CONSTITUTIONAL CONFUSION IN THE COCOS ISLANDS: THE STRANGE DELIVERANCE OF LIM KENG

BY G M KELLY*

When, in 1902, a murder was committed in the Cocos Islands and a resident native of the Islands was brought to trial at Singapore, the Supreme Court of the Straits Settlements ruled unexpectedly that it had no jurisdiction.

That decision threw doubt upon the validity of Letters Patent of 1886 which were to remain the constitutional foundation of British rule in the Cocos until the transfer of sovereignty to Australia in 1957. The doubt necessarily extended to matters of long-term practical importance, including the special position in the Cocos held by the Clunies-Ross family until 1978.

*This article considers the validity of those Letters Patent—a question peremptorily closed off by British authorities in the aftermath of the 1902 affair. Fundamental doctrines of colonial law in relation to territorial acquisition, and their application to British annexation of the Cocos Islands, are examined. The continuing relevance of those doctrines—*eg *to the recent line of land rights cases in Australia—is incidentally pointed out.*

The Letters Patent are also tested against the maxim omnia praesumuntur rite esse acta *and in terms of evolving judicial acceptance of severance. For that purpose, illustration of legal principle is drawn from Australian cases as from English law.*

1 BACKGROUND

On an imminent date in 1983, the tiny resident population of the Cocos Islands will exercise "an act of free choice" that some of them may find puzzling. The choice is to be independence, "free association" with Australia, or full incorporation, in effect as citizens of the Australian Capital Territory. During a century and a half of European settlement, the constitutional record of the Cocos has been singular and lively—an oddly repeated quest, it might seem, for a proximate parent.

Following British settlement in 1827, the Imperial Government rebuffed local clamour for annexation for 30 years. When annexation finally took place, the new colony's distant masters in London first dabbled with running it themselves and then bestowed it successively on the Governors of Ceylon and the Straits Settlements. From 1903 the Cocos Islands were incorporated in the Settlement of Singapore. During 1939-45 control went back to Ceylon. In the period immediately after, the Cocos formed part of the colony of Singapore.

* MA (Hons), LLB (NZ); Barrister and Solicitor of the High Court of New Zealand, of the Supreme Court of the Australian Capital Territory, and of the High Court of Australia. Commonwealth Attorney-General's Department, Canberra. The views expressed in this article are the personal views of the writer and not necessarily those of the Department. The writer wishes to express his thanks to Mr R J Linford OBE, formerly Administrator of the Cocos Islands, both for bringing the *Lim Keng* case and the issues raised by it to his attention, and for providing copies of the basic documents. Thanks are also due to Mr W R Edeson of the Australian National University for helpful comment on the article in draft.

The prospect of independence for Singapore and Malaya, keen-eyed Indonesian nationalism and gradual abdication of the British position in eastern Asia next suggested uneasy possibilities, as did British reluctance to maintain on the Islands an airfield and installations which had done useful service during the Pacific War. In a time and region of transition, Australia assessed the Cocos as valuable for civil aviation and more than valuable for defence. In the result, Australia became the next parent. By Order in Council under the Cocos Islands Act 1955 (UK) and the Cocos (Keeling) Islands Act 1955 (Cth), sovereignty was transferred and the Islands became a Territory of the Commonwealth of Australia

With the Territory went a complex legal legacy—an arcane inheritance of majestic judicial doctrine; Letters Patent under the Great Seal; Royal Instructions under the Sign Manual and Signet; Orders in Council; Imperial Statutes; colonial legislation; local instruments. Was that foundation solid? Were the effects of it all, except as expressly provided, extinguished? In conditions of Australian control, did any such question matter? More than fifty years earlier, in the Supreme Court of the Straits Settlements, a judgment since forgotten had already suggested a disturbing answer—it might.

2 *R* v *LIM KENG*

On the evening of 20 October 1902, the idyllic tranquillity of a remote Indian Ocean island was briefly shattered by the violent death of one Woo Tong. The legal aftermath puzzled law officers of the Crown, provoked an unusual and important judgment from the Supreme Court of the Straits Settlements at Singapore, and provided much grist to the mill of colonial law draftsmen. Beyond that flurry of activity, there was a more permanent legacy of the affair—lingering doubt that the constitutional foundation of the Cocos Islands might be scarcely more substantial than the fragile coral substratum of a tiny atoll where, in the words of Charles Darwin, "the ocean and the land seem struggling for mastery."[1]

Woo Tong, the evidence suggested, had perished by a felonious hand. When suspicion fell unrelentingly on one Lim Keng, another resident of the atoll with Malayan Chinese antecedents, it became evident that he ought to stand trial. Since the crime of murder was not justiciable within the little local settlement, the first question was to settle the forum.

Ample legal mechanism for the purpose appeared to be available. When the Cocos (or Cocos-Keeling) Islands had been annexed to the British Crown by Captain Fremantle in March 1857, he had appointed the proprietor, John George Clunies-Ross, as temporary superintendent.[2] No further administrative measures or demonstrations of metropolitan interest followed. The atoll long remained, as it had been nearly from the time of the original settlement in 1827, a closed-off family fiefdom.

---

[1] Darwin visited the Islands for 10 days during April 1836 in the course of the celebrated voyage of the *Beagle*. He collected many specimens of fauna and flora, evolved a subsidence theory of atoll formation which was subsequently discarded, and included a lively account of the Cocos in his widely-read book on the voyage. See Darwin, *The Voyage of the Beagle* (Everyman 1977 Reprint) 439.

[2] See below p 242.

Ultimately, however, the British Government thought it prudent to put to rest certain doubts as to the status of the Islands and to provide a less tenuous link with the Crown. Letters Patent of 1878 made the Cocos Islands a colony under the authority of the Governor of Ceylon.[3] On grounds of expediency other provision was made by Letters Patent of 1886.[4] Article III of those Letters Patent appointed the Governor of the Straits Settlements to be Governor of the Cocos Islands. Article IV further provided as relevant:

> We do hereby further authorise and empower the Governor of the Cocos Islands to make all such Rules and Regulations as may lawfully be made by Our authority for the peace, order and good government of the said Islands. . . .

Article VI, finally, conferred on the Governor power to annex the Islands to the Straits Settlements "at a date to be fixed by him". Until 1902, that step had not been taken.

When a cable dated 6 November 1902 reached the Colonial Office from the Governor of the Straits Settlements reporting the commission of a murder in the Cocos Islands, the Letters Patent thus appeared to suggest alternative methods of establishing jurisdiction. The cable sought direction whether, after appropriate action under Article IV, a judge should be sent to try the accused without a jury at Cocos, or whether the Islands should be brought within the jurisdiction by annexation under Article VI. A reply sent the following day directed the Governor to make an appropriate regulation under Article IV and, by order under the regulation, to arrange for the trial to be held in the Straits Setlements.[5]

The required regulation was duly made at Singapore on 11 November 1902.[6] An initial step involved appointing a magistrate for the Cocos Islands, with power to commit an accused person for trial and to compel witnesses. Clause 3 followed:

> On any such order of commitment being made the Governor may make an order for the trial of the accused by the Supreme Court at the next or any other Assizes to be held at Singapore or at a special Assize to be held for the purpose of such trial and may make all such orders and warrants for the conveyance of the accused to Singapore and for his custody both before and after the trial and also for the execution of any sentence passed upon the accused person as he shall think fit.[7]

The magistrate at once went to the Islands and conducted a preliminary inquiry. He held that there was a sufficient case, and committed Lim Keng for trial at Singapore. A special Court of Assize was appointed for the purpose in December. The outcome is best told in the discreet but pained tones of the Governor's subsequent dispatch to the Colonial Secretary:

> With reference to my telegram of the 20th ultimo and previous corre-

---

[3] Letters Patent of 10 September 1878, annexed as a schedule to the proclamation in *Ceylon Government Gazette* No 4,260 (22 November 1878).

[4] Letters Patent of 1 February 1886, Public Record Office File (Colonial Office) 273.

[5] A convenient guide to these transactions and to exchanges between the Colonial Office and the Law Officers of the Crown in London is to be found in D P O'Connell and Ann Riordan, *Opinions On Imperial Constitutional Law* (1971) 13-17.

