ADJUDICATION ON THE GOLD FIELDS IN NEW SOUTH WALES AND VICTORIA IN THE 19TH CENTURY

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SUMMARY

The sudden onset of the gold rushes in New South Wales and Victoria in 1851 created an immediate necessity for a system of resolving disputes among gold miners. Despite a large literature on the gold rushes generally, virtually nothing has been written on the adjudication systems. The aim of this thesis is to examine what these systems were, to discover what records of them have survived and to expose samples of those records. The thesis concentrates on the period from 1851 to 1875 when the adjudication systems were at their most active. It records the changing legislative provisions relating to adjudication in that period. The first adjudicative institution created in both New South Wales and Victoria was Gold Fields Commissioners appointed under the Crown Lands Act 1833. In New South Wales the first Commissioner appointed was John Richard Hardy who reached the Western Gold Fields at the beginning of June 1851 and immediately started both issuing licences to mine and settling disputes. The Commissioners operated in Victoria only until 1855. Having been discredited as a result of the events leading up to the Eureka Stockade, they were then replaced by Wardens and Local Courts. However, the Commissioners were successful in New South Wales, in part because of the personal qualities of Hardy, and continued to operate in one form or another until 1874 when they were replaced by Wardens' Courts. The thesis explores what records survive of adjudications in both Colonies and incorporates samples of them. It examines in some detail the career of Thomas Alexander Browne (who was the

novelist Rolf Boldrewood) as the Commissioner at Gulgong in the early 1870s and who, atypically of Gold Fields Commissioners, was at odds with his community. It also examines the reported cases in the Supreme Courts concerning gold fields adjudication. The thesis thus presents, for the first time, an account of these adjudicative systems. After 1875 a system of Mining Wardens' Courts for determining mining disputes became universal throughout Australia, and widely used beyond, which system, in one form or another, has persisted into the 21st century.

STATEMENT BY CANDIDATE

This work has not been submitted for a higher degree to any other university or institution.

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Chapter One: Introduction and Plan

101 The subject matter of this thesis is the origins, development and nature of the distinctive system of adjudication of mining disputes that grew up on the gold fields of New South Wales and Victoria in the mid nineteenth century. It has spread throughout Australia and beyond and persisted in some form until today. The context in which this project arose is the novel body of Australian mining law which originated on the gold fields of New South Wales and Victoria in the gold rush days of the early 1850s.

102 There were two distinctive features of this system. The first was a way of managing titles whereby mining was carried out under a totally different regime from that which prevailed in England or in the United States. The system developed in a fairly uniform fashion across all the States and Territories of Australia, and was exported to New Zealand, to Papua New Guinea when it was an Australian territory and to at least two Canadian provinces and four states of Malaya. The system originated in possessory claims held under a licence, subsequently called a miner's right, to take and keep the gold of the Crown in Crown lands. The gold was owned by the Crown under the Crown prerogative in respect of royal minerals and royal mines: *The Case of Mines*.[1] Subsequently a system of leasing Crown lands to permit mining was developed so that larger areas and longer

[1] (1568) 1 Plowden 310; 75 ER 472 adopted in Australia by *Millar v Wildish* (1863) 2 W&W E37 and *Woolley v The Attorney General of Victoria* (1877) 2 App Cas 163, see Paragraphs 1420 and 1450 below.

term titles could, as operations became more sophisticated and required the devotion of greater capital sums, be granted in return for payment of rent and a royalty. Ultimately in all jurisdictions the system expanded to permit the Crown to grant titles over privately owned lands to recover Crown minerals and, in the end, to recover also privately owned minerals, so that those minerals could not, from a public point of view, remain locked up and unexploited at the whim of the owner. In the case of privately owned minerals, the royalty was charged by and paid to the Crown, but the bulk of the royalty was subsequently returned to the owner of the privately owned mineral: *Cadia Holdings Pty Ltd v State of New South Wales*.[2]

103 Along with this original and distinctive system of titles to recover minerals, there grew up a distinctive and original adjudicative system for the settlement of disputes among miners on the field. These disputes commonly concerned the entitlement of particular persons to particular pieces of ground or complaints that one person was encroaching on or taking gold from ground to which another person was entitled. Equally, where more than one person was involved in a claim or lease, there were disputes concerning questions of entitlement as between co-owners or alleged co-owners, or, where there was a partnership, what the entitlements were under that partnership. It was obviously

[2] [2008] NSWSC 528; [2009] NSWCA 174, (2009) 257 ALR 528; [2010] HCA 27, (2010) 242 CLR 195.

important that these disputes should be determined locally, quickly and cheaply.

104 Initially the power of adjudication was vested in Gold Fields Commissioners. But the typical system that ultimately grew up and was adopted in some form throughout Australia was for the local Magistrate to be appointed as a Mining Warden and to be invested with jurisdiction to determine these disputes. This was instituted in Victoria in 1858, but the Gold Fields Commissioners in New South Wales retained the jurisdiction until 1874.[3] The jurisdiction that was ultimately invested in Wardens' Courts was jurisdiction that was coterminous with, although not exclusive of, the common law and equitable jurisdictions of the Supreme Court of the Colony (subsequently the State) in mining disputes, and this without any limitation of subject matter, whether by amount or otherwise. Wardens' Courts ultimately existed in every State. In Victoria alone there was a second level of courts called Courts of Mines corresponding with the County Courts. In two States, South Australia and Western Australia, Wardens' Courts retain their jurisdiction. In the other four States and the Northern Territory, Wardens' Courts have been abolished, in New South Wales as recently as 2008,[4] but the jurisdiction has been transferred to other tribunals. In Victoria in 1969 the jurisdictions of the Courts of Mines and the Wardens' Courts were respectively transferred to the County Courts and the Magistrates

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[3] See Paragraph 114 below.

[4] *Courts and Crimes Legislation Further Amendment Act 2008* (NSW).

Courts[5] and in New South Wales in 2008 the jurisdiction of the Wardens' Courts was transferred to the Land and Environment Court. Like the title system, this unique and distinctive adjudicative system was exported to overseas jurisdictions.[6]

105 There has been a good deal of historical writing about life on the gold fields.[7] On some aspects, particularly the rebellion of the Eureka Stockade, there has been a considerable literature.[8] But although there have been short accounts of the process of adjudication before Commissioners,[9] there has been no detailed writing on the institutions and operation of the process of adjudication other than in respect of the narrowaspect of the elective Victorian Local Courts that existed from 1855 to 1858.[10] The works recorded in fn 10 do give details of the establishment

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5 *Mines (Abolition of Courts) Act 1969* (Vic).

6 See Paragraphs 102 above and 1647 below..

7 Eg, C M H Clark, *A History of Australia IV: The Earth Abideth For Ever 1851-1888* (Melbourne University Press, 1978) 48-56; Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 46-52; Brian Hodge, *The Goldfields Story 1851-1861 Book 2: Frontiers of Gold* (Cambaroora Star, 1979) 61-69; Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963 (reprinted with corrections1968)) 72-85; Frank Cusack, *Bendigo: a history* (Heinemann, 1973) 37-46; Penny Russell, *Savage or Civilised? Manners in Colonial Australia* (University of New South Wales Press, 2010) 198-205.

8 See Paragraph 255 below.

9 Eg, J B Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988), 200-201.

10 See Paragraph 113 and the works relied on in Chapter Six below: Donald Just, *The Victorian Mining Judicature Under the Gold Fields Act 1855* (Research Paper submitted for the degree of Bachelor of Laws Honours, University of Melbourne, 1971); R L Sharwood, 'The Local Courts on Victoria's Gold Fields, 1855 to 1857' (1986) 15 *Melbourne University Law Review* 511; Ralph W Birrell, *Staking a Claim: Gold and the Development of Victorian Mining Law* (Melbourne University Press, 1998).

of these Local Courts and concerning their operation during their short history. But there is no other description of the adjudicative process even in the works that give close accounts of the New South Wales and Victorian gold fields, eg, the works of Blainey or Serle,[11] or the recent work of Knox.[12] These works give detailed accounts of the discovery of gold, life on the gold fields and the development of methods of mining and the treatment of ore. But, as already stated, they do not give any detailed account of the development of the adjudicative process or its operation in relation to specific cases. The secondary historical works will be relied on in relation to the mining, historicaI and social background. But it is to fill the gap in the historical record concerning the establishment and operation of the adjudicative process that this thesis is intended. To do so, the various regimes for adjudication will be identified, as will the extent of documentation that existed in respect of each, and the degree to which that has survived. What survives of the documentation is recorded in the next paragraph. Where available, samples of the documentation will be presented or summarised. In relation to Gulgong, contemporary newspaper reports have also been relied on.

106 This paragraph sets out the only records it has been possible to find despite an exhaustive search in the Archives. The only actual record of proceedings in the Victorian Local Courts is

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[11] Blainey, above n 7; Serle, above n 7.

[12] Malcolm Knox, *Boom: The Underground History of Australia, From Gold Rush to GFC* (Viking, 2013).

of the Beechworth Local Court between October 1856 and December 1857.[13] The only records of proceedings before Gold Commissioners in New South Wales are The Rocky River Record of May-July 1856;[14] the Gulgong Summons Case Book of March 1871-May 1872;[15] the Tambaroora Bench Books from 1863;[16] and the Hill End Bench Books from November 1871-November 1872.[17] After the creation of mining courts, in Victoria in 1858 and in New South Wales in 1874, there were formal record books, but they did not contain any record of the hearing or the evidence. None of this material has been previously exposed or has been the subject of secondary accounts.

107 The lack of material referred to in paragraphs 105 and 106 means that, in the main, the thesis proceeds by reference to primary sources only, without reference to secondary sources, except in the case of the elected courts in Victoria referred to in paragraph 105.

108 The heyday of gold fields adjudication in New South Wales and Victoria was from the commencement of the gold rushes in 1851 to about 1875. The reason for this is that disputes that required settlement by the system were much more numerous during those years than they were thereafter. It is also the period

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13 See Paragraph 636ff, Appendix I
14 See Paragraphs 732ff below.
15 See Paragraphs 910-919 below.
16 See Paragraphs 921-925 below.
17 See Paragraphs 926-936, Appendix II.

during which the adjudication system was initiated and developed to its final form. For these reasons, this thesis concentrates on that period. By about 1875 gold mining activity was declining in both Victoria and New South Wales and also the nature of the mining activity changed. These factors reduced the volume of disputes requiring resolution by the then perfected system.[18]

109 On the early gold fields mining was by individuals or small parties of four to six seeking alluvial gold by panning with dishes or by other simple means of separating the gold from alluvial gravel. The gravel was initially extracted from surface creek beds. Subsequently, it was recovered by deep lead mining, where shafts were sunk to 100 feet or so to reach deep leads, which were buried in gravel bearing creek beds at that depth under the surface. This required larger parties of up to ten or a dozen and more organised activity, but was still the province of comparatively small parties with limited capital. Once the easily obtained alluvial sources were exhausted, the gold had to be extracted from quartz veins. This involved deeper workings, breaking the quartz to permit it to be raised, crushing the quartz, generally in stamper batteries, and thereafter the extraction of the gold. Even in its early stages, with comparatively shallow workings, this required larger parties still, greater sophistication and more capital. In the end, much of the gold recovered was

[18] See Paragraphs 1516, 1517 below.

being extracted through shafts thousands of feet deep under towns such as Ballarat and particularly Bendigo.[19]

110 It was in general terms the small, unsophisticated operations that led to frequent disputes, first, as to entitlement to ground, encroachment or the taking of gold and, secondly, simple co-ownership and partnership disputes. During operations of this sort, disputes were frequent and required immediate settlement. On busy fields there were scores or hundreds of such disputes a year. This is what was occurring in the period up to 1875.

111 In its inception, the intention of the present project was to recover, if possible, and to examine and publish, cases that were determined on the gold fields under this adjudicative system, doing so in something like the way Professor Bruce Kercher and those assisting him have done with the cases of the early courts in Australia before there was any law reporting, including cases of the Supreme Courts of New South Wales and of other Colonies. Inspired by the Kercher Reports, a similar project has been carried out in New Zealand. However, a preliminary examination of the remaining material relating to adjudications on the gold fields made it plain that such a project could not be carried out on a comparative basis between the systems in New South Wales and Victoria. In New South Wales the relevant material is generally not available, since the adjudications were generally

[19] For further detail see Paragraphs 245-251 below.

conducted without writing.[20] Even in Victoria, where more material is available, such a project, because of the nature of that material, is not really practicable.

112 During the heyday period from 1851 to 1875 the legislative provisions for adjudication in Victoria and New South Wales were quite different. On the commencement of the gold rushes in 1851, Commissioners of the Gold Fields were appointed in both New South Wales and Victoria and it was they who, in an informal fashion, settled disputes of the types that have been mentioned. As well as having the function of settling disputes, the Gold Commissioners were the general administrators of the gold fields. They were responsible for collecting the unpopular licence fees that were charged for the right to mine; they were in charge of policing and of arranging gold escorts to transfer the gold safely to the capital; and they carried out the general administration of the fields. Particularly in those early days, the process of adjudication was almost universally conducted on the spot by the Commissioner attending, who would there and then consider the situation, take evidence if this was thought necessary and orally announce his decision on the dispute. This was a process that produced no written records. Even secondary reports are scarce and difficult to find.

113 As is well known,[21] the high handed attitude and behaviour of the Gold Commissioners in Victoria led to great dissatisfaction,

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[20] See Paragraphs 720-722 below.

contributing substantially to the sharp but short rebellion of the Eureka Stockade at the end of 1854. Although there is no doubt that personal high handedness was the natural style of many of the Victorian Gold Commissioners, they were backed in this attitude by the Government, which directed frequent raids (sometimes several a day) to ensure that everyone working on the gold fields had a licence.[22] The Eureka Stockade was followed swiftly by a Royal Commission to Inquire into the Condition of the Gold Fields of Victoria (1855) ('The "Eureka" Royal Commission'), which recommended the implementation of most of the reforms sought by the miners. The Report was accepted by the Government. There followed a radical reorganisation of the adjudication system, which will be discussed shortly.[23]

114 In New South Wales, while there was some discontent about the licence system, the Gold Commissioners, led by the exemplary John Richard Hardy, created much less resentment among the miners. The result was that, despite the 'Eureka' Royal Commission and reforms, the system of adjudication by Gold Commissioners (or by Justices of the Peace exercising the jurisdiction) was left in place for another two decades. It was not until the Mining Act 1874 that the adjudicative functions were removed from the Commissioners and vested in Wardens' Courts.

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[21] Eg, see John Molony, *Eureka* (Melbourne University Press, 2nd ed, 2001) Chapter 10.
[22] See Paragraph 256 below.
[23] Paragraph 113 below.

115 In Victoria under the Act 18 Vic No 37[24] assented to on 12 June 1855 Local Courts were set up in most gold mining districts. There were a total of 21 of them. These had two extraordinary features. First, they combined legislative and adjudicative functions. Secondly, their members were elected. Their legislative function was to frame the mining regulations for the gold district. The principal element of their adjudicative function was adjudication in respect of partnership disputes. Wardens (replacing Gold Fields Commissioners) were also appointed to deal with encroachment disputes. The Local Courts lasted for less than three years until 1858. The principal reason for their abolition appears to have been that it was recognised that the Courts were inconsistent with British constitutional arrangements, first, because they were elected and, secondly, because they had legislative as well as adjudicative functions.[25]

116 The Act 21 Vic No 32[26] assented to on 24 November 1857 and commencing on 1 January 1858 abolished the Local Courts and replaced them in each mining district with a Court of Mines constituted by a Judge. In practice, the local County Court judge was also the Judge of the Court of Mines. Wardens in the Wardens' Courts were also given adjudicative functions, with a right of appeal to the Court of Mines. This was the start of the definitive system referred to above, although no other jurisdiction ever adopted the two tier system of a Court of Mines

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[24] See Paragraph 419 below.
[25] See Paragraph 662 below.
[26] See Paragraph 422 below.

at County or District Court level and a Warden or Warden's Court at Magistrates' Court level. From this time on, statutory record keeping was introduced. In respect of proceedings both in the Courts of Mines and before Wardens, a register was kept in which were entered a plaint number; the name, address and description of the plaintiff; the name, address and description of the defendant; a statement of the nature of the proceedings; and provision for recording the course of the proceedings and their outcome. However, no record was kept of the evidence in contested cases.

117 This new Victorian system was in sharp contrast with adjudication before Commissioners, both when it occurred in Victoria and as it continued to occur in New South Wales. Initially, both the proceedings before Commissioners and the announcement of the result were conducted orally, generally with no written recording at all of the parties, the nature of the case or the result. As previously noted, this system persisted in New South Wales until the Mining Act 1874. However, by the early 1870s, as is shown by a Book of Summons Cases preserved from the Petty Sessions Court at Gulgong and by Tambaroora and Hill End Bench Books,[27] mining disputes were being listed and heard in Court, interspersed with ordinary summons cases. But the legislative framework was not changed in New South Wales until the Mining Act 1874, by which one level of mining courts was introduced in the form of Wardens' Courts. Comparison between

[27] See Paragraphs 910ff and 920ff below.

what occurred in New South Wales and what occurred in Victoria is difficult, because of deficiencies in recording in Victoria and its almost complete absence in New South Wales during much of the period in which mining litigation was in full flight.

Plan of Thesis

118 A number of questions arise in the course of this thesis, including the following: (1) Why did the adjudication system assume the form it did in New South Wales? (2) Was that system successful and, if so, why? (3) Did the Supreme Courts lead to the formalisation of dispute resolution in New South Wales and Victoria and, if not, what did?

119 The plan adopted for this thesis is as follows. Chapter Two deals with the relevant history and social background, including the nature of gold fields society and a brief account of the Eureka Stockade and the ensuing Royal Commission. Chapter Three deals with the origins of the system, including English precedents and the administrative background in New South Wales. There is only one background to be considered here, since Victoria was separated from New South Wales only on 1 July 1851. This administrative background has importance in two ways. Attention is frequently drawn to the general orderliness on Australian gold fields. This is in contrast to the situation in the United States. It is remarkable because the gold fields were frequently remote, particularly in their early days, from centres of settlement. The administrative background is of importance in

explaining this orderliness.[28] It is also important in being the source of the original system of adjudication by Commissioners. Chapter Four gives an account of the legislative history relating to adjudication in both New South Wales and Victoria. This includes a section in which details of the provisions over the entire period are gathered together in chronological order, even when they are mentioned or set out elsewhere, so that they may be referred to easily and the progression of the provisions can be readily seen. Chapter Five concerns the establishment of Gold Commissioners as adjudicators and deals particularly with the role of John Richard Hardy in New South Wales. Chapter Six covers the establishment in 1855 and operation of Wardens' and Local Courts as adjudicators in Victoria, including the abolition of Local Courts and their replacement by Courts of Mines under the 1857 Act mentioned above. Chapter Seven deals with the manner of adjudication by Gold Commissioners and the continuation and development of their function in New South Wales from 1853 to 1866. Chapter Eight is concerned with the 1866 legislation and the New South Wales Royal Commission into Gold Mining of 1870-1871 ('Royal Commission of 1870-71'). Chapter Nine deals with the continued operation of adjudicators in New South Wales from 1867 to 1873, and Chapter Ten with the operation of the Victorian Courts of Mines and Wardens' Courts from 1858 to 1875, including a comparison with the New South Wales system. Chapter Eleven covers the history of TA Browne as Gold Commissioner at Gulgong. Brown is focused upon because,

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[28] See Paragraphs 314 and 315 below.

atypically for a Commissioner, he was at odds with the community he served. A good deal of material is available about his performance at Gulgong, his relations with the Gulgong community and his decision-making on gold fields disputes. (He was, incidentally, the novelist Rolf Boldrewood; his novels cover many gold fields themes.) Chapter Twelve deals in particular with the culmination of TA Browne's relationship with the Gulgong community in the prosecution of Thomas de Courcy Browne, the editor of the *Gulgong Guardian* newspaper, for criminal defamation of Commissioner Browne, which resulted in the conviction and imprisonment of editor Browne. Chapter Thirteen deals with the establishment and operation of the Wardens' Courts in New South Wales, and Chapter Fourteen with the body of jurisprudence in the superior courts of New South Wales and Victoria relating to the adjudication system in the specialised mining courts. Chapter Fifteen outlines the history of Wardens' Courts subsequent to 1875. Finally, Chapter Sixteen contains a summary of the foregoing material, highlights, by way of conclusion, some notable aspects of the system discussed, and answers the questions set out in Paragraph 116.

Chapter Two: History and Social Background

History to 1851

201 New South Wales was a penal colony, founded as such upon the arrival of the First Fleet in January 1788. Van Diemen's Land, later Tasmania, subsequently became a separate penal colony. Transportation to New South Wales continued till 1840 and to Van Diemen's Land until the end of the 1840s.[1]

202 The sheep industry became the principal industry of New South Wales, and wool its principal export. Because the details of land holding and the administrative arrangements put in place are of significance to the development of the adjudicative system, the manner in which the lands were dealt with is set out in some detail in Chapter Three, where the development of the administrative system put in place is discussed.[2] Under this regime, by 1851 all the lands around Ballarat[3] and all the lands on what became the Western Gold Fields of New South Wales had been taken up and occupied for the purpose of grazing sheep.[4]

203 In New South Wales the lands can be considered in three categories, namely, the County of Cumberland, being Sydney and

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1 Alan Atkinson, *The Europeans in Australia: A History Volume II Democracy* (Oxford University Press, 2004) 224-226.
2 See Paragraphs 318-323.
3 See Weston Bate, *Lucky City: The First Generation at Ballarat 1851-1901* (Melbourne University Press, 1978) 1-2.
4 Brian Hodge, *The Goldfields Story 1851-1861 Book 1: Valleys of Gold* (Cambaroora Star, 1976) 19-22.

surrounds; the other counties within the boundaries of location; and the squatting districts beyond the boundaries of location, these being as defined in Chapter Three.[5]

204 The population of the County of Cumberland in 1841 was constituted as follows: convicts 7,908, emancipists 7,959, those born in the Colony 16,257, and those who had arrived free 25,984, so that 32,124 or 55.3 per cent were convicts, emancipists or natives. In the other counties within the boundaries of location, there were 13,553 convicts, 7,929 emancipists, 11,114 natives, ie, those born in the colony, and 14,852 who had arrived free, so that convicts, emancipists and natives totalled 32,596 or 68.7 per cent of the population. In the squatting districts beyond the boundaries of location there were 3,028 convicts, 2,360 emancipists, 1,210 natives and 2,447 who had arrived free, so that convicts, emancipists and natives totalled 6,598, or 72.9 per cent of the population.[6]

205 By 1851, a decade after the cessation of transportation, the figures were as follows. In the County of Cumberland there were 734 convicts, 6,546 emancipists, 36,812 natives and 37,022 who had arrived free, so that the total of 44,092 convicts, emancipists and natives made up 54.4 per cent of the population. In the other counties within the boundaries of location there were 998 convicts, 12,836 emancipists, 35,226 natives and 29,372 who had

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5 See Paragraph 318.

6 Figures from the 1841 Census as tabulated in Russel Ward, *The Australian Legend* (Oxford University Press, 2nd ed, 1966 (reprinted 1974)) 72.

arrived free, so that the total of 49,060 convicts, emancipists and natives made up 62.6 per cent of the population. In the squatting districts there were 961 convicts, 7,247 emancipists, 9,353 natives and 10,136 who had arrived free, so that the total of 17,561 convicts, emancipists and natives made up 63.4 per cent of the population.[7]

206 From 1827, Government policy was aimed at directing convict labour to the hinterland.[8] The principal employment of convict and other labour on the sheep runs was as shepherds. The need for shepherds arose from the fact that until after the commencement of the gold rushes the sheep properties were not fenced, so that the sheep required oversight by a shepherd who watched them during the day and penned them at night. He was often assisted by a hut keeper, who performed the duty of night guard.[9]

207 Despite a severe depression in the 1840s, wool remained the principal export and up to 1851 there was no possibility of any other industry emerging which could match wool as the colony's export staple.[10] By 1851 New South Wales had reached the maximum of its wool and tallow producing power.[11]

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7 Figures from the 1851 Census as tabulated in Russel Ward, above n6, ibid.
8 Id 73.
9 Id 80.
10 J B Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988) 99.
11 Hodge, *Valleys,* above n 4, 22.

208 Thus in 1851 sheep graziers and particularly squatters were the holders of the vast bulk of settled land in New South Wales. Prior to 1847, the squatters had held their land only under annual licences granted at a fee of £10. In 1846-1847, by dictate of the Imperial Government, they were granted a right to leases for periods from eight to 14 years. During the currency of a lease, the lessee alone could purchase the land and at expiry he had a pre-emptive right to purchase.[12] By 1851, under leases, 180 million acres were held by 1,800 people out of a population of some 200,000.[13] At one stage, Benjamin Boyd held 30 or more runs and over one million acres and W. C. Wentworth held eleven runs and 500,000 acres.[14]

Constitutional Arrangements

209 Prior to 1842 the Legislative Council had been an entirely nominated body. In 1842, the Imperial Parliament provided a new Constitution. Under this, the Legislative Council consisted of 36 members, of whom twelve were nominated by the Crown and 24 elected. The electors were people with property to the value of £200 and £20 householders. Elected members of the Council were required to possess property worth £2,000 or an income of £100 per annum.[15]

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[12] Robin Gollan, *Radical and Working Class Politics: A Study of Eastern Australia 1850-1910* (Melbourne University Press, 1960 (reprinted 1966)) 4-5.

[13] Hodge, *Valleys,* above n 4, 19.

[14] Gollan, above n 12, 5.

[15] New South Wales Constitution Act 1842 (UK). See Gollan, above n 12, 2.

210 By an Imperial Act of 1850[16], the New South Wales Constitution was amended by halving the property qualification of electors and separating Victoria from the parent colony with a Constitution similar to that of New South Wales. The 1850 Act did give the colonial legislatures power, subject to the consent of the British Government, to amend their own Constitutions. Under this Act, Victoria was formally separated from New South Wales on 1 July 1851, which, as will be seen, was a time at the inception of the gold rushes.

211 In December 1852 the UK Government despatched to New South Wales and Victoria its decision to grant them self-government. The Legislative Councils of both Colonies subsequently enacted Constitutions which, after considerable delay, were amended and approved by the UK Parliament in 1855.[17]

212 Each of those Constitutions provided for representative government with a Parliament consisting of two houses, the lower house being the Legislative Assembly and the upper house the Legislative Council. Elections were held in each colony in 1856. The franchise for the Victorian Legislative Assembly required the voter to be aged 21, to have resided in the Colony for at least a year, to be able to read and write, and to own property worth £50, or occupy property worth £10 a year, or occupy any

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16 Australian Colonies Government Act 1850 (UK) 13 & 14 Vic c59

17 New South Wales Constitution Act 1855 (UK) 18 & 19 Vic c 54. See Gollan, above n 12, 3.

Crown lands, or have a salary of £100 a year.[18] In New South Wales, whilst it was not the sole qualification, the minimum property requirement was the occupation of property worth £10 a year ("the £10 householder").[19]

213 The Constitutions contained quite different provisions for the membership of the Legislative Councils. The Victorian Legislative Council was to be elected, but on a franchise more restricted than the Assembly. In New South Wales the Legislative Council was to be wholly nominated, a regime which lasted for more than a century. This regime resulted from a vigorous campaign by W. C. Wentworth. His original aim was to have hereditary membership. This proposal was derided as creating a "bunyip aristocracy". The compromise ultimately reached was that the Council should not be elected but be nominated.[20]

214 In 1858 the Parliaments of both Colonies provided for manhood suffrage for elections to the Legislative Assembly.[21] A high degree of democracy was thus achieved in both Colonies at an early date. The influence on this outcome of the gold rushes occurring at the time will be noted below.[22]

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[18] Victorian Constitution. And see Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963 (reprinted with corrections1968)) 148.

[19] New South Wales Constitution 17 Vic No 41. And see Hirst, above n 10, 100.

[20] Andrew Tink, *William Charles Wentworth: Australia's greatest native son* (Allen & Unwin, 2009), Chapters 27 & 28.

[21] The Electoral Act 1858 (NSW); Electoral Act of 1858 (Vic). And see Hirst, above n 10, 102-103.

[22] See Paragraph 259 below.

215 As is apparent from the subsequent history of the gold fields, gold was widespread in both New South Wales and Victoria and was in many instances located at or near the surface of the ground. Over much of this ground shepherds, as noted above, ranged daily. It is clear that something like 100 pastoral labourers found gold before 1850, but this did not lead to a gold rush.[23] One named McGregor mined the gold methodically on a small scale and sold it in Sydney as early as 1845.[24] W. B. Clarke was an Anglican clergyman in Sydney and also a talented amateur geologist. As early as 1841 he found gold near Hartley (where, however, it has never been mined).[25] He sent specimens to Professor Sedgwick at Cambridge University. He even showed his best specimen in 1844 to Governor Gipps, who it is said responded, 'Put it away, Mr Clarke, or we shall all have our throats cut.' Similarly, some gold was found in Victoria as early as 1845-6.[26] In both Colonies these early discoveries of gold were kept secret.[27]

216 However, public interest in gold was precipitated by one Edward Hammond Hargraves. He was born in England in 1816 and had been in Australia since 1834. He was 18 stone and not energetic. Leaving his family in New South Wales, he went to

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[23] Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 6.
[24] Ibid.
[25] Id 7-8.
[26] Id 10.
[27] Malcolm Knox, *Boom: The Underground History of Australia, From Gold Rush to GFC* (Viking, 2013) 17.

California in 1849 to dig for gold. He returned to Sydney in January 1851.[28] He knew that gold had been found near Wellington. On his way there, he went to Lewis Ponds Creek about 16 miles from Orange. There, on 12 February 1851, he found a few grains of gold in the creek at a spot which can still be seen. Thereafter, while he prospected further in that vicinity with a young man named Lister and two other young men called Tom, further gold was found. On 22 March 1851 Hargraves went to Sydney and showed the Colonial Secretary Deas Thomson his original find.[29] Shortly before 10 May 1851 he held a public meeting in Bathurst at which he publicised his discovery and named the site of his find Ophir, after the biblical city of gold. This meeting was reported in the *Bathurst Free Press* of 10 May 1851.[30] On the day of the original discovery Hargraves wrote that he had exclaimed to his guide, 'This is a memorable day in the history of NSW. I shall be a baronet, you will be knighted and my old horse will be stuffed, put into a glass case and sent to the British Museum.'[31]

217 There were disputes over several decades as to whether it was Hargraves, Lister or the Toms who were the original discoverers of gold. However, there is no doubt that Hargraves

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[28] Blainey, above n 23, 14; Hodge, *Valleys,* above n 4, 9.
[29] Blainey, above n 23, 17; Hodge, *Valleys,* above n 4, 11.
[30] Blainey, above n 23, 18; Hodge, *Valleys,* above n 4, 12.
[31] Blainey, above n 23, 13; Hodge, *Valleys,* above n 4, 11.

was a master of publicity and that it was his publicity campaign that sparked the first gold rush.[32]

218 In mid July 1851 that first rush began in Victoria at Clunes near Ballarat, and by the end of the month there were some three to four hundred diggers at Clunes. Gold was discovered by one Hiscock at Buninyong near Ballarat early in August and late in August gold was also discovered ten miles from Buninyong at what was to become Ballarat.[33]

219 There soon followed discoveries on the Turon, Louisa Creek, the Meroo and the Abercrombie on the Western Gold Fields of New South Wales and on Bells Creek, Majors Creek and Araluen on what became the Southern Gold Fields. Subsequently, alluvial fields developed at Kiandra in 1860, at Lambing Flat, (now Young) in 1860 and at Forbes in 1861. In 1862 Forbes and Young provided half of the £2,500,000 worth of gold recovered in NSW in a record year. Gulgong in 1871 was 'one of the last poor men's rushes in south-eastern Australia'.[34] In Victoria, soon after Ballarat, there were important discoveries at Bendigo, Castlemaine and surrounding districts, and also in the Ovens Valley at Beechworth. There were many gold mining centres in Victoria. From early in the history of each gold field the

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[32] Blainey, above n 23, 18; Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia, Volume 1* (Cambridge University Press, 2013) 171; as to Lister and the Toms' claim, see Hodge, *Valleys,* above n 4, 14.
[33] Serle, above n 18, 11-12; Bate, above n 3, 7-8.
[34] Blainey, above n 23, 85.

Government provided a weekly Escort to convey gold safely to the capital for a charge of 1%.[35]

Growth of the Colonies

220 The gold rushes produced a population explosion in Australia such as has not been seen either before or since. Half a million people came to Australia in the ten years following 1851.[36] 86,000 arrived in the year after gold was discovered.[37] In Victoria, 35,000 people were at the diggings by the end of 1852 and 65,000 by the first quarter of 1854.[38]

221 The population of New South Wales went from 187,243 in 1851 to 350,860 in 1861, almost doubling. The population of Victoria went from 87,345 in 1851 to 540,322 in 1861, about a six-fold increase.[39] The population of Australia trebled in the first 12 years.[40] There were 40,000 diggers in June 1852 and 100,000 in 1855.[41] It will readily be appreciated from these figures that the impact on Victoria was greater than the impact on New South Wales. In the 1850s New South Wales produced seven per cent of

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[35] Id 25, 34, 86; Bate, above n 3, 16, 30; Hirst, above n 10, 201; Brian Hodge, *The Goldfields Story 1851-1861 Book 2: Frontiers of Gold* (Cambaroora Star, 1979), 263-264; John O'Sullivan, *Mounted Police in N.S.W.* (Rigby, 1979) 68, 69.

[36] Blainey, above n 23, 38.

[37] Atkinson, above n 1, 229-230.

[38] R M Crawford, *Australia* (Hutchinson, 3rd ed, 1970 (reprinted 1971)) 21.

[39] Figures from the 1851 and 1861 Censuses as tabulated in Ward, above n 6, 112.

[40] Blainey, above n 23, 38; Alison & Macintyre, above n 32, 181.

[41] Blainey, above n 23, 42.

the gold produced by Victoria, and from 1860-1863, 25 per cent.[42] From 1851 to 1860, Australia produced 39 per cent of the world's gold.[43] For twelve years gold supplanted wool as Australia's principal export.[44] On the effect of the gold rushes on the Australian economy, Brian Fitzpatrick writes as follows:[45]

> And if the call of the pastures and then of the mines had led to a great inflow of people, so that the Australian population, 190,000 in 1840, was 1,145,000 in 1860, it was remarkable that Australian imports per head rose from £8 in 1841-50 to £19 in 1851-60, while exports per head rose from about £6. 10s. to more than £17. This evident advance of British colonies in economic and commercial importance was of course a benefit which was not confined to themselves; England, whose colonies and investments they were, gained, too. The extent of the gain cannot be stated precisely, for the large Australian production of gold and the flooding of the gold down the financial channels of the world, helped to promote a large increase of British and world trade at this time.

Among the immigrants there are contemporary references to the large number of educated and professional men on the diggings.[46]

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42 Id 84.
43 Hodge, *Frontiers,* above n 35, 241.
44 Blainey, above, n 23, 61; Alison & Macintyre, above n 32, 180.
45 Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 2nd ed (revised and abridged), 1949) 113-114.
46 Ward, above n 6, 137; Alison & Macintyre, above n 32, 182.

From 1854 23 per cent of new arrivals were skilled tradesmen and professional people.[47]

222 The difference between the impact on New South Wales and Victoria has been characterised in the following way by Crawford:

> New South Wales was an old, established colony, able to absorb its relatively minor gold-rush as a colourful but not cataclysmic chapter in its history; infant Victoria could not do so. In ten years it was transformed from a pastoral extension of Tasmania and New South Wales into a bustling, aggressively self-assertive colony of over half a million people, close on 140,000 of them living in Melbourne, which was already on the way to becoming a metropolis.
>
> This was a change in numbers; it was also a change in kind.[48]

223 In New South Wales the fields remained small and dispersed.[49] The gold influx led in the first decade to seven settlements, none of which was permanently of any great size. Outside these settlements, Bathurst doubled in population and Mudgee trebled. There was a rapid enlargement of an affluent middle class in Sydney.[50] In subsequent decades, gold led to larger towns at Young, Forbes and Gulgong, but none of these was

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47 Crawford, above n 38, 104.
48 Ibid.
49 Hirst, above n 10, 212.
50 Hodge, *Frontiers,* above n 35, 240-241.

on the scale of the Victorian towns shortly to be mentioned. More is said of the nature of the New South Wales gold fields settlements in the next section.

224 In Victoria, on the other hand, the gold rushes led to the establishment of substantial towns based on gold. Among these, the one in the forefront of attention for the purposes of this thesis is Ballarat, which by 1871 had a population of 47,000[51] and has remained one of the most substantial towns in Victoria to this day. Bendigo was on much the same scale. Castlemaine and other towns were also substantial. More will be said below about the nature of these towns.

Nature of Settlements

225 This section will concentrate on Sofala and Ballarat as typifying what might be said about gold fields settlements in New South Wales and Victoria respectively.

226 At the beginning of the rushes, Crawford remarks, "Canvas, bark and rough-hewn slabs solved the problem of accommodating new numbers in Melbourne and on the diggings."[52]

227 Hodge gave the following description of the township of Sofala at its inception:[53]

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51 Bate, above n 3, 114.
52 Crawford, above n 38, 105.
53 Hodge, *Valleys,* above n 4, 47.

> Sofala in its early weeks – and indeed, months – was a settlement of tents, dotted along the convolutions of the river, close by the precious claims. All business premises at first were temporary, and even the police barracks built on the opposite side of the river on what logically came to be called Commissioner's Hill, were very rough slab and bark buildings. At the beginning of October the township was still *'a mere collection of tents of all sorts and sizes. It had a Post Office, a coach office, a circus, a Royal Hotel. The last of these establishments at which I took up my abode during my stay, consisted merely of a covering of white calico stretched over a framework of rough saplings'*, wrote John Dunmore Lang.[54]

228 Later in the same year, the *Bathurst Free Press* correspondent wrote:

> At Sofala, however, things are advancing a step. The calico tent is being displaced by the slab and bark hut; glass windows are coming into fashion, the baker's cart is driving 'damper' out of the field; vegetables are making their appearance, and milk for tea is becoming a possibility.[55]

229 Hodge states that the tents, bark huts, cabins and some elegant weatherboard edifices were crowded together in two long, narrow streets and several cross streets. He continues:

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[54] Cited in Hodge, *Valleys,* ibid.

[55] *Bathurst Free Press,* 6 December 1851.

> At night under the dull glow of oil lamps, the people surged along the streets into the shops and shanties, selling their gold and buying their rum; playing billiards or cards with their mates; yarning about the current lucky strike or discussing last Saturday night's donnybrook outside the pub.[56]

230 By 1856, the same author notes, bark had practically replaced calico.[57]

> Although these superior dwellings were not entirely impervious to wind or rain, they indicated a stability long desired by the business community.[58]

231 In 1858 the new Commissioner for the Western Gold Fields, Harold Maclean, described Sofala as follows:

> At about the central portion of that part of the river forming the goldfield is situated the flourishing township of Sofala, containing from 600 to 800 inhabitants. Sofala at the present time is marked by an appearance of great activity and prosperity. The former buildings of bark and slabs, are rapidly giving way to improved structures of weatherboards, with shingled roofs; and I am assured that the contemplated sale of the lands to the present occupants

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56 Hodge, *Frontiers,* above n 35, 66.
57 Id 69.
58 Id 66.

> is likely to lead, at no distant period, to the erection of brick buildings.[59]

232 By this time Sofala had three churches and four schools, the Church of England School at Sofala having 150 pupils. Within the district there were 34 licensed public-houses and a large number of stores and other places of business.

233 Sofala, in reality, did not proceed beyond this stage.

234 In Victoria, the settlements began in the same modest way. Weston Bate described Buninyong at its inception as 'a little Geelong under canvas.' He quoted the following description by one Alfred Clarke:

> The inhabitants of Geelong are becoming nomadic – various tribes from Geelong and Chilwell have sent their deputations, and the denizens of the Western District may be described ere long as dwellers in tents, as hewers of wood and drawers of water. Geelong is going out of town and going to Buninyong. Bricks and mortar are deserted for tarpaulins, comfort for inconvenience, ease for hardship, ordinary travail for hard labour, and all is set at nought by the desire for gold, gold that is to be rent from the bowels of the earth. Neither rain nor storm overpowers the desire; the cry is still 'They come, they come.'[60]

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59 Id 88.

60 Bate, above n 3, 7-8.

235 Serle describes a gold field in its early days as follows:

> The first view of an established goldfield was fascinating – holes like gravel-pits and tents everywhere, an anthill swarming with frenzied activity, a steady roar as in an immense factory from hundreds of rocking cradles. It was like a gipsy-camp, some said, or a fair extending for miles but on getting closer, the holiday appearance ... is entirely removed – no fun of the fair, no laughing – no women – but rough men ... rocking cradles with an earnestness you cannot imagine. Mostly serious, but some laughing as men laugh when they win at cards.[61]

236 On the next page Serle describes the living conditions of an early settlement:

> In the early days of the rushes, before the diggers settled down to long periods of residence on any one field, living-conditions were of the most primitive kind. Most of the tents were cotton, a few canvas and a few with tarpaulins: saplings were used for ridge-poles, nearly all of which had some means of identification attached – flags, boots, hats, anything out of the ordinary. Stumps and packing-cases served as furniture and a flour-bag was prized as the basis of a rough stretcher. Most slept on the ground, sometimes on straw mattresses or leaves ('bush feathers'), in blankets

[61] Serle, above n 18, 71.

> which were often flea-ridden, and wearing most of the clothes they possessed.[62]

237 In Ballarat in 1853, there was a profound change. Tradesmen returned to their trades and large wooden buildings were going up. A theatre opened and also an undertaker.[63] Weston Bate notes:

> The diggers also were living more comfortably. Many tents were now clad with slabs and had substantial chimneys, usually of mud-brick.[64]

238 1854 was a year of profound social and economic changes:

> In April miners began to build log huts in which to stay through the winter, and the stability and complexity engendered by widespread deep-sinking stimulated the activity of solicitors, auctioneers, sharebrokers, blacksmiths, builders and men of many occupations not much noticed before. Sixteen qualified practitioners were listed by the newly formed medical association.[65]

239 The building industry was well developed in 1854. Ballarat possessed a sawmill and several timber merchants, one of whom was handling 5,000 feet of local hardwood every week. There was another sawmill five miles away at Warrenheip. A brickyard advertised 60,000 bricks and a monumental mason supplied

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62 Id 72.
63 Bate, above n 3, 36.
64 Id 38.
65 Id 41.

hearthstones as well as tombstones. Shops kept paint, wallpaper, glass, nails and galvanised iron.[66]

240 In May 1854 central Ballarat had 22 hotels. As well as concert halls in two hotels, there was a circus, four theatres and the Assembly Rooms.[67]

241 In 1855, there were hundreds of businesses, whereas before Eureka there had been just a few dozen.[68] Between 1855 and 1861, Main Street was transformed.[69] In 1855 the shops were still modest weatherboard buildings.[70] By the 1860s Main Street was a street of substantial weatherboard and even brick buildings.[71]

242 It is to be remembered that, unlike Sofala, Ballarat went on growing. It has already been noted that by 1871 it had a population of 47,000. The railway reached Ballarat in 1862. In 1871 it received high praise from the celebrated English novelist, Anthony Trollope, who visited just after Christmas. Trollope said he was struck with more surprise by Ballarat than by any other city of Australia, not for its youth (Melbourne too was very young), and not for its size (its population was a quarter of Melbourne's), but because it was so solidly built and so well

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66 Id 44.
67 Id 45.
68 Id 96.
69 Id 105.
70 Id 98.
71 Id 106.

endowed with hospital, libraries, hotels, public gardens and other amenities.[72]

243 An important part of the explanation for Ballarat's growth was the development of secondary industry, which had no parallel in New South Wales settlements such as Sofala. The substantial building industry in Ballarat has already been mentioned. From the mid-1850s there was an increasing number of engines in Ballarat, largely for keeping water levels down in the mines.[73] Importantly, these engines began to be manufactured in Ballarat, the first being made in 1858.[74] The demand for the engines and other metal components for use in the mines led to a proliferation of foundries in Ballarat.[75] In addition to the continuing expansion of the building industry, clothing manufacture commenced and there were tanners and flour mills.[76]

244 The growth of Ballarat and other substantial towns exemplified the completely different scale of the changes which the gold rushes brought about in Victoria as compared with New South Wales.

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72 Id 114; see also Knox, above n 27, 87-90.
73 Bate, above n 3, 84, 122.
74 Id 123.
75 Id 125-128.
76 Id 129-131.

Nature of Fields and Methods of Mining

245 It is not the function of this thesis, and certainly not of this chapter, to give a detailed history of mining on individual fields. However, on virtually all fields mining methods went through the same three phases, so what is proposed, rather, is to give a general account of these methods as a background to the account of adjudication. The three phases can be described as surface alluvial mining, deep lead mining and quartz mining.

246 A description of surface alluvial mining is given by Serle as follows:

> In these early years when almost all the workings were surface alluvium, the methods of work did not greatly vary. If the deposit were very shallow it was simply a matter of opening the claim up as a pit, exposing the gold-bearing stratum, picking out any nuggets with a knife and handing the rich earth up in buckets. Where deposits were deeper, a three or four feet square or round shaft was sunk and horizontal drives were made at the bottom. It was necessary to raise the bucket with a rope or to use a windlass or a weighted pole to lever it up. Timbering was needed to keep the sides of the shaft firm and to shield those working in the drives from collapse. The earth was carried to the creek in carts, wheelbarrows, sacks, baskets or tins, by man or beast. The simple method of washing in a tin dish was slow and wasteful and quickly gave way to the Californian cradle, which was adequate to separate gold

> from gravel and light soil but not from stiff clay. Hence the puddling-tub – generally half a cask – came to be used more and more ... Where there was sufficient running water a 'Long Tom' – a long trough – was similarly used.[77]

In Victoria individual claims were initially only eight feet square,[78] subsequently 12 feet square[79] and later even larger, but never very large. Their dimensions varied at different times and on different gold fields. Their duration was coterminous with the licence or miner's right under which they were pegged, or its renewal.

247 The deep leads were buried rivers with gravel in their beds containing gold. The modern creeks and gullies gave no indication of their course. They had been buried over thousands of years by lava flows or otherwise. The search for them was more of a gamble than any other branch of gold mining. Shafts had to be sunk at least 50 or 60 feet and often 100 or 120 feet to reach the deep leads. In the course of the excavation, the shafts had to be timbered to prevent their collapse. Once a depth of 30 or 40 feet was attained, the shafts usually encountered water, which had to be bailed day and night. When the shaft reached a deep lead, it was then necessary to create a chamber or lateral drives to permit the gold bearing gravel to be recovered.

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77 Serle, above n 18, 73.
78 Blainey, above n 23, 32.
79 Serle, above n 18, 220.

Sometimes the drives were quite short, but sometimes they extended as much as 300 or 350 feet.[80]

248 Obviously these operations required more men, capital and organisation. Furthermore, ventilation was a problem, as the heat and humidity were otherwise unbearable. Steam driven pumps began to be imported to deal with the water problem.[81]

249 As the course of the deep leads could not be predicted, a practice arose of taking up and keeping claims, but not commencing sinking operations until nearby discoveries signalled that those claims might be fruitful. This practice was known as "shepherding".

250 Weston Bate opines that deep sinking had a threefold effect: (1) it kept hundreds of miners banked up on shepherded claims and forced hundreds more out of the fields; (2) it involved store keepers as capitalists; (3) it brought permanence to settlements.[82] Even surface alluvial mining could be performed effectively only by teams of at least two or three men. In wet claims on deep leads as many as ten to 14 men had to work together. Company mining started to develop,[83] but the involvement of companies was generally opposed by miners, who

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80 Bate, above n 3, 80.
81 Blainey, above n 23, 46-51.
82 Bate, above n 3, 41.
83 Serle, above n 18, 221.

wanted to continue to work as individuals, even if in cooperation with others.[84]

251 The source of gold other than in the alluvium was in quartz reefs. Quartz reef mining began early, contemporaneously with alluvial. Once the alluvial gold was exhausted, the quartz became the only source of gold. Quartz mining involved breaking the hard rock to extract it from the earth and crushing it to extract the gold. Although there were early attempts to do this by hand, as a matter of practicality the crushing required machinery, often in the form of stamper batteries, some use of which has persisted almost to the present day.[85] This again required the involvement of many men and significant capital.[86] Quartz reef mining necessarily required leases. These were much larger than claims, initially 10 acres[87] and subsequently larger again, and were held for a term of years. As time went by quartz reef mining generally came to be practised by companies, although, as already stated,[88] this tended to be resisted by individual miners. In some cases smaller parties extracted the quartz and sent it for crushing in the machinery of larger organisations.[89]

Chinese on the Gold Fields

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84 Ward, above n 6, 117-118.
85 Personal observation.
86 Knox, above n 27, 94.
87 Serle, above n 18, 220.
88 See Paragraph 250.
89 Blainey, above n 23, 64-66; Bate, above n 3, 89.

252 Prior to the Australian gold rushes, Chinese from Canton province had gone to mine alluvial tin in Malaya and gold in California. They soon started coming to Australia, and there were about 2,000 in Victoria by 1854. From the start they attracted hostility, being accused of immorality, gambling, heathen practices and mysterious rituals and rites. As a result they gathered together in isolated camps. At times they were able to mine anywhere on the gold fields. At other times they were restricted as to the areas in which they could mine. However, they did not otherwise have an impact on the system.

253 By reason of agitation against them, legislation was passed in Victoria restricting the number of Chinese passengers who could be landed from each ship and taxing them. This led to Chinese being landed in South Australia and walking to the Victorian gold fields. Some 14,600 travelled from Robe in South Australia before that colony copied the Victorian laws. Nevertheless, one quarter of Victorian miners were Chinese by 1858.

254 Hostility to them continued, but there were violent attacks on their camps in only two instances, in the Buckland Valley in Victoria in 1857 and at Young in New South Wales in 1861. After the attacks in Young, which required the attendance of troops and the Premier, New South Wales also restricted Chinese immigration. However, despite the hostility, relations between

the Chinese and white communities were often good.[90] At times the Chinese participated in the existing adjudication systems or litigated in the ordinary courts concerning mining matters.[91]

Eureka

255 As with the mining methods, it is no part of this thesis to give a full history of Eureka, which is the subject of the largest literature on any aspect of the early gold rushes.[92] However, some things need to be said as background to the question of adjudication by the Commissioners, which operated in Victoria until 1855.

256 There were various causes of Eureka, but the central cause was resentment at the licence fee of 30 shillings per month[93] and

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[90] For Paragraphs 252-254 see Blainey, above n 23, 87-89. For fuller accounts see Knox, above n 26, 52-63; Carole Woods, *Beechworth: A Titan's Field* (Hargreen Publishing Company, 1985) 57-70, and especially 57, 67-68 and 128-129 concerning good relations between Chinese and white communities.

[91] Eg, see Paragraph 734 Case No 17, Paragraph 922, Paragraph 928, Appendix III 1875 Cases No 3, 18 and 20, 1876 Cases Nos 2, 3, 10 and 11 and 1877 Cases Nos 3, 4, 5, 8, 9 and 10 and Paragraph 1405 below.

[92] Eg, Raffaello Carboni, *The Eureka Stockade: The Consequence of Some Pirates on Quarter-Deck Wanting a Rebellion* (J P Atkinson & Co,1855); A M McBriar (ed), *Historical Studies: Eureka Centenary Supplement* (Melbourne University Press, 1954); Ian MacFarlane (ed), *Eureka: From the Official Records* (Public Record Office of Victoria, 1995); John Molony, *Eureka* (Melbourne University Press, 2nd edn, 2001); Geoff Hocking, *Eureka Stockade: The Events Leading to the Attack in the Pre-dawn of 3 December 1854* (The Five Mile Press, 2004); Peter Fitzsimons, *Eureka: The Unfinished Revolution* (Heinemann, 2012).

[93] Serle, above n 18, 98; Knox, above n 27, 242-244; Molony, above n 92, 134-135.

particularly the method of its collection. That was set out in Gollan as follows:

> The grievance that was felt by all was the method of collecting the licence tax. At least once a month, and during 1854 more frequently, the police would pour on to the diggings, round up the miners, and demand to inspect their licences. Those who were not able to produce them immediately were arrested, treated to all kinds of indignity and petty cruelty, and fined or, if without the means to pay, imprisoned. The character of those raids is amply demonstrated by the accepted name of 'digger hunts' – hunts carried out with all the brutal sportiveness of the hunting field. Raffaello Carboni, himself one of the foxes, says that
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> > *both in October and November, when the weather allowed it, the Camp ... rode out for the hunt every alternate day. True, one day they would hunt their game on Gravel Pits; another day, they pounced on the foxes of the Eureka; and a third day on the Red Hill; but, though working on different levels, are we not all fellow diggers?*
>
> The 'Eureka' Royal Commission that sat immediately after the revolt found that the conduct of the police – the 'traps' or 'Joes' as the diggers called them – 'was trenching very closely on the limits of human endurance, although a course sanctioned by the letter of the regulations'.[94]

[94] Gollan, above n 12, 26.

Diggers were even called from the bottom of deep shafts to produce their licences.[95]

257 By reason of their participation in the process of collection, the role of the Commissioners in providing justice was seriously discredited.[96]

258 Early in October 1854 a Scot named Scobie was kicked to death outside the Eureka Hotel, of which the publican was one Bentley. Bentley was arrested and charged with complicity in the murder. He was, however, not committed for trial but was discharged by a Court held before the Commissioner in charge of Ballarat and another Magistrate who was suspected of being corrupt and a business associate of Bentley. Shortly after, a mob burnt down Bentley's hotel.[97] Digger hunts continued, the situation became more hostile and the Eureka Stockade was set up at the end of November 1854. In the early morning of Sunday 3 December, soldiers stormed the stockade and about 30 diggers and five soldiers were killed.[98]

259 The result of the 'Eureka' Royal Commission subsequently established was in effect to accede to all that was demanded by

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[95] Atkinson, above n 1, 239; and see, more generally, Serle, above n 18, l;98-101.
[96] Bate, above n 3, 62; Molony, above n 92, 40; R L Sharwood, 'The Local Courts on Victoria's Gold Fields, 1855 to 1857' (1986) 15 *Melbourne University Law Review* 509-510.
[97] See Serle, above n 18, 163.
[98] Id 167-168.

the miners. This was effected in 1855 by the Act 18 Vic No 37.[99] The licence was replaced by an annual miner's right at a modest fee which also conferred a right to vote. This was a step on the road to democracy. The existing administration was abolished and the Gold Fields Commissioners were replaced by Wardens and Local Courts,[100] as to which, see Chapter Six below.

260 As a demonstration of the hostility of the whole population of the colony to the behaviour of the Government, at the trials of those arrested and charged with treason, all the accused were acquitted by juries – despite the fact that the trials were held in

Melbourne and not in the gold fields.[101]

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[99] See Paragraph 419 below.
[100] Gollan, above n 12, 30-31; Serle, above n 18, 177.
[101] Serle, above n 18, 174-176.

Chapter Three: Origins of the System

301 The system of adjudication on the gold fields in colonial New South Wales and Victoria may be regarded as having origins in two important sources. The first is a long tradition of specialist mining courts in England. Although there was no direct translation of these institutions to Australia, the Australian system in a way looks back to this tradition. The second, from which the Australian system more directly flowed, was the administrative background in New South Wales and particularly the institution of Crown Lands Commissioners and the conferring on them of adjudicative functions.

Specialised Mining Courts in England

302 The two most important instances of mining courts in England that persisted into the nineteenth century were the Stannary Courts, with jurisdiction relating to the mining of tin (and subsequently other metals) in Cornwall and Devon, and the Barmote Courts, relating to lead mining in Derbyshire. Both systems go back many centuries, although both are now redundant. The Stannary Courts were actually abolished in 1896 and, although the Barmote Courts still exist, they now have no work. "Stannary Courts" is a generic term for the various courts that were established in the stannaries under names such as those that appear hereunder. "Barmote Courts" on the other hand were established and operated under that name.

303 Tin mining in Cornwall and Devon not only goes back to Roman times but goes back beyond Roman times into the Bronze Age. After the end of Roman times, tin was in fact mined in Cornwall and Devon during Anglo-Saxon times and again under the Normans.[1] The Stannary Courts, which lasted until modern times, can be traced back to the beginning of the thirteenth century. In 1197 William de Wrotham was appointed to be the first Chief Warden of the Stannaries.[2] A charter of King John of 1201 made the tin miners of Cornwall and Devon subject only to the jurisdiction of the Chief Warden. The charter went on to confer power on the Chief Warden and his stewards to do justice and right in respect of tinners.[3]

304 Over the centuries the Stannary Courts took various forms. During the thirteenth century, Stewards Courts with common law jurisdiction over tin miners and tin affairs were established in the eight mining districts of Cornwall and Devon, each of which was known as a stannary.[4] In 1305, Edward I granted two charters which defined the privileges of the miners of Cornwall and Devon respectively in the same terms. These charters were subsequently confirmed from time to time. Each granted immunity from the jurisdiction of all manorial and royal courts to "all the said tinners working in the stannaries which are our

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[1] See G R Lewis, *The Stannaries: A Study of the Medieval Tin Miners of Cornwall and Devon* (publisher not recorded, 1908) 33; Robert R Pennington, *Stannary law: a history of the mining law of Cornwall and Devon* (David & Charles, 1973) 12.
[2] Pennington, above n 1, 14.
[3] Id 15.
[4] Ibid.

demesne, so long as they are working in the said stannaries."[5] Instead they were subjected to the jurisdiction of the Warden of the Stannaries "for all pleas and suits arising within the said stannaries except pleas of land, life and limb".[6] This meant that in cases other than cases of homicide or relating to the title of land, tinners could only sue or be sued in the Stannary Courts, to the exclusion of the ordinary courts of the land. This applied not only in suits between tinners but between tinners and non-tinners where the subject matter arose within the stannaries.[7] The definition of the subject matter that was within this exclusive jurisdiction was imprecise and remained so for centuries, really throughout the life of the Stannary Courts.

