

WRITINGS ON  
AUSTRALIA

VI.

A PLEA FOR THE CONSTITUTION

JEREMY BENTHAM

edited by

TIM CAUSER AND PHILIP SCHOFIELD

The Bentham Project 2018

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### *The Collected Works of Jeremy Bentham*

The new critical edition of the works and correspondence of Jeremy Bentham (1748–1832) is being prepared and published under the supervision of the Bentham Committee of University College London. Eight volumes of the new *Collected Works*, five of correspondence, and three of writings on jurisprudence, appeared between 1968 and 1981, published by Athlone Press. Further volumes in the series since then are published by Oxford University Press. In spite of his importance as a jurist, philosopher, and social scientist, and leader of the utilitarian reformers, the only previous edition of his works was a poorly edited and incomplete one brought out within a decade or so of his death. The overall plan and principles of this edition are set out in the General Preface to *The Correspondence of Jeremy Bentham*, vol. I (Athlone Press), which was the first volume of the *Collected Works* to be published.

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## EDITORIAL INTRODUCTION

In ‘Letter to Lord Pelham’,<sup>1</sup> Bentham examined New South Wales ‘on the question of *policy*’, while in ‘A Plea for the Constitution’ he examined ‘the question of *law*’.<sup>2</sup> In ‘A Plea for the Constitution’ Bentham sought to demonstrate that the colony had been illegally founded, and was accordingly much more circumspect about distributing it than the first two ‘Letters to Lord Pelham’.

By late August 1802 Bentham had completed a version of ‘A Plea for the Constitution’, since on 28 August 1802 Samuel Romilly<sup>3</sup> returned him a copy of the work, commenting: ‘What you state respecting Botany Bay has very much astonished me. It has the more astonished me because I take the law upon the subject to be exactly as you have stated it’.<sup>4</sup> The following day Bentham told Étienne Dumont<sup>5</sup> that he had ‘ready for the press’ a pamphlet describing the illegalities of the colony, and of which the title was ‘The True Bastille, shewing the outrages offered to Law, Justice and Humanity by Mr Pitt and his Associates in the foundation and management of the penal Colony of New South Wales’.<sup>6</sup> He also claimed ‘Romilly has revised [it] for me’.<sup>7</sup>

On 3 September 1802 Bentham explained to his step-brother Charles Abbot, Speaker of the House of Commons, that the ‘researches for the purpose of the Narrative I have of late been employed in drawing up, containing the history of my transactions with government on the Penitentiary business’ (i.e. ‘A Picture of the Treasury’) had led him ‘to the subject of *New South Wales*’. To Bentham’s ‘unspeakable astonishment, as well as that of my eminently learned friend’, namely Romilly, he had made a number of ‘discoveries’.<sup>8</sup> First, ex-pirees had been ‘forcibly “detained”’ in the colony beyond their sentences of transportation, ‘not *individually* only, and for *special* cause—but *collectively*, and for an

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<sup>1</sup> Pelham bio

<sup>2</sup> Bentham to Charles Abbot, 3 September 1802, *The Correspondence of Jeremy Bentham*, vol. vii, ed. J.R. Dinwiddy, Oxford, 1988 (CW), p. 105.

<sup>3</sup> Samuel Romilly (1757–1818), lawyer and politician, Solicitor General 1806–7, was a friend of Bentham.

<sup>4</sup> Romilly to Bentham, 28 August 1802, *Correspondence* (CW), vii. 92.

<sup>5</sup> Pierre Étienne Louis Dumont (1759–1829), who produced five recensions of Bentham’s writings between 1802 and 1828

<sup>6</sup> The marginal summary sheets for ‘A Plea for the Constitution’, at UC cxvi. 269–70, carry this title.

<sup>7</sup> Bentham to Dumont, 29 August 1802, *Correspondence* (CW), vii. 96.

<sup>8</sup> Bentham to Abbot, 3 September 1802, *ibid.*, p. 102.

indefinite time—and with the evident intent of adding to the expired *legal* punishment, a *perpetual illegal* one’. This violated the Habeas Corpus Act of 1679<sup>9</sup> which gave protection against ‘illegal imprisonments beyond the seas’, and provided for compensation to those subjected to such imprisonment of treble costs and damages of no less than £500. Any person responsible for such illegal imprisonment was liable to ‘incur and sustain the pains, penalties and forfeitures’ provided for by the Statute of Praemunire of 1392,<sup>10</sup> namely confiscation of their property and possible life imprisonment. Second, transportees’ sentences had been illegally modified in the colony itself. Third, individuals sentenced to seven years’ transportation who had served upwards of five years on the hulks had nevertheless been transported, and then illegally detained in the colony when their sentences had expired. Fourth, ‘whether by negligence, or (as the *repetition* would indicate) by design’, the paperwork detailing the length of each transportee’s sentence had not always been transmitted to New South Wales, and so when individuals claimed that their sentences had expired, the presumption instead of being ‘*in favorem libertatis*, has been in *favorem servitutis*’, with the claimants being forced to continue on the footing of convicts until the relevant papers had arrived in the colony. Fifth, Bentham contended that successive governors of New South Wales had exercised ‘an absolute and illegal power of legislation’ which had been countenanced by ‘persons here at home’. Sixth, all colonial office-holders, from the governor down, were currently ‘exposed to ruin by actions and other persecutions’.<sup>11</sup>

Bentham had ‘set forth in detail’ these arguments ‘in a paper, which, though in substance a law argument, wears at present the form of a letter addressed to Lord Pelham’, though the ‘spirit it is written in, is that which would naturally be called forth by the enormities displayed in it, and is purposely preserved, in the view of exciting in the public mind that attention which would be necessary to the applying to the grievance whatever may be the proper remedy’. According to Bentham, the work then consisted of 56 manuscript pages, and he had shown it to no-one other than Romilly.<sup>12</sup>

In early February 1803 Bentham had prepared a contents page and a two-page

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<sup>9</sup> 31 Car. II, c. 2, § 12.

<sup>10</sup> 16 Ric. II, c. 5.

<sup>11</sup> Bentham to Abbot, 3 September 1802, *Correspondence (CW)*, vii. 102–3. Original emphasis.

<sup>12</sup> *Ibid.*, p. 104.

preface, with the work then having the title of ‘The British Constitution Conquered in New South Wales’. He showed the preface to Samuel Parr,<sup>13</sup> an associate of the leading Whig Charles James Fox,<sup>14</sup> and to Samuel Romilly who, on 15 February 1803, told Bentham that he did not like it, and ‘should vote for omitting it altogether. There is too much levity in it especially as it forms a very striking contrast with the proposed title’.<sup>15</sup> Romilly did, however, on 5 March 1803 show the preface to Spencer Perceval,<sup>16</sup> the Attorney General, who was ‘shocked very much by the *title*’, and stated to Romilly:

If I were disposed to interest myself to have the Panopticon established and to have him paced at the head of it and I should really be glad to do it if I saw a proper Opportunity how could I recommend to a Secretary of State to place in such a Situation a Person who had written such things of him or his predecessors.<sup>17</sup>

Bentham described the effect of the preface on Perceval to Charles Bunbury, who on 8 March 1803 suggested to Bentham that he consider ‘the bad Effects which might ensue from [‘A Plea for the Constitution’] *being seen* by those who are inclined to be *hostile*; and whether it would not be prudent, to let it lye *dormant*, and *not* be seen at all, whilst your Friends are trying to assist you [regarding the panopticon], and have any Hopes of success’.<sup>18</sup> In reply Bentham thanked Bunbury, noting that, ‘The caution was what had occurred to myself, and has been religiously observ’d’.<sup>19</sup>

Though Bentham had hoped to use the legal arguments made in ‘A Plea for the Constitution’ to force Perceval into becoming ‘the arbiter of fate’ in regard to the

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<sup>13</sup> Parr to Bentham, 8 February 1803, *ibid.*, p. 197. Parr (1747–1825) was a schoolmaster, writer, and Church of England clergyman. The manuscripts, in the hand of a copyist with Bentham’s autograph corrections, are at UC cxvi. 275. The ‘Preface’ was not included in the printed text, but is presented here as an appendix.

<sup>14</sup> Charles James Fox (1749–1806), Foreign Secretary 1782, 1783, 1806.

<sup>15</sup> Romilly to Bentham, 15 February 1803, *Correspondence (CW)*, vii. 201.

<sup>16</sup> Spencer Perceval (1762–1812), Solicitor General 1801–2, Attorney General 1802–6, Chancellor of the Exchequer 1807–9, and leader of the administration as First Lord of the Treasury 1809–12.

<sup>17</sup> Romilly to Bentham, 5 March 1803, *Correspondence (CW)*, vii. 207.

<sup>18</sup> Bunbury to Bentham, 8 March 1803, *ibid.*, p. 214.

<sup>19</sup> Bentham to Bunbury, 8 March 1803, *ibid.*, p. 214.

panopticon,<sup>20</sup> he failed to secure Perceval's backing. The work had evidently been printed by early April 1803 when Bentham gave a copy to David Collins, prior to his departure for New South Wales to lead an expedition to found a new penal settlement at Port Phillip, of which he had been commissioned the Lieutenant-Governor. Bentham told Collins that 'A Plea for the Constitution' would 'show you the gunpowder you are treading upon', and that, 'If you feel bold enough to continue in your command after looking at it, you will at least feel it prudent to insure your life in some good office.'<sup>21</sup>

On 2 May 1803, frustrated at the lack of progress in regard to the 'storming party' of supporters of the panopticon being assembled by Bunbury, Bentham wondered whether it was 'high time' finally to publish both 'Letters to Lord Pelham' and 'A Plea for the Constitution', provided 'no good is to be got by forbearance'.<sup>22</sup> On 8 May 1803 Bunbury hoped Bentham would not publish the works until he had seen Pelham again,<sup>23</sup> but when Bunbury read 'A Plea for the Constitution' for the first time in June 1803 he was far from relaxed about it being published:

The more I read of 'The Plea for the Constitution' the more desirous am I that it should *not* be published: It will bring upon you Enemies irreconcilable, and procure you Friends only amongst the Malefactors of New South Wales. It's Ingenuity, and Acuteness render it more objectionable, for the sharper the Knife, the Deeper the Wound. If you can't write down the Colony of Thieves at Port Jackson, and annihilate it by Argument, don't crush it by Rebellion—do not, in Anger, say—*Flectere si nequeo Superos, Acheronta movebo*.<sup>24</sup>

Bunbury met with Pelham on 13 June 1803, where Pelham heard his arguments in favour of the panopticon 'very patiently, and seemed to assent to several of them, but at last he

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<sup>20</sup> Bentham to Romilly, 7 March 1803, *ibid.*, p. 211.

<sup>21</sup> Bentham to Collins, 5 April 1803, *ibid.*, p. 222.

<sup>22</sup> Bentham to Bunbury, 2 May 1803, *ibid.*, 225.

<sup>23</sup> Bunbury to Bentham, 8 May 1803, *ibid.*, 225–6.

<sup>24</sup> ie 'If I am unable to bend the upper world, I will move the lower', a quotation from Virgil, *Aeneid*, VII. 312: see Bunbury to Bentham, 6 June 1803, *Correspondence (CW)*, vii. 236.

said, that the Judges did not appear to wish it to be carried into Effect, and he did not suppose Mr Addington would furnish the money necessary'.<sup>25</sup> Bentham's panopticon penitentiary scheme was effectively finished and, like the 'Letters to Lord Pelham', Bentham then set aside 'A Plea for the Constitution'.

The text of 'A Plea for the Constitution' presented here is based on the version which Bentham prepared and had printed by Wilks and Taylor of Chancery Lane, for Mawman, Poultry, and Hatchard of Piccadilly, in 1803.<sup>26</sup> It was first published, unaltered, in 1812 as a constituent part of *Panopticon versus New South Wales*,<sup>27</sup> and was subsequently reproduced in the Bowring edition of Bentham's works.<sup>28</sup>

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Thanks are due to University College London Library's Special Collections for

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<sup>25</sup> Bunbury to Bentham, 15 June 1803, *Correspondence (CW)*, vii. 240.

<sup>26</sup> On 24 February 1803 Messrs Brooke and Clarke, law booksellers at Bell Yard, Lincoln's Inn, told Bentham, that in regard to 'Plea for the Constitution', 'On a reperusal of the Title of the Publication to which You did us the favour yesterday to propose to affix our names as Publishers, it occurs to us that the Object of the Work in question is rather of political concern and very proper matter for discussion in Parliament, but does not afford any topics of legal investigation which are the peculiar objects of our business to publish.— We therefore have to request your permission to decline the favour intended us which will be so much better placed and more acceptable in other hands: see *Correspondence (CW)*, vii. 206.

<sup>27</sup> *Panopticon versus New South Wales, or, The Panopticon Penitentiary System, and the Penal Colonization System, Compared: Containing, 1. Two Letters to Lord Pelham, Secretary of State, Comparing the Two Systems on the Ground of Expediency. 2. Plea for the Constitution: Representing the Illegalities Involved in the Penal Colonization System*, London, 1812.

<sup>28</sup> Bowring, iv. 249–84.

permission to publish material from its collection of the Bentham Papers.

No volume of Bentham's *Collected Works* is produced in isolation. We are grateful to Professor Margot Finn, the co-investigator on *Convict Australia and Utilitarianism*, for her support and advice. Our Bentham Project colleagues Dr Oliver Harris, Dr Michael Quinn, Dr Chris Riley, Dr Katy Roscoe, and Dr Louise Seaward have been a never-failing source of support, expertise, and encouragement, and we are grateful for the support of our colleagues in UCL's Faculty of Laws. Dr Roscoe has provided invaluable assistance in checking the text and in researching the annotation. We would like to acknowledge the help received in the elucidation of certain references in the text from Dr Margaret Makepeace, Dr Quinn, Professor Harriet Ritvo, and Dr Seaward.

Grateful acknowledgment is hereby made to the authors, editors, and translators of standard reference works, such as the *Oxford Dictionary of National Biography*, the *Australian Dictionary of Biography*, and the *Loeb Classical Library*, and digital resources such as the *Old Bailey Online*, the *Digital Panopticon*, the *Dictionary of Sydney*, and the *Decisions of the Superior Courts of New South Wales, 1788–1899*, without whose scholarship the annotation of a volume such as this would hardly be feasible.

Finally, we would like to warmly acknowledge the contributions of the volunteers of *Transcribe Bentham*, the award-winning crowdsourced transcription initiative launched in 2010 by the Bentham Project in collaboration with UCL Library Services, UCL Centre for Digital Humanities, UCL Digital Media Services, and the University of London Computer Centre. *Transcribe Bentham* has been generously funded by the AHRC, the Andrew W. Mellon Foundation, the European Commission's Seventh Framework and Horizon 2020 programmes, and UCL. Though this text is based on a work prepared and printed by Bentham, a survey of relevant manuscripts was required and we would like to place on record our sincere thanks to the following *Transcribe Bentham* volunteers: Peter Hollis; Chris Riley; Laura Terry.

The text presented below is a preliminary version, in that the authoritative version will appear as part of a complete edition of Bentham's *Writings on Australia* for *The Collected Works of Jeremy Bentham*, with a full Editorial Introduction, name and subject indices, finalized annotation, and working cross-references. The volume is due to be published in 2020 by the Clarendon Press.

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September 2018

## A NOTE ON THE PRESENTATION OF THE TEXT

The present edition of a ‘A Plea for the Constitution’ corresponds as closely as possible with the style and conventions, including spelling, capitalization, punctuation, and the use of italics and other devices, of the text printed in 1803. There are some minor variations: double inverted commas indicating quotations are replaced here with single inverted commas (consequently, single inverted commas usually indicating quotations within quotations are replaced with double inverted commas); the symbols used in the 1803 text to indicate Bentham’s own footnotes and subfootnotes are replaced here, respectively, with superscript letters and italicized superscript letters (editorial footnotes are indicated by superscript numerals); and some minor errors of typography and punctuation have been silently corrected. Editorial apparatus is confined to the use of square brackets to indicate editorially inserted words, accompanied where necessary by an explanatory editorial footnote.

Bentham frequently quotes from other published works, especially David Collins’s *Account of the English Colony in New South Wales*. Minor discrepancies between the original and the reproduction in the present text have not been noted, and unless otherwise noted any italicization within quotations indicates Bentham’s emphasis.

## SYMBOLS AND ABBREVIATIONS

### Symbols

[to] Word(s) editorially supplied.

### Abbreviations

BL Add. MS British Library, Additional Manuscripts.

Bowring *The Works of Jeremy Bentham*, published under the superintendence of .^^. John Bowring, 11 vols., Edinburgh, 1843.

Collins D. Collins, *An account of the English colony in New South Wales: with remarks on the dispositions, customs, manners, etc. of the native inhabitants of that country*, 2 vols., London, 1798–1802.

CW This edition of *The Collected Works of Jeremy Bentham*.

HRA *Historical Records of Australia*, Series I.

HRNSW *Historical Records of New South Wales*.

TNA The National Archives of the United Kingdom, Kew.

SRNSW State Records Authority of New South Wales, Kingswood.

UC Bentham Papers in University College London Library's Special Collections. Roman numerals refer to boxes in which the papers are places, Arabic to the folios within each box.

NOTE TO TYPESETTERS: New recto. Please confine the title page to a single page. For layout and relative type sizes etc. see p. 000 of the hard copy.

A

PLEA FOR THE CONSTITUTION:

SHEWING

*THE ENORMITIES COMMITTED*

TO THE OPPRESSION OF

BRITISH SUBJECTS,

*Innocent as well as Guilty,*

IN BREACH OF

*MAGNA CHARTA,*

*THE HABEAS CORPUS ACT,*

*THE PETITION OF RIGHT,*

*AND THE BILL OF RIGHTS;*

NOTE TO TYPESETTERS: Insert a vertical double short-rule between the above two columns.

AS LIKEWISE OF THE

SEVERAL TRANSPORTATION ACTS;

IN AND BY

THE DESIGN, FOUNDATION and GOVERNMENT

OF THE PENAL COLONY OF

*NEW SOUTH WALES:*

INCLUDING

AN INQUIRY INTO THE RIGHT OF THE CROWN

TO LEGISLATE WITHOUT PARLIAMENT

IN

*TRINIDAD,*

AND OTHER BRITISH COLONIES.

NOTE TO TYPESETTERS: Insert short rule.

BY JEREMY BENTHAM, ESQ.  
OF LINCOLN'S INN, BARRISTER AT LAW.

NOTE TO TYPESETTERS: Insert double short rule.

LONDON:  
PRINTED FOR MAWMAN, POULTRY; AND  
HATCHARD, PICCADILLY,  
BY WILKS AND TAYLOR, CHANCERY-LANE.  
1803.

NOTE TO TYPESETTERS: New recto. For layout see p. 000 of the hard copy.

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## PREFACE.

NOTE TO TYPESETTERS: Insert double rule.

In two already printed Letters,<sup>a</sup> having for their direct object, not the *legality*, as here, but the *policy* of the penal colonization system, hints were given respecting the *illegalities*, which are the subject of the present sketch. At the same time the publication of them in the ordinary mode was forborne, and the circulation of them confined to a few select hands:<sup>29</sup> lest, before there should have been time for the application of a Parliamentary remedy, the information thus given, of the illegality of the government there, should, by any of those indirect channels which are not wholly wanting, find its way into the Colony, and be followed by any of those disorders, of which, in a community so composed, a state of known anarchy might so naturally be productive.

<sup>a</sup> Letters to Lord Pelham, giving a comparative view of the system of Penal Colonization in New South Wales, and the Home Penitentiary System, &c.<sup>30</sup>

On that same occasion, mention was made of the case of the Ship *Glatton*,<sup>31</sup> which in September or October had sailed with Convicts for New South Wales.<sup>b</sup> On all former occasions, the vessels in which Convicts had been conveyed had been private Vessels: the powers given by the various transportation Acts not being applicable to King's Ships.<sup>32</sup> The person to transport the Convicts was to be a private individual:—he was to execute the business by Contract;—and the service, to which the Convicts were to be subjected, was to be rendered exclusively either to the person so transporting them, or to some other person or persons, to whom by such contracting transporter the right to such service had been assigned. The *Glatton* is a King's Ship: the first, if I mistake not, that had ever been employed in that service. Setting aside the possible fiction of the King's Captain having

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<sup>29</sup> For the initial circulation of 'Letters to Lord Pelham' see the Editorial Introduction, p. 000 above.

<sup>30</sup> See pp. 000–000 above.

<sup>31</sup> See p. 000 above.

<sup>32</sup> See 'Letter to Pelham', p. 000 n. above.

been converted for this purpose into an independent contracting merchant, and the King's Governor into a character of similar description, it follows that, in point of law, neither has the Captain during the voyage, nor will the Governor have at the conclusion of it, any more power over these exiles than he would have over any other passenger. The eventual consequences, in respect of *trespass*, *murder*, and so forth, are too complicated, yet at the same time too obvious, to be unfolded here.

<sup>b</sup> Letter I. p. 000.

This intimation, though from so obscure a quarter, has not been altogether without its fruit. I speak of the Transportation-facilitating Act, the Act of 43 G. III. c. 15, dated 29th December, 1802;<sup>c</sup> a Statute which, from its almost unexampled brevity, may, without much expense of paper, find a place at the bottom of the page.

<sup>c</sup> 43 G. III. c. 15, 29th December, 1802. An Act to facilitate, and render more easy, the Transportation of Offenders.<sup>33</sup>

Whereas it is expedient that Provision should be made for transferring the Services of Offenders transported in His Majesty's Ships or Vessels, in Cases where no Contract is entered into, or Security given in respect of such Transportation, and that His Majesty should therefore be empowered to nominate and appoint Persons to have a Property in the Service of such Offenders .^.^ be it enacted .^.^ that whenever His Majesty *shall* please<sup>34</sup> to give Orders for the Transportation in any Ships or Vessels belonging to His Majesty of any Offender or Offenders who already have, or hereafter may be sentenced to be, transported to any Place or Places within His Majesty's Dominions beyond the Seas, it shall be lawful for His Majesty, by any Order under His Royal Sign Manual, to give, if He shall think fit, to any Person or Persons nominated and appointed for that Purpose in such Order, a Property in the Service of any such Offender or Offenders, for such Term or Terms of Life or Years, or any Part thereof respectively, for which such Offender or Offenders was or were ordered to be transported, as to His Majesty shall seem fit; and on such Nomination and Appointment, such Offender or Offenders may be delivered to the Person or Persons so nominated and appointed, without any Security being required or given for

<sup>33</sup> For further details concerning the passing of the Transportation Act of 1802 see the Editorial Introduction, pp. 000 above.

<sup>34</sup> Transportation Act of 1802 'shall be pleased'.

the Transportation of such Offender or Offenders; and every Person so nominated and appointed, and his or their Assigns, shall have the like Property in the Service of such Offender or Offenders, as if such Person or Persons had contracted and given Security to transport such Offender or Offenders, in the Manner required by the Act of the Twenty-fourth Year of His Majesty's Reign, intituled, *An Act for the effectual Transportation of Felons and other Offenders, and to authorise the Removal of Prisoners in certain Cases; and for other Purposes therein mentioned*,<sup>35</sup> or any other Law now in Force; any Thing in the said Act, or any other Act or Acts, to the contrary notwithstanding.'

The occasion, which called forth this manifestation of Parliamentary wisdom, was the then and still intended expedition of the Ship *Calcutta*—another King's Ship, with a similar lading—on a commission of exactly the same nature.<sup>36</sup>

In this Act, the powers I had ventured to point out as necessary for the Ship that sailed without them are precisely the powers that have been provided for the Ship that is now to sail: and so far all is right. But the ship that sailed without them?—what provision is made in the Act for *her* case?—None whatever. To the case of all such Convicts as may come to be transported, at any time *subsequent* to the 29th of December,<sup>37</sup> the powers *are* capable of being applied: to whatever have been sent off *before* that time, they are *not* applicable. Captain Woodriff,<sup>38</sup> whenever he sails, will sail (I doubt not) in the character of a lawful Agent of the Crown, provided with lawful powers: but Captain Colnett<sup>39</sup> (to whom I beg to be understood not to impute the smallest particle of moral blame), Captain Colnett, for any warrant or protection that has been afforded him by this Act, cannot have sailed in any other character than that of a kidnapper. For the exile, confinement, and

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<sup>35</sup> i.e. the Transportation Act of 1784.

<sup>36</sup> On 24 April 1803 H.M.S. *Calcutta*, along with the storeship *Ocean*, sailed from England with 307 convicts, together with an expedition, led by Lieutenant-Colonel David Collins, with a view to founding a new penal settlement at Port Phillip. The *Ocean* and *Calcutta* reached Port Phillip on 7 and 9 October 1803 respectively and a settlement was established at Sullivan Bay. Disappointed by the location, the poor quality of the land, and a shortage of fresh water, Collins abandoned the settlement and by February 1804 it had been relocated to Sullivans Cove on the Derwent River in Van Diemen's Land, thereby founding Hobart Town.

<sup>37</sup> i.e. the date on which the Transportation Act of 1802 received the Royal Assent.

<sup>38</sup> Daniel Woodriff (1756–1842), naval officer, had the command of H.M.S. *Calcutta* on its voyage to Port Phillip.

<sup>39</sup> James Colnett (bap. 1753, d.1806), naval officer and fur trader, had the command of H.M.S. *Glatton*.

bondage of Captain Woodriff's cargo of convicts, there will doubtless be a sufficient warrant under this Act. For the confinement and bondage of Captain Colnett's cargo, there is no better warrant than there would be for the like coercion, if an equal number of his Majesty's titled subjects, swept out of a Birth-day Ball-room, were to be the objects of it. Needless *in toto*, or else insufficient by half, such, upon the face of this statement, is the dilemma, out of which, if any gentleman in a long robe, or without a robe, is able to extricate the measure, he will do good service.

The Act is simply *enactive*: it is not *declarative*. By being made declarative it might have been made virtually retrospective: but declarative clauses are seldom to be found, without an introductory effort of sometimes real but more frequently pretended '*doubts*.' Here the preceding illegality, of the powers which it was the business of *this* Act to confer, was beyond all doubt. In the personal character of the truly honourable Servant of the Crown, on whose shoulders the mechanism of this disastrous business pressed,<sup>40</sup> I behold with pleasure, a cause sufficient to account, for the exclusion of this, as well as all other disingenuous pretences.

Being without retrospect *in effect*, the Act is still more palpably destitute of every operation of that kind, expressed in *direct terms*. The cause of the deficiency is not less perceptible in this case than in the other. The emotion of disgust and alarm, with which an eye of legal and constitutional sensibility could not but have shrunk on this occasion from every such retrospective glance, may be anticipated in some measure from the very title-page of this Essay, and I flatter my self will be pretty distinctly warranted as well as accounted for, by the tenor of the ensuing pages. So foul, so frightful, was the ulcer, the Surgeon durst not look it in the face.

Thus then stands the matter at this hour. The same Act, by which legality has been given to the expedition *about to sail*, confesses the illegality of that which is already on its way. A deeper probe, a broader plaster, are still necessary. A fresh Act must be passed for the Ship Glatton, or all pretence of consistency—all regard for official decency—all regard for the forms and fences of the constitution—must be disclaimed.

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<sup>40</sup> i.e. Perceval, who was responsible for introducing the Bill that became the Transportation Act of 1802 into the House of Commons.



NOTE TO TYPESETTERS: New recto

A  
A PLEA FOR THE CONSTITUTION,  
&c.

