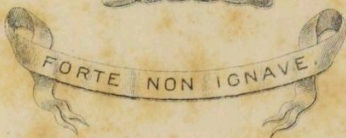


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Alfred Leef.

CASE SHELF

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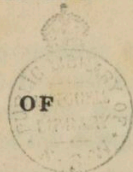
Russell Johnston

129

THE APPEAL

OF THE

LATE ATTORNEY GENERAL



NEW SOUTH WALES.

D. Bannister

(NOT PUBLISHED.)

“ Les plaintes les plus graves des colons, affoiblies en raison de la distance sont livrées sans défense dans le Cabinet du Prince aux tournures les plus insidieuses. Les moyens abondent pour déguiser au Prince les procédés les plus violens sous une apparence de nécessité: et les meilleures intentions ne peuvent pas préserver les ministres du danger de servir des intérêts particuliers aux dépens des intérêts publics. BENTHAM.

Theorie des Peines et des Recompenses, 2 tom. p. 390.

L O N D O N :

PRINTED BY W. MITCHELL,

39, CHARING CROSS.

1831.

TO LORD CHANCELLOR BROUGHAM.

MY LORD,

Being about to present to the House of Lords a petition on the subject discussed in the following pages, I do not hesitate to address this appeal to your Lordship as the chief legal adviser of the King.

I make no claim whatever to support, except upon a fair examination of the truth, as it can be shown from a few facts; and from a candid review of my public conduct, hitherto greatly misrepresented. The Secretary of State for the Colonies refused to advise his Majesty to order the hearing sought by my petitions, or even to make the inquiry essential to justice; and I venture to submit that it is not beyond the Lord Chancellor's competency to take notice of a case in which a Colonial Law Officer complains, as I do, of an *ex-parte* decision. As a lawyer, I am entitled to some sympathy from the head of the law; and your lordship, as a constitutional lawyer, can declare that such a decision by a Secretary of State is very far from being irreversible. His Majesty is bound to let a reasonable Petitioner be heard; and as things can be properly judged of only by a sufficient knowledge of the facts connected with them, to refuse to examine facts violates the plainest principles of common right.

To none, also, is it better known than to your lordship, how honest men may be thwarted by official intrigue, and if, as I believe, such intrigue, originating at the antipodes, through crafty men misleading and making dupes of the weak, has been allowed deeply to injure me, I trust I shall not seem intrusive in thus bringing my appeal to your personal observation.

I am far from arrogating to myself the praise of perfection in discharging my public duties; but I know that venial errors will not, on a fair trial, be visited severely, and circumstanced as I now am, I put myself to the proof of having been ordinarily discreet, diligent, honest, and successful in all the public business that in any manner came

into my hands in New South Wales. With every hour occupied there in incessant labour for the public, and having done well what has been indifferently done by doubled labourers in my office, I cannot consent to be held up as having failed in a colony, where gross misconduct, and the most absolute incompetency are not only excused, but functionaries to whom one or other of those qualities may be imputed, are continued, or promoted in the King's service.

The confidence of the King's Government has been erroneously given to the unworthy, but the error ought not to be aggravated by sanctioning wrong to one who has been substantially blameless.

In 1826, I wrote to Earl Bathurst in the following terms, which I may not very improperly repeat now.

"Delay is often required for the explanation of many things unavoidably obscure, for a time, in such an office as mine. It is an obvious evil, incident to that office, to which I have cheerfully submitted. With means in my hands to throw light on every measure to which I have been a party, and relying that true reports would be made on my conduct, if it should be noticed at all, I have hitherto been anxious to avoid offering explanation unduly. I perceive the advantage that has been taken of my adoption of a principle, by which, however, I do not repent to have been guided: I am sure it is the true principle, and I must now resort to my means of protection, and disabuse the King's Government."

"To me, what I ask is a debt of justice; but beyond my personal interests I submit that the good government of New South Wales is concerned in the establishment of the truth, and in the redress of wrong."

I have the honor to be,

Your Lordship's faithful Servant,

S. BANNISTER.

THE CASE OF THE LATE ATTORNEY GENERAL OF NEW SOUTH WALES.

The perusal of the following papers will, I trust, render a long introduction to the case of the writer needless. But the consequences to me of gross colonial misgovernment, and of a failure to obtain justice at the hands of the minister at home, having compelled an appeal to parliament, a slight exposition of his objects is indispensable.

Being convinced that intrigue in New South Wales has deceived the Secretary of State; and that he is induced by the effect of falsehood to advise the King to treat me unjustly, I rely on the force of truth for a change in the Secretary of State's decision, if I could obtain an hearing. I claim such hearing in defence of a professional reputation, without which I am irretrievably ruined; and for actual efficient services I seek pecuniary remuneration, which various accidents have rendered essential to my honorable existence. The money I could willingly abandon in other circumstances; but it has become of pressing importance to me, and it is in effect intimately connected with the vindication of my official conduct, which no suffering ought to compel me to forego. I cannot afford to give up money which I have honestly and hardly earned; and still less can I afford to lose the credit of even a few years of efficient service.

Even a hearing, however, is refused; and a course is adopted in the case equally opposed, as I apprehend, to clear principle and well established precedent.

In regard to me personally, all probability supports the reasonableness of my claims. Not an hour was lost in making them. I offer strict evidence on every point. And the Secretary of State admits my "honor, integrity and zeal." I understand also, that my mere *legal* knowledge has never been questioned. But because those qualities are not in dispute he will not look at the proffered proof

of my discretion and official knowledge, which I assert without any reserve, to have been most wrongfully impugned in letters cited below, p. 13, from the Colonial office.

