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Australia's Legal History and Colonial Legacy

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I acknowledge the Gadigal of the Eora Nation, the traditional owners of the land on which we gather. I pay my respects to their Elders, past, present, and emerging and especially welcome Aboriginal people here with us today.

On February 7, 1788, on a place called Camp Cove in Port Jackson—recognizable to our international visitors as the land mass around Circular Quay on the harbor's edge—a commission signed by the King of England, George III, appointing Captain Arthur Phillip captain-general and governor in chief in and over the territory of New South Wales was read out by the Judge Advocate, David Collins, before an assembled throng of just over 1000 people.[2]

This assembly of people had just completed a voyage from England of 5021 leagues—nearly 28,000 kms—which took exactly 8 months and 1 week. Apart from the military and naval officers and the few civilians who travelled on the first fleet,[3] the assemblage comprised British prisoners who had been sentenced to transportation or whose death sentence had been commuted on condition of transportation.[4]

Captain Phillip's commission covered the geographical area from the northern tip of Australia to its southern continental extremity and westward to 135 degrees east longitude—half the continental land mass—as well as the islands to the east, between the latitude of 43° 49' south to 10° 37' south in the Pacific Ocean.[5]

The geographical area I have described had been claimed and named New South Wales by Captain Cook almost two decades earlier—in 1770. Camp Cove, or Port Jackson, was not the intended landing place of Captain Phillip's ships. Rather, a bay to the south, Botany Bay, was the original destination. Captain Phillip, not considering the sandy soils of Botany Bay suitable to sustain those in his charge, investigated the surrounding bays and harbors and came upon Port Jackson or Sydney Harbour, which he found to be 'one of the finest [harbours] in the world'.[6]

At the time there were two other ships anchored in Botany Bay, the *Boussole* and the *Astrolabe* being part of the French expedition led by Captain M de la Perouse who had left France in 1785. Unlike the history I was taught, M

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[2] Lieutenant Colonel David Collins, *Chapter 1: The Arrival of the Fleet at Botany Bay* in 'An Account of the English Colony in New South Wales: From its first settlement in January 1788 to August 1801' (1802).

[3] Civilians on the First Fleet included the chaplain, Richard Johnson and his wife; Augustus Alt, surveyor-general; Andrew Miller, commissary of stores; Henry Brewer, provost-marshal, John White, surgeon-general; Dennis Considen, Thomas Arndell and William Balmain, assistant surgeons. In Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' in LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961), xvii.

[4] NSW State Archives and Records, *Convict Indents (Digitised) Index 1788–1801*, https://www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/node/1796/browse.

[5] Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' in LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961), 42.

[6] Governor Arthur Phillip, 'Dispatches' (January 22, 1788). The name Port Jackson came from the earlier voyage of Captain James Cook, who sailed past the heads of Sydney Harbour in 1770. Cook named the inlet after Sir George Jackson, his friend and Patron, a Lord Commissioner of the British Admiralty.

de la Perouse knew of Captain Phillip's purpose and destination and was not surprised to come across the British fleet; the French ships were not there as colonial aggressors.[7] So the romanticism of Australia as a French speaking idyll where the civil system of law was to flourish was but a poor history lesson and NSW, as is the whole of Australia, is a common law country with a Westminster system of government.

There is one other historical inaccuracy of that time, which has continued to haunt this country. That is the conception that the land mass of Australia was 'terra nullius', 'no one's land' so declared by Captain Cook at the time of his expedition in 1770. As we know wrong facts give rise to bad law and so it was for Australia's 200 indigenous nations with a population estimated at the time to be over 750,000. The facts and the correct legal outcome were eventually recognized in the historic High Court decision of *Mabo.*[8]

The *Mabo* decision is not the point of this article, and there are expert sessions at this conference on legal issues as they affect Indigenous Peoples.[9] However, I wish to make this observation. David Collins, the first Judge Advocate of the Colony described the interaction with the indigenous people at Botany Bay in terms that they had conducted themselves '*sociably and peaceably … and by no means seemed to regard [the officers and others] as enemies or invaders of their country and tranquillity*'. Given the reference to 'their country' one might wonder how the doctrine terra nullius might have been said to apply. Likewise, Captain Watkin Tench, commander of the Marines on the First Fleet wrote of observing, in the first few days of arriving, a village on the north west arm of Botany Bay, of about a dozen houses.[10] Tench also observed that the '*country is more populous than it was generally believed to be in Europe at the time of our sailing.*'[11]

Although the erroneous understanding of indigenous occupation must not be dismissed as mere historical error, Australia today derives from a legal and political system based on the rule of law,[12] supported by the doctrine of the separation of powers.[13] An integral part of both those doctrines is the independence of the judiciary, a doctrine which had strong legal and philosophical roots in the eighteenth century, including in the Act of Settlement 1701, the writings of Adam Smith and in Montesquieu's '*De l'esprit de loi*'.

