Felons, Mutineers and Other Learned Friends:

A History of the Development of the Colonial Bar in Australia, and the Contribution of its Advocates to the Evolution of the Colonies 1788-1856.

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This thesis represents a major part of the prescribed program of study.

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Summary

This thesis can be viewed as having two tiers; firstly, the development of the institution of the Bar in Australia from 1788 until 1856, and secondly, the broader role that individual advocates played in the formation of each new Australian colony.

This thesis is the first comparative history of Australian advocates and the development of the institution of the Bar. Previous histories of the Bar have either been restricted to the story of one colony, or the biography of a particular practitioner. It is my contention that a history of the institution of the Bar cannot be properly understood without a comparative examination of the colonial Bars, which also involves elements of general Australian history, legal history and judicial history.

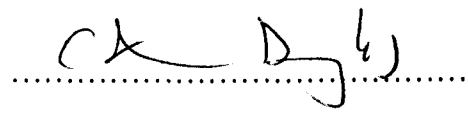
Traditionally, barristers trained in an English Inn of Court are seen as the members of the early nineteenth century colonial bars. The term 'advocate' is employed in this thesis to encompass the roles played by barristers trained in English Inns of Court, as well as certain attorneys, solicitors, convict attorneys and lay persons who performed an advocacy role in their colony. Often 'advocate' is more appropriate for early nineteenth century Australia as it also allows an examination of the roles played by people who did not have an English Inn of Court qualification, but who nevertheless performed court work.

Advocates by definition represent the causes of other people in society, and in doing so contributed in a significant way to the social, political and economic development of each new colony, and their systems of law and order. In a sense this thesis can also be viewed as an examination of key events in Australian history from the viewpoint of barristers and advocates.

Ultimately, an examination of key historical events can be used to aid our understanding of the dynamics of the modern-day Bar. It highlights the invaluable contribution that advocates make to society, but also reveals problems that are endemic within the Australian Bars. The argument is posed that there is a need for members of the Bar to understand their own history and the causes that have led to the modern state of the Bar, before they can make vital changes to guarantee the future effectiveness of their institution.

Statement

This work has not been submitted for a higher degree to any other University or Institution.



Catherine Douglas, 31 March 2007

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I would also like to take the opportunity to thank my supervisors, Professor Rosalind Croucher and Professor Bruce Kercher, for their advice over the past four years. I am also indebted to the late Emeritus Professor Alex Castles, who provided me with the inspiration to enter the field of legal history.

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Abbreviations

HRA	*Historical Records of Australia*
HRNSW	*Historical Records of New South Wales*
HRV	*Historical Records of Victoria*
CO	*Colonial Office Records* from the Australian Joint Copying Project
GO	*Governor's Office Records* (Tasmania)
Kercher's Reports	*Decisions of the Superior Courts of New South Wales and Van Diemen's Land*
Votes and Proceedings	*Votes and Proceedings of the Parliament of New South Wales*

PREFACE

> *History can be written at any magnification. One can write the history of the universe on a single page, or the life-cycle of a mayfly in forty volumes. A very senior and distinguished historian, who specializes in the diplomacy of the 1930s, once wrote a book about the Munich Crisis and its consequences (1938-9), a second book on* The Last Week of Peace, *and a third entitled* 31 August 1939. *His colleagues waited in vain for a crowning volume to be called* One Minute to Midnight. *It is an example of the modern compulsion to know more and more about less and less.*
>
> Norman Davies[1]

This is, unashamedly, a tertiary history of Australia. It draws from the invaluable work of many professional and amateur historians in the attempt to trace the genesis of the Australian Bar over more than half a century of history and an entire continent. It builds on the original, painstaking and dedicated work of many Australian legal historians, including John Bennett, Alex Castles, Enid Russell, Ralph Hague and Arthur Dean. This work documents all of the accessible primary sources that are available, but also acknowledges, where appropriate, the groundbreaking work of historians who have conducted the original research in particular areas.

This thesis arose out of the significant need for works of genuine scholarship aimed at integrating the plethora of secondary sources that are either focused on the legal profession of an individual colony or state, or are biographies of a colonial lawyer. In observing the forest rather than individual blades of grass, recognisable arguments and themes can be examined which help to explain why events in society's past have led us to where we are today. This all-important understanding of causation gives the subject of legal history its greatest immediacy and relevance to the modern-day reader and, more particularly, in examining past events facing the Bar we can shed light on its present-day status.

Writing a history with such broad parameters always involves choices as to what should be included or excluded. Often, the subject matter that is excluded draws more comment than that which has been included. To take one such example, this history has been written with the deliberate decision to exclude much of the story of European contact with the first Australians who had settled these shores. The conscious choice to write a European history reflects the fact that the modern Australian Bar is a European-evolved institution. This is not to say that there were not influences from each side of the culture divide as a result of black and white contact throughout Australia's history, but this simply did not seem to be the forum

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[1] Norman Davies, *Europe: A History* (1997) 1.

for their examination. The same observations could be made in relation to women's history, the history of religion and migration, none of which is given as detailed an analysis as is possible in such a work. The history of the Queensland Bar is also examined only briefly, not so much by design, but because of the time frame entertained in this thesis.

That being said, every attempt has been made to treat the history of the institution of the Bar comprehensively and objectively. The Australian legal profession does not know its own story, partly because of the absence of tertiary histories on the subject, and the general public is largely ignorant of the crucial role that advocates play in society. This work, which is intended to be the first of three volumes telling the story of advocacy in Australia from its inception to present times, is in some small way intended to redress that problem.

Finally, the author attempts to capture the excitement, passion and pathos encountered at every turn in reviewing the early history of the colonial advocates who played such a fundamental role in the foundation of the Australian colonies. After all, to be relevant, history needs to be read and appreciated by its audience, rather than gathering dust in the basement of a library. In adopting this lively narrative style, I hope to breathe new life into not only the lives of the colonial barristers, but also the research undertaken by the historians who came before me.

Catherine Douglas, March 2007

A STARTING POINT: ORIGINS AND MYTHS

> *You know the jealous feeling of the profession at home...And I must own that even at our humble Bar, I feel the indiscriminate admission of attorneys with barristers, as a little derogatory. But to give precedence to the attorney over the regular barrister does certainly overturn all my preconceived notions, and raises a strong doubt how far it can legally be done. The rank and privileges are part of the law itself; and can this be changed except by power of Parliament? Could it be done at Westminster? Mr Holland went so far as to tell me it had been in contemplation to place him on the bench of the Supreme Court, and, upon my asking him his standing at the Bar, he replied that he was not a barrister, but that a short Act was to have been carried into Parliament to remove that impediment. I immediately told him that he would have found an impediment here, which might not be quite so easy to remove. I did not credit his statement; but I should have declined sitting on the same bench with him.*
>
> Chief Justice Forbes to R.Wilmot-Horton,
> New South Wales, 22 March 1827[1]

When the Australian colonies were established in the late eighteenth and early nineteenth centuries, politicians and key stakeholders in England were invariably in the background, charged with the task of laying an effective blueprint for each new colonial society.[2] It was viewed as inevitable that the new colonies would, in time, emulate the best of the British institutions, laws, values and traditions.[3] Yet grand old institutions such as the parliamentary system, law courts and print media, which had been developing and evolving over centuries of British history, meant little in a new society that had to be built from the ground up.[4]

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[1] Forbes to R. Wilmot-Horton, 22 March 1827, CO 201/188, f. 65. Sir Francis Forbes was the first Chief Justice of the New South Wales Supreme Court. In relation to the above extract, Forbes refused to swear in James Holland as Solicitor-General as he could not produce a commission for the appointment. Traditionally, barristers filled the position of Solicitor-General, and Holland had never been called to the Bar in England. Furthermore, judicial appointments were exclusively made from the ranks of barristers. Forbes is considered further in Chapter Three.

[2] When each colony was formed, formal written instructions were given to the appointed governor and judicial officers, which briefly detailed their role as leaders of the new colony and the method by which political and legal infrastructure would be established. Often these instructions were called 'Letters Patent' or, in the case of South Australia, an Act of Parliament was also enacted. These instructions were usually rudimentary, simply conferring on the governor and judicial officers the basic powers to establish institutions, and then leaving it to their discretion as to how each institution, for example the courts, would be run.

[3] Those who were involved in the planning of each colony from the safe confines of Britain simply assumed that the colonies would be an extension of Britain. For some, it was a noble gesture of spreading British values around the world. They did not consider that different conditions might interfere with the reception of British values; for example, the fact that New South Wales and Van Diemen's Land were convict colonies, thus affecting the way the legal system might operate, or that different climatic conditions would render many British traditions inappropriate. For examples of naïve acceptance of British tradition, see Watkin Tench's views on civilisation in Chapter 1, and Edward Gibbon Wakefield's ideas in Chapter 7. See also Judge Jeffery Hart Bent's views on the operation of the legal system in Chapter 2.

[4] Bruce Kercher, in *An Unruly Child: A History of Law in Australia* (1995) xxi, when considering the implementation of British law in the Australian colonies, posed the question: 'The judges and law makers who came here may have perceived themselves to be British, but was the legal tradition they brought with them sufficiently powerful to impose itself on these conditions?' He concluded, 'These questions are all the more tantalising because English law in 1788 was on the verge of change. The inherited tradition was itself shifting

The instructions for the formation of each settlement were by necessity rudimentary.[5] They addressed the bare basics that would be required to ensure that the boatloads of settlers could survive the wilderness, and then slowly begin to build a community worthy of its position as an outpost of British Empire. A governor was chosen as leader of the community, clergymen were enlisted to ensure the moral health of the settlers, and a doctor was provided to tend to the sick. In recognition of the foibles of human nature, provision was sensibly made for the administration of law and order so that the inevitable crimes could be punished and squabbles resolved. Yet, while men of the faith were deemed an essential asset to a new community, men of the law were not.[6]

Invariably, however, lawyers took their own initiative to emigrate. They arrived to take their place in history, playing their part not only in the foundation of Australia's legal profession, but also in the crucial events that led to the political, social and economic development of each of the colonies.

The story of the development of legal advocacy - traditionally seen as the domain of the barrister - begins, as one might expect, with a desire to replicate the proud and ancient English traditions of the Bar. Yet, as history so often tells, expectation and reality were two entirely different things.

The Power of Myth

Barristers, attorneys and solicitors, the practitioners and exponents of the British legal system, historically performed complementary roles in dispensing justice,[7] yet custom emerged within

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during the process of its continuing acceptance and adaptation in the Australian colonies.'

[5] In New South Wales, for example, the instructions were comprised of the Heads of Plan, and Governor Phillip's Commission (See Chapter 1). See Part Two for details on the instructions from the Colonial Office for the other Australian colonies.

[6] Clergymen invariably found their way out to the colonies in order to deal with the moral and civilising aspects of new settlements. The native inhabitants were, in particular, deemed to be in need of this civilising influence, as the values of the British Empire were impressed upon them. Doctors were likewise seen as an essential service, and understandably so. Yet while it was recognised that systems of law and order were required, it was not considered necessary to encourage people trained in the law to migrate to the colonies to operate these new legal systems. See Part One in particular for further discussion on this point.

[7] For an explanation of the differences between attorneys, solicitors, proctors, serjeants-at-law and barristers, see J.H. Baker, 'The English Legal Profession, 1450-1550' in W. Prest (ed), *Lawyers in Early Modern Europe and America* (1981). See also Disney et al, *Lawyers* (2nd ed, 1986) Chapter 1. Historically, the major difference between barristers and other types of legal practitioners focused on the right to appear for a client before the judges of the higher courts in Britain.

British society which accorded barristers a higher professional standing.[8] The barristers, who were trained to perform advocacy work in the courts, claimed that they were the 'higher branch', with noble, gentlemanly traditions and customs placing them above the 'common' attorney.[9]

Regardless of whether the barrister's elevated professional standing was merited, it would take a near seismic force to challenge this notion that was supported by centuries of tradition. It was expected that when the Australian colonies were founded, the laws and customs of England would be transplanted with the settlers in the new antipodean lands[10] and it logically followed that barristers and attorneys would establish their professions under the guidance of the old English legal traditions.

But in a strange new land, where the seasons were reversed and tilling neat British gardens proved nigh impossible, the uneven balance between the two branches of the profession began to fluctuate. Common attorneys began to encroach on the barristers' traditional domain of advocacy and preconceived notions of the function and role of the barrister were questioned. Practical considerations and necessity dictated that attorneys play a larger role in the courts, which were traditionally seen as the exclusive province of the barristers, and soon the definition of who was a barrister and what constituted the colonial 'Bar' became a salient question.

Barristers naturally assumed that the English way of structuring the legal profession was the right way, and the only way in which to establish the colonial Bars.[11] They overlooked the fact that the English Bar itself had been constantly changing and evolving over the centuries, and that at the time when the Australian colonies were founded, the English Bar was considered by many learned legal minds to be in a state of crisis.[12]

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[8] There are many examples of barristers being accorded higher standing. The Benchers of the four English Inns of Court made the order of 1614 excluding attorneys from Inns of Court. Disney, ibid 14, refers to an undoubted 'perceived pecking order' with barristers at the apex. H.H.L. Bellot, 'The Exclusion of the Attorneys from the Inns of Court' (1910) 26 *Law Quarterly Review* 137, documents the gradual efforts to exclude attorneys from the Inns of Court.

[9] See Fortescue's description of barristers in *De Laudibus Legum Angliae (c1470)*, which describes the Inns of Court as a nobleman's residence.

[10] Views on the reception of English law in the Australian colonies are based on William Blackstone's treatise of settled lands. Blackstone authored the famous *Commentaries on the Laws of England* from 1767, which were frequently considered by the courts in Britain and the colonies to be an authoritative exposition on the law. A.C. Castles, *An Australian Legal History* (1982), discusses Blackstone and the reception of English law in the colonies in Chapter 1.

[11] See, for example, Sir Francis Forbes' quote, above n 1.

[12] See 'The English Inns of Court' below for further discussion on this point.

It is therefore little wonder that in a new colony where the profession had to be built afresh, attorneys, solicitors and even lay advocates with no legal training recognised that there was an opportunity waiting for them. The attorneys were more open to change than the barristers were, as the changes to the legal system suited them. Barristers who resolutely clung to English practices, procedures and customs were vocal in their unwillingness to change with the times.[13]

Despite the fact that the English Bar was arguably lacking direction in the early nineteenth century, it was sustained by the fact that its practitioners had, for centuries, been unwavering in their almost religious belief in the pre-eminence of their profession over that of the attorneys. This belief was inherited with fervour by British barristers migrating to the colonies, Chief Justice Francis Forbes of New South Wales being one of the most ardent exponents.[14] A walk back into English legal history through the hallowed Inns of Court demonstrates the potent power of that myth.

The English Inns of Court

The four English Inns of Court, respectively Lincoln's Inn, Middle Temple, Inner Temple and Gray's Inn, have formed the heart and soul of the English Bar for over five centuries. While it is unclear when each Inn came into existence, the 'Black Books' from Lincoln's Inn date from 1422, providing lists of the men admitted to the Bar of Lincoln's Inn and the profession of barristers in England.[15]

In 1780, Lord Mansfield of the King's Bench reflected on the history of the Inns of Court and concluded that while

> the original institution of the Inns of Court nowhere precisely appears...it is certain they are not corporations, and have no constitution by charter from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning.[16]

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[13] As will be shown in Parts One and Two.

[14] See introductory quote, above n 1.

[15] W.P. Baildon and R.F. Roxburgh (eds), *The Records of the Honorable Society of Lincoln's Inn: The Black Books* (1897-1969). See also W.R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590-1640* (1972) 1 for comment on the 'Black Books'.

[16] *R v The Benchers of Gray's Inn, on the Prosecution of William Hart* (21 April 1780) 99 ER 227-230 and discussed in W.C. Richardson, *A History of the Inns of Court* (1975) 2.

As Lord Mansfield alluded, the Inns of Court were originally an institution with a key educative function. For a time the Inns were collectively referred to as the 'Third University' in England, as Oxford and Cambridge initially had little involvement in legal education.[17]

Young men interested in a career as a barrister were required to take up residence in one of the four Inns of Court and participate in the activities of the Inn until they received their 'call to the Bar'. Their training program included lectures on the law and moots. The legal program changed over the centuries, but usually included the study of liberal arts and subjects such as Latin in addition to legal studies. Students could also receive tuition in dancing, music and other courtly arts.[18]

After a prescribed period, the student would be called to the Bar. Historically, a call to the Bar of an Inn of Court referred literally to membership and rank within the organisational structure of the Inn. Students 'traditionally sat in the dining hall at tables beyond a dividing barrier known, like its counterpart in courts of justice, as the Bar.'[19] As they progressed within the ranks they were admitted to the Bar and earned the right to full participation in the Inn's activities, and symbolically dined in the hall on the other side of the dividing barrier.[20] Their standing within the profession was based on the number of years during which they had practised the law since their call to the Bar. The most senior barristers were often promoted within the organisational structure of their chosen Inn by becoming a 'Bencher' who took a higher role in the administration and governance of the Inn.[21]

The Oxford English Dictionary recognised barristers as being a separate occupational category by 1695.[22] Yet, even in 1559, the monopoly that barristers claimed over advocacy work in the higher English courts was being cemented when the judges of Westminster Hall ordered that only barristers of more than ten years standing within their Inn of Court had the right of appearance before them.[23]

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[17] Richardson, ibid 1.

[18] Prest, *The Inns of Court,* above n 15, 1-2.

[19] Richardson, above n 16, 16.

[20] Ibid 15-18.

[21] Ibid 18-19.

[22] See W.R. Prest, 'The English Bar, 1550-1700' in Prest (ed), above n 7, 65.

[23] Prest, *The Inns of Court,* above n 15, 50.

This rule, in effect, divided the work performed by the English legal profession between barristers and other lawyers variously referred to as solicitors or attorneys.[24] Barristers came to be recognised as advocates, exclusively performing the role of presenting a client's case before the court and preparing documents such as pleadings that would outline the case, legal argument and remedy sought. Rules of etiquette were developed over the centuries and monitored by the Inns of Court, such as the convention that barristers received their brief from solicitors and did not have direct access to their clients.

Yet, regardless of rules providing for the division of the profession, it took a long time for the division to be fully put into practice. Economic considerations played a large role in inducing barristers also to perform work that is traditionally done by a solicitor today, and this remained the case until at least 1820.[25] Realistically, a vast number of barristers within the profession struggled to procure enough briefs to make a living. The image of the Bar as a lucrative profession for gentlemen often failed to live up to expectations, particularly in the years following the Restoration in late seventeenth century England.[26]

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[24] For a brief history of the origins of solicitors, attorneys and proctors, see Anthony Fisher, 'From Norman Conquest to Rum Rebellion' in J.M. Bennett, *A History of Solicitors in New South Wales* (1984) 4-5. Fisher notes that in early English history, legal functions were divided between solicitors, attorneys and proctors. Today, the three groups have been combined and are simply called 'solicitors'. Attorneys were initially considered the most reputable of the three groups of lawyers; in 1402 an Act was passed requiring judges of the courts to admit attorneys to the profession and monitor rules of conduct. In reality, the judges did not perform much of a supervisory role and attorneys quickly gained a disreputable image as pettifoggers or mercenaries. Solicitors were considered even more disreputable, as anyone could become a solicitor and no training was required. The courts had no supervisory jurisdiction, but solicitors were not entitled to the privileges of an attorney. 'Their functions included writing of common-law entries, court-keeping, auditing and acting, perhaps, as paymasters, estate agents, kitchen clerks, bailiffs.' If attorneys were seen as 'common' in comparison with barristers, it is not surprising that in return, 'the solicitor "is as offensive to the attornies as flies are to a galled horse"'. The little known group of proctors emerged parallel to the attorneys and solicitors, practising in the ecclesiastical and admiralty courts and being admitted to the profession by the Archbishop of Canterbury.

[25] Daniel Duman argues that the notion that barristers should not confer directly with lay clients did not become a formal rule of professional etiquette until the late nineteenth century, but that it had been observed as practice since the 16th century. He further argues that by the 1820s barristers' efforts to prohibit attorneys from the Inns of Court finally succeeded. See D. Duman, 'The English Bar in the Georgian Era' in Prest (ed), *Lawyers in Early Modern Europe and America* (1981) 101-103. See also Anthony Fisher 'From Norman Conquest to Rum Rebellion', ibid where he points out that solicitors in England complained about barristers conferring directly with clients as late as 1800. Realistically, the division between barristers and solicitors was elastic, allowing exceptions to the rules to suit economic considerations.

[26] For a description of prestige of the Bar as an avenue to wealth, see Prest, 'The English Bar 1550-1700' in Prest (ed), above n 7, 69 and 77-78. See also D. Duman, 'The English Bar in the Georgian Era' in Prest (ed), above n 7, 86 and 95. Duman explains that in the late 18th and early 19th century young barristers' incomes were often supplemented by the pursuit of other careers, such as journalism. This is evident in the colonies, where barristers such as William Charles Wentworth and Robert Wardell of New South Wales, and William Nairne Clark of Western Australia also pursued journalism pursuits as well as their legal careers. See Parts One and Two.

Despite the fact that the common attorney might actually be doing better business, the gradual act of reserving to barristers exclusive rights of appearance before the higher courts of England had the effect of providing a very real social demarcation between the barrister and the attorney.[27] The traditions of the Bar and the Inns of Court were often reflected on with pleasure; indeed, writing in 1908, Bernard Kelly prefaced his *Short History of the English Bar* with the glowing endorsement:

> That the place of the Bar in our national history has ever been a great one cannot be denied. From its ranks have gone forth some of the most fearless exponents of public liberty and justice...Few can contemplate that time honoured society of men with its great traditions, venerable customs and strong knit solidarity, without indulging in some of those feelings of emotion which spring from the recollection of great achievements and the glory of an historic past.[28]

Kelly, who confessed to be indulging in a moment of self-congratulation on the achievements of the Bar, not only records the history of the English Bar but also perpetuates the mythical qualities surrounding it. The Bar, because of its ancient traditions and customs, bred a 'fearless' individual who was able, because of his station in society as a barrister, to pursue justice for individuals in society. It is difficult to imagine the humble 'common' attorney receiving such accolades for his service to society; rather, the ordinary citizen commonly reviled attorneys as scoundrels who were taking advantage of a legal dispute in order to make a seemingly inordinate amount of money.[29]

In truth, barristers did not completely escape the distrust that encompassed legal professionals generally, but their efforts to market themselves as the gentlemanly branch of the profession and their consequent distancing of their profession from that of the attorneys arguably achieved its purpose in insulating the barristers from some of the harsh criticism.

Even Kelly did not deny that the Inns of Court, as institutions of learning, left much to be desired by the eighteenth century.[30] In 1758, the seminal English jurist William Blackstone lamented that legal education within the Inns of Court had been subject to 'long and universal

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[27] For a chronology of events leading to the division of the Bar, see Bellot, above n 8. See also Duman, above n 25, 104, who states that 'between 1762 and 1828 the bar defeated the threat posed by the attorneys by instituting a form of professional segregation. The result was the creation of the prototype of the modern profession.'

[28] Bernard Kelly, *A Short History of the English Bar* (1908) viii.

[29] As Wilfred Prest suggests, 'in a world whose traditional arrangements and values were challenged by powerful disruptive forces, including a quickening market economy, religious disunity and a more complex, centralising civil society, lawyers were seen – not without good cause – as the standard bearers of change and disruption.' Prest, 'The English Bar, 1550-1700' in Prest (ed), above n 7, 73.

[30] Kelly, above n 28, 82-3.

neglect'.[31] The program of lectures, readings and moots had long since been disbanded and students were left to their own devices in acquiring a working knowledge of the law.[32] Virtually the only requirement for being called to the Bar was residence within the Inn for a prescribed number of terms and eating the required number of dinners in the communal dining hall. New barristers could leave the Inn as ignorant of the law as they were when they entered it.

Nearly ninety years later, Blackstone's frustration was echoed by the Select Committee on Legal Education, which reported in 1846 on the 'lamentable' state of legal education, there being no organised system of education for barristers, no provision to examine candidates, or any means of testing their competence.[33] The Committee also took evidence from Justice Thomas Norton, who had served as a judicial officer for nine years in Newfoundland and British Guiana. Justice Norton voiced his opinion about the competency of judicial officers, stating that

> it is almost culpable on the part of our authorities to send men to adjudicate upon the lives and properties of others without knowing the system of law which they are called upon to administer.[34]

As Justice Norton and the Committee undoubtedly recognised, this long-standing lacunae in knowledge on international law, and lack of practical skills in areas such as interpreting legislation and drafting new laws, was becoming an increasingly real concern with the establishment of outposts of empire in the new British colonies, including those within Australia.

Outposts of Empire

If the British Government heeded the concerns of the Select Committee on Legal Education, there is no evidence of it in regard to the Australian colonies. After all, no efforts were made to send out to the colonies legally trained personnel who had special expertise in international law or drafting.[35] The barristers who, by choice, migrated from Britain were usually young, and it is also probable given the endemic breakdown of legal education within the Inns of

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[31] See Blackstone's inaugural Vinerian Lecture, published in his *Commentaries* (1809 ed) I, 4-5.

[32] Richardson, ibid 319. See also David Lemmings, *Gentlemen and Barristers* (1990) 75.

[33] *Report of the Select Committee on Legal Education,* Parliamentary Papers, X (25 August 1846) xxxi-xxxiv. Also quoted in Richardson, ibid 325-6.

[34] *Report of the Select Committee on Legal Education*, ibid 255. See also Richardson, ibid 328.

Court that these barristers were poorly trained and lacking knowledge in vital areas. Learning on the job would be essential, but a difficult task given that pioneer British barristers were migrating to colonies where there were few, if any, lawyers more senior than them, and a lack of libraries from which they could belatedly learn their craft.

Yet these barristers continued to project the mystique and aura of the Bar by proudly informing all who would listen that they were barristers trained in the English Inns of Court, and that they intended to transplant the fine traditions of the Bar to their new colony.[36] They conveniently perpetuated the myths that the Bar was an institution for gentlemen only, that barristers were better trained in the law than attorneys, and that it was a certain career path for those wanting a fast track to riches and fame. This is despite the fact that many barristers who migrated to the Australian colonies had already fallen on hard times, were frequently debt-ridden and often harassed by debt collectors.[37]

Many of the immigrant barristers undoubtedly hoped that the riches and fame that only an exclusive few barristers achieved at the overcrowded English Bar would be theirs for the taking in a newly established colonial Bar. The seductive lure of opportunity ensured that they conveniently forgave the imperfections of the English Bar in favour of its virtues.

The pioneer barristers were not prepared for the abrupt way in which the monopolistic traditions that had slowly been cultivated by the old English Inns of Court were swept aside when the new colonies were settled. There were no laws dividing the legal profession into branches of solicitors and barristers, and there were no regulatory bodies prescribing any particular training as a pre-requisite to being admitted as a barrister in the colonial courts. There were certainly no Inns of Court.

Anyone could initially perform the traditional advocacy role of a barrister, including laypersons with no training in the law, the common attorneys, and even worse, the 'impudent'

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[35] Perhaps the one exception is Sir Francis Forbes, the first Chief Justice of the Supreme Court of New South Wales, but he was not sent out to New South Wales until 35 years after the founding of the colony. See Part One for more detail on Forbes.

[36] See especially Chapter 2 and Jeffery Hart Bent for an example of a barrister who constantly referred to his qualifications in the Inns of Court.

[37] Examples include George Fletcher Moore of Western Australia who freely admitted that he was not making a viable living as a barrister, Sir John Jeffcott, the first Judge in South Australia, who was being hounded by debt collectors, and Justice Montagu of Van Diemen's Land. See Parts One and Two for further examples.

convict attorneys.[38] It was clear to the barristers trained in the exclusive Inns of Court that these groups of pretenders needed to be eliminated from the exclusive club of barristers. If the benchers of the English Inns of Court had been watching the events that were unfolding, it would have been clear that the colonial barristers had a difficult fight on their hands. English attorneys may have been barred from joining the English Inns of Court, but they were not willingly relinquishing their newfound claim to act as advocates in the colonial courts.[39]

The vexing question was, how could elements of the English Bar be salvaged and incorporated into the colonial Bar? Who should be allowed to perform the traditional advocacy function of a barrister, and what role would the advocate play in colonial society?

From Outpost of Empire to Self-Governing Entity

The answer to the seemingly simple questions of who was an advocate, and what constituted the Bar, is the story of a battle of ideals fought between members of the legal profession, in which the proponents of tradition (and, perhaps, myth) had to find their place in society against the rushing tide of emerging principles that were better suited to the necessary pragmatism of the new colonial era. It is also one of many complex and interweaving stories about the people who arrived in a distant land to establish a new society, and had to interact in an environment where it was not always possible to re-enact the lifestyle and values that they left behind in Great Britain.

The legal personalities who played their part in the unfolding events did not merely establish the colonial Bars, but also assisted in the transformation of their colony from an insignificant outpost of Empire to a self-governing entity. Generations of barristers and attorneys had a consciousness that their contribution to the legal, political, and social infrastructures of the

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[38] The convict attorneys, who had qualified as attorneys and practised their craft in Great Britain prior to being transported to New South Wales, frequently reprised their career once they became emancipated. Barristers, attorneys and judges who had arrived in New South Wales as free men resented the impudence displayed by 'convict attorneys' who practised as lawyers and offered their services to free men. The free men did their best to prove that the convict attorneys were disreputable, and to make it illegal for them to practise. See Part One for further information on this issue.

[39] Many of the new emerging principles that evolved in the colonies attached less importance on the traditional Inns of Court structure. Admission rules in the colonial courts frequently gave attorneys and solicitors the same appearance rights as barristers, and for a short time in New South Wales there was no distinction between a convict or emancipist attorney, and those who practised law as free men. Pragmatically, a system that did not differentiate between the different groups of lawyers was better suited to a colonial society where there were not enough legal practitioners to represent the colonists. See Parts One and Two for further information.

new colonies would be of immense importance, and they had the opportunity to assume roles in society above and beyond their skills as advocates.

Many advocates acted as advisers to the governors on important social, political and legal issues. They were often seen in the Legislative Councils or on the Executive, where they exerted powerful influence over the new legislation being drafted in the colonies. Some wielded even more influence by becoming members of the judiciary, and others acted out the colonists' grievances by advocating their cases in court. A few acted as commentators on the law by establishing newspapers which invariably analysed and criticised the administration of the law in the colony, much to the chagrin of the governors of the day. As the colonies became more established, many advocates became involved in political movements, such as the campaign for Responsible Government in the early 1850s.

As successive Australian-born generations gradually lost touch with their English roots, the issue of what it meant to be an Australian attracted lively debate. Some things never change, however, and by 1856, when Responsible Government had been achieved by four out of the six colonies, the questions of who was an advocate, and what constituted the Bar, were topics still meriting serious consideration. Yet the era of the English Inns of Court was passing; to the new generation of advocates, it was a world away.

The collision of old world and new, and the role that advocates played as central actors in the society-building experiment of colonial Australia, will be the subject matter of this thesis. It will examine the events that led to the formation of the colonial Bars and compare that history to the way in which advocates actually represented themselves and their profession in an effort to separate the facts of the institution from its myths. After all, before Europeans moored a single vessel at Botany Bay, as has just been discussed, the manner in which the English Bar represented itself and the actual state of the English institution were not one and the same. As a starting point, however, it is necessary to examine in more detail what is meant by 'advocate' and 'barrister' in the Australian context.

Defining an Advocate and Barrister

The Oxford English Dictionary defines an advocate as being 'one summoned or "called to" another, esp. one called in to aid one's cause in a court of justice'. A barrister is more specifically described as 'a student of the law, who, having been called to the bar, has the

privilege of practising as advocate in the superior courts of law'. A barrister, therefore, belongs to the sub-group of advocates and has specialised training that gains them the right to plead one's cause in a superior court. The broader definition of an advocate, however, recognises the possibility that people other than barristers can perform the advocacy function.

In the British legal profession, the reality was that the specialised legal training of the barrister gained them a monopoly on the right to perform advocacy in the superior courts of Britain, thus leaving no room for any other 'advocates' to perform court work. An 'advocate', effectively, was a barrister. In the Australian colonies, however, where the monopolistic walls had not yet been erected, the issue of a barrister's right to a monopoly on pleading one's cause in a higher court would be placed under the microscope. Other sub-groups within the definition of an advocate would come into play, and the barristers were simply one of many sub-groups.

Barristers who came to the colonies assuming that their role as advocates would be the same as in Britain quickly realised that it would not be so. As Chief Justice Francis Forbes of New South Wales wrote in 1827, all of his preconceived notions about who could perform an advocacy function in the courts and who could be appointed a judge had been challenged. His view of the world, and all the values under which he operated, were under threat. Forbes' answer to the questions of who is an advocate and what constitutes the Bar would undoubtedly be founded on the view that an advocate is exclusively a barrister who holds a qualification from an English Inn of Court. Yet, suddenly there were groups of people effectively posing as barristers, acting as barristers, and even calling themselves barristers.

These 'pretenders', as they were undoubtedly thought of, were redefining the definitions of advocate and barrister in early Australian colonial history. Dictionary definitions and histories of Australian barristers did not analyse this important and definitive period in early colonial settlement, primarily because of the use of the traditional definition of an advocate being exclusively a barrister. John M. Bennett uses such a traditional definition in his seminal historical studies.[40] He states that in New South Wales, a barrister's status

[40] John Bennett is the author of *A History of the New South Wales Bar* (1969) and *A History of Solicitors in New South Wales* (1984). His most recent works include the important biographies of Australian judges in his continuing series *Lives of the Australian Chief Justices*. Another author who uses this classical definition of a barrister is Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (1968).

> has always been an individual one, conferred by the Supreme Court of New South Wales. But with individual independence and responsibility, characteristics of their calling, they have always had a corporate sense. They have thought of the Bar as an institution to which they belonged, its traditions reaching back into English history. Acceptance of their inheritance and its customary disciplines was natural and easy from the first, for those who may be called the foundation members of the Bar in the Colony were all members of the Bar in the British Isles.[41]

The only change or concession in the definition of a nineteenth-century Australian barrister is that a colonial barrister is a person admitted to practise as a barrister in the Supreme Court (or its equivalent) of the person's resident colony. Implicit in the definition is that a nineteenth century colonial barrister was either trained in an English Inn of Court, or under newly styled colonial legal education programs. Also implicit in the definition is that the barristers were the only people allowed to be members of a 'collegiate' organisation called the 'Bar'.[42]

This definition of a barrister, while it holds true for the twentieth century Bar, does not address the cause for Forbes' angst in the 1820s in colonial New South Wales. What disheartened him was the number of people practising as barristers who did not meet the criteria of such a traditional definition: the attorneys who did not seek formally to retrain as barristers, the laymen who performed advocacy functions in the courts, and the convicts or emancipists who sought to practise law in the colony. There was also very little in the way of organised Bar Associations in the nineteenth century, so the gate-keeping role that a Bar Association would naturally perform in the twentieth century was largely absent before 1856.

Given this state of affairs in early colonial Australia, such a traditional definition omits much of the history surrounding the Bar. This thesis postulates that it is more useful, in the Australian context, to employ the term 'advocate' when referring to a group of people who represent another person's cause in a colonial court. This group of advocates, who arguably laid the foundations of the colonial Bars, not only included barristers trained in English Inns of Court, but also the attorneys, solicitors, convict attorneys and lay-persons who acted as advocates.

Advocates are, simply put, people who advocate the rights of a citizen of the community before a forum established by the governing body of that community according to that

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[41] Bennett, *A History of the New South Wales Bar,* ibid 1. See also Arthur Dean's definition in *A Multitude of Counsellors*, ibid 2, for the period 1837-1850 where he states 'The term "barrister" as used here and as applied to this period includes those men, few in number, who having been called to the Bar in England, Ireland or Scotland were on that qualification admitted to practise in New South Wales as barristers and who did in fact practise as such in the Port Phillip District of New South Wales.'

[42] Ibid.

community's laws.[43] Their agenda is not merely their own, but is given to them by others in the community who have business or social objectives to promote. The early history of advocates and the Bar is therefore also a social history of competing ideas within the community that they serve.

For the purposes of this thesis, the term 'barrister' will be used in exclusive reference to lawyers trained in an English Inn of Court, or its equivalent under colonial barrister training programs. 'Advocate' will be used to describe all of the people who performed a legal advocacy role in the colonial courts, whether they were a barrister, attorney, convict attorney or layperson. All of these advocates, regardless of their training, could legitimately lay claim to being foundation members of the Bar, or at the very least to have paved the way for the formation of the Bar in their colony.

It is extremely difficult to pinpoint exactly when the 'Bar' in each colony was formed, as there were no formal Bar Associations during the period of 1788-1856, and any attempts to establish a Bar Association soon petered out of existence, for example in South Australia. However, there are numerous records in colonial newspapers of informal meetings of advocates who undoubtedly considered themselves to be members of the 'Bar'.[44] There is also evidence of attorneys appropriating the title of 'barrister' regardless of their lack of formal training as such.[45] While it may be a matter of conjecture amongst historians as to when the colonial Bars were definitively formed, it is, at the very least, safe to say that all of the colonial advocates were an integral part of the events leading to the formation of the colonial Bars. Taken further, it could be argued that the foundation members of the colonial Bars not only included barristers, but also the attorneys (and where relevant, the convict attorneys and laypersons involved in advocacy).

In a similar vein, it is a matter for debate as to when the term 'legal profession' can be used in each colony generically to describe all colonists with legal training, whether as a barrister,

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[43] Note that female barristers were not admitted to practise until the twentieth century. For example, the first woman admitted to the Bar in New South Wales was Ada Evans in 1921. See R. Atherton, 'Early Women Barristers in New South Wales', in G. Lindsay and C. Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None* (2002).

[44] See, for example, Chapter 4 at n 186, which describes a courtroom walkout by the 'Bar'. Van Diemen's Land did not have a Bar Association or Law Society at that time, but there was certainly a collegiate sentiment.

[45] The newspaper article describing the walkout by members of the Van Diemen's Land legal profession refers to the members as being part of the 'Bar', despite the fact that many of the lawyers who walked out of the court were attorneys. This indicates that there was a common public perception that attorneys could appropriately use the title of barrister in the fused profession of Van Diemen's Land.

attorney or solicitor. This question is particularly relevant given the fact that it was common for a recently formed colony to boast only four or five legally trained personnel. It is the author's view that the small number of lawyers present in the colony does not preclude the existence of a 'legal profession', as the lawyers frequently used terms such as 'legal profession' in reference to themselves.[46] Newspapers and social commentators of the time also used the term without hesitation.[47] The numbers of practising lawyers does not seem to have been determinative of when the colonial legal professions came into being. In all likelihood, the legal profession in the respective colonies was assumed to be an extension of the British legal system, whether this was in fact true or not.

It also needs to be pointed out that the definition of who could be an advocate would continually change throughout the nineteenth and twentieth century. The myths and traditions surrounding the English Inns of Court were never forgotten, and, as Bar Associations in each colony were formally instituted, they undertook a gate-keeping role of membership of the Bar that excluded those who did not have the requisite training. The uniquely Australian definition of the advocate would make way for a more traditional definition.

Viewed from the vantage point of the twenty-first century, the nineteenth century colonial British barrister's averred right to supremacy based on superior training and experience in Britain is a much-indulged fiction. Yet it was a useful fiction that ensured the continuation of the British Bar in the colonies in the face of concerted challenges to its founding principles. The continuing monopoly of the Bar in Britain and Australia is perhaps one of the great examples in history of how popular ideas and myths can help to shape the future of institutions and societies.

The Bar is an institution that is continually evolving; it shifts direction and course in response to local circumstances. The story of the Bar certainly does not end in 1856, but charting its beginning places today's events in context. The events of tomorrow, which may seem radical and unforeseen, have roots twining back to the beginning of Australia's history and beyond.

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[46] See, for example, the quotation that prefaces Part 2 of this thesis, where Robert Lathrop Murray writing in 1828 speaks of lawyers arriving from Britain who 'resumed "the Profession" instantly upon their arrival'.

[47] See, for example, Chapter 5, n 127 where newspaper editor Geroge Arden uses the term 'legal profession' in 1841, despite the fact that the profession was still undoubtedly in its infancy.

New Beginnings

Australian legal history had its formal beginnings in convict New South Wales. Part One of this thesis explores the establishment of the New South Wales Bar, and questions who were the 'barristers' of the Bar. The relationships between barristers trained in the English Inns of Court, attorneys, convict attorneys, lay advocates, judicial officers and governors are explored, as are their respective roles in establishing law and order in a new society. Issues specific to the establishment of the Bar are examined and include, among others, legal education, the competence of judicial officers, and the implementation of trial by jury.

Part Two continues these themes as each chapter takes an individual look at the establishment of the Bars in four other Australian colonies: Van Diemen's Land (Tasmania), Port Phillip (Victoria), Western Australia and South Australia. Queensland, which began its existence as Moreton Bay, was not opened to free settlement until 1842 and was still a part of New South Wales' territory until 1859. Moreton Bay will accordingly be considered briefly as a section of Part One.

The differences between the colonies that began life as convict settlements and free settlements are highlighted, as are the implications that this had for the respective legal professions. The colonies with fused legal professions are also contrasted with the colonies with divided professions. The use of the term 'advocate' as opposed to 'barrister' is particularly important in a fused profession where both formally trained barristers and solicitors could and did perform court work.

Parts One and Two also highlight the pivotal role that advocates performed in the maintenance of law and order. Ultimately, despite each colony having such different beginnings, advocates played an essential and irreplaceable role in guiding their new settlement through its infancy. Their skills as advocates proved doubly useful when cast in the new and unfamiliar role of 'colony builders', but, as will be seen, their skills were not always used to the best advantage and the attending chaos that ensued when the exponents of law and order did not themselves respect the rule of law is telling.

This thesis concludes with a comparative examination of the twin themes of the role of advocates in society building and the establishment of the colonial Bars. It provides an

opportunity to examine the nature of the institution of the modern-day Bar, and in particular the role that the fact and myth dynamic plays in the 21st century legal profession.

A story can have many beginnings, but this narrative begins with the dream of an ambitious young lieutenant, who arrived on the shores of Botany Bay one hazy day in 1788...

PART ONE

Colonial New South Wales: 1788 - 1856

As for the division of the Bar, I approve of the principle, but when I look round me (here the speaker leisurely surveyed each individual, and a long pause ensued), I cannot but feel, that it is at least premature, nor can I hear without disgust the hatred you have manifested for the ill-used Attornies, many of whom are *almost* as talented and honest as some of *you, my learned friends*. For my part, I am going to visit my flocks, and perhaps I may not in future often attend the Court, but if, while I am collecting my *fleeces*, you take to *fleecing* the public, then for the good of my country (hear hear) I will return to practice, in which case some of you who look for *wool* will find yourselves *shorn*. However, I have not resolved upon retiring, though certainly I have talked about it these five years. There *is* something after all so *touching* in the receipt of a fee, and, unlike all other things, their repetition is so little tiresome, that I almost think I will bring philosophy to my aid, and for a few years longer bear the cares and labour of a public life. In the meantime, I will give you as a toast '*the deluded Attornies*.'

> From the article, 'Adjourned Meeting of the Bar', published by one designated only as 'A Reporter', in *The Australian*, 18 November 1834. (Emphasis in original article).

CHAPTER ONE

RUNNING THE PENITENTIARY

1788 - 1809

> *The wind was now fair, the sky serene though a little hazy, and the temperature of the air delightfully pleasant. Joy sparkled in every countenance, and congratulations issued from every mouth. Ithaca itself was scarcely more longed for by Ulysses than Botany Bay by the adventurers who had traversed so many thousand miles to take possession of it... To us it was 'a great, an important day,' though I hope the foundation, not the fall, of an empire will be dated from it...*
>
> Watkin Tench, *A Narrative of the Expedition*[1]

The Building Blocks of a Society

Australia's early history made no room for advocates. Second Lieutenant Watkin Tench's dream of empire stood in stark contrast to the reality of the situation, which was that Tench volunteered to come to New South Wales to help establish and administer a penal settlement. Botany Bay was a gaol – a convenient and pragmatic alternative for a Britain faced with overcrowded prisons.

Arriving in Botany Bay, the First Fleet's concerns were not of empire, but survival. The new colonists, an eclectic mix of convicted felons and their military overseers, fought for life and order in an unforgiving land that more often offered disorder and hardship. The colonists were provided with a rudimentary political and legal system designed to administer military justice in a gaol, a far cry from England's hallowed political and legal institutions.

No provision was made for free settlers trained as lawyers. None were sent out on the First Fleet, and none were ordered to come in later fleets. Lawyers were not seen as necessary in a settlement where the majority of its members had, in the commission of their crime, forfeited many of their legal rights.

Yet there was something prophetic in Watkin Tench's incurably romantic visions of empire. Others were soon to share his aspirations that stretched beyond the crude society of hastily

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[1] Watkin Tench, *A Narrative of the Expedition to Botany Bay* (1789) 45. Republished as Tim Flannery (ed), *1788: A Narrative of the Expedition to Botany Bay and a Complete Account of the Settlement at Port Jackson* (1996).

assembled convict settlers. This was to be the story of one of the world's most unusual and unplanned legal transformations: the story of how a settlement of lawless transportees laid the foundations of a legal profession and society devoted to the rule of law.

Less than thirty years after its founding, the dynamics of the colony had radically altered. The prison was emerging as a society of emancipists and free settlers. Emancipist attorneys stepped forward to adapt the law and to advocate its application in a rapidly changing society. They offered their advocacy services to convicts, free men and governors alike and had a significant hand in the growth of the fledgling colony. For a while, at least, it seemed that the freed inmates had come to run the penitentiary.

But the questions of for how long and how successfully the advocates could continue to practise would define the terms of a battle that would shape the early history of New South Wales. While no place had been made for them, colonial advocates came to demand their role in society - for they were needed as surely as farmers, doctors, soldiers and clergymen.

The Convict Problem

Approximately 729 convicts were assembled on the First Fleet, together with 19 officers, 24 non-commissioned officers, 8 drummers, 160 privates, 30 wives and 12 children.[2] Their voyage to Australia was the decision of English Prime Minister William Pitt's government, which had long sought a permanent solution to the convict problem.

By the 1770s, the question of what was to be done with Britain's convicted felons had become increasingly problematic.[3] When the American colonies, in the grip of their war of independence, refused to allow British convicts on American soil, the British government was forced to address the problems of the overcrowding of gaols and hulks, which had led to the spread of disease and unrest amongst the convicts. Africa was initially mooted as a site for transportation but was eventually declared unsuitable.[4]

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[2] Note that the number of convicts assembled on the First Fleet is uncertain, but Clark suggests that there were 729 convicts. For a discussion of this issue see Manning Clark, *A History of Australia, Volume 1: From the Earliest Times to the Age of Macquarie* (1962) 76. See also statistics in the *Historical Records of New South Wales (HRNSW)* vol. 1 pt. 2, 79. Robert Hughes in *The Fatal Shore* (1987) 72 suggests that there were 736 convicts aboard the First Fleet.

[3] For a discussion of the events in Britain that led to the decision to transport convicts to Australia, see Hughes, ibid chapters 1-3.

[4] The Beauchamp Committee convened in 1785 for the purpose of deciding where to send the convicts. See Hughes, ibid 63-4.

In 1786, the Pitt government under the guidance of Lord Sydney, the Secretary of the Home Office, formulated its plan for the settlement of Botany Bay in a bid to forestall 'the evils likely to result from the late alarming and numerous increase of felons in this country.'[5] When the plan was ultimately accepted, economic motives were also lauded, but there was little doubt that the new colony of New South Wales was to be first and foremost a penal settlement.[6]

Captain Arthur Phillip, a retired naval officer, was commissioned as the Governor of New South Wales.[7] Prior to embarking on his voyage to Australia, Phillip considered the nature of the settlement that he was to administer, and declared that he 'would not wish convicts to lay the foundations of an empire'.[8] To Phillip, the dubious morals of the convicts and their violent nature made the establishment of an efficient framework of military justice a matter of paramount importance.

The laws of the colony were to be the laws of England, subject to necessary adaptation owing to the unique conditions of the settlement.[9] The British Government established the First Charter of Justice in 1787, which provided for a court of criminal judicature and a court of civil judicature.[10] Reflecting the military structure of the settlement, David Collins, a former marines captain, was appointed as the Judge Advocate even though he was not trained as a lawyer. To this soldier fell the task of the maintenance of law and order in the fledgling colony, and the first judicial office held in New South Wales.

Collins' diary reveals that his main preoccupation was with the criminal justice system. Collins expressed his appreciation for those who drafted the First Charter of Justice as it showed that 'great care had been taken...to furnish us with a stable foundation whereon to

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[5] Lord Sydney to the Lords Commissioners of the Treasury, 18 August 1786, *HRNSW* vol. 1, pt. 2, 17.

[6] See 'Heads of a Plan' from Lord Sydney to the Lords Commissioners of the Treasury, 18 August 1786, *HRNSW* vol. 1, pt. 2, 19 where economic motives such as cultivation of flax and timber are mentioned, albeit secondary to the need to solve the problem of Britain's overcrowded gaols.

[7] 'Governor Phillip's First Commission', *Historical Records of Australia (HRA)* Series 1, vol. i, 1. 'Governor Phillip's Second Commission', *HRA* Series 1, vol. i, 2. For a biography of Governor Phillip, see Margaret Steven, *Great Australians: Arthur Phillip* (1962).

[8] 'Phillip's Views on the Conduct of the Expedition and the Treatment of Convicts', *HRNSW* vol. 1, pt. 2, 50-53.

[9] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765 - 1769 with an Introduction by Stanley N. Katz* (1979) 104-5. See also Introduction, and A.C. Castles, *An Australian Legal History* (1982) 10-11, for a discussion on Blackstone, and the laws of settlement and conquest.

[10] The Letters Patent, commonly called the First Charter of Justice, is reprinted in *HRA* Series IV, vol. i, 6.

erect our little colony, a foundation which was established in the punishment of vice, the security of property, and the preservation of peace and good order in our community'.[11]

He was in no doubt as to the need to dispense quick, summary justice. Collins thought an example needed to be set to demonstrate that the law was not to be trifled with, although he lamented that there were 'some minds so habitually vicious that no consideration was of any weight with them, nor could they be induced to do right by any prospect of future benefit, or fear of certain and immediate punishment.'[12]

Collins reported that the court of criminal judicature was to be convened 'as occasion may require', and was to consist of the Judge Advocate and six officers of the 'sea and land service' chosen by the Governor.[13] On 11 February 1788 the court was convened for the first time, and three prisoners were tried.

The first prisoner was Samuel Barsley, who was found guilty of assault and sentenced to receive 150 lashes. Thomas Hill, accused of stealing bread from another convict, was sentenced to a week's confinement on a small rocky island called Pinchgut near the entrance of Sydney Cove with only bread and water for sustenance. William Cole was sentenced to fifty lashes for stealing a plank valued at ten pence, but Governor Phillip recommended that the convict be forgiven his punishment.[14]

Those first cases were the beginnings of Australian criminal law. The early criminal court was a forum for swift and brutal military justice. There were no advocates sent from England to represent the defendants. Convicts and free men alike were at the mercy of the inquisitorial Judge Advocate and his military officers, whose duty it was to administer justice in a fair and impartial manner.[15]

Collins was loath to describe his court as being a military court in all respects, but he commented on the multi-faceted role of judge and jury that he had to play in the criminal justice system, and its partial resemblance to the military courts. As Collins said:

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[11] David Collins, *An Account of the English Colony in New South Wales* vol.1 (first published 1798, this ed 1975) 10-11.

[12] Ibid 8.

[13] Ibid.

[14] Ibid 7.

[15] See below for examples of cases involving free settlers, such as John Macarthur.

> The criminal court is assembled, not at stated times, but whenever occasion may require. It is composed of military officers (the judge-advocate excepted, whose situation is of a civil nature) who assemble as such in their military habits, with the insignia of duty, the sash and the sword. Their judgments are to be determined by the majority; and the examination of the witnesses is carried on by members of the court, as well as by the judge-advocate. But in other respects it differs from the military courts. The judge-advocate is the judge or president of the court; he frames and exhibits the charge against the prisoner, has a vote in the court, and is sworn, like the members of it, well and truly to try and to make true deliverance between the king and the prisoner, and to give a verdict according to the evidence.[16]

While, as might have been expected, the main focus in the early legal life of New South Wales was on the court of criminal judicature and its efforts to maintain order in the colony, the court of civil judicature (also established by the First Charter of Justice) acted as a surprising counter-balance in shaping life in early New South Wales.[17]

The court of civil judicature consisted of the Judge Advocate and two inhabitants of the settlement chosen by the Governor. Given the colony's penal nature, Collins felt that there would be little occasion to convene the civil court in the early years.[18] Collins was proved wrong in this regard and in July 1788 he presided over the colony's first civil claim in the case of *Kable v Sinclair.*[19] This case was to affect radically the evolution of the colony and the nature of the New South Wales legal profession. It emerged from the most commonplace and enduring of annoyances to any traveller: lost baggage.

The Kables were convicts who brought proceedings against Captain Sinclair of the vessel *Alexander* for loss of their baggage during their voyage from England. They had both been condemned to death for the commission of their respective crimes, but had their sentences commuted to transportation to New South Wales. Under English law, the Kables were under the legal prescription of 'felony attaint', which meant that while they were under sentence of transportation, they should not have been able to own property, nor have standing to prosecute a cause of action in court. Collins (without legal training) handed down a remarkable decision, for he awarded the Kables 15 in damages and, in doing so, ignored the English law of 'felony attaint'.[20]

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[16] Collins, above n 11, 9.

[17] For a detailed discussion on the development of civil law in New South Wales, see Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (1996).

[18] Collins, above n 11, 10.

[19] *Kable v Sinclair*, July 1788, 2/8147 held in New South Wales Archives Office. It is also reported online at Kercher's Reports, <http://www.law.mq.edu.au/scnsw/html/Cable%20v%20Sinclair,%201788.htm>.

[20] Note that in New South Wales, the English law of 'felony attaint' applied to convicts sentenced to death for

Whether Collins' decision was the product of accident, inexperience or design, the ramifications of the ruling were enormous for the economic development of the fledgling colony. As a result of the Kables' lost bags and trunks, convicts and emancipists in varying degrees now had a stake in the colony's future because they were allowed to work for money, own property, and sue in the courts.[21] The decision also paved the way for emancipist attorneys to represent others in the courts, another significant departure from the laws of England.[22]

The ability of convicted felons to acquire wealth was extremely important in light of the fact that, since 1790, Governor Phillip had been granted the power to remit sentences, creating a class of emancipated convicts. As the numbers of emancipists with property and other commercial interests continued to grow, they vied for a place in the emerging middle class of society in New South Wales.

Emancipists and free settlers alike proved to be a litigious group who increasingly used the court of civil judicature to test their legal rights, and to flex their political muscles.[23] This gave birth to an immediate and unfilled demand for legal representation. None of the free settlers had qualifications or experience as lawyers, let alone as courtroom advocates. But there were those with legal experience among the ranks of the convicts and the growing class of emancipists. After the *Kable* decision, emancipist attorneys would enter the fray to meet the demand for legal representation in the colony, much to the horror of some of the free settlers.

By the end of Phillip's term as Governor in 1792, the convicts had played a key role in making the colony economically viable. Initially the convicts and settlers had struggled to cultivate the land, as dwindling supplies threatened the viability of the settlement. The arrival

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their crime, but who then had their sentence commuted to transportation. Despite the commutation of their sentence, the 'attaint' continued until the expiry of the sentence, or upon receipt of a pardon. For further information on the *Kable* case, see Kercher, *Debt, Seduction and Other Disasters,* above n 17, xviii-xix and Chapter 3. See also Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) Ch. 2, and David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991).

[21] See Kercher, ibid Chapter 3. Kercher notes that the rules of felony attaint continued to be applied inconsistently in New South Wales. For further developments on the application of the law, see Chapter 2 of this thesis, 'The Law of Felony Attaint'.

[22] Ibid.

[23] See Kercher, *Debt, Seduction and Other Disasters* above n 17, for an extensive list of cases in the civil court.

of the second and third fleets of convicts ensured that there were even more mouths to feed, and many of the convicts were infirm and unable to work.[24]

By 12 October 1792, Phillip was able to deliver the positive report that there were 3108 people in the settlements of Sydney, Parramatta and Toongabbie, of whom 2362 were convicts.[25] Convict labour had been used to establish government farms at Sydney Cove, Parramatta and Toongabbie. Whalers and sealers used Sydney Cove as a base, and the colony had begun trading with England, Ireland, Calcutta, Batavia, various Chinese ports and the United States of America.[26]

Despite New South Wales' suddenly promising position, and the role that the convicts had already played, Phillip firmly believed that the only way the colony would move forward was to encourage free settlers to migrate to Australia.[27] The emancipists, in Phillip's eyes, were morally tainted, if not legally tainted, and had no enduring role to play in the 'empire'. Phillip was not alone in his views.

The First Legal Practitioners in New South Wales

In the 1790s, despite the free settlers' claims to social superiority, the steadily increasing population of emancipists refused to sit quietly. Perhaps this is surprising when considering the class stratification that prevailed in mother England. But New South Wales was not Britain. Most emancipists could not afford the fare to return to England, and many chose to stay in New South Wales as they saw better prospects there.[28]

By the time John Hunter was appointed as Governor in September 1795,[29] the colony was showing subtle signs of moving beyond its penal origins.[30] Collins (in a reflective and

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[24] For further discussion about this period see, for example, Clark, above n 2, and Hughes, above n 2, 105.

[25] Phillip to Dundas, 12 October 1792, *HRA* Series 1, vol. i, 398.

[26] See Clark, above n 2, 130.

[27] Phillip to Dundas, 19 March 1792, *HRA* Series 1, vol. i, 338; Phillip to Grenville, 5 November 1791, *HRA* Series 1, vol. i, 267, 272; and Hunter to Portland, 1 May 1799, *HRA* Series 1, vol. ii, 351, 352. Note that by 1800, only 20 free settlers had migrated to New South Wales. The population consisted of convicts or people assigned on official military/civil duties. See Hughes, above n 2, 106.

[28] Governor Hunter made the observation that convicts whose sentences had expired had 'no means or opportunity of getting out of the country': Hunter to Portland, 1 May 1799, *HRA* Series 1, vol. ii, 351, 352.

[29] For a biography of Governor Hunter, see Arthur Hoyle, *The Life of John Hunter: Navigator, Governor, Admiral* (2001).

[30] One of the main reasons for the development of the colony was the substantial land grants handed out to settlers by Governor Grose, thus creating a group of free settlers with vested property interests: Grose to Dundas, 16 February 1793, *HRA* Series 1, vol. i, 416; Surveyor Alt to Grose, 26 April 1794, *HRA* Series 1,

puritanical moment) even felt inspired to comment that 'it was pleasing to see so many people withdrawing from the society of vice and wretchedness, and forming such a character for themselves as to be thought deserving of emancipation'.[31]

One group of emancipists who carved out a life in Sydney were the attorneys. Several governors were later to despair at the unscrupulous morals of some of the emancipist attorneys, but for many years both free settlers and government officials alike had no choice but to take advantage of their services. As Collins had predicted, the increasing numbers of people owning property created more work for the court of civil judicature,[32] yet the British government had still seen no need to send out trained lawyers to New South Wales. By necessity, the colony adapted and emancipist lawyers filled the void left in the absence of free-settler lawyers. The New South Wales legal profession was born of necessity and opportunism.

Lawrence Davoren was the first known convict attorney in New South Wales. He was convicted in Dublin in February 1791, and transported to New South Wales in 1793. He did some attorney's work in New South Wales, which included preparing a statement for use in the 1796 trial of Ensign Moore who was charged with conspiracy. However, recidivism was a problem for Davoren, and in 1797 he was found guilty of issuing a forged promissory note for 50 and was transported to Coal River (Newcastle).[33]

James John Grant was at one time the Deputy-Sheriff's Clerk of the Shire of Inverness, Scotland. Grant was transported to New South Wales in 1794.[34] Both Davoren and, to a lesser extent, Grant, began to offer legal assistance to the colonists on a sporadic basis. While the legal profession was still in a very embryonic form, a precedent had been established for future transportees to practise law in the colony.[35]

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vol. i, 470. Alt made the observation that 4665 acres of land had been cleared, and of that land, 2962 acres had been cultivated under Grose's command.

[31] Collins, above n 11, 327.

[32] Ibid 10.

[33] K.G. Allars, who has done extensive research into the activities of the convict attorneys, reports that Davoren's original crime for which he was transported to New South Wales is 'unknown'. Once in New South Wales, Davoren committed numerous offences for which he was tried and punished. For further information on Davoren, see K.G. Allars, *The Development of the Legal Profession in New South Wales until 1850* (LLM thesis, University of Sydney, 1968) 51-54.

[34] For further information on Grant, see Allars, ibid 54-61. Once again, Allars reports that details of Grant's original offence are unknown.

[35] Allars commented that 'the development of the legal profession in New South Wales prior to 1798 has thus been established as a purely embryonic commencement with little achieved beyond spasmodic advice by Davoren and Grant to individuals and possibly the Judge Advocate and the valiant attempts of the unqualified

While Davoren and Grant were establishing legal practices, tension was mounting in the colony over the military justice system that no longer fulfilled their needs. Governor Hunter clearly expressed his views to the Colonial Office when he said 'I look forward with hope that the time may not be far distant when our Courts will be settled more immediately upon the plan of those in our mother country'.[36]

Collins, who left the colony in 1796, penned his reflections on the future of New South Wales, and clearly felt that the colony still had a way to go in ridding itself of the convict taint (despite his earlier assertion that the character of many convicts was proving to be worthy of emancipation).[37] Collins anticipated that if sufficient numbers of respectable men experienced in the business of agriculture arrived, 'the administration of justice might assume a less military appearance'.[38] Collins also looked forward to the introduction of trial by jury, which was 'ever dear and most congenial to Englishmen'.[39]

Whatever Collins' sentiments, to the British Government trial by jury was still a long way off for the penal settlement. The English Parliament continued to question the moral capacity of a society that was still predominantly convict based. There simply were not enough 'respectable' people that a jury pool could be drawn from. The 'military' justice system remained for the indefinite future.[40]

It would require the advent of a ferociously determined and prolific litigant to expose the inadequacies of the military courts in serving the gaol that was fast becoming a settled society. Such a litigant was John Macarthur.[41]

Collins to ensure that justice shall appear to be done. These activities were, however, performed against a background of increasing commerical activity and demand for legal assistance.' See Allars, ibid 61.

[36] Hunter to Portland, 26 August 1796, *HRA* Series 1, vol. i, 603.

[37] Collins, above n 11, 416.

[38] Ibid.

[39] Ibid.

[40] Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (2003). See especially pages 39, 47-50, 94, and 98-107.

[41] For biographies on John Macarthur, each offering a different perspective of his life, see Michael Duffy, *Man of Honour: John Macarthur - Duellist, Rebel, Founding Father* (2003); and M.H. Ellis, *John Macarthur* (2nd ed 1967).

Richard Atkins, John Macarthur, and the Turnip Episode

In 1789, Macarthur volunteered as a lieutenant in the New South Wales Corps. He is perhaps best known as one of the pioneers of Australia's merino wool industry. However, his family records indicate that prior to volunteering to come to New South Wales, he had toyed with the idea of going to the Bar.[42] While Macarthur had no formal legal training, he occupies a unique position in Australia's history as being one of the first colonists to use the legal system in an uncompromising defence of his rights to life, liberty, and property, both as plaintiff and defendant.

Macarthur recognised that in the absence of established political institutions such as a legislative council, the law courts would prove to be the ideal arena in which to influence and manipulate the politics of the colony.[43] His unerring eye for the flaws in the colony's legal system and his exploitation of its weaknesses proved to be a major thorn in the side for successive Governors.

Macarthur's first major foray into the legal system started in a turnip patch, and stemmed from his animosity toward the colony's acting Judge Advocate, Richard Atkins. When Collins announced his desire to return to England in 1796, Atkins was commissioned to temporarily fill the position of Judge Advocate.[44] Atkins, like Collins, was not trained as a lawyer. He had arrived in the colony in 1792, bringing with him an impressive English pedigree with connections to royalty.[45]

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[42] See Ellis, ibid 6-7. See also S. Onslow (ed), *Some Early Records of the Macarthurs of Camden* (1973) 1.

[43] H.V. Evatt in his book *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (1971) put forward the thesis that 'the Courts were the true forum of the little colony. They had no competitors as a means of expressing individual or public grievances. There was no legislature, no municipal government, no avowed political association or party, no theatre and no independent press...Bitter skirmishes between the opposing interests almost necessarily assumed the form of legal contests' (preface). It is interesting to note J.M. Bennett's opinion that Evatt's conception of the 'political role of the courts' prior to 1824 should be challenged, as the early courts were not designed to deal with matters of public law. (J.M. Bennett, *Lives of the Australian Chief Justices: Sir Francis Forbes* (2001) 68). In particular, Bennett points out that the courts lacked the necessary machinery, such as prerogative writs and the power to grant injunctions, which would have truly enabled them to assert their will in a 'political' sense. However, while bearing this in mind, I prefer to adopt a broader definition of what constitutes a political challenge. Citizens such as John Macarthur had definite ideas on the future direction of the colony, which did not always accord with the actions of the governor of the time. One of the most common ways to subvert the political will of the governor was to challenge laws and customs through the court system. Ultimately, the colony's court system played a large role in the disposal of Bligh as governor, as the colonists attempted to 'legitimately' effect a coup and install a new political order.

[44] Dundas to Grose, 31 June 1793, *HRA* Series 1, vol. i, 442. Note that Collins did not leave the colony until the end of 1796.

[45] Atkins is often described disparagingly as a 'remittance man', the younger son who had a problem with the bottle and who left his troubles behind in England in search of a brighter future in Sydney town. His

Atkins was regarded by many of his contemporaries to be incompetent in his role, but his impressive family connections ensured that his failings raised little more than a lament from successive governors of the colony, however frustrated they became.[46] However, lineage alone could not spare Atkins from the wrath of Macarthur.

When Macarthur resigned as Inspector of Public Works in the Parramatta district, Governor Hunter instructed Atkins to take over the position.[47] Macarthur nevertheless kept an eye on the affairs of the district and in particular the New South Wales Corps, and when Atkins informed him that he had caught a soldier stealing some turnips from the Governor's garden,[48] Macarthur requested the name of the soldier.[49] An angry exchange of letters followed.

To Macarthur's fury, Atkins refused to reveal the culprit's name.[50] Macarthur openly attacked Atkins' character, calling him, among other things, a drunk who had exposed himself in the public streets in a disgraceful state of intoxication.[51] Eventually, at Hunter's behest, Atkins revealed the name. Macarthur offered to state charges against Atkins based on fraud,[52] but when Collins investigated the charges he found in Atkins' favour.[53]

Atkins wrote a long and acrimonious letter to Macarthur, claiming that he was an 'incendiary', and promoter of feuds in the colony.[54] Macarthur (shortly prior to Atkins' confirmation as permanent Judge Advocate) wrote to Collins specifying charges against

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incompetence was largely overlooked by virtue of his connections back in England. Atkins' *Diary* for 1792, 1793 and 1794 is published online at <http://www.law.mq.edu.au/scnsw/html/atkins_intro.htm> and the original is kept in the National Library of Australia, MS 4039. See also Clark, above n 2, 144.

[46] Governor Hunter and John Macarthur in particular became frustrated by Atkins' actions. However, for a defence of Atkins' competency, see Kercher, *Debt, Seduction and other Disasters* above n 17, 28-35. On page 34, Kercher states that Atkins was 'no more or less neutral in his operation of the law than were the other judge advocates'.

[47] For further information see Evatt, above n 43, chapter V. See also Hunter to Portland, 12 November 1796, *HRA* Series 1, vol. i, 689.

[48] Atkins to Macarthur, 17 July 1796, *HRA* Series 1, vol. ii, 102.

[49] Note that Atkins took offence at Macarthur's letter, as it did not address him as 'Esquire'. Atkins to Macarthur, 18 July 1796, *HRA* Series 1, vol. ii, 102 (Enclosure No.3 to sub-enclosure No. 10); Macarthur to Hunter, 18 July 1796, *HRA* Series 1, vol. ii, 101.

[50] Ibid (Enclosure No. 3 to sub-enclosure No. 10).

[51] Macarthur to Hunter, 25 July 1796, *HRA* Series 1, vol. ii, 104 (Enclosure No. 1); see also Hunter to Macarthur, 23 July 1796, *HRA* Series 1, vol. ii, 103 (Enclosure No. 5 to sub-enclosure No. 10).

[52] Macarthur to Hunter, 18 July 1796, HRA Series 1, vol. ii, 101. See also letter from Macarthur to Hunter, 25 July 1796, *HRA* Series 1, vol. ii, 103-4.

[53] Collins to Macarthur, 23 August 1796, *HRA* Series 1, vol ii, 106.

[54] Atkins to Macarthur, August 1796, *HRNSW,* vol. 3, 125.

Atkins in his 'public and official capacity'.[55] Macarthur also wrote to the Duke of Portland listing the adverse effects on the colony of Hunter's inadequate administration.[56]

Hunter retaliated by stating that Macarthur was deliberately creating difficulties and discussed the ramifications of the Colony's acting Judge Advocate being the subject of criminal proceedings:

> The design of this prosecution of the intended Judge-Advocate is too apparent not to be immediat'ly seen thro'. Your Grace will discover that no Court, civil or criminal, can be held without such an officer at its head. This attempt is therefore in my opinion intended to deprive the service of the assistance of the man, who it is well, and has been long, known was nam'd by his Majesty's authority to do that duty during the absence of the Judge-Advocate, and thereby to embarrass the civil power.[57]

It is questionable whether the situation was as dire as Hunter suggested, for Collins did not leave the colony until 14 days after Macarthur lodged his indictment. Collins would have theoretically been available to preside over the court case. In any event, the Secretary of State in response directed that Atkins was to perform the duties of Judge Advocate until further direction, and the matter went no further.[58]

The colony was left in the invidious position of being saddled with a Judge Advocate who did not have the confidence of his fellow citizens, and a Governor who was at loggerheads with a leading citizen. The legal system was too easily bypassed as it was not sufficiently developed to resolve or mediate the dispute, and there were no legally trained free settlers to represent the colonists in court.

John Macarthur had developed a taste for the courts and with the turnip episode closed, his roving eye soon fell on the emancipist attorneys whose activities needed, in his opinion, to be immediately curtailed for the sake of the future of the colony.

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[55] Macarthur to Collins, 13 August 1796, *HRA* Series 1, vol. ii, 105-6.

[56] Macarthur to Portland, 15 September 1796, *HRA* Series 1, vol. ii, 89-93.

[57] Hunter to Portland, 12 November 1796, *HRA* Series 1, vol. ii, 672.

[58] 'Government and General Orders', *HRA* Series 1, vol. ii, 68; and Dundas to Grose, 31 June 1793, *HRA* Series 1, vol. i, 442.

Atkins was replaced at the first opportunity. In May 1798 Richard Dore, who had the distinction of being the first legally trained Australian Judge Advocate, arrived in the colony.[59]

Dore was old and in poor health, and arrived at the time when the rum traffickers plied a usurious trade in liquor to colonists who could ill afford the inflated prices. Dore continually frustrated Hunter who felt that the new Judge Advocate gave the aid of the law to the unscrupulous dealers. Hunter also disapproved of changes that Dore introduced to the Civil Court procedure, such as requiring suitors to pay court fees.[60] Hunter described Dore as 'weak and irresolute',[61] and openly questioned many of his decisions.[62]

The British Government had still not seen fit to send out any trained lawyers, and the convict attorney Davoren had by this stage been transported to Coal River. With Dore's competency in question[63] and his health failing, the new Judge Advocate employed the convict attorney Michael Massey Robinson as his clerk.

Robinson arrived in New South Wales after being convicted of sending a letter demanding a bank note from a citizen of London, in which he threatened to publish 'twenty stanzas of not inelegant poetry, alluding in very powerful and pointed expressions to the imputed circumstances' of the death of a Mr Dolly.[64]

Robinson was transported in lieu of being executed, and on the voyage to New South Wales in 1798 he befriended Dore.[65] Two weeks after their arrival in Sydney, Dore successfully

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[59] For a brief biography of Dore, see Kercher, *Debt, Seduction and Other Disasters,* above n 17, 35.

[60] Hunter to Portland, 21 February 1799, *HRA* Series 1, vol. ii, 243, 246.

[61] Ibid 248.

[62] See, for example, the case of Nichols in J.M. Bennett (ed), *A History of the New South Wales Bar* (1969) 6-9. One particular decision that raised Hunter's ire was in the case of Isaac Nichols who was on a charge of receiving stolen goods. Nichols was convicted to fourteen years transportation to Norfolk Island, despite the evidence being largely based on hearsay, and strongly prejudicial. Hunter used his power as Governor to suspend the sentence, and referred the case to English authorities who ultimately pardoned Nichols. For details of the trial and correspondence, see *HRA* Series 1, vol. ii, 279 onwards.

[63] Note that Hunter as early as 1799 requested that a trained lawyer be sent to the colony. However, he did not want a lawyer who gave truly independent opinions, but one who supported his views. Hunter was frequently critical of Dore for not supporting his position. See Hunter to Portland, 21 February 1799, *HRA* Series 1, vol. ii, 280.

[64] *R v Michael Robinson* (1796) 2 Leach 749.

[65] For further information on Robinson, see Hunter to King, 20 April 1800, *HRA* Series 1, vol. ii, 490-91. See

petitioned Hunter to grant Robinson a conditional pardon so that he might employ Robinson as his clerk. Robinson had reputedly trained as an attorney in either England or Ireland, and Dore felt that (despite Robinson's threatening letter) 'his character in this colony stands unimpeachable for integrity'.[66]

Robinson also had a private practice, and he would have competed for work with another leading convict attorney, George Crossley. Crossley had practised as an attorney in London for twenty-four years before being called to answer allegations of professional malpractice. The basis of the charge was the discovery of a blank affidavit form bearing a forged signature. Crossley was convicted of a perjury contained in his own affidavit when he attempted to answer the allegation. He was sentenced to imprisonment for six months during which he was required to stand in the pillory for one hour in the middle of each day in full view of the Westminster Courts, and then transported to New South Wales for seven years.[67]

Crossley arrived in 1799, having bought goods en route in order to stock a shop on his arrival. He was soon sued by D'Arcy Wentworth on behalf of creditors for the bills he had drawn to stock the shop.[68] Michael Massey Robinson played a part in advising Wentworth in his action against Crossley. In 1801, Crossley was granted a conditional pardon. Later, in 1803, Crossley was granted a free pardon and commenced his own legal practice.[69]

Crossley and Robinson practised in colonial New South Wales for decades. Other convict attorneys soon followed in their footsteps, and the colony now had a small but thriving legal profession.[70] They provided advocacy services for the citizens of the colony from whose convicted ranks they also were drawn, and Crossley in particular assisted Governor Hunter, and later Governors King and Bligh in administering the legal affairs of the colony. He advertised his services in the *Sydney Gazette* and consequently acted as an agent for litigants in the civil court, and he held powers of attorney for clients of wealth and influence in the

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also Allars, above n 33, Chapter 4.

[66] Dore to Hunter, 20 April 1800, *HRA* Series 1, vol. ii, 492-493, and 'Conditional Emancipation of Michael Robinson', Enclosure No. 1, 20 April 1800, *HRA* Series 1, vol. ii, 491.

[67] For more information on Crossley see K. Allars, 'George Crossley – An Unusual Attorney' (1958) 44 *Journal of the Royal Australasian Historical Society* 261.

[68] For further particulars of Wentworth's action, see 'Papers Relating to George Crossley's Appeal', *HRA* Series 1, vol. iv, 582-595, and King to Hobart, 7 August 1803, *HRA* Series 1, vol. iv, 350, 352.

[69] Ibid.

[70] Allars comments that Crossley was in active competition with Robinson, and that 'it is clear at this time there was a well developed de facto group of convict attorneys taking advantage of their knowledge of the law in the developing commercial life of the Colony.' Allars, above n 33, 71. Other convict attorneys included George Chartres, Edward Eagar and William Fleming. For brief biographies, see Allars, above n 33, 82-84.

colony.[71] Crossley also had the confidence of leading private citizens such as John Palmer, the Principal Commissary, Richard Campbell, a Magistrate, and Provost Marshall Gore.[72]

It was quite a remarkable achievement, considering that within a mere twenty years of the foundation of New South Wales, it could be said to have a legal profession and at least the foundations of a Bar. The new Australian profession of advocates was not a facsimile of the English profession. The Australian system of justice was rudimentary, and the advocates were compelled by forces of pragmatism and necessity to adapt the laws of New South Wales to meet the unique requirements of the colony. While England was the template, its antiquarian procedures, forms of action, and divisions of practice between barrister and solicitor were not strictly followed if poorly suited to the needs of the colony.[73] The standing and importance of the new and, in many ways, representative profession permeated all levels of society, as emancipists and free men alike were able to take advantage of legal services on offer.

However, it was an irony that the lawless convicts were running the legal shop. The call for 'legitimate' lawyers to be sent out to the colony was continued with the vigour of a religious crusade.

Agitating for Change

The new century ushered in some significant changes in the personalities administering the business of the colony. On 15 April 1800 Governor Hunter was ordered back to England. He was generally regarded as a weak and ineffectual leader, and the Colonial Office was aghast at the expenses that Hunter had amassed during his period of administration.[74] His replacement was Governor Philip Gidley King.[75] On 13 December 1800, Dore died, and

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[71] See Crossley's petition and affidavit in support of admission, 4 May 1815, *HRA* Series 1, vol. viii, 500, and 20 May 1815, *HRA* Series 1, vol. viii, 503.

[72] See, for example, evidence given by Palmer at John Macarthur's trial, 'The Examination of John Palmer Esq', 11 April 1808, *HRA* Series 1, vol. vi, 290, and evidence given by Crossley on 11 April 1808, *HRA* Series 1, vol. vi, 289-291. Crossley attests to the fact that he defended Gore at a trial in 1807.

[73] Note that George Crossley was reluctant to discard English legal procedures. Kercher, in *Debt, Seduction and Other Disasters,* above n 17, 4 states that Crossley, 'despite his manipulative dishonesty, stood for the strict application of English law'. The conclusion reached in the majority of cases, however, was that a practical approach to the law in the Australian bush was required, rather than a strict application of English law. Crossley's views are expressed in many of his cases, but see in particular '*Stogdell's case*', described in Kercher, ibid 3.

[74] Portland to Hunter, 5 November 1799, *HRA* Series 1, vol. ii, 387-92. One of the major reasons for Hunter's downfall was the burgeoning rum trade.

[75] 'Commander King's Commission', 1 May 1798, *HRA* Series 1, vol. ii, 605. For a biography of Governor

Richard Atkins, in the absence of anyone better qualified, was again the Judge Advocate.[76] Governor King, like his predecessor Hunter, became embroiled in Macarthur's political and legal machinations.

In July 1801, Lieutenant Marshall of the New South Wales Corps was tried before the criminal court for assaulting his superior officers, Macarthur and Abbott.[77] Macarthur had initially challenged Marshall to a duel that did not go ahead as scheduled, and Marshall later assaulted Abbott and Macarthur.

Atkins presided at the trial as Judge Advocate, alongside five military officers and one naval officer. Marshall objected to the presence of the military officers on the grounds of bias.[78] His objections were overruled, and Macarthur acted as prosecutor and gave an impassioned speech on the terror he felt when Marshall attacked him.[79] Marshall was found guilty, fined fifty pounds and sentenced to one year's imprisonment.

Marshall appealed to King claiming the trial was unfair,[80] and King concluded that the military officers hearing the case had not been impartial.[81] Macarthur was insulted by King's decision and organised the officers to exclude the Governor from private society. When Lieutenant Paterson continued to dine with King, Macarthur attempted to ostracise Paterson, resulting in a duel between them in which Paterson was wounded. He lamented the fact that settling the dispute in court was useless as the military jury would more than likely be composed of Macarthur's allies in the Corps.[82]

King eventually used his powers to send Macarthur to England to face a court-martial, and Macarthur temporarily left the colony on 15 November 1801.[83] King's relief at Macarthur's

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King, see Jonathan King and John King, *Philip Gidley King, a Biography of the Third Governor of New South Wales* (1981).

[76] King to Portland, 10 March 1801, *HRA* Series 1, vol. iii, 15.

[77] For a full record see 'The Two Trials of Lieutenant Marshall', *HRA* Series 1, vol. iii, 188.

[78] Ibid 196.

[79] 'Captain Macarthur to the Court', ibid 212-15.

[80] Memorial from Marshall to King, 30 July 1801, *HRA* Series 1, vol. iii, 236-7.

[81] King to Portland, 5 November 1801, *HRA* Series 1, vol. iii, 278-9.

[82] King to Portland, 5 November 1801, *HRA* Series 1, vol. iii, 279-280 and 284.

[83] As a post-script, Macarthur managed to evade the court martial by resigning his commission in the army! King to Portland, 5 November 1801, *HRA* Series 1, vol. iii, 274-276.

temporary absence was palpable. Only months before King had predicted that Macarthur's 'arts and intrigues...will one day or other sett (sic) this colony in a flame.'[84]

In Macarthur's absence, King turned his mind to other matters. The Marshall affair had amply illustrated the need for reform of the constitution of the criminal and civil courts of the colony, and the Governor advocated 'the necessity of a professional being placed here as Judge-Advocate, and the members of the Criminal Court being composed of other than military officers.'[85] Lieutenant Colonel Paterson in turn bemoaned the choice of Atkins as Judge Advocate who 'unworthily' filled his office, and entreated His Royal Highness to use his influence to ensure that the next Judge Advocate 'may be a gentleman of integrity, honor, and ability, and possessing some general legal knowledge'.[86]

In 1802, King also tired of the practices of some of the convict attorneys, reporting that Michael Massey Robinson had been convicted of perjury and sentenced to seven years hard labour on Norfolk Island.[87] However, King later reported in frustration that faced with Atkins' constant solicitations he was left with no choice but to defer Robinson's sentence of transportation to Norfolk Island, in order that he remain the Judge Advocate's clerk.[88]

Prompted by the necessity to interfere with Robinson's sentence, King made a further plea to England for a legally trained Judge Advocate. King lamented that Robinson and Crossley, practising as attorneys, were 'most infamous characters, whose private advice and actions requires the knowledge and abilities of a professional man to counteract their artful chicanery, or to detect and prevent it.'[89]

King's avowed dislike of the emancipist attorneys aside, he occasionally used Crossley's services and he did not seek to put him out of business by at any time requesting that free settlers trained as lawyers be sent to the colony. The problem was that Crossley, in particular, was too effective in doing his job. King simply wished for a competent legally trained judge advocate who was able to see through the supposed deviousness of the emancipist attorneys.[90]

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[84] King to John King, 21 August 1801, *HRA* Series 1, vol. iii, 246.
[85] King to Hobart, 7 August 1803, *HRA* Series 1, vol. iv, 354.
[86] Paterson to Brownrigg, 5 November 1801, *HRA* Series 1, vol. iii, 292-3.
[87] King to Hobart, 9 November 1802, *HRA* Series 1, vol. iii, 633.
[88] King to Hobart, 7 August 1803, *HRA* Series 1, vol. iv, 351-2.
[89] Ibid 351.
[90] Ibid 352-3.

Oppressing the emancipists was similarly not a part of King's design. King aided the emancipist attorneys' cause when the issue arose as to whether men with a conditional pardon could be accepted into the New South Wales Corps. In a letter to Major Johnston, Commander of the Corps, he stated that the colony was formed for the express purpose of receiving prisoners, but that the emancipists were not to be consigned to 'oblivion and disgrace forever.'[91]

With the emancipists slowly enmeshing themselves in the legal, political and commercial life of the colony, a group of free settlers, fearing for their own position, prepared for action. The stage was set for the most dramatic trial in the history of colonial New South Wales. The principal players were, once again, Atkins, Crossley and Macarthur. The catalyst for the unfolding events was to be the notorious William Bligh. The result would be an inquisition into the state of the New South Wales legal system.

Use of the Legal System in a Period of Turmoil

In 1806, William Bligh, who was already well known for the mutiny on his ship *HMS Bounty*, replaced King as Governor of New South Wales.[92] Macarthur, who had avoided a court-martial in England, had returned to the colony with ideas for developing the wool industry. One of his first acts on return was to give an address on behalf of the free settlers welcoming Bligh.[93] Weeks later, Bligh was confronted by separate groups of irate free settlers who repudiated Macarthur's right to be their spokesman, and accused Macarthur of driving up the price of mutton by withholding a flock of wethers until the prices rose.[94] For Bligh, it was to be a sound introduction to the fractious Macarthur.

Bligh and Macarthur were destined to be enemies. On settling into life in the colony, Bligh immediately began educating farmers about new agricultural practices emerging in England. He saw agriculture as the economic backbone of the colony. By vociferously promoting farming, the new Governor antagonised leading settlers, including Macarthur, who had

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[91] King to Johnston, 18 February 1803, *HRA* Series 1, vol. iv, 216.

[92] There are many biographies of Bligh, including: Ross Fitzgerald and Mark Hearn, ***Bligh, Macarthur and the Rum Rebellion*** (1988); John Bach, ***William Bligh*** (1967), and also Evatt, above n 43.

[93] 'Address to Governor Bligh', *HRNSW* vol. 6, 165.

[94] 'Sydney Settlers Address to Governor Bligh', *HRNSW* vol. 6, 188-9.

determined to place their fortunes in the wool trade.[95] Bligh also courted opposition as he continued King's war against the rum traffickers, in whose success Macarthur had long held a stake. At one stage, Bligh ordered the seizure of two copper boilers belonging to two stills that Bligh considered Macarthur to have illegally imported.[96]

Bligh also made efforts to improve the colony's legal system. In particular, he tried to convince British officials that Atkins should be replaced with a more competent Judge Advocate. Bligh denounced Atkins as being 'accustomed to inebriety; he has been the ridicule of the community; sentences of Death have been pronounced in moments of intoxication.'[97] Bligh proposed sending out a lawyer who would be paid a salary. Bligh also considered that the character of the colony had improved so much that 'the superior people ... are particularly desirous that the Military may have nothing to do in the Jurisprudence of the Country, either as Magistrates or Jurors;...the semblance also to Courts Martial is become irksome.'[98]

Soon Bligh was to have good personal reason for doubting the presence of the military within the legal system. The dysfunction of those same military courts would trigger Bligh's desperate fight to retain his office. Again, Macarthur was the protagonist. He was arrested for allowing a convict to escape on his ship the *Parramatta,* and on 17 December 1807, a bench of magistrates, including Atkins, unanimously committed Macarthur for trial.[99]

The trial was set for 25 January 1808, before six military officers and Atkins. Macarthur immediately requested that Atkins be stood down, because the enmity between them would increase the likelihood of bias on Atkins' part.[100] Atkins refused to be disqualified, and the next day the six military officers, who all belonged to Macarthur's New South Wales Corps, petitioned Bligh to appoint an impartial person as Judge Advocate.[101]

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[95] See Clark, above n 2, chapter 11, 'Bligh', and Fitzgerald and Hearn, above n 92, 20-21.