305 The Stewards Courts were established as, and remained throughout, courts having only common law jurisdiction. Under the Chief Warden there were Vice Wardens, one for each stannary, who could sit in his place.[8] During the fourteenth century the Vice Wardens came to have an equitable jurisdiction parallel to the common law jurisdiction of the Stewards Courts in much the same manner as the Lord Chancellor's equitable jurisdiction arose as part of the ordinary court system. [9] The common law jurisdiction of the Stewards Courts was found to be inadequate because of the inadequacy of the common law remedies which it could award. Just as a practice grew up of

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5 Pennington, above n 1, 16.
6 Ibid.
7 Id 17.
8 Ibid. The Courts came to be referred to as Vice Warden's Courts when presided over by the Vice Warden.
9 Id 29-30.

petitions being made to the King where the remedies of the ordinary common law courts had proved inadequate, and the King referring these petitions to the Lord Chancellor to be decided according to conscience,[10] so a practice grew up of petitions being made to the Duke of Cornwall in similar circumstances relating to the Stewards Courts. It became the practice to refer these petitions to the Lord Warden (an alternative title for the Chief Warden) and ultimately to the Vice Warden to be decided by him according to droit et reson (right and fairness).[11] There were thus two parallel systems of Stannary Courts. The Vice Wardens were also given jurisdiction to hear appeals from common law matters in the Stewards Courts.[12] Thus by the beginning of the seventeenth century it was said that the Warden of the Stannaries supplied "the place both of a judge for law and of a chancellor for conscience".[13] During the sixteenth and seventeenth centuries there was considerable and ongoing conflict between the Stannary Courts and the ordinary courts arising from the imprecise definition of the jurisdiction of the Stannary Courts and, as already indicated,[14] this was never really resolved so long as the Stannary Courts existed.[15]

306 The equity jurisdiction of the Vice Wardens survived these controversies. A most important stage in the development of that

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10 Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook Co, 2009) [1.160].
11 Pennington, above n 1, 30-32.
12 Id 33.
13 Id 32-33.
14 See Paragraph 304.
15 Pennington, above n 1, 35ff.

jurisdiction was the service in the office of Vice Warden of Cornwall from 1681 to 1689 of Sir Joseph Tredenham. His decisions were recorded in a fashion that had not earlier prevailed and he gave detailed reasons for his decisions which amplified and defined the equitable jurisdiction of the Vice Warden.[16]

307 During the eighteenth century the jurisdiction of the Vice Warden's Court was extended by inclusion in it of cases previously brought in the Stewards Court, particularly claims for debts. This was occasioned by the speedier justice available in the Vice Warden's Court, particularly by reason of the fact that the trial was by judge alone rather than with a jury. In particular, there was the evolution of the creditor's suit, whereby outside creditors could obtain judgment against tinners for their debts and enforce those judgments against the tinner's assets.[17] This led to the decline of work in the Stewards Courts and ultimately to their abolition by Act of Parliament in 1836.[18] This Act confirmed and gave a statutory basis to both the common law and the equitable jurisdictions of the Vice Warden's Court.

308 The Vice Wardens' Courts were at their greatest vigour between 1836 and about 1870.[19] During this time, the Vice Wardens' Courts of both Cornwall and Devon were presided over by two judges, John Lucius Dampier (1834-1853) and Edward

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16 Pennington, above n 1, 42-46.
17 Id 47-51.
18 *Stannaries Courts Act 1836* (UK).
19 Pennington, above n 1, 57, 58.

Smirke (1853-1870), who were in the opinion of Pennington, a leading authorityon the Stannary Courts, outstanding .[20] A decline in work, due in part to what Pennington thought was the less distinguished service of Smirke's successor[21] and to the decline in the relevant mining industries, led to the abolition of the Courts in 1896.[22]

309 It can thus be seen that the stannary jurisdiction was in full flower at the time that the mining adjudication system was created in Australia.

310 The system of Barmote Courts in Derbyshire seems to have both predated the Stannary Courts and to have outlasted them, at least nominally. As with the tin in Cornwall and Devon, the extraction of lead in Derbyshire goes back at least to the Roman occupation.[23] There were both a Small Barmote Court and a Great Barmote Court. The Small Barmote Court is thought to have evolved from the Hundred Court in Anglo-Saxon times and to have met in the open air every three weeks at the mining sites, presided over by the Barmaster. The Great Barmote Court evolved at an unknown later time but was in existence by 1415.[24] It met twice a year in the Barmote Hall and dealt with more substantial matters such as the taking of the King's royalties,

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[20] Pennington, above n 1, 59-66.
[21] This was Herbert William Fisher; id 66-67.
[22] Pennington, above n1, 67.
[23] J H Rieuwerts, *A History of the Laws and Customs of the Derbyshire Lead Mines* (published by the author, 1988]) 13. The author has served on the jury of the Wirksworth Barmote Court since 1968: personal conversation.
[24] Id 2.

regulation of the Courts and the swearing in of juries. Without going into detail in this regard, the Barmote Courts exercised a general jurisdiction over matters arising in the course of lead mining in Derbyshire, including the awarding of and disputes about titles to mine. The Barmote Courts were regulated by statute in 1851 and 1852. It is the Great Barmote Court that has persisted to the present day. The Great Barmote Court for the Low Peak or Soke and Wapentake of Wirksworth still meets annually in the Moot Hall at Wirksworth.[25] The present Moot Hall was erected in 1814 after the demolition of its immediate predecessor. The Small Barmote Courts have not sat in recent times.

311 It is beyond the scope of this thesis to discuss in any detail the systems of title under which tin was mined in Cornwall and Devon, but it may be observed that the title to take tin was by a system of "bounds" which bore marked similarities to the system that grew up in Australia of obtaining licences or miners' rights which entitled the holder to mine for gold. The system of title to mine for lead in Derbyshire was not dissimilar.

312 As has already been noted, the Vice Wardens' Courts of the stannaries were flourishing at the time of the establishment of adjudication on the gold fields in Australia.[26] The adoption of the title "Warden" for one of the most important of the gold fields

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[25] T D Ford and J H Rieuwerts, *Lead Mining in the Peak District* (Landmark, 2000) 198.
[26] See Paragraph 309.

adjudicators was clearly not coincidental and was mentioned in the 'Eureka' Royal Commission Report.[27] There were many miners of Cornish extraction and experience on the Australian gold fields.[28] There was adversion to the Stannary Courts in a speech of a Mr Donnelly in the Legislative Assembly of New South Wales on 9 August 1866. Mr Donnelly said:

> Wherever mining operations were systematically carried on in the British Empire it would be found that local laws existed. All must have heard of mining laws of Cornwall in the mother country, and the laws of the district of the Forest of Dean. [The hon. member read an extract from a work descriptive of the nature of the Stannary Laws of Cornwall, and proceeded.] It had always been considered necessary that local courts should be established. Without them he did not believe that gold mining could be carried on satisfactorily.[29]

It is apparent from this passage that not only were the laws known in Australia but that works concerning them were present and available here.

313 Despite this, Mr Donnelly's reference to the Stannary Laws in Parliament is an isolated one and no evidence has been found that shows that any of the Australian laws discussed in this thesis were directly derived from English law. One thing that might be

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[27] See Paragraph 603.

[28] See Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 9, 41, 45.

[29] *Sydney Morning Herald,* Friday August 10 1866.

said is that the jurisdictional conflicts that raged around the Stannary Courts in England over centuries were avoided in Australia. This was, at least in part, because of a clearer definition in Australia of the ambit of the mining jurisdiction. It was probably also assisted by the fact that the jurisdiction of the specialised tribunals or adjudicators in Australia did not purport to be exclusive of the jurisdiction of the ordinary courts. For example, throughout the life of the Wardens' Courts in New South Wales, although presided over by judicial officers at the level of Magistrates, they had a jurisdiction in mining matters as ample as that of the Supreme Court, but their jurisdiction was not exclusive of that of the Supreme Court, so that parties could always choose either jurisdiction as seemed to them appropriate.

New South Wales Administrative Background

314 A much debated issue is whether the New South Wales and Victorian gold fields were more orderly and law abiding than the Californian and other US gold fields.[30] There are many reports of violence on the Californian fields.[31] Even Reid, who thought the

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[30] C M H Clark, *A History of Australia IV: The Earth Abideth For Ever 1851-1888* (Melbourne University Press, 1978) 11, 51; Alan Atkinson, *The Europeans in Australia: A History Volume II Democracy* (Oxford University Press, 2004) 236; Blainey, above n 28, 42; R M Crawford, *Australia* (Hutchinson, 3rd ed, 1970 (reprinted 1971)) 105; J B Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988) 209; Brian Hodge, *The Goldfields Story 1851-1861 Book 2: Frontiers of Gold* (Cambaroora Star, 1979) 92, 193; Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963 (reprinted with corrections1968)) 81.

[31] Simon Chapple, *Law and Society Across the Pacific Nevada County, California, 1849-1860 and Gympie, Queensland, 1867-1880* (PhD thesis, University of New South Wales, 2010) 258-259.

general view of violence on the Californian gold fields was exaggerated, conceded that violence increased as time went on.[32] The conclusion usually expressed is that the New South Wales and Victorian gold fields were more orderly and law abiding and were orderly and law abiding to a high degree.[33] One notable contemporary statement is that of Lord Robert Cecil (later the Marquis of Salisbury and Prime Minister of the United Kingdom) who visited the Victorian gold fields in March 1852. He was astonished to find "less crime than in a large English town, and more order and civility than I have myself witnessed in my own native village of Hatfield".[34]

315 Whilst one must be careful of generalisations, the view to this effect is so universal that it cannot readily be doubted. It raises the question as to why this should have been so when there was great similarity in so many ways in conditions on the gold fields in California and Australia. Russel Ward has endorsed the view that the reasons were (1) the comparative nearness of the gold fields to the centres of government; (2) the relative homogeneity of the diggers' racial stock; (3) the virtual absence of a warlike aboriginal race; (4) the love of order inherent in Englishmen; and (5) "rude notions of honour supported by a kind of public opinion amongst themselves".[35] It is clear that a central reason lies in the administrative background and structures in

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[32] John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (The Huntington Library, 1980) 6-7.
[33] See the references in footnote 30 above.
[34] Serle, above n 30, 35.
[35] Russel Ward, *The Australian Legend* (Oxford University Press, 2nd ed, 1966 (reprinted 1974)) 120.

New South Wales up to the time of the discovery of gold and the adaptation of those structures to provide administration and order on the gold fields in both New South Wales and Victoria when the gold rushes commenced in 1851. It is to be remembered that Victoria was separated from New South Wales and established as an independent colony only on 1 July 1851, coinciding almost exactly with the discovery of gold and the commencement of gold rushes, first in New South Wales and shortly afterwards in Victoria.

316 In 1846 the United States declared war on Mexico and in 1848 Mexico ceded California to the United States. "California became an American territory with a 'thinly staffed, badly financed military government that had been superimposed on the very slight existing local government inherited from Mexico.'"[36] New South Wales on the other hand had been settled for more than half a century as a convict colony. From the start of the colony, a central requirement of its administration was to provide for the control and supervision of convicts, who for some decades were a majority of its inhabitants. The importance in this regard of the Magistracy, particularly in outlying areas, from the 1810s on has been noted by Lisa Ford. She describes them as "a vital tool of governance" and refers to their control of the police, their assignment of convict servants, their organization of musters of convicts and others, their presiding at public meetings and

[36] Chapple, above n 31, 40.

presentation of petitions and their taking of the local census.[37] The development of the administrative structures that grew up has been discussed at length by Hilary Golder.[38] Golder emphasises that "administrative attitudes and practices in New South Wales" were shaped by the development of convict management, involving the control, maintenance and employment of thousands of prisoners.[39] This control from early times extended into the countryside because of the practice of assigning convicts to work for settlers. Many of those convicts were assigned to settlers in the countryside. On assignment the settler received the benefit of the convict's working capacity free of charge. On the other hand, the Government ceased to be responsible for the maintenance of the convict, which then fell upon the settler to whom he or she was assigned. The Government had, through its representatives – largely the Magistrates – to maintain superintendence over the assigned convicts in the countryside.[40]

317 There was a similar phenomenon in Canada. The gold fields in British Columbia were more peaceful and law abiding than those in California. The view has been expressed that this was because in 'the Canadian West the law arrived before "the rush of

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[37] Lisa Ford, *Settler Sovereignty Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010) 123-124.
[38] Hilary Golder, *Politics, Patronage and Public Works: The Administration of New South Wales, Volume 1, 1842-1900* (University of New South Wales Press, 2005); see also John Kennedy McLaughlin, *The Magistracy in New South Wales, 1788-1850* (Master of Laws thesis, University of Sydney, 1973).
[39] Golder, above n 38, 25.
[40] See Paragraph 318.

settlement" … [W]hen the first settlers arrived in the West they found that governmental authority, i.e., the Hudson's Bay Company, had preceded them.'[41] Despite reservations about his views on the degree of violence in California,[42] there seems no reason to doubt Reid's view that there was orderly behaviour on the journeys across the Oregon and California Trails despite the absence of law enforcement mechanisms or institutions.[43] The reasonable conclusion would seem to be that this was the result of the tight communities constituted by the participants in these expeditions and the respect for law and notions of honour that prevailed among them during those journeys.

318 In 1826, to rationalise land alienation in New South Wales, Governor Darling defined a settled area known as "the limits of location" outside which it was impossible to obtain freehold title to land. By 1829 the limits of location or settled area had been defined into 19 counties and were often spoken of simply as "the 19 counties".[44] The Magistrates referred to in the previous paragraphs were appointed to districts within the 19 counties and were the Government's representatives in those districts. They both presided over the lowest level Courts and had administrative functions. Quite unlike the English practice, many of these were paid Magistrates known as "Police Magistrates". In

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[41] Hamar Foster, 'Law Enforcement in Nineteenth-Century British Columbia: A Brief and Comparative Overview' (1984) 63 *BC Studies* 4-5.
[42] See Paragraph 314 above.
[43] Reid, above n 32, 8-11.
[44] Golder, above n 38, 52-53.

1842 there were 33 Police Magistrates.[45] The number of Police Magistrates fell in the 1840s, so that there were only nine of them in rural districts, but increased again by the early 1850s.[46] The duties of the Police Magistrates included the supervision of convicts. A most important function was to maintain convict productivity by dealing in Court (with the assistance of Justices of the Peace, generally members of the local gentry) with cases of drunkenness, insubordination and petty crime. These really revolved around the prisoners' work or work readiness.[47] Perhaps an even more important function was the creation of a large volume of written reports and correspondence that passed between the Police Magistrates and the central Government concerning the individual convicts in the Magistrate's district. It may be added that at this stage there was no centralised control of the police and the Magistrate had the immediate control of the police in his district. It is thus easy to see how an administrative framework grew up of a sort totally lacking in California.

319 But the framework spread beyond the settled area. In 1836 Governor Bourke introduced registration and a small licence fee for squatters outside the limits of location.[48] The squatters had already begun occupying land outside the 19 counties before 1836 and Governor Bourke's action provided a framework in which this could be regulated. As already observed, the squatters could obtain no title to the land, but did have the Government's

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[45] Id 56.
[46] Golder, above n 38, 102.
[47] Id 57.
[48] Id 56.

permission to occupy it with their stock.[49] Although squatting licences conferred no property at all, runs were in fact bought and sold.[50] Governor Bourke appointed and employed Commissioners of Crown Lands to effect some superintendence over land use, water resources and the pastoral potential of the country to which they were assigned, as well as recording the numbers of people and livestock at each station that was occupied.

320 The Commissioners of Crown Lands were appointed under section 1 of an Act of 1833.[51] This section authorized them 'to do and perform under by and under direction of the Governor … upon or in respect of any Crown lands … all such lawful acts matters and things for preventing intrusion encroachment and trespass thereon' as any bailiff may do upon or in respect of any tenements of his employer.

321 A further step was taken towards the ultimate creation of the mining adjudication system when the Commissioners of Crown Lands were specifically given an adjudicative function under the provisions of section X of the Crown Lands Act 1839.[52] This section was of continuing importance, as its text was adopted in almost identical terms in the early legislation

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[49] Stephen H Roberts, *The Squatting Age in Australia 1835-1847* (Melbourne University Press, 1935 (reprinted with corrections 1964)) 65.

[50] Roberts, above n 49, 92.

[51] 4 Wm IV No 10. This Act was not named at the time but was subsequently referred to as the "Crown Lands Act, 1833".

[52] 2 Vic No 2.

governing adjudication on the gold fields in later years. It provided as follows:

> … and upon the complaint of any licensed party, or of his or her overseer or manager, that any person has encroached upon the *station* or run of any such party, the Commissioner of the district shall and may immediately proceed to enquire on the spot into the circumstances of the case, and if necessary to hear evidence on oath touching the same; and if it shall appear to the said Commissioner, on view, or by such evidence, that any such person has encroached upon the station or run of any such party, by the depasturing of stock, or in any other manner contrary to the established practice and usage of the colony in any such case, it shall be lawful for the said Commissioner to remove, or cause to be removed, from one place to another in the said district, the cattle and sheep, and servants of any licensed person so found and determined by the said Commissioner to be encroaching as aforesaid ... and if any such licensed or unlicensed person or persons, or his, her, or their servants, shall resist the said Commissioner, and prevent or endeavour to prevent, his so removing or causing to be removed, such cattle or sheep so found to be encroaching ... every such licensed person, and likewise every such unlicensed person so offending, shall forfeit and pay for every such offence a sum not less than twenty pounds, nor more than one hundred pounds ...

322 Thus, nearly 12 years before the gold rushes commenced, the Crown Lands Commissioners were able to exercise an adjudicative function relating to encroachments on land owned by the Crown to the detriment of persons whom the Crown permitted to occupy that land. There is no reason to doubt that the jurisdiction thus conferred was from time to time exercised by Crown Lands Commissioners from 1840 onwards. By the time the gold rushes did commence, the Commissioners were well established as adjudicative authorities. Indeed, the settlement of disputes took a large part of their time.[53]

323 The process of adjudication that the Crown Lands Act 1839 provided for contained four elements: (1) there had to be a complaint by a licensed party or his or her overseer or manager; (2) the complaint had to be that a person had encroached upon the station or run of such party; (3) the Commissioner was to proceed immediately to inquire on the spot into the circumstances of the case and if necessary to hear evidence on oath; (4) if it appeared to the Commissioner on view or by such evidence that the person had in fact encroached upon the station or run of the complainant, the Commissioner might remove the cattle and sheep and servants of the person found to be encroaching. As will be seen, this fourfold pattern carried over into the provisions that were enacted for settlement of disputes on the gold fields.

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[53] Hirst, above n 30, 123.

Conclusion

324 There are thus two backgrounds to the mining adjudicative system that grew up. Although there was some knowledge in Australia of the specialised English mining courts, there is virtually no evidence of the direct adoption of those institutions or the legislation or practice underlying them into the Australian system, other than the employment of the term "Warden". On the other hand, there is no doubt that the existence in the Australian colonies of an established system of administration in the countryside was highly influential on the development of the gold fields system. This was so in at least two important regards: first, the general orderliness of the Australian gold fields, and second, the adoption of the general adjudicative functions of the Crown Lands Commissioners into the system of mining adjudication. The detailed provisions of the mining legislation are dealt with in the next chapter.

Chapter Four: Legislative History in New South Wales and Victoria

401 As already noted, Victoria was separated from New South Wales on 1 July 1851. Legislation concerning gold mining thereafter followed a separate course in each of the colonies. But before the legislative provisions relating to adjudication are recorded in detail, the initial reactions to the gold rushes should first be set out and then the course of legislation in each colony should be summarised.

Initial reactions to the gold rushes

402 In New South Wales, immediately after the discovery of payable gold by Edward Hammond Hargraves was given press publicity on 10 May 1851, Governor FitzRoy thought it necessary to fill the absence of any reference in colonial law to the subject by issuing a Proclamation. The Proclamation was based upon the Crown's prerogative right to royal minerals.[1] Although contrary suggestions were made from time to time, the royal prerogative was ultimately held to apply to gold in land in Victoria and New South Wales.[2] It is doubtful whether the authorities in New South Wales had any power to make any proscription concerning the ownership of or mining for such gold, as this was not a subject that had been committed by the Imperial to the Colonial

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[1] See Paragraph 102 above.

[2] Arthur C Veatch, *Mining Laws of Australia and New Zealand* (Government Printing Office, Washington, 1911) 99-100; J R S Forbes and A G Lang, *Australian Mining and Petroleum Laws* (Butterworths, 2nd edn, 1987), Paragraphs [102], [203]; *Woolley v Attorney-General (Vic)* (1877) 2 App Cas 163 PC.

authorities. It is therefore doubtful whether the Proclamation that was made had any legal authority. However, with the gold rush setting in day by day, there was no time to refer the matter to the authorities in London. Such steps as could be taken had to be taken at once. The Proclamation, which was published in *Government Gazette No 55* on Thursday 22 May 1851, declared that 'all persons who should take from any Lands within the said Territory, any Gold Metal, or Ore containing Gold … or should dig for and disturb the soil in search for such Gold Metal or Ore without having been duly authorised in that behalf by Her Majesty's Colonial Government, will be prosecuted, both Criminally and Civilly, as the Law allows'. It continued that Regulations would 'be speedily prepared and published, setting forth the terms on which Licenses will be issued for this purpose'.

403 Those Regulations were published in *Government Gazette No 57* the next day, Friday 23 May 1851. As they are brief, it is expedient to set them out in full:

1. From and after the first day of June next, no person will be permitted to dig, search for, or remove Gold on or from any land, whether public or private, without first taking out and paying for a License in the form annexed.

2. For the present, and pending further proof of the extent of the Gold Field, the License Fee has been fixed at one pound ten shillings per month, to be paid in advance; but it is to be

understood that the rate is subject to future adjustment, as circumstances may render expedient.

3. The Licenses can be obtained on the spot, from the Commissioner who has been appointed by His Excellency the Governor to carry these Regulations into effect, and who is authorized to receive the fee payable thereon.

4. No person will be eligible to obtain a License or the renewal of a License, unless he shall produce a Certificate of discharge from his last service, or prove to the satisfaction of the Commissioner that he is not a person improperly absent from hired service.

5. Rules adjusting the extent and position of land to be covered by each License, and for the prevention of confusion, and the interference of one Licensee with another, will be the subject of early regulations.

6. With reference to Lands alienated by the Crown in fee simple, the Commissioner will not be authorised for the present to issue Licenses under these Regulations to any person but the proprietors, or persons authorised by them in writing to apply for the same.

404 It was by notice published in the same issue of the *Gazette* that John Richard Hardy was appointed to be a Commissioner of Crown Lands and also to carry out the regulations for the issue of

licences to dig and search for gold. An examination of the Regulations reveals that there is no specific provision for the settlement of disputes contained in them but that regulation 5 promises the early promulgation of rules for the prevention of the interference of one licensee with another.

405 Although Victoria was still part of New South Wales when the Proclamation and Regulations were promulgated, in Victoria a Proclamation corresponding with the New South Wales Proclamation and Regulations corresponding with the New South Wales Regulations were promulgated on 15 and 18 August 1851 respectively.[3] Regulation 5 of the Victorian Regulations, unlike the New South Wales regulation 5, contained a provision that

> rules adjusting the extent and position of land to be covered by each licence, for the prevention of confusion, and the interference of one licensee with another will be regulated by the Commissioner of Crown Lands who may be appointed to each locality.

Whilst this provided for the involvement of the Commissioner with the extent and position of the licences, it did not, any more than the New South Wales regulations, in terms confer adjudicative jurisdiction.

406 Despite the promise in regulation 5 of the initial New South Wales Regulations of rules concerning the prevention of interference of one licensee with another, and the fact that it is

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[3] See *Government Gazette No 6,* 16 August 1851 and *Government Gazette No 7,* 20 August 1851 respectively.

clear that the Commissioners engaged in the settlement of disputes from the arrival of Hardy on the Ophir Gold Field as early as 2 June 1851,[4] there does not appear to have been an early promulgation of such rules in either colony.

407 It should be noted that, despite the doubtful validity of the Proclamations,[5] no objection seem to have been taken by the Imperial authorities to the course followed in the Colonies, nor does any challenge to validity seem to have been brought in the Courts of the Colonies. There seems to be no doubt that the Supreme Courts of the Colonies had jurisdiction to determine broad constitutional questions such as these.[6]

Summary of course of legislation

408 The legislation in each colony followed a completely different course as to the institutions in which adjudicative functions were vested, but followed a quite similar course as to the substantive subject matter relating to the adjudicative functions.

409 In each colony, adjudication was in the first instance by the Commissioners, before whom proceedings were informal and not recorded in writing. In New South Wales adjudication continued to be by the Commissioners or persons acting in their stead up to

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4 J E Erskine, *A short account of the late discoveries of gold in Australia with notes of a visit to the gold district* (T and W Boone, 1851) 13.

5 See Paragraph 402.

6 *R v the Magistrates of Sydney* [1824] NSWKR 3; [1824] NSWSupC 20.

the Mining Act 1874. Until 1866 the legislation required the adjudications to be conducted 'on the spot' and they generally were. After 1866 the jurisdiction was to be exercised by Justices of the Peace rather than Commissioners and most of the Commissioners were dismissed from that office. Around 1870 or 1871 the adjudications came to be conducted in court interspersed among the general work of the Court of Petty Sessions.

410 However, the system soon changed in Victoria. After the 'Eureka' Royal Commission, adjudicative functions were, by the 1855 Act referred to below,[7] vested in Wardens and in Local Courts, before whom proceedings were conducted and recorded formally. The Local Courts were elected and also had the function of making regulations for their respective Gold Mining Districts. From the beginning of 1858, by the 1857 Act referred to below,[8] the Wardens remained in place but the Local Courts were replaced by Courts of Mines with professional Judges, at County Court level. This two tier system lasted until 1969. In 1865 the Mining Act 1865 was enacted.[9] This came to be regarded as the archetypal Australian Mining Act. Under this Act a Court of the Chief Judge of the Court of Mines was created, to hear appeals from Wardens and Courts of Mines. The Chief Judge was to be a Judge of the Supreme Court and the office was held by Sir Robert Molesworth. The Court was abolished by the Judicature Act 1883

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[7] Paragraph 419.
[8] Paragraph 429.
[9] 29 Vic No 191. However, Victorian Acts were by this time enacted with short titles.

and its functions transferred to the Supreme Court. When the Commissioners were replaced in New South Wales in 1874, there was no two tier system in place as in Victoria, but a single tier system of Wardens' Courts.

411 Substantive jurisdiction in both colonies was conferred from time to time, and in no very orderly fashion, in the legislative provisions detailed below.[10] The jurisdiction conferred fell into five areas:

(1) Encroachment disputes. These were complaints of encroachment or trespass on land held for mining. They resulted in orders to put the complainant back into possession or for damages.

(2) Partnership disputes. These arose from mining partnerships or co-ownership of mining titles.

(3) Breach of regulations. These were prosecutions for breach of mining regulations.

(4) General dispute resolutions. There came to be general provisions conferring jurisdiction over any dispute arising from mining or mining titles.

(5) In Victoria only, the Mining Companies Limited Liability Act 1864 conferred on the Courts of Mines jurisdiction to wind up companies registered under the Act.

412 In both colonies encroachment proceedings always remained what was probably the most important class of cases,

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[10] See Paragraphs 413-436.

followed by partnership disputes. However, there were considerable numbers of cases in all these categories.

Details of the legislative provisions

413 When it comes to setting out the provisions relating to adjudication, this has been done according to the chronological order in which the provisions were enacted, whether in New South Wales or Victoria. The purpose of this is to facilitate comparison of the regime in force in each of the colonies at any particular time and also the provenance of the various provisions and their effect in the one colony on the provisions in the other. The provisions most relevant to the subject matter are in general terms repeated in each subsequent chapter. The account in this section of the chapter is not so much intended to be read as a narrative as to provide a tool to facilitate the location of any particular provision and to examine it in its context.

414 Victoria put in place the first statutory provision on the subject of adjudication. That was contained in a Parliamentary enactment of 1851, being the Act 15 Vic No 15.[11] The relevant section was section II, which made provision following closely the four- part pattern contained in section X of the New South Wales Crown Lands Act 1839.[12] It provided for (1) a complaint to be made to a Commissioner for Crown Lands by a licensed party in cases where (2) a person had encroached upon the portion of

[11] Victorian Acts were not yet given short titles. This Act is hereafter referred to as 'the 1851 Act'.
[12] See Paragraphs 320-322 above.

waste lands of the Crown whereon the complainant was lawfully mining; and required (3) that the Commissioner should proceed forthwith to the spot to inquire into the case and on his own view, or if necessary by evidence on oath, hear and determine the same in a summary way; and further required (4) that when a person was found to be so encroaching, the Commissioner should ensure that that person, his implements, goods and chattels were removed. That Act was assented to on 6 January 1852.

415 There was still no provision dealing with encroachment claims in New South Wales, but provision was made in the Gold Regulations published in the *Government Gazette No 36* of 6 April 1852. Regulation 9 made provision in the same four-part pattern that (1) if a dispute should arise in respect of a claim, (2) the complainant should forthwith refer the matter to the Commissioner or Assistant Commissioner of the district, (3) who would lose no time in hearing and summarily determining the case on the spot according to the evidence adduced on either side; and (4) would, if necessary, take proper measures for placing and maintaining the successful party in possession of the claim. The pattern is the same as the relevant provision in section X of the Crown Lands Act 1839, although the language is a little different.

416 The first provision in a Parliamentary enactment in New South Wales was made in the Gold Fields Management Act

1852,[13] assented to on 28 December 1852 and commencing on 1 February 1853. That Act contained general provisions for conduct on the gold fields. By section 13 it provided that the Commissioners of Crown Lands appointed for the Gold Districts had power to determine the extent and position of each licensed person's claim or holding of land and to mark the same. By section 26 it conferred jurisdiction on the Gold Commissioners in respect of encroachment complaints, following the four part pattern and making provision in words similar to and in part derived from section II of the 1851 Act in Victoria. It likewise provided a penalty for a person who resisted the Commissioner.

417 In the New South Wales Code of Regulations for Management of the Goldfields published in the *Government Gazette* of 2 February 1853, regulation (11) in effect repeated the terms of regulation 9 of the Gold Regulations of 6 April 1852. However, there were two differences of some importance. First, unlike the 1852 regulation, this was not the primary provision spelling out the jurisdiction, which was now contained in section 26 of the Gold Fields Management Act 1852. Secondly, it added a then novel provision for the award of costs. The person to whom the complaint was to be made was specified to be "the resident Commissioner".

418 In Victoria the 1851 Act was repealed and replaced by 17 Vic No 4, assented to on 1 December 1853.[14] Section VIII of the

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[13] 16 Vic No 43.

[14] Hereafter referred to as 'the 1853 Act'.

1853 Act reproduced the provision of section 13 of the New South Wales Gold Fields Management Act 1852 that the Commissioners of Crown Lands had full power to determine and mark the extent and position of each licensed person's claim. Section XII provided an encroachment jurisdiction in the usual pattern and in language following very closely section 26 of the New South Wales Act of 1852. However, the offence that it provided for was not resisting the Commissioner or renewing the encroachment, but encroachment itself was made an offence punishable upon conviction before two Justices of the Peace. The offence of resisting the Commissioner or renewing the encroachment was dealt with separately in section XIII. Section XIV conferred upon two Justices of the Peace a separate jurisdiction in respect of encroachment, namely, to cause any gold taken to be summarily seized and delivered to the complainant and, if the complainant had sustained damage, to assess same and award compensation not exceeding £200. Section XV created for the first time a jurisdiction in respect of mining partnerships. The complaint might be made by the holder of a lease or licence that he was or had been engaged in a mining partnership and that a balance was due to him or he might apply for the dissolution of the partnership. The complaint or application might be heard by any two Justices of the Peace, provided the amount payable to any one partner did not exceed £200. The Justices might order that the partnership be dissolved and ascertain and determine the amount to be paid by any member to another, together with reasonable costs, or make such other order as should seem meet.

An order made under that section was a bar to any further proceeding in any other Court respecting the partnership.

419 In Victoria the 1853 Act was in its turn repealed by 18 Vic No 37, assented to on 12 June 1855.[15] The Eureka Stockade and the consequent Royal Commission occurred in the period intervening between these two Acts. As noted above,[16] the Parliament effected the recommendations of the Royal Commission, acceding to all the miners' demands. The former section VIII was replaced by a new section VIII that was similar, except that the officers with authority to determine the extent and position of claims were specified as officers appointed by the Governor with that authority. The encroachment provision of the 1853 Act was also replaced by a similar provision, save that the jurisdiction was conferred on a single Justice of the Peace rather than a Commissioner (section X). Provisions were added for the calling in of assessors (section XI) and the award of compensation (section XII). The most radical aspect of the Act was the provision for the creation of Local Courts for each gold mining district. The members other than the Chairman were to be elected and the Courts were given power to frame rules and regulations for their respective districts (section XVII). So far as adjudicative functions were concerned, the Local Courts had two heads of jurisdiction conferred on them. First, they had power "to take cognizance of any breach of rules or regulations framed" by the Court and inflict fines for such breaches (section XXIII). Secondly, by section XXIV

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[15] Hereafter referred to as 'the 1855 Act'.
[16] See Paragraph 259.

partnership jurisdiction was conferred on the Local Courts in terms virtually identical to the partnership jurisdiction conferred upon Justices of the Peace by section XV of the 1853 Act and with a similar proviso that the amount payable to any one partner did not exceed £200. By section XXXII, any person fined £10 or upwards by a Local Court or Justice or Justices might appeal to the next Court of General Sessions.

420 Furthermore, there was conferred on a Justice of the Peace by regulation xv of the Regulations of 12 June 1855, subsequently regulation ix of the Regulations of 4 October 1855, a general jurisdiction to decide all 'disputes connected with mining or the occupation of lands under the "Miner's Right" or lease or license within the gold district … in conformity with the provisions of the Act aforesaid, and according to the practice and custom as to the modes of mining at present existing on the Gold Fields, and according to such regulations as may be from time to time approved …'

421 New South Wales enacted a new, comprehensive Act in the Gold Fields Management Act 1857,[17] assented to on 11 March 1857. Again, the jurisdiction in section 11 to determine and mark the extent and position of a claim was conferred on officers appointed by the Governor. Section 13 provided for the encroachment jurisdiction in terms identical to section X of the 1855 Act in Victoria. Similarly to that Act, the complaint was not

[17] 20 Vic No 29.

to be to the Commissioner but to any Justice of the Peace. Section 19 provided, as usual, a penalty for a person who resisted the Commissioner or renewed encroachment. Section 14 provided for assessors to be called in and section 15 provided for the award of compensation by such Justice and assessors in a sum not exceeding £100. Section 20 and the following sections were the New South Wales provisions corresponding to the Victorian provisions for the constitution of Local Courts. By section 20, upon the petition of not less than 100 persons holding miners' rights or leases, the Governor might proclaim any gold field to be a district for the purpose of forming a Local Court and might appoint a Chairman. Section 21 provided that the Court should consist of the Chairman and nine persons holding a miner's right or a lease, elected as thereafter provided. Section 21 also provided that the Local Court should have power to frame local rules and regulations concerning claims and the use of machinery, which were not to be enforced until assented to by the Governor. As to adjudicative powers, the New South Wales Local Courts had conferred upon them the same twofold jurisdiction as the Victorian Local Courts, namely, in section 26, to take cognizance of and punish any breach of the rules framed by the Court and, in section 27, a partnership jurisdiction in virtually the same terms as the Victorian Courts, but with a proviso limiting jurisdiction to where the amount payable did not exceed £100 rather than £200. Section 30, similarly to Victoria, provided an appeal to a Court of General or Quarter Sessions. As is noted subsequently, only a small number of Local Courts were created

in New South Wales and they did little work, particularly little judicial work.[18]

422 The next major reform was by the Victorian Act 21 Vic No 32, assented to on 24 November 1857 and commencing 1 January 1858.[19] The 1857 Act repealed the 1855 Act. The provisions relating to Local Courts were not repeated. Instead, by section XIV there was created a Court of Mines to be held before a Judge who had practised as a barrister for five years. In practice, the local County Court Judge was usually also the Judge of the Court of Mines. For the first time (other than as provided by the regulation mentioned in Paragraph 420 above), in lieu of jurisdiction in limited areas such as encroachments and partnerships, the Courts of Mines were to have a wide and general jurisdiction over mining disputes. One important limitation was that the jurisdiction was to hear and determine all suits cognizable by a court of equity (section XXVII); there was no jurisdiction over actions at law. With that limitation, there was conferred on those Courts jurisdiction concerning any land occupied by virtue of a miner's right or comprised in any lease or any share or interest therein; arising out of any contract respecting such land or share or interest, or respecting any gold to be taken out of any such land, or respecting the working of such land; arising out of any mining partnership or between tenants in common or joint tenants in any such land or in any water right or easement; and concerning generally all questions

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18 See Paragraphs 712, 713 below.

19 Hereafter referred to as 'the 1857 Act'.

and disputes which may arise between miners in relation to mining. The Courts were given power to make such decree as should be just and to exercise such powers and make such orders as the Supreme Court could exercise or make (section XXVII). Power was given to grant injunctions or appoint receivers (sections LIII and LIV). Importantly, there was statutory provision for a register in which were to be entered minutes of all plaints, decrees and orders (section LXVI). There was provision both for the statement of a special case and an appeal to the Supreme Court.

423 By section LXXIII Wardens were to be appointed. They were given power by section LXXV to grant injunctions. By section LXXVI they were given encroachment jurisdiction in the usual form, but including a power to award to the complainant the amount of damage sustained. Both Courts of Mines and Wardens could sit with assessors (sections XXXII and LXXVIII). Section LXXX provided for the recording of Wardens' decisions and section LXXXIV for appeals from Wardens to the Court of Mines. The statutory provisions requiring records to be kept of cases both in Courts of Mines and before Wardens led to the creation of printed and bound record books which have to a considerable extent survived in the Victorian Archives. A two tier system was thus created, which has since persisted in Victoria.

424 In New South Wales the General Regulations of 5 August 1858, which replaced earlier Regulations, contained a general jurisdiction in regulation VII, which provided that the

Commissioner should have power to decide upon and make any necessary order in any dispute connected with the gold field's management and not provided for in the Regulations, provided that the decision and order were not inconsistent with the Act or Regulations.

425 The next general Act in New South Wales was the Gold Fields Act 1861.[20] It repealed the Gold Fields Management Act 1857. By section 2 it defined "Commissioner" as "any Commissioner, Assistant Commissioner or Sub-Commissioner for the Gold Fields". By section 13, the jurisdiction to determine and mark the extent and position of claims was committed to Commissioners appointed by the Governor. Section 15 provided for an encroachment jurisdiction generally in the usual form. However, the person who could determine a complaint was not any Justice of the Peace, as in the 1857 Act, but any Justice of the Peace being a Commissioner. So exercise of the encroachment jurisdiction was restored to Commissioners alone. The section also included a power to grant interim injunctions pending final decision of the dispute. Section 16 authorised the summoning of assessors and the Commissioner and assessors could hear and determine, as well as the complaint of encroachment, whether gold had been unlawfully or improperly removed from the claim and what damage had been sustained by the encroachment or trespass. By section 17 they could cause such gold to be summarily seized and delivered to the person encroached upon

[20] 25 Vic No 4.

and might cause the payment of damages not exceeding £100. This last was without prejudice to the right to resort to any other remedy at law or in equity. By section 21, any person who resisted the Commissioner, renewed the encroachment or breached an interim injunction was liable upon conviction before a Justice of the Peace to be fined or imprisoned. By section 23 and the following sections, provision was made for Local Courts which by section 27 might frame rules for the better management of all local matters relating to mining. However, no adjudicative function was conferred upon the Local Courts constituted under the 1861 Act. By section 31 jurisdiction to entertain an appeal against any decision relating to any encroachment or trespass was conferred on a Court of Appeal which was constituted under section 30, to consist of a Chairman and two other persons appointed by the Governor. Section 32 contained a partnership jurisdiction conferred on any Justice of the Peace being a Commissioner. Section 33 provided that assessors might be summoned in any case. Section 38 provided an appeal against any fine, penalty or sum of money amounting to £10 and upwards ordered by any Justice or Justices and assessors, the appeal being to the next District Court.

426 Under the 1861 Act the situation thus remained in New South Wales that there was not a general mining jurisdiction as conferred in Victoria upon the Courts of Mines, but only the by then usual separate jurisdictions relating to encroachment and to partnerships, in addition to the power to determine and mark the extent and position of claims. The terms of the partnership

jurisdiction conferred by section 32 are stated in more general terms than earlier partnership jurisdiction provisions, extending to 'any dispute or question regarding a mining partnership'.

427 By the New South Wales General Regulations of 7 February 1862, earlier Regulations were repealed. By regulation 24, in relation to partnerships, the Commissioner was to have power to deal with any partnership dispute connected with gold mining and to make any order consistent with the Act. He could declare any person or persons to be entitled to a share or shares in a claim and might make such order as should enable such person or persons to be represented in the occupation and working of the claim.

428 In Victoria, the Mining Companies Limited Liability Act 1864 conferred on the Courts of Mines jurisdiction to wind up companies registered under the Act. This jurisdiction was not dealt with and was left in place by the Mining Act 1865.[21]

429 The next general Act in Victoria was the Mining Act 1865[22] assented to on 28 November 1865. This Act was enacted after and informed by the Report of a Royal Commission on Mining.[23] The most important changes to the Courts were as recommended

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[21] See Paragraph 429 below.
[22] 29 Vic No 291.
[23] See Report of the Royal Commission on Mining Papers presented to Parliament 1862-3 Volume 3 pages727 ff. And see further Paragraph 1006 below.

by the Commissioners.[24] By section 2 it repealed the 1857 Act. By section 81 it continued existing Courts of Mines and by section 82 provided for a Chief Judge of Courts of Mines, who should be a Judge of the Supreme Court, and for a Court of the Chief Judge of the Courts of Mines. Section 101 provided for the jurisdiction of Courts of Mines to hear and determine all suits cognizable by a court of law or a court of equity concerning specified subject matters. The notable addition was the conferring of the power of courts of law as well as courts of equity. The subject matters included in the jurisdiction were stated in 12 placita. This method of the definition of jurisdiction in numerous detailed placita has been adopted in subsequent mining legislation. It is unnecessary to set out in detail the placita in the 1865 Victorian Act. It need only be said that the encroachment jurisdiction was included in placitum (iii); the partnership jurisdiction was contained in placitum (vi); and placitum (xii) conferred jurisdiction generally in all questions and disputes cognizable at law or in equity which might arise between miners in relation to mining. It is in part because of the absolute generality of this last provision that attention to the detailed provisions of the preceding placita is unnecessary. The powers of the Court were to make such orders as the Supreme Court could exercise or make. The Act provided for powers to grant injunctions (sections 158 and 159). The Judge by section 171 might state a special case for the Chief Judge of Mines. By section 172 there was an appeal from the Court of Mines to the Chief Judge.

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[24] See S H Z Woinarski, *The History of Legal Institutions in Victoria* (LLD thesis, University of Melbourne, 1942) 550 – 551.

430 Similarly, by section 176 existing Wardens were continued. By section 177 the Warden had the common law jurisdiction of the Court of Mines. By section 194 the Warden might grant a rehearing or state a special case for the Chief Judge of Mines. The Warden was empowered to grant an injunction after notice or to grant an injunction ex parte for seven days (sections 203 and 204). By section 212 there was an appeal from the Warden to the Court of Mines. Sections 195, 196, 197 and 198 made special provisions for proceedings before the Warden, in the case of proceedings for recovery of land or water races; in respect of the right to divert any water or remove any reservoir or race; in respect of any encroachment or trespass; and in relation to any debt or contract or money due in respect of any gold or minerals respectively.

431 There were two relevant Acts in New South Wales in 1866. The first was a short Act, the Gold Fields Amendment Act 1866,[25] assented to on 7 April 1866 and commencing on 1 May 1866. By section 1 it provided that any Justice of the Peace might exercise powers given by the Gold Fields Act 1861 to any Commissioner or any Justice of the Peace being a Commissioner. This removed the requirement of gold fields disputes being heard by a person who was a Commissioner of the Gold Fields with some expertise in gold fields law and practice. It was the source of the very general complaints to the New South Wales Royal Commission of 1870-

[25] 29 Vic No 20.

1871 that mining disputes were being determined by people without expertise and who, indeed, were reluctant to hear such disputes.[26]

432 The second Act effected a general repeal and reenactment of the gold fields laws. It was the Gold Fields Act 1866.[27] By section 12 the determination and marking of the extent and position of claims was committed to Commissioners or officers appointed by the Governor. Consistently with the 1866 Amendment Act, the encroachment jurisdiction which was contained in section 14 was conferred upon any Justice of the Peace. The other notable feature of section 14 was that, for the first time in the case of New South Wales encroachment provisions, the requirement to proceed to the spot to hear and determine the complaint was omitted. This expression had been contained in all New South Wales encroachment provisions up to that time.

433 Sections 15 and 16 reflected the provisions of sections 16 and 17 of the Gold Fields Act 1861 in providing for the appointment of assessors. Section 20 in effect repeated the provisions of section 21 of the 1861 Act, providing a penalty for resistance, re-encroachment or disobedience of an injunction. Section 21 provided for an appeal to two or more Justices in any Court of Petty Sessions against a decision in encroachment or trespass proceedings. Section 22 provided for a partnership

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[26] See Paragraph 820 below.
[27] 30 Vic No 8.

jurisdiction vested in a Court of Petty Sessions where the amount claimed did not exceed £100. Section 23 provided that assessors might be summoned in any case before Justices of the Peace or a Court of Petty Sessions. This Act was assented to on 27 September 1866 and commenced on 1 January 1867. Significantly, there were no Local Court provisions, so Local Courts were for all purposes abolished in New South Wales by the repeal of the 1861 Act effected by the 1866 Act. It should also be noted that, despite the generality with which jurisdiction over mining matters was by now conferred upon the Victorian Courts, the jurisdiction conferred under this New South Wales Act was limited in terms to encroachment disputes and partnership disputes in the traditional form.

434 The New South Wales Goldfields Regulations of 24 September 1869 repealed the former Regulations. Regulation 32 conferred a general jurisdiction in that it provided that a Commissioner might determine any dispute connected with the working of any claim or occupation of any holding not otherwise provided for and make such order as he might think requisite. This may seem a strange provision in view of the lack of requirement for a Commissioner as opposed to any Justice of the Peace to hear other disputes under the Act. Regulation 33 provided for an appeal against any decision of the Commissioner.

435 The Regulations in New South Wales were again generally repealed and reenacted by the Regulations for Gold Mining upon Crown Lands of 21 March 1872. By regulation 211 a

Commissioner was empowered to issue an injunction upon the application of any person claiming to be legally or equitably interested in any land claim or holding. A Commissioner was empowered by regulation 213, upon the application of any party to any suit or appeal, to appoint a manager of any claim or a receiver of any gold, quartz or other valuable material that was the produce of a claim. Regulation 241 provided for an appeal against any decision of the Commissioner. Regulation 248 provided for a Commissioner to determine any dispute not otherwise provided for in terms that replaced regulation 32 of the 1869 Regulations.

436 The New South Wales Mining Act 1874,[28] assented to on 16 April 1874 and commencing on 1 May 1874, redrew the picture of mining administration in New South Wales. It provided by section 7 for the creation of a Department of Mines. Mining was up to that time administered in the Lands Department. Section 12 provided for the appointment of Wardens. By section 42 and following, they were to inquire into and report on objections to mining leases. Section 67 provided that the Governor might establish Wardens' Courts and a Warden's Court was in fact established for each district. This brought to an end the dispute resolution jurisdiction of Commissioners and Justices of the Peace. As in the Victorian Act of 1865, the jurisdiction of Wardens' Courts in New South Wales was defined in section 69 in detailed placita, in this case 13 in number. As with the Victorian

[28] 37 Vic No 13.

Act, there is no need to enter into all the details of those placita. Placitum (4) conferred jurisdiction for encroachment or trespass to land. Placitum (7) conferred partnership jurisdiction and placitum (13), in terms virtually identical with Victorian placitum (xii), conferred general jurisdiction in respect of all questions and disputes which might arise between miners in relation to mining. Section 72 provided for the first time in New South Wales that the Warden should cause a register of complaints to be kept, which led to the creation of similar printed registers as had existed in Victoria for many years already. Section 78 required the entry of every decision of the Warden's Court in the register. Section 76 provided that assessors might be summoned. Section 79 provided that the Warden might reserve any question in the form of a special case for the Supreme Court. Section 83 provided that, in the case of a mining partnership account, the Court should take the account to ascertain what money, gold or minerals should be due. Sections 87 and 88 granted injunctive powers. Section 106 provided for an appeal to the District Court sitting as a Mining Appeal Court, with, by section 115, a further appeal from the District Court to the Supreme Court where the subject matter exceeded £50. It is to be particularly noted that this radical Act in New South Wales created a system containing only one tier of trial courts, namely Wardens' Courts, which had all the jurisdiction of the Supreme Court in relation to mining matters. In matters of debt or contract where the claim did not exceed £50 the decision of the Warden's Court was by section 69 final.

Conclusion

437 It is apparent from the above that there were frequent changes to the legislation over the 25 odd years covered by this review. What were the reasons behind this frequency of change? The main reason was the constant discussion and change of views on the gold fields as to how their business ought be conducted. Behind this there lay to some degree changes in the nature of the gold deposits available from time to time and place to place and the means there were for working them. Flowing from this were considerations as to the type and size of title to be allowed, the nature of the equipment necessary to work them and the size and nature of the entities by which they might be worked. All of these were in an almost constant state of flux. And the gold fields were capable of exerting, and did exert, considerable political pressure. By 1865 the state of flux had essentially settled down. The Victorian Mining Act 1865 embodied the provisions that came to be regarded as the appropriate framework for mining law. That Act has traditionally been regarded as the archetype of Australian mining statutes and the basis of subsequent Australian mining law. These changes do not seem generally to have been the subject of great political controversy, except for the 1857 legislation in Victoria[29] and the 1866 amendments in New South Wales.[30]

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29 See Paragraph 664.

30 See Chapter 8.

438 The overall trend of the legislation so far as concerned adjudication was from informal determination on the spot by Commissioners without writing to determination in Court with the formalities usually associated with court proceedings. This occurred in Victoria as early as 1855 as a result of the 'Eureka' Royal Commission.[31] In New South Wales the traditional system persisted, at least on paper, until the Mining Act 1874. However, as will appear below, the Commissioners were, ahead of the 1874 Act, actually hearing matters in Court as early as 1871.[32]

439 After this conspectus of the legislation, the history of the adjudicative functions can now be turned to.

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[31] See Paragraphs 256, 257, 259 and 502.

[32] See Paragraphs 911, 925 and 926.

Chapter Five: The Establishment of Gold Commissioners as Adjudicators

501 The first institution for discussion in relation to the adjudication of disputes on the gold fields is the Gold Fields Commissioners, as they were the first institution created and vested with adjudicative functions both in New South Wales and in Victoria. This happened in 1851 at the onset of the gold rushes. In New South Wales, they continued in one form or another to be the adjudicators until the Mining Act 1874 created the Wardens' Courts. In Victoria, their adjudicative role lasted a much shorter time. Because of the Eureka uprising in late 1854 and the Royal Commission which followed, they were replaced in their adjudicative functions in 1855 by Wardens and the elected Local Courts, as discussed below.[1]

502 The reason for their early replacement in Victoria was the general dissatisfaction on the gold fields with the Gold Fields Commissioners, which was manifested both in the uprising and in the evidence given to the 'Eureka' Royal Commission, particularly regarding their participation in the "digger hunts" for licences.[2] In New South Wales, as will appear below, the Commissioners gave general satisfaction for many years. This was the reason for their continuation in the role of adjudicators. As will be seen, they were created and given an adjudicative role at the very

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[1] See Chapter 6.

[2] See Paragraphs 256 and 257 above.

inception of the administrative arrangements made to deal with the gold rushes.

503 The political and economic background in New South Wales has been dealt with above.[3] The gold rushes commenced in New South Wales with the public announcement by Edward Hammond Hargraves in May 1851 of the discovery of gold at Ophir. After Hargraves' announcement men quickly began to arrive at Ophir to prospect and dig for gold. This created a crisis for the Government, as is plainly manifested in the minutes of the meetings, referred to below, in which the Executive Council sought to deal with the problem the Colony faced. The events as to the initial establishment of the administration of the gold fields have been set out in greater detail than subsequent events because of the importance of those early events for the subsequent history of adjudication.

504 The solution that was come to was the making of the Proclamation and the Regulations cited above[4] and the appointment of John Richard Hardy as Commissioner for Crown Lands for the Gold Fields and his immediate despatch to Ophir to issue licences and to take charge of the situation. Hardy, as will appear below, was, despite a comparatively short tenure of office, a pivotal figure in the administration of the gold fields in New South Wales for at least the ensuing 13 or 14 years, or even for 23

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[3] See Paragraphs 206-208 and 314-323.
[4] Paragraphs 402 and 403.

years. As will also become apparent below, his performance of the offices to which he was appointed was extremely successful.

505 Hardy was born in Sussex in 1807, the son of a vicar. He was educated at Charterhouse and at Cambridge, where he graduated with a BA in 1831. In 1832 he migrated to Sydney, where he edited *The Australian* newspaper for two years. In 1837 he married a sister of Alfred Stephen, who in 1844 became Chief Justice of New South Wales. Also in 1837, he was appointed Police Magistrate at Yass, but he became enmeshed in quarrels with local settlers and was suspended in 1843 over accusations of irregular procedures as a Magistrate. However, there was no suggestion that Hardy was corrupt.[5] In 1849 he was appointed Police Magistrate at Parramatta and held that office until his appointment as Gold Fields Commissioner in 1851.[6]

506 No reference has been found in primary or secondary sources to how Hardy was selected for that office. However, his selection had taken place before the matter was considered by the Executive Council, since he was present when the crisis was first considered by the Council at its meeting on 17 May, 1851.[7] His brother in law, the Chief Justice, may have played some part in it.

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[5] John O'Sullivan, *Mounted Police in N.S.W.* (Rigby, 1979) 61.

[6] Australian Dictionary of Biography (ADB) Online Edition; Mining Hall of Fame Database: Government and Educators; both last accessed 12 March 2014.

[7] V & P 1852 Minute No 51-20 Despatches Relative to the Appropriation of the Gold Revenue 22.

507 At that meeting, the history of the crisis from the beginning of April 1851 was recorded. On 3 April, Edward Hammond Hargraves wrote, reporting that he had discovered gold on Crown lands and proposed to point out the localities upon the award of a compensation of £500. He was informed that if he made the localities known he might rely on the liberality of the Government and was directed to place himself in communication with Mr Stutchbury, the Geological and Mineralogical Surveyor. In a letter dated 8 May, C H Green, Commissioner of Crown Lands at Bathurst, reported that Hargraves had been employing people to dig for gold on Summer Hill Creek. In a letter dated 13 May, Green reported that he had proceeded to the spot and found seven or eight persons at work under an authority from Hargraves and had given them notice to desist. He reported intense excitement in Bathurst, with hundreds gone or preparing to go to the gold field. A letter from Mr Stutchbury dated 14 May reported that he had seen sufficient at the diggings to prove the existence of grain gold.[8]

508 A draft was present at the Executive Council meeting of 17 May of a Proclamation prepared by the Solicitor General in the terms in which it was subsequently issued. The Governor then informed the meeting of the presence of the Inspector General of Police and the Inspector for the Sydney District and also of Hardy, "to whom it was proposed to entrust the duty of carrying out on the spot the regulations under which the gold diggers will be

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[8] Ibid.

authorized to work, and of collecting the fees which they may be required to pay for their licenses." The minute continues:

> Mr Hardy is then called in, and states to the Council that, if appointed to the office which it is proposed to assign to him, he does not consider that he should have any difficulty in enforcing an observance of reasonable regulations, if twelve mounted men, on whom he could depend, were attached to him, and if the fee imposed for the Licence to dig be moderate. He suggests that the men by whom he would be supported should all, if possible, be soldiers who have been in the Mounted Police, and who have but a short time longer to serve in their regiment to entitle them to claim their discharge with pensions. The inducement which such men would have to perform their duty faithfully would be such as to render it very improbable that they would either fail to support him, or desert.[9]

509 Hardy was then released from the meeting on the understanding that he would attend a Council meeting on the following Tuesday, 20 May 1851. The issue of the Proclamation laid before the Council was then approved.

510 At the meeting on the following Tuesday,[10] it was revealed that the Proclamation had not been made because of conflicting reports concerning the gold field. However, it was decided that

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[9] V & P 1852 Minute No 51-20 Despatches Relative to the Appropriation of the Gold Revenue 22.

[10] Id 25.

the Commissioner should at once be instructed to select his men and make all necessary arrangements for the equipment of his party.

511 At its next meeting on Wednesday, 21 May 1851[11] the Executive Council considered the Regulations which should be made and the instructions to be given to the Commissioner on his appointment, but deferred these subjects until the next day.

512 At the Executive Council meeting on Thursday, 22 May 1851,[12] the Council considered a report from Mr Stutchbury making it plain that gold would be found in greater or less quantities over a vast extent of country. The Council thereupon determined that the Proclamation should be issued at once. Hardy was then called in and reported that he had been able to find only ten rather than twelve suitable men of the 11th Regiment who had served in the Mounted Police. He stipulated that they should receive an additional remuneration of 2s 9d per day with a soldier's ration.

513 At its next meeting on Friday, 23 May 1851,[13] the Council resumed consideration of the Regulations and the instructions to the Commissioner. It fixed the licence fee at 30 shillings per month. Hardy was called in and expressed the view that there

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[11] V & P 1852 Minute No 51-22 Despatches Relative to the Appropriation of the Gold Revenue 26.

[12] V & P 1852 Minute No 51-23 Despatches Relative to the Appropriation of the Gold Revenue 26.

[13] V & P 1852 Minute No 51-24 Despatches Relative to the Appropriation of the Gold Revenue 27.

would be no difficulty in collecting a fee in that amount. There were further discussions in Hardy's presence of the proposed Regulations and of the Commissioner's instructions. Some amendments were made to them and they were finally settled and approved by the Council. The Regulations were gazetted on the same day, 23 May, 1851, in terms set out above.[14]

514 Also on the same day, 23 May 1851, Hardy was given his letter of instructions from the Colonial Secretary. Bearing in mind the lack of legislation and the small content of the Regulations, these instructions were of the utmost importance and continued so for some time. Despite the promise in the Regulations of early further Regulations, whilst piecemeal Regulations were passed later in 1851, it was not until April 1852 that there were Regulations that were anything like comprehensive or contained any matter relating to adjudication.