[6] Notified in *Straits Settlements Government Gazette* No 1461 (21 November 1902).

[7] *Ibid.*

> spondence as to the action taken regarding the murder of a Chinese coolie which took place recently in the Cocos Keeling Islands, I have the honour to inform you that although your instructions were carried out to the letter, it has been ruled that the Supreme Court of the Colony has no jurisdiction. . . .
>
> Before the merits of the case were entered into the question of jurisdiction was raised and the Chief Justice who presided, after hearing the arguments put forward by the Attorney-General and the Counsel for the defence, delivered a written judgement . . . to the effect that the Court had no jurisdiction to try the case. The prisoner was therefore released.[8]

A full report of the proceedings in the *Singapore Free Press* concluded with due regard for the element of drama inherent in the result:

> The Attorney-General remarked that he did not see that he would be doing any good by moving for a writ of error, and the prisoner who, perhaps naturally, did not seem quite to understand his good fortune, was released from the dock and told to go.[9]

The deliverance of Lim Keng involved a decision which was legally noteworthy for its *ratio*, but much more for the powerful sting in its tail. In essence, the Chief Justice, Sir Lionel Cox, had disposed of the case in a few lines: the Cocos Islands had not been annexed to, and did not form part of, the Colony. Assuming that the Letters Patent of 1886 were valid:

> they do not and could not give authority to the Governor to alter the law of *this* Colony. The Supreme Court of the Straits Settlements has no jurisdiction over the Cocos Islands and clause 4 of the Governor's Regulations which creates that jurisdiction *amends* the existing law. That could only be done by another *Law*. . . .[10]

The learned Chief Justice went on to discuss summarily other legislative possibilities which, by observing a correct manner and form, would be valid to confer the jurisdiction.

3 LETTERS PATENT—THE QUESTION OF VALIDITY

Nearly the whole of the judgment is taken up with consideration of the validity or otherwise of the Letters Patent of 1886. If it were shown that those Letters Patent were invalid, there would clearly have been no power to support the regulation of 11 November 1902. Independently of other grounds, that would have been sufficient reason for the deliverance of Lim Keng. Since the Chief Justice had no difficulty in deciding the case on the manner and form point, argument relating to the validity of the Letters Patent was unnecessary to the decision and should be treated as *obiter*. For more than 50 years, nevertheless, those Letters Patent formed the basic constitutional document of the Cocos Islands. Historically, as well as in legal perspective, the question is significant.

---

[8] Sraits Settlements Despatch No 1 of January 1903, Public Record Office File (Colonial Office) 273/290. A copy of the judgment of the Chief Justice, Sir Lionel Cox, and an extract from the *Singapore Free Press* were attached. Those texts are the basis for quotation and comment in this article.

[9] *Ibid.*

[10] *R* v *Lim Keng* 20 December 1902 in the Supreme Court of the Straits Settlements at Singapore.

Apart from Articles of the Letters Patent already referred to, Article V is of some practical consequence; it authorises the Governor to make grants of land:

> We do further authorise and empower Our said Governor to make and execute, in Our name and on Our behalf, under the Public Seal of the said Settlements, grants and dispositions of any Lands which may lawfully be granted or disposed of by Us within the Cocos Islands, either in conformity with Instructions under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, or in conformity with such Regulations as are now in force, or as may be made by him in that behalf, with the advice of the Executive Council of the said Settlements, and duly published in the Cocos Islands.

Now on 7 July 1886, the Governor of the Straits Settlements had executed an Indenture to George Clunies-Ross[11] granting to him and his heirs without right of alienation all land within the Cocos Islands, including Keeling Island, subject to a power of resumption by the Crown and on condition that, in return for reasonable compensation, Clunies-Ross would permit a cable station to operate. That Indenture was to remain the foundation of the Clunies-Ross saga and the rights of the family in the Islands for almost a century. What if those rights, not to mention successive and successful claims in respect of cable facilities, military and airport installations, and ultimately the total stake in the family empire, were in the final analysis built upon sand?

One preliminary point is worthy of an aside. It is apparent that the Governor's power of disposition under Article V is not unfettered, but to be exercised in conformity with:

(a) instructions under the Sign Manual and Signet;
(b) instructions through a Principal Secretary of State; or

---

[11] The Indenture was formally executed between Sir Frederick Weld as Governor and George Clunies-Ross on 7 July 1886, and is set out in the Report of the Senate Standing Committee on Foreign Affairs and Defence, Parliamentary Paper No 183: *United Nations Involvement with Australia's Territories* (1975). It seems to have been assumed on all sides that Cocos Islands had, by virtue of the annexation, become Crown demesne which might be granted and disposed of under the prerogative. That proposition would appear to be sound if the Cocos Islands are taken to have been acquired by conquest. But if the Islands are taken to be a settled colony, the position may be otherwise.

It should be noted that in colonies such as New South Wales and Virginia, British sovereignty and the first settlers arrived together. On the Cocos Islands, the Clunies-Ross family were in undisputed possession for nearly thirty years before annexation took place. That family remained in undisturbed possession, without express legislative or executive action to extinguish any rights to land in the Islands, for some thirty years between annexation and the execution of the Indenture. The family were at all times British subjects. It might be assumed they would have the protection of the common law, as applicable, in respect of any acquired property rights. The *Nissan* case (as discussed in n 14) further suggests that any such rights might be extinguished only by legislation, and subject to compensation.

The Indenture might be seen, therefore, as official confirmation of an established if unresolved prescriptive status rather than as a grant of land in the normal colonial sense.

Mr John Clunies-Ross (as contemporary representative of the family tradition in the Islands) surrendered to the Commonwealth Government on 31 August 1978 the special privileges and interests stemming from the original Indenture. Compensation of $A6.25 million was paid to him. The agreement enabled Mr Clunies-Ross to retain ownership of his residence and an outbuilding. See Department of Home Affairs, Canberra, *Cocos (Keeling) Islands: Annual Report 1978-79*, p 4 and Appendix I.

(c) regulations, with the advice of the Executive Council of the Straits Settlements.

On the face of the Indenture, there is no clue whatever as to which mode has been followed. *Omnia praesumuntur rite esse acta*—the better view is that the omission is not to be regarded as a defect on the face of the instrument going to validity.[12] Nevertheless, where a power is exercisable only if a specified condition is fulfilled or procedure followed, an instrument that fails to recite that such a requirement has been satisfied scarcely inspires confidence.

4 LEGISLATIVE AUTHORITY

A *Colonies by conquest or cession*

In undertaking his excursus, the Chief Justice of the Colony opened a window upon fascinating constitutional complexities of the colonial Empire. The heart of the matter was the extent of Crown prerogative, settled in

---

[12] *Halsbury's Laws of England* (Fourth Ed 1974) Vol IV para 118 states:

> In accordance with the maxim *omnia praesumuntur rite esse acta* formal requisites to judicial, official or public acts, or to titles to property which are good in substance, will be presumed.

MacDougall v *Purrier* (1830) 4 Bli NS 433; 5 ER 154 arose from the enactment 37th Hen 8 c 12 which provided that the decree of an Archbishop in relation to tithes should be enrolled in the King's High Court of Chancery of Record and would then 'stand, remain and be as' an Act of Parliament. There was no evidence of the enrolment. The House of Lords decided that after the courts had repeatedly treated the decree as a binding instrument, and the citizens had recognised it by usage of paying tithes according to its tenor, the enrolment must be presumed.

In the case of an instrument, or a testamentary disposition (*Davis* v *Mayhew, In re Estate of Musgrove* [1927] WN 184 (CA), or a marriage (*Piers* v *Piers* (1849) 2 HL Cas 331; 9 ER 1118) the presumption is most likely to be applied where there has been a considerable lapse of time since the execution or other originating act. There may frequently be scope, in such circumstances, for the operation of the doctrine of estoppel. The doctrine and the presumption will then have an apparent similarity and their effects will be coincident.

