In This Issue

This issue of the *Law and History Review* explores some of the most important dynamics of law's place in the definition, implementation, and structure of the British Empire, from its earliest seventeenth-century stirrings through its late nineteenth-century heyday. The juxtaposition of these articles allows us an opportunity to undertake a comprehensive assessment of the appropriate components of a postcolonial legal history of the British Empire—cultural, ideological, material, institutional—and to pursue discussion of how those components might articulate.

In our first article Daniel Hulsebosch offers a new perspective on an old and familiar question—the status of "the liberties of Englishmen" throughout the first British Empire. Rather than examine the issue retrospectively from the late eighteenth century, when North American colonists revolted in the name of English liberty, Hulsebosch pursues the matter as it arose in the early seventeenth century, when the empire and modern ideas of the English constitution originated. To effect his purpose, Hulsebosch focuses on Sir Edward Coke's opinion in *Calvin's Case.* He asks whether Coke, as a "framer" of England's constitution, believed that English rights traveled abroad. His answer is that Coke did not: Coke held a jurisdictional conception of English liberties that limited them to England, rather than an abstract or jurisprudential conception free of national boundaries. Nonetheless, Coke believed that the core of the English constitution—representative government and common law tenures—should apply to certain dominions outside the realm. Hulsebosch's conclusion is suggestive. Tendentious interpretation of Coke's work by colonial lawyers then, and historians now, has made it difficult to comprehend the full complexity of the empire's legal culture. That ahistoricism, Hulsebosch tells us, is itself a postcolonial legacy of the empire.

Our second article, by the eminent South African historian Charles Van Onselen, brings us forward to the late nineteenth century and a case study of the interaction of British imperialism with the Zuid Afrikaansche Republiek during the last years of S. J. P. Kruger's presidency, immediately prior to the Boer War. In South African historiography, Van Onselen tells us, there is a tendency to portray Kruger's successive administrations (1881–1899) as archaic, corrupt, inefficient, and generally uncomprehending of the requirements of a modernizing economy. But these judgments fail to pay adequate attention to the nature of the Z.A.R.'s political econo-

my and to its periodization of change over time. The result is a tendency to misread the modernizing process. Van Onselen illustrates his contention through an examination of the depth, extent, and nature of attempts to modernize the Z.A.R.'s Dutch-dominated civil service after 1895. His key focus is the conflict that arose in 1898–99 between J. C. Smuts and F. E. T. Krause over control of the Johannesburg public prosecutor's office. (Smuts would become an extraordinary figure in the later history of British imperialism. Here we encounter him at an early age, in comparative obscurity.) The Smuts-Krause clash illustrates how, besides differences of personality, the tertiary education and legal traditions embodied in a training in common law (Smuts, England) and civil law (Krause, Holland) helped inform the world views as well as the administrative practices advocated by the protagonists and their closest allies. Van Onselen follows this clash of world views into the realm of application—the policing of the social pathologies of urbanization (alcohol, gambling, and prostitution)—to examine the manner in which those pathologies articulated with changing government policies, as well as how the resulting possibilities were exploited by criminal organizations. The conflict between Smuts and Krause, Van Onselen concludes, helps illustrate how "less formal" processes of British imperialism helped to open new ideological space for the more conscious construction of a modernized white "South African" identity even before the South African War (1899–1902).

Our Forum sustains the issue's concentration on the legalities of British imperialism, and their effects, while also serving to highlight the emergence over the last twenty-odd years of a "new" Australian legal history through the work of some of its foremost scholars. First, we encounter Bruce Kercher's examination of the law of convict transportation in the British Empire, 1700–1850. Prior to the American Revolution, as is well known, British and Irish convicts were transported to British North America, principally the Chesapeake colonies of Virginia and Maryland. After the Revolution, the flow was diverted to the new colonies of New South Wales and Van Diemen's Land. The practice of convict management in the new penal colonies was very different from that in Virginia and Maryland, yet in its essential principles transportation legislation remained the same. Kercher examines the ways in which Australian courts dealt with the contradiction between law and practice and offers valuable observations on the way Australian research can be mobilized by American historians to refine the earlier history of convict management in pre-Revolutionary America. Kercher concentrates on two aspects of the law concerning convicts, felony attaint and the notion of property in a convict's services, and compares the operation of these principles in the American and Australian colonies. He finds that Australian courts faced the issue of attaint squarely, while

avoiding its effects so far as they could. As for property in services, New South Wales indirectly inherited the property interest in a convict's services from the custom of the American colonies, but did so in a very different context. Kercher shows us that little has been written on these important legal issues before now. More generally, he also demonstrates how colonial law was as much made within the colonies as passed down from the imperium above.

Our second Forum article, by Hilary Golder and Diane Kirkby, moves us once more to the late nineteenth century. In the New South Wales Supreme Court in 1891, Olivia Mayne, a married woman, brought an action for breach of a contract she had made for the hire of her property, a boxing kangaroo called "Fighting Jack." She was relying on the New South Wales Married Women's Property Act of 1879, but the defendants contested the legally binding nature of the agreement they had made with a married woman. The argument became one about the contractual capacity of a married woman under the new statutory regime. Mrs. Mayne was unsuccessful in her common law suit, although her right to make the contract was upheld by the jury, and when that was appealed, by the promise of an action in equity. The problem for Mrs. Mayne was the timid nature of the 1879 statute. The case made clear that further reform was needed, and this was achieved subsequently in the Act of 1893. The story of Mrs. Mayne and her boxing kangaroo reveals something of the meaning, significance, and timing of the statutory reform of coverture, and the inconsistent, to-and-fro direction of other seemingly progressive reforms. It also places legislative change in the Australian colonies in an imperial relationship, where comparisons of colonial reform and the special status of marriage can be made across settler colonies in general.

In their commentaries, Peter Karsten and Rosemary Hunter expand upon the significance of the new legal histories being written in Australia and elsewhere in the former British imperium and canvass the implications of those histories both methodological (notably in comparative legal history) and theoretical/historiographical. This discussion is joined by Bruce Kercher in a brief response that concludes the Forum.

As always, the issue concludes with a comprehensive selection of book reviews. Here we should pause to acknowledge, with deep gratitude, the tremendous service that Laura Edwards has given the *Review* in filling the position of Associate Editor for book reviews for the last several years. Last year Laura indicated that 2003 would be her fifth and final year in the job. I am delighted to announce that Al Brophy of the University of Alabama Law School has agreed to take Laura's place.

As always, too, we encourage readers to explore and contribute to the American Society for Legal History's electronic discussion list, H-Law.

Readers are also encouraged to investigate the *LHR* on the web, at *www.historycooperative.org*, where they may read and search every issue, including this one, published since January 2001. In addition, the *LHR*'s own web site, at *www.press.uillinois.edu/journals/lhr.html*, enables readers to browse the contents of forthcoming issues, including abstracts and full-text "pre-prints" of articles.

Christopher Tomlins
American Bar Foundation

---

https://doi.org/10.1017/S0738248000013237 Published online by Cambridge University Press