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# The Port Phillip magistrates, 1835–1851

James Theodore Ivan Rangelov



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Victoria University  
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Rangelov, James Theodore  
Ivan  
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# To my darling Michelle.

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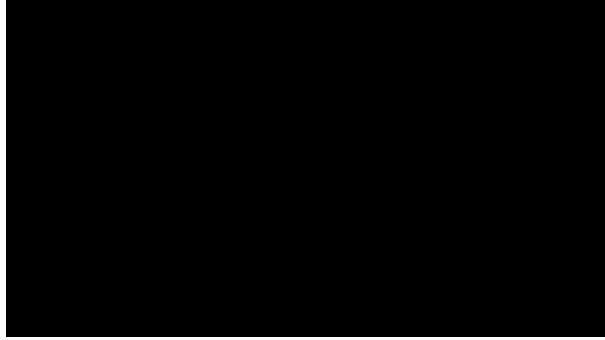
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## STUDENT DECLARATION

I, James Theodore Ivan Rangelov, declare that the thesis entitled 'The Port Phillip magistrates, 1835–1851' is no more than 100,000 words in length, exclusive of tables, figures, appendices and references. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise stated, this thesis is my own work.





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# Abstract

SOCIAL HISTORIES OF how people lived in the early years of the Australian colonies have generally underestimated the significance of the magistracy. This dissertation undertakes a detailed legal examination of a sample of the cases brought before the magistrates of the Port Phillip District, as Victoria was then known, in the 1830s and 1840s. Extant magisterial records demonstrate the crucial importance of these ‘gentlemen’, so styled, in enforcing collective norms of behaviour, stabilising an otherwise disorderly population in raw conditions, and thereby providing a bridge between English and colonial social structures.

These court records from early Port Phillip open a surprisingly revealing window into the conflicts, aspirations and tragedies of the colonists and the Indigenous people. Courtroom decisions vividly illustrate details of this developing society, the types of men sent to govern it, the administration of the local population, and the broad transformations taking place in this pre-Goldrush period. The magistracy was one of the few institutions that survived the migration process relatively unchanged, and in its turn provided a pivot on which colonial changes turned. Its significance was as much economic as social and cultural.

As colonial men, the magistrates themselves struggled in a daunting context. They faced the lack of a traditional English social order, a frontier society tranquillised by alcohol, and an absence of stabilising kinship networks. They were also caught up in political and status anxieties of their own, bit players in the larger context of a transplanted authority system where the rules were not so clear as they were in England, where their own biographical details are central to the larger story of their institution. In depicting these men with all their individual virtues and faults, this thesis presents a colourful and human account of the first Port Phillip magistrates and establishes that their influence, both benign and malignant, was profound.

# Introduction

THIS PRESENT WORK is written by a Legal academic with an interest in Social History rather than a Social Historian who has ventured into the arcane world of Law. This work consequently is intended to concentrate on those aspects of social science practice that appeals to lawyers – in particular in the use of technical legal language – and then to relate these understandings to the rather different project of scholarly History. The empirical core of this work is the substantial documentation of cases contained in the Court Registers from the Port Phillip District in the 1830s and 1840s. What do these determinations regarding the lives of those who came before the Bench tell us about this society? What was the mindset of these magistrates? How did their work influence the kind of society being constructed in the colonial period? These are our three main questions.

This work breaks new ground. The traditional accounts of pre-colonial Victoria emphasise the transplantation of gentry culture (Paul de Serville) or the political and social contests among the earliest settlers (A.G.L. Shaw). There is considerable attention paid to the physical appearance of early Melbourne (Robyn Annear) and particular accounts of important institutions such as the Melbourne Club. Instead, the method adopted here uses the work of Alex Castles, Mark Finnane and others to interrogate the extant Court records.

The cases reported in this study come from the four magistracies in early colonial times – Melbourne, Geelong, Portland and Alberton. We are fortunate to have such a rich legal record of such a society. The missing cases, lost to posterity through the lack of proper archives in these courthouses, would not change the overall picture. The Melbourne Court Register for the year 1839, for example, is lost. The Alberton records were only saved by chance. Symptomatic cases have been selected for detailed examination. These cases are representative and were selected by using the twin criteria of typicality and factual interest.<sup>1</sup> In terms of

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<sup>1</sup> During a wonderful six-hour discussion with the late Alex Castles in September 2001, Professor Castles was asked for advice on the methodology of case selection.

methodology, Alex Castles' advice was to select cases that were typical of an area under examination and then to select those cases that were factually interesting. This is the applied methodology in case selection used here.

Given legislative intervention, general magisterial penalty paradigms were established. Magisterial discretion, however, could be and was exercised. Patterns appeared suggesting that discretion was exercised in cases that demonstrated 'circumstances of aggravation'. In these instances, the magisterial Bench would levy the maximum allowable penalty. In cases where the facts revealed contrition, regret, co-operation or reconciliation with the plaintiff-master-constable, the Bench would use its discretion and admonish or levy the minimum allowable penalty. The exercise of discretion therefore became a matter of personal inclination or disposition. These inclinations or dispositions were naturally linked to the belief systems and world-view of the individual magistrates. As the magistrates derived from the 'elite' portions of colonial society and we are aware of the common inherited belief systems of that sector of English society, generalised observations are then possible.

We begin this account of a particular strand in legal history with a snapshot of colonial Australian life. Melbourne in the 1830s and 1840s, the centre of the Port Phillip District, was a frontier society, a 'new province for law and order' where those who were elevated to adjudicate in the lives of others were themselves just as likely to number among the miscreants. The American West – as famously depicted by Hollywood – was just as lawless, but was tamed by lawmen that supposedly exemplified the highest ideals of British justice. On the other hand, there were few recognised heroes among the lawmen in the Australian colonies. In this raw society, where there were as yet none of the bonds of family, let alone a settled social structure, the issue of who was fit to dispense local justice was by no means a simple one. So the colonists fell back onto the ruling English idea of 'polite society' and relied on those regarded as 'gentlemen' to provide social and legal leadership. Even when these gentlemen misbehaved in public, notably in their propensity to settle differences by duelling, they remained

gentlemen by definition, and therefore eligible to serve as magistrates. To offer a Commission of the Peace as a magistrate to a colonist was a key strategy of political control for the colonial Governors; the favoured colonist in his turn accepted the magistracy as a means of social mobility.

Several familiar British institutions, such as the Clubman groups, fraternal societies and Quarterly Assemblies, were transplanted to this frontier society in an attempt to give these gentlemen the leverage they needed to carry out the leadership role to which they had been entrusted. Many of these foreign institutions were insufficiently adaptive to the frontier conditions and did not flourish in the new context. Others, such as the gentlemen's clubs, did succeed in taking root, but they did not prove relevant to the business of keeping social order. The basic underlying English class structure did not survive the journey to the other side of the world, and attempts to found a 'Bunyip Aristocracy' in the Australian colonies was unsuccessful. One significant exception to this general pattern was the transplanted institution known as the magistracy. The magistracy served this colonial society well, despite many challenges and the occasional bad press it received, essentially because it had deep roots in the metropolitan culture. The argument of this thesis is that the magistracy played a role, largely not understood by historians, in easing the transformation of a state-controlled economy into a developing capitalist one. Before the emergence of the labour movement and modern political parties, there was limited scope for such transformations and where they occurred without a sophisticated legal system social disruption was often the result. By way of contrast, the experience of English-speaking colonies in the modern period was coloured by the existence of the English magistracy.

This argument takes us, naturally enough, to a consideration of the English magistracy in its original form and setting. The institution is ancient, dating back to feudal times around 1195. Justices of the Peace were part of the system of preventative justice instituted by the English monarch as a means of cementing a social compact between the ruler and his or her subjects. The JP's power was not

merely secular but extended into the religious domain – his duties included the enforcement of Church ordinances, and he later had a say in whom the clergymen could marry. The Justices possessed local knowledge of their parish affairs combined with an authority born of central government.

These Justices were powerless in the face of mass popular uprisings, such as Wat Tyler's Rebellion of 1381, but for the most part their accumulation of other official duties, such as coronial and sheriff functions, gave them a degree of local power that was undeniably potent. Eventually the Crown and the Commons wrested for control of the Justices of the Peace. It was this relative autonomy enjoyed by the Justices at the local level that made them more than merely the puppets of the monarch that Marx imagined. The magisterial authority enjoyed by the Justices was based in part on their local loyalty, for it was they in the early stages of capitalism that protected the parish from strangers as the proportion of migratory labourers and vagrants grew. It was they who dealt with violent acts committed inside the confines of the parish. And it was the Justices who speedily resolved local grievances between master and servant. Their class bias was evident in these determinations, and this image of them as glued to the values of the landed gentry followed them out to the Australian colonies. The matrix of class-parish-Crown had become the dominant identification of the English magistrates.

It is hardly surprising that the power to appoint magistrates was included in the tool-kit of the early Governors of New South Wales. Although the founders of this penal settlement assumed a constancy in social relationships that would carry over from Britain to Australia, according to some historians a process of 'perpetual transition' quickly set in. The class-parish-Crown matrix was disrupted by the presence in their new jurisdiction of so many unfree labourers, little better than the slaves of the Caribbean in their legal standing. In the absence of a clear rupture between the employment practices of the convict period and the kind of capitalist society that developed during the course of the nineteenth century, magistrates tended to carry the overseers' mind-set into the post-penal period. It had been assumed that the military caste that dominated the early years of the

magistracy would give way to a civilian cadre, but this manipulation of the institution was necessary in the penal era.

Half a century later, just as the Port Phillip District was being opened up for European settlement, Australia's first legal reference book was produced. This was J H Plunkett's *The Australian Magistrate* (1835), remarkable for its otiose account of the duties and responsibilities of the functionaries cleverly described as 'the governor's men-of-all-work'. The Australian magistrate demanded his own description because his work would have been unfamiliar to those accustomed to the duties of his English counterpart. Already the colonial magistrates had diverged in certain key respects from their prototype. They were less linked to locality because the basis of their claims to gentility was as likely military as economic. They were less benevolent toward their local population fundamentally because they were more dependent on the Governor than their English counterparts were reliant upon the favour of the Crown. Their power to assign convicts gave them an economic significance their counterparts in England lacked. They became magistrates less often on account of their existing social position than in order to establish a social position in the first place.

In the absence of a parliament of the kind that was exemplified by the House of Commons, several of the crucial conflicts in early New South Wales, such as the Rum Rebellion, were fought out in the confines of the magistrates' court. In this case the victory by the anti-government forces amounted to a usurpation of judicial authority. This history is important to understanding the Port Phillip magistracy, because the genealogical inheritance of Melbourne's magistrates is certainly English, but only by means of the Botany Bay experience. The military overlay continued because the Port Phillip area was initially settled during a period when England and France were at war. However, the 1803 settlement at the head of Port Phillip Bay failed and the first permanent settlement took place in 1834, a generation later. Private capital had raced ahead of the territorial capacity of colonial government, setting up the prospect for conflict

between commercial interests and the state akin to that which had occurred in New South Wales.

The question of whether the new district would begin as an annex to Hobart Town or to Sydney has been forgotten by historians – but there is no compelling reason that the Melbourne settlement should have been the progeny of one or the other. Perhaps if Melbourne had been Hobart's child, rather than Sydney's, Australian history would be changed fundamentally. Sydney's claim over Melbourne ahead of Hobart's led to the appointment of William Lonsdale as Police Magistrate and Government Agent in the Port Phillip District. The machinery of policing soon supported him and administration traditionally associated with the magistrate's role. In 1837 Foster Fyans was appointed the second Police Magistrate and established himself at Geelong, and in the following year a Court of Petty Sessions was finally set up at Melbourne.

The early cases heard in the Port Phillip District were concerned with 'breaches of the peace'. This gives us a sense of the primary role of the magistracy as one enforcing social order. Assaults on women that in reality constituted 'home invasion' fell under this broad rubric – whether they were actually sexual offences is not clear from the record.

The magistracy carried responsibility for regulating urban trading, an important area at the intersection between commerce and health. Many early magisterial powers were essentially expressions of public health concerns. Public health was an important issue in an isolated society still struggling to develop social cohesion and to put in place the structural trappings of civilisation. Similarly the immature market of early Port Phillip required strong commercial regulation in order to grow to economic adulthood. Of all urban traders, public houses received the greatest magisterial attention. The Crown appreciated that alcohol consumption threatened its political and economic security. It also realised the lucrative appeal of regulating liquor trading. Magistrates were also required to use the Crown's authority to buttress the church. Sabbath observance was strictly

enforced by the law in pre-colonial Port Phillip, in what was surely an attempt to utilise the stabilising tradition of religion in a young, unruly new society.

The domains of life potentially subject to magisterial intrusion were many and varied in Port Phillip. Legal provision governed the use of all public spaces and thus fines could be levied for obstructing footpaths or driving animals through city streets. The law fashioned not only the spaces around colonial inhabitants but also attempted to govern their bodies and behaviour. Public health regulation attempted to use black-letter law to prohibit the movement of diseases. Private behaviour could often escape unpunished, but unruly acts in public were strictly punished. Many magisterial sessions were devoted to the difficult task of trying to tame this wild frontier society by means of punishing swearing, violence and drunkenness. But as this thesis describes, this was an uphill battle in a society that used alcohol to celebrate most social gatherings and forget the harshness of this strange new land.

The English, colonial and Port Phillip magisterial court records share common adjudicative themes and the magistrates, as the primary enforcers of law and order, in both the old and new societies, were expected to regulate personal behaviour and economic relationships. The Port Phillip magistracy became a version of an institution that had been transplanted from England to the new Australian colonies. Finding itself in new surroundings, the office developed into a form and undertook responsibilities never contemplated by its creators. England enjoyed a settled and ordered landscape, tightly structured social classes and supportive institutions, a population that allowed for choice and scope in terms of order maintenance personnel and an acceptance of the codes of conduct common in settled societies. The Australian colonies and for the purpose of this thesis the Port Phillip District, as 'new societies', lacked those fixed social resources needed to replicate the socio-legal understandings obvious in the Home Counties.

# CHAPTER 1:

## GENTLEMEN, THE MAGISTRACY, AND PORT PHILLIP SOCIETY

### GENTLEMEN BEHAVING BADLY

THIS WAS A frontier society where even the lawmen were prone to lawlessness. The adjudications undertaken by magistrates highlight the role played by the colonial magistracy in frontier society. The Port Phillip magisterial Registers record not only the proceedings of the magisterial Bench in the settlement, but also serve as a prism of social relationships in Port Phillip society. The adjudication of disputes and the enforcement of social order by those adjudications regulated popular conduct in Port Phillip. An examination of these adjudications reveal that conduct regulation was not aimed only at 'the unruliness of certain groups',<sup>1</sup> for some of the leading figures of the early settlement were prone to violent and anti-social behaviour and were as prone to threatening or violent actions as those who belonged to the traditionally troublesome 'lower classes'.<sup>2</sup> There were many disputes *between* members of the lower classes, either as workplace disputes or as simple arguments that escalated into proceedings before the magisterial Bench. Fellow employees would strike each other.<sup>3</sup> Convicts and servants would

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<sup>1</sup> Sullivan, M., *Men and Women of Port Phillip* (Sydney, 1985) p.20.

<sup>2</sup> In *Re Captain Charles Scott*, Captain Scott, of the Royal Marines, threatened and abused John McNall, butcher, when McNall would not lend him money. Captain Scott did not agree with proposed loan documentation, used improper language, threatened to give McNall 'a damned good thrashing', challenged him to a duel, and was insolent to Mrs McNall. The Bench found the charge proved and fined Captain Scott 10 sh., with an order for costs or 7 days' imprisonment in default of payment. Fine paid; Melbourne Court Register, 9 December 1837, *Historical Records of Victoria [HRV]*, I, p.325.

<sup>3</sup> In *Re John Bruce*, a dispute between employees at James Smith's sheep run; it was alleged that John Bruce assaulted a shearer Timothy Seaton. Seaton had complained about Bruce's slowness in branding sheep. According to Seaton, Bruce's slowness in branding was making Seaton's arms ache as he waited for Bruce to complete his job. Seaton's testimony was supported by Michael Minnock, who was also branding sheep at the station. No penalty recorded; Melbourne Court Register, 13 February 1837, *HRV*, I, p. 314.

fight, destroy property and breach the peace. If one of the defendants was a convict, the Bench was rarely sympathetic.<sup>4</sup> Sometimes, a normally sedate servant would explode and strike another of his class.<sup>5</sup> In colonial Port Phillip almost anything could provoke a dispute and an inevitable assault. Cooking bad soup was risky.<sup>6</sup> There seemed to be little or no code of honour or solidarity amongst prisoners of the Crown.<sup>7</sup> Life in the convict barracks was understandably harsh.<sup>8</sup> Constables guarding prisoners were often subject to attack.<sup>9</sup> The magisterial Police Court was at times itself unsafe.<sup>10</sup> In terms of gross appearances, the 'lower classes' made up the vast majority of magisterial defendants in both civil disputes and in criminal prosecutions. But as this

<sup>4</sup> In *Re Henry Robinson (alias Grimaldi)*, Ellen Lawler testified that a fellow servant also in the employ of Mr Craig, caused a great noise and fighting at the premises. She claimed that the convict Robinson (*Hero*, 1835, 7 years) and another servant were fighting and in the process broke two panes of glass. The Bench found the charge proved and sentenced Robinson to be 'removed to the roads'; Melbourne Court Register, 4 December 1837, *HRV*, I, p. 325.

<sup>5</sup> In *Re David Firminer*, two servants of John Boadin quarrelled whilst transporting goods by boat. On the return trip to Williamstown the defendant Firminer struck the other servant, John Hannan, on the shoulder with a stick. Hannan claimed that he did not provoke the assault or excite the defendant in any way. Boadin, the master of the two servants testified as to the good character of both men. He testified that they had been in his service for some time and that they were both good, very quiet and sober servants. The Bench found the charge proved and fined Firmier 5 sh.; Melbourne Court Register, 10–12 December 1838, *HRV*, I, p. 338.

<sup>6</sup> In *Re John Reynolds*, Timothy Hurley, a cook aboard the vessel *Sarah* in his testimony alleged that Reynolds, seaman on the vessel *Sarah*, had struck him twice after receiving soup Reynolds claimed was not cooked well. He also threatened to do it again if Hurley reported Reynolds to the mate, Charles Graham. Graham testified that he had tasted the soup and that it was 'very good'. He also testified that he did not see the assault but heard the secondary threat. Horace Lime, seaman aboard the vessel, also testified, in substance concurring with the mate of the ship. The Bench found the charge proved and fined Reynolds 5 sh.; Melbourne Court Register 31 January 1838, *HRV*, I, pp. 328–329.

<sup>7</sup> In *Re James Barlow*, convict James Barlow (*Fairlie*, 1834, life) was charged with assault. Fellow prisoner Joseph Guthridge testified that Barlow struck him and then kicked him when he was being removed to a separate cell. Lonsdale found the charge proved and sentenced Barlow to 50 lashes; Melbourne Court Register 3 July 1837, *HRV*, I, p. 317.

<sup>8</sup> In *Re William Barnes*, involving another assault, Richard Wilson, a prisoner, testified that on the previous Monday at the barracks, Barnes (*Recovery*, 1836, 7 years) threw a blanket over him and beat him, cutting him several times about the head. The Bench found the charge proved and sentenced Barnes to 50 lashes; Melbourne Court Register 5 December 1838, *HRV*, I, p. 337.

<sup>9</sup> In *Re John McLise*, McLise was charged with being disorderly in gaol. Constable Mathew Tomkin had been called to the gaol to assist the gaoler in quietening the prisoner. Tomkin testified that whilst he was handcuffing him McLise then kicked him with as much force as he could'. Police Magistrate Lonsdale found the charge proved and added one calendar month's imprisonment to McLise's term; Melbourne Court Register 3 August 1837, *HRV*, I, p. 317.

<sup>10</sup> In *Re Michael Duffy*, Constable James Rogers testified that Duffy (*Caroline*, 1831, life) whilst in the Melbourne Police Office to receive his sentence on another matter, struck Constable Williamson and other persons present to give evidence within the Police Office and also used threatening language. The Bench, in defence of its Magistrates Court and Police Office, sentenced Duffy to 12 months in irons; Melbourne Court Register 12 March 1838, *HRV*, I, p. 330.

chapter shows, the leading figures of the community, especially during the early Port Phillip period, also suffered at the hands of the magisterial authorities. John Pascoe Fawkner, at the very least a co-founder of Melbourne, was a man who fell into the 'upper class' category, but was also seen as one of the 'troublesome' members of Port Phillip society. Police Magistrate Lonsdale specifically labelled him so.<sup>11</sup> A freeborn son of a transported convict, Fawkner also became a felon when he was tried before the Hobart Bench of magistrates and transported to Newcastle for assisting in the escape of convicts. Fawkner became very familiar with the settlement's magisterial proceedings<sup>12</sup>

One of the reasons for this type of behaviour in 'frontier' Melbourne was the absence of those social comforts and social constraints offered by the traditional extended family unit that exist in more established societies. The early Port Phillip Police force was unable to fill this authority vacuum. This phenomenon is typical of new societies. There was no substitute for the role played by families in stabilising and building patterns of social deference.<sup>13</sup> The frontier nature of the Port Phillip settlement also made it, as the earlier Sydney experience had likewise demonstrated, different from the typical British social template. The absence of large numbers of womenfolk, who traditionally acted as forces of stabilisation, was noticeable in the Port Phillip settlement.<sup>14</sup> The young male demographics of the settlement, together with the absence of those influences of kinship, familiar surroundings, friendship networks and the artifices of conduct

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<sup>11</sup> William Lonsdale to Sir Richard Bourke, 1 February 1837, *HRV*, I, p. 87.

<sup>12</sup> Violence and law-breaking at Port Phillip...was so common in frontier settlements. Men fought each other in Melbourne and Geelong. Employers struck their servants. Assaults were frequent. Publicans were both aggressors and victims. Fawkner was several times in court, accused of assaulting his servants, his rivals and his customers; Shaw, A. G. L., *A History of the Port Phillip District* (Melbourne, 1997) p.78.

<sup>13</sup> Nor were family restraints adequately replaced by the police force of between five and eight members. Per head, this was considerably more than in Sydney or London, but they were not very efficient; while in London half the force were dismissed in three years between 1829 and 1831, in Melbourne the turnover was so rapid that forty constables served in it in three years, thanks to the neglect of duty, corruption and drunkenness among its members; Shaw, *ibid*, citing Police Appointments, 1836–38; *HRV*, I, pp. 185–197

<sup>14</sup> Grant, J., & Serle, G., *The Melbourne Scene 1803–1857* (Melbourne, 1957) p.35.

regulation found in patriarchal British society, made it a very different place than that found in the rigidly structured motherland. There were also insufficient outlets and entertaining diversions to be found in the settlement.<sup>15</sup> As a result, in the pioneer settlement that was Port Phillip, almost any diversion would do. Street fighting became a spectator sport.<sup>16</sup> Geelong was no different.<sup>17</sup> These public disturbances were even more noticeable in small settlements. Shaw argues that the 'middle class observers were over-critical of the lower orders' in Melbourne and ascribes it to the social phenomenon of 'familiarity' and physical proximity – that they would more readily notice examples of 'impropriety', 'when all were living cheek by jowl', than they would in places where the 'respectable' citizens were more accustomed to keep their distance from the troublesome lower orders.<sup>18</sup> By 1844 Flinders Lane was seen as 'one of the worst localities in the Town; in fact the St Giles of Melbourne'; by the late 1840s portions of Little Bourke Street became a 'resort of abandoned characters' and, through incessant subdivisions, the eastern portion of Lonsdale Street was in 'the first stages of a flourishing slum'.<sup>19</sup>

The structural forms of church, class and peer pressures were also different in Port Phillip. The strict class demarcation lines and the effects that they had in producing deferential conduct were missing in early Port Phillip society. If one added alcohol into this colonial social

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<sup>15</sup> Melbourne had to wait until 1842 for its first European theatrical performance, *ibid* p.41.

<sup>16</sup> In *Re William Winberry*, Winberry, a boatbuilder, was charged with threatening to strike Constable J. W. Hooson. Hooson deposed that between 3 and 4 o'clock in the evening of Friday 4 June 1837 he was breaking up a disturbance and fight between some men in the town. Winberry was watching the fight and when Hooson attempted to take one of the pugilists away Winberry threatened him by saying 'if you do I will knock your bloody head off'. Constable James Rogers confirmed by testimony the evidence of Hooson. Police Magistrate Lonsdale found the charge proved and fined Winberry 5 pounds, to be disposed of for the benefit of the District; Melbourne Court Register 5 June 1837, *HRV*, I, p.318.

<sup>17</sup> *R v William Sawgood and John O'Neal*, before Foster Fyans, charged with riot and disorderly conduct as they were boxing in the streets of Geelong; both plead guilty; fined 1 pound each.; Geelong Court Register, 28 August 1839, *HRV*, I, p.354.

<sup>18</sup> Shaw, *op.cit.*, p.78, citing, Simpson to Wedge, April, 1835, *Batman Papers* and Billot, C. P., *John Batman and the Founding of Melbourne* (Melbourne, 1979) pp. 68, 283.

<sup>19</sup> Grimwade, W. R., *Victoria The First Century: An Historical Survey* (Melbourne, 1934) p.113, St Giles was a locality in London notorious for its seediness.

composite, whilst subtracting those traditional British social structures that provided stability, the traditional British class demarcation lines seemed to almost disappear. Personal excesses allowed for a cross-class familiarity that was non-existent in England.<sup>20</sup> The structural differences and the concomitant feelings of social isolation that existed in this frontier environment soon allowed alcohol, in particular, to become a salve to the wounds of loneliness and desperation felt by many. That colonial Australia was a prisoner to alcohol is not a novel proposition. Alcohol, and its darkest offspring, Rum, in the period 1790–1820, was an overriding social obsession in colonial Australia.<sup>21</sup> That obsession often destroyed spirit, hope and faith, men and families, and may have left an indelible stain upon the Australian psyche. Settlers would often sacrifice everything for it.<sup>22</sup> The New South Wales Corps and the Sydney squattocracy mixed their influence, wealth and ambition with it. Macquarie had been dispatched to the ends of the earth to extinguish the rebellious fire fuelled by it. From early colonial times it had long been used as a liquid incentive to workers,<sup>23</sup> and has arguably maintained an economic stranglehold on the economy of Australia – which it has never relinquished. Roger Therry when elevated to the Bench of the New South Wales Supreme Court officiated across the entire eastern seaboard of the continent. He presided in Sydney, Brisbane and Melbourne. He saw alcohol and the intoxication that it brought with over consumption as being the key to social and economic misfortune in colonial Australia.<sup>24</sup>

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<sup>20</sup> Heavy drinking, usually of rum or gin or brandy, was usual in the colony; all classes indulged in it, and it was not uncommon to see master and man lying in the road side by side dead drunk; Billot, C. P., *The Life and Times of John Pascoe Fawkner* (Melbourne, 1985) p.206; de Serville, P. H., *Port Phillip Gentlemen and Good Society in Melbourne before the Gold Rush* (Melbourne, 1980) p.44.

<sup>21</sup> Hughes, R., *The Fatal Shore* (London, 1987) p.290.

<sup>22</sup> Bligh, W., Testimony in *Report of the Select Committee on Transportation*, Appendix 1, p.46, cited in Hughes, *ibid*, p.290.

<sup>23</sup> Thomas Robson, Testimony in *Report of the Select Committee on Transportation*, 1812, Appendix 1, p.52, cited in Hughes, *ibid*, p.291.

<sup>24</sup> It was 'the hotbed from which crime springs..[and that]..all crime is traceable to it – the exceptions so few as to establish the general rule..[concluding that intoxication] is the cause of crime, by producing poverty, for in this country, habits of inebriety constitute the main cause of it, as no man in this country capable of work is necessitously poor.'; Therry, R., *Letter to the Rt Hon Wm E. Gladstone, M.P., with the Address to the Jury* (1850) as an address during the first circuit of the New South Wales Supreme court in Brisbane, 13 May 1850, cited in Castles, A. C., *An Australian Legal History* (Sydney, 1982) pp.225–227.

In early Port Phillip Melbourne, the hotel industry was booming.<sup>25</sup> The magistrates were doing a brisk trade in prosecuting public drunkenness.<sup>26</sup> Public drunkenness was a constant problem for the Constables who needed to detain and arrest these often-violent inebriants.<sup>27</sup> Drunks would at times threaten Constables with weapons.<sup>28</sup> During celebrations alcohol would dim the senses of the celebrants to the extent that they 'would turn festivities into calamities'. One contemporary account of the New Year celebrations for 1838-39 confirms this.<sup>29</sup> There were economic and social costs associated with drunkenness. The inebriate and his dependants felt the direct impact in terms of lost wages and fines. Employers lost productive hours, days and weeks. All parties suffered from an ever-expanding addiction to alcohol and its effects. As a general rule, one especially applicable to rural labourers, they would work to drink.<sup>30</sup> In social terms, alcohol and its close relative, public drunkenness, allowed for segregation within the community between those who possessed public self-control and those who did not. Moral outcries from members of the 'superior classes' were made possible, as alcohol consumption

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<sup>25</sup> By 1838, with the opening of Fawkner's new hotel, there were 'eight hostelryes and boozing dens to serve the population of about 3,500 [Port Phillip] over 1,000 of which was settled in Melbourne'; see Billot, *op.cit.*, pp.197-198.

<sup>26</sup> Within two years of the formal settlement of Melbourne, with a population of close to 1,600 free settlers and 300 convicts in and around the township, approximately 352 free men, 12 free women and 76 convicts were convicted of drunkenness; Shaw, *op.cit.*, p.78, citing *HRV*, I, pp.313-341, 424-427; 480-492, iv, pp. 464-476.

<sup>27</sup> *R v Thomas Grant*, Grant assaults Const. Mathew Tomkin whilst being arrested for being drunk; Spec.Const. John Gomm gave evidence in support; sentenced to one calendar month's imprisonment; Melbourne Court Register 16 March 1837, *HRV*, I, p.316.

<sup>28</sup> *R v David Magee*, Magee was very drunk and levelled a gun and threatened to shoot Chief Constable Henry Batman who was trying to clear John Moss's public house; Const. M. Tomkin gave evidence in support as did Private William Price; Magee was committed to trial in Sydney; Melbourne Court Register 14-15 August 1837, *HRV*, I, pp.319-320.

<sup>29</sup> In the most shameful manner possible, firing of guns, shouting, cursing, swearing, drinking and singing, breaking of windows and bursting open of doors. Where the police were I do not know, but the whole town was disturbed; Rev. William Waterfield, Diary, *Victorian Historical Magazine*, III, 3 March 1914, 29 October 1838, cited in Billot, *op.cit.*, p.206.

<sup>30</sup> 'All station hands and most independent workers were liable to drink themselves into delirium whenever there was a sufficient supply of grog, but as a general rule their serious drinking was reserved for the intervals between working. They were often aptly compared with sailors who after abstemious months indulged themselves to revolting excess. The practice of 'drinking their cheques' was such a well-recognised feature of colonial life that it was taken for granted'; Kiddle, M., *Men of Yesterday: A Social History of the Western District of Victoria, 1834-1890* (Melbourne, 1960) p.69.

became an economic inhibitor as well as being a social concern.<sup>31</sup> Not that the problems with alcohol were not also being felt in Sydney.<sup>32</sup> The high proportion of alcohol-related magisterial adjudications in Melbourne, however, not only gave rise to concern but also provides an insight into the dynamics of the society, the role played by alcohol and the part played by magistrates when adjudicating its consequences. In fact, some canny squatters, constantly in need of labour and who understood the legal system and the colonial labour force, would haunt the magisterial Benches and take advantage of men who had 'drunk their cheque' and were fined by the magistrates for drunkenness.<sup>33</sup> Shaw, however, tends to underplay the importance of alcohol in Port Phillip.<sup>34</sup> The Port Phillip Bench Book evidence suggests, however, that alcohol consumption patterns, especially in the early period of the Port Phillip settlement, tended to be 'binge' in nature and concentrated in effect. It was anticipated that alcohol would present itself as

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<sup>31</sup> Drunkenness was not only a social nuisance, an affront to the changing norms of public decorum, it was also

associated significantly in the minds of the opinion makers and social reformers with some of the most pressing problems of social life. Drunkenness distracted from work, it was associated with violence in some cases, or more generally with the ongoing problem of poverty and the creation of a dependent populations... The meaning of drunkenness became not just a matter of personal worth, a sign of a lack of control – its public exhibition became a constant reminder of an ever present threat to the strength of society... as a threat to racial vitality; Finnane, M., *Police and Government: Histories of Policing in Australia* (Melbourne, 1994) p.97; see also Garton, S., "Once a drunkard always a drunkard": Social reform and the problem of habitual drunkenness in Australia, 1880–1914', *Labour History*, 53, 1987, pp.38–53, cited in Finnane, *ibid.*

<sup>32</sup> Sturma, M., *Vice in a Vicious Society* (St Lucia, 1983) p.53. By the 1880s over 47 per cent of all charges laid by constables in N.S.W. were for drunkenness; see Mukherjee, S. K., et al., *Source Book of Australian Criminal and Social Statistics, 1804–1988*, (Canberra, 1988) cited in Finnane, *op.cit.*, p.97.

<sup>33</sup> 'The squatter would wait at the bar of the Police Office until any blackguard received his Sentence and then agree to pay him 45 pounds a year and advance the fine for him on condition he left the Town immediately'; Black to Gladstone, 16 August 1841, *Black Papers*, Public Library of Victoria, Archives Division, cited in Kiddle, M., *op.cit.*, p.51.

<sup>34</sup> For all that, and despite the court convictions, Melbourne was not an exceptionally drunken place, even if John Batman at times allowed 'his cups to get the better of his reason', and Henry was to die of alcoholic poisoning. Though a doctor might deplore the frequent cases of *delirium tremens* caused by 'an intemperate indulgence in intoxicating spirits' and George Arden complain of the 'scenes of a demoralising tendency' to be seen in the 'lower order of grog shops' which were 'haunts of iniquity and vice', the consumption of spirits, at a little over two gallons per head in 1838–39, though 50 per cent more than in than in the United Kingdom, was considerably less than in New South Wales (over three gallons), and that of beer (five gallons per head) was less than half that in the mother country; Shaw, A. G. L., *op.cit.*, p.78, citing drunkenness 1836–38, *HRI*, iv, 463–76; Cannon, M., *Old Melbourne Town—Before the Gold Rush* (Melbourne, 1991) p.423; liquor imports, 1837–39, *HRI*, iv, pp.236–251; *The Australians*, vol.x. *Historical Statistics*, p. 388; A. E. Dingle, 'The Truly Magnificent Thirst', *Australian Historical Studies*, xix, (1980) pp. 227ff., and tables, pp. 242, 247, 249.

a problem in Port Phillip. Indeed the persons who drafted the indentures of association for the *Port Phillip Association* understood the effects of alcohol and its social and economic costs.<sup>35</sup> One of Melbourne's most notable first drunkards, Henry Batman, would only drink when he either had rum or could afford it.<sup>36</sup> Servants, especially rural labourers in the outlying stations, had their alcohol stock and consumption constantly monitored by their masters. They would only have sporadic consumption opportunities when they found the 'means' of procuring some drink.

The problems faced in managing a Port Phillip colonial labour force and the important role that alcohol played in that management is illustrated by an examination of the surviving *Learmonth Diaries*<sup>37</sup> written from the *Ercildoun* run – which by 1841 covered 50,000 acres with 13,000 sheep, 325 cattle, and 16 horses, and employed 35 men and four women. Employees would often 'bolt' from the station in search of alcohol.<sup>38</sup> They would be found some weeks later in Geelong and returned to the station.<sup>39</sup> The labour shortage was such that anyone, abscondee, young, old, experienced or otherwise, would be hired.<sup>40</sup> If and when rum was discovered on the station the shearers would immediately 'get as drunk as fiddlers'<sup>41</sup> and would be unable to work the following day 'from the effects of last night's debauch'.<sup>42</sup> The station's female cooks were

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<sup>35</sup> It became a matter of formal Association policy that, 'no liquor of any description shall be landed on the settlement for sale or distribution among the servants, excepting only wine for family use or medicinal purposes'; Billot, *op.cit.*, p.118, Bonwick, *op.cit.*, p.368.

<sup>36</sup> In the very early days of the settlement, before the arrival of Lonsdale, Henry Batman would drink incessantly and cause a huge amount of disruption to the settlement, whereas the 'grogless Batman was quiet', see Billot, *op.cit.*, p.133.

<sup>37</sup> *Livingstone-Learmonth Papers*, Public Library of Victoria, Miscellaneous Learmonth records regarding Ercildoun Station from the 1830s to the 1860s, cited in Kiddle, *op.cit.*, p.68.

<sup>38</sup> *Learmonth Diaries*, 2 March 1839.

<sup>39</sup> *Learmonth Diaries*, 15 March 1839.

<sup>40</sup> *Learmonth Diaries*, 20 August 1839, where an indigenous American, Arthur Kewsie, was hired for 3 months, suspected of having absconded from an American whaling ship.

<sup>41</sup> *Learmonth Diaries*, 25 December 1839.

<sup>42</sup> *Learmonth Diaries*, 26 December 1839: 'Old Sovesby in bed from the effects of last night's debauch – as also all of the shearers....discharged shearers 18 January 1840.'

also prone to 'the effects of drink' and rendered unable to work.<sup>43</sup> Workers sent to Melbourne or Geelong could also fall to the temptation of drink and end up before the Bench of magistrates and in the stocks.<sup>44</sup> On one occasion Somerville Learmonth travelled to one part of the station to see some 'splitters'. On his return he discovered those workers left behind at the head station to be 'raving drunk'. They had stolen wine found amongst the possessions of an employee.<sup>45</sup> Once alcohol was found at a station most of the workers would become drunk and unruly,<sup>46</sup> some then threatening to 'bolt'. On one particular occasion, the 'bolter' could only be dissuaded from bolting by the offer of a further bottle of wine.<sup>47</sup> When the labourers were allowed a bottle of wine or spirits over Christmas, the concerns of the station owners or managers simply multiplied.<sup>48</sup>

The magisterial court records reveal that the 'means' of procuring alcohol normally occurred *after* a period of employment. On other occasions the servant would find themselves tempted beyond endurance and be compelled to leave their contractual assignments and travel to town; there they would get drunk and run foul of the authorities. Some drank in such a frenzy as to spend 16 pounds in three nights.<sup>49</sup> The attraction and evil lure of urban Melbourne and Geelong were irresistible to the rural labourer and posed a constant temptation to his urban brother. The main villains were, of course, the publicans. The rural labourers, and these included

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<sup>43</sup> *Learmonth Diaries*, 22 January 1840: 'Mrs Good [the cook-housekeeper] did nothing yesterday and to-day being unwell from the effects of *drink* brought up by the dray.'

<sup>44</sup> *Learmonth Diaries*, 31 March 1840: 'Drays returned from Geelong, George Taylor having been put in the Stocks for drunkenness.'

<sup>45</sup> *Learmonth Diaries*, 22 April 1840.

<sup>46</sup> *Learmonth Diaries*, 15 February 1841, all except for servants James Coleman and Edward Ferriss.

<sup>47</sup> *Learmonth Diaries*, 15 February 1841, James Harper threatened to bolt.

<sup>48</sup> There is a continual scene of dissipation and drinking among the lower orders. And we poor swells instead of partaking in any sort of enjoyment are kept continually galloping from station to station in mortal terror that Long Jim, Lanky Dick, with Bobby the Bull are all drunk with the sheep looking after themselves on the tops of the mountains; John Thomson to Neil Black, 29 December 1848, cited in Kiddle, *op.cit.*, p.69.

<sup>49</sup> Neil Black Journal, *Black Papers*, *op.cit.*, cited in Kiddle, *op.cit.*, p.69.

persons from as near as rural Heidelberg, the stockmen, bullock-drivers, shepherds and shearers who 'worked harder than horses in the Bush, and spent their money like asses in town'<sup>50</sup> were all subject to the 'lambing down' or 'sticking plaster' stratagems of the publican.<sup>51</sup> Associated with the plundering of the lamb-like patron arose the apparently mythical tale of the 'dead house'. This custom was said to have originated in England's Gin Houses where one could 'get drunk for a penny and dead drunk for twopence' and avoid death from exposure by being deposited in a room to sleep off the effects of drunkenness. Drunkards faced the dangers of arrest, the lock-up or 'the hospital'.<sup>52</sup> The realities were that patrons, hopelessly drunk, often belligerent, would spill or be forced out onto the street and into the arms of a constable on patrol and appear before the Bench of the ever-sober magistrates the next morning. Some paid the double penalty of also facing the town magistrate for being in breach of their employment obligations by their unauthorised travel to town. The Bench book record evidence also suggests that the 'binge' and opportunistic nature of the alcohol consumption magnified the socio-legal cost of drunkenness and was disproportionate to the actual gross figures of total consumption. The gross volume of alcohol consumption in colonial Melbourne is immaterial therefore when measured against the criminal and contractual repercussions concomitant with its consumption. The binge nature of colonial drinking patterns five generations later has indeed left its legacy. Today 54 per cent of Australian males between the ages of 20 and 24 engage in binge drinking patterns of alcohol consumption.<sup>53</sup>

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<sup>50</sup> Finn, E., 'Garryowen', *Chronicles of Early Melbourne* (Melbourne, 1888 and 1976, abridged edn., 1967), p.34.

<sup>51</sup> The 'lambing down' referred to the fleecing of these poor labourers, who if paid by commercial house 'orders' [cheques], would give the order to the publican who would [supposedly] stick the order 'up in the bar until the amount was said to be drunk out' or credit the poor lamb an amount equal to the order. During the labourer's 'melting process' all who entered the bar would be invited to drink the Gooseberry champagne, plunder the rum taps and beer bottles; Finn, *op.cit.*, p.34.

<sup>52</sup> If the patron was known to the publican or was a regular patron of the house, the publican, mindful of return and never ending business, would when the patron's 'order' was close to exhaustion and the patron himself was past that point, carefully deposit him in the 'dead house'. The dead house was a room within the public house set aside for 'casuals' helplessly intoxicated, who instead of being tumbled out of doors, were bedded down for the night', Finn, E., *ibid*, p.35.

<sup>53</sup> John S. Croucher, Professor of Statistics, Macquarie University, *The Age*, 12 October 2002, p.11. The continuity in 'the Australian thirst' has been the subject of historical research by A. E. Dingle, *loc.cit.*

The Port Phillip settlement also lacked the established sexual-political understandings that existed in the more settled society they had left in Great Britain where an 'age balanced' patriarchal tradition survived.<sup>54</sup> The frontier nature of the Port Phillip social milieu and the vibrant atmosphere of the settlement and outer districts tended to naturally promote masculinist responses to interpersonal relationships. Slight and affronts were felt at the drop of a hat. Members of all classes would take offence at gossip and strike back.<sup>55</sup> Debts were at times settled with fists.<sup>56</sup> Arguments arose over the sparse women in the settlement. Mates would argue and fight.<sup>57</sup> Livestock needed protection from neighbours. Land, glorious land, which was settled but not quite 'legally owned', often formed the basis of many acts of senseless violence. Solutions to these difficulties were limited and all classes saw violent methodology in their dispute resolution paradigms. The 'great unwashed' rolled around the muddy streets of Melbourne trying to gouge out each other's eyes outside their favourite 'pub'. On the other hand, those 'respectables' like Redmond Barry, when challenged to give satisfaction over a slight against another Melbourne Club member, would properly yet illegally meet at Sandridge with seconds.<sup>58</sup> Barry appeared on the field of honour in his spotless Regency attire. This duel between Barry and Snodgrass ended with Walter Scott-like inspired nobility: Barry fired into the air when Snodgrass's shot missed its mark.<sup>59</sup> Class hybrids, like John Pascoe Fawkner, would combine most of these methodologies, save and except for the noble gestures, within which of course, he saw no profit. The duelling

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<sup>54</sup> In 1842 Melbourne a new arrival commented that there was, the total absence of women from the streets, as well as the paucity of old men. In those days anyone over thirty was spoken of as old So-and-So; Fewer than a half of one per cent were over 60 (compared with nearly 20 per cent in 2003), Curr, E. M., *Recollections of Squatting in Victoria* (Melbourne, 1883) p. 7, cited in Shaw, *op.cit.* p.78.

<sup>55</sup> *R v Michael Horagon*, Peter Connell claims Horagon came up to him and asked what had he been saying about him the night before and struck him; Thomas Hartnall, a labourer, confirms this; fine 1 pound with 4sh. costs by 19th instant; Melbourne Court Register 16 November 1838, *HRI*, I, pp.336-337.

<sup>56</sup> *R v John Moss*, Moss (publican) assaults Pvt. Thomas Howard over a debt; Edward Jennings and John Moss Jr gave evidence; 2 pounds 10 sh. fine or two months imprisonment. Fine paid; Melbourne Court Register, 31 August 1837, *HRI*, I, p.320.

<sup>57</sup> *R v John Caulfield and John Jones Peers*, whilst in Scott's (hotel) two builders argued and throw ginger beer at each other; fine 10sh; Melbourne Court Register 10 December 1838, *HRI*, I, pp.338-339.

<sup>58</sup> Galbally, A., *Redmond Barry* (Melbourne, 1995) pp.58-59.

mentality amongst the Port Phillip 'respectable' class was consistent with the European themes of gentility and its honour based code of conduct.<sup>60</sup>

True gentlemen of good society during the Port Phillip period possessed a Regency sense of honour. The urgency of this code was heightened by colonial circumstances where social standing was not as assured and as fixed as in England. This in turn led to a general 'quarrelsomeness' and 'touchiness' that developed amongst the upper classes of Port Phillip society. This colonial version of the Regency code led to a plethora of duels, challenges, courts of honour and vitriolic outbursts in the settlement newspapers. There were 17 official duels fought in Melbourne between 1839 and 1850. What is remarkable is that combatants in duels often included the very men who were appointed to maintain social harmony in the young settlement. Magistrates both fought in duels and adjudicated in the courts of honour or sat upon the magisterial Bench to bind over duellists to keep the peace. Duellists included Frederick Powlett (CCL), William Ryrie (JP), George Brunswick Smyth (JP) and Peter Snodgrass (CCL). One of the first recorded duels in the settlement was in fact between two magistrates: Snodgrass and Ryrie. Snodgrass felt insulted by Ryrie at the Melbourne Club. They met at Batman's Hill. Snodgrass fired and shot himself in the toe. Ryrie then fired into the air. Honour satisfied, they all retired to the Club for drinks. Snodgrass later fought his duel with Redmond Barry at Sandridge, again with a similar result.<sup>61</sup>

One notable dispute of honour occurred between magistrates Peter Snodgrass and Captain George Brunswick Smyth. This arose out of a quarrel during an insolvency hearing that escalated into an 'incident' in Collins Street. Snodgrass, through his second J. M. Woolley, demanded apologies or satisfaction. Smyth, assessing Woolley to be drunk, successfully applied

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<sup>59</sup> 'Garryowen', *The Chronicles of Early Melbourne 1835-1852*, (Melbourne, 1888) vol.2., pp.779-780.

<sup>60</sup> Kiernan, V. G., *The Duel in European History* (Oxford, 1988).

<sup>61</sup> Strode, *op.cit.*, p.139; Garryowen, *op.cit.*, pp.775-780; de Serville, P., *Port Phillip Gentlemen and Good Society in Melbourne before the Gold Rushes* (Melbourne, 1980) pp.107-110; Ronayne, J., *The Irish in Australia: Rogues and Reformers First Fleet to Federation* (Melbourne, 2002) p.119.

to Melbourne Police Magistrate St John for an order binding over both Snodgrass and Woolley to keep the peace. Snodgrass took the matter to the committee of the Melbourne Club. Smyth, St John and Snodgrass were all Clubmen as well as magistrates. Before a general meeting of the Club, Smyth narrowly escaped expulsion for not fighting a duel. As a result, the incumbent President of the Melbourne Club, magistrate and former Melbourne Police Magistrate James Simpson, resigned from the Club. Smyth's reputation in Melbourne was ruined and he left the colony soon after, dying in England at the age of 31 in 1845, 'one of the many gentlemen colonists destroyed by the Antipodes.'<sup>62</sup>

There was also the dispute between magistrates John Fitzgerald Leslie Foster and Dr Farquhar McCrae. The dispute was over some outstanding amounts due in the transfer between the parties of the lease over the property *Eummemmerring*.<sup>63</sup> Foster challenged McCrae to a duel. McCrae declined and took the matter before a Court of Honour.<sup>64</sup> The Court of Honour decided in McCrae's favour. Foster then 'horsewhipped' McCrae in Queen Street on 1 December 1843. Two magistrates acting like this in the streets of Melbourne caused quite a stir. The Court of Honour took the unprecedented step of publishing its decision, whilst McCrae charged Foster with assault.<sup>65</sup> At the trial before Mr Justice Jeffcott and a five-man jury that included two magistrates,<sup>66</sup> the case devolved into a clash between the cultures and mores of the high caste Irish Ascendancy and the inferior middle-class caste of Scottish respectability. McCrae belonged to the Scottish caste and although possessing good family connections, was

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<sup>62</sup> McNicholl, R., *The Early Years of the Melbourne Club* (Melbourne, 1976) pp.28-29, as cited in de Serville, *op.cit.*, pp.112-114; Committee members included magistrates James Simpson (JP), F. A. Powlett (CCL), Robert Martin (JP-Portland Bay) and William Verner (JP), Melbourne Club Minutes, La Trobe Collection.

<sup>63</sup> Originally owned by Police Magistrate William Lonsdale.

<sup>64</sup> Of the eight members of the Court of Honour Members four were magistrates included James Simpson (JP), George Airey (JP-Geelong), J. D. Lyon Campbell (JP) and William Ryrie (JP).

<sup>65</sup> *Port Phillip Herald* [PPH], 5 December 1843, 19 December 1843; *Port Phillip Patriot* [PPP], 7 December 1843, 18 December 1843; as cited in de Serville, *op.cit.*, p.115.

<sup>66</sup> Edward Curr (JP) and J. B. Were (JP).

considered a social inferior to Foster, who came from the aristocratic Irish cousinage and was co-heir to the estates of his maternal uncle Lord Fitzgerald. McCrae's barrister, Edward Williams, mocked the Irish code of honour, questioned Foster's suitability to be a magistrate and reminded the jury that Foster was wealthy and should be fined accordingly. Foster's barrister, fellow Irishman Redmond Barry, chose to plead justification in the assault. He defended the Irish code of honour and his client's position as a magistrate. Barry cited his own duelling history and sought to characterise McCrae as a 'canny Scot' who was seeking to 'pluck' [take commercial advantage of] the newly arrived Foster. Jeffcott's summation condemned both parties for their conduct, but tended to favour McCrae, who succeeded in the assault claim and was awarded £250.<sup>67</sup> Governor Gipps was of a similar view and hoped that Foster would resign from the magistracy rather than forcing him to remove his name from the Commission of Peace.<sup>68</sup> In the hinterland, respectable squatters guarded their honour in a similar fashion. There the only difference was that the original slight was invariably based upon a cow, a sheep, or a fence-line.<sup>69</sup>

The *Quarry Affair* in 1844 also demonstrates the sensitivities of colonial Port Phillip polite society, its addiction to scandal, and the intricate and essential role played by the magistracy as Crown investigators in matters of order maintenance and the resolution of upper-class social chaos. Jephson Quarry, an Irish solicitor, married the daughter of squatter William Bowman. The poor girl tried to kill herself three months after the wedding and eventually took a lover. Quarry and his brother-in-law lay in wait one night and surprised two gentleman visitors. One of these men shot the brother-in-law and escaped. The Mayor of Melbourne and town magistrate Henry Condell was called in to investigate. A Melbourne Bench of magistrates issued

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<sup>67</sup> PPP 20, 23 April 1844; PPG 20 April 1844; PPH 23 April 1844; as cited in de Serville, *op.cit.*, pp.114–117; Ronayne, *op.cit.*, p.113.

<sup>68</sup> Gipps to La Trobe, 6 January 1844; de Serville, *op.cit.*, p.117.

<sup>69</sup> Similar though more sedate affair of honour occurred in *Huffington v Faithfull* where a rural dispute over boundaries and the improper branding of cattle led to injurious comments being made resulting in an action in libel. In this matter, Faithfull was Huffington's social inferior. The jury seemed unimpressed by the whole affair and awarded Huffington nominal damages of 1farthing; PPP 18 April 1844; PPP 20 June 1844; as cited in de Serville, *op.cit.*, pp.117–118.

warrants and conducted interviews. Mrs Quarry herself was interviewed *in camera*. Mr Quarry had found letters implicating Edward Hodgson as the lover. Quarry then challenged Hodgson to a duel. Hodgson's solicitor, Henry Moor, later Mayor of Melbourne and town magistrate, decided to go before the Melbourne Bench of magistrates after he had drafted Hodgson's Will in preparation for the duel. Warrants to keep the peace were issued against the parties and Hodgson disappeared 'up country'. A new duel was arranged and again abandoned. The charges for wounding Quarry's brother-in-law were dropped for lack of evidence and Hodgson was impounded by warrants.<sup>70</sup> Mrs Quarry eventually left with another lover, squatter Robert Jamieson, and settled in Sydney. Quarry followed them, fought a duel, disowned his wife and sailed for China. Mrs Quarry, centre of a luscious colonial high-society scandal, eventually fell a few notches in caste and in later years was to be found haunting bars in Collingwood hotels.<sup>71</sup>

Why were so many magistrates involved in 'affairs of honour' during the Port Phillip period? The explanation is they belonged to a gentleman caste that demanded that honour be defended. This gentlemanly duty overcame their sworn obligations as keepers of the peace. One of the few examples where sense and obligation as a magistrate overcame the call of the caste, in at least one of the protagonists, occurred in an affair of honour between magistrates George Playne and Edward Curr.<sup>72</sup> As members of the dominant group or ruling class in Port Phillip, those who duelled were performing a complicated elite ritual that involved an elaborate theatre. The rules that regulated this theatre had been devised in Europe. For centuries, European

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<sup>70</sup> Georgiana McCrae, *Georgiana's Journal* (Sydney, 1966) pp.11, 80; 90, 151–152; PPH 10 September 1844; PPG 11 September 1844; PPP 12 September 1844; PPP 12 & 16 September 1844; PPH 10, 13 & 17 September 1844, 29 October 1844; PPG 11 & 14 September 1844; PPG 2 & 9 November 1844; PPP 4 & 7 November 1844, 31 October 1844; PPH 1, 5 & 8 November 1844; as cited in de Serville, *op.cit.*, pp.118–120.

<sup>71</sup> William Rawson to Samuel Rawson 25 December 1846, in Gunson, N., *The Good Country* (Melbourne, 1956), p.40; Mrs McCrae, *op.cit.*, p.152; Kenyon *Cards*, La Trobe Collection; as cited in de Serville, *op.cit.*, p.120.

<sup>72</sup> The matter began over comments made by Curr at a meeting of justices concerning Playne's language during court proceedings. It escalated to the 'posting' of Curr at the Melbourne Club. Curr in retaliation applied to have Playne bound over before the Melbourne magistrates to keep the peace. He also wrote an open letter to the *Herald*, with a response in the anti-Curr, anti-Catholic *Port Phillip Patriot*. There were those who rose in Curr's defence and supported his refusal, as a magistrate, family man and older gentleman, to engage in a duel with the upstart bachelor Playne; PPH 27, 28 March 1845; PPP 28 March 1845, 2 April 1845 re caustic; as cited in de Serville, *op.cit.*, pp.121–122.

literature, music, art and folklore had perpetuated the belief that men of honour protected their value systems by duelling. Even those who condemned the class system that supported the practice were fascinated by the duel and its methodology. Marx, for example, claimed that fencing had been his favourite form of exercise, was involved in 'student duelling' at Bonn and participated in at least one 'serious meeting'.<sup>73</sup> The new Port Phillip elite were searching for ways to validate their right to dominate and lead the new society. Threatened by a lack of real property ownership and creeping democracy, the Port Phillip elite took up every opportunity to demonstrate their superiority. The debate over a proposed upper House of Parliament also neatly divided the later Port Phillip colonists along class lines. Archibald Cunninghame, although a member of the elite and a supporter of an upper house, doubted whether there were sufficient numbers of a 'recognised aristocracy' in the District to make such a proposition worthwhile. This underscored the greater issue that Port Phillip could not sustain or maintain the pretence of boasting a gentry class because the traditions and circumstances which maintained that class in England had taken centuries to develop.<sup>74</sup> The point has been made that the lack of a colonial gentry class that could devote time to its magisterial duties assisted the state in its move to appoint salaried magistrates.<sup>75</sup> Notwithstanding this, pockets of squatters of the Western District would later form a colonial version of the English gentry. During the Port Phillip period, however, they were just beginning to establish their 'runs' and fortunes. Most importantly perhaps, La Trobe whilst Superintendent, a Crown representative without vice-regal power, was not able to deliver the degree of patronage necessary to create such a class.<sup>76</sup> The system of English vertical class deference demanded patronage as its reward for vassalage. As Crown representative and leader of polite society in Port Phillip, La Trobe's lack of real power,

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<sup>73</sup> Kiernan, *op.cit.* pp.2–12; Raddatz, F. J., *Karl Marx* (London, 1979) pp.15–16.

<sup>74</sup> Coss, P., *The Origins of the English Gentry* (Cambridge, 2003).

<sup>75</sup> Palmer, D., 'Magistrates, Police and Power in Port Phillip', p.85, in Philips, D. and Davies, S., (ed), *A Nation of Rogues: Crime, Law and Punishment in Colonial Australia* (Melbourne, 1994).

<sup>76</sup> In Port Phillip there was no established landed class and no indigenous heraldic tradition. Polite society was lacking in numbers and could not muster sufficient popular support for the creation of such a parliamentary plutocracy; PPG 19 May 1841; PPH 23 July 1847; as cited in de Serville, *op.cit.*, pp. 125–127.

demonstrated in the traditional English customary parish and shire power structure, proved fatal to his career and the smooth transplantation of ordered vertical rules of deference and conduct across all classes in colonial Port Phillip society. La Trobe's only real powers of patronage lay in his ability to *suggest* appointments to the commission of the peace as magistrates.

If genealogy is the building block of ethnicity then Port Phillip society enjoyed enough ethnic diversity to distinguish itself from any culturally homogenous English home county. In particular, settlers of Scottish origin became a strong and successful portion of respectable society in colonial Port Phillip. This ethnic group enjoyed great numbers in Melbourne, the Western District and Gippsland, and constituted 'the largest portion of the respectable inhabitants of the colony' with, for many years, a stranglehold on the Melbourne Town Council. Many became successful pastoralists.<sup>77</sup> According to contemporary accounts the Scots were perceived to be very 'canny' and to disapprove of silly unproductive class-centric pastimes such as hunting. They were generally seen to be able to 'hold their land and to prosper'.<sup>78</sup> They were considered hard workers, somewhat dour in outlook, interested in politics, yet clannish, thrifty, serious and more adaptable than the English 'to the habits and modes of thought of other nations'.<sup>79</sup> The Scots tended to migrate in family groups, most were married when they migrated, and they enjoyed higher literacy rates than the English or Irish migrants. In fact, from 1839, the comment was recorded that 'Melbourne is almost altogether a Scotch settlement, and the people are so far as I can judge altogether Scotch in their habits and manners'.<sup>80</sup> The Scots spearheaded

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<sup>77</sup> PPP 12 December 1844; Amongst those Scots who succeeded through hard work, thriftiness and patience: John Robertson, James Malcolm, John Aitken, David Fisher, the Affleck brothers, John Bon and John McMillan and Neil Black; Robertson in *LVP*, *op.cit.*, pp.154–169; Malcolm in Selby, I., *Old Pioneers Memorial History of Melbourne* (Melbourne, 1924), p.305; Aitken in *LVP*, *op.cit.*, pp.47–50; Fisher in *LVP*, *op.cit.*, pp.36–47; Afflecks in *LVP*, *Ibid*, pp.292, 297; Bon in *LVP*, p.296; McMillan and others in Lang, *op.cit.*, pp.90, 99, 100, 101; Neil Black, *Journal*, 24 January 1840; as cited in de Serville, *op.cit.*, pp. 144–146.

<sup>78</sup> Curr, *op.cit.*, pp.383–384, this particular Scot sold his holdings at the right time and went home to Scotland with 40,000 pounds; Boldrewood, *Old Melbourne Memories*, *op.cit.*, pp.115–116; as cited in de Serville, *op.cit.*, p.146.

<sup>79</sup> Prentis, M. D., *The Scottish in Australia* (Melbourne, 1987) pp.6–7, based on his PhD thesis, *The Scots in Australia: A Study of New South Wales, Victoria and Queensland, 1788–1900*, Macquarie University, 1983.

<sup>80</sup> Prentis, *op.cit.*, pp.23–24, 35, 50.

the expansion into Gippsland during the Port Phillip period, creating their own *Caledonia Australis*.<sup>81</sup> The Melbourne *Sons of Scotia* could boast a number of magistrates as members.<sup>82</sup> They managed to make their way into the inner circle of gentility in Port Phillip polite society. Because the Scots were somewhat 'clannish' they were subject to internal divisions and enjoyed their own class and clan-based rifts. One example was the rival dinners held to welcome Aeneas Macdonnell of Glengarry. One of the receptions was organised by the *Sons of Scotia* and was more exclusive than the other more non-sectarian affair. The exclusive reception's organising committee included magistrates William Ryrie, James David Lyon Campbell and Peter Snodgrass. A number of the *Sons of Scotia* even decided to 'gate crash' the rival function and were thrown out of the reception through a window. This action again underscores the 'wildness' and un-gentlemanly behaviour that infected even the gentlemen caste of settlers in Port Phillip. Neil Black provides us with another instance. Whilst in Geelong on business, Black fell into the company of 'five gentleman squatters' who were drinking and carousing at an Inn, well into Sunday morning, thereby profaning the Sabbath. The waiter who was serving them was invited to sing with them and thereafter to join them at their table. The evening concluded with these 'gentlemen' urinating in the main street of Geelong, being arrested, charged with indecent behaviour and brought before the other fellow 'gentlemen' of the Geelong magisterial Bench.<sup>83</sup> In this example alone we have three breaches of gentlemanly etiquette: a breach of Sabbath observance, consorting with servants, and the performance of acts contrary to public decency.

## THE CODE OF HONOUR IN PORT PHILLIP POLITE SOCIETY

THERE IS NO doubt that the society transplanted to the Port Phillip District sought to reflect its origins in the recreation of a class-based society and the code of honour by which the

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<sup>81</sup> Watson, D., *Caledonia Australis: Scottish Highlanders on the Frontier of Australia* (Melbourne, 1984).

<sup>82</sup> Farquhar McCrae, William Ryrie, J. D. Lyon Campbell and Peter Snodgrass; as cited in de Serville, *op.cit.*, p.128.

<sup>83</sup> Kerr, J. H., *Glimpses of Life in Victoria* (Edinburgh, 1872), p.8; PPH 10 & 17 November 1840; PPP 26 November 1840; PPH 27 November 1840, 1 December 1840; PPP 30 November 1840, 3 December 1840; Neil Black, *Journal, op.cit.*, 2 February 1840, 26 January 1840, 8 March 1840; as cited in de Serville, *op.cit.*, pp.147–149.

Regency elite lived.<sup>84</sup> As Melbourne was ostensibly a 'free settlement', it sought to shape itself as a recreation of an English town with appropriate institutions and social rules. The citizens sought to counter the strangeness of their surroundings by transplanting and recreating the familiar.<sup>85</sup> Part of that transplantation was the transfer of the code of the gentlemen as part of the rules of conduct within 'polite society'. Historian Paul de Serville has argued that this code of conduct, as part of the mentality of the Port Phillip settlers, was as potent as the better-known egalitarian code of 'mateship' as a force of social behaviour and was more representative of the ties that bound the ruling elite that governed Port Phillip within their 'enclave mentality'. Liberal forces in the settlement opposed this re-creation of British society – with its particular codes of conduct, deference and breeding, and sought to create a merit-based democratic society. The economic recession of the 1840s, however, acted as a great social leveller. The disasters that befell members of polite society allowed some to conclude that 'fine gentlemen are the most unfortunate set of Colonists' as they had sunk 'beneath the very classes they had treated with contempt' in a process of social 'decomposition'. As a result, new classes would arise out of an indigenous colonial class structure based more appropriately on 'industry and good name'. It has been argued that the recession of the 1840s and the social upheaval of the gold-rush years did not entirely destroy polite society in Port Phillip and only 'checked' its unilateral rule. These developments allowed men 'who were not gentlemen by birth' to take the reins of social leadership during the Regency period of transition between the Georgian and Victorian eras.<sup>86</sup> The contemporary journals, the Gipps–La Trobe Correspondence, and the local newspapers of the day provide insights into polite society and the attitudes of the ruling elite of Port Phillip.<sup>87</sup>

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<sup>84</sup>Ronayne, J, *op.cit.*, p.12.

<sup>85</sup> Grant, J., & Serle, G., *op.cit.*, p.11.

<sup>86</sup> McCombie, T., *Arabin, or the Adventures of a Colonist in New South Wales* (London, 1845) p.103; as cited in de Serville, *op.cit.*, pp.14–16.

<sup>87</sup> Griffith, Charles, *Diary 1840–1841*, La Trobe Library, re Irish Cousinage; McCrae, Georgiana, *Georgiana's Journal, Melbourne 1841–65*, ed. Hugh McCrae, 2nd. Ed., (Sydney, 1966); Black, Neil, *Journal 1839–40*, La Trobe Library, re Scottish squatting; Batey, Isaac, *Reminiscences*, Royal Historical Society of Victoria Library; Russell, Robert, *Papers*, La Trobe Library; Pohlman, Robert Williams, *Diary 1840–41*, Royal Historical Society of Victoria Library and La Trobe Library; Waterfield, Reverend William, *Diary 1839–40*, Royal Historical Society of Victoria Library; Shaw, A. G. L., *Gipps–La Trobe Correspondence* (Melbourne, 1989); Browne, Thomas Alexander (Rolf Boldrewood), *Old Melbourne Memories* (Melbourne, 1969), ed. Sayers, C. F.; Curr, Edward, *Recollections of Squatting in Victoria 1841–1851* (Melbourne, 1883,

The novels of Martin Boyd also capture the essence of 'good society' in early Victoria.<sup>88</sup>

Who were these gentlemen, and why did respectable men come to the colonies? Why would a member of a social elite leave a settled society that supported their superior class position and exchange it for an uncertain life in a distant, foreign and developing colonial society? There seemed to be a variety of motivations behind 'gentlemen' seeking to emigrate. There can never be one complete answer to this question. With the younger gentlemen there may have been a sense of the 'adventure' in the undertaking. In the case of professional gentlemen there was also the sense of opportunity. Irish legal professionals famously saw the 'forty hats on the Munster Circuit' and realised that it was time to seek work elsewhere. Officers in the armed forces dreaded the intermittent peace of the period, and the resulting lack of 'opportunities' for advancement. There was also the issue of primogeniture, where the later-born sons needed to make their own way in the world. Poor health, restlessness or personal and private misfortunes also drove some into self-imposed colonial exile.<sup>89</sup>

Were the imports all true gentlemen? To be a 'gentleman' meant that one should fit a set of general and other more specific criteria. Minimum requirements seemed to be a level of 'manners, deportment, appearance, clothes, tastes and suitable education'. Genealogical purists insisted upon heredity and bloodlines. Others saw 'polished address, graceful manner, the ability

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fac.ed., Adelaide, 1968); Westgarth, William, *Australia Felix, or a Historical and Descriptive Account of the Settlement of Port Phillip* (Edinburgh, 1848), *Personal Recollections of Early Melbourne* (Melbourne, 1888), *Victoria, Late Australia Felix* (Melbourne, 1853).

<sup>88</sup> Boyd was a descendant of many of the respectable members of early Victorian society and used this intimate knowledge to great effect; Boyd, Martin, *The Montforts* (London, 1928) reprint (Adelaide, 1963); *The Cardboard Crown* (reprint, 1972); *Day of My Delight* (Melbourne, 1965); *A Difficult Young Man* (reprint, 1972); *Lucinda Brayford* (Melbourne, 1948); *A Single Flame* (London, 1939); as cited in de Serville, *op.cit.*, pp.26-28; Boyd's ancestors included Sir William aBeckett, fourth resident judge and later first Chief Justice of Victoria; Dr Robert Martin, doctor and squatter, clubman; Lucy Gear, claimed ancestry from St. Dominic and the Empress Eugenie; John Mills, Melbourne's first brewer and Captain John Boyd, secretary to colonial armed forces commander; as cited in de Serville, *op. cit.*, pp.26-28.

<sup>89</sup> Officers: Stawell, Lady, *My Recollections* (London, 1911) p.196, as cited in de Serville, *op. cit.*, p.28; Ronayne, J., *op. cit.*, p.9; Other Factors (misfortune): Hamilton, George, *Experiences of A Colonist Forty Years Ago & A Journal from Port Phillip to South Australia in 1839, by An Old Hand* (Adelaide, 1879), p.5; as cited in de Serville, *op.cit.*, pp.28-29; Lady Stawell, *op. cit.*, pp.11, 18.

to perform the latest dances as the *sine qua non* of urbane gentility'. Others looked to the cravat, the contents of a man's library, his knowledge of the Classics, his sporting prowess, and, strictly speaking, whether he could afford to live on unearned income. De Serville has classified the upper portions of Port Phillip society. There were those who were completely outside the pale of good society. There were others who could have been, but chose not to be part of good society. Those within the pale were divided into three groups: gentlemen by good family, gentlemen by profession or commission, and gentlemen by upbringing. Entry into polite society by membership of the legal profession was, and still is, a matter of established fact.<sup>90</sup> This also applied to clergymen, graduates of Oxford or Cambridge, and military officers. Another component of the elite grouping within Port Phillip were 'men of substance and respectability'. This was the category into which magistrates generally fell. This group, although strictly outside the parameters of the most exclusive castes of good society, nevertheless constituted a considerable social bloc who eventually, and especially after the gold rush, took hold of the reins of prestige from the original Port Phillip gentlemen exclusivists.<sup>91</sup> The Port Phillip exclusivists, aspiring to create a dominant class that through circumstance had become 'detached from its original setting', adopted an oversensitive attachment to credentials, lineage and the minutia of gentility. This phenomenon was not limited to Port Phillip and was not limited to colonial Australia.<sup>92</sup>

Climate, however, tends to affect people and their actions, and to a certain extent reflects a people and their motivations. The harsh Australian climate, mixed with dust and flies, all so different from England, undoubtedly affected not only the health but also the temperament of residents, even those in polite society. The foreign 'inverted' environment was difficult to

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<sup>90</sup> Classifications: de Serville, *op.cit.*, pp.29–32; PPH 24 June 1845, describing the entrant to the profession becoming a gentleman upon admission to practice, notwithstanding 'however low their origins or humble their possessions'; as cited in de Serville, *Ibid*, pp.30–31; When admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria in 1989, I always remember the documentation of the articles of admission reading 'James Theodore Ivan Rangelov, Gentleman, of ...'

<sup>91</sup> de Serville, *op.cit.*, pp.32–33.

<sup>92</sup> Kiernan, *op.cit.*, pp.152–154.

accept.<sup>93</sup> As a method of coping with the strangeness of the surroundings, magistrates Boldrewood and Joseph Hawdon and the settler Neil Black conjured up romanticised visions and the beauty of parts of the 'outback'. The majority of the descriptions however centred around the eerie 'appalling silence', the monotony, the isolation and in some the overwhelming depression which led to drink and sometimes to suicide.<sup>94</sup> The cavalier attitude of the new settler to the natural environment in part reflects their alienation from their new surroundings, 'There is no grass, no shade, no birds...the universal opinion that Melbourne is an odious, tiresome place.'<sup>95</sup> The theme of homesickness runs through the accounts of the early English exiles in a place they found 'breathtakingly alien'. They were strangers in a land of indifference, a land of waiting and melancholy<sup>96</sup> 'a land of, Bright blossoms...scentless and songless bright birds'.<sup>97</sup> Novelists attempted to put into words what they imagined the transplanted Britons had felt.<sup>98</sup>

Up to and including the period of the 1840s recession, one of the main features of the Melbourne settlement was the youthfulness of the population and the unmarried masculine domination of the frontier settlement. This only improved and stabilised with the coming of married settlers. It has been observed that Police Magistrate Foster Fyans 'was twice the age of

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<sup>93</sup> 'A very funny place where nothing happens like it should. The North wind's hot, and the South wind's cold. Trees drop their bark and keep their leaves. The flowers don't smell and the birds don't sing. The swans are black and the eagles white. You burn cedar to boil your hominy and build your fences out of mahogany'; Penton, B., *The Landtakers* p.81

<sup>94</sup> PPG 17 March 1841 re inferior water; PPP 26 October 1840 re dysentery; PPG 22 March 1842 re heat and health; McCrae re health and young children and fevers p.78, 92, 116; Browne, Thomas Alexander (Rolf Boldrewood), *My Autobiography*, Mitchell Library, p.38; Neil Black, *Journal*, 20–21 December 1839; Hawdon, Joseph, *The Journal of a Journey from New South Wales to Adelaide Performed in 1838* (Melbourne, 1952) reprint, p.46; as cited in de Serville, *ibid*, pp. 35–36.

<sup>95</sup> Cunninghame, Christina, *Journal*: May 1841, 12 November 1841, ML in McGowan, Rose, M., *A Study of Colonial Life and Conditions in Early Melbourne Prior to Separation*, M.A. Thesis (1951) University of Melbourne, ft.8, p.1.

<sup>96</sup> Dark, E., *The Timeless Land*, as cited in McGowan, *ibid*, ft.8, p.1.

<sup>97</sup> Gordon, A.L.: *A Dedication*, as cited in McGowan, *ibid*, ft.8, p.1.

<sup>98</sup> 'The Australian mountain forests are funereal, secret, stern. Their solitude is desolation. They seem to stifle in their black gorges, a story of sullen despair. In other lands the dying year is mourned, the falling leaves drop lightly on his bier. In the Australian forest no leaves fall'; M. Clarke: Introduction to A. L. Gordon's Poems, as cited in McGowan, *op.cit.*, ft.8, p.1.

the majority' [of settlers] when he arrived in Port Phillip.<sup>99</sup> Melbourne during the Port Phillip period was a frontier boomtown, full of youthful abandon and carelessness. One contemporary account recalls the outskirts being littered with champagne bottles and the young magistrates sipping their 'thin champagne' with some of the young squatters who chose to live in town whilst 'their overseers managed their stations'.<sup>100</sup> The young men who did this – who left their properties for the sake of revelries and who overused the system of credit bills – sacrificed any chance of success on the land and invariably failed during the recession. Those who did not, tended to succeed. One contemporary, as early as 1839, had predicted the recession as a result of the over supply of bills of credit.<sup>101</sup>

The snobbery of the elite members of Port Phillip good society was palpable. Charles Griffiths, a member of the *Irish Cousinage*, was a typical example.<sup>102</sup> He criticised many of his colleagues for their poor choice of words, a poor game of cricket, an overindulgence in alcohol or food, or any other 'crudities'. Amongst this circle the word 'colonial' became a 'term of opprobrium' for all types of second-rate conduct. It seemed that to insult a gentlemen, all one had to do was to call him an 'Australian Gentleman'. The leaders of good society would often sneer and belittle the attempts of the 'not so genteel' in their attempts to ape the social etiquettes of their betters in England. Madame McCrae commented that at the 1842 Mechanic's Institute ball, Mayor and Town Magistrate Henry Condell's young niece was waltzing like a mantis, in a dress of the same sheen.<sup>103</sup> The members of polite society also sought to house themselves

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<sup>110</sup> Brown, P. L., (ed), *Chyde Company Papers* (London, 1952) p.57.

<sup>100</sup> Grant, *op. cit.*, p.35; Therry, R., *Reminiscences* (London, 1863) pp.54–59; Curr, *op. cit.*, pp.9–19; J. A. Macdonald, *Old Time Reminiscences of the Early Days of Melbourne*, RHSV Collection; Neil Black, *Journal*, 3 December 1839; as cited in de Serville, *op.cit.*, pp.37, 41, 59.

<sup>101</sup> Neil Black, *Journal*, 6 & 17 November 1839, 3 December 1839; as cited in de Serville, *op.cit.*, p.40.

<sup>102</sup> de Serville, *ibid*, p.17; Ronayne, J., *op. cit.*, p.105.