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§ 1. *Subject Matter—Object—Plan.*

ON the ground of *natural justice*, as well as *expediency*, a view, nor that a slight or hasty one, has already been given of the penal colony.<sup>d</sup>

<sup>d</sup> Letters to Lord Pelham, &c. 1803, 8vo.<sup>41</sup>

The object of the present essay is of another order: the business of it is to examine the same establishment on the ground of *positive law*: and, in so doing, to state for the consideration of such of my fellow-subjects, if such there be, by whom the constitution under which we drew our breath may be regarded as worth preserving, the injury it has received from the system of misgovernment, by which this nursery of martial law was originally planted, and ever since during a period of more than fourteen years past, has been conducted and upheld.

On the ground of *policy*, the measure had from the first presented itself to me as more than questionable:<sup>42</sup> years many and many, before the particular inducements, by which I was led to a closer investigation, had so unfortunately occurred to me.—On the ground of *legality*, it was not till very lately that so much as a suspicion had come across

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<sup>41</sup> See pp. 000 above. Both ‘Letters’ were, of course, printed in and dated 1802.

<sup>42</sup> See, for instance, ‘Panopticon; or, the Inspection-House’, Postscript. Part II, p. 000 (Bowring, iv. 000) and ‘New Wales’, pp. 000 above, both of which were written during 1791.

me.<sup>43</sup>

In a survey taken of the system pursued by the government of the colony when founded, the *laws* passed for the foundation of it would not remain long unnoticed. Astonishment flashed from the first glance. Compared with the immensity of the superstructure, the scantiness of the basis exhibited a Colossus mounted upon a straw. Such is the impression, such the discovery, if so it may be termed by anticipation, that gave birth to the scrutiny, of which the following pages are the result.

Legislative power is, and all along has been necessary, for the maintenance of government in the colony of New South Wales.—Lawful power of legislation exists not—has not at any time existed—in that colony.—Actual power of legislation has at all times been—still continues to be—exercised there.—The power thus illegally assumed, was employed, as it had been assumed, for oppressive as well as anti-constitutional purposes.—Britons, to whom their country, with the whole world besides, was open by law, have been kept in confinement in that land of exile.—Britons, free by law as Britons can be, have been kept in that land of exile in a state of bondage.—Such are the propositions which have presented themselves, and which, as such, it will be the main business of the ensuing pages to establish.

Other propositions, though distinct in the expression, and more impressive on the imagination, are not distinct in substance, being virtually included in the foregoing ones. Of what passes there for *justice*, a great, perhaps the greater part, is so much lawless violence: Magistrates are malefactors: Delinquency, which, in the conduct of the most obnoxious of the governed, is but an occasional incident—is at all times on the part of the governing class, and especially on the part of the head of that class, the order of the day. To a part, probably the greater part of the mandates issued, *resistance* is a matter of *right*: homicide, in the endeavour to subdue it, would be—has actually, if the case has occurred, been—as the law stands at present—*murder*. Not a Governor, not a Magistrate who has ever acted there, that has not exposed himself—that to this hour does not stand exposed—to prosecutions upon prosecutions, to actions upon actions, from which not even the Crown

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<sup>43</sup> Bentham highlights the illegality of the government as one of several ‘discoveries’ concerning New South Wales made while composing ‘Picture of the Treasury’ in his letter to Charles Abbot of 3 September 1802: see *Correspondence*, vii. 102–5.

can save him, and of which ruin may be the consequence.

Connected with these propositions of dry *law*, are others in which considerations of a *moral* nature are combined with legal ones. Among the numerous, or rather innumerable manifestations of lawless power, are indeed some—and probably (let candour add) even by far the greater number, which import no moral blame: which, legality apart, import rather praise than blame, so far as praise is due to necessary prudence; and which, in a word, want nothing but *legality* to be *laudable* ones: measures, I mean, taken for the maintenance of authority and necessary subordination; measures calculated for the prevention of mischief in all its various shapes. To this division will be found to belong, more particularly, if not exclusively, the acts of the possessors of power upon the spot: measures recommended at least to them, if not absolutely forced upon them, by their providence, by their experience: measures finding, perhaps in every instance, an *excuse*, in most, if not all instances, a justification (I mean always in a moral point of view) in the mischiefs and dangers of all kinds, with which so unexampled a state of society is encompassed.

To acts of another description no such justification, no justification at all, scarce any thing that can be termed so much as an excuse, *in foro morali*<sup>44</sup> any more than *in foro legali*,<sup>45</sup> will perhaps, if the following view of the matter be correct, be found applicable. Such are the acts by which the punishment has been continued *in fact*, after the term, during which the *law* had authorized the infliction of it has been at an end. Of all such oppressions the guilt will be found to belong indisputably, and I hope, exclusively to men in power here at home: *indisputably*, because the exercise of such oppressions was of the essence of the system: necessary to the production of the effect, on which alone so much as a pretence to the praise of *utility* could ever have been grounded: *exclusively*, because the views promoted by such oppressions were the views of the contrivers and arch-upholders of the system, and of them alone, not of those local agents to whom the execution of it was committed; and because it was not natural, that, among professional men, whose profession is naturally understood to exempt them from the investigation of legal niceties, so much as a suspicion should have arisen, that in a system put into their hands by their official superiors, and those composing the supreme executive authority of the state, any thing should be wanting to render it conformable either to the spirit or the letter of the law;

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<sup>44</sup> i.e. 'before the moral tribunal'.

<sup>45</sup> i.e. 'before the legal tribunal'.

especially after the application, which on that very occasion, had been made to the legislature itself for powers, and powers obtained in consequence.<sup>46</sup>

Once more, it is not in the injury to individuals that we are to look for the main object of the present pages: nor yet in the so much more extensive mischief accruing to the whole body of the community, from the repugnancy of the system to every one of the *ends of penal justice*. These are the topics already handled at least, if not exhausted, elsewhere.<sup>e</sup> The grievance, by which alone the present representation was called forth, is of a still higher order. It consists of the wound inflicted on the whole body of the people, in what used to be felt to be the tenderest part—a wound in the vitals of that constitution, which to our forefathers at least was an object of such fond attachment, a subject of such unremitting jealousy. Over British subjects, the Agents of the Crown have exercised legislative power without authority from Parliament: they have legislated not in this or that case only, but in *all* cases: they have exercised an authority as completely autocratical as was ever exercised in Russia: they have maintained a tyranny—not the once famed argumentative tyranny of forty days,<sup>47</sup> but a too real tyranny of fourteen years: they have exercised it, not only over this or that degraded class alone, whose ignominy may seem to have separated their lot from the common lot of their fellow-subjects, but over multitudes as free from blemish as themselves: they have exercised it for the purpose of exercising the most glaring of oppressions: for the purpose of inflicting punishment without cause upon those on whom the whole fund of just and legal punishment had already been exhausted.

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<sup>46</sup> i.e. in the Transportation Act of 1802.

<sup>47</sup> When exports of corn from Britain resumed after the expiration of a ban in August 1766, a subsequent poor harvest led to disorder, amid fears of increased prices and starvation. With Parliament having been prorogued until 11 November 1766, a Royal Proclamation was issued on 26 September 1766 to prohibit further corn exports during the interim. When on 24 November 1766 William Pitt the Elder (1708–78), first Earl Chatham, Paymaster-General 1746–55, Secretary of State for the Southern Department 1756–7, 1757–61, and leader of the administration as Lord Privy Seal 1766–8, and Charles Pratt (1714–94), first Earl Camden, Attorney General 1757–62, Chief Justice of Common Pleas 1762–6, Lord Chancellor 1766–70, were accused in the House of Commons of tyrannical behaviour and violating the Bill of Rights for having issued the Proclamation rather than recalled Parliament, Camden pleaded the necessity of the measure and in mitigation suggested that it was ‘but forty days tyranny at worst’. See *Parliamentary History* (1765–71) xvi. 246–50 at 248.

The conclusions to which the investigation tends being thus announced, the proof will constitute the principal matter of the ensuing pages.

## § 2. *Power of Legislation—its Necessity in New South Wales.*

The power of *making regulations* considered as reposed in any other hands than those of the supreme authority of a state, is neither more nor less than *legislative power*, though derived from a superior power of the same kind, and acting under the controul of it.

A general right of legislation is one of those branches of power, the existence of which may be stated, without much fear of contradiction, as necessary in every political community whatsoever, old-established or new established: necessary—if, for short spaces of time not absolutely to the very *being* of the state, yet at all times to the *well-being* of it.

In this country, during the infant and ricketty period of the constitution, the want of so important an article in the list of the powers of government was but too notoriously, as well as frequently and severely felt, in the intervals between Parliament and Parliament.

In a colony—in a new-formed community—much more in the colony in question, at the time in question—a colony not yet formed, but to be formed—the existence of such a power may be pronounced altogether necessary to the very *existence* of the infant establishment.

The creation of such powers is a security, that surely was never before omitted in the case of any thing that was ever called a *colony*: never, even in the case of a colony established on the natural and ordinary footing, by a population composed principally or exclusively of free-settlers, impelled thither by the principle of social industry. How much more urgent the demand for it in the case of a population composed as in New South Wales! composed almost exclusively of such disturbed, discordant, dissocial elements!

It is a security never yet omitted, in colonies the *least remote*, in local situation, from the Mother Country. How much more indispensable in a population to be transported from

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<sup>48</sup> See pp. 000 above.

Britain to the very furthest point of the globe, at a distance more than twice as great as that of the Eastern dependencies, and more than four times as great as that of the western!<sup>f</sup>

<sup>f</sup> Speaking of *space*, I measure it here by *time*: for, of the two quantities time,—quantity of it necessary for intercourse,—is the only one of intrinsic importance with a view to practice.

In the act of founding a *Colony*, as distinguished from an originally independent state, two parties are necessarily concerned:—the destined *inhabitants* of the new territory, and the legal *founders* of it, their accustomed rulers, from whom they derive permission to quit their Mother Country, and assistance towards establishing themselves in this new one. But, on the part of the *founders*, as thus distinguished, unless it be the accidental contribution of pecuniary assistance, what was ever understood to be done by *the founding of a Colony*, but the conferring, on persons of certain descriptions, settled or about to settle in the territory of the Colony, the necessary assortment of the *powers of government*? an assortment of which the *power of legislation* has never been suspected, I believe, of being any thing less than a necessary ingredient.

From one source or another—from within or from without—from intrinsic authority or from extrinsic—who ever heard of the *foundation* of a state—dependent or independent—without a power in it *to make laws*? No surely: *Lucina sine concubitu*<sup>49</sup> is not a more palpable absurdity, than the idea of founding a Colony without providing any legislative powers for it.

Supposing the whole mass of law existing in the Mother Country, to be transplanted in one lot into the Colony, *judicial power* might in this case be of itself, admitted to be sufficient: admitting always (what never can be admitted) that no need will ever occur for the imposition of fresh obligations. But even in the *oldest* established communities, that

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<sup>49</sup> i.e. ‘pregnancy without intercourse’. See Abraham Johnson [pseud. of Sir John Hill (c. 1714–75), botanist], *Lucina sine Concubitu. A Letter Humbly address’d to the Royal Society; in which Is proved by most Incontestible Evidence, drawn from Reason and Practice, that a Woman may conceive and be brought to Bed without any Commerce with Man*, London, 1750, a hoax directed at the Royal Society by Hill after he failed to be elected as a Fellow, in which it was alleged that women could become pregnant without engaging in sexual activity, owing to the presence in the air of ‘floating Animalcula’, miniature people whom the author claimed to have captured and studied under a microscope.

need is occurring every day: and surely the more *novel* the situation, the more urgent and frequent must be the demand for fresh obligations. I say *obligations*: for it is by such instruments and such alone that any provision can be made, for the unforeseeable and infinitely diversifiable train of *exigencies*, of which such a situation could not but, in point of reason, be expected to be productive.

One omission it is time I should confess, in the observation of which the reader may not improbably have been before hand with me. In speaking of the *existence* of such a power as necessary, I ought to have added, or the *belief* of its existence. To many an eye the distinction might appear an useless refinement: for without a *really existing* power of legislation, how in the nature of things (it may be asked) can the *belief* of it be produced? or if it could be, who would set about producing it, and to what end or use?—Questions pertinent enough these, but not unanswerable. The reader will soon judge.

The expedition was fitted out. It left the seat and source of regular government.<sup>g</sup> A Governor<sup>50</sup> went out with it: and with him went not out the smallest particle of legislative power, derived from the only source of legislative power—from the source, from whence other and inferior powers, (*judicial* I mean) that at the same time were sent with him, had been derived—in a word from *Parliament*.

<sup>g</sup> 13th May, 1787. Collins, I. iii.<sup>51</sup>

An Act, brought in by Administration, had been obtained of Parliament to serve as a sanction for the measure: ‘An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales and the parts adjacent.’<sup>h</sup> Such is the title of the Act:—no such power as that of legislation is in the title; no such power is in the Act. What powers then *are* there in the Act? Powers for creating Courts of Judicature, and no other. This was the professed business of the Act: this, the only business: the very title says as much. Powers are given by it—to do what? to create any *new rights*? to impose any *new obligations*? No such thing. Nothing but to punish ‘*outrages and misbehaviours*.’<sup>i</sup> And what outrages and misbehaviours? ‘*Such*,’ (and such alone) ‘*as if committed in this realm*

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<sup>50</sup> i.e. Arthur Phillip, first Governor of New South Wales.

<sup>51</sup> As Collins states, this was the date on which the First Fleet departed from Portsmouth for New South Wales.

would be .^.^ *Treason or Misprision thereof Felony or Misdemeanor.*—‘Whereas,’ (says the Preamble,) ‘it may be found necessary that a *Colony and Civil Government* should be established in the place.’.^.^ *To establish* a Civil Government—that a ‘Civil government *should be established,*’<sup>j</sup> at least—established some how and by some body—was the professed object of the act. ‘A *Civil Government to be established,*’ and no power of making *general* regulations; no power of making laws—no, not in any case whatever—is comprised in it! If, without Parliament, power could be found for legislating in all other cases, and for all other purposes, why not for the establishment of this, or any other, court of justice?

<sup>h</sup> 27 Geo. III. c. 2.<sup>52</sup>

<sup>i</sup> *Outrages?* What a word for the basis of a system of legislation! ‘Outrages’ too, as well as ‘*misbehaviours:*’ when the import, vague and declamatory as it is, is at any rate included in *misbehaviours.*

<sup>j</sup> ‘And whereas, it may be found necessary, that a Colony and a Civil Government should be established .^.^.^ And that a Court of Criminal Jurisdiction should also be established .^.^.^ with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof .^.^.’ §. 1. Preamble.<sup>53</sup>

Under this provision of the law, an ordinance, suppose of the *prohibitive* class, is issued by the Governor in New South Wales. In the words above quoted, we have a standard for the validity of such ordinance. The *act prohibited by* it, is it of the number of those acts which would be ‘*outrages*’ or ‘*misbehaviours*’ if committed ‘*in this realm?*’<sup>k</sup> If not, then is the ordinance, by which it thus stands prohibited, illegal and void: void beyond dispute, unless the power of making laws binding ‘*in this realm*’ belongs to the Governor of New South Wales, or some other person or persons legislating in New South Wales.

<sup>k</sup> ‘*This realm?*’ What realm? Of the impropriety and inexplicability of the term, notice

<sup>52</sup> i.e. the New South Wales Courts Act of 1787.

<sup>53</sup> The quotation in the text is taken from § 1, and that in Bentham’s footnote from the Preamble, of the New South Wales Courts Act of 1787.

will be taken a few pages further on.<sup>54</sup>

### § 3. *Legislation—how far lawful in New South Wales.*

All this while, from the time of the first landing of the first expedition, (to the time at which the historiographer of the colony took his leave of it) that is from January 1788, to September 1796, ordinances were issued by the Governor, and as it should seem by his sole authority.<sup>55</sup> *Instructions* were also from time to time received by him from his superiors here at home; and ordinances issued in consequence of, and therefore (it may be presumed) in conformity to, these instructions.<sup>56</sup> And these ordinances are, not like the king's proclamations in Great Britain, mere acts of monition or other acts grounded on *pre-existing* acts of the legislature, but *original* acts of legislation, forbidding, and thereby converting into '*misbehaviours*,' a variety of acts, such as, if performed '*in this realm*,' whether in England or in Scotland, would not have been '*misbehaviours*,' would not have belonged to the class of '*misdemeanours*' or to any of those higher classes of delinquency '*(treason, misprision thereof, or felony)*' specified as such in the act.

This assumption of power, how shall it be accounted for? On the part of the Governor there can be little difficulty. Whatsoever were given to him for law, by his superiors at the Council Board, or the Secretary of State's office, would naturally enough, one may almost say unavoidably, be taken by this *sea captain* for law. By this sea captain: for such has been the profession and rank, of every gentleman who has ever as yet been inverted with this important office.<sup>57</sup>

On the part of these authorities at home, some imagination or other must necessarily have been entertained about the *right*. Either that a right to confer on the Governor this

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<sup>54</sup> See pp. 000 below.

<sup>55</sup> See §§ 10–13, pp. 000 below.

<sup>56</sup> According to Collins, i. 127 the arrival of the Second Fleet in June 1790 brought 'dispatches from the secretary of state, containing, among other articles of information, instructions respecting the granting of lands and the allotting of ground in townships', whereupon corresponding instructions were 'declared in public orders'. For the instructions and the subsequent public order see Grenville to Governor Phillip, 19 June 1789, and Enclosure, 'Phillip's Instructions re Land Grants', *HRA*, i. 122, 124.

<sup>57</sup> The three permanent governors of New South Wales up to the point at which Bentham was writing, namely, Arthur Phillip, John Hunter, and Philip Gidley King, were officers of the Royal Navy.

power was actually existing in the authority thus assuming and exercising the power; or at least that, of the existence of such right, a *belief* would be entertained by the several parties interested: a belief, which, though it were ill-grounded and erroneous, would, so long as it continued to be entertained by all parties, have the same effect as if well-grounded and correct.

On the first supposition, they went to work *bona fide*, believing that to be *legal* which was determined to be *done*. In the other case, conscious of the illegality of the course they were pursuing, they determined to persevere in it notwithstanding; perpetual fraud trusting for its success to perpetual and universal ignorance.

Of two such opposite conceptions, which then is it that, on the face of it, carries the strongest probability of having been entertained?

The first hardly, for what is there that can be found to countenance it? Legislative power exercised by an officer of the crown, for such a course of years, without authority from Parliament! On what possible ground could any conception of the legality of such a system be seriously entertained?

I will make the best case for it in my power: I will ransack imagination for possible grounds.

That the supposition was, *in the whole extent of it*, without foundation, would indeed be evidently untrue. That there was and is a considerable stock of lawful power in the colony to work with, is palpable enough. That that power was of a nature to serve as a *succedaneum*, *so far as it went*, to a regular and expressly constituted legislative power, must also be admitted: manifest enough, I accordingly admit, it is, that a power of legislating over certain *persons*, and in certain *cases*, was *virtually* among the contents of it. But, in addition to all *such* persons and cases, legislation (so the fact is) has been exercised there (as indeed it required to be exercised there) over abundance of *other* persons and in abundance of *other* cases.

To shew this, I will in the first place exhibit a short survey of the stock of the colony, live and dead, persons and things, thrown into classes in this view. It will then be easy enough, and with a degree of accuracy sufficient for the purpose, to go over them, and say of each, this stands subjected, or this does not stand subjected, to the powers of all-

embracing legislation, that have been exercised in New South Wales, by the sole authority of the King's governor of New South Wales.

In the course of a period of nine years and a half, comprised in the history given of the colony by its chief magistrate,<sup>58</sup> the inhabitants, considered in respect of their subjection to any ordinances of the governor (or of any other person or persons pretending to the exercise of legislative authority there) may be distinguished into the classes following:

NOTE TO TYPESETTERS: Please begin list.

1. *Officers and privates*, in the *land* branch of the king's military service, subject to orders as such under the *mutiny act*.
2. Officers and privates in the *naval* branch of the king's military service, subject to orders as such under the *articles of war*.<sup>59</sup>
3. Persons in the king's service in a *civil* capacity: as such, not subject either to the articles of war or the mutiny act: such as *chaplains, surgeons, superintendants, &c.*
4. Commanders and crews of *British vessels* in *private* service.
5. Commanders and crews of *foreign vessels*.
6. Convicts still in a state of legal bondage: the terms of punishment specified in their respective sentences, being as yet unexpired. For distinction's sake they may be called *convicts non-emancipated de jure*, or still more shortly *non-expirees*. The reason of this distinction and the nomenclature founded on it will appear immediately.
7. *Wives, children*, and other relatives, if any, of non-expirees.
8. *Expirees*. Convicts emancipated *de jure: de jure* in contradistinction to *de facto*. The distinction is altogether a necessary one: for in point of fact one of the characteristic

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<sup>58</sup> i.e. Collins.

<sup>59</sup> Articles of War for the regulation of the armed forces were originally issued as an act of royal prerogative. After the Glorious Revolution of 1688–9, their issue was authorized by the annual Mutiny Acts.

features of the establishment, and crimes of its foundation, was—that those who by law ought without exception to have been *free*, were, and were to be, in a multitude of instances *retained in bondage*.

9. Wives and children and other relatives of *expirees*.

10. *Unblemished* settlers: that is all settlers not belonging to classes 6, 7, or 8, or any of the preceding classes. In this instance, and for this purpose, the term *free settlers*—(the term employed elsewhere)—would not serve: since, if law had been the standard, classes 7, 8, and 9, would have been as *free* as these.

NOTE TO TYPESETTERS: Please end list.

1, 2. With reference to the two first of these ten classes (*Army* and *Navy*) the right of legislation may pass without dispute. Conditions might be stated as requisite—limitations might be suggested—but the discussion would be superfluous. For the purpose of the argument, I suppose and admit proper measures to have been taken, and by the proper authority, to subject all persons of these two descriptions to the authority of the Governor in that behalf.

3. Over persons of the third class (*servants of the crown in civil capacities*) supposing power to be given to the Governor to dismiss them from their respective situations, this power operates of course as a means of *influence*, tending to produce a disposition towards a general submission to his will, howsoever signified. Setting aside this means of influence, their condition is no ways different from that of class 10<sup>th</sup>; *unblemished* settlers.

4. With reference to commanders and crews of *British vessels*, the right might also be admitted for the purpose of the argument:—though, in this instance, it appears liable to particular objections, which will be mentioned presently.

5. With respect to the commanders and crews of *foreign vessels*, the right shall, for the same purpose, pass unquestioned.

6. With respect to *non expirees* (convicts still in a state of *legal bondage*) their legal subjection to the Governor, and consequently to all such orders as a Master in England has it in his power to issue to an indented servant, may be pronounced unimpeachable; I mean, supposing the course directed in that behalf by the act to have been pursued;<sup>1</sup> and

supposing the *civil* branches of the law of *England*, or of *Scotland*, or of both together, or of *Great Britain*, to have grown up in New South Wales, like so many weeds, without having been ever planted there: of which more will be said presently.<sup>60</sup> That the spirit of the old transportation system, which it is the professed object of the act to continue, cannot have been conformed to, I have already had occasion to explain in another place.<sup>m</sup> But, if the words of the act have been pursued, in the manner that will also be stated, I see nothing to hinder the power of the Governor, from having been rendered unimpeachable in relation to this class: always assuming the fulfilment of the unfulfillable conditions just mentioned.

<sup>l</sup> 24 G. III. Sess. 2. c. 56. §. 1. 13: which it may have been till of late; but could not have been in the case of the ship *Glatton*, which, having sailed in September or October, with about 400 convicts, without any legal power for consigning them to bondage, gave occasion for the act passed in December, by which legality has been intended to be given (and therefore I conclude, without having yet seen it, was given) to the transaction, by an *ex post facto* law. {Not given: see Preface.}<sup>61</sup>

<sup>m</sup> Letters to Lord Pelham, Letter i. p. 000.

7, 8, 9, 10. Over *expiree* convicts, their wives, children, and other dependent relatives—over the *wives*, *children*, and other dependent *relatives*, even of *convicts* themselves in a state of legal bondage—over unblemished *settlers*—the Governor neither had, nor could have had, nor without fresh authority from Parliament can ever have, any more power, (I speak always of legal power) than I have.

Over any *stores* intrusted to his care, the Governor, in his quality of agent to his Majesty—the legal proprietor of those stores, will have had the same legal power as any other proprietor any where. These stores being in a large proportion among the necessaries of life, from the proprietorship of these means of subsistence, must of course result a proportionable degree of *influence*.

But influence—*natural influence*—is one thing: *legal power* is another. To the production of an effect by influence, *consent* is necessary: special consent *precedently* given to each act, by the production of which the influence has fulfilled its purpose:—to

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<sup>60</sup> See pp. 000 below.

<sup>61</sup> See p. 000 & n. above.

the production of the same effect by *power* no such *consent* is necessary. Were the Governor to say to this or that man, being a man not in bondage to him—*Do such or such a piece of work, or you shall have no bread served out to you to-day*—an order *thus sanctioned* may be admitted to be legal, though without any previous authority given by Parliament for the issuing of it. But if, addressing himself to the same man, and speaking of the same piece of work, the Governor were in like manner to say (as he has so often done)<sup>62</sup>—*Do this, or you shall be whipped*—here would be an ordinance illegal and void.

The same thing may be said of any *general* ordinance addressed to *all* persons without distinction, with or without any *special* sanction annexed to it, and whatever may have been the utility or even necessity of it:—so far as the persons bound, or otherwise affected by it in point of interest, are persons subjected by any *special legal commission*, to orders from the Governor, so far, and as to those persons, it is good and legal. Beyond this, and as to all other persons, the same ordinance is illegal and void. As for example—Orders that no persons shall for such a time go beyond such and such bounds.<sup>n</sup> Orders that no man shall build, or begin to build, a vessel of a size beyond such and such dimensions.<sup>o</sup>

<sup>n</sup> II. Collins 286, 295.<sup>63</sup>

<sup>o</sup> I. Coll. 159, 488. II. 53.<sup>64</sup>

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<sup>62</sup> According to Collins, i. 26, during April 1788 Governor Phillip ordered that, in order to prevent its spread in the colony, any man or woman ‘having and concealing’ venereal disease would be flogged and put on short rations for six months.

<sup>63</sup> According to Collins, in February 1800 watchmen were ordered, after ten o’clock at night, to demand a counter-sign from anyone except officers who passed them, and patrolling constables to arrest ‘such improper or suspicious persons as they might meet in the town during the night’, while in May 1800 all individuals, except officers, were required to carry a passport when travelling between districts and to present it upon request to a constable.

<sup>64</sup> Collins, i. 159, 488–9, ii. 53 describes measures taken by the colonial government to restrict the size and number of boats built in the colony with the intention of preventing convicts from absconding: in April 1791, following the escape of the group led by William Bryant in March 1791 (see ‘Letter to Pelham’, p. 000 & n. above), it was ordered that boats built in the colony were to be no more than fourteen feet in length; in July 1796 an order requiring settlers to obtain the governor’s permission before either building or selling a boat was reiterated, while all privately-owned boats were to be taken to the master boat-builder, Daniel Paine, to be marked, and a register of marked boats was to be kept by Provost-Marshal Thomas Smyth; and in October 1797, following the escape of fifteen convicts from the colony, an order was issued prohibiting ‘the building

I take for granted (always for the purpose of the argument) that whatever power of legislation *could* be given by the crown, to any body, to be exercised in this colony, *has* all along been given by the crown to the several successive Governors. All this notwithstanding—all this being admitted—what I maintain is that, no such authority having been given to the crown, in the only Act in question,<sup>p</sup> by the legislature, it was no more in the power of the crown, to confer any such power of legislation (except the limited, and not so denominated, but only *virtual* powers of legislation above excepted) on the Governor, or any other person or persons, than in mine.

<sup>p</sup> 27 G. III. c. 2.<sup>65</sup>

#### § 4. *American, &c. Legislation no Precedent for New South Wales.*

The nature of the case not furnishing any just grounds, for the assumption of any such legislative power as has actually been exercised, I come now—(still acting under the difficulty already recognized)—I come now to fish out imaginary and possibly pretended grounds, at a venture.