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[7] Nor, would it seem, did the English consider the French as aggressors. Captain Watkin Tench, writing in March 1785 in his account of the settlement referenced 'to our good friends the French [departing] from Botany Bay in prosecution of their voyage' in Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' in LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961).

[8] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[9] See, e.g., conference presentations including: Thalia Anthony, 'Colonial Legal Histories and Indigenous Sovereignty'; Terri Janke, 'Protecting Indigenous Cultural Property'.

[10] Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961), 52.

[11] Ibid., 32.

[12] Sir Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8. According to Sir Ninian, the rule of law is not 'one simple ideal, but rather a group of vital principles'. Sir Ninian explains these principles to be:

> First, that '*Government should be under the law… law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to ordinary citizens*'.
>
> Second, '*those who play their part in administering the law, judges and other lawyers alike, should be independent of and uninfluenced by Government in their respective roles, so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase*'.
>
> The third and fourth principles are closely associated—here should be '*ready access to courts*' and the law should be '*certain, general and equal in operation*'.

[13] Baron de Montisquieu, *The Spirit of Laws* (Thomas Nugent trans, Cosimo Classics, 2011). In *The Spirit of Laws* Montesquieu described the three '*sorts of power*' in every government—the executive, legislature and judiciary. Montesquieu's approach was that liberty could only be achieved under the proper administration of the law by three separate arms of government:

> '*When the executive and legislative powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Where it joined… the life and liberty of the subject would be exposed to arbitrary control.*

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Nonetheless, the principle of the independence of the judiciary and the doctrine of the separation of powers did not find its way into the early legal and political structures of the colony. Nor were the laws of England always or consistently applied.

At this prestigious conference, I wish to explore briefly this story, that is the settlement of naval and military officers supervising approximately 750 convicts. The end point of the story, for the purposes of this article, is slightly more than 35 years later with the passing of the *New South Wales Act 1823*, which saw the introduction of a Legislative Council and Supreme Court for the colony.

1788—Introduction of the Common Law in New South Wales

The doctrine of *terra nullius* was embodied in Captain Arthur Philip's commission, delivered in 1787, in which New South Wales was described as 'uninhabited' and claimed as the King's 'Territory'.[14]

This characterization meant that the principle, which was of European feudal origin, that a person could not divest themselves of their allegiance to their sovereign unless becoming the subject of another sovereign, applied. According to that principle, a person '*... carried their allegiance with them as a personal law*'. It was a '*birthright*' and a '*measure of their duty*'.[15] In William Blackstone's words:

> '*...if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject are immediately in force... Such colonists carry with them only so much of English law as is applicable to their new situation and the conditions of an infant colony...*'[16]

The qualification in this last sentence played out almost immediately as I will shortly explain.[17]

Phillip's commission granted him 'all authority' and its public reading on February 7, 1788, also required by the terms of the commission, established the Crown's sovereignty '*by settlement*' in the colony.[18] '*Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by [the] common law*'[19] as it then was known in England.

In 1889, the Privy Council in *Cooper v Stuart*[20] upheld 1788 as the date from which English law applied in New South Wales, declaring the land to be a settled colony of Britain from the outset.[21] Some commentators contend that the common law had applied in New South Wales from the time of Cook, but that point takes us nowhere in the absence of any of the King's subjects until the arrival of Phillip and the First Fleet.

The challenge in *Cooper v Stuart*[22] was a land claim. In 1823, the Governor had made a land grant, subject to a Crown reservation, of land of more than 10 acres in any part of the grant, to be used for public purposes. Cooper, the successor of the grant, argued that the clause was invalid because it was in conflict with the law against perpetuities. The defendant, Colonial Secretary Sir Alexander Stuart, argued the law of perpetuities was not a part of the law of New South Wales in 1823.

The case was of significance at the time for these reasons: First, it set 1788 as the time from which the common law applied in New South Wales.

Second, in characterizing New South Wales as that type of colonial acquisition described as '*a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed*

[14] Captain Arthur Philip, *Draught Instructions*, 1787.

[15] 'Sir Victor Windeyer: A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) *University of Tasmania Law Review* 635, 636.

[16] Blackstone, *Commentaries*, Vol 1, 107.

[17] See, *Cooper v Stuart* (1889) 14 App Cas 286.

[18] Captain Arthur Phillip, Commission 2 APR 1787, in *Mabo and Ors v Queensland (No 2)* (1992) 175 CLR 1, 78 (Deane and Gaudron JJ). ('*Mabo*'); 'Sir Victor Windeyer: A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) *University of Tasmania Law Review* 635, 636.

[19] *Mabo* 175 CLR 1, 80 (Deane and Gaudron JJ).

