerogative, it would be a question, for Lord Bathurst's decision, whether such an authority should be confided to the present Governor. If his Lordship should think it proper to entrust him with such a power, I would submit whether it might not be expedient to declare that no grant of incorporation should be valid or take effect, until it had received His Majesty's approbation, to be signified through the Secretary of State.

Perhaps it will be sufficient to direct that he is not under any authority, granted in general terms, to give his Sanction to any measure of an unusual description or not of an urgent nature, without His Majesty's Approbation having been previously signified.

The ordinary powers of building Forts, of embodying and arming the male population for the suppression of rebellion, or of opposing a foreign force, of proclaiming Martial Law when necessary and lawful, of issuing Commissions of the Peace, and other Similar powers usually confided to the Governors of Colonies, would, I presume, of course be committed to the Governor of New South Wales.

The directions with respect to the passing Laws will form part of the General Instructions, and may to a considerable extent be transferred from other Instructions.

II. The Second general head, which I propose to notice is that of the duty of the Governor in respect to Legislation.

Upon this subject the Governor of New South Wales is placed in a situation differing materially from that of any other person, holding a similar Commission from the Crown. Under the recent Act of Parliament,† all Laws must be passed with the Assent of the Legislative Council, but first must be introduced by the Governor. Now it seems highly necessary that Som
instructions should be given for his direction and assistance in
the exercise of this important power. In those Colonies which
possess Legislative Assemblies, the Governor is specially in-
structed in what cases he shall refuse his assent to Laws, which
may be offered to him. In New South Wales, he should, on the
other hand, be instructed in what cases he is not to offer Laws
for the acceptance of his Council. The general rules, which I
would suggest for Lord Bathurst's consideration, and which are
chiefly borrowed from the Commissions of the North American
and West India Governors are the following:—

First. I would suggest the propriety of instructing the Gover-
nor never to propose to his Council the enactment of any Law,
which has once been disallowed by His Majesty, except in cases
where it had been disallowed on account of particular circum-
stances, which had subsequently undergone material alteration,
even then the Law ought not I conceive to be passed, without
a suspending clause.

Secondly. It has been the general rule in the Old Colonies to
prohibit the enactment of Bills for the Naturalization of Aliens.
Without such a restriction, many Individuals would become en-
titled, even in this Country, to the privileges of English Birth,
whom it might be highly inconvenient to receive in that char-
acter.

Thirdly. The Colonial Legislatures are also in general re-
strained from passing Acts for Divorces. The danger of the
power being abused, if it were once granted, has, I presume, been
the reason for withholding it; otherwise it might seem difficult
to assign any good reason why the parties should be indissolubly
united, notwithstanding the most aggravated case of Adultery
which can be supposed, merely because they reside in a distant
Colony. I should wish to be apprised, before the Commission
and Instructions are prepared, whether Lord Bathurst proposes
to extend to New South Wales these prohibitory rules respecting
Naturalization and Divorce Bills.

Fourthly, with regard to the enactment of private Bills, the
Governors of the old Colonies are, in general, required to with-
hold their Assent from them, unless they are passed with a sus-
pending clause, and the experience of every day demonstrates
the wisdom of this prohibition. Without it, Governors, whose
occupations in life have seldom led them to the study of the
Law, would be continually in danger of giving effect to Acts
subversive of the rights of private families. In general it is
also required, that all such Acts should carry within themselves
evidence that all necessary Forms have been observed for giving
of the measure to the parties concerned; and that the
Legislature have received proof of the truth of the preamble. In practice, this rule is universally disregarded. It seems to me, however, a very wholesome regulation, nor can I see any cause why it should not be laid down in the proposed Instructions.

5th. The standing Instructions to the Governors of the old Colonies require that all militia Laws, and Laws relating to Judicatures, shall be permanent; that all Revenue Acts shall be passed for at least one year, and all other Acts for at least two years, except when it shall be necessary to make provision for some temporary exigency. The obvious principle of all these rules is to prevent the Legislature assuming to themselves the functions of the Executive Government, by making Acts for so short a period as to require continual renewal. I presume that the Same rule might be advantageously established in New South Wales.

6th. The several prohibitions of Acts for raising money by Lotteries, of Acts infringing the Royal Prerogative without an express authority from the Secretary of State, and of Acts imposing unequal taxes on Absentee Proprietors, seem as applicable to the case of New South Wales as to that of the American Colonies.

7th. I presume that the Legislative Council of New South Wales will be restrained from passing Laws for making Paper money a legal Tender, or Laws imposing Fines for the benefit of any person except His Majesty, or Laws authorizing the application of the public money under any other authority than that of a Governor's Warrant.

8th. The rule prohibiting the enactment of Laws imposing Duties on the importation of convicts is of course peculiarly applicable to the State of New South Wales.

9th. All the ordinary rules respecting the form, in which Acts should be drawn, and the mode of promulgating and transmitting them to England, might, I should conceive, be transferred to General Darling's Instructions, with no other than mere verbal alterations.

The Chief Justice might be a Member of the Executive or Privy Council, as in all other Colonies, and not of the Legislative Council. In Canada, the Chief Justice presided at the same time in the Executive and was Speaker of the Legislative Council. Lord Bathurst approves of the Colonial Secretary having a Seat in the Legislative Council, and this does not appear inconsistent with former practice. In Canada, the Clerk of the Executive Council has a seat in the Legislative Council, And the Clerk of the Legislative a seat in the Executive Council.
With respect to the constitution of the Legislative body, you are perfectly aware of the objection which seems to exist to giving a Seat in the Council to the Chief Justice. The Act of Parliament requires that, before any Law is proposed to the Council, he should certify that it is not repugnant to the Laws of England. Exercising this degree of Superintendence over the general proceedings of the Legislature, it would seem unfit that he himself should act as a Member of that very Body. The danger of rendering him too powerful a Member of Society, the interruption to his arduous and many engagements, and the increased risk of collision between him and the Governor, would all seem strong concurrent arguments in favor of his exclusion, so soon as any person, sufficiently possessing the confidence of His Majesty's Government, can be found to take his place. This arrangement, if fit to be made at all, can, of course, be made with propriety only by the authority of the Government at home.

Objections also would seem to exist to the Colonial Secretary occupying a Seat in the Council. It being the appropriate duty of his Office to act under the direction of the Governor, and in a character entirely subordinate to his, the incongruity of rendering him in any Sense the Colleague of his Official Superior, and of enabling him, in his Legislative character, to counteract the very resolutions which, in his official character, he is bound to carry into effect, might not improbably prove the germ of discord.

III. Revenue is the next in order of the Subjects which it has been proposed to notice. Upon this head, I would in the first place recall to your recollection the very peculiar circumstances under which the Revenue of New South Wales is placed.

It may, in general, be said to arise from four distinct Sources: 1st the duties levied on Spirits and Tobacco under the statute of 3rd Geo. 4 c. . ., 2dly the casual Revenue of the Crown derived from Quit Rents, the Sale of Government Land, Fines, Forfeitures, Deodands, and other Similar Sources, 3dly Such duties as, in the exercise of the powers granted by Parliament, the Legislative Council may think fit to impose, 4thly the money annually voted by Parliament in aid of the Civil Establishment of the Colony.

Of these four sources of Revenue, the two first named are entirely unappropriated, and may be disposed of according to the discretion of His Majesty's Government for any public Service which they may think proper. The duties to be voted by the Legislative Council must be specifically applied to such purposes as shall be prescribed by the Act imposing the duty; and the Money granted by Parliament is invariably the subject of specific appropriation.
Hence arises the necessity of giving to the Governors distinct Instructions, applicable to these distinct funds. With respect to the appropriated Revenue, his duty will, of course, be nothing beyond that of issuing Warrants for the application of it to those purposes for which it is specially granted. With respect to the unappropriated Revenues, I presume that it will be thought right to apply it exclusively to the Support of the Civil Government of the Colony, in which it is raised, and that the Governor will be directed to apply it in the manner which His Majesty may from time to time direct through the Secretary of State; or, in default of such directions, in the manner which to the Governor in his discretion may seem most conducive to the public welfare.

Further, It appears highly necessary that some definite rule should be laid down for the conduct of the Governor in issuing these various branches of Revenue for public services. The plan at present pursued is as follows:

The Commissary or Deputy Commissary General draws Bills upon the King's Agent in England (an Officer appointed, I conceive, at the Treasury) for the Sums voted by Parliament. These Bills are, or ought to be, drawn only in obedience to written Orders issued for that purpose to the Commissary or Deputy Commissary by the Governor.

The Colonial Treasurer receives all the casual Revenue of the Crown, which he also issues in obedience to such Warrants as he may receive from the Governor.

In general, therefore, the duty of the Governor is not himself to receive any part of the Public Money, but merely to prescribe to the Treasury, or to the Commissariat, the proper time and manner of issuing the Funds placed under the control of those Departments. Whether this is the most convenient method of executing this part of the public service is a subject, upon which it would not be in my power to make any suggestion deserving Lord Bathurst's notice. But, if this method of proceeding is to be continued, it seems to me not only convenient, but necessary, that the Governor should be distinctly informed, by his General Instructions, that such is His Majesty's Pleasure.

It is not, I apprehend, consistent with the usages of the old Colonies, nor convenient or reasonable in itself, that the Governor of New South Wales should be converted into an Accountant, and held responsible to make good to the Crown any deficiency which may appear upon an investigation of the Public Accounts of the Colony under his Government. The persons to render the Account to the Colonial Auditors should apparently be the King's Agent in this Country, and the public Treasurer and
Commissary in the Colony. They alone have the actual Receipt of the Money, and into their hands only are vouchers for the expenditure of it delivered. By requiring the Governor, in addition to his other duties, to prepare for passing, on his return to England, an account of the whole expenditure of the Colony during his Government, he is not only subjected to extreme inconvenience, but is unavoidably prevented from giving that undivided attention to the duties of his Office, which seems so necessary for the effectual performance of it. It is, I submit also, somewhat hard that a Governor, whose official emoluments are seldom more than adequate to his unavoidable expenses, should be subjected to all the disadvantages under which public Accountants labour, without the benefit which they derive from the custody and possession of the public money. I understand that Twelve months have proved hardly sufficient to pass at the Colonial Audit Office the accounts of the Government of the Mauritius for one year; so that the Governor may be said to be employed in public duties for two years in consideration of one year's Salary. Neither can I see what advantage accrues to the public from calling on the Governor individually to render these Accounts. They would more properly, and quite as effectually, be passed by the persons into whose hands the money actually comes, who are Accountants by profession, who alone superintend the Accounts in their progress, who have the custody of the Vouchers, and who give, or ought to give, to the Crown Security for the faithful execution of their Trust. The warrant of the Governor for issuing public money, and the receipt of the person into whose hands the money is accordingly paid, form the proper vouchers of the Treasurer. If those Warrants are issued improperly, I cannot think that the Governor should be held directly responsible to make good the amount from his own pocket. A Governor authorizing a misapplication of the public money does not become a public Debtor, but a State delinquent; his offence is not within the cognizance of public Auditors, but of the Secretary of State, or of Parliament.

I have insisted the more largely on this point, because it is of great and general importance. If the Governor is not to render an Account on his return to England, he should be distinctly apprized that such is his situation. If he is to account, it is more necessary that he should be apprized of it, in order that he may carefully collect and preserve the vouchers necessary for his discharge.

IV: The Granting of Crown Lands is the next general Subject of consideration.
Upon this point, Lord Bathurst's decision has been so recently expressed, and so much at length, that I presume it may be taken for granted that the question requires no further discussion at present, but that General Darling's Instructions on this point will be a mere echo and repetition of the principles laid down in the Dispatch* recently addressed to Sir Thomas Brisbane. There are, however, two exceptions from this general remark, to which I would wish to call his Lordship's attention.

Upon the present plan of proceeding, there will be two distinct Commissions, the one to survey and divide the Territory, the other to fix the value of the Lands comprised in each division. Now, I would submit to you, whether it might not be a more simple, economical, expeditious and convenient plan to consolidate these Commissions into one, and to make the division of the Land and the valuation contemporaneous Acts of the Same Body of Commissioners.

The Scheme, as it stands at present, directs that all correspondence with respect to Grants of Land shall pass through the Office of the Surveyor General. But to this measure there would seem to be weighty objections. The Surveyor must himself be continually employed at a distance from the seat of Government, so that this important correspondence would usually pass through the hands of his deputies and clerks. And, independently of this objection, I doubt whether it is expedient to elevate a merely subordinate and executive Department of Government into an office of so much trust and responsibility as that of the Surveyor General would become upon the plan thus laid down.

The mode of proceeding, with respect to Grants of Land in Canada, was originally proposed for adoption upon this occasion, experience having been had of its advantages in those possessions, where Land has been granted upon the most extensive Scale, and because an opportunity is now afforded for the Colonial Secretary to obtain all the information necessary for putting the System in operation in New So. Wales, upon the arrival of the new Governor. The documents have already been put into Mr. McLeay's hands for this purpose.

The practice recommended in this case might perhaps be extended with great advantage. There is in Canada a Committee of the Council for matters relating to the public Accounts and Revenue. Three members are specially named, one of whom as Chairman takes the principal labour; the Committee is open to the whole Council. The Clerk of the Council or his Assistant acts as Secretary in those Committees, and minutes of its proceedings are regularly kept and entered in the same manner,

* Note 268.
but separately from those of the whole Council, to which the special reports of the Committees are finally submitted.

Experience has proved the great advantage resulting in Canada from a different mode of proceeding. In those Provinces, there is a Committee of the Executive Council called "The Land Board." All applications for Land are addressed to the Governor through his Public Secretary. The Governor refers those Petitions to the Land Board. The Petitioner then lays his case before this Board, and transmits to them any proofs and explanations they may think proper to require. Thus, for example, where two persons are claiming the same Land, or where a question arises respecting the performance or nonperformance of the conditions of any Grant, the whole Subject is brought under the cognizance of this Board, who make a report to the Governor on the question referred to them, having previously, with the aid of the Clerk of the Council, entered in a Journal a record of all their proceedings, with the evidence, at length, produced before them. The Governor signifies to the Board his approbation of or dissent from their conclusions, and an answer is ultimately returned to the Applicant from the Governor through the Colonial Secretary. By this method, the following advantages are obtained. The Governor appears in his proper character as the Author of all Public Grants, and actually exercises a constant superintendence over them. Punctuality and Method are observed in the investigation of questions of this nature, and an accurate record of all claims and evidence is preserved. The time of the Governor and his Secretary is spared for their other duties, and he is rescued from any imputations of partiality and injustice, to which a more direct interference might expose him. To which it is to be added, that His Majesty's Government at home have always the means, of obtaining, in detail, the most authentic and copious explanation upon every question of this nature, which may be brought under their notice.

In consideration of these advantages, not so easily, if at all, to be obtained by any other method, I would submit to you the expediency of introducing a similar Institution into New South Wales.

V. With respect to Judicial Affairs, which is the next general subject, it may be observed, that the greater part of the rules of Government under this head are already settled by the Act of Parliament, and the Charter of Justice. The subsidiary regulations, which it remains for His Majesty's Government to make, relate to the following topics.

So soon as the division of the Colony into counties can be carried into effect, it will probably be convenient that a
Commission of the Peace should issue, as in England, for each particular County; and I would also submit to you that it might be convenient to follow the course, pursued in Jamaica, of investing, in each county, some one Magistrate with the Office of "Custos rotulorum," selecting for that purpose the person in whom the local Government might place the greatest confidence. I need not observe on the Value of distinctions of this nature, the influence of which is felt in all Societies, and which have the effect of securing to the Government the cheapest and most effectual influence over the higher classes of Society.

The Act of Parliament having created a species of Military Jury for the trial of all offences, it has been represented that the Officers of the Army consider themselves aggrieved in being called upon to discharge a civil duty so entirely remote from their professional pursuits without any compensation. At an expence of about £300 per annum, an allowance of half a Guinea per diem might be made to every Subaltern Officer for attending the Court as a Juryman; and it has been supposed that such a regulation would be quite satisfactory to them, and would render attendance on this civil duty rather a privilege to be sought than a burden to be avoided.

The rule by which the Sheriff of New South Wales was required to pass on Oath once in every month an account of all the money he had received, and to pay the balance into the Colonial Treasury, to be disposed of according to the Orders of the Court, rests, at present, upon no other Authority than that of a letter from the Secretary of State. Assuming that the regulation is proper to be permanently established (as I humbly conceive it is), the present occasion ought, I think, to be taken for making it in a more solemn manner, and by a more formal Instrument.

The relative duties of the Governor and Judge, with regard to the execution of Capital and other Sentences in criminal cases, is a subject, which has recently given birth to discussion in the Colony, and which it seems fit to settle by the Supreme Authority at home. Upon this point, I would Submit to you, whether it might not be desirable to follow, with certain exceptions, the course usually taken after the Sessions held at the Old Bailey for London and Middlesex. To confide exclusively to the Judge the decision of the question, whether each particular convict shall suffer the extreme penalty of the Law, would be to impose a most painful responsibility on him with a very formidable power. In all cases of persons convicted of felony, whether capital or not, I conceive that the Judge should make a written report to the Governor of the Evidence given at the
Trial, and of the circumstances which either entitle the Prisoner to Mercy, or justify the execution of the Sentence; and the Judge should also (I apprehend) be required to express distinctly the opinion, whether the Sentence ought to be carried into execution or not. Whenever the Judge should recommend a mitigation of the punishment, or an unconditional pardon, I think the general rule should be that the recommendation should take effect, although it might be inexpedient so to fetter the Governor as to leave him no discretion on this point. But even where the Judge did not recommend that mercy should be extended to the Prisoner; I think it should be clearly understood that the Governor is to exercise his own discretion as to granting or withholding it. It is very conceivable that, on many occasions, he might have good reasons for exercising this power, of which the Judge might not be apprized, or which he might not have the means of estimating duly.

In point of form, it seems to me that an official letter should be written by the Governor to the Judge, in reference to each Report, stating whether it was or was not his intention to interfere with the execution of the Sentence, and the Judge should be directed to govern himself accordingly. This letter would be the Judge's authority for issuing or for staying his Warrant of execution to the Sheriff.

In all convictions for misdemeanors, I conceive that the sentence of the Court should be carried into effect, without any reference to the Governor. But in any case of peculiar importance, in which the Judge might himself be desirous to obtain the Governor's Sanction for the measures he proposed to take, I am aware of no reason why the Same course should not be pursued as upon convictions for Felony.

With regard to commutation of capital sentences, which appear to have been recently carried to a great extent in the Colony, and of which Mr. Secretary Peel has expressed his disapprobation in a recent letter to Lord Bathurst, I am not aware that it is possible to give any specific Instructions. To prohibit such commutations entirely would often prove highly inconvenient, and I know not by what general rule the cases, in which they ought to be allowed, can be distinguished from those in which they ought not. This matter must, I should therefore conceive, be left to the discretion of the Governor, with an intimation that the extent, to which commutations have recently been carried, is deemed an improper example for his imitation.

Connected with the general Subject of judicial Affairs, is that of the Offices and duties of the Attorney and Solicitor General of the Colony. The appointment of the latter Officer indeed

Commutation of capital sentences.

1825.
27 March.

Procedure proposed for execution of sentences in criminal cases.
carrying with it no salary or emolument, and he being therefore charged with no public duty except in the event of the illness or absence of the Attorney General, there is little or nothing to be explained respecting his situation. But the functions of the Attorney General are highly important and extensive, and I submit that for the prevention of all doubt and controversy, it would be convenient that the Governor should be distinctly apprized of the extent to which, and of the terms upon which, he is entitled to call for this Officer's assistance.

I would therefore propose that it should be stated that, in consideration of the Salary of £1,200 per Annum, received by the Attorney General, he is to conduct the prosecutions of all persons arraigned before the Supreme Court, and to prepare all criminal Informations; and that he is to be charged with the whole duty of conducting and making preparation for the Trial; that he should be required to manage all Suits and Actions in which the King is interested, either in regard to His Revenue, the Crown lands, or the Royal Prerogative; that it is his duty to give to the Governor, and the Several Departments of Government, his opinion upon all questions of Law proposed by them, through the Colonial Secretary, for his consideration; that he should prepare the Drafts of all Acts of the Legislative Council, and of all Proclamations, Government Orders, and other public and formal Acts of the Government, in which precision of style and legal accuracy may be peculiarly necessary; that he should be bound to attend the Governor, the Legislative and Executive Councils, or the Colonial Secretary, in person, when Summoned to do so upon public business of a legal nature; and that it should be his peculiar province to take care that all Grants of the Crown are prepared in proper legal form.

With respect to the Commissioner of the Courts of Request, I observe that the plan, proposed in the Colony for the execution of the duties of his Office, corresponds in general with that which is stated in Lord Bathurst's Despatch* on the Same Subject. I am, therefore, not aware that it would be necessary to make any alteration in those rules; but I conceive that, upon this, as upon all other topics connected with the Judicial Affairs of the Colony, it is desirable that the Rules to be observed should, as far as possible, be brought together within the Governor's General Instructions.

VI. Ecclesiastical Affairs and Education constitute the sixth General Head, under which it has been proposed to arrange the topics connected with the present enquiry.

The Despatch* to Sir Thomas Brisbane, which announced the appointment of the Archdeacon, contains a full explanation of

* Note 270.
1825.
27 March.

Duties of
archdeacon.

Charter
incorporating
trustees for
clergy and
school estates.

Administration
of police.

the duties which he will be required to perform; and it may be perhaps sufficient, for the present purpose, to say that, with Lord Bathurst's permission, I should propose to introduce the whole of that Despatch into the Governor's Instructions, with such alterations only as are necessary for adapting the style of that communication to that of a Royal Instruction.

The paper enclosed in Lord Bathurst's recent Despatches, entitled "A Charter for the Incorporation of Trustees for the management of the Clergy and School Estates," and his Lordship's directions for appropriating the necessary portions of Land for the support of the Clergy and Schools, will, I presume, be acted upon as soon as General Darling receives his appointment. I would therefore submit for his Lordship's decision, whether it may not be proper to include these arrangements also in the Royal Instructions, both because they seem to require that high authority for giving full effect to them, and because it would seem highly convenient to render the Instructions a comprehensive Code of Regulations for the Governor's Guide, and upon all the more important branches of his administration.

VII. Police is a topic peculiarly important in the Colony, in reference to which the present statement is made. An Officer is, I understand, to be appointed at Sydney with the Title of Superintendent of Police. The Functions of this Officer will, I presume, be those of an ordinary Justice of the Peace, with the additional duty of appointing Constables as a Watch and Ward for the Town and its precincts, and of receiving from the persons, so appointed, a daily verbal report of all material incidents. The whole body of constables being under the immediate direction of this Officer, they will, I presume, be required to bring before him at his public Office all disorderly and riotous persons, and all others seized in the Commission of any Offence, or, for the apprehension of whom, he may have issued his warrants, to be dealt with according to Law. The Superintendent of Police will, I presume, be farther required to make periodical reports to the Governor, at such short and stated intervals as may be found most convenient, of the state of the Police of the Town, and of the methods which may most conveniently be pursued for diminishing the expense or improving the efficiency of the Establishment; and the Governor will, I apprehend, be authorized to carry into effect any useful suggestions of this nature, whether originating with the Superintendent of Police, or from any other quarter.

The growing importance and population of some of the other Towns in the Colony may perhaps require the extension of a Similar system to them; and I should wish to receive Lord
Bathurst's directions whether any provision for that purpose should be made in the General Instructions or not. The arrangement of the minor details of Police, comprizing all the regulations necessary for maintaining Health, Cleanliness and Order in the Towns of the Colony, is, I conceive, the appropriate duty of the Legislative Council, and therefore does not require any particular notice on the present occasion.

VIII. The Subject of Convicts is one of extreme importance, and, I presume, that the rules, which are to be laid down for the guidance of the Governor under this head, cannot be conveniently framed except in concurrence with Mr. Secretary Peel, as the business of his Department may be materially, though indirectly, affected by the directions, which may be given respecting this class of persons.

It is not, of course, the object of His Majesty's General Instructions to provide rules for the conduct of the Governor in the various details of his administration, but rather to furnish him with general principles of conduct. Now, as far as my information extends, the general principles to be observed in the Government of Convicts are the following:—

First, I understand it to be the intention of His Majesty's Government to maintain the Office of General Superintendent of Convicts, and this Officer is, I presume, to be permanently resident at Sidney. His General duty is, I conceive, that of exercising a personal Superintendence over such of the Convicts, as are retained in the Capital, of regulating the internal concerns of the Establishment for their reception, and in receiving periodical reports from all subordinate Officers having the care of Convicts in the remoter parts of the Territory. From this Officer, who will thus have an Official cognizance of the condition and conduct of the Convicts throughout the whole Colony, I presume it is intended that Reports should be made, at stated periods, to the Governor for his guidance in relation to them.

The removal of the Convicts from the Towns and their vicinity, for the purpose of employing them in rural occupations, is, as I collect, a general maxim by which the conduct of the local Government is to be regulated, as far as it may be practicable to observe it.

By the Act of 5th Geo. 4, parliament has granted to the Governor of New South Wales, what may be termed a fiduciary property in the Services of the Convicts, with a power of alienation* to other persons, who will acquire a beneficial Interest in this species of property, an interest which, when once created, may be transferred, by Successive Alienations, to any number of successive owners. The condition of a Convict, whose

* Note 271.
services have been thus alienated, and that of a Slave, is the same in so far as they are both compelled to labor for the profit of a Master, from whom they receive no wages, and whom they have not the power to quit, although he possesses the right of transferring their service to another Master. The important distinction is that the Convict does not transmit his own condition to his posterity, and may himself be emancipated by an Act of the Government, without the consent of his Master. Still, however, there is sufficient resemblance between the two conditions to render it highly necessary that the extent of the Master's authority over the Convict, and the nature of his duty towards him, should be exactly defined. Especially the power of Alienation from one person to another should not, I humbly conceive, be exercised except with the previous consent of the local Government, otherwise convicts might become an article of traffic, and fall into the hands of persons most unfit to be trusted with their management.

I conceive that the object of Parliament, in this enactment, was to conquer the legal difficulties, which might seem to obstruct the employment of these people by private Masters; for, being once at large, and not in the precincts of any place of confinement, it might seem difficult to invest the Master with any lawful authority or control over them, except by giving him an actual property in their services. But as the enjoyment of every description of authority is more or less restrained and qualified by the Same Law which creates and protects it, so such restraints are emphatically necessary, when the subject of property is the Service of Man. Hence, therefore, I infer that the Governor of New South Wales should be instructed to make all Grants of Convict Service, under the Act of Parliament, conditional on the observance of such necessary rules, as may be laid down for the prevention of abuses by the Grantee; and, that he will be directed to take all necessary securities for the fulfilment of those conditions.

At this distance from the Country, in which the Grants are to be made, it would probably be impossible to foresee what conditions it may be most convenient to exact from persons receiving Grants of Convict labor from the Government, and rather because those conditions must unavoidably vary at different times, and in reference to different places. It may perhaps be sufficient that the Government should, in general, be informed that the conditions should be such, as will best promote the great objects of sobriety, cleanliness, health, instruction in some useful and profitable employment, religious instruction, humane treatment, and sufficiency of food and rest; and such also
as most effectually prevent transfers of the Services of the Convicts with a view to gain, or to persons disapproved by the local Government.

Another general maxim established with regard to the convicts is, I understand, that their labour should, as much as possible, be diverted from public works in which the Government alone are engaged, and directed to works in the actual and punctual performance of which private persons have a direct interest. In pursuance of this maxim, it is, I believe, intended that such works, as may be undertaken on the public account, should be executed by private contractors, whom the local Government would supply with Convict labourers for carrying them into execution. A rule thus general, and apparently so important, might, I should conceive, be properly introduced into the Royal Instructions.

Parliament having entrusted the local Government with the power of remitting, either partially or altogether, the execution of the Sentences pronounced against the convicts in the United Kingdom, it becomes highly important that a general rule should be laid down for his direction in exercising this important duty.

The intermediate condition between the State of a convict, whose sentence is in full force, and that of a person who has received a free pardon, that is, of the holder of a Ticket of Leave, seems to have been devised for the wholesome purpose of ascertaining, by experiment, whether the Convict was disposed to make a good use of his liberty before the restraints of the Law are irrevocably withdrawn. If it is intended to continue the established System of granting Tickets of Leave, it is, I apprehend, necessary that the Governor should receive the direct Sanction of His Majesty's Instructions for pursuing a measure, which his predecessors seem to have adopted without any legal Authority.

The power of granting free pardons to Convicts involves a duty of so much difficulty, and which is liable to so much abuse, that I would submit to you, for Lord Bathurst's consideration, whether it would not be a wholesome General regulation, that the Governor should never grant a pardon until he had communicated to the Executive Council the circumstances inducing him to think that the individual in question had reasonable and just claims to receive such an Act of Grace, and until he had received from the Council a written Report of their opinion and advice upon the Subject. The necessity of reducing into a written form, for the inspection and consideration of others, the reasons of any measure about to be adopted, and the obligation of suspending the measure itself, until those Reasons have
undergone discussion, is the most effectual check against precipi-
tation; and, with respect to the Office of granting pardons, the
danger of excess is much greater on the side of extreme haste and lenity, than on that of improper severity and delay. I would also suggest, whether it might not be fit for the information of His Majesty’s Government at home, the Governor of New South Wales should be directed to make, at short and stated intervals, reports of the persons to whom free pardons had been granted, accompanied with transcripts of his own communications to the Executive Council, and of their reports to him, in reference to every such case. Some period of probation ought, of course, to elapse before a pardon is granted; nor am I aware that any practical injustice, or even any serious inconvenience, would arise from laying down a rule, that no man should receive a free pardon until after he had resided three or four years, at the least, in the Colony.

There is no subject of more difficulty, or of more importance, connected with the duty of the Government of New South Wales, than that of the conduct to be observed towards convicts, who may have received a liberal education, and have lived in England in society elevated some degrees above the lowest ranks. Such persons cannot be employed in manual labour, and, if engaged in more liberal pursuits, they advance a claim to reception in general society, which it is equally mischievous entirely to acknowledge, or entirely to reject. In truth, it is much to be regretted that any such persons were ever sent to New South Wales; and His Majesty’s Government may perhaps deem it right to prevent the increase of their number. But, although the extension of the evil may be prevented, the degree to which it has already gone must continue to furnish the seeds of dissention and violent party spirit in the Colony. Now, as the demeanor of the Government towards persons of this description must, in a great degree, be the model for the conduct of the aristocracy of the Country in general, it becomes a question of no little public importance, whether he should or should not extend the hospitalities of his house and table to pardoned convicts of this description. Of course, this is not a subject, on which the direct authority of His Majesty could be interposed with any propriety, but I humbly conceive that General Darling’s Instructions would be defective in a most essential particular, unless the pleasure of His Majesty’s Government were communicated to him, on this point, in a private Instruction before his departure from England. Much, of course, must unavoidably be left to his own discretion; but, after all that has passed on this head, he would probably feel himself relieved of an
arduous responsibility by being informed, in an official manner, what may be Lord Bathurst's View of the merits of this controversy.

There are, of course, a great number and variety of minor details respecting the management of Convicts, which are to be found partly in Mr. Bigge's Report, and partly in Lord Bathurst's Dispatches, which, though highly important in themselves, are not such as to be noticed in the Royal Instructions, and are, for that reason, passed over without remark in the present communication.

IX. The Native Inhabitants of New Holland are mentioned in the Instructions of former Governors, as indeed the Aboriginal Natives of New Countries are usually mentioned in the Instructions of all His Majesty's Governors of Colonies settled among them. The objects of these Instructions are exceedingly indefinite. In very general terms, the Governor is commanded to promote Religion and Education among them; to maintain a friendly intercourse with them; and to protect them from injustice; Instructions, which, though they can afford little or no assistance to the Governor in the execution of his duty, it may yet be fit to repeat, because they are at least a record of the general feeling of the English Government on the Subject, and because the omission of them might possibly be construed into some change in that feeling.

One specific question has, however, recently arisen on this Subject, which seems to require a decision. It is whether the Governor may oppose, by Military Force, incursions of the Natives, when made in a predatory and hostile manner. My own opinion is that no real distinction is to be made, in this respect, between the Natives and the Settlers; but that the same methods may lawfully be taken to repress outrage and Riot, whether the Aggressors are of the European or of the Aboriginal race. I abstain from troubling you with the Arguments in favor of this conclusion, because, if Lord Bathurst thinks it expedient that this principle should be acknowledged, the Law Officers of the Crown may be required, on settling the Instructions, to state whether it is consistent with Law.

X. Respecting the New Settlements, which are either formed or in contemplation* within the limits of General Darling's Commission, I apprehend it would be necessary that he should receive some general rules for his guidance. For example, he should, I conceive, be directed to correspond with the Officers at the head of such Settlements; to establish, in pursuance of the Act of Parliament, a Summary Court for the Trial of Criminals, and perhaps a Court of Requests for the decision of small demands.

* Note 272.
of a Civil Nature. He should, also, be directed to issue his Proclamation, in pursuance of the Act, for preventing the intercourse of Trading Vessels with Ports appropriated exclusively as Convict Settlements. Perhaps, also, a discretion should be granted to him of selecting, for the purpose of these Settlements, such places as he may find best adapted for the purpose, with a power of detaching such Civil or Military Officers as may be necessary for taking the Command and Administering the Government in them.

Understanding it to be Lord Bathurst’s intention that a distinct Commission shall issue for the Government of Van Diemen’s Land, as a separate and independent Colony, the whole of the preceding remarks will apply equally to that Island and to the Colony of New South Wales. It will, however, be necessary to decide, without delay, the precise Geographical line, which is to form the Boundary between the two Governments. It will also be necessary to select proper Officers of Council in Van Diemen’s Land, and, in pursuance of the Act, to frame a Special Order in Council for effecting the Separation.

When I have learnt Lord Bathurst’s decision upon the various questions, which I have thus brought under your notice, I shall proceed in compliance with your directions, to prepare for his Lordship’s consideration the Draft of the new Commissions and Instructions.

I have, &c.,

JAMES STEPHEN, Junr.

ORDER IN COUNCIL FOR SEPARATION OF GOVERNMENTS OF NEW SOUTH WALES AND VAN DIEMEN’S LAND.

14th June, 1825.

A copy of this order will be found on page 41 et seq., volume XII, series I.

ATTORNEY-GENERAL BANNISTER TO SIR THOMAS BRISBANE.

28th June, 1825.

Copies of two letters under this date, containing remarks on the first eleven acts passed by the council in N.S.W., and on the proposed appointment of a second judge, will be found on pages 676 and 678, volume XI, series I.

EARL BATHURST TO GOVERNOR DARLING.

12th July, 1825.

A copy of this despatch, containing instructions for the control of the press, will be found on page 16 et seq., volume XII, series I.
EARL BATHURST TO GOVERNOR DARLING.

14th July, 1825.

[A copy of this despatch, defining the powers of the governor and enclosing a mandamus for members of the council, will be found on page 18 et seq., volume XII, series I.]

COMMISSION AND INSTRUCTIONS FOR LIEUT.-GENERAL DARLING AS GOVERNOR IN N.S.W. AND TASMANIA.*

16th July, 1825.

[ Copies of these documents will be found on page 99 et seq., volume XII, series I, and on page 1 et seq., volume V, series III.]

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HAY.

Sir, Whitehall, 16th July, 1825.

In obedience to Lord Bathurst's directions, I have prepared, and have the honor herewith to transmit to you, for his Lordship's consideration, the Draft of a Dispatch, to be addressed to the Governor of New South Wales, respecting the restraints which it may be proper to impose on the Publishers of Newspapers in that Colony. I have, &c.,

JAS. STEPHEN, Junr.

[Enclosure.]

[This was the despatch sent by Earl Bathurst to Governor Darling, dated 12th July, 1825; see page 16, volume XI, series I.]

WARRANT APPOINTING MEMBERS OF COUNCIL IN TASMANIA.

17th July, 1825.

[A copy of this warrant will be found on page 595 et seq., volume IV, series III.]

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HAY.

Sir, Whitehall, 15 August, 1825.

In compliance with your directions, I have perused and considered a Dispatch† from the Governor of New South Wales, dated 8th February, last (No. 29), and I am to report to you, for Lord Bathurst's information, my opinion on the various questions of Law, which are proposed to His Lordship in that dispatch.

The Attorney General of the Colony having brought under the consideration of the Governor, thirteen distinct enquiries connected with the general administration of the Law, Lord Bathurst would, probably, wish to transmit to New South Wales a full and direct answer to each of them. But, upon considering

* Note 273.  † Note 274.
1825.  
15 Aug.  
Queries re  

Validity of English statutes in colony.  

Interpretation of 4 George IV; cap. xcvi.

Liability of transports to trial.

License proposed for foreign built ships.

with attention the nature of these enquiries, it appears to me that comparatively a small part of them either require or admit of any distinct solution. I will, therefore, in the first place, point out such of the Attorney General’s questions, as it seems to me either unnecessary or impossible to answer.

First, there is a general question to the following effect, viz. whether Acts of Parliament, made subsequently to the first occupation of the Colony, and before the enactment of the Statute, 4th Geo. 4th, Cap. 96, do or do not extend to New South Wales? Now, a question precisely identical in principle with this was sometime since proposed to the Law Officers of the Crown, in reference to the Island of Newfoundland. Their decision of the one case will involve the determination of the other.

The second enquiry is in substance, whether certain clauses in the New South Wales Act have or have not the effect of extending to New South Wales, that part of the Law of England, which has been enacted by Parliament since the first occupation of the Colony? Now, as within little more than half a year from the present time, Lord Bathurst must bring into Parliament a Bill* for continuing and amending the New South Wales Act, his Lordship probably would not wish to pledge himself to any official interpretation of it during that short interval, unless it were necessary to meet some pressing emergency. But it is not even suggested that the present enquiry involves the decision of any practical question now depending. It seems to be now proposed as an abstract point of Law, and merely with a view of possible contingencies.

3rdly. The next enquiry in order is whether a transported Felon, who, during the time of his Service, may have committed a new felony, is to be tried and banished like any other person, or whether he is subject to a kind of criminal “equity”? I profess myself quite at a loss to understand what is meant by the terms employed in the latter branch of this question—“a kind of criminal Equity.” I know not how the doubt is to be solved, until the nature of it is more clearly explained.

4thly. A further question is, whether it may not be prudent to allow the Governor of N. S. Wales to license foreign built vessels to carry on the trade of the Colony and of the South Seas. This is a question involving no point of Law, but resting exclusively within the cognizance of the Board of Trade. But I fear that their Lordships would hardly be able to pronounce any decision upon it, without some explanation of the circumstances and reasons, which have led to the Suggestion being made.

* Note 275.
5thly. The Attorney General next enquires, whether the Act for registering British Vessels will be in force in New South Wales, before a Collector of Customs is appointed at Port Jackson. It would be useless to answer this question, because the Act, to which it refers, has been very lately repealed, and the whole system of Custom House regulations altered.

6thly. The next question relates to the limits of the jurisdiction of the Colonial Courts as defined by the Commission of Governor Brisbane. This enquiry, also, has become immaterial, in consequence of the revocation of that commission and the issuing of a new one, in which the limits of the Colony are ascertained by geographical lines of latitude and longitude.

7thly. The enquiry next in order I do not understand. It is thus expressed:—What are "the effects of an infamous judgment on the several classes of transported Felons." These effects, of course, are very numerous, and could not be stated without an explanation of all the elementary rules of Law on this Subject. Of course, it is not such an explanation that the Attorney General requires; and, without being apprized what is the particular difficulty to which his enquiry points, I am unable to apply my mind to the consideration of it.

It now remains to notice such of the questions proposed by the Attorney General, as appear capable of receiving a satisfactory answer.

1st he wishes to be informed whether a Pardon by the Governor, under the public Seal of the Colony, issued "in pursuance of his Commission," will restore the competency of the pardoned Felon to be a witness; it being assumed, that the conviction has taken place in the Colony, and that the judgment was, what is termed, "an infamous" judgment. Upon this Subject, I conceive that the Law of the Colony must coincide with the Law of England, which (as I understand) provides that, after a conviction or attainder, even for Treason or Felony, the pardon of the King, under the Great Seal, restores the credit of the party pardoned, so as to render him a competent witness. The distinction in the case of conviction for perjury is taken between a conviction at Common Law and the conviction upon a particular Statute. In the former case, the pardon does, in the latter it does not, restore the credit of the party pardoned. In the Colonies, a pardon under the public Seal is (I conceive) precisely equivalent in its effects to a Pardon under the Great Seal in England, because the power of pardoning is expressly delegated to the Governor by an Instrument under the Great Seal.

* Note 276.
2nd. The Attorney General enquires whether the practice of England, with regard to escheated property, is to be observed in New South Wales. I apprehend the answer to be, that the Governor cannot lawfully grant escheated property, except upon a reference to the Secretary of State, to whom he ought to communicate the circumstances of each case, and the reasons inducing him to recommend the Grant in favor of any particular persons, either jointly with, or to the exclusion of any others. Such references are answered by the Secretary of State, after communication with the Lords Commissioners of the Treasury.

3rdly. It is there asked whether, as long as no ecclesiastical Court exists for the punishment of incontinency, or for allowing a separate maintenance and alimony to married women, the Supreme Court does not acquire a jurisdiction for those purposes. It is difficult to understand how such a view of the Subject should be seriously maintained. The Supreme Court has no jurisdiction at all, except by the Act of Parliament, and the Charter of Justice; in both of which the extent of its powers in ecclesiastical causes is distinctly defined. There is no reference, in either of these Instruments, to matrimonial causes, or to the Offences which spiritual Courts in England visit with ecclesiastical censures. This subject was discussed when the Act and Charter were framed, and the omission was not accidental but intentional. It can be supplied (if it be fit to supply it) by no other authority than that of Parliament.

4thly. The Attorney General further desires to be informed, what rules should be followed with regard to the resumption of Land, which has been improved and occupied without regular grants. I understood it to be settled that it would be useless to lay down general rules on a Subject presenting, in each Successive case, such an infinite variety of special circumstances; and that therefore the Governor was to exercise his own judgment, in each case as it arose, reconciling, as far as possible, the rights of the owner on the one hand, and the reasonable pretensions of the Settler on the other. I do not know that a more definite rule of conduct could be given with any real advantages.

