A HISTORY OF THE LEGAL SYSTEM OF JAMAICA

(1661 - 1900)

Thesis presented by

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SUMMARY

This work examines the evolution of the legal system of Jamaica and the social, economic and political influences which moulded it from the establishment of civil government in 1661 upto 1900.

In Chapters 1 to 3 economic, social and political factors by which the legal system and the law (described in Chapters 4 and 5) were dominated for nearly two centuries are described.

The special problems of legal administration in a slave society (Chapter 6), and during the period of apprenticeship which followed emancipation (Chapters 7 and 8) are examined.

The operations of a Judiciary re-modelled to meet the changed conditions of a fully emancipated society are viewed in Chapter 9 against the background of new social and economic conditions which ensued.

The gradual emergence of a principle of judicial independence is the subject of special attention in Chapter 10.

How the failing economy and political institutions occasioned retrenchment of the legal system and the resulting decline in legal administration are examined in Chapters 11 and 12.

Chapter 13 identifies the causal factors in the Morant Bay Rebellion 1865 and traces the consequential replacement of the Old Representative,

by the Crown Colony, system of Government which provided new foundations for a radically new legal system.

Chapters 14, 15 and 16 mark progressive developments under this new form of government in the legal system: the establishment of an intermediate judicial system; the assimilation of Superior Courts of Law and Equity in procedure and practice, and finally the consolidation of these courts.

In Chapter 17 the defects and deficiencies of these re-organisations of the legal system in the context of limited economic resources and bitter political agitation are examined.

Chapter 18 describes the establishment of the Resident Magistrates' Courts, whilst Chapter 19 looks at some particular developments in relation to the Supreme Court.

The evolution of the legal profession and its role in Jamaica society comprise the subject-matter of Chapter 20, and in the concluding Chapter some current problems are examined against the background of past experiences.

ABBREVIATIONS

A.P.C.	Acts of the Privy Council (Colonial Series)
Bd. of T.	Board of Trade
C.S.P.	Calendar of State Papers (Colonial Series)
C.J.	Chief Justice
C.O.	Colonial Office
C.T.P.	Council of Trade and Plantations
Eliz.	Elizabeth
G. (or Geo.)	George
Gov.	Governor
H. (or Hen.)	Henry
J.P.	Justice of the Peace
J.L.R.	Jamaica Law Reports
O.A.G.	Officer administering the Government
P.D.	Parliamentary Debates
P.P.	Parliamentary Papers
Q.B.	Queen's Bench
R.M.	Resident Magistrate
S.J.	Stipendiary Justice
S.M.	Stipendiary Magistrate
W. (ow Wm.)	William
W.I.R.	West Indian Reports
V.A.J.	Votes of the Assembly of Jamaica
V. (or Vic.)	Victoria
V.-C.	Vice-Chancellor.

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PREFACE

The three great forces in any society by the actions and interactions of which the character and growth of its legal system are shaped and moulded are economic, social and political.

"Pursuits" Ovid said "influence character",[1] and economic pursuits through their influence upon the character of a people as well as their habits of life contribute to the determination and gradation of values which, in degrees varying with the estimate such people place upon them, they enshrine in their laws.

Pursuits, however, whilst they influence, do not alone make character. Racial origins, religion, education, customs, language, history, traditions - all these components of that intangible but very real factor in society called "national character" create other currents of influence which help to tip the scales one way or another in the evaluation of those conflicting interests which press their claims upon society for recognition and protection through law and the machinery of the legal system: hence the need to consider society itself in any study of its legal system.

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[1] Ovid, Heroid Ep. xv.83 "Abeunt studia in mores"

That government exercises its authority over society through the legal system sufficiently demonstrates the vital role political forces may play in determining the development and character of the legal system. It is the legislature that in great measure make the laws by which society is regulated and it is the legislature that prescribes the machinery and provides the funds for their enforcement. The structure of political government, the degree of separation of its traditional constituents, executive, legislature and judiciary, the measure of representation of sectional interest, its very capacity for response to changing economic or social conditions are therefore factors of great consequence in considering the history of the legal system of a country. With much truth, then, it has been said that "a knowledge of the political constitution of any country is necessary to a sound and perfect insight into the merits and defects of the jurisprudential institutions which are grafted on that constitution."[2]

In the facts of Jamaican history, and particularly Jamaican history down to the total abolition of slavery in 1838, there are additional reasons of an historical nature which render some understanding of its economic, social and political origins obligatory to a proper study of its legal system. Firstly, Jamaica history of the period, like the general history of the Caribbean, is largely the story of the maritime nations of Europe making wars in the area for trade and world power.[3]

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[2] First Report (Second Series) of the Commissioners of Inquiry into the Administration of Civil and Criminal Justice in Jamaica. Page 6.

[3] H. V. Wiseman's Short History of the B.W.I. (LONDON 1949) Foreword to.

Largest of the English Caribbean islands and the cynosure of all European eyes, Jamaica could no more escape the disruption of her trade and economic life, than she could avoid hostilities or the fear and threat of them. Secondly Jamaican history of this period and down to today is the story of two diverse peoples establishing themselves in a new land, of the inevitable intermingling of the human species, of the emergence of a new race, the product of that intermingling, and of the slow and agonising evolution of a new way of life for all. Jamaican history is, thirdly, the story of the transplantation of entire political and legal institutions into a new and strange social climate and of the slow and very gradual development of these institutions.[4]

Wrong in the Introduction to his illuminating work on "Government in the West Indies" has confessed his indebtedness to a study of the operations of social forces in West Indian society. "I have allowed myself to dwell more fully than would be justified, in most constitutional studies, on the social aspects of West Indian history. In the West Indies economics, politics and law are so intertwined and the ensemble is so strange to the student from abroad that some such course is essential for intelligibility."[5]

Of nowhere in the West Indies, perhaps, is this observation so true as of Jamaica from whose economic, social and political order law was first distilled and into which the ancient roots of her legal system lie embedded.

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[4] Wiseman Op Cit. Foreword to.
[5] Hume Wrong (Oxford 1923) Preface page 6.

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CHAPTER I

ECONOMICS AND THE LEGAL SYSTEM IN PRE-1838 JAMAICA

Even before the conquest of Jamaica from Spain in 1655 a code of commercial law for the nascent English Empire had already existed.

The Navigation Acts of 1650 and 1651 embodying that Code represented parliamentary confirmation and adoption of economic doctrine common among the maritime nations of Europe. "The essence of that doctrine" Dr. Williams has said "was that a nation's well-being depended upon the achievement of a favourable balance of trade. This meant an excess of exports over imports and involved on the one hand a search for markets, and on the other, either the substitution of local products for foreign imports, or the discouragement of foreign luxuries, or best of all, the control of overseas sources of commodities which would otherwise have to be imported . . . . . All these factors emphasized the importance of colonies.[1]

The vital principles of the Acts centred around the closure of English colonial ports to foreign shipping and the restriction of English colonial produce to English and colonial ports and shipping. Behind this legislative blue-print had lain a scheme of colonial expansion which came

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[1] Eric Williams' British Historians And the West Indies. p.1.

to be known as the Western Design and embraced as its major objective the conquest of the largest West Indian island, Hispaniola.

Pre-occupation with the first Dutch War (1652-1654) which was the direct result of the Acts themselves had, however, arrested the forward thrust of the commercial plan, the conquest of Hispaniola ended in ignoble defeat, and when in 1660 the Cromwellian era came to its end, the only visible fruit of its labours was Jamaica which the English forces in their retreat from Hispaniola had found weakly defended by the Spaniards and had taken, almost without a struggle.

Restoration of the monarchy did not however necessarily mean the end of Cromwellian economic policy. As Thornton has said "the restoration of the English monarchy in 1660 involved the shoring-up of an administrative structure whose weakness war and revolution had already made plain ..... England had to make her way in a jealous world, obtain political unity, increase her wealth and maintain her population."[2]

To the King's Counsellors, many of whom had been members of the late administration the road to this El Dorado seemed to lie, not unnaturally, along the very route which they and the Dictator had but partly trodden. Within three months of his accession Charles, not surprisingly, affixed his signature to another Navigation Act[3] which re-enacted confirmed and extended the earlier statutes and was, on the adjournment of Parliament, assured by Mr. Speaker that "this Act will enable Your Majesty to give the

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[2] A. P. Thornton's West India Policy under the Restoration p.1.
[3] 12 Car II C.18.

law to foreign princes abroad as your royal predecessors have done before you. And it is the only way to enlarge Your Majesty's dominions all over the world; for so long as Your Majesty is master at sea your merchants will be welcome wherever they come and that is the easiest way of conquering."[4]

This Act "for the encouraging and increasing of shipping and navigation" ordained that no goods or commodities should be imported into or exported out of any English colonial possession in Asia, Africa or America in any other ships or vessels but in such ship or vessels as did truly and without fraud belong only to the peoples of England or Ireland, or were built of and belonged to any of the said English colonial possessions and where-of the master and at least three-quarters of the crew were English, under pain of forfeiture of ship and cargo in any court of record, the proceeds of sale being divided in equal parts between the King, the Governor of the colony in which the proceedings were brought and the person informing or suing for the same." Admirals in particular were authorised to seize offending ships and bring them in as prize and deliver them to the colonial Court of Admiralty and in case of condemnation there, to receive one-half of the proceeds of the sale, the other half going to the King. Importation of the produce of the non-English parts of America, Africa and Asia into England or Ireland was likewise prohibited except in English, Irish or colonial ships similarly navigated. Further certain goods such as sugar, tobacco,

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[4] Parliamentary History IV p.120.

cotton-wool, indigo, ginger, fustic and other dye-ing woods, called "enumerated" goods could be taken only to England or to English plantations. Compliance with this provision was ensured by requiring ships leaving English ports to give bonds to carry their enumerated commodities back to England, whilst vessels arriving in the colonies from any other place were required to give bonds there to take these products either to England or to some English plantation.

Two subsequent Acts completed the basic structure of the re-vitalised economic plan of the Restoration Government.

The Staple Act of 1663[5] prohibited the exportation to the plantations of goods from Europe save in English ships laden and shipped in England upon pain of forfeiture in any colonial court in the plantation where the offence was committed, the proceeds of sale after condemnation being divisible in equal shares between the King, the governor, and the informer or person suing for same. Strict rules were laid down to be carried into execution by plantation governors.

Deficiencies in the actual working of the enumeration clauses of the Navigation Act led to the enactment of the third Act. Where imported into England enumerated goods were subject to import duty, but when shipped to colonial territories, little or no duty was payable thereon, the result being that colonial consumers paid less for such goods than their fellows in England. Further on re-exportation from England, only a part of the duty originally paid on enumerated products was refunded

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[5] 15 Car II C.7.

and consequently in the competition in foreign markets such enumerated goods experienced some disadvantage in relation to similar products coming directly from the colonies. By laying an export duty on enumerated commodities payable before shipment from one colony to another, unless bond was first given to take them to England and nowhere else, the Plantation Duties Act of 1673[6] sought to remove these loop-holes in the commercial system.

Simultaneously with these legislative labours, the Crown had vigorously prosecuted the trade to Africa. In the very year of the Restoration an African Company was formed with the King's brother, James Duke of York, at its head in order "to link together the scattered operations of individual merchants in the slave trade."[7] Neither its collapse in 1663, nor that of its successor, the Company of Royal Adventurers to Africa nine years later, could thwart the resolution of the English Government to establish its own sources of supply of this relatively cheap and inexhaustible labour on the African continent. The Royal African Company was immediately chartered and like its predecessors received the financial support not only of many eminent statesmen, officials and merchants interested in large colonial and commercial enterprises but also of the members of the royal household itself. The policy of imperial self-sufficiency which was the corner-stone of the commercial

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[6] 25 Car II C.7.
[7] A. P. Nenoton's "The European Nations in the W.I. (1493-1688) p.230.

system could not brook dependence of colonial planters upon European commercial rivals for their essential supply of labour.

"These three Acts of Parliament - the Navigation Act of 1660, the Staple Act of 1663 and that of 1673 imposing the Plantation Duties Act - constitute", as Beer has said "the conomic framework of the old colonial system which for nearly two centuries regulated the course of trade in the British Empire."[8] Its aim was the creation of one great commercial dominion in which mother country and dependency were to be mutually complementary, the one supplying as far as was possible, the manufactured products consumed in the colony, and the other the tropical products and the raw materials not produced in Great Britain. All trade within the Empire was to be carried on exclusively in English and colonial shipping with the object of increasing the Empire's naval strength. Colonial produce received preferential treatment in the English market by a system of preferential duties, or by direct bounties or by a combination of both. On the other hand European and Asiatic products could be imported into the colonies only from England, though there were important exceptions, and in addition the fiscal system was so arranged that upon payment of slight duties foreign products reached the colonial market from England. In particular the whole burden of imperial defence, in a day when colonies, incapable of defending themselves, were exposed to the attacks of powerful European rivals, fell upon England. On a whole, therefore, the system was based on the idea of mutual reciprocity of the

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[8] G. L. BEER The Old Colonial System 1660-1754 (NY 1912) Vol I p.84.

economic interests of mother country and colonies and for the protection owed by the former, the latter were expected to yield their obedience to the imperial Acts affecting the Empire as a whole.

Within this system, colonies of course had a critical role to play and the West Indian islands answered fully the requirements of ideal colonies. The enumeration of the exotic products of tropical colonies and the vigorous and relentless prosecution of the slave trade identified the islands of the Caribbean as possessing the indelible imprint of ideal colonies.

Little surprise could therefore have been stirred even in the Spanish Court when, in replying to insistent demands for the return of Jamaica, the Spanish Ambassador was advised in December 1660 that the King of England did not find himself obliged "de rendre ces deux places de la Jamaique et Dunquerque."[9]

Thus in 1660 a few curt words transformed a regicidal conquest into a royal plantation and Jamaica became at once a cog, albeit a very important cog, in the extensive complex of this commercial system directed and controlled from four thousand miles away.

The creation of a special committee of the King's Privy Council charged solely with the business of Jamaica,[10] the enticement to the colony of planters by generous offers of land, the allurement of merchants by extended tax holidays on imports and exports,[11] the prompt dis-establishment

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[9] P.C.CAL I p.302 (see also Beer Vol.I p.5 footnote
[10] APCI No.522.
[11] CO 140/2 Appendix to page 6.

of military rule and the grant of a constitution after the model of the parent state[12], bear eloquent testimony to the conscious efforts and passionate desire in high places of state to activate the plantations as rapidly as possible.

Unhealthiness of climate, however, noxious diseases, the second and third Dutch Wars (1665-7; 1672-8), the direct results of the Navigation Act of 1660, thwarted the efforts of the English Administration towards any rapid settlement of the colony in the first two decades after 1661, whilst the rich rewards of buccaneering diverted the energies of the colonists from the arduous and humdrum toils of agricultural labour. In addition a protracted though ultimately abortive attempt by the Crown in the years between 1678 and 1680 to suppress constitutional liberties not only shook the confidence of prospective settlers but occasioned many departures from the island.

With the restoration in 1680 by the English Government of the ancient form of popular representative government, the economic prospects of the island became brighter. Industry began to tred in the footsteps of newly-won liberty and, despite many natural calamities, immigration of white settlers improved, even if slowly, the importation of African slave labour received a fillip, whilst the outlines of the routine economic life of the country began to assume its future well-defined pattern.

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[12] Ibid pp. 5-6.

"Early attempts at diversification of the economy were continually but half-heartedly made . . . . Ginger, fustic, cotton, pimento and ebony were all grown, but of these only ginger was cultivated enough to find a place of its own on the export sheets. Cocoa had shown promise at one time, but a mysterious plague had destroyed most of it in the 1670's. Indigo had once been widely grown in the parish of Vere, but the French were soon able to undersell it enough to kill it completely".[13] Whilst other agricultural pursuits waxed and waned, the cultivation of sugar showed a steady and consistent upward trend. In the period 1680-1684 8000 hogsheads of sugar on an average were annually shipped to England. In the succeeding five years this average annual shipment was increased to 12,000 hogsheads. By the close of the 17th century the cultivation of sugar together with its by-products rum and molasses became the predominant agricultural activity of the island.[14]

Jamaica now became fully activated. Local circumstances had in the context of the overall requirements of the imperial system directed the economy inexorably in the direction of sugar production.

Sugar plantations generally averaged 8 or 900 acres[15] in size. Land was plentiful and not expensive, but the average labour force on such a plantation would usually consist of over 200 slaves apart from white overseers, book-keepers and the domestic staff.[16] Strong and

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[13] George Metcalfe Royal Government and Political conflict in Jamaica 1729-1783 (1965) pp.11-12
[14] Beer VOL. II p.81
[15] Metcalfe P. 12.
[16] Lady Nugent's Journal by Wright (1966) p.44 footnote

healthy slaves were expensive, the average price varying between £25 and £40 and in the early years were difficult to obtain, having been reserved for the Spanish colonial market. Added to this was the cost of erection of a sugar-factory. The juice of the sugar cane has to be extracted almost immediately after the cane has been cut in order to prevent fermentation and in the absence of a system of rapid transportation from cane-field to central mill every sugar-estate has to have a factory as well as a farm. Mills from England for grinding the cane, copper cauldrons from the same source for boiling the extracted juice, cooling vats too for cooling and draining the liquid, stoves from New England for making the hogshead in which to store the "enumerated" product - all these were part of the essential but expensive equipment for the establishment of an efficient factory.[17]

A well laid-out sugar plantation was an establishment of no mean proportions. Burn has described a typical plantation in these words "The works usually white and clean comprised an extensive range of buildings. There were the overseer's house and the store with the barracks for the book-keepers, carpenters, and masons; the mill-house, boiling house, cooling house, and still house; the carpenter's, cooper's and blacksmith's shops and extensive trashhouses. A little way off stood the hospital or hot-house and on the rising ground overlooking all, the Great House or Proprietor's Mansion, flanked by the negro houses or slave village; these last being buried in coconut, orange, and avocado-

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[17] Wrong p.47

pear trees."[18] It has been said that £30,000 was the minimum capital outlay requisite to create such an establishment.[19]

Few persons could provide this not-inconsiderable capital expenditure and so many of the estates came to be owned by English capitalists or mortgaged to English banks,[20] and as the commercial system to which the island was tied necessitated the exportation of her "enumerated" produce to, and the importation of her manufactures from, England, to meet the recurrent annual costs on sugar production, a system of credit with the merchants of England developed whereby "the cultivation of sugar plantations was carried on by the process of drawing bills against the consignment of produce."[21]

The one-crop nature of the economic life of Jamaica, its dependence upon slave labour and external trade, the necessary subordination of her economic interests to the wider interests of the imperial commercial system and the method of overseas financial credit had the most profound legal implications.

One such obvious and direct implication concerned the early introduction and the gradual rise to prominence of a court described by Burke as "one of the capital securities of the Act of Navigation."[22] As the judicial arm of the law-enforcement machinery under the Act of

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[18] W. L. Burn Emancipation and Apprenticeship in the British W.I. p.37.
[19] Wrong p. 47
[20] CE Carrington The British Overseas (Cambridge 1950) p.102
[21] CO 137/313 Gov.Grey to Earl Grey 2/3/1652.
[22] Edmund Burke on Conciliation with the Colonies (March 22 1775) and CO 140/2 appendix to-p.3. See also Chapter 4.

Navigation the Court ofVice-Admiralty became the watch-dog of imperial interests which in the eyes of the colonists did not always co-incide with their own. In such circumstances colonial resourcefulness was at times prompt either to size upon statutory provisions of dubious interpretation in order to impugn or obviate the jurisdiction of the court; or to discern and capitalise upon constitutional principles with which the procedure of the court conflicted.

In some cases, the court exercised an exclusive jurisdiction, in others it had a concurrent jurisdiction with colonial courts of common law, whilst in a third set of circumstances jurisdiction was limited to courts of record.[23] As participation by governors or naval officers in the spoils of a condemned ship depended upon the court of condemnation, nice issues of conflicting claims to jurisdiction between the vice-admiralty court and the colonial courts of common law not surprisingly arose from time to time, but behind the intricate legal facade, the powerful motivation of economic interests lay barely marked.[24]

Further, the spectacle of a court, in which jury trial did not obtain, but which participated in the fruits of its own condemnation was calculated to arouse the active animosity of a colonial society to whom notions of liberty and security of property were inextricably bound up with the verdict of their local peers. Indeed as will be

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[23] 12 Car II C 18 SI; 15 Car II C7 S5 and 25 Car II C7.
[24] CSP Cal 1685-8 pp.303, 356, 357
3 CSP Col 1675-6 Nos. 958: 972: CSP Col 1677-80 Nos. 195: 200.

seen[25] it was an early Jamaican statute ousting the jurisdiction of the vice-admiralty court and under which a Dutch vessel illegally trading in slaves to the colony had been released which in part precipitated the constitutional crises in 1677-80 and moved the Crown to attempt to force upon the island the legislative system of Poyning's Law.[26]

The proliferation of inferior courts in the island and the attendant multiplicity of judges which were prononounced features of its judicial system until the economic crises of the 1840's and 1850's forced a retrenchment of all civil establishments[27] were direct consequences also of the routine pattern of the economic order of society.

Community development, it seems natural to assume, followed the areas in which agricultural activities developed. These in their turn were largely dictated by the geographical features of the country which were characterised by broad coastal plains - suitable for sugar plantations - divided from east to west by a long range of mountains rising to their highest point in the Blue Mountains of the east.[28] It was under the shadows of these mountains on the southern side that the three earliest settlements under English rule were reared up and it was there also, at

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[25] See Chapter 6.

[26] So called from Sir Edward Poyning (1459-1521) who opened at Drogheda on 1/12/1494 the Parliament which passed the celebrated Act widely for the next three centuries all legislation submitted to the Irish Parliament required first to be approved by the English Council (Cambridge Modern History Vol. 1 p. 472)

[27] CO 137/327 Barkley to Russell 8/8/1855. For Courts see Chap. 4.

[28] Metcalfe p. 3

the capital St. Jago de la Veja (Spanish Town), at Morant Bay fifty-one miles to eastward, and at Point Cagua (Port Royal) the naval station, commercial capital and rendez-vous of the buccaneers that the first courts of law were in 1661 established.[29]

The physical obstacle of the high mountain ranges, the fact that these mountains had been the abode of the hostile maroons,[30] the resultant difficulties, delays, dangers and expense of travel and communication, and the very extent of the country in relation to its population would have tended to promote the isolation of the communities from the capital as they developed.

Thus in 1664 the work of proliferation began when "on consideration of the large extent of the island and the wide settlements, Governor Modyford decided that "the only way to keep them (the inhabitants) in order and to give speedy justice is to divide the island into counties, hundreds and tythings to keep monthly county courts, also court leets to save the allegiance of the inhabitants."[31] Four years later he reported that he had "found here but one Court of Common Pleas, but on petition of the Assembly divided the island into six precincts and established in each of them a county court with three judges and justices of the peace as in England and one Supreme Court to have jurisdiction over all pleas whatsoever . . . . in this Court are also three judges."[32]

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[29] CSP Cul 1660-8 NO 108.
[30] Former Negro slaves of the Spaniards who fled to the mountain after the defeat of the Spaniards and the conquest of Jamaica by the English.
[31] Modyford to Sir James Modyford his brother CSP Col 1664-8 NO 785.
[32] ASP Col 1660-8 1702.

In 1668 therefore with a total white population of about 6000[33] there were seven courts presided over by twenty-one judges. Two years later when the number of parishes had been increased to fifteen[34] and the white population to about 7000 by immigration and otherwise the number of judges stood at twenty-nine.[35] From nineteen parishes in 1728, the figure gradually rose to 22 by the middle of the nineteenth century. As parishes increased so the judicial institutions increased and the complement of judges as well.

Further in 1758 "for the speedy despatch of justice and for the greater ease as well of the inhabitants of the island of Jamaica who live remote from the Town of St. Jago de la Vega, as the merchants, masters of ships, and other persons who are concerned in the trade and commerce of the island and are obliged to attend the Supreme Court either as prosecutors . . . . or as jurors"[36] the King in Council consented to the passage of an Act dividing the island into three countries for two of which Courts of Assize and Nisi Prius were established each with its separate complement of three judges.

When in 1774 with a total white population of only 12,737 there were over one hundred judges in the land, the situation received the just condemnation of the historian Edward Long. "When judicial commissions are rendered so cheap and common they soon begin to lose much of their dignity and value in the eyes of many, even among the wiser planters, and

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[33] Frank Cundall's Governors of Jamaica in the 17th Century pp.19 and 60.
[34] Cundall p. 93.
[35] CSP COL 1671-1680 NO 1371. Sec'y Pomell Account of the Govt. of Jamaica

[36] CO 137/30: 29/6/1758 p.121.

by this means very unworthy and illiterate persons may presume to aspire to them and thus make the office of an associate (judge) disgraceful and useless."[37]

A third point to be noticed in connection with the legal complications indirectly arising from the nature of the economic ordering of Jamaican society relates to the utter dependence of the system upon slave labour, to the constant feeling of insecurity it bred, to the instincts of self-preservation which it aroused in the planter and to the measures he consequently prayed in aid.

Slave laws for its regulation and slave courts[38] for its maintenance and enforcement were the inevitable corollary to the slave status imposed in the economic order upon the peoples of African origin and descent. From economic and social distinctions there therefore sprang up two systems of law, English Law and Slave Law, intertwining but separate, both nurtured in the common soil of a slave society. Distinctions before the law, exclusive rights and privileges, immunities and disabilities all founded in tint became part of the legal order, and from inveterate practice inveterate attitudes arose which long after the abolition of slavery were to affect and condition the growth and development of the legal system.

Slavery, the most insecure of foundations upon which to build an economy, was, in the case of the negro, to prove also the most disastrous.

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[37] Edmund Long: History of Jamaica Vol 1 p. 74. There were then 30 judges of the Assize Courts and 75 judges of Common Pleas.

[38] See Chapter 9.

Slave rebellions which began as early as the late 60's of the 17th century increased in extent and savagery with the rapid growth of the slave population. Extensive destruction of cane-fields in the outbreaks of the 1740's and 1760's were exceeded by those of 1824 and 1831. In the intervening years uneasy quiet, punctuated by sporadic outbursts, was maintained only at great public expenditure in the support of regular English troops and local militia, whilst the mounting agitation in England against the slave trade and slavery itself, the gnawing fear of the duplication in Jamaica of the successful slave revolt in St. Domingo in 1791, and the untiring labours of the Dissenting Ministers, in the teeth of fierce opposition, to bring Christianity to the slaves, kept public spirit in a sustained state of high anziety. In 1832 a Committee of the House of Assembly reported damage to property arising out of the slave rebellion of the previous year to over one million pounds.[39]

These rebellions and frequent damage to plantations and loss of lives, both of slaves and of slave-owners, had long acquainted the planters with the dubious economic value of their property in slaves. This property, however, was one which had been enshrined for many decades as well in imperial as in colonial statutes and the planters stood on impregnable legal grounds when they asserted that "our right of property in slaves has long been established and is as well defined and recognised as the Laws by which Your Majesty fills the throne of England."[40]

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[39] CO 137/181.

[40] CO 137/189 Resolution of the House of Assembly after passing the Slavery Abolition Act in December 1833.

Economic insecurity sharpens the native instinct of self-preservation and before the relentless campaign to strip the planters of this specie of property, to dependence on which their whole way of life over the years had habituated them, the planters' instinct found sanctuary alternatively in the constitutional principle of non-interference by the imperial power in the domestic affairs of a colony[41] or in "the constitutional maxim that the property of the individual cannot be sacrificed for the good of the State without ample compensation to the party injured."[42]

Thus the slave trade "an integral and organic part of the old colonial system"[43] and its corollary, slavery, the very foundation of tropical plantation economy[44] provided the ground on which one of the fiercest and most sustained conflicts between morality and legality was waged.

Throughout the centuries of slavery and particularly whilst these profound issues were being slowly resolved in the years before the abolition of the slave trade in 1807 down to 1838, the year of the total abolition of slavery in Jamaica, the conflicting interests of the slaves and their supporters, the Dissenting Ministers on the one hand, and of the planter/slave-owners on the other hand increasingly found their way to the arbitrament of a judiciary whose composition of planter/judges and planter/

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[41] Resolution of House of Assembly 31/10/1815.
[42] CO 137/297.
[43] Beer Vol I p.321.
[44] CO 139/6 p 6 "the whole wealth of the inhabitants of this island consisted chiefly in the labour of their slaves" Resolution of Gov. & Council 1661

juries brought out into naked view such critical issues as the integrity and independence of the judges and the impartiality of juries, issues which in the very nature of Jamaican society could at no time have been really fully hidden even from casual view.

The final aspects of the influence of economic factors upon the legal system to be considered relate to the impact of the imperial economic system itself and of the system of overseas financial credit upon the status of the judiciary.

Of the former a Governor of Jamaica once said "Throughout the whole sphere of British commerce there are always the interests and necessities of merchants and planters and adventurers pressing upon those of the stationary population and permanent tenants of the soil, mixing themselves up with them and over-flowing them. The system of commerical credit and exchange, loans, public and private, banks and joint-stock companies, produce curiously complicated relations, inexhaustible sources of dispute and means of injustice, the most pervading and extensive and most difficult of control".[45] To this catalogue of the tangled commercial problems that of necessity came from session to session before colonial judges for determination may be added the intricacies of mortgages, bonds and securities.

The need for judges bred to the law in all the courts before which these commercial problems, difficult and perplexing in their very nature, and of consummate importance to parties as well as to the general

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[45] CO 137/302 Gov.Grey to Earl Grey 21/4/1849.

stability and progress of commerce to which imperial policy attached so much value, seemed as obvious to contemporary colonists as it does today, to the observer of this strange era in Jamaican history. It remains however one, but only one, of the many curios of that history that apart from the first five chief justices who all demitted office within the first decade after 1661, there was not a professional chief justice in the colony until 1801[46] and that the courts of record did not all become fully professional until 1867.

The voice of criticism against this system of non-legal judges which prevailed throughout the colonies, was forcibly raised in the older sister colony of Barbados. There in 1701 Codrington, an earnest administrator of great perspicacity observed "There is more ignorance than corruption among us . . . . and I have seen verdicts, judgments and indeed whole processes so very monstrous that I couldnot but at first suspect them to proceed from villany and bribery, when upon further examination I had reason to remain satisfied that they were really the offspring of wrong principles, irregular methods and want of discernment".[47] Eight years later another gubernatorial voice, that of Handasyd from Jamaica, joined in the outcry. "I do not know what will be the event of matters here . . . . . except there will be a chief justice sent over here from Great Britain who is a man of learning and will support the Laws of Great Britain, I do not see anything in our Courts will go right."[48]

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[46] Lady Nugent's Journal p.44 footnote. Also Report Commissioners of Inquiry

[47] CSP Col 1705 No. 294

[48] CSP Col 1706-8

Things, however, did not go right up to 1720, and indeed for many years thereafter, for in that year the chief justice complained to the Board of Trade that "often for want of knowledge both in Bench and Bar, the laws are wretchedly construed and perverted."[49]

Even after it had become customary to appoint only a professional gentleman to the office of chief justice, the value of his training and experience could be lost by the majority vote of the two or more lay judges who by law were associated with him.[50] The absurdity of the situation received the public demunciation of the Attorney General in 1836 when in the course of proceedings before a bench of three lay judges in the Supreme Court he expressed "that it was very much his desire to bring on the trial in the presence of the chief justice (who was absent), that he felt the want of a legal judge, that whilst he entertained the opinion of great integrity and intelligence in the court, they were no lawyers."[51]

Thus the technical legal problems related to the working of the commercial system raised and kept alive the need for a professional bench of judges competent by training and experience to deal with the subtleties of the law, but love of power and fear of the spirit of independence of men bred to the law preserved and tightened the planters' control over the judiciary.

The natural tendency of the system of commercial credit which has already been described was to place the colony in its relationship with

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49 C.T. Bunad CSP Col 1719-20 No 548

50 Report Commissioners of Inquiry

51 Newspaper Report - Jamaica Despatch & New Courant of 23/2/1836
CO 137/218 - case Mason v. Oldrey

the mother country in the position of a debtor to a creditor. Despite the harvest years of 1766-1776[52] and the Indian Summer of planting prosperity in the 90's of the 18th century,[53] the one-crop economy founded upon slavery and upon unreliable external trade slipped inexorably to its inevitable disaster and the potential debtor/creditor relation gradually became an actual one.

As early as 1756 the planters were reported as "seldom out of debt; for the charges attending a sugar settlement are very considerable and constant; the interest of money very high and their natural ~~prosperity~~ probensity to increase their possessions constantly engaging them in new disbursement and contracts."[54] By 1803 their only three topics of conversation were said to be "debt, disease and death".[55] By 1847 "the plain truth was that the whole body of planters and merchants and their subordinate agents who depend on advances of money on credit are in a deplorable way".[56] Eight years later the island was described as a "community of debtors",[57] a character which it had in fact always borne.

The system of financial credit therefore created a plantation of debtors, actual or potential, in whose courts litigation in respect of the recovery of debts due, or the realisation of securities given, or the foreclosure of mortgages, granted, had usually to be pursued. At best, justice could hardly appear to be done in courts whose judges and juries

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[52] Metclafe p. 167 et seq.
[53] Ibid p. 228
[54] Patrick Brown The Civil and Natural History of Jamaica (London 1756) p.23 also W. Burn p.22
[55] Lady Nugent's Journal p. 184
[56] CO 137/292 Gov. Grey to Earl Grey 22/4/1807
[57] CO 137/326 Gov. Barkly to Herbert 31/3/1855

could not quite remove the stain of bias with which their offices would be besmirched by reason of their interests as merchants, planters, estate-attorneys or arising from ties of blood or friendship in a small community. At worst, "cases frequently occurred" said Lord Nugent in the House of Commons "in which merchants and absentee proprietors are forced into the most ruinous compromises by the impossibility of obtaining justice against resident planters or managers".[58] In 1765 Chief Justice Thomas Fearon was dismissed not alone because "he was by no means qualified for the post, having never been bred to the profession" but also because he was "so embarrassed in his affairs that at this time there are writs of venditioni exponas standing out against him to the amount of £35,000".[59] Nine years later even the historian Edward Long, himself a planter, slave-owner and former sole judge of the court of Vice-Admiralty could not withhold the observation "the mind of man is subject from the infirmities of human nature to receive an impression of partiality in many cases where friendship, consanguinity, family interest or sense of honour severally act upon the passion that for this reason a person presumed to be under the impulse of such motives is deemed incompetent as a witness in matters where that impulse may pervert his conscience and it is probable that a false judgment, as a false testimony, may be given where the mind is prejudiced."[60] In 1801 when the first professional chief justice was appointed Governor Nugent "made it a point with him (Mr. Kirby) that he

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[58] Parliamentary Debates 1822 HC. p.1804
[59] CO 137/33 p.227
[60] Edward Long Vol 1 p.76

should hold no second situation (e.g. estate-attorney or manager) but devote himself solely to his duties as chief justice"[61] and this prohibition was later embodied in the law.

In conclusion, it may be noticed that it was from three areas of critical weakness in the economic structure of pre-1838 Jamaica that the impact of economic forces upon law and the legal system derived. These weaknesses of course related to the dependence upon and morality of slave labour, to the dependence upon overseas financial credit and to the dependence upon the imperial commercial system from which it had derived its very existence.

These circumstances in their several ways created conflicts of local and imperial economic interests and emphasized in varying degrees the basic problem of local economic insecurity. The planter's possession of "good estates"[62] in conjunction with other factors of a social character obliged Governors consistent with their Instructions to elevate him to judicial office. Possession of freehold also qualified him under law for jury service. From these offices conflict of interest and duty became at once apparent and in succeeding years even acute. Radiating from this central problem were the closely related problems of the competence, independence and integrity of the judiciary, security of tenure of the judges, impartiality of juries, just and equal laws for all. All these in turn were magnified so many times over by the proliferation of courts and multiplicity of judges which economic forces also in

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[61] Lady Nugent's Journal p. 45.
[62] CO 138/22 Instructions of Gov. Lyttleton 1761.

combination with geographical and other factors of a less permanent and enduring nature had tended to promote.

Sufficient has perhaps been said to indicate that these problems remained with the legal system down to 1838 and beyond. That they did is to be understood by reference to the study of the society itself with which their continuance was compatible and of the political order by which they were sustained.

CHAPTER II

SOCIETY AND THE LEGAL SYSTEM IN PRE-1838 JAMAICA

The people who inhabited Jamaica immediately after the conquest were composed of the residue of Cromwell's army together with a few Portuguese to whom were added in the pre-Restoration period some settlers from Antigua and Nevis, prisoners of war taken in Royalist uprisings in England and some of "the lewd and dangerous persons, rogues, vagrants and other idle persons, having no way of livlihood and refusing to work"[1] whom Cromwell's Council of State, upon failure to attract more worthy emigrants, had ordered to be apprehended and transported to the English plantations in America.

The moral state of most of this early soldiery, from among whom the hard core of the future white citizency of Jamaica was to be composed, was far from commendable. "Hectors and knights of the blade with common cheats, thieves, cut-purses and such like"[2] was the description of a contemporary writer. Others had hailed from Barbados "that Dunghill whereon England doth cast forth its rubidge",[3] were unsuccessful planters unsatisfactory servants and wastrels and "the most prophane, debauched

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[1] CSP Col 1574-1660 p.447
[2] British Empire Series p.380
[3] Hume Wrong's Govt. of the West Indies p.23

persons that we ever saw, scorners of religion and indeed men kept so loose as not to be kept under discipline and so cowardly as not to be made to fight".[4] St. Kitts, Nevis and Montserrat, small islands in the eastern Caribbean, made their contribution of new settlers who though small in numbers were reputed to be men of creditable background.

Reduced by disease, famine, conflict with the hostile maroons, and other vicissitudes, these the earliest post-conquest settlers numbered at the Restoration scarce 5000 souls.

In the three immediately succeeding decades however there was added to this original stock three streams of white humanity, two of which served merely to strengthen and consolidate existing conditions of irreligion, lawlessness and debauchery.

The first was associated with the people called "Buccaneers" because of their peculiar method of curing or "boucanning" the flesh of the cattle, horses and pigs which abounded on the island of Hispaniola, the northern and western shores of which these men had inhabited in the early 17th century. Principally Frenchmen but with some Dutchmen, Portuguese and Englishmen among them, they were all either sailors tired for a time of the sea, white servants escaped from bondage or refugees from political or religious persecution, and the loneliness and squalor of their lives did nothing to improve them. They found however no permanent abode upon Hispaniola. Spanish intransigent policy of exclusive possession of the Caribbean could not tolerate the presence of these intruders upon this otherwise sparsely inhabited territory and Spanish

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[4] A. L. Burn History of the West Indies o,

hostility drove them first to Tortuga, a small island off the north-west coast, and finally to the open seas where this heterogeneous group of men were welded together by the fire of common hatred for the Spaniards into an international band of the most desperate and bloody pirates.

After the conquest Jamaica's waters became their haven and until 1670 Port Royal was their sanctuary. From there they sallied forth under the protection of letters of marque as pirateers against Spanish shipping and thither they returned with Spanish loot. "The money of the buccaneers was wasted in a few days in taverns and stews . . . by giving themselves to all manner of debauchery with strumpexts and wine"[5] and Port Royal, the most populous town in the island, became the richest and most wicked place on earth, whilst the excitement of gain drew off many settlers from planting to privateering. Buccaneering acquired respectability and became a trade which a god-fearing merchant need not fear to support, nor, it was whispered, a king to support.[6]

Official countenance of buccaneering ended with the Treaty of Madrid in 1670, but it was many years before the actual way of life disappeared from the island for "this kind of rapine is so sweet that it is one of the hardest things in the world to draw those from it who had used it so long."[7]

The second addition to the primary stock of white settlers

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[5] A. L. Burn's p.7.
[6] Wrong Op cit. p.28.
[7] CSP Col 1675-6 p. Gov. Vaughan to the Sec'y of State.

derived from the prisons and streets of England. In December 1666 the English Government ordered "all Scotch rebel officers and ministers to be hanged, of the common sort, one in ten to be executed; one in ten to be forced to confession and the rest to be sent to the plantations"[8]. A year later Jamaica participated with other English Plantations in the questionable bounty of many prisoners of both sexes condemned in the mother country. Between the years 1677 and 1680 a number of English convicts were transported to the colony and in 1685 the population of the island was considerably augmented by the arrival of many who were convicted of participation in the Rye-House Plot and reprieved from hanging on condition of serving ten years in the West Indies. During these years and despite prohibitive legislation a practice called "spiritting" flourished at the ports of England. Masters kidnapped youths in the streets, "spiritted" them away in their vessels and carried them off to the West Indies where they were sold into temporary servitude.

The third stream of white humanity constituted the nucleus of the planting class. 200 of these came with Governor Windsor in 1662 and in the following year, his successor, Modyford, brought from Barbados near one thousand souls. Persons out of debt, "they were reported to be, most belonging to composed families and are now planting apace having been set down where they desired to plant".[9] In 1674 under the Treaty of Westminster 250 Surinamers were transferred to Jamaica. They had been engaged in agriculture for years in their former settlement and in

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[8] CSP Col 1661-8 NO 1351.
[9] CSP Col 1661-8 NO 767.

the Governor's view "constituted a considerable addition to us, most of them being well settled and exceedingly pleased with the island."[10]

In process of time, one writer recorded, these three hetrogeneous groups of settlers became amalgamated and from various local circumstances assumed something like a common character,[11] and another observed that "in those days the inhabitants of this island were certainly a very unpolished and uncivilised race."[12]

The external growth of the white community still continued to derive from the same sources.

The prisons of England still supplied the island with settlers whose laziness, indolence and depravity of character continued to arouse protestations.[13] The flow of indentured servants from Ireland, "the poor whites" of the island went on until the late 18th century,[14] whilst after the Act of Union in 1707, many young Scotsmen sought their fortunes

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10 CSP Col 1675-6 NO 932.
11 Jamaica Enslaved and Free British Museum £26.
12 Address by Bryan Edwards to the Assembly 1789.
13 CSP Col 1717-18 NO 681 Governor of Jamaica to Board of Trade "Several people have been lately sent over out of the gaols of England upon the encouragement of an Act of Parliament pass'd the last Session . . . . . These people have been so far from altering their evil courses and way of living and becoming an advantage to us, that the greatest part of them are gone and have induced others to go with a pyrating and have inveigled and encouraged several negroes to desert their masters. The few that remain proves a wicked lazy indolent people so that I could wish the country might be troubled with no more of them."
14 Long's Op cit VOL.1 pp.510-511.

in Jamaica as merchants and planters. The Jewish community which had been identified with the island even before the conquest grew and by 1730 numbered about 900. Abstemious and hard-working, they generally did well, trading with English Jews and monopolising much of the trade with the Spanish colonies.

Gain, however, the lodestone of the island's settlement, began in the 18th century to produce curious re-actionary forces which not only arrested the process of external growth by immigration, but deprived society of the benefits of a measure of its internal growth by procreation.

The planters' greed had early led to the monopolisation of lands far beyond their needs and in 1715 it was reported that "the greatest part of the valuable land unsettled had long since been patented and is now in hands who neither cultivate nor care to dispose of it."[15] This situation, a Board of Trade Enquiry reported, had resulted in the hoisting of prices for the remaining less fertile and accessible lands which operated as a discouragement to new-comers. It was found also that the scarcity of white inhabitants had led to the teaching of handicraft trades to blacks which in turn provided less job-opportunities to prospective white servants. Several recommendations were made to check these disincentives to immigration, including dispossession by law of proprietors owning extensive tracts of uncultivated land, the limitation of future grants to a stated maximum acreage with conditions for the maintenance of so many

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[15] CO 137/11 Hamilton to Board of Trade 30/8/1715. Long described the Creole white as "fond of monopolising large tracts of land, buying up all around them, and attempting to settle new estates before the old one is cleared of debts. pp.265-6.

white men per 100 acres of land, and the cessation of the practice of negro tradesmen. The old idea of establishing a race of yeoman farmer settlers was tenaciously slung to by the British Government, but met with little success. Legislative schemes[16] encouraging white immigration and placing special taxes on planters having fewer than a certain quota of white servants were promoted from time to time in the 18th century and met with some success, but land monopolisation, the planter's yardstick of his ascendancy in life, proved insuperable, to the discouragement of any rapid external accretion to society.

Far more injurious to society than this check to its external growth, however, was the development in the 18th century[17] also of absentee landlordism which deprived the island not only of its wealthiest and, perhaps by that token, most worthy sons but of their sons also who after an education in England might have been expected to return to the land of their birth and there display their gratitude by unselfish interest in its affairs.[18] By 1774 it was observed that "few more go out annually (to Jamaica) than come home at this time."[19] Planters, as soon as their wealth was secured, returned "to suck in the sweet ayre of England" leaving their estates in the hands of inferior social beings as estate-attorneys and rising overseers. Of their children three out of four who

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[16] By these methods Port Antorio, Norman's Valley and Manchioneal as well as St. Elizabeth were settled Vide 8 GIC2; 9 Geo II c.4.

[17] Admiral Benbow to Secy of State 1702: "The Govt. of this island now is entirely in the hands of planters who mind nothing but getting estates and when so to go off".

[18] In 1698 the West Indies were sending back annually to England about 300 children to be educated. Whitworth, Works of Davenant 11.7. See also Dr. William's Capitalism & Slavery p.86.

[19] Long Op Cit pp.510-11.

survived the dangerous state of infancy returned to Britain for education, but probably not two out of the three at an average ever returned to a permanent residence in the island. The natural unseverability of sugar-plantations resulted in their devolution whole to the eldest child, the others, being cared for by annuities charged thereon, sufficient to maintain them in England. As these later had no share in the management of the estate, there was no inducement to return to the colony.

Whilst the settlement of the island by white men was taking place, the black population had also been growing rapidly, the demand for negro slaves having been stimulated by the gradual transition in the 1680's from a diversified to a one-crop (sugar) economy, and satisfied by the opening in 1698[20] of the trade to Africa to all traders.

The following table illustrates the great disparity in the growth of these two segments of Jamaican society down to 1844.

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[20] Imperial Ad 9 W 3 C 26 effective from 1/8/1698.

YEAR	WHITES	BLACKS	
1655	5000	500	(a)
1678	7700	3,000	(b)
1698	3000	40,000	(c)
1730	7648	74,525	
1737	8000	80,000	
1746	10,000	100,000	
1755	12,000	130,000	
1762	15,000	146,000	
1768	17,947		
1801	18,000	300,000	
1818	20,000	346,000	
1834	20,000	310,666	
1844	15,776	361,657	

[21]

The black men came from a number of different tribes in, and from various parts of, Africa, and possessed of differing corporeal features, shades of colour, manners, dispositions, tempers, languages and superstitions; they arrived upon Jamaican soil, united only by a common savage and barbarous state of nature. Among them were Yorubas and Ibos

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[21] Understandably these figures are merely approximations. Among sources are (a) G.W. Bridges' Annals of Jamaica VI (b) Frank Cundall's Governors of Jamaica in the 17th century (c) W. L. Burn's Emancipation and apprenticeship in the B.W.I. (d) CO 137/28 (e) CO 137/33 (f) W. L. Burn op cit (g) "Remarks on Emmigration to Jamaica" (1840) See CO 137/227 (h) Census 1844 CO 137/280

from Nigeria, Joloffs, a refractory and dangerous people from Gambia and from the Gold Coast, the Coromantes, concerning whom conflicting testimonies have been borne. In one quarter they were supposed "to possess all the worst passions of which humanity is suscepitble"[22] whilst from another it is learned that "they are not only the best and most faithful of all slaves, but are really all born heroes. There never was a rascal or cowardly nation, intrepid to the last degree, not a man of them but will stand to be cut to pieces without a sign or groan, grateful and obedient to a kind master, and implacable revengeful when ill-treated."[23]

The negroes had no manner of religion and thus no theistic beliefs operated through their consciences upon their conduct which was uncharacterised by any form of propriety. "It is true" said one 18th century writer "they have several ceremonies, as dances, playing . . . but these for the most part are so far from being acts of adoration of a God that they are so for the most part mixed with a great deal of bawdry and lewdness."[24]

The task of moulding these ill-composed human elements into a form of society fell to the men of the first generation after the conquest, "the old standers of Cromwell's army" as they were called. By the end of the 17th century their work was done. They had fashioned the base of a social pyramid, a work in which Imperial legislation[25] by confirming

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[22] Jamaica enslaved and free. British Museum 4420 26.
[23] CSP Col 1701.
[24] Sloane's History of Jamaica also Augier & Gordon Sources of West Indian History p.174.
[25] e.g. 9 W 3 C 26.

the Common Law and making of the negro "goods and merchandise" furnished a convenient precedent. Upon this base succeeding generations, faithful to their economic and moral values, reared up the social structure into which every segment of the growing community was allocated its place, reserving the privileged apex for the white classes.

At its base was the negro slave. His value, like his place, in society was only economic. His labour, compulsorily exacted and unrewarded, was the foundation of tropical sugar economy, the dominant agricultural activity upon which the life of the country and the general expectation of riches depended. Further, the young and aspiring saw no shorter nor surer road to their economic gaols than the purchase out of their savings, as soon as they could, of two or more slaves which they let out to planters at hire.[26] Again the stigma associated in the popular mind between slavery and labour generally created such a revulsion against the latter that even ordinary domestic services had to be discharged by the labour of slaves, and widowed ladies found in the purchase of slaves for domestic hire the means of an independent livelihood. Thus the slave, regarded in fact, as he was in law, as mere property, became the universal object of ambition's acquisition, "a useful specie of cattle", the stepping stone to success of the rest of the

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[26] In opposition to the Slave Trade Abolition Bill in 1796 it was contended in Parliament that to do so "would terminate all spirit of adventure, all incitement to industry . . . . for hitherto it had been the hope of overseers to rise in the world, so soon as they had obtained that employment and the means they had of doing so was by saving a portion of their wages to purchase two or three negroes which they let out to planters for hire" Parl. Hist. Vol 32 1795-7 pp.866-7

Hiring fee was anywhere between 1/6d or 2/- per day whilst maintenance of the slave was 3d or 4d at the master's wishes CO 137/287 .

population.

Between the base and the apex of this pyramid lay in varying degrees of consequence in the social scale certain classes of persons categorised by reference either to their genetic connections with slavery, the critical social determinant, or to descriptions founded in colour or blood.

First were freed persons[27] estimated at only 4000, one century after the conquest. They were persons ~~forced~~ freed by Acts of Legislature or by manumission by will or by an instrument inter vivos. Legislative manumission usually arose out of circumstances in which the freed persons in his condition of slavery had rendered some signal service to white colonists, such as the betrayal of fellow slaves who had conspired to shake off an un-natural bondage, or aid in the suppression of Maroon rebellion, or bravery in the defence of their master's country from hostile invasion. Testamentary mnaumission was usually the expression of a master's appreciation of a life of service. So too was manumission inter vivos, though it was far from uncommon for masters to free sick and aged slaves in order to rid themselves of the obligations of their care.[28] Though they, unlike their white masters, had purchased their liberty with

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[27] E.G. the famous John Williams whose son Francis when in England so distinguished himself for his ingenuity and his knowledge of Languages and Mathematics that his acquaintance proposed him to be a Fellow of the Royal Society. Francis returned to Jamaica in the 1730's excluded from any public service. Jamaica Enslaved & Free op cit pp17.

[28] It was even the custom should a slave be executed for a crime that compensation be given to his owner. In 1739 an investigation of the House of Assembly revealed that masters had their own sick and lame slaves falsely accused in hopes that they might be executed and compensation gained. Journals of Assembly V3 pp.493.

the sweat of their brows or at the hazard of their lives, freed persons, like slaves, enjoyed no political status. They could not vote at parochial or general elections, nor sit in the Council or the Assembly, nor sit on juries or hold any public office whatsoever.

Next came free negroes and free persons of colour. The former were the issue of freed mothers and ~~native~~ negro fathers. The latter were the issue of freed or free negro women by white men and bore statutory descriptions such as mulatto, quadroon, and mestize, distinguishable by reference to distance of descent from the common Negro ancestress. All those within three steps removed in lineal digression from the Negro mother were loosely called mulatto and together with free negroes constituted the social strata next above freed persons from whom until 1748[29] they were distinguished in that proceedings by and against them were tried in the ordinary courts of law, their evidence being admissible in civil and criminal causes involving themselvs but subjected to prohibitive or restrictive qualifications where white persons were concerned. Civil and political disabilities included incapacity for all political or public offices, and until 1831 they could not vote in any elections or sit on a jury.

After free-born persons and higher in the social and civil hierarchy came persons entitled by private Acts of Assembly, for which considerable fees were payable, to particular rights and privileges of English subjects

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[29] Until 1748 freed persons were tried by 2 J.P.'s and 3 Freebreders.

born of white parents. Like the former classes however they could not be jury-men or judges or hold any public office or vote at parochial or general elections. Their specific privileges related pre-dominantly to the general admissibility of their evidence in courts of law. They were few in number being chiefly the illegitimate children of white officials.[30] With this class may be grouped the Jews whose religion disqualified them for all public offices save that of constable.

Finally at the apex of the social pyramid stood the relatively few white colonists, including the issue of mestye women by white men who being more than three steps removed from the negro ancestress were considered free from all "taint" of the negro race. To these only and subject to no other than proprietary restrictions, all rights civil, political and legal belonged. They only could vote and sit in the Assembly and Council. They only held all public offices. Their testimony alone was at all times competent in all courts in all cases for or against all parties. They alone made the laws, interpreted them and applied them.

The cohesive element in this curiously constructed society was force under law. As against the slave element at the base, it was

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[30] E.g. CO 140/40 p.384: 24/11/1762. An Act to entitle& Robert Penny and Lucy Penny reputed children of Robert Penny Attorney General late of the parish of St.Catherine deceased by Ann Forard a free mulatto woman deceased to the same rights and privileges as the English subjects born of white parents under certain restrictions. In 1827 a private Act cost £100

maintained ordinarily through wide disciplinary domestic discretion legally invested in owners, next through the instrumentality of Slave Courts administered by masters in the role of justices of the peace, freeholders or jurors, and exceptionally in times of alarm through the local militia under the command of planting attornies, overseers or book-keepers. The rationale was thus stated: "The essential difference between a small body of men disciplined and armed and a much larger body kept in subjection and un-armed seems greatly to over-poise the natural superiority of the latter and throws the weight of power into the hands of those who are enabled to maintain it by force of arms, whilst the others, being habituated from infancy to a uniform system of servitude and allegiance, custom renders it a second nature and adds much to the security of the lesser number which holds them in subordination.[31]"

As against the other classes of society beneath the apex dominance was maintained by denial of political and civil rights, by restrictions in the use of the processes and procedures at law and by the terror of the severer punishments prescribed by law in the case of the black and coloured population than for whites in similar offences.

The ethics of this society was gain, the moving spirit of the old colonial system of which the island was a most important part. Pride of wealth was the great desideratum. "It is this", said a 19th century writer "which exalts and ennobles, covers all defects, excuses all faults

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[31] Long Op cit. VI p.378

and produces a general and unqualified exterior respect."[32] From pride of possession to pride of life was but a step, and this latter was the badge of the semi-illiterate white Creole women. "Mrs. S" narrated Lady Nugent "like all Creole ladies has a number of servants with her and all are obliged to attend to any caprice of the little girl, as well as her mamma, and I grieve to see it. It will however be a good lession for me and I am determined to make my dear little boy so amiable that he shall be loved by all, and not feared. But in this country it will be very difficult to prevent him from thinking himself a little king at least and then will come arrogance, I fear, and all the petty vices of tyrants."[33]

As the social pyramid was being reared up social attitudes between the various segments of society gradually developed and crystallised, creating a social crust at once paralytic of society and impervious to change.

The sentiments of the white classes toward the negroes were recorded by an eighteenth century historian and quondam judge. "They and the negro had not one common origin. The negroes are a different specie of the

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[32] "An Account of Jamaica and its inhabitants by a Gentleman long resident in the island" pp.123-4. See also Burn Emancipation and Apprenticeship pp.28-9.

[33] Lady Nugent's Journal (New & Revised Edition by P. Wright) p.146. This pride of life was not peculiar to the Jamaican Creole White. Absentees took back with them to England numbers of their slaves and "they swaggered round London and Bristol in great equipages attended by negro boys decked out in exotic finery to arouse the envy and admiration of the world of fashion." See Carly Jamaica Old and New p.42 also Dr. Williams Capitalism and Slavery pp.85-97.

same genus, equal in intellectual faculties to the orang-outang which has in form a much nearer resemblance to a negro than the negro bears to a white man".[34] The persistence of this notion down into the 19th century was attested to by a diarist who observed "Negroes are considered as creatures formed merely to administer to white men's ease and to be subject to their caprice and I have found much difficulty to persuade these great people and superior beings, our white domestics, that the blacks are human beings or have souls.."[35] Social attitudes rooted in social practices acquired local currency and a newcomer who dared to criticise the delinquencies and deficiencies which he saw daily in his new surroundings or exhibited feelings contrary to those which generally prevailed was looked upon as little less dangerous than a mad dog.[36]

For his part the negro, even in his state of barbarism, could discern the great disparity between the white man's creed and his conduct, the inconsistency between his love of liberty and his greater love for

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[34] Long op cit. VII. Elsewhere in his History Long expressing a personal view continued "Such is the mirror of almost all these conjunctions of white and black! two tinctures which nature has dissociated like oil and vinegar". Vol II p.249.

[35] Lady Nugent's Journal (By Wright)

[36] "Jamaica under the Apprenticeship System" (1838) p.4.

the bondage of others, his claims to superiority and his state of moral degradation, and from the outset a first object of the negro's existence was to snap the captive chains of such an unworthy master:[37] hence the

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[37] Extracts from Cushoo - "An imaginary dialogue between E, a white man and Cushoo, a Slave".

E. O, no; we live in a land of liberty; - Englishmen love liberty and have often spilt their blood to maintain it.
C. Love liberty! Ah! dat be reckoned very good ting in England. But they roast and burn us for dat in the West Indies.
E. Rebellion you mean, I suppose and revolt.
C. Aye! it be same ting: black man want be free like white man.
E. But you are blacks, you know.
C. And you be white, Massa, ha ha! What odds dat make? We all broder.
E. But we are Christians.
C. Christians! Ah curse, swear, ly, whore, get drunk; suppose dat be Christian.
E. How! what do you mean?
C. Dat be de religion dey teach us.
E. O, our Bible don't allow any such thing.
C. But den you no believe it; so dat no signify.
E. Fye, Cushoo, fye! You're too severe.
C. Me wish white man no more severe.
E. Severe! You refer to punishments, I suppose. What are the punishments of slaves?
C. What Massa Overseer please.
E. But what are the most usual?
C. O when we do little nothing, dey den only fasten us to de stave, or to de ground, and flog us wid de whip, or de
E. Suppose you steal?
C. Den dey only whip us most dead, may be.
E. But if you revolt or run away?
C. Den dey roast, burn, starve or cut us to pieces.
E. What do they do when you are worn out and past labour?
C. O den dey give us free, and so we may lie about and starve to dead; or may be good-natured, hang us like poor old Quashita.
E. But there are laws, you know, for you as well as them.
C. O dey no mind laws. White man no hang one 'noder and dey no mind what black man say!

CO 137/182/203 Belmore to Goderich 2/5/1832 concerning the causes of the last great slave rebellion of 1831 "It is also proved that those persons who have been employed in situations of the greatest confidence and who are consequently exempted from all labour have almost universally been found acting as chief leaders in the rebellion and in their positive motives no less strong than those which appear to have actuated them - a desire of effecting their freedom.

paroxysms of fear, of rebellions and repressions by which society was paralysed.

The principle underlining white attitude towards the blacks influenced their attitude towards the free people of colour. The taint of negro blood was considered not to have been removed until after the third generation from the common negro ancestress. Accordingly it may frequently happen that "the lowest white person, considering himself as greatly superior to the richest and best educated person of colour disdained to associate with a person of the latter description."[38] The cult of slavery at the base became transformed into the cult of colour in the superstructure of the social pyramid and as slavery was to the whites "inevitably necessary"[39] so the condition of the people of colour was to white society by whom it was created "not in the power of man to abolish".[40] With a foot in either racial camp, the attitude of the mulattos was on their part depressing. Scorned by the one and scorning the other "they were crushed under the consciousness of their condition".[41] Without civil or political rights until 1832 and partly cut off from devolution of property until 1814, their progress was animated by no encouragement, their diligence by no reward[42] whilst the negroes scorned to be the slaves of men themselves descended from slaves.

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[38] Bryan Edwards History of the British West Indies V.2 pp.19-20.
[39] Long op cit p.
[40] Bryan Edwards op cit V.2 p.21.
[41] Bryan Edwards op cit.
[42] Ibid pp.19-20.

Within this social structure was the legal system established and from its social climate it drew its characteristics, its problems and difficulties.

The first problem was the difficulty of finding men to administer the system. The colonists had brought the complicated system of common law courts to Jamaica whose differing population structure and geographical features accentuated the weaknesses rather than the virtues of that system. Thus, although the common law courts in Jamaica did not sit continually or, even when they sat, did not do so for longer than three weeks at a time, the necessity for at least three judges to constitute any court, the requirement of a grand and petty jury in all criminal cases where the amount exceeded two pounds[43] imposed an exacting burden upon the scanty white population. Added to this general burden was the more regular and constant use of jurors in such matters as Coroners' inquests, enquiries relating to escheats and in a number of other cases provided by statute.[44] These difficulties, rendered more acute by the fact that as a minimum requirement only white males over 21 years of age could lawfully perform judicial or jury service, varied in degree from parish to parish. Spanish Town and Kingston, being areas of greatest population density, experienced the numerical shortages less than remote areas like St. Elizabeth or Vere where as late as 1824 the white males of all ages and description numbered only 161.[45] Malaria, yellow fever

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[43] In 1834 the sum was increased to £5 by Island Act 4W4C.4.
[44] e.g. the Island Highway Act.
[45] CO 137/156.

and intemperance exacerbated their problem. "They eat like cormorants and drink like porpoises"[46] and "the general ill-health of the men in the country"[46] was no consequential surprise to Lady Nugent.

From the beginning to the end of the period therefore insufficiency of white males for public offices remained the constant theme of official correspondence. Beeston in 1698 reported his embarrassment in finding people to be justices of the peace.[47] Even beneficial reforms could be frustrated upon this chronic difficulty, for two months later this same Governor complained of the grave consequences which local judicial reaction to the Imperial Act 9 W 3 C 26 (1697) was having. That statute, designed to rid colonial courts of constant and well-founded charges of bias and partiality had required colonial judges to resign their factorships or other connections with the Royal African Company.[48] The reaction was contrari-wise. "Several of them have resigned already and the rest when they please will make it an arguament that they serve in their offices for no reward and therefore not knowing how soon their friends in England may consign them a ship of negroes, they will not part with that which is a sure profit for that which is nothing but trouble and expense . . . . . neither was it considered that we have but few people and of these fewer fit to make judges and justices."[49] In 1801 similar difficulties still embarrassed the administration "the white population in some parishes being so ill-composed and trifling in

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[46] Lady Nugent op cit. p.81.
[47] CSP Col 1699 NO 887 Beeston to Board of Trade.
[48] See chapter 1 p.
[49] CSP Col 1698 Beeston to Board of Trade 5/12/1695.

numbers."[50] Thirty years later another governor regretted that "the country does not furnish more materials for placing in the magistracy gentlemen qualified for the situation . . . few being professional men, most being principally planters."[51]

One immediate consequence of insufficiency of numbers may here be noticed. Numerous offices, some quite incompatible in principle and in duties had to be held by the same persons. Chief Justices who in early times were members, sometimes even Speakers of the Assembly, invariably were members of the Council[51] whilst their Associates in the Supreme Court were, except on rare occasions, always members of one or other of those legislative bodies. Common membership of the legislature and judiciary consequently rendered stoppages necessary at times of one or other of these bodies, in order to allow the other to do business.[53] In the case of the Council delays and utter failure of justice were due as much to inability to convene a Court of Errors at all, as members of the Council who were judges of the Supreme Court could not review their own decisions in the Court of Error.

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[50] Lady Nugent op cit Introduction p. xxx.

[51] CO 137/178/40 Belmore to Godrick 6/5/1831.

[52] In the years between 1816 and 1831 the CJ's who had given at the request of Governor, an undertaking not to be involved in politics, were not members of any branch of the Legislature. In 1832 the Crown restored C.J. Rowe to the Council.

[53] CSP Col 1717-18 NO 681 Lawes to Board of Trade "I have adjourned the Assembly so as to allow the Supreme Court to sit, for CJ was Speaker of the House and several of the Judges and Lawyers being members of the House the previous Supreme Court having adjourned without doing any business for the same reason.

Incident to the insufficiency of numbers was the insufficiency of men of capabilities, a problem far graver in its consequences. In this connection absentee-ism rendered the island a critical blow inasmuch as by it white society was deprived of the services of its best educated men[54] and its public services abandoned to the management of their creatures, attorneys paid generally by commission on the gross yield of estates, salaried overseers, all men ill-fitted for such responsibilities. Their general want of education, their contractual relations with their absentee-masters, their dependence upon slavery, their deep-seated social prejudices rendered them incapable of holding the scales of justice evenly even in the given atmosphere of fundamental social injustice. Absentee-proprietors, like absentee-office-holders and absent creditors found little sympathy in the courts of planting judges and juries.

An indirect consequence of absentee-ism was the neglect of local education. As those who had the means sent their children to England for their education, there never was any compelling urge to place local educational facilities upon a footing suited to the needs of white

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[54] Education could possibly have secured less error or incoherence in the decisions of the Courts but was no guarantee against their prejudices. Thus Metclafe to Russell "As there were Resident proprietors who acted with the House of Assembly in its violent career during the recent struggle with the Government it is not certain, although it seems not improbable that a large number of wealthy proprietors resident in the island would give greater strength to the Government CO 137/255 12/2/1841.

society.[55] Charitable schools there were indeed, some aided by government subventions, but none so constantly and efficiently conducted as to afford more than indifferent tuition in reading, writing and arithmetic. "Learning was pitifully rare," wrote one 19th century observer, "learned institutions not to be found . . .few resident proprietors have the taste or time for improvement . . . too many men of this respectable class are debased by ignorance, licentiousness and low frivolous and grovelling pursuits."[56] Not all those who returned to Jamaica after having finished their education in England were a credit to the colony, "many being unpardonably illiterate and possessed of few attainments."[57]

Added to the want of education in white society was the notorious indolence in the best even of that society. "Their best men" it was said "even made it their choice to ly by at their ease whilst those of an opposite character are industrious in getting themselves elected, some for protection of their persons, others with design to embroil matters

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[55] As most of the schools, such as they were, were "white" schools, educational facilities for the people of colour were negligible.

As touching the slave population the Attorney General in 1827 said "There are no public institutions for their education, whether infants or adults, nor are the means of religious instruction, either by clergymen or places of worship at all adequate to their wants." Commission of Legal Enquiry 1st Report Second Series p.84.

[56] An Account of Jamaica and its inhabitants by a Gentleman long resident in the island. pp.173-4 also COL Burn Op cit pp. 28-9.

[57] Long Op cit V3 pp. 215-6.

and perplex the administration."[58]

Of the lower orders in white society few recruits could conceivably have been made from among them who were fit even for jury service. There was not a middle class of white citizens. The realities of large scale sugar production demanding extensive tracts of land as viable economic units militated against such a possibility and the immigrants brought in under the Deficiency Laws were predominantly of the servant class and were "in many instances, idle worthless white people . . . leading a most useless life."[59]

Thus white society composed at one end of ignorant and indolent attorneys and at the other end of even more ignorant servants was destitute even of the capabilities which ordinary education could have imparted, at a time when at the outset of the 18th century the work of the courts was demanding not merely men of liberal training but rather men of professional legal training and experience.[60]

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[58] H. L. Osgood The American Colonies in the 18th century V2 p.107 CO 137/20 Hunter to Board of Trade 8/9/1733. The indolence of the better class of white society was the constant theme of Gov. Trelawny e.g. Co 137/24 Trelawny to Board of Trade "I would have removed him (Mr. Fuller Asst. Supreme Court Judge) as I mentioned to your Lordship many years ago and I was thought too tame and unsensible for not doing it, but that I could not get proper persons to overcome their indolence and accept of being judges". See also CO 137/59 Trelawny to Duke of Bedford 1/6/1750.

[59] CO 137/188 Mulgrave to Goderich 2/2/1833.

[60] How low the standards of public efficiency was may be gleaned from CO 137/229 Smith to Glenelg 10/9/1838 "It is impossible to convey to your Lordship any idea of the difficulty attending a collection of requisite information and accurate compilation when obtained, the errors in the several returns arising from the ignorance and incapacity of the subordinate officials by whom they are sent in".

The entrenched commitment of white society to the continuance of the legal system in the mold which best protected their interests in due course of time came into conflict with the inevitable pressure of social change. Their refusal, perhaps inability to reform the legal system eventually undermined the Constitution itself.

The nineteenth century was the great age of reform in Europe, of radical social reform whose chain-reactions inevitably involved the legal systems of the Caribbean. The movement for reform which had begun in the last quarter of the 18th century, gathered momentum in the 19th century under the leadership of the Anti-Slavery Society in England, succeeded in abolishing the slave trade in 1807,[61] in securing the registration under law of slaves in the British West India Colonies a decade later[62], and prodded the British Government into taking the initiative in laying before the Colonial Assemblies an eight-point programme of social, religious and legal amelioration of slave conditions[63], including the limited admission of slave evidence against white persons. In addition,

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[61] 47 G 3 C 36 (1807).

[62] The Jamaica Registration of Slaves Act was passed in 1816.

[63] (i) Establishment of an Officer to be called the Protector or Guardian of Slaves (ii) Admission of Slave Evidence in certain cases (iii) Enabling slaves to purchase their freedom (iv) celebration of marriage among slaves (v) suppression of Sunday markets and prevention of Sunday labour (vi) enabling slaves to acquire property and establishment of a Savings Bank (vii) non-separation by legal process of slaves being members of the same family (viii) Regulation of punishment of slaves. CO 140/109 pp.598 et seq. The Assembly never effected (i) and (ii) was often effected by statutes which until 1831 were disallowed because of the tacking of clauses inimical to Dissenting Preachers.

complaints of the abuse of the administration of justice in colonial courts, due largely to that curious construction of colonial society which gave to a small white minority exclusive civil and political rights, led to the despatch of Commissioners in 1823 to enquire into and report upon the state of civil and criminal justice in the West Indies.[64]

Contemperaneous with this movement the ultimate objective of which was the total abolition of slavery, was the progressive abandonment by the mother-country of the old colonial system of protected markets and exclusive shipping, and the economic decline of sugar.[65]

Legal reform from the necessities of the situation and in the recommendation of the Commissioners of Legal Enquiry[66] involved the reconstruction of the whole judicial establishment, the displacement of the lay judges in all the superior courts by professional men, adequately paid, separated from the Legislature and from those interests and connections in society which undermined the status of the Courts and throw suspicion upon their judgments. Above all these however, legal reform urgently demanded the annihilation of the values on which the society had been erected and of the attitudes by which its life had been

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[64] Their Report upon Jamaica was submitted in 1827 and is referred to herein under the title Commissioners of Legal Enquiry First Report Second Series.

[65] Import Duties in West Indian Sugar had increased during the wars of the late 18th & early 19th centuries. The acquisition of Mauritus (1815) had brought another sugar colony into British possession. Cuban and Haitian sugar were coming in the world market in increased and cheaper supply and finally the protective duty in Indian Sugar was reduced in 1822. See Dr. Williams Capitalism and Slavery pp.137 et seq.

[66] First Report of Commissioners of Legal Enquiry Second Series pp.93-129.

paralysed. The problem was whether white society upon whom the responsibility for effecting reform rested could or would make the social and moral transition.

Economic insecurity merely awakened the native instincts of self-preservation in white society whose love of gain culled out ramparts of legalism and constitutionalism from which to defend its stand against change.

On the question of slave evidence, freeholders said that "they would have to be paid compensation, for the loss of the time of their slaves was a valuable proprietary right."[67] For any interference in the right of property in their slaves, colonists "firmly insisted upon the undoubted right to a full and direct indemnification of their property, the acknowledged principle of proceeding in all cases where private property is sacrificed for public purposes."[68] More fundamentally, interference in what was the internal affairs of the country was not to be tolerated "for the powers of the Commons of Great Britain within that realm are not superior to those which the Assembly have ever exercised within the island of Jamaica."[69] Indeed the whole British programme was in the

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67 CO 140/109 pp.462 et seq. From 1826 onwards the Assembly passed several Acts admitting slave evidence but tacked provisions inimical to Dissenting Preachers which re-examined the royal disallowance. Finally an Act was allowed in 1831.

68 CO 140/109 pp. 757-8.

69 CO 140/109 p. 584.

view of the colonists "mistaken benevolence"[70] " a dreadful experiment"[71] "an innovation to be dreaded"[72] and its local advocates, the Sectarian preachers were "mercenaries who make a trade of religion amongst the lower orders instead of uniting with us in the dissemination of the universal principles of obedience and industry and rendered the slaves dissatisfied with the allotment of Providence by instilling in their minds glaring sentiments which affect their happiness while they facilitate the extortion of those resources which might be more usefully employed . . . . as the means of purchasing their freedom."[73] Contrariwise, in the eyes of the colonists, "our cause is that of justice and truth."[74]

Where the legal system was manned by judges and jurors whose interests in slavery were long established, commonly-held public sentiments did not remain outside the precincts of the courts.[75] They invaded their chambers, defiled the jury box, sullied the bench and rendered them both instruments of oppression rather than of justice. Public opposition to

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[70] CO 137/164 Address of the Assembly d/d 21/12/1825 to the King.
[71] CO 140/109 p.228.
[72] CO 137/153 Manchester to Bathurst
1823 Manchester gave his full support to the British programme of reform but "they had to be approached with delicacy because of the dread of innovation in the Assembly and among white people generally."
[73] CO 137/172/49 Belmore to Murray 27/8/1830. Conveying sentiments of the Rev. G. W. Bridges Anglican Rector of St Ann.
[74] CO 137/164 Address of Assembly d/d 21/12/1825 to the King.
[75] In 1801 C. J. Henchell had over 400 slaves Lady Nugent Op cit pp.43-44. In 1826 an official return showed that the CJ, all the Asst. Judges, the Attorney General the Advocate General and all the Rectors of the various parishes had slaves. One Asst. Judge of the Supreme Court had 859 slaves, another either as owner or attorney had control of over 5247 slaves CO 137/163 Manchester to Bathurst 13/11/1826.

the abolition of slavery, and to Sectarian preachers, the friends of the slaves, had their echoes in the slave courts, in the councils of protection,[76] and in the verdicts of juries at trials affecting Sectarian Ministers.