[20] *Cooper v Stuart* (1889) 14 App Cas 286.

[21] (1889) 14 App Cas 286 at 291.

[22] (1889) 14 App Cas 286.

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to the British dominions',[23] it distinguished New South Wales from those colonies acquired by '*conquest or succession, in which there is an established system of law*'.[24] The relevance of this was that English law applied.

Next, the language of Lord Watson in *Cooper v Stuart*, to the land being '*practically unoccupied, without settled inhabitants or settled law*' may suggest that more was known of the indigenous population and their customs than a bare concept of *terra nullius* would imply.

Finally, it held that although the common law of England applied, the law of perpetuities did not, given the circumstances of the colony at the time—thus falling into the qualification to the feudal principle described by Blackstone, to which I have referred.

The relevance of *Cooper v Stuart*[25] to modern Australian jurisprudence is that it was the first in the line of cases that embedded into law the doctrine of Australia as *terra nullius*, at least '*in the sense that it was unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the colony vested in the Crown unaffected by any claims of the aboriginal inhabitants*'.[26] The case was overturned in *Mabo*.[27]

COMMISSIONS OF GOVERNANCE

Captain Phillip was given two commissions[28] although it is the second, given to him in April 1987 that anchored his almost singular authority in the colony over military personnel and civilians alike.[29] Of necessity, the second commission was countersigned by the King, as Captain Phillip, a naval officer, otherwise had no authority over the military. The commissions to successive Governors — Hunter, King, Bligh, Macquarie and Brisbane followed suit, establishing predominantly a military system of law in the colony, designed to establish British authority in the geographically isolated territory.[30]

Nonetheless, Governor Philip's personal autonomy in the colony was limited in three respects: he was answerable to directions and orders from Britain; he was eligible for recall to Britain at any point; and, he was liable to personal suit, should his actions ever be considered *ultra vires*, outside the bounds of the law.[31]

This last constraint followed in the wake of the English revolution, when the notion of personal liability developed to hold the executive to account in all colonial regimes. Before Captain Phillip set sail from England, the case of *Fabrigas v Mostyn*[32] had been heard in the English courts. In 1771, Mr Fabrigas, a Minorquan, was imprisoned by General Mostyn, the Governor of Minorca. Mr Fabrigas brought proceedings against the Governor in the English courts for assault, false imprisonment and banishment to a foreign country (the kingdom of Spain, where he was exiled for a year). According to Mr Fabrigas, he was subjected, without trial, to the worst prison available, with no bed and only bread and water. The Governor's defence was that the plaintiff was '*guilty of practices tending to sedition*' and further, his sole authority as Governor made it proper to inflict upon Mr Fabrigas the punishment of imprisonment.

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[23] *Cooper v Stuart* (1889) 14 App Cas 286, 291; See also J Stoljar 'Invisible Cargo: The Introduction of English Law in Australia' in JT Gleeson, JA Watson and RCA Higgins (eds) *Historical Foundations of Australian Law: Vol 1 Institutions, Concepts and Personalities* (The Federation Press, 2013), 194–211.

[24] *Cooper v Stuart* (1889) 14 App Cas 286, 291.

[25] (1889) 14 App Cas 286.

[26] *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 82 (Deane and Gaudron JJ).

[27] 'The islands of this continent were not terra nullius or "practically unoccupied" in 1788', Deane Gaudron JJ in *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 82–•83.

[28] In the first, dated October 12, 1786, Captain Phillip was '[appointed] to be Governor of all towns, garrisons, castles, forts and all other fortifications or other military works which now or may be hereafter be erected upon this territory'.

[29] The second commission of April 1787 commanded 'all officers and soldiers and all others for whom concern, to obey you…'

[30] Green, *The Provincial Governor,* Harvard Historical Series, Vol VII, in V Windeyer 'Responsible Government—Highlights, Sidelights and Reflections' *Journal of the Royal Australian Historical Society* 42 (1956) 257.

[31] Victor Windeyer, 'Responsible Government—Highlights, Sidelights and Reflections' *JRAHS* 42 (1957) 257, in Bruce Debelle AO QC (ed) *Victor Windeyer's Legacy: Legal and Military Papers* (2019), 39–40. *Fabrigas v Mostyn* (1773) Cowp 161; *Campbell v Hall* (1774) Lofft 655.

[32] (1775) 20 St Tr 82/ [1775] 98 ER 1021.