True it is accordingly, certainly in general, and for aught I know without exception, and as such I shall admit it—that among all the *charters* in which the Governments in the several existing English, British, or quondam British Colonies in America, (West Indies included) have respectively had their rise, there is not one, for the granting of which any powers, previously or subsequently to the concession of it, had been obtained from parliament.

Still more clearly true it is, that even in the instance of *Georgia* (the last colony established before the revolt, established at so late a period as in the sixth year of the reign of the late King)<sup>66</sup> when an act of parliament was passed, having for the object of one of its clauses<sup>q</sup> (as declared in what may be called *a clause* in its long-winded title) the ‘enabling

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of a boat of any kind’ without the governor’s permission, and stipulated that if any boat was found to be unsecured, or left with its oars, rudder, masts, or sails on board at night, it was to be taken ashore and burned.

<sup>65</sup> i.e. the New South Wales Courts Act of 1787.

<sup>66</sup> The Royal Charter establishing the Province of Georgia was dated 9 June 1732, which was during the fifth year of the reign of George II (1683–1760), King of Great Britain and Ireland from 1727, rather than the sixth year as Bentham states.

his Majesty .^.^.^ to pay .^.^.^ ten thousand pounds to the trustees for establishing the colony of *Georgia*,<sup>67</sup> no powers are given to the crown, any more than in any preceding or subsequent Act, for the purpose of legalizing such powers, as the crown must then recently have been creating for the government of that colony.

<sup>q</sup> 6 G. II. c 25. § 7.<sup>68</sup>

But *since that period*, and *before* that of the passing of the Act for the foundation of the Colony of New South Wales,<sup>r</sup> this practice of organizing governments for British dependencies, in territories out of Great Britain, by the sole power of the Crown, may, I think, be said to have been relinquished, and virtually acknowledged to be indefensible. I mean by the precedent set, by the Act commonly called the *Quebec Act*,<sup>s</sup> in which, whatever was done in the way of establishing subordinate powers of *legislation*, was in *that case*, as well as in the case of *judicature*, done either by Parliament itself, or by authority therein given to the Crown by Parliament.<sup>69</sup>

<sup>r</sup> 1787.<sup>70</sup>

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<sup>67</sup> The full title of the Supply, etc. Act of 1733 is ‘An Act for enabling his Majesty to apply five hundred thousand Pounds out of the Sinking Fund for the Service of the Year one thousand seven hundred and thirty-three, and for the further Disposition of the said Fund, by paying off one Million of *South-Sea Annuities*, and for enabling his Majesty out of the Monies arisen by Sale of the Lands in the Island of Saint *Christopher*, to pay the Sum of eighty thousand Pounds for the Marriage Portion of the Princess Royal, and ten thousand Pounds to the Trustees for establishing the Colony of *Georgia in America*, and for making good all Deficiencies and Charges by taking of Broad Pieces into the Mind, out of the Coinage Duty; and for appropriating the Supplies granted in this Session of Parliament, and for issuing to the Subdean, Treasurer and Steward of the Collegiate Church of Saint *Peter Westminster*, out of the Monies reserved for building fifty new Churches within the Cities of *London* and *Westminster* and the Suburbs thereof, and for making Provisions for the Ministers of the same, four thousand Pounds for the Repair of the said Collegiate Church, and twelve hundred Pounds for finishing the Dormitory belonging thereunto.’

<sup>68</sup> This clause provided for the payment, out of the sale of land on the Isle of St. Christopher, after the granting of £80,000 for the ‘Marriage Portion’ of the Princess Royal, of £10,000 ‘to the Trustees for establishing the Colony of *Georgia in America*, to be applied towards defraying the Charges of carrying over and settling foreign and other Protestants in the said Colony’.

<sup>69</sup> The Quebec Act of 1774 provided that the criminal law of England should continue in force in the colony (§ 11) and established its legislative council (§ 12).

<sup>70</sup> i.e. the date of the New South Wales Courts Act.

<sup>s</sup> 14 G. III. c. 83.

Even in the same reign which thus gave birth to the latest instance of unparliamentary colonization, and not more than seven years after that instance, the legality of the practice appears to have been regarded as matter of *doubt* at least, by Parliament itself.<sup>t</sup> At this time, among the American colonies, there were many, that under the powers of legislation granted to them from the Crown, had passed Acts of their own, *restricting personal liberty* (as in New South Wales) restricting the right of departure out of the precincts of their respective territories. Acts made (says the preamble of the British Act) ‘for the preventing the carrying off from the said colonies or plantations any servant or slave without the consent of the owner, or the carrying off from thence any *other person* or persons *whatsoever*, until such persons shall have taken out his ticket from the Secretary’s office within such respective colony or plantation, in such manner, and under such penalties and forfeitures, as in and by the said several laws is declared and provided.’ But, even at this time, so little satisfied was Parliament of the legality of the restraints thus imposed—in other words of the legality of the powers under which they were imposed—so far at least as among the persons thus legislated upon were included, viz.: ‘Commanders of private ships of war, or merchant ships having letters of marque’—that in the Act, and by the clause, from the preamble of which the passage above quoted is copied, provision is made for the declared purpose of giving legality to those same laws. ‘Be it *enacted*,’ (says the statute) ‘that all commanders (as above) *shall*, upon their going into any of those ports or harbours, *be subject*, and they are hereby determined to be subject to the several directions, provisions, penalties, and forfeitures, in and by such laws made and provided, any thing in this Act to the contrary notwithstanding.’<sup>u</sup>

<sup>t</sup> 13 G. II. c. 4. § 20. No. 1740.<sup>71</sup>

<sup>u</sup> The words ‘*are hereby determined to be subject*’ might, if they had stood alone, have been taken for words of mere *adjudication* .^.^.^ But before these come words of enactment ‘*shall* .^.^.^ *be subject*.’ From the *non obstante* clause it might again be argued, that nothing more was meant by this provision, than to save those colonial laws from being overruled by the other provisions in the *same* statute: and therefore, that the effect of this section in it was nothing more, than to *leave* the legality of these

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<sup>71</sup> i.e. the Naval Prize Act of 1740.

colonial regulations upon its own bottom. But, upon examining the act it will be found, that there is not any part of it to which the provision in this section bears any specific or effectual repugnancy. It is only from some perfectly vague and inconclusive inferences that any such apprehension could arise. But it requires little acquaintance with our statute law to have observed, how ready such apprehensions are to present themselves, and how ready the draughtsman is to quiet them with the customary *non obstante* opiate. Seven years had at this time scarce elapsed,<sup>72</sup> since parliament, in the very act of supplying with money the embryo colony, sat still and saw the crown monopolize the supplying it with the powers of government. But at this latter period (1740) the tide it seems had already turned: and the wonder will be the less, that 34 years afterwards, when a new Constitution was to be given to *Quebec*, parliament exercised the whole authority, and took upon itself the whole management of the business.

Will it be said—the confirmation of these colonial laws was necessary, so far and so far only, as they undertook to bind *others* of his Majesty’s subjects, natives of the *Mother Country*, visiting the colonies for a time only in the course of office or of trade? I answer in the words of the Court of King’s Bench in a case that will presently be mentioned.<sup>a</sup>—Among the ‘propositions, in which both sides seem to be perfectly agreed, and which indeed are too clear to be controverted’ is ‘The 4th, that the law and legislative government of every dominion equally affects *all* persons and property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An *Englishman* in *Ireland*, the *Isle of Man*, or the *Plantations*, has no privileges distinct from the natives.’ So far *Lord Mansfield*. If then these American laws were binding upon *any* body—were binding upon *Americans*, they were *already* binding upon *Englishmen*. They needed no act of parliament, to confirm them in their application to Englishmen and so forth.

<sup>a</sup> *Campbell and Hall, Cowper’s Reports, p. 208.*<sup>73</sup>

<sup>72</sup> i.e. between the passing of the Supply Act of 1733 and the Prize Act of 1740.

<sup>73</sup> Bentham goes on to quote from the unanimous opinion of the Court of King’s Bench delivered by William Murray (1705–93), first Baron and first Earl of Mansfield, Chief Justice of King’s Bench 1756–88, in *Campbell v. Hall* (1774) in Henry Cowper, *Reports of Cases Adjudged in the Court of King’s Bench; from Hilary Term, the 14<sup>th</sup> of George III, 1774, to Trinity Term, the 18<sup>th</sup> of George III, 1778, (both inclusive)*, London, 1783, pp. 204–14 at 208. See also p. 000 n. below.

Among the powers actually exercised in New South Wales with or without instructions from hence, conformably or unconformably to such instructions, is that of prohibiting or ‘preventing’ masters of private vessels ‘from carrying off persons’ from the colony, without special permission from the Governor, particularizing each person permitted in each instance.<sup>74</sup> Upon the exercise of these powers depends the whole system of government in this penal colony: every use which any body could ever fancy it good for, or capable of being made good for. Even in America, and so early as the year 1740, the legality of these powers was looked upon as being so *questionable* at least (to say no more) as to require for the confirmation of it the authority of Parliament. In *America* these powers were thus confirmed, and were therefore legal: but in *New South Wales* they have *not* been thus confirmed: for America is the only *place* mentioned in the act—American laws the only ‘*laws:*’—New South Wales has nothing in it that ever was *a law* or so much as called *a law:*—and America (God be thanked!) has no such colony in it as New South Wales.

### § 5. *Even in America, the Crown had no right to legislate without Parliament.*

Relinquished, as it has been, no otherwise than *tacitly*, if at all, (for the point is not worth arguing) if the power had been *declared* illegal, and abolished by express words, it would not have been so disposed of without very sufficient grounds. That over English subjects in England, or any where else, the King should, by himself or by others, exercise legislative power, without the concurrence of Parliament, was repugnant to the constitution, was repugnant to Magna Charta.<sup>75</sup>

True it is, for aught I know, that till the reign of George the Second, till the year 1740 at least, as above, it never had been disputed or doubted of: and the train of precedents by which it has been exercised, commences with what appears as the *first charter* given to the *first colony*, in the reign of James the First,<sup>v</sup> in 1606, or thereabouts.

<sup>v</sup> See Lind’s Remarks on the Acts of the 13th Parliament relative to the Colonies,

<sup>74</sup> See ‘First Letter to Pelham’, p. 000 & n. above.

<sup>75</sup> Magna Carta was first issued in 1215 by John (1166–1216), King of England from 1199, reissued in slightly modified form in 1216 and 1217, and attained its final form when reissued in 1225 on the majority of Henry III (1207–72), King of England from 1216.

But, in the days in which the practice thus originated, the exclusive right of Parliament to legislative power was far from being defined as now. Even within the territory of England—on this, and that, and other<sup>77</sup> ground—the King by his *proclamations* would be legislating without parliament, and even in spite of parliament. Whatever parliament would endure to see him do, this and more he was sure to do without parliament. By monopolies, by ship-money, by dispensations of penal statutes—on one pretence or another he was even *levying money* without parliament. The very existence of parliament was a matter of perpetual contingency. At all times it depended upon the King’s pleasure whether there should ever be another.<sup>78</sup> And so long as he could contrive to go on with existing powers, and upon existing funds, he had every thing to lose and nothing to gain, by calling to his aid any such troublesome assistance.

Even in *Lord Coke’s* time,<sup>79</sup> had this mode of legislating without parliament been questioned in the King’s Bench, it would not have stood its ground: at least if Lord Coke had at that time been in disgrace, and the decision had depended on Lord Coke.

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<sup>76</sup> John Lind, *Remarks on the principal acts of the thirteenth Parliament of Great Britain. By the Author of Letters concerning the Present State of Poland. Vol. I. Containing Remarks on the Acts relating to the Colonies, with a Plan of Reconciliation*, London, 1775, pp. 86–94, describes the first Virginian Charter of 10 April 1606 granted by James VI (1566–1625), King of Scotland from 1567, and as James I, King of England and Ireland from 1603. Bentham may have had in mind the passage in which Lind note (pp. 90–1) that, ‘The king ordains that each of these colonies [i.e. the two colonies established by the Charter] shall have a *council* to govern and order *all* matters and *causes*, which may *arise* within the colony, “according to such laws, ordinances, and instructions, as shall be in that behalf given and signed with his hand, or sign manual, and pass under the privy-seal of his realm of England.”’

<sup>77</sup> 1803 ‘and, other’.

<sup>78</sup> On 28 March 1626, after their attempt by the House of Commons to impeach his favourite George Villiers (1592–1628), first Duke of Buckingham, Lord High Admiral 1619–28, and their failure to turn a vote of three subsidies into a Bill to support the war effort, Charles I gave a speech to a joint session of the Houses of Parliament, informing them ‘that Parliaments are altogether in my Power for their Calling, Sitting, and Dissolution’: see *The Parliamentary or Constitutional History of England; Being a Faithful Account of all the Most remarkable Transactions in Parliament, from the earliest Times, to the Restoration of King Charles II*, 24 vols., London, 1751–61, vi. 451.

<sup>79</sup> Sir Edward Coke (1552–1634), Chief Justice of Common Pleas 1606–13, Chief Justice of King’s Bench 1613–16.

‘King Edward the Sixth<sup>80</sup> did incorporate’ (says he)<sup>w</sup> ‘the town of St. Alban’s,<sup>81</sup> and granted to make ordinances, &c. They made an ordinance upon pain of imprisonment, and it was judged to be against this statute of *Magna Charta*. *So it is if such an ordinance had been contained in the patent itself.*’ Thus far Lord Coke. The train of reasoning is evident. It was by the glaring illegality in the case *last* mentioned, (which is the *feigned* case) that light was thrown on the covert illegality in the former case, which was the *real* case. It was a case actually decided, decided in the Common Pleas, and reported by Lord Coke himself.<sup>x</sup> The decision was given in the 38th year of Elizabeth,<sup>82</sup> and even Elizabeth submitted to it.<sup>y</sup>

<sup>w</sup> 2d Inst. 54.<sup>83</sup>

<sup>x</sup> Coke’s Reports, part 5, p. 64. Case of the Corporation of St. Alban’s, called by him *Clark’s Case*.<sup>84</sup>

<sup>y</sup> There was something more in this than in ordinary cases. A snake was seen, or thought to be seen, in the grass. Even in that age of general abjection<sup>85</sup> and judicial dependence, the judges spied it out, and took fire at it. What little constitutional blood a man could at that time find in his veins, it called up in their cheeks. *More is meant (say they) than meets the ear. This is an attack upon Magna Charta: that peculiar and inestimable security of Englishmen which (so often has it been broken into) has more*

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<sup>80</sup> Edward VI (1537–53), King of England and Ireland from 1547.

<sup>81</sup> The town of St Albans was incorporated on 12 May 1553, with the Corporation and its officers to consist of an annually-elected mayor and ten principal burgesses.

<sup>82</sup> Elizabeth I (1533–1603), Queen of England and Ireland from 1558.

<sup>83</sup> Coke, *The Second Part of the Institutes of the Lawes of England*, p. 54.

<sup>84</sup> See the account of *Clark’s Case* (1596) in *The Fifth Part of the Reports of Sir Edward Coke Knight*, London, 1605, p. 64. In 1596 Clark, a burgess of St Albans, brought a charge of false imprisonment against Gape, the Mayor, who had ordered his arrest for failing to pay a contribution towards the building of the local courts. Gape’s defence was that the Charter of Incorporation of St Albans had granted the burgesses the right to make ordinances, ‘that they with the Assent of the Plaintiff and other Burgesses’ had assessed a contribution to be paid by each townsman towards the cost of the courts, that Clark had refused to pay, and hence his imprisonment was justified. Judgment was made in Clark’s favour, on the grounds that his imprisonment violated clause 29 of Magna Carta (see p. 000 n. below), though it was also found that the Corporation could have legally inflicted a ‘reasonable penalty’, such as a fine, upon him.

<sup>85</sup> 1803 ‘dejection’. The text follows the erratum. For further details see the Editorial Introduction, p. 000 above.

*than thirty times been confirmed. 'Cest ordinance est encounter [lestature]<sup>86</sup> de Magna Charta, cap. 29. Nullus liber homo imprisonetur. Quel act ad estre confirm, et estably oustre 30 foits, et lassent le plaintiff ne [poit]<sup>87</sup> alter la ley in tiel case.'*<sup>88</sup>

Had the first charter that was ever granted for the foundation of an English colony (say the charter, granted in 1606, for the colonization of the tract of land then comprized under the denomination of Virginia by James the First.)<sup>z</sup>—Had this first charter been questioned as illegal—as contrary to the decision in the St. Alban's case<sup>89</sup>—in vain would it have been to have said—*This case is different: THAT applies to Englishmen wishing to legislate in England: THIS applies to Englishmen wishing to legislate in a distant, and as yet unplanted region.* To warrant any such distinction there was neither principle nor precedent. Not *principle*: because, as to hardship, if Englishmen are to be legislated upon otherwise than by parliament, how was the hardship lessened by their being in the then wilderness of America?—in a quarter of the globe, so far out of the reach of the protecting hand of Parliament? Not *precedent*: for, of an attempt to subject them to legislation in this mode, the instance in question is, by the very supposition, the first instance.

<sup>z</sup> See Lind on the Colonies, p. 94. 1775.<sup>90</sup>

The right of thus granting away the powers of Parliament passed (it is true) unquestioned. Why? because nobody ever started up, to whom it had happened to conceive himself as being concerned in interest to question it. For, if a man went from England to live there, it was because he found it more agreeable to him to live there under those laws, than to live in England under English laws: and if at any time a man preferred English laws, England was at all times open to receive him. Whatever was the *cause*, such at least

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<sup>86</sup> 1803 'lestature'.

<sup>87</sup> 1803 'poet'.

<sup>88</sup> The first English edition of *Fifth Part of the Reports of Sir Edward Coke*, p. 64, gives the following translation: 'this Ordinance is against the Statute of Magna Charta, cap. 29. No free man may be imprisoned; which Act hath been confirmed and established above thirty Times, and the Plaintiff's Assent cannot alter the Law in such case'.

<sup>89</sup> i.e. *Clark's Case*.

<sup>90</sup> The page number may be a slip on Bentham's part. Lind's account of the first Virginian Charter is at *Remarks on the principal acts of the thirteenth Parliament of Great Britain*, pp. 86–94, and of the second Charter of 1609 at pp. 94–9.

was the *effect*: the right remained unquestioned: and, remaining unquestioned, usurpation had time to cloath itself in the garb of law.

Admitting, that on any *one* mass of territory, having English owners, and not being or having passed under the dominion of any foreign power, the concurrence of the three estates is necessary to legislation, no reason can be given why, on any principle either of *utility* or *analogy*, it should be less necessary on any *other* spot so circumstanced. By remoteness from the natal soil—from the seat of connection and protection—the hardship of whatever is looked upon as *tyranny* is not lessened but enhanced. The sense of *liberty* (of what is meant by *liberty* in one of its thousand senses) has not been found to evaporate by expatriation in English *men*, as the sense of smell has been said to do in English dogs.<sup>91</sup> Of Englishmen surely it may be said, if of any men, *Cælum, non animum mutant, qui trans mare currunt.*<sup>92</sup>

For whom, or what, was it that the protection afforded by *Magna Charta* was intended? For the *inhabitants* of the land, or for the *soil* only?—for the flesh and blood, or only for the stocks and stones?

A lawyer, who should attempt to get rid of the application, of the case of the charter given to certain inhabitants of St. Alban's, to the case of a charter granted to certain inhabitants of other places in England, must answer boldly—*Only for the stocks and stones.*—*Englishmen, the moment they get out of sight of the stocks and stones of England, for whom alone Magna Charta was designed, are neither worth protecting nor worth governing.* But, unless it be on a spot, which being under foreign owners, affords a protection and a governance of its own, in what book will he find a colour for saying, that Englishmen, by being out of sight of English ground, are either out of the *protection* or out of the *governance* of an English parliament? Limited as the power of an English King is over Englishmen in England, in what book will he find that it is absolute over them every where else?

Will the portion of *consent*, of popular consent, given *in the first instance* to these charters, or the consent given *in succeeding times* to the laws made in America, in the

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<sup>91</sup> [ANNOTATION TO BE FINALIZED.]

<sup>92</sup> i.e. 'They change their clime, not their mind, those who rush across the sea': see Horace (Quintus Horatius Flaccus), *Epistles*, i. xi. 27.

several colonies, in consequence of these charters, will any *such* sanction be urged in proof of the original validity of a purely royal act, thus attempting to legislate over Englishmen without Parliament?

Alas! what a cloud of illusions is involved in that little word *consent*, employed, as it is but too common for it to be employed! But, without plunging into any such discussions, it is sufficient to say here, that no such *unparliamentary* consent had any weight in the *St. Alban's case*. There never could have been applied, to the law of any American assembly of succeeding times, the *actual* consent, of so great a proportion of individuals to be governed by it, as there probably was in the *St. Alban's case*. But this did not hinder the attempt made in that case, (the attempt on the part of the King, in conjunction with a portion of the inhabitants of that one town, to legislate, on pain of imprisonment, over the rest) from being disallowed: disallowed on the ground of its being an invasion of the rights of Parliament.

What is the consent required by the constitution to give validity to a law?—The consent—not of a part surely, but of the whole. It is not the consent of that part of the King's subjects for whose exclusive advantage the law is made, that is sufficient to give validity to a law, by which others, not sharing in the benefit, are attempted to be bound: if it were, there would never be any want of consent to the worst law. Neither then, nor since, has the consent necessary to give validity to any English law, been either more or less than the consent of the two sets of trustees for the whole body of the King's subjects—the two *other* estates of Parliament.

The question is, whether the King, with the assent of a few persons named by himself, had it in his power to repeal *pro tanto* the statute called *Magna Charta*?<sup>93</sup> The answer is given by the Judges in the *St. Alban's case*. '*L'assent ne poet alter la ley in tiel case.*' If this be not the very best of French, better English at least cannot be desired.

To supply what is thus in contemplation of law wanting in point of *consent*, will any such topic as that of *abstract utility* be resorted to? Will it be urged, in the view of giving validity to the illegal mass of pretended law, that the *benefit* of all parties followed from it? This benefit, admitting it in its full extent, this benefit, destined to be reaped in after ages,

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<sup>93</sup> i.e. the *Confirmatio Cartarum* of 1297.

will it give retro-active validity to an act void from the very first instant? If so, at what point of time was it that, on a sudden, and without any efficient cause, an illegal act was thus converted into a legal one?

*Legality*, it must be remembered, not *expediency*, not abstract utility, is the question here: to confound the two ideas would be to tear all law up by the roots. Admitted in the fullest extent, the alledged expediency would prove no more than this, viz. that, had James the First obtained, by a law of parliament, authority for the foundation of his first colony—authority for the powers conveyed by the charters, in virtue of which this colony was founded;—had the King so done—a law to that effect, if passed, *would have been* a good law: and so in regard to the several other *real* colonies, *real* charters, and correspondent *ideal* laws. But, the expediency of all these *ideal* laws, does it prove them *real* ones? does it prove that any such acts of parliament were actually passed?

When a practice is repugnant to acknowledged principles, the case of *general warrants* is sufficient to shew how little force there is in mere official precedents: however numerous the train of them, and however ancient the commencement of it. For the purpose of that case, a list of *general warrants* (a list of the cases in which authorities of that description had been issued by the servants of the crown) was published at the time.<sup>aa</sup> It begins with the Restoration: not surely because there were none of any earlier date; (for such there must have been in numbers) but because it was not conceived that authorities of that kind, issued at any less constitutional period, could possess any tolerable chance of being looked upon as *good precedents*.

<sup>aa</sup> The documents printed in that list would not be found all of them to come within this description: but of one sort or other there are 136. The title of the book in my possession is—‘*Copies taken from the Records of the King’s Bench of Warrants by Secretaries of State,*’ &c. 4to. 1763. No bookseller’s name.<sup>94</sup>

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<sup>94</sup> See *Copies taken from the records of the Court of King’s-Bench, at Westminster; The original Office-Books of the Secretaries of State, remaining in the Paper, and Secretaries of State’s Offices, or from the Originals under Seal. Of Warrants issued by Secretaries of State, for seizing Persons suspected of being guilty of various Crimes, particularly, of being the Authors, Printers and Publishers of Libels, from the Restoration to the present Time. And also, Copies of several Commitments, by Secretaries of State, of Persons charged with various Crimes, during that Period*, London, 1763, pp. 1–62.

Prior to the issuing of the first general warrant,<sup>95</sup> there was no direct judicial decision against *general warrants*, as there was against legislative power exercised by the Crown without Parliament, in the case just mentioned: yet *general warrants*, spite of the number of precedents and length of the practice, could not stand their ground. Against *general warrants* there was nothing but *principle*. Against *colonization charters* there is the principle, and a direct *judgment* grounded on it. And who is there that will deny, that, in the scale of common law, a thousand unjudicial official precedents are not equal to one judicial one?

### § 6. Nullity of Legislation in New South Wales, for want of an Assembly to consent.

All this however is but skirmishing: matter of illustration, not of necessary argument. For, though the right of the Crown to found colonies (as the *American* colonies were founded) without Parliament, were ever so well established; a claim in that quarter to exercise or create legislative powers to be exercised over Englishmen, Scotchmen, or Irishmen, in *New South Wales*—in this *colony sui generis*—in this so denominated, but perfectly non-descript, and newly discovered species of colony, would not be the less unfounded.

In all the several charters, by which legislative power, whether *per se* or *per alios*,<sup>96</sup> was exercised by the King, there were two common features, and those most indispensable ones:—1. *Consent* on the part of the colonists, as to their subjection to such powers: [2.] *irrevocability* of the privileges granted by such charters—irrevocability of the King’s act, whereby such powers were created, or the right of creating them conferred.

The *irrevocability*, though a feature perfectly distinct from the *consent*, was a natural, and one may almost say a necessary consequence of it; or rather preliminary to it. For, what man of common prudence would have gone to embark his property and his prospects, under a form of government, in which, so long indeed as it remained unchanged, he looked upon them as safe, but at the same time without any security against its being changed at any time; changed into some unknown arbitrary form, under which every thing would go

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<sup>95</sup> The earliest general warrant listed at *ibid.*, pp. 1–2 is dated 3 November 1662.

<sup>96</sup> i.e. ‘for himself or for others’.

to wreck?—changed without his being heard, and at the suggestion of some Court favourite, whose object would be of course to extract plunder from the change?—Not general satire—particular history is here in view: *Elizabeth* and *James*, with their *favourites* and their *monopolies*.<sup>97</sup>

The irrevocability, of the sanction given by the Crown, was therefore of the very essence of the case. This attribute of it was recognized all along by the judicial power. Even in the most arbitrary times, the Crown itself never pretended that its own charters of this kind were revocable at its own pleasure. The utmost of its pretensions was—that for certain causes, these powers of subordinate government were susceptible of being forfeited: it belonged to the judicial authority in that behalf (the Court of King’s Bench) to pronounce—to pronounce judicially in each case—upon the existence of any such cause of forfeiture. And in the annals of that court, and of the colonies, are contained divers instances, of prosecutions instituted on that ground, against colonial governments, and of resignations made of charters, under the apprehension of such prosecutions.<sup>bb</sup>

<sup>bb</sup> See Lind. *Remarks on the Acts of the 13th Parliament, 1775*.<sup>98</sup>

As to consent (by which I do not mean a presumptive, constructive, fictitious, pretended general consent; but actual, direct, individual, consent); immaterial as the circumstance is in this view, under a government already formed, in a territory into the precincts of which a man has been introduced either by *birth* or *voluntary self-conveyance*—nugatory as any argument grounded upon it would be in the *ordinary* state of things—yet in a new-formed or forming government—in a new planted or about to be planted colony—every thing depends upon it: *utility*, and therefore that law, which so far,

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<sup>97</sup> The granting of monopolies to favourites had been a contentious issue during the reigns of Elizabeth I and James I, and had eventually led to the passing of the Statute of Monopolies of 1624 (21 Jac. I, c. 3), which declared that ‘all monopolies and all commissions, grants, licences, charters, and letters patent .^.^ of or for the sole buying, selling, making, working, or using of anything within this realm’ were ‘altogether contrary to the laws of this realm’.

