National Security (Legislative Provisions) Bill : Extraterritoriality

This paper discusses –

(1) the provision in the Hong Kong Act dealing with extraterritorial laws;

(2) the extent to which the proposed offence of sedition would have extraterritorial effect; and

(3) why it is possible for the proposed offences of subversion and secession to extend to extraterritorial acts of Hong Kong permanent residents.

Hong Kong Act

2. The Hong Kong Act was enacted in 1985 to provide that, as from 1 July 1997, the UK should no longer have sovereignty or jurisdiction over any part of Hong Kong.

3. The Schedule to the Act (amongst other things) empowered Her Majesty, by Order in Council, to make such provision as appeared necessary or expedient in consequence of or in connection with the main purpose of the Act to enable the legislature of Hong Kong to make laws having extraterritorial operation. Two orders in Council were made under that power.

4. The effect of the above provisions is discussed in "Constitutional and Administrative Law" by Professor Peter Wesley-Smith (see annex 1). It is clear from that discussion that the Hong Kong legislature's power to enact laws with extraterritorial operation was not limited to the areas covered by the two Orders in Council.

5. It is not therefore considered that the Act throws any light on the extent to which the SAR's legislature may enact laws having extraterritorial effect.

Extraterritorial effect of sedition

6. The proposed offence of sedition would be committed if a person –

(a) incites others to commit an offence of treason, subversion or secession; or

(b) incites others to engage, in Hong Kong or elsewhere, in violent

public disorder that would seriously endanger the stability of the People's Republic of China.

7. So far as paragraph 6(a) is concerned –

(a) treason could be committed outside Hong Kong only by a Chinese national who is a Hong Kong permanent resident;

(b) subversion and secession could be committed outside Hong Kong only by any Hong Kong permanent resident.

As a result, it would be an offence of sedition for any person in Hong Kong to incite extraterritorial offences of treason, subversion or secession by such a person. However, it would not be an offence to incite other persons to commit acts of treason, subversion or secession elsewhere.

8. So far as paragraph 6(b) is concerned, the incitement must take place in Hong Kong, even though the violent public disorder incited is to take place elsewhere.

Extraterritorial effect of subversion and secession

9. The Administration has been asked to explain why it thinks the proposed application of subversion and secession to acts outside Hong Kong of Hong Kong permanent residents would satisfy the nexus test.

10. The two leading Hong Kong cases on this subject are *R v Lau Tung-sing* [1989] 1 HKLR 490 and *Somchai Liangsiriprasert v Government of USA* [1990] 1 HKLR 85. The appellant in *R v Lau Tung-sing* had been convicted of arranging passage to Hong Kong of an unauthorized entrant, the offence having taken place in China. Section 37J of the Immigration Ordinance provided that "where any person is in Hong Kong, he may be charged and convicted in respect to anything which was done or which occurred wholly or partly outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong". Power JA held :

> The issue is not whether the law has some extraterritorial application but whether it was enacted for the peace, order and good government of the colony. What the court must ask is whether, given the delegated legislative power of the colonial legislature, it is making a law with regard to matters that are properly its business. If it is, then the law is *intra vires*.
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> We have no doubt that legislation which imposes liability upon a person who, having arranged the passage of unauthorized entrants into Hong Kong, then comes to Hong Kong is sufficiently connected with the peace,

order and good government of Hong Kong to make it *intra vires* the legislative power.

Similarly, in *Somchai Liangsiriprasert v Government of USA* it was held that conduct in relation to dangerous drugs aimed or directed at Hong Kong "is properly 'the business' of the legislature", whether it occurs "just within Hong Kong; just across the border; or at [some] greater distance away ....."

11. In both cases, extraterritorial provisions were upheld on the basis of the impact that the prohibited act could have on Hong Kong, irrespective of the nationality or other status of the defendant.

12. A summary of cases decided in respect of non-sovereign legislatures in other common law jurisdictions is at annex 2. These cases indicate that there may be sufficient nexus for extraterritorial legislation if –

(a) the relevant person is domiciled or resident in the particular jurisdiction; or

(b) there is a need to protect the defence or public security of the jurisdiction.