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The court heard testimony from both the Governor and Mr Fabrigas. The arguments of Fabrigas' counsel speak to the clash between popular conceptions of the rule of law which had already settled into place in English law and the opinion of an autocratic governor. The Governor had argued that:

> '*in this island of Minorca there is no law whatsoever; the form of government is despotism; that what may be called law, is the will and pleasure of the person who governs'*.[33]

Lord Chief Justice De Grey gave judgment in favour of Mr Fabrigas, leaving no ambiguity as to his opinion on this matter:

> '*...to maintain here that every governor in every place can act absolutely... is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable no-where*'.[34]

Despite the compelling terms of the judgment in *Fabrigas*, not only the Governors' commissions but the geographic isolation of New South Wales meant the early Governors of New South Wales retained significant personal legal authority in the day-to-day life of the colony and were often unquestioned as to the legality of their actions. [35]

In some respects, the autonomy of the Governor was aided by the manner in which the court system was established. Concurrently with Governor Phillip's commission, legislation was passed and letters patent issued in Britain whereby a Court of Criminal Judicature[36] and a Court of Civil Jurisdiction[37] were established in New South Wales. The Governor was responsible for all professional appointments to the Court, including judicial and jury appointments.

The judicial system was compromised from the outset. First, pursuant to the terms of Governor Phillip's commission all persons in New South Wales, including officers and soldiers were required to obey the Governor. There was no exemption for those appointed to one or other of the courts or during the time 'judicial duties' were being carried out.

Second, the courts were essentially military tribunals. For example, the first Court of Criminal Judicature[38] was presided over by a Judge-Advocate and six military officers personally selected by the Governor.[39] Historically, the Judge-Advocate was usually a member of Parliament, charged with the duty of advising the Crown and Commander-in-Chief on matters of military law, reviewing proceedings of courts martial and supervising the administration of the *Mutiny Act*.[40]

Collins, the first Judge-Advocate appointed in New South Wales was granted a commission which read:

> '*you are to observe and follow such orders and directions from time to time as you shall receive from Our Governor of said Territory and for the time being, or other your Superior Officer, according to the Rules and Discipline of War*'.[41]

These words featured in all civil and military commissions in New South Wales until the time of Governor Macquarie.[42]

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[33] [1775] 98 ER 1021 at [150].

[34] Ibid at [231].

[35] Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961), 42–43.

[36] 27 Geo III c 2 (1787).

[37] 'The First Charter of Justice for New South Wales', *Letters Patent* (2 April 1787) in JM Bennett and Alex C. Castles (eds), *A Sourcebook of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Sydney, 1979), 19.

[38] Statute 27 Geo III c 2, 'the person to be appointed Governor… to convene from time to time as occasion may require a Court of Judicature for the trial and punishment of all such outrages and misbehaviours as if committed within this realm would be deemed and taken, according to the laws of this realm, to be treason or misprision thereof, felony or misdemeanour'.

[39] 'Sir Victor Windeyer: A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) *University of Tasmania Law Review* 635, 653.

[40] *Mutiny Act 1797* (Imp) 37 Geo 3 c. 70.

[41] *Historical Records of Australia,* Series IV, Vol 1, 171 (24 October 1786), in 'Sir Victor Windeyer: A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) *University of Tasmania Law Review* 635, 643–644.

[42] 'Sir Victor Windeyer: A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) *University of Tasmania Law Review* 635, 644–645.

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The Governor was the sole source of appeal for all matters under £300. The time for appeal in a civil matter was 8 days, or 14 days in the case of matters exceeding £300 where the appeal lay to the Privy Council, a striking example of efficiency in the administration of justice, which modern courts would undoubtedly desire to emulate![43]

This right of appeal gave the Governor extensive power over the population inhabitants—almost unlimited given the unlikelihood of a convict being involved in a dispute concerning a sum greater than £300. To this there is to be added the law of attainder. Any convict whose sentence was commuted from death to transportation was '*civilly dead*' and therefore unable to hold property, give evidence in court, or bring a civil suit. [44]

The doctrine of attainder remained law in New South Wales until 1955 when capital punishment was abolished. It was last applied in the case of Darcy Dugan, a notorious felon convicted of the capital offence of attempted murder in 1951, whose death sentence had been commuted to penal servitude for life. Whilst serving that sentence, Dugan brought defamation proceedings against a local newspaper. The action was dismissed on the basis that Dugan was subject to the law of attainder.

Another power vested in the Governors was the authority to exercise the Royal Prerogative of Mercy, a power retained to this day, and to deliver Royal Pardons to those convicted of offenses, other than in the cases of treason and wilful murder. The Governors had power, in respect of these offenses, to stay execution until the exercise (or refusal) of the Royal Pardon by the King had been signified.[45]

The governors of New South Wales were also personally vested with a unique proprietary interest—the labor of convicts. In commuting a sentence to transportation, the interest in the labor output of each convict was assigned personally to the Governor.[46] As a property right it was capable of re-assignment and was used to control and distribute convict labor in the colony. The Governor could choose either to assign the labor of a convict to a private individual or retain it for the government's use. An assignee of convict labor was correspondingly vested with a property right in the bodily labor of convicts, redeemable against the world.

