

Civil-Law Systems, Judges, and the British Empire

John W. Cairns*

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I. INTRODUCTION

In 2006, I provided a chapter on the development of comparative law in Great Britain for the first edition of the *Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann. I linked the growth of comparative legal studies in later-nineteenth-century Britain to the development of the British Empire.¹ I pointed to two phenomena that seemed to me significant: first, the practical desire—represented by the foundation of the Society of Comparative Legislation in 1894—to gather information about legislation in the British colonies and dominions and the United States of America; and second, the need to train men in what were called “Mohammedan” and “Hindu” laws to ensure the efficient administration of justice in the British Empire.² Putting aside any reflections on the suitability of concepts of Hindu and Mohammedan law as conceived by the colonial British, this reveals the potentially plural nature of law and laws in the British Empire.

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1. J. W. Cairns, *Development of Comparative Law in Great Britain*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 131 (Mathias Reiman & Reinhard Zimmermann eds., 2006).

2. J. W. Cairns, *Development of Comparative Law in Great Britain*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 111, 113-14, 117-20 (Mathias Reiman & Reinhard Zimmermann eds., 2d ed., 2019).

This contribution will be devoted to one small but vital aspect of the administration of justice in the colonies, the appointment of judges and law officers. Of course, the topic has not been completely neglected. McLaren published an important monograph in 2011, in which he looked at the disciplining of colonial judges who got into trouble or were (politically) troublesome. At its core, his colorful study is about judicial tenure and responsibility. Colonial judges tended not to have the secure tenure found in Britain.³ In 2014 McLaren published an essay that discussed the same material.⁴ Similar themes are considered in Chandrachud's study of the Indian colonial judiciary.⁵ There have been a number of studies of individual colonial judges, or of events involving colonial judges.⁶ In 2021 Barnes and Whewell published a useful discussion and survey of literature on judicial biography in the British Empire.⁷ It has also proved a topic of interest for other colonizing European nations;⁸ but, again, the literature is not extensive.

McLaren's study shows that the colonial judiciary were typically drawn from the ranks of lawyers who did not have hopes of achieving high status at home, but who had sufficient connections to acquire the patronage necessary for a colonial appointment.⁹ One very obvious feature of their careers is their mobility within the Empire. Benton and Ford have rather nicely described these colonial legal servants as "a roving assortment of legal officials."¹⁰ Sometimes the imperial wandering of these individuals was the product of a search for a better position; sometimes it was the result of disagreements and difficulties with colonial governments and

3. JOHN McLAREN, DEWIGGED, BOTHERED AND BEWILDERED: BRITISH COLONIAL JUDGES ON TRIAL, 1800-1900 7, 17-33 (2011).

4. John McLaren, *Navigating the Scylla of Imperial Politico-Legal Aspirations and Charybdis of Colonial Micro-Politics in the British Empire: The Case of Judges*, in LEGAL HISTORIES OF THE BRITISH EMPIRE: LAWS, ENGAGEMENTS AND LEGACIES 15 (Shaunnagh Dorsett & John McLaren eds., 2014).

5. ABINHAV CHANDRACHUD, AN INDEPENDENT, COLONIAL JUDICIARY: A HISTORY OF THE BOMBAY HIGH COURT DURING THE BRITISH RAJ, 1862-1947 205-54 (2015).

6. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 305, notes 1 & 2, & 306-7, notes 6-7 (listing a number of relevant studies).

7. Victoria Barnes & Emily Whewell, *Judicial Biography in the British Empire*, 28 IND. J. GLOBAL LEAL STUD. 1 (2021).

8. Sanne Ravensbergen, *Rule of Lawyers: Liberalism and Colonial Judges in Nineteenth-Century Java*, in THE DUTCH EMPIRE BETWEEN IDEAS AND PRACTICE 159 (René Koekoek, Anne-Isabelle Richard & Arthur Westijn eds. 2019).

9. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 47-52.

10. LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850 1 (2016).

elites.¹¹ Indeed, as McLaren has pointed out, “colonial societies were typically fractious.”¹² The career of John Gorrie, a Scottish advocate, has been studied in detail, and it fully exemplifies such tensions and the way such officials moved around the British colonies. In a career lasting over twenty years, Gorrie served, in order, as (briefly) substitute procureur-général, and then as a judge in Mauritius, as Chief Justice of Fiji, as Judicial Commissioner for the Western Pacific, as Chief Justice of the Leeward Islands, and finally as Chief Justice of Trinidad (later including Tobago).¹³

Gorrie’s career was varied and, indeed, rather stormy; but it is notable that he started it as a colonial law officer and then judge in Mauritius, a colony captured from France during the Napoleonic Wars. After its incorporation into the British Empire, it maintained the French *Code civil* and certain aspects of French legal procedures.¹⁴ In 1866, the Privy Council decided that the *Code civil* as applied in Mauritius had to be interpreted solely as French law.¹⁵ This instantly reminds us of the varied laws of the British Empire, as will be discussed below. But in an era that divided European laws into two types, those of civil law and those of common law, the administrators of the British Empire had to cope with providing judges for civil-law systems. This may explain why Gorrie, a Scots advocate, trained in a system considered one of civil law, was appointed to Mauritius.

This possible explanation encourages reflection on the colonial careers of judges and other legal officials trained in the civil rather than the common law, thereby widening the field of research beyond the questions posed by McLaren, Barnes and Whewell. It is a large topic, deserving of much further research. Given there are rich archival resources to examine, a modest contribution such as this can only explore the surface and raise more questions than it can answer. It requires a discussion of the Empire and its constitution and government as the background to the

11. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 56-121.

12. *Id.* at 53.

13. Bridget Brereton, *A Judicial Maverick: John Gorrie at Large in the British Empire*, in LEGAL HISTORIES OF THE BRITISH EMPIRE: LAWS, ENGAGEMENTS AND LEGACIES 60, 60-62 (Shaunnagh Dorsett & John McLaren eds., 2014); McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 263-72. See BRIDGET BRERETON, LAW, JUSTICE AND EMPIRE: THE COLONIAL CAREER OF JOHN GORRIE, 1829-1892 (1997).

14. Alexander Wood Renton, *French Law Within the British Empire*, 10 J. Soc. Comp. Leg. 93, 105-08 (1909); BRERETON, LAW, JUSTICE AND EMPIRE, *supra* note 13, at 72-76.

15. *Procureur-Général v. Bruneau*, (1866) LR 1 P.C. 169, 191.

making of judicial appointments. It is possible to examine some of the appointments of judges trained in the civil law as well as considering their experiences in the colonies. These were mixed, which McLaren's research would suggest was normal for all colonial judicial careers in the period covered. But any conclusions to be drawn here can only be considered as preliminary.