<sup>98</sup> Bentham perhaps had in mind the passage in Lind, *Remarks on the Acts of the Thirteenth Parliament*, pp. 43–7, distinguishing between the king issuing an original charter to a colony in his ‘procuratorial capacity’ and, once that charter had been ‘forfeited’, issuing subsequent charters in his ‘subordinate legislative capacity’. In the former case, Lind argues, the charters were ‘sacred’ to the courts ‘as acts of parliament, whereas in the latter case, ‘the courts of justice *are* judges of their [i.e. the charters’] *legality*’.

and so far only as it has utility for its basis, is any thing better than oppression and abuse, depends upon it altogether. To a man's being *born in* a country, *his* consent cannot be taken:—but to his being *conveyed to* it his consent can be taken, and, on its being taken or not, depends a Pandora's box of miseries and injuries.<sup>99</sup>

In New South Wales, not only was this most indispensable of all requisites to the foundation of a colony—to the establishment of legislative power in a colony, wanting—notoriously wanting—on the part of the great mass of the intended population;—but the getting rid of so troublesome a condition—the weeding it and eradicating it out of the about-to-be-new-planted colony, was the very object—the professed object—the sole professed object—of the foundation of this vast receptacle of penal suffering. If, in point of fact, it should ever acquire a title to the name of a '*colony*'—(the name bestowed upon it in the tenor of the law made for the foundation of it),<sup>cc</sup> it could only be in so far as the persons sent thither against their wills, and having a *legal right of departing* from thence at the expiration of certain terms, should, by *irresistible power, in defiance of that right*, be kept there each to his life's end.

<sup>cc</sup> 27 G. III. c. 2.<sup>100</sup>

In common *intendment*—in common, and not merely in vulgar, but in deliberate and well-considered language—permanence of inhabitancy is acknowledged to be of the very essence of colonization. Accordingly, in the disputes that of late have arisen on the affairs of the East Indies, the language on one side is—*To do thus or thus would be colonization:—as you tender your existence, forbear to colonize.*<sup>101</sup>

Force *under* the law, was to plant men there: force *against* law, was to keep them there: and when under the law they were planted, it was for this very and only end and purpose—that against law they might be kept.

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<sup>99</sup> In classical mythology, Pandora was the first woman. Zeus gave her a jar containing all kinds of misery and evil, which escaped and flew out over the world when she opened it.

<sup>100</sup> i.e. the New South Wales Courts Act of 1787.

<sup>101</sup> [ANNOTATION TO BE FINALIZED.]

NOLENTES *per populos dat jura*<sup>102</sup> should be the royal motto, in this as purely royal, as it is daringly anti-parliamentary, colony of New South Wales.

So much as to the first-mentioned condition, *consent*—consent to habitancy and subjection. But this condition, a condition so inseparable to the foundation of every colony that is any thing better than a Bastille, being so essentially wanting to the foundation of this colony, it seems almost superfluous, to extend the observation to the other kindred condition—*irrevocability of privilege*. That which was never granted, cannot easily be revoked. So far the inhabitants—the chosen inhabitants of New South Wales—are secure enough. What was never possessed cannot be forfeited.

If common sense be not of itself convincing enough, e'en let us translate it into common law. In their day, the American Constitutions were legal ones: be it so. But *they* were by *charter*: *here* there is none. No charter either has ever yet been granted—or is in a way very soon to be applied for, by *the* inhabitants, or any inhabitants of New South Wales. Yet has the colony been '*founded*' I suppose:—founded as Mr. Pitt and Mr. Rose found colonies.—*No charter, no colony*. In that one technical expression, are condensed the two substantial and rational grounds of nullity:—no consent to subjection—no irrevocability of privilege.

All this while a sort of a colony there is—I am perfectly aware of it—that is, or has been supposed to be, capable of existing without charters, and in which the advisers of the Crown have accordingly been used to find themselves pretty much at their ease. I mention it, to save gentlemen the trouble of catching at the shadow of an argument. It is the sort of colony that has been obtained by *conquest*: having surrendered, with or without capitulation: having or not having, at the treaty which confirmed the cession of it, a stipulation made in favour of it: having or not having, antecedently to its surrender, a constitution of its own. All, or any of these varieties might upon occasion afford considerable *amusement* to any learned gentleman, who, along with his brief, should have acquired a taste for the Natural History of the Law of Colonies. But, as to any *practical use*

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<sup>102</sup> i.e. 'Unwilling to give rights to the people'. Bentham has perhaps adapted Virgil, *Georgics*, IV. 560–3: *Caesar dum magnus ad altum fulminat Euphraten bello victorque volentis per populos dat iura viamque adfectat Olympo*, i.e. 'Great Caesar thundered in war by deep Euphrates, bestowed a victor's laws on willing nations, and essayed the path to Heaven.'

for them, happily in the case of New South Wales, there is none. To the host of follies included in the circumstance of distant *possession*, this colony at least, with all its peculiarities and all its faults, has not added that vulgar and crowning folly of distant *conquest*. It is needless to enquire, what on this occasion might have been the virtue of a string of *wampum*: no wampum, nor any substitute for wampum, has either been received or given in New South Wales. When, from their immense continental island, *Benillong* and *Yem-mer-ra-wannie*<sup>dd</sup> did us the honour to bestow a glance upon this our little one, it was in the character of private gentlemen, travelling for their amusement, or at least for our's: they signed no *treaty* with his Majesty, nor brought with them any diplomatic powers.

<sup>dd</sup> Collins, p. 251.<sup>103</sup>

The flaw is an incurable one: if it were not, it would be none. No charter ever could, can now, or ever can be granted. It is not a case for charters: all the wax—all the parchment in the King's Stationary Office—all the law on all his wool-sacks—would not make one. A charter, make it of what or how you will, must have somebody to *accept* it. But a charter—a thing to keep men in New South Wales—Who is there, or who ever can there be, to accept it in New South Wales? A charter to empower a free man to lead a life of slavery, and to be flogged as often as he endeavours to escape from it!<sup>ee</sup>

<sup>ee</sup> Letter I. to Lord Pelham, p. 000.

Instructions and counter instructions—insinuations and counter insinuations—instructions in form, and instructions not in form;—despotism acting there *by* instructions, and *without* instructions, and *against* instructions;—all these things there may be, and will be, in abundance. But of *charters*—unless *such instructions* be called charters—of *constitutions*—that any body that can help it will be governed by;—of any *lawful warrants*, unless from Parliament;—from the present day to the day of judgment there will be none.

No, most assuredly; no parchment, no wax, no cement is there whatever, that can

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<sup>103</sup> According to Collins, i. 251, on 11 December 1792 Bennelong and his kinsman Yemmerrawanne or Meerawanyee (c. 1775–94) 'voluntarily and cheerfully' departed Port Jackson for England aboard the *Atlantic*, along with the colony's former Governor Arthur Phillip, and arrived at Falmouth on 19 May 1793. Yemmerrawanne died of a lung infection at Eltham on 18 May 1794, while Bennelong left England in the *Reliance* on 2 March 1795 and arrived back at Port Jackson on 7 September 1795.

patch the no-constitution of it together for a moment longer, or prevent the improved colony from being converted, any day in the year, into a still worse chaos than it is. No plaster of any kind can be laid on upon this universal sore, by any other than the all-healing hand of Parliament.

If this view of the law be not just, and if the penners of the New South Wales Act<sup>104</sup> were not themselves sensible of its being so, wherefore apply to Parliament for powers, for the organization of a judicial establishment in that colony? Judicial power is in its nature inferior, subordinate to legislative. If the Crown had an original right to create the superior power, how can it have been without the right of creating the subordinate? If, by the American Charters, the King creates legislative powers, by the same charters he creates powers of judicature; or what comes to the same thing, confers authority for the creation of such powers.

This argument, it must be acknowledged, supposes something like consistency on the part of the penners of the Act: and of consistency what traces in it are to be found?

### *§ 7. Nullity of Governor's Ordinances, for want of a Court to try Offences against them.*

One imagination more, for a last effort. With or without a declaration to that effect by the King's Governor, the laws of England, (let it be said) such as they exist at present, and such of them as are applicable to the state of things in the new colony, transport themselves in one great mass, into New South Wales. After them, transport themselves, as they came out, all subsequently manufactured masses of law, common as well as statute, such of them as are so applicable, and in as far as they are so applicable, each in an air balloon of its own making, without any body to send them out, or make it possible for them to be known, when they are arrived. Moreover, along with the first great mass, transports itself in like manner the *right of establishing courts of justice* for the trial of all offences against all such masses of *English-made law*, present and future, *as they come in*; under the single condition, that the mode of procedure, in such courts, in each sort of case, shall not be different from the mode of procedure, in the same sort of case, pursued in England.—Why these conditions?—for this reason. The circumstance, that rendered the

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<sup>104</sup> i.e. the New South Wales Courts Act of 1787.

authority of Parliament necessary for the legalization of the sort of court which it has actually been employed in legalizing, is—that *that* court not calling in the assistance of a jury, though the cases are jury cases, the mode of proceeding under it is not according to the law of England.<sup>105</sup> Being therefore the sort of court which the King’s Agent with all his powers, had not quite power enough to make, thence came the necessity of sending it out, *ready made* by the King, in pursuance of powers obtained from Parliament for the making it.

Unfounded this, a great part of it at least, in principle or in fact. But even if all the dreams in it were truths, the government of New South Wales would not, in point of legality, be one jot the better for them. These courts, made after the English pattern, serve for the trial of offences against English-made laws:—allowed: but the offences, for the trial of which, proper courts are wanted, are *not* offences against *English-made* laws. By what courts then in New South Wales, are these *Non-English* offences to be tried? Not by these supposed *New-South-Wales-made* courts, since, by the supposition, it is only for the trial of *English-made* offences that they can be made to serve. Not by the grand court, the establishment of which was the sole business of the statute: for it is to the trial of *English-made* offences that *that* court, by the express words of the statute, stands confined:—the court when ‘convened’ is to be ‘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:’—not *all* ‘outrages and misbehaviours’ *without exception*, but such alone as would be ‘misdemeanours’ and so forth, ‘if committed within *this realm*.’<sup>106</sup>

The Governor (suppose) issues an ordinance (such as, it will be seen, he has issued in abundance) prohibiting an act which would *not* have been either ‘misdemeanour’ or ‘misbehaviour,’ ‘if committed within this realm.’<sup>ff</sup> Admit then, that it is really in the power of the Crown to communicate to the Governor in his individual capacity (the power he has so often exercised) the complete power of legislation. Power of *legislation* alone being thus

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<sup>105</sup> Under the New South Wales Courts Act of 1787, verdict and judgment in the Court of Criminal Judicature would be given by a majority of the six officers who composed the court, except in the case of capital convictions where five members had to concur, though no death sentence was to be put into effect until the proceedings had been approved by the King.

<sup>106</sup> See the New South Wales Courts Act of 1787, § 1.

communicated to him, power of *judicature* (except in the case of acts that would be offences ‘if committed in this realm’) not being given to him or any body, what would he be the better for it? He has power to *create* the offence, but neither he nor any body else has any power to *punish* or *try* the offender for it, when committed. The Governor, by his *proclamations*, has power to *enact new laws*. Be it so. But has he likewise powers to create *Star Chambers*—to punish such as shall fail of obeying those proclamations? Where is the court to try any such offence?—The court created under the statute?—By the statute itself it stands precluded (as hath just been seen) from meddling with them.—A Court of King’s Bench, or any other Court, to be erected by the Governor under his *instructions*?—those instructions which are to be to *this* colony, what *charters* have been to all *other* colonies?—Nor that neither.—Power or no power—instructions or no instructions—thus much seems clear enough—that, down to the time of Mr. Collins’s quitting the colony in September 1796,<sup>107</sup> no such court—(no court other than what has been called there a *Civil Court*,<sup>108</sup> in addition to the court for the erection of which special power is given by the statutes)—had ever in fact been holden.<sup>109</sup> A court to be composed of the Governor alone,

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<sup>107</sup> Collins had departed New South Wales on 29 September 1796.

<sup>108</sup> The establishment of a Court of Civil Judicature in New South Wales, which was to consist of the Judge Advocate and two ‘fit and proper persons’ nominated by the Governor, was authorized by the ‘Charter for Establishing Courts of Civil and Criminal Jurisdiction on the Eastern Coast of New South Wales’ of 2 April 1787: see *HRA*, series IV., i. 6–12 at 6. The first civil case in New South Wales was heard on 1 July 1788, a successful suit for £15 brought by the convicts Henry and Susannah Kable against Duncan Sinclair, the master of the *Alexander*, the ship which brought them to the colony, for the loss of property which they had given to him for safe-keeping at the start of the voyage. The Court consisted of Judge Advocate David Collins, Reverend Richard Johnson, and the surgeon John White. See *Cable v. Sinclair* (1788) NSWSupC 7.

<sup>109</sup> There were, in fact, several other legal tribunals established in New South Wales before Collins’ departure in September 1796. According to Collins, i. 13, the Governor, Lieutenant-Governor, and Judge-Advocate of the colony were constituted Justices of the Peace. The first bench of magistrates sat on 19 February 1788, though the earliest sitting described by Collins himself (i. 39–40) took place during August 1788. Moreover, according to Collins, i. 13, the Governor was vested ‘with authority to hold general courts-martial, and to confirm or set aside the sentence’, while the commander of the troops ‘had the usual power of assembling regimental or battalion courts-martial’ for the trial of soldiers under his command. The earliest recorded court-martial recorded by Collins (ibid. 302–3) took place in early August 1793, while the earliest general court-martial (ibid. 305–6) on 12 August 1793. Again according to Collins, i. 13, the Lieutenant General was constituted judge of ‘a vice-admiralty court for the trial of offences committed upon the high seas’, although this court first sat on 20 August 1798, subsequent to Collins’s departure. For the establishment of the various

for the trying of offences created by the Governor alone?—If so, here then we have the very quintessence of despotism; too rank one should have thought, even for the meridian of New South Wales. It is Star-Chamber out-Star-chamberized: legislature and judicature confounded and lodged together, both in one and the same hand.

<sup>ff</sup> Obligated to copy from the act the words, ‘*this realm*,’ it is impossible to avoid noticing, to what a degree even the scanty scrap of power undertaken to be created by it, is torn in tatters by these two words:—a proof how little of the mind of the legislature was bestowed upon this business, and how slight any inference that can be drawn from what was *actually* done by it, to what was *intended* or in *contemplation* to be done. ‘*This realm*’—what realm? against the law of what realm must an act be an offence, triable under the court so constituted? Against the law of England? of Scotland? or of Great Britain, i.e. of both together?—If an act, being an offence—not against any law passed since the Union, but only against the law of England, as it stood before the Union;—if such an act be an offence triable in this court, so must an act which, though *not* an offence against the *English* law, *is* an offence against the *Scotish* law. To *point out* the confusion, is the only thing to the present purpose: to attempt to *clear it up* would take a volume.

Injuries purely *civil*, might, for aught I know, be ‘*misbehaviours*,’ but are they ‘*misdemeanours*?’ I mean in the legal sense of the word, according to the law of *England*. Take for example acts purely negative. *Non-payment of debts*: non-performance of contracts, &c. &c. Blackstone, at least, is as decided as possible in the *negative*. {B. IV. ch. I.}<sup>110</sup> And how stands this matter under the law of *Scotland*?

England, I take for granted—England alone—was looked to as the standard of every thing that was to be done: into Scotland, not so much as the mind of our legislators had ever travelled.

Offences, involving, in the description of them, denominations *common* or *proper*—

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tribunals see ‘Charter for Establishing Courts of Civil and Criminal Jurisdiction on the Eastern Coast of New South Wales’ of 2 April 1787: see *HRA*, series iv., i. 6–12.

<sup>110</sup> See Blackstone, *Commentaries on the Laws of England*, iv. 5: ‘The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it’s social aggregate capacity’.

names of *places, persons, and things*—things *real, things incorporeal, i e. fictitious*—such as *offices, &c. &c.*, may not improbably be found to be incommisable (i.e. acts, though of like tendency, may not be *offences, or not punishable*) in territories where such *places, persons, things, &c.* are not to be found. Even in England, Burn speaks of English laws rendered in this way inexecutable:—instancing those ‘which appoint an offender to be whipped by the *common hangman*—where perhaps there is no such officer.’ {*Burn's Justice, Conclusion.*}<sup>111</sup> Instances are innumerable: I give this as most likely to be familiar. Offences punishable in England by an *Ecclesiastical Court* only—are they ‘*misdemeanours*’ in New South Wales?

Points like these might be started, enough to fill a volume: all unresolved, and many unresolvable. The whole act is but a vast mine of nullities and *jeofails*. Found a colony out of an act like this? Build a house as well, out of a load or two of brick-bats.

Is it true then, that even such a court—a court thus arbitrary—might have been created, and that without any powers from Parliament?—If so, then, (as far at least as ‘misdemeanours’ are concerned) there was no need of Parliament, for the establishment of the *less* arbitrary sort of court, therein established and described:—a court composed of ‘the Judge Advocate .^.^ together with six Officers of his Majesty’s forces by Sea or Land:’<sup>112</sup> the Governor not sitting among them indeed; though, being the person to ‘convene’ the court, he possesses (as it was evidently intended he should possess) the power of choosing, on each occasion, such Members for it, as, on that occasion, he thinks himself most sure of. The conclusion is then—that in spite of all suppositions, whatever ordinances he enacts and executes are on a double ground illegal: first, because there is no law for enacting them: and again, because there is no law for executing them.

So much for *law*. In *fact*, in what set of cases the Governor makes use of this court, and in what cases he does without it, or whether any precise line is drawn between them, is more than on the face of the documents (I mean the Judge Advocate’s printed journal) I should expect to be able to pronounce. As far as I have yet seen, I should suppose *no*

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<sup>111</sup> Richard Burn, *The Justice of the Peace, and Parish Officer*, 2 vols., London, 1755, ii. 573, noted that one way in which the *Statutes at Large* might be made shorter and rendered more comprehensible would be to repeal all ‘statutes which are *frivolous*; that is, which possibly cannot, or probably never will be executed: such as those which appoint an offender to be whipped by the hands of the common hangman, where perhaps there is no such officer’.

<sup>112</sup> See the New South Wales Courts Act of 1787, § 1.

certain line: but, in each individual case, if it seems of importance enough, the court is convened: if not, whatever be the offence—English-made, or Colony-made—the Governor does what he pleases with it, without troubling any body else, unless it be the man who is to give the lashes, or to ‘*pull the house down*,’<sup>hh</sup> &c. as the case may be.

<sup>hh</sup> Collins, II.<sup>113</sup>

### § 8. *King’s Law Servants not infallible.*

But, (says somebody) do you consider, Sir, by what authority all these acts, thus charged by you with illegality, were done?—It is not the minister alone, and *his* subordinates, that are implicated. This is not mere *Treasury* business. The acts have not only the *King*’s name and signature to them, but the sanction of the whole *Council-Board*, with the opinions of this and that and t’other *great dignitary of the law* included in it.

My answer is—All this makes little difference. It goes no farther than to shew, that, as for a certainty a surprize was put upon *Parliament*, so probably enough a surprize was also put upon the *Council-Board*: upon the Council-Board, including the legal learning and legal authority belonging to it. On putting the dry question of law—*Has not the Crown, without special powers from Parliament, powers to organize a constitution for a new Colony?* the answer, judging from the supposed precedents of the American Colonies, may, not very improbably, have been in the affirmative:—especially if given on slight consideration, as it naturally enough might be, in a case where no opposition was apprehended.

But, surprize, or no surprize, God be thanked, it is not in the power of the King’s Counsellors,<sup>ii</sup> to inflict upon a single Briton an atom of punishment of their own creation, much less to inflict illegal punishment upon Britons by thousands, and to make *ex post facto* penal laws by dozens, in repugnancy to so many laws of Parliament, including

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<sup>113</sup> Bentham presumably had in mind the pulling down and burning of the house of Thomas and Elizabeth Jones in July 1799, following their execution for the murder of the Reverend Samuel Clode: see Collins, ii. 216–17 and ‘Second Letter to Pelham’, p. 000 n. above.

*Magna Charta*, and the *Bill of Rights*.<sup>114</sup> Let the sanctions lent to the measures be what they may—by whatever *pretences*—and from whatever *names* obtained—wholesale oppression was the object of it, wholesale oppression has been the result.

<sup>ii</sup> I mean *legal* power, and under the constitution, while it stands: If indeed it falls, and despotism rises in the place of it, then indeed, such power as that in question exists at any time, without difficulty: and *è converso*, if such power exists, the constitution is at an end, and despotism stands in the place of it.

What *does* appear in point of fact, and from very high authority, is—that in matters of Colonial legislation, there has been a time—and even since the accession of his present Majesty—when his Majesty’s Law-advisers in this behalf have not been altogether masters of this part of their business. So at least in the Court of *King’s Bench*, in the famous *Granada* cause—the great and only adjudged case since the foundation of the first colony, that has any bearing upon this point—(*Lord Mansfield* being spokesman)—was the opinion of the *Judges*.<sup>jj</sup> ‘The inattention of the *King’s Servants*’ (speaking of his Majesty’s law-servants) is the circumstance to which, as the sole cause, the dispute then on the carpet is ascribed by that discerning Judge. The power of legislation, as exercised in that Colony, in the way of *taxation*, on the 20th of July 1764, by the King alone, without the concurrence of any other authority—either that of Parliament *here*, or that of an assembly of the Colony *there*—exercised on the ground of its being a CONQUERED Colony—is there supposed, though but *arguendo*, to have been in itself indisputable. But, before that day, to wit on the 7th of October 1763, these his Majesty’s careless servants, not knowing or not minding what they were about, had so managed as to divest him of it: and it was after having so done, that, forgetting what they had done, they picked it up again, and in the name of their Royal Masters, exercised it as above: ‘inverting’ (says Lord Mansfield) ‘the order in which the instruments should have passed, *and been notoriously published*, the last act’ was under their management ‘contradictory to, and in violation of the first:’ and this is the ‘inattention’ spoken of. Here then was an occasion, on which, according to Lord Mansfield and the rest of the Judges in the King’s Bench, his Majesty’s law-servants did not know what they were about: and this occasion was—the same as that now in

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<sup>114</sup> The Bill of Rights of 1689 (1 Will. & Mar., sess. 2, c. 2) specified the terms on which Prince William of Orange (1650–1702) and his wife Mary (1662–94) were offered the throne as joint sovereigns of England, Scotland, and Ireland following the removal of James II.

question—that of the making or mending a constitution for a Colony. This was in 1763 and 1764: and, forasmuch as a mistake of this sort was actually made, and by his Majesty’s law-advisers, I think I may venture, from the demonstrated error of that prior time, to infer the possibility of an error on the like subject, on the part of the same description of persons, in 1786 and 1787. The arguments *ab auctoritate* and *ab impossibili*<sup>115</sup> being thus cleared away, the other arguments may without much rashness be trusted to their own strength.

ii Campbell v. Hall. Cowper’s Reports 1783.<sup>116</sup>

### § 9. Nullity of New South Wales Legislation, proved by the *Granada Case*.

If any addition could be wanting, to the proof already given, of the illegality of the legislative power exercised by the sole authority of the Crown in this Colony, it might be drawn, and with full assurance, from this *Granada* case.

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<sup>115</sup> i.e. ‘from authority’ and ‘from impossibility’. See Coke, *First Part of the Institutes of the Lawes of England*, pp. 254 and 92 respectively.

<sup>116</sup> See *Campbell v. Hall* (1774) in Cowper, *Reports of Cases Adjudged in the Court of King’s Bench*, pp. 204–14. The case turned on the legality of a duty imposed on sugar exports from Grenada by an Order-in-Council of 20 July 1764. The island had been captured by the British during the Seven Years War of 1756–63 and, according to the terms of the Treaty of Paris of 1763, the existing French laws and taxes were to remain in force until the King’s pleasure was made known. In a proclamation of 7 October 1763 George III had promised that a representative assembly would be granted to Grenada as soon as circumstances permitted, and on 9 April 1764 Robert Melville (1723–1809), soldier and botanist, had been appointed as Governor, with a commission to call an assembly. The sugar duty, therefore, was imposed after the proclamation announcing the calling of an assembly, but before it actually convened in 1765. James Campbell, formerly a resident of Grenada, brought a suit for £20 against William Hall, a customs officer, claiming that the sugar duty of 1764 had been imposed without the required authority of a local assembly. Judgment was given in Campbell’s favour, with Chief Justice Mansfield holding that, while the King had an absolute constitutional authority over a conquered territory, the inhabitants of which became his subjects, that authority became limited once a representative assembly had been granted to the colony. By the proclamation of 7 October 1763 promising an assembly, and the appointment of Melville as Governor with a commission to call one, the Crown had ‘immediately and *irrecoverably* granted .^.^ that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council’.

From the whole tenor of the argument of the court, as delivered by *Lord Mansfield*, and taken in short hand by the reporter in that case, two propositions may be deduced with full assurance.

1. That in no case had any *judicial decision* been given down to that time (1774) recognizing the right of the *Crown*, to legislate, *without Parliament*, over an English Colony; howsoever acquired, (whether *by conquest* as *Granada* was) or *without conquest*: that therefore, as to every point not necessarily comprized in the decision given in that *Granada* case, the question, so far as concerns *judicial decision*, in contradistinction to *extra-judicial opinion*, remained open to that day—and from thence, it may be added, to the present. The above-mentioned decision in the *St. Alban's* case<sup>117</sup>—the decision disaffirming the King's right to legislate over Englishmen without Parliament—has therefore nothing to contradict it.

2. That, although by that argument, in the case of the *foreign* inhabitants of a country acquired by *conquest*, the right in question is *affirmed*: yet, in that same argument, in the case of a colony acquired in any *other* way than by conquest, it is expressly *disaffirmed*: and in particular it is disaffirmed in the case of all the several other Colonies at that time in existence.

3. On *one* condition indeed, it is, in the nonjudicial opinion relied on by that same argument, *in a certain way*, affirmed: and the condition is—that, as in those other Colonies, a share be taken by an *assembly* of the Colony in the exercise of the right. But, by the affirmance of the right, restrained as it is by this condition, the case of Mr. Pitt, in *his exercise* of it, will not be bettered. For, of any legislative *assembly* in the penal Colony of *New South Wales*, there has never been so much as a shadow.

Nor even thus, is the affirmance given to the right a distinct and *positive* one. It is only not disaffirmed, because not disputed; both parties (the Crown and the local Assembly) being alike engaged by their respective views and interests to assume it. These propositions, being of such importance, may seem to have a claim to very specific proof; such proof shall not be wanting.

Of all these propositions proof will be afforded at the same time, by the two only

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<sup>117</sup> See pp. 000 above.

authorities, dated as having any bearing upon the case. These are,

1. A *dictum* in 1608 by Lord Coke, Chief Justice, in his report of the famous case called *Calvin's case*: the case in which, on the accession of James the First, a right on the part of *Scotchmen* to certain privileges of *Englishmen*, was claimed and allowed.<sup>118</sup> 2. A *non-judicial* opinion, given in 1702<sup>119</sup> by two practising lawyers—one of them at least at that time a servant of the Crown. *Sir Philip Yorke* (afterwards Earl of Hardwick) and *Sir Clement Wearg*,<sup>120</sup> on a question relative to the right of the Crown *to tax Jamaica*: an opinion which, so far as it went to the affirmance of the right, in the case of a colony obtained by *conquest*, appears to have had for its ground, and only ground, that same ante-colonial *dictum* thrown out in *Calvin's case*.