515 The letter of instructions[15] confirmed Hardy's appointment as a Commissioner of Crown Lands under the New South Wales Act (ie, the Crown Lands Act 1833[16]) with the following purposes and instructions. He was to organise his force of ten men (twelve could not be found[17]) and to proceed without delay to the Bathurst district and establish himself and his force in some suitable location. He was then at once to proceed to carry out 'the

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[14] See Paragraph 403.
[15] Appendix 15 NSW V&P 1852 Despatches Relative to the Appropriation of the Gold Revenue 16.
[16] See Paragraph 320.
[17] See Paragraph 512.

views published in the Proclamation of the 22nd instant, and the Regulations of this date'. In particular, he was to compel every individual at work at the gold field to take out and pay for a licence in the prescribed form. He was required to give security to the Government in the sum of £2,000 for the faithful discharge of his duty and the payment to the Government of all monies and gold collected. He was to remove all unlicensed persons from the gold field. And it was to be 'an essential part' of his duty 'to preserve the peace, to put down outrage and violence, and to protect the community generally'. He was required to swear in special constables. The fact that he failed in this regard became a matter of controversy.

516 Hardy arrived in Bathurst on 30 May 1851. Major Wentworth, the Provincial Inspector of Police, anticipating that Hardy would meet on the gold field with 'difficulty and opposition', offered him an additional eight mounted men to take with him. On 31 May 1851, Hardy wrote from Bathurst a private letter to the Colonial Secretary.[18] Whilst remaining 'quite easy on the subject myself', he accepted Wentworth's offer, as he would not 'be justified in neglecting every precaution'. The only difficulty he anticipated arose from the fact that there were some 1,500 men on the road from Sydney to Bathurst and he feared problems when these arrived and found the ground already occupied. He recorded that he liked Green, who 'is active and

[18] NSWA 4/3025.

anxious'. He hoped that the discovery of further gold fields would remove the problem that he anticipated.[19]

517 In an open letter to the Colonial Secretary of the same date, he advised of the availability of Major Wentworth's eight mounted men, but stated, 'I do not anticipate that there will be any present difficulty in carrying out the Government regulations.' He did advert to the possibility of disturbances between the present occupants and the numbers of gold seekers who were on the road.[20]

518 At the Executive Council meeting on 3 June 1851, Hardy's open letter of 31 May was presented. Hargraves was present at the meeting and was informed that he was to receive an immediate reward of £500. He was also informed that he should be temporarily appointed a Commissioner of Crown Lands for the express purpose of continuing a search for further fields of employment for the gold diggers.[21]

519 On 3 June 1851, Hardy wrote from Summer Hill Creek[22] that he had arrived there on Monday 2 June and had already issued 102 licences. He had met with no resistance.

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19 NSWA 4/3025.

20 V & P 1852 Minute No 51-26 Despatches Relative to the Appropriation of the Gold Revenue 27.

21 Ibid.

22 V & P 1852 Despatches Relative to the Appropriation of the Gold Revenue 23.

520 On 5 June 1851, Hardy wrote to the Colonial Secretary from his Camp.[23] He reported that he had the day before issued 200 licences to dig for gold. He referred to 'the walking from party to party ... , collecting them, taking their names, weighing the gold, and then marking out their ground, and occasionally settling disputes' as making 'the business of issuing licenses very tedious.' He went on to state that he had 'not experienced the slightest trouble or annoyance from any person here; they refer all their disputes to me, without attempting to settle them by violence, and submit to my decision without a murmur'. Later in the letter he stated, 'I caution every person never to attempt to settle any disputes by violence, but to send to me; and they do this very readily.' This is the first reference to dispute settlement by a Commissioner.

521 It thus appears that Hardy had entered into a process of settling disputes within three days of his arrival on the gold field and this without any legislative foundation or indeed any instruction in specific terms that he should do so.

522 From this time there was virtually daily correspondence from Hardy to the Colonial Secretary throughout the entire period that he held office in relation to the gold fields. This correspondence has largely been preserved and is available in the Archives to be read. At this point the very detailed account given thus far will cease, with only sparing quotations or references

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[23] Id 29.

from the correspondence that relate to the settlement of disputes. It is really remarkable how little there is in the correspondence concerning adjudication of disputes, bearing in mind the fact that it appears to have been a daily or virtually daily activity of Hardy and of the Assistant Commissioners when appointed. It is fairly plain that the dispute resolution was carried out to the general satisfaction of the participants and was the subject matter of very little controversy, as will be shown.

523 On 8 June 1851, Hardy wrote from his Camp at Summer Hill Creek to the Colonial Secretary. To that date, 446 licences had been issued. He stated:

> The greatest good order and quiet still continue amongst the people here. I have settled a great many disputes as to boundaries within the last few days. The parties and their witnesses are on the spot, and there is no difficulty in deciding. I may add, that this has given great satisfaction to the miners.[24]

He reported that there was only one case in which there was an inclination to disregard his decision. A butcher at Bathurst named Webber, 'a very tall, strong man,' began to work on another man's land. Hardy told him to desist but, as soon as his back was turned, Webber began again, saying 'he would work where he liked in spite of any one.' Hardy seized and handcuffed him and marched him off the ground, declaring his intention of sending him to Bathurst Gaol. An hour later, Webber was penitent and

[24] Id 47.

begged Hardy to let him off. Hardy did so and Webber thereafter worked quietly. Hardy stated that he had set these facts out 'chiefly to show how easily such a population may be managed.' On 11 June 1851 he reported that there were 700 or 800 men at work.[25]

524 On 24 June 1851, Hardy wrote to the Colonial Secretary in answer to complaints made of his conduct. The first was of his failing to swear in special constables as mentioned above.[26] The other was as to a practice he had adopted of allowing recently arrived diggers to dig for a few days to find enough gold to pay for a licence. On the same day he wrote to the Colonial Secretary from Bathurst to report on his visit to the new gold field that had been found on the Turon River. He asked for the appointment of an Assistant Commissioner for the Turon district as well as suggesting the establishment of Courts of Petty Sessions at both Ophir and the Turon.[27]

525 At an Executive Council meeting on 3 July 1851[28] the Council considered the letter of 24 June from Hardy. As to his explanations of the matters complained of, the Council declared itself 'in some measure satisfied with Mr Hardy's reasons for not having had recourse to the assistance of special constables.' They were still of opinion that he ought have sworn them in as

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25 Ibid.
26 Paragraph 515.
27 Id 60.
28 V & P 1852 Minute No 51-32 Despatches Relative to the Appropriation of the Gold Revenue 39.

originally directed but did not insist upon their being sworn in now. As to the practice of allowing persons to dig for a short period without a licence so as to obtain the requisite funds, the Council absolutely disapproved of this practice and insisted that the rule that a licence was required before a digger should commence to work 'would in no case be departed from.' They made it plain that they 'expressed themselves well satisfied with the ability and energy displayed by Mr Hardy in the peculiar position in which he has been placed, and they therefore desire to convey no censure on that officer.'

526 The Council expressed the view that the gold country should be divided into convenient districts and that in each of these districts an Assistant Commissioner should be appointed "who would preserve the peace and settle all disputes therein respecting mining rights." Hardy should retain supervision of all the present gold fields in the Western District. Hardy was called on to propose a suitable subdivision into Assistant Commissioners' districts.

The Council said that the location of each person's country should be pegged out on the ground 'so as to remove all cause of disputes as to boundary.'

527 On 8 July 1851, Hardy wrote to the Colonial Secretary from the Turon.[29] On 10 July 1851 he wrote to the Colonial Secretary

[29] NSWA 4/2940 letter 51/6771.

from Bathurst reporting on his visit to the Turon, where he had issued 704 licences. He stated:

> All the boundaries had to be marked, and all of them had to be altered – for the first arrivals had taken too much. And the alteration of one boundary involved the alteration of all the rest ... In the present case, where parties were disputing every foot of the ground, the measurement was required to be exact as nearly as I could mark by stepping ... I was beset by a crowd, all thrusting their pound notes into my face, and begging me to mark their boundaries. The boundaries I marked were universally acquiesced in without a word ... And on my return, late in the evening, I had not a single complaint of intrusion. All this settlement of adverse claims and disturbance of boundaries was done by myself alone – the single Policeman that accompanied me holding the horses at a distance. And nothing can show more strongly the love of order and the proper feeling that exists amongst the people of this Colony.[30]

This passage is set out at length as containing some account of the process of marking boundaries and settling boundary disputes and of the satisfaction with the process.

528 On 14 July 1851, Hardy wrote to the Colonial Secretary informing him that Green, who had by this time been appointed as the first Assistant Commissioner, had discharged his duties at

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[30] NSWA 4/2940 letter 51/6832. And as to the love of order and proper feeling cf Reid's account of the journeys on the Oregon and California Trails: see Paragraph 317 above.

Ophir most efficiently during Hardy's absence[31] and on 17 July he wrote to the Colonial Secretary informing him that the next day he would leave Ophir for the junction of Summer Hill Creek with the Macquarie River, proceed up the Macquarie to the junction of the Turon and thence up the Turon 30 miles to the diggings. He expected to find further diggings along this route.[32] As the year progressed, Hardy travelled to other new fields as they were opened up to establish the administration and the system of dispute resolution. These included, on the Western Gold Fields, Louisa Creek and the Meroo in August and the Abercrombie in September[33] and, on the Southern Gold Fields, Bell's Creek, Major's Creek and Araluen in October. [34] It should be noted that at Bell's Creek, as well as issuing licenses, he was 'marking the boundaries of the claims and settling numerous disputes' and that he 'was told by many different parties that they were very glad to see a Commissioner among them, to protect them in their rights and to settle their disputes.'

529 In November 1851, Hardy established a central office at No 11 Bridge Street, Sydney, in a house he rented for £60 a year.[35] From that time on he exercised a supervisory role, leaving local administration to the Assistant Commissioners then established on the various gold fields. However, he continued to spend a great deal of time visiting the gold fields.

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31 NSWA 4/2940 letter51/6944.
32 NSWA 4/2940 letter 51/6946.
33 NSWA 4/2447 letter 51/9323.
34 NSWA 4/3016 letter 51/10135; and see O'Sullivan, above n 6, 64-65.
35 NSWA 4/3018 letter 10886.

530 It should be added that, whilst the initial workings on new gold fields in 1851 were individual or small party workings of alluvial deposits, interest in quartz vein deposits commenced already in 1851 and continued in 1852. There was always great disputation between the interests of alluvial miners and quartz vein miners, which occupied a great deal of correspondence and controversy, but is not part of the present subject matter as it did not take the form of disputes to be adjudicated between individuals.[36] This conflict between the interests of alluvial and quartz vein miners continued for decades on virtually all gold fields.

531 During 1852, legal authority over the gold fields passed from the British Government to the New South Wales Legislative Council.[37] On 7 September 1852, on the motion of James Macarthur, the Legislative Council resolved:

> That a Select Committee be appointed to inquire into the system now in force for the management of the Gold Fields and the collection and administration of the Revenue thence arising, with a view to the suggestion of such measures as may be deemed expedient for the improvement and greater efficiency of the system.[38]

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[36] Eg, letter Hardy to Colonial Secretary 31 December 1851, NSWA 4/3026.
[37] J B Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988), 209.
[38] NSW Legislative Council V & P 1852 Votes No 50.

It was resolved that the Committee consist of ten members including the Colonial Secretary and the Solicitor General. It also included James Macarthur and William Charles Wentworth, who were to play a leading part in the conduct of the inquiry and were prominent in attacking the views held or which they believed were held by Hardy concerning gold mining.

532 Macarthur and Wentworth were leaders of the squatting interest. Wentworth held as much as 500,000 acres as a squatter.[39] Wentworth is said to have 'sneered at democrats and democracy and boasted of his intention to preserve the existing distribution of political power based on acres, sheep and cattle rather than men.'[40] It is also said that he 'understood that he had only a limited time to achieve a constitutional settlement that protected squatters in a society increasingly dominated by immigrant tradesmen and labourers. Doing so remained his goal for the next decade.'[41]

533 Evidence was taken before the Select Committee on various dates between 17 September and 13 December 1852.[42] The witnesses included Hardy on two occasions. Evidence was also given by C H Green and W E King, the first two Assistant

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[39] See Paragraph 208 above.

[40] C M H Clark, *A History of Australia IV: The Earth Abideth For Ever 1851-1888* (Melbourne University Press, 1978) 29.

[41] Andrew Tink, *William Charles Wentworth: Australia's greatest native son* (Allen & Unwin, 2009) 175.

[42] NSW Legislative Council V & P 1852 Third Report from the Select Committee on the Management of the Gold Fields with Minutes of Evidence and Appendix ordered by the Council to be printed 22nd December, 1852 (The Evidence).

Commissioners appointed. The latter was appointed on 14 July 1851. He was at the Turon as Commissioner for seven months.[43] Another witness was T B Naylor, who was the clerk in Hardy's office after that had been established in Sydney.

534 Among subject matters that were canvassed at some length in the evidence were the degree to which miners paid or evaded paying the licence fee in respect of alluvial claims; the manner in which applications for quartz vein claims were made and dealt with; the conflicts between quartz vein claims and alluvial claims; the circumstances in which relatives of Hardy, particularly his brother, William Hardy, made claims and had them dealt with; and the duties that Hardy performed and the manner in which he expended his time after he had established the Sydney office.

535 Hardy wrote a preliminary letter to the Select Committee in which he referred to 'the business of the commissioner to mark out the boundaries of each claim; to prevent intrusion upon the claims; and to settle all disputes on the spot'.[44]

536 Turning to the oral evidence, it is worth recording what Hardy said about the duties he had carried out whilst he was operating on the gold fields before his establishment in Sydney. He said:

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[43] See The Evidence, above n 42, 11 November 1852, question 3; 18 November 1852, question 116.
[44] Appendix, p 18.

> On the first breaking out of the Gold field I had to establish the general regulations of the Gold field at Ophir – to carry out the Government regulations – to establish a Police Office, an Escort, and a Post Office; that was from the 1st of June. In the month of July, I did the same thing at the Turon, which is about fifty miles from Ophir; I located the police there – made arrangements for buildings – for the establishment of Police Courts – for the establishment of an Escort – and for the conveyance of letters. In the month of August I did the same thing at Louisa Creek and the Meroo. In the month of September, I did the same thing at the Abercrombie; and, at the end of November, I did the same thing at Araluen.[45]

He said it had been necessary for him to stay three consecutive weeks on the Turon without leaving the place in order to attend to the above matters.[46]

537 Although the material concerning the dispute resolution functions of the Commissioners did not take up a great deal of the evidence, it is important to note that the evidence indicated the frequency of dispute resolution by the Commissioners and the general satisfaction of the miners with that dispute resolution.

538 Hardy emphasised the importance among the Commissioners' functions of the settlement of disputes as to

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[45] The Evidence, above n 42, 9 December 1852, question 66.
[46] Id, question 69.

boundaries and the maintenance of the rights of property as well as personal security.[47] He indicated that he resided uninterruptedly at the goldfields from 1 June till nearly the end of October 1851.[48] He referred to the absence of a law to compel obedience of a Commissioner's decision if the person against whom the decision was given chose to be troublesome.[49] He stated that his occupation up to the end of October 1851 was stationary but between October 1851 and May 1852 was ambulatory.[50] In the answers set out below he confirmed the lack of any written record of the Assistant Commissioners' proceedings:

> 146 Does each Assistant Commissioner keep a journal? No.
>
> 147 There is no record of his daily proceedings? Not the least.
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> 148 Nothing official. No.

He referred to the disputes requiring settlement as occurring daily.[51] He characterised the general character and conduct of the diggers as follows:

> They have behaved very well; they have been very quiet, orderly, and well-behaved, but it has been on compulsion...[52]

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47 The Evidence, above n 42, 22 September 1852, questions 19 and 20.
48 Id, question 56.
49 Id, question 52.
50 Id, question 107.
51 Id, question 303.
52 Id, question 314.

539 Henry Harper, a miner first at Ophir and then at the Turon, said of the Commissioners:

> It seems to me that the Commissioners can more satisfactorily investigate matters on the ground itself in dispute; and besides, the diggers generally have much confidence in the Commissioners' decision, even when adverse to themselves, and always acquiesce quietly in them. I do not in all my experience remember one instance in which the rectitude or impartiality of a Commissioner's decision has been questioned, even by the losers by such decision.[53]

540 William Roberts, who had had men working for him at the Turon, referred to the fact that the Commissioners:

> had not only to administer justice at their tents, but often to be hurried thence to a distance of two or more miles to adjudicate on claims, and to probably prevent bloodshed.[54]

He added:

> It evinces the good feeling of the Diggers in general towards the authorities, that instead of taking up the cudgels, and so think to settle their disputes, they waited until the Commissioner could come down and adjust the matter.[55]

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53 Id, 29 September 1852, question 113.
54 Id, 20 October 1852, question 9.
55 Id, question 10.

He attributed this to a disposition of the diggers to maintain quietness and order, 'not to speak of the innate reverence of the Anglo-Saxon character for law in the abstract.'[56]

541 Green referred to the busyness of the Commissioners, 'of which, without residing on a Commissioners' station, it is almost impossible to form an idea,' as including the settlement of disputes about claims.[57]

542 Hardy's views that attracted the ire of Macarthur and Wentworth were as follows.[58] To question 21, as to whether he considered it desirable to obtain a revenue from gold over and above that which may be sufficient to maintain the establishment, Hardy answered that that involved the principle whether the Government ought get as much as they could or whether they ought be contented with less. The examination continued:

> 22. *By Mr Wentworth*: I take it there can be no doubt that the Gold Field is the property of the public? Yes, the Gold Field is, but the Gold is not; that is, the Gold brought to the surface is brought there by man's industry, and I cannot conceive that there is any justice in taxing one man more than another; - I cannot conceive that Gold Diggers should be taxed more than the rest of the community, always supposing that they pay the expense which the Government is put to by their occupation of the Gold Field. The Gold is

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56 Id, question 11.
57 Id, 10 November 1852, question 56.
58 Id, 22 September 1852.

> under ground and there would remain but for the industry of these men; and their industry brings that to light in the same way that the fleece of the flock is brought to the market by the industry of the squatter.

543 Subsequently, Hardy resisted the proposition put to him by Wentworth that it was his view that the digger ought not be called upon to pay anything at all. Hardy re-emphasised that the digger ought pay all the expenses he puts the public to and perhaps something more.[59] As to the proposition that the Government had a perfect right to prevent gold digging, he stated that he thought they had not; he thought that gold digging was as legitimate an occupation as grazing and that the gold fields are open to the public in the same way as waste lands are open to occupation by squatters.[60]

544 The Select Committee published a Progress Report on 14 December 1852 in which they stated the conclusion:

> that the establishment of a Separate Department and Office in Sydney, under the charge of a Chief Gold Commissioner, has not been of advantage to the Public Service, but, on the contrary has led to delay and irregularity which it is most essential to prevent, in the discharge of duties of so responsible and important a character.

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[59] Id, questions 197, 198.
[60] Id, questions 204-207.

> Your Committee, therefore, recommend the abolition of the office of Chief Gold Commissioner, and suggest that the District Commissioners should refer directly to the Office of the Colonial Secretary, on the business of their respective departments.

545 Between that date and 22 December 1852, that Report was confirmed by the Committee of the Whole House. Interestingly, in the third and final report of the Select Committee, only the following matter was recorded with respect to Hardy and the reasons for his dismissal:

> With respect to the Chief Gold Commissioner, Mr Hardy, the Committee feel that the views and opinions expressed in his Evidence before the Committee on the 22nd September, 1852, more especially with respect to the Right of the Colony to the Gold Fields, and the Gold obtained therefrom, are of a character wholly incompatible with the position and Office held by him as Head of the Gold Department. Whatever may have been the zeal and activity displayed by this Gentleman at the first opening of the Gold Fields, the opinions he has avowed, and the course he has adopted in regard to the Management of the Gold Department, must in the opinion of your Committee more than outweigh any value that may attach to his former services.

546 It is significant that no more specific findings were recorded by the Select Committee with respect to Hardy's conduct or the reasons for his dismissal. There seems no doubt

that the central reason for his removal was his expression of views concerning the gold fields which conflicted with those of the Committee and particularly of Messrs Macarthur and Wentworth. The preponderance of squatters in the Legislative Council probably explains the adoption of the Report.

547 Upon the abolition of his office, Hardy was offered alternative service with the Government but declined and retired from public life to the property that he still owned at Yass.[61]

548 In 1855, Hardy published a pamphlet that was a response to the attack on him by James Macarthur and Wentworth and his dismissal.[62] The conflict was between the proposition that the Government ought get as much as they could out of the gold diggers as opposed to the proposition that the diggers should make all the profit they could out of their occupation, paying the expenses necessarily incurred by the Government in consequence, including police protection, the establishment of Courts of Petty Sessions, of Post Offices and of Gold Escorts.[63] He set out the exchanges in the evidence of the Select Committee from which this conflict most clearly appeared, including the passages referred to above.[64]

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61 Mining Hall of Fame Database, above n 6.
62 J R Hardy, *Squatters and Gold-Diggers, Their Claims and Rights* (W R Piddington, 1855).
63 Id 3, 4.
64 Paragraphs 542, 543.

549 He characterised, in terms, what Macarthur and Wentworth had said as giving "utterance to such trash, probably in a sincere, as it certainly was in an ignorant, spirit".[65] He commended Deas Thomson, the Colonial Secretary, as having "recognised the true policy of the time, and swerved not an inch from the straight path." He added:

> I am not giving him the merit of the organization of the gold field, or its settlement in quiet and good order – that, and the suggestion of the principle upon which it should be occupied, belongs to me alone.[66]

He expressed the conclusion:

> Gold diggers have a right to dig for gold, subject to general regulations for the management of the gold field. They are bound to pay their local expenses – and it is for the government to render the necessary payment certain, impartial, and sufficient. Woe to the government that demands more, or takes less.

550 Importantly, he made the following remarks upon the Gold Commissioners' role as dispute settlers:

> I know no more remarkable fact in the circle of social facts than this – that though the Gold Commissioners appeared amongst the diggers with the unfavourable *prestige* of tax-gatherers, they were universally popular and welcome. They were looked upon with confidence, as the protectors

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65 Id 4.

66 Id 14.

> and the just arbiters of the gold field. The thousands of disputes that necessarily arise in the gold field, were at once, without a day's delay, settled, without the expense, the delay, the tedious formality, that impedes the way of justice in other places – *sub Jove pluvio, in triviis et quadriviis*; the witnesses necessarily on the spot, and all the neighbours, the jury *de circumstantibus*, interested in a just decision, and present to assist in a just determination. If our Gold Commissioners had been of the usual government office type, gentlemen of the broad margin and red tape school, staying at home at ease, making work out of nothing, in well-known and time-honored official fashion – opening at ten and closing at four, gay triflers in the realms of foolscap – the gold field would not have been what it was, an honor and a credit to the government and its directors.

This passage summarises accurately the elements and grounds of success of adjudication by the Gold Commissioners.

551 Hardy offered his services, to no avail, to La Trobe and Hotham when they were respectively chief executive in Victoria.[67] He died in 1858 at Yass, leaving behind him, in operation, the system he had created.

552 Two further matters require comment. These are why the dispute settlement regime established by Hardy was successful

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[67] John Molony, *Eureka* (Melbourne University Press, 2nd edn, 2001) 82-83.

and what Hardy's significance was in the history of dispute resolution.

553 As to the success of the regime, the reasons for this appear from the above. They are founded in the personal qualities of Hardy himself and the manner in which he discharged the duties of his office, including dispute resolution. The success was all the more remarkable because of the lack of any formal provisions for enforcing the Commissioner's decisions.

554 His modus operandi in the early days and his personal qualities are discussed at some length by J B Hirst. Hardy did not make the diggers come to him but went among them. He issued licences, marked out claims and determined disputes on the spot, scrambling down the gorge to do so.[68] His personal qualities were a combination of discretion and good humour with decision and firmness on rare occasions when it was required. Hirst described him as 'patient, good-humoured, firm but not overbearing or haughty in manner'.[69] But Hirst also referred to Hardy's decisive dealing with trouble makers as evidenced by the incident with Webber, the butcher.[70] He was so completely trusted by the diggers that they came to ask him to look after their gold.

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[68] Hirst, above n 37, 199-200.

[69] Id 200. See also T H Irving and Carol Liston, 'State intervention and equality: administration in the New South Wales goldfields 1851-1853' in J J Eddy and J R Nethercote (eds), *From Colony to Coloniser Studies in Australian Administrative History* (Hale and Iremonger, 1987), 106.

[70] See Paragraph 523 above.

555 Two other factors that conduced to the acceptance of the system were that Hardy was perceived from his manner and his decisions to be impartial among the array of different classes represented on the gold fields and that the system provided cheap and almost instantaneous resolution of disputes.[71]

556 Despite his easy manner Hardy always maintained a position of authority. He insisted on a uniform. In Hirst's words, 'There was one major social inequality at the diggings – that between the commissioner and everyone else.' The gold fields were ruled by benevolent dictators.[72]

557 The second matter is Hardy's significance in the history of adjudication. The success that has been described depended to a large measure on Hardy's personal qualities. Although he was altogether out of the equation by the end of 1852, his initial conduct had set the mode of adjudication up as a successful system with wide acceptance. Furthermore, it provided the model by which subsequent Commissioners conducted themselves. And the selection of further Commissioners both under Hardy himself and subsequently seems to have been, overall, fortunate. One notable example is C H Green, who defused a potential outbreak of hostilities that was threatened at Sofala in February 1853.[73]

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[71] Hirst, 201.
[72] Id 204-205.

[73] Brian Hodge, *The Goldfields Story 1851-1861 Book 2: Frontiers of Gold* (Cambaroora Star, 1979) 40.

558 In any event, there seem to have been no widespread complaints about Commissioners or about the system until the legislation and Government action of 1866 discussed below removed the expertise from the system by replacing Commissioners as adjudicators with Justices of the Peace.

559 The success of the system for some 15 years can be attributed to the model and example of J R Hardy. And to this success can be attributed the fact that adjudication by Commissioners (or their replacements) persisted in New South Wales for nearly a quarter of a century while superseded in Victoria in less than four years.

Chapter Six - The Establishment of Local Courts and Wardens in Victoria in 1855 and Their Operation until 1858

I Origins

601 Local Courts and Wardens were established pursuant to the 1855 Act,[1] which, as has already been noted, was passed consequent upon the report of the 'Eureka' Royal Commission.[2] The Local Courts had both a rule-making power and limited adjudicative powers, the most important of which was the determination of partnership disputes. The unusual features of the Local Courts were their combination of legislative and adjudicative functions and the fact that, apart from a Chairman appointed by the Government, the members of the Courts were elected.

602 While there is no doubt that the Local Courts were created consequent upon the 'Eureka' Royal Commission Report, it is not correct that the elective nature of the Courts was recommended by the Royal Commission Report. As pointed out by Serle,[3] the Government in the 1855 Act 'went further' than the Commission's recommendation in providing for the election of the members of

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1 18 Vic No 37.
2 Paragraph 259.
3 Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963 (reprinted with corrections 1968)) 177.

the Courts.[4] The Royal Commission Report went only so far as to suggest that the body should be composed largely of miners selected by the Executive from those holding miner's rights.[5] The Report was even unclear as to whether the local boards appointed to make rules for the district should have an adjudicative function. It was only in the Act that the adjudicative functions were defined and the elective system established that operated until the end of 1857.

603 By the 1855 Act the encroachment jurisdiction was vested in Justices of the Peace. No mention is made in the Act of Wardens. However, pursuant to a recommendation in the Report, appointments were made of a head officer for each district. When appointed they were denominated as Wardens. There is no doubt that the appellation "Warden" was adopted by reason of its use in England in relation to the Stannary Courts. The use of the title was suggested in the Royal Commission Report where it was referred to as 'so long familiar in English mining'.[6]

604 There is no doubt that in England the Stannary Courts and the Barmote Courts were in full flower at this time.[7] However, there is no adversion in the Royal Commission Report to them or

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4 See Donald Just, *The Victorian Mining Judicature Under the Gold Fields Act 1855* (Research Paper submitted for the degree of Bachelor of Laws Honours, University of Melbourne, 1971) 40.

5 Paragraph 95.

6 Paragraph 87; Just, above n 4, 16; R L Sharwood, 'The Local Courts on Victoria's Gold Fields, 1855 to 1857' (1986) 15 *Melbourne University Law Review* 511.

7 See Chapter Three above.

the provisions relating to them other than the reference to the 'Warden' just quoted. Subsequently, in 1857, there was in the Parliamentary debates passing reference to the English courts, though by incorrect names.[8] But it cannot be concluded that they played any part other than the contribution of the name 'Warden' in the creation or form of the institutions provided for in the 1855 Act.[9]

605 Adjudication on the Californian gold fields, at least in the early years, was generally by self-constituted miners' courts.[10] These informal tribunals often comprised two miners, one chosen by each disputant, and a third who was either the Recorder or chosen by the other two. Otherwise disputes were heard by 'disinterested miners', 'miners of the hill' or a 'majority of the actual claimholders'.[11] The Californian practice was known in Australia at the time through the many Australians who went early to the Californian diggings (eg, Hargraves). But there is no evidence of any Californian influence on the formation of the Local Courts system.[12]

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8 Sharwood, above n 6, 517.

9 Id 516-518; Ralph W Birrell, *Staking a Claim: Gold and the Development of Victorian Mining Law* (Melbourne University Press, 1998) 40-41.

10 David Goodman, *Gold Seeking: Victoria and California in the 1850s* (Allen & Unwin, 1994) xvii.

11 Simon Chapple, *Law and Society Across the Pacific Nevada County, California, 1849-1860 and Gympie, Queensland, 1867-1880* (PhD thesis, University of New South Wales, 2010) 94.

12 Sharwood, above n 6, 518.

II Wardens

606 The gold fields were divided into five districts, and a Resident Warden was appointed to each: at Ballarat it was C W Sherrard, at Sandhurst, J A Panton, at Avoca, W Templeton, at Beechworth, W Turner (from 1856 M Price) and at Castlemaine, Captain J E N Ball.[13] Sub Wardens were also appointed in each district responsible to the Resident Wardens. Resident Wardens were required to furnish detailed regular reports to the Chief Secretary, initially weekly and subsequently fortnightly.[14] In addition, honorary Justices were appointed in each district.[15] These were not entirely successful and were the subject matter of some controversy.[16]

607 The jurisdiction that was exercised at the level of the Wardens was in fact conferred upon a single Justice of the Peace. As to the encroachment jurisdiction, this was conferred by section X of the Act. In addition, a very general jurisdiction over all disputes connected with mining or the occupation of lands under a miner's right or lease or licence was conferred, also on a single Justice of the Peace, by regulation xv of the Regulations of 12 June 1855, subsequently regulation ix of the Regulations of 4 October 1855.

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13 Just, above n 4, 22.
14 Id 23.
15 Id 24-25.
16 Id 25-27.

608 By section XI of the Act, there was provision for the calling in of assessors, and by section XII for the award of compensation. The assessors could be called in at the option of either party or the Justice, but were not compulsory. Although the records of cases before the Justices are sparse, it would seem that assessors were called in in a large number of cases.[17]. There was difficulty in finding assessors in some cases.[18] Although this was not specified in the Act, the general view was that a majority decision was acceptable, but there was controversy as to whether the majority had to include the Justice.[19]

609 So far as encroachment disputes were concerned, section X contained the usual provision that the Justice was required to 'proceed forthwith to the spot'. Encroachment disputes were almost universally decided on the spot, but sometimes were heard away from the site, in one case at the Ballarat Court House and in another at the Dutch Harry Hotel in Buninyong. In the first case there was fear of intimidation and in the second the case was attended by at least 800 persons.[20]

610 There was no appeal from decisions of the Justice either alone or with assessors. However, in some instances the Executive would hear complaints from disgruntled disputants about decisions, and some decisions were overruled despite the

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17 Just, above n 4, 31.
18 Id 31-32.
19 Id 33-34.
20 Id 33.

lack of a legal basis for this procedure.[21] Statistics have been derived from the Resident Wardens' fortnightly reports which are available with 95 per cent completeness. They include both encroachment disputes and general disputes under the regulation. Those statistics are as follows.[22]

District	15 September to end 1855	1856	1857	Total
Sandhurst	131	527	650	1308
Avoca	69	346	618	1033
Ballarat	129	235	158	522
Castlemaine	80	98	96	274
Beechworth	12	12	12	36
Total	421	1218	1534	3173

III Establishment of local courts

611 The 1855 Act provided for the establishment of a Local Court in each mining district with power to make regulations about mining claims in the district and to adjudicate in partnership disputes involving less than £200. A Chairman was to be nominated by the Governor in Council, but there were to be

[21] Just, above n 4, 35-36.
[22] Id 37-38.

nine members elected every six months by holders of the miner's right or a lease in the relevant mining district.[23]

612 The miner's right was what replaced the earlier licences that had caused so much hostility. The miner's right was issued for a year at a cost of £1 only and conferred not only mining rights but a right to vote.[24]

613 Initially Local Courts were established in the districts of Avoca, Ballarat, Beechworth, Bendigo and Castlemaine.[25] By the time of their abolition, as of 1 January 1858, there were 21 Local Courts.[26]

614 There does not seem to be available any material that throws light on how these provisions came to be incorporated into the Bill and therefore the Act.[27] The reasons for the elective nature of the courts were not really anywhere spelt out. It has already been observed[28] that the system of election which was adopted was not in terms recommended by the 'Eureka' Royal Commission Report. The relevant passage in that Report was only as follows:

> With reference to mining differences, lists of jurors qualified with the Miner's Right should be made out, and from these the Executive might nominate magistrates for

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23 Just, above n 4, 37-38; Sharwood, above n 6, 519; Birrell, above n 9, 41.
24 Sharwood, above n 6, 513.
25 Birrell, above n 9, 41.
26 Just, above n 4, 39.
27 Sharwood, above n 6, 511-512.
28 Paragraph 602.

each Gold Field, and fill up places at the local boards proposed for framing by-laws suited to each district.[29]

615 While it is true that there was at this time in the United States a trend to elected judiciaries[30] (which has persisted to this day, so that at the present time most State courts in the United States are elected), there is not really any evidence that it was by adversion to United States practice that this principle was adopted.

616 It has been suggested that the reasons for the adoption of this principle were to overcome Governor Hotham's view that there should be a breach in the line of demarcation between the Commission and the police on one side and the diggers on the other.[31] Also it was hoped that the right to vote for the Court members conferred by the miner's right would encourage miners to take out the miner's right. There are figures recorded that suggest that the number of miner's rights taken out in the three weeks leading up to the election of the Local Courts were two or three times the number taken out in other weeks.[32] It was suggested in the Legislative Council debate on the Bill that there was an advantage in involving the miners in the process of adjudication to take advantage of their local knowledge and

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[29] Victoria, Gold Fields' Commission of Enquiry: report of the Commission Appointed to Enquire into the Condition of the Gold Fields of Victoria, *Report* (1855) Parliamentary paper, 1854-55, no. A 76, Paragraph 95.
[30] Just, above n 4, 43.
[31] Id 41.
[32] Id 42.

special experience.[33] Probably the best conclusion that can be come to is the conclusion by Sharwood:

> The decision to make the positions on the Courts elective (save for that of the Chairman) seems to have been just another instance of the government's general anxiety (at the prompting of the Gold Fields Commission) to meet the miners' political aspirations, which were now recognised as legitimate.[34]

617 The first election was for the Ballarat Court. It was called for 13 July 1855 to be directed from a dray near the Charlie Napier Hotel but there was insufficient space for the crowd and the proceedings were postponed to 14 July at Bakery Hill.[35] The Bendigo election commenced on 21 July 1855 with about 500 miners present, but the stage collapsed and the meeting was postponed for a week. On the following Saturday there were 1,500 holders of miner's rights present and the election was completed.[36] The first Beechworth Court was elected on 25 July 1855 and that at Castlemaine on 4 August 1855 with only some 90 miners present. At Alma near Maryborough on 25 August 1855, 500 miners were present to elect the first Avoca Local Court.[37] Elections had, of course, to be held every six months. The attendance at elections was very uneven and varied between several thousand and apathetic farce when the meeting was

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33 Sharwood, above n 6, 516.
34 Id 518.
35 Just, above n 4, 45; Birrell, above n 9, 42.
36 Birrell, above n 9, 43.
37 Ibid.

attended by no one but the Chairman.[38] At Ballarat the crowd was as great as 4,000-5,000 on 22 April 1856 and 3,000 on 14 July 1857.[39] On the other hand, there were elections where there were only a handful of electors or even, at one by election at Sandhurst, no candidates.[40]

618 The method of election also caused problems. It was not specified with any particularity in the Act.[41] Candidates were nominated and seconded and were permitted to say a few words.[42] The names of the candidates were read out one by one and they were declared elected if a majority was apparent.[43] The difficulty was that there were no stated criteria for the order in which the names were to go before the meeting. This meant that there might be nine declared elected before all the candidates were put up for a vote. The practice developed of retaining the names until all proposals had been made and choosing by lot the order for submission to the voters.[44]

619 Just has compiled a list of the members elected to the Ballarat, Beechworth, Sandhurst and Castlemaine Local Courts.[45] These show a substantial continuity of members from one court to another (eg, Yates was elected at all five elections to the

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38 Just, above n 4, 45.
39 Id 47, 46; Sharwood, above n 6, 521.
40 Just, above n 4, 47; Sharwood, above n 6, 521.
41 Just, above n 4, 49.
42 Id 48.
43 Id 48-49.
44 Id 49.
45 Id 51-53.

Ballarat Court). There was thus a substantial continuity of experience on the Courts.

620 It is apparent from the information available that most members were practical miners. Some were or became radical leaders on the gold fields.[46]

IV The functioning of local courts as adjudicators

Appointment and Role of Chairman

621 Under section XVI of the Act, the Chairman was appointed by the Governor with the advice of the Executive Council. There was no specification of any category of persons from among whom the Chairman might be appointed, but it was the practice to appoint a Warden or Sub Warden as Chairman. Initially all five Wardens were appointed as Chairmen of the Local Courts in their districts.[47]

622 The Chairman stood equivocally between the members, the Executive Government and the Warden.[48] The roles he performed included the conduct of elections to the Court and the submission of proposed regulations to the Executive Government. In court, his primary role was to regulate discussion and maintain order. There were times when the Court 'lapsed into a state of

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46 Just, above n 4, 54-55.
47 Id 59.
48 Id 60.

noise and confusion.' On some occasions the situation got so out of control that the Chairman was forced to adjourn the Court.[49]

623 The Chairman also possessed under section XXV of the Act procedural powers including the powers to summon and examine on oath any witness and to commit for up to 14 days any person refusing to be sworn. He could issue a warrant to compel the attendance of witnesses. He was given 'generally the powers of a court of petty sessions'.[50]

Role of Members

624 By section XX the majority of five or more members and the Chairman were entitled to exercise the powers of the Court. The procuring of a quorum was a frequent problem. At one stage the Castlemaine Court was unable to sit for seven weeks for lack of a quorum.[51]

625 So far as the confidence of the public in the Local Courts is concerned, the integrity of the members was not always unquestioned. This was particularly so in Ballarat because of the prevalence of partnership and company holdings of mining titles. There were certainly fears there that members of the Court might hold indirect interests in disputed cases that might come before

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49 Just, above n 4, 61.
50 Id 62.
51 Id 57.

it. Mr Baragwanath, rather than be open to the imputation of questionable motive, resigned from the Court.[52]

626 As stated above,[53] the Chairman was empowered by section XXV to examine witnesses on oath, but there is no doubt that members also participated in the examination.[54]

627 One area of controversy in the operation of the Courts was the question of whether or not lawyers were to be permitted to appear for the litigants. The Act was silent on this subject. The Law Officers in an opinion stated that they inclined to the view that Local Courts could not refuse to hear lawyers.[55] In fact, the Avoca, Ballarat and Castlemaine Courts all persisted for a time in refusing to hear legal representatives. The Ballarat Court stated:

> Convinced from long Experience that too many of the Members of the said Profession prostitute the high and legitimate functions of their honourable Profession by frequently screening the rascalities of a rogue and Bullying the honest suitor for Justice; men whose ignorance of law is only equatted (sic) by their impudent audacity; men who are blind to the principles of moral rectitude and deaf to the claims of Justice.[56]

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52 Just, above n 4, 57-59; Sharwood, above n 6, 522-523.
53 Paragraph 623.
54 Just, above n 4, 77.
55 Ibid.
56 Id 78.

Lawyers were admitted in the Bendigo Court from the start. Ultimately they were admitted to appear in all Courts.[57]

628 The payment of members was also a subject matter of controversy. The sittings of many of the Courts were numerous and lengthy. The first Ballarat Court met some 70 times and by February 1856 Sandhurst had met on 38 occasions and Beechworth on 36. As the members were mostly working miners they really could not afford to sit with this sort of frequency without payment. In August 1855 the majority of the members threatened to resign unless they received payment. The Colonial Secretary expressed the view:

> Their time is very much occupied in adjudicating on mining partners' cases and unless they are independent persons they cannot continue without remuneration.

The result was that arrangements were made in various forms at different times for the members to receive payment in respect of the cases they sat on.[58]

Jurisdiction of Local Courts

629 The principal judicial work of the Local Courts was the exercise of jurisdiction over partnerships. Section XXIV of the Act empowered the Courts to hear partnership disputes, dissolve

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[57] Just, above n 4, 77-78; Sharwood, above n 6, 524; Birrell, above n 9, 45-47.

[58] For the above, Just, above n 4, 55-57; Birrell, above n 9, 50.

partnerships and enforce the balance of partnership accounts up to £200.[59]

630 Initially, partnerships on the gold fields were most commonly of a simple kind with a few individuals agreeing to cooperate in the various duties connected with excavating, transporting and washing. From time to time or upon abandonment of the claim, proceeds would be divided. By 1855, however, more complex mining operations were leading to more complicated partnership arrangements, especially at Ballarat, where the expense of deep sinking rendered large partnerships necessary.[60]

631 One of several mysteries surrounding the provisions relating to the Local Courts is why the partnership jurisdiction was conferred on those Courts (or, indeed, the encroachment jurisdiction on Magistrates). No explanation of this seems to be given in the surrounding material.[61] There is not any evidence of a demand for that jurisdiction to be conferred on a body such as the Local Court. It could just as easily have been conferred on a Magistrate. Just suggests that perhaps the real reason was lack of deep thought on the part of the Government.[62]

632 However this may be, there is no doubt that the Local Courts entered into this jurisdiction with gusto, particularly the Ballarat Court. The exercise of the jurisdiction appears to have

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59 Just, above n 4, 80; Sharwood, above n 6, 514.
60 Just, above n 4, 80-81.
61 Sharwood, above n 6, 515.
62 Just, above n 4, 81.

been very popular. Withers, the nineteenth century historian of Ballarat, claimed that some 1,600 cases were adjudicated upon by the Ballarat Local Court during its existence.[63]

633 There were doubts concerning the extent of the jurisdiction, in particular if there was a partnership between a miner and a non-miner.[64]

634 While complete statistics as to the exercise of the mining partnerships jurisdiction are not available, figures are available that were provided to the Chief Secretary in August 1856. These show that the following cases had been heard in the Courts indicated from their inception to varying dates in August 1856.[65]

Court	Partnership Cases	Breach of Regulation Cases
Ballarat	502	9
Creswick	18	-
Raglan-Fiery	6	-
Creek	4	-
Steiglitz	21	-
Castlemaine	5	-

63 W B Withers, *History of Ballarat* (Niven, second ed, 1887 (facsimile ed, Queensberry Hill Press, 1980)) 82-92.
64 Just, above n 4, 82
65 Id 83; Birrell, above n 9, 54.

Blackwood	3	-
Hepburn	150	23
Sandhurst	2	-
Heathcote	32	35
Beechworth	1	6
Yackandandah	36	7
Avoca		
Total	780	80

635 The other important head of jurisdiction was that by section XXIII Local Courts 'shall and may take cognizance of any breach whether of omission or commission of any of the rules or regulations framed by the said court' and empowered the Court to impose a fine of up to £10 for the first offence and £20 for subsequent offences. Despite the words 'shall and may' the Local Courts did not themselves initiate actions for breach of regulation. It was left to the miners to proceed against one another, the complainant by section XXXI receiving a moiety of the fine. The complainant had himself to serve the summons. The jurisdiction over breaches of regulations was but little exercised in most Courts, although it did receive use in the Beechworth and Sandhurst Local Courts.[66]

636 Despite the thorough research of Just, Sharwood and Birrell they do not refer to any record of proceedings in Local Courts.

[66] Just, above n 4, 79-80; and see Paragraphs 634 above and 637, 639 and 640 below.

However, one such record does exist in the Victorian Archives, being a full record of cases decided in the Beechworth Local Court between October 1856 and December 1857. This is contained in a bound volume entitled *Record of Cases Heard in the Beechwoth Local Court October 1856 to December 1857*.[67] The *Record of Cases Heard* records the parties, the nature of the cases, the orders made and, where given, the evidence relied on. Just does in his Bibliography refer to an item in the Latrobe Library entitled *Minutes of the Beechworth Local Court*, but it does not seem likely that it is the same document. The only part of its contents recorded in his thesis relates to elections of members of the Court.[68] This is inconsistent with the *Minutes* being the same document as the *Record of Cases Heard*. Because of its importance and its unique nature a full summary of the cases in the *Record of Cases Heard* decided between October 1856 and March 1857 has been included in a Table of Cases in Appendix I to this thesis. This Table of Cases gives a conspectus of the cases decided over six months. The balance of the Record to December 1857 has been inspected and does not show a substantial difference from the cases set out in the Table of Cases.

637 The Table of Cases sets out the date on which a matter was dealt with; the type of matter; and the result recorded on that day. Where a substantive order was made, each case in the Table is assigned a number from 1 to 102. No number is assigned where the matter was adjourned. The Table of Cases thus shows

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67 VPRS 1022.

68 Just, above n 4, 52 and fnn 163 and 164.

that there were 102 separate cases dealt with in the six month period. Of those cases 20 were partnership cases and 82 were breach of regulation cases.

638 Of the 20 partnership cases, nine were decided in favour of the complainant;[69] seven were dismissed;[70] and four were settled.[71] In each of the cases where the complaint succeeded there was an order that the partnership be dissolved. This contrasts with the later situation in the Hill End Bench Books, where in no case was there an order for the dissolution or winding up of the partnership.[72] However, neither in the Record nor in the Hill End Bench Books was there any provision in the orders for the taking of an account or the determination otherwise of the financial liabilities of the parties out of Court. In both instances the Court itself simply made an order for the payment of any appropriate sum of money and determined, where necessary, how any property was to be held. This indicates the simple nature of the subject matter being dealt with.

639 Of the 82 breach of regulation cases, 16 dealt with cutting water races. Of these, ten were decided in favour of the complainant;[73] and six were dismissed.[74] 57 cases dealt with interfering with a supply of water. Of these, 32 were decided in

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69 Nos 15, 23, 28, 32, 41, 69, 80, 83 and 96.
70 Nos 4, 10, 34, 73, 87, 90 and 99.
71 Nos 5, 77, 84 and 89.
72 See Paragraph 935 below.
73 Nos 1, 6, 9, 14, 18, 21, 24, 54, 60 and 64.
74 Nos 2, 3, 20, 39, 52 and 53.

favour of the complainant,[75] 22 were dismissed,[76] two were settled[77] and the result in No 37 was unclear. Of the other breach of regulation cases, three dealt with taking forcible possession of a claim;[78] two dealt with an inefficient flood or tail race;[79] two dealt with putting a dam in a creek without sanction;[80] and in two cases the relevant regulation cannot be identified.[81] Where the complaint succeeded, a penalty was imposed in all breach of regulation cases. Costs were ordered in many cases, both successful and unsuccessful.

640 An interesting feature of the six months cases (October 1856 to March 1857) in the Table of Cases is the preponderance of breach of regulation cases over partnership cases, viz, 82 as opposed to 20. This is in sharp contrast with the figures in the table in Paragraph 634 above recording cases to August 1856, where the figures for Beechworth are given as 32 partnership cases and 35 breach of regulation cases over a period of some twelve months. Although the periods do not overlap, these figures seem inconsistent with those appearing from the Table. No explanation can be found of this apparent discrepancy. But there is no reason to doubt the accuracy of the Beechworth

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75 Nos 11, 13, 17, 19, 22, 30, 36, 42, 47, 48, 49, 58, 61, 62, 63, 65, 68, 70, 71, 72, 74, 75, 76, 78, 82, 85, 88, 94, 95, 100, 101 and 102.
76 Nos 12, 16, 27, 29, 31, 33, 35, 38, 43, 44, 45, 56, 59, 66, 67, 79, 86, 91, 92, 93, 97 and 98.
77 Nos 50 and 51.
78 Nos 7, 46 and 57.
79 Nos 26 and 81.
80 Nos 40 and 55.
81 Nos 8 and 25.

Record of Cases Heard, which appears on its face to constitute a contemporaneous record.

Accommodation

641 At Ballarat a special court house was built for the first sitting of the Local Court, but subsequently there were complaints of the total absence of furniture and equipment. At Yackandandah, Steiglitz, Waranga and Mount Ararat, the Local Courts had to sit for a time in hotels. At Waranga there was violence with drunken customers. At Taradale the Chairman declined to hold meetings in the hotel and resorted to a tent, having neither table nor seats. The Beechworth and Buninyong Local Courts sat in the local police offices.[82]

Relationship Between Powers of the Local Court and the Warden

642 There was considerable confusion as to what the boundaries between the jurisdictions were. This continued throughout the life of the Local Courts. In particular, there was confusion as to whether the jurisdiction of the Local Courts over partnership disputes was exclusive or whether the Warden could also exercise such jurisdiction. Furthermore, there was confusion as to whether the Local Courts could exercise jurisdiction over matters committed to the Warden, eg, encroachment disputes.[83]

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[82] For the above, see Just, above n 4, 63-65.
[83] Id 84-85.

V Regulations

643 The Local Courts were by section XVII of the Act given the power:

> to frame rules and regulations for determining the extent and position of any claim, the conditions on which it shall be worked, and the application and use of any machinery and such local rules and regulations relating to mining...as the members...shall deem most beneficial.[84]

644 This power was exercised by all Local Courts. Over the two and half years during which Local Courts operated, over 170 submissions of new or amended rules were made. The greatest number of individual submissions was from Beechworth, where there were 25 submissions and eventually 60 regulations. But at Ballarat, though the changes were less frequent, the code submitted at the end of 1857 contained 101 mining regulations.[85]

645 The Act also contained in section IX a general power for the Government to make regulations. The Act did not specify clearly the relationship between those regulations and regulations made at the instance of the Local Courts. This led to doubt and procrastination over the priority that was to be given to which regulations. The Government requested the report of Chief Gold Fields Commissioner Wright, who recommended that, bearing in mind the purpose of the Act, the local regulations should have

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[84] Just, above n 4, 65; Sharwood, above n 6, 514.
[85] Just, above n 4, 65-66; Sharwood, above n 6, 519.

priority. In October 1855, the General Regulations made in June 1855 were repealed and replaced by two sets. A set of rules which conflicted with some Local Court rules was "to have effect in the absence of rules of the various Local Courts."[86]

646 The regulations dealt with a large number of subject matters, some of which are discussed below.

647 **Shepherding.** This occurred when the mining was of a lead. The "shepherder" took a claim thought to be on the lead but sought to hold it inactive till the trend of the lead was revealed by active diggers. Only when it appeared likely that the lead would run through his claim did the shepherder sink a shaft. Regulations disallowing shepherding compelled immediate working of claims, although overall such regulations were not successful.[87]

648 **Frontage claims.** The "frontage system" was provided for in regulations in 1856. Previously all claims had been held under the "block system". Under this system a claim had a fixed area with bounds ascertained from the start. The frontage system was intended to deal with leads the exact location of which had not been determined. The key provision was that "every party of 12 men shall be allowed 34 feet of the lead irrespective of width, until they have found the gutter..." The location of the claim was

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86 For the above, see Just, above n 4, 66-68.
87 Id 69-70.

allowed to change where the gutter was found to change its course from that originally supposed. The regulations were originally passed in Ballarat in relation to the Frenchman's Lead and were allowed by the Law Officers. The frontage system spread to other leads on the Ballarat and other Gold Fields and were still of widespread application when the Local Courts came to an end. It continued to have application in various places throughout the period under consideration in this thesis and always caused extensive disputes and litigation.[88]

649 **Extent of claims.** The most common regulations dealt with the extent of claims which varied not only between districts but often from place to place within a district. This depended on the pattern and richness of the gold deposits, terrain and availability of water. In block areas, distinctions were drawn between such categories as "quartz claims", "dry sinkings" and "wet sinkings" and "creek claims". Sometimes distinctions were drawn according to the manner of working, eg, "claims for tunnelling" and "extent for cement sinking". Extended claims were allowed as a reward for successful prospectors.[89]

650 **Water rights.** The power to make regulations relating to water rights was unclear. Although some such regulations were

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[88] Just, above n 4, 71-72; R Brough Smyth, *The Gold Fields and Mineral Districts of Victoria* (John Ferres, Government Printer, 1869 (facsimile ed, Queensberry Hill Press, 1979)) 175-176, 459-462.

[89] See Just, above n 4, 73-74.

allowed in 1855 and 1856, in 1857 such regulations were not allowed.[90]

651 **Partnership and company agreements.** Regulations that required such agreements to be in writing were permitted though of doubtful legality.[91]

652 **Chinese.** Regulations discriminating against the Chinese population were disallowed.[92]

653 The use of the Local Court regulation-making power was generally successful. In Just's view:

> The Local Courts were able to introduce into the regulations a practical knowledge which would have been impossible through central regulations, yet a formality and certainty lacking in the earlier customary law.[93]

654 There was a potential for confusion in the large number of varying regulations enforced in different districts. However, there does not seem to be evidence that such confusion existed.[94]

VI Leases and other functions

655 Section V of the Act authorised the Governor to grant leases of auriferous lands and the matter was dealt with in the General

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90 See Just, above n 4, 74.
91 Id 75.
92 Ibid.
93 Ibid.
94 Id 76. But see Sharwood, above n 6, 525.

Regulations of June 1855. Unworked alluvial lands could be leased in portions not exceeding 10 acres or 40 acres where the locality was not upon an established gold field and of which the auriferous character had been developed by prospecting at the instance of the applicant. Hotham stated:

> it is contemplated to exercise this power principally if not solely in cases where from the nature of the labour, such as Quartz crushing or reworking old Gold Fields, it may require more capital and a greater number to unite together, to carry on the works, than in the ordinary mode of mining.[95]

656 The General Regulations of August 1855 included a provision that every lease application should be considered by the Local Court of the district before being entertained.[96] There was on many fields an opposition by individual miners to the grant of leases. The exercise by the Local Courts of the power was uneven. At Sandhurst many leases were recommended from the start. After initial refusal the Ballarat Court began at the end of 1855 to approve quartz leases cautiously.[97] The number of leases actually granted is contained in the table below.[98]

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95 Just, above n 4, 86.
96 Id 87.
97 See id 87-89.
98 Id 90-91.

District	Number of Courts	Quartz Leases	Alluvial Leases
Sandhurst	3	464 for 24,133 yds.	56 for 41 acres.
Castlemaine	6	14 for 338 yds.	118 for 95 acres.
Ballarat	6	25 for 1,206 yds.	33 for 54 acres.
Avoca	3	-	1 for 1 acre.
Beechworth	2	-	-

657 Section VIII of the Àct empowered the Governor to appoint surveyors. The need for surveyors was greatly increased by the institution of the frontage system. The Local Court was allowed a de facto power to appoint surveyors. By late 1857 there were 11 surveyors at Ballarat.[99]

658 The Ballarat Local Court in May 1856 attempted to take over from the Wardens the granting of claims. This regulation was not allowed but a regulation was allowed whereby the Local Court assumed control over claim amalgamations.[100]

659 From the outset, the Local Courts passed resolutions on a variety of matters as a way of exerting political pressure.[101]

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99 See Just, above n 4, 91-93.
100 Id 93.
101 Id 94; Sharwood, above n 6, 520.

VII Reform

660 By the 1857 Act[102] comparatively minor improvements were made to the jurisdiction of Wardens, whose appointment was now provided for by statute.[103]

661 However, more radical attention was given to the Local Courts, which were abolished. Their adjudicative functions were thus removed and they were replaced by Local Boards to carry out the rule making function in respect of the gold mining districts. The Local Boards continued to be elected by the holders of miners' rights and leases.[104]

662 The reasons advanced for the abolition of the Local Courts were two matters of constitutional principle. The first, stated by Premier Haynes in introducing the Bill, was that it was "bad that the power of making the law and administering it [was] vested in the same body."[105] Haynes specifically stated that he did not wish to cast any reflection on the mode in which the Local Courts had discharged their judicial functions.[106] The other matter of constitutional principle brought forward was the objection to the election of courts on the basis that elected judicial bodies were "liable to corruption".[107]

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102 21 Vic No 32.
103 Just, above n 4, 95; Sharwood, above n 6, 527.
104 Just, above n 4, 95-97; Sharwood, above n 6, 526-527.
105 Sharwood, above n 6, 528-529.
106 Just, above n 4, 96-97.
107 Id 97; Sharwood, above n 6, 528.

663 The judicial powers of the Local Courts were transferred to Courts of Mines established in each district to be presided over by a Judge appointed from barristers of at least five years standing. The Judges were in practice also the Judges of the local County Courts. Because of difficulties of service in the Local Courts, bailiffs were to be attached to the new Courts, attorneys were declared admissible, an appeal was provided to the Supreme Court and power was given to grant injunctions.[108]

664 The Bill received both public opposition and public support. In Ballarat there was a meeting at the Charlie Napier Hotel attended by 3,000 people in opposition to the reforms. On the other hand, a number of newspapers in Ballarat and elsewhere supported the reforms. The grounds of support were the constitutional unsuitability of the regime and the fear of partiality in the members of the tribunals. The grounds of opposition were support for the locally based nature of the tribunals. The reforms were in the event passed and the Act came into force and the Local Courts were abolished on 1 January 1858.