Lastly, the Attorney General enquires what sort of action ought to be pursued for sustaining the rights of the Crown in real property. To this question, I should give the following answer:—The forms of practice and pleading adopted in England for asserting the Rights of the Crown are, in general, too complex and expensive to be followed in a newly settled Colony. The same remark may be extended to almost all suits and actions between private persons. The 17th Clause* of the New South Wales Act, and the Order in Council which followed it, have

* Note 277.
therefore authorized the Chief Justice so to modify these forms as to accommodate them to the Situation of the Colony and to the circumstances of the Settlers. No report has hitherto appeared of the manner in which the rules of legal proceeding have been framed. But the question, which is now referred for Lord Bathurst's decision, must ere now have been decided by the Chief Justice under the authority of the Act and Order in Council. It would therefore be useless to give any more particular answer to this enquiry. I have, &c.,

JAS. STEPHEN, Junr.

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HAY.

Sir, Whitehall, 16 Aug., 1825.

In compliance with your directions, I have perused and considered a Despatch* from Sir Thomas Brisbane to Lord Bathurst, dated the 28th of January, 1825; and I am to report to you, for His Lordship's information, my opinion on the question of Law proposed by the Governor in that Despatch for his Lordship's decision.

Sir Thomas Brisbane observed that "the Attorney General of New South Wales has given his opinion, that one Magistrate could not punish an Offender under the New Charter of Justice." The question for consideration is, whether this opinion is accurate or erroneous?

It is exceedingly difficult to understand, with precision, what is the legal doctrine for which the Attorney General contends, since no explanation is transmitted of the circumstances in reference to which his opinion was given. I consider that his meaning was as follows:—

In New South Wales, it was usual, until a very recent period, for the Magistrates, or for any Single Magistrate, to exercise a summary jurisdiction for the punishment of all Offences committed by Convicts, which were not capital. The legality of this mode of proceeding was, at all times, a subject of great doubt; and when the New South Wales Act was passed, provision was made for setting the question at rest. By the 19th Section† of the Act, the Courts of General or Quarter Sessions were authorized to punish by whipping, or other corporal punishment, or by hard labour, any convict found guilty in the Colony of any of the Offences enumerated in that Section. From this enactment the inference had, I presume, been drawn that, except by the Quarter Sessions, the punishments cannot lawfully be inflicted. I conceive that this opinion is accurate. The state of the case (as I apprehend) is not that any powers have been taken away from Single Magistrates, which they once possessed,

* Note 274 † Note 277.
but that powers, which they before exercised by a questionable right, have now been vested in the Sessions. But, by an Act passed in the last Session of Parliament (and not yet to be found among the printed Acts), the powers thus given to the Sessions may be exercised by any two Magistrates in New South Wales, unless when a Court of Sessions is to be held within one week from the time, and within twenty miles from the place at which the Offence was Committed.

In the Sense in which I understand the opinion attributed to the Attorney General of the Colony, I therefore think that he is right; but the Act, to which I have last referred, seems to supersede the necessity of enquiring further into the Subject.

I have, &c.,

JAMES STEPHEN, Junr.

MEMORANDUM ON JURISDICTION OF ONE MAGISTRATE.

The Evil, of which the Governor of New South Wales complains, is that Justice cannot be effectually administered against the Convicts, because the Attorney General considers the concurrence of two Magistrates necessary to a valid commitment.

I do not perceive that this evil (admitting it to be one) has been remedied; nor have I intended to say that any such remedy has been supplied by the Act of last Session.

My report is confined entirely to the simple question of Law, whether or not a single Magistrate is competent to act? a question which, as I have observed, has ceased to be of any importance since the Act of the last Session has finally settled it, by requiring that two Magistrates should act in these cases.

The particular inconvenience, of which Sir Thomas Brisbane complains, that New South Wales has not a sufficient number of inhabitants competent to act as Magistrates, remains precisely where it was before the passing of the late Act.

After all, however, on this question, I cannot but repeat the remark contained in my report, that, without knowing a little more fully the grounds of the opinion attributed to the Attorney General, it is scarcely possible to judge whether that opinion is right or wrong.

August, 1825.

JAMES STEPHEN, Junr.

EARL BATHURST TO GOVERNOR DARLING.

[As this despatch, transmitting letters patent appointing Governor Darling vice-admiral over the vice-admiralty court of New South Wales, will be found on page 53, volume XII, series I.]
Mr. James Stephen, Jr., to Under Secretary Hay.

Sir,

Whitehall, 19th August, 1825.

In compliance with your directions, I have perused and considered various Papers relative to the Grant of a Tract of 105 acres of Land in the immediate vicinity of the Town of Parramatta, in the Colony of New South Wales; and I am to report to you, for Lord Bathurst's information, my opinion as to the proceedings, which it may be proper to take in reference to this Grant.

It appears that the Land in question was originally cleared and cultivated at the public expense; and that it continued the property of the Crown until the month of August, 1806. At that time Admiral Bligh arrived in the Colony with a Commission as Governor. He did not, however, immediately enter upon the execution of his Office, his predecessor Governor King being continued for some short time to retain the Command. Accordingly, on the tenth of August, 1806, four days after Admiral Bligh's arrival, Governor King executed to him a Grant of this land under the public Seal of the Territory.

The objections to this proceeding were numerous and unanswerable. First, these gentlemen had no right whatever to postpone the assumption of the Government by Admiral Bligh. As soon as his Commission arrived in New South Wales, I conceive that the Commission of his predecessor was superseded. Secondly, I apprehend that Admiral Bligh, while he held the Commission as Governor, was incompetent to accept a Grant under that Colonial Seal, of land situate in the Colony. Thirdly, it is asserted (although I do not understand the meaning of the assertion) that Governor King had resigned his Office, and delivered up custody of the public Seal, Six months before the arrival of Governor Bligh. If so, at the time of executing this Grant, Governor King had not even the pretence of any authority for making it. Fourthly, the Land in question had been cleared and improved at the expense of the Crown, and Governor King had been distinctly prohibited from Granting property of that description, without the special license of the Secretary of State, and no such license had been given in the present case. For all these reasons, the Grant itself was either actually void in point of Law, or was liable to resumption at the pleasure of the Crown, as improvidently, if not fraudulently, made.

Governor Bligh, however, entered into possession of this land, and continued to hold it until the year 1814. In October in that year, Governor Macquarie addressed a dispatch to Lord Bathurst, pointing out the extreme inconvenience which the public sustained by the occupation of this tract of land by

* Note 278.
Governor Bligh. He stated that the effect of it was to obstruct the increase and improvement of the Town, and the erection of the projected Factory for female Convicts, and to prevent the inhabitants resorting to the only place where they could obtain fresh water. Governor Macquarie also referred to the improper and suspicious circumstances under which the Grant had been made; and he requested that Governor Bligh might be requested to surrender his Grant, on receiving a fair compensation in Land, to be taken in any other part of the Colony.

On the 4th of December, 1815, Lord Bathurst answered* this Dispatch, by directing that measures should be taken for the resumption of the land; but his Lordship did not advert to the Grant of any Compensation, deeming it (as I presume) unnecessary to give any indemnity to Admiral Bligh for the loss of property, to which he could not establish either a legal Title or an equitable claim.

Mr. Goulburn, by Lord Bathurst's direction, communicated this decision to Admiral Bligh, enclosing, for his information, an Extract from Governor Macquarie's Despatch. The concluding sentence of Mr. Goulburn's letter is in the following words:—"Lord Bathurst has felt no difficulty in sanctioning its resumption by the Crown, as recommended by Governor Macquarie." Now, as Governor Macquarie's recommendation included the Grant of equivalent lands in compensation for those to be resumed, and as the Dispatch containing that recommendation was communicated to Governor Bligh, there was some ambiguity in Mr. Goulburn's language, of which (as will shortly appear) the heirs of Governor Bligh would now avail themselves. Mr. Goulburn, I conceive, meant to represent Lord Bathurst as acceding to that part only of Governor Macquarie's recommendations which regarded the resumption of the Land. His language, however, might perhaps be construed to mean that his Lordship had adopted the recommendation in both its parts.

After receiving Lord Bathurst's Dispatch, Governor Macquarie published a Proclamation,* dated the 5th of August, 1819, announcing that the Grant to Governor Bligh was null and void, and calling upon his heirs to bring in the original Instrument to be cancelled. Shortly afterwards part of the Land was granted to other persons in distinct Building Lots, and other parts became the Site of public Buildings.

The subject has recently undergone further discussion in the Colony. It has been thought that this Proclamation could have no legal effect in destroying the Title of Admiral Bligh's Heirs, and that it was therefore necessary to adopt some more formal means of annulling the Grant and resuming the Land.

* Note 278.
The Attorney General of New South Wales has however reported that this is impossible, because, the Heirs of Admiral Bligh being absent from the Colony, no legal proceedings can (as he conceives) be taken with effect against them.

Under these circumstances, the Governor has suggested that measures should be adopted in England for revoking the Grant; and, on the other hand, Mr. Bligh (a Barrister of Lincoln's Inn) has written to Lord Bathurst, desiring to be informed whether His Majesty's Government intend to resume the Land simply, without making any compensation to Admiral Bligh's family; or whether, "according to the recommendation of Governor Macquarie," it is intended to make a Grant of equivalent Lands in some other part of the Colony as an indemnity.

In reference to the preceding statement, I have to report to you my opinion that it is impossible to proceed with effect in this Country to revoke the Grant made to Governor Bligh. I am aware of no case in which the Courts in Westminster Hall have been called upon to set aside a Grant made by the King under the public Seal of a Colony. That jurisdiction rests, as I apprehend, exclusively with the Colonial Courts; and, in New South Wales, the Supreme Court has (by the terms of the Act of Parliament) powers precisely analogous to those of the Supreme Courts in Westminster Hall. Now, as the absence of the Grantee from England would not prevent the Courts at Westminster from proceeding to set aside an illegal or improvident grant of Lands, situate in this country, so neither should the absence of the Grantee from New South Wales defeat the remedy which, in parallel cases, the Supreme Court there is authorized to administer. Independently of which considerations, it is to be observed that the whole evidence of the transaction is to be found in the Colony; and that in the Colony alone will it, in future times, be material to have a legal record of the revocation of the Grant. Supposing even that a Judgment were obtained in Westminster Hall at the Suit of the Crown against the Heirs of Admiral Bligh, that judgment would not operate in New South Wales without a further process there. To begin the suit in England would, therefore, be to give rise to a proceeding equally expensive, dilatory and unprofitable. For these reasons, my opinion is that the advice of the Attorney General of the Colony ought not to be followed.

Whether compensation should be made to the Heirs of Admiral Bligh is a question involving no legal consideration. I cannot collect from the Papers before me that Admiral Bligh's Heirs have any claim, either in Law or Justice, to receive an indemnity, unless that claim could be supported upon the
construction of Mr. Goulburn's Letter, to which I have already adverted. I observe that Mr. Bligh quotes the expressions of this Letter, as amounting to a promise of compensation, and represents that the Government took possession of this Land, upon the terms adjusted in this correspondence. Of this fact, however, no proof is to be found in the papers before me; and, in my apprehension, the construction put by Mr. Bligh on Mr. Goulburn's Letter is not the right construction.

If, however, Lord Bathurst shall see fit to authorize an indemnity being given, then there is no difficulty as to the mode of proceeding, because, in that event, it appears that the Family of Admiral Bligh are willing to surrender to the Crown such rights as they may have in the property. If his Lordship does not think fit to authorize the making a compensation, then I apprehend that the case must be remitted to the Colony, and that the Governor must be instructed to direct the Attorney General to proceed in the Supreme Court for the resumption of the Land. The form and manner of the proceedings must, I conceive, be borrowed from the process used in analogous cases in England; unless the Chief Justice should, in pursuance of the powers vested in him, have promulgated any general rule as to the proceedings in such actions, in which case that general rule must be followed.

I have, &c.,

JAMES STEPHEN, Junr.

Mr. James Stephen, Jr., to ———.

My dear Sir,

19th August, 1825.

I begin by protesting against any sort of responsibility resting on me for the error of the subject of the supposed Treasury Minute.

When General Darling was here, he and I exerted ourselves to the utmost to ascertain whether, upon his return from New South Wales, he was to go through an account of all the expenditure of the Colony during his Government. It makes my head ache even now to think of the incessant talkings and interviews to which this and other subjects connected with his instructions gave birth. After all, we could arrive at no decision in time to say anything on the Subject in his general instructions under the Sign Manual. At last he announced to me that the point was Settled, and that the Treasury had transmitted a Minute of their intentions to Lord Bathurst, which only awaited his Lordship’s approbation in order to become binding and effectual. The Minute I never saw; but, when the General was going, I wrote the Draft of a Despatch to be addressed to him, referring
to the Minute as the Rule and Guide of his conduct. In this I felt that Lord Bathurst must be safe, as the Treasury were left to explain their own intentions. It was further settled that the Dispatch (so far as related to revenue) should be sent to the Treasury for their sanction, before it was signed. Indeed, I remember Mr. Wilmot Horton's expression was that we ought never to send a Dispatch in which the word "money" occurred, until the Treasury had seen it.

Now, if General Darling was mistaken, and if no such Treasury minute ever existed, I can only say it was a very unaccountable mistake. I never troubled myself to enquire into the matter, for, understanding that their Lordships had laid down a rule, it was, for my purpose, quite immaterial what that rule might be. I had only to write a Dispatch referring to it, and adopting it.

I have two qualifications of the preceding statement to make. First, I cannot be confident that the word "Minute," which, in Treasury language, has a technical meaning, was the word used to me, altho' it is the word occurring in the Despatch. Secondly, altho' I am quite Sure that General Darling understood the matter as I did, and that his information was derived from a direct communication with the Treasury, yet I think my impressions were derived partly from General Darling and partly from what I heard Mr. Hill say on the Subject.

You do not mention how the matter stands. If the Despatch has not been sent, no harm is done. If it has, the harm must be undone by some explanatory statement. But in that case, how can it have happened that the difficulty was not made, when the Despatch was sent to the Treasury for their approbation?

I am, very Truly yours,

Js. STEPHEN, Junr.

EARL BATHURST TO GOVERNOR DARLING.

24th August, 1825.

[A copy of this despatch, containing replies to the queries of the attorney-general of the 8th February, 1825, will be found on page 54 et seq., volume XII, series I.]

WARRANT FOR COMMISSION FOR VICE-ADMIRALTY COURT IN TASMANIA.

1st September, 1825.

[A copy of this warrant will be found on page 598, volume IV, series III.]
1825.
11 Sept.

Statute re powers of magistrates.

12 Sept.
Appointment of second judge.

11 Oct.
Refusal of S. Bannister to draft act of indemnity.

15 Oct.
Papers re seizure of ship Almorah.

HISTORICAL RECORDS OF AUSTRALIA.

EARL BATHURST TO GOVERNOR DARLING.

11th September, 1825.

[A copy of this despatch, transmitting the statute, 4 George IV, cap. Ixix, defining the powers of magistrates, will be found on page 58, volume XII, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

12th September, 1825.

[A copy of this despatch, reporting the appointment of a second judge, will be found on page 841 et seq., volume XI, series I.]

SIR THOMAS BRISBANE TO EARL BATHURST.

11th October, 1825.

[A copy of this despatch, reporting the refusal of the attorney-general to draft an act of indemnity for magistrates, will be found on page 881 et seq., volume XI, series I.]

MR. JAMES STEPHEN, JR., TO UNDER SECRETARY HAY.

My dear Sir, Whitehall, 15th Octr., 1825.

I return the papers* in the case of the Ship Almorah, as I am informed that you are anxious to proceed immediately with the further prosecution of that business.

I should not have detained the Papers even thus long, had I been able to procure all the documents for which I have had occasion to search for the illustration of them. If you should refer this Subject to the Crown Lawyers, I should still wish for an opportunity of making a regular official Report upon the case; in which (for the assistance of the Attorney and Solicitor General) I should desire to state fully every fact to which their attention ought to be called. I am not yet in a position to make such a Report, and, therefore, trouble you with this private communication for the purpose of putting you shortly in possession of the view which I have taken of this controversy.

The questions of Law involved in this case appear to me to be six. They are as follows:—

1st. Was the Ship and Cargo liable to be seized and forfeited for trading within the limits of the East India Company’s Charter without a license?

2dly. Was there any Court in New South Wales competent to decide upon the question of forfeiture?

3rdly. Was the Attorney General right in maintaining that these goods could be lawfully taken away by force from the persons, who had seized them, before any adjudication upon their claims?

* Note 258.
4thly. Was Captain Mitchell justified in the resistance he directed to be made to the persons approaching for the purpose of taking possession of the Cargo?

5thly. Was the Attorney General right in point of Law, in preferring a criminal Information against Lieutenant Matthews and Captain Mitchell under Lord Ellenborough's Act?

6thly. Was Captain Mitchell justified in carrying the Ship to Calcutta?

In reference to the first of the preceding questions, it appears to me that, if this had been a private adventure, and if the goods had been private property, this would have been a legal forfeiture. Indeed, I am not aware that any defence could have been made upon the express words or obvious meaning of the Statute. But I may here observe, by the way, that the case of New South Wales appears to have been overlooked or disregarded by the framers of the East India Company's last Act, and that it may be a fit question for consideration whether the trade of that Colony ought not to be relieved from the restrictions to which, for the protection of the Company, the rest of His Majesty's Dominions are subjected. The *Almorah*, however, (as it is contended) is virtually excepted from the provisions of the Charter and Statutes, because her Cargo was the property of the King, purchased and imported by public money for the public service. Is then this defence well founded in point of fact? As far as appears upon the Papers before me, I should answer that question affirmatively. The Commissary, being directed to purchase rice and flour, took upon himself also to purchase Dollars and tea. He paid for them by Bills on the Treasury, and the purchase was adopted by the local Government. I have nothing to say respecting the merits or demerits of the Officer in this transaction. But, upon this state of facts, it appears to me that the whole cargo was the property of the King. I agree then with the Crown Lawyers of the Colony that the case is not within the meaning of the Statutes. I would say, broadly and generally with them, that the King cannot incur a forfeiture. It does not follow that His Majesty's Officers are at liberty to disregard all rules of Law in making their purchases on the Public Account. There are sufficient remedies for such abuses. But seizure and consequent forfeiture are not, I think, among the number of those remedies.

2ndly. The next question is whether there was any Court in New South Wales competent to decide upon the question of forfeiture. It seems not very clear whether a Commission* has been issued establishing a Vice Admiralty jurisdiction in the Colony. If not, I think there was no competent Court.
1825.
15 Oct.
Opinion re legality of re-seizure for government;

illegality of resistance by C. Mitchell;

and criminal information preferred against C. Mitchell.

cannot discover in the New South Wales Act, 4th George 4th, Cap. 96, any provision which would invest the Supreme Court of the Colony with such a jurisdiction.

3rdly. It is next to be considered whether the Attorney General was right in maintaining that the goods could be lawfully taken away by force from the persons, who had seized them, before any adjudication upon their claims. As a mere abstract proposition of Law, I conceive the Attorney General was correct, his doctrine being, of course, qualified by the condition that no felony or misdemeanour was committed by the persons resuming possession of the goods. But I apprehend that this question is unimportant, since, whatever might be, in theory, the right of the Crown to take possession of these goods, it was from the first evident that the right could not be exerted without giving rise to such resistance as would reduce the Crown Officers to the necessity of proceeding by other means.

4thly. I presume it is too plain to require any argument that Captain Mitchell's conduct was perfectly unjustifiable in directing a forcible resistance to be made, by the use of firearms, directed against the persons approaching the Ship. Captain Mitchell might, with quite as much reason, have fired a pistol at a Sheriff's Officer, about to arrest him for debt, because the supposed Debt was not really due. It is hardly possible to state too strongly the illegality of this proceeding, and the excuse made by Captain Mitchell is quite sufficient to show that he had no adequate apology to offer.

5thly. The enquiry next in order is whether the Attorney General was right, in point of Law, in preferring a criminal information against Captain Mitchell under Lord Ellenborough's Act. Upon the discretion, temper or good sense of the proceeding, I of course am silent, although I would observe that some allowance seems due to the Attorney General on this Score, in consideration of the feelings which might, not unwarrantably, be excited in his mind by the strange Act of violence, which had been committed against his own person under Captain Mitchell's Authority. But, viewing the question simply and only as a question of Law, I see no reason for imputing any error in this respect to the Attorney General. If death had ensued, I think that the parties might have been proceeded against for murder; and I, therefore, apprehend that they might in the present case have been lawfully proceeded against under the Statute in question. I assume that the muskets, or some of them, were loaded with ball, and pointed and discharged at the Boat's crew; and that this was done in obedience to the previous directions of Captain Mitchell. There is indeed some dispute
upon this subject, but I think this is the more reasonable inference from all the statements compared together.

Finally, the lawfulness of taking the ship to Calcutta depended upon the legality of the original Seizure, and upon the competency of the Supreme Court of New South Wales to decide the case. If the seizure itself was legal (which under the circumstances stated by the Governor I think it was not), then I conceive that the removal of the ship to Calcutta was legal also.

I have read the proposed letters to Mr. Harrison and Mr. Barrow, and it does not appear to me that they advance any legal doctrine, which is not substantially accurate.

I am, &c.,

JAMES STEPHEN, Junr.

SIR THOMAS BRISBANE TO EARL BATHURST.

25th October, 1825.

[The address to Sir T. Brisbane is a farewell address addressed to Governor Sir Thomas Brisbane on his departure from New South Wales, expressing the sincere respect and esteem of the inhabitants of the colony towards him and his family.]

ADDRESS.

To His Excellency Major General Sir Thomas Brisbane, Knight Commander of the Most Honourable Military Order of the Bath, Governor and Commander in Chief in and over the Territory of New South Wales and its Dependencies, etc., etc.

We, His Majesty’s most loyal and dutiful Subjects, the Gentry, Merchants, Landholders, Farmers, Traders, and other Free Inhabitants of New South Wales, assembled in Sydney at a Public Meeting duly convened and presided at by the Sheriff of the Colony, beg leave to approach Your Excellency with the most sincere expression of our respect and esteem, and on the eve of your departure from amongst us to present our earnest wishes for the health and happiness of Your Excellency and Family, and for your and their safe arrival in the land of your Fathers.

The period of Your Excellency’s Government has been too short to permit you to give complete effect to those benignant views which we know have animated your breast, but which in a Society composed of such different orders of men required the ripened experience of a more protracted Administration fully to develop and display.

When Our Most Gracious Sovereign committed this important but singularly constructed Colony to Your Excellency’s guidance, the Mother Country had arrived at the crisis of those sufferings,
which had arisen from overwhelming taxation and a convulsed and disjointed commerce forced into new channels by the greatest political innovations Europe ever experienced; His Majesty's Ministers felt it to be their imperious duty, at that arduous juncture, to attend to the cry of a famished and unemployed people, and to adopt in the Administration of the Colonies the most rigid economy.

Under these most unfavourable circumstances did Your Excellency enter upon your Government; yet we can truly say that, during the four years you have presided over us, we have enjoyed three of the greatest political blessings, a mild, an impartial, and a firm Administration.

Your Excellency's Government, for mildness, has not been equalled since the foundation of the Colony. For impartiality, it has been pre-eminently distinguished. Its firmness has been exemplified by Your Excellency having never, in the distribution of the patronage of the Crown, or in framing New Laws or Ordinances, allowed yourself to know the high from the low, the Emigrant from the Emancipist; all orders of the people have been equally protected and equally recognised by you; and no temptation has ever caused Your Excellency to swerve from the straight path of simple rectitude or to give one class of His Majesty's free Subjects an undue preference above another.

Our late revered Governor, Major General Macquarie, giving vent to the impulse of his benevolence, raised British Subjects, in bondage in this Colony, from an odious slavery, at once to the feelings of men, from a slavery as foreign to the intentions of Our late most venerated Sovereign, King George the Third, as to those of His present Most Gracious Majesty, King George the Fourth. The suddenness of that change might not have been without its inconveniences; but Your Excellency's distribution of tickets of leave, upon a system which excludes venality and ensures a final reward to real merit, (Merit too, of that species most to be encouraged in such men, namely, length of service to one master) has restored this unfortunate class of Colonists to a proper feeling, and has effected more towards their discipline and reformation than had ever been previously accomplished. And we are confident that Our Most Gracious Sovereign will not consider this as the least important characteristic of Your Excellency's Government.

The unlooked for emigration to these Colonies of that excess of population, wealth and intelligence, which impeded the renovation of the Mother Country during her late singular and trying struggle, proved the greatest support to this Community which it ever experienced from a single cause. The reduction, which,
upon Your Excellency's arrival, took place in the expenditure of our Commissariat Department, and which was then anticipated by all as the certain forerunner of general bankruptcy, was superseded and neutralized in its dreaded effects by the more than equal expenditure consequent on the influx of New Settlers; and contrary to universal expectation, our Agricultural, Commercial and Manufacturing Interests progressed with a rapidity which happily confounded the calculations of the most experienced Colonists. Notwithstanding those partial disasters, which were produced by the substitution of Spanish dollars for the sterling circulation which then preceded them, both the settlers in the country and the inhabitants of the towns continued to prosper and to accumulate capital. It is due to Your Excellency to state that the general prosperity was accelerated by sundry reductions of imposts on raw produce exportable from the Colony. But this important branch, equally with all other branches of our internal economy, requires, as Your Excellency is fully aware, revision and improvement, for which we are looking to the Honorable the Council of the Colony with patient expectation.

It is a duty, which we owe Your Excellency, to thank you for the readiness with which you opened, to fair and legitimate discussion, the columns of the Government Gazette, immediately after your arrival in the Colony, and the cordiality, with which Your Excellency witnessed the subsequent establishment of a free press,* convinced us of the sincerity of your former professions, and that you ever had our real freedom and prosperity at heart.

While we are bidding Your Excellency farewell, we feel that we can entirely rely upon your watchfulness to embrace all opportunities which may offer, on your return, of suggesting to His Majesty's Government the pressing necessity which exists for the immediate establishment, in this Colony, in all their plenitude, of those two fundamental principles of the British Constitution, Trial by Jury, and Taxation by Representation. We are not ignorant that, upon both these subjects, Your Excellency's opinion has long been accordant with the general opinion of the Colony. Your Excellency cannot but have felt the inconvenience of directing the efforts of a free People, left at large as it were to guide themselves by the analogies and recollections of English Law and English usage, in the absence of their ancient free institutions; a People whose good sense, moral feeling, and patriotism alone have prevented them from a louder expression of their impatience, when their English prejudices have been outraged by the unavoidable vexations of a Government, so

* Note 250.
anti-British in its structure and operation that it would be difficult to designate it by a just name.

With respect to Trial by Jury, the Magistrates of Sydney have already expressed the voice of the people in their answer to the patriotic interrogatory put to them by Your Excellency; and as to that other great first principle of the British Constitution, Taxation by Representation, we are aware how much Your Excellency has needed the assistance of a deliberative Assembly which, to prevent the influence of party faction, ought to consist of at least one hundred Members, a number, which our population can readily furnish, of men in every way qualified to discharge that duty to their fellow Colonists.

The Inhabitants of New South Wales, composed exclusively of British-born subjects and their descendants, now amount to nearly fifty thousand: A population exceeding the entire white population of the Colonies in the West Indies; and, as far as good morals are necessary for the enjoyment of enlarged Civil Rights, Your Excellency’s extensive acquaintance with the other Colonies must have convinced you that we excel them all in this great particular. The orderly state of Sydney, although a sea-port, the great attention and encouragement which schools and religious Societies receive from all classes, and the peace and order of our streets on the Sabbath day, all demonstrate that the seeds of Religion and good morals have taken deep root in Australia.

We will not, however, hide it from the Representative of Our Most Gracious Sovereign that there are Colonists of rank and wealth here, and of very great influence at home, who are inimical to the establishment in New South Wales of the British Constitution. These persons were also unfriendly to the late substitution of English Law, in the place of the arbitrary Regulations of preceding Governors. But the history of every institution, which has eminently blessed mankind, will shew the impolicy of withholding a great and general benefit, until those for whom it is calculated should be unanimous in their petition to obtain it. The very goodness of a thing will, of course, be ever considered its greatest objection by those who are conscious that their own aggrandizement is mainly attributable to the absence of that good. The number of such persons, however, is not considerable: and we trust that Your Excellency will make it known to His Majesty’s Government that nothing can render the Colony so soon independent of pecuniary aid from the British Treasury as a House of Assembly, elected by the free householders and free settlers; nor can any thing, as soon as the Trial by Jury universally diffused, put an end to those political dissensions which originated with the late Judge of the Supreme Court, were
REPLY BY SIR T. BRISBANE.

strengthened by the partial investigation and erroneous Report of the late Commissioner of Enquiry, and are kept alive by the misconceptions and misguidance which our lately appointed Colonial Agent labours under in consequence of the misrepresentations of the party here, with whom he is more immediately connected.

Your Excellency has been amongst us long enough to be satisfied that the great superiority of a popular and deliberative Assembly, in connection with a Council, over a Legislative Council alone, consists mainly in this; that the Members of a Council are too elevated in Society, too far removed from the habits of humble trade and domestic manufactures, to be at all familiar with the unphilosophical data and ignoble details without which however local laws will not only be impracticable in their operation, but absurd in their nature. Upon great questions of National Jurisprudence, a Council of real Statesmen is doubtless desirable; but in the British Colonies, the Jurisprudence of England being established, a minute acquaintance with the habits and circumstances of the operative classes of the people is all that is required in the framers of Colonial Regulations, and such knowledge can only be brought into action for the public weal by an Elective Assembly.

We now most respectfully take our public leave of Your Excellency with the assurance that you will long live in our grateful recollection, and in that of our posterity; and we sincerely hope that Your Excellency may enjoy, for many years in a dignified retirement, that peace and serenity of mind which can hardly fail to follow in the train of an arduous and honourable career, devoted to the service of your Country and of Mankind.

REPLY TO ADDRESS BY SIR T. BRISBANE.

Gentlemen,

I receive the Address, which you have been deputed by the Gentry, Merchants, Landholders and other Free Inhabitants of New South Wales, assembled at a Public Meeting in Sydney, to present to me, with the greatest satisfaction, and I beg that you will convey to your Constituents the grateful sense that I entertain of their personal good wishes towards myself and my Family.

The approbation, which has been publicly expressed of my Administration, by those over whom I have been appointed to preside, could not but be highly flattering and gratifying to my feelings at all times; but, at the present moment and under the circumstances of my retirement from the Government of the Colony, it becomes of peculiar value and importance to me.
I cannot but confidently hope that the sufferings of a people, among whom my Public Services have been performed, will prove the best refutation of the misrepresentations which have been circulated in England to the prejudice of my Administration.

Upon the particular Acts of my Government, it would not become me to speak. Bred to the Profession of a Soldier, and having spent the best years of my life in the campaigns of my Country, it was not to be expected that I could bring to the duties of the Office, entrusted to my charge, more than an ordinary acquaintance with the details of civil business. Considering the limited assistance placed within my power and the many complicated and difficult duties I had to perform, I ought to esteem myself fortunate, that the errors and omissions of my administration have not been more frequent. I must be permitted, however, to take credit to myself for the best intentions, and I will yield to no man in sincerity of desire to discharge the trust reposed in me with fidelity to His Majesty, and with justice and impartiality to the Public.

The proofs, I have given in this Colony of my attachment to the free Institutions of my Country, are the best pledge of the sincerity of my opinion of their excellence. Upon this, indeed, I do not understand that any difference of sentiment prevails in this Colony, for presumptuous, indeed, must be the opinion of that individual, and disloyal must be his principles, who, under the vain imagination of improving our Constitutional Forms of Government, would withhold from this Colony of British Subjects the venerated Institutions of their Forefathers: Institutions, which have been the growth of time, wisdom, and experience, under which our beloved Country has attained a height of civilization, prosperity, and virtue, unexampled in the history of the human race. How far her offspring, in this infant Empire, may be fitted to receive those Institutions, which in a more ripened age will become their indisputable inheritance, differences of opinion do prevail; and it is a question, upon which some diversity of sentiment may be allowed to exist, without any impeachment of motives. I believe His Majesty's Government to be too liberal and too enlightened to retard the communication of any Civil Right, which it may be convinced the state of the Country requires it to enjoy. In deciding, however, the Government must be guided by the representation it receives; and it is not a matter of surprise that it should find a difficulty in determining, where the representations are so opposite, and the Colony so far removed. I must be understood, therefore, merely to express my individual opinion, when I consider the Colony to have arrived at a state in which the Popular Institutions of
the Parent Country may be further introduced with mutual advantage; and, under the impression of this opinion, I shall not fail, on my arrival in England, to support the claims of the Colonists to an extension of their Civil Rights. It is but justice to the Free Inhabitants of the Colony to say that my opinion is founded on my personal experience of their loyalty, good conduct, and private worth, during the time I have resided among them; and I have no hesitation in declaring it as my opinion that they will bear an advantageous comparison with the most favoured of the British Colonists in North America.

In taking leave of you, I beg to express to the Inhabitants, who have done me the honour to pay me their parting tribute of respect, my sincerest wish for their individual health and happiness, and for the continued prosperity of the Country, which they have adopted. Though removed from their presence, I shall not feel the less interest in their welfare; and I desire to be understood, as offering a solemn pledge, that my personal attention and best interests shall be exerted in their behalf, in every Situation in which I may be hereafter placed.

THOMAS BRISBANE.


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To the Right Honorable The Earl Bathurst, K.G., His Majesty's Principal Secretary of State for the Colonies, etc., etc.

May it please Your Lordship,

We His Majesty's dutiful and loyal Subjects, the undersigned Landed Proprietors, Merchants, and other free Inhabitants of New South Wales, being most anxious to prevent a belief that the opinions (contained in an Address to His Excellency Sir Thomas Brisbane, bearing date the 21st October, 1825), have in any manner received our support or approval, feel it a duty to assure Your Lordship that, altho' we concur in the expressions of personal regard to His Excellency on account of the mildness of his Government, We entirely and unequivocally disapprove of the principles upon which that Address is founded, as well as of the personalities which it contains. And whilst we make this distinct and publick disavowal, We cannot forbear to depurate the attempt, which has been made by a few Individuals, to publish opinions and sentiments so fallacious and unfounded as the united voice of all classes of the Community.

Your Lordship's long experience and accurate knowledge of the true state of the Colony prevent our entertaining the slightest fear of suffering in the opinion of His Majesty's Government by
1825.

Petition to earl Bathurst in protest to address to Sir T. Brisbane.

this ill-judged attempt. We cannot however but feel apprehensive, that, unless timely counteracted, the continued and systematic dissemination, by means of a licentious press, of doctrines tending to inflame the worst passions of the lower orders, to excite a spirit of animosity towards the Upper Classes and contempt of all legitimate authority, will eventually subvert that disposition to peace, good order, and loyalty, for which the Colonists of New South Wales have been hitherto distinguished.

The progress of principles, so dangerous and disorganising, will, we trust, be considerably checked by the establishment amongst us of a well regulated and really independent press, and by the increasing emigration to the Colony of persons of respectability, to whom we feel assured every possible encouragement will be continued by Your Lordship; but above all we anticipate their final vindication from the wise and beneficent measures, which Your Lordship has instituted for the purpose of ensuring to the rising generation a liberal and moral education, so as to qualify them for the respective ranks in Society, to which, by their property, they may be entitled.

It is however evident that a system, so extended in itself, so important in its consequences, will require time to bring it to maturity.

As a more immediate means, therefore, of counteraction, we beg respectfully to submit to Your Lordship's consideration the following suggestions, which, if adopted, would, in our humble opinion, add strength to the Government, at the same time that they would confer upon the Colonists a representation and Legislature, as efficient and comprehensive as the present state of Society will admit. And we hope we shall not be deemed oversanguine in indulging an expectation that, when combined with the enlightened plans for our advancement already in progress under Your Lordship's direction, their united effect will frustrate the machinations of the disaffected, confirm the well disposed in their right intentions, gradually unite all classes in feelings of good will towards each other, and perpetuate our gratitude to that Parent Land from which we are proud to derive our origin.

We would earnestly then and respectfully entreat that Your Lordship will exert your influence to obtain for us an Executive Council, composed of the Officers of Government, and to extend the Legislative Council to at least fifteen members, to be selected by His Majesty from the most respectable Landholders and Merchants in the Colony. If to these boons be added, the extension, to our Supreme Court, of Trial by Jury, founded upon the same principles, with respect to the qualification of Jurors, as are, in
England, considered indispensable to secure an impartial administration of Justice, those, who now agitate our rising Colony, will be deprived of all power to do future mischief; and Your Lordship will have enabled its loyal Inhabitants to devote, in tranquility, their undivided attention to the advancement of the true interests of this valuable portion of His Majesty's Dominions.

New South Wales, 1825.

PROCLAMATION OF INDEPENDENCE.

3rd December, 1825.

[A copy of this proclamation, announcing the independence of Tasmania and the appointment of legislative and executive councils, will be found on page 11, volume V, series III.]

EARL BATHURST TO GOVERNOR DARLING.

12th December, 1825.

[A copy of this despatch re the introduction of trial by jury will be found on page 84, volume XII, series I.]

PROCLAMATION.

20th December, 1825.

[A copy of this proclamation, announcing the appointment of the executive and legislative councils in N.S.W., will be found on page 128, volume XII, series I.]

EARL BATHURST TO GOVERNOR DARLING.

1st February, 1826.

[A copy of this despatch, transmitting a commission for F. Forbes as judge in vice-admiralty, will be found on page 143, volume XII, series I.]

GOVERNOR DARLING TO EARL BATHURST.

1st February, 1826.

[A copy of this despatch, transmitting an address petitioning for administrative reforms, will be found on page 144 et seq., volume XII, series I.]
GOVERNOR DARLING TO EARL BATHURST.

1st March, 1826.

[A copy of this despatch, announcing the appointment of J. Stephen as acting chief justice and suggesting the appointment of a third judge, will be found on page 195, volume XII, series I.]

MR. JONES HOWELL TO UNDER SECRETARY HAY.

Whitehall, 10th March, 1826.

Sir,

In compliance with your directions, I have prepared and have the honor herewith to transmit to you, for Lord Bathurst's consideration, the Draft of a Letter to be addressed to the Attorney and Solicitor General for their opinion as to certain doubts, which have arisen respecting the appointment of one additional Judge in the Supreme Court of New South Wales.

I have, &c.,

T. JONES HOWELL.

[Enclosure.]

UNDER SECRETARY HAY TO CROWN LAW OFFICERS.

Downing Street, March, 1826.

Gentlemen,

By the Statute, 4th George 4th, c. 96, His Majesty is empowered, by charters or Letters Patent under the Great Seal, to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively, which shall be holden by one Judge or Chief Justice. And it is further provided that, in case it shall at any time hereafter appear to His Majesty, His Heirs and Successors, expedient to augment the number of Judges of either of the Said Courts, His Majesty may from time to time, as occasion may require, augment the number of Judges of both or either of the said Courts by Commission under the Sign Manual to three. By the 17th Section, it is enacted "that it shall be lawful for His Majesty, His Heirs and Successors, by His said Charters or Letters Patent, or by any Order in Council, at any time hereafter to make and prescribe or to authorize and empower the Judges of the said Supreme Courts in New South Wales and Van Diemen's Land respectively, under such limitations as His Majesty shall deem proper, to make and prescribe such Rules and Orders touching and concerning the time and place of holding the said Court respectively, the forms and manner of proceeding and the practice and pleadings upon all Indictments, etc., and all other matters and things whatsoever as to His Majesty, His Heirs and Successors, shall seem meet for the conduct of business in
the Said Courts respectively, and as may be adapted to the circumstances and condition of the Said Colony, and such Rules and Orders from time to time to alter, amend, or revoke, as to His Majesty, His Heirs and Successors, shall seem requisite, and all Rules and Orders, so to be established by any Such Order or Orders in Council as aforesaid, shall be of such and the like force and effect as if the Same had been inserted in this Act."

By virtue of the Said Act of Parliament, His Majesty, by Letters Patent bearing date the day of , constituted a Court under the name of the Supreme Court of New South Wales to be a Court of Record; and you will observe that His Majesty willed, ordained and appointed that such Court should consist and be holden by one Judge to be called the Chief Justice of the Supreme Court of New South Wales, and, after making several provisions for the regulation and procedure of the said Court, the Letters Patent conclude with the following proviso:—

"Provided always that nothing in these presents contained or any Act, which shall be done under the Authority thereof, shall extend or be construed to extend to prevent Us, Our Heirs and Successors, to repeal these presents or any part thereof, or to make such further or other provision by Letters Patent for the Administration of Justice, Civil and Criminal, within the Said Colony and the places, now or at any time hereafter to be annexed thereto, as to Us, Our Heirs and Successors, shall seem fit in as full and ample a manner as if these presents had not been made, these presents or anything contained to the contrary thereof in any wise notwithstanding."

The duties of the Supreme Court having been found too burthensome for the Chief Justice singly, it is expedient that he should receive some assistance in the discharge of his Judicial functions; and, for this purpose, it is desirable that the power, given to His Majesty by the Statute of augmenting the number of Judges, should be exercised as Speedily as possible.

Your early opinion is therefore desired upon the following points with reference to the Act, 4th Geo. 4, c. 96, and the Letters Patent founded upon it (a copy of which is herewith transmitted for your consideration).

Whether in the event of His Majesty appointing by Commission under the Sign Manual one additional Judge in virtue of the proviso of the Act of Parliament, such Commission alone would enable the new Judge to take any share of the Judicial business of the Supreme Court, constituted as it now is (by the
1826.
10 March.
Request for opinion re problems involved in appointment of second judge.

13 March.
Warrant appointing puisne judge.

18 March.
Opinion re appointment of second judge.

existing Letters Patent) of one Judge only? and whether it would be competent to the Supreme Court, supposing the first question to be answered in the affirmative, to make Rules for the division of Labour between the two Judges?

Supposing you should be of opinion that a remedy cannot be applied in the manner alluded to by the preceding questions, your opinion is desired upon the following:—

Whether it is now competent to His Majesty to exercise the power, reserved by the last Clause of the existing Charter, to revoke the subsisting Letters Patent, and to form, by new Letters Patent, a different constitution of the Supreme Court, by adding a second Judge, and either making new Regulations defining the respective duties of the two Judges, or giving to them the power of so doing? It having been doubted whether, by the issue of the subsisting Letters Patent, His Majesty has not already exercised all the powers conferred upon him by the Statute, and must consequently be considered as junctus officio.