As to what is said in Calvin's case, not applying (if to any colony) to any other than a colony acquired by *conquest* (such as New South Wales, most certainly, is not)—to scrutinize into it is a talk that may here be spared.

The proposition is a mere *dictum: collateral*, and not even very perceptibly relevant, to the case in hand, the words of it, when extracted and wiped clean, as it has been very carefully by *Lord Mansfield*, from the portentous mass of absurdity and atrocity with which he found it entangled,<sup>kk</sup> are as follows—'If a king comes to a kingdom by *conquest*,

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<sup>118</sup> See Edward Coke, *The Seventh Part of the Reports of Sir Edward Coke Knight*, London, 1608, pp. 1–28, reporting *Calvin's Case* or the *Case of the Postnati* (1608). James Colville, referred to in the legal record as Robert Calvin, born in Scotland in 1604 and grandson of James Colville (c. 1551–1629), Lord Culross, soldier and diplomat, had inherited land in Shoreditch, but his claim was challenged on the grounds that, as a Scot, he was an alien and therefore had no legal entitlement to land in England. Coke's judgment established that the *post-nati*, Scots born after James VI of Scotland's accession to the English throne and the Union of the Crowns in March 1603, were not aliens but subjects and therefore had the right to inherit property in England, whereas the *ante-nati*, those born before March 1603, remained aliens. In relation to the status of subjects in the Crown's overseas territories, Coke held that if England conquered a Christian territory, the Crown had the power to alter the laws of that territory, but in the meantime the existing laws remained in force, but if England conquered a non-Christian territory, the laws of that territory were deemed to be null and void and were immediately superseded by English law.

<sup>119</sup> The 'non-judicial opinion' was given on 18 May 1724, rather than in 1702: see p. 000 n. below.

<sup>120</sup> Philip Yorke (1690–1764), first Earl of Hardwicke, lawyer and politician, Solicitor General 1720–4, Attorney General 1724–33, Chief Justice of King's Bench 1733–7, Lord Chancellor 1737–56, and Clement Wearg (1686–1726), Solicitor General 1724–6.

he may change and alter the laws of that kingdom: but if he comes to it by title and {of} *descent*, he cannot change the laws of himself, without the consent of Parliament.<sup>121</sup>

<sup>kk</sup> Pronouncing the laws of every infidel (i.e. non-christian) country void in the lump, and so forth: Turkey, Hindostan, and China, for example.—Whenever the Khan of the Tartars sounded his trumpet after eating his dinner, it was to allow other princes to eat theirs. When this christian barbarian thus sounded his trumpet, it was to prohibit other potentates from eating their dinners: at least from eating them in peace and quietness:—All infidels (he says) are perpetual enemies.<sup>122</sup>

Of the opinion given by *Yorke* and *Wearg* the account given by *Lord Mansfield* is in these words:

‘In the year 1722, the assembly of *Jamaica* being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearg, to know what could be done, if the assembly should obstinately continue to withhold all the usual supplies. They reported thus: “If *Jamaica* was still to be considered as a *conquered island*, the *King* had a *right to levy* taxes on the inhabitants: but if it was to be considered in the *same light* as *the other colonies*, no tax could be imposed on the inhabitants, but by an *assembly of the island*, or by an act of *parliament*.”’

‘They considered the distinction in law as clear, and an indisputable consequence of the island’s being in the one state or the other.’<sup>123</sup>

‘In *the one state*’ (says *Lord Mansfield*) ‘or *the other*.’ Neither did he therefore, any more than those whose opinions he was adopting, know of any *third* state. They recognized not any such state, as that of a colony acquired otherwise than by conquest, and yet capable of being legislated upon by the crown alone: by the crown without any further sanction,

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<sup>121</sup> This is not a quotation from, but Bentham’s paraphrase of Mansfield’s paraphrase of the relevant part of, Coke’s report of *Calvin’s Case* at *Seventh Part of the Reports of Sir Edward Coke*, p. 18.

<sup>122</sup> See *Seventh Part of the Reports of Sir Edward Coke*, pp. 17–18, ‘All Infidels are in law *perpetui inimici*, perpetuall enemies (for the law presumes not that they will bee converted, that beeing *remota potentia*, a remote possibilitie) for between them, as with the divels, whose subjects they bee, and the Christian, there is perpetuall hostilitie, and can be no peace’.

<sup>123</sup> See *Campbell v. Hall* (1774) in Cowper, *Reports of Cases Adjudged in the Court of King’s Bench*, p. 211–12.

either that of a local assembly, or that of the supreme legislative body in the Mother Country: without any check at all upon absolute autocratic power: without the necessity of any consent, either on the part of any special deputies from that particular division of his Majesty's subjects, or on the part of the representatives of the whole.

In the case which drew this argument from Lord Mansfield, the point he was bound to determine, and which he accordingly did determine, was—that, *as matters stood*, the power of taxation, as exercised by the Crown in Granada, *was not* legal. Another point which, being at liberty to speak to it or not, he thought fit to speak to, was—that *if matters had been otherwise*, such power *would have been* legal. If, in humble imitation of such high and sincerely respected authority, and in precisely the same view, viz. that of seeing important constitutional questions settled on the broadest and most solid grounds, it may be allowable for an obscure ex-lawyer, on this same ground, *to travel*, as the phrase is, *a little way out of the record*, I will venture to state it as a question, which notwithstanding the opinion so distinctly given by that great lawyer in the affirmative, remains still quite open, whether, even in the case of *conquest*, in any colony acquired since the Revolution, *Trinidad* for example,<sup>124</sup> the right of the King to legislate without Parliament—I mean without express authority from Parliament—would, *in case of dispute*, be found maintainable in law.

Over *Englishmen*, it stands expressly negatived (as already mentioned) by *Magna Charta*, and by the interpretation put upon that statute, by the judicial decision given in the *St. Alban's* case.<sup>125</sup>

Over *foreigners*—inhabitants found existing in a colony acquired by conquest, it would (I am much inclined to think) be regarded as negatived, as well as over *Englishmen*, by the two connected constitutional principles, recognized in the 4th and 5th articles of the *Bill of Rights*: viz. that neither *in actu* nor *in potentia*, shall a King of England have, *as such*, without the express allowance of Parliament, either a separate army of his own, or a

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<sup>124</sup> The Spanish colony of Trinidad had surrendered on 17 February 1797 to a British force led by Sir Ralph Abercromby (1734–1801) and was formally ceded to Britain by the Treaty of Amiens of 1802.

<sup>125</sup> See pp. 000 above.

separate purse.<sup>126</sup> And in this light, it appears from *Edmund Burke*<sup>127</sup> that the Bill of Rights was most publicly (viz. in the House of Commons) and constantly, and, for any thing that appears, without contradiction, considered by *George Grenville*:<sup>128</sup> himself a *lawyer*—(according to Burke, even too much of a lawyer)<sup>129</sup> before he was a *Minister*: and this not on the ground of *policy* merely, but of actual *law*.

<sup>11</sup> Speech upon American taxation, 19th April, 1774; 3d edit. 1775, p. 54.<sup>130</sup>

Be this as it may, what is certain, is—that the question is still open, notwithstanding the decision in the *Granada* case: because in that case, though an opinion was given, affirming the right of the Crown to legislate in case of conquest, that opinion was not necessary to the decision then pronounced.

How much better for this country, as well as so many other countries, would it have been, if instead of fishing for drops of sense out of the extrajudicial ravings of Lord Coke, men of law had attended—on the one hand to the direct decision of the judicial authority,

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<sup>126</sup> Under the Bill of Rights of 1689, Art. 4, the monarch was prohibited from ‘levying Money for and to the Use of the Crown, by Pretence of Prerogative, for other Time, and in other Manner, than the same was granted by Parliament’, and under Art. 5, the monarch was prohibited from raising and keeping a standing army during peacetime without the consent of Parliament.

<sup>127</sup> Edmund Burke (1730–97), statesman, orator, and politician.

<sup>128</sup> George Grenville (1712–70), Secretary of State for the Northern Department 1762, First Lord of the Admiralty 1762–3, leader of the administration as First Lord of the Treasury and Chancellor of the Exchequer 1763–5.

<sup>129</sup> See Edmund Burke, *Speech of Edmund Burke, Esq. on American Taxation, April 19, 1774*, 3rd edn., London, 1775, pp. 47–8, reproduced in *The Writings and Speeches of Edmund Burke. Vol. II: Party, Parliament, and the American War: 1766–1774*, ed. P. Langford and W.B. Todd, Oxford, 1981, p. 432, stating that Grenville was ‘bred to the law, which is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together; but is not apt, except in persons very happily born, to open and to liberalize the mind exactly in the same proportion. Passing from that study he did not go very largely into the world; but plunged into business; I mean into the business of office; and the limited and fixed methods and forms established there’.

<sup>130</sup> According to Burke, *Speech on American Taxation*, p. 54, reproduced in *Writings and Speeches of Edmund Burke. Vol. II*, p. 436, Grenville ‘was of opinion, which he has declared in this House an hundred times, that the Colonies could not legally grant any revenue to the Crown; and that infinite mischiefs would be the consequence of such a power’.

as reported, in sober though very energetic language, by the *same* God of their idolatry, in the *St. Alban's* case; on the other hand, to that of the legislative authority, as displaying itself in the *Bill of Rights!* If they had, nothing in the way of legislation would, from first to last, have been done in English-America, but *by* Parliament, or with *express* authority from Parliament. It would not then have been so much as dreamt of, that it was in the power of the King, by confederating with a part of his subjects, withdrawing themselves for this purpose to a vacant territory remote from the eye of Parliament—that it was in the power of his law-servants, by any such management, to oust Parliament of its rights: I mean its exclusive right of legislation, as established in the *St. Alban's* case. Dissension would then have been nipped in the bud: and the American war,<sup>131</sup> with all its miseries, and all its waste of blood and treasure on all sides, would have been saved.

Unfortunately, in the *St. Alban's* case, the scene not lying in America, nor any thought being entertained by any body about America, no such word as *America* is to be found. Of *colonies*, as little: for at that time scarce had any such idea as that of *colonization* ever presented itself to any English mind. And thus it happened, that when America came to be the order of the day with lawyers, nothing appeared in their common-place books, to guide them to that case.

What is curious enough, is—that in the very first instance of a grant of land made by a charter from the crown of England to intended settlers in America, these portions of *American ground* were declared to be put upon the same footing in point of law, as if contained within a spot of *English ground*;—the manor of *East Greenwich*.<sup>mm</sup>—And, with the *St. Alban's* case, then comparatively a recent one, before their eyes;—with this case, one of the most prominent cases, in the most prominent of all law books, full in their teeth;—were these Crown lawyers audacious enough to make their king grant, to these inhabitants of *East Greenwich*, privileges which had already been declared illegal, not fourteen years before, when granted to the inhabitants of *St. Alban's*.<sup>132</sup> But the grant was of the number of those exertions of prerogative, which were not expected to come before an English court of justice, any more than they were intended for the eye of Parliament. Parliament, never for two days together sure of its own existence, had too much of its own and the whole nation's business upon its hands, to be inquisitive about a handful of obscure

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<sup>131</sup> i.e. the American War of Independence 1776–1783.

<sup>132</sup> The interval was in fact sixteen rather than fourteen years: see p. 000 n. below.

adventurers, who, turning their backs upon their country, betook themselves to other laws.<sup>nn</sup>

<sup>mm</sup> ‘All the lands within the precincts of the colonies (viz. between 34 and 45 degrees of latitude) were on petition to be granted by the King,’ ‘to be holden of the King, as of his Manor of East Greenwich, in Kent, in free and common soccage only, and not in capite.’ Lind. *Remarks on the Acts relating to the Colonies*, p. 94.<sup>133</sup>

<sup>nn</sup> Another example may help to shew the force and virtue of such exercises of regal power, in the character of *precedents*. On the 23d of March, 1609, about three years after the first Charter, a second is granted to the same Company, with additional powers. Among these is a power to any two of the Council of the Company resident in England, *to send out of England*—to send out to their Colony—‘there to be proceeded against and punished, as the Governor, Deputy, or Council there shall think meet’—any persons who, after engaging in the service of the Company, and having received earnest-money, shall either have refused to go out thither, or have returned from thence.<sup>b</sup>

What cared these men (I mean the Crown lawyers who drew this charter) about the *St. Alban*’s case, and the Court of Judicature that decided it? As little as about *Magna Charta* which it expounded: as little as their successors, who drew the *New South Wales Act*<sup>134</sup> for Mr. Pitt.

<sup>b</sup> Lind. Part II. § I. p. 100.<sup>135</sup>

All this, except what concerns the want of power, on the part of the servants of the Crown here in England, to legislate over Englishmen in New South Wales, and without any of those limitations, without which, or some of them, no such power had ever been exercised by any servant of the Crown of England any where else, is, as I have already

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<sup>133</sup> See Lind, *Remarks on the principal acts of the thirteenth Parliament of Great Britain*, p. 94, for the second quotation, while the first quotation is a paraphrase of a passage at pp. 88–9.

<sup>134</sup> i.e. the New South Wales Act of 1787.

<sup>135</sup> Contrary to the account in Lind, *Remarks*, pp. 100–1, and followed here by Bentham, the power to compel Virginia Company employees to return to the colony was not granted to the Company by the second Charter of Virginia of 23 May 1609, but by the third Charter of 12 March 1611: see *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America*, vii. 3790–3802, 3802–10, with the extract from the third Charter quoted by Bentham at 3809.

observed and acknowledged, a mere work of supererogation, with reference to New South Wales. But there are other places, with reference to which it may be not altogether so immaterial:—say *Trinidad* for example.

Mischievous as the effect of these questions might be if ill-timed, I start them without any sort of scruple. Parliament being now sitting,<sup>136</sup> the tendency as well as the object of them is, not to create confusion, but to prevent it. How desirable, on every account, that rights of such importance should be fixed at once upon the rock of *legislation*, instead of being left to totter upon the quick-sands of expected judicature, waiting for ‘*the competition of opposite analogies!*’<sup>137</sup> Can it be worth while, to leave so much property a prey to insecurity—so many confident expectations a prey to disappointment—for the chance of saving a little longer the stump of a rotten prerogative, and perhaps the pride of a few lawyers?

<sup>137</sup> Paley.<sup>137</sup>

But, all collateral questions dismissed, thus, on the ground of law, stands the government of New South Wales. Over Britons or Irishmen, in or out of Great Britain and Ireland, the King, not being himself possessed of legislative power, can *confer* none. To confer it on others—those others being his instruments, placeable and displaceable by himself at any time, is exactly the same thing as to possess and exercise it himself.

The displaceable instruments of the Crown—the successive Governors of New South Wales—have, for these fourteen years past, been exercising legislative power, without any authority from Parliament: and either without any authority at all from any body, or at most without any authority but from the King: and all along they have been, as it was most fit they should be, placed and displaced at his Majesty's pleasure.

And among those, over whom legislative power has thus been exercised, have been

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<sup>136</sup> Parliament was in session from 16 November 1802 until 12 August 1803.

<sup>137</sup> See William Paley, *The Principles of Moral and Political Philosophy*, London, 1785, Bk. VI, Ch. 8, pp. 519–20: ‘Finally, after all the certainty and rest that can be given to points of law, either by the interposition of the legislature, or the authority of precedents, one principal source of disputation will remain still, and into which indeed the greater part of legal controversies may be resolved, namely, “the competition of opposite analogies.”’

individuals by hundreds, or, ere this, by thousands, who, so far from subjecting themselves to this power by their own *consent*, or having been subjected to it by any consent on the part of their *ancestors*, under whom they were born and bred, have all along been doing their utmost to make their *escape* out of the reach of it:<sup>138</sup> and this very absence of consent—the very energy and notoriety of their repugnance—is among the very grounds on which, in the most important case of all, that of confining to this land of bondage such as are free by law, the power thus exercised over them would, if at all, be justified.

Of two things, one. Either there is not at this moment any legal power of legislation in *New South Wales*, or there is not any legal power of legislation in *Great Britain—Magna Charta* is waste paper. If, without fresh support from Parliament, the Constitution of New South Wales stands, that of Great Britain and Ireland is no more. If, without authority from Parliament, the King can legislate over Britons and Irishmen in New South Wales, so can he in Great Britain and Ireland. If, without authority from Parliament, the King can confine to that place of exile any such quondam bondsmen, reconstituted freemen by the expiration of their legal terms of bondage, so likewise can he deal by freemen who never were in bondage. If men of either description can be thus confined *when there*, with equal right may they be *sent there*. The King is absolute: and, instead of convening Lords and Commons to Westminster Hall to join with him in making laws, may send them to have laws made upon them in New South Wales.

### § 10. *Governor's illegal Ordinances exemplified. I. For Prevention of Famine.*

Thus then stands legislation there in point of *right*. In point of *fact* (I have already observed) there has not been any deficiency of it: or if there has, it has not had the deficiency in point of law, or any suspicion of such deficiency, for its cause. *Ten* classes, comprising the whole population of the colony, have already been brought to view:<sup>139</sup> half of them, or thereabouts, subject by law in one way or other, to a certain degree at least (for aught appears), to the Governor's legislative power: the other half, *not* thus subject to it. No traces of any such distinction in point of *right*, appear in point of *fact*. *Regardless*, or

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<sup>138</sup> For Bentham's discussion of reported attempts by convicts to leave New South Wales see 'Letter to Pelham, pp. 000 above.

<sup>139</sup> See pp. 000–000 above.

(to embrace the more probable, as well as more candid supposition) *unapprized*, of any such distinctions, he legislated *chance-medley*, upon all. The terms of each ordinance or mandate being general—addressed to all alike—no exception of this or that denomination of persons—neither *exception* nor *specification* (which is as much as to say an exception of all denominations not specified)—obedience appears to have been expected, and exacted, from all alike. *De jure* a limited monarch (though most strangely limited)—*de facto*, he was an absolute one: as indeed in the situation in which he, and every body under him, had been so unnecessarily placed, it was sometimes at least, if not always, necessary that he should be.

To satisfy the reader at one and the same view, that of legislation, there was little or no *want* in *one* sense, and at the same time a most urgent and perpetual *want* in the *other*—that there was *plenty* of legislation, accompanied all along by a most urgent *need* of it—here follows a list of the chief *objects* or *purposes*, which the ordinances actually issued, appear to have had in view. To class a set of laws under the very heads which point out the *reasons* of them—such, if not a very ordinary mode of classification, is neither an uninformative, nor surely an unfair one.

In the journal of the late Judge Advocate of the Colony, indications more or less distinct may be found, of a set of ordinances, of one sort or other—in number between sixty and seventy—issued within a period commencing with the arrival of the first expedition on the 20th of January, 1788; and ending with the month of September, 1796: a period of not quite nine years.<sup>140</sup>

Among the *objects* or *final causes* of these regulations, the following appear to have been the principal ones:

1. Security against *scarcity* and *famine*.<sup>141</sup>
2. Security against *depredation*, and other mischief from within.
3. Security against mischiefs from without, viz. against injuries from the *native savages*.

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<sup>140</sup> Bentham has, presumably, arrived at this figure from his own research on the first volume of Collins.

<sup>141</sup> Bentham lists examples of the relevant ordinances at pp. 000 below.

4. Security against accidents by *fire*.
5. Prevention of *drunkenness*.<sup>142</sup>
6. Enforcement of attendance on *divine worship*.
7. Prevention of *emigration*—whether on the part of *non-expirees*—of *expirees*—or *both* together without distinction.<sup>143</sup>

These objects were they of no moment? The mischiefs thus guarded against, was there any thing singular or unexampled in them?—any thing which to a man of ordinary forecast, legislating in England, could be expected to be invisible?

Without entering into particular examinations, thus much may be averred in general terms without error—that among these ordinances are many either altogether indispensable or indisputably useful: speaking all along of such, as, being introductory of *new law*, adapted to the particular exigencies of the spot, became *creative* of so many correspondent offences, such as would *not* be ‘*misdemeanours or felonies, treasons, or misprision thereof,*’ if committed in ‘*this realm;*’<sup>pp</sup> to use the words employed by the Act,<sup>144</sup> in the description of the only offences, which the only Court of Justice legalized by it, received authority from it to punish.

<sup>pp</sup> In whatever sense the words *this realm* be understood, v. supra, p. 000.

In every instance the stronger the necessity of each illegal ordinance, the clearer the innocence of the *local* lawgiver, if not in a *legal* point of view, at least in every other: but the more clear *his* innocence, the more flagrant the guilt of those who, sitting in the bosom of security, sent him out thus to legislate with a halter about his neck, and without legal powers! Guilty, if in their dreams they thus exposed him; how much more so if awake!

From the sort of account given of these several ordinances by the Judge Advocate (an account which had no such scrutiny as this for its object), to speak with decision, and at the same time with correctness, as to the legality of the ordinance, is not in every instance

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<sup>142</sup> See § 11, pp. 000 below.

<sup>143</sup> See §§ 12–13, pp. 000 below.

<sup>144</sup> i.e. the New South Wales Courts Act of 1787, § 1.

possible. In many, perhaps most instances, one and the same ordinance will have been in part illegal, in part legal: legal, in so far as it bears upon the faculties, active or even passive, of persons belonging to the classes above distinguished as legally subjected to the authority of the Governor; illegal, in as far as it bears in like manner upon persons *not* so subjected.

For shewing, by the tenor of the ordinances themselves, the urgency of the demand for legal authority for the issuing of them, and thence the guilt of those by whom it was left unsupplied, I select, out of the above seven cases, the three most prominent ones—*famine*, *drunkenness*, and *escape*.

The *absence*, coupled with the *need*, of any of the powers of government—this combination, as far as it extends, is *anarchy*. Famine and anarchy are the grand intestine foes, which all *infant* settlements have to struggle with. Each leads on and exasperates the other. From one or other, or both, many expeditions of this sort have suffered more or less severely: some have perished altogether. Such has been the case where the spot has been comparatively at next door to the source of power and supply: in *America* for example, at scarce a quarter of the distance.<sup>145</sup> To any considerate eye, how much more repulsive the danger in *New South Wales*?

This double source of destruction *ought* to have been foreseen; and with an ordinary degree of intelligence and attention *would* have been foreseen: and being foreseen, should of itself have been sufficient to *prevent* the establishment—if not of *any* colony—at least of any colony *so composed*. In a country so situated and circumstanced—of itself yielding nothing in the way of sustenance, and at that unexampled distance from the nearest country that yielded any thing—it was in the very nature of the enterprise, to deliver up the persons sent upon it, to the scourge of *famine*: it was in the very nature of the enterprise, to give birth to enormous exertions, in the way of national *expence*, in the view of protecting them

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<sup>145</sup> Examples of failed colonies included Roanoke, founded in 1587 but which had disappeared by 1590; the Popho or Sagadahoc colony, founded in May 1607 but abandoned a year later; Jamestown, founded in 1607 but temporarily abandoned in 1610 after the deaths by disease and starvation of between two-thirds and four-fifths of its colonists; and New Caledonia at the Gulf of Darien, founded in 1698 by the Company of Scotland, but abandoned in April 1700 after 2,000 of its 2,500 settlers had died owing to disease, food shortages, and attacks by Spanish forces, who claimed New Caledonia as part of their colony of New Granada.

against the affliction: it was in the very nature of the enterprise, that such exertions should be more or less *ineffectual*. Such was the *tendency* of it, such was the *event*: many sunk under the pressure: the remainder, for months together, stood between life and death. Death must evidently have been the general lot, had it not been for the exercise of those powers, of which the founders of the establishment *here at home* had left it destitute.

Such negligence, to give it the gentlest name, being too flagitious to be suspected, was not in that *ultima Thule* followed with those consequences, of which it *might* have been productive, in a situation communicating more freely with the centre of information. Against anarchy, a battalion of well armed soldiers, to keep in order a band of unarmed convicts—such a remedy, expensive at it is, must be allowed to be a *strong* one: continual as the apprehensions are, that it will not be strong enough.

NOTE TO TYPESETTERS: Insert space, centre the following line, and then begin list.

Examples of Ordinances, having for their Object Security against *Scarcity* and *Famine*.

1. Page 23,<sup>146</sup> March 1788. ‘Much damage .^.^ by hogs—.^.^ Orders given .^.^ any *hog* caught trespassing, to be *killed* by the person who actually received any damage from it.’
2. Page 28, May 1788.—‘The Governor .^.^ directed every person in the settlement to make a *return* of what *live-stock* was in his possession—’
3. Page 98, March 1790.—‘It being found that great quantities of stock were killed, an order was immediately given, to *prevent the farther destruction* of an article so essential in our present situation.’
4. Page 101, March 1790.<sup>147</sup>—‘Damage was received from the little stock which remained alive: the owners not having wherewithal to feed them, were obliged to turn them loose to browse .^.^ It was however ordered, that the *stock* should be *kept up during the night*, and every *damage* that could be proved to have been

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<sup>146</sup> 1803 ‘23d’. *Recte* Collins, i. 22. References are to the first volume of Collins.

<sup>147</sup> 1803 ‘27 March 1790’. Bentham appears to have confused the date when the colony was put on shorter rations, namely 27 March 1790, with a description of regulations at Rose Hill which is more generally dated March 1790.

received during that time was to be *made good* by the owners— .^.^.^ or the animals .^.^.^ *forfeited.*’—

5. Page 105, between the 3d and the 7th of April, 1790.—‘All *private Boats* were to be *surrendered* to the public use.’ This was for fishing: a determination having been taken ‘to reduce still lower what was already too low’ (the ration). ‘In *this* exigency, the Governor had thought it necessary to assemble all the Officers of the settlement—Civil and Military—to determine on .^.^.^ measures—’
6. Page 104, between the 3d and 7th of April, 1790.—‘The Lieutenant Governor .^.^.^ called a Council of *all* the *naval* and *marine* officers in the settlement, when it was unanimously determined, that MARTIAL LAW should be proclaimed; that *all private stock*, poultry excepted, should be considered as the property of the State!’<sup>148</sup>

NOTE TO TYPESETTERS: End list and insert space.

Of the several acts of disobedience with reference to these respective ordinances, how many are there that would have been ‘ *misdemeanours,*’ if committed in England?<sup>149</sup>— Scarce a single one.

The ordinances, all prudent and *expedient*:—upon the face of them, at any rate: some at least *necessary*: necessary to a degree of urgency to which even conception cannot reach in England. *Sanction*, the *physical: penalty of non-legislation*, not scarcity only but *famine*.

## § 11. *Governor’s illegal Ordinances exemplified. 2. For Prevention of Drunkenness.*

*Improvvidence—indolence—helplessness*—all *extensive*, as well as *intense*, to a degree scarce conceivable in this country, were the prominent features of this reformation colony, down to the time when its historiographer took his leave of it.<sup>qq</sup> But of all these

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<sup>148</sup> Collins’s reference is to the imposition of martial law, not in mainland New South Wales, but at Norfolk Island: see p. 000 & n. below.

<sup>149</sup> See pp. 000 above.

weaknesses *drunkenness* was the principal and perennial source.<sup>rr</sup>

<sup>qq</sup> Letter I. to Lord Pelham, p. 000 to 000.

<sup>rr</sup> *Ib.* p. 000 to 000.

