

No. Forty

No. 2

Downing Street  
28th April 1831

Sir,

Referring to my accompanying despatch of this date no.1, for the various instructions which I have found it necessary to issue for your guidance respecting the general administration of the affairs of His Majesty's Settlements in Western Australia, I shall in my present despatch, confine myself to those subjects of a Judicial or Legal nature to which you called my attention in your despatch of the 18th October last, as well as in your preceeding despatches of the 20th & 30th of January 1830.

I have the honour herewith to enclose a copy of the Statute 10th Geo: 4th: cap: 22 passed for enabling His Majesty by the advice of His Privy Council, to make & to authorise any three or more Persons to make all necessary Laws, & to constitute all necessary Courts for the peace, order and good Government of His Majesty's Subjects within those Settlements.

The Order of the King in Council dated 1st of Nov. last, which is also enclosed, executes the Powers of this Act of Parliament by enabling the Governor, the Senior Military Officer next in Command, the Colonial Secretary, the Surveyor General, & the Advocate General, to discharge the several functions entrusted by the Act of Parliament to the Persons to whom reference is there made. In the execution of those Powers, the Persons in question are required to conform themselves to the various Regulations contained in the Order, & in your Commission & Instructions, under His Majesty's Sign Manual. I trust that you will find little difficulty in distinctly apprehending the effect of those Instructions.

You will perceive that the Individuals who, under the Act of Parliament & Order in Council, are constituted a Legislative Council, are also appointed by the Second Article of your Instructions Executive Councillors for your assistance in the Administration of the Government. It may be proper to notice that Western Australia being a Territory acquired by mere rights of occupancy, & not by conquest, the King's Subjects residing there are, by a general principle of Law, entitled to all the Rights & Privileges of British Subjects, & carry with them the Law of their native country, so far as it is applicable to their new situation & circumstances I advert to this general maxim in explanation of the reasons which have led to the institution of two separate Councils, deriving their authority from two distinct sources. The King, in virtue of His Prerogative, has established in Western Australia, as in other Colonies, an Executive Council of which the Privy Council in England is the Type or Model. But the Royal Authority was not competent to the the creation of a Legislature except by Popular Representation, nor to the establishment of Courts constituted on different principles from those of Westminster Hall. The Colony not being yet ripe for Institutions of this nature, it was necessary to invoke the aid of Parliament to render legal the establishment of a Legislature, & Tribunals of a more simple, though less popular, character.

You will therefore understand that although the Individuals composing the two Councils are the same, yet that the two Bodies must be regarded as separate & that in order to mark the

distinction, separate Minutes should be kept of the Proceedings of the Council when acting in its Legislature & in Its Executive capacity.

From the tenth to the seventeenth clauses of your Instructions, both inclusive, you will find directions for the Rules to be observed in framing Legislative Enactments. It would be superfluous to recapitulate them. I therefore confine myself to the remark that they are to be understood as Rules to the observance of which great importance is attached, with reference to the future & permanent welfare of the Colony.

Amongst the earliest objects of the attention of the Council will be the institution of Courts of Justice, exercising jurisdiction in all cases, civil & criminal, arising within the Settlements. This is a power to the exercise of which they are specially called by Parliament, & to which effect must be given with the least possible delay.

In imposing this task upon yourself & other Gentlemen not regularly educated to the practice of the Law, as a profession, His Majesty's Government may at first sight seem to be making a very unreasonable demand. To regulate whatever relates to the administration of Justice, of course, presupposes so exact & comprehensive an acquaintance with the whole business of Jurisprudence, as is possessed by a comparatively small number even of those who have made the Law their peculiar study.

I should therefore have been happy to relieve you from so arduous & inappropriate an office. But great as may be the difficulty of instituting Courts without a profound knowledge of Law, the objections to undertaking that duty in this Country without the advantage of the minute local information essential on such an occasion, has appeared even yet more formidable. The following Instructions may perhaps contribute to your assistance in this difficulty.

It is almost needless to say that the administration of the Law both Civil & Criminal in England is incumbered with a multitude of forms, & attended by a degree of expence which have recently attracted the anxious deliberations of Parliament, and of His Majesty's Government. If the same system were transferred to an Infant Colony, it would, of course, be subversive of the very end it was designed to promote. Whatever may be the advantages, real or imaginary, of the complex Judicial Processes, which prevail in the Courts in Westminster Hall it will be at once admitted that in Western Australia Justice should be administered with the utmost possible degree of simplicity & economy.