[96] The episode of the stills is another example of Macarthur's use of the legal system in an attempt to discredit Bligh. Evatt gives a detailed description of the event in *Rum Rebellion,* above n 43, chapter XX. For an alternative pro-Macarthur perspective on the event see Ellis, above n 41, from 295 onwards. See also *Macarthur v Campbell Jnr* in *HRNSW,* vol. 6, 24 October 1807, from 332 onwards.

[97] Bligh to Windham, 31 October 1807, *HRA* Series 1, vol. vi, 150.

[98] Ibid 151.

[99] For more information on the surrounding events, see Duffy, above n 41, 272. See also 'Public Notice' 27 June 1807, *HRNSW* vol. 6, 270; and 'The Trial of John Macarthur' 2 February 1808, *HRNSW,* vol. 6, 467 re warrant for arrest.

[100] Johnston to Castlereagh, 11 April 1808, Enclosure No 1, *HRA* Series 1, vol. vi, 225-227.

[101] Members of the Court to Bligh, 25 January 1808, *HRA* Series 1, vol. vi, 221-2.

In his defence, Atkins delivered a memorandum of events, accusing military officers presiding at the criminal court, Kemp, Brabyn, Moore, Laycock, Minchin and Lawson, of committing crimes that amounted to a usurpation of Government, and inciting rebellion and treason.[102]

Bligh requested that the six officers involved appear before him at nine o'clock the next morning,[103] and wrote a letter to Major Johnston, the commander of the New South Wales Corps, apprising him of the situation.[104] When Major Johnston made a belated arrival in Sydney, he assumed the title of Lieutenant Governor and major of the New South Wales Corps and signed an order directing the release of Macarthur, an ex-corpsman, on bail.[105]

After news of Atkins' memorandum spread, the officers of the New South Wales Corps united behind Macarthur against the Judge Advocate and the Governor. Macarthur took his chance to unseat both and, with six other 'respectable citizens', petitioned Johnston to arrest Bligh. Macarthur claimed that 'property, liberty and life' were endangered while Governor Bligh remained in control.[106]

The Governor's resignation was sought, but, when Bligh refused to resign, Johnston arrested him, as well as Atkins and Robert Campbell, the naval officer and collector of taxes.[107] With the coup effected, Johnston was to be the new Governor, the existing magistrates were replaced, and Atkins was stood down as Judge Advocate (once again, only to be reinstated later in the absence of a better replacement).[108]

When the trial of Macarthur resumed, he was unanimously acquitted of all charges. The trial was an indictment on the state of the legal system in the colony. Atkins was examined on the

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[102] Atkins to Bligh, 26 January 1808, *HRNSW* vol. 6, 430-433.

[103] Bligh's Circular Letter to each member of the court, 26 January 1808, *HRNSW*, vol. 6, 433.

[104] Bligh to Johnston, 26 January 1808, *HRNSW* vol. 6, 433.

[105] Johnston to Bligh, 26 January 1808, *HRNSW*, vol. 6, 434; Major Johnston to Keeper of His Majesty's Gaol, 26 January 1808, *HRNSW* vol. 6, 433.

[106] Macarthur to Johnston, *HRNSW* vol. 6, 434.

[107] Johnston to Castlereagh, 11 April 1808, *HRA* Series 1, vol. vi, 208-221.

[108] Three Judge Advocates were appointed before Atkins was reinstated; Edward Abbott, Surveyor General Grimes and Anthony Fenn Kemp. There was great reluctance on their part to perform the role, and Atkins was only too happy to take up the position again. Abbott was appointed on 27 January 1808, Copy of General Orders, *HRA* Series 1, vol. vi, 271, and he resigned on 30 January 1808, ibid 272. For Grimes' appointment and resignation, see Johnston to Castlereagh, 5 April and 11 April 1808, Enclosures 'CC' and 'D', *HRA* Series 1, vol. vi, 272 and 277. For Kemp's appointment, see Foveaux to Castlereagh, 4 September 1808, *HRA* Series 1, vol. vi, 629. Finally there was 'no choice left but to restore Mr Atkins'; see Foveaux to Castlereagh, 20 February 1809, *HRA* Series 1, vol. vii, 2.

events that had led to Bligh's arrest. In a bid to gain favour he revealed, on oath, that George Crossley had prepared the infamous memorandum accusing the military officers of the Criminal Court of treasonable practices. Atkins also testified that Bligh often sought Crossley's opinion. He accused Bligh of trying to influence his opinion in civil causes prior to the court making its decision.[109] George Crossley gave evidence that Atkins had employed him for three or four years to give his private law opinion.[110]

Following the brief rule of de facto Governor Johnston, Lieutenant Colonel Foveaux and Paterson were in turn to take over the role of Governor of the colony. The rebel government was determined to punish Crossley for supporting Bligh. Crossley was tried for acting as an agent or attorney after being convicted for perjury,[111] and was convicted of the charge and transported to Coal River where he remained for two years.[112]

Bligh also remained a prisoner until Lachlan Macquarie arrived in January 1810 to assume his post as Governor of the colony. Macquarie was under instructions to publicly denounce the mutinous conduct that led to the forcible removal of Bligh, and restore all officers who had been removed from their Offices by Johnston.[113] Bligh, who had sought refuge in Van Diemen's Land, returned to Sydney Cove and was no longer under arrest.[114]

Macquarie declared all trials held during the period of usurpation of the Government informal, and revoked land grants made during that period. Crossley was allowed to return from Coal River, and he was awarded 500 in proceedings for trespass and false imprisonment brought against the rebels.[115]

Bligh, Johnston and Macarthur returned to England, where on 7 May 1811 a general court martial began in which Lieutenant Colonel Johnston was arraigned for beginning, inciting,

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[109] Johnston to Castlereagh, 11 April 1808, Enclosure No. 9, *HRA* Series 1, vol. vi, 277-280.

[110] Ibid, Enclosure No. 15, 289-91.

[111] Crossley was tried under 12 Geo. I c. 29, s. 4. Crossley unsuccessfully argued that the law could not apply in the colony, and that having been pardoned he should not have been liable even in England. See Johnston to Castlereagh, 11 April 1808, *HRA* Series 1, vol. vi, 214.

[112] Ibid.

[113] Castlereagh to Macquarie, 14 May 1809, *HRA* Series 1, vol. vii, 80-3.

[114] Ibid.

[115] *George Crossley v George Johnston and John Macarthur*, 5 April 1810, 5/1103-184 held in New South Wales Archives Office. Crossley's damages were later reduced to 300, but he was nevertheless the only person to successfully sue for damages. See Kercher, *Debt, Seduction and Other Disasters,* above n 17, 40.

causing and joining in a mutiny, and was judged guilty of the act of mutiny.[116] He was allowed to return to the colony as a settler in 1812. Macarthur was not to return until February 1817.

The Colony of Second Chances

In the aftermath of the rebellion, the inhabitants of the colony and the British Government drew a collective sigh of relief, reflecting on the state of the colony generally and, in particular, the suitability of its legal system. The colony had travelled far, both commercially and legally, since foundation, and was fast outgrowing its rudimentary courts designed for dispensing military justice in a gaol.

By the second decade of the nineteenth century, Sydney Town had become a thriving settlement[117] and the perfect environment for the opportunistic emancipist attorneys epitomised by Robinson and Crossley. If the British Government did not have the foresight to send out 'legitimate' lawyers, then they would perform the role. The emancipist attorneys developed their services to meet the needs of the growing colony. As a profession, however motley, the emancipist lawyer served judge advocates, governors and private citizens alike.

The features of the new legal profession were unique to New South Wales. There were no rules requiring formal qualifications for practice. There was no monopolistic demarcation between the role of barrister and solicitor. There was no established Bar or Inns of Court. There was no cause for the donning of wigs and gowns. Court procedures were not rigid but flexible and practical. The emancipist attorneys had, in the main, been trained in Britain, but the offices of the Judge Advocate and magistrates were performed by military officers or lay persons.

It was a 'rough justice' system but one which, courtesy of the *Kable* ruling, did not restrict the right of emancipists to enforce their legal rights, represent themselves in court, or hire an emancipist attorney to represent them. New South Wales' courts were not strictly bound by

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[116] Castlereagh to Macquarie, 14 May 1809, *HRA* Series 1, vol. vii, 80-81, and Castlereagh to Bligh, 15 May 1809, *HRA* Series 1, vol. vii, 86-7.

[117] In September 1800, there were an estimated 4,936 Europeans in New South Wales, 41% being convicts and 59% free or emancipated. See Hunter to Portland, 30 September 1800, *HRA* Series 1, vol. ii, 678-80. By contrast, in 1810 there were approximately 10,452 'souls in the settlement', and the numbers of free settlers and emancipated convicts had risen dramatically as only 13.7% of the population were recorded as being convicts. See Macquarie to Castlereagh, 30 April 1810, Enclosure No. 5, *HRA* Series 1, vol. vii, 280.

the protocols of their English counterparts. Moreover, the decisions of those courts demonstrated the capacity and willingness to adapt English laws to suit the unique conditions of the colony.

To Crossley and his like, the New South Wales of 1809 must have appeared a true colony of second chances. The emancipist attorneys were the vanguard of a new profession - one that had never been formally established. The swift evolution of a community of lawyers in New South Wales is a unique tribute to the necessity of giving an advocate's voice to the people, however lowly, if justice is to be administered even in a fledgling community.

The work of these unlikely men, each with a criminal history, ironically began the tradition of a society governed by the rule of law. Furthermore in 1815, it seemed that the laws of New South Wales might be adapted, procedurally and substantively, to serve the needs of the New South Wales community. New South Wales was not Britain, and could be served by a profession devoted to the residents of New South Wales and not merely the law of Britain transplanted.

But change was required. Macarthur's trial and the mutiny against Bligh proved that. A military system of justice so vulnerable to corruption was no longer adequate. Tension was brewing in the colony. Free settlers determined to secure their prosperity and position resented the gains that the emancipist class had made in society. There had long been those with disquiet about the freedoms enjoyed by emancipated convicts. There were residents of the colony who feared for the future of any country founded on a base of moral turpitude. And then there were those for whom the unique nature of New South Wales was itself a repugnancy. Only the introduction of the tried institutions and practices of England offered salvation.

For the free settlers one answer was to re-model the legal institutions of the colony to make it more closely resemble the revered Westminster system. The emancipist attorneys who had evolved into the colony's first advocates were to come under sustained attack from a select group of people who refused to believe that convicted felons could become the founding members of the colonial Bar.

But there was still hope for the emancipist cause. The bid to silence Crossley by sending him to Coal River had failed. Lachlan Macquarie, the new Governor, was sympathetic to the

social aspirations of the emancipists, and recognised the importance of the rights of ex-convicts who still constituted the majority of the population of the colony. Battle lines were being drawn. Once again the field of battle was to be the courts. The question that remained was whether the unique, adaptive brand of law developing under the New South Wales legal system would be washed away in a resurgent tide of conservatism.

CHAPTER TWO

THE GAME OF KINGS

1809 - 1823

> *The encouragement that may hereafter be given to free persons of respectable character to emigrate from Great Britain to New South Wales, will probably have a greater influence than any measure that can be adopted within the colony, in softening the asperity of feeling that now prevails there between the free and convict classes. Whatever repugnance the newly-arrived colonists may feel to an association with the latter, they will not partake of the local prejudice and aversion that exists amongst the older inhabitants. With an increase in the numbers and respectability of the free and unconvicted inhabitants, the benefits of influence and example will be more strongly impressed upon the minds of the convicted classes, and feelings of aversion will give way to those of conciliation and mutual respect.*
>
> J.T. Bigge, *The Judicial Establishments of New South Wales and Van Diemen's Land*[1]

Brewing Conflict

By 1809, the story of European settlement in New South Wales was rich and rife with bootlegging, felonies, forgeries, perjuries, assaults, murders, duels, plots, court-martials, alleged treasons, mutinies and conspiracies. Ironically, or perhaps not so ironically, all this proved a verdant soil for the growth of the emancipist legal profession. But what passed in the first two decades of settlement was only a prelude to one of the most subtle, significant and often overlooked conflicts in the history of early Australia. Between 1809 and 1823, powerful factions played out a political game of chess that would decide the direction and future of the colony.

On one side stood the emancipists, the class of freed convicts for whom New South Wales was home, frequently by need more than choice. These one-time transportees, who rarely had the money to return to Britain, became the labourers, farmers, clerks and merchants who gave to the colony much of its character. By 1809 many emancipists had begun to marry, and to build homes and families. They saw the colony as a society of second chances for freed men. Their legal rights had been largely restored to them, providing the platform for a new life and an opportunity to escape the opprobrium that had initially brought them to New South Wales.

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[1] J.T. Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (first published 1823 and reprinted 1966) vol. 2, 41. This report originated as the House of Commons Paper 33, ordered to be printed on 21 February 1823.

Attorneys like George Crossley were a part of the emancipist fold. He and his fellow attorneys, many of whom had trained as lawyers in England, were by no means indicative of the emancipist class. Freed convicts in New South Wales came from every strata of British society including the lowest classes of England's poor. What united this disparate group of people was the necessity of building a new life in New South Wales.

To the emancipists, ensuring their rights was vital because it meant preserving a future and way of life. While emancipists considered themselves subjects of the British Empire, they often benefited from the early modification or suspension of certain aspects of British law. However, those modifications did not suit the interests of all colonists.

Opposing the emancipist cause was the smaller but often wealthier and more politically connected group of free settlers. Soldiers, speculators, woolgrowers and others arrived in New South Wales by choice in search of opportunities that were not available to them in Britain. In the early years of settlement, cheap and accessible convict labour proved an attraction for the colony's free men. The emancipation of convicts and recognition of emancipist rights both increased overheads and diminished the monopoly over commercial opportunities once enjoyed by free settlers. Opposing emancipist rights meant money, power and the potential to amass a greater fortune in the development of the colony. Dubbing themselves the Exclusives, the free men of the colony became determined to undermine emancipist rights. One means of doing so was to insist on the strict application of British law and legal institutions.

Following the overthrow of Governor Bligh's administration, it was clear that New South Wales had outgrown its crude penal origins and the institutions established for the governance of the colony. The institutional and legal geography of New South Wales needed to be remade. The key questions were how, and for whose benefit?

The British Colonial Office would support significant change. Each side had its protagonists. In favour of the emancipist cause was the reformer, Governor Lachlan Macquarie, and Edward Eagar, a leading emancipist attorney. Against them stood the first Judge of the Supreme Court of New South Wales,[2] Jeffery Hart Bent, whose sympathy lay firmly with the

[2] The original Supreme Court in New South Wales was in operation from 1814, and was a civil court only. It was provided for by the Second Charter of Justice. A newly constituted Supreme Court was established by the Third Charter of Justice in 1823, and operated in both the civil and criminal jurisdictions. See Chapter 3 for further details on the Supreme Court constituted in 1823.

colony's Exclusives. With powerful interests at risk, each group made its opening gambit. The prize was the control of New South Wales.

A Brief Period of Harmony

The insurrection that unseated Bligh spurred the British Colonial Office to action. A change of leadership was clearly required. The Governor and Judge Advocate would be replaced, followed by more radical reforms to the judicial structure of the colony.

Lachlan Macquarie assumed the office of Governor in January 1810.[3] He was a farmer's son with a long career of military service behind him. From a formative age, his mother instilled in him a deep sense of social rank and order. The new Governor's military career had taken him all over the world where he had been exposed to the best and darkest aspects of human nature, including the treatment of penal colonists. These experiences had an enduring effect on Macquarie who developed a keen sympathy for the emancipist cause.[4]

Macquarie made no secret that the design of his administration was to build a society of laws and opportunities that would be inclusive of the whole population, whatever their past sins. His first acts were aimed at reforming what he saw as moral deficiencies in the colony. He frowned on drunkenness, idleness, and de facto cohabitation.[5] He tried to improve the morals of the colonists by promoting religious worship in the Church of England, and encouraged marriage and education.[6]

The Governor also wasted no time in broadcasting his intention that the emancipists of New South Wales play an active role in their own government.[7] The legal absolution of emancipation entitled a citizen of New South Wales to a role in public life. Macquarie broke social convention by inviting leading emancipists D'Arcy Wentworth, Simeon Lord, William

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[3] There are many biographies of Governor Macquarie, including: John Ritchie, *Lachlan Macquarie: A Biography* (1986); M.H. Ellis, *Lachlan Macquarie: His Life, Adventures and Times* (3rd ed 1958); Marion Phillips, *A Colonial Autocracy: New South Wales Under Governor Macquarie 1810-1821* (1st ed 1909, republished 1971); and Anthony Hewison (ed), *The Macquarie Decade: Documents Illustrating the History of New South Wales 1810-1821* (1972). See also Manning Clark, *A History of Australia: From the Earliest Times to the Age of Macquarie*, vol. 1 (1962).

[4] Clark, ibid 263-4.

[5] Ibid 269.

[6] Ibid 269 and 280. See also Ritchie, above n 3, 110, and Ellis, above n 3, 190.

[7] Macquarie to Castlereagh, 30 April 1810, *HRA* Series 1, vol. vii, 276. Macquarie stated his surprise that his predecessors had never acknowledged the emancipists who had 'not only become respectable, but by many Degrees the most Useful members of the Community'.

Redfern and Andrew Thompson to dine at his table. He appointed Thompson as a magistrate at the Hawkesbury and a justice of the peace.[8]

Thompson's appointment created uproar among the free settlers, who considered that magistrates should be chosen exclusively from their untainted ranks. As John Macarthur proclaimed in disgust, 'In our present state Governor Macquarie's distinguished Convict friends preponderate in every publick (sic) question'.[9] Macquarie seemed oblivious to these criticisms.

Prior to leaving for New South Wales, Macquarie had received notice that Ellis Bent had been appointed to the office of Judge Advocate as a successor to Richard Atkins.[10] Tall, heavy-set, deeply religious and Cambridge educated, Bent seemed a qualified replacement for Atkins. He was a member of Lincoln's Inn, having been called to the Bar in 1805, where he practised for a number of years.[11] The new Judge Advocate arrived in December 1809 on the same boat as Macquarie.

Ellis Bent initially enjoyed good relations with Macquarie, who described him as a man who 'has most happily blended the mildest and gentlest Disposition with the most Conciliating Manners, great good Sense, and accurate legal Knowledge.'[12] Bent efficiently went about his duties as Judge Advocate and did not initially object to the emancipist attorneys practising in his court.[13] The new Governor and Judge Advocate brought a harmony and accord to the discharge of their offices, which boded well for the future of the colony, or so it initially seemed.

This all augured well for the emancipists, including newly pardoned convict attorneys who were emerging in the colony. The most notable of these was Edward Eagar, an Irishman.[14] He had enrolled as an attorney in the Four Courts, Dublin. After practising for less than twelve months as an attorney in Ireland, Eagar was convicted of uttering a forged bill in 1809

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[8] Ibid.

[9] John Macarthur to his son, John Macarthur Junior, 20-28 Feb 1820 from Parramatta: in S. Onslow, *Some Early Records of The Macarthurs of Camden* (1973) 338.

[10] Castlereagh to Macquarie, 14 May 1809, *HRA* Series 1, vol. vii, 81.

[11] For further information on Ellis Bent, see C.H. Currey, *The Brothers Bent: Judge Advocate Ellis Bent and Judge Jeffery Hart Bent* (1968) Chapter 1.

[12] Macquarie to Liverpool, 18 October 1811, *HRA* Series 1, vol. vii, 395.

[13] J.M. Bennett (ed), *A History of the New South Wales Bar* (1969) 18.

[14] For a biography of Edward Eagar, see N.D. McLachlan, 'Edward Eagar: A Colonial Spokesman in Sydney and London', (1963) 10 *Historical Studies* 431.

and sentenced to death. Perhaps persuaded by his family connections, and after a demonstrative death-cell conversion, the British authorities commuted Eagar's sentence to transportation.[15]

The disgraced attorney arrived in Australia in 1811, and was conditionally pardoned by Macquarie in 1813. He advertised his services as an attorney in the *Sydney Gazette*,[16] and rapidly built an extensive legal practice. Less than two years after hanging out his shingle, Eagar by his own reckoning held 157 separate powers of attorney and had assumed the conduct of 507 cases.[17] He had seemingly reclaimed a measure of his old family respectability and was considered favourably by Macquarie's government.[18] However, the period of harmony that led to Eagar's relative prosperity would be short-lived. Changes were afoot.

The Second Charter of Justice

Even by 1811, when Eagar arrived in Sydney Town, it was generally recognised that the justice system of New South Wales was not meeting the needs of the growing colony. The structure of the court system received continuing scrutiny. In particular, Ellis Bent and Macquarie were both convinced that the legal system was inadequate for a society that was no longer solely based on penal justice.

A steady correspondence on the issue was entered into with the British Colonial Office. Bent stated in a letter to the Earl of Liverpool that the First Charter of Justice 'could be intended only for a very small community, where the mutual dealings between man and man are of the most simple nature.'[19] Bent expressed particular concern that in the Criminal Court the Judge Advocate was required to be the committing magistrate, public prosecutor and judge, and pointed out that the multiple roles made it extremely difficult to free his mind from bias. Bent also feared that the civil court was in even worse straits, due to its inability to try increasingly complex litigation.[20]

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[15] See Anthony Fisher, 'From Norman Conquest to Rum Rebellion' in J.M. Bennett, *A History of Solicitors in New South Wales* (1984) 18-19.

[16] *Sydney Gazette*, 10 April 1813, 1.

[17] See petition of Eagar to Macquarie, 11 April 1815, *HRA* Series 1, vol. vii, 493-495.

[18] Macquarie to Bathurst, 22 October 1821, *HRA* Series 1, vol. x, 557. Macquarie described Eagar as 'a man of strong good sense and superior understanding'.

[19] *Report from Select Committee on Transportation* (1812) Appendix no. 19, 93.

[20] Ibid 93-97.

Bent petitioned for trained solicitors to be sent out so that colonists would not have to represent themselves in court with their enmities on show for the world to see.[21] In particular, Bent was concerned that the emancipist attorneys were insufficient counsel for the proper trial of civil causes, and lamented that he had only allowed them to practise as agents of suitors out of necessity.[22]

In 1811, Macquarie supported the adoption of a proposed plan 'for the Improvement of the Judicial Department of this Colony,'[23] and in 1812, he received a letter from Earl Bathurst reporting that His Majesty's Government had finally given serious consideration to the state of the colony's legal system. The Colonial Office conceded that the colony had 'out grown' its military based legal system, and that, 'with the growing prosperity of the Colony, the number of the Causes has rapidly increased to an embarrassing extent.'[24]

The question of trial by jury in criminal cases was also raised, with Earl Bathurst asking 'how far the peculiar constitution of that Society of men will allow of the application of the British Constitution' and, in particular, whether it would be prudent to allow convicts to act as jurymen.[25] Macquarie's response was that:

> From the Observations I have thus made on Persons who have been Convicts, Your Lordship will see that in my humble Opinion they are in every Respect Eligible, and perfectly Competent for Jury Men, whenever it may be deemed Expedient to Assemble a Grand or Petty Jury in this Colony.[26]

The Colonial Office was evidently not satisfied with Macquarie's assurances, preferring the view that one-time felons were not fit to sit in judgment over their countrymen. Once again, the plans for a jury system were shelved.[27]

On 4 February 1814, the Second Charter of Justice became law.[28] The criminal court remained unchanged. However, the civil court would be split into the Governor's Court and the newly-created Supreme Court of New South Wales.

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[21] Ibid 93-97.

[22] Ellis Bent to Bathurst, 1 July 1815, *HRA* Series 4, vol. i, 136-141.

[23] Macquarie to Liverpool, 18 October 1811, *HRA* Series 1, vol. vii, 395.

[24] Bathurst to Macquarie, 23 November 1812, *HRA* Series 1, vol. vii, 672.

[25] Ibid 674.

[26] Macquarie to Bathurst, 28 June 1813, *HRA* Series 1, vol. vii, 776.

[27] Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (2003) 50.

Ellis Bent, as Judge Advocate, would preside in the Governor's Court alongside two residents appointed by the governor, and was assigned all cases under the value of 50 pounds. No appeal from decisions of the Governor's Court would be allowed.[29] A Lieutenant Governor's Court was established in Van Diemen's Land, along similar precepts.[30]

The Supreme Court consisted of a single judge and two magistrates, and was endowed with a common law, equity and probate jurisdiction. It was to be a superior court of record, and an appeal from its decision could be made to the governor if the claim litigated did not exceed the quantum of 3000. For greater disputed sums there was a right of appeal to the Privy Council in London.[31]

Addressing Bent's misapprehensions about the emancipist attorneys, approval was given for salaried solicitors to come to practise in the colony. Two English lawyers, William Henry Moore and Frederick Garling, were appointed to the posts.[32] The colony was finally to have two 'respectable' solicitors to counteract the 'chicanery' of the emancipist attorneys.

With the appointment of Garling and Moore, for the first time the British Government recognised that New South Wales had matured enough to require a legal profession. However, inherent in the appointment was the assumption that there was, to that point, no legal profession in New South Wales worthy of recognition. Patently, that was not so.

The problem was that, following the enactment of the Second Charter of Justice, a key question as to the legal right of emancipist attorneys to practise now needed to be answered. The profession of emancipist attorneys had, to that point, developed unchecked. The year 1814 marked the end of that period of grace. While the Second Charter of Justice did not expressly preclude the admission of emancipists as practitioners of the new court, it had the potential to do so.

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[28] Text of the Second Charter of Justice is contained in *HRA* Series 4, vol. i, 77.

[29] See A.C. Castles, *An Australian Legal History* (1982) 105.

[30] See Chapter 4 for further details.

[31] Castles, above n 29, 105-6.

[32] Bathurst to Macquarie, 13 February 1814, *HRA* Series 1, vol. viii, 139. Jeffery Bent's letters of recommendation contained in *HRA* Series 4, vol. i, 94-95.

That was a potential that the first judge appointed to the Supreme Court of New South Wales was determined to exploit.

Judge Jeffery Hart Bent

Jeffery Hart Bent, the elder brother of the Judge Advocate, Ellis Bent, was appointed to preside over the Supreme Court created under the Second Charter of Justice. Like his younger brother Ellis, Jeffery Bent received a public school education in England before proceeding to read law at Cambridge and being called to practise at the English Bar. The elder Bent was a man of unusually sensitive disposition who disliked witnessing cruelty to other people.[33] Despite his apparent sensitive nature, he quickly made enemies in New South Wales. They painted a less than favourable picture of Bent as a self-important, conceited and self-interested man, who was easily offended, quick tempered, snobbish, and careless of any injury that he caused to the feelings of others.[34]

Judge Bent's departure for and arrival in Sydney were marked by a series of perceived slights to his reputation. To the new judge this was simply unacceptable, because, as Bent was fond of saying, although he was only 27 years old he was nevertheless 'a barrister of near 10 years standing'.[35] Bent frequently complained that he was forced to depart for the colony without being properly received by the Prince Regent of England to mark his ascension to the bench.[36] Bent kept a diary during the voyage and it is clear from its pages that he barely suffered the company and morals of the passengers and crew alike.[37] Matters ran no more smoothly when the judge's ship reached Sydney Cove.

On arriving in July 1814, Judge Bent refused to depart his vessel without being properly received. He was chagrined that the governor had not observed proper ceremony by

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[33] J.H. Bent, *Journal of a Voyage Performed on Board the Ship Broxbornebury, Captain John Pitcher, from England to New South Wales*, MS in National Library, Canberra.

[34] See, for example, Macquarie's views on Jeffery Bent in his letter: Macquarie to Bathurst, 16 January 1816, *HRA* Series 1, vol. ix, 11. When Bent refused to pay toll tax, Macquarie commented that his 'Public Spirit is not very ardent.' He also lamented Bent's opposition to his government, and his 'Midnight Cabals and petty Factions.' For an example of Bent's capacity to be easily offended, see the series of correspondence between Judge Bent and Magistrates Broughton and Riley in *HRA* Series 1, vol. viii, 509-542, where Broughton and Riley commented favourably on Ellis Bent's 'mildness of ... manners and his uniform urbanity to us' at page 525, and contrasting this with Jeffery Bent's propensity to be offended. They added that they did not intend to offend the Judge. Judge Bent responded with his own assertions that he was subjected to 'unprecedented disrespect and indignity' at page 536.

[35] See, for example, letter from Jeffery Bent to Messrs Riley and Broughton, *HRA* Series 1, vol. viii, 517

[36] Bennett (ed), *A History of the New South Wales Bar,* above n 13, 17; see also Currey, above n 11, 99.

[37] Clark, above n 3, 290; see also Currey, ibid 100.

arranging a formal reception, including a gun salute on the ship and on shore. Macquarie, who had not seen the need to herald the new judge's arrival with quite that degree of formality, did not intend to acquiesce to Bent's demands, but finally mollified his chief judicial officer by ordering a thirteen gun salute. Macquarie, however, was not in the receiving party, having sent his aide-de-camp to meet the new judge.[38]

By the time of the new judge's arrival, Macquarie's relationship with Ellis Bent had soured because the Judge Advocate was offended that Macquarie had not made more efficient efforts to build a suitable and comfortable courthouse. Macquarie, in turn, was angered by Ellis Bent's 'disrespectful conduct' towards him, and would have at the very least suspended him from his duties, except for the fact that 'the Judicial business of the Colony would have been totally suspended'.[39]

When Jeffery Bent arrived, the Bent brothers were both adamant that Macquarie's plan to house the courts in the general ward of the hospital until the courthouses were built was ridiculous. They felt that the detached wing of the hospital reserved for the private use of the surgeon and assistant surgeon would have been ideal, and wrote to both Macquarie and Under Secretary Goulburn in Britain expressing their opinion in no uncertain terms.[40]

More alarming was Judge Bent's refusal to open sessions of the Supreme Court at all. In letters to Earl Bathurst, Macquarie complained that Judge Bent had still not opened the Supreme Court, even though it was nine months since his arrival in the Colony.[41] Judge Bent said that the court would do no business until the arrival of the English solicitor, Mr Garling.[42] Macquarie felt that it was a 'frivolous' reason to delay opening the Supreme Court. In Macquarie's view the emancipist attorneys were perfectly capable of practising in the new court.[43] Judge Bent, ardently supported by his brother the Judge Advocate, disagreed.

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[38] Macquarie felt that he did give sufficient reception: Macquarie to Bathurst, 7 October 1814, *HRA* Series 1, vol. viii, 300. See also Clark, above n 3, 291.

[39] Macquarie to Bathurst, 24 February 1815, *HRA* Series 1, vol. viii, 398.

[40] Judge Bent to Goulburn, 15 October 1814, *HRA* Series IV, vol. i, 108-110; Judge Bent to Goulburn, 30 November 1814, *HRA* Series IV, vo.l. i, 112-113; Judge Bent to Macquarie, 5 December 1814, *HRA* Series IV, vol. i, 114-115; Ellis Bent to Bathurst, 1 July 1815, *HRA* Series IV, vol. i, 134-5.

[41] Macquarie to Bathurst, 24 March 1815, *HRA* Series 1, vol. viii, 466.

[42] Judge Bent to Macquarie, 16 December 1814, *HRA* Series 4, vol. i, 114, 117.

[43] Macquarie to Bathurst, 24 March 1815, *HRA* Series 1, vol. viii, 466.

Judge Bent's attitude to the emancipist attorneys was clear. The commission of their respective crimes proved them to be unfit to practise as attorneys. He flatly refused to accept that following *Kable,* the English law of 'felony attaint' did not apply in the colony.[44] This served the interests of the colony's free settlers with whom Bent felt the greatest affinity. It also succeeded in frustrating Governor Macquarie towards whom the Judge felt the greatest enmity.

None of this pleased the colony's only resident advocates. Crossley and Eagar were understandably concerned that they be given a right of appearance in the newly created Supreme Court when it opened. Both men petitioned Macquarie for that right, and received a sympathetic hearing.[45] Macquarie approached Judge Bent on the attorneys' behalf. Bent was outraged that Macquarie might presume to intrude into the business of the court (which His Honour still steadfastly refused to open), and flatly refused any right of appearance.[46]

Macquarie marshalled his resources and brought pressure to bear. With the legitimate solicitor Garling nowhere in sight, Judge Bent finally relented and advised that the Supreme Court would sit on 1 May 1815. However, Bent had said nothing about any change in his attitude to the emancipist legal profession.

As the day appointed for the inaugural sitting of the Supreme Court approached, the emancipists deliberated on their strategy. The Second Charter of Justice did not expressly preclude their right of appearance, but if Bent's opposition could not be shaken it would sound the death-knell for their professional lives in the colony.

The Emancipist Deadlock

As required by the Second Charter of Justice, two magistrates, William Broughton and Alexander Riley, were appointed to sit with Bent to constitute the new Supreme Court's first quorum. On 5 May the Court opened for the first time and was handed petitions for admission to practise from Crossley,[47] Eagar,[48] and another emancipist attorney, George

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[44] Judge Bent to Macquarie, 20 April 1815, *HRA* Series 1, vol. viii, 495-500.

[45] Macquarie to Bathurst, 22 June 1815, Enclosure No. 2 (petition of George Crossley) and Enclosure No. 3 (memorial of Edward Eagar), *HRA* Series 1, vol. viii, 491-495. See also Macquarie to Judge Bent, 18 April 1815, Enclosure No. 1, *HRA* Series 1, vol. viii, 489.

[46] Judge Bent to Macquarie, 20 April 1815, Enclosure No. 4, *HRA* Series 1, vol. viii, 495.

[47] Petition of George Crossley, 20 May 1815, *HRA* Series 1, vol viii, 503.

Chartres. When the Court adjourned to consider the petitions, Judge Bent expressed his view that all the petitions ought to be dismissed as the emancipist attorneys were legally disqualified from admission into any court.[49]

Broughton and Riley, perhaps because of their longer residence in the colony and involvement in its affairs, opposed the judge's position. In their view, the emancipist attorneys should not be forever deprived of their livelihood. They favoured the argument that the *Frivolous Arrests Act 1725,* on which Bent relied, was expressly limited in its operation to England and, as a consequence, the emancipists were free to practise as attorneys in Australia.[50]

In the meantime, the newly appointed 'respectable' solicitor William Henry Moore had arrived in the colony seeking admission. The learned judge approached Broughton and Riley and requested that they preside with him to enable Moore's admission. In exchange, the magistrates were led to believe that the emancipist question might be reopened.[51]

On 11 May 1815, the Supreme Court convened and granted Moore his admission to practise. Judge Bent, however, refused Crossley permission to present his arguments, and after an altercation with Broughton and Riley he promptly adjourned the court. Broughton and Riley were livid and stated that they would not sit with Bent again as it was impossible for them to 'Cordially unite with this Gentleman.'[52] Both magistrates dispatched their resignations to the Governor.[53] Macquarie refused to accept the resignations for the good of the colony, and requested that the magistrates take their seats on the Bench.[54]

On 25 May 1815, Broughton and Riley headed towards the Supreme Court with the intention of taking their seats on the bench, but were informed by the clerk of the court that Judge Bent

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[48] Petition of Edward Eagar, 11 April 1815, *HRA* Series 1, vol. viii, 493.

[49] General Minutes of the Proceedings of the Supreme Court, *HRA* Series 1, vol. viii, 510-16.

[50] The Act referred to by Bent was a British Act, 12 Geo. I, c.29, that regarded the unfitness of persons convicted of crimes such as perjury and forgery to practise as attorneys or solicitors in courts. Macquarie to Bathurst, 22 June 1815, *HRA* Series 1, vol. viii, Enclosure No. 8, General Minutes of the Proceedings of the Supreme Court on 9 May 1815, 511.

[51] Ibid.

[52] Macquarie to Bathurst, Enclosure No. 7, Letter from Broughton and Riley to Macquarie, 23 May 1815, *HRA* Series 1, vol. viii, 509.

[53] Ibid.

[54] Macquarie to Bathurst, Enclosure No. 11, Broughton and Riley to Macquarie, *HRA* Series 1, vol. viii, 527.

desired to meet them in his chambers in an attempt to settle the convict issue.[55] On discussing the issue, it quickly became apparent that the judge refused to budge from his position.

Broughton and Riley stated their intention to take their seats in the court.[56] The Second Charter of Justice required that Bent be present in court with the two magistrates before a quorum might be achieved and the court's decision handed down. Bent made it clear that he would not convene the court for that purpose, knowing that if he did so his minority opinion would fail and the emancipist attorneys would be admitted. He instead sent the clerk along to read out a notice that the court would reconvene on 1 July.[57]

Broughton and Riley, deeply embarrassed by the Judge's actions, then proposed to allow the emancipist attorneys to practise as 'agents'.[58] They would be granted a right of appearance without formal admission to the role of practitioners. Judge Bent would have none of it and refused further discussion.[59]

The position was deadlocked. The Supreme Court, which had been empowered and staffed for more than a year, had yet to discharge any substantive business. The colony's superior court could not operate. The positions of the governor and chief judicial officer were philosophically polarised. At the most fundamental level, the question of the fate of the petitioners went to the heart of who should be the natural inheritors of the new society of New South Wales.

On 1 July 1815 Macquarie wrote to Earl Bathurst, delivering the ultimatum that he would resign unless the Bent brothers were replaced.[60] Before Macquarie received a reply, Frederick Garling finally arrived in the colony on 8 August 1815.[61] As there were now two solicitors in the colony, Bent scented victory and planned, at a leisurely pace, to open the Supreme Court.

The Judge's pleasure was short-lived, and the court was never reconvened under him. Ellis Bent, in an untimely manner, had become too ill to preside on the Governor's Court, and died

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[55] Macquarie to Bathurst, Enclosure No.12, Minutes of Proceedings at Judge Bent's Chambers, 25 May 1815, *HRA* Series 1, vol. viii, 528.

[56] Ibid.

[57] Ibid.

[58] Ibid, Enclosure No. 14, Broughton and Riley to Bent, 30 May 1815, 532-4.

[59] Ibid, Bent to Broughton and Riley, 1 June 1815, 534.

[60] Macquarie to Bathurst, 1 July 1815, *HRA* Series 1, vol. viii, 621.

[61] Macquarie to Bathurst, 18 March 1816, *HRA* Series 1, vol. ix, 55.

on 10 November from 'Dropsy in the Chest'.[62] Judge Bent immediately made a formal offer to perform both the roles of Judge of the Supreme Court and Judge Advocate until another replacement could be found. The Governor refused him.[63] Instead, Garling was offered the position of Judge Advocate, and he accepted.[64]

Jeffery Bent once again faced a Supreme Court served by only one admitted solicitor. Broughton and Riley refused to conduct the business of the Court unless the emancipist attorneys were allowed to practise. This time the deadlock was unbreakable. Judge Bent had lost.

Jeffery Bent was recalled by the Home Government and formally reproved for failing to consider the consequences of his agitations. The Home Government was of the view that the emancipist attorneys ought to have been employed while there was only one solicitor in the colony.[65]

While Eagar and Macquarie had won the battle, the emancipist attorneys' war was far from over. The disputed petition had only served to draw attention to the question of the rights of the emancipist attorneys to practise. Eagar knew that he had a fight on his hands. Even in censuring Judge Bent, the politicos of the Colonial Office had expressed their view that the disgraced judge's stance on convicts as attorneys was morally and legally correct.[66]
Eagar realised that the question could no longer be successfully ventilated in the judicial arena alone. The fight had become purely and desperately political. He knew that his only chance was to galvanise the emancipists into a political party, as Macquarie's inclusive politics were not universally accepted. The emancipists' only hope of victory lay in persuading the representatives of the British government: men thousands of miles removed from the practicalities of life in New South Wales.

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[62] Macquarie to Bathurst, 20 February 1816, *HRA* Series 1, vol. ix, 3. Note that Ellis Bent had been recalled by the British Government, but he did not receive notice of this before he died. See Bathurst to Ellis Bent, 12 April 1816, *HRA* Series 1, vol. ix, 110-11.

[63] Macquarie to Bathurst, 20 February 1816, *HRA* Series 1, vol. ix, 8-9.

[64] Ibid 9-10.

[65] Bathurst to Bent, 12 April 1816, *HRA* Series 1, vol. ix,112. Bathurst to Macquarie, 18 April 1816, *HRA* Series 1, vol. ix, 107.

[66] Bathurst to Macquarie, 18 April 1816, *HRA* Series 1, vol. ix, 107-8.

Politics

In October 1816, John Wylde arrived to take his place as the Judge Advocate of the colony.[67] In February 1817, Barron Field arrived as the second judge appointed to the Supreme Court. Field was a conservative barrister and member of Lincoln's Inn, but is often best remembered for his literary aspirations that resulted in the publication of some of his poetry.[68]

Both new appointees initially appeared more flexible than the Bent brothers. Wylde allowed emancipist attorneys to complete civil matters already on foot in the Governor's Court.[69] Field, while less lenient, allowed George Crossley to appear in the Supreme Court on at least one occasion. That was not to be the norm. The Colonial Office gave instructions that it was not willing to sanction the employment of ex-convicts as attorneys.[70]

Crossley typically chose to meet these judicial obstacles with more craft than brawn. By the time of Field's arrival Crossley was growing old and had little stomach to fight for a continued right of appearance. Instead, he entered into secret partnership with Thomas Amos, a free settler trained as a solicitor. Crossley's official title was that of 'clerk'. In reality, he continued the work as an attorney, and received half of Amos' profits, less a fee of 400 per year.[71]

Judge Field, who bore a personal grudge against Amos, learned of the arrangement and on 16 August 1819, his Honour ruled that Amos be suspended from practice as an attorney.[72] Only then did Crossley renew his petition to be admitted as a practitioner of the court. The petition was denied, although once again he was allowed to complete all civil cases then on foot.[73]

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[67] Macquarie approved of Wylde as Judge Advocate; see Macquarie to Bathurst, 4 April 1817, *HRA* Series 1, vol. ix, 345. For further biographical information on Wylde, see Bennett, *A History of the New South Wales Bar* above n 13, 21-22.

[68] Macquarie also approved of the choice of Field as judge. See Macquarie to Goulburn, 8 April 1817, *HRA* Series 1, vol. ix, 381For further biographical information on Field, see Bennett, ibid 22-24. An example of Field's poetry is published as: Barron Field, *Fresh Fruits of Australian Poetry* (1st ed 1819, republished 1990).

[69] Wylde to Goulburn, 31 March 1817, *HRA* Series 4, vol. i, 229.

[70] Macquarie to Wylde and Field, 11 March 1817, *HRA* Series 4, vol. i, 856.

[71] See K. Allars, 'George Crossley – An Unusual Attorney' (1958) 44(5) *Royal Australian Historical Society Journal* 261, 293.

[72] Amos to Bathurst, 27 July 1820, *HRA* Series 4, vol. i, 339-343; see also *HRA* Series 4, vol. i, Appendix A, 755.

[73] Petition of Crossley, 18 December 1817, *HRA* Series 4, vol. i, 268-271. See evidence of Eagar, *HRA* Series 4, vol. i, 766-70.

Both Wylde and Field noted that following their arrival the quantity of business in the Governor's Court diminished for a time. Both subscribed to the theory that emancipists preferred to hire emancipist attorneys as their representatives rather than the government solicitors, Garling and Moore.[74] The conclusion engendered no sympathy for a more representative legal profession, and did not change Wylde or Field's stance on the legality of the emancipist attorneys practising in their respective courts.[75]

Edward Eagar, realising that the door was closed to legal practice, turned his attention to advocating generally for the legal rights of emancipists. His foray into politics was timely, as Judge Bent's failures convinced the British Colonial Office that further steps needed to be taken to address the judicial mechanics of the colony. John Thomas ('J.T.') Bigge, at one-time the Chief Justice of Trinidad, was commissioned by the British Government to formally investigate and report on the state of the judicial establishments in New South Wales.

Bigge arrived in the colony in September 1819. He set about acquainting himself with the judicial system in the colony and interviewed people of note. His disposition towards the emancipists was revealed early, when he informed Macquarie that he disapproved of the emancipist Redfern having been appointed as a magistrate.[76]

Eagar was seemingly undeterred by Bigge's attitude, and was vigorous in his efforts to convince him and his superiors of the merits of the emancipist cause. Eagar convened well-attended public meetings and promulgated petitions that were signed by leading emancipists in the colony, who Macquarie stated were all men of wealth, rank and intelligence.[77]

The composition of the courts was central to the debate. In particular, the emancipists demanded the introduction of jury trials. The right to serve on a jury, in the minds of the emancipists, symbolised true citizenship. Eagar pointed out the injustice that slaves in the West Indies enjoyed the privilege of trial by jury whereas they, being Englishmen, did not.[78]

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[74] Bigge, above n 1, 4.

[75] Ibid.

[76] Bathurst to Macquarie, 10 July 1820, *HRA* Series 1, vol. x, 310.

[77] Macquarie to Bathurst, 23 March 1819, *HRA* Series 1, vol. x, 54, and see petition from 55-56. The petition addresses the judicial situation of the colony, as well as their desire for trial by jury.

[78] Ibid 57-8.

The Exclusives responded by taking to the moral high ground. Their leaders emphasised that those tainted by the stain of convictism were not worthy of serving as jurors. John Macarthur, who had finally returned from his exile in England, spoke to J.T. Bigge at length on the issue of jury trials. Macarthur pressed his view that confusion and disorder would reign if trial by jury were to be introduced. Macarthur's principal argument was that ex-convicts would unreasonably seek to convict the respectable citizens and thus bring them down to their own level.[79]

John Macarthur also wrote to his son John expressing strong views on the jury system and proposed legislative council:

> You must remember my decided disapprobation of Trial by Jury and anything in the shape of a Legislative Assembly in the present condition of our Society and I hope you have not neglected to say so at the Colonial Office – The establishment of either the one or the other at this time would seal the destruction of every respectable person here. I refused to sign the petition to the Prince Regent and gave great offence by so doing.[80]

However, to Macarthur's disgust his nephew and staunch ally Hannibal Macarthur signed the emancipist petition to the Prince Regent.[81] Like many, Hannibal felt that New South Wales would never progress along English lines if some concessions were not granted to the emancipists. However, momentarily at least, the issue of trial by jury and a legislative council was overshadowed by a legal issue of a more fundamental nature.

The Law of Felony Attaint

While forced out of the courts as an attorney and advocate, Edward Eagar was still appearing in a series of cases as a litigant. One of those cases became critical to the success of Eagar's political machinations.

In January 1820 Barron Field, in his capacity as a justice of the peace, censured Eagar for his 'seditious speeches', and branded him a revolutionist.[82] On 4 April 1820, Eagar brought slander proceedings against Field in the Governor's Court. Judge Advocate Wylde presided over the case. If Eagar had thought to gain political mileage from his case, he had seriously

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[79] Evidence of John Macarthur, undated, in J.T. Bigge, *Appendix*, CO 201/120 and reproduced in John Ritchie (ed), *The Evidence to the Bigge Reports,* vol. 2 (1971) 79, 88-89.

[80] John Macarthur to son John, 20-28 Feb 1820 from Parramatta: in Onslow, above n 9, 337.

[81] Ibid.

[82] Macquarie to Bathurst, Enclosure No. 4, 1 September 1820, *HRA* Series 1, vol. x, 354.

miscalculated. Field used the case as a vehicle to address a deficiency in the common law of the colony that he felt could not stand.

In his defence, Field argued that Eagar was under the disability of felony attaint. While the Governor had pardoned Eagar in 1818, Edward Eagar's name did not appear in any general pardon under the Great Seal of Great Britain.[83] Field relied on the English ruling in *Bullock v Dodds,* handed down the year before, which cast doubt on the legality of hundreds of absolute pardons dispensed by the Governor but not recorded on the Great Seal.[84]

To that point Field himself had repeatedly ignored the problem of whether the Governor's pardons were recorded on the Great Seal when faced with litigants in his court. However, he deliberately raised the issue in his defence, as a means of attacking the principle established by David Collins nearly thirty years before in *Kable v Sinclair.*[85]

Wylde heard argument and then adjourned the case for twelve months in order to allow a record of Eagar's conviction in Ireland to be obtained.[86] Wylde most likely reasoned that the additional time would help settle the dust on a case that he knew had the potential to seriously affect the commerce of the colony.[87] The trial would never reconvene.

Eagar made use of the adjournment by raising a petition to the British Crown, seeking to abolish the principle of felony attaint in New South Wales.[88] More than 1300 persons signed the petition. If the law of felony attaint were operative in New South Wales, a majority of the colonists would instantly lose the capacity to sue in the courts and to own property.[89]

Eagar and a fellow emancipist Redfern personally travelled to England to present the petition to Parliament.[90] The emancipists had the support of both Macquarie and, surprisingly, J.T.

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[83] For details of case of *Eagar v Field*, see *HRA* Series 1, vol. x, 351-64. For an explanation of the law of felony attaint, see Chapter 1 of this thesis, 'The Convict Problem', which discusses the case of *Kable v Sinclair* and the ramifications of the decision for the application of the law of felony attaint in the colony. Field's strict application of the law of felony attaint required evidence of Eager's pardon, and without evidence of his pardon Eager could not sue in the colony's courts.

[84] *Bullock v Dodds* [1819] 106 ER 361.

[85] See Chapter 1, 'The Convict Problem' and above n 83.

[86] Wylde to Macquarie, 1 September 1820, *HRA* Series 1, vol. x, 362-3.

[87] Ibid.

[88] 22 October 1821, *HRA* Series 1, vol. x, 549-556.

[89] Macquarie to Bathurst, 1 September 1820, *HRA* Series 1, vol. x, 351-3.

[90] See Macquarie's letter of introduction for Eagar to Bathurst, 22 October 1821, *HRA* Series 1, vol. x, 557.

Bigge on the issue.[91] While the petition was tabled in the British Parliament, the fate of the document was overtaken by and bound up with the publication of J.T. Bigge's report.

Edward Eagar's political campaigning had substantially come to a close. He never returned to New South Wales, leaving behind his wife Jemima and four children born in the colony. Eagar took an English mistress, Ellen Gorman, and fathered ten children by her. He worked for the rest of his days in England, and took it upon himself to liaise with the Colonial Office in England, promoting the emancipist cause in New South Wales.[92]

With Eagar's departure the one great advocate for the emancipist profession was lost to New South Wales. Eagar has been described as a strange mixture of lofty aspirations and base treachery, and a man 'haunted by the most terrible fear that his mask of piety might be stripped off'.[93] In him lived the odd mix of opposites that had come to characterise the unique work of the emancipist legal profession; a robust and adaptive profession, which in the teens of the nineteenth century was preferred by many New South Wales residents over that of the British substitutes.[94] The fate of that profession and Eagar's efforts to save it now relied on the reception of Bigge's report.

Bigge's Report and the Institutions of Government Remade

On returning to England, Bigge delivered his report and made numerous recommendations that changes be made to the colony's legal system. Bigge concluded that the legal rights of the emancipists needed to be remedied. Resurrecting felony attaint would plunge colonial society into chaos.

The main problems associated with the doctrine of felony attaint were eventually cured by legislation.[95] The process was slow, however, and in the meantime the schism between free settlers and emancipists further widened. Furthermore, the emancipists' rights would never

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[91] Bigge, above n 1, 8.

[92] Bennett, *A History of Solicitors in New South Wales*, above n 14, 19.

[93] Clark above n 2, 367.

[94] See Bigge, above n 1, 4 and 6. Bigge refers to a comment made by Field that George Crossley 'transacted more business and with more activity than than any one of the regular solicitors'.

[95] For a discussion on what the British Government did to remedy the situation re felon attaint, see Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) 36.

be fully restored, as Bigge proposed that emancipists should not be granted status as admitted practitioners in court.[96]

Bigge further suggested that a barrister, trained in principles of independence, be appointed as Attorney General to ameliorate the fact that the Judge Advocate performed dual functions.[97] He also recommended that two barristers be encouraged to come to the colony.[98] Bigge's report was the first occasion that the need for barristers as opposed to general attorneys was proposed at an official level, and the first suggestion that the profession be divided.

Bigge canvassed the question of jury trials, and commented that it was not an issue of concern amongst convicted felons in England, and it was only since the emancipist class in New South Wales became so numerous and 'their pretensions to the rights and privileges of free persons have been so much encouraged, that the question has been brought into discussion at all.'[99] Bigge felt that it would be unwise at this stage to introduce jury trial, principally because of the animosity that lay between the two classes. He stated his opinion that

> until these feelings shall have subsided, I should think it equally inexpedient and dangerous to submit the property or the life of a free person in New South Wales to the verdict and judgment of a jury of remitted convicts, as I should that of a remitted convict to a jury of free persons.[100]

The British government accepted the majority of Bigge's recommendations. Francis Forbes, a barrister and judge, was appointed to orchestrate reforms to the legal system in New South Wales. A Third Charter of Justice would be drafted to assist that process and, for the first time, the colony was to play a role in its own law making in the form of a Legislative Council.

In February 1822, Macquarie finally ended his term as Governor of the colony. He left New South Wales dissatisfied with the lack of recognition that he received for his efforts to reform colonial life. His policies of inclusion had been condemned by the Exclusives.[101]

The emancipists had played their end game and lost. The emancipist legal profession faced checkmate. The legal rights of pardoned convicts were no longer assured, and the emancipist

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[96] Bigge, above n 1, 7-8.

[97] Ibid 34.

[98] Ibid 59.

[99] Ibid 37.

[100] Ibid 40.

[101] Ritchie, above n 3, 188, opined that Macquarie 'had quit a small society, splintered over the emancipist issue and prone to gossip, mockery and character assassination.'

attorneys were denied the right to practise in the courts. The minority class of free settlers regained control of the legal system in the colony.[102]

The position of the Exclusives was in the end best captured by their most willing litigant, John Macarthur, who commented (perhaps hypocritically rather than ironically), that 'such is the litigious spirit of the convict gentry you cannot avoid Law, and when you get into the hands of the "sacred Priesthood" you are at sea without compass or rudder'.[103]

By 1823 New South Wales would no longer be governed as a penal colony. Adopting John Macarthur's analogy, a new compass and rudder was to be provided to the colony in the form of a Supreme Court modelled along the lines of the King's Bench. This would be complemented by a Legislative Council. For the time being, the Governor would continue to discharge all executive functions. Barristers were also to be encouraged to come to the colony to establish an independent Bar in New South Wales, and inject some respectability into the legal profession.

It would be a society re-built – a more English society suited to the governance of a people moving slowly towards nationhood. The changes to come were celebrated, particularly by the Exclusives, as reforms of great promise. The freshly modelled British institutions of New South Wales would rise, and, in doing so, reduce or eliminate any gains that the emancipist lawyers had fought for in the first 35 years of the colony's history.

The Passing of an Era

The peaceful death of seventy-five year old George Crossley in 1823 even more clearly signalled the passing of an era. The age of the emancipist attorney was at an end. The Third Charter of Justice barred emancipists from admission to the re-constituted Supreme Court. Their legal profession, which had grown as unbidden, rebellious and as hardy as a native bushland garden, was to be replaced by unyielding British hedgerows, whatever their suitability to Sydney soil.

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[102] Note that between January 1817 and July 1822, five more free settlers who were qualified as solicitors had been admitted to practise in the courts of New South Wales: T.S. Amos, 2 January 1817; J. Norton, 7 December 1818; T.D. Rowe, 11 October 1821; C.H. Chambers, 15 March 1822; and G. Allen, 25 July 1822. See Bigge, above n 1, 3 and 5.

[103] Macarthur to son John, 20-28 February 1820 in Onslow, above n 9, 339.

The year 1823 marks the beginning of a truly British profession in New South Wales. This new breed of lawyer had little in common with the emancipist majority of subjects in New South Wales, but little matter. With greater numbers of free men making their way to the colony the structure of society was slowly changing. Local conditions could be civilised. English customs and institutions could be imposed. The aberrations and adaptations to British law suited to a frontier country could be erased. The emancipist attorneys were never acknowledged as the colony's first advocates, let alone as members of a legal profession or a Bar.

Yet it is easy to wonder whether the baby had been entirely discarded with what the British Colonial Office considered to be the convict bilge water. The rights of a generation of prisoners who had accomplished the remarkable feat of forging a society hinting at prosperity were entirely trampled. In the case of the emancipist attorneys, one might easily conclude that the changes of 1823 robbed the colony of an early culture of innovation. With the death of the emancipist cause it would be easy to believe that the justice of a colony of true second chances was replaced by a slavish and unquestioning celebration of British traditions. Only a brief span of history would reveal many of those traditions to be in dire need of reform themselves. There can be no doubt that the Exclusive victories of the early 1820s changed the character of the development of Australian law in an enduring way.

But not all of the traditions of the emancipist legal profession would be easily washed away. As the emancipist attorneys had done, the 'respectable' barristers proved themselves just as capable of creating mischief. The rebellious spirit of the emancipist attorneys was never quite quelled. While it is only possible to imagine what might have become of the profession of Australian lawyers had the emancipists won the great game played out between 1809 and 1823, the traditions established by Crossley and Eagar would have their enduring legacy.

In 1823, the intention may well have been to develop the colony into a 'New Britannia', but no land or profession can fully escape its past. The decades to come would decide what enduring imprint that past would leave.

CHAPTER THREE

RAISING THE BAR

1823 - 1856

I am led to believe that the great policy of England towards this second giantess of her begetting is to educate her in principles strictly English. It is her interest; it is her duty; she owes it to her own glory and to the happiness of all Asia. It is said by Blackstone...that the laws of England are the birth right of a British subject, and he has a right to have them administered to him, in whatever part of the British dominions, (properly such by settlement) he may reside...But perhaps you will say, why prove what is not disputed? I answer that some how or other, this principle, to every lawyer luce clarior, is met by some undefined qualification about the convict character of this Colony.

Francis Forbes to R. Wilmot-Horton, 6 March 1827[1]

New Britannia

The 1800s was an age of empires. Britain committed her resources in the first fifteen years of the nineteenth century to defending herself and Europe from the French wars of imperial conquest. After Napoleon had 'met his Waterloo', Britain spent the next eight decades successfully cementing her own empire and accomplishing abroad the achievements that the French had dreamed of in Europe.[2]

At the dawn of the twentieth century, the industrial revolution and naval superiority ensured British colonial supremacy in climes as diverse as India, Hong Kong, Canada, the Pacific Islands, New Zealand, and Southern and Central Africa. At her height, Imperial Britannia 'ruled the waves' and was the most powerful nation-state on Earth. With ultimate dominion over a quarter of the globe and a quarter of the Earth's population, Britain's reach out-spanned even the wildest imaginings of the Caesars of ancient Rome.

This ascension was inspired and sustained by the fervour of Britain's subjects both at home and in the colonies. By 1823, the sentiments that would later be given voice in Thomas Macaulay's *History of England* were accepted by many Britons, if not clearly expressed as a manifesto. British society, as enshrined by the British government, was the apex of modern civilisation. Access to the institutions that were the bedrock of that civilisation was the

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[1] Forbes to R.Wilmot-Horton, 6 March 1827, CO 201/188, f. 45.

[2] For a general history text that examines British history during the time of its colonial acquisitions, see, for example, Wilfred Prest, *Albion Ascendant: English History 1660-1815* (1998).

inalienable right of every British subject.[3] The population of New South Wales shared these views with little exception.

After the issue of J.T. Bigge's report in 1823,[4] the eyes of Britain looked more directly on the development of New South Wales than they had at any time since settlement. She did not like what she saw. New South Wales was a society caught in transition: no longer a penal colony alone but, to the British, ill-equipped to grow into an independent nation.[5]

In the 1820s legislation designed to govern New South Wales was formed anew, according to a model designed to emulate the British organs of government. The majority of emancipists and Exclusives alike welcomed these changes as signs of progress reflecting the development of their country. The aim was to create an Australasian Britannia. Yet the transition from old institutions to new was not a smooth one in all respects. It had its casualties.

Emancipist attorneys were expressly precluded from practice in the newly constituted Supreme Court. Social, political and legal problems in the colony were intensifying rather than diminishing. Doubts were still cast over the ability of the colony's significant population of emancipists to participate in social and governmental institutions. Wealthy emancipists, particularly, lived under the constant threat that they would be deprived of the right to own property. At the same time, an 'Australasian' consciousness was slowly developing,[6] and a group of colonists began a concerted push for Responsible Government.

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[3] Thomas Macaulay, *The History of England from the Accession of James the Second*, vol. 1 (1864). Macaulay stated with pride at page 1 that his aim in writing his history of England was to 'trace the course of that revolution which terminated the long struggle between our sovereigns and their parliaments, and bound up together the rights of the people and the title of the reigning dynasty...the authority of law and security of property were found to be compatible with a liberty of discussion and of individual action never before known; how, from the auspicious union of order and freedom, sprang a prosperity of which the annals of human affairs had furnished no example.'

[4] See Chapter 2, 'Bigge's Report and the Institutions of Government Remade'.

[5] Politicians in England recognised in the early 1820s that New South Wales was on the cusp of change. Henry Grey Bennet in the House of Commons was one such person who began to question the nature of society in New South Wales, and expressed his views that transportation was no longer a deterrent to crime. Emancipists in New South Wales' society were being afforded rights consistent with that of a free society, not a penitentiary. For a further example of Bennet's involvement in the affairs of New South Wales, see below 'William Charles Wentworth'. For further information on the nature of New South Wales' transitory society, see J.T. Bigge, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales*, vol. 1 (1822) and also the appendices to the Report at CO 201, vols 118-142 in the Mitchell Library, New South Wales.

[6] According to the Oxford English Dictionary, the word 'Australasia' originated in 1756 from the Dutch navigator De Brosses. It took up patriotic connotations, particularly when William Charles Wentworth penned a poem entitled 'Australasia' in 1823. From the 1820s in New South Wales it was noted that the new generation of Australian born children, dubbed 'currency lads and lasses', were beginning to look different from their British born counterparts. J.T. Bigge stated in his report that the currency lads were frequently taller and slender and less prone to fatigue. By 1835, patterns of speech were noticeably different, and patriotic

In the three decades following 1823 the nature and basis of the modern New South Wales legal profession was conceived. Advocates played a significant part in determining the development not only of their own practices, but the character of the colony as a whole.

The legal profession, like the colony itself, was searching for an identity, and determining how closely that identity should be tied to England. To the lawyers of the 1820s, '30s and '40s fell fundamental choices about the organisation of the profession, the nature and degree of exclusion from professional membership, and legal education. Not least among these issues was the question of who would properly provide a voice to the residents of New South Wales – would there be an independent Bar and, if so, who would be its members?

The answer to those questions would be a reflection of the society that New South Wales aspired to be, and a seminal contribution to the development of the nation that the colony would one day become.

Rebuilding the Government: Third Charter of Justice

The passage of the *New South Wales Act 1823*,[7] and the Third Charter of Justice[8] constituted the most significant overhaul of the New South Wales justice system since the settlement of the colony. The legislation was also significant because, for the first time, it freed Van Diemen's Land from New South Wales' authority.[9]

Much of the existing institutional framework was discarded. The old Supreme Court and Governor's Court were abolished,[10] as were the offices of Judge Field and Judge Advocate Wylde. The emancipist attorneys were officially prevented from practising their profession and earning a livelihood in the law.[11]

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publications were printed such as *Currency Lad,* which began in 1832. See J.T. Bigge, *Report of the Commission of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (1823) 81-2, and Manning Clark, *A History of Australia vol.3: The Beginning of an Australian Civilization 1824-1851* (1973) 152-156.

[7] 4 Geo. IV c. 96.

[8] Third Charter of Justice, 13 October 1823, *HRA* Series 4, vol. i, 509.

[9] See Chapter Four for a detailed history of Van Diemen's Land.

[10] *New South Wales Act 1823*, s.1.

[11] Third Charter of Justice, above n 8, cl. 10. This clause in part states that 'the said Court shall not admit any Person to act in any or either of the Characters aforesaid, who hath been, by due Course of Law, convicted of any Crime, which, according to any Law now in force in England, would disqualify him from appearing and acting in any of Our Courts of Record at Westminster.'

The *New South Wales Act* and Third Charter of Justice overtook the existing judicial and governing institutions of the colony by replacing them with newly created bodies that emulated the British constitutional model of government. Legislative, executive and judicial powers were to be divided and reposed in separate institutions.[12] These changes marked the beginning of a gradual curtailment of the Governor's autocratic powers, and accommodated the colony's steady march towards self-government.[13]

A legislative council was created, consisting of the Governor and five to seven colonists nominated by the British Government. It was a parliament of sorts, but subject to severe restrictions. The Legislative Council was not an elected body, and only the Governor could initiate legislation. Even the Governor's powers were subject to veto by the British Crown.[14] However, the existence of the Council did finally provide the colony with a legitimate statutory basis to promulgate and enact its own laws.[15] At the very least, it provided a check against the otherwise arbitrary powers of the Governor. Moreover, as the decades wore on, the Council was to become elected and increasingly more representative of the populace.[16]

The colony also received the security of the increased regulation of the Governor's executive powers. Orders were made to create an Executive Council in 1825.[17] This Council consisted of government officials appointed by the Crown, and the Governor was to consult the Council in matters of an important nature, and act on the Council's advice, except in emergency situations.[18]

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[12] By dividing governmental powers between the Legislature, Executive and Judiciary, a system is created whereby each arm of government theoretically provides a check and balance to potential abuses of power by another arm of government.

[13] Initially the Governor still retained much of his autocratic power. However, subtle changes marked the beginning of a curtailment of these powers, for example the power of the Chief Justice to veto any proposed new law on the grounds that it was repugnant to the laws of England. See below for further details.

[14] For further detail, see A.C. Castles, *An Australian Legal History* (1982) Chapter 7.

[15] Prior to the creation of the Legislative Council, there had been queries raised in several quarters as to the Governor's power to make local laws that were repugnant to the laws of England. Both Jeffery Hart Bent and Ellis Bent raised concerns that governors were abusing their powers. Judge Advocate Ellis Bent in particular expressed concern about Governor Macquarie's arbitrary law-making powers, and voiced his opinion in a letter to Earl Bathurst on 1 July 1815, *HRA* Series 4, vol. i, 122.

[16] In 1842, provision was made in the *Australian Constitutions Act* for two thirds of the Legislative Council to be elected. Barristers formed an important part of the new Legislative Council, which will be discussed in further detail later.

[17] See Governor Darling's Commission and General Instructions, Bathurst to Darling, 14 July 1825, *HRA* Series 1, vol. xii, 18. Also, 16 July 1825, *HRA* Series 1, vol. xii, 99.

[18] For further information, see Castles, above n 14, 131-2.

A newly constituted Supreme Court provided for the final arm of government, the judiciary. Up to three judges could be appointed to the Bench at any one time, although only one judge was initially appointed. The Court's jurisdiction was expanded to consist of all pleas (civil, criminal or otherwise), as would fall within the jurisdiction of the English courts of King's Bench, Common Pleas and Exchequer.[19] Equitable jurisdiction was also bestowed on the court.[20] In addition, the Supreme Court was to exercise supervisory jurisdiction over lower courts established in the colony by the *New South Wales Act.* These included the Court of Quarter or General Sessions, and Court of Requests.

The Court of Quarter or General Sessions was established to try criminal matters of a less serious nature, and justices of the peace were to preside.[21] The Court of Requests was established to hear minor civil suits involving sums less than 10.[22]

Certain key elements remained unchanged under the *New South Wales Act* and the new Charter of Justice. Civil appeals were still vested in the Governor, who headed the Court of Appeals.[23] Appeals to the Privy Council were allowed where the amount involved was more than 2000.[24]

The system of trying cases using a military or naval jury also remained unchanged as far as the operation of the Supreme Court was concerned, much to the dissatisfaction of the emancipists, who viewed the denial of the right to serve as jurymen as an attack on their status.[25] However, the *New South Wales Act* and the Third Charter were silent on the use of

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[19] *New South Wales Act 1823* s. 2. The Supreme Court was authorised to deal with common law matters, which in England had been dealt with by three separate courts. The Court of Exchequer evolved in the 12th century, and dealt with financial matters. The Court of Common Pleas dealt with 'common pleas' between suitors. The King's Bench developed in the 13th century, and by the 17th century it played a key role in administrative law, controlling and supervising the actions of inferior courts and the actions of government officials.

[20] *New South Wales Act 1823* s. 9. The Supreme Court had the same equitable jurisdiction as vested in the Lord Chancellor of Great Britain. See Castles, above n 14, 136-140 for further detail.

[21] In England, the Courts of Quarter or General Sessions were created in the 14th century to try serious criminal offences. When they met for their quarterly sessions, they convened as the Court of Quarter Sessions, and if they met in between times, convened as the Court of General Sessions.

[22] *New South Wales Act 1823* s. 20.

[23] *New South Wales Act 1823* s. 15.

[24] Under the Second Charter of Justice of 1814, the minimum value of the amount litigated had to be 3000 before an appeal to the Privy Council was allowed, whereas this was lowered to 2000 under the Third Charter of Justice.

[25] In criminal cases, juries of seven commissioned officers of the armed services were to be empanelled as triers of fact. The Act did envisage the introduction of civilian jury trial, but further directions had to be made by His Majesty in Council before this could occur. These directions were to be a long time coming, and are the subject of further discussion later in this chapter.

civilian juries in the Court of Quarter or General Sessions, and experimental juries were soon tested in this forum, leading to an overhaul of the jury system.

While the new institutional regime demanded refinement it was to remain the blueprint for the government of New South Wales. In time, the Third Charter of Justice also became a model for the administration of the other Australian colonies.

In 1824, the *New South Wales Act* and the Third Charter of Justice introduced a new and instant skeleton for the bodies of government. It was the role of the judicial and executive officers of the colony to give those bodies flesh. The first Chief Justice of the new Supreme Court of New South Wales, Francis Forbes, performed much of that work. The reconstituted Supreme Court was formally opened on 17 May 1824, when Francis Forbes was sworn in as Chief Justice.

Francis Forbes and the New Supreme Court

Forbes was raised in Bermuda and trained as a barrister in England. Prior to his appointment in New South Wales, he served as a judge in Newfoundland. Forbes has been described as an astute administrator with an acute legal mind.[26] As Roger Therry, a fellow barrister and judge, observed of him, 'Forbes possessed judicial qualities of a high order – imperturbable calmness of temper, acute discrimination, and a thorough acquaintance with legal principles.'[27]

Forbes played a pivotal role in establishing the day-to-day running of the Supreme Court, and was responsible for drafting and implementing its rules and procedures.[28] Unlike his predecessors, Chief Justice Forbes enjoyed the benefit of advocates to run both the prosecution and defence of matters without the need to perform inquisitorial functions from the Bench. The days of military justice were at an end, and Forbes' role was purely judicial.

Francis Forbes was a staunch opponent of the claims of emancipist attorneys to practise. He assisted in drafting the *New South Wales Act 1823* and the Third Charter of Justice, and fully

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[26] For further biographical detail on Francis Forbes, see C.H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (1968) and J.M. Bennett, *Lives of the Australian Chief Justices: Sir Francis Forbes: First Chief Justice of New South Wales 1823-1837* (2001).

[27] Roger Therry, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (1974) 335.

[28] Francis Forbes to R. Wilmot-Horton, 6 February 1825, reproduced as Letter 35 in Bennett (ed), *Some Papers of Sir Francis Forbes*, above n 1, 57.

supported the introduction of a provision that quashed forever the extension of any right of appearance to the emancipist profession.[29]

A critical aspect of Forbes' role as Chief Justice was to interpret the laws of the colony afresh following the enactment of the Third Charter of Justice. Unlike many of his predecessors, Forbes had the benefit of legal training, and he put this to good use in deciding whether a law was repugnant to the laws of England. Forbes never missed a chance to promote the virtues of the British Empire, but was frequently confronted with English common law principles that were at odds with established practices that had expediently evolved to allow a colony populated by emancipated convicts to function.

For Forbes, that difficulty was most starkly illustrated at the mid-point of his judgeship when a series of disputes arose regarding how far the freedom of the press should be allowed to extend in the colony. In order to determine whether the press should be restricted in its operations, Forbes first had to make an assessment about how far New South Wales' society had progressed along the path towards full civil rights.[30] William Charles Wentworth, one of the new breed of 'respectable' barristers, would be central to the dispute.

William Charles Wentworth

Under the Third Charter of Justice, barristers, advocates, attorneys, solicitors and proctors intending to practise were to be admitted in the Supreme Court of New South Wales.[31] Despite barristers having a separate court roll to attorneys and solicitors, the profession was in reality fused. The inequity in admission rules was illustrated by the fact that local attorneys could be trained in Sydney Town and admitted to practise in the Supreme Court without holding any British qualifications.[32] There was also nothing stopping the attorney from performing the advocacy functions traditionally performed by the barrister.[33]

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[29] See above n 11 for text of clause 10 of the Third Charter of Justice.

[30] See quote at beginning of this chapter, in which Forbes debates the convict character of the colony, and the effect this had on introducing a full range of British civil rights: Forbes to R.Wilmot-Horton, 6 March 1827, CO 201/188, f. 45.

[31] See clause 10 of the Third Charter of Justice.

[32] In 1825, rules were made to the effect that anyone wanting to enter the profession as an attorney was required to serve a period of five years as an articled clerk in the practice of a qualified practitioner, whether it be in New South Wales or Britain. No equivalent rule was made to train barristers in Sydney by apprenticeship. In 1829, it was again clearly re-stated in the Supreme Court that no barrister was to be admitted to the Supreme Court, unless he had prior admission as a barrister or advocate in Britain.

[33] See below for further information on attorneys practising as barristers.

The admission rules as stated in clause 10 of the Charter of Justice were intended to achieve an improvement in the quality and ethics of the advocacy practised in the colonial courts. However, if a local Sydney-Towner aspired to be a part of the 'higher branch' of the legal profession, he had to return to England to train. For all but one man, the expense involved in qualifying as counsel was prohibitive. William Charles Wentworth was that exception and travelled to England to gain qualifications as a barrister. In 1824 he returned to Sydney ready to take advantage of the colony's need for 'respectable' counsel.[34]

Wentworth was far from the proto-type barrister envisaged by the Colonial Office, being of more humble origins. Wentworth's mother, Catherine Crowley, was a convict sentenced to seven years transportation. His father, D'Arcy Wentworth, was a surgeon and leading citizen in the colony, who closely allied himself with the emancipist cause.[35] Wentworth was born during the sea-journey to New South Wales, and was one of the first 'currency lads' in the colony.[36] His upbringing caused him to identify himself as a loyal resident of New South Wales, though paradoxically no less a subject of Britain for being so.

D'Arcy Wentworth was determined to prepare his son to assume a leading role in the new gentry of colonial society. That goal was occasionally at odds with young Wentworth's nature. From the first he was curious and enterprising. At an early age he joined Blaxland and Lawson in an expedition to traverse the uncharted Blue Mountains.[37] William's naturally adventurous and iconoclastic spirit was tempered by a public school and university education in Britain followed by his training at the Bar.[38] However, his natural tendency forever remained anti-authoritarian, with a sense of humour that would cause him strife. Wentworth's short, verse lampoons of major figures in New South Wales society, including John Macarthur, were known but not always welcomed.[39]

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[34] For biographies on William Charles Wentworth, see John Ritchie, *Wentworths: Father and Son* (1997); A.C.V. Melbourne, *William Charles Wentworth* (1934) and Daryl Clifford, *The Legal Career of W.C. Wentworth* (BA (Hons) Thesis, University of Queensland, (1983) Mitchell Library, Q994.402 09/1.

[35] For a biography of D'Arcy Wentworth, see Ritchie, ibid.

[36] Note that the term 'currency lad and lass' refers to the first generations of children born in Australia.

[37] See Gregory Blaxland, *A Journal of a Tour of Discovery across the Blue Mountains, New South Wales, in the year 1813* (1913).

[38] For specific details as to Wentworth's time at the Middle Temple in England, see Clifford, above n 34, 40-46.

[39] Wentworth's lampoon of John Macarthur was described by Ritchie, above n 34, 136, as 'implicitly contrasting the barbarian ancestry of the staymaker with the distinguished family of the Wentworths.' For further details of the lampoon, see *Wentworth Papers*, A4073, f.24, Mitchell Library, New South Wales. Another victim of Wentworth's lampoons was Colonel Molle. His father D'Arcy Wentworth had to admit that his son was the author. The effects of the lampoon were considered worthy of mention in J.T. Bigge's report, above n 5, 148.

As a barrister, Wentworth quickly established his prowess. Despite a busy practice, Wentworth's sense of justice and aspiration to higher social status drove him beyond the forensic forum. He became politically active, eventually leading the emancipist movement. He was a founding editor of the *Australian* newspaper and used his columns as a platform for open criticism of the government.[40] His commitment to attaining legal and political reform as leader of the emancipists was to have a considerable impact on Sydney Town society.

Wentworth's political ideology, conceived under his mother and father's guidance, was firmly shaped by his experiences in England and association with the Macarthur family. Wentworth freely mixed with the high society of Sydney Town, at home and abroad. The taint of his mother's convict origins was generally cured by his father's status as a leading surgeon. When first in London, Wentworth struck up a friendship with John Macarthur who was serving his term of exile following the overthrow of Governor Bligh. He was also friendly with Macarthur's son, John (junior), and aspired to marry Macarthur's daughter, Elizabeth.[41]

In 1819, with the encouragement of John Macarthur junior, Wentworth published a treatise in England outlining his views on the history and politics of New South Wales, with a view to stimulating emigration.[42] Wentworth's apparent sympathy with the outlook of the Exclusives and the Macarthurs was to be short lived.

At the same time that he was publishing his treatise, Wentworth made a very public discovery about his father's past that would forever change the course of his life and politics. D'Arcy Wentworth had been charged for highway robbery, but avoided prosecution by 'voluntarily' leaving England to go to Botany Bay as an assistant surgeon.[43] While not officially a convict, D'Arcy Wentworth's position in society was more akin to that of an emancipist. The elder Wentworth had been part of the group of emancipists who were in Macquarie's favour, but resented by the Exclusives.[44]

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[40] See below.

[41] Wentworth never married Elizabeth Macarthur, due to a dispute between himself and John Macarthur. See Ritchie, above n 34, 167 and 175.

[42] W.C. Wentworth, *A Statistical, Historical, and Political Description of the Colony of New South Wales and its Dependent Settlements in Van Diemen's Land, with a Particular Enumeration of the Advantages which these Colonies offer for Emigration and their superiority in many Respects over those possessed by the United States of America* (1820).

[43] Ritchie, above n 34, 20.

[44] See J.T. Bigge's report vol. 1, above n 5, which contains references throughout that clearly indicate that D'Arcy Wentworth was regarded as being part of the emancipist class, and not the Exclusives.

Wentworth was enraged when politician Henry Grey Bennet cast aspersions on his father's character in a letter to Viscount Sidmouth, which attacked Governor Macquarie's administration and used the example of D'Arcy Wentworth being elevated to the positions of Magistrate and Superintendent of Police despite his involvement in highway robbery.[45] That rage transformed to political zeal when Jeffery Hart Bent, well known for his antipathy towards emancipists, added his own vituperative comments that formed a part of J.T. Bigge's report.[46] Wentworth's views became outspokenly in favour of emancipist rights and forever soured his relationship with John Macarthur. For Macarthur's part, he professed to be 'quite shocked at the delusive Statements' contained in Wentworth's treatise on New South Wales in respect of the alleged profits of breeding fine woolled sheep, and considered the general merits of the book as being 'highly mischievous'.[47]

From the time when he commenced his practice as counsel in 1824, William Wentworth, one of the then only four 'British' advocates in the colony, and the first currency lad with a right of appearance as a barrister in the Supreme Court, aligned himself with the emancipist cause. The likes of Edward Eagar and George Crossley had found a natural successor. His career would continue the emancipist profession's tradition of anti-authoritarian challenge.

Like Forbes, for Wentworth that tradition would be most starkly illustrated in the freedom of expression cases of the mid-1820s; disputes which grew out of the politics of the colony.

The First Legislative Council

John Macarthur, whose exile was relieved by industrious politicking at the British Colonial Office,[48] returned to Sydney in 1817, and was nominated for the first Legislative Council. This was an obvious boon to the Exclusives' cause.

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[45] H.G. Bennet, *Letter to Viscount Sidmouth* (1819), 77-79 and 106-110. Note that Bennet's motive in attacking Wentworth was to highlight the failings of the transportation system. For further details, see Ritchie, above n 34, 177.

[46] Mr Justice Bent to Bathurst, 1 July 1815, *HRA* Series 4, vol. i, 144, 146-7; and Mr Justice Bent to Earl Bathurst, 4 November 1815, *HRA* Series 4, vol. i, 162, 168. Both of these letters were reprinted as evidence in the appendices to J.T. Bigge's report, above n 5, which is when they must have come to William Charles Wentworth's attention. Note that the appendices were published separately and are contained in CO 201, vol. 118-142. See also Ritchie, above n 34, 180.

[47] S. Onslow, *The Macarthurs of Camden* (1973) 320 at 337: Letter from Macarthur senior to his son John, 20 February 1820.

[48] See, for example, Onslow, ibid, 28 July 1816, 263, 264, where Macarthur was assured by the Colonial Office 'that every reasonable facility would be given to enable me and my sons to return to the Colony'. See also

Soon after the constitution of the Council had been announced, Chief Justice Forbes stated his opinion that the councillors were generally well selected, but noted that there was a potentially dangerous party faction within the Council, consisting of the notorious John Macarthur and his son-in-law Dr Bowman.[49] Forbes was well aware of the factionalism within the colony and Macarthur's role as leader of the Exclusives.

Forbes was well placed to observe the politics of the colony, as he was also awarded a seat on the Legislative Council. In 1825, he received nomination to the Executive Council as well, although he expressed himself to be a reluctant member of both bodies, considering that his presence represented an extraordinary merging of the duties of the judiciary, legislature and executive.[50] However, the fact that he alone had the power to certify that a proposed law was not repugnant to the law of England did not dissuade him from accepting the appointments.[51] As Roger Therry pointed out, no man vested of such power 'could expect to escape without being involved in strife'.[52]

Forbes was vocal in his desire to remain above the politics of the colony. Nonetheless, it did not take him long to incur the enmity of both John Macarthur and the new governor, Ralph Darling. Disagreements in the legislature fomented early. On Forbes' reasoning, the conflicts emerged because Darling and Macarthur were Tories, and he was a Whig.[53]

In Macarthur's case, it did not help that Forbes had ordered him to pay substantial costs in a matter that he had brought before his court.[54] True to his old form, Macarthur threatened to impeach Forbes, leaving Forbes to muse that Macarthur and his extended family had not set foot in his house since that fateful day.[55]

Macarthur's letter to Earl Bathurst (undated) which outlined his plans for the wool trade and his future back in New South Wales; ibid 268.

[49] Bennett, *Some Papers of Francis Forbes,* above n 1: Letter 34, 7 November 1824, 45.

[50] Forbes to Wilmot-Horton, 27 March 1827, CO 201/188, f. 124.

[51] Ibid. In this letter, Forbes discussed the power he held to decline to issue a certificate under s 29 of the *New South Wales Act* 1823 if he felt that a proposed law would be repugnant to the laws of England. He referred to this power as the 'veto' power.

[52] Therry, above n 27, 333.

[53] Bennett, *Some Papers of Francis Forbes,* above n 1: Letter 92, Forbes to Sir Richard Bourke, 19 August 1834, 229.

[54] Forbes to Under Secretary of State, 20 May 1828, reproduced at the end of the decision of *R v Macarthur* [1828] NSWSC 6 (13 February 1828), and published online at: <http://www.law.mq.edu.au/scnsw/Cases/1827-28/html/r_v_macarthur_1828.htm>.

[55] Forbes to R.Wilmot-Horton, 20 September 1827, CO 201/188, f. 194.

Forbes and Darling's enmity was of a more professional nature. Forbes thought that the Governor unfairly suspected him of being involved in Wentworth's schemes. Forbes stated his fears that Darling's efforts caused 'it to be believed in England that I am politically opposed to his government'.[56]

Any concerns that Darling had were without foundation. Forbes assiduously avoided association with Wentworth outside the precincts of the court, having already observed for himself that Wentworth and fellow barrister Dr Robert Wardell were 'gentlemen of very respectable legal talents and knowledge, but a little inclining against the powers that be.'[57]

Dr Robert Wardell was Wentworth's most notable contemporary as a barrister. Wardell arrived in the colony, having been persuaded by Wentworth to immigrate to New South Wales and answer the call for respectable barristers. A man of noble birth, Wardell had an impressive academic record, having an LLD from Cambridge. Before travelling to the colony, Wardell served as the editor of a London newspaper, but his true aspirations were in the law.[58]

In 1823, he applied for the position of Attorney General of New South Wales.[59] After failing to obtain the post, he decided to migrate to New South Wales anyway, believing that there would be lucrative opportunities in private legal practice and land speculation.[60] He arrived in the company of Wentworth, and they decided to jointly own and edit a newspaper in the colony.

It was not long before Darling and Forbes were to clash over important legislative issues, and Wentworth, Wardell and their newspaper, the *Australian,* would be the primary cause of the dispute.

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[56] Bennett, *Some Papers of Francis Forbes,* above n 1; Letter 61, Forbes to R.Wilmot-Horton, 7 March 1828, 187.

[57] Forbes to R. Wilmot-Horton, 24 March 1825, CO 210/166, f. 364.

[58] For further biographical detail of Wardell, see Douglas Pike (ed), *Australian Dictionary of Biography 1788-1850,* vol. 2, 'Wardell, Robert', at 570. See also Manning Clark, *A History of Australia vol.2, New South Wales and Van Diemen's Land 1822-1838*, 39.

[59] Wardell to Bathurst, 28 February 1823, CO 201/47, f. 540.

[60] Wardell also anticipated that there was an opportunity to start a colonial newspaper. He met Wentworth in England in 1819, when working at the *Statesman* newspaper, and when they migrated to Australia they reportedly took materials with them necessary to starting a newspaper. See 'Wardell, Robert', *Australian Dictionary of Biography,* above n 58, 570.