Your opinion is lastly desired whether, supposing neither of the means above suggested for remedying the existing evil to be practicable, there is any other mode short of an Act of Parliament by which the object may be attained.

I have, &c.,
R. W. Hay.

EARL BATHURST TO GOVERNOR DARLING.

13th March, 1826.

[A copy of this despatch, transmitting a warrant for the appointment of a puisne judge, will be found on page 220 et seq., volume XII, series I.]

SIR JOHN RICHARDSON’S OPINION

re Appointment of a Second Judge to the Supreme Court.
New South Wales, etc.

Qun. 1. The Act of 4 G. 4, c. 96, appears to me to have provided for the case which has arisen; and I am of opinion that, by virtue of the Proviso contained in the 1st section, His Majesty may, by Commission under His Sign Manual, augment the number of Judges of the Supreme Court of New South Wales, and may appoint a second or additional judge, such new judge to have equal authority in all judicial business with the Chief Justice (but inferior rank), and the Court to be holden by and before the two judges or either of them. The new judge so
appointed would, I think, be enabled to take an equal share with the Chief Justice in the judicial business of the Court, constituted as that Court was by the existing Letters Patent, but now to be augmented under the power reserved by the Proviso.

The power, given to H.M. by the 17th Section, does not appear by the Letters Patent to have been delegated to the Court. If such delegation has not yet been made, and is now deemed advisable, I think it may be supplied by an Order in Council, as provided for by that Section. The judges so impowered would, I think, be enabled to make all such Rules and Orders for regulating, facilitating and expediting the business and proceedings of the Court, as to them should seem expedient, according to the very large and comprehensive terms of that Sectn., and, in so doing, to a certain extent, for the division of their own labour, by providing for the issuing of process, the taking of preliminary examinations, and the decision of questions of practice and other subordinate matters, out of court, in such manner as is done by the Superior Courts in England; but, as the Act of Parliament appears to me to contemplate only one Court, I think that they would not so divide themselves, as to hold two Courts concurrently at the same time.

2nd. I am inclined to think that H.M. might revoke the subsisting Letters Patent, and, by new Letters Patent, reconstitute the Court upon an enlarged plan in the manner suggested. But this question appears to me to be attended with more difficulty than the former, and that the proposed mode of effecting the object by Commission under the Sign Manual is more obvious and unexceptionable.

3rd. This question does not arise, if I am right in my view of the 1st question. I shall therefore only observe here, that, tho' H.M. may by his Prerogative erect new Courts for the administration of the Common Law, I apprehend that he cannot erect a Court armed, as this Court is, with Equitable, Ecclesiastical and Piratical Jurisdiction, without the authority of an act of Parliament.

JOHN RICHARDSON.

Great Ormond Street, 18 March, 1826.

MR. JAMES STEPHEN, JR., TO MR. ADAM GORDON.

Dear Sir, Tunbridge Wells, 28th March, 1826.

I have always supposed that Lord Bathurst's object in appointing a new judge in New South Wales was to relieve Mr. Forbes from a part of his excessive labour. Upon this
supposition, it has seemed to me that, without an alteration in the Charter, the object was unattainable. As long as that instrument remains in force, the Chief Justice must preside at every trial, and indeed at every sitting of the Court. He will, therefore, still retain those duties, which he has found so burthensome and injurious to his health. But, if Lord Bathurst's immediate object would be answered by giving Mr. Forbes a Colleague on the Bench to assist his judgment and to divide the responsibility with him, then I do not doubt, nor have I ever doubted, that the purpose can be carried into effect merely by a Warrant under the Sign Manual.

Parliament has said that the King may, by an instrument of this nature, at any time augment the number of Judges. It follows then, as a matter of course, that, the Instrument being issued, there will be two Judges on the Bench instead of one.

Sir John Richardson was not aware that the Order in Council to which he refers was issued twelve months ago. This, however, does not at all affect his conclusions. That Order in Council, according to the terms of the Act of Parliament, enables the Chief Justice to establish Regulations for the conduct of business in his Court, and the power is given in terms as general and comprehensive as it was possible to use.

Under this Order then the Chief Justice may establish any Regulations not repugnant to or inconsistent with the Act or the Charter. If he were to make a rule of Court devolving upon the Second Judge the duty of trying all criminals, this would, I think, be repugnant to the Charter, and inconsistent with it. But if he should publish as a Rule, that the junior Judge should alone take Bail, this would not be at variance with the Charter. That Instrument is silent on all the minor details of business. It was intentionally left to the Chief Justice to settle them.

I perceive, therefore, no reason to question the accuracy of Sir John Richardson's opinion upon either point. The King's power of multiplying the Judges by Warrant is unquestioned, Parliament having expressly given it. The Chief Justice's power of making Rules devolving the minor business of the Court upon the Second Judge is, I think, scarcely less clear, such Rules being consistent with the Charter, which is silent on the Subject. But an effectual division of Labor, or any material relief to the Chief Justice, are, I fear, unattainable until the Act of Parliament is renewed which will be in the Session of 1827.

There is one difficulty to be anticipated from placing two Judges on the Bench. Suppose them to disagree, what is to be done then? In England upon an equal division of numbers, the
cause is in effect referred to the Senior Tribunal—the Exchequer
Chamber or the House of Lords. But in New South Wales there
is no superior Tribunal, unless the subject in dispute is of the
value of £500 or upwards. A conscientious and incurable dif-
ference of opinion would therefore in cases below £500 produce
an absolute denial of Justice. However this is a difficulty to be
removed by the next Act of Parliament.

I am, &c.,

Jas. Stephen, Junr.

Earl Bathurst to Lieut.-Governor Arthur.

2nd April, 1826.

[A copy of this despatch, suggesting legislation for the regula-
tion of the press in Tasmania, will be found on page 180, volume
V, series III.]

Mr. James Stephen, Junior, to Earl Bathurst.

My Lord,

Whitehall, 19th April, 1826. 19 April.

In obedience to your Lordship’s commands, signified to
me by Mr. Hay, I have perused and considered certain Rules of
the Supreme Court of New South Wales, bearing date June 22d,
1825, made by the Chief Justice in pursuance of His Majesty’s
Order in Council, dated October 19th, 1824.

I am of opinion that there is no objection in point of Law to
these Rules or any of them, which is humbly submitted to your
Lordship’s consideration by

Your Lordship’s most, &c.,

Jas. Stephen, Junr.

Lieut.-Governor Arthur to Earl Bathurst.

21st April, 1826. 21 April.

[A copy of this despatch, reporting the formation of the coun-
cil in Tasmania, will be found on page 147 et seq., volume V,
series III.]

Governor Darling to Earl Bathurst.

5th May, 1826. 5 May.

[In this despatch, Governor Darling reported his refusal to
sanction an increase in the capital of the bank of N.S.W.; see
pages 268-9, volume XII, series I.]
HISTORICAL RECORDS OF AUSTRALIA.

GOVERNOR DARLING TO EARL BATHURST.

20th May, 1826.

[In this despatch, Governor Darling reported the financial assistance granted to the bank of N.S.W.; see page 296 et seq., volume XII, series I.]

EARL BATHURST TO LIEUT.-GOVERNOR ARTHUR.

23rd May, 1826.

[With this despatch, Earl Bathurst transmitted remarks by J. T. Gellibrand on the act of parliament and administration of justice; see page 238 et seq., volume V, series III.]

UNDER SECRETARY HAY TO LIEUT.-GOVERNOR ARTHUR.

23rd May, 1826.

[With this despatch, remarks by J. Stephen, jr., on points raised by J. T. Gellibrand were transmitted; see volume V, series III.]

EARL BATHURST TO LIEUT.-GOVERNOR ARTHUR.

21st June, 1826.

[With this despatch, Earl Bathurst transmitted criticism by J. T. Gellibrand on the administration of Tasmania; see volume V, series III.]

COMMISSIONERS OF CUSTOMS TO LORDS COMMISSIONERS OF TREASURY.

4th July, 1826.

[This letter contained an opinion on the statutory powers of the governor to impose duties; see page 452, volume XII, series I.]

GOVERNOR DARLING TO EARL BATHURST.

2nd September, 1826.

[A copy of this despatch, transmitting the minutes of the executive council re the introduction of trial by jury, will be found on page 519 et seq., volume XII, series I.]

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

My dear Sir,

Sydney, 10th Oct., 1826.

I have just had time to finish my plan* for the next New South Wales bill†, and to transmit it, with marginal explanations, but without being enabled to enlarge on the principles, which

* Note 281.  † Note 275.
have led me to adopt it, instead of a more detailed plan. It has appeared to me both erroneous in principle, and inconvenient in practice, to resort to the British legislature to make laws upon matters purely local, erroneous in principle, because the declared law is, that acts of parliament shall not bind the colonies, unless they may be expressly named in such acts; and erroneous in practice, because it is impossible for the British Parliament to know what is required for the municipal wants of the colony; and, when the provisions of an act are found insufficient or inconvenient, it is impossible to amend or repeal them without a ruinous waste of time. Proceeding upon this view of the case, I have confined the project of the new bill to two principal subjects of legislation, namely, the Supreme Court, and the Legislative Council. As the constitution of these two great wheels of government is at variance with the laws of England, it is necessary to sanction it by the authority of Parliament; and, in both cases, a power is reserved to the Crown of assimilating the colonial courts and legislature to those of the parent country; in this state, I think the act should be made perpetual. Many of the minor provisions of the old act have been rendered unnecessary by the passing of subsequent acts of Parliament in pari materia, and some may be dispensed with, as being purely subjects for local enactment. I must refer you to the accompanying interleaved alterations and suggestions, upon the old act, for the more particular development of my views, only adding in this place, that I have been so pressed with official duties, in consequence of the delay of Mr. Stephen’s commission, that I have not had time to write more particularly.

We are going on very smoothly at present, and, maugré the Morning Chronicle, the colony is prosperous and the people contented. Some few there are among us, who see things with other eyes; but the discoloring lies in the optics, thro’ which they are viewed, not in the objects themselves. The old bank* has recovered itself, notwithstanding the predictions to the contrary, and the great exertions made to fulfil those predictions. I have not heard of a single failure in trade; and I do not think any are likely to occur. In the mean time, the sun shines, the grass grows, sheep multiply in numbers and their fleeces improve in fineness, and this simple machinery is quite sufficient to extricate New South Wales from all its temporary embarrassments.

I remain, &c.,

FRANCIS FORBES.

[Enclosure.]

[A copy of the amendments to the act is not available.]

* Note 282.
1826.
15 Nov.
Observations on N.S.W. act.

LIEUT.-GOVERNOR ARTHUR TO UNDER SECRETARY HAY.

15th November, 1826.

[With this despatch, lieut.-governor Arthur transmitted solicitor-general Stephen's observations on the N.S.W. act; see volume V, series III.]

GOVERNOR DARLING TO EARL BATHURST.

24th November, 1826.

[In this despatch, Governor Darling proposed the enunciation of a claim to territorial jurisdiction* over the continent of Australia; see page 700 et seq., volume XII, series I.]

ACTING ATTORNEY-GENERAL MOORE TO EARL BATHURST.

2nd and 15th December, 1826.

[These two letters contained opinions on the powers of the governor under the act in council 7 George IV, No. 5; see pages 753 et seq., and 758 et seq., volume XII, series I.]

LIEUT.-GOVERNOR ARTHUR TO EARL BATHURST.

3rd December, 1826.

[In this despatch, lieut.-governor Arthur replied to the criticism of the administration by J. T. Gellibrand; see volume V, series III.]

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

My dear Sir, Sydney, New South Wales, 4th Dec., 1826.

I have just heard that a ship will leave this port for Liverpool to-morrow; the opportunity is unexpected, and the notice too short to admit of my doing more, at present, than acknowledging your long communication of July, thanking you for the kindness and confidence which it discovers, and promising to answer every part in detail, in the course of a very few days.

The principal object of this is to convey my amended copy of the alterations in the new South Wales Act. To prevent confusion, I must request that the first copy, which I forwarded more than a month ago, should be destroyed, and the present put in its place. I shall forward a duplicate by the Regalia, which I had prepared the present copy to go by. I hope it will arrive in time to put you in possession of my views; at any rate you will have received the first copy, which only differs from the present in a few minor details; the plan of both is the same.

* Note 283.
The Governor will, doubtless, address you on the subject of the press. I have written him, with the view of laying my opinions on the law and policy of the measure officially before Lord Bathurst. Certes, in this land of convicts it is very questionable how far the freedom of the press, as it is established in your land of honest men, ought to be allowed; but, if you wish to check its abuses, you can do it with much more ease, and beyond comparison more effect than we can here. I have only time to give you the heads of my ideas; they are as follows:

New South Wales is principally peopled with prisoners, whom it is necessary to keep in subjection, by “a vigor beyond the law.” A military force is essential to overawe the prison population. All writings, which attack the magistracy, or even use freedoms with the government, tend to unsettle the prison discipline. Writings, which pretend that the prisoners of the crown are illegally or harshly dealt with, are dangerous to the public safety. And equally so are publications, that undue severity is exercised towards the military, the safe-guards of the peace of society in this convict colony.

These are my premises; the corollary is evident; a power at least should be created in the government of repressing the licentiousness of the press; but you will ask, why have you not created that power already? I answer,

Because, if we had commenced before we had a sufficient case, we should have been accused of making unnecessary incroachments on the right of public discussion.

Because it would have raised a feeling in the Colony adverse to the new government, which would have stood, in every subsequent measure, in the way of its popularity.

Because there would have been remonstrances and petitions, which would have embarrassed you in the discussions on the new bill, and exposed us to the vituperations of the leaders of the opposition.

I could urge many other reasons for your quietly disposing of the question in Parliament: but I feel that those, which I have offered, will relieve us from the imputation of having acted tardily or unwisely, and also convince you of the expediency of introducing a clause in the new bill, to place the press under the restraint of a license, durante bene placito. One word more, and I have done with this subject; the Governor, while I was at Bathurst, refused the application of Archdeacon Scott, and I believe, of Mr. John Macarthur, to direct the Attorney General to prosecute some of the papers for attacks upon those gentlemen. His Excellency told me, on my return, his reasons for doing so, which appeared to be drawn from his own ideas of propriety and

* Note 284.
the known practice in England. The Attorney General, also, I believe, joined in the representations of his friends; altho' it is remarkable that he should have sought the Governor's instructions to himself to perform his official duty; either he could, or he could not have prosecuted *ex officio*, for what he deemed libellous; that he could, no lawyer ever doubted; why then seek to remove the responsibility from his own shoulders to those of the governor; he had not done so in the times of his predecessor; then he had prosecuted when he chose, and whom he chose; witness his going down to execute process on the Captain of H.M.S. Slaney, and, because he was resisted, returning in the boat, and *instanter* filing an information against Captain Mitchell for a felony and arresting his person on the charge. This was, indeed, a strong measure, but it was done *ex officio*; why then must the present Governor be made a party to Mr. Bannister's official acts? I know of none, save that Mr. McArthur had desired the same thing. Be this as it may, I hold that the Governor's own good sense had kept him right. It is at all times desirable that the weight of government should be kept out of the scales of justice; even in England, it is so; but the reason, that it should, is a hundred fold stronger in this Colony, where the Judge that presides holds his place during pleasure; and the jury, that try, are military officers, subject in a thousand ways to the feelings and influence of the government, and consequently open to imputation, how conscientiously soever they may decide. There was a time when these reasons had their weight in the mind of the late Attorney General; but he had outlived them in this Colony at least. But I do not write to blame him. I only wish to vindicate the Governor, whose motives could not but have been pure, and whose acts, I am of opinion, were constitutionally correct.

I am trespassing on the hour for the meeting of the Executive Council. You have many sins to answer for, in having placed me there. A leading part in the Councils of any Country is an invidious one to perform. I would, as you know, have avoided it; the excellent advice of Polonius is still in my ears—

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beware
Of entrance—but being in,
Bear it, that the opposer may beware of thee.
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How I have sustained the great part, you have assigned me; remains for after times to tell. But it is quite time to conclude, when I have no longer any subject but myself.

Believe me, &c.,

FRANCIS FORBES.
An Act to provide, until the First Day of July One Thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, A Bill to provide for the better permanent Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof; and for other Purposes relating thereto.

(19th July, 1823.)

Whereas it is expedient to make further and more effectual Provision for the Administration of Justice in His Majesty's Colony of New South Wales and Van Diemen's Land respectively; Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That it shall be lawful for His Majesty, His Heirs and Successors, by Charters or Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively, which shall be styled “The Supreme Court of New South Wales” and “The Supreme Court of Van Diemen's Land”; and that each of such Courts respectively shall be holden by One Judge or Chief Justice more Judges, and shall have such ministerial or other Officers as shall be necessary for the Administration of Justice in the said Courts respectively, and for the Execution of the Judgments, Decrees, Orders, and Process thereof; and the said Judges shall from Time to Time be appointed by His Majesty, His Heirs and Successors; and the said ministerial and other Officers of the said Courts respectively shall from Time to Time be appointed to, and removed from their respective Offices in such Manner as His Majesty, His Heirs and Successors, shall by such Charters or Letters Patent as aforesaid direct; and the said Judges shall respectively be entitled to receive such reasonable Salaries as His Majesty, His Heirs and Successors, shall approve and direct, which Salaries shall be in lieu of all Fees or other Emoluments whatsoever; and it shall and may be lawful for His Majesty, His Heirs and Successors, from Time to Time as Occasion may require, to remove and displace any such Judge or Chief Justice, and in his Place and stead to appoint another fit and proper Person: Provided nevertheless, that if it shall at any Time hereafter appear to His Majesty, His Heirs and Successors, expedient to augment the Number of the Judges of either of the Courts of Judicature aforesaid, then and in that Case it shall and may be lawful

* Note 285.

† Observation—the Proviso here struck out, is rendered unnecessary by the addition “one or more judges” in the first page.
for His Majesty, His Heirs and Successors, from Time to Time as Occasion may require, by Commission under His or their Royal Sign Manual, to augment the number of Judges of both or either of the said Courts to Three, and to grant to such additional Judges such reasonable Salary or Salaries as to His Majesty, His Heirs and Successors, shall seem meet, and which shall be in lieu of all Fees and Emoluments whatever; provided also, that in Case of the Absence resignation or Death of any or either of the Judges of the said Courts in New South Wales or Van Diemen's Land respectively, or in Case of any such Disease or Infirmity as shall render any such Judge permanently incapable of discharging the Duties of his Office, it shall be lawful for the Governor or acting Governor of New South Wales to appoint some fit and proper Person to act in the Place and stead of any Judge so being absent, resigning, dying, or becoming permanently incapable, until such Judge shall return to the Execution of his Office, or until a Successor shall be appointed by His Majesty, as the Case may require; and in the meantime until such Judge shall return as aforesaid, or a Successor shall be appointed, and shall actually enter on the Discharge of his Office in the said Courts respectively, the Person so to be appointed by the Governor or Acting Governor as aforesaid shall have and exercise all the Jurisdiction, Powers, and Authorities belonging to or vested in the Judges of the said Courts respectively.

II. Provided always, and be it further enacted, that until His Majesty shall cause such Charters or Letters Patent to be issued as aforesaid, the Supreme Courts of New South Wales and Van Diemen's Land respectively instituted by His Majesty's Letters Patent, under the great seal bearing date the thirteenth day of October in the Fourth year of His Majesty's reign, shall continue and exercise the several jurisdictions and powers in such Courts vested by His Majesty's said last mentioned letters patent, so far as the same may not be altered by this Act, as fully and effectually, as if such Courts respectively had been instituted in virtue and in pursuance of this Act; and the said letters patent, and all orders, acts, matters and things made and done in pursuance of the powers and authorities vested in His Majesty in and by the said Act passed in the fourth year of the reign of his present Majesty shall be of the same force and effect, as if the same had respectively been issued, made, done and performed in virtue and in pursuance of this Act.

III. And be it further enacted, That the said Courts respectively shall be Courts of Record, and shall have Cognizance of all Pleas, Civil, Criminal, or Mixed, and Jurisdiction in all Cases whatsoever, as fully and amply to all Intents and Purposes in New South Wales and Van Diemen's Land respectively, and all and every the Islands and Territories which now are or hereafter may be subject to or dependant upon the respective Governments thereof, as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer at Westminster, or either of them, lawfully have or hath in England; and the said Courts respectively shall also be at all times Courts of Oyer and Termener, and General Gaol Delivery, in and for New South Wales and Van Diemen's Land, and the Dependencies thereof respectively; and the said Judges so appointed shall have and exercise such and the like Jurisdiction and Authority in New South Wales and Van Diemen's Land, and the Dependencies thereof respectively, as the Judges of the Courts of King's Bench, Common Pleas, and Exchequer in England, or any of them, lawfully have and exercise, and as shall be necessary for carrying into effect the several Jurisdictions, Powers, and Authorities committed to the said Courts respectively.
IV. And be it further enacted and declared that all the laws and statutes of the realm made and passed before the nineteenth day of July one thousand eight hundred and twenty-three* shall be applied in the administration of justice in the said Courts respectively, so far as the same can be applied in the said Colonies.†

III. V. And be it further enacted, That the said Supreme Courts in New South Wales and Van Diemen's Land respectively shall and may inquire of, hear and determine all Treasons, Piracies, Felonies, Robberies, Murders, Conspiracies, and other Offences of what Nature or Kind soever committed, or that shall be committed upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, or committed or that shall be committed in the Islands of New Zealand, Otaheite, or any other Island, Country, or Place, situate in the Indian or Pacific Oceans, and not subject to His Majesty, or to any European State or Power, by the Master or Crew of any British Ship or Vessel, or any of them, or by any British subject sailing in, or belonging to, or that shall have sailed in or belonged to and have quitted any British Ship or Vessel to live in any Part of the said Islands, Countries, or Places, or that shall be there living; and that all Persons convicted of any of the Offences so to be inquired of, heard, and determined in the said Courts respectively, shall be subject and liable to and shall suffer all such and the same Pains, Penalties, and Forfeitures as by any Law or Laws now in force Persons convicted of the same respectively would be subject and liable in case the same were respectively inquired of, tried, heard, determined and adjudged in England, any Law, Statute, or Usage to the contrary notwithstanding.

IV. And be it further enacted, That all Crimes, Misdemeanors, and Offences cognizable in the said Courts respectively, shall (until further provision shall be made for proceeding by juries, as herein after directed) be proceeded against and tried in the said Courts respectively, and the Trial of Crimes and Misdemeanors cognizable in the said Courts to be prosecuted by Information, and tried by the Judge, and seven Officers of the Army or Navy.

* the date of the New South Wales Act 4 GEO. 4 C. 96.
† Observation.—The loose manner in which the books lay down the principle upon which the Statutes of England are to be applied in the Colonies, occasions continual differences of opinion here—In the resolution of the Privy Council reported in 2 P. WM. 75 the inhabiting of a Colony is made the date from which English Statutes cease to bind. In a case reported in 4 MOD. REP. 224-5. the force of a particular Act is made to depend upon its being “ used ” in the Colony—And this dictum is rather borne out by the language of the legislature in 25 GEO. 2 CH. 6 SECT. 10 and see 1 CHALM COLL. 198-220.

As matter of fact, the Courts here do apply the English Acts of Parliament, in all cases where they can—and that they were right in doing so see 6 GEO. 4 c. 69 SECT. 1-2, in which this appears to have been assumed—I have adopted what I apprehend to be the true criterion of the principle stated in the text viz. the institution of a local legislature as the true date when English Statutes cease to bind—I have a valuable decision of the Supreme Court of New York upon this point as far back as the year 1764.

Should the above clause be deemed too large, I apprehend no difficulty whatever can prevent itself in DECLARING the penal laws of England to be the penal laws of this Colony in which case the clause should run in the following form.

IV. And be it further enacted and declared, that all and every offence and offences, committed in the said Colonies and their dependencies respectively, shall be, and they are hereby declared to be, offences of the same degree, quality and denomination respectively, and to be liable to the same punishments respectively as if they had been committed in England.
be prosecuted by Information in the Name of His Majesty’s Attorney General, or other Officer duly appointed for such Purpose by the Governor or Acting Governor aforesaid, and all Issues of Fact joined on every such Information shall be tried by one or more of the respective Judges of the said Courts, and a Jury of Seven Commissioned Officers of His Majesty’s Sea or Land Forces, whether on Full or Half Pay; and such Jurors shall from Time to Time be nominated for the Purpose aforesaid by the Governor or Acting Governor of New South Wales or Van Diemen’s Land respectively for the Time-being; and the said Officers shall severally be liable to be challenged or objected to upon the special Ground of direct Interest or Affection, to be specified in open Court at the Time of Challenge; and in Case of such Challenge or Objection being allowed by the Judges of the said respective Courts, the Officer or Officers so challenged or objected to shall be succeeded by another such Officer or Officers as aforesaid, who shall in like Manner be nominated by the Governor or Acting Governor for the Time being as aforesaid, and be liable in the same Manner to Challenge or Objection, until Seven Officers shall appear duly qualified for the Trial of any Offender in the said Courts respectively, and the said Officers shall thereupon severally take and repeat in open Court the same Oath as is taken by Petit Jurors impannelled for the Trial of any Crime or Misdemeanor in any Court of Record in England, and shall return their Verdict in open Court, by the Mouth of the senior Officer serving on such Jury; and the Proceedings of the said Courts respectively shall be under the Control and Direction of the respective Judges thereof; and all Matters of Law arising in the Course of Trial shall be determined by such Judges respectively, and the Judgment of the said Courts respectively shall be pronounced by them in the Manner by Law established on the Trial of Persons indicted in any Court of Record in England;* [Provided nevertheless, that if at the Time of the Meeting of the Supreme Court of Van Diemen’s Land there should not be Seven Commissioned Officers of His Majesty’s Sea or Land Forces within the Distance of Fifty Miles from the Place of holding such Court, or in Case of the Sickness of any such Officers, the Person administering the Government of Van Diemen’s Land shall nominate such Magistrates of the said Island, or of any District or County of the said Island, as to him shall seem meet, to act as Jurors on the Trials of such Crimes, Misdemeanors or Offences as aforesaid, together with such and so many Commissioned Officers as aforesaid as may then be within such Distance as aforesaid, and competent to act upon such Jury, so that there may in every Case be a complete Jury of Seven Men for the Trial of the said Crimes, Misdemeanors, and Offences; and the Magistrates so to be appointed by the Person administering the Government of Van Diemen’s Land shall be liable to be challenged or objected to in such and the same Manner, and shall, if necessary, be succeeded by some other Magistrates to be nominated by the Person administering the Government of the said Island, and shall severally take and repeat such Oath as is hereinbefore directed with respect to the said Commissioned Officers of His Majesty’s Sea and Land Forces.]

VII. And be it further enacted, That it shall be lawful for His Majesty, His Heirs and Successors, by his or their Instruction under His or their Royal Sign Manual, at any Time hereafter to authorize the Governor or Acting Governor of New South Wales for the Time being, to convene a Court or Courts, as often as Occasion may require, for the Trial of all Crimes and Misdemeanors committed within any Place or Places in New South Wales or Van Diemen’s Land, or the Dependencies thereof, which

* This Proviso must be left to those who advise as to the alterations for Van Dieman’s Land. I cannot offer any opinion on the clause.
by virtue of any Order in Council to be for that Purpose issued as after mentioned hath been or shall* shall be appointed for the Reception of transported Felons and other Offenders; which Court or Courts shall be of Record, and shall have and exercise all the Powers and Authorities incident and belonging to a Court of Record, and shall consist respectively of a Judge to be appointed by His Majesty, His Heirs and Successors, and such and so many proper Persons, not fewer than Three or more than Five, as shall be appointed for such Purpose by Such Governor or Acting Governor, by Commission to be duly made and executed under His Hand and Seal; and such Persons shall be sworn in such and the like Form, and the Verdict of the Whole of such Persons shall be taken and recorded in such and the like Manner, and the Proceedings of the said last-mentioned Court or Courts shall be superintended and the Judgments thereof pronounced shall be passed by the Judge or Judges presiding at every such Trial, according to such and the like Law and Usage form and manner† as is herein-before directed with Respect to the Trials of Persons prosecuted before the said Supreme Courts of Judicature of New South Wales and Van Diemen's Land respectively; and in all Cases where the Offence charged against any Person indicted before any such Court or Courts so to be established in any such Place or Places as aforesaid, shall not be punishable with Death, the Judge or Judges of the said Court or Courts respectively shall, and he and they is and are hereby authorized to adjudge the Offender to any Corporal Punishment not extending to Life or Limb, as the Circumstances of the Case may require: Provided always, that the Particulars and Grounds of every such Sentence shall in all Cases be made known by the Judge or Judges of the said last-mentioned Court or Courts respectively to the Governor or Acting Governor of New South Wales or Van Diemen's Land, as the Case may be, for his Approbation.

VIII.‡ And be it further enacted, That all issues in fact joined in any Actions at Law to be brought in the said Supreme Courts of New South Wales and Van Diemen's Land respectively, whenever the Parties Plaintiff and Defendant in any such Action shall join Issue on any Matter of Fact, the Trial of such Issue or Issues shall be by the Chief shall be tried and damages in any such Action shall, if necessary, be enquired of and attested by one or more of the Judges of the said Courts respectively, and by Two Assessors, being Magistrates or Justices of the Peace in and for the said Colony, or some County or District thereof; and the said Magistrates shall be nominated from Time to Time for the Purpose aforesaid by the Governor or Acting Governor for the Time-being of New South Wales and Van Diemen's Land respectively, and shall be liable to Challenge upon such and the same Grounds as may lawfully be alleged as Causes of Challenge against any Person impannelled as a Juror, for the Trial of any Issue of Fact joined between the Parties in any Action depending in any of His Majesty's Courts of Record at Westminster, and such Challenges shall be made in open Court, and decided by the Judges of the said Supreme Courts respectively; and, in Case any such Challenge shall be allowed by the said Judges respectively, another Justice of the Peace shall be nominated in Manner aforesaid in the Place of the Justice against whom such Challenge

* For an explanation of this alteration, vide post page 20, cl. 38.
† These alterations are necessary—the Court here instituted must proceed by INFORMATION and not indictment, and to proceed by information, in felonies, requires parliamentary sanction.
‡ There was an original defect in this clause, which I have endeavoured to remedy;—it did not comprehend the inquiring of damages in Cases of default, confession or demurrer, and literally speaking only the "Chief Judge" is empowered to try a civil issue.
shall have been so allowed, who may in like Manner be challenged, until Two Justices shall appear competent to act as Assessors of the Court upon the Trial of the said Issue or Issues of Fact; and the said Two Assessors shall thereupon severally take and repeat in open Court such and the same Oath as is taken by any Juror sworn upon the Trial of any Issue of Fact in any of His Majesty's said Courts of Record at Westminster, and the Judges of the said Supreme Courts respectively shall, together with the said Two Assessors, give their Verdict upon every such Issue or Issues of Fact as aforesaid; and in Case any such Judge and Assessors cannot agree upon such Verdict, the Verdict of the major Part of them shall be taken, entered, and recorded as the Verdict of all: Provided always, that if the Parties, Plaintiff and Defendant in any such Action, shall be desirous of having any such Issue or Issues of Fact as aforesaid tried by a Jury of Twelve Men, and shall concur in an Application for that Purpose to the Judges of the said Supreme Courts respectively, then and in every such Case such Issue or Issues of Fact shall be tried by a Jury, under the Direction of the said Judges respectively.

VII.* And be it further enacted, That no Person shall be deemed competent to serve upon any Jury as aforesaid, who shall not have and possess a Freehold Estate of Fifty Acres or more of cleared Land, or a Freehold Dwelling House or Tenement of the value of Three hundred Pounds Sterling or upwards, situate in some Part of New South Wales or Van Diemen's Land respectively.

VIII. IX. And be it further enacted, That it shall and may be lawful for His Majesty, His Heirs and Successors, by any Order to be by Him or Them issued with the Advice of His or Their Privy Council, at any Time or Times hereafter, to cause the Trial by Jury to be further introduced and applied in such Parts of New South Wales and Van Diemen's Land, and their respective Dependencies, at such Time, in such Cases, and with, under, and subject to such Rules, Modifications and Limitations in Respect thereto as to His Majesty, His Heirs and Successors, shall seem meet, and as shall be specified in any such Order in Council in that Behalf. And under such limitations and modifications as to His Majesty shall seem meet to authorise the Governor of New South Wales and Van Diemen's Land with the advice of the Council of the said Colonies respectively, or the major part thereof, further to extend and apply the form and manner of proceeding by grand and petit juries, in the presentment and trial of all crimes, misdemeanours, issues, matters and things, properly cognizable by juries, in such parts of the said Colonies and their dependencies respectively, at such times, and with under and subject to such rules in respect thereof as to the said Governors and Council or the major part thereof respectively shall seem meet: and as shall from time to time be specified in any act or ordinance in such behalf. And whenever and so far as, such manner of proceeding by juries shall from time to time be extended and applied as aforesaid, then the form and manner of proceeding hereinbefore directed as well in the prosecution of offences as in the trial of issues shall cease and determine.†

* This Clause is embraced by that which follows and I think had better be omitted, as the qualification of juries is a matter purely local.
† Observation.—This clause is founded partly on a suggestion of the Governor and Council in reply to a Despatch of Earl Bathurst—I propose placing the power of extending trial by jury in the Governor and Council in preference to the King in Council.—But it is NECESSARY to place it there by the AUTHORITY of THIS ACT, because a peculiar mode of proceeding, being created, cannot be altered or done away with except by the same authority which created it.—I must refer to the Report of the Council (dated in despatch No. ) for the specific LIMITATIONS under which the power should be delegated from the King to the Governor in Council. (See note 286.)
IX. And be it further enacted, That the said Supreme Courts respectively shall be Courts of Equity in New South Wales and Van Diemen’s Land, and the Dependencies thereof respectively, and shall have Power and Authority to administer Justice, and to do, exercise, and perform all such Acts, Matters, and Things, necessary for the due Execution of such Equitable Jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within England.

X. And be it further enacted, That the said Supreme Courts respectively shall be Courts of Ecclesiastical Jurisdiction, and shall have full Power and Authority to administer and execute within New South Wales and Van Diemen’s Land, and the Dependencies thereof respectively, such Ecclesiastical Jurisdiction and Authority as shall be committed to the said Supreme Courts respectively by His Majesty’s said Charters or Letters Patent: provided that, in all Cases where the Executor or Executors of any Will, upon being duly cited, shall refuse or neglect to take out Probate, or where the next of Kin shall be absent, and the effects of the Deceased shall appear to the said Judges respectively to be exposed and liable to Waste, it shall be lawful for the said Judges respectively to authorize and empower the Registrar, or other Ministerial Officer of the said Supreme Courts respectively, to collect such Effects, and hold or deposit or invest the same in such Manner and Place, or upon such Security, and subject to such Orders and Directions as shall be made, either as applicable to all such cases, or specially in any Case, by the said Judges, in respect of the Custody, Control, or Disposal thereof.

XI.* And be it further enacted, That, in all Cases where the Process of the said Supreme Courts respectively hath been sued out against any Defendant or Defendants in any Plaint or Action entered in the said Supreme Courts respectively, for Debt upon Specialty, or Bill or Note under Hand, or Book Debt, upon a Concessit solvere, and a Non est inventus hath been returned, it shall be lawful for the said Supreme Courts respectively to issue an Attachment, thereby commanding the Sheriff or Provost Marshal of New South Wales or Van Diemen’s Land respectively, or his lawful Deputy, to attach the Monies, Goods, Chattels, or Debts of any such Defendant or Defendants, in the Hands of any Person or Persons whomsoever, and notwithstanding any such Person shall be the Wife or Attorney of the Defendant aforesaid, in whose Possession or Power such Monies, Goods, and Chattels may be, or from whom such Debts may be due, and also to require such Person or Persons to appear at a Day certain of the next Term or Meeting of the said Supreme Courts respectively, to shew Cause why the said Monies, Goods, Chattels, or Debts, or so much thereof as will satisfy the Debt demanded, should not be delivered to the Plaintiff or Plaintiffs in such Action; at which Day, if the said Person or Persons shall confess, or it shall otherwise be made to appear to the Satisfaction of the said Supreme Courts respectively that the said Monies, Goods, Chattels, or Debts do properly belong to the said Defendant or Defendants against whom Process hath been returned as aforesaid, and if the said Plaintiff or Plaintiffs, their, his, or her Agent or Attorney, do swear in open Court that the Debt so demanded is due, and that no Part thereof hath been satisfied, and do also give Security, in Double the Debt demanded, to restore with Treble Damages the same, or so much thereof as shall afterwards be disproved, then and in all such Cases the Plaintiff or Plaintiffs shall have Judgment for the said Debt demanded, and Execution against the said Monies, Goods, Chattels, and Debts so attached; Provided always, that, if the said Defendant or Defendants,

*This Clause were better omitted and the subject matter left to the Colonial legislature;—it requires many amendments.
1826.
4 Dec.

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or any Person as Attorney to the said Defendant or Defendants, shall appear, and put in Bail to answer the Action and satisfy the Judgment, then and in all such Cases the said Attachment shall be dissolved, and Proceedings had according to the usual Course in the said Supreme Courts respectively; and if any Person or Persons as aforesaid, in whose Possession or Power such Money, Goods, Chattels, or Debts shall be so attached, shall dispose of the same or any Part thereof before the said Debt demanded shall be satisfied, or the said Attachment dissolved, then and every such Case the said Person or Persons for such their Default shall be liable to make Satisfaction to the Plaintiff or Plaintiffs, out of his, her, or their proper Estates, and in Case no such Satisfaction shall be made, shall be liable to be dealt with as for Contempt of the said Supreme Courts respectively.

His Majesty to institute circuits at such times and in such districts as shall be deemed necessary.

XII. And be it further enacted that it shall be lawful for His Majesty by any such charters, or letters patent as aforesaid or by any order of His Majesty in Council to institute Circuit Courts at such times and in such districts or Counties within the said respective Colonies, as shall from time to time be deemed necessary; and the said Circuit Courts shall be helden by any one Judge of the said Supreme Courts respectively, and shall have such ministerial officers as His Majesty shall appoint or direct; and the said Circuit Courts shall be Courts of Record, and shall have jurisdiction to hear and determine crimes and misdemeanours committed within the said Colonies respectively, and to try all issues in fact, and to enquire into and assess damages in any action at Law commenced in the said Supreme Courts respectively; and shall proceed in the like form and manner as the said Supreme Courts; and shall be and stand in the same relation to the said Supreme Courts as Courts of Oyer and Terminer and of Assize and Nisi Prius in England are and stand in relation to the King's superior Courts of record at Westminster.*

Where the Cause shall exceed $500 and shall not be tried by a Jury, the evidence to be taken in writing.

XIII. And be it further enacted, That, on the Trial of every Issue of Fact joined between the Parties in any Action at Law by this Act made cognizable in the said Supreme Courts, where the Sum or Matter at Issue shall exceed the Amount or Value of Five hundred Pounds Sterling, and where such Trial shall not be by a Jury, the Judge or Judges of the said Supreme Courts respectively shall cause the Evidence to be taken down in Writing by the Clerk or other proper Officer of the said Supreme Courts respectively, and repeated in open Court to the Witnesses respectively giving the same; and the Evidence so taken and repeated shall be entered upon the Proceedings of the Court, and be of Record, and that no Objection shall be allowed to the Competency of Witnesses of sufficient Age and Discretion, except for Interest in the Event of the Trial; and in every Case in which any Appeal shall be made or allowed under the Provisions of this Act, Copies of all Documents and Papers which shall have been produced and given in Evidence at such trial as aforesaid shall be certified by the said Clerk, or other proper Officer of the Court to be appointed for that Purpose, as authentic; and also Copies of any Documents and Papers which shall have been produced and tendered in Evidence, and rejected, shall, if required by the Party producing the same, be in like Manner authenticated, but marked by such Officer as aforesaid as rejected, in Order that all such Copies may be annexed to the Record as Part thereof, in Case of Appeal.

* OBSERVATION.—I apprehend the Colony will soon require Circuits and it requires legislative sanction to give to such Courts the peculiar powers given to the Supreme Courts.
XIV. Provided always and be it further enacted, that, on the application of either of the parties, at or before the trial of any issue of fact joined in any action as aforesaid, in case such issue shall not be tried by a Jury, the Judge of Judges of the said Courts respectively may permit the evidence on such trial to be taken down and copies of documents and papers certified as hereinbefore directed, notwithstanding the sum or matter at issue shall be less in value than Five Hundred pounds: Provided it shall be made to appear to such Judge, that the judgment, which may be given in such action, may be of such importance as to render an appeal proper; and if after giving such judgment the Judges of the said respective Courts shall concur in opinion that such judgment is of so much importance as to render it proper that an appeal should be permitted, it shall be lawful for such judges respectively to permit an appeal in like manner and subject to the like rules and regulations as in and by this act are directed in other cases of appeal from the judgments of the said Supreme Court.*

XIV. And be it further enacted, That it shall be lawful for the Plaintiff Parties allowed to appeal or Plaintiffs, Defendant or Defendants, against whom any Judgment, Decree, Order, or Sentence of the said Supreme Courts respectively shall be given, for or in Respect of any Sum or Matter at Issue cause of action or suit or any sum or thing above the Amount or Value of Five Hundred Pounds Sterling, or whenever the Judges of the said Court shall permit an appeal as aforesaid to appeal therefrom to the Court of Appeals hereinafter mentioned; and the Party or Parties appealing from such Judgment, Decree, Order, or Sentence, shall, within Fourteen Days from the Passing thereof, give Notice to the adverse Party or Parties of such Appeal, and within Twenty-eight Days from and after such Judgment, Decree, Order, or Sentence, enter into sufficient Security, to be approved by the Judges of the said Supreme Courts respectively, to satisfy or perform the said Judgment, Decree, Order, or Sentence, in Case the same shall be affirmed, or the Appeal dismissed, together with such further Costs as shall be awarded thereon; and in all Cases of Appeal, where Notice shall be given and Security perfected as aforesaid, Execution shall be stayed, and not otherwise.