<sup>103</sup> Words: Griffith, *Diary*, 9 December 1840 re Dr Clutterbuck; Cricket: Griffith, *Diary*, 14 January 1841; Alcohol: Griffith, *Diary*, 1 January 1841; Colonial: Griffith, *Diary*, 8 December 1840; PPG 28 January 1845; An 'Australian Gentleman' being somewhere between a lawyer and a sheep farmer; Georgiana McCrae, *op. cit.*, p.96; as cited in de Serville, *op. cit.*, pp.38–39, 62.

according to a style that their class dictated.<sup>104</sup>

It is important to note that a large proportion of Port Phillip settlers were not really settlers at all but 'economic visitors' who came for the purpose of making money, intending then to return 'home'. It seems that even 'gentlemen' under these circumstances lost some of 'their principles' when quick money and not permanent settlement was their goal. Along with their principles, they tended to lose the ability to strictly enforce those class distinctions that divided their own familiar system of vertical deference. Contemporary accounts argue that the shortage of labour allowed the labouring and working classes a degree of empowerment and indeed a familiarity with the master class that was uncommon and unheard of for both groups in Britain. It was claimed that they shared the same food as their masters, were more of a problem to their masters than the 'natives', and developed an 'insolence' that was intolerable.<sup>105</sup> Normal class classifications were almost obsolete in Port Phillip until the 1850s, when the population numbers allowed for a normalisation of traditional British class structures. Prior to this normalisation, many, who 'back home' would never have dared, sought the social distinction of being a colonial 'gentleman'. They attempted to climb a ladder not available to them in traditional British society. John Pascoe Fawkner was but one example. Through longevity and perseverance, Fawkner eventually found comfort in the title 'gentleman' by virtue of his post of Market Commissioner, his Legislative Council seat, and his eventual magisterial appointment to the Collingwood Bench. His ultimate affection for the title 'gentleman' is consistent with what George Arden termed to be the aspirations of any 'low-bred' person possessing wealth.<sup>106</sup> Wealth alone may not have

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<sup>104</sup> In South Yarra, Lt. Col. Anderson lived at *Fairlie*, Major Davidson at *Callitini* and Police Magistrate Major St John at *Little Rockley*. River positions were fashionable, the McCrae Family lived at *Mayfield*, the Curr Family at *St Hellier's*, John Orr at Abbotsford and John Hodgson at *Studley Park*. In Heidelberg, apart from Mr Justice Willis, magistrate Captain Smyth lived in *Chelsworth*, the Hawdon's, including magistrate John Hawdon, at *Banyule* and Thomas Wills at *Lucerne*; as cited in de Serville, *op. cit.*, pp.73–74.

<sup>105</sup> Neil Black, *Journal*, 7 December 1839, 4 January 1840, 8 January 1840; Meyrick, Frederick James, *Life in the Bush 1840–1847: A Memoir of Henry Howard Meyrick* (London, 1939) re Henry Meyrick to Susan Meyrick, 20 November 1845; Neil Black, *Journal*, 20 December 1839; Griffith, *Diary*, 21 November 1840; as cited in de Serville, *op. cit.*, pp.40–41.

<sup>106</sup> de Serville, *op. cit.*, pp.46–47.

provided automatic entry to polite society in Port Phillip, but it did give an aspirant a better chance than in England. The key may have been the disproportional strength of the expanding merchant and shopkeeper classes who objected to the strict enforcement of English class protocols and who would eventually win control of the Melbourne Town Council.<sup>107</sup> The exclusivist–emancipist colonial divisions were also transplanted to Port Phillip. Polite society in Port Phillip was ever vigilant for signs, real or imaginary, of the ‘taint’ of convictism. Fawcner’s convict ‘taint’ always dogged him. His convict taint was exaggerated to the point that the conviction and flogging that led to his servitude as a convict was whispered to have been occasioned by bestial relations with a female goat! William Lonsdale, Melbourne’s first Police Magistrate, Sub–Treasurer and later justice of the peace for the Territory, was hounded by persistent but untrue rumours that his wife was a ‘government woman’. Thomas Wills was likewise stung by his father’s convict past, but rose despite this to become a colonial gentleman by virtue of his commission as a magistrate.<sup>108</sup>

The advantages in being a gentleman were too numerous and obvious to list. Doors and indeed entire Districts were flung open to men of this rank. Magisterial appointments were generally given only to men of this rank. William Verner was placed upon the Commission of the Peace for Port Phillip on these terms,

There is with you a Mr Verner who acted as Magistrate for some time at Parramatta. I know nothing of his abilities, but [he] is a Gentleman, which is always something.<sup>109</sup>

Acheson French, later Police Magistrate at the Grange, was described as

a fine spirited fellow, with all the feelings of a gentleman – not above driving his bullocks or doing any of the things which snobs think lessen their dignity.<sup>110</sup>

La Trobe was a gentleman and technically the leader of polite society in Port Phillip as

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<sup>107</sup> Grant, *op. cit.*, pp.14–15.

<sup>108</sup> PPG 16 March 1842, PPG 5 October 1839, 22 November 1842, 26 November 1842, 2 February 1843; Robert Pohlman, *Diary*, 23 February 1841, RHSV Library; *ADB*, vol.2, q.v. H. S. Wills; as cited in de Serville, *op. cit.*, pp.49–52.

<sup>109</sup> Gipps to La Trobe, 15 May 1841; as cited in de Serville, *op. cit.*, p.48.

<sup>110</sup> Griffith, *Diary*, 13 January 1841; as cited in de Serville, *ibid.*

the representative of the Crown in the District and his commission as an *ex officio* magistrate of the Territory. His appointment, given his ethnicity, background and relative inexperience was considered strange by many, who would have favoured the more traditional appointment of a military man.<sup>111</sup> La Trobe's wife, as 'first lady of Port Phillip', was also considered both physically and emotionally unsuitable for the position of the first mistress of good society in early Melbourne. The social vacuum created by La Trobe's inability to lead polite society in Melbourne allowed a clique of colonial Port Phillip polite society to rule the elite of Melbourne through a network of familiarities developed within the Melbourne Club and fine-tuned by the Quarterly Assemblies<sup>112</sup> and through the associated social and sporting organisations and social functions that developed in their wake. Some of the leading male figures in the settlement also established English Masonic Lodges. These originally followed the English pattern but later splintered into Scottish and Irish Masonic constitutions. The primary institution in these evolving social structures was the Melbourne Club. Indeed, the *Melbourne Club* became the litmus test for respectability in good society and a finishing school in manners for any currency lads with potential.<sup>113</sup> The social sword of the blackball meant that non-election as a member or ejection for un-gentlemanly conduct ended one's chances in good society.<sup>114</sup> It should be remembered that this was good society 'colonial-style': Port Phillip's most exclusive club admitted traders, merchants and even Catholics to its membership, at a time when its English templates would not. Mercantile wealth, it seems, was enough to insert oneself into polite society, furthering the argument that, in the Australian colonies, money outweighed social rank and social talent. Lesser gentlemen in the settlement formed another club, the *Port Phillip Club*,

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<sup>111</sup> Although lacking a 'Government house' in which to entertain and with an annual income of only 800 pounds, the inability to entertain in an appropriate style; Another candidate for the post had been Lt. Col. Kenneth Snodgrass, whose son Peter Snodgrass, gentleman, settled in Port Phillip and was one of its more 'gallant' types; as cited in de Serville, *op. cit.*, pp.55-56, 63; Kerr, William, *Kerr's Melbourne Almanac and Port Phillip Directory* (1842) repr. (Mona Vale, 1978) p.182.

<sup>112</sup> de Serville, *op. cit.*, p. 58, 63, 129 note La Trobe's actions during the Birthday Ball Affair, and p.134.

<sup>113</sup> George Arden, foundation member in Melbourne Club PPG 2 March 1839; see de Serville, *op. cit.*, p.64.

<sup>114</sup> de Serville, *op. cit.*, pp. 139 and 64-65, citing Waterfield, *Diary*, RHSV, 4 January 1839; *Hunter Papers, La Trobe Collection*, J. A. C. Hunter to Evan Hunter, 13 January 1841.

also known as the 'second eleven'. Two settlement magistrates, John Wills and J. B. Were, were members of this short-lived contra club. One could not be a member of both clubs, and it has been suggested that blackballed members of the Melbourne Club made up most of the Port Phillip Club's membership. This latter Club eventually attained a total membership of 100 members, but a number of expulsions from the club, and the 1840s recession in Port Phillip, saw the end of this attempt to fabricate a second rein on the conduct and mentality of the thoroughbreds of Port Phillip.<sup>115</sup>

The *Quarterly Assemblies* in Melbourne were another attempt by the colonial Port Phillip aristocrats to copy the formal social gatherings of polite society in England, Ireland and Scotland. The first series of Assemblies in Port Phillip was organised by a committee and stewards in mid-1841. The Assemblies became the focal point of the social calendar of Port Phillip polite society. The Assemblies were as exclusive as possible given the limited population of the settlement, with people involved as merchants constituting the lower limits of acceptability.<sup>116</sup> Interestingly, the stewards for the first Assembly were all either magistrates and/or past or incumbent Police Magistrates. James Simpson, Farquhar McCrae, Frederick Powlett, James David Lyon Campbell, William Verner and Major Frederick St John can therefore be seen as 'members of the inner circle' of polite society in colonial Port Phillip and its social capital, Melbourne, although they were at one time derided as 'ill-bred puppies'.<sup>117</sup> The attempts to exclude and expel certain members meant that the Assemblies was the 'social court' of polite society in early 1840s Port Phillip. They were, however, dissolved during the recession years of the 1840s, and then reformed in 1846. They never seemed to regain their former glory, moreover, and continued sporadically until the 1850s.<sup>118</sup> The demise of the Assemblies reflects

<sup>115</sup> PPP 9 December 1839; McCombie, *Arabin, op. cit.*, p.108; Scott, E., *Historical Memoir of the Melbourne Club* (Melbourne, 1936) p.39; PPP 9 December 1839; PPH 27 & 30 July, 10 September 1841; 7 March 1843, 27 January 1844; as cited in de Serville, *ibid*, pp. 65, 134-135, 137-139.

<sup>116</sup> Murray, R. D., *A Summer at Port Phillip* (Edinburgh, 1843); PPG 23 July 1842; as cited in de Serville, *op. cit.*, pp.66-67.

<sup>117</sup> PPP 3 May 1841; PPH 29 June 1841, 16 July 1841, 17 September 1841; as cited in de Serville, *op. cit.*, pp.67, 130.

<sup>118</sup> PPH 7 April 1846, 14 May 1846, 2 June 1846, 11 August 1846; PPP 13 June 1846, 19 January 1847 re J. A. Erskine,

the transience and impermanence of social institutions, especially in frontier cultures. To be a subscriber to the Quarterly Assemblies was an essential badge of honour as a member of Port Phillip's good society. An attempt in 1842 to remove one member, Edward Curr, provides an interesting insight into a number of the important dynamics of colonial society in Melbourne. Curr accused another socially powerful gentleman, magistrate James David Lyon Campbell, of enticing Curr's house servant out of his employment. Curr took the matter before the Melbourne Bench of magistrates as an employment law matter. The charges were dismissed. Campbell was a magistrate at the time and member of the 'inner circle' of Melbourne's polite society, as was one of Campbell's closest friends and brother magistrate, William Verner of Heidelberg.<sup>119</sup> Verner sat on the Bench of magistrates before which the matter was brought. Curr suspected bias.<sup>120</sup> The episode revealed the power of the magistracy vis-à-vis the relatively weaker Assemblies.

One notable early settlement dispute involved two of the leading figures in Victorian Freemasonry. This dispute and the splintering of the original Melbourne Lodge of Australia Felix along ethnic lines underscores the difficulties facing settlers who sought to transplant institutions and customs into a culturally diverse and socially unstable colonial settlement. On 23 December 1839, 21 freemasons were called together to organise the formal establishment of an authorised 'Lodge of Australia Felix', under a provisional warrant from the District Grand Lodge of Australasia in Sydney, whilst the Grand Lodge of England undertook the warrant formalities. The Sydney warrant, dated 24 April 1840, was returned to Melbourne by magistrate [Commissioner of Crown Lands] Captain George Brunswick Smyth. Smyth, [mother Lodge St Mary's London No.76] carried the warrant overland from Sydney on horseback and was named as the first Master of the Melbourne Lodge. The Lodge was duly constituted in Melbourne on 25

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who fell over whilst dancing at an Assembly and took with him several of the leading ladies of the settlement; as cited in de Serville, *op. cit.*, pp.69–70.

<sup>119</sup> *Kerr's Melbourne Almanac*, *op. cit.*, p.182.

<sup>120</sup> Curr, E. M., *Memoranda Concerning Our Family*, La Trobe Collection, 20 August 1842; PPP 8 September 1842, 22 September 1842; PPH 13 September 1842; as cited in de Serville, *op. cit.*, p.68.

March 1840 as Lodge No 697. Apart from his assistance in the initial formation and consecration of the Melbourne Lodge, Smyth did not take up any further formal Masonic offices after this period. It seems that Smyth's duties as a territorial magistrate interfered with his ability to attend Lodge meetings. John Stephen was elected Master in early 1841 and is generally acknowledged as the father of freemasonry in Victoria.<sup>121</sup> Stephen was the driving force behind the original consecration. Smyth was appointed because of his social standing as a magistrate. The Lodge quickly prospered.<sup>122</sup>

On 23 November 1841 a group of masons led by James Erskine Murray and William Kerr petitioned Stephen to sanction the formation of a regular Scottish Lodge. Murray, barrister, son of a Scottish Lord, was a member of the Port Phillip elite. Eventually the Scottish Lodge Australasian Kilwinning, derived from Mother Kilwinning No 0, was formalised on 13 May 1844.<sup>123</sup> Irish members of the Lodge of Australia Felix also undertook moves to establish their own Lodge during 1843, under the leadership of John Thomas Smith.<sup>124</sup> Problems among the three Lodges began to surface in the early 1840s. The Australia Felix or English Lodge core members led by John Stephen resisted the development of the Scottish and Irish Lodges. This in turn led to the quarrels between Stephen and Kerr that, uncharacteristically in Masonic circles,

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<sup>121</sup> Past master of Lodge of Australia No 548 Sydney, John Stephen was a solicitor, correspondent and sometime assistant editor of the *Port Phillip Gazette*. He became Provincial Grand Master of the Southern Portion of Australasia in 1842 under the authority of the English Grand Master the Duke of Sussex; Thornton, P. T., *The History of Freemasonry in Victoria* (Shepparton, 1978) p.2.

<sup>122</sup> The first Senior Warden was William Meek of Lodge Restoration No 128, Victoria's first solicitor. On one occasion, however, Masonic furniture and regalia were damaged and sprinkled with alcohol on or about 24 June 1840, after the Masonic celebration of the festival of St John the Baptist. Accordingly, steps were taken to secure their proceedings and membership in order to 'prevent any unworthy gentlemen in the community from entering the Lodge through the back door'. The Lodge established initiation fees of 10 guineas and normally met in a variety of hotels. By June 1840 the Lodge had 64 members. Twenty-three meetings were held in the first 12 months and 50 candidates were initiated. Banqueting was reserved for festivals; Thornton, *op. cit.*, pp.1-3, citing early minutes.

<sup>123</sup> Communications were made with a New Zealand Scottish Lodge and a hand-delivered petition to the Scottish Grand Lodge for a warrant; Thornton, *op. cit.*, pp.3-4, 7-9.

<sup>124</sup> The 'Whittington of Melbourne', seven times Mayor and 'Father' of the Legislative Assembly and supporter of the eight hour day movement, see James, G. F. (ed), *A Homestead History being the Reminiscences and Letters of Alfred Joyce of Plaistow and Norwood, Port Phillip 1843 to 1864* (Melbourne, 1969) p.35 and Mennell, *ADB*.

led to the public airing of differences. Each used their positions of influence in the leading settlement papers of the day to put their case; Kerr in the *Patriot* and Stephen in the *Gazette*. The public scandal was felt across the Port Phillip District. One editorial in a rural newspaper,<sup>125</sup> reported that William Kerr, editor of the *Port Phillip Patriot*, was suspended by an extraordinary meeting of master masons in Melbourne, on the complaint of John Stephen that Kerr had scandalously, maliciously and infamously defamed his character. The Masonic examination lasted four hours. Kerr was suspended until the pleasure of the Grand Lodge in England was made known.<sup>126</sup> The story of Port Phillip freemasonry, like the story of the Assemblies, illustrates the difficulties inherent in the transplantation of social institutions to a frontier society.

Attempts were made to establish other British social institutions. Consistent with the elite positioning of the magistracy in Port Phillip society, and their desire to replicate the institutions of their homeland, some magistrates led these attempts. A core group of Melbourne magistrates<sup>127</sup> were at the centre of the proposal to establish the Yeomanry Corps of Volunteers during the early 1840s.<sup>128</sup> This was based on the English tradition of having a corps of county volunteers that served as a *posse comitatus* in times of unrest. Thomas Henty, patriarch of the Henty clan, had for example joined the Sussex Yeomanry Cavalry as a Lieutenant in 1803 and was promoted Captain in 1804.<sup>129</sup> The plan in Port Phillip was to establish twelve companies throughout the Port Phillip District. Each company was to be under the leadership of a

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<sup>125</sup> *Portland Guardian and Normanby General Advertiser* 28 January 1843.

<sup>126</sup> Forty-one masons were in attendance, 32 voted against Brother Kerr, with only one, probably himself, voting against the suspension. As a result of the scandal, some masons resigned from Australia Felix and Kerr eventually joined the Scottish Lodge as Deputy Master on 13 May 1844. Kerr also joined the St Patrick Society and indeed served as its vice-president in 1845. He later became chairman of the Burns Society and eventually became the second Town Clerk for the City of Melbourne, retiring from that post in 1856; Thornton, *op. cit.*, pp.5–10; see PPH 18 April 1843.

<sup>127</sup> Including Police Magistrate Frederick St John, William Verner JP and Commissioner of Crown Lands Frederick Armand Powlett JP; Kerr's *Melbourne Almanac*, *op. cit.*, pp.182–183.

<sup>128</sup> de Serville, *op. cit.*, p.72.

<sup>129</sup> *Sussex and Weekly Advertiser* 28 November 1803; *Sussex and Weekly Advertiser* 29 November 1804; cited in Bassett, M., *The Hentys: An Australian Colonial Tapestry* (Melbourne, 1954) p.8.

prominent local settler. Governor Gipps essentially agreed with the plan, save the proposal that company leaders be chosen by election, as it tended to remove Crown control over an armed body of colonial gung-homanry. The recession, however, notwithstanding Gipps' agreement, saw an end to a proposal that, in colonial terms, especially given the presence of Indigenes within reach of an essentially squatter-dominated body of armed men, could easily have become a threat to the relative peace and civil order that existed within Port Phillip.<sup>130</sup>

## APPROPRIATE MAGISTERIAL TYPES

LA TROBE'S FAVOUR and partiality to polite society and to the company of gentlemen was, unsurprisingly, absolute, and an advantage for magisterial aspirants. Henry Fyshe Gisborne, gentleman and magisterial Commissioner for Crown Lands before his untimely illness and death, used connections in polite society to his advantage when he first met La Trobe. He claimed that,

a circumstance of this sort coming out in a foreign country makes men of equal rank friends upon the spot, and does you no harm with superiors.<sup>131</sup>

Gisborne was obviously a man of 'quality' and, upon his arrival in Melbourne, the Melbourne Club made him an honorary member before he 'had time to get off his horse'.<sup>132</sup>

Griffiths praised George Sherbrooke Airey, magistrate resident in Geelong,<sup>133</sup>

Airey is one of the most gentlemanlike, pleasing men I have ever met - with something so straightforward in his manner and high-minded in his sentiments that I would depend upon him for anything - it was quite cheering to see that there were such men settled in the Bush.<sup>134</sup>

Farquhar McCrae, gentleman by birth, Melbourne clubman and magistrate, also neatly met the

<sup>130</sup> PPG 4 June 1842; PPP 6 June 1842; Gipps to La Trobe, 12 June 1842, 13 June 1842, 18 June 1842; as cited in de Serville, *op. cit.*, pp.72-73.

<sup>131</sup> Henry Fyshe Gisborne to Mrs Gisborne, 10 October 1839, Mitchell Library; as cited in de Serville, *op. cit.*, p.53.

<sup>132</sup> Henry Fyshe Gisborne to Mrs Gisborne, 12 September 1839, *op. cit.*; as cited in de Serville, *op. cit.*, p.65.

<sup>133</sup> *Kerr's Almanac*, *op. cit.*, p.182.

<sup>134</sup> Griffiths, *Diary*, 3 November 1840; as cited in de Serville, *op. cit.*, p.54.

prescriptions of the civilian magisterial office. It was however men from military backgrounds who filled government posts and invariably led the colonial police magistracy. They did bring the 'society' skills in terms of manners and bearing needed to 'civilise' a colonial settlement and satisfy its clique of 'respectables' stranded in the Australian Bush. On the other hand, they were also often seen by the 'democratic forces' to be unsuitable candidates as 'public servants in a civilian colony'.<sup>135</sup>

The gentleman of Port Phillip enjoyed 'an appetite for honours' as part of the 'ornamental aspects of their rank' in society. There was immense competition within Port Phillip to have one's name placed upon the Commission of the Peace and thereafter append 'JP' to their name, sit as a magistrate and officially, 'socially', lead their portion of society within the District of Port Phillip. There was an overwhelming drive within men of that period to gather badges of social distinction, especially if one had neither genuine Heraldic credentials nor a family coat of arms.<sup>136</sup> Times and social measurements have changed and it can be difficult for us to understand this desire, but this seems to have been very important to the colonial Regency-Victorian gentleman. Placed within the context as a measure of the success of one's life, it becomes more understandable. During the Port Phillip period, men with class pretensions would often fallaciously append 'Esq.' to their name, as an Esquire took precedence over a mere gentleman. Importantly, however, membership of the Port Phillip magistracy was one of those categories entitled to the rank. Men would protest when incorrectly addressed or written about and were then ridiculed about their affection for their colonial social degrees.<sup>137</sup> Otherwise intelligent men made scenes when their place or social rank in society seemed threatened, and

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<sup>135</sup> Russell, Robert, *Papers*, La Trobe Collection, 15 July 1839; Robert Hoddle, *PPG* 31 July 1841; *PPP* 15 July 1839; *PPG* 15 September 1841; as cited in de Serville, *op. cit.*, pp. 59–60.

<sup>136</sup> *PPH* 27 December 1844; as cited in de Serville, *op. cit.*, p.75.

<sup>137</sup> Technically, however, the title Esquire was one that was meant to be reserved and restricted to certain classes of gentlemen, although this had tended to be ignored in England as well as in the colonies; Woodward, J., *A Treatise on Heraldry, British and Foreign* (London, 1892) pp.6–8; Dodd, C. R., *A Manual of Dignities, Privileges and Precedence* (London, 1843), pp.247–252; *PPP* 6 July 1843; as cited in de Serville, *op. cit.*, p.76; Coss, *op.cit.*, pp.2–7, 18, 190, 243.

took exception when persons they considered their social inferiors took what they considered to be their place of priority during formal events.<sup>138</sup> Port Phillip seems to have been particularly obsessed with the notion of respectable identification marks.<sup>139</sup> Popular elections undermined the rule that only gentlemen should be placed on the magisterial Commission. Henry Condell, Melbourne's first Lord Mayor and *ex officio* justice of the peace for the town, was scoffed at because of his trade origins as a brewer and as someone who 'held until lately a very humble rank in society'. Apart from his trade, his past contained some very 'un-gentlemanly' activities that followed him to the ends of the earth, where he had apparently settled to escape them.<sup>140</sup>

The young male elite of Port Phillip loved to display their gentlemanly *élan* in dramatic ways. Like criminal gangs of the lower classes, a pack mentality brought together groups or 'mobs' of gentry youth. At the urging of the leader of their class, Superintendent La Trobe, a gang of five young respectables also known as 'the Goulburn Mob' <sup>141</sup> captured a gang of bushrangers. This was an example, of one acceptable 'respectable' armed wild bunch pursuing a less 'respectable' gang of vagabonds.<sup>142</sup> As a result of the dramatic capture a 'grateful' Bench of Melbourne magistrates later withdrew a charge of assault, in another unrelated matter, against one of these young 'respectables'.<sup>143</sup>

<sup>138</sup> Gipps to La Trobe, n.d., ?September 1842; Polhlman, R. W., *Diary*, 1840–1841, RHSV, 24 August 1846; PPH 21 January 1840 re *Hodde v Gisborne*; as cited in de Serville, *op. cit.*, p.81.

<sup>139</sup> PPP 22 August 1839, 6 July 1843; PPG 9 March 1844; as cited in de Serville, *op. cit.*, p.76.

<sup>140</sup> PPH 23 September 1843; Condell had apparently killed a servant girl in England and had only escaped trial and possible transportation as a convict by medical evidence given before the coroner that the servant may also have died from an abscess; PPH 13 January 1843; Curtis Candler, *Diary*, p.55, La Trobe Library; as cited in de Serville, *op. cit.*, pp. 48, 51.

<sup>141</sup> Fowler, Thomson, Chamberlain, Snodgrass and Gourlay, 'Garryowen', vol.2, 769ff; Curr, *op. cit.*, pp.112-115; Cotton, J., *Correspondence of John Cotton, Victorian Pioneer 1842-1849* (Sydney, 1953), ed., George Mackanness, vol.2, pp.26, 33, vol.3, pp.9, 17; as cited in de Serville, *op. cit.*, pp.42, 104.

<sup>142</sup> They had been sworn in as 'Special Constables'; Gross, A., *Charles Joseph La Trobe* (Melbourne, 1980) p.73.

<sup>143</sup> PPH 3 May 1842, 6 May 1842; PPP 2 May 1842, 5 May 1842, 9 May 1842; re charge against Gourlay, PPG 5 March 1842; as cited in de Serville, *op. cit.*, p.42.

In a colonial society with neither an indigenous hereditary oligarchy nor titled aristocracy, the Port Phillip populace was nonetheless sensitised by a system of class rule predicated upon the granting titles and honours by the Crown. The colonial Governors, however, were limited in their ability to address these needs. The Governors had few options. In the past they could bestow land grants on individuals, give conditional and unconditional pardons to people, make one a government official, or place one's name upon the Commission of the Peace as a magistrate. The Governors' arsenal of favour, during the Port Phillip period, was limited to the bestowing of commissions of the peace; a commission as a justice of the peace was therefore immediately recognisable as a Crown boon that was beneficial to both parties. The Crown would receive the services of an unpaid local judiciary, while the recipient would be immediately raised above the herd of respectables within the community. The appointment as a colonial honorary magistrate has correctly been described as 'an exercise in traditional patronage'. There was a certain perceived 'aristocratic distinction' in the appointment. Many settlers and new arrivals sought the appointment, some as of supposed right because they came to the colonies with some money. The new arrivals to the colony came armed with letters of reference and introduction from the highest authority with whom they could claim intimacy; these were used to great effect in a land ruled by public servants.<sup>144</sup>

The Gipps-La Trobe correspondence of the period gives us an idea of the criteria necessary for an appointment to the Commission of the Peace. The man had to be over 24 years of age, and to have been a resident in the colony for at least one year. He was not to be a practising doctor. The established protocol demanded that La Trobe as Superintendent would approach candidates and then suggest and submit names of candidates to Gipps or to his secretary in Sydney. Gipps maintained that he would never make an appointment to the Commission of the Peace without La Trobe's recommendation, thus avoiding direct communications between the applicants and the Governor. Dr Thompson of Geelong, a

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<sup>144</sup> McCombie, *Arabin*, *op. cit.*, p.59; Gipps to La Trobe, 27 February 1841; Gipps to La Trobe, 5 June 1841, 23 April 1841, 30 May 1841; as cited in de Serville, *op. cit.*, pp. 76–79.

respected settler, an original member of the Port Phillip Association, original catechist of the Association, first Government medical officer in the settlement of Melbourne and first Mayor of Geelong, quite apart from being a practising doctor, was rejected in his appointment 'for pressing his claims too fervently'. Subsequent to the incorporation of Melbourne and the creation of the magisterial divisions between urban and rural magistrates in Port Phillip, the town aldermen attempted to appoint themselves *ex officio* justices of the peace. Gipps did not approve this attempt to democratise the Port Phillip magisterial Bench.<sup>145</sup>

The Port Phillip unpaid magistracy were criticised for their love of titles and their general ignorance.<sup>146</sup> According to Curr, speaking as a magistrate, the rural magistracy knew little about the law, administered rough justice and drank a lot. The paid magistracy also had their critics. Apart from Police Magistrates Lonsdale, Fyans and Blair, the other original salaried magistrates in the Port Phillip District were the members of the Aboriginal Protectorate. The Aboriginal Protector Robinson and his Assistant Protectors were all placed upon the Commission of the Peace as magistrates. The Protectorate was a failure and two of the assistant protectors were either removed or left the service soon after reaching the colony. The Chief Protector, George Augustus Robinson, one of the unsung villains of Australian colonial history, was pilloried in the press for his mechanic origins and the lack of common sense or 'the ordinary intelligence of his class'.<sup>147</sup> The Commissioners of Crown Lands were also criticised. The criticisms were often personal and tended to reflect the intrusive aspect of their jurisdiction and of the individual Commissioner than a comment upon the office itself. Bargains would be struck between

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<sup>145</sup> Gipps to La Trobe, 18 April 1845, 1 March 1840, 19 June 1841; Gipps to La Trobe, 19 June 1841; re Peter Snodgrass 15 August 1840; re Dr Martin 15 October 1840; Thomas Thornloe 30 May 1842; Edward Curr 15 July 1843; re von Sieglitz 12 March 1844; re town magistracies 14 January 1843, 11 February 1843; as cited in de Serville, *op.cit.*, p.77.

<sup>146</sup> Criticism: *PPH* 16 May 1842, 9 January 1845, *PPP* 1 February 1844; *Melbourne Morning Herald* [*MMH*] 27 June 1849; Titles: *PPP* 27 August 1839; Ignorance: *PPH* 17 March 1846 re little more than read and write; as cited in de Serville, *ibid.*, p.77.

<sup>147</sup> 'Many of the justices were gentlemanly young fellows, and excellent sheep farmers; kept good liquor, rode good horses and were usually well placed with a pack of fox hounds which hunted the neighbourhood'; Curr, *op. cit.*, pp.404-405; Strode, *op. cit.*, vol.1, p.74; *PPP* 15 October 1846; as cited in de Serville, *op.cit.* p.78.

squatters for the purchase of a run, but an enforceable transfer would be subject to the Commissioners' sanction.<sup>148</sup> Uncharacteristically, C. J. Tyers was well liked in both the Western District as a surveyor and in Gippsland as a Commissioner of Crown Lands. Tyers possessed an even-tempered personality and an easy nature. On the other hand, Foster Fyans, originally Police Magistrate at Geelong, then Commissioner of Crown Lands for the Portland District, then again Police Magistrate at Geelong, was universally disliked. He was disliked by squatters, respectables and by his own master, Governor Gipps. Gipps' experiences with Fyans and Gisborne seemed to dim his view of the utility of the office of Commissioner. Frederick Powlett was another Crown Lands Commissioner whose personal arrogance, amplified by his attachment to a form of pseudo-military dress, brought similar criticism to the office.<sup>149</sup>

The Port Phillip newspapers helped foster perceptions and advertise disputes between settlers and the organs of colonial governance. Their attacks upon La Trobe led him to denounce the Melbourne press as being totally without quality.<sup>150</sup> Apart from Fawcner's early-unlicensed endeavours, Port Phillip's first licensed newspaper, the *Port Phillip Gazette*, was owned and edited by George Arden and Thomas Strode. Both men were 'respectables' and their product initially saw itself as a gentleman's paper. This tone changed, however, after Arden, who was a founding member of the Melbourne Club, was expelled from the club. Arden left the *Gazette* bankrupt after much fuss and confrontation with Willis. The paper then went to Dr Augustus Greeves and then to Thomas McCombie in 1844, both men being 'respectable persons', but not 'society figures', who steered the paper along a more 'moderate course'. Fawcner's *Port Phillip Patriot* was an avowed enemy and opponent of gentility and all that it represented. The paper continued in

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<sup>148</sup> James, G. F. (ed), *A Homestead History, Being the Reminiscences and Letters of Alfred Joyce of Plaistow and Norwood, Port Phillip 1843 to 1864* (Melbourne, 1969) p.45.

<sup>149</sup> Gipps to La Trobe, re Fyans 17 June 1843, 16 May 1844, 5 February 1846; Fyans re Gipps in *Reminiscences*, pp.427, 431, 476; Gipps to La Trobe, re OCL 20 March 1846; Baker, C. J., *Sydney and Melbourne; With Remarks of the Present State and Future Prospects of New South Wales* (London, 1845) pp.74–75; Howitt, R., *Impressions of Australia Felix During Four Years Residence in that Colony* (London, 1845) pp.136–137; Curr, *op. cit.*, pp.115–119, 342–346; as cited in de Serville, *op. cit.*, pp.78–79.

<sup>150</sup> Grant & Serle, *op. cit.*, p.58.

this editorial policy under Fawcner and, by 1841, William Kerr, a Scottish radical, Orangeman and Freemason, took the anti-Establishment policy of the paper to new heights until it became a journal of genteel mockery under George Boursiquot. The *Port Phillip Herald* was a 'respectable' or 'clubman's paper' established in 1840 by William Dutton and George Cavenagh. Both men were respectable, Dutton being a magistrate and squatter, and Cavenagh the Irish Protestant son of an East India Company Officer. The *Port Phillip Herald*, together with the *Portland Mercury* were the friends of the squatting interest in the Port Phillip District. The 'enemy' in this context became the magisterial Commissioner of Crown Lands. The *Herald*, in this vein, criticised what they saw as the 'arbitrary rule of Crown Commissioners'. The newspapers of the period, therefore, neatly demonstrated the class divisions and political and economic motivations of the Port Phillip settlers.<sup>151</sup> The point has also been made that the Scots dominated the Port Phillip and later Victorian newspaper industry.<sup>152</sup> The newspapers therefore reflected the links between the social classes and their inherited traditions and biases, and their attitudes to government, and to the various organs and offices of government in Port Phillip.

## THE MAGISTRATES AND THE SQUATTERS

ACCORDING TO THE New South Wales census of 1836, of a total white population of 77,096, the majority of the citizenry (39,797) lived either in the County of Cumberland or in the vicinity of Sydney. It is recorded that 2,968 persons were living 'Without the Boundaries'. These persons presented the state with a problem. They had colonised areas outside of the settled districts and therefore were technically in illegal occupation of Crown lands. These 'out-laws', however, produced valuable commodities necessary for trade and commerce. These *outlanders* were also beyond the immediate vigil of the rule of law and presented the civic authorities with a

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<sup>151</sup> PPP, 15 May 1845; 'Garryowen', vol.2, pp.826-828, 832-833; ADB vol.4; 'wanton insults have been perpetrated by commissioners upon squatters, not inferior to them in birth or education, certainly superior to them in breeding, and at all events their equals as British subjects'; PPH 25 June 1845; as cited in de Serville, *op. cit.*, pp. 19, 21-22, 88.

<sup>152</sup> William Kerr at *The Port Phillip Patriot*, Thomas McCombie at the *Port Phillip Gazette*, Kerr and J. S. Johnston at the *Argus*, James Harrison at the *Geelong Advertiser*, Ebenezer and David Syme at *The Age*, see Prentis, *op. cit.*, p.75.

conundrum: these settlers placed themselves outside of the state-ordained boundaries and the pale of society, yet produced valuable tangible commodities and those intangible messages of domination and conquest that the creeping boundaries of settlement must broadcast in a frontier society. These settlers or 'squatters' eventually hounded the state for forms of physical protection and dispute resolution mechanisms. The term 'squatter' seems to have its origins in the American colonies where an emigrant would settle or squat upon a parcel of land and develop it. They constituted a different class in America, however, being persons of mean repute. The squatters of New South Wales, however, began as persons of some means and then developed into that muddled class of rural princes of Australia that became the Squattocracy. The Crown, under Bourke, devised a system of annual land licences. The fees raised would enable the state to provide a police and magisterial presence in the districts outside of the settled nineteen counties. The legalisation led to the legitimisation of the squatting caste from that of trespasser to semi-respectable pastoralist, even though these gentlemen pastoralists, as distinct from their English country gentry, possessed legal title to nothing.<sup>153</sup> A new breed of magistrate would arbitrate any disputes arising between these pastoralists: the Commissioner of Crown Lands. The commissioner's jurisdiction was later increased and he became a colonial 'itinerant magistrate' patrolling the hinterland and controlling its inhabitants.<sup>154</sup> As rural boundary disputes were common, the adversaries would have to wait, sometimes for months, until the Commissioner arrived. He would hear their arguments, ride over the disputed area and make an immediate and final judgement.<sup>155</sup> In theory any party who enjoyed a good rapport or personal relationship with the Commissioner had an advantage.<sup>156</sup> On the other hand, friendly relations with the Commissioner did not always guarantee a favourable result. Alfred Joyce became embroiled in a

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<sup>153</sup> Therry, R., *op. cit.*, p.240; de Serville, *op. cit.*, pp.82-83.

<sup>154</sup> Palmer, D., *op.cit.*, in Philips and Davies, p.77.

<sup>155</sup> James, G. F., *Alfred Joyce, op. cit.*, p.50.

<sup>156</sup> 'I find I am summoned on Tuesday next to be present at a case before the Commissioner of Crown Lands. It is a question of boundaries. As everything goes by interest and the Commissioner is a friend of ours, I have no doubt the decision will be in our favour'; Meyrick, F. J., *Life in the Bush 1840-1847*, p.180, correspondence Henry Meyrick 27 September 1845; see James, *Alfred Joyce, op. cit.*, p.50.

boundary dispute with his neighbours the Bucknall family, who were 'like ourselves of English nationality and in a similar social position.'<sup>157</sup> He found that any relationship he enjoyed with the Commissioner meant nothing when the adjudication involved parties of the same or similar social standing.<sup>158</sup>

Interestingly, the licensing system also meant that the relatively wealthier 'legitimate' established stockholders and pastoralists were competing with a class of rural poor who could also point to a licence-based estate in land.<sup>159</sup> This levelling of the playing field was foreign to the traditional English land-based class system and meant that the new 'squatters' would one day overcome their previously subservient positions in society and gain an ascendancy in rural (and urban) Australian affairs which would last for 150 years. It is important to realise that only a few of the original pastoralists in Port Phillip survived the initial difficulties of settlement, the recession of the 1840s and the social upheaval of the gold period. They did not go on to become the wealthy and influential squatters of the post-1851 separation colonial period. The Western District settlers, in the main, came to Port Phillip from Van Diemen's Land, whilst the Sydney overlanders tended to settle the central Port Phillip areas and Gippsland. Foster Fyans, formerly Police Magistrate in Geelong, then Commissioner of Crown Lands in the Portland Bay District, had a very low opinion of the Vandemonian settlers and described them as 'cursed squats and damned shopkeepers'. He considered them quite unsuitable for a post on the Commission of the Peace as magistrates. His comments, however, must be placed in context. Fyans was not well liked. He was nearing the end of a long career in the service of the Crown. He felt that the Crown had poorly treated him in his removal from the office of Police Magistrate at Geelong. He also felt aggrieved when he was not appointed to the post of Melbourne Police Magistrate when Lonsdale retired from that office. Instead Fyans was required to perambulate a wild

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<sup>157</sup> James, *Alfred Joyce, op. cit.*, p.54.

<sup>158</sup> Alfred Joyce correspondence to parents 17 August 1844, 18 February 1845, see James, *Alfred Joyce, op. cit.*, p.54.

<sup>159</sup> Squatting Act 1836; Bourke to Lord Glenelg, 18 December 1835, 14 December 1836, *HR4*, I, vol. XVIII, pp. 230-231, 538-539; cited in Crowley, *A Documentary History of Australia* (Melbourne, 1980) pp.509-511.

pioneering district which in terms of size was larger than England, on a small salary, whilst all about him men of lower caste were making money and lifting their status above what he considered to be their natural place in society. Fyans consequently quarrelled with many, had decisions as Commissioner of Crown Lands successfully appealed, and would offer to fight duels at the drop of a hat. Fyans claimed that there were three kinds of squatters. The first group consisted of the gentleman squatters of character and breeding who maintained their degree of manners and deportment as required of gentlemen. One of these favoured squatters was Compton Ferres at *Wardy Yallock*, who hunted four days a week and whose kennels and hounds were legendary. The second were a group of 'shop boys' who, although moneyed, lived in filthy conditions and sullied the social position they enjoyed. The third and most detestable group, according to Fyans, were the rural working class who succeeded when their masters failed, purchased their former masters properties and subsequently forgot their original place in society.<sup>160</sup> Those who were not members of Fyans' first group, allowed their appearance to 'deteriorate' in the Bush. They began sporting beards of 'Turkish luxuriance' in contravention of the clean-shaven Regency fashion of the day. Their dress, Fyans claimed, became indistinguishable from those worn by the lower orders. Their appearance became more like that of 'Italian brigands' than English gentlemen. They would often allow their stations to fall into a state of squalor, consistent with their appearance. In Paul de Seville's words, 'to live primitively was to lose caste'. A travelling party of this 'type' of squatters were only recognisable as gentlemen by the servants on one Gippsland station once they began speaking, as their appearance was not consistent with their class. The deportment, manners and actions of this group, when in Melbourne, also tended to show a degree of contempt for law and order, consistent perhaps with their perception of superiority. The appearance of women in the rural areas, as the standard bearers of civilisation, began the process of 'civilising' the bachelor squatters of early Port Phillip. These general characterisations have been reinforced by the contemporary observations of Batey, Murray, Kerr and Lloyd. These contemporary accounts

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<sup>160</sup>Kiddle, pp.42-43; PPG 5 June 1839; Bassett, M., *The Hentys: An Australian Colonial Tapestry* (Melbourne, 1955) p.447; *Sprot v Fyans*, see OCP, vol.3, p.176, vol.4, p.27; PPP 11 July 1844, 10 June 1847; Sayers, C. E., (ed), *Letters From Victorian Pioneers* (Melbourne, 1969) pp.185-186; Fyans, *LVP*, *op. cit.*, pp.186-187; as cited in de Seville, *op. cit.*, pp. 83-84, 105.

should be approached with caution for a number of reasons, including the rise of the men of substance category between 1840 and 1860. Kiddle estimated that only 11 per cent of the Western District squatters could be designated officially as gentlemen by birth, making it consistent with the patterns in the other districts.<sup>161</sup>

Although life in early Melbourne was far from easy, a better example of La Trobe's 'British Perseverance and Industry' was to be found occurring on a daily basis in and around rural greater Melbourne. The deprivations and arduous lives of the pioneer European families of the Port Phillip District must never be forgotten or indeed overshadowed by the reminiscences of urban dwellers in Melbourne and their self-absorbed sense of importance. The image of the typical Port Phillip squatter is most often a misguided one, as many of the squatters were not originally wealthy or ultimately successful in their enterprises. Those who 'played' during the early Port Phillip period invariably failed in their ventures. Those who worked hard during the 1840s reaped the benefits in the 1850s.<sup>162</sup> Those who failed, and their failure was complete, vanished into a dusty colonial obscurity, leaving only the fleeting faint echo of existence that accompanies failure.<sup>163</sup> This theme of failure on the land was common amongst the authors describing the period. McCombie, Kingsley, Browne and later Richardson<sup>164</sup> all deal with the

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<sup>161</sup> Italian Brigands: PPP 31 August 1843; Lose caste: Neil Black, *Journal*, 10 September 1839, 1 & 26 January 1840; Gentleman speaking: Brodribb, W. A., *Recollections of an Australian Squatter; Or Leaves from My Journal Since 1835* (Sydney, 1883) p.44; Fawcner, 'their midnight orgies and broils when they visit our towns', PPH 15 May 1846; Isaac Batey to Evan Hunter, *Hunter Papers*, La Trobe Collection; Batey, *Reminiscences*, RHSV Library, pp.70, 167; Murray, R. D., *A Summer at Port Phillip* (Edinburgh, 1843), pp.238–239; Kerr, J. H., *Glimpses of Life in Victoria by A Resident* (Edinburgh, 1872), p.95; Lloyd, G. T., *Thirty Three Years in Tasmania and Victoria* (London, 1862), pp.444–449; Kiddle, *op. cit.*, p.518; as cited in de Serville, *op. cit.*, pp.84–86, 89–92, 95

<sup>162</sup> de Serville, *op. cit.*, p.87.

<sup>163</sup> 'I have lost my capital, I have lost my health, I have lost fifteen years of the best period of my life. I have undergone many hardships, exposed myself to many dangers, and am now a poorer man than I was when I became a squatter.' Mackay, G. E., *Letters from Victorian Pioneers* (Melbourne, 1969), 2nd ed., C. E. Sayers, p.23; as cited in de Serville, *op. cit.*, p.24.

<sup>164</sup> McCombie, T., *Arabin, or the Adventures of a Colonist in New South Wales* (London, 1845); *Australian Sketches* (Melbourne, 1847); Kingsley, Henry, *The Recollections of Geoffrey Hamlyn* (reprint Melbourne, 1970); Browne, Thomas Alexander ('Rolf Boldrewood'), *Old Melbourne Memories* (Melbourne, 1969), ed. Sayers, C. E.; Richardson, Henry Handel, *Australia Felix* (Melbourne, 1917).

realities of the tragedy that could so easily consume a colonial squatter and broke even the fairest of 'gentlemen colonists'.<sup>165</sup> There is also a recurring and constant theme during this period of 'divided allegiances' where the settler was living in colonial Australia only temporarily and dreamed of returning 'home' after a short and successful stay in the colonies. Profits made during this adventure would enable him to return to England to live a style of life that circumstances had previously denied. Such motivations had forced many to the colonies. The novels describing the period often reflected this. The memory of England, took hold over the hinterland of the colonies. On the other hand, the heroes of Bolderwood's novels stayed in Australia, and he made them nobler for possessing this sentiment.<sup>166</sup>

## A BUNYIP ARISTOCRACY

IF THE COLONIES could not compete with England for bestowing honours, there was an obvious solution for those gentlemen who wished to stay: elite forces within colonial society sought to formalise their notion of their 'right to rule' by the movement to establish a colonial aristocracy under a system of hereditary titles and rights of representation in the proposed upper houses of the colonial Parliaments.<sup>167</sup> These elite forces were ultimately unsuccessful in their attempt to mimic the English institutions of government in Australia. They were, however, only following a natural inclination present within members of their caste when cast adrift from their ritual ties by distance and foreign surroundings. The opponents of the ennoblement proposal argued two things: firstly, that a statute alone could not create that sense of reverence and respect that was essential in any vertical class system and, secondly, that as property was the foundation of aristocracy then a system that restricted the franchise to the propertied class would

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<sup>165</sup> de Serville, *op. cit.*, p.25.

<sup>166</sup> 'What honours...what society has this little colony to give, compared to those open to a fourth-rate gentleman in England' and required that some wanted 'to be a real Englishmen, not half a one'; Kingsley, *Geoffrey Hamlyn*, *op. cit.*, ch., xlv, pp.438-439; Boldrewood, R., *A Colonial Reformer* (London, 1891) pp.406, 407, 464; as cited in de Serville, *op. cit.*, pp.100-101.

<sup>167</sup> Borthwick, C. J., 'The Bunyip Aristocracy' (BA Honours Thesis, ANU, 1969); Martin, Ged, *Bunyip Aristocracy: The New South Wales constitution debate of 1853 and hereditary institutions in the British colonies* (Sydney, 1986).

achieve the same purpose as rule by a manufactured aristocracy.<sup>168</sup> The contrary arguments put by Pitt and Burke were that aristocratic power was not based upon property but lay instead in its intimate connection with the Crown, and that patronage by ennoblement would send clear signals in the more distant parts of the Empire, that the nobles there should seek the Crown's esteem.<sup>169</sup>

The Australian colonies developed their own 'aristocratic junta'. It sought to 'domineer alike over government and the people', had decided that they were the natural born 'hereditary counsellors' of the Crown and declared that they should be recognised as such. These colonial aristocrats should have estates and enjoy the protection of the Crown, and would be 'men of character ... who are actuated by the laudable desire to create a permanent and respectable provision for themselves and families'. Squatters and convict-drivers could not be instantly transformed into Dukes and Earls.<sup>170</sup> A generation later, in 1847, we have the logical development of this world-view in the arguments put by the Port Phillip squatter Archibald Cunninghame. He sought a higher property franchise qualification for Upper Houses elections. These voters would naturally elect wealthier settlers as their representatives. He also claimed that a system of hereditary titles 'would attract a better type of member than those who would otherwise be available'.<sup>171</sup> The colonial *noblese* movement had some support in England.<sup>172</sup> Wakefield offered a quaint horticultural parable concerning 'trees of firmer growth' and the

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<sup>168</sup> Harvey, *op. cit.*, p.52; *Parliamentary History of England* (Hansard), 29, 11 May 1789, p.107, 411; cited in Borthwick, *op. cit.*, pp.2-3.

<sup>169</sup> Hansard, *op. cit.*, pp.415, 420.

<sup>170</sup> Wentworth, W. C., *A Statistical, Historical and Political Description of New South Wales* (London, 1820) p.377; Macarthur Onslow, S., (ed) *Early Records of the Macarthurs of Camden* (Melbourne, 1919) p.346; cited in Borthwick, *op. cit.*, pp.4-5; Dukes and Earls: Martin, *op. cit.*, p4, re Wentworth.

<sup>171</sup> Melbourne, A. C. V., *Early Constitutional Development in Australia* (Brisbane, 1934), p.302; see Borthwick, *op. cit.*, p.6; Martin, *op. cit.*, pp.36-37.

<sup>172</sup> In a contemporary publication, Edward Gibbon Wakefield lent support to the establishment of a colonial nobility, by popularising the views contained in an article by the Archbishop of Dublin; Borthwick, *op. cit.*, p.8.

destiny of plants without ‘poles’.<sup>173</sup> He argued that given that the colonists were attempting to recreate England, the emigrant trained from birth to see the squire and his accoutrements, must see the same in the colonies for without the accompaniment of gentry and nobility to the colonies, the emigrant would degenerate into ‘the low habits and rebellious nature of the Americans’, as ‘honour rank and power are less ruinous bribes than money’. In New South Wales, Dickinson argued that ‘the lack of a legislative peerage in the Continental countries had caused the revolutions of 1848’. He also argued that without a peerage the colonies would not be able to transform the relationship from dependency to partnership with England, manager of her interests in the Pacific.<sup>174</sup> There was some merit to these arguments. Why should men abandon hope of ‘distinction’ by becoming a colonist. The well-bred respectable person and gentry class would hesitate in migrating if they were debarred from a system of honours.<sup>175</sup> It was claimed that without an honours system, the younger sons of the English aristocracy would not migrate to the colonies. Without a chance of purchasing a baronetcy, the wealthy gentry, with their tenant farmers in tow, would not come to the colonies and recreate ‘another England’. There was also Earl Grey’s overwhelming logic that it was as impossible to simply and instantly create an institution like the House of Lords as it would be to create an oak tree.<sup>176</sup> Both the institution and the tree could trace an ancestry back to the Norman Conquest: whatever society they reflected or protected in England, neither the House of Lords nor the oak tree would serve their purpose in the Australian colonies if they were only transplanted in a whimsical attempt to imitate an institutional or floral recreation of England. It might have comforted the memory but would not have actually reflected the overwhelming colonial social reality.

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<sup>173</sup> Wakefield, E. G., *A View of the Art of Colonization* (Oxford, 1849, reprint 1914) p.108; Borthwick, *op. cit.*, p.9.

<sup>174</sup> Wakefield, *op. cit.*, pp.111, 113; Borthwick, *ibid*; Martin re Dickinson, pp.76–77.

<sup>175</sup> Abandon hope: Martin, *op.cit.*, p.45; Lord John Manners, *Hansard*, 3rd series, vol.cxi, p.598, 19 April 1850; Borthwick, *op. cit.*, pp.11–12.

<sup>176</sup> Younger Sons and wealthy gentry: Martin, p.78; Dickinson, J. N., *A Letter to the Honourable the Speaker of the Legislative Council* (Sydney, 1852), p.6; see Borthwick, *op. cit.*, p.12.

## THE MAGISTRACY AND RURAL SOCIAL RELATIONS

THE URBANDWELLERS of Melbourne were persons who, after all, merely provided service industries and markets to consume the produce squeezed from the harsh Australian Bush. We have many examples of the reminiscences of struggles in the male-dominated Port Phillip Bush.<sup>177</sup> One of the few expositions of the life of the rural womenfolk can be found in a series of articles anonymously published in *Chamber's Edinburgh Journal*.<sup>178</sup> The author describes the practical difficulties in running a household and family: the real results of the heat, the difficulties of slaughtering and keeping meat, what to give pigs when no feed was available and how to deal with visiting 'natives'. Most poignantly, she recounts how her young daughter, never having seen another white woman and upon meeting a Mrs Gibson (who visited whilst travelling through to a new station) called her a 'white leubra' and asked 'if there were any more like her in her country'. Having spoken with 'the beautiful lady' all evening, and having dreamed of her all night, the daughter, the moment she dressed herself next morning, 'went to look at her again'.<sup>179</sup>

The hardships of the pioneering Port Phillip family were great, but inconsequential when measured against the realities of convict life and the social stigma attached to a convict past. By the late 1830s little had changed in their lot. The governing authorities in Sydney and London supported the low-cost economic advantages of the system of convict assigned labour as opposed to the spiritual kindness they reserved only for their pew hours on the Sabbath. Irrespective of their spiritual inclinations, all elite group members observed the rituals consistent with their worship of the common gentry God, property. The English Parliament understood the convict circumstances well and analysed them and their condition according to their

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<sup>177</sup> Hamilton, George, *Experiences of a Colonist Forty Years Ago* (Adelaide, 1880), Facsimile reproduction (Adelaide, 1974).

<sup>178</sup> Probably Katherine Kirkland, *nee* Hamilton.

<sup>179</sup> *Chambers' Edinburgh Journal*, 25 June, 2 July, 9 July 1842, pp.179, 188–189, 198; cited in Crowley, F., *op. cit.*, pp.582–583.

common gentry world-view.<sup>180</sup> The battle between the emancipists and the exclusivists, the primitive colonial version of English upper class consciousness, continued during the 1830s in the mother colony of New South Wales and its offspring, the rural districts of Port Phillip. The English papers pontificated about the immoral circumstances where a felon might rise to wealth and power and end up with a seat on the magisterial Bench.<sup>181</sup>

A natural consequence of this perception of 'class war' was the perceived need to maintain order amongst the 'lower orders' of people. These 'lower orders' were not confined to urban centres, but were in fact dispersed into the hinterland along the disorderly borders of civilization. The rural labourers, the former convicts and the frightened settlers all nervously clung together in their new *ersatz* parishes. The earliest Port Phillip settlers brought with them their assigned convict servants. Ticket of Leave men also came to Port Phillip and were registered and monitored until their freedom became absolute.<sup>182</sup> Port Phillip was literally flooded with Expirees, especially from Van Diemen's Land.<sup>183</sup> The convict taint had indeed arrived in free Port Phillip. The Indigenous inhabitants made what they could of their impossible situation. The rural hinterland presented the state with a poignant and immediate law and order problem. As a result, Gipps established the Border Police force in February 1839 to maintain

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<sup>180</sup> 'In the country districts of New South Wales, including Port Phillip and Van Diemen's Land, the proportion of convict men to women is as 17 to 1. As the greater portion of the agricultural labourers belong to the criminal population, they constitute a peasantry unlike any other in the world; a peasantry without domestic feelings or affections, without parents or relations, without wives, children, or homes; one more strange and less attached to the soil they till, than the Negro slaves of a planter. They dwell crowded together in miserable huts; the hours of recreation, which they can steal from the night, are usually spent in the unlicensed spirit-shops to be found in the vicinity of every estate. In these places, kept by some ticket-of-leave man or emancipated convict, the assigned servants of settlers generally purchase the means of gratifying their appetites for liquor, gaming and every species of debauchery, by the proceeds of their depredations on the flock and herds, and other property of their masters'; Report from the Select Committee on Transportation; in *Great Britain, Parliamentary Papers*, 1837-1838, vol. XXII, Paper no. 669, p.xxxi, cited in Crowley, *op. cit.* pp.564-565.

<sup>181</sup> 'But the whole body of the 'felonry', have been imbued with the most mistaken and most arrogant notions of their own consequence, and power, and dignity, and have become inflated with the ambition of acting not only as citizens, but as jurors, and even as magistrates'; *The Times*, London, 14 July 1838; cited in Crowley *op. cit.* pp.535-537.

<sup>182</sup> James, *Alfred Joyce, op. cit.*, p.87.

<sup>183</sup> Turner, H. G., *History of the Colony of Victoria* (Melbourne, 1973) vol 1, p.272, regarding Report from La Trobe to Fitzroy in 1846 stating that 2,000 expirees had formally come from Van Diemen's Land.

order. This force was to be distinct from the Mounted Police and was supposed to assist the special magistrates, the Commissioners of Crown Lands, in the maintenance of order in the areas outside of the settled districts. Order maintenance, especially between the white and black inhabitants of the wastelands, was the stated reason for creating the force. One example of the 'policing' function undertaken by these magisterial assistants (Border Police) in Port Phillip occurred in March 1843. This policing function was directed against that other grave threat to English social and political hegemony, the indigene native. The tale of Warri and Mirrandola perhaps summarizes the interaction between the forces of European rural control and the native inhabitants.<sup>184</sup>

The Hellenic, Roman and English state had always used the office of the magistrate as a tax collector. The tax collection role of the English version of the magisterial office was central to its longevity. In the Australian colonies, Gipps sought to pay for the Border Police through a new system of impost on top of the annual squatting licence. It is impossible to tabulate and compare costs with revenue from this scheme, however the point is made: the office of the magistrate once again became the outstretched hand of the state, and consequently wore the villainous face of collector of state dues. As the state's representative in the colony Gipps, during

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<sup>184</sup> Members of the Bangerang people in northern Victoria, took it upon themselves to, quite cleverly and without violence, steal a gun and approximately seventy sheep from a shepherd in the employ of Edward Curr at his *Tongala* station east of what became Echuca. The Border Police chose to act. They arrested a lone Bangerang man at *Tongala* station who had nothing to do with the theft. When he bolted for the river the next day he was shot and killed, his body placed in a canoe and let go into the stream of the Murray. Soon after, through the neglect of another shepherd, 120 lambs wandered off into the Bush. Members of the Bangerang tribe who came across them decided that it was time for a feast and barbequed them all over a three-day period. This last theft so incensed the local Border Police it decided to set a trap for the Bangerang. This it did, with bait followed by a charge, all to no avail. On returning to the station however, they came across one man, Warri, and his wife, Mirandola, who were waiting patiently for the head of a sheep that had been promised them. There was no direct evidence that Warri had participated in any of the sheep thieving. In fact Edward Curr, the owner of the station, knew Warri. Nevertheless the Border Police detained Warri and sent him to Melbourne by woo-dray. They graciously released Mirandola. On arrival in Melbourne he was committed to stand trial by the Melbourne Police Magistrate for sheep stealing. To his everlasting and long overdue credit, Mr Justice Willis, the resident Supreme Court appointee to the Port Phillip District refused to allow the matter to proceed any further until the prisoner was allowed the services of an interpreter, so that the proceedings could be explained to him and so that a trial with at least a modicum of justice could take place. The matter was stood down for some three months, during which time Warri languished, as all persons on remand rest in purgatory, in the Melbourne Police Magistrates' cells. Eventually, Warri was released and returned to *Tongala* station and reunited with Mirandola; Curr, *op. cit.*, pp.89-97.

Legislative Council discussions on the matter, continually complained about the 'evils of dispersion' and the impossibility of controlling the distant regions and those who lived therein.<sup>185</sup> He understood that those persons beyond the 'boundaries of location' needed protection. He referred to the aggressions made against them by the 'Aboriginal Natives' and the outrages made by the settlers against the natives. He also referred to the Crown Commissioners and the levying of the new tax in order to defray the cost of this new method of rural 'order maintenance'.<sup>186</sup>

As one of the main functions of the magistracy was the ordering and maintenance of the relations between masters and servants, Gipps' 1840 *Masters and Servants Act* gave magistrates detailed instructions as to how to deal with those appearing before them. Mindful of prior abuses in rural districts, the Act reduced the summary power of a magistrate sitting alone and made imprisonment a discretionary option. It reduced the maximum imprisonment term to three months and did not allow for the imprisonment of female servants. The provisions of the Act extended to all workers whatever their contractual status and extended the jurisdiction to the unsettled areas of the colony. The Act still allowed honorary justices of the peace to act as magistrates. The Act met strong resistance<sup>187</sup> and on 28 September 1840, Australia's first mass meeting of mechanics and 'other operatives' produced a 2,856-strong petition to the Legislative Council. The petitioners objected to the labour force regulation powers of the employer-magistrates and the obvious bias that would accompany their adjudications given 'the scarcity of labourers in the colony.'<sup>188</sup> The magistrates held jurisdiction over both contracts of employment

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<sup>185</sup> Gipps to Lord Glenelg, 6 April 1839, *HRA*, series I, vol. XX, pp.91-92.

<sup>186</sup> The Bill which I shall lay before you proposes to accomplish its objects, by giving to the Crown Commissioners, who already perform certain functions in those districts, far more ample powers than they now possess; and by providing that each Commissioner shall be accompanied by a moving Police Force, sufficient to repress the predatory attacks of the Natives, and to keep order amongst all classes...As it appears to me perfectly just, that the persons who are to be protected by this Force, should bear the expense of maintaining it, the Bill provides for this object, by means of an assessment on Cattle and other Stock...it would be highly unwise, in the present state of our Finances, to incur any new expenses without providing, at the same time, the means of defraying them; New South Wales, Legislative Council, *Votes and Proceedings*, 14 February 1839, vol.1, pp.1-2.

<sup>187</sup> *Australasian Chronicle*, Sydney, 29 September 1840.

<sup>188</sup> Your petitioners also think that the bill in question would confer a power upon justices of the peace, which, in this colony more particularly, they ought not to possess; that the justices of the peace are incompetent in many cases to

and the licensing of public houses. This was a necessary and serendipitous collection of jurisdiction, given the fact that the main marketplace for the hiring of labour in Port Phillip was in fact the public house. One contemporary account of a young squatter looking for a few bullock drivers in 1841 Melbourne demonstrates how dangerous the labour hiring process could be.<sup>189</sup> Our young would-be employer had stumbled into the 'public' bar, and was saved from assault by the publican who came to his rescue. The publican then directed young Edward Curr to a rear parlour where those who had already spent their money, had parked themselves. The employment contracts were entered into and both employer and employees left for the squatting station the very next day.<sup>190</sup> Most hiring interviews were not as dramatic as this and were initially quite orderly events.<sup>191</sup> The real issue, however, was the scarcity of labour, the attempts to rectify the scarcity by immigrant programs, the proposed transportation of convicts under the Pentonville plan, the impact of these factors on the employer / employee relationship and the dissipation of the traditional English servient mentality in the colonial labourer.

## THE LOCAL JUSTICE IN RURAL SOCIETY

A PERCEPTION DEVELOPED during the colonial period that the magistrates, especially the

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decide the value of labour, and, being for the most part employers of workmen, are necessarily, even if unconsciously, biased in their feelings, and are therefore incapable of administering justly the provisions of a law like that proposed to be enacted...the scarcity of labourers in the colony cannot in any way justify the oppression and maltreatment of those that are already here; Petition carried and reproduced in the *Australasian Chronicle*, Sydney, 29 September 1840; cited in Crowley (1980) *op. cit.* pp.587–588.

<sup>189</sup> Having learnt from my acquaintances in town that the only places at which men were to be found for hire were the public-houses at which they were accustomed to spend the proceeds of their labour, I went about 10 o'clock one morning to one of these establishments...A scene presented itself which surprised me not a little...Some of the men were drinking out of pots and glasses, and others out of the bottles; some were singing, others quarrelling; one, with vacant lack-lustre eyes, sat silently staring on the ground, another into an empty pannikin; whilst three or four were trying to dance an air which was being played on a fiddle... whose bestial face was a study in itself... The conversation of these heroes seemed to be carried on in a yell. Another burly ruffian... 'Tom' [asked] "What the fucking devil do you want, bloke, eh?" [after being told the others replied, urging Tom to] "Bonnet him, Tom; bonnet him", "Break his fucking back"; Curr, *op. cit.* pp. 23–24.

<sup>190</sup> Curr, *op. cit.*, p.24.

<sup>191</sup> James, *Alfred Joyce, op. cit.*, p.87, regarding Joyce hiring a bullock driver from Van Diemen's Land.

rural magistracy, were biased towards members of their own 'class'. One version of this argument appears in an editorial in the *Australian*. The editorialist maintained that although he did not wish to impute to the magistracy in the country districts any intentional desire to pervert the law, their position in society as employers and their other 'private interests' would weigh heavily on their minds and affect their ability to deliver impartial justice from the Bench.<sup>192</sup> The greatest legal problem facing the squatting class was not the supposed bias displayed by their magisterial brethren. Their main problem was the essential fiction of their legal 'ownership' of the runs and the stations they had built. The license from the Crown essentially meant that they had only a limited tenure over the land, a right to simply graze stock upon unoccupied land.<sup>193</sup> Being legally landless, they lived in constant fear of dispossession and at times felt abandoned by the Government.<sup>194</sup> The fact that they did not own their land disqualified them from enjoying early voting rights. Some complained that even though they met the necessary prescriptions of being 'country gentlemen', unlike their brethren in England, they were treated as serfs [by the colonial government] because of their lack of any electoral franchise.<sup>195</sup> There was, however, no unity of interest in this class. The squatting rights of depasturing were always being challenged by other stock owners or neighbouring squatters. These challenges represent evidence of the utilitarian and opportunistic creed by which the 'squattocracy' lived. Neighbours were needed but always suspected. Mutual help and assistance was sought and given, but dues were always entered upon an invisible ledger. Boundary disputes would begin with straying stock and end in stock theft, re-branding and fraudulent market sale. The office of the Commissioner of Crown

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<sup>192</sup> That their minds will be inevitably, though imperceptibly, biased [sic] in favour of one class of applicants rather than of the other. The general turn of their minds, the pressure of private interests, the cardinal necessity, as it seems to them, of preserving discipline, is not, in instances such as will occur under this Act, salutary to the undisturbed and impartial discharge of justice. And this reflection is rendered more weighty, and is more calculated to disquiet the mind, when we take it in conjunction with the indefinite discretionary powers entrusted by the Act; Editorial, *Australian*, Sydney, 1 October 1840.

<sup>193</sup> Therry, R., *op. cit.*, p.269.

<sup>194</sup> PPG 23 February 1842; as cited in de Serville, *op. cit.*, p.87.

<sup>195</sup> Griffith, C., *Diary*, La Trobe Collection, pp.91, 84–85; as cited in de Serville, *op. cit.*, p.87; Brown, P. L., *op. cit.*, pp.496–497, quoting James Harrison.

Lands, as the squatter's magistrate, was created to diffuse such controversies. Often, however, his work was in vain.<sup>196</sup> These 'special' magistrates, the Commissioners of Crown Lands, held a steady hand over the squatting zones of Port Phillip and became the colonial 'Lords of the Bush'. This colonial Baron would dictate his vision of settlement within his fiefdom.<sup>197</sup>

The grazing areas of the 'Major's Line'<sup>198</sup> were a steady source of business for the Commissioners. In February 1841, 21 year-old Edward Curr was journeying from Melbourne to the sheep station *Wolfsrag*. The station had been purchased by his father, Edward Curr Senior, and was located some 75 miles from Melbourne, five miles south west of present day Heathcote. On his journey he stayed overnight at one of the colony's infamous 'Bush Inns', 35 miles north of Melbourne. The drinking, carousing and singing of the other guests continued until near daybreak despite the protests of the landlord and the cries of the landlord's infant child. Next morning, whilst riding onto the station, and only a mile from the Bush Inn, Curr came across the local Commissioner. Over breakfast, Curr gave an account of the previous night's proceedings. The Commissioner immediately began weighing up whether to re-issue the publican's license.<sup>199</sup> The rural Commissioners tended to love their horses and to love quick justice. They had huge areas to cover and their jurisdiction was likewise immense. They were the state's frontier magistrates and were there to keep order and to collect the land tax that kept the state solvent.

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<sup>196</sup> 'The Commissioner of Crown Lands is supposed to mark out each run; but in many cases he omits to do so, and, even when he does, evidence is adduced to impeach the accuracy of his work. It is contended at these trials that the measurements may be applied to other land, or, if not, that the first occupant had abandoned it when the second claimant came upon it'; Therry, R., *op. cit.*, p.269.

<sup>197</sup> 'It is rather a wide step from the church to the public house and store, but from the very commencement of settlement suitable localities had been chosen by the sanction and direction of the Crown Lands Commissioner for the erection and establishment of inns, stores, blacksmiths' and shoemakers' shops and other necessary trades, which usually got drawn together in each locality'; James, *Alfred Joyce*, *op. cit.*, p.94.

<sup>198</sup> The track later used as a road that was originally laid by Major Thomas Mitchell in his explorations of the Port Phillip District, roughly west of the present day Hume Highway; see Curr, E. M., *op. cit.*, p. 15.

<sup>199</sup> 'Mounting our horses...we rode over to the quarters of the Crown Lands Commissioner, which, with the barracks of the mounted police under his command, were only a mile or so from the inn, and, in exchange for his breakfast, gave him an account of our miserable night, of which that official, I remember, took a more serious view than we had done; debating whether he would renew the license [sic] of a publican who allowed his customers to drink and conduct themselves uproariously after 10 o'clock p.m., as that seemed to him the hour at which travellers who were not drunk should be allowed to go to sleep'; Curr, E. M., *ibid.*

The order they kept was not only the order between disputing squatters over the boundaries to their colonial fiefdoms, and the licensing of Bush Inns. They also played a market surveillance role that more than a century later became the function of the Australian Competition and Consumer Commission. They would, for example, control the prices at the Bush Inns for food and fodder for horses and order a price reversal should they increase without good cause. Their riding requirements usually meant that the Commissioners had been military men, habituated to quick adjudications and to rapid-fire justice. Legal knowledge was not a primary requirement for the position. Common sense, intelligence and a commanding disposition were, it seems, prerequisites. One contemporary account maintains that using these skills, a commissioner was able to cut through 'red tape nuisances' and deal in an instant what would later require hordes of lawyers and hours of quill scratching.<sup>200</sup> The Commissioner, as a special magistrate, was also a member of the social elite of the district in which he served. He was expected to participate in the social activities of the regional townships; the assembly balls, local clubs and be the social conduit to the office of the Superintendent. He was also a welcome stranger on lonely nights.<sup>201</sup>

Henry Fyshe Gisborne was Port Phillip's first Commissioner. He arrived in Melbourne in August 1839, having overlanded from Sydney. He had been appointed Commissioner of Crown Lands for the Port Phillip District on 21 May 1839 and had travelled to the district with a

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<sup>200</sup> An example of this 'type' was the incumbent Commissioner in the Goulburn River District in 1842. Young Edward Curr saw 'His Worship' as he approached Curr's new station *Tongala*, which fronted the Murray River, seven miles east from what became Echuca: 'The duties of the Commissioner in those days were numerous and varied. The most important of them had reference to the Crown lands of his district, on which he issued licenses to squat. He also settled disputes about boundaries. Disagreements on this score, which in later times would have taken a judge, with his jurors, barristers, witnesses and *attaches* of the court, a week to dispose of - Bah! the Commissioner of the district in which I settled was not what one would call a bright man, but he did such business off hand, his jurisdiction in the matter being possibly summary in more senses than one ... I should say that our particular Commissioner kept few records of his official acts, if any; and never caused any marks to be made on the trees or land in connection with the boundaries of the runs... he considered things of the sort mere red tape nuisances; his custom in cases of disputes, as far as it came under my notice, being to hear but short statements, give his decision in a few words, change the conversation, light his pipe and ride away'; Curr, *op. cit.* p. 67.

<sup>201</sup> 'As regards the Commissioner of our district, he was popular and highly respected, and his visits acceptable to the sheep-owners. Besides the welcome novelty of having our solitude broken in upon by a pleasant, chatty person, well up in the current news, he generally carried with him a few newspapers, the perusal of which was, of course quite a treat. That they were often dated several weeks back was of little consequence, as their contents were generally quite as new to us as if they had been only a day old'; Curr, *op. cit.* p. 69.

detachment of police and in the company of James Stein.<sup>202</sup> And police detachments were necessary. One should not underrate the personal dangers that faced the magistrates and commissioners as they went about their business in colonial Port Phillip.<sup>203</sup> Another Commissioner, Captain Charles James Tyers, was a former naval officer who joined the Colonial service in 1839 after his arrival in Sydney on 24 July 1838. He was ordered to confirm the 141st meridian of the Victorian–South Australia border and to survey of the Portland Township and District. His surveying party departed Melbourne on 13 October 1839. His report to Gipps tended to reject Fyans glowing assessment of the area, but noted the great assistance given him by Stephen Henty.<sup>204</sup> Tyers returned to Portland in September 1841. He was accompanied on this trip by assistant surveyor E. B. C. Kennedy who later took up exploration in central and northern Australia, dying in his 1848 exploration of Cape York. His survey of the township followed the traditional rectangular pattern and ignored the pre-existing structures and Henty holdings. The north–south line of Bentinck Street, named after the family name of the Duke of Portland, proceeded through the Henty houses, stables and stores with lot number 4 encompassing the majority of the structures.<sup>205</sup> Tyers was appointed Commissioner of Crown Lands for the county of Normanby in December 1842. He was then appointed Commissioner for of Crown Lands for Gippsland on 17 June 1843. Gipps had asked La Trobe of his opinion of Tyers as a Commissioner as ‘I want a *real* good one for Gipps Land’.<sup>206</sup> Gipps knew that the

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<sup>202</sup> Gurner, *op. cit.* p.48.

<sup>203</sup> One example of the dangers of being a magistrate in a frontier town, and of some of the qualities necessary to successfully carry out that position, occurred in a confrontation between Police Magistrate Lonsdale and some ruffians on Saturday 9 February 1839. Lonsdale had fined two men the previous day for being drunk, riding furiously down a street and over footpaths within the town precincts, and assaulting police when arrested. The following day Lonsdale was riding alone to his Dandenong *Eummemmering* run. The very same two defendants and an associate confronted him. The ruffians were John Crew, John Ewart and ‘Bloomar’ Newsham. They approached Lonsdale and threatened him with violence. John Crew had a pistol and when Lonsdale warned off the group and threatened to call his men from the nearby house to thrash them, Crew replied, ‘You damned rascal, how dare you speak to me in this way, I will blow your brains out you villain’. With that, their spleen vented and their insolence demonstrated, the ruffians turned their horses and rode off. *Port Phillip Gazette*, 1838-1841 (Lansdowne Facsimile, 1979–1983), Vol. 1-6, p.1066, cited in Wilkins, *op. cit.*, p.94.

<sup>204</sup> Covering letter, Tyers Journal Report, Tyers to Gipps, 23 May 1840, reproduction in Learmonth, *op.cit.*, pp.110–115.

<sup>205</sup> *Port Phillip Gazette* 12 June 1839; Bassett, *op.cit.*, pp.448, 462; Learmonth, *op.cit.*, pp.110–122.

<sup>206</sup> Appointed: GLC, p.199, f.2; I want a real good one for Gippsland: GLC, Let.191, pp.206–207.

appointment of a Commissioner to Gipps Land really meant a magisterial appointment to the area, as Commissioners who acted beyond the boundaries were entitled to deal with all such offences.<sup>207</sup> In reality what Gipps was authorizing was the establishment of official government control over the inhabitants of Gipps Land using the handmaiden of government authority, the office of the magistrate, as the vehicle of sovereignty. Apart from the Gipps Land appointment, the same cost cutting mechanism was used to establish a presence in the Goulburn–Murray region with the appointment of surveyor H. W. R. Smythe in October 1843. Smythe's name was included in a surveyors redundancy list in May 1843 and he was singled out by Gipps as a possible candidate for the post of assistant Commissioner. Tyers was confirmed as the Commissioner for Gippsland, and to Gipps's annoyance took some time getting there. Gipps claimed that 'the People [of Gipp Land] are sadly crying out for want of Protection'. Tyers was in fact the first Commissioner for Crown Lands and magistrate to be stationed in Gipps Land.<sup>208</sup> As Commissioner he became involved in a controversy between himself and a squatter Loughnan. Tyers had taken it upon himself to remove Loughnan's overseer Frederick Taylor because of his alleged mistreatment of 'natives'. Loughnan proposed to take legal action.<sup>209</sup> There was correspondence on the matter between Gipps and La Trobe<sup>210</sup> and between La Trobe and Tyers.<sup>211</sup> In the end Tyers retreated from his allegations by investigating the charges against the overseer Frederick Taylor and finding him 'not guilty'.<sup>212</sup> Gipps however was not pleased and indicated that he believed that Tyers had no authority to 'try him' (Taylor) and stated that

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<sup>207</sup> See Squatting Act (1839) No. 27, s.9.

<sup>208</sup> Smythe appointment: *GLC*, p.209, f.3; Redundancy List and possible candidate: *Let.*192, p.208; Tyers Appointed to Gipps Land: Appointed CLC on 17 June 1843 and magistrate 2 September 1843, Tyers attempted a land crossing to Gippsland in September, failed, then left Melbourne for Port Albert on 2 January 1844 aboard the *Ranger*, see *GLC*, p.225, f.2; Tyers took some time to get there: *Let.*212, p.225; Protection in Gippsland: *Let.*216, p.228; *GLC*, p.228, f.1.

<sup>209</sup> *Let.*357, *GLC*, p.360.

<sup>210</sup> Thomson to La Trobe, 31 March 1845, PROV, Supt., I/L, 45/392; *GLC*, p.361, f.3.

<sup>211</sup> La Trobe to Tyers, 15 November 1845, 18 December 1845, PROV, Supt. O/L, local 45/1317, 1431; *GLC*, p.361, f.3.

<sup>212</sup> Tyers to La Trobe, 6 March 1846, PROV, Supt., I/L, 46/449; *GLC*, p.386, f.1.