A suitable example may suffice. In 1821 magisterial unfitness for office resulted in the illegal execution of a slave whose proper sentence was one of transportation. At the subsequent trial of the offending magistrates, the jury acquitted them of all guilt. The following year the remissness of a coroner, also a magistrate, in failing to hold an inquest into the death of a slave beaten to death in the private stocks of a white planter occasioned a reference in the governor's report to "the general scandalous neglect, ignorance and turpitude of the magistrates."[77]

Planting interests in the Council of Protection[78] set up for the investigation and prosecution of cases of ill-treatment to slaves rendered that body inadequate, in the view of the Commissioners of Legal Enquiry, for its purpose because "from the state of society, the persons who very often compose these courts are either connected with the parties

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[76] Infra p.
[77] CO 137/153 Lt.Gov. Couran to Bathurst 8/3/1832.
[78] They existed from as early as 1807.

complained of, or view the case through the medium of occupation in which they are engaged, or of the opinion they entertain of the necessity of discipline."[79] Removal of incompetent or corrupt magistrates at the insistence of the British Government provided only a partial remedy for owning to the sheer limitation of white men "I would dismiss many more than I could by possibility replace, the magistracy in many places inefficient or partial."[80]

Persecution of sectaries was no new thing in Jamaica. Apart from acts of personal violence it took the form of legislation passed to prevent preaching save by licensed preachers and then of refusing the necessary licences. Acts like those of 1802 and 1807 were disallowed in England, but disallowance took time and in the interim the unfortunate missionaries who dared to preach after having been refused licences courted and often suffered imprisonment.[81]

The first wave of persecution ebbed in 1815. It revived after the great and final slave rebellion of December 1831[82] in which many lives

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[79] Commissioners of Legal Enquiry Op Cit p.123.
[80] CO 137/183/25 Mulgrove to Goderich 7/4/1832.
[81] See W.L. Burn Op Cit. p.94.
[82] 137/182/203 Belmore to Goderich 2/5/1832 "It is also proved that those persons who have been employed in situations of the greatest confidence and who are consequently exempted from all labour have almost universally been found acting as chief leaders in the rebellion and in their positive motives no less strong than those which appear to have actuated them - a devil to effect their freedom."

both of white and black were lost and property damage to the extent of over one million pounds was suffered.[83] White reaction to this devastating slave rebellion was to blame the Sectarian preachers and to form an organisation dedicated to the object "of using all means in our power to expel them (the Sectarians) and of hazarding our lives in fulfilling an object so necessary to the peace and comfort of our negroes as well as to the safety of the country at large.[84] Thirteen Baptists chapels and four Wesleyan were totally destroyed in early 1832 by mobs composed, as the Cornwall Courier proudly claimed "not of thieves and pickpockets whom the unhappy politics of England now acknowledge as their liege lords but . . . of magistrates, vestrymen and freeholders of the island who have been in arms to preserve their property and who have in open day done this thing in self-defence."[85]

The magisterial vandals, members of the Colonial Church Union, as their organisation were called, were indicted before the Grant Jury in St. Anne and St. Mary. Their colleagues in those Juries obligingly ignored the Bills.[86] In Westmoreland those who had destroyed Baptist churches were "in jail in triumph", confident that their colleagues in depredation would effect their release by force. The Custos who had the mulitia under orders declined to remove the untrustworthy jailer,

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[83] CO 137/181/137 Belmore to Goderich 6/1/1832.
[84] CO 137/182/11 Pres. Cuthbert to Goderich 137/1832.
[85] W.L. Burn Op Cit. pp.95.
[86] CO 137/182/12 Pres. Cuthbert to Goderich 13/7/1832.
[87] CO 137/183 Mulgrave to Goderich 3/X/1833.

affronting the Governor with the curt reply "No, on such a service, none."[87] At subsequent trials the bills were ignored.

Public feelings had not merely invaded the jury box. Judicial dependence upon the planting interests or judicial partiality towards that class of which they themselves were members displayed itself in a decision of the Court,[88] which strained every principle of interpretation of the 22nd section of the Revenue Act 1 Geo 2 CI[89] to hold that the English Five Mile Act[90] and Conventicle Act,[91] restricted in their terms to England Wales and Berwick upon Tweed, were received, introduced, used and esteemed in Jamaica. Thus in June 1833 a majority of the Supreme Court upheld a verdict of guilt pronounced by magistrates at a Court of Special Quarter Sessions of St. Mary in July 1832 against a Wesleyan Minister who had preached, not having taken the oaths required by the English Acts. Four months later a grateful Assembly who had withheld the Chief Justice's salary for over a year voted him an annual stipend of £4,000.[92]

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[88] "Greenwood Vs Livingstone et al" CO 137/189. See also Chap. 5 and 6.

[89] All such laws and statutes of England as have been at any time esteemed, introduced, used, accepted or received as laws of this island shall and are hereby declared to be and continue laws of this His Majesty's island of Jamaica for ever".

[90] 17 Charles 2 C2.

[91] 22 Charles 2 C2.

[92] Chief Justice Sir Joshua Rowe was appointed directly by the Crown. Not having however practised for 5 years at the Jamaica bar he was not qualified for the higher rate of salary which an Island Act provided and the Assembly for over a year refused to vote him the salary appropriate to his status.

CHAPTER III

POLITICS AND THE LEGAL SYSTEM IN PRE-1838 JAMAICA

The bridling of the royal prerogative and the control which the local Assembly by degrees secured over the Executive Government and Judiciary comprised the political realities which most affected the evolution of the legal system.

(A) The Royal Prerogative

Political dependence of the colonies upon the mother-country was the sine qua non of the success of the old colonial system and in the eyes of the English Government, submission to English jurisdiction was only the obverse side of an imperial commercial system which afforded preferential markets and protected shipping to colonial territories. The instrument of the dependence was the royal prerogative.

By the exercise of the royal prerogative a military government was replaced in 1661 by a civil governor. In virtue of it he appointed a Council and set up civil judicatories with judges and justices. From it therefore sprang the courts of law, equity and admiralty. To it was due the birth of the Assembly and

its power in conjunction with the Governor and Council to make laws "provided that they be not repugnant to the laws of England and that such laws be in force for two years and no longer" unless confirmed by the Crown. By it the island secretaryship, the oldest civil office in the colony was pdented. Under its favour the infant colony was temporarily spared the burden of export and import duties.[1]

These seemingly unqualified powers of the Crown to legislate for and to tax the colony, to veto its legislation, to constitute courts of justice and to appoint its officers became focal points of struggle between the colonial and imperial powers. The course of these struggles as well as their outcome left their marks upon the legal system.

(i) The right to legislate and to tax. The circumstances of the island's acquisition lent force to rumours that "His Majesty as Lord of the island may impose what taxes he pleases on the native commodities before exportation because it was conquered at the charge of the State, and so no consent of freeholders necessary, but that we shall be under an arbitrary government which ..... Englishmen abhor."[2] Such rumours rendered the island, it was felt, "not a place to live in or to get an estate in",[3] and the House of Assembly from its inception in 1664 embarked upon corrective measures.

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1 CO 140/2 Appendix to the Journal of the House p.6 Clause 12 of Windsor's instructions.
2 CSP Case 1669-1674 Modyford to Arlington.
3 Ibid.

Among measures passed was one which voted supplies, not for the King, but "for the public use of the island" and another prohibited "any further or other tax or levy or assessment upon the island or inhabitants hereof without the assent of the Governor Council and Assembly." Assuming that what was regulated by statute could no longer be the subject matter of prerogative interference, the Assembly also placed the Courts upon a statutory basis, and recalling that in the mother-country the prerogative had been checked from time to time by law, they boldly laid claim by a Declaratory Act to "all the laws and statutes of England except those levying subsidies in our native country, the Kingdom of England, and all liberties, privileges, immunities and freedoms contained therein ..... as their birthright."

These and other measures of the Jamaica Assemblies of 1664, 1674 and 1675 regulating matters of police, procedures and processes of the courts, remuneration of legal officers, registration of deeds and numerous other things of a municipal nature did not receive immediate royal confirmation. The consequential necessity for bi-ennial enactment of their fundamental laws exacerbated the prevailing feeling of the insecurity of the political institutions, of person, of property and of the courts by which these latter were to be protected.

The Jamaica Acts however were considered by the British Government in 1676 when their general aim and bent "to take away

the power and authority of the Council Board"[4] so alarmed the Crown that it was decided to alter the constitution of the colony to the system of Poynings' Law.[5] The years down to March 1680 were occupied in unsuccessful attempts to force the new constitution upon the colonists, with consideration of and replies to the Assembly's objections thereto and with exchanges of correspondence.[6] Finally between March and June 1680 the questions concerning the prerogative power to legislate for, to tax, and to change the constitution of the colony were addressed to the Crown Law Officers, and because of their admitted difficulty the judges were asked to be associated in their considerations. The Attorney General whilst expressing the view that Jamaica had no right to be governed by the laws of England, added significantly "but by such laws as are made <u>there</u>, thus throwing doubt upon the power of the Crown to legislate for the colony. The Solicitor General's opinion threw doubt upon the prerogative power to tax, and the unrecorded views of the judges seemed equally unfavourable to the Crown.

By the ensuing constitutional settlement, the country's ancient government was restored, her laws unless for a temporary purpose were to be indefinite in duration unless disallowed by the Crown, quitrent and some other dues were surrendered by the Crown in order

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5 See Chapter 1

6 In the circumstances of the times an exchange of correspondence often extended over eight months.

the more readily to induce the colonists to grant a permanent revenue for the upkeep of the Executive Government,

The Crown had thus within two decades after the settlement of civil government recoiled from its claims to be empowered to legislate for, tax, or alter the constitution of the colony and was even prepared to acquiesce in a considerable degree to the colony's claim to the laws of England for the Lord Keeper had complied with a request "to draw an Act on the subject that may be confirmed by the King."[7] This liberal measure was rejected by the Assembly, perhaps because of distrust created by the sudden volte face of the Crown, more likely because of their growing objection to the consideration of bills not prepared in their House. In 1682 they voted a revenue only for 21 years and the laws regulating the courts of justice and other fundamental laws were confirmed for a similar period. Thus the issue of the "Laws of England" remained unsettled until 46 years later when the Assembly passed and the Crown confirmed a permanent Revenue Act to which was "tacked" a clause[8] declaring that "all such laws and statutes of England as have been at any time esteemed, introduced, used accepted or received as laws in this island shall and are hereby declared to be and continue laws of this His Majesty's island of Jamaica forever."

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[7] CSP Case 1681-5 No. 857. For Draft see Appendix A

[8] Section 22 of 1GII Cap. 1 confirmed by the Crown in 1729

Contemporaneously the island's Acts more firmly securing the courts of justice in their jurisdiction, powers and procedures together with several other enactments regulating municipal matters were permanently confirmed by the Crown.

The years of political instability however left scars upon the legal system. The Declaratory Acts[9] which by extending or purporting to extend the laws of England to Jamaica were intended primarily as a check to prerogative power had side effects "extremely troublesome in their consequences."[10] They encouraged to the island "a parcel of pettifoggers to set the people together by the ears in the endless labyrinth of the laws and fostered vexatious and troublesome proceedings so that the whole wealth of the island came into the hands of attornies and solicitors."[11] To check the depredations of the scavengers of the legal profession an Act was passed in 1672 permitting litigants to plead their own cases. This remedy did not achieve its purpose for "the laws continuing as voluminous as before, the cunningest knave carried all before him and indeed none but such as intended to cozen everybody durst or did become administrator to the dead or guardian to their children."[12] In these circumstances and not wishing to abandon their claims to the laws of England, the Assembly merely repealed

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9 The first Declaratory Act was passed in 1664 followed by several others, differing as to form but not in effect, both before and after 1680.

10 Long Op.cit. VI p. 604.

11 Ibid., p. 604

12 Ibid., p. 604

the Act of 1692 and pettifogging flourished once more.

Bi-ennialism which was considered by the Crown a device for keeping the distant colonial peoples in check did not achieve its purpose. On the contrary it became the main spur to disloyalty, but in addition it brought instability to the laws and the Judiciary. Although the expiry of the laws did not as such affect the existence of the courts which have derived from the prerogative yet their procedures and process had been regulated by temporary laws whose bi-ennial expiry rendered the courts incapable of functioning effectively. Thereby rights concerning such important matters as possession, succession, inheritance were rendered uncertain as to their enforcement from time to time, and the image of the courts as an institution for the vindication of right and punishment of wrong-doing suffered accordingly.

After 1680, the laws though extended in their duration, continued however to be periodic and the approach of their expiry revived the ancient insecurity. Thus when the laws expired in 1724, the Assembly refused to pass any further periodic laws, except a one year Act ending in 1725 objecting, it was reported "to be yearly tenants for their laws."[13] Thereafter and until the final settlements in 1728 the courts ceased to function, the island was reduced to distraction and confusion. "Justice at a stop

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[13] CSP Case 1726 No. 107 Portland to Board of Trade.

and people's demands (particularly of those in business from other parts of the world) suspended ..... the civil magistrates who generally are remiss enough in their duties have (at least a good many of them) since the expiration of the laws, been scrupulous of exerting their authorities, even in common breaches of the peace."[14]

Finally, there was the question of the applicability of the laws of England to the colony, particularly the English Statutes of Frauds (1677) and Habeas Corpus Act (1679) which were enacted subsequent to the settlement of Jamaica. These statutes regulating as they did property and security of person were dear to the hearts of the colonists.[15] The peremptory provisions of the Habeas Corpus Act appealed to colonists and the Act was introduced and used in the island two or three years after its enactment,[16] as also the Statute of Frauds. The years after 1693 however brought doubts and uncertainties into the law and frustration to the colony. In that year Holt, C.J. in Blanckard v. Galdy laid down that "Jamaica being conquered and not pleaded to be part of the Kingdom of England, but part of the possessions and realm of the Crown of England, the Laws of England did not take place there until declared so by the Conqueror or his successors."[17] Eighteen years later the Privy Council reversed the decision of the Grand Council and Court of Error of the colony in the case of

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14 Ibid.

15 Memories lingered of the arbitrary arrest in 1680 of Charles Long their protagonist in the constitutional struggle, of the denial by the Gov. of the common law writ of Habeas Corpus and of subsequent events leading to Long's loss of his properties and early death.

16 So affirmed Gov. Lyttleton to the Board of Trade CO 137/24 p. 32.

17 Blanckard v. Galdy 2 Salk 411. How little understood then were the facts and circumstances of Jamaica's conquest and subsequent settlement

Allison v. Long[18] holding that the Statutes of Frauds did not apply. A fatal blow was struck by this latter decision "at the very foundation of the laws by which this island has been governed and preserved for this 50 odd years last past"[19] and the authority of the courts was gravely undermined inasmuch as a multitude of judgments founded upon the Act and affecting large properties were thereby impeached. The legal profession, even after the decision in Allison v. Long, was sharply divided on the issue, some affirming, others dis-affirming that the laws of England applied to Jamaica. To make matters worse, politics entered the controversy in the form of a motion of censure by the Assembly against the Chief Justice and a majority of the judges of the Supreme Court for "not animadverting upon or censuring" the Attorney General for "the dangerous and seditious doctrine and insinuation" contained in Submissions of the Law Officers to the effect that "the free subjects of this island are not entitled to the liberties of Englishment, or to the common law of England, but that His Majesty and the ..... have power to dispense ..... with known laws,

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may be gleaned from the argument of Counsel for the Plaintiff that Jamaica is an island beyond the seas conquered from the Indians and Spaniards in Queen Elizabeth's time. No correction ever proceeded from the Court. It is possible to argue that this decision like many future ones was given "per incuriam".

18 In Allison v. Long the issue centred around the validity of a will executed by witnesses in a room adjoining one in which the testator was. There was evidence that he could see and hear what the witnesses were doing. The jury found a special verdict that the will was executed out of the presence of the testator and that the Statute of Fraud applied.

19 CSP Col 1710-11

rules and forms of proceedings in the courts of justice."[20] In a legal controversy of this delicacy, the lay judges were hopelessly distracted. Political intervention only served to distort the issue. Until 1728 when the matter was finally resolved by legislation, "the laws of England were neither universally nor constantly acknowledged by the several courts, nor were they allowed to be so but according to the knowledge, or will, or caprice or perhaps partiality of the judges."[21]

(ii) The right to veto colonial legislation. Although the main purpose of the royal disallowance was the protection of imperial interest, whenever its exercise affected the legal system, three main objects dominated imperial policy: improvement of the drafting of colonial legislation; preservation of the jurisdiction of the courts from legislative intrusion; and prevention of proliferation of the courts.

(a) Improvement of the drafting of legislation. As the practice in the Assembly was that any member who was interested in a measure should see to its drafting, the phrasing of legislation lacked the skill and accuracy of a professional draftsman and was often unintelligible.[22] Further the insistence that the Council had no power to amend or originate Bills, deprived the

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20 CO 140/9 pp. 416-7 (1722).
21 CO 137/35 p. 159.
22 CO 137/183/49 Mulgrave to Goderich 16/12/1832 "I think it is a good thing that Bills should sometimes originate in the Council where there is some legal knowledge instead of coming up as they now do in that crude and unintelligible form in which the ignorance or carelessness of the Assembly often suffer them to pass." See also Morris' Jamaica Reports (1836-1844) and the CJ's comment on a Stamp Act "it is so obscurely worded and carelessly drawn that it is next to impossible to reconcile all its clauses."

Assembly of the benefit of the expertise of the Attorney General who from early in the 18th century was always a member of the former body. Thus island legislation would come under the criticism of the Crown Law Officers or of the legal advisers to the Board of Trade and recommendations for their improvement would often follow. Such recommendations, if adopted by the Assembly greatly improved the exactness of legislation, their meaning being rendered more precise and the scope of their application more discernible to the judges.[23])

(b) Preservation of the jurisdiction of the courts from legislative intrusion. It was not uncommon up to the early 18th century for powerful men in and out of the Assembly to secure by the passage of private Acts the powers of trustees over property, or the rights of guardianship over infants, or the foreclosure of lands, thereby avoiding the expense and publicity of contentious litigation and perhaps committing fraud upon poor, ignorant or absentee parties. Crown Law Officers were particularly watchful over such legislation. Upon a private Act of 1726 "for foreclosing a mortgagor's interest in a property"[24] the legal adviser to the Board commented: "the Legislature should rarely interfere in matters of private right without the greatest necessity."[24]

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[23] e.g. CSP Col 1712-14 No. 39. A.G. Northey's criticism of a Jamaica Act for "quieting possessions" also CSP Col 1702-3 Nos. 445-946.

[24] CO 137/16 pp. 219-221

(c) Prevention of Proliferation of Courts. The outstanding instance of the exercise of the power of royal disallowance under this head occurred in 1751. The island legislature had passed an Act for dividing the island into five counties and for establishing in them Courts of Nisi Prius. The Board recommended its disallowance for the technical reason that it did not contain a suspending clause[25] but was careful to undertake an enquiry into the practical need in the island for such courts. The subsequent report affirmed the need, criticised the proposed division of the island into as many as five counties and proposed a Draft measure which later became an Act whereby Courts of Assize and Nisi Prius were established in two of three counties into which the island was to be divided.

Delays by the British Government however in attending to colonial legislation could create embarrassment for the Courts. As colonial statutes,[26] not containing a suspending or deferring clause took effect at once and were indefinite in their duration unless expressed to be for a limited time, it was possible that the Courts would administer such laws for a considerable length of time before notification of royal disallowance was received. Thus notice of the disallowance of the Deficiency Act and of a Slave Act of 1822 were not received until 1825. In the course of these years the Courts had grounded many decisions affecting the property

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[25] APC 4 pp. 248-252. See also

[26] After 1680.

of freemen and the rights, such as they were, of slaves.[27] Similarly the Slave Act of 1826 which came into effect on the 1st of May 1827, was disallowed in the following October, notice of it having been received in Jamaica on the 23rd of December 1828. In the November before receipt of the notification, two men were convicted at the Assize Court of murder and manslaughter respectively on the evidence of slaves which had been admitted for the first time by this Act. The circumstances raised delicate questions touching the validity of the trial and afforded opportunity also for the criticism of imperial interference. "It has weakened, it was said, the confidence of the slave in those benefits which have been held out to him - taught him to consider them as delusive and insecure - embarrassed the whole machine of government and defeated the ends of justice."[28]

(iii) The right to constitute courts of justice. The Crown had raised no objection in principle to, although it had amended particular provisions of, the island Acts regulatory of the Courts of law and equity and had without demur confirmed them, at first for extended periods, and then permanently in 1728.

These acts of confirmation implied in the outlook of the Crown or in its subsequent practice no renunciation of the prerogative power to create courts in the colony. Royal Instructions continued to enjoin Governors "not to erect any Court or Office of Judicature

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[27] CO 137/160 Manchester to Bathurst 8/8/1825
[28] G.W.Bridge's Annals of Jamaica Vol. 2 pp. 391-2.

not before erected or established nor dissolve any Court or Office already erected or established without our special order"[29] and in the century succeeding the constitutional settlement of 1681 the history of this subject withesses to the Crown's jealous regard for this head of prerogative power.

In 1680 the Crown treated with lofty disdain a proposal of the representatives of Jamaica to put the Courts of Chancery, Ordinary and Admiralty into commission and to reconstruct the Court of Error along the lines of the second Court of Exchequer Chamber in England.[30] Four decades later a similar stand was taken when the island Legislature sought to transfer the Governor's judicial powers as Ordinary to the Supreme Court. The reasonableness and convenience of the measure were readily conceded inasmuch as "their appeals will receive a speedier and cheaper determination and in cases of small value the want of such a court must oblige persons to bear their wrongs rather than appeal to England"[31] but the Crown nevertheless disallowed the Act on the ground that it in some measure impaired the prerogative.[32]

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29 Eg. Lyttleton's Instructions of 1761 CO 138/2.

30 CSP Col 1677-1680 No.1588 - 12/11/1680 A Humble Motion on the part of Jamaica to Lords of T & P. It is worthy of consideration whether a Governor solely ought to have and execute the authority of Chancellor, Ordinary and Admiral and power of pardoning crimes or whether some of the Council or Judges of the Supreme Court should not be called to his assistance.Also whether some method of appeal from the judgment of the Supreme Court somewhat like the examination of a judgment given here on the King's Bench by the same judges and others of the land in the Exchequer Chamber be not needful.CSP Col 1677-1680-No.1622 18/12/1680 Lords of Trade "We offer no opinion whether a Governor should combine in his sole person the authority of Chancellor, Ordinary and Admiral.

31 CSP Col 1717-7 No. 108

32 Appeals from the Ordinary went directly to the Privy Council whereas appeals from the Supreme Court went first to the Governor or Council forming a Court of Error and then in certain cases to the Privy Council.

In 1751 the Jamaica Legislature made a double-barrelled assault upon the prerogative. The first measure, an Act for providing that all the judges of the Supreme Court of this island shall hold their offices quamdiu se bene gesserint, though calculated to impose a check upon the Governor's delegated power of dismissal of the judges, had received his blessing "provided that the Chief Justice and an Assistant Judge were appointed from England."[33] The second, an Act for appointing Commissioners of Nisi Prius and enlarging the jurisdiction of justices of the peace in matters of debt, was represented as urgently necessary because "the poor and middle class people were required to go as far as 140 miles to attend Court (at St. Jago de la Vega) as suitors or as jurors."[34] Both Acts were rejected, the first because "it directly affects Your Royal Prerogative in a point of great moment",[35] the second because "it would make so extensive a change in the Constitution of Government with respect to the administration of justice and so great an encroachment on Your Majesty's prerogative to which the establishing Courts of Justice belong, that they cannot think it advisable to admit of such a precedent."[36] In both cases too, the Crown Law

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33 CO 137/25 Trelawny to Board of Trade, 25/3/1752."But it would otherwise be pernicious" Trelawny continued "because a permanent body of planter-judges would have more power than the Governor and Council.If my recommendation is to bear fruit however the Assembly should vote a salary for these men from England.The Assembly however would not want to provide the money."

34 CO 137/25 Part 3 Knowles to Board of Trade 1752

35 APC 4 p. 217 Opinion of Attorney General and Solicitor General.

36 APC 4 pp. 218-9 Opinion of Attorney General and Solicitor General.

Officers and the Board of Trade respectively asserted the amplitude of the prerogative power, unaided by colonial legislation, to redress the wrongs, if such existed, for which the measure had been enacted.[37]

Contemporaneously with this general vigorous defence of the prerogative, there is evidence nevertheless that in specific circumstances the Crown was not unready to manifest some flexibility in its stand. Thus in 1711 royal confirmation was given to a statute for regulating fees which not only prescribed the fees and charges incident to the various services of the courts of law and equity, but regulated numerous processes of execution and brought under control the conduct of the various officers of the courts.[38] Doubtlessly the Crown had come to appreciate that provided they did not offend fundamental principles of English Law, the details of procedural law, particularly where they involved charges on the public, were better left to the people's representatives

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[37] APC 4 pp. 217-9.

[38] See Spurdle's Early West Indian Government pp. 53-4 where he states that "although the concession was thus early made in the case of inferior courts, it was not considered applicable to the case of higher ones. The establishment or alteration of such a court as the Chancery was still deemed to belong solely to the Crown.Whenever a Colonial Legislative presumed by Acts of its own to trespass upon this higher field its action was hotly vetoed by the Imperial Authority and its measures subjected to summary disallowances.This continued moreover for a further 60 years".The Jamaican experience however was that as early as 1747 the Crown was prepared to accede to a Jamaican Statute putting Chancery in Commission if a qualified and salaried Chancellor were provided for by the Assembly.

than to the discretion of the royal representative. Nor was this weakening in imperial attitude limited to matters of procedure merely. In 1747, upon representations of a Governor of the general unfitness of the holder of that office to act as Chancellor, the Crown signified its willingness to place the Seal in commission if the Assembly were prepared to vote a salary for the professional judges to be appointed thereto, and the plan had failed only because colonists dreaded the loss of power which the proposals in respect of a professional judiciary would occasion.[39]

In 1758, however, circumstances in Jamaica compelled a closer and more searching examination of the practical scope of this prerogative power to constitute courts in the colonies. Not only had the need for courts of more extensive jurisdiction throughout the island become more urgent, but it was now represented in certain quarters that the location of the Supreme Court in St. Jago de la Vega was a hindrance to shipping and commerce.

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[39] CO 137/24 Trelawney to Board of Trade 14/4/1747. The full proposal was that the Chief Justice and an Assistant Judge of the Supreme Court should be professional men for whom the Assembly would provide a proper salary and that these judges should discharge the duties of the Chancery Court. After the failure in 1680 to include the Council in the judicial work of the Chancery, colonists did not wholly abandon the idea of wresting the office from the Governor. CO 140/9 p.433, 9/11/1722 House Committee to bring in a Bill with a clause allowing a salary for a Chancellor to be appointed in the island. CO 140/23/50 7/1/31-2 House Committee to bring in a Bill empowering Governor to appoint a fit person in the nature of the Master of the Rolls or three Commissioners with any two of them with full power to hear and determine in Chancery with appeal to Governor and Council. There is no trace of what became of these Bills but the cardinal trouble was that colonists despised lawyers and feared the loss of power a qualified judiciary would occasion.

Accordingly three Acts were passed by the Jamaica Legislature, the first to increase to £200 the jurisdiction of the Courts of Common Pleas, the second to remove the Supreme Court to Kingston and the third to set up Commissioners to enquire what losses freeholders and leaseholders in St. Jago would suffer by the removal of the courts. To the second and third Acts some factions, notably in the Capital and its environs, were vigorously opposed, high feeling and grave unrest agitated the colony, the royal representative became the object of scurrilous attacks and petitions proceeded to the throne. It could no longer suffice to reject these Acts as "encroachments upon the royal prerogative to which the establishing of courts belong." Some positive exercise, if it were possible, of prerogative power was needed to deal with an urgent practical problem. It will be recalled that in 1680 strong doubts were cast upon the power of the Crown to legislate for or tax the colony, either or both of which were inevitable to any prerogative settlement of the island's grievances.[40] Furthermore, precedent was wanting of a repeal or amendment by the Crown of a colonial statute which had received the royal assent.

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[40] Directions were given to the Crown Law Officers to draft an Act "making provisions for the payment of salaries and allowances to the judges and officers thereof" CO 137/30 page 121; 29/6/1758 Resolution of King in Council.

The cogitations of the Board of Trade reflected the complexity of the problem. Whilst conceding that "the dividing the island into a proper number of counties and establishing courts therein would be a proper and adequate remedy"[41] to the grievances of the colonists "grave doubts were entertained whether these measures could be carried into execution by the Crown consistently with certain Laws heretofore passed in the island and confirmed by the Crown by which the Supreme Court of Judicature and most of the Offices of Record are fixed and appointed to be held at St. Jago de la Vega."[42] From the Attorney General and Solicitor General to whom "a full state of the case"[42] was presented the terse opinion proceeded that "Circuit Courts cannot be established unless by an Act of the Legislature of Jamaica or by the Parliament of Great Britain."[42] The Crown Law Officers gave no reasons for this revolutionary constitutional volte-face, but they may be traced in a memorandum prepared only two years later by the Board of Trade for the Privy Council: "The Governor of every colony not incorporated by charter nor vested by Grant in particular Proprieties, is empowered by his Commission under the Great Seal to erect Courts of Judicature; And accordingly, in the infancy of the colonies, Courts of Judicature were established under

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[41] APC 4 p. 253 29/6/1758
[42] APC 4 p. 253 29/4/1758

that Authority, which Courts have in most of them been confirmed and their Proceedings regulated by Provincial Laws ratified by the Royal Approbation. But in Colonies of a later Establishment as Nova Scotia and Georgia the Courts of Judicature exist and act under the appointment of the Governor in virtue of his Commission."[43] In short, the Legislatures of the old West India Colonies had, by their legislative measures regulatory of their judicial establishments which had received the royal assent, eroded beyond practical utility the ancient prerogative right to establish courts in those territories, but in so far as the later colonies were concerned the experience of history would guard against the mistakes of the past.[44]

Jamaica which had led in this assault upon the royal prerogative, making the first critical breach in 1680, was the first also to profit from this latest and quite extraordinary imperial volte-face. The rash dismissal by the Governor of four judges of the Supreme Court in 1780 became the occasion for a measure "to make the places of the judges of the Supreme Court of Judicature and justices of Assize ..... more permanent and respectable" by which gubernatorial powers of dismissal were to be effectively curbed for the future. The Crown assented to it, but

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[43] APC 4 pp. 430-1. See also Enid Campbell "The Royal Prerogative to create Colonial Courts" 4 Sydney Law Review p. 354. Also L.W. Labaree's Royal Government in America (1930) p. 375.

[44] "More resolute steps were taken to ensure that prerogative instruments rather than colonial acts would be used for the erection of colonial judicial systems" L.W. Labaree op.cit. p. 375 also Enid Campbell op.cit. p. 354.

even before it did so, the relevant Instructions of the Governor were appropriately amended.[45]

In 1825 the first Reports of the Commissioners of Legal Enquiry for the West Indies reached the British Government and the question of the implementation of their recommendations agitated the Colonial Office. The answer that emerged constituted the epitaph to this head of prerogative power so far as the West India colonies were concerned. "If there were at this moment no Courts of Justice established in the West Indies, or if the existing Courts had been entirely the creation of the Royal Prerogative no practical difficulty would exist in giving effect to the recommendations of the Commissioners. The power of the King to erect Court of Justice by Grants or Charter under the Great Seal which is acknowledged in theory in England is a branch of the Prerogative which in practice is frequently exercised in the colonies. But in former and not very remote times this Prerogative of the Crown may be said to have been suspended in the West Indies. Towards the close of the last century the local Legislatures of these Colonies were permitted to pass Laws establishing such Courts of Justice as they deemed expedient and regulating with great

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[45] CO 137/49 Governor Archibald Campbell. Instructions dated 31/8/1872. Judges still held their offices 'during pleasure' but the Act subjected the Governor's power of suspension to certain procedural rules. It would be mistaken also to think that colonists had contended for any high-minded principle of "independence of the Judiciary". They merely wanted to transfer to themselves the control which the Governor hitherto exercised.

minuteness the forms of proceeding to be observed in them. By the same Acts tables of fees were established and the number and duties of the various officers of the Courts were settled. Whether it was wise to allow those judicial institutions which might have been lawfully and effectually regulated by Royal Charter to be regulated by Acts of Assembly it is now too late to enquire. It is obvious that the King cannot alter by His own unassisted authority either the constitution of their Courts after having given His assent to Acts of Assembly by which their powers have distinctly been defined and established."[46]

Seven years later the truth of this epitaph was driven home. Colonists who hated a professional judiciary never actively returned to the project of putting the Chancery Court into commission under paid and qualified gentlemen.[47] Under a lay Chancellor pre-occupied with secular affairs the Court became a byword for waste, expense and chicanery. In these circumstances an aggrieved suitor petitioned the Crown for "the appointment of a judge of approved integrity and acknowledged professional ability."[48] After recounting that "the power of His Majesty's Executive Government to correct the existing system or to discountenance particular abuses which may occur in the administration of it is

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[46] CO 319/29/18 by James Stephen
[47] See supra.
[48] CO 137/182 Stamp to Goderich 21/4/1832

confined within narrow limits"[49] the Secretary of State directed the Governor to inform Mr. Stamp that "I have no power to redress the evils of which he complains except by recommending to the Council and Assembly a plan for the better administration of justice in the Court of Chancery."[50]

Finally two cases, each in the latter half of the 18th and 19th centuries respectively may be noticed. In Campbell v. Hall[51] Lord Mansfield had laid down the doctrine which had a century earlier been applied to Jamaica, namely that once a colony had been given legislative institutions the Crown's legislative powers ceased. In re the Lord Bishop of Natal[52] it was held that "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." Thus, the Board continued, "although the Crown may in its prerogative establish Courts to proceed according to the Common Law, yet it cannot create any new court to administer any other law". As Enid Campbell very aptly observed

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49 CO 137/182 Goderich to Mulgrave 3/7/1832

50 CO 137/182 Goderich to Mulgrave 4/7/1832. In 1827 the Crown had wanted to set up an office of Master of the Rolls in New Brunswick, Canada. The Crown Law Officers' negotiations left them "in considerable doubt whether H.M. can lawfully by letters patent under the Great Seal or in any other manner without the intervention of Parliament or of the local legislature create any new judge in equity." 4 Sydney Law Review p.362.

51 Campbell v. Hall (1774) 20 St. Tr. 239.

52 Re Bishop of Natal (1864) 3 Moo PCCNS 115

"the distinction between legislating for colonies and constituting colonial courts, the Judicial Committee no doubt appreciated, was too fine a one to be maintained and therefore they chose to apply to the latter the same fundamental principle as Lord Mansfield had applied to the former."[53] It was a distinction from the subtlety of which the Crown Law Officers had shrunk as early as 1758.

(iv) The right to appoint to offices. The right to appoint to offices in colonial government had been claimed as a part of the prerogative and the appointment of Richard Povey to the Island Secretaryship on 13/1/1660 in fact pre-dated the establishment of civil government.[54] Other ancient patent-offices were the Attorney General[55] and provost-marshal's. In due course there followed the receiver-general's, surveyor-general's clerk of the court and crown's, advocate-general, registrar in chancery and a number of other inferior posts as clerk of the markets and so on. Governors were early instructed not to allow anyone "to enjoy more than one office at one time or to keep any office which is not executed by himself" but the Crown broke its own precepts and began in the 1690's to make grants of several offices to one person, to permit the discharge of the contingent duties by deputation and to treat colonial offices as real property out of which reversionary interests could be created.

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53 4 Sydney Law Review p. 363
54 CO 140/2/Appendix to Journals p. 2
55 CO 140/2 Patent to Edmund Ducke d/d 4/8/1671 Statistical Reports p. 89.

Deputation, multiplicity of office-holding, and the possession of property in offices were therefore the outstanding features of patentee-ism and each head will be discussed in turn:

(a) Deputation. "The purchase of a colonial patent-office" it was said, "was one of the simplest ways in which a politician's friend in England could secure an income without unseemly effort."[56] The interest of the patentee being in the income of the office rather than in the proper discharge of the duties, no great care was taken in the appointment of proficient deputies who were to do the work. "Strangers to the place, to the people and to the offices[57] was Governor Beeston's description in 1697 of the succession of island secretaries who in a short space of time filled this important office to which were annexed the duties of clerk of ordinary, clerk of the court of error and a great deal of other lesser functions. Men's estates, the probate of wills and grants of letters of administration were "ill and unduly managed" as a consequence. "It is just that the Patentees should either officiate themselves or else desire the Governor and Council to put in a fitting man, else great trouble and law-suits must ensue to the ruin of many families in time, by the neglect and ignorance of such officers."[58]

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[56] Wrong op.cit. p. 39
[57] CSP Col 1696-7 No. 1184 Beeston to Council of Trade & Plantations.
[58] Ibid.,

With the economic development of the eighteenth century, litigation grew and the legal offices remunerated as they were by fees, and not by fixed salaries, also grew in importance and in worth. The provost-marshal's office, that of the clerk of the court and crown, registrar in chancery and secretary were, like stocks and shares, sought after with eagerness and bidded for at auctions. The greater the value of the offices, the greater chain of deputation was possible. The system of appointment of the actual functionary changed also. No longer did he invariably come from England. The lesee, or in his absence, the local attorneys (usually merchants) of the patentee made a local appointment. This more often than not was not a change for the better so far as the prospects of improved efficiency were concerned. Local educational facilities were appallingly poor and the appointee, if a creole white, tended to be a person of little education. As each interested party in the chain of deputation expected a comfortable return on his investment, the obligation upon the local functionary to reap a sufficient income to discharge the prior obligations and to have a respectable income remaining for himself after paying for clerical assistance, stationery and other incidentals, became an anxious and burdensome one. Between exactions on one hand and mal-administration on the other suitors in the various courts of the island suffered at the hand

of the patentee-system. "Abuses, irregularities and exactions"[59] in the office of the provost-marshal, one of the most lucrative of legal offices were at various periods as frequent as they were notorious. In 1810 the Assembly reported that in a particular case the extortions on a debt of £500 amounted to £100 and that over a period of thirteen years judgment creditors had been defrauded of sums totalling £29,884 received and mis-appropriated in the office.[60]

As Governors' powers over the local functionaries extended only to dismissal for gross misconduct and to fill vacancies temporarily,[61] they had no continuous control over the day to day conduct of legal administration. If an officer vacated his office or died, leaving behind unfinished business e.g. the recording of judgments, for which he had been paid, a Governor had no power to call upon his successor to make right the deficiency. The new incumbent, if he chose, could do the work and look to his predecessor, or to his executors or administrators for payment. More often than not such work not surprisingly went undone, unless the Assembly specially voted supplies to clear off the arrears or back-log of work.

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59 CO 137/25. This persisted even into the 19th century long after patentee-issue was ended.
60 Journals of the Assembly (1810) p. 189.
61 Metcalfe's Royal Govt. & Political Conflict in Jamaica (1728-1783) p. 23.

In 1825 the Attorney General referred to the Registrar in Chancery as "that experienced and meritorious officer"[62] and in 1826 spoke of the office of the Provost-Marshal as being "much more efficiently and much more regularly conducted."[63] Such testimonies pointed to the fact that despite the patentee-system, it was possible that public offices in the charge of energetic and able men could be conducted with efficiency and satisfaction, yet such was the haphazard nature of the system of appointment to offices that four years later the Governor reported that the office of the Registrar in Chancery, now in other hands, "is conducted in the worst possible manner, no rules or practice are observed and in short the complaints of the public have become so loud that they cannot longer be disregarded."[64]

(b) Multiplicity of office-holdings. The island secretary, commented Long, was a great pluralist. He held the following employments: clerk of the enrolments and records, clerk of the council, clerk of the court of errors, clerk of ordinary, clerk of the committee of correspondence, associate judge on trials by commission for piracy, commissary-general of the island, notary public besides some other duties related to trade and persons leaving the island. Other offices held in conjunction with each other were those of the registrar in chancery and clerk of the

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62 Report of Commissioners of Legal Enquiry 1st Report. 2nd Series p. 205
63 Journals of the Assembly (1826) p. 742
64 CO 137/169/37 Belmore to Murray 22/8/1829

patents, as well as the offices of the clerk of the court and crown. The evils of pluralism were by-products of the system of deputation itself. The larger the conjunction of offices, the greater the expectation of rewards would be. The chain of deputation accordingly tended to be longer with all the attendant dangers of extortion and mal-administration. The Secretary's Office was by its pluralistic nature particularly suceptible to these dangers, despite the heavy statutory security imposed upon the incumbent. In 1814 he was reported to be "totally ignorant of the duties of the office and of the law prescribing them"[65] and in addition "the records and alphabets in his office are not in good order and repair but have for a considerable time been in bad order."[66]

(c) Vested Interest in Offices. The fact that offices came to be treated as freehold out of which interests in possession as well as in reversion could be created meant that upon the death of one patent-holder the system did not necessarily die with him, but was ready to start anew for the life of the reversioner with all the hazards to the proper management of the office or offices attendant on the lapse of one chain of deputation and the beginning of another. Not surprisingly the most lucrative and pluralist offices in the colony namely, the island secretary, the clerk of the court and crown and the provost-marshal were held subject to reversionary interests. Thus for example when one patent created

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[65] Journals of the Assembly (1814) p. 640.
[66] Journals of the Assembly (1814) p. 639.

in 1762 in respect of the latter office came to an end in 1825 another created 26 years before sprang to life and continued down to the second half of the 19th century.[67]

The patentee-system had become the subject matter of repeated complaints by governors and the Assembly from as early as 1668. In that year Modyford reminded the Lord Keeper that "his Lordship's predecessor promised that no grants should pass under the Great Seal for any offices or other thing whatsoever touching this island until he had given his opinion thereon, being very sensible how much the colony was hindered by such grants as the Surveyor's, Marshal's and Secretary's places. Humbly requests him to continue that favour whereby he will infinitely oblige the whole colony."[68] The favour was never granted and successive governors hated the system not only because of its abuses, but because it denuded them of the patronage, which, in the circumstances of colonial life, was the only weapon with which friends could be won and influence in favour of the Executive be exercised. The Assembly hated it because "it excluded them from offices of trust"[69] and occasioned an exportation of the wealth of the country. Moreover deputies by securing seats in the Assembly combined their forces to resist legislative changes[70] for the public good though to their individual disfavour, and holders

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67 CO 137/463 Grant to Kimberley 8/4/1872 "Mr. Sullivan was the last of the Patent Office holders in Jamaica appointed under the old system which disgraced our West Indian Administration in days gone by." "Mr. Sullivan the Provost Marshal held also at the same time the office of Secretary for Br. Guiana."

68 CSP Col 1661-8 No. 1715

69 Long VI pp. 86-90.

70 CO 137/22 p. 15.

of sinecures in England exerted their influence, often with success, to secure disallowances of local measures, the passage of which their creatures in Jamaica had failed to prevent. In this way local administration became the foot-ball of sectional interests and progress in public administration was to that extent rendered slow and ponderous. In 1699, 1711 and again in 1715 the Assembly passed Acts obliging residence in the island of patentees and prohibiting pluralism. All these measures were disallowed by the Crown as prejudicial to the interests of the prerogative. In 1782 Parliament intervened. 22 G 3 C 75 obliged patentees to discharge their duties in person. The Act did not apply to existing patents and the statutory provision in respect of leave enabled Governors under directives from the Crown to grant indefinite leave of absence even to patentees to whom the Act applied. In 1814 (54 G 3 C 61) the matter received parliamentary attention once more, as a result of the work of a number of Parliamentary Committees appointed in 1810, 1811 and 1812 to investigate the question of sinecure offices. The regulations respecting leave were tightened up and the obligation of residence was re-stated, but as existing patents were again exempted change came slowly. Finally in 1827 the Commissioners of Legal Enquiry condemned the patentee-system but at the same time exhibited extraordinary solicitude over the interests of patent-holders. "It would be the greatest injustice," they said "to make them personally the

victims of any reform"[71] nor would they "support any measure for the remedy of this evil that may tend in any way to affect the interest of the present patentees"[71] which they considered as vested interests. Their recommendation that the colony should "purchase these gentlemen's life and reversionary interests at a fair valuation",[72] was five years later rejected by the colonists who presumably found it quite incomprehensible that they should be asked to purchase public offices in their own government.[73]

In the course of the 1820's however a change in outlook had been growing concerning the principles of selection to colonial offices "not the emoluments of the offices but the advantage to the public",[74] was gradually becoming the policy of the Imperial Government, and care was being taken as often as vacancies occurred, from the office of governor downwards to suit the practice to the precept. Thus upon the death in 1831 of Chief Justice Scarlett, the Home Government making a break with traditional practice refused confirmation of the Governor's nominee, a colonist, and made their own appointment in the person of an English Barrister Sir Joshua Rowe.[75]

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71 Commissioners of Legal Enquiry 1st Report 2ndSeries p.111

72 Commissioners of Legal Enquiry 1st Report 2ndSeries p.111

73 CO 137/183/193 Belmore to Goderich 30/4/1832.The Assembly's reply to the Governor's communication was (in part) "The Patent Offices are very Oppressive but the House cannot consent to purchase them and they are unanimously of opinion that the Acts requiring the personal attendance in this island of Patent Officers should be most rigidly enforced." That same year Mr. Sullivan Patent Provost Marshal General and holder of the Secretaryship of Br.Guiana was required to assume his office in Jamaica.

74 Murray's The West Indies & the Development of Colonial Govt. pp.178-9.

75 It is doubtful whether this particular appointee satisfied in his career the high qualities of "strict and severe impartiality, a mind unbiased by the feuds which prevailed in the colony" which the Colonial Office now desired in the Colonial Chief Justices CO 138/54 Goderich to Mulgrave 6/11/1832.See also A.C. Edwards' Development of the Criminal Law in Jamaica up to 1900 (Thesis for Ph.D. London 1968) p. 170 et seq.

Simultaneously a similar appointment to the vacant office of Attorney General was also made. The makings of a new era in colonial administration seemed at hand even before the abolition of slavery.

(B) Assembly's Control of the Executive and Judiciary.

The campaign of aggression which the Assembly had waged in the 17th century against prerogative authority was extended in the 18th into aggression against all competing authority.[76]

First, disclaimer in 1679 of the Council's right to originate money bills was in 1715 expanded into an open denial by the Assembly of the power of the Upper House even to amend such bills, and despite vigorous assertions to the contrary on the part of the Board of Trade, the Assembly succeeded in adherence to its claim.[77]

The permanent revenue of £8,000[78] voted in 1728 soon proved totally inadequate to the needs of the expanding administration and recourse had necessarily to be made to the Assembly which voted supplies by Annual Acts and appropriated the monies so voted to specified uses subjecting all expenditure to the scrutiny of its own Committee of Public Accounts.[79] Issues for these annual votes

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[76] CSP Col 1733 No. 331 Hunter to Board of Trade "If your Lordship will look back into the history of the several circumstances I believe you'll be of the opinion that it has not been so much the Governors but the Government that has been disagreeable to the Assemblies: See aalso Metcalfe p. 57.

[77] Spurdle Early West Indian Government p. 113.

[78] The import duty for the forty years 1680 to 1720 did not however average more than £4,000 per year. See Spurdle op.cit. p. 115 also CO 137/217 p. 150.

[79] Spurdle op.cit.pp. 120-2

were accordingly made by virtue of the statute and not under any warrant of the Governor. Well known to the British Government, this practice was in 1781 acquiesed in by an Instruction to the Governor.[80] Finally in 1795 (35 G 3 C 9) the permanent revenue was increased to £10,000, but this made little change in the centre of financial power in the country. The power of supply was firmly in the Assembly's hands.[81]

Next by an island Act (4 G 2 C 4) the management of the waste lands was taken over from the Crown and they soon passed into the possession of planters.

In 1779 control of the militia re-engaged the attention of the Assembly and in that year they succeeded in getting a law passed and confirmed by the Crown whereby their whole Body became members of the Council of War. Thus "upon their own notions of alarm"[82] it came into the planters' power "to overawe the unfortunate negroes"[82] by calling out the militia.

Between 1764 and 1766 a conflict between the Assembly and the Judiciary ended in triumph for the former. In 1764 the Governor as Chancellor released under a writ of habeas corpus a bailiff who had detained during a sitting of the House goods of a member and had been imprisoned by the House for an alleged breach of its privileges. Existing rules of privilege had extended

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[80] Ibid., p. 119

[81] Even the Governor's salary was in the gift of the Assembly. Thus the Assembly withheld Governor Sligo's salary upon the abolition of slavery in 1834.

[82] CO 137/228 Smith to Glenelg 7/6/1838.

protection only to the person of a member during meetings of the House.[83] The House refused to vote supplies and demanded the expunging of the offensive order from the records of the Court. For a time the British Government upheld the refusal of the Chancellor to tamper with the records, on ground that to do so would be a high misdemeanour. Finally however the powerful influence of the West India Interests[84] prevailed, the privileges of the House were extended to members' goods and the Governor (and Chancellor) was recalled. Nothing succeeds like success. The House renewed their demands to the Governor in 1766. The new Chancellor bowed and whilst a thousand spectators crowded into the Assembly Hall and watched the destruction of the records the King's Prerogative Court of Chancery was humbled in the dust and the Common Law trampled under.[85]

Sixteen years later the Assembly through the action of an intemperate governor affected practical control over the Courts of Common Law.

Four judges of the Supreme Court, two whilst on the bench, were in 1780 summarily dismissed by the Governor, having handed

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83 APC II No. 1184 (1713)

84 They were the planting and mercantile interests in England with connections in the West Indies.They combined in 1784 to form the West India Committee.See Metcalfe op.cit. p.166 and Dr. Williams' Capitalism and Slavery pp.85-97.

85 The towns were splendidly illuminated,the shipping in the ports were dressed in their gayest colours and such joy and satisfaction appeared in every countenance as we may imagine were displayed by the English Barons receiving Magna Charta from the reluctant hand of King John. CO 137/34 Elletson to Board of Trade 7/7/1766 Metcalfe op.cit. p. 168.

down a majority verdict unfavourable to his wishes.[86] This extraordinary conduct on the part of the royal representative contrained the Crown to depart from its established policy[87] not to assimilate the position of the colonial judges to that of their English counterparts unless colonial legislation required them to be professional men for whom suitable salaries had been provided. In the exigency however, the Crown confirmed a measure by which future dismissals or suspensions of judges would require the consent of at least five of the Council.[88] It further provided that upon a suspension, a copy of the charges should be delivered to the suspended judge. As the Act conferred no power to compel attendance of witness before the Council, and as the accused was not required to appear before them, it became

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86 Gov. Dalling had in 1780 dismissed Mr. Harrison, the Advocate General because he had refused to institute certain proceedings under the Acts of Trade and Navigation, the successful outcome of which would have entitled the Governor to certain fees. Harrison however was soon returned to his office by the Admiralty in England but the Judge Advocate declined to recognise his restoration or to admit him to the exercise of his office. Four judges of the Supreme Court (six sat including the Chief Justice) granted a Writ of Mandanus against the Advocate General and Gov. Dalling promptly dismissed them.

87 Acts were passed in 1722, 1731, 1751 and 1779. Of the last Act the Legal Adviser to the Board of Trade said 'It appears to me that it is to be wished that when such an alteration in their Constitution shall take place, it may, if possible be made general and that only when suitable salaries shall have been settled on the judges CO 137/38/64 - 31/4/1779.

88 21 G 3 C 25 later amended by 57 G 3 C 17 by which only the concurrence of a mere majority of the Council was required.

largely a dead letter.[89] In 1804 the Assembly provided two scales of salaries for the office of chief justice, the higher of which went only to a barrister of at least three years' practice at the local bar. As local practitioners earned much more at the Bar this Act in fact "gave to the House a virtual monopoly of the office of Chief Justice and in fact precluded the Executive from looking elsewhere for a proper person to fill the situation in the event of there being no one of the privileged class (5 years at the local bar[90]) who may be altogether fit for the office."[91] The offices of the two senior lay judges of the Supreme and Assize Courts for whom in 1810[92] the Assembly provided an annual salary similarly came under the control of the Assembly.

Three events on the imperial scene brought the Assembly to the acme of its power before the close of the 18th century. The decision in 1774 in Campbell v. Hall[93] that the Crown could not legislate for a colony with a representative system of government was only a belated judicial confirmation of accepted political practice since 1680. Section 1 of 18 G 3 C 12 to the effect that

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89 CO 137/141 Manchester to the Council 22/12/1715. Under this Act the Council in 1815 considered allegations of "partiality, prejudices and arbitrary and oppressive conduct against C.J.Lewis who declined to appear before the Council. He resigned his office the following year.

90 Amended to 5 years by 58 G 3 C 18

91 CO 137/189 Stamley to Mulgrave 5/4/1833

92 Assistant Judges who could no longer hope to be Chief Justice after the Act of 1804 ceased to attend to their judicial offices with regularity or punctuality and in 1810 an Act was passed prescribing salaries for the two senior asst.judges in the Supreme and Assize Courts in order to secure their attendance CO 140/96 p. 234

93 20 State Tr. 239. In this same year the British Govt. disallowed some Jamaican Acts restricting the slave trade.

"the King and Parliament of Great Britain will not impose any Duty Tax or Assessment whatever, payable in any of His Majesty's Colonies.... in North America or the West Indies"[94] assured the planters that their pockets would be free from imperial pickings. Finally the defeat of a Bill in 1796 to modify the Governments in the West Indies in order to pave the way for negro emancipation carried the message with delight to the planters that "the transcedent power of Parliament to legislate for the empire is a right reserved for great emergencies"[95] one of which was not the liberation of the three hundred thousand slaves who constituted the strength and sinew of their economic order.

At the dawn of the 19th century therefore the Assembly had under its effective control the land, the militia, the finances and through the threat of stoppages of supplies,[96] the legislative machinery of the colony. "From this construction of the machine of the local government, the functions of the Executive" it was aptly said "was reduced to a condition of peculiar helplessness and inefficiency."[97] No effective external and superior authority existed over the Assembly. So far as the Crown was concerned its prerogative authority was now shrunken to the level at which

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94 Year 1778. 95 11/4/1796 Parliamentary History XXXII pp.144:970-971

96 CI 137/24 Trelawney to Board of Trade 14/4/1747"I have already complained to your Lordship in my former letters particularly in that of the 10th May last of the manner in which the Assembly exercise their power of granting money - we must take it as they will give it or not at all."

97 CO 137/188 Mulgrave to Goderich 17/4/1833.

enforcement of its policies rested solely upon its power of dismissal of a limited number of local officials whose remunerations were in the bestowal of the Assembly. So far as the transcendent power of Parlaiment was concerned effective intervention had been gratuitously circumscribed by the solemn pledge not to tax.

Constituted as it was of 44 members elected by 1,500 or 1,600 voters out of a population of over three hundred thousand souls,[98] the so-called Popular Branch of the Legislative was at the dawn of the 19th century for all practical purposes the sole authority in whom rested the means and the power with which to effect the changes and reform for which the legal system had long stood in need.

Of reforms the need for professional judges and for their separation from the Legislative had for a very long time been the subject of frequent comment.

Need for professional judges. The call for such men came positively in 1695. "Unless" wrote the Governor Beeston "the King send us a Chief Justice with orders to enlarge his salary to £500 a year I do not expect that the King or the country will find much justice here."[99] The Assembly in 1722 echoed this call with a direction to a Committee of the House to bring in a bill "providing a salary for a Chief Justice sufficient to encourage a gentleman learned in the law to come over from Great Britain in that post."[100]

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98 CO 137/230 Smith to Glenelg 24/12/1838.
99 CSP Col 1695 No. 2188 Benton to Board of Trade
100 CO 140/9/ p.49

Directions were likewise given "to receive a clause allowing for a chancellor to be appointed in this island"[101] but these legislative exercises were dissipated in the political turmoil preceding the Revenue Act of 1728 and the Assembly not characterised by any purposefulness or consistency of conduct[102] did not resume the subject until 1740.

In that year in response to an address of the Assembly concerning the Court of Errors which had not met for two years, the Governor placed before them and the British Government[103] comprehensive proposals for judicial reforms. Improvements included the appointment by the Lord Chancellor of two professional judges, a Chief Justice and an Assistant who together with a lay judge would discharge the work of the Supreme Court, and with or without the Governor, that of the Chancery.[104] The absence from the Court of Error of these judges for whom adequate salaries were to be provided would make room for the appointment of others so that that Court could more often be convened untroubled by the problems of common membership of itself and the Supreme Court. Nothing came of these proposals "for tho their judgment approve of it, their inclinations and passions are against it, as it would be parting with power which some of them hope to have a share of."

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101 CO 149/9 p. 433
102 CO 137/326 Barkly to Grey February 1855
103 The Board of Trade had indicated their approcal of the plan.CO 137/24 Trelawny to Board of Trade 14/4/1747.
104 CO 137/59 Trelawny to Duke of Bedford 1/6/1750.

"They readily" explained Trelawny "almost unanimously came into the scheme of petitioning to have the Chancery put into commission for that was taking away power from the Governor to be divided among themselves as they thought, but to have power taken from themselves is what they do not like."[105]

The lust for power however seemed not to have been the sole reason which stood between the Assembly's legislative capacity to effect reform and their accomplishment of it. There also was fear; the fear that men bred to the law in the atmosphere of social and political freedom would bring to the interpretation of the municipal laws a spirit alien totheir slave society. This popular fear was expressed by a former lay judge: "As the bulk of our island laws were for the most part framed by persons not educated to the practice of the law, but by plain well-meaning planters, who consulted more the general interests of the country, than finely-tuned periods and accurate phraseology, so we find them or at least many of them so loosely worded as not to bear the nice and subtle distinctions attended to by the gentlemen of the long robe; consequently if a severe hackneyed lawyer becomes the expositor of them and definer of their intention he will be apt to treat them according to the course of his usual practice or what happens to the modish practice of Whitehall and then impair their vigour, explain away their tenor and fritter them into

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105 Ibid.

absolute nullities ..... Judges who have not the solid principles of the constitution, of right and wrong of truth and reason forever before their eyes may lean more to the false refinements of sophistry and the hair breadth lines pencilled by the Courts of Whitehall than to the equity and merits of the cause".....[106] In short, common cause between the judiciary, the legislature and the white community would be best secured and preserved, in the accepted notion of things, by the maintenance upon the bench of the planting aristocracy. Thus in the second half of the 18th century the controversy "whether a man of rank or fortune in this island or a barrister is the more proper man to fill the office of chief justice" was still resolved in favour of the former although in the comparable case of the lay Chancellor and Ordinary by a peculiar distortion of logic it seemed insuperable to white colonists that "a commander of a brigade of foot, such as the Governor was, could suddenly metamorphose himself into a grave judge of courts."[107]

Non-professionalism throughout the judiciary continued down to the 19th century. Upon the death in 1801 of Chief Justice Henckell who had so many estates to manage that he had little time for the duties of his office, the Governor Lord Nugent secured

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[106] Long op.cit. Vol 1 pp. 71-2
[107] Long op.cit. V 1 p. 34

the appointment of a professional gentleman from the local bar and extracted from him an undertaking not to undertake the management of any estate or assume the attorneyship of any property during the tenure of his office.[108] Three years later the Assembly placed the precedent on a statutory basis, provided an annual salary in lieu of fees, required the incumbent to have practised at the local bar for at least three years and imposed the condition of dis-engagement from proprietary interests. The Chief Justice remained flanked by the planting attornies, his associate judges, who could maintain before their eyes "the solid principles of the constitution" and outvote the chief justice if and when he did not.

In 1827 the Commissioners of Legal Enquiry[109] re-iterated recommendations of a Committee of the House of 1809,[110] namely, removal of the lay judges appointment of a qualified chancellor and ordinary and abolition of the Court of Errors, but the Assembly before whom these recommendations were placed two years later rejected a bill to put these proposals in train.[111]

Separation of the Judiciary from the Legislature. The circumstance of joint membership of the judiciary and legislature affected all the courts of the island. The Governor, a constituent part of

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108 Lady Nugent Journal pp. 43-4
109 Commissioners of Legal Enquiry op.cit. pp. 96: 100.
110 CO 140/96 p. 235
111 CO 137/169 Belmore to Murray 17/11/1829.

the Legislature, was sole judge of Chancery and Ordinary and presided over the Council in its rôle as the supreme appellate court in the island. Except for a brief period in the 19th century[112] and at times in the 17th century the chief justice was always a member of the Council in its legislative and judicial capacities. Other members of the Supreme Court were usually members either of the Council or of the Assembly, some occupying the office of Speaker, and so also were the justices of Assize. Custodes who by virtue of their offices were Chairmen of Quarter Sessions and Common Pleas were not infrequently members of Assembly or of the Council. Where property holding was the common criteria for membership of both the judiciary and the legislature, this circumstance combined with the relative scarcity of white men rendered conjunction of offices inevitable.

Its consequences were pernicious to the unbiaised administration of justice. As early as 1678 the Assembly voiced its objections to "a governor being chancellor, ordinary and admiral, joined with his military authority for it lodges so great a power in him, that, being united and executed in one person make him totum in toto and totum in qualibus parte, so that he may invalidate anything done under his own commission."[113] Most Governors heartily detested

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112 From 1817 to 1832 the Chief Justices pursuant to a term of their appointment that they should be unconnected with colonial politics ceased to be members of the Assembly and Council CO 137/152.In 1829 the Secretary of State "deemed it expedient that the ..... CJ should be of H.M's Council" and C.J.Rowe upon his assumption of duty in 1832 became a member of the Council once more CO 137/169/61.

113 CO 140/

their judicial work.[114] Reasons were listed by Governor Trelawny thus: (i) the obvious conflict of interest and duty when the Commander-in-Chief sat either in Chancery, or in Ordinary, or in the Court of Errors on matters in which he had an interest either as party or otherwise[115] (ii) the distraction which attendance to judicial duties entailed upon the Governor of a military island and the inevitable delays.[116] "It was seldom" it was said "that men bred to the sword cared to attend or determine lawsuits."[117] Meetings of the Court of Error were at best irregular and uncertain. From 1738 to 1740 it never was convened.[118] Between 1803 and 1809 it sat only three days.[119] Five Councillors constituted a quorum but because several of the twelve Councillors were usually on leave in England and because several judges of the Grand Court were members of the Council and were therefore incompetent to hear appeals it was always difficult to secure a quorum. Thus the writ of error intended as a remedy against injustice in the lower courts, "became no remedy

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114 Hunter (1728-34) Gregory (1736-8) Trelawny (1738-52) Knowles (1752-6) Nugent (1801-5) Morrison (1811-13) were all anxious to be relieved of judicial duties.

115 CO 137/24 Trelawny to Board of Trade 14/4/1747 "I have been abused for sitting in a Cause in which I was concerned together with the Naval Officer against Mr. Gray the then Agent Victualler, tho I did it by the advice of the Council who consulted the then Attorney General and purely in favour of the adverse Party to make way for his appeal to His Majesty, it having been given in favour of me in the Court below.

116 Ibid.,

117 Ibid.,

118 CO 140/23/p.521

119 CO 140/96 p. 235

at all but to the unjust and only served the purposes of oppression and delay."[120] Further, where there was no Court of Error, further appeal to the Privy Council, except from the Courts of Chancery and Ordinary, was impeded and delayed.

The greatest mischief however emanated from the common membership of the Assembly and Supreme and Assize Courts where all the important criminal and civil litigation of the country was conducted. The smallness of the white population who alone down to 1831 possessed civil and political rights facilitated the consolidation of planting interests represented in the Assembly who passed the laws and in the judiciary by the dame interests who interpreted and administered them. Thus the Assembly's notorious opposition to absentees had its echoes in the Courts where decisions were consistently in their disfavour.[121] Further, in times of heightened public feeling the wild promises of the successful political candidate were likely to be transformed first into the measures of the legislator and finally into the judicial decisions of the legislator/judge.

In 1786 this issue of the separation of the judiciary from the legislature engaged the attention of the House which took the unprecedented step of consulting the freeholders. They likened the conjunction of offices to "a monster in politics equally dreadful

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[120] CO 140/96 p. 521 A bill was brought into the House to abolish the Court of Errors but it failed.

[121] Forsythe v. Yates (Jamaica) Reports (1836-44) p. 12
Gordonetal v. Finzies et al Morris (Jamaica) Report (1836-44? p. 71
Stultz v. Wallace: MadDougall's (Jamaica) Report pp. 44-67
See also Rowley v. East (Grant's (Jamaica) Report pp. 102-4 for an example of judicial antipathy towards Patentees.

as the wicked system of a Spanish Inquisition."[122] The protectionist policies of the planting interests prevailed as always, the Bill never became an Act, and the monster was permitted to live on, personified in the closing years of the period in Richard Barrett, Associate Judge of the Supreme Court, Custos of St. Catherines, Speaker of the Assembly and a planter, concerning whose conduct, and that of his colleagues on the bench, in the course of a case against a special justice of the peace, it was observed that "they made their judicial authority subordinate to the interests of their own class of society, the senior judge Mr. Barrett, being also the Leader in the House of Assembly of a political party opposed to your Lordship's administration, yielded on the Bench to the bias of party politics."[123]

The reality of the relationship between the Legislature and the Judiciary was that they were one. The mind of the planter underwent no transformation in its progress from the Great House, through the chambers of the Legislature and the halls of justice or vice versa. One interest pervaded all these scenes, namely the interest of the planter, and there was no authority able to prize from his grasp the trinity of executive, legislative and judicial power which he had studiously sought and to which he clung tenaciously.

Thus the laborious work of the Commissioners of Legal Enquiry reposed from 1829 to 1838 with the Governors all incapable by any effort of theirs to implement one title of it. The British

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[122] Journals of the Assembly (1736) p. 129.
[123] CO 137/217 James Stephens to Lord Sligo 1/4/1836.

Government contemplated imperial intervention within its self-imposed limitations but concluded that (a) whilst such intervention could be supported on the ground that, unity of design being essential to the common well-being of the island, individual legislation by the islands might not achieve the common aim, but a Parliamentary measure might be regarded as a precedent for interfering on the question of slavery and was on that score objectionable (b) a Parliamentary Act would have to legislate for the payment of fees which could be objected to as a breach of the faith of Parliament as pledged in 1778 and finally (c) the Parliamentary Act would have to repeal Colonial Statutes to which the royal assent had been expressly given. No precedent for this existed and such a measure now would be alarming and offensive to the colonists of the West Indies.[124]

Thus neither the Governor, nor the Crown, nor the Imperial Parliament was able to effect any legal reform whatsoever. That power had become the exclusive prerogative of the Assembly. The question of legal reform was, as can be seen from conclusion (a) above, inextricably interwoven with the broader and more fundamental question of the abolition of slavery. Legal reform and slavery were incompatibles. It is not surprising that the former did not come until after the latter had vanished from the scene.

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[124] CO 319/29/18

CHAPTER IV

THE COURTS OF JUDICATURE 1661 - 1838

The Courts of Judicature of Jamaica during this period included the Courts of Common Law, a Court of Chancery, some courts of special jurisdiction and the Slave Court. In addition to these was the Court of Error and superior to them all was the ultimate court of appeal in England, the Privy Council.

Their origin, jurisdiction, powers and procedures will be discussed in turn.

(A) The Courts of Common Law

There were four courts of common law: (i) the Supreme Court (ii) the Courts of Assize and Nisi Prius (iii) the Court of Quarter Sessions and (iv) the Court of Common Pleas.

(i) The Supreme Court. The King's Supreme Court of Justice of Jamaica, as it was styled, was one of the earliest, as it was indeed, the most important of the common law courts. It was established under the royal prerogative in June 1661[1] and its powers were first defined by a bi-ennial Act of 1675 to comprehend "all pleas, criminal, civil and

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[1] D'Oyley's Instructions are at CO 140/2 Commissions and Instructions, p.3. For resolution of Gov. Council to set up Court CSP Col 1660-8 NO.108.

mixt like the King's Bench, Common Pleas and Exchequer in England"[2]. Successive Acts preserved and perpetuated these powers and regulated its procedures, until the Court itself was more completely secured by the twenty-one year Act 33 Charles 2 C 23 which was rendered perpetual in 1728.

As the Act of 1675 indicated, the Court, unlike the Superior Courts of Record of the Mother Country, was one court, exercising through a common set of judges its criminal, civil and revenue jurisdictions. In 1777 an island Act (17 G 3C 27) empowered the Court, like the Court of Exchequer in England "to hold pleas on the equity side thereof in all matters whatever touching and concerning His Majesty's revenue".[3] It had by statute[4] a concurrent jurisdiction with the Court of Vice Admiralty in cases of seizure and forfeiture under the laws of trade and revenue and an island Act (50 G3 C14)[5] conferred upon this Court a concurrent jurisdiction with the Court of Admiralty Session to hear and determine offences committed in the high seas.

Until 1758 the territorial jurisdiction of the Supreme Court extended over the whole island. In that year however the island was divided into three counties and its jurisdiction was thereafter restricted to the County of Middlesex. The Court however continued to hear and determine offences committed out of the body of the County in

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[2] CO 139/5 p.36 An Act for the establishing and regulation of the several Courts of Justice in this island.

[3] Its equitable jurisdiction was not exercised 1st Report Commrs. of Legal Enquiry 2nd Series p.58.

[4] The Act of Trade and Navigation See Chap.1 pp

cases of information filed ex officio by the Attorney General, or complaints for breaches of duty against magistrates or other officers connected with the administration of justice.[6] By virtue of the Act of 1758 also actions for breaches of any Act of Parliament, or of the Assembly, relating to trade or navigation and actions in respect of custom duties could be heard only in the Supreme Court, whilst either party to an action for ejectment or title to land begun in a County Assize Court could move in the Supreme Court for its transfer into that Court.

The venue of that Court was for some years indeterminate, some sittings having been held in the island capital, St. Jago de la Vega (Spanish Town), others at Port Royal, the commercial centre. These perambulations were however terminated in 1673 by an Act which provided that the Court should be duly and constantly kept at Spanish Town and except for an interval between 1755 and 1758 that town remained its permanent venue until the year 1872 when it was finally transferred to Kingston.

In its criminal jurisdiction the form of prosecution and the proceedings before trial as respect the warrant, examination, bail, commitment and so on were the same as in England. Presentment by a grand

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5 The Crown Law Officers in 1835 advised that "it was incompetent for any Court except the Court of the Commissioners constituted by His Majesty's Commissioners issued in pursuance of the Statute 46 G3 C54 to take cognizance of offences committed within the Admiralty Jurisdiction" and thereafter the Court desisted from the exercise of their jurisdiction CO 138/59 Glenelg to Sligo 30/4/1836.

6 Comms. of Legal Enquiry p.51.

jury and trial before a petty jury of twelve constituted the mode of proceeding at trial, but unlike the practice in the English Courts, defendant's Counsel was allowed to make a full defence for his client by observations on the evidence. Twenty peremptory challenges in addition to any for cause shown were allowed.[7]

The Court had the power, in cases of aggravated misdemeanours immediately affecting the administration of justice, or the peace and happiness of society to make orders for the filing of criminal informations.[8]

The Chief Justice assisted by two Assistant Judges[9] presided over the Court whose officers on the criminal side included the Attorney General, the Provost Marshal and the Clerk of the Crown.

In its civil jurisdiction personal actions were instituted by a simple form of writ to which a simple[10] declaration was attached, copy of which was served upon the Defendant by the Provost Marshal or one of his deputies. Actions for the trial of title to land were initiated by the writ of ejectment which early superseded the writ of right and other real actions. The practice and rules of pleading were the same as in England.[11] There were rules of court prepared by the judges

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[7] Commissioners of Legal Enquiry pp.50-51: 191.

[8] Ibid p.51.

[9] An Act of 1673 constituted a legal bench of the Supreme Court of three judges and the Act of 1681 by which it was properly secured in its jurisdiction enacted that the judges of the Court should be "five at least". Sometimes they were as many as seven - all laymen.

[10] By the middle of the 18th century declarations lost their simplicity, containing many counts and were prolix.

[11] Commissioners of Legal Enquiry p.53.

under statutory power, one of which, created in 1809, declared that "the practice of the King's Bench in England shall govern the practice of the Court, so far as circumstances will admit, save when the established practice or any other rule of the court is to the contrary".[12]

Interlocutory judgments could be obtained before the court and damages were assessable by a jury. Notice of motion for new trial had to be given within forty-eight hours of the judgment and were heard by the same bench of judges.

Judgments were enforceable by a writ of venditioni exponas which combined the force and efficiency of the writs of fieri facias and capias ad satisfaciendum and lands could be proceeded against by writ of extent where the writ of venditioni exponas was returned "nulla bona".

The revenue jurisdiction of the Supreme Court was principally exercised in cases of debts accruing to the Crown from public officers and others and of penalties and forfeitures under the navigation and revenue laws. In such cases the information or other proceeding was intituled of the Supreme Court generally, without any reference in terms to its exchequer or revenue jurisdiction, and there was no distinction between this branch of the jurisdiction of the Supreme Court of Judicature and of its ordinary civil jurisdiction of King's Bench and Common Pleas, as to the persons who may sue or be sued[13]. By virtue of an Island Act 33 Chas 2 C22 the court had jurisdiction as a court of escheat.

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[12] Commissioners of Legal Enquiry p.53.
[13] Attorney General Burge to the Commissioners of Legal Enquiry p.58.

Until 1790 the Court sat at Spanish Town four times a year, each sitting lasting just three weeks. In that year the August Term was abolished and a long vacation established as in England.[14] The Court thereafter sat three times a year on the second Monday in February, the first Monday in June and the first Monday in October, each sitting continuing to be of the same duration. In its deliberations it was assisted by a jury of twelve persons.

The Supreme Court exercised a supervisory jurisdiction over Quarter Sessions and Common Pleas by means of the prerogative writs. It also exercised supervision over the Court of Vice-Admiralty.[15]

The Clerk of the Supreme Court who also held the office of Clerk of the Crown was in civil matters the principal officer of the Court. His office was held by patent.