*Prevention*—any thing like *complete* prevention—being out of the question, to snatch from this vice what *could* be snatched from it of its prey, would be as important an object as it was a natural one, to a Governor legislating on that spot. But *important* is not strong enough. In *this* country *well-being* only; in that, even *being* was attached to it. Upon sobriety, depended labour: upon labour, the means of immediate subsistence. In that state of things, to legislate against *drunkenness* was to legislate against *famine*. The *means* chosen might be more or less apposite; the result more or less successful. But the *endeavour* was as necessary, as *life* is necessary: and for this endeavour, the authority obtained from Parliament was as inefficient as for all the others.

Here, as in the case of *famine*, the same natural incompatibility established between the *expedient* and the *lawful*: to the Governor, the same distressing option between *legal* duty and *moral*, supposing the difference to have been present to his view.

Among the ordinances actually issued by him on this ground, it will be only by accident, if any one be found, that was not *expedient*: it will be only by accident, if any one can be found, that was not illegal. As to the *test* of illegality, it is already given.<sup>150</sup> To apply it to the several ordinances, article by article, would to lawyers be unnecessary, to non-lawyers tedious beyond endurance.

NOTE TO TYPESETTERS: Insert space and then begin list.

No. 1. Collins, i. p. 175. August 1791.<sup>151</sup>—‘Spirituous liquors .^.^.^ Ordered that none should be *landed*, until a *permit* had been granted by the Judge Advocate: and the

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<sup>150</sup> See pp. 000 above.

<sup>151</sup> 1803 ‘28 August 1791’. Bentham appears to have confused the date when the *William and Ann* reached the colony, namely 28 August 1791, with a description of the regulation concerning spirituous liquors which is more generally dated August 1791.

Provost Marshal, his assistants and two principals of the Watch, were deputed to *seize* all spirituous liquors which might be landed.’

No. 2, p. 300. July 1793.—‘Spirituous liquors. Notice’<sup>152</sup> (by the Lieutenant Governor) ‘that any person attempting to *sell* spirituous liquors without a *licence*, might rely on its being seized, *and the house of the offending parties pulled down.*’

No. 3, p. 449.<sup>153</sup> 18th Jan. 1796. ‘The Governor forbade all persons .^.^ to *distil* spirituous liquors .^.^ on pain of *such steps being taken for their punishment as would effectually prevent a repetition of so dangerous an offence.*’<sup>154</sup> ‘In pursuance of these directions,’ (pursues the text) ‘several *stills* were found and *destroyed.*’ Rather more of the mystery of despotism than of the certainty of law in the above *sanctionative* part: but, by the *practical comment*, the mystery was unravelled.

NOTE TO TYPESETTERS: End list.

The forbidden practice is spoken of as being ‘*in direct disobedience to his Majesty’s commands.*’<sup>155</sup> Here then we have one instance at least, in which the name of Majesty was profaned, for the purpose of giving an apparent sanction to these violations of law, which were found better adapted to the purposes and dispositions of Ministers, than the legal authority, which might or might *not* have been obtainable from Parliament.

NOTE TO TYPESETTERS: Begin list.

No. 4, p. 483.—‘Direction by the Governor .^.^ that none of those persons who had obtained licences should presume to carry on a traffic with settlers or others who might have grain to dispose of, by *paying for such grain in spirits.*’ Then, in case of contravention, comes the menace in the established mysterious style: ‘their licences would immediately be recalled, and *such steps taken for their punishment, as they might be thought to deserve.*’ Also that ‘*trading, to the extent which he found*

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<sup>152</sup> This phrase is not taken from Collins, but is Bentham’s.

<sup>153</sup> *Recte* 449–50.

<sup>154</sup> For the order see Governor Hunter to Duke of Portland, 12 November 1796, Enclosure, Government and General Orders (23 January 1796), *HRA*, i. 685–6.

<sup>155</sup> See Collins, i. 449.

*practised*, was strictly forbidden to *others*, as well as to those who had *licenced* public houses.’<sup>156</sup> Observations, in various shapes, present themselves: amongst others a question, how a man was to know whether he was safe or no under this law? But as to what may apply more particularly to individuals *there*, this is not a place for observations.

NOTE TO TYPESETTERS: End list.

## § 12. *Expirees forcibly detained.*

No. 1. Collins, i. p. 74.<sup>157</sup> July 1789. Liberty of departure, and freedom from bondage on the spot, both refused to a number of *expirees* at the same time; on the ground that no evidence, of the original commencement and length of their respective terms, was to be found.<sup>ss</sup>

<sup>ss</sup> Collins, i. p. 74. July 1789.—‘Notwithstanding little more than two years had elapsed since our departure from England, several convicts about this time signified that the respective terms for which they had been transported had expired, and claimed to be restored to the privileges of free men. Unfortunately by some unaccountable oversight the papers necessary to ascertain these particulars had been left by the masters of the transports with their owners in England, instead of being brought out and deposited in the colony; and as, thus situated, it was equally impossible to admit or to deny the truth of their assertions, they were told to wait till accounts could be received from England; and in the mean time, by continuing to labour for the public, they would be entitled to share the public provisions in the store. This was by no means satisfactory; as it appeared they expected an assurance from the Governor of receiving some gratuity, for employing their future time and labour for the benefit of the settlement.’<sup>158</sup>

There being, for any thing that appeared, no authority for treating them as convicts, the *legal* consequence would have been, in England, and in short under any system of law

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<sup>156</sup> Collins is describing events that occurred in June 1796. For the ‘Direction’ see Governor Hunter to Duke of Portland, 12 November 1796, Enclosure, Government and General Orders (18 June 1796), *HRA*, i. 693.

<sup>157</sup> *Recte* 74–5.

<sup>158</sup> See ‘Letter to Pelham’, pp. 000 above.

but that of New South Wales, that they should have been treated as freemen. Instead of that, they were kept in confinement and bondage there, till a time which might never happen.

The omission of the papers in question is ascribed by the historian, as by a candid interpreter it naturally would be, to ‘oversight,’ and the oversight is spoken of as being ‘*unaccountable*.’ What is curious enough is—that this omission is not the only one of the same kind.<sup>159</sup> But, even though it were the only one, indications are not altogether wanting, such as might lead to a suspicion at least, as to the cause. In the list of convicts, with their respective terms and days of sentence, given by Governor Phillip,<sup>160</sup> *five* persons are named whose terms were to expire in the very month in question, July 1789. Of these there was not one, whose remaining penal term, on the day of his being *shipped* for transportation, or at least on the day of the ship’s sailing, was so long as two years and three months: nor, on the day of his *landing*, more than eighteen months. Deducting, if it be but six months, for the time requisite for return, had these convicts, all of them, had a vessel in readiness for them to embark in for England, and embarked and arrived accordingly, so as to have reached England by the end of their respective terms, there would have remained no more than a twelvemonth for them to have continued, according to their respective sentences, on the spot to which they were conveyed at so heavy an expense. Is it natural, that after remaining in confinement in England for near five years out of his seven, a man should have been sent out to the antipodes with a view of his not being kept there for more than a twelvemonth? If not, then the *non inventus*, upon the documents by which their freedom would have been established, may not appear altogether so unaccountable, as without this comparison of circumstances it would naturally appear to be.

<sup>159</sup> See Collins, II. 22, 131, 267, 331.<sup>159</sup>

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<sup>159</sup> Collins, ii. 22, 131, 267–8, and 331 respectively describe the non-arrival of Irish convict indents in the colony by February 1797, rendering it difficult to establish whether individuals were still under sentence; the continuing non-arrival of the Irish convict indents in October 1798; the acquittal at the court of criminal judicature in October 1799 of John Kingston, Master of the *Hunter*, of aiding Ann Holmes in absconding from the colony, on the grounds that it was impossible to tell from the transportation registers whether or not she was then a convict (see also p. 000 & n. above); and the discovery, in August 1801, that convict clerks had been paid to tamper with the transportation registers (see also p. 000 & n. above).

<sup>uu</sup> Voyage, Appendix, p. lv.<sup>160</sup>

What is *certain*, from Governor Phillip's list, is, that certain *persons*, *five* in number, were in this predicament in this same month. What appears little less so is, that the persons claiming their liberty in that same month were those *same* persons: '*conscious in their own minds* that the sentence of the law had been fulfilled on them,' are the terms employed on this occasion, in speaking of these same persons, by their ever-candid historian and judge.

What they *claimed* on this occasion was, in the first instance, *pay*, upon the footing of *freemen*: what was announced to them on this head was, that 'by continuing to *labour for the public*, they would be entitled to share the public *provisions* in the store:'—that is, be kept from starving, on condition of their being kept in *bondage*.

The supposition of an intentional suppression any where, is, it is true, no more than a bare surmise: a suspicion, given as nothing more, and which, if unfounded, may be easily disproved. In the mean time, the probability of it will not be found diminished by Nos. 6, 7, 8, 9, 10.<sup>vv</sup>

<sup>vv</sup> Quere, At what *time*, and by what *means*, and by *whom*, were these facts ascertained *at last*, for the purpose of their insertion in the abovementioned printed list?—In the printed Voyage, the date on the title-page is 1789: the date in the dedication is the 25th of November in that year.<sup>161</sup> Among the materials of which the publication is composed, all the *other* articles at least were transmitted *from* New South Wales. If it was from New South Wales that *this* document was transmitted with the rest, the time of its being sent from thence must have been considerably *anterior* to the time in question. On this supposition, they must actually have been in New South Wales, at the very time when 'it was found that they were left by the masters of the transports

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<sup>160</sup> Bentham's reference is to the first page of the Appendix to Phillip, *Voyage*, entitled 'A List of Convicts Sent to New South Wales in 1787', which contains the names, places and dates of conviction, and sentences of those transported in the First Fleet. According to the list, the five convicts whose sentences were due to expire in July 1789 were John Carney (c. 1768–88), John Cullyhorn or Callaghan (c. 1785–c. 1807), Jeremiah Hurley (b. c. 1763), John Martin (c. 1757–1837), and James Ruse, whose details are given at pp. lviii, lix, lxiii, lxvi, and lxx respectively.

<sup>161</sup> The unpaginated dedication in Phillip, *Voyage*, is signed by the publisher John Stockdale (1750–1814).

with their owners in England.’ Collins, i. 74.<sup>162</sup>

No. 2. Collins, i. 74. July 1789. It was on this same occasion, that one of the claimants in question, having in presence of his Excellency ‘expressed himself disrespectfully of the Lieutenant Governor, was .^.^. sentenced to receive 600 lashes, and to wear irons for .^.^. six months.’<sup>163</sup>

What the *words* thus punished were, does not appear: but what does appear beyond doubt, is—that if there had been no such violation of law on the one part, there would have been no such violation of respect on the other.

No. 3, p. 159. April 1791. Information given by the Governor to the convicts, ‘that none would be permitted to quit the colony who had wives and children, incapable of maintaining themselves and *likely to become burthensome* to the settlement, until they had found *sufficient security* for the maintenance of such wives or children as long *as they might continue after them.*’ Considering the latitude of the discretion assumed by some of these terms, this notice may be considered as a pretty effectual embargo upon the whole married part of the community of *expirees*.

No. 4, p. 169. July 1791. Information given by the Governor to the *expirees*, that those who wished *not* to become settlers in New South Wales were ‘*to labour for their provisions, stipulating to work for twelve or eighteen months certain,*’ and that afterwards, on condition of their entering into such engagement (is not that the meaning?) ‘*no obstacles would be thrown in the way of their return to England;*’ but that, as to ‘*assistance*’ for any such purpose, nobody was to *expect* it.<sup>ww</sup> Illegal *detention*, for twelve or eighteen months, nobody was to know which, which is called ‘*certain:*’ and this at any rate *universal*:—illegal *bondage*, for the same uncertain certainty, and equally universal. And at the end of this certainty what was to be their fate? As to the means of departure, they were to get away if they could, but they were to have no ‘*assistance;*’ as to their condition so long as they *staid* (that is, as to the greater part of them so long as they *lived*), they were to be either bond or free, as it might happen, nobody was to know any thing about the matter.—Such is legislation in the *antipodes*: such is legislation by the servants

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<sup>162</sup> See pp. 000, 000, 000, 000, and 000 above.

<sup>163</sup> John Cullyhorn (see p. 000 n. above) was brought before the magistrates’ bench on 29 July 1789 on a charge of slandering Lieutenant-Governor Major Robert Ross.

of the crown. Such is legislation without parliament.

<sup>ww</sup> I cannot take upon myself to affirm with absolute certainty, whether the sense, in which the passage presented itself to me, be in all parts correct. To keep clear of misrepresentation, I here transcribe it at full length—

‘The convicts, whose terms of transportation had expired, were now collected, and by the authority of the Governor informed, that such of them as wished to become settlers in this country should receive every encouragement; that those who did not, were to labour for their provisions, stipulating to work for twelve or eighteen months certain; and that in the way of such as preferred returning to England no obstacles would be thrown, provided they could procure passages from the masters of such ships as might arrive; but that they were not to expect any assistance on the part of Government to that end. The wish to return to their friends appeared to be the prevailing idea, a few only giving in their names as *settlers*, and none engaging to work for a certain time.’ Collins, i. 169.

No. 5, p. 190. 3d December, 1791. Sailed the *Active* and *Albemarle* for *India*.<sup>164</sup> After their departure, *expirees* were missing. ‘Previous to their sailing, the Governor was aware of an intention on the part of the seamen to facilitate such their departure. He thereupon instructed the master to deliver any persons whom he might discover to be on board, *without permission* to quit the colony, as prisoners, to the Commanding Officer of the first British settlement they should touch at in *India*.’<sup>165</sup>

No. 6, p. 230. August 1792. ‘Such {*expirees*} as should be desirous of returning to England were informed, that no obstacle would be thrown in *their way, they being*’ (i. e. all of them being) ‘at liberty to ship themselves on board of such vessel as would give them a passage.’ Such was the intention *announced*. What was the intention at that same time *entertained*? The following words explain it:—*Now* it was that ‘it was understood that a clause was to be inserted, in all future *contracts* for shipping for this country, subjecting the masters to certain penalties, on certificates being received of their having brought away any convicts *or other persons* from the settlement, without the Governor’s permission: and, as it was not probable that many of them would on their return refrain from the vices or avoid the society of those companions who had been the causes of their transportation to

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<sup>164</sup> See ‘Letter to Pelham’, p. 000 above.

<sup>165</sup> See p. 000 & n. above.

this country, *not many could hope* to obtain the sanction of the Governor for their return.’—Not ‘*obtain*’ it? agreed. But—not so much as ‘*hope*’ to obtain it? Not even at the very time when it was expressly promised to them?—A promise made to *all*: and this at the very time when it was determined, that, a few only excepted, none should ever receive the benefit of it!

No. 7, p. 268.<sup>166</sup> 19th February, [1793].<sup>167</sup> *Intention executed*. Howsoever it may have been as between the intention *announced* and the intention entertained, between the intention entertained and the execution that ensued there was no repugnance. On this day sailed for Canton the *Bellona*. Into this ship had been received *six* persons from the settlement: *two* of them, *expirees*, *by permission*: *two* others, *expirees* also, but *without permission*: the remaining *two non-expirees*. Of the *four* latter it is stated, that they had been ‘secreted:’ also that they were ‘discovered:’ ‘the ship being smoked.’ That they were accordingly re-landed at least, if not otherwise punished, may pretty safely be concluded, though not expressly mentioned.<sup>168</sup>

Of the *two non-expirees* it is stated, that ‘they had not yet served the *full* period of their sentences.’ From this it seems not unreasonable to conclude that this full period would have arrived, before their arrival in Great Britain. If so, then neither by their *arrival*, any more than by their *departure*, would they have gone beyond the exercise of their renovated rights.

No. 8, p. 268. [5]th<sup>169</sup> February, 1793. At this time the expectation ‘about the clause .^.^ in the charter party, for preventing ship-masters from receiving any person .^.^ from the colony without the express consent and order of the Governor,’ was found to be realized. The *Bellona* came provided with this clause. She had sailed from England on the 8th of August, 1792.

No. 9, p. 283. 24th April, 1793. *Intention executed a second time*. Sailed the *Shah Hormuzear* and *Chesterfield*. ‘But few convicts {*expirees*} were *allowed* to quit the colony

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<sup>166</sup> *Recte* 268–9.

<sup>167</sup> 1803 ‘1792’.

<sup>168</sup> See ‘Letter to Pelham’, p. 000 & n. above.

<sup>169</sup> 1803 ‘15th’.

in these ships.’<sup>170</sup> On a subsequent occasion, in [September]<sup>171</sup> 1794, the number received on board the same number of ships (the Endeavour and the Fancy) had been *near* a hundred: whereof by permission, 50; without permission near 50 more. Ib. p. [429].<sup>172</sup>

No. 10, p. 316.<sup>173</sup> [13]<sup>174</sup> October, 1793. *Intention executed a third time*. Sailed the Boddingtons and Sugar-cane for Bengal. ‘From the Sugar-cane were brought up this day .^.^ two expirees: they had got on board without permission.—Punished with 50 lashes each, and sent up to Toongabbe.’<sup>175</sup>

In the continuation of the history, no *express* statements of detention have been met with. The historian not being at this time present in the colony, the precision exhibited in the former volume no longer presents itself in the same degree. During the latter period, the conception which it seems to be the object to present to view, is rather the removal of the restraint than the continuance of it. It is not however the less perceptible, that even at this time it was *restraint* that constituted the *general* rule, and that whatever instances of the exercise of the opposite *liberty* took place, were the result of so many *special* permissions, and constituted but so many *exceptions* to, and confirmations of, the rule.

No. 11. II. p. 11. 6th December, 1796. ‘Although they every day saw that no obstacle was thrown in the way of the convict *who had got through the period of his transportation with credit and a good character*, but that he was suffered to depart with the master of any ship who would receive him, and a certificate given to him of his being a free man, yet, &c.’ By this it appears as plainly, that, among *expirees* themselves, there were *some* to whom the liberty of departure was refused, as it does that there were *others* to whom it was granted.

No. 12, ib. p. 49. September 1797. ‘As the masters were *seldom* refused permission to ship such as were free.’ From this passage it follows that, at this time likewise, though

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<sup>170</sup> According to Collins, four male expirees and one female expiree departed the colony on the *Shah Hormuzear* and the *Chesterfield*.

<sup>171</sup> 1803 ‘November’.

<sup>172</sup> 1803 ‘398’.

<sup>173</sup> *Recte* 315–16.

<sup>174</sup> 1803 ‘2d’.

<sup>175</sup> See p. 000 n. above.

there were but *few* instances, yet there were *some*, in which such permission was refused.<sup>176</sup>

No. 13, ib. p. 45. August 1797. Sailed the *Britannia* and the *Ganges*. ‘The commander of the latter was *permitted* to take on board several convicts that had become free.’<sup>177</sup>

No. 14, p. 125.<sup>178</sup> September 1798. Sailed the *Barwell* for China. ‘Her commander<sup>179</sup> was *allowed* to receive on board about 50 persons, who had completed their period of transportation.’

No. 15, p. 57. October 1797. ‘Decreasing daily as did the number of working men in the employ of Government, yet’ {at this time it is stated that} ‘the Governor *could not refuse* granting *certificates* to such convicts as had served their respective terms of transportation; and no less than 125 men were at this time certified by him to be free. Most of these people had no other view in obtaining this certificate than the *enabling them* when an opportunity offered *to quit the settlement*, or following their own pursuits till that time should arrive.’ *Could not refuse?* why so? He had without any difficulty refused on the former occasions, mentioned in Nos. 1, 3, 4, 5, 7, 10; what was there to prevent him now? From hence it should seem, that by this time some legal scruples had arisen, in some breast or other, either in the colony or at home: and that from thence it was, in the first place, that the granting of the certificate, *at or about* the expiration of each man’s term, was regarded as in some measure *obligatory*; in the next place, that the effect of such certificate, when obtained, was to confer on the individual the liberty of departure:—a *primâ facie* liberty at any rate, though probably subject at all times to revocation by special order.

No. 16, p. 298. [July]<sup>180</sup> 1800. ‘Several certificates were granted this month, to persons who had served their terms of transportation.’

### § 13. *Expirees, during Detention, kept in a State of Bondage.*

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<sup>176</sup> See, for instance, p. 000 & n. above.

<sup>177</sup> The master of the *Ganges* was Thomas Patrickson.

<sup>178</sup> *Recte* 125–6.

<sup>179</sup> The master of the *Barwell* was John Cameron.

<sup>180</sup> 1803 ‘August’.

No. 17, I. 74. July 1789. Freedom from *bondage*, refused along with liberty of *departure*, on the same ground, viz. the want of evidence of the commencement of the term of servitude. See above, Nos. 1 and 2.<sup>181</sup>

No. 18, I. 169. July 1791. *Expirees*, who wished *not* to become settlers in New South Wales, ordered to work there for twelve or eighteen months certain. See No. 4.<sup>182</sup>

No. 19, I. 208.<sup>183</sup> April 1792. *Expirees* ‘become numerous.’ To fourteen of them the choice of the place where they were to labour (where these *freemen* were to be *forced* to labour) is stated as an ‘*indulgence*.’

No. 20, I. 474. 4th [May]<sup>184</sup> 1796. *No expiree* was now *allowed* ‘to remove himself without permission *from the public work*. But, notwithstanding *this had been declared in public orders, many withdrew* themselves .^.^ on the day of their servitude ceasing.’ *For this ‘they were punished, and ordered again to labour.’*<sup>185</sup>

No. 21, II. p. 22. February 1797. ‘Several convicts, who had served their respective terms of transportation, having applied to be discharged from the victualling books of the colony, and allowed to provide for themselves, it was determined that, *once during a given time*, certificates of their having so served their several sentences should be granted to them, together with the permission they solicited.’<sup>186</sup>—*Once during a given time*: i.e. once a year, once a quarter, or once a month, &c. if the sense that presents itself to me is what was meant. This being the case, the time when each man was restored to liberty, was the time—not when his *right* to it commenced—not when *law* and *justice* required that he should be restored to it—but a time which recommended itself to the imagination, by some such idea as that of *order* and *regularity*:—at any rate, by some idea or other, which in the order of importance occupied in certain conceptions a higher rank than that of *law* and *justice*. What would be the feelings of the good people in England, if, by the influence of any such love of order on the mind of a secretary of state or sheriff, prisoners were in

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<sup>181</sup> See p. 000 above.

<sup>182</sup> See p. 000 above.

<sup>183</sup> *Recte* 208–9.

<sup>184</sup> 1803 ‘October’.

<sup>185</sup> See ‘Letter to Pelham’, p. 000 & n. above.

<sup>186</sup> See also p. 000 & n. above.

future to be discharged from prisons *here*, not as at present, when their respective terms are up, but in gangs together, say every quarter-day? so that a man, for example, whose sentence was for a month, should, for the sake of *good order*, be kept in jail three months longer, all but a day or two, if his month happened to end a day or two after quarter-day?

No. 22, ib. II. p. 23. March 1797. ‘It appeared by the *books*, in which were entered the *certificates* granted to the convicts who had again become *free* people, that there were at this time not less than 600 men off the store, and working for themselves in the colony: forming a vast deduction of labouring people from the public strength, and adding a great many chances against the safety of private and public property, as well as present security.’

*Legality* (let it never be out of mind) is the object of enquiry here—not *abstract expediency*. So far as *security* and *economy* were concerned, *legality* and *expediency* seem to have been in a state of perpetual repugnance. *Legality* required, [t]hat each man should be liberated from bondage, the instant the time comprized in his sentence was at an end: *expediency* (had *legality* been out of the question) would perhaps have required, that, in a society so constituted, he never should be discharged at any time.<sup>xx</sup> But, as to the contrivance for making the discharges in the lump, at fixed periods, it is not quite so apparent how *expediency* was *served* by it, as it is that *law* was *violated* by it. What a system! under which in one way or other it was impossible not to do wrong! in which *mischief* in a variety of shapes—frequently perhaps *utter destruction*—would have been the consequence of any thing like an exact conformity to the rules of *law*!

<sup>xx</sup> See Letters I. and II. to Lord Pelham.<sup>187</sup> And, (on the occasion just mentioned (No. 21) of the expirees<sup>188</sup> ‘who having withdrawn themselves from the public work immediately upon the expiration of their terms of legal servitude, were punished and ordered again to labour’)—‘they seized’ (says the historian immediately after) ‘the first opportunity of running away.’—‘We were well convinced’ (it is added) ‘that by *these people* and those who harboured them’ {viz. the *expiree* settlers in general} ‘*every theft was committed.*’ I. p. 474.<sup>189</sup>

In a situation like this, the conduct of the *local powers* may on *each* occasion be,

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<sup>187</sup> See pp. 000–000 above.

<sup>188</sup> The following quotation is, in fact, Bentham’s paraphrase.

<sup>189</sup> *Recte* 474–5. See also ‘Letter to Pelham, p. 000 above.

upon the whole, blameable or unblameable, as it may happen:—but the *system itself*, under which they are *obliged* to act, what can it be, otherwise than blameable—blameable in the extreme—upon *all* occasions?

In all these transactions—in all this time—is it in the nature of the case, that the system of illegal detention, such as it is, should have been carried on in the penal colony, otherwise than in consequence of, and in general in conformity to, *instructions* received from home?

Much argument does not seem necessary to prove, that the difference between punishment of this sort for a limited term and punishment of the same sort for life, was no secret to those by whom it was obliterated in practice. But by a particular fact a sort of impression will often be made, beyond any that can be made by general inference.

In September 1794, in a single page, an account is given of no fewer than sixteen convicts existing at one time (one, in from a hundred to two hundred or some such matter) in whom symptoms of reformation had been *supposed* to be discovered.<sup>yy</sup> The supposed penitents here in question were *non-expirees*: to different individuals amongst them, different and very carefully measured degrees of indulgence were extended.<sup>190</sup> To one of them (William Leach) whose ‘term’ under ‘his sentence of transportation’ had been for seven years, of which term a part only had elapsed, permission ‘(it is stated)’ was given, ‘to quit this country’ (New South Wales): but clogged with the condition of his not returning to England, so long as his ‘term’ remained ‘unexpired.’<sup>191</sup>

<sup>yy</sup> It is almost the first discovery of the kind mentioned, and I believe quite the last: unless it be, that in the instances of the few permissions of departure granted to

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<sup>190</sup> According to Collins, i. 391, sixteen male prisoners received their ‘warrants of emancipation’ during September 1794, though he identifies only eight of them, namely: Robert Sidaway or Sideaway (1758–1809), who received an unconditional pardon ‘in consideration of his diligence, unremitting good conduct, and strict integrity in his employment for several years as the public baker of the settlement’; William Leach, ‘who was permitted to quit this country, but not to return to England during the unexpired term of his sentence of transportation, which was for seven years’; and Benjamin Carver, William Joyce, James Lara or Larra (1749–1839), Richard Partridge or Rice (c. 1759–1831), John or James Ruffler (c. 1759–1813), and William Waring, who each ‘received a conditional pardon, or (as was the term among themselves on this occasion) were made free on the ground, to enable them to become settlers’.

<sup>191</sup> See p. 000 n. above.

*expirees*, the recognition of such a change may, as far as those instances go, be supposed to be included.

Here then, the punishment we see, was analysed, and its constituent elements separated: the *confinement* to New South Wales, together with the species of *bondage* incident to it, was remitted: the *exile* was left, and for the whole time, in full force.

The written instruments, serving as evidences of the indulgences thus granted, are termed on the occasion, ‘*warrants of emancipation*:’ and to these warrants the ‘*seal of the territory*’ (it is stated) was affixed.<sup>192</sup> What was done on this occasion being done by so many *formal*, and of course (if any thing like a *Register* be kept there) *registered* acts, it seems difficult to suppose, but that it must have been upon INSTRUCTIONS, from Government here—Instructions in some degree correspondent in point of formality, that they were grounded. If, under any such nice distinctions and guarded limitations, power was thus given, for permitting individuals to quit the colony *before* the expiration of their respective sentences, given therefore in contemplation of the precise tenor of each law; is it supposable, that without INSTRUCTIONS equally deliberate, this large and continually increasing proportion of the population (the *expirees*) should have been detained as they were detained, though against law, *after* the expiration of their respective terms?