'men on becoming Crown Commissioners seem to take leave of their senses'.<sup>213</sup> La Trobe was also displeased with Tyers. The fact that the entire matter took over two years to settle seemed to annoy him.<sup>214</sup>

Frederick Armand Powlett was born in January 1811 at Shropshire, England into a gentry family with noble connections.<sup>215</sup> He accompanied Sir John Franklin to Van Diemen's Land in 1837 and then settled in Port Phillip the following year pioneering the area around Bacchus Marsh, the Werribee River, Mount Macedon, Pentland Hills and Pyalong. He was appointed Commissioner of Crown Lands for the Westernport District in 1840. He married Margaret Thomsen, daughter of Dr. William Thomsen, in 1850. His brother in law, J. C. Thomsen, was Police Magistrate at Gisborne.<sup>216</sup> He was in turn briefly Colonial Treasurer (1852–1853) with a seat in the Executive Council, Chief Commissioner of Crown Lands (1853–1860), Ballarat Goldfields Inquiry (1854), Warden at Buckland and Landsborough and Police Magistrate at Kyneton (1863) until his death in 1865. His social associations included the Melbourne Club, the Melbourne Cricket Club and the Church of England Assembly. He was a confidant and commercial agent for both La Trobe and Lady Franklin.<sup>217</sup> He typified the English gentleman and was a leading figure of respectable society in Port Phillip.

Acheson Jeremy Sidney French was another of the Irish born magistrates in colonial Australia. He was a unique and novel addition to the Port Phillip magistracy. A son of Robert French of Monivea Castle, Galway, French was educated at the Royal School Banagher and Trinity College Dublin. He was initially destined for the clergy, but from his later actions appears

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<sup>213</sup> Let.383, *GLC*, p.386.

<sup>214</sup> La Trobe to Tyers, 27 April 1846, PROV, Supt., O/L, local, 46/470; *GLC*, p.387, f.1.

<sup>215</sup> His father was the chaplain to the Prince Regent and related to the last Duke of Bolton; Sales, P. M., *ADB*, p.349.

<sup>216</sup> Sales, P. M., *ADB*, p.349.

<sup>217</sup> *Ibid*, p.349.

to have undergone an anti-orthodox epiphany, changed his mind about his future career and decided to come to the Australian colonies in 1840.<sup>218</sup> A contemporary description of French by a leading Melbourne respectable states that he was 'a fine spirited fellow', 'a perfect gentleman', with 'peculiar' religious views, extensively travelled'. Most peculiar for a 'gentleman' of the period, Griffiths states that French,

shewed [sic] me on his arm the arms of Jerusalem which were tattooed most beautifully by a monk in that city [Jerusalem]. They were done in blue and red. There were also on the other arm some Arabic characters in blue.<sup>219</sup>

By 1841, French was engaged to Anna Watton, daughter of Bacchus Marsh squatter and later Hamilton magistrate, Dr John Watton. French had also undertaken the *Monivae* run and was appointed Police Magistrate at the Grange in 1841.<sup>220</sup> Foster Fyans was chosen to be the magisterial Commissioner of Crown Lands for the Portland Bay District. Together with a troop of 18 Border Police, he was ordered to deal with squatting disputes and preserve the peace between the settlers and the natives in the District.<sup>221</sup> In 1841 La Trobe believed that a Police Magistrate be appointed to the District and after inspecting the area, La Trobe decided upon Acheson French as the appropriate candidate for the post. In the relevant correspondence between Gipps and La Trobe, Gipps stated that he wished that he 'had another Mr. Blair to send' to Melbourne, as the post was vacant, and authorizes the appointment of a Police Magistrate at the Grange. La Trobe later recommended Acheson French, squatter, bon vivant, the sixth son of Robert French of Monivea Castle for the appointment at the Grange. His appointment was agreed upon and he was formally appointed on 5 August 1841.<sup>222</sup>

<sup>218</sup> Garden, D., *Hamilton: A Western District History* (Melbourne, 1984) p.14; Garden states that French was the second son whilst Shaw states he was the sixth, *GLC, op.cit.*, p.83, f.10.

<sup>219</sup> Griffiths, C. J., *Diary*, MS, La Trobe Collection, pp.225–226; cited in Garden, *ibid*, p.15.

<sup>220</sup> French, A., *Letters*, MS, La Trobe Collection, HS 2 February 1870; Garden, *ibid*, p.15.

<sup>221</sup> Garden, *ibid*, p.18.

<sup>222</sup> La Trobe decided on French for District: NSW CSR 41/6058, 42/5378, 41/7932; NSW 4/2548, 4/2572; Garden, *ibid*, p.18; Wished he had another Blair: Gipps to La Trobe, 5 June 1841, *GLC* p.82, *SLV* H7042; Latrobe decided on French for the Grange: La Trobe to Thomson, PROV, Supt., O/L, 15 June 1841, 41/609; *GLC*, p.83, f.10; Appointment agreed: Gipps to La Trobe, 26 June 1841, *GLC* p.85, *SLV* H7045; Formally appointed: Thomson to La Trobe, NSW, Port Phillip O/L, 30 June 1841 41/6058/313 and 5 August 1841, 41/6058/375; *GLC*, p.83, f.10.

George Green was selected to be French's Constable and convicts were despatched from Portland to erect huts for the magistrate and a detachment of Mounted Police to be stationed at the Grange. French himself selected the positioning of these buildings. For his own use he selected a portion of the Grange Burn run along the Grange Burn River and established his presence as Police Magistrate in August–September 1841. Additions were made to the buildings in early 1842 and Surveyor Charles Tyers formally established the Reserve in August 1842. French married Anna Watton in February 1842. Her taking up residence at the Grange and the subsequent birth of their daughter Amy on 4 September 1843 marks them both as the first white women pioneers of Hamilton town. The Native and Border Police descended upon Hamilton following a request to La Trobe by French. This move seemed successful in quelling the native attacks and the retribution of the squatters. It also however led to the dismissal of Mounted Trooper Ransom, one of the two troopers stationed with French at the Grange, who refused to sleep in the same hut as the aboriginal Native Policemen. The other original Grange Mounted Trooper, Thomas Slow, was also eventually dismissed for dereliction and drunkenness in May 1843.<sup>223</sup>

Acheson French did not fit the mould of the typical squatter or gentleman magistrate. He became a Police Magistrate rather than a justice and this made him unique within the ranks of the squatters. His salaried magisterial duties also meant that he did not take up residence at his own station until later on in the mid 1840s. His personal and religious views also ran contrary to the orthodox. He was a Darwinian and a 'free thinker'. These beliefs also made French unique within the ranks of the colonial magistracy, as the vast majority of the colonial magistracy were either aligned to a Church or were indeed pillars of their Church with most enjoying deep

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<sup>223</sup> Stationed at the Grange: NSW CSR 43/1252; NSW 4/2626; Thomas Slow and Thomas Ransom; Selection of site and buildings: French, *op.cit.*, 13 April 1842; NSW CSO 42/375; NSW 4/3869; cited in Garden, *ibid*, pp. 18, 30; Magistrate's wife as women settler: PPG 16 September 1843; *Hamilton Spectator* 17 July 1863, 2 February 1870; Garden, *ibid*, p.31; Native and Border Police: SCO 42/1241; Garden, *ibid*, p.22; Quelling: French, *op.cit.*, 18 September 1842, 25 September 1842, 12 November 1842; Garden, *ibid*, p.22; Dismissal racism: French, *op.cit.*, 18 September 1842, 15 September 1842; SCR 42/1808; Garden, *ibid*, p.31; Dismissal drunk and dereliction: French, *op.cit.*, 25 May 1843, 19 June 1843; Garden, *ibid*, p.31.

religious convictions. French's manner of 'free thinking' would also cause him official problems. Instead of corresponding with La Trobe and seeking formal instructions, his self assured character led him to experience difficulties with La Trobe over, for example, his authority to hold Petty Sessions at the Grange in January 1843. This was followed by his attempt to form a Licensing Bench of Magistrates together with Edward Bell JP on 10 September 1842 for the purpose of issuing his former constable, George Green, with a publican licence for his proposed Inn the *La Trobe Arms*. A duly authorised Licencing Court was not held until April 1843, whereupon Green applied for and was granted a licence for his by then renamed *Grange Inn*, which opened on 1 July 1843. As a demonstration of the immediate effects of alcohol upon colonial society, within three days of the opening of the public house, a convict, under the lure of the new public house, become drunk and jeopardized his prospects of a ticket of leave.<sup>224</sup>

With the impact of the recession and the problems associated with the funding of Police Magistrates in the New South Wales Legislative Council, French's position of Police Magistrate at the Grange was abolished in December 1843. The office of Police Magistrate at the Grange/Hamilton would be vacant for some 10 years until W. N. Gray was appointed in 1853.<sup>225</sup> French remained in occupation of the 'government' buildings and sat as the chairman of an unsalaried bench of magistrates until a dispute with Lonsdale over the condition of the buildings and the proposal in September 1846 to establish a Court of Petty Sessions at the Grange. French assumed that new buildings would be built but found out that 'his' place of residence would be used. He left the Grange on 20 November 1847 and in his letter informing La Trobe of his removal, purported to resign from the Commission of Peace, although his name formally appears on the list of justices of the peace for the territory up to at least 1848. The

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<sup>224</sup> Darwinian and free thinker: Garden, *ibid*, pp. 24, 36; Official problems - Petty Sessions: *Portland Guardian* 21 January 1843; SCO 43/193; Unauthorised Lic. Cr: SCR 42/1842, 42/2196; SCO 42/1406; Later authorised Lic. Cr: *Portland Guardian* 17 June 1843; French, *op.cit.*, 10 March 1843; Drunken convict: French, *op.cit.*, 3 July 1843; as cited in Garden, *ibid*, pp.31-32.

<sup>225</sup> Office Abolished: SCO 43/1708, 43/1806, 44/55; French, *op.cit.*, 9 November 1844; Garden, *ibid*, p.33; No Police Magistrate for 10 years: Garden, *ibid*, pp.43-44.

unpaid justices of the District, including French's father-in-law Dr John Watton JP and Edward Barker JP, thereafter undertook the work of the magisterial bench at the Grange.<sup>226</sup>

French's influence over the community did not lapse with his departure from the magisterial bench. He was instrumental in the establishment of the non-denominational school at the Grange and was one of the elected patrons for the schoolhouse funding committee. His position was however threatened by his unorthodox religious views even in a non-denominational government school. His views concerning books from the Board of Education containing references to *Genesis* and the later representations of Archbishop Perry, led to his dismissal from the school board. The matter reached the Victorian Legislative Council where Fawcner attacked French, who in turn responded with a 500-pound wager if Fawcner could prove that the *Genesis* teachings were reconcilable with science.<sup>227</sup> In 1853 he chaired meetings called to form a Benevolent Society, to lobby for continued direct migration to Portland, to remove duty on tobacco used for the treatment of scab, and for improved road and mail services to the area. In 1854 he was involved with the formation of the Hamilton Cricket Club and in 1855 he became a member of the subscription committee for the Patriotic Fund in support of the Crimean War.<sup>228</sup> In 1857 and 1862 he purchased substantial acreage around his previous squat at Monivae. He eventually retreated to the country life of an established member of the Western District gentry. He contributed to the construction of a (non-sectarian) Hospital and Asylum and a rail link. His estate was eventually leased in 1864 and he spent his remaining years living between Hamilton and Melbourne. On 1 February 1870, whilst at the St Kilda baths in

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<sup>226</sup> Events prior to resignation: French, *op.cit.*, 19 February 1847, 18 April 1847, 8 May 1847, 7 June 1847, 20 November 1847; Garden, *ibid*, p.34; List of Territorial magistrates: See Mouritz, *Port Phillip Directory 1847*, Melbourne, Royal Historical Society of Victoria; Unpaid Justices take over work: Garden, *ibid*, p.34.

<sup>227</sup> School Committee: Garden, *ibid*, pp.35–36; Unorthodox views: It is believed that his daughter Amy enjoyed the first civil marriage in Victoria in July 1863; Garden, *ibid*, p.104; Dismissal from Board: Garden, *ibid*, p.42; Legislative Council and wager: French, *op.cit.*, circa August 1853; Garden, *ibid*, p.42.

<sup>228</sup> *Portland Guardian* 18 September 1854; *Portland Guardian* 14 May 1855; Victorian Government Gazette 20 November 1855; Garden, *ibid*, pp. 41, 65.

Melbourne, he dived into the shallow end of a swimming pool and died.<sup>229</sup>

A demonstration of the intimate, important and sometimes convoluted web of social contacts that existed between the Port Phillip elite and the magisterial class can be found in the de Castella–La Trobe–Anderson family connections. Through a process of intermarriage these three families joined and prospered. Though culturally, indeed ethnically different, the common link between them was membership of a common genteel class. Hubert de Castella came from an old French family from Gruyere Neuchatel, Switzerland.<sup>230</sup> Hubert entered the colonial *bureaucratic aristocracy* by marrying the second cousin of John Hubert Plunkett, JP, Crown Prosecutor, Solicitor General and Attorney General of New South Wales.<sup>231</sup> De Castella observed that rural infrastructure in Port Phillip was virtually non-existent. The poor condition of the roads was legendary, to the point that some settlers would exploit these difficulties. The further one went from Melbourne, the worse the infrastructure became. In the Western District, although trade and travel could occur by sea, travel to any entrepot by land was difficult. Individual riders on stout horses made distance with difficulty, but wagons were often stuck fast for weeks, leaving their teams camped idly beside them on the trackside. Acheson French, the Police Magistrate at ‘the Grange’ (later Hamilton) stated that in December 1842, for some months settlers had been stranded without basic supplies.<sup>232</sup>

<sup>229</sup> Garden, *ibid*, pp. 54, 65, 91, 95, 101, 104.

<sup>230</sup> It had been a rural family but had transferred its directions professionally. His brother Paul had come to Port Phillip in 1849 and settled in the Yarra Valley at his *Yering* station *Neuchatel*. Paul was to marry into the Anderson family, one of Melbourne’s leading families. Paul had come to Port Phillip in the company of Adolphe de Meuron-Osterwald, a nephew of Mrs Maria La Trobe. These contacts with the Superintendent’s family allowed Paul to be placed under the care of William Piper, a government surveyor who helped him select the best site on which to establish his station. After a short career in the French First Light Cavalry Regiment, Hubert had found his way to Port Phillip to join his brother in his pursuits; Thornton-Smith, C. B., (trans), de Castella, H., *Les Squatters Australiens* (Paris, 1861, Melbourne, 1987), Introduction, pp.1–28.

<sup>231</sup> Molony, J. N., *An Architect of Freedom* (Canberra, 1973) p. xiii.

<sup>232</sup> Wagons sometimes took a day to travel 200 paces along the unmade portions of the Sydney Road north of Melbourne which was littered with the bodies of dead horses and bullocks who had died ‘from exhaustion and beatings half buried in the mud’; There were reports of land owners whose fenced properties adjoined the roads sometimes opening up their own toll-ways (1 s. Per rider, 5 s. Per vehicle), allowing traffic to enter and exit their properties to avoid the quagmire of the unmade portions of roads in rural Port Phillip; Thornton-Smith, C. B., *op. cit.*, p.94; Wagons Stuck

Lt-Colonel Joseph Anderson was the head of the Melbourne branch of the Anderson family. His daughter Elizabeth married Paul de Castella, a squatter at *Yering*.<sup>233</sup> Another of the Anderson daughters, Fairlie Anderson married Lloyd Jones, a squatter (*Avenel* Station of 60,000 acres), member of the Melbourne Club (1851) and President of the Melbourne Club (1867) and described as being 'morally and physically perfect and the noblest example possible of a squatter'.<sup>234</sup> Jones was also the district magistrate for Avenel. His tent courthouse was beside the Mounted Police Post. The magistrate's clerk lived in a house next to the Constable in Avenel. De Castella describes the disadvantages of 'ambling' around the district with the local magistrate.<sup>235</sup> De Castella provides us with a rare description of the interior of a Port Phillip squatter-magistrate's house.<sup>236</sup> To be a rural colonial magistrate was one thing; to be his travelling

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for weeks: Kiddle, M., *op. cit.*, p.83; Settlers stranded for months without supplies: Acheson French Letter Book, 1841-1862 (in possession of Mr H. H. De ffrench of Melbourne; Kiddle, M., *op. cit.*, p.83.

<sup>233</sup> Anderson had seen action at Maida (1806), Egypt, the Peninsula War (1809-1812) and the West Indies. His regiment was posted to Sydney in 1834 and he was made Commandant of Norfolk Island. He was Commandant until 1839. In 1838, together with his brother General John Anderson, he 'acquired the 85,000 acre station of *Mangalore* on the Goulburn. Whilst visiting Melbourne in 1846 from India, where his regiment was stationed, he purchased blocks of land in South Yarra opposite the Botanical Gardens and built *Fairlie House*. This house is the present *Merton Hall* at the Melbourne Church of England Girls' Grammar School. He sold his Commission in 1848 and thereafter settled in Melbourne; Thornton-Smith, C. B., *op. cit.*, p.182.

<sup>234</sup> Thornton-Smith, C. B., *op. cit.*, p.183, citing Billis and Kenyon, *op. cit.*, pp.90, 168; also citing his examination of de Castella's *Reminiscences* transcript.

<sup>235</sup> 'We were bound to a certain official gravity which for my part could have certainly done without. When we went through the village we had to look dignified; and when we went past the stores I did not dare turn my head to find the doctor's daughter's pretty little face for fear of a ticking-off from Lloyd who was watching my every move from the corner of his eye. But this strictness was needed for a magistrate in a new country. It was particularly necessary in dealing with the class of people that the whole race of innkeepers in the colony generally belong to, consisting of greedy men who legally pillaged travellers and, particularly by encouraging them to get drunk, made profits of two or three hundred thousand francs per year'; Thornton-Smith, C. B., *op. cit.*, p.96.

<sup>236</sup> 'Lloyd Jones' homestead at Avenel was a kilometre from the village, it was a genuine colonial homestead. It consisted of a living room, master's bedroom and two little guestrooms. This living room, which the English name *sitting room* conveys a better idea of, what was both lounge and dinning-room. It was about thirty feet long and twenty wide, with walls completely covered with whitened sailcloth. A large table, a bookcase containing three or four hundred volumes, a divan in one corner and a few armchairs around a huge wooden fireplace, lined with stones which were whitewashed every morning, made up the furniture...we were expected; candles were burning in elegant branched candlesticks, and the simple luxury in the best taste of everything that had been cooked for our meal was heightened still more by the starkness of the walls in the room... An Englishman always dines in evening dress: at Avenel, although we were in the Bush and just two friends together, if we did not exactly put on a white tie, we at least put our best suit on every evening, or at any rate different clothes from what we had been wearing during the day'; Thornton-Smith, C. B., *op. cit.*, p.95.

companion, a position of all glory with no responsibility, must have been complete fun. The deference by association one received, especially from amongst the ranks of licensees of the public houses dotted along the landscape was by design a form of self-aggrandisement.<sup>237</sup> Accommodation for the traveller in Port Phillip during the period varied from the 'grog shanties' to the 'Inns'. Some were so mean that 'it was better to sleep by the roadside than to put up in such a place'. Accommodation costs in the inns were high and reportedly made the innkeepers wealthy. Prices in establishments relatively close to Melbourne, like the 'inn at Rocky Waterhole' (blue-stone country near Kalkallo) were high.<sup>238</sup> The proprietors of these establishments were also memorable men. The *Deep Creek* or *Bridge Inn* was situated at what now is the township of Bulla and was operated by the former Chief Constable of Melbourne (1838-1841) William 'Tulip' Wright.<sup>239</sup> He was a dreadful man and a true representative of his class.<sup>240</sup> To the southeast, the *Golden Fleece Inn* marked the halfway point between Melbourne and Geelong. By 1840 it was only 'a mere hut between the split slabs which stuck in the ground compose the walls of a hen with a brood of chickens might find her way out': *Mac's Hotel* in Geelong is similarly described, as well as the *Merrijig Inn* in Port Fairy and the other like establishments in Portland

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<sup>237</sup> 'To obtain an innkeeper's license the assent of three magistrates was required; likewise three assembled magistrates could deprive any innkeeper of his selling rights if there were complaints about him. When Lloyd [Jones, the Avenel district magistrate] explained all this I could understand all the special attention we had been given in the inns we had stopped at on our way from Melbourne'; Thornton-Smith, C. B., *op. cit.*, p.96.

<sup>238</sup> Better to sleep on the road: Kiddle, M., *op. cit.*, p.84; Rocky-Waterhole: Thornton-Smith, C. B., *op. cit.*, p.93; Blue-stone country near Kalkallo: Thornton-Smith, C. B., *op. cit.*, p.184, n.1, citing Billis R. V. and Kenyon, A. S., *Pastoral Pioneers of Melbourne* (1932) 2nd. ed. (Melbourne, 1984) p.272.

<sup>239</sup> 'Garryowen', *Chronicles of Early Melbourne*, vol.2, p.974; O'Donnell, N. M., 'Some Pioneers of the Sunbury District', *Victorian Historical Magazine*, VII, pp.72-76.

<sup>240</sup> 'Short, burly and somewhat foul mouthed specimen of an ex-Van Diemen's Land constable, with a stentorian voice which was often heard in a volley directed to some dilatory or offending menial in the distance. The sister isle supplied a considerable number of hosts for our many public houses and chief constables for our limited police. There was then, as now, no lack of public houses, many of which were of the usual low type, traps for the visiting Bushmen fresh from the country, with their hard-earned cheques in their pockets, or such of them as did not get intercepted by the road-side innkeepers who had a keen faculty for scenting an approaching cheque, and for the appropriating of which they had all sorts of devices, sometimes a decoy in the guise of another Bushman with a shilling for a shout or two'; James, *Alfred Joyce, op. cit.*, pp.84-85.

and Warrnambool.<sup>241</sup> The further inland one travelled, the meaner the establishment. In Colac, the local grog shanty was a perfect place to host a colonial bacchanalia.<sup>242</sup> The Inns deservedly had a reputation for being the meeting place for drunks from around the surrounding district. Their masters on the runs would monitor the availability of alcohol and these local 'grog shops' were the only 'means' of obtaining liquor without travelling to Melbourne or Geelong. De Castella has described the plight of the poor shepherds.<sup>243</sup>

To a privileged 'outsider' like de Castella, the ex-convict rural labouring population of the District of Port Phillip were poor reformed souls who had learnt their lesson. This was not a widely held view as the influx of former convict Vandemonians began taking up most of the 'criminal business' of the courts in Melbourne and Port Phillip. Added to this, the arrival of the ticket-of-leave convicts from Pentonville aroused great outcry and animosity from most settlers in Port Phillip, especially when they accounted for further 'serious crimes soon after their arrival'. Some former convicts undoubtedly did eventually 'learn their lesson' and prospered in the reforming colonial gaol. The *Austin Family* is but one example.<sup>244</sup> Most former convicts did not prosper and it was as labourers not masters that the 'Vandemonian convicts who bore the brunt of colonisation' in early Port Phillip, made their mark. As de Castella came to Port Phillip with capital, but without agricultural experience, he was not representative of the majority of

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<sup>241</sup> Kiddle, M., *op.cit.* p.83; also citing *Neil Black Journal*.

<sup>242</sup> 'The bar room was always filled with drunken men, many of them just in from a successful shearing season, and the oaths and curses of these infuriated beings strangely co-mingled with the howling and diabolical mirth of drunken and besotted black men and women'; *Ibid*, citing Hebb, Isaac, *History of Colac* (*Colac Herald*, Colac, 1887).

<sup>243</sup> "Bemused by the long isolation he had been condemned to, got his pay for a number of months...took his money to the innkeeper: 'Keep it', he would tell him, I'm moving in, and when I've drunk it all you can put me out. The poor devil shouted drinks for all comers, and the blacks squatting at the doorstep of the inn would finish off what was left in his bottles"; Thornton-Smith, C. B., *op. cit.*, p.96.

<sup>244</sup> Serious crime soon after arrival: Therry, R., *op. cit.*, pp.353-354; From Glastonbury in Somerset, downgraded from yeomen to tenant farmers and labourers over the years, one of their number, James Austin was transported to Van Diemen's Land for stealing beehives and honey. His ship, the *Calcutta*, was diverted to Port Phillip and Austin took part in the Collins Sorrento settlement, before transferring to the Derwent settlement in Van Diemen's Land. Prospering over the years, other members of his family followed to also prosper in the reformed gaol; Quarter Sessions Indictment Roll, 13 January 1802; Kiddle, M., *op. cit.*, p.25.

settlers. The converse, especially in the Western District, was the norm.<sup>245</sup> De Castella's world-view was also more continentally existential in outlook and more naive in aspect than that of the typical Scottish, English or Irish migrant. Representative of his views of the convict system, de Castella told the story of 'Old Tom', a former convict in his sixties who had been in the colonies for 30 years. The system of transportation, according to de Castella, worked in Tom's case; it shamed him and isolated him but gave him peace in the twilight of his days.<sup>246</sup>

Tom's story takes us back to where he did feel shame, England. The main themes of social discord that run through this early colonial period – class conflict and consciousness, alcoholism, master / servant relations and public order maintenance – were of paramount importance in the work of the colonial magistrates. As the primary enforcers of order maintenance, the Port Phillip magistrates often struggled to enforce order in a frontier society that seemed to resist control. The magistrates often seemed powerless in a society that lacked the established and accepted social structures essential in civic governance. We turn back to England to understand the origins of the magistracy and those themes that followed the office.

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<sup>245</sup> Kiddle, M., *op. cit.*, pp.24–26.

<sup>246</sup> [It] 'is the most humane of all and produces the best results. Tom had, it was said, been transported for serious crimes. Once perhaps he did have a very evil look about him, but with the influence of a new climate far from the causes of his downfall, in a land where he was partly protected from shame, and thus freed of the hatred that he would always have borne towards society, he had taken on a good cast of countenance again. Being happy with his present honest state, all the more in that for him it was something he had acquired for himself, he set greater store by it had he never fallen. As far as I was concerned I would have given him my purse to mind without benefit of witness'; Thornton-Smith, C. B., *op. cit.*, p.114.

## CHAPTER 2:

# THE ENGLISH ORIGINS OF THE MAGISTRACY

### JUSTICES OF THE PEACE IN MEDIEVAL ENGLAND

TO FULLY UNDERSTAND the colonial magistracy, we must first acquire a sense of the historical development of the office in its birthplace of England. The indigenous English office of the justice of the peace<sup>1</sup> was created in the fourteenth century. It was based upon a corps of knight guardians of the King's Peace originally established in 1195. They were formed to act as Crown agents of local social control. The office was essentially based upon the deference paid to the knight guardian by his lesser subjects. He was able to forcibly extract oaths from all common persons that they would not be robbers, outlaws or thieves and would join him in the pursuit of criminals when the 'Hue and Cry' was raised.<sup>2</sup> The knights eventually became known as the 'Custodes Pacis', the Keepers of the Peace. The Custodes Pacis possessed no judicial powers. In times of rebellion however, the Crown issued special Commissions granting exceptional powers to 'the Keepers'. This included the exercise of judicial functions that in turn led to the use of the title 'Justice' being adopted.<sup>3</sup> The transformation from 'Keeper' to 'Justice' has been interpreted as a form of localised devolution of power to the justices at the expense of the crown, the magnates and professional lawyers.<sup>4</sup> Some have interpreted this change as part of a process of

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<sup>1</sup> As opposed to the office of the Roman magistrate that administered justice in England, when England was a province of Rome; Babington, A., *The Rule of Law in Britain: From the Roman Occupation to the Present Day* (Chichester, 1995) pp.5-7.

<sup>2</sup> Milton, F., *The English Magistracy* (London, 1967) p.3.

<sup>3</sup> Osborne, B., *Justices of the Peace 1361-1848* (Dorset, 1960) p.4.

<sup>4</sup> Putnam B. H., 'The Transformation of the Keepers of the Peace into the Justices of the Peace 1327-80', *Transactions of the Royal Historical Society*, 4<sup>th</sup> series, 12 (1929) pp.19-48; Putnam, B. H., *Proceedings before the Justices of the Peace in the*

complementary power sharing and as a reaction to a perception of rising lawlessness. The point has also been made that the distinctions traditionally drawn between central and local appointees was not altogether accurate.<sup>5</sup> Once empowered, the local justice used the 'Hue and Cry' to rally and enforce popular obedience.<sup>6</sup> The statutory enfranchisement of the office occurred by the *Act of 1327*. This legislation allowed the justices to enquire into felonies and trespasses and to make arrests.<sup>7</sup> The appointment of a person to the Commission of the Peace has remained unchanged in England since 1195. The name of a Crown nominee from each county would be placed upon a document known as the Commission of the Peace. This document would be entrusted into the keeping of the local Clerk of the Peace. This Crown nominee then officiated as a local justice under one of the most enduring pieces of legislation to be found in the English-speaking world.<sup>8</sup> This legislation is an example of 'preventative justice'<sup>9</sup> which, together with the concept of the 'King's Peace', created a socio-legal compact between the subject and the sovereign: in exchange

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*Fourteenth and Fifteenth Centuries: Edward III to Richard III* (London, 1938); Coss, P., *The Origins of the English Gentry* (Cambridge, 2003) p.181.

<sup>5</sup> Musson, A., *Public Order and Law Enforcement: The Local Administration of Criminal Justice, 1294-1350* (Woodbridge, 1996); Musson, A. and Ormrod, W. M., *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (London, 1999).

<sup>6</sup> The 'Hue and Cry' rally required householders of the local 'hundred' to gather, pursue, capture and detain robbers, felons, murderers and thieves detected within their precincts. Failure to do so made them answerable to the sovereign; see Preamble to the *Statute of Winchester 1285*.

<sup>7</sup> Moir, E., *The Justice of the Peace* (London, 1969) p.17.

<sup>8</sup> In every county of England shall be assigned for the keeping of the peace, one lord and with him three or four of the most worthy in the county, with some learned in the law,<sup>8</sup> and they shall have power to restrain the offenders, rioters, and all other barators [exciters of quarrels] and to pursue, arrest, take and chastise them according to their trespass or offence... and to inquire of all those who have been pillors [pillagers] and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past...and to cause them to be imprisoned and punished according to the law and custom of the realm, to take all them that be not of good fame sufficient surety...of their good behaviour towards the king and his people, and the others duly to punish; to the intent that the people be not by rioters or rebels troubled nor endamaged, nor the peace blemished and also to hear and determine at the King's suit all manner of felonies and trespass done in the same county, according to the laws and customs aforesaid; Osborne, B., *op.cit.*, p.5; Milton, F., *op.cit.*, p.4., both citing Act of 1361, 34 Edw.c.1.

<sup>9</sup> When ordered to provide sureties against a defendant to prevent him from inciting suffragettes, a local English magistrate in 1904 ignored the argument put forward by Counsel that the legislation was inappropriate in this instance as the basis of the original fourteenth-century instituting legislation, it was argued, had been to deal with the social turmoil associated with the recently returned soldiers who had served in France; the English High Court held that magistrates were entitled to still use this ancient power of 'preventive justice'; Osborne, B., *op.cit.*, p.5 citing *R v. George Lansbury* (1913) unreported.

for a subject's loyalty, the sovereign would guarantee peace and security. Deference to a local person of esteem was essential; the office of the justice of the peace represented the creation of a local judicial office occupied by a respected local familiar. Through this the medieval English state sought to exercise control over the shire population at the local level via the twin tools of personal familiarity and social deference.<sup>10</sup> In Medieval England the justice of the peace served, in the absence of a standing army or police force, as a locally based agent of formal social control. The office required a person who could command deferential respect from the populace and who could exercise detective functions in the maintenance of the social order and its coagulant, peace. The 'Constables of the Hundred' were men of inferior social status and could not command deference because of their social standing. The Sheriff was seen as an outsider whose allegiance was to sovereigns whose interest and demand for taxes seemed insatiable. The office was used by the Medieval English sovereign to extend the power of the Crown in the absence of standing organs of local government.

The local justice was also closely linked to local religious institutions and practices. For example, the *Act of 1362* linked the sittings of the Court of Quarter Sessions to the religious calendar.<sup>11</sup> As religion was the social binder of medieval society, the local justice was required to strengthen medieval society by enforcing Church ordinances and enforcing spiritual conformity within the boundaries of the established Church.<sup>12</sup> He was required to co-ordinate Church attendance and

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<sup>10</sup> Babington, A., *op.cit.*, Deference: p.21; Local connections: 'The institution of Justices of the Peace, local gentry appointed by the Crown to govern the neighbourhood in the King's name, was a move away from inherited feudal jurisdictions. But it was also a reversal of the movement towards bureaucratic royal centralisation: it recognised and used local connections and influence for the King's purposes, a compromise significant of the future development of English society as distinct from that of other lands.'; Trevelyan, G. M., *English Social History* (London, 1942) cited in Babington, A., *op.cit.*, p.26.

<sup>11</sup> 'Within the utas of the Epiphany, the second within the week of Mid Lent, the third betwixt the feasts of Pentecost and of St John Baptist, the fourth within the eight days of St Michael'; Osborne, B., *op.cit.*, p.5; citing *Act of 1362*.

<sup>12</sup> Disobedience of religious ordinances were seen as evidence of personal 'obstinacy', 'impudence' and antisocial behaviour; this type of conduct would normally attract criminal sanction, yet were not classified as such because they lacked some of the necessary elements to constitute criminal activity. Breaches of the laws of the Church were not crimes but spiritual sins 'even though they may constitute disruptive or antisocial activity'; Cockburn, J. S., *Crime in England 1550-1800* (Princeton University Press, Princeton, New Jersey, 1977); Elton, G. R., *Introduction: Crime and the Historian*, p.3.

to audit parishioner contributions to the Church collections. These monies were used as relief funds for the poor within the shire. If any 'obstinate person' was detected, a report was to be made to the local Bishop.<sup>13</sup> The religiously 'obstinate person' was a close relative of the religiously 'impious' person and was thought to be inherently dangerous as he or she challenged established religious practice and by implication the secular 'order' that it supported. As if confirming the union, the state mandated that the local justices should help decide the wife of the local cleric.<sup>14</sup> The link between Church and the legal machinery of state can also be discerned in the development of the plea of 'benefit of clergy'. This plea was originally designed to protect clerics from unfair punishment at the hands of the secular courts. The plea was extended by the medieval common law in cases of murder and felony to any and all literate laymen. Legislation eventually limited its application to lesser felonies and first convictions and ultimately many criminal statutes were deemed 'unclergyable'.<sup>15</sup> To invoke the plea, the accused, in response to the *allocutus* would claim benefit of clergy and be required to pass a literacy test.<sup>16</sup>

The link between the magistrate, as the local representative of state authority, and the established religion of a society, is an ancient and cross-cultural policy of rule.<sup>17</sup> This unity of

<sup>13</sup> The Bishop would mentor the individual and, failing repentance on the part of the 'obstinate person', the recalcitrant would be summoned to appear in Quarter Sessions where judicial pressure would be applied in the name of state-orchestrated religious charitableness; *op.cit.*, p.15.

<sup>14</sup> Her Majesty's Injunctions to the Clergy, 'No manner of priest or deacon shall hereafter take to his wife any manner of woman without the advice and allowance first had by the Bishop...and two Justices of the Peace of the same shire'; Tanner, J. R., *Tudor Constitutional Documents* (Cambridge, 1922) p.140; Osborne, B., *op.cit.* p.15.

<sup>15</sup> Beattie, J. M., *Crime and the Courts in England 1660–1800* (Princeton, 1986) pp.141–145; Linebaugh, P., (1985), '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein', *New York University Law Review*, 60, pp.212–243, citing Radzinowicz, L., *A History of English Criminal Law and Its Administration Since 1750* (London, 1948) vol.3, pp.631–632; Weiss, *op.cit.*, p.62.

<sup>16</sup> The court would then ask the convict to read a prescribed passage from the psalter, such as the first verse of the Miserere (Psalm LI, v.1 'the neck verse'). The plea could only be used once and a system of branding pleaders (literate laymen or 'clerks' but not priests) on the left thumb with the appropriate 'T' (thief) or 'M' (manslayer) was developed; Cockburn, *op.cit.*, Chapter 1, Baker, J. H., *Criminal Courts and Procedure at Common Law 1550–1800*, at pp. 41–42; Beattie, *op.cit.*, literacy: pp. 452, 474–475, branding: p.490.

<sup>17</sup> In the Christian Bible the magistrate was seen as a person who would bring order to a society and would show people the shamefulness of their careless actions. Once before a magistrate with 'thine adversary' one should take care and show respect, otherwise the machinery of justice would eventually 'cast thee into prison'; *Bible*, King James Version, Judges

interest between the state and its sanctioned religion required the officers of the state to uphold the sanctity of the state's religion just as the officers of religion were bound to uphold the state's authority. Intemperate, impious or obstinate spiritual acts, apart from constituting the commission of spiritual treason, became acts of secular disobedience, which the state was obliged to punish as representations of a 'disrespectful disposition' towards the state and its institutions.<sup>18</sup> It has been argued, however, that by the eighteenth century the partnership between the Church and the state had been dissolved and the law replaced religion as the dominant form of ruling-class ideology.<sup>19</sup>

## THE GENTRIFICATION OF THE JUSTICES

THE ENGLISH MAGISTRATES, like their later Australian and Port Phillip counterparts, were set the task of maintaining peace and tranquillity within their territory. In medieval England the regularisation of the sittings of the justices was achieved by the *Act of 1632*. Individual justices would thereafter investigate complaints and arrange for presentment before the grand jury and justices for trial at Quarter Sessions.<sup>20</sup> The Quarter Sessions were an important part of the social

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18:7; Luke 12:58; Buddha, in his parable concerning Anathpindika and Prince Jeta, provides us with an insight into the role of the Eastern magistrate, its philosophical paradigms and the obligation to submit to magisterial authority. Buddha, advised, 'He who deserves punishment must be punished, and he who is worthy of favour must be favoured... His own acts have brought upon him the injury that the executer of the law inflicts. When a magistrate punishes, let him not harbour hatred in his breast, yet a murderer, when put to death, should consider that this is the fruit of his own act. As soon as he will understand that the punishment will purify his soul, he will no longer lament his fate but rejoice at it'; Buddha, *His Life and Teachings* (500 B.C.); Plato confirmed the institutional linkages between religion and the magistracy in Classical Greece. There the institutions intertwined their spiritual and secular operations by placing the secular magistrate within the religious and ceremonial programs of worship, processions and acts of sacrifice; Plato, *Laws* (348 B.C.) Book VIII.

<sup>18</sup> Plato, in instructing as to the proper disposition of magisterial functions, condemns the use of intemperate individual speech and directs that the 'magistrate who presides on these occasions chastise an offender' who offends against society by his intemperate speech and therefore undermines society and the directions of the legislator; Plato, *op.cit.*

<sup>19</sup> Hay, D., Linebaugh, J., Rule, J., Thompson, E. P., & Winslow, C., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975); Hay, D., 'Property, Authority and the Criminal Law', at p.17.

<sup>20</sup> 'Originally there was no distinction between summary and indictable magisterial jurisdiction. If a *prima facie* case was established by the grand jury, the presentment was endorsed *billa vera* by the grand jury and the accused would be sent to trial before yet another jury'; Osborne, B., *op.cit.* p.6; Beattie, *op.cit.*, pp.5-6, 16, 220, 283-288.

calendar of the magisterial class.<sup>21</sup> There were competing forces and interest groups at work in redefining and redesigning the office of the justice of the peace.<sup>22</sup> The medieval Crown was always in financial difficulties and in need of reliable tax collectors and competent judicial administrators. The Crown saw the justices as part of a solution to these financial and administrative problems.<sup>23</sup> Constant warfare was not only financially draining but also allowed for the serious social problems associated with the uncontrolled demobilisation of commoner troops blooded by an enforced King's apprenticeship in plunder.<sup>24</sup> The solution, as advocated by the Chief Justice of the King's Bench, Sir Geoffrey Scrope, was the creation of a corps of specially commissioned royal justices who would undertake both tax collection and judicial-administrative functions.<sup>25</sup> The later Australian colonial authorities also acted upon this advice when they developed their own peculiar magisterial progeny, the Commissioner for Crown Lands.

As proof of the importance of the office, the Crown and the Commons constantly fought over control of the office of the justice of the peace. They undertook this battle as competing interest groups. The Commons maintained their campaign for local-centric appointees to the office and fought for their extended role in economic administration.<sup>26</sup> The House of Commons

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<sup>21</sup> Formal processions, reading of commissions and proclamations, greeting of visiting judges, swearing in of jurors and charges to the juries were surrounded with great 'pomp and pageantry' especially given the fact that at Quarter Sessions, before three or four magistrates, all felonies were justiciable save and except treason; Babington, A., *op.cit.*, p.31.

<sup>22</sup> Had the Crown created yet another Sheriff-like bureaucrat who owed the Crown a fidelity over all others, the office of the justice of the peace would have become merely another servant of the Crown. By accident the Crown created an office independent of itself able to deliver local governance on a national scale unlike any other in the Christian world. Babington, A., *op.cit.*, pp.28-29, citing Sir Edward Coke, Chief Justice King's Bench, 1613.

<sup>23</sup> 'Profits of justice, not justice, were the essential consideration'; Putnam, B., *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries, Edward III to Richard III* (Cambridge, 1938) Massachusetts, p.xli.

<sup>24</sup> Milton, F., *The English Magistracy* (London, 1967) pp.3-4.

<sup>25</sup> 'These men would owe direct allegiance to the Crown and could be relied and depended upon by the Crown. On the other hand, the House of Commons, dominated by the gentry and burgesses wanted control of the office by insisting that Commissions be granted to local gentry with knowledge of local conditions'; Moir, E., *The Justice of the Peace* (London, 1969) pp.19-20.

<sup>26</sup> *Op.cit.* p.18.

eventually succeeded in the complete gentrification of the office of the justice of the peace. By the late sixteenth century, many justices also simultaneously held seats in Parliament. The Commons were eventually able to influence the magisterial nomination and induction process.<sup>27</sup> There were practical justifications for this union of interests. The appointments to the office became 'politicised' as competing power interests sought representation amongst the justices.<sup>28</sup> The vast majority of commissions of the peace were held by members of the gentry class. The qualifications suited that class.<sup>29</sup> The social reality of vertical deference that assisted the justice of the peace in maintaining his hold over lesser persons within his shire also worked against him when he was confronted by an Earl or Bishop who at times shared a place on his Bench. This vertical class format provided the Crown with another avenue of influence over the magistracy. Osborne labels these 'ornamental appointments'.<sup>30</sup> Commissions issued for Wiltshire reveal these class divisions within the Quarter Sessions Bench and the domination by the gentry.<sup>31</sup> The resulting matrix of justices, drawn from the stable gentry class, who possessed intimate local knowledge and a degree of consistent fidelity to a central government, gave England a superior

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<sup>27</sup> The influence and direct control of the shires by the justices proved fatal to sovereign interests and to the autocracy of the Crown. Parliament eventually wrested control and authority over the instruments of power and the body of advisors authorised to manage its bureaucracy; Jenks, E., *The Government of Victoria (Australia)* (London, 1891) p.1; The control of the office of the justice of the peace ultimately assisted the English Parliament in succeeding to the position of primacy over the Crown that it now enjoys; Babington, A., *op.cit.*, p.27; Musson, Public Order and Law Enforcement, *op.cit.*, pp.60, 81; Coss, *op.cit.*, p.184; Saul, N., *Knights and Esquires: The Gloucestershire Gentry in the Fourteenth Century* (Oxford, 1981) pp.128–135.

<sup>28</sup> Apart from self-aggrandisement, it served to counterbalance those appointments to the commission of the peace of persons who owed greater allegiance to the Crown, the Church or the nobility-land magnate class than to the gentry class; a custom had developed that required that Crown favourites and retainers, high officers of state, Judges of Assizes and Lord Mayors have their names entered upon the commissions of the peace; Moir, E., *op.cit.* p.30; Beattie, J. M., *Crime and the Courts in England 1660–1800* (Princeton, 1986) p.60.

<sup>29</sup> From 1389 one needed to be a most sufficient knight, esquires and gentlemen of the land; by 1414 most needed to reside within the county; by 1439, ownership of land of a minimum value of 20 pounds. Their names would be placed upon the commission by the sovereign acting on advice of the circuit judge and, upon appointment, was obliged to take the oath of allegiance and receive the sacrament according to the rites of the Church; Babington, *op.cit.*, pp.26–27.

<sup>30</sup> Of a total 149 Commissions, the Prince of Wales and the Archbishop of Canterbury appear in seven and five respectively. Of the remaining positions, the gentry esquires dominated the office. Bishops 6, Abbots and Clerks 5, Dukes 1, Marquises, Earls and Lords 10, Knights 35, Esquires 80; Osborne, *op.cit.* p.29.

<sup>31</sup> 1562 *Wiltshire*: 5 external county Crown appointees, 1 Earl, 2 Barons, 22 country gentlemen; 1600 *Wiltshire*: 6 honorary members, 7 local nobility, 1 Bishop of Salisbury, 1 Bishop of Salisbury's Chancellor, 37 country gentlemen; Hurstfield, J., 'County Government 1530–1660', *Victoria County History of Wiltshire*, (London, 1957) University of London, Institute of

form of internal nationwide administrative bureaucracy unknown in other countries.<sup>32</sup>

## THE MAGISTRATES AND OTHER LOCAL FUNCTIONARIES

THE DEVELOPMENT OF the office of the magistracy was linked to the demise of the office of the Sheriff, a position that was more administrative than judicial in nature.<sup>33</sup> The Sheriff was a direct appointee of the Crown and originally held the supreme position within a county. As a result of constant abuses within the office of the Sheriff, successive sovereigns decided to curtail his powers.<sup>34</sup> The Coroner was originally the Sheriff's deputy and undertook wide-ranging investigations and documentary trusteeship on behalf of the Crown.<sup>35</sup> The offices of the Sheriff and Coroner eventually gave way to the local gentry justice who is said to have achieved supremacy over the shire by 1461.<sup>36</sup> By 1550, most of the Sheriff's 'tourn' jurisdiction had been removed to the justices' sessions.<sup>37</sup> The Petty Constable was a member of the parish. His appointment was for a period of one year. The appointment was rotational and all of the most

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Historical Research, v, p.89 and Moir, E., *op.cit.* pp.30–31.

<sup>32</sup> This was observed in 1904 by the Marxist historian Charles Beard. He noted that the English 'had their justices chosen from the strongest and most stable elements of the gentry...scattered as permanent residents through every county, they possessed that intimate knowledge of local persons and conditions which facilitates efficient administration... No continental state possessed such a combination of local independence and central control, and one is surely warranted in saying that England's early national unity and internal administrative uniformity, were in large measure due to the institution of the justice of the peace': Beard, C.A., *The Office of Justice of the Peace in England* (New York, 1904) p.71.

<sup>33</sup> The Sheriff had been the traditional authority link between the land and the Crown. From 1388 the Sheriff was directed to pay a sitting fee of four shillings per day to local justices (a fee equal to sixteen times a labourer's daily rate); Milton, F., *op.cit.*, p.6.

<sup>34</sup> Babington, A., *op.cit.*, p.25.

<sup>35</sup> The office of the Coroner was first referred to in the *Articles of Eyre* in 1194 as the *custos placitorum* ('keeper of the pleas'); the name has its origins as 'coronator' or 'corona' ('crown'); he was elected by the freeholders of the county and was responsible for safeguarding the king's property and county legal documentation; in practical terms although subservient to the office of the Sheriff, was also designed as a check on the exercise of the Sheriff's absolute powers. The Coroner was authorised to hold suspects, to investigate felony and to maintain records of outlawed persons; Babington, A., *ibid.*, p.22.

<sup>36</sup> The Sheriff, for example, by the Act of 1461, could not preside over the bi-annual sessions within the hundred at his tourn where he would adjudicate summary jurisdiction over criminal assaults; Moir, E., *op.cit.* p.19.

<sup>37</sup> Cockburn, J., S., Ed. *Crime in England 1550-1800* (Princeton, 1977) Princeton University Press, New Jersey, Chapter 1, Baker, J. H., *Criminal Courts and Procedure at Common Law 1550-1800*, p.31.

'sturdy' men of the parish would eventually serve in the post. He was unpaid and undertook his duties on a part-time basis.<sup>38</sup> The constable was required to maintain the peace within the parish by personal vigilance and by the apprehension of criminals and vagabonds. He was technically under the authority of the High Constable of the Hundred but in reality direct command over the Petty Constable was exercised by the local justice of the peace. The Constable was not the only parish officer maintaining order,<sup>39</sup> but eventually became recognised as the central member of the parish order maintenance unit.

The Petty Constable was obliged to deliver 'Presentments' before Quarter Sessions. These 'Presentments' amounted to quarterly intelligence reports to the justices. These reports ranged from the simple pronouncement of *Omnia Bene* ['All's well!'] to the more detailed accounts of life within the parish.<sup>40</sup> The Petty Constable was responsible for carrying out court-decreed sentences and punishments. This annually appointed, part-time, lay member of the Parish, would detect offences, present the accused before a court, and then mete out corporal punishments to the convicted. These convicts were often their own neighbours and Parish acquaintances. The punishments ranged from monetary fines to imprisonment, whipping, setting within a pillory or branding with an iron. In the furtherance of the policies of property protection and social cohesion, the punishment for grand larceny,<sup>41</sup> or being without visible

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<sup>38</sup> Babington, A., *op.cit.*, p.27; Some districts enjoyed a tradition that occupants of certain houses would automatically become constables; or that they could avoid their duty by payment of a sum into parish funds or have an alternate person appointed as a 'constable by proxy'; see also City of Westminster practice which allowed for the hiring of 'substitutes', p.37.

<sup>39</sup> The peace obligations were placed upon all tithing-men, borsholders, the headboroughs and chief pledges; Babington, A., *op.cit.*, p.22.

<sup>40</sup> 'And this Newcome and she have continewde to live together - whether she be wyffe or no we cannot tell... Arthur Moore keepeth a vytelling house being not licensed, and the parsonage sprynge is destroyed and all the old staddells felled down...Our hyghe Wayes are all well according to the Statute. Our artyllery is a cordynge to the Statute. Our hale howsune ys lysensed a cordynge to the Statute...Richard warren for refusing to pay to the poor as he was assessed which was weekly paid...We presente Geo Mann vacabonde punished the 22nd July and delivered to the constable at White Notely withe his passpote to bring him to Reading in Berkshire...Things are well and quiet...*Omnia Bene*.' Essex Record Office, *Presentments of Constables, Sessions Rolls*, Vol.1, cited in Osborne, B., *op.cit.* p.21.

<sup>41</sup> Being the theft of anything of value worth more than one shilling.

means of support, or for being a woman 'wandering' outside her Parish whilst under a bond to keep the peace, was death by hanging.<sup>42</sup> The justices, Judges of Assize and juries began conspiring to thwart the sentence of death by allowing the accused to plead benefit of clergy and later by undervaluing the worth of stolen property.<sup>43</sup> The practise of undervaluing stolen goods was later transported to the Australian colonies.<sup>44</sup> These practises coincided with the growth of the English criminal code. The Code's main theme was the protection of property. It has been argued that the partial verdicts delivered by juries were really sentencing decisions with transportation a highly placed option. It appears that even though the punishment of death was available it was rare that the accused suffered the ultimate fate. The magistrates would advise prosecutors to underestimate rather than overvalue claims. The judicial officers also applied for pardons or for commuting of the sentence to transportation. This paradox of increased death penalties within the criminal statutes, from 50 to 200 during the eighteenth century, and the decrease in the number of executions, has never been adequately explained.<sup>45</sup>

Since the reign of Charles II magistrates began meeting in what was to evolve into Petty Sessions. These were separate from their administrative and licensing work and gave the justices immense power.<sup>46</sup> Quaint procedural rules began to evolve. The reprieve from a death sentence

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<sup>42</sup> Leonard, E. M., *Early History of English Poor Law* (Cambridge University Press, Cambridge, 1900) p.71, cited by Osborne, *op.cit.* p.24, citing Quarter Sessions Middlesex Vol. I, pp.94, 103, recording proceedings of sessions for the year 1575.

<sup>43</sup> They also began making partial verdicts of 'lesser included offences'. The tactic of undervaluation became quite widespread by the late eighteenth and early nineteenth century. Juries demonstrated high acquittal rates, especially when the allegations were supported by limited evidence; Langbein, J., (1983), 'Albion's fatal flaws', *Past and Present*, 98, pp.96–120, citing Beattie, J. M., 'Crime and the Courts in Surrey, 1736–1753', in J. S. Cockburn (ed), *Crime in England 1550–1800* (Princeton, 1977) pp.155, 163; Weiss, R. P., *Social History of Crime, Policing and Punishment* (London, 1999) pp.38–39; Beattie, *op.cit.*, Partial Verdicts: pp.419–430.

<sup>44</sup> Byrne, P. J., *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (Cambridge, 1993) p.280.

<sup>45</sup> Growth of transportation as a sentencing option: Ekirch, R. A., *Bound for America: The Transportation of British Convicts to the Colonies 1718–1775* (Oxford, 1987) pp.11–45; Execution rare: Only 10–20 per cent of felons were ever condemned to death; only 30–50 per cent of those subsequently suffered the sentence actually carried out: Radzinowicz, *History*, I, pp.140–151; Advice to undervalue: Langbein, *op.cit.*, p.37, citing advice given by Bow Street Police Magistrate John Fielding; Pardons: Baker, *op.cit.* p.43; Paradox: Linebaugh, P., *op.cit.*, p.216; Weiss, *op.cit.*, p.59.

<sup>46</sup> They were allowed to order up to 7 years' transportation for the burning of hay ricks; Babington, A., *op.cit.*, p.33.

or an order to transport originally required the consent of the defendant, after which the affixing of the Great Seal or the consent of the Privy Council would be sought. Transportation was seen as a good alternative (to death, or enforced work on the galleys or foreign military service, or medical experimentation) by all classes.<sup>47</sup> Parliament began using 'hulk' incarceration and transportation as sentencing options for dealing with their criminal 'classes'. It was during this period that the English legal system developed its love of precision in paperwork that sometimes came too late to be of benefit for the defendant.<sup>48</sup> This formal exactitude did not apply to magistrates sitting out of sessions, especially where they were investigating crimes in their dual roles of Police Chief and adjudicator. There were neither time limits for the detention of suspects nor any obligation to keep records, as these investigations were not considered 'judicial proceedings'.<sup>49</sup>

## FUNCTIONS OF THE MAGISTRATE

NOTWITHSTANDING EITHER SOCIO-political issues or struggles between the Crown and Parliament, the individual appointments of these officers of social control was always subject to the imperative established under *Magna Carta*<sup>50</sup> which formalised the division between the legal and administrative functions undertaken by the justices for the following nine hundred years. A division was made between those matters undertaken by the justice 'out of sessions' and those undertaken at Quarter Sessions. In some matters, a single justice or a combination of two or three lay justices could exercise jurisdiction over matters in the parlour of their own home(s) or

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<sup>47</sup> 'Such a reformation may be effected in the lower classes of mankind... as may in time supersede the necessity of capital punishment, except for very atrocious crimes', Babington, *op.cit.*, p.45 citing Blackstone, *Commentaries*, IV, p.371.

<sup>48</sup> Hulks: Ekirch, *op.cit.*, p.230; Precision in paperwork: *op.cit.*, p.43 citing *R. v Wakot* (1695) 4 Mod. 395 the Court of Appeal reversed the original decision where the record had omitted the fact that the defendant's bowels were to be burnt before his sight. The sentence, however, had already been carried out.

<sup>49</sup> Babington, A., *op.cit.*, p.33.

<sup>50</sup> *Magna Carta* (1215) cl.45 'We will not make justices, constables, sheriffs or bailiffs save of such as know the law of the kingdom and mean to observe it well.'

in a local alehouse or the local Shire hall. These were known as 'special', 'divisional' and finally 'petty' sessions. Single justices would adjudicate in matters such as first-offence vagrancy, non-attendance at Church, and bull-baiting under their 'out of sessions' authority. A further distinction was made between regular lay justices and those 'learned in the law'. Statutes which created civic ordinances would normally specify whether matters could be dealt with by individual justices 'in' or 'out' of sessions; other statutes would indicate the number of justices required when deciding matters and whether any of the justices should be *Of the Quorum* or 'learned in the law'. The original intention of the *Quorum* was to allow for the presence of Judges of Assizes and eminent lawyers in order that the lay justice could be guided in the proper interpretation and execution of the laws. Eventually the appointment to the *Quorum* became a symbol of prestige or seniority on the Bench.<sup>51</sup> Interestingly, within the Australian colonial context, Mr Justice Willis, resident Port Phillip Supreme Court judge, demanded the post of Chairman of Quarter Sessions, as it carried with it a *Quorum* position of social prestige.

The local justice was periodically required to undertake a Census of the parish and to file returns. He was also responsible for supervising the construction and maintenance of roads. The Hundred [medieval administrative locality grouping] was responsible for clearing of bushes on the sides of roads to thwart ambush.<sup>52</sup> Since the *Highways Act of 1555*, the local justice of the peace was also required to supervise the annually elected parish surveyor in maintaining local roads and bridges. The surveyor would appropriate the services of every resident in the parish in this system of ongoing maintenance.<sup>53</sup> This traditional use of the magistrate in local civic

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<sup>51</sup> Babington, A., *op.cit.*, p.31; Milton, F., *op.cit.* p.10; The Quorum, which today represents an allowable minimum of numbers in order to affect certain administrative acts, originally comes from the wording of the commission appointing justices to their post; Milton, F., *op.cit.*, p.11; The post was seen as a prized title of learning and was abused for many years; To be 'Of the Quorum' also allowed the residency requirement to be waived thereby allowing holders of high public office to gain admission to the Bench of justices; Milton, F., *op.cit.*, p.12, and Osborne, B., *op.cit.*, pp.30–31.

<sup>52</sup> Babington, A., *op.cit.*, p.23, citing *Statute of Winchester* 1285.

<sup>53</sup> The Crown undertook none of the costs in this endeavour, as the surveyor and parishioners were unpaid. A failure on the part of individual surveyors or parishioners to maintain the roads adequately allowed the justices, in Quarter Sessions, to fine entire parishes and to use the monies thus raised in other areas of need; Moir, E., *op.cit.*, pp.43–44.

governance and his jurisdiction over roads and highways can be traced back to the ancient Greeks.<sup>54</sup> Within the Australian context, the colonial authorities also originally tended to concentrate administrative powers into the single office of the magistrate rather than diffuse civic authority.

The 'focal point of law and order' within any community became the actual physical home of the magistrate, in England and to a lesser extent in the colonies, given that he combined the role of Chief of Police and judicial officer.<sup>55</sup> This feature of the office persisted until at least the early nineteenth century. This process of magisterial acropetal jurisdictional accumulation was slow and fluctuating. This fluctuation was commensurate with the state's need to regulate and control popular displays of discontent. Part of this process required the local justice to attend the needs of the poor within the parish. He distributed Church monies to the parish needy and ordered the lodging of persons within the boundaries of the parish. The local justice was also responsible for controlling the movement of 'strangers' or indigent persons throughout his parish. He would check their documentation and order them, upon pain of punishment, to move on. The local justice could order the indenture of a stranger to a local tradesmen and the subsequent enslavement for uncooperative indented persons and their offspring. The appearance of 'strangers' within the parish preoccupied the minds of both the medieval sovereign and the subject.<sup>56</sup>

The office of the justice was important in handling the social costs associated with the

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<sup>54</sup> Aristotle, *Athenian Constitution* (328 BC) Chapter 54 'The following magistrates also are elected by lot: Five Commissioners of Roads (*Hodopoi*), who, with an assigned body of public slaves, are required to keep the roads in order'. Aristotle also argued that modern governance and civic responsibilities required the creation of different classes of public servants or civic functionaries necessary to carry out the requirements of a state; Aristotle, *Politics* (350 BC).

<sup>55</sup> Babington, A., *op.cit.*, p.33.

<sup>56</sup> In the larger towns, city gates had been erected. They were open during the day and closed at night and manned by 'watchmen' who were 'skilful men and fluent of speech' who used their skills to detect and forbid entry to undesirables and criminals; Babington, A., *op.cit.*, pp.23–24.

enclosure of the common lands. The Crown had attempted to suppress the enclosure from at least 1489, but in reality, the local landholding–wool growing justices<sup>57</sup> and their sylvan allies allowed their unity of interest to prevail. The Crown was powerless against this alliance, as it was the justices themselves who were supposed to enforce the statutes prohibiting the enclosure process. Ultimately, however, the Crown lost little in this conflict, as the direct benefit of the enclosure process was the creation of a landless class of salary dependant workers who became the workforce of the industrial capitalist mode of production. Within this context it is important to note that the office of the magistracy controlled and adjudicated the master-servant relationship. The magistrate controlled the remuneration levels of the workforce, the ability of the servant to sell his/her labour, the ability of the servant to travel and to decide his/her place of residence, the process of training and apprenticeship regulation, and the enforcement of the regulatory and punishment regime.<sup>58</sup> The magistrate's power over master and servant adjudications originated with a series of statutes enacted during the fourteenth century.<sup>59</sup> It is commonly accepted that the justices represented 'the land owning class and were execrated by the workers as they had the power to compel people to work for the statutory minimum wages'.<sup>60</sup> The justices were to regulate the workforce in an attempt to control the workingman's Plague-decimated ranks, by restricting his ability to move within the kingdom,<sup>61</sup> then by

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<sup>57</sup> Moir, E., *op.cit.*p.41 citing Beresford, M., 'Habitation versus Improvement: The debate on Enclosure by Agreement', in *Essays in the Economic and Social History of Tudor and Stuart England*, ed. Fisher, F. J., (Cambridge, 1961) pp.40–70.

<sup>58</sup> Mark Twain mused that the magistrate, who being part of the 'master class' did not really 'work', but set the rate of pay of the members of the hive who did work. Twain pointed out that the masters 'combined' to do this but that eventually the 'combine' would go the other way and the working man would take 'a hand in fixing his wages himself... Ah, he will have a long and bitter account of wrong and humiliation to settle'; Twain, M., *A Connecticut Yankee in King Arthur's Court*.

<sup>59</sup> The *Statute (Ordinance) of Labourers* 1349 and 1350, designed to regulate the labour market and to limit the ability of labourers to demand higher wages. Given the decimation of the population as a result of the Black Death, labourers were in short supply. Wages were fixed to their pre-Plague level with local justices authorised to supervise employment relationships; Wallace-Bruce, N., *Outline of Employment Law* (Sydney, 1999) pp.8–9.

<sup>60</sup> Macken, J. J., O'Grady, P., Sappideen, C., *Macken, McGarry and Sappideen's The Law of Employment* (Sydney, 1997) p.3.

<sup>61</sup> 'No servant or labourer shall depart out of the hundred unless he bring a letter, containing the cause of his going, under the King's Seal, after the discretion of the Justices of the Peace; Osborne, B., *op.cit.*p.9 citing Act of 1388 in Hasbach, W. and King, P. S., *History of English Agricultural Labourers* (London, 1908).

controlling his entitlement or ability to determine his own wages by legislation.<sup>62</sup>

## MARXIST AND POST-MARXIST ACCOUNTS OF THE MAGISTRACY

THESE FORMS OF labour regulation led to the popular revolt of 1381,<sup>63</sup> also called *Wat Tyler's Rebellion*. It became the first great popular uprising in English history. It had two direct causes: the imposition of the 'poll tax' of 1381 to help finance The Hundred Years War with France and, as evidenced by the labour law reforms demanded by the mob, dissatisfaction with the *Statute of Labourers*. The inequities of minimising the cost of labour by this type of legislation fit neatly into the power-elite conflict theory of law.<sup>64</sup> There is little doubt that there was no equitable value consensus within the legislative or executive organs of government, who, with respect to the *Statute of Labourers*, simply saw an imbalance in the labour supply-demand coefficient and legislated to effect a limitation on the ability of the remaining labourers to freely sell the scarce commodity of labour. It is axiomatic that given the power realities of feudal governance, the only real method of expressing popular labouring class dissatisfaction was direct action via spontaneous riots. If we accept the argument that legislation can and has been used to further sectional interests within a society and that the law can and has at times become 'a weapon in the inter-group and class struggles of a society',<sup>65</sup> then the sporadic direct actions undertaken up until the mid-nineteenth century, were, given the tight censorship regime [also

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<sup>62</sup> 'But for as much as a man cannot put the price of corn or Victuals in certain... the Justices in every county shall make proclamation, by their own discretion, according to the dearth of victuals, how much every Mason, Carpenter and other Craftsman, workmen and other labourers, by the day, as well as in Harvest, as in other times of the year, shall take by the day with meat and drink'; *op.cit.* p.9, citing Act of 1389.

<sup>63</sup> Macken, J. J., O'Grady, P., Sappideen, C., *op.cit.*, p.3.

<sup>64</sup> These theories classify the motivations of groups within a society as relative to their power, with the elite power group seeking to dominate and achieve its 'political ends' at the expense of those less powerful groups. The conflict theory views the legal system as a support framework designed to serve the interests of the elite social group to the exclusion of less powerful social groups; Tomasic, R., *Legislation and Society in Australia* (Sydney, 1979) p.28.

<sup>65</sup> Chambliss, W. J. and Seidman, R. B., *Law, Order and Power* (Reading Mass, 1971) p.72 cited by Tomasic, R., *op.cit.* p.28.

enforced by the magistrates] the only forms of political expression open to the labouring class and therefore legitimate as outlets of social resistance and societal dissatisfaction. This is perhaps why this period has been categorised as ‘an age of lawlessness and disorder’ when ‘an unpopular policy, a provocative declaration, or merely an unfounded rumour could set in motion the bloodiest of riots’, with the mob becoming ‘the fourth estate’ of this community.<sup>66</sup> The *Wat Tyler Rebellion* stands as an example of such a popular flashpoint.<sup>67</sup>

Marx examined the social consequences of the jurisdictional authority of the justice of the peace.<sup>68</sup> Marx did not focus his attention upon the magistrate as the local enforcer of state social policy, economic regulation and law enforcement. He failed to realise that the gentry class, land magnates, urban financiers and high nobility often held competing economic interests. Moreover, he overlooked the consideration that, whatever the motivation behind Commons legislation or Crown initiatives, it was the office of the justice of the peace and the class that the office represented, the high and low gentry, who enforced Commons and Crown directives; sometimes *in toto*, mostly, however, in a piecemeal and selective fashion that was consistent with their own class and locality interests. In dealing with the process of enclosure, Marx believed that the process ultimately led to the creation of a property-less wage dependent class fundamental to the development of the modern capitalist mode of production. Peasants were the most obvious

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<sup>66</sup> Babington, A., *op.cit.*, p.15.

<sup>67</sup> Beginning in Essex in May 1381, it moved on London in June under Wat Tyler. The mob massacred Flemish merchants, destroyed the Savoy Palace of the Duke of Lancaster (the King's uncle), captured the Tower of London and London Bridge and beheaded the Lord Chancellor Archbishop Simon Sudbury and Crown treasurer Sir Robert Hales. The mob focused its anger upon the seat of power and its legislators. Tyler was attacked in front of the King during negotiations by the Mayor of London William Walworth. Tyler was taken to St Bartholomew's Hospital, but later forcibly taken from there by order of Walworth and beheaded. Richard II made disingenuous promises of reforms consisting of cheap land, free trade and the abolition of serfdom and forced labour. The army of labourers dispersed. Upon dispersal, the mob was cut down by the King's forces and finally crushed in East Anglia on June 25 by the Bishop of Norwich, Henry le Despenser.

<sup>68</sup> Marx, Karl, *Capital, Volume 1, Der Produktionsprozess des Kapitals*, (London, 1974) translated from the 4th German edition by E. & C. Paul. Marx's comments re wage regulation delegated to the Justices of the Peace. Marx correctly views the process of enclosure as the genesis of modern English proletarian history; Ch. 24 of *Capital*, especially divisions 3, 4 and 5.

example of this process.<sup>69</sup>

The magistrate played a crucial role in the creation of a property less wage-based salary dependant class essential to the establishment of the capitalist infrastructure. Together with the concept of relative surplus population and the summary and arbitrary regulation of wages – begun by the *Statute of Labourers* – the working class became dependent upon the capitalist wage system. This resulted in the labouring rural classes losing their link with the land. That link had allowed for communal safety and social identity as well as a degree of protection under the welfare structure of rural Medieval England. One only needs to turn to Thomas More for a contemporary account of the social cost and horrors of the enclosure process.<sup>70</sup> The enclosure process and the usurpation of domiciles forced many into perpetual vagrancy and made them subject to the ‘bestial’ punishments of the local justice of the peace.<sup>71</sup> Marx used some of the legislation that was enforced by the magistrates to shock the sensibilities of his nineteenth-century audience and to lend credence to his arguments that injustices were an essential part of the capitalist mode of production and the legal system that sustained it.

Any objective examination of the extensive jurisdiction of the justices underscores the vast social and economic influence exercised by the justices over English society. Their

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<sup>69</sup> He argued that the free peasant proprietor and agricultural labourers, who did not own their own land, enjoyed the *usufruct* rights that enabled them to augment their diets and use the resources therein as stakeholders of the common land. In Division 2, entitled ‘The Expropriation whereby the Countryfolk were divorced from the Land’; as a footnote cites Mirabeau’s account of the Silesian peasants under Frederick II as joint owners of the common lands, in *De la monarchie prussienne*, (London, 1788) vol.II, pp.125–126; cited in Marx, *ibid*, pp.794–795.

<sup>70</sup> ‘Thus it comes to pass that a greedy and insatiable cormorant and very plague of his native country... enclose many thousand acres of ground together within one pale or hedge, the husbandmen be thrust out of their own, or else, either by cunning and fraud, or by violent oppression...by one means, therefore, or by other, either by hook or crook, they must needs depart away, poor, silly, wretched souls, men, women, husbands, wives, fatherless children, widows, woeful mothers with their young babes, and their whole household...Always they trudge, I say, out of their known, accustomed houses, finding no place to rest in. All their household stuff...they be constrained to sell it for a thing of naught. And when they have wandered abroad till that be spent, what can they then else do but steal, and then justly, pardie, be hanged, or else go about begging. And yet then also they be cast in prison as vagabonds because they go about and work not; whom no man will set a work though they never so willingly proffer themselves thereto’; More, T., *Utopia*, cited in Marx, K., *Capital*, *op.cit.* p.815.

<sup>71</sup> *Op.cit.* p. 817.

jurisdiction ranged from the licensing of old beggars and the punishment of other vagabonds<sup>72</sup> to the breeding of horses if that breed was found deteriorating within the parish. Two justices would arbitrate disputes concerning the clearing of woodland.<sup>73</sup> If disputes arose between butchers and farmers regarding the price of bullocks, the justices would settle the price.<sup>74</sup> Justices would seize wine that was being sold at excessive prices.<sup>75</sup> Anyone who denounced another before a justice, as refusing to work was entitled to have that idle person enslaved to him by that justice. The justice would also decree the food allowance, the work to be undertaken and decree the punishment and branding with 'S' (for Slave) on forehead or back if the labourer-slave absconded or attempted an escape. A justice was empowered to hunt down persons who escaped. Once recaptured, the legislation recommended that chains were to be used to prevent further escape. The justices also carried out public brandings. The 'V' brand would be placed on the chest of vagabonds. An 'S' brand would be used for parish slaves; the children of 'S' or 'V' would be confiscated as apprentices. These 'parish-slaves' existed well into the nineteenth century.<sup>76</sup> On the other hand, if a parishioner's house was destroyed by fire, the justices would sponsor a fund for the parishioner's relief.<sup>77</sup> Unlicensed beggars were flogged and branded on the left ear unless an apprenticeship of two years duration could be found for them; penalties were itemized for second offences, with the death penalty mandated for a third offence.<sup>78</sup> If there was a surplus of corn in the County, the justices were to fix an export quota.<sup>79</sup> If an unmarried woman present within a parish was not working, the justices were to put her to forced

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<sup>72</sup> 27 Henry VIII; Marx, Karl, *op. cit.*, p.814.

<sup>73</sup> 32 Henry VIII C13, 35 Henry VIII C17; Osborne, B., *op.cit.* p.14.

<sup>74</sup> 25 Henry VIII C1, *ibid.*

<sup>75</sup> 24 Henry VIII C6, *ibid.*

<sup>76</sup> Marx, K., *op.cit.*, p.814.

<sup>77</sup> 1 Edward VI C3, Osborne, *op.cit.* p.14.

<sup>78</sup> Also 18 Elizabeth c.13, and Act of 1597; Marx, K., *op.cit.* p.815.

<sup>79</sup> 13 Elizabeth C 13, Osborne, B., *op.cit.* p.14.

labour at a wage determined by them.<sup>80</sup> Fishermen were not to be pressed into the Navy. Such conscription was invalid unless two justices approved their conscription.<sup>81</sup> The justices fixed the price of 'kilderkins'.<sup>82</sup> Any person found wandering about was to be declared a rogue and vagabond. Justices in Petty Sessions were entitled to punish them by whipping and imprisonment [to be whipped therein as often as the justices thought fit]. Incurable rogues were branded with an 'R' [Rogue] on their left shoulder and set to hard labour. Upon release if they were discovered begging again they would be executed 'without mercy'.<sup>83</sup> Some of these punishments were harsh by any standard and were not entirely remedied by 'popular' political revolution on the Continent.<sup>84</sup> The labouring class was not the only target of the employment law regulations enforced by the magistrates of England. To over-pay a worker was also an offence by the employer, punishable by imprisonment.<sup>85</sup> Justices were not only empowered to fix certain wages but able to modify them according to seasonal variances and the price of commodities.<sup>86</sup> Combinations and coalitions of labourers, the precursor to modern unions, were deemed criminal associations from the fourteenth century until 1825. Although maximum wages were established since 1349, no minimum rate was ever seen to be necessary.<sup>87</sup>

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<sup>80</sup> 5 Elizabeth CA, *ibid.*

<sup>81</sup> 5 Elizabeth C5, *ibid.*

<sup>82</sup> 8 Elizabeth C9, *ibid.*

<sup>83</sup> This statute was binding until beginning of the eighteenth century and repealed by 12 Anne, c.23; Marx, K., *op.cit.*, p.816.

<sup>84</sup> France promulgated similar statutes regarding vagabonds (truands) Ordinance of 13.7.1777: if anyone was discovered without means of support and in good health and is found within a different district without lawful excuse, they were to be sent to the galleys; again demonstrating the inherently and universally held fear of the 'wanderer' or 'stranger' as a direct threat to 'order' and 'regulation' of society; cited in Marx, *ibid.*

<sup>85</sup> Sections 18 and 19 of the *Statute of Apprentices* allowed for ten day's imprisonment for he who over-pays. It also provided for 21 days' imprisonment for he who accepted the wages. A principle begun by the Statute of Labourers, Edward III, 1349. Marx, *op.cit.*, p.818.

<sup>86</sup> Statute of Apprentices 5 Elizabeth, c.3, James I extended these regulative functions by justices to cover 'all possible categories of workers' - George II extended these again and, for example, maximised higher daily wages to 2s. 7 1/2d. for journeymen tailors around London except in cases of general mourning.

<sup>87</sup> Marx, *op.cit.*, pp.819, 820, 821; see re justices and factory owners and English Judges forever being at the 'beck and call of the ruling classes'; p.821 re sleigh of hand re 'conspiracy' prosecutions.

## OWNERSHIP OF THE OFFICE

MARX'S PRIMARY ERROR was that he did not realise that the English justices should never be classified as mere judicial-administrative State automatons. Their allegiances were spread to maximise their personal and class returns as recognised by successive sovereigns. Penalties were imposed upon justices who did not attend to their duties in Quarter Sessions. A penalty of 100 pounds was levied against any justice who failed to make diligent enquiries regarding a riot. The justices were admonished and instructed to act appropriately. At times proclamations were read out in open court in each Quarter Sessions to humiliate the justices. Most importantly medieval government could rail against the inefficiencies in the gathering of monies or levies destined for their never satiated coffers. This sentiment also featured in Proclamations.<sup>88</sup> Henry VIII would threaten justices in open letters regarding those 'privy maintainers of that papistical faction' and the 'sturdy vagabonds and valiant beggars'.<sup>89</sup> His daughter, Elizabeth, continued the family tradition and warned that fines and public accountability were necessary.<sup>90</sup> She ordered select senior justices of each county to meet before the *Custos Rotulorum* and then make a report directly to the *Curia Regis*. The Star Chamber was also mooted as the ultimate matchmaker in the

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<sup>88</sup> Osborne, *op.cit.*: Enquiries re riots: p.33, 'The Justices shall keep their Sessions in every quarter of the year at least, upon pain to be punished according to the discretion of the King's Council.'; Admonish justices: p.27, Preamble of 18 Henry VI C11: 'Some of the Justices be of small behaviour by whom the people will not be governed or ruled. The Justices for their Necessity do great Extortion and Oppression Among the people'; To humiliate justices: p.33, 'Item, The King our Sovereign Lord considereth, That by the Negligence, Misdemeaning, Favour, and other inordinate Causes of Justices of the Peace... the Laws and Ordinances made for the politique Weal, Peace, and good rule of the same, be not duly execute...wherefore his subjects be hurt to his great Displeasure; Proclamations: p.33-34, 'The King our sovereign considereth how daily within his Realm his coin is traitorously counterfeited, Murders, Robberies, Felonies been grievously committed and done...and by these Enormities and Mischiefs his Peace is broken... his subjects be little eased of the said Mischiefs by the said Justices, but by many of them rather hurt than helped. His Grace chargeth and commandeth all the Justices of the Peace to endeavor them to do, and execute the Tenor of their Commission...If they do not execute the laws they shall not be in his Favour, but taken as Men out of Credence, and be put out of Commission for ever'.

<sup>89</sup> 'If you shall give such diligence as may satisfy your duty, leaving all disguised corruption, we shall be content the more easily to put in oblivion all your former remissness and negligences. But if, on the other part, we shall perceive that this kind of gentle proceeding can work no kind of good in you, assure yourselves that the next advice shall be of so sharp a sort as shall bring with it a just punishment of those that have been found offenders'; *op.cit.*, p.35.