13. In paragraph 8 of Paper No. 36, the Administration set out four factors that it considers are sufficient to create a nexus for the proposed extraterritorial offences of subversion and secession. In the light of the authorities referred to above, the Administration repeats its view that the Legislative Council has the authority to enact those offences.

14. The Administration does not accept that the Legislative Council can only prohibit acts done outside Hong Kong if they relate to harmful activities planned to take place in Hong Kong. Since Hong Kong is part of the PRC, activities that would seriously endanger the stability or territorial integrity of the PRC would also harm Hong Kong, even if the harmful activities do not take place here.

15. This view is supported by a case decided in Singapore – *Re Choo Jee Jeng* (1959) 25 MLR 77. In that case, a Singaporean law created certain powers with a view to preventing a person from acting in any manner prejudicial to the security or public order of *Malaya*. Malaya was then defined as the Colony of Singapore and the Federation of Malaya. This law was challenged as being outside the powers of Singapore's non-sovereign legislature. The challenge was rejected and the extraterritorial effect of the law upheld as being for the peace, order and good government of Singapore.

Department of Justice
May 2003

Extract from "Constitutional and Administrative Law" by Peter Wesley-Smith

7.5 Extraterritoriality[117]

7.5.1 *The General Doctrine*

The Hong Kong (Legislative Powers) Order 1986, made under the *Hong Kong Act*, empowers the Hong Kong legislature to make laws having

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113 (1949) 33 HKLR 66.
114 See n 88 above.
115 [1957] HKLR 89.
116 See n 110 above.
117 See Peter Wesley-Smith, 'Extraterritoriality and Hong Kong' [1980] *Public Law* 150; and 'The Hongkong Bank and the Extraterritorial Problem, 1865–1890' in Frank HH King (ed), *Eastern Banking: Essays in the History of the Hongkong and Shanghai Banking Corporation* (London, The Athlone Press, 1983) ch 4.

extraterritorial operation relating to civil aviation, merchant shipping, and admiralty jurisdiction. The Hong Kong (Legislative Powers) Order 1989, also made under the *Hong Kong Act*, empowers the Hong Kong legislature to make laws having extraterritorial operation to the extent required in order to give effect to an international agreement which applies to Hong Kong, and for connected purposes (Chapter 3.4.3). Laws relating to other matters, it might be inferred, cannot have extraterritorial operation. The inference is incorrect, but there is a common law doctrine of uncertain extent which places some limitation on the ability of a colonial legislature to affect events outside its boundaries. The *Colonial Laws Validity Act* did not refer to this question and the common law still applies to Hong Kong.[118]

The cases establish the following propositions:

- The first question is always: did the legislature intend a statute to apply extraterritorially? There is a presumption of intraterritorial operation, whether for a colonial ordinance[119] or an Act of Parliament.[120] The presumption is of course rebuttable if clear words or necessary intendment leave no doubt.

- If the statute is found to apply to an event, fact, circumstance, or thing beyond territorial limits,[121] the competence of the legislature to enact the statute must be considered. National boundaries are of no consequence to the supreme Parliament, but dependent legislatures are in a different position.

- The general legislative powers of a dependent legislature like Hong Kong are derived from the grant of authority to make law for the peace, order, and good government *of the colony*, and this imports a limitation on the ability to make laws with effect anywhere else in the world.[122]

- The limitation does not deny all colonial legislation all operation beyond colonial boundaries: the statute will be valid if there is some point of contact, some 'nexus', between the colony and the provisions of the

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118 Unless s 5 abolishes the extraterritorial limitation: see Trindade, n 107 above, at 237–38.

119 *Veronica Ma Kit-ching v Attorney-General* (1983) CA, Civ App No 64 of 1983; *Hill v Circus Entertainment Management Ltd* (1985) Victoria DCt, Employee's Compensation Case No 67 of 1985; and *Ka Wah Bank Ltd v Low Chung-song* (1988) HCt, HCA No 4191 of 1987.

120 *Air-India v Wiggins* [1980] 1 WLR 815; *Holmes v Bangladesh Airlines* [1989] 1 AC 1112; and *Somchai Liangsiripunsert v Government of USA* [1990] 2 HKLR 612 (PC).