II. THE LEGAL STRUCTURES OF THE BRITISH EMPIRE

The term "British Commonwealth of Nations" first appeared in a technical sense in 1921 in a Treaty with the Irish Free State.¹⁶ It was as late as 1932 that the term "British Empire" first acquired a legal definition.¹⁷ The definition was not comprehensive, but created in the Import Duties Act of 1932 in connection with tariffs within the Empire and the development of the "Imperial Preference."¹⁸ The expression "British Empire" had hitherto—and indeed thereafter—generally been used as a means of designating all territories subject to the authority of the British Crown. In fact, it is easy to understand why Sir Robert Seeley famously wrote that "[w]e seem, as it were, to have conquered and peopled half the world in a fit of absence of mind."¹⁹ It is likewise easy to understand why the quotation is so popular, even if Seeley's questionable point is at bottom historiographical. What constituted the Empire was Britain's economic dominance over its component parts along with the relative homogeneity of the white population with its loyalty both to the monarchy and the idea and ideal of Britain in order to maintain influence and control.²⁰

Though there has been very considerable interest in the history of the Empire in the past thirty or so years, relatively little detailed attention has actually been paid to its governmental structures or constitution, though mention of them can be found in a number of studies focused on other aspects of the Empire, and there is a good chapter devoted to governance in the volume of the *Oxford History of the British Empire* devoted to the eighteenth century.²¹ But the general lack of such research means, as Roger

16. ARTHUR BERRIEDALE KEITH, *THE GOVERNMENTS OF THE BRITISH EMPIRE* 19 (1935).

17. *Id.* at 18.

18. *Id.*

19. J. R. SEELEY, *THE EXPANSION OF ENGLAND: TWO COURSES OF LECTURES* 8 (1883).

20. On the varying governments of the developed Empire, see BERRIEDALE KEITH, *GOVERNMENTS OF THE BRITISH EMPIRE*, *supra* note 3, at 20-23.

21. Ian K. Steele, *The Anointed, the Appointed, and the Elected: Governance of the British Empire, 1689-1784*, in *THE OXFORD HISTORY OF THE BRITISH EMPIRE. VOLUME II: THE EIGHTEENTH CENTURY* 105 (P. J. Marshall ed., 1998).

Louis has pointed out, that older, detailed works, such as those of Arthur Berriedale Keith remain relevant.²²

Government within the colonies was carried out in the name of the monarch. There were a variety of types of colonies—proprietary, charter, crown—though the last had become the norm by the time of the Seven Years War.²³ There were also colonies controlled by a chartered company, such as, most notably, the East India Company.²⁴ Through the seventeenth and eighteenth centuries, in both the Caribbean and North American colonies, an effective structure of local colonial government with legislatures had been progressively established, with a lower house and an upper house, while the colonial governor represented the monarch. The upper house was appointed, while the lower house was representative, which generally meant it was elected from and by the wealthier British and other European settlers. This provided a reasonably effective structure of government. Indeed, it offered a general framework that was later adopted (and adapted) for territorial government by the Federal Government of the U.S.A. in the Northwest Ordinance of 1787. Nonetheless, tensions could arise from restrictions, such as those on the voting rights of some groups such as Catholics.²⁵ A more inclusive electorate could sometimes be created as with the Cape Qualified Franchise of 1853.²⁶ In India there were only Councils and the attempt to create more representative structures involving Indians under the Government of India Act of 1919 was not considered a success, though an Act of 1935 greatly extended the franchise with direct suffrage.²⁷

All this indicates that colonial government varied but also constantly changed and evolved. There is no need to discuss this in detail. Throughout the Empire, however, the executive functions were carried out in the name of the Crown. Imperial business was accordingly dealt with through the monarch's Privy Council, until 1696 the business conducted by its

22. Wm. Roger Louis, *Introduction*, in *THE OXFORD HISTORY OF THE BRITISH EMPIRE. VOLUME V: HISTORIOGRAPHY 1*, 27-28 (Robin W. Winks ed., 1999).

23. ARTHUR BERRIEDALE KEITH, *CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE 167-79* (1930).

24. *Id.* at 179-82.

25. HANNAH WEISS MULLER, *SUBJECTS AND SOVEREIGNS: BONDS OF BELONGING IN THE EIGHTEENTH-CENTURY BRITISH EMPIRE* 138-63 (2017).

26. Jeff Peires, "*The Expenditure of a Million of British Sovereigns in this Otherwise Miserable Place*": *Frontier Wars, Public Debt and the Cape's Non-racial Constitution*, 63 *THEORIA: J. SOC & POL. THEORY* 25 (2016).

27. From an imperial perspective, see ARTHUR BERRIEDALE KEITH, *A CONSTITUTIONAL HISTORY OF INDIA, 1600-1935* 357-60 (1935).

powerful Lords of the Committee of Trade and Plantations. In that year, this body was reconstituted as the Lords Commissioners of Trade and Plantations. Less powerful, it reported to the Privy Council through one of the Secretaries of State. This body did much of the administration and routine information gathering of information necessary for the running of the colonies.²⁸ This body, generally known as the Board of Trade, was abolished in 1782 in the aftermath of the failure of the War in America, as was the office of Secretary for the Colonies, a post that had only been created in 1768 in an attempt to manage better the increasingly troublesome American colonies.²⁹ Responsibilities for the Colonies now went to the Home Secretary, and a little later a new committee, the Committee of Council for Trade and the Colonies, informally known as the Board of Trade, was appointed. In 1794, Henry Dundas was made Secretary of State for War, with responsibility for the colonies, the office being renamed Secretary of State for War and the Colonies in 1801 when held by Robert Hobart, appointed under the government of Henry Addington.³⁰

The government of the Empire meant that, in 1895, it could be written of Victoria that “[n]o monarch has ever formed a constituent part of so many Legislatures as the Queen . . . Some sixty Legislatures are at work in the British Empire.”³¹ The diversity of legislatures in the British Empire, with its mobile population, the mobility of which increased with the revolution in the speed and safety of travel that marked the course of the nineteenth century, created potential issues of conflict of law within the Empire. Rules of private international law therefore became important, as the law of another jurisdiction might need to be applied. This was also significant in an Empire that focused on creating wealth through privileged trade. These developments were part of the stimulus to found

28. Steele, *The Anointed, the Appointed, and the Elected*, *supra* note 8, at 107-08.

29. P. J. Marshall, *Britain Without America—A Second Empire?*, in *THE OXFORD HISTORY OF THE BRITISH EMPIRE. VOLUME II: THE EIGHTEENTH CENTURY 576, 589-90* (P. J. Marshall ed., 1998).

30. See McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 34-35; Roland Thorne, *Hobart, Robert, 4th Earl of Buckinghamshire*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (H.C.G. Matthew & Brian Harrison eds., 2004), <https://www-oxforddnb-com.ezproxy.is.ed.ac.uk/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-13396> (last consulted June 30, 2022).

31. Courtney Ilbert, *The Society of Comparative Legislation*, 38 *NINETEENTH CENTURY* 142, 142 (1895).

the Society of Comparative Legislation.³² Imperial control of colonial legislation progressively diminished.³³

Another significant governmental function was the dispensing of justice under the Crown. The study of colonial courts, other than in the colonies of North America, is not much developed.³⁴ But they were vital in the running of the colonies, as central to the local enforcement of order, the collection of debts, and the transmission of estates. Colonial courts were erected under the Royal Prerogative.³⁵ Appeals from colonial courts could be taken to the monarch in his or her Privy Council. With the growth of the Empire, the number of such appeals increased and the Judicial Committee Act of 1833 established a Judicial Committee of the Privy Council to handle them.³⁶

III. THE LAWS OF THE BRITISH EMPIRE

The legal picture of the Empire was further complicated by the practice that developed of generally preserving the existing laws in the territories acquired by conquest and treaty from other European colonial powers. William Burge, in his *Commentaries on Colonial and Foreign Laws*, rather widely wrote in 1838 that the “possessions of Demerara, Berbice, and Esquibo, which are now united under one government by the description of British Guiana, the Cape of Good Hope, Ceylon, Trinidad, St. Lucia, Lower Canada, Guernsey, Jersey, and the Mauritius have been allowed to retain the laws which they enjoyed at the periods when they became annexed to the British crown.”³⁷

It had not always been obvious that this would be the case. In the seventeenth and early eighteenth centuries, it had been common to think that the rights and liberties of British subjects were linked to the English

32. *Id.*

33. On review of legislation by the Privy Council, see BERRIEDALE KEITH, *CONSTITUTIONAL HISTORY*, *supra* note 10, at 287-99; BERRIEDALE KEITH, *GOVERNMENTS OF THE BRITISH EMPIRE*, *supra* note 3, at 48-53.

34. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 6-23 (4th ed. 2019). There are numerous specific studies.

35. Enid Campbell, *The Royal Prerogative to Create Colonial Courts: A Study of the Constitutional Foundations of the Judicial System in New South Wales, 1788-1823*, 4 *SYD. L. REV.* 343 (1964) clearly reveals the legal complexity of the issue.

36. 1 WILLIAM BURGE, *COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER AND WITH THE LAW OF ENGLAND* xiii-lxxix (Preliminary Treatise) (1838); BERRIEDALE KEITH, *GOVERNMENTS OF THE BRITISH EMPIRE*, *supra* note 3, at 53-64.

37. *Id.*, at xiv.

common law and part of the “inheritance” of free-born Englishman. This was a very powerful idea that contrasted liberty under the common law with “slavery” under the civil law of despotic states.³⁸ This was so even though Scotland as part of Great Britain had a private law based on the civil law.³⁹ Of course, the transplantation of the common law and its variation within colonies could prove a complex issue.⁴⁰

Britain captured Gibraltar in 1704 and Minorca in 1708, with possession confirmed by the Peace of Utrecht in 1713. As these were essentially military and naval bases, the question of settlers bringing with them the common law does not seem to have arisen, although Gibraltar eventually acquired English-style courts, with the “laws of England . . . to be administered between the parties, as near as may be.”⁴¹ This was understood to mean that English property law was to be applied.⁴² The first major challenge to the traditional assumption resulted from the acquisition of the colonies of other European powers during the Seven Years’ War. The Treaty of Paris of 1763 had granted Britain considerable French colonies in the Americas as well as the Spanish colony of Florida. Later that year, a Royal Proclamation organized the new colonies. A complex provision, it organized boundaries, relationships with the Native Americans or First Nations, law, and government. Governors were granted authority to organize assemblies, “so soon as the state and circumstances of the said Colonies will admit thereof.” The Governors and future assemblies were instructed “to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies,” while, “until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England.”

38. HANNAH WEISS MULLER, *SUBJECTS AND SOVEREIGN: BONDS OF BELONGING IN THE EIGHTEENTH-CENTURY BRITISH EMPIRE* 45-79 (2017).

39. John W. Cairns, *Natural Law, National Laws, Parliaments, and Multiple Monarchies: 1707 and Beyond*, in JOHN W. CAIRNS, *LAW, LAWYERS, AND HUMANISM: SELECTED ESSAYS ON THE HISTORY OF SCOTS LAW*, VOLUME 1 115 (2015).

40. Christian R. Bursset, *Why Didn't the Common Law Follow the Flag*, 105 VA. L. REV. 483 (2019).

41. 1 BURGE, *COMMENTARIES*, *supra* note 23, at xxxix-xl (Preliminary Treatise); see also MULLER, *SUBJECTS AND SOVEREIGN*, *supra* note 25 at 80-120.

42. 1 BURGE, *COMMENTARIES*, *supra* note 23, at xl (Preliminary Treatise).

The Governors were also empowered “to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England.”⁴³

In line with the Proclamation, the British Governors in East Florida established a functioning legal system, based on English common law.⁴⁴ In West Florida, with its administrative center at Pensacola, the Governor had established a Council and courts in 1764, and by 1766 an assembly.⁴⁵ Muller has carried out an important study of developments of ideas of subjecthood in Grenada and Quebec with their legal implications and different results in the two colonies, giving proper consideration to the issues that arose from the Catholicism of the colonists/subjects of French origin.⁴⁶ Common law eventually prevailed in Grenada;⁴⁷ but Canada was different, raising complex questions. Had the Royal Proclamation introduced the English common law? How did this affect the large number of francophone subjects with their own well-established customs, land tenures, and legal proceedings? Recent research on the events after the capture of Quebec means we do not need to discuss this in detail.⁴⁸ Detailed exploration has shown that the complexity both of the actions of the British and the reactions of the Canadian population.⁴⁹ The British government made an attempt to resolve these difficulties by an act of Parliament in 1774, generally known as the Quebec Act.⁵⁰ To put it briefly, it allowed Roman Catholics to worship freely and to participate in public life through use of a modified oath. It authorized appointment of a Legislative Council, but not an elected Assembly. It defined the

43. *By the King, A Proclamation*, 10354 LONDON GAZETTE, 1-2 (Oct. 4, 1763).

44. M. C. Mirow, *The Court of Common Pleas of East Florida, 1763-1783*, 85 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 540 (2017).

45. J. R. AIDEN, *THE SOUTH IN THE REVOLUTION, 1763-1789* 121 (1957).

46. MULLER, *SUBJECTS AND SOVEREIGN*, *supra* note 25 at 121-65.

47. 1 BURGE, *COMMENTARIES*, *supra* note 23, at xxxv-xxxviii (Preliminary Treatise).

48. For brief surveys, see 1 PHILIP GIRARD, JIM PHILLIPS, AND R. BLAKE BROWN, *A HISTORY OF LAW IN CANADA: BEGINNINGS TO 1866* 218-24; JOHN W. CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY: LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866)* xxv-xxviii (2015).

49. Michel Morin, *Les Revendications des nouveaux sujets, francophone et catholiques, de la Province de Québec, 1764-1774*, in G. BLAINE BAKER AND DONALD FYSON, *QUEBEC AND THE CANADAS: ESSAYS IN THE HISTORY OF CANADIAN LAW* 131 (2013); David Gilles, *L'arbitrage notarié, instrument idoine de conciliation des traditions juridiques après la Conquête britannique? (1760-1784)*, 57 MCGILL L.J. 135 (2011).

50. The British North America (Quebec) Act 1774, 14 Geo. III, c. 83.

boundaries of the colony and relationships with the First Nations. But from our point of view what was important was the following provision, abrogating aspects of the Royal Proclamation:

And be it further enacted by the Authority aforesaid: That all His Majesty's Canadian Subjects within the Province of Quebec, the religious orders and Communities only excepted, may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their Allegiance to His Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by His Majesty, His Heirs and Successors, shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinances that shall, from Time to Time, be passed . . .⁵¹

The three sections that followed preserved the existing rules governing land already granted on English socage tenure, freedom of testation, and English criminal law and procedure.⁵²

The Quebec Act has generally been understood in the context of Canadian history as well as that of the approach to the rebellion against the Crown of thirteen of the British North American colonies.⁵³ From a legal point of view, it was an attempt to sort out the uncertainties and ambivalences created by the Royal Proclamation of 1763 and developing practice in the colony. The development of the thinking on law has recently been thoroughly explored, leading to the conclusion that the act “gave precedence to two different national legal systems, one for private-law and one for criminal-law issues.”⁵⁴ The exception to “French” private

51. *Id.* § 8.