665 What conclusion can be come to about the success or otherwise of the Local Courts? There is no doubt that their regulation-making function was successful, as was acknowledged by its continuation in Local Boards created by the 1857 Act. Overall, there was a deal of satisfaction with their exercise of the

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[108] Just, above n 4, 97; Sharwood, above n 6, 527.

partnership jurisdiction, as attested by the number of cases brought.[109] However, some unease came to be felt about the exercise of judicial functions by elected Judges who were at least suspected of having indirect interests in the results of some proceedings. Their power of recommending leases was exercised in a wildly uneven fashion among various Local Courts[110] and was the subject matter of considerable controversy. Probably the best conclusion that can be come to is that of Withers, which was adopted by Sharwood:

> They were creatures of the times and served the times faithfully. As experiments they proved defective, but their work has been a part of our mining progress, and will remain an honourable portion of colonial history.[111]

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109 See Paragraphs 632 and 634 above.
110 See Table in Paragraph 656.
111 See generally Just, above n 4, 101-103; Sharwood, above n 6, 529-532.

Chapter Seven: Continued Operation of Commissioners in New South Wales from 1853 to 1866

Statutory Developments to 1862

701 Despite the account already given of the relevant New South Wales legislation in Chapter Four above, it is proposed to repeat here in this context the legislative provisions relevant to the adjudicative process in the subject period.

702 Regulation 9 for the settlement of disputes by the Commissioner in respect of claims in the regulations published on 6 April 1852 has already been noted.[1] The first provision contained in a statute was in the Gold Fields Management Act 1852 passed at the end of the same year. That Act[2] provided by section 13 for Commissioners to determine and mark the extent and position of claims. By section 26 it conferred jurisdiction on the Commissioners in the usual four-part pattern, that is, (1) upon complaint by a person licensed (2) that any person had encroached upon the holding of the complainant, (3) the Commissioner was required to proceed forthwith to the spot and to inquire into the case and on his own view or upon evidence determine the same in a summary way, and (4) if the complaint was justified, cause the person, his servants, implements, goods and chattels to be removed. A person who resisted or, after the Commissioner had determined the matter and pointed out the

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1 Paragraph 415.
2 Paragraph 416.

respective boundaries of the parties, renewed the encroachment, should upon conviction before any Justice of the Peace be fined £20.

703 There was a provision in regulation (11) of the Code of Regulations for the Management of the Goldfields published in the Government Gazette of 2 February 1853[3] that was the same in general terms but was wider in that it created power to resolve "any dispute arising in respect of any claim" (the same criterion as is fixed in regulation 9 of 6 April 1852). It also provided specifically for the giving of due notice to the party complained of.

704 The 1852 Act was replaced by the Gold Fields Management Act 1857.[4] That provided for the appointment of "officers" to determine and mark the extent and position of claims (section 11). Section 26 of the 1852 Act was replaced by section 13, which conferred jurisdiction in respect of encroachment complaints not on the Commissioner but on "any Justice of the Peace". However, the Commissioners were not removed and generally continued to perform the functions. The provisions concerning settlement in effect repeated the 1852 provisions, including the requirement 'to proceed forthwith to the spot'. The imposition of the penalty for renewal of encroachment was contained in section 19. Section 15 provided for the award of compensation not exceeding £100.

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[3] Paragraph 417.
[4] Paragraph 421.

705 Section 14 provided that assessors might be called in and sections 16, 17 and 18 made consequential provisions. It was this Act that by section 20 made provision for the first time in New South Wales, on the pattern of the Victorian Act of 1855,[5] for the establishment on gold fields of Local Courts.[6]

706 Section 30 provided for an appeal from a judgment of any Justice or Justices with or without assessors to the next Court of General or Quarter Sessions to be determined as provided for appeals from a judgment or conviction of Justices in Petty Sessions. The General Regulations published on 5 August 1858[7] repealed the regulations of 1853. The repealed regulation (11) was replaced by regulation VII, giving not Justices of the Peace, but the Commissioner, power to decide upon and make any necessary order in any dispute connected with gold field management the resolution of which was not otherwise provided for.

707 The 1857 Act was repealed by the Gold Fields Act 1861.[8] By section 13 the power to determine and mark the extent and position of claims was restored to "Commissioners". Section 15 conferred the jurisdiction as to encroachment or trespass on any Justice of the Peace being a Commissioner. The jurisdiction was conferred in the same four-part pattern as previously, including a requirement to "proceed forthwith to the spot". Section 16

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5 See Chapter Six.
6 See Paragraphs 712 & 713 below.
7 Paragraph 424.
8 Paragraph 425.

authorised a requirement by either party for assessors and the determination of whether gold had been unlawfully or improperly removed from such claim and what damage had been sustained by such encroachment or trespass. Section 17 authorised an order that such gold be summarily seized and delivered to the person encroached upon and that damages not exceeding £100 be paid by the person encroaching or trespassing (see also sections 18, 19 and 20). The provision imposing a penalty for renewing encroachment was contained in section 21.

708 Section 30 provided for the establishment of a Court of Appeal for any gold field or gold fields to consist of a chairman and two other persons appointed by the Governor, which was by section 31 to have power to entertain an appeal against any decision relating to any encroachment or trespass.

709 Section 32 for the first time conferred in terms on any Justice of the Peace being a Commissioner, jurisdiction touching any dispute or question regarding a mining partnership. It authorised the making of orders relating to the mode of working of any claim or the due division thereof. Section 33 provided that assessors might be summoned in any case.

710 An appeal was provided by section 38 in respect of monetary penalties or orders to the District Court.

711 By the General Regulations published on 7 February 1862[9] the former regulations were repealed. By regulation 24 specific provision was made for the orders that might be made by the Commissioner in relation to a partnership dispute.

The Local Courts in New South Wales

712 As noted above,[10] Local Courts were provided for in the 1857 Act. The provisions mirrored the Victorian provisions[11]. Section 21 invested the Local Courts when established with rule-making powers and section 27 with an adjudicative function in respect of partnership disputes. By section 21 the members other than the Chairman were to be elected. Local Courts were to be created only upon the petition of the holders of miner's rights and leases in the relevant district.[12] In fact, only four Local Courts were established under the 1857 Act, at Araluen, Nundle, Tuena and Adelong.[13] It is uncertain whether they did any adjudicative work; certainly no record of it can now be found. They played no important part in the adjudicative process in New South Wales.

713 In the 1861 Act the rule-making function of the Local Courts was continued, but their adjudicative function was not

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9 Paragraph 427.
10 See Paragraph 705.
11 See Chapter Six.
12 Section 20.
13 Respectively proclaimed on15 December 1857, 23 July 1858, 11 January 1859 and 2 August 1859. See Government Gazette 1857 volume II, 2311; 1858 volume II, 2311; 1859 volume I, 49; and1859 volume II, 1669. And see Lewis Lloyd, *The Sources and Development of Australian Mining Law* (PhD thesis, Australian National University, 1966) 297.

renewed. Courts were proclaimed at The Gulf, Kiandra, Burrangong (Young) and Lachlan (Forbes).[14] There is no doubt that at least the Kiandra Court exercised its rule-making powers.[15] Interestingly, the 1857 provisions were carried into Queensland on its separation from New South Wales, and a Local Court was established and operated in Gympie from 1868.[16]

Manner of Operation of Commissioners to 1866

714 By June 1852, there were in the field in New South Wales eight Assistant Commissioners, at Ophir, Turon, Meroo, Tambaroora, Tuena Creek, Major's Creek, Bell's Creek and Mongarlow, the last three near Araluen. The Assistant Commissioners were under the supervision of two District Commissioners, one for the five sites on the Western Gold Field and one for the last three sites on the Southern Gold Field.[17]

715 The duties of Commissioners in the field as to the settlement of disputes were typified by instructions given to Sub-Commissioners:

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[14] Respectively proclaimed on 27 May 1862, 6 June 1862, 22 July 1862 and 23 September 1862. See Government Gazette 1862 volume I, 981; 1862 volume I, 1035; 1862 volume II, 1321; and 1862 volume II, 1802. And see Lewis Lloyd, above n 13, 298.

[15] See the Government Gazettes for 13 June 1862, 28 November 1862, 17 February 1863, 12 May 1863 and 3 July 1863.

[16] Simon Chapple, *Law and Society Across the Pacific Nevada County, California, 1849-1860 and Gympie, Queensland, 1867-1880* (PhD thesis, University of New South Wales, 2010) 123ff.

[17] NSW Legislative Council V & P 1852 Papers Relative to the Gold Districts 1.

> You will, on the requisition of the parties concerned, settle all disputes amongst the diggers, it being understood that your decision, where, as above stated, both parties refer to you the matter in dispute, shall be final.[18]

716 There is a great deal of correspondence preserved in the New South Wales Archives passing from the Gold Commissioners in the field to the Chief Commissioner in Sydney and subsequently to the Lands Department. Similarly, while he remained in office, there is considerable correspondence passing from the Chief Commissioner both to Commissioners in the field and to the Colonial Secretary.

717 It is a significant fact that in all this correspondence there was little reference to adjudications by the Commissioners and in particular about the conduct and result of individual adjudications. This is despite the fact that it is clear that the settlement of disputes continued to be a large part of the duties and functions of Commissioners right through until they were finally relieved of the function by the Mining Act 1874. The correspondence contained from time to time questions by Commissioners in the field to their superiors and directions by superiors to Commissioners in the field. Thus, in relation to a dispute between registered claim holders and subsequent purchasers Commissioner Sibthorpe sought 'instruction' from his

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[18] Id 11.

superior Commissioner Maclean.[19] And J R Hardy requested Maclean at Araluen to put the applicants in possession of specified ground and wrote to Commissioner Green on 24 August 1852 requesting him to instruct Commissioner Bowman to go out and mark out and give possession to the applicant of a quartz vein claim.[20] These communications are an indication that the Commissioners on the ground were not operating as independent adjudicators performing a strictly judicial function but that the system was treating them as if they were performing administrative functions.[21]

718 The correspondence contained limited references to complaints about the determination of particular matters by Commissioners. These would appear in large measure to have been complaints about the results rather than of misconduct or impropriety on the part of the Commissioners. This is to be compared with the modern situation in relation to complaints made to the Judicial Commission of New South Wales concerning judicial officers, where frequently the complaints are dismissed as relating purely to the result and appropriate for appellate action, rather than complaints about the judicial officer.[22]

719 Whilst expressions of satisfaction with the operation of the system are not to be found, the inference may be drawn from the

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[19] NSWA 5/7945 letter 63/153.
[20] NSWA 4/421 letters 32 and 64.
[21] For a subsequent example involving T A Browne at Gulgong see Paragraph 1123 below.
[22] See, eg, Annual Report of the Judicial Commission of New South Wales 2009-10 34.

limited references in the correspondence to complaints concerning adjudications that the system was in fact operating satisfactorily and was in general terms so far as concerns its operations and results accepted by those it affected.

720 It seems clear that up to 1866 disputes were generally determined 'on the spot', as specified in the legislative provisions, and were determined without writing. By that is meant that, by and large, the initiation of the proceedings was not written and that the hearing (including the evidence when taken) and the rulings or results were not recorded in writing. In evidence before the 1852 Select Committee J R Hardy specifically stated that the Commissioners did not keep journals and that there was no record of their daily proceedings.[23]

721 The conclusions expressed above, based upon the thin materials available as to the conduct of dispute resolutions prior to 1866, are confirmed by a finding of the Royal Commission of 1870-71[24] as follows:

> Prior to the passing of the present [1866] Act the mode of proceeding in all cases of dispute has been merely this:-- The party aggrieved, or considering himself aggrieved, has made a verbal complaint to the Commissioner. Then, at a time fixed by the Commissioner, the complaint has been heard upon the ground, -- no evidence taken down in

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[23] See the answers to questions 146-148 on 22 September 1852 set out at Paragraph 538 above.

[24] As to which, see Paragraph 814 below.

> writing, -- and the decision of the Commissioner then and there pronounced ... The investigation takes place amongst very many disturbing influences -- in the open air, and not unfrequently in the presence of an excited crowd; and not only is the decision itself very often likely to be wrong, but, through the absence of any written evidence or of any record of the decision or the grounds on which it rested, there are no materials whereon to base an appeal which might set matters right.[25]

722 As noted by the Royal Commission, the lack of a record obviously created a problem if there was a complaint, review or appeal. If it were necessary, evidence had to be called from persons who were present, potentially including the Commissioner himself, as to what occurred on the occasion. This lack of writing was part of a system which was quick, cheap and easily accessible. How the system operated successfully in the absence of writing is discussed below.[26]

Descriptions of Proceedings Before Commissioners 'On The Spot'

723 Detailed descriptions of proceedings before Commissioners 'on the spot' are sparse and difficult to find. Of the examples that

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[25] New South Wales Royal Commission of Inquiry into the Working of the present Gold Fields Act and Regulations of New South Wales and into the best means of securing a permanent water supply for the Gold Fields of the Colony, *Report* (1871), Parliamentary Papers 1871/72 Volume 2, pp.135-372, Paragraph 41.

[26] See Paragraph 741 below.

follow, none was actually in New South Wales in the period from 1851 to 1866 – the period which is under consideration. One of them was in Victoria and two were in New South Wales after the period under consideration. However, in the circumstances, they can be taken as representing what occurred before Commissioners during the relevant period in New South Wales.

724 The first is an account given by C Rudston Read, a Victorian Commissioner, of proceedings before him in about 1852 at Myers Creek near Bendigo. On being summoned to adjudicate on a complaint respecting encroachments, he feared that to go amongst the diggers without five or six troopers was the height of insanity. However, having no troopers, he trusted to the general feeling amongst diggers of wishing to see justice done. He therefore proceeded to Peg Leg Gully where one or two diggers respectfully offered to hold his horse. He then proceeded:

> Following the man who had preferred his complaint in respect to disputed ground, a large crowd of men, numbering a thousand or more, immediately gathered together, but what was their object of so gathering? was (sic) it to pitch me neck and crop into a hole, if I did not give it in favour of the party who mustered strongest, and were determined that they should have it right or wrong? Was it to give evidence if required? Was it to endeavour to annoy me so as to *get a rise* out of me? or (sic) was it from curiosity to see whether I was inclined to favour one party, because they were what are termed a *swell* party, more than another who were not? ... In answer to these

> questions, I must say -- purely from curiosity (sic). Both parties would commence, perhaps, declaring it was theirs, but, I quietly informed them, that if they wanted me to decide impartially, they must speak one at a time; this was instantly complied with, and hearing both parties, and witnesses *pro et con*, and deciding to the best of my judgment, either by a division, or drawing lots, the case was satisfactorily settled, for it was not difficult to tell by a sort of popular feeling generally, if one *really* was in the wrong.[27]

725 He added that during the whole time he was a Commissioner at the gold fields, 'I always received the greatest civility from gold diggers.' Despite this, Rudston Read formed an overall view of gold fields society that was unfavourable. He was recorded elsewhere as expressing the view that 'one ought to escape from here and if possible leave Australia. This place is fit only for Negroes, Chinamen, deserting seamen and ex-convicts. It's not a place for a decent man.' He intended to leave as soon as possible. However, there is no reason to think these views were connected with his adjudicative functions rather than the general nature of the society.[28]

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[27] See C Rudston Read, *What I Heard, Saw and Did on the Australian Gold Fields* (T&W Boone, 1853), 159-160.

[28] Seweryn Korzelinski, *Memoirs of Gold-Digging in Australia* (University of Queensland Press, 1979) 87-88.

726 The next two instances described are of proceedings before T A Browne[29] at Gulgong in 1871 and 1872. The first, on 29 July 1871, was the settlement of a dispute in the sense now under discussion. It arose consequentially upon the marking off of adjacent blocks after a frontage claim had been blocked off. Scores of men had at dawn purported to stake out claims. A newspaper account continues:

> Through the gloom of the misty morning, appeared the dark form of three approaching riders, heralded by an escort of yelping dogs, halted at the edge of the clearing and surveyed the noisy and confused bedlam before them. It was the Commissioner and two troopers. The crowd suddenly parted, the fallen regained their feet, revealing a pile of pegs standing sheaf-like in each corner – the 'blocking-off' of No. 9 *Happy Valley* was over.
>
> Commissioner Browne had no easy task. In the exercise of his duty he was only required to take evidence and decide as to which four pegs had been placed first in the corner of the block claim, and to place those persons to whom the pegs belonged in possession of the claim.
> He did what he could. He rode around the extremities of the battlefield attended by the troopers and over a dozen dogs, carefully inspecting the pegs. He even counted them, making one hundred and sixty two in all.
> "Who put in the first peg in the north east corner?" he demanded.

[29] As to whom, see Paragraphs 1101-1109 below.

> "I did."
> "No, I did; it was me, Captain."
> "I put in first peg, Massa," sung out old man Ned.
> "No, no, my peg," yelled a tattooed Maori, brandishing his war club, and showing his sharpened teeth.
> "Damn the lot of you," roared out the irascible Commissioner, charging right among the excited crowd. "Get home all of you, and mind that not a sole (sic) stirs the surface till I give leave. How the devil am I to tell who is the first man? I know no more than Adam. Anyhow, I shall reserve judgement until tomorrow morning. Come up to the camp at ten o'clock and I will there and then deliver my decision. In the meantime, no-one touches the ground with axe, shovel, or pick, or I shall know the reason why."[30]

727 The following morning at ten o'clock at his office he held a ballot of all the contenders. Four names were drawn out of the ballot box and he adjudged those four men to be the legal occupiers and shareholders of the block off No 9 Happy Valley. As well as the above account from the *Gulgong Guardian* there is an account by Browne himself of these events in one of his novels, *The Miner's Right.*[31]

728 The second proceeding before Browne of which an account is given was not in fact the settlement of a dispute in this sense

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[30] See *Gulgong Guardian* 7 July 1871.
[31] Rolf Boldrewood, *The Miner's Right – A Tale of the Australian Goldfields* (Macmillan, 1891) 32-34.

but his ruling on whether a frontage claim was in possession of payable gold so as to justify the conversion of the area to block claims, such as were the subject of the last mentioned dispute.[32] Browne visited the area and announced that he would return the following Monday to make a determination. The account in the *Gulgong Guardian* continues:

> At precisely ten o'clock on the following Monday, the Commissioner accompanied by Inspector Medley, and a couple of well-armed troopers, rode up to the shaft of the *Home Rule* prospectors. The scene was changed somewhat since his visit of a week ago, a red flag proudly fluttered from a lofty pole in front of the claim, a crowd of two thousand eager, earnest soles (sic), gripped with strong passions of greed and anxiety, surged around the group in a tense and uneasy silence. On a new and presumably rich lead it was not unusual to see such a crowd, but rarely was there so much feeling shown as here.
>
> "I shall send down two miners to examine the wash, I need to satisfy myself if payable gold exists to begin with," yelled the Commissioner, standing in the stirrups as he scanned the sea of faces. "Here, you two boys go down and send up a couple of dishes of washdirt. Then we shall see if it's all worth fighting about."
>
> Two stalwart miners stepped forward – one of them called Geordie – a middle-sized but muscular specimen slipped his

[32] As to frontage and block claims, see Paragraph 648 above and Paragraph 1117 below.

> foot in a loop of the rope, closed his hands upon it above his head, and was rapidly lowered down. In a few minutes the rope came up empty, and the other miner descended.
>
> In less than a quarter of an hour a sample was brought to light, a collection of sand, quartz fragments, and gritty greenish clay. The miners having returned to the surface at once began to "pan off" according to the recognised rule and practice. Dipping the full dish into the pool, the sand and clay gradually disappeared over the rim. At length there remained a narrow segment of darkish sand at the bottom of each dish, where plain for all to see was a streak of dull yellow particles, chiefly fine in grain, but sprinkled with coarser pieces, some of which were the size of wheat.
>
> "I declare the prospecting claim of the *Home Rule Lead* to be in possession of payable gold," said the Commissioner ...[33]

729 It remained for the Commissioner to determine whether the wash dirt was at a depth greater than 100 feet, in which case the lead would be declared to be 'on the frontage' and the existing frontage claims would continue to be valid. If the depth were less than 100 feet the lead would be declared to be 'on the block' and block claims would have to be marked out. On 18 May 1872 the *Guardian* reported that the Commissioner had again ridden out to the lead, this time with a surveyor and, after the shafts were measured, declared 'the *Home Rule Lead* to be on the block'. He gave the frontage claim holders 24 hours to mark out their block

[33] The account is contained in the *Gulgong Guardian* of 8 May 1872.

claims. This proceeding was said to have taken place in the presence of 5,000 men. Again there is an account by Browne of these events in *The Miner's Right*.[34]

730 Despite the general success of the system, there were occasional mishaps. Blainey records[35] an incident in 1853 in Victoria. At Reid's Creek on the Ovens, Assistant Commissioner Meyer went with six armed troopers to adjudicate in a mining dispute. He gave his verdict that one party should cease mining the disputed ground and sent two troopers with cocked guns into the hole to eject the intruders. One trooper slipped and his musket fired, killing a spectator. Men rushed to the spot, disarmed the police and pelted them and then smashed more firearms at the official camp. Although there were inquests and protest meetings concerning this quite serious incident, it does not seem to have had any prolonged consequences.[36]

731 The above accounts demonstrate a number of things. Where there was public interest in the dispute, the crowd present could amount to thousands. However, even where emotions were generally raised (as in the Home Rule events recounted above), there was no problem in the Commissioner being present

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34 Boldrewood, above n 31, 76-87.

35 Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 53. Blainey cites no primary sources.

36 See Carole Woods, *Beechworth: A Titan's Field* (Hargreen Publishing Company, 1985) 22–26, for a fuller account than Blainey's of the incident and its sequelae. Her sources were principally newspaper reports in the *Argus.* She cannot have been Blainey's source as her account postdates his.

unattended or attended by no more than one or two police officers. His performance of his functions was not interfered with by the crowd. His decisions were generally accepted even when unpopular.

The Rocky River Record

732 It has already been noted[37] that in general no written records were kept of these proceedings in New South Wales, unlike the situation in the Victorian Warden's Courts and Courts of Mines, where from the start a Register of complaints was kept in statutory form, in which, among other matters, the result was recorded.

733 In New South Wales there appears to be only one exception to this lack of written records that has survived. During 1856 the Commissioner at Rocky River near Uralla in the New England district kept in a leather-bound book a record of all disputes before him during a period of some two months.[38] This appears to have been a personal initiative of the Commissioner. Not only has it survived but it has been lodged in the New South Wales Archives. It is appropriate to record in some detail the contents of that book because it is unique in recording in any methodical way dispute resolutions by a Commissioner in New South Wales during the 1850s.

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[37] See Paragraphs 720 and 721 above.
[38] NSWA 4/5482A.

734 The book is labelled 'Record of decisions in Disputes as to claims, encroachments &c at the Rocky River Gold Field 1856'. The record is marked as having been 'opened 3 May 1856' and the last entry is dated 4 July 1856. The keeper of the record appears to have desisted after that: there is no question of a subsequent book having been filled in and then lost; the record simply stops at 4 July 1856 with the remaining pages in the book left blank. Each case is labelled with a name in the margin. There are 19 entries relating to cases, which are misnumbered in the book but which have here been numbered 1 to 19 for reference purposes. The entries vary in content but the general format is a short statement of the nature of the matter; the procedural steps taken; where evidence was given, a short statement of the evidence; and a statement of the decision. The entries are fragmentary, which leads to lack of clarity in the accounts given. Each entry is initialled E C M, but it has not been possible to ascertain the identity of the decision maker. In one or two cases the whole text of the note has been set out to convey the spirit of the entry. Accounts of each of the 19 entries are as follows.

1 Kyle v F Kelly 3 May 1856

This was said to be an encroachment claim where, on a view, the encroachment was evident and admitted by Kelly. Kyle was not pressing for damage. Kelly was 'informed that a repetition of a complaint and its substantiation would be followed by forfeiture of his claim.'

2 Monroe v Symonds 7 May 1856

This was said to be a dispute as to measurement of claims in vacant ground between disputants who had formerly been in partnership with others. Thirteen claims were applied for and Symonds claimed his share, but Monroe argued that Symonds had abandoned his claim for 14 days and did not pay his hired men. It was said that there was evidence in proof, presumably of these facts. The result was that 13 claims were measured to Monroe and party.

3 E Johnstone v Chas McKay – undated

This record is set out in full:

> Johnstone partner with McKay & Others complains that his share is refused to him and that he is ousted from his claim on the plea that he had abandoned – admits that he had a bad hand and was unable to work but offered to pay for a man to work in his place --
>
> McKay urges that Johnstone is a drunkard and took no steps to provide a substitute, that the greater part of the work done in the shaft already sunk has been done since Johnstone knocked off – willing to reimburse him his share of the expenses incurred from that time and to give him up

one of the claims now held by the party -- Expenses incurred as above by the party of 7 £21.13.4.

Johnstone to be paid £3 and to have one of the claims -- To be decided by lot he shall select or the party allot.

The party won the draw and allotted a claim.

4 G William – undated

This case was stated to be an application for claims dependent upon the settlement of Monroe v Symonds (2). It was said (not very clearly) that there were six in the party but four claims only could be measured and it was done accordingly.

5 Ashmore v Frazer and Co 23 May 1856

Ashmore was taken into partnership by Frazer. The statement as to the agreement between them is unclear as also the statement as to the work that actually took place. Ashmore claimed a third of the proceeds of the work. The case was submitted to the arbitration of Messrs Snow for the complainant and Kennedy for Frazer with Mr McLeod as umpire. They decided that Ashmore was not entitled to one third and Ashmore was informed accordingly.

6 Denton v Evans 28 May 1856

This was described as a dispute as to the right to new ground. The question was as to which of the parties had been working the

ground. A number of witnesses were examined as to what they had observed about who had been on the ground. Three claims to be measured to Denton [balance of decision illegible].

7 J Bornes v Morris & Parker - undated

This was described as a dispute as to encroachment. It is stated that the parties were in partnership but separated and Bornes took up new ground adjoining the old claim on which he sank a shaft. Bornes complained that since he sank the shaft Morris and party had encroached on his claim. It was said he had no witnesses.

Morris and Parker admitted there had been encroachment on Bornes' claim, but said that the encroachment was made before Bornes took up the ground. They called as witnesses G O Wilkinson and Samuel Webb.

The decision was that the encroachment occurred before Bornes took up the ground.

8 Marshall v McDermott & Madden - undated

This was a partnership case. Marshall was in partnership with three others. There was debate as to the terms of the partnership agreement and debate as to whether Marshall had breached the terms of the agreement by not working at night. The decision was that McDermott was to pay Marshall 10/- and the partnership was to be dissolved, Marshall having no further claim upon the claims.

9 Old Paddy v Cox - undated

This entry is set out in full:

> Paddy took a claim for himself, took in two partners – they worked together for some days and dug out three load (sic) of washing stuff -- which yielded 30/- of gold – Paddy says that he was away a day and when he returned one of his mates who had stuck to the claim would not let him work --
>
> James Cox admits the partnership but says that after the produce of the Gold was divided Paddy & the other man Jones abandoned the claim as too poor – Jones has now returned and Paddy was away three days -- continued working the claim by himself and took in another man in the place of Jones -- Paddy did return then when he found the claim was being worked but has done no work in it.
>
> Claim to be divided into three. Paddy to have his third but not the part mined by Cox whilst he was away.

10 Wilson v Nicholls 2 June 1856

This was said to be a dispute as to new ground. Wilson asked to have the claim measured to him but Nicholls objected on the ground that it was one of five claims measured to him by the Sergeant. The ground remeasured was not included in Nicholls' ground and was measured for Wilson.

11 Hawke v Frazer 5 June 1856 (See also 13 and 15 below).

This was an encroachment claim – to appoint arbitrators.

Hawke named F Kelly and Frazer G Kennedy as arbitrators. The arbitrators were to appoint umpire and give him their award early next week.

12 Hunt v McKay 5 June 1856

This was an encroachment claim. Both parties had named arbitrators, Hunt naming Kelly and Tobin and McKay naming Jas Smith and R Ward. J Oliver was umpire. The arbitrators were to assess the value of washing stuffs taken out and deliver their decision at 11 o'clock Friday. In an apparently subsequent entry it was noted that the arbitrators did not appear but it was admitted that 337½ buckets of stuff had been taken out. This was valued by one party at 3/6 per bucket and by the other at 2/6. The decision was that 337½ buckets should be paid for at 3/- per bucket, totalling £50.12.6 with £2 costs against the encroacher.

13 Hawke v Frazer – undated (See also 11 and 15)

Case stood over from 5 June. The arbitrators could not agree and had chosen no umpire. Fresh arbitrators were appointed – E Kennedy for Hawke and I Crossin for Frazer, with Frank Temby as umpire.

The washing stuff, the subject of the case, was to be valued if there had been any encroachment, and a decision was to be given within two days.

14 I Dorman v Findland - undated

This was a dispute as to a claim said to have been vacated. Dorman stated that he took up the claim on 6 June with the consent of the original holder, one Lennard, and on the same day washed some stuff out of a heap of dirt from the claim. On Saturday he was preparing tools and on Monday he came to measure the hole and found Findland and party in the shaft setting up windlass. Considerable evidence was given as to what permission was gained from Lennard and who took up the claim and when.

The claim was given to Dorman.

15 Hawke v Frazer 18 June 1856 (sic) (See also 11 and 13)

Arbitrators Kennedy and Crossin found that Hawke had encroached upon Frazer about six inches by two feet, and Frazer had encroached upon Hawke about 20 inches by three feet. It was the Commissioner's decision that Frazer pay to Hawke the sum of £3 within 24 hours.

16 Lockhart v Mitchell Monday 16 June 1856

This was a dispute as to money owing for work performed and on contract.

The contract was to sink and bottom a shaft for £20, the money to be advanced as required. Lockhart had sunk 15 feet. He applied for money but only got £3. Lockhart was to have his claim separately and the partnership and contract were to be void.

17 Mitchell v 4 Chinaman (sic)[39] - undated

This was an encroachment claim. It was reported that the Chinamen had encroached and that 178 square feet of washing stuff had been removed, the stuff valued at 1 dwt to the bucket. The thickness of the washing stuff was estimated at nine inches, which gives two and a half buckets to the square foot -- making 445 buckets at 1 dwt per bucket, giving, at £3.11 per oz, £78.5.

The Chinamen were adjudged to owe that amount and were required to pay it forthwith. £65 was paid and the balance promised on Saturday 21 June.

18 Jones v Ryan 21 June 1856

This was an encroachment claim. A good deal of evidence was called as to whether there had been an encroachment and to what extent. The decision was that Jones had no claim upon Ryan.

[39] The designation of the defendants in this way rather than by name is a reflection of the hostility to the Chinese on the gold fields, as to which, see Paragraphs 252-254.

19 Le Breton v Chandler 4 July 1856

This was an encroachment claim. Arbitrators were appointed. The decision was that Chandler was to pay 1 oz to Le Breton.

735 It can be seen that the 19 entries involved 17 different cases. As was to be expected, these cases fell into three classes. One class was encroachment cases, of which there were 11, including the subspecies as to entitlement to new ground taken up (measurement cases). The second class was cases as to the abandonment of a claim, of which there were three. The third class was partnership cases or cases as to entitlement to payment for doing work on a claim, of which there were also three. Decisions were recorded in all cases.

736 Of the 11 encroachment or measurement cases, nine were determined by orders in favour of the complainant (Nos 1, 2, 4, 6, 10, 11 (including 13 and 15), 12, 17 and 19). Of these, in six the effect of the order was the allotment of a claim or claims, or part of a claim; in three there were orders for payment of money. In the other two cases (Nos 7 and 18) there were orders in favour of the defendant. In No 7 the decision was that the encroachment occurred before the complainant's entitlement arose and in No 18 that no encroachment was established.

737 The three abandonment cases (Nos 3, 9 and 14) were all determined in favour of the complainant and the orders were for the allotment of a claim.

738 Of the three mining partnership cases, two (Nos 8 and 16) were decided in favour of the complainant. In No 8 there was an order for the payment of a small sum of money combined with an order for dissolution of partnership. In No 16 the partnership was declared void. In No 5 it was decided that the complainant was not entitled to a share in the partnership.

739 As this record is unique so far as this period is concerned, it is impossible to say positively whether these cases are typical of the adjudicative work that was being done before Commissioners at the time. However, there is no reason to think they are not reasonably typical of what was occurring before Commissioners. Their content demonstrates how an instantaneous decision on the spot could be so useful.

The Success of the Unwritten System

740 The system of adjudication outside the ordinary common law courts is not of itself unique or even remarkable. H W Arthurs has written of the parallel operation of systems of adjudication at common law, and in less formal outside tribunals, both before and in the twentieth century.[40] Until the mid-nineteenth century much dispute resolution took place in traditional Local Courts and Courts of Requests. And after their assumption into the common law system there was extensive

[40] H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985).

creation of administrative and other outside tribunals in specialised areas. It is in this context that the establishment and operation of the gold fields adjudication system must be considered.

741 What was one of the most remarkable features of adjudication on the Australian gold fields was the continuation and success for 15 years and more in New South Wales of a totally unwritten system of adjudication. This is all the more remarkable when one considers that the system decided hundreds or thousands of disputes and that in many instances the decisions determined questions of title to mining tenements, some of which produced gold worth thousands of dollars. It is clear that the system was effective in the absence of recorded results. There is no express explanation apparent in the available material of how this was so. The conclusion to be reached in this regard would seem to arise from the nature of the communities in the context of which the decisions were made. These were clearly communities in which the participants were physically and socially close and interested in what was occurring around them, particularly in relation to mining. A reading of Boldrewood's novel *The Miner's Right* gives a lively sense of this. The book gives a fictional account of an Englishman venturing to the gold fields where he ultimately makes his fortune. The account purports to be based on the Victorian gold fields in the 1850s but is in fact based on the society of the Gulgong Gold Field while Browne was

there in the early 1870s.[41] It has been recorded that proceedings before the Commissioner were always observed by people in the community, in some cases by hundreds or thousands. The close community was always aware of the results and generally those results were acted on immediately. In these circumstances it would have been idle to assert, even some time afterwards, that the results were other than what they were. In any event, it seems quite plain that the system did work, even in the absence of writing.

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[41] R B Walker, 'History and fiction in Rolf Boldrewood's *The Miner's Right*' (1967) 3 *Australian Literary Studies* 29. This also appears from material set out in Paragraphs 726-729 above.

Chapter Eight: The 1866 Legislation and the New South Wales Royal Commission of 1870-71

The 1866 Legislation

801 Substantial amendments were made to the scheme of adjudications in New South Wales by two Acts in 1866. The first, early in the year, was the Gold Fields Amendment Act 1866 ('the amending Act').[1] Later in the year the Gold Fields Act 1866 ('the 1866 Act') replaced the 1861 Act and maintained the amendments that had been made in the amending Act.[2] The principal amendments were the transfer of dispute resolution jurisdiction from Commissioners to Justices of the Peace and the removal of the requirement to determine disputes 'on the spot'.[3]

802 Some background to the reasons for these amendments appears from questions asked and answered in the Legislative Assembly on Tuesday, 8 March 1864.[4] On that day Mr Dangar asked three sets of questions of Mr Wilson, the Secretary for Lands. In those questions he sought the amounts of salaries including expenses paid during 1863 to Gold Commissioners and Assistant Gold Commissioners for the South Western Gold Fields; the names of officers receiving salaries and where they were stationed; and the amount of fees received for miners' rights and business licences. He asked similar questions in relation to the Western Gold Fields and the Southern Gold Fields.

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1 Paragraph 431.
2 Paragraph 432.
3 See Paragraph 806 below.
4 *Sydney Morning Herald* 9 March 1864.

803 Whilst those answers are not set out in full, extracted in the table below are the relevant portions of the information given in answer to those three sets of questions as they appeared in the Sydney Morning Herald.

Name of Officer	Position	Location	Salary
South Western Gold Fields			
P L Cloete	Chief Commissioner	Goulburn	£500
R Lynch	Assistant Commissioner	Adelong	£450
A G Shadforth	Assistant Commissioner	Burrangong	£450
G O M Clarke	Assistant Commissioner	Burrangong	£450
R H Fitzsimons	Assistant Commissioner	Tumbarumba	£350
G J Meymott	Sub-Commissioner	Adelong	£275
A H Macarthur	Sub-Commissioner	Burrangong	£275
Western Gold Fields			
H Maclean	Chief Commissioner	Bathurst	£500

W Brown	Assistant Commissioner	Forbes	£450
W Johnson	Assistant Commissioner	Sofala	£450
H M Keightley	Assistant Commissioner	Rockley	£450
B Bridson	Assistant Commissioner	Sofala	£350
J Cox	Assistant Commissioner	Tambaroora	£350
J H L Scott	Sub-Commissioner	Hargraves	£275
T R Grenfell	Sub-Commissioner	Forbes	£275
J G King	Sub-Commissioner	Forbes	£275
L H Sibthorp	Sub-Commissioner	Stoney Creek	£275
T W Atkinson (resigned)	Sub-Commissioner	Windeyer	£252
Southern Gold Fields			
J H Griffin	Chief Commissioner	Braidwood	£500
O Harpur	Assistant Commissioner	Gulph	£350

D Dickson	Assistant Commissioner	Braidwood	£350
T A Cooper (resigned)	Sub-Commissioner	Araluen	£206 5s
S D Want	Sub-Commissioner	Kiandra	£275

In each case there were allowances for travelling expenses, forage and in some cases quarters. There were also salaries of the Commissioners' support staff. The amounts received for miners' rights and business licences were also given in the answers, but they are not relevant as they remained the same after abolition of the Commissioners.

804 In 1863 there were three Chief Commissioners, 11 Assistant Commissioners and nine Sub-Commissioners.

805 By the 1857 Act (replacing the 1852 Act) the jurisdiction as to encroachment was conferred upon any Justice of the Peace, not upon a Commissioner (section 13). However, by the 1861 Act (replacing the 1857 Act) the encroachment jurisdiction was conferred upon any Justice of the Peace being a Commissioner (section 13). Again, it was upon any Justice of the Peace being a Commissioner that a partnership jurisdiction was conferred, extending to 'any dispute or question regarding a mining partnership' (section 32).

806 The amendment made in 1866 by the amending Act was that by section 1 it was provided that any Justice of the Peace might exercise powers given by the Gold Fields Act 1861 to any Commissioner or any Justice of the Peace being a Commissioner. This dispensed with the requirement that gold fields disputes be heard by a Commissioner with expertise in gold fields law and practice. This dispensation was continued in the general provisions of the 1866 Act, which replaced the 1861 Act. In the 1866 Act the encroachment jurisdiction was conferred upon any Justice of the Peace.[5] Furthermore, for the first time in a New South Wales encroachment provision, the requirement to proceed to the spot to hear and determine a complaint was omitted. The partnership jurisdiction was vested not in a Commissioner but in a Court of Petty Sessions.[6] Such a Court would be constituted by two Justices of the Peace.

807 The indication implicit in the 1864 questions and answers as to the reasons for the removal of the jurisdiction from Commissioners to Justices of the Peace was made explicit in the parliamentary debates relating to the 1866 Acts. It was that expense could be saved by the abolition of Commissioners' positions and the use in dispute resolution of Justices of the Peace who were unpaid. There does not appear to have been a general economic downturn at this time. The major depressions were in

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[5] Section 14.
[6] Section 22.

the 1840s and 1890s.[7] Although there was some downturn in the pastoral industry in the 1860s,[8] Fitzpatrick makes no mention of a depression in the mid 1860s.[9] It must be concluded that the pressure for economy was not a result of depression but was in relation to the gold mining industry (see the reference below to 'extravagant expenditure on the gold-fields'). What would be called in these days economic rationalism was at work.

808 In the debate in the Legislative Assembly upon the amending Bill, Mr Donnelly, a member for a gold fields seat, opposed the transfer of the jurisdiction to Justices of the Peace. Mr Donnelly was reported as follows:

> [Mr Donnelly] doubted if justices would be found ready and willing to act in all cases as did the commissioners. It seemed to him to be merely a strong expression of that fit of economy with which they had all been seized -- (hear, hear.) -- and without a due regard to probable results. Hon. members were, he thought, liable to be led astray by the supposed 'extravagant expenditure on the gold-fields,' and did not always remember how great was the interest involved.[10]

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[7] Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 2nd ed (revised and abridged), 1949) 71ff and 253ff.

[8] See Paragraphs 1108, 1109.

[9] See Fitzpatrick, above n 7, 130 ff.

[10] *Sydney Morning Herald,* 23 March 1866.

809 Later in the year, in the debate on the substantive 1866 Bill, Mr Wilson, the Secretary for Lands, said in his Second Reading Speech:

> The next thing was the abolition of the office of commissioner, as it was at present understood. Within the last few months the Government had dispensed with the services of fourteen commissioners. ...[T]here would be a great reduction in the expenses of gold-fields, and he believed the day was not far distant when the Government could dispense altogether with the services of the commissioners.[11]

810 The Government intended to retain three Commissioners, one for the Northern, one for the Western and one for the Southern Gold Fields. Their duties were different from what they had been previously. They were collectors of revenue and their principal duty was to attend to the issue of miners' rights and the leasing of auriferous tracts of country.

811 Mr Donnelly again objected to the vesting of the encroachment jurisdiction in Justices of the Peace. His objections were recorded as follows in the *Sydney Morning Herald*:

> [Mr Donnelly] could not agree with the principle of appointing justices of the peace to settle matters of this kind, because justices of the peace for the most part were gentlemen who received nothing but the honour for their

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11 *Sydney Morning Herald,* 10 August 1866.

> services. It often happens that mining disputes in encroachment cases could not be thoroughly understood except by parties visiting the ground in dispute, or by the production of plans taken by competent surveyors. It was not likely that justices of the peace would, without remuneration, travel ten or twenty miles to examine the ground, and surveyors were not very plentiful. Considerable inconvenience must, therefore, result.[12]

812 The preponderance of evidence at the Royal Commission of 1870-1871[13] will be seen to demonstrate the prescience and accuracy of the views that Mr Donnelly expressed.

The Royal Commission

813 Before turning to the material relating to the manner of operation of the adjudicators between 1867 and 1874, consideration will be given to what appears from the record of the 1870-1871 Royal Commission as to the exercise of the adjudication process both prior to and after the 1866 amendments.

814 It is plain that by 1870 there was general dissatisfaction with the working of the mining legislation. The material available suggests that this centred on the leasing system and dispute resolution. On 4 March 1870 there was debate in the Legislative

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12 *Sydney Morning Herald,* 10 August 1866.

13 See Paragraphs 817-819 below.

Assembly which led to a resolution calling for the appointment of a Commission of Inquiry. In that debate Mr Church referred to 'a great difficulty in obtaining prompt and just settlement of mining disputes'. Mr Baker said:

> He knew of cases in which miners had to travel thirty or forty miles to get their disputes settled, and had to pay all the costs of conveying witnesses, &c.

Mr Wilson said:

> We had a Government who, under the plea of retrenchment, had taken away the competent persons sent to settle disputes.[14]

815 There was also correspondence in the press. Thus a letter from C N Emmett to the Editor of the *Sydney Morning Herald* complained that the

> unpaid magistracy cannot determine legally the rights or wrongs of many who unfortunately are litigants before them.[15]

An article in *The Empire* equally complained about the leasing system and the lack of 'competent and experienced persons' to administer the laws.[16]

816 The Royal Commission was appointed by Letters Patent dated 6 June 1870 issued pursuant to the address from the Legislative Assembly. The Chairman was J G Long Innes,

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14 See report in the *Sydney Morning Herald,* 5 March 1870.
15 *Sydney Morning Herald, 2* March 1870.
16 *The Empire,* 8 March 1870.

barrister. The remit was 'to make a diligent and full inquiry into the working of the present Gold Fields Act and Regulations, and to report upon the same, with … suggestions … for the framing of new Laws and Regulations for the Gold Fields of New South Wales.' The Commission took evidence between Tuesday 28 June and Tuesday 6 December 1870. It did not bring in its report until 31 October 1871. The Commission heard well over 100 witnesses.[17] Of those witnesses, more than 70 were miners.

817 The finding in Paragraph 41 of the Commission's Report as to the conduct of dispute resolutions by Commissioners prior to 1866 has already been set out above.[18] The Royal Commissioners considered this mode of conducting the proceedings to be unsatisfactory, not only from the surroundings in which they were conducted, but because the party complained of did not really know what complaint he was called upon to meet and it was difficult to give sufficient time to procure the attendance of witnesses.

818 The Commissioners in their Report stated that they regarded the central principle as being:

> That their adjudications shall be entitled to general respect and confidence is obviously the paramount consideration in the establishment of Courts of Judicature. The appointment

[17] New South Wales, Royal Commission of Inquiry into the Working of the present Gold Fields Act and Regulations of New South Wales and into the best means of securing a permanent water supply for the Gold Fields of the Colony, *Report* (1871), Parliamentary Papers 1871/72 Volume 2, 135-372, Appendix, 19-21.

[18] Paragraph 721 above.

> then of competent judicial officers is absolutely essential. And of hardly less practical importance is it, in the framing of a scheme for the satisfactory administration of justice, to adhere to the principles of *expedition, cheapness, simplicity of procedure,* and *effectiveness of decision* (emphasis of Commissioners).[19]

819 The Commissioners then went on to say that they had:

> the unanimous testimony of all the witnesses whom we have examined -- a host of witnesses composed not merely of miners, but of storekeepers, paid Gold Commissioners, stipendiary Magistrates, and ordinary unpaid Justices of the Peace, -- that the present plan of Judicature, established by and existing under the Act of 1866, is worse than useless.[20]

The plan referred to is that of adjudication by Justices of the Peace or inexperienced Magistrates, generally not on the spot.

820 While it is not quite correct that the testimony as to the unsatisfactoriness of the existing arrangements was unanimous, it was nearly so. The Report continued to state that the hearing and settlement of disputes by unpaid Magistrates 'is universally disapproved, and we think justly so.' The Court of Appeal was worse; it was unsatisfactory to have an appeal 'from one person who knows nothing about the matter upon which he has adjudicated, to two persons equally ignorant of the subject.' The

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[19] Report, above n 17, Paragraph 33.
[20] Ibid.

Commissioners continued to quote at length from the evidence of two witnesses. One was William Cleghorn, himself an unpaid Magistrate. The other was Harold Maclean, probably the person in the Colony most experienced as a Gold Commissioner. The reasons given for unsatisfactoriness of adjudication by unpaid Justices of the Peace were, as already appears, first, the lack in those Justices of any expertise in the difficult and complicated subject matter; secondly, the reluctance of those Justices to act, arising, no doubt, in part from their distaste for performing a function for which they were so ill equipped. [21]

821 As Mr Maclean said:

> These gentlemen are, for the most part, unacquainted with the nature of the questions, and are indisposed to act. Gold-mining disputes are too troublesome and difficult to be dealt with voluntarily, and it is not to be expected that the unpaid Magistrates should devote the requisite time to the special study necessary. [22]

Mr Cleghorn's evidence was as follows:

> I am an unpaid Magistrate myself resident on a Gold Field and I strongly condemn the system of requiring or permitting unpaid Magistrates to adjudicate in cases of mining disputes. It is not fair either to the miner or to the Magistrate; for in the first place in the great majority of cases the Magistrate knows nothing about it; and, if he does,

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[21] Ibid.
[22] Ibid.

> he is required to do a great deal of very disagreeable work which he ought not be called upon to do. Such Magistrates are always liable to imputations of partiality and injustice, and no matter how fair they really may have been, many people, and certainly the losers, will think and say otherwise.[23]

822 These extracts selected by the Commissioners showed, of course, that the predictions of Mr Donnelly in the debates on the 1866 Acts[24] were fulfilled to the letter.

823 The same conclusions were true of Stipendiary Magistrates who were merely *ex officio* Gold Commissioners.[25]

824 The following extracts from the evidence of other witnesses show the nature and unanimity of their opinions on the subject matter.

825 John Tom Lane, Police Magistrate at Orange: 'As a general rule the Magistrates themselves admit that they are not competent to adjudicate satisfactorily upon the many nice questions that arise; and indeed the Magistrates do not like sitting in these cases.'[26]

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23 Ibid.
24 See Paragraphs 808 and 811 above.
25 Report, above n 17, Paragraph 35.
26 Id, Paragraph 117.

826 I L Isaacs, JP: 'Speaking as a Magistrate, I know that unpaid Justices do not like to have anything to do with mining disputes, from not having any experience in mining matters.'[27]

827 J Milbourne Marsh, Police Magistrate of Macquarie, referred to 'the difficulty the miners have of getting Magistrates to take the case in the first instance. Speaking generally, Justices do not like to deal with cases of which they have no knowledge.'[28]

828 Hugh Bridson, Police Magistrate of Tambaroora referred to 'a great difficulty to get unpaid Magistrates to act -- from their want of mining knowledge and their dislike to adjudicate in mining disputes.'[29]

829 Thomas Frederick de Courcy Browne (who will be encountered again as the Editor of the *Gulgong Guardian* and critic of T A Browne as Commissioner at Gulgong[30]) stated: 'As a rule, and I speak from large experience, the decisions of Commissioners or Wardens give general satisfaction,' whereas with the decisions of unpaid Justices it was quite the reverse.[31]

830 William David Bourke, a miner, stated that unpaid Magistrates 'evince a great unwillingness to act.'[32]

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27 Id, Paragraph 120.
28 Id, Paragraph 129.
29 Id, Paragraph 133.
30 See Chapter 11 below.
31 Report, above n 17, Paragraph 4.
32 Id, Paragraph 24.

831 James Buchanan, Police Magistrate at Armidale and Commissioner in charge of Northern Gold Fields, said that unpaid Magistrates 'in their turn avoid acting as much as possible. The consequence is that disputes remain unsettled for a very long period, to the serious injury of the mining community.'[33] 'The system', he said, 'is most objectionable.'[34]

832 Mr M'Kay, Tumbarumba: 'Local Court of this district, so long as it lasted, was the perfect laughing stock of the mining community.'[35]

833 Mr Lynch, former Gold Commissioner South: 'Over and over again, unpaid Justices themselves have expressed to me their strong disapproval of the plan; and they evince a very strong disinclination to entertain such cases.'[36]

834 Alexander De Courcy Ireland, a miner: 'I don't think unpaid Magistrates should decide disputes, from their not being able or willing to give the necessary time or attention; and further, they are generally deficient in the requisite knowledge.'[37]

835 George O'Malley Clarke, Commissioner, Southern Goldfields and Police Magistrate for Young and Burrowa:

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[33] Id, Paragraph 38.
[34] Id, Paragraph 39.
[35] Id, Paragraph 71.
[36] Id, Paragraph 82.
[37] Id, Paragraph 93.

> I have never decided a dispute in court; and I think that the practice of hearing and settling them on the ground is, as a rule, preferable.
>
> I see no difficulty in obtaining evidence satisfactorily on the ground. Only the other day I heard and decided a case at Araluen, involving the right to several thousands of pounds. There was a good deal of conflicting evidence, and the most disturbing influence was the presence of the lawyers; yet I experienced no difficulty in procuring the evidence, in weighing it, and deciding upon it -- all on the ground.[38]

836 Whittingdale Johnson, Commissioner, Western Goldfields, had been a Gold Commissioner continuously since 1853 and was the senior Gold Commissioner. He said:

> The present system of deciding disputes has given very great dissatisfaction. In some cases the miners positively refuse to take the decision of the unpaid Magistracy; and within the last three months I have gone a distance of 100 miles from Bathurst to settle disputes, which, under the present act, should have been adjudicated on by the Bench of the district.[39]

837 John Rossiter, a miner: 'It is impossible to take evidence on the ground' and give attention to a case as can be done in a Commissioner's court.[40]

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38 Id, Paragraph 100.
39 Id, Paragraph 123.
40 Id, Paragraph 139.

838 The last witness, Charles Edward de Boos, a journalist very experienced in gold fields matters, characterised as the main cause of complaint 'that the settlement of disputes is confided to the local unpaid Magistracy, or to Police Magistrates, who know little or nothing of the business'.[41] De Boos stated that 'as large a proportion as nine out of every ten disputes' arise 'upon questions of boundary'.[42]

839 As appears above, the evidence was in effect unanimous that the system of adjudication by unqualified Justices of the Peace was unsatisfactory, for the reasons given. Implicit, if not explicit, in that evidence was that the adjudication should be by some paid and professional officer.

840 However, there were in the evidence widely differing views as to whether the proceedings should be on the ground, as was universal before 1866; or whether they should be in Court, with or without power for the adjudicator to take a view in every case. A majority of the witnesses who expressed a view were in favour of adjudication on the ground. There were 23 witnesses of this view.[43] Ten witnesses were of the view that the proceedings

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41 Id, Paragraph 132.

42 Id, Paragraph 153.

43 Id; specific pages are as follows: McEvoy, Miner, 43; Huggett, Miner, 44; Griffin, Magistrate and Gold Commissioner, 46; Fell, Solicitor, 47; Downer, Editor, 49; Bunce, Police Magistrate, 54; Blatchford, Miner, 57; Jones, Miner, 80; Vyner, Police Magistrate, 84; Nash, Miner, 95; O'Malley Clarke, Gold Commissioner and Police Magistrate, 100; Burns, Miner, 102; Vaughan, Miner, 103,108; Blair, Miner, 106; Stewart, Miner, 106; Eagar, Miner, 107; Callow, Miner, 110; McLachlan, Solicitor, 118; Wells, Miner, 126; McLeod,

should be in Court.[44] Seven witnesses expressed the view that there should be an option or discretion in each case.[45] The majority of the witnesses who expressed these views were miners, but there were also a substantial number of magistrates and gold commissioners, as well as solicitors, journalists and a publican.

841 Of the witnesses in favour of adjudication on the ground, some expressed the view that more difficult cases could be adjourned into Court. John Mather Burns expressed the view that Commissioners 'should be obliged to enter in a book a memorandum of the facts of each case, with a short abstract of the grounds of their decision.'[46] The Gulgong Committee Report contained the opinion that the evidence should 'be taken on oath with proper depositions.'[47] The satisfactoriness of the process on the ground was attested to by George O'Malley Clarke in the passage set out in Paragraph 835 above.

842 Among the witnesses preferring proceedings in Court, the following were expressed as reasons for that preference. Alexander Bruce said:

Miner, 135; Wyld, Miner, 137; Bloomfield, Miner, 140; Gulgong Committee Report, 145.

[44] Id; specific pages are as follows: Rose, Police Magistrate, 69; Wilson, JP and Miner, 44; Bruce, Miner, 78; Ireland, Miner, 93; McLennan, Auctioneer and Mining Agent, 103; Butters, Miner, 130; Bridson, Police Magistrate, 130; Westphal, Miner, 134; Rossiter, Miner, 139; Roberts, Miner, 146.

[45] Id; specific pages are as follows: Riley, Miner, 109; Torpy, Publican, 119; Whittingdale Johnson, Gold Commissioner, 123; Mongan, Miner, 136; Parker, Miner, 142; H Maclean, Commissioner, 150; De Boos, Journalist, 152.

[46] Id, Paragraph102.

[47] Id, Paragraph 145.

> The persons adjudicating would be less likely to be disturbed, the evidence could be better obtained and sifted, and altogether the decisions would be more satisfactory.[48]

John Rossiter's view has already been set out above.[49]

843 Although there was in the evidence an almost universal desire expressed for there to be a court of appeal from the primary adjudicator, there was considerable difference as to the form that tribunal should take. The most common view was that the District Court should be the court of appeal.

844 The Commission's recommendations of October 1871 were as follows: that instead of the large Northern, Western and Southern districts, the Colony be divided into smaller Mining Districts;[50] that each of these Mining Districts be under the charge of an official to be called the Warden, who would also be the Police Magistrate of the District;[51] that the Wardens, as a court of first instance, adjudicate upon all questions arising upon mining matters of every kind;[52] that these include all encroachment and trespass cases, all breaches of the Act and Regulations, all matters of contract or wrong between shareholders in a claim or lease (the amount of debt or damages to be limited to £100), and all partnership questions of every kind, whether during the continuance of the partnership or after its dissolution; that the

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48 Id, Paragraph 78.
49 Paragraph 837 above.
50 Report, above n 17, Paragraph 37.
51 Id, Paragraph 38.
52 Id, Paragraph 39.

Wardens also have power to grant injunctions, to appoint receivers and managers and to make all necessary orders for the working of claims pending the final settlement of disputes; and that for these purposes the Wardens be required to hold periodical courts, to be called Wardens' Courts. However, no provision was recommended for a Court of Mines with original jurisdiction at District Court level, such as existed in Victoria.

845 The Wardens' Courts were to have an entirely new set of rules.[53] All proceedings were to be instituted by the laying of a complaint and the issue of a summons to attend the Warden's Court.[54] The Warden was to have a discretion to conduct the investigation in Court or on the ground. If in Court, the Warden was to have a full power to have a view. Either party might demand that the evidence be taken in writing and in all cases a record was to be kept of the decision with a minute of the grounds for the decision.

846 Despite controversy on this subject in the evidence, it was recommended that provision be made that there might be assessors at the requirement of either party or at the instance of the Warden, the functions of the assessors to be limited to questions of fact.[55] The court of appeal should be the District Court,[56] the appeal being in the nature of a rehearing and, on disputed questions of fact, the Court might, if so desired, have the

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53 Id, Paragraph 40.
54 Id, Paragraph 42.
55 Id, Paragraph 43.
56 Id, Paragraph 46.

assistance of a jury of miners. Where the property in question was worth £200 or upwards, there should be a further appeal from the District Court to the Supreme Court.[57] The Warden should have power to state a special case for the opinion of the Supreme Court.[58]

847 The Commission's recommendations of October 1871 were introduced into Parliament some two years later in late 1873 and in substance embodied in the Mining Act 1874.[59] It will be seen from the above that the principal recommendations concerning adjudication were for the jurisdiction to be removed from Commissioners, Justices of the Peace and Courts of Petty Sessions and vested in Wardens' Courts. There does not appear to have been any particular change in political and economic conditions since the institution of the existing system of adjudication in 1866. There is no reason to think that the change was motivated otherwise than by the findings made by the Commission that the 1866 system had been a complete failure.[60]

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57 Id, Paragraph 48.
58 Id, Paragraph 49.
59 See this thesis Paragraph 436 above.
60 See this thesis Paragraph 819 above.

Chapter Nine: Continued Operation of Adjudicators in New South Wales from 1867 to 1873

Legislation

901 Legislative activity during this time was sparse, although it is to be remembered that it was during this period that the Royal Commission of 1870-1871 heard evidence and delivered its Report, the terms of which as to adjudication have been noted in Chapter Eight.[1] What legislative provisions there were will, despite the general account of legislation in Chapter Four, be repeated in this context, as at the commencement of Chapter Eight.

902 The New South Wales Goldfields Regulations of 24 September 1869 repealed the former Regulations. Regulation 32 provided that a Commissioner might determine any dispute connected with the working of any claim or occupation of any holding not otherwise provided for, and make such order as he might think requisite. This may seem a strange provision in view of the fact that under the 1866 Act, which continued in force, encroachment disputes were committed to any Justice of the Peace rather than to a Commissioner, and the partnership jurisdiction was vested in Courts of Petty Sessions. Regulation 33 provided for an appeal against any decision of the Commissioner.