Were the Court of Common Pleas to give judgment ‘in an appeal of death’ they would be ‘*guilty of felony*’—says Hawkins, B. I ch. 28. § 5. p. 169. 8vo. with a legion of marginal authorities for his support.<sup>193</sup>—*Guilty?*—why guilty?—then comes of course a *technical* reason:<sup>zz</sup> but the *rational* one, which it shades, is evident enough;—because, without what is called *mala fides*—without *criminal consciousness*—consciousness of the want of right to do what they take upon them to do—an error of that description could never, by persons of that description, be committed.<sup>aaa</sup>

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<sup>192</sup> See Collins, i. 391.

<sup>193</sup> See William Hawkins, *A Treatise of the Pleas of the Crown; or a System of the Principal Matters Relating to that Subject, Digested Under Proper Heads*, 7th edn., 4 vols., London, 1795 (first published 1716–21), i. 169: ‘if the court of common pleas give judgment on an appeal of death, or justices of peace on an indictment of treason, and award execution, which is executed, both the judges who give, and the officers who execute the sentence, are guilty of felony, because, these courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without any foundation’.

<sup>zz</sup> ‘Because, these courts having no more jurisdiction over these crimes than private persons, their proceedings thereon are merely *void*, and without any foundation.’

<sup>aaa</sup> Exile, confinement, and bondage—inflictions perfectly distinct—are the ingredients of which (as already noted)<sup>194</sup> the complex punishment styled *transportation* is composed. It has been so at all times, and under both systems: though under the new system the two last-mentioned ingredients possess a degree of inflexibility, strongly contrasted with their laxity under the old. When the transportation was to America, the bondage might be bought off or begged off, in the whole or in any less proportion, by agreement with the assignee of the property in the convict’s service:<sup>195</sup>—the bondage, which was the principal infliction of the two; and with it all the accessory accompaniments. Under the new system, neither the one nor the other is remissible, but by the act of the agent of the crown, nor therefore (regularly at least) but upon public grounds. Under the new system again, over and above the extraordinary degree of tension thus given to these two secondary branches of the punishment, the primary branch, the exile, has received a still more decided enhancement, by the addition made to the duration of it. For, supposing the *confinement* in the penal colony to be continued, as it always has been, to the legal end of each penal term (with or without the *bondage*, according to the fluctuating decision of the local despot), it follows, that under the new system, by the mere change of local situation—I mean by the substitution of the superlatively distant, and comparatively inaccessible, territory of New South Wales, to the so much nearer and more accessible coasts of British America—an addition has thus been made to the exile—an addition which can never have been so little as four months, and may have amounted to years: and in future instances may at all times amount to any number of years.

In the case of those, whose offences were prior, in point of time, to the year 1787, (the date of the Act for the foundation of this colony)<sup>196</sup> this addition, though by that Act rendered conformable to *law*, yet, not having any thing like necessity for its justification, could not by any Act be rendered conformable to *natural justice*.

Even in all *subsequent* instances, though the *injustice* was at an end, an addition of no small magnitude has been made, in this obscure and indirect mode, to the *severities* of the penal system. The severer the additional inflictions thus irregularly introduced,

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<sup>194</sup> See p. 000 above.

<sup>195</sup> See ‘Letter to Pelham’, p. 000 & n. above.

<sup>196</sup> i.e. the New South Wales Courts Act of 1787.

though in a manner not absolutely repugnant to law, the stricter, one should have thought, should have been the caution observed, to avoid adding, to the imputation of legal severity, the reproach of wanton and oppressive illegality and injustice. That the eyes of men in power were really more or less open to the distinctions thus confounded by their practice, is evidenced by the discriminations reported in the text.

## § 14. *Statutes transgressed by the Legislation and Government of New South Wales.*

The acts of legislation, and other acts of government, that have been exercised in New South Wales, have thus been stated, in a general point of view, as being contrary to law. It remains to confront the several heads of transgression that have thus been manifested, with the several constitutional laws and principles of law, which in those several points have been transgressed and violated.

### *I. Transgressions in Breach of the Habeas Corpus Act—Penalties thereby incurred under the said Act.*

‘And for preventing illegal imprisonment’ (says the act)<sup>bbb</sup> ‘in prisons beyond the seas; Be it further enacted .^.^.^ that no subject of this realm, that now is, or hereafter shall be an inhabitant or resident of this kingdom of England .^.^.^ shall or may be *sent prisoner* .^.^.^ into ports, garrisons, islands or places beyond the seas, which are, or at any time hereafter shall be, within or without the dominions of his Majesty, his heirs and successors; and that every *such imprisonment* is hereby enacted and adjudged to be illegal; and that if any of the said subjects .^.^ hereafter, shall be *so imprisoned*, every such person .^.^ so imprisoned .^.^.^ may for every such imprisonment maintain, by virtue of this act, an action or actions of false imprisonment in any of his Majesty’s courts of record, against the person or persons by whom he or she shall be so committed, *detained*, imprisoned, sent prisoner, or transported, contrary to the true meaning of this act, and against all or any person or persons that shall *frame, contrive, write, seal or countersign*, any warrant or writing for such commitment, *detainer*, imprisonment or transportation, or shall be *advising*, aiding, or assisting in the same or any of them;<sup>ccc</sup> and the plaintiff in every such action shall have judgment to recover his treble costs besides damages, which damages so to be given shall not be less than five hundred pounds, .^.^ and the person or persons who shall knowingly *frame, contrive, write, seal, or countersign any warrant for such*

commitment, *detainer*, or transportation, or shall so commit, detain, imprison, or transport any person or persons contrary to this act, *or be any ways advising, aiding, or assisting therein*, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England: and shall incur and sustain the pains, penalties, and forfeitures .^.^ provided .^. by the statute of provision and *præmunire*, .^.^ and shall be *incapable* of any *pardon* from the King.’

bbb 31 C. II, c. 2. § 12.<sup>197</sup>

ccc To the applicability of the *Habeas Corpus Act* to the present case, the words ‘*sent prisoner*,’ ‘*such imprisonment*,’ and ‘*being so imprisoned*,’ furnish an objection, which it is easy enough to see, and, from the other words of the act, not very difficult to refute. The discussion has been drawn out at length, but would be too long for the present purpose.<sup>198</sup>

To the provisions in this clause there are two exceptions, annexed by so many immediately succeeding clauses:— one, in respect of persons, by their own agreement in writing, contracting to be transported;<sup>ddd</sup> the other in respect of persons praying to be transported;<sup>eee</sup> as it seems they were allowed to do in some cases, as still in Scotland, to save themselves from severer punishment.<sup>199</sup>

ddd § 13.<sup>200</sup>

eee § 14.<sup>201</sup>

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<sup>197</sup> i.e. the Habeas Corpus Act of 1679.

<sup>198</sup> For the discussion in question see UC cxvi. 373–85 (22–7 January 1803).

<sup>199</sup> Though the Transportation Act of 1718, § 8 exempted Scotland from its provisions, Scottish courts had punished criminals, usually those convicted of the most serious offences, with banishment since the middle of the seventeenth century. However, unlike in England, defendants scheduled for trial to be tried for a capital offence had the right to enter a petition to be voluntarily banished, and it is estimated that, between 1718 and 1775, around 125 of the 700 persons transported from Scotland were petitioners.

<sup>200</sup> The Habeas Corpus Act of 1679, § 13, provided that ‘nothing in this Act shall extend to give Benefit to any Person who shall by Contract in Writing agree with any Merchant or Owner of any Plantation, or other Person whatsoever, to be transported to any Parts beyond the Seas, and receive Earnest upon such Agreement, although that afterwards such Person shall renounce such Contract’.

<sup>201</sup> The Habeas Corpus Act of 1679, § 14, provided that ‘if any Person or Persons, lawfully convicted of any Felony, shall, in open Court, pray to be transported beyond the Seas, and the Court shall think fit to leave him

There are also *at present* as many exceptions, as there are posterior statutes, authorising transportation: these exceptions, having for their extent that of the authority given in each case by each respective statute: but, forasmuch as by a statute authorising the crown to transport offenders for a term therein limited, no authority either express or implied is given to ‘detain’ any such offender, in any case, a moment beyond such limited time, the provisions in the *Habeas Corpus Act* remain, in the instance of every convict so detained in New South Wales, in full force and virtue.

The several *acts* and *modes of participation*, by and in which a man may be a partaker in the crime of unlawful imprisonment, are here carefully enumerated and distinguished.—As to *acts*, *commitment* is one; *detainer* is another. In the instance of the convicts, the *commitment* has *not* been unlawful: the *detainer* after the expiration of their respective terms has been and still is. As to *modes of participation*, the description given of them will, I believe, be found sufficiently comprehensive. To appropriate them to this or that great person, in or out of office, would at present be an useless labour. The Act has done its part; the books of the Council Board, and the Treasury—not forgetting the office of the secretary of state for the home department—these, with or without certain documents from the colony, and a little explanatory oral evidence, which need not be wanting, would do the rest.

It is almost superfluous to observe, that in intendment of law, every place, circumscribed or not by walls—every place in which, without sufficient warrant, a man is kept against his will—is, to this purpose—as for all purposes of justice it is most necessary that it should be—a *prison*.<sup>fff</sup> If an island larger than all Europe were not to *this* purpose a *prison*, one of the two equally declared objects of the law would be defeated, and the whole text of it turned into a dead letter.

<sup>fff</sup> Inst. 46. 589.<sup>202</sup>

## II. *Repugnancy of such Transgressions to Magna Charta, according*

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or them in Prison for that Purpose, such Person or Persons may be transported into any Parts beyond the Seas; this Act, or any Thing therein contained to the contrary notwithstanding’.

<sup>202</sup> See passages 1 and 5 at pp. 000 and below respectively.

to COKE and COMYNS.<sup>203</sup>

Thus saith *common sense*: and—what fortunately for the present purpose is much more indisputable and decisive—thus saith *Lord Coke*; whose *comment*, though the parliamentary *text* of it be of so much earlier date, is not here inapposite: since the *Habeas Corpus Act*, an Act having *Magna Charta* for its *ground-work*, has for its *object* no other than the affording an additional protection to this part of the rights, which by that sacred trumpet of the constitution had already been proclaimed. Step by step the oracles of the legal sage will be found advancing to the point, and at length coming fully home to it.

NOTE TO TYPESETTERS: Insert space and begin list.

1. ‘No man,’ says he, ‘shall be exiled or banished out of his country, that is, *Nemo perdet patriam*, no man shall lose his country, unless he be exiled according to the law of the land.’<sup>ggg</sup>

<sup>ggg</sup> Inst. 46.<sup>204</sup>

NOTE TO TYPESETTERS: Please present the following paragraph as a displayed quotation, retaining the quotation marks. Please see pp. 55–6 of the hard copy for guidance.

2. ‘No man shall be outlawed, made an *exlex*, *put out of the law*, that is, *deprived of the benefit of the law*, unless he be outlawed according to the law of the land.’<sup>hhh</sup> Their time of lawful punishment being expired, the quondam. convict inhabitants of New South Wales, by being kept there against their wills, are they not made ‘*to lose their country?*’ and, by being thus *de facto* removed out of the reach of the remedial arm of justice, are they not ‘*put out of the law,*’ as effectually, as if, after a wrongful judgment of outlawry pronounced against them, they had thus been deprived of the benefit of it, *ipso jure*, i.e. *falso jure?*

<sup>hhh</sup> Ibid.

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<sup>203</sup> John Comyns (c. 1667–1740), Baron of Exchequer 1726–36, Justice of Common Pleas 1736–8, and Chief Baron of Exchequer 1738–40.

<sup>204</sup> See Coke, *The Second Part of the Institutes of the Lawes of England*, p. 46.

3. 'By this law<sup>205</sup> of the land, no man can be exiled, or banished out of his native country, but either by authority of Parliament, or in case of abjuration for felony by the common law.'<sup>iii</sup> In the instance of each of these convicts, there is a time, for and during which, he *has* been '*exiled by authority of Parliament;*' and so far as it is only for and during this time that he is kept in New South Wales, so far there is no injury. But, after the expiration of this time, all the *rest* of the time during which he is kept there, he *is* kept '*in exile and in imprisonment, without authority of Parliament.*' He would be kept in *exile*, if, with the exception of this his native country, he had the choice of the whole world. But, besides being kept in *exile*, he is kept even, in most instances, in *imprisonment*, confined as he is to the insulated, however extended, region of New South Wales.

<sup>iii</sup> II. Inst. 47.

4. 'This' (Magna Charta) '*is a beneficial law, and is construed benignly:* and therefore the King cannot send any subject of England, against his will, to serve him out of this realm; for, that would be an exile, and he should *perdere patriam*: no, he cannot be sent against his will into Ireland, to serve the King as his deputy there, because it is out of the realm of England: for, if the king might send him out of this realm to *any* place, then, under pretence of service, as ambassador, or the like, he might send him *into the furthest part of the world, which, being an exile, is prohibited* by this act.'<sup>iiij</sup> To send the meanest of these convicts to this '*furthest part of the world,*' against his will, though it were to be governor there, would thus be an offence: an offence, in the first place, against *Magna Charta*; in the next place, against the *Habeas Corpus Act*. These men, not *one* of whom Majesty itself could order to continue there, were it even to be governor there, against his will, these are the men whom, *by thousands*, his Majesty's ministers are keeping there *still* in bondage.

<sup>iiij</sup> Ibid.

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<sup>205</sup> Coke 'the law'.

5. ‘So it is if a felon .^.^ Custody of the king’s officer .^.^ is an imprisonment in law.<sup>kkk</sup>  
He that is under lawful *arrest*, is said to be *in prison*, although it be *not infra parietes carceris*.<sup>206</sup> <sup>lll</sup>

<sup>kkk</sup> II. Inst. 589.

6. ‘*Imprisonment* doth not only extend to false *imprisonment*, and unjust, but for *detaining* of the prisoner longer than he ought *where he was at first lawfully imprisoned*.’<sup>lll</sup>

<sup>lll</sup> II Inst. 53.

7. ‘If any man, by colour of any authority, *where he hath not any in that particular case*, arrest or *imprison* any man, or *cause him* to be arrested or imprisoned, this is against the act; *and it is most hateful, when it is done by countenance of justice*.’<sup>207</sup>

NOTE TO TYPESETTERS: End list and insert space.

Had Lord Coke been a prophet as well as a lawyer, he could not have pointed more surely to the present case.<sup>mmm</sup>

<sup>mmm</sup> ‘Every restraint of the liberty of a freeman’ (says the abridgment of *Chief Baron Comyns* ‘will be an imprisonment,’—‘though it be in the high-street, or elsewhere, and he be *not* put into any *prison* or house.’ Besides the authority of *Lord Coke*, as above,<sup>208</sup> he quotes two others (*Cro. Car.* 210; per Thorpe: *Fitzh. Bar.* [301]).<sup>209</sup> I have them not at hand, nor is it material. *Comyns* is a channel that *adds* to the authority of

<sup>206</sup> i.e. ‘within the walls of a prison’.

<sup>207</sup> See Coke, *Second Part of the Institutes of the Lawes of England*, p. 54.

<sup>208</sup> i.e. Coke, *Second Part of the Institutes of the Lawes of England*, p. 482.

<sup>209</sup> 1803 ‘310’. See John Comyns, *A Digest of the Laws of England*, 5 vols., London, 1762–7, iii. 494, citing *The Reports of Sir George Croke Knight; Late, One of the Justices of the Court of Common-Bench of such Select Cases as were adjudged in the Said Courts, the time that he was Judge in either of them. Collected and written in French by Himself; Revised and Published in English, By Sir Harbottle Grimston, Baronet, Master of the Rolls*, 4 vols., London, 1790–2, iv. 209–10, concerning the case of Sir Miles Hobart (1598/9–1632), MP for Marlow 1628–9, and William Strode (1594–1645), MP for Bere Alston 1624–8, 1640–5, in which it was held that ‘the Prison of the King’s Bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty, is a Prison: As if one take Sanctuary and depart thence, he shall be said to be break Prison’.

the original source, instead of weakening it. And (what, if there could be a doubt, would render his interpretation a still more apposite one than any that could have been given by Lord Coke), Comyns wrote *after the Habeas Corpus Act*.

They would both of them have expressed themselves more fully, though scarcely more intelligibly, if they had said—Every restraint of the liberty of loco-motion, will be an *imprisonment*: every restraint upon the liberty of loco-motion, on the part of a freeman, i.e. of a man free from such restraint by law, will be an act of *false imprisonment*.

### III. *Transgressions in Breach of the Petition of Right, 3 C. I. c. 1.*<sup>210</sup>

In this statute, among the petitions contained in § 10, after the recital that ‘commissions’ had then of late been ‘issued forth’ ‘for proceeding by martial law,’ is this—‘that hereafter no commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by colour of them any of your Majesty’s subjects be *destroyed*, or put to death contrary to the laws and franchise of the land.’

After this comes the concluding section (§ 11.), which is in these words—

‘All which they most humbly pray of your most excellent Majesty as their *rights and liberties, according to the laws and statutes of this realm*; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people, in *any of the premisses, shall not be drawn hereafter into consequence or example*; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that *in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm*, as they tender the honour of your Majesty and the prosperity of this kingdom. Quâ quidem petitione lectâ, et plenius intellectâ, per dictum Dominum Regem taliter est responsum in pleno Parlamento, viz. Soit droit fait come est desire.’<sup>211</sup>

In full contradiction to this statute, it appears from the Journal of the Judge

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<sup>210</sup> The Petition of Right of 1628.

<sup>211</sup> i.e. ‘Which petition having been read and more fully understood, answer was made thus in full parliament by the said lord king, to wit: Let right be done as it is petitioned.’

Advocate, that, in April 1790, in New South Wales, by the Governor of New South Wales, martial law was actually proclaimed.<sup>nmn</sup> In the *petition of right*, the territory on which the commissions thus branded with illegality had been executed, stands described by words of no greater amplitude, indeed, than the words ‘*this realm.*’ Of *colonies* no mention is there made:—good reason why, no such dependencies being at that time in existence.<sup>ooo</sup> But, if the principles already laid down in this behalf are just, no just reason could be built on this ground, for regarding the *petition of right* as being in this point of view inapplicable to New South Wales. In the first place, what should hinder that settlement, though at the distance of the antipodes, from being considered as parcel of ‘*this realm?*’ Not local distance: for this, as we have seen already, did not hinder the whole of the intended plantations in America from being parcel of the manor of East Greenwich.<sup>212</sup> In the next place, among the petitions contained in the concluding section above quoted, is this, ‘that your Majesty will also vouchsafe to declare that the .^.^ proceedings to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or *example;*’ and moreover, ‘that *in the things aforesaid all your officers and ministers* shall serve you according to the laws and statutes of this realm.’

<sup>nmn</sup> ‘The Lieutenant-Governor, immediately after the loss of the *Sirius*, called a council of all the naval and marine officers in the settlement, when it was unanimously determined that martial law should be proclaimed; that all private stock, poultry excepted, should be considered as the property of the state; that justice should be administered by a court-martial to be composed of seven officers, four of whom were to concur in a sentence of death .^.^ The day following, the troops, seamen, and convicts, being assembled, these resolutions were publicly read, and the whole confirmed their engagement of abiding by them by passing under the king’s colour, which was displayed on the occasion.’ Coll. I. 104.<sup>213</sup>

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<sup>212</sup> See p. 000 above.

<sup>213</sup> The events referred to by Bentham took place at Norfolk Island. Collins describes the wrecking, on 19 March 1790, of H.M.S. *Sirius*, the flagship of the First Fleet, on the reef at Slaughter Bay, Norfolk Island, and the subsequent imposition of martial law by Major Robert Ross, the Lieutenant-Governor. Governor Phillip approved of Ross’s course of action, reporting that he had ‘directed him to continue while he thinks it necessary’ (see Governor Phillip to Sydney, 11 April 1790, and Governor Phillip to Grenville, 1 March 1791, *HRA*, i. 167–8, 235). Martial law remained in force at Norfolk Island until early August 1790.

<sup>000</sup> Charters had been obtained, as above,<sup>214</sup> and in a certain degree acted upon; but any settlement, understood to be a permanent one, had scarce as yet been made.

On this, as on all other occasions of *necessity*, real or apparent, I impute not any moral blame to the *Governor*: moral blame might, for aught I know, have been imputable to him, had he acted otherwise.<sup>PPP</sup> *Elsewhere* however—I mean to his Majesty’s ‘officers and ministers’ here at home—I see not how it can be that moral blame should not be imputable: I mean, if, under *constitutional* blame, *moral* be included;—if a regard for the constitution of their country—for the ‘*laws and statutes according to which*’ they are thus pledged ‘*to serve*’ their royal master—have any sort of place among the articles of their moral code. Amongst the documents which composed the legal armature of the Governor, was any such power as that of declaring martial law, in that nursery of despotism, included?<sup>215</sup> If so, then has there been, in that behalf, on their part, an open and point-blank breach made in this constitutional and hard-earned bulwark of the constitution. Again, be this as it may, when with or without precedent authority, from these his Majesty’s ‘officers and ministers,’ martial law had *actually* been proclaimed, was information of such proceeding officially transmitted to them in consequence? That, in one way or other, at one time or other, information of this fact has come to their cognizance, is beyond dispute: if not by the next conveyance, and in the way of official correspondence (an omission not naturally to be presumed), at any rate it was received by them in 1798, through the medium of the press.<sup>216</sup> It is therefore at any rate with their knowledge, that the petition of right has thus been violated. On the occasion of this, any more than of so many other exercises of unconstitutional powers, have they ever condescended to apply to Parliament—I do not say for *precedent* authority—but so much as for an *ex post facto* indemnity? Not they indeed: no, not in any one of the multitude of instances, that have called for indemnity at least, if not for punishment.

<sup>PPP</sup> In a passage in the third Institute, written without mention of the petition of right, and therefore it may be presumed before the passing of it, ‘If a lieutenant’ (says Lord Coke) ‘or other that hath commission of martial authority, in time of peace, hang, or

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<sup>214</sup> See p. 000 above.

<sup>215</sup> Phillip’s commission as Governor of New South Wales did in fact grant him the power to impose martial law: see ‘Governor Phillip’s Second Commission’, 2 April 1787, *HRA*, i. 2–8 at 5.

<sup>216</sup> i.e. through Collins’s book.

otherwise execute, any man by colour of martial law, this is murder; for this is against Magna Charta, cap. [29]<sup>217</sup>. .^.^.^ and here the law implieth malice.’<sup>218</sup> The law and Lord Coke may imply malice as they please: in a case such as that before us, God forbid I should be malicious enough to imply it!

#### IV. *Transgressions in Breach of the Declaration of Rights.*<sup>qqq</sup>

<sup>qqq</sup> 1 W. III. Sess. 2. c. 2.

This statute, so familiar to English ears, and once at least so dear to English hearts, under the name of the *Bill of Rights*, opens with the recital of twelve heads of transgression, ‘whereby the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert .^.^.^ the laws and liberties of this kingdom.’<sup>219</sup>

Of those *twelve* heads of royal transgression, of which in those days *England* had been the scene, *seven* at least present themselves, as having had their counterparts in *New South Wales*: with this difference, that, in the most material instances, the transgressions that at that time gave birth to the Revolution in this our island,<sup>220</sup> were but peccadillos in comparison of the enormities acted on that distant theatre. In England, the subversion was but attempted: at the antipodes it has been completed: complete in design, from the first moment; completed in the execution, so soon as occasion called for it: the subversion of English liberties having been the very object and final cause of the foundation of this English colony. The words of the clause, which it became necessary to copy, present another difference, but happily too striking a one to every loyal eye to require any further mention of it.<sup>221</sup>

No. 1. *Transgression the 1st in England.*—‘By assuming and exercising a power of

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<sup>217</sup> 1803 ‘39’.

<sup>218</sup> See Coke, *Third Part of the Institutes of the Laws of England*, p. 52.

<sup>219</sup> See the Preamble to the Bill of Rights of 1689.

<sup>220</sup> i.e. the Glorious Revolution of 1688–9, which saw James II replaced on the throne by William III and Mary.

<sup>221</sup> Bentham presumably means to suggest that George III was not implicated in the ‘transgressions’ in question.

dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.’<sup>222</sup>

*Analogous transgression in New South Wales.*—Exercising legislative power by the hand of the Governor there, without authority from Parliament, in an habitual train of enumerated instances, to the number of 60 or 70, or upwards, as already exemplified in § 10.<sup>223</sup> besides other instances not as yet specifically ascertainable. The word *analogous* requires correction. It is evident enough how inconsiderable the transgression is which consists in the mere act of *dispensation* or *suspension*, put upon here and there a law already existing, in comparison of an habitual and *positive* exercise of an illegal power of legislation, *in all cases*.

No. 2. *Transgression 2d in England.*—‘Committing and *prosecuting* divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power of suspending and dispensing with laws.’<sup>224</sup>

*Analogous transgression in New South Wales.*—Confining within this land of illegal bondage, and even, *without ‘prosecution,’* punishing by arbitrary power, viz. with whipping—divers persons formerly guilty, but who had been restored, in point of law, to the condition of innocent persons, by the expiration of their terms of legal punishment.<sup>225</sup>

<sup>225</sup> Supra, § 12.<sup>225</sup>

No. 3. *Transgression 3d in England.*—‘Issuing and causing to be executed, a *commission* under the Great Seal for erecting a *court* called the Court of Commissioners for ecclesiastical causes.’<sup>226</sup>

*Analogous transgressions in New South Wales.*—1. Instituting a court called a *Civil Court*, without authority from Parliament.<sup>226</sup>

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<sup>222</sup> See the Bill of Rights of 1689, § 1.

<sup>223</sup> See pp. 000 above.

<sup>224</sup> See the Bill of Rights of 1689, § 2.

<sup>225</sup> See § 12, item 2, p. 000 & n. above.

<sup>226</sup> See the Bill of Rights of 1689, § 3.

<sup>sss</sup> Coll. I. p. 7.<sup>227</sup>

2. Punishing divers persons, on divers occasions, in divers manners, by the single authority of the Governor, for pretended offences created by so many acts of legislative authority exercised by the Governor: For example, in some instances, by destroying stills;<sup>ttt</sup> pulling down houses;<sup>uuu</sup> destroying oars.<sup>228</sup> These, though on the mention of them presenting the appearance rather of ‘outrages’ committed by individuals, were among the acts done by the Governor in the exercise of these illegal powers.

<sup>ttt</sup> Coll. I. 450.<sup>229</sup>

<sup>uuu</sup> *Ib.* 300, 471, 482.<sup>230</sup>

No. 4. *Transgression the 4th in England.*—‘Levying money to and for the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was

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<sup>227</sup> According to Collins, i. 7–8, on 9 February 1788 Governor Phillip’s commission as Governor of New South Wales was publicly read in the colony, along with the ‘letters patent for establishing the courts of civil and criminal judicature in the territory’.

<sup>228</sup> Bentham probably has in mind the government order of October 1797 which stated that if any boat was found to be unsecured, or left with its oars, rudder, masts, or sails on board at night, then it was to be taken ashore and burned: see p. 000 n. above.

<sup>229</sup> According to Collins, i. 450, during January 1796 a number of settlers applied for Governor Hunter’s permission to ‘erect stills in different parts of the settlement’. It was discovered that ‘for a considerable time past they had been in the practice of making and vending a spirit, the quality of which was of so destructive a nature, that the health of the settlement in general was much endangered’, and Hunter instead ordered that it was forbidden to distil spirits of ‘any kind or quality’, while district constables were ordered to ‘be extremely vigilant in discovering and giving information where and in whose possession’ any illicit stills might be, several of which were located and destroyed. For the order in question see Governor Hunter to Portland, 3 March 1796, *HRA*, i. 555.