The First Business of the Court

When the Supreme Court was opened, its first business was to establish the roll of the Bar of New South Wales. The first name on the roll was that of Saxe Bannister, the Attorney General, who was admitted on 27 July 1824. John Stephen, the Solicitor General, and later puisne judge of the Supreme Court, was second on the roll.

When Wardell and Wentworth added their names to the roll of barristers in New South Wales on 10 September 1824, Wardell took immediate notice of the fact that the legal profession of New South Wales was fused, recognising no distinction between the roles of a barrister and solicitor.[61] Wardell made motion for separation of the profession, requesting that the six gentlemen currently acting as attorneys, solicitors and proctors[62] be compelled to retire from the newly-established Bar.[63]

Not surprisingly, no mention was made of the irony that the 'respectable' solicitors and advocates such as Garling and Moore, who were once so highly sought after to replace the 'scurrilous' emancipist attorneys, were now, in turn, being brushed towards obscurity. That being said, Garling and Moore's reputations were not unassailable. At the height of Macquarie's conflict with Judge Bent, the Governor had described Moore (an agitator who openly supported Bent) as 'a Worthless and Unprincipled reptile'.[64]

Garling, in particular, was more concerned with the principle of the matter than being allowed to act as counsel.[65] As Moore commented, it seemed to have been conveniently forgotten that he arrived in the colony 'at a time when the Colony was most deplorably off for legal skill; and that for ten years past, he (with Mr Garling) had practised as Solicitor, and exercised the duties of Barrister.'[66] After hearing the evidence, Forbes dismissed the motion, but

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[61] Note that Wardell and Wentworth were also allowed to act in the capacity of solicitors as well as barristers. See John Bennett (ed), *A History of the New South Wales Bar* (1969) 34.

[62] Note that the terms 'attorney' and 'solicitor' and 'proctor' were used interchangeably at this time. In order to distinguish the lawyers that practised under the Third Charter of Justice from the earlier emancipist attorneys, I have chosen to use 'solicitor' to describe all of the lawyers who were not trained as barristers in the Inns of Court in England, but nevertheless performed advocacy functions in the courts up until the division of profession. In England, a proctor had the technical meaning of being a person who acted on another person's behalf in civil matters, and in the ecclesiastical courts.

[63] *Sydney Gazette*, 16 September 1824, 2.

[64] Macquarie to Bathurst, 3 April 1817, *HRA* Series 1, vol ix, 329, 330.

[65] *Sydney Gazette*, 16 September 1824, 2 reported Garling's speech to the Court on the issue of Division of the Profession.

[66] Ibid.

commented that he hoped that division of the profession would be achieved in the near future.[67]

Wardell and Wentworth, having no choice but to accept temporary defeat, most likely took advantage of the fact that the profession remained fused and undertook some solicitor work in addition to their functions as counsel. In the first two years of his practice, Wentworth made a handsome profit of over 2500.[68] Wardell also entered into successful private practice.

The Colonial Office may well have regretted its decision not to appoint Wardell as the Attorney General of the colony. Dr Wardell's talents far outstripped those of the newly appointed Saxe Bannister. Wardell and Wentworth both easily out-mastered the Attorney General in their early skirmishes in court.[69]

An exasperated Governor Darling, a staunch supporter of Exclusivist rights, made early comment that Wentworth was a

> vulgar, ill-bred fellow, utterly unconscious of the Common Civilities, due from one Gentleman to another. Besides, he aims at leading the Emancipists, and appears to have taken his stand in opposition to the Government.[70]

As Wardell and Wentworth's criticisms of Darling's government became more vehement, the Governor declared Wentworth a 'demagogue'[71] and suggested that his partner in crime, Wardell, was 'without principle' and, as editor of the *Australian*, wrote up events to suit his purpose.[72]

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[67] *Sydney Gazette*, 16 September 1824, 2. Forbes' reason for dismissing the application for division of the profession was that section 10 of the Third Charter of Justice did not expressly allow for division, in contrast with Indian charters which prescribed for division of that profession. However, on expiration of the *New South Wales Act* in 1827, the chance would arise to make the position on division clearer in the new Act, and Forbes thought that the issue could be then re-examined.

[68] Wentworth's *Miscellanea*, A.1440, Mitchell Library, New South Wales. See also, Bennett, *A History of the New South Wales Bar*, above n 61, 36.

[69] See Darling to Hay, 25 July 1826, *HRA* Series 1, vol. xii, 445, 446 where Darling commented that Saxe Bannister avoided private practice on the pretence that he had no time, when in reality 'he is perfectly aware he has no chance with the Lawyers here, and would not succeed though his time were wholly at his disposal.' Chief Justice Forbes also confirmed Darling's opinion: Forbes to Horton, 15 December 1826, *HRA* Series 4, vol. i, 669, 670.

[70] Darling to Horton, 15 Dec 1826, *HRA* Series 1, vol. xii, 761, 763.

[71] Darling to Hay, 16 Dec 1826, *HRA* Series 1, vol. xii, 765.

[72] Ibid.

Wentworth habitually enraged the Governor by writing 'impertinent' letters in the names of emancipist businessmen on issues such as obtaining land grants. Darling saw Wentworth as giving unsolicited advice that could only lead to trouble. The Governor foresaw that

> these people, being unable to correspond, put themselves, when their interest is in opposition to the Government, into the hands of Mr Wentworth, or some other Lawyer, who avail themselves of the opportunity of insulting the Government.[73]

Yet Darling appreciated that both Wentworth and Wardell were talented practitioners, and recognised that he had been saddled with a string of incompetent legal officers.

Saxe Bannister, who had become increasingly dissatisfied with his salary, was threatening to leave. Darling called his bluff and accepted his resignation in 1826.[74] (Just prior to leaving the colony, Bannister fought a duel with Wardell at Pyrmont, in which shots were fired but neither party was injured.)[75]

Circumstances did not improve for the government. William Henry Moore was appointed acting Attorney General, but was considered inefficient and lazy.[76] James Holland, once the Attorney General of Bermuda, was appointed as the new Solicitor General when John Stephen left that post to become a puisne judge of the Supreme Court. The Governor declared that Holland was not 'capable of expressing himself in an intelligible manner'.[77] Worsening matters, Forbes refused to admit Holland to the roll of practitioners, as he had not qualified as a barrister in England.[78] Holland was pronounced insane in 1827.[79]

The Colonial Office appointed Alexander Macduff Baxter as Saxe Bannister's replacement as Attorney General. Baxter was a drunkard who lived far beyond his means, and a man known to have treated his wife badly.[80] The Governor's concern was that Baxter would also fail in

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[73] Darling to Hay, 6 February 1827, *HRA* Series 1, vol. xiii, 81.

[74] Darling to Hay, 2 September 1826, *HRA* Series 1, vol. xii, 522, 524.

[75] G. Rusden, *History of Australia* (2nd ed 1897) 20.

[76] Darling to Hay, 6 February 1827, *HRA* Series 1, vol. xiii, 81, 82.

[77] Ibid.

[78] Forbes to Horton, 22 March 1827, *HRA* Series IV, vol. i, 703, 709. See also Principal Surgeon Bowman to MacLeay, 10 July 1827, *HRA* Series 4, vol. i, 469.

[79] Darling to Hay, 28 July 1827, *HRA* Series 4, vol. i, 468.

[80] Darling to Hay, 28 March 1831, *HRA* Series 1, vol. xvi, 219, 220.

his official duties, once again leaving the field 'in possession of Mr Wentworth and Dr Wardell, and the Government will be worsted in every Contest'.[81]

Darling's position was, ironically, similar to that of his predecessors who had to contend with the likes of Crossley, whose advocacy outclassed successive Judge Advocates. In Crossley's case, the governors of the time decided to use his talents to their benefit. Not so Governor Darling, who became implacably opposed to any dealings with Wentworth and Wardell. He elected to press the government's advantage by a different means. New South Wales would take legal action against the editors of the *Australian*.

Freedom of the Press

Up until Wentworth and Wardell's arrival, the colony only had one newspaper, the *Sydney Gazette*, which was a semi-official government publication and censored by the Governor. Wardell and Wentworth did not seek permission to publish their newspaper. When the first edition of the *Australian* circulated on 14 October 1824, Robert Howe, the editor of the *Sydney Gazette*, realised that his paper now had competition. He made a successful application to Darling's predecessor, Governor Brisbane, to be released from censorship.[82] The *Monitor*, edited by Edward Hall, entered the fray in 1826 as the colony's third paper.

Governor Brisbane had no real issue with the freedom of the press, believing that releasing the *Sydney Gazette* from censorship benefited the public.[83] Initially, it did not appear to the government that there would be a problem in extending the press the freedom to publish as they wished. The first edition of the *Australian* made its lofty declaration of purpose clear for all and sundry:

> Independent yet consistent – free yet not licentious – equally unmoved by favours and by fear – we shall pursue our labours without either a sycophantic approval of, or a systematic opposition to, acts of authority, merely because they emanate from government.[84]

After Darling replaced Brisbane, the new governor swiftly reached the opinion that Wardell and Wentworth's paper did not live up to its objectives. Darling felt that the proprietors of the

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[81] Darling to Hay, 6 February 1827, *HRA* Series 1, vol. xiii, 81, 82. Darling's fears were confirmed in a later letter where he lamented 'it appears [he] never had a Brief in his life before his arrival here': Darling to Hay, 27 October 1827, *HRA* Series 1, vol. xiii, 565.

[82] Brisbane to Bathurst, 12 January 1825, *HRA* Series 1, vol. xi, 470, 471.

[83] Ibid.

[84] *Australian*, 14 October 1824, 2.

Australian and other papers in the colony had abandoned impartiality, stooped to the level of the licentious, and were undeniably railing against the government.

Darling openly expressed the antagonism that he felt towards the editors of the *Australian.* Chief Justice Francis Forbes considered the emerging question carefully. Forbes' dilemma lay in finding the balance between two opposing but legitimate principles. While he sought every opportunity to introduce 'the free institutions of our glorious common country', he felt that an 'unrestrained press is not politic or perhaps safe in a land where one half of the people are convicts, who have never been free men'.[85] Yet Forbes acknowledged that the other half of the population was free and thus was entitled, 'as of birth-right, to the laws and institutes of the parent state'.[86]

Saxe Bannister, as Attorney General, was in accord with Darling over the issue of freedom of press, and eventually became so enraged by Wardell's conduct that he refused to associate with him in official government business or private functions.[87] Both the Governor and Attorney General initially contemplated a libel prosecution. However, there was confusion between Bannister and Darling regarding who held the power to recommend the prosecution.[88] For a long time nothing was accomplished. Forbes pressed his view that it was the Attorney General's responsibility to police libellous publications and initiate appropriate prosecutions, but Bannister refused to act without Darling's advice.[89]

Darling chose instead to address the question through the legislature. The Governor introduced two bills, similar to statutes successfully enacted in Van Diemen's Land, designed to control the press by imposing a licence to publish newspapers and imposition of a stamp duty. Under the licensing law, the Governor would have the power to forfeit the licence if seditious or libellous material was published. Forbes, however, saw both laws as a dangerous threat to free expression. Sitting in the Legislative Council, he refused to certify the first six clauses relating to licensing of the newspapers, and thought the Stamp Duty Act, although passed, was invalid. Forbes maintained that remedies were available to curb the licentious press under the English laws of libel, if only Bannister used his powers to prosecute.[90]

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[85] Forbes to R. Wilmot-Horton, 6 February 1827, CO 201/188, f. 26.

[86] Ibid.

[87] Darling to Bathurst, 24 July 1826, *HRA* Series 1, vol. xii, 437.

[88] Forbes to Horton, 6 February 1827, *HRA* Series 4, vol. i, 679, 682.

[89] Currey, above n 26, 207.

[90] The *Licensing Act* was passed as 8 Geo. IV c. 2, on 27 April 1827. It still regulated the operations of the

In the meantime, Wardell and the other editors, Hall and Howe, continued their attacks on the government and its personnel unabated. Legislative Councillor John Macarthur considered himself to be a victim of newspaper libel. In his customary style, he was at one stage in concert with the editor Howe to use the *Sydney Gazette* as a medium to denigrate the *Australian*. When that campaign did not succeed to Macarthur's satisfaction he officially complained to Darling that Howe, as editor of the *Sydney Gazette*, had also libelled him. Macarthur threatened to 'destroy' Howe, but Darling, despite his own battles with the press, was inclined to overlook whatever was written about Macarthur.[91] Darling, like many others, considered Macarthur the root cause of dissension in the colony and decided that he could fare for himself. As Darling commented,

> if one man by his intemperance and another by his *wrongheadedness* render themselves obnoxious, and lay themselves open to the animadversions of the Press, the Government surely is not bound to make their quarrels its own, and implicate itself by defending them.[92]

Soon, Darling was made the subject of scandals reported in newspaper articles, and action was taken. In 1827 Wardell was charged three times with criminal libel; twice for articles published in the *Australian*, which attacked the character of Darling.[93] Several trials were held, and initially Dr Wardell represented himself. At Wardell's final trial, Wentworth conducted the defence. Wardell was acquitted each time, raising procedural defects in the prosecution's case in the first instance, and then having the good fortune of two successive military juries being dismissed, as they could not reach a unanimous verdict.[94]

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newspapers of the colony, but did not go as far as Darling would have liked, as Forbes removed the first six clauses which he felt violated freedom of speech. The *Stamp Duty Act* was initially certified by Forbes, but had not specified an amount of Stamp Duty to be imposed. When the Bill was read again in the Legislative Council, in Forbes' absence, a duty of four pence was inserted and some amendments made to the bill as certified by Forbes. The Act was passed but Forbes, on hearing that it was not the version he had certified, had doubts as to its validity. His view was eventually supported by the Colonial Office, which disallowed the Act and said that a duty of four pence on each newspaper was too high a duty to be levied for the purpose of mere revenue. See Murray to Darling, 1 January 1829, *HRA* Series 1, vol. xiv, 356, 357-8. For more information on Forbes' view that Bannister should initiate prosecutions for libel, see Currey, above n 26, Chapter XIX.

[91] See Darling's account of the episode in Darling to Hay, 1 May 1826, *HRA* Series 1, vol. xii, 253, 254.

[92] Ibid 256-7.

[93] See articles published in the *Australian*, 3 August 1827, 2 and 25 May 1827, 2 (where Wardell wrote as 'Vox Populi'.)

[94] The first prosecution was led by Moore, the acting Attorney General. Procedural defects were raised, and Moore did not attempt to re-instigate the prosecution. The second prosecution was led by Baxter, and Wardell conducted his own defence. The majority of the jury were apparently in favour of finding Wardell guilty of libel, but could not achieve a unanimous verdict. The same scenario occurred in the third prosecution, where Wentworth represented Wardell. After the failure of the third prosecution, Darling gave up on Wardell, but successfully pursued editors Hall and Howe. For a report of the cases, see *R v Wardell (No 1), (No 2) (No 3) and (No 4)* at <http://www.law.mq.edu.au/scnsw/cases 1827-28/html/r_v_wardell>.

Significantly, one of the defences raised during Wardell's final trial on 22 December 1827, was that the military jury nominated by the Governor to hear the case might not be impartial. The basis of the defence was an incident that occurred at the Turf Club, of which the Governor, Wentworth, Wardell and other prominent officers called as military jurymen at Wardell's trial were members.

On 9 November 1827, the Governor declined to attend a function at the Turf Club, and the club's members reportedly took the opportunity to make remarks personally offensive to him, including toasting him to the tune of 'Over the hills and far away'.[95] Darling, hearing this, promptly resigned from the club, suspended Moore from his position as Crown Solicitor until further notice, dismissed John Mackaness from his position as sheriff, and informed all officers and persons employed by the Government that membership of the Turf Club was inconsistent with their duty to the Government.[96]

Forbes and James Dowling, the new puisne judge, dismissed the objection that the military jury might not be impartial, but the point had been well made and Wardell once again defeated the charge of libel, securing a verdict of not guilty.

Edward Hall and Robert Howe, the proprietors of the *Monitor* and *Sydney Gazette* respectively, were not so lucky. Both editors were found guilty of libel on several occasions. Hall spent more than three years in total in gaol, and was heavily fined.[97] In retrospect, Wardell was fortunate that he was not successfully prosecuted, as his articles were undoubtedly defamatory. At the time, however, it was marked down as a decisive victory against the tyranny of the government, and a resounding and embarrassing defeat for Darling and the Exclusives.

Half of the barristers in New South Wales had literally been on trial for presenting, in and out of court, positions contrary to the will of the Governor. Less than ten years before, the power of the Governor had been nearly absolute. Wardell's acquittal was an early vindication for freedom of political expression. It was also a declaration of the judicial branch's right to

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[95] For an account of the incident, see article in the *Monitor,* 15 November 1827, 6 and Clark, *A History of Australia* vol. 2, above n 58, 78-79.

[96] Darling to Goderich, 14 December 1827, *HRA* Series 1, vol. xiii, 642. See also Government Order No. 43, *HRA* Series 1, vol. xiii, 646.

[97] Bennett, *A History of the New South Wales Bar*, above n 61, 38.

properly review and curtail the actions of the Executive in suppressing a New South Wales resident's rights. The cases were the first steps toward a free and independent press in Australia, and a vital confirmation of the essential public role of the advocate in achieving such important democratic rights.

Trial by Jury

One important corollary of the Wardell trials was that the spotlight was once again on the issue of trial by jury. Although Wardell had been acquitted, the fear that a jury linked to the Governor might not be free of bias was a legitimate one. While Wardell's problem was not as great as the problems faced by those being judged by a military jury composed of New South Wales Corpsmen in the days of Bligh, it was nevertheless another argument in favour of civilian jurymen with no links to the government of the colony.

Wentworth and Wardell had achieved their object of calling to attention the unjust tensions between the government-backed Exclusives and victimised emancipists, but tangible changes were still needed if any return was to be realised for their efforts. Trial by jury would be such a return.

Civilian juries were being convened in the Courts of Quarter Sessions by 1824. Emancipists were excluded from the list of jurors.[98] However, the emancipists, buoyed by the reports of the successful introduction of jury trial, used this as their platform to agitate for jury trial in the Supreme Court.[99]

With the *New South Wales Act 1823* due to expire in 1827, both the Exclusives and the emancipists recognised that the jury question would most likely be answered in the new Act. Both factions renewed their attempts to put their case before the Colonial Office.

Wentworth chaired numerous public meetings on the issue. On 26 January 1827, a petition was raised calling for a legislative assembly of at least 100 members elected on manhood

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[98] The Attorney General, Bannister, advised the magistrates who convened the Court of Quarter Sessions that emancipists were ineligible for jury service. Acting on this advice, the magistrates published a list of jurors that excluded all emancipists. The *Australian* criticised the magistrates for bias on 28 October 1824, 2. See David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) 182.

[99] For an example of the apparent success of the jury trial, see letter from the Magistrates to Governor Brisbane, 6 October 1825, which was printed in the *Australian,* 6 October 1825, 3. The magistrates reflected favourably on their experience of jury trials, and considered that the colony was now in a state to have jury trials extended to the Supreme Court.

suffrage, trial by jury and taxation by representation.[100] Edward Eagar, the former emancipist attorney now residing in England, undertook to present the emancipists' claims to serve as jurymen to the Colonial Office.[101] Unfortunately for the emancipists, the Exclusives also had an able representative in England, in the guise of John Macarthur junior who had obtained the ear of senior Colonial Office officials.[102] Governor Darling also sent his private secretary (who was his brother-in-law), to present his anti-emancipist views to the Colonial Office.[103]

Unfortunately for the emancipists, the new Bill for the administration of the colony that was put to the English Parliament set their cause back further. The *Australian Courts Act 1828* [104] abolished trial by jury in Quarter Sessions until such time as it was introduced in the Supreme Court.[105] The Supreme Court judges, however, were given the discretion to allow jury trial in civil cases on the application of either party, although this was of limited operation.[106]

The *Australian Courts Act* left it to the New South Wales legislature to make laws on the composition of juries. Forbes had advised Darling in 1828 that expirees (convicts whose sentences had expired) were legally eligible for jury service.[107] A Bill to regulate the constitution of juries in civil cases in the Supreme Court was put before the Legislative Council. When the Bill was debated, Macarthur was one of the councillors who opposed the inclusion of emancipists in the jury lists, holding to his views of exclusion. Ultimately it was determined that emancipists who had received a pardon were eligible for jury service, but those whose sentences had simply expired were not.[108]

Any further extension of jury trial was stalled until Governor Darling returned to England, and was replaced by Governor Bourke. He was a self described Whig, and was more

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[100] See report of meeting and text of petition in the *Australian*, 27 January 1827, 2.

[101] Clark, *A History of Australia vol. II*, above n 58, 81. Eagar called himself 'Agent' of the 'Emancipated Colonists'. See Eagar to Wilmot, 25 February 1823, *HRA* Series 4, vol. i, 429.

[102] Clark, ibid. Note that John Macarthur junior was John Macarthur's son, who lived in England at the time.

[103] Darling to Hay, 10 June 1827, *HRA* Series 1, vol. xiii, 417.

[104] 9 Geo. IV c. 83.

[105] Section 7.

[106] Section 8. Note that the first civil jury trial was *Hall v Rossi and Others*, 16 March 1830, <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/hall_v_rossi_and_others_1830>. Justice Dowling pronounced that the introduction of jury trial now 'places the Judges of this Court upon a proper constitutional footing with their fellow subjects in the sacred Temple of Justice.'

[107] Forbes to Darling, 19 January 1828, *HRA* Series 1, vol. xiii, 738.

[108] *Juries Act 1829*, 10 Geo. IV, No. 8. The disqualification provisions were contained in sections 4 and 5, which provided, in part, that men who were attainted of treason or felony or convicted of infamous crime, unless pardoned were ineligible for jury service, as were those convicted again after the expiration of their sentences.

receptive than Darling had been. Bourke, who had been given instructions by the King in Council to further advance the issue of jury trial,[109] immediately became an ally of Francis Forbes.

Governor Bourke approached the issue through a series of piecemeal reforms designed to gradually breakdown resistance in the Council. In 1832, trial by jury in civil cases was allowed when the Supreme Court ordered it. In criminal cases it was even more limited, applying only where the Governor or member of the Executive Council had an involvement or interest in the proceedings, or where the personal interest or reputation of a military or naval officer was at stake.[110] This effectively ended the perennial problem of bias in the military-based jury system. Emancipists who had not been pardoned, but whose sentences had expired were now eligible for jury service.

Bourke, still dissatisfied with restrictions on the right to trial by jury in criminal cases, wanted all remaining impediments to an unfettered jury system removed. With him were 4000 colonists who signed a petition demanding civilian criminal juries presented to the House of Commons in 1832. Finally, in 1833 legislation was passed extending jury trial to all criminal cases, although the defendant still had a right to request a military panel.[111] It was not until 1839 that the option of the military panel was abolished in criminal cases, and not until 1844 that an unrestricted trial by jury system in civil cases was implemented.

By 1844, the Exclusives had abandoned the fight to prevent trial by jury, and had to finally concede defeat on the issue of excluding emancipists from the jury lists.[112] A fully-fledged jury system was in operation, emulating the British system of jury trial, and wealthy emancipists jealously guarded their right to serve on a jury.

The recognition of a general right to participate in the jury system also served as a symbolic acknowledgement of equal citizenship for emancipists. To Wentworth it must have been a

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[109] Order in Council of King George IV made on 28 June 1830 authorised the Governors of New South Wales and Van Diemen's Land to extend jury trial in consultation with the Legislative Council. See Enclosure to letter from Murray to Darling, 17 July 1830, *HRA* Series 1, vol. xv, 588.

[110] *Juries Act 1832*, 2 Will. IV, No. 3. A jury of 12 civilians would be empanelled.

[111] *Juries Act 1833*, 4 Will. IV, No. 12.

[112] James Macarthur, John Macarthur's son, had previously published a book that warned against giving emancipists a place on civilian juries, as it was tantamount to giving them the 'political power' to which they aspired. See *New South Wales: Its Present State and Future Prospects* (1837).

proud achievement, but he did not stop long to reflect on the victory. His next ambition was of a grander scale: the right to representative government.

Move for the Division of the Legal Profession

During the period in which the extension of jury trial was gradually put in train, the legal profession had not been standing still. Forbes, overworked and in rapidly failing health, was finally given assistance in 1826, when the Supreme Court bench was expanded to two judges. The first puisne judge was John Stephen, who was also to have a battle with his health. Shortly after Justice Stephen's appointment, the bench was expanded to three when James Dowling was appointed as the second puisne judge. Like his brother judges, Dowling also became plagued by illness, probably due to the poor working conditions at Court and an extremely heavy workload.[113] When Justice Stephen retired in 1832, John Burton joined Forbes and Dowling on the bench during an important period for the development of the New South Wales legal profession.

In 1829, five years after Chief Justice Forbes declined to grant Dr Wardell's motion for division, the issue of the separation of the legal profession was again raised. Up to that point, the profession had remained fused, recognising no formal demarcation between the privileges and obligations of barristers and solicitors.

While Wentworth and Wardell were commonly recognised as leaders of the Bar in New South Wales, they remained dissatisfied that theirs was a position in name only. New South Wales did not support an independent institution of barristers organised along English lines, and they were indignant of the fact that a solicitor could practise as counsel in New South Wales, even if they had not been trained in the English Inns of Court.

When the *Australian Courts Act 1828* was passed, the barristers of the colony recognised that the Act opened the door for a re-consideration of the issue of division of the profession.[114] Unlike Wardell's previous attempt, the move for division now ostensibly had the joint support of those working predominantly as counsel and the judiciary. A proposed rule was read out in

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[113] See Bennett, *A History of the New South Wales Bar*, above n 61, 37 and 63. See also John Bennett, *Lives of the Australian Chief Justices: Sir James Dowling: Second Chief Justice of New South Wales 1837-1844* (2001).

[114] 9 Geo. IV, c. 83. Section 16 of the Act provided that the Supreme Court now had the power to make rules for 'the admission of attornies, solicitors and barristers'.

Court on 26 March 1829. It was mooted that the four senior solicitors be invited to elect the branch of the profession to which they would belong.[115] Those presently making a living predominantly as advocates would otherwise obtain a monopoly over that work.

The proposal was debated in the Full Court on 1 June 1829. While the barristers were, predictably, unanimously in favour, the thirteen solicitors of the colony, headed by Moore, signed a formal protest.[116] The solicitors' protest was to no avail, as the decision of the Court made on 5 September 1829 was in favour of separation of the profession.[117]

Chief Justice Forbes, and Justices Dowling and Burton, all having been trained in the English Inns of Court, felt that the time was right to formalise an independent Bar. The only concession made was that the solicitors currently in practice could elect to join the barrister's branch of the profession.[118] The rule was sent to England for approval.

The solicitors' position was easy to understand. In essence, those opposed to the division of the profession felt that the 'present system works well, and should therefore not be disturbed.'[119] Their chief concern was that it did not make sense to divide the profession in a colony the size of New South Wales, as economically it would drive up the cost of litigation.[120] Sustaining the infrastructure of an independent Bar would be costly, and the few newly recognised barristers would have a monopoly and could drive up their fees on brief.[121] The cost of appraising counsel of the facts of a case would prove duplicative, and the already low numbers of professionals available to try causes in the courts would be further reduced. The public would yet again face curtailed options when selecting legal representation.

Francis Forbes, while publicly supporting the division, had apparently had private concerns about disrupting a system that worked efficiently to that date with so little cause.[122] The senior barristers, however, had no doubt as to the personal gain that would follow a successful division of the profession. Those involved in the motion were Baxter (the Attorney General),

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[115] For a more detailed account, see Bennett, *A History of the New South Wales Bar*, above n 61, 44.

[116] *Sydney Gazette,* 8 September 1829, 2; *Australian*, 9 September 1829, 2.

[117] Bennett, *A History of the New South Wales Bar*, above n 61, 44-45.

[118] Ibid, and see *Australian*, 7 October 1829, 3. Also see Chief Justice Forbes to Bourke, 28 October 1833, *HRA* Series 1, vol xvii, 260.

[119] *Sydney Gazette*, 4 June 1829, 2.

[120] Ibid.

[121] The *Sydney Gazette* feared that the cost of actions would rise by at least 10; 4 June 1829, 2.

[122] J.M. Bennett, *A History of Solicitors in New South Wales* (1984) 52.

Sampson (the Solicitor General), Wardell and Wentworth. The number of persons acting predominantly as counsel had remained static at four members for many years, but by the late 1820s was beginning to expand. The new barristers, John Mackaness,[123] Sidney Stephen[124] and W.H. Kerr, also supported the division.

In reality, at the time when the Supreme Court sent to England for authority to divide the profession, there was only a handful of members of the Bar practising exclusively as counsel in New South Wales.[125] It was little wonder that the solicitors who also acted as advocates feared an unfair monopoly was about to be imposed on them.

By this time, Dr Wardell had retired from his role as editor of the *Australian* in order to devote more time to private practice. Francis Stephen, the son of Justice John Stephen and brother to the barrister Sidney Stephen, assumed the editorship in partnership with George Nichols, another solicitor. For the first time, the *Australian,* a publication initially run by barristers, fell into the control of solicitors whose natural sympathies rested with the 'lower branch' of the profession. Francis Stephen and Nichols, like many other solicitors in the colony, saw the potential creation of the independent Bar as little better than an exercise in pigs feeding at the trough.

Meanwhile, before the Justices' recommendation could become effective, it required approval in England, and practitioners who were predominantly solicitors continued to appear in the courts.

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[123] John Mackaness had been admitted to the Bar in 1827, shortly after his dismissal as sheriff for his involvement with Wentworth and Wardell in the Turf Club incident. For further information on the Turf Club incident, see above in Chapter Three, 'Freedom of the Press'. Mackaness was not deterred by Darling's animosity, and became a loyal acolyte in Wentworth's political manoeuvres. When he was accused of assaulting the acting Solicitor General, William Foster, he asked Wentworth to defend him. He was convicted of assault, but no sentence was imposed. See Carter and Foster to Colonial Secretary MacLeay, 25 January 1828, *HRA* Series 1, vol. xiii, 746. See also *HRA* Series 1, vol. xiii, note 177.

[124] Sidney Stephen, one of the many sons of Justice John Stephen, also joined the Bar. He was to continue the long line of Stephens in the legal field, but did not remain in New South Wales. He had a legal career in Van Diemen's Land, and then travelled to Port Phillip to try his luck as an advocate there. He later became a judge in the Supreme Court of New Zealand. See Chapters 4 and 5 for more information on his career.

[125] Note that the majority of barristers were employed as Crown officers. Wentworth and Wardell were a rarity in that they never held a government legal office. Other barristers such as Carter, Kerr and Mackaness later joined them in private practice.

Two Notable Deaths and a Retirement in the Colony

It took over two and a half years for the rule to be considered in England and a response made known. In the interim, the Bar lost its two most notable leaders, and a worrisome litigant.

Wentworth retired from private practice in order to manage the property that he had inherited, and to devote more time to his political activities. His achievements as an advocate were marked by the Justices of the Supreme Court extending him permission to wear a silk gown.[126] Wentworth thus became a de facto New South Wales' King's Counsel, before the institution of senior counsel was formally recognised in the colony.

The tradition of King's Counsel was firmly established in England, as an acknowledgment of the superior talents and service of capable, senior barristers. The tradition had not been extended to the colony because of the small size of its profession. However, by unofficially recognising Wentworth as King's Counsel, the path was cleared for the introduction of a formal system recognising senior counsel in Australia. Ultimately, it was another sign that the colonial profession was moving still closer to the traditions of England.

Despite his retirement from day-to-day practice, Wentworth remained at the forefront of politics in New South Wales, pressing for his next ambition: Responsible Government. In 1835, Wentworth founded the Australian Patriotic Association, whose membership included large landowners, wealthy emancipists, and lawyers such as Mackaness and the Stephen brothers. Wentworth and Mackaness were appointed vice presidents, and Justice John Stephen, now retired, was the secretary. The Association was short lived, and was disbanded in 1841, but it provided a rallying point for those supporting constitutional reform and intensified the split between the Exclusives and emancipists.[127]

Wentworth's own political platform was becoming more ambiguous, as his economic concerns took precedence over the Exclusive/emancipist debate. Land and wealth served to dull his long-cultivated radical edge.[128] On most economic issues, his views were in concert

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[126] *Sydney Gazette,* 12 February 1835, 2. The *Gazette* reported Wentworth's achievement with approval. No formal appointment was made by letters patent. See also Bennett, *A History of the New South Wales Bar,* above n 61, 236.

[127] For further information, see D. Fifer, 'The Australian Patriotic Association 1835-1841' (1987) 73(3) *Royal Australian Historical Society Journal* 155-172.

[128] Wentworth had inherited his father's extensive property, and also purchased new properties such as Vaucluse, in a bay on the south side of Sydney Harbour.

with the conservative faction of Exclusive landowners. For example, Wentworth came to advocate that it would be disastrous to the colony's economy if convicts were no longer sent out as free labour.[129]

Dr Wardell's loss to the Bar was unplanned and more keenly felt. On 7 September 1834, he came across runaway convicts while riding on his property at Petersham. After interrogating them, he was shot fatally in the chest. He had an extremely successful career, evidenced by the fact that during his time in New South Wales he amassed over 30,000 through his professional pursuits and land speculations.[130] Chief Justice Forbes presided at the trial of murderers Tattersdale and Jenkins, and both men were sentenced to death.[131] Jenkins, on hearing his fate, proudly stated that his actions had relieved the colony of a 'tyrant',[132] but the legal profession and general citizenry of New South Wales were greatly saddened by the loss of one of the colony's leading public men.[133]

John Macarthur died of natural causes on 11 April 1834. He was pronounced clinically insane prior to his death,[134] and his wife Elizabeth took him to Camden in 1833 where he lived the remainder of his life in seclusion.[135] It was a sad and undignified end for a man who had invested so much of his energy and fire in the establishment of colonial New South Wales. Politics and law in the colony would not see his like again. However, Macarthur's son James remained in New South Wales, having taken up his father's mantle as leader of the Exclusives.

The Rule is Approved

With the loss of Wentworth and Wardell, the early 1830s saw a changing of the guard at the New South Wales Bar. In 1829, Roger Therry arrived in New South Wales to practise as a

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[129] A draft petition arguing for the maintenance of transportation appeared in the *Australian* on 28 September 1838, 3 and 2 October 1838, 1. Wentworth was also the main speaker at a public meeting on 8 February 1839. See Fifer, above n 127, 168.

[130] Therry, above n 27, 351.

[131] R v Jenkins and Tattersdale (1834) at: <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_jenkins_and_tattersdale_1.htm>. See also Currey, above n 26, 467-469.

[132] See reports in *Sydney Herald*, 11 September 1834, 2, 10 November 1834, 2 and 13 November 1834, 2.

[133] A tablet in St James' Church, King Street, now memorialises Wardell's life.

[134] Governor Bourke noted that there was a vacancy in the Legislative Council due to Macarthur being 'pronounced a Lunatic'. See Bourke to Goderich, 27 March 1833, *HRA* Series 1, vol. xvi. 760.

[135] Clark, vol. 2, above n 58, 210.

barrister. Therry was an Irish Catholic, and had concerns that his career would be impeded by his religion.[136]

He was initially appointed as Commissioner of the Court of Requests, and served as Attorney General from 1841 to 1843. He eventually became Resident Judge in the Supreme Court at Port Phillip where, providently, the majority of the Bar was Irish. His success in Port Phillip led to his appointment as a puisne judge on the Sydney bench from 1846 to 1859. Therry was also to have an active political career, being the elected member for Camden for many years.[137]

The arrival of John Hubert Plunkett in 1832, to assume his appointment as Solicitor General, and later Attorney General, was fortuitous for Therry. Therry and Plunkett shared the bond of being Irish and Catholic. Sidney Stephen, fellow barrister, unkindly suggested that they shared more than the religious bond, intimating that Plunkett always favoured Therry when he doled out the Crown briefs.[138] Plunkett's arrival also signified a change in fortunes of the beleaguered Governor's office. Governor Bourke was to finally get the competent legal assistance that Darling had craved but been denied.

Shortly after Plunkett's arrival, the colony received important news from England.[139] On 1 November 1834, Chief Justice Forbes informed the legal community that the rule securing division of the legal profession was finally legally operative.[140] Confusion resulted, as the colony's solicitors had virtually ignored the rule and continued to appear in the courts as advocates.

Francis Stephen and George Nichols began publishing articles in a scathing and vociferous campaign in opposition to the division of the legal profession.[141] The Justices of the Court

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[136] Therry, on being recommended by Governor Gipps for the position of Solicitor General, felt impelled to send a letter to Lord John Russell stating his concerns that his religion would be a bar to his advancement, and included certificates of competence from Forbes, Dowling and the Legislative Council; Therry to Russell, 11 March 1840, *HRA* Series 1, vol. xx, 572-573.

[137] See Bennett, *A History of the New South Wales Bar*, above n 61, 41. See also Therry's *Reminiscences,* above n 27.

[138] Plunkett insisted that Stephen take his charges against his conduct to Court. The three judges dismissed Stephen's claims as being 'frivolous'. See *Sydney Herald,* 20 February 1837, 2 and 3 April 1837, 2, and J. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales1832-1869* (1973) 22-23.

[139] The letter approving the division of the profession is dated 6 June 1834: Rice to Bourke, *HRA* Series 1, vol. xvii, 453.

[140] *Sydney Herald,* 6 November 1834, 2.

[141] See, for example, *Australian,* 10 February 1835, 2; 13 February 1835, 2.

were accused of favouring the needy, briefless barristers in England over the people of the colony. There was still no facility for New South Welshmen to train as barristers in Sydney, and the cost of that education in England continued to be prohibitively expensive. A man schooled in New South Wales in the 1830s could train and qualify as a solicitor, but without considerable wealth and a long voyage to England and back, he could not represent his countrymen in Court.

On 10 February 1835, the *Australian* published an even more vehement and controversial article directly criticising the Justices of the Supreme Court.[142] On the first day of Term, 16 February 1835, the Court directed the Attorney General to instigate proceedings for contempt on the grounds that Stephen and Nichols were abusing their duty as officers of the court. Stephen admitted to writing the article, and Wentworth came back from retirement to defend him. Wentworth's principal line of defence was that the judges had been libelled in their individual capacity, but lost the argument.[143] The Court found Stephen guilty of contempt and fined him 50.[144]

Coinciding with the contempt proceedings was a challenge made by five solicitors, including Francis Stephen, who on the first day of Term in February 1835 moved the Supreme Court for admission to the Bar. Therry (somewhat ironically) appeared for Thomas Rowe, an English solicitor with a large clientele from the lower ranks of society, and presented the case that Rowe's substantive practice had been as an advocate in the criminal courts prior to the division of the profession.[145] Edward Keith acted as the advocate for the other solicitors concerned. Keith pressed his argument that the rule dividing the profession was a departure from *The Australian Courts Act 1828*.[146]

Keith's submission was that, among other things, section 16 of the statute conferred power to make rules only regarding admission to the profession, and could not be used to *ex post facto* disqualify those already admitted to practise. Keith also averred that the rule should not be upheld on policy grounds, including that there were not enough barristers to cope with the

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[142] *Australian,* 10 February 1835, 2.

[143] Bennett, *A History of the New South Wales Bar*, above n 61, 50.

[144] *R v Stephen & Nichols* (1835) 1 NSWLR 244.

[145] *Australian,* 24 February 1835, 2.

[146] *Australian,* 17 February 1835, 2; *Sydney Gazette,* 17 February 1835, 2.

volume of work available,[147] and that it would be unfair suddenly to implement a rule that had been considered a dead letter for many years.

The court bluntly dismissed Keith's arguments and the solicitors' motions, reaffirming the validity of the rule. Thomas Rowe was not allowed to elect to join the Bar. Reasons responding to the arguments against division were not published.

As Francis Stephen said in disbelief, 'it never could have been the intention of the legislature to confer the power by reference and innuendo, to deprive one half the members of the profession here of their income.'[148] Yet there was precedent for doing just that. Only fifteen years before, the emancipist profession were denied a livelihood that they had been permitted to earn for thirty years, also at the stroke of a pen.

The First Meeting of the Bar

The first meeting of the Bar as a group was held in the Attorney General's office on 13 November 1834.[149] The Bar numbered ten; there were a total of forty lawyers in New South Wales. Only three were in private practice, being Wentworth, Carter and Kerr, and at the time Wentworth was phasing himself out of private practice. The remaining barristers were Crown officers, like Plunkett, and Therry. The Supreme Court had left the people of New South Wales with two barristers to represent them.

At the meeting resolutions were made to adopt a code of ethics and conduct which accorded with English custom. For example, members of the New South Wales Bar would only accept briefs referred to them by a solicitor, and where the fee was paid immediately to the clerk on delivery of the brief.[150]

Inns of Court, based on English tradition, were not established. Barristers were still being trained in England, and it was most likely seen as unnecessary to establish an Inn of Court in Sydney Town when all barristers had advantage of the real English Inns back 'home'.

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[147] Affidavit of Keith, 16 February 1835, Admission Papers, New South Wales State Archives, 9/5136, 9.

[148] *Australian*, 24 February 1835, 2.

[149] *Australian*, 14 November 1834, 2.

[150] Ibid.

Criticism of the changes continued unabated. The *Australian,* temporarily changing its style of criticism, published a tongue in cheek article in which one of its writers claimed to have stumbled upon a drunken celebratory dinner for all ten members of the Bar. The members made laudatory speeches, and, while no names were mentioned, statements were reportedly made which emphasised the superiority of the Bar. One member, apparently tired of the derogatory statements being made about attorneys, stated that many attorneys were '*almost* as talented and honest as some of *you, my learned friends*'.[151]

Those opposing the division of the profession realised that the division was permanent, and their hopes of reversing the rule slowly but surely dwindled. The opponents of division could easily be forgiven for believing that their arguments had not been properly considered. The independent Bar had been established with a minimum of consultation, had seemingly deprived New South Wales of sufficient barristers in private practice to serve the Court or meet the public's needs, and there was no attempt of any nature on the part of the Colonial Office, or the Bench of the Supreme Court, to justify the basis and timing of the foundation of the Bar. Not even the argument that the colony was simply following England for England's sake was put forward, however unsatisfactory such a submission might have been.

However, for the new members of the Bar it was a positive, beneficial and necessary step forward. Their arguments lauded the great, ethical and procedural advantage of recognising the higher branch of the legal profession, and tended to ignore economic realities. Roger Therry was convinced that when he arrived in the colony prior to the separation of the profession, although there were men of talent in both branches, 'the profession generally was not in high estimation'.[152] After the division, it 'has been already mentioned as a very serviceable measure for promoting the better administration of justice'.[153] Therry proudly reported that the New South Wales Bar was now modelled 'on the practices and observances of the English Bar'.[154]

Justice Dowling was also typical of those who supported the division of the profession, and acted with open disdain towards solicitors with the impertinence to appear as counsel. Dowling was aghast when his son wrote to him from England stating his intention to garner

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[151] 'Adjourned Meeting of the Bar' by 'a Reporter', *Australian*, 18 November 1834, 2.

[152] Therry, above n 27, 347.

[153] Ibid.

[154] Ibid.

experience in an attorney's office, rather than moving straight to the Bar.[155] When his son also revealed his friendship with a law clerk, Dowling snobbishly lectured him that association with the clerk would not 'give you that sort of *stamp*, which I deem necessary to your successful *currency* in the profession of a Barrister, which imports freedom from the sordid sympathies of an Attorney's office in the East End'.[156]

Whatever the debate over its early merits, the institution of an independent Bar in New South Wales was established in 1834. Those who might be suspected of energetically supporting the Bar's formation in order to create an oligopoly of barristers earning stratospheric fees found themselves in a paradise short-lived. Word of the division of the profession rapidly reached England, where there were too many counsel and not enough work. Soon moves were also afoot which would open the door for the training of barristers in Sydney. The New South Wales Bar was about to undergo a rapid expansion.

Life as a Barrister in the 1830s and 1840s

In 1837 Francis Forbes retired as Chief Justice of the Supreme Court, finally succumbing to ill health. James Dowling was elevated to the position of Chief Justice, and was to witness a sudden expansion of the Bar.

Between 1836 and 1839, eighteen barristers were entered on the roll of the Bar of New South Wales. Richard Windeyer was one who had heard about the rule dividing the profession, and travelled to New South Wales to take advantage of it.[157] The emancipist attorneys were never acknowledged as the colony's first advocates, let alone as members of a legal profession or a Bar. Many others followed in Windeyer's wake, including Alfred Cheeke, Redmond Barry, John Darvall, William A'Beckett, Samuel Raymond, William Montagu Manning and Edward Broadhurst.[158]

Roger Therry, however, was quick to point out that New South Wales was no place for a British barrister who had failed in England and wanted to try his luck in the colonies.[159]

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[155] Letter to J.S. Dowling, 25 July 1840, quoted in John Bennett, *Lives of the Australian Chief Justices: Sir James Dowling*, above n 113, 137.

[156] Letter to J.S. Dowling, 18 June 1843, ibid 138. (Emphasis in original).

[157] Bennett, *A History of the New South Wales Bar*, above n 61, 54.

[158] See Bennett, ibid, for biographies of each above-mentioned barrister.

[159] Therry, above n 27, 348.

Therry may have defended his position by claiming a reference to the quality of counsel already in place in the colony, though it could equally be argued that the members of the early Bar did their best to discourage competition and retain market control.

Redmond Barry was an immigrating barrister who found it difficult to break into Sydney society. He was admitted to the Bar of New South Wales on 19 October 1839, but lacking local connections, took a long time to get introductions within the Government and with the Chief Justice of the Supreme Court. Almost immediately after he was admitted to the Bar, he left to embark on a successful career in Port Phillip. The Port Phillip colony was in a state of development more akin to that of Sydney Town in the early 1800s and, it seems, there were fewer closed doors for barristers there.[160]

Many of the barristers in Sydney Town had to be resourceful in order to obtain briefs, and, despite the inherent difficulties, some chose to service clients who had a case in the circuit courts in country towns. Areas such as Bathurst and Maitland, for example, were only accessible by horseback in the 1830s. Therry described the Maitland route as taking three days on horseback on a rough country road if no mishaps occurred, and he said that at the end of each day's riding, voyaging counsel were dependent on, and at the mercy of, the hospitality of their countrymen. On one occasion while en route to Bathurst, Therry was held up by bushrangers, and on another his horses were unable to ascend the steep slope of Mount Victoria, and he faced spending the night in a severe hail storm until a chance encounter with bullock-drivers rescued him from inauspicious accommodations.[161]

Ultimately, one of the most historically important circuits would be that of Moreton Bay, which would give rise to the colony of Queensland. It was initially a part of New South Wales' territory, but was remote from the laws of Sydney Town in more ways than one. It was not to be a circuit that the barristers and judges of Sydney Town enjoyed undertaking.

Moreton Bay

In the early 1820s, with the penal settlement of Van Diemen's Land rapidly heading towards independence from New South Wales, it became clear that alternatives were needed for places

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[160] See A. Galbally, *Redmond Barry: An Anglo-Irish Australian* (1995) Chapter 3. See Chapter 5 of this thesis for a detailed analysis of the Port Phillip Bar.

[161] Therry, above n 27, Chapter VII.

of secondary punishment.[162] Norfolk Island was still the place where the most depraved convicts would be sent, but other sites were required.[163] In 1823 Governor Brisbane, on instructions from Earl Bathurst, sent his Surveyor General, Lieutenant John Oxley, to examine a number of potential sites within the New South Wales geographical boundary, including Moreton Bay.[164]

Oxley's report was so favourable that Governor Brisbane considered that the isolated tropical setting of Moreton Bay would be suitable for free settlement,[165] but ultimately its distance from other settlements was an attraction which persuaded Brisbane to open the region as a purely convict settlement in September 1824.[166] Initially, 29 convicts were transported to the region on the ship *Amity*.[167] In November of the same year Governor Brisbane, Chief Justice Forbes, John Macarthur Junior and Francis Stephen were all part of the viceregal party visiting the area.[168] Initially the settlement was based at Redcliffe Point, but was then relocated to the present site of Brisbane, and in 1827 the site was named Brisbane.[169]

Unlike Botany Bay, which was opened up to free settlers as well as being a penitentiary, free settlers were not allowed within a radius of 50 miles of Moreton Bay without prior permission.[170] The consequences of not allowing free settlement severely retarded the growth of the area. Military personnel and storekeepers were virtually the only non-convict members of the population. With soldiers being required to undertake additional duties such as teaching, it is little wonder that other vital services, such as law enforcement, were neglected.[171] The low population count also ensured that there was no need for an extensive

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[162] Britain was concerned that transportation was no longer a deterrent to crime. Earl Bathurst wanted to prevent convicts 'who are in a state of Punishment from a Participation is those comforts and advantages that seem to be inseparably connected with the progress of colonization'. Moreton Bay was one the sites identified by J.T. Bigge as being a possible site for future transportation. See Bathurst to Brisbane, 9 September 1822, *HRA* Series 1, vol. x, 791.

[163] Governor Brisbane commented that Norfolk Island was difficult to access, thus unsuitable for frequent transportation. See Brisbane to Bathurst, 21 May 1825, *HRA* Series 1, vol. xi, 603, 604.

[164] Bathurst to Brisbane, 9 September 1822, *HRA* Series 1, vol. x, 791.

[165] Brisbane to Bathurst, 3 February 1824, *HRA* Series 1, vol. xi, 215 and Enclosure, Oxley to Goulburn, 10 January 1824, *HRA* Series 1, vol. xi, 215, 219.

[166] *Sydney Gazette,* 21 October 1824, 2.

[167] See J. Steele, *Brisbane Town in Convict Days* (1975) 1–13.

[168] *Sydney Gazette,* 11 November 1824, 1 and 9 December 1824, 2; *Australian*, 9 December 1824, 4.

[169] Steele, above n 167, 1-13.

[170] Governor Brisbane was determined that Port Macquarie should be opened to free settlers first, leaving Moreton Bay to be exclusively a convict settlement for the time being. See Brisbane to Bathurst, *HRA* Series 1, vol. xi, 604.

[171] E.R. Wyeth, 'Education in Queensland, 1955', reproduced in J. Steele, above n 167, 331.

legal system to be established, with the convict settlement reaching its height of a mere 1200 people in 1831.[172]

Law and order was ostensibly administered from Sydney Town, but the distance between the settlements meant that enforcement of the law through the court system was impractical. In reality, the Commandant of the settlement was judge and jury of all crimes committed, and ensured all punishment was carried out. Lieutenant Henry Miller was the first Commandant of the settlement,[173] followed by Patrick Logan in 1826. Logan was notorious for his brutal administration of justice, in particular his vicious flogging of the convicts.[174]

The *Australian*, observing the problems of law enforcement in the far-flung settlements, considered that 'it is a positive absurdity to make laws for a community, which is totally unknown to the legislators'.[175] Governor Darling did finally make the effort to visit Moreton Bay in 1827, and expressed his concerns at the location of the settlement, which made access difficult.[176] He was, nevertheless, happy with Logan's administration, and considered him to be abundantly qualified for the job.[177]

Logan was murdered in 1830 either at the hands of the natives or his convict servants. The convicts reportedly 'manifested insane joy at the news of the murder, and sang and hoorayed all night, in defiance of the warders.'[178] Captain James Clunie took over as Commandant of the settlement until 1835, at which time the numbers of convicts were dwindling rapidly.

By 1837, there were only 300 convicts in Moreton Bay, and the cost of running the penal settlement suggested that it should be shut down.[179] In 1839 the Legislative Council in New South Wales passed an Act enabling the transfer of the convicts out of Moreton Bay,

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[172] See Steele, above n 167, xxi-xxii. Note that in 1825 there were a mere 45 people in the settlement. See 1825 census statistics in *HRA* Series 1, vol. xii, 318.

[173] See Instructions from Governor Brisbane to Lieutenant Henry Miller, Archives Office of New South Wales, Ref. 4/3794.

[174] For a biography of Patrick Logan, see Charles Bateson, *Patrick Logan: Tyrant of Brisbane Town* (1966). For another view of Logan, see Steele, above n 167, 59-63.

[175] *Australian,* 8 June 1827, 2-3.

[176] Darling to Goderich, 26 September 1827, *HRA* Series 1, vol. xiii, 522 , 523.

[177] Darling to Murray, 10 April 1829, *HRA* Series 1, vol. xiv, 700.

[178] Extract from A. Meston, 'Queensland Anecdotes', reproduced in Steele, above n 167, 150. For official notification of Logan's death, see Captain Clunie to Colonial Secretary MacLeay, 6 November 1830, *HRA* Series 1, vol. xvi, 58.

[179] Bourke to Glenelg, 5 November 1837, *HRA* Series 1, vol. xix, 150.

signalling the beginning of the end of the region's convict days. By May 1839, only 94 convicts remained.[180]

By 1842, there were more squatters than convicts around the Moreton Bay area, but the legal system remained under the firm hand of Commandant Gorman. The Commandant's powers were still attuned to the needs of a penal settlement, regardless of the fact that free settlers were amassing around the boundary of the penal settlement.[181] The court was placed under challenge, however, with the arrival of an unnamed barrister in the Moreton Bay district.

Animosity between the squatters and the Aborigines was running high after a series of sheep stealing operations by the local Aborigines, and the killing of a group of shepherds. The superintendent of one station, 'Cockey' Rogers, was eventually accused of shooting the natives. The lead-up to the incident occurred in 1841, when a group of Aborigines under the leadership of 'Moppy' had slaughtered 70 sheep and were preparing to barbeque them back at their camp. Rogers and his followers immediately went to Moppy's camp, disturbed the barbeque, and discovered an ex-convict, George Brown, fraternising with Moppy's people. 'Cockey' Rogers made a citizen's arrest of Brown under the pretext that he was inciting the Aborigines to slaughter sheep and the shepherds.[182]

Unfortunately for Rogers, Brown had won the favour of Commandant Gorman because of his bush skills, despite his habit of absconding from the settlement. Brown immediately set about incriminating 'Cockey' Rogers, and Gorman issued a warrant for Rogers' arrest. To Gorman's displeasure, a barrister made the unprecedented move of volunteering to defend Rogers.[183]

The rudimentary criminal justice system had not had to deal with the issue of representation for the accused before this case. Gorman and two magistrates comprised the bench, and Gorman spent the first afternoon of the case in early 1842 arguing that lawyers should not be

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[180] Steele, above n 167, 263.

[181] See Stephen H. Roberts, *History of Australian Land Settlement 1788-1920* (1968) 170-1.

[182] For further details of the trial of Rogers, see John Campbell, *The Early Settlement of Queensland* (1875) 14-15. See also Steele, above n 167, 299-301. Note that John Campbell, also known as 'Tinker' Campbell, was a squatter in the 1840s in Queensland, who wrote articles about his experiences of the early settlement of Queensland. These articles, which represent some of the earliest known memoirs of the time, were initially published in the *Ipswich Observer* and *West Moreton Advocate* (dates undisclosed), and then published together as a pamphlet in 1875.

[183] Ibid.

involved in the hearing. The other two magistrates overruled Gorman's decision and Rogers was acquitted after detailed examination of 17 witnesses.[184]

With the justice system being forced to adapt to the needs of the free settlers, it was clear that the power was slowly being shifted from the Commandant's hands to those of the squatters who were demanding a voice within the legal system. Prophetically, Gorman left Moreton Bay soon after Rogers' trial, and a proclamation was made officially declaring the end of Moreton Bay as a penal settlement.[185] Settlers were advised that they were at liberty to take up permanent residence in the district of Moreton Bay should they wish to do so,[186] and the first official sale of land took place in 1842.

Brisbane Town became the focal point of activities in Moreton Bay, but the district grew slowly. In recognition of Moreton Bay's new status as a free settlement, the position of Commandant was replaced with that of a Police Magistrate. Captain William Wickham performed the role from 1842 until 1857.[187]

The Court of Petty Sessions was established, consisting of Wickham and two lay magistrates, who administered the law from the chapel of the old convict barracks. By 1847 the Court of Petty Sessions was extended to outlying districts such as Ipswich in recognition of the fact that the population of 2257 settlers in the district were well dispersed. Ordinary cases such as drunkenness and theft were dealt with in Petty Sessions, and in 1846 the jurisdiction of the court was extended to include the recovery of debts under 30. More serious criminal cases and civil cases were still sent to Sydney Town for trial in the Supreme Court.[188]

The inconvenience of travelling to Sydney Town was well recognised by the locals, but it was not until 1850 that the first circuit sitting of the Supreme Court of New South Wales was held in Brisbane Town. Justice Therry held the first circuit in 13 May 1850, consisting entirely of criminal matters,[189] and Chief Justice Alfred Stephen held the second in November 1850.

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[184] Ibid.

[185] *Proclamation* of 10 February 1842 published in *Government Gazette,* 11 Feb 1842, 249; *Australian* 12 February 1842, 1-2.

[186] Announcement by Colonial Secretary, ibid.

[187] See biography of Wickham in Pike (ed) *Australian Dictionary of Biography,* above n 58, 597.

[188] Castles, above n 14, 222-4.

[189] For an account of the circuit sitting, see *Moreton Bay Courier,* 18 May 1850, 2-3 and 20 May 1850, 1-2 (extraordinary edition). See Therry's account in his *Reminiscences,* above n 27, 5-6 and 287-9. See also Castles, ibid 224-227.

Circuit courts were then held twice a year until 1856. The Sydney judges regarded the Moreton Bay circuit as an inconvenience, and the local residents craved a more permanent form of justice.[190]

After much agitation, a Bill was introduced to the New South Wales Legislative Council in 1852 to provide for a resident judge in Moreton Bay. While the settlement of Port Phillip had achieved its bid for a resident judge, Moreton Bay was not deemed a suitable case for such a measure and the bill was defeated. Instead, a barrister was to be appointed who would act as 'Circuit Judge for the Circuit District of Brisbane'.[191] This measure was only invoked once, with Sydney barrister Purefoy filling the role.[192] By and large the Sydney Supreme Court judges continued to fulfil the role. In May 1855, everyone's nerves were frayed, with Chief Justice Stephen being shaken by a rough passage in the steamer, and the locals being upset because the judicial party had arrived four days late, inconveniencing the parties, witnesses and jurors.[193] Stephen was not, however, in favour of creating a resident judge's position, as he felt that the unfortunate judge would stagnate, and his legal abilities would remain underused.[194]

In 1855 an Act was passed appointing a fourth judge to the Supreme Court of New South Wales, who was to perform the position of Resident Judge of Moreton Bay.[195] Yet as the *Moreton Bay Courier* pointed out, little changed in reality as the new judge, barrister Samuel Milford, simply performed three circuits a year and spent the remainder of his time in Sydney campaigning for a position on the Sydney bench.[196]

In 1857 another Act was passed which finally created the Supreme Court of Moreton Bay.[197] Milford was again the judge, but he was still doing his best to return to Sydney and reporting on the lack of work to be done in the Supreme Court.[198] It was not until the appointment of

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[190] See 'Observation on the Present and Probable Future Wants of the Colony in Connexion with the Administration of Justice', 15 May 1855, (1855) *Votes and Proceedings of the Legislative Council,* vol. 1, 687.

[191] *Moreton Bay Judge Act 1852*, 16 Vict. No. 41.

[192] For further information on the 1852 version of the Moreton Bay Judge Act, see B.H. McPherson, *Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure* (1989) 9-10.

[193] *Moreton Bay Courier*, 26 May 1855, 2.

[194] 15 May 1855, 'Memorandum of Chief Justice Stephen', (1855) *Votes and Proceedings,* above n 190, 687.

[195] *Moreton Bay Judge Act 1855*, 19 Vict. No. 31.

[196] *Moreton Bay Courier,* 24 November 1855, 2, and 9 March 1859, 2.

[197] *Moreton Bay Supreme Court Act 1857*, 20 Vict. No. 25.

[198] Milford opened the Supreme Court on 15 April 1857. See *Moreton Bay Courier,* 18 April 1857. He described the settlement as a 'torrid Siberia' in the *Sydney Morning Herald,* 18 February 1859, and complained about

Alfred Lutwyche as judge of the Supreme Court in 1859,[199] and Moreton Bay's separation from New South Wales to become the colony of Queensland, that the legal system really became properly established.

As was the case in Van Diemen's Land and in other Australian colonies, the establishment of the Supreme Court represented a turning point in the administration of the law.[200] Each colony in Australia achieved the milestone of a Supreme Court at different times, the decision to grant the advanced legal structure being based on factors such as population numbers, the ratio of convicts to free settlers and the strength of their respective economies.

With the arrival of Lutwyche, the number of Supreme Court sittings doubled. More work was created for barristers and solicitors, which provided the catalyst for the formation of a legal profession in Queensland. Prior to Lutwyche's appointment, Queensland was the only Australian colony that by 1856 did not have a recognisable legal profession. Western Australia was the other colony that did not have a Supreme Court until late in the piece, but it had already achieved a thriving legal profession and stable government.[201] Queensland's challenge in the next half of the century leading up to federation was to find its niche within the Australian colonies, and settle its legal and governmental structures.[202]

Relationships Between Members of the Bar

Back in Sydney Town, the problems faced by the Moreton Bay settlement rated little attention. Barristers were more concerned with creating opportunities to fraternise. This was important in giving the Bar a sense of identity, as there was no formal Bar Association. The young barrister Thomas Callaghan recorded numerous social dinners that he attended, and

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the lack of work in his *Judges' Letterbook,* 6 July 1857, Queensland State Archives, SCT/G1. See also McPherson, above n 192, 14.

[199] Alfred Lutwyche was appointed Resident Judge on 21 February 1859. For a biography, see John Bennett, *Lives of the Australian Chief Justices: Sir James Cockle, First Chief Justice of Queensland 1863-1879* (2003). See also McPherson, above n 192, from 15.

[200] For a complete history of Supreme Court of Queensland, see McPherson, above n 192.

[201] See Chapter 6.

[202] While outside the timeframe of this thesis, it is noteworthy that Queensland would, in the twentieth century, be the only State other than New South Wales to have a formally divided legal profession. Queensland barristers would also have a strong presence on the High Court of Australia. In Michael White QC and Aladin Rahemtula, *Queensland Judges on the High Court* (2003) it is noted that Queensland produced three of the Chief Justices of the High Court. The current Chief Justice Gleeson in his foreword at p. vii commented that 'the number and importance of Queensland appointments to the Court may be explained, at least in part, by the strength of the State's long-established and separate Bar.'

commented that, while the speeches made were 'foolish', the 'custom is not a bad one. It generates social feeling and good fellowship.'[203]

However, relationships amongst members of the Bar were not always cordial. One incident of discord occurred during a case in December 1846, in which Darvall and Windeyer were opposing counsel. When Darvall became grievously insulted by Windeyer's comments, he hit him with his brief (a not inconsiderable volume of weighty papers fixed together with ribbon). They were both declared to be in contempt of court, and ordered by the Chief Justice to spend Christmas in Darlinghurst gaol.[204]

Setting aside the occasional overt display of physical animosity, most of the problems within the Bar revolved around the competitive nature of the profession. Thomas Callaghan initially struggled to obtain briefs, and most likely fell prey to professional jealousy. In his diary he disparaged the talents of certain barristers, especially Therry. But, to his credit (though lacking in a certain sense of irony), he acknowledged that there was much jealousy and pettiness amongst the members of the Bar.[205]

The embittered young Callaghan was determined to foster a sense of brotherhood, or at least to promote a good fight worth watching in the absence of regular briefs. Callaghan wrote a letter to the *Sydney Morning Herald* criticising William Wentworth when Mr Cheeke was displaced as Crown Prosecutor.[206] Wentworth, as a member of the Legislative Council, made himself unpopular when he was instrumental in the abolition of several Crown offices in a bid to counteract the effects of the economic depression in the early 1840s. Cheeke was a victim of the reforms.

Callaghan received no support or thanks from fellow members of the Bar, including Cheeke himself, for his attempts to fan the flames of controversy.[207] Thomas Callaghan eventually conceded that he was perhaps too harsh in his criticism of Wentworth, and probably realised that despite the pettiness that went on, the Bar was still a close-knit fraternity. Overtly attacking the public reputation of a colleague could spell the end of a young barrister's career.

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[203] Excerpt dated 31 May 1840; Callaghan's diary has recently been published as: J.M. Bennett (ed) *Callaghan's Diary: the 1840s Sydney Diary of Thomas Callaghan* (2005) 21.

[204] R. Flanagan, *History of New South Wales,* vol. II (1862) 162.

[205] 17 February 1840, *Callaghan's Diary*, above n 203, 5. Therry was described as a 'vulgar shallow person. I do not think that he is a man of more than ordinary intellect, he is certainly by no means a man of talent'.

[206] *Sydney Morning Herald,* 9 January 1844, 2-3.

[207] See entries of 6 January 1844 and 7 February 1844, *Callaghan's Diary*, above n 203, 187.

Another Move to Fuse the Legal Profession, and Legal Education

In 1840 the wisdom of having a divided profession was again raised, this time by George Nichols, editor of the *Australian* and a solicitor admitted in 1833, who had an extensive criminal practice.

Nichols was permitted to appear as an advocate for an accused person in petty sessions, and claimed that his right of appearance extended also to Quarter Sessions. In January 1841 the issue was debated before the Chairman of the Quarter Sessions, Manning, and a bench of magistrates.[208] Ultimately Nichols' motion was lost, although he was allowed to continue to appear as an advocate for clients as an exception to the rule.

The opposite scenario then arose in 1846 when Brewster, a barrister, wanted the right to act as a solicitor. Brewster's motion was raised twelve years after the profession had been divided. When both branches of the profession opposed Brewster's desire to act as a solicitor, he lost the motion. Brewster then sought to amalgamate the branches of the profession through the *Division of the Legal Profession Abolition Bill* of 1846.[209]

By 1843, the structure of the Legislative Council had changed, allowing for elected members in addition to the Crown nominated members. A significant proportion of the councillors were now barristers. At varying times between 1843 and 1856, the barristers Wentworth, Brewster, Broadhurst, Cowper, Lowe, Darvall, Foster, Therry and Windeyer were all members. Plunkett, as Attorney General, and Manning, as Solicitor General, were also members of the Council.

Wentworth, as one might expect, was one of the most active members of the Council. He and the majority of the barristers in the expanded Legislative Council naturally opposed the bill to amalgamate the profession. Ultimately the question was referred to a Select Committee, where the issue was vigorously debated.[210]

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[208] *Australian,* 12 January 1841, 2.

[209] Debates reproduced in *Sydney Morning Herald,* 16 September 1846, 2-3; 25 September 1846, 2-3; 19 September 1846, 2 and 24 September 1846, 2.

[210] *Votes and Proceedings of the Parliament of New South Wales*, 1846 (2), 383-422; 1847 (2), 416-96.

Those who argued for retention of the division of the profession felt that barristers added an 'aristocratical' air to the profession, whose members spent their days in the pursuit of honour, dignity and service to the public.[211] Such lofty ideals could not be maintained in face of fusion with the 'lowly' branch of the profession.

Ultimately the committee recommended that the profession remain divided, but that solicitors should be permitted to appear as advocates at Quarter Sessions.[212] With a clear indication that the legislature stood in favour of an independent Bar, Brewster's bill signified the last serious attempt to revive the fused profession of early New South Wales. The issue was not seriously raised again until 1883. The question of the membership of the Bar, however, required immediate scrutiny.

Reforms in the Education of Barristers

Having determined that the independent Bar should stay, the Committee turned its attention to the issue of the education and qualifications of barristers. The prevailing circumstances were anomalous. Aspiring young barristers in New South Wales were compelled to travel to England to train as barristers in order to obtain a right of appearance in Court, even though the solicitors had admitted locally trained men since 1825.[213]

In 1840 Plunkett, who had championed the establishment of an education system for the colony's youth,[214] was not in favour of the motion to allow barristers to be educated and trained in New South Wales. Plunkett's reasoning was that to allow locally trained barristers admission to the Bar would sully the great English traditions of law. As reported in the *Sydney Herald,* Plunkett opined that

> There is no profession which exercises greater influence over the public than the bar...The bar will of course direct the jurisprudence of the country, which he hoped will always be upon the model of English institutions and in order to properly estimate their beauty, they must be seen in the pure atmosphere of England.[215]

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[211] See L. Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *University of New South Wales Law Journal* 111, 116.

[212] *Votes and Proceedings* (1847) above n 210.

[213] See James Martin's comments, ibid 451. Martin was a solicitor who would eventually become Chief Justice of the Supreme Court of New South Wales. From a solicitor's vantage, he commented on the fact that local attorneys faced stringent admission requirements, whereas British barristers could immediately gain admission regardless of the standard of their training.

[214] See Molony, above n 138, 252.

[215] *Sydney Herald,* 10 October 1840, 2.

Plunkett's views, although not universally accepted, were not seriously challenged until Brewster's Bill of 1846.

In reality, the English system of educating barristers in the Inns of Court was patently inadequate and did not prepare counsel to fulfil the duties of their profession. Jurists such as Blackstone were savagely critical of the conduct of the Inns, which by this time no longer delivered lectures or, according to Blackstone, performed a role remotely resembling education.[216]

Admission to the Bar in England consisted of little more than eating the required number of dinners stipulated by the benchers of the Inn.[217] In view of this, it struck some members of the Legislative Council as ridiculous to put an aspiring colonial barrister through the expense of a journey to England simply to eat dinner.[218]

After long debate, the *Barristers Admission Act 1848* [219] provided for the education of locals in Sydney in preparation for admission to the Bar. Alfred Stephen, who had been Chief Justice of the Supreme Court since Dowling collapsed on the Bench in 1844, was in favour of local training for barristers. He felt that part of their education should incorporate classical instruction; otherwise it would be 'a Bar sadly uneducated; instead of a body of gentlemen, as accomplished and learned as their English brethren'.[220]

Taking into account views of barristers and judges such as Stephen, a balanced education was proposed, with tuition to be given in classics, mathematics, divinity, ethics and moral philosophy.[221] On the legal subjects, there was to be reading for four or five years in Real Property, Equity, Common Law, Evidence, and Pleading and Practice.[222] The Barristers

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[216] See Daniel Duman, 'The English Bar in the Georgian Era', 87 and 91 in W. Prest (ed) *Lawyers in Early Modern Europe and America* (1981). See also introduction of this thesis, which discusses Blackstone's lecture of 1758, in his capacity as Oxford's first Vinerian Professor of English Law, in which he laments that the Inns of Court had ceased to be schools of law, and encouraging Universities to bridge the gap in legal training.

[217] Ibid.

[218] See Martin, 'From Apprenticeship to Law School' above n 211, 116.

[219] 11 Vict. No. 57.

[220] *Votes and Proceedings* (1847) above n 210, 469.

[221] Ibid 490.

[222] Ibid 494.

Admission Board was established, comprising three judges of the Supreme Court and two practising barristers. Candidates were to be examined in Greek, Latin, Mathematics and Law.

However, despite provision for local admission to the Bar, barristers from Britain continued to be admitted regardless of the quality of their education.[223] In fact, British barristers were still given preference. Locally trained barristers remained ineligible for appointment as Supreme Court judges until 1861.[224]

Responsible Government

On 1 August 1840, transportation of convicts to the colony ceased,[225] and in 1841 a census of the colony was released which showed that 80% of the population was now free. In Sydney, only 7.6% of the population were classified as bond, and only 12.1% as emancipist.[226]

With the end of transportation, the British Colonial Office became more receptive to Wentworth's calls for self-government. The end of any vestige of transportation also saw the cessation of the long-standing division between Exclusives and emancipists. By 1841, Governor Gipps pronounced that:

> A rapid improvement in the Social and Moral condition of the People is very evidently taking place. The old distinction between Free Settlers, and persons who have been Convicts or are of Convict Origin, is still preserved, but the virulence with which it was formerly marked, is very happily subsiding.[227]

Even James Macarthur was prepared to let go the long-lived Exclusive/emancipist animosity that had obsessed his father,[228] and in 1842 the *Sydney Herald*, which had long espoused its opposition to the emancipist cause, wrote an editorial advocating the abolition of the 'two castes' division.[229]

The movement towards Responsible Government received its greatest boost after the discovery of gold. Wentworth immediately used this as a further impetus towards self-

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[223] Section 2 of the *Barristers Admission Act 1848*.

[224] Order in Council, 22 May 1840, *HRA* Series 1, vol. xx, 701-2.

[225] Gipps to Marquess of Normanby, 23 November 1839, *HRA* Series 1, vol. xx, 400.

[226] Census published September 1841. See also Molony, above n 138, 39.

[227] Gipps to Russell, 14 September 1841, *HRA* Series 1, vol. xxi, 510.

[228] *Sydney Herald*, 6 February 1841, 2.

[229] *Sydney Herald*, 11 January 1842, 2.

government. The British Government also took notice of the wealth generated by gold, and its implications in the world market. On 15 December 1852, all of the Australian colonies were informed that sudden wealth necessitated self-government, and the Legislative Council in New South Wales was instructed to devise a bill for self-government.[230]

Wentworth was given the responsibility of chairing the select committee that was assembled for the purpose of drafting the bill, but his ideas for self-government in New South Wales differed markedly from other citizens of the colony. Wentworth wanted to create a colonial aristocracy along the lines of England, with hereditary titles to be conferred.[231] This idea was labelled by its detractors as a 'bunyip aristocracy', and was swiftly rejected.[232] Wentworth conceded defeat on the issue, and travelled to England to present an amended draft bill. Responsible Government was conferred to New South Wales in 1856.

Felons, Mutineers and Other Learned Friends

Sixty-eight years after its settlement, New South Wales was transformed. Once a desolate land preferable only to death for Britain's lost men, the colony had burgeoned into a self-governing community worthy of its place in the British Empire.

By the mid-nineteenth century British politicians had argued with near evangelical zeal that Britain owed a duty to increase her dominion, bringing civility and modernity to her primitive international neighbours. Colonialism enjoyed an age of ascension. The Indian sub-continent was the centrepiece of an experiment in social re-engineering. Paternalistic but proud, the British government loftily aimed to educate its colonies and create a society modelled along British lines. The grateful colonies would be better for it, loyal because of it, and willing to trade with the nation to whom they owed so much.

That design was not intended for New South Wales. In 1788, the district surrounding Botany Bay and Sydney Cove was home to an indigenous population, but they were not deemed capable of civilising. Britain recognised no society, community or laws among the Aborigines of New South Wales. No grand plans had been made for the colony's population

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[230] Pakington to FitzRoy, 15 December 1852, CO 202/60; *Sydney Morning Herald*, 12 May 1853, 4.

[231] Report from the Select Committee to prepare a Constitution for the Colony, *Votes & Proceedings of the Parliament of New South Wales*, vol. 2 (1853) 117.

[232] See Manning Clark, *A History of Australia: The Earth Abideth For Ever*, vol. 4 (1978), quoting Daniel Deniehy, 38.

of transported whites either. Only bare provision was extended for the structuring of a new society. Yet New South Wales had grown, rapidly and vigorously, preparing itself for nationhood. Separated from England by a gulf of distance never before known in the history of colonisation, and populated by people without preparation or qualification to survive Australia's unforgiving landscape, the people of New South Wales adapted or died. The colony arose, built by men who adapted and invented in order to survive, because they had no other choice.

It was not a history that was intended to include advocates. Yet the process of transformation that took place during the early settlement of Australia is inextricably bound with the law, its institutions and its servants. In 1788, no advocates were sent out to the colony, but by 1856, an independent Bar had risen in Sydney making a home for thirty-one practising barristers who obeyed the received laws of England according to English customs of practice. By the 1850s, three separate generations of advocates had gained ascendancy in New South Wales: first the unbidden, and often unscrupulous emancipist attorneys; then, a fused profession of attorneys without universal schooling in the British Inns of Court; and, finally, barristers properly qualified according to British law.

Like New South Wales' farmers and engineers, advocates were there from the first, adapting to survive. But unlike the farmers and engineers, the legal fraternity arguably influenced the development of the colony as much as they evolved with it. In a very real sense the history of the journey of New South Wales' advocates from opportunistic, disgraced emancipated attorneys to respectable independent barristers is the history of the colony itself, in microcosm. Often that history was one of exclusion, oppression and unthinking obeisance to British institutions.

In the 1820s, the British Colonial Office and its representatives swept away the rights of the emancipist profession to practise without demonstrable consideration of, or any attempt to preserve, practices that had successfully evolved to facilitate a properly functioning colony. That point is illustrated by the real fears that gripped New South Wales when it appeared that the colony would be plunged into chaos by the re-introduction of felony attaint.

The explanation most frequently cited for the deprivation of the emancipist attorneys' rights was the taint of their criminal conviction. However, no reason was provided for the rejection

of principles established under the advocacy of emancipist attorneys, beyond the recognition that those principles were at odds with the common law of England.

While it is dubious whether the precedent established by Australia's emancipist profession was universally deserving of defence, it is easy to feel that the arrogance with which those early laws and procedures were discarded deprived the colony of some its autonomy, and uniqueness, and may have retarded its progress.

There are echoes of the downfall of the emancipist profession in the process that led to the division of the legal profession in 1834. Again a system had emerged within the colony that was pragmatic, operative and at odds with the prevailing practice in England. The arguments advanced by the profession of solicitors and newspapermen who stood against an independent Bar were logical and forceful in the 1830s. They received no substantial rebuttal but nevertheless failed, excluding yet another community of lawyers from an avenue of practice.

In this instance too, it might be argued that the willingness to follow English tradition, whatever the realities of the colony, lost the colony a chance at a more unique mode of development. But, more than this, the process by which the independent Bar was formed had revealing implications for the culture of the New South Wales legal profession.

The transition from emancipist attorneys to independent barristers, and the decisions that compelled those transformations, reflected a substantial change in the background and character of persons practising law in the colony. That change mirrored the institutional remodelling that occurred between 1788 and 1856. The emancipist attorneys, for all their numerous faults, were broadly representative of the population that they served. Emancipist lawyers were freed convicts providing an advocate's voice to a population constituted by a majority of freed convicts. They lived or died by many of the same forces affecting their clients. It was no wonder that even following the arrival of the respectable lawyers Garling and Moore after 1814, the services of the emancipists were still sought after.

The changes to practice in 1823 introduced attorneys far less linked to the population of the colony. From the 1820s onward the lawyers in practice had increasingly less in common with the population of New South Wales, William Wentworth (perhaps the most successful of their number) being the obvious exception. Legal restrictions on the ability to train as a barrister in the colony cemented this process. The division of the profession in 1834, and the consequent

influx of the unkindly described 'briefless barristers' who were attracted by it, meant that by the time that Responsible Government was granted to New South Wales, its legal profession had more in common with citizens born in Britain than in Sydney.

In the middle 1850s, New South Wales had achieved self-government, but boasted a judicial branch and legal profession represented by British immigrants, with a British outlook. Watkin Tench, who in 1788 had ambitiously mused about the creation of a new 'Empire' in Asia, would not have been disappointed if given the chance to look down on Sydney Town and view the progress made in the years since settlement. Yet to today's eyes those dreams of Empire, shared by so many British subjects in the 1850s, may have come with a sense of the loss. In many ways, New South Wales was a society deprived of the unique opportunity to develop with a profession of advocates born from their own ranks, with the confidence and autonomy to forge laws for New South Wales, heedless of what British traditions might say.

Whatever its past, the independent Bar was a profitable enterprise for those barristers talented enough to exploit its opportunities. Changes were, as always, in the wind. Local Sydney men were finally allowed to train as barristers in Sydney, and were beginning a tradition of home grown practice. The colony had a Supreme Court with wide powers, and jury trial had been fully introduced. The colony was readying itself for the long path towards federation.

Those changes were not confined to Sydney Town. Independent settlements were thriving in Van Diemen's Land, Port Phillip (Victoria), Swan River (Western Australia) and South Australia, each with their own legal profession and institutional history. Many Sydney Town barristers made the decision to move to these settlements to test their fortunes.

Australia's early history may have made no room for advocates, but its path to nationhood was to rely strongly on them.

INTERLUDE

Meanwhile, Back in Britain...

> *Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.*[1]

For Britain it was not only an age of empire, but also an age of exploration and experiment. By the 1830s, the industrial revolution had, for better or worse, wrought its immense changes over Britain's landscape. The industrial age precipitated a mass migration of people to the cities, transforming Britain from an agrarian society to an urban melting pot.[2]

While British society was hungry for the benefits of technology, it was the death knell for many cottage industries. The increasingly efficient use of technology heralded the era of mass production, leading to cheaper consumer goods but unprecedented levels of unemployment. The cities became home to disease, crime levels increased, and people struggled to find their niche in a new world.[3]

While the industrial revolution had the most immediate effect on the lower classes of British society, who struggled to find work and accommodation, the professional middle class was also affected by the massive changes. The legal profession was one such occupation, where unprecedented numbers of people were practising the law, resulting in under-employment for many struggling barristers and solicitors.[4]

Groups of ambitious men, dissatisfied with their lives, asked themselves whether there might be an opportunity waiting for them beyond the smoky, hazy skies of Great Britain. The convict taint deterred many potential free settlers from migrating to New South Wales or Van Diemen's Land, and the Moreton Bay penal settlement expressly precluded free settlers from

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[1] Luke 11:46 (King James version).

[2] There are many texts on the effects of the industrial revolution, but for a general 'documentary' view see Richard Tames (ed), *Documents of the Industrial Revolution 1750 – 1850* (1971).

[3] Ibid.

[4] See Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) Chapter 1 for a discussion on the effects of the industrial revolution on the English Bar and the English colonies. Duman argues that the British colonies, including the Australian colonies, provided employment for English barristers who would otherwise have struggled to gain sufficient work in Britain.

entering the area until 1842. Instead, attention was turned to the unclaimed lands in the south and west corners of the vast new continent in the Antipodes.[5]

In planning their new societies, men analysed their lives in Britain. They pledged to transport with them everything that was noble and refined about British society, but also to discard the unsavoury elements. In their Antipodean Eden, land ownership would be an attainable goal. There would be an opportunity to be a part of the gentry in a new, civilised society that was populated by free men. Crime, the scourge of British cities, would be non-existent, as convicts would not be a part of these new social experiments.[6]

Advocates were, in particular, lured by the idea of playing a role in establishing new societies. On hearing of the colonisation plans for Port Phillip, Western Australia and South Australia, individual advocates who were struggling to make a living on their provincial circuits immediately saw an opportunity for aggrandisement. As they correctly anticipated, the establishment and maintenance of law and order in a new settlement would be a primary concern.

The model societies were expected to have every advantage over New South Wales and Van Diemen's Land; the benefits of careful planning and analysis of the problems experienced in the convict colonies would help to create a structured and ordered society from the outset. Port Phillip, Western Australia and South Australia were settled within seven years of each other, with the colonists all coming from similar cultural and ideological backgrounds. Each colony observed the way in which New South Wales had adapted the English legal system to its unique conditions, and strove to improve on that colonisation blueprint.

Despite these key commonalities between the new Australian settlements, the vast distances between them combined with different geographical conditions and approaches to colonisation meant that they had little in common. Each colony was a unique sociological experiment, and analysis of New South Wales' flaws in colonisation was not enough to ensure survival.[7] This is underpinned by the fact that within years of settlement, both Western Australia and South Australia were on the verge of collapse. Port Phillip, initially proclaimed

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[5] See Chapters 5, 6 and 7.

[6] For further information about the utopian ideals surrounding the new settlements, see in particular Chapters 6 and 7.

[7] See in particular Edward Gibbon Wakefield's principles of colonisation outlined in Chapter 7.

an illegal settlement by the British Government, had to fight for its continued existence as a settlement, and to establish an identity separate to that of New South Wales.[8]

The struggle for survival in each colony tells a different story, but as in New South Wales, advocates were prominent in each case. Law and politics were closely intertwined in the early years of the settlements, and legal personalities played a large role in determining how law and order would be established in each colony. The advocates, perhaps because of their temperament and the skills acquired in the study and practice of law, felt themselves to be particularly suited to a role in the political governance of a new society. They eagerly applied for jobs as judges in the new colonies, or as legal advisers to the Governor. Many advocates who were not afforded the luxury of an official position determined that they would still play a part in the settlements by forming the core of its new legal profession, and the Bar.[9]

Port Phillip, initially a settlement established by residents of Van Diemen's Land, soon became home to a large cohort of Irish barristers. The Irish barristers transplanted British customs and values to the new settlement, and played a significant role in guiding Port Phillip towards becoming the conservative colony of Victoria, and an economic rival to New South Wales.[10]

The colonies of Western Australia and South Australia were planned with the endorsement of the British Government, and were to be utopian havens for the weary British expatriate. Unsurprisingly, the utopian dreams soon evaporated amid the harsh realities of the Australian climate. Their advocates, for better or worse, played a significant role in exposing the fallacies in the idealistic blueprints for the settlements, and ultimately guiding the respective colonies through the difficult settlement phase.[11]

Even Van Diemen's Land, the notorious island of secondary punishment, began to re-invent itself during the 1820s and 1830s as a civilised settlement offering opportunities for free settlers. As its economy began to strengthen, prospects opened up for advocates and the

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[8] See Chapter 5 for Port Phillip's struggle to achieve status as a legitimate settlement.

[9] See Introduction and Conclusion for a detailed comparative analysis of the roles that advocates played in the new colonies.

[10] See Chapter 5.

[11] See Chapters 6 and 7.

growing legal profession assisted in Van Diemen's Land's metaphorical journey towards light and civilisation.[12]

The age-old perception that the legal profession exists merely to capitalise on the burdens of the ordinary man is not borne out by the efforts of the advocates in the new Australian settlements.[13] The colonial advocates immersed themselves fully in the troubles and woes inevitably experienced in the establishment of a new settlement. Occasionally their contributions to colonial politics exacerbated the problems rather than solved them, but their underlying intentions were to benefit the colony as a whole.[14]

Ultimately, these advocates took an enormous chance in leaving their homelands. Regardless of whether the risk they took in sailing around the globe was worth it on a personal level, their efforts undoubtedly left an enduring legacy. They not only established the legal institutions in the respective colonies, but they actively contributed to their colony's development to the point where it could be accorded the privilege of self-government.

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[12] See Chapter 4.

[13] See opening quote at n 1.

[14] See especially Chapter 7.

PART TWO

Van Diemen's Land, Port Phillip, Western Australia and South Australia 1803 – 1856.

In a short time their numbers rapidly increased: importation succeeded importation. Gentlemen 'of the profession' who had originally emigrated from England as settlers, coming armed with attorney certificates, invariably found the prospect of harvest of the law more inviting than that of the land; and so we find that all of them resumed 'the Profession' instantly upon their arrival.

'The Law' by Robert Lathrop Murray, in Volume 1 of the *Austral-Asiatic Review* 1828, 260. Murray is referring specifically to the legal profession in Van Diemen's Land, but his comment could equally apply to the other Australian colonies.