The limits for the application of the maxim are not clear and it is never more than a rebuttable presumption. In *Woollett* v *Minister of Agriculture and Fisheries* [1955] 1 QB 103 a certificate in respect of property requisition could be given by the Minister only where a proposal was confirmed by a tribunal. It appeared that two members of the tribunal had not been duly "appointed by the Minister". Denning LJ was not prepared to invoke the maxim, but regarded the case as foreclosed by a statutory provision which had the effect of validating any irregularities.

Australian cases assist substantially in clarifying the operation of the maxim. In *Murphy* v *Matlock* [1926] VLR 170 the making of regulations was subject to the recommendation of the Pharmacy Board, but the subject regulations were not expressed to be so made. Mann J limited his decision to holding that the maxim did not give relief from proof where procedures were contested. On the facts, fulfilment of the condition had not been proved.

Foster v *Aloni* [1951] VLR 481 concerned regulations for which a recommendation of the Victoria State Electricity Commission was a condition precedent. Although the case was decided on a statutory provision, the following passage in the judgment of the Full Court (at 485) is significant:

> we think the maxim *omnia praesumuntur rite esse acta* applies in the absence of evidence to the contrary to show that the regulations were in fact made by the Governor in Council on the recommendation of the Commission so that that condition precedent is satisfied.

In the complex case of *Administration of Papua and New Guinea* v *Daera Guba* (1973) 130 CLR 353, 441 finally, Gibbs J (as he then was) discussed the application of the maxim in relation to an Order in Council whose validity was challenged on the ground that it had not been made by an authorised person. It is submitted that his Honour's comment encapsulates current law on the question:

respect of one class of colonial acquisitions by Lord Mansfield in the great case of *Campbell* v *Hall*.[13] Following the British conquest of Grenada from France during the Seven Years' War, a capitulation informed the inhabitants, most of whom were French, that existing laws would apply until other provision was made and that, in respect of basic legal rights, the population would be treated as British subjects. A proclamation of October 1763 declared that a representative assembly would be summoned as soon as appropriate. Another proclamation in March 1764 invited purchasers to take up allotments in the light of that undertaking. In April, Letters Patent under the Great Seal appointed a Governor and included a commission to him to convene an assembly "as soon as the state and circumstances of the colony admit". That assembly would have legislative competence and procedures similar to those of assemblies in the American colonies.

Before the Governor had arrived or the promised legislature had met, somebody was busy with schemes to pay for the war. In respect of the American colonies, the outcome is a matter of notoriety. George III's new island did not remain immune. In Barbados and in the other Leeward Islands, a sugar export duty of 4½ per cent was in force. It seemed eminently reasonable to extend that duty to Grenada. When Letters Patent of 20 July 1764 purported to do so, James Campbell, a plantation owner, brought an action on the ground that the duty had not been imposed by lawful or sufficient authority. When the case came before the Court of King's Bench, Lord Mansfield took the opportunity to state certain legal propositions relating to the acquisition of territory.

In a case of conquest, a country became a dominion of the King in right of the Crown. By virtue of the prerogative, the Crown might make or refuse peace, abandon the conquest or impose conditions at will. Lord Mansfield went on:

> These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.[14]

Once there had been a grant of representative institutions to a colony, on the other hand, the Crown was precluded from the exercise of the prero-

---

> On the basis of the presumption *omnia praesumuntur rite esse acta* it ought to be presumed, in the absence of evidence to the contrary, that the Deputy Administrator was administering the Government of the Possession when the Order in Council was made.

Where the presumption applies, an instrument or act will be voidable, not void.

[13] (1774) 1 Cowp 204; 98 ER 1045.

[14] *Ibid* 210; 1048.

A number of leading cases have approved and applied this doctrine. In *West Rand Central Gold Mining Co Ltd* v *The King* [1905] 2 KB 391, 402 Lord Alverstone CJ stated:

> When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them.

It is worth noting here that the corollary to Lord Mansfield's doctrine—that "laws of a conquered country continue until they are altered by the conqueror"—was doubted by Blackburn J in the course of a very full judgment in the Australian case of *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 224. In reliance on *Cook* v *Sprigg* [1899] AC 572 and a line of Indian cases, the principle would be that, as acquisition was

gative in respect of legislation for the colony.[15] On the facts of the case, proclamations had "irrecoverably granted" an assembly and "the King had precluded himself from a legislative authority over the island of Grenada". His Lordship concluded:

> through the inattention of the King's servants, in inverting the order in which the instruments should have been passed, and been notoriously published, the last Act is contradictory to, and a violation of, the first, and is, therefore, void.[16]

B *Colonies of settlement*

Very different considerations governed a territory not acquired by conquest or cession, but taken to be a settled colony. That description, as distinguished by a modern authority, included various possibilities:

> (a) occupation by British settlers under the authorisation of the Crown, *eg* . . . the Australian colonies . . .;
> (b) recognition by the Crown, as British territory, of unauthorised settlements by British subjects, *eg* . . . the Pitcairn Islands . . .; or
> (c) formal annexation of uninhabited islands or uninhabitable Arctic or Antarctic areas. . . .[17]

---

an Act of State, rights under any pre-existing legal system would be a nullity unless expressly recognised by the conqueror.

In *Attorney-General* v *Nissan* [1970] AC 179, however, there are suggestions that Act of State may have no application, or at most an extremely limited application, between Crown and subject, and that, at least in respect of British subjects, property rights in a previously foreign territory are not extinguished by a change of sovereignty. Lord Reid explains *Cook* v *Sprigg* in this way (at 211):

> A British subject cannot complain if the new sovereign alters the law of the annexed territory to his detriment, but he can, in my view, complain of a confiscation of his property which is not justified by any law . . . if Cook had been the owner of land in Pondoland I do not think that his land could have been confiscated.

Since any such "ownership" could have been recognised, presumably, only by reference to the pre-existing legal system of Pondoland, the *Nissan* case would appear to imply a quite far-reaching qualification upon the opinion of Blackburn J. The case has been taken by some commentators (see J Hookey, "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Land in Australia" (1973) 5 FL Rev 85) to involve a re-vindication of *Campbell* v *Hall* (1774) 1 Cowp 204, 98 ER 1045.

[15] On this point, *Campbell* v *Hall* has been followed consistently. Where, in South Africa, Letters Patent purported in two instances to confer an episcopal jurisdiction, the Letters Patent were held invalid as being inconsistent with the powers of a pre-existing legislative assembly in the colony: see *Long* v *The Bishop of Cape Town* [1863] 1 Moo (NS) 411; 15 ER 756. *In re Lord Bishop of Natal* [1864] 3 Moo 115; 16 ER 43. In the latter case, a succinct statement of the issue by the Lord Chancellor, Lord Chelmsford, (at 148) is a reminder that the exercise of the prerogative may be abridged and suspended rather than excluded (as is commonly said) where a representative assembly is constituted:

> After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom.

The question was taken up in the recent Australian case of *Wacando* v *Commonwealth and Queensland* (1982) 56 ALJR 16. Both Gibbs CJ and Mason J expressly endorsed the subject principle in *Campbell* v *Hall*. The instant analysis, in fact, states that principle in terms adapted from the judgment of Gibbs CJ at p 20, following *Sammut* v *Strickland* [1938] AC 678, 704 *per* Lord Maugham LC.

[16] *Campbell* v *Hall* (1774) 1 Cowp 204, 213; 98 ER 1045, 1050.

[17] O Hood Phillips and Paul Jackson, *O Hood Phillips' Constitutional and Administrative Law* (6th ed 1978) 668.

For any of those cases, Chitty's celebrated *Prerogatives of the Crown* sums it up admirably:

> Wherever an Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.[18]

By the common law, Crown prerogative in a settled colony was abridged accordingly. Subsequent Acts of the United Kingdom Parliament, it is worth adding, did not apply unless they were expressed to apply to that colony or to colonies generally.[19]

---

[18] Joseph Chitty, Jun. *A Treatise on the Law of the Prerogative of the Crown* (1820) 30. A fascimile edition is conveniently available in the Garland Series of Classics of English Legal History (1978).