John Grant, a convict (albeit an educated gentleman prior to his transportation), who was moved from Sydney to Norfolk Island after falling foul of Governor King, wrote of the conflict between the assumed rights of free born English citizens and the legal mechanism of assignment. Grant's poetic reference to the Magna Carta clearly was a stinging rebuke to the exercise by the Governor of his 'right of property' over convicts.

He wrote:

'*...The 'Magna Carta' our forefathers rear'd*
That brightest jewel on the British Crown
Ye trample on!
...
When shall All cry 'Britannia rules the Waves?
And Free-born Britons are no longer Slaves?'[47]

THE EARLY COLONIAL COURTS

As might be expected amongst a principally convict population, the first two cases conducted in the colony were criminal cases—both being held within weeks of the convicts having been landed on shore. On February 11, 1788, Judge-Advocate, Collins and six military officers of the Court of Criminal Jurisdiction heard a number of cases involving misdemeanour offences. The Court was the sole trier of law and fact. The Judge-Advocate did not have a superior vote and thus could be overruled by the military officers. Indeed, Collins, the first Judge-Advocate was himself a military officer subject to the orders of his superiors. Guilt was determined in each matter by casting votes — a majority of four would return a guilty verdict; five, if a capital offence was involved.

[43] Ibid., 648.
[44] Blackstone, *Commentaries*, 4, 380.
[45] Captain Watkin Tench, 'A Narrative of the Expedition to Botany Bay' in LF Fitzhardinge (ed) *Sydney's First Four Years* (Angus and Robertson, 1961), 42.
[46] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995), 24. *Re Jane New* [1828] NSWSupC 11.
[47] John Grant in David Neal *The Rule of Law in a Penal Colony*, 61. (*Peel Papers*).

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Three sentences were imposed from this first sitting of the court. The first, 150 lashes to a man convicted of assaulting a sentry. To the second convict, for stealing some biscuit from a fellow convict, a week's confinement on bread and water alone. The third offender was the most fortunate — his sentence of 50 lashes for stealing a plank was pardoned under the Royal Prerogative by Governor Phillip — there is no record of the reason why.[48]

The second convict's 'confinement' was an island in the middle of Sydney Harbour, where Fort Denison stands, now a favourite tourist destination. The terms of confinement on bread and water is the origin of the island's nickname 'pinchgut'. Sydney's premier chamber opera ensemble, the Pinchgut Opera presenting music from the 17th and 18th century draws its name from the convict island, as *'it wanted something recognisably Sydney, easy to remember and as a reminder of our tight budgets and humble beginnings'*.[49]

The second criminal case, an instance of theft from the public store at the end of February 1788, provides an insight into the colony at its inception, particularly in relation to the care of the convict population.[50] Shortly after all convicts had been disembarked at Sydney Cove, they were provided with the same food rations as the soldiers and officers, (although provision for females was 2/3 rations) other than for the supply of alcohol. As Judge Advocate Collins is recorded as saying, this generous provision to the convicts made the theft from the colony's stores 'the more atrocious'.[51]

Notwithstanding that the convicts were well provisioned, capital and harsh corporal punishment was common. We know from early reported cases that sentences imposed for infractions of the law included: one death sentence, carried out on the same day in front of the convict population, another sentence of 300 lashes, but pardoned by the Governor. A bizarre use the Royal prerogative occurred, when one offender was pardoned on condition of becoming the public executioner.

Reports vary as to the effectiveness of the punishments meted out by the courts in these early days. Some observers lamented that the punishments were too liberal and thus failed to have the necessary deterrent effect. However, Sir Roger Therry, an English lawyer commissioned to come to Sydney to serve on the Court of Request and Small Debts and who subsequently became a member of the Upper House, and later again a member of the Supreme Court of Queensland, expressed a more liberal philosophy. Whilst acknowledging that some persons would only ever by controlled 'by the use of the lash' he nonetheless considered that its use:

> '*on all men however different in temperament, always appeared to me a most reprehensible mode of punishment. It was not only ineffectual for the reformation of the man, but in many instances, it made him hardened and reckless…Bushrangers it is known, have been the terror of New South Wales. Of some hundreds of them who have passed through our criminal courts, I do not remember to have met with one who had not been over and over again flogged before he took to the bush*'.

The Court of Civil Jurisdiction authorized by the First Charter of Justice was constituted by the Judge-Advocate and two others appointed by the Governor. It heard most common law matters in the colony, with remit over all disputes concerning Lands, Houses, Tenements and Hereditaments, Debt, Contract, Trespasses, and all personal pleas.[52] An appeal lay to the Privy Council in matters over £300.