Although devoted to Indian and Colonial employment, I cannot think it is placing myself in a false position to be at issue with Viscount Goderich in such a case; and in my circumstances, I cannot abstain from seeking *all* that is fairly my due. His Lordship estimates character most incorrectly, in considering it made up of good intentions and integrity alone: (p. 16) and, I am persuaded, that when it is considered, that success in life greatly depends on discretion and knowledge of duties, most persons will approve of my resisting imputation in those respects, *at least, unless I can obtain an examination of the evidence, with which I am prepared, to the truth of what has passed.* This is surely so much the more prudent to stand upon, when the imputation is coupled with the ruinous penalty of dismissal from an employment which few are thought too inefficient to fill;—and with a denial of payment for *service*, devotion to which deprived me of a good professional income.

Integrity and zeal should undoubtedly be found in a public officer, and of all places New South Wales is not that in which they are the least valuable qualities, but an Attorney-General destitute of discretion in the degree charged against me, must be content to be very unceremoniously put aside. I do not pretend to be perfect; but standing upon facts, which I can fully establish, I spurn the imputation to which I am now exposed; and I even insist, when so unjustly dealt with, that instead of reproaches, I am entitled to praise for “the course” which I pursued.

I was charged with dictating to the Governors; with joining parties against them—these were absolute fictions; and, it is said (p. 16, below) that what I did “seems to have been inconvenient to the Colonial government.” But I submit that—the inconvenience arose from the strange proceedings of the Governors of New South Wales, to whom I was in the highest degree respectful. Surely, the scandalous Indemnity transactions of 1825, under Sir T. Brisbane and Governor Darling’s conduct in removing me for cautioning him against rash and unjust prosecutions, ought not to be defended at my expense. Because his Majesty’s ministers were misled in 1826, in regard to me, there ought not to be an unwillingness to admit the error now; and I

am convinced that, if I am heard, I shall obtain the rescinding of Governor Darling's act of removal, with the withdrawal of great reproof. In that event, the necessary consequence will be, that I shall obtain the remuneration, for which I am also contending.

The principle, on which I expect the money is stated as follows from Sir Edward Simpson, a high authority to this day in such matters.

“The acquittal restored Captain Sutton to his former situation in every respect, as if he had not been suspended. This is the rule in all other cases. Even in felony, a reversal of the conviction restores all rights. That this idea is not new appears from a manuscript treatise, composed by Sir Edward Simpson, formerly a judge of the Admiralty; a laborious, and long an able practitioner in the Admiralty and Ecclesiastical Courts. Under the title *Offence*, we find these words:— ‘Undoubted rule in Admiralty and Ecclesiastical Courts; that a person suspended for an offence supposed, for which he is afterwards acquitted *in proper court*, is entitled to all the intermediate profits; and it seems to be a rule of natural justice, that no one should suffer for what he is declared innocent of. And this seems the only proper mode of securing complete justice to the person injured; for, first, it removes a great temptation to do wrong in those in power: next, it secures the innocent in all his rights, which an action on the case against the offender could not do, because he may not be able to answer for the heavy damages required. Besides, the precarious issue of all such recoveries, both in the nature of legal proceedings, and from the death of the parties.’

“Under the title *Profits*, we find these words: ‘Persons suspended from an office, entitled to intermediate profits if innocent.’” — Pulteney's Observations on Sutton *v.* Johnston, 1787, p. 70.

These principles are exactly applicable to my case; and there is no proposition of law clearer, than that a crown officer subjected, as I am, to reproach for his public acts; and, removed from his post, as I was by Governor Darling, finds the “*proper court*” of appeal at the King's hands. Amongst other authorities, therefore, I stand upon this excellent one of Sir Edward Simpson, to clear the way to my pecuniary claims.

But not only is my appeal well grounded in principle, as my stake is considerable, in regard to the payment claimed for past services,—but my right to such payment has been distinctly connected by the Secretary of State, with my having “pursued an improper course, whilst in office.” (p. 13) So that proof of the propriety of my course is indispensable to meet this objection; and if that proof be clear the objection falls to the ground, and what is due must be paid.

It is however said, that the King may remove a public officer in my situation without giving a reason for the act,—a position which I do not dispute. I am quite aware that sufficient cause will be *presumed* for such a *tacit* exertion of the prerogative. But it is equally true, that if objections to the disadvantage of the public officer who is removed, *be expressed*, it is open to him to show that these objections are erroneously alledged,—that the crown has been deceived: and a refusal to hear the explanations is a great violation of the spirit of the constitution, however inconsiderable the person may be, who suffers the wrong. I assert that, to visit even error by ruin; or to place crown officers in a condition merely precarious, are not parts of the English constitution. But if condemnation once had, on an *exparte* view of conduct, is not to be reversed when the truth can be made known, none are safe. What was reported to the Secretary of State in March 1826 to justify the *intended* removal, I do not know. The real transaction is in p. 17 below.

Under these circumstances I ask the active support of all who feel interested either in a matter of private right; or who would promote good government in the Colonies, which is ever concerned in the struggle of Colonial functionaries for justice at home. And I put the whole case upon the examination of the truth, which might be done in far less time than has been occupied in writing letters, refusing the inquiry.

The following Letters are the last which have passed on the subject. The recent removal of Governor Darling led me to think the opportunity favorable to continuing the discussion.

Copy of a Letter to Earl Bathurst.

MY LORD,

May 13th, 1831.

Although your lordship has done me almost as much wrong as a public functionary can receive, I cannot bring myself to think, that any personal consideration against me could influence your advice to the King, by which I am grievously suffering. I will, therefore, appeal to your lordship to assist me in correcting harsh impressions.

From New South Wales there were sent to the Colonial office in 1825, 6 and 7, representations concerning me, which can now be shewn to be utterly unfounded.