The difficulty of adapting the Law of England to the condition of a new Colony has, of course, been frequently under the notice of this Department, & in the cases of New South Wales & Van Diemen's Land, Charters were issued by His Majesty under the Great Seal, & by the authority of Parliament, of which the professed object was, to diminish the probity and expence of legal proceedings. I have every reason to suppose that this end has in those instances been very completely answered. I cannot however propose the New South Wales Jurisdiction as a model entirely fit for imitation in Western Australia. The character of the Convict Population exacted deviations from the English mode of Trial in Criminal cases, which nothing but that very peculiar exigency could have justified.

A similar system was established a few years ago in the Colony of the Cape of Good Hope, and, as I have reason to think, with entire success. The great extent of that Territory, & with the wide dispersion of the Inhabitants required there, also, some Regulations for which no corresponding necessity can exist at present in the Colony under your Government.

It may, however, much abridge the labour to which you would otherwise be subject in revising a system of Judicial Administration, were you to consult the Charters of New South Wales & the Cape of Good Hope, & to extract from them such Provisions, as may be best adapted to the circumstances of Western Australia. I therefore enclose copies of those documents for your assistance, with copies of certain Rules framed by the Judges in those Settlements for simplifying the forms & practice of Legal Procedure. From these Materials, & with the assistance of the Advocate General, I should trust that you will be able to surmount the embarrassment, which, in a greater or less degree, must be inseparable from the undertaking in which it will be your duty to engage.

To provide for the Constitution of the Courts it will be scarcely a more difficult office than to select proper Persons on whom the duty of presiding in them must be devolved. At no remote period it will of course be necessary to appoint one professional Lawyer at least as Judge. For the present, it may not be necessary to incur that expence. The transactions of life in a Colony so recently settled, must be exceedingly simple, and I see no reason to doubt that, for some short period at least, Justice may be satisfactorily administered by the same body of Gentlemen whom you appear to have nominated as Magistrates, or by such of their number as are most distinguished by probity, general education, & aptitude for business. From amongst Persons of this description, you will select, at your own discretion, such as you may deem best qualified to act as Judges. That occasional errors will be committed, must of course be anticipated, & for those mistakes which result from an unavoidable ignorance of the positive Rules of Law, you will make every allowance. But with a firm purpose to administer Justice impartially, & with a Patient attention to the merits of every controverted question brought under their cognizance, I entertain no doubt, that Judges, so chosen, will promote the general interests of Society, & protect the Rights of Individuals until the arrival of that time when in Western Australia, as in more advanced countries, the administration of the Law shall occupy the entire time & attention of Persons devoted exclusively to that profession. In any event the more alarming violation of the public Peace, & all palpable encroachments on private property, will be effectually repressed, & an object of the first importance in Society will thus be secured to a very great extent, even tho' in an imperfect manner.

It will be an essential part of the scheme of Judicial Establishment to constitute a Petty Court for the Summary recovery of small sums, & to arm the Magistracy with the Power of punishing petty offences.

You will appoint such subordinate Officers as may be necessary to give effect to the Jurisdiction of the proposed Tribunals. The number of these Functionaries, I need scarcely say, should be as limited as possible.

The expence of thus administering justice, must, for the present, be defrayed exclusively by fees. Of these a Table must be framed, calculated on the most moderate scale, which will afford an adequate remuneration for the services to be rendered by the Judges & Officers of the Court. It will require your utmost vigilance, & the most inflexible decision to prevent the growth of abuses on this subject which therefore I cannot too strongly commend to your very particular notice.

From the 18th to the 25th Clause of your Instructions you will find all the Regulations which have been thought necessary for your guidance in effecting a complete Territorial division of

the Colony into Counties, Hundreds, & Parishes, nor am I aware that any addition could be advantageously made to that body of Rules, or that they demand any further elucidation.

The series of Instructions from 26th to 32nd Clause, respecting the granting of waste Land to Private Settlers, together with my accompanying despatch will, I trust, place you in full possession of the views of His Majesty's Government on that important subject.

It however remains to be stated that the Grants thus to be made should be drawn up in one uniform style. For your assistance I enclose the draft of such a form of Grant as is fit to be adopted on every such occasion.