52. *Id.* §§ 9-11.

53. Ollivier Hubert and François Furstenberg, *Introduction: Entangling the Quebec Act*, in *ENTANGLING THE QUEBEC ACT: TRANSNATIONAL CONTEXTS, MEANINGS, AND LEGACIES IN NORTH AMERICA AND THE BRITISH EMPIRE* 3 (Ollivier Hubert and François Furstenberg eds. 2020) discuss the varying historiography.

54. Michel Morin, *Choosing Between French and English Law: The Legal Origins of the Quebec Act*, in *ENTANGLING THE QUEBEC ACT: TRANSNATIONAL CONTEXTS, MEANINGS, AND LEGACIES IN NORTH AMERICA AND THE BRITISH EMPIRE* 101, 116 (Ollivier Hubert and François Furstenberg eds. 2020).

law was testamentary freedom. Although there was still thinking about further incorporation of common law into the private law, the “legal dualism” became “an essential feature of Quebec’s distinct identity.”⁵⁵ Procedure was also adapted from that of the common law.

It is possible to claim that Quebec’s “legal dualism” offered a broad model for adoption when the colonies of other European powers were acquired by conquest and treaty in the later eighteenth and nineteenth centuries, as happened in quite a number of instances in the course of the French Revolutionary and Napoleonic wars. Of course, this was not always a straightforward process or practice. The details of the “legal dualism” might vary. But the practice of preserving the private law, on which, for example, property rights would depend, was general.

Given the possibility of appeal from the courts of colonies to the Privy Council, this created problems, as the Privy Council had to apply the varied colonial laws. This led William Burge, who had served as Attorney General of Jamaica, to compile his important *Commentaries on Foreign and Comparative Law*, though its scope was wider than simply imperial, including in its coverage legal systems that were not colonial as such.⁵⁶ In the first volume, as noted above, Burge wrote in 1838:

The possessions of Demerara, Berbice, and Esquibo, which are now united under one government by the description of British Guiana, the Cape of Good Hope, Ceylon, Trinidad, St. Lucia, Lower Canada, Guernsey, Jersey, and the Mauritius have been allowed to retain the laws which they enjoyed at the periods when they became annexed to the British crown.⁵⁷

A century later, Berriedale Keith, in discussing the constitution and government of the British Empire, also turned to the circumstances when the Crown “became possessed by cession or conquest of territories already occupied by representatives of a civilised power, and in enjoyment of a code of law.”⁵⁸ He wrote:

The law of England admitted the absolute power of the Crown, so far as was consistent with the terms of cession, to alter that system of law prevailing, but it did not hold that the law was changed by the mere fact of conquest or

55. *Id.* at 116.

56. William Whyte, *Burge, William (1786-1849)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (H.C.G. Matthew & Brian Harrison eds., 2004), <https://www-oxforddnb-com.ezproxy.is.ed.ac.uk/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-109602?rskey=oHuajk&result=1> (last accessed Aug. 15, 2022).

57. 1 BURGE, *COMMENTARIES*, *supra* note 23, at xiv (Preliminary Treatise).

58. BERRIEDALE KEITH, *GOVERNMENTS OF THE BRITISH EMPIRE*, *supra* note 3, at 12.

cession, and, where the Crown refrained from action, the common law remained that prevailing before the British acquisition.⁵⁹

One can see here the fruit of the lessons learned from the effects of the Royal Proclamation of 1763 and the Quebec Act. Indeed, in these circumstances, while each colony could be different, in general, as in Quebec, one finds the automatic introduction of the English common law's view of the political rights of the Crown, adoption of English constitutional traditions, a version of English court structures and procedure, and English criminal law and procedure. Berriedale Keith explained:

Hence it is that old French law, the Coutume de Paris, underlies the law of Quebec and St. Lucia, and the French Code that of Mauritius and Seychelles, while Roman-Dutch law has been recognised in Ceylon, the Cape of Good Hope, the Transvaal and Orange Free State, and extended to Natal and Southern Rhodesia, and until lately lingered on in British Guiana. In Trinidad the old Spanish law may still on occasion be referred to.⁶⁰

McLaren explained that:

The imperial government introduced English criminal law and procedures in all these territories—a reflection of the strong, and in some respects erroneous, belief that it was a system superior to that of its European rivals, and more humane. It was in the realm of civil or private law that pre-existing systems had more staying power, such as Roman-Dutch law in Cape Colony and British Guiana, and the French *Code Civil* in Mauritius.⁶¹

The legal dualism of Quebec had become the norm for such colonies.

IV. CIVIL LAW AND COMMON LAW IN THE EMPIRE

In 1899, F. P. Walton, a Scots advocate who was then Professor of Roman Law and Dean of the Faculty at McGill University in Quebec, wrote that there were “two great legal systems of Christendom, the Civil law and the Common law.”⁶²

Broadly speaking, the modern law of France, Belgium, Holland, Germany, Austria, Italy, Spain, and Portugal is still Roman law. It is of course Roman law with a difference. Every country has modified it in a thousand ways. In

59. *Id.*

60. *Id.* On Trinidad, see ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 80 (2d ed. 2008).

61. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 39.

62. F. P. Walton, *The Civil Law and the Common Law in Canada*, 11 JURIDICAL REVIEW, 282, 282 (1899).

all it is mingled with a proportion greater or less of law taken from other sources . . .

France, Spain and Portugal carried their laws with them to the new world. French law still forms the basis of the law of Quebec and of the law of the State of Louisiana, and Spanish or Portuguese law that of the greater part of South America. Holland also carried her laws into Africa and America and they still remain in the Cape Colony, Natal, the Transvaal Republic, and in British Guiana, under the name of Roman Dutch law.⁶³

If Roman law dominated in Europe, where only England and Ireland followed the common law, the “New World has redressed the balance of the old.” Common law prevailed in all of North America other than in Louisiana and Quebec.⁶⁴ The important point to note is that Walton divides European legal systems into civil-law systems and common-law systems. It is tempting to deduce that Walton, who had served as Secretary to the Liberal Lord Advocate, J. B. Balfour, owed his appointment at McGill, not just to British political patronage, though that could be further investigated, but also to his education in Scots law, which was viewed as a civil-law system. Walton wrote of Scots law that “[a]s to its substance, a great part of the Common law of Scotland is still Roman law, not more modified than the *Heutiges Römisches Recht* of Germany of the *Droit Civil* of France.”⁶⁵

It is obvious that Burge in his pioneering work understood the law in the Empire that derived from European law as subject to the same binary divide. He was not doctrinaire in approach; but one can identify a tendency to divide his account around the major axis provided by a distinction between civil law and common law. His thinking on this was primarily historical, but clear. Discussion of Roman law was followed by a discussion of Roman-Dutch law, which led to an account of the law in South Africa, Guyana, and Ceylon. His account of French customary law led to a treatment of the law of Quebec and some other jurisdictions, while treatment of the *Code civil des français* led to a discussion of the law of Mauritius. Finally, discussion of that of Spain led to that of Trinidad.⁶⁶ This was also generally reflected in his discussion of substantive law.⁶⁷

63. *Id.* at 282-83.

64. *Id.* at 283.

65. *Id.* at 291.

66. 1 BURGE, COMMENTARIES, *supra* note 23 at ii & vi (Dedication), xiv-xxviii (Preliminary Treatise).

67. *Id.* at 135-52.