But, in delicacy to your Lordship, Viscount Goderich declines to examine what is called a case of a former administration. This is a principle, however, which, I trust, means will be taken to set aside. It cannot be fit, that the ruin of an individual should be sealed, because a ministry is changed before affairs, sixteen thousand miles off, are fully developed.

The recal of Governor Darling, after that of Sir Thomas Brisbane, with the full exposure of the character of Chief Justice Forbes, must be considered good illustrations of my conduct,—who earnestly, but always respectfully, and often even delicately objected to the course of both* governors.

I came to the King's service without a stain; and having acted in it with discretion and efficiency, I feel strongly that your Lordship ought to assist me in inducing Viscount Goderich not to deny inquiry from any motive of consideration to your Lordship—when you cannot but be willing to have wrong put right, at even a personal sacrifice,

I take the liberty to enclose a copy of a letter sent to-day to Viscount Goderich; and, I trust, to have your Lordship's support in the case.

S. BANNISTER.

(Copy of the letter to Viscount Goderich.)

MY LORD,

13th May, 1831.

In presenting the enclosed pamphlet on Colonies to your Lordship, I shall be excused referring to my claims on the justice of the crown.

* I had one difference only with SIR T. BRISBANE, (p. 17 below)

During more than four years, I have sought pecuniary compensation for my services ; and cannot obtain even a hearing ; and to my application for a reversal of an undeserved statement, that I must have been removed, had I not resigned, it is replied by your Lordship's direction, that the statement was true, being made upon a formerly existing intention.

I have never doubted the existence of such intentions ; and I only urge, that, as the proof is at length complete, if the King having been led to form it by misrepresentation from New South Wales, His Majesty should now be advised to do justice to a victim of that deception.

Instead of my conduct deserving reproof, infinite discredit would have been avoided, if others had adopted my advice, or acted as I have acted ; and I ought not to be left to suffer from the mis-government of Sir Thomas Brisbane and General Darling, whose errors have caused their actual removal.

Your Lordship informed me some moths ago, that no complaint is now made against me ; but that what occurred in the time of Earl Bathurst could not be examined. I submit this goes on a principle utterly opposed to the justice due from the King to his subjects ; and that my persevering appeals ought more especially to be listened to, when all my assertions are proved to be well founded, and my warnings most prudent.

No Government can be brought into disrepute by repairing an error : and, if Earl Bathurst was led by unfair means to misapprehend my character and conduct, it is just to his Lordship to consider him anxious that the consequence of the mistake should be corrected.

I have therefore humbly to request that His Majesty may be advised graciously to consider my claims.

S. BANNISTER.

Copy of the Answer from Earl Bathurst.

May 16th 1831.

SIR,

I have to acknowledge the receipt of your letter of the 13th instant.

At this distance of time, you will readily believe I have no accurate recollection of your case, or of the dispatches relating to it, which were received in the years 1825 and 1826.

In the beginning of 1827, I resigned the Seals, and as I have since uniformly declined any interference in the concerns of that office, I am quite ignorant of what has subsequently happened with regard to your case; and of the reasons which may have induced you to postpone urging sooner your claim to a reconsideration of it.

I can therefore only say, that if Lord Goderich be persuaded that you have been able to vindicate yourself, he knows me, and his duty, too well, to refuse to rescind a decision made to your prejudice from an apprehension that his doing so could be otherwise than satisfactory to me.

BATHURST.

Copy of the Reply to Earl Bathurst.

May 18th 1831.

MY LORD,

I have to thank your Lordship for the reply to my letter of the 13th instant; and upon that part of the reply which mentions "reasons that may have induced me to *postpone* urging sooner my claims for a reconsideration of my case," I beg leave to observe, that from the first hour in 1826, when the injury was done me by General Darling, I commenced a series of appeals, by notice, by letter, and by petitions, never since interrupted.

My difficulty has been, and is now, the not being able to obtain a hearing.

I will not intrude upon your Lordship by repeating the volumes which I have written on the subject in 1826, 1827, 1828, 1829, 1830 and 1831, at Sydney, at Sea, at the Cape of Good Hope, and in England. The enclosed single letter* shews, how early and how earnestly I began my appeal.

The distance of the place and the nature of the circumstances led me to expect delay, but, I also relied on ultimate justice.

* Letter of 1826 from which an Extract is printed above (p. 4.)

I am now exceedingly gratified not to appear unreasonable in having written my letter of the 13th, and to be right in the conjecture that "to rescind a decision made to my prejudice would be satisfactory to your Lordship," an inference which I have drawn from the reply to mine.

Tedious as the years of trial have been; and indeed doubly grievous, by having happened to be concurrent with severe family misfortune; I have not permitted myself to doubt, that the most improper proceedings in Sydney would at length be appreciated; and the recent occurrences respecting General Darling and Chief Justice Forbes, induced me to address your Lordship in the manner I took the liberty to do.

S. BANNISTER.

As to this letter, Earl Bathurst stated it did not require an answer.

To Viscount Goderich.

18th May, 1831.

MY LORD,

Last week I applied to the Colonial Office on a point, relative to which I also wrote to Earl Bathurst; and I beg leave now to transmit his Lordship's reply, with another letter from me, to which I have been informed, no answer is necessary.

With the intimation of Earl Bathurst's sentiments, shewn in this correspondence, I may venture to call again upon your Lordship for an enquiry into my claims—And I submit confidently, that to do justice to me will improve and facilitate good government in New South Wales; where five individuals will not be found to whom such justice being done will not be gratifying.