The principle has been attributed to Lord Coke in *Calvin's case* (1607) 7 Co Rep 1a; 2 Howell St Tr 559; 77 ER 377. Chitty's dictum was already current, and expressed accepted law, early in the eighteenth century: Geoffrey Lester and Graham Parker, "Land Rights: The Australian Aborigines have lost a legal battle, but . . ." (1973) 11 Alberta Law Review 189, 196-200. The boundaries of the principle, as formulated by Blackstone (1 Comm 107), are fully discussed by Lord Watson in the leading case of *Cooper* v *Stuart* (1889) 14 App Cas 286, 291-293 in the Privy Council on appeal from the Supreme Court of NSW.

This portability of the common law has frequently been endorsed by the courts. In *Falkland Islands Co* v *R* [1863] 2 Moo (NS) 266; 15 ER 902 it was taken as common ground that the Falkland Islands had been acquired by "occupation" and therefore fell to be considered as a colony of settlement. A licence or lease to depasture stock was made by the Crown to the Company without any reservation or provision as to the right to take and kill wild animals. The question whether the matter might be considered under the common law relating to *ferae naturae* was answered by the Master of the Rolls, Sir John Romilly (at 275; 905) in these terms:

> It is not disputed that the law prevailing in the Falkland Islands must be considered to be the Common Law of England, modified only by such Statutes as apply to these Islands.

In the event, the case was decided on the basis of admissions by the Crown rather than in terms of common law doctrine.

Yeap Cheah Neo v *Ong Cheng Neo* (1875) LR 6 PC 381 demonstrates how the common law may be regarded as in force in a colony *in so far as applicable to circumstances*. There the Privy Council held that the common law applied in Singapore subject to a local Charter of 1826 which had regard to the various religions, manners and customs of the population.

In *Penhas* v *Tan Soo Eng* [1953] AC 304 the question arose, also in Singapore, whether for the purposes of the grant of letters of administration in an estate, there had been a common law marriage. The *Yeap Cheah Neo* case was followed, and it was held by the Privy Council on the facts that a common law monogamous marriage had been contracted.

[19] Any doubts as to whether an Act of Parliament might apply to a settled colony, or to a colony acquired by conquest or cession that had subsequently been granted representative institutions, were resolved by section 1 of the Colonial Laws Validity Act 1865 (28 & 29 Vict c 63) which states:

> An Act of Parliament or any provision thereof, shall be said to extend to any Colony when it is made applicable to such Colony by the express words or necessary intendment of any Act of Parliament.

It is of interest that colonial law authorities on the distinction between colonies by conquest or cession and settled colonies have been fully considered in the recent line of Australian land rights cases. In all such litigation, three basic questions have to be addressed:

(a) did the relevant mode of acquisition involve common law protection of pre-existing property rights;
(b) did legally recognisable property rights exist; and
(c) how might any such rights be lawfully extinguished?

It is sufficient to say that the colonial law distinction may have an important bearing on the answers to (a) and (c), whereas (b) is a finding of fact—though at times a controversial one.

Since *Cooper* v *Stuart* (1889) 14 App Cas 286 it has generally been taken as settled that the Australian States were in origin settled colonies. This conclusion (which is a conclusion of law) was strongly reaffirmed by Blackburn J in *Milirrpum* v *Nabalco*

But for the decisive jurisdictional objection, therefore, the life of Lim Keng might well have hung upon an issue so apparently incongruous as the constitutional origins of his island home. If the Cocos Islands were taken to be acquired by conquest or cession, Crown prerogative would operate without restriction: the Letters Patent of 1886 would be valid. If the Islands were treated as a settled colony, prerogative legislation would be excluded. At the trial in Singapore the Attorney-General for the Colony proceeded on the basis that the Islands were not acquired by conquest or cession. This was accepted by the Chief Justice and became the foundation of His Lordship's comment.

Argument on these lines, however, was not quite the end of the affair. A series of Acts of Parliament had already made special provision for possessions acquired pursuant to settlement, could be effective to override the common law or prerogative powers (at least *pro tanto*) and thus, in respect of the validity of the Letters Patent of 1886, might import a new dimension.

Legislative provision for settled colonies during the nineteenth century responded to the fact that it was not always practicable or sensible for British subjects to exercise their fundamental rights by way of representative institutions. At times, for example, as in the Cocos Islands, British settlers were a tiny handful of people not amounting to a viable electorate or even, for any assembly, a reasonable quorum. Power was therefore conferred on the Crown by 6 & 7 Vict c 13 (1843) to legislate by Order in Council and to delegate the power subject to conditions. That Act applied only to settlements on the West Coast of Africa and to the Falkland Islands. By 23 & 24 Vict c 121 (1860) it was extended, to speak broadly, to all possessions of the Crown. Under section II, a new provision, the Supreme Court of any possession might be authorised by Order in Council to take cognizance of a prosecution for treason or felony in any possession to which the Act applied, every such Order to be laid before both Houses of Parliament.

The legislation culminated in the British Settlements Act 1887, whose preamble is an irresistible guide to its purposes:

Pty Ltd (1971) FLR 141 and by Gibbs J (as he then was) in *Coe* v *Commonwealth of Australia and Another* (1979) 24 ALR 118. In the latter case, however, Murphy J criticised the historical validity of the conclusion (at 138):

> the statement by the Privy Council (in *Cooper* v *Stuart*) may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.

His Honour then pointed out that decisions of the Judicial Committee are not binding upon the High Court. Jacobs J (at 136) took the position that the point had never been directly decided, a view which, with respect, a narrow reading of the *ratio* in *Cooper* v *Stuart* supports.

It is a matter for regret that the statement of claim in *Coe's* case was so manifestly unacceptable as to preclude satisfactory consideration by the Court of this quite fundamental constitutional question. It would also have been welcome if the case had provided definitive guidance on two other significant issues touching on the colonial law background which had been addressed in detail by Blackburn J in *Milirrpum*, but possibly not definitively closed:

(a) whether communal native title existed in aboriginal communities in a manner and to a degree sufficient for purposes of recognition by Australian legal systems; and

(b) whether, if communal native title did so exist, there would be an entitlement to protection under the common law.

> Whereas divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilised government, and such settlements have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements. . . .

Essentially, the earlier legislation was re-enacted, but with a more far-reaching jurisdiction provision. Section 4 states, as relevant:

> It shall be lawful for Her Majesty the Queen in Council to confer on any court in any British possession any such jurisdiction, civil or criminal, original or appellate, in respect of matters occurring or arising in any British settlement as might be conferred by virtue of this Act upon a court in the settlement . . . Provided always, that every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament. . . .

In respect of settled colonies, then, legislative authority which the Crown would otherwise have lacked was conferred on the Crown by a series of Acts finally consolidated into the British Settlements Act 1887. That authority, and more specifically the power conferred by s 4 of the Act, could be exercised only in the manner prescribed—by Order in Council laid before Parliament. In relation to the Letters Patent at issue in the *Lim Keng* case, the conclusion is best left to the Chief Justice:

> if it is the fact that . . . the Cocos Islands were not acquired by Conquest or Treaty then it would not be easy to see how the Letters Patent could be held valid.[20]

Somewhat far-ranging legal exploration thus appeared to have discovered a second and substantial line of defence for the unhappy Lim Keng—in the event unnecessary and unexploited.

5 COLONIAL OFFICE REACTIONS TO THE DECISION

The decision in *Lim Keng* was not received with particular relish in London. On 7 January 1903 a memorandum was addressed to the Law Officers of the Crown by the Colonial Office rehearsing the factual and legal background to what had happened and requesting a report (or opinion) on questions which ranged beyond the immediate circumstances of the case. Underlying anxieties in relation to constitutional arrangements for the Cocos Islands under the Letters Patent of 1886 were not concealed. The statement did, however, consider the decision in some detail and included a suggested alternative argument on the question of the validity of the Letters Patent.[21]

The opinion of the Chief Justice, the Colonial Office recalled, appeared to be based on s 4 of the British Settlements Act:

> which dealt with the specific case of conferring on a Court in a British possession jurisdiction in respect of matters occurring or arising in a British Settlement.

---

[20] *Supra* n 8.