CHAPTER FOUR

VAN DIEMEN'S LAND – THE FORGOTTEN COLONY

1803 – 1856

> *The South-East Coast of Van Diemen's Land...resembles a biscuit at which rats have been nibbling...If the supposition were not too extravagant, one might imagine that when the Australian continent was fused, a careless giant upset the crucible, and spilt Van Diemen's land in the ocean.*
>
> Marcus Clarke, *For the Term of His Natural Life*[1]

The Wild 'South' of Australia

Legends of Botany Bay as a harsh, brutal and lawless land endure as popular Australian folklore; yet the ever-evolving Sydney Town was never a truly lawless society. Its rudimentary legal structure had been provided for before the First Fleet landed on Australia's shores, and, while lawyers had not been considered a necessary part of the new society, its legal infrastructure allowed for the rapid development of a de facto legal profession. Sydney Town was undoubtedly a rough and ready place, but it was never completely beyond the pale of the law.

The early settlement in Van Diemen's Land, however, was not to be graced with an equivalent legal infrastructure. Sydney Town was ostensibly responsible for the administration of law in Van Diemen's Land, with its courts of law charged with the duty to disseminate justice beyond the Bass Strait. Practicalities and human nature intervened; distance and lack of interest in the small settlement ensured that Van Diemen's Land became a forgotten colony. The beauty of the little island, with its rich fertile soil, desolate coasts, and rocky crags appealed as the perfect place for a maximum-security prison. To the new agrarian elite of Sydney Town, Van Diemen's Land was a remote and forbidding place, tucked away at the bottom of the continent almost by mistake, but perfect as a venue where Sydney Town could offload its worst convicts and banish them from memory.[2]

Aside from a few locally appointed magistrates who had only limited powers to punish offences, Van Diemen's Land would be left to struggle for over twenty years without a suitable legal infrastructure. There were no professional legal advocates, for there was no true legal system in which they could work. Cut off from the rest of the world, Van Diemen's

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[1] Marcus Clarke, *For the Term of His Natural Life* (this ed 1970) 94.

[2] See A.C. Castles, 'The Vandemonian Spirit and the Law – Eldershaw Memorial Lecture' (1991) 38 *Tasmanian Historical Research Association* 105.

Land battled to survive for the first two decades of its existence, becoming home to a miscellany of bushrangers, murderers, thieves and frontier men. If the fledgling Australia ever had its version of the American 'Wild West', then Van Diemen's Land fitted that description better than Sydney Town ever did. Yet after two decades of rule by fist and gun, the colony was given the opportunity to embark on a path of law and order remarkably similar to the colonies on the mainland.

It was no coincidence that this emergence from the mire coincided with the provision of a legal infrastructure that the Van Demonians could call their own, and the arrival of professionally trained lawyers. Most of all, change came with the advent of an autocratic Governor who was determined to let nothing impede the efficient administration of law and order on his island.

The story of Van Diemen's Land, however, is not the story of Sydney Town; the marked differences in the legal beginnings of each colony illustrate the vital role that the law plays in the development of an emerging community. This story is also a unique historical comment on the thin dividing line between civilisation and chaos and the importance of laws that hold that frontier.

Van Diemen's Land was still regarded as a convict colony in the 1840s, at a time when the residents of Sydney Town had successfully put their convict days behind them. Despite the convict yoke, the free settlers of Van Diemen's Land were determined to shake off the lawless past and finally place their colony on the map. Remarkably, they were successful in achieving Responsible Government at the same time as the colony of New South Wales in 1856.[3]

The First Settlement at Port Phillip

Buoyed by the success of Sydney Town, the British Government and settlers alike soon turned their sights to taming other parts of the vast, unruly wilderness of Australia. While John Macarthur and other free settlers had already begun exploring the land that lay beyond Sydney Town by the turn of the nineteenth century,[4] the British Government had set its sights

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[3] Frank Welsh, *Great Southern Land: A New History of Australia* (2004) xxxii, notes that 'one particularly striking characteristic of Australian history is the speed of development...For the first generation the settlements in New South Wales and Van Diemen's Land were unequivocal penal colonies, with representative civil institutions dating only from the 1820s, yet a mere thirty years later those colonies were self-governing societies where democratic constitutions were well in advance of those in Britain.'

[4] See Part One.

further afield, intending to establish new settlements using convict labour. It was contemplated that new boatloads of convicts would be diverted to the new settlements, and Port Phillip (in what would later be the colony of Victoria) was earmarked for this purpose.[5]

The Lieutenant Governor of the new settlement of Port Phillip was to be David Collins, who had been New South Wales' first Judge Advocate. When Collins resigned as Judge Advocate in 1796 he returned to England, where he was informed that he could not resume duty in the marines unless he accepted a post as the lowest ranking Captain in the corps. He was unwilling to serve under officers who had not even entered the corps at the time when he initially took his commission as Captain, and instead remained on half pay and pursued his literary ambitions.[6] The opportunity to return to full pay on a new Australian assignment was difficult to resist. Collins was not to know that the new venture would lead him into an early grave.

The Port Phillip region had largely been chosen on the strength of reports of Matthew Flinders, who enthusiastically stated that the region had good soil and would be conducive to wheat farming.[7] However, the new settlement was even less planned than Botany Bay had been. The actual landing site had not even been chosen, and Collins was given the discretion to choose a suitable location.[8]

Even more revealing was the lack of thought given to the implementation of law and order in a settlement to be largely populated by convicted felons. Collins, who had successfully administered the rudimentary courts of Sydney Town, was to be the sole source of law and order in the settlement in Port Phillip.[9] As Collins was to discover, however, it was far easier to operate within a flawed and basic legal system than to attempt to apply the law in a land where no legal infrastructure existed at all.

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[5] There were many reasons involved in the decision to colonise Port Phillip. There was a need to establish a settlement that could relieve Sydney Town and its surrounding environs of its surplus of convicts and repeat offenders. Fear of the French laying claim to parts of the Australian continent may have played a part in the decision, as did the economic prospects of sealing and whaling. For further information see King to Portland, 21 May 1802, *HRA* Series 1, vol. iii, 488 at 490 and 'Memorandum of a proposed settlement in Bass's Straights,' *HRA* Series 3, vol. i, 1-3.

[6] See John Currey, *David Collins, A Colonial Life* (2000) Chapters 9, 10 and 11.

[7] King to Portland, 21 May 1802, *HRA* Series 1, vol. iii, 488, 490 refers to Flinders' assessment of 'soil and natural advantages at Port Phillip'. Acting Lieutenant Murray also enthusiastically referred to his discovery of a 'noble and spacious harbour' at Port Phillip: see King to Portland, 29 March 1802, *HRA* Series 1, vol. iii, 482.

[8] Hobart to Collins, 7 February 1803, *HRA* Series 1, vol. iv, 10, 15 and 'Commission of Lieutenant Governor Collins, *HRA* Series 3, vol. i, 4.

[9] Note that Barbauld was initially appointed as the Deputy Judge Advocate but he never arrived at the new settlement: See Commission in *HRA* Series 3, vol. i, 5, and see below for further details.

Amid such hasty preparations, the *Calcutta* and the *Ocean* set sail from England and arrived on the shores of Port Phillip in October 1803. The new settlement gained an instant 466 persons, of whom 299 were convicts. A chaplain, three surgeons, deputy commissary, deputy surveyor, mineralogist, two superintendents of convicts, and two overseers were included among the new settlers.[10] Collins' eventual choice of site was named Sullivan's Bay, Port Phillip.

Sullivan's Bay was ill fated from the beginning. The lack of water was the first problem facing the settlement, as was the suitability of the harbour.[11] At first Collins persevered with the settlement, and he instructed the convicts and their families to land.[12]

One convict in the group was John Fawkner senior, whose petty crime had earned him a passage out to Port Phillip. Fawkner senior, by necessity and twist of fate, had brought along his wife and children to Australia. No one could have foreseen that his 11-year-old son, John Pascoe Fawkner, would have an enduring impact on the development of two Australian colonies.

John Pascoe Fawkner was born in London in 1792, being described as a small, delicate but much loved child.[13] His father, John Fawkner senior, was a craftsman whose ability to provide for his family was compromised by the attractions of alcohol. To feed his family and his addiction, he resorted to a life of crime. Unfortunately he was not well suited to the criminal's trade, and was caught and charged with receiving stolen goods.[14]

On 1 July 1801, John Fawkner senior was sentenced to fourteen years transportation.[15] He had little choice but to bring his children along; his preferred option of leaving his son behind

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[10] The *Calcutta* was the first ship to arrive on 9 October 1803. See Collins to King, 5 November 1803, *HRA* Series 3, vol. i, 26 and Enclosures. See also King to Hobart, 1 March 1804, *HRA* Series 1, vol. iv, 454.

[11] Collins to King, ibid, 27 and 29. See also adverse reports by surveyors C. Grimes and C. Robbins; King to Collins, 26 November 1803, *HRA* Series 3, vol. i, 38, 39.

[12] See C.P. Billot, *The Life and Times of John Pascoe Fawkner* (1985) 10. According to Billot, the convicts were finally allowed on to the shore on 19 October 1803.

[13] Ibid 1-2.

[14] *Old Bailey Session Papers, 4 December 1776 - 1 November 1834*; see 1 July 1801 (5th Session 1801). See also ibid 2.

[15] *Old Bailey Session Papers*, ibid.

to complete his education was quashed when all three surviving grandparents inconveniently died shortly before his ship was to set sail for Port Phillip.[16]

When the family disembarked at Port Phillip, they discovered that the settlement gave new meaning to the concept of primitive. Each tent erected was to hold three families.[17] Lavatories were only dug for the military personnel. Yet despite the problems of initial settlement, John Fawkner used his carpentry skills to build a hut for his family, and the land was gradually cleared. His son, Johnny, ran wild in a rudimentary settlement with no schools.[18]

Collins in the meantime persisted in sending out parties to search for more suitable land, but he was never to find the site that is present day Melbourne.[19] The Yarra River eluded his advance parties, as did the rich pastoral land that was there for the taking. Collins, disillusioned, began to consider abandoning the settlement.[20]

Years later, John Pascoe Fawkner was to claim that Collins had ignored evidence from an escaped convict who told stories of the existence of the Yarra River.[21] Fawkner, as an adult, was to rediscover the potential of Port Phillip, and play a large role in the founding of Melbourne.[22]

In the meantime, however, the word of a convicted felon was insufficient to change Collins' mind, and after obtaining permission from Governor King late in 1803, he had determined to shift his little settlement from Sullivan's Bay to the Derwent in Van Diemen's Land.[23]

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[16] Fawkner reported that the death of his grandparents 'doomed me to visit the wilds of New Holland': *Reminiscences of John Pascoe Fawkner* (c1856) 1. State Library of Victoria, MS 8512, Box 3670, No.2. Note that Fawkner wrote his reminiscences when he was 63 years old.

[17] Ibid 14.

[18] Billot, above n 12, 10-13. Young John Pascoe Fawkner engaged in fishing, and began to converse with a convict who had a wooden hand press used to print newspapers. This press was the beginning of a life-long obsession with the print-media.

[19] See Collins to Hobart, 14 November 1803, *HRA* Series 3, vol. i, 34, 35. See also Mr Harris' survey of Port Phillip, *HRA* Series 3, vol. i, 31.

[20] Ibid. Collins was contemplating Port Dalrymple on the northern side of Van Diemen's Land.

[21] *Reminiscences of John Pascoe Fawkner,* above n 16, 16 and 19. Fawkner was referring to the convict William Buckley, who successfully escaped from Collins' convict settlement and lived among the Aborigines for 32 years. For further information on Buckley's life, see John Morgan, *The Life and Adventures of William Buckley* (1852), this edition introduced by Tim Flannery (2002).

[22] See Chapter 5.

[23] King to Collins, 26 November 1803, *HRA* Series 1, vol. iii, 38. Note that Collins' settlement on the Derwent was not the first time that Van Diemen's Land had been colonised by Europeans, but this chapter focuses on Collins' settlement only. A small settlement already existed at Risdon Cove, under the superintendence of

The Foundation of Hobart Town

Initially, Collins had high hopes for the settlement that he established at Hobart Town; he felt that the position of its harbour offered innumerable opportunities as 'a Port of Shelter to Ships from Europe, America or India, either for whaling or other speculation'.[24]

Despite the trading potential, it did not take him long to recognise that he would receive very little assistance from the British Government or New South Wales in making Van Diemen's Land a viable economic prospect. Simply surviving each day was a struggle. Many of the convicts and settlers, including young John Pascoe Fawkner, were weakened by illnesses such as scurvy, which was difficult to treat due to lack of supplies.[25] Supplies were eventually so scarce that Collins had to send men out to hunt kangaroos in order to supplement the rations.[26] He had problems with members of the military, and a group of convicts whom he deemed 'daring, flagitious and desperate Characters'.[27]

Collins soon realised that Sydney Town was ridding itself of its worst felons, turning Van Diemen's Land into a place of secondary punishment. He ruefully reported that it was 'convenient' for magistrates in Sydney Town 'to get rid of such Characters, which may be extremely troublesome to them'.[28]

Collins felt that it was imperative for the British Government to authorise the establishment of a proper criminal and civil court in Van Diemen's Land.[29] He would have been aghast had he realised then that the newly founded Hobart Town was not to be graced with courts of law beyond the magistracy for another 12 years.[30]

Lieutenant Bowen. His small settlement was superseded by Collins' settlement. For a brief history of the Risdon Cove settlement, see *HRA* Series 3, vol. i, 189-213, which details correspondence between Bowen and King, Another settlement existed at Port Dalrymple, established in 1804 under the command of Lieutenant-Colonel Paterson. This settlement continued on independently of Collins' settlement. See correspondence in *HRA* Series 3, vol. i, 605-728.

[24] Collins to King, 28 February 1804, *HRA* Series 3, vol. i, 217, 218.

[25] *Reminiscences of John Pascoe Fawkner*, above n 16, 31.

[26] Ibid. See also Collins to Hobart, 10 November 1804, *HRA* Series 3, vol. i, 286.

[27] Collins to King, 24 April 1804, *HRA* Series 3, vol. i, 234, 236.

[28] Collins to King, 29 February 1804, *HRA* Series 3, vol. i, 221, 226.

[29] Collins to Castlereagh, 25 June 1806, *HRA* Series 3, vol. i, 365.

[30] The first magistrates appointed as part of Collins' settlement in Van Diemen's Land were A.W.H. Humphrey and Reverend Knopwood. For further information on the functions and role of magistrates in colonial Australia, see Chapter 5, 'The Magistracy of New South Wales, 1788-1823' in A.C. Castles, *An Australian Legal History* (1982).

The status as the forgotten colony was cemented early, when the British Government ignored Collins' pleas that Van Diemen's Land should be provided with a legal infrastructure separate from that of Sydney Town. While the magistrates were empowered to deal with less serious crimes, they could not deal with crimes requiring capital punishment, and could not deliver a more serious punishment than that of lashes.[31] Collins, illustrating the unsuitability of law enforcement on the island, gave the example of five 'Wretches' who had stolen half a barrel of gunpowder and two muskets, and escaped into the woods.[32] When they surrendered, Collins could not afford the time and cost of sending them to Sydney Town for trial in the Criminal Court, so he simply recommended they be severely punished and 'kept to Labour as a Jail Gang'.[33]

The prisoners also despised the magistrates. The first two magistrates appointed were the Reverend Knopwood and A.W.H. Humphrey. Young John Fawkner, who was in the employ of Knopwood for a time, observed that the good Reverend was so fond of ordering the lash as punishment that Collins often had to intervene and severely reduce the sentence. He reported that Humphrey was more humane, usually only ordering 25 lashes.[34]

Finally, Collins' increasingly desperate pleas for a more sophisticated form of punishment were heeded. The British Government had initially commissioned a Judge Advocate, Mr Benjamin Barbauld, to travel with Collins and the convict party to Port Phillip,[35] yet as luck would have it, Barbauld kept postponing his journey from England and was never to set foot on Australian shores. His appointment was finally superseded on 15 January 1804 when Samuel Bate was appointed as Judge Advocate.[36] However, matters were compounded further when Samuel Bate finally arrived in Hobart Town on 14 May 1806, but did not bring the necessary Letters Patent that would have enabled Collins to establish the criminal and civil courts.[37] The colony was left in the extraordinary situation of having a legally appointed Judge Advocate, but no courts of law to allow him to discharge the duties of his office.

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[31] Collins to Castlereagh, 25 June 1806, *HRA* Series 3, vol. i, 365.

[32] Collins to King, 29 February 1804, *HRA* Series 3, vol. i, 221 at 226.

[33] Ibid.

[34] *Reminiscences of John Pascoe Fawkner*, above n 16, 32-33, and 56-57.

[35] Commentary Note 5, 'Judge-Advocate Barbauld' *HRA* Series 3, vol. i, 782. See also 'Return of the Officers belonging to the Civil Establishment of Port Phillip' which lists Barbauld as 'in England on leave.' *HRA* Series 3, vol. i, 33.

[36] 'Commission of Deputy Judge-Advocate Bate, 15 January 1804, *HRA* Series 3, vol. i, 122.

[37] Collins to Castlereagh, 25 June 1806, *HRA* Series 3, vol. i, 365.

Collins immediately sent a despatch to Viscount Castlereagh to alert him to the fact that Letters Patent needed to be issued. He explained that, while he was aware he could have recourse to the courts in Sydney Town, the inconvenience was such that he had 'hitherto preferred inflicting such corporal punishment as a Bench of Magistrates were competent to adjudge'.[38] It was simply not practical to cross the Bass Strait to Sydney Town on a regular basis. To avoid the problems of distance, and stem the increasing lawlessness on the island, it was Collins' wish 'that the Criminal and Civil Justice of the Settlement should be administered as nearly conformable to the Law and Practice of its Courts in England'.[39]

Collins' wish was never granted while he was Lieutenant Governor.[40] Criminals continued to get away with lesser punishment for serious crimes. Ironically, the only crime committed in the settlement that virtually guaranteed a journey to Sydney Town was sheep stealing.[41] Commerce in the colony was also affected, as there was no court established for the purpose of collecting debts.

When the increasingly depressed Collins died unexpectedly in 1810 after a sudden illness,[42] the settlement on the Derwent was little more than a shantytown. No public building works of any significance had been completed, and the increasing lawlessness was magnified with the rise of the bushrangers.[43] Collins, intent on recreating the legal infrastructure of Sydney Town, had failed miserably in his task. His success as Judge Advocate in Sydney Town was marred by his failure as Lieutenant Governor of Hobart Town, and he died a frustrated man.[44]

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[38] Ibid.

[39] Ibid.

[40] For a further plea for a judicial system, see Collins to Castlereagh, 9 June 1809, *HRA* Series 3, vol. i, 429.

[41] Collins to Atkins, 31 March 1807, *HRA* Series 3, vol. i, 386, 387.

[42] Collins was only 54 at the time of his death. News of Collins' death was relayed by Macquarie to Lord, 16 June 1810, *HRA* Series 3, vol. i, 451. Fawkner reported that Collins was 'very sad' prior to his death, in his *Reminiscences,* above n 16, 49. Currey, above n 6, 299-300 stated that just prior to his death, Collins wanted to return voluntarily to England.

[43] See Collins to Macquarie, 2 February 1810, 'Account of the Settlement of the Derwent River', *HRA* Series 3, vol. i, 432. At page 433-4, Collins lamented the lack of labourers, reporting that the convicts who had been there more than 7 years had already served their sentences, thus making the building of essential infrastructure difficult. He implored the British Government to pay more attention to the settlement, and stated that 'support from your Excellency...will compensate for the many Difficulties, with which it has had to struggle, and the Disappointments it has met with'.

[44] Ibid.

Collins was given a lavish funeral, but even beyond the grave there was no rest, as the wooden chapel in which he was buried was swept away by a violent gale.[45] Fawkner, who was no admirer of Collins, felt that it was perhaps divine intervention because the Lieutenant Governor had set the Colony a bad moral example by co-habiting with a woman while leaving his wife and children back in England.[46]

Despite Fawkner's disapproval of Collins, his death did not bring any solutions. The way forward for Hobart Town remained uncertain, as a succession of Lieutenant Governors inherited the same problems faced by Collins. Sydney Town, in comparison, had just endured the Bligh insurrection, and was now agitating for new and improved courts of law. The convict attorneys had begun to fill the vacuum caused by the absence of trained advocates in the colony.[47] Hobart Town, at the same time, would have been happy for any form of court system, whether based on military justice or not. Unsurprisingly, there were no advocates of any description in Hobart Town by 1810, given that there were no courts of law for them to service. Unfortunately, the situation was destined to get much worse.

The Rise of the Bushrangers

A series of Commandants replaced Collins from March 1810 until February 1813.[48] Andrew Geils, who governed the settlement from February 1812 until February 1813, sank Van Diemen's Land deeper into the quagmire, as he neglected to administer any public works.[49] Governor Macquarie was induced to lay the charge that Geils was 'venal and corrupt', and used building materials from the public store for his own private use.[50]

Lieutenant Governor Thomas Davey, who was considered a more affable man but again an undisciplined administrator, replaced Geils in 1813 as the first Lieutenant Governor since Collins' death in 1810. It was during Davey's administration that the absence of law in Van

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[45] For a report of this incident, see Manning Clark, *A History of Australia vol. 1: From the Earliest Times to the Age of Macquarie* (1962) 232.

[46] *Reminiscences of John Pascoe Fawkner*, above n 16, 42 and 71.

[47] See Chapter 1.

[48] Lieutenant Edward Lord governed the settlement from 24 March 1810 until 8 July 1810, and then Captain Murray was appointed Commandant from 8 July 1810 until 19 February 1812. Geils became Commandant from 20 February 1812 until 4 February 1813. See Macquarie to Lord, *HRA* Series 3, vol. i, 451, 452.

[49] Geils' instructions, 8 February 1812, *HRA* Series 3, vol. i, 467. For a biography on Geils, see *HRA* Series 3, vol. ii, ix.

[50] Macquarie to Geils, 24 March 1814, *HRA* Series 3, vol. ii, 52, 53.

Diemen's Land finally became too dire for Sydney Town to ignore.[51] The catalyst was the rise of the bushrangers. Bushranging was not confined to Van Diemen's Land; the term had been used as early as 1805 by the *Sydney Gazette* to describe convicts who absconded to the bush, and in 1806 five convicts in Sydney Town were brought before the magistrates with the charge of being 'bushrangers'.[52]

It was in Van Diemen's Land, however, that the modern day conceptions of violence and bushranging began to emerge. The rise of the bushrangers in Van Diemen's Land was partly attributable to the lack of food in the settlement, and to the culture of lawlessness arising as a result of the absence of courts of law. During Collins' era, the lack of a steady, consistent supply of food from England and New South Wales meant that Collins was forced to send out groups of men who were paid to hunt for kangaroo meat. Once the supply of food became more reliable, the kangaroo hunters were decommissioned, but many chose to stay in the bush in well-armed roving bands, making their ignoble living by robbing the settlers and unfortunate travellers.[53]

Few people were spared the plundering habits of the bushrangers; as John Pascoe Fawkner recounted, he and his sister were victims of two bushrangers when they were left alone in their hut after dark. Fawkner fired a musket at the two thieves but missed, and they managed to run away. Their precious supplies of food and clothes were stolen, and were never recovered.[54] The magistrates of Van Diemen's Land were unable to deal lawfully with many of the crimes committed by the bushrangers, and as a consequence vigilante justice by the magistrates and local inhabitants was common.[55]

Matters were not helped when Governor Macquarie, in a rare display of interest in Van Diemen's Land, issued a proclamation on 14 May 1814 granting immunity from all crimes except murder to twenty nine named bushrangers providing they surrendered during the following six months and returned to a lawful occupation.[56] Predictably, most of the named

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[51] See 'Lieutenant-Governor Davey' in *HRA* Series 3, vol. ii, x, at pages xv-xviii.

[52] See Castles, above n 30, 79. Castles cites the *Sydney Gazette* in February 1805 as using the term 'bushranger' but does not give a more specific date.

[53] See 'Lieutenant-Governor Davey' in *HRA* Series 3, vol.ii, x, at pages xv-xviii. Macquarie instructed Davey to discontinue the purchasing of kangaroo meat for Government Stores as it is a 'great encouragement to these *Bush Rangers'*. See Macquarie to Davey, 30 January 1813, *HRA* Series 3, vol. ii, 13, 21.

[54] *Reminiscences of John Pascoe Fawkner*, above n 16, 51.

[55] Castles, above n 30, 80.

[56] *HRA* Series 1, vol. viii, 264.

bushrangers saw it as an opportunity to commit any crime they wished, before surrendering to take advantage of Macquarie's reprieve.[57]

The residents of Van Diemen's Land were under siege. Violence was escalating and their lives and property were at stake. On 30 August 1814, the bench of magistrates met and wrote a letter of address to Lieutenant Governor Davey, in which they implored him to declare martial law. They recounted an 'outrage' committed by a group of 'banditti' at Mr Ingle's farm, in which 'a Banditti, consisting of fourteen, all well Armed, who forcibly entered his dwelling House, and, having secured the Servants there, plundered it of property of the Value of Seven Hundred pounds Sterling, and then most cruelly abused the person of a female residing on the Spot.'[58]

Davey willingly acquiesced to the request, and declared martial law.[59] However, the bushrangers were growing bolder by the day, and making demands of the Lieutenant Governor. Michael Howe, leader of one group of 'banditti', had been transported to Van Diemen's Land for Highway Robbery, and he easily slipped into his new role as a bushranger. Howe communicated the intentions of his mob to Lieutenant Governor Davey by writing him letters, allegedly in blood.[60] He informed Davey that his group had spies who kept them informed of the Government's actions, and warned the Government to leave them be, while simultaneously making claims to the amnesty promised by Macquarie.[61]

Lieutenant Governor Davey's declaration of martial law did, however, give the local residents some reassurance that something was being done about the situation. The existence of martial law was in direct conflict with Governor Macquarie's amnesty, and highlighted the

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[57] See 'Lieut-Governor Davey' in *HRA* Series 3, vol. ii, x, at pages xvi-xvii.

[58] 'Meeting of Bench of Magistrates', 30 August 1814, *HRA* Series 3, vol. ii, 79.

[59] Proclamation of Martial Law, Davey to Macquarie, 30 April 1815, *HRA* Series 1, vol. viii, 567. See also address of thanks for the declaration of martial law from VDL inhabitants, who stated that it was necessary due to 'there being no Court of Criminal Judicature on this Island; 30 September 1815, *HRA* Series 3, vol. ii, 133. Davey replied to the settlers by vowing to communicate to the British Government 'the distresses and difficulties, which the colonists on Van Diemen's Land have so long suffered owing to the absence of Courts of Civil and Criminal Jurisdiction', *HRA* Series 3, vol. ii, 134, 135.

[60] See reference to petition from Howe to Bathurst (via Lieutenant Governor Sorell in 1814), *HRA* Series 3, vol. ii, 90 and Note 105. Note that the text and date of the petition are not provided in the *HRA,* which could not locate the record. Lloyd Robson, *A History of Tasmania:* vol. 1 (1983) refers to the allegation that many of the communications were signed in blood. See also the extensive newspaper reports at the time, a sample of which is listed below.

[61] The *Hobart Town Gazette* followed Howe's activities with interest. See reports on 3 August 1816 (attacks by Howe's gang), 23 November 1816, 14 December 1816, 11 January 1817 (letter from Howe to Davey), 3 May 1817 (Howe's surrender), 2 August 1817 (escape from gaol), 6 September 1817 (reward offered for capture), 18 October 1817 (found guilty of murder of William Drew), 22 November 1817 (at large and wanted for murder), 24 October 1818 (Howe's death).

unsatisfactory nature of Sydney Town's rule of the distant settlement on the Derwent. Davey, unlike his predecessor Collins, was much more willing to take the law into his own hands to resolve matters. Collins' letters to England were far easier to ignore than the direct action of proclaiming martial law, and Davey's brand of unauthorised vigilantism did not escape the attention of administrators in Sydney Town and England.

A New Legal System

Amidst the growing lawlessness of the bushrangers, the Second Charter of Justice for New South Wales was passed in February 1814, allowing for the establishment of a separate civil court in Van Diemen's Land.[62] The Second Charter of Justice had been promulgated with the needs of the Sydney Town residents in mind, rather than those of Van Diemen's Land, and pre-dated Davey's declaration of martial law. Unfortunately, the settlement of Van Diemen's Land still had no criminal court of its own in which it could have prosecuted the bushrangers.

However, the commerce of the colony was greatly aided by the provision of means to sue for debts under the amount of £50. The new court was to be called the Lieutenant Governor's Court,[63] and was to be presided over by Judge Advocate Edward Abbott, who had originally arrived in New South Wales in 1790 as part of the New South Wales Corps. Abbott was not trained as a lawyer,[64] and the choice of Abbott as Judge Advocate was a curious one as he had been associated with John Macarthur and the Bligh rebellion.[65] The authorities, having apparently given him the benefit of the doubt as to his role in overthrowing the Governor of New South Wales, decided to reward a possible act of treason by offering him the position of Judge Advocate in Van Diemen's Land.[66]

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[62] Letters Patent, 4 February 1814, *HRA* Series IV, vol. i, 77-94.

[63] Note that under the Second Charter of Justice, Sydney Town also had an equivalent court named the Governor's Court, which also dealt with small civil matters. The main difference was that Sydney Town was provided with a trained barrister, Ellis Bent, who was appointed to the position of Judge Advocate of the Governor's Court, whereas Van Diemen's Land had no legally trained personnel to head its courts. See Chapter 2.

[64] Abbott's role as a legal amateur heading the settlement's judicial system was similar to that of David Collins and Richard Atkins in the courts in the early days of Sydney Town. See Chapter 1.

[65] Note that Abbott had performed the role as Judge Advocate for three days in New South Wales after the Bligh insurrection. See Chapter 1.

[66] For notice of Abbott's appointment, see Bathurst to Davey, 1 June 1814, *HRA* Series 3, vol. ii, 59. Abbott denied any involvement in the Bligh rebellion when questioned at the Court Martial of Lieutenant George Johnston, stating that he was in Parramatta when the rebellion occurred, and that he was out of favour with both Macarthur and Johnston immediately prior to the rebellion. See *Proceedings of a general court-martial held at Chelsea Hospital, May 7, 1811 for the trial of Lieut.Co. Geo. Johnston on a charge of mutiny for deposing on 25th January 1808, William Bligh* (1811) 362. However, in a letter from Abbott to Ex-Governor King, 13 February 1808, *HRNSW* vol. vi, 831, in which Abbott claims he was not one of the 'leading characters', he does state that he 'disapproved of several things in the early stage of the business'. This

However, the luckless settlement had to wait a bit longer before their new court was to become functional, courtesy of the new Judge Advocate declining to open the court for almost a year after he arrived in Hobart Town.[67] It was not a case of Abbott mimicking Justice Jeffery Hart Bent's refusal to operate his court in Sydney Town while convict attorneys were allowed to act as agents.[68] Laziness was the most likely explanation for Abbott's tardiness, as he did not proffer any moralistic reasons for refusing to open the new court. As J.T. Bigge commented when he visited Van Diemen's Land to assess its legal system, Abbott's evasive explanation was simply not 'satisfactorily accounted for'.[69]

When the court was finally opened in January 1816, a huge amount of business awaited it. Between the years 1816 and the end of 1819, at least 1083 cases were tried in which verdicts were obtained, amounting altogether to the sum of £18,848 which in those days was an enormous sum.[70]

The First Advocates

Despite the large amount of business being transacted in the court, there were no free persons acting as solicitors or barristers available to assist the court.[71] Abbott felt that this caused him a great inconvenience, for while 'the Rules of the Court are simple, the People will not give themselves the Trouble to attend to them'.[72]

However, Abbott reported that there were a number of agents who represented clients. As in Sydney Town, convict lawyers were always willing to fill the breach, and now that there was a court operating they were able to offer their services. The most noticeable agent was Mr

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statement indicates that he at least had prior knowledge of the events that occurred. H.V. Evatt, author of the *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (1971) 233-236 concedes that there was a dislike between Abbott and Macarthur, but firmly states his view that this letter indicates that Abbott's involvement in the affair went deeper than the existing documents suggest, and that Abbott was blatantly lying at Johnston's Court Martial.

[67] J.T. Bigge, *Report on the Judicial Establishments of New South Wales and Van Diemen's Land* (this ed 1966) 41. See below for further information on J.T. Bigge and his report.

[68] See Chapter 2.

[69] Bigge, above n 67, 41.

[70] Ibid, 42.

[71] Examination of E. Abbott by J.T. Bigge, 7 March 1820, *HRA* Series 3, vol. iii, 257, 258. See also Bigge, ibid 43, where he reported that 'as late as the month of November 1821, no free professional person had arrived at Hobart Town to practise'.

[72] Bigge, ibid 259.

William Brodribb, an English attorney who had been transported and now offered his services as a conveyancer,[73] and Mr Jemott, who was an emancipist and well-regarded by Abbott.[74]

Abbott, now faced with the same dilemma as Judge Jeffery Bent in regard to the admission to practise of the convict attorneys, took a more practical approach to the situation. Unlike Judge Bent, he was amenable to Brodribb acting in his court as an agent, particularly given that there were no free men in the settlement practising in the courts. However, he hastened to say that if Brodribb or anyone of his ilk applied for admission, it would be refused on the grounds that 'they are unfit persons to conduct legal Business'.[75] When questioned as to why this same principle should not be applied to ban convict attorneys from being agents as well, Abbott maintained that a person acting in the capacity of agent was distinguishable from that of an admitted legal practitioner. Abbott did not appear to see any inconsistency in his position, despite J.T. Bigge intimating to him that the work performed by the agents, and the trust reposed in them by their clients, was from the client's perspective indistinguishable from the duties imposed on a practitioner admitted to practise in the courts.[76]

Another advocate also emerged, in the form of John Pascoe Fawkner, who was now a young man with a strong social conscience. Fawkner was still small in stature, yet what he lacked in size, he compensated for in sheer tenacity and will. His father, who had now been emancipated, settled down to life as a wheat farmer, but his son had a more varied career, trying his hand as a carpenter, builder, bookseller, sawyer, timber merchant, farmer, baker, innkeeper and journalist, before turning to the law.[77]

Fawkner's restless disposition ensured frequent brushes with the law. Influenced by his father's experiences as a convict, he had nurtured a dislike for authority. When he tried to help a group of convicts escape in 1814, he was sentenced to 500 lashes and three years'

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[73] Brodribb advertised his services in the *Hobart Town Gazette*; see for example the advertisement on 9 January 1819, 3, in Supplement to *Hobart Town Gazette*. The 'Examination of E. Abbott', above n 71, 259 and 264, reveals that Brodribb's crime leading to transportation was the administering of unlawful oaths. See also G. Brown, and P. Walker (eds), *The Briefcase [A Collection of Papers on Tasmanian Legal Memorabilia and Tasmanian Places Associated with the 21st Australian Legal Convention]* (1981) 8.

[74] Examination of E. Abbott, above n 71, 259 and 264. Abbott reported that Jemott's 'conduct has been generally respectable and regular', and he understood that Jemott's crime leading to transportation was the absconding and sale of 'supercargo of a vessel'.

[75] Ibid 258.

[76] Ibid.

[77] See generally *Reminiscences of John Pascoe Fawkner*, above n 16. See also Billot, above n 12, 59 and 78.

Government labour.[78] Fawkner was also convicted of other crimes such as assault, and selling a loaf of bread short of weight.[79]

Yet Fawkner did not just appear before the magistrates as the accused. After serving his sentence he returned to Van Diemen's Land and moved to Launceston in 1817, where he began to appear before the courts as a 'bush' lawyer. He was a self-styled champion of the people, and although he had no legal training, he felt well placed to subvert the tyranny of the magistrates and help the 'little' people of Van Diemen's Land.[80]

In particular, he specialised in acting for his fellow Van Demonians in the court of suits under £10, which he called the 'Little Go'. He advertised his fees at six shillings when the amount sued for did not exceed three pounds, or ten percent of any amount exceeding three pounds. He insisted on up-front payment of the fees but, in keeping with his philanthropic nature, he rendered free services to those unable to afford his fees providing their case assisted his battle against autocracy.[81] He reported his skirmishes in his newspaper, the *Launceston Advertiser*,[82] delighting in the opportunity to run down the magistracy.

An Assessment of the Legal Situation in Van Diemen's Land

Meanwhile, the operation of Abbott's Court was much scrutinised by J.T. Bigge when he travelled to Van Diemen's Land in 1819 to undertake a long overdue assessment of its legal infrastructure. Undoubtedly the escalating situation with the bushrangers, and Davey's declaration of martial law, had prompted the British Government at last to take some action. J.T. Bigge had been commissioned primarily to make an assessment of Sydney Town's courts, but the fact that he actually crossed Bass Strait to make an assessment of the needs of the little island settlement was a promising sign.

Abbott's civil court was deemed to be a successful experiment, despite Abbott's own peculiarities.[83] It was not difficult for Bigge to recognise the glaring need for an equivalent criminal court. In the meantime, however, the result was not the establishment of a criminal

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[78] *Reminiscences of John Pascoe Fawkner*, ibid 81-2. See also Billot, above n 12, 63.

[79] *Hobart Town Gazette*, 16 January 1819; see also Billot, above n 12, 73.

[80] See Billot, above n 12, 87.

[81] Ibid.

[82] First edition, 8 February 1829.

[83] Bigge, above n 67, 42.

court independent of Sydney Town, but rather the commencement of the Supreme Court of New South Wales' occasional circuits to Van Diemen's Land. The Supreme Court until 1824 only dealt with civil matters, so any criminal matters would still have to be heard in Sydney Town.[84]

Justice Baron Field had announced on 26 September 1818 that a circuit sitting would be held, and arrived amid much pomp and ceremony on 2 January 1819.[85] Field also allowed Brodribb to act as an attorney in the interests of 'the more effectual administration of justice'.[86]

It was clear, however, that circuit courts, while at least a step in the right direction, were at best a temporary answer to Van Diemen's Land's legal problems. As Field himself said, 'I have tried to stretch the arm of the law across Bass's Strait, but have found it impossible for the purpose of any constant good.'[87] Bushrangers still roamed the island, despite the capture of Michael Howe and the gory display of his head above the gates of the gaol.[88] Crime rates were still too high, and penalties for those who were unfortunate enough to be caught were not consistent and did not act as a deterrent to others.

The island still needed a permanent solution to its legal problems, and trained legal personnel.

A New Era Begins

By 1820, increasing numbers of free settlers were arriving in Van Diemen's Land and were demanding that the colony evolve beyond its penal origins and institute a workable legal system.[89] Under the guidance of the likeable new Lieutenant Governor, William Sorell, and

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[84] Note that on Bigge's recommendation, Judge Advocate Wylde of New South Wales finally held a circuit sitting of the Criminal Court in February 1821. For Wylde's account of the circuit, see Wylde to Bigge, 14 July 1821 (Enclosure No. 3), *HRA* Series 4, vol. i, 351. Until the circuit sitting, free people charged with committing a crime had been tried in Sydney, and convicts were tried locally by a Bench of Magistrates. Bigge reported that 'the want of a separate criminal jurisdiction in Van Diemen's Land has, however, been and is still more seriously felt than that of a civil court,' and was happy to recommend the installation of a separate criminal court in Van Diemen's Land. (See Bigge, ibid 45-6.)

[85] See *Hobart Town Gazette,* 2 January 1819, 2; *The Briefcase,* above n 73, 7.

[86] *Hobart Town Gazette,* 23 January 1819, 1.

[87] Field to Bigge, 23 October 1820, *HRA* Series 4, vol. i, 858, 863. Field also recommended separate courts for Van Diemen's Land.

[88] J. Harrison, *Court in the Colony* (1974) 23.

[89] In 1818, there were 541 free men and 223 free women, but this figure had doubled by 1820 when statistics show that there were 1009 free men and 510 free women. See James Bernard, *Statistics of Tasmania 1804-1854* (1856) 8-9. One example of the increasing involvement of free settlers in the affairs of the colony is a meeting held by Hobart Town's business community on 17 May 1820 to agitate for a Lieutenant Governor's

with the efforts of settlers such as the Fawkners to establish a viable farming industry and commercial base, the settlement finally began to emerge beyond its wilderness years. Complete separation from the administration of New South Wales soon became a driving interest.[90]

One positive by-product of Van Diemen's Land's separation as an independent colony would be the necessity for the British Government to provide the new colony with its own legal infrastructure. The colonists were aided by the fact that the British Government was already contemplating a complete overhaul of New South Wales' judicial system, as indicated by J.T. Bigge's visit to assess the state of the law in the colony. When the Third Charter of Justice was promulgated in 1823, it recognised the need for a separate Supreme Court in Van Diemen's Land to deal with both civil and criminal matters.[91]

In 1824, a new era in legal administration had begun.[92] Justice John Lewes Pedder had arrived to take up his position as the sole judge of the Supreme Court, Joseph Tice Gellibrand took his place as Attorney General, and Alfred Stephen, (son of John Stephen who was to be puisne judge in the New South Wales Supreme Court from 1826) soon assumed his position as Solicitor General.

However, the colonists did not completely achieve their objectives. Van Diemen's Land became an independent colony in 1825,[93] but the remote island's major value still lay in its operation as a penal colony. The free settlers, whose numbers were beginning to match the convict population by 1824,[94] discovered that their request for a complete transplant of England's Westminster System would be hard fought. Their desire for institutions symbolic of a free democratic society, such as representative government and jury trial, must have seemed even more unattainable when they first set eyes on the new Lieutenant Governor of the colony, George Arthur.

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court with broader jurisdiction, the institution of a criminal court, and trial by jury. See *HRA* Series 3, vol. iii, 534.

[90] For a biography on William Sorrell, see Leonie Mickleborough, *William Sorell in Van Diemen's Land: Lieutenant-Governor, 1817-24: A Golden Age?* (2004) For the petition for legal and commercial independence of Van Diemen's Land, see *HRA* Series 3, vol. iv, 475.

[91] Letters Patent, 12 October 1823, *HRA* Series 4, vol. i, 509.

[92] The Supreme Court of Van Diemen's Land was opened in May 1824.

[93] For the independence of Van Diemen's Land, see proclamation of 3 December 1825, *HRA* Series 3, vol. v, 11. For Arthur's Commission on 22 August 1823, see *HRA* Series 3, vol. iv, 131.

[94] See population statistics in Return No. 17 from 1824 to 1835 in *Statistics of Tasmania 1804-1854,* above n 89. The statistics for 1825, the year of separation from New South Wales, show that the population total was 14,512 persons of whom 6,759 were free settlers and 6,845 were convicts.

After years of chaos, violence and lawlessness, the Colonial Office took action. The situation was viewed as desperate. It was not enough to simply install courts of law into the colony, and send out a few barristers and a judge to administer the new legal infrastructure. What was required was, by any other name, an enforcer; a person prepared to stamp out criminality and restore order.

Despite the fact that Lieutenant Governor Sorell had, over a number of years, considerably assisted in the development of Van Diemen's Land, it was evidently determined that he did not possess the moral qualities necessary for such a high position.[95] The Colonial Office searched further afield, and found the perfect candidate in Sir George Arthur who was an unashamed autocrat, manipulative and cunning.[96] His achievements were remarkable, for during his twelve-year reign (and Arthur was a man who ruled), he rapidly completed the transformation of Van Diemen's Land from its position of a lawless chaotic society to a colony ready to compete on an equal footing with that of Sydney Town.

Yet, the free settlers began to ask, at what cost? It was a question that was to be raised with increasing frequency, in particular by members of the new Van Diemen's Land legal profession. Arthur, in imposing law and order on the island, was using the legal system to legitimise his autocratic agendas. The tension between autocratic rule and the democratic independence of the court and legal system was palpable, and on many occasions Arthur's manipulation of his legal officers to ensure that legal decisions went his way seriously compromised the independence of the judicial arm of the Government.

Ultimately, and ironically, Arthur's methods would bring about his downfall. The inherent independence of the legal system and the integrity of those who served it prevailed. Yet Arthur's legacy, so often overlooked, was the stunning reversal of Van Diemen's Land's 'Wild West' image, and the foundation stone of the colony's rapid ascent to democratic self-sufficiency.

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[95] It was well known in colonial circles that William Sorell had abandoned his wife Harriett and their six children to live in virtual poverty, while he cohabited with another woman. Regardless of this fact, Sorell was well liked, and the free settlers were sorry to see him depart the colony. See Mickleborough, above n 90, Chapter 6. See also Sorell's report in which he pleads for a continuing opportunity to steer Van Diemen's Land towards a position of prosperity; Sorell to Bathurst, 24 August 1824, *HRA* Series 3, vol. iv, 563.

[96] For biographies of George Arthur, see, for example, W.D. Forsyth, *Governor Arthur's Convict System: Van Diemen's Land 1824-36: A Study in Colonization* (1970), and A.G.L. Shaw, *Sir George Arthur, Bart 1784-1854: Superintendent of British Honduras, Lieutenant-Governor of Van Diemen's Land and of Upper Canada, Governor of the Bombay Presidency* (1980).

Governor Arthur's Gaol

When Sir George Arthur arrived in Van Diemen's Land he brought with him an impeccable record for enforcing discipline, law and order in far-flung settlements of the British Empire. He had survived his role as Superintendent of the Honduras, where he had to deal with the politically sensitive issue of slavery,[97] and proved himself to be an efficient administrator to the decided approbation of the Colonial Office. Having set eyes on Van Diemen's Land, he concluded that it was undoubtedly a penal island; his energies were best directed in ensuring that it was run to maximum efficiency, and that the convicts received adequate opportunity to reform themselves. His evangelical policies towards the convicts were humane for his time, and he put a great deal of thought into the theories behind criminal behaviour and reformation of character.[98]

For the free settlers, however, there was no escaping the fact that Van Diemen's Land was a penitentiary, and Arthur soon earned a reputation for being a militaristic autocrat.[99] As Fawkner said, the Governor was an 'able, but cruel tyrant...the evil, he did, was great, the good he did, was permanent, but the evil is borne longest in remembrance.'[100]

Arthur was fortunate that Van Diemen's Land, unlike New South Wales, did not have a strong, politicised emancipist class.[101] The opinions of settlers such as Fawkner therefore were of little consequence to Arthur in the early years of his administration. He was not faced with Governor Darling's problem of needing to deal with conflict between free settlers and

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[97] Arthur believed in freeing the Indian slaves of the Honduras; his stance was a particularly brave one for the time, and earned the admiration of James Stephen in the Colonial Office (who was the first cousin of Alfred Stephen). See 'Introduction: A Note on the Lieutenant Governor' in *HRA* Resumed Series 3, vol. vii, xv at page xvi. See also Shaw, ibid 33-40.

[98] Arthur stated that 'coercive measures must be bounded by humanity; if they are not, the criminals are driven into a state of mind bordering upon desperation'; Arthur to Goderich, 1 December 1827, *HRA* Series 3, vol. vi, 367. See also George Arthur's *Defence of Transportation in Reply to the Remarks of the Archbishop of Dublin in his Second Letter to Earl Grey* (1835), State Library of Victoria. For further analysis on Arthur's methods, see also *HRA* Resumed Series 3, ibid, and in particular his approval of the ideas of Jeremy Bentham at page xix. Forsyth, above n 96, Chapter 4 also describes in detail Arthur's efficient structuring of the convict system.

[99] For contemporary comment, see Henry Melville, *The History of the Island of Van Diemen's Land from the Year 1824-1835 Inclusive* (1835, this ed 1967 Australiana Facsimile Editions No. 104).

[100] *Reminiscences of John Pascoe Fawkner*, above n 16, 39.

[101] Melville, above n 99, 3-4 commented in his footnote that there was no emancipist class in Hobart. See also John West, *The History of Tasmania* (1st published 1852, this ed 1971) 380.

emancipists.[102] Arthur's aim was quickly to stamp out the behaviour of any settlers who were subversive to his administration.

To this end, the fledgling legal fraternity was of particular use to Arthur. He was shameless in manipulating the inexperienced advocates of Van Diemen's Land to apply the law in a certain way, and those legal personnel who did not fall in line with Arthur's autocratic policies were destined to incur the long and drawn out effects of his wrath. Unlike Governor Darling, who had to contend with the politically astute Chief Justice Forbes, and concerted opposition of opinionated barristers Wentworth and Wardell,[103] Governor Arthur was well able to keep his legal officers in line.

The Legal Profession in Van Diemen's Land

Undoubtedly the person most susceptible to Arthur's manipulation was the new Justice of the Supreme Court, John Lewes Pedder. The judge was a young and impressionable man, and frequently supported Arthur's politics.[104] Pedder had only been called to the Bar at Middle Temple on 16 June 1820, and then in 1823 made an application for the position of Judge of Van Diemen's Land. The Colonial Office, which would have preferred to have appointed a military man to the position, was nevertheless constrained by statute to appoint a barrister, and determined that Pedder's inexperience was not a bar to his obtaining the position.[105]

Justice Pedder opened the Supreme Court of Van Diemen's Land on 10 May 1824,[106] admitting Joseph Tice Gellibrand as the Attorney General, and George Cartwright, Hugh Ross and Frederick Dawes as lawyers.[107] The legal profession was fused, with no distinction between the roles of barristers and solicitors. Unlike New South Wales, there was no

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[102] See Chapter 3.

[103] Ibid.

[104] For a detailed study of Pedder's life, see J.M. Bennett, *Lives of the Australian Chief Justices: Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (2003).

[105] Ibid, 9. See also Minute, 10 March 1823, CO 323/118, f. 44a.

[106] The Supreme Court of Van Diemen's Land had its official ceremonial opening on 7 May 1824, which, as Professor A.C. Castles points out, makes it the oldest continuously functioning court in Australia. The Supreme Court of New South Wales (as constituted under the Third Charter of Justice) was not formally opened until 17 May 1824, although its first substantive sitting was held on 19 May 1824 whereas the first substantive sitting in Van Diemen's Land was on 24 May 1824. See Castles, 'The Judiciary and Political Questions: the First Australian Experience' (1975) 5 *Adelaide Law Review* 294. See also Bennett, above n 104, 13.

[107] *Court Roll of the Supreme Court of Van Diemen's Land 1824-1831*, Archives Office of Tasmania SC 480/1. Note that Cartwright, Ross and Dawes were solicitors, as was Gellibrand.

concerted pressure for the division of the profession, due to the small size of Van Diemen's Land.

Other lawyers were soon to arrive, however, and it did not take long for law firms to be established. The firm of Russell, Young and Butler, established in September 1824, can lay claim to being among the oldest law firms in Australia.[108] The majority of solicitors undertook advocacy work out of necessity, and Scottish lawyer Thomas Young's first case was a successful defence of a man charged with the theft of a pig.[109]

The first criminal sitting of the Supreme Court of Van Diemen's Land occurred on 24 May 1824, at which the Attorney General, Joseph Tice Gellibrand, reflected on the fact that '20 years have scarcely elapsed since this Island was a barren and desolate country' and grandly pronounced that this was a day 'which secures the rights and privileges of the subject' and 'one of the proudest the Colony has ever known'.[110] It was certainly a significant step forward for a settlement that had struggled for so long to secure the right to its own criminal court.

Governor Arthur, however, did not reflect for too long on how far the settlement had come since the days of his predecessor, David Collins. It soon came to his attention that his Attorney General was not doing all that he could to prosecute those who were publishing statements in the press criticising his administration of the colony.

Arthur saw Gellibrand's inaction as subversive to his administration of a penal colony,[111] for if the press were not kept under control, Arthur's own authority would be diminished in the eyes of the convicts. Governor Darling was to face a similar problem in New South Wales, with Wentworth and Wardell publishing libellous statements in the *Australian.*[112] While Wentworth and Wardell ultimately remained one step ahead of Darling, Governor Arthur was determined to win his battle. The colony's new legal system was to be the battleground.

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[108] *Mercury,* 25 September 1924. (This article reflects on the centenary of the establishment of Russell, Young and Butler).

[109] Ibid.

[110] *R v Tibbs*, 24 May 1824, reported in *Hobart Town Gazette*, 28 May 1824 and reported online in *Decisions of the Nineteenth Century Tasmanian Superior Courts* at: <http://www.law.mq.edu.au/sctas/html/r_v_tibbs__1824.htm>.

[111] See, for example, Arthur to Bathurst, 17 January 1826, *HRA* Series 3, vol. v, 49, 52-3.

[112] See Chapter 3.

Robert Lathrop Murray and the 'Colonist' Letters

The main cause for concern, from Arthur's point of view, was Gellibrand's close association with Robert Lathrop Murray, a former army officer and an ex-convict who had been transported for bigamy in 1815, and who was from 1825 editor of both the *Colonial Times* and *Hobart Town Gazette.*[113] Arthur prudishly reported that Murray had been living

> in a state of concubinage with a female of the name of Brown, whom he brought hither from Sydney three years ago...and we find that Mr Murray was in the habit of walking arm in arm with her, and riding on horseback with her in the Street and elsewhere.[114]

Even worse than Murray's scandalous living arrangements was his propensity to use his newspaper as a vehicle to undermine Arthur's administration,[115] for Arthur's philosophy on prison management meant that a free and unrestrained press 'is incompatible with the well being of society and the safety of the Colony'.[116]

Gellibrand was not initially an acquaintance of Murray when the newspaperman began to publish licentious letters in the *Hobart Town Gazette* in October 1824 under the pseudonym of 'A Colonist'. The Attorney General showed the letters to Arthur and offered to file a criminal information against the publisher of the newspaper, Andrew Bent.[117] Arthur initially held off,[118] but by March 1825, when Murray's pernicious letter writing showed no sign of abating, he instructed Gellibrand to prosecute the responsible parties for libel.[119]

By this time, however, Gellibrand had struck up a friendship with Murray. He determined that he would prosecute Andrew Bent as publisher of the letters, but not Murray as the writer as he was not 'prepared to pronounce any part of them libellous'.[120] Bent was tried, and after a series of inexcusable delays, he was found guilty, fined £100 and sentenced to three months imprisonment.[121] He was also tried for a series of other libellous articles.[122] However, while

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[113] See *Robert Lathrop Murray Papers*, Mitchell Library, A4434/2 for further information. See also 'Murray' in D. Pike (ed) *Australian Dictionary of Biography* (1966) vol. 1, 272.

[114] Arthur to Bathurst, 17 January 1826, *HRA* Series 3, vol. v, 49, 66.

[115] Ibid 66. Arthur reported that Murray 'first as an anonymous writer, and afterwards as Editor of Bent's Paper, has been incessant in calumniating the Government'.

[116] Arthur to Bathurst, 17 January 1826, *HRA* Series 3, vol. v, 49, 50.

[117] Gellibrand to Arthur, 8 October 1824, *HRA* Series 3, vol. v, 257.

[118] Arthur to Gellibrand, 11 October 1824, *HRA* Series 3, vol. v, 258.

[119] Arthur to Gellibrand, 18 March 1825, *HRA* Series 3, vol. v, 258.

[120] Gellibrand to Arthur, 23 March 1825, *HRA* Series 3, vol. v, 259.

[121] For details of Bent's trial, and the numerous delays in reaching a verdict and sentencing, see Bennett, above n 104, 51-53. See also decision of *R v Bent (No.1)*, 1 July 1825 and reported online at:

Arthur had successfully targeted Bent, he had not silenced Murray, who was still making inflammatory comments attacking the 'close connection of the Chief Justice with the Government'.[123]

Arthur acted rapidly to prevent matters getting further out of his control. Most likely he considered that his control over Chief Justice Pedder was an important component of his Government, and he did not want this to be scrutinised by the public. In order to deflect attention from his relationship with Pedder, he began to attack Gellibrand's role in the affair. According to Arthur, it was Gellibrand's friendship with Murray that lay at the heart of the problem.

Gellibrand v Stephen

One measure that Arthur used to counteract Gellibrand was to cultivate a close relationship with Alfred Stephen, his newly appointed Solicitor General. Stephen, a young barrister, could not believe his luck that 'within a year after my call to the Bar I should receive a Law appointment in Van Diemen's Land'.[124] He promptly got married and sailed for Van Diemen's Land, arriving on 24 January 1825, and was admitted to practise in the Supreme Court on 4 February 1825.[125]

Stephen had spent a childhood alternating between life in the West Indian Island of St Kitts and schooling in England.[126] On arriving in Van Diemen's Land, he immediately launched his legal career by suing surgeon Mr Crowther for a battery and assault that had occurred on the ship while sailing to Australia. The two had been engaged in an argument over a Shakespearian quote, leading Crowther to form the opinion that Stephen was an 'insufferable puppy'.[127]

<http://www.law.mq.edu.au/sctas/html/r_v_bent__no_1___1825.htm> and *R v Bent (No. 2)*, 1 August 1825 <http://www.law.mq.edu.au/sctas/html/r_v_bent__no_2___1825.htm>.

[122] See Bennett, above n 104, 53-55 for a description of the other charges. For the complete report of the 1826 case, see <http://www.law.mq.edu.au/sctas/html/r_v_bent__1826.htm>.

[123] *Colonial Times*, 2 June 1826, 2.

[124] Alfred Stephen, *Jottings from Memory: 1818-1824*, reprinted in R. Bedford, *Think of Stephen: A Family Chronicle* (1954).

[125] Ibid.

[126] See Bedford, ibid, for an account of Stephen's childhood. Also see Stephen's own reminiscences in *Jottings from Memory: 1802-18* reprinted in Bedford, above n 124.

[127] *'Stephen v Crowther'* by F.D. Cumbrae-Stewart in George Deas Brown and Peter Walker, *The Briefcase [A Collection of Papers on Tasmanian Legal Memorabilia and Tasmanian Places Associated with the 21st Australian Legal Convention]* (1981) 24. See also *Stephen v Crowther*, 12 July 1825, reported online at:

The young pup clearly had sharp teeth, however, as Stephen was successful in winning £50 in damages. He was also an ambitious man, determined to uphold the integrity of the Bar, and to map the path of his eventual ascension to the bench of the New South Wales Supreme Court. Fortunately for Arthur, one such person who offended Stephen's morals and ambitions was the unfortunate Joseph Tice Gellibrand.

Stephen demonstrated a pattern of opposition to Gellibrand early in his career as Solicitor General when he advocated that the right to jury trial in the Court of Quarter Sessions had been established.[128] Stephen's opinion was pitted against Gellibrand's advice, which was that the omission of any reference to juries was intentional.[129] Both Pedder and Chief Justice Forbes in New South Wales were considering the same question, and reached opposite conclusions.[130] Pedder's decision, much to the derision of the New South Wales press and dismay of the Van Diemen's Land settlers, was that the right to jury trial had not been established.[131]

Arthur was pleased with the result, as it was in keeping with his philosophies on prison management,[132] but that did not help Gellibrand's cause. Arthur and Stephen were undoubtedly of similar opinion that the recalcitrant Attorney General needed to go. Stephen thought that he had the perfect ammunition when he observed Gellibrand's conduct in the case of *Laurie v Griffiths* in July 1825.[133]

The case arose when Griffiths was alleged to have illegally seized Mr Laurie's boat, the *Fame*. Griffiths had also imprisoned Laurie, as he suspected him of harbouring runaway convicts and carrying forged banknotes. Laurie, indignant about his treatment, consulted the

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<http://www.law.mq.edu.au/sctas/html/stephen_v_crowther__1825.htm>.

[128] *R v Magistrates of Hobart Town*, 5 July 1825, reported online at: <http://www.law.mq.edu.au/sctas/html/r_v_magistrates__1825.htm>. See also A.C. Castles, 'The Judiciary and Political Questions: the First Australian Experience 1824-1825' above n 106, 294, and Bennett, above n 104, 20.

[129] Ibid.

[130] See Bennett, above n 104, 19.

[131] For New South Wales comment and criticism of Pedder's legal abilities, see Dr Wardell's article in the *Australian*, 25 August 1825, 3.

[132] Arthur to Hay, 15 November 1826, *HRA* Series 3, vol. v, 421.

[133] *Laurie v Griffiths*, 7 and 12 July 1825, reported online at: <http://www.law.mq.edu.au/sctas/html/laurie_v_griffiths__1825.htm>.

newspaperman Robert Lathrop Murray, who was not a trained lawyer but occasionally dabbled in legal advice.[134]

Murray on this occasion referred Laurie to Gellibrand, who was able to engage in private work in addition to his duties as Attorney General. Gellibrand had advised Laurie, and completed the pleadings in the matter, at which point Alfred Stephen had taken over the case from Gellibrand. In the meantime, Gellibrand, careless of any conflict of interest, took up instructions to act for the defendant, Griffiths, and appeared in court against Stephen.[135]

Griffiths was found guilty and damages of £460 were awarded against him, for which Griffiths sought indemnity from the Crown. Gellibrand's actions had thus exposed a conflict of interest between his private practice and his duty to the Crown as Attorney General. It also demonstrated the pitfalls of a lawyer acting for both sides in a matter, as Gellibrand should have afforded Griffiths better protection in court. Gellibrand's conduct was now firmly under scrutiny, and Solicitor General Stephen in particular took careful note of the scenario that had just unfolded.

Stephen Resigns as Solicitor General

Stephen pondered the Gellibrand situation and how best to proceed, and eventually played his hand when he tendered a letter of resignation as Solicitor General to the Governor on 10 August 1825, citing his inability to work with Gellibrand, whose political connections and private law practice were 'inconsistent with the honor and dignity of his Office'.[136] It is difficult to believe that Arthur and Stephen had not discussed how to proceed tactically prior to the tendering of the letter, and Arthur predictably declined to accept the resignation immediately.[137]

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[134] Harrison, above n 88, 28 states that Murray, who arrived in Hobart Town from Sydney Town in 1821, was granted the right to appear in court as an advocate, until the Third Charter of Justice and the operation of the Supreme Court of Van Diemen's Land imposed the need for formal qualifications to practise law in the colony. In Sydney Town (where Murray had been originally transported but granted a pardon soon after his arrival) he was a principal clerk in the Police Office and assistant superintendent. Murray himself fancied his skills as a lawyer, and wrote of his role as a 'special pleader' in the Lieutenant Governor's Court, and expressed his regret for the passing of the 'old days' of the legal profession. See 'The Law' (1828) 1 *Austral-Asiatic Review* 260.

[135] For an analysis of the case, see Bennett, above n 104, 25-27.

[136] Arthur to Executive Council. 15 September 1825, *HRA* Series 3, vol. v, 62.

[137] Arthur to Stephen, 7 January 1826, *HRA* Series 3, vol. v, 106.

Arthur sent Stephen's allegations to Justice Pedder, seeking his opinion on whether he had the power to appoint a Commission of Inquiry.[138] Pedder, unable to see any 'distinctly specified' charge in Stephen's papers, told both Gellibrand and Arthur that he only proposed to hear the matter in his capacity as a judge before the Supreme Court. Justice Pedder was unwilling to act extra-judicially by convening a Commission.[139]

By 8 September 1825 the new Court term was about to open, but Stephen had still declined to place formal charges against Gellibrand. As far as Pedder was concerned, his involvement in the affair had then ended, as he could not compel the Solicitor General to lay charges.[140] Arthur, however, was unwilling to accept Pedder's decision. He persisted with his idea that he would appoint a Commission of Inquiry, as he could not 'suffer the affair to rest in its present most unpleasant state' and required Stephen to prepare his case and lay discernible charges against Gellibrand.[141] He requested that Pedder head the Commission. Pedder, despite a series of appropriate protests that to head a Commission of Inquiry was inconsistent with his judicial duties, eventually buckled under the pressure and agreed to Arthur's request.[142]

Meanwhile, the new Court term opened on 10 September 1825, and Gellibrand challenged Stephen in the Supreme Court to put forward the charges against him. Stephen refused to do so, citing the reason that he was still gathering evidence.[143] The court was adjourned until Stephen finally produced affidavits from himself and the solicitor Frederick Dawes. The substance of the allegation was that Gellibrand, in the case of *Laurie v Griffiths*, had drawn pleadings for the plaintiff, and then acted for the defendant. Stephen earnestly told the Court that such a practice 'places suitors of the Court completely within the power of the Profession' and the lack of impartiality damaged the reputation of the legal profession, which should be 'positively pure'.[144]

Pedder, who was in no doubt that Gellibrand's actions were ethically suspect, nevertheless informed Stephen that he still had no distinct substantive charge before him. Stephen's

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[138] Arthur to Horton, 14 September 1825, *HRA* Series 3, vol. iv, 366, 368.

[139] Arthur to Bathurst, 17 January 1826, *HRA* Series 3, vol. v, 49, 56. See also Pedder to Gellibrand, 24 August 1825, in J.T. Gellibrand, *The Proceedings in the Case of His Majesty's Attorney General* (1826) 5-6.

[140] CO 280/7, f. 117, ff. 118, 118a.

[141] Arthur to Pedder, A.W.H. Humphrey and Jocelyn Thomas, 15 September 1825, *HRA* Series 3, vol. v, 62, 63.

[142] See following correspondence: Pedder to Arthur, 10 September 1825 in *Arthur Papers*, vol. 9, Mitchell Library, A2169; 14 September 1825, *HRA* Series 3, vol. iv, 366, 368.

[143] See *In re Gellibrand* (1825) reported online at: <http://www.law.mq.edu.au/sctas/html/in_re_gellibrand__1825.htm>.

[144] Ibid.

allegations as they stood were only a moral issue and not a civil case.[145] Two days later, on 14 September, Gellibrand gave a spirited speech in his defence. Pedder once again asked Stephen to show the grounds or authority on which he rested his motion, to which Stephen, clearly out of his depth, confessed that he was 'really ignorant how I should now proceed.'[146]

Pedder, mustering the wrath of a judge whose time is being wasted, demanded to know whether Stephen could demonstrate a contempt of court.[147] Stephen, still at a loss about how to proceed, made the desperate motion to get the Attorney General struck off the Rolls of the Court.[148] On 20 September 1825 an adjournment was procured so that Stephen could prepare interrogatories.[149]

On 26 September 1825 the Commission of Inquiry began, running simultaneously with the court proceedings.[150] Chief Justice Pedder was the Chairman, and the other two members were A. Humphrey and Jocelyn Thomas who were, along with Pedder, members of the Executive Council. Gellibrand initially agreed to attend voluntarily.[151] The Commission, however, was conducted in secret, and was not subject to the laws of evidence. It was an occasion for much public excitement, and the anomalous situation of the Judge sitting in open court by day, and presiding over a Commission conducted by night did not escape the attention of the media.[152] One newspaper decried the 'introduction into a British Colony of a tribunal, unknown to the British law, and which has been applied to the most illegal purposes.'[153]

Pedder, most likely wracked by indecision about whether he was doing the right thing, nevertheless pressed on. Argument resumed in court on 3 October 1825, with Gellibrand making an extensive speech about why the interrogatories should not be answered. He felt that it was simply an attempt by Stephen to fish for more information to present at the Commission of Inquiry. Gellibrand expressed his grievance at being subjected to simultaneous proceedings, one being under oath and the other not under oath, and declared his

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[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Ibid.

[149] Ibid.

[150] For a report on the proceedings of the Commission, see the notes taken by Gellibrand's lawyer, Hugh Ross, and published by Gellibrand: *The Proceedings in the Case of His Majesty's Attorney-General*, above n 139.

[151] Giblin, *The Early History of Tasmania* (1928) 476.

[152] Melville, above n 99, 41-2.

[153] *Colonial Times,* quoted in Melville, ibid 42. Note that no date was provided.

extreme concern that statements made without the protection of the oath would necessarily leave an impression even if 'the Judge was a very Angel'.[154]

Pedder ultimately disallowed the interrogatories, and dismissed Stephen's motion on 5 October 1825.[155] While Pedder decreed that acting for both sides in a dispute was a 'detestable practice', the court could not punish a wrong relating to honour, propriety or delicacy.[156] Arthur, despite his undoubted frustration at Pedder's decision, still had the Commission of Inquiry, which Gellibrand had unsuccessfully tried to halt.[157]

The proceedings at the Commission had been continuing since mid-September, and nothing was off-limits. Gellibrand's relationship with Murray, and his dealings with private clients were all scrutinised. Allegations were made that Gellibrand allowed Murray to sit near him at the Bar table and offer advice on court proceedings. Finally, on 16 November 1825, Gellibrand became so indignant at his treatment that he walked out and never returned.[158]

The Commissioners resolved to complete the matter without him, and took over a month to hand down their decision. On 29 December 1825 they finally gave their reasons, concluding that at least half of Stephen's charges had been substantiated.[159] They found that Gellibrand did indeed associate with Murray privately, and that he allowed Murray to converse with him at the Bar table even though he was not legally trained. They considered the *Laurie v Griffiths* case and its implications. They also determined that Stephen had not made the allegations for personal gain, a finding that gratified Stephen immensely as he had been concerned that the public would misconstrue his 'painful duty'.[160]

Later in the day, Arthur convened a meeting of the Executive Council to discuss Gellibrand's future. The councillors were none other than Pedder, Thomas and Humphrey, who had moved from the role of judge to executioner. Despite their intimate knowledge of the case,

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[154] *In re Gellibrand*, above n 139.

[155] Ibid.

[156] Ibid.

[157] Ibid.

[158] Pedder, Humphrey and Thomas to Arthur, *HRA* Series 3, vol. v, 64, 65.

[159] See report in *HRA* Series 3, vol. v, 64 (Enclosure No. 2 of despatch dated 17 January 1826).

[160] Stephen to Arthur, 8 January 1826, *HRA* Series 3, vol. v, 107.

there was perhaps a measure of discomfit involved in the process as they took until New Years Day, 1826, to deliver the decision to suspend Gellibrand.[161]

Arthur forwarded the papers to the Colonial Office, where Gellibrand's suspension was eventually confirmed.[162] Arthur did not escape without reprimand, however. James Stephen, who was the Colonial Office's legal officer and, coincidentally, cousin of Alfred Stephen, chastised Arthur for consulting Pedder extra-judicially, as it caused an inexcusable merging of Pedder's executive and judicial duties.[163]

Ultimately, despite Gellibrand's appeals to the British Government and threats of libel suits,[164] he was forced to accept his fate. While James Stephen had expressed considerable misgivings about the whole affair, he felt that his relationship as Alfred Stephen's cousin precluded him from making a formal investigation.[165] This was perhaps fortunate for Alfred, since his cousin James' legal abilities were well recognised. Since the case had attracted considerable attention, the task of reviewing it was instead given to the little known T.J. Howell in London, who declared that Gellibrand had no right of appeal.[166]

Gellibrand remained in the colony and practised law in a private capacity. He remained an influential citizen, keenly interested in the welfare of the colony. Pedder remained as Chief Justice, overburdened by his duties both on the bench and as Executive and Legislative Councillor. Yet Pedder did not relinquish his position on the Executive Council, even though the Gellibrand affair had undoubtedly exposed the problems in mixing judicial and executive functions.

Chief Justice Forbes of New South Wales, in contrast, had spent much time worrying about the potential conflict between his judicial and executive functions, and resigned his position on the Executive Council when the opportunity arose.[167] It is extremely unlikely that Forbes,

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[161] Arthur to Bathurst, 11 February 1826, *HRA* Series 3, vol. v, 104; Arthur to Gellibrand, 8 February 1826, *HRA* Series 3, vol. v, 113 (Enclosure No. 4).

[162] Bathurst to Arthur, 22 June 1826, *HRA* Series 3, vol. v, 296.

[163] Stephen to Arthur, *Arthur Papers* vol. 4, 77, 81. Mitchell Library A2164.

[164] Gellibrand to Bathurst, 4 April 1826, CO 280/10, f. 188, ff. 195.

[165] Stephen to Hay, 17 July 1826, CO 280/8, f. 111.

[166] Note Bennett's opinion that Howell was chosen as 'tame referee' who was encouraged to ratify the Gellibrand proceedings. Bennett, above n 104, 46.

[167] See Part One. For further discussion on the development of the separation of powers doctrine during the colonial era, see J.M. Bennett, *Colonial Law Lords (The Judiciary and the Beginning of Responsible Government in New South Wales)* (2006).

with all of his experience, would have agreed to conduct an extra-judicial commission. Pedder's reputation, from that time forward, remained a little suspect, and comparisons with Chief Justice Forbes were never made favourably.[168]

Arthur had emerged victorious on this occasion, but had a battle ahead of him to regain public confidence. Robert Lathrop Murray had not been silenced, and he remained the focal point of opposition to the Governor's policies. Pressure was mounting from groups of colonists to introduce a more representative system of government. They called for legal reform, in particular jury trial.[169] It had become apparent to the colonists that Arthur's autocratic style had seen him take firm control of the legislative, executive and judicial arms of government. The only way to change the balance of power would be to either depose Arthur, or institute measures that would give the colonists greater control over the three arms of government. Representative Government would counter the effects of autocratic rule by granting the free settlers a voice in their own affairs, and jury trial would help to circumvent the peculiar sway that Arthur seemed to have over Chief Justice Pedder and his Court.

The free settlers chose to pursue both options by pressing the Colonial Office for a new Governor, and the installation of a more representative form of government. Life for Arthur would become quite uncomfortable, as he crossed swords with influential colonists who were baying for his recall. The press reported the new turn of events with delight, observing the altercations as they were invariably played out in Chief Justice Pedder's courthouse.

Legal Reforms

The Supreme Court, which had for so long been distracted by the Gellibrand proceedings, was able to resume normal duties. The criminals of Van Diemen's Land did not fare at all well, with executions numbering 53 and 50 respectively in the years 1826 and 1827. By 1831, the number of executions had dropped dramatically, with only four in that year.[170] Arthur's imposition of law and order on the island was, it seemed, having a significant effect.

It was becoming apparent, however, that there were many problems within the legal system itself that served to prevent it functioning efficiently. One result of Chief Justice Pedder

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[168] See, for example, newspaper licensing dispute of 1826, reported in Bennett, above n 104, 55-61, where Forbes' opinions on the issues are given far more credence than Pedder's.

[169] See petition of 1834, reproduced in Melville, above n 99, 182-186.

[170] 'Executions – Return No. 32' in *Statistics of Tasmania,* above n 89.

disallowing jury trial in the Court of Quarter Sessions was the decision to try all free persons charged with criminal offences in the Supreme Court.[171] As Stephen pointed out, this placed an enormous burden on Pedder, who had to preside over even the smallest misdemeanours. The colony's gaol was overcrowded, and there were delays in bringing prisoners to trial.[172]

In 1830, the Court of Quarter Sessions was reconstituted so that it could take some of the burden off the Supreme Court.[173] In the same year a limited right to trial by jury was allowed in actions at common law, providing that the presiding judge agreed to it.[174] It was not a big concession, but it was a start.

Chief Justice Pedder was also to benefit from legal reforms being made, with the issue of the Second Charter of Justice for Van Diemen's Land in March 1831.[175] The Second Charter helped to lay a more solid foundation for the workings of the judicial system, and provided for a second judge to be appointed to assist Pedder in his workload.[176] The only problem was that the second judge was specifically named - Alexander MacDuff Baxter, the former and incompetent Attorney General of New South Wales.[177]

It quickly became apparent that Baxter could never fill the role of second judge. He had problems with debt, his wife was most likely insane, and it was simply another case of New South Wales offloading its unwanted people into Van Diemen's Land.[178] Legislation was required to fix the problem, and Baxter retired in Britain.[179]

It was not until 1833 that the colony received a replacement for Baxter, and this appointment was to prove a hindrance to the effective administration of justice rather than an asset. The new judge was Algernon Montagu, and the colonists soon discovered that, while he was not

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[171] See Castles, above n 30, 268 and *R v Magistrates of Hobart Town,* reported online at: <http://www.law.mq.edu.au/sctas/html/r_v_magistrates__1825.htm>. See also Castles, 'The Judiciary and Political Questions: The First Australian Experience, 1824-1825', above n 106, 294.

[172] Stephen to the Judges, 7 January 1834 – 'Observations of Alfred Stephen (Attorney General) on the Arrangement of Court Business', reprinted in J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History* (1979) 124.

[173] *An Act to Institute Courts of General and Quarter Sessions 1830*, 10 Geo. IV, c. 2.

[174] *Jury Act 1830*, 11Geo. IV, No. 5.

[175] 4 March 1831, set out in edited form in Bennett and Castles, above n 172, 116. Full text available in Tasmanian statutes.

[176] Castles, above n 30, 269.

[177] See Chapter 3.

[178] Arthur to Goderich, 28 October 1831, in Australian Joint Copying Project, Archives of Tasmania, GO 33/8, 1026-1037. See also Castles, above n 30, 269.

[179] Ibid.

in alliance with Arthur or easily manipulated by the Governor, his peculiar style of legal decision-making created an entirely new set of problems.

Algernon Montagu had served the colony as Attorney General from 1828, and the decision was made to elevate him to the Bench rather than importing a judge from Britain. He had an impressive pedigree, as a relative of the Earl of Sandwich and descendant of Sir Edward Montagu who had been the Lord Chief Justice of the King's Bench in 1539. As a child, Algernon Montagu had associated with the poets Wordsworth and Coleridge before following his father into the law, being called to the Bar on 1 February 1826. Given his lineage, the Colonial Office overlooked the fact that Montagu was constantly in debt when he applied for the position of Attorney General of Van Diemen's Land.[180]

Montagu proved his worth as Attorney General, pleasing Governor Arthur with an incisive legal mind and able prosecutions in court.[181] When he was commissioned puisne judge, it seemed like a good choice at the time. For Chief Justice Pedder, however, Montagu's arrival on the Bench was a mixed blessing. Pedder now had someone to share the judicial load, but Montagu proved to be more of an adversary than a friend.[182] The new judge was to create problems for the legal community for fifteen years, and in particular the barrister who had been recently raised to the position of Attorney General, Alfred Stephen.

'Mad Judge' Montagu

Algernon Montagu was a fiery judge, quick to criticise suitors and practitioners of the court, and in constant disagreement with Chief Justice Pedder. He soon earned the title 'Mad Judge', and journalists reported the skirmishes in his courtroom with relish, but also with real concern for the administration of justice in the colony.[183]

Over the years, few people were spared. Mr Thomas Horne, a barrister, was reprimanded for not wearing a gown.[184] Juries were ridiculed for decisions they made and dismissed

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[180] See P. Howell, 'Of Ships and Sealing Wax: The Montagus, the Navy and the Law.' (1966) 13(4) *Tasmanian Historical Research Association* 101.

[181] Ibid 115.

[182] See Bennett, above n 104, 75-76.

[183] The title of 'mad judge' was reportedly conferred on Montagu by the *Hobart Town Courier* after Montagu's conduct in the case of Thomas Lewis in 1834. This case is described in further detail later in this chapter. See also B. Keon-Cohen, 'Mad Judge Montagu: A Misnomer?' (1975) 2(1) *Monash University Law Review* 50, 61.

[184] *Hardiman v Bingham,* 10 May 1839, reported online at:

accordingly.[185] Justice Montagu refused to conduct business in his chambers when required, forcing Pedder to do extra duties. On one occasion he and the Chief Justice were over forty-five minutes late arriving at the courtroom, and the members of the Bar staged a walkout. The Chief Justice discussed the matter reasonably with the Bar on a later occasion, chastising them for their disrespect but eventually conceding that he had been extremely late. Montagu, on the other hand, stated self-righteously that 'occurrence of this kind have been so very common, that I shall offer no commentary whatever, but allow it to pass with the most perfect silence.'[186]

Silence was not Justice Montagu's preferred mode of response, however, as Alfred Stephen had discovered. In one case, Montagu charged Stephen with misquoting and insulting him. Pedder and the observers in his courtroom reportedly looked on in horror as Montagu flew into a rage, saying, among other things:

> I will protect this Bench from being insulted even by an *Attorney General!* I do not care for your *smile*, however you may intend to express your contempt by it. You have often treated me with disrespect both in Court and elsewhere, and charged me with acting improperly. I now, Sir, call upon you to state where you stand what you have said of me in public elsewhere, and not to stab in the dark.[187]

Stephen eventually wrote to Arthur, requesting protection against the mad Judge's attacks. Arthur wrote to Montagu and received from the indignant Judge seventy-six pages detailing Stephen's insulting conduct. Arthur then referred the matter to the Executive Council. The Council looked at the matter for a fortnight and made many findings of fact, such as Stephen had been eating and drinking at the Bar table (but it was stated that such a practice was not without precedent in the Courts of Westminster). Stephen had also omitted to bow to the judges on entering and leaving the courts (although it was conceded he was not the only barrister who did not accord this mark of respect).[188]

<http://www.law.mq.edu.au/sctas/html/1839cases/HardimanvBingham,1839.htm>.

[185] *Smith v Griffin* and *Driscoll v Watts* (December 1839) reported online at: <http://www.law.mq.edu.au/sctas/html/1839cases/SmithvGriffin,1839.htm>.

[186] *Hobart Town Advertiser*, 16 August 1839. The Bar 'walkout' is also reported online at <http://www.law.mq.edu.au/sctas/html/1839cases/Walkoutbybar,1839.htm>. Note that the members of the 'Bar' named in the article were: McDowell (Attorney General), Mr E. Butler, Mr S. Jones, Mr Sutton, Mr C. Ross, Mr Perry, Mr Horne, Mr Allport, Mr Harrison, Mr Browne, Mr Pitcairn, and Mr Young. As is permissible in a fused profession, these men were all named as barristers regardless of whether or not they were formally trained as a barrister in an English Inn of Court. Note also that despite the small numbers of advocates in the colony, there was no hesitation in calling them collectively members of 'the Bar'.

[187] *R v Rowlands (No.2)* (1836) reported online at: <http://www.law.mq.edu.au/sctas/html/1836cases/RvRowlands(No2),1836.htm>. (Emphasis in original).

[188] For all of the correspondence, see Original Minutes of Evidence No. 1 – No. 10, from 21 September 1836 -1 October 1836, Archives Office of Tasmania, CSO Bundles, EC 2/1/1. Lawyers interviewed about Stephen's

It was concluded that these incidents and others had led to a level of great hostility on Montagu's part. The Executive Council in the end expressed the 'strongest disapprobation' of the conduct of both parties. Despite the lengthy investigation, neither party was suspended. Arthur referred the papers to the Colonial Office, which also refused to enter into the dispute, being of the opinion that Justice Montagu should learn to hold his tongue.[189]

Stephen resigned his office as Attorney General shortly afterwards, and devoted himself to private practice. His career certainly was not harmed by the spate of incidents with the judge, as in 1839 he left Van Diemen's Land to take up a position as Judge on the bench of the Supreme Court of New South Wales. The colonists gave him a fond farewell. One testimonial stated that, 'as a lawyer and advocate, your talents have ever commanded our admiration.'[190] Even the journalists, normally harsh in their assessment of colonial officials, had nothing but praise for Stephen, who had the fortune to possess

> professional learning, tact and eloquence; qualifications which, in his advocacy at the bar, his self-respect has never permitted him to deface by that arrogance and overbearing demeanour, which are not always disassociated in the person of the advocate with high legal attainments.[191]

Governor Arthur had left the colony a few years prior to Stephen, but he was not graced with such recognition. While Stephen seemed to have a talent for surviving political fracas, and engineering promotion from them, Arthur had met the fate of many Governors before him. His dogged insistence that Van Diemen's Land was a penal colony had become outdated, and many free settlers, including members of the legal profession, resented his treatment of them. Politicking to the Colonial Office to have him recalled to England had begun in earnest. The 'mad judge' Montagu also inadvertently played a part in Arthur's downfall, as the administration of justice in the colony fell into serious disrepute.

Arthur's Recall to England

Influential landowners, such as Gilbert Robertson, William Bryan and Mr Meredith were typical of those who had tired of Arthur's policies that served to restrict the rights of the free settlers. When he, at various times, punished their misdemeanours by confiscating their right

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conduct included Thomas Young, Joseph Allport, George Cartwright, Robert Pitcairn and Horne.

[189] Ibid.

[190] *Testimonial from Launceston*, 15 April 1839, signed by 245 persons; Mitchell Library, CY 2761.

[191] *Tribute from Journalists to Alfred Stephen*, Mitchell Library, CY 2761.

to assigned servants, they turned to the press to vent their anger at his administration.[192] They had the support of many of the colony's advocates, including Gellibrand and Thomas Horne.

William Bryan, a property magnate, had come to Arthur's attention because of his suspected connection with cattle duffing. Arthur, to send the colonists a message, not only stripped Bryan of his assigned servants, but also struck him off the list of magistrates.[193] Bryan, consequently, was feeling particularly vengeful. It did not help matters when fellow magistrate and Arthur supporter William Lyttleton reportedly yelled to passers by in the street insulting remarks about Bryan's honour.[194] Bryan sent his friend Lewis to sort matters out, and when Lewis challenged Lyttleton to a duel with Bryan, the magistrate refused. Lewis was charged with attempting to incite Lyttleton and Bryan to a duel, and he had the misfortune to represent himself before Justice Montagu who threatened to fine Lewis £10 for every question Lewis put that was unconnected to the case. Lewis was given the harsh sentence of 18 months imprisonment and £150 fine, despite hiring Joseph Tice Gellibrand to act for him part way through the case.[195]

The *Colonist*, published by Andrew Bent, devoted much time and energy into reporting the travesty of justice which had occurred, and ventured to say that 'Mr Algernon Montagu...has struck more terror into the minds of the peaceable Inhabitants of this Colony, than would the breaking out of 5,000 bushrangers, with sword and firebrand through the land.'[196] The *Sydney Gazette*, observing the developments from afar, similarly decreed that the state of affairs in Van Diemen's Land was 'alarming', and firmly placed the blame at Governor Arthur's doorstep. They felt that the

> advocates of Colonel Arthur are reduced to this dilemma; either he is indifferent to the extraordinary scenes that are constantly taking place within his government, or he approves of them. Take it either way, and is he fit to govern a British Colony?[197]

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[192] For a detailed version of the battles between Arthur and the free settlers, see M. Clark, *A History of Australia, vol. 2: New South Wales and Van Diemen's Land 1822-1838* (1968) Chapter 11.

[193] Arthur to Stanley, 1 December 1833, CO 280/43, f. 404-5. *Colonist*, 3 December 1833, and see also Clark, vol. 2, ibid 282.

[194] Letter from William Bryan to the *Colonist*, 11 January 1834, and 14 January 1834. See also Clark, vol. 2, above n 192, 283.

[195] *R v Lewis* (May 1834) reported online at: <http://www.law.mq.edu.au/sctas/html/1834Cases/RvLewis,1834.htm>.

[196] *Colonist*, 13 May 1834, 1.

[197] *Sydney Gazette*, 7 June 1834, 2.