(ii) The Courts of Assize and Nisi Prius. In 1758 the Crown confirmed an Act dividing the island into three countries, Cornwall, Middlesex and Surrey and establishing Courts of Assize and Nisi Prius in the first and third counties. The growth of commerce, and the fact that the growing population was scattered in places remote from the capital rendered it necessary to take justice to the people and to avoid the delay and expense incident to the travelling of parties, witnesses and jurors

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[14] Edwards History of the W.I. V.I p.210.

[15] The Supreme Court in 1779 granted a writ of Habeas Corpus for the release of a defendant in the custody of Court of Vice-Admiralty CO 140/59 p. 154. In Ex parte Oliveres Daniel, the Supreme Court, whilst refusing an application for a Writ of Prohibition on the facts of the particular case in no sense denied the existence of the general power to do so Grant's (Jamaica) Reports pp. 293 et seq.

over long distances.

The Act provided that the Court should be presided over by "such persons as the Governor shall think fit," three to be a quorum and they were given "the same powers, authority and jurisdiction, in their respective counties, that the justices of Assize and nisi prius, justices of oyer and terminer and justices of gaol delivery now have or ought to have in that part of Great Britain called England."[16]

The forms of criminal procedure were the same as the Supreme Court. Like the Nisi Prius Court in England civil proceedings were begun in and the interlocutory stages conducted before the Supreme Court at Spanish Town down to the stage at which an issue was arrived at for determination by the justices and jury at the quarterly sittings of the Courts at their respective county-towns, Savanna-la-mar[17] and Kin gston. Unlike the English Nisi Prius Courts, however, judgments were awarded and motions for new trial or in arrest of judgment were entertained and disposed of by the respective Courts and not in the Supreme Court which had no power to revise or reverse their decisions. After 1758 the supervisory jurisdiction formerly exercised by the Supreme Court over courts of inferior jurisdiction was taken over by the Assize Courts, each in respect of the inferior courts within its jurisdiction.[18] They were empowered to impose fines and to make rules

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[16] 31 G 2 C4 S xi.

[17] Transferred to Montego Bay in 1815 CO 137/141 Manchester to Bathurst 26/5/1815. Savanna-la-mar had become a "decayed town" whilst Montego Bay was "a thriving bustling place" Savanna-la-mar was too remote from the rest of the country".

[18] 31 G2 C4 S25.

and orders for the regulation of proceedings before them and such fines rules and orders were not liable to be taken off, mitigated, revised in or by the Supreme Court.

Like the Supreme Court, the Assize Courts had a concurrent jurisdiction with the Court of Admiralty Session over offences committed on the high seas.

Until 1817 none of the judges of the Assize Courts were lawyers. In that year however the inconvenience of this situation was alleviated by the passage of an Act which increased the salary of the Chief Justice and required him to preside in these Courts.

The officers of the Cornwall Assize Court were the deputies of the Clerk of the Court and Crown and of the Provost Marshal. The Attorney-General and the Clerk of the Court and Crown attended the Surrey Assize Court.

(iii) Quarter Sessions derived its existence from the exercise of the prerogative power committed to Governor D'Oyley and his Council "to direct and constitute such and so many civil judicatories"[19] and was more properly secured in its jurisdiction by 33 Chas. 2 C.23. The Court first sat with its bench of justices of the peace on the 2nd of July 1661 at Port Royal and ordered the execution of a soldier "in order", it was said "to show that the law could do as much as a court-martial".[20]

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[19] CO 145/2 Commissions & Instructions p.3.

[20] Journals of Col. Wm.Beeston in "Tracts relating to the island of Jamaica" British Museum 9772 g.2. This trial and sentence were in excess of jurisdiction as Quarter Session had no power at Common Law to impose the death sentence.

Additional courts were established in 1664 in each of the six precincts in which the island was divided and in December of that year the Governor and Council framed rules and orders directing the jurisdiction, method and form of proceeding in the courts.

The Custos "usually the best and riches of gentlemen in the parish" presided over the Court assisted by two or more justices of the peace. In the absence of the Custos the senior magistrate presided. As a Court of criminal judicature its jurisdiction was co-extensive with that exercised by the Court of Quarter Sessions in England. The court also had a concurrent jurisdiction with the Supreme and Assize Courts in those criminal cases which did not extend to life or in which an exclusive jurisdiction was not given to the latter courts.

Apart from the common law jurisdiction of the court, it also exercised a wide variety of statutory powers including ultimately a power under the Slave Act of 1830 to hear and determine with a grand and petty jury a number of cases against slaves with power to impose the death sentence, transportation or confinement to hard labour for life.[21]

In 1837 its jurisdiction was extended as a result of the abolition of slavery and the sudden transfer of the great bulk of the population,

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[21] The quarterly sessions in the 18th century must have been scenes of great activity. Custodes and Magistrates were required by law to read aloud a number of Acts and the Provost Marshal and his Deputies were required to conduct slaes of "stray cattle" in the neighbourhood of the Court in its quarterly sessions.

from the judicial discipline of the Slave Courts to that of the other Courts of the land. By the Larceny Consolidation Act of that year its jurisdiction was extended to embrace grand larceny, that is, larceny of articles above the value of one shilling and the court was empowered to award sentences of transportation in addition to its original powers of imposing fine, whipping or a sentence of imprisonment.

The Court sat four times a year on days established either by law or custom at the Court House of the parish or other place assigned for parochial business and was assisted by a grand and petty jury.

Indictments were prepared and prosecutions conducted by the Clerk of the Peace who held his office "quamdiu se bene gesserit" from the Custos of the parish. He was remunerated by fees fixed by each parochial vestry and the justices of the peace.

The variety and importance of the business, civil and criminal, done at Quarter Sessions prompted the Commissioners of Legal Enquiry to recommend that "a barrister with a suitable salary should be appointed to preside over the Court."[22]

(iv) Court of Common Pleas. Like the Court of Quarter Sessions the Court of Common Pleas was established under the prerogative in 1661 and was subsequently placed upon a statutory basis, and its practices and

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[22] Commissioners of Legal Enquiry First Report 2nd Series p.111.

procedures regulated, by 33 Chas.2 C 23.[23]

In course of time Courts were established in all the parishes with the exception of St. Catherine, St. Dorothy, St. John and St. Thomas in the Vale. Matters that were properly cognisable in the Courts of Common Pleas were tried and disposed of in the Supreme Court of those four parishes.

The Court had jurisdiction in civil matters to the extent of twenty pounds only. It originally exercised a jurisdiction in matters affecting freehold but as "divers errors were committed by the judges mistaking their jurisdictions"[24] the power was withdrawn.

The Custos of the parish and two justices of the peace appointed by the Governor under a separate commission presided over the quarterly sittings of the Court in which it was assisted by a jury of twelve persons. Proceedings were initiated by filing in the office of the Clerk of the Peace a declaration, a copy of which with writ annexed was served upon the defendant by the Deputy Provost Marshal at least fourteen days before the return day.

Until the establishment of the Assize Courts in 1758 its proceedings were removable by Certiorari into the Supreme Court, but after that date they were so removable into the former court.

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[23] Section 18 of the Act.
[24] CO 140/2 p.35 Year 1678.

The Clerk of the Peace was the principal officer of this Court concerning whom it was recommended that he should have received a legal education and have been admitted an attorney of the superior courts. In addition it was recommended that a salary should be attached to the office sufficient to attract persons of respectability and experience.[25]

(b) The Court of Chancery

The custody of the Great Seal of the island having been committed to Sir Charles Lyttleton, Deputy to the Governor, Lord Windsor, Sir Charles was sworn as Keeper in the presence of the Governor and Council on the 5th of September 1662 and thus became Jamaica's first Chancellor.

Upon his departure from the island in 1664 the Chancellor, pursuant to his instructions, put the Seal into Commission "with power to determine any case of equity or passing of grants."[27] Later that same year, however, the new Governor Sir Thomas Modyford assumed possession of the Seal "lest there should be made an office of it, if it should be in particular hands."[28] The commission of the Great Seal therefore came to an end and thereafter every succeeding governor by virtue of the letters patent appointing him as such, exercised the office of sole Chancellor.

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[25] Commissioners of Legal Enquiry Op cit. p. 114.
[26] CO 139/1 p. 17. CO 140/2 p. 48 Appendix C.
[27] CSP Col. 1661-8 NO 746.
[28] CO 140/2 Appendix p. 35.

The Court's jurisdiction was similar and co-extensive with that of the Court of Chancery in England. It exercised a jurisdiction in cases of idiotcy and lunacy derived from express grant in the letters patent appointing the governors. It also appointed guardians to infants, entertained writs of dower and partition and granted injunctions to stay waste. It had power to decree the sale of lands for payment of judgment debts, and to grant specific performance. It entertained actions for the administration of the estates of deceased persons and for the construction of wills of personalty.

There also was a common law or petty bag side of the office.

In case of doubt as to any material fact the Chancellor could direct an issue, and in what County it should be tried. Similarly the Chancellor could refer a point of law for the determination of the Supreme Court, but both these powers were seldom invoked.[29] Contrariwise the power of the Court to stay proceedings at law was commonly exercised and in 1722 became the subject of popular complaint.[30]

The practise and proceedings of the Court in its equity jurisdiction were as analogous to those of the Court of Chancery in England as local circumstances permitted.[31]

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[29] Commissioners of Legal Enquiry Op Cit p.63.
[30] CSP Col 1722-23 NO 320 Petition of Merchants and planters trading to and concerned in Jamaica to the King.
[31] Commissioners of Legal Enquiry, p.61.

The Chancellor's common law jurisdiction included the issuing of writs for the election of Members of Assembly, and of Coroners (of whom there was one in each parish), writs of error and patents for land and for escheated property.

The officers of the Court were the Registrar in Chancery (who also was Clerk of the Patents) and Masters in Chancery who held their offices at the pleasure of the Governor. The Masters resided at the seat of the Government in Spanish Town where also the Court was held in January, May and September of each year. In the country were some Masters in Ordinary holding commissions from the Masters Extraordinary and to whom occasionally references were made and who together with the Masters Extraordinary administered oaths, examined witnesses, took recognizances and until 1817 taxed costs. Masters were not required to be professional men, an Act of 1823 merely requiring that no person be so appointed unless he was over 25 years of age and had served in articles with a Master for three years[32]. They received no salary but rather were paid by fees and references to them were made either upon the nomination of the complainant, or, if there was an objection by the defendant, by the Chancellor. In 1796 there were as many as six Masters but their numbers were subsequently reduced to three.

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[32] Commissioners of Legal Enquiry Op cit p.66 "Of the impropriety of continuing to appoint Masters so qualified, when it appears . . . . that their duties with the exception of appointing receivers are co-extensive with that of a Master in England and that they also discharge in addition the functions of examiners, we trust little need be said".

The Provost Marshal was Serjeant at Arms and to him all contempt process and writs of ne exeat insula were directed.

(c) Courts of Special Jurisdiction

The courts of special jurisdiction were the Court of Ordinary, the Courts of Admiralty, the Courts of Justices of the Peace out of Session and the Slave Courts, each of which will now be considered.

(i) The Court of Ordinary derived its existence from the exercise by Governor Windsor in 1662 of the royal instruction "to settle judicatories and determine all causes . . . . . matrimonial and testamentary."[33] Colonel Mitchell was in 1662 sworn as Jamaica's first Ordinary. On his accession to the Government in 1664 Sir Thomas Modyford assumed the office by virtue of the royal authority in that behalf and succeeding Governors by the same authority performed the functions of Ordinary.[34]

The subject matters of the court's jurisdiction were the probate of wills and the granting of letters of administration. Wills affecting real and personal property in the island were proved in this court in common or solemn form and where the grant of probate or of letters of administration were not contested, same were grantable out of the Secretary's

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[34] CO 140/2 Appendix p. 46 Report on State of the Government of Jamaica by Sir Thomas Lynch Governor 1683 "The king doth not only appoint his governor to be his chancellor, but likewise the bishop's ordinary, and judge of the prerogative court, supposing that he who is entrusted with the whole may be fittest to be trusted with particulars".

Office after caveat had been entered for a specified time.

Neither the probate of a will, nor the grant of letters of administration authorised an executor or administrator to enter on, or possess himself of the real estate of the deceased.

In 1827 it was reported to the Commissioners of Legal Enquiry that the Court had no jurisdiction to pronounce a sentence of divorce, either a **vinculo** matrimonii or a mensa et thoro, or to decree alimony,[35] but the Commissioners were informed that the Court of Chancery had jurisdiction to award separate maintenance to a wife on proof of misconduct by her husband.

The Court did not possess the means of enforcing obedience to its orders, nor had power to excommunicate, nor empowered with any process to punish contempt or to carry its orders into execution. It sat in Spanish Town.

The Commissioners of Legal Enquiry recommended that the office of Ordinary, like that of Chancellor, should be placed in the hands of a professional person "thus relieving the Governor from offices which subject him to great inconvenience and perplexity.[36]

(ii) The Courts of Admiralty

(a) In 1661 Edward D'Cyley, the first Governor of Jamaica was instructed to settle judicatories for crime and admiralty affairs and in 1662 the

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[35] Commissioners of Legal Enquiry p.112.
[36] Commissioners of Legal Enquiry Op cit pp.101-111.

powers of the Duke of York as Lord High Admiral were extended to foreign possessions of the Crown in Africa and America.[37] Accordingly when in that year Lord Windsor was appointed Governor of Jamaica he was instructed by the Crown to cause to be held courts of admiralty by such judges as should be commissioned for that purpose by the Duke of York.[38] Windsor's brother-in-law Colonel Mitchell sat as the first judge of the Admiralty in 1662[39] under power of the Governor's Commission and subsequent appointees to the office similarly derived their authority from the letters patent under the Great Seal of the Admiralty.

The Court's jurisdiction extended over crime and maritime causes in which it was guided by the same law as the High Court of Admiralty in England in like cases. It also had jurisdiction in matters of and smuggled goods, but its principal function related to the enforcement of the Acts of Trade and Navigation.

The first of these Restoration Acts, 12 Chas.II C.18 ordained that importations into and exportations from colonial possessions were to be undertaken only in English ships or in ships built in and belonging to a colony and legally navigated.[40] Breaches of the Act where seizures thereunder were made by the Admiralty were to be conducted in the Vice-

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[37] CSP Col. 1661-8 Nos. 22 and 245.
[38] CO 140/2 Appendix p.5.
[39] CSP Col 1661-8 NO 379: CO 137/46 "Report on the Origin of the Admiralty Court in Jamaica."
[40] "Legally navigated" meant that at least three-quarters of the crew including the Master had to be English.

Admiralty Court, but otherwise in any court of record. The Staple Act of 1663 conferred power upon "any court in the plantations" to condemn ships conveying to the plantations goods and produce from Europe other than in accordance with the Act.[41] Infringements of bonds under 12 Chas II C18 and the Plantation Duties Act of 1673 were also enforceable in the Court of Vice-Admiralty.

Experience between the years 1660 and 1696 had shown that contentions whether the Court of Vice-Admiralty was a court of record as well as the fact that in some cases colonial courts had a concurrent jurisdiction with the admiralty court had led to evasions of the commercial code. In 1696 the Act for prevention of frauds and regulating abuses in the Plantation Trade (7 & 8 W 3 C 22) gave to any court in the plantations (necessarily including the Court of Vice-Admiralty) jurisdiction for the condemnation of ships trading with the colonies in violation of the parent Acts and provided that penalties and forfeitures not otherwise particularly provided for should be recoverable in the Court of Admiralty. In addition power was given to the Commissioners of the Treasury and of the Customs to appoint and send out to the colonies officers who should superintend the enforcement of the revenue laws and the collection of the duties.

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[41] This Act required that from and after 20/3/1664 European goods and produce should not be imported into the English Plantations except they were first laden and shipped in England in English-built shipping legally navigated.

This consolidating Act of 1696 became the foundation of the Court's jurisdiction in cases of forfeiture relating to trade and revenue and was later re-enforced by 4 G.3 C 15 (S,41), 8G3 C 22 and 49 G.3 C 107 by which the powers of the Court were extended.

By the Island Acts 28 G 3 15 sect.9 and 29 G3 C 15, where goods seized as forfeited, did not exceed in value £100, or where the vessel was under 15 tons, with a cargo of no greater value than £50 they could be proceeded against in a summary manner before a Judge of the Supreme Court, or two justices of the peace, who had full power to condemn. In all other cases, actions had to be originated in the Vice-Admiralty Court.

The Court was unassisted by a jury and evidence was taken by the Registrar upon interrogatories filed in the office by either party. Accordingly parties to proceedings in the Court did not have the benefit of cross-examination.

The Attorney General in answer to questions by the Commissioners of Legal Enquiry expressed the view that proceedings before the Court though not dilatory were expensive.

Originally there was no regular appeal to England from the decisions of the Vice-Admiralty Courts the only method of redress being to petition

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[42] Commissioners of Legal Enquiry Op Cit. p.211. The Registrar of the Court on the other hand asserted that they were neither dilatory nor expensive p.245. In the view of a Committee of the House of Assembly, they were dilatory and expensive and vexatious to an enormous degree. See CO 140/69 pp.548 et seq..

the King.[43] In 1686 however, one Thomas Cook of Ireland petitioned the King, stating that his ship, the O'Brien, had been seized and on trial had been unjustly condemned in the Nevis Admiralty Court.[44] The petition was referred by the Lords of Trade to the English Admiralty Judge who reported that in his opinion the seizure was un-warranted by law and "altho there may not in strictness of law ly any appeals, yet ex speciali gratia of His Majesty he may admit the complaints to except against this judgment and with submission to your Honour for the security of navigation and trade it may even be necessary, for when these Admiralties find there is a superior power to inspect their sentences and so to confirm or reverse, they will be more careful to follow the rules of law and so administer justice unpartially.[45]

Thereafter provisions were made for appeals to lie from the Court in causes civil and maritime and under the laws of trade and revenue, to the High Court of Admiralty in England.

Before 1721 the Court was from time to time presided over by a sole judge or by a plurality of judges. From 1721 onwards however the Court

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[43] In 1673 Sir Thomas Lynch suggested the possibility of such an appeal lying either to the King in Council or to the Court of Delegates in England to which the Council replied "it would prove of ill consequence and tend to the subversion of the Government if once admitted and that there never had been any such precedent of any appeal allowed either on this island or any of H.M.'s Dominions beyond the seas.(CSP Col 1668-74 NO 1150).

[44] CSP Col 1685-8 p.257.

[45] CO 1/58, 83 viii.

was administered by one judge, the Judge Advocate as he was called, assisted by three surrogates, a Registrar and a Marshal.

The Court sat in Spanish Town, but for convenience was occasionally convened in Kingston.

(b) The Court of Admiralty Session. At the Restoration the English Statutes regulating the trial of treasons, felonies, robberies, murders and confederacies committed in or upon the seas were 27 H.8 C 4 and 28 H8 C 15 (1536). These Statutes which applied only to England empowered Commissioners appointed under the King's Great Seal (of whom three constituted a quorum) to try within the realm such offences after the course of the common law. Thereafter the mode of trial according to the civil law fell into disuse.[46]

Despite the absence of any statutory authority criminal trials under the assumed authority of 27 & 28 H8 were prosecuted in Jamaica before the establishment of a civil government and continued to be so prosecuted after that date. Matters were further complicated in 1672 when upon the trial and conviction of one Peter Johnson, a pirate, for an offence of which he had been previously tried and acquitted, the King enjoined the Governor "to try all pirates by the civil or maritime law."[47]

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[46] Under the Civil law a conviction could only be recorded upon a confession of the accused or upon the testimony of two or more witnesses. The difficulties inherent in the situation led to the enactment of the Tudor Statutes.

[47] CSP Col 1668-74 NO 1132 the King to Sir Thomas Lynch.

Four years later the timely intervention of the Lords of Trade extended the life of another pirate who, pursuant to the King's advice, had been tried and convicted under the obsolete system of the civil law. "Since 28 H 8 C 15" they said "neither the Lord High Admiral nor his Lieutenant or Commissary ever tried pirates but by Commission of oyer and terminer under the Great Seal". Deane's execution must therefore be stopped and a new trial had under commission of oyer and terminer now and in all future cases.[48]

In the years between 1676 and 1678, however, the inapplicability of the English Statutes to the colonies was discovered and so an Act framed by the Lords of Trade was forwarded to Jamaica and was subsequently included in the number of Acts confirmed by the Crown for 21 years in 1683 and indefinitely in 1729.

That Act was 33 Chas 2 C 8 by section 3 of which all prior assumed jurisdictions were validated and power was given to the judges of the Admiralty and to other substantial persons appointed by the Governor by commission under the seal of the island to try treasons, felonies, piracies and other offences committed upon the sea in accordance with the manner provided in and powers conferred by 27 and 28 H.8. The Court of Admiralty Sessions therefore properly derived its original jurisdiction from this Island Act.

In trials under the Island Act, as under 27 & 28 H.8 the Court was assisted by a grand and petty jury, and, as under the English Act, a person

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[48] APC I pp. 669-70.

tried for murder could not be found guilty of manslaughter.[49]

The Imperial Act 11 and 12 W 3 C 17 "for the more effectual suppression of piracy"[50] came into effect in 1700 and the Governors of the island were directed to hold Courts of Admiralty Sessions under its provisions and not under those of the island Act. The Imperial Act had been passed because it had been found necessary to convey to England for trial persons who had committed offences upon the high seas in the East and West Indies, few of the colonial possessions having enacted legislation similar to the Jamaica Act. The expense of these trials in England were however so prohibitive that the practical step was taken of passing an Act that would at once apply to all colonial territories.

By virtue of commissions under the Great Seal of England or the Seal of the Admiralty of England, authority under the Imperial Act was given to the Governor to appoint named persons including the judges of the Vice-Admiralty Court to constitute a Court of Vice-Admiralty Sessions for the trial of piracies, robberies and felonies upon the seas. Trials under the Act proceeded without a jury and accessories had to be conveyed to England for trial.

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[49] This was the rule at civil law which the introduction of the common law mode of proceeding did not change. This rule was altered in England by 39 G 3 C.37 which did not extend to Jamaica. An Island Act 50 G 3 C 14 subsequently effected a similar change in conformity with the rule at common law.

[50] A seven year Act 11 and 12 WC was rendered perpetual by 6 Geo I.

In 1717 another Imperial Act (4 G 1 C 11) directed that trials under the parent Imperial Statute should be conducted "in such manner and form as in and by the Act 28 H 8 C 5 is directed and appointed for the trial of pirates" that is, by trial by jury and the Act further abolished the plea of clergy. By another Imperial Act, four years later accessories were deemed "to be principals and shall and may from the 25th of March 1722 be enquired of, heard, determined and adjudged in the same manner as pirates."[51]

The absence of jury trial and the expense and inconvenience of transporting accessories and witnesses to England generated in the colony considerable opposition to the Imperial Act but in 1703 a Committee of the House charged with the duty of revising the Laws of Jamaica (including 33 Chas 2 C 8) about to expire reported that "they had made some progress therein, but finding an Act of Parliament made in England in the 11 and 12 W3 for punishing pirates and that in the said Act the Statute H.8 . . . . . was put in force and that Commissioners under the last Act are to have the sole power of judging in all cases of piracy in the colonies of America, which said Act of William 3 . . . . . is still in force. Whereupon the Committee are of opinon that such an Act made here will be altogether unnecessary and of no effect."[52]

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[51] 8 GI C 24.

[52] CO 140/2/295. The Island Act 33 C 2 C 8 was however renewed and made permanent and was only repealed in the 1840's.

The commission issued by the Governor under 11 & 12 W 3, as under 33 Chas 2 C 8, were always directed to the judge of the Vice-Admiralty Court as the President, to the Commander in Chief of the squadron, the members of His Majesty's Council, the Chief Justice and Assistant Judges of the Supreme Court, the Captains of the Navy on the station, the judges of Assize, Barristers-at-law, the Secretary of the Island and a few other persons. Out of this number three constituted a Court, of whom the Judge of the Court of Vice-Admiralty was required to be one. His assistants were usually two of the Assistant Judges or Justices of Assize.

The inability of the Court of Admiralty Sessions to convict of manslaughter where an accused had been tried for murder created great inconvenience and resulted in many guilty parties escaping just punishment. Accordingly an Island Act 50 G.3 C.14 removed this defect whilst giving the Supreme and Assize Courts concurrent jurisdiction with the Court of Admiralty Sessions over offences committed on the high seas. The Act also contained a provision permitting an accused to plead his clergy.

After the enactment of the island Act Admiralty Sessions were held less frequently, nor were the powers under an earlier Imperial Act 46 G 3 C 54 invoked despite letters patent thereunder bearing date the 1st of February 1815 authorising the Governor, the judge of the Vice-Admiralty Court, the Chief Justice and some other distinguished persons to constitute themselves a Court with the same powers as Commissioners appointed under 28 H 8 C.15 had for the trial of piracy, robberies, and

felonies upon the high seas.[53]

In 1836, however, upon advice received that "it was incompetent for any Court except the Court of Commissioners constituted by His Majesty's Commission issued in pursuance of the Statute 46 G 3 C 54 to take cognizance of offences committed within the Admiralty Jurisdiction",[54] the authority under the Island Act was no longer exercised. New letters patent under the Imperial Statute were obtained and the Admiralty jurisdiction exercised thereunder.

By virtue of the Imperial Act 58G3 C 98 Commissioners under the Act 46 G 3 C 54 had a power to try felonies and misdemeanours against the laws for the abolition of the slave trade.

The Court sat in Kingston wherever it was necessary to convene it. There was no appeal from the Court, but motions in arrest of judgment could be argued before the same judges who sat on the trial.

The officers of the Admiralty Sessions were the Clerk of Arraigns and the Marshal. The appointment of the latter was permanent, but the former was nominated by the Judge of the Court of Vice-Admiralty, upon a commission being issued.

(iii) Court of the Justice of the Peace. The power to appoint Justices of the Peace derived from the Governor's Commission and Instructions and pursuant thereto one of the first acts of the civil government established

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[53] Commissioners of Legal Enquiry Op cit. p.112.
[54] CO 138/59 Glenelg to Sligo 30/4/1836.

under Governor D'Oyley was the investiture of all the members of the Council with that office.[55]

They held their offices pro vita aut culpa and they could not act, though appointed, until they had taken out a writ of dedimus from the secretary of the governor empowering certain persons therein named, or one of them, to administer the usual oaths to them. They were usually recommended for appointment by the Custodes, but such recommendation was not essential to the appointment.[56]

Justices of the Peace were in numerous instances commissioned to act as judges of the Court of Common Pleas. The two offices, however, were not necessarily blended, but were separate.

The powers and duties of justices of the peace depended on their Commissions and on the several Acts conferring jurisdiction upon them.

Their Commissions empowered and directed them to preserve the peace, to suppress riots and affray, to commit felons and inferior culprits. As conservators of the peace they had power to hear charges against offenders, issue summonses or warrants thereon, examine informants and witnesses, binding over the parties to prosecute and give evidence and bail the accused or commit him for trial. These acts any two justices of the peace could do out of session or when assembled at their quarterly sessions.

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[55] CSP Col 1661-8 NO 108.

[56] So said the Commissioners of Legal Enquiry in 1827 op cit. p.27 but later on "the power of recommending candidates to the magistracy had been claimed almost as a right by Custodes CO 137/324 Baskley to Newcastle 25/11/1854.

Particular Island Acts conferred judicial criminal jurisdiction upon justices of the peace in addition to those conferred upon them under various Slave Acts.

In 1663 a civil jurisdiction was conferred upon one justice of the peace by a resolution of the Council that "creditors of sums not exceeding forty shillings shall have recourse to any justice of quorum, who is hereby empowered to give relief to creditors as amply as if brought into any court of judicature"[57]. The following year this civil jurisdiction was extended "to take cognizance of and decide all pleas and differences betwixt person and person not exceeding the value of forty shillings wherein the titles of land are not concerned". This power was permanently secured by 33 Chas 2 C 6 and continued down to 1834.[58]

Proceedings in this civil jurisdiction were instituted by laying a complaint before a justice of the peace of the parish in which the act complained of arose. A summons was then issued to the defendant calling upon him to attend and answer the charge at a place and time stated therein. For non-appearance a warrant of contempt for his arrest followed and the justice could impose a fine not exceeding 10/- for every contempt in addition to any damage and costs he may award in

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[57] CSP Col 1661-8 NO 518.

[58] CSP Col 1661-8 NO 870. Upon the abolition of slavery in 1834 it became necessary to increase this jurisdiction. This was done by 4 W 4C4, the jurisdiction being increased to £5 "wherein the title of land or real estate is not invoked."

the proceedings. Judgment was recoverable by distress, or in the absence of goods to be distrained upon, by imprisonment until the debt was paid. Where the justice of the peace issued a warrant to bring the party before the court and not a summons he was entitled to a fee of one shilling and three pence. There was no appeal from the judgment of the justice of the peace.

By 55 G 3 C 29 two justices of the peace could hear and determine in a summary manner disputes between masters and servants up to an amount of one hundred pounds. Proceedings in this Court were likewise not removable into any other court.

Under a Vagrancy Act (1833) passed by the Assembly to take effect upon the abolition of slavery one justice of the peace upon his own evidence or upon the evidence of one or more credible witnesses had power to order an "idle person" to be confined in a house of correction for one week. Under this Act also justices and vestry in each parish were empowered to build houses of correction "with treadmills and such like necessary implements to set rogues and such other idle persons to work".

In addition to their judicial and ministerial duties justices had by various island statutes many administrative duties such as the case of the parochial gaols, duties relating to the highways, under the liquor laws and so on.

(iv) <u>The Slave Court.</u> "The state of slavery" said Lord Mansfield "is so

odious that nothing can be suffered to support it but positive law.

In Jamaica the Slave Court was from its inception in 1664 to the abolition of slavery in 1839 the creature of island statutes. Its development was from a court of one justice of the peace and one or more freeholders in 1664 to a Court of quarter sessions in 1831 presided over by three justices of the peace and assisted in its deliberations by a grand and petty jury.

In 1674 the first significant development took place. Dependent upon the gravity or otherwise of the offence committed and the sentence imposed by law, the court was differently instituted. Thus by this Act maiming or killing of horses, horned-cattle or hogs was triable before two justices of the peace and three freeholders in the parish in which the offence was charged to have been committed and was punishable in the discretion of the Court. For lesser offences such as assaulting a white person whipping could be imposed by one justice of the peace for a first offence, whilst for a second offence additional punishment such as slitting the nose or burning on some part of the face could be awarded by one justice also.

Three years later a court of two justices of the peace and three freeholders became necessary to hear and determine all cases of violence offered by slaves to white persons punishable in the first and second instances in the manner already described. In addition the sentence of

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[59] Somersett's Case 20 St.Trial.

death could be imposed by a court so constituted for robbery, burglary, arson or rebellion.

In 1696 a comprehensive Slave Act was passed designed to regulate the conduct of slaves with greater strictness and to remove such weaknesses in the existing legislation as had been discovered in the course of slave uprisings in 1690. Crimes committed by slaves were classified as capital and non-capital. Capital cases had now to be tried only by two justices of the peace and three freeholders. A fixed place for the trial of such offences had to be provided by the justices and vestry of each parish and the Clerk of the Peace who conducted prosecutions in the Court was required to keep a record of such trials.[60] Within the category of capital offences a further distinction was made between those in which the unanimous decision of the whole bench of justices and freeholders was required and those in which a mere majority decision, one being one of the justices of the peace, was sufficient. Thus, offering violence to a white man became, like felony, burglary, arson, rebellion and conspiracies, a crime of a capital nature punishable by death, transportation, dismemberment or other punishment in the discretion of the whole bench, whilst possession of stolen goods whether knowing them to have been stolen or not or being a runaway slave was similarly punishable

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[60] In fact however Vestry Records of the various Parishes disclose that records even of the gravest offences were barely kept. See Richard Hill Rights and Shadows of Jamaica History p.39.

by a majority of the Court. Under this Act one justice of the peace had jurisdiction to punish petit crimes, trespasses and injuries done by slaves by severe whipping, and exceptionally, where a slave returned to the island who had been ordered to be transported off it, one justice of the peace had power upon view of the record to order his execution.

Section 23 of the Act of 1696 regulated the mode of trial of all capital offences. The justice of the peace to whom the complaint was made was required to issue his warrant for the apprehension of the accused and for the attendance before him of all available witnesses. If the guilt of the accused appeared probable at the ensuing examination, the justice was required to commit him to prison and to call upon another justice of the peace to be associated with him at the trial. The two justices of the peace were thereupon to summon three freeholders, setting out the matter in the summons and requiring them to appear at the place set aside for such trials on the day and at the hour fixed in the summons. Upon the appointed day the trial proceeded unassisted by a grand or petty jury, nor was any formal indictment laid and charged.

Freed men were similarly proceeded against criminally in this Court in which the evidence of one slave against another slave or freed person was deemed good and sufficient proof in all causes.[61]

Under this law the willing, wanton and bloody-minded killing of a slave by a white man was made a clergyable felony in the first instance

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[61] This was so until 1748.

and for a second offence was deemed murder and punished by death without forfeiture of lands, tenements, goods or chattels.

As death was the possible punishment for a number of crimes committed by slaves, owners unwilling to lose their services, concealed the commission of crimes by their slaves. To remedy this situation an Act of 1717 provided a compensation of £40 to every master for every slave put to death as a result of his report. The Act at the same time prohibited the dismemberment of slaves by owners under pain of £100.

The first consolidation of the Slave Laws occurred in 1781. By the Act of that year the constitution of the Slave Court underwent a change. In capital cases, the three freeholders were thereafter required to be chosen by ballot out of a number of not less than five. Three years later the murder of a slave whether by his master or by a stranger was rendered punishable by death.

In the first decade of the nineteenth century several Slave Acts were passed but were disallowed by the Crown either because they did not contain a suspending clause[62] or because they contained provisions suppressing the teaching activities of theDissenting Bodies. Thus was disallowed 47 G3 C 17 which embodied provisions for the setting up of a Council of Protection composed of the Justices and Vestry of each parish

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[62] By their Instructions Governors were ordered not to give their assent to any island Act affecting religion which did not contain a clause suspending its operation until the royal pleasure was made known.

with power to enquire into complaints of ill-treatment against slaves and to order prosecutions of offenders. The Act also introduced provisions for protecting the rights of slaves to holidays, prohibited the abondonment of sick or elderly slaves and provided a trial by three justices of the peace and a jury of nine persons of all offences punishable by death, transportation or confinement to labour. This Act however, as well as its successor in 1809, was disallowed by the Crown because of provisions severely hostile to the Methodists.

The Consolidating Act of 1816 received the royal approbation and remained the principal Slave Act down to 1831. This Act classified offences pommitted by slaves into two groups, those attracting the punishment of death, transportation or hard labour and those not so doing. The former were tried by three justices of the peace and a jury of twelve persons, whilst the latter were heard before two justices of the peace alone. The former related to grave offences, the latter to misdemeanours and inferior crimes. Violence to white persons, possession of fire arms without the knowledge of the owner, possession of implements of Obeah, conspiracy were some of the offences triable before three justices and a jury. Two justices of the peace had jurisdiction to hear and punish the offence of preaching without the permission of the owner and of Quarter Sessions, possession of fresh meat unknown to the master, wilfully maiming a horse and other inferior crimes.

The mode of proceeding in offences punishable by death, transportation or hard labour was prescribed in section 78 of the Act. By it

the justice of the peace to whom complaint was made was required to issue his warrant for the apprehension of the accused slave and for the bringing of the witnesses before him or any other justice of the peace. If at the enquiry the probable guilt of the accused was established, the justice was required to commit the accused to gaol, to bind over the witnesses to appear on a day not later than ten days hence, at the place where the Court of Quarter Sessions was held, or if no Quarter Sessions were held, then at the place where parochial business was transacted and finally he was required to certify the cause of the committal to two other justices of the peace who were to associate themselves with him at the trial. The three justices of the peace then summoned twenty-four jurors, none of whom should have any interest in the case, to attend the trial at a named time and place. A panel of twelve jurors was then selected and the accusation, having been read, the court and jury proceeded with the hearing of the case to verdict and sentence.

Justices were empowered in their discretion to respite execution of death sentences for a period of thirty days or until the Governor's pleasure was known, and, on the application of the jury, were obliged to do so and report the particulars of the case to the governor. These provisions, however, did not apply to cases of rebellion or conspiracy in which the justices could lawfully order immediate execution.

Upon termination of their normal business at Quarter Sessions justices were obliged to open a special slave court by proclamation and

to hear and dispose of all cases concerning slaves imprisoned in the gaols of their jurisdiction, such cases to be conducted in the same manner as obtained at trials in the ordinary slave court.

If a slave were imprisoned for six months and was not within that time brought to trial the Act required that he should be discharged and where upon a trial for murder malice was not established against the slave charged, the Act provided for the recording of a conviction for manslaughter and the Court was empowered to inflict such punishment as it saw fit not extending to life or transportation. In all trials under the Act six days' notice was required to be given to the owner, or attorney in charge, of the slave failing which the trial would be a nullity.

Masters were by the Act entitled to compensation not exceeding £100 for every slave belonging to them that was sentenced to death, transportation, or hard labour for life, whilst a sum of £50 was provided when the charge against the slave was one of running away.

Provisions were made restraining the maltreatment or mutilation of slaves by their owners and ill-treated slaves could make their complaints to the Council of Protection composed of the Justices and Vestry of the parish who were empowered to enquire by witnesses into the matters complained of, and, if necessary, prosecute such owners at the expense of the parish. Owners able to pay were liable to be sued by the Council for the recovery of any costs expended in prosecuting. Evidence of a slave was not admissible against a white person either before the Council or before any other tribunal.

In trials under the Act the Clerk of the Peace officiated as prosecutor. There was no grand jury nor were slaves allowed a right of challenge to the petit jury whose verdict was required to be unanimous.

There was no right of appeal from the sentence of the Court.

The next important Slave Act was that of 1826 which came into force on the 1st of May 1827 and although its duration was very short, having been disallowed by the Crown in October of that year, its provisions were sufficiently far-reaching to deserve notice. It provided for a trial on indictment before a grand and petit jury at Quarter Sessions or Special Slave Court for the parish or precinct in which were committed by slaves certain prescribed offences or any other offence subjecting them to punishment of death, transportation, or confinement to hard labour for life, or for more than one year. The preliminary hearing before justices was to proceed in the same manner as in the case of white persons or persons of free condition and at the trial the indictment was to be read to the accused in open court and was not to be quashed for defect in form.

No owner or proprietor of any prisoner, or either party having an interest in the slave was permitted on the jury which could be challenged for cause by the Crown or by the slave who was by the Act entitled to the aid of Counsel or of an Attorney-at-law.

Section 130 of the Act introduced an entirely new provision respecting the evidence of slaves. In all prosecutions for a wide range of crimes including treason, murder, robbery, rape and a number of

offences against slaves, the evidence of slaves was made admissible against white persons and persons of free condition, provided that before reception of the evidence a certificate of baptism was produced and the court was satisfied on due examination that the slave comprehended the nature and obligation of an oath. In addition the section provided that no conviction should upon the evidence of slaves alone be recorded against a white person or person of free condition unless two at least of such slaves clearly and consistently deposed to the same fact or circumstance and the complaint had been made within twelve months after commission of the crime charged.

The last Slave Act whose provisions were identical with that of the disallowed Act of 1826[63] was the Slave Act of 1830 which came into effect on the 4th of August 1831 and continued in operation until the Abolition of Slavery three years later.

(D) The Court of Error

The principal appellate court in Jamaica in this period was the Court of Error, a prerogative court, established by virtue of the Royal Instructions to the Governors to which the letters patent referred.

The precise date of its establishment seems uncertain, but that it was in existence before 1678, there can be no doubt. In that year the petition to the Privy Council of one Francis Mingham complained of his

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[63] Save that the provisions relating to the Dissenting Bodies, though still unsatisfactory, were less odious.

inability to prosecute his appeal before the Governor and Council from a judgment awarded against him in the Supreme Court and prayed for relief.[64] Mingham's misfortune prompted a recommendation from certain representatives of Jamaica that a Court of Appeal constituted after the manner of the Second Court of Exchequer Chamber in England be established in Jamaica.[65] Rejecting the proposal, the English Government in 1680 affirmed the view that "appeals should be permitted from all Courts of Jamaica to the Governor and Council in all causes (at the hearing whereof any three or more of the judges of the Supreme Court are to be present) provided that the value appealed for exceed £100 and that the appellant give security for such costs as shall be awarded if the original sentence be confirmed".[66]

The royal instructions issued immediately after this statement, authorised the hearing of appeals in civil cases where the sum appealed against exceeded £100,[67] but the appealable minimum was increased to £300 in 1687.[68] In 1690 the right of appeal to the Court of Error was extended to embrace criminal cases where the fine imposed exceeded £500,[69] but eleven years later this minimum sum was reduced to £200

The right of appeal granted by the royal Instructions "from any of the courts of common law in our said island" to the Court of Error seemed to have been interpreted at times as relieving a party to proceedings in

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[64] APC I p.864.
[65] CSP Col 1677-80 NO 1575.
[66] CSP Col 1677-80 NO 1622.
[67] CSP Col 1681 NO 227 - 8/9/1681.
[68] CSP Col 1685-8 NO 1187 - March 1687.
[69] Lt. Gov. Molesworth on 22/4/1689 had written to the Lords of Trade that "it is much desired that there should be an appeal to the King in Council against fines exceeding £200 (CSP Col 1689-92 NO 204). Gov. Inchiquin's Instructions in October 1689 permitted "appeals to the

an inferior court of common law from the necessity of an intermediate appeal to the Supreme Court which had a statutory power to entertain such appeals. The settled practice however was that appeals were entertained in the Court of Errors only from the Supreme Court and, after 1758, from the Assize Courts.

Originally members of the Supreme Court who were also members of the Council sat on appeals from themselves from the court below. This situation in 1689 prompted the Lt. Governor to recommend that "it should be laid down that members of the Council who have sat on a case in an inferior court shall not act on the same case in the Court of Appeal". Three years later this recommendation was acted upon and a standing Instruction issued that "judges of the court from whence such appeal is made shall not be admitted to sit and vote upon the appeal but may be present at the hearing and give reasons for judgment."

As five councillors constituted a quorum of the Council for legislative purposes, it became the practice that that number of Councillors together with the Governor constituted a Court of Errors whose decisions were determined by the majority. What was to happen where the Court was equally devided was never clearly determined. Such a situation arose in 1725, but the Governor, anxious to know whether he could lawfully exercise a casting vote "lest such a situation might lead to a lessening of

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King in Council to be allowed in cases of fines exceeding £500". In 1701 Gov. Selwyn's Instructions reduced the sum to £200 CSP Col 1701 NO 647.

His Majesty's prerogative,"[70] received the rather unhelpful reply that "this is a matter which may depend upon the usage in Jamaica but we have no custom in the Courts of Judicature here to warrant a double vote."[71]

The writ of error issued out of the office of the Registrar in Chancery returnable before the Governor in Council and brought before that body the complete record of the court from which the appeal came. As in England, that record was limited to the writ or bill by which the proceedings were begun, the pleadings, issue and verdict, a note known as the Postea recording the appearance of the parties at the trial, the empanelling of the jury and their verdict, and finally, the judgment of the court given either upon demurrer, or after a trial at nisi prius. This restriction in the scope of the writ meant that the proceedings initiated by it were limited to matters of law.[72]

A writ of error could be brought at any time within twenty-one years of the judgment appealed from but by section 1 of 17 G 3 C 16 no execution was to be delayed by such writ of error unless the person in whose name such writ should be brought or his representative other than his attorney at law had, in addition to security given in the office of the Registrar in Chancery, become bound to the party who had obtained the

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[70] CSP Col 1724-25 NO 675.
[71] CO 138/17 pp.41-44.
[72] In any event until 1828 when the British Govt. directed that "no judge do hereafter upon any consideration omit to take down in writing and carefully to preserve a full note of the evidence delivered at any criminal trial by the witnesses for or against the Prisoner" notes of evidence in criminal cases were very loosely and inadequately taken CO 137/169 Keane to Murray acknowledging dispatch of 30/11/1828.

judgment in a recognizance with two sufficient sureties in double the sum recovered by the judgment, to prosecute the writ of error and to satisfy the judgment with costs, if affirmed.

By virtue of his office of Clerk to the Council the Island Secretary was also Clerk to the Court of Error.

In addition to the Court of Error, theSupreme Court also exercised a statutory power[73] to review upon writ of error the judgments of inferior courts of common law. As inferior courts exercised a wide power of amendment before judgment and as the judges were discouraged by their commissions against "reversing any judgment given in inferior courts, or abating any declaration or allowing of any non-suit for want of form only"[74] this appellate power seemed in fact to have been infrequently exercised. The Supreme Court also had a power to hear appeals by way of case stated from Quarter Sessions and by the prerogative writs exercised a supervisory jurisdiction over the inferior courts. Upon the establishment of the Assize Courts, however, in 1758, this supervisory power was in relation to matters arising within the counties of Cornwall and Surry given to the respective Assize Courts.

(E) The Privy Council

The authority of the King in Council to hear appeals from the colonial possessions of the Crown is a part of the prerogative.

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[73] 33 Chas 2 C 23.
[74] CO 140/2 Appendix p.38.

Although the Crown entertained appeals from Jamaica before 1680[75], it was in that year that such appeals were first placed under regulations. After affirming the authority of the Governor and Council to hear appeals "from any of the courts of common law in our said island"[76] the English Government proceeded to lay down that "if the appellant be unsatisfied with the judgment of the Governor and Council he should then be at liberty to appeal to His Majesty in Council on making good the proviso requisite in the first appeal. In such case, execution shall not be suspended by reason of such appeal to His Majesty".[77]

The royal Instructions issued pursuant to the order of 1680 limited appeals to sums exceeding £500.[78] In 1689 appeals in criminal cases where fines exceeding £500 were imposed were allowed,[79] but this sum was reduced in 1701 to £200.[80]

Whether the colonial Court of Chancery should allow appeals from itself to the Privy Council did not clearly appear from the royal Instructions. In 1713 this doubt was removed by the Board of Trade. "We cannot but think" said the Board" that your Lordship took the right way in permitting them (appeals from the Chancery Court) since they exceed the value of £500, your instructors being general to allow all

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[75] APC I 944 (19/7/1072).
[76] Forty-Seventh Instruction to Governors Commissioners of Legal Enquiry p.276.
[77] CSP Col 1688-80 NO 1622.
[78] CSP Col 1681 NO 227.
[79] CSP Col 1689-92 NO 496.
[80] CSP Col 1701 NO 647.

above that sum".[81] On the same ground appeals from the Court of Ordinary went also to the Privy Council. Thus by the settled instructions to the Governors of Jamaica appeals to the King in Council lay immediately from the Courts of Chancery and Ordinary and ultimately from the Court of Error.

Prior to 1696 appeals to the King in Council were referred to a Committee of the Council, the Council for Trade and Plantations, and its recommendations were sent back to the Council for final decision. In 1696 the judicial functions of the Council for Trade and Plantations were, upon its dissolution, transferred to a standing Committee of the Privy Council styled the Committee for Appeal,[82] which like its predecessor heard appeals and made its recommendations to the Council proper which formally pronounced the orders and decisions. The recommendations of this Standing Committee, which was composed of the chief legal authorities, the Bishop of London, one or other of the two Secretaries of State and such other members of the Council as were interested in the matter in hand, were invariably ratified by the Council.

By an Act of 1833 (Imperial Act 3 & 4 W 4 C 41) in place of the whole body of the Privy Council a special committee was set up to hear appeals composed of the Lord Chancellor, former Lord Chancellors and

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[81] CSP Col 1712-14 NO 413 Board of Trade to Gov. Hamilton.

[82] On 10/12/1692 It is ordered that all appeals from any of the Plantations be heard as formerly by a Committee who are to report the matters so heard by them with their Opinion thereupon to His Majesty in Council. And in order thereunto His Majesty did declare His further pleasure that all the Lords of Council or any three or more of them be appointed a Committee for the purpose APC II NO 657.

others who had held high judicial office. This change became necessary because "the legal members of the Standing Committee had various judicial duties to perform in other Courts which prevented the attendance at the Privy Council Office except on a few occasional holidays, whilst the Master of the Rolls, in general the presiding judge, was seldom able to devote more than eight or ten mornings in the year to this duty"[83]. The result was an accumulation of arrears of judicial business from all over the Empire with all the mischief usually attendant on delays in the administration of justice.

The colonial part of the procedure and practices regulating appeals to the Privy Council were contained in the royal Instructions and varied according to the court from which the appeal arose.

In cases arising out of the Court of Error the appealable minimum was £500, but an exception was made in respect of any tax or duty due to the Crown, in cases of ejectment, or in matters relating to any fee of office or annual event, or other such like matter or thing where the right in future might be bound.[84] In these latter cases there was no requirement of a minimum sum to ground the right of appeal. In all cases arising out of the Court of Error fourteen days' notice of appeal after the conclusion of the cause had to be given and the Clerk of the Court of Error was thereupon required to furnish the parties with copies of all the proceedings. The appellant was required to enter into

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[83] CO 319/29/18 Note by James Stephens.
[84] Commissioners of Legal Enquiry op cit p.276.

security in the sum of £500 to prosecute the appeal and to answer the condemnation and pay such costs and damages as may be awarded in case the judgment of the Court of Errors were affirmed.

The early royal instructions had specifically directed that an appeal should not operate to suspend execution on the judgment appealed from. This situation often worked hardship on a successful appellant who found himself unable, by reason of the absence or bankruptcy of the erstwhile judgment creditor to recover his losses. An Instruction of 1726 therefore required the suspension of execution on judgments until the final determination of the appeal unless good security be given by the respondent.

In cases of appeals from the Court of Chancery the practice was stated to be as follows: "the appeal was written at the foot of the draft order in the suit, when submitted for perusal and before same was entered in the office. The appellant with a surety then entered into a bond in £500 to prosecute the appeal and answer the costs that may be awarded against him. Such security ought in strictness to have been given within 28 days from the date of entry of the Order, failing which the appeal could be dismissed, but in practice an additional 28 days could be obtained by common petition in which to enter into security." In contrast with appeals from the Court of Error which were only possible in respect of final orders of that Court, appeals from the Court of Chancery to the King in Council were available from all orders, except those for costs alone and for contempt process and an appeal operated as a stay of all proceedings in the suit except such part of an Order

appointing a Receiver as relates to change of possession merely.

Finally it may be observed that the limitations placed upon colonial courts as to the granting of appeals to the Privy Council did not in any was restrict the power of the Crown to entertain petitions or appeals falling outside those qualifications. The Crown, unless controlled by statute, retained the authority by virtue of the prerogative to review the decision of any colonial court, but the inconvenience of entertaining such appeals in cases of a strictly criminal character being so great, applications of that character rarely met with success.

CHAPTER V

LAW
IN PRE - 1838 JAMAICA

Two systems or codes of law prevailed in Jamaica in the years between 1661 and 1838, namely English common and statute law and Slave Law, the law of liberty and the law of bondage.[1]

To this curious legal co-mixture administered contemporaneously by white society attention must now be given.

"Right reason which is the common law of England together with Magna Carta and the ancient Statutes of England so far as practicable",[2] was the reply of Sir Thomas Modyford in 1671 to the royal enquiry respecting the laws in force in the colony. Half a century later another royal representative asserted that the common law of England so far as concern the life, limb and property of the subject, the people here were ever governed by"[3] and in 1720 Chief Justice Bernard added the weight of his confirmation.

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1. CSP Col 1710-11 No.842 Gov. Handasyd to the Bd. of T. "All the English Laws (excepting some few that have been made for the better management of slaves etc.) have been constantly observed and followed in all Courts of Justice here".
2. CSP Col 1668-1674 No. 704
3. CSP Col 1719-20 No.479 Lawes to Bd. of T.

"All pleas of the Crown" he said, "criminal cases, all causes relating to the King's peace have always in this island been heard, tried and adjudged according to the Laws of England; and likewise all civil causes, all common pleas (except in some very few points) have been determined according to the same Law".[4]

The factual bases of this reception, if it may be so called, of English common and statute law rested on three grounds; the text of the commissions appointing the island judges, a royal letter, and the consistent confirmatory conduct of the King in Council. Judicial Commissions. The form of commission by which the governors appointed the judges of the courts of common law uniformly enjoined them for half a century or more " to do that which to justice doth appertain according to the laws statutes and customs of our Kingdom of England and of that our island".[5] The scope of these commissions did not appear to transgress the standard gubernatorial instructions "to see that no man's freehold, life or member be taken away or harmed, but by established laws, not repugnant, but as much as may be agreeable to the known laws of England"[6] and as copies of these commissions attracted no objections at home, governors had no reason to think so. Further in his "Report on the Present State of the

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4. CSP Col 1719-20 No.548 Thomas Bernard to John Chetwynd a member of the Bd. of T. The Chief Justice added "tho often for want of knowledge both in Bench and Bar are wretchedly misconstrued and perverted".

5. CO140/2 Statistical Papers pp 35-9 Lynch's Report also stated that the Office of Attorney General was "to appear and prosecute for the King in all crime and criminal causes as the Attorney General in England".

6. CO140/2 Com & Ints p.5.

Government of this island, civil and military" presented to the English Government in 1671 Sir Thomas Lynch exhibited the judicial commissions, indicated the extent of the common[7] and statute law[8] already in use in the island and "begged His Majesty and their (i.e. the Lords of the Council for foreign plantations(order for continuance, if they shall think them apt and convenient".[9] Imperial silence was construed as consent and the reception proceeded without abatement.

The Royal Letter Positive affirmance of the propriety of the reception of the common law of England came from the King himself in 1672, when, angered by the violation of the rules of autresfois acquit concerning a pirate. He chided the Governor in stern words: "Reflecting upon the manner and circumstances of this condemnation contrary to law His Majesty has thought fit to signify his dislike of the same which though his severe orders about pirates might in some degree seem to mitigate, yet in a case so extraordinary and where the offender, though never so guilty, was by course of law cleared, His Majesty did expect that the cognizance of the whole matter should have been remitted to him for his determination and therefore for the future

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7. Common Law in use then included Habeas Corpus, Socage tenure, leaseholds, equitable reliefs, murder, manslaughter, defence of chance medley, jury system, special and general verdicts.

8. Statute Law in use then included Statute of Extortions, Statute of Wills, Forcible Entry, Forcible Detainer, Statute of Distribution, Statute of Jeofayles

9. CO 140/2 Stat Papers P.39

His Majesty strictly commands to follow the strict rule of law in all cases, especially concerning the life and property of any of his subjects".[10]

The King in Council From the earliest cases which appeared whether by way of formal appeal or by petition before the King in Council the Board uniformly and consistently upheld the application of English common and statute law as the law of the colony and sought to purge this application of abuses thereof.

In the earliest case on record the Board, affirming the reception of the Statutes of Distribution, ordered the Judge of the Court of Ordinary in 1672 to make redress available to a widow who had failed to secure an account from the administrator of her husband's estate[11] and in 1707 another judge of the same Court was ordered to revoke a temporary grant of letters of administration in favour of a permanent one to the widow.[12]

In 1704 the Crown Law Officers implied the prevalence of the common law in advising that members of Assembly who neglected attendance in the House "were guilty of a high misdemeanour..... and may be prosecuted against in His Majest's Ordinary Court of Justice there and punished by fine and imprisonment".[13]

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10. CSP Col 1673 No.1132 the King's letter to Sir Thomas Lynch 15/1/1673
11. APCI No.944
12. APC II No. 13031
13. CSP Col 1704-5 No.840

Twelve years later the Privy Council upheld the use of the rules of equity by confirming an Order of the Jamaica Court of Chancery which had granted an injunction to a defendant to stay proceedings in an action at common law on three claims of ejectment, upon a bond and for an account stated,[14] and in 1726 the Board reversed the decision of the Court of Error and Supreme Court in criminal proceedings for a misdemeanour and ordered repayment of the fine imposed.[15] Observance of the rules of natural justice was enjoined when in 1727 the Board set aside an Order of the Chancellor in a suit affecting a near relation.[16]

Whilst this reception of English common and statute law developed under royal encouragement and the example of the highest tribunal in the Empire, its political and legal bases remained in obscurity. In 1660 the King had rejected advice to issue a proclamation expressly declaring that the people should be governed by the Laws of England[17] but condescended a year later to proclaim that the natural children of English subjects born in Jamaica were to be subjects of England with tha same entitlement to all privileges as free-born subjects of England.[18]

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14. APC II p706
15. APC III pp60-62
16. APC III p172
17. CSP Col 1661-8 Nos. 107 : 122
18. CSP Col 1661-8 No.195 The Proclamation was dated 14th of December 1661 but Windsor by whom it was borne to Jamaica did not arrive on the island until August 1662

This ambiguous document was treated by the colonists at different times in different ways as the political circumstances seemed best to dictate. In the Oliphant dispute in 1766[19] the Assembly contended that it was the source of what they regarded as the common law right to the privileges of the House of Commons.[20] Forty years later in the course of a struggle with the Crown[21] the Assembly voiced the more consistently held sentiment that " the proclamation, although conferring no privileges not before enjoyed by Englishmen, has always been regarded as a solemn recognition and acknowledgment on the part of the Crown, that their new situation of colonists without the realm, did not alter or abridge those rights franchises and immunities inherent in, and inalienable from the person of a subject of England, whilst his allegiance is unimpeached".[22]

Neither the Crown Law Officers nor the Judges of England seemed capable of defining the import of this document.[23] To the

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19. See Chapter 3 p22

20. CO 137/23 p182. Of the Proclamation Gov. Lyttleton said "It seems to be intended to prevent such children from being considered as aliens, but I do not apprehend can be construed to give any privileges to the Assembly".

21. Over an Island Act inimical to Dissenting Preachers.

22. CO 140/96 p167

23. The Crown Law Officers, conceding the difficulty of the matter sought the views of the Judges which so far as they were recorded threw little light on the subject

colonists however English Law was personal to Englishmen whether within or without the realm[24] and " the island of Jamaica although originally conquered from the Spaniards, having been settled by natural born subjects of England and at the national expense there can be no pretence to question their title to the benefit of all the Laws of England then existing and the rights of Englishmen".[25] When doubts were sown by rumours of the King's intention to tax the island and otherwise to govern it by his free will, the colonists resorted to the political expediency of the Declaratory Acts claiming thereby "all the laws and statutes of England..... and all liberties, privileges and immunities and freedoms..... as their birthright". The scope of these Declaratory Acts passed in the years prior to 1680, extending as it did to include English Statute Law passed since the settlement of the colony, had over-reached the immediate objectives of the colonists. Those objectives were made known in the announcement of the Lord Chief Justice in 1680 that "the gentlemen of Jamaica are prepared to grant the King a perpetual Bill for the payment of the Governor..... provided that they be restored to their ancient form of passing laws and may be assured of such of the laws of England as concern their liberty and property".[26]

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24. This claim was persisted in, not only by laymen but also by English Lawyers long after Campbell v Hall e.g."Substance of a Remonstrance to Earl Bathurst on the abuses in the Administration of Justice in Demarara "by J. Clayton Jennings Advocate Fiscal of Demarara (1821)

25. Long. Op at V1 p160

26. CSP Col 1677-1680 No.155

The assurance sought by the colonists came three years later in the draft of an Act which authorised the reception of all English common and statute law affecting property, crime, tort, equity and admiralty,[27] but colonial doubts about the intentions of the Crown seemed to have lingered and the draft did not become an Act. Moreover the colony did not vote the King a perpetual revenue, as it had undertaken to do, and the Crown likewise declined to confirm their laws perpetually and in particular their Declaratory Acts under which some English Statutes passed since the settlement were received and used in the colony.

Until 1711 the Courts of the island applied the Statute of Frauds (1677) and the Habeas Corpus Act (1679)[28] by force of " the Declaratory Act, described as" an Act passed in this island for the Statute Law and Common Laws of England to make them in force here which was never repealed by a Privy Seal sent here as is usually done in such cases from His Majesty or any of his predecessors".[29] In that year, however, the Privy Council reversed a decision of the Supreme Court and Court of Error on the ground that the Statute of Frauds did not extend to the colony.[30] Great uncertainty and confusion in the

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27. See Appendix A

28. The Act was said to have been first applied on the island about two or three years after its enactment CO 137/34 Lyttleton to Bd. of T. 1764

29. CSP Col 1710-11 No.842 Handasyd to Bd. of Trade 19/5/1711

30. APC II No.1067 Allison v Long (1711)

administration of the law supervened as multitudes of judgments affecting large properties and founded upon the English Statutes were thereby impeached, and the four years preceding 1728 were years of great distraction in which the Courts all but ceased to function, In that year however the struggle was ended when the country voted a permanent revenue and the Crown likewise confirmed the Act to which the cautious colonists had tacked a clause, the twenty-second, claiming "all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted or received, as laws in this island.....to be and continue laws of this His Majesty's island of Jamaica for ever".[31]

The 22nd clause of 1 Geo 2 CI, the grand charta as it has been called, of the people's liberties[32] constituted a formal political settlement of the anterior struggles concerning the status of English common and statute law in the colony and it remained for the judiciary through the vagaries of litigation to frame a legal doctrine for this political arrangement..

Judicial decisions have not, however, been uniform some having ignored the facts, others having mistaken them. In Calvin's Case[33] which ante-dated the conquest and settlement of Jamaica the judges had resolved that where a colony had been acquired by conquest of a

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31. I G. 2 C I S 22
32. Long Op Cit Vol I
33. I State Tr 589

Christian Kingdom the laws of such colony should remain in full force until altered by the Crown. This case could have no relevance to Jamaica inasmuch as upon the conquest of the Christian Kingdom no legal institutions or laws were left behind which "remained in full force until altered".[34]

In another case some eighty years later and subsequent to the settlement of Jamaica the Court ruled that "Jamaica being conquered..... the Laws of England did not take place there until declared so by the Conqueror".[35] No account was taken of the non-existence of a legal system at the time of the conquest, and so ignorant indeed the Court appeared to have been of the facts that the contention of Counsel for the Plaintiff that Jamaica was conquered in the time of Queen Elizabeth passed without correction or even notice.

In 1769 Lord Mansfield in R.V. Vaughan[36] ruled that Jamaica ought to be considered as a colony (meaning doubtlessly a settled colony) "the old inhabitants having left the island". Five years later in Campbell v Hall[37] the legal status of English colonies received authoritative formulation on the basis of the mode of their acquisition:

(i) In a colony acquired by settlement, the colonists carry

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34. The Spaniards had left Jamaica before the establishment of civil government in 1661. No legal system or jurisprudence was left behind.

35. Blanckard v Galdy 2Salk 411

36. 4 Burr 24 96

37. 20 State Tr 239 Also Blackstone Commentaries Vl pp 106-7

with them so much of the English Law as is applicable to their own situation and the condition of an infant colony.

(ii) In a colony acquired by conquest or cession the colonists retain the existing system so far as it is not repugnant to natural justice unless or until the Crown, which had an unfettered power of legislation, makes alternative provisions.

The non-existence of a lex loci in the colony at the time of its conquest seemed to favour the case of Jamaica falling within the first rather than the second proposition, or to reiterate the words of Lord Mansfield "being considered as a colony". Confirmation of this view fell from the lips of Lord Lyndhurst in 1828. "The reason" he said "why the rules are laid down in books of authority with reference to the distinction between new-discovered (i.e. settled)[38] countries on the one hand and ceded or conquered on the other hand may be found, I conceive, in the fact that the distinction has always or almost always practically corresponded with that between the absence or existence of a lex loci by which the British settlers might without inconvenience be governed".[39]

This view commended itself to the Supreme Court of Jamaica in 1839 in Stultz v Wallace[40] and again in 1867 in Jacquet v Edwards[41]

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38. My interpolation
39. Freeman & Farlie 1 Moo Ind App 305 at 324-5
40. MacDougall (Jamaica) Reports P.67. Stephens (Jamaica) Reports Vol 2 P. 1875 at p.1884
41. Stephens (Jamaica) Reports Vol I pp 414-421

In delivering the judgment of the Court in the former case the Chief Justice[42] expressed himself thus "It should be remembered that this island has been treated as a colony appended to the Crown of England, and not as a conquered or ceded country ——— a distinction which is very important, because as a colony the settlers here would bring with them all such laws of England as would be necessary to the new condition, which laws would confer on them the same rights and attach to them the same liabilities as if they had remained in the Mother-Country". In the latter case Kemble J opined "There is sufficient in its early history to show that by the Acts and conduct of the Crown the colonists became entitled to the same rights and privileges as they would have been entitled to had the colony been a settled one".

The political arrangement concluded in 1728 may fairly be said then, in the light of the island's anterior legal history, to have been adopted by the weight of judicial authority to that legal status called "settled colony" subject to the important qualifications introduced by the 22nd section of 1 G 2 C I.

The text of this section was not unfamiliar to Jamaican legislation and was in fact only the last of the long series of Declaratory Acts passed by colonists "for the Statute Law and Common Laws of England to make them in force here"[43]

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42. Sir Joshua Rowe (1832-1856)

43. CSP Col 1710-11 No.842 Handasyd to Bd. of Trade 19/5/1711

In intendment this declaratory section, as it may very properly be called, imported into the legal status of Jamaica two features significantly different to settled colonies falling simpliciter under Campbell v Hall. First the common law rule concerning the closing date of reception of English common and statute law was advanced from 1661, the date of the establishment of a civil government in the colony, to 1728 the year of enactment of 1 G 2 C I. Although the concept of the common law as a system of immemorial existence rather than as a set of constantly evolving principles and rules inhibited any possible accretion of common law to Jamaican jurisprudence by the mere up-dating of the closing date of reception, this statutory qualification had a tremendous impact upon Jamaican Statute Law inasmuch as it made available to it not only such English Statutes as had been passed before 1661 but also almost seventy years of English Statutes passed thereafter, provided they all conformed with the statutorily substituted rules of reception.

By the second qualification, the general common law rule of applicability to the circumstances and condition of the colony at settlement was replaced by the statutory rule of user as the basis of the reception of English common and statute law. The advantages were two-fold. By its nature, the rule of user admitted of a greater capacity for accurate proof than the rule of applicability which was bound to become increasingly difficult to establish with the passage of time. Again, under the rule of applicability "what English Laws shall be admitted and what rejected, at what time and under what

restrictions[44] were to be decided as a matter of law by judges, whereas under the rule of user, these matters were transformed into one of fact for a jury, who in the context of the struggle for the laws of England were more suited to such determinations.

With the passage of time, however, the declaratory section ~~because~~ became divorced from its history, and the very clouds of uncertainty which had provoked the protracted struggle for the laws of England descended upon this section, the fruit of that struggle.

Within a century no legal relation between the common law and 1 Geo 2 C.I. was associated in popular professional opinion. It was reported in 1827 that "with respect to the common law of England..... it prevailed as far as local circumstances permit, and when it is not at variance with the colonial Acts";[45] a vagueness which prompted from the commissioners of Legal Enquiry the rather ironic wish that "this notion of the prevalence of the common law of England in Jamaica could be rendered more precise by some colonial Declaratory Act".[46] Four decades later the Judiciary formally repudiated that relationship". The common law by whatever means introduced, and to what extent it may prevail..... is in force in the colony irrespective of 1 G 2 C.I."[47]

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44. Blackstone's Commentaries 168
45. Commissioners of Legal Enquiry op at p.93
46. Ibid
47. Jacquet v Edwards (1867) Stephens (Jamaica) Reports Vol.1 p.414 at p.419

The extent too of the reception of English statute law into Jamaica fell under uncertainty. The Commissioners of Legal Enquiry found such difference of opinion on the subject at the Bar and at the Bench as to have moved them to suggest that "such Acts and parts of Acts made in the mother-country deemed to have the force of law in the colony be enumerated by their precise titles in an Act of the Colonial Legislature to be passed for the purpose".[48] In R.V. Stephens (1888)[49] it was argued, but not decided, before the Supreme Court of Jamaica that "1 G 2 C.I. was applicable only to English statutes passed after the settlement of the island".

The Courts have confronted no little embarrassment by reason of the practical difficulties experienced in obtaining direct and positive evidence of user such as the declaratory section requires. "Greenwood v Livingstone"[50] was a case in point, the issue being whether the English Toleration Acts had been introduced, used, esteemed and received in Jamaica. A majority of the Court rejected

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48. Commissionersof Legal Enquiry Op at p.93

49. Stephens (Jamaica) Reports Vol I p.862 at pp 863 & 864

50. CO 137/189 The Court held that the English Tolerations Act 1 W3 C18 applied to Jamaica. Bernard J dissenting adopted a rule of construction propounded by A.G. Wm. Bruge that "all British Statutes which are not local in their enactment and which are not at variance with any colonial Acts of the island are in force". On this construction be held that 1 W3 C18 was local in its application and therefore did not extend to Jamaica. See Commissioners of Legal Enquiry Op at p.182. See also Chap. 2 and 6.

a contention that "before the Court can recognise any English Statute, we must have evidence before us to prove that it had been acted upon in the island before the passing of 1G 2 C.I". "We cannot.....unless on grounds which bring home to our minds the clearest connection adopt this construction of the last section of 1 G 2 C.I because, if the argument of the Plaintiff's Counsel is worth anything, it must go to this extent: that no acting upon or recognition of a British Statute since the passing of that Act, no matter for how long would be sufficient to justify the Courts in this island considering such British Statutes as laws here. This doctrine would completely unsettle the Law of the land by introducing the greatest uncertainty into our proceedings and might be the means of depriving the colony of some of the most important Acts which are now in daily use, such as for instance the Habeas Corpus Act and the Statute of Frauds from the difficulty of showing they were acted upon before the passing of 1 G 2 C.I".[51]

With respect to the fears which led the majority to their rejection of the Plaintiff's contention, we have already seen how colonists asserting a general right to the laws of England as their birthright had received into use a number of English pre- and post-settlement statutes, notably the Statute of Frauds[52] and the

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51. CO 137/189

52. See supra p.7.

Habeas Corpus Act,[53] and how the Privy Council had stoutly repudiated this claim so often as issues came before them judicially. We have seen too how uncertainty as to their legal status and insecurity as to their property and persons had erupted first into a constitutional crisis (1679-1681) and finally into the grave civil disorders of 1724-1728. 1 Geo 2 C I had marked the culmination of that struggle and constituted "a compact between the Home and Colonial Governments, the former recognising such laws of England as had been used as laws in Jamaica to be laws there forever and the local Government for the first time granting a permanent revenue".[54] By 1 G 2 C I therefore the basis and extent of the right of colonists to the laws of England had been definitively laid down by reference to the prevailing quantum of domestic use already made of English law. Though the majority proceeded to lay down the law even in more emphatic terms, namely "we..... think that the terms of the last section of the 1 G 2 C I are satisfied by showing constant recognition of British Statutes by the Court since the date of that Act",[55] there seems little doubt that the principle of construction for which the Plaintiff's Counsel contended is the one implicit in the history of the section.

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53. CO 137/33 Lyttleton to Bd. of Trade 1766 "The Habeas Corpus Act 31 at C C2 is held to be in force here by virtue of the last clause in the Act of Assembly for granting a revenue to His Majesty passed Anne 1728". "It is understood to have been introduced in this island within two or three years after it was enacted in England" CO 137/34 page 32.

54. CO 137/376 Eyre to Newcastle 7/12/1863 (Despatch forwarding views of Attorney General Heslop.

55. CO 137/189.

In R. V. Stephens (1888)[56] The question was whether the English Statutes relating to forcible entry extended to Jamaica. These Acts had been in use in the colony from earliest times, as for example, Lynch's Report[57] and the Act of 1711 for regulating fees clearly demonstrate. The only evidence adduced however was a local statute of 1773 based upon the assumption of the existence of the English Acts in Jamaica. Upon this "tabula in naufragio" the Supreme Court was induced first to super-impose the rule of evidence that "Where it is necessary to establish the immemorial existence of a right, evidence of this existence and exercise of that right as far back as living memory extends will, in the absence of any evidence to the contrary, afford grounds on which it may be presumed that the right had existed during living memory"[58] and then to conclude presumptively[59] that "the English statutes relative to forcible entry and detainer are in force in Jamaica".[60]

Whilst in the result the decision that led from such a principle of evidence happily did no violence to historical reality,

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56. See Supra

57. See Supra

58. Stephens (Jamaica) Report Vol.1 p.862 at p.863

59. An obvious danger inherent in this rule is that in one case, for want of rebuttal, the decision will go one way, whilst in another case, where rebutting evidence has been adduced, the the decision would go the other way, thus ending up with two conflicting decisions on the same issue.

60. Stephens (Jamaica) Report Vol.1 p.862 at p.865.

it is to be questioned whether the application of such a rule of evidence, borrowed from the realm of the law of prescription, is not wholly misconceived in the unique context of 1 G 2 C I, for whilst long uninterrupted enjoyment of a right after 1189 prima facie affords evidence of its enjoyment since 1189, what is required in relation to 1 G 2 C I is proof of user, not since, but before 1728.

As in Greenwood v Livingstone so in R. V. Stephens the absence of the records of the courts and of relevant 17th and early 18th century laws[61] was at the root of the dilemma. "For many years after the passing of that Act (1 G 2 C I) it must have been easy to prove by reference to the records of the Court or by other evidence that any English statute which it was thought to invoke had been received as law in Jamaica before 1728. The difficulty of furnishing such direct proof however, must have increased with each succession. And now it would be practically impossible to obtain direct proof of such a fact. The records of the Court prior to that date are practically non-existent, and any other form of direct evidence of the fact which would satisfy the requirements of section 22 of 1 G 2 C I".[62]

Thus principles of interpretation and modes of proof, the product of evidential necessity, have been evolved by means of which the historical significance of the declaratory section has been

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61. Even at the Colonial Office matters seem to have been in no better order Goderich to Mulgrave 15/5/1883 "We can't find the papers (Acts of 1671 & 1672 of Jamaica) neither at Downing St., the State Paper Office or at the Board of Trade".

62. Stephens (Jamaica) Report Vol.I p.862 at p.864.

distorted and the all-important object of this Magna Carta to mark definitively the historical date-line of the reception of English Law was all but frustrated.