[21] The opinions of the Law Officers of the Crown as contained in Colonial Law Officers' Opinions Vol 6 Nos 177 and 178 are set out in O'Connell and Riordan, *supra* n 5, 13-17.

The language of the section was permissive, not imperative. Further, s 3 of that Act gave the Crown power to delegate, by Letters Patent laid before both Houses of Parliament, *all or any of the powers* conferred by the Act on the Crown. If therefore the power of the Crown under s 4 had been lawfully delegated to the Governor by the 1886 Letters Patent, then the regulation of November 1902 would be valid.

When the Letters Patent were made, the Colonial Office continued, 6-7 Vict c 13 (1843) and 23-24 Vict c 121 (1860) were in force rather than the British Settlements Act. Under that earlier legislation the delegation of powers was required to be made to *any three or more persons within the settlement*—a requirement continued by the British Settlements Act when the earlier legislation was repealed. Clearly enough, the form of words italicised did not describe the Governor who had made the regulation of November 1902. Thus, the Letters Patent seemed to be *ultra vires* on this ground. They seemed, in any event, not to have been laid before both Houses of Parliament as the relevant legislation required. In the result:

> the conclusion would appear to be that the decision arrived at by the Chief Justice was correct, though the grounds upon which it was based, as reported in the telegram of the 20th December, were not the true ones.[22]

The difference of approach was not as substantial as might appear. After reviewing the background, the Chief Justice fixed on s 4 of the British Settlements Act because, in his view, the situation excluded any Crown power to legislate except as derived from Acts of Parliament—and s 4 of the British Settlements Act did confer such a power. In the opinion of the Chief Justice that was the appropriate way out. It had not been followed; therefore what did follow was invalid. The Colonial Office started from the other end. Letters Patent had purported to create the necessary legislative authority. Subject to certain conditions and specified procedures, Letters Patent *could* create such authority. But the conditions had not been met nor the procedures followed. The conclusion was just the same. On its own terms, either view of the matter would appear to be unexceptionable.

An extensive area of vulnerability thus seemed to be exposed, involving, in the Colonial Office view:

> the probable necessity of amending the Letters Patent of 1st February, 1886, and the desirability of making further provision for the government of the Cocos Islands and of considering, generally, the extent of the operation of the British Settlements Act, 1887.[23]

Annexation of the Cocos Islands to the Straits Settlements, moreover, was still pending. The Law Officers were invited to comment on an understandably wary outline of how that might best be consummated.

6 OPINION OF LAW OFFICERS OF THE CROWN

The Law Officers' opinion was despatched just one month later. To be

[22] O'Connell and Riordan, *supra* n 5, 14.
[23] *Ibid.*

correct, two opinions were sent on the same day (7 February), and that has to be explained.

When, on 7 January, the Colonial Office requested the report, the basis for it was information by telegraph. Somewhat unaccountably, since the text is short enough to be sent by that means, the judgment in *Lim Keng's* case had not arrived. When it did reach London nearly a month later, a copy was at once sent on to the Law Officers for their consideration. Their report, however, had already been drafted, and they simply added a post-script. The whole business does seem a little precipitate. In such questions, nevertheless, it is a case of whisper who dares—the signatures over which both opinions appear are those of R B Finlay and Edward Carson.[24]

A lapidary opinion first endorses the Lim Keng decision and the *ratio*: Article IV of the Letters Patent of 1886 could not confer on the Governor power to give jurisdiction to the Courts in the Straits Settlements. Validity is dealt with next and the conclusion is a surprise. Acts of Parliament, it is recalled, were passed to provide for British settlements to which ordinary representative institutions were unsuited. The Cocos Islands, however, cannot be treated as a settled colony within the meaning of the British Settlements Act 1887:

> These Letters Patent [of 1878] and the Letters Patent of 1st February, 1886, appear to treat the Islands as having been acquired 'by conquest', in virtue of the annexation effected in 1857. On this view of the facts the Letters Patent of 1886 are valid, and their provisions are not touched by the Acts referred to, and . . . No part of these Letters Patent is *ultra vires*.[25]

A *Cocos Islands—origins of British annexation*

Let us, with respect, examine the facts.[26] Until early in the nineteenth century, the Cocos Islands were not permanently settled. In 1827, the Scotsman John Clunies-Ross established himself on one island (Home Island) with his family and a handful of Malays. After displacing a rival colony led by a degenerate eccentric, one Alexander Hare, Clunies-Ross enjoyed undisputed possession. By the 1850s there were fewer than 20 Europeans on the atoll, nearly all dependants of Clunies-Ross, and about 200 other people of various Asian origins, some regarded as permanent residents, others contract labourers from Java. Work in connection with coconut plantations was nearly the only regular occupation.

Vague fears of a Dutch claim to the Islands practical concern arising from the conduct of sailors from whaling ships which called occasionally and ambitious hopes of entrepot trade moved Clunies-Ross to petition

---

[24] Robert Bannatyne Finlay, 1st Viscount Finlay. Solicitor-General 1895; Attorney-General 1900; Lord Chancellor 1916; Judge of the Permanent Court of International Justice 1921.
Edward Henry Carson, Baron of Duncairn. Solicitor-General for Ireland 1892; Solicitor-General 1900; Attorney-General 1915; Member of War Cabinet 1917; Lord of Appeal in Ordinary 1921.

[25] O'Connell and Riordan, *supra* n 5, 16.

[26] Useful scholarly articles and various memoirs have appeared on the history of the Cocos Islands, but there is no definitive work. An entertaining and fairly accurate account is Ken Mullen, *Cocos Keeling* (1974).

repeatedly for British annexation. One of his plans was to make the Cocos a dependency of Mauritius. This appealed to the naval officer-in-charge at Port Louis, who called the Islands "a sentry-box in the midst of all our tracks", but Whitehall was not impressed. Later pleas to the British Naval Commander-in-Chief, East Indies, advocated that at very least Cluniès-Ross be "constituted British authority in the Territory", but were received with complete indifference. Time passed; local stability was maintained; the fervour for British protection faded.

In 1857 Captain Fremantle and his *Juno* appeared rather as a bolt from the blue. The new "laird of the Cocos", son of the now deceased John Clunies-Ross, was in fact absent in the East Indies on business. Later, when British annexation evoked a measure of Dutch resentment, the Cluniès-Ross position there actually suffered some harm. The warship, meantime, had a thoroughly cordial reception and stayed three months. When annexation was proclaimed, the *Juno* spliced the mainbrace for all hands on the Islands in a massive celebration. On return from Java, the head of the Clunies-Ross family was created by Captain Fremantle "temporary superintendent" of the colony. As a "conquest", all this has to rank as about the strangest in the colonial record.

Captain Fremantle's mission, moreover, was Gilbertian in its origins.[27] To the north of the Andaman Islands in the Bay of Bengal there are two small islands called the Great and Little Cocos. Sporadic attempts at European settlement had fallen through, but another venture was being organised actively in Calcutta during 1856. For this and other reasons the Indian Government recommended to London that those islands be made a British possession. The sequel is scarcely credible. At the end of a long chain of inexactitude, faulty assumptions and confusion, the Sydney naval station and Captain Fremantle received orders which, to say the least, left it doubtful just what were the co-ordinates of the island group to be possessed. In complete innocence, but with lasting detriment to his reputation, Captain Fremantle proceeded to the wrong place. British annexation of the Cocos Islands occurred not by conquest but by mistake.

These facts suggest one reasonable interpretation only—peaceable acquisition of the Cocos by the consent of established British settlers. In population and circumstances, let it be added, the Islands were subject to just those disabilities for representative institutions that Victorian legislation was designed to overcome. The preamble to the British Settlements Act fits the case perfectly. In the result, the conclusion reached by the eminent Law Officers must be respectfully regarded as *per incuriam*. A pair of Olympians, even, may be detected in a Homeric nod.