<sup>90</sup> *Statute of Artificers 1563*: five pounds for justice of the peace being inactive.

relationship between the sovereign and its local magisterial 'spies'. It seems that some men often only sought the prestige of having their name placed upon the Commission of the Peace and did not undertake the writ *dedimus potestatem* which finalised the appointment. Others undertook membership of the office in name only and were not 'active' in their duties and filing of returns. In reality, the burdens of the office, the unpleasant and intrusive nature of their duties, and the time and effort required to carry out their work, especially given the 'parlour adjudications' in the justice's own home, would have more than outweighed any prestige that came at such an undisclosed price.<sup>91</sup>

The office of the justice owed loyalties to both the Sovereign and to Parliament; but above all else to their own gentry class and their parish-based locality. These loyalties were at times in conflict. Magistrates tended to prioritize their allegiances as class, locality, God, Parliament, country then sovereign. The best example of this is the maintenance of the incumbent magistracy after the English Civil War, when a victorious Parliament made only a few changes to the membership of the Commissions of the Peace. This was because the office of the English justice of the peace was owned by the gentry class and not by the State. This ownership was shared almost equally between the landed and clerical gentry. It is important to note the divergence in appointment policy between this traditional format and the selection policies undertaken much later by Australian colonial Governors. The colonial Governors sought to absolutely control the office of the paid and unpaid justice. It was successful in this until the young society began to develop its own gentry class which sought to control the office. Governor Bourke, for example, specifically refused to appoint men of the cloth to the Port Phillip magistracy.<sup>92 93</sup> There had been some clerical appointments in the early New South Wales

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<sup>91</sup> 'By Her Majesty's commandment, a number of these Justices are yearly, once at least, called into her Highness' Star Chamber and there, in Her Majesty's name, exhorted, admonished, and commanded, to see the due execution of their charges'; Osborne, *op.cit.*, p.36 citing Lord Keeper's address to Parliament in 1571; Beattie, *Crime, op.cit.*, pp.59–62.

<sup>92</sup> 'I have the honour to propose that the nomination of three gentlemen, Frederick Armand Powlett, Farquhar McGrae and Rev. James Clow, be submitted for his Excellency's approval. Should his Excellency give his sanction, I have to request that the necessary steps may be forthwith proceeded with to enable them to take their seats.'; C. J. La Trobe to Col. Sec. 4 November 1839, *HRI*, I, p.272.

settlement, but given the fact that the English magistracy was at times almost flooded with gentry clerics,<sup>94</sup> this departure alone makes the Australian colonial magistracy essentially different in structure and makeup from its English construct.

The English office of the justice of the peace was originally an exclusive judicial guild.<sup>95</sup> Appointments made in urban centres in the nineteenth century changed the social demographics of the English magistracy. The job of the urban magistrate was more difficult in cities without rural feudal traditions and manorial deference upon which the magisterial system had always been based. The system of a deference-based social control was never adapted to meet the needs of urban society.<sup>96</sup> In London, tradesmen, artisans and tavern keepers were appointed to a post that had hitherto been the exclusive repose of the gentry.<sup>97</sup> The office was changed by the process of urbanisation and by the creation of a new class of paid justices, the Stipendiary or Police Magistrate.<sup>98</sup> The Police Courts over which they presided ushered in a new evolutionary phase of an erstwhile honorary office. It also provided a modern context for a more professional magistracy within a necessarily more complex urban setting. These new magistrates held different belief systems and were viewed with hostility by both the gentry magistracy and polite society. Polite society and the English intelligentsia entered into an alliance against paid magistrates. This alliance also reappeared in the Australian colonies.<sup>99</sup> Paid appointees were seen

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<sup>93</sup> Col. Sec. to C. J. La Trobe 14 December 1839, *HRI*, 1 p. 273.

<sup>94</sup> Beattie, *Crime*, *op.cit.*, pp. 62-63; in Surrey clerical appointments constituted 10 per cent of appointments in 1761, rising to between 25 to 33 per cent by the end of the century.

<sup>95</sup> Benjamin Disraeli (a magistrate since the age of 32) failed in his attempts to get a commission for his brother James because of his bourgeois commercial trading status as a small farmer in Buckinghamshire; Milton, F., *op.cit.* p.14.

<sup>96</sup> Babington, A., *op.cit.*, pp. 29-30.

<sup>97</sup> Tindall, G., *Two Hundred Years of London Justice: The Story of Hampstead and Clerkenwell Magistrates' Courts* (Camden Historical Society, Camden, 2001) p.14.

<sup>98</sup> Barlow, L., 'A strictly temporary office?: NSW Police Magistrates 1830-1860', *Law and History in Australia*, Vol. III, Law and History Conference Papers 1985-1986, pp. 50-63.

<sup>99</sup> Modern Context: Davis, J., 'A poor man's system of justice: The London Police Courts in the second half of the C19th', *The Historical Journal*, 27, 2, 1984, pp. 309-335, see Barlow, *op.cit.*, p.50; Alliance in Australia: Barlow, *op.cit.*, pp.51.

as government agents from a different class, neither landed gentry nor 'country gentlemen' and at best tended to come from the ranks of bourgeois merchants or military men. Any abuse of the magistrate's office was more obvious in urban centres. The antics of the *trading or basket justices*, so named because they carried baskets for offerings, nearly damned the entire office. These men of 'mean degree' took bribes, filed false charges and in contravention of their prime directive of maintaining the peace, undertook actions designed to inflame 'rather than composing quarrels in order to increase their fees'.<sup>100</sup> The urban trading justices were not part of the gentry class, and, being labelled 'scum of the earth' were often advised to seek work elsewhere, if they could find anyone who would employ them.<sup>101</sup> By contrast, popular authors of the late eighteenth and early nineteenth centuries presented the polite society image of the gentry magistracy. English polite society supported the traditional role played by the unpaid country justice because he personified the qualities essential to their class. Such qualities were held to be quintessentially and universally English: steadfastness, dependability, honesty and integrity. They were also seen as the bulwarks against economic and social change and against Jacobinism and all things French or Continental. They formed the frontline defence against Chartism and the collective insurgency[combinations] of rural labourers. They were vigilant in the maintenance of the *status quo*, raising the *hue and cry* in support of the system of class interest, representatives of a 'local oligarchy, appointed for life and responsible to no one.'<sup>102</sup>

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<sup>100</sup> Babington, A., *op.cit.*, pp. 35–36; Beattie, *Crime, op.cit.*, p.63.

<sup>101</sup> Needy, mean, ignorant and rapacious magistrates who pocketed bail money, exacted protection money and invented other devices for enriching themselves both from accused and accusers, so that their decisions came to be driven by this motive rather than by a desire to keep the peace and dispense justice. The reputation of these Middlesex and Westminster Justices eventually became so bad that even respectable tradesmen avoided the job, and Edmund Burke could declare furiously after the Gordon Riots in 1780 that the Benches were composed of the scum of the earth - carpenters, brickmakers and shoe makers; some of whom were notoriously men of such infamous character that they were unworthy of any employ whatever, and others so ignorant that they could scarcely write their own names; Tindall, G., *op.cit.*, p.14.

<sup>102</sup> Phillips, D., 'The Black Country Magistracy 1835–1860', *Midland History*, Spring, 1976, Vol. III, No.3, pp.161–190; Barlow, *op.cit.*, p.51.

## AN ASSESSMENT OF THE PREMODERN MAGISTRACY

THE QUESTION OF whether the magistracy managed the local affairs of state well can be answered variously. A negative answer was given in the seminal work of Sidney and Beatrice Webb,<sup>103</sup> although their conclusions may have been encouraged by their politics.<sup>104</sup> The legislative themes of order maintenance are linked to the issue of the success of the office in attaining its historic calling of social control. The most common theme was the class of wandering rogues and vagabonds who at one stage had eleven acts specifically devoted to them. A mountain of codified criminal offences was placed before the justices. They also undertook enormous administrative responsibilities.<sup>105</sup> The principal stage for these adjudications was the magisterial Quarter Sessions that were engulfed by criminal indictments.<sup>106</sup> The labouring classes represented the greatest percentage of defendants. This gave the appearance of 'class warfare'; an elite persecuting a dispossessed proletariat where criminality was an expected option, and an understandable reality.<sup>107</sup> If the class war had begun was the battlefield to be the courtroom?<sup>108</sup>

<sup>103</sup> Webb, B. and Webb, S., *English Local Government* (London, 1906).

<sup>104</sup> The Webbs 'were most unwilling to admit that government based upon a landowning interest and reflecting aristocratic leadership (in its widest sense) could govern this country and could govern it well throughout the eighteenth century.'; Moir, E., *op.cit.*, p.11.

<sup>105</sup> Osborne, B., *op.cit.*, Wandering Rogues: p.11, One 1547 Act, for example imposed a codified penalty of slavery with 'rings of iron around the neck and leg'; Mountain of Criminal Offences: p.12, Hunting by night (1486), deceitful makers of featherbeds (1496), users of crossbows (1503), mummers (1512), killers of weanling calves (1537), witches (1554), makers of foul and fantastical prophecies (1573); Administrative responsibilities: p.12, Setting commodity prices, wages, profits, employment, religious observance, marriages, weights and measures, bridge maintenance, road and highway maintenance, licensing of inns, administration of the poor laws, administration of prisons, appointment and supervision of constables, travel, the acreage of crops, apparel, apprenticeships, house building, manufacturing processes (including sea fishing): the part-time magistrate was indeed overburdened; Osborne, Bertram, *op.cit.* p.12; Babington, A., *op.cit.*, p.28. The magistrates were also responsible for fixing the price of longbows, determining the wages twice yearly for every class of manual worker, conscripting persons to labour in the harvest, binding over children of the poor into enforced apprenticeships for up to 14 years and license married men to be drovers and badgers (hawkers). In 1576 the magistrates were directed to construct 'Howses of Correction' where rogues and vagabonds could be accommodated and sett on work'. This Act also contained the first statutory regulation of the issue of bastardy; Osborne, *op.cit.*, pp. 12-13.

<sup>106</sup> They were originally seen as inferior or junior courts of Assize. However, because of the multitude of statutory criminal and administrative jurisdictions levied upon the court, it became superior to the Assize in popular effect; Osborne, B., *op.cit.* pp. 13-14.

<sup>107</sup> Engels, F., *The Condition of the Working Class in England* (1844); trans. and ed. Henderson, W. O. & Chaloner, W. H., (Oxford, 1958); 'If the demoralisation of the worker passes beyond a certain point then it is just as natural that he will

Hay believes it to be so and claims that the law became a servant to a ruling class conspiracy by making the law a 'selective instrument of class justice'. Langbein believes that Hay is mistaken. He claims that there is no direct evidence of a conspiracy to extract deference from the lower orders, that the defendants were seldom destitute and had succumbed to temptation rather than necessity and that most victims of crime were also working-class.<sup>109</sup> Financial reward has also been seen as one of the English judiciary's main motivations. Even the unpaid gentry magistrates were entitled to claim remuneration for sitting at Quarter Sessions.<sup>110</sup>

Marx failed to appreciate the existence of class warfare within the ranks of the judicial functionaries, most apparent within the ranks of the magisterial class. The social divide between rural and urban, salaried and voluntary, gentry and merchant class magistrates was as vivid and real as between the proletariat and the bourgeoisie. The elite magistracy saw their urban brothers as nothing less than 'scum' or illiterate, uneducated self-serving rascals.<sup>111</sup> More importantly perhaps, the fear of a 'savagely inclined' society seemed to dominate and motivate successive English Parliaments. If the ruling class wanted to protect itself then why did they not use the available machinery to deal with the problem?<sup>112</sup> It has been argued that the state did not really concern itself with 'total crime' but only with matters that became immediate 'threats' to vested

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turn into a criminal as inevitably as water turns to steam at boiling point' ; Engels, *op.cit.*, pp.145-146, 149.

<sup>108</sup> Marx believed that judicial self-interest had become institutionalized within the courts as a result of the moiety system where fees would be collected from those appearing before them. 'If feuds were settled by *a* and *b*, The courts would be swindled out of their fee.'; Cain, M., & Hunt, A., *Marx and Engels on Law* (Academic Press, London, 1979) p.1 citing Marx, K., 'Mathematical Wisdom', *MECW* [*Marx-Engels Collected Works*] I, pp. 545-546.

<sup>109</sup> Hay, *op.cit.*, pp. 48-52; Langbein, *op.cit.*, pp. 30-34.

<sup>110</sup> These fees would, however, often go towards the salaries of their Clerks. In the superior courts, there is evidence that fees substantially increased the take-home pay of the judges, as can be seen in the huge increase in salaries when the fee system was abolished; Babington, A., *op.cit.*, pp. 34-35, also citing W. S. Holdworth on judges salaries, which increased from 2,600 pounds to 5,500 pounds per annum once the payment of fees was abolished, p.35.

<sup>111</sup> Babington, A., *op.cit.*, p.37, citing Edmund Burke, and Henry Fielding in *Amelia*.

<sup>112</sup> 'Why did they not secure a higher percentage of convictions and why did they suffer - indeed, in the persons of the judges, encourage - contrived acquittals and the substitution of penalties well short of what the law could exact?', *op.cit.*, p.4.

interests in elite society.<sup>113</sup> Eventually, selective prosecutions would occur as either 'threats' diminished, or the law was repealed by legislation, or other enforcement regimes were enacted.<sup>114</sup> Elton offers examples of legislation reducing the effectiveness of the common law.<sup>115</sup> This represented a fragmented legislative policy led by the disorganised pressure groups that undertook 'pet projects' as quickly as they discarded them. This approach to legal history underscores the importance of the role played by the magistrates. It reveals that breaches of the peace and other misdemeanours were never properly classified by statute and allowed for the unlimited use of personal discretion by the magistrates. The justices enjoyed primary jurisdiction over offences against property. Together with the order maintenance regulations, these offences constituted the greatest number of offences brought before the justices and Quarter Sessions, even though the lack of detail in the records precludes one from concluding that these justices acted in any way but consistently in the exercise of that discretion. Modern notions of forensic social justice are unhelpful when identifying historical criminal activities and the machinery used to deal with it. No wonder we find it difficult to understand pre-modern magisterial trial procedures. Matters such as the regularity of sureties or binding over persons all remain shrouded in mystery because of the lack of attention to common procedures throughout England and the colonies, the shallowness of the records of the magisterial decision-making process and the reliance upon local 'common knowledge'.<sup>116</sup> Today, we have no reliable evidence of this 'common knowledge' although contemporary newspapers are an excellent source of it. This common knowledge helps us understand, for example, the realities involved in

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<sup>113</sup> Philips, D., *Crime and Authority in Victorian England* (New Jersey, 1977).

<sup>114</sup> Banton, M., *The Policeman in the Community* (London, 1964) pp.172–173.

<sup>115</sup> In the case of grand larceny of the theft of linen. This theft was made a felony (Act 4 George II c.16) but the possibility of conviction was reduced because the judge could only convict in accordance with the new statutory regime. Furthermore, the theft of sheep and cattle were felonies at common law, yet Parliament (Act 14 George II, c.6) only provided for the theft of sheep. This required an amendment the following year to include cattle (Act 15 George II, c.34); Elton, in Cockburn, *op.cit.*, p.5.

<sup>116</sup> The initiation of proceedings, for example, also depended upon 'presentments' either by juries in the Curia Regis, or by an archdeacon's visitation in the Church courts: both involved a communal participation and a reliance upon 'common knowledge'; *op.cit.*, pp.5–7.

the issuing of warrants of arrest.<sup>117</sup>

Some argue that no reliable statistics can be compiled because of the incomplete evidence of English primary resources. The materials dealing with English Quarter Sessions are sparse because the statutory obligation to lodge returns was not generally obeyed. This is also a common complaint from the Governors of the later Australian colonies. The English court return records are also deficient because they do not reveal the particulars of the crime, the details of what went on in court, the background of the defendant (or informants) and whether the sentence was ultimately carried out. It is therefore necessary to analyse non-return supporting material in order to fully understand the social context of the main actors.<sup>118</sup> Elton concurs with Cockburn's proposition that the ultimate act of social disobedience, homicide, was in fact rare and normally a family-based occurrence, and on the other hand that most thefts were committed by vagrants. This supports Ingram's hypothesis<sup>119</sup> that 'outsiders' were often the target of prosecution that underlines the societal division between 'familiar' and 'strangers'.<sup>120</sup> If this be so, then the magistrate, as the guardian of the familiar and the man made responsible for judicially 'filtering' human movement to and from counties and parishes, must axiomatically be seen as the state organ responsible for initial detection, indictment and prosecution of 'strangers'. The 'stranger' or 'vagabond' again rises to the fore as the typical villain or suspect should things or people go missing, go wrong, or die in the local parish. The later Port Phillip magisterial

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<sup>117</sup> This process was apparently plagued with corruption, especially in urban areas, where warrantees needed to lodge a fee for the issue of bail to be considered. This became a substantial source of revenue for runners and Bow Street magistrates alike; Babington, A., *op.cit.*, p.36.

<sup>118</sup> Elton, in Cockburn, *op.cit.*, p.9, Elton praises recent scholars, 'for avoiding spurious certainties and the easy road of ready-made opinions leading to influential but unproven conclusions'; Poor Returns: pp.9-10, citing Cockburn, J. S., *A History of English Assizes 1558-1714* (Cambridge, 1971) and his extensive bibliography of manuscript sources; Non Return Supporting material: p.11 (note also the fact that many of the indictments were flawed and inaccurate and because these irregularities were used to quash convictions); Social Context: p.13, Elton warns 'the solemnities of the sociologist [should overcome] the instructed frivolity of the historian', *op.cit.*, p.13.

<sup>119</sup> Cockburn, *op.cit.*, Ingram, M. J., Chapter 5, *Communities and Courts: Law and Disorder in Early-Seventeenth-Century Wiltshire*, p.133.

<sup>120</sup> Elton, *op.cit.*, p.9, citing Cockburn, *op.cit.* pp.57, 63.

records tend to reflect this presumption. English research indicates that in Tudor times the victim or his kin sponsored criminal prosecutions<sup>121</sup> and that there was a slow transfer to our now familiar state-based prosecution where the local constable's role ended once he brought a defendant before a justice. There is a clear divergence here between the role of the constable in England and the more extensive role played by the constable in colonial Australia. Both systems, however, allowed the magistrate great latitude in his role, becoming 'something between a detective and a judge d'instruction', a role he filled until the formation of a professional police force in the nineteenth century. It was the justices' duty to see to the general peace of the community and supervise the machinery of local law enforcement in 'receiving and investigating complaints, calling witnesses and binding them over to appear at trial, examining accused persons and committing them to gaol or releasing them on bail, and attending sessions', as well as coercing the private complainant to do his own prosecuting.<sup>122</sup> Langbein's argument that the local justice 'orchestrated' proceedings at the trial and took depositions to 'buttress [his] oral performance'<sup>123</sup> seems closer to the Australian colonial reality. This has been challenged.<sup>124</sup> The challenge emphasises the role of the Clerk of the Peace.<sup>125</sup> Baker provides an excellent summary of the framework within which the English justices operated.<sup>126</sup> He also examines the difficulties in obtaining a quorum, the abject negligence of the constables and gives examples of the sovereign's displeasure with the performance of their justices.<sup>127</sup> These complaints were also

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<sup>121</sup> Cockburn, *op.cit.*, Chapter 1, Baker, J. H., *Criminal Courts and Procedure at Common Law 1550-1800*, p.15.

<sup>122</sup> Baker, *op.cit.*, p.16.

<sup>123</sup> Langbein, J. H., *Prosecuting Crime in the Renaissance* (Cambridge, MA, 1974) p.35.

<sup>124</sup> Cockburn, J. S. 'Trial by the Book? Fact and theory in the criminal process 1558-1625', paper delivered at the Cambridge Legal History Conference, 8 July 1975.

<sup>125</sup> 'In managing courtroom proceedings by preparing calendars, drawing indictments, arraigning prisoners, calling witnesses and keeping records'; Baker, *op.cit.*, p.16. For processes of indictment see *op.cit.*, pp.18-20; for process of information see pp.20-21.

<sup>126</sup> Listing of appointment and jurisdiction of the justices of the peace including an analysis of the five *assignavimus* or jurisdictional assignments. These *assignavimus* remained unchanged in England until 1878; Baker, *op.cit.*, pp.28-30.

<sup>127</sup> Hyde C.J. admonished the justices and warned them to heed the advice of the lawyers amongst them and not decide 'according to their fancy and opinion', *op.cit.*, citing Hunt, R. D., ed. Henry Townshend's Notes on the Office of a

common in the Australian colonies.

## LOCAL STUDIES OF SIXTEENTH AND SEVENTEENTH-CENTURY ENGLISH CRIME

EVERY AGE AND every generation is convinced that it is in the grip of a massive crime wave from which there can be no salvation. Sixteenth-century local magistrates certainly thought so: 'Sins of all sorts swarmeth and ... evildoers go on with all licence and impunity';<sup>128</sup> even visiting Italians thought so: 'In no country in the world ... are [there] more robbers and thieves than in England'.<sup>129</sup> Modern historians have tended to agree upon the gross, violent and delinquent extent of crime in Renaissance England.<sup>130</sup> The English authorities perceived it to be so and regarded the gallows as the quick, economical and appropriate remedy.<sup>131</sup> It is also possible that these evil-doers formed part of Hobsbawm's 'social banditry'<sup>132</sup> as an organised form of social protest against oppression. The vagabonds were undoubtedly social outcasts, but do not quite fit into the classes of banditry that generally made up Hobsbawm's categorisations.<sup>133</sup> Defining the

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Justice of the Peace 1661-63', *Worcestershire Hist. Soc. Misc.*, II (1967) pp.113-114.

<sup>128</sup> Read, C., Ed., *William Lombarde and the Local Government* (Ithaca, 1962) p.68; Lombarde was a magistrate in Kent.

<sup>129</sup> Sneyd, C. A., Ed., *A Relation of the Island of England* (1847) Camden Soc. XXXVII, p.34. Compare the complaint in 1597 of the Jesuit Robert Parsons: *The Jesuit's Memorial for the Intended Reformation of England under their First Popish Prince*, (1690) ed. E. Gee, pp. 210-211, 252-254.

<sup>130</sup> Rowse, A. L., *The England of Elizabeth* (New York, 1966) p.344; Stone, L., *The Crisis of Aristocracy, 1558-1641* (Oxford, 1965) pp.223-234; Emmison, F. G., *Elizabethan Life: Disorder* (Chelmsford, 1970) p.148; see also Maddern, P. C., *Violence and Social Order: East Anglia 1422-1444* (Oxford, 1992) pp.1-26. who cites contrary views McFarlane, K. B., *The Nobility in Later Medieval England* (Oxford, 1973), *England in the Fifteenth Century: Collected Essays* (London, 1981).

<sup>131</sup> Chief Justice Fortescue even boasted, '...there be more men hanged in England in a year for robbery and manslaughter than there be hanged in France for such cause of crime in seven years.' Plummer, C., Ed, J. Fortescue, *The Governance of England*, (Oxford, 1926), pp. 141-142.

<sup>132</sup> Hobsbawm, E. J., *Bandits* (London, 1969); Hobsbawm, E. J., *Primitive Rebels; Studies in Archaic Forms of Social Movement in the Nineteenth and Twentieth Centuries* (Manchester, 1959).

outcast group in any society is a difficult exercise.<sup>134</sup> Whatever the 'social' reality, the vagabonds and landless wandering groups were feared and targeted by the parish magistrates as tangible evils and consistently prosecuted. An analysis of the Essex, Hertfordshire and Sussex Assizes also confirms the hypothesis that there was a class-economic linkage between criminal behaviour and prosecution, and the violence of the society.<sup>135</sup>

Had it not been for the contemporary pamphlet accounts of cases, essential details of the matters appearing before the courts as evidence of the callousness and violence that infected Medieval society would be lost.<sup>136</sup> A similar caveat can be lodged in terms of the later colonial Port Phillip records. Cockburn suggests that 'these acts were not the result of calculated or protracted violence', but the result of unpremeditated aggression. Everyday activities sometimes turned to arguments that escalated into 'fatal quarrels'. Cockburn states that fully five per cent of

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<sup>133</sup> There has also been some debate as to whether Hobsbawm has romanticised the social bandit to a point where he overlooks the fact that even if they were a voice of social protest, they still managed to terrorise, rob and victimize members of their own peasant or labouring class and that by excluding urban bandits, his conclusions were flawed; Blok, A., 'The peasant and the brigand: Social banditry reconsidered', *Comparative Studies in Society and History*, 14 (1972) pp.494–503, cited in Weiss, R. P., (ed), *Social History of Crime, Policing and Punishment* (London, 1999) pp.15–17.

<sup>134</sup> Hobsbawm contends that his 'bandits' were sometimes 'good' and sometimes 'bad', were no more than symptoms of crisis and tension within a society where contemporary public opinion would ultimately dictate who was the 'social bandit' and who was 'merely' a criminal; Hobsbawm, E., 'Social bandits: reply', *Comparative Studies in Society and History*, 14 (1972) pp. 494–503, cited in Weiss, R. P., ed., *Social History of Crime, Policing and Punishment* (London, 1999) pp. 26–27.

<sup>135</sup> Cockburn, J. S. ed., *op. cit.*, Chapter 2, pp.56–57, 'The nature and incidence of crime in England, 1559–1625: A preliminary survey'; Two Penhurst labourers who attacked a local woman, stabbed her and then slit open her stomach, from which they took an unborn child. PRO, ASSI 35/32/8/34 [Sussex, I, 1212]. Similarly, a Stratford cordwainer, after killing an unidentified woman at Leytonstone, cut off her arms and legs. 35/3/2/33 [Essex, I, 131]. During the course of a burglary at East Wittering one of the thieves was wounded. His five companions helped the wounded man to escape to Fishbourne, but when it became clear that he would hinder their further flight all five set upon him and beat him to death with their cudgels. 35/24/7/50–52, 55, 57 [Sussex, I, 856]. Attempts to eliminate incriminating witnesses, to terminate extra-marital pregnancies and to dispose of unwanted children or step-children commonly involved excessive and sometimes protracted brutality. 35/34/1/30; 35/43//1/1; 35/43/2/2 [Essex, I, 2271, 3057, 3107]. 35/24/7/50–52, 55, 57 [Sussex, I, 856]. At the Hertfordshire summer assizes in 1606 Agnes Dell, an innkeeper's wife, and her son were convicted of killing a boy, Anthony James, whose body had been found in a pond four years earlier; 35/48/2/11 [Herts., II, 163].

<sup>136</sup> *Op.cit.*, citing the two pamphlets: 1. *The Horrible Murder of a young Boy of three years of age, whose sister had her tongue cut out: and how it pleased God to reveale the offenders by giving speech to the tongueles Childe* (1606); 2. *The most cruell and bloody murder committed by an Innkeepers Wife, called Annis Dell* (1606); *Op.cit.*, p.56, For example, Cockburn states that only the chance survival of a pamphlet account reveals the violent circumstances in which a Mayfield man murdered his wife in 1595. He was convicted on the eye-witness testimony of his five-year-old son; citing pamphlet C.f. *A Most horrible & detestable Murder committed by a bloudie minded man upon his own Wife* (1595) found at PRO, ASSI 35/37/7/23 [Sussex, I, 1537].

the deaths analysed followed injuries sustained while playing or arguing about games of various sorts.<sup>137</sup> It is also important to note the prevalence of domestic violence,<sup>138</sup> sexual crimes, and assaults. The vast majority [75 per cent] of prosecuted offences were against property. There were noticeable fluctuations in the numbers of indictments over the period. The 'surges' in indictments, or 'crime waves', were clearly linked to economic downturns and their social consequences. Prosecutions were connected to upturns in the price of food with the price of wheat and the criminal indictments,<sup>139</sup> demonstrating a near-perfect relationship. Similar themes are also to be found in the later Australian colonies. The magisterial Clerks of Court when filling out court documentation often used class 'tags' when identifying defendants.<sup>140</sup>

The local parish magistrates were constantly 'en guard' against strangers, but locals could be dealt with and handled as 'familiar' with a degree of certainty.<sup>141</sup> Some justices warned of the wandering soldiers and other 'stout' rogues of England numbering three to four hundred to a county. Magistrates advised that they be wary against the 'swarms of vagrants and flying beggars

<sup>137</sup> *Op.cit.*, p.57 example of 'Richard Terry, a Throcking tailor, met his death during a game of shovelboard with his son and namesake are fairly typical. During the game, young Richard 'found fault with his father for his play, At this, Richard senior ordered his son to leave the house, and when he refused struck him, causing him to drop his money on the floor. As he bent to pick it up, his father kicked him in the backside, whereupon Richard junior picked up a jug and hurled it at his father. It struck him on the head, inflicting a wound from which he died sixteen days later'; PRO, ASSI 35/59/4/2,5 [Herts., II, 890].

<sup>138</sup> Cockburn, J. S. ed., *op. cit.*, *The Nature and Incidence of Crime in England 1559-1625: A Preliminary Survey*, Chapter 2, p.57: 13 per cent of the deaths investigated involved the killing of one member of a family by, or with the connivance of another: if deaths involving domestic servants are included, the proportion rises to more than 18 per cent. Wives were the victims in almost three-quarters of the instances of marital killing. Husbands favoured blunt instruments or direct physical violence as a means of eliminating family members. Wives, on the other hand, were commonly associated with premeditated murder, often by poison. In at least two instances females followed the notorious example of Alice Arden in hiring professional killers to dispose of unwanted husbands (citing: *The Lamentable and True tragedie of M. Arden of Feversham in Kent* (1592) PRO, ASSI 35/40/2/38, 47 [Herts., I, 871]).

<sup>139</sup> Cockburn, *op.cit.*, Fluctuations: pp.58-60, p.53; Price of Wheat and crime: pp.67-69.

<sup>140</sup> Most defendants were signed in as 'labourers' even when the defendant was a trained craftsman. Returning soldiers were also given special attention by court officials and were 'tagged' as 'troublemakers' who had learnt devious ways whilst abroad in His Majesty's forces; Cockburn, *op.cit.*, p.61.

<sup>141</sup> The stranger, however, was an unknown and by definition did not fit into the social matrix of parish society. The 'swarms' of vagrants posed the greatest of all threats; pilfering market stalls, stealing clothes from hedges and houses, the 'hookers' armed with their hooked staffs lifting things through open windows and horse thieves plundering the symbol of wealth wherever they went; Cockburn, *op.cit.*, p.62 citing a Kent Magistrate, Thomas Harman, *A Caveat or Warning for Common Cursitors* (1566), held at Yale University, Beineke Library, Law Deposit GR 29.5 case no. 14.

who... infect and stain the earth with pilfery, drunkenness, whoredom, bastardy, murder and infinite like mischiefs'.<sup>142</sup> It has been observed that vagrants mostly acted as opportunistic thieves, that is, committing only when the opportunity arose and not as organised gangs of professional thieves.<sup>143</sup> J. A. Sharpe confirms the proposition that England was administered by the office of the magistracy through the machinery of county government which the office controlled.<sup>144</sup> In view of the notorious sparsity of court records, he emphasises the importance of informal documents for understanding the motivations of individual justices and providing that 'wider dimension' necessary to establish a social context.<sup>145</sup> In examining the social stability of Kelvedon-Easterford, Sharpe concludes that there were two factors influencing the relative socio-legal stability of the parish: the existence of a respected justice of the peace, and a group of sturdy men to support him. Sharpe calls these the 'fixed interests of the community',<sup>146</sup> who saw peace and tranquillity within the parish as concerns of paramount socio-economic importance.

Sharpe's exhaustive study of the office of the constable reveals that the constables themselves had been brought before the Bench on any number of occasions.<sup>147</sup> This

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<sup>142</sup> Warning: Edward Hext, Somerset magistrate; BL, Lansd. MS 81, ff.161–162v; Magistrate Lambarde, *Lambarde and Local Government*, Cockburn, *op.cit.*, p.181.

<sup>143</sup> Gangs did exist but did not constitute the majority of property-related matters before the courts. Only a small percentage of prosecutions occurred against pick-pocketing and cut pursing or of the highway 'stand-and-deliver' type crimes; Cockburn, *op.cit.*, pp.63–66.

<sup>144</sup> J. A. Sharpe, 'Crime and delinquency in an Essex Parish 1600–1640, Chapter 4 in Cockburn, J., S., ed. *Crime in England 1550–1800* (Princeton University Press, Princeton, New Jersey, 1977) p.90.

<sup>145</sup> One such example deals with the parishioners of Great Horkesely requesting the local justices to tie up a violent neighbour; Sharpe, *ibid.*, pp.90–91 also citing ERO, Q/SBa/2/91.

<sup>146</sup> 'Robert Aylett LL.D, as archdeacon of Colchester and justice of the peace he was the officially commissioned stabiliser of the district; and a solid body of minor gentry and yeomen... who provided an element of permanence and solidarity in the parish' who supported the local justice of the peace not only in philosophy and class allegiance, but also by filling the posts of parish churchwardens and parish constabulary; Sharpe, *ibid.*, p.94.

<sup>147</sup> Sharpe, *op.cit.*, p.95–98; citing examples such as Nicholas Willowes, Constable at Church Hall Manor, who had previously appeared on charges of fornication with two women, one charge of having a servant with child, three charges of keeping disorder in his house on the Sabbath, one charge of turning dirty water into the street and one for keeping his

phenomenon is also reflected in the later Port Phillip records. Sharpe also questions the perception that criminal activity is an exclusively lower-class preserve and argues that this was not the case before English industrialisation. He maintains that before industrialisation, the aristocracy and gentry 'were still given to delinquent behaviour'. Sharpe provides us with examples of 'the more prosperous malefactors'.<sup>148</sup> This phenomenon is also reflected in the later Port Phillip records. Sharpe's findings support the proposition that the gentry considered themselves not strictly bound by the law. Contrast this with the condition of the poor, the marginalised, the vagrant migratory worker and the household servant. These were<sup>149</sup> and are seen as society's criminal stereotype yet they bore the suffering that only the curse of being born into poverty can provide. The position of the female servant girl who more often than not, became the sex slave of a rapacious male employer, was also nothing less than diabolical.<sup>150</sup> Whilst the gentry family unit enjoyed all those privileges and stabilising accoutrements that only money and social position can provide, the working-class family faced constant threats from the economic necessities of migratory work patterns. This often demanded the physical separation of the dispossessed rural poor family unit.<sup>151</sup> The social 'life' consequences for the spouse, and, more importantly, the children of this economically 'divorced' family were devastating. This

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pigs penned near the parish sewer; Robert Gosnald, also Constable, two charges of disorder and drinking in his house on the Sabbath, one charge at Quarter Sessions for unlicensed victualling, one charge for subdividing his tenement, and one of a group to be presented for enjoying the well-worn favours of Lydia Banbricke.

<sup>148</sup> 'The gentry were not subjected to the inculcation of a sense of imperial duty, muscular Christianity and the public school spirit that was to have such an impact on the governing classes in Victorian England. The English *gentleman* and *aristocrat* needed to divest himself of the violent habits of a factious medieval nobility'; Sharpe, *op.cit.*, p.96; also cites four examples of aristocrat and gentry violence, L. Stone, *The Crisis of the Aristocracy, 1558-1641* (Oxford, 1965) pp.223-234; Prosperous Malefactors: Sharpe, *op.cit.*, pp. 96-98.

<sup>149</sup> See Judges, A. V., Ed., *The Elizabethan Underworld* (London, 1930); Salgado, G., Ed., *Cony-Catchers and Bawdy Baskets* (Harmondsworth, 1972); challenged by Slack, P. A., 'Vagrants and vagrancy in England 1598-1664', *Economic History Review*, 2nd. Ser., XXVII (1974), pp. 360-379 and by Beier, A. L., 'Vagrants and the social order in Elizabethan England', *Past and Present*, LXIV (1974), pp. 1-29.

<sup>150</sup> As bastardy and fornication were technically crimes, the woman (servant girl) who bore a child outside the bonds of holy matrimony but within the confines of the self-contained morally magnified world of the local parish faced not only the prospect of secular punishment and spiritual admonishments, but also the uncertain and painful future of raising a child in poverty, without help and assistance from family or biological father; Sharpe, *op.cit.*, pp. 98-99.

<sup>151</sup> *Ibid.*, pp.99-100.

social phenomenon is also evident in later colonial Port Phillip where husbands, especially those engaged in rural employment, were practically divorced from their families. The social 'cost' of such realities is inestimable.

Alcohol played an important role in the lives and social conduct of citizens. This phenomenon is also reflected in the later Port Phillip records. The study of the parishioners of Kelvendon confirms this proposition. Sharpe's study notes the disorders of the alehouses, the criminality that almost inexorably followed drunkenness, the social levelling effect that alcohol has upon society's classes [all men, no matter what class, get drunk] and the condemnation by the spiritual leaders of the community. As in the Australian colonies, alcohol was a central motif running through the work of the pre-modern magistracy. English research also confirms the proposition that State overregulation produced an idiosyncratic view of crime and supports the contention that crime was not just the prerogative of the poor.<sup>152</sup> English Quarter Sessions records<sup>153</sup> also reveal that larcenies constituted the largest indictment group with recognisances to keep the peace widely used by the magistrates.<sup>154</sup> Constables or Bailiffs were also frequently brought before the magistrates on a variety of charges; again, the enforcers of the law were more often than not made defendants before it. One contemporary handbook for Sheriffs lists the abuses bailiffs commonly undertook in the exercise of their office.<sup>155</sup> The condition of communal living also tended to help shield local community members against prosecution for necessitous behaviour. Strangers could not use those ingenious defences used by 'familiar' or locals when they faced the magistrates. Familiarity also bred prosecution. This is demonstrated in a study of prosecutions in Essex where 'almost all persons charged with theft were neighbours of

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<sup>152</sup> Sharpe, *ibid*, pp. 102–108; apart from all the other considerations on this point the area was also a Puritan stronghold and therefore 'religious' criminality and prosecutions were also the province of wealthy class members.

<sup>153</sup> Ingram, M. J., 'Communities and courts: Law and disorder in early seventeenth-century Wiltshire', Chapter 5 in J. S. Cockburn, ed., *op.cit.*.

<sup>154</sup> Ingram, *op.cit.*, p.111.

<sup>155</sup> Enforcers as defendants: Ingram, *ibid*, pp.123–125; Dalton, M., *Officium Vicecomitum. The Office and Authorite of Sheriffs* (1623), ff. 176–178, 193–194; cited in Ingram, *op.cit.*, p.123.

their victims'.<sup>156</sup> However, an analysis of the occupations held by those prosecuted for larceny found that the stranger class constituted two-thirds of all the larceny and compound larceny indictments. This of course was a gross exaggeration of their relative size in relation to the population at large. These figures do not reflect a 'communal Arcadia' – the battle lines were clearly drawn between the 'familiar' and the 'outsiders'. Instead it demonstrates the universal and time-honoured 'xenophobia towards the wandering poor'. The troubles within the cloth industry and poor harvests forced many people onto the road as vagrants, depriving them 'of the benefits of neighbourhood'. They simply disappeared from history. Neighbours were often affronted by the destitution of one of their own and as a result, especially in hard economic times, instructed and initiated prosecution where once they might have ignored pilfering; remembering that death by hanging was a real possibility.<sup>157</sup> Magistrates gave lip service to the Christian 'reconciliation theory', however their class allegiances, more often than not, allowed them to conveniently overlook their spiritual 'prime directive'. The Wiltshire Quarter Sessions table of indictments clearly demonstrate that property offences dominated indictments before the local magistracy. Assaults, trespass, alehouse-drunkenness, unlawful hunting and prosecutions for decayed highways and watercourses followed this.<sup>158</sup>

<sup>156</sup> Ingram, *op.cit.*, pp.128–129; Shield community members: cites the examples of 'gleaning' (picking up fallen ears of corn) and 'pulling' (actually plucking corn from the crop) and those defences used by Thomas Farmer and Abraham Stockwell against the charges of pig and sheep stealing; Strangers: p.129; Neighbour prosecutions: p.129, citing Samaha, J., *Law and Order in Historical Perspective: the Case of Elizabethan Essex* (New York, 1974) p.46; Stranger class larceny:

<sup>157</sup> Ingram, *op.cit.*, pp.128–133; Shield community members: cites the examples of 'gleaning' (picking up fallen ears of corn) and 'pulling' (actually plucking corn from the crop) and those defences used by Thomas Farmer and Abraham Stockwell against the charges of pig and sheep stealing; Strangers: p.129; Neighbour prosecutions: p.129, citing Samaha, J., *Law and Order in Historical Perspective: the Case of Elizabethan Essex* (New York, 1974) p.46; Stranger class larceny: Ingram, *op.cit.*, pp.130–133; Benefits of neighbourhood: *ibid.* p.133; Disappeared from history: *ibid.* p.133, Two sad examples of destitution were Anthony Hooper of Keevil and Agnes Slade of Melksham representing the lives led by these lost souls who, by accident of birth, and the decline in trade and failing harvests, were forced onto the roads as vagrants. Wherever they went, they were whipped and beaten by the locals and their magistrates as outcasts. Through desperation and hunger they stole food, in the case of Agnes 'to relieve her and her child' from famine; Neighbour destitution and prosecution: p.134, citing example of this: Nicholas Sedgwick of South Newton, executed for various acts of pilfering and theft, and for encouraging others to do so.

<sup>158</sup> Reconciliation: Lambarde, *Eirearcha*, *op. cit.*, p.10; They also included one indictment of 16 people for leaving their trades and becoming nightwalkers, a few cases of riot, rout and public disturbance, and of riotous assault and trespass. Some cases involved riotous trespass and included cases of illegal possession and use of handguns, crossbows, nets and greyhounds; Table of indictments 1615–1624; Ingram, *op.cit.*, p.112.

## LOCALITY INFLUENCES ON MAGISTERIAL PRACTICE

THE CONTEMPORARY HANDBOOKS written for justices of the peace give the impression that England was overrun with criminals, with 'the infinite swarms of idle vagabonds ... which ... wander up and down to the great danger and indignity of our nation ... (and were) ... for the most part thieves, cut-purses, cozeners or the like'. The learned magistrates of the day would also provide advice to justices on how to recognise such persons and overall advice to justices as to the pressing need to reduce the number of vagrants. If we focus on assault and disturbing the peace, a pattern later repeated in the colonies of New South Wales and the Port Phillip District, it appears that common assault was often a spontaneous attack between neighbours and was rarely premeditated.<sup>159</sup> Alcohol was a major source of criminality.<sup>160</sup> The alehouse keepers generally viewed as being 'low' characters, promoted the distress that alcohol consumption caused to the peace of the parish. The Alehouses also often doubled as brothels. Forms of unofficial social control included: 'the ridiculing of non-conforming community members' and the exercise of non-legal community pressure, before community members would resort to the organs of official social control. A distinction has been made between short-term spontaneous criminality and long-term patterns of criminal behaviour.<sup>161</sup>

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<sup>159</sup> Curtis, T. C., 'Quarter Sessions appearances and their background: A seventeenth-century regional study', Chapter 6 in J. S. Cockburn, ed., *op. cit.*; Overrun with criminals: p.135 referring to Bond, J., *A Complete Guide for Justices of Peace* (1685); Chamberlain, R., *The Complete Justice* (1681); Lambard, W., *Eirenarcha* (1591) 2nd edn.; Infinite swarms: p.135 citing Dalton, *Country Justice* (1697) 5th edn. pp.205, 385; Recognise such persons: p.135 citing Dalton, *op.cit.* pp.413-414 and Nelson, W., *The Office and Authority of a Justice of the Peace* (1715) 5th edn. p.594; Need to reduce vagrants: p.135 citing Lambard, W. *The Duties of Constables, Borsholders, Tythingmen, and such other low and lay Ministers of the Peace* (1619) 2nd edn. pp.28-29; Common assault: p.136, example William Neald: alehouse all night-struck Gregory Hughes; Roger Parsons offered to stab John Leigh because of owed money; William Swindles attacked John Heaps because asked to repay debt; Higginson Family: constable sent to take away violent son; later referred to p.138 and p.146. Robert and Thomas Broxon found gathering acorns in the park and manhandled and threatened gamekeeper John Chaddock; Alice Hallux and John Gee: master /servant relations: servant girl seduced; *op.cit.*, p.137.

<sup>160</sup> Justice Humphrey Hulme when dealing with Thomas Coppocke described him as '...a very disordered lewd fellow, much given to haunting alehouses and apt to quarrel in his drink'; Curtis, *op.cit.*, p. 137 citing Quarter Session files January 1611, no.22.

<sup>161</sup> Curtis, *ibid.* Brothels: p.139; Non legal pressure: p.138 citing Baxter, R., *The Autobiography of Richard Baxter* (London, 1931) Everyman Edn. pp.2-6; Campbell, M., *The English Yeoman under Elizabeth and the Early Stuarts* (London, 1960) 2nd

Inter-communal quarrels represented the second major source of communal disharmony. These neighbourhood disputes and quarrelling constables led to appearances before the magisterial Bench. There is evidence that preferential treatment was shown by the justices and their Constables towards certain community groups and individuals in deciding whether to prosecute an offence. The preferential bias fell into two groups: the religious sympathies of the Bench and the influence exerted by the network of family relationships within the district. The law enforcement officers did not operate in a vacuum and were subject to pressures from the community and from their superiors in deciding whether to prosecute. The Privy Council would also intervene.<sup>162</sup> There were many examples of conflicting local and central authority interests. These were 'the politics of compromise triumphing over the letter of the law'. The local law enforcers were more concerned with reconciliation of local disputes than with the application of the law.<sup>163</sup>

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edn. pp. 253–254; Short term / Long term criminal behaviour: Curtis, *op.cit.*, pp.138–139, 140, 147; Elizabeth Tushingham was an example of a long-term troublemaking 'spinster' and John Horton was another person considered a general troublemaker.

<sup>162</sup>Curtis, *ibid.* Neighbourhood disputes: Ralph Calverly and John Edwards re piece of land (p.140); John Stevenson and Elizabeth Orme (pp. 140–141); John Burgess and William Paul for taking away his wife (p.141); Thomas Aldersey (who became the local Kiddington Constable) and David Edowe that had lasted for six years: on attempting to collect the poor tax was abused by Edowe (pp.141–142); John Faulkenor, his wife and the rest of the neighborhood (p.142) and the interesting use of the local clergyman to attempt to diffuse this neighbourhood dispute; Quarrelling Constables: Richard Fryer and Hugh Gandy (p.143); quarrel between two constables and an adulterous fornicator Richard Reddich who had been excommunicated yet found in a Church (p.143); John Brook and a Justice Sir John Arderne re justice had robbed him (p.143); Leftwich Oldfield, JP and a meeting of Quakers (pp.143–144); Preferential treatment: Curtis, *op.cit.*, p.144; Preferential bias groups: Case of Randle Furnival (son) and the father (constable); Case of constable John Hollingworth allowing the escape of a 'man' of Sir Edmund Trafford; Case of a supervisor of highway maintenance not attending to his job and the petitioners who were required to labour in highway maintenance petitioned against the supervisor; Case of resistance to constables executing warrants/serving summonses: Correspondence between a justice and his clerk where the justice advises that he shall aim to extend a bond by reason of personal knowledge of the bonded man (Davenport) who, was an evil man and that at Quarter Sessions he would so advise the Bench; Curtis, *op.cit.*, pp.144–148; Pressures to prosecute: pp.146–147, citing Cockburn, *Assizes*, pp.158–172; Privy Council intervention: Curtis, *op.cit.*, p.148; Privy Council railed against Cheshire justices for not undertaking their tasks with the requisite zeal and instructing them to take direct action against unlicensed alehouses and most importantly to collect the correct fees from those properly licensed alehouses.

<sup>163</sup> Curtis, *ibid.* Local interests conflict: p.151. Local Constables 'were not enthusiastic about interfering with local drinking habits'; another, when forced into prosecuting unlicensed alehouse keepers, the justices prosecuted 1300 persons, and promptly found them all not guilty; Politics of compromise: p.152; Reconcile disputes over application of law: pp.152–153; An example of this would be the removal of individual antisocial cankers, members of the community who did not share their desire in maintaining socially harmonious relations. For example see Edward Clare and the

In short, there were enormous pressures exerted upon the justices: ties of kinship, political and religious affiliations and beliefs, communal pressure, personal beliefs, assize pressure, central government pressure. Religious social policy took up much magisterial time and effort. If one were to graph this, one would see periods of high enforcement and low recusancy enforcement. Individual actions and communal group pressure were important factors in sponsoring or initiating prosecutions before the magisterial Bench. The justices would exert pressure as well. No one simplistic model can therefore explain the complex system of law enforcement at work at the parish level. The machinery of law enforcement did not operate to serve the interests of or against any single class, institution or interest group because there were too many competing interests involved. In this version the process was more than just confrontation between individual and state but rather more like 'an intricate chorus of negotiation between all parties and interests'.<sup>164</sup>

## EIGHTEENTH-CENTURY STUDIES OF CRIME IN ENGLAND

IN THE PERIOD following the end of the War of Austrian Succession in 1748 England experienced 'a crime wave of unexampled proportions'.<sup>165</sup> A London magistrate, Henry Fielding,

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correspondence from the Bench of magistrates to the Nantwich House of Correction; see also the case of Samuel Jeffreys correspondence this time to the gaoler of Chester Castle.

<sup>164</sup> Curtis, *ibid*: Religious social policy: p.148, Sometimes Catholics of high social standing were targeted. At other times it was Protestant recusants who bore the brunt of the state's spiritual engineering policies; Individual actions: pp.148–149, John Huson, charged with profaning the sacrament and later with contempt of court regarding remarks made against two women he thought were unfit to take the sacrament; Communal group pressure: pp.149–150, Prosecution against two women (Ellen Taylor and Elizabeth Hurstfield) who were charged with stealing corn. The chief crown witness was Margaret Kennerly; a group of ten neighbours petitioned against her as an idle and malicious woman whose testimony should carry no weight; Justices pressure: p.153, Correspondence from Uriah Leigh, J.P., to the Clerk of the Peace explaining how he had released one person after having, together with others 'that wished well to both parties', pacified the situation and relieved the courts from further need to hear the disputation; Chorus of negotiation: p.154.

<sup>165</sup> Beattie, J. M., 'Crime and the courts in Surrey, 1736–1753: An investigation of the records of the Assize and quarter sessions in the county of Surrey', Chapter 7 in J. S. Cockburn, ed., *op. cit.*, p.155.

reflected upon the huge increase in property crimes he encountered.<sup>166</sup> The situation became so bad that in 1751 the King's January speech to Parliament led to the establishment of a committee to deal with the crime wave. The Committee voiced a growing belief that the harshness of the criminal code was responsible for the increase in crime, however the House of Lords rejected a Commons recommendation of an increase in the use of incarceration and hard labour and a narrowing of the death penalty. Facing the opposition of the Lords and using a logic that only Parliaments can muster, Parliament increased the gross number of offences punishable by death. The courts were also eventually able to decree transportation directly. This meant that it became a common outcome. The extension of the capital categories and by implication the increase in transportable offences again indicates a piecemeal approach to legislative policy-making.<sup>167</sup> Research in Surrey has revealed that there were great fluctuations in property crimes: there were seasonal fluctuations [more crimes were committed or detected over the winter months] as well as annual fluctuations linked to 'want and necessity produced either by unemployment or falling real incomes'. These fluctuations were linked to war. There was a fall in indictments during wartime and a rise after the cessation of hostilities as a result of demobilisation and the impact on the job markets. The fluctuations in indictment figures of the rural portions of the study are also related to the war years. The main influence however, seems to have been harvest yields, the concomitant effect upon grain prices, the shortage of harvest

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<sup>166</sup> 'The streets of this town and the roads leading to it will shortly be impassable without the upmost hazard; nor are we threatened with seeing less dangerous gangs of rogues among us, than those which the Italians call Banditti'; Beattie, *op.cit.*, p.155, from Fielding, H., *An Enquiry into the Causes of the Late Increase of Robbers*, in *The Works of Henry Fielding*, (London, 1806) 10 vols, X, p.347.

<sup>167</sup> Lords rejection: Beattie, *op. cit.*, pp.155–156; Increase in death penalties: pp.156–158; These were in the main property offences with an added theme of appreciable trespass; of violence or intrusion onto property; benefit of clergy had been removed from these offences (the literacy test for the plea of benefit of clergy had been abolished in 1706 (5 Anne, c.6); Transportation directly: Ekirch, *op.cit.*, pp.16–18; Common outcome: p.158, 4 Geo, I, c.11, 1718; 'transportation became the most common consequence of conviction for non-capital property crimes. Even in the case of petty larceny, the courts were disposed by the middle of the century to employ the harsher alternative of transportation to the American colonies'; citing Smith, A. E., *Colonists in Bondage: White Servitude and Convict Labour in America, 1607–1776* (Chapel Hill, 1947) pp.96–97, and Shaw, A. G. L., *Convicts and the Colonies* (London, 1966) pp.23–25; Piecemeal approach: p.157, 'Horse theft and picking pockets had been made capital offences by the Tudors... By 1736, domestic servants who pilfered from their masters were liable to be hanged, as were shoplifters or men who stole from ships or barges, or from docks or warehouses. In 1741 sheep-stealing became a capital offence and in the next year cattle theft. The process continued through the century.' Beattie, *op.cit.*, p.157 citing Radzinowicz, *History*, *op. cit.* I, pp. 3–8.

work and the rise in food prices.<sup>168</sup>

The rural gentry and landed yeomanry demanded swift action and protection of their livestock and petitioned Parliament resulting in 'an uncommon burst of parliamentary action'. There was a decline in indictments once harvest yields and prices returned to normal levels. A shorter time would be spent in gaol by an accused if they were remanded to appear before Quarter Sessions because it was not uncommon for accused appearing before Assizes to languish in gaol for up to seven months. Languishing on remand was a grave injustice, especially if the prosecution was ultimately unsuccessful, given the conditions of confinement and the high death rate in custody. Fast production line adjudications developed within the magisterial Quarter Sessions, largely the result of the huge increase in caseload after the Spanish War.<sup>169</sup>

The importance of this period is the shift in sentencing options and the increasing use of transportation. The normal punishment for larceny before the magistrates in Quarter Sessions had been public whipping; after the increase in prosecutions, linked to post-Spanish War economic factors, the magistrates began favouring transportation as the preferred sentencing option.<sup>170</sup> Interestingly, the Quarter Sessions jurisdiction over murder was only removed in

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<sup>168</sup> Beattie, *op.cit.*, Fluctuations and war with Spain: pp.158–160; Harvest yields: p.160, 'The privation and hardship of these years was noted by contemporaries, and put forward in mitigation of their crimes by numbers of those who found themselves before the courts on charges of theft. It was undoubtedly the depth of rural distress in the winter of 1740–41 that lay behind an apparent increase in the theft of sheep'; Beattie, *Crime, op.cit.*, Prices: pp.205–212; War: pp.213–222; War: Maddern, *op.cit.*, pp.17–18.

<sup>169</sup> Beattie, Cockburn, *op.cit.*, Burst of parliamentary activity: p.160, The formation of a parliamentary committee (with powers to also consider ways of dealing with the increasing problem of orchard and fruit tree pilfering) and resulted in sheep stealing becoming a capital offence by March of 1741, citing House of Commons Journals, XXIII, (1737–41), pp. 572, 585–586, 690; Languishing in gaol: p.161; High death rate: p. 162, 'Gaol fever', as typhus was known, took its toll on persons in remand: 35 men and women died during the period in the Surrey County Gaol between 1736 and 1753: 25 died between 1735 and 1742, famine years, with 10 dying in the winter of 1740–41; Custody: pp.161–162, example, acquittal of three men, on remand for four months, accused of stealing chickens being released immediately instead of at the end of the sessions and being excused of gaol fees; citing Surrey Assize Proceedings, p.4; also an example of collection of monies by the jury for a man likewise falsely accused p.162 citing *op.cit.*, p.19; Post Spanish War caseload: pp.175–177, This caseload led to the increased use of the undervaluing of stolen property so that the matter would be summarily tried by the justices at Quarter Sessions.

<sup>170</sup> Beattie, *ibid*, Increased use of transportation: p.177, At Assizes 84 per cent of convictions for grand larceny (exceeding a value of 1s.) were transported to the American colonies for a period of seven years; Whipping to transportation: p.177, Before 1750, for example, Beattie maintains that no person was transported by the Surrey magistrates. After this period

1842<sup>171</sup> after many years of peace and stable economic times. The decision to commute was entirely personal based upon the Bench's observations of mitigating circumstances and submissions made regarding the character of the offender. Rural offenders had an advantage over urban dwellers.<sup>172</sup> Women enjoyed trial advantages over men. Women committed fewer and less serious crimes.<sup>173</sup> Women were more likely to be acquitted than men, more likely to be reprieved if found guilty, more likely to be found guilty of a more reduced charge, more likely to be whipped rather than transported and more likely to be transported than hanged. One example was Elizabeth Hood. Her husband was found guilty of stealing from a warehouse. She 'was acquitted as acting under the direction of her husband'. Guilty verdict patterns were also directly related to prosecution frequency. High numbers of prosecutions meant a greater proportion of guilty verdicts: judicial officers and juries were more prone to convict and punish more severely when there was a perceived increase in the level of crime.<sup>174</sup> The criminal justice system was concerned with threats to the peace of the realm and the tranquillity of the lives of those subjects worthy of its protection. The character and disposition of the defendant became the single most important consideration in a system that was to outgrow its rural beginnings.<sup>175</sup>

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however, almost two-thirds of sentencing options resulted in transportation to the American colonies; Ekirch, *op.cit.*, p.21.

<sup>171</sup> To avoid hanging and receive the second prize of a mandatory fourteen years of transportation, the Assize judges and the Quarter Sessions magistrates were required to recommend mercy and recommend that the Royal pardon be used to commute the mandatory legislated death sentence; Babington, A., *op.cit.*, p.32.

<sup>172</sup> 'The close social relationships that still characterised much of rural England and that gave rise to the structures of paternalism and deference which encouraged and were in turn supported by the intervention of those in authority on behalf of members of the community in trouble did not flourish as easily in the crowded and more anonymous urban parishes on the northern edge of Surrey'; Beattie, *op.cit.*, p.181.

<sup>173</sup> *Ibid.*, p.182 citing Beattie, J. M., 'The criminality of women in eighteenth-century England', *Journal of Social History*, VIII (1975) pp.80-116.

<sup>174</sup> Beattie, *op.cit.*, p.182 see also Hooper, W., *The Englishwomen's Legal Guide* (London, 1713) pp. 93-94; Elizabeth Hood, in *Surrey Assize Proceedings*, March 1745, pp. 13-14; Women were seen much less dangerous to the community, much less of a threat to authority and social order and that the courts were as much concerned with considerations of this kind as with punishing criminals; Beattie, *op.cit.*, pp.182-183; Perceived increase in crime: pp.183-184.

<sup>175</sup> It was a system that had grown out of and was well adapted to the needs of a rural society in which men were known, in which the character and disposition of an offender were known in particular to the respectable members of the community, to gentlemen, clergy, farmers... To this extent the criminal law could be brought to support and sustain the authority of the society's natural leaders, for when its extended terrors could be tempered by opinion and influence, the

By the eighteenth century the English magistracy formed part of a pact between the ruling elites to shape and control a society so as to maximize the relationships between the law, property and power.<sup>176</sup> The local gentry and magistracy socially feted the Assize circuit judges when their courts came to town. The 'wealthier' JPs would entertain the superior legal officers in their homes, with 'their' women folk conspiring to maximise mileage from the 'social event' by invariably organising an 'Assize Ball'. The sanctity of the Assize courtroom was not immune from class intimacy and social ceremony.<sup>177</sup> Following E. P. Thompson's lead, Hay does not underplay the skill and tenacity of the emerging working class in undermining and challenging the elite's socio-economic-legal conspiracy. The brand of 'justice' however, dispensed by the local justice of the peace, usually from their front parlour room, can be criticized for, at best, its general legal ignorance, and at worst, its rampant impartiality and inability to extricate itself from the pact it had made with its social allies. The magistrates' parlour justice was arbitrary, ignored due process and *stare decisis*, and was subject to the influences of the local land magnate. Nonetheless, at times the labourer could use the law to his advantage. He used the contradictory statutes and the system of informer prosecutions that 'occasionally allowed the powerless to make the law their servant, whether for personal revenge or the sake of reward'.<sup>178</sup>

Anyone who threatened the sanctity of property should be removed from society, either

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administration of criminal justice could provide powerful reinforcement to the local authority of those whose opinion mainly counted and whose interest was mainly effective; *ibid*, p.185 also citing discussion in Hay, D., 'Property, authority and the criminal law' in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975), ed. Hay, D., Linebaugh, P., and Thompson, E. P.

<sup>176</sup> Hay, D., Linebaugh, P., Rule, J. G., Thompson, E. P., Winslow, C., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London, 1975).

<sup>177</sup> 'By a condescension sufficiently extraordinary, the judge permits his Bench to be invaded by a throng of spectators, and thus finds himself surrounded by the prettiest women of the county - the sisters, wives or daughters of grand jurors...They are attired in the most elegant negligee; and it is a spectacle not a little curious to see the judge's venerable head, loaded with a large wig, peering among the youthful female heads'; Cottu, Charles, *The Administration of Criminal Justice in England*, (Paris, 1822) pp.103-104; Cottu was a French lawyer/Judge sent to examine the English legal system.

<sup>178</sup> Hay, D., *op.cit.*, pp.34-35.

by state-sanctioned physical death [hanging] or by state-sanctioned social death [exile and transportation]. It is argued that the 'Glorious Revolution' of 1688 established the right of the property class to defend their proprietary interests at the expense of those dispossessed by the law. Locke and Blackstone<sup>179</sup> find agreement on this. In order to protect the God of property, the English developed 'one of the bloodiest criminal codes in Europe'. The gentry class that controlled Parliament could use legislation to protect their self-interests. They mandated death or transportation for the food and enclosure rioters and for people who interfered with the bridges or the 'new fangled' steam engines, the latest source of profit for the gentry and aristocracy.<sup>180</sup> It has been argued that the move by Parliament to increase the number of offences triable by magistrate alone, unencumbered by an uncertain jury, was part of a conspiracy to shore up a class system in decline. Even though the death sentence was not an option,<sup>181</sup> it still allowed for the removal by transportation to the colonies of the non-deferential elements within society. The key was a more successful detection mechanism; hence the need to establish a corps of professional full-time detectors or enforcers: the *raison d'être* of the modern Police Force. The English however, consistently resisted the creation of an organised corps of police who might be used by a tyrant in trampling their liberties and would put up with the failings of amateur policing as a cost of freedom, even though this meant perpetual social insecurity.<sup>182</sup> The elite were more fearful of 'disloyalty within their household' where the laws and Constables could not protect them and only their fairness towards their servants would save them. The elite simultaneously held the offices of MP and JP, allowing them to both legislate

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<sup>179</sup> 'Government has no other end but the preservation of property' Locke, J., *The Second Treatise of Government* (1690) s.85 and 94; 'The execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours and fortune.', Blackstone, William, *Commentaries on the Laws of England* (1793-95) London, 12th edn., Edward Christian, vol. IV, p.13.

<sup>180</sup> Hay, D., 'Property, authority and the Criminal Law', Chapter 1, p.19, in Hay, *Albion's Fatal Tree*, *op.cit.*, p.21; the particular legislation being 9 Geo. III c.29.

<sup>181</sup> Save and except for forgery as a direct threat to 'property', the basis of all wealth: 'Forgery is also punished capitally, and nobody complains that this punishment is too severe, because when contracts sustain action property can never be secure unless the forging of false ones be restrained'; Adam Smith, *Lectures on Justice, Police, Revenue and Arms* (1763), ed. Edwin Cannan, 1896, p.150.

<sup>182</sup> Radzinowicz, L., I, pp.23-55, 248, 410, cited in Langbein, *op.cit.*, p.116; Weiss, *op.cit.* p.49.

and adjudicate. They dealt with common larcenies speedily but the real threats of sabotage that represented a threat to their real social authority could only be defeated by a common belief in their superior status and image as 'kind and just landlords and magistrates'. The only other real threat, theft of their land, was dealt with along mathematical lines, 'the only way it could be taken from them illegally was by forgery and it is significant that forgery was punished by unmitigated severity throughout the century, by death'.<sup>183</sup>

## WORKING-CLASS RESISTANCE TO THE LATE EIGHTEENTH-CENTURY MAGISTRACY

ENGLISH SOCIETY HAD produced an array of dispossessed members of the poorer classes that were filled with grievances. Actions of armed resistance would almost always be preceded by pamphlets or threatening letters addressed to authority figures. This was a characteristic form of social protest in any society enjoying a modicum of literacy. Group grievances formed the largest percentage of the 'threatening literature'. The effect upon the recipient was total and tended to serve its purpose of intimidation to the point of perpetual panic.<sup>184</sup> The threatening letters warned: you would be murdered ('very soon Nock't out of the Book of Life'), throats would be cutt [sic], property destroyed, rebellion would occur, mutilation handed out and stock destroyed. The recipients included all that held positions of social, economic and political power, especially Magistrates. The grievances represented wide-ranging discontent with the economic lot of the labouring classes. The majority of these letters dealt with the issues of the price of bread corn and food, machines and wages and attempts to influence justice.<sup>185</sup> These literary protests coincided with the growth of industrialisation and urbanisation in England and the concomitant breakdown in the traditional stabilising value forces of familiarity, deference and rural

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<sup>183</sup> Hay, *op.cit.*, pp.59–60.

<sup>184</sup> Thompson, E. P., 'The crime of anonymity', Chapter 5 in *Albion's Fatal Tree*, *op. cit.*

<sup>185</sup> See Three Tables from *op.cit.*, pp.259–260.

communality that had helped magistrates stabilise parish life in England.

Half of the 'threatening' letters were directed specifically against the magistracy. Lancashire Luddites sent a threatening letter to the Clerk of the Manchester magistrates regarding a verdict of justifiable homicide after a mill owner in defending his mill from a Luddite attack, killed three of them. A Jacobite letter was brought to the local magistrate Thomas Cardhew. A letter addressed to James Bailey JP, of Manchester, shortly after the riots of 12 July 1762, justified the riots and claimed a continuing solidarity and hatred for those who controlled the prices and marketplaces. A notice stuck upon a door, addressed to the 'Honoured [sic] Magistrates & Elders of Swanze' complaining of the millers' toll for grinding corn, various marketplace pricing practices, and calling for like starving men with familise [sic] to gather in protest. A letter from Shropshire complained about the enclosures within the district and they being 'clem'.<sup>186</sup> One letter was stuck on a signpost in Bicester, likewise complaining about enclosures and starvation. Another was addressed to a West Somerset magistrate, John Acland, again complaining about the marketplace pricing policies, starvation, and threatened to burn down his house if the situation was not remedied. Sometimes the letters or threatening rhymes were affixed to whipping posts, long held as the magistrates' weapon of choice, or to church doors. There were examples of soldiers joining and helping the protestors, who, when caught, were executed as an example to the other State troopers. The magistrates would be greatly alarmed by such threats and would send off letters asking for soldiers to reinforce the occupation of their own parishes.<sup>187</sup>

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<sup>186</sup> Thompson, *op.cit.*, Lancashire Luddites: p.323; Jacobite Letter: p.325, Threatening the destruction of workhouses, mills, some gentlemen's houses, 'fixt [sic] upon a signpost in the public marketplace' of Woodbridge, Suffolk; Justifying riots: p.326, Dying of starvation, 'for we may as well all be hanged as starved to death and to see ower [sic] Children weep for Bread and none to give Them'; Like starving men: p.327; Enclosures: p.328; 'clem' is to starve.

<sup>187</sup> Thompson, *ibid*, Enclosures, prices, rhymes, whipping post: pp.331–337; Soldiers: p.338 citing the execution of two such soldiers from the Oxford regiment on 14 June 1795; Magistrates alarmed and seek assistance: pp.338–339, citing an example of a Maldon magistrate writing directly to the Secretary of War with examples of discontent among 'the lower orders of the people'.

When not threatened by direct action, the magistrates were under fire from the labouring class in its battle to maintain basic levels of remuneration and conditions in their workplace. Arguably it was the poor rate of wages that forced many into the custom of larceny to survive. The pay rates of the English labourer were never much greater than that required to live at a subsistence level within 'the barest essentials of physical existence'.<sup>188</sup> Lamentable working conditions prevailed throughout England, producing an angry docility amongst the working class.<sup>189</sup> Industrial employers forever sought to minimise pay rates, make deductions from wages for allegedly sub-standard work and generally harass employees who appeared 'progressive' in their outlook. If a textile employee disputed an employer's pay reckoning, his only recourse was to a Bench of magistrates who came from the same class and occupational background as the defendant employer. The high cost of appealing a magisterial decision usually made it a likewise unpalatable option.<sup>190</sup> There seems to be a divergence here between these 'perceptions' of a biased magistracy when it comes to English master-servant magisterial adjudications and those held in the Port Phillip District, where, especially during the 1840s recession, the magisterial adjudications for non-payment or underpayment of wages seem, according to the Bench records, remarkably fair.

Apart from the daily 'bread-and-butter issues' facing the labouring classes, there were

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<sup>188</sup> Linebaugh, P., *op.cit.*, p.227; Weiss, *op.cit.*, pp.69–70; Furniss, E., *The Position of the Labourer in a System of Nationalism: A Study of the Labour Theorists of the Later English Mercantilists*, 24 (London, 1920) cited in Linebaugh, *op.cit.*, p.227; Weiss, *op.cit.*, p.70.

<sup>189</sup> One notable tract concerning the plight of the journeyman cotton spinner in 1818 Manchester describes the workingmen as generally docile if not goaded. This docility arose from being forced to work from the age of six, from five in the morning to eight or nine o'clock in the evening, surviving on a poor diet with not even the chance to supplement his wages and diet with the returns from a small plot of land that the 'negro' slave of the West Indies enjoyed. The English slave spinner had no pleasures in life. The spinner's fatigued family members held no joy for each other; Thompson, E. P., *The Making of the English Working Class* (London, 1986) pp.218–223.

<sup>190</sup> 'Summon his employer before a magistrate; the whole of the acting magistrates in that district, with the exception of two worthy clergymen, being gentlemen who have sprung from the same source with the master cotton spinners. The employer generally contented himself with sending his over-looker to answer any such summons, thinking it beneath him to meet his servant. The magistrates' decision was generally in favour of the master, though on the statement of the over-looker only. The workman dared not appeal to the sessions [Quarter Sessions] on account of the expense'; Thompson, *op.cit.*, p.221, citing document 'Black Dwarf', 30 September 1818.

shared 'value' concerns involving matters such as the depletion of traditional employment customs, justice, independence, security and family-economy considerations which led to great episodes of conflict in the early 1800s. These matters appeared before the local magistrates as the arbiters of employment law disputes. Strange theories evolved to justify employer practices. One such theory, that poverty was an essential goad to industry and that reduction of wages was really 'a national blessing and advantage and no real injury to the poor' was well publicised in the eighteenth century.<sup>191</sup> This theory was universally held by employers, magistrates and some members of the clergy.<sup>192</sup> There was a perception of class bias by the magistrates that accompanied the office to the Australian penal colonies and is reflected in the 'type' appointed to the colonial magisterial Bench. This image problem was not helped by the fact that English and Australian magistrates would commonly employ spies to gather information, to be used for local prosecution purposes or sent to the Home Office as part of general intelligence work.<sup>193</sup>

An analysis of the English landed society in the nineteenth century<sup>194</sup> confirms that justices of the peace from each region were meant to be men of good standing; the practical realities and the philosophical imperatives demanded that they all were drawn from amongst the ranks of the landed gentry class. The landed gentleman, wedged between the nobility and the labouring classes, was consumed with the task of proving appropriate attributes and views, and cultivating acceptance within the titled class. The landed gentleman was contemptuous of all

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<sup>191</sup> Thompson, *ibid*, Value concerns: p.222, This included the potters protesting the Truck system, textile workers agitating for the 10 hour day Bill, building workers agitating for co-operative direct action, all workers for the right to join a union and the 1831 coal strike for security of employment, tommy shops and the issue of child labour; Strange theories: p.306, 'This theory presupposed that overpayment of the worker would only lead to workers becoming 'idle' and 'never work(ing) any more time... than is necessary just to live and support their weekly debauches', citing Smith, J., *Memoirs of Wool* (London, 1747) II, p.308.

<sup>192</sup> Wadsworth, A. P. and Mann, J. de L., *The Cotton Trade and Industrial Lancashire* (Manchester, 1931) p.387.

<sup>193</sup> Thompson cites the holdings of the Public Record Office in Bolton and that on face value, because of the amount of 'spying correspondence from the local magistracy, it should have been the absolute insurrectionary centre of all England. The truth is that Bolton 'suffered from two unusually zealous magistrates - the Rev. Thomas Bancroft and Colonel Fletcher' - and that their personalities therefore tended to skew any historical assessment; Thompson, E. P., *op.cit.*, p.536.

<sup>194</sup> Thompson, F. M. L., *English Landed Society in the Nineteenth Century* (London, 1963).

who laboured for a living (including merchants and those other men of the new capital caste) and was well designed for the magisterial task. Retired gentlemen, professional men of sufficient standing and members of 'old' families were the preferred candidates. In the early nineteenth century there was a statutory requirement, for example, that a candidate for a commission be in possession of an income of at least one hundred pounds per year from land. The justices kept active in local civic affairs; their wives likewise adopted pet projects, usually the village school, clothing clubs for the 'unfortunates' and similar charitable activities. They owed a genuine allegiance to their locality and have been characterised by their 'territoriality'.<sup>195</sup> They did not particularly like the aristocratic nobility, even though they aimed their daughters at them. Commissions of the Peace became almost hereditary in certain families; the English county magistracy was, [by the early eighteenth century] an efficient, reliable, accountable and honourable judicial and administrative office that served its own interests well, and those of the Crown with effect. The sons of this class filled the professions, church, army and civil service. Had it not been for political intervention (i.e. Gladstone's university, civil service, purchase of military commission reforms) and the end of patronage in favour of merit as the formula for advancement in professional, civil and military endeavours, the landed gentry might still be the class ruling England through its magistrates in 21<sup>st</sup> century England. They demonstrated a durability down the centuries that, as the following chapter details, would find expression in the penal colonies on the other side of the world where many of their audience were transported.

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<sup>195</sup> Coss, *op.cit.*, pp.9–11.

# CHAPTER 3:

## THE MAGISTERIAL OFFICE

## TRANSPLANTED TO THE

## COLONY OF NEW SOUTH WALES

### A PENAL COLONY ESTABLISHED UNDER ENGLISH LAW

THE INSTITUTION OF the magistracy first received its Australian form in the colony of New South Wales. Governor Arthur Phillip established English legal hegemony over the eastern portion of the Australian landmass by means of two commissions issued to him by the English Crown. These commissions were variants of a standard form document regularly issued to Governors throughout the British Empire. Governor Phillip's commissions were similar to these standard Gubernatorial commissions.<sup>1</sup> The right to appoint colonial justices of the peace to govern colonial territories was similarly a well-established Gubernatorial prerogative.<sup>2</sup> It was intended that the Australian settlement was to be a penal establishment, where the crimes of Britain's unwanted could be 'expiated at a distance by punishments sufficiently severe to deter others'. Economic, Imperial and strategic considerations played a part in the decision to settle Botany Bay. The development of the settlement as an English colony was, however, only a

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<sup>1</sup> Legal Hegemony: Governor Phillip's First Commission, 12 October 1786, *HR4*, Ser.1, Vol.1, p.1; Governor Phillip's Second Commission, 2 April 1787, *HR4*, Ser.1, Vol.1, p.7; Standard Form: The Crown jealously guarded its ability to control its foreign land holdings from Parliament via the direct authority of the Privy Council and the succession of committees, Councils of Trade, Foreign Plantations and Home and Colonial Offices; Jenks, E., *The Government of Victoria (Australia)* (London, 1891) pp.2-7; Gubernatorial Commissions: Windeyer, W. J. V., 'Responsible Government - Highlights, Sidelights and Reflections', *JRAHS*, Vol. 42, 1956, Pt.6, 257, cited in McLaughlin, J. K., *The History of the Magistracy in NSW, 1788-1850*, LL.M thesis, University of Sydney, 1973, p.26; for example the Letters Patent issued to Sir Walter Raleigh in 1584 and to Sir Ferdinando Georges as Governor of Maine in 1639.

<sup>2</sup> As evidenced by the commissions issued to Sir Thomas Modyford in Jamaica in 1663 and to Captain Osborne, Governor of Newfoundland in the 1720s, see McLaughlin, J. K., *op.cit.*, p.30

‘secondary consideration’. Whitehall was indeed ‘not yet interested in the experience of convicts outside Britain’.<sup>3</sup> The loss of the American colonies and the inadequate system of domestic convict storage forced the English Government to look for a place to hide its convict classes. Legislation authorised this societal cleansing. All that was needed was to choose a place that would accommodate this social refuse. The type of society that was formed in the Colony of New South Wales, given these origins, made it something of a social novelty: white convicts would enjoy conditions of slavery in a society specifically created for that purpose.<sup>4</sup> The proposition that the Australian colonial convicts were ‘slaves’ and that the new settlement was a slave society, must be qualified. Unlike slaves, the convict’s bondage was fixed and convict children were ‘free’. The convict was subject to due process of English law and could not be flogged, struck or otherwise assaulted by any assigned master. Australian convicts could take part in legal proceedings, give evidence, sue and be sued, and at times during the colonial period, own property. Assigned convicts could also earn wages. The convicts were however ‘the property of the Governor of New South Wales’ and he could assign, oversee, remit, reprieve or pardon them according to his will.<sup>5</sup> Critically however, the widely held contemporary *perception* that the convicts lived a slave-like existence and produced a slave-based society and economy operated as a self-fulfilling prophesy.