It was a question that many colonists were beginning to ask themselves. Bryan in the meantime was preparing to regain his servants through the court of law, using Gellibrand as his legal adviser. The Solicitor General, Edward McDowall, noted that the case had caused considerable excitement in the press, and as a result had materially prejudiced opinion. The Crown was not prepared to allow trial by jury. Bryan abandoned his case, and was stung by the refusal of a jury trial.[198] According to him and other settlers, it was simply further evidence of the denial by the Arthur administration of basic rights that should have been accorded as a matter of course to the free population.[199] Chief Justice Pedder again came under fire and Bryan returned to England, where he began lobbying for Arthur's removal.[200]

A meeting was held on 14 July 1834 in the Court House in Hobart to discuss the perceived travesty of justice that had occurred. Gellibrand, taking the lead, stated that the recent acts in denying jury trial had violated their rights and liberties, and the very appearance of justice.[201] The colonists discussed the type of society they wanted to live in and resolved that they wanted a representative government, the extension of jury trial, and taxation by representation.[202] Arthur remained resolute; free institutions were not in keeping with a penal colony. Unlike Governor Bourke in New South Wales, he wanted to postpone the day on which the colony ceased to be a receptacle for convicts.[203]

One of the few concessions Arthur made was to extend the right to a jury trial. In November 1834 the use of assessors was abolished in the Supreme Court, and juries of four persons could be empanelled in civil cases.[204] Military juries in criminal cases were not abolished until 1841.

Arthur's concession had been too little and too late. On 17 September 1835 the Political Association was formed for the purpose of expressing dissatisfaction with the state of the Government, and to give their vote of no confidence in the Legislative Council in which none

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[198] *Bryan v Hortle* (June 1834) and *Bryan v Lyttleton* (27 June 1834) reported together online at: <http://www.law.mq.edu.au/sctas/html/1834Cases/BryanvLyttleton,1834.htm>.

[199] The *Tasmanian* on 1 July 1834, 2 stated that 'we deplore deeply the effects which this most injudicious course...cannot fail to produce. We deplore it for the sake of the colony. We deplore it that the Head of Government will be involved therein, and most unjustly!'

[200] Ibid. The *Tasmanian* reported that Bryan was due to sail for England on the next vessel.

[201] See *Colonial Times*, 15 July 1834, for a report of the meeting.

[202] Ibid. For details of further meetings held on the same issues, for example 9 June 1834, and 12 July 1834, see Clark, above n 192, Chapter 11.

[203] Clark, ibid 288.

[204] *An Act for the Extension of Trial by Jury and to regulate the Constitution of Juries 1834*, 5 Will. IV, No. 11.

of the representatives were appointed by the people. Gellibrand was a member, as was Thomas Horne, a barrister who had arrived in the colony in 1830.[205]

In November 1835, Arthur decided to act to repress inflammatory statements being made in the press. Stephen, who was still Attorney General at that time, brought to the attention of the judges observations made by Henry Melville in the *Colonial Times,* which he said brought the court into disrepute. Melville was imprisoned for twelve months and fined.[206] He used his time in gaol to complete his *History of Van Diemen's Land*, in which he wrote that Arthur's administration had 'reduced the settlement to misery'.[207]

A further meeting in 1836 this time led to the resolution that Arthur be removed from Van Diemen's Land.[208] Melville suggested, tongue in cheek, that the colonists might as well ask for the recall of the Attorney General and Chief Justice at the same time.[209] The Colonial Office did not remove Pedder from office, but did instruct Arthur to force Pedder to resign from the Executive Council to prevent the disastrous mixture of judicial and executive duties.[210]

Arthur was informed on 25 May 1836 that he was to be recalled.[211] Many of the colonists began their celebrations, and those bold enough to express regret were caustically chastised. Joseph Tice Gellibrand, still holding a grudge against Arthur for the way he was deposed as Attorney General, reportedly walked around the town posting libellous notices on the town walls. The effect of the notice was to alert the public that there were some people who insisted on raising money to buy a plate for Arthur, and urging those approached by Arthur's supporters to laugh in the plate buyers' faces.[212]

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[205] Report of the first meeting of the Political Association in the *Colonial Times*, 22 September 1835. See also, Melville, above n 99, 214-5.

[206] See Melville, ibid 221-224 and *In re Melville* (November 1835) reported online at: <http://www.law.mq.edu.au/sctas/html/1835Cases/InreMelville,1835.htm>.

[207] Melville, ibid 224.

[208] *True Colonist,* 22 January 1836, 4.

[209] *Colonial Times*, 5 January 1836, 4.

[210] Glenelg to Arthur, 14 October 1835, CO 408/12, ff. 63-64. Pedder was reluctant to resign, but finally did so on 1 March 1836. See Bennett, above n 104, 107.

[211] Glenelg to Arthur, 10 January 1836, CO 408/12, ff. 58-9.

[212] *Hobart Town Courier,* 10 June 1836, 2 and *True Colonist*, 15 July 1836, 4-5. Clark, vol. 2, above n 192, 308.

Arthur ignored the attack by Gellibrand, reportedly tried to reconcile with the deposed Attorney General, and left the colony on 29 October 1836.[213] While Gellibrand's animosity was understandable and even warranted, Arthur was not rewarded with the recognition that he deserved from many other colonists. The colony had changed markedly during the twelve years of Arthur's rule, and, while his methods were questionable, the results were plain to see. The campaign for Responsible Government, which was being mounted with renewed vigour, had been made possible largely because of Arthur's successful mission to impose law and order on the island. As John Pascoe Fawkner said, Arthur did much good and much evil for the island.[214] The 'good' was frequently overlooked, but even the most ardent opponent of Arthur must have realised that not all 'evil' could be attributed to the recently deposed Governor.

Van Diemen's Land's political system was inextricably linked to the transportation of convicts and, while Arthur had been deposed, the penal system remained. When transportation to New South Wales ceased in 1840, the British Government continued to send convicts to Van Diemen's Land.

Meanwhile, other parts of Australia were being rapidly colonised by free settlers in the 1830s. New settlements in Western Australia and South Australia proudly declared themselves to be free of the convict taint, and the rich pastoral land of Port Phillip that had eluded Collins over thirty years ago was now being successfully settled. Many residents of Van Diemen's Land left the colony in 1837, lured by the chance to play a founding role in the future colony of Victoria. Men such as Gellibrand and John Pascoe Fawkner saw a better future for themselves in the new settlement. For Fawkner, who had childhood memories of Port Phillip, it was a homecoming of sorts.[215] Van Diemen's Land, for a time, was decreasing in numbers of free settlers, as greener pastures beckoned.[216]

For those that remained, it became even more important that their small island be equipped to compete on an equal footing with the other Australian colonies. Anti-transportation

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[213] Clark, vol. 2, ibid 311.

[214] *Reminiscences of John Pascoe Fawkner*, above n 16, 39.

[215] See Chapter Five for the continuation of the story of the settlement of Port Phillip, and John Pascoe Fawkner and Joseph Tice Gellibrand.

[216] Statistics show that in 1837, the total population had decreased by 1100, and in 1839 it again decreased by 1735 persons. See *Statistics of Tasmania 1804-1854*, above n 89, Statistical Return No. 17 from 1824-1835 and Table 23, population 1838-1841.

movements were instituted with renewed vigour, led by lawyer Robert Pitcairn.[217] Successive governors were continually approached about the possibility of Responsible Government.

The advocates, while deeply involved in the politics of the colony, also had to deal with the internal politics of the Bar. The 'mad judge' continued to terrorise many of the practitioners, and ethical problems that went to the heart of a barrister's practice were raised. The protagonists in the next major legal dispute were familiar names: Montagu and Stephen. The only difference was that the member of the Stephen family involved on this occasion was not to be Alfred Stephen, but his brother Sidney.

Sidney Stephen and Barristers' Ethical Obligations

While Van Diemen's Land was decreasing in population for a short period, the legal community continued to attract new recruits. One notable barrister who arrived in Van Diemen's Land was Sidney Stephen.[218] Sidney was one of the first barristers who had been admitted to the roll of barristers in New South Wales, and when he re-located to Van Diemen's Land in 1839 he practised as both barrister and solicitor, as was permissible in Van Diemen's Land.

In 1842, however, Chief Justice Pedder and Justice Montagu struck him off the rolls of the Supreme Court of Van Diemen's Land in a unanimous decision which brought into sharp focus the ethical obligations of barristers and their ability to sue for unpaid fees.

The matter began when Stephen attempted to recover unpaid fees from several clients.[219] The accepted rule was, as it is now: the instructing solicitor pays a barrister his fee, and the barrister does not directly approach the client for payment.[220] In this case, Stephen did not have a good relationship with the solicitor and chose to approach his clients for payment. Eventually a series of agreements were brokered in which the bills were guaranteed by a third party, Mr Thorne.

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[217] Harrison, above n 88, states that Pitcairn, a Scottish solicitor, was chiefly remembered for his active involvement in the cessation of transportation movement and the introduction of Responsible Government.

[218] Sidney Stephen was an Inns of Court trained barrister, and thus will be referred to specifically as a barrister rather than advocate. He was entered on the Court Roll of the Supreme Court of Van Diemen's Land on 5 January 1828, Archives Office of Tasmania, SC480/1. He was also admitted to practise in the Supreme Court of New South Wales on 1 February 1828, and began his colonial legal career in New South Wales.

[219] For details of the incident, see *In re Stephen*, reported online at: <http://www.law.mq.edu.au/sctas/html/1842cases/In%20re20Stephen,201842.htm>.

[220] Ibid.

When the parties were in default of payments, Stephen chose to sue Thorne to recover the amounts owed. Stephen directed his son to find a solicitor through whom he could bring an action in the Supreme Court, and the solicitor Fisher was chosen for this task. Through a series of misunderstandings, Fisher was wrongly named as plaintiff to the action, but continued the action in his name even when the mistake was discovered. After two attempts by Stephen to bring the case before the Supreme Court, Thorne offered to settle the matter with Stephen by payment of a horse in satisfaction of the debts, with Thorne to pay his own costs.

The matter would most likely have ended there had the defendant's solicitor not then determined to sue Stephen for costs. Stephen protested that the agreement was that the defendant had agreed to pay his own costs, and refused to pay. When the matter came before the Court, the unusual circumstances unfolded before the judges who deemed Stephen's conduct reprehensible. Justice Montagu declared that

> there is no question that if the judges cannot think the bar consists of men of character, men of candour, men of honour, men of integrity, that it would be better there should be no bar.[221]

Both Pedder and Montagu abhorred the fact that Stephen had direct contact with his clients, and had accepted a third party as guarantor for bills, even though Thorne had no connection with the legal work Stephen had done for his clients and was not obliged to pay the bills. They condemned the fact that Stephen used Fisher as plaintiff in the action against Thorne, seeing it as a backdoor way around the rule that a barrister cannot sue for fees. Stephen was also charged with misleading the court by concealing contents of an affidavit filed in the proceedings.[222] Both Stephen and Fisher were struck off the rolls of the Court on 7 December 1842.

Sidney Stephen, unwilling to accept his fate, immediately began to amass support for an appeal to the Privy Council. He tendered affidavits from all the parties involved,[223] and received a declaration from the Bars in New South Wales and Port Phillip that he still remained on their respective rolls of barristers.[224]

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[221] Ibid.

[222] See Montagu's list of charges against Stephen, ibid.

[223] Ibid.

[224] Ibid.

In the meantime, perhaps because of the focus on legal ethics, the Van Diemen's Land Law Society was formed on 29 October 1845. Its president was Joseph Hone, and Charles Butler was the secretary. Prominent lawyers were among its membership, such as Robert Pitcairn, William Douglas, Edward Butler, Gamaliel Butler, John Roberts, Valentine Fleming and Thomas Rowlands. Its stated objective was to 'promote fair and honorable practice among the members of the profession'.

Despite such laudable objectives, the society had difficulty in attracting enough members to its meetings to form a quorum, and disbanded on 11 August 1848 without achieving anything notable for the practice of the profession.

Sidney Stephen's ongoing case no doubt attracted interest amongst the profession, however, and it finally came before the Privy Council in 1847. He argued that bills of exchange within the colony were a common practice, and that there was nothing untoward in his using that method to ensure his fees were paid. He stated that, while the action was wrongly instituted in Fisher's name, the defendant Thorne was aware of the mistake and could have used it as a defence to the action. There was no intention of concealing evidence, or lying to the Supreme Court.[225]

The Privy Council decreed that the order to disbar Stephen from practising in the Supreme Court of Van Diemen's Land be rescinded.[226] Yet the age-old problem of barristers recovering their fees was not resolved. The Privy Council did not comment on the propriety of Stephen's actions. Successive generations of barristers would continue to grapple with the problem of payment. The ancient edict that it was ignoble for a barrister to concern himself with payment for a brief was rapidly becoming problematic and outmoded in an increasingly commercialised society.

Sidney Stephen, while victorious and vindicated, had not remained in Van Diemen's Land. He had long since moved to Port Phillip, where his reputation unfortunately preceded him and he again ran into problems with the judiciary.[227] He apparently shared his brother Alfred's talent for surviving political skirmishes, however, and he eventually moved to New Zealand where he became a Justice of their Supreme Court.

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[225] Ibid.

[226] Ibid.

[227] See Chapter 5 for further information on Sidney Stephen's dealings with Justice Willis and the Port Phillip Bar.

Montagu's Amoval from the Bench

In the meantime, Montagu, having unsuccessfully attempted to end the career of another Stephen family member, discovered that his own career as a judge was rapidly drawing to a close. His autocratic and harsh methods of judgment over his fellow citizens were becoming increasingly outmoded and less tolerated in a society that was working tirelessly in its campaign for Responsible Government.

Justice Algernon Montagu's own judgment day arrived on 31 December 1847. Successive Governors, Sir John Franklin, Sir Eardley Wilmot, and Sir William Denison, were all frustrated by Montagu's actions, but it was not until Governor Denison took the helm that his career was seriously threatened.

Montagu's behaviour had not improved after Arthur's departure. On one occasion when the courthouse needed repairs, Montagu refused to sit in the makeshift courtroom and insisted that sittings be held in his private room. The advocates of the colony protested, so sittings were not held at all, and the Court's business was needlessly paralysed.[228] Montagu also continued to dissent from many of Pedder's judgments, causing both Pedder and the colonists to call for a third judge to decide disputes.[229] Montagu was also famed for keeping a keen eye out for new colonial legislation that he could declare as being repugnant to the laws of England.[230]

One of the biggest frustrations for the colonists, however, was Montagu's perpetual state of indebtedness. Governor Eardley Wilmot reported that Messrs Allport & Roberts, solicitors, had in their possession bills of exchange for the amount of £800 payable by Montagu.[231] Allport and Roberts discovered that the irascible judge refused to pay his debts, and was cleverly preventing them from suing him for the monies owed by claiming 'the impossibility

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[228] *Memorial of legal practitioners*, 21 November 1837, Tasmanian Archives Office, GO 39/2 at 161. See also Bennett, above n 104, 82.

[229] Petition of Tasmanian Colonists, 15 January 1848, in *British Parliamentary Papers: Colonies Australia vol 10, Sessions, 1847-1848* (House of Commons Papers No. 566, ordered to be printed on 29 July 1848), (Van Diemen's Land) 383-385. See also Bennett, above n 104, 81.

[230] See Bennett, ibid 81.

[231] Eardley Wilmot to Stanley, 6 January 1844, *British Parliamentary Papers,* above n 229, 277.

of suing a Judge of the Court'.[232] Wilmot reported that the judge 'is accustomed to use violent and energetic language in court, being easily excited, and of an eccentric character'.[233]

The matter went no further, however, until the arrival of Sir William Denison. The new Governor rapidly earned the dislike of many prominent colonists who saw him as a rude, malicious tyrant.[234] Justice Montagu equally rapidly earned the dislike of Denison, who carefully crafted a case against Montagu for amoval from the bench.

The issue of Montagu's debts was again raised after Mr McMeckan forwarded Denison a petition on 23 November 1847, stating that Montagu refused to pay his debts and had again pleaded his position on the Bench as a bar to the action of recovery. Mr McMeckan requested that Montagu be suspended until judgment could be recovered against him.[235]

Denison ignored McMeckan's suggestion for the time being, until a debacle arose over a case before the Supreme Court involving the *Dog Act.*[236] Denison considered that with the new evidence that had come to light he could instigate a clean sweep of the colony's judicial department and remove not only Montagu from the bench, but also Chief Justice Pedder.

The *Dog Bill* was tabled before the Legislative Council in 1846, and as was customary, the judges were required to consider whether its provisions were repugnant to the laws of England. Pedder did not initially perceive any repugnancy, and the Act was passed. Its ostensible effect was to impose a licence on dog owners, thereby attempting to limit the increase of dogs on the island.

When Pedder and Montagu were adjudicating on the case of *Symons v Morgan,*[237] in which the defendant, a vociferous opponent of the *Dog Act*, was charged with keeping a female dog without a licence, they were required to consider whether the *Dog Act* was lawful. Despite

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[232] Lord Stanley to Eardley Wilmot, 25 June 1844, ibid 279.

[233] Eardley Wilmot to Stanley, 6 January 1844, ibid 277.

[234] John West, a Congregational Church minister, journalist for the Launceston *Examiner,* and author of *The History of Tasmania,* above n 101, 243 wrote that Denison's 'injustice to the judges, and his sarcastic delineations of colonial character, have narrowed the circle of his friends'. Denison in turn wrote of his perception of the low morals of the colonists, and the selfishness and distrust that pervaded the community. See generally Richard Davis and Stefan Petrow (eds), *Varieties of Vice-Regal Life by Sir William and Lady Denison* (2004).

[235] Denison to Earl Grey, 17 January 1848, *British Parliamentary Papers,* above n 231, 279; see also petition of M'Meckan at 298 and reply of Montagu at 299.

[236] See *Symons v Morgan* (1847) discussed below.

[237] Judgment delivered on 29 November 1847, and printed in *British Parliamentary Papers,* above n 229, 349.

their not previously stating any objection to the Act in the Legislative Council, the judges now determined that the Act was repugnant to the laws of England, as its true purpose was to impose a tax. Montagu, for once, agreed unreservedly with Pedder's decision.[238]

Denison was not happy; Pedder and Montagu had left the door open for challenge to several other Acts which imposed a licence fee, potentially depriving the Government of revenue worth £3000 a year.[239] Denison argued that Pedder and Montagu had their opportunity to declare the repugnancy of the Act to the laws of England prior to its being passed. They had not done so, and thus should not be allowed to reverse their decision later on to the detriment of the Government.[240]

Denison, already armed with the information about Montagu's indebtedness, acted swiftly in getting him suspended. The Executive Council gave Montagu an opportunity to defend himself,[241] but determined that his defence was untenable. Several members recommended that suspension was not sufficient, and that he should instead incur the more permanent punishment of being amoved from the bench.[242] The Law Officers of the Colony advised that the Executive Council had the power to amove Montagu from the bench,[243] and he was informed of the decision on 31 December 1847.[244]

Montagu left the colony in January 1848, although Lady Denison reported that his departure was almost barred by an angry butcher who demanded payment for yet another debt! She reported that Governor Denison himself gave Montagu £20, and others similarly subscribed to the fund so that the disgraced judge could pay his debt.[245] He was then allowed to sail for England, where he unsuccessfully appealed to the Privy Council against his ignominious amoval from the bench.[246] He continued his career in the Falklands and Sierra Leone, earning

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[238] Ibid 353. See also Bennett, above n 104, 96-102 and Howell, 'The Van Diemen's Land Judge Storm' above n 180.

[239] See letter from Sir William Denison to Charlotte Denison, 10 January 1848, in Davis and Petrow (eds), above n 234, 82.

[240] Denison to Pedder, 4 January 1848, *British Parliamentary Papers*, above n 229, 337.

[241] Montagu's letter of defence, 28 December 1847, ibid 34-36.

[242] Minute of meeting of Executive Council, 29 December 1847, ibid 15-17.

[243] Minute of meeting of Executive Council, 30 December 1847, ibid 17-19.

[244] Clerk of Council (Kirwan) to Montagu, 31 December 1847, ibid 19-21.

[245] Davis and Petrow (eds), above n 234, 79-82, 84 and 95.

[246] The case was heard in June-July 1849; *Montagu v The Lieutenant-Governor and Executive Council of V.D.L* (1849) 6 Moo. PC, 495-497. Reported online at: <http://www.law.mq.edu.au/pc/MontaguvVDL,1849.htm>. See also P. Howell, 'The Van Diemen's Land Judge Storm' (1996) 2(3) *University of Tasmania Law Review* 265.

far more respect than he had during his time in Van Diemen's Land.[247] It is ironic to consider that Montagu's replacement on the Supreme Court of Van Diemen's Land was the Attorney General, Thomas Horne, who was also deeply mired in debt.[248]

With the colony rid of one quarrelsome character, Denison then focused on Chief Justice Pedder, who was causing political difficulties with some of his decisions. He used the circumstances of the *Dog Act* case as justification for Pedder taking an eighteen-month leave of absence.[249] Pedder, however, was equal to the task. The young, inexperienced and naïve jurist of Governor Arthur's reign was now more politically astute.

Despite being denied due process, Pedder put forward a strong argument justifying his right to change his opinion about the legality of an Act of Parliament.[250] A petition from the colonists containing over 1500 signatures, expressing their concern that Denison was undermining the independence of the Supreme Court, supported Pedder's.[251] The people had clearly spoken, and it was not long before Pedder had the support of the Colonial Office as well.[252] Denison was chastised for his actions, and Pedder continued as Chief Justice of the Supreme Court until 1854, when he was debilitated by a stroke that paralysed his left arm and leg.[253]

Responsible Government in the Wild South

Chief Justice Pedder was to recover from his stroke, but determined to resign his position and return to England in 1856.[254] He was given accolades for his decades of service but ultimately Pedder's indecisiveness, which he openly admitted marred his career as a judge, ensured that his career would never be considered in the favourable light of his contemporary, Chief Justice Forbes.[255]

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[247] See Howell, 'Of Ships and Sealing Wax' above n 180, 123-128.

[248] Keon-Cohen, above n 183, 76.

[249] Denison to Grey, 18 February 1848, *British Parliamentary Papers,* above n 229, 331.

[250] Pedder to Denison, 6 January 1848, ibid 339. On 8 January 1848 the Executive Council requested that Pedder answer 'a charge of neglect of duty in having failed to certify against the *Dog Act 1847* 10 Vict. No. 5 on the ground of repugnancy within the period provided by law,' and Pedder responded on 20 January 1848; see *British Parliamentary Papers,* ibid 65-66 and 71-73.

[251] A public meeting was held on 15 January 1848 to protest against Denison's 'unconstitutional' actions. See full report in *Hobart Town Courier* on 19 January 1848, 2-3.

[252] Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 147.

[253] *Mercury,* 22 July 1854, 2. See also Bennett, above n 104, 110-111.

[254] Ibid.

[255] See Bennett's assessment of Pedder, ibid 112-113.

However, in the political arena, the easily manipulated judge of the 1820s had grown in stature over his three decades of service. Denison's attempts to remove Pedder from the Bench may well have succeeded in earlier years, and conversely, Governor Arthur may not have been successful in convincing Pedder to conduct an extra-judicial commission to remove Gellibrand from his position as Attorney-General.

Pedder's growth as a colonial judge in many ways reflected the growth of Van Diemen's Land as a colony. His departure from colonial life in 1856 came at a time when the island had finally been granted the political privileges it had craved for so long. On 11 August 1853 transportation to the island ceased, and Van Diemen's Land was ready to take its place alongside New South Wales, Port Phillip, and South Australia in being granted Responsible Government. The legal fraternity, spearheaded by advocates like Alfred Stephen, Thomas Horne and Joseph Tice Gellibrand, had worked tirelessly over many years to achieve that result.

Not content with the cessation of transportation and the promise of Responsible Government, many citizens began campaigning for a change of name from Van Diemen's Land to Tasmania, to reflect their change of image from that of a crude fire and brimstone convict colony to a civilised, enlightened and free society. The British Government agreed to the request, and proclaimed that as of 1 January 1856, Van Diemen's Land would be officially known as Tasmania.[256]

The change of name marked just how far Tasmania had come since its lawless beginnings as a violent shantytown on the banks of the Derwent River, where bushrangers roamed with impunity. The dividing line between lawlessness and civilised order has never been more apparent in Australia's history than in the early years of Van Diemen's Land, where the absence of legal infrastructure allowed for the unchecked growth of crime.

The question that men like David Collins might have asked themselves is why? Had Collins lived to reflect on his different experiences as a Judge Advocate in New South Wales and Lieutenant Governor of Van Diemen's Land, he could hardly have conceived two more disparate outcomes from a seemingly similar beginning. Both settlements began life as home to a population of convicts and British overseers thousands of leagues from home. Yet the key

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[256] *Launceston Examiner*, 29 November 1855; see also M. Clark, *A History of Australia* vol. 4: *The Earth Abideth Forever 1851-1888* (1978) 102.

difference that emerged between the early histories of the two colonies contains a startling comment on the nature of law and its governing profession: without the guiding hand of force and order there can be no society of laws.

While the residents of New South Wales had the luxury of making calls for improvements to their legal system, the Van Demonians were still attempting to attain the building blocks essential to achieve an ordered society. It was not until the arrival of Governor Arthur, and the promulgation of the Third Charter of Justice in 1823, that Van Diemen's Land finally had the structure of a legal system that it could call its own.

Arthur, armed with the law enforcement mechanisms supplied by the new court system, performed a crucial role in ensuring that criminals were no longer allowed to escape unpunished. His rigid imposition of discipline in a penal community was essential in creating a new law-abiding image for the colony. The free settlers, who quickly forgot the terror of the days when bushrangers were rarely apprehended for their crimes, did not always appreciate Arthur's efforts. Arthur similarly did not brook attempts to undermine his authority, and one area in which he was particularly keen to assert his dominance was the legal profession.

The Van Diemen's Land legal profession truly began when Arthur arrived on the island. Unlike New South Wales, there had not been a strong tradition of emancipist lawyers practising in the colony, and there was little overt class tension between the free settlers and emancipists. Emancipist lawyers such as Brodribb and Jemott had been largely limited to activities such as conveyancing, given that there were no criminal courts for them to service until 1824.

When the British lawyers began to arrive in Van Diemen's Land in 1824, they were able to establish a legal profession with a clean slate. There was no awkward takeover or supplanting of an emancipist legal profession. The small size of the island's population also ensured that its legal profession remained relatively free of debate about whether it should be fused or divided.[257] Practicalities ensured that solicitors simply performed the traditional role of the barrister in court, and there was no call for specialist advocates.

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[257] Note that Justice Montagu raised the issue of division of the profession in 1843. He and Chief Justice Pedder invited discussion from members of the profession as to whether such a move would prove injurious to their practice. Chief Justice Pedder said that previous enquiries that he had made on the issue indicated that several members of the legal profession would be injured by such a move. See *Hobart Town Advertiser*, 10 February

However, the years following 1823 were not without conflict. The new legal profession of Van Diemen's Land was far from immune to the power plays, ambition and zealotry that can result from strong-willed men with conflicting views on the future direction of their society. The effects of naivety, incompetence, and laziness were keenly felt, and the petty intrigues between governors, judges, advocates and citizens eager to assert their legal rights all threatened to derail the stability of the colony.

Regardless of competing personal opinions as to what was best for Van Diemen's Land, it is clear that the legal system was able to outlast individual assaults on its integrity, and effectively perform its role as arbiter of human affairs. The days of the 'Wild West' were fading into memory. Journalists who bemoaned the travesties that occurred in the administration of justice on the island were fortunate to be living in an era where they, unlike their forebears, did not have to campaign for even a rudimentary legal system.

By 1856, few people would have remained who remembered the Van Diemen's Land of Collins' day. By the time that Responsible Government was attained, the newly-titled Tasmania could claim to be as civilised and progressive as their mainland counterparts. The small colony had a thriving legal profession, boasting several law firms that still remain in existence, and well-known personalities whose descendants are still practising today.[258]

In the decades leading up to Federation, Northern and Southern Tasmanian Law Societies would be established and issues such as legal education would be seriously considered for the first time. The well-respected jurist, Andrew Inglis Clark, would play a major role in Federation, proving that the federal movement was not confined to New South Wales and Victorian protagonists.

The Tasmanians had earned the right to take civilised society for granted, and build on their hard-earned achievements; the struggle to achieve the simple building blocks of law and order was soon relegated to history.

1843. The *Colonial Times,* 7 March 1843, 3 then reported that Justice Montagu observed that he had received only one communication on the issue of division of the profession, from a Mr Harrison who objected to the idea on the grounds that he would incur a financial loss. During discussion in the courtroom, Mr MacDowell also indicated his opposition to the proposal. The lack of further discussion on the issue indicates that there was little enthusiasm for the idea of division of the profession, and the small size of the profession is the most likely reason for any resistance towards division.

[258] For example, the descendants of Butler and Thomas Young are still practising law today.

CHAPTER FIVE

PORT PHILLIP – THE TRANSPLANTED BAR

1835 – 1856

I certainly do not like a country without any law but that of the club or spear, altho' heaven knows we may have too much of the parchment also.

James Simpson to John Wedge, 28 April 1835[1]

The Second Attempt at Settlement in Port Phillip

John Pascoe Fawkner always held treasured memories of his brief stay in Port Phillip as a child.[2] By chance or fate, his father had been ordered to serve his sentence for receiving stolen goods in the new settlement in 1803, and his young family accompanied him.[3] Only months after landing, a disenchanted Lieutenant Governor David Collins abruptly decided to remove the convict party to the greener pastures of Van Diemen's Land.[4]

Fawkner, who had roamed Port Phillip as an impressionable boy, remained forever convinced that Collins had underestimated its potential as a place of settlement.[5] The subsequent discovery of the river 'Yarra Yarra' in the early 1830s, and its surrounding green, fertile pastures vindicated Fawkner's long-held beliefs. Yet even Fawkner could not have dreamed that the settlement of Port Phillip would soon be rivalling New South Wales in population and as a centre of commerce, or that he would lay claim to being the founder of Melbourne.

When Fawkner heard that John Batman and his party had formed the 'Port Phillip Association' in 1835,[6] he instantly set about forming his own group. His intense rivalry with and dislike of Batman ensured that he would never join the Port Phillip Association.[7] His modest party included two carpenters, a master mariner, an architect and a plasterer.[8] He

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[1] *Port Phillip Association Papers*, MS 9142, Box 113/11, State Library of Victoria, 2-3.

[2] *Reminiscences of John Pascoe Fawkner,* MS 8512 Box 3670, No. 2 (Book), State Library of Victoria, 16.

[3] Ibid 1-16; see also C. P. Billot, *The Life and Times of John Pascoe Fawkner* (1985); H. Anderson, *Out of the Shadow: The Career of John Pascoe Fawkner* (1962).

[4] See Chapter 4 for details of the first settlement in Port Phillip.

[5] *Reminiscences of John Pascoe Fawkner*, above n 2, 16 and 19.

[6] For further information on the formation of the Port Phillip Association, see letter from John Batman to George Arthur, 25 June 1835, *Historical Records of Victoria, vol. 1: Beginnings of Permanent Government* (1981) 5-10, which provides a description of the treaties, and membership of the Port Phillip Association.

[7] See below for further discussion of the rivalry between Fawkner and Batman, especially with regard to who held the title of founder of Melbourne.

[8] Billot, above n 3, 102.

placed Captain Lancey in charge of the *Enterprise,* but their first attempt at sailing for the new settlement was aborted, Fawkner's creditors having got an order to detain his vessel until investigations into his affairs had been completed.[9] Fawkner finally instructed his party to conduct an exploratory mission without him, and they arrived in Port Phillip in August 1835 and immediately began exploring the area. Lancey detailed his explorations in a diary for Fawkner's benefit, the most important detail being the discovery of water.[10]

Fawkner immediately began preparing to settle in Port Phillip, and he landed in October 1835.[11] The Port Phillip Association had also staked their claim on the land. Like Fawkner, all the members of the Port Phillip Association were originally from Van Diemen's Land.[12] They crossed the Bass Strait with hopes of expanding their pastoral opportunities and forming a new society that was free from the supposed morally corrupting influence of convicts. Fawkner and Batman had more in common than either would have cared to admit, for both were the sons of convicted felons who had been transported to the Antipodes to serve their sentences. Their convict ancestry was a sensitive issue, as free settlers did not hesitate to use it as a point of social distinction. [13]

It was not long before a formal social demarcation was made between the members of the Port Phillip Association and Fawkner's more modest party. Both groups were cultivating land on the south side of the Yarra River, and John Wedge, the Port Phillip Association's surveyor, quickly informed Fawkner that he was encroaching on the Association's land.[14] Fawkner

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[9] Ibid 103-5.

[10] Captain Lancey's diary is transcribed by W. Greig (ed) 'Some New Documentary Evidence Concerning the Foundation of Melbourne' (March 1928) XII, 3 *Victorian Historical Magazine* 109-15.

[11] For details of Fawkner's preparations to settle in Port Phillip, and his fellow settlers who went with him, see Billot, above n 3, Chapter 12.

[12] Members of the Port Phillip Association included John Batman, Henry Batman, John Wedge (Government Surveyor), James Simpson (Police Magistrate), Joseph Tice Gellibrand (ex-Attorney General), Charles Swanston (Banker), Thomas Bannister (J.P), J & W Robertson (Drapers), Henry Arthur (nephew of Lieutenant Governor Arthur of Van Diemen's Land), John Sinclair (Superintendent of Engineer's Department at Launceston), J. Collicott (J.P. and Postmaster General), Anthony Cottrell (Chief District Constable), W.G. Sams (Deputy Sherriff at Launceston), Michael Connolly (Businessman), and George Mercer (Port Phillip Association's Agent in Britain). See *Port Phillip Association Papers*, above n 1.

[13] See Manning Clark, *A History of Australia vol. 3: The Beginning of an Australian Civilization 1824-1851* (1973) 86, for a discussion of the social implications of convict ancestry on the native-born population, and in particular for John Batman.

[14] See John Wedge's journal: *'Journey to Examine the Country West of Indented Head'*, commenced Tuesday 18 August 1835, and in particular his entry for 3 September reproduced in James Bonwick, *Port Phillip Settlement* (1883) 259-60. See also *Port Phillip Association Papers*, above n 1, 18 onwards, which includes a memorandum to John Batman concerning the issue of Fawkner's party settling on 'Association' land, and the resolution to show Fawkner a chart of the land and the documents detailing the grant of land from the natives to the Association.

eventually acquiesced in settling on the other side of the river. Both groups, however, soon faced a more significant problem concerning occupation of land.

The British Government had not previously been faced with the prospect of a convict-free settlement in Australia, and was not consulted about the settlement plans.[15] In particular, neither Fawkner nor the Port Phillip Association sought permission from the British Government to occupy and survey the land. Rather than concede that the British Crown had ownership of the land surrounding the Yarra River, the Port Phillip Association ingeniously surmounted that hurdle by claiming that the native Aboriginal tribes were the legal owners.[16] To this end, Batman requested that the disgraced former Attorney General of Van Diemen's Land, Joseph Tice Gellibrand, draft a treaty 'with the Natives for the purposes of obtaining a tract of country'.[17] Gellibrand's treaty involved exchanging trinkets with the native Aboriginal tribes in exchange for a purported legal ownership of the land.[18]

When Governor Bourke of New South Wales and the British Colonial Office heard that several parties had staked claims around the Yarra River, it was immediately proclaimed an illegal settlement.[19] Gellibrand's treaty, signed by Batman and the Aboriginal tribal chiefs, was declared by the British Government to be an invalid passing of legal title.[20] While the British Government had been in favour of a settlement at Port Phillip in 1803, the intervening years had seen the Blue Mountains traversed, and settlement had spread out beyond the control of the Governor based in Sydney Town. The new colony of Western Australia had been formed, and the British Parliament had just sanctioned the formation of the South Australian colony.

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[15] The existing colonies of New South Wales and Van Diemen's Land were formed for the express purpose of convicts. Other new convict-free settlements were in contemplation in the 1830s, such as Western Australia and South Australia, but the British Government approved the plans for these new colonies before the settlers left British shores. (See Chapters 6 and 7). Governor Bourke of New South Wales' concern was that the Port Phillip settlement had been formed with an 'absence of any provision for the control and government of the inhabitants of the intended settlement'. See Bourke to Glenelg, 10 October 1835, *HRA* Series 1, vol. xviii, 153, 154.

[16] A report of John Batman's meeting with the Aborigines and a copy of the treaty are reproduced in Tim Flannery (ed), *The Birth of Melbourne* (2002) 52-58.

[17] John Batman to Gellibrand, 1 May 1835, *Port Phillip Association Papers,* above n 1, 4.

[18] For a discussion of the treaty see Flannery, above n 16, and also Henry Turner, *A History of the Colony of Victoria, vol.1, 1797-1854* (1973) Chapter V, 'The Founding of Melbourne'.

[19] The Proclamation was dated 26 August 1835 but was not published in the *Government Gazette* (NSW) until 9 September 1835; for text see *HRV,* above n 6, 12-14.

[20] Colonial Secretary to John Montagu, 1 September 1835, *HRV,* above n 6, 14-15. See also Proclamation, 26 August 1835, ibid 12-14.

By the time the British Government reacted, squatters were firmly ensconced in their newly erected dwellings and a society was being formed.[21] The consequences of such a declaration of illegality, however, were potentially grave. The settlers had no formal system of government or courts of law. Furthermore, they had no recourse to the legal system in Sydney Town or Van Diemen's Land.[22]

However, unlike the early days of Hobart Town, lawlessness was not to be a prominent feature of the settlement. Undeterred by the official response towards their enterprise, the squatters established their own de facto system of governance and laws, all the while working towards achieving official sanction of their settlement.[23] Despite the British Government initially turning its back on the entrepreneurial settlement, the response of the settlers was to promise a new society that would blossom by emulating the best of British tradition.[24] It is a paradox that these pioneers, who were desperate to create and protect their autonomy, would achieve this by such conservative and traditional means.

One traditional British institution that was rapidly established was the Bar. It is an irony that a settlement that was initially declared to be beyond the law would become host to a thriving legal profession.[25] From its inception, Melbourne Town presented an alternative opportunity for British barristers.[26] Many of the lawyers who migrated to Australia in the 1830s and 1840s initially disembarked at Sydney Town, but soon found themselves moving on to Port Phillip.[27] Sydney Town, once the land of opportunity, was now host to an ever-expanding legal profession. The age-old problem of achieving a break in an established collegiate profession was resurfacing, and those who did not have connections in Sydney Town found that Port Phillip was an increasingly attractive option.[28]

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[21] For further details of the early days of Port Phillip, see Billot, above n 3, and also C.P. Billot, *Melbourne's Missing Chronicle: Being the Journal of Preparations for Departure to and Proceedings at Port Phillip/ by John Pascoe Fawkner* (1982).

[22] See report in *Port Phillip Association Papers*, above n 1, 74, which details the problems experienced by the absence of courts of law.

[23] See generally *Port Phillip Association Papers*, above n 1. See also A.C. Castles, *An Australian Legal History* (1982) 230-231.

[24] See generally *Port Phillip Association Papers*, above n 1.

[25] See below for further details about the establishment of the Bar.

[26] The township was named 'Melbourne' in March 1837. See below for further details.

[27] See Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (1968) Chapters 1 and 2, for a general history of barristers in Port Phillip.

[28] The Sydney Town legal profession by 1835 had become established enough to pose problems for new settlers wishing to join the Bar. The 'junior' Bar faced similar problems to that experienced in Britain, such as struggling to gain briefs. Thomas Callaghan of New South Wales wrote a diary which gives an insight into the life of a new barrister trying to gain a foothold in the legal market, and the importance of fostering local

Port Phillip was also to boast an important distinction from Sydney Town, for the majority of its barristers were Irish. The first wave of Irish barristers migrating to Melbourne occurred in the 1840s, when many of those who were unable to break into the Irish circuits saw lucrative opportunities in Port Phillip.[29] They were not unhappy to leave their native land, which was suffering from hardships wrought by the potato famine of the 1840s, and the ongoing political unrest between Ireland and England that was being highlighted by the barrister Daniel O'Connell's Catholic emancipation movement.[30]

Despite the majority of barristers being Irish, the English legal system was embraced. The Irish and English Bars were historically linked, as all Irish-trained barristers were required to be members of the Irish Inn of Court, King's Inn, and also to undergo a residency in one of the four English Inns of Court before being called to the Bar.[31] When they migrated to Port Phillip, it must have seemed natural that their profession should, from the beginning, be divided into the traditional branches of barristers and solicitors.[32] After all, they had practised in a divided profession in Ireland and England, and New South Wales had shown that a divided profession could be established in the Antipodes. Calls were even made for an Inn of Court to be established in Melbourne, and suggestions that the profession be fused were consistently rejected.[33]

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connections within the Bar. See Chapter 3 for Callaghan's story, and the New South Wales Bar. The story of Redmond Barry, below, further illustrates the importance of having connections within the profession.

[29] See Dean, above n 27. Examples below include Edward Brewster and William Stawell.

[30] Daniel O'Connell, an Irish barrister, holds a revered place in Irish history as one of the few people who successfully advocated the rights of Irish Catholic citizens in a society where Protestant members formed the ruling elite. Barristers were particularly affected by the Protestant ascendancy, with penal laws forbidding Catholics from practising law. These laws were not repealed until 1791, but this was just in time for a young O'Connell to enrol in Lincoln's Inn in 1794, and then King's Inn in 1796. He went on to become an extremely successful barrister on the Munster circuit. He entered politics, becoming the first Catholic to take a seat in Parliament, and his efforts in enacting penal reform legislation earned him the title of 'Liberator'. Many of the barristers who arrived in Port Phillip in the 1840s had encountered O'Connell on the legal circuits, and had even worked with him. See, for example, the story of Richard Ireland below. For further information on O'Connell, see Maurice O'Connell, *Daniel O'Connell: The Man and his Politics* (1990).

[31] See C. Kenny, *King's Inn and the Kingdom of Ireland: The Irish 'Inn of Court' 1541-1800* (1992). See also R.W. Bentham, 'The Bench and Bar in Ireland' (1959) 1 *Tasmanian University Law Review* 209.

[32] Note that Port Phillip formed a part of New South Wales until 1851, and was thus under New South Wales' jurisdiction. The New South Wales legal profession was, at this time, divided and Port Phillip thus followed this precedent. See Chapter 3 for the New South Wales campaign on division.

[33] Note that since the profession was automatically divided into the branches of barristers and solicitors, only Inns of Court trained barristers performed advocacy work in the courts, thus this chapter refers specifically to 'barristers' and not generally to 'advocates'. This is in contrast to Chapters 1, 2, 4, 6 and 7, which deal with fused legal professions in the other colonies where people were permitted to act as advocates in the courts despite not having a qualification from an English Inn of Court. See below for further information on the issue of whether the profession should be divided or fused, and the suggestion that an Inn of Court be established.

As in New South Wales and Van Diemen's Land, the newly arrived barristers did more than simply practise the law. They immersed themselves in the affairs of the settlement, proffering their views on the question of whether convicts should be admitted to the settlement, campaigning for the right to become the independent colony of Victoria, and becoming embroiled in public skirmishes such as miners' rights in the Eureka Stockade. On the legal front, they also had challenges to deal with. The irritable Resident Judge Willis saw many members of the Bar running for cover, and caused grave concerns for the administration of justice in the settlement.[34]

When Victoria achieved Responsible Government in 1855, its economy buoyed by the discovery of gold in 1851, it had become a civilised and independent colony. Despite having no blueprint for its settlement in 1835, unlike New South Wales and even Van Diemen's Land, and initially being declared an illegal venture beyond British law, the Port Phillip residents never suffered from the absence of law. It had been over fifty years since the First Fleet arrived in Botany Bay, and the new settlement of Port Phillip benefited by learning from the mistakes of their forebears. The deprivations and hardships suffered by pioneering settlers in New South Wales and Van Diemen's Land as a result of immature legal systems and the actions of autocratic governors were never felt as harshly in Port Phillip.[35]

With the path forward being illuminated by the soft hue of gold, barristers and residents alike were motivated by their proud desire to create a genuine rival to New South Wales.[36] When John Pascoe Fawkner died in 1869, debate was re-opened on whether he or John Batman was the founder of the colony.[37] While opinion differed, the sentiment that his death signalled the passing of an 'epoch' of history was not controverted. As the *Daily Telegraph* said, 'the childhood of the country was over, and we had entered upon a second stage. With him was

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[34] See the story of Justice John Walpole Willis below.

[35] See Part One, and Chapter 4 for a description of the establishment of law and order in New South Wales and Van Diemen's Land. Their initial legal systems were much more rudimentary in form, and the residents had to wait longer for the establishment of the respective Supreme Courts. The Port Phillip residents never had to face the trials and tribulations of a long campaign for an advanced system of courts of law.

[36] George Arden, editor of the *Port Phillip Gazette*, proudly pronounced in the first edition on 27 October 1838 that Port Phillip would not be the 'broken, cold and unnatural' form of society that New South Wales was. Fawkner, earlier in the first edition of his *Melbourne Advertiser* on 1 January 1838, had exhorted his fellow residents to be a part of 'advancing Civilization' as 'Sons of Britain'.

[37] Historian James Bonwick, who had been tracing the history of Port Phillip, cast Batman as the founder of Port Phillip in his book *Discovery and Settlement of Port Phillip,* first published in 1856. Bonwick had requested Fawkner's account of events, but Fawkner at the time refused to give his assistance. Following Bonwick's history, much debate was entered into in the media in the late 1850s and 1860s, with Fawkner intent on rebutting Bonwick's assertions. For an account of this debate, see Billot, above n 3, Chapter 30.

passing away the Old, and before all who gazed upon him lay open the limitless future of a Newer Life.'[38]

Attempts to Establish Legal Infrastructure in the New Settlement

John Pascoe Fawkner had repeatedly proved that he was a formidable opponent. He was one of the most pro-active squatters in the Port Phillip settlement,[39] and brought with him his keen sense of what was right and wrong. In the wilds of Van Diemen's Land he had advertised his services as an advocate for his fellow citizens in its courts. In Port Phillip there were initially no courts of law, but the feisty little man, along with the other settlers, was adamant that the new settlement should be administered according to universal laws of justice.[40] Establishing courts of law, and appointing officers to administer the law, was accordingly one of the first priorities.[41]

While Bourke's proclamation had no effect in deterring settlement, it did mean that the established legal infrastructure of Sydney Town was not available to the settlers of Port Phillip. Ostensibly, Port Phillip should have been under New South Wales' jurisdiction, with access to Sydney Town's advanced court structure and its legal profession. However, with the British Government refusing to sanction the new settlement, there was no recourse to be had from Sydney Town in the immediate future. Lieutenant Governor Arthur of Van Diemen's Land made overtures to administer the settlement as part of the territory of Van Diemen's Land.[42] His proposal was logical given that the majority of the Port Phillip settlers were from Van Diemen's Land, but the British Government consistently rejected this idea, hence denying the Port Phillip residents access to the legal system in Van Diemen's Land.[43]

When a dispute arose between Fawkner and John Batman's brother Henry within a few months of settlement, it was evident that a system of law and order was desperately needed,

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[38] *Daily Telegraph,* (Victoria) 9 September 1869, 2.

[39] Fawkner, among other things, opened the first hotel in Port Phillip, and wrote the first newspaper, the *Melbourne Advertiser.*

[40] Billot, above n 3, Chapter 16.

[41] See generally the *Port Phillip Association Papers,* above n 1.

[42] Arthur to Spring Rice, 4 July 1835, *HRV,* vol. 1, 11. Note that Arthur recognised that Port Phillip was under New South Wales' jurisdiction, but considered that it made good sense if Van Diemen's Land was at least granted temporary administration of Port Phillip; see Montagu to Batman, 3 July 1835, *HRV,* vol. 1, 10.

[43] The Port Phillip Association's agent, Mr. G. Mercer, also argued that Van Diemen's Land should have the superintending authority over Port Phillip, and not New South Wales. Lord Glenelg rejected the arguments. See the series of correspondence between Mercer and Glenelg attached as enclosures to the letter from Glenelg to Bourke, 13 April 1836, *HRA* Series 1, vol. xviii, 379.

and that the settlers themselves would have to create the foundation of their legal system.[44] Their fledgling society was under threat; it could ill-afford the devastating effects that crime and lawlessness had on the Van Diemen's Land society in its early years.[45] All of the gains that the Port Phillip squatters had made would be lost if it attracted the image of a rough, uncontrollable settlement. A de facto system of law and order might not be recognised by Sydney Town, but it would help to legitimise the new settlement by creating the appearance that order and not chaos ruled.

It was resolved at a meeting of the residents to put Fawkner and Batman's dispute to arbitration, with James Simpson, formerly a police magistrate in Van Diemen's Land, to be the 'regulator' of the dispute.[46] Simpson was a well-respected resident, with his judgment being trusted by everyone.[47] Even though he had no formal legal training, unlike Gellibrand, he was an ideal choice as arbitrator. The first arbitration in Port Phillip was heard on 2 May 1836, and resulted in Henry Batman being fined.[48]

Following closely on the heels of the first arbitration was the inaugural council meeting of 1 June 1836.[49] James Simpson was formally elected as the sole arbitrator, and New South Wales' Governor Bourke was petitioned to appoint a resident magistrate to Port Phillip. The petitioners acknowledged that they had settled without the sanction of the British Government, but prophetically forecast that the settlement would be 'of the utmost importance to the British Crown'.[50]

While the residents of Port Phillip were generally peaceable, problems did arise with some of the natives who had taken to plundering the settlers' stores. One of the settlers, John Wedge, recognised that a diplomatic solution was required, and advised that the perpetrators simply

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[44] See Castles, above n 23, 230-231.

[45] See Chapter 4 for further information on the effects of lawlessness on the development of Van Diemen's Land.

[46] Billot, above n 3, Chapter 15.

[47] The opinionated Garryowen, otherwise known as Edmund Finn, who was a journalist with the *Port Phillip Herald,* said of Simpson: 'I never knew a more independent and impartial man on the bench...; he always comported himself in a manner which secured the confidence of everyone who witnessed his thorough uprightness.' See Finn, *The Chronicles of Early Melbourne,* vol. 1 (1976) 6. See also Clark, above n 13, 87-88, for a brief biography of Simpson. For a biography of Edmund Finn and general comment on his *Chronicles,* see Swift (ed), *The Chronicles of Early Melbourne,* vol. 3 (1976) 3-16.

[48] See Billot (ed), *Melbourne's Missing Chronicles*, above n 21, 68-69, for a description by Fawkner of the charges laid and the fines imposed on Henry Batman.

[49] Minutes of residents meeting, 1 June 1836, *HRV*, above n 6, 36-37. See also Fawkner's description of the meeting in his diary, Billot (ed) *Melbourne's Missing Chronicles*, ibid 80-83.

[50] Residents' petition to Sir Richard Bourke, 2 June 1836, *HRV,* ibid 38.

be 'secured and kept prisoners till a communication be made to the Sydney Government.'[51] He opined that the danger was that to 'take the law into our own hands would only afford General Bourke a pretext, which he is most anxiously looking for, to interfere with our occupation of the land.'[52]

The residents persevered with their requests for recognition, and were finally rewarded for their efforts when Governor Bourke authorised the settlement on 9 September 1836.[53] He ordered an official survey of the land, and appointed Captain William Lonsdale as the Police Magistrate.[54] Lonsdale was a military officer, and he arrived at the new settlement with a small entourage of convicts to help build and develop the settlement.[55] Lonsdale immediately wrote to the Colonial Secretary and Governor Bourke to express his concern about the lowly character of the new settlement, and the lack of persons of 'respectability'.[56]

It is likely that the actions of the tempestuous Fawkner had not gone unnoticed by Lonsdale.[57] Lonsdale was evidently not deterred by his early opinions of the settlement, as he stayed on to become a well-respected citizen of Port Phillip, and ably administered the legal business. Like David Collins' civil and criminal courts in early Sydney Town, Lonsdale's law resembled martial law. He was accompanied by the military when discharging his legal duties, and had no formal legal training.[58]

Lonsdale's court sessions were held wherever it was convenient. Much of his business was provided by the settlement's small population of convicts, who were in the main punished by flogging.[59] Even the free settlers appeared before Lonsdale, with Fawkner making his now

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[51] John Wedge to Captain Swanston, 23 July 1836 in *Port Phillip Association Papers*, above n 1, 37.

[52] Ibid.

[53] Governor's Memorandum, 11 September 1836, *HRV*, above n 6, 45-46.

[54] Colonial Secretary to William Lonsdale, 14 September 1836, ibid 49-54. See also Bourke to Glenelg, 15 September 1836, *HRA* Series 1, vol. xviii, 540.

[55] William Hunter to William Lonsdale, 12 Septenber 1836, ibid 46-48.

[56] William Lonsdale to Sir Richard Bourke, 2 October 1836, ibid 82-3. See also Lonsdale to Bourke, 1 February 1837, ibid 87, where Lonsdale referred to people 'taking advantage of the absence of power to behave in a lawless and intimidatory manner'.

[57] Garryowen acknowledged that in the early days of Melbourne 'everyone seemed to do much as he liked', but added that 'the few people were industrious and law-abiding without law'. He stated that the 'only quarrelling was between Batman and Fawkner'. See Finn, above n 47, 5.

[58] J.L. Forde, *The Story of the Bar of Victoria* (1913) 13-14.

[59] Ibid 13.

obligatory appearances for assaulting his servants, rivals and customers (all misdemeanours being committed in the interest of justice).[60]

James Simpson and Major St. John in turn took over from Lonsdale as police magistrates. While Simpson, as a leading member of the Port Phillip Association, was much respected, St. John, a British major who had served at Waterloo, did little to earn the confidence of the colonists. He had a vehement dislike for journalists, and when Edmund Finn recognised this antagonism towards his profession, he decided to take action to preserve his livelihood from future harm at the hands of the obviously irascible magistrate.[61] He had done his research, and one evening he presented the magistrate with a list detailing various 'presents' that St John had allegedly received from persons appearing before him in court, and the accordingly favourable decision made in each case. As Finn had calculated, a ceasefire was called on the condition that he kept quiet about the bribes. Finn kept his word until he received notice of St John's death forty years later.[62]

While the abuses of the legal system may not have been apparent to the residents who were not privy to the information that Finn had, the population was rapidly increasing and it was clear that a more advanced legal system that could cope with the needs of an expanding society was required. By the end of December 1838, there were 3511 settlers in the Port Phillip district, and approximately 600 people in Melbourne Town.[63] Entrepreneurial Fawkner had established a hotel, and his newspaper the *Melbourne Advertiser.*[64] There was also a changing of the guard, as John Batman, Fawkner's rival for the title of founder of Melbourne Town, had died after a long illness on 6 May 1839.[65]

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[60] Billot, above n 3, 191.

[61] St. John was described by Forde, above n 58, 17, as 'a curious compound of physical bravery and moral weakness'.

[62] This anecdote can be found in Forde, above n 58, 17-19.

[63] Census figures show that there were 3511 persons in Port Phillip by 31 December 1838, and nearly 5000 by 31 December 1839. See *Historical Records of Victoria: vol. 3, Early Development of Melbourne 1836-1839,* Chapters 29 and 30 for Melbourne Town and Port Phillip statistics respectively.

[64] The first edition of the *Melbourne Advertiser* was published on 1 January 1838. This newspaper was initially handwritten, and ceased publication on 23 April 1838, when it was shut down because permission to publish had not been formally obtained. Fawkner was to publish a new paper soon after, the *Port Phillip Patriot.*

[65] For Fawkner's reaction of Batman's death, see Billot, above n 3, 210-11. An article written by Fawkner, published in the *Digger's Advocate,* 1853, gave a detailed account of settlement at Port Phillip and downplayed Batman's role. The article is reprinted in Bonwick, *Port Phillip Settlement* (1883) 294-300. See also Fawkner's article in the *Melbourne Herald,* 18 July 1856, attacking historian Bonwick's assertions that Batman was the founder of Melbourne.

Despite this rapid growth, a Court of Quarter Sessions to hear criminal cases had still not been established, and there was no avenue to hear civil cases of any description. Up until this point, a succession of police magistrates formed the entire legal system.[66] The settlement received a further blow when Aborigines supposedly murdered its only legally trained resident, Joseph Tice Gellibrand, in November 1837. His skeleton, identified by its gold tooth, was discovered several months later.[67]

The Attorney General of New South Wales, John Plunkett, wrote in 1837 that Port Phillip was 'almost without the pale of the law'.[68] Despite its efforts to establish a de facto system of law, it was never going to be as effective in dispensing justice as a formal, British Government sanctioned system of courts of law. The settlement was in danger of suffering the same fate as Van Diemen's Land in its early years, when the natural growth of the commerce in the colony was being retarded by a lack of legal infrastructure.[69] Experience in Van Diemen's Land had shown that the installation of an advanced justice system precipitated advances in the social, political and economic status of the colony.[70] Whether for good or ill, it also provided an opening for lawyers. Port Phillip, fortunately, did not have to wait as long as Van Diemen's Land for the benefits provided by a genuine Westminster legal system. In 1839 New South Wales, under pressure from the squatters, finally acknowledged that something had to be done and determined that a Court of Quarter Sessions would commence operations.[71]

Up until 1839, all of Port Phillip's achievements had been gained without the assistance and influence of trained lawyers. However, with the commencement of the Court of Quarter Sessions, settlement in Port Phillip was to enter a new phase. Having survived the threat of New South Wales exterminating the settlement, the objective was no longer merely existing from day to day, but creating a civilisation worthy of its place in the British Empire.[72] As in

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[66] Lonsdale explained the need for a Court of Quarter Sessions and Court of Requests in a letter to Sir Richard Bourke, 1 February 1837, *HRV*, above n 6, 87-88. For further information about the origins of Courts of Quarter Sessions and General Sessions, see Chapter Three.

[67] See an account of Gellibrand's death while exploring in the Cape Otway Ranges in November 1837 in Finn, vol. 1, above n 47, 7.

[68] This comment was made by Plunkett in a report dated June 1837, and annexed to a letter from Bourke to the Secretary of Colonies on 13 June 1837. It is reproduced in Forde, above n 58, 23, but the original source of the report has not been referenced by Forde, or located.

[69] See Chapter 4 for an analysis of Van Diemen's Land's commercial and legal system prior to the establishment of its Supreme Court.

[70] See Chapter 4.

[71] Sir Richard Bourke to Lord Glenelg, 14 June 1837, *HRV*, above n 6, 122-24.

[72] Newspapers of the day commonly made proud references to Port Phillip's place within the British Empire. See, for example, the *Port Phillip Patriot's* comment on the arrival of La Trobe as Superintendent of the settlement in September 1839: 'He comes to us as our good genius, to assist to develop our resources, and

New South Wales and Van Diemen's Land, the legal profession would prove to be extremely important in this endeavour. With law enforcement mechanisms now in place, the environment and conditions were now ripe for lawyers, and predictably barristers soon arrived to mark their place in history. Yet it was to be a peculiarly Irish brand of justice that prevailed.

An Irish Brand of Law and Order in Port Phillip

A Court of Quarter Sessions commenced operations on 13 May 1839.[73] Its first chairman was a newly admitted Irish barrister, Edward Brewster. He was a graduate of Trinity College, Dublin, and a member of King's Inn, where he was called to the Bar in 1837.[74] By chance, he had read a book giving a favourable account of Australia written by John Macarthur's son, William. One line in the book apparently stated the view that 'there was a good opening for barristers'. Brewster said 'this news immediately set me ruminating, and forming a comparison between the legal profession in the distant colony and its overstocked condition in Ireland'.[75] Brewster arrived in Sydney in 1838 with letters of recommendation to Plunkett, the Attorney General, and Governor Gipps of New South Wales. His timing was fortuitous, as a chairman was needed for the new Court of Quarter Sessions in Port Phillip.[76]

The first Crown Prosecutor was Horatio Carrington,[77] a solicitor, who performed the role briefly until the arrival of barrister James Croke, who was also Irish and a graduate of Trinity

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place us high in the scale of Colonies. Colonies! nay, he comes here to found a mighty Empire!'

[73] Report on the upcoming Court of Quarter Sessions in the *Port Phillip Gazette,* 20 April 1839, 2. See Castles, above n 23, 236 for further detail. The Court of Quarter Sessions was proclaimed on 14 August 1838 in the *Government Gazette (NSW)* under the terms of Will. IV, No. 3 (NSW).

[74] For biographical details on Brewster, see Forde, above n 58, 23 and 28-31.

[75] See Forde, ibid 28. Forde states that 'the late Mr. E.J. (afterwards the Rev. Dr.) Brewster, who died in 1898, furnished to the author of these pages the following interesting account of how it was that he emigrated to Australia, and came to be the first barrister who settled in Port Phillip'. Forde reveals that Brewster's autobiographical memoirs were written in June 1895, and the memoirs appear to be reproduced in entirety in Forde's book, pages 29-42. Unfortunately, the memoirs have not been independently located in any of the major Australian libraries. Brewster's statement that William Macarthur wrote a book with one line indicating that there was an opening for barristers has also not been verified. William Macarthur was one of John Macarthur's sons, and he mainly published books on horticulture. It is more likely that another of John Macarthur's sons, James Macarthur, wrote the book which Brewster read, entitled *New South Wales, Its Present State and Prospects* (1837). It does not specifically mention barristers, but strongly promotes the opportunities available in the colony.

[76] See Forde, above n 58, 23 and 28-31. Brewster's statement that he arrived with letters of recommendation has been verified. See Gipps to Marquess of Normanby, 3 October 1839, *HRA* Series 1, vol. xx, 363, and Gipps to Marquess of Normanby, 30 October 1839, *HRA* Series 1, vol. xx, 378.

[77] Carrington previously worked as an attorney in the Isle of Man. See Gipps to Glenelg, 15 February 1839, *HRA* Series 1, vol. xx, 5.

College, and who had been called to the Bar at Gray's Inn in 1821.[78] Croke had a chequered career in Ireland. On one unfortunate occasion he had announced his appearance in court, only to be informed by the magistrates that legal representation was not allowed in that case. After his protests that such a declaration was unconstitutional, he suffered the ignominy of being ordered to stand in the dock and apologise. The Irish Bar was outraged that such an indignity had been perpetrated on one of its members, but, despite Croke being awarded damages for defamation, his career on the Irish circuits was never to reach great heights. After ten years, he determined that a career in the colonies would be a better option.[79]

Brewster regarded him as an 'agreeable and able' lawyer,[80] although Finn, the resident journalist, unkindly described Croke as 'the veriest muff', a 'queerish-looking, cross-grained, red-gilled customer'.[81] Despite Croke's appearance, Port Phillip now had a Court of Quarter Sessions, a chairman, and a prosecutor. The residents of Port Phillip would also gain genuine legal representation in the courts for the first time, with barrister Redmond Barry[82] arriving from Ireland, Richard Pohlman coming from England,[83] and Archibald Cunninghame[84] setting sail from Scotland.

The two non-Irish practitioners, Robert Pohlman and Archibald Cunninghame, in conjunction with the Irish barristers, initially provided the Port Phillip Bar with a genuinely 'cosmopolitan' British feel. Cunninghame had practised law on the Scottish circuits and had been recently called to the English Bar in 1834.[85] Robert Pohlman had been called to the English Bar in 1839 and almost immediately migrated to Port Phillip.[86]

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[78] See biography of Croke in J.M. Bennett, *Lives of the Australian Chief Justices: Sir William Stawell, Second Chief Justice of Victoria 1857-1886* (2004) 31-36.

[79] *Croke v O'Grady and Bevan* (1830) 4 Law Recorder (O.S.) (C.P. Ireland) 49. See details of the case in Bennett, *Sir William Stawell,* ibid, and Forde, above n 58, 64-66.

[80] Dean, above n 27, 10.

[81] Finn, vol. 2, above n 47, 866. Governor Gipps was to later agree with Finn's assessment of Croke's abilities. When Croke applied for the position of judge or Attorney General of Port Phillip, Gipps felt that it was his 'public duty' to state that he could 'by no means recommend Mr Croke for any appointment in the Colony of greater importance than that which he now holds'. See Gipps to Russell, 28 September 1841, *HRA* Series 1, vol. xxi, 525-6.

[82] See Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (1995) for a biography of Barry. See also Finn, vol. 2, above n 47, 867 and Dean, above n 27, 68-70.

[83] See Robert William Pohlman's *Diary* for the years 1840-1848, MS 10303, MSB 194, State Library of Victoria. For a biography of Pohlman, see Dean, above n 27, 73, and Finn, vol. 2, above n 47, 867-868.

[84] For a biography of Cunninghame, see Finn, vol. 2, above n 47, 868.

[85] Ibid 868.

[86] Ibid 867.

England and Scotland were soon to become under-represented, however, as wave after wave of Irish barristers began to arrive, many via Sydney Town. Redmond Barry, who was one of the first Irish migrants to Port Phillip, saw little point in trying to break into the Irish circuit and determined to embark on a career in Australia.[87]

While Barry was on the boat to New South Wales in 1839, he whiled away the long, empty hours by embarking on affairs with other passengers, including a married woman.[88] The scandal quickly circulated throughout the tight-knit legal circles in Sydney Town. Barry lacked connections within the Sydney circuit, and his reputation was sullied to the point that he was now facing the same limited opportunities he had experienced in Ireland. Consequently, he determined to move on to Port Phillip to begin what would become an illustrious career.[89] Barry did not have the capital that fellow barristers such as Brewster had to begin a career in speculation in land, but he had the legal skills and opportunity to forge a career for himself in the law and in other facets of public life.[90]

The sense of fraternity that developed amongst the resident Irish barristers and the lure of owning land ensured a steady flow of their brethren to the settlement. William Foster Stawell, who arrived in 1843, had most likely heard about the success of his fellow barristers in Port Phillip. He was a contemporary and rival of Redmond Barry while in Ireland, and faced the same limited prospects at the Irish Bar. He nevertheless persevered on the Munster circuit until 1842, when he reportedly stated, 'when I saw forty hats on the Munster circuit and not enough work for twenty, I felt it was time to go, and so I came to Australia'.[91]

Ultimately, the formation of Port Phillip's Bar became not so much a process of evolution, as a transplant of the British Bar. The conditions were ideal for such a transplant. Famine and political turmoil in Ireland had precipitated a mass migration of Irish citizens all over the world; for barristers, there was no better opportunity than a rapidly developing society that

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[87] Galbally, above n 92, 28-31. Barry records that he was called to the Irish Bar along with 46 other 'bright prospects' on 31 October 1838. His father had recently died, and one of his brothers inherited the estate. Barry had good connections in Ireland, but little capital, and at the age of 26 he embarked on a voyage to Sydney Town in the hope that his good social connections would lead to a more prosperous career than that faced in Ireland.

[88] Ibid 33-35.

[89] Justin Corfield, *The Ned Kelly Encyclopaedia* (2003) 40. Galbally, ibid.

[90] Galbally, ibid 41.

[91] See Mary Stawell, *My Recollections* (1911) 196-7. Dean, above n 27, 14.

offered the promise of commercial gain and improved living conditions. For those who were Catholic, Port Phillip also offered religious freedom.[92]

Unlike New South Wales, there were no native-born lawyers in Port Phillip, and no pressure to institute legal training programs to encourage local youth to become barristers. There was no William Charles Wentworth to stir the pot.[93] There was simply a community of barristers who knew that their ranks could continually be replenished from the Irish Bar.

As it was to turn out, the success of the Irish barristers in Port Phillip was such that the position of Chief Justice of the Supreme Court of Victoria was to be filled by Irish barristers for all but five of the first eighty years of its existence.[94] Fawkner, in 1865, showed that the Irish influence was still strong, for example when he recorded disapprovingly in his diary that it was St Patrick's Day, and consequently the courts were closed: 'Irish taste rules here – Irish Judges, Irish Attorney-general, Irish barristers, Irish Clerks of Court'.[95]

Despite the genuine emergence of the Bar of Port Phillip, by 1840 the court system was still limited to Brewster's Court of Quarter Sessions, and a Court of Requests headed first by Brewster, then by Redmond Barry.[96] Each court had a limited jurisdiction, and cases that could not be heard in those courts had to be heard in Sydney Town.[97] Not surprisingly, justice was often not served as the parties and witnesses did not want to endure the time and expense of a sea or overland voyage to Sydney Town that took one week each way.

It was an untenable situation, as Port Phillip was rapidly becoming a thriving commercial port, yet their courts had no machinery to register bills of sale or execute debtor's goods. The

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[92] See above n 30, for further discussion on the problems that Catholic lawyers historically faced practising law in Ireland. See also Chapter 3, which gives details of two Irish Catholic barristers in New South Wales, John Hubert Plunkett and Roger Therry, and their concerns that their religion would be a bar to their progress in the legal profession. The Port Phillip Bar, which would become predominantly Irish, would not present the same concerns.

[93] See Chapter 3 for further details on legal training programs. Wentworth was a native born New South Wales 'currency lad' who had to return to England to train as a barrister as there were no training programs for aspiring barristers in the colony. By 1823 he was an integral part of the New South Wales Bar. His case highlighted that there was a demand for training for barristers in New South Wales.

[94] Galbally, above n 92, 135. Note that the Supreme Court of Victoria was formally opened in 1852, with Sir William A'Beckett as its first Chief Justice. See below for further details.

[95] Billot, above n 3, 300.

[96] See Castles, above n 23, 237. The first sitting of the Court of Requests occurred in April 1840, and legal practitioners could not appear in cases involving less than 10 pounds.

[97] Ibid 238.

debtors in turn had to travel to Sydney Town if they desired to become insolvent.[98] Those who did pursue their rights in Sydney Town often regretted it. One instance is cited of a settler who became embroiled in a dispute concerning the right to occupation of land and determined that he would bring an action of trespass in the Sydney courts. He endured the long trek overland, only to discover that he had to pay his solicitor an upfront fee of £400. He retained leading counsel in Sydney Town, but found that it was the solicitor's opinion that his chosen counsel 'had been playing whist up to two that morning'. Fortunately his counsel, apparently with the aid of a restorative drink, won his case and the settler was awarded £300 in damages. However, to his dismay, the defendants promptly declared themselves insolvent, and his solicitors charged him £1000 in total for their services.[99]

While the Port Phillip residents could do little about the legal fees, they did seek to at least eliminate the long journey to Sydney. Their wishes to have a Supreme Court presence in Port Phillip was granted in 1841, when the Sydney Supreme Court bench was increased to four, with the view to sending a judge to take up permanent residence in Port Phillip.[100] If they hoped for the 'luck of the Irish' however, they were let down sorely when Justice John Walpole Willis was confirmed as the first resident judge.

Justice John Walpole Willis

Justice Willis was a member of Gray's Inn, and was called to the Bar in 1816. He quickly set about establishing a reputation in the field of Equity by publishing three books, including *Pleadings in Equity* in 1820.[101] His ambition was not satisfied by a career as a barrister and author, and he was pleased to be offered judicial appointments to the Court of King's Bench of Upper Canada,[102] and also to British Guiana.[103] Here his burgeoning career began to falter,

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[98] Forde, above n 58, 46.

[99] For the full anecdote, see Forde, ibid 47-52.

[100] *Administration of Justice Act 1840* (NSW) 4 Vict. No. 22.

[101] For a biography of Willis, see J.F. Behan, *Mr Justice J.W Willis: First Resident Judge In Port Phillip* (1979). See also article by B.A. Keon-Cohen, 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703. Keon-Cohen's view at page 713-4 is that Willis' actions have been judged too harshly by historical commentators, as 'his transgressions were due to human failings not to incompetence or malicious intent. To dwell on them alone grossly distorts the man, and his career as a judge, and ignores his considerable achievements under very difficult circumstances.' Keon-Cohen is largely alone in this view, as an important attribute of a judge is the ability to understand the community he/she serves, and have a respect for the Bar. Willis patently lacked this attribute, thus losing the respect of the community.

[102] Ibid Chapter 2.

[103] Ibid Chapter 3.

as the Attorney General in Canada and Governor of British Guiana evidently did not appreciate his talents or personality. He was removed from his position in Upper Canada.[104]

While on leave from British Guiana, Willis was fortuitous enough to receive a third opportunity when a vacancy arose on the New South Wales Supreme Court Bench in 1837, but his quarrelsome behaviour had not been reformed.[105] Consequently, he irritated Chief Justice Dowling, who commented 'I am a peaceable person, but even a lamb will flinch from the knife'.[106] Governor Gipps seized the chance to remove this troublesome element from the Sydney Bench when the position of resident judge at Port Phillip was created.[107]

The Port Phillip residents, perhaps being unaware of Willis' history, welcomed the new judge with enthusiasm.[108] Justice Willis opened judicial business in Port Phillip on 12 April 1841, and, upon being administered the oath of office, he gave the first of many lengthy speeches to the court about the importance of his judicial duties.[109]

Justice Willis was to seize every possible opportunity during his term as judge to pontificate to the jury, barristers and citizens of Port Phillip on a wide range of topics. One of his favourite homilies concerned the evils of allowing freed convicts to settle in Port Phillip which, according to Willis, was a free settlement that was rapidly being tainted by the wiles of barely reformed felons.[110] On this subject he was on safe ground, as the residents of Port

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[104] For Willis' account of his removal from Upper Canada, see Willis to Gipps, 30 March 1839, *HRA* Series 1, vol. xx, 118. See also *Willis v Gipps*, in Kercher's Reports, http://www.law.mq.edu.au/pc/WillisvGipps,1846.htm, and Behan, ibid, which details Willis' quarrelsome manner, and the breakdown of his marriage prior to his arrival to Port Phillip.

[105] For details of the conflict between Willis and Chief Justice Dowling, and Willis' intemperate conduct on the Bench, see Gipps to Russell, 3 January 1841, *HRA* Series 1, vol. xxi, 160.

[106] This quote can be found in Behan, above n 101, 42. Behan did not provide a source for the reference, which has not been independently verified. Dowling did, however, make similar comments about Willis, which are recorded by J. Arthur Dowling, (1907) 2(5) *The Australian Historical Society Journal and Proceedings* 97. At page 108, J. Arthur Dowling reveals that he had in his possession two of Justice Dowling's letters, in which the Judge commented that 'Willis is a fidgety, restless, self-opinionated fellow, and it requires a good deal of forbearance and caution on my part to go on smoothly with him.' Justice Dowling then commented that 'Willis is going to Port Phillip as Resident Judge, where I pray he may stick, and I pray that I may never see his face again.'

[107] Gipps to Russell, 3 January 1841, *HRA* Series 1, vol. xxi, 160; Russell to Gipps, 22 June 1841, *HRA* Series 1, vol. xxi, 406.

[108] *Port Phillip Herald,* 10 March 1841, welcomed Willis and commended the fact that he represented a step forward in Melbourne's development and importance as a colony.

[109] *Port Phillip Gazette,* 14 April 1841, 3; *Port Phillip Herald,* 13 April 1841, 2. See also Behan, above n 101, 55-56.

[110] Gipps to Stanley, 14 November 1842, *HRA* Series 1, vol. xxii, 351 at 352. See also Behan, ibid 63. Willis' penchant for delivering speeches from the Bench did not escape the attention of Governor Gipps, who considered that they were 'characterized by a want of moderation or decorum'. See Gipps to Stanley, 12 November 1842, *HRA* Series 1, vol. xxii, 351.

Phillip were keen to promote themselves as free settlers, in every sense.[111] One immediate advantage of being regarded as a free settlement was the fact that the juries to which Willis gave his addresses were composed entirely of civilians. Sydney Town, which had only just stopped receiving new boatloads of convicts, still had juries predominantly composed of military officers.[112]

Another of Willis' pet topics was the illegal squatting practices indulged in by many of the settlers. His determination to stamp out these practices was not universally welcomed, however; some of the illegal squatters also happened to be the barristers with whom he would have to work.[113] While the barristers may not have been initially aware of Willis' proclivity for provoking trouble, they were soon to find out. The administration of justice in the colony, far from being enhanced by the inauguration of the Supreme Court, was soon thrown into chaos.

For the residents of Port Phillip, it was a clear sign that trouble was brewing when the fledgling Port Phillip Bar came under attack, and was soon under threat of decimation.

The Legal Fraternity Thrown into Chaos

One of Willis' first duties was formally to establish the Bar of Port Phillip. Robert Pohlman reported in his diary on 12 April 1841 that 'without wig (alas sent up to the station by accident) but [in] gown and white neck-cloth, [I] entered the Court and, on the motion of Mr Croke, we, the Bar, were admitted in the following order; Croke, Brewster, Redmond Barry, R. Pohlman, A. Cunninghame'.[114]

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[111] Willis was referring to convicts who had served their sentences. Note that despite being promoted as a convict-free settlement, there were also, in actual fact, convicts still serving their sentences among the settlers. Captain Lonsdale brought convicts with him when he arrived as Police Magistrate, and in 1837 there were 130 prisoners working in public works, or assigned as servants to free settlers who needed cheap labour. In 1842, 140 transportees were listed in service, escapes were common and rewards given for their capture. In the mid-1840s, convicts from Van Diemen's Land who had completed their sentences flooded Port Phillip. For further information on the early convict presence in Port Phillip, see Michael Cannon, *Old Melbourne Town: Before the Goldrush* (1991) Chapter 2.

[112] For reports of Willis' views on the importance of juries in a civilised society, see *Port Phillip Gazette,* 19 May 1841, 2-3, and 16 June 1841, 3. For further information on jury trials in New South Wales, see Chapter 3.

[113] Galbally, above n 92, 49. She suggests that Redmond Barry's impecunious circumstances, which prevented him from indulging in squatting practices to the extent of barristers such as Cunninghame and Stawell, led to civilised relations with Willis for longer.

[114] *Robert William Pohlman: Diary 1840-1848*, April 12, 1841, MS 10303, MSB 194, State Library of Victoria.

The Port Phillip legal profession mirrored itself on the New South Wales profession, which had recently reverted to a traditional British model by enforcing a division between barristers and solicitors.[115] While Van Diemen's Land still retained a fused profession, due primarily to economic factors, the fact that Port Phillip was under New South Wales' jurisdiction meant that the barristers unquestioningly accepted that their profession was to be divided.[116]

The select group of five barristers were not part of a Bar Association or Law Society, perhaps because there were so few of them. Willis, in order to engender a sense of fraternity, began the tradition of inviting every barrister in Port Phillip to dine with him at the beginning of each Law Term.[117] The barristers soon realised, however, that appearing before Judge Willis was no easy task. He was prone to erratic behaviour, such as imprisoning witnesses for one month in order to 'refresh' their memory,[118] or as punishment for appearing before the court in a state of intoxication.[119]

The barristers and solicitors themselves were soon under attack. A solicitor, Sewell, was ordered out of the court because he dared to sport a moustache,[120] and Cunninghame, who was one of the 'evil' landowners, was berated because Willis thought he had dared to advertise the services of his stallion.[121] The judge took an instant dislike to the Crown Prosecutor, James Croke.[122] Brewster also rapidly came to the conclusion that he would never receive a fair hearing from Judge Willis, and eventually withdrew from practice at the Bar.[123] Judge Willis' Term Breakfast initiative was eventually disbanded, as one by one, each barrister refused to attend.[124]

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[115] See Chapter Three for further information about the division of the New South Wales legal profession.

[116] Castles notes at above n 23, 243 that 'Although membership of the profession was small for a number of years it seems to have been accepted without question that it would be divided between barristers and solicitors, as in Sydney'.

[117] The custom of term breakfasts was introduced in May 1841; see Finn, vol. 1, above n 47, 67. Behan, above n 101, 70.

[118] Behan, above n 101, 63-64; 'The case of the forgetful witness'.

[119] Behan, ibid, 64, 'The Case of the Alcoholic Witness'.

[120] Finn, vol. 1, above n 47, 70-71.

[121] 'The Houndsfoot Affair', *Port Phillip Gazette,* 4 September 1841, 2 in article 'The Bench and Bar'. See also account in Behan, above n 101, 76.

[122] See below for further details on Croke's skirmishes with Willis.

[123] See article 'The Resident Judge' in *Port Phillip Gazette,* 4 August 1841, 3, which mentions several barristers vowing to give up practice while Willis was on the Bench. The barristers are not named, but Brewster was thought to be one of them; Behan, above n 101, 101. Brewster went on to have a successful career in politics, and reignited the debate on the merits of division and fusion of the legal profession; see Chapter 3 for more information on 'Brewster's Bills' in parliament.

[124] Finn, vol. 1, above n 47, 67.

The biggest battle that was developing, however, was between Willis and a solicitor, Horatio Nelson Carrington, who had managed to earn Willis' undying enmity. Willis constantly perused the rules of court in a bid to find any technicality or defect on which he could non-suit Carrington's cases. Carrington, who had a flourishing practice, was equal to Willis' game.[125] He became instrumental in a number of newspaper libel cases that resulted because of his dislike of Judge Willis. It was a situation reminiscent of Wardell, Wentworth and the emancipists of Sydney Town who had sought to undermine Governor Darling in the 1820s.[126] The Port Phillip press felt it was their duty to point out to the public the gross injustices that were occurring in the courtroom under Willis' administration.[127]

Due to the efforts of the press, Judge Willis' unprecedented attacks on the legal profession of Port Phillip did not go unnoticed by the public, some of whom considered his courtroom to be the best entertainment in Port Phillip.[128] Those with a conscience, however, felt that they could not sit by without making some form of protest at Willis' conduct, particularly when it became apparent that he also had a vendetta against two of Port Phillip's most respected citizens, former magistrates James Simpson and Captain Lonsdale.[129]

All of the progress that the colony had achieved to date with respect to updating their legal system was under siege due to the caprice of one man. When members of the press threw their weight behind the barristers of Port Phillip, it showed that the Port Phillip residents had clearly accepted the transplanted British Bar as their own. Barristers played a pivotal role in

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[125] See, for example, the incident where Willis accused Carrington of entering a false plea on the court file, reported in *Port Phillip Gazette,* 20 November 1841, 3. See also case of Tempest Parker, where Carrington was ordered out of the courtroom for alleged disrespect to Croke; reported in *Port Phillip Gazette,* 9 April 1841, 3. Further details in Behan, above n 101, 87-88.

[126] See Chapter 3.

[127] George Arden, editor of the *Port Phillip Gazette,* commented on 4 August 1841, 3, that 'the Bar, in like manner, have been treated with an *hauteur* and disdain unfitting the relative positions of a Judge and an Advocate...Any contemptuous behaviour between the Bench and Bar, must much more powerfully operate to shake the confidence of the people in the administration of the law; and the late fracas in the Supreme Court between Mr. Justice Willis and the members of the legal profession have laid the foundation of that tendency.' Other critical articles by Arden on Willis' conduct include; *Port Phillip Gazette,* 21 July 1841, 3; 24 July 1841, 3; and 4 September 1841, 2. The *Port Phillip Herald,* edited by George Cavenagh (and employer of journalist Edmund Finn) also wrote articles criticising Willis' conduct on 23 July 1841, 2; and 27 July 1841, 2.

[128] Finn, vol. 1, above n 47, 69.

[129] See below for an account of Willis' treatment of Lonsdale. James Simpson, as Police Magistrate, was often required to sit on the Bench alongside Willis, who frequently questioned Simpson's lack of qualifications for the office of magistrate. On one occasion, Simpson was not present in Court when Willis required him. When Willis discovered Simpson was detained on private business at the Bank of Australasia, he became enraged and apparently would not accept Simpson's explanation. Willis suggested that Simpson resign as Police Magistrate, and he did so, but published a letter in the *Port Phillip Gazette* on 24 July 1841, 3, detailing the circumstances of his resignation. The *Port Phillip Herald* was also indignant at Simpson's treatment; see article on 23 July 1841, 2.

the administration of justice, and an attack on the institution of the Bar was deemed to be an attack on justice itself.[130] Members of the press vowed to continue their campaign against the judge, even when it became apparent that their own liberty was at stake.

Newspaper Warfare

During Willis' time, there were three newspapers in the colony. John Fawkner owned the *Port Phillip Patriot*, George Arden was editor of the *Port Phillip Gazette*, and George Cavenagh was the editor of the *Herald*. Residents were initially puzzled that Fawkner did not engage in his usual firebrand politics and use his paper to denounce Willis' conduct, until it was later discovered that Willis had a financial stake in Fawkner's paper.[131] With Fawkner sycophantically in favour of Willis, it was left to Arden and Cavenagh to orchestrate the protest. They did this admirably, with Willis becoming accustomed to sending his tipstaff to their respective offices to inform them that they were yet again being prosecuted for libel.[132]

One letter by Arden was signed as the 'Scrutator' and questioned Willis' fitness to be a judge given that he was 'a creature of deluding impulse', and highlighted his scandalous treatment of the magistrates, barristers and attorneys of Port Phillip.[133] Arden was inevitably brought before the Court. Willis refused to allow the case to be transferred to Sydney, but allowed a bench of magistrates to conduct the case. Carrington undertook to represent Arden, and he was released from custody.[134] Willis, according to an observer, was induced into a violent rage.[135]

Having lost this round, Willis waited for his next opportunity. On 12 February 1842 Arden published yet another libellous article, and he was eventually convicted and sentenced to

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[130] See, for example, *Port Phillip Herald,* 23 July 1841, 2.

[131] Willis' financial stake in Fawkner's paper was commented on by Governor Gipps; see Gipps to Stanley, 4 February 1843, *HRA* Series 1, vol. xxii, 551, 552. Fawkner's paper rarely criticised Willis' conduct. Incidents that enraged the colony's other editors rarely scored a mention in the *Port Phillip Patriot.* For example, the affair leading to Simpson's resignation gained little comment other than an affirmation of respect for Simpson. Willis' part in the incident was not mentioned. See *Port Phillip Patriot,* 26 July 1841, 2. See also Billot, above n 3, 250-1, and Behan, above n 101, 261-2.

[132] Behan, above n 101, 103.

[133] *Port Phillip Gazette*, 29 September 1841.

[134] *Port Phillip Gazette,* 2 October 1841, 3. Arden was required to provide various sureties to keep the peace, totalling £800. See also Behan, above n 101, 111-13.

[135] *Port Phillip Gazette,* ibid. Arden's paper, obviously biased against Willis, said that three cheers were given when Arden left the Court. 'Upon hearing the universal shout, his Honor rushed upon the bench, his gown streaming behind him and the tails of his wig standing on end'.

imprisonment for 12 months, and fined £300.[136] Willis was shaken by the public outrage that followed the severe sentence and the extent to which he was shunned in public; even Fawkner's pro-Willis paper censured the sentence.[137] On 18 February 1842, Willis ordered the transfer of Arden from the Melbourne Gaol to the more spacious confines of the Watchhouse on the Eastern Hill. Unsurprisingly, the majority of the public were unmoved by Willis' supposed act of clemency,[138] and moves were soon afoot to petition for the removal of the cantankerous judge.