B *Opinion of Law Officers sustained*

That the Law Officers had thus arrived at an opinion inconsistent with the view conceded by the Attorney-General for the Colony will not have escaped notice. For the reasons suggested, the arrival in London of the judgment in the case had presented a second chance. With the judgment,

---

[27] This episode is convincingly analysed in N Tarling, "The Annexation of the Cocos-Keeling Islands" (1959) 8 Historical Studies 400.

moreover, the Colonial Office presented a new question. If the Letters Patent of 1886 were valid, it should follow that:

> any rule which could be laid down by His Majesty in Council under section 4 of the British Settlements Act, 1887, could be laid down with equal propriety by Regulations made in pursuance of the Letters Patent.[28]

In that event, the question implies, Lim Keng ought to have faced the music. If, posed at large, the question was fair, it was not very bright in the context of the *Lim Keng* case. The judgment had suggested the only answer. Even if the Letters Patent were valid and (a question the Chief Justice did not address) a regulation made by their authority was valid, such legislation could not extend to, and change the law of, the Straits Settlements; not, that is, unless a statutory provision applying in respect of the colony could be called in aid. As far as jurisdiction was concerned, therefore, the Colonial Office question was heading up a blind alley.

For whatever reason, the rejoinder of the Law Officers to the question—and to the fresh documentation from Singapore—was peremptory. It will scarcely detain us to quote the report in full:

> these further papers do not affect our former Report* [*No 177] of even date. We agree with the Chief Justice in thinking that the Letters Patent would be *ultra vires* if the Cocos Islands were acquired by settlement. We also agree with him that the Letters Patent of 1886 gave no power to confer jurisdiction upon Courts outside the Cocos Islands. . . .[29]

7 VALIDITY OF OTHER ARTICLES OF LETTERS PATENT

It remains to consider, on the supposition that Article IV of the Letters Patent was invalid to confer the purported legislative authority, what was the extent of the invalidity. The expedient approach is first to examine the other relevant Articles in isolation from Article IV.

Article II is straightforward. It appoints the Governor of the Straits Settlements to be Governor of the Cocos Islands. It is well settled that the appointment of colonial Governors is an exercise of the prerogative, and Letters Patent is the established procedure to constitute the Office.[30]

It has been well said, on the other hand, that Crown prerogative is:

> both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.[31]

Article VI permitted the Governor of the Cocos Islands to provide for the annexation of those Islands to the Straits Settlements. When the Letters Patent were made, the authorities obviously considered that a power to annex the Islands to the Straits Settlements might be so conferred on the Governor.

---

[28] O'Connell and Riordan, *supra* n 5, 16-17.
[29] *Ibid* 17.
[30] O Hood Phillips, *supra* n 17, 667.
[31] A V Dicey, *The Law of the Constitution* (8th ed 1920) 420 cited in *Attorney-General* v *De Keyser's Royal Hotel, Ltd* [1920] AC 508, 526 *per* Lord Dunedin.

Statutory intervention then occurred in the form of the Colonial Boundaries Act 1895, which provided that a colony's boundaries might be altered by Order in Council or Letters Patent. The source of Crown authority, not necessarily the manner of its exercise, was changed. In foreshadowing the annexation of the Straits Settlements, the Colonial Office clearly thought that either of the modes referred to in the Colonial Boundaries Act would do, but they asked anyway. The Law Officers, perhaps shying off Letters Patent after the Lim Keng affair, replied cryptically, "We think that the annexation had better be by Order in Council."[32]

Article V, it will be recalled, authorised the Governor to make grants of land. The power to grant Crown lands was historically within the prerogative and was regularly exercised by colonial governors. Halsbury states:

> In general a Governor by Letters Patent or Royal Instructions is empowered . . . to make grants of land, subject to any laws or instructions from the Crown or local regulations, after making due reservations for public purposes. . . .[33]

This was the position regardless of whether a colony was acquired by conquest or settlement. Nowadays, common law rules relating to Crown grants of land have largely been superseded by statute, as, in the United land. The power to grant Crown lands was historically within the prero-Kingdom, by the Crown Estate Act 1961. In nineteenth century colonial conditions, however, especially in remote regions of no great importance, it was frequently the case that legislation had not yet interposed.[34] The British Settlements Act might have done so, but the disposition of lands is not included in the specified subject matter. No relevant legislation has come to attention which, in respect of the Cocos Islands, would have the result of circumscribing this prerogative power.

In the result, Articles II, V and VI relate to matters that might properly and lawfully be dealt with by Letters Patent. Failing some other ground of objection, those Articles would appear to be valid. It has been shown that, if the Cocos Islands were taken to have been acquired by conquest, Article

---

[32] O'Connell and Riordan, *supra* n 5, 16.

[33] *Halsbury's Laws of England* (Third Ed 1953) Vol 5, 559-560. See also Fourth Ed 1974, Vol 6 para 1040.

[34] The position in the early years of the colony of New South Wales is reviewed in *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 71 *per* Windeyer J:

> On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land . . . all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne. The Colonial Act, 6 Wm. IV No. 16 (1836), recited in its preamble that the Governors by their commissions under the Great Seal had authority "to grant and dispose of the waste lands"—the purpose of the Act being simply to validate grants which had been made in the names of the Governors instead of in the name of the Sovereign.

The exercise of such powers by successive Governors aroused notorious controversy and hastened intervention by legislation. The so-called Ripon Regulations introduced the principle of sale rather than free grants after 1831. That policy was extended by the "Sale of Waste Lands Act" 5 & 6 Vict c 36 (1842) but the direction of policy changed when 9 & 10 Vict c 104 made generous provision for leasehold—the squatters' charter. The "Waste Lands Repeal Act" 18 & 19 Vict c 56 (1855) vested in colonial legislatures the entire control and management of waste (unalienated) land of the Crown within their respective territories. See also J J Eddy, *Britain and the Australian Colonies 1818-1831* (1969) Ch VIII—"Land Settlement".

IV would also be valid. Even if the Law Officers supported that view, however, it is more than doubtful. Did they permit the law, as represented by the Letters Patent, to colour their interpretation of the facts? The evidence rather suggests a settled colony. If that conclusion is correct, the Letters Patent would be invalid. A large and final question is thus presented. Does the apparent invalidity of Article IV taint the instrument? Does the defect of the part destroy the whole? That question, clearly, is one of severance.

8 EFFECT OF INVALIDITY OF ARTICLE IV—SEVERANCE

A number of reservations must be made by way of preliminary. First, the validity of the Letters Patent was not tested at any relevant time. Except in terms of legal and historical interest, the question would now seem to be extinguished. Second, the requirement is to ascertain the law that would have applied at a relevant time, by resort to something like the "inter-temporal principle" familiar in international law. Modern authority may help to clarify principles, but is not in point. Third, the assumption is made here that the question of severance would be governed by the common law. Imperial legislation of the period, and specifically the Interpretation Act 1889 (UK), contains no statutory rule on severance. Since the colonies usually followed rather than led, it is reasonable to suppose that common law rules were not displaced by local legislation in the Colony. Finally, no precedent has come to attention in which severance of Letters Patent has been considered. Reasoning by analogy is an imperfect substitute for authority.

It is nowadays well settled that severance may be effected in an appropriate case.[35] Whether the attitudes of the Courts should be generous or cautious,[36] whether tests of result or of presumed legislative intention[37]

---

[35] A succinct discussion of the doctrine of severance in Australian law, with some reference to English authorities, is to be found in D C Pearce, *Delegated Legislation in Australia and New Zealand* (1977) Ch 30. As Professor Pearce points out, the issue arises relatively frequently in Australia in relation to the constitutional validity of Commonwealth legislation.

While the point is only very generally relevant to the present inquiry, it should be recalled that severance has long been well established in the law of contract, though in most cases fairly strictly confined. The question of severance usually arises in the context of restraint of trade. For a review of relevant principles in that field see *Attwood* v *Lamont* [1920] 3 KB 571 *per* Younger LJ at 591-596. On severance in relation to contracts generally see *Halsbury's Laws of England* (Fourth Ed 1974) Vol 9 para 430. It is submitted that the conclusion advanced here for severance in relation to an instrument is consistent with the broad principles applied by the courts in the case of a contract.