Charles Darwin examined the partially developed society begun by this settlement. In January 1834 he criticised the ‘rancorously divided’ colonial society for its moral bankruptcy, the mixing of the classes, the avarice and greed that replaced a love of literature and the ‘uninviting

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<sup>3</sup> Other factors: see Buckley, K., & Wheelwright, T., *No Paradise for Workers: Capitalism and the Common People in Australia 1788-1914* (Melbourne, 1988) pp.33–34; Secondary consideration: Shaw, A. G. L., *Convicts and the Colonies* (London, 1966) pp.102–103, citing Instructions to Commissioner Bigge, January 1819, *HR4*, x, pp. 4ff; Not interested: Atkinson, A., *The Europeans In Australia: A History* (Melbourne, 2004) vol.2, p.65.

<sup>4</sup> Transportation Act, 24 Geo. III, c.56, August 1784; Heads of a Plan for effectively disposing of convicts, unsigned Pitt Cabinet document, August 1786, Nepean, CO 201/2:15 and HO 42/7:24; Hughes, R., *op.cit.*, p.66; Shaw, A. G. L., *op.cit.*, pp.45-49; Shaw, *op.cit.*, p.103; Hirst, J. B., *Convict Society and its Enemies* (Sydney, 1983) p.21.

<sup>5</sup> Hirst, *op.cit.*, pp.81–82, 58, 108–109, 120–124; Byrne, P. J., *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (Cambridge, 1993) p.20; Wages: Buckley & Wheelwright, *op.cit.* p.45; Property: Atkinson, *op.cit.*, p.67.

aspect of the country'. Darwin represented the world-view of the educated English gentry class. He believed the 'social contagion' that convicts brought with them would contaminate 'free' settler children. He believed that without assistance and intellectual pursuits, Australian society would deteriorate. There is no direct evidence that the contagion did infect the children, but the importance again rests in the perception that it would. The Superintendent of the Sydney Police and town magistrate William Augustus Miles believed that cross-infection would occur because familiarity would make it so.<sup>6</sup> Chief Justice James Dowling concurred. Because of man's insidious fascination with vice, he believed in the Medusa-like contaminating effect of convictism.<sup>7</sup> On some levels Darwin was undoubtedly correct.<sup>8</sup>

Forced English colonisation involved an equally forced transplantation of the class structure and the demarcation lines which existed between English classes. The perceptions held by the elite respectable portions of this class structure were crucial in setting new demarcation lines and attitudes in colonial society. The novel influences exercised by the penal nature of original white settlement in Australia and the new society it created can never be underestimated. In a society that demanded social status and patronage as the essential elements for success, a convict stain should have proved fatal to chances of success.<sup>9</sup> The transplantation of the office of the magistrate was part of the 'cultural baggage of the Governors, officials and settlers' that assumed that its efficacy in England would be replicated in a penal setting. The colonial society

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<sup>6</sup> Evidence before Select Committee on the Insecurity of Life and Property, N.S.W., *V & PLC*, 1844, vol.2, p.384; Sturma, M., *Vice in a vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (St. Lucia, 1983) p.1.

<sup>7</sup> James Dowling to Son, 16 February 1839, *Dowling Correspondence*, ML, A 486-1; see Sturma, M., *op.cit.*, pp.1-2.

<sup>8</sup> 'There are some very serious drawbacks to the comforts of the families the chief of these is perhaps being surrounded by convict servants. How disgusting to be waited on by a man, who the day before, was by your representation flogged for some trifling misdemeanour. The female servants are of course much worse; hence children acquire the use of the vilest expressions, & fortunately if not equally vile ideas'; Barlow, N., ed., *Charles Darwin's Diary of the Voyage of H.M.S. Beagle* (London, 1933), pp.376, 386-388, cited in Crowley, *op.cit.* (1980) pp.495-497.

<sup>9</sup> Hirst, J. B., *op.cit.*, Bentham, J., *Panopticon Versus New South Wales* (London, 1802) in Vol. 4, Bowring, J., (ed) *The Works of Jeremy Bentham* (Edinburgh, 1843) 11 Vol; Success: Buckley & Wheelwright, *op.cit.*, pp.34-35.

that sprang from the English settlement was to be a society in perpetual transition,<sup>10</sup> from the penal convict-slave, to a free settler colony.<sup>11</sup> This transition involved the diffusion of the 'corrupting effects of the absolute power' held by the master class in early Australian colonial society.<sup>12</sup> This transitional process relied heavily upon the office of the magistrate. The magisterial officeholders began as the primary enforcers of order maintenance in the penal society and eventually developed into the chief organ of social control necessary in free colonial settlements. This transition process and the role played by the office of the magistrate were not entirely unique to Australia and are comparable to other 'slave' societies of the period.<sup>13</sup> In the colonies of Jamaica and Belize, the transition from slavery to emancipation, is an example of other 'non-free' colonial societies that experienced this process. The magistracy is unusual in that it played a role throughout this perpetual transition. Other institutions came and went, or underwent significant change, while a magistracy that would remain recognisable to earlier generations continued to function, chiefly due to its plasticity. The magistrates played a crucial role in the construction of convict society and the attempt to reproduce English society in early New South Wales.<sup>14</sup> The class-parish-Crown belief matrix held by the magistrates of England was to give way to a distinctive colonial disposition, mainly because of the dominating effect of slaves in colonial settlements.<sup>15</sup> It is interesting to compare the Jamaican experience, their transition process and the role played by magistrates. The English *Emancipation Act* declared that on midnight 31 July 1834 slavery was to be abolished. In Jamaica, all children under the age of six were to be immediately freed and all registered slaves were to be apprenticed to their former

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<sup>10</sup> Cultural Baggage: Barlow, L., *op.cit.*, p.51; Transition: One of the markers in this process of transition has been seen as the arrival and Government of Macquarie that coincided with a growth of free immigration and the greater prevalence of women within the colony, Molony, J. N., *An Architect of Freedom* (Canberra, 1973) p.11.

<sup>11</sup> The 'social character' of the early penal settlement had again further changed by the time Gipps undertook his period in office, another 'transitional' segment of change within the colonies; Molony, *op.cit.*, p.32.

<sup>12</sup> Hirst, *op.cit.*, p.23-24.

<sup>13</sup> Governor Macquarie in correspondence to his brother described the convict system 'at best a state of slavery', 7 and 19 October 1819, National Library Canberra, cited in Shaw, A. G. L., *op.cit.*, p.103.

<sup>14</sup> Hirst, *op.cit.*

owners. Thirty-three Special Magistrates, newcomers to the settlement, were appointed to govern the transition process and to adjudicate in disputes.<sup>16</sup> The Colonial Office believed that the newcomers would be able to adjudicate in an impartial fashion and be independent. It did not take into account local realities: an inclination to sympathetically treat members of their own race and class and their physical dependence upon the kindness of the local gentry for accommodation and simple conversation. Magistrates who favoured the planters were treated well by them; those who attempted impartiality were nicknamed *Buckra Magistrates* and were often physically attacked by planters who saw them as class and race traitors.<sup>17</sup> In 'Her Majesty's Settlement of Belize in the Bay of Honduras' the settlers developed the unique practice of popularly electing seven of their members to serve as magistrates for the year.<sup>18</sup> Responding to this act of colonial reformation, the Colonial Office warned these magistrates to remember their place as subjects of the Crown. Interestingly, George Arthur, later Governor of Van Diemen's Land, saw service as Superintendent in Belize during this same period of transition. The Colonial Office ended the unique colonial experiment of popularly elected magistrates in 1832.<sup>19</sup> The Belize version of the unpaid magistrate was abolished in 1846 in favour of Stipendiary Police Magistrates. Superintendents and Governors undertook future appointments via a special

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<sup>15</sup> Hirst, *op.cit.*, p.28; Gunson, N., (ed.) *Australian Reminiscences and Papers of L. E. Threlkeld* (Canberra, 1974) 2 Vols., p.180.

<sup>16</sup> The magistrates were paid 300 pounds per annum (later increased to 450) and were normally army or navy officers on half pay who were new to Jamaica and therefore apparently uninfluenced by the local assemblies, free from local passions; Abrahams, P., *Jamaica: An Island Mosaic* (London, 1957) pp.82–83.

<sup>17</sup> Realities: Poor conditions under which the 'stranger' magistrates worked, their insufficient salary, their lack of clerical assistance; Abrahams, P., *op.cit.*, p.83, quoting Hall Pringle; Buckra magistrates: Abrahams, P., *op.cit.*, p.84.

<sup>18</sup> These seven magistrates in turn would elect one of their number to serve as a Senior Magistrate. Originally, only white settlers were able to vote in the Public Meeting proceedings. The Belize magistrates enjoyed both executive and judicial powers, similar to Deputy Judge Advocate Collins at the Sydney, Port Phillip and Derwent settlements. The Belize magistrates prepared legislation for the 'Public Meeting' and presided over the colony's three courts, the Grand Court, the Summary Court and the Slave Court. For a short period in 1800, the Public Meeting created the salaried post of Police Magistrate at an annual salary of 300 pounds. In 1809, qualifications were formally established for the post of magistrate: to be white, British born and own a minimum of 500 pounds in property; Rodwell-Hulse, G. (J.P.), *A Brief History of Justices of the Peace in Belize*, in *Justice of the Peace Manual* (Belize, 1999) Government Publications, p.1.

<sup>19</sup> See Royal Proclamation, 13 December 1819, George III to George Arthur and the Belize Magistrates; It claimed that such a practice did not exist in any other part of the King's dominions and was contrary to and 'subversive of the principles of good government'; Rodwell-Hulse, G. (J.P.), *op.cit.*, p.1.

commission under the public seal with jurisdiction either in a specific district or throughout the colony as a whole.<sup>20</sup>

As slavery was an essential element of Caribbean colonial society, so convictism and penal influences are central to any assessment of the cultural mores of colonial Australian society. Colonial Australia however did not have the benefit of legislation or revolutionary war that would free an underclass and distinguish them as free and equal citizens in a new society. In colonial Australia the lower orders were always perceived to be unrepentant vile debauched creatures whose appetites ran to loose living, alcohol and theft. The labour market and its management practices were firmly imprinted with the stamp of convictism and the notions that were attached to it. There had been a similar effect in the American colonies prior to the Revolution, where transported convicts were 'assigned' to settlers. These American settlers enjoyed an enforceable legal proprietary interest in the convict during their period of assignment. The American colonial economy was dependent upon both English convicts and free indentured white labourers, who were cheaper than African slaves.<sup>21</sup> The essential difference between the American and the Australian position was the moral presence of an established free settler society in the American colonies that would check the 'contamination' process of the convict portion of society.<sup>22</sup> Exile, a concept foreign to the common law, had been introduced in the 39th year of the reign of Elizabeth I. Transportation was later first codified by 18 Chas. I c.3. It was specifically enacted for 'the purposes of removing persons to His Majesty's possessions in America'. These transportees were bound to penal labour and to be 'slaves' on the estates of

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<sup>20</sup> Rodwell-Hulse, G. (J.P), *op.cit.*, p.2.

<sup>21</sup> American Colonies: Shaw, A. G. L., *op.cit.*, pp.30-31, citing Douglas, D. C., *English Historical Documents* (London, 1953) vol. viii, ix, p.460-461; Simpson, H. B., 'Penal Servitude, its Past and Future', *LQR*, xv (1899), pp.41-42; Ekirch, R. A., *Bound for America*, *op.cit.*; Colonial Economy: The pre-revolutionary American colonial labour market was in fact often serviced by English magistrates who used their office to illegally transport felons or to 'convince' defendants to take the transportation option rather than the rope; Shaw, A. G. L., pp.31-32, citing Douglas, D. C., *op.cit.*, pp.481-491; Morris, R. B., *Government and Labor in Early America* (New York, 1946) p.313, 328, 409, 412, 468; Bruce, P.A., *Economic History of Virginia in the Seventeenth Century* (New York, 1896) I, ch.9, pp.603, 608.

<sup>22</sup> Hirst, *op.cit.*, pp.12-14; Bentham, J., *Works*, *op.cit.*, Vol.4, p.214.

planters in those settlements. Even though there were great labour shortages, there was some objection from the inhabitants of Barbados, Maryland and New York to the 'letting loose upon the New World the outcasts of the Old'.<sup>23</sup> It has been argued that because those transported to the established settlements of freemen in America were assimilated into ordered 'free' communities populated by 'men of thrift and probity' and because the transportees were dispersed, they would soon lose their predilection to vice and be reformed. The Molesworth Committee compared this to the situation in colonial New South Wales where without an established civilian superstructure, the vice and immorality of the transportees was only accentuated by their new circumstances.<sup>24</sup> The Transportation Act, authorized transportation during the mid nineteenth century. The Act also gave a proprietary interest in the services of a transportee to the Governor of a penal colony.<sup>25</sup> The Governor was also invested with powers of absolute or conditional remittances and controlled the labour market through direct control over the labour supply. This was an especially important feature in labour intensive rural industries and dictated both the expansion abilities and settlement capacities of capitalist developers in the early settlements.<sup>26</sup>

Newly arrived convicts in the Australian colony, in keeping with the proprietary nature of the Crown-convict relationship, were classified and distributed as labour to settlers as assigned servants or as government workers.<sup>27</sup> Critically, the early convict imprint on the Australian colonial labour market was discernible in the later magisterial employment adjudications, because the magistrates could never divorce themselves from the idea of the convict origins of the labour

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<sup>23</sup> The Molesworth Committee (1838) on the Origins of Transportation, extract cited in Bennett, J. M., & Castles, A. C., *A Source Book of Australian Legal History* (Sydney, 1979) p.1; Ekirch, *op.cit.*, pp.167-193.

<sup>24</sup> Bennett & Castles, *op.cit.*, p.2.

<sup>25</sup> 5 Geo. IV c.84; Molesworth Committee, Bennett & Castles, *op.cit.*, p.2.

<sup>26</sup> Remittances: 9 Geo. IV c.83; 2 & 3 Will. IV c.62; Control Labour Market and expansion: Davidson, A., *op.cit.*, pp.19-31, especially p.30.

<sup>27</sup> Molesworth Committee, Bennett & Castles, *op.cit.*, p.3.

force. This prejudice developed during the assignment system when the colonial magistrates exercised jurisdiction similar but foreign to their English brethren.<sup>28</sup> Matters commonly brought before the magistrates involved disobedience and neglect,<sup>29</sup> insolence<sup>30</sup> and absconsion.<sup>31</sup> These charges were also later frequently laid against 'free' servants within the Port Phillip District where one senses a similar mind-set amongst the magistracy. It was believed that the rural working class was functionally compromised: a wholly masculine environment, devoid of female companionship, their vileness descended to great depths, without respite, redemption or hope for the future.<sup>32</sup> The commissions granted to Phillip placed 'despotic' powers in his hands. He could rule as 'he thought fit' and be assisted 'as the occasion may require' by the bench of military justices.<sup>33</sup> Phillip and his successors were deemed to exercise authority over a vast area. Whatever the precise definitions, the territory devolved to the Governors of New South Wales was an immense tract of land.<sup>34</sup> The white settlements were to expand across these lands and

<sup>28</sup> Crowley, F., *A Documentary History of Australia* (Melbourne, 1980) vol.1, p.445.

<sup>29</sup> *R v Martin Birmingham*, 2 July 1833, Muswellbrook 4/5599, Magistrates' Bench Books, involving a slow blacksmith who also received guests in his quarters contrary to orders, sentenced to 50 lashes, in Crowley, *op.cit.*, p.445.

<sup>30</sup> *R v John Turner*, 16 December 1833, Picton 4/5626, Magistrates' Bench Books, involving an assigned servant of the Macarthur's who talked back to the overseer concerning wheat stack positioning, movement at dinner time and refusal to work, was sentenced to 50 lashes, in Crowley, *op.cit.*, pp.445-446.

<sup>31</sup> *R v Mary McDonald*, 7 February 1831, Stonequarry 4/7572, Magistrates' Bench Books, involving a female assigned servant who had been impertinent to her mistress and negligent in work and had absconded, was sentenced to 6 months to the Third Class of the Female Factory and then returned to her Master thereafter, in Crowley, *op.cit.*, p.446.

<sup>32</sup> 'They constitute a peasantry unlike any other in the world; a peasantry without domestic feelings or affections, without parents or relations, without wives, children, or homes: one more strange and less attached to the soil they till, than the Negro slave of the planter'; *Great Britain, Parliamentary Papers*, 1837-8, vol. XXII, Paper No. 669, p.xxxi.

<sup>33</sup> Jenks, E., *op.cit.*, p.11; Davidson, A., *The Invisible State: The Formation of the Australian State 1788-1901* (Cambridge, 1991) p.21.

<sup>34</sup> All lands from the northernmost point of Cape York, to the southern portion of Van Diemen's Land; westward to the 135th meridian; including all adjacent islands in the Pacific Ocean; Castles, A. C., *An Australian Legal History* (Sydney, 1982) p.25; There is evidence to suggest that the adjacent islands referred to in the commissions, which specifically included Norfolk Island, also included New Zealand. In fact early Australian Governors appointed magistrates for both New Zealand and Tahiti. On 16 November, 1814, Governor Macquarie placed Thomas Kendall, missionary, upon the commission of magistrates to be justice of the peace at the Bay of Islands and throughout the Island of New Zealand. Likewise, William Henry, another missionary, was also made a justice of the peace for Tahiti and their adjacent islands: *HR4*, Ser. IV. Vol. I, p.112; *HR4*, Ser. IV., Vol. I, p. 56; No eastwards limitation was placed upon Phillip's territory and the meridian of Norfolk Island passes through the South Island of New Zealand and that it only lies four degrees eastwards; see Dr Frederick Watson, Editor *HR4*, Ser. IV, Vol. I, 913, n.45; although McLaughlin, *op.cit.* pp. 197-200, is

later into tracts further than those originally anticipated by the Crown. The frontier nature of the colonial period is another critical theme in understanding the process of white domination of the Australian Continent. The Crown sought to limit, control and organise the process of settlement and the expansion of the settlement into the 'waste-lands'. It also sought to plan the process of expansion and the transplantation of the ordered English system of governance via class division and distinction that maintained the Crown and its claim to govern. Colonial receptivity to this societal form required the installation of the inorganic forms of social control, the bureaucratic offices and officials, who provided the Crown with the methodology of control and class domination. The transplantation of the English version of the office of the magistrate played a crucial role in this project.

## DAVID COLLINS AND THE FIRST AUSTRALIAN MAGISTRATES

AUSTRALIA'S FIRST JUDICIAL officer and Chief Magistrate was Deputy Judge Advocate David Collins. Collins is important in that he directly effected the transmission of the English magisterial office to Australia in the three colonies he was eventually to direct in both judicial and executive capacities. Collins was of 'gentle' birth.<sup>35</sup> His father was Major General Arthur 'Tooker' Collins. It was through *his* career, position and influence that Australia eventually found its first judicial officer.<sup>36</sup> David Collins grew up in Exeter and joined the Marines as soon as he was able.<sup>37</sup> He saw service in the American Colonies at Boston Common and at the battle of

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probably correct in his conclusions that such a proposition does great violence to the word 'adjacent'; see also, Bill Gammage, 'Early boundaries of New South Wales', *Historical Studies*, vol.19, no.,77 October 1981, pp. 524–531.

<sup>35</sup> Born in London on 4 March 1756, he was the eldest surviving son of a family with forebears that included Christopher Colyns the Constable of Queensborough Castle and Francis Collins, an executor and legatee of William Shakespeare. His ancestry also included his 'profligate' great-great grandfather, William Collins of Kenilworth, who rendered the family almost destitute. His great grandfather, John Collins, made the family 'respectable' again. His grandfather, Arthur Collins, who as a genealogist, antiquary and publisher kept the family linked to the moneyed and influential classes, did not, however, gain patronage; Currey, J., *David Collins: A Colonial Life* (Melbourne, 2000) p.3, p.12.

<sup>36</sup> Currey, J., *op.cit.*, pp.3–8; Arthur Collins after marrying Elizabeth Tooker, daughter of Dr John Tooker of London, affixed the name Tooker.

<sup>37</sup> He was 'taught the fundamentals of a liberal education' at Reverend John Marshall's Grammar School. His immediate

Bunker Hill. After this and on his father's orders he was appointed Battalion Adjutant, a 'paper soldier', a role he would fill for the rest of his life. After the English evacuation of Boston, he was removed to Nova Scotia where he met and married Maria Stuart Proctor. Her father was a merchant, one of the 'founders' of Halifax, a member of the Legislative Assembly, and a magistrate.<sup>38</sup> Collins was ordered to England in 1777. By July 1780 he was promoted to Captain. Under the terms of the Treaty of Versailles he was placed on half pay and his financial position became precarious.<sup>39</sup> By 1786 he was encouraged by his father to apply for a position with the First Fleet Expedition. Richard Howe was then First Lord of the Admiralty. David Collins' father had served with Howe's brother as a comrade-in-arms for many years. On Howe's recommendation to Lord Sydney, David Collins was appointed Deputy Judge Advocate of the penal colony of New South Wales. He had no legal training and had no 'acquaintance with the law', save for his experience of military law. He therefore 'swotted' furiously prior to his departure.<sup>40</sup> The Georgian system of placing 'connections' ahead of talent to secure advancement once again prevailed in the selection of Australia's first legal officer.

The first magistrates or justices of the peace appointed for the new colony recited their oaths of office before Deputy Judge Advocate Collins on 12 February 1788. These were Surveyor-General Alt, Captain (later Governor) John Hunter for the settlement of Port Jackson, and Lieutenant (later Governor) Phillip Gidley King for Norfolk Island. In central Sydney, two justices were to constitute the magisterial Bench with jurisdiction to hear and determine all summary matters.<sup>41</sup> Governor Phillip enjoyed a power to review these decisions and could also

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childhood influences were military, and at 14 he joined his father's division the 3rd Marines as an Ensign. He was promoted in 1771 to the rank of second lieutenant. His father had become Plymouth Divisional Commandant in 1772; Currey, J., *op.cit.*, pp.12–14; his three brothers also joined the Marine Corps.

<sup>38</sup> Currey, J., *op.cit.*, Service to Bunker Hill: pp.16–23; Halifax: pp.23–25.

<sup>39</sup> This proved to be a consistent theme in his professional life.

<sup>40</sup> Currey, J., *op.cit.*, pp.28–31.

<sup>41</sup> It has been argued that some were in fact appointed in England prior to the Fleet sailing whilst others were placed on the Commission of Peace once they arrived at the new settlement, see Cuthill, W., *The Magistrates' Court, Melbourne*,

remit sentences of transported felons.<sup>42</sup> Collins had received two judicial commissions; one as Military Judge Advocate, the other as Judge Advocate within the settlement.<sup>43</sup> There have been some criticisms concerning the consistency of the sentencing patterns and the summary flavour of the adjudications of these twin systems.<sup>44</sup> Sittings began on 12 February 1788 with future criminal sittings arranged irregularly as the need arose.<sup>45</sup> The early Sydney and later Port Phillip magistrates also undertook coronial inquests, even though the Charter of Justice allowed for the special appointment of 'coronors' [sic]. Under this jurisdiction, the very first Australian coronial inquest took place before Augustus Alt on 14 December 1788.<sup>46</sup> The earliest magisterial Benches could also investigate specific matters ordered by the Governor or the Deputy Judge Advocate, under special commissions. One of the earliest of these was the investigation into convict complaints that they had been denied their proper ration of food whilst on board the convict ship *Queen*.<sup>47</sup> It is a matter of great significance, however, that the Australian colonial magistracy, in its very first deliberation, *Dease v Jackson*,<sup>48</sup> the court found in favour of the defendant convict

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MS000884, 248/1, Royal Historical Society of Victoria Library Collection, p.1, correspondence to Clerk of Courts, unpublished series of notes and commentaries by former Melbourne Chief Stipendiary Magistrate and last Police Magistrate for Melbourne, the late William Cuthill; Central Sydney: The justices would deal with charges during the week and deal with 'difficult' matters on Saturday, see Cuthill, *op.cit.*, p.1 of letter to Clerk of Courts.

<sup>42</sup> 30 Geo. III, c.47.

<sup>43</sup> Military personnel were dealt with by court martial whilst the magisterial jurisdiction would be exercised through the civil and criminal court; *HR4*, IV, I, pp.1–2; see Currey, J., *op.cit.*, p.53.

<sup>44</sup> Currey, J., *op.cit.*, pp.53–54; Nagle, p.83.

<sup>45</sup> Began: *HR4*, I, I, p.736; Irregular: 1788: 11 February, 27 February, 1 May, 26 May, 2 June, 10 June, 23 June, 16 July, 7 November, 17 November, 2 December, 1789: 10 January, 2 March, 25 March, 29 April.

<sup>46</sup> It investigated the death of convict Charles Wilson, whose body had been found on 11 December. After the autopsy, it was reported to the court that his internal organs were entirely empty of food: the court found death had been occasioned by starvation; Bench of Magistrates, Sydney, Heading: By Order of Robert Ross, Lieut. Gov. Inquiry into cause of death of Charles Wilson, a convict, found dead 11 December 1788, before Augustus Alt, J.P. for the County of Cumberland, p.116.

<sup>47</sup> After two days of investigations, depositions and testimony, the Bench of Collins, Alt, Johnson and Creswell, decided that there was insufficient evidence to proceed against any individuals and referred the matter to the Governor to dispose of as he thought necessary; *HRNSW*, Vol. XI, 453, 17 October, 1791, cited in McLaughlin, *op.cit.*, p.39.

<sup>48</sup> Bench of Magistrates, Sydney, Minutes of Proceedings, February, 1788-January, 1792, *NSW4*, 1/296, 1; see Currey, *op.cit.*, p.50.

woman. The defendant, Mary Jackson, was defending an allegation by a non-convict sailor, Edward Dease, that she had improperly detained his property. Likewise in the colony's first civil action, *Cable v Sinclair*,<sup>49</sup> which involved a convict Henry Cable suing Duncan Sinclair, the non-convict Master of the transport *Alexander*, seeking damages for a lost parcel of clothes, the convict succeeded and was awarded 20 pounds by the court.

The magisterial office was pivotal to the successful domination of the Australian landmass by Europeans. This subjugation could not have been achieved without the unique qualities of the magisterial office. Most importantly, it was only achieved by manipulating that office to suit the vicissitudes of frontier life in a penal settlement. It was envisaged that once a better class of citizens were attracted to the colony, a less despotic and militaristic form of judicial administration would emerge.<sup>50</sup> The First Charter of Justice authorised the Gubernatorial prerogative to appoint men to the magistracy. This gave the Australian magistrates the same responsibilities as their English brethren.<sup>51</sup> The Second Commission issued to Phillip<sup>52</sup> detailed those matters one would expect from a document legitimising the settlement of a new colony.<sup>53</sup> The sixth instruction provided for the appointment of justices.<sup>54</sup> The leading members of the

<sup>49</sup> Castles, *op.cit.*, p.96 citing Minutes of the First Sitzings, facsimile in Watson, *Beginnings of Government in Australia* (Sydney, 1913) unpaginated; Hirst, *op.cit.*, p.81.

<sup>50</sup> Currey, J., *op.cit.*, p.54, citing Collins, *Account*, p.416.

<sup>51</sup> 'The same power to keep the peace, arrest, take Bail, bind to good behaviour, Suppress and punish Riots, and to do all other Matters and Things with respect to the Inhabitants residing or being in the place of Settlement aforesaid as Justices of the peace have within that part of the Kingdom called England within their respective Jurisdictions'; First Charter of Justice, *HR4*, IV, I, 6-12, cited in Castles, A. C., *An Australian Legal History* (Sydney, 1982) pp.67-68.

<sup>52</sup> Read out by Deputy Judge Advocate Collins before the members of the colony and an assembled crowd of convicts 'assembled like children sitting on the ground' in a ceremony on 7 February 1788, see Currey, J., *op.cit.*, pp.46-48.

<sup>53</sup> It described *inter alia*, the territorial jurisdiction, general instructions, described the necessary non Popish [Catholic] oaths and warnings against those recusants, the possession and Custody of the Great Seal of New South Wales, and granted the right to administer oaths; Governor Phillip's Second Commission, 2 April, 1787 from *HR4* I, p. 4.

<sup>54</sup> 'And Wee [sic] do hereby authorize and empower you to constitute and appoint justices of the peace coronors [sic] constables and other necessary officers and ministers in our said territory and its dependencies for the better administration of justice and putting the law in execution and to administer or cause to be administered unto them such oaths as are usually given for the execution and performance of offices and places'; Governor Phillip's Second Commission, 2 April, 1787 from *HR4* I, p. 4.

settlement included Governor Phillip, Lieutenant-Governor Robert Ross and Deputy Judge Advocate David Collins. Under the Charter and by virtue of their office they were all *ex officio* justices of the peace for the territory of New South Wales. This precedent would be followed throughout the colonial period. All future Governors, Lieutenant Governors and Judge Advocates were to be deemed *ex officio* justices.<sup>55</sup> This provision was repeated in the Second Charter of Justice, which stated that all of the future officeholders (together with the Deputy Judge Advocate) were to be considered justices 'within the territory and its dependencies'.<sup>56</sup> Those appointed to the commission of peace were authorised to summarily dispose of all minor criminal matters and public order offences within the new territories.<sup>57</sup> The matters brought before the Sydney magistrates and the later Port Phillip magistracy included offences which would become the bread and butter of the Australian colonial magistracy: insolence, disobedience, abusive language, stealing, absent from work, idleness, neglect of work, drunkenness and disturbing the peace. The matters were not serious, but the penalties were generally savage. This severity may have merely reflected the military composition and world-view of the early Sydney magisterial bench.<sup>58</sup> In *Re Barnsby*,<sup>59</sup> Samuel Barnsby, whilst drunk, abused and assaulted marines and guards, and was sentenced to 150 lashes. In *Re Hill*,<sup>60</sup> Thomas Hill, whilst hungry, stole a piece of bread and was sentenced to confinement in irons on bread and water for one week on the rock in Sydney Harbour, later known as Pinchgut Island. In *Re Cole*,<sup>61</sup> William Cole, whilst drenched, stole two planks of wood to shore up his tent and keep the

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<sup>55</sup>First Charter of Justice; see Bennett and Castles, *op.cit.*, p.25.

<sup>56</sup>Second Charter of Justice for New South Wales, Letters Patent, 4 February 1814; see Bennett and Castles, *op.cit.*, p.37.

<sup>57</sup> Golder, H., *High and Responsible Office: A History of the NSW Magistracy* (Sydney, 1991) p. 2.

<sup>58</sup> McLaughlin, *op.cit.*, pp.32-33; Therry, R., *op.cit.*, p.46.

<sup>59</sup> 11 February 1788; Currey, J., *op.cit.*, pp.49-50; Nagle, *op.cit.*, pp.86-88.

<sup>60</sup> 11 February 1788; Currey, J., *op.cit.*, pp.49-50; Nagle, *op.cit.*, pp.89-90.

<sup>61</sup> 11 February 1788; Currey, J., *op.cit.*, pp.49-50; Nagle, *op.cit.*, p.90.

rain out. He was sentenced to 50 lashes.<sup>62</sup> Collins and Alt either dealt with the matters summarily or committed the matters to the criminal court. Early examples of these summary dispositions included *Re Barnsby (No.2)*, where the same Samuel Barnsby was sentenced to 50 lashes for threatening a woman. In *Re Levi*,<sup>63</sup> Joseph Levi received 100 lashes for abusing and threatening an overseer. In *Re Stowe*,<sup>64</sup> James Stowe received 100 lashes for a breach of trust in not returning a possum, whilst in *Re Meredith*,<sup>65</sup> Frederick Meredith received 100 lashes for trading a bottle of rum for the said same possum.<sup>66</sup> The judicial mood in the colony hardened on 27 February 1788 with the colony's first execution. An execution was ordered for the protection of property and to serve as a warning to those who would steal food in a settlement that was slowly starving to death. Following the discovery of a conspiracy by four convicts to rob the public stores and steal 'butter, pease [sic] and pork', three convicts were sentenced to hang, whilst the fourth was to receive 300 lashes. Remissions were made and the convict population was eventually summoned to watch Thomas Barrett meet his end. The solemnity of the occasion was ruined however when the executioner refused to proceed. He relented when threatened that he would be shot if he did not continue.<sup>67</sup>

## THE ALPHABETICAL RESPONSIBILITY OF THE AUSTRALIAN MAGISTRATES

IN WHAT WAS to become Australia's first legal reference book (1835) and the leading

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<sup>62</sup> 11 February 1788; This decision was quashed on appeal to the Governor, Currey, J., *op.cit.*, pp.49–50.

<sup>63</sup> 21 February 1788.

<sup>64</sup> 22 February 1788.

<sup>65</sup> 22 February 1788.

<sup>66</sup> Currey, J., *op.cit.*, pp.50–51; Nagle, pp.93–96.

<sup>67</sup> Currey, J., *op.cit.*, pp.51–52 and Nagle, *op.cit.*, pp.96–98.

colonial magisterial handbook,<sup>68</sup> the duties of the Australian magistrate were described as being 'more arduous and complicated ... than in any other part of His Majesty's Dominions'. J. H. Plunkett labelled the magistrates themselves as 'the governor's men-of-all-work'. He observed that the wellbeing of the 'anomalous' community depended upon the proper discharge of the magisterial office.<sup>69</sup> Plunkett's summary of the powers of the colonial magistrate has entered the scholarly lexicon.<sup>70</sup>

The colonial magistrates became 'the pivot on which the administrative organisation of the settlement(s) turned'. They exercised authority over a convict population unknown to their British colleagues.<sup>71</sup> As part of the metamorphosis of the colonial magistracy from convict disciplinarians to regulators of a liberalised economy, the magistracy eventually undertook civil jurisdiction in small debts<sup>72</sup> and dominated the colonial labour market when conferred original jurisdiction over employment law adjudications.<sup>73</sup> The 'troublesome' nature of the English version of the magisterial office, given the huge responsibilities that the office entailed, was always in the forefront when commentators addressed the need for such an office. Blackstone maintained that their duties were

of such vast importance to the public as to make the country greatly obliged to any worthy magistrate who, without sinister views of his own engages in the troublesome service.<sup>74</sup>

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<sup>68</sup> Plunkett, J. H., *The Australian Magistrate, Or a Guide to the Duties of a Justice of the Peace for the Colony of New South Wales* (Gazette Office, Sydney, 1835).

<sup>69</sup> Plunkett, *op.cit.*, Preface.

<sup>70</sup> 'Because of the comprehensive range of the colonial government's activities, the justices of the peace, as the governor's men-of-all-work, became responsible for a range of duties even more extensive than those of their English counterparts'; McMartin, A. M., *Public Servants and Patronage* (Sydney, 1983) pp.75–76.

<sup>71</sup> Phillips, M., *A Colonial Autocracy* (London, 1909) *Thesis D.Sc.*, Faculty of Economics, University of London, reprint (Sydney, 1971) p.69.

<sup>72</sup> 57 Geo. III, c.15, 'An Act for the more easy recovery of debts in His Majesty's Colony of New South Wales', see Phillips, M., *op.cit.*, p.69.

<sup>73</sup> *Government Gazette*, 5 February 1820, enforcing English legislation 20 Car. II, c.19, see Phillips, *op.cit.*, p.69.

<sup>74</sup> Blackstone, *Commentaries*, I, IX, p.354.

Indeed the extent of this 'public service' was almost impossible to tabulate in England and later in the Australian colonies. Collation only became possible with the help of the alphabet.<sup>75</sup> Plunkett in his *Australian Magistrate* followed this alphabetical codification of magisterial responsibilities.<sup>76</sup> Traditionally, the English magisterial prototype tended to exude a caring, paternalistic image. As we have seen, the exemplar was the archetypal gentry country magistrate who, though lacking legal training, was practical, mindful of the welfare of his tenants and neighbours, and imbued with the overriding need to steward a peaceful law-abiding population. The English magistrate according to a Parish Reverend and Chairman of Quarter Sessions, was to

visit the cottages of the poor and by gentle modes of persuasion inculcate the necessity of sobriety, diligence, neatness and cleanliness, together with an economical management of the little earnings they obtain ... and in this way [there] will be established a firm and compact union between the different classes of society.<sup>77</sup>

The men who made up the ranks of the Australian colonial magistracy could not undertake this benevolent role, as they did not enjoy the circumstances and autonomy of their English prototype.<sup>78</sup> The duty-matrix favoured by the English gentry of class-parish-Crown was only possible because the rural gentry had captured the office in a process that had taken five hundred years. In the colonies, however, the magistrates and justices were entirely dependent upon the Governor's patronage. This favour and patronage was always subject to the fickle predilections of individual Governors.<sup>79</sup> The colonial magistrates were not initially wealthy; they were elevated to the Bench whilst in that period between the desire for wealth and its accumulation. The English prototype assumed that the unpaid magistrates could afford the time

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<sup>75</sup> 'Long ago lawyers abandoned all hope of describing the duties of a justice in any methodic fashion, and the alphabet has become the one possible connecting thread'; Maitland, F. W., *Justice and Police* (London) p.84.

<sup>76</sup> Plunkett, J. H., *Australian Magistrate*, *op.cit.*

<sup>77</sup> McLaughlin, J. K., *op.cit.*, p.7; Chairman of Quarter Sessions, Rev. John Foley, *Charges delivered to the Grand Jury 1798-1804*, quoted by Esther Moir, *The Justice of the Peace*, *op.cit.*, p.98.

<sup>78</sup> Finn, P. D., *Law and Government in Colonial Australia* (Melbourne, 1987).

<sup>79</sup> Example, Major Francis Grose dismissing the entire Sydney Bench of civil magistrates, Collins, Rev. Johnson, Surveyor Alt, see Currey, J., *op.cit.*, p.117.

to undertake the role; not being able to afford that time, the office would fall from the hands of the gentry gentlemen who understood the gravity of their position as law enforcers and into the hands of lesser men, who did not. Blackstone warned of

the burdensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting on the commission ... this trust [office], when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice or personal resentment.<sup>80</sup>

The Australian colonial magistracy could not effectively mimic the English gentry, nor receive that deference that had been accumulated by the English magistracy. The colonial magistrates were not members of that 'collective identity' that was the English gentry class. They were not members of a lesser nobility, they were not great property holders and they lacked a local elite substructure that would support their claim to public authority.<sup>81</sup> They were only able to maintain their status as a territorial elite through force of arms, government troops, the 'standard cat' and a Gubernatorial dictatorship occasioned by the lack of democratic representative government. The colonial magistrates, unlike their English cousins, owed no obligations to any particular region, parish or county. They were not emotionally *linked* to their surroundings and those appearing before them. One of the crucial components of the English gentry construct was the 'sense of territorial identity'. This identity linked a gentry family, not so much to itself through family lineage, but to a defined area.<sup>82</sup> Indeed, 'it is the ownership of place that is more important than the true descent of the lineage.'<sup>83</sup> The ranks of the early colonial magistracy, on the other hand, were filled with men who were young and eager to make money, like John Macarthur, or, like James Morrisett, old and twisted through regret and lost opportunities. Other than military connections and pretensions of being *gentlemen*, the early

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<sup>80</sup> Blackstone, *Commentaries*, IV, 20, p.11, cited by McLaughlin, J. K., *op.cit.*, pp.9–10.

<sup>81</sup> Coss, *op.cit.*, pp.1–19, especially p.11.

<sup>82</sup> *Ibid*, pp.202–215.

<sup>83</sup> Morgan, P., 'Making the English Gentry', in Coss, P. R. and Lloyd, S. D., (eds.), *Thirteenth Century England V*

Australian colonial magistracy was not a class-based office in the traditional English sense. Save for immediate self-interest they owed no specific class or district any allegiance. The military and civilian 'gentlemen' who took up a place on the colonial Bench also brought with them an uncodified 'code of honour'. These military and civilian gentlemen, in striving to establish themselves as a colonial elite, used the code, its duelling requirements and its inherently discriminatory practices to great advantage.<sup>84</sup> Critically, until they formed their own elite interest group the colonial magistracy were at the mercy of the respective Governors of the day. They technically owed an allegiance to he who had placed them 'upon the commission'.<sup>85</sup> It seems, however, that the military men owed more of an obligation in honour to their Regiments, fellow officers and benefactors in England, than to the colonial Governor. The clergy likewise owed obligations to benefactors that had brought them to the colony.<sup>86</sup> The magistrates' immediate future advancement and security lay in the Governor's hands and they indeed have been classified as 'more agents of the Governor than agencies of government'.<sup>87</sup> The colonial version of the English magistracy was therefore different in both officeholder and circumstance, and sufficiently different from that office from which it had sprung, to make it an entirely new office of social control.

Successive colonial governors felt that they owned the magisterial office. The appointment to the commission of the peace in early colonial times was by a series of documents, culminating in the formal appointment under the hand and seal of the colonial Governor. In this document, it is interesting to note the use of the phrase 'my Justice to keep His Majesty's peace'.<sup>88</sup> This indicates the claim to personal ownership of the office by successive

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(Woodbridge, 1995) p.25; Coss, *op.cit.*, p.203.

<sup>84</sup> Duffy, M., *Man of Honour: John Macarthur – Duellist, Rebel, Founding Father* (Sydney, 2003)

<sup>85</sup> The Governor's control over the office of the magistracy via his powers of appointment and dismissal, were not directly challenged by London until the 1820s; Phillips, *op.cit.*, p.75.

<sup>86</sup> Reverend Richard Johnson and Reverend Samuel Marsden benefactor William Wilberforce; Hirst, *op.cit.*, pp.16–17.

<sup>87</sup> Phillips, M., *op.cit.*, p.76; McLaughlin, J. K., *op.cit.*, p.36.

<sup>88</sup> Form of Appointment, William Henry, 18 September 1811; emphasis added; Bennett and Castles, *op.cit.*, p.24.

colonial governors. The candidate for the office would then make an Oath. This Oath included the obligation to

do equal right to the poor and the rich after my cunning, wit and power, and after the laws and customs of the realm and statutes thereof made. And I will not be of council of any quarell [sic], hanging before me; and that I hold sessions after the form of the statutes hereof made, and the issues, fines and ameriaments, that shall happen to be made, and all forfeitures, which shall fall before me, I will cause to be entered without any concealment or embezzling, and truly send them to the King's Exchequer in this Territory. I will not let for gift or other cause, but well and truly do my office of Justice of the Peace to be done, but of the King and fees accustomed and costs limited by statute.<sup>89</sup>

Interestingly, the magisterial applicant then had to make a Declaration, consistent with the directives of the Church of England, and further evidence of the linkage between the office of the magistrate and the religion of State, in the following terms,

“I, William Henry, do declare that I believe that there is not any transubstantiation in the Sacrament of the Lord's Supper, or in the elements of Bread and Wine, at or after the consecration thereof by any person whatever.”<sup>90</sup>

Furthermore, once the Courts of General and Quarter Sessions and Courts of Requests were authorised for New South Wales and Van Diemen's Land in 1823,<sup>91</sup> the rules of Practice and Procedure in these courts were declared *settled by the Governor* ‘with the assistance of the Chief Justice’.<sup>92</sup> This alone substantiates the argument that the office of the Governor in fact controlled the magisterial sessions. The magistrates were also warned, together with other officeholders, to take care in the discharge of their duties ‘at their peril’.<sup>93</sup>

The penal nature of the original settlements and the social cicatrize of such a childhood necessarily presented the respectable colonial enclaves with particular difficulties. They were in unique circumstances: the gentlemen justices of England in the eighteenth and nineteenth centuries did not face the twin obstacles of geographic and social isolation that their Australian

<sup>89</sup> Oath of Appointment, William Henry, 18 September 1811; Bennett and Castles, *op.cit.*, p.24.

<sup>90</sup> Declaration at Appointment, William Henry, 18 September 1811; *ibid*, pp.24–25.

<sup>91</sup> New South Wales Act, 4 Geo. IV, c. 96, s.19; *ibid*, pp.50–51.

<sup>92</sup> New South Wales Act, 4 Geo. IV, c. 96, s.21; *ibid*, pp.51–52.

<sup>93</sup> Third Charter of Justice for New South Wales, Letters Patent, s.23, 13 October 1823; *ibid*, p.58.

confreres experienced.<sup>94</sup> The colonial magistrate was not confined to small settled, green, fertile and familiar English parishes. The Australian justice of the peace endured perambulations through a bush-land that clung tenuously to an unforgiving earth. The distance between settlements also meant that succour and encouragement from fellow magistrates was never a practical reality. Contact with friends and relatives in England were a whole world away.<sup>95</sup> Instructions from the authority precincts in Sydney, Melbourne and Hobart Town were always weeks, if not months away. This geographical isolation was an important factor in the style of governance undertaken by the colonial magistracy and demonstrably affected both their personal and professional judgements. This was especially so in the early days of settlement where they always lived within the shadow of 'convictism'. This shadow was dark and ominous; it provided the magistrates with a tangible reminder of the class demarcations that defined the social bunkers they defended. As a result, strangers were viewed with suspicion. At a distance, the colonial magistrates could not easily distinguish bondmen from free. In appearance and clothing all strangers looked the same until the magistrate could determine the strangers' class.<sup>96</sup> In any analysis of the colonial magistracy, the frontier mentality of the parties, the reciprocal perceptions and the concomitant uneasiness that travelled with it, should never be underestimated.<sup>97</sup> In the main the English landed gentry had inherited the wealth that allowed their gentry magistrates the leisure time and ruling mentality required by their office. The circumstances of the colonial adventurer-magistrate, especially after 1820, were different. Most of these magistrates – especially the Police Magistrates who normally came from military backgrounds – were sparsely educated, poorly financed and barely 'gentlemen' by birth.<sup>98</sup> They

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<sup>94</sup> The 'tyranny of distance' effect was doubled geographically: within the colonies the lone magistrate had huge distances to cover and govern. The colonial authorities, because their magistrates were beyond direct control, were geographically obliged to place greater authority and confidence in the hands of their magistracy; Therry, *op.cit.*, p.48.

<sup>95</sup> In extreme examples, where magistrates were granted authority over vast tracts of sparsely populated regions, their loneliness and isolation was at times overwhelming. Examples of Foster Fyans and Henry Fyshe Gisborne.

<sup>96</sup> Hirst, *op.cit.*, p.104.

<sup>97</sup> The wonderful six-hour discussion with the late Emeritus Professor Alex Castles, 28 September 2001, Adelaide.

<sup>98</sup> Example of Christopher George Plunkett, brother of John Hurbert Plunkett, Solicitor General, Crown Prosecutor and Attorney General of NSW. He served in the military for many years. At age 50 went into semi-retirement as Police

were well enough connected, but poorly placed in terms of primogeniture. The colonial magistrate was normally the second or third son of a family that offered him aspirations, connections and table manners, but little else. He was to make his own way in the world. Alternatively he was the first born of a military family, a man who had actually fought the Empire's wars; who basked temporarily in the fleeting glory of parades and ribbons. He received accolades from the young wealthy gentry girls who swooned at his exploits but would rarely marry him. If he could not wed above his station and into moneyed gentility,<sup>99</sup> he needed a foreign posting that would enable him to rise above his financial station.<sup>100</sup> Men of this caste had traditionally used battle as a means for advancement. The decisions of bureaucracy and the timing of war were however, capricious. When wars were unavailable, foreign postings were their only chance to advance.<sup>101</sup> The military gentleman's sense of honour sometimes undid their most carefully laid career plans.<sup>102</sup> All Australian colonial magistrates who came from military backgrounds sang the same sad tune. Almost none came married from the mother country; all came under regimental orders to the 'fatal shore' with great expectations, hoping for advancement. Most wanted to go 'home' to England to die comfortably; others languished in the social purgatory of being an officeholder without a defined social class. Some did succeed in the colonies and returned home.<sup>103</sup> Those less fortunate died in the Antipodes becoming a scar in

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Magistrate at Kilmore in 1852, see Police Bench Report 1852, 52/2016, State Library of Victoria; Molony, J. N., *op.cit.*, p.3.

<sup>99</sup> George Collins, brother of David Collins, was a textbook example: After serving with the Marines in the West Indies George returned to England, wooed and married heiress Mary Trelawny, resigned from the Marines and settled down to a prosperous rural gentry existence, see Currey, *op.cit.*, p.27.

<sup>100</sup> Broken romances and the shame of a refusal often precipitated the decision to come to the Australian colonies. This was the case with John Hubert Plunkett; Molony, *op.cit.*, p.6, citing Charles Hubert De Castella Memoirs, uncat. Papers, ML.

<sup>101</sup> David Collins is a classic example of this, as his posting with the First Fleet and the Port Phillip-Van Diemen's Land settlement were made during cessations in hostilities, his appointment was due to patronage, see Currey, J., *op.cit.*, p.28.

<sup>102</sup> David Collins' youngest brother, Arthur 'Little Atty' Collins was killed in a duel whilst in service with the Marines in the West Indies, see Currey, J., *op.cit.*, p.135.

<sup>103</sup> William Lonsdale, George Augustus Robinson.

the family line that sadly experienced a colonial failure.<sup>104</sup> They would be mourned by a spinster sister and the gentry girl who had rebuffed his advances so many years before.<sup>105</sup>

## NEW RESPONSIBILITIES ADDED TO THE OLD

THE CONVICT NATURE of this colonial society also meant that the local justices undertook duties that were similar yet inherently unfamiliar to their English brethren: administration of the convict system is but one example.<sup>106</sup> The colonial magistrates became 'magnates' of a land without a heraldic lineage and would adjudicate master-assigned servant disputes out of the public eye in their meagre private residences – unlike their English magisterial cousins who held court in their salubrious parlours.<sup>107</sup> They punished those who shirked work in the stifling Antipodean heat, those who disobeyed orders or were insolent to their masters. The magistrates assigned convicts to settlers and granted tickets-of-leave. The entire process of assignment in the rural areas was under the control of the magistracy, exercised in the name of the government.<sup>108</sup> The remainder were assigned to colonists (including members of the magistracy) by the magistrates themselves.<sup>109</sup> In the exercise of this central duty, the magistrates were always technically under the control of the Governor. The Governors, however, were often reluctant to intervene and were incapable of regulating the process.<sup>110</sup> As the magistrate ruled the convict

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<sup>104</sup> Such as David Collins.

<sup>105</sup> This was Henry Fyshe Gisborne's tale.

<sup>106</sup> Their convict duties ranged from assignment to punishment. The punishments ranged from floggings, imprisonment, hard labour on road gangs, solitary confinement on bread and water and sentences of secondary transportation; *Government Order*, 10 September 1814; Phillips, M., *op.cit.*, p.70.

<sup>107</sup> Therry, R., *op.cit.*, p.47.

<sup>108</sup> Davidson, *op.cit.*, pp.40–42; In one Macquarie census the majority of convicts (55 per cent) were retained by the government for public works; Dryster, B., 'Public Employment and Assignment to Private Masters, 1788–1821', in Nicholas, S., (ed) *Convict Workers: Reinterpreting Australia's Past* (Cambridge, 1988) pp.128–136.

<sup>109</sup> See Table of Male Convict Distribution, 1814–1820, Bigge Report Appendix, reproduced in Shaw, A. G. L., *op.cit.*, p.92.

<sup>110</sup> Even when the Governors did decide to intervene in the routine of frontier magisterial order maintenance and

labour market he in fact dominated the colonial economy. His will constituted local government. He arbitrated master and servant disputes and would eventually set prices for commodities as well as wages. He collected fines, organised land auctions, co-ordinated road works, settled boundary disputes between squatters, granted public house licences and punished all who contravened his interpretation of government policy. The justice of the peace, obliged by the honour of being 'on the Commission', but still involved in the process of accumulating wealth, could spare but little time for the performance of magisterial duties.<sup>111</sup> This put at risk his ability to meet the overall ideal of his role.<sup>112</sup>

Many colonial magistrates received considerable rewards by virtue of their office. Reverend Samuel Marsden received favourable land grant terms because he was prepared to actively preserve public order in Parramatta as a magistrate.<sup>113</sup> Magistrates also received 'free' convict labour as servants, with the servant's ration coming from the Crown Commissariat.<sup>114</sup> Some magistrates quickly learnt to profit from this practice.<sup>115</sup> This profiteering is an indictment of a body of men who for two decades constituted the only apparatus available to apply the rule of law in Van Diemen's Land.<sup>116</sup> In early Van Diemen's Land the magistrates dealt with all

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economic regulation, they failed. Scrutiny and enforcement of the Gubernatorial edict was nearly impossible. One example of this was the attempt by Governor Macquarie to stop the sexual exploitation of female assigned servants by their male assignees. Macquarie ordered that only 'married' men with probity checks verified and supported by the local cleric and local magistrate would be able to receive female assigned servants. This 'safeguard' was hardly ever enforced; Golder, H., *op.cit.* p. 11, citing Select Committee on the State of Gaols, BPP, 1819, 7 (575), Evidence Riley: Q 45.

<sup>111</sup> Therry, R., *op.cit.*, p.325.

<sup>112</sup> The Magistrate of the District lives in the midst of the people, knows their characters and circumstances, and the different relations in which they stand to each other; with this practical knowledge, he is not so likely to be imposed upon by the unprincipled and designing, and possesses such means of deciding justly between the Parties as cannot possibly be obtained at a distance; HR4, I, 10, p.637, 633-648.

<sup>113</sup> HR4, I, 3, p.613.

<sup>114</sup> Phillips, M., *op.cit.*, p.75.

<sup>115</sup> In early Van Diemen's Land, for example, the practice developed where the magistrates would send out their free assigned servants, who were fed by the commissariat, to hunt for kangaroo. They would return with kangaroo meat and the magistrate would then sell it to the very same commissariat, always for a profit; Robson, L. L., *History of Tasmania*, I (Melbourne, 1983) pp. 68-69.

<sup>116</sup> From its settlement in 1803 until December 1815, when Edward Abbot commenced duties as Deputy Judge

criminal matters. The magistrates were the only legal officers in Van Diemen's Land.<sup>117</sup> Only the most serious charges were referred to Sydney for disposition.<sup>118</sup> The situation did not improve until the Supreme Court was established in Van Diemen's Land after 1823. Despite recommending a general increase in magisterial powers,<sup>119</sup> Bigge in his *Report* commented that the rule by magistrate alone in Van Diemen's Land, distorted the system of justice.<sup>120</sup> In the colony of New South Wales, it was during the term of Deputy Judge Advocate Richard Dore, a qualified lawyer, that the colonial magistracy also began taking for themselves a portion of the filing fees for issuing of summons in civil matters.<sup>121</sup> With the increase in civil debt matters appearing before the court, Dore appointed a bailiff at Parramatta.<sup>122</sup> Dore's magisterial court also exercised matrimonial jurisdiction and ordered maintenance payments for deserted wives and children. The Sydney Magisterial Bench was the only court to exercise this jurisdiction until 1840.<sup>123</sup> Sometimes the magistrates ordered a 'truck' payment system. Instead of an unsuccessful party paying damages, they were allowed to pay *in kind*. This occurred in *William Fitzgerald v Robert*

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Advocate of Van Diemen's Land, the entire island was administered solely by the magistracy; Bigge, *First Report*, *op.cit.*, p.110.

<sup>117</sup> Bennett and Castles, *op.cit.*, p.25.

<sup>118</sup> Bigge, *Second Report*, *op.cit.*, p.45.

<sup>119</sup> Hirst, *op.cit.*, p.107.

<sup>120</sup> The penalties which they [the magistrates] inflicted were far more severe than those being imposed on the mainland, and included transportation to the Coal River for three or five years, sometimes accompanied by an order that the convict should work there in chains, and flogging up to 300 lashes; Bigge, *Second Report*, *op.cit.*, p.45.

<sup>121</sup> This had been a common practice in England. Dore himself would pocket one third of these fees: one shilling for a claim under five pounds, two shillings for a claim over five pounds; McLaughlin, *op.cit.*, p.56.

<sup>122</sup> There is, however, some doubt as to the legality of the civil process at this time although there is evidence that Governor Hunter, who sat as a magistrate on the very same Bench from 1788 to 1791, agreed to the civil matters being disposed of by the Bench; Hunter to Dore, 7 December, 1798, *HR4*, Ser.1, Vol.II, 253.

<sup>123</sup> Consisting of Deputy Judge Advocate Dore, Reverend Johnson and Dr William Balmain, the first such recorded action was *Fox v Fox*. In that matter of Hannah Fox took action against her husband, Patrick Fox. She alleged that he had left her and her child 'destitute and unprovided for'. The court ordered that the said Patrick Fox allow and pay for her for the support of herself and Infant five shillings every week the first payment to commence on Saturday next and to continue every week weekly; Bench of Magistrates, Sydney, location, 1/297, pp.42,43, McLaughlin, *op.cit.*, pp.53-54.

*Evans*,<sup>124</sup> before the Sydney Bench comprising Deputy Judge Advocate Atkins, the Reverend Samuel Marsden, and Dr Harris.<sup>125</sup> Payment in goods was apparently a common feature of the early colonial period and indeed was the preferred method of payment by most convicts and servants.<sup>126</sup>

A seat on the Sydney Bench of magistrates was highly desirable. It gave the incumbent great prestige and provided an empowerment that only a commission of peace could give. In November 1806, for example, the Sydney Bench was comprised of the most powerful men in the colony.<sup>127</sup> These men represented an extraordinary concentration of power upon the Bench. Note the presence of the New South Wales Corps, firmly entrenched upon the central Sydney Bench of magistrates and the fact that Bligh installed his son-in-law on the Bench soon after his arrival in the colony. Interestingly, Bligh had a very low opinion of his chief legal officer, Deputy Judge Advocate Atkins, who, he felt, possessed some very human failings.<sup>128</sup>

The colonial magistrate was intended to be, like his English cousin, the representative of the Crown at the local level. Like his English cousin, although he owed his commission to the Crown, he would exercise independence that at times threatened the power of the Crown's

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<sup>124</sup> 2 March 1806.

<sup>125</sup> A labourer, William Fitzgerald, claimed six pounds twelve shillings for labour from his employer, Robert Evans. The debt was acknowledged and it was agreed that six bushels of wheat and the remainder in corn would be delivered to the successful plaintiff (the former employee) within fourteen days; Bench of Magistrates, Sydney, loc.1/300,17, cited in McLaughlin, *op.cit.*, p.57.

<sup>126</sup> Hirst, *op.cit.*, p.45.

<sup>127</sup> William Paterson, (Lieutenant Governor, Presiding), Richard Atkins (Deputy Judge Advocate), Major George Johnson (Second in Command, New South Wales Corps), the Reverend Samuel Marsden (Senior Chaplain, New South Wales), Dr John Harris (Senior Surgeon, New South Wales, naval officer and Controller of Police), Captain Thomas Houston (New South Wales Corps), Dr Thomas Jamison (Surgeon General, New South Wales) and Lieutenant John Putland (son-in-law and aide-de-camp to the Governor, Captain William Bligh); McLaughlin, *op.cit.*, pp.61–62.

<sup>128</sup> He was accustomed to inebriety; he has been the ridicule of the community; sentences of death have been pronounced in moments of intoxication; his determination is weak, his opinion floating and infirm; his knowledge of the Law insignificant and subservient to private inclination; and confidential cases of the Crown, where due secrecy is required, he is not to be trusted with; Bligh to Windham, 31 October 1807, *HR4*, Ser.I, Vol.VI, p.150, McLaughlin, *op.cit.*, p.67.

representative, the Governor. It occurred to the Governors that installing full-time paid stipendiary magistrates who owed their livelihood to the central government would partially ensure obedience from the non-salaried part-time justices of the peace. These men had practically developed their own class: the exclusivist 'Botany Bay Tories'. The solution was the office of a salaried Police Magistrate. This person would be allocated a district of about 60–100 square miles, on a salary of between 250 and 400 pounds per annum and would attend to all order maintenance and government business within their district. At their disposal was control of the force of Constables. The magistrates would attend magisterial hearings and provide monthly districts reports to the central government.<sup>129</sup> Unlike the English Police or Stipendiary Magistrates, who had to be barristers of seven years' standing, the colonial salaried magistrates had little or no formal legal training save for military tribunal experience during their time in the services.<sup>130</sup>

The moves to appoint full-time Stipendiary or Police Magistrates was resisted in the colonies as it had been resisted in England. Quite correctly the English magistracy saw the proposal as an attempt by the central government to break their piecemeal rule of England. The abuses of the corrupt portion of the English magistracy, labelled basket or trading justices, spoilt the domination enjoyed by the gentry dominated English magistracy. These urban magistrates, still striving to accumulate their fortunes, were novices in their approach to the office. Some contemporary accounts were quite scathing.<sup>131</sup> Their excesses led to the creation of the salaried, full time and relatively speaking lower caste magistracy in England under the Middlesex Justices

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<sup>129</sup> Therry, R., *op.cit.*, p.325.

<sup>130</sup> Barlow, L., *op.cit.*, pp.50–51.

<sup>131</sup> 'Generally the scum of the earth; carpenters, brick makers, and shoe-makers; some of whom were notoriously men of such infamous character that they were unworthy of any employ whatever; and others so ignorant that they could scarcely write their own names'; Golder, H., *op.cit.* p.6, citing Edmund Burke in Phillips, D., 'A New Engine of Power and Authority: The Institutionalization of Law-Enforcement in England, 1780-1830' in Gatrell, V. A. C., Lenman, B., and Parker, G., (eds), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (London, 1980) p.163.

Act 1792.<sup>132</sup> This legislation allowed for Police Magistrate offices to be established in the London metropolitan area.<sup>133</sup> The Act also stipulated that the newly appointed Police Magistrates were to be trained lawyers. This practice was not followed throughout England. By 1813, Manchester had only appointed one such person. The directive could also not be followed in the colonies because of the lack of lawyers prepared to sacrifice lucrative practices in exchange for an appointment to the magisterial bench.<sup>134</sup> The English honorary magistracy labelled the process of professionalising the magistracy and the constabulary that it controlled as un-English and decried those salaried magistrates as Continental Fouche spies. This argument was also used in the Australian colonies.<sup>135</sup> Fouche had been Napoleon's Chief of Police. He created a very efficient system of spy/informer networks that greatly assisted the police in the carrying out of their detective duties. The general feeling in England was that it would better that a few throats were slit than be subject to the constant surveillance and despotism inherent in Fouche's contrivances.<sup>136</sup> The English magistracy correctly accused the new paid appointees of being spies for the central government: the English police magistrates' initial salaries were in fact paid out of secret service funds. These arguments were replicated in the colonies.<sup>137</sup> It is interesting to note that as Superintendent of Police and as Chief magistrate, Wentworth was required to compile and maintain a register of Sydney households and family members as part of an intelligence gathering campaign.<sup>138</sup> This surveillance met with little success given the poor quality of the constabulary, the fact that most of the constables were ex-convicts and the absence of 'active

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<sup>132</sup> 32 Geo. III, c. 53.

<sup>133</sup> Golder, H., *op.cit.* p. 6.

<sup>134</sup> Golder, H., *ibid.* p.39.

<sup>135</sup> Neal, D., *Policing Early NSW*, Australian Historical Association, Biennial Conference, History '84 University of Melbourne, August 1984; Barlow, *op.cit.*, p.51.

<sup>136</sup> Halvey, E., *History of the English People in 1815* (London, 1924) p.44, cited in Shaw, *op.cit.*, pp.39–40.

<sup>137</sup> *Sydney Herald*, 16/11/1835, 'Fouche' spies; *Sydney Herald*, the stipendiaries were tools of the government, from Neal, *op.cit.*, p.125, citing Roe, *op.cit.*, n.27, pp.25–26.

<sup>138</sup> Phillips, M., *op.cit.*, p.78.

and vigilant magistrates' to oversee the process.<sup>139</sup> Likewise, when A. W. H. Humphrey was appointed Superintendent of Police / Chief Magistrate in Hobart Town in 1818, he also instigated a system of record keeping and *surveillance*. Commissioner Bigge favoured this approach.<sup>140</sup> It should be noted however, that non-stipendiary magistrates in the more settled Middle Districts of New South Wales had for years maintained extensive informer 'spy' networks. The 1804 *Castle Hill* uprising, for example, could have been avoided had Governor King heeded the intelligence gathered from the spy system operated by magistrates Marsden and Arndell.<sup>141</sup> This is a perverse observation, given the fact that the 1833 *Castle Forbes* uprising was centred on James Mudie's magisterial estate and was caused by his brutal management of the magisterial bench. Therry, as defence Counsel for the rebels recalls that they preferred death to returning to his service.<sup>142</sup> The argument has also been put forward that policing principles within this 'Convict Country' were necessarily different from those that governed the 'Mother Country' and that systems necessary to enforce those principles were also necessarily different.<sup>143</sup>

The colonial office sought to promote and sponsor greater civic responsibility amongst its colonial Tories. It appeared to be trapped in its world-view that gentlemen must rule as part of the 'duty' component of the rules and customs of their class. The gentry of the colonies must according to the rules of nature, seek out positions of authority. The honorary magistracy was theirs for the asking. According to the Colonial Office the ratio of 29 paid stipendiaries out of a total of 238 men on the commission of peace in 1834,<sup>144</sup> was an insult to the English ruling classes. The colonial elite were perceived as social slackers for not undertaking their rightful

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<sup>139</sup> Shaw, A. G. L., I, *op.cit.*, p.80.

<sup>140</sup> Golder, H., *op.cit.* p. 40.

<sup>141</sup> Gallagher, J. E., 'The Convict Rising at Castle Hill 1804' (B.A. Hons.) Thesis, University of New England, 1970, p.69, cited in Yarwood, *op.cit.*, p.98.

<sup>142</sup> Therry, R., *op.cit.*, p.168.

<sup>143</sup> Brisbane to Bathurst, 8 February 1825; G.O HRNSW, vii, 398, 405; in Shaw, *op.cit.*, p.197.

<sup>144</sup> Neal, *op.cit.*, p.125 citing *Report of the Committee on Police and Gaols*, Appendix.

place in society's power structure; they should understand that with the benefits of wealth and power, there were also responsibilities to maintain the cheap and reliable organs of social control that had served England well for 500 years. The Colonial Office remonstrated with the idle colonials.<sup>145</sup> One member of the ruling elite, Roger Therry, former Attorney General and Supreme Court Justice, viewed the office of the Police Magistrate in very romantic terms. He felt that the Police Magistrate became a friend to settlers in his district, who they would consult

in their little difficulties, abided by his opinion and advice in matters not strictly coming within the range of his magisterial jurisdiction, and he was in many ways their monitor and guide. His tribunal was quite a Cour de Conciliation. There were others of the same class who rendered similar service.<sup>146</sup>

Neal concludes that the installation of paid stipendiary magistrates did little to change the ultimate composition of the magistracy. The 1839 Committee thought them only a temporary expedient measure. There was little change as the appointees were ex-military staff and sons of the ruling elite.<sup>147</sup> The magistrates who testified before the 1839 Committee, swore that both the stipendiary and honorary magistrates shared similar class interests.<sup>148</sup> Indeed other testimony before the Committee, confirms the fact that the system of rule by elite continued whether the magistrate was paid or independently wealthy.<sup>149</sup> The New South Wales Legislative Council eventually decided the issue concerning the office of the salaried Police Magistrate. In one of its

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<sup>145</sup> With reference to your observation as to the disinclination of the Inhabitants to give up their time to the discharge of Magisterial Duty, and the necessity which would therefore exist for a future augmentation, if convicts continued to be sent out in large numbers, I think it right to acquaint you that His Majesty's Government will not feel at liberty to sanction the substitution of a stipendiary for an Unpaid Magistracy, excepting under peculiar circumstances, and that therefore Persons of Property, who may be otherwise qualified for the task, must not be encouraged to expect that they can be relieved altogether from a duty, which is required from them as much for their personal interests as for those of the Community at large; Lord Stanley to Governor Bourke, 17/5/1834, *HR* 4 I, XVII, p.430.

<sup>146</sup> Therry, R., *op.cit.*, p.326.

<sup>147</sup> Neal, *op.cit.*, p.126, citing Barlow, L., 'A Stricly Temporary Office: New South Wales Police Magistrates 1830-1860' (Law in History Conference, La Trobe University, 1985), n.52, pp.12-14.

<sup>148</sup> Messrs. Gisborne and Bushby, Testimony before Committee, p.73 and p.168.

<sup>149</sup> The appointment of paid magistrates was considered some time ago to be an attempt to remedy evils in the administration of the law at the inferior courts ... but I do not believe that it did any good. The police magistrate gets acquainted with his settler neighbours who are honorary members of the bench; and the same system goes on, only with this difference, that it is at second hand; Alexander Harris, Labourer, testifying before 1839 Committee, *op.cit.* N.45, p.228.

first legislative enactments it disallowed 'the salaries of these gentlemen, and thereby the abolition of the office of the Police Magistrate in the majority of the Districts'. There followed an interval, after which the office was re-instated.<sup>150</sup>

Commissioner Bigge approved of policies that promoted better convict record keeping, greater surveillance capabilities, stricter convict regimes including more severe punishment codes, and an expansion of the numbers and powers of the colonial magistracy. The Bigge Report and its recommendations were designed to strengthen the grasp over the convict population for a more efficient running of a continental panopticon. The recommendations are consistent with Bathurst's initial instructions and with the mentality and philosophy of the English Colonial Office during almost all of the eighteenth and nineteenth centuries. This philosophy was that Australia was and always should only be a receptacle for its criminals, the waste product of English society.<sup>151</sup> The incumbent magistracy fought against the implementation of the policy of appointing full time paid magistrates. They saw their social-judicial power base being eroded by the appointment of men over which they could exercise less than absolute control. This is consistent with the proposition that the colonial magistrates, like most people who possess power, are reluctant to surrender it.<sup>152</sup> The colonial New South Wales unpaid magistracy had however, asked for it. Apart from their attempts to politically dominate the colony there is evidence that they continually disobeyed Gubernatorial policies and superior judicial directions.<sup>153</sup> These directions came from the Government as General Orders and

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<sup>150</sup> Therry, R., *op.cit.*, p.326.

<sup>151</sup> 'Must chiefly be considered as receptacles for offenders, in which crimes may be expiated, at a distance from home, by punishments sufficiently severe to deter others from the commission of crimes, and so regulated as to operate the reform of the persons by whom they had been committed. So long as they continue destined by the legislature of the country to these purposes, their growth as colonies must be a secondary consideration, and the leading duty of those to whom their administration is entrusted will be to keep up in them such a system of just discipline as may render transportation an object of serious apprehension'; Letter Earl Bathurst, K.G., to John Thomas Bigge, Esq., 6 January 1819, Downing Street, printed House of Commons, 7 July, 1823; McLaughlin, *op.cit.* p. 209.

<sup>152</sup> Therry, R., *op.cit.*, p.164.

<sup>153</sup> Neal, *op.cit.*, p.123.

directly affected the magistrates in the disposition of matters before them. These binding Gubernatorial Ordinances specified, *inter alia*, convict regulation with respect to wages, clothing, hours of work,<sup>154</sup> the processing of ticket of leave,<sup>155</sup> and the number of lashes imposed for various offences.<sup>156</sup> The evidence suggests that they disobeyed these directions. They did not follow the ticket of leave instructions,<sup>157</sup> and did not abide by the lashing regulations,<sup>158</sup> by simply having a defendant charged with multiple variations of the same offence: a practice that is universally employed by prosecutors to this day. The arguments over the paid magistracy continued in newspaper editorials and in investigative committees. The emancipist editor of the *Sydney Monitor* reluctantly accepted the arguments in favour of a paid magistracy.<sup>159</sup> Interestingly the Committee on Police and Gaols claimed that the institution of a paid magistracy would interrupt the 'natural order of things' and that their removal would allow for the training of 'gentlemen' in the 'art of government'. This was meant to prepare those 'gentlemen' for a day when representative democracy would be allowed to flower in the colonies. It did recommend that because of the physical and social differences that existed between England and the colonies, given the fact that the colony did not have 'gentlemen' in suitable or requisite numbers, more practical solutions needed to be found.<sup>160</sup>

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<sup>154</sup> GGO, 7/12/1816.

<sup>155</sup> GGO, 9/1/1813.

<sup>156</sup> Police Regulations, *HR*A I, VII, 410; Circular to Magistrates 20/9/1814.

<sup>157</sup> GGO, 10/12/1814, *HR*A IV, I, 142.

<sup>158</sup> Bigge Report I, p. 100; New South Wales, *Report of the Committee on Police and Gaols*, Legislative Council, 1839, p.73.

<sup>159</sup> As to the salary, what is the expense of a salary to any country, in comparison to the inestimable advantages, the indescribable benefits of a pure, discreet, lawful administration of the law. The best money that a nation expends is that which is laid out in the administration of justice. Custom has given rise to many eulogiums on the unpaid magistracy of England, but those panegyrics have lately much called in question, and from the superior tact, discretion, diligence, and steadiness of the paid part of the English magistracy (the police of London to wit) over the unpaid, we ourselves are more than half converts to the cause of the paid; Hall, E. S., Editorial, *Monitor*, 13/1/1827.

<sup>160</sup> 'That the state and occupations of this community render it impossible in all cases as in the Rural Districts of England, to obtain the services of an unpaid magistracy. There is a marked distinction between a newly formed Society, thinly scattered over a wild and unimproved Country and all necessarily engaged in the active pursuits of life, and the mother country possessing in great numbers men of wealth, and leisure, ready to devote their time and talents to Public objects...where necessary for an efficient Police is rendered the more necessary from the absence of a resident Gentry';

## THE EMANCIPIST CONTROVERSY AND THE MAGISTRATES

MEMBERS OF BOTH the paid and honorary magistracy became embroiled in the class conflicts in New South Wales.<sup>161</sup> Two opposing social groups had developed in the colony: the exclusivists and the emancipists. The exclusivists were free respectable settlers.<sup>162</sup> John Macarthur originally led them.<sup>163</sup> They were variously known as the Exclusives, the Settlers, the Emigrants, the Party or the Pure Merinos.<sup>164</sup> They were bound essentially by the dogma that they must exclude all tainted by convictism from positions of power and respectability in the colonies. This discrimination and exclusion from public office was to apply to transported felons, emancipees and also to convict offspring. Some suggested that their freeborn native children, members of the *currency*, not be allowed to sit on juries. The power of the exclusivists must never be underestimated, as their doctrines spread a gossamer thin social web of respectability that arguably affects New South Wales society to this day. This group was powerful.<sup>165</sup> Indeed, the constant struggles between the emancipists and exclusivists ultimately cost Macquarie his job, provided Bligh with his undeserved historical epitaph, and forced Bourke to resign in desperation. This class warfare affected almost every aspect of early colonial life, from commerce to judicial administration, to the rules of social etiquette. There was a distinct

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New South Wales, *Report of the Committee on Police and Gaols*, Legislative Council, 1839, pp.58–59.

<sup>161</sup> Neal, David, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Melbourne, 1991): based upon his Ph.D. thesis.

<sup>162</sup> They were originally neither wealthy, respectable nor landed: eventually they became wealthy and landed and 'respectable' only in that peculiar Australian fashion where money allowed for all things to occur. At the base of the early exclusivists lay members of the New South Wales Corps. They received their first *real* economic advantage during the Grose administration with the extensive land grants and government 'allowances'; Currey, J., *op.cit.*, pp.117–118.

<sup>163</sup> 'Rum Corps officer and paymaster and the officers of the New South Wales or 'Rum Corps' who best displayed their embryonic elitism through their 'Anacreontic or Singing Society'; Currey, J., *op.cit.*, p.118.

<sup>164</sup> Therry, R., *op.cit.*, p.58 re 'pure merino'.

<sup>165</sup> Macarthur once warned the newly appointed Governor Darling (at their first meeting) that he always succeeded in disposing of any who were obnoxious to him, Governors included; Darling to Hay 10 December 1825, PRO, CO 323/146, f.128 ff.

military flavour to this class dispute; dipped in vice it provided an alluring condiment to colonial Australian society.<sup>166</sup> Typically, when Macquarie attempted to sponsor social intercourse between the two camps by 'forcing' emancipists upon dinner guests at Government House, Commissioner Bigge chastised him for being insensitive to 'social proprieties'.<sup>167</sup> Ironically, these new colonial elites were led by persons who themselves often came from undistinguished backgrounds and would have had difficulty entering polite society in England. Macarthur and Marsden came from 'embarrassingly humble backgrounds'. Sydney magistrate Captain Rossi, a Corsican with a poor grasp of the English language, unwittingly damaged the exclusivist cause by his support, 'for my part, no matter what crime man come to dis [sic] country, I never put my legs under one table wid [sic] him'. Major Mudie, magistrate, exclusivist and Lord of Castle Forbes, had been dismissed from the marines, was involved in stupid speculative ventures and was neither a gentleman nor a Major.<sup>168</sup> Australian colonial society and its magisterial class was indeed a prisoner of 'aspirational culture'. Aspirational culture, 'where whatever one's condition on arrival, to better oneself was a major object in life',<sup>169</sup> is not a unique feature of Australian colonial society. It is in fact a critical feature of all immigrant-based nations. In the Australian colonial context however, where free immigrants sought to distinguish themselves from the convict classes, establish a new, distinct and recognisable middle class and rise above whatever station birth had given them in their original homeland, the addiction to the 'culture of gentility' was uncontrollable.<sup>170</sup>

As there was no forum in the early Australian colony for political debate or for the

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<sup>166</sup> Therry, R., *op.cit.*, p.59.

<sup>167</sup> Neal, *op.cit.*, pp.19–20, citing *Bigge Report*, I, p.89.