121 As to Hong Kong's territorial limits, see Wesley-Smith, 'Extraterritoriality and Hong Kong', n 117 above, at 150–55.

122 This is much debated. Is the extraterritoriality limitation a purely common law doctrine or does it arise from the terms of the grant of legislative authority? If the former it might be held to apply to the SAR legislature; if the latter it would not be applicable under the Basic Law (see Section 7.8 below). The limitation may of course owe its existence to both the common law and construction of the grant. For recent contrasting accounts, see Mark Moshinsky, 'State Extraterritorial Legislation and the Australia Acts 1986' (1987) 61 ALJ 779 at 781–85; Christopher D Gilbert, 'Extraterritorial State Laws and the Australia Acts' (1987) 17 *Fed LR* 25 at 26–27; and Killey, n 51 above, at 29–41. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43 at 50–51.

legislation.[123] Whether that nexus exists, and whether it is sufficient or too remote, are questions which are incapable of precise answers and which depend on the particular facts of each case. But ordinances to deport aliens, extradite fugitive offenders, or control smuggling are valid even though they necessarily involve action outside the territory. The test is whether the legislation bears a 'real or substantial relation' to the colony.[124]

- If a dependent legislation fails to 'mind its own business', if its legislature has no or little relevance to the territory over which it has authority, then that legislation will be struck down by the courts as ultra vires.

The Australian High Court has adopted a very liberal approach to the extraterritoriality doctrine. In *Wacando v Commonwealth*[125] reference was made to a report of the Law Officers in England, dated 25 August 1894, which stated that a colonial legislature could not annex territory because its laws could not have extraterritorial operation. Mason J said:

> The course of recent decisions in this Court denies the validity of the [above] proposition. *Bonser v La Macchia*,[126] *New South Wales v The Commonwealth* (the *Sea and Submerged Lands Case*),[127] *Pearce v Florenca*[128] and *Robinson v Western Australian Museum*[129] now demonstrate that the colonies could in the nineteenth century make laws which had an extra-territorial operation. The contrary view was founded not so much on judicial decision as on doctrines which gained currency in the opinions of the Imperial law officers and reflected Great Britain's Imperial, maritime and trading interests. The strength and persistence of the traditional view is [sic] attested by the declaration in s 3 of the Statute of Westminster 1931 (Imp) that the Dominions (but not the States or Provinces) had power to enact extra-territorial legislation. To the historian it may seem strange that we can now enunciate the law in terms diametrically opposed to informed legal thinking in the nineteenth and early part of this century. Our ability to do so rests on a clearer perception of what essentially was involved in the grant of power to make laws for the peace and good government of a colony, uninfluenced by restrictive considerations not expressed in the grant of power itself.[130]

123 As discussed, eg, in *Boath v Wynill* (1989) 85 ALR 621. See also *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340 at 372–73.
124 See, eg, *Ashbury v Ellis* [1893] AC 339; *Attorney-General for Canada v Cain* [1906] AC 542; and *Croft v Dunphy*, n 62 above.
125 (1981) 148 CLR 1.
126 (1969) 122 CLR 177.
127 (1975) 135 CLR 337.
128 See n 107 above.
129 (1977) 138 CLR 283.
130 See n 125 above, at 21.

7.5.2 *The Piggott Doctrine*

There are several Hong Kong ordinances which permit the exercise of extraterritorial powers, though none has been found ultra vires. Sir Francis Piggott, Chief Justice 1905–12, developed a theory by which formal notification of the decision by the Queen not to disallow an ordinance transformed the ordinance into the Queen's own legislation which could not be challenged for any breach of the extraterritoriality doctrine.[131] Non-disallowance, according to Piggott's theory, is equivalent to ratification, approval, and adoption, and the Queen's power to legislate extraterritorially extends to statutes by the legislature she created in Hong Kong.