V. IMPERIAL JUDGING

In 1841, Burge published a lengthy pamphlet calling for a united and revised supreme appellate court to serve Great Britain and the Empire.⁶⁸ He reviewed appellate systems through the prism of the Empire, again noticing the potential problems posed by the varying systems of law.⁶⁹ Before the 1833 Act creating the Judicial Committee, Burge noted that the judge on most cases before the Privy Council had been the Master of the Rolls. He singled out Sir William Grant for praise in that role, as his “early education and professional practice rendered him more familiar than any other judge, who preceded or followed him, with the Civil Law, and with those systems of law, which were in so great a degree founded on its principles.”⁷⁰ Grant had had an unusual career for a member of the English bar who had risen to high judicial office. As his name would suggest, Grant was of Scottish origin. He had studied at the University of Aberdeen and was called to the English bar in 1774. Probably because of the connections of his uncle Robert Grant, a London-based merchant involved in the Canadian fur trade, Grant moved to Canada in the aftermath of the Quebec Act, arriving in 1775. There he served as Attorney General, though the Governor, Guy Carleton, failed to have him confirmed in post by the Crown. The Lieutenant Governor, Hector Cramahé, emphasized Grant’s skills in the French language and law. Grant returned to London in 1779.⁷¹ It is easy to see why, for Burge, Grant’s education and experience made him an ideal judge to deal with colonial appeals.

In the absence of someone with Grant’s skills and knowledge, difficulties might be encountered. Burge pointed out that in 1827 a colonial appeal required knowledge of the “law of Holland as administered in Demerara.” The court sought the opinion of a Dutch

68. WILLIAM BURGE, OBSERVATIONS ON THE SUPREME APPELLATE JURISDICTION OF GREAT BRITAIN, AS IT IS NOW EXERCISED BY THE COURTS OF THE QUEEN IN COUNCIL AND THE HOUSE OF LORDS (1841).

69. *Id.* at 18-21.

70. *Id.* at 12.

71. D. R. Fisher, *Grant, Sir William (1752-1832)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004), <https://www.oxforddnb-com.ez.proxy.is.ed.ac.uk/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-11292> (last accessed July 1, 2022); Jacques l’Heureux, *Grant, Sir William, Lawyer, Militia Officer, and Office Holder*, in 6 DICTIONARY OF CANADIAN BIOGRAPHY, http://www.biographi.ca/en/bio.php?id_nbr=2896 (last consulted July 1, 2022). L’Heureux states that Grant studied at Leiden; he is not to be found in its published matriculation records, or that of any other Dutch university. This does not mean that he did not spend two years studying Roman law in the Netherlands, as l’Heureux claims, only that it is not documented in university records.

lawyer in Amsterdam, which it followed. In the same year, the court sought the opinion of two French advocates on another case.⁷² For Burge this was particularly worrying, because as he explained, in the majority of the West Indian colonies, “in which the common and statute law of England, and the acts of the local legislatures, constitute their jurisprudence, one only of the three or four judges necessary to constitute a Court of Law, has been educated for the profession.” While “[i]n those colonies which adopt either the French, Spanish, or Roman-Dutch law, the judges of these courts will be found to have been taken from the English or Irish Bar, and who previous to their appointment, had acquired no acquaintance with the law or practice of the Courts of which they are to be the judges.”⁷³

It is noticeable that Burge does not mention members of the Scots bar as potential judges and law officers in the colonies. This is odd, since he wrote that one of the advantages of the reform he proposed was that the new combined appellate court would be better qualified to deal with Scottish appeals, as it would have “the learning and experience in those systems of foreign law which were required for the decisions of appeals from many of our Colonies.” “A great part of the jurisprudence of Scotland is,” he wrote, “founded very much on the Civil Law.” He explained that this “Law is the basis on which the systems of the Dutch, Spanish, and French Law has been raised.”⁷⁴ By his argument, Scots advocates would have been peculiarly suited to serve in certain colonies; but he does not state this. It may be that Burge felt he could not write this in 1841, because of a strong view expressed by Henry, Lord Brougham, in 1828, a view that will be discussed below.

Scots lawyers did seek—and gain—colonial appointments. In the 1850s, however, the Faculty of Advocates became anxious about whether or not its members were gaining as many such appointments as they should. In 1852, it established a committee to ensure that members of the Scots bar had the right to hold judicial appointments and practice as barristers in the courts of law in East India and the British colonies.⁷⁵ The committee reported in July of that year, but consideration of its work was

72. BURGE, OBSERVATIONS ON THE SUPREME APPELLATE JURISDICTION, *supra* note 66, at 21-23.

73. *Id.*, at 20-21.

74. *Id.* at 39.

75. National Library of Scotland, Minute Book of the Faculty of Advocates, F.R. 8, at 263 (June 8, 1852), 267 (July 17, 1852).

postponed. Four years later, the Faculty returned to the topic when it received notice of a resolution to the effect that various judicial positions in the colonies, which had previously been held by Scots advocates, had recently been filled by English barristers. In the same period, no Scots advocate had been appointed to such a post. A meeting with the Lord Advocate was proposed to help ensure the Faculty received its share of such patronage.⁷⁶ Members of the Faculty evidently agreed with Burge's reasoning and considered that they might be particularly suited for jobs in "civil-law" colonies. Thus, the Dean of Faculty wrote to the Colonial Secretary in 1879 suggesting that a Scots advocate should be appointed as Chief Justice of Mauritius, and more generally claiming a share of colonial judgeships for Scots. The Colonial Secretary replied neutrally to the effect that Scottish applications would be carefully considered.⁷⁷ This particular letter was prompted by the recent demission of the office of Chief Justice of Mauritius by Sir Charles Farquhar Shand, a member of the Faculty, who had held the post since 1860, while the advocate John Gorrie had served there as a puisne judge from 1870-76.⁷⁸ The recommendation supporting the latter's appointment had noted that he was "far more deeply versed in the jurisprudence of several foreign states which, like Scotland, retain the Roman law as their basis, than most of his countrymen."⁷⁹

The effect of the Faculty's campaigning requires further study. One can say that, through the nineteenth century, the Faculty seems to have considered its claims to such appointments for its members were not adequately recognized. Thus, in March 1889, it established another committee in connection with legal appointments in the gift of the Foreign, Indian, and Colonial Offices, to determine how to improve advocates' chances of gaining them.⁸⁰ Two years later the committee reported. Its printed report was to be circulated to the Secretary of State for Scotland,

76. National Library of Scotland, Minute Book of the Faculty of Advocates, F.R. 8, at 391-92 (Mar. 10, 1856).

77. National Library of Scotland, Minute Book of the Faculty of Advocates, F.R. 9, at 377 (June 26, 1879).

78. MAURITIUS ILLUSTRATED: HISTORICAL AND DESCRIPTIVE COMMERCIAL AND INDUSTRIAL FACTS, FIGURES, AND RESOURCES 286 (Allister MacMillan, ed., 1914; repr. 2000); BRERETON, COLONIAL CAREER OF JOHN GORRIE, *supra* note 13, at 66-76.