<sup>168</sup> *Australian* 10 December 1830; Hirst, *op.cit.*, pp.148, 150–151; Macarthur's father was a draper, Duffy, *op.cit.*, p.11.

<sup>169</sup> Young, L., 'Extensive, economical and elegant: The habitus of gentility in early nineteenth century Sydney', in *Australian Historical Studies*, no.124, October 2004, p.201.

<sup>170</sup> Young, L., *ibid*, pp.202–203; Young, L., *Middle-Class Culture in the Nineteenth Century: America, Australia, Britain* (Basingstoke: Palgrave, 2003), ch.2.

resolution of competing political and economic interests, or a space where deals and class compromises could be made, the courts in early colonial New South Wales, especially the magisterial Bench, became the theatre where these issues could be played out.<sup>171</sup> The Rum Rebellion is a perfect example of this type of social dynamic. The New South Wales Corps, the 102nd Regiment, one of the most 'disreputable' of English military units,<sup>172</sup> had spent 16 years in a penal settlement and had itself become 'tainted' by convictism.<sup>173</sup> This only seemed to inflame its noted repugnance for authority. The Corps had also lost its reason through the inebrium of economic dominance provided by rum.<sup>174</sup> Without an impartial outlet for the resolution of competing economic, social and political interests, social eruptions will eventually occur in any society. Bligh because of his difficult personal disposition and his world-views became the scapegoat. For example, he viewed yeoman farming as the 'backbone of society'<sup>175</sup>, placing him in direct opposition to the alcohol-wool-commerce bund led by Macarthur,<sup>176</sup> the Corps and the exclusives. With Bligh's February 1807 ban on the barter of rum, notwithstanding a petition of support signed by a variety of settlers<sup>177</sup> and a warning from magistrate the Reverend Samuel Marsden,<sup>178</sup> the dysfunctional relationship between the two competing colonial ruling elites

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<sup>171</sup> Evatt, H. V., *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur of the NSW Corps* (Melbourne, 1971) (first published Sydney, 1938) p. 121.

<sup>172</sup> The New South Wales Corps included convicts and military prisoners within its ranks, and in general was not an appropriate choice for service in a penal colony, see Shaw, A. G. L., Shaw I, *op.cit.*, p.73, citing Collins, I, 395 (Sept.1794); Hunter to Portland, 10 August 1796; Portland to Hunter, 22 February 1797; George Suttor to Bligh, 10 February 1809; *HRNSW*, vii, 23; Shaw, A. G. L., 'NSW Corps', *JRAHS*, xi vii, p.128.

<sup>173</sup> Ex-convict 'emancipists' had been recruited into the NSW Corps since 1793, see Shaw I, *op.cit.*, p.75, citing Collins, I, p.260 (January 1793), p.391 (September 1794), p.455 (February 1796).

<sup>174</sup> Therry, R., *op.cit.*, p.74.

<sup>175</sup> Bligh to Windham, 31 October 1807, *HR4*, I, VI, pp.146-147, see Currey, *op.cit.*, p.50.

<sup>176</sup> Magistrate John Macarthur had received substantial land grants of 5,000 acres and 30 convicts from the Crown, see Shaw, *op.cit.*, p.74, citing Camden to King, 31 October 1804; King to Camden, 20 July 1805.

<sup>177</sup> Address of the Settlers to Governor Bligh, 1 January 1807, *HRNSW*, VI, pp. 410-411; Currey, *op.cit.*, p.50.

<sup>178</sup> Elder, J. R. (ed), *The Letters and Journals of Samuel Marsden 1765-1838* (Dunedin, 1932); Currey, *ibid*, p.50.

could only be resolved by force of arms.<sup>179</sup> The flashpoint for the rebellion and the overthrow of legitimate legal authority over mainland Australia would occur on the colonial magisterial Bench. John Macarthur was charged to appear before the Court of Criminal Jurisdiction. An attempt was made by Major Johnson to 'stack' the magisterial Bench in his favour. Governor Bligh then removed magistrate Captain Abbott from the commission. When he appeared before the Bench, Macarthur refused to recognise the jurisdiction of the court as the 'criminal' Deputy Judge Advocate Atkins was presiding. The military 'magistrates' sitting with Atkins then requested he be replaced. Bligh in response threatened to charge them with treason; before this could occur, Johnson arrested Bligh, carried out a coup d'état and formed an illegal military government. Even though Bligh received some disingenuous notions of support from one of his Lieutenant Governors,<sup>180</sup> his arrest effectively ended his tenure as Governor. One of the first actions of the junta was to dismiss all serving magistrates and reconstitute the members on the commission of peace. These new appointees were all dismissed by Macquarie upon his arrival in 1810. The Rum Rebellion stands as proof of the importance of the magisterial office in our colonial history. It was the field upon which the competing forces of legitimate and illegitimate lawful dominance played out their roles in a game of treasonable chance. The magisterial office was shown to be instrumental in terms of government structure. It represented a basic infrastructural tool of competing class interests that dominated colonial social warfare and governance. Bligh had ignored the economic interests of the Corps<sup>181</sup> and had therefore put the state on a collision course with its most powerful ruled class.

The Rum Rebellion was not however the first time the military sought to wrest authority from the lawfully constituted organs of government in Australia and to use the office of the magistracy as the vehicle by which it could install itself as a form of government. When Phillip

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<sup>179</sup> Currey, *op.cit.*, p.50.

<sup>180</sup> David Collins to William Bligh, 4 April 1808, *HR4*, I, vol.6, p.565, cited in Currey, J., *op.cit.*, pp.257–258.

<sup>181</sup> Therry, R., *op.cit.*, p.74.

departed the colony Major Francis Grose, the Lieutenant Governor, after taking the oath of office as acting Governor from Deputy Judge Advocate Collins, suspended all applications before the civil magistracy in the colony and effectively suspended civil government.<sup>182</sup> The rule of law had left the colonies.<sup>183</sup> As the chief Crown legal officer, it was incumbent upon Collins to protest this infringement of his judicial commission and point out the injury that such an action would inflict upon the legitimate judicial institutions of the colony. Collins did no more than make pathetic journal entries concerning the inconvenience of such policies.<sup>184</sup> The colony's Chaplain, the Reverend Richard Johnson, writing to Hunter in 1798, related and protested the coup.<sup>185</sup> To his credit former magistrate Reverend Johnson, through protracted correspondence with Grose during his 'administration', did more to protest the destruction of the civil judiciary, than did Deputy Judge Advocate Collins.<sup>186</sup> William Patterson who succeeded Grose on 17 December 1794 maintained this military overthrow. It was not until Governor Hunter took office on 11 September 1795, and restored the jurisdiction of the civil magistracy, that the rule of law returned to the colony. One modern historian has provided a benign explanation of why Grose chose to suspend the magistrates, the civil government and the rule of law.<sup>187</sup> It was

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<sup>182</sup> Collins, D., *An Account of the English Colony in New South Wales* (London, 1798) Vol.1, (London, 1802) Vol.2., pp.252, 253, cited in McLaughlin, *op.cit.*, p.41.

<sup>183</sup> 'That all inquiries by the civil magistrate were in future dispensed with, until the lieutenant-governor had given directions on the subject; and the convicts were not on any account to be punished but by his particular order'; Collins, *op.cit.*, p.253.

<sup>184</sup> *Ibid*, p.214, from Currey, J., *op.cit.*, p.117.

<sup>185</sup> 'But no sooner had Governor Phillip left the colony than I was convinced that the plan or measures of Government were about to undergo an entire change. The civil magistrates, within two days, received an order that their duty would in future be dispensed with, and from that time until your Excellency's arrival again in the colony everything was conducted in a kind of military manner. This, I believe, was the first step towards overthrowing all those attempts and endeavours that had hitherto been planned and pursued for the establishment of good order to be kept up amongst the different ranks and orders of the inhabitants of the colony.'; Johnson to Hunter, 5 July, 1798, *HR.A.*, Ser.1, Vol.II, 178.

<sup>186</sup> Currey, J., *op.cit.*, p.119; Cobley, J., *Sydney Cove* (Sydney, 1965) Vol.4, pp.83-88.

<sup>187</sup> Probably the true explanation for the conduct of Grose in placing the Colony under military control was that the Lieutenant Governor was an ignorant military man, totally without experience beyond the restricted confines of army life [which he had entered when only sixteen or seventeen]. The only principles of organization which he knew or understood were the rules of war. Within the narrow ambit of such militaristic concepts there was no place for a civil judiciary; there was no need for a Bench of Magistrates. It was a nuisance and a limitation upon what Grose considered to be the efficient administration of the Colony as a military establishment; McLaughlin, *op.cit.*, p.48.

during this military interregnum, that John Macarthur, a Lieutenant in the Corps, received his first taste of magisterial power.<sup>188</sup>

This class warfare also infected the fourth estate, the colonial newspapers. The emancipists created the *Australian* and the *Monitor* newspapers to counter the influence of the *Sydney Gazette*, a conservative publication originally the official government-publishing organ<sup>189</sup> that was devoid of objectivity until reformed by Bourke.<sup>190</sup> The class battles in these publications ultimately fostered the development of democratic structures and a belief in merit rather than position or social background. These structures and belief systems changed Australian society from a convict oligarchy to a mediocre democracy.<sup>191</sup> The power of the exclusivist group began to wane in the 1830s with the rise in the numbers of convict offspring, the immigration of free settlers and the steady decline of 'pure convicts'. The emancipist group included non-convicts as well,<sup>192</sup> primarily poor free settlers of an inferior class position. They had been excluded from colonial opportunities by the exclusivist group or had been marginalised by the Rum Corp officers who abused their judicial positions on the Bench and their positions of influence on the various governing committees of colonial institutions. Governor Hunter, in an act of final desperation, requested the Imperial authorities to force the 'transplantation' of English magistrates<sup>193</sup> to undertake the role then exercised by his frequently troublesome justices.<sup>194</sup>

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<sup>188</sup> Lieutenant Governor Grose appointed Macarthur to undertake administrative and judicial duties in Parramatta during this period; he continued in these duties after Governor Hunter reactivated the magistracy in October, 1795; Collins, *op.cit.*, p.430, McLaughlin, p.49.

<sup>189</sup> Neal, *op.cit.*, pp.20–21.

<sup>190</sup> Therry, R., *op.cit.*, p.132.

<sup>191</sup> See O'Malley, P., 'Class Formation and the "Freedom" of the Colonial Press: New South Wales 1800–1950', *Law and History in Australia*, Vol. IV, Conference Papers Law and History Conferences 1985–1986, pp.64–77.

<sup>192</sup> Neal, *op.cit.*, pp.18–20.

<sup>193</sup> Phillips, M., *op.cit.*, p.75, citing Report of Committee on Transportation, H. C., 1812, II.

<sup>194</sup> Hunter, John, *Governor Hunter's Remarks on the Causes of Colonial Expense of the Establishment of New South Wales* (London, 1802) pp.51–52.

Hunter and others did not understand, however, that the English magistracy was never a totally sycophantic and totally reliable agent of central government policy<sup>195</sup> and that its Australian version would necessarily have also reflected this 'independence'.

## THE INSTITUTION FULLY TRANSPLANTED

THE PRIMARY ALLEGIANCE matrix of the English magistracy was centred upon a self-serving-class belief system sustained by an honour code based upon the 'principles' of self-advancement and self-preservation. It took the English magisterial landed gentry five centuries to master the process of draining the Crown of its local authority by using the commission of the peace network to create autonomous administrative-judicial spheres of influence. Though individually small and locality based, together they created an authority network that covered all of England. The English central government, until it developed a system of paid stipendiary magistrates in the late 1700s and formalised the modern system of local council governance, was at the mercy of the magistracy and the gentry class it represented. The circumstances of convict settlement, the poor financial state of the Governor's treasury and the Colonial Office's desire that the Australian colonies be self-funding after 1827,<sup>196</sup> or earlier,<sup>197</sup> meant that the financial position of the Australian settlement demanded the establishment of wholesale unpaid magisterial rule. As could be expected, the unpaid colonial justices of the peace, drawn from the ranks of the new Australian elite caste, began exercising their authority in concert with their personal interests. The Governors were in a difficult position. They relied upon the unpaid magistracy to maintain order in their provinces. The Governors could only appoint 'suitable' persons to the commission of peace and hope that they would carry out Crown policy ahead of

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<sup>195</sup> Thompson, E. P., 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past and Present* (1971) pp.50, 76; Phillips, D., 'The Black Country Magistracy 1835-1860', *Midland History* (1976) p.173.

<sup>196</sup> Jenks, E., *op.cit.*, p.13.

<sup>197</sup> Typically, the English Government had hoped the colony to be fully self-sufficient within two years of initial settlement; Shaw, *op.cit.*, p.60.

their own vested interests. What did 'suitability' mean in this context? The candidate needed to be male, and know how to command and organise, especially police units. The appointee needed to be able to command respect from all possible defendants: freeman exclusivists, freed emancipists, ticket-of-leave persons, assigned servants and serving convicts. Historians agree that the early holders of the office were 'less' than the leisured, established gentlemen of the English ideal and that many of them were just men on the 'make'.<sup>198</sup> Some have observed that the early colonial magistracy comprised *improper materials*, as their ranks were full of military and naval men who merely transferred the untempered 'rough and ready justice' of the quarterdeck to the magisterial Benches. Other magistrates were merely greedy, ambitious settlers who used their position 'to extort by the lash the maximum of labour from prisoners assigned to them'.<sup>199</sup>

The reality of frontier colonial society was that successive Governors relied upon the magistrates to exercise their duties 'beyond its observance and control'.<sup>200</sup> In a society where courthouses were rare, the early colonial magistrate was more likely to adjudicate whilst enthroned in his own home.<sup>201</sup> Under these circumstances there was no public accountability attached to magisterial adjudications. Single magistrates would often adjudicate in their parlours. This practice effectively hid them and their adjudications from public scrutiny. This in turn reinforced their own belief that they as 'little magnate(s) of the land' could abuse the convict servants within their reach, with impunity. These parlour adjudications were a time-honoured

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<sup>198</sup> Golder, H., *op.cit.* p. 12.

<sup>199</sup> Therry, R., *op.cit.*, p.46.

<sup>200</sup> *Ibid*, p.48.

<sup>201</sup> 'Although masters of convict servants were debarred from dealing out summary punishment to their own assignees, they could invite a neighbour, who was on the Commission of the Peace, to sit in judgement on their offending servants. The compliment could then be returned, if desired, in respect of the neighbour's assignees. Even a guest having just risen from dinner might be called upon to pass judgement and to order punishment for his host's recalcitrant servants. Such a case, in which three assigned servants had been sentenced in their master's own parlour to 100 stripes each by their master's guest (who was a magistrate from another district), was brought to Bourke's notice soon after he arrived in the Colony. In letters sent through the Colonial Secretary he rebuked both the master of the servants and his guest for the indiscreet use they had made of magisterial authority. Bourke intended, he told the Secretary of State, to discourage such practices by every means in his power'; King, A. H., *op.cit.* pp. 160–161.

feature of the English magisterial prototype and must be viewed within the context of that English social milieu and its tempering forces. Governor Bourke sought to reform the magistracy. Bourke's brief to Forbes required him to repeal previous Acts and to consolidate the laws regulating the magistracy into a plain and easily understandable body of legislation.<sup>202</sup> The resulting legislation abridged the powers of magistrates sitting alone in an attempt to sweep away the abuses of the single magistrate acting without public scrutiny within the confines of his own home.<sup>203</sup> Transportation to places of secondary punishment could only be affected at Quarter Sessions. Two magistrates sitting together could order temporary work on road gangs or other public works. Curiously, under s.28, road surveyors were invested with the powers of a single justice, whilst supervising convicts in road gangs. An early description of life in one of these colonial road gulags near Bathurst describes the scene.<sup>204</sup> The Act also regulated and specified the magisterial powers and sentencing parameters with regards to imprisonment terms, solitary confinement and other like punishments.<sup>205</sup> The colonial magistrate, sitting alone, could only sentence 50 lashes for drunkenness, neglect of work, abusive language and insubordination.<sup>206</sup> Bourke claimed that the opposition to the legislation's purpose of curbing, consolidating and codifying magisterial power, was only apparent in a minority of justices of the peace and that the majority accepted the reforms without rancour.<sup>207</sup> There is evidence that the reforms were well

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<sup>202</sup> With impunity: Therry, *op.cit.*, p.47; Brief to Forbes: Forbes to Bourke, 16 June 1832, Bk. Ps, ML., vol.11; Legislation: King, A. H., *Richard Bourke* (Melbourne, 1971) p.161.

<sup>203</sup> Therry, R., *op.cit.*, pp.48–49.

<sup>204</sup> 'With a sheet of Bark for my bed, the half of a threadbare Blanket for my covering, and a Log for my pillow, the action of the frost was so severe on my limbs that it was with difficulty I could find a use of them, and then only by frequenting the fire at intervals during each night. As I arose, after experiencing all the horrors of a restless and perishing cold Night, the rugged mountains covered with snow, and the frozen Tools for labour stared me in the face before the stars were off the skies; and many a tear did I shed, when contemplating upon my hard fate, and the slight offence for which I had been doomed to participate so largely in the bitters of a wretched life'; Cook, T., '*The Exile's Lamentations: Memoir of Transportation*', Ms. A1711, ML, Sydney, cited in Hughes, R., *op.cit.* p.431.

<sup>205</sup> King, A. H., *op.cit.*, pp. 161–162.

<sup>206</sup> Legislation consolidated and codified magisterial jurisdiction to matters considered misdemeanours: pilferings, simple larcenies involving goods worth less than five pounds, drunkenness and master and servant disputes; Cuthill, *op.cit.*, p.1.

<sup>207</sup> Bourke to Stanley, 15 January 1834, *HR4*, I, 17, p.324.

received in some quarters. The emancipist *Monitor* maintained that it was the most important of all of the colonial legislation and that all magistrates should learn it by heart.<sup>208</sup> The exclusivist *Herald* blamed its 'soft on convict' ideals as being responsible for all subsequent convict acts of insubordination.<sup>209</sup> Golder also provides evidence that the customary practice in the Hunter Valley region had been 50 lashes per magistrate under Macquarie; Commissioner Bigge had accepted this as being the case. However when Bourke attempted to enforce his 50 lash limit under the 1832 legislation, the Hunter magistrates claimed that it had been customary to have a maximum of 100 lashes; Bourke officially circularised his warning against this and the practice of 'splitting offences'.<sup>210</sup>

The pre-*Bigge Report* Sydney magistrates, like their future colonial magisterial brethren, were faced with a multitude of tasks and armed with a multitude of penalties designed to assist them in the order maintenance necessary to carry out those tasks. The favoured penalty especially in a colony full of penniless convicts where a monetary fine would be useless was the flogging punishment. The option of incarceration in prison was counterproductive in an economy forever experiencing labour shortages. In this sense I disagree with Douglas Hay's comments that the imprisonment rate during this period for the Australian colonies was seven times higher than that of England.<sup>211</sup> Imprisonment, especially during the formative stages of a colony's development, was never a realistic option. Most settlements did not have adequate incarceration facilities. Corporal punishment was seen as the magistrates' first best resort. Flogging only incapacitated the recipient temporarily whilst imprisonment deprived the colony of labour. The evidence suggests that the Australian colonial magistracy became expert

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<sup>208</sup> *Monitor*, 2 January 1833.

<sup>209</sup> *Herald*, 9 & 18 of February 1833, 9 December 1833, 12 June 1834, 20 July 1834, 14 December 1835.

<sup>210</sup> Golder, H., *op.cit.* p.37, citing *HR4*, I, 17: p.313–41.

<sup>211</sup> Hay, Douglas, Law and History Conference, Melbourne, Australia, 21/9/2001; in all fairness to Professor Hay it was probably only a slip of the tongue as the flogging passion in the colonies was later brought up in discussion and he readily agreed.

contenders in the art of flogging. To have calculated a penalty of 37 lashes for calling a convict woman 'a strumpet [and] a Bitch' and for making 'disagreeable noises' towards her, required an almost abacus-like precision. By contemporary English standards, the severity of the flogging punishments in the Australian colonies was severe.<sup>212</sup> William Eden (later Lord Auckland) although favouring flogging to the death penalty, insisted that a magistrate sitting alone should never order it.<sup>213</sup> The flogging of colonial defendants was the preferred penalty of choice, by single or multiple magistrates. There are recorded instances where the colonial bench would show mercy; these were few and far between and tended to appear in the early part of Phillip's term.<sup>214</sup> Castles' examination of the early Sydney Bench books confirms the high use of the lash in the early days of magisterial governance.<sup>215</sup> The act of flogging became such a part of colonial Australian life, so common an occurrence, that colonial children at play could be seen mimicking their elders and authority figures and practise on a tree, what their role models were exacting upon the backs of men.<sup>216</sup> What did the colonial children see? One graphic eyewitness account describes a common scene at the Bathurst Court House.<sup>217</sup> Convict slang developed. There was

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<sup>212</sup> Golder, *op.cit.* p. 9; McLaughlin, *op.cit.*, p.33, citing Radzinowicz, L., *A History of English Criminal Law and its Administration from 1750* (London, 1948) Vol. 1., Chapter 1; 37 Lashes: Longford Petty Sessions, 22 April, 5 May 1829, AOT LC362/1, cited in Atkinson, A., *op.cit.*, p.72.

<sup>213</sup> Eden, W., *Principles of Penal Law* (London, 1771) pp.58, 63, cited by McLaughlin, *op.cit.*, p.33.

<sup>214</sup> In *R v Elizabeth Clark*, the sentence to be flogged up and down the encampment whilst tied to a cart was remitted with the words 'forgiven her punishment'; in *R v John Turner*, an old convict, found with rum, sentenced to be only reprimanded and discharged; Bench of Magistrates, Sydney, 60, 89, cited McLaughlin, *op.cit.*, p.37.

<sup>215</sup> On many occasions the punishments meted out by the Sydney magistrates were as severe as those inflicted by the Criminal Court. From the earliest sittings convicts could be sentenced to 200 lashes or more. Sometimes, the penalties awarded by the Court would reach a crescendo. Sentences of 500, 800 and even 1,000 lashes, sometimes coupled with other penalties, would be ordered by the Sydney Bench; Castles, *op.cit.* p.77 citing *Proceedings of the Bench of Magistrates*, State Archives, N.S.W., Loc. 1/296; 13 January, 1806 (800 lashes); 8 February, 1806 (500 lashes); 1 March, 1806 (500 lashes); 9 May, 1806 (1,000 lashes); 27 December, 1806 (1,000 lashes), Loc. 1/300.

<sup>216</sup> Harris, A., *Settlers and Convicts, or Recollections of Sixteen Years' Labour in the Australian Backwoods* (London, 1847), reprint (Melbourne, 1964) ed. C. M. H. Clark, p.11.

<sup>217</sup> 'I had to walk past the triangles, where they had been flogging incessantly for hours. I saw a man walk across the yard with the blood that had run from his lacerated flesh squashing out of his shoes at every step he took. A dog was licking the blood off the triangles, and the ants were carrying away great pieces of human flesh that the lash had scattered about the ground...The scourger's foot had worn a deep hole in the ground by the violence with which he whirled himself round on it to strike the quivering and wealed back, out of which stuck the sinews, white ragged and swollen. The infliction was a hundred lashes, at about half minute time, so as to extend the punishment through nearly an hour. The

an inversion of the English language, in this convict 'dialect'.<sup>218</sup> One of the principal reforms initiated by Bourke's *Summary Jurisdiction Act* related to the administration of flogging punishments. Some magistrates had previously ordered flogging punishments to be staggered over a number of days. This assisted the magistrate in questioning prisoners. They offered reprieve from further floggings in exchange for information.<sup>219</sup> Most disturbingly, the magistrates realised that if the floggings were spread, the subsequent whipping would aggravate the wounds inflicted on the first day. These wounds would then fester and become infected. The best that the person being flogged could hope for was that the maggots that eventually came to life on their backs, ate their infected flesh.<sup>220</sup>

The social experiment of an open-air continental panopticon had begun. Using the dexterous office of the magistrate the Imperial authorities sought to govern a wild land and its unique inhabitants. The authorities used this office even though the necessary supporting social infrastructures, long established in England, were missing in the colonies. With the magisterial office established in New South Wales [and Van Diemen's Land] we turn now to examine this transplanted institution in the Port Phillip District in somewhat more detail.

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day was hot enough to overcome a man merely standing that length of time in the sun...I know of several poor creatures who have been entirely crippled for life by these merciless floggings'; Harris, A., *op.cit.*, p.12.

<sup>218</sup> The *tester* or *Botany Bay dozen* was used to categorize 25 lashes. A man who screamed and cried was called a crawler or a sandstone. A man who faced the triangle well or in silence, was baptized a pebble, iron man being flash or game. After the last lash, the domino, by custom, he should spit at the feet of the scourger who had given him his red shirt; Hughes, R. *op.cit.* pp. 428–429; 'Evil was literally called good - and good, evil; the well disposed man was branded wicked, whilst the leader in monstrous vice was styled virtuous. The human heart seemed inverted, and the very conscience reversed'; Therry, R., *op.cit.*, p.19.

<sup>219</sup> Therry, R., *op.cit.*, pp.44–48, citing the floggings of Henry Bayne and Henry Watson.

<sup>220</sup> 'My shoulders were actually in a state of decomposition the stench of which I could not bear myself, how offensive then must I appear and smell to my companions in misery. In this state immediately after my landing I was sent to carry Salt Beef on my back with the Salt Brine as well as pressure stinging my mutilated and mortified flesh...I really longed for instant death'; Frayne, Laurence, *Memoir of Norfolk Island*, undated manuscript, ML, Anonymous Convict Narrative p.427 miscellaneous papers, NSW Col. Sec. Papers, vol. I, Ms. 681, transcribed by Hughes, R., *op.cit.* p.462.

# CHAPTER 4:

## THE MAGISTERIAL OFFICE

### TRANSPLANTED TO PORT

### PHILLIP

#### MAGISTERIAL POWER IN 1803

THE FIRST EXERCISE of magisterial power in the Port Phillip District occurred at 11.00 a.m. on Wednesday 2 November 1803. The magistrate was Robert Knopwood BA, MA, chaplain to the short-lived 1803 settlement at Sorrento.<sup>1</sup> There is evidence to suggest that Knopwood took a relaxed approach to his spiritual duties and was very flexible in their applications. He was a man in the mould of the English gentry sporting parson who preferred *distractions* to the performance of his spiritual duties.<sup>2</sup> Knopwood exercised his magisterial authority via a field commission granted him by Lt Governor Collins. No documents remain confirming this appointment, probably as a result of the disappearance of the bulk of the Collins papers.<sup>3</sup> Knopwood officiated in a magisterial capacity in Port Phillip as acting Judge Advocate<sup>4</sup> prior to his 'long and bloody reign' upon the magisterial Bench in Van Diemen's Land. His Port Phillip adjudications were

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<sup>1</sup> Knopwood was the son of a Norfolk landowner. After graduating from Cambridge, he fell into profligate ways and, even though ordained, gambled away his inheritance. He became in succession chaplain to Viscount Clermont, chaplain to Earl Spencer and chaplain aboard H.M.S. *Resolution* prior to his appointment as chaplain for the Port Phillip expedition; Currey, *op.cit.*, p.236.

<sup>2</sup> Billot, *op.cit.*, p.5; Interestingly, there is no record of Knopwood administering to the convicts' spiritual needs during the voyage to Port Phillip, save in matters of burial at sea.

<sup>3</sup> Note the actions of Edward Lord who burnt a significant portion of them immediately after Collins death; Currey, *op.cit.*, pp.302, 307.

<sup>4</sup> Knopwood read out Collins' Commission on 17 November, just as Collins had done as deputy Judge Advocate for Phillip; Currey, *op.cit.*, p.208.

quite severe.<sup>5</sup> He maintained an 'Old Testament attitude' towards convicts.<sup>6</sup> Lt Benjamin Barbauld had originally received the commission in London as Judge Advocate for the new Port Phillip settlement.<sup>7</sup> Barbauld was the brother-in-law of David Collins. The appointment was an act of nepotism on the part of Collins, but it was an acceptable practice during the period. Barbauld however, did not take up the appointment.<sup>8</sup> Lt Governor Collins had therefore decided that Knopwood would undertake the lead in the legal administration of the new settlement.<sup>9</sup>

On 11 November it rained intermittently and, as it had been raining for some days, all were soaked. It was to be a wet Bench. The judicial proceedings that day were short, lasting less than one hour. Before Knopwood were two servants in dispute. One of the litigants has faded into history's mist; the other would forever haunt the history of Port Phillip as one of its greatest characters.

At 11 a complaint came before me as a majestrate [sic] that Robert Cannady, servant to Mr Humphreys<sup>10</sup> had promised Buckley, the Governor's servant, a waistcoat for a pair of shoes, which he had taken and worn, and would not return the waistcoat; but after hearing them on both sides I had the waistcoat given to Buckley.<sup>11</sup>

William Buckley would famously escape from the settlement.<sup>12</sup> The escapees planned to travel overland to Sydney.<sup>13</sup> One of the convicts, Daniel Mc Allenen, would return to the

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<sup>5</sup> 'The chaplain was to have a dreaded reputation as a magistrate, allowing no defence to prisoners brought before him, as he considered them guilty by virtue of their apprehension, and dealing out floggings of hundreds of lashes'; Billot, *op.cit.*, p.5.

<sup>6</sup> C. M. H. Clark, *A History of Australia* (Melbourne, 1977) p.184; Billot, *op.cit.*, p.15.

<sup>7</sup> John Sullivan to David Collins, 5 April 1803, CO 202/27, f.94; Currey, *op.cit.*, p.183.

<sup>8</sup> Currey, *op.cit.*, p.196.

<sup>9</sup> Noble, *op.cit.*, p.16.

<sup>10</sup> A. W. H. Humphry, mineralogist, ocean passenger on H. M. S. Calcutta, annual salary 91 pounds, 5 shillings.

<sup>11</sup> Knopwood, R., *Journal of the Reverend Robert Knopwood, Chaplain to the Settlement, from 24 April 1803 to 31 December 1804*; reproduced in Shillingshaw, *op.cit.* p. 142.

<sup>12</sup> Knopwood, R., *op.cit.*, Journal entry Saturday 31 December listed the deserters from the camp as MacAllennan, George Pye, Richard M. Warner, Wm. Buckley; see reproduction in Grimwade, *op.cit.*, p.30.

settlement, the others save for Buckley who reappeared 32 years later, were never heard from again.<sup>14</sup> Indeed, Buckley himself was declared to have ‘perished miserably in the bush’ by Lieutenant–Governor Collins.<sup>15</sup>

## THE PORT PHILLIP ASSOCIATION

WITH THE FAILURE of the Sorrento settlement the Port Phillip District remained free from formal white settlement for some two decades. In 1827 John Batman and J. T. Gellibrand made an application to the Colonial authorities in Sydney for permission to occupy land at Westernport or Port Phillip.<sup>16</sup> This application was rejected on the grounds that it was too remote a province and that its settlement was contrary to the policy of uncontrolled expansion into the wastelands. John Batman and J. T. Gellibrand and others<sup>17</sup> eventually formed the Port Phillip Association as a vehicle for exploiting opportunities in the land across Bass’s Strait.<sup>18</sup> There is also speculation that Governor Arthur had some influence and involvement over the formation of the Association.<sup>19</sup> This Association sent an expedition to Port Phillip. Leaving Launceston on 12 May 1835, the expedition landed at Port Phillip on 26 May 1835. Batman brought seven Sydney

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<sup>13</sup> Captain Phillip Parker King, *Diary*, HMS *Rattlesnake*, Port Phillip, 3 March 1837, *HRV*, I, p.111. Buckley would become an Australian legend by surviving for thirty two years in the wilderness in and around the Port Phillip district, being finally reunited with his race when he came in contact with the Wedge portion of Batman’s party in 1835. Buckley was born in Marten in Cheshire and enlisted to become ‘the right hand man of the Grenadier Company’ of the 11th – King’s Own Regiment in Gibraltar. He was convicted of receiving stolen goods and was transported to Sullivan’s Cove on HMS *Calcutta*.

<sup>14</sup> Billot, *op.cit.*, p.25; Billot includes Thomas Pritchard in the list of escapees.

<sup>15</sup> General Orders, Hobart Town, Van Diemen’s Land, 28 July 1805, Billot, *op.cit.*, p.105.

<sup>16</sup> See also Grimwade, *op.cit.*, p.61.

<sup>17</sup> The Association Members: John Batman, Joseph Tice Gellibrand, James Robertson, William Robertson, Henry Arthur, John Sinclair, Charles Swanston, James Simpson, John Thomas Collicott, Anthony Cottrell, William George Sams, Michael Connolly, Thomas Bannister and John Helder Wedge, from, Gurner, H. F., *Chronicle of Port Phillip, Now the Colony of Victoria* (Melbourne, 1876) First Published, 2nd Ed. (Melbourne, 1978) p.9.

<sup>18</sup> Arden, G., *Latest Information with Regard to Australia Felix* (Melbourne, 1840) reprint (Melbourne, 1977) p.14, cited in Campbell, J., *op.cit.*, p.4.

<sup>19</sup> Fact that his nephew Henry Arthur was a foundation member of the group; Westgarth, *op.cit.*, pp.32–33.

'natives' with him to facilitate communication with the native inhabitants of the Port Phillip district and because there was no available lands for them in Van Diemen's Land that these 'disposed natives' could occupy.<sup>20</sup> Batman concluded two treaties with eight local 'chieftains' on 6 June 1835 'beside a beautiful stream of water' [Merri Creek].<sup>21</sup> These treaties presupposed that 'sovereignty in the soil is [was] vested in the aboriginals'<sup>22</sup> and that once they gained title from them they would then negotiate with the Crown.<sup>23</sup> Gellibrand, as a Hobart lawyer, magistrate and Van Diemen's Land's first Attorney General created the document and drafted a precedent or prototype deed of the transfer in Hobart.<sup>24</sup> The treaties were made with what Batman referred to as eight indigenous chiefs and comprised of a purchase of two parcels of land.<sup>25</sup> Batman took great care to abide by the contractual obligations of consideration and the principles of *feoffment*.<sup>26</sup>

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<sup>20</sup> It would be a favourable opportunity of opening a direct friendly intercourse with the tribes in the neighbourhood of Port Phillip, and by obtaining from them a grant of a portion of that territory upon equitable principles, not only might the resources of this colony be considerably extended, but the object of civilization be established, and which, in process of time, would lead to the civilization of a large portion of the Aborigines of that extensive country'; John Batman to Sir George Arthur, 25 June 1835, *HRV.*, I, I, p.5

<sup>21</sup> Boys, R. D., *First Years at Port Phillip* (Melbourne, 1959) p.39; Grimwade, *op.cit.*, p.65.

<sup>22</sup> Jenks, E., *op.cit.*, p.24.

<sup>23</sup> Grimwade, *op.cit.*, p.62.

<sup>24</sup> It is believed that William Todd transferred this precedent to six parchment copies as the 'major deeds'. Details were obtained from the native representatives and these were transcribed onto the prototype with further copies being made by Todd. Two 'special deeds' were also prepared for presentation to Arthur with further forty-six 'minor deeds' being made for members of the Association upon Batman's return to Van Diemen's Land; Harcourt, *op.cit.*, p.216.

<sup>25</sup> The first parcel comprising between 500,000 to 600,000 acres around the Bay area. The second parcel, amounting to some 100,000 acres was in and around the present day City of Geelong. These are referred to as the Dutigalla and Geelong deeds; Castles, *op.cit.*, p.28; also citing Boys, *op.cit.*, p.38 and Bonwick, *John Batman* (1868) (1973 reprint Sayers) Melbourne, p.68.

<sup>26</sup> Now is the time for entering into and effecting a purchase of their land. A full explanation that my object in visiting their shore was to purchase their land, they appeared to understand; and the following negotiation or agreement was immediately entered into. I purchased two large blocks or tracts of land, about 600,000 acres, more or less, and, in consideration there for, I gave them blankets, knives, looking-glasses, tomahawks, beads, scissors, flour &c., and I also further agreed to pay them a tribute or rent yearly. The parchment or deed was signed this afternoon by the eight chiefs, each of them, at the same time, handing me a portion of the soil: thus giving me full possession of the tracts of land I had purchased'; Batman, J., *The Settlement of John Batman in Port Phillip, From His Own Journal* (Melbourne, 1856) pp.19–21, cited in Crowley, F., *A Documentary History of Australia* (Melbourne, 1980) Vol. 1., p.486.

The contracting parties marked corner tree boundaries to define the purchase. Batman had given the aboriginal 'chiefs' consumables and a promise of a yearly tribute or rent. They in turn handed him a portion of the soil as a symbolic transfer.<sup>27</sup> The format of the symbolic transfer was necessary as the conveyance documentation purported to transfer by a feudal feoffment.<sup>28</sup> The ritual itself was imperfect.<sup>29</sup> The 'chiefs' had also supposedly signed the deed simultaneously and in the presence of each other. This is also doubtful.<sup>30</sup> The purchase was contemporaneously referred to as 'an advantageous bargain with the scite [sic] of the new township to be named Batmania'.<sup>31</sup> One should note the Vattelian<sup>32</sup> correctness with which Batman sought to legitimise the grant by immediately sowing the land and constructing a family residence.<sup>33</sup> The Vattel proposition became the juridical basis of the doctrine of *terra nullius*. This doctrine underpinned the entire process of the English Crown establishing its right of *fee simple absolute* ownership of all territory in Australia; a right that the Crown did not enjoy in England. It has been argued that even though there is some evidence that the Crown Commissions to the early colonial Governors may have included the Port Phillip District as being within their jurisdiction,<sup>34</sup> that it would be immaterial even if it had not included the area. This is so because of the

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<sup>27</sup> Batman, *op.cit.*, pp.19–21.

<sup>28</sup> Castles, *op.cit.* p.28.

<sup>29</sup> As there was no effective symbolic feoffment of the Geelong territory, as the settlement meeting did not occur upon that portion of the land; Harcourt, *op.cit.*, pp.217–218.

<sup>30</sup> 'There is too much uniformity in the supposed 'native' marks. There is no evidence of 'rough handling' or 'smudges' that normally accompanied such parchment documents. There is also some forensic similarity between Batman's own diary and the parchment that tends to suggest that no original native mark was ever made upon the documents; Harcourt, *op.cit.*, pp.218–220.

<sup>31</sup> *Cornwall Chronicle*, Launceston, 13 June 1835.

<sup>32</sup> Lapradelle, Introduction to the English translation of Vattel, E., *The Law of Nations or the Principles of International Law* (London, 1916).

<sup>33</sup> One of the popular propositions at International Law at the time was that a claim of title to land would be strengthened if activities of enclosure and domination over claimed land were exercised at the earliest possible opportunity. This was especially important if the claim was made against nomadic peoples who had never endeavoured to cultivate land and had therefore not exercised real possession of that land, in the strict European legal-cultural sense. This land could thereby be occupied and was not considered conquered; *Ibid.*, Book 1, ch.XVII, pp.84–86; see Castles, *op.cit.*, pp.16–17.

<sup>34</sup> Bourke's Commission; Jenks, E., *op.cit.*, p.25.

theory that, an English subject, as Batman and the Association members undoubtedly were, acts within the confines of an agency agreement.<sup>35</sup> The Association's actions of land tillage and the erection of dwellings were not accidental; nor were they the spontaneous acts of the Van Diemen's Land settlers attempting to tame a wilderness. They were in fact evidence of acts of settlement and enclosure consistent with the then current formulas of ownership and land tenure. Batman was only acting as an agent for the Association, and as was Joseph Tice Gellibrand, who provided not only the authorship of the treaty documentation, but also advice for the successful legal recognition of the venture.<sup>36</sup> When tested by Counsels' opinion, however, all agreed 'that the grants from the aboriginals were not valid as against the Crown'. One opinion considered 'that the right to the territory adjacent to Port Phillip is at present vested in the Crown'.<sup>37</sup> In an ironic twist to this mutinous land grab, J. T. Gellibrand later died, possibly at the hands of local tribesmen, west of modern Geelong in February 1837.<sup>38</sup> He had for over a decade sought lands across Bass Strait. He did finally gain 100,000 acres of the Association's treaty. His death was also a mystery. Ironically, the extensive search for Gellibrand and Hesse 'opened up more country'.<sup>39</sup>

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<sup>35</sup> English law recognises no title to land by *occupatio* in its subjects. There is not any No-mans-land within its dominions; all is vested in the Crown. And if the British subject colonises land which is outside British dominions, he does so as an agent of the Crown, who may be disavowed if he acts without authority, but whose territorial acquisitions belong to his principal; Jenks, E., *ibid*, p.25.

<sup>36</sup> Authorship: Noble, *op.cit.*, p.36; Correspondence, James Simpson JP to J. H. Wedge, 19 June 1835, MS in ML; Billot, *op.cit.*, p.101.

<sup>37</sup> Jenks, *op.cit.*, p.26 citing Bonwick, *op.cit.*, pp.376–378; Grimwade, *op.cit.*, p.80; Westgarth, *op.cit.*, p.34, citing Dr. Lushington.

<sup>38</sup> Death: Together with a settler, barrister George Hesse, disappeared; a body was found some time later and it was said to be that of Gellibrand because of a front gold tooth; two hills near Winchelsea were named after these two explorers; Gurner, *op.cit.* p. 37; Shaw, A. G. L., *A History of the Port Phillip District: Victoria before Separation* (Melbourne, 1997) p.113.

<sup>39</sup> Land: Sir George Arthur to Sir Richard Bourke, 25 March 1836, HRV, I, p.23; Mystery: The Hobart Life Assurance Company refused to pay out on his policy of 11,000 pounds until three years after his death; Harcourt, *op.cit.*, p.132; Open up country: Thomas Armytage later followed the tracks made by the searchers. He then proceeded to make his fortune by squatting at his station *Ingleby*, Kiddle, *op.cit.*, p.39.

## THE RESPONSE OF THE STATE

BATMAN SET OUT his 'purchase' of the lands and intention to settle the district in correspondence to the Van Diemen's Land Lieutenant-Governor soon after his return to Hobart.<sup>40</sup> Arthur's Secretary, John Montagu, responded that His Majesty's Government was already in possession of the territory.<sup>41</sup> The Henty family enjoyed a similar position.<sup>42</sup> Arthur realised that settlement was about to take place and requested permission to temporarily govern the settlement from Van Diemen's Land.<sup>43</sup> He proposed an expedition of surveyors, missionaries, convicts and Van Diemen's Land natives to Port Phillip.<sup>44</sup> Arthur also stated that the supposed *feoffment* from the natives would and should not be confirmed by the Crown as the territory had already been claimed by the Crown by Collins, Wright, and by the explorations by Hume and Hovell in 1824 and 1825. Arthur sent Bourke a copy of the Batman Deed along with the correspondence.<sup>45</sup> Bourke issued a proclamation declaring the Port Phillip settlement illegal. The proclamation declared that all persons found in possession of those lands would be considered trespassers and liable to be dealt with by the Government as intruders upon vacant Crown lands.<sup>46</sup> Bourke then corresponded with Arthur. He enclosed copies of the

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<sup>40</sup> *HRV*, I, pp. 5–10.

<sup>41</sup> From the occupation of the territory by Governor Collins in 1803 and by Messrs Hovell, Hume and Captain Wright (the 1826 Westernport settlement). Batman and the Association were warned not to expend further funds in reliance upon a belief that the Crown would confirm their title; 'Would, therefore, only observe that the recognition of the rights supposed to have been acquired by the Treaty into which you have entered with the natives, would appear to be a departure from the principle upon which a parliamentary sanction, without reference to the Aborigines, has been given to the settlement of Southern Australia, as part of the possessions of the Crown'; John Montagu to Batman, 3 July 1835, *HRV*, I, pp.10–11.

<sup>42</sup> This correspondence also referred to the unsuccessful attempt by the Henty family for a similar grant of land. To accede to the proposed grant would have been a deviation from the established principles of Crown-controlled settlement of the unoccupied areas of New South Wales; *ibid.*, p.11; Atkinson, *op.cit.*, p.91.

<sup>43</sup> Sir George Arthur to Rt. Hon. T. Spring Rice, 4 July 1835, *HRV*, I, p.11.

<sup>44</sup> Noble, *op.cit.*, p.34.

<sup>45</sup> Arthur stated that Batman had been an enterprising and prudent settler and, that notwithstanding the Association having 'a great respectability of the gentlemen interested in the arrangement' he held little prospect of their claim being 'favourably considered'; Sir George Arthur to Rt. Hon. T. Spring Rice, *HRV*, *op.cit.*, p.12.

<sup>46</sup> The proclamation stated that the original commission issued to the Government of the colony of New South Wales by the English Crown included that part of the territory now being claimed by the Port Phillip Association. The proclamation also stated that any treaty, bargain and contract with the aboriginal natives attempting to grant

proclamation, with specific instructions that the document and sentiments affecting the rejection of claim for lands in Port Phillip be conveyed to Batman and the members of the Association. This stated the Crown policy of not allowing occupation of territories beyond the presently authorised limits. This was consistent with the long-standing Imperial policy of intensive land settlement. This policy was originally designed to regulate settlement and mimic the 'British sense of place, of closeness, of community and good order.'<sup>47</sup> Bourke also authorised the same proclamation to be issued in Perth, Western Australia, to discourage other like-minded entrepreneurs seeking private treaties with the natives and undermining the Crown's prerogative rights in such matters. The proclamation was posted in public areas in the Swan settlement, and also published in the *Perth Gazette*.<sup>48</sup> Bourke argued that the evils of dispersion would lead to a diminution of state control over individuals occupying wastelands. He also however craved the monies that land sales would generate and saw the private adventure as providing an opportunity to facilitate expansion of state hegemony over hitherto unoccupied areas. He stated that the boon of the young wool industry was 'long likely to continue [as] its [the colony's] chief wealth'.<sup>49</sup> Economic circumstances required an expansion into the unsettled districts. Bourke also conceded the reality of events and sought any advantage that could be wrought from them.<sup>50</sup>

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possession, title or claim to any lands within the said areas defined by the aforementioned original commission be void and of no effect; Proclamation dated 26 August 1835, *New South Wales Government Gazette*, 9 September 1835, *HRV*, I, pp. 12–14.

<sup>47</sup> The basis of the rejection of the claim by Bourke and his Executive Council was couched in terms consistent with the dispatch from the Earl of Aberdeen; Dated 25 December 1834; see also Colonial Secretary to John Montagu, 1 September 1835, *HRV*, I, pp.14–15; Intensive land settlement had been threatened by the outwards push by squatters in New South Wales as a result of the growth in population and the decline in the urban–rural population ratio; Davidson, A., Wells, A., 'The Law, the Law and the State: Colonial Australia 1788–1890', (1984) *Law in Context*, Vol.2, pp.89–117; British sense of community: Atkinson, *op.cit.*, p.92.

<sup>48</sup> Colonial Secretary to Peter Brown, 9 September 1835, *HRV*, I, p.15; Peter Brown to Colonial Secretary, 4 January 1836, *HRV*, I, p.15.

<sup>49</sup> Bourke to Lord Glenelg, 10 October 1835, *HR4*, 1, vol. XVIII, pp.154–157.

<sup>50</sup> 'I do not, however, mean to admit the claim of every wanderer in search of pasture to the protection of a Civil or Military Force. The question I would beg leave to submit, is simply this: How may this Government turn to the best advantage a state of things, which it cannot wholly interdict? It may, I suggest, be found practicable by means of the sale of Land in situations peculiarly advantageous, however distant from their locations, to procure the means of diminishing the evils of dispersion, and, by establishing Townships and Ports and facilitating the intercourse between the remote and more settled Districts of this vast Territory, to provide, though but imperfectly, centres of

Batman and the subscribers to the Association proceeded to ignore all proclamations in a wonderful game of colonial brinkmanship. Part of their strategy was to convince the government in Sydney that the Crown should take advantage of the *de facto force majeure* settlement of Port Phillip. The Henty family had already settled a portion of the coast. Mercantile exploitation of the Port Phillip district had begun.<sup>51</sup> The Association needed the Crown to legitimise the occupation by instituting formal crown settlement. The instrument of local government authority, the magistracy, was the vehicle by which the Association sought to achieve its objectives. Once the central authorities installed a government representative, the settlement would be legitimised. The members of the Association never really believed that the Crown would verify its Treaty. Their chief legal advisor, former Attorney General Gellibrand, understood how to manufacture an acceptable form of conveyance in which to clothe the transaction. Most importantly, however, he understood government policy and legal tradition. He understood the current jurisprudential base upon which the Crown had claimed *absolute fee simple* ownership of all territories of eastern Australia arising via Phillip's commissions. He realised the impossibility of the Crown relinquishing such claims in the face of what amounted to a technical rebellion by a band of adventurers. The most the Association could expect was that discounts or remissions would be made on formally sanctioned land sales, if the state saw fit to open up the territory for settlement. Gellibrand also understood the mentality of Governor Arthur, as Arthur understood Gellibrand.<sup>52</sup>

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Civilization and Government, and thus gradually to extend the power of order and social union to the most distant parts of the wilderness. Such are the considerations, wh. [sic] render me unwilling to oppose the Settlement of Twofold Bay. The same considerations induce me to believe that it will be more desirable to impose reasonable conditions on Mr Batman and his associates than to insist on their abandoning their undertaking'; Bourke to Lord Glenelg, 10 October 1835, *HRA*, 1, vol. XVIII, pp.154–157.

<sup>51</sup> Captain John Hart had already exploited the wattle bark resources of Westernport in 1833, when in the *Andromeda* he sailed for England and sold its cargo there for 13 pounds per ton; Noble, *op.cit.*, p.34.

<sup>52</sup> 'Mr Gellibrand, who you will know as our great opposition lawyer, is deeply engaged in Port Phillip speculation he has lately made two expeditions there, and relates, I understand, the most wondrous tales as to the natural fertility of the country - millions of acres of the finest sheep walk, but that the most desirable tract - the 100,000 acres he has been pleased to appropriate to himself - is such within the limits of the Government of New South Wales...all his [Gellibrand's] political schemes have proved so abortive here that I make no doubt he will be glad to change his quarters, and try his hand at mischief-making at Port Phillip'; Sir George Arthur to Sir Richard Bourke, 25 March 1836, *HRI*, I, p.23.

Gellibrand and Batman understood that by forcing the government to send some part of its authority structure to the settlement at Batmania, Bearbrass or Bearpurt<sup>53</sup> it would succeed in forcing the Crown to open up the territory for settlement.<sup>54</sup> The Association's attempt to name the settlement is again evidence of the intent to provoke the Crown into action.<sup>55</sup> Batman sought the investiture, from Hobart, of 'proper authority being given to some individual'.<sup>56</sup> Governor Arthur sought to gain authority over the new settlement to secure the obvious economic advantages apparent for Van Diemen's Land.<sup>57</sup> Arthur in fact nominated Captain Thomas Bannister, former Sheriff of Van Diemen's Land for the Port Phillip magisterial post. Bannister reportedly believed that 'it cannot be considered a first class appointment'.<sup>58</sup> Captain Thomas Bannister, originally from Steyning, Sussex, brother of Saxe Bannister, first came to Australia via the Swan River settlement aboard the *Atwick* on 19 October 1829. He later resettled in Van Diemen's Land. He was a member of the Port Phillip Association, became Sheriff of Van Diemen's Land and was proposed first resident Police Magistrate for the Port Phillip District by Lt. Governor Arthur.<sup>59</sup> He seems to have enjoyed a difficult disposition, being variously described by contemporaries as either being 'for a gentleman...the greatest bore I ever met' or just

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<sup>53</sup> Early names suggested and used for the settlement; the name Bearpurt was used in correspondence, J. H. Wedge to John Montagu, from Bearpurt Port Phillip, 15 March 1836, *HRV*, I, pp. 34–35.

<sup>54</sup> This proposition is supported by Palmer, D., *The Making of the Victorian Colonial Police: From Colonization to the New Police*, M.A. (Criminological Studies), La Trobe University, October 1990, p.40.

<sup>55</sup> Batman sought Batmania and even renamed Merri Creek 'Lucy Creek' after one of his daughters; Finn, Edmund, *The Chronicles Of Early Melbourne, 1835 to 1852, by Garryowen* (Melbourne, 1888) reprinted edition, edited by Weidenhofer, M., (Melbourne, 1967) pp.5–6.

<sup>56</sup> The Association attempted to play-off the distant ruling Sydney authorities against the close but financially-troubled Hobart government. Batman even suggested that the arrival of other non-Association settlers [Fawkner's party] would lead to trouble. He offered to defray such portions of expense that the government considered fair and reasonable; John Batman to Sir George Arthur, 23 October 1835, *HRV*, I, pp.19–20.

<sup>57</sup> Shipping: Shaw, A. G. L., *op.cit.*, p.74, By 1837–38, some 90 per cent of the shipping transport to the Port Phillip settlement would be from Launceston and George Town; Mass Exodus: Campbell, *op.cit.*, p.6 Arthur was anxious to control both the Port Phillip territories and what was to become a mass exodus of labour, capital, stock and 'ambition' from Van Diemen's Land to Port Phillip; Exodus Frantic: *Bent's News*, 24 September 1836; Campbell, J., *op.cit.*, p.6; The exodus was frantic and self-sustaining, especially during the early period of settlement when the new district was seen as destined 'to become one of the very greatest in the hemisphere'.

<sup>58</sup> Captain Thomas Bannister to Sir George Arthur, 8 December 1835, *HRV*, I, pp.21–22.

<sup>59</sup> Sec. of State to Arthur, 8 February 1836, Tas. Arc.; Bassett, *op.cit.*, p.161.

simply a 'terrible bore'.<sup>60</sup> Arthur sought permission from Bourke to appoint Bannister.<sup>61</sup> Bannister was in fact a member of the Port Phillip Association.<sup>62</sup> Bourke rejected his nomination as district magistrate. Bourke duplicitously maintained that he had no intention to make any appointments for Port Phillip.<sup>63</sup> Bourke had in fact already advocated the settlement of the district. Bourke was awaiting instructions from London, and informed Arthur that no protection should be afforded to Batman 'until His Majesty's commands be received as to the ultimate disposal of the settlement'.<sup>64</sup>

## SYDNEY'S ASSERTION OF CONTROL

THERE WAS INTENSE lobbying between the competing interests of Hobart and Sydney for control of the Port Phillip District. The lobbying was best demonstrated in the competition for the assignment of the district's magisterial post. Good sense would have dictated that Hobart should govern the Port Phillip District. Physical proximity, the flood of people from Van Diemen's Land to the new settlement and the poor state of the Van Diemen's Land economy seem to suggest this. Some argued that it was simply absurd to annex Port Phillip to New South Wales.<sup>65</sup> Others argued that proximity and the need and ability to physically exclude convicts from the new settlement meant that Van Diemen's Land should be the choice. There is no doubt that the inertia behind the settlement of the Port Phillip district came from Van Diemen's Land. Especially during its early stages, the settlement depended on Van Diemen's Land for its food supply,

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<sup>60</sup> Boyes, G. W. T. B., *Diary*, MS, Royal Historical Society Library, Hobart; Bassett, *op.cit.*, p.161.

<sup>61</sup> Sir George Arthur to Sir Richard Bourke, 13 January 1836, *HRV*, I, p.22.

<sup>62</sup> Gurner, *op.cit.*, p.9.

<sup>63</sup> Governor Bourke's minute, 10 February 1836, *HRV*, I, p.22.

<sup>64</sup> Colonial Secretary to John Montagu, 23 December 1835, *HRV*, I, p.23.

<sup>65</sup> Correspondence, J. V. Thompson to Lord Glenelg, 29 November 1836, *HRV*, I, p.31.

stock, money and continued existence.<sup>66</sup> The adventurers were tired of the stratification of Tasmanian society and the aristocratic government officials who ruled their destiny. The weight of supporting the convict infrastructure was borne by the free settlers. This forced them to look elsewhere for economic opportunities, free from the constraints of the island panopticon and its hated *Impounding Act*.<sup>67</sup> The Van Diemen's Land enclosure regulations were detrimental to the interests of all landholders, especially small stakeholders.<sup>68</sup> As a result there was the overwhelming need for new unclaimed and cheap acreage to service an ever-expanding pastoral demand. By 1820, for example, there were more sheep in Van Diemen's Land than in the mother colony of New South Wales.<sup>69</sup> As always, however, in military-dominated colonial Australia, common sense and economic realities were overlooked in true military tradition. The wishes of the General [Bourke] superseded the opinions and aspirations of the Colonel [Arthur], notwithstanding the Colonel's devious gamesmanship and his suspected vested financial interest in the control of the Port Phillip District.<sup>70</sup>

John Pascoe Fawcner settled again in Port Phillip in July 1836. Fawcner had first come to Port Phillip as an eleven-year-old boy<sup>71</sup> with the failed 1803 Sullivan Bay settlement. His father, John Fawcner Snr, had been sentenced to fourteen years transportation for receiving stolen goods. It was unusual that family members were

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<sup>66</sup> Correspondence, J. V. Thompson to Lord Glenelg, 10 October 1836, *HRV*, I, p. 29 re choice; Kiddle, M., *Men of Yesterday: A Social History of the Western District of Victoria 1834-1890* (Melbourne, 1961) pp.34, 41 re money; Campbell, J., *op.cit.*, p.11 re existence.

<sup>67</sup> Noble, *op.cit.*, Stratification: p.33; Impounding Act: p.34, Livestock which strayed onto Crown Lands would be impounded and sold at auction; this system was much abused.

<sup>68</sup> The high rents for depasturing livestock on crown land meant that grazing in Van Diemen's Land was becoming unprofitable. A squattocracy had arisen that placed 750,000 acres in the hands of 26 landholders; Billot, *op.cit.*, p.94; Governor Arthur was said to own 100,000 acres himself.

<sup>69</sup> 182,000 as opposed to 100,000 in NSW, cited in Harcourt, *op.cit.*, p.24.

<sup>70</sup> Gamesmanship: Billot, *op.cit.*, p.106; Financial interest: Billot, *ibid*, p.102; noting that the Governor's nephew, Henry Arthur was a member of the Association and a magistrate.

<sup>71</sup> He turned eleven the day after the convicts were disembarked at Sullivan's Cove.

allowed to accompany transportees.<sup>72</sup> After the settlement transferred to Van Diemen's Land, Fawkner prospered. When Fawkner returned to Port Phillip in 1836, he visited the Sullivan's Cove site and found limestone chimneys and a water cask from the original settlement. Fawkner had chartered a schooner *Enterprise* under the command of Captain Lacey. Lacey entered Port Phillip heads on 15 August and disembarked amidst 'the beauty of the country' that was to become Melbourne on 2 September 1835. Lacey met John Helder Wedge, a member of the Port Phillip Association. The famous rivalry between the Batman and Fawkner claims to the fatherhood of Melbourne began. Wedge informed Lacey of the prior claims of Batman's party and Lacey obligingly moved to the 'unoccupied' land on the opposite bank of the river. It was during this time that the river running alongside the proposed settlement was named.<sup>73</sup>

The settlement began to expand. Governor Bourke became concerned for the safety of the white settlers in Port Phillip and the potential for racial strife. Gellibrand had already sent a shepherd back to Van Diemen's Land for interfering with native women.<sup>74</sup> Government 'intervention' in the settlement at Port Phillip came with the report of outrages committed against the native population in Westernport by men employed in the collection of mimosa bark and previous attacks against natives at Portland Bay. These reports, contained in correspondence from J. H. Wedge to Arthur, were published in the *Hobart Town Gazette*. The report of these outrages resulted in a flurry of correspondence between Bourke and Arthur. Bourke issued his second Port Phillip proclamation that decried the reported 'flagrant outrages ... upon the aboriginal

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<sup>72</sup> Fawkner's mother Hannah and sister Elizabeth were allowed to accompany the transportee; Harcourt, *op.cit.*, p.15.

<sup>73</sup> Visit to Sullivan's Cove site: Noble, *op.cit.*, p.42; Beauty of the Country: Bonwick, J., *Port Phillip Settlement* (London, 1883) pp.297–298, citing J. P. Fawkner in the *Diggers Advocate*, 1853; Rivalry: Billot, *op.cit.*, p.119; Naming River: A native boy who pointed to the river and cried out Yanna, Yanna, accompanied Wedge; he claims to have heard the boy call out 'Yarra Yarra' which Wedge took to be the name of the river. Gurner, *op.cit.*, pp. 20–21; according to Gurner, Yanna Yanna means: It runs, it goes or it flows; however according to Bonwick, citing J. H. Wedge it denotes a waterfall; Bonwick, J., *John Batman, the Founder of Victoria* (Melbourne, 1867) pp.48–49.

<sup>74</sup> Settlement Expand: The first recorded white birth in Melbourne occurred in the Fawkner camp on 29 December 1835, when Mary Gilbert gave birth to James Port Phillip Gilbert; Billot, *op.cit.*, p.120; His father James was the camp's blacksmith. When the locality's name changed to Melbourne, the proud parents likewise changed their son's name to James Melbourne Gilbert; Harcourt, *op.cit.*, p.110; Safety and Racial Strife: See Correspondence, *HR4*, I, XVIII, p.540. Shepherd sent back: Billot, *op.cit.*, p.126.

natives of Westernport by a party of white men' and declared that those territorial precincts were still part of the colony of New South Wales.<sup>75</sup>

What Bourke actually meant was that the full weight of the State's most trusted, cheap and judicially pliable office, the colonial magistracy, was about to descend upon the Port Phillip District. The day following the drafting date of the proclamation, correspondence reveals that plans had already been made to dispatch George Stewart, Police Magistrate at Campbelltown, to Port Phillip, under a special commission to investigate the new settlement.<sup>76</sup> The correspondence suggests that the two constables who were to accompany Stewart to the settlement be sworn in as constables of the territory of New South Wales, rather than retaining their restricted commissions as merely sworn to 'act for the town and port of Sydney'. Bourke, under advice of his Executive Council, dispatched Police Magistrate Captain George Stewart, Sergeant John Sheils and Constable Timothy Callaghan as the first in a series of acts designed to gain control over an area mutinously occupied by adventurers.<sup>77</sup> The revenue cutter *Prince George* left Sydney on 6 May 1836 bound for Westernport. Stewart carried a letter to Wedge requesting 'co-operation and assistance of that gentlemen and of all with whom he may be connected'. Stewart's arrival was reported in Hobart.<sup>78</sup> Stewart did not alight at Westernport, but instead, under sealed orders given to Captain Roach of the *Prince George*,<sup>79</sup> met J. H. Wedge at his Geelong station on 27 May 1836.

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<sup>75</sup> All persons residing or being within the same, are subject to the laws in force in the said Colony, and the promptest measures will be taken by me to cause all persons who may be guilty of any outrage against the aboriginal natives, or of any breach of the said laws, to be brought to trial before the Supreme Court of New South Wales, and punished accordingly, Proclamation 3 May 1836, published in *NSW Government Gazette*, 18 May 1836, *HRV*, I, p.35.

<sup>76</sup> Kiddle, M., *op.cit.*, p.34, claims that he came from the Goulburn District, as does Edmund Finn, *op.cit.*, p.8, and Grimwade, *op.cit.*, p.72; Castles, p.230, citing Turner, *op.cit.*, p.148–149.

<sup>77</sup> Pursuant to section 4, 4 William IV, No.7; Correspondence, H. C. Wilson to Colonial Secretary, 4 May 1836; Finn, E., *op.cit.*, p.10.

<sup>78</sup> Correspondence, Colonial Secretary to John Montagu, 5 May 1836, *HRV*, I, pp. 35–36; Stewart arrival, note misspelling of name as 'Stuart', see Hobart Town Courier, Friday 17 June 1836 in *CCP*, *op.cit.*, p.10.

<sup>79</sup> Police Magistrate George Stewart's Report on Port Phillip, George Stewart to Colonial Secretary, 10 June 1836, *HRV*, I, pp. 39–43.

The residents of Port Phillip held a meeting at John Batman's residence on 1 June 1836 to decide on temporary methods of governance until the proper authorities were moved to create the machinery of government in the new settlement. Sixteen of the leading residents were present at the public meeting. Police Magistrate George Stewart was not officially recorded as being at this meeting, but some suggest that he was present. I believe this to be the case with a clue to his presence found in paragraph 10 of his subsequent Report. Even if Police Magistrate Stewart was not physically present, it is strange that after such a period of occupation, the settlers would choose this very moment to hold their first public meeting.<sup>80</sup> It is possible that the meeting was staged for Stewart's benefit. According to the minutes of the meeting, the most important settlers, women excluded, voted unanimously on nine proposals or, as Finn called it, 'a charter of home rule' or the first attempt at legislation in the settlement.<sup>81</sup> The proposals were quite extraordinary given the circumstances of settlement.<sup>82</sup>

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<sup>80</sup> Suggestion present: Editorial note, *HRV*, I, p. 34; Clue: On the same day of my holding the conference with the natives there was a meeting of the Europeans at the Settlement, and I embraced that opportunity of promulgating the proclamation of Sir Richard Bourke, and circulating copies of such, for the purpose of their being posted up at the various stations of Europeans; Police Magistrate Stewart's Report, *op.cit.*, p. 41, paragraph 10; Present were John Batman, J. H. Wedge, John Pascoe Fawkner, John C. Darke, John Wood, Frederick Taylor, David R. Pitcairn, William Diprose, Thomas Roadknight, W. G. Sams, John Aitken, Alexander Thompson, Joseph Sutherland, William Roadknight, James Simpson and G. Mackillop; see Labilliere, *Early History of the Colony of Victoria* (London, 1878) vol. II, pp.141–142.

<sup>81</sup> Finn, E., *op.cit.*, p.8; Castles, *op.cit.*, p.231, Turner, *op.cit.*, p.151.

<sup>82</sup> '1.That James Simpson be appointed settlement arbitrator to arbitrate between individuals disputing on all questions, excepting those relating to land, with power to him to name two assistants that he may deem fit; (Prop: J. P. Fawkner; Sec: J. Wood); 2.That the arbitrator or arbitrators be empowered to inflict any fine that he or they may deem fit proportionate to the injury complained of; (Prop: J. C. Darke; Sec: J. H. Wedge); 3.That all the subscribing parties to these resolutions bind themselves not to raise any action at law or equity against the arbitrator or arbitrators for any act he or they may perform in the execution of the duties hereinbefore imposed on them; (Prop: J. P. Fawkner; Sec: Dr. Thompson); 4.That the residents not present at this meeting be invited to become parties to these resolutions; (Prop: J. H. Wedge; Sec: Mr Aitken) 5.That all parties do bind themselves to communicate to the arbitrator any aggression committed upon or by the Aborigines that may come to their knowledge by the earliest opportunity and that he be empowered to proceed with the matter as he shall deem fit; (Prop:Mr Pitcairn; Sec: Dr. Thompson); 6.That all subscribing parties pledge themselves to afford protection for the Aborigines to the utmost of their power and further that they will not teach them the use of firearms or allow their servants to do, nor on any account to allow the Aborigines to be in possession of any firearms; (Prop: J. H. Wedge; Sec: J. P. Fawkner); 7.That the arbitrator collect all the fines and hold them until the next general meeting of the settlers on the first day of September next; (Prop: Dr. Thompson; Sec: John Batman);8.That the destruction of the wild dogs being of great importance to the colony, a reward of 5 shillings be given for the production of every head of the same and that a fund be raised by subscription for that purpose. The masters' certificates being sufficient proof of the destruction; (Prop:Mr Roadknight; Sec:Mr Aitken); 9.That a petition be prepared to Governor Bourke praying him to appoint a resident magistrate at Port Phillip and that he will be further pleased to appoint from among the residents here other gentlemen to assist him when required'; (Prop: J. P. Fawkner; Sec: J. H. Wedge); *HRV*, I, pp. 36–37.

Port Phillip's first public petition was executed the following day. The petition reviewed the position of the settlement. It stated the current population at 177, and mentions the 100,000 pounds capital investment brought to the settlement. It also cites the smuggling of excisable articles into the settlement.<sup>83</sup> This was obviously designed to highlight the lack of import revenue collection facilities. The petition's main purpose, the appointment of a Police Magistrate and local justices of the peace, is summed up in its final paragraph.<sup>84</sup> The core Association members understood the dynamics and the structural basis of colonial governmental infrastructure and the central importance played by the office of the magistrate. One of the main areas of magisterial jurisdiction was adjudicating in master and servant disputes. The very first disputes between the Batman-Association and Fawkner camps had been employment related. Fawkner had claimed that Henry Batman had enticed Scott from his service whilst Batman counter-claimed that Fawkner had done likewise with 'Old Jemmy' Gumm. It is important to note that the very first proposal contained in the settler's petition-constitution was that James Simpson be appointed arbitrator.<sup>85</sup> Simpson had previously adjudicated in disputes between the Batman and Fawkner camps supposedly, according to Grimwade, over the destruction of some rabbits. The dispute however, was more involved than Grimwade contends. There were in fact five charges brought by Fawkner against Henry Batman. It was agreed that John Aitken [later magistrate] and Dr. Thompson [leading member of the Association and later first Mayor of Geelong] would serve as special jurors. It was also decided that James Simpson [magistrate in Van Diemen's Land and later justice of the peace and Police Magistrate in Melbourne] would arbitrate the proceedings 'to regulate all disputes here'. The matter was heard on 2 May 1836. Fawkner noted the charges in his journal.<sup>86</sup>

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<sup>83</sup> Residents' Petition to Sir Richard Bourke, 2 June 1836, *HRV*, I, p. 38.

<sup>84</sup> We humbly hope the circumstances above recited will indulge Your Excellency to comply with our request not only to appoint a Police Magistrate but also to nominate from the residents here a sufficient number to the Commission of the Peace to constitute a Bench when required; Residents' Petition, final paragraph, *op.cit.*, p. 38.

<sup>85</sup> Master-servant: Billot, *op.cit.*, p.128; See also Arbitrator: Bonwick, *op.cit.*, p.416, cited in Jenks, E., *op.cit.*, p.28; Simpson had previously also been Commissioner of the Caveat Board in Van Diemen's Land; Kiddle, M., *op.cit.*, p.32.

<sup>86</sup> Some rabbits: Grimwade, *op.cit.*, p.71; More involved: Castles, *op.cit.*, pp.230-231; Turner, *op.cit.*, p.148; '1.shooting one of my kangaroo dogs and it not destroying any property; 2. shooting 3 of my rabbits at several times; 3.sending

The fifth and final charge amounted to a series of complaints concerning the conduct of Henry Batman for which no damages were sought. Charge 4 was dismissed as it related to the conduct of Mrs Henry Batman. In the matter of the first charge, 30 shillings was awarded; as to the second, nothing, with a reservation by the panel that 'some hasty expressions of Mr Batman' may have led one of the Sydney natives (Bullit) to have destroyed the rabbits. In the third and final charge damages of five shillings and a fine of twenty shillings 'in consideration of its being an act of unauthorized aggression' was awarded. The panel concluded by praising Fawkner for his forbearance and good conduct, a statement which, given Fawkner's cantankerous personality and manic behaviour, brings a smile to the face of any student of Victorian history. Simpson, dubbed by Fawkner in his *Journal* as the 'Arbitrator General of Pascoevale Port Phillip', was well suited to the post of 'legal autocrat'. Finn concurred with this assessment.<sup>87</sup> The settlers understood the importance of controlling the ranks of the honorary magistracy and how important a domination of the said office was to be in the future rule of the new colonial settlement. It is ironic that those who had 'ruptured the legal fabric' by unlawfully occupying crown land now sought to 'repair the damage' by seeking Crown protection via that office which at all costs sought to maintain order.<sup>88</sup>

Some 22 years prior to this, Fawkner had been imprisoned for helping convicts to escape from Van Diemen's Land.<sup>89</sup> For a man who now enjoys something of a parsimonious reputation amongst historians, Fawkner spent most of his money and time

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the Sydney blacks to pull down my paling during the night; 4. his wife setting a large dog on my calf by which means its leg was broke and we were compelled to kill it she drunk at the time'; Fawkner, J. P., (ed. C. P. Billot) *Melbourne's Missing Chronicle: Journal of Preparations for Departure to and Proceedings at Port Phillip* (Melbourne, 1982), 2 May 1836.

<sup>87</sup> Good Conduct: Fawkner, J. P., (ed. C. P. Billot), *Journal*, cited in Billot, *op.cit.*, pp.142-144; Arbitrator General: Fawkner, J. P., (ed. C. P. Billot), *Journal*, 1 June 1836, cited in Billot, *op.cit.*, pp.152; Finn assessment: 'no better choice of an autocrat could possibly be made than Mr Simpson. He had been Police Magistrate at Campbell Town in Van Diemen's Land; and, with a large experience of our earlier and later magistracy - stipendiary and honorary - I never knew a more independent and impartial man on the Bench'; Finn, E., *op.cit.*, p.9.

<sup>88</sup> Campbell, J., *Pastoral Settlement in the Port Phillip District 1834-1847*, Ph.D. Thesis, La Trobe University, April 1981, p.223; Palmer, D., in Philips and Davies, *op.cit.*, p.76.

<sup>89</sup> Fawkner had in fact fallen in with a group of convicts and had decided to help them escape. Amongst them was a Piedmontese soldier-baker who seems to have been instrumental in gaining Fawkner's support, Billot, C. P., *The Life and Times of John Pascoe Fawkner* (Melbourne, 1985) p.60.

over a two month period helping the convicts build a ship.<sup>90</sup> The boat was to take the convicts to South America and freedom. They christened the lugger *Liberty* and although the escape attempt failed<sup>91</sup> and all of the escapees and Fawkner paid the appropriate price, the plan, some 200 years later, still bespeaks a romantic *quixotism* that only desperate yet doomed ventures evoke.<sup>92</sup> One can only speculate as to whether it was the floggings or the incarceration that changed Fawkner's thinking on the matter of escaping convicts. There is no direct evidence that Fawkner actually received his entire allotment. The number of lashes also exceeded the accepted Sydney maximum of 300 lashes, which could only then be administered with the Governor's consent. Part of the flogging was supposed to occur 'before his father's door', in keeping with the tradition of the time. One famous example is the flogging of the son of Lieutenant Governor Collins by Governor Bligh in 1808. What is not in doubt is that Fawkner was sentenced to 3 years imprisonment. This imprisonment was served in Sydney and the secondary punishment settlement of Coal River (Newcastle). His sentence was remitted to two years and he returned to Van Diemen's Land.<sup>93</sup> Having a sense of the man who would become the most belligerent, litigious and anti-authoritarian person in colonial Victoria, I doubt very much that Fawkner had changed his mind at all on the issue of escaped convicts at Port

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<sup>90</sup> The ship would ply the Hobart-Newcastle run for many years, *Age* 7 June 1862; Billot, *op.cit.*, p.62.

<sup>91</sup> *Van Diemen's Land Gazette*, 21 May 1814.

<sup>92</sup> Fawkner was very bitter that the convicts having escaped some 100 miles out to sea returned for water, were detected and captured and then confessed his part in the plot; August 23, 1814. John Fawkner Junior. Aiding and abetting Fortros Desantos, Anthony Jenny, Patk. McCabe, Antonio Martini and Firenza Buccheri to escape from the colony 500 lashes and labour for Govt. 3 years. (Rev. R. K. [Knopwood], F. W. [Williams], J. G. [Gordon] Esq.); Billot, *op.cit.*, pp.62–63.

<sup>93</sup> Floggings: There is some dispute as to whether the floggings occurred, Billot, *op.cit.*, p.64; Flogging maximum: *The Report of the Select Committee on Transportation*, 1813, *op.cit.*; Billot, *ibid.*; Fathers door: Bonwick, J., *Port Phillip Settlement* (London, 1883) p.282; Tradition of the time: Bridges, R., The Flogging of Johnny Fawkner, *Herald*, 22 April 1933; Famous example: After being deposed by the Rum mutineers, Governor Bligh sailed to Hobart instead of sailing on to London as ordered by Paterson. He arrived in Van Diemen's Land aboard the *Porpoise* on 19 March 1808 and sought support from Lieutenant Governor Collins in Hobart against the mutiny of the Rum Rebellion. When Collins did not provide Bligh with this support a mad game of cat and mouse ensued until the arrival of Macquarie and the departure of Bligh. This no doubt hastened Collins death on 24 March 1809. Part of this game included Bligh ordering that Collins' son, a midshipman aboard the *Porpoise*, was to be tied to the gangplank and given two dozen lashes 'under his father's nose': see Correspondence, J. Hobbs to J. N. Calder, 26 May 1873, Calder Papers, La Trobe Collection, State Library Victoria, cited in Billot, *op.cit.*, p.53; Fawkner imprisonment term: Billot, *op.cit.*, pp.65–66.

Phillip or anywhere else. Fawkner held conflicting beliefs about convicts and the 'convict system'. His father had been a convict. Fawkner was sent free to Australia, but was for two years also a convict. Fawkner married a transported convict woman. Fawkner's brother-in-law was a transported convict. From a young age Fawkner had learnt to despise the convict system and the society that it created. Years later Fawkner was to rail against the planned settlement of 'Pentonvillains' in Port Phillip and the tyranny of convictism that it would bring.<sup>94</sup> The convict system had no place amongst the burghers of the supposedly free settlement of Port Phillip.