Slavery had left its indelible mark upon the legal system. The general blight[63] it had engendered had resulted in utter neglect of all records. "No trustworthy records to mark event no statistics with which to compare and weigh.....the experience of one generation died with it[64] and the Magna Carta, fruit of more than half century of struggle of one generation of white colonists, became by neglect almost useless in the hands of succeeding generations.

Contemporaneously with their struggle for English common and statute law, the English colonists progressively built up another legal code which they imposed in varying measure upon the classes, other than themselves, of whom the social pyramid was composed.

The spirit and the tenor of this code are to be understood by tracing its origins upwards from the lowest level of society in which it began and to which it was applied in all its completeness.

The early corner-stone of Slave Law was the acceptance by the Imperial Power[65] and by white colonists of the capability of possessing

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63. CO 137/229 Smith to Glenely 13/8/1838 "It (slavery) blighted all the institutions by which it was enforced".

64. CO 137/432 Dr. Bowerbank Cust. of Kingston to Buckingham & Chandos 2/7/1867.

65. "The lands of Jamaica having been patented by your Royal ancestors on the special condition that they should be cultivated by slaves for the promotion of the national wealth" CO 137/289 Memorial of the Assembly in 1846 to the Queen. This practice was not terminated until 1831 CO 137/179 Godrich to Belmore 29/5/1831.

property in the inhabitants of Africa. This concept the common law[66] did not find repulsive and thus black men became her heritage. Imperial law[67] confirmed this concept when in 1697 it made negroes "goods and merchandise" and colonial law as early as 1677 superimposed the status of freehold. "Since all our estates here" said the English Colonists, "or their increase or preservation depend wholly upon the frail thread of the life of our negroes, the weakest of all freehold, we by our Acts have made them to be of that tenure."[68] This status was automatically transmitted through the slave mother to the children even by an Englishman. As such all the customary incidents of freehold attached to the person of the slave, adult, adolescent or infant. He was devisable, devolved to the heir on intestacy, was available for dower or curtesy and escheated to the Crown for want of heirs. Actions for wrongs done to him lay in his master, not in him. If his daughter were seduced, the action lay in

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66. See Smith v Brown etal, 1706 an action in indebitatus assumpsit for the value of a slave sold by the Plaintiff to the Defendant where C.J. Holt recommended amendment of the pleading to the effect that the sale took place in Virginia and that negroes were saleable there as chattels. In Forbes v Cochrane over a century later Smith v Brown etal was explained away thus. "It has been supposed to establish the position that an action maybe maintained here for the price of a negro provided that the sale took place in a country where negroes were saleable by law. But that point was not decided. The court only held that the question could not be agitated unless that fact was averred in the face of the declaration" B & S Reports p.47. For further see Dr. Williams Op. Cit pp 45-47

67. 9 W 3 C 26 "An Act to settle the trade to Africa."

68. CO 140/2/ p.141.

the master, not in him for she like her father was her master's property.[69] He could be leased for life or for years and was entailable. Upon cesser of a term be reverted to his landlord/master. If illegally distrained upon or held over, replevin or ejectment lay for his recovery. As in other freehold, joint and successive interests were sustainable in him and he could be the subject (or object) of a mortgage. In character as personalty, distress could be levied upon him for his master's debts.[70]

These basic rules comprehending the concept of slaves as property, provided the legal rationalisation of the economic system. In the possession of this property the master had the panoply of statutory protection. An owner whose slaves were detained or inviegled away was entitled to damages and the offender was liable to criminal charges. Where a slave was sentenced to death or transported, for loss of his property the master was compensated from the public treasury.

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69. A case somewhat in point was the seduction of an apprenticed girl in early 1839 " no action could lay" said her solicitor " for loss of services for they are due to the girl's master and not to the parents" CO 137/227 Smith to Glenely 25/4/1838.

70. Thus he became the helpless victim of his master's misfortune or prodigality. Accordingly the slave goes about his own business, free from the anxieties of distraint, only on Sunday when such process could not lawfully be executed. In this way desecration of the Lord's Day among slaves became normal practice.

The Christian religion had posed problems of short-lived delicacy. Despite statutory degradation as property, the conclusion seemed not to have been absolute that the negro was not a person, and as such an object of the Christian Gospel. If he were a person, and if the negro embraced the faith, subsequent continuance in slavery seemed a non-sequitur. These theoretical Gordian knots were severed by the English Colonists in 1674 and 1677 respectively by two decisive statutory blows. After reciting the trite fact that "slaves are bought as goods and chattel", the first Act conceded that they are reasonable creatures capable of being taught the principles of religion "which however was to be manipulated, the Act continued" the more to civilise and command them more to our service ..... and finding that being baptized and made Christian, they serve their masters with more fidelity and respect ..... and being also further considered how is needful of extraordinary means to keep the negroes faithful and dutiful". The later Act by providing that "no slave shall be free by becoming a Christian" swept away residual clouds of niggling conscientious doubts.

As a person with the faculty of activity and, above all, the faculty of will, it became necessary to evolve laws to prevent the slave from endeavouring to escape from his status as the legal property of his owner. This was the function of the criminal Slave Law. Running away from bondage was a crime and those who aided were punished with the runaways, whilst those who captured them were rewarded. The movement of slaves off their estates was rigidly

regulated and masters authorising their slaves to leave the estates on business were required to furnish them with passes. From the earliest times thefts by slaves were severly punished,for slaves stole not only to supplement their illiberal provisions, but also to provide themselves with articles of trade. Dangerous assemblies of slaves were discouraged by making it an offence to beat drums, or blow horns and the practice of obeah or myalism by which slaves were brought under the power and control of other slaves for rebellious purposes was punished with death. Any slave who struck or opposed a white man, even in defence of his own life or of that of his child or wife, committed an offence. Rebellion, conspiracy, possession of firearms without the knowledge of the master, poisoning or attempted poisoning of a white person were punishable by death, transportation or other punishment at the Court's discretion. For lesser crimes such as preaching without the permission of the owner and of Quarter Session or wilfully maiming a horse flagellation or imprisonment might be imposed.

As we have seen, the criminal slave code provided its own courts independent of and apart from the common law system. As no white man considered himself the mere pares of the black the latter was not permitted a trial by jury of twelve men until 1831. Until 1788 two justices of the peace and three freeholders exercised judicial powers over him, extending even to life. The evidence of one slave too against another was deemed good and sufficient proof in all cases.

Where the Slave Code was silent its silence was as significant as its express provisions. The master's obligation to provide clothing for his slave was of the meanest prescription the sanction for failure in their observance, weak and ineffectual.[71] Provisions of medicine and medical attendance were left to the vagaries of custom. The master exercised a wide power of private flagellation or imprisonment of the slave without necessity for recourse to any judicial authority. Not until 1696 was the "willing wanton and bloody-minded killing of a slave a clergyable felony, nor until 1831 was the evidence of a slave admissible against a white person.

The general principle of subordination of all other classes to the white elite which was the dominant social rule necessitated the extension of legal, political and civil discrimination to freed persons, free negroes and persons of colour.

Freed persons, like slaves, were until 1748 tried by two justices of the peace and three freeholders. Their evidence was not admissible against white persons until 1831 and, until 1748 not even against free persons of colour.[72]

Free negroes and persons of colour were indeed tried in the ordinary courts of law, their evidence being admissible in civil and criminal cases involving themselves but until 1796 [73] only in civil

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71. By law he merely had to refute on oath the allegation of a slave that the law had not been observed. The master's oath was sufficient to exonerate him.

72. For the nature and extent of their political disabilities see Chapter 2.

73. 36 G.3 C 23.

cases against white persons or persons particularly endowed by statute with special privileges. In that year, as a reward for their zealous and prompt obedience in the suppression of a Maroon rebellion, their evidence was rendered admissible against any person whatsoever in cases of assaults and similar offences committed against their class, provided certain requirements respecting baptism and registration of names and residences were fulfilled. Eighteen years later reception of their evidence was extended to all cases against all persons, subject however to some restrictions which were further alleviated in 1823. More severe punishments were meted out to them under law than to white persons for identical Offences.[74] Their freedom could be taken away by law and they were exposed unlike white men, to transportation. Their rights to the testamentary disposition of property under the Statute of Wills, an English Statute received in the island were abridged by law "lest the distinction requisite and absolutely necessary to be kept up on this island between white persons and negroes their issue and offspring" [75] be destroyed.

English common and statute law and Slave Law grew side by side

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74. Assaulting slaves, free mulatto to receive a public whipping but a white person to pay a fine or undergo imprisonment or both; Stealing or inveigling away slaves: White person to pay £200 or 12 months, free mulatto to suffer loss of freedom and transportation; perjury: White person to suffer according to the Law of England; free mulatto, loss of freedom and transportation.

75. 2 G. 3 C 8 (1764).

in the common soil of a slave society.Their birthright, as the English colonists never tired to proclaim, the former was almost a personal rather than a territorial law. It was "white" law which clung ipso vigore to the person of the white man by reason of his tint, but extended, and only in a qualified measure, to free persons of colour and freed persons, only at the judicial and legislative suffrance of the white elite.

Some deprivations of the Common and Statute Laws have already been noticed. Specific negation of other fundamental rights involving the desecration of ancient and venerated constitutional documents must now be mentioned.

By a simple judicial interpretation the courts of common law laid down that the child of a slave by a white man was also a slave thereby setting at nought the royal proclamation which had made "all children of our natural born subjects of England to be born in Jamaica..... free denizens of England with the same privileges .....as our free-born subjects of England"[76] Numerous decisions of the colonial courts and of the Privy Council for over a century and a half, by upholding devolutions and dispositions of property in persons entitled to the sacred pledges of this ancient royal document, hallowed its violation.

Colonial legislation which excluded free persons of colour from the jury box repealed the English Magna Carta which had decreed that "no freeman shall be taken or imprisoned or be disseised of his

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76. Royal proclamation dated December 1661 C S P Col 1661-8 No. 195.

freehold or liberties, or free customs or be outlawed or exiled or any otherwise destroyed nor will we pass upon him nor condemn him but by lawful judgment of his peers or by the Law of the land".[77]

The circumstance of colour simpliciter raised in the colonial courts a presumption against freedom, though unsupported by any Act of Assembly. "We are at a loss" said the Commissioners of Legal Enquiry "how otherwise than by an express Act for the purpose, a doctrine so much at variance with the first principles of English Law should in any case or under any circumstances have been recognised by the Courts of Justice in Jamaica".[78] Thus the legal obligation of the greater part of the free population to prove their freedom was a denial of the Justice and Right pledged in the English Magna Carta.[79]

The disabilities, legal, civil, and political of freed persons had their basis in the judicial interpretation of the effect of the Act of manumission. "The courts of law" explained Bryan Edwards "interpreted the act of manumission by the owner as nothing more than the abandonment or release of his own proper authority over the person of the slave which could not convey to the object of his bounty the civil and political rights of a natural born subject".[80] In short, manumission merely caused the severed chains of bondage to

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77. Section 29 of the Magna Carta.
78. Commissioners of Legal Enquiry Op Cit p.117.
79. Section 29 of the Magna Carta.
80. Bryan Edwards History of the West Indies V2 p.18.

fall at the freed person's feet. It did not confer any rights to English common or statute law. Those lay in the legislative pleasure of the white elite.

With regard to slaves who constituted nine=tenths of the population their only contact with the ordinary courts of the land, ----- Common Pleas, Assize, Supreme Court, Chancery, Ordinary Court of Error ----- or with the Privy Council was in their capacity as property or as exhibits in a case. The writ of habeas corpus whether at common law or under the received statute, did not run to enquire into the legality of a master's statutorily undefined right to incarcerate his slave. When in 1784 certiorari was sought to remove into the Supreme Court proceedings before two Justices of the Peace and three Freeholders against a slave condemned to death on a charge of obeah the Supreme Court unanimously rejected the application. "The tendency of such a practice" they said "would be dangerous and repugnant to the whole tenor of laws for the government of slaves and establishing courts for trying them summarily for capital offences. If granted in this instance application with equal reason might be made when a rebellion might be raging throughout the country. It seemed to be the first attempt of the kind and required to be discountenanced".[81]

Two further cases, one in the eighteenth, the other in the nineteenth century, illustrate the standing of the slave in relation

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81. Rex to the Custos of St. Andrew Supreme Court of Jamaica (1784) Grant (Jamaica) Report p.148.

to English common and statute Law.

"Rex versus Jones - 1/6/1778. Jones a white man found Neptune a slave at Mr. Kemy's watchman's hut about 9 p.m. He struck the slave with a cutlass which cut him through the ear to the pericranium (as Dr. Broadbent proved) and afterwards dragged him to his house where he flogged him. The case of R.V. Fell[82] was cited yet the jury, governed by the generally received notions of slavery returned a verdict of not guilty".[83]

Simpson was in 1822 convicted at the Cornwall Assizes and sentenced to be hanged upon conviction under an indictment which charged him with the rape of a slave child, nine and a half years old, contrary to the English Statute 18 Eliz C7. The records of the courts abounded with instances of the reception of the English Statute in cases of rape committed or charged to have been committed on white or free persons. It was agreed upon a motion

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82. R.V. Fell Grant (Jamaica) Report p.29, a case before the Jamaica Supreme Court 1777 of a white man beating a negro slave and robbing him of a piece of meat, the property of his master Chief Justice Welch. It was questioned whether an indictment could lie in the case of a slave. The affirmative was held and Fell, though "a refractory turbulent man" was fined £20. See MacDougall (Jamaica) Report p.47 and the comment there on this case. "It may indeed be doubted whether any notice would have been taken of the offence at all, if the meat had not belonged to Mr. Welch who was then the C.J. The denial of former C.J. (Pinnock) of the existence of precedents to warrant the conviction show how partial must have been the administration of criminal justice at that time".

83. Grant (Jamaica) Report p.29.

in arrest of judgment that the crime of rape, if committed by a white or free person upon a slave, was not punishable under the Statute of Elizabeth, that the colonial Acts which dealt with wrongs done to slaves, were not modifications of or restrictions on rights which slaves devived from the Common or Statute Law of England in force in the island, for they did not exist for slaves, nor were slaves within their operation. Further it was contended, the silence of colonial Acts with respect to certain crimes, for example, rape committed on the person of slaves did not leave those crimes to be dealt with according to such common or statute law but that the colonial Acts comprehended every crime committed on a slave which is to be made the subject of punishment[84] The motion was rejected by the Court but on more mature reflection, the Chief Justice requested a respite of the sentence whilst the Crown Law Officers were being consulted, for he considered that "even if at this day the murder of a slave is considered to be punishable with death only under the Consolidated Slave Law and if the sanction

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84. See Sir Fortunatus Dwarris, Substance of the three reports of the Commissioner of Enquiry into the adminstration of civil and criminal justice in the W.I (India 1827)pp 431 "It does appear to me, that it might be advantageous that in the Windward as well as in the Leeward Islands, the common law of England should be declared to be the certain rule for all descriptions of persons being subjects of His Majesty: and to obviate all doubts real or pretended upon this head it might be recited and set forth explicitly in such declaratory law, that all African or creole slaves admitted within the King's allegiance are and shall at all times be taken and held to be entitled to the protection..... of the common law.

of the Legislature was necessary to authorise that punishment of murder I know not upon what principle it can in the absence of all usage be inflicted without the same sanction for a mere outrage (however monstrous) upon the person".[85]

In the following year the submissions of Counsel for Simpson on the motion in arrest of judgment were upheld. Intelligence was received that the Crown Law Officers "had expressed concurrence with the view that the conviction was wrong".[86] The moral wrong[87] done to Charlotte, the slave child was legally right. Neither English Common Law not English Statute Law availed to maintain the appearance of the balance of justice. They were not the heritage of the mass of the people.

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85. CO 137/153 Chief Justice Scarlett to Lt. Gov. Conran 26/7/1832.

86. CO 137/155 Bathurst to Lt. Gov. Conran 29/4/1823.

87. The act was accompanied with particular circumstances of aggravation. Simpson had chained the infant to his bed and amid her cries "do Massa, no do me so" he violated her again and again and again.

CHAPTER VI

ADMINISTRATION OF LAW IN SLAVE JAMAICA

In any consideration of the legal system in slave Jamaica, the numerous conflicts and crises in the administration of the law stand out in bold relief. To these, the very staple of legal administration in the pre-abolistion era, separate attention will now be paid.

(1) Conflicts in legal administration.

Conflicts with nature and with internal and external foes, conflicts for the Laws of England, conflicts of rival factions within the State, conflicts of jurisdiction of the Courts and of legalative bodies pretending to judicial powers affected the machinery of the law and etched their influences upon its growth and character.

Conflicts with nature and with internal and external foes. For years the island was unhealthy, especially to those not born in tropical climes. . Malaria, an endemic disease, and the terror of new-comers, reigned until far into the 19th Century. It first struck with widespread severity in 1699. This "bleeding fever" as it was called, was fatal to so many that it was difficult to find people to be Justices of the Peace. It struck in 1702 and 1703 and again in 1707 reducing the white population which had stood at 7700 in 1678 to scarce 2700 souls. At the sitting of the Grand Court in 1707

the arrears of cases were said to be as high as a third of the white population, so depleted it had become and so insufficient for its exclusive administration of a widespread common law system of judicial institutions. Fatalities exacerbated by habits of intemperance became commonplace even beyond the close of the 18th Century and "death" in the trilogy of evil "debt", disease and death" [1] with which, according to Lady Nugent, the country was afflicted, largely related to the vicious combination of drunkenness and malaria. The constant drain on the population remained a chronic threat to all public administration. "I truly think" said Governor Trelawny in 1747 "that there is hardly any evil we labour under, but what is owing ultimately to the small number of inhabitants; it makes the duties of magistrates and all commissions, civil and military, very hard on the residents and there is no choice." [2]

Other contemporaneous circumstances aggravated the problem.. In the Maroons, former slaves of the vanquished Spaniards, colonists inherited a persistent intestive foe. In rebellious negroes, subjected to slavery, colonists heaped upon themselves another. Added to these were the constant alarms which the hostilities of Britain's imperial rivals occasioned the island in the 17th and 18th centuries.

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1. Lady Nugent's diary. p. 184.
2. CO 137/24. Trelawny to Board of Trade 14/4/1747. C CSP Col.1696/7. No. 101. Beeston to Board of Trade.

Dislocation of the life of the country was also brought about by hurricanes, some followed by epidemics, and earthquakes, and droughts, the regularity and devastating effects of which were a marked feature of the colony's life in the first century after its settlement.

To cope with these circumstances, the limited white population had to be mobilised on a warlike footing. "Frequent declarations of martial law by which the ordinary people are kept on duty instead of being at work to earn their bread, made them retire to the Northern Colonies for greater quiet and ease"[3]. It also discouraged immigration and thus intensified the great evil to which Trelawny had referred. Of more immediate relevance, however, was the fact that until the 1730's when the matter began to be regulated by statute, every declaration of martial law occasioned a cessation of the general civil law and a stoppage of the business of the courts. Suits could not be filed, nor processes served, nor litigation heard during the continuance of martial law.

Maroon rebellions which began in 1663, went on desultorily throughout the 17th Century. In 1729 they exploded into open and very fierce warfare which lasted for nine years exhausting the resources of the island, both in men and in supplies, until the peace of 1738. Throughout these years periodic declarations of martial law disrupted the legal system. During the course of the second and third Dutch Wars (1665-7; 1672-8) fears of invasion

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3. CSP Col 1696-7 No. 101 Beeston to Board of Trade.

precipitated martial law three times, as did fear of a French invasion in 1680 to 1681. The actual invasion came in 1694, two years after the great earthquake which destroyed Port Royal, and with it a great deal of the irreplacable records of the Courts, and much loss of life. In these years the work of the courts was stopped from time to time. In the years between 1665 and 1738 martial law was declared over twenty-five times, each occasion bringing about some interference with the functioning of the legal system. In such circumstances men turned necessity to their account. By 1694 "people had already grown so accustomed to martial law by which common justice is obstructed, the credit of the island lost, and people kept out of their just debts, that as soon as the Assembly meets, one of the first things is for it to address for martial law"[4].

8 Geo 1 C 1 , an island Act for establishing a perpetual anniversary fast on the 28th of August perpetuated the memory of two devastating hurricanes in the years 1712 and 1722, the first of which was followed by a virulent epidemic, and both of which brought the activities of the Courts to a standstill for some considerable time.

Deaths of sovereigns too could impede the work of the Court in these times. At common law the death of the sovereign terminated all commissions. 7 and 8 W3C. however, had tempered the common law rule by extending the operation of existing commissions six months after the royal demise. Yet the distance of Jamaica from the Mother Country and

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4. CSP Col 1693 - 6 No. 1258 Beeston to Bd of T 26/8/1694

the slowness and general hazards of communication by sea could occasion delay in the receipt of new commissions. Such was the circumstance six lunar[5] months after the death of King William in 1702 when "the Chief Justice absolutely refused to hold a court which has made the others timorous"[6] Twelve years later and for similar reasons "the proceedings of the Courts of Law have been stopped by her late Majesty's decease (Queen Anne's) for several terms"[7].

A Governor's death too in circumstances in which the administration fell to the senior member of the Council and not to a Lieutenant Governor was held by colonists to create a termination of judicial commissions which in turn would cause a cessation of the activities of the courts. As dormant commissions to Lieutenant Governors were not usually granted in these times, such stoppages of the courts were likely to happen. Thus upon Lord Inchequin's assumption of the government in 1960, two years after the death of his predecessor the Duke of Albermarle, "great distraction fell upon the island, the courts of justice having ceased nearly two years"[8].

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5. CSP Col 1702 No.912 Lt.Gvr.Beckford to the Bd of Trade "The day after the Chief Justice came and told me the A G had been with him and showed him a cause or two that the six months were only lunar months and to be computed so and not according to the Calendar" King William died the 8/3/1702. The Courts could not function in September without new commissions.
6. CSP Col 1702 No. 811 Lt.Gvr.Beckford to Bd of T 25/8/1702 The Island was put under martial law.
7. CSP Col 1714-15 No. 588 Hamilton to Board of Trade
8. CSP Col 1689-92 No.980 Inchequin to Lords of Trade & Plantations 6/7/1

"The people" Inchequin reported "have lived without law or justice to the great encouragement of malefactors and to the strengthening of pretentions to martial law". [8]

In 1736 the Board of Trade were advised that "martial law ought never to be made use of in a civil government except upon great emergency". This information was communicated to the colonial government which in later years enacted legislation for the continuance of legal actions and service of court process in times of martial law. Martial law continued to be proclaimed thereafter if circumstances rendered it necessary, but its declaration no longer by its own force terminated the operations of the courts.

Conflicts for the Laws of England. The general effects of this struggle upon the legal system have already been described. [9] The years immediately prior to the political settlement of 1728 were particularly disruptive of the courts. Of this period it was recorded that "this island was nothing but distraction and confusion, nay it was almost in an absolute state of anarchy. In vain did the people claim a right to and the protection of the laws of their mother country which they fondly imagined that they had brought with them; they were often refused the benefit of them, they were neither universally nor constantly acknowledged by the several courts to be in force in the island, nor were they allowed to be so, but according to the

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8. CSP Col.1689 - 92 No. 980 Inchequin to Lords of Trade and Plantations 6/7/1690.

9. See Chapter 3.

knowledge, or will, or caprice or perhaps the partiality of the judges"[10].

Conflicts of rival factions within the state. Hardly less injurious to the administration of justice than the convulsions of nature, the claims created by the warring imperial powers or the endemic diseases were the factions which the plantocracy brought to the judicial bench. This phenomenon of Jamaican legal and political life made its debut some time after the close of the constitutional struggles of 1677 - 1680 but attained disastrous proportions during the administration of the Governor Edward Trelawney (1738-1752) The centre of the faction was the Office of Chief Justice, the cause of it, the fact that appointments thereto were made from among the Gentlemen Planters in the island. "It tends to keep up parties in the island", wrote Trelawney "which burst out with great violence upon every vacancy of a chief justice, for that office being the next in rank to a Seat in the Council, but in power and authority much above it, is the object of ambition of every one who thinks himself of weight and interest in the country; by which means it seldom happens, but there are two competitors upon different pretences, one perhaps as the eldest judge claims, it his due by seniority, the other being a Councillor or more popular in the island, thinks it an injustice to his rank and much to be denied any honour he aspires to.

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10. CO 137/35 p 159 year 1768.

As it is impossible for the Governor to please both, all he has to consider is who is the least able to hurt him; for he may be well assured that the disappointed person with all his friends and relatives will become his utter enemy. Tho' the disappointed candicate is so angry the successful one is not equally pleased and soon after the pleasure that arises upon the first gratification of his ambition is over he finds the labour of his office much too great and wants to retire, and then the Governor has the same ugly game to play over again. The disappointed judge and all the judges that espouse his interest quit their seats on the bench and this of necessity occasions frequent changes there".[11]

More serious than the changes on the bench however was the fact that "not only the lawyers but the suitors", if friends of the faction opposed to that of the bench, were exposed to oppression and injustice from the court. "The Attorney General", reported Trelawny, "as being a known friend to my Administration had a greater share of their (the Court's) disfavour than any other and it being heightened by a particular quarrel between the Chief Justice and him, the former used to treat him indecently, which one day he did to such a degree that

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11. CO 137/24 Trelawny to Bd. of T. 14/7/1747. The Office of Chief Justice was the only judicial office then remunerated by a salary (£120. p.a.) and fees. The eldest assistant judge therefore aspired to become Chief Justice but where he was passed over in favour, for example, of a member of the Council he would lose interest, perhaps resign, and his juniors would follow suit. In the time of Trelawny the office of C.J. began to lose some of its financial appeal. A custom developed whereby the Chief was obliged to keep a "public table" every session, the cost of which quite exhausted his fees. By the time the 19th century came, no barrister wanted the office.

the Attorney left the Court and came no more that term. This in effect brought on a Revolution on the Bench".[12]

These factions continued until the last quarter of the 18th century when they became submerged in the face of the common danger to the whole planter class which arose in the last quarter of the 18th century from the activities of the anti-slavery movement.

Conflicts of Jurisdictions of the Court. Dependence of the planters upon overseas trade brought them inevitably into contact with the Court of Vice-Admiralty, the Court of enforcement of the Acts of Trade and Navigation. Naval Officers seizing ships trading illegally with the colonies were directed to condemn them as prizes in the Admiralty Court where they were entitled to half of the proceeds of sale, the other half going to the Crown. If the offending vessel were seized by Civil Officers condemnation could proceed in any court of record, and the Governor, the informer and the Crown received in equal shares the proceeds of sale. Less ambiguous than the Act of 1660 was the Staple Act (1663) which provided that seizures for violations thereof could be condemned in any of His Majesty's Courts in the plantations. Thus these two fundamental statutes gave an exclusive jurisdiction over certain seizures to the Admiralty Courts whilst in other cases such powers were conferred on Courts of records and again in a third class of cases the Admiralty and Colonial courts had concurrent jurisdiction.

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12. Ibid.

Imperial Wars[13] however in the 17th and 18th centuries rendered commerce with the colonies haphazard, irregular and expensive. Ships of the enemy laden with goods or slaves which the planters needed were not infrequently in Caribbean waters when English shipping was not.

Two cases in the 17th century left little room for doubt what course colonial courts would take if, in times of economic difficulties, issues under the Acts of Trade and Navigation were litigated before them.

In 1676 a Dutch vessel operating without a licence from the Royal African Company appeared off the coast of Jamaica, 300 slaves abroad. Supplies of negroes from the Company had been infrequent, expensive, and at the height of the third Dutch War, unavailable. On the basis of a local Act for dividing the island into parishes the judge of the Vice- Admiralty Court was persuaded that he lacked jurisdiction. In the Court of Common Pleas the planter/jury had no hesitation in finding the patent of the Royal African Company void because of the Statute of Monopolies. The precious cargo of African slaves was released[14].

Two years later the King's Receiver General libelled an Irish ship in a Court of Common pleas. The jury likewise found no difficulty

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13. The Second Dutch War (1665-7); The Third Dutch War (1672-8); King William's War (1690-7); Queen Anne's War (1702-13); War of Jenkin's Ear (1739-48)) The Seven Years' Was (1756-63); War of American Independence (1776-84).
14. CSP Col 1675-6 No.863. The case was subsequently referred by the Crown to the Surrogate of the Admiralty Court who reported that "it is not in the power of the Governor, Council and Assembly of Jamaica by an Act of theirs for dividing the island into parishes to make the high sea part of a parish, much less to deprive the Lord Admiral of his jurisdiction" CSP Col No.75-6 Nos.958; 972 Governor Vaughan was thereupon enjoined to take care to preserve the Admiralty jurisdiction.

in accepting evidence that its cargo of "soap was victual and that one might live upon it for a month",[15] and acted upon it to the loss of the King's Receiver General.

The difficulty of finding unbiassed juries in the plantations[16] obliged resort to the Vice-Admiralty Court[17]. This Court however had several procedural defects, at least from a colonial point of view. Unlike the common law courts, it proceeded without a jury and evidence was taken out of the sight and hearing of the court upon interrogatories and without benefit of cross-examination. In addition the court, staffed by lay-men[18], lacked legal knowledge and experience, although in this respect it was at no particular disadvantage by comparrison with the courts of common law.

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15. CSP Col.1677-80 No.1304 Morgan (Judge Admiral) to Lords of Trade 24/2/1680.

16. CSP Col.1677-80 No.1304 Morgan to Lords of Trade 24/2/1680.

17. Beer Old Colonial System (1660-1674) Vol Part 1 p 307 "It was the futility of attempting to secure a verdict from the jury in even the clearest of cases that ultimately led to the extension of the Admiralty Courts throughout all the colonies".

18. In 1680 Morgan wrote to the Lords of Trade "The office of Judge Admiral was not given to me for my understanding of the business better than others, nor for the profitableness thereof for I left the school too young to be a great proficient in either that or other laws and have been much more used to the pike than the book" CSP Col.1677-80 No.1304. See also CSP Col.1681-5 No.1247 Lynch (reputed to have been a barrister) to Lords of Trade & Plantation 12/9/1683 "he was not a man of skill in the law".

The situation was rife with possibilities of conflict of the jurisdictions of the two courts and colonists did not fail to exploit those possibilities as often as need presented itself. Legalistic contentions that the Vice-Admirality Court was not a court of record were raised. Governors whose financial interests lay with the Colonial Courts disputed with naval officers whose financial interests lay with the Admiralty Court whether the latter Court had jurisdiction when seizures were made by the Navy within a port and not on the high seas. The want of jury trial and viva voce examination provided the basis for powerful emotional appeals before colonial judges and juries upon points of sacred constitutional rights against the Admiralty Court. To these arguments and appeals the Supreme Court yielded on occasions with writs of prohbition[19] to restrain the proceedings of the Vice-Admiralty Court and writs of habeas corpus [20] to release prisoners from its custody.

To check "the great abuses daily committed to the prejudice of the English Navigation and the loss of a great part of the Plantation Trade to this Kingdom by the artifice and cunning of ill-disposed persons" the Imperial Act 7 and 8 W3 C22 (1696) strengthened and confirmed the jurisdiction of the Admiralty Court by providing

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19. "ex parte Oliveres Daniel" Grant (Jamaica) Report p 293 et seq. where the Court, through denying the Prohibition, did not deny that such a general power to restrain proceedings in the Admiralty Court vended in the Supreme Court.

20. CO 140/59 p.154. Supreme Court by writ of habeas corpus released a merchant whom the Admiralty Court had attached after considerable difficulty upon a "pluries attachment".

that the condemnation of unfree bottoms could be pursued in any court in His Majesty's plantations and that penalties not otherwise particularly provided by the Act could be recovered in the Courts of Admiralty where the offence was committed or in any other plantation belonging to any subject of England.

The procedural defects of the Admiralty Court were still left unreformed, whilst the jurisdiction of the common law courts remained as they were until extended by an imperial Act 4 G 3 C 15 (1764) which gave the Supreme Court jurisdiction concurrent with that of the Admiralty Court to hear suits for the recovery of penalties. Areas of conflict of these two courts, though narrowed, still remained, but in 1786 the majority verdict of the Supreme Court bench in one case and the corrupt verdict of a jury in the other brought this conflict to an end.

In the former case""ex parte Oliveres Daniel"[21] a writ of prohibition was sought to restrain proceedings in the Vice-Admiralty Courts where the ship "Le Beaumont" with a cargo of 680 barrels of flour had been libelled. For the applicant it was argued that the Admiralty had no jurisdiction where there was a remedy at common law, that the Admiralty had jurisdiction in navigation matters, but not in trade and revenue, that 4 G 3 C 15 was a revenue Act, that trial without a jury was a violation of the constitutional rights of colonists. The bench of five by a mere majority of one rejected the application "however contrary to their wishes as members of the community".

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21. Grant (Jamaica) Report p 293 et seq.

In the latter case "Mac Allister V Greyhound Packet"[22] an informer undertook the perilous venture of putting the merits of his case to the test of a colonial jury. The packet had smuggled into the country a great quantity of gin. The only shadow of an argument raised by the traverser was that a packet was the King's vessel (which in fact it was not) and not liable to seizure. The jury grasped this shadow and returned a verdict in favour of the defendant. After this manifestation of reluctance by the colonial jury to pronounce a verdict of condemnation even under the clearest proof of fraud and violation of the laws "proceedings on the part of the Crown and the seizing Officer" reported the Judge Advocate "are now always instituted in the court of Vice-Admiralty"[23]. Similarly the denial of the writ of prohibition in exparte Oliveres Daniel, albeit by such a slender majority of the Court, discouraged such applications in the future and thus a century or more of conflict between the common law and admiralty courts came to an end.[24]

Jurisdictional conflicts between the Court of Chancery and the Supreme Court also existed. From the earliest times Chancery issued

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22. Grant (Jamaica) Report p 310.

23. Judge Advocate in answers to questions from the Commissioners of Legal Enquiry. Commissioners of Legal Enquiry Op Cit p 236.

24. It was also due to the fact that Colonial Courts of Admiralty declined after the close of the American War of Independence and the gradual break-up of the old colonial system.

injunctions to stay proceedings at law[25] and this jurisdiction which was sanctioned by the Privy Council[26] was not opposed by the common law courts, but the frequency of its exercise and alleged irregularities of procedure became from time to time subjects of complaint by merchants and suitors.[27]

On its part the Supreme Court on occasions granted writs of habeas corpus to release defendants in the custody of the Court of Chancery and for a while frowned upon the practice of the Court of Chancery in granting writs of "ne exeat insula" against parties to actions at common law and in entertaining suits which by their nature ought properly not to have been instituted in a Court of Equity. This latter practice had developed however out of the circumstances of the times rather than from any conscious desire on the part of Chancellors to encroach upon the common law jurisdiction. It was the consequence of the delays and frustrations which litigants who wished to appeal to the Privy Council experienced in getting the intermediary appeal to the Court of Error heard.

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25. and 26. See Chapter 5

27. In 1722 Merchants and Planters in a petition to the King complained that "Injunctions have been frequently issued out of Chancery without the proper affidavits filed or being within any other of the forms usually observed in Your Majesty's Court of Equity and sometimes even before any bill has been preferred in Chancery by the party obtaining such injunction CSP Col 1722-23 No.320. See also CO 140/9/427 and Commissioners of Legal Enquiry Op Cit p 205 Answer to Question 284.

As appeals from Chancery proceeded directly to the Privy Council, suitors preferred to bring their suits before the Chancellor who made no meticulous distinction between proceedings at law and in equity[28].

In 1756 a Judge of the Supreme Court released upon a writ of habeas corpus a solicitor who had been imprisoned by the Chancellor for "taking false notes"[29]. The Judge whose conduct was investigated by the Chancellor/Governor and Council successfully defended his action on the authority of "an Act of Parliament passed in Great Britain in the 31st year of King Charles the second entitled an Act for the better securing the liberties of the subject and for prevention of imprisonment beyond the seas which hath always been esteemed..... in this island and ..... hath by the 1728 Act been declared to be and continue law of this island for ever" [30].

Nearly three decades later however the judges of the Supreme Court in declining to grant a similar writ to take the body of the defendant in a suit at common law out of the custody into which he had been put on a writ "ne exeat insula" issued out of Chancery

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28. CO 137/131 Lt.Gov.Morrison to LIVERPOOL 20/9/1811.
29. CO 140/33 pp. 661-663.
30. Ibid. The Habeas Corpus Act of 1679 which was said to have been "introduced into the island within two or three years after it was enacted in England" CO 137/34 p. 32 Lyttleton to Board of Trade.

conceded the authority of the Court of Chancery in these words: "The jurisdiction of that Court (the Court of Chancery in England) and of this must be taken from their arch-types in England and no case has been shown where the King's Bench under the notion of its transcendent power has ever granted a prohibition to the Court of Chancery though in this country it too often entertains suits in the strictest sense determinable at law ..... we have no control over its proceedings and instead of deeming the ne exeat a contempt it may rather be considered as coming in aid of the common law to ensure justice to a creditor"[31]. In the following year the Court firmly re-iterated its stand: "We cannot", they said "control or judge of the Chancellor's proceedings in civil suits; it can only be done on appeal to the proper forum; whereas he often interferes by injunction as in the present instance and whether it becomes a question whether the remedy is at law or in equity he is to judge" [32]

These local conflicts between the Courts of Jamaica recall to mind those of the courts of the mother-country, but the differing effects of the differing circumstances in which the respective conflicts of jurisdiction were laid are instructive. The unification in Jamaica under one set of judges of the Supreme Courts of Common Law could and did not give rise to that competition for business

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31. Wildman v Kemeys, February Grand Court 1785 Grants (Jamaica) Report

32. Habeas Corpus - ex parte Kemeys (1786) Grants (Jamaica) Report p.299.

between the King's Bench, Common Pleas and Exchequer which dominated the English Courts and which resulted in these three courts having co-ordinate jurisdiction in many common classes of cases, although the differences of procedure between them were numerous and troublesome. Accordingly the process of rationalisation of the Superior Courts of Jamaica in the late 19th Century was not the subject of the protracted legislative labour which it became in the mother country. "The eventual fusion into one system" reported Governor Grant "of all the English System of Law would be a trifling and easy task here where the same men are already judges, advocates and practitioners in all the Courts."[33] Nor was it mere competition for judicial business which brought into conflict the provincial Supreme and Admiralty Courts. Doubtlessly the choice of Courts would have been a matter of complete indifference to colonists if the latter court had been equipped with the procedure of jury trial. Local interests were centred in the outcome of the cases, not in the choice of Courts simpliciter. In the colony, therefore, the imperial status of the Admiralty Court secured for it a triumph over the Courts of Common Law which it did not achieve in Britain.

It will be noticed too that no acrimonious feelings at any time embittered relations between the Colonial Chancellor as such and the judges of the Courts of Common Law, and that the latter

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33. CO 137/343 Grant to Granville 24/8/1869.

conceded without significant hesitancy the hierarchical ascendancy of the former, whilst such opposition as there was to the common injunction was attributable rather to the incidental manner of its exercise than to the validity of its use as such.

Legislative bodies as Courts of Law. In the early years of political government it was not unnatural that a great many decisions of a judicial character should take place in the Council where the men of largest means, prestige and influence in the community were assembled. Some of them were always judges of the Supreme Court. All were justices of the peace. That the judges who were either members of this body or otherwise closely connected to it should turn to its collective wisdom for advice was normal. Further judicial commissions directed the judges that "where the strict rules of common law will not permit you to do right you shall acquaint the Governor and Council with it, that they may apply a remedy"[34].

In 1661 the Council is recorded as having directed the Courts of Common Law to construe commercial documents "according to the literal words written upon them"[35] and that same year it stayed execution upon the verdict of a Court of Common Pleas respecting property in a negro because "matters of this nature do not come

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34. CO 140/2 Appendix p.36

35. CSP Col.1661-8 No. 136

under the cognizance of a civil Court.[36] With the passage of time the judicial powers of the Council tended to grow. They summoned persons before them, administered oaths to witnesses, received evidence, ordered parties to enter into recognizance with sureties to keep the peace and granted habeas corpus.[37] They stopped the due process of the law in exercise of a pretended supervisory authority in 1672,[38] ordered in 1672 prosecution of a man who had already been acquitted of the charge[39] and affected to appoint guardians of property.[40] These judicial exercises hallowed in time and usage lent credence to the notion that they had "during their sessions, a judicial power like that of the House of Lords and can hear and determine civil causes."[41]

These pretensions to the powers of a Court of Law did not always go unchallenged. In 1712 an Assembly man submitted to an order of the Governor and Council to enter into bond for keeping the peace but challenged their authority to do so.[42]

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36. CSP. Col 1661 - 8 No. 789
37. Long op.Cit.P 174
38. CSP. Col 1668-74 No. 730
39. CSP. Col 1668-74 No. 945
40. CO 140/3/331
41. These were the words of Gov.Bellmont of New York in 1700 concerning the pretensions of the Council of that territory CSP Col.1700 No.3. Lyttleton confirmed the same of the Council of Jamaica in 1762 "The pretensions of the Council" he said "to exercise the power of the House of Lords is built upon the same foundations as the Assembly's pretensions to be exemplar of the House of Commons, namely their rights as English subjects to the Laws of England which in their view included the powers and privileges of Parliament."
42. CSP Col.1712-14 No. 149.

In 1767 matters came to a head when the Supreme Court intervened to release upon a writ of habeas corpus a public official imprisoned by the Council for administrative delinquency. In confirming the action of the Supreme Court the Crown Law Officers denied the authority of the Governor and Council "to compel Mr. Douglas to come before them either to be detained to answer charges alleged against him or to commit him for contempt in not appearing before them according to their summons. His offence in detaining the books and papers of his office and keeping the monies belonging to the Revenue in his hands were matters properly cognisable in His Majesty's Court of Law in that island in the ordinary course of justice." [43]

The pretensions of the Assembly to be a Court of Law rested, as did the Council's, upon claims to "an inherent right to do so as English subjects entitled to the use and benefit of the Laws of England of which the customs of Parliament make a part." [44]

Of equal or perhaps greater extent than those of the Council, they

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43. CO 137/34 - 16/6/1767.

44. Lyttleton to Board of Trade 13/4/1762. See also CSP Col 1701 No.749 Beeston to Board of Trade 19/8/1701 and Long's History of Jamaica Vol.1 Chap. 1 p 11. "The Assembly or lower House has an exact resemblance of that part of the British Constitution which it stands for here; it is indeed an epitome of the House of Commons, called by the same authority, deriving its power from the same source and governed by the same form. It will be difficult to find a reason why it should not have the same privileges and powers, the same superiority over the Courts of Justice and the same rank in the system of our little community as the House of Commons has in that of Britain.

persisted for considerably longer, were sanctioned for a while by the highest tribunal in the Empire and in fact lasted almost as long as the Assembly itself. In addition to the ordinary claims to summon parties before them, to administer oaths, to examine witnesses and so on, it claimed a power to imprison for contempts of its privileges whether committed in the face of the House or outside its doors and to "impeach" judges and justices before the Governor and Council and by address to seek their removal from office.

Attention has already been drawn in another connection to the Oliphant Case of 1766.[45] A feature of that case which anticipated the celebrated case of Stockdale v Hansard[46] and the case of the Sheriff of Middlesex[47] and illustrates with what tenacity local colonists embraced the privileges of their Representative Body must now be noticed. In that same year an Attorney issued proceedings in false imprisonment against the messenger of the House who had carried out their orders in arresting the servant of the Provost Marshal.

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45. See Chapter 3

46. (1839) 9A & E ; K & L 127.

47. (1840 11A & E 293; K & L 140. In Stockdale v Hansard, Stockdale sued the printer of certain reports containing defamatory matter which were published by Order of the House of Commons and were available for sale to the public. The defendant was ordered by the House to plead that he had acted under an Order of the House of Commons, a court superior to any Court of Law, whose orders could not be questioned. The Court of Queen's Bench rejected the defence and awarded the plaintiff damages. The sequal to this case was the execution of a levy upon the property of Hansard by the Sheriff of Middlesex. The House committed Stockdale and them, on the sheriffs refusing to refund the proceeds of the execution, also committed them for contempt without expressing the real cause for the committal. The House of Commons may be said to have followed the Jamaican precedent.

He and his client for their temerity were promptly cast into gaol by the Assembly and the messenger declared "indemnified",[48]

Three other cases, two involving constructive contempt of the House, which fall outside our period, may for completness be here considered.

In Beaumont & Barret,[49] an action for false imprisonment brought by the plaintiff under circumstances of an arrest under a warrant of the Speaker of the House of Assembly charging a contempt committed out of its doors, the Supreme Court by a majority expressed "no doubt of the power of the House of Assembly to comment for contempt"[50] and on the precedent of Oliphant's Case concluded that "the highest Court in this island has not the power of releasing a party committed by the House".[50] On appeal the Privy Council upheld the decision but in the later case of Kielly v Carson[51] in which an action for assault and battery and false imprisonment was brought against the Speaker and others of the House of Assembly of Newfoundland. Baron Parke reversed his earlier decision and laid down that the power of committal enjoyed by the House of Commons in England was held, not because it was a representative body with legal functions, but by virtue of an ancient usage and prescription, the lex et consuetudo Parliamenti which forms a part of the common law of the land.

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48. CO 140/40 26/6/1766 p 536.
49. Stephens (Jamaica) Report 433 pp.434 - 6 also 1 MOO PC 59.
50. Ibid
51. 5 MOO PCC.63

Colonists who considered the Lex Parliamenti as their inherent right as Englishmen and on the ground also of the Revenue Act of 1728 comprehended no obstacle in Kielly v Carson when in 1853 requiting the Supreme Court for its generosity seventeen years earlier, they in their Assembly committed to the Common Gaol a distinguished member of that Court to whose article published in the Press they had taken umbrage.[52]

In re Ewart (1864)[53] was the case of a public official who was committed to prison for his refusal to communicate to a Committee of the House information which he had received confidentially from the Governor in the course of his public duty. It was now seven years since the leading case of Fenton v Hampton[54] in which opportunity had been taken to correct an error in the judgment delivered in Kielly v Carson. The lex et consuetudo Parliamenti, it was laid down, "applied exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a colony by the introduction of the common law there." All the tangled issues in relation to the colonial Assembly's pretensions to the privileges of the House of Commons were now resolved and in the leading judgment Mr Justice Ker seemed at pains to do posthumous justice to his eminent departed colleague. "The single inquiry therefore is, is the House of Assembly

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52. CO 137/316. Grenelg to Newcastle 9/4/1853. For a fuller treatment see below Chapter 10

53. In the application of David Ewart for a Writ of Habeas Corpus supreme Court February Term 1864 CO 137/379. See Chapter 12.p 448

54. 11 Moo P.C.C. 347.

a Court of Law. The answer, beyond all dispute and controversey, must be in the negative. The Assembly is not a Court of Law, does not possess one judicial function. It cannot administer an oath.[55] It cannot even adjudicate upon the validity of the election of its own members..... What was granted to his colony was a Representative Assembly, of which Kielly v Carson has decided that a general power to commit for contempt is not a legal attribute and accompaniment..... For these reasons I was of opinion.....that this warrant was....bad and that Mr. Ewart was properly discharged; and I continue of that opinion still."[56]

Long before in re Ewart, however, the exorbitant claims of the House did not always go unchallenged. In 1756 on the basis of testimony collected by a Committee of Enquiry of the House, the Assembly did demand and obtain the dismissal of a Chief Justice,[57] but in 1818 Chief Justice Jackson who had extracted the recognizance of a Member of the House refused to have his judicial conduct enquired into by the Assembly "lest I compromise my conscience as a man and make a deliberate surrender of my independence as a judge."[58] Again in 1832 Chief Justice Rowe said that "he should refuse to be sworn (to give evidence before

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55. Doyle v Falconer LR 1PC328 it was held that a Colonial Assembly does not possess authority to commit and punish for contempt committed and interruption and obstructions given to its business by its members or others in its presence and during its sittings. Fenton v Hampton and in re Ewart quite definitely decided that the Assembly had no power to administer an oath.

56. CO. 137/379.

57. Chief Justice Philip Pinnock, Journals of Assembly Vol 4 pp 617-660 Moore to Board of Trade 4/11/1756. CO.137/29. See also Metcalf Op. at p. 142.

58. Journals of the Assembly Vol. 13 pp. 282-3.

the House or any of its Committees) and added that he would never entertain any prosecution for perjury upon an oath administered by them."[59]

59. CO.137/183/47. Mulgrave to Goderick 15/12/1832. "I will not call your Lordship's attention to the fact of how much more liable it (the power to summon people before the Assembly) is to abuse in a small community exercised by such a Body as the House of Assembly who arbitrarily summon whomsoever they please from any part of the island, make no allowance for his expenses and then bind him by an oath to answer any questions which they may choose to put to him."

(ii) Crises in legal administration

The commercial infancy, and by that token, the legal infancy of Jamaica was brief. Whilst it lasted, the wants of individuals and the relations of the small white society were few and simple.[61] In 1663 Lt. Governor Lyttleton reported that "the laws were plain and easy, neither merchant nor planter..... the least dissatisfied, every cause determined in six weeks with 30/- or 40/- charges".[62] A writer at the end of the 17th century confirmed that "in earlier times when the inhabitants were few their controversies were few and were generally decided in a summary way".[63] The points then litigated could not have been involved in much difficulty and might have been equitably decided by men possessed of no other qualification than sound integrity and plain sense."[64]

By 1684, however, the island's economic destiny had been moulded and its commerce was being drawn more and more into the web of the imperial economic system. The impact of that development was that the advanced commercial system of the mother-country was imposed upon the fledgling colony and the lay judiciary became increasingly ill-equipped to deal with the complicated legal relations and inexhaustible disputes associated with the system of commercial credit

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61. CO 140/96 p.235

62. CSP Col 1661-8 No.

63. Hodges' Plantation Justice showing the constitution of the Courts and what sort of judges they have in them (1702) Br. Museum.

64. CO 140/96 p.225

and exchange, loans public and private, banks, bonds, mortgages and joint-stock companies. The situation was aggravated by the brevity of the tenure of the judges of the Supreme Court in these early years, occasioned by deaths, removals and other circumstances. Between 1661 and 1729 there were nineteen chief justices four of whom held office more than once and none more than twice. The average tenure of any chief justice was thus about two years or eight sessions of the court, each of three weeks duration at most. Deducting periods of stoppages of the courts occasioned by martial law or other exigencies it seems almost certain that for the entire period of their service the judicial experience of some chief justices was limited to a few weeks at most. Little surprise therefore is awakened by the report in 1720 of Chief Justice Bernard that "for want of knowledge both on Bench and Bar, the laws were often wretchedly miscontrued and perverted".[65]

Positive call for a qualified chief justice was first made in 1695.[66] Repeated by the Assembly in 1724,[67] it was enlarged a quarter of a century later into a call for a qualified assistant judge of the of the Supreme Court as well, for "with every change in the judicial

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65. CSP Col 1719-20 No.548
66. CSP Col 1695 No.2178 Beeston to Board of Trade 2/12/1695
67. CO 140/9 p.427

personnel, there were changes in the rules and decisions of the courts,"[68] a situation that owed its origin to the want on the bench of men of science thoroughly grounded in the art and mystery of the law "for let them have ever so much good sense otherwise and be ever so honest, private judgment will ever vary and be different in different men, but the dictates of science is one and the same in all."[69] In the course of his sittings in his court Chancellor Trelawney (1738-1752) observed "several practices which I think not right, nor for the good of the suitors, but for want of a confidence in my own judgment, not being bred to the law, I let them pass. I am told it is pretty much the same in the Courts of Law for the same reason".[70]

With disappearance of pettifogging which the Declaratory Acts had encouraged[71] and with the emergence in the last quarter of the

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68. CO 137/59 Edward Trelawney to Duke of Bedford 1/6/1750
69. Same
70. CO 137/59 Edward Trelawney to Duke of Bedford 1/6/1750
71. See Chap.3. n.

18th century of a tolerably proficient Bar and Solicitors' profession,[72] the want of a comparable development on the Bench accentuated this cardinal weakness in legal administration, and "it often happened in Chancery" and Chancellor Trelawney was informed that it did so too in the Courts of Law" that some lawyers shall affirm the practice of the Court, or the rule of law, to be one way and other lawyers shall affirm it as positively to be a quite contrary way and the inexperienced judge is in an amaze and at a loss what to do in such a case".[73]

These calls for a qualified judiciary remained unfulfilled throughout the seventeenth and eighteenth centuries. At the dawn of the 19th century a legal chief justice was added to the judicial establishment but illness prevented the incumbents from paying such attention to the duties of the office, their legal opinions could at any time be over-ruled by that of the two lay justices associated with them and the state of the administration of justice in the first decade of the 19th century became the subject of a succinct diagnosis

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72. A Solicitors' Act of 1773 sought to correct the old practice under which prospective practitioners would merely complete formal documents of articleship and without in fact serving in articles would go off to other employment until the period of the articles had expired and then apply for admission to practice. In 1795 a "Law Society" was founded. Journals of the Assembly V13 pp 123-6

73. CO 137/59 - 1/6/1750. To minimise judicial embarrassment and to achieve some unanimity on the bench a practice among the judges developed which " on questions of any difficulty the judges met at the Chief Justice's in consultation where he was used to lay before them the law and the Books on the occasion which tho the Asst. Judges were not brought up to the law, yet they contracted a practical and in some degree a theoretical knowledge that gave a consistency to their determinations that had not before been common in the country". See CO 137/38/p.91 - 17/11/1780 Evidence of James Pinnoch, Asst. Judge of the Supreme Court to Committee of the House. How early the practice began is not known.

of a Committee of the House."It is difficult to gather from our courts any permanent rule of conduct their decisions are often erroneous and always uncertain and the success of the suitor depends in general less on the merits of the case than on the skill and address of his advocate". This parlous condition was, in the considered opinion of the Committee, attributable to one primary cause, namely, the non-professional state of the judiciary. "It is impossible" they said " for them to be governed in their decisions by any established principles whether of law or equity: unacquainted with these principles, a knowledge of which can only be acquired by long and laborious researches they are compelled to resort to those loose and arbitrary notions of justice which vary in every mind and which..... serve to mark very imperfectly the distinctions between right and wrong".[74]

For these ills of the judicial system, the Committee had prescribed the remedy. "Attention to legal forms and adherence to established rules and precedents are absolutely necessary" to which end "in addition to the appointment of a legal chief justice, there should be formed a bench of four gentlemen of ability at the Bar and salaries should be provided sufficiently liberal to induce barristers of the highest respectability in the profession to renounce their practice."[75]

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74. CO 140/96 p.235 Year 1809
75. Ibid

Reformation of the legal system, however, was not undertaken by the Assembly despite efforts of the British Government and local governors,[76] and amid the social political convulsions of the first decades of the 19th century the crisis in legal administration deepened.

That crisis became neither more nor less than one of confidence in the judiciary itself as an institution. Its very capacity to administer justice according to law even within the narrow limits of a slave society came into question. Fundamental rules of procedure and the nature of its constitution pre-disposed the legal system to failure.

Legislative obstructions with which the path to the witness stand of free and freed persons were strewn branded legal procedure as an engine for the suppresion rather than the revelation of truth. The total exclusion of free and freed persons from the jury box even in cases involving themselves alone placed the jury system, corner-stone of the common law, in contempt. Exclusion of slave evidence

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76. In 1829 Murray, the then Secretary of State announced that it was his intention to propose a bill for the reform of the Colonial Judicatures, founded upon the Reports of the Commissioners of Legal Enquiry. In 1830, however, Murray was inclined to withdraw from his undertaking on grounds, inter alia, of the expense involved. Before any Bill was introduced, however, the Government fell (Nov. 1830) See Anti-Slavery Monthly Report No. 49 June 1829 p.2 and Murray's West Indies and the Development of Colonial Government pp 157-8.

stopped the mouths of the only witnesses peculiarly capable of establishing the guilt of slave-owners, thereby putting that class beyond the practical reach of the law. Statutory compensation to owners whose slaves were condemned to death or transportation involved the injustice of indemnifying owners at the public expense for their criminal acts committed upon their orders by the hands of their slaves.[77] The technical deficiencies of non-professionalism and the attendant evils of inconsistent and erroneous judgments held up the court to ridicule.

Above all these precedural and technical defects, however, was the nature of the constitution of the courts themselves. The salaried judges of the Supreme Court and Assize Court being dependent upon the Assembly for their stipends, were placed in a position utterly inconsistent with the responsibilities of their office. In the case of the chief justice, as his remuneration was not given by any permanent law of the land, whenever any person not having practised for five years at the Jamaican bar[78] was appointed to the office, a separate enactment in his favour became necessary.

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77. Case reported in Jamaica Courant and the Public Advertiser of 26/9/1829. "Four slaves at the instance of several free persons killed a free man, William Graham. Slaves tried at a Special Slave Court and hanged. No charges against the accomplices. The slaves were induced to murder their master under threat of being sold by the Provost Marshal. Slaves valued at £288. 6. 8d. Sum paid to free mistress. See also Royal Gazette of September 1829 "A wife instigating her slaves to the murder of her husband and for the mercenary consideration of securing her property free from sale for the payment of his debts."

78. "Jamaica under the apprenticeship System" p.2.

Previous to receiving this legislative favour, he had to please the Planter/Assembly in his mode of administering the law and was therefore wholly dependent on their approbation[79] for his means of existence.

As the salaries attached to the other judicial offices[80] furnished no attraction to barristers who gained considerably more at the bar, these were filled, like the remaining unpaid posts, in the majority of cases by planters,[81] men owning or managing large gangs of slaves, some usually having seats in the Assembly. Their interests as planters, their obligations as political representatives and their prejudices as white men of the slave-owning class[82] combined to render them unsuited for their duties as judges, all the more so, as

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79. Ibid

80. The two senior assistant judges of the Supreme Court were each paid £700 p.a. local currency whilst the two senior assistant justices of the Assize Court received £500 p.a. each. After the Act of 1804 was passed, restricting the increased salary of the chief justice to a barrister, the assistant judges of the Supreme Court deprived of the prospect of future preferment and reward, grew dis-interested in their offices and their attendances became irregular and uncertain. The sittings of the Assize Court were marked by the same uncertainity and many days were lost to suitors in both Courts by the want of a bench of judges. The situation was sought to be rectified by providing a remuneration for some of the lay judges as already shown. CO 140/96 p.234.

81. See reply of W.A. Burge Attorney General to Commissioners of Legal Enquiry Op Cit p.189

82. See Chapter 2

by their majority vote they had the capacity to over-rule the judgment of the only qualified member of the Supreme and Assize Courts.[83]

On the bench at Quarter Sessions, in the Slave Courts and Councils of Protection and on the grand and petty juries sat only the white/planter class.

Throughout the entire judicial establishment one class was exclusively placed in judgment upon their conduct inter se, upon the conduct of all other classes inter se and upon the conduct of themselves in their relations with the other classes. In short they were always judges in their own cause. In the case of one particular class, the slave class, judges, juries, magistrates, public officers and the legal profession[84] had deep proprietary interests. For that class too they had an avowed contempt and were

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83. CO140/96/ p.235 also Commissioners of Legal Enquiry Op. Cit p.96 "When we consider the importance of a learned and able court to the due administration of justice, and the wrongs which must result to the subject from the erroneous judgments of an incompetent court (a court, so constituted that the assistant judges who are unlearned in the law, may in the decision of any cause, pronounce the judgment of the court against the opinion of the only learned Judge on the bench) we feel it important to suggest to your Lordship the urgent necessity which exists for an early reform in the constitution of this court by a law or other effectual regulation by which this court should have the addition of two barristers of a certain standing, as puisne judges, in place of the present assistant judges".

84. For judicial slave-holding see Chapter 2. In 1838 Gov. Smith reported that "All the Councillors (i.e. the Barristers) with the exception of Mr. Middleton and Mr. MacDougall were planters" CO 137/230 Smith to Glenelg 10/11/1838.

separated by the strongest prejudices established and practised over many decades under the sanction of the law.[85]

The enforcement of the laws in protection of slaves, and against slaves, and the public attitude towards the Dissenting Bodies who espoused their cause provided special problems for legal administration occasioned by slavery.

Slave Protection The great weakness of the whole system for providing legal and practical protection for ill-treatment for slaves was that until 1831 it did not admit slave evidence against free persons. The reason for this was not the fear of parjury,[86] but the fear in the whites that the bonds between the master and the slave, his property, would be loosened and thereby open the gate to insubordination and the gradual destruction of the economic and social systems. The case of Mr. Jackson, Assistant Judge of the Surrey Assize Court and Custos of Port Royal demonstrates how impossible it was through the absence of slave evidence and the

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85. In 1837 Sligo wrote "Those who are acquainted with the West Indies will be aware that the black and coloured population are received by the white inhabitants, as little more than semi-human, for the most part as a kind of intermediate race, possessing indeed the form of man, but none of his attributes" Jamaica under the Apprenticeship System p.1.

86. CO 137/167 Gov. Keane to the Assembly on the question of admission of Slave Evidence."It will hardly be maintained that the negroes are of so ingenious a turn of mind, so adroit in the fabrication of falsehood and so fertile in resources for supporting it under pressure of a public examination as to baffle the reader of truth more effectually than the practioners of fraud in the great societies of Europe.

and the Constitution of the Councils of Protection and the Common Law Courts, to a achieve even an approximation to justice for a gravely wronged slave. For a trifling quarrel which, Ann, an eighteen or nineteen year old slave girl had with "Miss" Elizabeth, the judge's nine year old daughter, his wife, and then he, administered a flogging upon Ann with a supple-jack until it broke. The flagellation was then continued with a cat-o-nine and six months thereafter, Ann, a domestic slave, was put to field labour. The Council of Protection, constituted of planting justices and presided over by the brother of the judge, found that "there was no ground for a prosecution for neither the letter or the spirit of the law had been infringed."[87] A criminal information subsequently laid against the judge failed for want of the evidence of Ann. This was only one of many cases which prompted the observation "It is impossible to contemplate in the number and variety of the cases of oppression which have recently been brought before the Council of Protection in Jamaica and the uniform result of such complaints without the most painful feelings. It would be irrational to expect and perhaps scarcely just to require from the magistracy of a colony affected with the institution of slavery, the same prompt and impartial administration of justice towards all classes of society which distinguishes the same of public offices in more fortunate countries..... But after making the largest admissions which on

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87. CO 137/179/84 Belmore to Godrich 31/8/1831. Jackson was dismissed from all offices CO 137/181/169 Belmore to Godrich 8/3/1832.

grounds of this nature it is possible to claim for the magistracy of the island enough remains to justify and to demand the expression of my deepest concern for the course of conduct which they thought proper to pursue."[88]

The combination of jury trial and non-admission of slave evidence became a shelter for tyranny. Mr. Betty, a magistrate, administered a severe flogging upon a slave woman for the offence of sighing when she heard her brother threatened by Mr. Betty with confinement in the workhouse. Betty also accomplished his threat "by confining the brother in the workhouse in chains till he was at the point of death, his body being so cut up with severe flogging that for several weeks his life was despaired of and he was obliged to lie upon his stomach day and night, his back being a mass of corruption." To queries of the British Government into such magisterial conduct, Betty, "conscious that I have done nothing," objected "I am ready to meet any charge which may be preferred against me in a court of justice where my actions will be investigated before a legal tribunal of twelve honest men, but with all the deference I feel for the Colonial Office,

88. Godrich had written this communication to Belmore in response to the news of Jackson's enormities, but the Despatch was subsequently withdrawn.

I will never consent to answer interrogatories.[89]

Slave Trials. It was the statutory duty of clerks of the peace to make and preserve complete records of trials in slave courts where they officiated, but such records were from earliest times of the most fragmentary nature.[90] In 1829 a message from the Governor to the House drew attention to "the imperfect manner in which the evidence is taken, which although sufficient to establish the guilt of the offender in the minds of those who are in the vicinity where the offence has been committed and who have had previous

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89. CO 138/53/170 Godrich to Belmore 29/4/1830. Popular resentment to any investigation by the Crown of the conduct of public officials is reflected in the Courant of 30/8/1828 "Let it once be declared that a slave-owning Magistrate is to be tried not by his Peers, but by Commissioners nominated by young Stephen (who as is notoriously known, saves Ministers the trouble of thinking in the Colonial Office) and no man of sense will act as a Magistrate CO 137/167.

90. Extracts from th Trial Book of Slaves kept at the Vestry Office Morant Bay in the year 1766 are to be found at page 43 of Richard Hill: Lights and Shadows of Jamaica e.g. "Will for crime of runaway. Evidence." Robert Paterson being duly sworn said that prisoner has been runaway upwards of 12 months and further says he is a notorious runaway. Justices and freeholders having maturely considered the evidence against the prisoner Will do find him guilty of the crime laid to his charge therefore do sentence him to be immediately carried Lysson's Estate and there to be hanged by the neck until dead and his Head severed from his body and exposed in some public place.

knowledge of all the circumstances which attend it is not so simple and conclusive as is required when the case is submitted to higher authorities."[91] This situation the Governor said, was due to the fact that at different times different magistrates presided over the court, in consequence of which uniformity of precedure was not maintained. Little corrective measures seemed, however, to have been taken, for five years later when another Governor called for the notes of evidence taken at the trial of slaves at Quarter Sessions, it was discovered that, "Custodes or acting Chairman rarely, if ever, took notes 'and that although the Clerks of the Peace did' of many of the trials no memoranda could be found, and of those which were sent, the majority were scanty and deficient."[92] There could be no motive for adherence to details in a court staffed by slave-owners and in which the owner of a slave condemned to death or transportation was in all cases to be indemnified by an award of the court for the loss of his property in the slave. Not even the indictments laid in the Court were drawn with a care for the protection of the rights of the slaves "Prisoners were charged generally with a guilty participation in the rebellion of 1831 without any specific allegation of the overt acts

91. CO 137/169/51 Belmore to Murray 14/11/1829. In none of the Courts of Common Law did it appear to be the practice to take full notes of the proceedings and it became necessary in 1828 for the Crown to direct the Colonial Governors to see to it that "no judge do hereafter upon any consideration omit to take down in writing and carefully to preserve a full note of the evidence delivered at every criminal trial by the witnesses for and against the prisoner.

92. CO 137/221 Sligo to Glenelg also "Jamaica under the Apprenticeship System". p.8.

for which they were to answer,"[93] and it became necessary for the Attorney General to be warned "of the necessity on any future trials for similar offences of rendering the indictment sufficiently specific to place the accused of their Counsel in full possession of the exact nature of the charge."[93]

Dissenting Bodies. For the white classes blame was to be laid for the disastrous rebellion of 1831 fairly and squarely to the sectarian preachers whose revolutionary messages had rendered the slaves "dissatisfied with the allotment of Providence"[94] and a resolution of justices of the peace, freeholders and of the Custos of St. Ann "collectively and individually to use all means in our power to expel them (the Sectarians) and will hazard our lives in fulfilling an object so necessary"[95] found fulfilment in part in the destruction of Sectarian Chapels in St. Ann, St. Mary and St. James in early 1832.[96] This popular resentment invaded the planter/ juries who uniformly rejected every bill against the offending magistrates and freeholders. "It seemed quite useless to the Governor that legal proceedings should be instituted against members of the militia and justices of the peace who burned to the ground some Baptist Chapels.

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93. CO 137/182 Godrich to Mulgrave 4/9/1832
94. CO 137/172/49 Belmore to Murray 27/8/1830
95. CO 137/182/11 Pres. Cuthbert to Godrich 12/7/1832
96. CO 137/182/12 Pres. Cuthbert to Godrich 13/7/1832

"Sustained" he said "as I fear these gentlemen would be by the applause and encouragement of no inconsiderable part of the community, the exercise of any strong bit of authority towards them would be attended with considerable risk."[97] The sense of the futility of any prosecutions against the incendiarists of the religious buildings was, in the mind of the Attorney General, grounded not only upon the risks to public peace involved, but also in the corruption of "Jamaican Juries" who have much to learn, much prejudice to free themselves from and these are cases just calculated to enlist the prejudices of the jury in favour of the accused..... I would have no hope of convicting."[98]

Hostility towards Sectarians invaded the Bench as well. In 1833[99] the majority decision of a bench of the Supreme Court consisting of the Chief Justice, an Assistant Judge who was a Solictor and three Planters (the Solicitor/Judge dissenting), held, contrary to the opinion of a majority of the Bar, of the Attorney General, and of the Crown Law Officers, that the English Toleration Acts extended to Jamaica and that Sectarian Preachers were bound by its provisions.

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97. CO 137/183/35 Mulgrave to Godrich 10/11/1832

98. CO 137/188 O'Reilly (Attorney General) to Mulgrave 10/1/1833

99. Greenwood v Livingstone Et al heard in the Supreme Court 20/6/1833 CO 137/189 See also Chapters 2 and 5

PART II.

Jamaica Under Apprenticeship.

CHAPTER VII.

JAMAICA UNDER APPRENTICESHIP.

The grave danger of further outbreaks of servile wars [1] throughout the West Indies combined with vigorous pressure from the Anti-Slavery movements [2] in England accelerated consideration of the abolition of slavery in the reformed Parliament of 1833.

The first official decision was a resolution of the Cabinet in January 1833 for "the entire emancipation of the slaves to take effect either from January 1, 1838, or January 1, 1837, probably the former ".[3] Four months later the new Colonial Secretary, Lord Stanley, submitted to the House of Commons, in the form of six resolutions, his abolition plan which became the basis of 3 and 4 W 4 C 73 (1833) "An Act for the abolition of

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1. CO 137/191 F.B.Zinche, a Jamaican to Belmore 23/5/1832 "The question will not be left to the arbitrament of a long angry discussion between the Government and the planter. The slave himself has been taught that there is a third party, and that party himself. He knows his strength and will assert his claim to freedom. Even at this moment, unarmed by the late failure, he discusses the question with a fixed determination. Further see Dr. Williams Op Cit pp. 205-208.

2. e.g., the Agency Committee composed of younger abolitionists and led by George Stephen and the two Quaker brothers Emanuel and James Cropper. The Rev. Wm. Knibb had also returned to England fresh from planter/persecution in Jamaica and had embarked upon a vigorous assault upon slavery. See Burn Op. Cit p.96.

3. CO 320/8.

slavery throughout the British Colonies for promoting the industry of the manumitted slaves and for compensating the persons hitherto entitled to the services of such slaves".

Under power of this Imperial Act, with effect from the 1st of August 1834 all slaves within the British West Indian Colonies above the age of six years and duly registered as such on or before that date were declared apprenticed labourers under obligation to render unremunerated services of a prescribed maximum of hours per week for their former owners. Slave children under six years of age and children subsequently born to former slave mothers were made free but subject to restrictions.[4]

Two categories of apprentices were created, namely, praedial and non-praedial,[5] the former to terminate on August,1, 1840, the latter two years earlier, but provisions existed for possible earlier dissolution of the relationship. Thus voluntary cessation

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4. If the children became destitute they could be apprenticed to the persons entitled to their mothers' services. Such indentures could not be made, however, before the children were twelve, nor continued after they had reached twenty-one.

5. Praedial apprentices were further divided into two classes, those attached and those un-attached to the soil. The former comprised all those persons who in the state of slavery were usually employed in agriculture or in the manufacture of colonial produce or otherwise upon lands belonging to their owners. The latter were those who had been similarly engaged, but upon lands not belonging to their owners, whilst non-praedial apprentices included all other slaves not falling within either of the two afore-mentioned classes.

could be effected by deed, indenture or other form prescribeable by colonial law, but masters were obliged to care for aged, sick or infirm apprentices for the remainder of the term. In addition apprentices could purchase their discharge upon payment of the value of their services after appraisal "in such manner and form and upon and under and subject to such conditions as shall be prescribed under such authority and by such Acts of Assembly...."

Persons entitled to the services of the apprentices were, during the existence of the relationship, required to supply them with food, clothing, lodging, medicine, medical attendance and such other maintenance and allowance "as by any Law now in force in the colony to which such apprenticed labourer may belong an owner is required to supply to and for any slave being of the same age and sex as such apprenticed labourer shall be", and where, in lieu of such food, provision ground was made available to apprentices, such grounds should be adequate in quality and quantity for their support and within a reasonable distance of their usual place of abode, allowing a sufficiency of time for such apprentices to devote attention to such grounds.

By section 16 numerous other details were left to the regulations of the colonial Assemblies, including the classification of apprentices, the maintenance of order and discipline among them, punctual discharge of services, suppression of indolence, insubordination, vagrancy, riot or combined resistance to law, securing punctuality

and method in the supply to apprentices of food and so on, punishment of fraud or neglect respecting the quality or quantity of such supplies injustice, wrong, cruelty to apprentices, prompt and efficient administration of justice and punctual visitation of estates.

Subject to the Imperial Act and to the colonial enactments made pursuant thereto section 12 declared "all persons free and discharged of and from all manner of slavery and.... forever manumitted" and "in order to ensure the effectual superintendence of the apprenticed labourers and the execution of the Act... and ..... any other Laws which may.....be made for giving more complete effect to the same", exclusive jurisdiction was given to persons called Special Justices, appointed and paid by the Crown, "over any offence committed or alleged to have been committed by any such apprenticed labourer or by his or her employer in such their relation to each other over the breach, violation, neglect of any of the obligations owed by them to each other and over any question, matter or thing incident to or arising out of the relations subsisting between such apprenticed labourers and the persons respectively entitled to these services."

Section 17 contained an important provision and proviso. None but a special justice could order any form of punishment whatsoever for an apprentice and no female could be whipped by an order even of that judicial officer, "provided always that nothing

in this Act contained doth or shall extend to exempt any apprenticed labourer in any of the said colonies from the operation of any Law or Police Regulation which is or shall be in force therein for the prevention and punishment of any offence, such law or police regulations being in force against and applicable to all other persons in free condition."

The Imperial Act being essentially a skeleton measure, in order to ensure the suitability of colonial measures made pursuant thereto, it was provided that the payment of compensation to the former slave-owners was conditioned upon a declaration by the Crown that such subsidiary legislation were "adequate and satisfactory."

In the autumn of 1833 Assembly men of Jamaica therefore gathered to enact the necessary legislation and on the 12th of December 4 W 4 C 31 received vice-regal assent.