XIV. And be it further enacted, That it shall be lawful for the Judges of either of the Supreme Courts aforesaid, on the Application of either of the Parties, Plaintiff or Defendant, at or before the Hearing or Trial of any Suit or Action commenced in the said Supreme Courts respectively, to permit an Appeal to the said Court of Appeals from any Judgment, Decree, Order or Sentence of the said Supreme Courts respectively, although the Sum or Matter at Issue, for or in Respect of which such Judgment, Decree, Order or Sentence shall or may be given, made or pronounced, shall not amount to or be of the Value of Five Hundred Pounds Sterling, in Case it shall be made to appear to the Satisfaction of the said Judges of the said Supreme Courts respectively that such Judgment, Decree, Order or Sentence may be of peculiar Importance, or may affect directly or indirectly the Decision of any other Question or Questions of peculiar Importance, or involve directly or indirectly any Claim, Demand, or Question to or respecting Property, or any Civil Right, amounting to or of the Value of Five Hundred Pounds Sterling; and in all such Cases where the Trial shall not be by a Jury, the Evidence given before the said Supreme Courts respectively shall be taken down in Writing, and repeated to the Witnesses giving the same; and such Evidence shall be of Record, and

*Observation.—I think that in allowing the Appeal under £500 the Judges should concur in its propriety.
†I have transposed this clause, merely for the sake of order—and proposed certain amendments as above.
Copies shall be made and authenticated of all Documents and Papers produced, in such Manner as before directed respecting the Trial of Issues of Fact where the sum or Matter at Issue shall exceed the Amount or Value of Five Hundred Pounds Sterling.

XVI.* And be it further enacted, That the Governor or Acting Governor of New South Wales shall from Time to Time hold a Court, to be called "The Court of Appeals of the Colony of New South Wales," which Court shall have Power and Authority in all such Cases as aforesaid, to receive and hear Appeals from the Judgments, Decrees, Orders, and Sentences of the Supreme Courts of New South Wales and Van Diemen's Land respectively, and to affirm, alter, or reverse the said Judgments, Decrees, Orders or Sentences, in Whole or in Part, or to dismiss the said Appeals, with Costs or otherwise as may be just: Provided, always, that the Governor or Acting Governor aforesaid shall be assisted in the hearing or determining of all Appeals from the Supreme Court of Van Diemen's Land by the Chief Justice of the Supreme Court of New South Wales: Provided also, that the Record of every Judgment, Decree, Order or Sentence to be pronounced by the said Court of Appeals, shall by such Court be remitted to the Supreme Court whence the Appeal was brought, to be by such Supreme Court carried into Effect according to Law: Provided also that, upon any Appeal to be brought to the said Court of Appeals from any Judgment of either of the said Supreme Courts, founded upon the Verdict of a Jury of Twelve Men, the said Court of Appeals shall not reverse, alter, or inquire into the said judgment, except only for Error of Law apparent upon the Record.

XVII. And be it further enacted, That it shall and may be lawful for His Majesty, by the said Charters or Letters Patent respectively, to allow any Person or Persons feeling aggrieved by any Judgment, Decree, Order or Sentence of the said Court of Appeals, to appeal therefrom to His Majesty in Council, in such Manner, within such Time, and under and subject to such Rules, Regulations, and Limitations, as His Majesty, by any such Charters or Letters Patent respectively, shall appoint and prescribe.

His Majesty to make, or to empower the Judges to make Orders for the Conduct of all Business in the said Courts.

XVIII.† And be it further enacted, That it shall be lawful for His Majesty His Heirs and Successors, by His said Charters or Letters Patent, or by any Order in Council, at any Time hereafter to make and prescribe, or to authorize and empower the Judges of the said Supreme Courts in New South Wales and Van Diemen's Land respectively, under such Limitations as His Majesty shall deem proper, to make and prescribe such Rules and Orders touching and concerning the Time and Place of holding the said Courts respectively

* I humbly submit it as the better opinion of the Colony in general, that this provision should either be rescinded and an Appeal allowed immediately to His Majesty in Council; or else that some more extensive Court of Appeals should be instituted—The people here will never be satisfied with any judgment of a Governor upon matters of law; and, since the addition of other Judges, the reasons become stronger for a direct appeal to the King in Council—I should limit such appeal to the sum of £1000 unless the judges should be of opinion that the case was proper for an Appeal to the King in Council—Should my ideas be adopted the two following clauses will require adaptation.

† I have already made a series of rules and orders and as His Majesty has delegated the power to me; I assume that it would be redelegated if a new power were reserved to the Crown—I have added a clause making such rules subject to the King's approval or disallowance—post next page.
the Forms and Manner of Proceeding, and the Practice and Pleadings upon all Indictments, Informations, Actions, Suits, and other Matters to be therein brought, the appointing of Commissioners to take Bail and examine Witnesses, the form and manner of Bail, the taking Examinations of Witnesses de bene esse, and allowing the same as Evidence, the granting of Probates of Wills and Letters of Administration, the Proceedings of the Sheriff, Provost Marshal, and other ministerial Officers, the Process of the said Courts and the Mode of executing the same, the impanneling of Juries, the Admission of Attorneys, Solicitors, and Barristers, the Fees, Poundage, or Perquisites to be lawfully demanded by any Officer, Attorney or Solicitor in the said Courts respectively, and all other Matters and Things whatsoever, as to His Majesty, His Heirs and Successors, shall seem meet for the Conduct of Business in the said Courts respectively, and as may be adapted to the Circumstances and Condition of the said Colony; and such Rules and Orders from Time to Time to alter, amend, or revoke, as to His Majesty, His Heirs and Successors, shall seem requisite; and all Rules and Orders so to be established by any such Order or Orders in Council as aforesaid shall be of such and the like Force and Effect as if the same had been inserted in this present Act. Provided always that all such rules and orders shall be subject and liable to be disallowed by His Majesty and upon such disallowance being signified through any Governor of the said Colonies respectively the same shall become void and of no effect.

XVIII. And be it further enacted, That the Governor, or Acting Governor Regulations as lo of New South Wales and Van Diemen's Land, and the Dependencies thereof, respectively, upon the arrival in the said Colony of His Majesty's Charter Supreme Courts. or Letters Patent for the Establishment, by Virtue of this Act, of the Supreme Courts of New South Wales and Van Diemen's Land respectively, shall by Proclamation notify to the Inhabitants of the said Colony the Time when the said Courts respectively are to be opened, and the Judges thereof respectively are to assume and enter upon the Exercise of their Jurisdiction therein; and when and so soon as the said Courts shall actually have so assumed and entered upon the Exercise of such Jurisdiction, then and from thenceforth the Act made and passed in the Twenty-seventh Year of His late Majesty's Reign, intituled, An Act to enable His Majesty to establish a Court of Criminal Jurisdiction on the Eastern Coast of New South Wales, and the Parts adjacent, shall cease to have effect and determine, and the Courts of Criminal and Civil Jurisdiction in New South Wales and its Dependencies respectively, instituted by His Majesty's Letters Patent under the Great Seal, and bearing Date respectively the Second Day of April, and the Fourth Day of February, in the Twenty-seventh and Fifty-fourth Years of His late Majesty's Reign, shall likewise cease and determine, and every Suit or Complaint which shall at that Time be depending in the said Courts respectively shall and may be proceeded upon in the said Supreme Courts of New South Wales or Van Diemen's

*All the clauses which follow to the 24th (page 14) are properly referable to the local legislature. I have already expressed my opinion on this head—I would confine this act* to the creation of a Supreme Court, and its subordinate Circuit Courts, and the constitution of a legislature, together with such other matters as are not within the limits of local legislature: of the latter, are the remission of sentences imposed in England and the regulation of contracts of servants entered into at home—It must be borne in recollection that when the first draft of the New South Wales bill was made, a local legislature was not contemplated; from this circumstance alone, has arisen the anomaly of creating a local legislature and directly legislating upon local matters, in a way quite unknown in the older and more regular colonies.
The Governor to institute Courts of Requests, and such Courts to determine all Civil Suits under £10.

Land respectively, in the same Manner as any Suit or Complaint originally commenced or brought in such Courts respectively under this Act, and as if such Suit or Complaint had been originally brought or commenced in such Courts respectively; and all the Records, Muniments, and Proceedings whatsoever of and belonging to the said Courts of Criminal and Civil Jurisdiction respectively shall, from and immediately after the opening of the Supreme Courts respectively instituted under this Act, be delivered over and deposited for safe Custody in the said Supreme Courts respectively, to which all Parties concerned shall and may have Recourse as to the other Records of the said Courts; provided that, until the said Supreme Courts to be established by Virtue of this Act shall have actually assumed and entered upon the Exercise of their Jurisdiction in the said Colony, the said Courts of Criminal and Civil Jurisdiction now existing within New South Wales and Van Diemen's Land, and the Dependencies thereof, shall enjoy and exercise all Powers, Authorities and Jurisdictions lawfully vested in them by the said several Letters Patent, as fully and effectually to all Intents and Purposes as if this Act had not been made.

X. And be it further enacted, That Courts of General or Quarter Sessions shall be holden in New South Wales and Van Diemen's Land, and their Dependencies, at such Times and Places as the Governor or Acting Governor of New South Wales shall by his Proclamation appoint; and the said Courts of Sessions respectively shall have Power and Authority to take cognizance of all Matters and Things cognizable in Courts of General or Quarter Sessions in England, so far as the Circumstances and Condition of the said Colony shall require and admit; and the said Courts shall have Power and Authority in a summary Way to take cognizance of all Crimes and Misdemeanors not punishable with Death, which have been or shall be committed by any Felons or other Offenders who have been or shall be transported to New South Wales or its Dependencies, and whose Sentences shall not have expired or been remitted, and also of all such Crimes and Misdemeanors committed by any such Felons or Offenders on board of any Ship or Vessel during the Voyage to New South Wales or the Dependencies thereof, and the same to punish, if such Courts shall see fit, by extending the Time for which such Persons may have been originally transported, or by Transportation to such other Part of New South Wales, or the Dependencies thereof, as shall or may be appointed for the Reception of Offenders as hereafter mentioned, and as the Case may require, and by hard Labour for any Time not exceeding Three Years; and also in a like summary Way to take cognizance of all Offences made against any such Felons or Offenders for Drunkenness, Disobedience of Orders, Neglect of Work, Absconding or Desertion, abusive Language to their, his, or her Employers or Overseers, Insubordination or other turbulent or disorderly Conduct, and all such Offences to punish by whipping or other corporal Punishment not extending to Privation of Life or Member, or by Removal to some other Part or Place in the said Colony or its Dependencies, and hard Labour, according to the Nature and Degree of such Offences respectively; Provided that a Return of all Sentences imposed by the said Court be made to such Governor or Acting Governor aforesaid, and shall be by him within Six months transmitted to one of His Majesty's Principal Secretaries of State in England.

XX. And be it further enacted, That it shall be lawful for the Governor or Acting Governor of New South Wales from Time to Time to institute Courts of Civil Jurisdiction, to be called Courts of Requests, in different Parts of New South Wales and Van Diemen's Land, or the Dependencies thereof, as Occasion shall require, with full Power and Authority to hear and determine in a summary Way all Actions, Plaints, and Suits for the Payment or Recovery of any Debt, Damages, or Matter not exceeding Ten Pounds Sterling, except the Matter in question shall relate to the Title to any Lands, Tenements, or Hereditaments, or to the taking or demanding of any Duty payable to the King,
to any Fee of Office, annual Rent, or other such Matter, where Rights in future
may be found, or to any general Right or Duty, and to award Costs therein;
and the Determination and Award of such Courts of Requests, in all Cases
within the Jurisdiction thereof, shall be final, and shall be carried into Execu-
tion by Attachment and Sale of the Goods and Effects, or by corporal Arrest
of the Party or Parties against whom such Determination or Award shall be
made; and each of the said Courts of Requests respectively shall be holden by a
Commissioner, to be appointed by the Governor or Acting Governor aforesaid
for the Time-being, with such Salary as the said Governor or Acting Governor,
with the Approbation of His Majesty, shall think proper to appoint, which
Salary shall be in lieu of all Fees, Profits, or Emoluments whatever, in Respect
of the Office of such Commissioner aforesaid.

XXI. And be it further enacted, That the Governor or Acting Governor of
New South Wales shall and may, with the Assistance of the Chief Justice of
the Supreme Court of New South Wales, from Time to Time settle such Forms
of Process, and such Rules of Practice and Proceeding, for the Conduct and
Dispatch of Business in the said Courts of Sessions and Requests respectively,
and appoint such reasonable Fees to be taken as shall seem necessary and proper
for expediting the Business of the said Courts with most Convenience and least
Expense to the Parties concerned therein, and such Rules and Forms shall be
followed, and such Fees shall be paid accordingly, and no other.

XXII. And whereas it is expedient to make Provision for an equal Distri-
bution of the Effects of Insolvent Debtors in New South Wales and Van
Diemen's Land, and the Dependencies thereof, among their Creditors; be it
further enacted, That as often as any Writ or other Process for the Recovery
of any Debt or Sum due shall be issued by the Supreme Courts aforesaid, or
either of them, against any Person or Persons residing or carrying on Business
in New South Wales or Van Diemen's Land, or any Place within the respective
Dependencies thereof, and it shall be made to appear to the said Courts re-
spectively, at the Return of such Writ or Process, that the Person or Persons
against whom the same shall have been issued is or are unable to pay Twenty
Shillings in the Pound to all his, her, or their Creditors, it shall be lawful for
the Judges of the said Courts respectively to cause the Person or Persons against
whom the same shall have been issued, together with all his, her, or their Creditors,
to be summoned by public Notice to attend the said Court on a certain future
Day; and in the mean time, if it shall appear necessary to the Judges of the
said Courts respectively, to appoint one or more of the said Creditors as pro-
visional Trustee or Trustees, to discover, collect, and receive the Estates and
Effects of such Person or Persons so appearing to be insolvent, subject to the
Orders and Directions of the said Judges respectively; and if, after due Ex-
amination of the Person or Persons against whom Process shall have been
issued as aforesaid, or if such Person or Persons shall abscond or fail to attend
the said Courts respectively, pursuant to such Summons as aforesaid, it shall
be made to appear to the Satisfaction of the said Judges respectively that such
Person or Persons is or are insolvent, it shall be lawful for the said Courts
respectively to declare such Person or Persons insolvent accordingly, and
immediately to take Order for discovering, collecting, and selling the Estates,
Debts, and Effects of such Insolvent or Insolvents, and distributing the Produce
thereof, equally and rateably, amongst all his, her, or their Creditors, and for
that Purpose to authorize any Two or more Creditors of the said Insolvent
or Insolvents, or any other fit and Proper Person or Persons to be for that
Purpose nominated by the said Courts respectively, to act as and be Trustees
for the Benefit of the Creditors of such Insolvent or Insolvents; and the said
Courts respectively shall from Time to Time make such Orders as shall be
just, for better discovering, collecting, selling, and realizing the Estates, Debts,
and Effects of the Person or Persons so declared insolvent, and for making


a rateable Distribution thereof amongst all the Creditors of such Insolvent Person or Persons, or, if Occasion shall require, for vesting the same, or any Parts thereof, in the Public Funds or Securities in England, until such Distribution can be made.

XXIII. And be it further enacted, That, if such Insolvent Person or Persons shall make a full and true Disclosure, Discovery, and Surrender of all his, her, or their Estates, Goods, Debts, and Effects, and shall conform to the Orders and Directions of the said Judges of the said Supreme Courts respectively in respect thereof, the same shall and may, with the Consent in Writing under the Hands of the major Part in Number and Value of the Creditors of such Insolvent or Insolvents, be certified by the Judges, under the Seal of the said Courts respectively; and such Certificate may be pleaded, and shall be a Bar to all Suits and Complaints for Debts and Contracts for Payment of Money due, and entered into by such Person or Persons prior to the Time of his, her, or their being declared insolvent as aforesaid; and if any Person or Persons so declared insolvent as aforesaid shall fail to make a true Disclosure and Discovery of all his, her, or their Estate or Estates and Effects, or shall otherwise refuse to conform to the Orders or Directions of the said Judges of the said Courts respectively, it shall be lawful for the said Courts respectively to cause such Person or Persons to be arrested and imprisoned until he, she, or they shall make such Disclosure and Discovery and in all Respects conform to such Orders and Directions; Provided always, that no Person or Persons, who shall be declared insolvent as aforesaid a Second Time, shall be entitled to any such Certificate, unless his, her, or their Estate or Estates and Effects, when collected and realized, shall be sufficient to pay at least Fifteen Shillings in the Pound to all his, her, or their Creditors; and that no Person or Persons who shall be declared insolvent as aforesaid a Third Time or oftener shall be entitled to any such Certificate.

XXIV. XIX.* And whereas it may be necessary to make Laws and Ordinances for the Welfare and good Government of the said Colony of New South Wales, and the Dependencies thereof, the Occasions of which cannot be foreseen, nor without much Delay and Inconvenience be provided for, without entrusting that Authority for a certain Time, and under proper Restrictions, to Persons resident there; And whereas it is not at present expedient to call a Legislative Assembly in the said Colony; be it therefore enacted, That it shall and may be lawful for His Majesty, His Heirs and Successors, by Warrant under His or Their Sign Manual, to constitute and appoint a Council, to consist of such Persons resident in the said Colony, not exceeding Seven nor less than Five, as His Majesty, His Heirs and Successors, shall be pleased to appoint; and upon the Death, Removal, or Absence of any of the Members of the said Council, in like Manner to constitute and appoint such and so many other Person or Persons as shall be necessary to supply the Vacancy or Vacancies; and the Governor or Acting Governor for the Time-being of the said Colony, with the Advice of the Council to be appointed as aforesaid, or the major Part of them, shall have Power and Authority to make Laws and Ordinances for the Peace, Welfare, and good Government of the said Colony, such Laws and Ordinances not being repugnant to this Act, or to any Charter or Letters Patent or Order in Council which may be issued in Pursuance hereof, or to the Laws of England, but consistent with such Laws so far as the Circumstances of the said Colony will admit: Provided always, that no Law or Ordinance shall be passed or made, unless the same shall first by the said

* I leave to the Governor, who is privy to these proposed alterations, to state the views entertained by the local government of the component parts of the new legislature.
Governor or Acting Governor be laid before the said Council, at a Meeting
to be for that Purpose convened by a written Summons under the Hand
of such Governor or Acting Governor, to be delivered to or left at the usual
Place of Abode of the Members of such Council respectively; provided
also that, in Case all or the major Part of the Members of the said Council
shall dissent from any Law or Ordinance proposed by such Governor or
Acting Governor at any such Meeting as aforesaid, the Members of the
said Council so dissenting shall enter upon the Minutes of such Council
the Grounds and Reasons of such their Dissent, and in every such Case
such proposed Law or Ordinance shall not pass into a Law; provided
nevertheless that, if it shall appear to the Governor or Acting-Governor for the
Time-being of the said Colony, that such proposed Law or Ordinance is essential
to the Peace and Safety thereof, and cannot without extreme Injury to the
Welfare and good Government of the said Colony be rejected, then and in every
such Case, if any one or more Member or Members of the said Council shall
assent to such proposed Law, the said Governor shall enter upon the Minutes
of the Council the Grounds and Reasons of such his Opinion; and in every
such Case, and until the Pleasure of His Majesty, His Heirs and Successors,
shall be made known in the said Colony respecting the same, such Law or
Ordinance shall be of full Force and Effect in the said Colony, and the
Dependencies thereof, any such Dissent as aforesaid of Majority of the Members
of the said Council notwithstanding.*

XXV.† Provided also, and be it further enacted, That, in case any
Rebellion or Insurrection shall have actually broken out in the said Colony,
or if, in the Judgment of the Governor or Acting Governor thereof for the
Time-being, there shall be good and sufficient Cause to apprehend that
any such Rebellion or Insurrection is about forthwith to break out therein,
then and in every such Case it shall and may be lawful for such Governor
or Acting Governor to promulgate and enforce within the said Colony and
its Dependencies any Law or Ordinance which may be necessary for
suppressing or preventing any such Rebellion or Insurrection as aforesaid,
although every Member of the said Council should dissent from any such
Law or Ordinance.

XXVI.‡ Provided also, and be it further enacted, That it shall and may
be lawful for His Majesty, His Heirs and Successors, by any Order to be
by Him or Them issued by and with the Advice of His or Their Privy
Council, to make and establish any Law or Ordinance which may have
been previously laid before and dissented from by the whole or the major
Part of the said Council, in Case such Law or Ordinance shall appear to
His Majesty, His Heirs and Successors, to be necessary for the better
Government of the said Colony and its Dependencies.

* This proviso looks ill and never can answer any practical purpose—I
have had no hesitation in striking it out, and I have as little in affirming
that no such contingency will ever arise as will render it necessary for
the Governor to act contrary to the opinions of his Council; and if it
were, the far more prudent plan would be not to press such an Act upon
the Colony.

† 25. This clause falls under the same and even stronger objections than
the last—what sort of Council must that be, which, in case of “actual
rebellion,” would refuse to pass an “ordinance for suppressing it”?

‡ 26. I shall not presume to offer any opinion upon this clause; but I
think a well constituted Council composed in its majority by the highest
officers in the Colony will not leave any occasion for the judicious exercise
of this power.
No Tax or Duty shall be imposed by the Governor and Council, except for local purposes.

69 G. III c. 114, XXVIII.—And whereas an Act of Parliament was made in the Fifty-ninth Year of the Reign of His late Majesty King George the Third, intitulel "An Act to stay Proceedings against any Governor or other Person concerned in imposing and levying Duties in New South Wales; to continue, until the First Day of January One thousand eight hundred and twenty-one, certain Duties; and to empower the said Governor to levy a Duty on Spirits made in the said Colony": And whereas the said Act hath been continued from Time to Time by divers Acts of Parliament, and was varied and altered by an Act passed in the Third Year of the Reign of His present Majesty, intituled " An Act to continue, until the First Day of January One thousand eight hundred and twenty-four, an Act passed in the Fifty-ninth year of His late Majesty, relating to imposing and levying Duties on Goods imported into the said Colony; and to suspend for Ten Years the Payment of Duty on the Importation of certain Goods the Produce of New South Wales"; and it is expedient that the said Act of the Fifty-ninth Year of the Reign of His said late Majesty King George the Third should be made perpetual, and that all the Powers and Authorities thereby or by the said Act of the Third Year of His present Majesty committed to the Governor, or other Person administering the Government of New South Wales, should be continued as fully as if this present Act had not been made; be it therefore enacted by the Authority aforesaid, That the said Act passed in the Fifty-ninth Year of His said late Majesty King George the Third shall be and the same is hereby made perpetual, and that nothing in this Act contained shall extend or be construed to extend to repeal, alter, or affect the said last-mentioned Act, or the said Act passed in the Third Year of the Reign of His present Majesty; any Thing herein contained to the Contrary notwithstanding.

No Law to be passed until a copy shall have been laid before the Chief Justice, and his Certificate given thereupon, &c.

*27. The limitations here struck out would prevent fees to the CUSTOMS, PILOTS, HARBOUR MASTERS and others connected with the care of Ships,—to LIGHT-HOUSES and other useful institutions; and the acts mentioned in the following clause are at variance with such limitations as they expressly authorise a tax upon imported goods and merchandise.

†28. I should recommend the two acts herein recited to be suffered to die their natural death—they introduce the anomaly of TWO TAXING powers in the Colony vizt. the Governor alone and the Governor with the advice of his Council.—If it be necessary to preserve so much as suspends the payment of duties on imports from New South Wales, it had far better take a separate form.

‡ It will be recollected that I stood out against this clause from considerations partly of a personal nature; but as my arguments were overruled upon full consideration I presume it must stand—in practice it may be found a convenient way of preventing the legislature and the Courts from differing upon the legal force of a law.
their Advice or Approbation, or be passed into a Law, unless a Copy thereof shall have been first laid before the Chief Justice of the Supreme Court of New South Wales, and unless such Chief Justice shall have transmitted to the said Governor or Acting Governor a Certificate under the Hand of such Chief Justice, that such proposed Law is not repugnant to the Laws of England, but is consistent with such Laws, so far as the Circumstances of the said Colony will admit.

XXX. And be it further enacted, That every Law or Ordinance so to be made as aforesaid shall, within Six Months from the Date thereof, be transmitted by the Governor or Acting Governor for the Time-being of the said Colony to One of His Majesty's Principal Secretaries of State for the Time-being; and that it shall and may be lawful for His Majesty, His Heirs and Successors, from Time to Time as He or They shall think necessary, to signify, through One of His or Their Principal Secretaries of State, His or Their Approbation or Disallowance of all such Laws and Ordinances; and that from and immediately after the Time when such Disallowance shall be published in the said Colony by a Proclamation to be for that Purpose issued by the said Governor or Acting Governor, all such Laws and Ordinances shall be null and void; but in Case His Majesty, His Heirs and Successors, shall not, within the Space of Three Years from the making of such Laws and Ordinances, signify His or their Disapprobation or Disallowance thereof as aforesaid, then and in that Case all such Laws and Ordinances shall be valid and effectual, and have full Force.

XXXI. Provided also, and be it further enacted, That all Laws and Ordinances to be made in the said Colony, as aforesaid, and all Orders to be made by His Majesty, His Heirs and Successors, with the Advice of His and their Privy Council, in Pursuance of this Act, shall be laid before both Houses of Parliament within Six Weeks at latest next after the Commencement of each Session.

XXXII. And be it further enacted, That the Members for the Time-being of the said Council shall by virtue of such their Office be Justices of the Peace in and for the whole of the said Colony of New South Wales and its Dependencies, and shall within the said Colony take Precedence of all Persons next after the Governor or Acting Governor thereof, and the Judges of the said Supreme Courts, and the Commander in Chief for the Time-being of His Majesty's Forces within the said Colony and its Dependencies; and the said Members of the Council shall, before they enter upon and discharge the Duties of such their Office, severally take and subscribe, before and in the Presence of the Governor, or Acting Governor of the Colony, an Oath in the following Words; that is to say, "I do swear, That I will, to the best of my Judgment and Ability, faithfully advise and assist the Governor or Acting Governor of the Colony of New South Wales and its Dependencies, in all such Matters as shall be brought under my Consideration as a Member of the Council of the said Colony; and I swear, that I will not, directly or indirectly, communicate or reveal to any Person or Persons, any Matter which shall be so brought under my Consideration, or which shall become known to me as a Member of the said Council. "So help me God."

XXXIII. And be it further enacted, That in case of the Death, resignation, Absence, or permanent Incapacity illness of any Member or Members of the said Legislative Council, the Governor, or Acting Governor for the Time-being of the said Colony, shall and may appoint some fit and proper Person to act in the Place and Stead of such Person or Persons, until such
Provided that His Majesty may authorise the Governors to convene legislative assemblies.

Provided always and be it further enacted that it shall be lawful for His Majesty his heirs and successors at such time as his said Majesty shall deem expedient to authorise the respective Governors of the said Colonies of New South Wales and Van Dieman's Land to convene legislative assemblies in such manner as to his said Majesty shall seem meet; and when and as soon as such assembly shall be so convened and shall enter upon the exercise of their legislative functions, then and immediately thenceforth, the several powers and authorities in and by this Act vested in the said Council to make laws and ordinances aforesaid shall cease and determine.*

XXXIV. And whereas by an Act passed in the Thirtieth Year of the Reign of His late Majesty King George the Third, intituled, "An Act for enabling His Majesty to authorise the Governor or Lieutenant Governor of such Places beyond the Seas, to which Felons or other Offenders may be transported, to remit the Sentences of such Offenders," after reciting several Orders made by His Majesty with the Advice of His Privy Council, whereby His Majesty had declared and appointed that the Eastern Coast of New South Wales and the Islands thereunto adjacent should be the Place or Places beyond Sea to which certain Felons and other Offenders should be conveyed and transported, it was enacted, that it should be lawful for His Majesty, by His Commission under the Great Seal, to authorize the Governor or Lieutenant Governor for the Time being of such Place or Places as aforesaid, by any Instrument in Writing under the Seal of the Government in which such Place or Places should be situated, to remit, either absolutely or conditionally, the Whole or any Part of the Time or Term for which any such Felons or Offenders should have been or should thereafter be respectively conveyed or transported to such Place or Places; and it was further enacted, that such Governor or Lieutenant Governor should, by the first Opportunity, transmit to One of His Majesty's Principal Secretaries of State, Duplicates of every Instrument as aforesaid, and that the Names of such Felons or other Offenders respectively, which should be contained in such duplicates, should be inserted in the next General Pardon which should pass under the Great Seal of Great Britain after the Receipt of such Duplicates; And whereas, in virtue of the said Act and of His Majesty's Commission under the Great Seal, the Governors of New South Wales for the Time being have from Time to Time remitted the Time or Term for which divers Felons and other Offenders have been transported to the said Places, but the Duplicates of the several Instruments, by which such Times or Terms of Transportation were remitted, have not been regularly transmitted to England, and the Names of the Felons, or other Offenders respectively therein contained, have not been inserted in any General Pardon under the Great Seal of Great Britain; be it further enacted, That all Instruments in Writing, made in conformity with the said Act, or which shall be so made before the First Day of January next, whereby any Governor or Lieutenant Governor of New South Wales, for the Time being, hath remitted or shortened, or may remit or shorten the Time or Term of Transportation of any Felons or Offenders as aforesaid,

*Observation.—His Majesty has already the constitutional power of authorising the Governor to convene Assemblies of the people for the purpose of making laws—but it would be necessary to seek for the power of Parliament to abrogate a legislative power, conferred by this Act upon the Governor and Council, without the addition of any popular representation.
shall have and shall be deemed and taken to have had, within New South Wales and its Dependencies, from the Days of the respective Dates of such several Instruments, such and the like Force and Effect in the Law, to all Intents and Purposes, as any General Pardon, if passed under the Great Seal aforesaid, and including the Names of such Felons or other Offenders respectively, could or would have had; and the same Instruments, whenever they shall be ratified by His Majesty, if his Majesty shall be pleased to ratify the same and such Ratification shall be notified in Writing by One of His Majesty's Principal Secretaries of State, shall have the same Force and Effect within this Realm, and all other His Majesty's Dominions, from the Days of the respective Dates of such several Instruments, or from such other Days as shall be expressed in such Ratifications respectively.

XXXV.* And be it further enacted, That all Instruments in Writing whereby any Governor or Acting Governor of New South Wales shall hereafter remit or shorten the Time or Term of Transportation of any Felons or other Offenders, in pursuance of the said Act passed in the Thirtieth year of the Reign of His said late Majesty King George the Third, shall by such Governor or Acting Governor be transmitted to His Majesty, His Heirs and Successors, for His and Their Approbation or Allowance; and in case His Majesty, His Heirs and Successors, shall, through One of His or Their Principal Secretaries of State, signify His or Their Approbation or Allowance of any such Remission or shortening of any such Time or Term of Transportation as aforesaid, then and in such Case only, every such Instrument so transmitted as aforesaid shall have, and shall be deemed and taken from the Date thereof to have had, within New South Wales and the Dependencies thereof, but not elsewhere, such and the same Effect in the Law, to all Intents and Purposes, as if a General Pardon had passed under the Great Seal aforesaid, on the Days of the Dates of such Instruments respectively, in which the Names of such Felons or Offenders as aforesaid had been included.

XXXVI.† And be it further enacted, That, if any Person or Persons, being in New South Wales or any of the Dependencies thereof, under or by virtue of any Sentence of Transportation, or Order of any Court in the United Kingdom of Great Britain and Ireland, for any Time or Term of Years not then expired, or not remitted by the Governor or Acting Governor of the said Colony, shall be convicted by due Course of Law in the said Colony, or any of the Dependencies thereof, of any Offence which if committed in England would or MIGHT BE PUNISHABLE ‡ by Transportation; it shall and may be lawful for the Court, before which any such Offender or Offenders may be so convicted, to sentence and adjudge him, her, or them to Detention and safe Custody in New South Wales, or any of the Dependencies thereof, for any Term or Number of Years, not exceeding the Term or Number of Years for which such offender or Offenders might or could by Law be sentenced to Transportation, in case he she or they had been convicted of such or the like Offence in any Court of Record in England; and such Detention shall take Effect, and be computed, NOT FROM THE DATE OF ANY SUCH SENTENCE OR JUDGMENT AS AFORESAID, BUT FROM THE TIME WHEN THE TERM OF SUCH ORIGINAL SENTENCE OF TRANSPORTATION SHALL...

*This and the preceding clause will I suppose be re-enacted.
†I cannot conjecture what gave rise to this extraordinary clause. I am of opinion that it is cumbersome and useless—See Chitty's Crim. law vol. 1 p. 718, 95. And the provision scored under has in practice been found inconvenient.
‡Note "might be punishable," all felonies might be so punished.
**Surgeons of Convict Ships may inflict moderate punishment on convicts guilty of misbehaviour.**

**His Majesty to appoint Places for the Reception of Offenders, and to prohibit trading vessels from holding intercourse with such places.**

1826. 4 Dec.

**EXPRESS;** [and in case any Person or Persons,* who shall be so sentenced to be detained in the said Colony or its Dependencies, shall be afterwards at large within any Part of the United Kingdom of Great Britain and Ireland, without lawful Cause, before the Expiration of the Term for which such Offender or Offenders shall have been sentenced to be detained as aforesaid, every such Offender being at large as aforesaid, and being thereof lawfully convicted, shall suffer Death as in Cases of Felony without Benefit of Clergy; and such Offender or Offenders may be tried before the Justices of Assize, Oyer and Terminer, Great Sessions, or Gaol Delivery for the County, City, Liberty, Borough, or Place in any Part of His Majesty's Dominions, where such Offender or Offenders shall be apprehended or taken; and on every such Trial, a Certificate in Writing signed by the Judge or Judges of the Court in New South Wales or its Dependencies, whereby such Offender was so sentenced to be detained, containing the Effect and Substance only (omitting the formal Part) of the Indictment and Conviction of such Offender, and of the Sentence of Detention, shall be sufficient Proof of the Conviction and Sentence of every such Offender.]

XXXVII.† And be it further enacted, That, if any Person or Persons who may hereafter be transported to New South Wales, or any of the Dependencies thereof, under any Sentence or Order of any Court in the United Kingdom aforesaid, shall be guilty of Misbehaviour or disorderly Conduct on board of any Ship or Vessel in which such Person or Persons shall be so transported, it shall be lawful for the Surgeon or Principal Medical Officer for the Time being of any such Ship or Vessel to inflict or cause to be inflicted on the Person or Persons, so offending, such moderate Punishment or Correction as may be inflicted by Law on Convicts confined on board Vessels in the River Thames by the Superintendent or Overseer of those Vessels: Provided always, that no such Punishment or Correction shall be so inflicted, unless the Master or Principal Officer for the Time being of such Ship or Vessel shall first signify his Approbation thereof in Writing under his Hand; and every such Punishment or Correction, as aforesaid, shall on the same Day, in all Cases, be entered by such Master or Principal Officer as aforesaid upon the Log of every such Ship or Vessel, under a Penalty of Fifty Pounds in case of every refusal or Neglect to make such Entry, to be recovered by Bill, Plaint, or Information in either of the Supreme Courts of New South Wales and Van Dieman's Land aforesaid, or in any Court of Record in England; One Half of which Penalty shall go to the Use of His Majesty, His Heirs and Successors, and the other Half to the Person or Persons who may inform or sue for the same.

XXXVIII.‡ And whereas it may be expedient to appoint certain Ports or Places in New South Wales, or the Dependencies thereof, for the Reception of Felons and other Offenders who may hereafter be sentenced to Transportation, or whom it may be necessary to remove from the Settle*

* If the latter part of this clause vizt. in case any person &c. should be deemed necessary or expedient to prevent the return of transported persons to England after or pending a second conviction in the Colony, it had better take the form of a distinct clause in itself.

† This clause in embodied in the general transportation act 5 Geo. 4, c. 84 Sect. 6. and may therefore be dispensed with.

‡ By Statute 6 Geo. 4th c. 69. Sect. 4, a general power is reserved to the Crown of appointing places for the reception of felons by order in Council to such effect. An order in Council dated 11th November 1825 has been received in this Colony and a local ordinance has been passed upon the subject see 7 Geo. 4 No. 5 entitled "An Ordinance for the transportation of offenders to penal settlements and for the more effectual security of the same"—the above clause should therefore be OMITTED.
ments at present formed in the said Colony, and for the better preventing the Escape of such Felons or other Offenders, it is expedient that no trading Ship or Vessel should be permitted to enter, or touch at, or hold Intercourse with any such Ports or Places; be it further enacted, That it shall and may be lawful for His Majesty, His Heirs and Successors, by any Order or Orders to be issued by and with the Advice of His or Their most Honourable Privy Council, from Time to Time to appoint such Ports or Places in New South Wales, or any of the Dependencies thereof, as shall be deemed proper for the Reception and Keeping of Felons or other Offenders; and to prohibit all Masters, Mariners, and other Persons, commanding, navigating, or sailing on board of any Ship or Vessel, from entering, touching at, or communicating with any such Port or Place, and for that Purpose to establish all such Rules and Regulations as may be necessary; and for the Breach or Violation of any such Order or Orders, Rules or Regulations, to impose all such Penalties and Forfeitures as to His Majesty, His Heirs and Successors, with the Advice of His and their said Council, shall seem meet; which Penalties and Forfeitures shall and may be recovered in the Supreme Courts of New South Wales, and Van Dieman's Land respectively, or in any Court of Record or Vice Admiralty in any Part of His Majesty's Dominions.

XXXIX.* And be it further enacted and declared, That any Person or Persons assisting Persons, who shall in any Manner contrive, aid, abet, or assist in the Escape, or intended escape, from any Part of New South Wales or Van Dieman's Land, or the Dependencies thereof, of any Person or Persons there being of a Misde-meanor or intended escape, from any Part of New South Wales or Van Dieman's Land, or the Dependencies thereof, of any Person or Persons there being of a Misde-meanor, Term not then expired, or of any Judgment or Sentence of Transportation for any Term not then expired, or of any Judgment or Sentence pronounced in any Court of competent Jurisdiction in the said Colony or its Dependencies, is and are, and shall be and be deemed and taken to be guilty of a Misdemeanor, and shall incur and be liable to Fine not exceeding Five hundred Pounds, or to Imprisonment for any Time not exceeding Two Years, or, to both, at the Discretion of the Court before which any such Person or Persons may be convicted; and such Misdemeanor shall and may be tried and inquired of by the Supreme Courts of New South Wales or of Van Dieman's Land respectively, or by His Majesty's Court of King's Bench at Westminster, or by any Court of Record in any of His Majesty's Colonies, Plantations, or Foreign Dominions.

XL. And be it further enacted, That from and after the Thirtieth Day of June in the year of Our Lord one thousand eight hundred and twenty-four, all and singular the Provisions, Penalties, Clauses, Matters, and Things contained in an Act passed in the Second Year of the Reign of His Majesty King George the Second, intitled "An Act for the Regulation and Government of Seamen in the Merchant Service," and also of another act, passed in the 37th year of His late Majesty George the 3rd entitled "An Act for preventing the desertion of Seamen from British Merchant Vessels trading to His Majesty's Colonies and plantations in the West Indies," shall be and the same are hereby extended to New South Wales, and Van Dieman's Land, and the respective Dependencies thereof.

*This clause may be re-enacted with advantage although declaratory.
† Observation.—Mr. Bigge recommended the extension of this Statute to New South Wales (1st Report—page 12) but I think from the objects he proposed to attain by it he intended the 2 Geo. 2, ch. 36. I think however the prevention of desertion is required in this Colony. It may be necessary however to see if this Act or Acts may not have been repealed or altered by some later Statute, which is not known in this Colony.
And be it further enacted, That it shall and may be lawful for any Artificer, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or other Labourer, not being under the Age of Eighteen Years, by Indenture duly executed, and without a Stamp, to contract with any Person or Persons about to proceed to or actually resident in New South Wales, or the Dependencies thereof, or with the Agent or Agents of such Person or Persons, faithfully to serve or to proceed to and faithfully serve such Person or Persons in the said Colony, or the Dependencies thereof, for any Period not exceeding the full Term of Seven Years, to be computed from the Day of the Date of such Indenture.

And be it further enacted, That it shall and may be lawful for any Person or Persons, with whom such Artificer, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or other Labourer, shall have so contracted to serve as aforesaid, to maintain an Action on the Case against any Person or Persons who shall employ, retain, harbour, or conceal any such Artificer, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or other Labourer, with Intent to deprive the Employer of any such Person or Persons of his, her, or their Services or otherwise, with Intent to defraud or injure such Employer; and, in case the Plaintiff or Plaintiffs in any such Action shall recover a Verdict, he, she, or they shall, in addition to the Damages found by such Verdict, recover and have Treble Costs.

And be it further enacted, That it shall and may be lawful for the Court of Sessions, or any Two or more Justices of the Peace in New South Wales, or the Dependencies thereof, upon Complaint made upon Oath, to punish by Fine or Imprisonment, or both, any wilful Violation of the Provisions of such Indentures as aforesaid by, or any Misdemeanor, Miscarriage, or Ill-behaviour of, such Artificer, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or other Labourer, in such his Service or Employment as aforesaid, and also to hear and determine all Complaints, Differences, and Disputes which shall happen and arise between any such Artificer, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or other Labourer, and the Person or Persons whom he shall have so contracted to serve as aforesaid, and to make such Order or Award in every such Case as to such Courts of Sessions or Justices respectively shall seem just, and every such Order or Award to enforce by Execution against the Goods, Effects, or other Property of the Party or Parties against whom such Order or Award shall be made, or by Arrest of the Person and Imprisonment for any Time not exceeding Three Calendar Months.

Provided always, and be it further enacted, That, in case it shall at any Time seem fit to His Majesty, His Heirs and Successors, to constitute and erect the Island of Van Dieman's Land, and any Islands, Territories, or Places thereto adjacent, into a separate Colony with distinct Jurisdiction:

after which Appeal from Van Dieman's Land to Governor of New South Wales to cease.

* This clause has already been carried into effect.
Restrictions, Provisoes, and Declarations as are herein-before made and contained; and thereupon the Appeal hereinbefore granted to the Governor of New South Wales and its Dependencies, from the Judgments, Decrees, Orders, and Sentences of the Supreme Court of Van Dieman's Land, shall cease and determine: and from and after the making of any such Order, all Instruments in Writing whereby any Governor or Acting Governor of Van Dieman's Land and its Dependencies shall remit or shorten the Term or Time of Transportation of any Felons or other Offenders shall have such and the like force, effect, and virtue in the Law, as any such Instruments in Writing to be made by any Governor or Acting Governor of New South Wales and its Dependencies can or may lawfully have by virtue of the before-mentioned Act passed in the Thirtieth Year of the Reign of His late Majesty King George the Third, or by virtue of this present Act.