The enquiry which I seek is not extensive; It can be heard at the Privy Council on my Petitions already laid before the King, but upon which His Majesty has not yet been pleased to give any orders—or, what I take the liberty to suggest as preferable in the first instance, the inquiry may be carried on in the Colonial Office—access being permitted me to what has been laid to my charge, as the cause of the intended removal, mentioned by Mr. Hay in 1828.

The Examination of the Papers will be easily limited to two or three points; and a very brief explanation may place me in the light in which I humbly contend I ought to stand before His Majesty's Government, and absolve me from every reproach excited since I sailed from home in 1823.

S. BANNISTER.

Note of Claims left with Viscount Goderich, 24th May, 1831

A.

Vindication from the following reproaches, inasmuch as a knowledge of the truth will shew they are undeserved, and the consequences should be rescinded.

27th June, 1828.—“It became known that Mr. Bannister had conducted himself with so much indiscretion in his office, as would have rendered his removal necessary, had not his own resignation anticipated that measure.”

R. W. HAY.

11th July, 1828.—“The money claimed is not to be paid, especially, when it is considered in how unsatisfactory a manner Mr. Bannister performed the duties of his office.

R. W. HAY.

18th September, 1828.—“The Secretary of State does not consider that he can with propriety relax his decision upon the subject of the compensation solicited for Mr. Bannister, more especially as the course pursued by that gentleman, while in office, does not appear to have been such, as could justify any unusual indulgence.”

HORACE TWISS.

The acceptance of my conditional resignation, was, in reality, a mode of removal, and that removal was determined upon by Earl Bathurst, under a mistaken view of my conduct.

Upon the whole matter of conduct, misrepresentations have been practised; and vindication is due.

B.

Pecuniary Compensation on the following Heads.

(1.) Whatever was meant in the following passage of a letter of 11th April, 1828, to Mr. Wilmot Horton, by Mr. T.

“As far as I can task my recollection, you informed me, in 1825, that you should (as to those heads of extra charge) submit to Lord Bathurst, the propriety of an increase to Mr. Bannister’s salary, of from £300 to £400 per annum, to take effect from the date of his appointment.”

It has always appeared to me, that these allowances, or some increase, had been settled in my favour, and the misrepresentations that reached England in March or April, 1826, stopped them.

(2.) Whatever is just, for having devoted all my time in doing the whole crown business, expected by His Majesty’s Government, and by me in 1823, to take part of my time only, and which has since had *two* crown officers.

(3.) The full salary from the date of my being removed by General Darling, to the date of my successor’s arrival.

(4.) An allowance for my voyage home, having been removed unjustly.

At this interview, Viscount Goderich said he would look into the papers, and consider if the inquiry I sought was needed; in three weeks I received the following decision not to inquire as I sought.

Downing Street,

14th June, 1831.

After an attentive examination of all the circumstances of the case, Lord Goderich is not of opinion, that it would be advisable, or could answer any useful object, to institute such an inquiry as you demand. Your retirement was your own act (*a*) in consequence of the Secretary

(*a*) Not so.—The “retirement” as it is called, was a removal—occasioned, I believe by slander. Earl Bathurst thought I had “pursued a course” which I had not pursued. The real transaction is in page 17 below; and I am in the judgment of the reader, if, for my share, I ought to be removed from my office.

of State having felt it to be his duty to refuse (b) your request, to be allowed a higher salary than that which it was agreed (c) you should receive, when you proceeded to New South Wales. You cannot, therefore, claim as a matter of right, to be reinstated (d) in an office which you voluntarily resigned, or to receive another in its place.

Your pecuniary claims have already been fully (e) considered, and Lord Goderich desires me to acquaint you, that he has nothing to add to the communications made on the 26th September, (f) 1829.

The only object, therefore, for which an inquiry could possibly be instituted, would be that of removing the imputations which you conceive to have been thrown on your character by the expression in the letter of the 27th June, 1828. (g)

Lord Goderich can well understand, that you should feel acutely what you conceive to be an undeserved censure on your conduct, and he would consider it to be his duty to decline no investigation, even though it should be attended with much labour and inconvenience to himself, having for its object, to relieve an individual from an unmerited reproach incurred in the course of his public service.

(b) Not so.—A higher Salary was intended for me; and it was actually given to my successor. Since my time, the duties which I discharged, have cost the country more than double of what was paid to me; whilst slander alone deceived the King's Government and deprived me of a fair increase.

(c) Not so.—The agreement was quite otherwise.

(d) I have never sought to be re-instated. I have claimed indemnity for the services for which I have not been paid; and against General Darling, for removing me because I advised him not to be unjust. In 1829 also, I offered my services again, in any other Colony, and I have even since been a candidate for public employment.

(e) They have not been fully considered. I have not yet had a hearing on these claims. This way of assuming facts, subverts every principle of justice.

(f) I pledge myself to shew that the communication of 26th Sept. 1829, and the matters connected with it, would place the matter irresistibly in my favor; if the truths were discussed, which is refused by the Secretary of State.

(g) And the 11th July and 18th September 1828 (see page 13.)

With respect to yourself, however, Lord Goderich conceives that this necessity for an investigation does not exist, as not the slightest imputation has been cast upon your honour and integrity, (*h*) nor any complaint preferred from any quarter, of want of zeal in the discharge of your duties.

Your recall, had it taken place, would only have been decided upon, in order to relieve the colonial government (*i*) from the inconvenience which seems to have resulted from the erroneous view (*j*) which you took of your duties.

HOWICK.

16th June, 1831.

REPLY.

In acknowledging your Lordship's letter of the 14th Inst. I beg leave to state my increasing conviction, that a very brief inquiry would display the real facts (at present, as that letter shews, quite misunderstood) and would make the soundness of my discretion apparent, and tend to the value of my exertions to promote the public peace in New South Wales being recognised—things as indispensable to justice, and to my safety, as the admission of my integrity and zeal is.