903 The Regulations in New South Wales were again generally repealed and reenacted by the Regulations for Gold Mining upon

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[1] Paragraphs 844-847 above.

Crown Lands of 21 March 1872. This was, of course, after the Report of the Royal Commission of 1870-1871. By regulation 211, a Commissioner was empowered to issue an injunction upon the application of any person claiming to be legally or equitably interested in any land, claim or holding. A Commissioner was empowered by regulation 213, upon the application of any party to any suit or appeal, to appoint a manager of any claim or a receiver of any gold, quartz or other valuable material, the produce of a claim. Regulation 241 provided for an appeal against any decision of the Commissioner. Regulation 248 provided for a Commissioner to determine any dispute not otherwise provided for in terms that replaced regulation 32 of the 1869 Regulations. The appeal was presumably to a Court of Petty Sessions, although this is not clearly specified in the regulation. The appeal in encroachment proceedings was specifically committed by section 21 of the 1866 Act to two or more Justices in any Court of Petty Sessions.

Proceedings Before Adjudicators

904 The evidence as to what actually occurred in relation to the determination of disputes during these years is thin and uncertain. There is evidence, as discussed below, that in 1871 and 1872 these disputes, whether committed to a Justice of the Peace, a Commissioner or a Court of Petty Sessions, were being determined in court and recorded in the records of Courts of Petty Sessions in the same way as other cases within their jurisdiction. Unfortunately, there is not otherwise clear evidence

as to what was occurring. Whilst the Royal Commission Report[2] set out clearly the practice prior to the 1866 Act, it did not similarly state the practice that had been followed since that Act and it was not clearly stated in the evidence before the Royal Commission what the general practice was. While George O'Malley Clarke, Commissioner for the Southern Goldfields and Police Magistrate for Young and Burrowa, stated that he had never decided a dispute in court and that hearing and settling them on the ground was preferable,[3] there appears to be no other express statement by the various witnesses as to what course was followed. Looking at this evidence given in 1870, extracts from which are set out above,[4] one would probably infer that most of these cases were being determined in court, although that inference is far from clear. Furthermore, the obligation to proceed to the spot having been removed in 1866, judicial officials would have been more likely to determine the cases in their own court than to ride, perhaps many miles, to attend on the spot. This is particularly so given that a time had arrived when the likelihood of their doing so for other reasons had been diminished, particularly in the case of judicial officers who were not Gold Fields Commissioners. It does not appear that there was any pressure from the Supreme Court in favour of moving the hearing of proceedings into court. Indeed, the Supreme Court

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[2] New South Wales, Royal Commission of Inquiry into the Working of the present Gold Fields Act and Regulations of New South Wales and into the best means of securing a permanent water supply for the Gold Fields of the Colony, *Report* (1871), Parliamentary Papers 1871/72 Volume 2 135-372, Paragraph 41. See also this thesis Paragraph 721 above.

[3] See Paragraph 835 above.

[4] At Paragraphs 820-838 above.

appeared to favour the independence of operation of the statutory tribunals.[5]

905 The surviving Petty Sessions records have been examined to discover what, if anything, can be divined from them concerning the locus and manner of the determination of disputes. What has been discovered is far from comprehensive. The preservation of Petty Sessions records from this period is very patchy and, insofar as those records do not record the determination of such disputes in court, this does not establish that they were not determined in court, since most were determined by the relevant judicial officer not as a Court of Petty Sessions but as a persona designata, whether as a Justice of the Peace or as a Commissioner.

906 The books that do contain records are of particular importance. These include the Gulgong Summons Case Book for the early 1870s.[6] This Book shows that in 1871 and 1872 mining disputes of all types were being recorded in the court record in the same manner as ordinary summons cases and were being determined in court, mostly by T A Browne, who was at the time both the Police Magistrate at Gulgong and the Gold Fields Commissioner. The Book records the days on which the cases were listed, the names of the parties, the type of matter, eg, trespass, mining partnership dispute, appeal, disobeying order, wages or other dispute. It briefly records a result, whether by

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5 See Paragraph 1410 below.
6 NSWA NRS 3052, 4/6582.

way of adjournment or substantive order. The orders are recorded in the shortest possible way, as by recording the amount of an order for payment, the dismissal of the proceedings or the sustaining or dismissal of an appeal. What else can be divined from the Book is discussed below. The Book does not give any indication of the reasons for decision and does not contain any of the evidence given in any of the cases.

907 The books which are most illuminating on the subject matter are the Tambaroora Bench Books[7] and the Hill End Bench Books.[8] The relationship between what is recorded in the Tambaroora Books and the Hill End Books during the time they overlap is not entirely clear. Hill End and Tambaroora were only three or four miles apart. They have suffered different fates. Hill End has survived as a small town servicing the rural countryside and acting as a base for desultory mining and prospecting activities that are still carried on. Tambaroora, which was once at least an equally large settlement, has essentially vanished: only one brick chimney remains standing.[9] During the relevant period, one Magistrate, J W Lees PM, sat in both places. Furthermore, the Hill End Books indicate that during the relevant period the Court sat in Tambaroora rather than Hill End most of the time.

908 Be that as it may, these Books have great advantages over the Gulgong Book. The first advantage is that the Tambaroora

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7 NSWA NRS 3436, 4/6596-6599.
8 NSWA NRS 3078, 4/6599-6602.
9 Personal observation.

Bench Books cover the entire period from 1862 to 1880 in four volumes. They thus span the whole of the period 1867-1873, during which how and where the disputes were determined is under consideration. The Hill End Books run till 1889 but commence only in 1871, perhaps that being when mining activity in Hill End achieved some considerable volume. Tambaroora was the earlier settlement. The period spanned by the Tambaroora Books permits us to see what mining disputes were recorded as determined in court and in particular when the recording of disputes of the sort under consideration commenced, as opposed to prosecutions for mining without a miner's right or a licence, which were prosecutions in the Court of Petty Sessions in its ordinary jurisdiction, rather than the determination of disputes under the mining legislation.

909 The second great advantage is that the Tambaroora and Hill End Bench Books record not only the matters recorded in the Gulgong Summons Case Book but, where evidence was taken, set out that evidence. The practice at that time, as persisted in New South Wales Courts of Petty Sessions into living memory, was that evidence was taken by way of written depositions. In modern times they were typed by a depositions clerk as the evidence was given and then the typed deposition was signed by the witness.[10] The system in the 1870s was identical but for the absence of the typewriter. The court clerk hand wrote the evidence into the Bench Book as it was given and the witness signed it in the Bench

[10] Personal observation.

Book. This means that, possibly uniquely in New South Wales, there is a record of evidence in mining dispute cases contained in the Tambaroora and Hill End Bench Books.

The Gulgong Summons Case Book

910 As to the detail of what is revealed, the Gulgong Summons Case Book will be considered first. In analysing the types of cases recorded, an attempt has been made to eliminate multiple references to the same case where that was adjourned on one or more than one occasion. This attempt may not have been entirely successful, as the appearance of cases on different days and under different descriptions makes it difficult to determine whether later cases are identical with cases recorded earlier. However, a large number of entries have been eliminated which are clearly later manifestations of cases already recorded. Along the way many cases simply disappear in that they are adjourned to a later specified day but just do not appear in the record for that day or any other day subsequent to the original order of adjournment. The analysis that follows cannot therefore be regarded as precise, but it does give some feeling of the types and volumes of cases that were dealt with.

911 During the period from 28 March 1871 to 17 May 1872, 265 separate cases are identified, of which 96 were trespass or encroachment cases; 72 were mining partnership cases; 48 were appeals; 21 were characterised as 'disobeying order'; and eight related to wages. Of the remaining 20, 13 were described as a

'mining dispute' without further specification. As already noted,[11] T A Browne is recorded as having participated in the determination of the vast majority of these cases. Bearing in mind the assignment of the various jurisdictions involved, it would seem that the trespass or encroachment cases were determined by him in his capacity as a Justice of the Peace. The mining partnership cases, appeals, disobeying order and wages cases were presumably determined by the Court of Petty Sessions. The 'mining disputes' may have been determined by the Gold Fields Commissioner under the jurisdiction conferred by the 1869 Regulations.

912 Of the 96 trespass or encroachment cases, decisions appear to have been recorded in 37 cases. Of these 37, ten were determined by orders in favour of the complainant. Two of those were apparently prosecutions, because they resulted in fines imposed on the defendant. Of the other eight, there were orders in six for recovery by the complainant of the ground complained of in the form either of an order in terms that the defendant vacate the ground or of an order in terms that the trespass be abated. One was resolved by an order for the delivery of goods, otherwise dismissal of the information. The tenth case recorded the result as 'Verdict for Complainant adjudged to be a quarter shareholder conjointly with Reardon.'

913 The contents of the results apparently in favour of the

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[11] Paragraph 906 above.

defendant are more equivocal. Of the 27 in this category four were marked 'withdrawn'. A further four were marked 'no parties' and were presumably treated as dismissed. One was marked as 'settled'. Of the remainder, nine were marked as 'dismissed' and nine as 'verdict for the defendant'. It is hard to tell whether these terms indicated different results or were merely differences in the terminology of the person making entries in the record. Certainly the nine marked as 'verdict for the defendant' appeared in the second half of the record. There seems to be no doubt that the nine verdicts for the defendant followed hearings on their merits. One of them was recorded as 'Verdict for Defendant Awarded half the claim.' Two included the notation 'No Trespass Committed,' which is as close as any of the recorded results gets to giving a basis for the order. Whether the nine recorded as 'dismissed' were dealt with in that way after a hearing on their merits or on some other basis does not appear.

914 Of the 72 mining partnership cases, results were recorded in respect of 36. Of these, 19 were decided in favour of the complainant. With only two exceptions, the result was in the form of a verdict or order for the payment of an amount of money. In some cases, particularly later in the piece, this was recorded as the 'amount claimed'. Where specified amounts were recorded, they were between 10/- and £5, except in two cases where the amounts were respectively £13 and £27. In two cases the order required the defendant to acknowledge the complainant as a shareholder, in one case specified as an equal shareholder. It would seem that, although these were described

as partnership cases, the issues were generally both simple and comparatively small so far as the amount of the claim was concerned. The results did not include any declaration or order that a partnership be dissolved or wound up or provide any mechanism for winding up, indicating a lack of complexity in the issues.

915 The results were not in favour of the complainant in 17 of the partnership cases. These included one where the result was recorded as a verdict for the defendant and seven were recorded as dismissals, one adding 'no appearance'. There were three more marked 'no parties', which no doubt were treated as dismissals. There was one noted 'no jurisdiction Private Ground". There were four marked "withdrawn" or "not served' and one noted as settled. Presumably the verdict for the defendant was after a hearing on the merits, but it is impossible to tell whether or not the dismissals (other than that marked 'no appearance') were after hearings on the merits or on other grounds.

916 Of the 48 appeals, results were recorded in 25 cases. Of those, nine record that the appeal was 'sustained' without any further indication of the order made in lieu of the order appealed from. Of the 16 cases where the appeal was not upheld, ten were simply marked 'appeal dismissed'. In respect of three, the note recorded is 'No order'. One was recorded as 'struck out' and two were recorded as 'withdrawn'. These appeals were presumably appeals to a Court of Petty Sessions from a determination by a Justice of the Peace of an encroachment complaint under section

21 of the 1866 Act. It is possible that some were appeals to a Court of Petty Sessions from a decision of a Commissioner under the 1869 Regulations.

917 So far as concerns the 21 cases of disobeying order, results were recorded in 12 cases. Of these, five were decisions in favour of the complainant. In two of them the result was an order to remove an obstruction within three days. The other three were obviously prosecutions for the offence of disobeying an order and a finding for the complainant resulted in the imposition of a fine. Of the seven cases where the decision was not in the complainant's favour, five were simply marked as 'dismissed'; one was marked as 'No order'; and one was marked 'withdrawn'.

918 All of the eight wages cases resulted in a determination. In five cases, there was a monetary order in favour of the complainant for the unpaid wages. Two were marked 'no parties' and no doubt treated as dismissed. One was marked as settled.

919 Of the 20 'other' cases, it will be remembered that 13 were marked as 'mining disputes'. The others included prosecutions for various offences against provisions of the mining legislation. Of the 20 cases, results were recorded in respect of 14. Of these, four appear to be in favour of the complainant, three recording the result as 'Verdict for Plaintiff' but without further revelation of the content of this verdict. One was recorded as the imposition of a fine for some offence. Of the ten results not in favour of the complainant, three were marked as dismissed (including one

marked 'No parties') and two more were recorded as 'No parties', which were presumably treated as dismissed, although this was not specifically stated. Four cases were marked as withdrawn and one was recorded as being a 'decision for defendant'. Whether the three dismissed cases other than that marked 'No parties' were dismissed after a hearing on the merits or for other reasons does not appear.

The Tambaroora and Hill End Bench Books

920 Turning now to what appears from the Tambaroora and Hill End Bench Books, in the material relating to these Books frequent use was made of the terms 'pegging disputes' and 'jumping disputes'. 'Pegging disputes' and 'jumping disputes' are not terms of art and there may be some overlap between the two. Where these terms appeared in the records they have been adopted. In other cases of trespass or encroachment, cases have been assigned to one or other category. To the category 'pegging disputes' have been assigned cases where the challenge litigated was to the initial validity of the title, whether there was a dispute as to who had pegged in priority or whether the challenge litigated arose from the manner of pegging or application. To the category 'jumping disputes' have been assigned cases where it was not disputed that the title had been validly pegged and applied for in the first place, but it was contended that the holding had subsequently lost validity. This was in most cases by reason of abandonment or for failure by the holder to comply with the labour conditions, there being conditions attached to both claims

and leases that required continuous working for the title to be maintained. Where the competitor claimed there was such an abandonment or failure, he would overpeg the existing title and allege that, although originally valid, it had ceased to be valid at the time of the overpegging.

921 Remember that the Tambaroora Bench Books stretch back to 1863 and therefore reveal whether cases were being determined in the Tambaroora Court during the earlier part of the period under consideration. The first of those Books[12] in fact deals with a period before the 1866 Act came into force. However, it is worth noting that the first mining case recorded in that Book dated to 26 July 1865 and related to a charge of being on the gold fields without a miner's right. The next eleven cases all dated to January 1866, before either of the 1866 Acts was passed. They again related to charges of being without a miner's right or licence where one was required. It may be noted that all twelve cases in 1865/1866 were against defendants with Chinese names. Presumably they were the result of some sort of blitz against Chinese on the gold field, or at the very least against Chinese who were there without a miner's right or licence.

922 The next entries are in Volume 2 of the Tambaroora Bench Books.[13] The first relevant entries in this Book were in March 1868 and were again against Chinese defendants for mining without a licence. The first case recorded as being in the

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12 NSWA NRS 3436, 4/6596 1863-1866.
13 NSWA NRS 3436, 4/6597 1866-June 1871.

Tambaroora Court that related to a dispute of the sort we are concerned with was a case listed on 1 September 1868. As it is the first such case recorded, the case is set out in full. The evidence is not transcribed verbatim but presented in summary form:

> Charley Low Siu v John Gudgeon & Co
>
> Tambaroora 1 September 1868
>
> Gold Fields Jumping
>
> Charley Low Siu On the 19th inst. the Defendants jumped a quartz Claim of mine on the Red Hill near Tambaroora. I was only working with one mate. I never registered my claim.
>
> John Gudgeon On 19 August last I jumped the Plaintiff's claim in company with inter alios Richard Smith about 7 or 8 o'clock. I registered same about 8 or 9 o'clock. I took out R Smith's miner's right just before I registered the ground, not before I jumped the claim.
>
> John Lawler I am the Lock up Keeper and have charge of the Registration Book. On 19 August at 8 1/2 or 9am, Defendant came to Police Camp and asked me for a miner's right for R Smith, which I gave him. At the same time he registered a claim on the Red Hill for four men, saying he had jumped the Plaintiff's claim there.
>
> Jump disallowed.

It is interesting to note that the complainant or plaintiff in this case appears to have been Chinese and to have been successful.

923 Returning to Volume 2 of the Tambaroora Bench Books, there was a further complaint of claim jumping on 15 September 1868 which was again successful. This was at Tambaroora. The next entry after that was a prosecution of a Chinese on 16 June 1870 for working on the Tambaroora Gold Fields without a miner's right. There is nothing further until 20 April 1871 when a pegging dispute was recorded. As this is the first pegging dispute to be recorded in the Court, it will be set out in full, again bearing in mind that the evidence is a summary rather than a verbatim report:

> Thomas John Kerr & party v William Farr & party
>
> Police Court Tambaroora Thursday 20th April 1871
>
> Dispute as to pegging out a claim O'Brien's Gully 8th April '71
>
> Thomas John Kerr There were two men acting with me. On the eighth of this month, Saturday, we all three went on the claim. There was no-one there when we arrived in the morning about 9 or 10 o'clock. We took possession.
>
> For the Defence
>
> William Farr I pegged out this ground on Thursday last. We went on the ground on Saturday morning. I believe it was about 8 or 9 o'clock. I believe it was not ten o'clock. I did not see Kerr or his party on the ground that morning.
>
> Registration 71 cancelled. Kerr & party to have the ground.

Farr & party give notice of appeal.

There were a further three claim jumping cases recorded as having been dealt with in April and June 1871.

924 The next Book, Tambaroora Volume 3,[14] recorded nine cases of mining disputes listed to be dealt with during that period. Of these, so far as can be told, three appear to be claim jumping cases; three appear to be pegging disputes; two were wages claims; and one was a prosecution for mining without a licence.

925 Tambaroora was a busy field throughout the period covered by the Bench Books. An examination of the Books reveals that there was no record of determination in court of a mining dispute of the sort we are concerned with until 1868 and in that year only two, both in September. The regular recording of the determination of mining disputes in court appears to have commenced in April 1871. Thus, the recording of the hearing in court of mining disputes did not commence with the coming into effect of the 1866 Amendment Act early in that year or of the substantive 1866 Act on 1 January 1867. Similarly, it cannot be thought that the trigger was the recommendations contained in the Report of the Royal Commission of 1870-1871, since that was not published until 31 October 1871 and the regular recording of mining disputes determined in court appears to have commenced in about April 1871. The evidence given at the Royal Commission does not speak as to what occurred at this time, as that evidence

[14] NSWA NRS 3436, 4/6599 July 1871-15 November 1871.

was all given in 1870. It has already been noted that there does not appear to have been any pressure from the Supreme Court in favour of moving the proceedings into court.[15] Why, on at least two busy fields, namely, Gulgong and Tambaroora/Hill End, these cases began to be regularly recorded as heard in court in the first half of 1871 does not appear, and no explanation has been found for the procedure beginning at that time.

926 Turning now to the Hill End Bench Books, the first of these covers the period 17 November 1871 to 4 June 1872 (Hill End Cases 1).[16] The second covers the period 4 June 1872 to 28 November 1872 (Hill End Cases 2). [17] Hill End Cases 1 contains 29 cases relating to mining and Hill End Cases 2 contains 28 cases relating to mining. These cases have been extracted and assigned numbers 1 to 57 inclusive, for ease of reference. As already indicated, these Books provide a particularly significant resource because in cases where evidence was taken, the evidence was recorded. Because of the unique and revealing nature of this material, there have been included in Appendix II all of the cases from No 1 to 29 of the Hill End Cases 1 and, of the cases in Hill End Cases 2, Nos 53, 56 and 57. The reason for the inclusion of all of cases Nos 1 to 29 is that this presents a picture not otherwise available of all the mining cases listed in a particular Court during a period of some eight months and thus presents a complete picture of the mining disputes heard in that Court over that

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[15] See Paragraph 904 above.
[16] NSWA NRS 3078, 4/6599.
[17] NSWA NRS 3078, 4/6600.

period. It is to be noted that Hill End was an operating and lively gold field at that time. The reason for the inclusion of cases Nos 53, 56 and 57 is that they relate to partnership disputes and Hill End Cases 1 is rather thin in cases of partnership disputes.

927 The cases taken from the Hill End Bench Books as recorded in Appendix II are not a verbatim transcription of material from those Books. The cases have been summarised and, in particular, the evidence as set out is a selection and summary of such of the evidence as appears significant to the nature and decision (where recorded) of those cases. In relation to all of the cases, a reading of the material in the Appendix will give a feeling for the subject matter of these cases, the way in which they were conducted and the evidence that was led in them.

928 Nine of the cases in the Appendix contain a record of legal representation.[18] The possibility of representation in other cases is not excluded, because the facts as to representation or appearance were not recorded methodically. It may also be noted that there were Chinese parties in two cases, in case No 1 on both sides and in case No 4 on one side only. There is one case in which a woman was a party, namely, No 25. She was the complainant by virtue of having inherited a house built on an allotment by her late husband. The defendant claimed part of the land surrounding that house.

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[18] Nos 1, 2, 4, 7, 22, 25, 53, 56 and 57.

929 Of the 32 cases in the Appendix, it is to be noted that 23 were encroachment or trespass cases; six were partnership cases; one was a wages dispute;[19] and there were two others, being prosecutions for breach of regulations.[20]

930 In the 23 encroachment cases the complainants were successful (at least in part) in 13 cases.[21] With the exception of No 1, which was a flooding case and resulted in a monetary order, the other cases in which complainants were successful resulted in orders that determined in one form or another who should be in possession of the disputed ground. The complainants were completely unsuccessful in five cases.[22] No decision appears from the record in five cases.[23]

931 Trespass/encroachment cases can mostly be characterised as falling into the two classes of 'pegging disputes' and 'jumping disputes'. Case No 1 is a simple case of trespass by flooding. In Cases Nos 4 and 15 it is unclear whether they are pegging or jumping disputes. But the other 20 cases may be assigned to one or other of the categories 'pegging disputes' and 'jumping disputes'. Although, as has been said, there is no absolute precision about the assignment of the cases between these categories, of the 20 cases, six cases have been characterised as

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19 Nos 17.
20 Nos 7 and 28.
21 Nos 1, 2, 5, 6, 8, 9, 10, 12, 18, 22, 24, 26 and 29.
22 Nos 3, 4, 11, 14 and 15.
23 Nos 13, 16, 21, 23 and 25.

'pegging disputes'[24] and 14 cases as 'jumping disputes'.[25]

932 Comments on various cases are appended. No 13 was a pegging case. It was a case in which no decision was recorded. But it is of interest as showing the manner of proceeding where there was a dispute as to priority of pegging. Like this one, it is clear that such cases proceeded by the evidence of eye witnesses as to the pegging or competing peggings. In general terms, no more concrete form of evidence was available as to these events. As in this case, there can be little doubt that the evidence of the witnesses, often several in number, was frequently imprecise and conflicting. The conflict simply had to be resolved by the tribunal of fact in the same way as conflicting oral evidence concerning any event.

933 In a number of cases, both of 'pegging disputes' and of 'jumping disputes', the evidence was so clear that the decision was easy, and indeed the cases might well be characterised as 'try ons'. Such cases include No 12, a jumping case, No 18, a pegging dispute, and No 22, again a jumping case. No 26 and No 29, both jumping cases, also appear to be very clear cases against the defendant. The fact that disputes could be brought to court and seriously pursued on a very thin basis emphasised the need for the existence of a readily available dispute resolution mechanism.

934 Some jumping cases depended upon a defect in the holder's

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24 Nos 3, 5, 13, 16, 18 and 23.

25 Nos 2, 6, 8-12 (inclusive), 14, 21, 22, 24-26 (inclusive) and 29.

title. Thus, in case No 11 it was asserted by the challenger that the holder's title was claimed through transfers but that these transfers were never perfected. Largely, as already noted, jumping cases depended upon allegations of breach of labour conditions or abandonment of the title by the initial holder. It was not uncommon for the challenges to the titles to be rejected on the basis of acceptance by the tribunal of evidence that the titles had in fact been worked at the relevant times: see No 8, 9 and 10.

935 Of the six partnership cases included in Appendix II, results were recorded in five. These included dismissals in two cases.[26] It is not very clear from the material available what the basis of defence and dismissal was, but one would infer that in each case the partnership or the liability of the defendant under it was not found to be established. In the other three cases,[27] there was in each case an award against the defendant of a specific sum or sums of money. The issues of fact were simple if they could be resolved in this way. In no case was there an order for the winding up of the partnership or the creation of any mechanism out of court to take an account or otherwise determine the financial liabilities of the parties.

936 From the material in the Appendix, it appears that trespass/encroachment cases formed the large bulk of the cases in the period from March to November 1871. There were 23 such

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[26] Nos 19 and 53.
[27] Nos 27, 56 and 57

cases out of 29. These were in general determined by a Justice of the Peace under the encroachment disputes provision, although one or more were prosecutions for offences that would have been dealt with by a Court of Petty Sessions. The categories into which these cases fall have already been described. The cases were intermingled, whether the tribunal was sitting as a Justice of the Peace, a Gold Fields Commissioner or a Court of Petty Sessions. The second, though much smaller, category of cases was partnership disputes. It is apparent that these were of the simplest sort which could be resolved in the case of the complainant's case being made out by a simple award of a sum of money. The other small number of cases related to wages or prosecutions for breach of regulations.

Chapter Ten: The Establishment of the Victorian Courts of Mines and Wardens' Courts in 1858, Their Operation from 1858 to 1875 and Comparison with the New South Wales System

1001 The Victorian Local Courts were, as recorded in Chapter Six, abolished as of 1 January 1858. This was effected by the 1857 Act,[1] which created a system of Courts at two levels – Wardens' Courts at Magistrates Level and Courts of Mines at the level of County Courts.[2]

1002 The Court of Mines was created by section XIV to be held before a Judge who had practised as a barrister for five years. In practice, the local County Court Judge was also the Judge of the Court of Mines. The Court had a general jurisdiction over mining disputes as wide as a court of equity, though not at this stage jurisdiction to entertain actions at law. It had jurisdiction concerning any land occupied by virtue of a miner's right or comprised in any lease or any share or interest in a lease, or arising out of any contract respecting such land or share or interest, or respecting any gold to be taken out of any such land, or respecting the working of such land. Most importantly it had a partnership jurisdiction to replace that of the Local Courts. And it had a general jurisdiction over all questions and disputes which might arise between miners in relation to mining, including power to grant injunctions and appoint receivers.

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1 21 Vic No 32, Paragraphs 422 and 423.

2 Chapter Six, Paragraphs 660-663.

1003 By section LXXIII Wardens were to be appointed. They were given power by section LXXV to grant injunctions. By section LXXVI they were given encroachment jurisdiction in the usual form, but including a power to award to the complainant the amount of damage sustained.

1004 Both Courts of Mines and Wardens could sit with assessors.[3] Section LXXXIV provided for appeals from Wardens to the Court of Mines. The statutory provisions requiring records to be kept of cases both in Courts of Mines and before Wardens led to the creation of printed and bound record books that are generally still available.

1005 In Victoria, the Mining Companies Limited Liability Act 1864 conferred on the Courts of Mines jurisdiction to wind up companies registered under the Act. This jurisdiction was not dealt with and was left in place by the Mining Act 1865.[4]

1006 The next general Act in Victoria was the Mining Act 1865[5] assented to on 28 November 1865. This was enacted after and by reference to the Report of the Royal Commission on Mining 1862-3.[6] The Royal Commission was appointed as a result of pressure arising from dissatisfaction concerning the 1857 Act,

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[3] Sections XXXII and LXXVIII.
[4] See Paragraph 1006 ff below.
[5] 29 Vic No 291; see Paragraphs 429 and 430.
[6] See Report of the Royal Commission on Mining Papers presented to Parliament 1862-3, Volume 3, 727 ff. See also Paragraph 429 above.

particularly relating to the court arrangements.[7] The most important changes to the Courts were as recommended by the Commissioners.[8] By section 2 the 1865 Act repealed the 1857 Act. By section 81 it continued existing Courts of Mines and by section 82 provided for a Chief Judge of Courts of Mines, who should be a Judge of the Supreme Court, and for a Court of the Chief Judge of the Courts of Mines. It was to this position that Robert Molesworth was appointed. Blainey regards him as the most influential mining lawyer in Australian history.[9] As was said in 1897 by Sir Samuel Griffith,[10] '[i]t is a well-known fact that the mining law of Australia was practically made by the decisions of Mr. Justice Molesworth and the supreme court of Victoria.'[11]

1007 The jurisdiction of Courts of Mines was stated in most general terms as applying to subject matters in numbered placita and extended to all suits cognizable by a court of law or a court of equity. The powers of the Court were to make such orders as the Supreme Court could exercise or make. The Judge by section 171 might state a special case for the Chief Judge of Mines. By section 172 there was an appeal from the Court of Mines to the Chief Judge.

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[7] R Brough Smyth, *The Gold Fields and Mineral Districts of Victoria* (John Ferres, Government Printer, 1869 (facsimile ed, Queensberry Hill Press, 1979)), 388-389.

[8] Dr S H Z Woinarski, *The History of Legal Institutions in Victoria* (LLD thesis, University of Melbourne, 1942) 550-551.

[9] Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 57.

[10] Then Chief Justice of the Supreme Court of Queensland, subsequently the first Chief Justice of the High Court of Australia.

[11] Arthur C Veatch, *Mining Laws of Australia and New Zealand* (Government Printing Office, Washington, 1911) 97.

1008 Similarly, by section 176 existing Wardens were continued. By section 177 the Warden had the common law jurisdiction of the Court of Mines. By section 194 the Warden might grant a rehearing or state a special case for the Chief Judge of Mines. By sections 203 and 204 the Warden was empowered to grant an injunction after notice or to grant an injunction ex parte for seven days. By section 212 there was an appeal from the Warden to the Court of Mines. The Wardens' Courts retained jurisdiction in respect of encroachment cases and these provided the greatest bulk of their work.

1009 There were Courts of both sorts for each mining district. The examples that will be used are the courts of the Ballarat Mining District. It is not necessary to analyse the records for every year. In relation to the Warden's Court there will be an examination of the records of 1858, the first year of the Court's operation. This will bear comparison to the Rocky River Disputes record of 1856 in New South Wales.[12] There will then be an analysis of the records of 1871, which will bear comparison to the Gulgong and the Tambaroora-Hill End records of 1871-1872 in New South Wales.[13] So far as the Court of Mines is concerned, it is not possible to begin with the 1858 record. The reason for this is that, although the Register Books for the opening years exist and are preserved in the Victorian Archives in Melbourne, they are not accessible. They are severely water damaged and cannot be

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12 See Paragraphs 732 ff.

13 See Pagraphs 907-909.

opened. Access will not be given to them till they are restored – if and when that occurs. Faced with this, 1867, a year midway through the period, has been taken as an example. There is no reason to think the work of the Court of Mines varied greatly over the period under consideration.

1010 None of the Ballarat Register Books for Courts at either level records the evidence as do the Tambaroora and Hill End Bench Books in New South Wales,[14] nor do they even give a summary of the contents of the case as was done in the Rocky River Record of Commissioner's decisions.[15] They contain only the limited formal material set out below in respect of the Register Books that are analysed. That means that the material available in respect of the Victorian cases is much more limited.

1011 Turning to the 1858 Warden's Cause Book,[16] the cases were listed between 9 March and 29 December 1858. The Book was not yet in the statutory printed form. Each case had a one page hand written entry headed Ballarat with the date. It then had the names of the parties and a short statement of the nature of the case. There followed a verbatim record of the finding and the order and the signature of the Warden and the signatures, where they sat, of the assessors. Throughout the year the Warden was James Daly, except during the period 23 June to 24 August when it was Bernhard Smith. Cases that were adjourned

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14 Paragraph 909.
15 See Paragraphs 732 ff.
16 VPRS 1463/P/0000/1.

(presumably there were some) were not recorded in this Book.

1012 During the year there were 65 cases. Assessors sat in 28 of them. All of them were trespass or encroachment cases of some sort. Ten of them related to water rights. Of the 55 general trespass or encroachment cases, decisions were recorded in 48 cases. Of these 48, 30 were determined by orders in favour of the complainant. In these cases there were findings that the defendant had occupied or encroached on the ground complained of and orders that possession be delivered to the complainants. In some cases there was an injunctive order to protect the possession. In four cases damages were awarded, in one instance as high as £330. Of the 18 cases that were dismissed there were positive findings in 16 that no occupation or encroachment had occurred, a finding in one that there was not sufficient evidence and one was dismissed for want of jurisdiction.

1013 Set out by way of illustration is the entry relating to one of the general encroachment cases:

> Ballarat 9th June 1858
>
> Minute
>
> Fras Downer & 15 others v George Grey & others
> Encroaching Spring Diggings
>
> I find that George Grey and party have occupied the Claim of Francis Downer and party the Complainants and I do order that the said George Grey and party do abstain from

further interference with the said Claim and that possession of the ground so occupied shall be delivered to the said Francis Downer & party

James Daly Warden

1014 Of the ten trespass or encroachment cases relating to water privileges, decisions were recorded in all cases. Of these ten, seven were determined by orders in favour of the complainant. In these cases there were findings that the defendant had interfered with the water right complained of and orders restraining or curing the interference. In one case an agreement was recorded as to how this should be done. In another case £60 damages was awarded. In the three cases that were dismissed there were positive findings that no interference had occurred.

1015 Turning to the 1867 Court of Mines Book,[17] this is in the statutory printed form. This provides in a double page format for the number of the proceedings, the names and addresses of the parties, the date of filing, the nature of the proceedings, the order made, the date and result of the trial and the result of any appeal. During the year there were 59 cases. These fell into four categories that had separate numbering systems. The most diverse class was of ordinary actions of which there were 21, numbered 1 to 21. The most numerous class was company petitions, of which there were 27, numbered One to Twentyseven

[17] VPRS 720/P/0000/3.

(sic). There were nine appeals from Wardens, being appeals numbered I to VIII together with one transferred from another Court. There were two matters relating to Warden's Certificates, numbered C and D, but it is not intended to deal further with these.

1016 Of the 21 actions there were four encroachment or boundaries cases; ten were partnership or dividends cases; four were claims for an account of gold; two claimed transfers of property; and one was unspecified.

1017 Of the four encroachment or boundaries cases, two were dismissed (one of them on appeal). In the other two, boundaries were fixed in one and an order made dividing land and gold in the other.

1018 Of the ten partnership or dividends cases, four were dismissed or withdrawn. There is nothing in the record of these four cases that reveals anything of their subject matter. Of the six cases in which there was an order for the complainant there was only one that was a partnership dispute, in the other five there being monetary verdicts in the plaintiffs' favour for dividends owed. The partnership case was quite a sophisticated case, not surprising in Ballarat in 1867. The orders were that the partnership be dissolved, that the property be sold at an auction to be advertised, and that accounts be taken, which they subsequently were.

1019 Of the four accounts cases, one was settled, one resulted in an order for the taking of accounts, one was dismissed and one resulted in an order on appeal by Molesworth C J for the payment of £525 for encroachment. Of the two transfer of property cases, one led to an order for transfer and the other was dismissed. The 21 actions were a mixed bag indeed!

1020 The 27 company petitions generally sought either payment of a debt and in default an order for winding up or a winding up order simpliciter. Orders either for payment of the debt and in default an order for winding up or a winding up order simpliciter were made in favour of the petitioning creditor in 19 cases, but set aside in two, presumably because the debt was paid; the petition was withdrawn in three cases; and the result is unclear in five cases. Where there was a winding up order, a meeting to establish the proof of debts was recorded in twelve cases.

1021 Of the nine appeals, five were successful, including one on a special case stated to Molesworth C J, and four were dismissed.

1022 Turning now to the Ballarat 1871 Warden's Cause Book,[18] this is also in the statutory printed form. Unlike the 1858 Warden's Cause Book, it does record adjourned cases and an attempt has been made to eliminate multiple references to the same case as was done with the Gulgong Summons Case Book in

[18] 1463/P/0000/8.

New South Wales.[19] This done, there are 99 separate cases recorded in the Book.

1023 As in so many other regards with these 19th century records, lack of uniformity in the terminology used complicates attempts at comparison between what is revealed in different records. In the 1858 Warden's Cause Book all 65 cases were described as trespass or encroachment cases. And, as appears above, they all or virtually all sought possession of the subject matter. In the 1871 Book there were 99 cases, of which 64 were described as forfeiture cases and only 27 as trespass, encroachment or interference cases. There were in addition three partnership or dividend cases as well as one interpleader, three matters relating to injunctions and one inquiry.

1024 Unlike 1858, the 1871 encroachment cases, with only one exception, sought damages for encroachment or interference, rather than possession. Of the 27, eight were successful and resulted in awards of damages ranging from as low as 1/- to as high as £587. Of the 64 forfeiture cases, 30 were successful. In the successful cases the order was expressed as 'Order for forfeiture and possession to Plaintiff'. The only exceptions were in August and September when the form was 'Order for forfeiture' only, without the addition of an order for possession. One can only imagine that this had the same effect in practice with the Plaintiff entitled to possession after the forfeiture order.

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[19] See Paragraph 910.

1025 It would seem that at this time all possession cases were commenced by a claim for an order for forfeiture. The nature of these cases does not otherwise appear from the record, which has no further material relating to the content of these cases. It would seem that these 'forfeiture' cases encompassed both what are described as 'pegging disputes' and what are described as 'jumping disputes' in the context of the contemporaneous New South Wales material.[20] There is no doubt that the Victorian Wardens retained a full encroachment jurisdiction encompassing possession cases as well as damages cases. As the so-called 'encroachment' cases are restricted to damages cases, the claims for possession as a result of encroachment must be included in the 'forfeiture' cases.

Comparison of the New South Wales and Victorian Systems of Adjudication

1026 The 1856 Rocky River Record was of the decisions of a Commissioner made on the spot as all New South Wales decisions were well into the 1860s. The Victorian 1858 decisions were made after the establishment of a formal Warden's Court and were consequently made in that Court. Overall, the subject matter of the bodies of decisions was substantially similar, dealing with the right to possession of ground. The major exception was that the New South Wales decisions included a number of partnership decisions, since in that Colony the

[20] See Paragraph 920 above.

determination of such decisions was also committed to the Commissioner, whereas in Victoria it was generally committed to a Court, before 1858 the Local Court and from 1858 the Court of Mines.

1027 It is impossible to compare the content of the encroachment decisions, because of the lack in Victoria of material relating to their content in any detail. It is apparent from the form of the findings recorded in the 1858 Warden's Court Book that the allegation was in each case of the occupation of the complainant's claim. It also appears that the form of the orders made in favour of successful complainants was much more standardised than in New South Wales.

1028 What little can be told of the nature of the partnership cases in the 1867 Court of Mines Register has been recorded above.[21] Despite the thinness of the material, one would conclude that partnership disputes in Ballarat in 1867 were much more sophisticated than those on the alluvial field at Rocky River in 1856.

1029 A comparison will now be made of the 1871 Ballarat Warden's Court Register with the contemporary New South Wales cases, particularly the cases in the Gulgong Summons Case Book and the cases in Appendix II extracted from the Hill End Bench Books.

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[21] See Paragraph 1018.

1030 Comparing the Ballarat Register with the New South Wales Appendix, it is plain that claims for possession were at the heart of the jurisdiction in both Colonies. This flowed from the ongoing form of activity on the gold fields conducted through the pegging and working of small claims. This led to frequent disputes as to the validity and location of peggings, as well as to disputes as to whether claims were forfeited by abandonment or by non-compliance with labour conditions. There were in Victoria, under the heading of encroachment, a larger number of cases where the remedy sought for intrusion was damages, which were awarded in a number of cases. However, possession was the more general remedy. And, as was to be expected, there were a number of partnership disputes in New South Wales,[22] where these could be determined only at Commissioner level. It should be noted that it appears that the issues in these disputes were still simple, not surprisingly when Tambaroora/Hill End were still essentially alluvial fields. Although the range of cases in the Gulgong Book is more diverse, it too follows the general pattern.

1031 Probably the most remarkable thing about the pattern of determination in both Colonies is the way that New South Wales as well as Victoria moved by the early 1870s to determination of disputes in court rather than on the spot. This was effected in Victoria in 1858 by the establishment of a formal court system.[23] But the establishment of a court system did not occur in New South Wales until 1874 and on the spot determination continued

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[22] See Paragraphs 926, 935.

[23] As to the reasons for this, see Paragraphs 253, 254, 256 and 502 above.

to be virtually universal. As has been documented above,[24] the requirement for on the spot determination was removed in 1866, but there is no evidence that there was an immediate switch to in-court determination. It would seem that by about 1871 (though not much before) mining disputes were being listed in ordinary Petty Sessions lists and determined in court.[25] This does not appear to have been the result of any pressure from the Supreme Court.[26] Thus, although the legislative basis was still quite different in the two Colonies in the first years of the 1870s, the practice as to determination of mining disputes had become virtually identical before the enactment in New South Wales of the Mining Act 1874.

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24 See Paragraph 806.
25 See Paragraph 925.
26 See Paragraphs 904 and 1410.

Chapter Eleven: T A Browne and Gulgong

T A Browne

1101 Gulgong and T A Browne have been chosen as the subject matters of Chapters Eleven and Twelve for a number of reasons. The principal reason that Browne is significant is because, unlike most Gold Fields Commissioners, he was substantially at odds with his community, highlighting the generally affable relations that existed elsewhere. Gulgong was 'one of the last poor-men's rushes in south-eastern Australia'.[1] In 1872 and 1873 it was the most productive gold field in New South Wales.[2] As has been mentioned, Browne, who was Gold Commissioner and subsequently the first Mining Warden at Gulgong during most of the rush, was the novelist Rolf Boldrewood, and he incorporated material from the Gulgong rush in his novels *Robbery Under Arms* and *The Miner's Right*. Proceedings before him were recorded in the Gulgong Petty Sessions Book of Summons Cases.[3] The *Gulgong Guardian* newspaper closely followed Browne's doings and was critical of him and his poor relationship with the community, and provided detailed material concerning his career at Gulgong. The availability of this detailed material is another of the reasons for the attention given to Browne. The poor relationship culminated in the proceedings brought against the editor of the *Guardian* for criminal libel of Browne. These were

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[1] Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 85.
[2] Paul de Serville, *Rolf Boldrewood: A Life* (The Miegunyah Press, 2009) 156.
[3] See Paragraph 906 above and Appendix II.

reported in detail in *The Sydney Morning Herald*[4] and illustrated the public issues on the gold field.

1102 Thomas Alexander Browne[5] was born in London on 6 August 1826.[6] His father was a sea captain.[7] Browne voyaged to Australia in the *Proteus,* a small ship owned and captained by his father, arriving in Sydney on 21 September 1831.[8] His father rented a house in Macquarie Place[9] and commenced business as a whaler.[10] Browne was educated first at a Dame's school followed by Sydney College.[11] In 1835 his father built a house at Enmore to plans by John Verge, the well-known architect.[12]

1103 In 1837 the father moved the family to Port Phillip.[13] On the way he bought a run known as Darlington on the Campaspe River.[14] In Melbourne he acquired property for development purposes.[15] Browne was left at school in Sydney, but came to Melbourne in 1841.[16] The father sold Darlington and concentrated on a dairying property at Darebin Creek near

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4 See Paragraph 1211.
5 The family spelt the name "Brown" until 1864 when the "e" was added: De Serville, above n 2, 130. The version "Browne" will be used throughout in this thesis.
6 De Serville, above n 2, 15.
7 Id 10 ff.
8 Id 23-27.
9 Id 29.
10 Id 30.
11 Id 31.
12 Id 37.
13 Id 43.
14 Id 44.
15 Id 45.
16 Id 45, 48.

Melbourne.[17] In 1842 his affairs unravelled in the general depression.[18]

1104 Although Browne was only sixteen years old, he stepped into the breach.[19] In 1844 he took up an unnamed run in Western Victoria with stock from the dairy farm.[20] In the same year he took up Squattlesea Mere or The Swamp in the same general vicinity.[21] There he had a 'large circle of friends and acquaintances diverse in experience, background and tastes'.[22] His father behaved badly towards him and relations between them were severed.[23] All the father's property was finally lost, including the Melbourne home, and the whole family including Browne went to live at The Swamp.[24]

1105 In 1851 the advent of mining raised cattle prices.[25] Browne himself took cattle to the Ballarat Gold Field and butchered them for the Government officers and the miners.[26] In 1854 the Melbourne home was recovered, the family returned there, and Browne was elected to the Melbourne Club.[27]

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17 Id, 50.
18 Id 51.
19 Id 53-54.
20 Id 57.
21 Id 59.
22 Id 61.
23 Id 72.
24 Id 77.
25 Id 85.
26 Id 84-85.
27 Id 86-87.

1106 In 1855 Browne made £2,000 from The Swamp, but like his father Browne speculated.[28] In 1858 he purchased Murrabit, a grazing property in New South Wales, for £24,000.[29] In 1859 he sold The Swamp by a terms contract under which the purchase price was payable by instalments.[30]

1107 In 1860 he paid a visit to England and Ireland[31] and on his return in 1861 he married Margaret Mary Riley.[32] While in Ireland he spent time with his brother in law, Frederick (later Sir Frederick) Darley.

1108 In October 1861 the purchasers failed in the payment of instalments on The Swamp and it was forfeited to Browne.[33] In March 1863 he assigned his estate to trustees to avoid bankruptcy.[34] He lost The Swamp and Murrabit.[35]

1109 In 1864 a property known as Bundidjaree near Narrandera in the Riverina was acquired. Browne had at least four sisters[36] and the property was purchased in the names of two of his brothers in law. Browne went to manage it. It is unclear who provided the £2,900 for which the property was acquired.[37]

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28 Id, 89.
29 Id 93-94.
30 Id 96.
31 Id 97 ff.
32 Id 114.
33 Id 123.
34 Id 124.
35 Id 125.
36 Id 22, 23, 36, 46.
37 Id 132.

When he went to Narrandera he was appointed as a Justice of the Peace and sat frequently as a Magistrate.[38] In 1868 wool was down in price 25-50% and sheep were unsaleable.[39] As a result, Browne failed again and in 1869 left the district penniless.[40] In 1871 he obtained the appointment to Gulgong.[41] This was probably through Darley, who was in the Legislative Council and a friend of Premier Martin.[42]

Henry Tebbutt

1110 There are three further participants in events in Gulgong during the relevant period about whose history some short note should be made. The first is Henry Tebbutt. Tebbutt was an architect by profession who was born near London in 1817. He arrived in New South Wales in the late 1830s. In the 1850s he operated as a store keeper and auctioneer in Mudgee. He participated in the local council when Mudgee became a municipality in 1860, including being mayor in 1868. He became a Justice of the Peace and sat as a Magistrate in Mudgee, but in the 1870s sat regularly on the bench in Gulgong with or without Browne and moved to Gulgong permanently.[43] At that time a Court of Petty Sessions could in some circumstances be constituted by a single Justice of the Peace and one or more Justices frequently sat with the Police Magistrate.

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[38] Id, 137-138.
[39] Id 146.
[40] Id 146-147.
[41] Id; see Paragraph 1115 below.
[42] Id 154.
[43] Ruth Boyd-Davis & Barry Baldwin, *Diary of a Goldfield* (published by the authors, 2001), 48.

Thomas Frederick de Courcy Browne

1111 De Courcy Browne is the second person who needs to be noticed in T A Browne's Gulgong days. He was the founder and during those days was the owner and editor of the *Gulgong Guardian* newspaper. An Irishman, he had worked on a number of Australian gold fields including Lambing Flat, Gympie and Gilbert River and was well familiar with mining law and practice. He had edited a succession of country newspapers and was an indefatigable journalist and controversialist.[44] The *Gulgong Guardian* commenced publication on 18 February 1871.

Simon Belinfante

1112 Simon Belinfante was born in Amsterdam in 1831. He qualified as a doctor in 1858, although he was not a gold medallist of London University, as he claimed. He moved to New South Wales where he practised as a doctor. He studied law and had qualified as a barrister by 1870. In March 1871 he arrived in Gulgong where he practised both his professions. As an advocate he displayed an 'excitable and fiery character', and when not successful he 'displayed sinister outbursts of temper'.[45]

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[44] De Serville, above n 2, 157.
[45] Boyd-Davis & Baldwin, above n 43, 18.

Gulgong

1113 The Gulgong gold rush began in April 1870.[46] There were various leads on the Gold Field and the rush was accelerated by the discovery of the Black Lead in October 1870.[47] In 1872 the escort[48] took 134,455 ounces from the field. By 1878 production had declined and only 6,488 ounces were taken away.[49]

1114 Hannibal Macarthur, of the well-known family, was appointed as the first resident Gold Commissioner at Gulgong. He was appointed on 21 December 1870 but did not arrive until the middle of January 1871.[50] As well as being appointed Gold Commissioner, he was also appointed Police Magistrate, Clerk of Petty Sessions and Mining Registrar.[51] In March 1871 he died. His habit had been to work in the field from sun up to sun down, then in his office until midnight. It was thought that he died through overwork and anxiety. He had no proper premises and conducted his business as Mining Registrar through the window of his bedroom at Selff's Hotel.[52] During the interregnum after

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46 Brian Jinks, *Gulgong's Golden Days, The Gulgong Gold Rush of the 1870s, A Guide For Visitors* (published by the author, 2004 (reprinted 2006)), 2.
47 *Gulgong Guardian,* 14 & 28 October 1871.
48 See Paragraph 219 above.
49 R B Walker, 'History and fiction in Rolf Boldrewood's *The Miner's Right*' (1967) 3 *Australian Literary Studies*, 30.
50 *Gulgong Guardian,* 11 March 1871.
51 *Gulgong Guardian,* 18 February 1871.
52 *Gulgong Guardian,* 11 March 1871.

his death, Mr Johnson, the Gold Commissioner for the Western Gold Fields, returned to Gulgong to perform his duties.[53]

1115 News reached Gulgong in April 1871 that T A Browne had been appointed as Macarthur's successor to the offices of Gold Commissioner, Police Magistrate, Clerk of Petty Sessions and Mining Registrar.[54] He took up residence at the Guntawang homestead owned by the Rouses about five miles out of town.[55] He appears to have heard mining disputes in court interspersed with Petty Sessions summons cases.[56] He was faced, as Macarthur had been, with the lack of a court house or proper office or other facilities.[57] The regular departure of a gold escort from Gulgong to Sydney commenced in June 1871.[58] Browne went so far as to erect an office for himself at the police reserve at his own expense.[59] It was not until January 1872 that the court house was opened, but it still had no furniture.[60]

Criticism of TA Browne

1116 Although there was a suggestion that Browne had had some experience in an official capacity on the Victorian gold fields,[61] it is apparent from his history as set out above that he in

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53 *Gulgong Guardian*, 25 March 1871.
54 *Gulgong Guardian,* 15 April 1871.
55 Boyd-Davis & Baldwin, above n 43, 9.
56 See Paragraph 906 above and Appendix II.
57 *Gulgong Guardian,* 13 May 1871.
58 *Gulgong Guardian,* 10 June 1871.
59 Ibid.
60 *Gulgong Guardian,* 6 January 1872.
61 *Gulgong Guardian,* 15 April 1871.

fact had no experience at all in an official capacity on any gold field.[62] His only experience on the Victorian gold fields had been in butchering.[63] This was hardly a suitable background for the Commissioner on what was rapidly becoming the most productive gold field in New South Wales. Whilst there was no formal qualification required for appointment to the office of Gold Commissioner, those appointed usually had experience on a gold field or gold fields. Criticisms of Browne's performance in his offices commenced in the *Gulgong Guardian* by the middle of 1871.

1117 A great number of the disputes which had to be determined involved frontage claims and these were difficult because of their complicated nature and the uncertain state of the regulations concerning them, which were initially in the 1869 Regulations[64] and subsequently in the 1872 Regulations.[65] Frontage claims, as they existed in New South Wales at this time, arose from the 'laying down a right line along the supposed course of the lead, and the longitudinal boundaries of the frontage claims were laid off at right angles to such right line… These lines or boundaries, called the frontage parallels embraced the claim, and the owner of it might sink shafts and search for gold anywhere within the parallels which formed his boundaries'.[66] In New South Wales at

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62 See Paragraphs 1104-1109 above.
63 See Paragraph 1105 above.
64 See Paragraph 434 above.
65 See Paragraph 435 above.
66 Henry J Armstrong, *A Treatise of the Law of Gold-Mining in Australia and New Zealand* (Charles F Maxwell, 2nd ed, 1901), 33. See also R Brough Smyth, *The Gold Fields and Mineral Districts of Victoria* (John Ferres, Government

the relevant time, if gold was discovered less than 100 feet from the surface, the lead was declared to be on the block. If this occurred, the holder of the frontage claim was given a preference in marking out a block claim,[67] to which his rights were then confined, and the balance of the frontage claim could be marked out as block claims by other miners.

1118 An example of what occurred in such circumstances is the proceedings relating to the Happy Valley No 9 claim, which are discussed in Chapter Seven.[68] Whilst the block claims marked out were supposed to be given priority in accordance with the time of marking out – that is, the earlier the claim the greater priority it was given – on that occasion[69] the Commissioner found it impossible to determine as a factual matter the temporal order in which claims had been marked out, and gave the relevant claims priority in accordance with a draw from a hat.

1119 The *Guardian's* attitude to the Happy Valley decision appears to have been equivocal. In one place it appears to have accepted that, if the course followed was 'somewhat irregular', it was 'utterly absurd for the Commissioner to attempt to *hear* evidence on that point'.[70] On the other hand it subsequently expressed the view that it was 'imperatively necessary that the Gold Commissioner should at all times set the example of abiding

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Printer, 1869 (facsimile ed, Queensberry Hill Press, 1979)) 175; Walker, above n 49, 31.

67 That is, a square claim of regular size. See also Paragraph 728 above.

68 See Paragraphs 726 and 727.

69 See Paragraph 727.

70 *Gulgong Guardian,* 5 August 1871.

by the regulations when adjudicating on a mining dispute'.[71] It is at this point that it was stated, 'We do not take any pleasure in having a "go in" at Commissioner Browne. On the contrary nothing but a strict sense of duty compels us at any time to criticise his decisions'.[72]

1120 Certainly thereafter the *Guardian* made frequent criticisms of his conduct. These fell into two categories. The first was of delay or laxity in carrying out his duties. The second was of incompetence.

1121 As to the first, there was a complaint that there was a serious delay in hearing disputes. However in the same place there was a concession that this was caused in part by the multiplicity of 'petty offices' held by the Commissioner.[73] There is reference to a petition requesting a second Police Magistrate 'in order to divide the heavy duties now performed - or rather expected to be - by Commissioner Browne so as to allow mining disputes to be promptly heard'.[74]

1122 In relation to the second issue, from early on there were also criticisms of Browne's competence. Thus it was suggested that it would require 'an experienced officer, possessing a decisive character to satisfactorily discharge' his duties, and the implication was that Commissioner Browne did not meet this

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71 *Gulgong Guardian,* 12 August 1871.
72 *Gulgong Guardian,* 12 August 1871.
73 *Gulgong Guardian,* 19 August 1871.
74 *Gulgong Guardian,* 16 September 1871

requirement.[75] Similarly it was suggested that he allowed solicitors 'an untrammelled development' of verbosity and that if he exhibited more firmness in hearing cases on the bench 'much valuable public time would be saved, and its litigants would also save their money'.[76] There was a reference to 'the apparently endless litigation that is rampant on every lead containing gold, not wholly by reason of the defective regulations as the defective way in which they a (sic) administered'.[77] There was a complaint about his wrong decision concerning the capacity under the mining legislation of an eleven year old boy. Associated with this was a reference to 'the slovenly and peculiar manner in which mining disputes are now decided in every court on this goldfield'.[78]

1123 There was focus upon events relating to the Home Rule Lead and these exacerbated the criticisms of Browne. Browne's initial determinations concerning this matter are set out in Chapter Seven.[79] The problem arose because, having on 15 May 1872 declared the Home Rule Lead to be on the block, Browne subsequently varied his decision. After his original decision representatives of the frontage claimants proceeded to Sydney and made submissions to the Minister for Lands, Mr Farnell. They did this in the absence of, and Farnell did not hear, any opposing view. By subsequent communication, perhaps oral, and

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75 *Gulgong Guardian,* 12 August 1871.
76 *Gulgong Guardian,* 30 September 1871.
77 *Gulgong Guardian,* 18 November 1871.
78 *Gulgong Guardian,* 9 December 1871.
79 See Paragraphs 728 and 729 above.

certainly by a telegram, Farnell directed Browne to vary his decision.[80] The new decision that Browne gave on 14 June 1872 was 'that all ground from the prospectors to the southern boundary of No.9 frontage should be worked in block claims, and from No.9 northward the frontage should prevail'.[81] This illustrates the situation then prevailing that there was no real separation of powers and the Gold Commissioners were not as adjudicators totally independent of the administration.[82]

1124 Browne subsequently attended in order to lay down a baseline from No 9 north but the 'miners mustered about 1,000 or 1,200 strong, and determinedly refused to allow the base line to be laid, and hooted and jeered the Commissioner until he and the police rode out of sight'.[83] It was stated that it 'is an unfortunate circumstance - but one evidently that cannot be avoided - that we are compelled almost every week to complain of the maladministration of the regulations by Commissioner Browne ... It is absolutely necessary that the officer in charge should be a man of energy, decision and experience', [84] and by this it was implied that Browne was deficient in all these qualities. There was detailed specification of his failure to sit during ordinary hours and of his permitting of 'irrelevant examinations and pointless objections without a word of remonstrance'. The criticism continued, 'Censurable as Mr

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80 *Gulgong Guardian,* 3 August 1872.
81 *Gulgong Guardian,* 15 June 1872.
82 See also Paragraph 717 above.
83 *Gulgong Guardian,* 19 June 1872.
84 *Gulgong Guardian,* 20 July 1872.

Browne's want of energy is, his peculiar indecision is more so. He allows himself to be bullied or wheedled by clever designing persons in such a manner that the saying, "'he has no mind of his own" is so commonly declared.'[85]

1125 Despite the earlier prevention of the laying of a baseline north from No 9 shaft, Browne subsequently succeeded in having a baseline laid from No 8. On that occasion he read out a letter to himself from the Minister for Lands, 'announcing the decision of the Government and instructing him to lay the baseline as fixed upon. He said that his decision on June 14th was not his own: he acted under the instructions of the head of his department.[86] He held the same opinion now as he did on May 15th- that the *Home Rule* should be worked upon the block.'[87]

1126 There was a widely held view that the decision of 14 June and the subsequent laying of the baseline were invalid, as the Commissioner's decision of 15 May was final and he had no power to vary it. These propositions were tested by trespass actions which were determined in August by Mr Tebbutt. He ruled that there was no power to alter the decision of 15 May declaring the Home Rule Lead on the block and that the baseline on 8 August was illegally laid, the Commissioner having no power to alter it.[88]

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85 *Gulgong Guardian,* 20 July 1872.
86 See also Paragraph 1123 above.
87 *Gulgong Guardian,* 7 August 1872.
88 *Gulgong Guardian,* 24 August 1872.