79. BRERETON, LAW, JUSTICE AND EMPIRE: THE COLONIAL CAREER OF JOHN GORRIE, *supra* note 13, at 67.

80. National Library of Scotland, Minute Book of the Faculty of Advocates, F.R. 9, at 587 (Mar. 19, 1889).

the Lord Advocate, the Solicitor General, and members of both Houses of Parliament with a connection to Scotland.⁸¹

It is possible that the Faculty's suspicions of disadvantage and discrimination were correct. For example, only one Scots advocate, William Menzies, was ever appointed to the bench of the Cape Colony.⁸² And this was so despite evidence that Lord Stowell had recommended to the Colonial Office that "members of the Scottish bar should be employed in judicial offices in the colonies, particularly where the Roman Dutch law prevailed."⁸³ In a debate in the Commons over the Governorship of Lord Charles Somerset in that colony, Henry Brougham stated that he opposed the appointment of individuals who were not English lawyers to colonial judicial positions. According to Hansard, Brougham explained:

Before he sat down he wished to allude to a circumstance connected with the administration of justice at the Cape of Good Hope and other colonies. Some little doubt and alarm had lately prevailed amongst English barristers, owing to the circumstance of the government sending out to some of the colonies, and the Cape amongst others, persons as judges who were not English lawyers. He must protest against such a practice, except under very extraordinary circumstances indeed. It was not safe to send out as judges, even to places where the civil law was administered, any persons not practised in the English law, or not habituated to trial by jury and the English law of evidence. . . . If government would send out persons imbued with English law principles, and with a knowledge of trial by jury, and the English law of evidence, they would have better judges than they could hope to obtain by sending out individuals conversant with civil law only. But then if they would have civil lawyers, let them take them from Doctors Commons, and not go to Scotland for them. To look for any knowledge of civil law there, was quite absurd.⁸⁴

Brougham's attack on the appointment of individuals other than English barristers and on the knowledge of civil law in the Faculty of Advocates understandably upset Scots. The fact that he had been admitted to the Scots bar gave apparent authority to his remarks. Although much more widely phrased, his attack was, of course, entirely motivated by politics. Menzies

81. National Library of Scotland, Minute Book of the Faculty of Advocates, F.R. 9, at 632 (Mar. 20, 1891).

82. S. D. Girvin, *William Menzies of Edinburgh: Judge at the Cape 1827-1850*, JURIDICAL REVIEW 279, 279 (1993).

83. C. Graham Botha, *The Honourable William Menzies, 1795-1850*, 33 S. AFRICAN L. J. 385, 389 (1916).

84. Henry Brougham, Speech in the House of Commons, June 29, 1827, in 17 UNITED KINGDOM, HANSARD PARLIAMENTARY DEBATES, cols. 1433-34 (June 29, 1827).

had just been appointed to the Cape Bench. He was a Tory gaining the appointment through the patronage of Tories.⁸⁵ Brougham's remarks were indignantly reported in a slightly different and perhaps more accurate version.⁸⁶ Debate ensued.⁸⁷ One can start to understand the Faculty of Advocates' anxieties.⁸⁸ And, as noted, Menzies was the only Scots lawyer ever appointed to the bench of the Cape Colony. It is worth noting that Menzies produced the first set of court reports for the colony, and has been remembered as a great judge and defender of the Roman-Dutch law.⁸⁹ It is also difficult to understand some of Brougham's criticisms. Scotland had always used trial by jury for all serious criminal offences and had recently introduced it for civil cases in some circumstances.⁹⁰ Perhaps by "trial by jury" he was alluding in short-hand to a whole series of matters that Whigs associated with "English liberties," that a Tory Scot, such as Menzies, was

85. Botha, *William Menzies*, *supra* note 79, at 386-88.

86. J. BROWNE, REMARKS ON THE STUDY OF THE CIVIL LAW; OCCASIONED BY MR. BROUGHAM'S LATE ATTACK ON THE SCOTTISH BAR 10-11 (1828):

It was understood that there was little doubt prevailing in the minds of English barristers, in consequence of certain appointments in some of the colonial districts, and, amongst the rest, in the Cape of Good Hope, as to the propriety of sending out, as Judges to the colonies, persons who were not English lawyers. He was one of those who would be extremely adverse to such practice. He thought it would not be safe to place in such an office any man, who though he might be acquainted with the Civil Law, was not well versed in the English law and trained and habituated to the trial by jury, and the English law of evidence. He would be sorry to see any practice contrary to this maxim. He was convinced that a knowledge of the Civil Law, upon which the Dutch law existing in some of the colonies was founded, would not be a sufficient qualification for a discharge of these important functions. *But as to the Civil Law, there was no knowledge of it to be obtained in Scotland.* It had been proved at the recent trial at Lancaster, that this was mere sham and farce. *A young man about to be examined, had nothing to do but to go to the evening before, and ask in what page he was to be questioned, and to prepare himself accordingly. It was therefore absurd to send Judges from the Scotch Bar.* Let men be sent who were imbued with the principles of English law and trial by jury. If civil lawyers were required, let them be taken from Doctors Commons, *but it was perfectly absurd to go to the Scotch Bar to look for them.* (Browne's emphases).

87. *Review*, Art. IV, *Wenck, Magister Vacarius*, in 5 THE FOREIGN REVIEW AND CONTINENTAL MISCELLANY 65, 80-85 (1830).

88. John W. Cairns, *The Influence of the German Historical School in Early Nineteenth Century Edinburgh*, 20 SYRACUSE J. INT'L. L. & COMM. 191, 199-200 (1994).

89. S. D. Girvin, "William Menzies of Edinburgh: Judge at the Cape 1827-1850," (1993) *Juridical Review*, pp. 279-93, at pp. 284-285.

90. See John W. Cairns, "The Dearest Birth Right of the People of England:" *The Civil Jury in Modern Scottish Legal History* in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND:" THE JURY IN THE HISTORY OF THE COMMON LAW 1 (John W. Cairns and Grant McLeod eds., 2002).

presumed not to know. But it is difficult to think this was motivated by anything other than politics.

Perhaps also fueling the Advocates' anxieties about colonial legal posts was the opposition expressed to the appointment of John Reddie, advocate, as a judge in the colony of Mauritius. Reddie held a doctorate in Roman law from the University of Göttingen.⁹¹ The *Morning Chronicle* complained that the office "of judge in the Court of first Instance has been bestowed on a young man from Glasgow, totally unacquainted with the French law, whom it was necessary to provide for out of Scotland."⁹² This raises many issues, but crucially it denied the Scots bar's special claims to legal offices in the former French, Spanish, and Dutch colonies. The next day Reddie's appointment was defended by "Vindex" in *The Times*, emphasizing the young advocate's skill in Roman law and qualification as an advocate in Scotland, which meant he was "far from being ignorant of French law."⁹³ This argument was not accepted by the writer in the *Morning Chronicle*, who stressed that though French law and Scots law were both founded on Roman law they were very different.⁹⁴

VI. EXPERIENCE IN THE EMPIRE

Although much further study is required of Scots and other civilian lawyers appointed to colonial legal positions, it is possible to examine the experiences of a few through the nineteenth century. These suggest a measure of engagement with the idea that a Scots or civil lawyer might be particularly suited for appointment to certain colonial legal posts.⁹⁵

I shall start first, however, with a colonial legal official who was not a Scottish but a Guernsey lawyer, Sir John Jeremie. Private law in Guernsey ultimately derived from that of Normandy.⁹⁶ Jeremie had apparently studied law in Dijon, and this education in French law encouraged the Colonial Office to appoint him as First President (Chief

91. See the brief account of his life in John W. Cairns, *Reddie, James (jurist) (1775-1852)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004) <https://www-oxforddnb-com.ezproxy.is.ed.ac.uk/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-23242?rskey=WK3Ghl&result=1#odnb-9780198614128-e-23242-div1-d1641290e230> (last accessed July 19, 2022).