Several provisions of the local Act were mere reproductions of the parent Statute, but others addressed themselves to the legislative fulfilment of the system of regulation and restrictions within which apprenticeship was to operate. Thus forty and a half hours were fixed as the weekly hours of unremunerated apprenticed labour, and masters' obligations to supply their apprentices with food and so on were limited in accordance with the Imperial Act to the provisions of the latest Act for the government of slaves. By section 54 special justices were required to visit plantations on which apprentices exceeded forty in number one day in every fortnight

for the purpose of hearing and dealing with complaints. Upon infractions by apprentices sanctions were imposed ranging from forfeitures of free time to severe flagellation and imprisonment.[6] Contrari-wise, the maximum sentence imposed by planters upon themselves in the special justice's court for any offence against an apprentice was a fine of five pounds currency or five days imprisonment, but an apprentice who made a frivolous or unfounded complaint against his master could be sentenced to as many as twenty lashes.

By the colonial Act the Board made responsible for the valuation of apprentices' services was constituted of two local justices and one special justice. It was expressly provided also that apprentices were not to be exempt from the ordinary law.

Despite its defects[7], its manifest severity towards apprenticed labourers and partiality towards masters, the Jamaican Abolition ...

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6. An apprentice who absented himself from work for half a day was to forfeit one day; for a day, three days; for two successive days or two distinct days in the same fortnight, to serve for a week in the penal gang or to receive twenty stripes. Refusal or neglect to perform labour promptly entailed a sentence of four days' imprisonment or twenty stripes, with double for a repetition of the offence within a month. The undefined crime of insubordination was punishable with a maximum sentence of thirty-nine lashes or a fortnight in the penal gang, whilst the maximum punishment for offences, not otherwise specified, was to be fifty lashes, three months' imprisonment, or, in the case of women, twenty days' solitary confinement and extra labour up to fifteen hours in one week.

7. One very marked defect was the absence of any provision indemnifying special justices against the consequences of acts done bon a fide in the course of duty. This deficiency was supplied by an Act of July 1834 lasting under December 1835. It was in 1836 renewed first by the Imperial Parliament and later by the Assembly to the end of apprenticeship.

Act[8] received Stanley's approval.

Because of their importance to and influence upon the later workings of the apprenticeship system, two other Jamaica Acts, one passed at the same time as the local Abolition Act, the other seven months later, must here be mentioned. By the Act "to restrain and punish vagrancy" the justices and vestry in each parish were authorised to build houses of correction with treadmills and such like necessary implements in order to set rogue and such other idle persons to work. By statutory definition an idle person included one who ran away leaving wife and children unsupported or a person able to work but refusing or neglecting to do so. On the mere view of one justice or on the evidence of one witness such a person[9] could be committed to hard labour for a week. By other provisiors rogues and vagabonds, that is to say, persons begging alms, squatters on lands, pedlars, could be punished by imprisonment with hard labour for six calendar months and by whipping "at such times as the justices

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8. It was to be described later as "the worst law of all the late slave colonies" CO 137/221 Smith to Glenelg 13/11/1837. Jamaican slave owners would become entitled to their compensation, the first payment of which was made in late 1835.

9. The Act was applicable to apprentices as well. Speaker Barrett said that in their straitened political circumstances the Home Government "would be too happy to accept any Bill and that therefore now was the time for the Assembly to make use of the advantage by incorporating with it (the Abolition Act) the strongest Vagrant Laws and other overdue enactments. CO 137/189/43 Mulgrave to Stanley 13/12/1833.

at the sessions shall think fit". In case of an incorrigible rogue imprisonment could be extended to two years. The second Act "for the regulation of gaols and workhouses" gave the Council of Kingston and five justices in special or quarter sessions elsewhere the power to make rules for the maintenance of discipline in these institutions.

These two Acts did not infringe any principle of the Imperial Abolition Act which confined the exclusive arbitrament of the special justices strictly to matters arising out of the relation of master and apprentice, but planter/legislators, more astute than their Parliamentary betters, were quick to see that by exclusive control of the judicial and prison institutions, so far as control of the blacks was concerned, an engine was devisable which could effectively restore to them all the advantages of slavery, but its name.

Stanley had promised "respectable persons wholly unconnected with the colonies to act as district magistrates and other officers for the protection of the negro and preservation of the peace".[10] To these men, whose authority over the ex-slave was to supplant that of the ex-slave owner, attention must now be given.

Of the 119 who served in Jamaica, roughly a third were officers in receipt of half pay from the Army and Navy. Their habituation to a rough way of life far from home seemed to have commended them

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10. Parliamentary Debates 3rd Series. V 17 p.1207.

to the Colonial Office as suitable material for the management and direction of the apprenticeship system. Constituting the largest single group of special justices, it was to them the prospect of restoring decayed fortunes through the special facility of retaining their half-pay whilst in the public service which provided no small appeal to joining the special magistracy. Of the remainder thirty were drawn from other quarters in England and the residue from among Jamaican ex-officials and other sections of Jamaican society unconnected with the planting interests. Among them were seven coloured gentlemen. Few had had any legal training.

Some of the duties of this rather heterogeneous body of men have already received incidental notice. Their commissions extended over the whole island, but each special justice was assigned a particular district. Within it he had to visit once every two weeks every estate with not less than forty apprentices upon it. Visiting estates was an exhaustive and exhausting job occupying the greater part of the fortnightly periods. Numerous matters, niggling in their individual context, but far-reaching in cumulative effect upon success or failure of the new venture and upon the reputation of the special justice crowded upon his attention. The adequacy of provision grounds, insolence under veil of a gesture, laziness, insubordination, ill-treatment of apprentices, defrauding of praedials in the matter of working hours, charges and counter-charges, criminations and re-criminations amid a chorus of babbling voices simultaneously demanding attention, the obnoxious medley of ignorance,

arrogance, suspicion and distrust, became the judicial fare of the special justice as he did his weary itinerary by horse- or mule - back day into day. The ex patriate's want of familiarity with the brawling speech of the creole white, the negro patois and with the agricultural practices and customs of the country as well as the general want of legal knowledge among the special justices compounded the difficulties of their job. To wait indefinitely for the advice of the over-burdened Attorney General, a practice of questionable propriety, occasioned delays which neither irritated feelings, nor economic exigencies could allow.

As it was imperative at the inception that the Chief Executive as well as the Crown should be apprised in the fullest manner and at the earliest possible times of the development and progress of apprenticeship, paper work became inevitable. Diaries had to be kept showing distances travelled, estates visited, complaints made, names of complainants and dependants, sentences imposed. Each week's diary had to be forwarded at the end of that week to the Governor with a note on the condition of the district and these weekly diaries had in due course to be expanded into monthly returns showing estates visited and the dates of visiting, of estates not visited and the reasons why. A return of every valuation made had to be forwarded without delay and in January, April, July and October an abstract had to be submitted of all the quarterly valuations. Subsidiary duties included a monthly return of money spent in postage and the payment, once of a week, of fines levied during that week, to the

Deputy Receiver General.

Not merely a judge and administrative officer, the special justice was expected to be a one-man conciliation board between planters and apprenticed labourers, a peace-maker and to exert none the least by the example of his own life a morally uplifting and stabilising influence within his jurisdictional district.

For these divers onerous duties the special justice received a salary of £300 per annum which was subsequently increased to £450.[11] Described by one Special Justice as "about that of a third rate clerk in a commercial house in Kingston"[12] the gross inadequacy of the pay in the context of Jamaican conditions was the subject of Governor Sligo's animadversion "That sum ..... proved quite insufficient to meet their necessities. By those who possess a knowledge of expenses in Jamaica from having resided any time in the island, it would, without hesitation, be fixed at a much higher sum - at not less than £700 a year. Every necessary of life costs twice as much in Jamaica as in England - the distances too, which the magistrates were compelled to ride in the week, added to the difficulty of procuring good fodder for their horses, and the great propensity of these animals in that climate, to gall, obliges them to keep great numbers. Four horses and two mules were generally found necessary ..... No horse of the most moderate description can be bought under £40 or £50 currency; and if for a heavy weight, under

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11. CO 137/354 Darling to Newcastle 6/5/1861 (From a memorial by Stipendiary Magistrates' to the Treasury accompanying official Dispatch,

12. Dr. Burke see Burns Op Cit p 213.

£60 or £70. The first thing that a special justice has to do on landing is to establish an agent, and borrow from him money enough for his outfit of horses, sadlery portmanteau.... He thus becomes embarrassed at the outset, and is obliged to pay a portion of his salary for the liquidation of his debt. If he has the misfortune, not uncommon, of losing one of his horses when on duty, he gets into difficulty still farther; and unless he has a private fortune..... he cannot maintain his independence. The stipendiaries are compelled on this account, as well as in consequence of the scarcity of inns, to have recourse to the hospitality, so proverbial in Jamaica, of the planters; and then it is difficult for him to do his duty honestly in a house where he has been received with kindness."[13]

"Again another great grievance of the special Justices, is the manner in which their salaries are paid. The Commissary is their paymaster and they are compelled to take the dollar at 4/4d when it only passes for four shillings in the island and generally costs the Government but 3/10½d. Thus they lose 8½d per cent of their already miserably insufficient salaries."[13A] If the Justices wished to transmit money home for their families, they had to purchase drafts at rates of exchange which operated adverse to their financial interests.

"Annual expenses included a furnished house, servants, provisions of food for himself and his domestic help, forage for his horses.

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13. Jamaica under the Apprenticeship System" pp 33-35.

13A. Ibid.

These would cost £80, £40, £136 and £125 respectively. Taxes replacements, medical bills and other incidentals would take the special justice's normal expenses quite beyond his income. Only the strictest economy and good health could secure a precarious existence. Bad luck, ill-health or any of the numerous unpardonables to which flesh is heir could deal him a fatal blow. No pension for his dependents consoled him on his dying bed, no prospect of leave spurred him to endeavour."[14]

It was amid these financial hazards and the inherent vicissitudes of their assignments that twenty-eight expatriate special justices assumed their duties on the 1st of August 1834 to the stirring message of Governor Sligo, "let your zeal be shown in the readiness with which you attend to the calls and suggestions of the proprietors and gentry of the country. Let your caution be exhibited in the consideration you give to the suggestions and to the cases which may be submitted to you."

Five months of utter confusion, a year and a half of superficial tranquillity, succeeded by two years of persecution of special justices and apprentices, general mal-administration of justice and finally imperial intervention, represent the story of apprenticeship.

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14. Burn Op.Cit

(A) The First Five Months.

The inadequacy of the number of Special Justices, their unfamiliarity with local conditions, planter animosity and Assembly opposition were constituted the problems of this period. (1) Inadequacy of numbers. Of 33 Special Justices originally determined by the Colonial Office for Jamaica only 28 were on hand on that eventful 1st of August. The size of the country, its configuration, the extent of the population, their backwardness would have challenged the resources and stamina of twice that number of Special Justices whose subsequent augmentation to 63 sufficiently attests gross official miscalculation of the country's needs. In the necessitous circumstances one Stipendiary Justice[15] albeit an able and untiring man, found himself in charge of an area of 1200 square miles, virtually a quarter of the island's surface area. However much they rode up and down, visited plantations and covered vast areas, the labours of the Stipendiary Justices were bound to be inadequate, "From the difficulty and delay of obtaining their attention offences were passed over, and as a natural consequence crimes increased."[16]. Up to October only twice had the constituency of one particular Assembly-man been visited and the result there was that "all was confusion and labour at a stand still."[17]. No amount of labour on the part of the Stipendiary Justices could prevent such occurrences for "it was impossible that a population

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15. Oldrey Stipendiary Justice. 16. CO 140 /125 pp 18-19
17. CO 140/125 pp 18-19 Burn Op Cit.p.182.

of 320,000 men women and children emerging from one state into another could be governed by the decision of 20 men."[18]

(11) Unfamiliarity with local conditions. Habituation to rough army or navy life could conceivably have been of some advantage in wrestling with the mere physical hardships of a tropical climate and undulating country, but could hardly furnish any aid to the Stipendiary Justice in his struggle with the subtle non-physical problems of his tedious assignment. Thus only time, patience and perseverence could surmount the natural barriers which an unaccustomed ear would confront in comprehending the ungrammatical brawl of the uneducated white creole or the jabbering patois of the excitable and ignorant negro. Until such human resources gained the mastery, nothing could allay his bewilderment as the Stipendiary Justice's judicial ears were assailed by charges and counter-charges accompanied by torrents of words and fortified at every stage with wild distracting gesticulations.

His ignorance of the peculiar laws of the backward heterogeneous community and of the inveterate prejudices by which it was torn was only compounded by his even graver unfamiliarity with the modes and practices in agriculture, with the calculating character of the planter or with the unsuspected shrewdness of the negro. Two issues, namely, allowances and the

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18. Royal Gazette October 18,1834.

ham-system of work, illustrate the consequences of the Stipendiary Justice's ignorance of local conditions.

Allowances consisted in the issue by slave-owners of such things as fish and herrings, of a supply of rum after heavy work or bad weather, in the provision of watchmen for provision grounds and in various degrees of exemption from work, granted to the old, pregnant women and nursing mothers. These constituted a universal and uniform code of practice in the days of slavery, but had no statutory basis, Slave Law having prescribed only a supply of clothing and either provision grounds or a supply of food. We have already seen that the local Abolition Act, following the parent Statute, limited masters' obligations during apprenticeship to the supply of such allowances as were allowed "by any colonial law now in force". At the inception of apprenticeship many masters withdrew the non-statutory allowances, a perfectly legal and valid act, however injudicious and petty. With more good will than good law the Attorney General in August 1834 advised that apprentices were entitled as of right to what were now called "indulgencies" and until the Crown three months later conceded the validity of the planters' contention,[19] the Stipendiary Justices, ignorant alike of the law and of the antecedent local practices, were baffled and confused by the contrary currents of arguments and opinions. Legal niceties, however, could not then

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19. Spring-Rice to Sligo CO 188/56/57. 10/11/1834.

as now quench negro craving for salt fish or rum, and viewing the withdrawal as mere planter/spite, he retaliated with withdrawal of his labour. "Ill-will on one side generated ill-will on the other"[20] and the smouldering dispute might have erupted into violent ill-feeling had not the sheer inconvenience of the shortage of negro labour counselled the un-wisdom of punctilious insistence upon legal rights unproductive of any real economic benefits and forced the mutual acceptance of a situation in which the grant of indulgencies was traded for extra labour.

The local Abolition Act had fixed the maximum weekly labour of apprentices at 40½ hours. Out of this statutory provision two systems of labour were possible, the nine-hour and the eight-hour system. Apprentices preferred to work for nine hours from Monday to Thursday and a half day on Friday, thus having an extended week-end in which to look after their provision grounds, visit distant relations and so on. Planters on the other hand preferred the eight-hour system by which the apprentices were held in labour from Monday through Friday, a system which equated more closely to the pattern in slavery. Before the inception of apprenticeship Sligo, who had erroneously thought that the nine-hour system was sanctioned by the Imperial Act, directed the Stipendiary Justices so to adminster the local law. Planters

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20. Jamaica under the Apprenticeship System p. lX.

insisted on the right of choice of the eight-hour system and Sligo altered his instructions, only to issue counter-manding instructions later on. Torn on this issue, as on that of allowances and unable to bring to bear upon the matter an independent judgment informed by competent knowledge of social conditions and practices, the Stipendiary Justices appeared in the eyes of the planters as the mere tool of the Executive.[21].

Latent ill-will was nurtured upon genuine causes for dissatisfaction and criticsm, not gainsayable, followed in torrents. The Stipendiary Justice's "entire ignorance of the peculiar habits and disposition of the negroes or of the fair and reasonable quantity of labour which they are competent and ought to perform"[22] was animadverted upon. Nor did the manner of their recruitment escape censure. "Selected from a class of persons utterly incompetent to administer the law, namely half-pay officers of the Army and Navy, the latter of whom were notorious for their hatred of law, therefore incompetent to administer it."[23].

(111) Planter Animosity. Accustomed for over a century and a half to absolute domindon over slaves, planters were instinctively opposed to the mere principle of apprenticeship inasmuch as it interposed between themselves and their former slaves the authority of a third party, namely the Stipendiary Justice, over whom they

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21. "We cannot conceal from ourselves the fact that even much of our laws.... are rendered inoperative by an influence biassing the decisions of the Stipendiary Justices" The Assembly 18/12/1839
22. Burn Op Cit. page 186.
23. Royal Gazette October 18, 1834.

were to have no control. Apprenticeship therefore was a check to white supremacy and that threat being symbolised in the person of the Stipendiary Justice, the latter became either the butt of planter attacks or the objects of their blandishments. Whatever the method employed, the ultimate objective remained the same, namely the control of the special magistracy.

Before apprenticeship had even got under way, collection of subscriptions to finance litigation against Stipendiary Justices in the planter dominated courts, had been organised.[24] Two months after apprenticeship began Sligo reported that "the Stipendiary Justices were never named as a body without execration"[25] and in November the planter press asked revealingly and indignantly "to what infatuation or perversion of policy we owe the establishment of a foreign jurisdiction to supersede the rightful sway of men of long standing, tried experience and heartfelt interest in the welfare of the country ..... To send strangers to interfere with and control the affairs of a community of which they are totally ignorant is certainly a quick mode of producing riot and confusion."[26] It was not only the genuine causes for dissatisfaction that aroused the fulminations of the white planter-class for in the salutation "dear friends" with which one Stipendiary Justice addressed apprentices, as he enquired whether they had any complaints to make against

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24. This accounts perhaps for the delay in enacting the Act of July 1834 for the protection of Stipendiary Justices against vexatious litigation. It was limited in the first instance to a year and a half.
25. CO 137/193/39 Sligo to Spring Rice 12/4/1834.
26. Kingston Chronicle 1/11/1834.

overseers, they saw "an incitement to disorder."[27].

Propaganda and hospitality were, in addition to open offence, weapons in the planter armoury for use upon Stipendiary Justices. In a pamphlet, copies of which greeted Stipendiary Justices on their arrival, an introduction to the cult of Jamaica white society was provided. "The negro", it said "was a being of an inferior understanding to that of the European, more akin to that of the monkey tribe. If you spare the rod when the negro merits it, you will prove his greatest enemy." Not surprisingly the Planter Press exultingly reported in August 1834 "Stipendiary Justices moving rapidly about from one estate to another flogging and sending the headleaders to the workhouse."[28]. Simultaneously violent complaints were made against other Stipendiary Justices whose humanitarianism recoiled at such savage use of the whip."[29].

Of the impecunious condition of the Stipendiary Justices none was more aware than the hospitable planter. "The salary allowed those persons" they agreed, "was wholly inadequate, little more than sufficient to support their horses."[30]. The service of self-interest could be conveniently masked under the unsuspecting display of traditional planter hospitality. An offer to pass a night, perhaps a hint to stay at the great house, was almost a Hobson's Choice to the Stipendiary Justice for it often

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27. CO 140/125
28. Kingston Chronicle 13/8/1834
29. Notably Norcott Stipendiary Justice and Richard Hill Stipendiary Justice.
30. Burn Op Cit. p.185.

meant rest in a comfortable house, the attention of servants, appetizing fare, compatible association, even freedom from future financial anxieties for himself and his distant family, instead of a rough wearisome ride "creeping through glens and ravines as well as his weary animal will enable him until 3 or 4 in the morning to arrive at his solitary comfortless retreat with the cold air of night, perhaps of death hanging around.[31] In any well-composed society such occasional hospitality would only be a part of the normal exchanges among civilised men. Not so however in Jamaica. The dulcet offer was no less than the syren call wooing the Stipendiary Justice from the path of judicial independence to becoming a "Busha Magistrate." If he refused he became in the eyes of his rejected host and all his clan a negrophilist reserved for the venom of the press and all the other irritations and inconveniences within the planters' armoury.[32]

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31. Dr. Burke Stipendiary Justice in a letter to the Colonial Office dated 29/12/1834. CO 137/196.

32. E.g. Baynes' wife had been recently confined. His persecutors commenced their operation with the wet-nurse, who was an apprentice. Though earning excellent wages in his service, much to the advantage of the probably absentee owner, who knew nothing of the affair, she was suddenly withdrawn from his house. He was in a similar manner deprived of the services of his other servants who were all of the same class. Finally he was, by a general concentrated plan, refused a residence in the parish. "Jamaica under the Apprenticeship System". p.44.

(iv) Opposition of the Assembly. In October planters convened in their Assembly. No aspect of apprenticeship escaped the justifiable or unjustifiable censure of that Body or of any of the three Committees set up to investigate particular aspects of its administration. "Could it be supposed that men who had never been in a tropical climate before could visit every property having 40 apprentices once every fortnight travelling over hills and gullies."[33]. It was observed by that same member that some Stipendiary Justices had expressed surprise at the texture of the hair of the negro, not having set eyes on such a person before. In an address to the Governor they regretted that "the conduct of some of these persons in the administration of justice has not tended to diminish the difficulties of the situation."[34].

For the impecuniosity of the Stipendiary Justices and the deficiencies generally of the apprenticeship system the legislators had their own legislative and other remedies.

From the most distant parts of the island Stipendiary Justices were summoned to attend meetings of the Committees of the House. The experience of Oldrey Stipendiary Justice was only typical "In obedience to the summons from the Chairman of the Committee Custos Phillip Berry[35] I proceeded from St. Elizabeth to Spanish Town and arrived there on the 4th of November. On

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33. Burn Op Cit. p.171. 34. Burn Op Cit. p.182.

35. Phillip Berry Custos of Manchester of whom Smith wrote, "I am so satisfied of his hostility to Her Majesty's Government as an obstinate opponent of the Abolition Law that I should have removed him from the important Office of Custos of Manchester". CO 137/227 Smith to Glenelg 10/4/1838. Glenelg subsequently authorised his dismissal.

the 5th I reported myself but was not examined. I continued in waiting for several days without being called upon. At last I was unceremoniously transferred over to Mr. Townsend's Committee and was detained until the 2nd of December when I was discharged without having had a single question put to me by the Chairman of the said Committee."[36] Thus for one month one particular Stipendiary Justice who had 20,000 apprentices under his charge was to no purpose taken away from his responsibilities by a Legislature protesting the insufficiency of numbers, inadequacy of pay and general inadequate state of appointment of the special magistracy. Re-imbursement of Oldrey's expenses which amounted to £47. and of those of other Stipendiary Justices similarly summoned was refused by the Assembly which further weighed down their financial burdens by the imposition of a tax specially limited to the commissions of the special justices.[37]

"Withdrawal from the masters of their domestic and from the local magistrates of their judicial authority and the unfitness of many Stipendiary Justices for their position were the bane of apprenticeship for which appropriate legislative action was forthcoming. Two principal Acts were passed, one to exact compulsory labour for hire from apprentices, the other to invest the local justices with the special commission. Their objects, namely the restoration of slavery in fact if not in name and the

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36. CO 137/224.
37. Co. 137/194/12. Sligo to Spring Rice 9/12/1834.

restitution of the magisterial dominance of the planter, were too obvious to save them from vice-regal rejection, but not so two others. The first December Act in Aid[38] repealed and replaced section 44 of the local Abolition Acti which had limited to 15 hours the extra labour which might have been awarded in any one week against an apprenticed labourer by a provision empowering Stipendiary Justices to establish penal gangs of sentenced apprentices on estates, thus giving masters a vested interest in convictions. Section 6 of this Actin aid also instituted appeals from Stipendiary Justices to the Supreme Court, Assize Court and Quarter Sessions, in which planter-magistrates preponderated. The second December Act "for granting aid from public funds in erecting and enlarging houses of correction and treadmills" bespoke its purpose. Not long after treadmills were being advertised in the newspapers and erected in the workhouses.[39] As apprentices were liable to the ordinary law for extra-apprentice offences and as any sentence of imprisonment, whether ordered by a Stipendiary Justice or not, had to be served in the workhouse, the power now put into the hands of the justices and vestry of each parish under whose superintendence and regulation these institutions fell, was incalculable. Within the walls of the work-houses and removed

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38. This Act was not disallowed until June 1835.

39. CO 137/193/49. Sligo to Spring Rice.

from the interference of the Stipendiary Justice, the apprentice under sentence of imprisonment once more confronted the planter or the planter's placeman. The making of a new tyranny under the guise of judicial sentence and prison discipline had been forged within five months of the inception of apprenticeship. This possibility derived from the creation of a state of things in which apprenticeship was made dependent at all stages upon the local political government and upon a derelict executive government in which the Governor, unable to obtain or demand the advice of his overburdened Attorney General, was obliged to consult his own wisdom or the suitability of technical legislation for his vice-regal assent.

(B) The Period of superficial tranquillity.

Whilst the Assembly had been busy with denunciations of the Stipendiary Justices and with calculating legislative schemes, Sligo had doubled his exertions in redressing genuine grievances. By persuading serving Army Officers to accept temporary commissions, by appointment of local men free from planting connections and by prompt responses from Home to urgent appeals for more Stipendiary Justices their numbers underwent rapid and satisfactory increase. From 28 in August they rose to 45 in December. In February 1835 there were 48, 54 in July and 58 by the end of October. The problems arising from insufficiency of Stipendiary Justices had at last been overcome but not the ill-will for which the original inadequacy had provided a pretext.

Morale too among the magistracy needed reviving. Two had succumbed to the vicissitudes of office and in November 1834 one had resigned under fierce persecution. Of the others one was "not very active", another "weak and inefficient", whilst a third was reported to have passed his time entirely in the company of overseers. For over-leniency to apprentices some had earned a bad repute with planters and for over-severity others had attracted the clamour of apprentices. By transfers, by counsel, and by exhortation the Chief Executive laboured to re-build the spirit of the magistracy and to get the optimum out of every man.

The issue of allowances had been pacified and the nine-hour system of work was everywhere in operation.[40] By the spring of 1835 gubernatorial labours were being rewarded by encouraging reports from the Stipendiary Justices. "The comparison of my diaries of the months of September and October" wrote Lyon from St.Thomas in the East in March, "with those of the last two months shows an improvement both rapid and astounding."[41] At the end of June Sligo reported, "the perfect tranquality of the Island and the improved state of Industry."[42] Two monthd later the Chief Executive again referred to the perfect tranquality of the island and to the absence of complaints on 2121 out of 5386 estates visited in July and cited the exemplary conduct

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40. Sligo to Spring Rice CO.137/194/110. 25/12/1834.
41. CO. 137/198/38. Sligo to Aberdeen 27/3/1835.(Enclosed with the Dispatch).
42. CO. 137/199/39. Sligo to Glenelg 28/6/1835.

of one master who allowed his apprentices the use of his oxen to transport 17 wagon loads of their provisions several miles to Kingston.[43.]

Economically, apprenticeship had now settled down to a tolerable condition. Masters' and apprentices' needs were basically complementary. The one needed labour, the other food, clothes and wages. In the fire of the early conflict a certain economic compatibility had been forged and was proving not unworkable.

Beneath the peace which economic necessity had imposed, inveterate prejudices rankled and discontent continued to seethe. "On some estates apprentices were worse off than under slavery."[44.] and "the acts of some Stipendiary Justices who lived with planters" were "in the view of a colleague "revolting to human nature."[44.] Dr. Palmer Stipendiary Justice reported even in June 1835 that, "coercion was decidedly on the increase"[45] and that same month the Rev.Knibb spoke of apprenticeship as "thrice accursed..... nothing but blood, murderous cells and chains."[46.] That same month a motion was moved in the House of Commons (but later abandoned) "to enquire if the conditions on which compensation had been granted were being carried out for the Stipendiary Justices in the colonies were not officials free from local passions."

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43. CO 137/201/74 Sligo to Glenelg 6/8/1835.
44. Burn Op Cit.p.333.
45. Burn Op Cit.p.334.
46. Ibid.p.335

In August 1835 the Anti-Slavery Society presented a demand to the Secretary of State for the abolition of apprenticeship.

Threats to the uneasy calm began to develop when Sligo intemperately dissolved the Assembly and again in November when the new House met to consider among other things the renewal of the Police Bill and the Act in Aid of July 1834 by which Stipendiary Justices were specially protected against vexatious litigation.

The deliberations of the Popular Body extended into the new year and when their Bills reached the Upper Chamber, that Body [47] proposed several amendments including the introduction of a suspending clause. The amendments were rejected [48] but with equal vehemence the Council adhered to their amendments. The Act in Aid expired. The special magistracy had in fact become the battleground of a constitutional struggle.

Feelings were aggravated when Sligo who regarded Assembly men as a "set of children" and earnestly desired their abolition,[49] sent two messages to the House. "On reference to the minutes

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47. The Council, chafing under the loss of legislative power, was now making a bid to recover some of it.

48. It was inconceivable that the Assembly would, without a struggle, yield even a particle of its absolute legislative power at a time when socially and economically white supremacy was struggling for its survival.

49. CO 137/201. Sligo to Glenelg "The British Government, no matter what may be its peculiar terms, has nothing to hope for from the Assembly of Jamaica.

of the Council" the first of these ran "His Excellency finds that the amendments made by them but not adopted by the House, are adhered to; and from the nature of the proposed alterations he concludes that, had it reached him, he would have been unable to have assented to it. His Excellency therefore studiously avoiding the use of any expression which could be considered in the slightest degree offensive, entreats the House to reconsider the subject with a view to expunging such matters as has been considered unsurmountably objectionable."[50]. The second message conveyed vice-regal regrets at the Assembly's rejection of his recommendation that the Police Bill should be made co-equal in duration with the apprenticeship term."[50].

By a massive majority of 29 to 4 the Assembly on the following day voted the Governor's first message "a breach of the privileges of the House insomuch as the subject matter of that message was then pending between the other branches of the Legislature. That this House cannot, consistently with its dignity or with due regard to its rights and privileges which are the first bulwark of the liberties franchises and immunities of the people proceed to any other business until reparation shall be made for the breach of privileges."[51].

The constitutional struggle had now been advanced to the stage of crisis out of which planters hoped to achieve the

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50. CO 140/126 pp.259-60; 262-4

51. CO 140/126 pp.272 also Cornwall Chronicle 10/2/1836.

reduction to impotence of the Stipendiary Justices, the consequential demolition of the apprenticeship system and a virtual return to the palmy days of slavery. Batty, a leading member of the Bar and prominent Assembly man had earlier declared in the Legislature Chamber that "he was so great an infidel that he did not care for any British Act of Parliament attempting to bind this island."[52] Richard Barrett, too, Speaker of the Assembly and Senior Assistant Judge of the Supreme Court "had been watching the Canada people and saw their men diminishing the power of the Crown and by God they would do the same."[53] In January 1836 he had reminded his audience at a dinner in his honour that "we have now a Government of expediency - nothing more. The Government is kept in office by a small majority in the House of Commons. They cannot bring forward a measure in that House that they can with certainty carry."[54] The local Abolition Act had been passed, so the House had said "against their better judgement"[55] "without pledging ourselves for its success without incurring any of its responsibilities."[56]

Sligo attempted to reason constitutional niceties with the House. "In the House of Commons the Ministers are the legitimate interpreters of the wishes and suggestions of the Crown; in the House of Assembly no such character exists and

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52. Royal Gazetter October 15th,1834.
53. Burn Op.Cit. 54. Jamaica Standard 13/1/1836
55. Burn Op.Cit p.171.
56. CO.137/228 Smith to Glenelg.17/5/1838.

therefore the only manner in which the views of the Executive can be legitimately conveyed to the representatives of the people for their consideration is through a message."[57]. Gubernatorial naivity had failed to penetrate beyond the constitutional camouflage of the Assembly to its real objectives. Unconvinced and implacable the Assembly demanded from the Chief Executive an apology and were prorogued to the 18th of March.

The Speaker's judgment of imperial weakness was not entirely misplaced. The same dispatch that brought news of an Imperial Act to revive and continue the Act in protection of the Stipendiary Justices enclosed a direction to Sligo to apologise to the Assembly. This Sligo did on May 24th having already tendered his resignation.[58].

In less than two years planters had scored notable triumphs. Their success in the matter of the allowances had underwritten the fact that to that extent at least apprentices were now worse off than as slaves. They had by open hostility, by propaganda or by blandishments won some Stipendiary Justices to their allegiance. They had secured control of the prisons. They already were in control of the ordinary courts of Justice and juries. Finally they had secured an apology from the Chief Executive and, some would say, his recall. Apprenticeship was now passing into the final phase which with uncanny accuracy

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57. Burn Op Cit. p.305

58. The apprentices of Jamaica subscribed a sum of over a thousand dollars to be spent in providing some mark of their gratitude to Sligo. A Candelabrum was bought & presented to Sligo in March 1839,

Sligo foretold in a final Dispatch "When I see that contemptible oligarchy without the semblance or even the hypocritical assumption of honesty opposing the wishes of the British nation and from personal motives endangering the success of the new system I confess myself disquieted to the last degree."[59.]

(C) Persecution of Special Justices and Apprentices.

The change of administrators at this critical stage in the development of apprenticeship occasioned greater disquiet than Sligo had had reason to entertain inasmuch as the early administration of his successor, Sir Lionel Smith, precipitated a decline in the standing of the special magistracy. Perfectly sincere and well-meaning, humanitarian and intolerant of cruelty the new Governor failed to appreciate that "in Jamaica he was dealing with a social and political organisation much more complicated than had faced him in any of the Windward Islands."[60.] He conceived that by the personal authority, influence and prestige alone of the Royal Representative he could successfully administer the affairs of the colony and he looked with violent disapproval upon the influence which the special magistracy as a body had exercised under his predecessor's regime. "They have been encouraged" he said, "to keep up a constant state of collision with the inhabitants..... they are the most troublesome class of British subjects in the island.... they have been acting

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59. CO.137/212/ Sligo to Glenelg 1/7/1836 (Private)
60. Burn Op Cit. p.319&320

like a fourth estate of the legislature."[61].

An active and deliberate policy of reduction of the influence of the Stipendiary Justices was embarked upon. Smith put an end to the weekly reports to his Office of the Stipendiary Justices and informed the November Assembly that "it is my anxious hope that all animosities will cease and that the seat of government will no longer be considered a magazine of combustibles."[62]. His dismissal of Dr.Palmer Stipendiary Justice, though justifiable, was untimely and was hailed by planters as their triumph. When he forbade Stipendiary Justices to wear the distinctive red collar and cuffs, the insignia of their office, the final act of public denigration seemed to have been accomplished. "Planters now felt that they could do anything with impunity, and that they had nothing to do but get up a memorial against a Stipendiary Justice to have him dismissed if he refused to go hand in hand with them."[63].

Plantocratic ascendancy, seizing the timely opportunity to retrieve lost supremacy, initiated a campaign against apprentices and special justices. Beginning on the plantations, it spread to the workhouses. It extended to and polluted the judiciary.

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61. CO 137/213 Smith to Glenelg 25/11/1836.

62. Smith in his address to the Assembly 1/11/1836.

63. Walsh Stipendiary Justice to Smith 1/7/1837 enclosed in Smith to Glenelg CO 137/220/172 8/2/1838.

(1) The plantations. In January 1837 ill-tidings began to assail the Governor's ears. "Mutual distrust and alienation have long been and still are on the increase between master and apprentices."[64] Three months later Baynes Stipendiary Justice became even more emphatic. "Close observation and the experience of three years justify me in expressing my opinion that less blame attaches to the apprentices than to the master for the unfortunate position in which they now relatively stand; the total want of conciliation on the part of the latter, the indifferance too general to the bodily comfort of his dependent, the distressing apathy manifested towards his moral improvement, the rigid exaction of the whole law from him with the imprudent and discreditable anxiety too often exhibited for the infliction of its severest penalties now produced a corresponding and inevitable result by rendering the negro, instead of confiding, satisfied and cheerful, suspicious, reserved and dis-contented."[65]

All the old causes of irritation and dissatisfaction began to re-appear. Apprentices were compelled to go to their masters' work in their own time "as if working and walking on the business of another are not both in law and reason, an equal sacrifice of time in his service."[66] They were obliged to remain at their

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64. CO 137/219 Baynes Stipendiary Justice to Governor's Secretary 8/1/18
65. CO 137/220 Baynes Stipendiary Justice to Governor's Secretary 14/4/1
66. Ibid.

work in the field during heavy falls of rain, a practice no less prejudicial to the interests of the master than pernicious to the health of the apprentices. Indulgences once more were being withheld, whilst return to the eight hour system in combination with the very proper discouragement of attending to provision grounds on the Sabbath placed apprentices, as regards free time and independent means of subsistence, in a position worse than as slaves. Thus was the increase of free time provided by the Abolition Law whittled away and the intentions of the Act evaded and defeated. Remaining terms of apprenticeship were valued at exorbitant rates by planter-dominated valuation courts[67] which refused to take into account the fall in the prevailing price of sugar.

Two other forms of plantation oppression may here be noticed. First, the practice developed of taking apprentices accused of offences under the Abolition Act before the special justice on Saturdays in their own time, enforcing the attendance of witnesses on that day, thereby preventing them from employing it in the necessary cultivation of their grounds. "It not unfrequently happens that the apprentice is not convicted; it even turns out often that the charge is vexatious.[68] Thus we have here several innocent persons harassed by a long journey and injured by the loss of a day of which they are deprived with

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67. Supra .

68. Planters of course were not punishable for bringing vexatious proceedings.

impunity at the caprice of an overseer who would not fail to bring them to trial for encroaching only five minutes on their master's time."[69] Secondly, in respect of labour for wages, masters did not usually pay more than 1/8d per day though the jobbing employer was paid at the rate of 3/4d for each able hand. This disparity of remuneration for the same quantity and quality of labour was of course mere economic exploitation of the black[70] and consequently "working for wages was not very prevalent."[71].

Where Stipendiary Justices sided with planters it was futile, perhaps even dangerous, to complain against these abuses. In other cases various artifices were employed to silence the apprentice. "Their herrings will pay for it"[72] promised one planter who was fined for illegally confining apprentices. Others were demoted for giving evidence against overseers and by impressing upon them the risk Stipendiary Justices ran of dismissal if they acted upon their complaints, apprentices were generally deceived into not doing so. "Conciliation has completely failed ..... Three long years of apprenticeship yet unexpired. I am of opinion that we have not advanced this year

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70. CO 137/220 Baynes Stipendiary Justice to C.H.Darling Governor's Secretary 14/4/1837.

71. CO 137/220 Baynes Stipendiary Justice to Governor's Secretary 14/4/1837.

72. CO 137/219.

69. CO 137/220 Baynes Stipendiary Justice to Governor's Secretary. 14/4/1837

in any thing and I can see that slavish fear returning into the heart of the apprentice."[73].

(11) The Workhouses. We have already noted the proviso to Section 17 of the Imperial Abolition Act.[74] In practice however the Laws made applicable to all classes were applied almost exclusively to the apprenticed class. "Long-established habits, and want of sympathy between whites and blacks have given such a bias to the minds of the white magistrates that with the most honourable and conscientious intentions, it never comes into their thoughts that these laws, however worded, were ever intended to meet the cases of free or white offenders." In particular under the Gaol Acts and Vagrancy Act the planter / magistrates gained a jurisdiction which they exercised over idle apprentices by committing them to the houses of correction whose keepers, though possessed of a wide discretion in the matter of prison discipline, were by law irremovable by the Executive Government. The subordinates of these keepers, the men upon whom the day to day responsibilities fell, were often convicts comdemned for life. Into the hands of such men even apprentices under sentence from the Stipendiary Justices fell. The horrors of the work-houses passed all description. Females were chained by the neck in couples. "Women in an advanced state of pregnancy - mothers with infants at the breast -

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73. Walsh to Smith 1/7/1837 enclosed in Smith to Glenelg. CO 137/220/172.

74. Supra p.

young girls - sick and aged apprentices of both sexes were broken on the treadmill."[75].

The "Narrative of James Williams" conveys some impression of what a combination of planters and Stipendiary Justices in a remote parish could, without immediate disclosure,[76] achieve in the way of unspeakable barbarity. A week after Williams an apprentice had served ten days' imprisonment in the workhouse of St.Ann for not turning out cattle quickly enough, Rawlinson the Stipendiary Justice who said that "he had not done with him in regard to the sheep" ordered him 20 lashes for "insolence of manner". Ten days later and whilst still sore from the late flogging Rawlinson again ordered 20 lashes for not turning out cattle and sheep. Williams fled the estate a month later, but after seven weeks he returned and was again sentenced by Rawlinson to nine days with treadmill and penal gang, to receive 15 lashes on going in and to repay 50 days to the estate." Other apprentices in St.Ann had undergone like sufferings. A Commission of Enquiry reported that "the allegations of

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75. "Jamaica Assembly Suspension Bill" issued from the Anti Slavery Office 1/5/1839.

76. CO 137/220 Smith to Glenelg 25/8/1837 "My Lord, no man of any experience in the present state of the late slave colonies would attempt to deny that many abuses do exist. We have upwards of 300,000 apprentices with only a weekly communication through the islands. It is impossible to control the various tempers and dispositions of all the persons put in charge of this mass of human beings. In the case of absentees' properties, low, uneducated and violent overseers become their masters and a great deal of ill-treatment, not punishable by law is frequently resorted to."

James Williams' Narrative have received few and inconsiderable contradictions, whilst every material fact has been supported or corroborated by an almost unbroken chain of convincing testimony ..... that the Abolition Law has not been properly administered in some parts of the parish of St.Ann; that the House of Correction of that parish was until recently a place of licentiousness and cruelty; that the treadmill has been from the time of its erection and still is an instrument of torture rather than of just and salutary punishment."[77].

The atrocities such as Williams underwent, though not widespread, were not singular. "Some special justices had become Busha Magistrates and "acted as if their sole duty was to coerce labour and to maintain at any cost the authority of the planter."[78]. To this perversion of duty and corruption of authority of some Stipendiary Justices, the unsatisfactory manner of their recruitment, the inadequacy of their salaries, general unsatisfactory working conditions,[79] and the crumbling state of

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77. CO 137/221 Commissioners to Smith 23/4/1837. See also Burns Op Cit. p.257.

78. Sturge and Harvey The West Indies in 1837 (London 1838) p.339 Stipendiary Justice dismissed or would have been dismissed bu t for the death or the approaching end of apprenticeship were (1) For general uselessness 3; (11) For undue harshaness to apprentices 17, (111) For refusal from undue consideration to apprentices to carry out the provisions of the Abolition Act 3 Burn Op Cit.p.262 . Footnote.

79. Baynes Stipendiary Justice spent £500 on medical attendance during his service. 4 of his 8 children had died on the island and he himself had been assailed, vilified persecuted even clandestinely shot at "Let 30 deaths in 3 years and the number of orphans who now in England or elsewhere wander about in a state of destitution... attest this." Enclosed in Smith to Glenelg CO 137/226/43 - 8/3/1838.

the public services which inhibited effective control, discipline and efficiency, were largely contributory.

(111) The apprentices and the Judiciary. A cardinal principle of the Imperial Abolition Act was that rights in apprenticeship were restricted to masters who had duly registered their former slaves on or before the 1st of August 1834 in conformity with the laws then in force in the colony. This principle was swept away by a decision of a majority of the Supreme Court in June 1837[80] that non-registration of slaves did not exempt from service as apprentices. Thereby the distinction between those who had and those who had not obeyed the Slave Registration Acts was destroyed and the numbers of those under partial bondage were increased to the obvious benefit of the planters. In another decision[81] of the same June Session of the Supreme Court, the Court unanimously ruled that "a Stipendiary Justice appointed to a district only had jurisdiction off plantations for estates not entitled to statutory visits on account of the number of apprentices being under 40 and that in all questions and things relating to plantations having 40 labourers and upwards, his authority was to be held restricted to the plantation itself, he being bound to hold statutory courts there every two weeks." The court also ruled that a Stipendiary Justice could not summon witnesses before him, on a visit to a plantation, on any but

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80. Bayley v Ewart CO 137/220
81. Mason v Oldrey CO 137/220

alleged complaints and grievances on which an adjudication was to take place. As fear of recrimination often prevented apprentices making complaints against masters, the estates' courts became nearly entirely restricted to accusations in which masters were complainants. The authority given to the special justices to hear cases where the people may be working was denied and the obligation to enquire into any matters or things that came to the knowledge of the visiting justice in any other shape than as a sustantive complaint was repudiated. In short the power of special justices of affording protection to apprentices was effectively abridged.

Two other decisions of the Supreme Court, the strict validity of which is not impugned, emphasize nevertheless the practical evils which the state of the existing Law allowed and how prejudicial to the apprentices their operations were. In R.V.Hendricks[82] the Chief Justice ruled that magistrates could lawfully order the shaving of the head of a female under commitment by a special justice, though there was a special exemption in the warrant against such an infliction. Under a local law of general application the justices and vestry of each parish had power to make rulesand regulations not subject to review by the Governor, for the discipline of the workhouses. Under this law intra vires rules permitting shaving of a prisoner's head, ostensibly for reasons of sanitation, had been

82. CO 137/220 - 1837.

framed. In R.V.Mason[83] for neglecting a sick apprentice Counsel for the defence argued successfully that a special justice had no authority to treat as a case of neglect the non-provision of medical attendance for the sick on an estate for the Consolidated Slave Law did not fix medical attendance as a legal obligation, though it was the usage of the colony in the days of slavery.

Biassed judgments of the planter/bench had their parallel in the corrupt verdicts of planter/juries "Harris Stipendiary Justice having been refused admission to the cells by Loundes an Attorney and Gyles a proprietor in St.Thomas in the East took Palmer with him on a second attempt to carry out such an inspection on Gyles' estate. Gyles was a violent brute who had been dismissed from the Commission of the Peace by Mulgrave and in this instance he fully bore out his character "laid hold of Palmer and dashed him back with great violence so that he fell against H arris" then again rushed on the justices and hurled them back. At the same moment Mrs Gyles came behind the justices and with a measuring rod 8 ft.long aimed a desperate blow at the head of Dr.Palmer which his servant rushed forward and averted."[84] Yet when Gyles was indicted at the Middlesex Sessions in October 1836 the Grand Jury refused to find a true bill. Likewise was Rawlinson, the tormentor of James Williams,

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83. CO 137/220 - 1837.

84. Burn Op cit. pp 224-225.

exonerated by a grand jury of his crimes against the apprentice.

It was virtually impossible to secure a verdict on a capital charge against a white man for the death of an apprentice. A Coroner's inquest returned a verdict of "death from old age and debility" in the case of the death of an aged and ailing apprentice whose overseer named Jenkins had ordered flogging for every one who did not work. Charged before a grand jury Jenkins was exonerated, a circumstance that aroused the "deep regret" of the Secretary of State "that a case should present itself in which no conviction could be obtained for a murder committed with the most malignant cruelty and proved by clear and uncontradicted evidence."[86].

Liddell, overseerof Mr.T.J. Bernard Assistant Judge of the Supreme Court, knocked down and repeatedly kicked Juliana Ayton, an apprentice. "So strong was the impression in the medical men of Mr.Liddell's criminality that one of them, Dr.Stamp, very properly came into Spanish Town to report to the magistrate that she could not be expected to live through the day - his object being to have Liddell, then on bail, taken into custody."[87]. The grand jury threw out the bill for the capital offence, and subsequently, when another bill was preferred, found for an

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86. CO 138/59 Glenelg to Sligo 14/6/1836.

87. Jamaica under the Apprenticeship System pp.14-16.

assault on the same evidence, thus clearly proving that they were satisfied that the assault which preceded the death had been committed but that they would not send the man for trial for it."[88].

(1V) The Special Justices and the Judiciary. The popular approach of the planters to the special magistracy became in 1837 the subject of examination by one special justice. "He can expect to succeed with and receive co-operation from the master only when he renders himself an object of terror to the apprentices; any manifestation of confidence in his impartial administration on the part of the people subject him to clamorous opposition and abuse of managers."[89]. "In 1836 the Middlesex Grand Jury threw out every bill sent in at the instance of a special justice and returned a true bill on every indictment against a special justice. They ignored a bill against one Patrick Thomas for assaulting and ill-treating apprentices in a house of correction without taking a single deposition in support of it. On the other hand they returned true bills and took depositions in the case of two special justices although the evidence before them was not on oath."[90]. On the north coast of the island opposition to special justices was equally intense.

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88. Jamaica under the Apprenticeship System pp.14-16.

89. CO 137/220 Chamberlaine Stipendiary Justice to Richard Hill Governor's Secretary April 1837.

90. CO 137/219 also the Telegraph of 4/4/1837.

There "an unrelenting spirit of persecution from the beginning of the apprenticeship to the present hour"[91] characterised, in the words of the Governor, the verdicts of juries.

The Act in Aid of 1834, renewed in 1836 by the Imperial Parliament (and by the local Legislature) in 1836 afforded some protection to special justices, but as a solitary measure for their defence it proved "quite inefficacious in the present state of the bench and petty juries."[92] The relative impecuniosity of the special justice was his point of greatest vulnerability, hence in the common parlance of the day "to catch a special justice and sweat him"[93] was a favourite pastime of the wealthier planters. The "sweating" in which the active participation of opposing Counsel was joined with judicial connivance, consisted in securing repeated postponements of a case in which a special justice was involved until his well-known limited resources reached exhaustion and his witnesses grew weary of fruitless travellings back and forth and abandoned him or died or left the island. When eventually the case came on for hearing, the special justice, bereft of witnesses and of means of retaining legal representation, would be unable to proceed with his case if he were Plaintiff and would, if he were defendant, be exposed

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91. CO 137/239 Smith to Normanby 17/8/1839.
92. Jamaica under the Apprenticeship System (Jan.1838) p.36.
93. CO 137/224 Oldrey Stipendiary Justice to Glenelg. 28/4/1837.

to loss of his suit and be condemned in heavy damages and costs. Counsel too boldly exherted juries without judicial rebuke to award damages below the minimum applicable to the Privy Council so as to prevent the passage of the case to the impartial hearing of that tribunal.[94] In Mason v Oldrey the jury men exceeded the solicitations of Counsel by awarding against the special justice a sum which precluded an appeal even to the Court of Error.[95] Special Justice Bourne ordered the arrest of a planter named McLean, refusing bail as the death of the apprentice whom he had gravely wounded seemed imminent. Despite an address in his favour in a subsequent action of false imprisonment, the jury returned a verdict against him and awarded £200 damages.[96]

(D) General mal-administration of justice.

Behind the economic interests which had inspired the partialities exhibited by the Judiciary in the administration of the law as it related to the specific relations of planter and

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94. Jamaica Dispatch and New Courant 23/2/1836 "Counsel for Mason told the jury that he did not wish them to award damages as much as £500 for "if the Jury returned a verdict for £500 it would be in the power of the defendant and his supporter further to harass the plaintiff by carrying the matter over the water. He therefore hoped the jury would return a verdict for £499.19.11¾."

95. They awarded £289. damages.

96. CO 137/218; also the Watchman 23/1/1836.

apprentice had lain the deep prejudices arising from the circumstances of slavery which had alienated the white and black peoples which composed the Jamaican society. In such circumstances it was impossible, having regard to the constitution of the bench, that judicial partialities and injustices should be restricted to cases of planters, apprentices and special justices. In the workhouse in the parish of St. Andrew, a judge of the Supreme Court and Custos of St. Andrews, it was established on the oath of many witnesses, had allowed the keepers to abuse the free female prisoners.[97] The increased powers given to the local magistrates in Quarter Sessions by the Larcenies Consolidation Act of 1837 were exercised with such severity in the award of punishments of whipping against free black men by the Custos and magistrates of St.Catherine that "some more effective control seemed necessary" in the view of the British Government "over the proceedings of the local magistrates not only during the period of apprenticeship but also after its termination."[98]

Individual judges in the Superior Courts had already gained infamy by acts of oppression and injustice. One Assistant Judge of an Assize Court and Custos of a parish had been dismissed for

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97. Asst. Supreme Court Judge Mais CO 137/221 Sligo to Glenelg.
98. CO 138/61 Glenelg to Sligo 15/5/1838 p.426. 42 Stipendiary Justices were eventually selected by Smith for continued post-emancipation service.

unmitigated brutality to a domestic slave girl.[99] The treasonable utterances and calculating conduct of Richard Barrett have already been noticed.[100] His handling of the case of Mason v Oldrey confirmed the accusation that he had "yielded on the bench to the bias of party politics."[101] The integrity of the Chief Justice[102] and the merit of his judgment occasioned doubt and in some quarters even censure. The Larcenies Consolidation Act had been promoted by him "because" said Governor Sligo "it saves him much trouble, but as he is well paid for it and ought therefore to take the responsibility of opposing the illegal decisions of others which he invariably tries to shake off I hope that his opinion will not induce His Majesty to give his assent to it."[103] In his strictures of the Chief Justice and Bench of Jamaica a Special Justice received encouragement "from the numerous reports and complaints made by several persons."[104]

Two cases, one involving a black man, the other two white men, and the observations of the Crown upon the principles of

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99. Mr. Jackson Judge of the Surrey Assize CO 137/179 Belmone to Goderich 31/8/1831.

100. Supra .

101. CO 137/217 Stephen to Lord Sligo 1/4/1836.

102. Sir Joshua Rowe, the first of the professional judges of Jamaica whose appointment was made directly by the Crown.

103. CO 137/221 Sligo to Glenelg.

104. CO 137/224 Oldrey Stipendiary Justice to Glenelg 28/4/1837.

sentencing employed in the cases afford an objective basis for the consideration of the qualities of the Chief Justice as a man and of his merits as a lawyer.

Thomas Richards was sentenced to transportation for life for stealing some food in a public market place. "Struck by the extra-ordinary apparent disproportion between the crime and the punishment,"[105] Glenelg, the Secretary of State sought an explanation of the Chief Justice. That explanation was that "though Richards was only indicted for larceny yet in fact he was at the head of a gang who broke open a store in the market place and stole the articles mentioned in the indictment and he was only not indicted for burglary from the accidental circumstance that no one was living in the building. The Court however considering the vast amount of property kept in the stores in the island in which no one resides thought the offence a very serious one and one which it was our duty to check by an exemplary punishment."[106] As none of the facts disclosed in the explanation appeared in the evidence "the principle upon which the Court proceeded" appeared to Glenelg "full of danger."[107]

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105. CO, 137/220 Glenelg to Smith 14/4/1837. The case was heard in the Supreme Court in 1836.

106. Ibid.

107. Ibid.

"Instead of apportioning the punishment to the evidence given at the trial", continued the Secretary of State, "they regulated it by reference to facts which however indisputable were not judicially proved and to considerations which however just in themselves were not founded upon the evidence given in the presence of the accused and his defender..... I believe it to be foreign to the practice of this country, as I think it is irreconcilable with justice, that any man should undergo an extent of punishment greater than that which is warranted by the evidence taken at the trial."[108] Richards was ordered to be discharged "as soon as he shall have remained in gaol for six months."[109]

The facts of the second case, R. V Freeman and Gordon,[110] were that the defendants, a head driver and a Constable respectively, forced a lime down the throat of an apprenticed labourer and killed him. The jury convicted the accused men, but the bench of judges, presided over by the Chief Justice, recommended commutation of the death sentences to six and nine months respectively "as there appeared to us an absence of all malice and of such conduct as would necessarily have produced death."[111] Glenelg, to whom a transcript of the evidence had been transmitted, was "at a loss to understand how the absence of malice can be maintained in a case

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108. CO 137/220 Glenelg to Smith 14/4/1837.

109. CO 137/219 Glenelg to Smith 23/5/1837.

110. Supreme Court 1836.

111. CO 137/226 Sir Joshua Rowe to Warren Governers Secretary 29/12/1837.

when the deceased was first imprisoned, then tied and beaten by the prisoners and in which one of the prisoners immediately after committing the deadly act said of the deceased "he may go to hell," the other prisoner sending away the witness and saying that he the prisoner would do the business. Without referring to the general principal of law as to the legal influence of malice in such cases it seems to me that these uncontradicted facts distinctly establish that the crime was committed under the impulse of malignity however occasioned. The words imply nothing less than a distinct purpose of inflicting death, the beating, tying, and imprisoning by which those words were immediately preceded indicate animosity in a very high degree. Nor am I better able to understand Sir Joshua Rowe's opinion that the act which caused the death was "not such conduct as would necessarily have produced death"..... It is in the discharge of a very painful duty that after receiving the Chief Justice's explanation I am unable to admit it to be satisfactory and that in this case two men clearly convicted of the brutal murder of an apprenticed labourer under their charge have escaped the merited punishment of their crime."[112.]

As in the days of slavery, so in those of apprenticeship, the judiciary had become an instrument of the policy of the Legislature. The latter had passed the Slavery Abolition Act,

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112. CO 137/226 Glenelg to Smith 12/3/1838.

publicly stating that "we do not pledge ourselves for its success or assume its responsibility." The former by its decisions nullified the Imperial Abolition Act, abridged[113] the powers of the special justices and perverted apprenticeship into "a species of bondage in various respects more cruel and more oppressive than that for which it is substituted."[114].

(E) Imperial Intervention - the End of Apprenticeship.

Whilst in his confidential dispatches Smith, like his predecessor Sligo, urged the reform of the Judiciary replacing the planting judges by men bred to the law, the Governor urged upon the Assembly proposals for the redress of the various ills which had gradually crept back into the apprenticeship system during the course of the years 1836 and 1837. Among specific recommendations put to the Assembly of October 1837 were the establishment upon a statutory basis of the nine hour system of work and the grant as of right of the various indulgences. All proposals and recommendations, including those of their own Committee, were so stoutly rejected by the House that Smith "lost hope that they will correct the evils I exposed to them."[115]. and urged that "nothing else but an appeal to Parliament will

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113. CO 138/61 Glenelg to Smith 15/12/1837 "The decision in the cases of Mason v Oldrey and "Harris v Loundes" seems to me calculated so materially to abridge the jurisdiction of the Special Magistrates'.

114. "The Jamaica Assembly Suspension Bill". p4.

115. CO 137/221 Smith to Glenelg 24/11/1837.

secure the improvement of the Abolition Law."[116].

The spotlight then shifted to the mother-country. There confirmation of the barbaric cruelties visited upon James Williams in the St. Ann workhouse coupled with the refusal of the officials of the Kingston Workhouse to allow one Captain Pringle[117] to inspect that institution afforded sufficient evidence of the need for parliamentary intervention. The nature that intervention should assume excited controversy and debate, some[118] desiring total abolition of apprenticeship, others[119] "apprehensive of the excitement, irritation and disturbance"[120] which abolition would cause offered the alternative of an Act of Parliament to remove all the grievances of which apprentices complained and to do it so thoroughly and carefully that apprenticeship could fulfil the purposes for which it had been originally designed."[121].

On the 27th of March 1838 such a Bill passed its third reading in the House of Lords and on the 9th of the following month the Bill withstood two amendments proposing abolition and

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116. CO 137/221 (Private & Confidential) Smith to Glenelg.26/12/1837.

117. Captain J.W.Pringle had been commissioned in 1837 by the British Government to inspect and report upon the West India prisons. Of those in Jamaica he said,"Jamaica is the only colony in which I have found prisoners chained by the neck or indeed worked in chains excepting such as had been convicted for heavy crimes such as caused them to be sentenced to two or more years hard labour."
CO 137/227 Pringle to Smith 17/2/1838.

118. Notably Lord Brougham in the House of Lords.PD 3rd Series Vol.XL pp 1284-1357

119. The British Government.

120. Burn Op Cit. p.348.

121. Ibid.

passed its third reading in the House of Commons also. The Act[122] was far-reaching. The regulation of the hours of work and the issue of allowances were placed under the regulatory jurisdiction of the Governor. So also were the prison institutions, for the duration of apprenticeship. Special justices were empowered to order the payment over to apprentices of fines imposed upon masters and the Governor was given a power to stay actions against special justices. In short this Imperial Abolition Act Amendment Act drew a shield around apprentices and special justices so adequate in its protection as would have frustrated the campaign of the planters so to erode away the apprenticeship system as to restore slavery all but in name.

On May 17 Smith reported receipt of the Imperial Act to which the Assembly sullenly replied that "if they should agree to remove an unnatural servitude they hoped they might thereafter be left in exercise of their own constitutional privileges to legislate for the benefit of all classes without any further parliamentary interference."[123].

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122. 1 Vic. C 19 (11/4/1838). The loophole in the original Abolition Act which had made possible the legalised flogging, and other forms of abuse of negresses was removed in this Act and all flogging even of males was to cease after 15/8/1838. The Pass Laws carried over from slavery were abolished and provisions were included which frustrated the scheme of planters so to manipulate the classification of apprentices as to increase the category of praedial apprentices.

123. CO 137/228/98 Smith to Glenelg 17/5/1838. "It was impossible to answer for the conduct of the Jamaica House of Assembly", and he continued to speak of "planters who would be delighted to get up an insurrection for the pleasure of destroying the negroes and missionaries. They are in fact mad."

By June 1838 planters had studied the Imperial Act sufficiently closely to uncover its fatal defect. Its operation being limited to the duration of apprenticeship, the abolition of the latter would render the Act inoperative thereafter. Special justices would be stripped of all exclusive powers and jurisdiction. The prisons would automatically be restored to their control and with the continued aid of their planter/judiciary, they would once more be free to impose tyranny over black men. On the 16th of June therefore the Assembly abolished apprenticeship by their Act with effect from the 1st of August 1838 "neither assuming the responsibility nor exonerating the public faith."[124]

Like its"twin-brother" slavery, apprenticeship had been doomed from the outset to inevitable ruin, neither having been rooted in any noble principle, nor inspired by commitment to any high -minded notions of justice and liberty. The Imperial Abolition Act did indeed concede that it was just that "divers persons holden in slavery within divers of His Majesty's Colonies should be manumitted and set free." More significant, however, the Act, in expressly affirming that planters were hitherto entitled to the services of slaves "for the deprivation of the right to which "reasonable compensation is just and expedient" had upheld the rectitude of slavery.

A Colonial Office Memorandum however had outlined the

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124. CO 137/228 Smith to Glenelg. 17/5/1838.

operative approach. "The consideration mainly turns upon the best mode of procuring a fair share of labour from the slave without using cruel or unjustifiable means on the part of the master."[125] In short, brutality, that open and repulsive feature of slavery, should cease, if possible, but not the planter's exploitation of negro labour. To this fundamental premise another was added. If freed the negro would not work of his own will upon the plantations. In some mountain clearing the fewness of his wants and the fertility of the soil would enable him to live with very little labour, hence "the emancipation of the slaves..... if unqualified by any corrective provisions, would at once bring them into the state described as being characteristic of countries imperfectly settled."[126]

The sum total of these corrective provisions spelt "apprenticeship", a relationship in which the economic umbilical cord that had tethered slave to slave-owner remained unsevered, somewhat lengthened,perhaps and regulated by the special justices who were largely under the control of the masters. An examiner of the local Abolition Act remarked that under it"apprenticed labour was reduced to a condition "entirely inconsistent with the most limited degree of freedom, the apprentice remaining an unemancipated prisoner on the estate to which he was attached substantially liable to the same punishments and labouring under

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125. CO 320/1.

126. Ibid.

the same incapacity as before, the whip following him at every step, hard labour awaiting him at every turn".[127]

New crimes appeared on the statute book of which only the blacks were capable. Indolence, the bane[128] and the luxury of the while planter class, became a crime in the apprentice. For insufficiency of labour, idleness, disrespect to employer, acts possessing no moral turpitude, the black was treated like a criminal and exposed to the lash, whilst the most extensive punishment for the most criminal act of the master against an apprentice under the Abolition Act was a fine of £5. or 5 days imprisonment.

Not unnaturally "to the negro performance of his daily tasks derived from no sentiment of affection or goodwill to his employer, but from passive acquiescence in the provision of the Law ..... he feared that a breach of the imposed conditions - for on his part it is no compact - in which his bonds were finally to be broken would compromise the result."[129]

To masters whose notions of slavery could not have been shaken by the payment of compensation, apprenticeship seemed only "a part of the ransom" and even upon their own abolition of it

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127. George Stephen of the Agency Committee.

128. See Chapter 2.

129. CO 137/219. Baynes Stipendiary Justice to Governor's Secretary 5/1/1837.

they had reserved "the right to demand indemnity for that sacrifice of property thus forced upon us".[130]

Such basic emotional reactions pre-disposed to ruin a system whose ill-founded conceptions, debased motivations and grossly inadequate provisions had augured for it little success. It only remained for the turpitude of the planter[131] working through the economic, judicial and legislative institutions upon which apprenticeship was dependent to accomplish that inevitable ruin. The four-year safari into the non-existent borderland between freedom and bondage upon which the black had without his consent been launched was ended.

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130. From "the humble Address and Petition of the Assembly of Jamaica" to the Queen on passing the Apprenticeship Abolition Act CO 137/228.

131. Sligo had said that if apprenticeship failed it would be the fault of the planter.

PART III

Free Jamaica

CHAPTER VIII.

Liberty and the Legal System in the post-emancipation polity.

Two problems of grave perplexity and difficulty were to confront Jamaica in the post-emancipation era, namely the practical and effective realisation of freedom for all and the establishment upon the un-altered foundations of the old slave polity of a legal system consistent with and adequate to the needs of a free society.

The implications of these two problems in the immediate post-emancipation era constitute the subject-matter of this chapter.

(1) Freedom under Law.

The translation of theoretical freedom into a practical reality was from the outset opposed by several factors in the heterogeneous society.

Most prominent of all were social altitudes. Payment of compensation for lost property in human beings had glorified the Common, not the moral, law and so far from laying a basis for any moral self-judgment in white society, it had upheld and confirmed the rectitude of their abuse of black men. Not surprisingly,

therefore, apprenticeship had been regarded, as we have seen, as a part of the ransom.[1] Accordingly, no degree of self-examination permeated the conscience of white society, nor opposed itself to the passions and prejudices by which recent outlook and conduct had been vitiated. Similarly, there was no renunciation of force as a primary cohesive element in society, nor of gain as its ethos. Emotionally, therefore, nothing in white society distinguished the first day of un-restricted general freedom from the last day of qualified slavery, and ignorant white men, long accustomed to compulsory services of black men, found it more natural to look back to the past with its nostalgia, than to face the future with sympathetic regard for the principles and spirit of freedom. Where then there should have been desire for reconciliation, there was fear, and the fear of recrimination by black men sharpened the instincts of self-preservation and led inevitably to conduct which tended to alienate rather than to conciliate.

Among coloured peoples, inclination towards the whites, despite the latter's arrogant disdain, and away from the

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1. See Chapter 7. See Co 137/220 Richard Chamberlaine Stipendiary Magistrate to Richard Hill Asst. Secretary Special Justice Dept., "One of the great errors into which the gentry of this country have fallen is the preposterous idea that this probationary state was established for the exclusive advantage of the proprietary and as part of the ransom".

blacks[2] was traditional. Many had possessed slaves and had joined with the whites in the persecution of Missionaries and destruction of their chapels.

In 1831 free people of colour in St.Mary had openly declared themselves "embodied with the white classes of His Majesty's subjects and consequently their liberties, rights and properties are identified with the whites[3] and in 1838, six of eight of their representatives in the Assembly "have gone over to the Enemy" reported Smith "their leaders Jordan and Parborn, formerly staunch friends of freedom, now conducting a paper in the planters' interest."[4]

To the blacks, to whom the struggle for freedom was no new thing, there seemed to exist no reason for indebtedness to the generality of society. It was their final great rebellious exertion of 1831 which had translated imperial policies of gradualism and parliamentary polemics into the abolition of slavery.

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2. Hansard Third Series, 46, 9/4/1839 p.1291. Dr. Lushington had been always of opinion that on emancipation the coloured people would adhere to the higher class and desert the blacks, and had been so convinced of this, that when the former had applied to him for assistance in 1824 he made it an express stipulation that if they obtained their freedom they should join in the efforts for the blacks. H e told them that the best case they could make for themselves would be bindness to their black dependents."

3. CO 137/181. Resolution of meeting at Manning's Town St.Mary on 28/7/1831.

4. CO 137/230 Smith To Glenelg 13/4/1838. Smith continued "Any new member of that caste would take the same course."

No compensation, either in money or in land,[5] was paid in indemnification, even in part, of their great and long abuse. Some indeed, either as slaves or as apprentices, had in fact bought their freedom from white men. Others carried on their bodies the indelible marks of their struggles for it. Save, therefore, to their gallant friends, the Missionaries and the Special Justices as a body, blacks were agitated by no justifiable sense of gratitude towards the rest of society, nor could a spirit of reconciliation be awakened in them towards those from whom in the generality no conciliatory overtures proceeded. Contrari-wise "slavery and ignorance combined to produce in the negro mind an almost universal suspicion and distrust towards white men"[6] and only time, it seemed, and a studied judicious policy of conciliation on the part of the latter could perhaps submerge emotional memories.

Exacerbating these strong currents of opposing social attitudes were the complexities inherent in the new and important relations which the sudden transition to freedom had precipitated upon society - that of master and servant.

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5. CO 137/237 Glenelg to Smith 28/12/1839. "Her Majesty's Government are decidedly opposed to the system of making gratuitous allotment of land for the maintenance of the emancipated negroes." This policy was pursued with a view to compelling the negroes to continue to work on the sugar-plantations.

6. CO 137 /229 Stipendiary Magistrate John Daughtrey to Richard Hill 10/7/1839.

Before 1838 planters had never regulated or directed a system of free labour. The science of managing dependents through their minds by encouragement and reward, rather than through their sensations by the stimulus of the whip, was a new study. Slavery had been no school for this attainment and the opportunities afforded by apprenticeship had been prostituted by its debasement to the level and condition of the former. Bargaining, not bludgeoning, conciliation not coercion would need be the ideals of management/labour relations. In the throes of their economic difficulties[7] however, such methods of time and patience ill-commended themselves to estate-attornies in whose minds long exercise of arbitrary power had left feelings and habits of thought towards the negro, scarcely compatible with wise and temperate administration of authority over free peoples. Further, those who would have the immediate charge of labour, namely overseers and headmen, rooted in former habits of abuse, and having scarcely less to overcome than to acquire, would feel far more at home with methods of severity over former objects of property than in resort to the unfamiliar exercise of dubious moral authority over free labourers.

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7. The colony had been bankrupt since 1832. See Burn Op Cit.p.25. In 1838 the public debt stood at £1,000,000 including £500,000 sterling lent on estates CO 137/227 Smith to Glenelg 23/4/1838. In 1836 the duty on Indian Sugar had been reduced. Further Jamaican free grown sugar had to compete with slave grown sugar of Cuba and Brazil. See Dr.Williams Op Cit.p.152.

For their part, newly emancipated blacks did not constitute the most tractable body of labourers to superintend and direct. "The mental darkness and semi-barbarism in which more than one half of the slaves were plunged"[8] had been noted in 1836 by Oldrey Stipendiary Justice "with feelings of deep regret and compassion"[8]. "They were", in his view, "little more than agricultural and sugar-raising machines."[8] There being nothing like principle therefore in such minds, nor moral influence in their managers, with the removal of the whip, liberty could degenerate into licence and all authority and order cease.

The third factor that opposed itself to the practical realisation of freedom related to the state of the statute law regulating the relation of masters and servants and other cognate matters.

By the Master and Servant Act (5 W 4 C 2) (1833), "any person having entered into a contract, written or unwritten, with any person for any kind of service, may for not commencing his work according to the terms of the contract, or for absence during its continuance, or for neglecting to fulfil it, or for any other misconduct or misdemeanor in the execution thereof, be committed by <u>any</u> justice of the peace of the parish to hard labour

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8. CO 137/218 Oldrey to Glenelg 6/2/1836. During apprenticeship some educational measures were in progress supported from Great Britain and carried on by the co-operation of benevolent individuals and societies without aid or sympathy from the Assembly.
CO 137/218 "Supplement to the Watchman Newspaper" 20/4/1836.

in the house of correction for a reasonable time, not exceeding three months, and at the same time be deprived of wages which would have been due during the period of such confinement, or he may be deprived of the whole or any part of his wages, or he may be discharged from his contract."[9]

The ancient island statute 35 Ch 2 C 11[10] authorised one justice of the peace by flagellation on the bare back up to a maximum of thirty-nine lashes to punish as rogues and vagabonds any person able to work but refusing to do so. In addition the convicted person was to be sent from parish to parish, "the next straight way to the parish where he or she dwelt for one year last past". Another clause of this Act empowered one justice of the peace to send men who refused to work for the usual common wages to the parish workhouse there to be set to work for any time not exceeding six months for any offence. A later Act 32 G 3 C 11 increased the penal provisions of the Act of Charles 2.

The Apprenticeship Abolition Act which gave the ex-apprentices the use of their houses and provision grounds for three months

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9. Hansard, Third Series, 45, 3/5/1839. p.809.

10. This Act had revived upon the disallowance in 1836 of the Vagrancy Act of 1833.

after the cessation of apprenticeship,[11] also contained a clause which gave power to two ordinary justices of the peace to eject any erstwhile apprentice on whom three months' notice had been served.

The Judicature, too, in point of its composition, was not calculated to advance the cause of freedom. The judgment seats and the jury-boxes in freedom, as in slavery, had been occupied exclusively by the white classes, although the much less numerous race, to the entire exclusion of the great numerical majority of blacks. Justified perhaps on the basis of the ignorant and depressed condition of the citizens of African birth or descent, the situation was none the less detrimental to impartial justice. Local justices in the courts of quarter sessions and common pleas, in which were litigated the vast majority of disputes arising out of the relations of master and servant or landlord or tenant, were invariably planters disqualified by interests and by inveterate feelings from adjudicating in matters involving those who but a few years last past were in their eyes mere objects of sale and barter. By them would be

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11. The question arose immediately after apprenticeship whether the ex-apprentices were obliged to pay rent during the first three months. The local Attorney General held that they were so obliged, but some of the local legal profession and the Crown Law Officers held otherwise. CO 138/63 Glenelg to Smith 29/4/1838; CO 138/62. J. Campbell and Rev.Rolfe to Glenelg 12/11/1838. "They occupy the premises by the authority of the law, and not by the voluntary permission of the proprietors. They are not liable in any shape in respect of the occupation between 1/8/1838 and 1/11/1838... after 1/11/1838 if they holdover, they are liable to be treated as trespassers under 4 W 4 C 41 and 1 V C 31."

determined, for example, the issue as to what "The usual common wages" were. Even before the end of apprenticeship, "the negroes enquired with great earnestness whether there would not be gentlemen from England to see them righted,"[12] being "apprehensive of being left to the country magistrates in disputes about payments and agreements where Massa and Massa' friend would have to decide for each other."[13] Where the justices were stipendiary magistrates "it unfortunately happens that those esteemed by the Executive are most disliked by the planters"[14] and however unjustified such planter/dislike might have been, its prevalence could not fail to impair the magisterial bench.[15] As to juries, pervading feelings of animosity sapped the very foundations of the jury system and destroyed public confidence therein.