1127 Although it appears this decision was upheld by the Appeal Court at Gulgong, the case was ultimately decided in favour of the frontage men by the Court of Appeal in Mudgee.[89] The decision of 14 June thus ultimately prevailed and Home Rule gradually settled back to work after a long period of confusion and idleness, which was from time to time referred to as 'the Commissioner's muddle.'[90] It was said of Browne, 'There was once a celebrity in England nick-named "Mr Capability Brown". Ought not New South Wales, being in the antipodes, to be proud of our "Mr Incapability Brown"? The Home Rulers should glorify in him for has he not thrust notoriety upon them.'[91]

1128 One particular area in which Browne received criticism from time to time was his use of injunctions. These were issued frequently 'upon the ex-parte application of any person who "pitches" a plausible tale to him of person or persons having trespassed upon a claim…the effect… is that men are for the most frivolous causes compelled to cease work and shepherd their claims until the commissioner makes an effort to hear the dispute.' This, it was said, was often not for several weeks.[92] It was asserted that 'the working of a claim is stopped for an indefinite period, without any lawful excuse being assigned.'[93]

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89 *Gulgong Guardian,* 4 September 1872.
90 Eg, *Gulgong Guardian,* 2 November 1872.
91 *Gulgong Guardian,* 6 November 1872.
92 *Gulgong Guardian,* 7 August 1872. See also *Gulgong Guardian,* 24 August 1872.
93 *Gulgong Guardian,* 13 November 1872. See also *Gulgong Guardian,* 15 January 1873.

1129 After the resolution of the Home Rule dispute, criticisms of Browne continued. 'We ask in all sober seriousness, if our present Commissioner is competent to discharge his duty? The one meanest impartial answer must be- No!'[94] There was specific criticism of his not sitting. 'The people of the Gulgong goldfield have borne his constitutional love of ease patiently for nearly two years, in the vain hope that this official would improve with age and experience, but it is sad to be compelled to say that he has not.'[95] Again, it was said, 'The mining regulations are far from perfection, but with an officer possessed of a fair share of practical ability and mining experience, the regulations could have been made to work in a fairly satisfactory manner. We know that the great body of the miners are disgusted at their repeated failures to have a change for the better initiated in the management of the goldfields, and no wonder.'[96]

1130 One particular incident where criticism was clearly justified was that in the hearing of a trespass case 'the commissioner who was the presiding Justice allowed himself to be sworn as a witness, and was therefore in the witness box leaving no Justice on the Bench. A question was asked him, and objected to and he therefore had to become adjudicating Magistrate while still a witness to decide whether he should answer the question.' This hearing was described as 'one of the most humiliating exhibitions we ever witnessed in a Court of Justice and furnished food for

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94 *Gulgong Guardian,* 13 November 1872.
95 *Gulgong Guardian,* 23 April 1873.
96 *Gulgong Guardian,* 10 May 1873.

brave reflection as to whether the administration of the law on this goldfield is to be a farce or a solemn proceeding.'[97] There can be no doubt that on any reckoning this was a most unsatisfactory piece of conduct.

1131 Ultimately there was a commission of enquiry into the administration of justice at Gulgong. The commissioners were J Milbourne Marsh, Police Magistrate at Bathurst, and Edmund Fosbery, Superintendent of Police. They conducted a public hearing in Gulgong in February 1874. They dealt with the conduct of both T A Browne and Tebbutt.[98] The report alluded to Browne's inexperience but exonerated him of any misconduct. However it found substance in specific charges against Tebbutt.[99] Tebbutt was subsequently removed from the Magistracy.

1132 Were the complaints about Browne justified? No doubt some of his conduct was erroneous.[100] Equally, it would seem that he was sometimes lax and unpunctual. However, his exoneration by the commission of enquiry indicates that he was not guilty of serious misconduct in his performance of his duties. It would seem that large factors in the constant complaints about his performance were that his decisions were frequently in conflict with views held in the community and the excessive work he was expected to carry out. The animosity of de Courcy Browne

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97 *Gulgong Guardian,* 2 April 1873.
98 De Serville, above n 2, 167.
99 Report of Commission of Enquiry into the Administration of Justice at Gulgong, Legislative Assembly B&P 1873/74, Volume 2, pp. 171-187.
100 See for example the instance in Paragraph 1130 above.

did not help. However, his performance in office must be regarded as unsatisfactory in that, unlike most Commissioners,[101] he was unable to gain and hold the confidence of the community that he served.

TA Browne as Novelist

1133 Browne commenced his career as a novelist whilst at Gulgong. He published more than a dozen novels, all under pseudonyms, principally Rolf Boldrewood. The first was serialized in the *Town and Country Journal* in 1873, the last was published in 1905.[102] Two only call for particular notice here. The first is *The Miner's Right* which has already received mention in this thesis because of its subject matter.[103] It was serialized in 1880 and published by Macmillan in book form in 1891. The other is *Robbery Under Arms*, which also had a gold fields background. It was serialized in 1882-1883 and first published in book form in 1888. It has remained in print ever since and is Australia's best known novel of the nineteenth century. His other novels have sunk from public view.

Browne's Career Subsequent to Gulgong

1134 In 1874 T A Browne, upon the creation of the Wardens' Courts by the Mining Act 1874, was appointed as the Mining Warden at Gulgong. Browne went as Police Magistrate to Dubbo

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101 See Paragraphs 550 and 717 above.
102 De Serville, above n 2, 378.
103 See Paragraphs 727 and 729 above.

in December 1880.[104] He spent eight months as Police Magistrate at Armidale in 1884.[105] He went to his final judicial post as Police Magistrate at Albury at the beginning of 1885. From there he retired in 1893.[106]

[104] De Serville, above n 2, 199.
[105] Id 220.
[106] Id 222, 247.

Chapter Twelve: Browne v Browne

Earlier Libel Cases

1201 The culmination of the conflict between Commissioner T A Browne and newspaper editor de Courcy Browne in Gulgong came with the criminal prosecution of de Courcy Browne for libelling Commissioner Browne. Before proceeding to deal with that case, reference should be made to two earlier libel cases against de Courcy Browne.

1202 The first was a civil action in the District Court at Mudgee brought by Tebbutt.[1] The case appears to have been resolved by an apology published in the *Guardian*.[2] The substance of the libel does not appear from either newspaper entry.

1203 The second libel case arose from a leading article in the *Guardian* concerning the Appeal Court. There was asserted 'the generally held opinion that the decisions are the result of deliberate partiality… as there is no denying the fact that charges of corruption have been freely made against this judicial tribunal.' It was further stated that:

> It had been asserted that the bench had been stacked both in Mudgee and Gulgong to hear particular cases… there is another far more serious charge that has been made, and that is corruption. It has been asserted that a Justice has been induced to travel from his home to sit in an appeal

[1] *Gulgong Guardian,* 13 March 1872.
[2] *Gulgong Guardian,* 16 March 1872.

> case for which he was to receive a 'sleeping share', if decided in favour of the party who tempted him. The tempter gained the appeal but we do not know if the temptee gained the reward of his prostitution.[3]

A criminal prosecution was brought for unlawfully and maliciously printing and publishing a 'false scandalous and malicious libel of and concerning the Bench of Magistrates at Gulgong and Mudgee.' On a subsequent occasion the newspaper stated as follows:

> The item simply stated what everybody has heard on the goldfield at various times, and in fact, what was contained in a memorial signed by nearly 2,000 miners and presented to the Premier and also published in the Sydney Morning Herald:
>
> > *"We repudiate most emphatically any criticism we have ever made on the administration of the law on the goldfield, that we have had any personal feeling or motive in so doing. The subject of the article was raised for the publics* (sic) *good and with a desire to remove if possible the discontent that has existed so widespread on this goldfield for many months past in the administration of the law. We have made no charge against any person, simply stating what has been asserted."*[4]

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[3] *Gulgong Guardian,* 4 September 1872.
[4] *Gulgong Guardian,* 11 September 1872.

1204 A public meeting of over a thousand people was held at Home Rule to support de Courcy Browne and a collection was taken up for his defence.[5] The committal proceedings were heard before T A Browne. He said that he would have preferred that some other Magistrate adjudicated but committed de Courcy Browne for trial.[6] The case came on for trial before Judge Josephson at the Mudgee Court of Quarter Sessions but was, on the application of the prosecution, stood over to the next Quarter Sessions.[7] The proceedings were brought by Tebbutt and McDonnell, who had sat on the relevant appeal court. Tebbutt apparently stated that he had no wish to prosecute de Courcy Browne.[8] Late in January 1873 the Attorney General announced that it was not his intention to proceed further with the charge of libel.[9]

Browne v Browne - The Trial

1205 The subject matter of the prosecution was a letter signed 'A Blocker' published in the *Gulgong Guardian* on 29 March 1873. The offending part of the letter was as follows:

> The conduct of Commissioner Browne is in keeping with his whole career. He is as clay in the hands of an unlicensed fellow of the law here. He consults him on mining disputes and like a half-witted being meekly does as he is told. He is a dummy on the bench and also off it. He first decided

[5] *Gulgong Guardian,* 21 & 25 September 1872.
[6] *Gulgong Guardian,* 14 September 1872.
[7] *Gulgong Guardian,* 18 December 1872.
[8] *Gulgong Guardian,* 25 December 1872.
[9] *Gulgong Guardian,* 1 February 1873.

against the Tammany but the screw is put on him and he changes his opinion - a fair example of this official's intellect. This unexplained change of opinion is very curious, some impute it to ignorance of the regulations in the first instance, but if after a year's experience in dealing with lease applications, he does not understand the correct mode of procedure, then it is time he was removed to some sphere of duty where he cannot perpetrate such mischievous blunders; but I deny his ignorance in this case. What he did was done by him deliberately. He has been proved guilty of prevarication and positive untruth. He misled the block claim holders as to the time and place of taking evidence, which resulted in their being prevented from replying to the evidence so surreptitiously taken by him. This is the official whom a clique back up as a 'blessing to the gold-field, whose intimate knowledge of the regulations is second to none, whose removal would mourned (sic) as a loss.' He would be mourned by the few who have manipulated him to their own will as is patent to all who visit the police court. As a magistrate, he is dumb on the bench. Mr Tebbutt delivers the judgment, this P.M. meekly, in a wavering tone, agreeing. Several on Gulgong would find their income seriously lessened if he were removed and no wonder they protest against that result.[10]

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[10] The original publication in the *Gulgong Guardian* is lost. The above is from the *Town and Country Journal,* 17 May 1873. The relevant number of the*Town and Country Journal* cannot be located in legible form but the letter is reprinted in Paul de Serville, *Rolf Boldrewood: A Life* (The Miegunyah Press, 2009) 164.

It was clear from the evidence that the person alleged to have influenced Browne was Edward Clarke, who was not an attorney but appeared in Court in many matters.

1206 De Courcy Browne was ordered to appear on a charge of libel by Commissioner Browne, who stated that in a recent issue of the *Guardian* he had been misrepresented and defamed.[11]

1207 The committal proceedings were heard before Tebbutt. The charge was in terms that 'he did on the 29th March last maliciously publish a false, scandalous and defamatory libel of and concerning T.A. Browne, Gold Commissioner, in a letter signed "A Blocker.'" Dr Belinfante appeared for the complainant. Mr Davidson appeared for the defendant and on more than one occasion sought an adjournment of the proceedings on the ground that the defendant's case was not prepared, but Tebbutt refused the applications and refused to permit them to be noted on the depositions. In support of the applications, Mr Davidson relied on the fact that his client's liberty was at stake. The publication was proved. T A Browne deposed that he was the complainant being the person referred to as Commissioner Browne. 'I am the Commissioner for the Gulgong Goldfield.' Mr Davidson addressed the bench. He said the practice of the Crown was to allow the aggrieved party in such cases to seek a remedy by civil action and that to call a Magistrate a 'block-head' or an 'ass' was not libellous for he cannot be other than what his Maker

[11] *Gulgong Guardian,* 26 March 1873.

made him. His address was warmly applauded by a crowded court until stopped by the police. Tebbutt said he did not intend to say anything about the libel but that a prima facie case was made out. He committed the defendant for trial at Mudgee on Thursday 27 April.[12]

1208 A defence committee was convened. The *Guardian* wrote of Tebbutt that his 'well-balanced judicial intellect could not be swayed from the "bee-line" of impartiality. With rare good taste he sat to oblige his friend; thus illustrating the old Scotch saying of "Scratch my back and I'll scratch yours. You committed the defendant for libelling me and I'll commit him for libelling you." There was every sign on my old friend Tebby's face that he was delighted with the task.'[13]

1209 On Saturday 12 April 1873 there was an 'indignation meeting' held in front of Selff's Hotel attended by 1500 people. The meeting both passed a resolution supporting de Courcy Browne and called for 'all to contribute what they could afford.'[14]

1210 On Monday 21 April the libel case against de Courcy Browne came on before the Chief Justice Sir Alfred Stephen at the Circuit Court at Mudgee. Mr Buchanan applied for an adjournment on the ground that the defendant had not had time to prepare his defence. The Chief Justice was reluctant to hear the

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[12] *Gulgong Guardian,* 9 April 1873.
[13] *Gulgong Guardian,* 12 April 1873.
[14] *Gulgong Guardian,* 16 April 1873.

case because Commissioner Browne had been known to him for some years and he would prefer that another Judge should try it. He also suggested that it would be better if it were tried out of the district. After some discussion it was arranged that it be heard at the Supreme Court at Darlinghurst on 15 May.[15]

1211 The case was tried at the Central Criminal Court at Darlinghurst before Mr Justice Hargrave on Thursday 15 May 1873. The proceedings including the evidence were fully reported in the *Sydney Morning Herald*.[16] Also available is Hargrave J's note book.[17] This contains a fuller account of the evidence but is not entirely legible. The accused pleaded not guilty and justification. J E (later Sir Julian) Salomons prosecuted. Dalley and Windeyer appeared for the defendant.

1212 Opening the case for the Crown, Salomons said that the article not only tended to defame Browne most directly and wrongfully, but to injure and interfere with the administration of justice at Gulgong. The libel charged Commissioner Browne with corruption and falsehood if not with actual perjury. It imputed to him wilful falsehood and prevarication. Counsel for the defendant had admitted the publication so that the only question was whether the matter complained of was or was not a libel. He stated that 'it was libel and one of the most grievous libels ever published.' He said that it was immaterial whether or not the

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[15] *Gulgong Guardian,* 23 April 1873.
[16] *Sydney Morning Herald*, Friday 16 May 1873. All passages from the trial quoted in this Chapter are taken from this article.
[17] NSWA Container 2/4397, 24-35.

letter signed 'A Blocker' was or was not written by the accused because as the acknowledged proprietor the accused was clearly responsible for printing it.

1213 Salomons called Commissioner Browne as a witness. He elicited an account of a hearing by Browne of an objection to a lease application. He asked Browne whether the allegations in the libel were true. He received the following answer:

> Few of them are true but the greater portion of them are false; the allegations of 'partiality and corruption' are wholly untrue; no 'screw' was put on me as alleged; on the contrary, very full evidence was taken upon the case referred to in the libel; the case was not heard 'surreptitiously', as insinuated in the libel; full evidence was taken by me in the hearing of the case and I decided thereupon after hearing that evidence.

1214 For the defence, James Francis Plunkett was called as a witness. Plunkett deposed that he was a miner's agent at Gulgong. The case referred to in the article was one between the 'Blockers' and the 'Leaseholders.' He had attended the proceedings at the Police Court, on the part of the 'Blockers.' The case was decided by the Commissioner. The witness subsequently found that a telegram had been received by the Commissioner and that he had been directed to reopen the case. Those involved had reasons to be dissatisfied with the second decision of the Commissioner.

1215 Lester Stuart Donaldson, Clerk of Petty Sessions at Gulgong and a Magistrate, gave evidence that there had at times been considerable dissatisfaction expressed by the miners at Gulgong at the mode in which justice was administered. He remembered several 'roll ups' of hundreds of miners dissatisfied with the decisions of the Commissioner and with the administration of justice generally. He knew Edward Clarke, who had told him he was not an attorney, but who appeared in Court in many matters. He saw him many times in Commissioner Browne's company and heard him speak about cases coming on in that Court. Clarke told him that Browne had acted on Clarke's advice. Browne never said anything about Clarke's speaking to him. Cross examined, Donaldson denied any animosity against Commissioner Browne and warmly disclaimed any idea of taking over his job.

1216 Alfred A Connor also deposed to a considerable amount of public indignation at Gulgong on account of the administration of justice. He had no personal feeling whatever against T A Browne.

1217 T A Browne, recalled for the prosecution,

> [a]ltogether denied the assumption that he had ever been unduly influenced by the advice of Mr Clarke, as had been stated. He had always decided cases brought before him, with strict impartiality and according to evidence. Sometimes he had decided against Mr Clarke's cases and sometimes against Mr Plunkett. He had known 'excitement' about decisions as to claims; miners would at times get

excited about such decisions; whichever way they might be given.

1218 Edward Clarke[18] stated that he had never approached Browne improperly as a Justice of the Peace and had never spoken to him except as an advocate might speak to any Magistrate about cases likely to be brought before the Court.

1219 Dalley addressed for the defence. He contended that the violent language of the opening address had not been at all sustained. He said that the institution of a criminal proceeding for libel at the instance of the Police Magistrate was quite unprecedented.[19] He urged upon the jury the danger of dragging a newspaper proprietor before the Court and the necessity for a free and unfettered press. He argued that the state of things on the Gulgong gold field was such that 'some sharp criticism was to be expected' although the language of the article was not altogether commendable as a specimen of literature.

1220 Salomons replied insisting on the grossness of the libel and the complete failure of any attempt by the defence at justification.

1221 In summing up, his Honour pointed out that the freedom of the press was not an apology for licence. A fair amount of criticism on the administration of justice was allowable. But in this case the language had been extremely gross and offensive

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[18] See Paragraphs 1205 and 1215.
[19] See Paragraph 1224 below.

and the allegations had not been justified but disproved. In the communications which Commissioner Browne had with Mr Clarke about some cases there was nothing beyond perhaps a certain degree of imprudence.

1222 The jury retired at 5:25pm and on their reappearance 15 minutes later returned a verdict of Guilty.

1223 Dalley addressed on sentence. Salomons said 'that Commissioner Browne desired him to intercede with his Honor (sic) in mitigation of the punishment which might be awarded the prisoner'. The Judge said that the language used by the defendant had been gross and libellous in the extreme. When such bitterness and malignity appeared in print the law was bound to intervene and stop it, not by fine but by imprisonment. The Judge sentenced the defendant to six months imprisonment.

1224 It was not correct that the institution of a criminal proceeding for libel at the instance of a judicial officer was unprecedented. In *R v Raine*[20] criminal proceedings were brought against a defendant who had written a defamatory letter concerning Roger Therry's conduct as a Commissioner of the Court of Requests. The defendant was convicted and sentenced to three months imprisonment. In *R v Arden*[21] the editor of a

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[20] http://www.law.mq.edu.au/research/colonial_case_law/nsw/site/scnsw_home/ [1834] NSWSupC 70, last accessed 13 March 2014.
[21] http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/ 1 October 1841, last accessed 13 March 2014.

newspaper that published a libel concerning the conduct in court of Mr Justice Willis was bound over to be of good behaviour for 12 months. This case was complicated by the fact that Willis J was at the time the only Judge in the province of Port Phillip.

The Aftermath

1225 The news of de Courcy Browne's conviction and sentence was received in Gulgong with 'feelings of painful surprise and sorrow.' 'The imprisonment of Mr Browne was a result totally unlooked for and general sympathy was felt for him in the unexpected misfortune which has overtaken him.'[22] The course then pursued was to take up a petition for a remission or mitigation of the sentence.[23]

1226 The petition to the Governor, Sir Hercules Robinson, was in terms that the petitioners fully admit the justice of the sentence but

> beg to represent to your Excellency that the article complained of as libellous was a correspondence letter, which was inadvertently admitted into the columns of the G*uardian* and not an editorial comment. That in the opinion of your petitioners, the ends of justice would be met by the passing of the sentence and the infliction of the most nominal punishment. That, should the sentence as passed be fully carried out, the business of the defendant in

[22] *Gulgong Guardian,* 17 May 1873.
[23] *Gulgong Guardian,* 17, 21 & 24 May 1873.

> this action will be utterly ruined and his wife and family placed in destitute circumstances. In acknowledging the justice of the sentence and urging nothing in extenuation, we humbly beg that justice may be tempered with mercy and that your Excellency may be pleased to extend the Royal clemency to the defendant and release him or commute his sentence.[24]

1227 The petition was forwarded to Sydney on 31 May 1873. It bore nearly 2,500 signatures. It was to be presented to the Governor by Mr David Buchanan, a Member of Parliament for the gold fields.[25] It was presented to the Governor on 4 June 1873.[26] In fact de Courcy Browne was released from Darlinghurst gaol on 19 June 1873. His six month sentence was remitted by the Governor after petitions from miners of the various gold fields were deliberated upon by the Executive. Immediately upon his release from gaol de Courcy Browne was arrested on a warrant to appear before the Gulgong bench to answer a charge in reference to an alleged deficiency in the funds of a local mining company of which he had been secretary. Upon his appearing before the Gulgong bench the case was stood over.[27] He came again before the Gulgong Court presided over by T A Browne on Friday 27 June 1873 and was committed for trial to the next Court of Sessions at Mudgee.[28]

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[24] *Gulgong Guardian,* 24 May 1873.
[25] *Gulgong Guardian,* 31 May 1873.
[26] *Gulgong Guardian,* 4 June 1873.
[27] *Gulgong Guardian,* 25 June 1873.
[28] *Gulgong Guardian,* 28 June 1873.

1228 Shortly after de Courcy Browne returned to Gulgong upon his release from prison the *Guardian* was sold to the proprietor of the *Argus*.[29] During 1874 de Courcy Browne for a time conducted a newspaper known as the *Home Rule Pilot,* but it met its demise by August 1874. The charge of embezzling funds from the company was dismissed in October 1874. In 1874 he was also elected to the Mining Board established under the new Mining Regulations and was elected as Vice Chairman. It is suggested that he became editor of a Mudgee newspaper, perhaps *The Independent.* In 1881 he became the Warden of the Gulgong Gold Field after T A Browne left for Dubbo. He was elected to Parliament as the member for Mudgee in 1885 and later became the member for Wentworth. He then accepted a position in Kalgoorlie where he became Deputy Chairman of the Mining Board. He lived in Sydney for twelve months before his death but was ultimately confined in the Callan Park asylum. He died in 1899 aged 65.[30]

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[29] Ruth Boyd-Davis & Barry Baldwin, *Diary of a Goldfield* (published by the authors, 2001) 240.
[30] Id 238.

Chapter Thirteen: Wardens' Courts in New South Wales from 1874

The Mining Act 1874

1301 As noted above,[1] the recommendations of the Royal Commission of 1870-1871 were in substance incorporated in the Mining Act 1874, which commenced on 1 May 1874. That Act by section 7 created a Department of Mines and by section 9 created eight Mining Districts: The Mudgee Mining District, The Tambaroora and Turon Mining District, The Bathurst Mining District, The Lachlan Mining District, The Southern Mining District, The Tumut and Adelong Mining District, The Peel and Uralla Mining District and The New England and Clarence Mining District. Section 12 authorised the Governor to appoint Wardens.

1302 Section 15 provided for the miner's right, which entitled the holder not only to occupy and mine for gold on Crown Lands but to cut, construct and use water-races, dams and reservoirs, and to take and divert water from any pool, lake, spring or stream for gold-mining and domestic purposes. By section 19 no person had any capacity to bring a mining suit in any court unless the holder of a miner's right. By section 28 the holder of a miner's right might obtain permission to mine under any street, road or highway, or under any bay, river or creek. By section 44 the Warden was to inquire into objections to any application for a mining lease and report thereon to the Secretary for Mines.

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[1] See Paragraph 847.

1303 By section 67 the Governor might establish Wardens' Courts which by section 68 should have jurisdiction throughout New South Wales. By section 69 the subject matters of jurisdiction of Wardens' Courts included the following: claims to the possession of any Crown Land by virtue of a miner's right or lease or to cut or hold any interest in any race, drain, dam or reservoir (placitum 1); claims to recover any land or race, etc, alleged to have been abandoned or forfeited (2); claims to the use, enjoyment or sale of any water (3); encroachment or trespass upon any such land or race, etc (4); claims for debt or damages arising out of any contract relating to gold or any metal or mineral (5); claims concerning or arising out of any partnership for or in relation to mining for gold or other mineral in any Crown Land (7); and generally all questions and disputes which might arise in relation to mining on Crown Lands (13).

1304 Section 70 provided that proceedings should be commenced by summons, but section 71 provided that if the parties consented, the Warden might hear and determine a complaint without requiring any formal proceedings. Section 72 required a formal register of complaints, including the nature of the relief sought and (by section 78) every decision. Complaints were not to be dismissed for informality (section 75) nor removed into the Supreme Court except as provided (section 122). The hearing might be before assessors sitting with the Warden (section 76). The Warden might state a special case on any question for the Supreme Court. He might authorise entry on adjoining land (section 86). By section 87 the Warden might

grant injunctions, including, by section 88, ex parte injunctions, for up to seven days. By section 106 there was an appeal by way of rehearing to the District Court. And, subject to limitations of subject matter, by section 115, there was an appeal from the District Court sitting as a Mining Appeal Court to the Supreme Court.

1305 A search in the Index of the State Archives reveals that a number of Wardens' Courts were set up on 12 May 1874, not surprisingly in established mining centres. These included Araluen, Bathurst, Gulgong, Hargraves, Hill End, Kiandra, Major's Creek, Mudgee, Sofala and Windeyer. At some late stage (such records were still in the Court Houses in the 1960s[2]) these records were called in to the State Archives. Unfortunately, what is in the State Archives is very patchy. Thus, the records of the Gulgong Warden's Court in the State Archives do not commence until 1947, although, as already noted, that Court was operating in 1874 with T A Browne as Warden.[3] This would have made the records of that Court of considerable relevance to this thesis.

1306 In practice the Warden appointed at any place was also the Police Magistrate holding office at that place.

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[2] Personal observation.
[3] See Paragraph 1133 above.

Sofala Warden's Court 1874 – 1878

1307 One Court with relevance to this thesis of which complete records are available in the State Archives is the Sofala Warden's Court. To illustrate the workings of New South Wales Wardens' Courts in their early days there have been recorded in Appendix III the subject matters and results of the 50 cases decided in that Court during its first five years, ie, 1874 – 1878 inclusive, as recorded in the Register of Complaints. A Summary of those cases in the categories set out in Paragraphs 1310 and 1311 below is appended at the end of this chapter. The Summary merits a full reading to apprehend the nature of the cases done in the Warden's Court. What follows is some commentary upon those cases.

1308 What appears in Appendix III is virtually the whole of the material on each case recorded in the Register of Complaints. Whether there was legal representation is not recorded, nor evidence given, nor arguments put on behalf of the parties, nor any reasons for judgment.

1309 Of the 50 cases, three were commenced in 1874, 21 in 1875, 12 in 1876, 12 in 1877 and two in 1878. Dividing the cases into categories is a task that is complex and imprecise. The best that can be done is to classify 31 as concerning water races or water, 14 as cases of encroachment or trespass on land, three as contract cases and two as administrative cases. There is some

overlap between categories and some cases could have been placed in more than one category.

1310 With the exception of one case referred to arbitration,[4] the cases were all decided by one of two Wardens, Whittingdale Johnson and Ernest A L Sharpe. The Register does not record the participation of assessors in the decision of any of the cases. As the system was intended to provide speedy resolution of disputes, it is gratifying to record that virtually all cases were decided in less than and mostly considerably less than three weeks after their commencement. The only exceptions were five cases that were adjourned[5] and even they appear to have been disposed of in less than two months. It is interesting to note that four cases were decided informally under section 71 of the Mining Act 1874.[6]

1311 A notable feature of this body of cases is that the subject matter of a majority of them was water races or water. This is not surprising at Sofala, where virtually all of the titles were in or adjoining the Turon River or associated streams. Of the 31 cases relating to water, nine can be characterised as relating to the supply of water, in most cases deprivation of water, but one case related to flooding;[7] 17 can be characterised as cases of

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4 1875 No 15.
5 1875 Nos 8 and 9; 1876 No 10; and 1877 Nos 1 and 2.
6 1875 Nos 3, 5 and 6; and 1876 No 9.
7 1874 No 1, 1875 Nos 5, 8, 9, 12 and 18; 1876 Nos 2 and 7; and 1877 No 3.

encroachment or trespass on water rights;[8] and five were administrative cases, where objection was taken to the registration of interests in water rights.[9]

1312 Of the remaining 19 cases, 14 related to encroachment on or trespass to land;[10] three were contract cases;[11] and two were administrative cases relating to whether land should be thrown open for gold mining purposes.[12]

1313 A consideration of these cases demonstrates that the volume of the disputes formally resolved – 50 in five years - had fallen sharply from the early days of the field when hundreds of disputes would have been resolved in the same period. This fall in numbers would have been due in part to the lower number of claims worked. It is hard to tell whether it could also be attributed in part to a more formal approach to the process. The more formal approach is already visible in the determination in court of disputes by the Commissioner as recorded in the Gulgong and Tambaroora/Hill End Books in the early 1870s.[13] The greater formality of the method of determination is also embodied in the court proceedings and is apparent from the record. If this is so, there is no material suggestive of any

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8 1874 No 2; 1875 Nos 2, 6, 7, 13 and 14; 1876 Nos 3, 4 and 10; 1877 Nos 5, 7, 8, 9, 10 and 12; and 1878 Nos 1 and 2.

9 1875 Nos 10 and 15; and 1876 Nos 5, 6 and 8.

10 1874 No 3; 1875 Nos 1, 3, 4, 17, 19, 20 and 21; 1876 Nos 1, 9 and 12; and 1877 Nos 4, 6 and 11

11 1875 Nos 11 and 16; and 1876 No 11.

12 1877 Nos 1 and 2.

13 See Paragraphs 920 ff above.

alternative method of resolution of disputes. It may be wondered whether the subject matter of cases at this later stage was less weighty than earlier, but this is mere speculation.

SUMMARY OF APPENDIX III

WATER DEPRIVATION 9

1874	NATURE OF CLAIM	RELIEF SOUGHT	DECISION
No 1	Diverting water cutting off supply from complainant's race	Injunction	Injunction issued 12 months
No 5	Ditto	Injunction	Case dismissed
No 8	Blockading with stones & box	Injunction	Adjourned
No 9	Ditto	Injunction	Adjourned. Interlocutory order
No 12	Flooding	Damages	Struck out
No 18	Loss of water	Damages	Case dismissed
1876			
No 2	Taking water from river and not allowing sluice head	Injunction	Order defendant to allow one box sluice head
No 7	Cut away dam	Injunction	Dam to be removed
1877			
No 3	Dam throws water back on plaintiff's workings	Injunction	Ditto

WATER TRESPASS 17

1874			
No 2	General allegation	Injunction & damages	£10 damages + injunction
1875			
No 2	Ditto	Ditto	1/- damages + injunction
No 6	Ditto	Injunction	Withdrawn
No 7	Ditto	Injunction & damages	Dismissed
No 13	Failing to repair tail race as promised	Damages	Injunction – no damages
No 14	Felling or drawing timber across race	Damages & injunction	Injunction – plaintiff to erect bridge
1876			
No 3	Running tailings in plaintiff's tail race	Injunction & damages	£5 damages + injunction
No 4	Restrain defendants from cutting water race	Injunction	Restrained from interfering with plaintiff's prior right
No 10	Damage to race & rent of water	Damages	Adjourned
1877			
No 5	Trespass to specified land at specified time	Damages	Settled
No 7	Trespass by cutting race through claim	Damages	Dismissed
No 8	General allegation	Injunction	Ex parte injunction for 7 days
No 9	Ditto	Damages	Adjourned, then verdict for £7-10

No 10	Trespass by taking & using water	Damages	Dismissed at plaintiff's request
No 12	Trespass by sheep on tail race	Damages	Verdict for £20
1878			
No 1	Trespass by cutting water race through claim	Damages	Dismissed. Plaintiff failed to produce miner's right
No 2	Trespass by filling in water race	Damages	No appearance

WATER ADMINISTRATIVE 5

1875		
No 10	Registration be refused of race & dam	Refused but plaintiff directed to keep race in repair
No 15	To prove defendant's right to water	Referred to arbitration
1876		
No 5	To restrain defendant from being registered as holder of water race held by plaintiff	Registration refused
No 6	To restrain defendant from being registered as holder of machinery site as ground held as claim & rented to plaintiffs who are using water	Registration refused
No 8	Defendant may not be allowed dam as plaintiff has improvements on ground which he has applied to purchase	Stood over till plaintiff's application dealt with

1874			
No 3	General allegation of trespass on lease	Injunction & damages	Found no trespass. Case dismissed
1875			
No 1	Blocking road so plaintiffs unable to wash dirt	Damages	Verdict for defendant
No 3	General allegation of trespass on claim		Verdict for plaintiffs
No 4	Restrain defendant from working on ground being portion of road under s 28	Injunction	Ex parte injunction 7 days
No17	Working & trespassing on alluvial claim	Injunction	Case dismissed
No 19	Cutting race through defendant's claim	Injunction	Verdict for plaintiff. Defendant's race not to interfere with plaintiff's working of claim
No 20	Trespass on claim sluice & race of plaintiffs	Injunction	Ex parte injunction 7 days
No 21	Trespass on plaintiff's ground in bed of river	Injunction & damages	Verdict for plaintiff with 1/- damages & orders plaintiff keep dam at such height as water shall not go back on defendant's claim
1876			
No 1	Trespass on specified ground of Company	Injunction & damages	Verdict for plaintiff without damages & injunction
No 9	Entitlement to quartz claim		Warden decides on portions to which plaintiff &

			defendant respectively entitled
No 12	Trespass on ground applied for as a Lease	Injunction & damages	Trespass found & injunction issued. Plaintiff did not wish for damages
1877			
No 4	Encroachment on extended claim	Injunction	Application withdrawn
No 6	Registration of de fendant as holder of 1/3 interest in claim	Injunction	Application refused
No 11	Damage done to plaintiff's rights and land	Damages	No appearances

CONTRACT CASES 3

1875			
No 11	Defendant has not cleaned out Crossmans Race according to his agreement	Damages	Verdict for plaintiff damages £10
No 16	Unspecified breach of contract	Damages	Verdict for plaintiff damages £4-10
1876			
No 16	To recover balance of purchase £1.14.6 of share in river bed claim on Turon River	Damages	Case dismissed

ADMINISTRATIVE CASES 2

1877			
No 1	To show cause why defendant's ground on the Crudine Creek should not be thrown open for gold mining purposes		Case adjourned then dismissed for want of jurisdiction
No 2	Do		Do. No appearance on part of plaintiff

Chapter Fourteen: Jurisprudence in Superior Courts Concerning Adjudication System

Scope of Chapter

1401 This chapter concentrates on the period from 1851 to 1875, being the period on which this thesis has concentrated. It examines what reported cases are available during that period relating to the systems of adjudication on the gold fields in New South Wales and Victoria. This essentially means reported cases during the 1860s and early 1870s, since there were no law reports current in either New South Wales or Victoria before the early 1860s. The only exception to this is the two volumes of Legge's Reports in New South Wales, which cover the period from 1825 to 1862. However, they were not contemporaneously published reports but were cases collected in the 1890s out of newspapers by J G Legge, who was a barrister. These volumes, however, contain no cases on mining or gold mining, presumably because the statutes on which such cases were decided had been repealed by the time that Legge was making his collection.

New South Wales Cases

1402 The first case to be noted is *Ex parte Harrison*, an application for a writ of prohibition. [1] The case arose from an allegation that there had been an encroachment on a claim on the Lachlan Gold Fields. This allegation was heard and determined by the Chief Commissioner. The unsuccessful party appealed to

[1] (1862) 1 SCR 256.

the Court of Appeal at Bathurst, which reversed the Chief Commissioner's decision. However, it appeared by evidence given on the prohibition application that the chairman of the Court of Appeal did not at any relevant time hold a miner's right. The relevant section provided that the Court of Appeal should consist of 'a chairman and two other persons who have held miners' rights for six months, to be appointed by the Governor.' In favour of the prohibition it was argued that this required the chairman as well as the other members to hold a miner's right; in opposition it was argued that on the correct construction only the other members were required to hold miners' rights. The motion to make the order nisi for prohibition absolute was heard before Stephen C J and Wise J. Their Honours held that on its correct construction the chairman must have held a miner's right and that therefore the prohibition should go. Wise J said:

> If the word 'other' were left out, the sentence would then have the meaning contended for; but those words are in the Act, and some effect must be given to them. [2]

1403 *Ex parte Bornulph and Company*[3] was also an application for a prohibition. The principal point in this case was the same as that in *Ex parte Harrison*.[4] The opposing parties held adjacent claims on the South Caledonian lead on the Lachlan Gold Fields. Their dispute was determined by Commissioner Browne. Against his decision there was an appeal which came on before the Court

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[2] 1 SCR at p 259.
[3] (1862) 1 SCR 326.
[4] Supra Paragraph 1402.

of Appeal at Bathurst, of which Harold Maclean was chairman. It refused to reverse the order and Harold Maclean issued an injunction restraining the appellants from working the subject claim. The affidavits showed that Harold Maclean did not hold a miner's right. The Full Court of the Supreme Court (Stephen C J and Wise J) again held that there was no Court of Appeal, since the chairman was not the holder of a miner's right. It was further contended that as the order of the Court of Appeal affirmed the decision below and did not make a substantive order, there was nothing to prohibit. However, Stephen C J said that 'if we refuse to grant this application it would be equivalent to saying Mr *Browne's* order had been confirmed by a Court of Appeal'.[5] The prohibition was therefore granted.

1404 *Ex parte Chambers*[6] was again a prohibition application. The prohibition applied for was to restrain further proceedings on a conviction and order made by Justices of the Peace upon the hearing of a complaint to the effect that the applicants 'did unlawfully refuse to allow' the complainant to go to work after a decision had been given in his favour by a Gold Commissioner and two assessors. The applicants were ordered to pay the complainant the sum of £20. The orders were made under a section of the relevant Gold Fields Act giving a Justice, being a Commissioner, power, in relation to a complaint made by the holder of a miner's right who is or has been engaged in a mining partnership, touching any dispute regarding such partnership.

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[5] 1 SCR at p 328.
[6] (1863) 2 SCR 206.

The Justice, having enquired into and heard the complaint, had power to 'make such order relating to the mode of working any claim or due division thereof as to him shall seem meet. The Full Court of the Supreme Court per curiam (the participating Justices not being identified in the report) could not find that the disobedience of such an order was made punishable by any section of the Act and ruled that the prohibition must go.

1405 *Ex parte Ah Tchin*[7] was a further application for a prohibition. The applicants were Chinese. They had obtained miners' rights at a time when they were entitled to mine for gold at any place on the Burrangong Gold Field.[8] Subsequently there was a proclamation which limited the area on the Gold Field within which Chinese might mine. They were convicted of unlawfully mining for gold outside that area. Stephen C J ruled that the convictions should stand. His Honour said:

> They obtained a licence at a time when they could roam all over the gold fields, but afterwards the Governor restrained the rights to particular places. The law allows that to be done and we cannot prevent the law being carried out.[9]

Milford J concurred but Wise J dissented, saying:

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[7] (1864) 3 SCR 226.

[8] The Burrangong Gold Field was subsequently known as Young. It was, in 1860 and 1861, the scene of the worst violence against Chinese in the history of New South Wales. The violence was put down only after the personal intervention of the Premier, Charles Cowper, and the despatch of troops; see C M H Clark, *A History of Australia IV: The Earth Abideth For Ever 1851-1888* (Melbourne University Press, 1978) 128-134; P A Selth, 'The Burrangong (Lambing Flat) Riots, 1860–1861: A Closer Look' (1974) 60 *Journal of the Royal Australian Historical Society* 48.

[9] 3 SCR at p 228.

> It would require clear words to show that the Legislature intended that the Governor should have power to issue an *ex-post facto* proclamation limiting a right already acquired and paid for.[10]

Stephen C J had conceded that the Act 'is framed very loosely, and in defiance of all rules of grammar.'

1406 *Foster v Hayes*.[11] Upon a judgment obtained by the plaintiffs in the Court of Appeal at Forbes for £89 as damages for encroachment by the defendants on the plaintiffs' claim. Originally such a judgment might be recovered by distress and the sale of the goods and chattels of the judgment debtor in a manner prescribed by law for the recovery of any sum adjudged by Justices of the Peace as a pecuniary penalty or compensation. But the Act making this provision was repealed, leaving no manner prescribed for the recovery of such a judgment. The plaintiff's declaration upon the judgment of the Court of Appeal was demurred to by the defendant. A demurrer was a formal allegation that a pleading was bad in that, even if the facts alleged were proved, it did not establish a valid claim or defence. Stephen C J said:

> But the plaintiff having been deprived of that remedy, has now no other remedy except by action; and I am of opinion that, consequently, the action will lie.[12]

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[10] 3 SCR at p 229.
[11] (1867) 6 SCR 4.
[12] 6 SCR at p 7.

Hargrave and Cheeke J J concurred with the Chief Justice in overruling the demurrer.

1407 *Oriental Bank Corporation v The Queen*[13] was an action brought by a bank by a petition of right against the Government for the loss of gold dust and bank notes being carried by the gold escort from Forbes to Sydney. The escort was held up and the gold and bank notes taken by bushrangers. It appeared from the evidence that the escort was conducted in a manner that was negligent or perhaps grossly negligent. However, there was in force a notice in the *Government Gazette* which stipulated that 'it is to be understood that in the event of a loss notwithstanding that protection, the Government will not be responsible for it' and an additional regulation that '[i]t must be understood that under no circumstances will the Government be responsible for the loss.' The trial before the Chief Justice and a jury resulted in a verdict for the plaintiff. The jury declined to say that there was gross negligence. Upon a rule nisi calling upon the suppliant to show cause why the verdict should not be entered for the Crown or a new trial granted, the Full Court ordered a new trial. In delivering the judgment of the Full Court Stephen C J said:

> I agree with my colleagues, that a special contract, not the ordinary one of a common carrier, has here been established, under which the Crown is relieved from responsibility for the loss complained of - however occasioned.[14]

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[13] (1869) 8 SCR 171.
[14] 8 SCR at p 184.

1408 *Ex parte McInnes*[15] was again an application for a prohibition. Upon an appeal from the Gold Commissioner at Ophir concerning a disputed mining claim, the Court of Appeal at Bathurst had held that the title of the applicants (McInnes and five others) was bad on the ground that four of the party had not actually occupied or taken possession of the claim by pegging or assisting in pegging it out. The Full Court held that the rule nisi should be discharged. Stephen C J said:

> But, reading this regulation in connection with the others cited, I think we may conclude that it requires those that wish to take possession of a mining claim to be present on the spot, and personally to mark out its boundaries, or, at all events, assist in doing so.[16]

Hargrave and Cheeke J J concurred.

1409 *Ex parte Irwin*[17] was an application for a prohibition against Magistrates constituting the Gulgong Court of Appeal who had dismissed an appeal and ordered the appellants to pay the respondents' costs. Section 21 of the Gold Fields Act 1866 provided that no proceeding in the Court of Appeal should be quashed for want of form nor be removed into the Supreme Court by certiorari or otherwise. The Full Court (Stephen C J, Hargrave J and Faucett J) dismissed the application on the ground that section 21 rendered the judgment of the Court of Appeal final and

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[15] (1870) 9 SCR 28.
[16] 9 SCR at p 30.
[17] (1871) 11 SCR 49.

unappellable. The only ground on which the decision could be challenged was for excess of jurisdiction and it was not shown that the appellate court had in any way exceeded its jurisdiction.

1410 *Wichern v Davidson*[18] was an action in the Supreme Court for trespass upon the plaintiffs' claim on a gold field. The defendants pleaded (inter alia) that the ownership of the claim had been determined under the Gold Fields Act 1866 by a Justice of the Peace to be the plaintiffs' claim but that that decision was appealed to two Justices in Petty Sessions who reversed the decision below and determined that the claim was the claim of the defendants, thus the defendants pleaded that the plaintiffs ought not be admitted to say that the land was theirs. The plaintiffs demurred to this plea. The Full Court (Stephen C J, Hargrave J and Faucett J) held that it was plain by section 21 of the Act that it was not intended that the Supreme Court should have any jurisdiction and that the decision of the Court of Appeal should be final, so that the plea was good either as a plea in estoppel or as a plea in bar. In giving judgment Stephen C J said:

> In these colonies it is customary for thousands and tens of thousands of persons to congregate upon comparatively small areas of land, for the purpose of mining for gold. These areas are divided into very many sections or claims, held or possessed by miners or claim holders. For the purpose of regulating the occupation and working of these claims, of preserving good order, and of deciding disputes

[18] (1872) 11 SCR 129.

> which might arise between the various claim-holders, the Legislature has thought proper, under this Gold Fields Act, to establish tribunals to settle these disputes, which otherwise might possibly result in bloodshed, and summarily to decide who were the parties entitled to work disputed claims; and from the words of the Act it clearly appears that the adjudication of these Courts was intended to be final - for it could never have been the intention of the Legislature that there should be further litigation after the local Court had decided a matter upon which they were so qualified to give a decision, and for which very purpose they were established.[19]

1411 *Thomas Chappel v Samuel Samper*[20] was an action in the Supreme Court for trespass upon certain land of the plaintiffs at Gulgong. It was alleged that the defendants had got from the land a great quantity of gold of the plaintiffs, carried the same away and converted it to their own use. One of the defendants' pleas was to the effect that the plaintiff held the land under a lease by virtue of the Gold Fields Act 1866 and subject to labour conditions imposed by the regulations which labour conditions had not been fulfilled. The defendants said that by reason thereof and, as they lawfully might, they being the holders of miners' rights, took possession of a portion of the said land as their claim and duly registered and worked the same. The plea was demurred to on the ground that, assuming non compliance with

[19] 11 SCR at p 132.
[20] (1872) 11 SCR 138.

the labour conditions to work a forfeiture of the lease, no one can take advantage of such forfeiture but the Crown, and the facts stated in the plea afforded no justification to the defendants. The Full Court ruled that the demurrer must succeed. Stephen C J said:

> I do not think that the mere fact of the defendants entering into possession of and registering the claim, with the cognisance of the Gold Commissioner is sufficient in itself to show that he intended to declare that the plaintiff's lease had been forfeited… The only question here is, did the Crown exercise its undoubted right of forfeiture? It does not appear that this right was exercised; so that upon the whole I am of opinion that the plea is no answer, and the plaintiff must succeed.[21]

Hargrave and Faucett J J were of the same opinion.

1412 *Ex parte Mulholland* [22] was an application for prohibition to restrain Justices at Windeyer from proceeding on an order that the applicant pay £73 3s 9d and costs. The allegation was that the plaintiffs engaged in a mining partnership with the defendants who were indebted to them in the sum awarded for work and labour done and performed. It was contended that the matter in dispute was not a question regarding a mining partnership but merely a dispute about the construction of a contract to do work which the Justices had no jurisdiction to determine. This contention was upheld in the Full Court. Stephen C J said:

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[21] (1872) 11 SCR at p 141.
[22] (1872) 11 SCR 310.

> As to whether the justices had jurisdiction to entertain the plaint. My (sic) strong impression is, that the justices had no such jurisdiction, for the dispute or question does not "regard" the partnership in the sense used in the enactment.[23]

Hargrave and Cheeke J J agreed that the prohibition must go.

1413 *Charles Bacon and James Laird v Louis Rebora.*[24] This was an action for the possession of land at Washpool on the Lombardy Reef, Solferino. Bacon and Laird took possession of the land, applied for a lease and complied with all the provisions of the Gold Fields Act necessary to acquire such lease. At that time the land was not within any area proclaimed as a gold field. Subsequently the Solferino Gold Field was proclaimed and Rebora and party entered on the land and pegged it out as their claim, which was the trespass complained of. The question was whether the proclamation of the Gold Field invalidated the plaintiffs' rights under their lease application. The case was tried before Faucett J and the verdict was returned by consent for the plaintiffs subject to the opinion of the Court. The Court held that the plaintiffs were entitled to possession under their original lease application. Hargrave J said:

> "*Qui prior est tempore, potior est jure*"… and whenever a "gold field," and the rules and regulation for gold fields thereunder come into operation, such rules and regulations are accumulative on all then existing rights whether

[23] 11 SCR at p 312.
[24] (1873) 13 SCR 134.

> statutory or at common law and cannot be displaced or repealed by any subsequent leases or other statutory rights excepting *express* statutory enactment to such effect of repeal.[25]

Faucett J said:

> The defendants rely, not on a lease, but on the fact they first took up the land after the proclamation; but this cannot deprive the plaintiffs of the right of possession which they had previously acquired under the existing regulations.[26]

Stephen C J agreed, with some doubts, referring again to 'the peculiar - and if I may venture to say so, the vague - wording of the Gold Fields Act and the various regulations made under it'.[27]

1414 *The Queen v Wilson*[28] was a special case reserved for the consideration of the Full Court by Faucett J after a criminal trial at the Mudgee Assizes. The prisoners were, relevantly, convicted under the Imperial Act 7 and 8 Geo IV, c29, s37 of stealing 'gold ore' which was the property of the Queen from a 'mine of gold ore' of the Queen, and secondly, of stealing 'ore of a certain metal, to wit, washdirt, containing gold,' also the property of the Queen, from a certain 'mine' of the Queen. The relevant section provided that if any person shall steal the ore of any metal from any mine, every such offender shall be guilty of a felony and, being convicted, shall be liable to be punished in the same manner as in the case of simple larceny. Various questions were reserved by

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[25] 12 SCR at p 149.
[26] 12 SCR at p 159.
[27] 12 SCR at p 145.
[28] (1874) 12 SCR 258.

Faucett J for the Court, including that there was no evidence that what was taken was 'ore'; that the property was wrongly laid in the Queen; and that, as the Queen did not in practice claim the gold, there could be no felonious stealing of it. It was held that there was sufficient evidence that the material taken was ore within the meaning of the statute. However, what was decisive in the case was that by a later New South Wales statute, 20 Vic No 29 (the Gold Fields Act of 1857), pecuniary penalties were imposed on persons mining for gold on Crown lands without a miner's right. It was held by Sir James Martin C J and Faucett J – Hargrave J dissenting – that the imposition upon the relevant acts of the lesser penalty by 20 Vic No 29 pro tanto repealed 7 and 8 Geo IV, c29, s37 in so far as it applied to gold. Faucett J said:

> We have thus all the ingredients of larceny - the taking away without any colour of right of the property of the Crown against the consent of the Crown and the appropriating of it to the use of the taker and to the offence thus constituted a penalty attached. Now in my opinion it is not consistent with legal principles that the penalty of two years' imprisonment imposed by 7 and 8 G. IV, c29, s37 should co-exist with the penalties imposed by this Act [20 Vic No 29].[29]

The same view was expressed by Sir James Martin CJ. The judgment below was therefore avoided and it was ordered that the prisoners should be discharged from custody.

[29] 12 SCR at p 283.

Victorian Cases

1415 There is a much greater volume of reported cases in Victoria than in New South Wales. This may stem from more extensive litigation in that Colony, but certainly a factor is the existence of the Court of the Chief Judge of Courts of Mines and the extensive reporting of decisions of Robert Molesworth as Chief Judge. There was no corresponding court in New South Wales, there being a gap between the appeal courts on the various gold fields and the Supreme Court, where cases were taken by way of applications for prerogative writs or by the bringing of actions in that Court. Molesworth J also dealt with mining cases sitting in the Supreme Court in Equity. By reason of the greater volume of Victorian cases, they are generally summarised somewhat more shortly than the New South Wales cases.

1416 Again, there was no reporting of cases before 1862, so it is only from that time on that cases can be accessed through law reports.

1417 In *Banks v Granville*[30] it was held by a Full Court of the Supreme Court (Stawell C J, Williams J and Molesworth J) that the Court of Mines had no jurisdiction to determine, as a suit for the definition of boundaries, a case in which one party denied that the other party had any right at all. *Kin Sing v Won Paw*[31] was a

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[30] (1862) 1 W&W L158.
[31] (1862) 1 W&W L303.

case also decided by a Court presided over by Stawell C J. It was held that the power given to the Warden on the complaint of any person that he is legally entitled to any claim or any undivided share therein empowers the Warden to determine whether a partnership in the claim exists and, if it does exist, to put the complainant in possession of his undivided partnership share in the claim.

1418 *Critchley v Graham*[32] was a case in which a number of complainants sued before a Warden for damages for encroachment. Upon an appeal from the Warden to a Court of Mines, a number of questions were reserved in the form of a special case for the opinion of the Supreme Court. That Court, again presided over by Stawell C J, answered certain of those questions as follows. Where several of the complainants had not miners' rights at the time of the encroachment, the Warden should ascertain the damages generally and, out of them, award an amount in proportion to the number of shares held by shareholders entitled to institute proceedings by virtue of miners' rights. Where in the case of a continuous trespass it appears that some of the complainants had miners' rights during a part only of the time, the Warden may divide the time and give damages accordingly. Where the Warden awards damages against all the defendants, but upon appeal to the Court of Mines it appears that some only of the defendants participated in the trespass, the Court of Mines may and ought to reverse the decision in part and

[32] (1863) 2 W&W L71.

affirm it in part. In a second report,[33] a Full Court also presided over by Stawell C J held that where the holders of miners' rights are actual occupants of a claim, but have legally forfeited it or should legally 'be deemed to have abandoned it,' and other holders of miners' rights are summoned by the actual occupants before the Warden for encroachment, the defendants cannot avail themselves of the supposed forfeiture of the complainants without having themselves first obtained the adjudication of forfeiture of the Warden.

1419 There were a number of cases decided in the Full Court as to whether, as the legislation stood, if a Warden refused to give possession on a complaint before him that demanded such possession, an appeal lay or did not lie to the Court of Mines. In *Power v M'Dermott,*[34] a Full Court presided over by Stawell C J, and in *Wardle v Evans,*[35] a Full Court constituted by Stawell C J, Barry J and Williams J, held that no appeal lay from such a dismissal by the Warden. However, in *Tatham v M'Gill*[36] those cases were reviewed by a Full Court constituted in the same way. It was held that if the Court of Mines should find that there had in fact been an encroachment, it would be competent for it to order that the possession so encroached upon should be restored to the complainant, and such an order might be enforced by the Court of Mines.

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[33] (1863) 2 W&W L211.
[34] (1863) 2 W&W L241.
[35] (1864) 1 WW&A'B L188.
[36] (1865) 2 WW&A'B L113.

1420 *Millar v Wildish*[37] was a demurrer to a bill in an equity suit. The plaintiff was the owner of land and the defendants, who were in possession of adjoining land, had carried a drive 40 feet and more under the plaintiff's land, and removed large quantities of soil and gold. The bill prayed for an account of the gold and profits which the defendants had taken and an injunction restraining the defendants from carrying on mining in the plaintiff's land. In upholding the demurrer Molesworth J said:

> On the authorities, I should hold that an owner of private property might by injunction restrain a trespasser mining and taking minerals belonging to him, the owner… But, with considerable hesitation, I have arrived at the conclusion that the present Plaintiff, as mere owner, seeking protection and account for gold under his land, fails, because the gold is in no way his; and as to the removal of underground earth by a trespasser, that it is not a subject of injunction unless real damage to the Plaintiff's use of the surface result from it.[38]

Molesworth J held that it was the law of this country that all gold mines belong to the Crown even though the Crown may have granted the lands containing them to a subject without reservation on the authority of *The Case of Mines*.[39]

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[37] (1863) 2 W&W E37.
[38] 2 W&W at pp E46-47.
[39] (1568) 1 Plowden 310; 75 ER 472.

1421 In *Attorney-General v Cant,*[40] Molesworth J made an order permitting the District Surveyor, with such assistance as he may require, to enter and survey the defendants' mine with the object of ascertaining how far the defendants had worked into the land of the plaintiffs, and how much auriferous soil or gold they had removed. In *Harvey v Rodda,*[41] the Full Court of the Supreme Court held quartz crushing to be a mode of obtaining gold, and a partnership for that purpose to be a mining partnership for the purpose of the Gold Fields Act. And in *James v Higgans,*[42] a Full Court of the Supreme Court presided over by Stawell C J ruled that the Judge of the Court of Mines had no jurisdiction to hear and decide a motion, or grant an injunction, outside the territorial limits of his Court, even if that motion or injunction was otherwise within the jurisdiction of his Court.

1422 In *In re Verdon and Berry, Ex parte The Albion Company*,[43] the Full Court of the Supreme Court ruled that a company registered under the Companies Act 1864 is a 'person' within the meaning of the statutory provision requiring that every person shall have a miner's right before he can in a Court of Mines assert or defend any interest in a claim. The Court therefore made absolute a rule nisi for mandamus ordering the issue of a miner's right in the name of the company.

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[40] (1863) 2 W&W E113.
[41] (1864) 1 WW&A'B L21.
[42] (1864) 1 WW&A'B L51.
[43] (1864) 1 WW&A'B L207.

1423 *McGill v Tatham*[44] was a case concerning the rights of the holders of frontage claims[45] at a time when the parallels of such claims had been marked, but the lateral boundaries were not yet defined because the lead had not yet been found. The respondent was the holder of the relevant frontage claims. Within the parallels of the frontage claims the appellants had sought to take possession of block claims and had registered one and applied to register the remainder. The respondent had brought a suit to restrain them from working or registering their block claims and an injunction had been granted until hearing or further order. The appellants applied to dissolve the injunction and the dismissal of that application was the subject matter of the appeal to the Full Court of the Supreme Court. In the judgment of the Court read by Stawell C J it was ruled that despite the difficulty occasioned by the lack of definition of the boundaries, the respondent was entitled to an inchoate right which should be protected until the lead had been discovered and all the boundaries fixed, and the injunction was therefore rightly granted.