<sup>230</sup> Collins, i. 299–300, 471, 481–2, respectively describes the government order of July 1793 which warned that anyone attempting to sell spirits without a licence could expect the alcohol to be seized, ‘and the houses of the offending parties pulled down’; the government order of April 1796 which warned that anyone who persisted in retailing spirits without a license was liable for their house to ‘be pulled down as a public nuisance’; and in June 1796 the pulling down of a hut in which two ‘notorious offenders’ named James or Andrew McManus and George Collins were discovered after having absconded from the their gaol gang, a measure which Collins described as being intended ‘to deter others (if possible) from harbouring thieves and vagabonds’.

granted in Parliament.<sup>231</sup>

*Analogous transgression in New South Wales.*—Levying for the use of the crown a tax of 6d. per bushel on corn, and other taxes, applied towards the expense of building a jail at Sydney.<sup>vvv</sup>

<sup>vvv</sup> *Ib II. 41. 214, 283, 297.*<sup>232</sup>

No. 5. *Transgression the 7th in England.*—‘Violating the freedom of election of members to serve in parliament.’<sup>233</sup>

*Analogous transgression in New South Wales.*—Legislation, exercised by the Governor alone, without authority from parliament at home, or the concurrence of any assembly, standing in the place of parliament, in New South Wales.

No. 6. *Transgression the 10th in England.*—Excessive bail ‘.^.^. required .^.^. to elude the benefit of the laws made for the liberty of the subject.’<sup>234</sup>

*Analogous transgression in New South Wales.*—Married men, whose terms were expired, not suffered to quit the colony, without *finding security* for the maintenance of their wives and children, if left behind.<sup>www</sup>

<sup>www</sup> The reasonableness of the obligation, supposing the imposition of it had been

<sup>231</sup> See the Bill of Rights of 1689, § 4.

<sup>232</sup> Collins, ii. 41–2, 214, 283, 297 respectively describes the requirement in June 1797 for residents of Sydney each to provide twenty-four bundles of grass, and for civil and military officials who had been assigned convict servants each to provide fifty bundles, in order to complete the thatch roof of the gaol; the agreement in July 1799 of the ‘officers, principal inhabitants, and landholders’ of Sydney to Governor Hunter’s proposal that ‘an assessment .^.^. be furnished by each, as well of money as of labour’ in order to complete several public works, most notably the new stone gaol; the raising of money in January 1800 for the still incomplete gaol ‘by each person leaving in the hands of the commissary sixpence for every bushel of wheat they should put into the store’; and the report in June 1800 from the committee overseeing the construction of the new Sydney gaol, which noted that ‘several persons had resisted the payment of the necessary assessments which had been ordered to defray the expenses of the building’, and the issuing of orders requiring immediate payment of the assessments.

<sup>233</sup> See the Bill of Rights of 1689, § 7.

<sup>234</sup> See the Bill of Rights of 1689, § 10.

guarded from abuse by proper checks, and warranted by law, can never amount to a justification of such an act of coercion, limited as it was by no such checks, and sanctioned by no such warrant. And whence came the pretence for imposing it? From the very act of those who, in bringing forward any such plea, must *take advantage of their own wrong*,<sup>235</sup> ere they could avail themselves of it. By that conjugal affection, by which these poor females were in a manner compelled to avail themselves of the means afforded them for sharing in the exile of their husbands, they were enticed into this *cage*, and, out of the *physical* bar, which *there* opposed itself to the return of the females, a legal bar was *thus* constructed, for preventing the return of both sexes, males as well as females.

No. 7. *Transgression the 11th in England.*—‘Illegal and cruel punishments inflicted.’<sup>236</sup>

*Analogous transgression in New South Wales.*—Perpetual exile, accompanied with perpetual confinement and perpetual slavery, inflicted on his Majesty’s subjects, altogether without cause; whatever offences they had been convicted of, having been previously expiated by appropriate lots of punishment, marked out by law. Of the mere endeavour to escape from this combination of illegal and cruel punishments—the humble and peaceable endeavour without any thing like *force*—an additional lot of illegal punishment, illegal whipping, was the appointed consequence.<sup>237</sup>

Under this head the enormities imputed to James the Second were mere peccadillos, in comparison of the more palpably ‘*illegal*,’ more ‘*cruel*,’ and above all prodigiously more numerous enormities of the like complexion, committed under ——<sup>238</sup> My pen refuses to complete the sentence.<sup>xxx</sup>

<sup>xxx</sup> The most striking, of the few instances of inordinate punishment that could have been alluded to in this article of the Bill of Rights, was the whipping (certainly a most

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<sup>235</sup> For this legal maxim see, for instance, Blackstone, *Commentaries on the Laws of England*, i. 443–4, 452, ii. 278, 321, iv. 209.

<sup>236</sup> See the Bill of Rights of 1689, § 11.

<sup>237</sup> See § 12, item 2, p. 000 & n. above.

<sup>238</sup> The draft at UC cxvi. 356 (28 Jan 1803) is left blank at this point, though ‘George III’ is inferred.

severe one) of *Titus Oates*.<sup>239</sup> But the crime for which Oates thus suffered was but *one*, in a system of murders of a most terrific and atrocious complexion, murder by the hand of justice,<sup>240</sup> though left out of that denomination in the early and dark ages of our law. It would have required the united enormities, of a dozen or a score of the most guilty among the colonists of New South Wales, to make up a mass of guilt equal to that which issued from this one murderous tongue.

In point of *illegality*, the utmost that can be alledged, against the penal inflictions thus condemned by the Bill of Rights, is an excess—on the side of severity indeed, but in the exercise of a power plainly discretionary, and having by law no specific limits: in the case of the modern system of illegal punishments, the legal portion had in every instance been marked out by the clearest limits: and it is by the palpable transgression of these limits, and by a course of contempt, as direct and pointed as it is possible to manifest, towards the repeatedly declared will of the supreme power by which these limits had been marked out, that the enormities, thus censured by the ancient constitution, have been committed in these our days.

In point of *multitude* of transgressions, for every instance of punishment, in respect of which illegality could thus have been imputed to the penal system of that time, a hundred at least might be found, of the more cruel and more palpably illegal masses of punishment, with which the administration of penal justice has thus been stained.

After the statement of the several heads of *transgression* by which the rights in question had been *violated*, the act proceeds to declare the *rights* themselves in thirteen articles, the first of which is in these words—‘The pretended power of *suspending* laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.’<sup>241</sup> But, if simple *suspension* or *dispensation*—(i.e. abrogation for a time in individual instances) be thus illegal, how much more flagrant must be the illegality of *positive* enactment, and that without any limitation as to the nature of the case?

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<sup>239</sup> Following his conviction for perjury at a trial on 8–9 May 1685, Titus Oates (1649–1705) was whipped through the streets from Aldgate to Newgate on 20 May 1685 and from Newgate to Tyburn on 22 May 1685.

<sup>240</sup> Thirty-five persons were tried and executed after being implicated in the so-called Popish Plot, principally fabricated by Oates, and which allegedly aimed to assassinate Charles II (1630–85), King of England, Scotland, and Ireland from 1660, and his brother James, Duke of York and future King James II, unless the latter agreed to establish a Jesuit government.

<sup>241</sup> See the Bill of Rights of 1689, § 1.

In § [6],<sup>242</sup> after declaring the rights and liberties in question to be ‘the true ancient and indubitable rights of the people of this kingdom,’ the act concludes<sup>243</sup> with ‘declaring and enacting,’ that ‘*all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.*’

The wretches in question, whatever may have been their crimes, were they not—are they not still and as truly as the very best of their betters, so many individuals of ‘*the people of this kingdom?*’—And thus it is then that his present Majesty, the venerable and beloved successor of the royal founders of these rights and liberties,<sup>244</sup> has been ‘*served*’ by ‘*the officers and ministers of his time:*’ thus it is, that the ‘*ancient and indubitable rights,*’ of this helpless and defenceless portion of his people, have been respected and protected by these his ‘officers and ministers.’

#### *IV. Transgressions in Breach of the several Transportation Acts, by which that Punishment has been appointed for limited Lengths of Time.*

It would be a double charge of the same article, to state these as so many acts of delinquency, distinct from and over and above those already referred to, in their character of transgressions against the *Habeas Corpus Act*.<sup>245</sup> It is by these several statutes, that the limits of legal punishment are marked out, in the several respective instances; it is in the transgression of those limits in each instance that consists the violation offered to that sacred law.

It would moreover be a waste of paper to give, by a string of references, a specific list of the several particular laws thus transgressed. It would be making so many useless transcripts, from the already existing indexes and abridgments.

In this complicated body of enormity, perspicuity requires that the distinction between the two main branches be kept in view. The one consists in the system of

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<sup>242</sup> 1803 ‘64’.

<sup>243</sup> The following passage is the conclusion of § 6, whereas the Act itself has a further seven sections.

<sup>244</sup> George III, and William III and Mary, respectively.

<sup>245</sup> See pp. 000 above.

groundless as well as illegal punishment; the other in the system of illegal legislation and government:—the former, in the oppression exercised upon individuals; the latter, in the usurpation exercised by the servants of the crown over the authority of parliament:—the former, in the wound given to the penal branch, and through that alone to the constitutional branch of the law; the other in a system of delinquency, striking more directly against the constitutional branch. The relation of the latter system of transgression to the former, is that of a *means* to an *end*: it was for the purpose, of the oppression exercised upon individual subjects, that the authority of his Majesty in Parliament was thus usurped by his ‘officers and ministers.’

One thing, in regard to the question of *law*, requires particularly to be observed: which is, that though the right of the crown to legislate in this new-founded colony, without the concurrence, either of the two other estates of the supreme legislature in the mother country, or of a subordinate assembly of states in the colony, were as clear as, I flatter myself, the contrary has been made out to be,<sup>246</sup> the stain of illegality would not even thus be cleared away: for, admitting, on the part of the King’s Governor of New South Wales, the right of legislating to every other effect imaginable, even then no such supposition could be entertained, consistently with any sort or degree of supremacy on the part of Parliament, as that of a right of making ordinances in New South Wales, in direct repugnancy to the several acts of Parliament, by which express limitations stand annexed to the several lots of punishment respectively appointed by those acts. And as to the *Habeas Corpus Act*, should even the letter of that sacred charter be (as I can scarce conceive it to be) deemed not to have been violated, the violation of the spirit of it would still remain as plain and palpable, as it could have been in any of the cases, the experience of which may be supposed to have given occasion to the law.

As to every thing that concerns *motives* and *extenuations*—*motives* by which any of the transgressors may be supposed to have been led into transgression—*extenuations* that may be supposed capable of being grounded on those motives—discussions on any such topics as these, might in the present state of the business be regarded as premature. The essential subject of solicitude is the constitution: the essential operation is the healing the wound that has thus been given to it: that object being accomplished by the requisite votes

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<sup>246</sup> See §§ 3–6, pp. 000 above.

and laws, every thing else may in comparison be deemed of light importance; and may without much danger be left to float upon the tide of popular and party favour. The object on no account to be lost sight of is *futurity*: that being provided for at any rate, it is a matter of little comparative moment what degree of indulgence may accompany the retrospect, which cannot altogether be omitted to be taken of the *past*. The fact of transgression declared, then would come the consideration of the censure, if any, and the deductions or set-offs to be made, on the score of motives, intentions, or past services, real or supposed, in other lines. All would be lost, the constitution would be betrayed and sacrificed, if, dazzled by the lustre that circles the head of this or that arch-delinquent, the eye of Parliament were to show itself insensible to the distinction between right and wrong, and the quality of the criminal were to be accepted as a warrant for the crime. It was not in the case of James the Second; it was not in the case of that misguided, yet most religious, though so unhappily religious, king: it saved him not from forfeiture, much less from verbal censure. It remains to be seen, whether the constitution, which, in the seventeenth century, even a king was punished and expelled for violating, is to be complimented away, and made a sacrifice of, to the pride of this or that domineering subject, in the nineteenth century: in this maturer age, in this supposed period of constitutional improvement, and more firmly established rights.

Compare the case of this immense, yet too real, because uninspectable Bastille, with that of the scene of kindred abuse in miniature,—the Home-Jail thus hyperbolized and stigmatized—in *Cold Bath Fields*. See what was the conduct of Parliament in the one case, and from thence say what it ought to be, what, if consistency be the rule, it cannot but be, in the other. Information to Parliament of mismanagement in a prison—a lawful prison—employed as such under the law for the suspension of the Habeas Corpus Act. No principle of the constitution violated: no authority setting itself up to make ordinances repugnant to the laws, and subversive of the authority of Parliament. The alleged cause of the abuse, mal-practices on the part of a single Jailor,<sup>247</sup> negligence or connivance on the part of certain Magistrates, his official superiors. On this ground—on this single ground—an address is presented to his Majesty by the House of Commons for an inquiry into the management of this jail; an address presented with the express concurrence of the

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<sup>247</sup> Thomas Aris, Governor of Coldbath Fields Prison: see p. 000 n. above.

Chancellor of the Exchequer;<sup>248</sup> and a commission of inquiry is issued accordingly—issued by the Crown,<sup>yyy</sup> and executed.<sup>zzz</sup>

<sup>yyy</sup> 2d Sept. 1800. Printed by H. Commons' Order dated [15]th<sup>249</sup> Dec. 1800.<sup>250</sup>

<sup>zzz</sup> Report of Commissioners, dated 1st Nov. 1800; printed as above.<sup>251</sup>

On the present occasion, his Majesty's subjects kept by hundreds, ere now, perhaps, by thousands, in a state of exile and bondage, without end and without cause: the four grand bulwarks of the constitution all broken through, for the very purpose of this causeless and endless punishment:—the authority of Parliament treated by the servants of the Crown with a contempt already become habitual and rooted:—is the supposition so much as an enduring one, that after information thus exhibited, though it be by so obscure a hand, Parliament should sit still and silent, exactly as if nothing amiss had ever happened?

When on that occasion the motion was made for the address, the delicacy of the Chancellor of the Exchequer of that day would not suffer him to refuse his declared concurrence with it.<sup>aaaa</sup> Would the supposition be so much as a decent one, that the Chancellor of the Exchequer of the present day<sup>252</sup> would show so little respect to the precedent thus set by his predecessor, as to refuse to the very vitals of the constitution that attention, which it was then not thought decent to refuse to the police of one of the prisons?<sup>bbbb</sup>

<sup>aaaa</sup> Parliamentary Register, 22d July, 1800.<sup>253</sup>

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<sup>248</sup> William Pitt.

<sup>249</sup> 1803 '18' is a slip.

<sup>250</sup> For the Commission of Inquiry issued by the Crown on 2 September 1800 see 'Papers Presented to the House of Commons, relating to His Majesty's Prison in Cold Bath Fields', *Commons Sessional Papers* (1800) cxxxii. 3–4.

<sup>251</sup> For the Commissioners' Report see *Commons Sessional Papers* (1800) cxxxii. 5–100.

<sup>252</sup> Henry Addington.

<sup>253</sup> On 22 July 1800 Sir Francis Burdett moved for a Committee of the whole House 'to consider the state and management of the prison of Cold-bath fields', whereupon George Tierney (1761–1830), Treasurer of Navy 1803–4, President of Board of Control 1806–7, proposed instead that an address be presented to the King that

<sup>bbbb</sup> Without a thought of any application to existing circumstances, I happened but now to open the reign of Charles I., in *Hume*.<sup>254</sup> If prejudices of any kind be deemed imputable to that prince of historians, they will hardly be of that cast, which would dispose a man to exaggerate the mischief, resulting from [a transgression]<sup>255</sup> of the limits, prescribed by the constitution to the power of the crown. Whether to that dispassionate, acute, and comprehensive mind, the wounds given to the constitution on the ground of the penal colony, would have presented themselves as matters of indifference—as incidents in which the body of the people have no concern—is a question, the answer to which may be read, I should suppose, without much difficulty, in the following passages:—

Vol. vi, 8vo. p. 316,<sup>256</sup> a[n]no 1637. Speaking of Ship money, ‘what security’ (say the arguments which he exhibits as conclusive) ‘what security against the further extension of this claim? .^.^ Wherever any difficulty shall occur, the administration, instead of endeavouring to elude or overcome it by gentle and prudent measures, will instantly represent it as a reason for infringing all antient laws and institutions: and if such maxims and such practices prevail, what has become of national liberty? What authority is left to the *Great Charter*, to the *Statutes*, and to that very *Petition of Right*, which in the present reign had been so solemnly enacted by the concurrence of the whole legislature?’ So far Hume. The breach of those two constitutional safeguards constituted in those days, according to the historian, the superlative of tyranny. The *Habeas Corpus Act* and the *Bill of Rights* have since been added. To triumph over those more antient laws, the violation of which cost Charles the First his crown and life, was not enough: the violation of the Habeas Corpus Act, and the Bill of Right—a course of systematic violation persevered in for fourteen years—has accordingly been added to the triumphs of ministers in these our times.

Along with those two fundamental laws, other ‘Statutes’ are mentioned by the historian in general terms: and, as an aggravation of the tyranny, the *then* present reign is noted as the period that gave birth to the *Petition of Right*, one of those two fundamental laws. Statutes of inferior account, in crowds, contribute to swell the

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an inquiry be established, a proposal for which Pitt stated that he ‘saw no necessity’ but which he ‘would not oppose’: see *Parliamentary Register* (1800), iii. 494–504.

<sup>254</sup> Bentham is quoting from David Hume, *The History of England*, 8 vols., London, 1778, vi. 199–547. The work was first published in six volumes at London between 1754 and 1762.

<sup>255</sup> 1803 ‘at ransgression’.

<sup>256</sup> For ship money see p. 000 n. above.

triumph obtained over law (with grief I say it) in the *now* present reign: and among them the several *transportation acts*, to which, in numbers too great for reference, this same reign has been giving birth.

Ib. p. 314, anno 1637. ‘It was urged’ .^.^ (continues the historian) ‘that the plea of necessity was in vain introduced into a trial at law; since it was of the nature of necessity to abolish all law.^.^.^ P. 315. And as to the pretension that the king is sole judge of the necessity, what is this but to subject all the privileges of the nation to his arbitrary will and pleasure? To expect that the public will be convinced by such reasoning, must aggravate the general indignation, by adding, to violence against men’s persons, and their property, so cruel a mockery of their understanding.’

Ib. p. 421, anno 1641. ‘In those days,’ observes the historian, ‘the parliament thought’<sup>257</sup>—and according to him—‘justly thought that the king was too eminent a magistrate to be trusted with discretionary power, which he might so easily turn to the destruction of liberty. And in the event it has hitherto been found, that, though some sensible inconveniences arise from the maxim of adhering strictly to law, yet the advantages overbalance them, and should render the English grateful to the memory of their ancestors, who, after repeated contests, at last established that noble, though dangerous, principle.’ Established it? So *they* thought (it seems) in *their* times: so Hume thought (it seems) in *his* time. In these *our* times, does that valuable principle *remain* established? Or, after having been overthrown and trampled upon for these fourteen years, is it now finally to be abandoned, and to remain lifeless and extinct for ever?

In one point indeed, at least according to the view given of it by this historian, the parallel would be found to fail. ‘The imposition of Ship money, independent of the consequences,’ (viz. the anti-constitutional consequences above spoken of,) ‘was a great and evident advantage to the public:’ viz. ‘by the judicious use which the king made of the money levied by that expedient.’ Ib. p. 319, anno 1637. So far as to the unconstitutional impost of *that* day. As to the anti-constitutional system of the present times, what degree of ‘judiciousness’ there was, either in the design of it or in the ‘*use*’ made of it, may be seen in the Letters to Lord Pelham,<sup>258</sup> by any man, when conscience will permit him to look the subject in the face.

Ib. p. 360, anno 1640. ‘The lawyers had declared, that *martial law* would not be

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<sup>257</sup> ‘In those days the parliament thought’ is Bentham’s insertion.

<sup>258</sup> See pp. 000 above.

exercised, except in the presence of the enemy; and because it had been found necessary to execute a mutineer, the generals thought it advisable, for their own safety, to apply for a pardon from the crown.’—So much greater was the respect paid to the constitution by the king's servants—Strafford of the number—in those days, than in these. See above.<sup>259</sup>

Ib. p. 319, anno [1637].<sup>260</sup> The cause of the unfortunate pertinacity on the part of the misguided king, and the deceitful ground on which it rested, are thus delineated: ‘Though it was justly apprehended, that such precedents, if patiently submitted to, would end .^.^ in the establishment of arbitrary authority; Charles dreaded no opposition from the people, who are not commonly much affected with consequences, and require some striking motive to engage them in a resistance to established government.’

Such at that time had been the *reliance*, but now follows the *result*.

Ib. p. 317,<sup>261</sup> anno 1637. ‘Hambden, however,’ (observes the historian), ‘obtained by the trial the end for which he had so generously sacrificed his safety and his quiet: the *people* were roused from their lethargy, and became sensible of the danger to which their liberties were exposed. Then national questions were canvassed in every company; and the more they were examined, the more evidently did it appear to many, that liberty was totally subverted .^.^ slavish principles, they said, concur with illegal practices; .^.^ and the<sup>262</sup> privileges of the nation, transmitted through so many ages, secured by so many laws, and purchased by the blood of so many heroes and patriots, now lie prostrate at the feet of the monarch. What though public peace and national industry increased the commerce and opulence of the kingdom? This advantage was temporary, and due alone, not to any encouragement given by the crown, but to the spirit of the English, the remains of their antient freedom. What though the personal character of the king, amidst all his misguided counsels, might merit indulgence, or even praise? He was but one man; and the privileges of the people, the inheritance of millions, were too valuable to be sacrificed to his prejudices and mistakes.’

Ib. p. 375, anno 1640. The jealousy of the people was roused; ‘and, agreeably to the

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<sup>259</sup> Bentham’s allusion is presumably to the declaration of martial law at Norfolk Island and the hanging of Wolloughhan and McLean: see ‘Letter to Pelham’, p. 000 above.

<sup>260</sup> 1803 ‘1587’.

<sup>261</sup> *Recte* 317–18.

<sup>262</sup> Hume ‘all the’.

spirit of free governments,<sup>263</sup> no less indignation was excited by the view of a violated constitution, than by the ravages of the most enormous tyranny.’ Such was the language—such the spirit—of the people of that day: such their language and their spirit, when both as yet were temperate, and had not burst forth into the wild explosions that ensued. In the case of New South Wales, *both* provocations—the ‘*violated constitution*’, and the ‘*enormous tyranny*’—go hand in hand: the tyranny, the end; the violation of the constitution, the means. What will now be the spirit of a British Parliament? What will now be the spirit of the British People? It remains to be seen in what degree, if in any, the people of this day retain the virtues of their ancestors.

They must be degenerate indeed, if they are to be lulled into any such persuasion, as that the constitution will be capable of retaining for their benefit its protecting force, after it has been made apparent, that with ultimate impunity, it may thus be trampled upon in the most vital parts of it, for such a course of years.

FINIS.

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<sup>263</sup> Hume ‘government’.

[APPENDIX: ‘THE BRITISH CONSTITUTION  
CONQUERED IN NEW SOUTH WALES’—  
CONTENTS AND PREFACE]

NOTE TO TYPESETTERS: Please begin a new recto.

[116–275<sup>r1</sup>]

*The British Constitution conquered in New South Wales:  
Shewing the enormities committed, in breach of Magna Charta, the  
Petition of Right, the Habeas Corpus Act, and the Bill of Rights, in  
the design, foundation, and government, of that Penal Colony.*

NOTE TO TYPESETTERS: Please present the following in two columns, and confine to a single page. Please consult the hard copy for guidance.

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| §.1. Subject—matter object—plan.   | §.9. Nullity of New South Welch<br>legislation proved from the <i>Granada</i><br>Case.          |
| §.2. Power of legislation—its <i>necessity</i> in<br>New South Wales.                            | §.10. Governor’s Illegal Ordinances<br>exemplified—1. for prevention of<br><i>famine</i> .      |
| §.3. Legislation—how far <i>lawful</i> in New<br>South Wales.                                    | §.11. Governor’s Illegal Ordinances<br>exemplified—2. for prevention of<br><i>drunkenness</i> . |
| §.4. <i>American</i> etc. legislation no precedent<br>for New South Wales.                       | §.12. <i>Expirees</i> , forcibly detained.  |
| §.5. Even in America, the Crown had no<br>right to legislate without Parliament.                 | §.13. <i>Expirees</i> , during detention, kept in<br>bondage.                                   |
| §.6. Nullity of legislation in New South<br>Wales, for want of an <i>Assembly</i> to<br>consent. | §.14. <i>Statutes transgressed</i> by the<br>Legislation and Government of New<br>South Wales.  |
| §.7. Nullity of Governor’s Ordinances, for<br>want of a Court to try offences<br>against them.   |   |

§.8. The King's Law-Servants not  
infallible.

[116–275<sup>v2</sup>]

### *The British Constitution conquered in New South Wales*

The appetite for conquest is too strong in man to be difficult in its choice, in respect either of *matter*, *mode*, or *place*. When the conquest of America was the order of the day, America was conquered in Germany, as it would have been in the moon, rather than that it should not be conquered. America having since {taken itself into its own hands, and} conquered itself within itself, much remains not of the prior conquest, unless it be the honour and glory—in which, however, was contained all the value of it.

Another enterprize of the same illustrious Chieftain, was an attempt to conquer the British Constitution in Great Britain. A legislation by King without Parliament—a ‘*tyranny*’ without disguise or limit—was set up at once under its own name: set up for no more than ‘*forty days*’ indeed or in the first instance but renewable *toties quoties*.<sup>a</sup> In those days there was a General *Mansfield*, who stood up and took upon himself the defence of the invaded territory: More short lived still than the *military*, the *political* conquest did not outlive the experimental forty days.

<sup>a</sup> A° 1766. On the occasion of the suspension put upon the Corn Laws, per Lords Chatham and Camden, among the indefeasible rights of the Crown, is that of suspending Acts of Parliament in all cases: subject only to the obligation of employing the word *necessity*, as in the case of Ship-money. To the objection that this is a tyranny, the answer was—*True: but it is but for forty days*. See Almon’s *Parliamentary Register*.

The appetite above spoken of being so natural to the whole species, the wonder is the less, when, in any more than ordinary degree of strength, it is observed to be hereditary in families. The plan for the conquering of the British Constitution *proprio loco* [116–275<sup>v2</sup>] proving thus abortive, some other field was to be found for any renewal of the experiment. The more remote from observation, the more favourable to the purpose. New South Wales is at the *antipodes*. The theatre of war was transferred to New South Wales.

Upon this less brilliant but better concerted enterprize, fortune has hitherto bestowed

all her smiles. The conquest made in Great Britain was abandoned as soon as made. The attack made in New South Wales found no resistance, and howsoever it may have been with the Settlement itself, the tyranny so happily planted in it has been flourishing for above these fourteen years.

Against such dominion, established as it is, '*insurrection*' may surely be said to be a *right*, if not, as some would add, 'a *duty*'. *Insurrection, conspiracy, treason*, every thing of that sort is accordingly here 'compassed and imagined': *treason*, not precisely against the constitution indeed, but unquestionably against the despotism so lately built upon the ruins of it: *conspiracy*, though of a somewhat new complexion, corresponding to the novelty of the domination plotted against it:—*conspiracy, in Parliament and by Parliament*, with the Sovereign *de jure* at the head of it: *conspiracy*, the fruit of which would be, to engage the constitutional Ex-King to rebel and rise upon the despot, to pluck the sceptre from his grasp, and to re-ascend in his place the too long 'deserted', not to say 'abdicated', throne.