XLV.* And be it further enacted, That this Act shall be and continue in force until the First Day of July in the Year of our Lord one thousand eight hundred and twenty-seven, and from thence until the End of the next Session of Parliament.

*Omitted.

EARL BATHURST TO LIEUT.-GOVERNOR ARTHUR.

11th December, 1826.

[With this despatch, Earl Bathurst transmitted a warrant for members of the legislative council in Tasmania; see volume V, series III.]

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

My dear Sir, Sydney, 15th Decr., 1826.

I wrote you a hurried letter by a vessel called the Corsair, about a week ago; it contained however some useful information, and accompanied a draft of the bill which I have prepared, according to my ideas of what is required for the Colony, for the next parliament. It is now my fate to write always in haste, for the variety of my official vocations and the absolute necessity, which the master of a family is under in this new country of devoting some portion of his time to the business of life, that of having something to eat and to drink, and being provided with the means of locomotion and rest, and without which personal attention, life would soon be at a stand, leave me no leisure for composing my ideas and writing in the manner which I should prefer being read. My head and heart are always together, however, when I take my pen to address you, and it is probable that what I write may lose much of its point, if I sit down in a workmanlike manner to polish off its roughness. I shall therefore surrender myself to my quill, and leave the rest to your liberality.

1. The Attorney General, Bannister, has left us on his return to England, and he is gone, not in the best of humors. As it is
probable he will make his appearance in Downing Street in the character of an aggrieved man, I will put you in possession of a few leading facts, which cannot fail to be of considerable use to you in looking into his case. Mr. Bannister came to this colony with false and, to speak candidly, foolish expectations; he had raised them upon a great overestimate of his own talents and the revenues of the bar; consequently he experienced disappointments and, as is commonly the case, grew into excessive ill-humor with himself, the colony, and the government. Under pretext that his time was so exclusively occupied with his office, he had no oppportunity of cultivating private practice; he had hoped as a last resource to induce government to retain his entire services at a rate of stipend of between two and three thousand pounds a year; and, in furtherance of this plan, he had gradually persuaded himself that, in virtue of his office, he was to become the premier of the colony; it was really marvellous, as well as amusing, to hear his beau ideal of "an Attorney General of New South Wales"; your department, the Governor's, mine, and many others, were but secondary agents to it. As far as himself was concerned, his own ideas were clear enough, and had wrought all the persuasion he could wish. But unfortunately there were others, who thought that the Attorney General of New South Wales was but a miniature of that officer in England, and that Mr. Bannister's pretensions, beyond that of being the stipendiary counsellor of the Crown, were all founded in usurpation. I had the misfortune to be among these free-thinkers, and fell of course under the ex-Attorney General's Auto-da-fe. It was easy to perceive from Mr. Bannister's manner, that he was not on terms of good feeling towards me; he had twice refused to dine with me without assigning any reason, altho' he dined with other persons. Our official intercourse, however, continued on the same terms as before, until about twelve months before his departure, when his manner occasionally in the Court and his style of addressing me off the bench were such as I would not have borne from any other person without marked disapprobation, and as I was only induced to tolerate in him, from knowing the irritability of his temper, and not feeling quite free from suspicion that his mind was occasionally unsound.* I am since confirmed in this suspicion, not only by the extravagant conduct of the man, but by the fact that he was taken ill at Parramatta of a fever connected with his brain, and suffered an aberration of intellect for some days, with occasional returns for some weeks. It may be out of place to enumerate instances of his offensive demeanor towards me, officially and personally. I will just notice one or two instances.

* Note 287.
I had ruled, as a principle of law, that the Statutes of England, so far as they could be applied, were in force in this Colony; the Attorney General held a doctrine directly the reverse, and addressed it to me as his deliberate opinion in opposition to mine on the Bench, a thing quite unprecedented and indecorous in the King's Courts. He held also, out of doors, that the Legislative Council, previous to Colonel Stewart's arrival, was not a legal council, and this, after several pressing laws had been passed, and he well knew the painful difficulties in which the Government and the supreme Court were placed, in consequence of the delay of the Lieutenant Governor. It is true that the legality of the Council's Acts was very questionable, and that the first Act of the full Council was to confirm the acts of the other; but the King's Counsellor should have been the last man in the Colony to give his opinions gratuitously and openly upon so delicate and important a question. These were public actions. I shall only mention one private occurrence, because it related to my official character. You must remember the case of the Almorah. That ship had been chartered by government, and sent to Batavia for a varied cargo, comprising, among other things, tea, which by the company's charter can only be imported under a license from the Indian Government. There was no license, and the vessel was seized; it is unnecessary to inquire into the legality of the trade, but, right or wrong, the Captain of the King's Ship had a right to bring the question before a competent Court, and a preliminary right to arrest the vessel. Capt. Mitchell seized the Almorah, and finding from the opinion of his legal advisers, supported by that of the King's Attorney General, that there was no court competent to try the question in this Colony, he prepared to carry the vessel to Calcutta; after the ship was gone, an action of damages, to a large amount, was brought by the Attorney General, in the name I think of the Commissary, against Mitchell for the abduction of the Almorah's cargo; when the case was approaching the time of trial, Mitchell's advisers moved the Court to quash, or to stay proceedings in this Colony, on the ground that this Court had not jurisdiction over the principal subject, viz. the legality of the seizure for a breach of the Company's privileges, and that the whole case should be left to the decision of the King's Courts at Calcutta; in support of this application to the Court, Capt. Mitchell had sworn as to the principal facts of the seizure, and the removal of the vessel, and stated as his reasons that he had been advised that this Court had no jurisdiction, and was confirmed by the opinion of His

* Note 288.
Majesty's Attorney General. In answer to this affidavit, Mr. Bannister put in a certificate, but not on oath, in which he positively denied ever having expressed such opinion to Capt. Mitchell. The point come on for discussion, and it was contended that the Attorney General's certificate, to the particular fact in dispute, could not be received; he must swear to its truth, or his statement must be rejected. The Attorney General however contended that he was privileged, and in the course of his statements threw out insinuations which appear to have been felt by his opponents, Dr. Wardell and Wentworth.* As soon as he had finished, and the other rose to reply, he abruptly turned his back on Dr. Wardell and quitted the Court. The other complained, as being unfair, that he should advance statements, which reflected or were felt to reflect on other persons, and not stay at least to hear them refuted; and thus compel his opponent to reply to an absent man; and, as nearly as I can recollect the words, he added, "I will therefore use the short moment that is left me, before the Attorney General is out of doors, and tell him that he has placed a falsehood on the files of this Court." The Attorney General heard the closing words, and did not return to sustain his own case, but went home and wrote me a very offensive letter; he told me I ought to have "put down" Dr. Wardell, and that no Court could be respected that suffered such indecencies with impunity. Mr. Bannister had no right to hold such language to me. He did not know in what manner I had checked Dr. Wardell; it was he who had ingeniously contrived to make the truth or error of his own assertions part of the case before me; had the Attorney General, or had he not, expressed an opinion to Capt. Mitchell, as the seizure of the Almorah, that no Court here had power to try the case? Whether the fact of his having done so or not was or was not of importance to the decision of the motion before the Court is not material; it was a fact, relied upon as important by one party, and expressly denied by the other; and it was therefore part of Capt. Mitchell's case, which his counsel had a clear legal right, independently of any sufferance of the Court, to make the most of. I repeat, therefore, the correctness or incorrectness of the Attorney General's statements, in his certificate, was a part of the case before the Court, and Dr. Wardell had an uncontrolable right to contend that the statement was not true. I did, in the most prompt and pointed manner, stop him in the use of unbecoming language, and reproved him; he instantly apologised, and said (and I thought truly) that the aggression had been on the part of the Attorney General. And lo! the Attorney General's own autograph was exhibited to the Court, and it appeared

* Note 259.
that he had distinctly, directly, and, in the course of his official communications with Capt. Mitchell on the seizure of the Almorah, given it as his decided opinion that there was not any Court of competent jurisdiction in this Colony to try the merits of the seizure!

I have stated the above occurrences, not to charge Mr. Bannister, but to explain how it happened that we differed; it is part of my history of events, not intended to furnish articles of impeachment against the late Attorney General, for whom I feel sincere pity and great regret for the unfortunate irascibility of his temper and turn of his mind. I wish these communications to be considered as in entire confidence between us. I have hitherto alluded to his actions and opinions in reference to myself. I will add, that the government had not much confidence either in the judiciousness of his advice, or the correctness of his opinions. In his department of framing laws for the Governor to lay before the Council, he had shewn so palpable a deficiency of proper knowledge that his drafts were the jest of the Council Chamber. So far from saving trouble, he heaped it on us; and withal so tenacious of his own views, that he would never alter a draft to meet those of the Council, without remonstrance or protest or something pugnacious. In one instance, namely the last proclamation of Sir T. Brisbane, revoking and amending former proclamations on the duties under Stat. 3 Geo. 4, C. 96, he made the Governor sign a proclamation in direct opposition to the advice of the Council, which he had asked, and in violation both of law and policy—ab uno discendum; the Attorney General differed with the Council; he afterwards espoused the cause of Mr. Marsden, took up the presentment of that perjured jury,* who presented Magistrates for doing things which had been remedied, and of which they had set the example; refused to prepare the quieting bill,* and declared it to be illegal, and in short differed with the Governor.

So stood matters when a vacancy occurred on the Bench, in consequence of my illness and retirement to Bathurst. He then prepared the draft of a commission for Mr. Stephen, and so prepared it, that he had nearly put me off the Bench altogether, had not my intellects proved stronger than my body, and enabled me to correct the error; he made me out to be "permanently infirm," and you will see, by the 1st clause of the New South Wales Act, by the rule of singula singulis reddendo, that I became civilitu mortuus, and my locum tenens was to hold on, until a Successor should be appointed by the King. This was very probably an accident; but I have heard it said that the Attorney General was disappointed at not being placed
on the Bench; it appeared to me, however, that, as my absence would only be for a few months, at the utmost three, it was not worth while to disturb the Attorney General's Office for that short time, and I recommended the nomination of Mr. Stephen, at the same salary as the Attorney General's. A great part of my duties, I knew, must stand still until I returned to my office.

Soon after General Darling’s arrival, I retired to Bathurst. I left the Governor in dense correspondence with the Attorney General. I had been forced into a station at the shipwreck of Sir Thomas’ administration, which I was determined I would not occupy under his Successor. My own place, I knew no man in the Colony could fill. I was heedless of worming myself into the Councils of the new Governor; and I considered it a fortunate circumstance for myself that he should be entirely freed from any supposed exertions of mine to influence his judgment, and at liberty to choose his future Counsellors. My absence was soon felt; the business of legislation stood uninterrupted still; no man proposed a law; the Bank of New South Wales became embarrassed, and it was indebted to the government (in the name of the Treasurer) in the sum of considerably more than a hundred thousand dollars. The intrigues of political men had found their way into the Council, and there was a division among the members. I accidentally arrived on the eve of a decisive meeting* of the Council; it was my good fortune to see the matter in its true light, and to influence the judgment of others; the great question before us was carried without opposition; it saved the bank; it secured government’s debt, and is now universally admitted as a wise, as it was acknowledged to be a liberal measure. From that hour, the Governor fixed his confidence on me. I sought it not, but it was not for me to reject it. I act upon open and avowed principles lex et rex. Let the Attorney General vaunt as he will, he was an agent in the hands of those who sought the destruction* of the old Bank. I think he was unconscious of it himself, but it was the firm persuasion of the Governor, Mr. McLeay, and myself, and we felt confirmed in our opinion from the singular circumstance of his recommending partial measures, which it was evident he did not understand himself, and which were therefore put into his hands; while we, who had possession of the other parts with which the first exactly fitted, could trace the sources from which the whole had descended. Soon after these occurrences, advices were received from the Attorney General’s friends that his terms of retirement or increased salary were not likely to be satisfactorily decided upon; the anchor, which bound him to

* Note 290.
government, was now loosened, and he became a most independent officer; he took upon himself to lecture the Governor as to the persons who were proper to be admitted to his table, to call the Colonial Secretary to account for interfering as he called it with the Magistrates, and in short acted like a person whose part was done in this Colony, and who laid himself out to provoke some act which might be interpreted into a grievance, to lay the foundation of a decent claim to be provided for in some other. This is the only possible way in which I can account for, the extraordinary departure from the rules of common prudence, not to say of decency, which marked the demeanor of the Attorney General to the Governor, the Colonial Secretary and myself, a few weeks before his resignation was announced as having been accepted. The Governor has, I know, written fully on the subject of what may be termed his personal misbehaviour. But there is one fact which, altho' he may have mentioned it, yet deserves to be borne in mind. Mr. Bannister had insinuated in one of his “flying letters” to the Governor, that he had serious charges to bring against some public officer or officers in the Colonies; the Governor immediately desired him to declare openly, what those charges were, and against what officers they were directed. This he declined, saying he should defer them until he should be able to make them in England! Thus he dared to insinuate in the gross, to let his insinuations light on the heads of those whom his listeners might choose to fix them on; but he would not name; he would not prove; no, that part would be better reserved till he got safely away, some sixteen thousand miles; and then he might let fly at random, spargere in vulgium voces ambiguas, without fear of simultaneous contradiction or of responsibility. Unfortunately, Lord Bathurst's order, that all complaints should proceed openly thro' the Government of the Colony, had not then arrived; but the propriety and justice of the measure were the same; and (out of New South Wales) it would require the stifling of many feelings of honor in any man to bring himself to believe that secret charges against officers of a distant colony, which had been invited and refused in the Colony, would be entertained by government at home.

I now come to the last act of the piece, which was the Attorney General’s prosecuting the Editor of the Sydney Gazette for a libel* on him as an officer of the Crown. I shall refer you to the newspapers for what passed, only observing that, if I had entertained doubts of Mr. Bannister’s sanity before, they were confirmed by his conduct on that occasion. Howe had not intended to libel but to laud him; he knew it, and admitted it; but he

* Note 291.
Reasons of S. Bannister for prosecution.

1826.
15 Dec.

Conduct of H. Macarthur re H. G. Douglass.

Intimacy of S. Bannister with H. Macarthur.

Error committed by R. Darling.

Powers conferred on governor by act of council, 7 Geo. IV, No. 5.

prosecuted in order to afford himself an opportunity of vindicating his whole political life in this Colony, and reflecting upon the late Governor, the present Governor, and the Chief Justice; and that the latter was in Court, and on the Bench at the time, was so much the better. But his arrows fell short of their mark; they had venom at the point, but they wanted the vigor of the bow; or rather I will affirm that they could not reach their object, and excited no feeling but that of weariness and commiseration. I had never injured him in any way; he thought, I sincerely believe, that I had done so; but the dagger, which had wounded him, was air-drawn and driven by himself. I confidently appeal to all my confidential letters to you, if I have not always spoken of Mr. Bannister with kindness and recommendation. But, in fine, he is a disappointed man; he was predisposed to be in ill humor; and there were intriguing persons here (whom I know to have undervalued him in days past); who practised on his infirm points, and made him the instrument of annoyance to the government. How else can one account for this astonishing fact? He knew that Hannibal McArthur was in open variance with Dr. Douglass; he knew, that, carrying his feelings with him into the jury box, he had, in open defiance of common honesty as well as his solemn oath, charged his enemy* as a criminal; he knew that he had set him the example in the very crime he had presented; he had seen the books of records, and knew that particular cases were culled to criminate particular men, and to skreen others. He knew that one of the most shameless attempts to pervert justice, and render courts ministerial to the gratification of political vindictiveness, had been made; he knew all these things, and yet, in the fulness of his charity, he forgave them all; continued intimate to the latest hour with the man who had been guilty of them; and reflected on the government for setting its face against such bare-faced proceedings! How, upon ordinary principles, can one account for these things? But I repeat, I do not mention these circumstances to charge Mr. Bannister, but only to put you in possession of facts, upon which you must form your own opinion. And now I shall dismiss this painful subject.

2. The Governor has lately fallen into an error, which I fear will give you some trouble; the case is briefly this. In giving effect to the penal law of England, we (Pedder and I) used to pass sentence of transportation, leaving the Executive authorities to carry that sentence into effect the best way they could. We lately however passed a law,† enabling the Governor to carry transportation into effect, in such manner as he should deem proper; and, at the end of the act, a power was given him of

* Note 292. † Note 293.
withdrawing prisoners from the penal settlements, and either working them in irons on the roads, or assigning them to Settlers in the ordinary way. The evident intention of this power was to enable the governor to withdraw well-conducted men for service, and unreformable culprits for hard labour. The Governor, however, read the Act as giving him a power to change transportation immediately into labor in irons on the roads, and had ordered many persons to be so worked, who were under sentence, but never transported. Unfortunately two soldiers* had been convicted of larceny, which it appears they had committed with the view of getting out of their regiment, and in the expectation of being assigned as convicts. The Governor to strike terror, by the force of example, issued an order, in the form of a garrison order, notifying the commutation, and directing it to be carried into effect in a manner rather formidable to English readers. The prisoners were taken from gaol, dressed in chains, and, after being paraded before the Regiment, were drummed out and sent back to gaol. On the following day, one of them (Sudds) was taken ill, and removed to Hospital, where, in four days after, he died, apparently from a sense of shame operating upon a diseased body. I think the Governor was in error; but the case was a very flagitious one, and required exemplary punishment, and I think that it will appear satisfactorily that the death of the soldier was not caused by the extraordinary punishment to which he was subjected, over and above that to which he might legally have been subjected. The chains weighed thirteen pounds twelve ounces, and were on only fourteen hours, before they were removed. However, the case was unfortunate; it has made a good deal of noise here, and will probably be made the most of in the discussions on the new bill. I have given the Governor my opinion, united with Mr. Justice Stephen's, on his powers under the ordinance, which I also inclose; and I can safely say that the Governor did not intend to do anything but what he thought he might do by law, and certainly nothing was done with a cruel intention. The case has terminated unfortunately, but was not essentially treated here with greater severity than it would have been exposed to, had it occurred in England, where Prisoners are worked in chains before transportation.

The industry of the local government, in furnishing you officially with details of all that is doing, has abridged both the necessity and extent of my correspondence; but I must say a few words about the new bill, before I close this letter.

3. Inclosed is my draft of the proposed bill, which is exactly the counterpart of the amended copy sent by the Corsair. I
must especially beg of you to support the clause numbered IV as to declaring the penal laws of England, the penal laws of this Colony. In Mr. Peel's Act, 6 Geo. 4, chap. 69, they are extended to convicts in the American colonies, because those colonies, having legislatures in the reign of the Stuarts given them, are not included in the operation of any Statutes passed since, but not so this Colony; it had no legislature within it until 1823, and the legislature of the mother country was necessarily the only legislature it had. Your last Statute (6 Geo. 4, 69) expressly leaves New South Wales out; and why? because it was already in the same state, with reference to the application of the penal laws of England, as the older Colonies were afterwards placed by that act. I must press, for the honor of the Court, that the clause he made declaratory. The Governor will write you about the constitution of a Legislative Council. We agree that the number may be advantageously increased to twelve. We shall probably want a President, and I presume your eye, guided by analogy to what is done at home, will look for the Chancellor of the Colony. The Governor informed me, some time since, that he was authorized to appoint a Lieutenant Governor. Why keep up this absurd office? Bigge recommended its abolition, and it is so entirely left out by the Act, that it is overtopped by the Judges, the Commander in Chief, and all the Members of the Legislative Council. But if it is in future to be a discretionary appointment of the Governor, it will merge into a mere household sinecure, and be disrelished by those in authority, as well as those out of authority. The Legislative Council should have all the weight which office can give it; but of what weight can be the vote of a mere sinecurist, holding a floating commission from the Governor? The succession of the government is provided for by the Governor's commission; why keep up this man of straw? I presume it will always be held or given to the Senior Military man; but the affairs of the Colony are becoming too important and complicated to be successfully conducted by every military gentleman, who, by the chances of the service, may happen to succeed to seniority. If the office must be kept up, it should be adequately salaried, adequately ranked, and last, tho' not least, adequately filled. Will four hundred pounds per annum, with the bare chance of being Governor pro tem., be a sufficient bounty to tempt gentlemen to this Colony, who are well qualified for managing the affairs of a Government, which cannot be safely entrusted to the Senior member of the Council?—dubitatum.

4. I wrote you about the press, in the Corsair. I shall add nothing here, to what I have said already, and with more
FORBES TO HORTON.

force in my letter* to the Governor on that important subject. Wishing you health, happiness, and thanking you for the kindness with which you receive my communications,

I remain, &c.,

FRANCIS FORBES.

[Enclosure No. 1.]

GOVERNOR DARLING TO CHIEF JUSTICE FORBES AND JUDGE STEPHEN.

Gentlemen, Government House, 13th of December, 1826.

A difference of opinion being entertained with respect to the powers vested in the Governor of this Colony, by the 6th Section of the Act of the Legislative Council, dated the 10th day of August last, No. 5; I am to request that you will take the said Act under your consideration, and favour me with your opinion as to the powers given to the Governor by the 6th Section as above referred to.

I have, &c.,

RA. DARLING.

[Enclosure No. 2.]

CHIEF JUSTICE FORBES AND JUDGE STEPHEN TO GOVERNOR DARLING.

13th December, 1826.

[A copy of this letter will be found on page 755, volume XII, series I.]

GOVERNOR DARLING TO UNDER SECRETARY HAY.

17th December, 1826.

[In this despatch, Governor Darling criticised the draft for the proposed N.S.W. bill; see page 803 et seq., volume XII, series I.]

GOVERNOR DARLING TO EARL BATHURST.

19th December, 1826.

[In the enclosures to this despatch, the division of duties between the chief justice and the puisne judge and the status of the latter were discussed; see page 783 et seq., volume XII, series I.]

GOVERNOR DARLING TO EARL BATHURST.

31st January, 1827.

[With this despatch, Governor Darling transmitted a petition from the colonists, soliciting trial by jury and taxation by representation; see page 50 et seq., volume XIII, series I.]

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

My dear Sir,

Sydney, 6th Feb., 1827.

I shall confine this communication to two subjects—the addresses from the inhabitants of the Colony to Parliament, and the press. I could write a small volume upon each of these

* Note 295.
1827.
6 Feb.

Petition to parliament for trial by jury and no taxation without representation.

Criticism of public expenditure.

subjects; but as my time is limited, (this being the month for trying prisoners) and your's is too importantly occupied with the general affairs of the colonies to admit of your entering minutely into all the details of this, I shall select the prominent points for your consideration only.

You will have perceived by the despatches of the governor that a meeting of the inhabitants was called by the Sheriff, at the requisition of some of the most respectable and opulent proprietors in the Colony; the objects were to petition Parliament for trial by jury and taxation by representation; the meeting took place last month, and, as I am informed, was creditably attended, decently conducted, and quite unanimous in its resolutions. I have read the petition, and it contains many truths, which cannot be denied; indeed I may say that the feeling in this country is unanimous in favor of some mode of infusing the voice of the public in the raising of the revenue, and of some ulterior check upon its expenditure. To say that the country is not ripe for representation, that it will interfere with private pursuits too much, in the present thinly peopled state of the country, to furnish delegates for an assembly, and similar arguments, is to object merely to the specific remedy, but not to deny the fact of disease, or to prescribe any palliative. The people of the Colony do, at this moment, pay taxes to the acknowledged amount of nearly sixty thousand pounds a year; for the payment of this comparatively large amount, they have no authority than the fiat of the governor, and no other guarantee for its due appropriation than his Excellency's honor, which, however high it may be, is at best but a personal security, and a very insufficient one in a constitutional point of view. I can affirm with safety that, in the application of the public resources, our governments have not invariably acted with a view to the public advantage; as an instance of the fact, I will state that up to this hour we have no court-house, and no prison for debtors. The want of the first is a serious public evil; our sittings are held in a charity school, roughly fitted for a temporary purpose, and the debtors complain of being associated in one common place of confinement with felons, in express violation of the positive injunctions of Parliament. The excuses for these things have been the want of workmen; yet I have seen other buildings rise up with surprising rapidity, stables, temples for bathing, etc., etc., have gone on as magnificently and merrily, as if we had a superabundance of money and men, and only wanted occasions for employing them. While such things are, the voice of the public will be heard; and, if it is not permitted to speak thro' the medium of a house of assembly, it will seek such other channels of proclaiming
itself, as cannot be closed, the English press, and the British parliament. It were vain to attempt to suppress public opinion in this colony. I have had some experience in it now; the people are far more intelligent, active and determined, than any of the older colonies; they are newly sprung from intellectual and enterprising England; they bring improved knowledge and enlarged opinions with them, fresh from the parent source; to govern them, as are governed the people of the Isle of France or our Indian possessions, is quite impossible. Self-taxation is so rudimental a part of our constitutional government, it so immediately enters into the daily business of life, that you will never keep things quiet without some substitute at least in this colony; you must find some means of consulting the payers of taxes as to the manner of laying them on, some check upon the appropriation, some audit, to which every public accountant may be brought, some channel thro' which you will communicate your accounts to the people. If this substitute be not found, I will venture to foretell, without claiming the gift of prophecy, that you will have a petition from New South Wales at every meeting of Parliament, and the budget of Botany Bay will be as regularly called for in the Commons of England as the revenues and expenses of the mother country. Do not imagine, from what I have written, that I am advocating the cause of popular representation in this colony. I would not take upon myself the responsibility of recommending such a decided measure upon any terms. I mean merely to state some of the prominent objections to the existing close system, and leave it to your better judgment to weigh the difficulties of the question, and to interpose some temporary expedient, until an appropriate system may be devised and adopted. All that I affirm is that the present state of things requires reformation; it began in assumption, and was submitted to from necessity; it has been bolstered up by the same necessity; the legislative council sanctioned it for a time only, and until something better could be provided; the public are clamorous for a remedy, and I suppose something must be done; what that something may be, will be experimental at best, and I will not venture an opinion upon it.

The press shall be my next subject. I have already given you my opinion in general terms, that a free press is not quite fitted to a servile population; it is excellent, indispensable, in a free state, because of its tendency to counteract that eternal propensity of our social natures to make slaves or dupes of one another; but for that reason perhaps, it is not suited to a state of society, where one half of the community are worked in chains by the other; the direct tendency of the press is, in short, to equalize
mankind; and the direct policy of our little state is only an enlarged prison-discipline; the first is to set all free; the last, to hold one half in servitude. This is my opinion, and I would fearlessly stand upon it, and maintain, with a veneration for the free institutions of our glorious common country inferior to no man's who ever breathed its healthy freshness, that an unrestrained press is not politic or perhaps safe in a land where one half of the people are convicts, who have been free men; yet I must not leave out of the account that the other half of the people are free, and that, as an abstract right, they are consequently entitled, as of birth-right, to the laws and institutes of the parent state. It is a mixed question, and requires to be carefully examined; if you take away the freedom of public opinion upon matters of government, you take away a legal right; necessity you will say justifies it; then the limit of that justification is the necessity which compels it; it should go no further; a question then naturally arises whether all the means of restraint, which the law of England has provided, have been tried in this colony without success. The answer is at hand, they have not; the late attorney general never instituted one prosecution for libel, except in his own case,* and in that he failed for obvious defects of legal merits. I am uncharitable enough to believe that of two articles (one in the government gazette and the other in an opposition paper), he selected the first from its neutral, nay laudatory character, that he might offer the failure as an excuse for his palpable and most reprehensible oversight. I was the very last man in the colony to venture any opinion upon particular instances of licentiousness. I never did venture such, feeling that I should disqualify myself for sitting in judgment upon any publication, which I had previously denounced. But the attorney general should have been the first man to notice every licentious article, and to have presented it with the unvarying certainty of cause and effect; he is the grand jury of the country, as well as the crown prosecutor; as the first, he should never have suffered one case to pass unprosecuted, any more than he ought to passed over a felony; it did not implicate the government, because he had drawn the distinction between his acts as officer, and his acts as the parliamentary substitute for a grand jury. To his unpardonable neglect or mistake of duty, I attribute, in a principal degree, the present licentious state of the press. The ingenious subterfuge of asking the governor's permission to prosecute, on behalf of the crown, was unworthy; as the legal representative of His Majesty's prerogative, he should have sought no sanctions beyond his own upright opinion of what the interests of the public required; in law, he is exclusively

* Note 291.
appointed to judge of the expediency of prosecuting; and, in attempting to shift this responsibility from his own shoulders to those of the governor, or to furnish himself with an excuse for betraying, or neglecting, or mistaking his duty, I think he has acted unworthily. As matter of fact, then, all the means within the power of the law to repress the licentiousness of the papers have not been tried; assuming however, that they might be found insufficient, what may be the just measure of restraint, a government license, to be granted or withdrawn at pleasure? Let it be remembered that the government are now the complainants, and that, by placing the censorship in its hands, you place one party directly in the power of the other. Is there no medium, nothing which can be interposed between the governor, seeking to put down a particular publisher for free, perhaps false, perhaps true, exposure of some act of his administration, and the natural right of complaining of what may be felt as a grievance. If something of this mediating character cannot be found, then I say prohibit newspapers altogether, for the government will laud itself, opposition will be excited, the people will meet and will complain, and our ill-humour, instead of being allowed to fret itself away in the colony, will vent itself in Petitions to Parliament, and thro' the columns of the morning chronicle. What led to the laborious and expensive enquiry* into this government, to the removal* of our two last governors, to the addresses now under way? the same causes, that will lead to other complaints, other enquiries and other removals; complaints there will always be, and I think an unlimited censorship in the hands of the governor will increase the grounds of complaint and ultimately end in his recall. Such are my sincere opinions upon the policy of this most important measure; as a question of mere law, it has I find been decided at Bombay that a preliminary license is inconsistent with, and repugnant to, the laws of England; if it be not, it may be difficult to say what is. I address these remarks therefore to you in the supposition that the subject may be under consideration with a view to removing every legal objection to the form, in which you may ultimately determine to restrain the press. I find that Mr. Pedder at Van Diemen’s Land has certified the licensing law.† I rather suppose, however, that the Lieutenant Governor does not feel his authority sufficiently weighty to act upon. I recommended silence upon the subject, until it became too late for a petition to Parliament. Were it not generally known that the Chief Justice of Van Diemen’s Land had certified in an English colony, as not repugnant to English law, what the Judges in an Indian proprietary government had upon principle refused to certify, India not being a British colony properly

* Note 296.  † Note 297.
speaking, I should earnestly suggest the withholding of trial by jury there for a time, until the certificate should be forgotten; I am sure he would find it impossible to guide the juries in his Court. An English judge cannot be too careful of his reputation for independence; if he lose that, he loses his necessary influence over the public opinion, and, on state occasions, he becomes useless to the state; his charges bear no weight, the juries do not respect him, and his decisions carry no conviction over the mind of the public; it is fit that, whenever a judge is placed in such a position, he should retire from the bench. I am no advocate for courting popular applause “that echo of folly and shadow of renown” as Lord Mansfield once called it; but the good opinion of the public, over which one presides, is worth having; and the judgment of the people, altho’ sometimes misguided, is always grounded on right feeling; their suffrages are sometimes just. It is beautifully said by Sallust, of the great competitor of Caesar, quo minus gloriam petebat, ex magis sequebatur, and without affecting any comparison, I can safely say that, if I have had the good fortune to win the confidence and well-wishes of this community, it has been by the simple acts of honesty and an impartial discharge of my duty.

You will say this is a sceptical letter; so it is; the way to open the law, says Lord Bacon, is upon doubts; and so seems to think his present illustrious successor. I may therefore seek shelter under the protecting wings of two such great examples, and throw in my doubts upon questions, which are too momentous to this colony, and too important to its future peace to be disposed of upon, mere general reasoning. But, without doubt, I am a friend to a defined limitation upon the press in the present state of the Colony, and also to some point of contact with the people as to the raising and accounting for the revenues of the country.

I enclose a few papers of this place; pray read the Australian and Monitor of the 3rd instant* with attention; the first contains a very caustic article, more acutely felt than you can well understand; it relates to the new regulations about granting tickets of leave; the Monitor animadverts upon the abrupt manner in which the convict mechanics are called in from the service of the Settlers; upon the first, I will state a fact or two for your right understanding of the subject. Tickets of leave have long been in use in the Colony, and Bigge, in his first report, page 131, commends them “as an excellent instrument of the reformation of convicts, from the combined effect of stimulating their industry, and restraining their misconduct.” The purport of the regulations of a ticket of leave is a promise of the governor that,

* Note 298.
if the newly arrived convict will conduct himself well for a
given time in the service of one master, or a longer time in the
service of more than one, the governor will reward him with the
privilege of working on his own account. While I was at
Bathurst in May last for my health, the government issued an
order suspending the issuing of tickets of leave, or, in other
words, the performing of their promise, until further provision
should be made, under the plea of great abuses being discovered
under the existing regulations. A short time ago, being about
nine months after this suspending order, the new regulations
were promulgated, differing only in a few minor details from
the former, as related to the objects of the pledge, and creating a
new incitement, in the form of apprehending offenders and giving
information of offences, a thing very well meant but perhaps of
rather doubtful policy. Soon after the order appeared, it was
followed by the government notice, which forms the subject of
the Australian’s observations. The Monitor seems to anticipate
some check upon his own licentious pages; the article is ex-
tremely worth reading, as it admits the anomaly of a free press
and the present state of the Colony, habes veum cenfententum; he
has furnished you with a fair argument, and a case in point
together. Lest you might not have read the decision* of the
Bombay judges, I send a Sydney Gazette containing extracts
from the Indian journals; you will see the avidity with which
this interesting subject is caught, and the feelings that are alive
to it, even in the heart of a foreign colored race, held in sub-
jection by the want of that very thing, which an unfettered press
must ultimately give them, a sense of their own degradation and
of their own strength.

I have not time to run over the pages I have already written;
it is approaching the hour of the meeting of the Court, and I
must therefore conclude this rapid epistle. The subjects I have
touched I have well considered, and I have written as I should
have spoken, had I the pleasure of communicating with you in
person. You mentioned that your former department, with
reference to this Colony, had been supplied by Mr. Hay,† and
suggested that I should write to him; officially, I will certainly
do so; but, in writing to you, it is as to a friend, in whose con-
fidence I may trust, on whose liberal allowance I may always
rely, who knows me personally, knows my manner of thinking
and habit of expressing myself. Holding myself to have been a
tried friend of the government at home, and to have proved my-
self most anxious for the successful administration of this, I am
apt to use a freedom of thought and strength of expression that,
by a personal stranger, may be easily mistaken; and therefore

* Note 299.  † Note 300.
1827.
6 Feb.

I must continue to write to you, assuming that you will use your discretion as to any information and opinions I may convey to you. You will have perceived, from the tenor of my letters in Sir Thomas Brisbane's time, as well as during that of his Successor, that I think this Government wants, not re-organizing, but creating rather; for there are hardly the elementary parts of a government according to English notions. The governors of past years were all in all; they made laws, levied taxes, laid out all the monies, repaired the roads, appointed the constables, doorkeepers, etc., etc., etc., and in short descended even to the minutiae of counting the stock of the Settlers, all very useful among a family of convicts and soldiers in a strange land, but quite unnecessary or unmanageable in the present improved and enlarged state of the colony. Busied with such pursuits, the government office has become, in the course of time, so encumbered with details that it has no time for the loftier objects of political economy. No scheme of government, either formed from the fragments of the existing state, or drafted upon a liberal view of the actual position of society in this singular portion of the King's dominions, has been ever dreamed of; but the constant complaint is, the officers are fagged to death with business, and yet very little seems to be done. And it must continue so, until some superior mind, gifted by nature and elaborated by study and experience, comes to the subject; all will then assume another appearance and character; let there be light, and there shall be light. But where will you find such a mind; surely amidst your brilliant candidates for fame, some spirit may be found philosophic enough to become the Solon or Lycurgus of this young empire, or, at least with the ambition of Caesar, rather to be first here, than the tenth or perhaps twentieth at St. Stephen's. However, until you transport us such a genius, let me advise you to throw a good deal of the present occupation of the government out of its hand; power is so bewitching, that few like to part with it. But I repeat that, in my opinion, the true cause of the government office here, being oppressed with business, is it's assuming the exercise of a mass of petty powers and details which do not belong to it. The great objects of the Executive of New South Wales may be considered as to the granting of the crown lands, disposing of the crown prisoners, and superintending the police of the colony. If these main objects are adequately attended to by the government, every other power may be safely and advantageously entrusted to other and better hands; the commerce and agriculture of the country had better be left to themselves in the absence of some popular representation; witness the extraordinary game that has been played with
the trade of this colony, and some of the first necessaries of life, in the form of proclamations* raising a tax on tobacco from sixpence to four shillings as an encouragement to agriculture, and, while the crops were gathering in, abruptly lowering it again to one shilling per pound; the interdict upon foreign spirits to give a bounty to the use of corn in the distilleries; and the subsequent licensing of distillation from sugar to the utter confusion of all principles of economy and all speculations in trade. Do, my dear Sir, destroy this power, or limit its exercise to the consent at least of the Council. General Macquarie looked upon all commerce as a thing forbidden by law, and only tolerated by government; he borrowed his notions from the chartered monopoly of the E. I. company, hence he used to grant people licenses to import, and on one occasion (Simeon Lord's) the permit, that he gave, was sold immediately for (as I am informed) the monstrous sum of sixteen thousand pounds! If you will cast your eye over the chart of Sydney harbor,† you will find that upwards of one half of the sea-shore is appropriated to the governor's pleasure-ground, and, of the remaining half, one half is occupied by government establishments; this was done upon a system of prohibited commerce, very proper in days when the escape of prisoners was the primary object of prevention; but very injurious at present. I suggested to Sir T. Brisbane, at the close of his administration, to give up the whole of Sydney cove to the uses of trade; and it is clear that a large revenue is yearly sacrificed, as well as a great deal of public convenience, by this unnecessary monopoly of useless ground, hardly valued as it is actually shut out from the government grounds by a high wall. I believe he wrote to Earl Bathurst, but I have heard nothing further since. Much of this, my dear Sir, is in confidence to you; for the present governor I have the highest respect; but there are abuses in the government, which he did not create, and which he may not see or redress. In my next, I will sketch an outline of what I think should be the department of the governor, strictly within his own office. At present I must conclude myself

Yours faithfully,
F. Forbes.

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Governor Darling to Under Secretary Hay.

9th February, 1827.

[In this secret despatch, Governor Darling discussed the proposed constitutional changes; see page 96 et seq., volume XIII, series I.]

* Note 301. † Note 302.
Chief Justice Forbes to Under Secretary Horton.

My dear Sir,

Sydney, 6th March, 1827.

In my last I promised to send you my sentiments upon the theory and practice of the government of this colony. It would be a most invidious task, if what I am about to offer, were delivered in any other form than that of a confidential communication to one of the heads of this government; but feeling that what I write will be confined to those to whom it is entrusted to watch over the welfare of the colony and to correct any errors that may have grown up within it; that the distance, at which we are removed, renders any other mode of making your department acquainted with the true state of our case, than the reports of the accredited servants of the crown, impracticable; and that a longer residence in New South Wales, and a more extended knowledge of the systems of other colonies, have provided me with the means of taking a truer view of the actual state of this colony, and of forming a more correct estimate of its policy and future improvement than any other public functionary now here, I shall write fully and freely without any fear of being misunderstood and with every confidence that what I write will be assigned to the best motives.

A great deal of the present anomalous system of government in New South Wales may be placed to the account of the manner in which the colony was at first peopled; the first emigrants from England were a body of convicts, with as many marines as were necessary to guard them; the first government of the colony was that of a gaol, and the first law little more than prison discipline. In a new country such as this was at the landing of the expedition under Governor Philip, the second object, after providing for the care and correction of the prisoners, was that of procuring sustenance; every thing necessarily centred in the governor as the primum mobile of the machine; the police, the roads, the market, the importation of supplies, the cultivation of provisions, and even the prices of every article of daily consumption, were regulated by the orders of the governor; these phirmans entered into some of the minutest matters of domestic life, and gradually became so familiar to the inhabitants, that instances are to be found of domestic quarrels being referred to the fountain head of authority, and there settled with all the form and sanction of legal supremacy. This was a very natural order of things; a government, situated like that of New South Wales, necessarily became patriarchal; and, had the colony continued for centuries in the same state, I should have listened with reluctance to any innovation, how beautiful soever in theory; I have lived under
various forms of government; I have been a close observer of the memorable changes which have taken place throughout the world in my own life; I have read a great deal upon the subject, and reflected a great deal more; and the sum of my deductions is that governments are founded in opinion and formed by events; that all changes, except such as are wrought by time, are revolutionary and mischievous, and that whoever abruptly attempts to make violent alterations, merely because they are better in the abstract, is a traitor or a maniac. Were any exception to be made to this rule of following events in the formation of governments, it would seem to be in case of the colonies, and especially in such as this, where the people are not of the production of the place, but for the most part emigrants from England and Ireland, and annually bring with them the opinions and habits of the countries from which they come. It was the misfortune of General Macquarie that he did not perceive the effect of this principle upon the colony; he found it a gaol upon a large area; he governed it like a good governor of a gaol, and he resisted, as an innovation upon his authority, every attempt to change the policy of the colony and to render penal labor subsidiary to the purposes of a free settlement. There had been a time when wiser heads had questioned the expediency of the change, but that time had gone by; and, whatever degree of confidence he might have felt in the soundness of his own views, he was bound to defer to the instructions of his superiors. To this reluctance of Governor Macquarie to surrender his authority, I attribute the utter neglect of every civil institution during his protracted administration; he was certainly a very industrious person, and descended to the lowest details of the public service; the plump folio, which you caused to be sent to me at Portsmouth to amuse my leisure hours during the passage to Botany Bay, is a tolerable record of his assiduity in legislation; and every useful or ornamental public work in the colony was created or commenced during his administration; yet he did absolutely nothing for the civil government of the colony; his laws were framed without authority; he never attempted to introduce the parish and county usages and customs of the parent country; he quarreled with every judge, and never, amidst all his splendid edifices, appears to have dreamed that a court-house was at all necessary to the state; yet year after year, his government was increasing with emigrants from England, India, and other parts of the world, who brought with them the light of latter times, and whom it was impossible to persuade that, because their servants were prisoners, they likewise were liable to prison-discipline. They naturally complained; their complaints produced enquiry; and the enquiry, that was
instituted under our friend Bigge, led to events in which I had the honor to become associated with you, and which are too familiar to your recollection to require more than adverting to; the result was a change only, not a revolution, in this colony; the abrupt transition from the despotic authority exercised by the governor; the creation of a superior power in the legislative body; the erection of a judicatory upon the basis and with the united powers of the English courts at Westminster; the broad recognition of English law as the only rule of subjection, were so many decisive innovations upon the old system of gaol government, that I only marvel at the moderation of the people in witnessing these changes, and not running into greater excesses. That these innovations were necessary and indeed unavoidable, I readily admit; but I think that it forms a very grave charge against the government of the colony that, for the vulgar fame of being first in all things and the poor incense of an ignorant multitude, it should suffer this promising young colony to grow up like a neglected stripling, ignorant of the first elements of education, and attain an age when much must be unlearned and many propensities subdued, before any good or permanent instruction can be conveyed. We have now been in the colony three years, and certainly a great deal has been effected; but we are only at the threshold of our work yet, and I fear there is much to be done in clearing the "Stables of Macquarie" before our labors can be availably directed to any other task.