The first civil case was that of Henry and Susannah Cable and their missing luggage.[53] For visitors from the United Kingdom, it may have a resonance with Judge Peter Smith's concern for his lost luggage.[54] Cable's case is a 'sweet romantic story' of two convicts, sentenced to death in Norwich in 1783 for house-breaking, their sentences

[48] David Collins 'An Account of the English Colony in New South Wales' (1756–1810)—references the proceedings of the court but makes no mention of the reason for the Governor's pardon, only that it occurred.

[49] https://www.pinchgutopera.com.au/

[50] David Collins 'Chapter 1: Arrival of the Fleet at Botany Bay' in *An Account of the English Colony in New South Wales (1756–1810)* (University of Sydney, 2003).

[51] Those rations were, per week: 7 lbs of biscuit, 1 pound of flour; 7 pound of beef or 4 pound of pork; 3 pints of pease; and 6 ounces of butter: David Collins 'Chapter 1: Arrival of the Fleet at Botany Bay' in *An Account of the English Colony in New South Wales (1756–1810)* (University of Sydney, 2003).

[52] 'The First Charter of Justice for New South Wales', *Letters Patent* (April 2, 1787) in J.M. Bennett and Alex C. Castles (eds), *A Sourcebook of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Sydney, 1979), 19.

[53] *Cable v Sinclair* [1788] NSWSupC 7.

[54] *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch).

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being commuted to transportation for the term of 14 years, a baby born in jail, a kind gaoler who managed to get them onto the same transport ship, and a public subscription, which is an early example of 'crowd funding' raising monies for a package of baby clothes and other goods.[55]

Upon arrival in the colony, the parcel was missing. As convicted felons whose sentences were commuted from death to transportation, the law of attaint would ordinarily apply. Nonetheless, the Cables brought an action against Sinclair, the captain of their transport vessel, for their missing package. The court accepted the suit and found in their favor, awarding £20 damages in compensation for their loss.[56]

It would seem that the success of their suit was attributable to that great legal tradition of being honest and only providing such information as is necessary. In what we would now call the 'pro forma' or standardized writ, the words 'free settlers', which would have represented that they were entitled to bring the claim, was crossed out. However, as there was no requirement in the form of writ to specify any other status, they made no statement that they were convicts transported under a commuted death sentence.

As they were illiterate it may be that their apparent canniness had in fact been supported by Reverend Johnson, who had assisted them in England, and, it is sometimes suggested, encouraged them to bring the suit and who sat on the Civil Court that decided their claim.[57] Perhaps, however, it was the ignorance of the non-legal adjudicative panel which meant that their claim went forward with an unquestioning acceptance of their standing to sue. Such was the operation of the law in the first days of the colony.

The operation of the courts in the early years—and indeed up to the establishment of the Supreme Court in 1823 was the subject of heavy criticism due to their perceived lack of impartiality. The last Judge-Advocate, John Wylde, remarked on the bias involved in selecting military officers for court service. Not only were officers selected solely by the Governor for each sitting of the court, each officer was entirely dependent upon the Governor for promotion and thus, it was suggested, could be relied upon to deliver 'appropriate' verdicts, that might be thought would satisfy the Governor.[58]

Appointment to both the civil and criminal courts was of '*fit and proper persons*' at the Governor's pleasure. This was particularly problematic given the societal divide that soon arose between those in positions of authority, commissioned into office in New South Wales or free settlers who had emigrated to the colony, on the one hand, and those convicts who had been emancipated and had thus gained their freedom on the other. Tensions developed between these two groups as freed convicts sought to have greater recognition before the law, but who were essentially at the mercy of the ruling class.[59]

However, the principal issue in the civil jurisdiction was a steady rise in the number and complexity of cases and courts that were deficient in the legal expertise necessary to answer the intricate questions of law that arose.[60]

The first professional judicial officer in New South Wales, Judge-Advocate Ellis Bent did not arrive until 1810, more than two decades after the colony was established. Bent clashed with Governor Macquarie over the course of his term, both in respect of the Governor's accountability to the law and the role of the judiciary. To our international visitors, Macquarie is a revered figure in New South Wales colonial history. In modern terms he would be described as an 'infrastructure governor'. Many of our historical buildings date back to his time. In 1814, Governor Macquarie had proposed a number of orders imposing a scheme of duty and penalty payments for ships using Sydney Harbour for trade. Whilst the Governor had the power to introduce regulatory schemes, as his power derived from the Crown, he did not have the authority to legislate, which derived from Parliament.

[55] The newspaper story reporting the reuniting of Henry and Susannah in the *Norwich Chronicle* attracted the attention of Lady Cadogan, who organized a public subscription which yielded 20 pounds—enough money to buy clothes and other items for their life in NSW. FN #5, Ch 1—Bruce Kercher 'An unruly child' p. 4.

[56] *Cable v Sinclair* [1788] NSWSupC 7, [9].