Leaving this, now, to Viscount Goderich, whose refusal to hear me I deeply deplore, I request to be informed of the specific points upon which, as your Lordship states, I am thought to have occasioned "inconvenience to the Colonial Government, by taking an erroneous view of my duties."

(*h*) But imputations are cast on my discretion, my knowledge of my duties, (by which alone I can live); and I say roundly, it has happened through slander from New South Wales, and by an estimate made in Downing Street of my conduct, which will be altered if the truth be known.

(*i*) The Colonial Government ought to be informed, that such advice as mine might have warded off the disgrace, the confusion, and the expence of the last four years; and the King ought, I submit, to be advised now to do me justice for having had the sagacity to see the occasion for my advice, and the honesty to give it.

(*j*) I challenge a just inquiry to shew that no incorrectness of my view of my duties deserved *removal*. S. BANNISTER.

To be liable to dismissal from an office for such an offence, even if proved, is a punishment unparalleled in Colonial History. I contend also, that the offence cannot be proved, whilst the acceptance of the alledged resignation was, I apprehend, only a less troublesome mode of removal for my supposed delinquency—supposed on grounds now capable of explanation.

S. BANNISTER.

To this letter it was replied, on the 20th June, 1831, that Viscount Goderich could only refer to the letter of the 14th June.

The Torture Transactions of 1825, which were mis-represented to the Home Government in 1826, are sufficiently described in the following letters; and I submit, that my conduct on the occasion, was very far from deserving reproach, even if erroneous.

SIR,

SYDNEY, 28th September, 1825.

I yesterday received your Excellency's instructions to prepare a Bill, pursuant to a paper sent therewith, and signed by three Members of the Council, "to stay all Criminal Proceedings which may have been, or shall hereafter be, commenced against the Magistrates, for *any sentence, act, matter, or thing*, passed or done in execution of his office, before the promulgation of the Act 4, G. IV. c. 96, in the Colony of New South Wales."

This paper also states "that a report is made respecting the origin and extent of the practice of inflicting punishment after conviction, to compel restitution of property, or *disclosure of parties implicated*."

I have to submit, that the recommendation extends beyond the objects of the report, and to request that your Excellency will be pleased to order the report to be sent to me, in as much as it is necessary that I should examine it, before I can venture to draw the Bill.

S. BANNISTER.

His Excellency the Governor.

GOVERNMENT HOUSE, SYDNEY.

SIR,

28th September, 1825.

I have just received your note upon the subject of preparing a Bill, pursuant to a recommendation of the Council, as conveyed in a letter to me of yesterday's date, and signed by a majority of the

members, in which you request that the report of the Council should be sent to you for examination, before you could venture to draw the Bill. It does not appear to me that I can comply with your request, on the view you seem to take of the subject. I apprehend that when the Governor has taken the advice of the Council upon any legislative measure, and the Governor acting upon that advice, requires the Attorney General to prepare a Bill for giving effect to the recommendations of the Council, that the Attorney General's Office becomes merely ministerial. Whether a proposed law be repugnant to the law of England, or not, is a question for the Chief Justice—the policy of the measure is exclusively with the Governor and Council. It is possible the Attorney General may take a different view of that policy, but I conceive that would be no reason why he should not be called upon to put into regular form any Bill which may be required by the Governor, with the advice of the Council.

Viewing the matter in this light, I send you the report* of facts upon which the Council have thought proper to forward the recommendation of a Bill, agreeably to the paper placed in your hands; and I must desire that you will prepare a Bill strictly in conformity with that recommendation.

THOMAS BRISBANE.

The Attorney General.

SIR,

SYDNEY, 29th September, 1825.

The Bill of Indemnity which your Excellency directs me draw, is intended to stay proceedings in criminal cases against all Magistrates of New South Wales, who, in the execution of their office, may have inflicted what I find is in law held to be Torture, and this not rarely, but as a very general practice.

The passing of such a law would remove many perplexities which are now pressing on me as Attorney General, but it is with unaffected pain that I find myself compelled to decline drawing the bill on the instructions before me, and also to state that I cannot venture to be a party to such a measure *even in that minor degree, without having an opportunity of examining its merits*. The difficulty in which those instructions place me, is extreme. The bill can hardly be contemplated without hesitation,—it touches directly one of the great principles of law, and I am not furnished with materials out of which the indispensable preamble can be penned.

I am much relieved in the case by knowing that the ordinary objection to my refusal cannot exist here, in as much as the mere machinery of the act is not complicated, and your Excellency has the means of supplying the step which I cannot take; what I now do will therefore not thwart the passing of the law.

That vindictive criminal prosecutions may not be proper under certain circumstances, cannot be doubted; and in the matter in question the points have always appeared to me to demand the most

* Part only was sent.

careful examination. But I trust to be pardoned for being scrupulous to act myself *without examination of them*, and for stating the principle which guides me in regard to drawing the bill, and in regard to the duty which my office imposes on me, as I conceive, of forming an opinion on the measure itself.

The practice complained of is repugnant to a fundamental law, peculiar to England for ages, and I think that *on such a subject*, an Attorney General in New South Wales owes it to the King whose Commission he holds, to your Excellency, and to himself, if he draws a bill indemnifying parties against criminal prosecutions for breach of this law, to do so upon such a view of facts as will enable him to introduce into it, as is usual, its justifications; and also to weigh the evidence of facts adduced to such a topic, that he may not become a remote party to what may be a measure in the highest degree wrong.

On the subject itself there are several points of extreme importance as it appears to me, which I feel it will be my duty to lay before your Excellency, if I am permitted to examine the facts.