I consider it as a given point that, since the passing of the New South Wales act, the policy of Great Britain towards this Settlement is upon the broad basis of her colonial policy; that the laws of England are essentially the laws of New South Wales; that the government is essentially an English government; and that the Courts are essentially the Courts at Westminster. These data are plain; but, in giving effect to the principles they involve, a whole volume of detail lies before us. I am at this moment in my library, surrounded by about five hundred volumes of digests, codes, statutes and reports, which I have found or believed necessary to enable me to fulfil that part of the new system which you confided to me, the administration of justice upon the principles and practice of English law; and, if all this apparatus be necessary in my department, am I to believe that the duties of the legislature and executive are so much less, or their task so much easier, that no other or higher qualifications are requisite than a sound judgment, and an industrious pair of hands? The question answered itself. I will freely state it as my opinion to you that I do not think there are many men in the empire, exactly fitted for the government of this colony at
this critical juncture; and, as you are not likely to hit upon the competent few, the only alternative appears to be to enlarge the councils of the executive department, and supply by numbers, what you cannot hope to provide in the individual. I give every credit to the motives of the governor, but good intentions, however seconded by sound sense in themselves, cannot supply the place of science or experience. I am led to believe that the great policy of England towards this second giantess of her begetting is to educate her in principles strictly English; it is her interest, it is her duty; she owes it to her own glory and to the happiness of all Asia. It is said by Blackstone, whom I cite because his fame is classical, that the laws of England are the birth right of a British subject, and he has a right to have them administered to him, in whatever part of the British dominions, (properly such by settlement) he may reside. This principle was deliberately settled by a resolution of the King in Council in 1722, and has ever since been acted upon with undeviating adherence. In its application to this colony, it is strictly true the first act of Parliament relating to New South Wales, passed as far back as the year 1784, recites the necessity of a "colony and civil government" being established here; and the court that was instituted under that act, altho' in its mere form it varied from the courts at home, yet it administered the criminal law of England. The Court which now sits is strictly an English Court, the form of taking inquests by a jury of military men instead of civilians being little else than mere form. But perhaps you will say, why prove what is not disputed? I answer that some how or other, this principle, to every lawyer luce clarior, is met by some undefined qualification about the convict characters of this colony. It is certainly a convict colony; so are the West Indies slave colonies; but I never heard it contended with reference to them, that their forms of Government and measure of British right were less, because their estates were cultivated by their slaves. Transportation was not peculiar to New South Wales; the language of the act, passed in the 4th year of George the first, is that, "in many of His Majesty's colonies in America, there is great want of servants, who, by their labor, might be the means of improving such colonies, and making them more useful to the nation." And it was, under the provisions of this very statute, that every convict was sent to this colony, until last year, when Mr. Peel brought in his new transportation bill.* The policy of sending convicts then to New South Wales stands recorded upon the rolls of Parliament; it was, and it is, to improve the colony, and make it more useful to the British nation; but in what law, or in what place shall we find that it was in barter

* Note 303.
1827.
6 March.

Necessity for introduction of English laws and institutions.

for British right; or that any man was less amenable to English law, or less entitled to the privileges of an English man, because the soil on which he trod was cultivated by convicts? As a lawyer, I know of none such; on the contrary, I have always thought that the colonies were only a more remote portion of the British realm; that the laws of England were the common bond that united Englishmen in allegiance to their King, and in fraternity with each other; that they are the cheapest and strongest defence, and the most durable guarantee of defendence; and when the state of the two countries may have so changed, as to render a separation, in the persons of their respective rulers, essential to the well-being of both, they will still be united by identity of laws and institutions, similarity of habits and feelings; the result of such laws, and those endearing ties between people sprung from one common ancestry, which the worst policy cannot wholly eradicate, and the best may render eternal. If I am correct in assuming it to be the great policy of England to introduce her institutions into this country, the next proposition will be the time, and the manner; that the same bold experiment should not be made upon the other parts of the British constitution, as was made in the introduction of an independent judiciary, every reasoning and experienced person must readily admit; but it will as easily be proved that it is indispensably necessary the foundations should be so laid, as, when it shall be found expedient to introduce the English colonial system, as it prevails in all the other colonies settled by emigration, that it may be done without a violent change; it is impossible to deny that some improvements are indispensable already, in a few years more will be required, and the demand will increase, until the state of the colony may admit of a full extension of political privileges, without inconvenience and with complete safety. To do whatever now is demanded, requires a practised hand. In the first place, there should be a careful revision of the whole of the exploded orders of past times; the selection of such useful institutes as were suggested by events, and the adaptation of them to the analogies of English laws and customs. As soon as the County of Cumberland is divided in hundreds and parishes, there will arise a parish law, as a necessary consequence, and it will become the business of government to meet the exigency by a careful adaptation of the parish laws of England to the circumstances of this colony; the county laws, too, and the consequences upon the general laws of the land, of the territorial division of the colony into counties will follow, and require to be met. The repairs of roads, and other public works, which hitherto have devolved upon the hands of government, will fall under this division of
legislation. The revenues of the country are in perfect confusion; they are founded in part, upon the Governor's proclamations, issued in pursuance of a very defective act* passed in the third year of his present Majesty's reign, forming a series of defective proclamations founded on the act of parliament, and partly on another act, passed at the close of His late Majesty's reign, legalizing the levy of any rates or duties previously laid on by any governor, and prohibiting every other. I may also add an act of the legislature of the colony, sanctioning, until further provision, the receipt of fees and dues taken by particular officers and others in the government. There is no provision about the appropriation of any sums so raised, and no audit except through the commissary of accounts, whose exposés are exclusively subject to the orders and eyes of the Treasury at Whitehall. The people of this Colony know as little of what becomes of the taxes they pay, as the natives in the woods. This might have been all very well, so long as the Colonial expences were defrayed by drafts upon the British treasury; but, now that the whole charges of the local government are to be defrayed out of the colonial revenues, it will become necessary to enlarge the taxes, and at least to let the payers know what is done with the money, if they be not allowed a voice in the raising it. What possible objection can there be to lay the accounts of all sums, received and appropriated, before the legislative council? It appears to me that, in what form soever you may intend to exercise the taxing power in this colony, all taxes should spring from, and be accounted for before that power; and therefore I always regarded the clause† in the New South Wales act, which went to perpetuate the taxing power in the Governor alone, as a most extraordinary anomaly. I never could find out how it came there; because a legislative power of raising taxes, being given by the same act to the Governor in Council, there could be no necessity for continuing a similar power in the Governor without the Council. The tremendous experiments, that have from time to time been made of this sole power upon the trade of the colony, are a lasting commentary upon its utter inexpediency. What can any governor of this colony know of trade, and its interests, except from the reports of others? he must act from advice; and what advice so likely to be sound and disinterested as that of his accredited and responsible councillors? the question in practice is, whether he shall act by the advice of his council or his private secretary; and experience has invariably proved that no advice can be trusted, unless it come from a responsible adviser. Before I quit this branch of my subject, let me impress upon you the impolicy of giving up the rents upon land; you

* Note 303.  † Note 304.
are depriving the future revenue of the colony of their best and least oppressive sources; land here is peculiarly the best subject of taxation; and, in giving it to settlers, burthened with a slight rent, it is felt rather as a bounty than a duty, and no man objects to paying it. I am led to these remarks from some expression in one of Mr. Hay’s letters to Colonel Arthur, in which allusion is made to the expediency of allowing quit-rents to be redeemed by the keeping of convicts. Surely there is a great delusion here; the demand for convicts exceeds the supply, even now by one full third, and, in the course of a year or two, will exceed it by one half; do not therefore, listen to any of such suggestions, they proceed from interested persons, and are practised with an intent to deceive the government. Connected with the revenues is the trade of the colony. General Macquarie boldly denounced this branch of human industry and national wealth, as inconsistent with the safety of a penal settlement; and, finding that he could not absolutely stifle its existence, he endeavored to fret it away by a load of vexatious restraints and onerous imposts, that have survived his dynasty, and are continued to this hour. I have repeatedly urged upon your attention that, while the remotest portions and minutest sections of the empire, from India to Heligoland, have the means of registering vessels, that this colony and Van Diemen’s Land, which build their own coasting vessels, have it not; and that consequently they are indebted either to accident or the liberal feelings of the navy, that the inhabitants’ vessels are not seized and confiscated. I saw a blank warrant from the Lords of the Treasury, leaving it to the Governor to fill up, and another in which the name of Capt. Piper, the naval officer, was inserted, as it had been transmitted from your office; but still no collector is appointed; the why I cannot tell, altho’ I do conjecture. But assuredly the property of the colonists should not be left at the mercy of seizing officers in this colony, and out of it, upon any pretext whatever; and, if it be seized and condemned, as condemned it must be, it will lay a very just claim for indemnity against the government. That the government is apprized of the difficulty is apparent, since it put forth a proclamation, copying the last registry act, and suggesting to ship owners, “the nearest possible conformity to its provisions,” which you will see by referring to your copy (for doubtless there has been one sent) page 4 of the “Government Proclamations, etc.”; why then, when the means of strict compliance with the law were provided, suspend their effect, and leave the colonial vessels unprotected by a legal title? Next to the regulations, required for the trade and commerce of the colony, will be those for the disposal of land; the power of
disposing of land you have already vested in the Governor, with the assent of the Executive Council. This limitation was prudent, and not imposed an hour too soon; the late governor left the disposal of this branch of the public property, pretty much to the discretion first, of the colonial secretary, next of his private secretary, and lastly of his aids de camp; the present government had assumed an unlimited right to dispose of all the lands in the colony, after the example of its predecessors; in the exercise however, it was more discreet; but it was by accident merely that it was discovered the real power had been taken away from the governor alone, and placed in the discretion of the Governor and Council. Sir Thomas Brisbane had been accused of breaking through his instructions, and making most improvident grants, sales, and promises of land, after he had received a précis of the intended instructions of government. I asked to look at those instructions, and finding they had not been regularly executed until Genl. Darling was appointed governor, I begged to look at the present governor's commission, in order to see how far he was tied down to follow his instructions; and then, for the first time, it was discovered that the power* of granting land had been limited to the consent of the council. I may be wrong and perhaps illiberal, but I think this restraint was not relished, and the less so, as it came to light, after a long series of orders and regulations had been issued by the mere fiat of the governor, and a tax, in the form of a rent, actually imposed and levied on all cedar cut on the ungranted tracts of the territory. Had the governor consulted the executive council, it is probable they would have dissented from the policy of this tax; and possible that its legality, under the act I just now referred to, might have been questioned. If, however, you desire to avoid such things in future, I would suggest that the assent of the council be continued as a necessary check in the disposal of the lands of the colony. With land is necessarily connected the subject of labor, and the main body of operatives are, as you know, prisoners under sentence of the law. You are aware that the law, before Mr. Peel's act,† respecting property in the service of transporters, and the right of assigning them, was very much at large, if indeed there could in strictness be said to be any law at all; the status ante of the question is noticed in Bigge's Report 198; by the third section of the present act for the transportation of offenders, property is given in the service of convicted persons to the Governor of the colony, and his assignees, for the residue of the term of the prisoner's sentence, with a saving only of the King's prerogative of mercy, and subject of course to the provisions of the 30th of his late Majesty, enabling the Governor

* Note 305.  † Note 303.
to pardon the sentences of transported offenders. I have heard
some strange doctrines advanced upon this clause of the act, and
it is important, as recent events in this colony have shewn, that
there should be a clear understanding upon the real nature of
the power of the governor, resulting from this legal property in
the service of the transportees. I will first give you my impres­
sions of the law, and I will then state the opinion that appears
to be entertained of it in other quarters. Before the passing of
Mr. Peel's act, servitude was rather an argumentative inference
from the tenor of the sentence of transportation, than a clear
penalty of the law, and the title of the assignee to the services
and control of the convict rested upon a still less intelligible
basis; it was to remedy these uncertainties, that the act under
consideration provided that, upon the transportation and delivery
of any offender to the governor of a foreign colony, such governor
and his assignees should have a property in the services of such
offender for the remainder of his original sentence of trans­
portation. One of the objects of this law appears to have been
to prevent servants, who had become useful to their masters,
being with-drawn from their service at the mere will of the gov­
ernor. It was apparent that many inconveniences would have
attended this law, if literally enforced; some would have serv­
ants whom they did not want or could not manage, and whom
they could not get rid of, while others would be in want of serv­
ants without the means of procuring them; to be sure the power
of assigning from one to another might be supposed to provide a
remedy for this, but such a power, in the general form conveyed
by the act, might and would have led to many abuses. However,
such was the law, and, while it remained unrepealed, every
restraint imposed upon the assignee was manifestly an evasion,
and in direct derogation from his rights under the act of Par­
liament. It is clear, beyond the reach of doubt, that, when the
governor had assigned over a convict to the service of a settler,
that such assignment carried with it all the property and all the
power which the governor had possessed over such convict, and
any condition, with which such assignment might have been
coupled, was discharged by the language of the act. Such is the
construction I always put upon the law, and, feeling that there
were difficulties attending it, I recommended, in the late gover­
nor's time, that it should be as little brought into notice as pos­
sible. While I was at Bathurst, in the early part of May, 1826,
the governor was advised to suspend the system of granting
tickets of leave; and lately he has published a new code, which
has provoked a good deal of discussion, and raised among others
a question how far the governor has the power to interfere with
the legal property of the master by granting his servant the privilege of his own labor; the dispositions of different settlers have been put to the test, some assenting to the indulgence granted their assigned servants, and others refusing to allow it. Had the council been consulted, it is pretty certain that the law at least would have been ascertained, before the government proceeded to the length of issuing its edicts, which are considered to be unlawful, and the observance whereof is purely conventional, or submitted to upon reasons of individual policy. But there is still another, and a greater error into which the local government has fallen, in reference to the power it assumed over the persons and disposal of convicts. The whole transportation code is now embodied in the act, I have so often alluded to; the whole power of the governor is there defined; it consists in receiving and assigning convicts; the same authority, which he possessed, is transferred to his assignee. Cannot the governor then, upon the arrival of a convict ship, order as many of the prisoners as he pleases to a penal settlement within the colony? This question may be answered by another; cannot any settler, who is displeased with his assigned servants, order them to a penal settlement in the same manner? certainly not, because the law has expressly appointed these places, "for the reception and punishment of offenders, convicted of offences within the colony," and has empowered, first the court of quarter sessions, (3 Geo. 4, Ch. 90), and afterwards a single magistrate (6 Geo. 4 c. —) to try prisoners for misdemeanors as well as neglect of duty, and punish them, if guilty, by removal to such places for a term of years not exceeding three. Yet a power of this sort has been claimed, and what is more unfortunate has been exercised, at the mere fiat of the governor. In the case of sixty two pirates, who were lately tried for seizing and running away with a government hired transport, called the Wellington, on a voyage from Sydney to Norfolk Island, it appeared that some of the parties had been sent, under colonial sentences to Port Macquarie; and, mechanics being wanted for the service of government at Norfolk Island, an order was sent to the commandant at Port Macquarie to select the required number and send them to Sydney. The commandants, not being apprized of the intention of the governor, selected such artificers as he found of the best character and most reformed conduct, believing that some indulgence was to be extended to these persons, under the power given by the local act of the Governor and Council (7 Geo. 4, No. 5); the parties arrived in Sydney harbor, were delivered over immediately, without landing, to the keeper of the hulk, put into irons and transported, together with the felons of the worst character to Norfolk
Island; at the trial, their defence was that they had been unlawfully sent to Norfolk Island; that, from the duress in which they were placed, it was not an offence in law to make their escape; and that they had used no violence nor done any act, beyond that of endeavoring to free themselves from a bondage and second transportation, to which they were not liable by law or the sentence of any court. I felt at the time that the case of these men was encumbered by a very delicate question, and, as there were many to whom the same arguments did not apply, I rather inclined to their acquittal upon the ground of having not taken any part in the forcible seizure of the Wellington. This is the second instance* in which the consequences of an irregular interference of the government with the sentences of prisoners have come to light, and raised an unfavorable impression against it. I hope it will be the last; but as “the love of power is the last infirmity of noble minds,” and as few are disposed to part with what they love, if they can avoid it, I think it more than probable that you will be written to upon the subject of this same power; and, as there are ways of putting questions so as to elicit the answers that one desires to have, so it is possible that a question may be propounded to your office in such form as to mislead; the true question is this—can the governor, without any charge of a new offence committed within this government, order any person, transported from Great Britain, to any penal settlement that he may think proper? We say he cannot; for first, transportation is inflicted as a punishment for many slight offences at home, because it is known to the legislature, who inflict such sentence, that, in the ordinary course of being carried into effect, the punishment is comparatively slight, and consists in working as a mechanic or laborer in New South Wales, with a stated allowance of food and clothing, instead of working in England; that is, in fact, changing country, and losing the right of free labor. This knowledge of the actual state and effect of the sentence, they authorize, must be presumed to have been in the possession of Parliament; and therefore any extraordinary deviation from the well known and previously established course must necessarily have been illegal. The framers of Mr. Peel’s act were aware of this, and in the act expressly provided His Majesty with power to order offenders to any part of the world, within or without his dominions; but no such power is given to his governor; his sole authority is derived from the same act, which vests him “with a property in the service of such offender,” and enables him to assign such offender to any other person, who thereupon has the same extent of property, which the governor had before. It is clear then that Mr. Peel’s act gives no such

* Note 306.
power; the prisoner is ordered by His Majesty to a particular place, the governor receives him, and becomes a trustee of his services for the purposes of the colony; the estate he holds he passes over by assignment, and the settler has the same interest as the governor had. The settler cannot change the King's orders, and send the convict to a different place; neither can the governor. Secondly, The New South Wales act, sect. 19, enables the Court of Sessions to try all misdemeanors, as well as breaches of duty, committed within the Colony, and to punish the same by transportation to such other part of the Colony, as the King should appoint by order in Council, for any term "not exceeding three years." This order in Council was not issued; but a subsequent statute enabled the King to authorize his governors to appoint such penal places; and, His Majesty having authorized the Governor of New South Wales accordingly, a proclamation was issued by His Excellency, and Port Macquarie, Moreton and Norfolk Island were appointed penal settlements or place, within the colony, to which "offenders convicted within the colony, might be transported." Now all this apparatus was unnecessary, if the governor could, by a mere order, transport the convicts arriving from Europe, at any time during their term of transportation, to any penal place that he might think proper; of what use is the Sessions? why was the act giving a similar power to a single magistrate passed in England? why limit the term of secondary transportation by the local courts to three years, if the governor could order it for the whole residue of the original sentence, altho' that sentence should be for life? Such are the grounds upon which I have formed my opinion, that, when a Prisoner has received his sentence of transportation in England, His Majesty, by order in Council, is to determine the place to which he is to be conveyed; that being received by the Governor, he should be assigned in the ordinary way; and that any deviation from this course is irregular, and any additional severity becomes unlawful. I have thus run through some important considerations respecting the legal treatment of prisoners arriving from Europe; according to my view, the government has fallen into errors, both in reference to the rights of the settler, and to the treatment of the convict, errors which the council would have avoided; and the remedy is, I think, to render it necessary that, in all future rules and orders in respect of the assignment and treatment of the prisoners of the crown, the Governor should act with the advice of the Executive Council.

7th March.

I have touched the principal heads of the subject, upon which I sat down yesterday morning to write to you, and I now resume
my observations. The short time, I can command from the duties and details of my immediate office, never allows me to arrange my thoughts, or throw what I have to offer under regular heads. I am obliged to follow the guidance of my pen, and trust to the frequency with which I have considered my subject to suggest the shortest course, and to my own conviction, for arguments to convince you. From the number of pages I have already filled, I fear that my method has not been the most happy. It was my intention to run thro’ the causes of the present accumulation of extra-official business in the departments of government; to prove that a great deal might be dispensed with; that the Augean Stables of Macquarie required clearing; and I also wished to impress upon you that the actual and indispensable duties of the government required more science and experience than it could at present command, I have in the preceding pages a little irregularly, but I trust sufficiently, established the last position; and, as it is by means of a good, efficient executive council, that every improvement in the Colony must be accomplished, I shall commence the few pages, I shall add, with the constitution and duties of this body. I must assume that an executive council is to be considered as a government body, created by the mere pleasure of the King, and removable at his royal word; in short, I propose them merely as a cabinet for the colony; this is strictly constitutional; His Majesty rules the empire; but he rules it by means of responsible ministers; and we know that in practice the government of the kingdom is directed by the cabinet. This I propose as a model for the government of New South Wales. This colony differs from every other at present in existence; in Jamaica the details of the governor’s office are so regular, that one day’s work hardly differs from another. Here, everything is to arrange and put in its right place—the first heroes of antiquity are less celebrated for their victories than for their patronage of the acts of peace.

Deorem in templa recepti;
Dum terras hominumque colunt genus,
agros adsignant, oppida conduit;

to perform similar heroic deeds, it is necessary that the government should first discharge itself of every superfluous duty; and next should be provided with counsels fully competent to discover and execute what is best for the welfare of the colony.

I have already glanced at the first causes why so much detail and so many duties, not within the ordinary business of the executive, have been accumulated in the hands of this government; what necessity began, the love of power and patronage
have since continued. The first anomaly, that strikes a stranger, is the government establishments for growing corn, raising stock, etc., etc. Mr. Bigge recommended the reduction and disposal of these places; and every person, not interested in their continuance, must see the impolicy of keeping them in existence at the present day. Some of them do not defray their own expenses, and the whole together are an unprofitable concern to government, and a great source of dissatisfaction to the settlers. Genl. Darling seemed to me, on his first arrival, to have determined to reduce them; but he has since apparently formed a different opinion. It were improper to doubt the sincerity of that opinion; but that which is universally true, with reference to all men in power, cannot be false in its application to him; he has a direct interest in preserving these places; and therefore his opinion must labor at least under the supposed possibility of that bias, which interest ever will give, and which, to except in his case, would be to surrender common sense to an overstrained courtesy. Be assured that, until you instruct the governor, without loss of time, to lay the whole of the public establishments before the executive council, and enable them to look into everything connected with them, and report their opinion upon the expediency of retaining or reducing them, they will be continued, and continued and yearly professions made of an intention to diminish, with no such intention in fact. There are at this moment fifteen hundred men in the public works as they are called; why, of course, if there be so many men retained by government, they must have barracks to live in, hospitals to retire to, overseers, superintendents, engineers, civil surgeons, etc., etc., etc., to attend them; there must be horses and carts, and other apparatus; there must be food and clothing, and consequently farmers, and graziers, and tailors, and other artizans to provide for them. "The public works," said Major Goulburn, upon one occasion in the Council, "as they are called, are the greatest cover for idleness and wasteful expenditure in the colony." Now all these things are of an enormous expense to the government, and the benefits derived from them by no means commensurate with the expence. Yet the very poorest arguments have been demed all-sufficient to continue them; such for example, as that the people of Sydney could not do without their labor upon the saturdays (their holiday), that government could not get its public buildings erected or repaired, etc., I answer, look at the Court-house—look at the Gaol, the two most essential buildings of all, without which the police of the colony cannot be carried
Alleged maladministration by governors.

Management of crown lands and convicts.

Necessity for general control by executive council.

1827.  
7 March.  

Proposed control of revenues.

on; look at them, just where they were three years ago! I will pledge my life that I would have done them by contract in half the time, and at less expense to the crown. I have seen other works of mere private luxury spring up as if by magic, between the intervals of a ride or a drive in the summer. Where hundreds of laborers and mechanics are placed at the disposal of persons, who have no restraint but their own will, private accommodation is naturally mistaken for public good; and it is no ground of fair accusation against the present administration, that it has only done what was done before by every governor in succession from the foundation of the colony. The remedy is a short one, refer it to the Council, and require their report, and the reasons upon which it may be founded. So far as to the public establishments, next as to the revenues.

Under the head of the revenue, I have already expressed it as my opinion that they will require augmentation, and that, for the purpose of uniformity, all taxes, levied within the colony, should proceed from the local legislature, before whom, at regular periods, the accounts of receipts and disbursements should be laid. Should the two acts, recited and continued by the 28th sect. of the act 4 Geo. 4, Ch. 96, be further continued in the new bill for New South Wales (which heaven forfend) I hope you will deem it expedient to instruct the governor never to perform any act under them, without the advice of the Executive Council, and command that all the accounts should be laid before the Legislative Council, which in any way relate to the levy or appropriation of the revenues of the country.

The disposal of the waste lands of the crown is already vested in the Governor and Council; the framing of all general rules for the assigning, retaining, rationing, and governing of convicts can only be safely entrusted to the same body.

And lastly a good executive council only is capable of superintending the administration of all matters out of the ordinary routine; until you provide this and instruct the governor to guide his measures by the counsels of high responsible officers within his government, the administration of New South Wales will continue to be guided by the fancies of a favorite, or the accidental force of stray opinions, in every case except where the governor may act from his own knowledge; which, in the nature of things, must be very seldom. To honest errors, but still not the less errors, because honest, I attribute that degree of odium, perhaps unprecedented, which at this moment has fallen and rests upon the government of New South Wales.

I remain, &c.,

F. Forbes.
Lieut.-Governor Arthur to Under Secretary Hay.

12th March, 1827.

[In this despatch, lieut.-governor Arthur reported the proposed act* for imposing a duty on newspapers in Tasmania; see volume V, series III.]

Chief Justice Forbes to Under Secretary Horton.

My dear Sir,

New South Wales, 22nd March, 1827.

I wrote you a very long despatch about the beginning of the present month, in which I redeemed a promise, of giving you my sentiments upon the best manner of governing New South Wales in the present state of the times. I hope you will have received my letter, as it contained the results of much consideration; and subsequent experience has confirmed me in the opinion I entertained, that a cabinet council is indispensably necessary to the right government of the colony. I confined myself rather to abstract reasons for my opinion; there is a degree of delicacy verging towards the point of honor, in privately commenting upon measures, with which one may seem to be confidentially made acquainted, and in some respects a party; the consciousness of rectitude may protect us from self reproach, but it may not prove sufficient to shield us from suspicion; and the bare possibility of being misapprehended should be quite enough to arrest the pen, how pure soever the motive that might dictate its periods. With such feelings about me, sometimes preponderating, and sometimes giving way to the all-compelling impulse of performing what is felt as a duty, I have hesitated, written, destroyed what I had done, and again sat down to write to you. Whether this letter will share the fate of its predecessors, is more than I can predict; my present determination however is strengthened by a conviction, that I am discharging a duty which I owe to you, and doing the local government, perhaps the governor individually, some service, in giving you my free and full impressions of the present state of our affairs.

Sir Thomas Brisbane you know my opinion of, both the man and his administration. I once told you that he would leave a very difficult task to his successor, and my predictions have been fully verified. Altho' the late governor was not a man of business himself, it is now more marvellous than ever, what a sum of business was transacted under him; the present administration will not bear a comparison with it, either for the quantity of work, or the talent displayed in the performance; it is true that you received no long details of what was done, perhaps no accounts at all; but the colony at large will confess that more

* Note 307.
essential business was transacted in the several departments in the last year of Sir Thomas' government, than has been done within the last fifteen months, in the proportion of two to one. The secret lies in this, the late government was entirely one of departments; every principal officer did that which appeared to him to be most pressingly required by the public. Sir Thomas, who was the best tempered and least suspecting man alive, put every public officer upon his parole; and in no instance, I believe, was his confidence abused; out of this confidence arose a trust, a responsibility, and a feeling of honor in the heads of the departments, which, though not very office-like, though not secured by recognizance or immediately liable to an extent in aid, yet protected the public from official misdeeds, and left the wheels of business to revolve with unexampled rapidity. I do not propose this as a model to be imitated, or a system to be retained, but I describe it as a fact, and I vouch for the accuracy of the description. There were evils, however, in this, as in every thing else that is of human contrivance; men, that are used to have every thing their own way, become impatient of control, and the very consciousness of acting right renders the interference of a superior less gracious. Before Sir Thomas had resigned his government, he felt the reins had fallen from his hand; he felt too that it would be impossible for him to resume them; and his friends were sincere in recommending him to retire from the responsibility of a situation, which had completely outgrown his control. Such was the state of the times when the present governor landed in New South Wales. His Excellency came with a new private secretary, and was immediately followed by a new public one. It was his misfortune to have imbibed an impression, before his arrival, that every thing, which had been done before in the colony, was wrong, or at least required "re-organizing"; and, before he had been many weeks in his government, a stranger in a strange land, and surrounded by persons as strange to the colony as himself, he commenced the work of reformation; the business of every office, the details of every department were to be revised, and made to pass in review before the Governor; rules and orders followed upon rules and orders, and even some of the oldest regulations of the government, suggested by circumstances, matured by experience, and approved in Downing Street, were revoked or suspended until they could be remoulded upon a new and improved plan by the new administration. It was but natural to expect that this ambitious spirit of reformation would be accompanied and justified by a corresponding extent of talent and knowledge; and what was found fault with, would at least be improved; and that the improvement
would be so decisive, as to make amends for repudiating what had been tried and was known, for what was new and speculative. Unfortunately these expectations have not been realized, or rather, they have ended in complete and universal disappointment. How could it be otherwise? The governor, his private secretary, and the colonial secretary, the real cabinet of the colony, were not only new to the colony, but novitiates in the office of governing, that is, of governing according to the laws of England. The general was born in the army, and, after passing through the first gradations of military promotion, passed the meridian of his life in the adjutant general’s office; the short experience, he had in the government of a French colony, was not calculated to add much to his knowledge of the laws of his own country. The colonial secretary is a very industrious officer, but knows little or nothing out of the details of a subordinate board; and the private secretary is a young soldier of fortune; I have had occasion to see all these gentlemen, in situations which afforded me the best means of determining the measure of their abilities and the nature of their views; and they are not such as I am sure you would have selected, as the best fitted for directing the affairs of this colony, of all others, under the British crown, requiring at this moment the greatest share of talent, the nicest tact, and the widest reach of intellect to direct aright, and to prevent its becoming a future curse to its parent. To the general disappointment of the colonists, succeeded much dissatisfaction among the principal public officers; the assumed independence of their situations had been abruptly checked; and there were some that seemed to feel a sense of personal wrong. I presume you have been made acquainted with the visit that was unexpectedly made the colonial treasurer; he complains that it was intended not so much to guard the revenue, as to win the individual; and that altho’ the power had been given, yet it was not intended to be exercised without some proof of malversation, and in such a manner as to wound the feelings, or injure the character, of a respectable servant of the crown. The Naval officer too seemed to consider that the office he held, rather than the manner in which it had been conducted, had attracted the attention of government; and the public have rather sympathized with these officers for the jeopardy in which they appeared to be placed, than with the government for the vigor which had been exercised towards them, in order to protect the public interest. I once heard it privately said by a friend of the colonial secretary that his son would succeed to the collectorship of the colony. I denied it; for I think I may venture to say that the Secretary has too much honor to contemplate such a reward for his visitatorial
exertions in the Naval office, and I am sure that His Majesty's government would never sanction such a measure. I merely state these things among the occurrences in the colony, that I may translate you, as it were, to the spot, and, by lending you my eyes and ears, enable you to form a spectator's opinion of what is passing amongst us. Public men are always suspected; and therefore, with all that feeling of independence, and superiority to the opinions of the "swinish multitude," which the veriest imitator of Caius Martius Coriolanus might, affect to feel, I say that public men should keep themselves above the imputation of selfish and impure motives. I did not approve of the Governor of a colony, so distant as this, and composed as this is, without any thing like its fair proportion of the moral sense, surrounding himself with his relatives and filling the subordinate situations of the colony with his brothers-in-law; they are evidently expectants of what may first fall; and it is impossible not to feel, when, perhaps, a just and necessary measure of severity may be resorted to by those in power, that other motives than of public may have secretly, nay, unconsciously, had some share, some influence. Why is a judge at Westminster not allowed to sit where he has an interest? simply because he has an interest; and where is the difference in principle between the judge and any other functionary, who has an interest in the decisions he may make.

It were invidious to comment upon certain acts of the government, which have added to the other causes of discontent; the tax on cedar, and the order which was supposed to trench upon the rights of persons who held Sir Thomas Brisbane's orders for grants of land, are among the most prominent. The pervading spirit of the public orders, the parade of authority, and certain ill-judged proclamations, rather reflecting upon private character, have all added to the feelings which are abroad. The case* of the soldier, Sudds, has been already before you. I feel at some loss to form an opinion as to what you will think of that case. I am sure the governor did not mean to do any thing contrary to law; but the case was very unfortunate, and occurred at a most inauspicious moment, just in time to arrive in England about the period when the New South Wales Bill would be likely to come before parliament. I have written to you very freely, my dear Sir, but I have done so in the full assurance that what I write is confidential, and that it will be only used for the purpose of ensuring the better administration of the colony, and of eventually protecting the governor himself. Personally, he is I believe a humane well-intentioned person; but he is a soldier by profession, habit, and in fact nothing but a soldier; and the counsellors he has about him, with the single exception of the colonial secretary, is no

* Note 294.
Surely you have been deceived in the estimate you have formed of the men you have sent to this distant colony; they are very inferior to what were here before; they are very industrious, always at the desk, and ready to execute whatever they are commanded; but where is the spirit to command, to create, collect, animate, and to embody; *hic lepidum caput, sed ubi sunt cerebra?* I cannot close these remarks, without putting you upon your guard upon the manner in which, it rather strikes me, the government is now endeavoring to relieve itself from responsibility, and shift whatever may go wrong upon other shoulders.

The executive council is seldom convened, never previously, to consider the policy or propriety of any measure; but, if the law has been exceeded, or some power is sought to be exercised of doubtful authority, the executive council are called together to bolster up the deed, or to strengthen the aim of government. I feel that I ought not to be present upon such occasions. I may be called upon to adjudge the act, which I am previously supposed to advise; but, unless a lawyer be present, and one of sufficient force to take a high ground, I know that many illegal measures will be resorted to. Bannister, with all his indiscretion, was a most independent adviser, and his loss has been severely felt by the government. The same policy, which is observed towards the executive council, has rather, I think, disclosed itself towards your office. Judging from the massive amount of despatches which are transmitted by every opportunity, it is inferible that the government here must enter rather minutely into all the details of the colonial administration, and with a view to obtain beforehand, the sanction of the Secretary of State. Now you must receive your data from this government, and your resolution must, in most instances, be formed upon statements made by it, and most probably in conformity with the views it may desire you to entertain; the measure therefore comes back, stamped with the approval of the home government, and consequently is supposed to relieve the colonial government from all responsibility or blame. But assuredly, you cannot intend this. I am immovably convinced of the rectitude of the opinion, I long since expressed to you, that "New South Wales can only be governed in New South Wales," and you could never have meant that a governor, whose services are paid at an expence to the crown of not less than ten thousand a year, should be nothing more than a local reporter of other men’s opinions, and the medium of communicating Lord Bathurst's commands. Certainly you will not keep public servants in the colony, and take upon yourself all the details and responsibilities of the government; perhaps I may have erred in this conjecture; but my sentiments are not
1827.
22 March.

Decisions to be given in colony.

1. Reason for making report.

1827.

22 March.

Decisions to be given in colony.

gratuitous nor formed upon slight data. You once transmitted an
official to the late governor, inclosing a note from the home office,
desiring that cases of difficulty, occurring in the Supreme Court,
should not be referred to His Majesty's Law Officers at home, but
must be decided in the colony. I never referred one case; it was
my colleague Pedder; but I cite the rule, equally applicable to
every department, that every public officer, who holds the King's
commission, and receives the King's pay, should discharge all
the duties, and incur all the responsibilities of the place to which
he is appointed.

I fear I may have wearied your patience with my series of
remarks upon this colony, all important in my eyes, because I
live in it, but of less estimate in your's possibly, from the remote-
ness at which it is viewed; localities will insensibly enter into
our best feelings for our country, as well as for our friends ita
natos, ut inter omnes esset societas quodam, major autm, ut
quisque proxime accederet. If there be an exception to this rule
of nature, it is when the exile turns his thoughts to the land in
which you live; and the same feeling may excuse our friends in
that same land, if they seldom range in thoughts even to this
region of the outcast; where nature's very loveliness serves but
to contrast with the moral degradation and wretchedness of Eng-
land's fallen children. I have come to this duty as a task; but I
have felt it as one that I ought to perform, to you, to the govern-
ment, and to myself. Altho' the nature of my judicial office
separates me from any immediate connexion with the executive
department, yet it was your pleasure that placed me in the Coun-
cil. I am therefore a supposed member of the government, and
I feel a real interest in its honor and prosperity. In endeavoring
therefore to prevent its running into errors, which cannot fail
to bring ultimate discredit upon all its members, I may be justi-
fied upon selfish grounds; but I do not rest upon such; my argu-
ment is drawn from a better feeling; I hold it to be due to His
Majesty as the representative of that noble people, by whose
great policy this colony was founded, and at whose expense it is
maintained, to represent to you what I consider either injurious
to the honor of His Majesty's government, or may prove bene-
ficial to the nation. In the spirit of this feeling, I have penned
the above observations on the present state of affairs in this
colony. In discharging my obligation, I hope I have not exceeded
the fair bounds of an allowable discretion, and done a wrong to
any individual in the government; of their private merits and
personal worth, I am sensible; and I am equally desirous of seeing
them continued in the discharge of the several offices to which
they are assigned. But they want a directing power, and I am
not aware of any ways or means of supplying such in the present circumstances of the colony, except it be in the form of a cabinet or council, to whom every measure of importance should be referred before it is adopted, as it is in that model in many respects of foreign government, the Council in India.

Before I conclude I must add a word or two upon the other matters, which I think you will have to consider, and upon which I think a few remarks will be useful to you. Mr. Holland came here without credence, except a private letter from Mr. Hay, saying something about him, but without naming his office, and claimed to be sworn into the Supreme Court as Solicitor General. I refused to admit him as such, or to swear him into office, unless I saw his patent. Of course I could not do otherwise; had he proceeded by information, as solicitor general in the absence of the attorney general, the fact of his appointment might, and I know would, have been traversed, and might have placed the proceedings of the court in a disagreeable predicament. My letter to Mr. Holland, which you will probably see, explains itself; the office of Solicitor general, like that of attorney general, is a patent office, and, to perfect the grant, requires the great seal of the colony. As Mr. Holland could not produce that, I could not admit him to the station he claimed in the Court. But, apart from his mere patent qualification, he is not competent to the discharge of the situation; if it be intended merely to give him rank at the bar, I must most respectfully remonstrate. You know the jealous feeling of the profession at home; it is carried so far, as sometimes to reject even the society of an attorney from the barrister's table upon circuit. And I must own that even at our humble bar, I feel the indiscriminate admission of attorneys with barristers, as a little derogatory; but to give precedence to the attorney over the regular barrister does certainly overturn all my preconceived notions, and raises a strong doubt how far it can legally be done; the rank and privileges of the bar are part of the law itself; and can this be changed except by the power of parliament? Could it be done at Westminster? Mr. Holland went so far as to tell me it had been in contemplation to place him on the bench of the Supreme Court, and, upon my asking him his standing at the bar, he replied that he was not a barrister, but that a short act was to have been carried into Parliament to remove that impediment. I immediately told him that he would have found an impediment here, which might not be quite so easy to remove. I did not credit his statement; but I should have declined sitting on the same bench with him. He has I believe since moved the governor to give him the commission of Solicitor general; the governor, unadvised by me, has

* Note 308.
declined it, until he hears further from home. My opinion is
decidedly against his being appointed on public grounds; and,
as relates to himself, the appointment will not be of any value to
him. He has so many superiors in the Court, that he cannot
expect any good business, few persons would be found to employ
him, and no one practitioner of any sort of consequence would
consent to take a brief under him. His Majesty's Solicitor
General must therefore be content with the refuse of the bar,
or remain silent altogether.

You pointedly asked my opinion, some time ago, about "the
great company," and I freely gave it to you. I believe I pre-
dicted, that, constituted as the resident committee is, they would
benefit themselves at the expense of their employers; they are all
stockholders to a man, and have managed, in the course of their
first year's probation, to divide between eleven and twelve thou-
sand pounds of the company's money. What else could be ex­
pected from such a committee? they remind one of the dramatis
personæ of a certain play, in which all the characters are of one
family, ecce interlocutores,

The Hon. John McArthur—principal actor behind the
scenes.

James Mc A.—Son of the aforesaid Honble. John.

Dr. Bowman—Son-in-law of the same.

Hannibal McA.—Nephew and eleve of the same.

Capt. King—brother in law of the aforesaid Hannibal.

That a company, so composed, should play for their own benefit,
was naturally to be expected; but that the managing directors in
London should place the interests of a body of persons, associated
together for national purposes, and under the sanction of Par­
liament, in the hands of a few men in this colony, whose in­
terests were diametrically opposed to those of their employers,
is a circumstance which cannot be accounted for upon any of
the known principles, which regulate the ordinary transactions of
life, and baffles every effort of conjecture. The loss of a few
thousands may not be of much importance to the wealthy pro-
prieters of shares in the Company; but, in such a society as this,
such transactions have a peculiar evil tendency; they furnish
examples of fraud committed with impunity by the better orders
of society, and tend to create an impression that the hand of
justice is upraised only against the lower. Had the servants of
the Honorable members of the committee been guilty of but a
hundredth part of the wrong towards their masters, which has
been practised towards the company, it would be difficult to
compute the lashes, imprisonings, and transportings, that would
have followed. Hear what Lord Eldon would say upon such a
transaction. "How am I to prevent such frauds as these, but by giving the relief I am called upon to give? Where a man undertakes to buy for me, what my colliery shall want, can it be possible that I can trust him to sell those articles to me himself? it is opening a door to the most monstrous fraud" (Massey and Davies, 2 Vez. J. 320). Such things however are nothing in New South Wales; where rogues are rewarded for their cunning, and character is of little worth, and poor, neglected virtue must shrink within herself to seek her only recompense.