[57] The original manuscript of the court proceedings bears only 'x' marks where Henry and Susannah Cable were required to sign, *Cable v Sinclair* [1788] NSWSupC 7, [9].

[58] Alex C. Castles, *An Australian Legal History* (Sydney, 1982), 53.

[59] These tensions are no better represented than in the Emancipists' petition for equal representation in courts—evinced most clearly in their campaign for inclusion in jury selection. Their petition of 1819 to the King, signed by 1261 'Merchants, Settlers & c' is clear evidence of this deepening tension: *Historical Records of Australia,* Volume I, X, 56–57.

[60] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), 85–104.

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Macquarie sent the Judge-Advocate a draft of his proposed regulations, asking Bent to re-organize them in a legal format for distribution. Bent considered that the sheer number of regulations had a legislative effect, and further, considered some to be specifically inconsistent with English trade legislation and were thus *ultra vires*.

Macquarie's response was that local circumstances necessitated the regulations and therefore they were to be actioned as being within his remit. Bent's response is well recorded:

> '*I hope that I am not presuming too much when I express a humble confidence that it never could be intended that so vast a power should be placed in the hands of any one man without the smallest provisions against its abuse; a power which, as far as this Colony is concerned, and under the bare pretence of local circumstances, I will be bold to say, sets the Governor of New South Wales above the Legislature of Great Britain, and at once resolves the rule of action here into the mere will of the Governor, a will not subjected to any previous advice or control*'[61]

To break the impasse, Macquarie appealed to the Colonial Office in London and found support in Lord Bathurst, who openly rebuked the Judge-Advocate, informing Bent he considered it:

> '*particularly incumbent on [him] to uphold the Governor's Authority and to set an Example of due obedience to it: for there could not exist a greater Misfortune to a Settlement… than an Appearance of Misunderstanding between the Governor and [Judge-Advocate], or a Suspicion that [Bent] were disposed to question or disobey his Orders*'.[62]

In 1814 the Second Charter of Justice was delivered to New South Wales. It sought to address the issues that had arisen in the colony—amongst them, the subordination of the courts to the governor's personal discretion. It did this by establishing three new courts for NSW—a Supreme Court, a Governor's Court and a Lieutenant-Governor's Court, the latter to administer the law in Van Dieman's land, now Tasmania.[63] Whilst this was an improvement on the previously existing structure, the subordinate position of the courts to the executive in New South Wales remained.

Bent was dismissed by Bathurst in 1816. Nonetheless, Bent's clashes with Governor Macquarie laid the foundation for John Thomas Bigge's inquiry into British policy in New South Wales. Bigge's report spoke in great depth of the Governors' clashes with the legal system and the inadequacy of the courts as they existed under the Second Charter of Justice. He emphasized the need for an independent judiciary, with an appellate jurisdiction separate from the Governor.[64] It was this report that prompted the drafting of the New South Wales Act of 1823.[65]

THE SUPREME COURT OF NEW SOUTH WALES

The New South Wales Act established a Supreme Court for New South Wales and a Legislative Council. In so doing, it provided accountability measures for each arm of government in the colony and cured the lack of legislative power that had provoked Macquarie's quarrel with Bent.[66]

It was in this context that Jane New brought a claim of Habeas Corpus before the court. Jane New was a convict in Van Dieman's land. After serving part of her sentence, Jane was authorized by the Lieutenant Governor of Van Dieman's land, Arthur, to leave the colony and come with her husband to Sydney. To facilitate this movement, Jane was formally assigned to her husband, under the process of assignment previously described.[67]

Whilst living in Sydney, Jane was charged, tried, and convicted under a repealed statute for stealing silk goods from a proprietor, sufficient of itself set aside the conviction. However, it was also found that Jane was

[61] Bent to Bathurst, 1/7/1815, *Historical Records of Australia,* Volume VI, No 1, 149.

[62] Bathurst to Ellis Bent, 11/12/1815, *Historical Records of Australia,* Volume VI, No 1, 170, [172].

[63] 'The Second Charter of Justice for New South Wales', *Letters Patent* (4 February 1814) in J.M. Bennett and Alex C. Castles (eds), *A Sourcebook of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Sydney, 1979), 31.

[64] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), 105.

[65] 4 Geo. IV c 96.

[66] 4 Geo. IV c 96, s 24.

[67] *Re Jane New* [1828] NSW SupC 11.