In the meantime Stewart, the visiting magistrate reported that he held a conference with natives on 1 June and distributed blankets to them.<sup>95</sup> Stewart made enquiries as to the extent of tribal division in the colony and made notes for intelligence purposes on this matter.<sup>96</sup> He undertook a statistical and agricultural-geographical survey of the settlement and its environs, concluding that the settlement would enjoy rural prosperity.<sup>97</sup> He noted the existence of smuggling and compiled a list of ships that operated between Van Diemen's Land and the settlement. Stewart commented upon the excise fees lost to the governments of both Sydney and Van Diemen's Land.<sup>98</sup> Stewart concluded that the settlers would be gratified to receive the protection of the government via the placement of a magisterial presence amongst them. Soon after this report was dispatched to Bourke, Edward Waterton JP, applied for the post of Police Magistrate at

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<sup>94</sup> Father: Sentenced to 14 years transportation for feloniously receiving goods known to have been stolen, Old Bailey Sessions Papers 6th Session, 1801, pp.466–469; Billot, *ibid*, p.2; Married convict woman: Eliza Cobb: Sentenced to 7 years transportation for stealing a child; she apparently talked a small girl into handing over her 4 month old brother to her, stole him away, and was caught by the Bow Street Runners three days later. Eliza was 17 years old at the time; Old Bailey Sessions Papers, 17 September 1817; Billot, *ibid*, p.72; Brother-in-law: Thomas Green, sentenced to death for stealing a horse, commuted to transportation for life, came out with the Fawkner family aboard the *Calcutta*, who succeeded in escaping from Hobart Town in February 1805 (reaching Sydney), married Fawkner's sister Elizabeth on 13 October 1807; Billot, *ibid*, p.54; Despise convict system: Billot, *ibid*, p.60; Pentonvillains and tyranny: *ibid*, p.259.

<sup>95</sup> Stewart Report, *op.cit.*, p.40, paragraph 7.

<sup>96</sup> Stewart Report, *op.cit.*, p.40, paragraph 9.

<sup>97</sup> Stewart Report, *op.cit.*, p.40, paragraphs 11, 12, 13, 14.

<sup>98</sup> Stewart Report, *ibid*, p.40, paragraph 14.

Port Phillip. His self-nomination was rejected.<sup>99</sup> Bourke was still maintaining the official line that 'the occupation of Port Phillip is not sanctioned'.<sup>100</sup> Ten days later, however, tenders were called for the provision of a ship to accommodate passengers to Port Phillip.<sup>101</sup> This vessel would transport to the district its first and most famous regularly appointed territorial magistrate, William Lonsdale.

In 1836 Fawcner described the land as being unrivalled for sheep and cattle,<sup>102</sup> yet chose more perfunctory pursuits in his dash for wealth. Fawcner was to construct the first house in Melbourne, which he soon turned into an unlicensed hotel.<sup>103</sup> It was constructed of turf and wood. Fawcner named it *The Royal Hotel*, a place where you could purchase bad rum or water, and by contemporary accounts in March 1836, 'a house of entertainment where we could not get entertained'.<sup>104</sup> Fawcner always sought to challenge John Batman as Melbourne's true first settler. His expedition had begun settling the township before Batman, as Batman's men had been left at Indented head.<sup>105</sup> Fawcner's virulent litigiousness was legendary in Van Diemen's Land and was to be repeated in Port Phillip. Fawcner outlived Batman by many years and prospered financially. He eventually rose to a level of respectability that allowed him a seat in the Victorian Legislative Council, a commission as a magistrate upon the Bench at Collingwood<sup>106</sup> and a State

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<sup>99</sup> Edward Waterton, J.P., having returned from a tour of the Pacific Islands, had heard the gossip surrounding Port Phillip and concluded as everyone had that a magisterial appointment was imminent. He therefore put himself forward for the position; Correspondence, Edward Waterton to Sir Richard Bourke, 19 June 1836, *HRV*, I, p.43.

<sup>100</sup> Sir Richard Bourke, Governor's minute, 27 July 1836, to Edward Waterton correspondence, *HRV*, *ibid.*, p. 43.

<sup>101</sup> Tender for Vessel, NSW Gov. Gazette, 7 September 1836, *HRV*, I, p.45.

<sup>102</sup> *Colonist*, Sydney, 22 September 1836, pp.302–303.

<sup>103</sup> Casltes, *op.cit.*, p.229; Boys, *op.cit.*, p.35.

<sup>104</sup> Bride, T. F. (ed), *Letters from Victorian Pioneers* (Melbourne, 1899) p.12, citing David Fisher.

<sup>105</sup> Challenge Batman: He reminded all who would listen that he had originally arrived in the District in 1803 with the Collin's settlement. He claims to have planned a Batman Treaty with the natives himself; Batman to Wedge; Bonwick, *op.cit.*, p.330, original in M.L.; Billot, *op.cit.*, p.101; Fawcner expedition settled Melbourne: Billot, *ibid.*, p.101.

<sup>106</sup> Fawcner sat on the Collingwood Bench of Magistrates from 1860 and was Chairman of the Bench of Magistrates at Collingwood from 1862 until the time of his death; Billot, *ibid.*, p.307.

funeral, the size of which has not been matched to this day.<sup>107</sup> If not for his character flaws which effectively hid his kindness, generosity and advanced liberal ideas, Fawcner might have earned the respect of contemporaries and historians, and found himself duly recognised as the stepfather or co-founder of Melbourne.

## WILLIAM LONSDALE APPOINTED

ON SEPTEMBER 14 1836 Bourke issued a proclamation opening the district of Port Phillip for lawful settlement and formally announcing the appointment of Captain William Lonsdale, of the 4th, or King's Own Regiment, to the position of first Police Magistrate for the Port Phillip District.<sup>108</sup> Lonsdale was to become Victoria's most famous member of the colonial magisterial fraternity. Bourke's proclamation concerning the settlement and the appointment of a Police Magistrate to the district therefore extended the scope of the legal structures of governance into the Port Phillip District by incorporating that district into the jurisdiction of the mother colony of New South Wales. Palmer argues that this extension and the body of men who would enforce that legal structure would also enforce the dominant sectional interests and values of that structure;<sup>109</sup> that the dispatch of Lonsdale to the district was similar to the dispatch of the Royal Canadian Mounted Police into the Yukon Territory as an overt act by the Imperial government to establish its authority in the new territory.<sup>110</sup> This interpretation is

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<sup>107</sup> *Victorian Government Gazette Extraordinary* No.46 (1869) announced that all public offices would be closed from noon for the funeral, both Houses of Parliament would be adjourned for the day, City Council adjourned for the week, 228 carriages stretching over two miles long in the funeral cortege with an estimated 50,000 people lining the streets; Billot, *ibid*, p.311.

<sup>108</sup> Publication of Official Notice, NSW Gov. Gazette, 14 September 1836, *HRV*, I, 3, pp.55–56; *Sydney Gazette*, 13 September 1836.

<sup>109</sup> Palmer, D., *The Making of the Victorian Colonial Police: From Colonization to the New Police*, M.A. (Criminological Studies), La Trobe University, October 1990, p.39.

<sup>110</sup> Palmer, D., *op.cit.*, p.39, citing Brogden, M., An Act to Colonize the Internal Lands of the Island: Empire and the Origins of the Professional Police, *International Journal of the Sociology of Law*, (1987) 15: 179–208 and Morrison, W., 'The North West Mounted Police and the Klondike Gold Rush', in Mosse, G., *Police Forces in History* (London, 1975); Palmer, D., in Philips and Davies, *op.cit.*, p.76.

essentially accurate.<sup>111</sup> The dispatch of a Police Magistrate and a body of constables to a district was a common theme in colonial governance. The dispatch would normally be in response to a settler demand for 'security against natives, bushrangers, gold robbers and stock thieves as well as disorder in rural towns'. This would then be followed by a proclamation extending the Towns Police Act to the district with the constabulary under the care, control and supervision of the magistrate.<sup>112</sup> The dispatch of Lonsdale and his party to the District of Port Phillip is consistent with the normal practice of the day except that the settlers in this case had been deemed trespassers. The settlers genuinely needed a familiar authority figure in the guise of a magistrate who would maintain order, protect their personal and property rights and allows them a legitimacy that their endeavours deserved. The settlement needed an order maintenance figure. The settlers were very often drunk and violent. Even the 'respectables' amongst them would engage in public brawls and fistfights. Fencing disputes between the two camps had also begun with both parties either erecting or pulling down fences consistent with their own personal assessment of their boundaries.<sup>113</sup> The settlers did not want a replica of the Van Diemen's Land autocracy tainted by convictism, but a colonial caricature of their vision of England and the birthrights attached to it. Forever claiming to be a free settlement and fighting the infection of convictism, the settlement that grew to become Melbourne, always prided itself, somewhat falsely, on its free origins. The settlers 'prayed him [Bourke] to send us a Magistrate and Police, but he, in the true Military spirit, sent us a Commandant Military'.<sup>114</sup>

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<sup>111</sup> Fondly remembered discussion with Emeritus Professor A. C. Castles, Adelaide, September 2001.

<sup>112</sup> Dispatch: Finnane, M., *Police and Government: Histories of Policing in Australia* (Melbourne, 1994) p.17; Proclamation: Finnane, *ibid*, p.17.

<sup>113</sup> Respectable brawling: Such as the bare-knuckle fight between drunken settler Flett and Dr Barry Cotter because Flett had urinated in Cotter's bed, 29 February 1836: Billot, *op.cit.*, p.131; Fencing disputes: Henry Batman began to fence close to Fawcner's house and in the process and under cover of darkness began pulling down sections of Fawcner's fence; Billot, *op.cit.*, pp.131–132.

<sup>114</sup> Fawcner to Waterfield, in Bonwick, J., *Port Phillip Settlement* (London, 1883) pp.326–329, cited in Billot, *op.cit.*, p.153.

William Lonsdale was born on 21 October 1799 at Fort Den Helder (Holland) in the baggage train of Wellington's army.<sup>115</sup> His father, Lieutenant James Lonsdale, of the 4th (King's Own) Regiment was from an English military family originally from Skipton in North Yorkshire. His mother Jane Lonsdale (*nee* Faunce) came from an English military-legal family originally from Sharsted Court in Kent. Together with his expectant wife, James joined the Anglo-Russian armies in Holland in October 1799. The French forces were victorious and according to the terms of surrender, the family left Holland for England on 19 November 1799.<sup>116</sup> Over the next decade James Lonsdale saw action in the Hanover and Gothenburg Expeditions and in the Spanish Peninsula War. In 1814 he was injured and rendered a quadriplegic from injuries he sustained in the Peninsula War in Spain. He was pensioned at 100 pounds p.a. in January 1819 having experienced 'a total loss of the use of his limbs whilst on service'.<sup>117</sup> One can only speculate as to the effect his father's war injuries and quadriplegia had upon William Lonsdale. As the eldest of seven children the responsibilities of adult life must have fallen heavily upon his shoulders. On 8 July 1819, William Lonsdale entered the British Army, in his father's old 4th Regiment, as an Ensign (his brother Alured soon followed him) 'without purchase'.<sup>118</sup> William served in the West Indies and on 4 March 1824 was promoted to Lieutenant. He enjoyed powerful family military connections.<sup>119</sup> There is no direct evidence that William Lonsdale ever gained direct advantages from his eminent family connections. It is interesting to note, however, that Governor Sir Richard Bourke was also originally from

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<sup>115</sup> Wilkins, J. M., *The Life and Times of Captain William Lonsdale 'Nieuwe Dieper' 1799–1864* (Melbourne, 1991) p.1.

<sup>116</sup> Wilkins, *op.cit.* p.4.

<sup>117</sup> *Ibid.* p.5, citing Public Records Office, Kew (U.K.) War Office Records, Army Lists, U.K., Keith, G. T. E., *Index to (U.K.) Regimental Army Lists*.

<sup>118</sup> This privilege was granted to those sons whose fathers had served with distinction in the Regiment; otherwise the practice of purchasing a commissioned rank, with prices varying between 100 pounds for an Ensign, 1000 pounds for a Captain and 6000 pounds for a rank of Colonel; Wilkins, J. M., pp.5–6; citing Cowper, Col. L. I., *The King's Own: The Story of a Royal Regiment, Vol. 2, 1814–1914*, (Oxford, 1939) University Press; and Army Lists, U. K.

<sup>119</sup> His maternal uncle Lieut-Colonel Alured Dodsworth Faunce was in command of the Regiment and that his cousin Lieutenant A. T. Faunce was the Regimental Adjutant. Colonel Alured Faunce was later to be ADC to King William IV and Queen Victoria and eventually promoted Major General; Wilkins, *op.cit.*, pp.6–7.

the 4th Regiment and indeed fought in the Dutch campaign in the same action with William's father James. It was Bourke who first placed Lonsdale on the Commission of the Peace in New South Wales and was later to select him to be the first resident Police Magistrate and Crown representative in the Port Phillip settlement. Whilst stationed in England Lonsdale gained his first taste of magisterial practice.<sup>120</sup> His regiment also engaged in recruiting marches, Lonsdale once marching 188 miles in seventeen days.<sup>121</sup> On 14 December 1831, Lonsdale arrived in Sydney aboard the *Bussorah Merchant* guarding convicts. He then served in New South Wales for next five years. He supervised Governor Darling's double distilled villains who toiled for the state in the chain gangs, building roads over the Blue Mountains and the breakwater at Newcastle. In 1834 Lonsdale was appointed to command the Port Macquarie detachment of the Regiment. Wilkins describes him as having a calm temperament.<sup>122</sup> On 11 July 1834, he was promoted<sup>123</sup> to the rank of Captain [commission cost 1,000 pounds] at a salary of 100 pounds per annum plus rations and quarters. On 4 April 1835<sup>124</sup> whilst stationed at Port Macquarie [his maternal cousin Lieut. A. T. Faunce having previously commanded there] William Lonsdale married Martha *nee* Smythe<sup>125</sup> the daughter of a civil engineer from Launceston.<sup>126</sup> With the 28th Regiment sent to Port Macquarie, Lonsdale was sent back to Sydney and on 2 November 1835 was sent to command an Iron Gang at Parramatta.<sup>127</sup> In Sydney on 2 January 1836, Lonsdale's name is gazetted on the list of

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<sup>120</sup> His regiment was engaged in civil order maintenance duties, where, armed with Royal Warrants they would assist the 'Civil Magistrates and all others concerned, are to be assisting in providing Quarters, Impressing Carriages and otherwise as there shall be occasion' in maintaining order and peace within the kingdom; Wilkins, *op.cit.*, p.7, citing The King's Own 4th Regiment Pay and Muster Lists.

<sup>121</sup> *Ibid*, p.7.

<sup>122</sup> Wilkins, *op.cit.*, pp.10–11.

<sup>123</sup> Penny, *ADB* entry.

<sup>124</sup> Penny, *ADB* entry, claims it to be 6 April 1835.

<sup>125</sup> Wilkins, *op.cit.*, p.12.

<sup>126</sup> Shaw, *op.cit.*, p.67.

<sup>127</sup> *NSW Government Gazette*, 2 November 1835, p.779.

Magistrates for the Territory, serving as an honorary unpaid justice of the peace.<sup>128</sup> He also held the post of assistant Police Magistrate as supervisor of constables. He again was engaged in supervising chain gangs, convicts 'of the worst kind'.<sup>129</sup> This is contrary to the assertion that Lonsdale had 'no previous experience in police management'.<sup>130</sup>

In September 1836, Lonsdale was chosen by Bourke to be the first<sup>131</sup> Police Magistrate in the Port Phillip District. He was also Commandant of Troops and 'Chief Agent of Government'. He was to report directly to the Governor. His appointment came in the form of two separate instructions: one military,<sup>132</sup> the other civil.<sup>133</sup> The military instructions were in the form of a standard colonial military commission. It confirmed his appointment to Port Phillip together with a detachment of the 4th King's Own Regiment. This consisted of a subaltern, two sergeants and 30 rank and file troops. Lonsdale was directed to sail to Port Phillip aboard HMS *Rattlesnake* and upon arrival, to establish a residence, barracks, commissariat store and huts for constables. He was to select a position irrespective of any prior claims to ownership of any lands therein, but was to avoid any needless interference with persons already arrived.<sup>134</sup> He was instructed to take into account the site of the future township when deciding the position of the government camp.<sup>135</sup> The rationing regime was detailed. He was instructed that ovens for bread be erected as soon as possible, and was advised to strictly adhere to General

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<sup>128</sup> *NSW Government Gazette*, List of Justices of the Peace, 8 January 1836, NSWA.

<sup>129</sup> Wiedenhofer, *ADB* entry.

<sup>130</sup> Palmer, D., *op.cit.*, p.39, citing Haldane, R., *The People's Force: A History of the Victoria Police* (Melbourne, 1986) pp. 6-7.

<sup>131</sup> Penny, Sayers *ADB* entry.

<sup>132</sup> Military Instructions to Lonsdale, Correspondence, William Hunter to William Lonsdale, 12 September 1836, *HRV*, I, pp. 46-48.

<sup>133</sup> Civil Instructions to Lonsdale, Correspondence, Colonial Secretary to William Lonsdale, 14 September 1836, *HRV*, I, pp. 49-54.

<sup>134</sup> Military Instructions to Lonsdale, *op.cit.*, p. 46.

<sup>135</sup> This is in direct contradiction to Grimwade, *op.cit.*, pp.72-73, who maintains that 'it is a mistake to suppose that Bourke intended Lonsdale to establish a town forthwith'.

Orders regarding the issuing of tea and sugar in lieu of spirits.<sup>136</sup> A garden was to be laid out and maintained until markets were established in the settlement.<sup>137</sup>

The Civil Instructions or General Instructions to Lonsdale are more detailed. They begin with a brief overview of the unauthorised settlement of the Port Phillip and then direct the formal settlement of the area with Lonsdale named as the Police Magistrate for the District of Port Phillip. It states that in his capacity as Police Magistrate, he was to exercise the ordinary jurisdiction of a justice, in accordance with the laws of England and those now in force in the Colony of New South Wales and the Acts of the Governor in Council.<sup>138</sup> In the exercise of this jurisdiction, he was to be assisted by his subaltern who was also to be placed upon the commission so as to allow them to exercise the jurisdiction requiring two justices. A clerk was to be appointed at Lonsdale's discretion. He was also to submit Returns and Reports as required from other colonial magistrates. Most importantly, he was to lodge a secret Monthly Confidential Report at the end of every month and send it marked 'Confidential' to the Governor himself.<sup>139</sup> These civil instructions are similar to those given to Charles La Trobe as Superintendent of Port Phillip. The civil and military instructions are more consistent with the post being more properly described as Superintendent rather than that of a Police Magistrate. Such military and civil powers were also more akin to that of a Commandant rather than those of a civil administrator.<sup>140</sup> It should be noted that Lonsdale had previously served in such a position in Port Macquarie. Such powers also brought suspicion.

Lonsdale became popularly known as the government 'Agent' in Port Phillip. Lonsdale was the director of the state's order enforcement arm, the pre-modern police

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<sup>136</sup> General Order, No.259, 18 September 1835.

<sup>137</sup> Military Instructions to Lonsdale, *op.cit.*, p. 48.

<sup>138</sup> Civil Instructions to Lonsdale, *op.cit.*, p. 49.

<sup>139</sup> Civil Instructions, *op.cit.*, pp. 49-52.

<sup>140</sup> Haldane, *op.cit.*, p.7.

force. The officers of the new police force in England were to become domestic missionaries that 'sought to incorporate the English provinces into centrally governed order'.<sup>141</sup> In Australian colonial society, still close to its 'open-air' panopticon origins, this incorporation process was easier to achieve than in England and more necessary because of local conditions. It was a common phenomenon within the British colonies as part of a process of institutional and cultural absorption.<sup>142</sup> The presence of Lonsdale and his police subordinates or colonial domestic missionaries in the Port Phillip District sealed the compact between citizen and the state. The panopticon origins of the Australian colonies were crucial in forming cultural identities, perceptions and the attitudes towards the organs of law enforcement during the colonial period. The popular support given the northwest Mounted Police in Canada can be contrasted with the negative popular perceptions of the police forces in colonial Australia.<sup>143</sup>

Police Magistrate Lonsdale was informed that he was to be accompanied by a representative of the Surveyor General's Department who was to be appointed a special magistrate, a Commissioner of Crown Lands for the district.<sup>144</sup> An officer of customs was to follow. Lonsdale was given the choice of either confirming the existing Association settlement surgeon and catechist [Dr Thompson] or appointing someone else to the post. Lonsdale was also to immediately take a census of the settlement, including information regarding the occupation of lands.<sup>145</sup> Bourke also instructed that one of Lonsdale's most important duties was to see to the protection of the natives in the District. He was to establish a native village and to employ William Buckley as an intermediary. It was also specified that the natives must be taught that they were subject to the laws of England

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<sup>141</sup> Storch, R., 'The policeman as domestic missionary: Urban discipline and popular culture in Northern England, 1850-1880', *Journal of Social History*, (1976) 9:481-509, Palmer, D., *op.cit.*, pp.51-52.

<sup>142</sup> Brogden, M., *op.cit.*, p.205, cited in Palmer, D., *op.cit.*, p.52; 'open-air panopticon' phrase as a result of comment by Professor S. Macintyre, May 2005.

<sup>143</sup> Finnane, M., *op.cit.*, p.23.

<sup>144</sup> Under the provisions of William IV, No.4.

<sup>145</sup> Civil Instructions, *op.cit.*, pp. 52-53.

and were liable to punishment should they choose to ignore them. The natives would be sent to trial in Sydney if the seriousness of any charges brought against them warranted such removal.<sup>146</sup> Lonsdale was also instructed to advertise his appointment.<sup>147</sup> He was also required to strike a balance between not preventing free persons, with or without stock, from passing into the District, and discouraging persons from occupying land and affecting improvements to the land before they had acquired legal title. In this respect, he was given specific instructions to remove any persons from land whose conduct was such as to render their presence injurious to public order. He was to remove and fine such persons and if necessary transport them to the Sydney Gaol.<sup>148</sup> These last measures, he was informed, through the proper union of firmness and diplomacy, should be avoided.<sup>149</sup>

Sullivan maintains that Lonsdale was 'plucked from obscurity' supervising convicts at the Hyde Park Barracks to the post of Police Magistrate at Port Phillip.<sup>150</sup> But Lonsdale had already developed extensive magisterial experience with the Blue Mountain chain gangs, in Port Macquarie as magisterial-commandant and in the Sydney Barracks. Given the fact that he had succeeded in obtaining the posting to Port Phillip over and above at least two other applicants for the position, one of whom was the former Sheriff of Van Diemen's Land, Sullivan's charge of obscurity is unsustainable. Shaw comments that Lonsdale had quite a wide variety of colonial experience.<sup>151</sup> Cannon states that he had experience as an officer in the management of convicts at Hyde Park, as a magistrate in hearing minor criminal matters<sup>152</sup> and that during his tenure as Melbourne's first Police

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<sup>146</sup> Civil Instructions, *op.cit.*, p. 53.

<sup>147</sup> By posting up the notice proclaiming it about the settlement; Grimwade, *op.cit.*, p.73.

<sup>148</sup> Under the provisions of 5 William IV, No. 22.

<sup>149</sup> Civil Instructions, *op.cit.*, p. 54.

<sup>150</sup> Sullivan, M., *Men and Women of Port Phillip* (Sydney, 1985) p. 20.

<sup>151</sup> Shaw, *op.cit.*, p.67.

<sup>152</sup> Cannon, *op.cit.*, p.31.

Magistrate, he did an outstanding job.<sup>153</sup> Haldane also notes Lonsdale's experience as an assistant police magistrate and justice of the peace at Port Macquarie. He makes the point that Lonsdale 'did not have previous experience in administering a civil police force'.<sup>154</sup> Lonsdale was to be supported in his magisterial role in the Port Phillip settlement by Ensign George King of the 4th (King's Own) Regiment. King had been gazetted a magistrate for the territory [13 September 1836] so that together with Lonsdale, they would be able to maximize their magisterial jurisdiction.<sup>155</sup> Two magistrates were required to adjudicate in certain offences under *Bourke's Summary Jurisdiction Act*. Lonsdale arrived in Port Phillip aboard HMS *Rattlesnake* with his wife, baby child and his two assigned servants on 29 September 1836. His salary was to be 300 pounds per annum, with a deduction of 50 pounds whilst in receipt of his army pay.<sup>156</sup> He was also allowed an initial allowance of 100 pounds for outfit together with a whaleboat for his use in Port Phillip.<sup>157</sup> Lonsdale initially chose a site at Gellibrand Point to be the Government Camp because of anchorage advantages,<sup>158</sup> but wisely decamped to the Yarra settlement site within a month of arriving.<sup>159</sup> This in itself displays a lateral thinking that was not present in Collins some thirty years earlier. The *Rattlesnake* undertook a survey of the Bay and Geelong Harbour,<sup>160</sup> under the command of Captain William 'Sweet William' Hobson. The supply ship *Stirlingshire* arrived at Port Phillip with troops and stores on 6 October

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<sup>153</sup> He ruled with considerable self restraint, accepting the system as it was, handing out floggings to rebellious convicts and lighter sentences to wayward gentlemen, supervising Melbourne's growth through its first great economic boom, engaging in as much speculation on his own account, attempting to conciliate the dispossessed natives, and generally acting in a patient zealous manner. Although showing little vision, he remained a faithful servant of the Sydney government and its policies; Cannon, *op.cit.*, p.31.

<sup>154</sup> Haldane, *op.cit.*, p.7.

<sup>155</sup> Civil Instructions to Lonsdale, *op.cit.*, p. 49.

<sup>156</sup> Correspondence, Bourke to Lord Glenelg, 15 September, 1836, *HRV*, I, 3, pp. 56–58.

<sup>157</sup> Correspondence, Colonial Secretary to William Lonsdale, 19 September 1836, *HRV*, I, p. 59.

<sup>158</sup> Correspondence, William Lonsdale to Colonial Secretary, 10 October 1836, *HRV*, I, p. 83.

<sup>159</sup> Correspondence, William Lonsdale to William Hunter, 21 October 1836, *HRV*, I, p. 84; Grimwade, W. R., *op.cit.*, p.73.

<sup>160</sup> John Henry Norcock, Gunnery Officer, HMS *Rattlesnake*, *Journal*, National Library of Australia, Journal entry, reproduced, *HRV*, I, pp. 65, 67.

1836, carrying the surveyor Robert Russell and his assistants, Frederick D'Arcy and William Wedge Darke,<sup>161</sup> a customs collector, a tide waiter, a commissariat officer, thirty soldiers and convicts.<sup>162</sup>

## LONSDALE ESTABLISHES HIMSELF

THREE POLICEMEN ACCOMPANIED Lonsdale to the Port Phillip District: District Constable Robert Day and Constables James Dwyer and Joseph William Hooson.<sup>163</sup> Other than being native born, little is known of Hooson. Robert Day had been a colour-Sergeant in the 57th West Middlesex Regiment and later licensee of *The Highlander* public house in Sydney. James Dwyer, an Irishman, was the only one of the three with previous police experience. He had served with the Sydney police and had been given special permission to bring his ticket of leave wife with him to Port Phillip.<sup>164</sup> Lonsdale, his constables, Ensign King and the accompanying soldiers provided for tactical support, constituted the civil order maintenance unit of governance in the Port Phillip District. The office of the colonial magistracy was to provide the only source of law available in the District of Port Phillip for the next three years.<sup>165</sup> To maintain order and enforce the law, the crown provided a fusion of the civil (constables) with the military (soldiers) to assist what was essentially and originally a civilian tool of order maintenance. This was not unique within the colonial context; it did however seem to favour the 'paramilitary style of Irish policing' rather than 'the civilian style policing of London'.<sup>166</sup> The parallel to the Irish notion of order maintenance is worth further examination. The convulsive nature of English rule in Ireland and the tenuous grip Dublin Castle had on the

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<sup>161</sup> A nephew of John Helder Wedge, cited in Noble, *op.cit.*, p.48.

<sup>162</sup> Noble, *op.cit.*, p.48.

<sup>163</sup> Professor Jenks, E., *op.cit.*, p.28, claims that there were only two, this is incorrect.

<sup>164</sup> Haldane, *op.cit.*, pp.7-8.

<sup>165</sup> Castles, *op.cit.*, p.231.

<sup>166</sup> Finnane, *op.cit.*, p.11.

periodically riotous population<sup>167</sup> in that social laboratory<sup>168</sup> is not dissimilar to the order enforcement patterns used in the Australian colonies. Both places used the office of the magistrate as 'key figures in the enforcement and administration of law in rural areas'; both bemoaned the fact that there were few suitable men available for the office.<sup>169</sup>

The Irish office of the Resident Magistrate was under the control of the Lord Lieutenant. They were well paid, responsible for directing the constabulary in the performance of their duties and were commonly used during periods of 'unrest' to maintain or restore order. The Irish Resident Magistrates, like their colonial cousins, enjoyed wide and largely undefined duties. Apart from attending to petty sessions, they were to monitor public gatherings and undertake general surveillance tasks. These were noted and returned in their monthly journals, as part of Dublin Castle's intelligence network.<sup>170</sup> In Ireland, as distinct from the colonial experience, all stipendiary magistrates prior to 1836 were barristers. After this time, the appointments were made from amongst the ranks of landowners and the upper-middle classes that held appropriate legal or administrative experience. Former police officers, retired army officers, country gentlemen and men who had previously enjoyed the position of unpaid justice of the peace constituted the majority of appointments to the office of Irish Resident Magistrate.<sup>171</sup> The social experiment being undertaken in the Australian colonies, the subjugation of a land using a servile population while seeking to replicate English social structures, makes the parallels between the Irish and the Australian colonial magisterial

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<sup>167</sup> *Ibid*, p.12.

<sup>168</sup> Finnane, *op.cit.*, p.13, citing Burn, W. L., in MacDonagh, O., *Ireland: the Union and its Aftermath* (London, 1977) p.34.

<sup>169</sup> In consequence there were recurring criticisms of the justices as not being truly gentlemen. Men engaged in trade and others deemed unsuitable were allegedly admitted to the commission of the peace because no better candidates could be found. Such men, it was argued, were often lacking in a sense of duty or concern for the public good. It was suspected that they were motivated by self-interest and in hope of benefiting financially from their appointment; Bonsall, P., *The Irish RM's: The Resident Magistrates in the British Administration of Ireland* (Dublin, 1997) p.11.

<sup>170</sup> Bonsall, *op.cit.*, pp.12–13.

<sup>171</sup> Bonsall, *op.cit.*, pp.16–17.

policing systems more obvious. The difference between the two experiments, apart from the wider range of superior applicants, is said to be the absence of that 'invisible boundary' between criminal activity and social protest that was so especially Irish.<sup>172</sup>

An integral part of this order maintenance paradigm, in Port Phillip, was the appointment of a 'bonded convict' Edward Steel as settlement scourger. Without adequate confinement facilities in the Port Phillip settlement, the most expedient of punishments, the flogging, was at times the only sentencing option open to the magisterial Bench.<sup>173</sup> As in New South Wales, the post of scourger was a despicable position, with only suitably despicable persons attracted to the job. In return for the payment of one shilling per day, those who ordered him to administer the lash would see the scourger as a ghoul; those who received his strokes would see him as a class traitor and a ghoul. Steele's predicament of classlessness was underscored when he faced the Bench as a defendant in one of the first criminal prosecutions in the settlement.<sup>174</sup>

Lonsdale appointed William Buckley as the District Interpreter with a salary of 60 pounds per annum.<sup>175</sup> Lonsdale also temporarily appointed Dr Alexander Thompson, member of the Port Phillip Association, to the post of surgeon, with a salary of 200 pounds per annum.<sup>176</sup> These were the first public appointments at the modern Port Phillip settlement. Lonsdale found the settlement, consistent with its frontier character, to be in a 'lawless state' and despaired the 'lower order of people' behaving in a 'lawless

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<sup>172</sup> Finnane, *op.cit.*, p.13.

<sup>173</sup> Haldane, *op.cit.*, p.9, citing VPRS 51, vol.1, pp.35–168 where because of the poor confinement facilities most were sentenced to floggings of 50 lashes for interfering with a constable and 25 for drunkenness and disorder.

<sup>174</sup> Fined 10 day's pay for being in a woman's tent without lawful explanation, Haldane, *op.cit.*, p.9.

<sup>175</sup> Buckley had been appointed Superintendent of Native Tribes, Interpreter for the Association and instructed to impart Religious knowledge to the natives, in February 1836 by Gellibrand at a salary of 50 pounds p.a, see Billot, *op.cit.*, p.125.

<sup>176</sup> Correspondence, William Lonsdale to Colonial Secretary, 20 October 1836, *HRV*, I, p.78.

and intimidatory manner'<sup>177</sup> towards the more respectable settlers. Some historians maintain that from his first moment in the settlement, Lonsdale was 'aligned with the few respectable people'.<sup>178</sup> This begs the question: who were the respectables within the early settlement? Lonsdale describes the meeting between himself and Dr Alexander Thompson. Thompson was later to become one of the original pastoral settlers in the Geelong district, first Mayor of Geelong and a man who would wield immense political influence well beyond his Bellarine seat of power. Lonsdale met Thompson whilst he was wearing a 'formidable brace of pistols'<sup>179</sup> and being, in general, 'quite a sight to behold'. Lonsdale reluctantly and temporarily appointed Thompson surgeon. Eventually, Lonsdale, as his original instincts had suggested, deemed Thompson unfit for the position of settlement surgeon.<sup>180</sup> Similarly, Henry Batman although a powerful figure within the early settlement, could not be seen to be a respectable person because of his constant binge drinking.<sup>181</sup> To describe Fawkner as a respectable person is indeed expanding upon its intended definition. Dr Barry Cotter would beat up drunken guests in public brawls.<sup>182</sup> Lonsdale would eventually prosecute him in *R v Cotter* for Sabbath non-observance in hiring John Batman's servants to wash sheep on a Sunday.<sup>183</sup> To the religious Lonsdale, this alone would disqualify Cotter from being considered a respectable person within the community. Necessity and indeed custom required the nineteenth-century English magistrate to identify and seek assistance from respectable persons within a community. This generalisation cannot be applied to the frontier society that was the early Port Phillip settlement. If the forces of law and order are not 'socially neutral

<sup>177</sup> Correspondence, William Lonsdale to Sir Richard Bourke, 2 October 1836, *HRI*, I, p. 82.

<sup>178</sup> Sullivan, *op.cit.*, p.24; see also Grimwade, *op.cit.*, p.73.

<sup>179</sup> Bride, *op.cit.*, p. .

<sup>180</sup> 'Found him mixed up in many intrigues of the place, and not in my opinion fit either from this cause or professional abilities for government employment'; Correspondence, William Lonsdale to Sir Richard Bourke, 1 November 1836, *HRI*, I, pp.84–85.

<sup>181</sup> Billot, *op.cit.*, p.130.

<sup>182</sup> Billot, *ibid*, p.131.

<sup>183</sup> Melbourne Court Register, 20 October 1836; Castles, *op.cit.*, pp.233–234.

instruments of a general social will' for order but only representatives of 'dominant class interests'<sup>184</sup> seeking to protect their domination by regulating and ordering territorial expansion, then the trespassers of early Port Phillip could hardly be seen as respectable. Irrespective of their previous status or social positions in Van Diemen's Land, they were now challenging the Crown in its most sanctified jurisdiction: *fee simple absolute* owners of all land in Australia. The law and its enforcers, the magistracy and the police, were not ready to serve the community 'as a mosaic of interest groups' equally worthy of protection.<sup>185</sup>

Lonsdale did conduct private business in the settlement. He would continue his private trading and speculation until his departure from Melbourne in 1854, a relatively wealthy man. His first business transaction was with John Batman. Lonsdale purchased 250 maiden ewes in one transaction, and a further 150 maiden and 50 two-year-old ewes in a second transaction soon after. This he revealed to Bourke.<sup>186</sup> What Lonsdale did not explicitly reveal to Bourke was that this purchase was on credit, as Lonsdale was awaiting monies from the sale of his Captain's Commission. He also did not reveal that whilst depasturing his flock on Emerald Hill, on the south side of the river, he accepted Batman's offer of his head shepherd and the use of his rams for the season.<sup>187</sup> Batman was to later lodge a complaint against Lonsdale and the government for Lonsdale's act of appropriation of 20,000 feet of cedar wood and building materials around Port Phillip that he claimed was his.<sup>188</sup> This did not appear, however, to permanently sour the relationship between the two men. Another example of Lonsdale's early entrepreneurial activities was his arrangement with Captain Hobson that he bring some cattle aboard the

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<sup>184</sup> Finnane, *op.cit.*, p.10.

<sup>185</sup> Haldane, *op.cit.*, p.7.

<sup>186</sup> Correspondence, William Lonsdale to Sir Richard Bourke, 9 December 1836, *HRV*, I, p. 86.

<sup>187</sup> Correspondence, William Lonsdale to Dr James Bowman, 9 November 1836, *ML*, A4285, was written in palimpsest style, writing at right angles; Wilkins, *op.cit.*, p.36.

<sup>188</sup> *Sydney Gazette* 26 January 1837.

*Rattlesnake* from Sydney. Lonsdale had purchased them from a friend. These activities met with relative success, but ultimately cost him his reputation thanks largely to Justice Walpole Willis. Lonsdale also maintained the normal colonial magisterial tradition of using his assigned servants to labour for his benefit, instructing them to sow three acres of maize, potatoes and turnips. Lonsdale was to have constant trouble with one of these servants. In *Re Peter Thornton (No.1)* Lonsdale as magistrate sentenced his own servant Peter Thornton to fifty lashes. Thornton, (*Countess of Harcourt*, 14 years) was charged with assaulting a fellow servant, Sam Manley, by hitting him with a stick on the head. Sergeant Thomas Kellow gave evidence to the effect that he heard but did not see the blow being struck. In *Re Peter Thornton (No.2)* Lonsdale pressed charges of insolence against Thornton before Ensign Hawkins of the 80th Regiment who was stationed in Melbourne and acting as Lonsdale's co-magistrate. Thornton was again found guilty and was sentenced to another 50 lashes.<sup>189</sup>

As part of his surveillance and intelligence gathering function, Lonsdale conducted his census of the settlement on 9–10 November 1836. This census excluded the settlements of Geelong and Portland.<sup>190</sup> It has been argued that Constable Dwyer's involvement in the Census operation was the first of many 'extraneous non-police duties' undertaken by members of the Victorian police force. Dwyer's actions, under the orders of the settlement magistrate, served as a precedent that would shape the relationship between members of the new police and their employer well into the twentieth century.<sup>191</sup> Yet the job descriptions of Government officers and officials were either non-existent or vague in the extreme. This applied especially to the ranks of order maintenance officials, who were expected to conduct duties without borders. This is evident in many examples, either when magistrates were enrolled as returning officers for

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<sup>189</sup> Cattle from friend: Correspondence, William Lonsdale to Dr. James Bowman, *ibid*; Assigned servant labour: Wilkins, *op.cit.*, p. 34; Thornton (No.1) Melbourne Court Register 11 January, 1837, *HRV*, I, 313; Thornton (No.2) 3 August 1837; Wilkins, *op.cit.*

<sup>190</sup> Kiddle, M., *op.cit.*, p.35.

<sup>191</sup> Haldane, *op.cit.*, p.10.

elections, or when, members of the Melbourne constabulary were expected, until 1845, to be fire fighters.<sup>192</sup> The Census found the settlement established with settlers determined to succeed agriculturally.<sup>193</sup> Lonsdale removed himself from the *Rattlesnake* in December 1836 and took his family into the temporary subaltern's hut whilst his home was being completed. He also began collecting the 25-pound annual public house licence fee from the three unlicensed public houses already operating in the settlement. The most salubrious of the public houses, made of logs, ostensibly belonged to Fawkner, whilst the other two hovels were made of turf.<sup>194</sup> To arm him with the legal knowledge necessary to undertake his role as sole governmental representative, the Colonial Secretary in Sydney sent Lonsdale a set of Government Gazettes, assuring him that a set of the *Acts of Council*, from 1825 to July 1835, would be sent once they were printed. The Colonial secretary also sent Lonsdale a copy of Plunkett's *Australian Magistrate*.<sup>195</sup> This was the magistrate's key text.

## PLUNKETT THEORISES THE AUSTRALIAN MAGISTRACY

JOHN HUBERT PLUNKETT WAS BORN at Mount Plunkett, Roscommon, Ireland, in June 1802, the younger of twin boys. After graduating from Trinity College Dublin in February 1823 he began a career at the Irish Bar on the Connaught Circuit.<sup>196</sup> Plunkett

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<sup>192</sup> Elections: Grimwade, *op.cit.*, p.162, where Magistrate St. John was the returning officer for the New South Wales Legislative Council elections; Fire fighters: Grimwade, *op.cit.*, p.109.

<sup>193</sup> Established Settlement: 224 white persons with 178 males over 12 years old, 8 under; 23 females over 12 years of age, 15 under. All except three of these persons had come from Van Diemen's Land. Wilkins maintains that there were 45 occupiers of land in 36 buildings (7 weatherboard, 16 mud or wattle and daub, with eleven of the buildings having shingle or thatched roofs) and 6 tents; whilst Harcourt claims 43 dwellings; Harcourt, Rex, *Southern Invasion Northern Conquest: Story of the Founding of Melbourne* (Melbourne, 2001) p.111; Agriculture: There were 97 acres under cultivation including wheat, barley, maize, oats, turnips and potatoes. There were 41,332 sheep, 500 of which were owned by Franks (deceased). There were 155 cattle and 75 horses owned between 40 settlers including 28 partners in Van Diemen's Land and elsewhere; Wilkins, *op.cit.*, p.36.

<sup>194</sup> Remove from Ship: William Lonsdale to Sir Richard Bourke, 9 December 1836, *HRV*, I, p.86; Collecting and Buildings: Wilkins, *op.cit.*, p. 34, citing Bonwick, *op.cit.*

<sup>195</sup> Correspondence, Colonial Secretary to William Lonsdale, 14 September, 1836, *HRV*, I, p. 55.

<sup>196</sup> De Castella, Charles Hubert, *Memoirs*, in Miscellaneous Papers, MSS, uncat., ML ; see Molony, *op.cit.*, p.6. He seemed destined to a successful career as a Barrister-Politician when he suddenly applied for and received an appointment as Solicitor-General for New South Wales. It seems that Plunkett had been rejected in his engagement

and Roger Therry were the leading Irish Catholic colonial lawyers of their day. They came from different backgrounds and Plunkett, it seems, was more compassionate and better imbued with a sense of divinely inspired reforming justice than his compatriot.<sup>197</sup> Plunkett was refused a free grant of land,<sup>198</sup> yet undertook his new post of Solicitor-General in the criminal colony with vigour. The 'convict station' mentality of the settlement was soon realised. Plunkett soon felt the ramifications of being the chief Crown legal agent within a convict society on a personal level when the convict assigned to him, fellow Irishman Bryant Kyne, was charged with the murder of another of Plunkett's servants on 24 December 1833. Plunkett in fact conducted the prosecution against Kyne.<sup>199</sup> Kyne, more incredibly, had formerly been a magistrate in Ireland, was found guilty and executed.<sup>200</sup> Likewise, the murder of one of the colony's leading figures, Dr Robert Wardell, on 7 September 1834 so shocked the community that there were calls that convicts should wear distinctive marks upon their clothes to identify them as being potentially dangerous persons.<sup>201</sup> Wardell was one of the colony's leading respectable gentlemen and Barrister. As an indication of the type of man he was, he would often adjourn legal cases when called to play cricket.<sup>202</sup>

Plunkett's work as Solicitor-General, moreover, included most of the work of the ailing Attorney General John Kinchela.<sup>203</sup> He was at the centre of the political-legal

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and therefore sought an overseas posting. Before he took up the post however, he met and quietly married in London, the daughter of a distant cousin, Maria Charlotte McDonougha. They sailed from Cork on 6 February 1832, an elite couple accompanied by the more simple Irish migrants who clutched their witch hazel to ward off Australian reptiles, and arrived in Sydney on 14 June 1832.

<sup>197</sup> Molony, *ibid*, pp.8–9.

<sup>198</sup> Bourke to Goderich, 22 September 1832, *HR4*, I, XVI, p.751.

<sup>199</sup> Molony, *op.cit.*, p.14.

<sup>200</sup> *Sydney Herald* 13 January 1834, 16 January 1834; *Sydney Gazette* 11 January 1834, 14 January 1834.

<sup>201</sup> *Sydney Gazette* 11 September 1834.

<sup>202</sup> *Sydney Gazette* 5 April 1834; *Sydney Herald* 3 April 1834; Molony, *op.cit.*, p.106.

<sup>203</sup> Bourke to Stanley, 5 December 1833, Plunkett to Stanley, November 1833, *HR4*, I, XVII, pp.282–286; Molony, *op.cit.*, p.13.

battles of the period. He was seen as an ally of Bourke and a foe of the exclusivists.<sup>204</sup> There is evidence to confirm the deep friendship between Plunkett and Bourke,<sup>205</sup> but little to suggest that he disagreed with the idea that certain classes should rule. The *Herald* saw him as an ally of the convict class,<sup>206</sup> although those convicts prosecuted by Plunkett and executed as a result of his exertions might have contested this.<sup>207</sup> Plunkett's report on the convict revolt at magistrate James Mudie's 'Castle Forbes' property led to Bourke declining to recommission Mudie as a magistrate<sup>208</sup> and led to the formation of the Committee on Transportation.<sup>209</sup> Plunkett also played a principal role in drafting and lobbying for the Church Act for state aid to religion.<sup>210</sup> It was said to have been his proudest and most significant social colonial achievement and has been labelled by some as the Magna Carta of Australia's religious liberty.<sup>211</sup>

Plunkett's most important contribution to the Australian colonial magistracy was the publication in 1835 of his seminal work on the law and work of the Australian magistrate.<sup>212</sup> This work became Australia's first published legal textbook. Bourke in fact encouraged him in his undertaking, with the Crown purchasing 50 copies for distribution to the various magisterial courts in the colony.<sup>213</sup> Previous to the publication of Plunkett's

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<sup>204</sup> Molony, *op.cit.*, pp.17–18.

<sup>205</sup> Bourke to Plunkett, 23 October 1837, *Plunkett Papers*, ML; Molony, *op.cit.*, p.23.

<sup>206</sup> *Sydney Herald* 7 August 1834.

<sup>207</sup> Example his adjudication on Norfolk Island in December 1835; *Australian* 27 November 1835, 4 December 1835, 15 January 1836; Molony, *op.cit.*, p.19.

<sup>208</sup> Bourke to Stanley, 20 September 1834, *HR4*, I, XVII, pp.542–543.

<sup>209</sup> Molony, *op.cit.*, pp.18–19.

<sup>210</sup> Act 7, William IV., No.3 (1836).

<sup>211</sup> See Turner, N., *Sinews of Sectarian Warfare? State Aid in New South Wales 1836–1862* (Canberra, 1972); Flanagan, R. J., *The History of New South Wales* (London, 1862) 2 vols, pp.512–513; *Colonist* 25 August 1836; Molony, *op.cit.*, pp.23–24.

<sup>212</sup> Plunkett, J. H., *An Australian Magistrate; or, a Guide to the Duties of a Justice of the Peace for the Colony of New South Wales. Also a Brief Summary of the Law of Landlord and Tenant* (Sydney, 1835).

<sup>213</sup> N.S.W. Governors' Dispatches, vol.25, 1835, pp.164–165, ML; Plunkett to Colonial Secretary, 1 April 1835, A.G.'s Letter Book, 1 April 1835, p.156, *NSWA*, 4/473; Molony, *op.cit.*, p.163.

work in 1835, the only relevant legal reference available for the colonial magistrate were the few outdated copies in the colony of the 1825 edition of the English standard magisterial text, Richard Burn's *Justice of the Peace and Parish Officer*.<sup>214</sup> Plunkett summed up the importance of the colonial magistrate and the unique duties that he faced in the preface of the first edition.<sup>215</sup> Plunkett relied heavily on Burn. The format of Plunkett's book is, like Burn's, alphabetical. Each section contains an overview of the applicable English common law, relevant statutory enactments, together with any relevant colonial points of law and procedure. The text at times is identical to Burn.<sup>216</sup> Plunkett's *Australian Magistrate* became the primary tool of legal education for all colonial magistrates.<sup>217</sup> Plunkett's text provides the conceptual framework for understanding the role of the magistracy in shaping colonial life. In his text, Plunkett summarises the then current English and colonial common law principles and legislative directives that apply to work undertaken by the colonial magistrates. The following chapters examine the application of these directives and the real outcomes achieved in the urban and rural magisterial courts of Port Phillip.

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<sup>214</sup> Burn, R., *Justice of the Peace and Parish Officer* (London, 1755) 2 vols, with 29 later editions.

<sup>215</sup> 'In no part of His Majesty's Dominions are the duties that belong to the Magistracy more arduous and complicated, than they are in this Colony, and, upon their proper discharge, depends very much the well being of its anomalous community'; Plunkett, *op.cit.*, unpaginated preface; Molony, *op.cit.*, p.164.

<sup>216</sup> See the 'Murder' headings in both Plunkett and Burn; Molony, *op.cit.*, p.164.

<sup>217</sup> Police Magistrate Michael Murphy edited the second edition in 1840; Barrister Edwin C. Sutor the third in 1847, with W. H. Wilkinson doing the same in 1860, 1866, 1876, 1881, 1903 and 1911; Molony, *op.cit.*, pp.164–165.

# CHAPTER 5:

## REGULATING THE PORT

### PHILLIP REGULATORS

#### MAGISTERIAL OFFICES, OFFICERS AND THE POLICE

THE PAPER ACCOUNTABILITY of Lonsdale as Police Magistrate and 'Government Representative' in Melbourne can be seen as being a primer of the 'ideal' required by the colonial civil service. His returns were timely, detailed and thankfully written in a legible hand. His prisoner returns are a good example.<sup>1</sup> The returns are quite detailed and included notations concerning the prisoners' religious beliefs and country of origin.<sup>2</sup> Expenditures for the settlement were also recorded in minute detail, including voucher numbers, amounts expended and details of item expenditure. The *Monthly Return for Prisoners in Government Employ*, apart from representing prisoner numbers and origins also details the prisoners' prior trade experience.<sup>3</sup> The returns also noted the increase and decrease in numbers of prisoners as 'received' and 'discharged'. Religious backgrounds and countries of origin were again included. Lonsdale also produced abstracts and remittances of salaries and allowances for labourers hired in the settlement for government work.<sup>4</sup> The Police Magistrate's exercise of absolute command and control functions over the constabulary is also apparent in these documents. Lonsdale submitted

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<sup>1</sup> PROV, VPRS 5517: Monthly Return for Prisoners in Government Employ, drafted by Police Magistrate Lonsdale commencing November 1836, unpaginated.

<sup>2</sup> April-March 1837 returns recorded 37 Episcopalians, no Presbyterians and 7 'Roman Catholics'. There was also a category for Jews but there appeared to be no Jewish prisoners present in Port Phillip at that time. The ethnicity column was divided up into English, Irish, Scottish and 'Foreign'.

<sup>3</sup> The trades represented in the Returns include painters, glaziers, blacksmiths, wheelwrights, sawyers, brickmakers, bricklayers, carpenters and scourgers.

<sup>4</sup> PROV, VPRS 5517: Supplementary Return 1 October 1837 – 31 December 1837.

all police returns for the settlement.<sup>5</sup> All requisitions for the gaol [police lockup]<sup>6</sup> and the Police Office were drafted and submitted to Sydney by Lonsdale.<sup>7</sup> The Returns indicate that the Sydney authorities were guilty of undersupplying the settlement. In January 1839 for example, after 28 months at the settlement, the Melbourne Police Magistrate lacked basic government standard forms necessary to carry out the duties of his office.<sup>8</sup> This is perhaps understandable given the frontier nature of the settlement, as outlined in Chapter 1, and as outlined in this Chapter, the jurisdictional and logistical problems associated with the governance of a remote settlement by a magistrate who was directly accountable to the power structures in Sydney. After the appointment of La Trobe, the later Port Phillip Police Magistrates were able to concentrate on their more traditional functions of public order maintenance. This is reflected in the later magisterial Bench book records.

The development of the institutionalised 'patterns of policing' in Melbourne and the Port Phillip District followed the patterns that had been established in New South Wales. The members of the Port Phillip police force followed a vertical management structure. Ultimately there were to be a varying number of Chief, District, Ordinary and Special Constables appointed throughout the district. The apex of this structure in early Port Phillip was originally Lonsdale as Police Magistrate in Melbourne. The Police Magistracy was to spread throughout the District with appointments eventually being made for Geelong, Portland, the Grange and Alberton. In the early settlement, central Magisterial Police command was exercised from the 'Government Block'<sup>9</sup> bounded by Spencer, Flinders, King and Bourke Streets in a storehouse owned by John Batman. This

<sup>5</sup> PROV, VPRS 5517: Return of the Dept of Police Melbourne 1 January - 31 December 1837.

<sup>6</sup> PROV, VPRS 5517: Returns for Requisitions for Gaol 3 June 1838 included items blankets, handcuffs and razor straps.

<sup>7</sup> Lonsdale to Colonial Storekeeper Sydney, 1 January 1839, PROV, VPRS 5517: Requisitions were made for articles used within the Police Office at Melbourne. Items such as the pro forma sheets for the Court proceedings were listed in great detail, with items listed as either quantities 'in hand' and those 'required', in lots of 100, 150 or 200.

<sup>8</sup> Lonsdale had no Seal, sealing wax or wafers for court documents, no Publican's or confectioners licence applications, certificates, recognizances, Information forms or endorsements at his disposal and requested fifty copies of the same from Sydney.

<sup>9</sup> Finn, E., *op.cit.*, p.17.

was known variously as the Magistrates' Court, the Town Court or the Police Court and romantically described as the 'first Temple of Justice' in the District.<sup>10</sup> Not that an actual structure was necessary as magisterial jurisdiction was held *in personam* and, following English protocols, this personal jurisdiction allowed for hearings to be held in the home of the magistrate. It has been noted that in the colonial context, hearings could be held at any convenient place, including out of doors. The magistrate would have an escort of constable and 'scourger' and be therefore able to adjudicate and sentence 'on the spot.'<sup>11</sup> The management of the Police force and the vast majority of the magisterial adjudications before the early Port Phillip magisterial Benches substantiate the proposition that the majority of the Melbourne and District Police Magistrate's time was spent as 'Comptroller of Police'.<sup>12</sup> The pattern of policing in the Port Phillip District also followed a pattern unique and specific to the Australian colonial context. These patterns gave the magistrates and police an extensive and unique role in the management and development of colonial society.<sup>13</sup>

Apart from the office of the Police Magistrate, the Port Phillip period saw a number of other magisterial forms of the office function within the District as part of the policing structure. These magisterial officers were members of the traditional unpaid honorary magistracy or Justices of the Peace. The Commissioners of Crown Lands, members of the Aboriginal Protectorate and later Gold Fields Commissioners<sup>14</sup> joined the justices as 'magistrates' of the territory. These 'officers' had all been invested with

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<sup>10</sup> Castles, A. C., *op.cit.*, p.232, citing Forde, *The Story of the Bar of Victoria* (undated), p.13, date subsequently found to be (Melbourne, 1913).

<sup>11</sup> Castles, A. C., *ibid*, p.233, citing Forde, *ibid*, p.13.

<sup>12</sup> Haldane, R. K., *op.cit.*, p.10, note there is some doubt, however, as to the regularity and legality of the police activities in the early settlement as there was a failure to administer the correct oath of office to the members of the fledgling police force upon their arrival in Port Phillip; a period of some two months elapsed until their actions were technically regularized by the administration of the same in December 1836.

<sup>13</sup> They had 'an important *political and administrative* role: guaranteeing the success of settler dispossession of Aboriginal land, sustaining the boundaries of urban order, acting as agents of the state in the collection of taxes, conducting elections, and counting the population'; Finnane, M., *op.cit.*, p.34.

<sup>14</sup> Palmer, D., *op.cit.*, p.61; the Gold Field Commissioners are outside the time frame of this study.

magisterial power and commissioned as justices of the peace. To this list should be added *ex officio* appointees such as persons invested as Mayors, Chairmen of Quarter Sessions and the Court of Requests, and individual representatives of the respective Port Authorities who eventually administered the functions of the Water Police.

The Police were under the direct authority of the Police Magistrate. The other magistrates or the unpaid honorary 'justices of the peace' also held authority over members of the police force. The constables were obliged to follow their directions. This point is fundamental in understanding the office as the crucial and visible centrifuge of power within colonial Port Phillip.<sup>15</sup> Once the settled areas spread throughout the Port Phillip District, the new settlements would have either a Police Magistrate appointed or have 'respectable' members of the local community placed upon the 'Commission' as justices of the peace. These persons would then manage and direct the members of the police force that had been placed at their disposal.<sup>16</sup> The Port Phillip magistrate would adjudicate matters brought before them by their 'thief catchers', hear intelligence reports from the constables concerning happenings within the locality, and generally manage the policing structure within their district. The Port Phillip magistrate, acting on either complaints from members of the public or information from their constables, would also initiate investigations into matters of private or public concern within the settlement. One early example of a *Magisterial Investigation*<sup>17</sup> occurred upon a complaint by the superintendent of Sylvester John Browne's run. A horse had been discovered with its tongue cut out. Police Magistrate Lonsdale commenced an investigation. Lonsdale in correspondence with the Colonial Secretary in Sydney asked for a reward to be offered. Lonsdale suspected that the convicts working on Browne's station had committed the act

<sup>15</sup> The importance of the magistracy for understanding policing is that at the general level the magistracy was the key site for the exercise of local authority. More particularly, the magistrates exercised control over the different police forces operating in Port Phillip. The magistracy was the key site of power and as such there were ongoing struggles over access to the office of the magistracy, the power of the magistrates and their control over policing; Palmer, D., *ibid*, p.61.

<sup>16</sup> Consistent with common practice of the time, these police forces stood separate and alone and were 'unconnected to other police forces' throughout the District, Palmer, D., *op.cit.*, p.53.

<sup>17</sup> Lonsdale to Col. Sec., 5 September 1838, *HRV*, I, p.482.

of cruelty. In response,<sup>18</sup> the Colonial Secretary authorised a ten-pound reward to a 'free person' and a Conditional Pardon to a convict for information leading to a conviction of the offender who cut the tongue from Sylvester John Browne's horse. The Port Phillip magistrates were also obliged to undertake coronial inquests into sudden and unexplained deaths not certifiable by a medical practitioner.<sup>19</sup>

It was also the function of the Police Magistrate to discipline his constables. Early examples of such disciplinary actions are bountiful. There were dismissals for drunkenness<sup>20</sup> and absenteeism.<sup>21</sup> These very early disciplinary actions resulted in the eventual appointment of Henry Batman as District Constable of Port Phillip.<sup>22</sup> Batman was later promoted to Chief Constable.<sup>23</sup> His appointment was confirmed at a salary of 100 pounds per annum.<sup>24</sup> The power of the magistracy to discipline the constables under their direction was an important part of their role as 'administrative' rather than as 'judicial' officers. This discipline function was more pronounced with men holding commissions as Police Magistrates, yet unpaid or honorary justices of the peace also held

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<sup>18</sup> Col. Sec. to Lonsdale, 9 October 1838, *HRV*, I, 483.

<sup>19</sup> Melbourne Court Register, 20 October 1836, see Castles, A. C., op.cit., p.233; One example, a *Magisterial Inquest regarding the death of Hugh Niven*, Joseph Sutherland testified and claimed that he was riding with Hugh Niven, when Niven's horse fell on top of him injuring him. Niven was transported by dray to the *Wool Pack Inn* public house. Dr Jonathan Clerke testified that he examined Niven at the public house, conversed with him and that Niven then suffered from his injuries for an hour or two until he died. Geelong Court Register 23 September 1839, *HRV*, I, 490.

<sup>20</sup> James Dwyer was dismissed on 31 December 1836 for being 'repeatedly drunk'; on 10 January 1837, Police Magistrate Lonsdale dismissed District Constable Robert Day likewise for drunkenness, see William Lonsdale to Colonial Secretary, 31 December 1836, *HRV*, I, p.186.

<sup>21</sup> William Lonsdale to Colonial Secretary, 11 January 1837, *HRV*, I, p.186, being 'repeatedly absent from duty'.

<sup>22</sup> Victoria Police Management Services Bureau, *Police in Victoria 1836–1980* (Melbourne, 1980) p.3.

<sup>23</sup> This appointment occurred on 8 July 1837, when Police Magistrate Lonsdale sought Henry Batman's appointment to Chief Constable citing his pleasing performance of duties as District Constable. Correspondence, William Lonsdale to Colonial Secretary, 8 July 1837, *HRV*, I, 13, p. 189.

<sup>24</sup> Governor's Minute on above Correspondence, *ibid*, p.189.

disciplinary jurisdiction. Palmer correctly argues that the justices played an essential role in the policing of colonial policing functions.<sup>25</sup>

The general protocols of the policing function revolved around patrolling the 'public places' and streets of the settlement and enforcing the first commandment of the magisterial office: peace, order and tranquil behaviour consistent with the concept of the King's Peace.<sup>26</sup> Short-term imprisonment was really the only option available to the early Melbourne magistrates as the available space within the lock-up was limited. Long-term incarceration was ultimately legally legitimised with the temporary police 'lock-up' at Port Phillip (Melbourne) being proclaimed one of the common gaols of the colony.<sup>27</sup> The eventual extension of the numerous regulatory ordinances such as the *Towns Police Act*, *Licensing Act* and *Vagrancy Act* to the Port Phillip District bolstered the magisterial ability to maintain peaceful if not servient popular co-existence. The maintenance of peace and order in public places within the colonial context is consistent with the English prime directive and the English prototype of the office of the magistrate and his constabulary. The colonial order maintenance legislation, especially the New South Wales *Towns Police Act* for example, was modelled upon English legislation.<sup>28</sup> The English Vagrancy legislation, with its roots in Elizabethan England, was an attempt by the state to 'control

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<sup>25</sup> They played 'an integral part of the reviews of the efficiency of the police in the colony such as witness appearing before enquiries. Further, they could use the relationship between the judiciary and the police forces to discipline police practices. Indeed, the 1853 legislation establishing the Victorian Police gave the local magistrates statutory power to discipline police in their locality by hearing summary cases of complaints against the police'; Palmer, D., *op.cit.*, p.74. citing 16 Vic. No.24, s.XII.

<sup>26</sup> In *R v Anon.*, Special Constable Henry Grimaldi testified before the Melbourne Bench that at about 3 o'clock in the afternoon of the previous day he came across a person 'with his trousers down' urinating 'in the open streets not near any shelter' near the market reserve. An unnamed female apparently saw what the man was doing and 'was obliged to turn back'. The anonymous defendant was also drunk at the time. The defendant was found guilty and sentenced to seven days imprisonment; Melbourne Court Register 8 October 1838, *HRV*, I, 483.

<sup>27</sup> *Government Gazette*, 28 December 1836.

<sup>28</sup> The English *Vagrant Act* (1822) (1824) and the *Metropolitan Police Act* (1829), see Finnane, M., *op.cit.*, pp.34–35.

the large numbers of wandering property-less and workless labourers' and became 'a major instrument of [the] regulation of public places'.<sup>29</sup> This very flexible legislation was also used to regulate sexual relations within the colonial settlements. Women who worked as prostitutes were subject to the charge of being of 'disorderly character' and 'without visible means of support'.<sup>30</sup>

The colonial enforcement of the vagrancy legislation is consistent with the perceived right of the Crown to regulate movement within the jurisdiction. There is support for the proposition that the intolerance of 'outsiders' or 'strangers' is an important feature of colonial historical analysis.<sup>31</sup> Indicative of the 'eighteenth century flavour about the administration of justice' in Melbourne was the use of the stocks outside of the watch house in the Market Square and the later public executions that took place next to the new gaol in Russell Street.<sup>32</sup> In time the Port Phillip Water Magistrate and Water Police would monitor and enforce a similar regime under the various Port and Seaman's Acts. Later still, the rural Police units would patrol 'the declared districts' and beyond the 'settled districts' in the form of the Mounted Police, the Border Police and the Native Police. These units would patrol and enforce order within their districts.<sup>33</sup> These various organs of order, conduct management and social control, would either be directed by Police Magistrates, the local justices of the peace or Commissioners of Crown Lands. The Mounted, Border and Native Police unit commanders would also be invested

<sup>29</sup> Chambliss, W., 'A Sociological analysis of the law of vagrancy', *Social Problems*, 12, 1964, pp.67-77; Roberts, M., 'Public and private in early nineteenth century London: the Vagrant Act of 1822 and its enforcement', *Social History*, 13, 1988, pp.273-294, cited in Finnane, M., *op.cit.*, p.95.

<sup>30</sup>In *R v Ellen Mansey*, Chief Constable William Wright gave sworn testimony alleging that Mansey was of 'a disorderly character with no visible means of support except by prostitution'. Apparently she had passed him in the street the previous night and had unwisely abused him when she was taken into custody. The Bench, however, seemed to pity the poor wretch and discharged her with an admonition; Melbourne Court Register 24 November 1838, *HRV*, I, 483.

<sup>31</sup> Fairburn, M., 'Vagrants, "folk devils" and nineteenth-century New Zealand as a bondless society', *Historical Studies*, 21 (85), 1985, pp.495-514, cited in Finnane, M., *op.cit.*, p.96.

<sup>32</sup> One such execution in 1842 attracted more than 2,000 people, which after the January execution of two Tasmanian aboriginals, was said to have attracted 'very few women', Grimwade, W. R., *op.cit.*, pp.114-115.

<sup>33</sup> Palmer, D., *op.cit.*, p.53.

with magisterial powers as 'special justices' with the commanders of the various specialised units placed on the commission of the peace as justices of the peace. Notwithstanding the later creation of the Aboriginal Protectorate, the Port Phillip magisterial office and constabulary were also responsible for 'native' governance. The 'native' population around the Melbourne settlement presented a constant source of 'concern' to both the settlers<sup>34</sup> and Crown order enforcers. The Aborigines were in an invidious position. Haldane has commented on the unique unfairness of their plight. The 'natives' of the district had not requested a magisterial and police presence in Port Phillip. The white settlers-trespassers, had specifically requested it. Once the organs of temporal control descended upon Port Phillip, however, the native population was immediately made subject to a legal system totally outside their logical comprehension and social understanding.<sup>35</sup> The unfairness of this 'invidious position' is perhaps best demonstrated by the fact that indigenous persons could not effectively give sworn testimony before the colonial courts. The weight given to their statements before the courts was always, therefore, naturally inferior. Within the Port Phillip context, on 8 October 1839 the Legislative Council of New South Wales approved legislation<sup>36</sup> allowing for the evidence of aboriginal persons to be heard in court under affirmation or declaration. This was to be given 'weight only as corroborative circumstances might entitle it to'. The aboriginal declarant was then, ironically, also made liable to all of the penalties of perjury. The Act was not effective until it received Royal Assent. This was not forthcoming, as the proposal was eventually disallowed by dispatch of Lord Russell on 10 July 1840.<sup>37</sup>

The early Port Phillip magistracy faced grave jurisdictional obstacles. In this third confidential report to Bourke [1 February 1837], Police Magistrate Lonsdale requested

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<sup>34</sup> In September 1835, both the Batman and Fawcner parties were threatened with a 'massacre' by a large group of natives that had gathered, this was averted; see Grimwade, W. R., *op.cit.*, p.69 and Billot, *op.cit.*, p.115.

<sup>35</sup> Haldane, R. K., *op.cit.*, p.7.

<sup>36</sup> Act, 3 Victoria, No.16.

<sup>37</sup> Gurner, *op.cit.* p.50.

*inter alia* that Courts of Quarter Sessions and Petty Sessions be established in the settlement to avoid the jurisdictional and geographical problems he was facing. Until these courts were established his civil jurisdiction as a justice of the peace was limited to masters and servant disputes.<sup>38</sup> Any attempt to adjudicate other civil matters until a Court of Petty Sessions was constituted in Port Phillip remained *ultra vires*. Until these courts were established these matters were to be transferred to Sydney for hearing.<sup>39</sup> Sitting as a lone justice he could also entertain minor criminal matters.<sup>40</sup> This applied to free men as well as convicts.<sup>41</sup> Cases involving more serious criminal offences however, were to be disposed of by two justices sitting together.<sup>42</sup> Without a Sessions Court in Port Phillip, a magistrate could also not technically increase a penalty for repeat offences, although he could remand the offender to the Constable of Petty Sessions for additional punishment.<sup>43</sup> As a result of the jurisdictional problems, it has also been argued that many settlers often ignored or did not report criminal activity as they knew that if it led to a serious criminal prosecution, all parties including witnesses and complainants would need to decamp the 600 miles to Sydney for trial.<sup>44</sup> It became a question of weighing up the cost of crime against the real cost of law enforcement.<sup>45</sup>

The Sydney authorities attempted to govern the early Port Phillip settlement by remote control through the office of the magistrate. This had an impact on the ability of the magistrates to properly undertake their tasks and adversely affected the economic

<sup>38</sup> NSW Gov. Order No. 18, 20 June 1831, Assigned Servants.

<sup>39</sup> Castles, A. C., *op.cit.*, p.231.

<sup>40</sup> Col.Sec. Office Circular, 24 September 1832, Summary Trial and Punishment of Convicts.

<sup>41</sup> Col.Sec. Office Circular, 18 May 1833, Duties of Justices of the Peace.

<sup>42</sup> Col.Sec. Office Circular, 18 May 1833, PROV 39/35.

<sup>43</sup> Cuthill, W., *Manuscript, Some Aspects of the Law under Lonsdale* (Melbourne, 1977) MS, RHSV.

<sup>44</sup> Haldane, R. K., *op.cit.*, p.9; Castles, A. C., *op.cit.*, p.231.

<sup>45</sup> 'A person had better lose by robbery a few pounds, than neglect his affairs losing [sic] his business, absent himself for weeks from home, and peril his life by two sea voyages'; *Melbourne Advertiser and Port Phillip Patriot*, 5 March 1838, Editorial, cited in Castles, A. C., *op.cit.*, p.232.

growth of the settlement. Incredibly, it was not until 1849 that prisoners sentenced to hard labour or 'labour on the roads', who previously had to be sent to the middle districts of New South Wales, were able to enjoy their sentence in Port Phillip. Thereafter they were most commonly found on 'the Sydney Road' constructing the stockade at the village of Pentridge.<sup>46</sup> Lonsdale had hoped that Bourke's visit to the new settlement would bring confirmation that Bourke had decided to establish Quarter Sessions in Port Phillip to alleviate the jurisdictional and logistical problems and order the auctioning of lots already surveyed within the town plan, so that permanent building projects would commence. This would also finally attract substantial numbers of respectable migrants to the settlement.<sup>47</sup> As it was, settlers were reluctant to commence building substantial structures and privately funded infrastructural developments until they were guaranteed some semblance of security of tenure. Until then, it was felt that only 'adventurers' would come to the settlement.<sup>48</sup> In the very early settlement, Lonsdale could only call upon Ensign King (also commissioned) who was busy undertaking his own military duties, to sit with him upon the Melbourne Bench. Even with Ensign King on the magisterial Bench, they could still only exercise the limited jurisdiction allowed them under the *Summary Jurisdiction Act*.<sup>49</sup>

The Melbourne Police Magistrate's lack of Quarter Sessions jurisdiction was but one example of the 'legal' as opposed to the 'administrative' difficulties facing the early magisterial regulation of Port Phillip. Until further Police Magistrates were appointed, Lonsdale had an entire district to police. Lonsdale desperately needed further magisterial appointees, an increased jurisdictional base, and more funds to attract 'appropriate' persons to serve as constables. Far from being 'respectable', most of the early Port Phillip police were drunkards, corrupt or both.<sup>50</sup> Even in England, Peel's New Police did not

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<sup>46</sup> Grimwade, W. R., *op.cit.*, p.153.

<sup>47</sup> Shaw, A. G. L., *op.cit.*, p.69.

<sup>48</sup> William Lonsdale to Sir Richard Bourke, 1 February 1837, *HRV*, I, p. 87.

<sup>49</sup> 3 William IV No.3, section xxvii.

<sup>50</sup> *The Age*, 16 August 1980, cited in Haldane, R. K., *op.cit.*, p.10.

then attract 'people of money or ambition'.<sup>51</sup> This was especially so in Port Phillip where a constable would be paid a labourer's wage of 2sh 3d per day as opposed to clerks (5 sh), tide-waiters (5sh 4d) and customs officers (11sh).<sup>52</sup> By 1852, with perceived fortunes waiting to be made at the goldfields, wages for constables had only risen to 5sh 9d per day. This was less than a labourer's daily wage.<sup>53</sup>

Lonsdale's position as magistrate and government representative meant that he undertook a far greater workload than would normally be expected from a Police Magistrate. Some of these duties were quite unsavoury. Lonsdale, for example, was bound to provide punishment returns for the settlement. This required him to personally witness and detail the flogging punishments delivered with the indispensable colonial 'institution'<sup>54</sup> of the 'standard cat'.<sup>55</sup> What Lonsdale needed were more justices of the peace and a Quarter Sessions jurisdiction. He would eventually get these but only after spending some time in magisterial purgatory. Appointments to the commission as a justice of the peace necessarily needed to come from amongst the ranks of 'respectable' persons within any settlement. Lonsdale's relationship with the settlement's early 'respectables' was not, what one would expect. The social composition of the early Melbourne settlement demonstrated a class structure and a divergence of class interests that fostered the peculiar form of 'respectability' that was unique to colonial Australia. There were very few 'respectable' people in the early settlement. Of those few 'respectable' persons there were fewer still that were absolutely 'clean' and distinctly 'respectable' in the traditional English sense. Then again there were 'leading' figures in the settlement, but not many 'respectable' leading figures within the early Port Phillip settlement. Fawcner was a leading, but not respectable figure. The son of a convict, he

<sup>51</sup> Critchley, T. A. A., *A History of Police in England and Wales* (London, 1978) pp.51-55, cited in Haldane, R. K., *op.cit.*, p.10.

<sup>52</sup> ML, A1267-14, pp.1686-7, cited in Haldane, R. K., *op.cit.*, pp.10-11.

<sup>53</sup> *Argus*, 14 April 1852, cited in Haldane, R. K., *op.cit.*, p.20.

<sup>54</sup> Finn, E., *op.cit.*, p.17.

<sup>55</sup> Wilkins, *op.cit.*, p.35 citing Finn, E. (Garryowen), *The Chronicles of Early Melbourne 1835-1852* (Melbourne, 1888; reprint Melbourne, 1976, Neil Swift, ed.)

too developed a convict stain having been sentenced to a term of servitude in Newcastle. John Batman was also a leading but not technically a 'respectable' person. He too was the son of a convict and had married an absconding convict.<sup>56</sup> Constable and Chief Constable Henry Batman was also a leading but not respectable figure. A drunkard and a brute, he would disgrace himself, his office, his family and himself on many occasions. Joseph Tice Gellibrand, on the other hand, was both a leading figure and a 'respectable' figure both in Van Diemen's Land and in Port Phillip. Yet before he could exercise that moral authority that came with being the leading member of the Port Phillip Association, he died. Had he lived, he would undoubtedly have been placed upon the commission as a justice of the peace. James Simpson was also a leading figure and a 'respectable' person. He was, however, during the very early period of the settlement, outside of the settlement proper on his squat at Werribee. Dr Thompson was a leading figure, but was also not entirely 'respectable' and was also removed from Melbourne, being in Geelong.

The first 'traditional' extension to the Port Phillip magistracy came with the appointment of James Simpson as a justice of the peace. Simpson was a respectable person who commanded personal respect with his 'familiar'. Simpson was a member of the original Port Phillip Association and settler group. The settlers at their first 'public' meeting had selected him as 'Settlement Arbitrator'. He was universally respected by all quarters of the early settlers and had settled on a tract on the Werribee River. Simpson, who had previously been a justice of the peace in Van Diemen's Land, was appointed a justice of the peace for the Colony of Port Phillip on 25 August 1837.<sup>57</sup> <sup>58</sup> He was eventually to be sworn in<sup>59</sup> on 4 October 1837.<sup>60</sup> Foster Fyans, like Lonsdale, thought

<sup>56</sup> Eliza Callaghan, sentenced to death for passing a forged bank note, commuted to 14 years transportation. She later absconded and was assisted by Batman who began living with her. She was to later marry, the union producing eight children, see Billot, *op.cit.*, p.81.

<sup>57</sup> Correspondence, Dedimus, Crown Solicitor NSW to Colonial Secretary, 25 August 1837, *HRIV*, I, 17, pp.267–268.

<sup>58</sup> *Government Gazette*, 12 April 1837, according to Professor Jenks, *op.cit.*, p.28.

<sup>59</sup> Correspondence, Colonial Secretary to William Lonsdale and Lieut. William Hawkins JP, 26 August 1837, *HRIV*, I, 17, p. 268.

<sup>60</sup> Correspondence, William Lonsdale to Colonial Secretary, 26 August 1837, *HRIV*, I, 17, p. 268.

highly of Simpson and was relieved at his appointment. Lonsdale also sought the appointment of a constable to assist Simpson in his duties.<sup>61</sup> This was granted<sup>62</sup> and Joseph Hodgson [a freed convict] was appointed from Van Diemen's Land 'as no suitable candidate could be found in the district'.<sup>63</sup> Hodgson arrived on 12 July 1838 and was sworn in by Lonsdale.<sup>64</sup> According to Police Magistrate Lonsdale, Simpson was a 'worthy man' and welcomed his appointment. It is apparent that Lonsdale was relieved to now have the company of a more mature [Simpson was then 45] fellow magistrate, as the naval officers who had been acting as relieving justices were considered too young and inexperienced to properly carry out their magisterial duties.<sup>65</sup>

Simpson was eventually to replace Lonsdale as the Melbourne Police Magistrate in June 1840. This was a short appointment however, as in April 1841 Simpson resigned the post when his application for an increase in salary was refused. He left the paid magistracy to resume his squatting interests at his run 'Yallock Vale' in Ballam.<sup>66</sup>

In September 1837 Lonsdale was granted the formalised power to issue Public House Licences, the former grants being 'irregular certificates'.<sup>67</sup> The prior 'irregularity' of the public house certificates stemmed from the wording of the licensing legislation that required applicants to lodge the licence fee in the Sydney Treasury within 14 days of

<sup>61</sup> Foster Fyans to Col. Sec. 12 January 1838, *HRI*, I, 268.