I inclose a Sydney Gazette, in which you will see the report of a trial* which has excited a good deal of feeling in the colony; the title of the case is Broadbear and his wife, agt. Harris and others. That you may the better understand it, I will state a few of the particulars. The orphan school is, or was, founded by the governors of the colony, and supported by grants of land and a portion of the public revenues. Of this school a person named Walker, intended I believe for the established church, and educated at Cambridge, was appointed Superintendent; under him were Broadbear as an assistant in some way, and his wife as nurse. These persons were in their several stations when the Archdeacon brought with him the copy of the intended charter of incorporation of the trustees for the church and school lands, etc., but, from some cause or other, no instructions were transmitted to the governor upon the subject of issuing letters patent; they were for the first time brought to the colony by General Darling, and were not issued until March following. Soon after the Archdeacon's arrival, he visited the orphan school, and feeling himself offended at some conduct of Walker's, he represented it to the governor, who upon enquiry did not see fit to dismiss the Superintendent; the Archdeacon, however, conceived that he had sufficient authority for such purpose himself, and set about exerting it, secundum artem; he summoned Walker to appear before him at a certain day and place, as the King's Visitor, fully appointed in due form of law. I believe that Mr. Scott supposed at the time that he really possessed the judicial powers he had taken upon himself to exercise. Walker however, thought differently; and perhaps was in the real secret that no letters patent had ever been issued, creating the corporation, and investing the Archdeacon with the powers of King's Visitor; he moved the court for a prohibition, and ultimately succeeded in stopping the Archdeacon's proceedings; there was a good deal attempted, that should never have been thought of, and some partial swearing in the Supreme Court. I acquit the Archdeacon, for I know he thought at the time, as I did, that the charter had been issued in England, and had failed in the transmission; but

* Note 309.
there were others who knew the fact, and for prudent reasons suppressed it. Lord Bathurst's private despatches were adduced to show that the government considered the Archdeacon as the Visitor; but it became evident afterwards that they were written after the draft of the intended charter had been prepared, and was supposed to have been transmitted to Sir Thomas Brisbane, for the purpose of being issued under the great seal of the Colony. At length however, the long expected letters became patent, and, as soon as they were safely delivered into this world of troubles, Walker, who expected a second visitation, walked off, and with him went Broadbear and his wife, leaving the children in the orphan school, very much incommoded, in all probability, by their abrupt departure. I have heard this act of the parties very much censured, with a view to throw some color of justification over the severe measures which were afterwards resorted to against them; but the true question was not one of the measure of charity or humane feeling, which they ought to have shewn; but whether they had a legal right to go away from the school or not; and it must in common candor be admitted that, as the Archdeacon had endeavored to dismiss them by the process of his visitatorial powers, before he was clothed with legal authority, it was but natural to expect they would retire as soon as they found he was in a condition to carry his intentions into effect. Mr. Scott complained to the Police at Parramatta; the Broadbears were summoned to attend, when it would seem no person what ever appeared against them, and no evidence was taken in their presence; their worships however convicted them, under the act for regulating mechanics and laborers, and sentenced them to three months' imprisonment in the house of correction. Erroneous as such a judgment was, it is probable it would not have been followed by any other proceeding than a certiorari in the Supreme Court, had the bench been composed entirely of Magistrates of the District of Parramatta; but it so happened that there were three stranger magistrates present, who took an active part in the proceedings of the day; and that circumstance gave rise to the action for false imprisonment, which I have referred you to the report of. I think you will agree with me in opinion, that it is remarkable that this should be one of only two cases, which have occurred, since the opening of the Supreme Court, of gentlemen filling the office of ministers of justice, or conducting themselves, as to leave it open to inference that they had availed themselves of their office to gratify their personal feelings; and it is no less remarkable that both these instances should occur in the same family; the first was the memorable presentment of the grand jury* at Parramatta, of which Hannibal

* Note 310.
McArthur was foreman; and the next is the case before us. When the second convention took place at Parramatta, Lord Bathurst's salutary admonition had not reached the colony; it was not then supposed that the judgment seat was not a fit place to favor one's friends, and visit one's enemies; it had been the rule of olden times, and nothing short of the decree of a Secretary of State, could have set it aside. You have more power than the law, the court, or the church; we can only condemn or anathematize; you can refuse land, and perhaps take away beneficial trusts. You will say I am severe. I feel that I am so, but I hope not undeservedly; we lawyers are bred in a severe school, accustomed to watch the seat of judgment at Westminster, and to hear the pure oracles of that temple of Eleusis; we feel what is just with the force of a passion, and any abuse there seems nothing short of sacrilege. For myself, I can sincerely say that the possibility of having pronounced an erroneous opinion, upon even a disputable point of law or fact at a trial, is quite sufficient to disturb my pillow; what feelings would follow upon a malicious or vindictive judgment, I can only conjecture.

I incline to think that the Sheriff is in some disfavor with the governor at present, and I will put together a few observations upon his case, as it will probably come before you under the influence of a different light. Mr. Mackaness I understand to have been appointed to this colony, at the instance of the Chief Justice of King's Bench; he is a good natured man, but sometimes a little misguided in his views of his office; he supposes himself to be here exactly what the Sheriff of a county is in England; the mistake is natural enough, and I believe not confined to the humble office of Sheriff; the fanciful titles of King and Secretary of State are not entirely unknown in Botany Bay.

"I'm King here," said His Majesty's representative Lachlan Macquarie, Esquire, to a man that produced an unwelcome order for land from your office; The high sheriff of New South Wales, in imitation of his superiors, supposes that he is like an English high Sheriff. Some irregularities occurred in the public gaol a few months since; the celebrated Dr. Halloran had been imprisoned for debt; and, as there are no regular apartments for debtors, his daughter Mrs. Laura Shortt, who was under conviction for petty larceny, was allowed to remain in the same place of temporary accommodation with Halloran; one Smithers, a contractor, being afterwards convicted of receiving stolen property, and having sundry accounts to close before he was transported, was by the lenity of the gaoler, permitted to occupy part of the cooking room used by the debtors. Doctor Halloran's aristocratic
1827.
22 March.

Criticism of the administration of J. Mackaness as sheriff.

pride was sadly outraged at this confusion of ranks in the gaol, and he wrote his complaint* to the Governor; the simple course would have been to refer the case to the proper courts; but the Governor sent the Doctor’s complaint to the Sheriff, and required him to answer it. It set forth a great deal of that hardship, which every man who goes to gaol must naturally expect to endure, complained of the unlawful association of debtors with felons, and pretty plainly attributed corruption to the gaoler and his Superior; such he said, was “the magic influence of dollars, hic et ubique.” The Sheriff, upon receiving the Governor’s commands, called to his assistance two magistrates who inquired into the charges, and reported that they were unfounded, except as to the accommodation afforded to the Receiver, Smithers, upon which they remarked, as coming with a very ill-grace from the father of Laura Shortt. The governor, upon receiving the report, wrote a letter of reproof to the Sheriff, which produced a reply, certainly a little unguarded. His Excellency afterward brought the affair before the council with a view, as I have since thought, of getting my opinion upon the question, how far his powers extend over the Sheriff and the gaol. It happened to be within my private knowledge, that Halloran had behaved with singular ingratitude and duplicity to the Sheriff, and I threw in a few words in mitigation. I saw, however, that the jealousy of power had been offended, and that the Sheriff must look to his place. I am not at liberty to reveal what passes in Council, altho’ you must receive a copy of our minutes; but, should the subject be revived in Council, I will tell you here, exactly what I will say there. It is naturally expected by every man that he should be heard before he is condemned; and civil officers are led to expect a good deal of courtesy, even when they are placed upon their defence. Laying aside the previous ill-conduct of Halloran towards the Sheriff, it was clear that the rule had been relaxed towards his own family, which he insisted upon being enforced with so much rigor against another person; his insinuation conveyed directly to the governor, of pecuniary corruption, was gross in the extreme; it was false, and I do not think it should have been visited upon the Sheriff with reproof. Here I should stop. I think Mr. Mackaness has taken a wrong view of his office and his obligations, and placed his own case in an unfavorable point of view. But I can forgive a man sometimes being blinded by feelings of supposed injury, and I am convinced that a little cooling time would have convinced him that he is responsible for the safe-keeping of prisoners, as well as the preservation of good order in the gaol. Here again I must stop. The Governor has no legal right to interfere in the

* Note 311.
ordinary complaints of prisoners; the Courts are at hand; in them is the proper course of redress. Surely His Excellency's being besieged with Dr. Halloran's libellous letters, and Dr. Shortt's impertinent visits, was not a sufficient reason for the government to interfere in the discipline of the gaol, and to censure the Sheriff without inquiry or proof.

It is possible that a short correspondence* between the Governor and my associate, Mr. Stephen, may also come under consideration; this is touching very delicate ground, because it is near home; and therefore I shall pass over it as lightly as possible. Some twelve months ago, at the time when the aforementioned Walker applied to the Supreme Court for a prohibition against the Archdeacon, it was ruled by Mr. Stephen, in answer to the Attorney General's insisting upon the Archdeacon's right to try his powers by a plenary proceeding in prohibition, that, besides the grounds expressed by the Court in awarding the prohibition, there were others which must have induced the interposition of the Supreme Court; it was stated by Walker that a personal difference existed between the Archdeacon and himself, and it was this difference which the proceedings of the Visitor were intended to decide, and that no man could be a judge in his own case. In the Newspaper report of the case, it was said that the Court awarded the writ, because the Archdeacon's proceedings were vindictive, or something to that effect. The Governor wrote a private letter to Mr. Stephen, requesting to be informed if such were his words, and, if not, to desire he would contradict them in the papers, (So I understand from Mr. Stephen). Mr. Stephen felt that this was rather a novel kind of request, and politely declined entering the lists with the papers. A few days or weeks ago, the governor addressed an official letter to Mr. Stephen, quoting a paragraph from the Monitor, and desiring to be informed whether it contained his opinion upon the point referred to; as if it did, it would become necessary to guard the Magistrates against the consequences, or words of a similar import. This letter Mr. Stephen took as an intended reproof, and shewed it to me. I am not quite clear but it was so intended. I can answer for the Supreme Court, that it is most anxious to uphold the Magistrates upon all occasions; and that the hypothesis that, under any circumstances it became necessary for the governor to interpose his authority to protect the Magistrates against the Supreme Court, was equally gratuitous and illegal. It is impossible to guard against occasional misapprehensions; the publication of the Court's proceedings here, like the publication at home, is liable to error; but the error is compensated by many advantages, which turn the balance largely in

* Note 312.
its favor; if we are misrepresented, the parties can correct the error by applying to the Court, upon open motion; and, if it be of sufficient consequence, the Court will interpose; but for a party to apply to the governor, and the governor to come down in the form of a command, is what no English Court was ever yet called upon to submit to. A word or two upon the abstract question of the Governor's right to interfere. The King, by the constitution of our country, is the head of every political institution; but it is equally true that H.M. has delegated his powers to the different departments of his government; his judicial power is altogether delegated to his judges, and his executive, to the several great officers of state. In England, the judicial authorities are as independent of the ministerial, as the ministerial are of the judicial; in New South Wales, in the same way, the King has delegated his jurisdictions to his judges; and some of his prerogatives he has entrusted to the governor, to be exercised according to such instructions as the governor shall receive from His Majesty's Secretary of State for the colonies. Neither the Governor's commission nor his instructions give him any power over the judges; such power is not within His Majesty's prerogative; the notion of control is inconsistent with the nature of a Supreme Court; which stands in the same relation to the King in New South Wales, as the Superior Courts at home stand in to the King in England. His Majesty may remove the Judges here, and so may the two Houses of Parliament at home; but the judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law. This is a lawyer's view of the Supreme Court; but I rather suspect that the Governor looks upon it rather in the light of a court martial, the proceedings of which are subject to the revision of the commander-in-chief, and, in so far as it recedes from that useful tribunal, it is a direct encroachment upon his authority, as representative of the King. This is, in some degree, the opinion of most military men, and is at once a very natural and excusable error; but it may, unless checked in proper time, become a very fatal one; and my object, in entering into these last details, is to give you possession of the whole case, and enable you to apply the preventive before the evil may become difficult to remove. You will do the Governor a most essential service, if you will inform him that his commission and instructions contain the limits of his authority from the Crown, and that every excess of power, unsanctioned by law, will be displeasing to His Majesty. A simple admonition of this kind will produce more benefit to the governor, and save more trouble to your office than you can well imagine. How happens it that Sir Thomas Brisbane had
no differences with the law authorities, and that his Successor has differed, on some occasion, with every one? Merely because he mistakes his commission, and believes himself to be at the head of two independent and incompatible departments. In your arrangements for a temporary administration of the government, you pass over the Chief Justice, and nominate the next member of Council; and why? because the situations of head of the judicial, and of the executive departments, are incompatible in the same person. Yet does the General seem to imagine that they are united in his person. It is marvellous to me, hearing as I do the perpetual complaint of pressure of business, that there should be a disposition still further to increase the grounds of their complaint, even if a modest consciousness of utter inability to guide the machinery of the Courts did not check the inclination to interfere with their proceedings. But power, power, who but the man that knows its use, and feels its responsibility, can withstand the temptations of all-seducing power!

You will, I fear, fancy that I have some cause of complaint, some secret discontent, at heart; it is indeed not so. I support the governor upon all occasions, when I can; and, when I cannot, I privately express my reasons, and keep my counsels to myself. But I am afraid of his measures. I have no confidence whatever in his counsellors; and I am obliged to keep myself at some little distance to avoid being mixed up with what I cannot approve. Besides, at this moment, the governor is in hostile feeling with so many persons and offices in his government, that I feel, as being the appointed arbitrator of any disputed points, that I cannot keep myself too free from possible influence on the one side or other. What will be the result, I cannot foresee; the Governor evidently wishes to make things quiet by suppressing the voice of public opinion; his opponents as evidently desire to effect the same end, by removing the governor. I propose a middle course; in medio tutissimus ibis is the advice of a first rate moralist as well as poet. I think the whole cause of public complaint may be removed by giving the governor the benefit, and requiring him to guide himself by the counsels of a cabinet, formed of the most efficient officers of the Colony.

I remain, &c.,

Francis Forbes.

Lieut.-Governor Arthur to Earl Bathurst.

23rd March, 1827.

[This despatch contained a report on the preparation of a petition to parliament, praying for trial by jury and taxation by representation; see volume V, series I.]
1827.
27 March.

Decision re legal rights of convicts.

[In this dispatch, Governor Darling reported the decision of Mr. Justice Stephen on the legal rights of convicts, and allegations of interference with the judiciary; see page 206 et seq., volume XIII, series I.]

EARL BATHURST TO GOVERNOR DARLING.

2nd April, 1827.

[In this despatch, Governor Darling reported the disclosure of confidential information by the judges; see page 259 et seq., volume XIII, series I.]

EARL BATHURST TO GOVERNOR DARLING.

8th April, 1827.

[In this despatch, Governor Darling reported the disclosure of confidential information by the judges; see page 259 et seq., volume XIII, series I.]

GOVERNOR DARLING TO EARL BATHURST.

18th April, 1827.

[In these despatches, Governor Darling detailed his proposals to regulate the press; see pages 277 et seq., 289 et seq., 374 et seq., 380 et seq. and 391 et seq., volume XIII, series I.]

LIEUT.-GOVERNOR ARTHUR TO EARL BATHURST.

23 May, 1827.

[This despatch contained a report on the preparation of a petition to parliament praying for trial by jury in Tasmania; see volume V, series III.]

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

My dear Sir,

New South Wales, 27th May, 1827.

Herewith I inclose a series of colonial newspapers, in which you will find our new bills,* for taxing and regulating the press, fully and freely discussed. I, of course, come in for more

* Note 313.
than an ordinary share of animadversion; and indeed I have incurred more than an ordinary share of responsibility. I need not remind you that, when the measure of creating a legislative council in this colony was first proposed, I objected to it on several grounds. I foresaw that it would engender the idea of popular representation; and I felt that the *veto*, with which I was invested, must, sooner or later, bring the chief justice into contact with the governor, or the people, or both. You cannot marvel if, in the course of discharging the very delicate and difficulty duty enjoined upon me, of restraining the executive from introducing laws into this colony, which might appear to me to be irreconcilable with the laws of England, cases should arise in which the governor might think I had stopped short of the point, I ought to reach, and the people should be of opinion I had passed beyond it. Such a case has presented itself, and I will lay all the facts before you; you will then see the difficulties I have had to encounter, and be enabled to do justice to the motives by which I have been actuated.

Soon after Col. Arthur's arrival at Hobart Town, he addressed a letter to Sir Thomas Brisbane, and inclosed the draft of a proclamation, prohibiting any person from publishing a newspaper, without first obtaining a license from the Governor, under the penalty of £500; this proclamation he recommended the Governor to issue upon his personal responsibility; he was aware that the Legislative Council had not then been called into existence. Sir Thomas Brisbane shewed me Col. Arthur's letter. I told the Governor he had no power to make laws, and recommended him to consult the Attorney General. In fact, there was no ground for but one opinion, and the proposition was not adopted. Unfortunately, Sir Thomas Brisbane was apt to defer answering official letters, until he had forgotten his subject; and his Excellency appears to have replied to Col. Arthur, that he could not issue such a proclamation, as had been recommended, because it was contrary to the law of England. With the same unfortunate inattention to the matter before him, his Excellency took credit to himself for removing the censorship* from the press, in imitation of the Marquis of Hastings in India, utterly disregarding the radical difference in the constitution and laws of the two countries, and overlooking the facts that the Australian had been established, without asking his permission, and in opposition to his administration, for more than twelve months. You will, I am sure, pardon the digression if I turn aside to state to you all that Sir Thomas Brisbane really did, for, as I was known to be his counsellor upon some occasions, it might naturally be inferred that he would not take so important a step as that of

* Note 314.
removing an established censorship from the press of the colony without consulting me. The fact is this; in the infancy of the settlement, government had imported a printing press and materials for establishing a paper, which was called the Sydney Gazette; the printing of this paper was given to a Mr. Howe; and over it the government exercised the same control that every proprietor is, by law, bound to answer for, if he does not exercise, over his own paper; there never was any local order or proclamation issued upon the subject; in the course of business, the printer of the Gazette used to forward his proof sheets to the colonial secretary, to see if there were any matter contained in them, which might not meet the views of government; and I have occasion to know, from what transpired in the course of a trial in the Supreme Court, that the colonial secretary never carried this proprietary right further than to protect the interests of the government. As soon as the Australian was established, Mr. Howe, the son of the first government printer, prayed to be relieved from this control, and to retain his copy-right of the Gazette; conceiving, as he stated, that it injured the public effect of his paper, to be considered under a censorship, while his adversary was free. I inclined to think he should be allowed to publish what he pleased upon his own responsibility, but for a different reason. It had appeared to me, from what I noticed at the trial alluded to, that the government was considered in the light of a proprietor of the Gazette, and in consequence answerable to the public, and every private individual, for whatever might be published in it; this of course should not be; and therefore I was of opinion that the governor acted wisely in relieving the government from such a responsibility; but it was any thing but removing a censorship from the free press of the colony; no such censorship ever existed. To return to Col. Arthur's proposition, it has rather impressed itself upon me, that it was this proposition of the Lieut. Governor of Van Diemen's Land, which first suggested in Downing Street the idea of establishing a licenser in this colony. Your opinions must necessarily be formed, in a great measure, upon the representations which you receive from the local authorities; and with them is the responsibility of the statements they make, and the measures they recommend. I have always regarded Lord Bathurst's despatch* to the governor of New South Wales, under date the 12th July, 1825 (No. 5), as approving of a recommendation from the Colony rather than initiating the measure itself; at all events, I could not otherwise than assume it to be intended merely as a sanction to the governor to propose a strong measure, the responsibility of which he might not like to sustain himself, leaving it, as

* Note 315.
matter of course, to the chief Justice to say how far he could certify it, and to the legislative Council to determine whether they would pass it into law. The despatch itself, however, seems to have been very differently viewed by the governor; his Excellency seems to have thought that it was of course for me to certify the proposed law, and for the legislature to adopt it. This apprehension of the matter appears to me to have produced a long train of incurable evils; the power, which the governor believed himself to possess of silencing the press at will, led him to neglect the regular course of law for restraining its licentiousness; it held out the strong temptation of procuring an act, which was to place the press under his authority; it created delay, until the evil grew into a precedent for itself, and the question became personal with the governor, and many of the Legislative members, until the law became exposed to all the odium of a privilegium, and the legislators became liable to all those imputations which men, whose private feelings are necessarily mixed up with their official duties, are always, and not unfairly, exposed to. Under such a state of things, have our new acts been ushered into light and it is not to be wondered at, if they are not well received. I do conscientiously believe that their unpopularity arises not so much from themselves, as from the undissembled spirit and temper with which they were passed.

It was not until April, 1826, while I was at Bathurst for the recovery of my health, that I was apprized for the first time of the substance of Lord Bathurst's instructions* to the governor. As I expected to return to Sydney the following month, I requested the matter to be deferred until my return, and, as soon as I arrived in Sydney, I called the attention of the governor to the subject; his Excellency thought that, as the press was then very temperate, there was no immediate necessity to entertain the matter, and I of course did not press any advice. I could have wished, however, that it had then been disposed of in the colony, and such representations forwarded to you officially, as, by this time, would have put us in possession of your ultimatum. You will, I am sure, bear in recollection that I have frequently mentioned the subject to you, and gone as far as I could go, in intimating my doubts about the legality and expediency of establishing a license upon the press by the mere force of a local ordinance. Early in December last, the Governor shewed me a bill from Van Diemen's Land, embodying the provisions recommended from home, and certified by Mr. Pedder; and I availed myself of the occasion, thus afforded me, of addressing a letter to Genl. Darling, which I requested his Excellency to transmit to Earl Bathurst, dated 1st December, 1826; to that letter I must

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* Note 315.
refer you, for doubtless you have read it, as containing my views upon the whole matter; the governor acted upon the advice it contained, until it became too late to get up a petition to Parliament from this colony, which would be likely to interfere with any views of government at home. But feeling perhaps that he was incurring a larger share of responsibility than might be approved of, as well as being naturally enough irritated at the unceasing attacks of the papers on his administration, his Excellency determined to press the measure of a license to the extreme point, and, on the 2d of April last, proposed the subject in a private form of discussion; this I had many reasons for desiring to avoid; the governor's duty was plain; he discharged it by a simple obedience to his instructions; mine was beset with troubles and difficulties, and I was naturally guarded in the discharge of it. I must refer you to the official letters,* which passed between the governor and myself, and which of course His Excellency has transmitted, together with my formal reasons for not certifying the law proposed by him. And here I would leave this part of the case to speak for itself, but there are some things which are necessary to be known, which I could not, without seeming irrelevancy, introduce into my formal reasons; nor weave into my correspondence with the governor, without some appearance of recrimination, than which, nothing could have been less suited to the temper, with which it was my desire that our discussions should be carried on. There are many things arising out of this correspondence, to which I wish to call your particular attention, as necessary to forming a correct estimate of the superadded embarrassments under which I have been called upon to discharge a duty, in itself the most delicate and responsible, which any judge could be called upon to perform; the letter, to which I allude, is that from Genl. Darling to me, dated 14th April, 1827. In the first paragraph of that communication, the governor speaks of the papers having "succeeded in exciting a strong spirit of discontent amongst the Prisoners." Viewing the duty I had to perform as the governor did, and considering it as one of purely political exigency, it was allowable to assume this fact, as one upon which my judgment should be formed; but, according to my interpretation of the discretion placed in me by Parliament, it was neither allowable nor strictly correct. But I raise no objection to it on this ground. I beg leave, with every sentiment of respect, to say that I think the governor was mistaken, and in argument assumed as fact, what I do not think it possible could exist without my knowledge, and which I declare most religiously has never come to my knowledge. On the contrary, the Prisoners, I am assured by the Superintendent, are as

*Note 316.
quiet and well-disposed as they have been for years past; and
neither within the range of my experience in the criminal court,
or in the executive council, has it appeared that any sensation
has been caused by the papers among the Prisoners of the Crown.
I did indeed read among the occurrences of the day, while I was
at Emu-Plains, and in correspondence with the governor, that
certain anonymous letters had been written to several inhabi­tants,
which had been interpreted into some mysterious design
against government, but that was thought to be a hoax at the
time, and afterwards proved to be the act of a solitary swindler;
this you will see by referring to the Sydney Gazette of 4th May
instant, which I inclose for your satisfaction; you will read it
under the title, "Raising the Wind."

In the same paragraph, the governor affirms that "the safety
of the colony has been endangered by the licentiousness of the
press." I beg to ask why has that licentiousness been allowed to
go unrestrained so long; are there no laws in force to punish
it; is the English code so poor that the public safety may be
hazarded, and no provision found to restrain the evil of a licen­tious press? Why the effectual laws of England were not put
in force, can only find an answer in the hypothesis I have already
put. I impute no blame, but I think there was a very serious
error in judgment, in not causing the laws to be rigorously
enforced, before the evil had reached such a height as even to
approach the point of public safety. In the second paragraph,
his Excellency expresses his opinion of the law, as it embraces
my duty, upon which I shall offer no'comment; the opinion is his
Excellency's; the act would have been mine, and mine the re­ponsibility. In the next paragraph, the governor considers the
instructions as those of "His Majesty's ministers, and as being
imperative on him," and, at the close of his letter, he adds "His
Majesty's government having directed these measure, which you,
as Chief Justice, are required to sanction"; this indeed was
reducing my function to a very easy principle, and nothing would
give me greater satisfaction than to be convinced that the 34th
section of the New South Wales act imposed upon me no greater
difficulty than to follow such instructions as I should, from
time to time, receive from His Majesty's ministers. But I do
not think this was precisely the intention of government, when
the act was framed, nor of Parliament, when it was passed. Other
judges, of greater fame than I, have agreed with me in thinking
that this duty was solemnly enjoined, and necessarily independ­ent of control in its exercise, save only that of the law. The
last paragraph, to which I will advert, is the closing statement
that "the Chief Justice of Van Diemen's Land had certified
bills, the powers granted by which, as I was aware, exceeded those proposed to be vested in the government of New South Wales." The difference, to which his Excellency alludes, is in the granting of a license by the governor; in the Van Diemen's Land bill, it was to such persons as the governor should think fit, in express terms; in the New South Wales bill, these words were omitted, but the same thing necessarily implied, as is too evident to admit of legal question, and as you will, I think, find clearly established by my letter to the governor under date the 11th of May. Upon the opinion of Mr. Pedder it would be improper to remark. I have no doubt it was conscientiously given; but, soon after I saw his certificate, and had written my letter of December, 1825, intimating pretty clearly my own opinion, I read in an Indian Paper the solemn decision of the three able English judges, who now preside at Bombay, which decision is in the very teeth of Mr. Pedder's opinion, as collected from his certificate; and, even upon the mere weight of judicial authority, I should not affect a modesty I do not feel, and think that my own judgment is of less estimate than his, altho', in this particular case, his opinion has fortunately coincided with the sentiments of government, and mine has been formed in the face of embarrassments abundantly sufficient to have perplexed a much sounder head, and to have induced a less sound heart to seek for refuge from the difficulties with which it was surrounded, in a salutary compliance with the requisitions of the governor. There is one other fact, which does not appear upon the correspondence, but which it is material to notice. While I was at Emu-Plains, the Sanction of governor, as I afterwards found from the minutes of the Council, convened the members of the executive council, and received their concurrence in recommending the bills to me for my official certificate. Now, I have never been able to find a sufficient reason for this step; the governor, in his letter to me, says his own instructions are "imperative on him," and therefore he could not require the sanction of the executive council to give them greater force; but the measure itself served to increase the weight of my responsibility, already sufficiently onerous; and I do not think it was exactly consonant with the spirit of the oath, imposed upon the members of the Legislative Council by the act of Parliament; that oath was evidently intended to protect the members in the exercise of their free opinion; and the object is as effectually evaded by canvassing the votes of the members in the executive, as in the legislative council, for the latter comprizes all the former. I am sure this was not the object of the governor; but the consequence was to put his Excellency in possession of the individual opinions of all the members,
before they met in the legislative council. I am not fastidious in matters of mere form, but I think there was something more than a mere ceremony contemplated by Parliament, when it prescribed the oath which should be taken by the members of the legislature. The effect of this recurrence to the executive council was not merely to forestal their sentiments; it was to add to my difficulties, and fill up the measure of my responsibility.

I cannot too frequently repeat, my dear Sir, that I urge nothing in the form of complaint; the governor, I have no doubt, from the undisguised tenor of his expressions, felt that, in "using his best endeavors" to produce the passing of the bills, he was merely fulfilling his instructions, and discharging his duty. But, when I look at the act of Parliament, and consider the sacred trust reposed in the presumed knowledge and proverbial integrity of a British judge, and the necessity, even for the sake of appearances, of withholding from such judge any matter at all calculated to influence his opinion or surprise his discretion, and then consider the extraordinary endeavors, which were used to induce me to certify the bills which were laid before me, after a pretty clear intimation of my opinion, I do say that I have had a most embarrassing duty to perform; and, if my judgment have erred in any stage of the proceeding, I feel no difficulty in ascribing its errors to the accumulation of perplexities with which it has been oppressed.

It is a circumstance not to be overlooked in the passing of the new bills,* that they were at first submitted to me in a letter marked "secret and confidential." I was precluded from even consulting my brother judge, and had no means of clearing my own doubts by hearing the sentiments of others. I was not present at the passing of the four penny stamp act; it was hurried through the Council while the Supreme Court was sitting, and I entertain serious doubts upon it. It is evidently not what Lord Bathurst intended; his Lordship's despatch (above referred to) directed a duty to be imposed upon newspapers for creating a fund to defray "the charges of printing public acts, proclamations, and orders," and concludes in these words, "in fixing the amount of the stamps, you will therefore so regulate the scale of the duty, that the produce of it may be adequate to provide for this charge." Now, the maximum of charge for government printing does not exceed two hundred pounds per annum, and the stamp duty on newspapers may be estimated at two thousand pounds per annum; indeed, the government printer has professed his readiness to print free of expense to the public. The stamp act then is not in conformity with Earl Bathurst's instructions. I think it is not consistent with itself, for it proposes to raise

* Note 313.
1827.
27 May.
Method of passing and certifying stamp act.

HISTORICAL RECORDS OF AUSTRALIA.

a fund for a specific purpose; but so far exceeds such purpose that it is too easy to perceive that another object was meditated than that which is overtly expressed; and it is not quite consistent with the 37th section of the act of Parliament. It was laid before me for my certificate, in blank, as to the amount of the duty; and my certificate consequently only went to the general propriety of an act proposing to raise some fund for a specific purpose; the amount was added by the Council, and I have not since been called upon to certify it; indeed it was promulgated by the governor immediately after it passed the Council, altho' it was well known that it was then the criminal sessions of the Supreme Court, and that Mr. Justice Stephen was confined to his bed with the gout. I have understood that it was proposed to send me the act from the Council, but some of the members deemed such a step derogatory to their dignity; where private feelings are awakened, it is not surprizing that they should sometimes pass beyond the bounds of discretion. I mention this extraordinary fact to shew the precipitancy with which a grave subject has been disposed of here, and to prepare you for meeting it in England, where I have no doubt it will be carried and discussed, with an acerbity of feeling and tenacity of purpose, which will give you a great deal of trouble, and which might have been softened, if not avoided, by a little more temper and deliberation in this Colony.

I have thus far, my dear Sir, stated to you all the circumstances of importance connected with the passing of our new acts up to the present time. You are in full possession of every view I have taken, every spring by which I have been impelled. I can only trust that my proceedings will meet your approval. You must have felt that I have had a most difficult duty to perform; and that I have been overwhelmed with embarrassments caused by circumstances, in addition to the intrinsic perplexities of that duty. But I feel that I am not yet clear of the labyrinth; and that the precipitate step of the government, in promulgating the stamp act before it had received my sanction or certificate, will again involve me in unpleasant correspondence with his Excellency. I know that the governor is, at this moment, without competent advisers, either legal or official, and that this fact will make an ample apology for a great many irregularities; but why does his Excellency, feeling this deficiency, and continually urging it as his excuse, act with so much precipitation in matters which any man, ordinarily versed in the constitution and manner of passing laws in England, should know require the greatest openness in the discussion and care and deliberation in the adoption. And it was to me a thing, for which I cannot find any
excuse, that, after his Excellency should have looked at the clause of the act which points out my duty with sufficient attention to favor me with a gratuitous opinion as to what that duty was, he should have so completely overlooked his own, and published a law, at the passing of which he must have known I was not present, and which having been essentially altered, or rather an essential part added, and returned to him, he must have seen bore neither my certificate nor signature. I have already stated to you, my dear Sir, that I feared there was some latent motive in this law; it is too evident to be mistaken; and the Colonial Secretary has admitted to me that such motive was, in short, to silence the opposition journals. Now, was it fair, after I had been called upon to certify a bill which openly professed this object, and which I refused to certify, because it was inconsistent with the law of England, to attempt to surprize me into becoming party to a measure, which sought to effect the same end by secret and disguised means? I must not be imposed upon; I must not be misunderstood. If the Governor and the Executive Council will take upon themselves to say openly, broadly, and decidedly, that they believe the safety of the Colony, or its peace, (in the legal sense) disturbed or hazarded by the licentiousness of the press, then will I certify that, assuming such to be the true state of the colony, a bill for suspending the press altogether, until the danger shall have passed away, is not repugnant to, but is consistent with, the spirit of the English law. But will the Governor and Council do this? Oh, no, no, that will not answer; the inhabitants might protest against such a misrepresentation of the state of the country; the legislative Council must inquire into the fact, and then it may turn out to be all untrue; that it would prove unfounded, I vouch my whole character; the press might have been, may still be, restrained within legal bounds by the regular exercise of legal remedies. With these impressions, my dear Sir, how is it possible that I can become party to the scheme of reducing the press to a servile, adulatory creature of the local government, knowing, as I full well know, the purposes to which it would be turned? And who is to be charged with the responsibility of all this, the Governor and Council; No, the Chief Justice's certificate is an all-sufficient sanction for gentlemen, not supposed to be versed in the niceties and subtleties of the law. Let me put the case hypothetically. Suppose that our stamp act, which is required by the New South Wales act to be laid before Parliament within six months after its next session, should be brought under the consideration of the House, and that it should be made to appear that, while the avowed object was to raise a fund for a particular purpose, the amount of the tax would be
to defeat its own object, and to destroy the article itself, upon which the duty was imposed, what would your very able friend the Chancellor of the Exchequer say? What would the House itself say, if it should be made apparent that the tax was but the cloak for another and widely different object? would it not say that it was a shameful evasion of the law, and a gross breach of the solemn trust, which Parliament had reposed in the honor of the few gentlemen who compose the legislature of this young colony. And supposing this to be language of the House, whose reputation would be at stake? would honorable gentlemen in this colony, who speak with ease upon what the Chief Justice ought to do, in a case in which they have feelings, be equally ready to share the reproach which must fall upon the judge, who is necessarily responsible for the legality of the proceedings of the Council. My dear Sir, there are unsound councillors amongst us, upon this subject; of the Governor and seven members, there are only three individuals who have no feelings to appease; one honorable member proposed a tax of sixpence, avowedly to stop the press; he had a long score to settle. Surely gentlemen, however excusable as men for feeling sore at the strictures of a newspaper, should lay aside something in consideration of their almost sacred office; did they believe that Parliament intended to give them the power of avenging their own wrongs; if it did not, is it not a great abuse to convert it to such a purpose? True you will say, but men will be men still, and many allowances should be made, if their feelings have been improperly wounded and excited. I am open to this, and I do make the fullest allowances for whatever may appear of irritated feeling. But it necessarily calls upon me to be more guarded in what I do; my judgment, at least, should be kept cool, and my feelings uninfluenced by a dangerous sympathy with those of my colleagues. I have no feelings to gratify; if honorable gentlemen in this colony have no care for their discretion, I, who live in the hope of returning to England, must take heed that I do not leave my character behind me; the same clean hands, that received His Majesty's commission, shall be preserved to lay it at the foot of the throne, whenever, from the course of years or circumstances, they shall be called upon to resign it. I am fully aware of the slippery ground I stand upon; it necessarily exposes my motives to illiberal suspicion, and my opinions to be mixed up with the press itself; and I know full well that this circumstance will not be lost sight of by those who consider me as the only obstacle to the attainment of the object they are pursuing. Yet I feel that I need not attempt to relieve myself from unmerited odium by protestations to you or Lord Bathurst; assuredly I need not affirm that I have no more
common feeling with the editors of the papers, than I have with the felons I am called upon to adjudge. I regret the licentiousness of the press. I deplore the deep-rooted animosities, which it brings to light; it causes me many anxious hours and painful feelings; but I cannot help it; the remedy is in the law, and, if that be ineffectual, you alone can supply its defects by recurring to Parliament.

Before I conclude, I must observe for your satisfaction that the difference of opinion, entertained by the governor and myself, has not disturbed our official intercourse or the relations of private life.

I remain, &c.,

Francis Forbes.

Governor Darling to Under Secretary Hay.

5th July, 1827.

[A copy of this despatch, detailing the relations between the executive and the judiciary, will be found on page 429 et seq., volume XIII, series I.]

Under Secretary Hay to Governor Darling.

17th July, 1827.

[In this despatch, the appointment of a third judge was announced; see page 447, volume XIII, series I.]

Viscount Goderich to Governor Darling.

19th July, 1827.

[A copy of this despatch re granting letters of denization will be found on page 451, volume XIII, series I.]

Governor Darling to Earl Bathurst.

3rd August, 1827.

[A copy of this despatch re the jurisdiction of magistrates over assigned servants will be found on page 487 et seq., volume XIII, series I.]

Warrant appointing James Dowling, Esquire, to be Puisne Judge at New South Wales.

George R.

George the Fourth by the Grace of God of the United Kingdom of Great Britain and Ireland, King Defender of the Faith, To Our Trusty and Well Beloved James Dowling Esquire, Greeting. Whereas by an Act of Parliament passed in the Fourth Year of
Our Reign intituled "An Act to provide until the first Day of July, One Thousand Eight Hundred and Twenty Seven, and until the end of the next Session of Parliament for the better administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other purposes relating thereto," it is enacted that it should be lawful for Us Our Heirs and Successors by Charters or Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land respectively which should be styled the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land for the purposes and with the Jurisdictions, Powers and Authorities specified in the said Act. And Whereas in pursuance of the Act above recited We did by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date the Thirteenth day of October, One Thousand Eight Hundred and Twenty Three in the Fourth Year of Our Reign, erect and establish a Court of Judicature styled the Supreme Court of New South Wales and nominate and appoint a Chief Justice, and did also prescribe and ordain certain Rules and Regulations touching the proceedings of the said Court as relation being had to the said Letters Patent may more fully and at large appear. And Whereas it is provided by the Act before mentioned that if it should at any time appear to Us Our Heirs and Successors expedient to augment the number of Judges of both or either of the Courts of Judicature aforesaid then and in that case it should be lawful for Us Our Heirs and Successors from time to time as occasion may require by Commission under Our or Their Royal Sign Manual to augment the number of Judges of both or either of the Said Courts to three and to grant to such additional Judges such reasonable Salary or Salaries as to Us Our Heirs and Successors should seem meet and which should be in lieu of all fees and emoluments whatever. And Whereas by an Act passed in the Seventh and Eighth Year of Our Reign intituled "An Act to continue until the Thirty First day of December, One Thousand Eight Hundred and Twenty Nine, an Act of the Fourth Year of His Present Majesty for the better administration of Justice in New South Wales and Van Diemen's Land," the said recited Act was continued until the Thirty First day of December, One Thousand Eight Hundred and Twenty Nine. And Whereas We have deemed it expedient that an Additional Judge should be appointed to the Supreme Court of New South Wales Now Know Ye that We reposing especial trust and confidence in the loyalty, integrity and ability of you
the said James Dowling do in pursuance of the provisions of the 
before recited Act of Parliament passed in the Fourth Year of 
Our Reign hereby constitute and Appoint you the said James 
Dowling to be one of the Judges of the Supreme Court at New 
South Wales to have hold, exercise and enjoy the said Office dur- 
ing Our Pleasure together with all the Rights, Profits, Privileges 
and Salaries unto the said Office and Place belonging. Given at 
Our Court at Windsor this sixth day of August, One Thousand 
Eight Hundred and Twenty Seven, In the Eighth Year of Our 
Reign.

By His Majesty's Command,

GODERICH.

CHIEF JUSTICE FORBES TO UNDER SECRETARY HORTON.