This approach has not been noticed anywhere else in the common law world. It would seem, as a matter of logic, to extend beyond the defect of extraterritoriality and the curative of non-disallowance: thus, for example, some other deficiency in an ordinance, such as inconsistency with the legislature's constitution, ought to be corrected either by non-disallowance or, if the bill had been reserved, by the Queen's assent. To go so far would be startling, at least, to traditional doctrine. In the *Winfat* case at first instance[132] Kempster J held that the ordinances under attack 'were ratified by non-disallowance amounting in law to express authorisation'. This was an extension of the Piggott doctrine from extraterritoriality to disobedience to Royal Instructions. The Court of Appeal said: 'we would not like it to be thought that we agree with it, since there must be grave objections in principle to attributing to the Crown, in its prerogative guise, power to give force to an otherwise invalid law, by the mere act of deciding not to disallow it.'[133] It was thus doubtful that the rationale for formerly protecting Hong Kong ordinances from invalidation on the ground of extraterritoriality would continue to be accepted by the courts.[134]

In 1988, indeed, Piggott's innovation was impliedly discarded. The appellant in *R v Lau Tung-sing* had been convicted of arranging passage to Hong Kong of an unauthorised entrant, the offence having taken place in China. Section 37J of the *Immigration Ordinance* provided that 'where any person is in Hong Kong, he may be charged and convicted in respect to anything which was done or which occurred wholly or partly outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong'. Power JA held:

> The issue is not whether the law has some extra-territorial application but whether it was enacted for the peace, order and good government

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131 *Re Iu Ki-shing* (1908) 3 HKLR 20 and *Re Chan Yue-shan* (1909) 4 HKLR 128, see Wesley-Smith, 'Extraterritoriality and Hong Kong', n 117 above, at 162–66.

132 [1983] HKLR 211 at 225–26.

133 See n 51 above, at 50. Disobedience to Royal Instructions did not, of course, render the law 'otherwise invalid'. See also *Attorney-General v David Chiu*, n 55 above, at 105, citing *Cameron v Kyte* (1855) 12 ER 678 at 682.

134 See the first edition of this book, pp 274–75, for a discussion of the rather odd nature and ramifications of Piggott's doctrine, and W Harrison Moore, 'The Privy Council and the Australian Constitution' (1907) 23 LQR 373, esp at 380 for pertinent comments (though not based on anything said by Sir Francis Piggott)

> of the colony. What the court must ask is whether, given the delegated legislative power of the colonial legislature, it is making a law with regard to matters that are properly its business. If it is, then the law is *intra vires*.
>
> We have no doubt that legislation which imposes liability upon a person who, having arranged the passage of unauthorised entrants into Hong Kong, then comes to Hong Kong is sufficiently connected with the peace, order and good government of Hong Kong to make it *intra vires* the legislative power.[135]

Similarly, in *Somchai Liangsiriprasert v Government of USA* it was held that conduct in relation to dangerous drugs aimed or directed at Hong Kong 'is properly "the business" of the legislature', whether it occurs 'just within Hong Kong; just across the border; or at [some] greater distance away... .' In relation to dangerous drugs the Hong Kong legislature was empowered to make law with extraterritorial effect and the *Dangerous Drugs Ordinance* was manifestly enacted with intent that it apply outside the jursdiction.[136]

7.5.3 *The Legislative Powers Orders in Council*

The court also disposed of a related argument that the Hong Kong legislature can only make law with extraterritorial effect on matters dealt with in the Orders in Council under the *Hong Kong Act*. The *Immigration Ordinance* 'is not "extra-territorial" in the sense in which that term is used in s 2(b) of the Hong Kong (Legislative Powers) Order 1986 nor in any sense that makes it an *ultra vires* exercise of power by the Hong Kong legislature'.[137] The rather startling consequence of this remark appears to be that Hong Kong can legislate extraterritorially on civil aviation, merchant shipping, and admiralty jurisdiction, or to give effect to an international agreement, whether there is any connection between the ordinance and the colony or not. The more likely reason for the grant of extraterritorial legislative authority by the Orders in Council is that the draftsman believed either that Hong Kong did *not* otherwise possess it or that there was room for doubt.

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135 [1989] 1 HKLR 490 at 500

136 [1990] 1 HKLR 85 at 105.

137 See n 135 above, at 500

What, then, is a law *for the colony*? There must be some point of contact, some nexus, between the colony and the provisions of the legislation. Whether that nexus exists, and whether it is sufficient or too remote, are questions which are incapable of precise answers and which depend on the particular facts of each case.[45] If there is a sufficient nexus, the circumstance that the law has an extraterritorial scope is immaterial to the issue of its validity.