Finally the state of political government offered no expectation that it would or could discharge its function as

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12. CO 137/228 Stipendiary Justice Daughtery to Darling 26/6/1838.

13. CO 137/229 Smith to Glenelg 1838. "Special Magistrates were ordered to sit with the local magistrates and become a most useful check on their habitual severities towards the black population". CO. 137/230 Smith to Glenelg 12/4/1838. "Stipendiary Magistrates were given Commissions as Judges of Common Pleas." In early 1838 Glenelg had instructed Smith to retain for a time the services of a large body of Stipendiary Magistrates payable by the British Treasury." See CO 137/228 "Glenelg to Smith 15/9/1838 where the instruction is referred to.

14. CO 137/228 Smith to Glenelg 17/5/1838.

15. Hansard Third Series, 46, 4/9/1839 p.1246. "We cannot conceal from ourselves the fact that even much of our laws ....are rendered..... inoperative by an influence....biasing the decisions of the stipendiary justices". Reply of House to Speech of the Governor.18/12/1839.

protector of the freedom of all classes.

Under existing law, the negro, if a free holder or a leaseholder, a year or more in duration, could at the end of fifteen months acquire the right to vote. At the end of apprenticeship, however, neither directly nor indirectly were his interests represented in the Assembly.

The men who sat in that Body, forty-five in all, and representing only a constituency of about 2,000 voters out of a population of near 400,000, were for the most part estate-attorneys. They, therefore, constituted a sort of government of agents and factors, middlemen, more dangerous than any other, for while they exercised a delegated power, they entertained none of those interests by which that power was governed.

That "one half of the Assembly's members could not afford to be in it nor the other half out of it"[16] aptly described the desperate conditions of the representatives of the people, for it was based upon the unhappy truth that a reputation for corruption or connivance at corruption was justly attached to the names of too many of the representatives; and that some of them, had they not been elected, would have been in prison for debt."[17]

Their intellect did not rise about their character. "Their little reading has been anything but of that character calculated

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16. Letters from Jamaica p.48.

17. Burn Op Cit. p.154.

to expand the mind so as properly to comprehend the bearings of a measure which had been submitted to their attention."[18].

Entrenched in the Legislature and Judiciary and aided by the state of the law, white planter society was in a commanding position to establish and secure their interests at the expense of the blacks, and to render the freedom of the latter a mere name.

A systematic plan was devised. Prior to the first of August, planters in several of the parishes met to fix wages.[19]. Likewise notices to quit under the Abolition of Apprenticeship Act were served and heavy rents demanded by the planters.[20]. The full modus operandi subsequently and rapidly developed. Tenancies less than a year in duration were insisted upon with the double object of securing for the planters the continued labour of tenants who were anxious to hold over so as to reap the crop and of preventing such labourers becoming annual tenants

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18. CO 137/235 Rev.Peter Duncan to Glenelg. 22/2/1838. See also Burn Op Cit. p.154.

19. CO 137/237 Smith to Glenelg 6/1/1839. The Missionaries and Stipendiary Magistrates countered "this combination which was to grind the labourers down to gratuitous labour with their old masters" by advising what wages the labourers should demand. These actions became the subject of complaint by the Island Agent Burge to Glenelg that they were interfering "in the free and voluntary dealings of Master and Servant over wages."

20. CO 137/229 Smith to Glenelg 10/9/1838.

and thereby securing the rights of electors.[21] The full planter/technique of erosion of the labourer's property in his labour was explained thus: "Landowners in many instances refuse to let house or land for a longer period than a week. Rent therefore may be legally exacted with a very short notice on any terms that the landlord may choose to impose, and it is often made subservient to labour, being lessened or entirely remitted, in addition to payment of wages, if labour is afforded, and doubled or trebled, if labour is withheld. It is in some places a practice to take rent from every individual subsisting himself by cultivation on a property if he did not work for the estate without regard to the number that may occupy one house or till the same ground, the rent not being levied on the actual value of the house or on any specific quantity of ground....."[22]

Within a month of the cessation of apprenticeship the Governor reported that "many violent planters are rejoicing in the power it (35 Ch 2 C 11) gives of flogging free men from parish to parish." That same September it was also reported that "proceedings to recover rent are marked by features of

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21. CO 137/239 Stipendiary Msgistrate Fishbourne to Richard Hill 1839. "It is apprehended that if the negroes become annual tenants, they may hereafter be created voters for members of Assembly, vestry men etc. and this I learn is considered a strong objection against letting the people their houses and grounds by the year."

22. CO 137/240 Metcalfe to Russell December 1839.

injustice and oppression."[23] Encouraged by their successes, planters could not resist the temptation to abuse the procedures of the Court. "In one case local planter/magistrates went into a separate apartment of the court-house to decide while their colleagues, the stipendiary magistrates were in attendance at the usual bench. In another case they insisted on adjudicating by themselves although the stipendiary claimed the right to associate. In a third case adjudication upon two cases of ejectment took place on a day when there was no regular district court."[23].

In November when the statutory tenancies[24] came to an end women could be seen "with children in their arms and old persons driven to be houseless vagrants by the process of the courts held by local justices and neighbouring proprietors on the plantations on which the labourers cited had been slaves and where under notice they were located. The decision of these courts had terminated in the issue of distress warrants in which the beds on which the persons slept were taken and sold."[25].

Whether he were defendent or plaintiff the fortunes of the labourer before the Courts of Justice scarcely differed. The very cost of litigation presented to him an unsurmountable obstacle.

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23. CO 137/237 Stipendiary Magistrate Finlayson to Smith 1/1/1839.
24. Under the Island Abolition of Apprenticeship Act. See Supra.
25. CO 137/230 Richard Hill to Smith 5/11/1838.

"This in many cases amounts to a considerable sum which the poor labourer cannot always readily meet consequently it becomes almost a denial of justice."[26].

In the upper mill-stone of summary ejectment from their lands and their nether mill-stone of possible imprisonment and flagellation in their work-houses,[27] an engine had therefore been devised by the planters whereby, under colour of delinquencies as tenants or servants or vagrants, free labourers would once more be "ground down to gratuitous labour with their old masters."[28].

In September 1838, however, the Governor threw around the

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26. CO 137/229 Gurley to Richard Hill 20/8/1838, "In illustration I shall here mention a case that has lately occurred. A man engaged with the overseer of Willis Pen to take a job for 5 dollars upon which he hired others to assist him. Having completed the job, he asked for his money, when the overseer tendered him four dollars and refused to pay more. The man came to me and I went to the Clerk of the Peace with him. The expenses would have amounted to more than the sum sought after and he was told that if he proceeded he would lose all, as he had not a written agreement or witnesses other than those whom he had engaged to perform the job which would not be admitted in evidence; he has therefore been obliged to submit to the loss of 1/5th of his money." A preliminary fee of 2/6d and mile money at the rate of 6d per mile had to be paid respectively for the filing of suits and serving of process. The average weekly earnings of a labourer was about 6/-d per week.

27. "The governors of the gaols were broken-down planters whose minds were influenced by feelings in favour of the old slave-system and the inferior officers were convicts and improper officers." Hansard Third Series, 45, 3/5/1839 p.807.

28. CO 137/237 Smith to Glenelg 6/1/1839

labourers the shield of the West India Prisons Act[29] enacted by the Imperial Parliament. Under this measure he assumed control of the prisons of Jamaica and thereby tempered the dangers to which they were exposed.

As we have already seen* an earlier Imperial measure (I.V.C.19)[30] (1837), essentially a Prisons Act, had been enacted to redress, during the continuance of apprenticeship, the abuses of the Jamaica work-houses, to the relief of which the attention of the planters had been repeatedly addressed in vain[31] and it was with a view "to getting rid of this interference of the home government and to establish a new specie of bondage under the cloak of a free constitution"[32] that they had put an end to apprenticeship. When therefore for the second time an imperial measure frustrated the designs of the planters against the black population, the former were infuriated and resorted to clamorous appeals to the royal proclamation of 1661 and to constitutional dogmas in defence of their right of non-interference by the Imperial Parliament in the domestic affairs of the colony.

In October 1838 and again in November the Assembly by

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29. 1 and 2 V C 67. (4/8/1838)

30. "An Act to amend the Act for the Abolition of Slavery in British Colonies" (11/4/1838)

31. Hansard Third Series.

32. Pamphlet by Anti-Slavery Society d/d 1/5/1839 entitled, "The Jamaica Assembly Suspension Bill" p.9 CO 137/247.

* See Chapter 7 p.

massive majority resolved to do no business "except such as related to the public creditor until they shall be left to the free exercise of their inherent rights as British subjects and firmly rejected all pleas of the Governor to consider legislation urgently necessary for bringing the laws of master and servant, vagrancy, and for determining of qualification of electors into conformity with the altered state of society. Accordingly they were dissolved.

The new House met in December 1838. By then about seventeen laws , some of the first importance to the colony, including fiscal and police laws and laws regulating the processes of the court, were on the point of expiry. The House was unmoved. They adhered to their resolution of the late session and in their reply to the Governor's speech they alleged that "our legislative rights have been directly invaded by Parliament enacting a law to regulate our gaols, a measure of internal and municipal regulation clearly and palpably within our province..... nor can we conceal from ourselves the fact that even such of our laws as have received to sanction of the Crown are rendered in a great measure inoperative from an influence.... biassing the decisions of the stipendiary justices.[33] Convened again in February 1839, the Assembly, firm in their stand to do no

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33. Hansard 3rd Series V 46. 9/4/1839 p.1246. Reply of December Assembly to Governor's Speech.

business, was dissolved and Jamaica was left virtually without a constitution.

In such circumstances imperial intervention was sought to resolve the crisis.[34] On the 9th of April 1839, a Bill was introduced into the House of Commons "to suspend the existing constitution of the island of Jamaica and to provide for the temporary government of the colony."[35] The following May the Bill received a mere majority of five[36] and was abandoned,[37] the Imperial Parliament contenting itself two months later with approving a measure which empowered the

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34. In October 1838 Smith called for the abrogation of all the Statutes of the W.I. and the substitution of the Laws of England CO 137/230 Smith to Glenelg 13/4/1838. In January 1839 he called for "some change in the form of government of this island" CO 137/237 Smith to Glenelg 21/1/1839. In April 1839 Normanby said, "The more thoroughly the peculiar circumstances of the case are understood the more convinced I feel that the repeated and absolute abrogation of their functions by the ordinary Legislative Body at a time when a novel state of society required prompt and impartial attention on their part will be found to have left the Government no alternative but to provide for the emergency in the manner proposed" CO 137/238 Normanby to Smith 15/4/1839.

35. Hansard 3rd Series V 46. 9/4/1839,p.1243.

36. Hansard 3rd Series V 45, 6/5/1839 p.967. Ten members of the Government voted with the opposition. p.1125.

37. Melbourne's failure to suspend the constitution of Jamaica led to the famous Bedchamber Issue and to the fall of his government. See Carrington "The British Overseas".p296.

Governor and Council to renew the expired Jamaica Laws, if the Governor, Council and Assembly did not do so within two months after the latter Body had been summoned.[38]

In October the Assembly was convened under the administration of a new Governor[39] instructed expressly"to impress upon Planters and Proprietors in general that the Parliament and People of the United Kingdom will never permit a return to compulsory labour nor award any further compensation for its abolition".[40] Revolted perhaps at the thought that the Council should appear to have any share in original legislative functions, the Assembly resumed its functions and the constitutional crisis came to an end. The struggle for freedom continued but its character was to change.[41].

An anatomy of the struggle is instructive. "Freedom is not an abstraction; it inheres in some sensible object."[42].

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38. An Act to provide for the enactment of certain Laws in the island of Jamaica 2 and 3 V C 26 - 19/7/1839.

39. Lord Metcalfe. (26/9/1839 - May 1842).

40. CO 138/62 Normanby to Metcalfe 9/9/1839.

41. Torn between attachment to the sugar estates where generations of their ancestors had lived, died and been buried and revulsion at working for former slave-owners, persecution by the planters drove the large numbers of blacks to choose the life of peasant farmers and to abandon the estate. Immigration followed of Indians, Chinese and even of Blacks from Africa and wasteful expenditure of vast sums of public money exhausted the Treasury and further embarrassed the economy of the country.

42. Edmund Burke "Speeches and letters on American Affairs". Taken from "On conciliation with the Colonies" delivered 22/3/1775.

In the circumstances of Jamaica in the times immediately succeeding the abolition of apprentcieship, that sensible object was limited to one crucial economic issue - how far by a system of labour that was in fact free might the cultivation of the sugar estates be successfully pursued. T here was no question which generated more anxieties than this. Recollections, passions, prejudices, brought from a different frame of society rankled in men's breasts - and clouded their minds. Yet there was no question which profoundly involved the transquillity, the welfare and the prosperity of the whole colony. Freedom had strong economic overtones. To the labourer, it meant the non-exploitation of his labour by any methods or designs which savoured of compulsion. To the planter, it meant the security of his investments from ruin by sudden and capricious or designing withdrawal of labour. These freedoms were complimentary or at least they were not inherently conflicting, nor beyond the scope of law and the judiciary to compose.

Law. It has been seen that even before the end of apprenticeship, the half-slave half-free apprentice had been enquiring whether "in freedom there would not be gentlemen from England to see them righted."[43]. Men turned instinctively to law, not as to a bundle of legal doctrines exciting their intellect,

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43. See ~~page~~ Supra

but as to a practical and serviceable device for the solution of a social and economic need.

The state of existing legislation, however, on the subject of master and servant, as on other related matters had derived from conditions of slavery and of apprenticeship, and was outdated by social changes. "All our laws are vague and unsuited to this civilised age"[44] declared Stipendiary Magistrate Walsh. To the Governor "a sweeping Act of Parliament" was necessary to abrogate forever all the Statute Laws of the West Indies and to substitute those of the Parent State..... for many of what have been called our free Laws or Laws passed by the Powerful for the low whites, are quite as oppressive as any Slave Laws"[45] and even the planters "were sensible of the many evils which loudly call for laws to remedy them."[46].

Failing to discharge its role as the expression of social needs, law became a dis-service to society, and in the context of a society of mixed racial groups, an instrument of oppression - 5 W 4 C 2 "for enlarging the powers of justices in connection with masters and servants" "acquired a new and very objectionable character in consequence of the abolition of apprenticeship"[47]

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44. CO 137/238 Walsh to Smith 2/4/1839.
45. CO 137/230 Smith to Glenelg 13/4/1838.
46. Hansard Third Series,46, 9/4/1839 p.1246.
47. CO 138/62 Glenelg to Smith 29/9/1838.

whilst by the Vagrant Law, enacted against the lawless soldiery of General D'Oyley, "a free black man can now be flogged from parish to parish till he finds a settlement".[48]

The Judiciary The function of the judiciary as the bastion of freedom was circumscribed by the state of the law and by its own out-moded composition and structure.

Judges were obliged to administer the law as they found it and to make the design and meaning of the law-giver the rule of their judicial conduct. This admirable principle, however, was rendered absurd inasmuch as several of the judges in the superior and inferior courts of the island, being members of the Legislature, were themselves the law-givers. Being drawn from the proprietary body, also, the judges had interests to promote by the vigorous execution of the letter of the laws as they then existed, and thus in the decisions of the courts the hand of the judge was rendered indistinguishable from that of the planter.

Further, where the administration of the courts, was not, or at least did not appear to be, partial, it was either inaccessible to the poor by reason of the cost of litigation,[49] or delayed to rich and poor alike, because its existing structure, calculated to the requirements of a slave society, had not been altered to suit the altered state of society. "The Act which abolished slavery having annihilated the twenty-three slave courts

48. CO 137/230 Smith to Glenelg. 13/4/1838.

49. See supra.

in which all offences committed by slaves were tried, the superior Courts have had to do all the work which had before been done in them without any alteration being made to meet this additional Crown business. No less than 350,000 persons were brought within the jurisdiction of the supreme and the two Courts of Assize by the Act of 1834. Accordingly the necessity of delivering the gaols almost amount to a denial of justice to the suitors as they can never calculate on their causes being tried during the Court in which they should be disposed of, and thus great delay occurs in disposing of questions and great expense is entailed on parties litigant, from the necessity of bringing witnesses to the Courts several times."[50] In addition, "the inadequacy of time is productive of either hurry or delay and if the Court does not suffer in its credit, it is impeded in its vigour or diminished in its certainty."[51]

The legal profession, though considerably improved in professional competence,[52] had compromised its integrity by its attachment to the planting interests[53] and could not command

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50. CO 137/240 C J Rowe to Smith 1/12/1838.

51. CO 137/238 Richard Hill to Smith 2/4/1839.

52. Since the early thirties of the 19th century its numbers had been gradually reducing.

53. "As all the Counsellors, with the exception of Mr. Middleton and Mr. MacDougall were planters, delicacy prevented my consulting Mr.Batty, Mr. Panton and Mr.Edwards on the opinion of the Attorney General on the issue of Rent". CO 137/230 Smith to Glenelg 10/11/1838.

the confidence of the mass of the people as defenders of the liberty of the subject.

Because of the conjunction of laws unsuited to the general needs of society and a partial, expensive and inefficient legal system, the basic political features of slavery had remained unchanged, namely the effective oppression under law of the majority by a minority of the people distinguished from the former by physical distinctions of colour and national origin and alienated from them by inveterate feelings. "Liberty, my Lord, is still but a name in Jamaica and the most dreadful oppressions are exercised against the peasantry by forcibly ejecting whole families from their dwellings, distraining their goods and driving them to despair."[54]

Political Government. The law and the judicature, being out of accord with the economic and social changes of the time, were in urgent need of reform, and men turned their attention to the Legislature, and in particular to the Assembly in whom the power of reform exclusively resided. The composition of that Body, however, the character and reputation of its numbers have already been noticed, "The intent object and the key-stone of all their late perverse conduct" - a reference to their resolute refusal to do any business - was that "The bulk of the people should be placed again in slavery."[55] Such was the state of the

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54. CO 137/230 Smith to Glenelg. 10/11/1838.
55. CO 137/230 Smith to Glenelg. 24/12/1838.

electoral law that any reference to the constituency was sure to be unproductive of any change in the representation. "A constituency which may be computed at about 1500 or 1600 voters for the whole island, have returned - and will continue to return the same members who deny the authority of the mother country, while upwards of 300,000 of her Majesty's free and loyal subjects are totally unrepresented: and my appeal to obtain for them common laws of protection as labourers, has been totally disregarded."[56] The reform of the electoral system, indeed of political government itself, had become the ultimate issue in the struggle for freedom.

Transcendal Power. All domestic resources of legal, judicial and political power having bee n exhausted in vain in the struggle for freedom, the superior authority of an external power was, having regard to the realities of colonial polity, invoked. The Imperial measure had contemplated all necessary reforms. The constitution, the Judicature, the laws, particularly those affecting masters and servants, the electoral system, the poor, vagrancy, the militia, were all to have been the subject of revision, but "the transcendal power of Parliament was an arcanum of empire which ought to be kept back within the penetralia of the constitution. It should not be produced on trifling occasions. It should be brought forward only in the utmost extremity of the state, where other remedies had failed to

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56. CO 137/230 Smith to Glenelg 24/12/1838.

stay the raging of some moral or political pestilence."[57.]

Jamaica did not qualify for this exceptional display of the imperial sword. The final instruction to emerge from the anatomy of freedom was clear. Slavery may be abolished by an external power, but real freedom, the practical realisation of it, can be had, not upon a platter, but only by the exertions of those who strive after it.

(ii) The legal system in the post-emancipation society.

In the decade which succeeded the Report of the Commissioners of Legal Enquiry events within the colony had developed with such rapidity as to have out-moded the premises upon which the recommendations of that august Body had been founded.[58.] The sudden conversion of the mass of the population from chattels to men and their investment with the privileges and responsibilities of free men had set in motion forces of an economic, social and political character, so new and so profound in their consequences as wholly to have transformed the context in which reform of the legal system had hitherto been regarded.

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57. Hansard Third Series. Vol.47 pp.767-8.

58. "Without going into the general question of slavery in the abstract, or the comparative condition of slaves with that of free labourers and the possibility of converting them into such in the colonies (which questions, however important, were not within the scope of our commission and instructions, and on which one, therefore, do not feel ourselves authorised to deliver any opinion, as Commissioners in this Report....." Commissioners of Legal Enquiry Op.Cit.p.115.

Economic considerations "It was one of the peculiarities of slavery that it needs not the existence of laws which in free societies are requisite to regulate some of the most important relations of life. In the state of slavery, masters provided for the poor. There was no vagrancy but that of runaways. The Acts which society punished as crime in free men were with exceptions merged in the offence to the master and the greater part of the criminal code was consequently superfluous, the master taking the place of the government in adjudicating on crime and administering punishment.[59] The disputes between slaves, legally incapable of entering into contracts or undergoing civil injury, were matters regulated by the paternal jurisdiction of the master. The functions of police were those of merely supplying physical force to enforce that jurisdiction. Nor did the State interfere with the education, hardly with the religious instruction of the slave".[60]

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59. The persons who pretend that crime has increased in this community wilfully disguise from others a fact known to themselves, that none but enormous and atrocious offences were formerly subject to judicial enquiry and punishment; all crimes of lower grade were visited by domestic discipline, when they affected the interests of the proprieties; when they did not, and the public only was injured, the master rarely gave up a delinquent slave to justice, except in cases which subjected him to the penalty of transportation or death, in both of which instances the owner was reimbursed for his loss; in all others he was deprived for a time of the services of his dependant. CO137/237 Reports of Ramsay, Baynes, Kerr and Jackson Stipendiary Magistrates to Smith 12/1/1839.

60. Hansard Third Series V45 pp 825-6 (1839)

In apprenticeship, the great body of the half-slave half-free people had remained bound in the greater part of their social relations by the ties of that curious statutory relationship, whilst the incipient new responsibilities of the State were neglected.[61]

In freedom therefore the State had still to provide what it had previously left to the master - it had to provide for those of whose support it had relieved the master and to regulate the question of pauperism and of vagrancy. It became its duty to provide the education by which alone the ignorant negro together with the rest of society, might not only share honourably the privileges, but also discharge creditably the responsibilities of freedom. Public hospitals would need to replace plantation hot-houses, public gaols[62],

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61. In 1836 Sligo had pressed upon the assembly the need to establish more Courts of Assize in view of the increase in the number of cases brought into the Common Law Courts on the abolition of slavery. CO 137/27 p.69 Burge to Glenelg March 1836. Another plan of Sligo was to appoint two qualified judges of the Supreme Court to be remunerated out of the fees to be saved by a commutation of the salary of the Registrar in Chancery then paid by fees CO 137/217 pp.291-2. After the decision Mason v Oldray in 1837 another effort was made to replace the lay judges of the Supreme Court by qualified men and the Attorney General was asked to draw up a plan CO 138/59 pp 93-5. For want of funds these plans all came to nought: "Since the Act of general emancipation..... not one measure of essential importance to the cause of freedom, to awaken the confidence and industry in the apprentice..... or to reform the administration of the courts..... have emanated from the House of Assembly". Resolution of Freeholders at Spanish Town 16/4/1836 Supplement to the Watchman CO 137/218

62. CO 137/220 Smith to Glenelg 13/4/1837 "One of the many evils of slavery has been the neglect of all such buildings beyond the immediate object of personal security, for they were not resorted to as places for the punishment and reform of prisoners, because the individual power of masters over slaves gave them more prompt means of punishment without incurring the expense of prison maintenance or the loss of labour. All the prisons of the West Indies will for these reasons be found bad compared to similar institutions in free countries".

the domestic places of incarceration. Without the aid of an efficient police the criminal law could not be properly administrated, nor the orders, judgments and decrees of the courts respected. A Civil Service[63] would have to replace the system of patentee-ism[64]. Sanitation, roads[65], bridges, public buildings[66], all these and many others now contested with reform of the administration of justice a place among competing items on the lengthening list of government expenditure, thus giving rise to the need for a careful assessment of priorities[67].

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63. As early as 1843 "a confidential report of the qualifications of the respective candidates for public employment within the colony" was being sought by the Crown - vide CO 137/275 Elgin to Stanley 3/X/1843.

64. This system still had its strangle-hold on three vital offices, namely Island Secretary, Clerk of the Court and Crown and Provost-Marshal.

65. These remained bad for almost another century as a result of which "going Circuit was no jaunt of pleasure" Alan Ker Puisne Judge CO 137/518 (1884).

66. Some parishes were not provided with Court Houses. In the issue of the St. Jago Gazette appeared a notice of the holding of the Court of Quarter Sessions and Common Pleas at Miss Darcy's Tavern Port Maria on the 3rd of January 1821-- vide CO 137/152.

67. Even in the days of slavery the importance of an efficient system of administration of justice to the economy was appreciated "Obstruction of justice will expose His Majesty's Government to dishonour and distress, destroy and private credit and Trade 2Report of Committee of the Assembly (1740) CO 140/23 p.521

These financial problems emerged at a time of growing economic embarrassment in the sugar industry, the major source of the island's wealth. With the abolition of slavery, child-labour on the plantations gradually ceased[68]. During apprenticeship, hired labour, when obtainable, did not sufficiently supplement apprenticed labour as to restore the man-hours of work customary in the days of slavery. When apprenticeship ended many women withdrew from wage-labour to give attention to domestic matters[69], whilst planter-policy of combining rent and wages together with ejectment or the threat of ejectment had recoiled upon their own head by destroying the negro's emotional attachment to his provision ground and driving him to acquire land of his own[70]. Reduction in the supply of labour and rising costs, unaccompanied by any rapid development of mechanisation in agriculture, led inevitably to a rise in the costs of production and a lowering of output. Further at a time when many estates were going out of production, free-grown Jamaica sugar had to compete with slave-grown sugar of Cuba and Brazil[71].

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68. "No one who knows the utility of children for planation work can imagine that the planters will forego this assistance, if they can get it" CO 137/293 - 20/9/1847

69. CO 137/237 Smith to Glenelg 6/1/1839 "There was the same senseless clamour against me for advising the poor women not to perform heavy field labour (cane-hole digging) which in the apprenticeship particularly had caused the premature loss of thousands of children. My answer is that the first step to improve the civilisation of the negro in the West Indies is to raise the condition of the women. I preferred the dictates of humanity to the interest of short-sighted planters".

70. See Murray "Free Jamaica 1838-1865" p.20

71. "The development of the rail road - the first was constructed in Cuba in 1837 - enabled the Cuban planter to enlarge his plantation, increase his output and reduce his costs of production, while the Jamaican planter was still asking for protection and labour" Dr. Williams Op Cit p.151-2.

The public Treasury too had been in serious plight for sometime. In 1832 the island was already bankrupt.[72] Island cheques were valueless. "If by a decree as Chancellor I was to set any portion of these monies (Suitors' monies in Chancery) free, they could only be now repaid in island cheques by which at their present depreciation a very heavy loss would occur to planters".[73] In April 1838 the public debt stood at nearly £1,000,000, including £500,000 sterling lent on estates and to the island by the mother country.[74] Reduction of the salaries of public servants had been embarked upon.[75]

Greater economic perils loomed on the imperial scene where for a long time winds of change had been blowing which had all but overthrown the old colonial system upon which the island's economy had been built for almost two centuries. Britain had emerged as the world's first industrial power. Capitalism had overthrown mercantilism and laissez-faire was about to do the same to monopoly and protection, and West Indian

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72. Burn Op. Cit. p.25

73. CO 137/188 Mulgrave to Goderich 2/2/1833

74. CO 137/227 Smith to Glenelg 23/4/1838

75. In 1833 the salary of the Chief Justice was lowered from £5,600 to £4,000 p.a. The lowering of the Chief Justice's salary was not an isolated act the Governor reported "for they (the Assembly) are lowering the salaries of many Officers dependent upon them CO 137/189 Mulgrave to Secretary of State 1833.

Colonies, once the darlings of the Empire, were about to become an anachronism[76]. When in 1832 the Reform Act had swept away the rotten boroughs and thereby adjusted the balance of political power to the realities of the changed economic order, the handwriting on the wall spelt out the inevitable decline of the once all-powerful West India Interest[77].

All these events carried the unmistakable message that in public expenditure in the colony rigid economy was imperative. Imperial solicitude formulated and urged two complementary lines of policy, namely (a) "measures consistent with the due efficiency of the Public Service should have for their object the enforcement of economy in every branch of public expenditure (b)[78] "it was necessary, nevertheless to make adequate provisions for the discharge of the effective and laborious public offices which have not hitherto been placed in that respect on a proper footing."[78] To these was to be added the most careful evaluation of priorities.

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76. Merivale to Oxford Undergraduates 1839 "the rapid tide of sublunary events is carrying us inevitably past that point at which the maintenance of colonial systems and navigation laws was practicable, whether it were desirable or not. We are borne helplessly along with the current.....the monopoly of the West Indian Islands cannot stand". See Dr. Williams Op.Cit.P.135. By 1849 the Navigation Laws were repealed.

77. See Chapter 3 Foot Note 84.

78. CO.138/61. Glenelg to Smith 31.1.1837.

Judged by these standards of economic restraint, the prevailing system of theadministration of justice, particularly in the superior counts of law and equity was neither efficient nor economical, and, as a matter of priority, urgently demanded reform so that it could fulfil its social role of guaranteeing the protection of person and property and thereby creating a proper climate for the restoration of commercial credit and economic stability.

The Supreme and Assize Courts. These Courts, as we have seen, sat each three times per year, two weeks at a time. In respect of these nine annual sittings, occupying less than a third of the year, six judges resident in their counties and one itinerant judge received salaries amounting to £7,400. Except when he did not sit, the whole judicial burden fell upon one member only of the entire judicial staff, the Chief Justice "who had not only to decide what is the law, being the only professional member, but sometimes to pronounce judgment upon the correctness of his previous decisions." In addition he alone without special appropriations for travelling or subsistence undertook the judicial peregrinations around an island still haunted by desease and death. "I am up and down the country for nine months of the year" he said, "attending Assize and Supreme Courts. My salary of £4,000. will hardly meet my expenses and I could not make a pension out of it after a service of fifteen years." [79].

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79. C.J.Rowe to Stanley CO 137/189 - 25/X/1833.

Commerce was hampered by the dreadful state of arrears in the Courts. In September 1839 the Chief Justice reported "The list of remands in the Supreme Court has more than doubled, and the length of time which elapses between the bringing of actions and their trial amounts really to a denial of justice to the suitors living in the county of Middlesex, defeating as it does altogether, the priority law which was passed for the purpose of placing all judgments obtained in the three counties on an equal footing." [80]

Thus out of a judicial establishment of seven paid judges, six of no professional competence whatsoever, with no acknowledged responsibilities and resident in their counties, received nearly a half of the public appropriations for salaries, the only professional judge being underpaid and over-worked, whilst the Courts over which he presided impeded commercial business by their inadequacies, and their decisions failed to command respect or confidence because of the preponderance of remunerated amateurism.

The Court of Chancery. The importance of this Court lay rather in the quality than in the quantity of the work that came before it. "There" it was reported " a greater value of property is litigated than in any other"[81]. but "there being no separate Chancery Bar the Chancellor cannot sit in the Chancery Court for

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80. CO 137/240. Rowe to Higginson. Sec'y to the Governor 9/3/1839.

81. CO 137/182. Stamp. an aggrieved suitor in Chancery to Goderich 21/4/1832.

more than ten weeks in the year, six or eight weeks in the year being the longest period hitherto filled by the sitting of the Chancery Court "[82]. Thus neither efficiency nor economy was served by the periodic distractions of the vice-regent from the weighty duties of his principal office, whilst as Chancellor, albeit remunerated by fees, he attended incompetently to the important but brief judicial duties which might without additional cost to the State have been performed by the substitution of a professional judge for the paid laymen of the Supreme Court Bench.

The intimate connection between economic stability and the legal system justified reform of the latter on the basis of a priority expenditure. It had been perceived by the Assembly as far back as 1740 that "none will venture his fortune, or any part of it, in trade to any country or place where ready remedies are not provided and secured for private injustice, and where he knows others are sunk in poverty and despair for want of such remedies; a merchant or tradesman will not care to be at the mercy of the persons he deals with, or depend upon their resolutions to pay him or not as they will choose, he must have it in his power to sue them, and form to himself a certainty that he will be paid by such suit, otherwise he will not have any commerce with them. Nor will people be animated to acquire properties or become settlers among us, when they find they cannot defend their acquisitions; to possess

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82. CO 137/248 Metcalfe to Russell 15/4/1840.

in security the effects of their industry, is the most powerful and reasonable motive for pwople to be industrious, and where property is precarious, labour must languish".[83] In the circumstances of freedom and against the background of the economic situation of the colony in 1840, the roll of the legal system, as an expression of social need could not be over-emphasized.

Social Implications. In the amalgam which was the free Jamaica society, ignorance, prejudices, and mutual distrust were at once the major social characteristics and bane.

Many of the worthier whites had withdrawn from public life,[84] others were gradually leaving the island altogether, leaving behind the planting attornies and people of the lower orders such as overseers, book-keepers and small proprietors, all decayed or decaying in fortunes, without education, culture, or morality.[85]

Want of education had retarded the coloured peoples in their social advance. "As a race they are not in any respect deficient in apprehension or natural quickness of

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83. Co 140/23. p.521. Report of the Committee of the House upon the delays and arrears in the administration of justice in the Court of Error in 1740.

84. CO 137/183/40. Mulgrave to Goderich 13/11/1832 "The resignation on the part of the most respectable members, disgruntled at the state of things, have of late frequently occurred."

85. At this time, as it was in the early 18th century, the cry was renewed concerning "absentees". "The only means" wrote S.M.Oldrey "of preserving that splendid colony (if it be not too late) rests jointly with the Govt. and the Proprietors - but to Jamaica they should go and look into their own interests..... become the representatives of the people..... " CO 137/224. Oldrey to Glenelg 11/8/1837.

intellect.....but there is a want amongst them of that common understanding which results from a long continuance of homogeneous renewals of a people. Their faculties are deficient in solidity and sequence.....they have had only in rare instances the advantages of high or good education. They have no traditional sentiments unless it be a sense of injury, and a feeling of resentment, more instinctive than malignant against white persons "[86]. By legislation [87] and in the bestowal of public offices they suffered discrimination at the hands of the whites, one of their members having complained in 1837 that "since the departure of Lord Sligo (in 1836) I have not seen the name of a single coloured person gazetted to a stipendiary office. I have seen a very few made officers of militia, and one or two justices of the peace, but not one appointment to an office of emolument" [88].

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85. Continued.

"Another cause perhaps of the want of influence of the Government over the local legislature is the absence of nearly all the wealthy proprietors of the island..... As however there were resident proprietors who acted with the House of Assembly in its violent career during the recent struggle with the Government it is not certain, although it seems probable that a large number of wealthy proprietors resident in the island could give greater strength to the Government" CO 137/255. Metcalfe to Russell 12/2/1841.

86. CO 137/313. Grey to Pakington 26/6/1852.

87. The Act to regulate the practice of Solicitors 1837 ostensibly designed to protect the profession, was intended to deprive coloured persons from earning a livelihood by copying documents from the records of the several courts of the island, a service to which many had devoted themselves in the times when they were prevented by law from becoming Solicitors CO 137/224. Russell to Glenelg 10/5/1837.

88. CO 137/224. Russell to Glenelg 10/5/1837.

Of the emancipated blacks who constituted nine-tenths of the population, one in forty could read and in fact they were, despite the laudable labours of the Dissenting Bodies, still "half-savages". Poor, their weekly earnings, after deductions for rent, were trifling indeed. In ignorance and poverty, freedom stood in danger of becoming merely nominal, and the rights and privileges of free men, an apparition. In apprenticeship, however, "the negroes had looked to law, because law as administred by thestipendiary justices gave them a feeling of security,[89] and as free men they cherished similar expectations. It was noted of them that "there does not exist in any part of the world a labouring population less likely to submit to oppression without making any practicable exertion to resist it. They are fully sensible of the rights of freedom and having stepped into them suddenly, they are more tenacious of them in every tittle, than those who have grown up in the possession of those rights from infancy to manhood. At the same time, having been taught by circumstances and the instruction of others to regard their former masters as their enemies, they are devoid of that habitual deference and respect for their landlords and superiors which the rural population of other countries generally imbibe. I have not the slightest apprehension that they would submit to injustice without struggling for redress".[90]

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89. CO 137/240 Russell to Metcalfe 29/1/1840.
90. CO 137/240 Metcalfe to Russell 21/12/1839

The primary social problem, therefore, was the admission of 350,000 people into the rights of freedom without disturbing the peace and order of society,[91] and in doing so "it was of the first importance that the mass of the people should have justice - should be convinced that they have it, and that they have been given a freedom which is consistent with obedience to authority and reverence for the law."[92]

In the peculiar social milieu which was Jamaica, however, riven by racial prejudices, factious, ignorant and poor, the legal system was in its composition and structure ill-adapted either as the bulwark of freedom or as an instrument for social harmony. An indictment of six counts had been laid against it by the Crown in 1840.

First "existing provisions for the administration of justice had placed that duty, with a solitary exception, in the hands of persons whose previous studies and pursuits in life had given them no preparation for the right discharge of it."[93]

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91. "The recently emancipated people of Jamaica were as much a new people as if they had been recently conquered and required as much care in legislation". Sir Charles Grey, House of Commons, 30/5/1839. Hansard 3rd Series Vol. 45 p.1130

92. CO 137/240. Russell to Metcalf 29/1/1840.

93. CO 137/248/56. Russell to Metcalf 12/2/1840.

Accepted, and even defended by white society for over a century and a half, judicial non-professionalism could find no place in the new social environment, the numerous intricate legal relations of whose members had, in the interest of racial peace and harmony, to be composed by tribunals whose erudition in the law was capable of commanding the respect of all parties.

Second, "in a society of two races of men separated from each other by physical, by political, and by social distinctions, no security existed that the judicial body should be exempt from the prejudices which in such a state of things were inevitable."[93] Of the prejudices to which the Supreme Court, bound by interests to the plantocracy and subservient to the Legislature by common membership, stood suspect there was a final glaring demonstration during the late constitutional crises. In the election campaign that preceded the December Assembly 1838, Richard Barrett, Assistant Judge of the Supreme Court and late Speaker of the Assembly, harangued his constituents thus: "The Assembly has been dissolved because it would not obey the dictakes of a straw-catching Ministry and usurping Parliament. I will never consent to a change in our ancient and free British institution, except to make them more free. With this pledge, I once more offer you my services."[94]

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93. CO 137/248/56. Russell to Metcalfe 12/3/1840

94. From the Morning Journal of November 1838. Barrett died Septr.1839.

Third, "the Courts of the island, and the judges presiding in them, were inconveniently numerous. The consequence was so to diminish the labour of each as to deprive all of the opportunity of acquiring an extensive acquaintance with judicial affairs, and the multiplicity of disconnected tribunals has tended to involve the rules of law in extreme uncertainty by conflicting interpretations of them." 95. The proliferation of the Courts and the consequential distribution of judicial business beyond the point of experimental utility did not answer the requirement of efficiency which was required of the legal system in the new order of things. Likewise, conflicting judgments of Courts of co-ordinate jurisdiction did not tend to promote peace in a country "full of crime or litigation, every man loving law, but few practising justice." 95.

Fourth, "justice was both tardy and expensive - evils certainly not peculiar to Jamaica, but existing there in a high degree." 96. Peace and order in a factious multi-racial society, jealous of its rights, demand prompt justice administred without expense to parties.

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95. CO 137/248. Russell to Metcalf 12/2/1840.
96. CO 137/227. Smith to Glenelg 25/4/1838.

Likewise, the forms and procedures of law should be simple and straightforward, "especially suited to the necessities of our untaught peasantry, relieving them from all those difficulties which beset their ignorance and unacquaintance with judicial proceedings."[97.] Fifth, "that most important branch of the judicial system which was confided to the magistracy had, for a long course of years, devolved exclusively on those who either as individuals or as conspicuous members of the privileged race, had interests to promote or prejudices to gratify at the expense of the great body of the people over whom their magisterial authority was exercised."[98.] It was to remedy this evil that the Crown had sanctioned the retention for a time of the services of a large body of the Stipendiary Magistrates.

Sixth, both the grand and petit juries had been composed exclusively till of late, and even now but with few exceptions,[99.] of those whose descent

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97. CO 137/238. Richard Hill to Smith 2/4/1839.

98. CO 137/248. Russell to Metcalfe 12/2/1840.

99. CO 137/239. Fishbourne S M to Richard Hill 1839. "At the last Court of Quarter Session the business was suspended from the want of a petty juryman to make up the legal number.... I proposed to the Magistrates to call up a negro.....This was objected to on the following grounds: because it was not usual to call labourers to serve as jurors: because the man could not write; and because it was very desirable to keep up the respectability of juries. I replied that Jeremiah Russell, a white man, then serving on the grand jury is a labourer..... My proposal was rejected and a white man, who is as frequently drunk as sober, was found and sworn. An exclusion so complete affecting about 10,000 blacks in the parish is no less striking than objectionable. It is one of the means silently enforced for maintaining invidious distinctions between this class and other free inhabitants of this parish and for perpetuating exclusions and disabilities."

was either wholly or chiefly European to the exclusion of those whose origin is entirely African. Of the evils which resulted from this circumstance it would be easy to draw from authentic and recent records, a very formidable catalogue."[100].

Political Implications. A grim reality of political life in colonial Jamaica was that for all practical purposes the House of Assembly was the only body by the exercise of whose law-making powers any legal reforms could be effected, or any funds provided or supplies voted to render such reforms a practical reality. As in slavery, so in freedom, legal institutions were founded upon the political constitution, and the implications for the legal system of law-making and revenue and expenditure processes of the Popular Branch of the Legislature were profound.

(a) The Law-making Process. We have already seen how in the course of the 17th and 18th centuries the Assembly had progressively eroded away the legislative powers of the Council.[101] In the early 19th century suggestions to revive them were considered "vain"

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100. 137/248. Russell to Metcalfe 12/2/1740.

101. See Chapter 3.

by one Governor,[102] whilst the attempts of two others[103] proved unsuccessful and partly occasioned the recall of one.

At the end of the third decade of the 19th century, therefore, the position was such that "all enactments originate in the House of Assembly which has jealously denied the claim of the Legislative Council to introduce bills and will not entertain any but its own ..... and proposals or advice, or suggestions on the part of the Government unless they be of a general and vague sort are in danger of being regarded as breaches of privilege.[104] The consequence of the "abrupt separation.....between the Government and the Assembly, admitting of no mixed influence of each authority upon the other and of none but the most formal and guarded communications,[105] was that schemes of legal reform upon which

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102. CO 137/63. Manchester to Bathurst 13/11/1826. "Your Lordship is of course aware that no legislativemeasure originates in the Council. This privilege has been so long out of use that it would be in vain to attempt to revive it now."

103. CO 137/183/49. Mulgrave to Goderich 16/12/1832. "I have had to dissolve the Assembly over the question of the right of the Council to originate bills. I think it is a good thing that Bills should sometimes originate in the Council where there is some legal knowledge". The two others were Mulgrave and Sligo whose departure from Jamaica was not unconnected with troubles with the Assembly. See Chapter 7.

104. CO 137/3)2. Governor Grey's report on the State of the Island d/d 12/2/1849.

105. CO 137/249. Russell to Metcalfe 26/11/1840.

the Crown had bestowed the most anxious attention as well as recommendation based on their experience which the Chief Justice and Attorney General, members of the Council, could offer, could not reach the official notice of the Assembly.

In the House no person was appointed to prepare or revise bills, and a public bill was generally prepared in committee or by the member proposing it.[106] Any Law, not to speak of legislation dealing with legal reform, which was the product of such a mode of law-making, was not likely, even among the best-intentioned legislators, to be scientific, precise, clear or adequate in its contents. From among planters "absorbed in their overweening notions of their own consequence"[107] legislation arrived in the Council "in that crude and unintelligible form in which the ignorance or carelessness of the Members of Assembly often suffer them to pass".[108] Rather than incur the risk of a stoppage of supplies which amendments of such legislation in the Council would precipitate "the Governor and Council are induced.....to humour the Assembly by passing ill-digested bills which mutual conferences, if it could be ventured to propose them, might easily improve into wholesome laws".[109]

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106. Commissioners of Legal Enquiry Op Cit p.44
107. CO 137/183/49 Mulgrave to Goderich 16/12/1832
108. CO 137/183/49 Mulgrave to Goderich 16/12/1832
109. CO 137/302 Gov. Grey's Report on the State of the Island d/d 12/2/1849. The Stamp Act of 1843 (6 V C 36) was described by the Chief Justice as "so obscurely worded and carelessly drawn that it is next to impossible to reconcile all its clauses". See Morris's (Jamaica) Reports 1836-1844

Finally the omnipotent House, whilst conceding that the Crown had a right to object to the principle of a Bill or of any enactment in a Bill, had asserted that if the principle be sanctioned the details in carrying it out were properly the business of the local legislature and were prepared in any contest with the Home Government to back up this stand with the ultimate weapon of refusing supplies.

Reserve and Expenditure Processes. Revenue, the manner of its collection and the principles affecting its appropriation are no doubt matters of the first importance in the development of any society. In Jamaica where, as we have seen, freedom had transferred numerous responsibilities from the master to the State, proper exploitation of available sources of revenue, and their efficient and economical collection, could in point of importance be equalled only by their judicious appropriation, according to priorities, upon competing social needs.

References have already been made to the House Committee of Accounts and to the engrossment by the Assembly of all taxative and supply powers.[110] With respect to taxation " all the Acts for raising any public monies were of an annual nature and when any difference arose between the different branches of the legislature which could not be at once adjusted, the Acts expired, revenue was lost, the public service was disorganised, public officers were rendered insecure in their offices and irreparable injury was occasioned to the public credit",[111]

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110. See Chapter 3.

111. CO 137/319 Newcastle to Barkley 16/8/1853

On the side of supply, any member was empowered to make application for a grant of money, a system which sacrificed efficiency, economy and a sense of priorities to the necessities of mutual gratification of members' wishes. In addition to the Committee of Accounts the Assembly had also constituted themselves (sometimes in conjunction with the Council) into a Board of Works, Commissioners of Public Buildings and of Forts and Fortifications.

This system of taxation and expenditure as well as its injurious effect on social and economic development came under the scrutiny of the Crown. "It is opposed to maxims of Government almost universally acknowledged and adopted. The union of Legislature and Executive Junctions in one and the same Body is contrary to all received principles of government. In this country a grant of money cannot be proposed to the House of Commons but by a responsible public servant. In Jamaica any member of Assembly may propose a grant for any purpose. In this country the appropriation being once enacted, the conduct of the expenditure in conformity with the enactment is committed in every stage to responsible officers. In Jamaica the Assembly appointing itself now a Board of Account and now jointly with the Governor and Council a Board of Works supervises and conducts the expenditure, makes the contracts and audits the accounts..... Again in this country the taxes proposed by the Government when enacted by the Legislature are levied by responsible officers of Government according to Law. In Jamaica the House of Assembly having enacted the taxes transforms itself into a Board of Account and in that character appoints the Collectors, supervises the collection and

and exacts or remits the levy at its pleasure. Financial responsibility is thus brought to travel in a circle within a body of 47 members.[112] acting sometimes collectively, sometimes by a small quorum..... Such a system is notoriously certain to lead to the most irregular and wasteful management of the public revenue"[113] "It must always involve..... extreme unfairness, looseness and partiality in the collection of taxes, and excessive waste and corruption in public expenditure".[114]

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112. With the creation in 1841of the parish of Metcalfe the number of Assembly men rose from 45 to 47.

113. Earl Grey to Gov. Glenelg 13/4/1851

114. CO 137/319 Newcastle to Barkley 16/8/1853 10G 4 C 24 and 10 G 4 C 30 make illuminating reading. Under the former "An Act appointing Commissioners of Account" J. R. Jackson and other members of Assembly were appointed Commissioners. Under the latter "An Act for raising a tax by the poll....." the Receiver General was directed to pay J. R. Jackson and other Member of Assembly various sums for the execution of various public works. Under this latter Act the Receiver General was directed to pay Richard Barret Custos and Asst. Judge of the Supreme Court sums totalling £2,500 for his labours as a builder of public roads and bridges. This legislator/judge's spirited defence of "our ancient and free British Institutions" is in the circumstances hardly surprising.

Reformation of the political system, however, so needful as the indispensable pre-requisite to legal and other improvements, was unhappily not within immediate realisation. In the view of the new Governor who "loved popularity and perhaps was not unwilling to make some sacrifice to obtain it"[115] to interfere with the various Commissions of Works, Accounts, Forts and so on would be to court truculence without any visible prospect of benefit" [116].... for it was not to be expected that the Assembly would be readily induced by any means to relinquish the assumed rights and privileges or the actual power which it had acquired during the progressive formation of the Jamaica Constitution".[117]

The Imperial Government, not unmindful of the recent defeat of the measure to suspend the Jamaica Constitution, acceded with reluctance to the Governor's policy of conciliation. "Here" it was said "is a Legislature which cannot be got rid of - which must exercise a most extensive authority for evil or for good - which may be kept in continued check by the superintending power rejecting its Laws or which may be soothed, flattered and conciliated by an unhesitating acceptance of its enactments. They cannot be destroyed or much enfeebled, but they may be coerced or coaxed. Sir Charles Metcalfe's recommendation is in favour of pursuing the latter

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115. Note of Sir James Stephen on CO 137/256 Metcalfe to Russell 2/8/1841
116. CO 137/249 Metcalfe to Russell 23/7/1840
117. CO 137/255 Metcalfe to Russell 12/2/1841

course..... Now that the great abuse is extinguished we should do more good to the objects of our solicitude by propitiating the goodwill of the Assembly even at the expense of acquiescing in many bad measures than we could do by the most inflexible exercise of the right of rejecting all such measures at the expense of one protracted quarrel with that House".[118]

It was in this climate of official political opinion and policy that the Assembly had resumed legislative functions. A Committee was set up " to enquire and report what enactments are required for making provisions for the better administration of justice in the several courts of the island".[119] In April of 1840 the wisdom of the Popular Body, uninformed and unenlightened by the reflection of the Crown on the character of the reforms desirable in the legal system in the context of freedom, produced 3 V C 65 "An Act to make provisions for the improvement of the administration of justice in the several courts of this island and for other purposes". It was only the first of many bad measures affecting the legal system which was to be "acquiesced in" until the abolition of the Assembly itself a generation later. The Governor, later to be charged with "conciliation with the West India Body both here and in England".[120] forwarded it to the Crown with a plea not to disallow same, having

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118. Note of Sir James Stephen on CO 137/256 Metcalfe to Russell 2/8/1841

119. The Chief Justice, an Assistant Judge of the Supreme Court T. J. Bernard and the Attorney General were directed to give evidence before the Committee of the House.

120. CO 137/355 Darling to Newcastle 6/6/1861

resolved so far as his constitutional relations with the Assembly were concerned "to make the best of things as they are".[121]

121. CO 137/255 Metcalfe to Russell 12/2/1841

CHAPTER IX

THE RE-MODELLED JUDICATURE 1840 - 1856

The innovations introduced by the Act 3 V C 65 affected the Superior Courts of Law and Equity as well as the Courts of Quarter Sessions and Common Pleas and lasted for sixteen years. Together with some subsequent ancillary measures this Act will now be discussed, followed by a critique of the changes wrought in the legal system and of their impact against the background of changing social and economic conditions.

The Courts of Chancery and Ordinary.

Section 1 of the Act empowered the Governor to appoint, by commission under the broad seal of the island, a barrister-at-law of at least five years' practice at the Jamaica Bar at any time previous to such appointment to be an Assistant to the Chancellor and to be called "Vice-Chancellor of Jamaica". As such, he was invested by the Act with all the existing judicial and ministerial powers of the Court of Chancery either as a Court of Law or as a Court of Equity or "such as shall hereafter be submitted to the jurisdiction of the said Court or of the Chancellor by

by the special authority of any Act of this island." Section 3 conferred upon the decrees and orders of the Vice-Chancellor the same authority as like orders and decrees of the Court of Chancery, subject to the right of appeal to the Privy Council. By the following Section the Vice-Chancellor was empowered to sit with the Ordinary as surrogate whenever required to do so. Two years later measures were taken to abridge the length of proceedings [1.] in the Court of Chancery, whilst in 1852 [2.] actions in the court were begun by petition rather than by bill or information, viva-voce examination was allowed for the first time, and the Vice-Chancellor was authorised, with the consent of the Chancellor, to make rules for the court.

The Supreme and Assize Courts. Under Section 11 of the Act the Supreme Court was re-constituted. It was thereafter composed of the Chief Justice and two assistant judges "who shall have been admitted to practice and shall have practiced at the Bar in the superior courts of this

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1. 6 V C LVI. An Act to remedy great delays and expenses in the Court of Chancery by effectuating the service of process out of the jurisdiction of the Court, and by abridging unnecessary length of proceedings thereon.

2. 15 VC 16. The Court of Chancery Regulation Act 1851.

island for five years at any time previous to their appointment" which was placed in the power of the Governor by commission under the broad seal. In the new judges was vested sole jurisdiction over the Supreme Court and they or any two of them composed a Court en banc "with all the powers, authority and jurisdiction now or which have at any time been used exercised and enjoyed by the judges of the Supreme Court."

Three times in each year, beginning on the first Monday in February, June and October, the Court en banc sat at St. Jago de la Vega (Spanish Town) "and not elsewhere" for "a fortnight at each sitting if necessary but no longer." When two judges presided over the Court en banc, the third was required to hear motions of course and such other matters as were disposed of by the judges of the Queen's Bench in England in Chambers.

In view of the restriction of the functions of the Supreme Court to matters en banc a Court of Assize for the county of Middlesex was created and by Section 13 the Governor was empowered to issue commissions of assize and gaol delivery for the three counties to the Chief Justice, the Vice-Chancellor, the two assistant judges of the Supreme Court and to such others as he saw fit, being

barristers-at-law. Courts of Nisi Prius and gaol delivery were required to sit separately but simultaneously under a single judge, each lasting for a fortnight and no longer. In Middlesex the courts convened on the third Monday of February, June and October respectively immediately after each term en banc. For Cornwall, the courts assembled at Montego Bay, on the second Monday after expiration of the two weeks appointed for each of the Middlesex Courts and for Surrey, they met at Kingston, the second Monday after the expiration of the two weeks appointed for each of the Cornwall Courts, next following the February and June terms en banc, and as to the October term en banc, or the first Monday in January yearly.[3]

Motions for arrest of judgment in misdemeanours continued to be heard before the justice who presided at the trial who was however empowered under Section 24 of the Act, if he thought fit, to direct the motion to be made in the Supreme Court, and to require the party convicted to enter into recognizance to appear before the Justice of the Assize and gaol delivery sitting in the country where the indictment was tried on the next occasion after the decision of the judges of the Supreme Court to receive such judgment as the

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3. As per Section 13 of 3 V C 65 as amended by 6 V C 29 S.2. and 13 V C 33 s 2.

justices shall direct. [4] Motions for new trial, however, and applications to enter or set aside non-suit were no longer made before the Assize Courts but were moved in the Supreme Court. [5]

Arrest on Mesne process was extended to include free-holders but was limited in all cases to suits for twenty pounds and upwards. [6] Misnomer [7] was abolished, the plea of non-joinder circumscribed in scope [8] and parties were allowed, subject to the discretion of the Court, to make payments into Court. [9] Amendments of pleadings, submission of special cases for the

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4. 3 V C 65 S 24.

5. 3 V C 65 S. 21.

6. 3 V C 47 (1840) The Commissioners of Legal Enquiry had recommended the abolition of mesne process altogether. See Commissioners of Legal Enquiry Op. Cit p.98.

7. 8 V C 28 S 5 (1844).

8. 8 V C 28 S 2. No plea in abatement of non-joinder as a co-defendant was allowed unless it was stated in the plea that such person was resident within the jurisdiction of the Court and unless his place of residence was stated with convenient certainty in an affidavit verifying such plea.

9. 8 V C 28 S 10. Except in actions for assault and battery, false imprisonment, libel slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant.

opinion of the Court,[10.] and the admission of documentary evidence [11.] were made the subject of statutory regulation. The strict rules concerning the framing of indictments [12.] and the mode of trial of accessories before and after the fact [13.] were relaxed. Juries were in some cases allowed to return alternative verdicts and in 1847 the qualification for jury service was restricted to males between the ages of 21 and 60 who were able to read and write.[14.]

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10. 8 V C 28 S.13 (1844) After issue joined, by consent and by order of any of the judges of the Supreme Court, a party could state the facts of the case, in the form of a special case, for the opinion of the Court.

11. 8 V C 28 S.9 (1844) Judges were empowered to make rules for the admission of documents in evidence.

12. 16 V C 15 (1853) permitted amendment of indictments where errors in the description of places, persons or property were committed, and in indictments for murder and manslaughter it was no longer necessary to state the means or manner of death.

13. 13 V C 7 S.1. (1849) permitted the trial of accessories before the fact in all respects as if he were a principal felon. Section 2 authorised the indictment of accessories after the fact with or after the trial of the principal and whether he be convicted or not.

14. 15 V C 9 (1851) allowed in all civil cases (except informations for recovery of penalties) a majority verdict of three-quarters of the number of jurors and also allowed the trial of civil causes without a jury at all by consent of parties.

Quarter Sessions and Common Pleas. By Section 32 of 3 V C 65 the custodes of the various parishes who by custom had always been appointed to preside as Chairmen of the Courts of Quarter Session and Common Pleas were replaced by professional judges appointed by the Governor by commission under the broad seal of the island. These judges, nine in all, were required to be "barristers of law of two years standing at any of the several bars of the United Kingdom of Great Britain and Ireland or who shall have practised at the Bar of this island for two years at least or who shall be attorneys at law admitted to practice and shall have practised in the Supreme Court of this island for ten years at least before their respective appointments to be and act as Chairmen of Quarter Sessions and presiding judge of Common Pleas.

Each judge was assigned to one of the nine districts [15].

15. 3 V C 65 S.33 (1) Kingston,Port Royal, St.Andrew. (2) St.Thomas in the East and St.David. (3) Portland and St.George (4) St.Mary and St.Ann. (5) Trelawney and St.James. (6) Hanover and Westmoreland. (7) St.Elizabeth and Manchester. (8) Clarendon and Vere. (9) St.Catherine, St.Thomas in the Vale, St.John , St. Dorothy. In 1845 "An Act to provide for the gradual reduction of the number of the Chairmen of Quarter Sessions" from 9 to 6 was passed. This was done as vacancies occurred (1) Kingston,Port Royal,St.Andrew. (2) St.Thomas in the East and precinct Portland,St.George and Metcalfe (3) St.Ann, St.Mary and St.Thomas in the Vale, (4) St.Catherine and precinct Clarendon and Vere,(5) Trelawney, St.James, Hanover,(6) St. Elizabeth,Westmoreland and Manchester.

into which the island was divided, and in addition to their duties in quarter sessions and common pleas, [16.] was required to hold courts for the hearing and determining of all matters of appeal to be made to him from the Courts of Petty Sessions [17.] and from the summary jurisdiction of any justice or justices within his district.

The right of appeal was given "to any person aggrieved by any judgment, order, determination or conviction of any justice or justices of the peace acting under any law in force in this island", and this included appeals against findings of facts as well as on points of law. This right was exercised by serving upon the adjudicating justice or justices a notice in writing of intention to appeal and by entering into recognizance with one surety in any sum not exceeding £10 to prosecute such appeal and to obey any order of the appellate judge to be made in the matter. Within ten days after these formalities were executed, the justice or justices were required to certify the proceedings to the Court of Appeal which was given power to affirm or reverse the judgment and make

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16. By 5 V C 26 (1841) the jurisdiction of Common Pleas was increased to £30.

17. 8 V C 20 (1844) the jurisdiction of justices in actions of debt was increased from £5 to £6.

such orders and issue such processes as were necessary for enforcing the judgment. The Court of Appeal also had power to award costs not exceeding five pounds. Under Section 37 of the Act the Governor was required, after consultation with the custodes and magistrates of the various districts to appoint places convenient to the public for the holding of the Court and for the times of their sitting, and by the following Section the judges of the Supreme Court were empowered to make rules and orders for regulating the practice and proceedings of the Courts. From the Court of Appeal there was a further appeal to the Supreme Court limited however to proceedings by way of certiorari.

Like the Vice-Chancellor and the assistant judges of the Supreme Court the new Chairmen of Quarter Sessions were prohibited from having any connections by attorneyship or trusteeship with estates or plantations. Unlike the judges of the superior courts of law and equity however, they were not expressly prevented from being members of the Assembly nor were there any express statutory provisions for their removal from office. [18] By Section 45 of 3 V C 65 they were not allowed

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18. The Vice-Chancellor and the judges of the Supreme Court were expressly made removable in accordance with 21 G 3 C. and 57 G 3 C 17.

during their tenure of office to practice in any of the Courts of the island, and their principal legal officer, the Clerk of the Peace, was thereafter required to be Attorneys, admitted to practise in the Supreme Court.

(ii) Critique of the remodelled legal system.

In looking to the merits and demerits of the changes effected in the legal system, it is helpful to understand the motives by which those changes were inspired.

Although many planters conceded that in the altered state of society some stipendiary magistrates were necessary and that the business of the courts could not be sufficiently carried on by unpaid magistrates, yet to the planting interests as a whole "the institution of stipendiary magistracy and the majority of its members were objects of rooted dislike". [19.] This attitude, as we have seen, [20.] was rooted in their experiences during apprenticeship. Attachment of the Stipendiary Justices to the Executive, reliance for advice on litigated issues upon the Attorney General and the "foreign jurisdiction" [21.] which they represented, had all helped to transform into implacable

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19. CO 137/240 Metcalfe to Russell 21/12/1839.
20. See Chapter 7.
21. See Chapter 8.

hatred that natural dislike which planters entertained towards anyone affecting to supplant their dominion over their slaves or apprentices. Moreover those Stipendiary Magistrates retained after apprenticeship for judicial services in freedom were "those esteemed best by the Executive, [22.] and therefore "most disliked by the planters."[22.] Further, in the eyes of the planters the Stipendiary Magistrates were responsible for the prevailing want of deference on the part of the labourers to their landlords and employers.

To the labourers, on the other hand, the Stipendiary Magistrates had come to be regarded as their peculiar protectors "a body especially appointed for the security of their freedom and rights, in whom they placed their exclusive confidence." [23.]

For his part the new Governor reflected the sentiments of the planters. "Whatever may have been the advantages produced by the stipendiary magistrates in other respects, they have, I fear, caused or promoted the great evil of discord between the landholders and the labouring population. I should therefore regard the abolition of the stipendiary

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22. CO 137/228 Smith to Glenelg 17/5/1838.
23. CO 137/240 Metcalfe to Russell 21/12/1839.

magistrates as most desirable." [24]

Desire on the part of the politically powerful for the extinction of the stipendiary magistrates had, however, to be weighed against fears of an upheaval by the politically weak but numerous blacks at any sudden attempt to remove their friends and protectors and to re-impose a magistracy of recent slave-owners. "I cannot tell what might be the effect of a sudden removal of the stipendiary magistrates" said Metcalfe. "Its operation on the imagination of the people might produce serious and deplorable consequences, even if no pains were taken to aggravate their despair but I am induced ..... to believe that a gradual reduction is advisable." [25] On the one hand, the planters would be conciliated by the gradual extinction of the stipendiary magistrates, whilst on the other hand the emancipated blacks would progressively become accustomed to the want of stipendiary magistrates, and, it was said, "if any evil should thence arise, it will become apparent before the mischief be either great or irremediable." [26]

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24. CO 137/240 Metcalfe to Russell 21/12/1839. There was a saying among the Baptists to whom Metcalfe was strongly opposed that "Massa's Turtle soup poison Gubna ..... Turtle soup, my friends, is very good but not for Baptists." CO 137/248.

25. and 26. CO 137/240 Metcalfe to Russell 21/12/1837.

It was in this climate of hate for the stipendiary magistrates and of fear of violent reaction on the part of the mass of the people to any sudden withdrawal of that magistracy that the bill for the improvement of the administration of justice was introduced into the House.[27] Of it the Governor said : "It includes a provision for the appointment of Chairmen of the Courts of Quarter Sessions to be nominated from gentlemen of legal education..... If this bill be carried, several members of the House of Assembly will have given their support to it chiefly for the purpose of effecting the removal of the stipendiary magistrates." [28]

With such basic motivation as the fulcrum around which reform of the legal system should revolve, the judicial bench rather than the judicature as a whole engrossed legislative attention. Inveterate social attitudes re-inforced by inveterate defects in the machinery of law-making and of revenue and expenditure then combined to impart to the reformation of the legal system characteristics which may

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27. By a Member for Kingston CO 137/303 Report of speech in the Council in 1849 by T.J.Bernard, Solicitor and Chairman of Quarter Sessions.

28. CO 137/240 Metcalfe to Russell 21/12/1839.

conveniently be discussed in relation to the following heads: (a) judicial qualifications, (b) judicial independence, (c) judicial salaries and the judicial structure.

(a) Judicial qualifications. The firm policy of substituting professional judges in the lower courts for the stipendiary magistrates rendered indefensible the continuance of lay men in the superior courts of law and equity. No issue on this score could or was in fact raised, but it at once provoked a new problem, namely, that of the range of selection of the professional gentlemen for these offices.

At best some members of the local Bar, which was few in number, were not suited for the judicial office, whilst "others of them have earned much distinction in those controversies from which the judges of the colony cannot stand too completely aloof." [29]. The consensus of respectable opinion, therefore, was that the interests of impartial administration of justice demanded that the tribunals

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29. CO 137/248/56 Russell to Metcalfe 12/2/1840.

should be formed out of fresh material, [30] but the traditional hostility of the planters towards imperial patronage revived and in combination with a new closed-shop spirit among the legal profession produced a restriction of the choice of judges to the Jamaica Bar which was productive of great damage to the image of the new judiciary.

On the one hand, the recollection of patent sinecure offices granted to individuals in England at the expense of the colony, the duties performed by ill-paid deputies and the emoluments enjoyed by absentees produced a spirit of counter-action, and planters were resolute that new local patronage should be kept out of the hands of the Crown. On the other hand, it was contended in the legal profession that judicial offices in Jamaica ought to be conferred upon the sons of Jamaica and further that unless eligibility to those offices was thus limited there would not be sufficient inducement for men of talent to join the Jamaica Bar.

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30. CO 137/248/56 Russell to Metcalfe 12/2/1840. Both Sligo and Smith, predecessors of Metcalfe had urged that judges should be sent out from England, vide CO 137/217 8/3/1836. Sligo to Glenelg CO 137/248 Metcalfe to Russell 18/3/1840 "The formation of courts under persons qualified by legal knowledge and paid by adequate salaries is very desirable but it is essential for the success of any tribunal that they should have the respect and confidence of all parties. It might be difficult forvindividuals permanently located in any of the agricultural parishes to avoid either a bias or a suspicion of a bias which would affect those feelings injuriously."

Between the stools of old rancour and new parochialism, the judiciary was precariously suspended for nearly a year. "I offered these appointments" said Metcalfe "to the gentlemen of the Jamaica Bar who were eligible under the Act 3 V C 65 and in all respects unobjectionable. I omitted one who was considered to be super-annuated..... All the barristers to whom the appointments were offered declined them, the two seniors, as I infer, because they hold offices in practice of greater value or to which they attach higher importance and the two juniors, for reasons which they explained of a different character but perfectly creditable to themselves." [31.]

Circumstances thus forced upon the House the reconsideration of the wisdom of their policy. A bill "pro hac vice" was introduced and, after much heated debate, passed, limiting selection to members of the Jamaica Bar of two years' practice, failing which, to members of the English Bar of eight years' practice. In Council the Bill was restored to the manner in which it had originally entered the House, namely, widening the conditions of eligibility to members of the English Bar of eight years' practice and to members of the Jamaica Bar of two years' practice. In

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31. CO 137/250 Metcalfe to Russell 23/12/1840.

addition the Council included members of the Irish Bar [32]. "The amendment of the Council was rejected in the Assembly by a larger majority than that which had carried the restriction partly because the amendment was supposed to be a breach of privilege, which point, however, was waived and partly on account of the addition of the Irish Bar which was most insisted on as a breach of privilege." [33].

The "pro hac vice" Bill, as it had left the House, became law in the autumn of 1840 and in the spring of the following year the Governor performed the perfunctory duty of appointing to the Supreme Court Bench the only two available members of the local Bar, one of whom, formerly a solicitor, had barely completed two years' practice at the

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32. With respect to the admission of barristers to the Jamaica Bar it appears that none but English barristers have for a considerable time been admitted to practise in Jamaica, while it is not stated that Irish or Scotch barristers are inadmissible. We think it would be right to remove that doubt and declare them eligible." Commissioners of Legal Enquiry Op.Cit. p. 95. See also Answers of Chief Justice Scarlett p. 167 (1787) See re Montefiori Grant's (Jamaica) Report. Case of an objection by 60 practicing Solicitors to an application by a Jew for admission as an Attorney.

33. CO 137/250 Metcalfe to Russell 23/12/1840. Thus constitutional niceties were made to obstruct progress in legal administration. "The education of an Irish barrister seems peculiarly suited to colonial practice, as it is the habit of the Irish Bar to attend the Courts generally, criminal, common law and equity, as they do in the colonies....." Commissioners of Legal Enquiry Op.Cit. p.95.

Jamaica bar.

Appointment to the Vice-Chancellorship was delayed [34] another year in hope that the Assembly, impressed with the grave inpracticability of the principal legislation, would widen the scope of selection to this important office, it being clear that the wider the range of selection, the better would be the prospect of recruiting good judges. A Bill to this end was defeated in the House by a majority of eighteen to thirteen. "Thirteen of the eighteen forming the majority are connected with the legal profession in the island either personally or through their relatives and accordingly there is a strong phalanx in the Assembly bound by their own interests or those of others dear to them or by professional feelings to the support of exclusive qualifications." [35]

In May 1842 another purely nominal appointment was therefore made by the Governor when he issued his commission to Edward Panton, as Vice-Chancellor, "the one individual to whom the appointment was virtually limited" [36] "In short" remarked Sir James Stephens "the Assembly contrived so

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34. At the instance of the Brown. See CO 137/257 Stanley to Metcalfe 8/10/1841.

35. CO 137/261 Metcalfe to Stanley 10/1/1842.

36. CO 137/257 Stanley to Metcalfe 8/10/1841.

to define the qualifications of the judges as to leave only four qualified candidates in the island of whom one was their own Speaker, [37] another a member of the Council and the third, unless I greatly mistake, a member of the Assembly also. They thus carved out for themselves three excellent places." [38]

The implacable determination to dislodge the stipendiary magistracy from predominant influence in judicial affairs by the introduction of professional chairmen of Quarter Sessions sufficed to check the influence of professional jealousy, of constitutional pin-pricking, and even of hostility to imperial patronage in determining the qualifications for appointments to these intermediate judicial posts. Members of the Irish Bar were even included. In addition of course it was quite impossible to recruit locally the " nine upright un-biassed gentlemen of legal knowledge and sound judgment" [39] whom the Governor intended for the offices. Eight "angels with wigs and gowns" [40] appointed by the Crown from the English Bar together with one solicitor [41]

37. Edward Panton who in 1839 succeeded Richard Barrett deceased as Speaker of the Assembly.

38. Note dated 21/9/1841 on Colonial Office File, written by Sir James Stephens.

39. CO 137/248 Metcalfe to Russell 15/4/1840.

40. So described in a note on the Colonial Office File.

41. T.J.Bernard, formerly of the Supreme Court Bench.

locally nominated took up their offices in the several districts of the island in July 1841. "Free from bias they became a credit to the island and under their supervision the jury box formed a sort of school for training the newly emancipated freeholders." 42.

Whilst, however, recruitment of members from the English Bar promoted the relief of the local judiciary from, or from suspicion of, bias and local prejudices, that system was not free from difficulties. Any English barrister who was likely, from his training and experience, to adorn the bench by his learning in the law and personal stature would have been a person already established in the practice of the law in his own country to whom a colonial judicial appointment would offer little temptation. On the other hand, a fledgling from the English Bar, cut off from contact with current developments in the law and from association with professional colleagues by isolation in a remote jurisdictional district of Jamaica, would soon have scarcely less to acquire than to display of learning in his art. Referring in 1856 to the Chairmen of Quarter Sessions Governor Barkly said "The Barristers sent from home to fill the offices have not as a

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42. CO 137/330 Barkly to Labouchere 8/2/1856.

general rule enjoyed much reputation here as lawyers, or stood on a par with those selected from the Island Bar, though many of them have discharged the subordinate functions assigned to them with great zeal and efficiency; nor is this to be wondered at, seeing that Government was forced to make its selection from such members of the various Inns of Court as were ready to sacrifice all prospects of professional advancement at home for £1000 a year in an expensive and unhealthy country. [43.]

Two other defects in the hierarchical structure of the colonial judiciary must also be noticed. The first was that Chairmen of Quarter Sessions were, by the operation of the first and seventh Sections of 3 V C 65 which limited the higher judicial appointments to members of the Jamaica Bar, excluded from all prospects of promotion to higher judicial posts within the island. Doubtlessly this situation became a dis-incentive to judicial industry and a contributive factor to the general status of inferiority to the local Bar which was the unhappy lot of the intermediate Bench. It was, as they believed, "without precedent in any part of Her Majesty's dominions, and

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43. CO 137/330 Barkly to Labouchere 9/2/1856.

calculated, in a great degree, to impair their efficiency by crushing for them that spirit of just and laudable emulation and ambition which is encouraged throughout all nations of the civilised world, and is one of the just elements in the training and finishing of the brightest judicial luminaries.[44.]

The second defect sprang from the fact that appeals from Chairmen of Quarter Sessions to the Supreme Court had been limited to review by way of certiorari on matters of law only.[45.] This system afforded little opportunity for members of the Supreme Court to judge satisfactorily either of the professional competence or temperamental suitability of members of the lower judiciary. Neither opinion at the Bar nor "the tone of the Press in such a state of society as is to be found in this colony ..... constituted a very safe criterion where the merits of individual judges were concerned."[46.] Accordingly, in 1856 when the new scheme of judicature was established, rendering Chairmen of Quarter Sessions eligible for appointment to the Supreme Court Bench, the judgment of the Chief Executive in his choice of judicial

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44. CO 137/302 Memorial dated March 1849 of Chairmen of Quarter Sessions to Earl Grey.