1424 *Smith v The Scottish and Cornish Company*[46] was also an appeal against the granting of an injunction by the Court of Mines at Ballarat to the holders of a frontage claim. The respondent company did not itself hold a miner's right, but each of the litigant shareholders had obtained a miner's right. It was held in a

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[44] (1865) 2 WW&A'B L52.
[45] See Paragraph 1117.
[46] (1865) 2 WW&A'B L121.

judgment of the Court read by Stawell C J that this was a substantial compliance with the statutory requirements, and the injunction should be upheld.

1425 *Thompson v Land*[47] was a decision concerning the validity of a claim. The relevant by-law provided that possession should be taken of a claim by erecting a post at each corner not less than three inches in diameter and extending at least three feet above the ground. In this case the defendants set two posts, but blazed one tree and adopted a stump of another instead of using posts. Molesworth J in the Court of the Chief Judge of Courts of Mines thought the by-law reasonable and held that a non compliance with it avoided the effect of taking possession. In *Craig v Adams*[48] Molesworth J held that an applicant for a mining lease taking proceedings against trespassers pending the decision on such application is bound to prove not only that he has marked the ground out, but that he has inserted advertisements as required by the Orders in Council, which Orders in Council are not ultra vires.

1426 In *Longbottom v White*,[49] Molesworth J held that pumping water out of a claim is not sufficient to protect it from abandonment unless such pumping be for the purpose of working the claim.

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[47] (1866) 3 WW&A'B M13.
[48] (1866) 3 WW&A'B M19.
[49] (1866) 3 WW&A'B M35.

1427 In *The United Extended Band of Hope Company Registered v Tennant*,[50] Molesworth J dealt with a case in which the plaintiffs took up block claims within their own frontage area. His Honour said:[51]

> I would not hold the taking up of a block claim within their area as a forfeiture of their right to the entire. But the case is different as to the precise block claim taken up. I think generally no one has a right to hold simultaneously two claims on the same space under distinct titles and terms. For instance, as to forfeiture for not working, he would have no right as to his block claim, to defeat an adverse claimant, by shewing that he had a frontage claim of which the block claim formed a part and had been working the frontage.

Similarly, in *The Great North-West Company Registered v Sayers*[52] and *Clerk v Wrigley*,[53] Molesworth J held that if a block claim was taken up within a frontage claim, the frontage claim no longer applied to the ground so taken up. In *Clerk v Wrigley* it was held that the block claim will be forfeited unless evidence should show that there had been work on or in relation to that block claim. The foregoing decisions of Molesworth J were in effect approved by the Full Court of the Supreme Court in *McCafferty v Cummins.*[54] See

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[50] (1866) 3 WW&A'B M41.
[51] (1866) 3 WW&A'B at M52-53.
[52] (1867) 4 WW&A'B M64.
[53] (1867) 4 WW&A'B M74.
[54] (1868) 5 WW&A'B L73.

also the decision of Molesworth J in *United Working Miners' Gold-Mining Company Registered v Prince of Wales Company Registered*.[55] The Full Court of the Supreme Court specifically approved of Molesworth J's decision in *Clerk v Wrigley* in *Regina v Clow, Ex parte Oliver and Dickson*.[56]

1428 In *Hunter v Aratraveld*,[57] A took possession of a claim at Sandhurst and was registered as owner. Subsequently B was by mistake registered as owner of the same claim. The claim was subsequently left unworked and H obtained a Warden's order of forfeiture against B only and took possession of and worked the claim. It was held by Molesworth J that H was not entitled to take possession of the claim without giving notice to or summoning A and without obtaining a declaration of abandonment by the Warden.

1429 *Duffy v Tait*[58] concerned a by-law providing that where the owner of a quartz claim should not within 24 hours after the expiration of the period of registration cause work to be renewed on such claim according to the usual course of proper and efficient mining, such claim should be forfeited. Molesworth J held that where, as a preliminary to working the claim, it would be necessary to drain the whole reef at very great expense, cessation in working was nevertheless

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55 (1868) 5 WW&A'B M50.
56 (1868) 5 WW&A'B L89.
57 (1866) 3 WW&A'B M59.
58 (1867) 4 WW&A'B M17.

within the meaning of the by-law and entailed forfeiture, and the by-law was not invalid, being unreasonable.

1430 In *Barlow v Hayes*[59] Molesworth J held that marking out is not a necessary preliminary to proceeding before a Warden to obtain possession of Crown lands unlawfully occupied. This was because *Critchley v Graham*[60] required that persons wishing to avail themselves of forfeiture should proceed to recover through a Warden instead of entering as upon vacant ground.

1431 In *Spiers v Whiteside*,[61] the Full Court of the Supreme Court held that an order for entry, inspection and survey of a gold mine made by a Warden not made in the form provided in the Mining Act 1865 and not otherwise showing the matters necessary to give the Warden jurisdiction, is invalid, and disobedience to it is no offence.

1432 In *Western Freehold Gold-Mining Company v Great Western Gold-Mining Company*,[62] Molesworth J, sitting in the Supreme Court in Equity, dealt with a case where the plaintiffs had an exclusive licence from the owner of land to mine for gold thereon and under an adjoining street, the soil of which belonged to him. The defendants encroached upon the plaintiffs' workings under the street. It was held that

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59 (1867) 4 WW&A'B M67.
60 Supra Paragraph 1418.
61 (1867) 4 WW&A'B L91.
62 (1867) 4 WW&A'B E44.

persons mining under licence from the owner under streets over private property had a right to an injunction to restrain others from trespassing on them, though the public might have a right to the use of the street. Also sitting in Equity in *The City of Melbourne Gold-Mining Company Registered v The Queen*,[63] Molesworth J held that a petition will not lie against the Crown at the suit of a holder of a mining claim to restrain the issue to other parties of a mining lease of the land occupied as such claim. Nothing binds the Governor to follow the opinion of the Warden contained in his report on the hearing of the application for and objections to a lease.

1433 In *Smith v The Golden Gate Gold Mining Company Registered*,[64] Molesworth J, sitting as Chief Judge of Courts of Mines, held that an application by the holder of a claim for a gold mining lease of the ground does not protect the claim from forfeiture, incurred either before or after the lease application. This case was followed by Molesworth J in *Perkins v The Hercules Gold Mining Company Registered*[65].

1434 In *Cruise v Crowley*,[66] Molesworth J held that, where a claim was properly marked out with an area of sixteen acres, but without fraud described in the notices required by the by-laws as twelve acres, and it was surveyed under the by-laws to sixteen acres, and the persons registered were

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[63] (1867) 4 WW&A'B E148.
[64] (1868) 5 WW&A'B M5.
[65] (1868) 5 WW&A'B M48.
[66] (1868) 5 WW&A'B M27.

entitled to that quantity, a good title was acquired to the sixteen acres.

1435 In *Collins v O'Dwyer*,[67] Molesworth J held that where a claim is actually forfeited it is open to the first legal claimant; but unless it be actually abandoned, the persons alleged to have forfeited should be summoned before a Warden to dispossess them. In *The United Extended Band of Hope Company Registered v Doyle and Johnstone*[68] Molesworth J dealt with a case where, at the time of the repeal of a mining by law, a claim held under it was liable to forfeiture for a breach of that by-law. The repealing by law expressly saved 'the rights of all persons obtained previous to, and held at the time of this by law coming into force.' His Honour held that proceedings for forfeiture for the breach would lie notwithstanding the repeal of the by-law and that it was not necessary that a person taking such proceedings should have held a miner's right either when the breach occurred or prior to the repeal of the by law.

1436 In *Mulcahy v The Walhalla Gold-Mining Company Registered*,[69] it was held by Molesworth J sitting in Equity and by the Full Court of the Supreme Court on appeal, that the remedies afforded by the Mining Act 1865 in cases of encroachment were cumulative and did not exclude the

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[67] (1868) 5 WW&A'B M30.
[68] (1868) 5 WW&A'B M39.
[69] (1868) 5 WW&A'B E103.

ordinary jurisdiction of the Supreme Court. Where ground is actually abandoned as a matter of fact, it may be taken up by any holder of a miner's right, without any previous adjudication of abandonment by a Warden.

1437 In *Cawley v Ling*,[70] Molesworth J, sitting as the Chief Judge of Courts of Mines, held that one person cannot by obtaining a multiplicity of miner's rights in his own name legally occupy a multiplicity of single men's claims. This was followed by Molesworth J in *Milne v Morrell*[71].

1438 In *Constable v Smith*,[72] Molesworth J, sitting as the Chief Judge, held that appeals from Wardens to Courts of Mines should practically be re-hearings. An appellant was entitled to prove another and different case from that proved before the Warden, but he should be confined to the grounds stated in the notice of appeal.

1439 *Regina v Davies*[73] was a decision of a Full Court of the Supreme Court delivered by Williams J. It was held that gold may be considered as taken from a vein or bed though the gold be in grains separated by particles of earth, provided it be in its natural position in situ, so as to sustain a charge of stealing gold.

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[70] (1869) 6 WW&A'B M12.
[71] (1872) 3 VR M4.
[72] (1869) 6 WW&A'B M58.
[73] (1869) 6 WW&A'B L246.

1440 In *Campbell v Ah Chong*,[74] it was held in the Full Court that it is incumbent on persons mining on Crown lands under miners' rights to use a stream flowing past the ground on which they are mining in such a way as not to injure the land or the water of those below them. This was a demurrer to a plea to a declaration for damaging the plaintiff's land by throwing sludge on it, that the defendants, as holders of miners' rights who were mining on Crown lands, only used a stream flowing by those lands for the purpose of their mining operations, and that by such use the stream became necessarily impregnated with earthy substances. The plea was held bad on demurrer.

1441 In *Thompson v Begg*,[75] the Great North West Company by the Defendants its trustees were registered for a united alluvial block claim. The Plaintiffs claimed a declaration of the forfeiture of the claim for a breach of labour conditions. In the Court of Mines at Ballarat the Defendants succeeded on the ground that there was no evidence that any of the Defendants was or claimed to be in actual possession of the claim. On appeal to the Chief Judge of the Courts of Mines Molesworth J said:[76]

> Here the plaintiffs had reasonable grounds for supposing that all of the defendants did claim an interest and that some of them, it might be hard to say which, were in

[74] (1870) 1 VR L25.
[75] (1871) 2 VR M1.
[76] 2 VR M7.

possession, so that they could not be ejected without summons, although they had ceased to work.

His Honour dissented from the view of the Judge of the Court of Mines that the plaintiffs could not succeed in a suit for forfeiture unless it was shown that the defendant was or claimed to be in possession of the claim.

1442 In *Bottrell v The Waverley Gold-Mining Company*,[77] Molesworth J as Chief Judge of Courts of Mines held that the principle in *Critchley v Graham*[78] applied to a claim taken up under a by-law that was ultra vires and the person in possession was not to be disturbed unless by legal proceedings.

1443 In *Rendall v Hadley*,[79] Molesworth J sitting as Chief Judge of Courts of Mines held that trespass can be maintained by an applicant for a gold mining lease against a person who was not previously in lawful occupation of the land but after the application for lease obtained, as against the applicant, a Warden's adjudication of forfeiture as a claim and purported to enter upon the land under such adjudication and continued thereon actually working.

1444 In *The St. George and Band of Hope United Company Registered v The Band of Hope and Albion Consols*

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[77] (1871) 2 VR M16.
[78] Supra Paragraph 1418.
[79] (1871) 2 VR M21.

Registered,[80] Molesworth J as Chief Judge of Courts of Mines and on appeal the Full Court of the Supreme Court held that a frontage claim[81] subsists over its entire surface until narrowed under the by-laws. The claim holder is entitled not only to the gold upon the lead in respect of which the claim is registered but to all gold within the claim until narrowed and, when narrowed, to all gold at whatever depth within the claim as narrowed.

1445 In *Mole v Williams*,[82] it was held by Molesworth J that an appeal, being practically a rehearing, the complainant below should begin. See also *Constable v Smith*[83] where it was held that an appeal from a Warden to a Court of Mines was practically a rehearing.

1446 In *Reardon v Sayers*,[84] it was held by Molesworth J that where the holder of a mining claim has committed an act of forfeiture and is liable to eviction by an informer, a collusive recovery by a friend undertaking to act as trustee for him will not be allowed to form a new title for the defaulter.

1447 In *Davis v Bull*,[85] the Full Court of the Supreme Court held that non compliance with the labour conditions,

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80 (1871) 2 VR E206.
81 See Paragraphs 648 and 1117.
82 (1872) 3 VR M7.
83 Supra Paragraph 1438.
84 (1872) 3 VR M19.
85 (1872) 3 VR L138.

however caused, rendered the claim liable to forfeiture See also the similar decision of Molesworth J in *Duffy v Tait.*[86]

1448 In *United Hand and Band of Hope Company v Winter's Freehold Company*,[87] Molesworth J sitting as Chief Judge of Courts of Mines held that the law recognises a disinclination on the part of mining companies to allow their mines to be inspected, and the Court will refuse a motion for inspection in a suit for encroachment where inspection may be used unfairly to the company whose mine is to be inspected.

1449 In *Ah Wye v Lock*,[88] Molesworth J sitting in Equity said:[89]

> This is a suit to establish a right to mine on private property. Gold on such land belongs to the Crown, but for a long time heretofore the Government has permitted owners and those bargaining with them to mine without interruption as to the Crown claiming real profit of the gold; and there is, I think, no illegality in agreements about such mining for gold, the parties dealing remaining subject to the Crown right being at any time asserted.

1450 In *Woolley v The Ironstone Hill Lead Gold Mining Company*,[90] Molesworth J sitting in Equity said[91]:

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86 Supra Paragraph 1429.
87 (1872) 3 VR E77.
88 (1872) 3 VR E112.
89 3 VR E115.
90 (1875) 1 VLR E237.

It is regarded as clear law in England that the Crown is entitled to all gold and silver mines against the owners of private property, and all other persons, and that its rights can be conveyed away only by express conveyance of royal mines; that a grant of lands from the Crown including in the description all mines, will not pass these royal mines, was expressly decided after great consideration in the case of *The Queen v Earl of Northumberland*.[92]…

In Victoria all land was regarded as between the Crown and subjects, as originally Crown property, so that title depended solely upon the language of grants; and it is reasonable that grants to subjects should have the same effect as the same words would have in English Crown grants. All the reasons stated for the right in England would equally apply in colonies – the Crown being entitled to the most excellent of things, the want of money to support armies and defend the realm, the use of precious metals to exercise the royal prerogative of coining money for the use of trade, the danger of subjects possessed of valuable mines being too strong to be controlled. I am not arguing for the force of these reasonings as to present times, or as against the present plaintiffs, but merely to say that the reasons, whether right or wrong, on which the old law was based, apply

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91 (1875) 1 VLR at E247–248.

92 (1568) 1 Plowden 310; 75 ER 472.

> equally to colonies, and that no one should reasonably expect that an effect of words in a Crown grant, having an established meaning in England, should be varied here.

This decision confirmed Molesworth J's ruling in *Millar v Wildish*.[93] From this decision of a single judge an appeal was taken directly to the Privy Council and was dismissed in *Woolley v The Attorney General of Victoria,* [94] thus establishing definitively the doctrine of royal mines in Australia.

Commentary

1451 In New South Wales there were only 13 cases touching on mining adjudications among the cases reported in the 1860s and early 1870s. Of these, eight were encroachment cases, three were criminal cases, one was a partnership case and one was a contract case.

1452 Not a great deal can be said about them in general terms. No general conclusion can be reached as to why these particular cases were the subject of appeals. Among them there is displayed a requirement of a close and literal adherence to and interpretation of the terms of the relevant legislation. This can be seen in *Ex parte Ah Tchin*[95] and particularly in *Ex parte McInnes*,[96] which emphasises the need for literal compliance with the

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93 Supra Paragraph 1420.
94 (1877) 2 App Cas 163.
95 Supra Paragraph 1405.
96 Supra Paragraph 1408.

requirements of regulations to enable rights to be obtained. The Court commented on the loose drafting of the legislation in *Ex Parte Ah Tchin* and also in *Bacon and Laird v Rebora*.[97]

1453 Of particular interest is the general statement by Stephen C J in *Wichern v Davidson*[98] concerning the nature of the gold fields and the part played on them by the specialised dispute settlement tribunals. His Honour's conclusion was that the decisions of these tribunals were intended to be final, and subject matter dealt with by them was not to be called in question in the ordinary courts. This is in contrast with what Arthurs characterises as the general attitude of the courts to adjudicative bodies outside the court system; see, for instance, his reflections on the relations between the courts and arbitrators and the courts' progressive interference in proceedings before arbitrators in the nineteenth century.[99]

1454 In Victoria, as already observed,[100] there was a larger volume of reported decisions, particularly by Molesworth J. Forty six cases have been noted. Of these, 24 were encroachment cases, twelve were forfeiture cases (a category not noted in New South Wales), two were criminal cases, two were partnership cases, five were administrative or procedural cases and one was a nuisance case. It should be observed that a number of the encroachment

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97 Supra Paragraph 1413.
98 Supra Paragraph 1410.
99 See H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) 68-75.
100 See Paragraph 1415 above.

cases could also be characterised as procedural cases. The subject matter of the cases was very diverse and they cannot be classified except as above. They illustrate graphically how Molesworth J earned his reputation as the master of Australian mining law.

1455 As in New South Wales, a strictness of approach to the legislative provisions may be perceived. This can be seen in *Millar v Wildish*,[101] *James v Higgans*,[102] *Thompson v Land*,[103] *Craig v Adams*[104] and *Spiers v Whiteside*.[105] *Thompson v Land* should particularly be noted as a case in which comparatively minor non compliances with the requirements for marking out invalidated the taking of possession.

1456 *Woolley v The Ironstone Hill Lead Gold Mining Company*[106] is the leading nineteenth century Australian mining case, being the case that finally established that the doctrine of royal mines applied in Australia.

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[101] Supra Paragraph 1429.
[102] Supra Paragraph 1421.
[103] Supra Paragraph 1425.
[104] Ibid.
[105] Supra Paragraph 1431.
[106] Supra Paragraph 1450.

Chapter Fifteen: History of Wardens' Courts After 1875

Establishment in All Australian Jurisdictions

1502 The establishment of Wardens' Courts in Victoria and New South Wales has already been discussed.[1]

1503 In South Australia the Gold Mining Laws Amendment Act 1871 provided for the appointment of Wardens and for proceedings to be heard in their "office".[2] Proceedings continued to be held in their "office" under the Mining Act 1893[3] and under the Mining Act 1930.[4] Wardens' Courts were created under the Mining Act 1971.[5]

1504 In Queensland Wardens' Courts were established under The Gold Fields Act 1874.[6] They continued to operate under The Mining Act of 1898.[7]

1505 In Western Australia Wardens' Courts were established under the Gold Fields Act 1895.[8] They are now constituted under the Mining Act 1978.

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1 See Paragraphs 606ff and Paragraphs 1303-1306 above.
2 See ss 11 and 14 and sch E.
3 See s 20.
4 See s 17.
5 See Part X.
6 See ss 29 and 48.
7 See ss 4 and 100-112.
8 See Part IV.

1506 In Tasmania Wardens' Courts were established under the Mining Act 1905,[9] replacing Local Courts that could be established under the Gold Fields Regulation Act 1859.[10] Wardens' Courts were renamed Courts of Mines under the Mining Act 1929, but the presiding officers were still called Wardens.[11]

1507 In the Northern Territory Wardens' Courts were established by the Mining Ordinance 1939.[12]

Spread of System Overseas

1508 Wardens' Courts were also established in some overseas jurisdictions.

1509 They were established in New Zealand by the Gold Fields Act 1858.[13]

1510 In the Territory of Papua Wardens' Courts created under The Mining Act of 1898 of Queensland were preserved by the Mining Ordinance 1937 and new Wardens' Courts could also be established under that Ordinance.[14]

1511 In the Territory of New Guinea Wardens' Courts were created by the Mining Ordinance 1922. Those Courts were

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9 See s 13 and Part IX.
10 See ss 25-36.
11 See ss 2, 8, 9 and Part XI.
12 See Part IX.
13 See ss 15-27.
14 See ss 4 and 117.

preserved by the Mining Ordinance 1928 and new Wardens' Courts could also be established under that Ordinance. [15]

1512 Mining Wardens were provided for in at least four States of Malaya, namely, Perak,[16] Selangor,[17] Negri Sembilan[18] and Pahang.[19]

1513 In Canada, there were Mining Wardens in at least two provinces, New Brunswick[20] and Nova Scotia.[21] In British Columbia there were no Wardens but there were Mining Courts presided over by Gold Commissioners.[22]

Extension of Mining Legislation and Work of Courts to Private Land

1514 Claims and leases could originally be obtained only over Crown Land. Mining on private land could be engaged in only with the permission of the landowner. Where what was mined for was gold belonging to the Crown, the permission of the Crown had also to be obtained. There was considerable agitation from the start of mining for titles to be granted compulsorily over private land. This was in the end permitted, and later title to mine would be granted even in respect of privately owned

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15 See ss 4 and 65.
16 Mining Enactment 1904.
17 Mining Enactment 1904.
18 Mining Enactment 1904.
19 Mining Enactment 1915.
20 General Mining Act 1892, s 135.
21 Mines and Minerals Act 1892, ss 21, 22, 23 and 41.
22 Gold Mining Ordinance 1867, s 5.

minerals. The jurisdiction of Wardens consequently came to extend to mining on private land.

1515 The Acts by which private lands were thrown open in the respective Colonies or States were as follows: Victoria Mining on Private Property Act 1884; South Australia Mining on Private Property Act 1888; New South Wales Mining on Private Land Act 1894; Western Australia Mining on Private Property Act 1898; Queensland Mining on Private Land Act 1909; Tasmania Mining Act 1917.[23]

Decline of Mining and the Work of Courts

1516 There is no doubt that from the late 1850s onwards there was a decline in gold production and particularly in the number of men engaged in gold mining. In 1858 there were 140,000 individual miners working on the Australian gold fields, but by 1862 this had fallen to 93,000 and by 1868 to 65,000. Important background to this diminution are the changes in the methods of mining and the underlying causes of those changes.[24] The first phase of mining was surface alluvial mining by individuals or small parties of miners working by hand. As the gold was mined out of the surface alluvium operations moved to the deep leads which involved shafts of 50 to 100 feet requiring timbering and often requiring constant dewatering, necessitating larger parties of men and more capital. And this was even more so in relation to

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[23] Part VIII.

[24] See Paragraphs 245-251 above.

the third phase, involving the extraction of gold from quartz reefs. Not only did this progression mean that less gold was won overall, but that fewer men were involved in the recovery of that gold.[25]

1517 This diminution caused a reduction in adjudications in various ways. One was simply the reduction in the number of people involved. But the disputes requiring adjudication were also fewer by reason of the changed nature of the operations. The boundary and encroachment disputes were more numerous between individual miners working on adjacent small claims. And partnership and co ownership disputes were more frequent in relation to alluvial workings. This is illustrated by the small number of cases – 50 only – in the Sofala Warden's Court in its first five years, 1874-1878.[26] In the 1850s in five years there would have been hundreds of cases on the Sofala field.

Abolition of Wardens' Courts

1518 The first abolition of Wardens' Courts was in Victoria, where they were first created. Both Wardens' Courts and Courts of Mines were abolished by the Mines (Abolition of Courts) Act 1969. Their jurisdiction was transferred in the case of Wardens' Courts to Courts of Petty Sessions and in the case of Courts of

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[25] As to this paragraph see Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 1963) 60-61; Malcolm Knox, *Boom: The Underground History of Australia, From Gold Rush to GFC* (Viking, 2013) 43 and 94-96; Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia, Volume 1* (Cambridge University Press, 2013) 187-188.

[26] See Paragraph 1312 above.

Mines to County Courts. The cases therefore can still be heard by Magistrates and County Court Judges respectively.

1519 In Tasmania, Courts of Mines were abolished by the Mineral Resources Development Act 1995 and their jurisdiction transferred to the Mining Division of the Magistrates Court of Tasmania known as the Mining Tribunal.[27]

1520 In Queensland the Wardens' Courts were abolished by the Land and Resources Tribunal Act 1999 and their jurisdiction transferred to the Land and Resources Tribunal.

1521 In New South Wales the Wardens' Courts were abolished by the Courts and Crimes Legislation Further Amendment Act 2008 and their jurisdiction transferred to the Land and Environment Court.[28]

1522 In the Northern Territory the Wardens' Courts were abolished by the Mineral Titles Act 2010 and their jurisdiction transferred to the Lands, Planning and Mining Tribunal.

1523 The Wardens' Courts have not been abolished and continue to exist in South Australia and Western Australia.

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[27] See Part 7, s 206, Sch 1.
[28] See Sch 19 [54].

Chapter Sixteen: Conclusion

1601 This Chapter contains two sections. The first summarises the material in Chapters Two to Fifteen. The second contains some conclusions arising from the subject matter of the thesis.

Summary

1602 New South Wales was founded as a penal colony in 1788 and continued to receive convicts until 1840. The principal industry became the keeping of sheep largely by squatters for wool and tallow. Convict labour was directed to the hinterland, principally for employment as shepherds. In 1851 squatters were the holders of the vast bulk of settled lands in New South Wales. This was the state of the settlement in which the discoveries of gold led to the commencement of the gold rushes in 1851.

1603 From 1842 the Legislative Council was partly elected. By an Imperial Act of 1850 the colonial legislatures were given power to amend their own constitutions and Victoria was separated from New South Wales effective from 1 July 1851. Pursuant to a decision in 1852 to grant the Colonies self-government, they both enacted constitutions which became effective in 1855. From 1856 they both had two House Parliaments with restricted franchises. Manhood suffrage for the Legislative Assemblies was provided for in 1858.

1604 Although there were earlier discoveries of gold, the gold rushes dated from discoveries in 1851 in New South Wales near Orange by Edward Hammond Hargraves and shortly afterwards in Victoria at Clunes. Many other fields opened shortly afterwards in both Colonies.

1605 As a result, between 1851 and 1861, the population of New South Wales almost doubled and the population of Victoria increased six fold. From 1851 to 1860 Australia produced 39% of the world's gold, which supplanted wool as the principal export. Production in Victoria greatly exceeded that in New South Wales. While the gold towns in New South Wales remained small there were in Victoria substantial gold towns such as Ballarat and Bendigo.

1606 The accommodation in all gold settlements started with tents, progressed to slab and bark huts and went on to weatherboard and even brick buildings. Stores proliferated, and hotels. In 1871 Anthony Trollope was impressed by Ballarat because of its hospital, libraries, hotels, public gardens and other amenities. The growth of Ballarat was fostered by the development of secondary industries.

1607 On all fields the methods of mining went through three stages: surface alluvial mining; deep lead mining, where alluvial gold was recovered from the beds of buried creeks; and quartz reef mining. The latter two methods required more men and money.

1608 The principal causes of the Eureka Stockade were the high licence fee (30/- per month) and the pervasive 'digger hunts' to collect the licence fee. As a result of the ensuing 'Eureka' Royal Commission, virtually all of the diggers' demands were met. The sympathies of the general population were marked by the acquittal by juries of all those charged arising out of the uprising.[1]

1609 Turning to the origins of the system of adjudication on the gold fields, there were two important sources. The first was the long tradition of specialist mining courts in England, to which the Australian system looked back, although there was no direct translation of these institutions to Australia, except for the adoption of the title 'Warden'. A more direct influence was the institution of Crown Lands Commissioners in New South Wales and the adjudicative functions they performed.

1610 The two most important systems of English mining courts prevailing in the nineteenth century were the Stannary Courts, with jurisdiction relating to tin and other metals in Cornwall and Devon, and the Barmote Courts, relating to lead mining in Derbyshire.

1611 The Stannary Courts dated back to the beginning of the thirteenth century and took various forms during their history. They ultimately had both common law and equitable jurisdiction.

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[1] Paragraphs 1602-1608 summarise Chapter Two.

They had jurisdiction over tinners in relation to all suits arising in the stannaries to the exclusion of the ordinary courts. This included suits between tinners and non-tinners. The Barmote Courts exercised a general jurisdiction over matters arising in the course of lead mining including disputes over mining titles.

1612 In New South Wales, as settlement spread, grazing activities were carried out by 'squatters' on Crown Lands. In 1833 Crown Lands Commissioners were appointed to prevent intrusion, encroachment and trespass on grazing licences. In 1839 they were given a specific adjudicative function (in terms later mirrored under the mining legislation) and exercised this function from 1840 on.[2]

1613 The first adjudicative institution created in both New South Wales and Victoria in 1851 was the Gold Fields Commissioners. In New South Wales their adjudicative functions continued until 1874, but in Victoria they were replaced in 1855 as a result of the 'Eureka' Royal Commission.

1614 In New South Wales a crisis was created for the Government as a result of the announcement by Edward Hammond Hargraves of his discovery of gold at Ophir near Orange. The Government responded with a Proclamation, Regulations and the appointment of John Richard Hardy as

[2] Paragraphs 1609 -1612 summarise Chapter Three.

Commissioner of Crown Lands for the Gold Fields and his despatch to the Bathurst district to take control of the situation.

1615 Within five days of his arrival, as well as issuing licences, he was settling disputes among the miners, although invested with no specific function in this regard. He continued on the gold fields until November, when he was removed to Sydney to exercise a supervisory role. He was removed from office late in 1852 by the Legislative Council (although without criticism of his performance of his functions), but the system of adjudication he initiated continued with general satisfaction.

1616 Regulations in April 1852 applied to mining adjudications the same rules as applied to adjudications under the Crown Lands legislation. In particular, the Commissioners were required to proceed to determine disputes 'on the spot' and this requirement persisted until 1866.[3]

1617 By the 1855 Act in Victoria both Wardens and Local Courts were established with adjudicative functions. The Wardens, at Magistrates level, were invested with encroachment jurisdiction. The Local Courts were given jurisdiction over both partnership disputes and prosecutions for breach of regulations.

1618 The Wardens heard numerous matters, some 3173 in the five original Gold Mining Districts in 1855 alone. The Local

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[3] Paragraphs 1613-1616 summarise Chapters Four and Five.

Courts had not only their adjudicative functions, but power to make regulations effective in their respective Districts. The Chairmen were appointed by the Government, but remarkably, the other nine members were elected by the holders of miners' rights in their District.

1619 Whilst five Local Courts were initially established, by the time of their abolition on 1 January 1858 there were 21 Local Courts and they all had considerable adjudicative business. Thus, between their establishment and August 1856 twelve Courts dealt with 860 cases. In addition, they exercised their regulation-making power so that over two and a half years over 170 submissions of new or amended rules were made. They also came to have the power to consider and make recommendations concerning all applications for mining leases.

1620 The system was revised by the 1857 Act. The amendments relating to Wardens were minor, but the Local Courts had their adjudicative functions removed. The rule-making function was transferred to elected Local Boards, and the judicial functions were transferred to Courts of Mines to be established in each District presided over by a Judge appointed from among barristers. The Judges were also in practice the Judges of the local County Courts.[4]

[4] Paragraphs 1617-1620 summarise Chapter Six.

1621 In New South Local Courts were provided for under the 1857 Act, but were to be established only on the petition of holders of miners' rights in the District. Few were established and they did little work.

1622 The ambit of disputes was widened to include partnerships and all disputes arising in respect of a claim. Up to 1866 disputes were determined on the spot. Complaints were made verbally, the Commissioner went to the ground, no evidence was taken in writing and the decision was then and there pronounced.

1623 Owing to the lack of writing there is little in the way of accounts of these proceedings. One book that was kept on the Rocky River Gold Field for part of 1856 shows 17 cases, eleven of encroachment, three as to the abandonment of a claim and three as to partnership or doing work.

1624 The continuation and success of a totally unwritten system is one of the most remarkable features of adjudication on the Australian gold fields. It can only be explained by the nature of the communities in which the decisions were made, in which the participants and the communities generally were physically and socially close and all in the community were interested in what was occurring around them, particularly in relation to mining.[5]

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[5] Paragraphs 1621-1624 summarise Chapter Seven.

1625 Two Acts in 1866 made important amendments to the scheme. First, all jurisdiction was vested in Justices of the Peace rather than Commissioners. Consequentially most of the Commissioners were removed from office. Secondly, the requirement to go to the spot was removed.

1626 In Parliament this regime was opposed on the ground that JPs (who were unpaid) lacked expertise and would be reluctant to act. This proved to be so and the Royal Commission of 1871-71 found that 'the present plan of Judicature … is worse than useless'".[6]

1627 The Royal Commission recommended the creation of Wardens' Courts at Magistrates Court level to exercise all jurisdiction under the mining legislation. This was embodied in the law when the Wardens' Courts were created by the Mining Act 1874.[7]

1628 The material as to how adjudications were conducted in New South Wales between 1866 and 1873 is exiguous. Determinations on the spot certainly diminished. In the early 1870s the mining disputes came to be determined in court (although the Justices of the Peace were not formally sitting in court) and recorded in writing, so that the system closely resembled that of Victoria. Evidence of their determinations in

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6 Paragraph 819 above.
7 Paragraphs 1625-1627 summarise Chapter Eight.

court is provided by the Gulgong Summons Case Book of 1871-1872 and the Tambaroora and Hill End Bench Books.

1629 The Gulgong Summons Case Book records 265 separate mining cases between March 1871 and May 1872. Of these the most numerous were trespass or encroachment cases, of which there were 96. 72 were mining partnership cases and 48 were appeals (presumably to a Court of Petty Sessions from a Justice of the Peace). The Book records parties, type of matter and, briefly, result.

1630 The Tambaroora and Hill End Bench Books record, in addition, the evidence – where evidence was given. These Books cover a longer period and reveal that it was in 1871-1872 that matters are recorded as determined in court. 32 cases from the Hill End record are summarized in an Appendix. These include 23 encroachment or trespass cases and six partnership cases. The encroachment cases were divided between 'pegging' cases, where in general terms the complaint was of invalidity in the original acquisition of the title, and 'jumping' cases, which generally turned on loss of entitlement by breach of labour conditions or abandonment.[8]

1631 In Victoria from 1858 there was a two-tier system of Wardens and Courts of Mines. From 1865 there was a Chief Judge

[8] Paragraphs 1628-1630 summarise Chapter Nine. .

of Courts of Mines. This was Robert Molesworth, generally regarded as the preeminent Australian mining lawyer.

1632 The 1858 Ballarat Warden's Cause Book records 65 cases, in 28 of which assessors sat. They were all encroachment cases, ten of them relating to water rights. In the 55 general encroachment cases, the complainants succeeded in 30, obtaining orders for possession and in some cases injunctive relief as well. In four cases there were damages, as high as £330 in one. In the water rights cases where the complainant succeeded there were orders restraining or curing the interference.

1633 The 1867 Court of Mines Book reveals work that included 21 ordinary actions (of great variety), 27 company petitions and nine appeals from Wardens. The 21 ordinary cases included one partnership case, which was of considerable sophistication, not surprising in Ballarat in 1867.

1634 In the 1871 Warden's Cause Book there are 99 separate cases, of which 64 were described as forfeiture cases and 27 as encroachment cases. Unlike the encroachment cases in 1858, these sought damages rather than possession and high damages were sometimes awarded – £587 in one case. In the forfeiture cases that were successful orders were made for possession and it would seem that at this time all possession cases were commenced by a claim for forfeiture.

1635 Comparing the New South Wales and Victorian material, it is clear that the subject matter of the bodies of decisions was substantially similar, generally dealing with the right to possession. This flowed from the ongoing form of activity on the gold fields conducted through the pegging and working of small claims. Victoria went over to a court system in 1858 and, although there was no mining court in New South Wales until 1874, the determination of disputes in the Petty Sessions lists commenced in the early 1870s.[9]

1636 A detailed examination is made of the career of T A Browne as Gold Commissioner at Gulgong in the early 1870s. This is because Gulgong was one of the last poor men's rushes in south eastern Australia. Much more so than generally, there is available extensive material on his relations with the mining community and the general community. This shows that, unlike earlier Commissioners, Browne was at odds with his community and shows the system working unsuccessfully.

1637 Born in England, Browne grew up in New South Wales and Victoria, and failed in grazing enterprises in both Colonies. He obtained appointment as Gold Commissioner, Police Magistrate, Clerk of Petty Sessions and Mining Registrar in Gulgong in April 1871, probably through the influence of his brother in law, Sir Frederick Darley. He had no relevant experience to qualify him for those posts.

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[9] Paragraphs 1631-1635 summarise Chapter Ten.

1638 Almost contemporaneously, Thomas Frederick de Courcy Browne commenced as editor of the *Gulgong Guardian.* He soon became frequently critical of T A Browne's performance, on the grounds of both delay and incompetence. Although these were not completely without substance, Browne was in effect exonerated of serious misconduct by a commission of enquiry in 1874. However, his performance was unsatisfactory in that he was unable to gain and hold the confidence of the community. In the meantime, allegations against him in the *Guardian* of bias and dishonesty had led to de Courcy Browne's conviction and imprisonment for criminal libel.[10]

1639 The trial took place in the Supreme Court in Sydney on 15 May 1873 before Hargrave J. The defamation was in a letter signed 'A Blocker'. The allegations included that Browne was 'as clay in the hands of an unlicensed fellow of the law' and 'is a dummy on the bench' and also that he had 'been proved guilty of prevarication and positive untruth'.

1640 J E (later Sir Julian) Salomons appeared to prosecute. He described it as 'one of the most grievous libels ever published'. Evidence was given of proceedings before T A Browne by witnesses including Browne himself and Edward Clarke, who was the 'unlicensed fellow'. In summing up, the Judge said that the language used 'had been gross and libellous in the extreme'. The

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[10] Paragraphs 1636-1638 summarise Chapter Eleven.

jury convicted in 15 minutes and the Judge imposed a sentence of six months imprisonment, despite an indication that T A Browne interceded in mitigation of the punishment.

1641 Upon a petition signed by 2500 persons for remission of the sentence, de Courcy Browne was released on 19 June. He sold the *Guardian,* edited other papers, became the Warden at Gulgong when T A Browne left in 1881 and subsequently became a Member of Parliament. He died in Callan Park Asylum in 1899.[11]

1642 The recommendation in the Royal Commission Report of 1871 for the establishment of Wardens' Courts in New South Wales was implemented in the Mining Act 1874. On 12 May 1874 Wardens' Courts were set up in Araluen, Bathurst, Gulgong, Hargraves, Hill End, Kiandra, Major's Creek, Mudgee, Sofala and Windeyer. Unfortunately the records of Wardens' Courts that have reached the State Archives are very patchy. But there is a complete set for Sofala.

1643 These show 50 cases decided in the first five years, 1874-1878, three commenced in 1874, 21 in 1875, twelve in 1876, twelve in 1877 and two in 1878. Of these cases 31 concerned water races or water, 14 concerned encroachment or trespass on land, three were contract cases and two were administrative cases. All cases were decided within two months and all but five within three weeks.

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[11] Paragraphs 1639-1641 summarise Chapter Twelve.

1644 The number of cases shows a sharp fall from the early days of the field when there would have been hundreds of disputes in the same period. The fall would have been due in part to a diminution in the number of claims worked. It may have been contributed to by the greater formality of the proceedings.[12]

1645 A survey of the reported cases concerning adjudication of disputes decided in the superior courts of the Colonies in the 1860s (when law reporting began) and the first half of the 1870s shows 13 such cases in New South Wales and 46 in Victoria, where Molesworth J presided over the Court of the Chief Judge of Courts of Mines.

1646 The cases turned on their individual circumstances and not a great deal can be said about them in general terms, save that in both Colonies there was displayed a requirement of a close and literal adherence to and interpretation of the terms of the relevant legislation. Thus comparatively minor non-compliances with the requirements for marking out invalidated the taking of possession. Further, the Supreme Court of New South Wales displayed an explicit reluctance to interfere in subject matter committed to the specialised dispute settlement tribunals.[13]

1647 From 1871 onwards, Wardens' Courts were established in all Colonies (subsequently States) other than Victoria and New

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[12] Paragraphs 1642-1644 summarise Chapter Thirteen.

[13] Paragraphs 1645 and 1646 summarise Chapter Fourteen.

South Wales and in the Northern Territory. They were also established in Papua and New Guinea, New Zealand, some States of Malaya and some Provinces of Canada.[14]

1648 As to the work they did, this was extended to private land, but from the 1850s on there was a decline in gold production and the number of men engaged in gold mining. This led to a decline in the number of adjudications relating to both boundary and encroachment disputes and to partnership and co-ownership disputes.

1649 However, Wardens' Courts continued to exercise their jurisdiction into the 20th Century, and in some cases, the 21st Century. Whilst in five out of seven Australian jurisdictions they have now been abolished, their specialised jurisdiction has been transferred to other tribunals – in New South Wales the Land and Environment Court – and is still exercised.[15]

Conclusions

1650 The gold rushes were probably the most important event or series of events in the history of Australia. They are the subject

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[14] The States of Malaya were Perak, Selangor, Negri Sembilan and Pahang (Mining Ores Enactments respectively No 5 of 1904, No 5 of 1904, No 4 of 1904, No 1 of 1915). And see Charles Alford, *Mining Law of the British Empire (*Charles Griffin & Co, London, 1906) 69-70. In Canada, in New Brunswick, Wardens are mentioned in the General Mining Act 1892 and in Nova Scotia in the Mines and Minerals Act 1892. In British Columbia there were Mining Courts presided over by Gold Commissioners: Gold Mining Ordinance 1867.

[15] Paragraphs 1647-1649 summarise Chapter Fifteen.

of a large literature. Adjudication on the gold fields was of daily occurrence and of great importance. Yet it has been the subject of virtually no writing, with the exception of the Local Courts that existed for some two years in Victoria, which have attracted some attention.[16]

1651 But the adjudication systems that grew up and have persisted, along with the somewhat related subject matter of the forms of title to mine, are one of the great novelties that arose out of the early gold mining. As noted above,[17] they were established in all Australian States and Territories and a number of overseas jurisdictions. As well as being novel they are of considerable legal significance.

Origins of Systems

1652 The systems of adjudication that were adopted in a way looked back to the mining courts in England, although not directly derived from those courts.[18] However, more importantly, to settle the unexpected administrative crisis that arose from the sudden onset of gold mining, the systems were initially based upon the powers that Commissioners of Crown Lands had to determine disputes over the occupation of Crown Lands for grazing purposes.

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16 See Chapter Six above.
17 See Paragraphs 102 and 1647
18 See Paragraph 324 above.

1653 In 1833 Crown Lands Commissioners were appointed to prevent intrusion, encroachment and trespass on grazing licences. In 1839 they were given a specific adjudicative function in terms later mirrored under the mining legislation, which required them, in particular, to proceed to and determine disputes 'on the spot'. From 1840 on a great deal of their time was taken up in such adjudications.[19]

1654 When Edward Hammond Hargraves publicized his discovery of gold at Ophir, miners immediately started to flock to the area. Faced with this crisis, the Executive Council appointed John Richard Hardy as Crown Lands Commissioner for the Gold Fields and despatched him to the Bathurst district to issue licences to mine at a fee of 30/- a month and 'to preserve the peace, to put down outrage and violence, and to protect the community generally'.[20]

General Trends

1655 Although he was given no specific power to settle disputes, other than what he had in any event as a Crown Lands Commissioner, he was settling mining disputes within five days after his arrival, and his decisions were accepted 'without a murmur'.[21] This was substantially due to Hardy's personal qualities.[22]

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19 See Paragraphs 320-322 above.
20 See Paragraph 515 above.
21 See Paragraph 520 above.
22 See Paragraphs 553-555 above.

1656 Although Hardy was removed from the equation at the end of 1852,[23] this system continued in New South Wales until 1874. The mining legislation came to confer jurisdiction in terms similar to the Crown Lands legislation,[24] including, until 1866, a requirement to proceed to the spot. Despite Hardy's removal, the exercise of the jurisdiction in New South Wales by his successors as Commissioners continued to give general satisfaction until 1866. As J B Hirst has opined, '[n]ever was justice so prompt, so cheap, and so accessible'.[25]

1657 In 1866 the jurisdiction was transferred from the Commissioners to Justices of the Peace, who were unpaid and inexperienced in mining matters.[26] Most of the Commissioners were dismissed.[27] Furthermore, the requirement to go to the spot was removed. As was made plain in the evidence before the Royal Commission of 1870-1871, these changes led to the deterioration of the quality of and satisfaction with the adjudicative system, so that the Royal Commission reported that 'the present plan of Judicature … is worse than useless'.[28]

1658 Perhaps the most remarkable feature of this system until 1866 and beyond was that the proceedings were completely oral;

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23 See Paragraphs 545, 546 above.
24 See Paragraph 415 above.
25 Hirst, J B, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988) 201.
26 See Paragraph 801 above.
27 See Paragraph 809 above.
28 See Paragraph 819 above.

that is, neither the complaint, nor the hearing (including any sworn evidence), nor the decision, was written down.[29] This is unique among adjudicative systems in recent centuries. From the beginning of New South Wales, even the tribunals dealing with the most minor matters were based on written records of the litigants and adjudicators. The earliest Magistrates Courts kept written records, as did the earliest Court of Civil Jurisdiction, which began operation in 1788.[30] Those small courts were based on an English court model. By contrast, the oral on the spot decision-making of the Gold Field Commissioners was based on the administrative model of the land regulations which had preceded them. Despite the success of that model, gold litigation eventually fell into the court-based pattern which was ubiquitous throughout the British Empire.

1659 Although the system of adjudication before Commissioners continued in New South Wales until 1874, it came to an abrupt end in Victoria in 1855. This was the result of the discrediting of the Commissioners by reason of their participation in the 'digger hunts' that led to the Eureka Stockade and the Report of the ensuing Royal Commission. The 1855 Act created a two-level system of adjudication, the lower level being Wardens, to which office the Commissioners were appointed, and the higher level being Local Courts, of which all the members other than the

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[29] See Paragraph 721 above.

[30] Paula Byrne, *Criminal Law and Colonial Subject: New South Wales 1810-1830* (Cambridge University Press, 1992); Bruce Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict NSW* (Federation Press, 1996).

Chairman were elected, and which also had legislative functions. At both levels proceedings were formally recorded and were conducted in a more formal way.[31]

1660 At the beginning of 1858 the elected Local Courts were abolished as inconsistent with British constitutional principles,[32] and replaced by Courts of Mines presided over by a Judge who was also the Judge of the local County Court. This two-tier system has persisted in Victoria to this day, but has not been replicated in any other jurisdiction.

1661 In New South Wales the cases in the early 1870s came to be heard in court, although in hearing them the Justices of the Peace were sitting under the mining legislation rather than as Magistrates.[33] This system was formalised when the Mining Act 1874 created Wardens' Courts in accordance with the recommendations of the Royal Commission of 1870-71.

Notable Features of the System

1662 As already remarked,[34] this system provided dispute resolution that was prompt, cheap and accessible. It was quite different from any system in the United Kingdom, the United

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31 As to this and the succeeding paragraph see Chapter Six above.
32 See Paragraph 662 above.
33 See Paragraph 904 above.
34 See Paragraph 1656 above.

States,[35] or elsewhere. There are three features of the system that are revealed by this thesis to be particularly notable.

1663 The first feature is the elected Local Courts. These were the only elected courts in the history of Australia. They were not as such recommended in the 'Eureka' Royal Commission Report, but were included in the consequential Act of 1855. Their provenance is not clear, but the most plausible conclusion is that they arose out of the Government's general anxiety to meet the miners' political aspirations, which had come to be recognized as legitimate.[36] Their operation in Victoria was for some two-and-a-half years only, from mid-1855 to the end of 1857. Their performance of their adjudicative functions appears to have been generally successful, although they faced difficulties with regard to the members, who were practising miners, devoting the necessary time to their judicial duties, and also regarding the question as to the constitutional suitability of the Courts. They were also provided for in New South Wales, but did virtually no adjudicative work there. But in Queensland there was an active Local Court in Gympie from 1868.

1664 The second notable feature of the system that is revealed is the completely oral nature of the proceedings before Commissioners in New South Wales from 1851 until well after the Acts of 1866, combined with the requirement until 1866 to

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[35] See Simon Chapple, *Law and Society Across the Pacific Nevada County, California, 1849-1860 and Gympie, Queensland, 1867-1880* (PhD thesis, University of New South Wales, 2010) 91-95.

[36] See Paragraph 616 above.

proceed to the spot. This helps explain the lack of records of these proceedings. There appears to be no other example of a tribunal conducted completely without writing, at least in modern times, nor one required to give its decision on the spot. Thus, in H W Arthurs' exhaustive study of informal tribunals in 19th century England referred to in the next paragraph there is no evidence that any of them operated in this manner. Despite the ephemeral nature of completely oral proceedings, the system appears to have worked successfully and without complaint. The lack of the necessity to record the proceedings undoubtedly contributed to justice being so prompt, cheap and accessible, especially during the early days when Commissioners were deciding many cases, particularly on the move. That the proceedings were effective and their decisions operative must be attributed to the nature of the communities in which the decisions were made. All community members were physically and socially close, and all were interested in what was occurring around them, particularly in relation to mining.[37]

1665 H W Arthurs[38] has written of the parallel systems of the common law courts and of informal adjudicative tribunals (including the mining tribunals referred to above[39]) as they operated in England in the 19th century. The adjudications on the Australian gold fields obviously fall into the second category. Arthurs emphasizes that in the UK the ordinary courts

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[37] See Paragraph 741 above.
[38] See Paragraphs 740 and 1453 above.
[39] Paragraphs 302-313 above.

discouraged simplicity in the informal tribunals, taking the view that "there can be no Alsatia where the King's writ does not run."[40] He writes that the judges, lawyers and magistrates' "interests and ideology were affronted by any trespass upon their claimed monopoly over adjudication."[41] This led the common law courts to interfere in proceedings in the informal tribunals even when not specifically authorized to do so, and to insist that decisions in proceedings in those tribunals accord with common law rules of law. As seen in Chapter 14,[42] exactly the opposite approach was taken to the specialized informal mining tribunals by the Supreme Court of New South Wales. That is, the legislature made plain that the tribunals' decisions were meant to be final and that there should not be further litigation upon a matter on which they were so qualified to give a decision.

1666 The third notable feature of the system revealed by the thesis is that the distinctive adjudicative jurisdiction that grew up in the first 25 years of the gold rushes persisted and came to be vested generally in Wardens' Courts. It spread throughout Australia and beyond. It has continued in existence and in operation throughout the 20th century and into the 21st century. The Wardens' Courts themselves have now been abolished in five out of the seven Australian jurisdictions in which they existed but

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[40] H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) ix.

[41] Id 139.

[42] See Paragraph 1410.

their jurisdiction has in every instance been preserved and transferred to another body which still exercises the jurisdiction.

Answers to Particular Questions

1667 Three particular questions were posed at the end of Chapter One.[43] Those questions are answered below.

1668 *Question (1): Why did the adjudication system assume the form it did in New South Wales?* This arose out of the circumstances faced by the Government as a result of the sudden onset of the initial gold rushes. The mechanism chosen by the Executive Council to control the situation was the appointment of a Crown Lands Commissioner specifically for the Gold Fields and his despatch to issue licences and impose law and order on the large number of diggers converging where the gold was to be found. He did have adjudicative powers under the Crown Lands Acts, but it is quite unclear whether he was purporting to exercise those powers. Certainly, within days he was maintaining law and order by settling disputes among the diggers and insisting the diggers brought their disputes to him for settlement.[44] In 1852 there was legislation regulating the exercise of jurisdiction in relation to mining disputes and this was in the form originally incorporated in the Crown Lands Acts.[45]

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[43] See Paragraph 116.
[44] See Paragraph 520 above.
[45] See Paragraph 415 above.

1669 *Question (2): Was that system successful, and if so, why?* It was successful until 1866, when the jurisdiction was removed from Commissioners who had, or had quickly developed, expertise in mining matters. Thereafter it was transferred to Justices of the Peace who lacked that experience. The oral system permitted matters to be dealt with expeditiously when their nature called for expedition and when they were numerous. In New South Wales, as opposed to Victoria, Commissioner Hardy inspired confidence and trust through his personal qualities, and in large measure his successors continued to do so.

1670 *Question (3): Did the Supreme Courts lead to the formalisation of dispute resolution in New South Wales and Victoria, and if not, what did?* There appears to be no record of encouragement by the Supreme Courts of formalisation of proceedings. Indeed, in New South Wales the Supreme Court expressed approval of the existing system.[46] The formalisation in Victoria resulted from the discrediting of the Commissioners by their participation in the 'digger hunts' leading to the Eureka Stockade and the Report of the ensuing Royal Commission. In New South Wales the move into court followed the transfer of jurisdiction from the Commissioners to Justices of the Peace and Magistrates after the 1866 Acts and the removal of the requirement to go to the spot. At the same time the volume of decisions had diminished and there was a view expressed by many witnesses before the Royal Commission of 1870-1871 that

[46] See Paragraph 1410 above.

evidence was better heard and considered in court.[47] The change was formalised by the creation of the Wardens' Courts in the Mining Act 1874.

[47] See Paragraphs 837 and 841-843 above.

APPENDIX I

TABLE OF CASES

RECORD OF CASES DETERMINED IN BEECHWORTH LOCAL COURT

Proved = The Court decided the case had been proved

Not Proved = The Court decided the case had not been proved

Water race = Cutting a water race

Supply of water = Interfering with a supply of water

Only cases determined are numbered, not cases adjourned

NO	TYPE	RESULT
Mon	6 October 1856	
		Adjourned
		Do
		Do
1	Water race	Deft fined £2/2/0 Costs £1/5/6
Mon	13 October 1856	
2	do	Dismissed
3	do	Dismissed the Court being of opinion that Deft having first occupied his claim had a right to cut his race where he pleased
4	Partnership	Dismissed
5	do	Settled
	do	Adjourned

6	Water race	Proved Fined 1/- Costs of Court 8/6 Ptff's Costs £2
Mon	20 October 1856	
7	Possession of claim	Dismissed
8		No appearances Dismissed
9	Water race	Proved Fined 1/- Ptff's Costs £2/10/6
10	Partnership	Dismissed with Costs £1/9/6
11	Supply of water	Proved Fined Deft McLeod £5 with Costs £2/19/-
12	do	Dismissed Ptff having expressed his wish to withdraw the Case
13	do	Proved Fined 1/- and Costs £3/0/8
14	Water race	Proved Fined £5 Costs of Court 9/6
Mon	3 November 1856	
15	Partnership	The Court dissolved the partnership and ordered the Applicants to buy out Mason & Duggan from both claims for the sum of £50 to be paid forthwith to both of them
Mon	10 November 1856	
16	Supply of water	Dismissed
17	do	Proved Fined 1/- Costs 30/-
		Adjourned
18	Water race	Proved Fined 1/- Costs of Court 8/6
	Water race	Adjourned (after evidence)
19	Supply of water	Proved Fined 1/- Costs 30/-
Mon	17 November 1856	
	Water race	Adjourned (after evidence)
20	do	Dismissed

21	do	Proved Fined £2 each Costs of Court 7/-
22	Supply of water	Proved Fined 1/- Costs of Court £1/10/6
23	Partnership	The Court dissolved the partnership by ordering the Deft to pay to James McKean as agent of James Rea £150 for the 10th share in the claim. Ten days allowed for payment.
24	Water race	Proved Fined 1/- Costs of Court 12/-
	Supply of water	Adjourned (after evidence)
Mon	24 November 1856	
25	Breach of regulation	Proved Fined 1/- Costs of Court 14/6 Ptff's Costs £2
26	Inefficient flood race	The Deft admitted the facts but contended that no injury has been sustained. The Court fined the Deft 1/- Costs of Court 14/6 Ptff's Costs £2
	Taking forcible possession of a claim	Adjourned
27	Supply of water	Dismissed
Mon	1 December 1856	
28	Partnership	The Court ordered the partnership to be dissolved Gander paying to Perry £195/10/- Iokinson £195/10/- Robertson £97/15/- & Bardo £195/10/- in each case immediate payment.
29	Supply of water	Dismissed with Costs of Court 10/10 & Ptff's Costs & witness £2
		Adjourned
30	do	Proved Fined £1 Costs £1/6/6 immediate payment
	do	Adjourned (after evidence)
Mon	8 December 1856	
31	do	Dismissed without costs

32	Partnership	The Court dissolved the partnership and ordered that the Respondents pay to the Applicant £22/10/- and Costs of Court 10/6 24 hours allowed for payment.
33	Supply of water	Dismissed
34	Partnership	No appearance Dismissed
	Supply of water	Adjourned
35	do	Dismissed
36	do	The Court fined the Deft 10/- and Costs of Court 8/6 24 hours allowed for payment
Mon	15 December 1856	
37	do	Disposed of by Mr Sub Warden Lane
38	do	Dismissed
39	Water race	No appearance Dismissed
40	Putting a dam in the Woolshed Creek	The Court fined the Deft 10/- and Costs of Court 10/6
41	Partnership	The Court dissolved the partnership and ordered that Shakespere hold the claim And pay to the Respondents £80 per man in full discharge of all their Right and interest in claim tools and Plant 10 days allowed for payment.
42	Supply of water	Proved Fined £1 Costs of Court 15/6
Mon	22 December 1856	
43	Supply of water	Dismissed
44	do	Dismissed
45	do	Dismissed
46	Taking forcible possession of a claim	Proved Fined £1 Costs of Court 15/6

Wed	7 January 1857	
47	Supply of water	Proved Fined 1/- Costs of Court 8/6
48	do	Proved Fined 1/- Costs of Court 10/- and Ptff's costs for one Witness £1
49	do	Proved Fined 1/- Costs of Court 7/6
50	do	Summons withdrawn on the undertaking of the Deft to pass the water by his claim at the level of the original Race
51	Supply of water	Summons withdrawn on the same undertaking as in the previous case
Mon	12 January 1857	
	Taking forcible possession of a claim	Adjourned
	Water race	Case remanded to Mon next the 19th inst on payment by the Deft of Costs of the day amounting to £20
52	Water race	Dismissed
53	do	Dismissed
54	do	Proved Fined £2 Costs £3 and Costs of Court 8/6 Immediate payment
55	Putting a dam in the Woolshed Creek without the sanction of the Warden	Proved Fined 1/- Ptff's Costs £1 and Costs of Court 6/6
56	Supply of water	Dismissed
57	Taking forcible possession of a claim	The Court being of opinion that a partnership existed between the parties dismissed the Case

Mon	19 January 1857	
	Water race	Postponed
58	Supply of water	Proved Fined the Deft W Hedley £2 Costs £2 and Costs of Court 10/6
59	Supply of water	The Court refused to order the Clerk to leave [the Court] as requested by the Ptff. The Court refusing to proceed in the Case the Court dismissed the Case and ordered that the Complainant pay to the Deft £5 Costs. Immediate payment
60	Water race	Proved Fined 1/- and Costs of Court £2/14/-
61	Supply of water	Proved Fined 1/- and Costs of Court 3/6
62	do	Proved Fined 1/- and Costs of Court 7/6
63	do	Ptff has sanction of Warden. Deft has built a dam that intercepts the water with the exception of ½ a sluice head. The Deft admits having placed the dam. Proved. Fined £2 and Costs of Court 8/6
64	Water race	Proved Fined 1/- and Costs of Court 7/6
65	Supply of water	Proved Fined 1/- and Costs of Court 13/6
66	Supply of water	The Court dismissed the Case on the ground that the Complainant has no written sanction from the Warden to sluice on the bed of the Creek.
Mon	2 February 1857	
67	do	The Court dismissed the Case with Deft's costs £1
	Water race	Postponed to Monday next at 12 o'clock Ptff & Deft each bound over in £20 then to appear
Mon	9 February 1857	
68	Supply of water	Proved Fined 1/- Costs of Court 8/6 & Ptff's Costs £1

69	Partnership	The Court dissolved the partnership and ordered that the Applicants including LH Matthews pay to Robert Dryburgh the sum of £80 for his one 7th share in the claims above the Pump holes – 7 days allowed for payment.
Mon	16 February 1857	
70	Supply of water	Proved Fined £2 Ptff's Costs £3 Costs of Court 10/6
71	do	Proved Fined 1/- Costs of Court 8/6
72	do	Proved Fined £5 Costs of Court 8/6
	Cutting away a dam	Remanded for Judgment
73	Partnership	Neither party appearing dismissed
74	Supply of water	Proved Fined 1/- Costs of Court 13/6
75	do	Proved Fined 1/- Costs of Court 6/6
Thu	19 February 1857	
76	do	Proved Fined 6d Each party to pay their own costs
	The Court at the disapprobation of the Water to run to same existed in the Creek	same time expressed their strong the conduct of the Complainant in allowing Waste at a time when such a scarcity of the
77	Partnership	Settled out of Court
Mon	23 February 1857	
	Partnership	Adjourned
78	Supply of water	Proved Fined 1/- Each party paying their own costs
79	do	Dismissed

80	Partnership	The Court ordered that the partnership be dissolved and that the Defts hold the claim on payment of £12 to the Applicant Mority Israel.
Mon	2 March 1857	
	Partnership	Adjourned
81	Not keep an efficient tail Race	Not Proved Dismissed
82	Supply of water	Proved Fined £5 & Costs of Court 8/6
Mon	9 March 1857	
83	Partnership	The Court decided to examine the Defts as to the value of the claims. They fixed the value at £100 per share. Witnesses produce accounts The Court ordered that the partnership be dissolved. That Respondents Jos Ianbourn G King D Flannery & C Jackson hold the claim and pay to the Applicant the sum of £200 in the following proportions to wit Ianbourn 1/8th £33/6/8 King 1/8th Flannery 2/8th £66/13/4 & Jackson 2/8th £66/13/4. One week allowed for payment. Each party to pay their own costs.
	Partnership	Adjourned after evidence
Tues	10 March 1857	
84	Partnership	The Court deferred judgment in the case
85	Supply of water	Proved Fined £5 Ptff's Costs £5 & Costs of Court 10/6. Immediate payment.
86	do	Not Proved Dismissed
84		Called for judgment. Parties appeared and intimated they had come to an arrangement out of Court and requested that the Court would dismiss the Application. Dismissed accordingly.