[36] D C Pearce, *supra* n 35, 279-281 gives good examples of both tendencies. Compare *Bank of New South Wales* v *The Commonwealth* (1948) 76 CLR 1, 368-371 and *Hinds* v *The Queen* [1976] 1 All ER 353, 374 *per* Lord Diplock:

> This may be only half the loaf that Parliament believed that it was getting when it passed the 1974 Act but their Lordships do not doubt that Parliament would have preferred it to no bread.

[37] See *Attorney-General for Alberta* v *Attorney-General for Canada* [1947] AC 503. Viscount Simon's enunciation of the principle (at 518) includes both tests. In *Hinds* v *The Queen* [1976] 1 All ER 353, 373 Lord Diplock expressly endorses both. Australian courts would appear to have been more reluctant to fathom the intentions of the legislature and have tended to emphasise the test of independent survival without change to the nature or operation of a scheme. On these matters see above pp 248-250. See also *The Federated Amalgamated Government Railway and Tramway Service Association* v *The New South Wales Railway Traffic Employés Association*

should be applied, are matters of degree and detail into which this inquiry is not concerned to enter. Statutes,[38] delegated legislation[39] and a range of other instruments and documents such as court orders[40] and licences[41] may be severed. The common law position is still important for decisions of the courts, but in many jurisdictions also has statutory reinforcement.

A *Emergence of severance in English law*

It is not easy to trace just when the principle of severance became established. In the late eighteenth century, there is still a conflict of opinion and authority. Comyn's Digest is a good starting point historically, but may need qualification as a legal guide. The section on by-laws states:

> A by-law being intire, if it be unreasonable in any particular, shall be void for the whole.[42]

The instance given, "as if the penalty be unreasonable" would seem to involve the case where the invalid part is closely interconnected with the part that is valid. It is not quite established that the statement should be taken to apply to provisions which are independent, where severance would not affect the operation or effect of what remained. About the same time, indeed, the Court of King's Bench indicated a different answer. In *The King* v *Company of Fishermen of Faversham*[43] Serjeant Bayley included severance as an alternative plea in terms that may suggest the principle was more or less a commonplace:

> At all events, if the bye-law be avoided as far as respects that word, the rest of the bye-law may be supported.[44]

The judgment of the Chief Justice, Lord Kenyon, took this view of the matter:

> With regard to the form of the bye-law indeed, though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other.[45]

Since the case was decided on other grounds, this statement is evidence rather than authority.

(1906) 4 CLR 488 (the *Railway and Tramway Service* case) especially *per* Griffith CJ; and *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow and Co* (1910) 11 CLR 1, especially 35 *per* Barton J.

[38] As in the cases cited in n 37 above.

[39] *Wall* v *Commissioner of Railways* (1905) 7 WALR 206.

[40] *R* v *Bournemouth Licensing Justices ex parte Maggs* [1936] 1 WLR 320.

[41] *Pyx Granite Co Ltd* v *Minister of Housing and Local Government* [1958] 1 QB 554. In this case, the Court concluded that a licence was validly issued but that conditions attaching to the licence were beyond power. The Master of the Rolls (Lord Denning) and Morris LJ were prepared to sever the two and support the validity of the licence, Hodson LJ dissenting. On appeal the House of Lords decided the case on other grounds, but their Lordships did not appear to doubt that a licence could be severed if the part severed was independent of the part left and if the severance would not change the effect of what was left. The case may also be taken to confirm that the Court will consider severance in a wide range of situations.

[42] *Comyn's Law Digest* (Third Ed 1792) Vol II (By-law c 7) 163.

[43] *The King* v *Company of Fishermen of Faversham* (1799) 8 TR 352; 101 ER 1429.

[44] *Ibid* 355; 1431.

[45] *Ibid.*

Nineteenth century references tend also to be suggestive without being conclusive. The report of *Clark* v *Denton*[46] includes a comment by Bayley J, "A bye-law may be good in part and bad in part",[47] but this was no more than an interjection during the hearing and did not become the foundation of the decision. The provisions in issue were in fact closely bound up together. *Dyson* v *London and North Western Railway Co*[48] enunciated the principle in the same way, but also found it unnecessary to the decision. This occurred because severance was considered in relation to a by-law of which the first part was held to be repugnant to statute, and the second part unreasonable. In the words of Mathew J:

> The by-law is, in point of fact, two by-laws put together, each of which is bad. . . .[49]

Another railway case[50] arose when the plaintiff, who possessed a ticket, refused to show it when changing trains. In the Court of Queen's Bench, the Chief Justice, Lord Cockburn, discussed a by-law of the railway company which provided that a passenger should "shew and deliver up his ticket" on demand, and attached the penalty that an offender should pay the fare from the point of departure of the relevant train. The Chief Justice addressed himself to the question of severance and quoted Comyn's Digest with approval. Since both the by-law and the penalty were held objectionable, however, the Court was not called on to decide that the two could not be severed.

Strickland v *Hayes*[51] took a view opposed to that in *Saunders* case. When a person uttered objectionable language on a footpath in a field, though with many people present, he was prosecuted under a by-law which stated that:

> No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language.[52]

When the case came to appeal in the Court of Queen's Bench, Lindley LJ commented:

> There is plenty of authority for saying that if a by-law can be divided, one part may be rejected as bad while the rest may be held to be good.[53]

In the event, however, it was held that even if the words "or on land adjacent thereto" were struck out as too wide, the by-law was still unreasonable because it lacked any mention of the factor of annoyance. Reference to the possibility of severance was once again *obiter*.

Another significant English case in this period concerned the operation of powers of appointment. In *Topham* v *The Duke of Portland*[54] the Court

---

[46] (1830) 1 B & Ad 92; 109 ER 721.
[47] *Ibid* 95; 722.
[48] (1881) 7 QBD 32.
[49] *Ibid* 38.
[50] *Saunders* v *South Eastern Railway Company* (1880) 5 QBD 456.
[51] [1896] 1 QB 290.
[52] *Ibid.*
[53] *Ibid* 292.
[54] (1863) 1 DE GJ & S 517; 46 ER 205.

of Appeal in Chancery considered whether, if a power contained in a marriage settlement were wrongfully exercised, another appointment under that power would be affected. Turner LJ, after first stating the rule in *Daubeny* v *Cockburn*[55] that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment, went on to say:

> that this general rule is correct when applied to cases in which the evidence does not enable the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose, I feel no doubt; but if the evidence enables the Court to make this distinction, the foundation on which the rule rests . . . wholly fails. . . .[56]

When this case was affirmed by the House of Lords,[57] the question whether the power to make a new appointment would remain was expressly left undecided, and discussion was not based directly on the principle of severance.

Although the cases tend toward recognition of severance, therefore, there is not much to show for a century of decisions. Nearly all judicial comment, moreover, is in the limited field of by-laws. Nor, until much later, did statutes relating to interpretation alter the picture. It should not be overlooked, nevertheless, that various statutory provisions in Victorian times did embody the principle of severance. One that is well known occurs in the colonial field. Section 2 of the Colonial Laws Validity Act 1865 states *inter alia*:

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act . . . shall be read subject to such Act . . . and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

B *Illustration of common law position in early High Court cases*

It is a significant gloss on nineteenth century English authority to refer briefly to two Australian cases in the early days of the High Court. In the *Railway and Tramway Service* case[58] the question arose as to the validity of registration by the association of State railway servants under the Conciliation and Arbitration Act 1904 (Cth) and severance arose for consideration in relation to a statutory provision. In delivering the judgment of the Court, Griffith CJ declined the invitation of Higgins KC to take account of *Topham* v *Duke of Portland*[59] and confined his comments, which tended to a similar conclusion, to American authority. A whole Act would be invalid unless the invalid part could plainly be separated without altering the meaning or effect of what remained.

Four years later, in *Whybrow's* case,[60] an award under the Commonwealth

---

[55] (1816) 1 Mer 626; 35 ER 801.
[56] (1863) 1 DE GJ & S 517, 572; 46 ER 205, 227.
[57] *The Duke of Portland* v *Topham* (1864) 11 HLC 32; 11 ER 1242.
[58] *The Federated Amalgamated Government Railway and Tramway Service Association* v *The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488; see n 37 above.
[59] (1863) 1 DE GJ & S 517; 46 ER 205.
[60] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co* (1910) 11 CLR 1.