Sydney, New South Wales,

My dear Sir,

Before I touch upon business, permit me to indulge one 
of the most sincere feelings of satisfaction, and offer my best 
congratulations on your merited elevation to a seat in His 
Majesty's Council. It is indeed but a just tribute to your 
claims, but the obligations, due to merit, are not always punctu­ 
ally discharged; and our gratification is so much the greater, 
when fortune dispenses her favors with justice. I will only re­ 
gard this first step as the promise and pledge of higher and further 
distinctions; and I am sure there will not be one who will watch 
your progress with more anxious hope, nor hail your successes 
with more heartfelt satisfaction than myself. It had been only 
within a few days that we had heard of any change being con­ 
templated in the Cabinet, and the utmost that we anticipated 
was a move or two in office, occasioned by the retirement of Lord 
Liverpool. Separated as we are by a span of half the globe, 
our information from England reaches us by chapters of months 
at a time; and you may well imagine our surprize at hearing, all 
at once, of the entire revolution in His Majesty's Councils. We 
were naturally most anxious about our immediate minister for 
the Colonies, and I believe the feeling to be universal of ap­ 
proval of the choice, which has fallen upon your illustrious friend 
Lord Goderich. To his Lordship I am unknown, but he is not 
so to me. I have had many occasions to observe his honorable 
career while at the head of the Board of Trade; and the plaudits 
of the nation I have heard echoed in the Commons, for his able 
and manly expositions of the state and finances of the British 
empire. Perhaps there is no situation in which so much sub­ 
stantial and widely-diffused good might be done, as in the office 
to which the destinies of the Colonies have auspiciously called
his Lordship. We have an old, an inelegant maxim in the law, that _de non existentibus et non apparentibus eadem est ratio_. If this be true at all, it is especially so in distant settlements; and perhaps the force of its application may be calculated in the exact ratio of the distance which divides the Colony from the parent country, and, according to such a scale, this settlement, above all others belonging to the British crown, presents the widest field for the statesman, the philosopher, and the philanthropist, to exercise their various talents and virtues. I cannot conceive a fairer occasion for the exertion of those qualities which belong to the truly great and truly good, than is here presented; of all those feelings which go forth in the work of human benefaction, with no ambition but the happiness of the human race, for no applause but the silent approval of their own heart; for the exercise of such feelings this Colony presents a wide and inestimable field whether we consider the wretched exiles, victims of crime and misfortune, but not incapable of feeling and being reclaimed, the planting of a young and ambitious colony of Europeans in the heart of Asia; the education of England's giant Son in a manner suited to his illustrious birth, and fitted to perpetuate in this Eastern clime, to the end of time and the earth's duration, the glorious institutions of England's laws, the beautiful productions of England's literature, the sacred fire of England's genius. These are awakening thoughts; be assured that the man, who would build an imperishable monument to his name, may advantageously forego the immediate returns of fame in London, for the more remote but far more durable memorials of Australian history; the name of Sallustius Crispus is nearly buried in the dust, _incolunni Mæcenate proximus; max precipuus; cui secreta imperatorum inniterentur_. It is with great men as with great mountains, their elevation is more observable at a distance, and is most remarkable when they stand alone. Is it not worth the ambition of some one of our great statesmen to emulate the fame of Romulus or Theseus? I have been dreaming of days to come. I fear they are far, very far off; at this moment I cannot fancy any place in which an unfortunate servant of the King can find himself less agreeably situated, than the exact one now in the tenure of him who sits down to contrast the fair-eyed future of Botany Bay with the sober present of old England. Be it so; without hope at the bottom, this life were indeed a bitter chalice, and her promises being always greatest where her gifts are least. it may be that, from the absence of every thing just now that one could wish, I am led to speculate more ardently and more devoutly upon that which is to be. Now for dull reality.
In my last letters upon the subject of that most disagreeable of all themes, "the press," I prepared you to expect that some explanation would be sought by me, touching certain rumours in particular quarters, of my having been actuated by less scrupulous motives than a high and inflexible sense of duty. Finding however that these rumours had died in a state of abortion, and confident that there was not one honest man in the Colony who would believe them, I gave up further inquiry, assured that you would not be easily led to believe any thing so highly detrimental to my honor, and that the internal evidences of their untruth, were too strong for the scepticism of any, save the willing infidels by whom, in all probability, they were invented and propagated. My correspondence with the Governor dated the 16th April, and my reasons assigned at large for not feeling myself authorized to certify the proposed licensing act, clearly prove that I had all along advised the government to resort to a vigorous course of prosecution in the Supreme Court, against the publishers of libellous matter; is it reconcilable with common sense, that I would have recommended such a course if I had committed my character to the keeping of the persons, whom I should be compelled to try, to punish, and perhaps to exasperate against me? and this too, with so easy a door to escape at, as a quieting license law or a four penny stamp-act? No, my dear Sir, those who listened to this slander, and countenanced it under the bond of secrecy, well knew its falsehood, and are ashamed to admit even the condescension of having listened to it. Feeling the high ground I stood upon, I determined not to suppose my character had been put in question until I should have tried all the cases of libel which the government seemed at length, in good earnest, determined to prosecute; but, from the unaccountable delays which have occurred (by whose default I pretend not to say further than that the Court has been most anxious to get rid of them), and fearing that my silence might be used by my enemies as an encouragement to new inventions, I determined to speak to the Governor. I accordingly did so, and the correspondence, which I have annexed, was the result. It has left me pretty much where I was, in the dark, as to the names of the parties who have become familiar with His Excellency's ear, what may be the insinuations they have made, or the impressions they have left. In this state of uncertainty, I have felt it an act of justice due to myself, and to you, who selected me for the trust which has been confided to me by His Majesty, to furnish you with such particulars as will I hope be sufficient to defend me even from secret attacks and unknown accusers. The purport of this letter is merely to put you in possession of the means of
estimating my conduct. I must be distinctly understood not to make any complaint, or to prefer any charge. I sit down merely to prevent misrepresentation; and that what I have to say may be more clearly understood, I will put my statements in the form of a narrative of such events as it may be necessary to notice, preserving the order of time in which they occurred.

I assisted in preparing the first New South Wales bill, and was appointed to the Supreme Court in 1823. The many and more important subjects, which have since engaged your attention, will not have caused you to forget the great anxiety I felt and expressed in a letter to you, intended to be laid before Lord Bathurst, upon the very delicate ground you had placed me, in regard to the Governor of this Colony. The powers of the government had been at once legislative, judicial, and executive; your act abridged all these powers, and created in the Supreme Court a check, indeed a controlling authority. I felt that sooner or later this power of the Judge would be considered by the governor as an encroachment upon his authority, and, in spite of the best feelings of private good will, would bring their respective offices into difference. During Sir Thomas Brisbane's government, I contrived to keep clear of all collision; but, since the administration of his successor, I have not been equally fortunate.

The arrival of a new Governor in a colony is like a new succession to the crown in England; and General Darling's first landing was greeted by all those outward feelings which are usually manifested on such occasions. The first six months of his government were peaceable, even popular; his first acts, tho' evidently marked with a decisive character, were tempered by a due regard to public feeling. The Executive Council was consulted upon most occasions, and softened the vigor or shared the responsibility of the Governor's measures. During these days, I was not unfrequently made acquainted with the views of government. I cannot say that I had, or sought His Excellency's particular confidence. I would have declined it, had it been tendered, as irreconcilable with that strictly independent position in which the nature of my office had placed me. The last months of Sir Thomas Brisbane's administration had taught me that, as Chief Justice of the Supreme Court, I could not be too scrupulous in not allowing myself to be mixed up with any measure that might possibly come before me judicially. I consider myself therefore as having occupied, from the beginning of General Darling's government, that neutral ground which I had deliberately chosen as becoming the judgment seat. As General Darling's experience of the Colony encreased, he acted more from himself, and less with the assistance of his Council;
he saw no person except upon particular business, and his real
cabinet consisted of himself, the colonial Secretary, and Colonel
Dumaresq, his private Secretary. In the mean time the senti-
ments of the public had undergone a gradual change and, before
the first year of the Governor’s probation had passed, his adminis-
tration was generally disliked. It would be contrary to the rule,
I have laid down for myself, to enter into particulars, or to
state any act that may be supposed to convey a charge or even
censure upon the local government. I merely state a fact, too
universally admitted to be denied, that the government had be-
come unpopular in a very remarkable degree; it was in a state
of positive difference with several of the principal officers, and
of bad feeling with reference to a very large body of the Colo-
nists. In this state of things it appeared to me to be indispens-
able necessary that I should keep clear of the conflict of parties;
and with this opinion and this view, I retired from any osten-
sible connexion with the stronger measures of the Governor. I
have reason to believe that the Governor considered that I was
bound to support him; whatever I might think of the abstract
policy or propriety of any particular act, that I was bound to
give the weight of my opinion to the measures of government,
and not, by an appearance of neutrality, to allow it to be sup-
posed that I disapproved of them. Perhaps the Governor was
right, if I were to be regarded in the light of a privy counsellor,
but assuredly it was my first duty to preserve the irreproacha-
bility of the judgment seat. The people of this country look
with the most intense anxiety at every act, every opinion of the
Judge; without trial by Jury, without the corrective power of
an assembly, without one single popular right, they naturally
regard the Supreme Court as their only protection against abso-
lute power; their rulers may be the best possible, but they will not
probably be better than the rulers at home; and why have the
people of England imposed all those checks and balances, but
upon the assumption that they are necessary; and, if they are
necessary there, why should they be less so in New South Wales?
I propose the question, I do not profess to answer it; but this I
will affirm, that it has been my incessant endeavor, ever since I
have been in this Colony, to raise the character of the Supreme
Court in the opinion and confidence of the Colonists; that I have
strained hard to preserve its independence, and prevent its being
supposed to be capable of being influenced; in this I have thought
I consulted the highest honor of the crown, as well as the best
interests of the people; if I have erred, I have done so upon
principle; but it will require some extraordinary power of persua-
sion to induce me to believe that, in a Court firm in the
1827.
20 Sept.
Principles and policy of F. Forbes.

confident of the people, there is not a safeguard of the public peace, stronger than in the force of armed men; that, in a just, and vigorous because just, execution of the laws, there is not a far greater protection to the government, than in the seeming acquiescence of a pliant judge, than in all the subserviency of the most obsequious bench. Such is my principle, and such has been my policy; by them I have guided every proceeding in my office; and it is at once my pride and satisfaction to say that the Supreme Court does rank high in public opinion, and is at this moment affording the government a support and protection, by the force of its character, and the independence of its acts, which, although not accurately estimated by the government itself, are felt by its adversaries, and acknowledged by the community at large. Even the slow and unskilful prosecutions, which have been commenced, have already lowered the tone, and checked the licentiousness of the opposition press, and I will pledge all my reputation upon the issue of the pending trials, that they will reduce the papers far below the real standard of public feeling in this Colony. You must then be prepared for meetings and petitions, the only course that will be fairly open, to work off those causes of real or imagined grievance, which Englishmen must first learn how not to feel or to fancy, before they can be taught not to complain of and to express.

I have stated the principles upon which I felt myself called upon to take up that neutral position which, as it seemed to me, the office I filled required of me, and I have expressed my belief that the government considered they were entitled to call upon me as an ally. I should however have been enabled to go on smoothly for some time, but for the illfated bills for suppressing the papers; you are already in full possession of my reasons for refusing to certify those bills; reflexion has only served to confirm me in the opinion I then entertained. You have no doubt read all my correspondence with the governor with care; let me beg of you to throw back upon it a passing glance. I had been appointed by Parliament to discharge a sacred duty; it was to see that the laws of the empire were not encroached upon. I was called upon by the Governor to perform this duty. I did so to the best of my judgment and ability. I refused to certify General Darling's bills, because I thought them repugnant to law; because I felt I should compromise my oath, and my honor if I sanctioned them. His Excellency's function was at an end, and I had performed mine; what legal right could the governor claim to press me further, or to endeavor to alarm me into compliance; does the correspondence, which passed between us in April and May last, present the calm, the temperate, the courteous
application of one high officer to another, calling upon him to perform a deliberate act upon his own judgment and responsibility, or is it like the mandate of a superior to an inferior, intimating his duty, and warning him of the peril of disobedience? His Excellency is pleased to express his own opinion of my duty. "His Majesty's ministers" I am informed were well-advised before they directed the licensing law; the Executive Council of the Colony had recommended it. I am reminded that a similar bill had received the sanction of Mr. Pedder, and that "circumstances" might not be wanting the devices of a solitary swindler were pressed into service by way of allusion and deemed of sufficient magnitude to sanction an assertion, that "the effects of the licentious press had already begun to be observed upon the Prisoners of the Crown"; all this might seem very ingenious, and might be supposed to produce a very striking effect; it was most excellent ruses de guerre; but was this the way to obtain the uninfluenced opinion of a Judge upon a most important point of constitutional law; were the honor of Parliament, or the dignity of His Majesty's Crown, or the purity of Justice consulted in such a course of proceeding? Are the opinions of the Judges, or even of the law officers obtained in this way at home? When the three Judges of Bombay were brought to a consideration of the same question, they discussed its merits in open Court, and decided against it in the heart of a Mahommedan country. I was called upon alone, under the bondage of secrecy, in the centre of a British Colony! I will not pursue the contrast.

You are fully in possession of the circumstances under which the prohibitory stamp duty was imposed; and of my reasons for refusing to certify that act, in the form it had passed the Council. I recommended that it should be resubmitted, and the Council were convened for that purpose; but in the mean time the Governor had taken other counsels, and ultimately declined laying the bill a second time before them, assigning as a reason, in his letter to me of the 30th May, "that, the Council having agreed to the bill as it then stood, he was not aware of the object of any further discussion, or that it could with propriety be entered into." This was in truth no reason at all, for the precedents of the Council furnish numerous instances of bills being amended, and sometimes new-modelled in the Council, and in all such cases they have been re-certified by me; the post office bill is exactly in point; after it had passed the Council, I found a difficulty under the English act of Parliament, and it was returned to the Council and amended so as to avoid my objections. In my opinion, the true ground of the Governor's unwillingness to send the stamp act again before the Council was the fear that its
impropriety would be seen, and that the amount of the duty would be reduced to what the preamble professed, and what had been recommended by Earl Bathurst. Moreover the unanimity of the Legislative Council in favor of a prohibitory stamp act was too good an argument in support of the licensing bill, and the suppression of the press, to be easily given up. I am aware of its force, and of the effect it might be supposed to produce in England; and, God knows if it had been one upon which I could conscientiously have reposed my own judgment, I should have been too happy to have sought it as a sanctuary. The unanimity of the Council may sound very well in Downing Street, but it means nothing in New South Wales. This is very delicate ground, and must be lightly touched; it were invidious to question the motives of other men, particularly where they have no opportunity of being heard; but you will find no difficulty in supposing that, in a question where the governor had so decided a feeling, the government members may have felt themselves bound to support the wishes of his Excellency; the real force of the argument therefore is derived from the assent of the three gentlemen who are presumed to represent the public. Mr. John McArthur is well known to you; it is no disparagement to him to say that he was hostile to the press from private motives; because he had avowed his own feelings, and proposed a shilling duty instead of four pence as being a more certain remedy. Mr. Campbell lives in seclusion, and his opinion carries no weight in society. Of Mr. Throsby I cannot speak with the respect due to a colleague, and I do not feel that I am trespassing beyond the limits I have prescribed, in putting you in possession of certain facts, which I have learnt from the most accurate sources of information. Mr. Throsby is a grazier; early in March last the Commissary advertised in the usual manner for tenders for the supply of a hundred tons of salted Beef and Pork, the tenders to be addressed under seal, and to be opened on the 27th of April. There were many offers received, and a schedule prepared, and the lowest recommended to the government by the regular officers of the Commissariat. Mr. Throsby’s was not among the number, but, on the 1st May he sent in a tender in a private form; the 2d of May was the day appointed for considering the stamp act. Mr. Throsby voted for this act on the 3rd of May, and on the 5th he had the good fortune to find his tender had been approved by government. What renders this transaction more remarkable is, that the advertisement was for salted meat, deliverable at Sydney, and that tenders for more than the required amount had been actually approved before Mr. Throsby’s tender was received; and then it was for fresh beef, deliverable near his own residence
at Liverpool, which government were to be at the expense of salting and conveying to Sydney and his terms, taking this expense into consideration, I am assured are higher than some of the rejected public tenders. Now why was this done. I will acquit the government of every dishonorable motive; but was it prudent to hold such an intercourse with one of three members of Council at such a moment? however conscious it might feel of the purity of its own acts, was it equally well assured that Mr. Throsby's virtue would stand the proof of such a temptation, or his character the effect of such a transaction, if it were known to the public? Of what value was the vote of such a man, under such circumstances? Mr. Campbell was the only member in a situation to resist the Stamp act, and he did resist it; but, upon Mr. McLeay's assurance that it had my entire concurrence, he withdrew his opposition and so the bill unanimously passed the Council. I vow to God that Mr. McLeay acted without authority from me. I have never in one instance, delegated my vote to any man; why should I have been so very complaisant on this single occasion? was my recent correspondence on the licensing bill of that smooth and acquiescent kind that I should be induced to place unusual confidence in the Colonial Secretary? or is it more probable that his extreme anxiety to carry a favorite measure, might have led him to believe what he had only imagined? on which side turns the scale of probabilities?

The prohibitory stamp-act was suspended* on the last day of May; and, on that very day, I heard, for the first time of the rumours to which I have already alluded; they came to me direct from the Council chamber, and I have reasons for believing they had been listened to in a quarter, where I am sure they could not have been sincerely credited, and from which I had a right to expect an open and unreserved disclosure. Whose character can be safe, if the head of the government will condescend to receive insinuations under the pledge of secrecy? the wound, that was sought to be inflicted on me, was in the tenderest place. I had just performed a most painful, an awful duty; the anchor, by which I held, was the uprightness of principle by which I had been guided; what slander then could have been invented so dishonorable in itself, so humiliating to my pride or so destructive to my character, as the imputation of my acts to private motives of a secret connexion or understanding with the conductors of the press; what solitary act of mine, since I had filled the bench in the Colony, would sanction such an imputation? I had determined at first to require an immediate explanation; but, on maturer consideration, I thought it better to wait until I should have tried the persons with whom I was supposed to

* Note 317.
1827.  
20 Sept.

have a secret understanding, and, if guilty, have punished them to the full measure of their deserts; for it might be that I should have occasion to call upon them to disprove the tale, and it were better to call upon them after conviction than before; then at least, they could not be influenced by any hope of favor; and so fearless am I of what even the vindictive passions of such persons might suggest, that I would have trusted to their testimony with the most undisturbed confidence. I am now very glad that I did not require an explanation earlier; it might have led to publicity, which could answer no good purpose, and would inevitably have exposed the government to this charge, that, having in vain tried to bend the integrity of the Chief Justice, it now sought to undermine his reputation; the rumours have not taken here, not so much for the want of zeal in the propaganda, as for the want of true believers in the faith; it is possible they may be supposed to have found a more ready credence at home. and, to tell you the truth, my main object, in seeking some explanation with the Governor, was to give me the means of correcting any unfavorable impression which might have been attempted to be made in Downing Street. My correspondence with the Governor has however left me in the same uncertainty with respect to the "impressions" of His Excellency as I was in before. I had also another motive; it was to avail myself of the occasion to caution the governor against the appearance, if not the danger, of the counsels which his retirement to Parramatta had caused. You must pardon me, if I digress a little in this place; it is of infinite importance to my case, to be able to trace consequences to their true causes, and to lay that foundation in probable grounds which are the best expositors of facts, and the strongest confirmation of their truth. You must well remember the enquiry* which Earl Bathurst directed into certain alleged charges against Dr. Douglass. I was placed on that enquiry without my knowledge, and against my will; the issue also is fresh in your recollection; the accusers were brought to shame, and their system laid bare to the bone. This was felt as a deadly blow at the system itself, and the most desperate efforts were made to ward off its consequences; it was necessary to destroy the honesty of the report of the Commissioners, and they, who had opposed the very naming of a jury in New South Wales, were not ashamed to prostitute their principles and their oaths together, and, under pretence of presenting public grievances, single out their foes and charge them with offences of which themselves were equally guilty, and had set the first example. The memorable presentments* at Paramatta were accordingly got up as a set off against the report upon the

* Note 315.
enquiry; those presentments were examined by the Council, and their iniquity exposed, and the party again defeated in their object, with additional disgrace. You have approved of what I did on that occasion, and it has triumphantly stood the assaults of gentlemen in the House of Commons. From the moment that your decision was made known, I was cut by all Mr. McArthur's followers in this Colony; not one of his family has since set foot within my house; in what had I offended? why in discharging my duty, and preventing a man from being put down by the power of influence and misrepresentation; from that hour I have been the marked man, and no efforts have been spared to injure my character, and get me out of the Colony. It was useless to attack me openly; my public life, passed under the broad gaze of the people, left no point of attack. I must be assailed by secret means. I must have courted popularity; the people's opinion must have been won by corruption, and thus the reward of all my labors, the unbounded confidence of the community in the integrity of their Chief Judge, was ingeniously manufactured into a charge. I knew that the first mere difference of opinion, I might have with the Governor, would be the rallying point for the Paramatta party; and I have therefore most scrupulously avoided all occasions of difference. I have patiently borne many things which, under other circumstances, I should have felt it due to my office to represent. I have sacrificed much, and I am prepared to sacrifice more upon the altar of peace; but there is a point beyond which I must not go; at all hazards I must preserve the Judgment seat free from the appearance of an improper influence; in doing this, I shall afford the Governor a far more effectual support, than by suffering myself to be involved in the spirit of party, which at present divides the government and the people. I hope too that the time is not distant when the Governor will have learnt, from experience, how to estimate the value of an independent tribunal, and be convinced that what he deems support would have been considered as subserviency; and what he deems opposition is only that high-toned, inflexible justice, which is at once the best protection of the public, and the safest guard of the government.

How far the representations of my political enemies have infected the ear of the Governor, is more than I can determine; but the unfortunate bills for suppressing the papers presented the most favorable occasion which they could have desired; the Governor's private feelings were in perfect sympathy with their own; the acquiescence of the three independent members was a powerful auxiliary; it must be secured at any price and then, would the Chief Justice dare to resist; would he persevere in the
opinion he was known to have expressed in December, 1826, and
not comply with the requisition of the Secretary of State? he
did resist; he did persevere in his opinion, and his reputation
has been, as a necessary and long foreseen consequence, assailed.
These are the probabilities I professed to establish; take them
with you to the consideration of the whole subject, and you will
arrive at the attacks which have been privately made upon me,
as an inevitable consequence. In this view I can forgive the
Governor that he has suffered impressions to be made against
me; he has been most vilely used, but he has placed it out of my
power to assist him. Surrounded by his family and expectants,
it was not for me to force myself upon his confidence, besides, if
I do not much mistake his Excellency, he is not easily dissuaded
from his purpose. He was moreover evidently jealous of the office
I filled; and I may be mistaken, but I do think not quite free
from a little pique at my reputation in the Colony. These com­
bining causes rendered it impossible for me to “overstep the
modesty” of my situation, and force my counsels unsolicited
upon the Governor. I retired to the position, I have ever since
occupied, of strict neutrality in all differences which might, by
possibility, come before the Court, and, in all other cases, to
support the government where I could do so by law.

Such, my dear Sir, are the grounds of my defence, in the event
of my conduct being arraigned. I must naturally feel a little
sore in the view I have taken of things. I have not allowed it
however to interfere with that respect, which is due to the gov­
ernor, nor to prevent my giving him all the best advice I can
in Council; but I feel that I have no business there; what would
Lord Chief Justice Abbott do at the Horse Guards; how long
would his Lordship be there, before he would be accused by the
Commander in Chief of mutiny and sedition?

To turn to the Governor’s correspondence; of his impressions
I cannot form any opinion sufficiently distinct to remove them,
and he has declined putting me in possession of facts. I may
therefore quote my first maxim, and perhaps a little more in
point, that de non apparentibus, et non existentibus, etc. There
are two tangible points, however, which, if I am rightly informed,
have been mentioned. I will just say a few words on each, and
conclude this long letter.

1. Countenancing Dr. Wardell.—This I deny in the largest
sense; this gentleman arrived in the Colony soon after myself;
he has dined at my Table three times in upwards of three years,
at public bar dinners. For the last nine months, he has not been
inside my house; but I do not choose to manifest my dislike to his
conduct any further, because I shall have to try him, and I do not
mean to place it in the power of any person charged before me to say that I have shewn any feeling of private hostility towards him. The Dr. was once the friend of Col. Dumaresq, and more than once a guest at Government House; his paper was then courteous altho' sometimes a little at the expense of past administrations. That, so late as March last, the Governor did not believe I had any particular affection for this person his correspondence on the subject of trying him will prove. I annex it, because it will also shew you how utterly unconscious the Governor appears to be of the punctilious delicacy which should be observed towards a Judge.

2. *Delays in bringing the libel prosecutions to trial.*—This charge I will answer by referring you to the accurate report which appeared in the Gazette of the 17th instant, and which I inclose for your perusal. The Supreme Court has been most anxious to bring these trials to a conclusion. Was it likely that, after recommending a vigorous prosecution of libellers, I should endeavor to fritter away the force of my own argument against the proposed extinction of the press? I admit that there have been delays, but those delays have been entirely with the officers of government.

I will now conclude assuring you, that the Colony itself was never more peaceful, nor the convicts in more subjection, than they are now, and have been for the last year; that it will be my strenuous effort to preserve as good an understanding with the government, as the nature of my office will allow me, until the decision of Lord Goderich upon the little points of difference may prevent the recurrence of any future dissention, by establishing the boundaries between the Governor and the Judges, and that I am, and ever shall be, My dear Sir, &c.,

FRANCIS FORBES.

[Appendix.]

Correspondence between the Governor and the Chief Justice relating to certain "impressions."

Sir,

Governt. House, 11th Sepr.

I hasten to correct an error into which I may have led you, in the interview this morning, by having made use of the word "received." I meant, that I entertained certain impressions. I think it necessary to give you this explanation as you appeared, by what fell from you at the moment of your departure, to suppose I had received information on the points to which you had alluded.

I have, &c.,

RA. DARLING.

Sir,

Sydney, 11th Sepr., 1827.

It was certainly on my recollection that your Excellency had admitted you had received information to my prejudice, and
I intended to have written to your Excellency and requested that I might be put in possession of the names of my accusers, the specific charges against me, and such other particulars as would enable me at once to meet and refute them. I cannot form any definite opinion of what "impressions" your Excellency may entertain; but to this I will pledge myself, that if your Excellency will state to me the data upon which they are founded, I will undertake to give such explanation as I think will remove them from your Excellency's mind. Your Excellency well knows that, in this Colony, I have a few deep and determined political enemies, made so not by any voluntary act of mine, but by a duty imposed upon me by His Majesty's government. I have long predicted, and been prepared to expect, that the first difference of opinion between your Excellency and myself would be eagerly embraced as the means of scattering wide the seeds of disunion and I have not been disappointed. For the honor, however of His Majesty's government, and for the interests of this Colony, I must still request your Excellency to state the facts upon which your unfavorable impressions rest, that I may be afforded an opportunity of removing them.

I have, &c.,

FRANCIS FORBES.

Sir,

Paramatta, 15th Sept., 1827.

I have received your letter of the 11th instant, and am not surprised at the mis-conception alluded to. I was totally unprepared for the discussion of the subject you introduced, and too unwell at the time to give the necessary attention to any matter of importance.

I have only to observe in declining explanation at present that the time is gone by when it could have led to any satisfactory result. You will therefore agree with me that any discussion is rather to be avoided than desired. I have been prevented by continued indisposition from writing, or I should not have delayed acknowledging the receipt of your letter. I have, &c.,

RA. DARLING.

GOVERNOR DARLING TO CHIEF JUSTICE FORBES.

3rd March, 1827.

[A copy of this letter will be found on page 430, volume XIII, series I.]

MEMORANDUM.

3rd March, 1827.

To the above I wrote an answer immediately, professing my readiness to try every case which should be brought before me, in due course of law, and I referred His Excellency to the rules of
practice, in the New South Wales Almanack (rule 69) to satisfy
him that if there were any delay, it was with the prosecutor.
There was at this very time a point connected with this note,
pending in the Court.
See the Sydney Gazette, 10th March, 1827.

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GOVERNOR DARLING TO VISCOUNT GODERICH.

8th and 20th November, 1827.

[Copies of these despatch re the legal status of convicts will be
found on pages 604 et seq and 622 et seq., volume XIII, series 1.]

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CHIEF JUSTICE FORBES TO UNDER SECRETARY HAY.

Dear Sir,

New South Wales, 12th Nov., 1827.

Under the flattering auspices of Mr. Wilmot Horton's
name, I venture to address you on such points connected with
the administration of justice in this Colony, as fall more im­
mediately within my means of communicating experience and
correct information; and which it may be of importance to put
you in possession of, in order to be more fully prepared to meet
the discussions, which will probably take place in the ensuing
session of Parliament upon the several clauses of the new bill.
It was only the day before yesterday, that I was favored, for the
first time, with a sight of the proposed new act. I perceive that
it exactly follows the draft I forwarded last year from this
colony; as, in some measure, an offspring of my own, I cannot
but feel a parent's solicitude for its success in Parliament, and
favorable reception with the public. I may therefore be per­
mitted to use a parental freedom of language and to claim the
best interpretation of all I have to offer.

I drew the bill upon this general principle:—that the Parlia­
ment of England should do nothing more than lay the founda­
tions of a Supreme Court, and a Legislative Council, and leave
every matter, which required particular enactment, to the legis­
lature of the Colony; and, as part of the machinery of the
Court was intended to be temporary, namely the mode of trying
issues by Officers and Assessors instead of juries in the ordinary
way, to provide for the future introduction of juries, and the
consequent discontinuance of the temporary mode of trial, and
further to enable His Majesty's government, at such time as
should be deemed expedient, to grant the representative franchise
to the people; when that time shall have arrived, is for you to
determine; I was only anxious that upon constitutional prin­
ciples it should rather flow as a boon from the Crown than be
granted as a concession in Parliament. I must beg to impress
upon government the necessity of preserving this general principle. Specific legislation by the Parliament of Great Britain is attended with many great and inevitable inconveniences; it necessarily proceeds upon partial and defective local knowledge; if it be found impracticable or inconvenient, it is incapable of being amended by the local authorities; it moreover involves this legal difficulty, that Parliament, having delegated a limited power to the legislature of the colony, and having made a particular provision upon a particular subject, thereby intended to take such subject matter out of the power of the local legislature, and every other subject in pari materia; or why should Parliament have created a local legislature, and have proceeded to pass a particular enactment, if it had intended that the matter of such enactment should be within the power of the legislature of the Colony? This argument misled the late Attorney General, and has perplexed many others; it arose out of the fact that the first New South Wales act did contain many specific provisions, without its being known that the draft of that act contained a whole code of laws, which were deemed so complex and unfit for discussion in Parliament, that it was suddenly determined to weave a legislative power into the body of the act; this simple fact, which was only known to Mr. Stephen and myself, will explain the seeming anomaly of the first New South Wales act. In consequence of the resolution thus suddenly adopted, many clauses were retained, which should have been expunged; such for example, as the clauses relating to Courts of Sessions and Requests, the declaring of insolvencies, foreign attachments, and other matters of purely local moment; these are all omitted in the New Bill. I am led therefore to hope, from this hasty review of the reasons for preserving unity of principle in the bill, that it will be kept entire in principle, and not encumbered with any particular provisions upon local subjects, which local experience only can adequately comprehend and provide for.

It has been assumed, both in framing the first act and the new bill, that the laws of England are the laws of New South Wales, so far as they could be (physically) applied. In affirmation of this doctrine, I inserted the clause* (number 4) in the new bill. I have annexed to the draft, I sent home, the particular reasons I had for wishing such a clause to be inserted. Since the clause has been adopted, I beg to offer a few popular reasons for it. Every man, who has read Blackstone’s Commentaries, knows that it is laid down as a given proposition, that the English laws in force, at the time of a British Colony “being planted,” are in force in the Colony as the birthright of

* Note 320.
the subject (vol. I, page 107). But what may be the true
epocha, at which to fix this planting or settling of a Colony, is
not quite so clear. In all the older Colonies of the British crown
in America, it was held to be from the time of a local legisla-
ture being established within the Colony; until such time, the
Colony was held not to be fully settled; not having within itself
the elements of a legislative function, it was still considered as
within the care of Parliament, and entitled to receive the benefit
of all the municipal laws of the mother country. I have several
printed cases of decisions incidentally recognizing this general
principle in the Colonies, but, as they are not usually to be met
with, I must refer you to a work in which you will find it laid
down as a fundamental maxim in the older Colonies (Pownall
on the Administration of the Colonies, page 127). That many
difficulties will present themselves upon this branch of the law,
I am fully aware of. I have often, and attentively, considered
the subject with a view to some explanatory enactment. But I
have never been able to contrive myself, nor have I been so for­
tunate as to see any contrivance of any other lawyer to clear
away the difficulties; on the contrary, the remedy has only added
to the complexity of the disorder. In a maturer stage of the
Colony, it may perhaps be allowed to the local legislature to
purge and purify the statute book, and to point out specifically
what parts of the statute law it would retain or reject; but we
are too young for such a speculation yet; and the business of
reforming the law of the land will not be devolved upon legis­
lators, such as this Colony may be presumed to furnish within
the next half century; in the mean time, it had better be left
as it stands.

Since I transmitted the draft, several things have suggested
themselves, which I beg leave to submit to you as deserving of
consideration, and possibly a place in the new bill.

1. In the act, 6 Geo. 4, Cap. 69, Sect. 3, is a clause which
should be repealed, and the subject matter left to the local legis­
lature; to save trouble I have added the draft of such a clause.

2. I annex a sketch* of the existing state of the law with
respect to the punishment of transportation, and the power of
the local government to remit the sentences of prisoners under
English convictions. I have brought the subject under the
notice of the governor upon two occasions; one, on which I
pointed out the necessity of passing an act of the legislature to
authorize Justices of the peace to take cognizance of complaints
made on behalf of assigned convict servants against their
masters; and the other, on which I suggested the propriety of
calling the attention of His Majesty's government to the

* Note 321.
conflicting state of the law and practice, with respect to what are here called tickets of leave. I beg to inclose the Sydney Gazette for 1st August, 1827. You will there observe a government notice, in which the law is assumed as being settled by a despatch from the Secretary of State* for the Home Department. I interpret that despatch differently; to me it appears to mean that there is nothing in the law to prevent the local (legislative) government from making regulations upon the re-assignment of Prisoners, nor the governor from assigning upon condition of the assignee fulfilling all the conditions impliedly annexed to the state and relation of convict servants. The last transportation act (5 Geo. 4, Cap. 84, Sect. 8) expressly says “it shall be lawful for the assignee to assign over any offender, and so, as often as may be thought fit”; the government order says, “no person is to re-assign to another, a prisoner received from the Governor.” This surely is not modifying an assignment under the statute; it is, in terms repealing one of its provisions. As a penal consequence of not obeying the government order, the party offending is further ordered “to be deprived of his assigned servant by order of any Bench of Magistrates”; this is justified upon the ground of what is assumed as “the established practice.” But I must beg to refer you to the 19th section* of the New South Wales act, by which you will perceive that, altho’ a summary jurisdiction is given to Justices in Sessions over breaches of civil duty, committed by convicts, there is no such jurisdiction over their Masters; and the defect cannot be supplied by a mere order of the governor. There is no law justifying such a jurisdiction, whatever may have been the practice before the passing of the New South Wales act. I have therefore suggested to the governor that a law should be passed, requiring the assignees of convict servants to conform to certain regulations, upon pain of forfeiting their services, in the same way as they might forfeit or pay any other penalty; and to invest two or more Justices of the Peace with power to enforce such penalty. So far we can go in the Colony, but there are points which are beyond our power; we cannot interfere with the sentence of the law passed by an English Court; we cannot abridge the right of private property, derived under the express provisions of an act of Parliament; it required the authority of Parliament to enable the Governor to give to any transported Prisoner the benefit of a pardon; and it will require the same authority to enable him to grant a ticket of leave; they both stand upon the same ground, and differ only in degree. With respect to the policy of granting tickets of leave, there is some difference of opinion; but I believe the prevailing sentiment is

* Note 322.
in favor of the measure; and, should it be adopted in the new bill, I would suggest that all such instruments should be granted and resumed with the advice of the Executive Council, and the act of granting or revoking registered in the Supreme Court; and further that all persons, holding such instruments, should be considered, for the time being, in the same light as persons having a pardon under the great seal of the Colony; and that the registration in the Supreme Court office should be deemed sufficient proof of such ticket of leave being duly granted.

3. As there is now a second Judge, and in the course of events we may soon expect a third, I must earnestly pray to be relieved from that most invidious and responsible duty of certifying every proposed law, before it can be laid before the Council; and that, instead of "the Chief Justice," it be amended, and required of "the Judges of the Supreme Court" to certify every projected law.

I have addressed you with that freedom from reserve, which springs from a consciousness of intending for the best. I may appeal with confidence to all my acts, since I have been in this Colony, to prove the earnestness of my desire to preserve the good feelings of the inhabitants towards His Majesty's government, and to furnish His Ministers with such a view of the true interests of the Colony, and such means of defence of every measure I have recommended or assisted in carrying into effect, as might enable them to make a successful and gratifying stand in the Councils of the Empire; the honor of the Secretary of State has been the star, by which I have guided my conduct; and, if I have borne the independence of the Court with a high hand, it has been not more from a sense of what was due to the office I filled, than from an assurance I felt that, in upholding the purity and inflexibility of the judgment seat, I should best serve the interests, and secure the approbation of His Majesty's government.

Before I conclude, I will offer one or two remarks upon some of the clauses which, from what I am informed by persons recently arrived from England, will be likely to be opposed in the ensuing session; these are principally the clauses, which relate to trial by jury and taxation by representatives. Upon the first, it is now generally conceded that the colony is quite advanced to a state to fit it for this mode of trial; but it is one thing to admit the propriety of the measure, and another to carry it into effect; there must be a great number of details to arrange, and many powers to balance and adjust before the machinery can be set in motion; all this had better be left to the local authorities, under a pledge, if necessary, that within
HISTORICAL RECORDS OF AUSTRALIA.

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Proposed introduction of trial by jury.

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a stated time it should be carried into operation. By analogy to the qualifications required by the laws of England, I presume that property will be the test of eligibility to serve as a juror. In the cases of persons, who have been transported to this colony, I will assume that this qualification should be placed upon a scale sufficiently high to ensure some approach to that respectability, which most commonly accompanies the acquisition of landed property; it will not be well to theorize too much upon this branch of the subject; it is one of those cases, in which it becomes impossible to please all parties, and where much may be left to the good sense and the good feeling of society. With respect to a House of Representatives, there is much difference of opinion also; but all are agreed that the present powers of legislation are utterly unsuited to the feelings of the colonists; the legislative body is too small in itself, and has no influence over public opinion; the government presents at this moment a remarkable illustration of the inefficiency of accumulated power, unless it be accompanied by influence; with all the land, and all the labor, and all the revenues of the colony at its uncontrolled command, it is paralysed for the want of power; it has no influence, no hold upon public opinion; it deliberates in secret, and puts forth its acts in the dark, uncertain whether they will be well or ill received, and having nothing but good intentions to lean upon for support. The consequence naturally is a suspicious feeling between the governors and the governed, and entire want of confidence. To prevent this, there must be a middle estate and, in whatever form it may be conceded, it is, in my opinion, and I believe in that of the best informed of all parties, indispensable to the peace, and indeed the good government of the Colony. To say that the state of society is not sufficiently ripe for a representative legislature is to meet but a very small portion of the case; it is much too ripe for the close council that at present represents a legislative body. In justification, therefore, of my proposition, as contained in the clauses of the bill, I wish you to understand that I have reserved the power to the King of calling forth an assembly of the People, not only with the view of preserving the constitutional principle, but in the sincere hope that the power itself would be immediately put in a course of preparation, with a view to its being carried into effect as soon as circumstances will permit. It may be said of this, as of a trial by jury, it is a mixed question of fact and feeling, incapable of being reduced to rule, and consequently open to different and undecided opinions; something must be ceded on each side, and the rest left to that self-redressing principle in human affairs, which often
succeeds when the wisest Councils fail. With a legislative body, having some points of contact with the people, a cabinet, composed of the heads of the higher departments, and an executive, guiding itself by the rule of leaving every office to its own details, and holding the head of it responsible for its due performance, New South Wales might be made one of the most happy, as it is one of the best-disposed of all the English Colonies.

I have trespassed further than I thought I should have occasion at the commencement of this letter. I am always obliged to write upon the spur of the occasion, and never can command more time than will enable me to write out my thoughts; the want of method you must excuse. I only hope I have made myself understood. The business of the Supreme Court is alarmingly upon the increase, not in the trial of crimes, for I am happy to say that branch of our jurisdiction is rather diminished, but in the trial of civil causes. We have four issuable terms, of one month each, in the year; the last was in September, and since that month we have issued upwards of two hundred writs, and there are now considerably more than one hundred causes for trial. I am anxiously expecting that the new act will enable us to sit in separate Courts at the same time, for it has become quite impossible for one Court to get rid of all the business of the Colony.

I remain, &c.,

FRANCIS FORBES.

[Enclosure No. 1.]

PROVISO to be added to the second clause* of the new Bill.

Provided also that, when and so soon as His Majesty shall cause such Charters or Letters Patent to be issued, as by this Act is directed, all actions, suits, matters and things, which shall or may be then depending in the said Courts, respectively instituted on the thirteenth day of October in the fourth year of His Majesty’s reign as aforesaid, shall and may be prosecuted and proceeded upon, in the same manner as any action, suit, matter, or thing originally commenced or brought in the Courts, respectively intended to be instituted under the present act; and all the records, muniments, registrations, and proceedings, whatsoever of or belonging to, or deposited in the said Courts, respectively instituted as aforesaid, shall, from and immediately after the promulgation of His Majesty’s said Charters, or Letters Patent in New South Wales and Van Diemen’s Land respectively, be deposited for safe custody and kept in the Supreme Courts intended to be instituted under this Act, in like manner as any other records of such last mentioned Courts.

* Note 323.
Clauses to follow the clauses* respecting remissions of sentence if approved.

And, whereas it is expedient that the Governors of New South Wales and Van Diemen’s Land should be enabled to grant to persons, under sentence of transportation, certain exemptions from service, not amounting to pardons, and revocable in case of misconduct: be it further enacted, that it shall be lawful for the Governors of New South Wales and Van Diemen’s Land respectively, for the time being, to grant to any felon or offender, who shall have been transported to New South Wales or Van Diemen’s Land respectively, and who shall appear to such Governors to be deserving of the same, exemption from service for any part of the term of transportation of such felon or offender, during his or her good behaviour, under and subject to such Rules and Regulations, in respect of the holding, continuing, revoking, or making void such exemption, as shall from time to time be made and published by the said Governors, with the advice and consent of the Privy Council of the said Colonies respectively; and, further, that it shall be lawful for every such felon or offender, during such time as he or she shall have or hold such exemption as aforesaid, to maintain any action, suit, or other proceeding for the recovery of any debt, damage, or thing, in any of the Courts of the said Colony respectively, in like manner as other Suitors in such Courts.

And be it further enacted that, from and after the publication of this act in New South Wales, so much of an Act, passed in the Sixth year of his present Majesty, intituled, “An Act for punishing Offences committed by transports kept to labor in the Colonies, and better regulating the powers of Justices of the Peace in New South Wales,” as relates to the summary jurisdictions thereby vested in one or more Justices of the Peace in New South Wales, shall be, and the same is hereby repealed.

Governor Darling to Viscount Goderich.

11th December, 1827.

[A copy of this despatch re the effect on the executive council of the abolition of the office of lieut.-governor will be found on page 634 et seq., volume XIII, series I.]

Governor Darling to Under Secretary Hay.

17th December, 1827.

[A copy of this despatch, enclosing criticisms on the New South Wales bill, will be found on page 652 et seq., volume XIII, series I.]

* Note 323.
APPENDICES.