The two cases usually cited in this connection are *Attorney-General for Canada* v. *Cain* [46] and *Croft* v. *Dunphy*.[47] In *Cain* it was pointed out that the Crown of England could expel or deport aliens and could delegate this power to the colonies. The colonial legislature was entitled to exercise such power in the same manner as the Crown could exercise it, and the fact that extraterritorial constraint was imposed to effect the expulsion was irrelevant. There are several subsequent cases in which the *vires* of deportation legislation has been upheld. A Commonwealth Act for the deportation of Kanaka labourers, for example, was valid as it came under a constitutional head of power, even though it involved executive action beyond the territorial sea.[48] Such extraterritorial effect should be attributed to a dependent legislature's deportation laws as is necessary to make deportation effective.[49] *Croft* v. *Dunphy* concerned anti-smuggling legislation which provided a 12-mile territorial sea for any vessel registered in Canada. The judgment contains this passage:

> "Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order, and good government of Canada, . . . their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than one applicable to the legislation of a fully sovereign State." [50]

'peace, order, and good government' did not overcome such incompetence": *op. cit.* p. 409.

[45] ". . . I cannot escape the conclusion that the decision of the present problem depends upon a consideration of matters of degree, or upon the exercise of a judgment": *per* Lush J. in *Baker* v. *Norris* (1967) Supreme Court of Victoria, unreported but quoted by Trinade, *op. cit.* p. 238.

[46] [1906] A.C. 542.

[47] [1933] A.C. 156.

[48] *Robtelmes* v. *Brenan* (1906) 4 C.L.R. 395.

[49] *R.* v. *Secretary of State for Foreign Affairs and Secretary of State for the Colonies, ex parte Greenburg* [1947] 3 All E.R. 930; see also *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* [1947] A.C. 87 and *Zabrovsky* v. *General Officer Commanding Palestine* [1947] A.C. 246.

[50] [1933] A.C. 156, 163. *Cf.* the further comment by the Judicial Committee in *Wallace* v. *Commissioner of Income Tax, Bombay* (1948) 75 I.A. 86, 98: "There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends on the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate legislature with affairs or persons outside its own territory may therefore suggest a query whether the legislature is in truth minding its own business. It does not compel the conclusion that it is not." Quoted by Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 971.

If the *topic* is related to the government of the *territory*, extraterritorial effect is permissible if it is "ancillary" [51] or "auxiliary" [52] or the "complement of an admitted power" [53]: it is one of the "accessory incidents attached by necessary implication to main powers" if, without it, the power would be meaningless.[54] The additional implied power, however, is limited by what is necessary to effectuate the primary power.[55]

Taxing statutes, particularly those of the Australian States, provide a wealth of cases illustrating the nexus required. In Evatt J.'s formulation the general principle is correctly stated in *Ashbury* v. *Ellis* [56]: the question is whether the law can truly be described as being for the peace, order and good government of the colony. Does it, "in some aspects or relations, bear upon" the territory? If it bears a "real or substantial" relation, it is valid.[57] This was criticised by O'Connell as merely begging the question,[58] though Roberts-Wray supports it [59]; the test serves to indicate that there may be a territorial connection which is too remote, but the question remains "what is a 'real or substantial' relation?" The domicile of a deceased is sufficient to attract duty to his estate, though in respect of property outside the jurisdiction [60]; property inside the jurisdiction, of course, is eminently taxable, whatever the domicile of the deceased.[61] An owner domiciled or residing or carrying on business beyond territorial boundaries may be liable to charges imposed on a vehicle operated within those boundaries,[62] but not if he is merely an absentee director of an owner company incorporated outside the state.[63] There is a sufficient connection where money is secured by the mortgage of intraterritorial property to justify taxing the interest.[64] But if the property is not locally situate [65] and the taxpayer is not locally domiciled or

[51] *Zabrovsky* v. *G.O.C. Palestine* [1947] A.C. 246, 262.

[52] *R.* v. *Lander* [1919] N.Z.L.R. 305, 331.

[53] *Delaney* v. *Great Western Milling Co. Ltd.* (1916) 22 C.L.R. 150, 165.

[54] *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association* (1913) 16 C.L.R. 664, 690.

[55] *Hazelton* v. *Potter* (1907) 5 C.L.R. 445, 471–472.

[56] [1893] A.C. 339.