If that liberty be not allowed to me, I have humbly and with great regret to submit, that my view of the duties of my office in this case, differs from that which your Excellency was pleased to state to me yesterday.

S. BANNISTER.

GOVERNMENT HOUSE, PARRAMATTA,
30th September, 1825.

SIR,

I have read your letter of yesterday's date with much regret. At the present moment, and under the many embarrassments which attend my administration, I can but ill spare the co-operation of any officer of Government; but I cannot bring myself to receive your assistance upon the terms on which alone you seem to feel yourself justified in affording it.

I am not deeply versed in law—but reading the Act of Parliament creating the Governors and Council a legislative body in New South Wales, I cannot find in what way the Attorney General can become *party** to any law. He may assist the Governor with his counsel, but the Governor must act at his own discretion; and the advice of the Attorney General would not protect him from responsibility.

I apprehend the duties of the Attorney General are to be collected from his commission. Your commission gives you the rights and privileges which belong to an Attorney General, that is, I presume, an Attorney General of England, as far as the circumstances of the Colony will admit. The legislative functions of Parliament are entirely independent of the Attorney General in England. I understand it to be the practice in Government bills, to send them to the Attorney and Solicitor Generals to

* I apprehend that an Attorney General who should put *his hand unnecessarily* to a Torture Bill, or advise it, might be indicted or otherwise prosecuted. The Governors responsibility would not save the subordinate officer. By the law of England, the command of a superior in such a case, is no indemnity; and *such ministerial* officers have been punished for submitting to be blind instruments in illegal acts. My Case has been compared with Sir C. Wetherel's as to the Catholic Bill, but the distinction is very plain.

see that they are prepared in due form, and do not interfere with any right of the Crown; but beyond this, the Attorney General of England has no discretion to exercise over the measures which the Government may think proper to lay before Parliament. The policy or impolicy is entirely with the Ministry; the Attorney General may happen to be in the Ministry in the Cabinet, but surely that would not be a sufficient reason why he should refuse to see that the measure which he may disapprove, should be put into due form of law. This is the case in my Government. You addressed a letter to me on the presentments which appeared in the newspapers, for my instructions on the subject. As the case was a delicate one, I laid it before the Council, and requested their advice. Before they gave it, they inquired fully into the subject, and at last came to the resolution to recommend a particular measure to me, in the propriety of which, I as Governor entirely concur. From your letter, I understand that you decline drawing a Bill to give effect to this measure, until you have examined its merits, and made up your mind upon its propriety. Now this appears to me to amount to a complete *veto* upon the Governor and Council, and renders the Attorney General a third estate in legislature of the Colony. I cannot consent to this, the Council will not consent to this; and I must, therefore, desire you to reconsider your letter, and inform me whether you still decline to prepare a Bill according to the instructions of the Governor, unless you are permitted to examine its merits, and form your judgment upon its expediency.

THOMAS BRISBANE.

The Attorney General, &c. &c. &c.

SIR,

SYDNEY, 3d October, 1825.

I have presented to your Excellency two letters on the proposed Indemnity Bill, with a degree of pain I am incapable of describing; and although in my present imperfect knowledge of the facts, I distrust any other conclusion than what those letters express, I cannot forbear most humbly suggesting a course which appears to me to be effectual and safe.

If the facts be as your Excellency apprehends, and a little further enquiry will, I think, put that point out of doubt, I should not hesitate, as Attorney General, to stop all indictments and informations by process of *noli prosequi*, after giving the accusers an opportunity to state their objections to me; I think there is sound law for this course; and although I would gladly avoid its difficulties, I am prepared to meet them or any others, to be presented by what seems to be my duty.

The advantages of it are, that it will check the operation in Courts of Law of the present wrong feelings; and that, if with some wrong impressions the accusers are substantially right in what they undertake, the criminal remedies they have chosen will merely be postponed till instructions arrive from His Majesty to withdraw such a stay of proceedings. If they are wrong, that stay will be made perpetual.

* As to the policy of the Torture Indemnity, I claimed no control. I stood out upon quite a different principle, as my letters shew. The whole proceeding of 1825 was in reality a fraud to screen an individual now deservedly exposed.

Special cases of cruelty could not be saved by this course, or by an indemnity act; if such exist, there is no excuse, and no possible protection for the parties. I would also humbly repeat the advice I have before given, and recommend, if any men have been condemned upon doubtful evidence, gained by the infliction of punishment to extract it, suitable indulgences be now granted to them.....

S. BANNISTER.

His Excellency SIR THOMAS BRISBANE, K. C. B.
&c. &c. &c.

GOVERNMENT HOUSE, PARRAMATTA,
3d October, 1825.

SIR,

If I am right in my apprehension of your letter of yesterday's date, you admit as a general principle, that the Attorney General is not necessary to be deferred to, whether a Bill will be prepared in the Colony; but you consider that cases arise which create exceptions to the rule, and that the recommendation of the Council in the pending case is one. Admitting this principle as a rule of your guidance, it becomes of course discretionary with yourself, whether you will prepare any Bill; of the necessity of which you may entertain doubt. Under such circumstances, it will be impossible for me to call upon you to *prepare any Bill*, without submitting to the chance of a refusal, and therefore, until the pleasure of His Majesty's Government is made known, I must seek for professional aid in this branch of Government elsewhere.

THOMAS BRISBANE.

S. BANNISTER, Esq. *Attorney General*,
&c. &c. &c.

GOVERNMENT HOUSE, SYDNEY,
4th October, 1825.

SIR,

On my arrival in town this morning, I found your letter of yesterday on my table. After having submitted the whole matter to the Council, and received their recommendation of a specific course being pursued, I do not feel that it would be right to resort to any other, unless the most conclusive reasons could be given against it. You say, as Attorney General, that you should not hesitate to stop the proceedings by process of *Noli prosequi*, after giving the accuser an opportunity of stating their objections to you.