Conciliation and Arbitration Act was in question. Griffith CJ[61] made a statement on severance along the lines of that in the *Railway and Tramway Service* case and declined the speculative American test of determining whether a legislature would have passed an enactment with the invalid part omitted. Barton J also considered American cases,[62] with a similar preference for considering not presumed legislative intention but the effects of severance. For present purposes, however, the important point is that neither counsel nor the judgments referred to any English decision. To the contrary, Barton J expressly noted that there appeared to be a gap in authority:

> So far as their reasoning commands our assent, we may well apply them [principles of American law] in the absence of other authorities which do bind us.[63]

These Australian cases thus confirm, to their own time, the limited development of severance as a principle of English law.

C *Later English law authorities*

It is conceivable that the Indenture and Letters Patent of 1886 might have been challenged at a time much later than the confusions of the Lim Keng affair. In English law, one impression stands out: the more recent the time in issue, the more settled the legal position becomes. For present purposes it is not practicable or necessary to do more than give landmark indications of that point.

One feature of the decisions is noteworthy. Without exception, superior courts appear to have taken severance for granted. Not one decision has come to attention in which development of the principle has been traced or its reception into the common law argued. *In re The Initiative and Referendum Act*[64] was a case before the Privy Council where provisions of that Act were held to be repugnant to the British North America Act 1867 (UK) and to be "so interwoven into the scheme that they are not severable".[65] In delivering the judgment, Viscount Haldane dismissed the general question of severance with no more than that comment, but in relation to one provision went on significantly:

> As to s 12, if the last sentence were omitted they [their Lordships] think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and its context, it could have been validly enacted.[66]

While his Lordship was doubtless expressing himself summarily in a situation where severance was not to be effected, the comment is characteristic for the assumption it contains.

Much later, nevertheless, the Privy Council considered severance more

---

[61] *Ibid* 20-33.
[62] *Ibid* 34-35, citing *The Employers' Liability Cases* (1907) 207 US 463; *El Paso & North Eastern Railway Co* v *Gutierrez* (1909) 215 US 87.
[63] *Ex parte Whybrow & Co* (1910) 11 CLR 1, 35.
[64] [1919] AC 935.
[65] *Ibid* 944.
[66] *Ibid* 945-946.

fully. That consideration, on the other hand, related to conditions for its application, and its limits, not its foundations. In *Attorney-General for Alberta* v *Attorney-General for Canada*[67] the constitutional validity of social credit banking legislation was in issue. Viscount Simon's review of the principle makes clear that tests of effect and of presumed legislative intention were both in his mind; it is possible he regarded them as much the same thing. That view, at an earlier stage, had not commended itself to the High Court of Australia.[68] However that may be, Viscount Simon's concluding statement on severance in the *Alberta* case has been solidly endorsed by later English decisions[69] and may be regarded as the *locus classicus* on the topic:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.[70]

9 CONCLUSION

Reefing sail after an odyssey through these partly charted shoals of legal lore, the inquiry returns to the untumultuous haven of the Cocos, to Letters Patent and to the Law Officers of the Crown. The authorities reviewed suggest that even if Article IV were invalid, the rest of the Letters Patent of 1886 should be regarded as severable. In the aftermath of the Lim Keng affair, officials in London were not called on to consider that issue because of the view taken on acquisition. It was certainly present to their minds. In the Colonial Office statement for report, there is a significant passage. Even if the British Settlements Act had the effect of invalidating Article IV:

> it would seem clear that the exercise of other prerogative powers of the Crown not mentioned in the Act, *e.g.*, power to appoint a Governor . . . and to make land grants . . ., was not affected by the Act.[71]

In those respects, it is implied, the Letters Patent might still be treated as good.

So far as the Law Officers are concerned, it is certainly true that their second report seems to express unambiguously that if the Cocos were a colony by settlement, the Letters Patent were invalid. The question, however, was not one they felt called upon to decide. Moreover, the second report is very brief and general, almost a dismissal. It has to be read with the first, and read down consequently to an understood context. It would seem inherent in the comment that the Letters Patent would be invalid in so far as the legislative intention in Article IV was defeated—and only to that extent. In the result, the case for severance is not diminished.

---

[67] [1947] AC 503.
[68] *Railway and Tramway Service* case *per* Griffith CJ; *Ex parte Whybrow & Co per* Griffith CJ, Barton J.
[69] See *Hinds* v *The Queen* [1976] 1 All ER 353 *per* Lord Diplock.
[70] [1947] AC 503, 518.
[71] O'Connell and Riordan, *supra* n 5, 15.

If the doctrine of severance may so be called in aid to avert the threatened invalidity of the Letters Patent of 1886, the constitutional foundations of the Cocos Islands at last appear less shaky. It would no longer matter if the Islands had been acquired, *pace* the Law Officers, by settlement. For reasons substantially different from those they gave at the time of the *Lim Keng* case, the conclusion emerges that arrangements made by the Letters Patent of 1886, other than those related to Article IV, were not shadowed by an original invalidity.

It is all long ago. The issues and the world in which they were relevant are remote from the contemporary scene. It is satisfactory to be able to find, then, that legal reasoning coincides with wisdom. We may safely let sleeping dogs lie:

> It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong.[72]

The conclusions of this analysis may now be summarised:

1 The case of *R* v *Lim Keng* was decided on the basis that Article IV of the Letters Patent of 1886 could not confer on the Governor of the Cocos Islands a power to alter the law of the Straits Settlements by regulation.
2 The case also placed in question the validity of those Letters Patent.
3 Fundamental to that question was the manner in which the Cocos Islands were acquired by the Crown.
4 Under the common law, in the case of a colony acquired:
   (a) by conquest or cession—legislative powers under Crown prerogative would be unfettered; or
   (b) by settlement—local laws could not be made under Crown prerogative.
5 Progressively throughout the nineteenth century, British legislation made special provision for settled colonies, but the instruments considered in the *Lim Keng* case did not confer relevant powers in accordance with the requirements of that legislation.
6 The reports of the Law Officers of the Crown dated 7 February 1903 took the Cocos Islands to be a colony by conquest. On that view the Letters Patent of 1886 would be valid.
7 The facts relating to annexation suggest that the Islands should be taken to be a settled colony. On that view, the Letters Patent of 1886 would be invalid.
8 In the *Lim Keng* proceedings, and in the judgment, the Islands were taken to be a settled colony.
9 If Article IV of the Letters Patent of 1886 is taken to be invalid for the reasons that:
   (a) the Islands should be taken to be a settled colony; and
   (b) legislative powers, in consequence, could not be conferred or exercised by Crown prerogative,

   the question arises as to the extent of the invalidity.

---

[72] *Gibson* v *Doeg* (1857) 2 H & N 615, 623; 157 ER 253, 257 *per* Pollock CB.

10 Articles II (constitution of the office of Governor), V (authorisation of land grants by the Governor) and VI (empowering annexation to the Straits Settlements) all relate to matters normally dealt with by Letters Patent at the time the Letters Patent of 1886 were made. *Caeteris paribus*, those Articles would be valid. Note that the Colonial Boundaries Act 1895 provided a statutory rather than prerogative source of power for matters such as Article VI, but Letters Patent remained one manner of exercise.

11 The important Indenture of July 1886 under Article V of the Letters Patent of 1886 is defective in omitting recitals. *Semble* the Indenture would nevertheless be valid.

12 Validity of the Letters Patent of 1886, other than Article IV, would nevertheless depend on whether the doctrine of severance could be applied.

13 In nineteenth century English law, that question is not free from doubt. *Semble* all other Articles of the Letters Patent of 1886 would have been severed from Article IV and held good.

14 For any later challenge to the Letters Patent of 1886, the authorities suggest fairly clearly that severance would have been applied.

15 In the result, constitutional arrangements made for the Cocos Islands by the Letters Patent of 1886, and the Indenture concluded pursuant to those Letters Patent, are not shadowed by an original invalidity.