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not convicted upon clear and conclusive testimony. Jane brought a suit for Habeas Corpus. Seventeen affidavits were submitted to the court giving testimony of Jane's innocence. Jane was discharged with a declaration of wrongful conviction.[68] Yet, upon her discharge, Jane New was 'dispatched and confined to' the female factory, under order of the Governor—Jane's assignment to her husband nullified by the Governor's power to revoke assignment 'at will'.[69]

In response to Jane New's claim of Habeus Corpus regarding the Governor's powers of assignment, Chief Justice Forbes' excoriated the Governor on the arbitrary removal of a convict from a master. He equated the powers of assignment to the discretion exercised by a Court of Justice, '*to be guided by Law — it must be governed by rule, not by humour, it must not be arbitrary, vague, fanciful, but legal and regular*',[70] requiring '*solemn enquiry and adjudication by means known to the Law of the Land*'.[71]

Thus, in a strange twist, the propriety right over the labor of convicts was the basis for the first judicial statement in the colony of notions that we would now understand to be integral to procedural fairness, itself a fundamental integer of the rule of law.

EARLY LEGISLATION PASSED BY THE LEGISLATIVE COUNCIL

By 1821 the colony was a thriving hub of trade, commerce, farming, and land ownership. However, its 'currency' was a combination of:

> '*promissory notes issued by a variety of businessmen for as little as three pence, stores receipts issued by commissaries, Spanish dollars, Indian rupees, holey dollars and dumps - introduced by Governor Macquarie in 1813, and British copper coins, all of which had to be exchanged for 'sterling' Commissariat Bills on the British Treasury to make overseas payments…*'[72]

There had been an attempt to make the Spanish dollar,[73] which had been the currency of reference for world trade between the sixteenth and eighteenth centuries, the basis of the New South Wales monetary system.

However, that came to an end with the passing of the first Act by the Legislative Council the C*urrency Act 1824*,[74] which allowed for the exchange of the Promissory Notes in Sterling in place of the Spanish dollar, thereby standardizing New South Wales' currency.

It was not until 1825 that the first significant tranch of legislation was passed by the new Legislative Council. Twenty-two Acts were passed in that year. Two Acts granted citizenship, or 'naturalization' to two prominent traders who brought economic growth to the colony—Prosper de Mestre[75] and Timothy Goodwin Pitman.[76]

One Act authorized the appointment of an additional judge to the Supreme Court—again, indicative of the growth of the population and number of matters being heard by the court.[77] Another Act laid down requirements for the registration of deeds and conveyances, with the goal of preventing fraudulent transactions.[78] Three more Acts attempted to reform the collection of debts in the colony—one relieving those imprisoned for debt, and two making provision for the more efficient recovery of debts.[79]

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[68] *Re Jane New* [1828] NSW SupC 11.

[69] IX Geo IV. LXII sec. 2, in *Re Jane New* [1828] NSW SupC 11.

[70] Lord Mansfield, *The King v Willis* 4 Burr. 2539, quoted by Forbes CJ in *Re Jane New* [1828] NSW SupC 11.

[71] *Re Jane New* [1828] NSW SupC 11 (Forbes CJ).

[72] Lieutenant Colonel T C Sargent (Ret'd) 'The British Garrison in Australia 1788–1841—the Commissariat' *Sabretache Vol XLI* (June 2000), 15–23.

[73] The Spanish dollar, also known as the peso or a 'piece of eight' gained literary notoriety in Robert Louis Stevenson's *Treasure Island.* You may remember Captain Flint's parrot's catch cry '*pieces of eight, pieces of eight!*': Robert Louis Stevenson, *Treasure Island* (London, Cassell and Company, 1883), in Shepard Pond, 'The Spanish Dollar: The World's Most Famous Silver Coin', *Bulletin of the Business Historical Society* 15(1) (Harvard, 1941), 12–16.

[74] *Currency Act 1824* (NSW), passed September 28, 1824.

[75] No XIII (July 5, 1825).

[76] No XVII (August 30, 1825).

[77] No XVI (August 17, 1825).

[78] XXII (November 16, 1825).

[79] No VII, XI, XIV.

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There was an Act to regulate postage in New South Wales and a total of four Acts to regulate the grant of licenses for the sale of spirits and liquors in New South Wales—an important measure for the population—and an area of economic growth for emancipated convicts. Convict transportation was still very much in force in 1825 and an Act to prevent both the harboring of runaway convicts and the encouragement of tipping or gambling was also on the list of those passed in 1825.[80]

The picture these Acts draw is one of growth, a developing community and a desire for the law to reflect and make provision for personal and collective economic growth and development—quite different from the focus of the original commissions and letters patent drafted for a penal colony.

CONCLUSION

The commissions of the early Governors provided significant personal authority, deemed necessary for the administration and order of a penal colony. Within just over a quarter of a century, however, the colony of New South Wales was developing into a modern liberal democracy. The structure of executive, legislative, and judicial power had moved from a focus on maintaining order in a penal colony based mostly on military principles, '*toward the facilitation of liberty*' as Montesquieu would say. As the essential aspects of the rule of law became embedded in the legislative, executive and judicial systems the way was paved for New South Wales to transition from a penal colony to a free society.[81]

[80] No III.

[81] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), 84.

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