This, it appears to me, would be laying the Government open to the charge of being identified with the accused Magistrates; a charge which has already been advanced, which I have been most anxious to guard against, and, to avoid which, I was inclined to place the matter in the hands of the Council. If you possess the power, as the legal Officer of the Crown, to stop all criminal prosecutions, it does not appear to me that the Governor and Council, as the legislative of the Colony, will have entrenched upon any sacred principle in co-exercising the same power as is lodged in your individual discretion.

On the contrary; it will give a wider base and greater strength to the measure, and will relieve the Government from the odium, from which I can conscientiously declare it is entirely exempt, of taking any part whatsoever in the prosecutions now pending before the different Courts of the Colony.

As you desire it, I will transmit the whole of your letters to Earl Bathurst upon the subject.

THOMAS BRISBANE,

To S. BANNISTER, Esq,
&c. &c. &c.

SIR,

SYDNEY, 4th October, 1825.

In a letter of yesterday, your Excellency is pleased to dispense with my services, under my Commission, until the decision of His Majesty, on my case, is known.

It is my duty to submit to this decision, and I have only to request that copies may be ordered to be furnished to me of a few of the documents which have been laid before your Excellency, by me, on the subject of the Parramatta Presentment, and on the Magistrates since the 20th of August; that I may be able to transmit a state of the case to my friends. Copies of most of the papers are in my possession, but the pressure of public business may have prevented me preserving all of them regularly.

Unless required to do so, I shall not appeal from the decision of His Majesty upon your Excellency's representations, which I am sure will be full, but as my offer in 1823, to serve the Crown, was made solely on such proof of a good reputation as I could procure from them who had known me, I am bound to endeavour to convince the friends who once thought well of me, that I have done nothing to forfeit their esteem.

S. BANNISTER.

His Excellency SIR THOMAS BRISBANE, K.C.B.
&c. &c. &c.

SIR,

SYDNEY, 5th October, 1831.

In my letter of yesterday, relative to what your Excellency might think it right to state to Earl Bathurst, upon the circumstances which my previous letters designate, I expressed the confidence I feel, that the statement would be full. I have no other desire on the subject, than that the whole matter should be known to those whose approbation I hope to continue to enjoy.

The disappointment I have met with in point of income, renders it probable that I may soon leave New South Wales; and as I cannot be a stranger in any part of the world, moderate as my pretensions are, the welfare of many who depend on me is deeply concerned in my good fame. My English friends therefore should know exactly what occurred in a matter likely to affect their opinion of my judgment and honor. I am sure my feelings cannot be too tender on this topic.

Your Excellency had rightly and kindly rejected any impressions which unworthy conjectures of my conduct between the contending parties in recent affairs might have made, but the same justice may not be done me elsewhere, if I am silent under what I clearly perceive has been busily whispered in several quarters. I was ready to explain my proceedings to your Excellency, as I mentioned, on Monday week. To no one else in New South Wales is even explanation due from me.—I made this offer to your Excellency because the nature of my office renders some things obscure, although I feel I require no defence against such inconsiderate conjectures. I must, however, put my friends in possession of the means of denial, that if I have an enemy here, others may not be pained by my neglecting to state the truth.

For these reasons, I wish to send the documents to my Brother in London; leaving to your Excellency to determine what may be proper to be submitted to Earl Bathurst.*

S. BANNISTER.

His Excellency SIR THOMAS BRISBANE,
&c. &c. &c.

GOVERNMENT HOUSE, SYDNEY,

4th October, 1825.

SIR,

My letter of yesterday was certainly not intended to dispense with your services generally, but merely in drawing Bills recommended by the Council. I beg leave further to state distinctly, that it is my wish you should continue to discharge your duties under your Commission. I had less difficulty in considering it proper to resort to the other professional assistance in drawing Bills, as you yourself have considered I might do so, in your communication to me.

THOMAS BRISBANE.

To S. BANNISTER, Esq.

Attorney General, &c. &c. &c.

This official letter was accompanied by a private one, written in the tone, which Sir Thomas uniformly preserved towards me, and, if possible, increased the regret I felt at his submission to the advisers who entangled him in this transaction. It will be seen that I studiously avoided discussing the strange doctrine put into his letters.

SIR,

4th October, 1825.

I am grateful that your Excellency should have condescended to correct my impression that I was superseded in my office.

So much of doubt had I on the subject, that I have continued to do what I was before occupied in; and I should have offered my services even if ceasing to be a public officer, if I could have done so consistently with the respect I owe your Excellency.

I am aware that an Attorney General is not a Minister of State, but some subjects appear to me of extreme delicacy, and on this, I think, I should be liable to punishment if I put my hand to the bill.

I had the honour of waiting on your Excellency this afternoon, and I will come, if required, to-morrow.

S. BANNISTER.

* What SIR THOMAS BRISBANE stated to Earl Bathurst, I know not. His friends have since asserted that I joined a party against him; but after his disclaimer to me, personally of listening to such an imputation; it is quite incredible that Sir Thomas Brisbane should have had the duplicity to defame me to the Secretary of State.

TO THE HOUSE OF COMMONS.

THE HUMBLE PETITION OF S. BANNISTER,
Late Attorney General of New South Wales.

Sheweth,

THAT Petitioner was appointed to his office in 1823, and discharged the duties until October, 1826.

That in October, 1826, Lieutenant General DARLING, the Governor of the Colony, removed Petitioner from his office, for writing a letter to him in the terms following :

“ 6th October, 1826.