[57] *Trustees Executors and Agency Co. Ltd.* v. *F.C.T.* (1933) 49 C.L.R. 220, esp. 240–241.

[58] *Op. cit.* p. 390.

[59] *Op. cit.* p. 330.

[60] *Thompson* v. *Commissioner of Stamp Duties* [1968] 3 W.L.R. 875.

[61] *Johnson* v. *Commissioner of Stamp Duties* [1956] A.C. 331.

[62] *O'Sullivan* v. *Dejneko* (1964) 37 A.L.J.R. 456.

[63] *Welker* v. *Hewett* (1969) 43 A.L.J.R. 410, approved and applied in *Cox* v. *Tomai* [1972] A.L.R. 497.

[64] *Broken Hill South Ltd.* v. *Commissioner of Taxation (New South Wales)* (1936) 56 C.L.R. 337.

[65] *Commercial Cable Co.* v. *Attorney-General of Newfoundland* [1912] A.C. 820; *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* [1945] A.C. 1, 7; *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694.

resident,[66] the territorial connection will usually be considered insufficient. For example, the estate of a person dying resident out of and domiciled out of the state could not validly include, for stamp duty purposes, shares held in an outside company carrying on some of its business within the state[67]; incorporation of a company within the state, however, would be enough.[68]

It may be too much to expect consistency in approach when other areas of the law are concerned. Whereas a statute authorising judicial proceedings in respect of contracts made or to be performed in the state against a defendant out of the jurisdiction is valid,[69] arbitration of a dispute involving officers on ships registered within the territory was outside the jurisdiction of the arbitration court.[70] Doubts were at one time expressed whether defence powers could be exercised extraterritorially, but "it is absurd to limit the effectual defence of Australia or any country to operations on its territory. Imagine the Navy confined to the three mile limit!"[71] Similarly, an ordinance for the public security of Singapore validly dealt with extraterritorial matters.[72]

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[66] *London and South American Investment Trust Ltd.* v. *British Tobacco Co. (Australia) Ltd.* [1927] 1 Ch. 107.

[67] *Commission of Stamp Duties (New South Wales)* v. *Millar* (1932) 48 C.L.R. 618.

[68] *Myer Emporium Ltd.* v. *Commissioner of Stamp Duties* (1967) 85 W.N. (Pt. 2) (N.S.W.) 115 (noted in (1967) 41 A.L.J. 462)).

[69] *Ashbury* v. *Ellis* [1893] A.C. 339.

[70] *Merchant Service Guild of Australasia* v. *Archibald Currie and Co.* (1908) 5 C.L.R. 737.

[71] *Sickerdick* v. *Ashton* (1918) 25 C.L.R. 506, 517; see also *Semple* v. *O'Donovan* [1917] N.Z.L.R. 273. *Cf. Brisbane Oyster Fishery Co.* v. *Emerson* (1877) Knox (N.S.W.) 80, 86; Keith, *The Constitution, Administration and Laws of the Empire* (1924), p. 19 (referring to imperial legislation removing supposed limitations on Dominion authority over navies).

[72] *Re Choo Jee Jeng* (1939) 25 M.L.R. 77. *Cf.* however, *Dato' James Wong* v. *Officer in Charge*, a case from Sarawak noted and discussed in [1975] J.M.C.L. 158. In *Ex p. Cousens; Re Blacket* (1946) 47 S.R. (N.S.W.) 145, 149 Jordan C.J. said: "much water has run beneath the bridge since *Macleod* v. *Attorney-General for New South Wales* was decided; and in view in particular of what was said by the Privy Council in *Croft* v. *Dunphy* [1933] A.C. 156 at p. 163 I do not regard it as obvious that the law of New South Wales is necessarily incapable of protecting the State from high treason so long as the treason is committed beyond the three mile limit . . ." (quoted in *Connor* v. *Sankey* (1976) 21 A.L.R. 317, 363–364).

[73] [1891] A.C. 455.

[74] Although some writers have sought to explain this case as the mere application of a restrictive principle of interpretation (*e.g.* Salmon, "Limitations of Colonial Legislative Power," *op. cit.* esp. p. 131, and Smith, *op. cit.*), it seems obvious that their Lordships would have declared the New South Wales Act *ultra vires* if it was to be given a necessarily extraterritorial scope.