92. MORNING CHRONICLE 3 (June 5, 1833).

93. THE TIMES 3 (June 6, 1833).

94. MORNING CHRONICLE 3 (June 7, 1833).

95. Malta, for example, also provides interesting issues that cannot be pursued here.

96. Darryl Ogier, *THE GOVERNMENT AND LAW OF GUERNSEY* 1-3 (2005); Edmund Lenfestey, *The Bailiwick of Guernsey in the Channel Islands*, 10 COMMONW. L. BULL. 417 (1984).

Justice) of St. Lucia (a former French colony, where pre-codified French law applied) in 1824.⁹⁷ An active abolitionist, his views on slavery (on which he published) “aroused much hostility among the West Indian planters.”⁹⁸ In 1832, he was appointed public prosecutor (procureur-général) in Mauritius, where the French *Code civil* applied. His quarrels and difficulties in the colony led to his resignation and return to London where he was again active in the anti-slavery cause.⁹⁹ It seems likely that his appointments to St. Lucia and Mauritius reflected his training and experience in a strongly French-influenced legal system. Jeremie was ultimately exonerated from the complaints, and appointed to a judgeship in Ceylon (Sri Lanka).¹⁰⁰ Roman-Dutch law was in force there for certain purposes, though, as typical in the colonies, English criminal law, procedure and mercantile law were followed.¹⁰¹ Again, it is easy to assume that his legal training was deemed to make his appointment particularly appropriate. From being second puisne judge in Ceylon, Jeremie was soon appointed first.¹⁰² In 1840 he was in London to attend the World Anti-Slavery Convention. In that year he was also offered and accepted the office of Governor of Sierra Leone, where he died within a year.¹⁰³

It is important to say a little about Mauritius at this period. It had developed into a sugar island, rivalling those of the West Indies. The cultivation was founded on slavery.¹⁰⁴ The island was captured by Britain in 1810, just after the slave trade had been abolished in the British Empire. In the 1820s, the issue of slavery and illegal trade in slaves in Mauritius became an issue of major concern for the British abolitionists, as Britain worked towards an amelioration of the position of enslaved men and

97. Alexandra Franklin, *Jeremie, John (1795-1841), Colonial Judge and Administrator*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004) <https://www-oxforddnb-com.ezproxy.is.ed.ac.uk/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-14773> (last accessed July 13, 2022).

98. Rosamaria Alibrandi, *Early Nineteenth-Century Parliamentary Debates for the Abolition of Slavery in the British Empire and the Contribution of the Colonial Judge, Sir John Jeremie in the period 1824-41*, 35 PARLIAMENTS, ESTATES AND REPRESENTATION 21, (2015).

99. *Id.* at 26-27; JOHN JEREMIE, RECENT EVENTS AT MAURITIUS, ATTESTED ALSO BY JOHN REDDIE, ESQ. (1835).

100. THE TIMES 1 (Feb. 15, 1836).

101. L.J.M. Cooray, *The Reception of Roman-Dutch Law in Sri Lanka*, 7 COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 295, 304 (1974).

102. Alibrandi, *Early Nineteenth-Century Parliamentary Debates*, *supra* note 96, at 27.

103. *Id.*

104. MEGHAN VAUGHAN, CREATING THE CREOLE ISLAND: SLAVERY IN EIGHTEENTH-CENTURY MAURITIUS (2005).

women and ultimately the abolition of slavery.¹⁰⁵ The appointment of Jeremie was therefore seen as provocative by the French planters and the Governor.¹⁰⁶

It was into this fractious political and cultural mix that the Scotsman, John Reddie, whose disputed appointment has been mentioned above, was appointed as President of the Court of First Instance of Mauritius in 1832.¹⁰⁷ Like Jeremie, he fell out badly with the colonial administration, the Governor, Sir Charles Colville, not wanting to admit him, while claiming—quite plausibly, one suspects—that his appointment would be obnoxious to the colonial bar. There is no need to go into the disputes in detail; Reddie himself sets out the facts at length (from his perspective).¹⁰⁸ Early in 1833 the new Governor, Sir William Nicolay arrived, and a few months after Reddie's arrival, Jeremie, who had been sent home by Colville while Governor, returned.¹⁰⁹ Much of Reddie's problems seem to have revolved around the law. But, though he and Jeremie were of different political persuasions, their difficulties and the powerful oppositions to them became linked.¹¹⁰ There can be little doubt but the build-up to the abolition of slavery and the introduction of the system of apprenticeship fueled the bitter quarrels in the colony. Ultimately the governor secured Reddie's dismissal and recall.¹¹¹

The Times noted that no fewer than three Whig Secretaries for the Colonies seemed implicated in the political attacks on Jeremie and Reddie.¹¹² The election of early 1835 had resulted in a brief minority Tory Government that quickly collapsed, to be replaced by a government led by Lord Melbourne. Whether these political changes were significant or not cannot be explored here. The events in Mauritius were discussed in the Commons on February 13, 1836.¹¹³ Like Jeremie, Reddie was ultimately

105. ANTHONY J. BARKER, *SLAVERY AND ANTISLAVERY IN MAURITIUS, 1810-33* 24-88 (1996).

106. The events are very concisely set out in *id.* at 6-7; see also Peter Burroughs, *The Mauritius Rebellion of 1832 and the Abolition of British Colonial Slavery*, 4 *J. IMPERIAL & COMMONWEALTH HIST.* 243 (1976).

107. [JOHN REDDIE], *BRIEF STATEMENT OF THE CIRCUMSTANCES UNDER WHICH JOHN REDDIE, D.C.L., AND MEMBER OF THE HON. FACULTY OF ADVOCATES OF SCOTLAND HAS BEEN RECALLED FROM THE OFFICE OF PRESIDENT OF THE COURT OF FIRST INSTANCE, IN THE CROWN COLONY OF MAURITIUS* 3 ([1835]).

108. *Id. passim.*

109. *Id.* at 4-5.

110. JEREMIE, *RECENT EVENTS*, *supra* note 95, at 66.

111. REDDIE, *BRIEF STATEMENT*, *supra* note 101, at 1.

112. *THE TIMES* 5 (Aug. 13, 1835).