“ SIR,

“ It has appeared to me more than once to be my duty to notice to your Excellency the serious inconvenience arising from matters of law and police being improperly administered in the Colony : and unpleasant as it is to me, under the circumstances in which I am placed, I cannot forbear mentioning another important instance. I allude to the inaccuracy of the statements in the Government notice of the 29th September, relative to an attack on Dr. Dalhanty's family at Burwood.

“ Yesterday I reported to your Excellency what seemed to me to be the nature of the crime, and who the perpetrator was, as proved in the Supreme Court. The transaction, I am convinced, was very different from that set forth in the notice. I do not mention this to extenuate the crime of the offender Thomas Mustin, or to depreciate Dr. Dalhanty, the conduct of whose family was shewn to be exemplary : but it is of infinite importance in the administration of justice not to confound crimes, and that a prejudice should not before trial be raised against any accused parties. Common rumour is apt to create a difficulty of this kind to Courts ; but if the Governor of the Colony interposes his authority out of time, and incorrectly, the safe course of the law is in danger of being perverted.

“ S. BANNISTER.”

“ To His Excellency the Governor.

That Petitioner's successor did not arrive in the said colony until July, 1827.

That petitioner claims redress for the loss of his salary, during this period, and remuneration in other respects for services rendered to the crown in his said office.

That, during four years, petitioner has in vain sought a hearing at the Colonial Office, and at the Privy Council, touching his said claims; and he submits, that not fully to hear a complainant, is contrary to the ancient and just practice of the Constitution, and a direct encouragement to intrigue.

Petitioner, therefore, prays the intervention of your Honorable House with His Majesty the King, that he may be heard in the matters aforesaid, and that he may be recommended by your Honorable House to have such remuneration for his past services, as his conduct may be found to have merited.

TO THE RIGHT HONORABLE THE LORDS
SPIRITUAL AND TEMPORAL IN
PARLIAMENT ASSEMBLED.

THE PETITION OF S. BANNISTER, &c. &c.

Humbly Sheweth :—

THAT in June last Petitioner presented a Petition to His Majesty, the late King, stating, that in 1827 he delivered to the Right Honorable the Earl Bathurst, a Petition to His Majesty, complaining that in October, 1826, the Governor of New South Wales removed him from his office unjustly, and stating that in 1827, Petitioner sent divers copies of the same to the Governor at Sydney, and Petitioner submitted that sufficient opportunity had been given to the Governor to transmit answers to the matters urged therein against him to His Majesty's Colonial Office.

And praying to be heard touching the complaint, and to have such redress as to His Majesty should seem meet.

That Petitioner since has presented Petitions praying for pecuniary compensation in respect of his said office.

That no day has been appointed for hearing the said Petitions.

That Petitioner discharged the duties of the said office faithfully, and with advantage to the public.

That by error, and without due inquiry, the principal Secretary of State for the Colonies, in 1828, caused it to be declared in writing, to Mr. _____ in Petitioner's absence from England, that Petitioner's conduct was such, that had he not resigned his office he would have been removed.

That since Petitioner's return, the Secretary of State has in part indirectly withdrawn such grievous imputation, but still refuses to make the full inquiry into the case which justice demands.

That time had produced proof of the propriety of Petitioner's conduct, and of the impropriety of the conduct of the Governors of New South Wales.

That the matters imputed to Petitioner were,

1st. Refusing conditionally, in 1825, to draw a bill, commonly called the torture indemnity bill.

2ndly. Cautioning Governor Darling, in 1826, not to risk the peace of the community by affording marked and unusual favour to a violent partizan engaged in conducting a newspaper.

3rdly. Also cautioning Governor Darling not to authorize killing the natives of New South Wales against law. And

4thly. Cautioning Governor Darling not to to intermeddle unduly in the administration of the criminal law.

For which last caution, expressed in respectful terms, and upon an occasion of great oppression, Governor Darling removed Petitioner from his office, an act against which Petitioner has already specially prayed redress.

And Petitioner submits, that in all these matters he executed his trust with devotion to the public interest, and with a fitting regard for the honour of the Crown, and that the Governors of the Colony ought to have taken due advantage of his humble advice therein.

And Petitioner declares that what is called his resignation took place solely in consequence of the insufficiency of his emoluments, and he believes, that to do the duty which he did, has since cost the public more than double the sum paid to him, and an intended increase of his salary was only stopped in 1826, by mis-representation of his conduct.

And Petitioner submits, that a due regard to his cautions would have promoted the public peace; that he had sagacity to penetrate intrigue, and integrity to denounce it;—and that not to have acted as he did act on the foregoing occasions, would have been a betrayal of his duty to the King. In his manner of proceeding, he believes that he was never wanting in a becoming respect, and although frank towards the Governors, the subsequent discovery of the truth shews Petitioner to have exercised a strictly sound discretion.

The conjunctures referred to were delicate, and he consulted, what he still considers to have been public duty, under circumstances exceedingly painful to his feelings. They were the only points upon which he had the slightest difference with either of the Governors, Sir Thomas Brisbane or General Darling. He cheerfully gave to both all the aid he could, and all the support warranted by his commission.

The money claimed is for labour, not unskilfully bestowed—the reparation against Governor Darling, is upon matters which deeply concern the administration of criminal law in the Colony—and the acknowledgement of Petitioner's well deserving, is sought upon the force of clear evidence and the ancient practice of the Crown.

Upon the whole matter, Petitioner humbly submits that good Colonial Government, and his just private interests, equally require that right be done to him, and that His Majesty has been improperly advised in not appointing a time for hearing his Petitions.

And Petitioner prays the intervention of your Lordships with His Majesty, that he may be heard upon one or upon all the Petitions which he has presented to the Throne, relative to his office in New South Wales.

And Petitioner, as in duty bound, shall ever pray.



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