Fawkner's paper was delighted to reveal the conspiratorial plot for the judge's removal.[139] Fawkner organised a counter petition, but only managed to get 300 signatures as compared with 523 signatures on the main petition.[140] The other two papers then engaged in a war of words with Fawkner's *Patriot*, and Fawkner was enraged when he was called a 'twice-convicted felon' by Arden's paper, nominally being published by Jolly while Arden was in gaol.[141] Fawkner instructed Redmond Barry to act for him in his case of libel against Jolly.[142]

Willis enthusiastically brought the case on immediately, rather than waiting for the next court term to begin. His hopes of incarcerating Jolly were dashed, however, when Arden admitted that he had written the article from the confines of his gaol, and wrote a letter of apology to Fawkner who withdrew the proceedings.[143] Arden's supporters, in the meantime, had

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[136] The libellous articles published in the *Port Phillip Gazette* included 'Mr Cavenagh's Case', 12 February 1842, 2-3, which referred to the 'extraordinary *outbreak* on the part of the Resident Judge'. See also the articles of 16 February 1842, 3, which was a report of Supreme Court proceedings on 15 February where an attachment was issued against Arden, and 19 February 1842, 2-3, 'Mr Arden and the Judge'. See also Behan, above n 101, 151-156 for full details.

[137] The *Port Phillip Patriot* on 17 February 1842, 2, hoped that Willis would 'consent to a mitigation of the sentence', given the state of the gaol and Arden's poor health. Predictably, the *Port Phillip Gazette* had much to say on 19 February 1842, 2, and 26 February 1842, 2. The *Port Phillip Herald* was similarly outraged on 18 February 1842, 2. See also Behan, above n 101, 156-7.

[138] *Port Phillip Gazette,* 19 February 1842, 3, 'The Bench and the Press'. *Port Phillip Herald,* 22 February 1842, 2, refers sarcastically to the 'clemency' of the Judge in moving Arden from the gaol to the watch house.

[139] *Port Phillip Patriot*, 12 March 1842. It was referring to the respective articles 'Petition for the Removal of Judge Willis' in the *Port Phillip Gazette*, 12 March 1842, 3, and also 'Removal of Judge Willis' in the *Port Phillip Herald,* 15 March 1842, 2.

[140] See A.G.L. Shaw, *History of the Port Phillip District: Victoria before Separation* (1996) 184.

[141] See article in *Port Phillip Gazette,* 12 March 1842, 3.

[142] The *Port Phillip Gazette* reported that Fawkner was suing Arden on 16 March 1842, 3. See Behan, above n 101, 164-168.

[143] An apology was issued in the *Port Phillip Gazette* on 23 March 1842. See also report in *Port Phillip Herald,* 15 April 1842, 2.

organised a petition demanding his release[144] and Willis, recognising the tide of public opinion was against him, discharged Arden from the remainder of his sentence.[145]

Willis remained unrepentant. He eventually seized an opportunity to charge the solicitor Carrington with contempt of court, and struck him off the roll of the Supreme Court on 28 April 1842.[146] Even when the Full Court in Sydney ordered that Carrington be placed back on the roll,[147] Willis refused to implement the Court's decision for a long time, in the process destroying Carrington's career.[148]

Carrington's downfall was only the beginning. By the end of Willis' first year as Resident Judge, the residents of Port Phillip, led by Arden and Cavenagh, were demanding that Willis be replaced.[149] Willis had destroyed the livelihood of many people. Carrington, although eventually allowed back on the roll, never regained the extensive practice that he commanded before Willis' arrival. Arden was in financial difficulties, and his creditors eventually sold his paper, the *Gazette*, to an editor who was pro-Willis.[150]

While Willis' skirmishes with the editors of the newspapers were consuming much of his energies, he still had time to make life difficult for the resident barristers. The members of the Bar were under siege, and no one was spared Willis' wrath.

Justice Willis' Amoval from the Bench

One of the few barristers who were able to manage Willis was Redmond Barry, who frequently appeared before the irascible judge. One explanation that goes some way towards explaining Barry's ability to handle the Judge is that Barry, being impecunious, was not able to partake to the same degree in the land speculation indulged in by other barristers, and for

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[144] *Port Phillip Herald*, 15 April 1842, 2.

[145] *Port Phillip Gazette*, 25 May 1842, 'Entire Remission of Arden's sentence'; and *Port Phillip Herald*, 19 April 1842, 2. See also Behan, above n 101, 170.

[146] Carrington had appeared before Willis in the case of the Insolvent Estate of Peter Snodgrass. See report in *Port Phillip Gazette*, 30 April 1842. See also Behan, above n 101, 180.

[147] Gipps to Stanley, 13 October 1842, *HRA* Series 1, vol. xxii, 320. See also Behan, ibid 188.

[148] Behan, ibid 189-192. Willis claimed that the Supreme Court of New South Wales had no jurisdiction over the Port Phillip Bench, and stated that he would appeal to the Privy Council. See *Port Phillip Gazette*, 3 August 1842, 2, and 6 August 1842, 2-3, 'The Carrington Case'.

[149] Between October 1841 and July 1843, Governor Gipps received eight petitions and complaints from residents of Port Phillip. See Gipps to Stanley, 2 July 1843, *HRA* Series 1, vol. xxiii, 3.

[150] Behan, above n 101, 233.

that reason would not have come under the Willis' roving eye.[151] Even Barry, however, was not immune to Willis' wrath, and recorded that only eleven days after having breakfast with the Judge, he 'threatened to suspend me'.[152]

On one occasion, after the Judge had made caustic remarks about the prosecutor Croke's conduct and directed the jury to discharge the accused, the members of the Bar wrote a letter to Willis protesting at this unwarranted attack. Willis read the letter aloud in court, and declared that he was quite happy to conduct his court sessions without the aid of barristers.[153] On another occasion, Willis publicly humiliated Croke by discussing his financial affairs in the public court. Croke gathered his materials and walked out in protest, and the other members of the Bar, in a display of solidarity, walked out with him.[154]

Willis also continued to strike lawyers off the rolls of court. The Honourable James Erskine Murray, a barrister who was also a well-respected member of parliament, was struck off the rolls without being given a chance to explain his position. Murray, however, probably never knew of his ignominious position as he had sailed out of Melbourne and was months later killed in a fight with natives in Borneo. [155]

Another career that Willis attempted to destroy was that of Sidney Stephen, who had arrived from Van Diemen's Land in the hope of resurrecting his career as a barrister. In Van Diemen's Land, Supreme Court judges Pedder and Montagu had attempted to strike Stephen off their roll of barristers and solicitors as a result of a case in which Stephen was the defendant and had allegedly breached legal ethics.[156] While an appeal to England eventually reinstated Stephen on the roll, he candidly admitted that 'the poison had done its work', and

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[151] See Galbally, above n 92, 49. Note comments in text above that one of Willis' pet grievances was squatting. Many members of the Bar, such as Cunninghame, indulged in this practice.

[152] Ibid 50.

[153] The letter was from Eyre Williams, Cunninghame, Raymond, Barry, Pohlman and Stawell. See Behan, above n 101, 73-74.

[154] Finn, vol. 1, above n 47, 79. See also Behan, above n 101, 77.

[155] Behan, above n 101, 82.

[156] See Chapter 4, and Sidney Stephen, Esquire: Copies or Extracts of any Correspondence between the Colonial Office and any of the Authorities in Australia, Van Diemen's Land, or New Zealand, relating to the Removal of Mr Sidney Stephen from the Bar of Van Diemen's Land, and his appointment as a Judge of the Supreme Court of New Zealand', House of Commons, 8 March 1850.

he was a 'ruined man'.[157] With the support of his successful brother Alfred, Sidney decided to migrate to Port Phillip.[158]

He had not, however, bargained for the fact that Judge Willis would refuse to admit him as a barrister on the rolls of the Supreme Court. Willis, giving reasons for his decision, cited the case that had led to Stephen being struck from the rolls in Van Diemen's Land, and which consequently gave an air of 'suspicion of reproach'.[159] Stephen wrote to Governor Gipps complaining of Willis and stating, 'I have been cruelly aspersed, and publicly traduced by him from the Bench, branded as dishonourable and dishonest, and finally sentenced to exclusion from the Bar.'[160]

Stephen was consequently shunned not only by Willis, but also the legal community of Port Phillip.[161] He began petitioning the British Government for Willis' removal, in the hope that he could resurrect his career under a new judge. It is interesting that Stephen's plight, however unfortunate, did not gain the sympathy of his fellow barristers.[162] Arriving from Van Diemen's Land, he perhaps lacked the Irish Catholic connection, and with his career under shadow, his fellow barristers were not willing to embrace him as one of them. He was to persevere with his career in Port Phillip and eventually gain a measure of acceptance, but eventually left to take up the more lucrative position as a judge the Supreme Court bench in New Zealand.

Willis' final mistake was not his treatment of Stephen, but in attacking well-respected members of the community. He felt that Captain Lonsdale had fraudulently acquired trust assets in John Batman's deceased estate for his own use and benefit, and wanted Croke, as Crown Prosecutor, to bring Lonsdale before the Court. Croke was deliberately uncooperative in the matter. When Willis explained to the magistrates who were sitting with him what he intended to do to Lonsdale, Magistrate J.B. Were questioned Willis as to what law Lonsdale had actually infringed. Lonsdale was eventually spared a criminal sentence due to Croke's

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[157] Sidney Stephen to Deas Thomson, 20 January 1843 in *Sidney Stephen & GM Stephen*, FA 923.49/S, Mitchell Library.

[158] See *Sidney Stephen Esquire* above n 156, Enclosure No. 4.

[159] *Port Phillip Herald,* 6 September 1842, 3. See also report in *Port Phillip Gazette,* 7 September 1842, 2, 'Mr Justice Willis and Mr Sydney Stephen' (sic).

[160] Letter from Sidney Stephen to Governor Gipps, 16 November 1842, in *Sidney Stephen and G.M Stephen,* FA923.49/S, Mitchell Library.

[161] Ibid.

[162] Ibid. See also Alfred Stephen's comments on his brother's plight in Enclosure 4 of *Sidney Stephen Esquire* above n 156.

prevarication, but J.B. Were was sentenced to six months' imprisonment for contempt of court.[163]

The business community of Melbourne united in a final bid to remove Willis.[164] Superintendent La Trobe agreed that Willis had irretrievably crossed the line, and sent the petitions on to Sydney. On 24 June 1843, the judge was amoved from his office.[165] The community in Port Phillip had clearly shown that they were not willing to be ruled by the caprice of one judge. The Bar, while it had undoubtedly suffered during Willis' term as judge, had the clear support of the community it served throughout the ordeal. Justice, while it was a long time coming, had finally prevailed.

Willis, however, felt that yet another gross injustice had been inflicted upon him. Even his amoval from the Bench did not put an immediate end to his influence on the Supreme Court or the Port Phillip community, as he immediately instituted an appeal.[166]

New Judges in Port Phillip

After Willis' amoval from office, Justice William Jeffcott was appointed as the next resident judge. He was a barrister of only five years standing, and was the brother of John Jeffcott, who was South Australia's ill-fated inaugural judge.[167] Unlike his brother, William Jeffcott was well respected, and the barristers and the Port Phillip community appreciated his "manly conduct'.[168]

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[163] *Port Phillip Gazette*, 5 June 1843, 2-3.

[164] Behan, above n 101, 267-276.

[165] Gipps to Stanley, 26 June 1843, *HRA* Series 1, vol. xxii, 797; and Gipps to Stanley, 19 July 1843, *HRA* Series 1, vol. xxiii, 47, 50 where Gipps commented that Willis' conduct rendered 'further occupation of the Judgement seat incompatible with the peace and good government of the Colony'. The *Port Phillip Gazette* on 28 June 1843, 2, stated that 'It becomes our duty to record the unwelcome intelligence of the removal of His Honor Mr Justice Willis'. The *Gazette* was at this point no longer owned by Arden, and was now a pro-Willis paper. The *Port Phillip Herald*, now the only anti-Willis paper in the colony, issued an 'Extraordinary' edition on 24 June 1843, and announced the 'gratifying fact' that Willis had been suspended. It followed up with articles on 27 June 1843, 2, and 30 June 1843, 2. See also Behan, above n 101, Chapter 24.

[166] Willis eventually won his appeal, although he was not reinstated as Resident Judge. See *Willis v Gipps* (1846) 5 Moo. PC 379; 13 ER 536, and reported online at <http://www.law.mq.edu.au/pc/WillisvGipps,1846.htm>. The decision was in Willis' favour because he had not been given an opportunity to defend his case prior to his amoval from the Bench. Note that Governor Gipps always defended this lack of a hearing on the basis that 'Melbourne is 600 miles distant from Sydney'. He could not bring Willis to Sydney, and it would cause the 'greatest public inconvenience' to send a Commission to Melbourne. See Gipps to Stanley, 19 July 1843, *HRA* Series 1, vol. xxiii, 47, 52.

[167] See Chapter 7 for information on William Jeffcott's brother, John Jeffcott.

[168] *Port Phillip Gazette*, 19 July 1843, 2. See also *Port Phillip Herald*, 18 July 1843, 3, which decreed that Jeffcott supported the 'dignity of office'.

Unfortunately for William Jeffcott, Willis' appeal cast doubt as to whether Jeffcott's commission as resident judge was valid. Jeffcott's concern was that if Willis succeeded in his appeal, and Jeffcott's commission were invalidated, then any criminal executions that Jeffcott had ordered would also be invalid.[169] Jeffcott decided that, despite numerous reassurances from the Colonial Office, he could not live with such uncertainty, or the spectre of an unauthorised execution.[170] Willis was ultimately successful in his appeal, but while he was not reinstated Jeffcott's career was nevertheless curtailed.

Roger Therry, who was Resident Judge for one year from February 1845 to February 1846, replaced Jeffcott. Therry, unlike Willis, was pleased to report that he was ably served by the Bar, consisting of Stawell, Barry, Eyre Williams and Croke.[171] Willis' reign had left many casualties, including Brewster,[172] so the Bar was temporarily understaffed.

Therry was in Melbourne Town at the time when a great furore was caused by the arrival of ticket-of-leave holders from Pentonville prison.[173] Dubbed the 'Pentonvillains', the Port Phillip residents feared that their settlement was to be turned into a reception area for convicts. The 'Pentonvillians' were prisoners who had served a term of one or two years at a newly devised prison in England called Pentonville, where the special discipline supposedly reformed the felons. They were sent to Port Phillip as 'exiles' with conditional pardons rather than as convicts.[174]

The ship that arrived on 16 November 1844 only carried 21 exiles, but the concern was what would happen in the future. The barrister Cunninghame was in favour of the Pentonvillians, being a squatter and in need of cheap labour. By 1849, 1727 Pentonvillians had landed,[175] but by then opposition to the exiles had increased and the calls for separation of Port Phillip from New South Wales were renewed with vigour.

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[169] *Mr Justice Jeffcott – Correspondence with the Colonial Office Concerning his Judgeship at Port Phillip, 1845*, 11-16. MS 12601 Box 3435/1, State Library of Victoria, 16-23. Jeffcott's opinion was supported by D.R. Pigot, Joseph Napier and R. Warran.

[170] Ibid. See also Bennett, *Lives of the Australian Chief Justices: Sir William a'Beckett: First Chief Justice of Victoria, 1852-1857* (2001) 15.

[171] Roger Therry, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (1974) 353.

[172] Brewster was to enter politics and begin a campaign for the fusion of the profession. See Part Three.

[173] Therry, above n 171, 354.

[174] See Finn, vol. 2, above n 47, Chapter. xxxviii, 'The Anti-Transportation Campaign' for a description of the furore caused by the 'Pentonvillains'. See also Shaw, above n 140, 191.

[175] Shaw, above n 140, 207.

The Port Phillip residents were keen to preserve their status as a largely convict-free settlement. There was a notion that the introduction of convicts, however named, would bring down the civilised and respectable nature of the community. A meeting was called on 2 March 1847, in which barristers William Stawell, Sidney Stephen and Edward Eyre Williams were among those giving addresses opposing the reception of more exiles.[176] Eyre Williams, when not giving an address, was lending support in other ways by physically tackling Edward Curr, a businessman who had tried to give a speech in support of the Pentonville prisoners.[177]

The first resolution of the meeting was that 'the moral and social influences of the convict system, and the contamination and vice which are inseparable from it, are evils for which no mere pecuniary benefits would serve as a compromise'.[178] Delegations were sent to the Governor and correspondence entered into in order to convey the anti-transportation sentiments.

There was still a strong segment of the community who were in favour of transportation, however, and Archibald Cunninghame was representing their interests to the Colonial Office. It appeared that Cunninghame, who was already in England to lend support for the petition to separate Port Phillip from New South Wales, exceeded his authority by also throwing his weight behind the Pentonville scheme. His actions were censured and the anti-transportation efforts continued, with the residents challenging the new boatloads of 'Pentonvillains' that continually arrived on Port Phillip's shores.[179]

In June 1848 and February 1849, Lieutenant Governor La Trobe sent the boats of exiles on to Geelong where there was less hostility. In August 1849, when yet another boat arrived, a crowd gathered in the bay and successfully prevented the exiles from landing.[180] The transportation threat, which could have irretrievably changed the social geography of Port Phillip, had been staved off due to the untiring efforts of the community. Barristers such as Stawell and Barry had successfully used their position and status to represent the anti-transportation segment of the community. Port Phillip would remain, as their founders had

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[176] Finn, vol. 2, above n 47, 'The Anti-Transportation Campaign', 520. See also Shaw, above n 140, 208.

[177] Finn, ibid 520-521.

[178] Ibid.

[179] Ibid 522.

[180] Shaw, above n 140, 209.

desired, a conservative and socially acceptable settlement that embraced British institutions and values.[181]

By 1849 Port Phillip was on the cusp of change, with the Colonial Office being petitioned for the separation of Port Phillip from New South Wales.[182] Separation from the mother colony would also ensure that Port Phillip had increased control over issues such as the reception of convicts. The settlement's strong economic position and distance from Sydney meant that it was economically viable to create a new colony and give the Port Phillip residents increased control over their affairs.

In 1851, the new colony of Victoria was proclaimed, with La Trobe as its Governor.[183] The transportation threat was over. While convicts had not marred the social landscape of Melbourne Town, the discovery of gold in 1851 would inexorably change its social composition. Gold was to be the financial making of Victoria, and the new colony had no choice but to deal with this influx of itinerant and cosmopolitan gold diggers.

The changes wrought on Melbourne Town were felt in every tier of the community. The social structure of Melbourne had changed, with a deluge of Chinese miners attracted to the goldfields.[184] The business community faced shortages of labour as workers left in droves, searching for their golden fortune.[185] The Bar and Bench, headed by its new judge, William a'Beckett, was necessarily ushered into this new age. New barristers arrived, many from Ireland, and they almost immediately began reaping the benefits from the increased amount of litigation.[186]

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[181] A typical expression of the founders' intentions can be seen in a letter from J.V. Thompson to Lord Glenelg, 10 October 1836, *HRV*, above n 6, 29, in which he states that Port Phillip 'should be kept clear of convicts and destined to the reception of free emigrants only of good character'.

[182] For more information on the campaign for separation from New South Wales, see Shaw, above n 140, Chapter 12. See also Finn, vol. 2, above n 47, Chapter LXIV, 'The Story of Separation'. He records at pages 908-9 that the first separation meeting was on 13 May 1840, and that Redmond Barry was one of the speakers. Stawell and Cunninghame were also ardent advocates of separation, although Cunninghame was more interested in advancing his squatting interests. The first petition was prepared in 1840, and by 1848 the issue of separation was 'seriously contemplated by the Home Government'.

[183] *Australian Constitutions Act 1850,* 13 and 14 Vict, c. 59.

[184] See Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (1963) for a general history on the Victorian gold rushes. Serle records at page 382 the census statistics that reveal that the total population in Victoria in 1851 was 97,489, which rapidly climbed to 168,321 in 1852, and then ballooned to 541,800 a decade later in 1861.

[185] Ibid.

[186] Chief Justice a' Beckett ascribed the increase in crime to the gold rushes, and his biographer, John Bennett, also comments that there was an increase in commercial litigation due to the wealth and expansion brought to the colony by gold. See Bennett, *Sir William a'Beckett,* above n 170, 48 and 60. Justice a'Beckett was one person who expressed the view that the 'entire fabric of colonial life' was threatened by the gold rush, and

When the Supreme Court Judge Roger Therry returned to Melbourne for a visit in 1856, he grandly pronounced that

> the humble town I had quitted in 1846 had been transformed in 1856 into a splendid city, as no city in the ancient or modern world had heretofore exhibited in a corresponding period.[187]

Yet this 'splendid city' was struggling to adapt. Words such as treason and tyranny were floating on the air. Miners' rights and governmental responsibility were in conflict, culminating in the Eureka Stockade. The dispute was the perfect launching pad for the colony's new barristers.

Canvas Town

William a'Beckett, who had been admitted to the Bar at Lincoln's Inn in 1829, replaced Roger Therry as Resident Judge. He had arrived in Sydney in 1837, shortly after barrister Robert Wardell's death. It had been wisely suggested to him that the New South Wales Bar would keenly feel the loss of Wardell's talents, and that there would be an opening.[188] Despite the onset of a spinal ailment leading to paralysis,[189] a'Beckett quickly achieved the position of Solicitor General in 1841, and was then offered a place as acting judge on the Supreme Court Bench in 1844. In 1846, he moved with his family to Port Phillip as resident judge.[190]

When Port Phillip separated from New South Wales in 1851, a'Beckett became the first Chief Justice of the Supreme Court of Victoria,[191] and Redmond Barry and Eyre Williams were elevated to the Supreme Court Bench.[192] William Stawell was made Attorney General of Victoria, despite Croke's solicitations for the job.[193] Croke was no longer in favour with Governor La Trobe, his eccentric manners and practices not going unnoticed. La Trobe gave

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published pamphlets denouncing the effects of the gold rush mania (ibid 42).

[187] Therry, above n 171, 357.

[188] See Bennett, *Sir William a' Beckett*, above n 170, 5. For a further biography of a' Beckett, see B. Niall, *The Boyds: A Family Biography* (2002) 17-28. Note that a' Beckett was an ancestor of the Boyd family, including Arthur Boyd.

[189] Bennett, ibid 10.

[190] Ibid 16-19.

[191] The Supreme Court of Victoria was enacted under the *Supreme Court (Administration) Act 1852*, being gazetted on 21 January 1852. William a'Beckett was appointed Chief Justice of the new Victorian Supreme Court, as opposed to his former position of Resident Judge of Port Phillip under the auspices of the New South Wales Supreme Court. See Bennett, ibid 44-46.

[192] Barry became the first puisne judge in January 1852, and Eyre Williams became the second puisne judge in July 1852. See Bennett, ibid 46.

[193] See Bennett, *Sir William Stawell*, above n 78, 36-39.

Croke the position of Solicitor General in a bid to appease the disgruntled barrister, but he left the colony soon after.[194]

With Barry, Eyre Williams and Stawell all leaving private practice to undertake their civic duty, the Bar was seriously depleted. However, when news of Victoria's fortunes spread abroad, new barristers arrived in droves, many of them again from Ireland.[195]

Melbourne was unable to cope with the influx of new migrants. Accommodation was scarce, and, while new infrastructure was being built, it could not keep pace with demand. A temporary solution was devised, in the name of Canvas Town.[196] Many of the new barristers stayed in this makeshift town, including the future Chief Justice of Victoria, George Higinbotham, who went to Trinity College in Dublin and was called to the Bar at Lincoln's Inn in 1853.[197] He reportedly said that he was 'in despair about making my way at home', and thought that he would prospect for gold in Australia.[198] A wise friend advised him to pack his wig and gown as well, and he was admitted to the Victorian Bar on 27 March 1854. His ideas of digging for gold were soon abandoned, as he realised that there was a wealth of work for him in the law.[199] He also supplemented his income by working as a journalist for the *Argus*.[200]

Fellow Irish barrister Townsend MacDermott also stayed at Canvas Town.[201] Prior to moving to the Antipodes, he had practised law in Ireland and acted as junior barrister in a case with the famous Daniel O'Connell. While MacDermott admired O'Connell, he did not share his political ideologies of Young Ireland.[202] Another barrister who did share O'Connell's philosophies, however, was to migrate to Victoria.

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[194] Ibid.

[195] Dean estimates that just over one hundred barristers arrived in the colony between 1851 and 1860, 23 barristers arriving in 1853 alone. The colony did not begin to produce its own locally grown barristers until 1859, as the University of Melbourne did not begin teaching law subjects until 1857. See Dean, above n 27, 26.

[196] For further information on Canvas Town, see Turner, above n 18, Chapter XV, 'The Social, Commercial and Financial Confusion of 1852, 1853, 1854'.

[197] Edward Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice of Victoria* (1895) 27-28, and 36.

[198] Ibid 30.

[199] Ibid.

[200] Ibid 37.

[201] *Reminiscences of Canvas Town, 1852,* MS 10819, MSB 322, 8/11, State Library of Victoria. Townsend MacDermott was one of the many new arrivals who could not initially obtain accommodation when he arrived in Victoria, and he wrote of his experiences in the makeshift city of Canvas Town.

[202] *Ballarat Courier*, 22 January 1907, 4. This article also contains a biography of MacDermott, who spent part of

Richard Davies Ireland was called to the Irish Bar in 1838, and had commanded a successful practice in his native land despite the overcrowded circuits.[203] In the 1840s he became involved in Irish politics and helped to launch the Protestant Repeal Association, as part of the Young Ireland movement. After the arrest of some of his fellow compatriots, he moved to Port Phillip.[204] He left, still protesting the British Government's policies that left the Irish 'trampled and tyrannised'.[205] He arrived in Melbourne, only to discover that British tyranny had stretched its long arms into the Antipodes.[206] When the Eureka Stockade occurred, Ireland's fighting spirit was re-kindled, and he seized the opportunity to criticise the British Government yet again.[207]

The Eureka Stockade

When animosity between the gold diggers and licence checkers culminated in the deaths of soldiers and miners and the raising of the 'Eureka flag', thirteen men were arrested for high treason.[208] It was the first time that such a serious charge had been levelled in the Australian colonies. The Attorney General, William Stawell, made the indictments on 15 January 1855 and they came on for hearing before Justice a'Beckett on 22 February 1855.[209]

Stawell, in his younger years, had been described as having 'Janus-like' qualities, a strange mixture between the wild youth and a seriousness that belied his years.[210] When he was elevated to the position of Attorney General, one of his duties was to advise Governor Hotham on legal matters. When he was addressing the issue of miners' licences, it appears that his better judgment deserted him in his eagerness to perform his duties as Attorney General, and perhaps impress the Governor with a view to further career advancement.[211]

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his career practising law in Ballarat. For further information on O'Connell, see above n 30.

[203] John Ireland, *'Three Cheers for Mr Ireland: Towards a Reassessment of Richard Davies Ireland'* BA (Hons) Thesis, University of Melbourne, 1988 (unpublished) MS 12570, Box 3404/7, State Library of Victoria.

[204] Ibid 10.

[205] Article written by Richard Davies Ireland, published in *Nation,* 3 June 1848, 354-5, and cited in John Ireland, ibid 13.

[206] Ibid 13 for Ireland's disparaging views on the 'British faction'.

[207] Ibid 15.

[208] For further information on the Eureka Stockade, see for example, Hugh Anderson (ed), ***Eureka: Victorian Parliamentary Papers Votes and Proceedings, 1854-1867*** (1999), and Ian MacFarlane (ed), ***Eureka: From the Official Records*** (1995).

[209] Bennett, *Sir William Stawell*, above n 78, 65 and see generally Chapter 5.

[210] C. Parkinson, *Sir William Stawell: The Victorian Constitution* (2004) 3.

[211] Bennett, *Sir William Stawell*, above n 78, 61-74.

The influx of miners had redefined the social strata of Victorian society, and created a new temporary, makeshift class in society. The itinerant miners flocked to the goldfields with the sole objective of making their fortunes. They were not there to further the interests of the new Victorian colony, unlike old residents such as Fawkner who contributed to the advancement of society as well as their own pecuniary interests.[212] Stawell was from an old Irish family, and was accustomed to traditional class divisions;[213] any empathy that he may have had for the miners deserted him, as he determined that they could at least contribute to the colony by paying for their mining licences.[214] The revenue raised could be put towards infrastructure and other projects in a colony that was literally bursting at the seams.

While the idea was sound, the licences were so expensive that the majority of diggers just starting their enterprise rarely had the money to give to the reviled collectors.[215] After the Eureka flag was raised and the indictments for treason made, the reaction of incredulity and shock rippled through the community. Such a move was unheard of in the Antipodean colonies, but Stawell and Governor Hotham persisted with the charges despite obvious public backlash.[216] The depth of Stawell's miscalculation as to where the public's sympathies lay was finally revealed when his fellow members at the Bar volunteered to defend the miners on treason charges.

Several members of the Bar offered their services for free including Butler Cole Aspinall, a young barrister who had only been in the colony for a few weeks.[217] Archibald Michie, who had recently arrived from Sydney, was also part of the action,[218] as were barristers Chapman[219] and Cope. Aspinall acted as junior to Ireland, and together they seized the opportunity to criticise the Government. Ireland, using all of his persuasive powers in front of the jury, stated in defence that

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[212] Chief Justice a'Beckett in particular disapproved of this itinerant class. He disliked the notion that enormous wealth could be generated from little toil, and attributed the increase in crime almost entirely to the gold rushes. See Bennett, *Sir William a'Beckett*, above n 188, 42-48.

[213] Parkinson, above n 210, 1 and 8.

[214] Ibid 62.

[215] Ibid.

[216] See *Melbourne Morning Herald,* 22 January 1855. Stawell's effigy was burnt on the goldfields, and the press mercilessly hounded him. See also Parkinson, above n 210, 7-8.

[217] See biography of Aspinall in Dean, above n 27, 79-81.

[218] See biography of Michie in Dean, ibid, 72-3.

[219] See biography of Chapman in Dean, ibid, 81-2.

> the diggers had been baffled for fourteen days; the Government had trifled with them...serious matters of life and death were not to be thus trifled with...the law was made for the people, and not the people for the law; and when the people are oppressed and tyrannised over, it becomes them to right themselves.[220]

All of the defendants received the verdict of 'not-guilty', despite Stawell's efforts in presenting the evidence.[221] Soon after the tempestuous affair things began to settle down, and members of the expanding Bar resumed their normal practice.

The barristers had successfully performed one of the nobler aspects of their profession: the defence of civil liberty. Less than five years before, the Port Phillip community had rallied around its barristers, protecting the institution from decimation at the hands of Justice Willis. The barristers can be seen to have re-paid the community they served by defending their liberty from encroachment by an over-eager government.

Stawell's reputation needed re-building after his unsuccessful hard-line approach to the gold diggers, and there was no better way to begin to restore credibility than by becoming involved in the drafting of a new constitution for the colony of Victoria. It was his chance to promote the colony as being more British than the British. It was also an opportunity to promote the interests of the community's long-serving members over those of the itinerant miners who had created so many problems.[222]

Responsible Government

By 1854 the advent of Responsible Government was a reality, not a mere aspiration. The British Government advised that the eligible Australian colonies should each submit a draft of their constitution for approval by the Colonial Office in London.[223] It was uncertain what 'Responsible Government' actually meant, beyond a common perception that it involved a

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[220] *Argus,* 21 November 1854, 5. Note that Parkinson comments that the Eureka Stockade was seen by many as a 'continuation of the fight for freedom from British rule in Ireland'. Richard Davies Ireland was one barrister who certainly viewed events in this light. See Parkinson, above n 210, 8.

[221] See reports in the *Argus,* 23 February 1855 and 21 March 1855.

[222] For a detailed analysis of Stawell's role in drafting the Victorian Constitution, see Parkinson, above n 210.

[223] The *Australian Constitutions Act 1850,* 13 and 14 Vict. c. 59 gave authority to draft the new constitution, and on 15 December 1852, Sir John Pakington, Secretary of State for the colonies, wrote to the respective Governors of New South Wales, Victoria, South Australia and Van Diemen's Land indicating that the British Government was now receptive to those colonies drafting their own constitutions. See Parkinson, above n 210, 16 and Victoria, *Constitution,* VPLC, Parl. Papers No. B2 (1853-1854).

degree of self-government and autonomy from England.[224] The draft constitution was to reflect these sentiments.

For long-term residents like William Stawell, an important consideration was the make-up of the new Victorian parliament, and to this end he pressed for a property qualification for those desiring to nominate themselves as members of the upper house.[225] The advantage of a property qualification was that only residents with a long-term interest in Victoria's future would be able to qualify, thus eliminating the potential miner class who would have had more immediate and short term goals.[226]

The Bill was accepted in England, and Responsible Government commenced in Victoria in 1855. Stawell, having ably served his Governor as Attorney General, was not to stay in the post for long. Justice a'Beckett's health was failing, and he finally retired from his post in 1857.[227] The new Chief Justice of the Supreme Court was not to be Redmond Barry, who was already a puisne judge of the court, but William Stawell, who had used his political connections to manoeuvre himself forward in what would be an extremely successful career. The Eureka Stockade, which might well have been Stawell's downfall, was merely a hiccup along the way.

The Bar, which Stawell would oversee in his capacity as Chief Justice, had settled back into routine. The small Bar of the 1840s had made way for a mass migration of new barristers, with just over 100 arriving in the colony between 1851 and 1860.[228] By the time Responsible Government commenced, the local Bar was still entirely serviced by overseas recruits. The University of Melbourne had only been established in 1853, and unlike Sydney Town, there were no earlier concerted calls for a legal training program for local youth aspiring to become barristers.[229] The first colonial barrister would not be admitted until 1859.[230]

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[224] The term 'responsible government' is used in many different contexts by different people to reflect the extent to which a territory is self-governing, the situations in which the Governor acts on ministerial advice, and the level of responsibility by ministers to Parliament. Such is the fluidity with which the term is used that it is perhaps not surprising that in 1888 Higinbotham CJ described the difficulties in specifying the details of responsible government as "quite insurmountable". See Parkinson, above n 210, xv.

[225] Ibid 30.

[226] Ibid.

[227] Bennett, *Sir William A'Beckett*, above n 170, 100. His last sitting was on 20 February 1857. See report in the *Age*, 21 February 1857, 5.

[228] See Dean, above n 27, 25-26.

[229] Note that the Faculty of Law was not established until 1873, although law subjects were taught prior to then. The degree of LLB was conferred from 1860. Sydney Town, in contrast, provided a local admission program for barristers from 1848, in response to local demand. See Chapter 3, 'Reforms in the Education of

In the meantime the Bar's overseas recruits, regardless of whether they were from England or Ireland, were trained under the ancient English Inns of Court system. Despite this allegiance to the English system, there was no Inn of Court, and there was still no Bar Association to lend guidance to the increasing numbers of barristers.

One barrister, a Mr Fellows, made the proposal in 1856 that an Inn of Court be established in Melbourne. The *Victoria Law Times* commented that the colonial Bar

> is little more than a collection of legal adventurers, met together from all quarters of the globe, each engaged in carrying out his own objects and furthering his own interest, without any check or guide than such as his own inherent sense of what is just and right, or the traditions of professional honour which he brought with him from home furnish.[231]

An 'Inn of Court' Bill was put forward in the Victorian parliament, but ultimately the idea lapsed.[232] Sewell, the editor of the *Victoria Law Times*, hoped that the idea would soon be revived, for an Inn of Court would not only benefit the legal profession, but also the public who would gain from a clearer notion and enforcement of legal ethics.[233]

Clearly, the challenge for the Victorian Bar following the advent of Responsible Government would be to create a cohesive Bar, which had clearly defined ethical rules and obligations between itself and the public. The tag of 'legal adventurers' would have to be shed.[234] The threat of amalgamation of the profession of barristers with the solicitors was becoming increasingly real, and ultimately the only way to stave off such an incursion would be to form a recognisable collegiate identity.[235] In the coming years it would not be enough to identify

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Barristers', for a more detailed discussion of the events leading to the provision of training for barristers in New South Wales.

[230] Henry Lawes was the first colonial barrister, admitted in 1859. See Dean, above n 27, 26.

[231] 'The Proposed Inn of Court' in *Victoria Law Times and Legal Observer*, (ed) Sewell, No. 1, 10 May 1856, 4. The *Victoria Law Times* ran from May 1856 until November 1857. It was the first legal journal to be published in Victoria, and its editor, Edward Sewell, was a solicitor.

[232] *Inn of Court Bill 1855-56.*

[233] 'The proposed Inn of Court' above n 231, 5.

[234] This is not to say that the Victorian barristers prior to the era of Responsible Government did not have a sense that they were part of the 'Bar'. They clearly identified themselves as barristers as opposed to solicitors, and had informal meetings (as demonstrated above, particularly during Willis' term as judge). However, the existence of a formal Bar Association demonstrates to the members of the public that the barristers of the colony are serious about setting professional and ethical guidelines. Note also that the barristers and advocates in the other colonies also struggled to form enduring Bar Associations and Law Societies, so in this sense all of the barristers and advocates in the Australian colonies were 'legal adventurers' prior to 1856.

[235] The threat of amalgamation was also recognised by Sewell in his article 'The proposed Inn of Court'. He prophesied, '... unless something of the kind is done matters will end in an utter confusion of all ranks and

with the British legal system. The 'Victorian' Bar would need to create its own, permanent identity.

Membership of the Victorian Bar would not be the only major issue facing the barristers as the century wore on. William Stawell had clear insights and saw that federation of the colonies would be on the cards. The legal ramifications of such a move were obvious to him, and he foresaw a time when the individual colonies would need to collaborate to oversee a colonial court of judicial review.[236]

A Mutually Beneficial Relationship

In the days following the inauguration of Responsible Government, however, such notions of federation were rarely in the contemplation of the majority of barristers and their fellow colonists. In just over twenty years, they had participated in the transformation of barren land that had been deemed unsuitable for settlement, into a thriving metropolis. A land that was initially beyond the law now boasted an advanced legal and political infrastructure. For an unplanned colony, which was initially deemed to be an illegal settlement and treated by the British Government as a weed that needed to be pulled, it was a significant achievement.

As experience in Van Diemen's Land had proved, legal infrastructure and lawyers are vital to the progress of a settlement; but unlike Van Diemen's Land, Port Phillip's entrepreneurial residents were able to implement its legal infrastructure quickly, and thus make their community an instantly attractive proposition for barristers. The legal profession thrived in an environment where the conditions were right for a transplant of what was essentially an Irish Bar. Port Phillip was a far cry from the overcrowded circuits of Ireland in the days of the potato famine and political unrest. The barristers in flight had found a permanent home.

The discovery of gold, in particular, had created a commercial environment rich with opportunity for barristers. It was a mutually beneficial relationship, in which the community

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grades in the profession. The distinction of barrister and attorney will be done away...' Note that the Victorian legal profession did amalgamate in 1891, but in reality little changed in terms of the structure of the profession, as it prompted the formation of the Victorian Bar Association which restricted its membership to people practising exclusively as barristers. This move created a furore in the newspapers: see, for example, the *Argus,* 5 December 1891, which published the 'rules' of the Association, and 30 January 1892, in which a list of 49 Association members was published, as against 28 barristers who were not members. Eventually the Association was disbanded, but solicitors continued to brief barristers to perform the court work. It was not until 1900 that a Bar Association was again formed, and this attempt was successful. For further detail, see Dean, above n 27, Chapter 6, and Chapter 10.

[236] Parkinson, above n 210, 41-42.

embraced its transplanted Bar, and the barristers, despite being tagged as individualistic 'legal adventurers', in turn supported their community when it most needed it.

The first twenty years of settlement in Port Phillip had also established the foundation for a keen rivalry between Victoria and New South Wales. This rivalry continues to this day, and is mirrored through the legal professions. Melbourne Town, from the outset, supported a classical and conservative legal profession, directly transported from the British Inns of Court. There was no question that any other model would be followed, and it tied in with the desire of the founders of Port Phillip that their settlement emulate the best of British tradition.

By contrast, New South Wales' legal profession went through the tumultuous process of evolution, rather than the simpler process of transplantation.[237] The early history of Sydney Town's barristers highlights significant contributions to the legal profession and its Bar from civilians with no legal training and convict attorneys who did not have the traditional qualifications from an Inn of Court. Legal training for local residents who did not desire to travel to England to gain their qualifications to practise was also established at a much earlier date than in Victoria. It was not until after thirty years of settlement that conservative barristers trained in English Inns of Court managed to unite to impose a more classical British structure on the Bar of Sydney Town.

It was clear, however, that Melbourne Town's transplanted Bar would have to begin to evolve beyond its identity as a collection of British 'legal adventurers'. Yet these adventurers were there to stay, and had implanted the Bar as a permanent institution that had made an extremely significant and long-lasting impact on the legal, social, political and economic fabric of the new colony of Victoria.

[237] See Part One.

CHAPTER SIX

WESTERN AUSTRALIA - A NEW EDEN

1829 – 1856

When we read of the difficulties, the trials, and privations which attended the settlement of New South Wales, South Australia, New Zealand – colonies possessing rich natural resources to assist the pioneers – it should be with a feeling of profoundest admiration that we turn to the story of the settlement of the Swan. The Pilgrim Fathers of Swan River lighted upon a corner of the continent more infertile probably than any other...It is a story of brave men, of indomitable pluck, of a patient, long continuing resistance to difficulties, and of steady determined effort to succeed.

> *West Australian*, 26 December 1882, introducing their readers to the final instalment of the diary of one of the Swan River's first settlers and Advocate General, Mr George Fletcher Moore.[1]

The 'Pilgrim Fathers of Swan River' were British men from all walks of life, united by dreams of prosperity and riches that were seemingly out of their grasp in a society that had changed beyond recognition since the onset of the industrial revolution.[2] Four advocates proved to be an integral part of this migration to the Swan River, despite the fact that the presence of the legal fraternity was not planned for, or even seen as necessary.

The society on the Swan was to be a modern-day Eden[3] and lawyers, who were frequently seen as the harbingers of disruption and discord, did not fit the prototype of a model citizen.[4] The cornerstone of the blueprint for the Swan River was that it would be a civilised

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[1] George Fletcher Moore, *Diary of Ten Years Eventful Life of an Early Settler in Western Australia* (1978) 422.

[2] See Richard Tames (ed), *Documents of the Industrial Revolution 1750-1850* (1971) and Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) for a discussion of the effects of the industrial revolution on British society.

[3] In a bid to attract settlers to the new colony, its virtues were extolled and its drawbacks were virtually ignored. It was depicted as an Eden-like place to live. See Pamela Statham's chapter 'Swan River Colony 1829-1850' in C.T. Stannage (ed), *A New History of Western Australia* (1981), where she comments that 'from mid to late 1829 the words "Swan River" definitely conjured visions of a land of milk and honey.' In a bid to attract new settlers a decade after the initial settlement, a favourable account of the colony was written by Nathanial Ogle, *The Colony of Western Australia: A Manual for Emigrants 1839* (1839). Such idealistic and utopian visions rarely accorded with reality: see J.M.R. Cameron, 'Information distortion in colonial promotion: the case of the Swan River Colony' (1974) 12 *Australian Geographical Studies* 57. Cameron analyses the effects of exaggeration and distortion of climatic conditions in the new colony.

[4] Lawyers have long had a reputation in society as being self-centred and greedy. Literature written prior to, and at the time of settlement of Western Australia, often promotes a 'seedy' image of the lawyer, and rarely paints the legal profession in a favourable light. The Bible takes a dim view of lawyers, as seen in, for example, Luke 11:46, 11:52. Charles Dickens, an author who lived through the times relevant to the settlement of Western Australia, (he was born in 1812 and died in 1870) had much to say about lawyers, especially in his book *Bleak House* (1852). Dickens was critical of the legal system, and its inability to deliver speedy justice. For further information on Dickens' view of lawyers, see William Holdsworth, *Charles Dickens as a Legal Historian* (1929). Wilfred Prest partly explains this historical distrust of lawyers as being the fact that they were often the 'standard bearers of change' in a world that was rapidly changing. See W. Prest (ed), *Lawyers in Early Modern Europe and America* (1981) 73.

community. It would be untainted by the scourge of convictism, and crime and poverty would be a thing of the past.[5] In this new Eden, populated by gentlemen, law and order was the least of their concerns.

Yet every society needs the certainty of enforceable mechanisms of law and order. The Swan River, unsurprisingly, was no Eden and the small community only survived because of the sheer determination of its settlers. As in all communities, disputes inevitably arose. Remarkably, Swan River's small fraternity of advocates, far from being the serpent in the Garden of Eden, proved to be one of the prime conciliating forces ensuring the settlement's survival.

Captain James Stirling

Captain James Stirling was the driving force behind the establishment of the Swan River colony, which ultimately came into being as a result of his vision and active campaigning.[6] Stirling explored the Swan River region while in command of the HMS *Success* in 1826 and 1827.[7] He quickly recognised that the land, as yet unclaimed by the British Government or any other foreign power, presented a golden opportunity for colonial advancement.[8]

Stirling was captivated by the notion that he could not only form a new settlement, but also achieve instant social status and recognition by being appointed as its Governor.[9] His judgement was perhaps clouded by the grandeur of his visions when he wrote to the Colonial Office and Governor Darling of New South Wales in order to present an extremely favourable report of the soil, climate and trading prospects of the Swan River.[10]

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[5] For general texts on the settlement of Western Australia, see F.K. Crowley, *Australia's Western Third* (1960), especially chapters 5-6 for a description of idealistic notions surrounding the settlement of the colony. See also J.S. Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (first published 1924, this ed 1978); and W.B. Kimberly *History of Western Australia: A Narrative of her Past, together with Biographies of her Leading Men* (1897).

[6] For a good biography on James Stirling, see Pamela Statham-Drew, *James Stirling: Admiral and Founding Governor of Western Australia* (2003).

[7] See *Sir James Stirling - Papers* (1827) in J.S. Battye Library, Western Australia, ACC 428A for reports on his first trip to the Swan River. See also 'Official Papers Relating to the Settlement at Swan River, West Australia. December, 1826 - January, 1830' in *HRA* Series 3, vol. vi, 551-640. See Statham-Drew, above n 6, chapters 5-6 and M. Bassett, *The Hentys – An Australian Colonial Tapestry* (1954) Part III, Chapter 1.

[8] Stirling to Hay, 30 July 1828, *HRA* Series 3, vol. vi, 585. Captain Stirling presented a different picture of Western Australia to that of previous French and Dutch explorers, who said the Western Coast had neither fresh water, fertile soil or safe anchorage. Stirling disputed all three findings. See also Stirling to Darling, 18 April 1827, *HRA* Series 3, vol. xi, 551, and Statham-Drew, above n 6, Chapter 6, especially page 85.

[9] Stirling to Bathurst, 15 May 1827, *HRA* Series 1, vol. xiii, 307.

[10] Stirling to Governor Darling, 8 December 1826, enclosure 2, *HRA* Series 1, vol. xii, 775. Stirling to Under

The British Government was initially unenthusiastic, particularly towards the idea that the colony be a private venture with no convicts.[11] Furthermore, a small convict settlement had already been established in the West at King George's Sound,[12] and the remoteness of the Swan River was also a key concern as it would be virtually impossible to use the well-established political and legal infrastructure of Sydney Town.[13]

Despite the negativity of the Colonial Office, Stirling's ideas had begun to ignite the imagination of influential people. One such man was Thomas Peel (a relative of the Home Secretary and future Prime Minister, Robert Peel), who undertook to provide shipping and supplies for 10,000 emigrants in exchange for a choice allocation of land.[14]

The British Government finally permitted the colony to be founded, partly because they perceived a threat of the French settling in the West and gaining a large foothold on one third of the Australian continent. The Colonial Office agreed that convicts would not be sent out to the new settlement,[15] but determined that Swan River would be a Crown colony and thus in the political control of the British Government, and not a private settlement funded solely by wealthy investors. [16]

Secretary Hay, 20 July 1828, *HRA* Series 3, vol. vi, 585.

[11] Stirling and Major Moody to Under Secretary Hay, 21 August 1828, *HRA* Series 3, vol. vi, 586. See also speech of Sir George Murray, House of Commons, 1 May 1829, cited in Battye, above n 5, 70.

[12] King George's Sound was no more than a small, isolated convict settlement, under the control of New South Wales. The British Government never intended to use the settlement as a means of establishing a more permanent foothold in the West of Australia. The western third of Australia was not a part of New South Wales' territory, and had not been claimed by any nation. See *HRA* Series 3, vol. vi, 453-548, for the correspondence surrounding the settlement at King George's Sound.

[13] Huskisson to Darling, 28 January 1828, *HRA* Series 1, vol. xiii, 739.

[14] Thomas Peel, Francis Vincent and others to Murray, 14 November 1828, *HRA* Series 3, vol. vi, 588. For further information about Peel, see Alexandra Hasluck, *Thomas Peel of Swan River* (1965).

[15] The pledge that no convicts would be sent to the new colony was contained in the 'Enclosure: Conditions for Land Grants at Swan River', 5 December 1828, *HRA* Series 3, vol. vi, 594.

[16] Fear of French occupation hit Sydney Town when the French man-of-war *L'Astrolabe* anchored beside British ships in the harbour. The *Morning Chronicle* on 10 November 1828 reported a false rumour that the French Government wanted to establish a settlement on the West Coast of Australia. Governor Darling of New South Wales was particularly concerned that the French might want to settle in the Western regions of Australia, and requested that the British Government take steps to secure the area; see Darling to Bathurst, 24 November 1826, *HRA* Series 1, vol. xii, 700. Darling requested that he be granted a commission to govern the whole territory so that there would be no dispute as to sovereignty. See also Goderich to Stirling, 8 March 1833, No. 21 as reproduced in Battye, above n 5, 58 (original source unknown). Goderich's comments make it clear that the British desired a Crown colony to stave off the threat of the French colonising Western Australia, but that the Government also encouraged private investment. See also Bassett, above n 7, 78-81, and Statham-Drew, above n 6, 110.

Nevertheless, private capital was encouraged, and Thomas Peel's scheme was granted in a modified form, in which he undertook to take out 400 emigrants in exchange for 250,000 acres of land near the Swan River.[17] Stirling's efforts and vision were also amply rewarded when he was confirmed as Lieutenant Governor of the new colony.[18]

All that remained was to convince members of the British public to take a chance and to build new lives in this new colony. The utopian vision was a powerful motivator for those struggling to make a living in Britain. Several advocates immediately offered their expertise, sensing an opportunity to own land and practise their craft in this new 'Eden'.

Recruitment of Personnel

Once the decision to settle in the west of Australia had been made, the British Government began its propaganda campaign. The Swan River was touted as being a place with extremely fertile soil, a good harbour, and excellent prospects of trade.[19] The British media were scathing of the fact that Thomas Peel had been promised the best land in the colony,[20] but the prospects for the ordinary settler also seemed promising. The Colonial Office began to receive enquiries from many British citizens who wanted to create a better life for themselves.[21]

One such colonist was George Fletcher Moore, a struggling Irish barrister.[22] While no formal provision had been made for lawyers in the new settlement, Moore immediately scented an opportunity to further his career. It is likely that he recognised that the colony would have need of legally trained personnel to help establish and administer the legal framework of a

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[17] Hay to Peel, Vincent, MacQueen and Schenley, 6 December 1828, *HRA* Series 3, vol. vi, 593.

[18] Murray to Stirling, 30 December 1828, *HRA* Series 3, vol. vi, 600. Note for the purposes of this thesis he will be referred to as 'Governor' Stirling rather than his official title of 'Lieutenant-Governor'.

[19] This information was based on Captain James Stirling's reports. See Stirling to Governor Darling, 8 December 1826, *HRA* Series 1, vol. xii, 775 and 777. Stirling to Under Secretary Hay, 30 July 1828, *HRA* Series 3, vol. vi, 585. For an analysis of how these reports were portrayed in the British media, see Cameron, above n 3.

[20] See letter to *The Times,* 18 April 1829, and *Hobart Town Courier,* 5 September 1829. See also Hasluck, above n 14, 50-1.

[21] See, for example, the story of James Henty and his family, recorded in Bassett, above n 7. The Henty's were initially considering a life in New South Wales, but when they heard about the Swan River settlement they were instantly attracted by the lure of land, and instant social status in a new society. See in particular the undated letter written by James Henty reproduced in Bassett, above n 7, 34-36.

[22] George Fletcher Moore was one of the few barristers who left substantial documentary evidence of their life. See Moore's diary of the years 1834-1841, above n 1. Much of his published diary is sourced from his *Manuscript* in J.S. Battye Library, Western Australia, ACC 1151A. See also his *Letters and Journal 1830-1848* on microfilm in J.S. Battye Library, ACC 263A. These contain letters to his family from 1830-1848, and his journal 1837-1841.

new society, regardless of whether formal provision had been made for them. He wrote to the Colonial Office requesting an official appointment.[23]

The British Government was consumed by immediate concerns of surveying land, sowing and tilling, and bricks and mortar.[24] It had not learnt from the experience of New South Wales, where advocates had not been a formal part of the formative years of the colony, yet had soon established their profession as an essential part of the colony. Their services were sought by private citizens, military officers and governing officials alike, and proved to be either a great assistance or thorn in the side for successive governors.[25] Despite the enormous influence advocates had on New South Wales society, for good and ill, the British Government did not seek to control their introduction to the new colony in the west of Australia.

Instead, Moore was informed that the British Government would not offer him the assurance of an official position. He was, however, told that if he went to the Swan River as an emigrant he would be given a 'favourable letter of introduction' to give to the new Governor, Captain James Stirling.[26]

Moore, needing little persuasion, determined that the Swan River was to be his new home. As he freely admitted, he had also been 'attracted by the hope of obtaining possession of a good estate', and he was not sorry to be leaving his career as a barrister in Ireland as 'the prospect of success at the Irish Bar was but remote and uncertain'.[27] Moore's options for a new life in the Antipodes were at that point limited to New South Wales, Van Diemen's Land, or the Swan River. He was still a decade ahead of the mass Irish legal migration to Port Phillip, South Australia had not yet been settled, and the 'new Eden' undoubtedly seemed a better prospect than life in a convict colony.

Other advocates also decided to emigrate, including William Mackie and the Stone brothers, Alfred and George. Mackie had been admitted to the Middle Temple in November 1822,

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[23] In the preface to his *Diary*, above n 1, v, Moore refers to an application he made to the Government for an official appointment, although there is no evidence of that letter. See also James Cameron, 'George Fletcher Moore' in B. Reece (ed), *The Irish in Western Australia*, Studies in Western Australian History, 20 (2000).

[24] Governor Stirling's Commission, which addressed matters of law and order, did not even arrive until 1832. Stirling was forced to improvise on matters legal up until this point. See below for further details. Even New South Wales had formal instructions for a military court from the beginning of settlement. See Murray to Stirling, 30 December 1828, *HRA* Series 3, vol. vi, 600.

[25] See Part One for more information on the influence of the convict attorneys.

[26] Moore, above n 1, v.

[27] Ibid.

although he had never been called to the Bar in England.[28] He also determined to leave for the Swan River as a private settler and undoubtedly he, like Moore, hoped to gain an official legal position on arrival.

Alfred Hawes Stone had qualified as a solicitor in England, and he took his hopes and ambitions for a prosperous legal career with him to the Swan River.[29] His younger brother, George Stone, would join him two years later once he turned 18.[30] While George Stone was not legally trained, he too would have a significant impact on the establishment of law and order in the Swan River colony. Both were destined to become advocates.

Moore, Mackie and Alfred Stone, having informed their families of their decision to leave Great Britain, tied up their affairs and were among the first wave of settlers to brave the wilderness that was Swan River, which would be transformed into their new Eden.[31] The new colony was officially proclaimed on 18 June 1829, and on that date Western Australia was formally declared British territory, subject to the laws of England.[32]

False Rumours of Abandonment of the Colony

On arrival in the new colony in 1830, Moore and the other new settlers were bitterly disappointed with what they saw. Stirling, in a desperate bid to get Britain to accept his proposal for founding a new colony, had undoubtedly over-stated the virtues of the Swan River.[33] As Moore commented, 'much disappointment has been felt by many over-sanguine persons here, who thought they had nothing more to do than scratch the ground and sow'.[34] Fellow advocate Alfred Stone similarly lamented, 'the appearance of the settlement on first

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[28] D. Pike (ed), *Australian Dictionary of Biography, vol 2: 1788-1850 I-Z*, 'Mackie, William Henry' 174. See also W.S. Ferguson, 'William Henry Mackie' (unpublished) in J.S. Battye Library, PR 14514/MAC/1 - 0/20.

[29] See *Diary of Alfred H. Stone*, copied by his grandson Charles Stone and covering the years 1852-1853 in J.S. Battye Library, Western Australia, B/STO. See also biography of A.H. Stone in Enid Russell, *A History of the Law in Western Australia* (1980) 97.

[30] See biography of George Stone in Russell, ibid 92.

[31] Moore's friends and family were apparently dubious as to the wisdom of his decision, and he hastened to reassure them that he would at least keep them fully informed of his progress by way of his letters and diary. See Moore, above n 1, v.

[32] Proclamation of Lieutenant-Governor Stirling, 18 June 1829, vol. 3 *Swan River Papers* 13 in State Records Office of Western Australia, and reproduced in Bennett and Castles, *A Source Book of Australian Legal History* (1979) 256.

[33] For further analysis on this point, see Cameron, above n 3.

[34] Moore, above n 1, 24.

landing is most forbidding. The soil is entirely sand...[and is] of little use to the agriculturalist.'[35]

Rumours began to circulate in England that the colony was unsuitable for habitation, culminating in the *Morning Journal* of 26 January 1830 reporting that it had 'been informed this afternoon that the settlement had ultimately been abandoned, and that the Governor and settlers had proceeded to Van Diemen's Land'.[36] These rumours, which were false, nevertheless had a disastrous effect on future immigration to the new colony, with the flood of enquiries to the Colonial Office slowing to a mere trickle after January 1830. Five ships that had been scheduled to leave for Western Australia were cancelled.[37]

Back in the colony, the settlers did their best to overcome initial first impressions. Settlements were established at Perth and Fremantle, and the settlers were busy preparing their land to sow crops, building permanent dwellings, and assisting the Governor in establishing the social, political and legal infrastructure essential to any new society.[38]

The British Government had put little effort into establishing effective machinery for governing the colony and establishing legal infrastructure. Unlike New South Wales, which had specific instructions for the establishment of criminal and civil courts, and a Judge Advocate appointed to administer the judicial system,[39] the Swan River settlement was left to fend for itself. Stirling had left for the Swan River with scant instructions, and a frank admission by the British Government that 'difficulties may easily be anticipated in the course of your proceedings from the absence of all Civil Institutions, Legislative, Judicial and financial.'[40]

Until formal instructions arrived, Stirling was simply advised to combat the difficulties experienced by using his 'own firmness and discretion'. In the absence of courts of law, Stirling was to

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[35] Letter by Alfred Stone, 1 November 1829, reproduced in Ian Berryman (ed), *Swan River Letters* vol. 1 (2002) 94.

[36] Reproduced in Berryman, ibid 20.

[37] Ibid 23.

[38] For an account of the new settlers' progress in establishing new homes and lives for themselves, see a sample of letters published in Berryman, ibid.

[39] See Chapter 1.

[40] Murray to Stirling, 30 December 1828, *HRA* Series 3, vol. vi, 600.

> endeavour to settle with the consent of the parties concerned a Court of Arbitration for the decision of such questions of Civil right as may arise between the early Settlers and until a more regular form of administering Justice can be organized.[41]

Stirling did not wait for the official instructions to arrive from England, and immediately set about creating his own de-facto system of law and order in the colony. His decision to do so was wise, as it gave the colonists the reassurance that law and order would be enforced from the beginning, and perhaps assisted as a deterrent to crime.[42] When Stirling issued a government notice on 9 December 1829 appointing eight justices of the peace,[43] no one seriously questioned its lack of legality. Stirling also constituted a Court of Quarter Sessions to deal with criminal offences, the first sitting being held in July 1830.

The Governor was also aided by the fact that Mackie, Moore and Stone were all jostling for a legal appointment. They had chosen to overlook the British Government's lack of enthusiasm in appointing official legal positions in the colony,[44] undoubtedly reasoning that their services would be required sooner rather than later. Stirling chose to place his trust in them immediately, and they all played a vital role in the governance of the colony; it was the beginning of a partnership that helped Stirling, the former sea captain, to steer his ship through difficult times.[45]

William Mackie was the first to gain an official position, being appointed the Chairman of the Court of Quarter Sessions, and Advocate-General. Stirling was extremely fortunate to receive the benefit of competent legal advice, and Mackie rapidly became one of Western Australia's most valued and respected residents.[46]

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[41] Ibid 602.

[42] Stirling to Murray, 20 January 1830, *HRA* Series 3, vol. vi, 615-40. See especially page 616, which relates the establishment of the magistracy and police, and the appointment of William Mackie as a legal officer.

[43] See proclamation in *Colonial Secretary - Correspondence Forwarded*, 9 December 1829, Acc 49, vol.1, Letter no. 418, 280, located in the State Records Office of Western Australia. Also reproduced in Russell, above n 29, 13.

[44] Goderich to Stirling, 28 April 1831, vol. 11 *Swan River Papers* 59, State Records Office of Western Australia.

[45] William Mackie was described by Stirling as a 'gentleman bred to the law'. See *HRA* Series 3, vol. vi, 615, 616.

[46] Mackie was good friends with George Moore, who frequently mentions associating with Mackie in his *Diary of Ten Years*; Alfred Stone also mentions his friendship with Mackie in his letters – see Berryman, above n 35, 96. He commanded the respect and admiration of Stirling – see Despatch No. 186, 18 March 1837, (original source unknown) reprinted in Russell above n 29, 81; and on his death in 1860 he was described as a 'man of unblemished reputation, in a public or private point of view' – *Perth Gazette and Independent Journal of Politics and News*, 30 November 1860, 2-3.

The advantage of the Swan River not being a convict colony was immediately apparent when jury lists were posted for viewing in public places.[47] The colonists, after the introduction of Stirling's legal system, certainly seemed to show respect for the law. Stirling reported that 'Petty Thefts, Drunkenness and Insubordination are now rare, and Deference to the Decisions of Law as so administered has become a very general Feeling'.[48] One settler reiterated these sentiments when he commented that:

> All things considered, the peace and good order of the Colony have been hitherto very well preserved. Several magistrates have been lately appointed, and a Court of Quarter Sessions established. The usual sources of riot and disturbance have been checked as much as possible.[49]

Undoubtedly, the industrious character of the free settlers assisted in keeping crime levels down. Stirling was fortunate that he did not have to contend with convicts, and to avoid the social problems that arose in the early years of the settlement in Van Diemen's Land, which was besieged by all manner of crimes, from bushranging to sheep stealing. Lieutenant Governor Collins of Van Diemen's Land did not have suitable legal infrastructure to deal with such crimes, and was faced with the problem of having to commute long distances to the courts in Sydney Town.[50] Stirling, being in charge of establishing the administration of the court system, had the luxury of simply being able to dispense justice as he saw fit.

For reasons unknown, Stirling did not go so far as to constitute civil courts without further instructions. Stirling perhaps saw no need to constitute a civil court in a young settlement where there were few commercial transactions of note. Yet permission was given to Alfred Stone in January 1831 to practise as a 'solicitor, Attorney at Law, Conveyancer and Notary Public', suggesting that there was work available for a solicitor regardless of the absence of a civil court.[51] When his brother George Stone joined him in the colony, the Stone brothers established the private law firm of A.H. and G.F. Stone, Solicitors and Agents.[52]

In 1832, Stirling received the instructions necessary to make moves legally to constitute the court system. The despatch was dated 28 April 1831, and instructed that the Western

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[47] A.C. Castles, *An Australian Legal History* (1982) 297; see Part One for the struggle in New South Wales to achieve trial by jury.

[48] See vol. 5 *Swan River Papers* 66 in State Records Office of Western Australia.

[49] The settler is most likely Frederick Chidley Irwin, the officer in charge of the 63rd Regiment, although positive identification cannot be made. See his letter dated February 1830, reprinted in Berryman, above n 35, 156.

[50] See Chapter 4.

[51] Russell, above n 29, 67.

[52] See biographical notes in Russell, above n 29, 97-99.

Australian justice system should be administered 'with the utmost possible degree of simplicity and economy'.[53] The Court of Quarter Sessions continued as before, but Stirling was now able to establish the Court of Civil Judicature, known as the Civil Court.[54] The court had the jurisdiction commonly exercised in the courts of King's Bench, Common Pleas and Exchequer in England, although there was no mention of whether the jurisdiction of Courts of Equity applied.[55] The practice and procedure of the court, as instructed, was simplified.[56]

George Fletcher Moore was appointed as the Commissioner of the Civil Court on 17 February 1832, and Alfred Stone was appointed Registrar-Clerk. Creditors finally had an avenue through which they could pursue their debts, and Moore soon made the comment that, 'although it is a new country, settlers retain all their old manners, habits, prejudices, and notions of a sturdy, free commercial, litigious people.'[57] From a lawyer's point of view, it was undoubtedly a good thing that people retained their litigious instincts. From a social perspective, it was perhaps an indication that the Swan River was not to be the Eden that people desired.

Despite the British Government's obvious lack of interest in establishing a legal framework for the colony, it took less than two years for a fully functioning court system to be established, and serviced by a fledgling legal profession. Like New South Wales, advocates were not seen as essential personnel to a new colony. A Governor was deemed essential for the political administration of the colony, and medical professionals were required to ensure the physical health of the settlers, as were chaplains for the religious and moral health of the settlement. Advocates, who, viewed in an unkind light, made their money by capitalising on other people's problems, were not regarded as an essential component of a functioning society.

Yet, as Moore commented, the administration of law and order in a colony is vital to keeping the peace. The colonists, even in a remote corner of the earth far away from the hustle and

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[53] Goderich to Stirling, 28 April 1831, vol. 11 *Swan River Papers* 59 in State Records Office of Western Australia.

[54] *Court of Civil Judicature Act 1832*, 2 Will. IV, No. 1.

[55] Ibid, s. 7.

[56] See 'Rules and Orders', (Civil Court) 17 February 1832, vol. 17 *Swan River Papers* 61 in State Records Office of Western Australia. Among other things, the pleadings were to be oral rather than written, and the costs of litigation were to be kept low. Not everyone was pleased that costs were to be kept low. Abel Morrison, for example, commented that 'the Civil Court of this colony does not behave civilly to its practitioners (they say), snubbing them in the matter of costs, until they become as transparent as Mr Marley's ghost.' See the *Inquirer*, 25 September 1844, and Russell, above n 29, 121.

[57] Moore, above n 1, 55.

bustle of Britain, had disputes that needed to be resolved, or committed crimes that required punishment. In New South Wales, convict attorneys seized the opportunity presented by the British Government's lack of foresight. In the Swan River, the legally trained Moore, Mackie and Stone had correctly intuited that there would be a role for them to play in the colony's new legal system.

However, a healthy legal profession also requires a healthy economy. Moore, Mackie and Stone had migrated to the Swan River with ambitions of becoming rich landowners with social status unattainable in Britain. While their hopes of using their legal skills had come to fruition, the land was not reaping the rewards that they had dreamed of. The colony, populated as it was by people unsuited to the realities of farming, was facing a bleak future.[58] New South Wales had convicts to perform the backbreaking tasks of farming and establishing physical infrastructure. This new, convict-less Eden had more people who wanted to be masters than servants.

Dire Financial Straits

While Stirling had admirably established the colony's legal and political systems despite the lack of interest by the British Government, he was not able to prevent the deprivations and hardship that came hand in hand with an unhealthy economy. The false rumours that the colony had been abandoned meant that there was a dearth of new settlers with capital immigrating to the colony.[59] Some settlers, such as the Henty family, had tired of struggling to make a living on the harsh land and moved to Van Diemen's Land.[60] Thomas Peel's scheme, to the delight of the English press, was a failure as the aristocratic man was ill equipped to be a pioneer.[61]

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[58] See Statham-Drew, above n 6, especially Chapters 11-18, which describe the difficulties the colony faced. Alfred Stone soon gave up on the rigours of farming and devoted his life to the law. See Berryman, above n 35, 93.

[59] Pamela Statham points out that by the end of 1830 the population of Western Australia was almost 2000 people, but by 1850 had only increased to 5254. By contrast, South Australia had 52,904 people at the same time, although it was settled seven years later than Western Australia. See 'Swan River Colony 1829-1850' in Stannage (ed) above n 3, 181. Note that population statistics always vary slightly depending on the source used. For example, the *Statistical Register of the Colony of Western Australia for 1898 and Previous Years* (Registrar General's Office, 1900), states that there were 1767 people in 1830, and 5886 people by 1850. It reports that in 1848, the colony lost 95 people.

[60] See Bassett, above n 7, 174 -181.

[61] See, for example, *Morning Journal*, 26 January 1830, Crowley, above n 5, 15; and Hasluck, above n 14.

By 1832, the colonists requested that Stirling return briefly to England so that he might persuade the British Government to inject funds into the ailing colony.[62] Stirling acquiesced, but the British Government was not of much assistance in addressing the colonists' concerns. As James Purkis, a settler, ruefully observed:

> The colony is now considered as formed, and the Government at home are now withdrawing the leading strings from this infant settlement; but alas! too hastily; and, if I may continue the comparison, a beautiful child will be crippled, unless it be watchfully nursed for about three years longer.[63]

The colony was not nursed, and for the following two decades Western Australia experienced very slow growth.[64] By the 1840s, the colony was in the grip of economic depression and in desperate need of both capital and labour.[65] Yet surprisingly, the colonists made no moves to depose Governor Stirling.

William Tanner, a leading colonist and eventually a member of the Legislative Council, felt that Stirling had 'a great deal to answer for on account of mal-administration', but went on to say that 'everybody here is so very quiet as tho' they were all afraid of the powers that be'.[66] George Fletcher Moore also commented that Stirling 'is generally disliked as a governor though much liked as an individual'.[67]

It is interesting to surmise why no moves were made to depose Stirling; certainly settlers in other colonies were not afraid to campaign to remove governors and judges from their positions, and undermine their authority if it was for the good of the colony.[68] In the cases where the colonists succeeded in their desire for the removal of a government official, the legal profession was invariably at the forefront. It was extremely difficult for a governor or judge to succeed without the support and guidance of their legal officers, and virtually impossible if the legal profession was openly hostile to them.

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[62] Moore referred to a 'meeting of the settlers' on 2 July 1832 at which it was resolved to ask Stirling to return to England as the colony's representative; Moore, above n 1, 98-99, and 121.

[63] Berryman, above n 35, 256.

[64] In 1848, the colony lost 95 more people than had arrived. See *Statistical Register* above n 59. Funds were not made available to assist immigration of workers (Crowley, above n 5, 17).

[65] For a description of the effects of the depression, see Battye, above n 5, Chapter VII, 165.

[66] 14 August 1833 reprinted in P. Statham, *The Tanner Letters* (1981) 58.

[67] Moore, *Letters* mid-Dec 1830, J.S. Battye Library, WAA406A; see also Statham-Drew, above n 6, 184.

[68] For example, Governor Darling of New South Wales was targeted by Wentworth and other members of the legal profession, see Chapter 3; Justice Willis of Port Phillip was targeted by the legal profession for poor performance, see Chapter 5. Justice Montagu of Van Diemen's Land was also targeted by the legal profession for poor performance, see Chapter 4.

Stirling was fortunate that the small legal profession of Swan River made no moves to depose him. Perhaps the small size of the profession assisted Stirling, as he was able to employ all of them in an official capacity. Even when Moore was stripped of the position of Commissioner of the Civil Court in 1834 as part of an economic rationalisation, he made no moves to incite the public against Stirling. He was understandably peeved, but after much correspondence he accepted the position of Advocate General and subordinated any feelings of antagonism he had towards the Governor for the sake of the colony.[69]

While Stirling no longer had Moore's complete confidence, Moore ably and competently served the Governor through his involvement on the Legislative Council as Advocate General.[70] Stirling also had the Stone brothers involved in government administration from time to time, and Alfred and George, in a bid to further their careers, ensured that they toed the Government line.[71]

Stirling, while understandably concerned about Swan River's lack of economic progress, had much to be personally thankful for. He was in the extremely unusual situation of having the colonists working with him, rather than against him. Unlike Governor Darling of New South Wales, he was not forced to wage battle against the incompetence of his legal advisors, and he had not felt the devastating effects that can flow from earning the enmity of important legal personalities in the colony.[72] Stirling did not feel the need to remove government officials from their positions, as did Governor Arthur of Van Diemen's Land, who went out of his way to get Joseph Tice Gellibrand sacked from his position as Attorney General.[73] There was no need to contend with vigilante justice, as there were no convicts to create mischief, or bushrangers pilfering food and valuable goods from people's homes.[74]

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[69] CO 18/15, ff. 554-64. George Moore sent a memorial to the British Government protesting against his removal from office. Notification of his removal was published in the *Perth Gazette* on 23 August 1834.

[70] James Stephen, Under Secretary for the Colonies and one-time legal advisor to the Colonial Office, praised Moore's drafting of legislation for its 'great clearness, simplicity, and good sense.' Stirling to Glenelg, 1 September 1838, CO18/20 f. 160 – see marginal note made by Stephen. See also Statham-Drew, above n 6, Chapter 17 for Moore's involvement on Legislative Council.

[71] Russell's opinion of the Stone brothers was that they 'came out to the new Colony determined to succeed and their every endeavour was bent upon improving their own positions. Fortunately they were honest, upright and able men, and so long as their own positions were not endangered, they could be relied upon to act in the good interests of the Colony.' Russell, above n 29, 94.

[72] See Part One, which discussed the actions of Wentworth, Wardell and Chief Justice Forbes who all disagreed with Governor Darling's policies.

[73] See Chapter 4.

[74] See Part One and Chapter 4.

The Swan River's legal system, therefore, was not subjected to the upheaval of the other colonies, and once the courts were legally constituted there was no concerted agitation for a new and improved legal structure.[75] The legal system, although basic in its structure, was sufficient for the colonists' needs. The peaceful evolution of the legal system is reflected in the fact that Western Australia did not have a Supreme Court until 1861.[76]

Yet the question that ultimately needs to be asked, is whether Western Australia was best served in the long run by adhering to its rudimentary governmental and legal infrastructure. The lack of growth and change to the legal structures in particular was a reflection of the economic retardation of the colony. The other Australian colonies, while initially wracked with dissension, ultimately had far more advanced legal systems than Western Australia by 1856. In the other colonies, the achievement of a Supreme Court was an important milestone, which reflected and heralded increased economic prosperity and aided the development of the legal profession.

The Swan River, slipping into obscurity, had little to boast about. Letters written to loved ones in Britain told of the struggles in making a living, the deprivations and hardships. Even Stirling, in a report to the Colonial Office, admitted that

> no fresh importation of property or population has taken place within the last three years, and the want of a market for future products together with the evils, and inconveniences resulting from the smallness of the community have occasioned considerable despondency.[77]

It was hardly a successful advertisement for prospective settlers, who now had a choice of colonies to migrate to. The lack of new blood in the colony was no more apparent than in the legal profession itself.

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[75] See Russell, above n 29, 6. Russell points out that Western Australia was unusual in that it had long serving officials, and the friendly atmosphere enabled differences of opinion between officials to be over-ridden. This goes a long way to explaining why the Swan River settlers did not agitate for a new and improved court system. As experience in the other colonies has shown, political rifts and dissensions, which were played out in the legal arena, exposed weaknesses in the court system, leading to agitation for change.

[76] For information on the Supreme Court of Western Australia, see G. Bolton, *May it Please Your Honour: A History of the Supreme Court of Western Australia 1861-2005* (2005). See also J.M. Bennett, *Lives of the Australian Chief Justices: Sir Archibald Burt: First Chief Justice of Western Australia* (2002).

[77] Stirling to Glenelg, 13 February 1837, CO 18/18, f. 21. See also Statham-Drew, above n 6, 308.

Because the colony was not subject to rapid expansion, the legal profession remained small. In 1860, the editor of the *Inquirer* noted that the Bar was 'small, without power and without influence'. There were only four barristers in the colony, two of whom held official positions.[78]

This group of lawyers, which formed the entire 'Bar' and legal profession of the day, operated as a fused profession. However, the English distinction between solicitor and barrister was maintained where possible. Moore was quite indignant when an attempt was made to combine the offices of Crown Solicitor and Advocate General, as he felt it was compromising the role of a barrister to undertake the work of a solicitor.[79] Yet the reality was that the legal profession was so small that practitioners acting for the public, such as the Stone brothers, had to act in the dual capacity of solicitor and barrister.

Due to the absence of a Supreme Court the rules governing admission to practice initially differed from those of the other colonies. When the colony was first formed, legal practitioners acted as agents for clients in court.[80] There were no formal admission requirements and legal training was not required in order to act for another person in court.

After a rash of litigation between 1832 and 1836, the *Civil Court Act* and Rules were amended to introduce licensing requirements.[81] Practitioners had to register their intention to practise law in the colony with the Civil Court. A fee was payable annually depending on the applicant's qualification.[82] Solicitors who were admitted to practise in the courts of Great Britain were required to pay two pounds to be granted a licence, whereas those admitted to practise in local, provincial or colonial courts paid four pounds. There was even provision for persons who had no prior legal qualifications at all to apply for a licence, providing they paid six pounds. Barristers were accorded specialised status and did not have to pay any fee, and could represent clients without any permission from the court.

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[78] *Inquirer,* 14 November 1860.

[79] Original source could not be traced. Cited in Russell, above n 29, 70 as '192 CSF 194' (Colonial Secretary – Correspondence Forwarded, year and accession number unknown).

[80] The rules of the Civil Court of 1832 stated that parties could appear in person or be represented by an authorised agent. No specific mention was made of legal practitioners. John Ferres, Alfred Stone, William Nairne Clark and W.J. Lawrence were given permits, but in reality anyone could apply to be an agent of the court. See Russell, above n 29, 67.

[81] *Civil Court Act 1836*, 6 Will. IV, No. 1, section 1.

[82] Ibid section 2.

The situation was reminiscent of early Sydney Town, when the convict attorneys practised as advocates in court.[83] The Swan River environment could not have been more different from the traditional legal environment in Britain, where the profession of barristers was governed by the ancient traditions of the four Inns of Court.[84] The foundation had been laid for a more adaptive legal profession in the Swan River, which would develop according to the colony's needs. With a stagnant economy and small population, there was simply no need for a divided profession, and it would not have been a functional or meaningful division.

However, the court admission rules and fee structure meant that the ceremonial division between solicitor and barrister was nurtured. This would have pleased Moore, who was originally from the Irish Bar. The reality, however, was that anyone could perform an advocacy role in the court, and there was nothing to stop them from calling themselves a barrister. This was strengthened by the fact that there was no semblance of any formal legal education in Western Australia until 1855. This meant that George Stone, who had no prior legal training in England, was able to establish himself as an advocate without undergoing any training.

In 1855 the admission rules were amended in an attempt to prevent non-trained practitioners from practising in the Civil Court. The rules did, however, finally provide for training of local lawyers. George Stone took advantage of the training and was thus called to the 'Bar' in 1858, and formally admitted to practise in the new Supreme Court in 1861.[85]

Prior to the introduction of legal education, Moore, Mackie, and the Stone brothers were the stable core of the profession and had remained so for decades. Moore and Mackie were practising in an official capacity and only the Stone brothers offered their services to the public on a part-time basis. The colony needed other men to offer their services to the public.

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[83] See Chapter 1.

[84] See Introduction.

[85] *Practitioners in the Civil Court Ordinance 1855*, 18 Vict. No. 9. Note that no specification was made as to how the local lawyer should be trained, and did not distinguish between solicitors and barristers. The 1855 Act was repealed in 1861 and replaced by the *Supreme Court Ordinance Act 1861* 24 Vict. No. 15. Section 16 stated that solicitors already practising could be admitted to the Supreme Court, but that no other person was eligible unless he had qualified as a barrister in England or Ireland, or was entitled to practise in one of those countries, or had been admitted to practise in another colony, or had regularly served five years in the office of a barrister in Western Australia. Men who trained locally in a barrister's office had to provide a certificate from their master on completion of the five years training to verify their competence. No examination was required. Barristers were severally enrolled as barristers, solicitors, attorneys and proctors. Training specific to solicitors was not introduced until 1865. For further information see Russell, above n 29, 70-71.

Over the years, a few other practitioners emerged such as Edward Landor and William Temple Graham. Landor arrived in the colony in 1841, and practised as a solicitor and barrister. In 1842 he was appointed Commissioner of the Court of Requests, which had been newly formed. He returned to England in 1846, but came back to Western Australia in 1859 with his family.[86]

Graham made a more immediate impression on the colony. He was not legally trained, but offered his services to the public. He arrived in the colony in 1830 after resigning from the Royal African Corps. He did not enhance the reputation of the legal profession as he was often personally involved in lawsuits, and at one time was attacked in the street by a Mrs Collins who held a horsewhip. Mrs Collins proudly stated in the *Perth Gazette* that gentlemen in the colony had contributed to pay the 50-shilling fine.[87]

The other notable arrival in the colony was William Nairne Clark, who had evidently decided that the staid, small and insular profession needed its legal feathers ruffled.

William Nairne Clark

Clark was born in Scotland, and had received a commission from the Supreme Court of Scotland making him a Notary Public for life.[88] He arrived at the Swan River in 1831, and made his base at Fremantle.[89] He did not have a problem in securing clients, as there were few lawyers available in the colony.[90]

Clark's reputation as a disreputable character soon solidified. Stirling did not offer him an official position, and, perhaps out of jealousy, Clark was one of the few people in the colony in the early years to demonstrate open disrespect for Mackie and Moore.[91] He bitterly stated:

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[86] For further biographical details see Russell, above n 29, 101.

[87] *Perth Gazette*, 31 March 1838, 1. For details of the case, see *Perth Gazette,* 17 March 1838, 3. For further biographical details on Landor, see Russell, above n 29, 100-101.

[88] D. Pike, (ed) *Australian Dictionary of Biography vol. 1: 1788-1850 A-H,* 'Clark, William Nairne' 227. See also E. Russell, 'William Nairne Clark', (unpublished) B/CLA, J.S. Battye Library, Western Australia.

[89] Ibid.

[90] See reports of cases in the *Perth Gazette* in which Clark is frequently named as acting for plaintiff or defendant.

[91] See Statham-Drew, above n 6, 301.

O'er the famed Laws of England we no longer need pore,
Blackstone be____, we have Mackie and Moore![92]

He soon provided work for Moore in the civil court when he sued Richard Lewis for £500 damages for being called a 'pettifogging lawyer and a thief'. Lewis in defence cited 'great provocation' as the cause, and nominal damages of 39 shillings were awarded to Clark.[93] Another libel case soon followed, Clark this time suing Steel, the owner of a billiard saloon, for posting a notice on the door reading 'if a man called William Nairne Clark wishes to keep good order in society, he will not again appear at this billiard table'. The damages awarded on this occasion were even less, being one shilling damages, and one shilling in costs.[94]

In 1832, Clark was involved in a duel with a merchant, George French Johnson. Unfortunately things went a little too well, and Clark killed Johnson with a pistol. Clark was charged with manslaughter, but fortune favoured him and he was acquitted at the trial.[95] Free to create further mischief, Clark eventually turned his mind to another of his favourite pastimes, journalism.

Clark had prior experience in journalism when he was in Scotland,[96] and in 1836 he became the proprietor of the *Swan River Guardian*. In 1838, the rival Government-sponsored *Perth Gazette* complained that Clark used the paper as a medium in which he could vent his 'own passions, his piques, personal prejudice, and egotism, put forward as the public voice'.[97]

Clark certainly had much to say about Stirling's administration of the colony, opining that the Governor was a 'perfect gentleman...but from such another Governor "Good Lord deliver us"'.[98] The rival *Perth Gazette* made short shrift of Clark's continued stirring, and came to the

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[92] *Swan River Guardian*, 24 November 1836, 3.

[93] Civil Court Record No 406; see Russell, above n 29, 125.

[94] *Perth Gazette*, 8 February 1834, 3.

[95] *Australian Dictionary of Biography* above n 88, 227. For an account of the trial, see P. de Mouncey, 'The Historic Duel at Fremantle between George French Johnson, Merchant, and William Nairne Clark, a Solicitor, in the year 1832' (1929) 1(4) *Western Australian Historical Society Journal and Proceedings* 1. See also F.I. Bray, 'New Light on the Johnson-Clark Duel' (1930) 1(8) *Western Australian Historical Society Journal and Proceedings* 85-86.

[96] *Australian Dictionary of Biography*, ibid.

[97] *Perth Gazette*, 10 February 1838, 2.

[98] *Swan River Guardian*, 1 December 1836, 2.

sorrowful conclusion that 'the good of the Colony has not been a consideration with him; he has constantly fallen into great disrepute here'.[99]

Clark, on reading that editorial, threatened to sue the writer, Mr C. MacFaull, for libel. MacFaull later reported that the threat had been 'wisely abandoned'.[100] The *Swan River Guardian* was forced to cease operations shortly after, however, as legislation had been introduced requiring licensing conditions to be satisfied. The legislation had no doubt been aimed at Clark's paper, and MacFaull gleefully reported that the *Swan River Guardian* came to an end on 21 February 1838 due to a lack of sureties.[101]

Clark made other attempts to publish a newspaper, but was ultimately unsuccessful.[102] He did, however, publish the first book in the colony, and made several exploratory journeys in the south west of the colony.[103] In 1848 he moved to Van Diemen's Land, and resumed his journalistic ambitions there.[104]

Clark's desire to create controversy was certainly not unique among the ranks of colonial lawyers. He was not the only lawyer in the Australian colonies to kill a man in a duel,[105] promote anti-governmental views in a newspaper,[106] or to sue a colonist for being described as a 'pettifogging lawyer'.[107] Yet while the agitations of successful barristers Wentworth and Wardell of New South Wales ultimately helped to create change, the majority of the Swan River colonists dismissed Clark's actions as being simply mischievous.

Clark was probably correct in his assertion that the Swan River colony was too reliant on Mackie and Moore for too long, but his method of attacking the stalwarts of the legal profession was not appreciated. His brand of activism was self-interested, and merely served

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[99] *Perth Gazette,* 10 February 1838, 2.

[100] *Perth Gazette,* 17 February 1838, 2.

[101] *Perth Gazette,* 3 March 1838, 3.

[102] The *Perth Gazette* reported on 3 March 1838 that Clark was now producing the *Political Register* and expressed concern that the paper did not comply with legislation.