Connected with this subject is the very important consideration which respects the alienation of Lands by sale & conveyance. The difficulty of adopting the English System of conveying has been acknowledged in all Colonies dependant on the British Crown, & has been remedied in most by the introduction of two essential Laws. The first establishes some simple Forms to the use of which is attributed the effect of a complete alienation & transfer from the Seller to the Buyer of the Property. The second establishes a general office of Registry in which every transaction of this nature is recorded, & which Record is declared essential to the validity of the transfer. You cannot too soon adopt Regulations of this nature, & for your assistance I enclose a copy of an Act passed for a similar purpose in the Island of Van Diemen's Land. In a Settlement of which the wealth & resources must, to a great extent, consist in agriculture, whatever tends to relieve the Proprietors of the Soil from uncertainty, respecting their Titles, or from embarrassment in the conveyance of their property must eminently conduce to the general welfare.

The final Clause of your Instructions relating to the execution or remission of Judicial Sentences suggests the necessity of apprizing you that by an Act of Parliament of which I enclose a copy passed in the 6. Geo: 4th cap: 6q, and by an Order of His Majesty in Council (of which I also enclose a copy which was issued in pursuance of that Statute, you possess the power of determining to what places Convicts sentenced to Transportation shall be sent. Of course the Penal Settlements of New South Wales & Van Diemen's Land are the most proper places for the reception of such Offenders, but you will take care that the Provisions of the Act, and Order in Council, to which I have referred, be strictly followed on every such occasion.

I am  
Sir  
Your Most Obedient Humble Servant  
Goderich

## Transcription of the Order-in-Council accompanying Despatch No. 2

(Begin transcription)

Copy to Gov. Stirling in N. 2 of 28 of April 1831.

At the Court at St James's  
the 1<sup>st</sup> of November 1830

Present

The King's most Excellent Majesty in Council

Whereas by a certain Act of Parliament, passed in the Tenth year of the reign of His late Majesty King George the Fourth Cap(?): 22 intituled "An Act to provide until the thirty first day of December one thousand eight hundred and thirty four, for the Government of His Majesty's Settlements in Western Australia on the Western Coast of New Holland" it is enacted that

It

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it shall and may be lawful for His Majesty His Heirs and Successors by any order or orders to be by him or them made with the advice of His or Their Privy Council to make ordain and (subject to such Conditions and Restrictions as to Him or Them shall deem meet) to authorise and empower any three or more persons resident and being within the said Settlements to make ordain and establish all such Laws Institutions and Ordinances, and to constitute such courts and officers as may be necessary for the peace order and good Government of His Majesty's Subjects and others within the said Settlements. Provided that all such orders in council and all Laws and ordinances so to be made as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and Enactments thereof respectively. His Majesty doth therefore with the advice of

His

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His Privy Council and in pursuance and exercise of the authority in him vested by the said Act, Order and it is hereby ordered that the Governor for the time being of the said Settlements of Western Australia or the Officer administering the Government thereof. The Senior Officer of His Majesty's Land Forces next in Command the Colonial Secretary of the said Territory for the time being the Surveyor General thereof for the time being and the Advocate General thereof for the time being so long as they shall respectively be resident in the said Settlements or any three of them of whom the acting Governor to be one shall have authority and power to make ordain or establish all such Laws and ordinances and to constitute such Courts and officers as may be necessary for the peace order and good government of His Majesty's subjects and others within the said Settlements which power and authority shall nevertheless be so exercised subject to the following conditions

And

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and restrictions that is to say that all such Laws and ordinances as aforesaid shall by the said Governor or officer administering the Government be with all convenient expedition transmitted to His Majesty for His approbation or disallowance through one of his Principal Secretaries of State and that the same or any part thereof shall not be in force within the said Settlements after His Majesty's disallowance thereof or of any of them or of any such part thereof or of any of them as aforesaid shall be made known therein. And further that no such Law or ordinance shall be made unless the same shall have first been proposed by the said Governor or officer administering the Government. And further that in making all such Laws and ordinances the said several persons shall and do conform to all such Instructions as His Majesty shall from time to time be pleased to issue for that purpose. And

further

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further that no Court of Justice be constituted by the several persons aforesaid within the said Settlements except by a Law or ordinance to be by them for that purpose made under and subject to the conditions and restrictions aforesaid. And the Right Honorable Viscount Goderich one of His Majesty's principal Secretaries of State is to give the necessary directions herein accordingly.

Greville

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(End transcription)