45. 3 V C 65, S.42.

46. CO 137/330 Barkly to Labouchere 9/2/1856.

personnel was limited to the recommendations of the retiring Chief Justice who "could only speak confidently of two Chairmen of Quarter Sessions who had formerly practised before him."[47].

(b) Judicial Independence. The long era of common membership of the Legislature and Judiciary finally came to an end, as we have seen, by the legislative provision [47A]. against eligibility of the judges of the Supreme Court to seats in the House. Prohibition of judicial connections with estates and plantations was also extended to the Assistant judges,[48] and all judicial salaries[49]. were

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47. CO 137/330 Barkly to Labouchere 9/2/1856. A very comparable situation exists today vis a vis Resident Magistrates and the Chief Justice who under the Jamaica Constitution (1962) is virtute officii, Chairman of the Judicial Service Commission and who together with the President of the Court of Appeal and other members of the Commission are responsible for advising on promotions from the lower Judiciary. The Chief Justice, however, sits only in exceptional circumstances in the Appeal Court and accordingly has no personal and "confident" knowledge of the men whose fortunes or misfortunes are largely in his hands. (See Jamaica Constitution Order in Council 1962 SS 111, 112, 103.)

47A. 3 V C 65 S. 27 See supra.

48. 3 V C 65 SS 27 and 45 including Chairmen of Quarter Sessions vide S.45.

49. "The dependence of the Judges upon the legislative assemblies for their salaries, places them in a state utterly inconsistent with the high duties they have to perform and lessens their respectability in the eyes of the inhabitants. We therefore recommend that some proper means may be provided for rendering the payment of the Judges' salaries independent of the local Legislature." Commissioners of Legal Enquiry Op.Cit. p 96. See also answer of Chief Justice Scarlett to question No. 68 p.168.

provided for in a permanent Act. It would however be misleading to think that these measures secured independence for the judges. First of all the Governor's power of appointment was rendered almost nominal by the combination of the restrictive qualifying provisions of the Judicial Act and the circumstances of professional life in Jamaica which rendered practice at the Bar more lucrative and therefore more attractive than a career on the Bench. Secondly, and perhaps a more important reason, was the fact that although judicial salaries rested upon a permanent Act which directed payments to be made out of any unappropriated monies in the Receiver General's hands, yet the principal Revenue Acts upon which it almost entirely depended whether there would be any monies at all with the Receiver General was passed from year to year. [50] In short judges, now debarred from financial interests in plantations and having no other resources of their own, were, in point of dependence upon the Assembly, in a position worse than their former colleagues by reason of the iniquitous

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50. CO 137/302 Grey's Report on the State of the Island dated 12/2/1849. For a fuller treatment of the subject of Judicial Independence see Chapter 10.

system of revenue and expenditure.[51] "The establishment of an amply sufficient permanent civil list was an indispensable necessity for the carrying on of the whole executive and judicial branches of the government to the extent to which they are required for the due protection of all classes and all individuals." [52]

(c) Judicial structure and judicial salaries. No attempt whatsoever had been made by the Assembly to re-frame the structure of the island's judicature which remained after 1840 (and until 1856) essentially as it had been in 1758. A considerable advantage had indeed been gained by the replacement of the lay judges of the Supreme and Assize Courts and the custodes of Quarter Sessions by professional men but according to Russell (to whom a plan of the intended changes had been communicated before their enactment) "the bench will still be as numerous and the Courts as much disconnected as before. There will be the same

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51. See Chapters 8 and 10.

want of a balance between the prejudices of the white and black races - the same undue amount of unoccupied time - the same cost and delay - and, to a great extent at least, the same preponderating influence of the local magistracy in the parochial courts." 53.

In principle, a plurality of local magistrates in Quarter Sessions and Common Pleas presided over by one of legal knowledge was not an un-mixed merit. "It is far less from erroneous constructions of law than from prejudiced apprehensions of matter of fact that the course of justice is perverted in all countries, and this is certainly not less true of the parochial courts of Jamaica than of other tribunals. Even should the legal opinions of the Chairman universally prevail, there would still be wanting the requisite securities for the impartial discharge of their duty by the members of the court, or at least by the great numerical

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53. CO 137/248 Russell to Metcalfe 12/2/1840.

majority of them." 54.

Experience soon showed that nine Chairmen of Quarter Sessions were more than the duties assigned to them required and it was provided by an Act of 1845 to reduce their numbers to six upon the occurrence of vacancies, but the disconnected system of intermediate courts persisted until 1856 "in consequence of which ..... the decisions of these co-ordinate courts were often irreconcilable with each other." 55.

As the Assize Courts were held only in the county capitals, Spanish Town and Kingston, thirteen miles apart on the south coast of the island, and Montego Bay, over one hundred miles away on the north side, and as each county

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54. CO 137/248 Russell to Metcalfe 12/2/1840. The Crown forwarded two schemes for structural reforms for consideration by the House but the "abrupt separation" (See Ch. 8.) between the Government and the Assembly rendered their detailed communication constitutionally impossible. Plan A. was as follows :- (i) Supreme Court of 3 judges going on circuit twice per year and sitting en banco twice or thrice per year, (ii) Abolition of Assize, Quarter Sessions and Common Pleas, (iii) Three County Courts of Appeal to do the work of Quarter Sessions and Common Pleas in their usual districts and to hear appeals from justices, (iv) Certiorari from the County Courts of Appeal to the Supreme Court. Plan B.(i) Supreme Court of six judges holding court en banco and doing judicial circuits, (ii) Abolition of the Assize Court (iii) Continuance of Quarter Sessions and Common Pleas and jurisdiction of justices, (iv) Appeals from the latter Courts to judge on circuit.

55. CO 137/336 Report of Attorney General Heslop in 1858.

comprised several parishes, some not inconsiderable in size, litigants, witnesses, jurors, and legal representatives travelled considerable distances over bad and dangerous roads and incurred great expense and inconvenience in pursuit of justice. Thus justice in the superior courts of common law could not be said to have been brought to every man's door.

The unsuitability of the jury system itself, from participation with which nine-tenths of the population had been deliberately excluded for two centuries and with which they certainly had no traditional ties, seemed to have attracted scant attention. 56. Suited essentially to a large homogeneous community living as individuals in comparative anonymity, the jury system, in a small Heterogeneous society where each person is not unknown to the other, where attitudes readily divide on lines of race and tint, and public opinion is a weak and ineffectual force, tended rather to subvert than to uphold the fair administration of justice, and that all the more so where no effective system

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56. CO 137/248 Russell to Metcalfe 12/2/1840. "I should not seek for a remedy (for the ills of the jury system) by abandoning the principle of jury trial, although I should be glad to see every precaution taken against partiality in the election of jurymen."

of appeal existed.

If the system were opened up to the mass of the people, its utility as an engine for the finding of facts would have been weakened by their prevailing ignorance and the want of that desirable sense of the obligation of an oath which was occasioned "as a natural consequence of slavery where a falsehood so often saved from punishment." 57. If limited, as it had been for the past two centuries, to freeholders, that policy would have too patently promoted the ascendancy of the whites in whose hands Jamaica Juries had justly acquired a reputation for "no conscience, no honour, no justice." 58.

The qualifications to sit on juries were, as we have seen, limited in 1847, 59. to persons between the ages of twenty-one and sixty who could both read and write, but the renovation did not prevent failures of justice whilst it multiplied inconvenience and hardship.

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57. CO 137/349 Laidlaw S.M. 20/1/1860.

58. CO 137/239 Attorney General O'Reilly to the Jury in the libel action of William Knibb v. William Dyer. Chief Justice C.J. Rome "If you think, as the Court does, that a case of libel has been made out, your duty will be to find Mr.Dyer guilty." "Without retiring even for a few minutes, the Jury returned a verdict of not guilty." Reported in Cornwall Courier 25/7/1839.

59. 11 V C 23 S.10. The former necessity of being a freeholder was abolished.

The numbers who qualified for jury service were small, from which circumstances the blacks, [60.] in proportion to their numbers were comparatively excluded. In effect the juries continued to be composed predominantly of those whose descent was either wholly or chiefly European to the comparable exclusion of those of African origin entirely. The limited numbers of jurors necessitated frequent summonses of the same persons with all the attendant inconvenience and expense. In Nisi Prius Court, the incidence of jurors unable to agree constantly occurred and poor people found it hard to finance second trials, [61.] whilst in quarter sessions, [62.] abuses of the right of peremptory challenges so denuded the grand juries of respectable persons that "the panel is reduced so low in intelligence that no safe verdict can be expected." [63.] From a perverse verdict of a jury on a matter of fact, certiorari to the Supreme Court offered no relief. [64.]

The cost of litigation, particularly in the

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60. In 1836 one in forty of the blacks could read. In 1861 only a fifth of the population could read and write. CO 137/364 Darling to Newcastle 28/2/1862 re Census of 1861.

61. Report of Chief Justice Rowe to the Governor's Secretary 5/8/1850 vide CO 137/307.

62. 11 V C 23 did not apply to quarter sessions, but only to the superior courts of law.

63. CO 137/326 Half-yearly report of Laidlaw S.M. dated 21/1/1855.

64. In the context of the system , this limited method of reviewing the verdict of the lower court was inadequate.

intermediate courts of appeal, was high whilst the costs awardable by law to a successful appellant was often insufficient to cover his legal expenses. [65] Justice, rendered prohibitive by its costs and hindered by its delays and other inconveniences of administration, so far from promoting "the peaceable admission of 350,000 people to the right of freedom without disturbing the peace and order of society" tended to provide a catalyst to rebellion.

If the improvement in the legal system worked inefficiently, neither was its cost economical. The Chief Justice received a salary of £3000 per annum, described as "fully merited." [66] Not so however was that of the Vice-

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65. CO 137/287 Laidlaw S.M. to Governor's Secretary 1/12/1845. "The great expense of carrying on an appeal in these courts must necessarily render the supposed protection entirely inoperative as regards "the great bulk of the population..... To prosecute an appeal with the slightest chance of success, it is essential that a barrister or attorney should be employed, which must cost at least between £8 and £10 and as the Act creating the court of appeal only allows £5. of costs, the appellant, if successful, must necessarily lose several pounds, and, if defeated, must pay between £12 and £15. .... I feel, therefore, fully justified in stating that the appeal court will never afford any protection to the labourer, who will naturally much rather submit to a serious injury than subject himself to so great a risk and expense.

66. CO 137/248 Metcalfe to Russell 15/4/1840.

Chancellor who received £2500. "Created on political grounds of expediency," [67]. the incumbent of the office had little to do and "the unnecessary expense of a separate office" [68]. might have been spared by attaching the duties of the office to the judges of the Supreme Court. The assistant judgeships of the Supreme Court were "two of the three excellent places which the Assembly had in effect carved out for themselves," [69]. and the incumbents received £2000 per annum for judicial services which occupied less than half of the year in their discharge. In addition to the Chairmen of Quarter Sessions, each of whom received £1000 per annum, [70]. five salaried lay judges were superannuated at £250, the sixth at £300, whilst the Planter / Assembly bestowed gratuities upon five unsalaried planter-judges amounting to £2850.

The appropriations for judicial salaries, in the first year of the new establishment totalled £22,850, and the recurrent annual expenditure, omitting annual pensions £18,500. If to these latter sums were added the cost to

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67. CO 137/404 Robert Russell's "History of the Court of Chancery"
68. CO 137/257 Metcalfe to Stanley 2/12/1841.
69. Supra
70. Upon the reduction of the number of districts from 9 to 6, which was completed in 1847, each Chairman received £1200.

the Imperial Treasury of £15,750 for salaries for 33 stipendiary magistrates, the total appropriations in respect of the first and subsequent years were £38,400 and £34,250 respectively, or more than £10 per head of the total population.

Never since has the Judicature been the object of such legislative liberality. Gubernatorial descriptions of this financial mis-appropriation on judicial salaries alone ranged from "sufficient and liberal" [71] to "somewhat lavish." [72] In 1856 it was described as being "no considerable sum to be paid by a population not much larger than that of the borough of Marylebone." [73] Professional opinion, understandably, was scant, but in 1849 an eminent Chairman of Quarter Sessions disclosed that he had considered the measure "costly," [74] that in his view it was "absurd to have appointed thirteen gentlemen to administer the criminal and civil law of this country" [74] and that when he had cautioned economy, the mover of the Judicial Act had replied that "the country had altered in its

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71. CO 137/302 Governor Grey's Report on the State of the Island 1847.

72. CO 137/317 Grey to Newcastle 25/7/1853.

73. CO 137/330 Barkly to Labouchere 8/2/1856.

74. T.J.Bernard, solicitor, former assistant judge of the Supreme Court and a member of the Council at the time of the enactment of the Judicial Act - CO 137/303.

political position and new institutions must beformed at any cost."

Two points however need to be noted concerning the cost of the judicial establishment. The first is that apart from the sum of £2500 paid annually to the Vice-Chancellor, an office whose creation could not possibly be vindicated on any ground related to the volume of equity business or to economy, no other individual judicial post was over-remunerated. Rejection of posts on the Supreme Court Bench by the abler members of the local Bar and acceptance only by the fledglings of the English Bar of the Chairmanship of Quarter Sessions bear out this fact. Secondly, it is clear, as T.J.Bernard [75.] considered, that there was a superfluity of judges. There had been failure in evaluating fully the average annual quantum of judicial business and in organising its distribution with an eye to efficiency and economy over a minimum staff of able and energetic judges.

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75. T.J.Bernard was for several years an Assistant Judge of the Supreme Court. He became a Chairman of Quarter Sessions in 1841. He delivered dissenting judgments in Greenwood v. Livingstone Etal (1833) and Bayley v. Ewart (1837) and in Beaumont v. Barrett (1836)

(iii) The Legal System in changing social and economic conditions 1840 - 1854.

Despite its deficiencies and defects the re-modelled judicial system gave satisfaction for some time.

The political circumstances of their appointment did not inhibit the undoubtedly considerable professional competence of the new incumbents of the Courts of Chancery and the Supreme Court. Edward Panton, the first Vice-Chancellor was "one of the most eminent of Barristers in Jamaica of his day."[76]. Before taking up residence in the island the Senior Assistant Judge, Mr.William MacDougall, had practised at the English Bar for eleven years, and whilst in practice at the local Bar had given to Jamaica one of the first of her Law Reports.[77]. His colleague, Mr.William Stevenson, had an extensive practice in the island as a Solicitor prior to his call to the Bar in 1837.[78]. Both Assistant Judges had had no connection with the planting interests and so came to the Bench, their characters for integrity and impartiality, untainted in the public mind either by suspicion or doubt.

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76. CO 137/262 Metcalfe to Stanley 3/3/1842.
77. MacDougall's (Jamaica) Reports 1839.
78. CO 137/250 Metcalfe to Russell 23/12/1840.

In the more congenial atmosphere of freedom and disconnection of the Supreme Court from politics and the Assembly, the stature of the Chief Justice regained some of its lost lustre, whilst his dissenting judgments indicated an independence of judgment, rare instancesof which glimmered through the darkness of slavery and apprenticeship. He gave assiduous attention to the rationalisation of the rules of Court, and in 1854 by the gratuitous offer [79.] of his services he rescued the Court of Chancery from the judicial amateurism to which the Assembly was about to consign it once more upon the death of the Vice-Chancellor.

Thus, the professional abilities of the judges, their zeal energy and integrity sufficiently redeemed the administration of justice in the Supreme Courts of Law and Equity from the consequences of the technical and organisational defects of the legal system to have earned general public satisfaction.

In the magistracy a number of factors combined to render the administration of justice there tolerably successful for the first decade or more.

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79. It was not however entirely gratuitous. He agreed to his taking over the work of the Vice-Chancellor in exchange for not going on the Cornwall Circuit. CO 137/323 Barkly to Newcastle 23/5/1854.

At the inception of the new system of judicature there was in the lower judiciary a sufficiency of stipendiary magistrates. Thirty-three in all, they had comprised the best of the remaining special justices who were retained for magisterial service in freedom, and some had been invested with special power to sit in Quarter Sessions and Common Pleas in order to moderate the severities of local magistrates against the black population in those courts.

Described in 1841 as "most efficient" [80] their services were said in 1844 to be "still of much value" [81]. all the more so as unpaid justices of the peace were "acquiring the habit of looking to those who were in the enjoyment of salaries for the discharge of a considerable portion of the ordinary business of the magistracy." By 1845 a spirit of "utmost cordiality" [82] was reported between the Stipendiary Magistrates and the local magistracy and from time to time applications were made by Custodes for the appointment of Stipendiary Magistrates to districts under their charge. [83]

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80. CO 137/257 Metcalfe to Stanley 7/12/1841.
81. CO 137/279 Elgin to Stanley 12/7/1844.
82. Ibid.
83. CO 137/283 Elgin to Stanley 21/1/1845.

Disputes, too, on the subject of rent which, as we have seen, had been a most futile source of discord between proprietors and labourers gradually abated. "In most cases an entire separation between labour and rent had been effected and the terms of either severally adjusted to the satisfaction of the parties." In some quarters too the practice of leasing land to the peasantry in small lots for a year or a series of years gained ground, and, as often as opportunity afforded, the blacks "with their natural shrewdness and intelligence" [84.] exploited the impoverished condition of some landed proprietors by buying up their lands at £2. to £10. per acre and setting themselves up as small farmers. [85.] Thus, with the settlement of the rent issue, the gradual development and expansion of a class of independent black peasant farmers and the resultant dissolution of the former close economic relations between blacks and whites, the causes of irritation which had operated during the period of transition from slavery to freedom were disappearing.

Again, some Chairmen of Quarter Sessions to whom there was an appeal from all decisions of the petty courts took great

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84. CO 137/273 Elgin to Stanley 20/4/1843.

85. Hall's Free Jamaica (1959) p.20.

pains in reviewing the decisions of the magistrates.[86] As their reputation for competence and impartiality grew, confidence in the lower courts, the forum in which the common people litigated their grievances, was established.

Finally, all these circumstances, the numerical sufficiency of Stipendiary Magistrates, the competency and impartiality of the judges of the other courts, and the changing pattern of the economic order, accorded well with the general temperament of the large black community. "They were", it was observed in 1848, "as generally free from rebellious tendencies, turbulent feelings and malicious thoughts as any race of labourers.... Under a system of perfectly fair dealing and of real justices they will come to be an admirable peasantry and yeomanry, able-bodies, industrious and hard-working, frank and well disposed. But they are quick in perceiving the tendency of measures indirectly affecting their interests and irritable and liable to be rendered wild and desperate by terror and fury.... My chief aim would always be to give them no reason for complaint, fear or distrust." [87]

Before the mid 19th century had arrived, however,

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86. CO 137/287 Elgin to Stanlye 5/1/1846.
87. CO 137/297 Governor Grey to Earl Grey 1848.

reasons for complaint had begun to mount. In the Imperial Sugar Duties Act of 1846 planters envisaged the economic ruin which they had dreaded for the past four decades. There were by this time only 19 Stipendiary Magistrates, of whom 16 had been appointed between 1834 and 1836. [88] The magistracy was now composed of tired men exhausted by climate and impoverished in condition. Their salaries had remained static despite the increase in the cost of living since emancipation which "advanced the prices of most frugal necessities beyond the cost of English luxuries." [89] Servant wages too were high and save in the large towns accommodation was difficult, obliging Stipendiary Magistrates to rent houses from absentee proprietors at high rentals. They were not allowed to hold any private offices, professional men among them being debarred from practice unassociated with their magisterial duties, though other public duties were being constantly saddled upon them. "Of the 19 Stipendiary Magistrates two are really Police Magistrates and two others hold other appointments which consume their time." [90] Dissatisfaction and despair were

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88. CO 137/309.

89. CO 137/256 Memorial of Stipendiary Magistrates to Russell October 1841.

90. CO 137/322 Barkly to Newcastle 21/2/1854.

naturally rampant and once any Stipendiary Magistrate was established in a place, he stoutly resisted any attempt to be transferred. There, therefore, tended to be " a superfluity of them in towns and in favourite parishes, whilst the more remote and less pleasant localities were avoided." [91].

An increase in the stipendiary magistracy "so as at least to make it equal to the number of the parishes, [92]. was now urgently needed, but neither the local nor the Imperial Government responded to gubernatorial requests. No amount of deployment of limited paid magisterial staff could compensate for numerical insufficiency and several parishes, some of which like St.Ann was as large as an English county and contained 423 square miles, were literally without Stipendiary Magistrates. Local justices on the whole were too immersed in their own affairs to fill the void with any consistency and with the decline in their economic conditions which became more marked after the Sugar Duties Act of 1846, the plantocracy exhibited less and less interest in the administration of justice.

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91. CO 137/303 Grey to Earl Grey 21/9/189

92. CO 137/303 Governor Grey to Earl Grey 31/9/1849.

The epidemic of cholera and small pox of 1850 and 1851 which carried off about one in thirteen of the population relieved the pressure upon the inferior courts for some time, but it laid bare a technical deficiency of the legal system around which much of the subsequent strife was to revolve. This deficiency related to the absence of any local courts,[93] of competent jurisdiction and meeting with frequency and regularity to adjudicate on land disputes. "During the prevalence of the epidemic a great many of the labouring people who owned small freehold properties died intestate, in numerous instances leaving their helpless children unprovided for. The extent of these freeholds generally was 5 acres but in each was a small dwelling place and the land was chiefly in cultivation. On the demise of the owners, persons claiming relationship were found to assert their right to the possession of the property, many of whom were mere adventurers and not infrequently the bereaved mother and children were turned out of doors and denied the right of taking food from the provision ground. Oft in disputing the rights to possession breaches of the peace were committed and strife and contention were prolonged. The magistrates were applied to for justice,

93. The Courts of Common Pleas had no jurisdiction in respect of freehold.

but in the state of the law, the jurisdiction for settling disputes regarding opposing claims to landed propertywas vested in the Supreme Court to which the poor could not apply on account of its being an expensive and tardy mode of proceeding and in a variety of other matters grievances go un-redressed in consequence of the inability of poor persons to prosecute in or have recourse to the Upper Courts. 94.

Grievances un-redressed and practically un-redressible, rekindled in the negro mind the sense of past injustices. In 1854 Barkly acknowledged that "complaints of the result of such a state of things have already reached me from all classes .... At the root of the evils which were once more shaking the society to its very basis were the want of mutual confidence in the transactions of every day life, and the insecurity of property arising from the inadequacy of the existing arrangements for enforcing the Law." 95.

Two years later the legal system was to undergo a drastic retrenchment that would set the colony on its course to rebellion.

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94. CO 137/322 Barkly to Newcastle (Forwarding Report of Lake, Stipendiary Magistrate for Portland, dated 10/1/1854.
95. CO 137/322 Barkly to Newcastle 21/2/1854.

CHAPTER X

JUDICIAL INDEPENDENCE AND "THE SEVEN YEARS' WAR" 1846 - 1853

It was one of the incidents of colonial life that suddenly and without notice the currents of its affairs could be gravely agitated by acts of the Imperial Power.

Of such a nature was the Imperial Sugar Duties Act of 1846 by which the duties charged on sugar entering Britain were gradually to be equated so that by 1852 all sugars coming into the country, whether foreign or colonial, whether grown by slave labour or by free men would pay the same rates of duty based entirely on the quality of the article.[1]

The reaction of planters whose interests were most directly to be affected by this radical change in imperial fiscal policy was the embarkation upon a course of retrenchment in public expenditure the principles and policies of which threatened the independence of the Judiciary, brought that institution into open conflict with the Assembly, the Representative Body with the Council, and culminated in far reaching alterations in the political and judicial systems of the country.

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[1] Hall op.cit. p. 37

In this and the succeeding chapter the struggle of the Judiciary for independence and the re-modelling of the legal system will respectively be examined.

In November 1846 the Assembly declared their "utter inability to continue to maintain our institutions on their present scale."[2] In the following months they passed an Act reducing by 20% the salaries of public officers including those of the Vice-Chancellor, the Chief Justice and judges of the Supreme Court and the Chairmen of Quarter Sessions. It was rejected by the Council. In the 1847/48 Session of the House another Bill in which the contemplated reductions varied from ten to thirty three per cent was similarly rejected by the Council.

Foiled in these attempts to reduce official salaries, the Assembly in the Session of 1848/49 resorted to the device of appropriating the available revenue in a manner which left no funds out of which the salaries of the judges or other officials could be appropriated. In addition they demanded a reformation of the Council in which legal and judicial representation preponderated. In their view "a legislative body dependent on the Crown, irresponsible to the people and composed of judges of the land[3] and salaried officers is opposed to the principles of the British Constitution."[4] "The Board of Council so constituted and unanimously resisting all attempts

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2 CO 137/289 Barkly to Grey 6/11/1846

3 The Chief Justice, the Vice-Chancellor, the Attorney General and T.J. Bernard Chairman of Quarter Sessions were members of the Council which usually met with seven members.

4 CO 137/301 Gov. Grey to Earl Grey 21/2/1849 (Forwarding Resolution of Assembly).

at reduction of the public burdens had forfeited the confidence of the House and the People and ought to be reformed."[5] These resolutions were in due course fortified by a third by which no further Revenue Bills were to be voted after the 14th February 1849.

This deprivation of their salaries to which, by the deliberate act of the Assembly, all the judges of the land were made subject, helped to focus attention on the grave issues of principle upon whcih the Legislative Body and the Judiciary were so sharply divided.

The judges rested their case upon the Judicial Act of 1840. To them that Act under which the salaries of the new judicial establishment had been permanently fixed and assented to by the Crown, constituted a legislative compact on the faith of which "they had relinquished their profession and accepted judicial appointments with every confidence in the good faith of the local Legislature and in the permanency of the salaries fixed by Law."[6] Without payment of compensation, in respect of which proposals were early submitted to the Assembly,[7] disturbance of their statutory salaries would amount to "a departure from constitutional principle and legislative faith,"[8] and they made comparison with the Imperial Precedent embodied in 9 & 10 VC 98[9] for establishing the Small Debt Courts which in addition to abolishing a number of courts throughout the mother-country, provided by the 38th section

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5 Ibid.
6 CO 137/301 Memorial d/d 19/12/1849 of the Vice-Chancellor and Judges of the Supreme Court to the Queen.
7 20% of reduction in salaries with retiring pension after 10 years' service to the amount of a quarter of present salaries" CO 137/303 Gov. Grey to Earl Grey 22/4/1849
8 CO 137/301 Memorial d/d 19/12/1849 of the VC and Judges of the Supreme Court to the Queen.
9 1846

that "every person who is entitled to any franchise, right of appointment or office in any court" mentioned in a schedule, "or whose emoluments shall be diminished by the Act, shall receive compensation."[10]

The extent of the reduction of salaries and its possible effects upon future recruitment of judges also engaged earnest judicial concern. "The remuneration to public officers should be fixed on such a scale as would guard the expenditure of the country against extravagance and at the same time such as would ensure for the public service men of high character and efficiency."[11] "To deserve the name, economy must be rational and no consideration of mere money can be set in competition with the paramount evident necessity of securing for offices of great trust and confidence the highest class of intelligence and integrity."[12]

Above all other issues of principle and sound practice, however, was the paramount question of the independence of the Judiciary which had been assailed through the encroachments made upon, and the deprivation of, the salaries of the administrators of the laws. "Judges ought to beware how they allow the laws to be brought into contempt through the persons of those who administer them; once lay those prostrate in whose maintenance all have a common interest, and the descent to anarchy will be short and the triumph of physical force over moral influence will be rapid and complete."[13]

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10 CO 137/303 Debate in Council 12/11/1849
11 CO 137/303 Debate in Council 12/11/1849 C.J. Rowe citing Sir Rbt. Peel.
12 Ibid., 13 Ibid.,

Without emoluments or fees of office beyond those prescribed by law, the stoppage of their salaries had placed, or was about to place, members of the Judiciary in a position of dependence upon, the goodwill and credit of persons in a small community whose interests were constantly appearing before the courts in litigation. "Dependent on those revenues for our salaries, which must for the time remain impaired, we will be deprived of the means of keeping up our establishments which, from our peculiar judicial position, and all its social incidents, are necessarily of an expensive character; and as such establishments cannot at a moment be destroyed, but must to a great, if not to a full, extent be continued; as our expenses of circuits and other judicial duties must still be incurred, we must necessarily be left to the mercy of our tradesmen and servants and be thrown on our own credit and resources for the support of ourselves and our establishments and with all the humiliation attendant on such subsistence and credit."[14] Further, in any popular question of excitement that might be brought before the judicial tribunals of the country for determination "of which some are already in agitation in the courts"[15] it was inevitable that the very existence of such antagnostic questions with the Lower House, as those respecting their judicial salaries, would lead litigants to suppose that the judges were influenced by bias or prompted by personal feelings.

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14 CO 137/301 Memorial d/d 19/2/1849 of the VC and Judges of the Supreme Court to the Queen.

15 Ibid.

The consequential danger that legal administration might have been brought into contempt through the person of those charged with the duty of administering the laws in such circumstances, therefore, prompted the Vice-Chancellor and Judges of the Supreme Court humbly to submit to the Queen that "Your Majesty's judges should for the future be rendered wholly independent of the local Legislature and that either some permanent revenues should be allotted for their payment by some Act of the Imperial Parliament, or some other equally potent authority, beyond the control of the local Legislature or that they should be paid from the British Treasury, or from some other source satisfactory to Your Majesty; or that the case of Your Majesty's Judges in this colony, may meet with such other considerations as their high position and the importance of the subject so imperatively require."[16]

We have seen in Chapter 9 that although the Judicial Act was a permanent measure, yet it was by annual Revenue Acts that the salaries provided thereunder were actually funded. From this circumstance was derived the fierce contrary argument of the Assembly that the Judicial Act did not, and was never intended to, provide permanent and unqualified salaries to the judges and that "it was in their exclusive and absolute power to reduce salaries in such amounts and at such times as they saw fit."[18] "That alone can be

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[16] CO 137/301 Memorial d/d 19/2/1849 of VC and Judges of the Supreme Court to the Queen. CO137/302 Earl Grey to Gov.Grey 16/4/1849 "I wish you to assure these gentlemen that I sincerely lament the inconvenience to which they are likely to be exposed by the conduct of the Assembly, but that there are no funds at my disposal from which it would be possible for me to alleviate the hardships they may be made to suffer."

[17] Chapter 9 R.

[18] CO137/303 Debate in Council reviewing the constitution of the Assembly.

designated a permanent vested interest which had been charged upon a distinct revenue fund which was or had been concurrently and equally permanent; but a permanent fund to meet any annual stipends, excepting in the Acts of 1 G 2 CI [illegible] and 8 VC 16[19] was purposely withheld."[20] "All stipends fixed under other Acts have been hitherto always provided for by annual grants and they were accepted by the holders upon that understanding. This practice had been pre-determinedly and purposely adopted to admit of alterations under unforeseen changes of circumstances and this mode of making provisions for payments of such annual stipends was therefore in fact a condition which was notorious at the time of its acceptance, and was accepted knowingly. For the judges to affirm otherwise would render the payment of those stipends an attempt through a fallacious representation to compel the Assembly to make that provision absolute which was always intended to be conditional only and which have been so accepted."[21]

This view of the Assembly, completely opposed to that of the Judiciary, admitted of no room for the acceptance or acknowledgement of an obligation to pay compensation upon reduction of salaries during the incumbency of public offices and the House utterly repudiated any such obligation.

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19 8 VC 16 repealed and re-enacted on an enlarged scale the Council Fund under 1 G 2 CI.

20 CO 137/303 Debate in Council on aguments of the Assembly.

21 CO 137/303 Debate in Council on Arguments of the Assembly.

Divergencies of views on these grave issues of principle and sound governmental practices were aggravated by sentiments and passions which lingered on long after their formal constitutional and legislative settlement.

Judges had had reason as early as 1844 to suspect that they had been singled out for legislative spoilation. A Bill of that year had not been pursued by the Assembly because an amendment in Council had excluded judicial salaries from its operation "though every other item of reduction contemplated by the Bill was secured."[22] "Still further to show that the reduction of the salaries of the judges were really their object and nothing else, a Committee was apointed before that Bill was brought in 'to inquite into and report the expediency of amending the Judicial Bill as to the salaries paid thereunder' - The Committee made no report but was still in existence when the Bill was abandoned."[23] As to the Reduction Bills of 1846 to 1848, upon analysis "the small amount of saving they would have effected in the public expenditure and the disproportionately large share which the Judicial Officers would have borne" clearly convinced the Governor that "the same spirit was to be found in them which had given birth to the former measure."[24]

Judicial perspicuity did not fail to notice that in all the Reduction Bills, the salaries of the Speaker, the Clerk, the Sergeant-

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22 Ibid.
23 CO 173/303 Debate in Council 12/11/1849.
24 CO 137/303 Debate in Council 12/11/1849 also see CO 137/302 and Grey's State of the Island Report of 12/2/1849

at-Arms and other officials of the Assembly had been carefully excluded, whilst those of other office-holders earning sums as small as £60 per annum did not escape legislative attention. Planters too, it was said, had demanded compensation from the British Government for violation of vague rights remotely affected by changes in imperial fiscal policy, but "scatter to the wind the faith and guarantee of our own local laws when dealing with the rights of others."[25]

By frequent stoppages of legislative business considerable revenue had been lost and judges shared with the Governor the conviction that "the main cause of the financial difficulties of the colony has been the large expenditure on Coolie Immi gration[26] and in special grants made wholly and entirely by the Assembly itself in the course of the last 8 or 9 years without the Council having been allowed either to originate or to control any portion of it."[27]

The unequal distribution of the burden of taxation was not calculated to win sympathy for the planters in whose favour the scales of taxation had been tipped. Whilst the rest of the population - and particularly the recently emancipated negroes - were bearing their fair share of taxation, planters had been progressively

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25 CO 137/303 Debate in Council 12/11/1849

26 Between October 1824 and October 1848 £21,7000 had been spent on immigration generally and of this sum £90,000 on Coolie Immigration in the last five years CO 137/303 and CO 137/301.

27 CO 137/302 Gov. Grey to Earl Grey 9/3/1849

relieving themselves of the burden of land tax.[28]

Reference in Council to the case of the Rum Duty Bill of 1848, a striking case of partiality, alienated the mercantile community largely represented in the House. The loss of that Bill had occasioned a considerable fall of revenue which it was proposed to recover by an ex post facto law, but the attempt was vigorously and successfully opposed by the merchants. An ex post facto law would be "a violation of private rights, dignified though it may be by the misnomer of legislation - a wrong which every citizen ought to resist as a beginning of the letting in of waters whose progress no man can stay - the purchaser of rum had nothing to do with the lapsing of the late Rum Bill." "So," reasoned the Chief Justice in Council, "although the merchants of Kingston consider that the public officers' rights are to be interfered with, they had no idea of their own being disturbed - Reduce the salaries of the Public Officers, but don't touch my rum; if you do that, it is monstrous, vexatious and unconstitutional ..... yet they send a petition praying this Board to do that which, when their own interests are concerned, they so strongly reprobate."[29]

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28 CO137/297 Gov. Grey to Earl Grey 1848 "Jamaica Quit Rent at the moment is 1d. per acre and yields £9000. The lands on which it is paid can bear a quit rent of £1 per acre"CO 137/301 Gov. Grey to Earl Grey 21/2/1849"I am sorry to say that the largest arrears of taxes are supposed to be those of the Quit Rents and landtax and that they are due from those who are best able to pay, namely the owners of large estates".See also CO137/331 Barkly to Labouchere 9/4/1856 re causes of failure of Bill to recover possession of Crown lands.

29 CO 137/303 Debate in Council 12/11/1849.

To the changing composition of the Assembly were to be traced its differing aims and aspirations, desire to gratify which united the Popular Body in a common and tenacious antagonism towards the Judiciary.

The planting interests continued to preponderate, engrossing about a half of the seats in a House of forty-seven members. Next in extent of representation was the Town or Coloured Party, followed by the Jews, who shared about a quarter of the seats and a number of practising Barristers and Solicitors.

Of the planters and merchants it was recorded that they were "too apt to consider their own interests, which are only those of one class, as representing the whole community" and "would not recognise and did not like to be told of a prosperity in which they were not sharing."[30] In their economic plight, planters, therefore, eyed disconcertingly the apparent ease and freedom from anxiety of the holders of fixed incomes. "In the view of one set of people, the planters and proprietors are indignant, or, in the view of another, envious of the comparative ease of the office-holders..... amid the general difficulties and distress. They wanted to relieve the Public Revenue of the charges for the civil establishment so that they could cast the parochial burdens or immigration loans upon it."[31] Thus in their electioneering campaigns they fed their

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30 CO 137/375 Eyre to Newcastle 4/11/1863.
CO 137/391/149 Eyre to Cardwell 20/6/1865 (forwarding views of Mr, Justice Ker who said "Planters were jealous of the small freeholders."

31 CO 137/316 Grey to Newcastle 10/5/1853.

gullible hearers with contemptuous references to the judges as "pampered officials"[32] and disparaged the Judiciary in the eyes of the ignorant masses.

Since the Judicial Act of 1840 the separation of the Judiciary from the Assembly, and the composition of the former exclusively of gentlemen bred to the law and unconnected with the planting interests must doubtlessly have tended to promote between the two bodies a separate-ness which, though ideally desirable in the interests of sound administration of justice, would have been completely alien to the tradition and thinking of Assemblymen. In the persons of Mr. Justice Stevenson[33] and Mr. Justice MacDougall, men who had had no history of identity with the planting interests, a new image of independence was being fostered around the Judiciary which excited the jealousy of a supremacy-loving Assembly. "There was jealousy too amongst those who formed the other branch of the Legislature between those who came from Europe and those gentlemen and gentlemen's sons brought up here."[34] As the former class, in the person of its legal and judicial members, preponderated in the Council and the latter in the lower Chamber, love of absolute power, petty piques and prejudices founded upon distinctions between English whites and creole whites combined with constitutional differences to unite and embitter the planting interests in the

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[32] CO 137/303 From Debate in Council 12/11/1849 "If to those the lower orders are to look for guidance and advice, how can they feel respect for those engaged in the administration of the laws, when they hear and know that they are objects of daily vituperation and personal obloquy". C.J. Rowe.

[33] Later Sir William Stevenson.

[34] CO 137/301 From Debate in Council 1849.

Assembly against the Judiciary.

Visions of political ascendancy dominated the Coloured Party. "They wished to make that branch of the Legislature (the Assembly) despotic over the other two and with that view adheres to the usage of keeping nine-tenths of the revenue supplies upon annual grants and asserts and exercises the privilege of having money-bills introduced by any member of the Assembly who may please to do it. They were eager also to reduce all public offices and establishments to a level at which they would be less desired by Europeans and more open to themselves."[35]

Jewish attitude was recorded in these words: "With less of that negation of country and exemption from local ties and obligations which is generally characteristic of their race they have a natural dislike of duties and taxes and very little regard for ecclesiastical and judicial establishments, and some of them, unless they are much belied, find occasions and means of private profit in the temporary interruptions and resumptions of the import and rum duties which are brought about by the dissensions in the Colonial Legislature."[36]

Among the legal members of Assembly the growing narrow parochialism could only see in the drastic reduction of judicial salaries an opportunity for Jamaica's sons to supplant the "men from home" upon the judicial bench.

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35 CO 137/316 Grey to Newcastle 19/5/1853
36 Ibid.

The feuds, prejudices and passions in which the vital issue of judicial independence was now shrouded did not subside with the prorogation of the Assembly in 1849. Upon their re-convening in June the Assembly denounced "the circumstance of salaried officers deciding against the reduction of their own salaries"[37] and affirmed that "it is for them and them alone to decide the amount of supply, its duration and its appropriation; this authority it has been in the custom of resorting to whenever there appeared a necessity for its exercise ..... It was the safeguard of the rights and liberties of the people and the Assembly will not surrender to motives of expediency that which reason and principle alike defend."[38] The earlier resolution to vote no supplies beyond the 17th of February 1849 was expanded into the familiar determination to exercise no legislative functions and the House was dissolved.

Dissolution however was of little consequence. The chronic absence of any worthwhile public opinion in the country, the state of the Electoral Law and the limited extent of franchise-holding ensured the return in October of a House insignificantly different either in sectional representation or in policy, and although an Import Duty Bill was passed which did not prohibit application of the revenue to the payment of public salaries, thus securing judicial stipends, yet one Bill for reduction of salaries by forty per cent together with compensation was lost in the House, whilst another, rejected in Council, was described as "unjust inasmuch as

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[37] CO 137/303 Gov. Grey to Earl Grey 7/7/1849 (Forwarding Resolutions of House).
[38] Ibid.

it purported to reduce fixed salaries without giving any compensation, impolitic as it affected the independence of the judicial office and dangerous and pernicious inasmuch as if it could have been forced upon the other branches of the Legislature, the Assembly might the very next year have proceeded further, and with increased power, in breaking down these institutions of the colony on which the maintenance of peace and order depends."[39]

In 1850 and 1851, the years of the epidemic of cholera and smallpox, there was an abatement of the struggle, the Assembly contenting itself to pass, and the Council and Governor to approve and to assent to respectively, a more moderate measure of prospective reduction of salaries as vacancies occurred.

The causes of the agitation had not however been removed, and the "sort of armistice"[40] came to an end in late 1852 when the Assembly, adopting a report of its Committee which had rejected proposals from the judges for the contraction of the judicial establishment based upon the removal of supernumaries and elimination

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39 CO 137/303 Gov. Grey to Earl Grey 21/11/1849

40 CO 137/330 Barkly to Labouchere 8/1/1856. "The Prospective Reduction Act (14 VC 43-1851) by which, in the case of new appointments, reduced salaries were to be paid, passed during a sort of armistice in 1851, but it by no means put an end to the agitation for the Clergy (and the Judiciary too, I should think) were designed to be again subjected to the general retrenchment of 20% the refusal to concur in which caused the final breach between the two branches of the Legislature"

of waste of judicial time and of expense, passed a sixth Reduction Bill effecting a twenty per cent reduction of judicial and ecclesiastical salaries without provision for compensations. The Bill was rejected in Council. "It was a harsh indiscriminate measure setting at nought all considerations arising from the nature of the duties or the amount of labour performed or of the terms of the enactment by which the salaries and stipends had been secured. Being totally devoid of all provisions for any compensation whatever, it was, in every case in which the salary or stipend had been secured by previous enactment for more than a year, an undisguised and shameless violation of public faith, and above all, as there was no security for the future payment even of the reduced allowances nor against a repetition of the same process in the very next Session of the Assembly, a submission to it would have left ..... the Judicial Establishment as to all salaries ..... entirely at the mercy and caprice of an Assembly several of whom expressed a wish for further reductions and a large majority of whom intended to compel the Council and Government to submit by a refusal of ordinary supplies on any condition."[41]

Judicial restraint broke its bounds. In a letter to the Press in March 1853 Mr. Justice Stevenson referred to the recent defeat of the Reduction Bill in Council and observed "Thus has this Seven Years' War once more terminated by your sixth unanimous defeat. Who does not grieve for the loss to the country of legitimate

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41 CO 137/316 Gov. Grey to Newcastle March 1853.

revenues, the parliamentary reputation and the colonial credit that has resulted from these vain attempts at bursting the infrangible bonds of legislative faith ..... This financial battle between the violators and the defenders of the Faith seems to have been fought over the prostrate bodies of the Judges ..... Let this contest be submitted to the arbitrament of any two of the best constitutional lawyers in England to determine whether your vested rights should destroy our vested rights."[42]

Having more expeditious methods at their command the Assembly saw no need to accept the judicial challenge. The Speaker's warrant brought the judge from his house to the bar of their House under arrest to answer his contempt and breach of their privileges. The publisher was not summoned. The formalities of evidence were brushed aside, but the judge declined to answer for his conduct, declaring his readiness "to submit, Mr. Speaker, as I am now doing, to the judgment and warrant for my imprisonment, repudiating it nevertheless and protesting against it as illegal and unconstitutional."[43]

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[42] CO 137/316 Grey to Newcastle 9/4/1853 (Forwarding Stevenson's letter to the Press of March 1853.

[43] Ibid. For a greater contempt of the House the Assembly decided to reprimand John Costello whose article appeared in the Falmouth Post of 29/3/1853, on or about the same time as Mr. Justice Stevenson's. It read "Besotted fools, scum of society, designing knaves, unworthy of respect and confidence..Folly and selfishness reign triumphantly within the walls of the House of Assembly. The minority of talent and unblemished character is outvoted by the majority of ignorance and corrupt reputation. Let them be ousted from their seats which they are unworthy to occupy and be required to attend to the vocations for which nature apparently designed them-the cobbler to his last, the fisherman to his hook and seine, the grogseller to his metal measures, the saltfish retailer to his weights and scales, the pedlar to his pack and the vulgar demaguge to his senseless agitation." The uneven treatment meted out to Mr. Justice Stevenson on the one hand and to Mr. Costello on the other can leave no room for doubt that the Judiciary had become the official object of persecution by the Assembly.

By a majority which included one junior barrister and two attorneys of the Supreme Court, the House voted his committal to the Common Goal where he was detained for twenty-four hours.[44]

The public humiliation of "a judge whose character and attainments were acknowledged to be of a very high order"[45] did not quench the appetite of the Assembly for laying the judgment seat prostrate. Within a month two Revenue Bills were sent up to the Council in each of which an appropriation clause "excluded and in effect prohibited the Receiver General from paying the judicial ..... establishment."[46] Both were rejcted by the Upper Chamber and upon the House resolving to transact no further business with the Council, they were prorogued on April 25th.

The insoluble constitutional impasse "so closely analogous to that which existed in 1839"[47] loudly demanded, in the view of the retiring Governor, a similar remedy. His judgment on the Seven Years' War was clear. However such suspicion could be thrown on the dis-interestedness of members of the Council and on the independence of the Board because of the intervention of personal interests "it was right that the Council should have resisted the attempts in 1847, 1848 and 1849 to reduce the judicial establishment

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44 CO 137/316 Grey to Newcastle 9/4/1853.The Secretary of State regarded Stevenson's "severe reflections upon the conduct and character of the Assembly" as a "momentary indiscretion after much provocation" CO 137/316 Newcastle to Grey 14/5/1853.

45 CO 137/316 Newcastle to Grey 14/5/1853

46 CO 137/316 Grey to Newcastle March 1853.The lapse of the revenue meant a daily loss of £10,000 and Grey had to be thinking of devising 'tickets of leave' to convicts who could no longer be maintained in the prisons.

47 See Chapter 8 p.

because the means employed would have shattered the frame of government and the administration of the law!"[48] As to the machinery of political government "the present perversions of privilege and corruption of parliamentary usage maintained by the Assembly ..... are evils that must be corrected. There should be established a Permanent Revenue by which the Government can carry on the ordinary public establishments and the Governor should be given power to name three Assemblymen to whom the power to bring in Government Bills should be exclusively committed."[49]

The reflections of the Crown on the Seven Years' War were imparted in August 1853 to the Governor Designate, Henry Barkly. "When permanent Acts have been passed by the Legislature assigning specific salaries to particular offices, and the Crown, having by its assent to such Acts become a party to their enactment, has appointed persons to the Offices without any intimation that the salaries so received by Law were liable to be reduced or withdrawn, the Crown has thereby contracted an obligation which forbids it to be a party to any enactment which should take away the right to the salary without either obtaining the consent of the officer or providing such a fair and reasonable equivalent as ought to command that consent."[50] The contention of the judges that reduction of their stipends without payment of compensation was "a departure

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48 CO 137/311 Gov. Grey to Earl Grey 31/12/1851
49 CO 137/316 Grey to Newcastle 26/5/1853
50 CO 137/319 Newcastle to Barkly 16/8/1853.

from constitutional principle and legislative faith," had thus been vindicated by the highest authority within the Empire.

The Jamaica system of collection and appropriation of revenue came under critical imperial review. "Above everything else it was the mal-administration of Government finance that was at the root of Jamaica's troubles."[51] The non-existence of a Civil List and the frequent stoppages of supplies and loss of revenue had bred such insecurity in public offices that "larger salaries are requisite as an inducement to properly qualified persons to serve in the island."[52]

In the system of political government reforms were urgent and imperative. The legislative incompetence of the Council and the "abrupt separation" between the Executive Government and the Popular Body had reduced the machinery of government to impotence. It was essential that the Assembly should shed its executive authority and return to the Council a meaningful role in legislative affairs. If satisfactory reforms were introduced and "an adequate permanent revenue provided"[53] the British Government offered to guarantee a loan of £500,000[54] to the island for the purpose of consolidating the public debt at a lower rate of interest.[55] "I am also prepared to concur with the Assembly in immediate abolition of offices or reduction of salaries accompanied by just compensation to existing holders and in order to facilitate to the utmost of my power any measures which the Assembly may regard as proper accompaniment of

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51 CO 137/319 Newcastle to Barkly 16/8/1853.
52 Ibid.,
53 Ibid.,
54 CO 137/319 Newcastle to Barkly 16/8/1853.
55 Hall's op.cit. at p. 101

of a reformed system of financial administration, provided the reforms which I have pointed out shall be carried into effect, to propose to Parliament the guarantee of a loan to an amount not exceeding £50,000 for the purpose of providing proper compensation for those public servants affected by the abolition of their offices."[56]

Judicial independence may be examined in vacuo but it does not exist in vacuo. Practical judicial independence has its roots in the economic, social, legal and political complex of which the corporate life of the community is composed. Accordingly the new deal extended to the colony incorporated the reformation of the political structure of government, a reformation into which independence and security of the judicial service could be more securely built.

The reformed political system came into being on the 22nd of November 1854. The Bill had passed the Council by a mere majority of one, having been opposed by the Chief Justice and two others on the ground among others that "it provided for only three quarters of the judicial salaries leaving a quarter to the annual vote by a Popular Body, not always swayed by prudent and just motives."[57] The measure, 17 VC 29,[58] nevertheless received Royal confirmation and the

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[56] CO 137/319 Newcastle to Barkly 16/8/1853 also Hall op.cit.101

[57] CO 137/323 Barkly to Newcastle 7/4/1854.

[58] "The essential features of the new political organisation were as follows: The Legislative Council was to consist of 17 nominated members, of whom only 5 might hold 'office of emolument', each of the others had to own a freehold in the island of not less than £300 annual value. The enlarged Council was given power to originate bills not involving taxation or the appropriation of revenue. Secondly, the governor was empowered to select 3 Assemblymen and 1 councillor to form a committee to assist him in his duties. This Executive Committee was to have all the powers of the old Assembly Wards and Committees, and in future money votes were to be proposed in Assembly only on the recommendation of the Governor-in Executive Committee. Thirdly, various sources of revenue especially the newly scaled import duties were to be set permanently against the costs of the civil establishment and the costs and liquidation of the British guaranteed loan CO137/323 Barkly to Newcastle 10/4/1824 Hall op.cit. 101

hope was expressed that the deficiency would be speedily corrected "so as to place in full security the whole of the salaries to be paid to these offices whether present or prospective, for a partial provision or a defective security for judicial salaries leaves the principle of maintaining the independence of the judges unestablished."[59]

It was not until two years later that the Assembly could be reconciled to the principle of compensation either for the loss of office or for reduction of the emoluments attached thereto. The Judicial Amendment Act 1855[60] introduced a new legal system and an Act in Aid provided compensation in the form of pensions charged on the permanent revenue under 17 VC 29 for the displaced judges.

The Seven Years' War for the independence of the Judiciary had formally ended. Although their salaries were only partially secured and their victory, therefore, incomplete, the principles for which the judges had contended were fully vindicated.[61]

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[59] CO 137/323 Newcastle to Barkly July 1854.

[60] The Bill came into the House in 1855 but became law in 1856. See Chapter 11

[61] It is interesting to note the provisions of the Jamaica Constitution 1962 Section 101(1). The Judges of the Supreme Court shall receive such emoluments and conditions of service as may from time to time be prescribed by or under any law. Provided that the emoluments and term and conditions of service of such a judge, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.

CHAPTER XI

THE JUDICATURE
1856 - 1865

By the Judicial Amendment Act 1855[1] the whole fabric of the law as to the constitution and times of sitting and the practice of the courts as they existed from earliest times underwent radical changes.

We must now consider these changes and examine their merits and demerits.

(A) The re-modelled Judicature

(i) The Courts of Chancery and Ordinary. The death in 1853 of Vice-Chancellor Edward Panton made possible the merger of the functions of his office with those of the chief justice.[2] Accordingly section 2 of the Judicial Amendment Act provided that the chief justice should as such "be an assistant judge to the governor in his office of Chancellor of this island, in the discharge of the judicial functions of the said office, and shall be called 'The Vice-Chancellor of Jamaica'."

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1 CO 137/330 Grey to La bouchere 25/1/1856 "The Judicial Amendment Act of 1855 as finally settled is by no means free from blemishes - indeed its very title is a misnomer as it did not pass until 1856."

2 Not however without some difficulty for the House had passed a Bill in 1854 "but instead of merely enabling the Governor to dispense for a time with the aid of a Vice-Chancellor it was found when it reached the Council to go the length of abolishing the latter office altogether and restoring absolutely and permanently the judicial functions of the Vice-Chancellor" CO 137/323 Barkly to Newcastle 23/5/1854. Colonists were not yet weaned from their attachment to a lay judiciary. The Bill was amended at the suggestion of the CJ and upon his offer to do the work of the VC gratuitously if he were spared the burden of the Cornwall Circuit. See 17 VC 22; 18 VC 4 and 19 VC 12.

Section 9 empowered the new Vice-Chancellor to hear and determine all matters there or thereafter depending in the Court of Chancery either as a Court of Law or as a Court of Equity and preserved in him all the powers, authority and jurisdiction of his predecessor. Similarly the power formerly vested in the first Vice-Chancellor to sit with the Ordinary as Surrogate whenever required so to do was transferred to his successor.[3]

As formerly, appeals from these courts proceeded directly to the Judicial Committee of the Privy Council.

(ii) The Supreme Court. Upon the coming into operation of the Act[4] the existing offices of the chief justice, and assistant judges were declared vacant and the Governor was empowered to appoint (a) as chief justice, a fit person who had practised five years at least at the bar of this island or at the common law bar of Great Britain or Ireland,[5] at any time previous to his appointment and (b) as assistant judges, three fit and proper persons "who shall have been in actual practice and have actually practised three years, at least, at the bar of this island or at the common law bar of Great Britain or Ireland at any time previous to this appointment."[6]

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3 19 VC 10 S 10
4 19 VC 10 S 1
5 Same. Members of the Irish Bar were now for the first time permitted to become judges of the Supreme Court. See Chapter 9 p.
6 19 VC 10 S 13

The Court was constituted of the chief justice and one or more of the assistant judges, or, in the unavoidable absence of the former, of any two or more of the remaining judges, but for certain prescribed purposes[7] it was competent for one judge to preside. Its sessions continued to be convened at St. Jago de la Veja three times per year on the first Mondays of February, June and October, each session lasting two weeks, and except in so far as they were altered by the Act, the existing constitution, powers and jurisdiction remained vested in and exercisable by the Court.[8] Four innovations, one affecting the jurisdiction of, the others procedure in, the Supreme Court may be particularly noticed. First, upon the abolition of the courts of common pleas, all their jurisdiction[9] was vested in the Supreme Court. Secondly, the venue in all civil actions was deemed transitory, and subject to a power in the Court on the application of any defendant or plaintiff to change or retain same on satisfactory grounds, plaintiffs were now free to choose their venue provided it was indicated in the margin of the declaration and of the copies thereof and was endorsed thereon as well.[10] Thirdly, the clerk of the court was no longer required to certify the copy declarations to be served on defendants which could now be certified by the plaintiffs or their attornies

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7 19 VC 10 SS 6 and 8. Prescribed purposes included "establishing the service of action and process" "disposing of motions of course", "moving for orders nisi", "consent matters".

8 19 VC 10 S 7

9 19 VC 10 S 17 also ss 36-37. See also Chapter 9 p.

10 19 VC 10 S 25 but see also S.26 and below p.

and delivered to the Deputy Marshal of the parish in which they were to be served. Fourthly, the ancient customary rules affecting priority of judgments[11] were abolished. So also was the formal writ of execution and the writ of venditioni exponas, somewhat altered by statute, became in effect a writ of levari facias.

(iii) The Circuit Court. For purposes of the Act the island was divided in four circuits, the Home, comprising the precincts of Kingston and St. Catherine, the Cornwall, comprising the parishes of St. Elizabeth, Westmoreland, Hanover, St. James and Trelawny, the Surry, comprising the parishes of St. David, St. Thomas in the East, Portland, St. George and Metcalf, and the Middlesex Circuit, comprising the parishes of St. Mary, St. Ann, St. Thomas in the Vale, Vere, Clarendon and Manchester.[12] Under Schedule A of the Act various places in each Circuit, chiefly the parish capitals and numbering eighteen in all, were named as Court Stations, at which at prescribed times and for prescribed periods in no case extending beyond two weeks, circuit courts were to be held, in the Home Circuit under the Chief

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11 "The practice grew from the mode of dealing between Slave Importers and their Customers which was, I believe, invariably by the latter's giving his bond to the Importer for the amount of his purchase. And if in such case the obligee took judgment on his bond for the purpose of having a present means of enforcing his demand against the only really valuable portion of the debtor's property he would by the issue of an effective writ (except in the case of necessity) be simply destroying the debtor's only means of payment. Hence the writ of execution which became very easily a mere writ of Form was held to bind the debtor's slaves from the time it was lodged in the Provost Marshal's Office and afterwards by express enactment this advantage was ... extended by making the judgment itself to have the same effect from the 1st day of the Supreme Court at which it was obtained or for which the action was brought (38 G3C23 S 3)" Opinion of Bryan Edwards, later CJ CO137/330 Barkly

12 19 VC 10 S 11

Justice, and in the other Circuits, under an assistant judge. The judicial powers duties and authorities of the Chairmen of Quarter Sessions and Chief Judges of Common Pleas as well as of the assistant judges of those courts were transferred to the Supreme and Circuit Courts and upon the coming into operation of the Act, the former courts and judicial offices associated therewith automatically ceased.[13] Section 19 provided that within their respective circuits the chief justice and assistant judges were to act "in all respects as the judges of assize, oyer and terminer and goal delivery have heretofore done and it shall be the duty of each, within the jurisdiction of the courts respectively over which he shall preside ..... to enquire by the oaths of good and lawful men of the parish or precinct in and for which the courts shall be held, of all treasons, misprision of treason, felonies and misdemeanours whatsoever and of the accessories to the same, and to hear and determine the same ..... to deliver the goal and goals within his circuit doing therein what justice shall require and ..... shall take verdicts upon issues and assessments of damages within such circuit and shall also dispose of and determine all matters re insolvency heretofore subject to the adjudication of the insolvent debtors courts of this island and shall also exercise the jurisdiction re matters of appeal, heretofore exercised by the chairmen of quarter sessions."

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[13] 19 VC 10 S 17

The order of disposal of business in the circuit courts was statutorily regulated. First to be heard were such applications as in the opinion of the presiding judge, ought to be made in open court, after which the court was required to deliver the goals and to hear and determine indictments that were ready for trial. Thereafter civil business, in the order in which they appeared on the lists, were to be attended to. Finally came matters of insolvent debtors (which, however, upon the application of any insolvent debtor could be referred to the judges of the Supreme Court) and appeals from the decisions of justices of the peace or any other appeals which chairmen of quarter sessions were empowered by law to entertain.

All proceedings before the Circuit Courts of an original nature were initiated in the Supreme Court and subject to the rules relating to transitory actions already mentioned,[14] the authority to try issues civil or criminal joined in the latter was limited to the court established for the parish or precinct within which the cause of action of offence was stated or charged to have arisen or to have been committed. Power to change the venue in any indictment for felony or misdemeanour was expressly conferred and to the court to which the trial was transferred, power was similarly given to decide and determine the same "as if the offence charged in the said indictment had been charged to have been committed and had been committed in the parish or precinct wherein the same shall so be ordered to be tried."[15]

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[14] See supra. p.
[15] 19 VC 10 S 26

Save where the Crown was party to a suit, the presiding judge could with the consent of the parties signified in open court, dispense with the trial by jury;[16] upon obtaining judgment by default in an action for liquidated damages it was no longer necessary for the plaintiff to assess such damages before a jury. In such cases section 35 of the Act empowered the clerk of the court, or in case of disagreement or doubt, a judge, to assess the damages, provided the plaintiff had endorsed on the original and copy declaration particulars of his debt or demand or of the damages or compensation claimed and had proved the same before the clerk or judge by the sworn evidence in writing of himself and/or his witness.

In any proceedings in these courts attorneys admitted to practise in the Supreme Court were permitted to appear.

The principal officer of the Circuit Court was the clerk of the peace. Hitherto the principal legal officer of the courts of quarter session and common pleas, he became the clerk of the circuit court for the parish or precinct for which he then was or may thereafter be clerk of the peace, save that the respective clerks of the peace of St. Andrew, Kingston and Port Royal, comprising the precinct of Kingston, were limited to the conduct of prosecutions of offences charged to have been committed in the respective parishes for which they held office and that the clerk of the peace for Kingston was charged with the conduct of all matters of civil

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16 19 VC 10 S 34

jurisdiction in the circuit court of the precinct of Kingston.

The duties of the clerk of the peace in his capacity as clerk of the circuit court were detailed in the Act. They included the duty to attend his Court, to call the jurors whose names appeared on the panel for his court and to make known to the judge their defaults and excuses. In all criminal cases he was required to call the parties bound under recognizance to appear and to prepare all bills of indictment and to present and receive the same from the grand jury. He arraigned all prisoners for trial before the court and received and recorded the verdicts given in all criminal trials and in all such cases administered oaths, made entries of all proceedings and in the absence of the Attorney General or his lawful deputy, conducted the prosecutions. He was expressly prohibited from preparing and sending before the grand jury of his parish or precinct any bill of indictment against any person whatever, otherwise than in cases of private prosecution for a misdemeanour, unless the complaint or information upon which such indictment was founded had been preferred before one or more justices of the peace or a prosecution had been directed by two such justices or the accused had been committed or held to bail by them for the offence charged against him, or such prosecution had been directed by the Attorney General in writing to the same. With respect to civil matters he exercised all the powers and discharged all the duties that formerly appertained to his predecessor, the Clerk of the Assize Court and within seven days after the end of each circuit court he was required to transmit

to the Clerk of the Supreme Court the records of cases tried in his court with their verdicts and assessment of damages, having first made a docket of all such verdicts as part of the records of his court.

By section 31 "nothing in this Act contained shall prevent or be construed to prevent the clerk of the peace ..... from practising as attorney at law in the several courts of this island, as they now do in all civil actions, notwithstanding they shall be and act as clerks of the court of the several circuit courts established under this Act."[17]

There was no statutory prohibition against their being members of the Assembly.

Powers of supervision and discipline over the clerks of the peace which hitherto vested in the Courts of Quarter Session were now vested in the judges of the Supreme Court "as fully and effectually as such powers and authorities were vested in such courts of Quarter Session before the passing of this Act."[18]

Three statutes, two dealing with the powers procedures and jurisdiction of justices of the peace, and one regulating the jury system, completed the basic framework of the judicature as re-modelled by the Judicial Amendment Act.

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[17] The Judicial Act of 1840 had required clerks of the peace to be attorneys admitted to practise in the Supreme Court.

[18] 19 VC 10 S 32

(iv) Courts of the Justices of the Peace. 19 VC 37 (1856)[19] consolidated and amended prior Acts dealing with the recovery of petty debts. It extended from £6 to £10 the power of two justices to adjudicate upon liquidated demands and it repealed and re-enacted their ancient power to entertain unliquidated claims up to £2. By consent of the parties a single justice could lawfully hear and determine any case involving a petty debt and parties and their spouses were made competent witnesses. Clerks of the Magistrates' Courts[20] took minutes of the evidence given,[21] and judgments awarded under the Act were recorded by the proper clerk of the peace and the originals thereof filed in his office.[22] An appeal to the circuit court of the parish or precinct from the decisions of justices in matters of petty debt was expressly provided. By 21 VC 10 (1857) questions of title to land not exceeding £20 in value were made justiciable by justices and by 19 VC 9 (1856) "an Act in aid of the law giving summary jurisdiction to justices in petty session." The law relating to the execution of judgments in petty session was placed on a firmer and clearer basis and a general power, with the consent of parties, was given to a single justice to adjudicate in any summary matter.

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19 Amended 20 VC 20 (1857) and 23 VC 25 (1860). The Petty Debts Courts were abolished in 1870 by Law 4 of that year.

20 CO 137/372 Eyre to Newcastle 9/5/1863 (Opinion of AG.Heslop accompanying despatch "The Clerks of the Magistrates were until 1845 unknown by that name, such duties as are performed by Magistrates' Clerks in England having been theretofore performed by the Clerks of the Peace. Since the Act of that year (9 VC 42) and by several subsequent statutes of a temporary character the office was recognised as distinct from that of the Clerk of the Peace and a scale of fees provided for the Officer - See 18 VC 35."

21 19 VC 37 S 32

22 19 VC 37 S 32

Juries. 19 VC 23 (1856) an Act for amending the law relative to jurors and juries implemented recommendations[23] of the Chief Justice. The annual jury list for each parish composed of males between twenty-one and sixty years of age and able to read and write was hereafter required to distinguish those who were justices of the peace or were qualified to serve as members of Assembly. From these two latter groups special juries were drawn, the remainder making up the common juries. Every panel of jurors for a circuit court consisted of the names of forty persons, fifteen being taken from the special, and twenty-five from the common jury list. The former composed the grand jury, of whom not less than nine were required to sit, while the remaining twenty-five served as common jurors. For the trial of misdemeanours and all felonies

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[23] CO 137/307 CJ Rowe to Gov's Secy. 5/8/1850
"I recommend (a) the creation of two panels returned to each Court, one of Grand and the other of Common Jurors, the Grand Jury to be composed of gentlemen holding commissions of the peace and so to arrange the periods when they will be called on to serve as not to make their attendance at the Courts more frequent than they are under the present system, (b) the adoption of the practice of Scotland of accepting two-thirds of three-quarters majority verdict. A great difference of opinion exists on this subject but I could never understand the advantage of compelling an unanimous opinion of twelve individuals acting as jurors when in almost every transaction of life which is to be disposed of by an appeal to many, the decision of the majority is held to be binding. The inflexible rule that a verdict shall be unanimous often may lead a timid man to agree to it against his conscience as it gives the means to a dishonest juror to defeat for a time the just claims of a party to whom he may be opposed by withholding his assent to a verdict called for by the evidence and thus obliging the Court to discharge them .. I confine my recommendations to civil trials .. leaving the trial of Crown Cases as at present until time shall have shown that the alteration works so well that it may also safely be applied to them."

other than murder or other capital felonies it was made lawful to empanel a jury of seven persons whose verdict had to be unanimous. The same number of jurors, whether special or common, sufficed to constitute a lawful jury in all civil cases, save suits at the instance of the Crown for the recovery of penalties and the court was empowered to receive as the verdict of the court the verdict of a majority of five declared by the foreman in open court.

(v) Appeals.

(a) Appeals from the Supreme Court. By section 12 of the Island Act 17 VC 29 (1854) "for the better government of the island" "all and every the functions and privileges of the present Council of this island whether exercised as a Privy Council, a legislature or an Administrative Council or as a judicial body or otherwise howsoever ceased and determined." The succeeding section empowered the Crown "to nominate and appoint such a number of persons as it shall see fit to be the privy or advising Council of the Governor of this island and such persons so appointed shall have and exercise and enjoy the like powers and authorities as are now exercised enjoyed and holden by the members of the present Council of this island when sitting or acting as a Privy Council." Whether by this latter section the authority of a Court of Error was revived and transferred to the newly created Privy Council - an entirely different body - was in the opinion of the Supreme Court of Jamaica "at best an

arguable question."[24]

Gubernatorial Instructions upon which the authority of the Court of Error anciently rested[25] continued to appear among the formal Instructions to the Governors until 1864 when the propriety of their continuance as well as the very validity of the Court, if indeed it existed, were called into question. The Judges of the Supreme Court were unanimously of the view that the Court "if there be one ought to be abolished simply on the ground that it has long ceased to be of the slightest utility ....." By the Imperial Act 7 & 8 VC 69 (1844-5) appeals are allowed from colonies where there was no Court of Error. Shortly thereafter an appeal was allowed directly from Jamaica - re Barnett 4 Moo 453, but there the appellant could not take his case into the Court of Error here because the Chief Justice refused to sign a bill of exceptions. In the Attorney General of Jamaica v. Manderson 6 Moo 240 not long after an appeal direct to England was allowed on exceptions to a judge's ruling at Nisi Prius (to save the delay and expense of proceeding in the Court of Error in Jamaica). Since then appeals were common when the amount in litigation was large. They were of course by leave of the Court in Jamaica, but an appeal has been allowed where the damages were nominal - 40/-d. Benn v. Emery 7 Moo 195.[26]

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[24] CO 137/384 Eyre to Cordwell 27/9/1864 (enclosing Opinion of the Judges of the Supreme Court). It is submitted that only so much of the old body as was a "privy or advising Council" was revived, that by detailing the powers of the original Council in section 12 and by selecting only two of their details powers with which to invest the New Council, the lawmakers in legal intendment at least had divested the latter body of all judicial powers.

[25] See Chapter p.

[26] CO 137/384 Eyre to Cordwell 27/9/1864(Opinion of the Judges of the Supreme Court enclosed in Dispatch)

The judges further considered that no good end would be served by preservation of the Instructions and "so far as they might be considered to revive or establish a Court of Error ..... it would be more advisable to cancel them."[26]

The opinion of the Attorney General was that "the judicial powers of the Privy Council (colonial) were abrogated by 17 VC 29 S 12"[27] and that the Instructions were "utterly inoperative,"[28] whilst the Governor considered that "it might be as well in any future Commission to oust the clauses altogether from the Instructions."

As nothing more was heard of the Court of Error it may be assumed that this ancient relic of slavery by a process of disuetude in the era of freedom had disappeared from the scene within two decades of emancipation and that the royal Instruction which had given it birth was withdrawn. Appeals from the Supreme Court were to go directly to the Judicial Committee of the Privy Council for almost a century.

(b) Appeals to the Supreme Court. A person convicted upon an indictment for a felony or misdemeanour before a circuit court judge who felt aggrieved by any misdirection of the said judge or improper reception or rejection of evidence could move for a new trial before the Supreme Court, provided he had subjected at the trial to the ruling of the court. Where the indictment or information contained no sufficient charge of a punishable offence or where

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[26] Ibid.
[27] Ibid.
[28] Ibid.

there was a mistrial, an aggrieved party could also move for a reversal of the judgment if already delivered or for an arrest of judgment if otherwise. The appellant was required to enter into security to enter his appeal within a period prescribed by rules of court ffamed by the judges under statutory powers.[29] Existing powers of appeal in civil cases were not affected.[30] Appeals by way of Bills of Exception were expressly preserved and no judge of the Supreme Court was allowed to sit in review of any decision of his own.[31]

(c) Appeals to the Circuit Court. As already noticed, from and after the commencement of the Judicial Amendment Act, 1855 all appeals from the decisions of any justices of the peace or court of petty sessions or otherwise which under any law were required to be determined by a Chairman of Quarter Sessions were required to be made in the manner prescribed by the existing regulations[32] to the judge of the Circuit Court for the parish or precinct in which the decision or other act or determination complained of was made or done,[33] and such judge of the circuit court was empowered to adjudicate in the same or like manner as the Chairman of Quarter Sessions were empowered to do.

The Circuit Court exercised a wider power of amendment of any defect in form in any part of the proceedings on appeal before it[34]

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29 19 VC 10 S 43
30 See chapter 9 ~~page~~
31 19 VC 10 S6
32 See Chapter 9 ~~page~~
33 Supra p 406.
34 21 VC 22 S 26

and where the certified notes of evidence of the court below were impunged by either party, witnesses could be examined and cross-examined afresh before it, but fresh evidence was inadmissible.[35] The court had a power to affirm or reverse the judgment.[36]

If the Circuit Court were unable to meet within a month of the date of the decision impeached, either party was permitted to refer the appeal to the decision of a judge of the Supreme Court in Chambers who exercised like powers of affirmation or reversal of the appeal.[37] Questions of law were referable either by a judge of the Circuit Court or by a justice of the peace or by either party to the decision of the Supreme Court or a judge thereof (other than the judge of the circuit court from whom the reference was made) who may either reverse, affirm or amend the decision of the justices or certify their opinion which became the judgment of the court of the justices by whom the reference was made.

The Appeal Regulation Act of 1857 gave a general right of appeal to the Circuit Court "unless where otherwise expressly provided" from the summary jurisdiction of justices of the peace and placed the procedures to be pursued for appealing on a basis which was to last with minor changes until the twentieth century. Any party aggrieved or affected by any judgment of any justice of the peace could either give verbal notice of appeal, or at any time within fourteen days

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35 21 VC 22 S 24
36 21 VC 22 SS 33 and 37
37 21 VC 22 S 22

after the date of the judgment serve written notice of appeal upon the justice of the peace and to the respondent and within the same period of fourteen days deliver to the clerk of the magistrates and to the respondent the grounds in writing of his appeal. Within the period of fourteen days also the appellant was required to enter into recognizance with sureties for the due prosecution of the appeal in a sum sufficient to cover the penalty or sum awarded in the courts and in a further sum of three pounds to cover the cost of appeal. Upon fulfilment of these procedural requirements, stay of execution automatically followed. Upon payment of his prescribed fees the clerk of the magistrate was required to supply any party applying for the same, a certified copy of the proceedings, and to forward to the proper clerk of the Circuit Court not later than fourteen days after the delivery of the judgment appealed from the original or copies of all original documents together with a copy of the proceedings for the use of the judge of the appeal court.