[103] The book published was typically self-involved, being a *Report of the late trial for libel!!! Clarke versus MacFaul* (1835).

[104] *Australian Dictionary of Biography*, above n 88, 228.

[105] Justice Jeffcott of South Australia also killed a man in a duel; see Chapter 7.

[106] Wardell and Wentworth of New South Wales criticised Governor Darling in their newspaper, the *Australian;* see Chapter 3.

[107] Barrister George Milner Stephen of South Australia was called a 'pettifogging' lawyer; see Chapter 7.

to give the legal profession a bad name. When Clark left the colony he was not missed, and he had no enduring legacy to leave behind.

While it was clear that change was needed, the insular Swan River community did not have any strong characters that were able to suggest changes that needed to be made, so that the economy would be strengthened and the colony seen as a desirable place for emigration. Since they had failed to lure enough free settlers to the new 'Eden', some colonists began to re-evaluate the wisdom of the one fundamental tenet of their blueprint for colonisation that had hitherto remained unsullied: the absence of convicts.[108]

The issue of convicts was being keenly debated in all of the Australian colonies at this point. New South Wales and Van Diemen's Land, the traditional reception points for convicts, were campaigning for the cessation of transportation to their colonies.[109] The free settlers had determined that they had reached the point where self-government could and should be granted, and convicts were hindering their efforts to become a civilised community. Port Phillip, initially convict free, was repelling the British Government's efforts to introduce convicts to their settlement.[110]

With the other colonies rejecting transportation, the path was open to persuade the British Government that the Swan River could be used as an alternative option. The idea was a blow to many settlers who were still clinging to the idealistic notions that it was a society of gentlemen. To some, it was no doubt akin to selling the soul of the colony.

Saved by the Convicts

Governor Stirling left the colony in 1839, having chosen to resign his post. He was one of the few colonial governors who had not been recalled by the Colonial Office. Despite a generous farewell from the colonists he was undoubtedly a little disappointed that he had not been able to steer the colony into a more prosperous position.[111] Stirling departed at a time when the colonists were becoming desperate to reach a viable solution to the shortage of cheap labour.

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[108] For further information on the introduction of convicts in Western Australia, see C.T. Stannage (ed), *Convictism in Western Australia: Studies in Western Australian History IV* (1981).

[109] See Chapters 3 and 4.

[110] See Chapter 5.

[111] Statham-Drew, above n 6, Ch. 21 and especially page 373.

In the 1840s suggestions began to be floated about introducing convict labour.[112] In the beginning, the Swan River settlers were steadfast in their resolve not to do so - it was a source of pride that the colony was founded on the notions of a free society. As one settler proudly stated in 1830:

> The class of people who have come out are much superior to what has gone to any other Colony, and, when once they are quietly settled, we shall have a very good society – even now we can sit down any day at dinner with a party of as gentlemanly, and well-connected men, as we usually associate with in England.[113]

The colonists by and large clung to the notions of a gentlemanly society until the severity of the depression in 1842 and 1843 forced them to finally face the reality of their plight. Their colony would continue to stagnate unless they could obtain a bigger population base from which they could utilise free or cheap labour. In April 1844, the York Agricultural Society moved a motion stating their dissatisfaction with land regulations, and that after 'mature deliberation' had determined to petition for a 'gang of 40 convicts, to be exclusively employed on public works'.[114] Ultimately the motion was not passed, but the incumbent Governor Hutt was requested to make moves to address the labour situation.[115]

With the public now aware of what the York Agricultural Society wanted to achieve, vigorous comment was expressed in the newspapers which were against the idea of convict labour.[116] Nevertheless, the movement to secure convict labour gained momentum, and on 1 May 1849 an Order in Council was passed which nominated Western Australia as a convict colony.[117] A new society was emerging, where the 'gentlemen' of the 1830s were being swept aside by businessmen with a more practical outlook.

One settler who lost the confidence of the public was George Moore, who had borne the brunt of decisions made by the Legislative Council in relation to fiscal matters that were not to the colonists' liking. He had unsuccessfully tried to dissuade fellow colonists from reliance on the

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[112] For a more specific account of the history of agitation for and against the introduction of convict labour, see Battye, above n 5, Ch. VII.

[113] The settler is most likely William Stirling. His letter of 25 January 1830 is reprinted in Berryman, above n 35, 140.

[114] *Inquirer*, 17 April 1844, 3.

[115] See Battye, above n 5, 197-98.

[116] See Battye, above n 5, 198. *Perth Gazette*, 19 July 1845, 2 and 26 July 1845, 2; *Inquirer*, 16 July 1845, 2 and 23 July 1845, 3. The Editorial of the *Perth Gazette* on 19 July 1845, 2 expressed the view that 'a serious injustice would be inflicted upon our free settlers who immigrated here under the pledge that this was to be a free colony.'

[117] *Western Australian Government Gazette*, 6 November 1849, 2.

British Government, but many settlers obviously felt that the time had come in which sheer hard work and financial prudence was no longer enough.[118]

In June 1850, the *Scindian* arrived bearing the first load of convicts.[119] Western Australia remained a penal settlement until 1868, by which time 9,668 men had been sent to the colony.[120] The convicts assisted the ailing economy enormously, but aside from some necessary strengthening of criminal laws to deal with the convicts, life in the colony continued much as before.[121] The stronger economy had not been used as an impetus to argue for a Supreme Court, perhaps because much of the populace were convicts without bargaining power.

As legal business was not dramatically increasing, the legal profession correspondingly remained small and stagnant. The slow pace and lack of change in the colony's political and legal structures would have been reassuring for some, and frustrating for those who wanted the colony to be on an equal footing with the other colonies. As is often the case, it would take an external event to effect dramatic change: the gold rush of the 1890s.

No Need to Introduce Change for Change's Sake

While the other colonies were busy negotiating with the British Government for Responsible Government, which they achieved in 1856, Western Australia had comprehensively waived that right by introducing convicts into the fold. The Supreme Court was not formed until 1861, and a fully representative government was not achieved until 1870.

By the time New South Wales, Tasmania, Victoria and South Australia had all achieved the goal of Responsible Government, they had advanced legal systems in place. They had growing legal professions and Bars which were concerning themselves with questions such as whether their profession should be divided or fused, the importance of legal training, and the competence of their judicial officers. Each colony had been through hardship and upheaval, which prompted the improvement of the legal system so that it could better serve the community.

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[118] See James Cameron, 'George Fletcher Moore', above n 23, 30.

[119] See Battye, above n 5, 207.

[120] Crowley, above n 5, 38. Note that all the convicts transported to Western Australia were men.

[121] For an account of the changes made to the legal system as a result of the introduction of convict labour, see Russell, above n 29, 140-141.

In Western Australia, the legal profession and Bar remained small until 1856, with little change of personalities. Mackie remained the sole judge in the colony until his retirement in 1857 from his respective positions as Chairman of the Quarter Sessions and Commissioner of the Civil Court. The Stone brothers continued to practise in various capacities until 1870. Moore remained as Advocate General until 1854. A few other practitioners emerged to assist the public in their legal disputes, but it wasn't until the gold rush of the 1890s that Western Australia truly emerged from its sheltered cocoon, and by that time the other colonies were debating the merits of federation.

Yet it is unlikely that the Western Australian community regretted the slow pace of change. Mackie was well respected, the legal business of the community was being dispatched in a timely fashion and their legal officers ably served the Governors who were in charge.

When Mackie died in 1860, his contribution to the peace and harmony of the community was not forgotten.[122] Praise was lavished on the man who had served the Swan River Community so diligently, and one poem was written which exemplified the feelings of many settlers:

> Not of the crowd, nor with the crowd, did he
> Labour, but for them; - with clear wisdom bent,
> On melioration, steadily he went
> Onward, still onward perseveringly;
> His nature was incarnate honesty.[123]

Change for change's sake was not required, and the majority of the legal community and population did not seek it. In time, with the expansion of the economy and increase in population, improvements to the legal system did need to be made, but these changes occurred when needed, with little fanfare. Evolution of the legal system was seen as preferable to revolution.

Western Australia's unfolding history was a far cry from the tempestuous development of South Australia, in which the Governor was not respected, political factions developed, the leading lawyers were warring with each other, and the judicial staff were either disinterested with the affairs of the colony or incompetent. By luck, or fate, or the randomness of history, the lawyers who chose to migrate to Western Australia were more interested in conciliation

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[122] *Inquirer*, 28 November 1860, 2. See also Russell, above n 29, 82.

[123] Ibid 3.

than conflict. Their assistance to and cooperation with Governor Stirling enabled him to steer the colony for the first ten years of its existence, and, while he could not achieve the prosperity he desired, he did provide stability.

Interestingly, Mackie had been offered the position of Advocate General of South Australia in 1841, but had declined to move.[124] He had no doubt heard of the turmoil in South Australia, which was often referred to disparagingly in the Swan River and other colonies' newspapers.[125] The Swan River citizens were smug in the knowledge that their little community, despite its economic troubles, had nevertheless held a united front. In 1841, the Swan River citizens still had hopes that their initial blueprint for settlement of the Swan River would succeed. Yet while the founding fathers' vision had undeniably failed when convicts were introduced to the colony, and the governmental and legal structures in place in 1856 were rudimentary, the legal system did suit and evolve with the slow pace of life in the colony.

The colonists of the Swan River were entitled to view the tumultuous events as they unfolded in South Australia with disdain. As George Moore advised in 1837, any person interested in settling in South Australia should be told to

> consider well what they are about to do. From all the accounts we have, there will be, there must be, great distress, and much ruin there before long. The system is wrong...the seeds of dissension and discord are already sowing, and flourish between the Government and the companies and others. In short, they have a very severe ordeal to go through.[126]

What George Moore may not have known was that advocates were at the heart of the dissension in South Australia.

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[124] D. Pike (ed), *Australian Dictionary of Biography vol.2: 1788-1850 I-Z* 'Mackie, William Henry' 74, 175.

[125] See, for example, *Perth Gazette,* 28 April 1838, 4 and 15 December 1838, 2-3.

[126] Moore, above n 1, 334-5.

CHAPTER SEVEN

SOUTH AUSTRALIA - UTOPIA IN THE ANTIPODES

1836-1856

The first thing we do, let's kill all the lawyers.

William Shakespeare, *King Henry the Sixth,* Part II, Act IV, Scene II

Wakefield's Dream

When Edward Gibbon Wakefield was ensconced in his cell at Newgate Gaol in 1829, paying his dues for the abduction of the daughter of an heiress, he put pen to paper and wrote of his plans for the founding of a new Australian colony.[1] The settlement at the Swan River had just been given official approval by the British Government,[2] but Wakefield felt that there were ample resources and interest to support the establishment of yet another British outpost in the antipodes.[3]

His ideas began to solidify as he mapped out a blueprint for his ideal colony. He began by examining what had gone wrong with the established Australian colonies, and concluded that New South Wales was a barbaric and uncivilised place that had a surfeit of land but suffered from an acute shortage of labour.[4] He observed with interest the new settlement at the Swan River which was suffering from economic difficulties, and, although he approved of the fact that it was free from the taint of convicts, it was his opinion that the land was too cheap, and settlement was becoming too dispersed.[5]

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[1] For details of Wakefield's trial, see William Townsend, *Modern State Trials,* vol. 2 (1850) 112. Wakefield's publications include: E.G. Wakefield, *A Sketch of a Proposal for Colonizing Australasia* (1829); *A Letter from Sydney* (1829). Both of these publications were written while Wakefield was in prison serving his three-year term. He was not released from prison until May 1830. For further information on Wakefield, see A.J. Harrop, *The Amazing Career of Edward Gibbon Wakefield* (1928). See also Douglas Pike, *Paradise of Dissent: South Australia* 1829-1857 (2nd ed, 1967) 75-83. Robert Gouger, who was to become the first Colonial Secretary in South Australia, undertook to publish Wakefield's treatises while he was still in prison and became the chief promoter of the scheme to settle South Australia. Gouger had planned to migrate to Western Australia, until Wakefield persuaded him that the South Australian settlement would be more successful; see Harrop, ibid 64.

[2] See Chapter 6 for further information on the colonisation of Western Australia.

[3] In *A Letter from Sydney,* above n 1, 84, Wakefield writes of the 'pauperism arising from want of employment'. He viewed the underemployed British labourers and middle class as the untapped source of wealth on which a new colony could be founded.

[4] Ibid 9-14 and 35-39.

[5] Wakefield, *Plan of a Company to be Established for the Purpose of Founding a Colony in Southern Australia,* reprinted in M.F. Lloyd Prichard (ed), *The Collected Works of Edward Gibbon Wakefield* (1968) 289-90.

Wakefield's solution was to sell land to settlers rather than giving free grants, thus ensuring an adequate supply of labour as the new immigrants were forced to work and save money in order to purchase land.[6] Land would only be released in proportion to the needs of the colony, thus ensuring a concentrated settlement.[7] The funds raised from the sale of land would in turn be used to assist further immigration of persons of suitable character.[8] Wakefield stressed, however, that not everyone had to work on the land. The new towns would be ideal for 'young men of rank and connection', including lawyers who could make their fortunes by re-establishing their profession in a new land.[9]

Other prominent English businessmen and politicians including Colonel Torrens and Sir Robert Wilmot Horton, the under-secretary of the Colonial Office (and long time confidante of Chief Justice Francis Forbes of the New South Wales Supreme Court) had arrived at similar notions for founding a new settlement and were willing to explore ideas to encourage emigration.[10] Wakefield's well-publicised ideas were accordingly greeted with interest.

A devoted band of followers formed the National Colonisation Society in 1830, which soon failed due to philosophical differences amongst its members.[11] The South Australian Land Company also faded into non-existence,[12] and it was not until the South Australian Association was formed in 1833 that the plans for settlement became a reality.[13] It was

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[6] Article 2 in *A Sketch of a Proposal for Colonizing Australasia*, above n 1, suggests that a sum of two pounds be paid for each grant of land, and see his explanatory notes at 9-24.

[7] Ibid 15.

[8] Ibid, Article 3. See Wakefield's explanation at 24-27.

[9] *A Letter From Sydney,* above n 1, 85. Note that the preface of *A Letter from Sydney* reproduces an article 'On the State and Prospects of the Country', originally published in the *Quarterly Review*, No. lxxviii, Article 8. This article mentioned the fact the professions in England were overstocked, and put forward the view that emigration to the colonies was the answer. Wakefield applied this article specifically to the Australian colonies, and mentioned the legal profession as being one of many professions which would benefit from emigration to the new colonies.

[10] Wilmot Horton was appointed Under-Secretary of the Colonial Office in 1821. He was interested in the problems caused by Britain's surplus population. In 1823 he experimented with sending 500 dissatisfied Irish people to Upper Canada, and in 1825 and 1827 he procured further money to continue the scheme. See R.W. Horton, *A Letter to Sir Francis Burdett on the Subject of the Parliamentary Grant for Emigration* (1826), and Pike, above n 1, 32. Colonel Torrens had been involved in efforts to establish a chartered company in New Zealand, but the scheme was abandoned. See Pike, above n 1, 33.

[11] Initially the society was a link between the humanitarian principles of Wilmot Horton who was attempting to encourage 'pauper emigration', and the utilitarian principles of Wakefield who placed emphasis on 'capital and enterprise'. Wilmot Horton and Colonel Torrens soon raised a protest against Wakefield's concept of concentrated settlement and defected from the society. See Pike, above n 1, 52-54.

[12] See Pike, above n 1, 60-64.

[13] Gouger to Whitmore, 26 November 1833, *Letter Book of the South Australian Association*, CO 386/10, f. 1. The South Australian Association was based on Wakefield's principles of systematic colonisation, and was formed by Gouger.

determined that the new colony was to be called South Australia, and the plan was to establish a chartered company which would implement Wakefield's theories and be economically and politically independent of the British Crown.[14]

South Australia was expected to be one of the finest examples of British colonisation; having learnt from the mistakes made during the process of settling other Australian colonies, it would be paraded as the model settlement, adhering from the beginning to the British rule of law and importing the finest institutions that Britain had to offer.[15]

Among the most ardent supporters of Wakefield's scheme was an intrepid group of lawyers, who, regardless of whether they were trained in the English Inns of Courts, would become South Australia's first advocates. As was the case when the Swan River was founded, many advocates saw a unique opportunity to be involved in the governing of a new colony.[16] If they were not given an official role in its government, then they could still reap the benefits by speculating in land and transplanting their legal practice from the overcrowded English circuits to the wide expanses and lush pastures of the new colony.[17]

Yet the seeds of dissonance and discord, which should have had no place in Wakefield's plans, lay within this group of advocates who so enthusiastically promoted the scheme. Altruism was mixed with self-interest, and the question was whether the utopian blueprint for the new settlement of South Australia could withstand the conflict.

Legal Recruits

One recruit was solicitor Richard Davies Hanson who, on reading Wakefield's 'A Letter from Sydney', immediately recognised the opportunities that would be presented in South Australia for advancement in life.[18] In England, he was a struggling attorney, who had been deemed

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[14] The plans for settlement of South Australia kept evolving and changing to meet the requirements of the British Parliament. For a detailed account, see Pike, above n 1, 64-73.

[15] See Wakefield, *A Letter from Sydney*, above n 1, 82-86, where he describes his proposed new settlement as an 'extension of Britain'. He further described his plans as his 'castle in the air', that deserved to be executed for it provided the foundations of 'usefulness, strength and beauty.'

[16] See Chapter 6.

[17] See Introduction of this thesis. Wakefield also commented on the fact that trades and professions in England were becoming overstocked, and felt that opening up colonisation in distant lands would provide employment for countless Britons who were currently a burden to the public. See Wakefield, *A Letter from Sydney*, above n 1, 86.

[18] Henry Brown, *The Life and Work of Sir Richard Davies Hanson 1805-1876* (1938). Unpublished, State Library of South Australia, South Australiana Books. See also Henry Brown, *Sir Richard Davies Hanson: A*

too much of a 'firebrand' to work at the conservative legal firm of Bartlett & Beddome.[19] His promotion of the concepts of universal manhood suffrage, free trade and open universities were too radical for English society.[20] The Wakefield scheme, in contrast, had by 1834 evolved into an egalitarian experiment offering everything from freedom of worship to instant wealth,[21] and seemed ideally suited to an ambitious radical such as Hanson.

James Hurtle Fisher was a London solicitor who had commenced practising law in 1816.[22] Having a brother who was evidently doing well in New South Wales, Fisher was well disposed towards trying his own luck in a new colonial venture.[23] Charles Mann, who was also a solicitor in England, had the added skill of being a trained journalist and was involved in the promotion of education and religion.[24] The egalitarian society of South Australia would be ideal for a man interested in education and religious worship.

While Hanson, Fisher and Mann were all trained as solicitors, it will be seen that their talents lay in the field of advocacy. When South Australia was settled they would all become a vital part of the South Australian Bar despite their lack of training as barristers. In the meantime, however, Hanson and Fisher in particular were concerned with ensuring that the proposed settlement of South Australia became a reality.

Fisher became a member of the Board of Commissioners, which was formed in 1835 and chaired by Colonel Torrens. He took a keen interest in the legislation that would set out the fundamental principles by which the colony was to be governed.[25] While the other Australian colonies were formed by executive letters patent, South Australia was to be different; its system of government would be cast in stone in the form of an Act of Parliament.[26]

Bibliography (unpublished) State Library of South Australia.

[19] Ibid 3.

[20] Ibid.

[21] *Outline of the plan of a proposed colony to be founded on the south coast of Australia; with an account of soil, climate, rivers etc.* (1834); See also Gouger's concept of South Australia opening its doors to religious dissenters, in Gouger to Parker, 8 January 1834, CO 386/10, f. 21.

[22] George Morphett, *Sir James Hurtle Fisher, First Resident Commissioner in SA: His Life and Times* (1955) 2.

[23] G. Morphett, *C.B. Fisher: Pastoralist, Studmaster and Sportsman: An Epic of Pioneering* (1945) 4.

[24] K.T. Borrow, *Charles Mann 1799-1860* No 31/51, Pioneers Association of South Australia (1958) 2; see also Pike, above n 1, 110.

[25] Lawyer Daniel Wakefield, under the guidance of his brother Edward Gibbon Wakefield, drafted the *South Australian Colonisation Act*. Fisher was involved in drafting colonial land regulations, leases and registers. The Act conferred powers on the emigration agent, storekeeper and colonial treasurer, who were under the control of the Colonisation Commission, and Fisher expressly drafted their powers so as to keep them beyond the control of the Governor. See Pike, above n 1, 105.

26 As James Stephen noted, New South Wales and every other British colony in the world had been founded

Hanson used his advocacy skills to speak to a gathering of 2500 people at Exeter Hall in London on 30 June 1834,[27] and wrote articles in defence of the plans of the South Australian Association to newspapers such as the *Globe* and *Morning Chronicle.*[28] Defence of the scheme was vital, as there were many soothsayers willing to espouse their views that the proposed colony was a disaster in the making.[29]

James Stephen, the legal adviser for the Colonial Office and cousin of Alfred Stephen,[30] was one person willing to put forth his negative views of the colonisation proposals. He disliked Wakefield and his grandiose schemes, and when faced with a choice of befriending Wakefield or making an enemy of him, chose to prefer 'his enmity to his acquaintanceship.'[31] When the South Australian Land Company proposed a charter for settlement of the colony,[32] Stephen immediately saw through the rhetoric and had grave misgivings about the financial viability of the new colony. He felt that it was unrealistic to sell land at a high price when it was being given away for free in neighbouring colonies. He also noted that the Company had political aspirations with alarming republican overtones, and firmly stated that the British Government was not willing to relinquish political control over any Australian colony.[33]

The South Australian Association consequently suffered several fruitless attempts to get legislation passed through parliament to sanction the new colony.[34] Wakefield himself lost interest in the plans for the new colony, after he felt that his founding principles of systematic colonisation were being eroded.[35] There were plenty of disciples still willing to turn

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through the executive branch of government, which issued Letters Patent, as opposed to being sanctioned through legislative action. See P. Knaplund, *James Stephen and the British Colonial System 1813-1847* (1953) 77-81.

[27] *Morning Chronicle,* 1 July 1834, and see Brown, above n 18, 8.

[28] See, for example, *Morning Chronicle*, 3 July 1834.

[29] James Stephen was one detractor of the scheme (see below for further details). Many articles were written in newspapers and journals pointing out the various deficiencies in the proposed colony. One such criticism was published in the *Westminster Review,* No. XLII entitled 'New South Australian Colony'. Colonel Torrens felt compelled to write a lengthy rebuttal of the criticisms, which is published as R. Torrens, *Colonization of South Australia* (1835).

[30] For further information on Alfred Stephen, who became Chief Justice of the Supreme Court of New South Wales, see Chapter 3 and Chapter 4.

[31] W.P. Morrell, *British Colonial Policy in the Age of Peel and Russell* (1930) 41. Knaplund, above n 26, 93-4 and 76-80.

[32] Formed in 1831.

[33] See James Stephen, *Memorandum on the Draft Charter of the S.A Land Company* 1832, CO 13/1, f. 265-284. See also discussion of the memorandum in Pike, above n 1, 62.

[34] For a discussion of how the South Australia Bill was modified and finally passed through parliament, see Pike above n 1, Chapter 3.

[35] Wakefield became estranged from Gouger over the issue of 'sufficient price' of land. Wakefield felt that the

Wakefield's ideas into reality, however, including Torrens and Gouger. The scheme was continually modified to address the concerns of parliamentarians, to the point where the idea of a chartered company was abandoned, as were the hopes of establishing a group of self-appointed 'Commissioners' exercising legislative power.[36] Nevertheless, through sheer persistence, success finally came when the *South Australian Colonisation Act 1834,* 4 and 5 Will. IV, c. 95 was passed.

Unfortunately, the Act was no shining example of legal drafting and was to be the cause of political conflict in the early years of the colony. Politics and law were, as ever, inextricably intertwined.[37]

The South Australian Colonisation Act

The scene had been set for what should have been the most detailed, legally and judicially planned colony in the Antipodes. It would be a free colony, unmarred by convicts and supposedly untrammelled by crime. Lawyers had been involved as architects of this utopian experiment, and had ensured that the legal profession would be instantly established by providing for a Supreme Court Judge.[38] Other colonies had to fight for decades to receive the privilege of a Supreme Court.[39]

One would expect that such a formal experiment, years in the planning, would have every chance of success when compared with the hasty settlements of Sydney Town and Swan River, and the even less thought-out colonies of Port Phillip and Van Diemen's Land. Yet history tells a different story; a utopian dream torn apart by an overly legalistic interpretation of South Australia's foundation stone, the *South Australian Colonisation Act.*

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minimum price should be two pounds per acre, whereas Gouger and others felt that twelve shillings was more realistic. Wakefield outlined his objections in the *Morning Chronicle* on 20 October 1834, signing his article as 'Kangaroo'. From that point Wakefield was merely a spectator in the colonisation of South Australia, and turned his attention to New Zealand.

[36] The South Australian Land Company had collapsed under the weight of Stephen's criticisms by September 1833, and the South Australian Association was then formed in December 1833. See Pike, above n 1, 64.

[37] For a detailed discussion on the interrelationship between law and politics, and the failings of the *South Australian Colonisation Act,* see Ralph M. Hague, *Hague's History of the Law in South Australia 1837-1867,* vol. 1 (2005).

[38] See Section II of the *South Australian Colonisation Act.*

[39] See Part One for New South Wales' campaign for a Supreme Court, and Chapter 4 for Van Diemen's Land's slow struggle to achieve a Supreme Court. Note that Western Australia did not have a Supreme Court until 1861.

Unsurprisingly, the Act provided for a governor to be appointed to attend to the administration of the colony. Captain John Hindmarsh accepted the role of governor after the initial appointee declined the offer.[40] Hindmarsh's commission was unique in the history of the Australian colonies, for unlike the far-ranging and autocratic powers of the governors of the other colonies, his powers were expressly limited by the terms of the Act.[41]

Two functions that were outside the scope of Hindmarsh's power were land sales and emigration, which were to be controlled by Commissioners appointed under the Act.[42] The legal connection was quickly established, as James Hurtle Fisher was appointed as the Resident Commissioner, and was loyally supported by the Advocate General, Charles Mann. Governor Hindmarsh was soon to realise the folly of an Act that divided power between separate polities, but did not adequately define the limits of the power reposed in each body. Hindmarsh's lack of control over the funds generated by land sales was also to prove a crucial mistake on the part of the drafters of the *South Australian Colonisation Act.*[43]

The early years of the colony, marred by the consequences of bad legal drafting, nevertheless gave the legal fraternity plenty of opportunities to put their advocacy skills to good use. The *South Australian Colonisation Act* decreed that the laws in force in South Australia were to be the laws in force in England at the time of settlement in 1836.[44] Accordingly, the legal profession was quite different from the profession in Sydney Town, as the New South Wales laws that had recently divided its legal profession did not bind South Australia.[45] Practical local considerations, such as the size of the Bar, ensured that the South Australian legal profession remained fused.[46]

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[40] Colonel Napier had been invited to put in an application for the position as Governor, but he withdrew it claiming that 'I have no ambition to be at the head of such a milk and water colonial government and while fancying myself a Governor discover that I was only a football.' See C.J. Napier, *Colonisation, particularly in Southern Australia, with some remarks on small farms and over population* (1835) xviii. For a biography on Hindmarsh's career, see F. Stewart Hindmarsh, *From Powder Monkey to Governor* (1995).

[41] For a full discussion of the Commissioners' powers, see Hague, above n 37, 17-18.

[42] See section VI. John Brown was appointed as emigration agent.

[43] See below for further discussion.

[44] Section 1. See also J. Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (1979) 178.

[45] When Port Phillip was settled, it was deemed to be a part of the geographical territory of New South Wales, rather than Van Diemen's Land, which was more proximate. Consequently Port Phillip inherited all of New South Wales' law that was in operation at the time of its settlement, including the law that effected the division of the legal profession. If Port Phillip had been under the jurisdiction of Van Diemen's Land, which did not have a divided legal profession, then Port Phillip would not have automatically assumed division of its own profession.

[46] Note that Van Diemen's Land and the Swan River also had fused professions. These colonies both had smaller population bases and economies than New South Wales and Port Phillip.

Many members of the legal profession were to become intricately involved in the political wrangling, which frequently spilled over into the courts. As there was only one Inns of Court trained barrister in the colony during the first years of settlement,[47] many of the solicitors assumed an advocacy role in court. These advocates frequently used the title of 'barrister' rather than solicitor despite their lack of training in the English Inns of Court.[48]

The only province that South Australian solicitor advocates could not invade was the custom that judicial officers should be drawn from the ranks of barristers from the Inns of Court.[49] South Australia was provided from the outset with a Supreme Court Judge with an annual salary of 500.[50] Even though the Supreme Court itself had not yet been statutorily enacted, applications for the position of its inaugural judge began to arrive.

An impartial judge, immune from the political wrangling between the Governor and Colonisation Commissioners, could be part of the answer to addressing South Australia's problems that stemmed from factionalism.

Choosing a Judge for South Australia

The office of judge was initially given to Henry Parker, a barrister, who promptly resigned his post before even setting sail for South Australia. His reason for resignation was the fact that he had already become embroiled in petty disputes between the Colonisation Commissioners and the Colonial Office.[51]

After this inauspicious beginning, the Colonial Office then offered the office to Sir John Jeffcott, a man with a chequered history but strong political connections. Sir John had recently killed a man in a duel, and was desperate to leave England in order to evade his

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[47] The sole barrister was Henry Jickling, who will be referred to in more detail later.

[48] See discussion later in this chapter.

[49] See Richard Davies Hanson's bid to become a judge, below.

[50] For a discussion on the salary to be awarded to the successful applicant to the position of judge, see R.M. Hague, *Sir John Jeffcott* (1963) 56-7.

[51] Parker's request that his salary commence from the day of embarkation on the ship to South Australia was refused, and he resigned with the conviction that 'dissensions will be the result in the Colony.' See Parker to Glenelg, 18 March 1836, CO 13/5, f. 266-9.

creditors.[52] Despite Jeffcott's actions, the British Government evidently saw him as an appropriate candidate for the prestigious title and office as justice of the Supreme Court.[53]

One disappointed applicant was the talented solicitor Richard Davies Hanson who, despite being such an ardent supporter of the colonisation of South Australia, abandoned all ideas of emigrating.[54] He was to have a change of heart and migrate to South Australia a decade later, and eventually defy the unwritten rule that only barristers could be judges by becoming Chief Justice of the Supreme Court. He was a well-respected judge, and it was unfortunate for South Australia that the Colonial Office had passed him over when he first applied for the position.

Another disappointed applicant left in Jeffcott's wake was Henry Jickling. Jickling would, however, try his chances in the infant legal profession of South Australia, and along with Charles Mann and James Hurtle Fisher, would form the backbone of South Australia's infant Bar. For the time being, however, attention was firmly focused on the controversial Sir John Jeffcott.

Sir John Jeffcott

Sir John Jeffcott was admitted to the Middle Temple on 20 June 1822, and called to the Bar on 10 February 1826.[55] Although Irish he never practised in his native land, instead seeking an official appointment in one of Britain's colonies. After being rejected for positions in Grenada, St Christopher, Dominica, Lower Canada, Ceylon and Tobago, persistence paid off when he was rewarded with the position of Chief Justice of Sierra Leone and the Gambia in

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[52] All biographical details about Sir John Jeffcott are derived from Hague, *Sir John Jeffcott,* above n 50.

[53] It is possible that Jeffcott was chosen by default. Of the other applicants, Henry Jickling, who was a barrister, was temperamentally unsuited to the position (see below) and Daniel Wakefield, barrister, was disliked by many of the Colonisation Commissioners as he was the brother of Edward Gibbon Wakefield. Daniel Wakefield later married and withdrew his application. See Hague, above n 37, 58-61.Richard Davies Hanson's main fault was that he was a solicitor, and it was customary to give the office of judge to a barrister. The Emigration Officer, John Brown, was a supporter of Hanson's application to be a judge, and tried to convince Fisher and Gouger, the Colonisation Commissioners, to also lend their support. Fisher had no problems with a solicitor becoming a judge, but Gouger had reservations. See John Brown's diary for an account of the saga, particularly in April 1836. *Diary of John Brown,* February 1, 1834 – July 3, 1836, State Library of South Australia, PRG 1002/2.

[54] See Brown, above n 18, 15. Hanson, disappointed at being passed over as judge, decided against migrating to South Australia, and instead chose to go to Canada and then New Zealand. For further details see Brown, Chapters 3 and 4.

[55] Hague, *Sir John Jeffcott,* above n 50, 3.

1830. The previous four chief justices of Sierra Leone had died while holding office, but the high salary of 2000 no doubt swayed Jeffcott to accept the position.[56]

After serving for two years, and creating controversy about the slave trade, he returned to England on leave in 1832 and, in the interests of his health, requested that he be sent to another colony.[57] He was knighted in 1833 and was finally persuaded to return to Sierra Leone.[58] Before setting sail he learned that a Dr Hennis had made slurs on his good character, and, being unwilling to accept the doctor's explanation, he challenged him to a duel. Unfortunately for Jeffcott, Dr Hennis was wounded and died a week later. Jeffcott had in the meantime proceeded to Gambia, and was charged *in absentia*.[59]

With the assistance of his brother, William Jeffcott (who would briefly become a judge of the Supreme Court of Victoria), he was acquitted of the charges, but prudently kept quiet for a couple of years.[60] When he resurfaced, it was to once again seek an appointment as a colonial judge. When the South Australian position arose Jeffcott accepted it immediately, despite the fact that the remuneration was only 500 per annum.[61] When his creditors learned of his position, they made insistent claims for repayments of various loans.[62] To avoid arrest by angry creditors, Jeffcott was stealthily rowed to the schooner *Isabella* in the dark of night, and left for South Australia via Van Diemen's Land.[63]

On arriving in Van Diemen's Land Jeffcott visited his relations, the Kermode family, and did not leave for South Australia for a further three months.[64] His tardiness is primarily explained by his love affair with and engagement to Anne Kermode.[65] His evident feelings of diffidence to South Australia were reinforced when he finally did arrive in the new colony,

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[56] Ibid 4-7.

[57] Hague, *Sir John Jeffcott,* above n 50, 24.

[58] Ibid 28.

[59] See Rundle to Grey, 10 October 1836, CO 13/5, ff. 275-6, which gives details of the duel.

[60] See Hague, *Sir John Jeffcott*, above n 50, Chapter 2 for details of the trial at the Exeter Assizes, and Chapter 3 for details of his appointment as a judge.

[61] Jeffcott to James Stephen, 19 April 1836, CO 13/5, f. 221.

[62] Charles Milford was one of many creditors who insisted on repayment, and he requested that the Colonial Office supply him with Jeffcott's details. See, for example, Charles Milford to Glenelg, 21 June 1836, CO 13/5, f. 246. Jeffcott was prevented from sailing until arrangements were made about his financial situation; see Milford to Glenelg, 21 June 1836 and 24 September 1836, CO 13/5, f. 256.

[63] Jeffcott to Grey, 22 August 1836, CO 13/5.

[64] He finally arrived in South Australia on 21 April 1837.

[65] Hague, above n 37, 66.

only to find himself in the midst of a political sandstorm. South Australia's advocates were doing little to quell the situation.

Utopia Divided

The fight for the political control of South Australia began in earnest on 3 August 1836, when Governor Hindmarsh and Resident Commissioner James Hurtle Fisher set sail for South Australia on the *Buffalo*, full of anticipation for a new life. They had a unique opportunity to form a new colony into any shape they desired, yet a clash of personalities occurred which was so severe that any hope of agreement on how the colony should be developed was doomed before the *Buffalo* even reached South Australian soil.[66]

John Hindmarsh was a naval captain who impressed the Colonial Office and the Commissioners with his energy and courage. He had lost an eye while serving his country, was never adequately compensated, and consequently was in desperate need of the regular salary of a Governor.[67] He lodged an application for the South Australian position, supporting it with many letters of recommendation, and was eventually successful in obtaining the post.[68]

Hindmarsh chose George Stevenson as his private secretary. Stevenson had been a Scottish medical student who had to leave his homeland after allegations of fraud. He later became a journalist in England, before accepting his post in South Australia.[69] As well as being Hindmarsh's secretary, he was to be, among other things, clerk of the court, justice of the

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[66] Small incidents occurred during the voyage that did not assist relations between the Governor and the Colonisation Commissioners. There was not enough room at the official dining table, so Hindmarsh chose to exclude two of Fisher's children from the table. George Stevenson recorded many of the incidents in his journal, *'Extracts from the Journal of a Voyage in His Majesty's Ship Buffalo, from England to South Australia'* in *Angas Papers*, Quarto Series, PRG 174/1, microfilm reel 1, 383, State Library of South Australia. Stevenson commented at page 403 that 'the poor Governor's popularity has fallen below zero with everybody'.

[67] J.I. Watts described Hindmarsh as being 'every inch a sailor', and described his glass eye as 'that awful eye' which 'remained stationary in its orbit'. J.I. Watts, *Memories of Early Days in South Australia* (1882) 23. See also biography of Hindmarsh in Pike, above n 1, 103. Pike details the numerous correspondences surrounding the issue of Hindmarsh's salary, and the fact that he almost resigned over the issue of when he would get paid.

[68] See Hindmarsh to Glenelg, 28 May 1835, CO 13/3, f. 174. For an example of a letter of recommendation, see Auckland to Glenelg, 31 May 1835, CO 13/3, f. 178. See also Pike, above n 1, 103.

[69] Stevenson wrote for the *Globe and Traveller*. See Stevenson's *Journal*, above n 66, from 383, and the *Register*, 11 March 1857, 2, which details the issue of Stevenson's fraud. See also Hague, above n 37, 34-35 for a description of Stevenson's acerbic character. Stevenson and his wife initially had no great liking for Hindmarsh, but Stevenson soon recognised the power he could wield by becoming Hindmarsh's confidante. Stevenson, like Hindmarsh, had a long-running feud with Fisher and the Colonisation Commissioners.

peace, and editor of the colony's first newspaper, the *South Australian Register and Colonial Gazette*.[70]

On arriving in the colony, the battlelines had been firmly drawn. Hindmarsh and Fisher could not agree on who had ultimate control over the colony's development, and neither the Governor nor the Resident Commissioner was satisfied with sharing power equitably.[71]

It became clear that the problem was not so much with the utopian ideals underpinning the settlement of South Australia, but one of power and control. As some observers might unkindly say, it was the perfect environment in which adversarial lawyers could thrive. Unlike the advocates in the Swan River, who supported Governor Stirling regardless of whether they approved of his decisions, the South Australian advocates did not band together with a display of unanimous support for the Governor.[72] For Fisher and Mann in particular, self-interest was the order of the day.

The Legislative Council

The colony was proclaimed on 28 December 1836, and the fight for control was soon in session when the six person Legislative Council was constituted. One is tempted to reflect that John Jeffcott's proven method of resolving disputes by engaging in a duel would have afforded a far swifter resolution than the protracted fight that ensued. In the six person Council, the lawyers Fisher and Mann squared off against Hindmarsh and Stevenson, with Robert Gouger (the Colonial Secretary) and John Jeffcott being the other two members.

Three out of the six members were thus legally trained, but Jeffcott's decision to remain in Van Diemen's Land for so long ensured that Hindmarsh had no one to counteract the legal manoeuvrings of Fisher and Mann during the first few months of residence in the colony. As he soon noticed, the Council suffered under the legalistic presence of Fisher and Mann, and he commented that Fisher 'cannot get out of the solicitor's office' and would 'oppose an angel were he only called governor'.[73]

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[70] Pike, above n 1, 104-105.

[71] See below.

[72] See Chapter 6.

[73] Hindmarsh to Angas, 11 April 1837, *Angas Papers*: Quarto Series, above n 66, 771, 784

Fisher and Mann, for their part, quickly grew tired of Hindmarsh's attempts to exercise autocratic powers, and hastened to point out their view that Hindmarsh was not intended to be a governor vested with autocratic powers akin to the first governors of New South Wales, and that the Legislative Council should have more power.[74] Fisher, writing a letter to the Colonisation Commissioners in England, expressed his disappointment that their respective powers had not been more clearly defined. [75]

Fisher and Mann's views were a precursor to arguments for Responsible Government, which allowed the colonists greater control over the governing of the colony. Such measures would be implemented in the majority of the Australian colonies by 1856. The only problem was that the two politically minded advocates were twenty years ahead of their time. Hindmarsh would have drawn little solace from this, as he had few friends in the colony.[76] He fervently awaited the arrival of the judge, so that he might finally have an ally in the Legislative Council and attempt to shift the balance of power.[77]

A Declaration of War

Jeffcott, when he finally arrived on 21 April 1837, surprisingly turned out to be a conciliating force in the colony. Hindmarsh and Jeffcott became firm friends, and the Colonisation Commissioners accepted Jeffcott's counsel.[78] Jeffcott, however, had left his fiancée back in Van Diemen's Land. On 3 June 1837, after only six weeks in the colony, he returned to Van Diemen's Land, leaving South Australia to fend for itself once again. [79] He had done little more than address a grand jury, and broker an uneasy ceasefire between the warring factions

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[74] Mann's views are clearly stated in his newspaper, *Southern Australian*, 9 June 1838, 3.

[75] Fisher to Colonisation Commissioners, 1 June 1837, reproduced in Morphett, *Sir James Hurtle Fisher,* above n 22, 39-40.

[76] Gouger commented that the Governor was 'without a real friend in the Province'; Gouger to Angas, 5 May 1837, *Angas Papers*: Quarto Series, above n 66, 789, 792. His only friend, it seemed, was George Stevenson, who commented that the Governor's behaviour had settled down since the 'petty tyranny of the ship', but that 'Fisher and he are at all but open war'. Stevenson to Angas, 9 February 1837, *Angas Papers*: Quarto Series, above n 66, 658-9.

[77] Hague, *Sir John Jeffcott*, above n 50, 69.

[78] Hindmarsh commented that without Jeffcott's assistance 'I should be alone in the Council and out of doors.' See Hindmarsh to Glenelg, 31 May 1837, quoted in J. Blacket, *The Early History of South Australia* (1911) 138. One of the ways in which Jeffcott tried to smooth asperities was to encourage the Governor to host a ball and invite the Colonisation Commissioners to it. Hindmarsh to Angas, 4 June 1837, *Angas Papers*: Quarto Series, above n 66, 826. See also Hague, above n 37, 71.

[79] As well as seeing his fiancée, Jeffcott was also commissioned to buy stores for the Government from Hobart. See Hague, ibid 78.

of the colony. [80] His presence, however, had been enough to embolden the Governor, who devised a plan of action.

On 3 June 1837, the *Register*, edited by George Stevenson, made a symbolic declaration of unity, stating that 'party spirit can have no share in discussions of matters which come home to the bosom of every man'.[81] However, war was what the colony got, as members of the Legislative Council were involved in a purge. The Colonial Secretary, Gouger, was suspended from office as he was 'scarcely restrained from openly opposing His Majesty's authority'.[82] The troublesome emigration agent, John Brown, was dealt with in the same summary fashion in September 1837.[83]

Jeffcott, on returning to South Australia in October 1837, was dismayed at the Governor's handling of matters, as he knew that it would inflame the Colonisation Commissioners who argued that the Governor did not have the power to dismiss Brown and Gouger.[84] Jeffcott nevertheless ridiculed the 'Utopian scheme of government' in which the Governor was a 'mere cypher'.[85]

Matters soon took a turn for the worse when Hindmarsh, now having the clear backing of the Judge, made moves towards suspending Charles Mann from his position as Advocate General and from the Legislative Council. Hindmarsh felt that Mann openly thwarted and impeded

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[80] See Jeffcott's speech to the grand jury in the *Register,* 3 June 1837, 4. South Australia was the first colony to completely introduce trial by jury. New South Wales did not have it fully introduced until 1839, due to the fact that it was a convict colony. See Part One, and Hague, ibid 73.

[81] *Register,* 3 June 1837, 3.

[82] Soon after the Judge's departure, a fight broke out between Gouger, the Colonial Secretary, and Osmond Gilles, the Colonial Treasurer. Hindmarsh sided with Gilles and decided to suspend Gouger from his office, despite a majority of the Legislative Council vetoing his decision. Hindmarsh replaced Gouger with the loyal Strangways. Hindmarsh to Glenelg, 2 June 1837, CO 13/6, f. 256. See also *Register,* 16 September 1837, 1 and Hague, above n 37, 78-81.

[83] Brown disobeyed Hindmarsh's orders, claiming he was an officer of the Colonisation Commission, not the Governor's. Hindmarsh to Glenelg, 30 May 1837, CO 13/6, f. 176, and *Register,* 16 September 1837, 5.

[84] See Hague, above n 37, 88. Hague quotes a letter from Fisher to Brown, 12 September 1837, but his reference of 'CSMisc' has not been able to be traced. It must be noted that Hague's seminal work on the *History of the Law in South Australia 1837-1867* is poorly referenced. Some of the abbreviations that he used when he wrote his thesis in 1936 are not traceable today. When the editorial team responsible for publishing Hague's thesis was faced with the daunting task of dealing with his footnotes, it proved too difficult a task to undertake, and the decision was made to simply acknowledge the inadequacy of the referencing. However, the vast majority of his references that have been used in this thesis have been traced back to their original source in collections such as Colonial Office Papers, which indicates that his use of primary sources was consistently reliable.

[85] *Register,* 6 January 1838, 2. One of Mann's arguments led to debate in Legislative Council over his assertion that the laws of the colony should be made by a majority vote of the Council and not merely by the Governor. It was just another way in which Mann sought to undermine the Governor.

the proceedings of the Government.[86] Mann tendered his resignation in November 1837 before Hindmarsh received approval to suspend him.[87]

Jeffcott quickly realised that the situation was not likely to improve, and hastily began writing letters in an attempt to gain a judicial position in Van Diemen's Land.[88] In the meantime, however, he could not avoid his legal duties in South Australia. The Supreme Court had been formally established, and was vested with the jurisdiction commonly exercised by the superior courts in England.[89] The Judge promulgated rules and orders for the regulation of the court's procedure on 18 November 1837.[90] Reflecting the fact that South Australia's legal profession was fused, the practitioners of the court were 'individually to act in the several capacities of Barrister, Attorney, Solicitor and Proctor'.[91]

In an action before the Supreme Court involving both Mann and Fisher, a jurisdictional difficulty arose which left the Judge in grave doubts about whether the Court had power to try a capital felony that was committed on the high seas.[92] The Judge altruistically proposed that he would repair to Van Diemen's Land to discuss that jurisdictional issue, among others, with the Judges of that colony.[93] He recommended that Mr Henry Jickling, the sole barrister in the colony, be appointed as acting judge in his absence.[94]

Jeffcott left the colony feigning to have been thus far a disinterested observer, but drawing the weary conclusion that:

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[86] Hindmarsh to Glenelg, 1 November 1837, *South Australian Papers: Despatches from the Governor of South Australia vol. 1 1837-1841*, Mitchell Library, A2309. See also Hindmarsh to Glenelg, 1 August 1837, CO 13/6.

[87] Mann wrote to Jeffcott requesting a certificate stating that he exercised his duties diligently while in office. On receiving endorsement of his skill and ability, Mann then tendered his resignation. See *Southern Australian,* 22 September 1838, 5 and *Register,* 7 April 1838, 2-3, and Hague, above n 37, 99-100.

[88] Hindmarsh to Lord Glenelg, 1 November 1837, *South Australian Papers,* above n 86. Hindmarsh enclosed Jeffcott's letter in which he applied for position as judge in Van Diemen's Land. He forwarded the letter with regret, but did not wish to stand in 'the way of the promotion he so eminently deserves'. For Jeffcott, it was more likely seen as an escape from the situtation in South Australia, not a promotion. See also Hague, above n 37, 101-103.

[89] *Supreme Court Act 1837,* 7 Will. IV, No. 5; see also A.C. Castles, *An Australian Legal History* (1982) 314.

[90] Hague, above n 37, 542.

[91] See *Rules of Court*, 1837, No. 6.

[92] Cases of Stephens and Wright; see Jeffcott to Hindmarsh, 16 November 1837, quoted in *Register,* 18 August 1838, 3.

[93] Ibid.

[94] Ibid, and see also *Register,* 6 January 1838, 1.

> My share of it, however, has to come, for they have all appealed to me, and as soon as my Court sits, all the questions which have been agitating this unhappy place in my absence will be brought before me in the shape of ex-officio informations, indictments, and actions for libel and defamation innumerable.[95]

Jeffcott, analysing the roots of dissension in the colony, came to the conclusion that the personalities of both Fisher and the Governor were to blame:

> Like every disinterested observer in quarrels of this kind – I am certain, and that is that both parties are in the wrong.
>
> I told you, as you will recollect, from the beginning, that Fisher was a wily attorney, the very worst class of person that could have been selected for the office, who, by dint of writing and special pleading and splitting hairs upon every insignificant point wishes to put the Governor, who is a bluff, straightforward, but not very prudent sailor, into a false position.[96]

Jeffcott's observations and predictions were uncannily accurate except in one sense; he was not to be the man that would ultimately end up dealing with the colony's problems in the Supreme Court. Jeffcott did not get the transfer to Van Diemen's Land that he desired, but instead got a more permanent release from South Australia's woes when he accidentally drowned at the River Murray Mouth in November 1837.[97]

While it was difficult to mourn a man who had so rarely been present in the colony, Jeffcott's death heralded a new level of pettiness in the politics of the colony. This time, the legal system was the central forum in which the jealousies were played out, and the drama began when barrister Henry Jickling was confirmed as the Acting Judge.

Lawyer v Lawyer

When Jickling first arrived in South Australia he initially lodged with Charles Mann's family, but soon set himself up in practice as the colony's sole barrister.[98] Jickling was, according to the colonists, an eccentric, kind-hearted and studious bachelor, who was socially inept and

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[95] Jeffcott to Kermode, 5 November 1837, reproduced in Hague, *Sir John Jeffcott,* above n 50, 112, 113-114. Hague refers to the letters and papers of the Jeffcott and Kermode families, in particular a letter in the private possession of Miss L. Wintour of Bristol. Note that Kermode was Jeffcott's prospective father-in-law.

[96] Ibid 114.

[97] *Register,* 6 January 1838, 3. See also Hague, *Sir John Jeffcott,* above n 50, Chapter 6.

[98] Jickling was the only member of the infant South Australian legal profession who could legitimately use the title of barrister, as he had been admitted to Lincoln's Inn on 7 August 1818 and called to the Bar on 8 June 1826. He was admitted as a practitioner of the Supreme Court by Jeffcott in May 1837, and on 5 July 1837 was appointed as Clerk to the Bench of Magistrates. All biographical details about Henry Jickling can be found in R. Hague, *Henry Jickling: Judge of the Supreme Court of South Australia from November 1837 to March 1839* (1993).

had a strange sense of fashion. He was reported to wear trousers that barely reached his ankles, and was so shortsighted that he wore bright green spectacles, and mistook trees for persons.[99] One colonist recounted that Jickling

> was the essence of politeness, and it was said that on one occasion (his sight not being very good) he ran against a post, and supposing that he had obtruded himself upon a passer-by, he drew back, took off his hat, and, with a polite bow, said, "I beg your pardon!"'[100]

Hindmarsh initially distrusted Jickling because of his association with Mann. He soon realised, however, that the amiable barrister was not allied to the troublesome Fisher faction,[101] and Jickling became the logical replacement for Jeffcott as he was the sole barrister in the colony. Prior to Jeffcott's death, Jickling did not have to perform any judicial duties as acting judge, but on being confirmed as the replacement for Jeffcott until further instructions were given from England, Jickling inevitably inherited the problems that Jeffcott had so assiduously tried to avoid.

Fisher and Mann did their best to invalidate his appointment.[102] Their attempts failed, and Mann resolved to make Jickling's life as Judge a difficult one. The animosities between the Hindmarsh and Fisher factions soon spilled over into the courtroom.

Jeffcott, even in death, was still embroiled in the politics of the colony. Jickling's period of judicial office began when Mann attended the courthouse to demand that the Judge hear an application by him, so that his friend Edward Stephens could be granted the administration of the goods of Sir John Jeffcott. Jickling refused to hear the application, as George Stevenson, the Governor's secretary, had already undertaken the administration.[103]

When Mann continued rudely to address the Judge in a manner unbecoming to the etiquette of the Court, Jickling reportedly gathered his materials and fled. Mann was later forcibly ejected from the courtroom by a constable. Jickling soon retaliated by suspending Mann from

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[99] James Hawker, *Early Experiences in South Australia* (first published 1899, reprinted 1975) 13-14.

[100] H. Hussey, *Colonial Life and Christian Experience* (1897) 69. Many South Australian colonists have recorded similar versions of this story. See Hague, above n 37, 107.

[101] Hindmarsh noted that Mann's tent was the central meeting place of those disaffected persons allied against him, and included Jickling in his list of names, presumably because Jickling was lodging with Mann. Hindmarsh to Glenelg, 2 June 1837, CO 13/6, f. 256, 258.

[102] Fisher argued that Jickling's appointment had only been as acting judge while Jeffcott was alive. On Jeffcott's death, his appointment should automatically be terminated. Hindmarsh got around this argument by re-appointing Jickling on 26 December 1837 until Her Majesty's pleasure should be known. See *Register*, 6 January 1838, 1.

[103] This skirmish took place on 29 December 1837; see *Register*, 20 January 1838, 2.

practice.[104] The *Register* approved of Jickling's actions, and hoped that 'one or two persons who assume to be "learned in the law" will take a lesson from the fate of their friend'.[105]

Fisher, meanwhile, kept Jickling busy with libel actions instituted in May 1838 against George Stevenson and Robert Thomas in their capacity as proprietors of the *Register.*[106] Mann, who had by then been re-admitted to practice,[107] appeared for Fisher but soon proved that he had not learnt his lesson when he again insulted the Judge. The Judge left the court after one too many interruptions from counsel, and had his clerk read out a petulant message to the court:

> In consequence of Mr Mann's insulting conduct the court was adjourned by me, and the jury in the case dismissed, and I positively refuse to hear the case so long as Mr Mann is present.[108]

Jickling eventually consented to return, but then informed the parties that the hearing could not proceed as he had been informed that the jury had made up their minds to return a guilty verdict, regardless of the evidence. Jickling, having now offended the members of the jury, finally continued with the trial which took five days, and the jury found for the plaintiff, Fisher, who magnanimously decided not to press for damages.[109]

Stevenson vented his frustrations in the next edition of the *Register,*[110] but was soon to discover that he was no longer the only person able to voice their opinions through the media, for the colony as of 2 June 1838 had a rival newspaper, the *Southern Australian,* operated by Mann. As Mann declared, his paper was established to counteract the *Register,* which was a 'monopoly' catering for sections of the community that supported the Governor.[111]

South Australia was not alone in having a rival newspaper headed by lawyers. New South Wales had the *Australian*, operated by Robert Wardell and William Charles Wentworth, Western Australia had the *Swan River Guardian,* which was started by William Nairne Clark,

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[104] Ibid.

[105] Ibid.

[106] For a full account of the trial, see Hague, *Henry Jickling*, above n 98, 44-47. See newspaper reports (which are biased) in May 1838 in the *Register* (pro Stevenson and Governor) and from 2 June 1838 in the *Southern Australian* (pro Mann, Fisher and Resident Commissioners).

[107] Hague, above n 37, 124.

[108] *Register,* 19 May 1838, 5.

[109] Ibid.

[110] The *Register* on 19 May 1838, 8, stated 'we spit upon a verdict so obtained'. The motion for a new trial was unsuccessful.

[111] *Southern Australian*, 2 June 1838, 1.

and Van Diemen's Land and Port Phillip had newspapers such as the *Patriot*, which were written by the legally-minded John Pascoe Fawkner.[112] Advocacy and the writing of newspaper editorials utilise similar skills, in that both involve putting forth a particular view of the world and persuading others to agree with any given opinion. In times of turmoil, skilful advocacy can be used as a weapon, particularly when there is no judge to act as arbiter.

Undermining the activities of the colonial governor ranked high in the objectives of these newspapers, and it seemed that in South Australia's case, it was working. Hindmarsh, in dismay, reported that Mann's sole objective was the 'reduction to a mere cypher – if not the absolute destruction – of the power of Her Majesty's Government in South Australia.'[113]

The Legal System in Turmoil

Another way in which the Governor could be undermined was by attacking his appointed judge, Jickling. Unfortunately, Jickling was an easy target, as evidenced by his displays of incompetence in the courtroom, and Mann's ego was undoubtedly still smarting after his recent treatment. While Jickling was correct in not tolerating Mann's behaviour in his courtroom, his methods of disciplining Mann left much to be desired.

After the Fisher libel cases were decided, an urgent meeting was called at the Adelaide Tavern on 2 June 1838 to consider the administration of justice in the colony.[114] While there was no formal law society, a large gathering of concerned lawyers and residents proved that the justice system in the colony was a matter not to be taken lightly. Resolutions were adopted which mainly deprecated Jickling's handling of cases in the Supreme Court. One resolution was that

> freedom of speech and discussion, either in person or by counsel, is the undeniable right of every Englishman, and that the independence of the Bar is a necessary concomitant of the liberty of the subject; and that this meeting deprecate the course adopted towards certain members of the legal profession in the Province.[115]

The *Register*, unable to allow the *Southern Australian* the upper hand and recognising Mann's ulterior political motive, stated that the attack on the Judge, and Hindmarsh for appointing

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[112] See Chapters 3, 4, 5 and 6.

[113] Hindmarsh to Secretary of State, 12 June 1838, CO 13/11, f. 23, ff. 24.

[114] Full reports in *Southern Australian*, 9 June 1838, 4; *Register*, 16 June 1838, 3.

[115] *Southern Australian*, 9 June 1838, 4.

him, was 'pitiful in the extreme' as the Governor had no alternative, there being no other barrister in the colony.[116] The *Register* did not, however, pretend that Jickling was worthy of his position as judge, and suggested that he should be replaced at the very first opportunity.[117]

There is a touch of irony in the resolutions adopted, given that both political factions were claiming that their liberty and rights were at stake. The grand rhetoric of democracy, freedom of speech and liberty was being used to cloak the true agenda, which was self-interest.

What was required was a judge recruited from England who could remain separate from colonial politics, and become a positive leader of the Bar. The advocates resident in South Australia needed to distance themselves from politics, and be informed that their job was to establish an independent Bar that would service the public and the courts. With Jickling at the helm, and rapidly losing respect as a judge, there was little chance of the advocates being reminded of their duties. Signs of change were afoot, however, when the news arrived that Hindmarsh had been recalled.

A Change of Government

The Colonial Office was becoming increasingly alarmed at the colonial politics, and the escalating level of debt in a colony that was supposed to be self-sufficient.[118] Its solution was to recall Hindmarsh, who had been an ineffectual leader, and replace him with Governor Gawler.[119] James Hurtle Fisher did not escape unscathed either, as the *South Australian Colonisation Act* was amended to enable Gawler to perform the dual functions of Governor and Resident Commissioner.[120] Hindmarsh, prior to leaving, had earned a small measure of

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[116] *Register,* 16 June 1838, 3.

[117] Ibid.

[118] Hindmarsh left the colony on 14 July 1838. The Colonisation Commissioners had brought a series of charges against him, including that he interfered in the choice of site for the capital city, and had drawn upon the treasury and thrown the colony's finances into disarray. While it is true that Hindmarsh did attempt to interfere with Colonel William Light's choice of site and held up the surveying, the remainder of the charges were trumped up. The Colonial Office nevertheless had little choice but to recall Hindmarsh. For the series of charges against Hindmarsh, see *Southern Australian*, 30 June 1838, 4. See also G. Dutton and D. Elder, *Colonel William Light –Founder of a City* (1991) for a detailed account of the disputes over the choice of the site for the capital city.

[119] Stephen to Colonisation Commissioners of South Australia, 21 February 1838, *British Parliamentary Papers vol. 6, 1840-1841*, 420.

[120] 1 & 2 Vict. c. 60. A new Colonisation Commission was also constituted in 1840, consisting of three members, as opposed to the old board of nine members. James Stephen, the Under-Secretary, made this proposal to help reduce disputes between the two factions.

revenge when he levelled charges against Fisher for mismanagement of colonial funds.[121] It would take Fisher years to exonerate himself from the charges.[122]

The Colonial Office's decision was a clear sign that the utopian blueprint had failed. South Australia, despite its plans to be the model colony guided by the rule of law, had within two years of settlement disintegrated to the point that the Colonial Office felt it had no choice but to intervene. The Colonial Office reverted to the tried and proven formula of appointing a governor with autocratic powers.

In the interim period between Hindmarsh's return to England on 14 July 1838 and Gawler's arrival on 17 October 1838, George Milner Stephen was the Acting Governor. For three months, he was at the helm of a colony spiralling into bankruptcy, and riven with jealousies and animosities.

Stephen had only arrived to take his part in colonial politics in February 1838. He had been residing in Van Diemen's Land until he heard of the vacancy for Advocate General in the new colony of South Australia. Using his brother Alfred's influence, he managed to gain official favour and obtain the legal position.[123] He also managed to curry political favour by courting Hindmarsh's daughter, Mary.[124] One colonist, Mrs Watts, described Stephen as

> a good-looking, dapper little man, with light curly hair and whiskers, and *small* in every way...He danced well, sang soft sentimental ditties...to the accompaniment of a guitar...and was in fact what usually goes by the term of a 'lady's man' with an abundance of small talk considered suitable to the feminine capacity.[125]

Other colonists were not so kind in their description. Henry Gisborne, who had been a police magistrate in Sydney and was private secretary to Governor Bourke of New South Wales, was aghast to discover that Stephen had obtained the position of Advocate General and was then

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[121] Hindmarsh sent despatches to the Colonial Office, levelling charges against Fisher. The Colonisation Commissioners, on receiving the accusations had little choice but to suspend Fisher. See Torrens to Stephen, 23 April 1838, *British Parliamentary Papers vol. 6, 1840-1841*, 394.

[122] One of Gawler's first tasks on arriving in the new colony was to investigate the charges against Fisher. The results of the inquiry are seen in Gawler to Commissioners, 26 October 1838, ibid 394. For further information on Fisher's efforts to clear his name, see Pike, above n 1, 230. See also Morphett, above n 75. Fisher was not fully vindicated of the charges until 1845.

[123] See Letter from Stephen to Robert Lathrop Murray, 21 January 1838, *Robert Lathrop Murray Papers 1824-49* vols. 3-4, Mitchell Library, CY 4213, 272. See also Hague, above n 37, 115-119.

[124] Stephen eventually married Mary Hindmarsh. See F.Stewart Hindmarsh, above n 40, 144.

[125] J. I. Watts, above n 67, 22.

Acting Governor of South Australia. He vented his feelings in a letter to his mother, where he described Stephen as 'a younger man than me and much more foolish'.[126]

When Stephen arrived in South Australia, he was admitted by Jickling as a practitioner of the Supreme Court, despite the fact that he had not been trained as either a barrister or solicitor in England, and had risen no higher than Clerk of the Court in Van Diemen's Land.[127] This lack of qualifications was not lost on Fisher and Mann, who were resentful of Stephen's meteoric rise from Clerk of the Supreme Court of Van Diemen's Land, to Advocate General of South Australia and then Acting Governor within the space of six months.[128]

Despite Fisher seizing every opportunity to make Stephen's life as Acting Governor difficult,[129] Stephen performed a reasonable job in steering the colony through a difficult few months.[130] Governor Gawler, on taking over the reins, felt Stephen to be a very useful and knowledgeable man 'with great professional talent'.[131]

Mann, on the other hand, was identified by Gawler as a principal player in the disputes of the colony, and the new governor felt that he could not offer Mann the vacant position of Advocate General because of his 'excessive propensity for raising quibbles of law, and his great pertinacity and perseverance in maintaining and propagating them'.[132] Gawler then hastened to reassure the Colonial Office that the colony was not in a state of 'division and

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[126] Letter from H.F. Gisborne to his mother, 2 September 1838, Mitchell Library, Ag68/3.

[127] Hague, above n 37, 115.

[128] See *Register,* 4 August 1838, 3. According to the Letters Patent appointing Hindmarsh as Governor, in the event of his resignation the most senior member of the council would take his place in the interim. Jickling as Judge, or Strangways as Colonial Secretary should have taken the position, but were passed over. Fisher had claims to seniority on the Council, but was not offered the position. Stephen, as Advocate General, was willing to accept the position.

[129] When Stephen called his first Legislative Council meeting on 16 July 1838, Fisher declared that he should be Acting Governor, and then promptly left the meeting, the consequence being that only Stephen and Jickling were in attendance at the meeting and without the necessary quorum of three members to pass resolutions. Stephen ingeniously surmounted this obstacle by appointing Robert Bernard, an Irish barrister, to fill the position of Advocate General left vacant due to Mann's suspension and thereby giving him the necessary quorum of three members. After a few weeks, Stephen recorded that even Fisher gave up his hostilities, and shook his hand at the racecourse. See Hague, above n 37, 118.

[130] There was no money in the Government Treasury, salaries of government employees were often unpaid, and surveys came to a halt. Stephen was up-front to the colonists about the difficulties, and managed to steer the colony through the next three months until Governor Gawler arrived. J.W. Bull in *Early Experiences of Colonial Life in South Australia* (1878) 27 was one settler who opined that Stephen 'conducted the Government in a very efficient style'.

[131] Gawler to Glenelg, 14 February 1839, *South Australian Papers,* above n 86.

[132] Gawler to Glenelg, 14 March 1839, *South Australian Papers,* ibid.

confusion. The people as a body are quiet and contented, well satisfied with high profits and wages, a beautiful climate, and a most promising country.'[133]

While the colonists may have been a peaceful set of people, the resident advocates were not. With Mann and Fisher now sidelined from official duties, they threw their renewed energies into the legal profession, which was undoubtedly floundering under Jickling's supervision. A new judge was on the way, however, and all, including the hapless Jickling, eagerly waited his arrival.

Justice Charles Cooper

In anticipation of the arrival of the new Judge, and no doubt due to a loss of confidence occasioned by the resolutions of the public meeting, Jickling determined that he would not hold any further criminal sessions of the court. In August 1838, there were 13 prisoners awaiting trial, and by December there were over 20. When he was finally induced to act, he discovered that the jury lists had not been prepared, and had to wait a further month.[134] It was not until February 1839 that the criminal sessions were held, at which 35 prisoners stood trial, and not one conviction was gained.[135] The new prosecutor, Mr Bernard, was incompetent, and due to the delays evidence had been lost, witnesses were missing and the jury was sympathetic to the plight of the prisoners who had been locked away in a gaol for so long while awaiting trial.[136]

Fortunately, another fracas was averted by the timely arrival of Mr Justice Cooper, who took over the Judge's duties on 26 March 1839. Cooper had entered the Inner Temple in 1822, and was admitted to the Bar in 1827.[137] He turned down the position of Solicitor General in New South Wales in 1830, but when he admitted to himself that he was of delicate health, and that his practice at the Bar obtained him an income barely sufficient for his support,[138] he sought another opportunity for a colonial appointment. This time he was offered the position of Justice of the Supreme Court of South Australia.[139]

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[133] Ibid.

[134] *Southern Australian,* 6 February 1839, 3, 13 February 1839, 3 and 13 March 1839, 2-3.

[135] Ibid.

[136] *Southern Australian*, 13 March 1839, 2-3.

[137] J.M. Bennett, *Lives of the Australian Chief Justices: Sir Charles Cooper* (2002) 2.

[138] Ibid.

[139] Cooper to Glenelg, 26 July 1838, CO 13/13, f. 139.

On his arrival, relieved colonists gave him a warm reception, at which the judge vowed to steer clear of party politics, and asserted that his 'desire was to soothe asperities, to reconcile differences, not to foster them'.[140] Even Cooper, however, could not avoid the festering colonial politics.

At the centre of the next major political storm were the two colonial newspapers and George Milner Stephen, who was now Gawler's Colonial Secretary, and with whom the new judge was lodging while awaiting the completion of his own house.[141]

Stephen in this case demonstrated the precariousness of a political career. He had purchased 4000 acres of land on the Gawler River, for 1 per acre. At a social function a guest reportedly overheard that Stephen had sold half the estate for 10,000, to which Stephen reportedly replied that he had made the sale for 20,000.[142] That evening, Stephen handed a note to Stevenson, the editor of the *South Australian Gazette and Colonial Register*, which allegedly stated that the sale price was 20,000.[143] The rival newspaper, the *Southern Australian,* on 8 May 1839 stated that the sale had only been for 10,000, and accused Stephen of artificially inflating the value of the land so that he might sell the remainder of his estate at even greater profit.

A series of trials began when Stephen sued Macdougall, the editor of the *Southern Australian,* for libel.[144] Stephen then determined to sue Robert Thomas, the proprietor of the *Register*, for libel for publishing a statement that Stephen's testimony in the previous proceedings had been false. Mann, who had acted for Macdougall, also acted for Thomas. Any victory against Stephen, who was allied to the Governor, would be a symbolic victory for the now defunct Colonisation Commission.

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[140] *Register*, 6 April 1839, 3.

[141] Bennett, above n 137, 11.

[142] For a complete account of the Stephen affair and the three court cases emanating from it, see Hague, above n 37, 154-165 and Bennett, ibid 14-22.

[143] A paragraph was published in the *Register* to this effect on 13 April 1839, 3.

[144] In the first trial, *Stephen v Macdougall,* the jury entered a verdict of guilty. See reports in *Register,* 6 July 1839, 4 and *Southern Australian*, 3 July 1839, 3. In the second trial of *Macdougall v Stephen*, Macdougall sued Stephen for perjury. Mann appeared for Macdougall in both trials, and was frustrated that the note on which Stephen had altered the price at which the land was sold was deemed inadmissible as evidence. Mann eventually withdrew the case.

The trial of *Stephen v Thomas* occurred on 2 September 1839. According to Governor Gawler, who was called as a witness, Stephen was an incompetent counsel on his own behalf, and did not produce the necessary evidence.[145] The note to Stevenson was the subject of the proceedings, and the jury found that it had originally borne the figure of 20,000, but that it had later been altered to 10,000.[146] The finding was thus in favour of the defendant Thomas, and the implicit finding that Stephen had perjured himself spelled the end of his political career.[147] Stephen left the colony with his reputation in tatters, and Mann scored a belated victory on behalf of the Colonisation Commissioners. George Milner Stephen was not to disappear into the misty England winter, however.[148] Years later, he would return to South Australia, determined to resurrect his career as a barrister.

A New Direction in the 1840s

With Stephen gone, the arrival of the new judge, and Governor Gawler having taken over Hindmarsh and Fisher's respective roles, the political disputes of the late 1830s gradually died down. South Australia steered itself away from bankruptcy with the timely discovery of copper in 1842, thus avoiding the slow economic decline experienced in the Swan River colony.[149]

The colony was now being developed on more traditional lines, with Governor Gawler and his successor Governor Grey exercising powers akin to those of their eastern state counterparts.[150] The next goal to be achieved was the extension of the limited powers of the Legislative Council by the granting of representative government. [151]

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[145] Gawler to Glenelg, 25 September 1839, *South Australian Papers,* above n 86.

[146] For an account of the trial see *Southern Australian*, 11 September 1839, 3 and its *Supplement,* 1.

[147] See article in *Register*, 7 September 1839, 2-7. The *Register* on 14 September 1839, 4, further reported that Stephen had resigned his office as 'Commission of the Peace' and 'Chairman of the Bench of Magistrates'.

[148] After Stephen returned to England, the former Governor Hindmarsh became the Governor of Heligoland. Stephen accompanied him to act as his secretary. He then returned to England to be admitted to the Inns of Court in order to train as a barrister.

[149] Governor Gawler was recalled after it was revealed that his expenditure grossly exceeded the income. He had performed much necessary work establishing infrastructure and essential services such as a police force. See Pike, above n 1, 289. The new Governor, Grey, reduced expenditure by implementing measures such as reducing the size of the police force. Grey was fortunate that the discovery of copper boosted the colony's income. The discovery of this natural resource undoubtedly saved South Australia from a slow decline. By 1845, South Australia was paying its own way, and more British emigrants were arriving in the colony than ever before. See Pike, above n 1, Chapter XIII.

[150] See above, for explanation on the amendment on the *South Australian Colonisation Act.*

[151] In 1842 an Act was passed allowing a Legislative Council of at least seven persons to be nominated by the Crown. Four persons not holding public office were chosen by Grey to sit on the Legislative Council in 1843. See Pike above n 1, 246-7. By 1851, the Legislative Council was partly-elected. The advent of Responsible

Despite the failure of the initial blueprint of colonisation, many utopian ideals underpinning South Australia still remained, such as the fact that it was convict-free.[152] Unlike Western Australia, this fundamental tenet of settlement would never be compromised. South Australia was still to be a 'civilised' colony, with even numbers of men and women migrating to the colony (and thus improving moral standards).[153] A high level of importance was placed on education and religion, which both afforded a civilising influence.[154]

As the colony grew, the legal profession also became an increasingly important institution. South Australia's economy was much more vibrant than the Swan River's, and this is reflected in the strength of its legal profession. By 1840 there were over twenty legal practitioners practising in the colony, compared with the Swan River which was noted to only have four members of the Bar in 1860.[155] While Mann and Fisher were the initial leaders of both the legal profession and the Bar, others soon arrived such as William Smillie and John Nicholls.[156]

Efforts were soon made to give the profession a unified appearance rather than being a collection of individual practitioners, but the legal governing bodies that sprang up from time to time were short lived. In 1843 the 'South Australian Law Society' was formed, but left few records of its actions and seems to have quickly faded from existence.[157]

Government would see a wholly elected Legislative Council.

[152] The other Australian colonies frequently commented on South Australia's progress in their newspapers, and were quick to deride the 'failed' experiment. It could not be disputed, however, that South Australia remained convict free, although one Lord Robert felt that it was an occasion for sarcasm when he mentioned the fact that South Australia 'has never stained its lily purity by the admission of convicts'. See Eric Richards (ed), *The Flinders History of South Australia: Social History* (1986) 14.

[153] Assisted immigration statistics show that the proportions of men and women migrating to South Australia were substantially even, eg in 1837, 383 men and 349 women migrated. In 1846, 719 men and 678 women migrated. For further statistics, see Pike above n 1, 517.

[154] South Australia was dubbed the 'paradise of dissent' partly because of its religious freedom. A group of German Lutherans settled in Hahndorf under the guidance of Pastor Kavel in order to practise their religion without retribution. See Pike, above n 1, for more on the religious elements.

[155] See Chapter 6 for the Western Australian statistics, and Hague, vol. 2 above n 37, 732 for the South Australian statistics. Note that Hague's statistics do not differentiate between barristers and solicitors, but he suggests that until 1846, Jickling and Nicholls were the only English Inns of Court trained barristers. However, as discussed above and below in this chapter, many solictors called themselves 'barristers' to denote the fact that they provided advocacy services to the public.

[156] Mann and Fisher are examples of solicitor advocates who called themselves barristers. Smillie was a Scottish lawyer who served as Advocate General in South Australia from 1843 until his death in 1852. Nicholls was an Inns of Court trained barrister who was admitted to practise in 1839.

[157] Its two recorded actions were to suggest that the Supreme Court be transferred to Mr Solomon's Theatre and mount a criticism of the *Real Property Act*. See Hague, vol. 2 above n 37, 734.

Nevertheless, despite the absence of a formalised Law Society, the profession called meetings from time to time to discuss important issues. At one meeting held in 1841, the gentlemen of the legal profession were called upon to consider whether it was 'expedient to separate the practice of barrister from that of attorney and solicitor, and confine themselves strictly to one or other of the different branches of the profession.'[158] Twenty-one members of the profession attended the meeting, and the majority acceded to resolutions made to divide the profession. The Advocate General (Smillie), Mann, Fisher, John Nicholls, George Morphett and Poulden went further and declared that they would only act as barristers.[159]

It is unclear why the profession, in spite of the resolutions, was never formally divided. Nevertheless, the social standing attached to being described as a barrister was still considered important by many members of the profession. Mr John Nicholls felt compelled to write a letter to the *South Australian* to set the record straight that he was a barrister of more than ten years standing, and not a mere solicitor as described in Mr J.F. Bennett's *Almanack* of 1845.[160]

The division of the profession was most likely not rigorously pursued, as only Jickling and Nicholls were barristers trained in the English Inns of Court. Lawyers such as Smillie, Mann, Fisher, Morphett and Poulden may have realised that under a fused profession they were free to practise as barristers without the burden of a regulatory body deeming their qualifications to be insufficient. In New South Wales and Port Phillip, they would not have been permitted to act as quasi-barristers.[161]

The laxity of the admission laws did not escape the attention of the newspapers. One commentator stated that

> the mere production of a certificate of practice, or of admission to the Inns of Court, is sufficient to entitle any legal gentleman to practise in colonial chambers, or to assume the functions of a full-blown barrister. No question is asked as to character, and the candidate's legal abilities are not subjected to any test or analysis...a grossly unskilful lawyer or uncouth pleader may make his way to the bar without the necessity of being *called*, as in England, to the exercise of that honourable profession.[162]

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[158] *South Australian*, 3 August 1841, 3.

[159] Ibid. As noted above, n 156, Nicholls was the only person who was trained as a barrister.

[160] *South Australian*, 21 January 1845, 3.

[161] See Part One and Chapter 5.

[162] *Register*, 25 February 1850, 3.

One case that the *Register* could have cited in support of its argument was the admission of George Milner Stephen in 1838 to the Supreme Court, despite having had no legal qualifications beyond being a clerk of the Supreme Court of Tasmania. Stephen perhaps recognised this lack of qualifications, and when he returned to England in disgrace in 1839, he decided to undertake training as a barrister. He returned to South Australia in 1846, proud to furnish evidence that he had been called to the Bar at the Middle Temple in 1845.[163]

The Return of the 'Pettifogger'

Stephen's reincarnation as a barrister was completed when he appeared in the Supreme Court in 1846 resplendent in the English barrister's gown and wig. As the *Observer* explained, even the Judge rarely wore the wig in South Australia.[164] When Nicholls also appeared in full attire, Judge Cooper felt compelled to question the recent practice of donning wig and gown, and deemed the practice 'ridiculous'.[165] Stephen and Nicholls bowed to pressure and relinquished the wig, but not before they had both made impassioned speeches about their standing at the English Bar, and the fact that it was disrespectful to the Judge himself not to wear wigs. Cooper, on the other hand, had the practical attitude of the first Chief Justice of New South Wales, Francis Forbes, and was more concerned with the heat and flies.[166]

While Stephen may have lost his point on the wig, he continued his efforts to educate the South Australian public on what he felt was appropriate courtroom etiquette. He enjoyed arguing points of law with the Judge, but informed Cooper that it was 'bad practice' for the Judge continually to interrupt counsel.[167] The *Register* felt that Stephen had undoubtedly crossed the line, and cautioned him that in light of his past history, he would be wise to 'avoid those particular displays which have before given him an unenviable notoriety'.[168] Yet those waiting for Stephen to fall were to be disappointed. By 1850, the *Register* noted that Stephen was having enormous success at the criminal bar, frequently obtaining acquittals in his cases. It glumly stated that 'the thieving fraternity have now "a good time coming", for if anybody in the colony can get them off, 'twill be he'.[169]

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[163] For further background to Stephen's admission to the Bar in England, see Hague, vol. 2, above n 37, 737. For a biography of Stephen, see Diana Cook, *Uneven Stephen* (2000).

[164] *Observer*, 5 September 1846, 2.

[165] Ibid.

[166] Ibid.

[167] *Register*, 17 June 1846, 3.

[168] *Register*, 17 June 1846, 2.

[169] *Register*, 25 March 1850, 3.

Stephen was never to be universally accepted, and he later felt compelled to sue Stevenson for calling him a 'pettifogger'. Fisher was engaged to explain to the court what the term meant, and he declared that it did not, in this case, mean 'a low and disreputable practitioner', but was rather derived from 'the French words "petit voguer" – a seeker of small cases, and it could not be applied to a barrister of the Supreme Court'.[170]

As other lawyers arrived in South Australia, Stephen's antics were not given as much attention. Henry Parker, the barrister who was initially offered the position of Supreme Court Judge only to resign the position because he correctly feared political turmoil, obviously thought that South Australia was now a viable proposition.[171] Richard Davies Hanson had also had a change of heart.[172] Both were to become leaders of the South Australian legal profession.

Expansion of the Legal Profession

By 1847 there were 24 practising lawyers in the colony, and there was a call for a second judge to be sent to cope with the increased amount of judicial business.[173] In 1846 the Legislative Council had agreed that a second judge should be appointed,[174] and by 1849, when nothing had been achieved on that front, Governor Young renewed the plea.[175] Mann had been Acting Judge while Cooper was away, but he entertained no illusions that he would be chosen as the second judge and did not even apply for the position.[176] George Milner Stephen, however, predictably put in an application for the position, as he proclaimed that he was 'leader of the Common Law Bar in this colony'.[177] Justice Cooper and Governor Young had other ideas, and suggested that the new judge ought to be appointed from England.[178]

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[170] *Register,* 11 September 1851, 3; 13 September 1851, 2.

[171] Parker arrived in May 1849. For more information on Parker's career see Hague vol. 2, above n 37, 739-40.

[172] Hanson arrived in 1846 and was admitted to the Supreme Court of South Australia on 7 October 1846. He conducted his first case in the Magistrates Court two days later. See Brown, above n 18, 51.

[173] John Stephens, *Royal South Australian Almanack and General Directory for 1847* (1847) 89. Note again that 'lawyers' refers to both barristers and solicitors.

[174] *Observer,* 11 July 1846, 4.

[175] Young to Grey, 4 March 1849, *Despatches from the Governor of South Australia 1848-49*, Mitchell Library A2312.

[176] See Hague above n 37, 177.

[177] Stephen to Grey, 27 March 1849, CO 13/62 f. 303, ff. 304.

[178] Young to Grey, 28 March 1849, CO 13/62 f. 301.

The appointee, George John Crawford, was not English, but Irish. He had a Doctor of Laws from Trinity College, Dublin, and was a practitioner at the Connaught Bar.[179] He arrived in South Australia on 27 June 1850 and was enthusiastically greeted by the legal community who treated him to a celebratory breakfast.[180]

At Crawford's instigation, wigs were now to be worn in the Supreme Court, and a Law Society was again established.[181] The committee of the Law Institute was comprised of Smillie, Mann, Hanson, Gwynne, and Maguire. After no agreement was reached as to the amount of the subscription, the idea lapsed until a year later.[182] A new committee was eventually appointed and Mann was elected president. In June 1851 the first meeting took place, and George Milner Stephen was not invited.[183] The newspapers of the colony were pleased with the formation of the society, as it meant that more attention could be given to 'weeding out the pettifoggers'.[184]

The new society felt that it was incumbent on them to oppose the admission of an English attorney, Joseph Grave, who wrote threatening letters to a John Munn with the intention of extorting money from him. Gwynne, on behalf of the society, stated that it was their aim to 'preserve the respectability of the profession'.[185] Grave, in his defence, admitted that he had written the letters but submitted that it was just a practical joke.[186]

Despite the Law Society's vigorous opposition to Grave's admission, it did little else of note and once again petered out of existence.[187] Justice Crawford's time in South Australia was also to be short, as he died of renal failure after only two years in the colony. The South Australian community greeted his death with much sorrow, for he had been an enthusiastic and lively judge who worked well in concert with Cooper and the South Australian Bar. His funeral was one of the largest seen in South Australia at that time.[188]

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[179] For further information on Crawford, see Hague, *Mr Justice Crawford: Judge of the Supreme Court of South Australia 1850-1852*.(unpublished) (1995). See also Bennett, above n 137, Chapter 6.

[180] *South Australian*, 9 July 1850, 2.

[181] Ibid.

[182] *South Australian*, 9 July 1850, 2.

[183] Hague, *Mr Justice Crawford*, above n 179, 40.

[184] *South Australian*, 7 June 1851, 2.

[185] *South Australian*, 24 June 1851, 3.

[186] Ibid.

[187] *Register*, 31 January 1856, 3.

[188] Crawford died on 29 September 1852. The *Observer*, 2 October 1852, 7 reported that 'nearly all the members of the Bar' attended his funeral, and opined that only Colonel Light's funeral was attended by more people.

As judges, Cooper and Crawford were viewed as opposites. Cooper was sickly and softly spoken, but a man of high principle who always discharged his duties with impartiality.[189] Despite Cooper constantly battling his ill-health, he remained on the bench until his retirement in 1861, having attained the title of Chief Justice in 1856.[190] Crawford was only forty when he died, but during his short period of tenure he vigorously carried out his duties, and had an eye for law reform.[191] Governor Young sorrowfully wrote that

> there was recognised in him some of the most suitable qualifications of a good Judge. Calmness, patience, firmness, diligence, quick perception, and uprightness, invariably characterised his judicial conduct.[192]

The vacancy caused by Crawford's death was not to be filled immediately, due to a decrease in judicial business caused by a population exodus to the Victorian goldfields.[193] Gold was not discovered in great quantities in South Australia, although Stephen managed to create a false alarm when he claimed the government reward for discovering a gold field on the Onkaparinga River. A government party, along with nearly 500 enthusiastic diggers, went to the field but could find neither the mine, nor Stephen. Two days later, Stephen resurfaced and said that his discovery was at Mitchell's Flat and a second wild goose chase ensued.[194]

While the discovery of gold in Victoria plunged South Australia into a period of financial uncertainty, the legal profession would have considered that every cloud had a silver lining, as George Milner Stephen soon after moved to Victoria to pursue his fortune.[195] He was admitted to the Victorian Bar in 1852, and then re-launched his political career by representing Collingwood in the Legislative Assembly.[196] At the age of 66, he once again diversified his career to begin practise as a 'faith healer'.[197] The legal practitioners of South Australia may have heaved a collective sigh of relief, but South Australia had lost one of its most colourful and controversial characters.

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[189] See Hague, vol. 1, above n 37, from page 152. For a comparison of the attributes of Cooper and Crawford, see Bennett, above n 137, 94. Bennett suggests that Hague has unfairly juxtaposed Ccoper and Crawford's personalities, thus diminishing Cooper's important contributions as a Judge.

[190] See Bennett, above n 137, 94.

[191] Hague, *Mr Justice Crawford*, above n 179, 43-46.

[192] Young to Pakington, 25 September 1852, *South Australian Papers,* vol. 5, above n 86.

[193] Ibid.

[194] Pike, above n 1, 445.

[195] For a brief account of Stephen's life in Victoria, see Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (1968) 83. See also a biography of Stephen's life in Cook, above n 163.

[196] Ibid.