113. *THE TIMES* 1-2 (Feb. 16, 1836).

exonerated, after having been “wrongfully and shamefully dismissed,” as *The Times* put it.¹¹⁴

Reddie’s recompense was to be made Chief Justice of St. Lucia.¹¹⁵ One suspects that, as with Jeremie earlier, the choice of appointment may have been due to his civil-law background. Once more Reddie had problems with a colonial Governor, who, in 1838 suspended him, and committed another judge for contempt.¹¹⁶ He was swiftly reinstated, the *Morning Chronicle* attributing his suspension to “party feuds.”¹¹⁷ The newspaper suggested that such feuds were always most bitter in “contracted societies,” but particularly formidable in “smaller colonies, in which the majority of the inhabitants are of French origin.” The structure of government of the island was also amended.¹¹⁸ Reddie’s nemesis in St. Lucia proved to be Governor Torrens. Torrens considered himself libeled by two letters allegedly written by Reddie. He suspended Reddie, who was then reinstated;¹¹⁹ Torrens, who had left St. Lucia, then returned, once more to ensure Reddie’s removal for his insubordination.¹²⁰ After further inquiry Reddie was again suspended.¹²¹ Reddie returned to London and an inquiry before the Privy Council followed.¹²² Reddie’s removal was eventually confirmed by the Queen.¹²³

It is interesting to note that in 1849 Reddie gave expert advice on the marriage law of St. Lucia on June 19, 1849 in a lawsuit in London.¹²⁴ This is because he was shortly thereafter appointed as First Judge of the Small Cause Court of Calcutta (Kolkata). This court was established under an Act of 1850 reforming the Court of Requests in Calcutta.¹²⁵ He obviously still had friends who could secure an appointment for him. But this was his last appointment as a colonial judge, and he died of cholera in Kolkata on November 28, 1851.¹²⁶

114. THE TIMES 2 (Mar. 24, 1836).

115. CALEDONIAN MERCURY 1 (Apr. 11, 1836).

116. MORNING CHRONICLE 3 (Apr. 12, 1838).

117. MORNING CHRONICLE 2 (Apr. 14, 1838).

118. *Id.*

119. CALEDONIAN MERCURY 4 (Nov. 1, 1847).

120. CALEDONIAN MERCURY 1 (Dec. 9, 1847).

121. MORNING CHRONICLE 6 (Feb. 25, 1848).

122. THE TIMES 6 (16 June 1848); MORNING CHRONICLE 4 & 7 (Nov. 1, 1848).

123. MORNING CHRONICLE 4 (July 14, 1848).

124. THE TIMES 7 (June 20, 1849).

125. Chara Chandru Ganguly, *The Presidency Small Causes Court of Calcutta*, 13 J. INDIAN L. INST. 459, 459 (1971).

126. THE TIMES 6 (Jan. 15, 1852).

VII. CONCLUSION

The story of law in Quebec revealed that it was impossible to substitute English common law for a well-established private law of civil-law origin in a colony. It was easy to get certain things accepted, such as criminal law and trial by jury, indeed sometimes trial by jury was wanted,¹²⁷ but people's property rights were bound up with existing private law. Changing it would destabilize a colonial society. Hence the development in the British Empire of "legal dualism."

The careers of Menzies, Jeremie, and Reddie can be understood as reflecting appointments to suit newly acquired colonies by supplying them with judges and officials acquainted with the civil law, who came from jurisdictions that would now be classed as "mixed." Much further research would be required to know how typical such appointments were; but they were obviously not completely exceptional, as is indicated by the careers of Gorrie and Sands. Slightly later, one can think of the career of Sir Alexander Wood Renton, who served as a puisne judge and then as Chief Justice of Ceylon, but started his colonial career in Mauritius as procureur-général. A Scot, Renton was an English barrister, but he had studied law at the University of Edinburgh.¹²⁸ One has also to reflect on the role of English civilians as well as other lawyers from the Channel Islands. Consider, for example, Sir John Stoddart, an English Civilian, as King's Advocate and then Chief Justice of Malta.¹²⁹ But it is also worth noting that once established, the careers of these "civil lawyers" were not restricted to the colonies with "civil-law" systems.

Central to establishing and sustaining a career in the colonial judiciary was patronage. No doubt this lay at the center of the Faculty of Advocates' anxieties; they were too far from the center of patronage in London. Patronage was all: Gorrie, for example, was clearly a difficult man—impatient, impulsive, and outspoken. He annoyed local elites. He nonetheless continued to be supported by the Colonial Office, so that the solution to local displeasure was to remove him through promotion.¹³⁰ The patronage that had initially gained him his colonial posts continued. He

127. J. J. Cremona, *The Jury System in Malta*, 13 *Am. J. Comp. L.* 570, 570-72 (1964).

128. Who was Who, <https://www-ukwhoswho-com.ezproxy.is.ed.ac.uk/view/10.1093/ww/9780199540891.001.0001/ww-9780199540884-e-216078?rkey=bBPUNG&result=1> (last accessed July 21, 2021).

129. *The Late Sir John Stoddart*, 4 *LAW MAG. & L. REV. QUART. J. JURIS.* 124, 127-28 (1857). Consider also the role of Andrew Jameson, the Scottish advocate in the Criminal Code of Malta.

130. Brereton, *A Judicial Maverick*, *supra* note 13, at 66-67.

had come to the attention of those involved in colonial affairs through his participation as counsel for the Jamaica Committee in the Royal Commission set up to investigate in Jamaica the reprisals undertaken after the Morant Bay Rebellion of 1865.¹³¹ Gorrie already knew John Bright of the Jamaica Committee, and he, with Sir Henry Storks of the Jamaica Royal Commission, who served briefly as Governor of Jamaica, sought from Lord Granville, Secretary of State for the Colonies, an appointment in Mauritius for Gorrie, described as a “good French linguist and an able man.”¹³² The then Governor of Mauritius duly supported him for a further judicial appointment.¹³³ Gorrie’s subsequent great patron was Sir Arthur Gordon, son of the Earl of Aberdeen, future Lord Stanmore. This fellow, if rather grander, Scot shared many of Gorrie’s concerns, ensuring his appointment as Chief Justice of Fiji and as Judicial Commissioner of the Western Pacific.¹³⁴ After Gorrie disagreed with Gordon’s successor as Governor of Fiji, the Colonial Office offered him the post of Chief Justice of the Leeward Islands, which he eventually accepted. Again, he fell out with some of the colonial elites because of his reform-mindedness.¹³⁵ His difficulties there led him to be promoted to Chief Justice of Trinidad (later including Tobago).¹³⁶ There he again fell out with the elites and was suspended. He died in London while waiting for the Colonial Office and Privy Council to consider his case.¹³⁷ As McLaren points out it may be significant that, in the Caribbean, he had no local “powerful patron . . . to afford him protection.”¹³⁸

It is a telling story. Reddie and Jeremie lacked local patronage in Mauritius, and indeed faced resentment and opposition there. Reddie later faced opposition in St. Lucia. Though his dismissal was confirmed in London, he still managed to acquire a post in Kolkata, suggesting he still had influence in his favor. Personality was also important for a successful career. Gorrie’s life shows this: it was his strength and his downfall. It may

131. BRERETON, LAW, JUSTICE AND EMPIRE: THE COLONIAL CAREER OF JOHN GORRIE, *supra* note 13, at 32-65.

132. *Id.* at 66-67.

133. *Id.* at 67.

134. Brereton, *A Judicial Maverick*, *supra* note 13, at 65-66.

135. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 267-68.

136. *Id.* at 267-68.

137. *Id.* at 268-71; BRERETON, LAW, JUSTICE AND EMPIRE: THE COLONIAL CAREER OF JOHN GORRIE, *supra* note 13, at 286-314; Bridget Brereton, *Sir John Gorrie: A Radical Chief Justice of Trinidad (1885-1892)*, 13 J. CARIB. HIST. 44 (1980).

138. McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at McLAREN, DEWIGGED, BOTHERED AND BEWILDERED, *supra* note 3, at 271.

be that issues of personality contributed to Reddie's problems in Mauritius and later in St. Lucia. In 1830, he had fought a very well-publicized duel in Calais with a fellow Scot, Captain Maitland, arising out of a quarrel in Ayrshire.¹³⁹ He may have continued stubborn and quarrelsome.

139. MORNING CHRONICLE 4 (May 21, 1830).