No party was allowed to appeal from a judgment, order of dismissal, decision or determination admitted or assented unto by him or his duly authorised attorney or agent or from any conviction entered up on a plea of not guilty and no party was entitled to appeal where judgment was entered against him by default of appearance "or otherwise" unless such party upon oath in writing within fourteen days set forth his grounds of appeal showing the reasons for his absence at the hearing or trial, that the appeal was not brought for delay but to obtain substantial

justice in the matter.[38]

Judicial Appointments. The judges of the Supreme Court were appointed by the Governor[39] and were removable in accordance with 21 G 3 C25 and 57 G 3 C18.[40] They held their offices durante bene placito regis. Consistent with the constitutional changes, it was expressly provided in the Judicial Amendment Act that the powers of suspension were not to be exercisable save by and on the advice and consent of a majority of members of the new and enlarged Privy Council,[41] and like their predecessors, the judges of the re-modelled Supreme Court were precluded from membership of the Assembly and of the parochial vestries. Likewise they were prohibited from holding or acting under any power of attorney for the management or superintendence of any estate or plantation in the island. The Act also expressly prohibited their "practice at the bar in any court of this island or otherwise professionally."[42]

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38 21 VC 22 S 41
39 19 VC 10 SS 1 and 13
40 See Chapter p.
41 See Chapter 10 p.
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(B) Critique

In the previous chapter reference was made to the sentiments, whether of ungovernable envy, of ambitious design, or of abject indifference with which the Judiciary was regarded by the major constituent elements in the Assembly throughout the progress of the Seven Years' War[43] and of the two-fold offer made by the British Government to assist the colony in rehabilitating itself. We have seen too that after some initial delay the first offer had been acted upon "the Assembly having been actuated in their concurrence to alterations in the system of Government solely by the hope of satisfying Her Majesty's Government and securing thereby the proferred loan of £500,000."[44]

No similar motivation however animated the Popular Body to grasp with alacrity the second offer. On the one hand they were opposed no less to borrowing money to pay compensation than they were to the principle itself of paying compensation for loss of, or injury in office, although in the interest of the finances of the country in the long term it was "much more advantageous to the public in a pecuniary point of view and afforded so much better opportunity for the entire re-modelling and simplification of our courts of law and jury system."[45] On the other hand "... many members of the House, of whom ..... nearly a fourth are of the Hebrew Faith, were pledged in colonial parlance to vote for cutting down everything and everybody."[46]

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[43] See Chapter 10 p. [44] CO 137/323 Barkly to Newcastle 10/4/1854
[45] CO 137/327 Barkly in an address to the House 16/4/1855
[46] CO 137/330 Barkly to Labouchere 8/1/1856

For two years therefore after the political system had been re-modelled, the fate of the Judiciary hung in the balance, until a communication of late 1855 informed that "the offer to guarantee a loan of £50,000 for effecting the compensation of returning officers which was made two years ago and not then accepted by the Assembly cannot now be renewed."[47]

Having by neglect lost the proffered resources with which to pay lump sum compensation, Assembly men were restricted in their choice of action, either to a continuance of the expensive and indeterminate policy of prospective reduction of salaries as vacancies occurred or to immediate retrenchment coupled with the payment of compensation, not in the form of lump sums which were now unavailable, but in the form of life annuities or pensions. The choice was easy to make. By mere effluxion of time "cutting down everything and everybody" emerged as the dominant policy with which the deliberations of the Representative Body were charged when in November 1855 the Judicial Amendment Act was introduced into the House.

It was the limits set by this policy in conjunction with the influence exerted by the legal members of the Assembly in protection of professional interests which shaped the re-modelled legal system, whose main characteristics will be examined under the following heads, namely:

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[47] Henry Taylor's Note in the Colonial Office d/d 7/9/1855 on 15/9/1855 Lord Russell replied officially "I have to express to you my regret that the offer cannot now be renewed." CO 137/327.

(a) The Superior Courts of Law and Equity.

It had been remarked by Lord Metcalfe in 1840 that "unless some duty were found for the Vice-Chancellor beyond that of the Chancery Court and Court of Ordinary he will be highly paid for doing little for there being no separate Chancery Bar he cannot sit in the Chancery Court for more than ten weeks in the year."[48] This waste of financial resources and of judicial personnel came to an end in the merger under the Judicial Amendment Act of the functions of the Vice-Chancellor and Chief Justice.

Another weakness or defect of the Judicial Act of 1840, was, as we have seen, that it had left un-reformed, with all their attendant evils, the proliferation of courts which had, from the days of slavery, occupied the intermediate stages between the courts of the justices out of session and the superior courts of law and equity. These defects the Judicial Amendment Bill had sought to remedy by replacing the courts of assize, nisi prius and goal delivery and the courts of quarter session and common pleas by separate district courts in each county whose processes would issue from the office of the clerk of the District Court of the parish in which the cause of action arose and from whose judgments appeal would lie to an appellate court in the capital. For two months, however, the Bill became "the sport of contending parties in a House comprising ten lawyers all more or less concerned."[49] They emerged the victors. The provisions in

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[48] CO 137/248 Metcalfe to Russell 15/4/1840
[49] CO 137/330 Barkly to Labouchere 25/1/1856

respect of the District Courts were exercised and replaced by Circuit Courts to be held by the peripatetic judges of the Supreme Court. This was done "for the purpose of confining the issue of process in actions at law to the Clerk of the Supreme Court's Office in this city, instead of letting it issue from the Office of the Clerk of the District Court of the parish where the cause of action arose. Its effect will be to enhance the gains of the old established legal firms of Spanish Town and Kingston through whose agency all suits will now have to be conducted - and I much fear - to increase the expense of litigation to the poorer suitors, though half costs only are to be allowed on actions in which under £30 is recivered which heretofore came within the jurisdiction of the Parochial Courts of Common Pleas, whose process issued locally."[50] "The design of the Executive Committee to bring not only law, but cheap law to every man's door will thus be frustrated, but it was quite impossible for them to withstand the influence brought to bear upon the question."[50]

Two conditions of particular appeal to the planting interests had won their support for the legal members of the Assembly. The offices of the Clerk of the Court and Crown and the Provost Marshal were still held by patentees and remunerated by fees. With the concurrence of the local Legislature, Sir Molyneux Nepean, the Clerk of the Court and Crown, then resided in England, "a circumstance that showed that the emoluments of his office still sufficed for himself

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[50] CO 137/330 Barkly to Labouchere 8/2/1856

and his deputy."[51] The office of the Provost Marshal had, since the abolition of slavery, declined considerably[51] "the fees being so small as to render it difficult for Mr. Sullivan the deputy to remunerate proper persons as his deputies throughout the island, these being thus driven in some instances to very irregular modes of eking out an income."[52] Both Offices being therefore in urgent need of reform, the Bill had provided for their abolition upon the basis of the payment of compensation to their incumbents who were anxious to retire. Planters, however, implacably opposed to the patentee system and finding the very notion of compensation odious offered little resistance to the machinations of the lawyers to whom concentration in Spanish Town of the work of the offices of the Clerk of the Court and Crown and Provost Marshal in Spanish Town was advantageous. "Thus the opportunity was lost in the one case of securing a resident principal, and in the other the power of delegating the execution of the law in each county to a Sheriff and of combining the County Goals with the District Prisons in each county town, whereby a considerable saving ought to have been effected."[53]

Two other objections existed in the system of Circuit Courts. The first consisted "in the great additional weight of business which has ..... been thrown upon the Chief Justice and which I doubt whether any man will be able satisfactorily to perform. Besides the tendency to concentrate all legal proceedings in Spanish Town,

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[51] Ibid.
[52] CO 137/330 Barkly to Labouchere 8/2/1856
[53] Ibid.

where he must reside, the task of presiding in all the Courts of the Home Circuit which includes Kingston as well as the Capital, - or in other words, the bulk of the work of the Counties of Surry and Middlesex, is thrown upon him in addition to his regular Supreme Court duties and his sitting as Vice-Chancellor and Surrogate to the Ordinary."[54]

Whilst on the one hand the mal-distribution of judicial work by express legislative decree imposed so unequal a burden on the Chief Justice as to have necessitated subsequently the enactment of a number of special Acts to relieve him from the weight of particular crises,[55] on the other hand the three assistant judges, experience showed, had little to do and it was conceded that the judicial business that fell to them could have been done by two. "Much time lost and needles expense imposed upon the Puisne Judges by a most defective arrangement of the Circuit Courts"[56] reported Darling in 1859.

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[54] Co 137/330 Barkly to Labouchere 8/2/1856

[55] Eq. 23 VCI. An Act to provide for assisting the CJ in the court of the precinct of Kingston.

[56] CO 137/343 Darling to Lytton 26/1/1859 "Consultation with the judges themselves led us to the conclusion that by recasting these arrangements the duty could be readily performed by two instead of three judges. The The illness of Asst.Judge O'Rielly which left no hope of his recovery and his desire to retire at an allowance of £400 p.a. offered an excellent opportunity of placing the Establishment of Judges upon a footing which without increasing its present but diminishing its future would be the means of widening the field of selective and inducing competent Barristers from the Mother Country and from other colonies to accept judicial offices in Jamaica in the event of our local resources continuing ... to be as limited as they are at present" My proposals were not accepted intoto but a substituted Bill providing for an arrangement of Circuits - an amendment upon the existing system but falling short of what the system is susceptable of was presented. I gave it my assent." See 23 VC 2 and 23 VC 3.

One advantage of the circuit court system should not be unnoticed. Unlike the Assize Courts they sat not only in the County but also in the parish capitals, and, in the case of the Surrey and Middlesex Circuits, at a number of other places as well. Whilst therefore the need to go to the capital in order to initiate proceedings in the Circuit Courts occasioned considerable expense, the expense and inconvenience formerly experienced by jurors and witnesses on being required to travel hundreds of miles in attendance upon the courts came to an end.

(b) The Courts of the Justices of the Peace.

We have seen how in the course of the decade after the Judicial Act of 1840, administration of justice in the courts of petty session had progressively declined with the decrease, on the one hand, of the number of stipendiary magistrates, and on the other, the growing indifference of the local justices to their magisterial duties. Infrequency and uncertainty in the sessions of the court had led to a want of confidence in the ability of the Government to uphold the law and "the absence of any prompt and inexpensive mode of settling trifling differences and disputes among the lower orders often led to serious crimes by people taking the law in their own hands."[57] So quickly indeed had the situation worsened that in 1854 the Governor had entreated the Secretary of State "should any more Stipendiary Magistrates be transferred from other colonies where they are less needed not to be unmindful of the urgent needs of Jamaica in this respect."[58]

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[57] CO 137/331 Barkly to Labouchere 9/4/1856
[58] CO 137/322 Barkly to Newcastle 21/2/1854

The new scheme of judicature aggravated the problem in several ways. First, the abolition of the court of common pleas deprived the people of the facility of a court presided over by a professional gentleman, whose processes issued locally, whose procedures were not over-complicated and whose jurisdiction was accommodated to the requirements of a predominantly labouring class. For such courts there was no substitute in the circuit courts whose jurisdiction could only be invoked, however small the sum litigated, by an expensive and tiring trip to the capital. Secondly, the absence of a competent local court of reasonably substantial civil and criminal jurisdiction, combined with the desirability of disburdening the circuit court of a great mass of relatively trivial business led to a tendency to invest the courts of the justices of the peace with increased powers disproportionate to their real importance in the hierarchy of the courts and unsuited to their composition. Thus, whilst necessity, in the context of the re-modelled judicial system, might have pleaded strongly for giving petty sessions a power to adjudicate issues relating to title to land, wisdom would have counselled that lay magistrates could have no competence for such a task. Further, the heterogenity of the society, into which the emotional and psychological effects of slavery were so deeply embedded, augured ill for the creation of a jurisdiction in which white planter/magistrates were given power to adjudicate between whites and blacks over so fertile a source of discord as disputed rights to land.

Even the increase of jurisdiction in petty debts had aroused Barkley's anxieties "whether the extension of the jurisdiction from £6 to £10 is prudent remains to be proved, but I regard the enabling them to entertain claims for unliquidated damages or for damages not exceeding forty shillings arising out of tort as a very questionable experiment calculated to foster the spirit of litigation to which the peasantry are already too prone. Whilst the class generally before whom these claims will be sued for, cannot be qualified either by education or experience for the decision of the nice legal questions which will so frequently arise."[59]

Thirdly, no provision was made for increasing the number of judges of the courts, the jurisdiction of which was so considerably increased, despite the fact that even before the new legal system came into operation "the need of magisterial attendance at many of the rural courts of petty session was a crying one."[60] Proposals of the Government, submitted contemporaneously with the Judicial Amendment Bill, for the appointment at a small salary of one or two local magistrates in areas where there were no stipendiary magistrates were "stood over" by the Assembly "having been received with jealous distrust by some, although in order to avoid any charge of an attempt to increase the power of the Crown, the Bill was so drawn as to empower the Justices themselves to submit for each appointment the names of

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59 CO 137/331 Barkly to Labouchere 9/4/1856
60 Ibid.

two of their own body whom they considered best qualified of whom the Governor was bound to select one - and with coldness by others because the remuneration was designed merely to cover expenses and not to maintain a staff of paid officials which the island cannot afford."[61]

Finally, the new legal system led to the engrossment of power in the hands of the clerk of the peace that was quite disproportionate to his stature in the official legal hierarchy. We have seen that upon the abolition of the courts of quarter session the disciplinary powers exercisable over this office was vested in the Supreme Court. This power however was exercisable only upon complaint made. Clerk of the Circuit Court, almost without exception clerk of the magistrates' court also, a practising attorney and often a member of the Assembly, the clerk of the peace rapidly became such a colossus of power and influence within and without his jurisdiction that very few people, not to speak of an ignorant peasant, would dare to inveigh against him. Thus he became virtually irremovable, often acting in defiance of Governors and in contemptuous disregard of the judges of the Supreme Court.

(e) Judicial qualifications and judicial salaries. The Judicial Amendment Act had placed English and Irish barristers upon a footing of equality with members of the local Bar for appointments to the Jamaican Bench. There were several circumstances in Jamaican life which rendered it not merely desirable but even necessary that

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61 CO 137/331 Barkly to Labouchere 9/4/1856.

recruitment to the local Bench should be possible from sources outside the island. First, although the period was one in which the outward manifestations of prejudice derived from distinctions of race and complexion had been veiled and their mention concealed, yet their existence was none the less real and they engendered secret feelings of jealousy and mistrust, baneful to the administration of justice. Thus when Mr. Moncrieffe, a man of colour, and a member of the local Bar "at which he had much distinguished himself"[62] had declined an assistant judgeship in the new judicial structure, the Governor's reaction was a mixture of sincere regret and relief "for although his election would have been hailed with enthusiasm by the Party (The Coloured Party) which is undoubtedly the most united and powerful in this colony, the fact of its taking place over the heads of the other judges and chairmen would have given umbrage to their friends and connections and, following so soon upon Mr. Heslop's advancement to the Attorney Generalship, would have been regarded almost as an outrage on the white inhabitants."[63] Through the corruption of prejudices systematically sown in the times of "the great abuse"[64] judicial decisions, however impartial in fact, were exposed to the danger of being viewed through the eyes of racial and colour connections.

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62 CO 137/330 Barkly to Labouchere 9/2/1856

63 D'oniell O'Rielly Attorney General since 1832 died on 13/9/1855. He was succeeded by Mr. Alexander Heslop, a man of colour and a member of the Inner Temple. "Thereafter the office was to be a political one" CO 137/330 Barkly to Labouchere 21/2/1856

64 Sir James Stephen in reference to "slavery" note upon Dispatch CO 137/256 Metcalfe to Stanley 2/8/1841

"In a small colonial community and particularly one so divided and suspicious as this, there are obvious advantages in putting one to preside over the legal tribunals who is quite unconnected with the country by family ties, by party connection or by class prejudices."[65] Secondly, the Jamaica Bar had not been able to supply the country's needs. Its numerical strength[66] had never been stable. It had displayed over the years as marked a tendency to decline in seasons of economic distress, as to increase when circumstances were favourable, and as the country was then passing through a protracted period of economic depression, the professional barometer would continue to descend. Thirdly, experience had shown in the 1840's that appeals to patriotic loyalties without the added economic incentive of attractive judicial rewards were insufficient to arouse the ~~more~~ able members of the local Bar to assume their responsibilities to the Bench, to legal administration and to the country. In all the circumstances therefore the official Imperial policy was that "judicial appointments in the colony should not be made from persons connected with the colony by birth and family ties, by practice at its Bar or by long residence in it."[67]

The general policy of the Assembly namely to "cut down everything and everybody" in conjunction with the closed-shop policy of the legal

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[65] CO 137/330 Barkly to Labouchere 9/2/1856

[66] It should also be borne in mind that not all members of the Bar, then, as now, were suited by temperament, in point of character, as well as in learning for judicial office.

[67] CO 137/334 Lt. Gov. Bill to Labouchere 24/2/1857 citing Circular Dispatch No. 107 of 30/1/1851 from the Colonial Office.

members thereof operated however to prescribe judicial salaries, £1,800 in the case of the Chief Justice and £1,200, in the case of the assistant judges, so low as to render the posts unattractive to English and Irish barristers and in effect to shut up appointments to members of the local Bar. Barkly "sensible of the difficulty there will be to find a man of established reputation and high moral character willing to accept the colonial chief justiceship"[68] at £1,800 per annum was nevertheless so impressed with the need to secure an appointment from outside the colony that he urged the Crown "to make the attempt to discover a suitable person."[69] Of the salary attached to the assistant judgeship it was observed that "if the real value were correctly understood there would always be great difficulty in finding candidates for the office amongst the barristers who enjoy any prospect of practice or preferment at home as in any other populous colonies or whose appointment would prove satisfactory to Her Majesty's Government and conduce to the improvement of the administration of justice in this island."[70]

Despite the labours of the Crown and the unceasing exertions of the Governor there was no member of the Supreme Court Bench which was finally constituted on the 23rd of May 1856 who, in point of family ties, party connections, or long residence in the island, was

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68 CO 137/330 Barkly to Labouchere 9/2/1856
69 Ibid.
70 CO 137/351 Darling to Newcastle 24/12/1860.

removed in the public eye from identity with the prejudices and piques of the island.[71]

The circumstances of the deaths in 1857 and 1860 respectively of two judges of the Supreme Court will serve to illustrate how utterly impracticable the closed-shop policy of the legal profession had become and what injury was ~~reflected~~ inflicted upon the administration of justice thereby.

Upon the death of Mr. Justice Lewis in 1857, the Crown, unable to secure an English barrister for the vacancy at so low a salary, was reluctantly obliged to confirm the appointment of the brother of the late Attorney General upon the firm assurances that "he has no family ties in the island and that he has not resided so long in it as to have created local influences at variance with his position as a judge."[72] Darling, the new Governor, aware of the divided state of the Bar and anxious to avoid for the future the recent predicament of his predecessor caused to be introduced that same year into a Bill for amending the Judicial Amendment Act a clause rendering barristers of a certain standing at the Bars of Barbados, Trinidad and British Guiana eligible for judicial offices in the colony. "The proposal of course met with very general disapproval in that Body in which however are no less than six Solicitors, a Branch of the legal

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[71] Sir Bryan Edwards of the local Bar together with three Chairmen of Quarter Sessions of long residence in the island became Chief Justice and Asst. Judges respectively.

[72] CO 137/334 Bell to Labouchere 24/2/1857 citing statement by former Colonial Secretary.

profession in which I understand a strong expectation prevails that under pressure of the circumstances the Bench will be ultimately thrown open to its members."[73] "Unable to consider such a result desirable and the Bar being at this moment reduced to 5 including the Attorney General who would not ..... accept a Puisne Judgeship"[73] the frustrated Governor was led to suggest a remedy not unfamiliar in officialdom: "I should be very glad to learn that the term of the local Law would admit of Her Majesty's Government annulling an ineligible appointment which the Governor might by the force of circumstances be compelled to make on the recurrence of a vacancy."[73]

Mr. Justice Wilkinson's death in 1860 realised the Governor's worst fears. Darling had had a long association with Jamaica and with colonial administration in general. He had been Secretary to Sir Lionel Smith during apprenticeship, a most difficult period of Jamaica's history, had seen the Bench "yield to the bias of party politics" and was familiar with the partialities of Jamaica juries. On the question of recruitment to the colonial judiciary his policy was enlightened. "I have always had the opinion that great advantages to the colonial communities in general would result from a system by which the Judicial Bench in each should be thrown open to competent barristers from all, comprising also the occasional introduction of gentlemen who had practised at the bars of England and Ireland with promotion from the inferior to the higher judicial appointments

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[73] CO 137/333 Darling to Lytton 20/7/1858

throughout the whole range of the colonies, governed by considerations of high character and ability and in some cases of special aptitude for the duties which the particular judicial office to be provided for may involve. Colonial Legislation has, I am aware, done much to prevent the beneficial application of such a system by the enactment of restrictions avowedly desired to limit the selection of judges for a colony to the materials which the Bar of that colony may supply, and by providing salaries insufficient to attract legal competency, much less superior ability, from the Home bars or even from those of the more wealthy and flourishing dependencies. Upon this narrow and erroneous view of the interests of society, the Legislature of Jamaica has, I fear, hitherto acted without entering into details of the standing and position of the gentlemen now practising in the island as barristers."[74]

In 1860 the state of the Bar was even worse than it had been in 1857. The Attorney General was the person best qualified for the vacant office but his appointment would "inflict a serious injury upon the community by diminishing the already insufficient number of the Bar and impairing its professional efficiency."[75] No immediate augumentation to the Bar could be envisaged in the strained economic conditions and there was every liklihood that the precarious health of another member of the Bench would soon force another inroad upon the depleted Bar.

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[74] CO 137/349 Darling to Newcastle 24/4/1860
[75] Ibid.

The official sleight of hand suggested in 1857 did not in 1860 commend itself to the Governor. While he awaited imperial views or commands he resolved not "to inflict upon the colony the injury which the elevation to its judicial bench of any member of the Bar would at present occasion ..... while that injury may possibly be averted at the cost of a little passing dissatisfaction with any proceedings on the part of some section of society."[76]

The passing dissatisfaction lasted six months. In October 1860 Alan Ker Chief Justice of Dominica assumed duties as Assistant Judge of the Supreme Court of Jamaica. Three months later, upon discovering that the judge was not qualified under the local Law[77] for the appointment, a Bill to amend same and to validate his acts was introduced into the House, but was rejected. Members expressed their alarm "at the attempt to annul the solemn and deliberate provision of the Legislation of this island specially assented to by Her Majesty the Queen that the members of the Bar of this island shall be eligible for promotion to the Judicial Bench of the colony and that if the Members of the Bar of this colony are excluded from the Bench of the colony grievous injustice will be inflicted on those who are now members of the Bar of Jamaica and on those colonists who have educated and may choose to educate their sons for the Bar of their native country."[78]

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[76] CO 137/349 Darling to Newcastle 24/4/1860

[77] Ker's Practice had been at the "equity" not the common law bar as the Law required.

[78] CO137/351 Darling to Newcastle 24/12/1860

To the commercial community, however, "to whom the constitution of the higher judicial tribunals was especially a matter of interest and concern"[79] the retention of the services of Mr. Justice Ker was a matter of great moment, all the more so as on the 22nd of December the death of Mr. Justice O'Rielly reduced the complement of the Supreme Court to the number of two. The Assembly was now compelled to relax its barren constitutional and parochialist stand. In early 1861 another pro hac vice Act[80] was passed just in time to permit Mr. Justice Ker to share with his remaining colleagues the burdens of the February Session of the Supreme and Circuit Courts and thereby to initiate a career of long, devoted and fearless service to Jamaica in which he earned recognition for "high character as a lawyer and as a man of firmness and an impartial temper and judgment."[81]

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79 CO 137/349 Darling to Newcastle 24/12/1860

80 See Chapter 9 p.

81 Lord Granville 29/7/1869. Upon his death in 1885 the Gazette Extraordinary of 20/3/1885 "Mr. Ker had the most lively feelings of sympathy with the people of Jamaica and especially with the poorer classes" "As Chief Justice of Dominica he received £600 p.a. After deducting travelling expenses from his Jamaican salary of £1,200 his take-home pay would be not much greater than £600." Note of Henry Taylor.

CHAPTER XII

LEGAL ADMINISTRATION
1856 - 1865

The process of decay in the administration of justice which had already been at work before the Judicial Amendment Act persisted throughout the succeeding decade, exacerbated by the hostility of the Assembly, by the general moral decay in society, and by the deficiencies and defects inherent in the system of judicature established under that Act.

Each of these matters will be considered in turn.

(A) The hostility of the Assembly. The jealousies, envies and prejudices which had engendered and sustained the implaccable hostility of the Assembly towards the Judiciary throughout the Seven Years' War had not been buried in the settlement of which the Judicial Amendment Act was the legislative record. Popular feeling, it seems clear, had not been reconciled to the notion of an independent judiciary, and how little indeed had the generality of Members of Assembly even conceded the desirability of a professional bench may be gauged from the fact that in 1854 the Council had, with no little dismay, received from that Body "a Bill which had gone the length of ..... restoring absolutely and permanently the judicial functions of the lay Governor/

Chancellor."[1]

From 1856 to 1864 the Assembly, by attempted intimidation, by denial of reforms which, without incurring any additional expense, would have improved judicial status, and by refusal to effect improvements in the legal system as a whole renewed and maintained their assault upon the independence of the Judiciary.

(a) Intimidation. The campaign of intimidation began within four months of the investiture of the new judges in their office and Mr. Justice Cargill became for eight years the butt of it. At the Vere Circuit Court in August 1856 he directed the acquittal of three defendants who had been charged with larceny from an estate of a can of sugar on the grounds of the non-production of the can and of "the utter want of the faintest proof of identity of the accused."[2] The jury, however, after consultation with the Clerk of the Peace on retirement to consider their verdict, returned a conviction, and the judge, who was desirous to postpone sentence in order to consult his colleagues, at the insistence of the Clerk carried out his duties by imposing the nominal punishment of 24 hours imprisonment. Infuriated by this judicial lenity to black men, the magistrates

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1 CO 137/323 Barkly to Newcastle 23/5/1854. The Council amended the Bill to provide for the discharge gratis by the Chief Justice of the function of the Court of Chancery. The Assembly could hardly refuse. The Bill became law and was renewed until the Judicial Amendment Act made permanent provisions.

2 CO 137/334 Bell to Labouchere 8/1/1857 (Records Accompanying Dispatch)

vestrymen and other inhabitants of the parish traduced the judge in a petition to the Assembly for "his great irritation of temper ... .contempt of the rights of property ..... utter absence of those high qualities which are requisite to enable anyone to weigh and balance evidence"[3] and for tampering with the notes of evidence which from the published version "did not appear to contain a truthful account of all the circumstances attending the trial."[3] The Committee of Grievances of the House, before which Cargill was invited to attend but declined,[4] heard the evidence of six witnesses[5] and recommended that the House submit the petition and evidence to the Governor with a view to the suspension of the judge after a trial before the Privy Council.

Against the propriety of an enquiry into his conduct, in respect of which no charge of moral turpitude was raised, the judge contended that "in the exercise of his office, a judge is answerable to no one even for an error of judgment unless corrupt or improper motives be shewn"[6] and as to the merits of the case he urged that (i) "as the prisoners were undefended, according to the humane principle of English Law, the judge was counsel for the prisoners, that is, was bound to see that all proceedings against them were legal and strictly regular", (ii)"whether there was any evidence is a question for the judge, whether it is sufficient,

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3 Ibid.

4 Cargill's refusal to appear before the Committee was based upon the same grounds as those of his courageous predecessor Mr. Jackson. See Chapter 6.

5 Three were owners of neighbouring plantations, one the Clerk of the Peace Mr. Foster-Davies himself the manager of a sugar estate and the book-keeper and attorney-at-law of Foster Davis' property.

6 CO 137/334 Bell to Labouchere 8/10/1857 (Accompanying Dispatch)

for the jury" and (iii) "asto the allegation of suppression of evidence, I as judge took down only that which was receivable as evidence." Opinion in the Colonial Office did not entirely accord with Cargill's. In particular "the jury having chosen (wrongly, if you please) to overrule his technical opinion, he ought to have waived it altogether, but," continued the Secretary of State, "to take measures towards the punishment of a judge for a single case of forgetfulness of this description, incident as it is even to the ablest and most honest judicial functionaries in the discharge of their difficult duties would do greater injury to the community by compromising that independence of the Bench, which is the safeguard both of public and private rights than good by the correction administered in the particular case."[7]

The case of Fitz Morris v. Morgan for trespass before Mr. Justice Cargill in the St. Mary Circuit Court in the autumn of 1859 provided the circumstances for the second petition against this judge. Morgan, for whom the Clerk of the Peace and Member of Assembly Wellesley Bourke had appeared, was an overseer and member of the parish vestry "who after living several years with the plaintiff as his mistress throws her off suddenly for a younger woman and then tries to deprive her of her property, accusing her of larceny for taking her own goods away from his house and was obliged to compromise the matter in order to escape an action for trespass."[8]

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[7] CO 137/334 Labouchere to Lt.Gov. Bell 16/2/1857
[8] CO 137/348 Darling to Newcastle 24/2/1860 (Comments of Cargill accompanying Dispatch).

For his mendacity during the case he was charged with perjury but the grand jury ignored the bill "two of them being his bail and intimate friends and ..... on the morning of the Circuit Court at which the Bill was preferred the grand jury were drinking champagne freely at Morgan's expense."[9] Agitated by the unhappy course his client's case was taking, Bourke repeatedly interrupted Plaintiff's Counsel during his address, was rude and insultive[10] to the judge, and was threatened with committal for his contempt. Upon a petition by Mr. Bourke alleging in the judge "judicial intemperance, partiality, prejudice, indignant and unbecoming conduct, wilful perversion of truth in the administration of justice,"[11] the House, after receiving evidence and report of its Committee of Grievance recommended the Governor to forward the petition, the report and evidence to the Secretary of State.

In the spring of 1861 instructions were received that "the most fit course of proceeding would be that of instituting an enquiry into the charges before the Privy Council"[12] and having readily voted a sum of £500 to defray the incidental expenses, the Assembly authorised seven of its members including the Speaker and Mr. Bourke "to prosecute the impeachment"[13] against the judge

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9 Ibid.

10 Cargill had charged him with wasting the time of the court, with irrelevant references and long drawn-out speeches. Bourke in his address to the Jury made references to the judicial rebuke and said that the judge was well paid for his time. Cargill of course could have committed for his contempt but refrained.

11 CO 137/348 Darling to Newcastle 24/2/1860

12 CO 138/73 Newcastle to Darling 16/4/1861. There was a delay whilst the Secretary of State consulted the Attorney General and the Solicitor

13 CO 137/365 Darling to Newcastle 9/3/1863 /General.

against whom nine specific charges relating to his judicial conduct in the circuit courts of six parishes and going back to the Vere trial of 1856 and extending over the years 1856 to 1861 were laid.

The written answers of the judge to these charges lift the veil of secrecy from over the court rooms of the mid-nineteenth century. "Their (Mr. Bourke's and his friends') hostility to me, independently of their being led on by Mr. Bourke, is thus accounted for: previously to the passage of the Judicial Bill (1855) they had been accustomed only to the Petty Courts of the island, but when the Circuit Courts came into operation from which Barristers were necessarily excluded, the same rudeness and want of decorum which they had been accustomed to in the Petty Courts, they still desired to indulge in and any attempts at repressing such practices were by then misconstrued into personal dislike towards them ..... The interests of the clients in a cause and the interests of the judge are one - namely to have the suit disposed of on correct principles and as soon as possible. The interests of the attorneys employed, however, is different and unless they be men of strong principle, they may give way to it, for however disastrous new trials may be to parties who pay costs, they are clear gain to the Attorneys, and hence, I believe, has arisen much of the mystification which I have endeavoured to repress."[14] To the charge of judicial intemperance the judge countered that "it is impossible to avoid

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[14] CO 137/366

feeling annoyance and even pain at some of the dishonest and rude conduct I have witnessed, but such a feeling is very different from that which would warp a man's judgment or integrity. I am also quite unconscious of having committed the vulgar antics laid to my charge, but how can I disprove them? If I coughed or moved my chair, it was noted and mis-reperented. Persons not hostile cannot have noticed anything so trivial."[15]

One specific charge of "undignified and unbecoming conduct as a judge" and the circumstances from which it arose are instructive. On his way to court Cargill had stopped at Mr. Shakespeare's house for breakfast. At table words had fallen from his lips touching a case to be heard before him to the effect that "it is a serious charge and if Mr. Lindo is convicted I shall feel some difficulty in awarding his sentence. I think I shall write and consult the Chief Justice." Braine, the complainant, overheard these words, and communicated them to Mr. Bourke who "thought it his duty as a public prosecutor to mention the circumstances to the Attorney General."[16] The remark in due course found its way into the "County Union" as evidence that "the judge had prejudiced the case."[16]

In early 1862 the Privy Council "after consideration of all the charges were unanimously of opinion that upon none of the charges were there grounds for recommending that Judge Cargill should be suspended from executing his office."[17] Dissatisfied

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15 Ibid. 16 CO 137/366
16 CO 137/365 Darling to Newcastle 20/3/1862

and unrelenting, the Assembly at the instance of Mr. Bourke called in question "whether the secret operations of the Privy Council as a judicial tribunal are in the opinion of the Executive Government conducive to justice and adapted to the state of the society"[18] and laid before the Governor a report submitted by a Committee which had been appointed to prepare a remonstrance to the Home Government as to the conduct of the proceedings against Mr. Justice Cargill.*

Before the report of this Committee of the House was acted upon, "the magistrates, Ministers of Religion, merchants, planters and other inhabitants" of Mr. Bourke's constituency, St. James, had memorialised the Queen. In the circumstances of three cases in the Circuit Court of that parish in which the judge had passed sentences upon three accused parties the memorialists considered that they were justified in attacking the judge for his "undue leniency in sentencing parties convicted of common assaults and manslaughter"[19] "bearing in mind that the present is not the first instance in which Mr. Cargill has offended society from the judgment seat".[19]

In the first case, one of manslaughter, the prisoner William Duncan had gone about his business after an initial wrestling with the deceased Allen who followed him to his workplace and provoked him by striking him. In retaliation he flung a bit of wood two feet long by three inches wide at him which struck and killed him. The wood accidentally struck him at a weak place in the deceased's skull and the jury returned a verdict of manslaughter with a

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[18] CO 137/368 Eyre to Newcastle 31/1/1863
[19] CO 137/374 Eyre to Newcastle 8/9/1863

recommendation of mercy whereupon the judge imposed a fine of three pounds.[20] This the memorialists considered "a most unfortunate and unhappy precedent to the lawless passion of all classes and a direct encouragement to crime."[21]

Of the legality of a fine in manslaughter and common assault the judge was in no doubt. In addition, in imposing such a punishment he had addressed his mind to the relative deterrent influences of various sanctions upon the accused, a negro. "To imprison a negro without hard labour is more injurious than beneficial to society for he has not that active mind which makes mere confinement irksome to him and to be well fed and cared for in idleness is no punishment."[22] "As to the amount of the fine imposed ..... the average wages for labourers is one shilling per day and they work for money wages five days, reserving the sixth for marketing or working in their grounds. A fine of 40/-d. is therefore a mulct of eight weeks money earnings and quite equivalent to two or three months imprisonment."[23]

In the second case, the prisoner, a married woman, found her husband with the prosecutrix who admitted in evidence that she was having a child for the prisoner's husband. In a quarrel the prisoner pulled the prosecutrix to the ground but the prosecutrix's evidence as to violence was exaggerated. Three weeks later the

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20 Ibid.
21 Ibid.
22 Ibid.
23 CO 137/374 Eyre to Newcastle 8/9/1863 (enclosing Cargill's defence).

child was born dead. The verdict of the jury was for common assault for which the judge imposed a fine of 40/-d., a sentence "equally injurious in its example as the previous one"[24] in the eyes of the memorialists.

In the third case, the prosecutor had been trifling with the prisoner's "sweetheart". He told him to leave his premises and on his refusal the prisoner struck him with a half-brick. The evidence was conflicting as to the effect of the blow. Upon the jury's verdict of guilty for common assault, a fine of two pounds was imposed. This the memorialists considered "a suggestion to the evil-minded that a paltry sum of money is in the highest criminal court full satisfaction for an offence stopping short of death itself."[25]

No censure proceeded from the Crown. The principle of judicial independence was firmly upheld, no corrupt purpose having been imputed to the judge. "It was not the practice of the British Government to interfere with the judges to whom the administration of the penal laws is entrusted."[26]

Behind the campaign of accusations against the Judiciary the strands of two firm designs could be un-masked. One was that the criminal law, in the view of white society, should be administered against the blacks with utmost severity. The policy of "punishing

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24 Ibid.
25 Ibid.
26 CO 137/374 Newcastle to Eyre 8/4/1863. It was however the view of the Crown that in the case of manslaughter of Allen by Duncan "there was an apparent failure of justice but as the verdict was accompanied with recommendation to mercy it must be supposed that there were circumstances in the case which are not appreciable by those who were not present at the trial".

the damned black rascals"[27] had persisted through apprenticeship into freedom, and its want of manifestation in the sentences against the three accused, as the Vere Case and in the three cases last instanced, had excited the anger and remonstrance of the judge's accusers. With such sentiments judicial approach did not accord. Cargill did not agree with the idea of the memorial that the way to redress crime was to punish slight offences harshly, for "although the negroes are no doubt prone to offences against the person and against property on slight temptation, premeditated crime is not common among them."[28] "I have never observed any sympathy evinced by them for serious offenders and they can quite understand the reasons given for a slight or for a serious punishment. That indiscriminate sentences produce recklessness "is not quite understood by the memorialists from Montego Bay."[29] The other strand of design, a survival of slavery and apprenticeship, was that the law, not being made for white men, should never be used against them. Thus in the case of Fitz Morris v. Morgan the desire to use the court as a vehicle of white policy having fallen short of accomplishment, popular resentment was gratified by the abuse of the jury box and by the levelling of accusations against the judge.

The judiciary had withstood the attempts to undermine its independence but the unseemly conflict was likely to impair the

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27 Jamaica under the Apprenticeship System p. 43
28 CI 137/374 Eyre to Newcastle 9/9/1863 (enclosing Cargill's Defence).
29 Ibid.

confidence of the mass of the people in the institution. "If it were permitted to prevail that Jamaica's judges were to be intimidated by the House of Assembly on ex parte statements, justice must become corrupt."[30]

The final act in the long conflict between the Assembly and the Judiciary came to a head on the 9th of February 1864. David Ewart, Stipendiary Magistrate and Agent General of Immigration, had been committed to the Common Goal of the county of Middlesex for his contempt of the House in refusing to make known certain communications to him from the Governor. Ordering his release upon a writ of habeas corpus, the Full Court of the Supreme Court in an unanimous decision demolished the pretensions of two centuries of the Assembly. "The Assembly" said Mr. Justice Ker "is not a Court of Law. It does not possess one judicial function. It cannot administer an oath. It cannot even adjudicate upon the validity of the elections of its own members ..... What was granted to this Colony was a Representative Assembly of which Kielly v. Carson has decided that a general power to commit for contempt is not a legal attribute and accompaniment."[31]

(b) Assembly's refusal of judicial reforms. In the two years after the establishment of the Circuit Courts experience had brought to light certain defects in the organisation of the system. Comprehensive

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30 In a letter to the Press by George William Gordon.
31 CO 137/379 In the Supreme Court February Term 1864. For a fuller examination of in re Ewart see Chapter 6.

information obtained from the judges on such matters as the average number of days on which the Court sat at each station, the time in fact spent by the judges at such stations, and the number of miles travelled on circuit indicated the possibility of a re-organisation and contraction of the number of circuits which, whilst effecting a more judicious employment of time and more efficient despatch of judicial business, rendered possible the desirable retirement of one assistant judge incapacitated by grave illness, and a consequential increase in the emoluments of the others. It was shown, for instance, that judges, having finished their business at one circuit station, was obliged at unnecessary personal expense and inconvenience to remain there pending the opening of the next circuit on his itinerary. Again, under existing arrangements each judge on an average travelled 805 miles and was on circuit 126 days in each year, whereas under new proposals of the Governor with which all the judges had agreed, each of three judges would travel 705 miles and be on circuit 103 days despatching all the judicial business of the circuit. In addition to the increased efficiency and economy they afforded, the proposals also offered the possibility of placing the establishment of judges upon a footing which would be the means of strengthening the bench through the wider field of selection which the increased emoluments would offer.

The proposals were rejected by the Assembly. Opening the bench to non-Jamaicans was anathema to barristers and solicitors alike in and out of the Assembly. Not even the proposals of

diminishing future costs of the judicial establishment could appeal to Assemblymen whose constant groan was the high costs of the public establishments. Implacable hatred of the "pampered officials" inhibited acceptance of any proposals which would have placed retiring benefits in the hands of one assistant judge or have improved the financial status, and by that token, the independence of the others. Instead, a substitute Bill which reduced the number of Circuits from four to three whilst retaining the three assistant judges was passed. The Governor gave it his assent although "it fell far short of the improvements of which the circuit court system is susceptible."[32]

It was not long before the defects of the new arrangements came to light. 23 VC 1 to provide for assisting the Chief Justice in the court of the precinct of Kingston was an ad hoc measure which testified to the enormity of the burden being borne by the Chief. Riots in Westmoreland and Trelawney in February and August respectively of 1859, and the attendant necessity of trying a considerable additional number of persons at one time dislocated the existing system and rendered necessary further ad hoc measures.[33] Finally the Assembly passed 23 VC 15 an Act to amend the Judicial Amendment Act

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[32] CO 137/343 Darling to Lytton 26/1/1859.

[33] 23 VC (1860) An Act to extend and alter the attempt of the Circuit Court of St. James and Trelawney to be held after the October term 1859. 23VC3 (1860) an Act to regulate the issuing of, and the proceedings under a special commission of oyer and terminer for the trial of certain offences committed in the county of Cormwall. CO 137/348 Darling to Newcastle 25/1/1860 23 VC I, 23 VC 2 and 23 VC 3 have answered the purposes for which they were enacted and are no longer operative."

1855. It gave the Governor power to issue special commissions of oyer and terminer and goal delivery to the judges of the Supreme Court in times of emergency. It made no provision however for compensating the judges and other functionaries for the additional expense to which the special duties subjected them.[34] In short, the Act was a mere legislative directive to the judges to undertake without recompense the judicial burdens which periodic crises imposed upon an inefficient legal system. As the travelling expenses necessarily incurred while on circuit and absence from home for a considerable portion of each year consumed nearly a half of a salary of £1,200 per annum they found their emoluments "utterly incompatible with the maintenance of anything like a becoming position."[35]

(c) Assembly's refusal to effect other improvements in the legal system.

We have seen in an earlier chapter[36] how by reason of the rapid dimunition of the number of stipendiary magistrates and the failure of the unpaid magistrates to attend to their duties the want of a regular and efficient administration of justice in the lowest branch of the judiciary was in 1854 "shaking society in the island to its very basis." "Three times since then" Darling

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34 CO 137/348 Darling to Newcastle 25/1/1860. Of course the judges could have sued for their expenses on a "quantum meruit" but ~~but~~ among other awkward situations would have been the spectacle of each judge adjudicating on the other's claim. They consequently bore the imposition in silence.

35 CO 137/343 Darling to Labouchere 9/2/1859 (enclosing representations to Mr. Justice Wilkinson).

36 Chapter 9.

reported to the Secretary of State "measures intended to provide either for increasing the existing number of stipendiary magistrates or for supplying vacancies as they might occur have failed in the Assembly. A Bill in Barkly's time , a Bill in the Session of 1857, and the present Bill which differed materially from those to which I have just referred inasmuch as it contemplated only one new appointment at the present moment, although it provided for the permanent maintenance of fourteen stipendiary magistrates, the vacancies to be filled up by the Governor and a salary at a reduced rate of £400 per annum with an additional £100 per annum to such stipendiary magistrates as might be assigned to larger districts, the whole costing additionally but £1,100. In addition this Bill provided for the creation of Assistant Magistrates."[37] It became impossible to obtain the concurrence of the Assembly to any plan for maintaining a permanent magistracy which did not embrace a considerable amount of patronage to be distributed on the island.[38] In short, imperial patronage of the days of slavery, was to be replaced by local patronage in the era of freedom, and as the latter was as intolerable as the former and could not be maintained, the Govenor conceded in despair that "the Government will have to rely upon an unpaid magistracy composed of such material as the Planting and Mercantile Bodies may afford in future and of

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[37] CO 137/343 Darling to Lytton 26/1/1859
[38] Ibid.

these experience shows us that the most eligible will not give their regular attendance at the Petty Sessions."[39]

From 1856 therefore down to 1866 no paid magistrate was appointed for any parish save that of Kingston.[40] By deaths, resignation, transfers and other causes the stipendiary magistracy dwindled to eleven in 1860. Two years later when there were twelve parishes without the services of these men Eyre drew the attention of the Legislature to the fact that "in some of the country districts great difficulty is experienced in procuring a sufficient number of magistrates to form the courts of petty sessions in consequence of which the administration of justice is greatly impeded or often frustrated altogether, suitors being compelled to attend successive court days at great inconvenience and expense without having their cases called for trial."[41] Neither the Council nor the Assembly in their replies even adverted to the question.

(B) Moral decay in society

Emancipation had released the captive energies of a people long held in slavery and the collapse of the social pyramid had offered to all the constituent elements of society the chance and

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39 CO 137/343 Darling to Lytton 1859.

40 21 VC 27 (1858) established a police magistrate for the city and parish of Kingston."Because important questions of law often arise in the Petty Sessions & Petty Debt Courts and from the fact that the city of Kingston contains an extensive population and a large mercantile community it is enacted that the holder of the office of Police Magistrate must be a Barrister at law of not less than 3 years standing or an Attorney at Law of not less than 5 years standing in the island" CO137/336 Darling to Labouchere 9/1/1858. The first appointee was Mr. Girod.

41 CO 137/368 Eyre to the Council and Assembly 4/1/1862.

the challenges of building a new and exciting way of life. After an initial attempt to turn back, the response became keen and enthusiastic, and society was borne along on the current of a novel social and economic experience. The growth of peasant-farming gave the blacks a sense of independence hitherto unkown. The labourer worked for wages, paid his rent and tasted the dignity of manhood. The eyes of the planter were lifted up to see waste of time and labour in the inefficient hoe and he replaced it with the plough and the harrow. The utility of new inventions designed to save labour, cut costs and improve profits excited and gratified his imagination. Above all, in the courts administered by professional gentlemen, unconnected with politics and secular engagements, black and white and coloured had the assurance that the unpaid wage, or rent, the over-due debt would be ordered to be disgorged. The guarantee of receiving the reward which the judicial system offered became the incentive to labour.

Real social stability in a heterogeneous society to which the habits and conditioning of slavery still clung tenaciously required, however, the more solid foundations of widespread education, Christian instruction and mental improvement. To obtain these the primary need was an improved political system truly representative of all classes, responsive to social needs and alert to change. We have seen in Chapter 10[42] what the composition of the Assembly

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[42] See Chapter 10.

was and what objectives engaged the interests represented there. Any reasonably progressive extension of the franchise which could possibly bring about a change in the political representation was impossible. An attempt in 1856 to increase the aggregate constituency from 2,000 to 6,000 had failed in the House, the real secret of the rejection being, for instance, that "in Spanish Town the capital ..... and for the whole surrounding parish there is now a constituency of 38 electors to return 3 Members and the representation has long been divided without a struggle between certain parties who may be said to have acquired a monopoly which they are naturally dis-inclined to see discontinued."[43]

In the hands therefore of 47 men elected by a constituency of not more than 2,000 rested the destiny of over 400,000 souls. Of the 47 down to the end of this period over a half were planting-attorneys, mere middlemen, the factors and agents of absentees, bound to obey their behests.[44] Jews, coloureds and lawyers composed the rest. Except for the latter among whom were public servants such as the Clerk of the Court and Crown and several Clerks of the peace, the rest were predominantly "half-educated and unintelligent and some certainly unprincipled men,"[45] obsessed either with gain or with the complexes of colour and race.

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43 CO 137/331 Barkly to Labouchere 9/4/1856.

44 Even treasonable behests . Dowell O'Rielly the A.G."had read plainly letters of advice teeming with treasonable suggestions which the writers dared not utter in England but which they try to get their unfortunate agents in this country to carry out." CO 137/301 O'Reilly in the Council 1849.

45 Note by Taylor of the Colonial Office on CO 137/368 Eyre to Newcastle 23/12/1863.

Under the sterility which such an immutable political system maintained, education remained unfostered, religious activity declined and with increasing economic difficulties came political corruption, corruption in public offices, partialities in the dispensation of mercy which destroyed the faith and confidence of the masses in the possibility of social and legal justice.

(a) Political corruption. A characteristic of the times was the misuse of law and the Legislature for the gratification of private and personal ends, a practice which doubtlessly brought disrespect upon the law and upon the agencies through which they were enforced. Two examples will suffice. The Law of Libel Amendment Act of 1855 which had a retrospective effect "was calculated to oblige Mr. Clacker Custos of Portland and Plaintiff in a prosecution of Clacker v. Walters to pay costs. The Bill had been introduced and passed with great haste through the Legislature by Mr. Foster-March, Solicitor for Walters and like his client a Member of Assembly."[46] Of the Vexatious Litigant Act 28 VC 35 (1865) Chief Justice Edwards remarked that "the whole statute may be taken as a specimen of Case Legislation, of legislation that has been far too prevalent in Jamaica. Some particular circumstances occurred either to the framer of the Statute or his friend, which they considered a hardship and which a particular enactment might remedy and straight away the measure was introduced and forced on in spite of all opposition."[47]

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46 CO 137/326 Barkly to Grey 1855.

47 CO 137/435 Grant to Buckingham & Chandip 23/7/1868 forwarding comments of the CJ on the repealed Vexatious Litigant Act.

The case of Mr. Wellesley Bourke's petition to the House against Mr. Justice Cargill can also be seen as a misuse of the power of membership of the House in order to satisfy feelings injured in the Courts of Law in circumstances of justifiable judicial rebuke for behaviour unbecoming of an officer of the court.

(b) Corruption in public offices. There was no subject on which at the time of Barkly's accession to the administration of the Government so remarkable an unanimity of opinion prevailed as in regard to the evil which resulted to the community from the unfitness of many of those on whom the Commission of the Peace had been conferred. The power of recommending candidates to the magistracy had been claimed almost as a right by the Custodes and when it is borne in mind that these high officials presided in the Vestries at which Justices of the Peace had an equal right with the elected members to sit and vote on the disposal of the parochial funds and local patronage it only requires but slight knowledge of human nature to appreciate that in order to carry some resolutions or secure some situation for a friend highly improper persons had been recommended to the Executive for Commissions.

Barkly's purging of the Rolls, as well as his insistence upon Custodes to forward with their recommendations full particulars as to the position and claims of their nominees, and upon the prompt investigation of complaints of the conduct of individual justices, preserved the magistracy from the contamination of improper members for some time, but by 1858 corruption had once more reared

its head. Scandals became rife that "certain justices made almost a trade of their offices by attending most punctually to only such duties of it as entitled them to fees,"[48] and in order to check the abuse 21 VC 31 (1858) was passed, namely an Act for the abolition of fees to justices of the peace. Two years later Mr. Girod, the first Police Magistrate for the parish of Kingston and a lawyer was removed from office for the confessed crime of forgery and in 1863 four justices of the peace lost their commissions for gross misconduct.

Most reprehensible of all perhaps was the conduct of the Justices of the Peace of St. Catherine in the matter of John Fonseca, Superintendent of the County Goal of that parish. Dismissed for neglect to which the escape of a prisoner under sentence of death was attributable, the Speaker of the House Mr. Jackson and another Member of Assembly prevailed upon the Justices on the strength of whose report Fonseca's dismissal was ordered, to re-instate him. The re-appointment was illegal inasmuch as the law precluded the justices from doing so without the Governor's written sanction. The Governor formally dismissed the Superintendent of the County Goal once again and in reporting the incident commented: "Mr. Fonseca is the electioneering agent of Mr. Charles Jackson the Acting Speaker and others and in that capacity made himself very useful to these

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[48] CO 137/336 Darling to Labouchere 19/3/1858 forwarding A.G. Heslop's comments in 21 VC 31.

gentlemen. It is ..... to reward him for these electioneering services that the justices at the instance of Mr. Charles Jackson and the other gentlemen who have benefitted by Fonseca's services elected him to be Superintendent of the District Prison of St. Catherine. This occurrence will afford ..... another instance of the difficulties which a Governor has to contend with in Jamaica from the personal motives and influences which are constantly at work to prevent ..... what is right or desirable for the good of the country and to induce ..... what is wrong or injurious to the best interests of the community."[49]

Political and magisterial corruption soon found its way into and vitiated the Public Service. For their own personal advantage public servants holding seats in the Assembly opposed Government measures, often securing their defeat,[50] and they and others leaked confidential information to the Press.[51] The system of quarterly payment of salaries plunged public officers into debt and usurious Jews battened off impecunious civil servants.[52]

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49 CO 137/378 Eyre to Newcastle 18/1/1864.

50 Thuse in the 1857 Session of the House the Clerk of the Courts and Crown and the Registrar in Chancery opposed the Bill for the establishment of a body of SM's even to the recording of votes upon a decision CO 137/350 Darling to Newcastle 28/6/1860.

51 Necessitating a Government Circular of 1859 to the effect that "persons in the Service are expected to abstain from addressing to the Public Newspapers communication whether anonymous or avouched by a signature which have reference to Public Questions or which bear a controversial criminatory or recriminatory character." CO 137/348.

52 Darling introduced monthly payments instead of quarterly payments and incurred thereby the animosity of the Jews CO 137/345 Darling to Newcastle 24/8/1859.

The same year that saw the summary removal of four justices of the peace[53] also witnessed the dismissal of fifteen public servants, including a Clerk of the Peace and the Registrar of the Court of Admiralty for offences varying from taking bribes, intemperate habits, neglect of duty and embezzlement.[54] It was the painful duty of the Governor in reporting these dismissals to state that "it is my firm belief that there are still in the Public Service in Jamaica a very considerable number of Public Officers who are equally undeserving and quite as inefficient as those who have been turned out but against whom no sufficient evidence has yet been brought forward. With such a want of principle and such an addiction to intemperance among the Public Servants it will be at once seen how difficult it is to govern satisfactorily a colony like Jamaica where the physical nature of the country prevents the exercise of that vigilant supervision and prompt control which are so essential to the maintenance of well organised and efficient establishments. Most of the defalters are persons who have been enjoying offices of trust and respectability and they are connected with parties of position and influence in the community ..... Very recently a merchant of high standing in Kingston indignantly threw up the honorary appointment which he held of Member of the Board of Visitors of the Public Hospital merely because I declined to put his brother's name down on the

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53 Supra.
54 CO 137/375 Eyre to Newcastle 1863.

list of Candidates[55] for public employment after learning that he had already been employed in Her Majesty's Dockyard and was dismissed for misconduct."[56]

Thomas Witter Jackson SM. spoke of the poor religious and moral state of the labouring classes and despaired of any improvement in that respect among them "while pernicious examples of open and avowed violations of law are daily set before them by those whose position commands respect and whose example should be worthy of imitation. While anyone in authority is permitted to set himself above the law with impunity no willing obedience can be looked for from those placed in an inferior position, an erroneous notion is inculcated and hence it is that we frequently see men notorious for their depravity, men who condemn the common decencies of life thrust forward as the honoured and chosen of their fellowmen."[57]

(c) Partialities in the Dispensation of Mercy. The notion which had existed in apprenticeship that "the laws, however worded, were never intended to meet the cases of free or white offenders"[58] persisted in freedom and if it did not lead to perverse acquittals by juries,[59] it could excite successful petitions for pardon to the

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55 On the 25/8/1863 Eyre published a notice which required recommendations for appointments to the Service to be accompanied by a statement of belief in the Candidates honesty, sobriety and moral conduct and habits CO 137/374 Eyre to Newcastle 7/9/1863.

56 CO 137/375 Eyre to Newcastle 6/11/1863

57 CO 137/339 Darling to Lytton 25/4/1858 (enclosing SM's half-yearly report).

58 Jamaica under the Apprenticeship System p. 11.

59 Eq. the Case of Perjury against Morgan in the St. Mary Circuit Court 1859 Supra.

Chief Executive. Girod, the first Police Magistrate for Kingston[60] did not undergo the punishment for his crime but received a pardon conditioned on his removing himself from the island, and there were other cases reported to Governor Eyre "of forgery by persons of education and position, excepting one in which the convict, Joseph Stewart a son of Dr. Stewart, had been instrumental in causing the death of a person by pouring turpentine on his stomach and setting it afire at a drunken revel."[61] So entrenched indeed had the notion become that great offenders should be relieved from the just reward of their crimes that clamour among persons of high respectability was aroused when in early 1865 Governor Eyre rejected a petition praying a like remission of a sentence of seven years' imprisonment imposed upon Clarence Dias "a Jew well connected in a respectable social position and ..... pretty comfortably off in his circumstances" who was "convicted on the clearest evidence of cattle-stealing on a large scale."[62]

There was now no lingering desire in the community to uphold as a matter of principle what was intrinsically right. Personal and class feelings over-rode all other considerations and "the exercise of the prerogative to relieve culprits in high places from the punishment awarded to their offences was calculated to produce

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60 Supra. 61 CO 137/391 Eyre to Cardwell 24/6/1865.

62 Ibid., The petition was signed by Planters, Vestrymen, freeholders, clerks, druggists, Ministers of Religion, Justices of the Peace and H. Rees Webb BCL. CO 137/391 Cardwell to Eyre 31/7/1865. I regret that persons who being in the Commission of the Peace are themselves entrusted with the administration of justice should allow themselves from whatever motives to join a movement for enforcing upon the Governor of the Colony such an exercise of the Prerogative of Pardon.

on the minds of the population at large the very undesirable and mischievous impression that the laws of the country are not equally administered."[63]

(C) Deficiencies and defects of the legal system.

(i) The Court of Chancery. There was, until the establishment in 1867 of the District Courts, no court, other than the Court of Chancery sitting at Spanish Town, which was seized of matters in equity. The consequence was that if a party in the western extremity of the island desired to initiate a suit in the court, however small the sum or value of property concerned, the practical difficulties of the matter necessitated his engagement not only of an attorney in his locality, if there was one, but also of an attorney and barrister in Kingston or in the Capital. The fees of suit, travelling and legal expenses were necessarily considerable, and, in the case of the poor man, sufficiently high as to slam the door of the court in his face. The well-to-do however was not likely to fare much better, for if he succeeded in getting his action afoot, the delays, notorious of the old Chancery Court of England, which was the proud examplar of the local court,[64] dissipated resources and frustrated patience. It was "no more than the bare fact to state that a suit in equity may not be decided in the course of an ordinary lifetime."[65]

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63 CO 137/391 Eyre to Cardwell 24/6/1865

64 CO 137/330 Barkly to Labouchere 8/2/1856 "The early colonists prided themselves on having brought with them the complicated system of the English Courts of Law and Equity in all its integrity....."

65 CO 137/408/82 Grant to Carnarvon 26/12/1866

But the centralisation of the Court of Chancery, its expense and delays were only some of its lesser evils. The wastage of an estate in Chancery in the payment of solicitor's charges and fees consequent on the innumerable incidents of suit had not been remedied by the establishment in 1840 of the legal equity judge.[66] The Court continued to be "a mere legalised machinery for the plunder of dead men's estates."[67] Its organisation was well adapted to that end. The duties of his office almost dispensed with the personal attendance of the Registrar save when it was requisite, as for example, attending on the Vice-Chancellor during the sittings in Court. Accordingly the day to day affairs of office fell to be discharged by the Registrar's clerk or office servant. The duties of the Masters in Chancery were the same as those of their counterparts in England. In addition to such important duties as taking accounts, approving investments of trust money, the duties of examiner were imposed upon the Masters. They were not required to be professional gentlemen, were remunerated by fees and were generally appointed to superintend an estate or matter on the nomination of the plaintiff's or petitioner's solicitor. In the nature of things the Chief Justice whose judicial duties, as we have seen, were particularly burdensome after the

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66 Of the pre-1840 Court of Chancery it had been said that "an idea prevailed among the people of this country that a property which becomes the subject of a suit in equity is sure to be swamped by law expenses. CO 137/182 Mr. Stamp (an aggrieved suitor) to Lord Goderich 21/4/1832.

67 Mr. Justice Ker Jamaica Handbook (1881) p. 199.

Judicial Amendment Act 1855, was not able to exercise any considerable degree of control over the office of the Court of Chancery. "Estates continued to vanish, families to be ruined, and the general impression of all unprejudiced persons was that the reformed Court, like its unreformed predecessor, looked upon a property confided to its fostering care as a pirate looks at a treasure ship ..... Decrees and orders affecting large sums of money and valuable landed estates were ..... habitually entered up behind the back and without the consent or knowledge of the Vice-Chancellor."[68]

(ii) The Supreme Court. It was impossible within less than one year to prosecute to completion and satisfaction of judgment an action in the Supreme Court. If the action were filed in February and the defendant appeared but filed no defence, the plaintiff could get a judgment by default, but the records would have to be sent to the Circuit Court in which the venue was laid for assessment of damages by a jury and it would have to be transmitted back to the ensuing Supreme Court in June (the damages having been then ascertained for the information of the Court) to have the final judgment of the Court entered up by lodging the Postea, upon which a writ of venditioni exponas might for the first time be issued. The Plaintiff however could not compel the Provost Marshal to file a return to the writ until October. By

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[68] Mr. Justice Ker Handbook of Jamaica 1881 p. 200.

reason of the delays and frauds of which the Provost Marshal General's Office was notorious[69] no execution could in fact take place, and if it did, mis-appropriation of the proceeds in fraud of the judgment-creditor may have frustrated the anxieties, expense and hopes of the year.

The dilatoriness and expense of proceedings in the Supreme Court, injurious to the commercial interests generally of the community, bore particularly heavily upon distant and poor suitors and gave to the wealthier classes an unfair advantage over the poorer ones, as the case of the Manchester Ginger Growers illustrates. "These poor people sold their year's produce of ginger, represented to be their whole available means, to some trader who kept their ginger but refused to pay for it, setting up some plea that might or might not justify the repudiation of the contract, but could not possibly justify the taking of the ginger without paying for it. In consequence these poor people are ruined for they cannot afford the expenses to which the filing of so many separate actions in the Spanish Town Supreme Court and the employment of an attorney in each action would put them."[70] In general, therefore, the poor and oppressed, like the Manchester ginger growers, not

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[69] See Chapter 3

[70] CO 137/408/82 Grant to Carnarvon 26/12/1866.

having the means to bring their grievances into court, or not choosing to spend in law proceedings more than they could recover by a judgment, turned away from the courts and sought their own redress.

The reformations of the legal system since emancipation had barely touched the subject-matter of procedure. The labyrinth of procedural law may best be described through the eyes of Mr. Justice Ker "No language can adequately express the anamolous and unsatisfactory condition of this branch of the law when I was first brought in official contact with it twenty years ago.[71] It was a mere instrument of craft and oppression: substantial justice was habitually and systematically defeated by it: technicalities the most absurd carried everything before them. John Doe and Richard Roe were treated with the respect due to real human beings. Over and over again has a meritorious suit collapsed upon a mere point of pleading. Over and over again have I asked myself the question, sitting on the Bench: Is this justice that I am administering? What cause, human or divine, is advanced by such a state of the law? The function to see that right shall prevail and chicanery be repressed was reduced to hearing and determining motions to file the postea and enter judgment nunc pro tunc. To try an average action of ejectment was an experience so painful that I positively shrank from it. A judge dare not tamper with the law, and I had constantly to rule against my convictions and direct verdicts which were palpably unjust. Law

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[71] 1860 See Chapter

triumphant and justice prostrate was a spectacle of such common occurrence that nobody felt the smallest surprise at it. It was fast becoming a question, as I individually viewed matters, whether the Supreme Court was to retain the respect and affection of the population or be voted as a mere anachronism, incapable of appreciating the wants of the time."[72] Upon the Supreme Court therefore the general verdict pronounced in 1865 was that the state of the law in Jamaica was dilatory, costly and unsatisfactory, wholly unsuited to a mercantile community and that, until it was amended, one of the greatest obstacles to the prosperity of Jamaica would remain in full force.

(iii) The Circuit Courts. Inasmuch as the proceedings in the Circuit Courts were begun in the Supreme Court, the procedural and other defects of the latter court were also those of the former. Like the Supreme Court too, the dilatory practice of meeting only thrice a year worked most unsatisfactorily, particularly so, when it is borne in mind that every petty larceny over the value of 5/-d. and every action at law over the sum of £10 had to be litigated in these courts, the former involving all the inconvenience and waste of time not only of a petty jury but of a grand jury as well.

(iv) The Legal Profession. The Bar since the abolition of slavery had been steadily declining in numbers. That trend continued after emancipation. In 1859 there were only five

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[72] Handbook of Jamaica 1881 pp. 198-9.

gentlemen practising at the Bar. In 1860 the number was reduced to two. On the other hand the Solicitors' Branch of the profession had progressively grown in numbers since the late eighteenth century and were in the second half of the nineteenth a section of the community of considerable influence. We have seen how in 1859 their design to engross the Supreme Court Bench had led to the rejection of a Bill widening the qualifications for appointment thereto so as to render members of the colonial Bar generally eligible for appointment.[73] Neither their conduct in court nor the standards of professional etiquette maintained in practice were calculated to elicit from the masses that respect for the law so vital to the maintenance of peace and order in a community still making the delicate transition from a social state of which slavery was the basis to one of almost lawless freedom. "The bullying and brow-beating of witnesses, pertinacity in propounding their own law to the jury instead of taking it from the judge, disregard of the rules and evidence and the issues really raised by the pleadings were of frequent occurrence"[74] in the Circuit Courts, in which as a Supreme Court of Law, their voices were first permitted to be heard by the Judicial Amendment Act of 1855.

To the judicial testimony in 1860 of "pieces of sharp small practice"[75] was added eight years later the grave indictment that

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[73] See Chapter 11

[74] CO 137/348 Darling to Newcastle 24/2/1860 (conveying Mr. Justice Cargill's explanation of the hostility of the Cornwall Attorney to him.

[75] Ibid.

"unprincipled lawyers ..... so plentiful in Spanish Town and Kingston ..... are the bane of the population."[76] The ignorance, credulity and sometimes dishonesty of the tenant or squatting peasantry provided a fertile source of champertous actions against landowners. One example will suffice: "The squatter (Ann Edwards) ..... sued the proprietors of Hordley Estate for £50 damages, as she alleged, by cattle, in martial law. The case was argued before Judge Ker who stated that as Ann Edwards was poor and Hordley proprietors .... rich he could not grant security for costs. The venue could not be changed as St, Thomas' jurors were sure to be biassed. The consequence was that the case went to trial before the Chief Justice. After being cross-examined for a few minutes, the plaintiff Ann Edwards (the first witness called) a poor, simple good sort of negress, so thoroughly exposed the rascality of the transactions, in spite of the nods and winks of Grant, her accomplice and prime mover along with the lawyers in the conspiracy, that the jury begged His Honour to stop the case, to which he could not accede. The advocate for the plaintiff then threw up his brief, and the lawyer begged to be heard, making some rambling statement that the action was in no way speculative. Although gained, this action cost the proprietors of Hordley £150 to defend, not a farthing can be recovered from Ann Edwards, as she is very poor - living in a hut."[77]

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[76] CO 137/441 Harrison JP St. Thomas to Rampini District Court Judge 17/3/1868

[77] CO 137/441 Harrison JP St. Thomas to Rampini District Court Judge 17/3/1868

Purcell, Stipendiary Magistrate, against whom strong animosity was aroused because of "his defence of coloured persons against the pillage of attorneys at law" saw "Bills of Costs (the costs not specified and set forth severally as they ought to be, but lumped up in one sum) which the poor coloured population have been compelled to pay on cases which have been put off and delayed and protracted for years at a fearful loss and expressed his opinions very plainly on the manner in which such cases were conducted and the mode in which costs were run up thereon."

In the Public Service the Solicitors' Branch of the profession was numerously represented in the Clerks of the Peace who numbered twenty down to 1867. Except in a few parishes they were also the clerks to the magistrates' courts responsible for advising justices on committal proceedings. As Clerks of the Circuit Court they conducted the prosecution on such committal proceedings and therefore had a vested interest in securing convictions.[78] They drew salaries of from £120 to £600 per annum from the Public Treasury but by reason of their right of private practice in civil cases their earnings were represented as exceeding a thousand pounds per annum. The principal legal advisers in their parishes, the earners of net incomes, perhaps larger than those of

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[78] There had been complaints at an earlier stage when the Clerk of the Peace in his capacity as such prosecuted in Quarter Sessions the cases on which he had advised committals before Justices in Petty Sessions "The habit of always aiming at guilt and conviction acquired by the Clerk of the Peace unfits him for the duties of Magistrates' Clerk CO 137/261 Jackson SM to Metcalfe 18/1/1842.

the Assistant Judges of the Supreme Court, and sometimes Members of Assembly, they became a law unto themselves. In the Assembly they stoutly and successfully resisted every attempt to establish a paid magistracy. "Accustomed to speak and argue plausibly in public they not infrequently succeeded in moulding measures before the Assembly to their own views by the introduction of amendments the real force of which escaped notice at the time and ..... a large proportion of the alterations by which the measures introduced by the Government were crippled and diminished in efficiency could be traced to them."[79]

(v) The Courts of the Justices. Grave dissatisfaction rapidly gathered around the administration of justice in the courts of the justices of the peace. Reference has already been made to the three unsuccessful attempts made between 1857 and 1858 to check the decline in numbers of the stipendiary magistrates. Of these officers only 14 remained in 1858, and in order to utilise their services to best advantage, those in the principal towns where local justices were more readily available were withdrawn and sent to the rural areas. Within two years however their numbers were reduced to 11.[80] In 1861 there were only 9 stipendiary magistrates[81] and in 1868 only 5.[82]

As the numbers of the stipendiary magistrates progressively decreased so the conduct of the petty sessions and petty debt courts

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79 CO 137/350 Darling to Newcastle 28/6/1860

80 CO 137/351 Darling to Newcastle 18/4/1860

81 Mr. Crewe died in October 1861 and that same year the illustrious Mr. Daughtrey resigned.

82 CO137/435/157 Grant to Buckingham & Chandos 23/7/1868(Forwarding letter of T.W.Jackson SM in which he said "Only 5 SM's remain in office among whom I am the last appointed."

became more and more dependent upon the unpaid justices of the peace. This development took place contemporaneously with the economic decline which worsened after the outbreak of the American Civil War in 1861 and with the increasing departure from the island of the better class of person upon whose shoulders magisterial duties might more fitly have been placed. The relative paucity of the justices, particularly in certain areas, the unfitness in point of character and education of many for their judicial work and the unsatisfactory constitution of the court, having regard both to the nature of some of the judicial business it had to do, and to the heterogeneous character of the society, constituted the chief sources from which the deficiencies and defects of the administration of justice in the Petty Sessions derived.

(a) Paucity of the Justices of the Peace. The census of 1861 indicated that during the seventeen years between 1844 and 1861 the white population had decreased by seventeen per cent, the numbers of that class having been 15,776 in the former and 13,816 in the latter year.[83] In the place of the white colonists who had left the island there had risen up the ignorant or half-educated overseers and book-keepers who had been the vermins by which apprenticeship had been vitiated. Want of education had rendered

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[83] CO 137/364 Darling to Newcastle 28/2/1862. The coloured population however had increased by 20% from 68,529 in 1844 to 81,065 in 1861. The black population had increased by 18% from 293,128 in 1844 to 346,376 in 1861.

most coloured and black men unfit for such responsible duties. Generally therefore the numbers of those available for magisterial duties were small and from 1857 onwards gubernatorial dispatches dwelt constantly on this theme. The indolence of the better class of magistrates coupled with the apathy of others or pre-occupation with their own affairs led to the sittings of the court becoming both uncertain and irregular. In several of the parishes it often was difficult to get together a sufficient number of justices to constitute a bench for the trial of pending cases[84] and even in 1866 petitions were received by the Governor "from persons complaining of having come from great distances week after week (indeed one petition says, I know not how truly, for months together) on Court Days to Petty Sessions and found no Court open." In one particular case three persons were accidentally discovered by an Inspector of Prisons who had been confined three weeks - one of them perhaps a month - in a lock-up untried and uncommitted for want of two Justices to hear the accusations.[85]

(b) The Unfitness of the Justices of the Peace. The gradual decay of the fortunes of the island and the almost entire cessation of the arrival of new colonists of position, ability and intelligence to take the place of those who had retired or died and the all but total neglect by the Assembly of the educational needs of the people[86] made it necessary to thrust responsible offices upon incompetent and

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84 CO 137/368 Eyre to Newcastle 9/4/1862
85 CO 137/407/31 Grant to Carnarvon 23/4/1866
86 CO 137/368 Eyre to Newcastle 9/4/1862 also CO 137/384/256 Eyre to Newcastle 10/9/1864.

untrustworthy persons. Overseers and book-keepers desperate to make a success of the decaying business of estates which they had purchased were suited neither by education, by habits or by temperament to adjudicate upon the nice issues which could be raised in the Petty Debt Court in an action in tort, whilst the successive purging of the rolls of justices and the wholesale dismissal of many from the Commission testify to the want of probity among magistrates.

(c) The Unsatisfactory Composition of the Magisterial Bench.

There were many classes of cases, cases of particular interest and importance to the people on which however carefully and honestly the Bench may decide it was impossible that the people should be satisfied of the justice of their decisions. Thus a bench of overseers trying the case of an overseer charged with ill-treating an immigrant Indian could not possibly impress the Indians of a district or the public with confidence in the local administration of justice in that class of case. Similarly a bench of employers of labourers, or of landowners could not be a satisfactory tribunal for trying questions between master and workman, landlord and tenant, or owner and squatter. Generally too in the classes of cases which interested the people most when it happened that the judge and complainant changed places as the several causes were called on, that degree of confidence in the administration of justice which it was essential to the public peace that the people should have

was impossible.[87]

The satisfaction of judgments in the Petty Debt Courts was also in a most unsatisfactory condition. The Petty Debt Collector who was charged under the various Petty Debt Acts with the execution of writs of execution for petty debts was an appointee of the justices and vestry of the parish in which he served and was dismissable by them. He was remunerated by fees out of which he paid his deputies. As the remunerations of the office were small it proved quite impossible to secure suitable appointees with the result that the posts fell into the hands of dishonest characters and the office of the Petty Debt Collector became a by-word for abuse and fraud, inflicting great hardships upon the poorer classes and maintaining conditions of irritation and unrest.

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[87] CO 137/408/82 Grant to Carnarvon 26/12/1866.