[197] *A Record of Some Wonderful Cures by George Milner Stephen* (3rd Edition 1889).

Towards Responsible Government

As South Australia recovered from the economic downturn caused by the gold rush, it increasingly turned its attention to the achievement of Responsible Government. While it was clearly no Utopia, it was obvious to all concerned that the colony had come a long way since its turbulent foundation. In 1849 Governor Young foreshadowed that the local legislature would be proposing a

> transference to South Australia of those political and social institutions of Great Britain by which the useful grandeur and glory of the Empire have been gradually and progressively enlarged and strengthened and preserved.[198]

The colonists, as predicted, started agitating for an increased role in the government of their colony. Richard Davies Hanson, more than twenty years later, had not lost the fervour for politics and reform that had led to him being labelled a 'firebrand' in the 1830s in England. By 1851 he was a leader of the Bar, and advocated his ideas for a more representative government.[199]

In campaigning for Responsible Government, some of the idealistic notions that remained from the early years of settlement began to resurface. South Australia was always intended to be a model colony that adopted the best of British custom and traditions. It was a system that was conceived to represent the best of British law. Yet the advocates who had a hand in designing the Utopia did not respect the personality of the Governor, who was at best a bluff sailor and who, to their way of thinking, was determined to wrest control of the colony from them and blight their blueprint for a perfect society. They systematically tied his purse strings, and in doing so abused the spirit of the rule of law.

In the early years there was no military man able to take autocratic power and break the impasse. There was no competent judicial personality to offer advice and keep the situation in check. Instead, the system simply fell apart at the seams. It is perhaps the greatest irony of the model colony that it was only when the Colonial Office determined to abandon the model and govern the colony in a more autocratic fashion that it became more functional.

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[198] Young to Grey, 16 November 1849, *South Australian Papers,* vol. 4, above n 86.

[199] Brown, above n 18, 60. See also Hague, vol. 2, above n 37, from 322.

Having progressed along more traditional lines, South Australia left its early years of turmoil behind. It boasted a strong Bar that assisted the development of the colony, rather than hindering it. Advocates such as Henry Parker and Richard Davies Hanson, who initially foresaw the strife that would attend the settlement of the colony, recognised that the time of crisis had passed and were willing to return to the fold.

When Responsible Government was achieved in 1856, there was little doubt that the South Australian Bar had set a solid foundation from which to expand in the next fifty years. The introduction of King's Counsel would add prestige to the profession, and judges would soon be chosen from the ranks of the local Bar.[200] In the lead up to federation, members of the South Australian Bar would play a leading role in unifying the Australian colonies.

South Australia was no Utopia in the antipodes, but the advocates, who had played a large part in the downfall of the Utopian dream during the tumultuous first two years of its founding, had redeemed themselves by playing a large role in guiding the colony towards a more realistic and prosperous existence. It is this perplexing fact that makes the story of South Australia so unique.

Of all Australia's early settlements, South Australia stands alone in the degree to which advocates contributed to and were planned for in its founding. Advocates, despite being unwanted and unplanned for in the early life of New South Wales, evolved to fulfil and prove the essential nature of their role in Sydney Town, whereas conversely, in South Australia they illustrated the harm which advocates acting without check can inflict on the functionality of a community.

Perhaps the story of South Australia does not support the aphorism that good lawyers make poor governors, but it is a unique comment on the danger that lurks if the legal profession seeks to dominate a community in the name of serving it. For a time, the advocates of South Australia arguably turned their backs on the rule of law and, by doing so, came close to destroying the dream that they wished to build. A society without the means to preserve order may be ravaged by chaos, but without the balancing force of law that society risks tyranny – it is only when the power of government is constrained by law that there can be any hope of justice. Advocates are the crucial means of connecting a community to its laws in a

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[200] See Hague, vol. 2 above n 37, 745-6. The first King's Counsel was appointed in 1865, being William Alfred Wearing, Randolph Stow and R.B. Andrews.

Westminster democracy, but if those whose role it is to deliver justice abandon respect for the law then nothing can be achieved at all.

AUSTRALIA'S EARLY BAR: A CASE STATED

> *The dignity of a lawyer is larger than the mammoth. A little while ago one Gardiner turned up in the dock at Benalla (Vic) and incautiously trod on the tremendous majesty of this overwhelming being. There was no barrister in Benalla, for that little one-horse town can't support that ravening animal and Gardiner was too poor to hire a guy dressed in horsehair and bed furniture from Melbourne and pay his fee and travelling expenses, and then have the pleasure of going to gaol because his advocate hadn't even looked at the case and wasn't there to bargain. Accordingly, he asked the Court in the usual way to permit his solicitor to appear for him, and the Court enquired whether that lofty and refulgent being, the Crown Prosecutor, would stoop from his elevated sphere to meet an ordinary low, cheap, common solicitor, and the Crown Prosecutor rose with carnage in his eye and refused to associate with the ignominious branch of the profession. Consequently, Gardiner was hauled away to wait till next assizes, and if he can't hire a barrister when that time comes he will probably be again remanded, or else he will have to do without a defence of any kind. But it is better that an inconsiderable human being, without any capital worth speaking of, should go to gaol undefended than that a shining barrister should be tarnished, and interfered with, and contradicted, by a mere grovelling solicitor who never owned a misfit wig in his life or fell over the tails of that extraordinary garment which makes the exponent of the law look like a sack of potatoes in disguise.*
>
> The *Bulletin*, 16 August 1890[1]

Birds of Prey

The myths surrounding the Bar, perpetuated by the British barristers who migrated to Australian shores, were clearly alive and thriving on the eve of Australian federation when the *Bulletin* undertook to write a series of tongue-in-cheek exposé articles berating the legal profession and, in particular, barristers.[2] According to the *Bulletin,* barristers styled themselves as the higher branch of the profession, and demonstrated their lofty status with the use of paraphernalia such as wigs and gowns, and exercising their right to exclude solicitors from appearing for a client in court. Such a stance was not considered to be for the common good of the public, whom the legal profession supposedly served.

The *Bulletin's* anti-lawyer attitude was particularly apparent in its article headed 'The Abolition of Lawyers',[3] which suggested (without discriminating between barristers and solicitors) that the profession of lawyers was not a necessary institution in society. It alleged that lawyers, in their own self-interest, perpetuated the myth that they were necessary to the

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[1] Page 7.

[2] See also 'The Abolition of Lawyers', *Bulletin,* 5 September 1891, 6 (discussed below) and an article concerning proposed introduction of 'Law of Evidence Bill', *Bulletin,* 11 October 1890, 7, which was a Victorian bill which would attempt to prevent barristers intimidating witnesses in cross examination.

[3] *Bulletin,* 5 September 1891, 6.

functioning of society. The writer caustically summarised what he saw as the professional propaganda of lawyers as follows:

> For though the lawyer is admittedly a bird of prey he is a constitutional and old-established bird of prey – an eloquent bird of prey – the sort of bird of prey who can only grow in an educated and refined community, and he is one of the landmarks of progress, and a deep rooted institution generally.[4]

The *Bulletin* suggested that if lawyers were abolished, their complicated laws and regulations (which they, themselves, drafted) would be swiftly abandoned. In its place, simple laws would be enacted which every citizen and judge could interpret without the need to resort to lawyers. The author's view was that the legal profession was surviving on its mythic qualities alone, but the reality, if only the reader chose to see it, was that 'the lawyer is the cause of himself, and makes the demand for his own existence. The world does not want him in any sense what-ever.'[5]

If one were to examine the veracity of the assertions of the *Bulletin* journalist against the institution of the Bar, then there could scarcely be a more ideal model than the history that has just unfolded. Colonial Australia, in a unique way, was an unprecedented experiment in the development of British democracies. At first glance there were gaping differences between the settlements; New South Wales was devised as a crude, hastily planned military prison, in contrast with South Australia's birth forty-eight years later as a free settlement based on Edward Gibbon Wakefield's principles of colonisation.

Despite such fundamental differences in origin, the Australian colonies nevertheless germinated from the same basic seed. Each colony had, at its roots, a population taken from the same country. They were settled by people with common social, cultural, historical, institutional and economic backgrounds. It was by sheer dint of geography, and Australia's familiar tyrant, distance, that these essentially similar populations were then, by necessity, required to evolve with very little immediate influence on each other. It is this divergent evolution of the colonies, which all began with common denominators, that results in such a fertile soil for comparison.

Placed in this context, advocates are uniquely positioned to shed light on the growth of institutions in a society founded on the principles of Westminster democracy in a way that no

[4] Ibid.

[5] Ibid.

other group can. The story of Australia's early history viewed through the lens of the colonial advocates not only allows us to see the public and private development of the colonies, but also reveals much about the nature of the institution of the Bar itself. At the most fundamental level, the advocate exists in order to facilitate communication between individuals and the organs of their government. The story of advocates is, in this way, also seen as the story of a government's relationship with its people over time.

Yet the *Bulletin,* with its vehement attacks on the Bar, would eliminate the institution entirely. It is not surprising that colonial lawyers in general, and advocates in particular, received their fair quota of poor press. The nature of the advocate's work brought him/her into contact with people at a time when they were experiencing emotional difficulties, whether they were facing a jail term or were in the midst of a costly civil dispute that risked their livelihood. A client does not require the services of an advocate during stable, happier times, and human distress is an advocate's bread and butter. The fact that in offering their services advocates commanded a substantial fee means that their profession would always attract a measure of resentment.

However, even those considerations apparently fail to explain the depth of resentment that advocates, and in particular barristers, continue to attract today. The question is whether there is any justification for the continued hostility towards the Bar in the public imagination. Does the Bar deserve its self-portrayal as an age-old and vital feature of an educated and refined community? Are advocates really 'shameless pettifoggers', or are they in fact noble 'servants of all, yet of none'?[6] The two schools of thought could scarcely be further opposed. The history of the Bar in early Colonial Australia, and its glimpse of the nature of Australian advocacy in its formative years, perhaps provides a window into where the truth lies.

The answers to these questions are as significant for the development of Australian society today as they were in the infant years of each of the colonies. The history of Australia's first advocates paints a portrait with far more complexity than either the *Bulletin's* vituperative attacks or the conventional wisdom of the Bar would have us believe.

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[6] 'Servants of all, yet of none' is the New South Wales Bar Association's motto. Barry O'Keefe QC, then President of the New South Wales Bar Association, explained that the motto 'embodies two elements which are of the essence of barristers. We must meet the needs of those who require expert legal representation and advice. At the same time we must maintain an independence from influences which distract from the provision of that representation and advice, whilst at the same time maintaining an independence from the client. Barristers are not merely mouthpieces in the way in which our American counterparts have come to be painted. We are professionals. Our continued existence depends upon the maintenance of professionalism and excellence.' *Bar News,* Winter 1991, 3.

Debunking the Traditional Definitions of Advocates

Before it is possible to make any useful comment on the Australian Bar, the issue of who was a member of the 'Bar' needs to be resolved. It is often assumed by historians that barristers were the only members of the legal fraternity eligible to be members of the Bar, and Australian history books generally use a traditional definition of what a barrister is, explaining the institution with reference to training in the English Inns of Court.[7] The problem with the traditional definition, when applied to early colonial Australia, is that there were many people performing advocacy roles in the courts who did not bear the formal qualifications of a barrister.[8] The story of the Bar in its formative years is thus better told by using the all encompassing term of 'advocate', with barristers trained in the English Inns of Court forming a distinct sub-set of the class of 'advocate'.

'Inns of Court' barristers were not initially seen as a necessary part of the colonisation process in any of the colonies. Yet invariably legal issues arose in each settlement, and consequently a panoply of lay advocates, convict attorneys and solicitors all stepped in to fill the lacunae left as a result of the Colonial Office's failure to provide the embryonic colonies with barristers

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[7] John Bennett, in *A History of the New South Wales Bar* (1969) 25 states that in around 1820, 'there being then no barristers in the Colony, the solicitors who appeared regularly as advocates in the Courts must have a place, an important place, in the history of the Bar of New South Wales.' Bennett nevertheless considers that the true Bar of New South Wales began in 1825 when the roll of barristers in the Supreme Court of New South Wales commenced. The statement that there were 'no barristers' refers to the absence of barristers trained in the English Inns of Court. See also Arthur Dean, in *A Multitude of Counsellors: A History of the Bar of Victoria* (1968) who defines a barrister in the period 1837-1850 as including those men 'called to the Bar in England, Ireland or Scotland' and were admitted to practise in New South Wales.

[8] New South Wales, which began with a fused legal profession, had a diverse history of people performing advocacy roles in its courts despite their lack of Inns of Courts qualifications. New South Wales was also the first colony to look seriously at the issue of admission of barristers under a colonial legal training program, so that aspiring barristers could avoid a lengthy journey back to England's Inns of Courts to gain the necessary qualifications. However, training of barristers within a colonial setting was not available until many decades after settlement, thus increasing the number of people who fit the definition of an advocate, but not the more restricted definition of a barrister. In South Australia, Western Australia, and Van Diemen's Land, which also began with fused legal professions and (unlike New South Wales) retained this mode of operation, such a definition based on training is clearly not appropriate as it eliminates from consideration, even in the 20th century, all lawyers who legitimately practised as barristers under their respective colony's admission laws, but did not have specialised training as a barrister. The colonies of Victoria and Queensland, which were settled after the division of the New South Wales legal system, both followed New South Wales' divided profession model from the outset and thus a more traditional approach to the definition of a barrister based on training is suitable. Ross Johnston, *History of the Queensland Bar* (1979) 6, for example adopted the definition that a barrister 'refers to any person who has signed the Roll of Admission of Barristers...in control of the Supreme Court of Queensland.' Admission to the Roll of Barristers required admission to an English Inn of Court, or training in a colonial university degree. Given that Queensland did not separate from New South Wales until 1859, when there were university training courses more widely available, a restricted definition of barrister is appropriate.

specifically trained to perform the advocacy roles that arose. As will be seen, these 'advocates' considered themselves to be the foundation members of the Bar in their colony.

In this environment it makes sense to reject more traditional definitions that identify a barrister by qualifications or training, and to instead provide a definition that focuses on the function of advocacy. For the purposes of this discussion, an advocate is defined as a person who advocates the rights of a citizen of the community before a forum established by the governing body of that community according to that community's laws.[9] Such a definition simply looks at the function of the advocate, and not their training or qualifications.[10] It takes into account the fact that the court admission laws in each colony were not based on traditional British admission laws, and hence initially allowed legally untrained people like John Macarthur of New South Wales,[11] John Pascoe Fawkner of Van Diemen's Land[12] and George Stone of Western Australia[13] to act as advocates for people. Similarly, convict attorneys such as George Crossley and Michael Massey Robinson were initially permitted to give legal advice at the highest level to the Governor and Judge Advocate, despite their criminal status and lack of formal training as barristers.[14] Many solicitors in the colony also embraced this new opportunity to act as advocates, often appropriating the title 'barrister'.[15]

By looking to function rather than form, we gain the opportunity to observe the evolution of the 'advocate' over a very compressed timeframe. For example, in New South Wales, the colony initially had no advocates, but within a decade of its settlement it had a plethora of lay advocates and convict attorneys who performed an advocacy function in the courts. The 'legitimate' solicitors then supplanted these first advocates, and when sufficient numbers of barristers trained in the English Inns of Court had arrived in the colony, they in turn supplanted the solicitor advocates. Within fifty years of the settlement of the colony, the

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[9] For a detailed discussion on the tasks that an advocate performs, see Disney et al, *Lawyers* (1986) 3. They state that 'advocacy traditionally is the raison d'etre of the Bar', and that 'principally, the barrister is the court-room lawyer'.

[10] Note that barristers today are undeniably bound by the more traditional definition based on legal training: court admission laws demand this. However, in early Colonial Australia, court admission laws were far more fluid.

[11] See Chapter 1 generally, and particularly the sub-section entitled 'Richard Atkins, John Macarthur and the Turnip Episode'.

[12] See Chapter 4 generally, and particularly the sub-section entitled 'The First Advocates'.

[13] See Chapter 6, generally, and particularly the sub-section entitled 'Development of the Legal System'.

[14] Note that Robinson was granted a conditional pardon so that he could give legal advice to Judge Advocate Dore: see Chapter 1, 'Richard Dore and the Rise of the Convict Attorneys'. Crossley gave advice to Governor Bligh and Judge Advocate Atkins: see Chapter 1, 'Use of the Legal System in a Period of Turmoil'.

[15] See generally Chapter 7 on South Australia, and in particular the section entitled 'A New Direction in the 1840s'. See also Chapter 3 on New South Wales and the debate surrounding division of the profession in which solicitors desired to retain their rights of appearance before the Courts.

barristers had succeeded in their aim to form an exclusivist Bar composed entirely of English Inns of Court trained barristers.[16]

By persisting with the more traditional definition of 'barrister' from the outset, we would lose this vital history surrounding the formation of the colonial Bars, which, although striving to be replicas of the English Bar, were patently not. In considering the role that advocates performed in the formation of each colony, we get a clear view of what is important about the job that they do, and are simultaneously afforded a new view of the early history of the Australian colonies. The *Bulletin* author's suggestion that the profession is 'self-creating' and unnecessary does not stand up to historical scrutiny.[17] Rather, the efforts of the Australian advocates fundamentally shaped the formation and direction of their respective colonies, regardless of whether their efforts were appreciated or acknowledged.

The Role of Advocates in Colony Building[18]

Examination of the work performed by advocates in early Australian colonial history offers an invaluable insight into the primary functions performed by the institution of the Bar in a modern Western democracy. Given that each colony had common British roots, it is interesting to compare and contrast the approaches to 'society building' employed by each colony between the years 1788 to 1856.[19] For one unfamiliar with colonial Australian history, it would be easy to make the assumption that convict New South Wales would never offer any opportunities for the 'traditional' British barrister, whereas early South Australia would have been the ideal place for a transplant of the English Inns of Court model.[20]

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[16] This swift evolution of the New South Wales Bar in discussed in Part One. Note that the traditional definition of a barrister is based on his/her training, which is discussed in detail below.

[17] *Bulletin*, 5 September 1891, 6.

[18] It is important to again reiterate the fact that 'advocate' is used in preference to barrister here, as it is better suited to an Australia-wide discussion of the Bar. As noted above, South Australia, Western Australia and Tasmania retain the structure of a fused profession, and lawyers are admitted in the duel capacity of solicitor and barrister. Colonial New South Wales also had a fused profession prior to 1834. Port Phillip (Victoria) and Queensland were the only colony/states that began with a divided profession that was serviced solely by the traditional Inns of Court barrister, and even Victoria now has a fused profession.

[19] The concept of 'society building' is also canvassed by Frank Welsh in *Great Southern Land: A New History of Australia* (2004). He prefaces his book with the comment that Australia consistently ranks in the top five of the United Nations' Human Development Index, and seeks to explain why Australia, as a nation, has done so well. As a British historian writing about Australian history, his aim was to explain to the rest of the world how Australia's peaceful evolution contributed to its success as a nation. See Welsh's Introduction from xxxi.

[20] South Australia, in fact, did not offer any government-sponsored positions for British barristers other than one position as Supreme Court Judge. South Australian advocates, as in New South Wales, had to take a chance and make their own luck in the new colony.

Such perceptions are quickly proved to be false, however, and an in-depth view of Australian history shows a clear similarity between the work performed by advocates in each of the colonies, despite obvious differences in the reasons behind the foundation of each colony, politics, geography or economics. What becomes increasingly clear is that Australian advocates utilised their skills in three main areas during the colony-building phase. Broadly, they helped to legitimise the colony's legal system, provided a voice for the people, and acted as a check on the Governor's exercise of power.

Legitimising the Legal System

It is easy for a modern commentator looking back on events to promote the argument that there was inevitability to the manner in which those events unfolded. This in part explains the certainty with which the Bar refers to itself as a stabilising hallmark of a civilised society with an age-old history.[21] This view can legitimately be criticised for failing to grasp how dynamic, unstable and evolutionary the institution of the Bar really was;[22] yet the history of the Australian colonies shows that there is clearly something tangible in the notion that the presence of advocates is an indicator of a sophisticated and functioning democracy. In the swift march to Responsible Government of each of the Australian colonies, it is clear that the rapid evolution of the Bars was, if not expressly stated, at least of oblique importance in persuading Britain and the colonists themselves that each of the fledgling societies had come of age.

The colony of Port Phillip, in particular, had no legal basis for its initial foundation. The residents sought official sanction of their settlement by utilising the law. The colonists set up a de facto arbitration system and appointed their own mediator of disputes. John Pascoe Fawkner, who was a self-taught advocate, and James Simpson, a police magistrate who had no formal legal training, pledged to resolve disputes within the bounds of the law.[23] Although

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[21] See Introduction for a more detailed discussion on the evolution of the English Bar, and in particular Bernard Kelly's romantic views on the place of the Bar in society. For a more recent comment on the Bar's ancient traditions, see an address by Justice Ipp on 8 June 2001 entitled 'Enduring Values and Change, in *Bar News,* Winter 2001, 37. Justice Ipp opened by stating that 'the Bar is an ancient institution...In the 600 or so years of its existence the Bar has stood for certain values that have had a major influence over the way in which the law has been practised and our society has developed.'

[22] For a discussion of how truly evolutionary the Bar really was, see J.M. Bennett and J.R. Forbes, 'Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century', (1971) 7 *University of Queensland Law Journal* 172, 184. Bennett and Forbes explain that 'Conservative practitioners [claimed] that Division is part of the nature of the most fundamental things. In reality, Division [of the legal profession] was a composition of fairly recent origin, still volatile and unstable.'

[23] See Chapter 5, 'Attempts to Establish Legal Infrastructure in the New Settlement'.

ultimately unsuccessful, lawyer Joseph Tice Gellibrand attempted legally to transfer land from the native Aboriginal tribes to the European settlers by way of treaty, rather than the settlers appropriating the land by squatting.[24]

Correspondence with both the Governor of New South Wales and the British Colonial Office made it clear that the settlers intended Port Phillip to be a law-abiding settlement, and ultimately their insistence on following the rule of law made it impossible for the British Government to avoid giving Port Phillip official sanction.[25] Soon after, the 'Irish' Bar was established, and the increasing numbers of Inns of Court barristers reflected Port Phillip's growing economic status and prosperity. Port Phillip was, ultimately, the colony that most closely resembled the traditional British Inns of Court structure.[26]

The very different example of Van Diemen's Land, while always an officially sanctioned settlement, demonstrates the problems that arise when the rule of law is not obeyed. During Governor Collins' era there was no efficient legal system, and consequently no distinct group of advocates. Bushrangers flouted the law, and rough 'bush justice' prevailed.[27] When Lieutenant Governor Davey finally pronounced that martial law would be implemented, Sydney Town was forced to acknowledge the depth of the problem that existed in Van Diemen's Land.[28] It was not until J.T. Bigge's report that recommended changes to the colony's legal system, and Governor Arthur's arrival, that the situation began to change. For the first time, lawyers from Britain had an incentive to migrate to Van Diemen's Land, as the Supreme Court was finally in operation.[29] It was not that Van Diemen's Land had no legal system prior to Arthur's arrival, but that there was no one to effectively administer and promote it.

For the colonists of Van Diemen's Land, the arrival of courts and judges and advocates to represent them marked the transition from chaos to order. As a people, the colonists had suffered a procession of terrors, at first from the hands of marauding convicts and bushrangers, and then from being yoked under martial law. The recovery of the community from those events was, ultimately, surprisingly rapid, and must be explained in part by the

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[24] Ibid, 'The Second Attempt at Settlement in Port Phillip'.

[25] Ibid.

[26] Ibid, 'An Irish Brand of Law and Order in Port Phillip' and 'Canvas Town'.

[27] Chapter 4, 'The Foundation of Hobart Town'.

[28] Ibid, 'The Rise of the Bushrangers'.

[29] Ibid, 'A New Era Begins'.

reassurance that was felt on the arrival of the familiar British institutions of justice and the advocates who operated it.[30] In the rough island-colony of Australia, the arrival of advocates proclaimed to the colonists, as indeed to the rest of the world, that civilisation had finally arrived in Van Diemen's Land.[31]

The role of advocates as legitimisers in society can be seen even in the Moreton Bay settlement (Queensland), which was not truly established until after the other colonies had achieved Responsible Government. Moreton Bay demonstrates the importance of a legal profession in transforming a settlement from a rudimentary place of punishment to a true community. While it was a penal settlement, free settlers were not allowed within a 40-mile radius and there were no advocates. After this rule was relaxed and squatters began to colonise the area, an unnamed 'barrister' arrived to provide a voice for a resident in a trial. Thus began the slow transformation of the legal system from that of a rudimentary bush justice system to the developed and sophisticated court system of modern Queensland. The establishment of the Supreme Court in 1861 in particular heralded a new era, and reflected the growth of the settlement from a place of secondary punishment to a community of free settlers.[32]

South Australia and Western Australia, the two planned and initially convict-free settlements, had advocates present from the beginning. Despite the very different ways in which each settlement progressed, there was never any question that these colonies would adhere to the values of a modern Western democracy. Western Australia's peaceful evolution, despite its economic difficulties, owed much to the conciliatory nature of the colony's advocates.[33] The fact that Western Australia survived as a colony is in part due to the efficient operation of the colony's legal system which helped to keep peace and order during troubled times.[34]

South Australia's advocates were over-zealous in their application of the law, and the early years of settlement demonstrate the problems that can arise when advocates do not effectively perform their role as 'legitimisers' of the legal system. Their deliberate and consistent undermining of the actions of the Governor, often through the colony's Supreme Court, created so much turmoil and disorder that the British Government and other colonies began to

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[30] Ibid, 'The Legal Profession in Van Diemen's Land.

[31] Ibid, 'Responsible Government in the Wild South'.

[32] Chapter 3, 'Moreton Bay'.

[33] Chapter 6, 'False Rumours of Abandonment of the Colony'.

[34] Ibid, 'Development of the Legal System' and 'No Need to Introduce Change for Change's Sake'.

look disparagingly on the new settlement.[35] When governmental changes were made and the politics of the colony were resolved, the colony's advocates effectively performed their role. Together with increasing economic prosperity, this placed South Australia in a strong position to achieve Responsible Government by 1856.[36]

South Australia proves the important role of advocates as legitimisers by illustrating an exception to the rule. The assumption of social legitimacy extended by the wider world to the planned colony was quickly stripped away when its advocates turned their backs on the rule of law, which is fundamental to the institution of the Bar.[37]

However, all of these examples aside, the function of advocates as agents who 'legitimised' a society is illustrated most clearly in the early history of colonial New South Wales. Australia's first colony, established for the express purpose of the reception of convicts, was not expected to conform to the structures of the British legal system.[38] Yet the arrival of the convict attorneys, who unexpectedly became the colony's first advocates, began the transformation of the colony's legal system from a swift and brutal military justice system to a fully-fledged British legal system complete with its own Supreme Court and 'legitimate' barristers.[39] Advocates like Macarthur and Crossley all operated within the bounds of the legal system. Even the Bligh insurrection, orchestrated by Macarthur, used the colony's rudimentary legal system to put into effect the overthrow.[40] The legal system was respected; it was just the people filling the barristers' robes that, in some quarters, were not.[41] With each 'improvement' made to the colony's legal system, and the arrival of solicitors, barristers and judges from Britain, the colony slowly began its journey from penitentiary to a free society.[42]

Chief Justice Forbes' insistence that the legal system follow the British model as closely as possible assisted in lending respectability to the colony.[43] The barristers Wentworth and Wardell, while occasionally antagonistic to the governor of the day, never undermined the

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[35] Chapter 7, 'Utopia Divided', 'The Legislative Council', 'A Declaration of War', 'Lawyer v Lawyer', and 'The Legal System in Turmoil'.

[36] Ibid, 'A New Direction in the 1840s', and 'Expansion of the Legal Profession'.

[37] Ibid, Towards Responsible Government'.

[38] Chapter 1, 'The Convict Problem'.

[39] See Part One generally.

[40] Chapter 1, 'Use of the Legal System in a Period of Turmoil'.

[41] Ibid, 'The Colony of Second Chances'.

[42] See Chapters 2 and 3 generally.

[43] See Chapter 3, and in particular 'The First Business of the Court' and 'Move for the Division of the Legal Profession'.

legal system when orchestrating their protests. Within 70 years of settlement, New South Wales had achieved Responsible Government, and was a far cry from the settlement that operated under Captain Collins' tough and rudimentary Court.[44] Arguably, the meteoric rise of a formal justice system in New South Wales, promoted by the New South Wales Bar, had a significant impact on the British Colonial Office's agreement to allow the colonists to govern themselves. It should be of little surprise that many of the advocates who operated the colony's legal system were at the vanguard of the charge for self-government.[45]

As each of these examples illustrates, regardless of the genesis of the colony, advocates acted as an interface between the government and its laws. History repeatedly shows that when the people do not respect, or consider themselves to be bound by their own laws, then chaos ensues. Van Diemen's Land's resort to military rule, the overthrow of Bligh and the initial failure of the 'Wakefieldian' system in South Australia all stemmed from a lack of confidence and respect for law and its enforceability. On the other hand, Port Phillip's insistence on following the rule of law, and Western Australia's cooperative approach to Government reveals that there is a thin dividing line between civilisation and chaos, and that the conduct of advocates can do much to determine the manner in which an infant settlement will progress. Advocates who act as leading voices in social change, and demonstrate to the populace that their society's system of law will provide a measure of justice, ultimately enhance the stability and progress of a developing community.

Traditionally, in an adversarial system, advocates stand against each other.[46] In the colonial era, the Advocate General, who presented the case for the government, was cast in direct opposition to the advocate acting for the private citizen. The judge, discharging the role of impartial adjudicator, performed a different function again. Yet all three representatives of the court system had to bear in mind their higher duty to the justice system itself,[47] in performing

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[44] See Chapter 3, 'Responsible Government'.

[45] For example, William Charles Wentworth, ibid.

[46] For further information on the operation of an adversarial system of law, see Disney et al, above n 9, 832-837. The authors explain that in an adversarial court system, (such as Australia, England and the United States), the parties and their advocates play the principal role in gathering evidence and presenting it to the court. The parties are thus directly opposed in terms of the evidence they present to the court. An 'inquisitorial' system, which operates in countries such as France and Germany, places the onus on the court to gather evidence and question witnesses, rather than on the parties themselves.

[47] Lord Denning commented that an advocate's duty 'is not only to the client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.' See *Rondel v Worsley* [1966] 3 WLR 950 at 962.

their broader role as 'legitimisers'. It is an axiomatic common law precept that justice need not merely be done, but must be seen to be done.[48]

For the ordinary citizen, however, the most direct and obvious way in which advocates promoted the virtues of their colony's legal system was in providing a voice for the people, or at least the illusion that popular grievances would be heard. Frequently, the advocate's advice to individuals brought them into direct conflict with governmental policy. The adversarial system worked to ensure that the advocate's vital second function of providing a voice for the people could not be quashed, no matter how inconvenient it was.

Providing a Voice

Whatever definition of a barrister or advocate one adopts, one of the functions of a professional performing that role was to provide a voice for their clients. However, what remains contentious and a subject of debate, as we saw at the outset of this chapter, is whether the advocate's role was in some way essential to their society. History arguably settles that question in favour of the advocate, because the experience of each of the Australian colonies demonstrates the necessity of the existence of a group of people providing a voice for the population for Western democracy to function effectively. In instances where that voice was initially absent, people stepped up to perform that important function. Where that evolution proved impossible, as in the case of early Van Diemen's Land where there was rule by the gun, or because those calling themselves barristers had forsaken their obligations, as in South Australia, the result was respectively chaos and stultification.

The convict attorneys in New South Wales thrived simply because people needed someone with advocacy skills to communicate their legal problem. Judge Advocate Atkins required legal advice, as did the governors of New South Wales when faced with a legal issue.[49] Macarthur acted as spokesman for the New South Wales Corps, and even acted as prosecutor in court, so that the Corps could effectively govern the settlement their way.[50] Free settlers, who had become embroiled in civil disputes or criminal matters, frequently turned to the

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[48] This principle is demonstrated clearly in Administrative Law, particularly in the context of the 'Bias Rule'. For an explanation on the importance of concepts such as natural justice and rules against bias in judicial and administrative officers, see Roger Douglas, *Douglas and Jones's Administrative Law* (4th ed, 2002), and in particular Chapter 19 'The Rule Against Bias'.

[49] See Chapter 1, 'The First Legal Practitioners in New South Wales', 'Richard Dore and the Rise of the Convict Attorneys', and 'Use of the Legal System in a Period of Turmoil'.

[50] Ibid, 'Agitating for Change'.

convict attorneys in the absence of free lawyers, for even the voice of a convicted felon with legal training was better than no voice.[51]

Lay advocates John Pascoe Fawkner in Van Diemen's Land and George Stone in Western Australia were able to engage in advocacy work simply because there was no one else to fulfil that role. In New South Wales, in particular, the early governors quickly recognised that it would be futile to ban the convict attorneys from practice because their services were in demand by everyone. Michael Massey Robinson was actually granted a pardon so that he could act as clerk to Judge Advocate Atkins.[52] The only solution to eliminating the convict attorneys was to plead for 'respectable' lawyers to be sent out thus obviating society's need for the services of the disreputable attorneys. As each colony progressed, the importing of 'legitimate' barristers and advocates eliminated the need for lay advocates and convict attorneys, yet the increasingly respectable legal profession still caused problems for the colonial governors, all in the name of free speech.

Barristers William Charles Wentworth and Robert Wardell of New South Wales, advocate William Nairne Clark of Western Australia, and lay advocate John Pascoe Fawkner of Van Diemen's Land and Port Phillip, all operated their own newspapers in which they provided, at times, vituperative comment on the governors of the day. They argued their points under the banner of free speech and democracy, and used their advocacy talents to provide a voice of opinion from a section of the community that otherwise might not have been heard.[53]

Advocates similarly lent their support to the popular movements of the day, such as Responsible Government, anti-transportation campaigns,[54] and freedom of speech. In Port Phillip, barristers defended the miners charged with treason in the Eureka Stockade.[55] Advocates provided the people with a legitimate voice when grievances were relayed to the British Government, and their names were usually at the forefront of petitions, undoubtedly under the belief that they added a measure of respectability to the cause.[56]

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[51] Ibid, 'The First Legal Practitioners in New South Wales', and 'The Colony of Second Chances'.

[52] See Chapter 1, 'Richard Dore and the Rise of the Convict Attorneys' for the circumstances surrounding Robinson's pardon. See Chapters 4 and 6 respectively for further information on Fawkner and Stone's careers.

[53] See Chapter 3, 'Freedom of the Press' for specific details on this issue, and Part Two generally for further details on censorship in the other colonies.

[54] See in particular Chapter 5, 'New Judges in Port Phillip' for further information on Port Phillip's anti-transportation campaign and their reaction to the 'Pentonvillains'.

[55] Chapter 5, 'The Eureka Stockade'.

[56] The Port Phillip barristers in particular lent their support to a number of petitions, including anti-transportation

The point that advocates were a voice for their clients may seem so obvious that it is hardly worth labouring further, yet the effects of so patent a proposition are impossible to overstate. In performing what could be termed their 'demotic' role, advocates played a significant part in acting as engines of social reform and regime change. It is difficult to conceive the rapid ascension of each of the Australian colonies to Responsible Government without them. Their contribution to Australian society was to ensure that whatever the different paths taken by each of the colonies, it was a road travelled with a profound respect for the rule of law.

The universal appearance of advocates in Australia's early history is undoubtedly a major factor in what is arguably its greatest achievement - for unlike its English parent, or its American, South African or even Canadian cousins, the people of Australia achieved a bloodless autonomy, free of revolution, civil war or violent insurrection. This is the hallmark of a people who govern themselves according to argument and reason, and who are confident that their voice will be heard. Of course, there were undoubtedly advocates among the countries with a more violent history than Australia as well, and the presence of advocates does not ensure an enduring peace. However, the contribution of advocates as a protection for the people against tyranny, and the apparent effectiveness of that contribution in Australia are worthy of study.

Closely allied with their role in providing a voice for the people is the advocate's function of providing a check on excessive and detrimental use of power by the governors and other interest groups. For the colonial governors of the day, such 'interference' from the advocates was often unhelpful, unsolicited and definitely unwelcome. Governments that do not allow a society to argue against governmental policies ultimately lie at risk of rebellion and overthrow.

Providing a Check on the Exercise of Power by the Government and other Interest Groups

A profession of advocates was not constitutionally guaranteed in any of the Australian colonies. The Bar does not form a component of the traditional machinery of checks and balances on the exercise of power that one usually thinks of when considering the way in

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petitions and petitions for the removal of Justice Willis; see Chapter 5 generally. Across all of the colonies petitions were sent to the British Government requesting the installation of Responsible Government and Jury Trial; see, for example, New South Wales' efforts to gain trial by jury and William Charles Wentworth and Edward Eagar's respective roles in Chapter 3, 'Trial by Jury'.

which a democratic society works.[57] However, even a cursory analysis of Australian colonial history demonstrates that many advocates were, in fact, performing that practical role of providing checks and balances to the exercise of power in a number of ways.

Some advocates were able to perform this function in a direct way by acting as official advisers to the Governor. It was always a contentious question as to whose interests the Advocate General should serve. It was a potentially powerful position, and the question of allegiance was resolved differently depending on the individual advocate. In New South Wales, a succession of governors constantly bemoaned the lack of effective advocate generals who could assist them in enforcing Governmental policy.[58] In Port Phillip, Advocate General William Stawell acted in the Government's interest in issuing miner's licences at exorbitant fees, contrary to the wishes of the general populace. Members of the Port Phillip Bar redressed this imbalance by acting for the miners charged with treason following the infamous incident leading to the Eureka Stockade.[59]

In Van Diemen's Land, Governor Arthur considered that his Advocate General, Joseph Tice Gellibrand, was not acting in the Government's best interests as he favoured the interests of sections of the general populace, and Arthur contrived to remove him.[60] George Fletcher Moore so effectively performed his role in Western Australia that there were few overt conflicts between the Government and its people,[61] whereas Charles Mann of South Australia was so evidently in favour of the Colonisation Commissioner's political creed that Governor Hindmarsh's actions were consistently undermined.[62] Ultimately each Advocate General influenced the politics of the colony, whether for good or ill.

The influence that advocates wielded on government agendas was also reflected in the number of advocates who took up political or judicial office. With their thinking shaped by their experiences of life at the Bar, which so often brought them into contact with the issues

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[57] The 'separation of powers' doctrine, in which the Legislative, Executive and Judicial arms of Government are supposedly kept separate, theoretically provides a safe-guard against abuse of power, as each arm of government performs a separate function and works as a check against abuse or excess of power by another arm of government. For a modern day example of the difficulties in defining and enforcing the doctrine of separation of powers, and the principle that justice must be seen to be done, see the 'Nemer case' in South Australia, discussed by Chris Finn and Ryan Maguire, 'Nemer & the DPP', *Law Society Bulletin* April 2004, 20.

[58] See Part One generally.

[59] Chapter 5, 'The Eureka Stockade'.

[60] Chapter 4, 'Gellibrand v Stephen' and 'Stephen Resigns as Solicitor General'.

[61] Chapter 6, 'Dire Financial Straits'.

[62] See Chapter 7 generally, and in particular 'The South Australia Act', and 'Lawyer v Lawyer'.

facing the government and society of their day, the marriage between advocacy and public office was all but inevitable.[63] The propensity of advocates to fill positions in the Legislative Council, Executive or Judiciary is one that is still evident at both state and federal level today.[64] Those who became involved in politics often had a direct hand in drafting the colony's laws.

A position on the Legislature offered much scope for input from advocates. George Fletcher Moore from Western Australia was praised by the Colonial Office for the simplicity of his drafting of colonial legislation when he performed the role of Advocate General.[65] William Charles Wentworth of New South Wales became heavily involved in the drafting of the legislation that would become the foundation of Responsible Government.[66] In the lead-up to federation, when elections were held for representatives on the Legislative Council, advocates from all colonies were consistently elected to the office, and played a prominent role in the Federation debates, which did not go unnoticed by the newspapers.[67]

The Executive also frequently involved advocates in colonial Australia. In the days before Responsible Government, it was not uncommon for a judge such as Sir Francis Forbes of New South Wales, or John Lewes Pedder of Van Diemen's Land, to be involved in governing issues both as judges and as members of the Executive and even the Legislature. Such a merging of powers undoubtedly went against the fundamental tenets of the separation of powers doctrine, as one person could be vested with the power to draft and interpret laws, without being subject to the checks and balances provided by the other arms of government.

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[63] John Bennett provides a list of barristers in the New South Wales legislature between 1843 and 1856, which includes Wentworth, Brewster, Broadhurst, Cowper, Lowe, Darvall, Foster, Therry and Windeyer. See Bennett, above n 7, 57.

[64] In South Australia, barrister Penny Wong has been elected to the Federal Senate, and academic lawyer Linda Kirk is also a member of the Senate. Many of the people filling the top leadership positions also have law degrees, for example the Prime Minister, John Howard, Phillip Ruddock and Malcolm Turnbull.

[65] See Chapter 6, 'Dire Financial Straits' at n 70.

[66] Chapter 3, 'Responsible Government'.

[67] Colonial barristers had a big influence on the Federation debates. See Helen Irving (ed) *The Centenary Companion to Australian Federation* (1999) for information on the barristers involved in the lead-up to federation. The *Age* in Melbourne commented on 13 February 1897 at p. 8 that 'almost one-third of the nomination papers in Victoria for the Federation Convention have been lodged by lawyers' and noted that the oratory skills of the lawyer lent itself to a parliamentary career. The journalist was, however, imbued with the traditional distrust of the legal profession and was a little dubious as to the 'sincerity' and motives of the lawyer in parliament.

Chief Justice Forbes was certainly uncomfortable with this merging of his duties, and he sought to be removed from his position on the Executive as soon as practicable.[68] Chief Justice Pedder, however, resigned his post from the Executive with considerable reluctance, and only after the colony's newspapers highlighted the disastrous results that occurred when Pedder merged his duties by acting as Chairman of the Commission of Inquiry against Advocate General Joseph Tice Gellibrand, and then as a supposedly impartial judge in the case against Gellibrand running concurrently in the Supreme Court.[69] Pedder's position was criticised by his colonial counterpart, Chief Justice Forbes, and fortunately that incident highlighted the importance of having a judge unencumbered by other governmental duties.[70]

Advocates who were elevated to judicial positions played a crucial role in interpreting the colonial laws. A common function for the colonial judge was to assess whether a colonial law was repugnant to the laws of England, and to assess the fairness of laws under challenge in the colonial courts.[71] The importance of having an impartial, unbiased judge cannot be overstated, and Australia's colonial history in particular demonstrates how a 'rogue' judge could wreak havoc with the colony's legal system. Justice Willis of Port Phillip[72] and Justice Montagu of Van Diemen's Land[73] soon demonstrated the damage they could cause by undermining the advocates who served the legal system. Furthermore, recalcitrant judges like Justice Jeffcott of South Australia[74] and Judge Bent of New South Wales[75] provide illustrations of the detrimental effects of judicial neglect, as those colonies lost an invaluable source of effective dispute resolution between their citizens and government.

Whether advocates were making their presence felt as government lawyers, or were wearing the new hats of judicial, legislative or executive office, there is little question that they were disproportionately represented in the ranks of colonial government as the colonies marched towards political autonomy. Given the relatively low population base of the colonies at the time, this phenomenon is perhaps not unexpected. Advocates, by experience and inclination, were ideally suited to these roles in an evolving society. As a result of their involvement in

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[68] Chapter 3, 'The First Legislative Council'.

[69] Chapter 4, 'Stephen Resigns as Solicitor General'.

[70] Chapter 4, 'Arthur's Recall to England'.

[71] See, for example, Chapter 3, Chief Justice Forbes' role in New South Wales in 'The First Legislative Council', and Chapter 4, Justice Montagu's role in Van Diemen's Land in 'Montagu's Amoval from the Bench'.

[72] See Chapter 5 generally.

[73] See Chapter 4 generally.

[74] See Chapter 7, 'Sir John Jeffcott' and 'A Declaration of War'.

[75] See Chapter 2 generally.

the machinery of colonial government, it is impossible to sensibly demarcate the history of the profession of advocates from judicial history, general political history and legislative history. Their influence on colonial politics had not diminished by the eve of Federation, and even today, as we have already seen, members of the legal profession continue to involve themselves in the political affairs of the country.

What is interesting to observe is how advocates conducted themselves when they were wearing different hats, either as Advocate General, or playing an appointed role on the legislative, executive or judiciary. The responsibility of advocates in an adversarial system was to advocate their client's rights by putting forward or contesting and opposing arguments, and in each of the examples just discussed it is evident that this innate tendency to argue and oppose any given agenda was not shed once the governmental 'hat' was put on. In other words advocates remained advocates, to some degree at least, even when performing other roles in the government of their society.

Arguably, this led to the development of a culture within Australian colonial government that was inconsistent with an autocratic exercise of power. Advocates frequently met unilateral decrees issued by a governor with opposition; it was second nature for them to quarrel, object and analyse proposals in the light of legal argument.[76] Such scrutiny by this class of people led to an unwritten but vital check on the processes of power.

Advocates also formed a check on government agendas in a more overt way. Whenever the government threatened to take action that trammelled upon the rights of a private citizen, that person was entitled to challenge the decision in court; the most routine example being the state's requirement to prove criminal charges beyond reasonable doubt. In the civil sphere, advocates also made memorable stands against government 'tyranny', perhaps the most important being the freedom of speech and censorship litigation that took place across the colonies.

Many of the earliest newspapermen were advocates. Their vocal, politically charged and colourfully worded publications were printed and disseminated to the public in the name of free speech, much to the chagrin of the governors of the day. The colonial governors used the

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[76] Governor Darling of New South Wales in particular found that his attempts to exercise autocratic power were frustrated by barristers such as Wentworth and Wardell. See Chapter 3. Governor Hindmarsh similarly found that his desire to exercise autocratic power was stymied by Charles Mann, the Advocate General. See Chapter 7.

legislature and courts in an attempt to silence dissident and critical journalists. Censorship was, at its most base level, a governmental attempt to curb the rights of citizens in a free society. For example, Robert Wardell, in his capacity as editor of the *Australian,* directly challenged Governor Darling's position on censorship, and was defended by fellow barrister William Charles Wentworth.[77] To the south, Port Phillip's barristers rallied behind editor George Arden, who was unreasonably jailed for his attacks on Judge Willis and the government.[78] In Van Diemen's Land the Advocate General, Joseph Tice Gellibrand, fuelled Governor Arthur's ire by protecting newspaperman and advocate Robert Lathrop Murray from prosecution, despite the fact that he had published licentious letters about Arthur in the *Hobart Town Gazette.*[79]

Advocates were also in the front line of other campaigns that were fought in the name of a free society. Arguments against stringent tax laws, anti-transportation campaigns and petitions for jury trial were all essential areas that advocates helped to litigate, and the reforms that were achieved assisted in shaping the development and destiny of the colony.[80] Had strong advocacy not held the line in relation to these issues, Australia's worldwide recognition for frank and open speaking, and its healthy desire to hold its political leaders to account may never have reached full bloom.

Most importantly, Australia's colonial history illustrates the importance of advocates' contributions to the emerging colonies prior to Responsible Government. As a group, they were a catalyst for change and a retardant to autocratic power. Advocates were a voice for the people who spoke to colonial governments and to the wider world of imperial Britain, and by performing functions vital to the preservation of democracy, they assisted each of the colonies in laying the foundations of an eventual Australian nation with extraordinary swiftness and civility.[81]

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[77] Chapter 3, 'Freedom of the Press'.

[78] Chapter 5, 'Newspaper Warfare'.

[79] Chapter 4, 'Robert Lathrop Murray and the "Colonist" Letters'.

[80] See above.

[81] Frank Welsh in his history *Great Southern Land,* above n 19, stated at xxxii that one of his aims was to trace 'the process and explain the reasons for Australia's success and its emergence as an exemplar of what might be called Western, or liberal democratic values.' He also noted that 'one particularly striking characteristic of Australian history is the speed of development' and commented that New South Wales and Van Diemen's Land were 'unequivocal penal colonies, with representative civil institutions dating only from the 1820s, yet a mere thirty years later those colonies were self-governing societies whose democratic constitutions were well in advance of those in Britain.' This thesis argues that advocates played an important role in enforcing these 'liberal democratic values'.

It is little wonder that the Bar and the legal traditions that it embodies are celebrated by its members, but just as scrutinising the history of the Bar's beginnings reveals the institution's importance and virtues, it also unmasks a less flattering side to the way in which the Bar operates. It is to these less admirable qualities of the institution itself that we now must turn.

The Role of Myth – Examining the Institution of the Bar

While the achievements and influence of individual advocates can be analysed in detail, the role of the colonial advocates as collegiate foundation members of the colonial 'Bar' is not as clear. Newspaper records in each of the colonies referred to the advocates as collectively belonging to the 'Bar', but beyond these fleeting references, the institution of the Bar in Australia does not, until very recently, have a strong tradition of recording or scrutinising its own history.[82] Nevertheless, there is a surprisingly uniform conventional wisdom adhered to by modern-day barristers when they speak about the nature of their institution and the work that they do. Beliefs that are commonly propounded include the long and stable history of their profession, the superiority of their training for advocacy work, their ability to deliver justice, and their innate qualifications for judicial roles.

However, conventional wisdom can be dangerous unless it is routinely analysed and scrutinised. When comparing what the Bar says about itself against what we do know about the institution's history, a number of interesting questions begin to emerge. The starting point is to look at where the foundation for the modern Bar's rhetoric about itself lies.

In establishing the institution of the Bar in each colony, traditional British myths about barristers were imported.[83] Whether the colonies had fused or divided legal professions, and regardless of whether training programs were offered to 'currency lads' aspiring to become barristers, a common assertion was that barristers trained in an English Inn of Court were the only people equipped to perform advocacy work. It is an irony that these much-vaunted barristers in actual fact rarely received an education that would enhance their advocacy

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[82] Most Bar Associations now have a history committee, which is dedicated to supporting projects that preserve their early history. The New South Wales Bar Association has recently gone further and has incorporated the Francis Forbes Society for Australian Legal History, which has annual lectures on legal history topics and assists in the publication of legal history. It draws inspiration from the Selden Society in Britain. John Bennett, as discussed above, has also made a seminal contribution to the historical knowledge of Australian barristers, both through his work on the New South Wales Bar, and more recently, his continuing series on *The Lives of the Australian Chief Justices,* which indirectly deals with the Bar Australia-wide.

[83] See Introduction for further information about the development of the British Bar.

skills.[84] Furthermore, the majority of British barristers who trumpeted their qualifications were young and inexperienced when they arrived in the colonies, and admitted that they had difficulty making a living on the British circuits.[85]

In reality, the convict attorneys of New South Wales, solicitors in fused legal professions and lay advocates all performed a vital advocacy function for the public, and there is no evidence that their services were of a lesser quality. In colonies such as South Australia and Van Diemen's Land, the advocates considered themselves to be members of the 'Bar' regardless of whether they had been trained as a barrister. It was simply an enhancement of reputation to furnish a qualification from an English Inn of Court.[86]

Nevertheless, this claim to superiority, based around the aura of the Inns of Court, leaves a legacy in the way that the Australian Bar thinks about itself today, even though the era of the Inns of Court is now only of historical curiosity in Australia. The following handful of examples illustrates this point. Debate over the merits of division versus fusion of the legal profession, legal training programs for barristers, and the argument that selection of judges should only be made from the ranks of the Bar, all stem from ideologies promoted by the English Bar. The question is whether these ideologies have any basis in reality, and whether they serve the Bar as well as they ought. Overarching all of these issues is the question of how effectively the Bar represents the community it serves.

The Merits of Division versus Fusion of the Legal Profession

The institution of the Bar in Australia currently favours a divided profession in which advocacy work is the exclusive dominion of barristers. Nevertheless, one of the most fiercely debated questions recurrent throughout the history of the colonial Bar is that of the merits of division versus fusion.[87] Today, the 'correct' answer to this debate will invariably be framed by the Australian State that the advocate comes from, which dictates whether they are working as a barrister in a fused profession or divided profession.

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[84] See Introduction, 'The English Inns of Court'.

[85] Ibid, 'Outposts of Empire', and see Parts One and Two generally.

[86] Barristers such as Judge Bent of New South Wales proudly referred to their years of 'standing' at the Bar. Some aspiring colonial-born youths returned to England to train as barristers, for example William Charles Wentworth of New South Wales. George Milner Stephen also chose to train as a barrister in England despite the fact that such a qualification was not necessary in South Australia.

[87] For a detailed discussion on the issue of fusion and division of the legal profession, see J.R. Forbes, *The Divided Legal Profession in Australia* (1979) and Parts One and Two of this thesis.

Historically, there is little evidence in the period leading up to Responsible Government in 1856 that a divided profession worked better than a fused profession. The initial attraction of a divided profession was simply that the British profession operated that way, and in an infant colony trying to emulate British practices, it was logical that legal practitioners would aspire to a legal model similar to the system that operated at 'home'. The reality was, however, that in the early years of settlement other considerations were more important, such as the numbers of barristers and solicitors in the colony, and the size of the population and strength of the economy. Each colony made its decision on whether to operate a divided or fused profession based on their unique circumstances, and the distance between the settlements ensured that local rivalry played little part in the decisions made on the structure of the legal profession.[88]

By 1856 New South Wales and Victoria had divided professions, whereas South Australia, Western Australia, and Tasmania had fused professions. Queensland, on separation from New South Wales in 1859, retained New South Wales' model of the divided profession and always had a separate roll of barristers. As the colonies headed towards federation, Victoria converted to a fused profession, but in reality little changed in terms of historical membership of the Victorian Bar.[89] In the 1960s, the remaining states that had retained their fused professions all introduced the concept of an 'Independent Bar', while retaining the basic structure of a fused profession.[90]

This constant revision, re-evaluation and debate surrounding the structure of the legal profession continues to this day. Intricately entwined in the debate of fusion versus division is the question of membership of the Bar, and what constitutes the 'Bar'. The rhetorical justification for the course ultimately chosen has consistently been couched in terms of how the public could best be served by the legal profession. When New South Wales divided its

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[88] Disney et al, above n 9, 34 point out that 'physical separation from the early eastern settlements, their very small populations and the absence of strong vested professional interests fostered an independent approach to the initial organization of the profession in the other States'.

[89] For further information on the fusion of the Victorian Bar, see Arthur Dean, above n 7, Chapter 6, and Forbes, above n 87, 73-134. See below for further discussion of the events surrounding the fusion of the Victorian legal profession.

[90] Note that 'Independent' has been capitalised, to denote the fact that it is a Bar operating within a fused legal system. In a divided legal system, the Bar is referred to as the 'independent Bar'. See G. Sawer, 'Division of a Fused Legal Profession: The Australian Experience' (1966) 16 *University of Toronto Law Journal* 245 for details of Western Australia's and South Australia's moves towards an Independent Bar. See also Jack Elliott, *Memoirs of a Barrister* (2000) 208-209 for a brief account of his involvement in South Australia's Independent Bar.

legal profession in the 1830s,[91] and then over 130 years later when South Australia, Western Australia and Tasmania introduced their Independent Bars, the rationale was that barristers specially trained in the art of advocacy could better serve their clients.[92]

The public, on the other hand, frequently saw division of the profession as another example of legal snobbery, and an effort to fleece the public of hard-earned money.[93] Yet the legal profession took the issue seriously; the colonies with divided legal professions stated that it was not just about monopoly and money,[94] but also reputation. The 'refulgent' Benalla prosecutor who rose to fame in the *Bulletin* article of 1890 undoubtedly felt that justice would not be served by utilising the services of a solicitor untrained in the art of advocacy.[95] The New South Wales solicitors of the 1830s befell the same fate when New South Wales formally divided its legal profession, not because of their reputation, but simply because they were not trained in the art of advocacy.[96]

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[91] See Chapter 3 for the arguments for and against division of the profession, and in particular the solicitors' protests against the proposed monopoly and the effects it would have on delivering justice to the public.

[92] Murray Tobias QC, when speaking of the future of the independent Bars in Australia, conceded that an image overhaul was necessary, but strongly argued that 'no one seeks to deny that a strong, independent Bar of specialist advocates is beneficial to the administration of justice.' See 'W(h)ither the Bar?' in *Bar News* Spring/Summer 1994, 7, 10. Sir Francis Burt, the founder of the Independent Bar in Western Australia, stated in an interview that his reasons for practising solely as a barrister was a 'functional' one, as it was easier to do justice to a client's case without the pressure and demand of daily life in a solicitor's office. It was also easier to maintain a degree of 'objectivity'. See 'The Foundations of the Independent Bar' in *Brief: The Law Society of Western Australia* 19(7) August 1992, 11.

[93] Murray Tobias QC stated that 'it is unnecessary at this point of time to chronicle the attitudes of solicitors, the media, politicians and the public towards the profession in general and the Bar in particular. They are well known...we are told in practically every press or media report about the greed of barristers; we are informed that we all earn $7000 per day, 365 days per year; we are told that we are elite, arrogant, rude and insensitive. Stereotypical attitudes abound!' Ibid.

[94] The issue of whether the Bar is a monopoly is a sensitive one. An article on the 'Independence of the Bar' by a Victorian 'Staff Writer' in *Victorian Bar News,* Spring 1991, 28, stated that the Victorian Bar was not a monopoly, for while nearly all practitioners appearing in litigation in the Supreme Court were members of the Bar, the reality was that 'any one of the 7,500 barristers and solicitors in Victoria who are not members of the Bar has a right of audience equal to that possessed by a barrister.' The New South Wales Bar Association has been described as the 'most exclusive and highly-paid trade union closed shop' in the *Sun-Herald,* 22 September 1991, 19, but the NSW Bar Association defends itself by stating that anyone can train to become a barrister, and that it faces competition from other sources such as solicitor-advocates in large law firms. See Lee Aitken, 'Stars and Bars', (1992) 9 *Australian Bar Review* 119, 125-6. A further comment on the issue of competition and monopoly in the divided profession of New South Wales can be found in 'The Battle of the Bar', *Australian Financial Review,* 2 April 1996, 4, in which Chris Merritt makes the point that although solicitors can appear as advocates and may have the same degree of expertise, the market demands barristers. 'Given the same degree of expertise, it's the title that gives barristers their edge. And to work under that title currently requires extra study and a separate practising certificate.' He comments that if all lawyers could display the word 'barrister' in the title, then the marketing edge could diminish.

[95] *Bulletin,* 16 August 1890, 7.

[96] For more detail on the New South Wales solicitors' arguments against division of the legal profession, see Chapter 3, 'Move for the Division of the Legal Profession', and 'The First Meeting of the Bar'.

While such an attitude would not help the impoverished accused in the docks who were denied the opportunity of cheaper representation, it was an attempt to retain the highest possible standards of the legal system cultivated by ancient British tradition.[97] The spirit of the English Inns of Court was kept well and truly alive, as the ranks of the Bar were constantly infused with new blood from Britain. It did not matter that the efficacy of training in the English Inns of Court was being questioned in Britain itself; in New South Wales and Victoria, admission to an English Inn of Court was the easiest way to gain membership of the lofty Bar.[98]

Colonies with fused legal professions necessarily dealt with the question of membership of the Bar differently. It was a sign of kudos to call oneself a barrister and advertise services to the public in that capacity, but it did not matter if the advocates calling themselves barristers were not trained in an English Inn of Court, (although those who boasted such qualifications certainly pointed them out).[99] Rather, it was the title of 'barrister' that was important. Nevertheless, the more advanced the colony became, the more important it was for the legal profession to emulate British traditions. For smaller colonies such as South Australia, Western Australia and Van Diemen's Land, it did not make economic sense to divide the legal profession, but that did not stop those who appropriated the title of 'barrister' from imposing a theoretical division between themselves and those practising solely as solicitors.[100]

When we step away from the rhetoric surrounding the structure of the legal profession, the question of whether the public is best served by a divided or fused legal profession is not so easily resolved. The *Bulletin's* criticisms partially stem from the fact that the divided profession in Victoria could deny a citizen effective access to justice. The *Bulletin* posited that if the profession were fused, such a scenario would not have arisen.[101]

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[97] Ibid, 'The First Meeting of the Bar'.

[98] See Chapter 3, 'Reforms in the Education of Barristers'.

[99] See, for example, the South Australian advocates. Those who were trained as barristers in an English Inn of Court, such as George Milner Stephen and John Nicholls certainly made their qualification known, but other advocates who did not have Inns of Court training still saw themselves as barristers rather than solicitors; see Chapter 7, 'A New Direction in the 1840s'. George Stone of Western Australia similarly saw himself as a barrister despite a lack of formal training. When the colony introduced training for local lawyers, he took advantage of it so that he could legitimise his status and was thus formally called to the 'Bar' in 1858. See Chapter 6, 'Development of the Legal System'.

[100] Ibid. See also Chapter 3 generally.

[101] *Bulletin,* 16 August 1890, 7.

On the eve of federation, Victoria's legal profession did become fused amid renewed debate about the cost-effectiveness of litigation.[102] In reality, the fusion of that profession spurred the formation of a Victorian Bar Association, whose membership was confined to those who had formal training as a barrister.[103] The existence of the Bar Association ensured that the Victorian legal profession was fused in name only.[104]

In the 1960s, the states that began with fused professions all established an Independent Bar, with a group of lawyers setting up chambers and pledging to practise exclusively as barristers.[105] The public was thus offered additional choice when choosing legal representation in the courts. In an interesting twist in the merits of division and fusion debate, Tasmania now has two separate Bar associations, with one restricting membership to those who belong to the roll of the Independent Bar,[106] and the other opening its doors to members of legal firms with an interest and involvement in advocacy work.[107] Such practitioners are referred to as 'amalgams'. The Tasmanian Independent Bar most closely resembles the English Inns of Court, while the Tasmanian Bar Association represents a distinct shift from the old English paradigm.[108]

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[102] See Dean, above n 7, Chapter 6.

[103] The first Victorian Bar Association was short-lived, due to public backlash against the attempt to re-establish a monopoly despite the fact that the profession was now fused. The legal community was also divided as to the appropriate way in which to respond to the new amalgamation of the profession, with some barristers joining the Bar Association, and others being dubbed as 'non- Association' barristers. The first Victorian Bar Association was abolished on 4 February 1892, but reformed in 1900. See newspaper articles about the controversy, for example, the *Age*, 2 February 1892, 4 and 6, and the *Age*, 30 January 1892, 9.

[104] Dean comments at above n 7, 101, that 'owing to the ingenuity, resource and the will of the Bar to survive, the practical result [of amalgamation] was nil.' Those who did try to practise as 'amalgams' found it very difficult to operate their practices against the might of the Bar Association, and in the *Royal Commission on Law Reform, 1897-99*, T.P. McInerney gave evidence that 'any member of the Bar who did not join that Association was practically a pariah...It is the strongest trade union that was ever formed.' Dean notes at p. 103 that the Victorian Bar Association had been disbanded six years prior to McInerney's evidence, but his evidence does point to the fact that the Victorian Bar still retained their hold on the monopoly, which was formalised when the Victorian Bar Association was rekindled in 1900.

[105] Sir Francis Burt was the founder of the Western Australian Independent Bar in 1961. For an account of the events surrounding the formation of Western Australia's Bar, see *Brief: The Law Society of Western Australia* (1992) vol. 19(7), and in particular the interview with Sir Francis Burt at p. 11. For further information on the establishment of the South Australian Independent Bar, see John Emerson, *History of the Independent Bar of South Australia* (2006). The establishment of the Independent Bars was met with resounding approval by the Australian Bar Association, which pledged to give all possible assistance and aid to the fledgling Independent Bars. Garfield Barwick, then Commonwealth Attorney General, pronounced that 'the simultaneous emergence from the "amalgam" profession in so many places of nuclei of an independent Bar is a sign of growth and confidence within the profession, that the older-established Bars have likewise exhibited.' *Australian Bar Gazette*, 1963, p. 2.

[106] The Tasmanian Independent Bar was formed in 1996.

[107] The Tasmanian Bar Association opens its doors to all amalgam practitioners with an interest in advocacy.

[108] In 1996, David Bennett QC, then President of the New South Wales Bar Association, saw Tasmania's unique situation of hosting two Bar Associations that catered for different members as being 'complicated'. The Tasmanian Independent Bar was granted admission to the Australian Bar Association (ABA), whereas the Tasmanian Bar Association is not a member of the ABA. See *Stop Press*, No. 37, September 1996.

Regardless of one's opinion on the relative merits of fusion and division, it is clear that the Bar must not lose sight of the two issues that most concern the public: quality of representation, and cost-effectiveness of litigation. Unfortunately, as early Australian history demonstrates, the Bar is all too clearly seen as a monopolistic institution that does not attempt to keep its costs down,[109] and the quality of representation is not guaranteed by the mere existence of a divided profession or Independent Bar.[110] It is to the issue of quality of representation that we now turn, for as history shows, the quality of training for the Bar was always variable, even in the venerated English Inns of Court.

Training

The modern-day Bar habitually cites the long-standing traditions of its institution, and the quality of its training is used to support its claim to produce the best and most skilful barristers. Held up to the light of history, this particular claim is highly questionable. First, it assumes a stability in the institution of the Bar that has never existed, for while barristers have existed for many centuries, their professional institutions have had a chequered and dynamic history. What is meant by a barrister in 1706 and 2006 is in fact very different, and when considering their level of experience, education and training it is not sensible to view the traditions of the Bar as being immutable over time.[111] Second, perhaps the most variable constituent of a barrister's experience over history has been the level of education and training received. For example, as late as the second half of the twentieth century there were senior counsel propounding the old theory that basic advocacy skills such as cross-examination could not be taught, because a true cross-examiner is born, not taught.[112]

The fact that each Australian State has its own unique legal system, with different legal training programs and variable criteria for membership of the Bar, reflects the fact that

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[109] See n 93 and n 94 above.

[110] There are signs that the Bar, in the face of increased competition, is now beginning to address some of these issues. David Bennett QC, in response to the threat posed by the solicitor advocate in New South Wales, stated that 'we need to do more to maintain and improve advocacy standards so that our excellence and pre-eminence in our core field remains.' *Stop Press,* No. 29, December 1995.

[111] See Introduction for a brief overview of the history of the English Bar and training of barristers in the Inns of Court.

[112] See, for example, Jack Elliott's views in *Memoirs of a Barrister,* above n 90, 27 where he records a conversation between himself and fellow barrister Roderick Chamberlain in which Chamberlain states that cross-examination 'is not something you can learn from a book'. In the last twenty years, there has slowly been a shift in this wisdom, and it is accepted that advocacy is a skill that can be taught, or at least enhanced. See, for example, Mr Justice Hampel's opinion that 'at last the myth that advocacy cannot be successfully be taught has been exploded.' *Victorian Bar News,* No. 59, Summer 1986, 11.

historically each colony began its life with little reference to and intercourse with the other Australian colonies. Despite this lack of communication between the colonies, one universal commonality was the fact that barristers who boasted training from and admission to an English Inn of Court regarded themselves as being superior to other advocates and lawyers.[113]

The proponents of the view that barristers are better trained are, it seems, those who gain something by perpetuating it. The first Australian 'Bar' was established by fortune hunters: barristers and solicitors from Britain who generally had limited legal experience and limited financial resources,[114] or lay advocates with no legal training at all.[115] The 'myth' surrounding the institution of the Bar was simply a convenient means of allowing one group to displace another group. As the definition of the 'Bar' changed, groups of advocates were displaced, all in the name of justice. To take the experience of New South Wales, British solicitors displaced the convict attorneys, and then British barristers replaced British solicitors.[116] Irish barristers dominated over English barristers in Port Phillip.[117] In fused colonies, those with formal qualifications as barristers attempted to achieve precedence over those who were merely solicitors, but solicitors used the title of barrister as a sign of prestige.[118] Eventually, Australia-wide, Australian-born barristers replaced the British migrant barristers.[119]

Each new wave of 'barristers' perpetuated the same gate-keeping myths, all using their 'superior' training as justification for their position. The assumption that a British background made a professional more qualified to appear in court would have naturally appealed to the leanings of a colonial society which viewed itself as indisputably British.[120] It was also a

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[113] For example, John Nicholls of South Australia felt the need to write to the *South Australian* to emphasise the fact that he was a barrister of ten years standing, and not a mere solicitor. See Chapter 7, 'A New Direction in the 1840s'. Chief Justice Francis Forbes and Justice Dowling were also among the ranks of barristers to express their disdain for mere solicitors and attorneys; see Chapter 3, 'The First Meeting of the Bar', and Forbes' refusal to admit James Holland as Solicitor General as he was not admitted to the Bar in England in Chapter 3, 'The First Business of the Court'.

[114] See in particular Chapter 5 and the Irish barristers who saw better prospects practising law in the colonies. All of the colonies had barristers and advocates with similar motivation for coming to the colonies.

[115] See in particular the experiences of lay advocates in Chapter 1 in early New South Wales and Chapter 4 in Van Diemen's Land.

[116] See Chapter 3.

[117] See Chapter 5.

[118] See especially Chapter 7.

[119] Chapter 3 in particular deals with the rise of the 'Australian' barristers, although this topic is largely beyond the timeframe of this thesis.

[120] On 24 July 1871, the *Australian Jurist*, vol. II, no. II, xiii, which had been critical of the fact that barristers could gain their qualifications with 'a fixed period of study at an Inn of Court, and the consumption of a specified number of dinners', was pleased to report that colonial barristers could now sit for exams locally at

difficult proposition to test, and it is unlikely that the colonial barristers were interested in scrutinising the issue too closely. To do so might interfere with the economic monopoly that each new wave of advocates relied on to make their living. It was left to the 'non-barrister' advocates that were relegated to the outer, and journals such as the *Bulletin* to question the veracity of barristers' claims about their institution.[121]

There was some reason for scepticism. History shows that quality of training has not always been high on the agenda. The British Inns of Court, in actual fact, offered very little useful instruction on advocacy at the time when Australia was settled, attracting criticism from eminent jurists including Lord Blackstone.[122] The approach adopted in each of the Australian colonies, at least during their early history, did not improve on the English position. Legal training within Australia was a haphazard affair prior to 1856 and marked by a perhaps misplaced deference to the disorderly British model.[123] After 1856, each colony and State eventually developed their own training programs, with little reference to what the other States were doing.[124]

While this superior 'forensic' training of barristers may have been a convenient way to establish a monopoly in colonial days, this convention should not stand in the way of more structured research and analysis into the question of legal training with a view to improving advocacy services. While inroads are finally being made, a considerable amount of work on the topic remains to be done. There is simply no data either way to suggest, for example, that members of the Independent Bar in the fused professions are the best people to perform the work.[125]

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the University of Melbourne. It was a sign that society was moving away from the notion that barristers trained in the British Inns of Court was the only real option.

[121] See, for example, the solicitor Francis Stephen's comments about the Bar in Chapter 3.

[122] See Introduction, 'The English Inns of Court'.

[123] New South Wales developed its own legal training program for barristers in 1848 under the auspices of the *Barristers Admission Act 1848 (NSW)*. See Chapter 3, 'Reforms in the Education of Barristers'. Other colonies did not follow suit until after 1856.

[124] The lack of consistency and formality in training is is highlighted by the fact that barristers from the Independent Bars in South Australia, Western Australia and Tasmania until very recently have not been required to undergo specialist training. The basic university law degree and admission to the Supreme Court entitles the holder of the degree to practise as both barrister and solicitor. The States of New South Wales, Victoria and Queensland, in contrast, require further training before admitting the recipient to their respective Bars. While specialist advocacy programs are now being established in States with a fused profession, such moves are recent, and still require refinement. The question of how and to what degree advocacy skills can be taught remains a divisive one, and resolution of this issue is not aided by the lack of empirical research into the efficiency of the training models that are presently in use.

[125] The Honourable Sir Anthony Mason, in reflecting on his years on the High Court Bench, did make the observation that 'the standard of advocacy in a fused profession does not match that of an independent Bar. My firm conviction on that score is the outcome of hearing arguments presented to the High Court of

The importance of having quality advocates is also demonstrated by the retention of yet another British Inns of Court tradition, namely that the majority of judges are still chosen from the ranks of the Bar, supposedly because of their unique training.

Selection for the Judiciary

Despite the fact that British tradition suggested that only barristers should be promoted as judges, the majority of the Australian colonies did not have experienced barristers filling the office of judge or judge advocate. David Collins, the first Judge Advocate of New South Wales, had no legal training,[126] and while William Mackie of Western Australia had some legal training, he was never actually admitted to the Bar in Britain.[127] Likewise, James Simpson of Port Phillip was not legally trained in any sense of the word.[128] Yet all three men performed admirably in administering their respective colony's court system, often under difficult circumstances, and when there was a push for barristers trained in the English Inns of Court to be appointed as judges, their replacements were not necessarily better at their job simply because they were said to have had the requisite training and experience. Judge Jeffery Hart Bent, despite constantly alluding to his status as a barrister, did not perform well as a judge in New South Wales.[129] Justice John Lewes Pedder of Van Diemen's Land was young and inexperienced,[130] Justice John Jeffcott of South Australia was disinterested in the position he filled,[131] and Justice John Walpole Willis of Port Phillip abused his position of power to the detriment of the community.[132]

Australia over many years.' Mason did, however, applaud the development of the Independent Bars in Western Australia and South Australia, and it was his view that 'it has brought about a marked enhancement in the standard of advocacy in both states.' See Anthony Mason, 'The Independence of the Bench; the Independence of the Bar and the Bar's Role in the Judicial System' (1993) 10 *Australian Bar Review* 1, 6. Observations such as this ideally require further analysis, given that Bar training programs in the Independent Bars were not instituted until after Mason's time on the High Court. It would be interesting to know what, in particular, led to such an improvement in the quality of advocacy from those states. One possible answer is the increased focus in the law schools on practical training as a part of the law degree, but barristers and solicitors alike receive such education.

[126] See Chapter 1, 'The Convict Problem'.

[127] See Chapter 6, 'False Rumours of Abandonment of the Colony'.

[128] See Chapter 5, 'Attempts to Establish Legal Infrastructure in the New Settlement'.

[129] See Chapter 2.

[130] See Chapter 4.

[131] See Chapter 7.

[132] See Chapter 5.

South Australia, which was established as a convict-free and traditional 'British' colony, had chosen Sir John Jeffcott as its first judge because it wanted to follow British practice in appointing a member of the Bar. In doing so, it overlooked the application of Richard Davies Hanson who only had the qualifications of a solicitor and not of a barrister. Ironically, Hanson was later to become Chief Justice of South Australia's Supreme Court despite his lack of Inns of Court qualifications, and he performed that role much better than many of his predecessors who were said to have the right qualifications.[133]

The belief that barristers are the best candidates for the office of judge persists to this day with the preponderance of modern judicial appointments still being taken from the ranks of the Bar.[134] Today, while in the minority, there are well-regarded judicial appointees from the ranks of solicitors and academia.[135] Yet questions remain over the appointment of non-barristers as judges, particularly as to their lack of 'forensic training' and court experience.[136]

There has been much recent criticism surrounding the question of judicial practice and the process of judicial appointment.[137] It will always be extremely difficult to answer these criticisms given the paucity of analysis of the role of judicial training, or any measurement of judicial performance.[138] What is clear is that these issues are likely to persist as long as the prevailing view that the Bar automatically ensures a good quality of judge is not challenged.

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[133] Chapter 7, 'Choosing a Judge for South Australia'.

[134] Chief Justice Macrossan of Queensland was of the view that 'a significant lowering of judicial standards would result from a move away from the Bar as the general source for appointments. The Bench and the Bar are the specialists in litigation, the work which daily occupies the courts. The relevant expertise is to be found amongst their ranks rather than elsewhere.' See *Queensland Bar News*, No.42, December 1992, 16, 18.

[135] Justice Kirby of the High Court of Australia frequently refers to the fact that he was a solicitor before he was a barrister, was only at the New South Wales Bar for seven years (during which time he travelled extensively), and was never appointed a Queen's Counsel. He is not the traditional proto-type of a judge. See Michael Kirby, 'Seven Ages of a Lawyer' 25 October 1999, reproduced on the High Court website at <www.hcourt.gov.au/speeches/kirbyj>. In the Federal Court, one example of a non-Bar appointee is Justice Finn who was an academic prior to his appointment to the judiciary, and Judge Herraman of the South Australian District Court was a solicitor. Many appointees to the Federal Administrative Appeals Tribunal are solicitors, for example Deputy President Jarvis and Senior Member Dunne of the Adelaide Registry were both partners of their respective law firms prior to being selected as Tribunal members. The lower courts and tribunals are more likely to utilise the skills of solicitors and academics than the Supreme, Federal and High Courts.

[136] Sir Anthony Mason was of the opinion that a barrister was more likely than any other to be equipped with the 'necessary independence of mind and skills to serve as a judge'. He conceded that there were successful judges made from the ranks of academia and solicitors, but believed that in the main, 'the notion that lawyers inexperienced in court work can readily be transformed into competent judges by the simple expedient of a crash course is a dangerous prescription.' See Mason's article 'The Independence of the Bench; the Independence of the Bar and the Bar's Role in the Judicial System' (1993) 10 *Australian Bar Review* 1, 3.

[137] See, for example, Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' [2003] *Melbourne University Law Review* 32.

[138] Justice Kirby of the High Court of Australia has long been a proponent of judicial training, as the function of a judge is so different to that of an advocate, but he states that his ideas have met with considerable resistance

Representative of the Community

The final issue to be considered, out of many that could be addressed, is the oft-made assertion that the institution of the Bar is representative of the community it serves. Of course, this largely depends on what is meant by 'representative'. As we have seen, the presence of colonial advocates in society as a class of people representing the interests of their clients was a necessary part of the functioning of Australian democracy. However, the degree to which the advocates resembled their clients as a matter of nationality, wealth, social standing, religion, ethnicity and gender is a very different question.

From its earliest origins, the Bar in Australia showed a tendency to become an increasingly homogenous group, with strict 'gate-keeping' rules that prevented it from being truly representative of its community. Much fun has always been made of the fact that barristers wear gowns and horsehair wigs, giving the illusion of lofty, self-important people elevated above that of the humble citizen they represent.[139] However, the adoption of this garb was no accident. It arguably reflects a conscious choice by the Bar to appear the same; that is, to homogenise themselves.[140]

In early colonial Australia, imposing and enforcing restrictions in the Bar's ranks was a daunting challenge given the initial variety and diversity of persons claiming to perform advocacy work. We have already seen how the history of advocates in the colonies can be characterised as progressive waves of takeovers by different groups trying to seize control of the monopoly of advocacy work. That phenomenon was accompanied by a trend that saw the members of the Bar become increasingly similar, not only in terms of training, but also in terms of social, racial and religious backgrounds as well.[141] When the convict attorneys were

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until recently. See his speech given at a seminar in Ireland, which is now listed on the High Court of Australia website, 'Legal Institutions in Transition: Modes of Appointment and Training of Judges: A Common Law Perspective', 8 June 1999 at:
<http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_judicial2.htm>.

[139] See, for example, the *Bulletin* article quoted at n 1.

[140] For a discussion on the gradual adoption of wigs and gowns in the Australian colonies, see Rob McQueen, 'Of Wigs and Gowns: A Short History of Legal and Judicial Dress in Australia' (1999) 16(1) *Law in Context (Special Issue)* 31. McQueen also makes the point that barristers often used wigs and gowns in the early colonial years to strengthen the demarcation between barristers and solicitors, and uses the members of the South Australian Bar as a case in point. See also Chapter 7 of this thesis, 'The Return of the Pettifogger'.

[141] In the period 1788 to 1856, the barristers and advocates were universally male and British. The biggest points of differentiation were initially the convict attorneys who practised as advocates, and who were soon ousted as a result of their social and legal status; see Part 1. After the convict attorneys lost their battle for their right to practise law, the Irish barristers represented the greatest diversity within the ranks of the Bar, along with

prevented from practising the law in New South Wales, for example, their emancipist clients were denied the use of a legal representative who was in a socially similar situtation.[142]

There are now attempts to diversify the ranks of the modern Australian Bar, for the tendency for exclusion, which was woven into the fabric of the early institution, is still evident. The issue of women in the law is particularly salient in today's society, for, while women now often outnumber men in university law courses, relatively few choose to become barristers.[143] Similar issues apply for Aboriginal lawyers in the profession, and other ethnic groups.

Negative focus on the above issues facing the modern-day Bar is prevalent in the media, and it is unfortunate that attention on topics such as these overshadows the positive contributions that the Bar has historically made to Australian society. Nevertheless, the challenge that lies ahead for the Bar in each State is to recognise this criticism, and to be seen by the public to address the issues that have been raised. Too often, the tendency for barristers and critics of the Bar alike has been to resort to attacks that are no more than polemics, thus wasting the opportunity to give serious consideration to what lies behind long-standing tensions and to make real improvements.

This chapter has not set out to provide an exhaustive list of these tensions, or to provide definitive answers, but the examples used do illustrate the value of surveying the past in seeking the solutions to problems as they arise. With that in mind, now is an opportune time to return to the particular criticisms raised a century ago by that sharp-tongued *Bulletin* journalist who took pot shots at Australia's 'eloquent birds of prey'.

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the few Catholic lawyers. For a discussion of the Irish Bar, see in particular Chapter 5. There were certainly no female lawyers during this time, or lawyers from outside the British Isles.

[142] For evidence that many emancipists preferred to use an emancipated advocate, see Chapter 2, 'Politics'.

[143] In Western Australia, for example, statistics compiled as at 30 June 1998 showed that there were 2708 lawyers, 31.5% of which were women. Of the 134 resident barristers practising at that time, only 11 were women. See *Brief: The Law Society of Western Australia*, 26(5), June 1999, 5. The under-representation of women on the Bench has also been a topic constantly attracting discussion. South Australia's Supreme Court recently made news when in June 2006, for the first time, an all-woman Court of Criminal Appeal was constituted for the first time. An editorial in the *Advertiser* pointed out, however, that it was symbolic of how slow progress has been since the appointment of the South Australian Supreme Court's first female judge, Dame Roma Mitchell, 41 years ago. 'More than half of all law graduates in South Australia each year are women yet of the 13 Supreme Court judges...only three are female.' The editor opined that 'Justice needs the balance to reflect the society with which it deals', and felt that 'the State Government should be proactive in the appointment of female judges, magistrates and Queen's Counsel – and the judiciary must be prepared to accept them on equal terms.' *Advertiser*, 23 June 2006, 16.

History's greatest virtue is its capacity to add richness and texture to modern debates. While it cannot be claimed that the answers to all problems and obstacles facing the modern Bar lie in an examination of the past, history can assist in identifying why things are the way they are now, and what questions should be asked about one of our society's most fundamental institutions. What is absolutely clear is the need to debate the issues further, in the hope that the important functions performed by advocates throughout our history continue to protect Australian society as it evolves during the next two hundred years.

What, then, does the story of the colonial Bar in Australia have to say in response to the criticisms levelled at it by the *Bulletin's* journalist in 1891? This is a pertinent question given that journalists still vocally propound many of the same criticisms today.[144] It is too simplistic to liken an advocate to the mythical snake that feeds upon its own tail. If there is one lesson that emerges from the swift and awe-inspiring climb of the Australian people to colonial self-government from 1856, it is the advocate's pivotal role in ensuring the smooth functioning of a Western democracy governed according to the rule of law. Where advocates were not solicited, people naturally grasped the opportunity to perform that role, and acted as a crucial interface to inevitable tensions between the government and its people.

This point is illustrated dramatically by the many immediate and subtle ways in which advocates influenced the progress of Australian colonial society. The causes that they presented, and the direct hand that advocates as a class of people played in the social and political events of colonial Australia, demonstrate their enormous and largely uncelebrated influence on Australia's history. It should be noted, however, that, while Australian history illustrates the advocates's contribution to colony building with unusual clarity, the Australian experience is not unique. Advocates undoubtedly made a similar contribution to the establishment of other Commonwealth and Western democracies, and this may provide a rich field of comparative study.

While it is important to celebrate the advocate's essential and historically undervalued contribution to society, the Bar as an institution is certainly not beyond criticism. It is often

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[144] See, for example, the 'Current Issues' section of the *Australian Law Journal* edited by Justice Young, which frequently refers to articles written by journalists that attack the legal profession and the judiciary. All of the nation's newspapers frequently publish critical articles, which question everything from the representativeness of the legal profession to the salaries granted to judicial officers.

unfavourable comment from outside the cloistered ranks of the Bar that provides the true catalyst for change. Criticism of the Bar has naturally increased as the society within which it operates has transformed. The technology and communications boom of the late twentieth century has exposed more than ever before the failings of the institution. The rise of feminism, multiculturalism, and the accessibility of the Internet, which provides the public with ready access to legal information, has also influenced the public's perception of the Bar.

That advocates will survive this onslaught of issues is a near certainty; their necessity to a Western democratic society ensures this. Whether or not advocates continue in the same classically defined mode familiar to advocates practising today is a far more equivocal proposition. However, the key to survival for today's advocates is likely to rest in understanding and examining in a more objective way their origins and place in the society they now serve. The real risk for the modern, classically defined barrister and the Bar Associations would be to cling to the conventional wisdom about the Bar that has always sustained the institution in the past and which is increasingly proving less satisfactory to contemporary Australia.

The first steps towards a more introspective approach are slowly being taken. Legal history projects are being actively pursued Australia-wide.[145] Issues such as training, gender equality and representation are more clearly on the agenda at the outset of the 21st century than ever before. Even the old debates about fusion and division, and junior counsel and senior counsel divisions are being invigorated and examined, hopefully with fresh eyes. Access to justice remains a driving factor and the Bar recognises, more than ever before, the need for economic value for return to its clients.

Every indicator points towards modern advocates grasping the truth about their inheritance, which is the sheer dynamism of the history of advocacy. The English Bar, now adopted on Australian shores, has a tradition of change that spans nearly a millennium. It can be difficult to recognise the broad changes that have occurred over the centuries, and when faced with a challenge to traditional beliefs it is all too easy to want things to remain the same. Chief Justice Forbes in 1827, when contemplating the issue of attorneys ranking equally with barristers, candidly stated that he did not support such a move, and that such a precedent 'does

[145] See, for example, the Francis Forbes Society at <www.forbessociety.org.au> and discussed above n 82, and the Queensland Supreme Court's History Program, described at <www.courts.qld.gov.au/schp/about/>.

certainly overturn all my preconceived notions.'[146] Recognition and examination of preconceived notions is essential to the continued survival of the institution, and reforms that are made will diminish, if not silence, the number of the Bar's harshest critics.

[146] Forbes to R. Wilmot-Horton, 22 March 1827, CO 201/188, f. 65.

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