Mon	16 March 1857	
87	Partnership	All the Applicants not appearing Dismissed
88	Supply of water	Proved Fined 1/- & Costs of Court 8/6
89	Partnership	Settled out of Court & Case dismissed
90	Partnership	One Ptff has forgotten to bring Miner's Right. Dismissed
91	Supply of water	Not Proved Dismissed
92	do	No appearance of Complainant. The Court dismissed the Case. Ordered that Complainant pay Deft's costs £1
93	Interfering with a paid flow	Not Proved Dismissed
Mon	23 March 1857	
94	Supply of water	Proved Fined £2 Ptff's Costs £1 & Costs of Court 4/6
95	do	Proved Fined £1 Ptff's Costs £2 & Costs of Court 10/8
96	Partnership	The Court dissolved the partnership and ordered that the Applicants hold the Race on the payment of £80 to the Respondent Henry Pollard – 3 days allowed for payment
97	Supply of water	The Ptff not appearing the Court dismissed the Case and ordered that the Complainant pay the Deft's costs £3
Mon	30 March 1857	
98	Supply of water	Dismissed
99	Partnership	No appearances. The Court dismissed the Case
	Supply of water	Postponed

	do	Postponed
	do	Postponed
100	do	Proved Fined £2 Ptff's Costs £1 & Costs of Court 10/6
101	do	Proved Fined 1/- & Costs of Court 8/6
102	do	Proved Fined £1 Ptff's Costs £1 & Costs of Court 6/6

APPENDIX II

CASES FROM HILL END BENCH BOOK

NOTE: Notices were required by the regulations to be put up when ground was pegged and again when a claim was registered or a lease applied for.

No 1 Ah Lung and party v Gan Chang and party [1] [FLOODING]

Police Court Tambaroora Fri 17 Nov 1871

Encroachment 15th November 1871

Defendants plead not guilty

Only witness Joshua Birkbeck Knight deposes he is shareholder in complainant's claim. Defendants have next claim downstream about ¼ mile. They cause water to be backed up by closing flood gates at a race and with a dam across a portion of the river preventing water wheel from working and causing £3 loss.

Ordered to pay £3 Complainant's Costs 5/6 Witnesses 10/- Professional Costs 21/- and Interpreter's fee 10/- total £5:6:6.

No 2 Daniel Sandford Miles and George Edward Wright v John Griffith [2] [JUMPING]

Police Court Tambaroora Fri 17 and Mon 20 Nov 1871

Encroachment 15 Nov 1871

Mr Gilder for Defendant pleads not guilty and objects to the jurisdiction of the Court as Defendant claims to be entitled to the ground.

Mr Gilder Solicitor objects that information does not show the jurisdiction of the Court as it does not show under what authority Complainants claim to be entitled to the allotment.

Daniel Sandford Miles Complainants were in partnership as chemists & druggists in Tambaroora. Took out business license, bought allotment and took it up under the Business License. They did work filling holes and erecting fence with poles. Defendant subsequently entered into possession [said, I've jumped the ground], put men to work and said he had taken it up under the Gold Fields Act and Complainant had not complied with the requirements.

Other witnesses were for the Complainants George Edward Wright, John Reid Miles and Fredk Hawkins Wright and for the Defendant John Griffith, Nathaniel McGee and George Johnson and Daniel Sandford Miles in reply. The evidence largely concerned what work had been done and what happened to the poles.

Adjourned to Mon 4 Dec

Mon 4 Dec 1871 [11]

Ordered the Defendant to vacate the allotment in dispute forthwith. Costs disallowed.

No 3 Charles Augustus Lindberg v Samuel Holman [8] [PEGGING]

Police Court Tambaroora Wed 29 Nov 1871

Trespassing on Claim – Lease 16 Nov 1871

Defendant pleads cause to show

George Milner Stephen, Barrister, appointed Complainant his agent in writing on 30 Oct. Lodged application and paid £7 on 2 Nov, receipt #82,293. I never marked lease by going on the land. Neither did my son. Nor did I post any notices.

Charles Augustus Lindberg. Evidence re telegrams. Saw Defendant's men on ground after the 10th. Saw notices on the ground, but Stephen's notice only put there recently.

Samuel Holman. Lodged application and paid £7 about the 3rd, receipt #82,300.

Messrs McIntosh & Stephen having addressed the Court in reference to the evidence failing to prove certain preliminaries to the taking up of a Lease.

Case Dismissed.

No 4 John Smith and party v Ah Fook, Ah Sung and party [11] [UNCLEAR]

Police Court Tambaroora Mon 4 Dec 1871

Encroachment 8 Nov 1871

Mr Gilder, Solicitor, objects to the Information that it does not give the names of the Defendants.

Withdrawn; Costs disallowed

No 5 George Hill & party v John Daniel Hill & party [12] [PEGGING DISPUTE]

Police Court Tambaroora Tues 5 Dec 1871

Trespassing on Claim 30 Nov 1871

Defendant pleads cause to show

George Hill Four men with me are shareholders with me in a claim [in] an angular piece of ground on "Sergeant's" Reef, Red Hill, Hill End. Pegged it on 27 Nov at 6 o'clock or between 6 & 7 in the morning. Registered the ground the same day – 6 men's ground. On Tues morning found Defendant's party had taken it up.

William Jowett There when ground pegged.

Adam Forsythe, Joseph Wythes and Charles Bourke Nicklin Observations re pegs.

John Daniel Hill On Tues went with all my party and marked off the ground.

George Hill; Wm Jowett; & Adam Forsythe of the Complainant's party to have three men's ground out of the claim of six from the "Excelsior" end of the claim – the Defendants' party to have the other three men's ground.

No 6 William Cromp v Henry Henry [13] [JUMPING]

Police Court Tambaroora Wed 6 Dec 1871

Trespassing 18 Nov 1871

Defendant pleads cause to show

William Cromp Holds a share in the "Union Jack" claim in Specimen Gully. Worked in claim up to 13 Nov, then left it to rest of party as it was unworkable because of foul air. Put on Barlow to work, but he could not.

James Barlow Corroborated he could not work because of foul air. On Sat 18th found that Defendant had jumped Complainant's share.

The Complainant to have possession of Share; & Defendant paying Costs of 5/6 & Expenses 10/-

No 7 Joseph Jeffree; Thomas Foster; and James Henry v Richard Jeffree [14] [PROSECUTION]

Police Court Tambaroora Thurs 14 Dec 1871

Information read

Defendant on advice declines to plead to the Information

James Harvey Partner in claim subject of information. Believes information is true but has no personal knowledge.

George Cave Works in claim but is not partner. Worked with Defendant who was not a good miner.

Defendant registered as shareholder 12 Dec 71 per regulation 645

Case Dismissed

No 8 David Bailey, Walter Bailey, James Hutchinson, John Scallard, Edwin Yates and William Stanley [16] [JUMPING]

Police Court Tambaroora Tues 16 Jan 1872

Trespassing on "Eureka" claim 3rd January '72

Defendants plead not guilty

George Maynard I took up a claim with some others twelve months ago and registered it. Yates worked for me and I used to pay him a little occasionally. He was a half share holder as well as myself. I cautioned the Baileys & others in the claim to discontinue the work there on the 2nd , and served the Letter produced upon them. We were about forming it into a company. I was not working in the claim & no notice was given me that my interest was at stake.

William Chapman I formed one of a party who took up the "Eureka" claim. I worked in it and sold half of my share to Sparks. The Defendants all except the Baileys were mates of mine & they have jumped with the Baileys our Interest. I had had no notice of the ground being about to be jumped. I worked from 9:30am till about 3pm on Thursday the day before the claim was jumped. I was at work on the claim with Scallard on Wednesday for an hour. On Tuesday I was not there at all, and I do not think any one else was. About 3 months ago I went to the new rush at ? Gully.

Thomas Simpson I held a miner's right in Augt '70 when this claim was taken up. I paid Stanley £1 per week to work for me & he was to have a half share from me but I have not yet transferred it to him. Stanley is one of the Defendants & he never gave me notice of his intention to jump the claim.

David Bailey The Eureka is on Sergeant's Line of Reef, west of Hill End. Watched claim from Mon 18 Dec. No one working. Took possession Fri 22, pegged it out Sat morning. Registered the ground.

James Hutchinson I am sure that I have not seen any one working for six days previous to our taking possession.

John Scallard After I worked in the claim representing Thos Martin's and my own half shares there was no work done in it till my party took possession: the claim was abandoned. I told Maynard & Chapman that the Second Reservation expired: & Maynard said "it'll be all right till after the holidays".

Wm Stanley There has been no work done except 2 days between the first & second registration. I assisted my party in pegging out.

The claim to revert to original proprietors as registered prior to the 28th of Decr

No 9 Timothy O'Regan Collins & Eugene O'Sullivan [18] [JUMPING]

Police Court Tambaroora Tues 16 Jan 1872

Patrick Marraman Pegged and claim registered on 7 Nov last on expiry of a reservation from labour. Worked till 18th of last month when I put McGovern on to work for me and went to Sydney on the 20th and in my absence claim was jumped.

Patrick McGovern I went to work on the 18th. They jumped the claim on the 20th of last month.

Denis McAnernay Working on claim on 18th of last month and for a month previously.

The registration to the Defendants cancelled; & the Complainants to retain possession. Costs of 5/6 to be paid by Defendants

No 10 Charles Augustus Lindberg v William Maher and John Kelly [19] [JUMPING]

Police Court Tambaroora Tues 16 Jan 1872

Trespass on claim 11 Jan 72

Defendants plead not guilty

Chas A Lindberg Present at marking out of claim registered on 26 May last of 4 men's ground. On 20 of last month pegged out about 11/2 men's ground extra adjoining the 4 men's ground. Transferred 6 men's ground to Mr Stephen but never registered spare piece of ground separately or amalgamated claim. Defendants have taken possession of part of that 11/2 men's ground & also of the shaft which was on the 4 men's ground originally registered in May last.

Postponed to Tues next 23rd instant

Tues 23 Jan 1872 [21]

Chas Augs Lindberg The claim of 6 men's ground was worked continuously up to the time of Defendants jumping it. They pegged out the whole of the 11/2 men's ground and as much of the original four men's ground as would embrace the shaft. I was alone when I marked out the 11/2 men's ground. I never registered it. The Defendants have tried to prevent our men going into the shaft from an old shaft on the boundary between the 4 and the 11/2 men's ground.

John Hendrick Smith Not at the pegging of the 11/2 men's ground. At that time Defendant's pegs not there. I have seen them since. Their pegging includes the shaft. I have seen Kelly at the bottom of the shaft on the 4 men's ground having come through the old drive from the old shaft. Shaft is down 40 to 50 feet and we have driven 50 to 60 feet in the 4 men's ground.

Ebbe Swenson With the exception of about a week I worked continuously. I did no work on the 11/2 men's ground. I worked on the 4. Since we pegged out the 11/2 men's ground we have had 3 men at work. On the 10th inst Fisher & I were working on the 4 men's ground; & Smith was away on the business of the claim.

For the defence

John Kelly I believe it is 2 not 11/2 men's ground. I marked it off on the 11th and registered it on the 11th. Complainant said he had authority to hold the ground. I asked him to show me the Registration but he did not. When first the peg was put in it went beyond their Claim Shaft of the 4 men's ground but I told the Complainants that we only claimed up to the boundary of the 4 men's ground.

The Defendants ordered to remove with their implements, goods & chattels from the Complainant's claim of 4 men's ground the Lease in dispute forthwith.

No 11 Stanley Hosie v Charles McDonald [20] [JUMPING]

Police Court Tambaroora Tues 23 Jan 1872.

Trespass on claim Clarke Street Hill End 27 Nov 71

Defendant pleads not guilty

Stanley Hosie Store keeper of Bathurst. Registered as agent for William Mears of Bathurst who is entitled to an allotment in Clarke Street through transfers Jenkins to Williams & Purcell to Hyams to Mears. On 27 Nov said to Defendant I have heard you have taken possession of an allotment belonging to Mr Mears which I have come to take possession of. He said, I have taken possession of it and intend to keep it & build on it. Hosie was refused access to it.

Adjourned till Tues next 30th inst

Tues 30 Jan 1872 [24]

John Nepean MacIntosh Solicitor. Instructed to prepare transfer from Hyams to Mears & prepared agreement which Hyams signed.

George Purcell Applied to purchase allotment and then sold to Hyams portion in dispute. When first we took possession we did not make any application for the allotment not for some months after: we never registered it. It was allotted to us. No survey till a week or two ago. Sold various portions including to Hyams. Did not obtain consent of Commissioner. Mears has not made any improvements.

For the Defence

Charles McDonald I claim the allotment in dispute and applied to purchase it by virtue of my improvements. Took possession under both a miner's right and a business license about June of last year and registered it soon after. Hyams had never put stick or stone on it. I was in possession for some time before any claim against me. I have put blocks in the ground for a foundation and have been prevented from doing further work by the claim.

Case Dismissed

Verbal notice of appeal given 30/1/72

No 12 Thomas Lowery v Geo Milner Stephen, Alfd Hindmarsh Stephen and JJ Macdonald [26] [JUMPING]

Police Court Tambaroora Tues 30 Jan 1872

Encroachment 20th January 1872

Information read

Defendant Mr Macdonald states that he appears for himself & the Messrs Stephen & pleads cause to show stating - that Mr Stephen applied for the 10 acres Lease on the 7th Dec & put on ?labor only on the 19th or 20 Jany – that he himself pegged out the Lease for the Messrs Stephen, as registered agent for them.

Nicholas Peters I pegged out some ground south side of the Turon. I pegged it on the Base line 240 yards apart as near as I could step it on 22 December last. I put notice of the Lease being applied for on both pegs on the 26th of last month dated the 23rd. We put men on to work on the 22nd of this month. I saw men at work, I supposed they were the Defendants' men.

Sydney Sherman I put two notices up one at the Court House here & one at the Post Office at Hill End but not one at the Police Station at Hill End. It stated that a Lease had been applied for by the last witness & Complainant. It was either the 26th or 27 of last month I posted them.

Thomas Lowery The receipt 85817 is that for the Deposit & survey fee for the 5 acres Lease. I received the Certificate 70s (?) holding that Lease in reserve for 14

days from the 10 January. I saw the notices posted on the ground of Reservation and of our right to construct a tunnel. On the 23rd or 24th I saw men at work there. I saw men on the 20th inst putting up tents on this 5 acre Lease. I then obtained this summons. I have not heard of any objection to our Lease. I saw a notice on the ground (about a week or fortnight after the Lease was pegged out) in the name of Stephen dated the 7th December and another I think was dated the 4th.

Nicholas Peters recalled On 22 Dec I posted the preliminary notices at the time of pegging that we intended applying for a Lease and on the 26th I posted the Board Notices.

For the defence

James Anderson I work for Defendant Mr Macdonald. Camped on ground with others. Saw Board Notice and other people's notices.

Ordered the Defendants with their servants implements goods & chattels to remove forthwith from the 5 acres Lease in dispute.

No 13 Charles Johnson v Chas Alexr Williamson [28] [PEGGING DISPUTE]

Tambaroora Police Court Tues 20 Feb 1872

Encroachment at Golden Gully

Defendants plead not guilty

Charlie Johnson Have been working on the ground 3 weeks. Cook came on the ground 2 or 3 days after I commenced. Mr Williamson's notice of lease applied for was dated 16th Jan. Our notice of intended application was also on the ground dated the 13th of January.

John Howard Pegged out lease in dispute between 2 and 3 o'clock on the 13 of January and put notice on each peg of intention to apply for lease dated 13 of January. Left board notices with last witness to put up. Applied for lease and got a receipt when I paid the money myself on the 16th viz £7. Never visited the ground till the 30th when I did not see the board notices. Have several times had to put the pegs back in. On Tues 30th I put 5 men on to work and worked myself. Not any notices dated the 12th on the ground but on 30th I saw the Board Notice of the Defendants. If there were any notices on the ground when I pegged out I must have seen them.

Henry Cook One of the Defendants. On 12th January Friday I pegged out the lease with two base line pegs one at each end and put notices on each peg of intention to apply for lease. Replaced small pegs with larger ones on the Saturday. I think the small pegs were plain to be seen. I think it was about two o'clock on Saturday I put the pegs in the ground: to cut which I borrowed an axe from Nat Moore.

Nathaniel Moore I recall last witness borrowing an axe from me between 5 & 6 o'clock one Saturday evening and I saw the pegs he cut which were about 3 feet long.

Case adjourned till Tuesday 27 instant

Tues 27 Jan 1872 [31]

Patrick Geaghan Was with Cook on Saturday when he pegged out the lease. It was about 2 o'clock. I did not notice any other pegs but I could not be positive they were not there.

William Hobson Was there about 5 o'clock on Saturday when Howard put in a peg. Did not see any other peg where Howard put his in. He said he had put in the other one. The one he put in was near the Chinaman's hut.

Edward Foot Saw Howard put in a peg near the road. I think it was about half past 5.

William Langford I was with Howard when he put in his pegs on the Saturday. Saw southern peg driven in. Did not notice any other pegs which I must have seen if they had been there. Think it must have been between 3 & 4 o'clock when I was there.

William N Farley On or about the 13th of last month Howard asked me to write out some notices for a Lease. Langford went with Howard. I saw both northern & southern pegs driven in. No pegs visible near northern or southern peg. Saw him put the notices on both pegs.

Robert Gibbs Saw Moore lend axe to Johnson and two hours later lend same axe to two men on horseback who cut some pegs and rode off towards the land.

Henry Cook Never borrowed an axe more than once to cut pegs. There in company with another man on horseback. Saw Defendant's pegs on the following Monday, Saw pegs again about 8 days ago. Defendant's are where they were. Don't know who moved Howard's northern peg. I didn't.

Charles Johnson I shifted northern baseline peg when Howard was with me more than a week ago.

Case adjourned till Tues 5 March for decision

[There is definitely no entry re this case on 5 March.]

No 14 Charles Inch v William Mitchell [34] [JUMPING]

Tambaroora Police Court Fri 8 March 1872

Encroachment

Defendant pleads not guilty

Charles Inch Brewer Took up an allotment of upwards of 2 acres for a brewery, dam & stabling. Have worked on the ground and been making a road. About 4 weeks ago I saw Defendant on the land. He has built a house and placed saplings to obstruct my road.

Thomas Worsley Saw Defendant put saplings across to prevent road assisted by Dally.

Joseph Mitchell Defendant's brother. Told him I had heard land was considered to be private property and he could not build there but he said he was going to make a garden. House is built. There is plenty of room for a road to be made without interfering with the house.

William Mitchell Pegged ground on 4 or 5 Jan, began to build house end Jan, went to live in it last Sat week. Moved pegs last Sat Week to allow room for road. He asked for 2 feet more but I refused.

Richard Dally Pegs in 8 Jan. Corroborates Defendant re moving pegs.

Adjourned till 15th instant.

Fri 15 March 1872 [36]

No appearance

No 15 James Gillard v John Walsh & party [36] [UNCLEAR]

Tambaroora Police Court Fri 15 March 1872

Trespass

Adjourned till Tues 19th inst

Tues 19th March [38]

No appearance

No 16 Richard Charles Tunnicliffe & party v Edward Elliott & others [37] [PEGGING DISPUTE]

Tambaroora Police Court Mon 18th March 1872

Encroachment

Complainant Tunnicliffe Pegged out the ground on 20 Jan between 6 & 7 o'clock in the morning. I was alone & saw no one on ground. Lease of 5 acres adjoining on N lease of Braggs. Had pegged previously on the 18th but saw notice on Defendant's

application for lease on 15th. However I learn Defendant had not paid so over pegged him on 20th and on same day my partner paid at Commissioner's office in Bathurst. Put up notices on 18th and fresh ones on 20th.

Thomas Foster Know for certain Plaintiffs Tunnicliffe and Holman have not taken up any land but that now in dispute on Hawkins Hill South.

The enquiry terminated.

No 17 Thomas Donald v WG Collings [38] [WAGES]

Tambaroora Police Court Tues 19th March 1872

Wages £5

Thomas Donald Kinnaird told me a man was wanted to work on Defendant's lease @ £2:10:0 pw. Worked 3 weeks. Received £2:10:0 from Defendant who said he had sent money to pay the men. I believe Kinnaird got my money and he is now in gaol. Did not report to Mr Horn who I know is manager that Kinnaird had sent me to work there.

Wm John Horn I was managing the work on the lease & I paid the men for the Defendant. I paid Kinnaird knowing he had been working on the lease. Kinnaird told me he had employed a man in his place when he was not on the lease.

Case Dismissed

No 18 Joshua Vickery v Albert Lisle and Thompson Hogg [39] [PEGGING DISPUTE]

Tambaroora Police Court Tues 19th March 1872

Encroachment 14 Feb 72

Joshua Vickery I am a shareholder in the amalgamated claim Star of the West now formed into a Company under the name the Rampant Lion Company situate on the west side of Hawkins Hill. It consists of 8 men's ground. I claim as Legal Manager of the Company. Went on ground and found 2 pegs with a notice of application for lease in name of Defendants. Defendant Hogg admitted it was his writing on notice. Asked why he had marked ground of other people he was saucy and impudent & said I would have to prove it. I was not present when claim was marked out. Amalgamation certificates produced.

William Ross I was at the original marking out of the Western part of the Eight men's ground since amalgamated with the rest April last. I showed the pegs to the Complainant.

For the Defence

Thompson Hogg Neither of the pegs was in ground claimed by any one else so far as I knew. There was a peg with a notice cautioning against trespassing signed by Plaintiff. I have not wilfully trespassed on Complainant's ground.

Ordered Defendants to discontinue the trespass upon the claim of Eight Men's ground referred to by the Plaintiff forthwith

No 19 Patrick Hanley v John King Weir [41] [PARTNERSHIP]

Tambaroora Police Court Fri 22 March 1872

Partnership dispute

Patrick Hanley I am holder of a share in the Star of Victoria lease north of Williamson's north of Turon. Defendant also a shareholder which share we gave him to float a Company he guaranteeing to see us paid he did not say how or when. Defendant said Company formed but final arrangements to await decision of Chief Commissioner. Gave us order on Stewart for £10 worth of tools. He said it was hard for him to pay the whole. I said I thought so too but do not know who else to look to

Francis Collins Shareholder in lease. I was working with Complainant. We told the Defendant we wanted to float; the Defendant was promised the share only for floating the Company. If he did not succeed in forming it he would not have got the share. Defendant promised I'll see you paid.

Case dismissed

No 20 Francis Collins v John King Weir [PARTNERSHIP]

Tambaroora Police Court Fri 22 March 1872

Partnership dispute

Information withdrawn

o 21 Joseph Golding v James Cox [42] [JUMPING]

Tambaroora Police Court Tues 26th March 1872

Encroachment 23rd inst

Summons not served Case adjourned till 23rd inst [sic]

[See No 26 9 April below]

No 22 Charles Garner v Walter McKay [42] [JUMPING]

Tambaroora Police Court Tues 26th March 1872

Encroachment 23rd inst

Defendant pleads not guilty

Charles Garner I am one of the partners in the lease now being worked by us. Defendant has come since we commenced to work depositing some building materials on the ground.

I heard Golding caution him.

Defendant here pleads guilty

Ordered to remove with his servants implements goods & chattels from the ground in question forthwith

To pay Costs of Court 5/6: Professional costs 21/-: and Expenses of the Complainant & party £2

No 23 William Jarman v John Cook [43] [PEGGING DISPUTE]

Tambaroora Police Court Tues 9th April 1872

Encroaching

Defendants plead not guilty

Matthew Hancock I am in partnership with Jarman. On 13 March I was on the ground and the notices were posted of intention to apply for lease and one was posted on the Court House here and one at the Post Office at Hill End. I saw the notice of having applied on the ground on the 16th. Chief Commissioner's receipt of 19 March for £7 is produced #21831.

William Jarman I pegged on the ground on the 13th, put up the notices of intention to apply and of application on the 16th and paid the money at the Post Office at Hill End on the 14th. There were not any notices up on the ground I took up. My notices were dated the 12th and I wrote them the night before I pegged out.

Oliver Hawkes Pegged out the ground on the 12th and the next morning about 10 o'clock I put up notice that we had applied for lease – only notice I put up. Paid the money at the Post Office at Hill End on the 14th and my receipt from the Chief Commissioner is dated 18th March and is #21729. I noticed Jarman's notices posted when I posted mine.

John Cook Wrote out notices and on the 14th I went on the ground. I noticed the notices of the Complainants on the ground then.

JW Lees signed as Commissioner rather than Police Magistrate

Decided by the Chief Commissioner

No 24 Richard Berryman v Thomas Willis [44] [JUMPING]

Tambaroora Police Court Tues 9th April 1872

Encroaching on allotment

Defendant pleads cause to show

Richard Berryman 2 months ago I took up land in Alexander St Hill End. Registered the allotment under my Business License. Last Monday week Defendant cut down 6 panels of my fence. I made an application to purchase about ten months ago. Defendant residing 5 or 6 months on Allotment 5. Built a house partly on the allotment. More than two thirds of it was fenced in by me ten months ago. It is about a quarter of an acre I claim. When he built I did not dispute his right to do so but afterwards found out that he was on ground I claim.

William Anderson Licensed Surveyor. I made application for Berryman about 9 months ago. In Jan I found Defendant had a house on allotment 5. The allotments were originally taken up as half acre allotments. I received instructions from the Surveyor General to subdivide them into quarter acre allotments. Defendant's house is on Allotment 5. Complainant could have held half an acre up to the time of its subdivision.

Before Danl Martin JP as well as JW Lees PM

Defendant Willis to have the south portion of Allotment 5 of Sec 4 at Hill End to the fence put up by the Complainant

No 25 Bridget Watson v John Maris [46] [JUMPING]

Tambaroora Police Court Tues 9th April 1872

Encroachment

Defendant pleads cause to show

Bridget Watson Widow living in Hill End in Thomas Street. I applied to the Government to purchase in virtue of my improvements in allotment where I am now living. I have been living there 2 years. The house was built by my late husband. It is worth £60. Defendant has lately put up a fence around the allotment.

In consequence of his encroachment I am prevented from building. I am thinking of commencing a business to support myself and 6 children. Husband killed about six months ago. Defendant was living near me but never disputed my right till my husband died. I find since his death that he had according to the survey built his house in the street.

John Maris Mrs Watson has no improvements whatever on the land in dispute. I have been 14 years on the land.

Samuel Thompson I put the fencing up where the surveyor's marks were.

Mr Richardson solicitor sought a postponement by reason of absence of Mr Gillard whom he wished to call to prove Defendant's application to purchase.

Adjourned till Tues next 16th inst

No further record on the 16th or any other time

No 26 Joseph Golding v James Cox [47] [JUMPING]

Tambaroora Police Court Tues 9th April 1872

Encroachment 19 March 1872

Defendant pleads not guilty

Joseph Golding I pegged out the Lease on the 30th of December last at Price's Flat Tambaroora, the notices were posted and the survey fee was paid. I produce receipt from the Chief Commissioner dated 9 January. On 19th of last month I first saw Defendant on the ground. I told Palmer in Defendant's hearing that the ground was mine and he said What a pity. We have sunk 3 shafts and have struck veins. Nearest shaft is about 100 yards from Defendant's house.

William Holman Handed letter written by Cook to Golding this morning.

Thomas Hutchinson Recall on 19th of last month seeing Defendant peg out ground. Corroborates What a pity. Gold had been struck previous to this.

Charles Garner Corroborates It's a pity. Defendant left building stuff on the ground.

William Anderson Licensed Surveyor. Produced survey of town. Have not surveyed any ground west of the Mudgee Road.

James Cox I do not believe gold has been struck. My building & allotment would not interfere with their mining. I claim half an acre. The public Hill End Tambaroora road passes close to where I have put my building materials. I took up the ground as a residence and for business purposes. Am according to the Complainant's assertion on their Lease. I laid no claim to the half acre previous to the 30 of

December last and had no right to it prior to the 18th of last month the day I pegged it out.

Danl Martin JP sat with JW Lees PM

The Defendant to remove with his implements, servants &c from the ground of the Complainants forthwith; allowed four days to remove

No 27 David Bailey, Walter Bailey and William Walsh v Henry Miller [50] [IN EFFECT PARTNERSHIP]

Tambaroora Police Court Fri 12th April 1872

David Bailey About 3 weeks previous to Christmas last my brother and I pegged out a Lease at Oakey Creek. As the Defendant was going down to Sydney I promised him a fourth interest in the Lease. He agreed to accept & to Float the Company. We commenced work Walsh & I. Defendant came up and told me the Company was formed all right and that he had received £60 a portion of instalment of £120 and that the second £60 would be up on the 1st March. He asked us to let the first £60 remain in the Bank till the second was paid. It did not arrive. When we asked him to divide the first £60 he demanded £30 expenses never previously heard of. I did not promise him £10 each for his expenses.

William Walsh Deft promised to float the Company. He went to Sydney twice. Last witness & I worked; after he returned the second time he said every thing was right. I promised Defendant nothing. I never authorized last witness to promise any money. I am not prepared to allow him £6 for travelling.

Walter Bailey is called, states he can only corroborate the foregoing witnesses & is willing to pay **£**6 expenses.

Henry Miller The agreement produced has been carried out so far as I am concerned. The Complainants who gave evidence agreed to pay my expenses the second trip, and £10 each for the first trip. I have offered to pay them £7:10:0 each which is all they are entitled to.

Lees PM sat with Charles Cropper JP

To pay the sum of £22:10:0 being £7:10:0 each; allowed till 1.0pm tomorrow Saturday

No 28 Joshua Vickery v Isaac Mobbs and John Bunyan McCure [52] [PROSECUTION]

Tambaroora Police Court Tuesday 30 April 1872

Breach of Gold Fields Regulation

Information read

Joshua Vickery Last Friday week Defendants took possession of a portion of Lease No 495 in the occupation of the Great Extended Company West side of Hawkins Hill and the same has been surveyed about eleven months ago; and in working ever since; the first year's rent has been paid. I had noticed two of them on the ground. Mobbs was one. The boundaries were well defined.and anyone accustomed to claims or Leases would easily have known it was in occupation.

John Green. I saw the two Defendants on the Lease. I asked them what they were measuring up. They said they were going to make a plan. I afterwards saw them cutting pegs. Mobbs said he would like to see me stop them. They had marked out a block of the lease.

For the Defence

John Bunyan McCure I taped out the ground and came to see the Commissioner who told me to mark it out first and then to make the application. On the 19th we did so I do not remember whether I told the Commissioner it was part of the Gt Extended. But on Monday he told me it was within the Surveyor's Marks and he should not register it.

Isaac Mobbs I went on the ground and after taping it off we came to the conclusion the Gt Extended had got 30 yards more than they were entitled to. Then we took Mr White a surveyor down; & then we cut pegs and pegged it out as a Block Claim for ourselves. Then failed to get permission of the Commissioner; who I had told we had found a piece of spare ground.

Henry O'Sullivan White I surveyed the ground at the request of the Defendants. There is more than 50 yards from the Base line claimed by the Complainants at this part where Defendants have taken up a piece.

The Defendants found guilty the permission to peg having been obtained in contravention of regulation 247

Fined £2 and Costs of Court 15/3 each

No 29 William C Marshall v Samuel Ward [54] [JUMPING]

Tambaroora Police Court Tuesday 4 June 1872

Trespass upon the claim of the Complainant

Defendant pleads not guilty

William Charles Marshall I have occupied the allotment which the Defendant lays claim to for the last two years and have improved it to the value of £36, there is about an eighth of an acre. It is separated from my purchased land by a narrow

lane. When first Defendant came on the ground I told him it was mine and he said he was going to make it his. He put materials there. I gave him notice in writing of my intention to take proceedings against him unless he desisted. I took up this ground for a residence. There is a building, fencing and about 100 loads of stuff on the ground put there to fill up holes. The house is a bark hut but is a substantial building. I use it not as a permanent residence but occasionally to shepherd.

John Charles Marshall I reside with the last witness. The allotment in question was taken up by my brother about 2 years ago and is improved to the value of about £36. I have been residing in it lately or shepherding it might be called.

Samuel Ward Storekeeper I have taken up a piece of land under 8th Sec of Crown Lands Alienation Act of 61 & applied to purchase it by virtue of the improvements I had upon it. I value my improvements at between £40 & £50. I have been in possession of it since the 16th May. Five pounds would cover the value of the Complainant's improvements. The land was vacant when I took possession of it. My improvements consisted of putting some wood and iron upon the ground. There is a tent on the ground. I have taken it up as a business allotment.

The Police Magistrate states that he has not in his capacity as Commissioner marked off the allotment in dispute as a business allotment since January 1871; but that he cannot say that it was never done by his predecessors.

Ordered the Defendant to remove from the Allotment in dispute with all his Servants, implements, goods & chattels within seven days; Costs of Court 5/6 to be paid by Defendant to be recovered by Levy by Distress

No 53 Chas Alexr Williamson v Charles Orchard [84] [PARTNERSHIP]

Hill End Police Court Monday 4th November 1872

Partnership dispute

Defendant pleads not indebted thro his attorney Mr Gilder Solicitor

Case postponed till Monday next 11th November

Monday 11th November 1872 [88]

Defendant not appearing

Chas Alexr Williamson I served a copy of the summons on the Defendant at the Tambaroora Hotel and a copy of the account produced was handed to him by me. Did not appear on 4 November and does not appear today. Was engaged in a mining partnership on the 6 March last. Till the date of my information certain monies became due. I had become responsible for the whole amount claimed in my

Information up to the 2nd Nov. I had not expended the sum of £7:10:0 but all the rest I had expended on Defendant's account. I bought the third held by Rankin, thus with my third I held two thirds, the Defendant the other third. From time to time the Defendant promised to pay me the amount and never disputed the amount. Defendant was aware of the amount being expended in the Lease. He never disputed the amount.

Decision adjourned till 1 tomorrow 12 inst

Tuesday 12th November 1872 [89]

Case Dismissed

No 56 Charles Alexander Williamson v Charles Orchard [90] [PARTNERSHIP]

Hill End Police Court Thursday 28th November 1872

Partnership dispute

Mr Gilder Solicitor for Defendant appears for him and pleads not indebted

Information read

Charles Alexr Williamson Defendant has been called but does not appear. I took up lease on 27 January between Turon and Macquarie Rivers. This is nearest Court of Petty Sessions. I now hold two thirds, Defendant one third. Certificate from Mining Registrar at Bathurst that share Defendant held still in his name in the Books there. Defendant and I were together when the ground was marked out. I have since incurred expenses of which Defendant's share is £94:14:2. Defendant has from time to time promised to pay portions of that amount. He told me he has transferred the share but I know that has not been done. Defendant has agreed with me to work the ground & agreed with me to pay his proportion of Expenses.

Ordered the Defendant to pay the sum of £94:14:2; Costs of Court 5/6; Service of Summons £2:2:0; Professional Costs £2:2:0; to be recovered by Levy by Distress or in default to be imprisoned for one (1) month

No 57 Chas Alexr Williamson v AG Frazer, John Booth, FL Edwards, CT Sandon, TR Allt, GA Goodchap and John Hamilton [91] [PARTNERSHIP]

Hill End Police Court Thursday 28th November 1872

Partnership dispute

Information read

Mr Gilder for Defendants pleads not indebted, objects that the Information should have been laid in Sydney; & that a bill of particulars should have been filed.

Charles Alexander Williamson I am in partnership with Defendants in the "Phoenix" 6 acres Lease at Glen Valley. The Defendants' names are entered in the Lease. The account produced is correct; the amount claimed is for Expenses incurred in working the Lease; it is still due; the amount is due from the Defendants collectively. The amount I seek to prove has been paid by me. I have allowed for payments received by me. Shares held by Defendants Frazer 6; Booth 3; Edwards 3; Sandon 3; Allt 3; Goodchap 2 or 4; Hamilton 3. I hold all of the Defendants responsible for the whole of the amount sued for.

Case Dismissed

APPENDIX III

REGISTER OF COMPLAINTS IN SOFALA WARDEN'S COURT

The No is the No in the Court Register.

The Date is the date on which proceedings were commenced.

NO	DATE	RELIEF SOUGHT	DECISION	DATE OF ORDER
	1874			
1	24 Sep	Injunction to restrain Defendant from diverting water from Nuggetty Creek into his water race thereby cutting off supply from Complainants' race in same creek	Injunction issued for 12 months – 30/- Costs – and I hereby order that the Defendant do refrain from trespassing upon by (sic) diverting Water from the Race in question for the period of 12 months from this date – allowed one month to pay costs Whittingdale Johnson W	24 Sep
2	25 Sep	To restrain Defendants from encroaching and trespassing upon Complainant's water race situate at the Hospital Gully race	Verdict for Complainant without costs but £10 damages allowed. And I hereby order that the Defendants refrain	13 Oct

		course near Sofala and to recover £10 damages for such encroachment	from any further trespass on the race of the Complainant at Hospital Gully, Sofala Whittingdale Johnson W	
3	25 Nov	To restrain Defendant from encroaching and trespassing upon Complainant's & others' Lease situate at Wattle Flat near the Public School & to recover £5 damages for such trespass	The Warden's Court finds that no trespass has been committed and dismisses the case without costs Whittingdale Johnson W	8 Dec
	1875			
1	17 Dec 1874	Damages (£10) occasioned by you having obstructed and blocked up the passable Road or highway leading from Plaintiffs' claim situated on the West side of Little Oakey Creek aforesaid whereby the said Plaintiffs have been and still are unable to wash the dirt obtained from their said claim within said Creek and the said Plaintiffs further complain that you applied for permission to erect a puddling machine on the east side of the said Creek but that you in	The Warden's Court finds a Verdict for defendant without costs Whittingdale Johnson W	

		defiance of such permission are erecting one on the West side of the said Creek to the injury of the said Plaintiffs, also complain that you occupy and hold the **[INDECIPHERABLE]** of the said Creek and refuse to allow the said Plaintiffs to wash dirt therein or otherwise to have the use thereof for a distance of 900 yards more or less contrary to the Gold Fields Act and Regulations		
2	6 Apr	To restrain Defendant from encroaching and trespassing upon Complainant's tail race in the river at Sofala reach and to recover from Defendant £10 for such trespass	The Warden's Court finds a Verdict for Plaintiff one shilling no costs And orders the Defendant to refrain from encroaching or trespassing on the race of the Plaintiff situated as described in summons Ernest Sharpe W Damages paid	27 Apr
3	27 Apr	The Plaintiffs seek relief fm the trespass of the Defendants on their claim at Palmer's Valley Creek NOTE: Chinese plaintiffs	The Warden finds a verdict for the plaintiffs Ernest Sharpe W This was a complaint made under the 71 (sic) section of the Mining Act 1874. Both parties were present at the hearing &	27 Apr

			consented that such complaint should be heard by the Warden under the said section	
4	5 May	An injunction to restrain Defendant from working and trespassing on ground applied for by Plaintiff & another under the 28th section of the Mining Act of 1874 the said ground being a portion of the main road from Mudgee to Sofala known as Maitland Point	Injunction issued under 88th section of the Mining Act of 1874 to be in force for a period of 7 days inclusive of the day on which order was made. Ernest Sharpe W No application for costs	5 May
5	2 June	To prevent the defendant fm interfering with the plaintiff's race by cutting off the water from the said race	Case dismissed Whittingdale Johnson W This case was heard under the 71st section of the Mining Act of 1874.	2 June
6	2 June	To prevent the defendant from interfering with the plaintiff's water right	Plaintiff's application withdrawn Whittingdale Johnson W This case was heard under the 71st section of the Mining Act of 1874.	2 June
7	15 June	To prevent the defendant interfering with Plaintiff's Water & from Trespass upon such Water he is damaged in the sum of £10 – seeks to recover that sum from	Case dismissed without costs Ernest Sharpe W	29 June

		Defendants		
8	16 June	That the defendant has not completed his race according to his application & instructions received by him from the Warden of the District & has thereby prevented me from putting in my heading to my race as he has taken sole possession by blockading with stones & also putting a Box in the bed of the said Creek	Adjourned till next Warden's Court Ernest Sharpe W	
9	6 July	Same as last	Case adjourned till next Warden's Court – 20th of August – The Court orders that the parties use the water on alternate days - Ernest Sharpe W	20 July
10	6 July	That registration be refused to defendants of a race & dam at Golden Point	Application refused but the plaintiff directed to keep race in repair Ernest Sharpe W	20 July
11	11 July	For non performance of contract – Defendant not having cleaned out the race known as Crossmans Race according to his agreement whereby Defendant (sic) considers he is damaged (£15)	Verdict for the plaintiff damages £10.0.0 without costs Ernest Sharpe W Plaintiff to apply for warrant after ascertaining what value in property the defendant has	20 July

		NOTE: Chinese defendant		
12	13 July	Seeks to recover damages from you for your trespass upon and injury to the Property situate at Tobin's Oakey near Sofala from 1 July 1874 to the date hereof by allowing the water from your race to overflow over his said property and for allowing your race to remain out of repair thereby causing great injury to his fencing fruit trees & garden & the Plaintiff claims £50 damages & further prays that the said trespass injury and damage may be immediately discontinued	Neither party appears. Case struck out Ernest Sharpe W	20 July
13	14 July	For trespassing encroaching on my Tail race close to Camp at Maitland Point on or about 15th April last which you promised to repair & did not do so whereby I am damaged in this sum (£5) by your neglecting to repair said race	The Warden's Court orders that the defendant repair the damage done by him at once – no damages or costs Ernest Sharpe W	20 July
14	14 July	Seeks to recover damages from Defendants for felling Timber over my races	The Warden's Court orders that a bridge be erected by plaintiff over the race in	20 July

		from 2 Mile Creek to Golden & Maitland Points known as the 2 Mile and Golden Point race in June last & drawing wood over said races for such trespass we claim £10 - & further to restrain you from further trespass	question where it crosses the road down to Golden Point and that the defendant refrain from drawing wood across the complainant's race except where the bridge crosses it Ernest Sharpe W	
15	2 Aug	To prove Defendant's right to Skid Hollow water	It was agreed by the parties that this case should be settled by arbitration and that the decision arrived at should be final Ernest Sharpe W	20 Aug
16	10 Aug	Seeks to recover the sum of £12 for breach of contract entered into on the 1st July last between Plaintiffs & Defendants	The Warden's Court finds a verdict for the plaintiffs damages £4-10-0 no costs Ernest Sharpe W Damages paid	20 Aug
17	17 Aug	An injunction to restrain Defendants from working & trespassing on Plaintiffs' alluvial claim on Moonlight Hill Palmers Oakey Creek	Case dismissed Ernest Sharpe W	20 Aug
18	6 Sep	Seeks to recover from Defendant & his party the sum of £8 for loss of water through Defendant & party's neglect & for one week's water besides 30/- which Defendant & his party agreed to pay &	Case dismissed Ernest Sharpe W The defendants admitted that the case was the same as the last & elected to be non suited	17 Sep

		has not done so & £5 for loss of Gold through their neglect whereby Complainant is damaged in the sum of £14.10.0 NOTE: Chinese defendants		
19	22 Oct	To prevent Deft from cutting a race through Defendant's (sic) claim at Solitary Creek Wattle Flat	The Warden's Court finds a verdict for the plaintiff and orders that the defendant ? his race over the said claim in such a manner so as not to interfere with the working of it and the plaintiff is directed to place his pegs in their original position Ernest AL Sharpe W	22 Oct
20	20 Oct	Injunction to prevent the defendants from trespassing on the claim sluice & race of the plaintiffs NOTE: Chinese defendants	Injunction granted and order made as follows In the Warden's Court Holden at Sofala Upon hearing Wm Eyre & Geo Williams of Sofala Gold Miners I Ernest AL Sharpe the Warden of the Tambaroora & Turon Mining District do order that you Ah Leow Wah Sen Ah Fat & party whose names are unknown to me do refrain from encroaching upon occupying or using or working a certain	22 Oct

			claim sluice and race situate on Maitland Point Sofala River the registered property of the said Wm Eyre and Geo Williams for a period of seven days from this date inclusive Ernest AL Sharpe W This was an application under the 88th section of the Mining Act of 1874	
21	Dec 28	To restrain Defendant and his party (10) from encroaching or trespassing upon Plaintiff & his party's (7) ground in the bed of the River near Spring Creek Upper Turon & to recover from Defendant & his party the sum of 35/- per day for such trespass & encroachment	The Warden finds a verdict for the Plaintiff with one shilling damages and the costs of the summons two shillings and sixpence and orders that the plaintiffs do keep the dam such a height that the water shall not go back on the defendants' claim Ernest Sharpe W Costs paid to plaintiffs	21 Jan 1876
	1876			
1	14 Jan	To restrain you from encroaching and trespassing upon the Company's ground situated at New Zealand Point Lower Turon and to recover from you £5 Damages for such	The Warden's Court finds a verdict for the plaintiff without damages or costs - & orders that the defendant desist from trespassing on the plaintiffs' claim	

		trespass as aforesaid	Ernest Sharpe W The plaintiffs are informed that they should take their race on to its destination & that they have no right to hold more than one claim	
2	17 Jan	To restrain Defendants from taking water from the bed of the Turon River at the old crossing place about 100 yards from Complainant's residence & not allowing a sluice head to go down the River That the Defendants are using a race in the Bank which is not theirs – that I have always helped to clean out this race with the Defendants that I on the 23rd of last month took water from the said race & upon going back at the end of the holidays the Defendants particularly the Defendant Ah Sing stopped me & refused to allow me any water fm the said race or allow any water to go down the river – by so doing I consider I am damaged in the sum of £3.15.0 NOTE: Chinese defendants	I find a verdict for the plaintiff with costs two shillings and sixpence. I order the defendants to allow the plaintiff one box sluice head of water Costs paid to McCarthy	
3	31 Jan	To restrain the Defendants from	The Warden's Court finds a verdict for the	18 Feb

		running their tailings in Complainant's tail race & to compel the Defendants to pay the sum of £10 for damage done by the Defendants to said tail race NOTE: Chinese defendants	plaintiff with £5 damages and seventeen shillings and sixpence costs and orders the defendants to put the tail race in such repair as it was before the damage was done that is to say in such a state as it will drain the plaintiff's claim Ernest Sharpe W	
4	14 Feb	To restrain Defendants from cutting a Water race applied for by Defendants on the 11th ? & No 6 – if Registered such right will interfere with my right	Application granted but not to interfere with plaintiff's prior right Ernest Sharpe W	18 Feb
5	28 Mar	To restrain Defendant from being Registered as the holder of a water race applied for by him at Munday Pt on the 17th Inst Plaintiff being the holder thereof & never abandoned by him	Objection upheld and registration refused Ernest Sharpe W	13 Apr
6	30 Mar	To restrain Deft fm being Registered as the holder of Machinery Site at Sawpit Gully to erect puddling machine as applied for by the Defendant on the 29th Instant as the ground pegged out by the Defendant is a claim belonging to one William	Registration refused with costs of summons Ernest Sharpe W Paid to plaintiff costs of summons 2/6	13 Apr

		Herring & rented by Plaintiff s from Herring and Plaintiffs are now using the water		
7	1 Apr	That Defendants be ordered to cut away Dam erected by them at the lower end of Tobins flat, that Complainants have noticed them in writing to do so & the Defendants have not complied therewith & by their neglect Complainants are then damaged in the sum of £6	The Warden orders the dam to be removed at once & awards one pound eight shillings & sixpence to the plaintiffs Ernest AL Sharpe W Cost Smns 2-6 Service 6-0 2 witnesses 1 day at 10/- each 1-0-0 Total £1-8-6 Costs paid	13 Apr
8	16 May	That Defendant may not be allowed the Dam applied for by him at Black Creek Wattle Flat on account of Plaintiff having Improvements on the ground he has applied to purchase	The Warden decides that Defendant's application shall stand over until Plaintiff's application for an improved purchase is dealt with the application embracing land applied for by Defendant Ernest AL Sharpe W	27 May
9	13 June	To settle a dispute as to which parties were entitled to a certain quartz claim at Wattle Flat adjoining Scott's	The Warden decides that Defendant is entitled to one man's ground 60 feet by 400 feet & Plaintiffs to the	13 June

		Hotel	remainder of the land between Defendant's land & the purchased land Ernest Sharpe W This was a case under the 71st section of the Mining Act of 1874. The parties being present and consenting that the Warden should hear & settle the dispute on the ground.	
10	14 Aug	To recover from Defendants for rent of water £4 & for damaging the race of Plaintiff NOTE: Chinese defendants	Case adjourned till 15 Sep Ernest Sharpe W	18 Aug
			Further adjournment till 16 Sep Ernest AL Sharpe W No appearance of the parties Ernest AL Sharpe W	15 Sep 16 Sep
11	15 Aug	To recover the balance of the purchase (£1.14.6) of one share in a River bed claim on the Turon River above ½ mile above Mr Fredk Wildes NOTE: Chinese parties	Case dismissed Ernest AL Sharpe W	18 Aug
12	11 Dec	To prevent Defendant trespassing upon the ground applied to Lease	The Warden finds that the Defendant has committed a trespass	19 Dec

		by me on Circus Point which I consider I am Lessee whereby I am damaged in the sum of £5	on the land applied for by the plaintiff to lease at Circus Point & order the trespass to be discontinued Ernest AL Sharpe W The plaintiff in this case stated that he did not wish for damages	
			The number of cases heard by me at Sofala during the year 1876 was twelve and the number of pages used in recording such cases four Ernest AL Sharpe W	20 Jan 1877
	1877			
1	7 Jan	To show cause why his ground on the Crudine Creek should not be thrown open for Gold Mining purpose	Case adjourned till the 17th proximo Ernest AL Sharpe W The parties in this case to be informed whether they will be required to appear on the 17th prox Adjd fm 20th January 1877 Case dismissed for want of jurisdiction	20 Jan 17 Feb
2	7 Jan	To show cause why his ground on the Crudine Creek should not be thrown open for Gold Mining purpose	Case adjourned till the 17th proximo Ernest AL Sharpe W The parties in this case to be informed	20 Jan

			whether they will be required to appear on the 17th prox Adjourned from 20th January 1877 Case dismissed for want of jurisdiction No appearance on the part of the plaintiff	17 Feb
3	20 Jan	To show his title to a Dam in the bed of the River opposite Timothy McCartys residence and now occupied by him – and the plaintiff also complains that defendant by his dam throws the water of the River back on the plaintiff's workings thereby preventing him fm working his dam NOTE: Chinese defendant	The Warden orders that the said dam be cut away to allow the water to return to its proper level Ernest AL Sharpe W No appearance on the part of the defendant	17 Feb
4	28 Mar	Seeks to obtain an injunction to prevent Defendant from encroaching upon Four acres two roods & 30 perches & extended claim of the 20 May 1872 containing five acres all situated at Chinamans Flat Upper Turon NOTE: Chinese plaintiffs	Application withdrawn Ernest AL Sharpe W	17 Apr
5	28 Mar	Seeks to recover from Defendant the sum of	This case is settled between the parties on	17 Apr

		Two hundred pounds in respect of trespass committed by Defendant upon 9 ½ acres of land at Chinamans Flat being portion 618 & Extended claims of 20th May 1872 between the twentieth day of March Inst & the date of the issuing of this Summons NOTE: Chinese plaintiffs	the following terms. The defendant is to have 20 feet wide on the surface from ?rud to Each of the 9 acres 2 roods & 30 perches with a slope of one in one to the bed rock whatever be the depth – To allow the plaintiffs to sight (sic) sluices through that race as they may require from time to time Each to be four feet wide to be cut by the plaintiffs at the level of the surface of the ground on giving 24 hours notice in writing and to be sunk by them of the same width down to the bed rock as they may require Defendant maintaining his own sluice. Defendant to pay Plaintiffs £30 for the earth taken by the race & the support & £4 for expense Ernest AL Sharpe W	
6	9 May	Seeks to prevent Defendant being registered as the holder of a one third share in the Pennyweight Sluicing Companies extended claim	Application refused Ernest AL Sharpe W	18 May

7	12 May	Seeks to recover the sum of fifty pounds £50 in respect of damages done by Defendant in cutting a race through the Pennyweight Sluicing Companies extended claim of three acres	Case dismissed Ernest AL Sharpe W	18 May
8	18 May	Injunction to prevent the Defendant from interfering in way (sic) with Plaintiff's race situated at Big Valley Creek Wattle Flat No of Permit 9-1876 NOTE: Chinese defendants	Application granted. Injunction to be in force for a period of seven days Ernest AL Sharpe W In the Warden's Court of the Tambaroora and Turon Mining District Holden at Sofala Upon hearing the Plaintiff in person Ernest AL Sharpe the Warden of the Tambaroora and Turon Mining District orders that you Cum Hung and party (the defendants) do refrain from encroaching upon occupying using or working or otherwise interfering with a certain race the property of the said Felix Huttermus (the Plaintiff) – the said race commencing in Big Valley Creek Wattle Flat – about a quarter mile upwards from Poor Man's Point and	18 May

			terminating at Poor Man's Point and that this order shall be in force for a period of seven days from this date inclusive of this day Ernest AL Sharpe W	
9	17 July	Damages done by Defendant to Complainant's Water Race & right at Palmers Valley Creek £10 NOTE: Chinese defendant	Adjourned till 31st Aug 1877 Ernest AL Sharpe W Verdict for the Defendant with costs £7-10-0 Ernest AL Sharpe W If costs not paid within 3 days Execution to issue	6 Aug 31 Aug
10	10 Aug	Seeks to recover £20 damages done by Complainant through Defendant taking and using water from their water race at Palmers Valley Creek from the 29th of June last until date of complaint NOTE: Chinese defendant	Case dismissed at request of plaintiff with attorney's costs £2.15.4 Ernest AL Sharpe W Execution to issue in 3 days If costs not paid	31 Aug
11	10 Aug	Seeks to recover £2.10.0 for damage done by Defendant to Complainant's rights & land at Pepers Creek Wattle Flat	No appearances Ernest AL Sharpe W	31 Aug

12	22 Aug	Seeks to recover £20 in respect of certain damages done by Defendants sheep trespassing upon Complainant's Tail Race situated on the Race Course near Sofala	Verdict for amount claimed with costs £3.14.10 Total £23.14.10 Ernest AL Sharpe W Attorney's costs £2.15.4 Cost of summons 4.6 Two witnesses 15.0 Total £3.14.10 This case the summons was served on the defendant 10 days before the hearing at the trial Mr Brown appeared to ask postponement but was not prepared to pay costs thereof. The case was therefore heard ex parte	31 Aug
	1878			
1	20 Aug	Complainant seeks to recover Fifty pounds (£50) in respect to Certain damages done by Defendant cutting a Water Race through Complainants Extended Alluvial Claim situated at Pennyweight Flat	Case dismissed - with costs for one witness Ernest AL Sharpe W Costs for one witness 10/- In this case plaintiff failed to produce his Miners Rights to prove his title to the claim from the date it was taken up	

2	23 Aug	Complainant seeks to recover Ten pounds (£10) in respect to Certain damages done by Defendant filling in Complainants Water Race situated at Wattle Flat	No appearance of the parties Ernest AL Sharpe W	

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