<sup>62</sup> Acting Governor's minute, 6 February 1838, *HRI*, I, 268.

<sup>63</sup> Foster Fyans to Col. Sec. 2 May 1838, *HRI*, I, 269.

<sup>64</sup> Foster Fyans to Col. Sec. 15 August 1838, *HRI*, I, 269.

<sup>65</sup> 'I have at last, I am glad to find, a colleague in the Magistracy, Mr Simpson, who is I believe a worthy man whose assistance and coagency[sic] will be a great help to me for I have hitherto had to battle with the rogues alone, which is not always pleasant or desirable, a second opinion being more satisfactory. The Subaltern Officers have been JP's but so young that they were of little use'; Correspondence, William Lonsdale to Dr James Bowman, 9 November 1836, ML Ref. A4285, cited by Wilkins, *op.cit.*, p.58.

<sup>66</sup> Cannon, M., *Old Melbourne Town Before the Gold Rush* (Melbourne, 1991) p.133.

<sup>67</sup> Colonial Secretary to Foster Fyans, 12 September 1837; General Instructions to Fyans, *HRI*, I, p.227, enclosing a copy of the new Licensing Act for Lonsdale; Wilkins, *op.cit.*, p.68; According to Grimwade, Lonsdale had discovered three public houses operating when he arrived in Melbourne from which he accepted a licence fee of 25 pounds each, see Grimwade, W. R., *op.cit.*, p.74.

the magisterial consent to such a licence being issued. Police Magistrate Lonsdale was not prepared to entertain applications knowing that the requirements of the legislation could not be met for logistical reasons. This reluctance caused much friction between Lonsdale and John Pascoe Fawkner who had already opened and closed one 'Fawkner's Hotel' and was preparing to open a second. This was a dangerous development, especially since Fawkner was also to become Melbourne's first newspaper publisher and would often use this position to attack perceived enemies.<sup>68</sup> Lonsdale's technical inability to act on the licence issue gave credence to the argument that he only served the interests of Sydney.<sup>69</sup> The first Licensing Court had been held in June 1837.<sup>70</sup> The magisterial Bench consisted of Police Magistrate Lonsdale, James Simpson JP and Lieutenant Hawkins JP. There were six applications for public house licences<sup>71</sup> including one application from John Pascoe Fawkner.<sup>72</sup>

Foster Fyans, the second Police Magistrate in the Port Phillip District, arrived in Melbourne on 25 September 1837.<sup>73</sup> <sup>74</sup> Fyans left for Geelong with his magisterial

<sup>68</sup> According to Finn, E., *op.cit.*, pp.29–32, Fawkner's first hotel was on the Custom House Reserve, the second, on the South-East corner of Collins and Market Streets, with the *Melbourne Advertiser* first published 1 January 1838. The list of hotels however does not include Fawkner's grog shanty, 'The Royal Hotel' established soon after his arrival in Melbourne in 1836 and although not licenced by him, did have an irregular licence granted by Lonsdale to Smith who unlawfully took occupation of the site until he was removed by Fawkner and his band of 'wheat threshers', see Billot, *op.cit.*, p.177.

<sup>69</sup> 'The Police Magistrate (Captain Lonsdale) a timid martinet unwilling to risk any consequences he could not foresee, was reluctant to grant the magisterial certificate upon which a licence could issue from the Sydney Treasury'; Finn, E., *ibid*, p.28.

<sup>70</sup> Billot, *op.cit.*, p.184.

<sup>71</sup> Michael Carr for a proposed 'Governor Bourke Hotel' in Flinders Street, John Moss for the proposed 'the Ship' in Flinders Street, James Connell for 'the Highlandsman' in Queen Street, Edward W. Umphelby for 'the Angel' on the corner of Collins and Queen Streets, George Smith for a renewal of his licence for the 'Lamb Inn' on Collins Street, and John Pascoe Fawkner for 'Fawkner's Hotel' on the corner of Flinders Lane and William Street, Billot, *ibid*, p.184, citing O'Callaghan, T., 'Scraps of Early Melbourne History, 1835-1839', *Victorian Historical Magazine*, III, 41, June 1914, pp.149–151.

<sup>72</sup> Alfred John Eyre was to post one of the sureties needed for Fawkner's license; he was later to become Police Clerk at Geelong, see Billot, *ibid*, p.187.

<sup>73</sup> William Lonsdale to 'The Gentlemen Signing the Memorial, Geelong', 26 September 1837, *HRV*, I, 15, pp.227.

<sup>74</sup> Noble, *op.cit.*, p.52; Noble maintains that Fyans arrived on 4 July 1837 aboard the first steamship to visit Port Phillip, the *James Watt*; Fyans, F., *Memoirs*, *op.cit.*, pp.203–205.

‘cortege’ consisting of himself as Police Magistrate (at 300 pounds p.a), Charles Wentworth as the Clerk to the Justices (at 100 pounds p.a), Patrick McKeever as District Constable (at 3sh 0d per day), with Owen Finnegan and Joshua Clarke as Ordinary Constables (at 2sh 9d per day) and no fewer than twelve convicts.<sup>75</sup> It is worth noting that apart from his duties as a District Constable, McKeever was also to be appointed Inspector of Slaughterhouses. This is another example of Haldane’s ‘extraneous’ ‘non police duties’ so often placed upon the shoulders of colonial policemen.<sup>76</sup> These ‘extraneous police duties’ according to Haldane ‘impaired their efficiency and were not cost effective’.<sup>77</sup> Also accompanying Fyans was his servant Ben Cross. Cross had attended Fyans at Norfolk Island and had stayed with him at Moreton Bay. Cross assisted Fyans in settling at Fyansford in Geelong. He later proceeded to rob him and abscond.<sup>78</sup> It is believed that Cross overlanded to Adelaide and provided Rolf Boldrewood with the basis for his character Captain Starlight.

Fyans began issuing and selling depasturing licences to the Geelong squatters in July 1838.<sup>79</sup> Together with surveyor H. W. H. Smythe, they chose the site of the present city of Geelong between Corio Bay and the Barwon River. The plan of the township was approved on 26 October 1838<sup>80</sup> with the first land sales in February 1839.<sup>81</sup> Henry Wilson Hutchinson Smythe (Martha Lonsdale’s younger brother) was Lonsdale’s brother in law. He had arrived in Melbourne on 28 November 1837, to take up a post as assistant surveyor.<sup>82</sup> Under Fyans, convict detachments constructed the Breakwater and Queen’s

<sup>75</sup> Colonial Secretary’s Office, Sydney, 20 September 1837, *HRV*, I, 15, p.228.

<sup>76</sup> Haldane, R. K., *op.cit.*, p.13.

<sup>77</sup> *Report of the Committee on Police and Gaols*, Sydney, T. Trood, 1839, p.35, cited in Haldane, R. K., *ibid*, p.14.

<sup>78</sup> Blake, L., *op.cit.*, p.12; Fyans, F., *Memoirs*, *op.cit.*, pp.157–161; *PPP* 30 January 1840.

<sup>79</sup> Wynd, *op.cit.*, p.11.

<sup>80</sup> Gazetted, *Government Gazette*, 28 November 1838, see Jenks, E., *op.cit.*, p.29.

<sup>81</sup> Wynd, *op.cit.*, p.12.

<sup>82</sup> Correspondence, William Lonsdale to Colonial Secretary, 29 November 1837, *PROV*, *HRV*, 3, p.286, cited in Wilkins, *op.cit.*, p.71.

Wharf east of Yarra Street. The township of Geelong was eventually proclaimed on 26 October 1838.<sup>83</sup>

On 12 June 1838 Lonsdale formally requested that the magisterial powers contained in the *Sydney Police Act* be extended to Melbourne. This would enable him to specifically prosecute common public disturbance offences. These included the dangerous discharging of firearms, Sabbath observance and Sabbath employment issues, swearing and other matters of 'public annoyance'. The Police Act extension would help the Port Phillip magistracy curb the common settlement practice of entertaining persons in private residences 'and thereby frequently having drunken people therein causing annoyance or disorder to the public'. On 17 July 1838, a Court of Petty Sessions was finally approved by the Colonial Secretary 'to be made available for Melbourne, in the County of Bourke, Port Phillip'.<sup>84</sup> A proclamation on 29 August 1838 also established magisterial Quarter Sessions for Melbourne.<sup>85</sup> <sup>86</sup> This together with the proclamation for the extension of the *Police Act* to Melbourne on 5 November 1838<sup>87</sup> provided Lonsdale with the expanded juridical base that he required and had requested. Even with this jurisdictional expansion, prisoners tried at Quarter Sessions in 1839 were still only temporarily housed in the Melbourne Gaol whilst awaiting their departure for Sydney where they would serve out the term of their sentence.<sup>88</sup>

William Wright was appointed Chief Constable of Melbourne on 5 August 1838. He replaced Henry Batman who had been dismissed for bribery. Batman had accepted one pound from another constable to change his tour of duty. Most importantly, he was

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<sup>83</sup> Blake, L., *op.cit.*, p.12.

<sup>84</sup> *NSW Government Gazette*, 18 July 1838, *HRV*, I, p.270.

<sup>85</sup> *NSW Government Gazette*, 29 August 1838, *HRV*, I, p.277.

<sup>86</sup> Jenks, E., *op.cit.*, p.29 claims *Government Gazette*, 22 August 1838, under 3 Will. IV. No.3.

<sup>87</sup> Victoria Police Management Services Bureau, *op.cit.*, p.5.

<sup>88</sup> Finn, E., *op.cit.*, pp.80–81.

dismissed for lying about the said tour allocation when questioned by Lonsdale about the matter.<sup>89</sup> Batman, having been placed upon the magisterial commission as a Commissioner for Crown Lands, was dismissed from his position as Chief Constable of the Port Phillip District and had his name removed from the commission.<sup>90</sup> The appointment of Wright as Chief Constable<sup>91</sup> would have grave consequences for Lonsdale in his later tribulations with the press and with Mr Justice Willis. A Court of Requests<sup>92</sup> was finally established in Melbourne by proclamation on 5 October 1839.<sup>93</sup> It was originally to be held on the first Tuesday of every month but was soon after changed to a quarterly regime on the first Monday of January, April, July and October in order to coincide with the Quarter Sessions hearings.<sup>94</sup>

## BREACHES OF THE PEACE

A CLEARER SENSE of the work of constables can be gleaned through an examination of cases involving 'breaches of the peace'. Under the common law constables possessed extensive powers as 'Conservators of the Peace'. The office of the constable was designed primarily to preserve the peace, prevent crimes, apprehend offenders and execute warrants of the justices of the peace.<sup>95</sup> They were under a common law obligation to preserve the peace by arresting those making affray, committing assaults, threatening to do harm to others and those making riot. The constable possessed the common law authority to command other citizens to assist them in appeasing such disturbances and to take and present those arrested before a justice for the purpose of

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<sup>89</sup> William Lonsdale to Colonial Secretary, 5 August 1838, *HRV*, I, 13, p.193.

<sup>90</sup> Robert Hoddle to Surveyor General, 11 August 1838, *HRV*, I, 13, p.194.

<sup>91</sup> Edmund Finn claims that Wright was in fact Melbourne's first Chief Constable, see Finn, E., *op.cit.*, p.74.

<sup>92</sup> Under the jurisdiction of Act 3 Vic. No.6.

<sup>93</sup> *Government Gazette*, 9 October 1839.

<sup>94</sup> *Government Gazette*, 1 January 1840, see Jenks, E., *op.cit.*, p.30..

<sup>95</sup> Re Constable, in Plunkett, *op.cit.*, pp.113–117.

obtaining sureties of the peace.<sup>96</sup> In cases of felony, the ‘peace officer’ was authorised to pursue and arrest and/or charge later upon information.<sup>97</sup> For misdemeanours, the constable must have witnessed the act himself or otherwise act upon the information being laid by witnesses to the act. The common law also however restricted the ability of the constable to enter public houses or ‘to turn anyone out of a public house’ unless they had clear evidence that some offence had been committed.<sup>98</sup> Again the requirement that properly allowed a constable to legally intervene, enter and arrest was the issue of a breach of the peace, a ‘disturbance’ or a ‘making of alarm in the neighbourhood’.<sup>99</sup> The common law also maintained that the constable only had authority to act within the district to which he is appointed and most importantly, attached the constable to the justice of the peace within that district as ‘the proper officer of the justice of the peace’ bound to serve and enforce all warrants issued by that or those justices within that district.<sup>100</sup>

The primary responsibility of constable was therefore to maintain peace within his area and to present those who breached the peace before the Bench of local magistrates. As a frontier society still developing its own unique set of standards of behaviour, the early Port Phillip settlements presented the local constable and magistracy with many ‘challenging’, sometimes comical, disturbances. Although ‘quaint’, most of these matters seem alarmingly familiar to the modern reader. There were neighbourhood disputes. In *R v Catherine Doyle*,<sup>101</sup> Jane Coghlan testified that whilst she was at a neighbour’s yard getting water, Catherine Doyle approached her saying ‘I’ll convert you’ and pushed her over. John Cronan testified and stated that she then called him a ‘thief and drunkard’ and then

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<sup>96</sup> Dalt., c.1.

<sup>97</sup> *Beckwith v Philby*, 6 B. and C. 638; *Ex Parte Krans*, 1 B. and C. 261, per Abbott, C. J.

<sup>98</sup> *R v Smith*, 6 C and P.136, per Tindal, C. J; *Wheeler v Whiting*, 9 C and P.262.

<sup>99</sup> *Howell v Jackson*, 6 C and P.723.

<sup>100</sup> 2 Hawk, c.10, s.35.

<sup>101</sup> Melbourne Court Register 4 July 1838, *HRV*, I, 332–333.

called Mary Cronan a 'rogue and a thief'. Doyle in her defence claimed that Coghlan had provoked her. She claimed she had called her 'a drunkard and a thief'. The Melbourne Bench found Doyle guilty and fined her one pound with 4sh. costs. In *Simon Connelley v W L Brodie*,<sup>102</sup> before Frederick Berkley St John 'Esq PM JP' and J. F. Palmer Esq JP, Brodie faced a prosecution for 'malicious injury to a fence'. The case was dismissed, with an order that 'the plaintiff is to give two days labour as costs to court'. In *Simon Connelley v Richard Broady*,<sup>103</sup> before Frederick Berkley St John 'Esq PM JP' and James Smith Esq JP, Connelley sued for 'a malicious injury to his paddock fence'. The court ordered a fine of 20sh with 40sh costs. In *George Ogilvie v John Pullan*,<sup>104</sup> also before St John and Palmer of the Melbourne Bench, Pullman faced a charge of 'illegal detention of clothes'. The court decreed the clothes be given up and 'recommended the dispute be referred to arbitration'. *R v Mary Doughty*<sup>105</sup> involved a complaint by Anne Saunders regarding a breach of the peace by the use of threatening language, before George Stewart PM of the Alberton Bench. Anne Saunders, resident of Tarraville, deposed that there was an argument between the women on 12 October 1848 and that Doughty, free by servitude, 'got into a great rage' claiming that she (Anne Saunders) had been debasing her and that she would 'have her life' and used other violent language. Saunders informed the Constable that Doughty had been disturbing the peace. The Bench found the matter proved and decreed that Doughty be bound over to keep the peace for twelve months and particularly towards the Complainant Ann Saunders, and if breached, she 'will be fined in the sum of 10 pounds and with two sureties in the sum of 2 pounds 10sh each'.<sup>106</sup> There were breaches of the peace during tenancy disputes. *Lewis Robinson v Cornelius Tracy*,<sup>107</sup> before Frederick Berkley St John Esq PM JP [and blank space then Esq JP written in at the end of the Bench entry] concerned a landlord and tenant dispute where the landlord charged

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<sup>102</sup> VPRS 2136, *ibid*, Wednesday 23 Aug 1843.

<sup>103</sup> VPRS 2136, *ibid*, 26 August 1843.

<sup>104</sup> VPRS 2136, *ibid*, Wednesday 23 August 1843.

<sup>105</sup> Alberton Court Register, 13 October 1848, p.176.

<sup>106</sup> *Ibid*, p.177.

<sup>107</sup> VPRS 2136, *ibid*, 25 August 1843.

‘that tenant did malicious injury to gate posts of a house’. The Melbourne Bench ordered the premises to be given up to the landlord Lewis Robinson.

A second set of breaches of the peace involved road traffic offences. There were prosecutions for incidents of ‘road rage’ and dangerous or ‘furious driving’ as the offence was then known. In *R v George Ross*,<sup>108</sup> Private William Lord testified and claimed that he was struck by Ross, a bullock driver, with a whip when Ross was ‘passing two yards from him’. The Melbourne Bench found Ross guilty and fined him two pounds. In the ‘furious’ riding or driving cases, the normal penalty was a fine of 40sh although there was some divergence in the fines levied. The Melbourne Bench generally imposed a fine within the 40–60sh range, whereas the Geelong Bench tended to favour a fine of two pounds. In *R v Joseph Griffin and Andrew Macnaughton*,<sup>109</sup> before Foster Fyans of the Geelong Bench, it was alleged that ‘the two men were riding furiously in the township of North Geelong’. The defendants pleaded guilty and each were fined two pounds with costs of 4 pounds, 7sh 6 d. On the other hand in *R v Charles Seymour Wentworth*,<sup>110</sup> Foster Fyans dismissed a case against his own Clerk of the Geelong Bench who had been ‘charged with riding furiously in the town of Geelong on the 19 instant’. In *R v William Akers*,<sup>111</sup> before Foster Fyans, it was alleged that Akers ‘on the 23rd instant, did ride his master’s horse furiously in the township of Geelong’. A guilty plea was entered and the defendant was fined two pounds and costs. Similarly, in *R v John Mason*,<sup>112</sup> before Fyans and Thomas Gisborne of the Geelong Bench, it was alleged that Mason ‘on the 25th instant, did ride his master’s horse furiously in the township of Geelong’. A guilty plea was again entered and the defendant was also fined two pounds.

<sup>108</sup> Melbourne Court Register 6 November 1838, *HRV*, I, 336.

<sup>109</sup> Geelong Court Register 11 October 1839, *HRV*, I, 490.

<sup>110</sup> Geelong Court Register 19 September 1839, *HRV*, I, 490.

<sup>111</sup> Geelong Court Register 24 December 1839, *HRV*, I, 492.

<sup>112</sup> Geelong Court Register 26 December 1839, *HRV*, I, 492.

On the other hand, in *R v William Gold*,<sup>113</sup> before Henry Condell Esq JP, James Agnew Smith Esq JP and James Frederick Palmer Esq JP of the Melbourne Bench, Gold ‘appeared upon a charge of furious riding in Bourke Street’. Gold was found guilty and fined 40sh and costs of 5sh. Interestingly, Gold was also drunk at the time but was not charged with that offence even though in testimony his state of intoxication was brought before the notice of the Bench. In *R v Edward Stretton*,<sup>114</sup> Stretton also appeared before the above Bench charged with furious riding. He was found guilty and fined 50sh with costs of 5sh. Stretton also seemed to be ‘very drunk’ during the commission of the offence and appears to have ‘resisted the arrest by the constables’ when he was being taken into custody. These aggravating circumstances may account for the imposition of a slightly higher fine than that ordered in *R v William Gold*. In *R v John Brown*,<sup>115</sup> before Henry Condell Esq JP, Brown was also charged with furious riding. He pleaded guilty and was fined 40sh with costs of 7/6. Likewise in *R v Robert MacNamara*,<sup>116</sup> before Henry Condell Esq JP and William Hull Esq JP, upon a charge of furious riding, MacNamara was fined 40sh and 5sh costs. On the other hand in *R v Patrick O’Brien*,<sup>117</sup> before Henry Condell Esq JP, upon a charge of furious driving, there were declared circumstances ‘in aggravation’ as the testimony revealed that ‘children were playing nearby’. O’Brien was found guilty and fined 50sh with costs of 7/6 and two months gaol in default of payment. Similarly in *R v Peter Foreman*,<sup>118</sup> before Henry Condell Esq JP and Andrew Parnell Esq JP, upon a charge of ‘careless’ riding, which implies a circumstantial aggravation, Foreman, although admitting the information, was fined 60sh with costs of 7/6, and an award in restitution of 5sh in damages.

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<sup>113</sup> VPRS 2136, *op.cit.*, Friday 20 October 1843.

<sup>114</sup> VPRS 2136, *op.cit.*, Friday 20 October 1843.

<sup>115</sup> VPRS 2136, *op.cit.*, Tuesday 24 October 1843.

<sup>116</sup> VPRS 2136, *ibid*, Monday 19 February 1844.

<sup>117</sup> VPRS 2136, *ibid*, Monday 20 November 1843.

<sup>118</sup> VPRS 2136, *ibid*, 23 February 1844.

A third type of 'breaches of the peace' concerned 'threatening behaviour'. These included prosecutions for threatening behaviour, assaults and domestic violence. In *R v Richard Holt*,<sup>119</sup> Ellen Lawler testified and claimed that Holt (*Strathfieldsaye*, 1836, life) 'threatened to kill her'. Mary Harrison testified and confirmed that Holt had a knife and that he had made threats 'against others as well'. The Melbourne Bench sentenced Holt to fifty lashes. *William Hooson v John Rodgers*,<sup>120</sup> involved a complaint to have Rodgers 'bound over to keep the peace', before C. J. Tyers and John Reeve Esq of the Alberton Bench. Hooson, the Poundkeeper at Tarraville, deposed that 'last Monday week', John Rodgers, a bricklayer residing at Mr. Reeve's Special Survey [note that Reeves was one of the presiding magistrates] between the hours of 10 and 1 o'clock did threaten Hooson's life. Hooson claimed that Rodgers had said that he would 'pluck out my bloody brains'. Hooson requested that Rodgers be bound over to keep the peace as Hooson 'was in fear of his life'. At the hearing of *William Hooson v John Rodgers*,<sup>121</sup> before William Odell Raymond Esq JP and John King Esq JP, Hooson deposed that on 29 December 1845 between 11-12 o'clock he saw Rodgers and another man coming from the direction of his house. He asked Rodgers what brought him to his house and was abused by Rodgers who called him an 'old bugger', that he would go to my home whenever he liked and that he would 'knock his bloody brains out'. Curiously, the Bench dismissed the case stating that 'there not being sufficient proof to prove an assault'. In *James McEvoy v Charles Lucas & William Mason*,<sup>122</sup> involving an allegation of 'assault and whipping', the applicant sought a warrant for the defendants, before C. J. Tyers Esq JP of the Alberton Bench. McEvoy, a saddler of Tarraville, deposed that he was at his home on 1 January 1846

<sup>119</sup> Melbourne Court Register 8 December 1838, *HRV*, I, 338.

<sup>120</sup> Alberton Court Register, 8 January 1846, p.54.

<sup>121</sup> Alberton Court Register, 4 January 1846, p.61. This however must be an error, as the original complaint by Hooson was presented to the court on 8 January 1846, and judging from the context of the preceeding and following cases the date is probably 14 January 1846, or 4 February 1846, making the original Court Register entry a simple slip of the quill.

<sup>122</sup> Alberton Court Register, 6 January 1846, p.88; note that at the beginning of the entry the date is put as 6 January 1846, which corresponds with the deposition by McEvoy, however at the end of the deposition the date 6 December 1846 appears, witnessed by Tyers at jurat. The following case in the Court Register appears dated as 6 January 1847. I believe that the correct date for this matter is therefore 6 January 1847, rather than January or December 1846.

when Lucas approached him and struck him several times with his horse whip and Mason then struck him in the face with his fist, knocked him down and struck him on the head when he was down, and begged that a summons be granted for their appearance at the court to answer the charge.<sup>123</sup> The summons appears to have been granted, at least against Mason as the matter against him was heard two days later. In *James McEvoy v William Mason*,<sup>124</sup> before Charles J. Tyers and W. O. Raymond ‘two of Her Majesty’s Justices of the Peace for the said Colony’ of the Alberton Bench, McEvoy again testified with John Cummins of Tarraville, carpenter, supporting his evidence, that the basis of the dispute and the challenge to fight involved a debt of 3 pounds 1sh.<sup>125</sup> The Bench fined William Mason the sum of one pound ‘or to be committed to prison’ and ordered him to undertake ‘sureties to keep the peace’. A Bench note reveals that the fine was paid.<sup>126</sup> In *R v Joseph Duggan*,<sup>127</sup> before Henry Condell Esq JP and Charles Payne Esq JP, Duggan faced a charge of attempting to stab his wife. The charge was found proved and Duggan was fined 20s in default one month in the Melbourne gaol [no costs award made]. In one instance of domestic violence, where alcohol again seemed to be an essential ingredient, Thomas Leahy killed his wife Sarah Leahy at Portland Bay on 16 November 1840 by stabbing her in the heart. He was committed to trial for murder at Melbourne by the Portland bench. Found guilty at the trial held on 15 May 1841 [PPG 19 May 1841] his sentence was commuted to transportation for life. He was eventually sent back to Portland where Police Magistrate James Blair appointed him scourger and later constable.<sup>128</sup>

There were prosecutions for what became known as ‘home invasions’. In *R v*

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<sup>123</sup> *Ibid*, at p.89.

<sup>124</sup> Alberton Court Register, 8 January 1847, p.94.

<sup>125</sup> *Ibid*, at p.95.

<sup>126</sup> *Ibid*, at p.96.

<sup>127</sup> VPRS 2136, op.cit., Saturday 21 December 1843.

<sup>128</sup> VPRS 34/P/1, 16 November 1840.

*Martin Larkins*,<sup>129</sup> Martha Walton testified and claimed that on 5 December 1838 Larkins had gained entry into her home and ‘assaulted her in her home’. Larkins had apparently come ‘to aid some woman in the home of Walton’. The Melbourne Bench found Larkins guilty and fined him three pounds and costs of 3s 10d, ‘and imprisonment for five weeks if fine not paid sooner’. In *R v William Humphries, William Stevenson, George Weaver and Charles Hall*,<sup>130</sup> before Foster Fyans of the Geelong Bench, Mrs Eliza Alton testified and alleged that she was assaulted and robbed in her house by her former servant Humphries, who was acting in concert with the other men. James Jack [servant, storeman for Mr Champion of Corio] testified and confirmed the testimony. Constable Joshua Clarke gave testimony however to the effect that both William Stevenson and Mrs Alton were not sober at the time of the incident and cast doubt upon the allegation. Not surprisingly, no penalty was recorded. In *Gill v Connolly*,<sup>131</sup> involving an allegation of assault and ‘breaking down of a door of a home’, before C. J. Tyers Esq, Commissioner of Crown Lands of the Alberton Bench, Dr Gill of Tarraville deposed that Connolly, ‘a labourer in the employ of the government’, came to his door asking to see ‘a Mr Berry’. When told nobody of that name was there he kept insisting and said ‘You’re the bloody doctor’, pushed the door violently and broke the pipe in Dr Gill’s mouth ‘and gave him a violent blow behind the ear’.<sup>132</sup> Interestingly on 16 January 1846, Dr Gill withdrew the charge.<sup>133</sup> There were ‘public commotions’ to be dealt with. In *R v Thomas Hermitage*,<sup>134</sup> Andrew Macnaughton (publican) testified and claimed that on 1 August 1839 Hermitage had caused a ‘commotion and riot within the public house’. Charles Hunt, a servant in the public house, testified and supported the allegation. Samuel Well testified in Hermitage’s defence. Constable Patrick McKeever gave testimony and confirmed the riot. Constable Williams’ testimony also confirmed the riot. The Geelong Bench found

<sup>129</sup> Melbourne Court Register 27 December 1838, *HRV*, I, 341.

<sup>130</sup> Geelong Court Register 20–21 November 1838, *HRV*, I, 484–486.

<sup>131</sup> Alberton Court Register, 8 January 1846, p.57.

<sup>132</sup> *Ibid*, p.58.

<sup>133</sup> *Ibid*, p.59.

<sup>134</sup> Geelong Court Register 2 August 1839, *HRV*, I, 352–354.

Hermitage guilty and fined him two pounds 10sh. In *R v James Montgomery*,<sup>135</sup> before Frederick Berkley St John 'Esq JP and PM' of the Melbourne Bench, Montgomery appeared upon a charge of 'discharging firearms in Bourke Street 9.00 pm'. He was found guilty and fined 10sh with costs of 5sh.

## REGULATION, POWERS AND DUTIES OF MAGISTRATES AND CONSTABLES

THE OFFICE OF the constable is a historically 'ministerial' and not a judicial office. This gave the constable the ability to delegate the service of warrants when he was unable to do so.<sup>136</sup> The constable had also to strictly abide by the directions contained in the warrant; otherwise he might face an action as a trespasser<sup>137</sup> upon property or upon goods.<sup>138</sup> Unreasonable detention of a person under arrest was also actionable, therefore the common law made the actions of the constable measurable against the yardstick of reasonableness.<sup>139</sup> The requirement to act in a reasonable fashion extended to the detention of a prisoner, where the constable was required to treat a prisoner 'with no greater severity than is necessary to prevent his escape'.<sup>140</sup>

When magistrates sat in Sessions of the Peace they were seen to be attending to the general obligations imposed upon them by their commissions or by legislative authority.<sup>141</sup> Magistrates convened in Petty Sessions were generally constituted as a Bench of two justices, even though one justice might have had authority to act. Plunkett always

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<sup>135</sup> VPRS 2136, Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, 14 August 1843.

<sup>136</sup> 2 Hawk, c.10, s.36.

<sup>137</sup> *Hoye v Bush*, 1 M. and Gr.775.

<sup>138</sup> *Crozier v Cundey*, 6 B and C.232.

<sup>139</sup> *Wright v Court*, 4 B and C.596.

<sup>140</sup> *Wright v Court*, 4 B and C.596.

<sup>141</sup> See Sessions of the Peace, in Plunkett, *op.cit.*, pp.433–434.

advised two justices to sit, even when any relevant legislation may only have required one to be present.<sup>142</sup> The later Alberton Bench was careful in this respect.<sup>143</sup> The phrase 'Special Sessions' describes the sitting of justices convened to perform some particular branch of their authority.<sup>144</sup> General Sessions, constituted by two or more justices,<sup>145</sup> were also to be seen as a Court of Record.<sup>146</sup> Magistrates convened in General or Quarter Sessions possessed a power to act against any contempt<sup>147</sup> in the face of the court.<sup>148</sup> These acts of contempt include 'rude or contumelious behaviour, violent and obstinate expressions of disapprobation or applause refusal to be sworn, breaches of the peace in open court, prevarication in the witness box, or any gross manifestation of a want of that respect on which the satisfactory administration of justice depends'.<sup>149</sup>

Most colonial magisterial adjudications were undertaken in the exercise of their summary jurisdiction powers.<sup>150</sup> Many Acts gave magistrates summary jurisdiction in diverse areas and, together with the general Legislative Council legislative regulation of summary proceedings,<sup>151</sup> provided the magistrate with his jurisdictional base. The specific requirements of any applicable legislation would detail whether one or two magistrates

<sup>142</sup> Plunkett, *ibid*, pp.433–434, citing the general advice of Talford in Dickensons Sessions.

<sup>143</sup> For example in the matter of *Thomas Harmer*, Harmer, conditionally free, was brought before the Bench on a charge of absconding. There 'being no second magistrate present and the parties having discussed the matter out of Court, the defendant acknowledging the information, is convicted'. The matter was then dismissed without penalty; Alberton Court Register, 27 December 1848, p.185.

<sup>144</sup> Plunkett, *ibid*, p.434.

<sup>145</sup> 11 Geo. IV., No.13, s.2, *ibid*, p.434.

<sup>146</sup> Cro.Cir. Com. 13, *ibid*, p.434.

<sup>147</sup> Re Contempt, in Plunkett, *op.cit.*, pp.117–118.

<sup>148</sup> VPRS 34/P/1; 2 February 1841, In *Re William Tobin*, free by servitude, under a charge of contempt of court as he 'declaimed in open court against the decision of the [Portland] bench'. 25 February 1841, In *Re Samuel Turley* (or Hurley) charged with prevarication in the witness box, sentenced to 2 days gaol by the Portland bench. 29 January 1842, In *Re George Barber*, charged with gross prevarication whilst giving evidence to the bench, sentenced to 14 days gaol at Melbourne by the Portland Bench.

<sup>149</sup> Dick, Q. S. 47, *ibid*, p.117.

<sup>150</sup> See Summary Jurisdiction, Plunkett, *op.cit.*, pp.449–453.

<sup>151</sup> 5 W. IV., No.22, *ibid*, p.449.

were necessary in any proceedings. Notwithstanding this, any single justice was able to receive a complaint and issue a summons or a warrant<sup>152</sup> to appear in order to initiate proceedings. Subsequent to appearance, or action in contempt in the event of non-appearance, the magistrate was then able to examine all parties and witnesses<sup>153</sup> and then give an appropriate judgement. Magistrates would then sentence a party, with the normal sentence being a fine. In default of payment of the fine, however, the magistrate was able to then order a distress of goods and chattels to make good the amount of the fine and associated costs.<sup>154</sup> If there were insufficient goods to render the extinction of the penalty, the legislation applied a specific formula for imprisonment.<sup>155</sup> After a magisterial decision, any other justice of the peace within the district could undertake enforcement proceedings.<sup>156</sup> <sup>157</sup> Appeals from the decisions of the Bench were permitted to General Sessions, after sureties were lodged.<sup>158</sup> Interestingly, no convictions could be quashed merely on the basis of errors in form, such as names, dates and other merely 'descriptive' items.<sup>159</sup> Moiety of fines was prescribed again in the discretion of the magistrate, as to be half to the informer or prosecutor and the remainder to the Crown.<sup>160</sup> The general common law duties of the offices of the colonial Police Magistrate and Constable<sup>161</sup> were codified for Sydney<sup>162</sup> and for other places,<sup>163</sup> as and when they were extended by

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<sup>152</sup> 5 W. IV., No.22, s.2, *ibid*, p.450.

<sup>153</sup> Witnesses who did fail to appear were liable to be fined between 2 and 20 pounds; 5 W. IV., No.22, s.4, *ibid*, p.452.

<sup>154</sup> 5 W. IV., No.22, s.1, *ibid*, pp.449-450.

<sup>155</sup> 14 days for less than 10 shillings; 1 calendar month for less than 1 pound; 2 calendar months for less than 5 pounds; 3 calendar months for any amount greater than five pounds; see 5 W. IV., No.22, s.1, *ibid*, p.450.

<sup>156</sup> See Summons, Plunkett, *op.cit.*, p.453.

<sup>157</sup> 3 G. IV., c.23, s.2, *ibid*, p.453.

<sup>158</sup> 5 W. IV., No.22, s.3, *ibid*, p.451.

<sup>159</sup> 5 W. IV., No.22, s.5, *ibid*, p.452.

<sup>160</sup> 5 W. IV., No.22, s.6, *ibid*, p.452.

<sup>161</sup> Re Police, in Plunkett, *op.cit.*, pp.340-366.

<sup>162</sup> 4 W. IV. No.7.

proclamation. The legislation codified the common law nexus between the office of the magistrate and the constabulary and highlighted the *de jure* authority exercised by the magistracy over the colonial 'police force'. The legislation confirmed the Governor's powers of appointing Police Magistrates,<sup>164</sup> with the Police Magistrate's oath of office to be taken before a justice of the Supreme Court<sup>165</sup> The ancient magisterial prime directive of order maintenance was codified, 'to suppress all riots, tumults, &,' as the very first legislative obligation under the legislation.<sup>166</sup> The Police Magistrate was to appoint 'fit and able men as constables',<sup>167</sup> to make regulations 'for the management of the Police force' and to suspend or dismiss errant constables,<sup>168</sup> as part of the magisterial management of the colonial police. Part of this Police management obligation was 'vigilance' on the part of the magistrate 'in guarding against bribery'.<sup>169</sup> At common law, bribery was a receipt or an offer of any undue reward, by or to a person whose ordinary profession or business related to the administration of public justice to do a thing against the known rules of honesty and integrity.<sup>170</sup> Both parties to the bribe were liable to prosecution, as were persons offering the same temptations for elections of Members of the Legislative Council.<sup>171</sup> Lonsdale took disciplinary action on 16 November 1837 against what is the first documented act of police corruption in the district of Port Phillip.<sup>172</sup> A prisoner,

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<sup>163</sup> 2 Vict. No.2, 'An Act for regulating the Police in the towns of Parramatta, Windsor, Maitland, Bathurst, and other Towns respectively, and for removing and preventing nuisances and obstructions, and for the better alignment of streets therein'.

<sup>164</sup> 2 Vict. No.2, s.1.

<sup>165</sup> 2 Vict. No.2, s.2, to 'faithfully, impartially, and honestly, to the best of his skill and knowledge to execute all powers and duties of a Police Magistrate'.

<sup>166</sup> 2 Vict. No.2, s.3.

<sup>167</sup> 2 Vict. No.2, s.4.

<sup>168</sup> 2 Vict. No.2, s.5.

<sup>169</sup> See Bribery, in Plunkett, *op.cit.*, p.62.

<sup>170</sup> Hawk, c.67, s.2, *ibid*, p.62.

<sup>171</sup> 6 Vict. No.16, s.52, *ibid*, p.62.

<sup>172</sup> Victoria Police Management Services Bureau, *op.cit.*, p.3, claims that he was dismissed on 17 March 1837, this appears incorrect as the original Lonsdale correspondence cited herein is quite clear on the dates in question.

labourer James Murphy, swore a complaint before Lonsdale<sup>173</sup> against District Constable Joseph Will Hooson, nicknamed the 'General without an army'.<sup>174</sup> He alleged that Hooson (who was his employer) took a bribe of 10 shillings (almost three days' pay for Hooson) to release him two days before his due parole. The fact that the prisoner had been released before his time, coupled with the rumours that Hooson had been borrowing heavily around the settlement, gave Lonsdale no alternative but to suspend Hooson from duties.<sup>175</sup> The Sydney authorities later upgraded this suspension to a formal dismissal.<sup>176</sup> The new appointees to substitute for the loss of Hooson and Dwyer were Constables John Gomm and Mathew Tomkins.<sup>177</sup> Another early example of bribery occurred in *R v James Hall and William Wells*,<sup>178</sup> before Foster Fyans of the Geelong Bench. Corporal William Brock of the Mounted Police testified that he saw Hall and Wells 'riding furiously along the high road to *Macnaughton's Public House*'. The defendants were stopped and were told that 'their conduct was dangerous'. The defendants then offered Brock 2sh 6 d not to say anything about the matter and then 'invited him to share a half-gallon of brandy'. They then left again at such a furious pace that one road user Joseph Griffin was 'forced to take his cart off the road'. The defendants were fined a total of 4 pounds.

The relationship between the magistrates and 'their' constabulary was similar to the modern role of personnel manager invested with powers of discipline and dismissal. *R v Constable Cornelius Sullivan*,<sup>179</sup> for example, involved a police disciplinary action where

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<sup>173</sup> Statement sworn before William Lonsdale, J.P., 16 November 1837, *HRV*, I, 13, p.189.

<sup>174</sup> Finn, *op.cit.*, p.74.

<sup>175</sup> Correspondence, William Lonsdale to Colonial Secretary, 17 November 1842, *HRV*, I, 13, p.190.

<sup>176</sup> Correspondence, Colonial Secretary to William Lonsdale, 18 December 1842, *HRV*, I, 13, p.190.

<sup>177</sup> Victoria Police Management Services Bureau, *op.cit.*, p.3.

<sup>178</sup> Geelong Court Register 17 October 1839, *HRV*, I, 490–491.

<sup>179</sup> Alberton Court Register, 3 September 1845, p.14.

Constable Sullivan faced a charge that he 'neglected his duty, disobeyed orders and was abusive to a magistrate'. The matter was brought before C. J. Tyers, W. O. Raymond and Robert Thompson of the Alberton Bench. The informant in this matter was Lachlan McAlister J.P. McAlister deposed that on 21 August 1845, whilst at Port Albert he came across a drunken man of 'improper character' named Miller who challenged him to a fight and 'annoyed him greatly'. McAlister called upon Constable Sullivan to take Miller into charge 'until he was sober'. Later McAlister came across Constable Sullivan and asked what became of the man, to which Sullivan replied that no such order had been given. McAlister also thought that Sullivan was drunk. McAlister also claimed that he later heard Sullivan making 'very great noises in the yard'. Andrew Thompson also deposed in support of McAlister and testified that he heard Sullivan shouting after McAlister. The Bench found Sullivan guilty of disobedience and fined Sullivan 1 pound 'to be applied to the relief of the poor'.<sup>180</sup>

The Chief Constable undertook the task of maintaining discipline amongst the constables, detecting police misconduct and initiating disciplinary proceedings before the magistrates. Manton Flinn, Chief Constable in Gippsland during the late 1840s, undertook these types of disciplinary functions whilst in the service of the Alberton Bench. The Alberton Bench swore in Manton Flinn<sup>181</sup> as Chief Constable for the District of Alberton in January 1848. This was the first matter presided over by George Stewart, Police Magistrate Alberton, as noted within the Alberton Court Register, under the heading 'Police Office Alberton'. Shortly after his appointment, Flinn initiated a disciplinary hearing before the Alberton Bench against Constable John Jones.<sup>182</sup> Flinn deposed that on 24 January 1848, Constable John Jones requested two hours absence from duty. Flinn claimed that Jones did not return to his duty and that he and his family were 'at work at the (undecipherable) Public House'. In his defence, Jones claimed he was

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<sup>180</sup> *Ibid*, p.15.

<sup>181</sup> Alberton Court Register, 17 January 1847, p.145, note however that the date should be 17 January 1848, as indicated by the following matters dated January 1848.

<sup>182</sup> Alberton Court Register, 25 January 1848, p.145.

not at work at the time in question. He also stated that he was willing to forfeit his pay and resign now rather than wait until the end of the month as requested by the Police Magistrate. The Bench decided that he 'be removed from his situation as constable', his pay would be forfeited and that 'his name would not to be included within the pay abstract and consequently his pay will not be drawn from the Treasury'.<sup>183</sup> Henry Laporte Smith<sup>184</sup> was soon after sworn in as an Ordinary Constable for this District to replace Jones. Because of their low wages, constables would often seek to augment their wages with other sources of income. Patrick Kating is one such example.<sup>185</sup> He was sworn in as Constable on 3 March 1848. In a matter of a *Police Disciplinary Hearing*,<sup>186</sup> Patrick Kating a Constable attached to the Alberton Police, was discovered 'drinking and drunk at *Patrick's Inn*' by Chief Constable Manton Flinn, and 'not being in a fit state to be seen in public' was ordered by Flinn to his quarters. He refused 'and made use of obscene language'. The Bench decreed that Constable Kating be removed from his office of Constable in the Police. John Morley<sup>187</sup> was later sworn in to replace Kating. Chief Constable Martin Flinn<sup>188</sup> was also later appointed Bailiff of the Small Debts Court for the District of Alberton.

All breaches of the *Police Act* were justiciable before one or more justices of the peace. The most common form of presentment before the magisterial Bench was by way of summons. In this case the person complained against or charged by an 'informer' gave information against the defendant. The defendant was summoned to appear at a certain time and place to have the matters raised in the summons heard by the Bench of

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<sup>183</sup> *Ibid*, p.146.

<sup>184</sup> Alberton Court Register, 1 February 1848, p.146.

<sup>185</sup> Alberton Court Register, 3 March 1848, p.154.

<sup>186</sup> Alberton Court Register, 20 April 1848, p.158.

<sup>187</sup> Alberton Court Register, 1 May 1848, p.160.

<sup>188</sup> Alberton Court Register, 31 July 1848, p.168 before George Stewart Esq JP and A. Meyrick Esq JP of the Alberton Bench.

justice(s). Informers or prosecutors were also, according to the legislation, to be considered competent witnesses. Furthermore, no person could be convicted of an offence contrary to the *Police Act* after the expiration of one month from the time such offence is alleged to have been committed.<sup>189</sup> A Summons would also be issued to ensure the presence of witnesses to give evidence upon oath or affirmation, for either the prosecutor-informer or on behalf of the defendant. Refusal or 'neglectful non-appearance' pursuant to a lawfully delivered summons was punishable, upon conviction, for every single offence, by a fine not exceeding ten pounds and not less than five pounds.<sup>190</sup> In *R v Thomas Fisher*,<sup>191</sup> before Foster Fyans of the Geelong Bench, a summons having been issued 21 April 1839, and the defendant not attending court, a warrant was issued for his arrest. Fisher entered a plea of guilty, and no excuse was recorded. The Bench fined him one pound for non-attendance with 10sh costs. In *R v Nathaniel Ford*,<sup>192</sup> before George Stewart PM of the Alberton Bench, Ford, free by servitude, failed to appear as a witness in the case *Whitford v Monaghan*. He had been served with 'a summons to appear'. Ford pleaded guilty and by way of explanation stated that 'he works as a carrier and was away with the rivers in flood at the time'. The Bench obviously took his circumstances into consideration. It chose not to fine Ford but merely 'cautioned him'.

Where a magistrate in his adjudications sentenced a defendant to a payment of fines,<sup>193</sup> there was a legislative requirement that the magistrate send a Statement of Fines, containing particulars of the defendant, to the Clerk of the Peace at the nearest Quarter Sessions.<sup>194</sup> Unpaid fines were liable to an action of distress and sale of goods.<sup>195</sup> If there

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<sup>189</sup> 2 Vict. No.2, s.58.

<sup>190</sup> 2 Vict. No.2, s.59.

<sup>191</sup> Geelong Court Register 1 October 1839, *HRV*, I, 355.

<sup>192</sup> Alberton Court Register, 27 October 1848, p.178.

<sup>193</sup> Re Fines, in Plunkett, *op.cit.*, p.175.

<sup>194</sup> 2 Vic. No.8, s.1.

<sup>195</sup> 6 G. IV. No. 19.

was a statutory requirement in the prosecuting legislation that directed fines to be ‘paid to the poor’ and there was no benevolent society in the prosecuting district, legislation required the fines to be sent to the Benevolent Society of Sydney.<sup>196</sup> There was also a legislative requirement that all fines in cases of drunkenness, not exceeding five shillings, be sent to the district’s Benevolent Asylum or benevolent society. If the fine exceeded five shillings however, ‘then in such proportion, not exceeding one-half, to the informer as the Justice or Justices may in his or their discretion direct, and the residue to such Benevolent Asylum or Society as aforesaid’.<sup>197</sup> Needless to say, a fine greater than five shillings for public drunkenness was an obvious inducement to a more stringent police enforcement of the colonial public drunkenness regulations.

## LA TROBE AND THE PORT PHILLIP MAGISTRACY

AS A ‘GENTLEMAN of his time’, La Trobe held the Port Phillip ‘lower classes’ in contempt and supported the ruling classes in their grasp on power. One example of this attitude can be found in his description of the celebrations welcoming him to the settlement on 3 October 1839. He recalled how the persons in *that* class ‘got jovially drunk & were fined [by the town magistrates] – all in my honour’. On the other hand he respected Police Magistrate Lonsdale, his abstention from the land speculation that had gripped the District and his ‘moral ascendancy’ in the settlement. He felt he had to ‘pass through this ordeal in common with other honourable men’.<sup>198</sup> As Superintendent, he served as the Governor’s representative in the District. Part of his role was to periodically submit a list of candidates for the position of justices of the peace within the District. The ultimate powers of appointment were however vested in the Governor, who over time exerted his influence and authority over these appointments.

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<sup>196</sup> 2 Vict. No.23.

<sup>197</sup> 6 Vict. No.13.

<sup>198</sup> Shaw, A. G. L. (ed.), *Gipps-La Trobe Correspondence 1839–1846* (Melbourne, 1989), La Trobe to Gipps, 19 October 1839, L.2, pp.4–6; subsequent citations are by date of correspondence, GLC & SLV.

La Trobe came to depend upon 'his' Port Phillip magistracy. The salaried magistrates served as formal and tangible Crown representatives throughout the District and in the absence of a network of 'modern' town councils, regulated the social and economic life of the settlements. The non-salaried magistrates, the justices of the peace, served the Crown in a role not dissimilar from that found in England. They were reliable enforcers of central government policy and ruling class ideology. If properly motivated, the magistracy would enforce unpopular policies, attract public scorn and deflect any criticism that should properly have been directed against the government. As a demonstration of both government policy and the reliance of colonial administrations upon the office of the magistrate, Gipps in a very confidential tone once informed La Trobe that in matters of some controversy 'where there has been some loss of life, the less the Executive Government interferes the better', and that the magistrates should act in the 'ordinary discharge of their Duties' and forward depositions, etc, to the Attorney General for appropriate action. This statement of policy concluded with the rider, 'It is only in cases where the Magistrates may appear lax in their Duty, that the Government should interfere'.<sup>199</sup>

Some Port Phillip magistrates, however, did not understand their 'secret function' and often proved to be quite troublesome. In 1841 for example, the issue of the vacant position of Police Magistrate in Melbourne, according to Gipps, seemed to 'irk La Trobe unnecessarily'. After only a short period in the post, James Simpson resigned his position as Melbourne Police Magistrate. Gipps attempted to placate La Trobe<sup>200</sup> and offered an interpretation of the legislation<sup>201</sup> which correctly stated that there were in fact only 'very few things that an ordinary Justice of the Peace cannot do as well as a Police Magistrate'.<sup>202</sup> The legislation did however give specific matters the mandatory attention of the Police Magistrate. Those 'very few things' included matters such as the disposal of

<sup>199</sup> Gipps to La Trobe, 6 February 1841, *GLC* pp.57-58, *SLV* H7020.

<sup>200</sup> Gipps to La Trobe, 23 August 1841, *GLC* p.98, *SLV* H7060.

<sup>201</sup> 2 Vict. No.2.

<sup>202</sup> *GLC*, p.100, f.6.

perishable articles for charitable purposes,<sup>203</sup> the removal of structures which encroached upon footpaths,<sup>204</sup> the enclosure of holes,<sup>205</sup> notices of proposed blasting,<sup>206</sup> and the opening of drains.<sup>207</sup> Gipps also stated that as a government employee, the office of Police Magistrate could not be unilaterally vacated and the responsibilities of the appointment would not end by the simple act of resignation. Gipps therefore believed that the vacation of the office was not affected until that resignation was accepted and that La Trobe could force Simpson, under threat of punishment, to continue acting until a replacement Police Magistrate was found. At this point, it seems that Gipps had also almost made up his mind that Frederick St John was to be the next Police Magistrate in Melbourne.<sup>208</sup>

During the Port Phillip period, 'connections' were very important and often opened doors for magisterial opportunity. Propriety and political reality demanded the appearance that independent, Melbourne-based and meritorious magisterial appointments be made. John Leslie Fitzgerald Vesey Foster provides us with a good example. He had arrived in Sydney from Dublin in 1840.<sup>209</sup> He was the son of Rt Hon. John Leslie Foster, F.R.S., Member of Parliament and judge.<sup>210</sup> Foster junior called upon Gipps in November 1842 and enquired if he might be placed upon the commission of the peace as a magistrate in the Port Phillip District as he was about to overland to Melbourne. He eventually took up land near Avoca in February 1843. Gipps then

<sup>203</sup> 2 Vict. No.2., s.16; see *GLC*, p.100, f.7.

<sup>204</sup> 2 Vict. No.2., s.48; see *GLC*, p.100, f.8.

<sup>205</sup> 2 Vict. No.2., s.31; see *GLC*, p.100, f.9.

<sup>206</sup> 2 Vict. No.2., s.37; see *GLC*, p.100, f.9.

<sup>207</sup> 2 Vict. No.2., s.38; see *GLC*, p.100, f.9.

<sup>208</sup> Gipps to La Trobe, 23 August 1841, *GLC* p.98, *SLV* H7060.

<sup>209</sup> *GLC*, p.177, f.1.

<sup>210</sup> *Ibid*, f.2.

proceeded to advise him that 'he never placed persons upon the commission except on La Trobe's recommendation'.<sup>211</sup> La Trobe then proceeded to place Foster on the Commission of the Peace six months later. The appointment, as later events demonstrated, proved to be a poor one. Another example of connections opening the path to the magisterial Bench, involved E. C. Merewether. He was the Aide-de-Camp to Gipps from January 1842 until Gipps left the colony. In November 1845 Gipps wrote to La Trobe and stated that 'before I go away, I wish to make my ADC. Mr. Merewether a Commissioner of Crown Lands. Is there room for him in Port Phillip?'<sup>212</sup> Gipps stated in further correspondence that Merewether would resign as his ADC after 'the Birthday Ball (in 1846) and be made a Commissioner of Crown Lands'.<sup>213</sup> However, Merewether delayed taking up this post and became Fitzroy's ADC until 1847, when he was later appointed Commissioner of Crown Lands in the Lower Darling District.<sup>214</sup> As is obvious from this example, there were times when Gipps sought to ignore his own policy of never appointing magistrates for Port Phillip without 'acting upon La Trobe's recommendation'. Others also exerted their influence in the 'selection' process. In a meeting with Gipps on 15 July 1843 Plunkett, in his role as Colonial Attorney General, apparently demanded that Edward Curr be appointed an unpaid magistrate within the Port Phillip District. Gipps referred to his 'policy' response of relying totally upon recommendations from La Trobe. Plunkett then stated that La Trobe held 'some impressions against Mr Curr', suggesting that La Trobe held an improper and biased view of Curr.<sup>215</sup> Both Plunkett and Curr were Catholics. Curr was eventually appointed a justice of the peace for the territory on 4 November 1843.<sup>216</sup>

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<sup>211</sup> Gipps to La Trobe, 19 November 1842, *GLC* p.176, *SLV* H7137.

<sup>212</sup> Gipps to La Trobe, 21 November 1845, *GLC* p.368, *SLV* H7333.

<sup>213</sup> Gipps to La Trobe, 8 May 1846, *GLC* p.389, *SLV* H7352.

<sup>214</sup> *GLC*, p.369, f.4.

<sup>215</sup> Gipps to La Trobe, 15 July 1843, *GLC* p.220, *SLV* H7183.

<sup>216</sup> Gipps to La Trobe, 5 August 1843, *GLC* p.220, *SLV* H7187; *GLC*, p.220, f.1.

Further magistrates were appointed for Port Phillip on 15 January 1844. Interestingly, Gipps wrote to La Trobe and queried why Edward Carleton Atkinson of Port Fairy was not included in La Trobe's recommendations.<sup>217</sup> Atkinson's brother James Atkinson had already been appointed a magistrate in 1840. Edward Atkinson had in fact been appointed on 9 January 1844.<sup>218</sup> Similarly Gipps later queried La Trobe as to his recommendation of John von Stieglitz of Ballan as a magistrate. Gipps assumed on the basis of his surname that Stieglitz was not British. Gipps further commented that even if he was naturalised and held 'Letters of Denization' he would still be ineligible to become a magistrate.<sup>219</sup> Stieglitz had in fact been born in Ireland. He was the son of Baron Heinrich von Stieglitz. He was also one of the earliest settlers in the Port Phillip District. It took La Trobe some time to clarify these issues with Gipps. La Trobe assured Gipps that Stieglitz 'was a British subject born and bred', and pressed for his appointment.<sup>220</sup> After further correspondence, wherein Gipps claimed to have mislaid details of Stieglitz's Christian name,<sup>221</sup> he was appointed on 28 August 1844.<sup>222</sup>

The Melbourne Town Council and the Town magistrates were quite determined to run their own policing affairs within Melbourne. The town councillors, who dominated the magisterial Bench, constantly fought with La Trobe and the Sydney authorities for this control. In July 1844, for example, the Melbourne Bench of magistrates dismissed Chief Constable Brodie for 'discourtesy and disrespect'.<sup>223</sup> La Trobe initially supported Brodie<sup>224</sup> and claimed that they could not do this as 'the police

<sup>217</sup> Gipps to La Trobe, 15 January 1844, *GLC* p.244, *SLV* H7233.

<sup>218</sup> *GLC*, p.244, f.2, 3.

<sup>219</sup> Gipps to La Trobe, 12 March 1844, *GLC* p.249, *SLV* H7216.

<sup>220</sup> La Trobe to Gipps, 18 July 1844, *GLC* p.274, *SLV* H6951.

<sup>221</sup> Gipps to La Trobe, 29 July 1844, *GLC* p.277, *SLV* H7245.

<sup>222</sup> *GLC*, p.277, f.1.

<sup>223</sup> Gipps to La Trobe, 3 August 1844, *GLC* p.278, *SLV* H7246.

<sup>224</sup> La Trobe to Thomson, 15 July 1844, 26 July 1844, 27 July 1844, 20 August 1844, 24 August 1844, 27 August 1844, PROV, Supt., O/L, 1100, 1171, 1181, 1316, 1350, 1384; *GLC*, p.280, f.6.

were under the control of the government'. He reported the matter to Gipps. Gipps however, reasoned that forcing magistrates to accept a 'government' Chief Constable would be an unpopular precedent. He concluded that it would be unwise to antagonise the Bench of Melbourne magistrates by forcing it to maintain close working relations with the 'disrespectful' Chief Constable. He in fact concluded that Brodie had been insolent towards the Bench,<sup>225</sup> and confirmed Brodie's dismissal on 20 August 1844. Gipps then proceeded to appoint him Chief Inspector of Distilleries.<sup>226</sup> Gipps decided to eventually rescind the magisterial circular that had been used by the Bench of magistrates as the basis for their dismissal of Brodie.<sup>227</sup> This circular, of 6 May 1839, had in fact only given justices of the peace the ability to appoint but not dismiss constables, but had been commonly interpreted as providing the power to do both.<sup>228</sup> The issue of having two magisterial Benches in Melbourne, one Town and one County, and the requirements for separate buildings and support Clerks presented Gipps with a conundrum. Gipps requested some time to ponder the issue,<sup>229</sup> especially given the fact that the magistrates had requested a Chief and assistant clerk at higher than the accepted rate.<sup>230</sup>

In April 1845, Gipps, in response to a proposed list of candidates for Commissions of the Peace, agreed to gazette six persons.<sup>231</sup> He declined to appoint Dr Alexander McKenzie because of his hidden policy of avoiding if at all possible, the appointment of medical practitioners as magistrates. He apologised to La Trobe for omitting to inform him of this 'policy' and produced two other 'conditions of appointment'. The two other 'secret conditions' were that the man must have resided in

<sup>225</sup> Gipps to La Trobe, 10 August 1844, *GLC* p.281, *SLV* H7248.

<sup>226</sup> Thomson to La Trobe, 10 August 1844, 14 September 1844, NSWA, Port Phillip, O/L, 44/418, 44/478; *GLC*, p.280, f.6.

<sup>227</sup> Gipps to La Trobe, 11 September 1844, *GLC* p.287, *SLV* H7253.

<sup>228</sup> *GLC*, p.287, f.2.

<sup>229</sup> Gipps to La Trobe, 15 April 1845, *GLC* p.326, *SLV* H7293.

<sup>230</sup> *GLC*, p.327, f.2.

<sup>231</sup> 22 May 1845; *GLC*, p.328, f.1.

the Colony for at least one year and that they must not be under 24 years of age.<sup>232</sup> In follow up correspondence, and upon the assurance by La Trobe that Dr Cheyne was a settler<sup>233</sup> and only occasionally practiced medicine, Gipps agreed to place him on the Commission of Peace as a magistrate.<sup>234</sup> Another example of La Trobe's limited powers of patronage and reliance upon Gubernatorial support can be seen in the *Swiss Denization case*. In late 1845 La Trobe sought Gipps's assistance in the Denization process of two Swiss nationals, Louis Pattavel and Frederick Breguet.<sup>235</sup> This drawn out process in the end involved the Secretary of State in London who eventually issued the necessary papers on 4 July 1846.<sup>236</sup> La Trobe also lacked any real prerogative powers. One example of this was the issuing of spirit licences. In these matters, only Gipps as governor was able to exercise the prerogative allowed him under the Licensing Act to nominate towns able to sell spirits. Gipps had named Port Fairy as one of these towns. He seems to have regretted this and stated to La Trobe that in policy terms, apart from his own powers under the legislation, public house licensing and 'all other matters connected with the sale of spirits' was to be left in the 'hands of the Magistrates'.<sup>237</sup> This is but one example of the extensive powers held by colonial magistrates, best demonstrated by their complete authority over the colonial labour market and urban space regulation.

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<sup>232</sup> Gipps to La Trobe, 18 April 1845, *GLC* p.328, *SLV* H7294.

<sup>233</sup> Formerly in the Wimmera region then moved to Broken River; *GLC*, p.330, f.1.

<sup>234</sup> Gipps to La Trobe, 12 May 1845, *GLC* p.330, *SLV* H7295.

<sup>235</sup> *GLC*, Let.354, p.358.

<sup>236</sup> *GLC*, p.358, f.2.

<sup>237</sup> *GLC*, Let.327, p.332.

# CHAPTER 6:

## EMPLOYMENT AND THE REGULATION OF URBAN SPACE

### SOCIAL CATEGORIES

HAVING EXAMINED THE processes that established and regulated the work of the magistrates and their constables, the logic of the colonial legal system can be better understood. The 'logic' of the colonial legal system is best demonstrated in the magisterial regulation of labour relations and the management of urban space. Control over these areas is an essential feature of orderly governance in a civil society. The difficult colonial circumstances of frontier development, made the regulation of these two areas especially difficult but particularly important. Plunkett's legal discourse on the applicable magisterial substantive law, for example, made explicit distinctions between and among the social categories making up colonial society. Contemporary English legislation often made class distinctions within its penalty paradigms. It was common that, upon conviction, a day labourer, common soldier or seaman was liable to a fine of 1 sh, whereas others 'under the degree of gentleman'<sup>1</sup> were liable to 2sh, and those 'of or above the degree of gentleman' were to be fined 5sh.<sup>2</sup> Interestingly, and again indicative of the times, English soldiers and sailors, if in default of payment, were not to be imprisoned within the House of Corrections, but sent instead to the stocks for an hour per offence and two hours for multiple offences.<sup>3</sup> A limitation of action of eight days after the alleged offences was also mandated by the legislation.<sup>4</sup>

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<sup>1</sup> For example a baker, see Information Pro Forma, 19 Geo. 2. c.21, s.8, Plunkett, *op.cit.*, pp.465–466.

<sup>2</sup> 19 G. II. c.21, s.1.

<sup>3</sup> 19 G. II. c.21, s.5.

<sup>4</sup> 19 G. II. c.21, ss.8, 12.

Given the convict origins of Australian settlement, the law of 'escape'<sup>5</sup> during this period was quite detailed and is particularly important to a society where a significant proportion of its population either were or had been felons. The general concept of escape may also be philosophically linked to the absconsions amongst the colonial labouring classes. The magistrates and constables of the period were attentive to the appearance of strangers within their districts. They were especially concerned with the detection of any 'wandering persons' and all former convicts in their jurisdictions. According to Plunkett, where a person effected liberation without the use of force, then it is properly described as an escape. If the captive person affects his escape by himself and with force, then it was considered a prison breaking. If the liberation was made with force and with the assistance of others not in custody, this was categorised as a rescue.<sup>6</sup> There also must have been a deprivation of liberty and an effective arrest for an escape to occur.<sup>7</sup> During the very early Port Phillip period there were convicts in government service.<sup>8</sup> Convicts would be assigned to settlers in remote rural stations. Some sought their freedom by escape.<sup>9</sup> Their escape would then be reported to the local magistrate. The local constabulary was placed on notice to check the documentation of strangers within their precincts in order that these 'escapees' be re-captured and returned to government service. At times, the master himself sought to 'track down' the absconder.<sup>10</sup> In the ostensibly 'free' settlement, Port Phillip's first resident Police Magistrate William Lonsdale felt 'compelled' to confirm the 'status' of ticket of leave persons within Port

<sup>5</sup> See Escape, in Plunkett, *op.cit.*, pp.163–165.

<sup>6</sup> 1 Hale, 590, *ibid*, p.163.

<sup>7</sup> 2 Hawk, c.10, s.1.

<sup>8</sup> ABRS 3 No.1, Police Magistrate 1839–1852, Volume I; Progressive Number 71, 16 June 1837, 27 convicts were sent *per steamer* to Port Phillip for public service for the Survey department.

<sup>9</sup> ABRS, *ibid*, Progressive Number 55, 25 May 1837; Henry Howey reports the escape of 3 convicts assigned to him as servants.

<sup>10</sup> In *John Hepburn v James Whitford*, Hepburn claimed that Whitford (*Susan*, 1836) was assigned to his station under the management of John Coghill. Whitford absconded on 23 February 1839 and was not seen for 10 days until Hepburn captured him. Hepburn estimates he had travelled some 150 miles in finding Whitford. He also claimed to have found items stolen from his station in Whitford's possession, namely a flannel frock, a shirt, blanket and trousers. The prisoner was sentenced by the court to 50 lashes for absconding and to six months to the 'road party' in irons; Geelong Court Register 4 March 1839, *HRI*, I, 415.

Phillip.<sup>11</sup> One contemporary account maintains that the majority of bush mechanics in Port Phillip enjoyed a hearty convict past,<sup>12</sup> but with a constant glut of merchandise waiting to be bought in the stores in Melbourne and the perennial problems of labour being in short supply, migrants or former convicts were seen as the only solution to a society dependant upon wool and its rural production.<sup>13</sup> Assigned convicts would escape or attempt to escape their bondage.<sup>14</sup> The police were vigilant in noting the presence of former convicts in the district and would regularly test the status of 'suspects'.<sup>15</sup> The Crown would also prosecute those settlers who knowingly employed escaped convicts.<sup>16</sup>

Without immediate presentation of 'papers', any stranger could be arrested 'on suspicion' of being an escapee. Persons facing such a charge were remanded in custody until they could establish their 'proof to be free'. In *Re John Davis*,<sup>17</sup> heard before Frederick Berkley St John Esq PM JP and James Smith Esq JP, on a charge of suspicion of being illegally at large and drunk, the defendant produced his certificate of freedom

<sup>11</sup> ABRS, *ibid*, Progressive Number 72, 29 June 1837; conditional pardons for William Thomas and William Sidebottom to hold good in Port Phillip.

<sup>12</sup> Graham, S., *Pioneer Merchant*: The Letters of James Graham 1839–1854 (Melbourne, 1985) p.50, Graham states that 9 of the 12 men he first employed had been convicts.

<sup>13</sup> *Ibid*, p.64, *Correspondence* from Donaldson & Lambert, London to James Graham, Melbourne, 14 March 1840.

<sup>14</sup> VPRS 34/P/1, 2 November 1841, In *Re Mary Curley* (Isabella, 1840) 7 years, assigned to Police Magistrate James Blair, was charged with attempting to leave premises thorough a window. The Portland Bench sentenced her to solitary confinement for 7 days on bread and water.

<sup>15</sup> In *Re Shadrack Blake*, a matter heard before Melbourne Police Magistrate Frederick Berkley St John and James Frederick Palmer JP involving a charge of suspicion of being illegally at large, the matter was discharged on proof of his freedom. He had been arrested by Constable Lawrence, and having previously been prisoner of the Crown and could not produce anything to prove his freedom when challenged to do so; VPRS 2136; Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, 9 August 1843.

<sup>16</sup> In *R v William Kampff*, Kampff, who had a station on the Sydney Road, appeared on a charge of employing John Rooney a prisoner of the Crown illegally at large on 30 November 1842. Kampff pleaded ignorance of the law and of the fact that the man was a convict. Kampff claimed to have only been here 7 years: 'I am only a new chum'. Magistrate St John, presiding, stated that it was high time that settlers became aware of their responsibility in employing servants who might be runaways without making proper enquiries. St John claimed that Kampff ought to have used due diligence in making enquiries before engaging any servant. He stated that 'His squatters licence ought have informed him had he read it carefully that it was necessary for him to make a Return of the names of the servants on his station, therefore he would not allow the plea of ignorance of the law'. Kampff was fined 20 pounds; PPP Monday 2 January 1843.

<sup>17</sup> VPRS 2136; 19 September 1843.

before the Bench and was only fined 15sh for his drunkenness. Two other 'suspicion' cases were heard on the same day.<sup>18</sup> On Wednesday 11 October 1843, the last entry for Frederick Berkley St John as Melbourne Police Magistrate, Joseph Barker appeared on suspicion of being illegally at large. He was remanded in custody 'for evidence'. This matter was again heard on Thursday 12 October 1843 this time before Henry Condell Esq JP, James Smith Esq JP and Frederick Berkley St John JP. This was to be the first matter recorded before Condell as Mayor and St John as an unpaid justice upon the Melbourne Bench of magistrates. The records indicate that Barker was simply 'freed'. This arrest first-ask questions later approach was common during this period.<sup>19</sup> Soon after on Tuesday 17 October 1843 before His Worship the Mayor and James Smith Esq JP [this is the first time mayoral title is used on the Melbourne Bench of magistrates] the Bench heard the matter of *Re George Kedwell*, again on a charge of suspicion of being illegally at large. On this occasion, the defendant was 'immediately discharged'. On Monday 23 October 1843 *James Atkins* appeared before Condell also facing a charge of suspicion of being illegally at large. He was remanded. On the following day two persons presented themselves before the Bench and provided the Bench with evidence the he was not at large. Atkins was immediately released. The rural Port Phillip Benches, if not satisfied with the defendant's status, would normally refer the defendant to either Melbourne or Sydney's Hyde Park barracks for final identification and disposition.<sup>20</sup>

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<sup>18</sup> In *Re Thomas Kibble*, on the same charge of suspicion of being illegally at large, having been arrested by Constable Rafferty, the defendant established to the Bench's satisfaction that he had come out 'free' and was discharged by the court. In *Re William Darling* alias Patrick Dowling, the matter was discharged after the Bench was shown evidence of his 'proof to be free'; VPRS 2136; 19 September 1843.

<sup>19</sup> VPRS 2136; Wednesday 11 October 1843; William Brown appeared before St John, also on suspicion of being illegally at large. The arresting constable believed he was alias Albert Miller (*Chyd*, 1832). Brown managed to prove his identity and was discharged by the Bench.

<sup>20</sup> VPRS 34/P/1, 3 September 1841, In *Re William Dwy Williams* (Jordan, 1837) life, charged with being illegally at large and with having powder and shot in his possession, sent to Melbourne by the Portland Bench to be identified and dealt with. 4 September 1841, In *Re Thomas Masterman* (Bussorah Merchant, 1828) 7 years, charged with being illegally at large, sent to Hyde Park Barracks by the Portland Bench to be identified and dealt with. 15 September 1841, In *Re Charles Buckland* (Lady Kennaway, 1836) life, charged with being illegally at large, sent to Melbourne by the Portland Bench to be identified and dealt with.

In England, to assist in the escape was considered to be 'an obstruction to the course of justice' and a felony,<sup>21</sup> and where there was an assistance effecting the escape of a murderer, the penalty was death.<sup>22</sup> In the event of a rescue,<sup>23</sup> the crucial point of law was whether the prisoner under detention was in the custody of an officer of the law,<sup>24</sup> as a prisoner having been convicted by a court of law and thus serving a sentence,<sup>25</sup> and following that, whether the person was guilty of a felony or a misdemeanour.<sup>26</sup> Interestingly, the rescue or attempted rescue of a traitor or a murderer, either from prison or whilst going to or immediately before an execution, was at common law a felony.<sup>27</sup> The offence could also be committed when seeking to free cattle that had been impounded as a distress of goods.<sup>28</sup> Any who harboured escaped felons in Port Phillip during this period were severely dealt with.<sup>29</sup> The rural Port Phillip Benches demonstrated little patience with those who harboured convicts.<sup>30</sup>

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<sup>21</sup> *Rex v Tilley*, 2 Leach, 671.

<sup>22</sup> Callaghan, vol.1, p.213.

<sup>23</sup> See Rescue, in Plunkett, *op.cit.*, pp.414-416.

<sup>24</sup> 2 Arch. J.P.413, *ibid*, p.414.

<sup>25</sup> 2 Hawk., c.21, s.7., *ibid*, p.415.

<sup>26</sup> 1 Hale, 598, *ibid*, p.415.

<sup>27</sup> 25 G. II., c.37, s.9 and 1 Vict. c.91, s.1, 2, *ibid*, p.415.

<sup>28</sup> 1 Russ. 363; also subject to a civil suit, *R v Bradshaw*, 7 C. and P. 233, *ibid*, p.415. In the Australian convict colonies of New South Wales or Van Diemen's Land, however, the assistance or aid to any person who had escaped, was made a misdemeanour, liable to a fine not exceeding 500 pounds (an extraordinary amount) or imprisonment for two years, or both fine and imprisonment at the discretion of the court, triable before any court of record, which would also include the magisterial Quarter Sessions. (9 G. IV., c.83, s.34, *ibid*, at p.164.) It should also be noted that where an officer negligently permits a prisoner to escape or allows a prisoner in his charge to commit suicide, then that officer is also guilty of a misdemeanour; (Dalt. c.159, *ibid*, at p.165.)

<sup>29</sup> In *Re Maria Johnston*, heard before Frederick Berkley St John Esq PM JP and R. H. Bunbury Esq JP, on a charge of harbouring a prisoner of the crown contrary to 4 Vic No.11, Johnston was fined a massive 10 pounds and 3 months gaol in default of payment; VPRS 2136; 13 September 1843.

<sup>30</sup> VPRS 34/P/1: In *Re John English*, free by servitude, charged with harbouring an escaped convict, fined 15 pounds with 57 sh costs or gaol in Melbourne 3 months; heard 15 September 1841; In *Re Richard Clarton*, before the Portland Bench, the defendant appeared on a charge of harbouring a prisoner of the Crown. He was found guilty and fined five pounds; *Portland Guardian and Normanby General Advertiser* 3 September 1842, case heard 30 August 1842.

Social categories were most evident, however, in the crucial area of 'masters' and 'servants'. Indeed, one of the main areas of magisterial jurisdiction was the regulation of the law of employment under the Masters and Servants<sup>31</sup> legislation.<sup>32</sup> The later pre-Separation legislation is most relevant here. This later legislation specifically forbade any magistrate adjudicating in any matter concerning their own servant and importantly, 'or in any case in which any such Justice may be directly interested'.<sup>33</sup> The primary obligation of a servant under the various Acts, which sought a codification of the common law obligations, was to serve a master according to their contractual arrangement. The servant was bound to enter the service of the master and continue in the service of the master until the expiration of their contractual arrangement. Failure to do this in itself constituted 'disobedience'. Magistrates sometimes overlooked breaches, especially if it was evident that the parties were still able to work together.<sup>34</sup> Inadvertent or lower category breaches were possible and were dealt with accordingly.<sup>35</sup> Aggravating conduct [disobedience, insolence or threats made to the master] when added to the contractual breach of leaving the master's service [absconding] was punishable by the Bench. In November 1844, within the space of one week, one master, William Bacchus appeared before W. B. Wilmot Esq JP and James Smith Esq JP of the Melbourne Bench, in two master and servant matters. The facts were almost identical save for the 'disrespectful' conduct of one of the defendant servants. Thus in *William Bacchus v J. Arundel*,<sup>36</sup> the

<sup>31</sup> See Master and Servant, in Plunkett, *op.cit.*, pp.293-308.

<sup>32</sup> *Master and Servant Act* 1823 (UK); *Amendment* 1840; *Master and Servants Act* 1842 (UK); 9 Vict. No.27.

<sup>33</sup> 9 Vict. No.27, c.XXVIII. All actions under the legislation were commenced by complaint upon oath before a single justice, (See 11 Vict. No.9, s.13 with adjudications and convictions being made by a Bench comprised of two justices. (Plunkett, *op.cit.*, p.293).

<sup>34</sup> In *James Simpson v James Burton*, upon complaint of Henry Cumming, Simpson's overseer, before William Lonsdale Esq. the plaintiff claimed that Burton had left his service on 1 August 1838. Burton 'the prisoner' pleaded guilty. He was however 'forgiven' his breach and was returned to his 'master' when he promised to fulfil his service without further trouble; Melbourne Court Register 4 August 1838, *HRV*, I, 389.

<sup>35</sup> In *Edmund Ferguson v Michael Minnock*, Ferguson testified and claimed that Minnock was a hired servant on continuing contract, with a mutually agreed period of ten days notice between the parties. Minnock was sent to wash sheep and left the station. He was later found in *Carr's Public House*. Minnock claimed that 'he did not mean to leave his master's service altogether'. The Bench ordered that he forfeit one week's wages, amounting to 15 sh; Melbourne Court Register 30 January 1837, *HRV*, I, 359.

<sup>36</sup> VPRS, *op.cit.*, Monday 11 Nov 1844.

servant was fined 3 pounds with costs of 15sh, in default two months gaol for leaving his masters service. Five days later, this time before 'His Worship the Mayor' Henry Condell in *Henry Bacchus v William Green*,<sup>37</sup> it transpired that Green had behaved in a more disrespectful manner towards his master; he was insolent, he stated that 'he would see Bacchus dead', and was accordingly fined 3 pounds with costs of 15sh or 2 months gaol.

Disobedience itself, however, became a crucial factor in Australian colonial master and servant relations. The key to understanding Master and Servant relations during the colonial period in Australia, however, is to be found in the fluctuations in supply and demand for labour resources. The early Port Phillip master and servant adjudications indicate a large amount of litigation over 'absconsions' when servants attempted to maximise their wage potential by marketing their scarce labour resources and leaving any contracted employer in search of higher wages. As the economic recession of the 1840s took hold, there were less 'absconsion' cases and a notable rise in servant-led wage recovery litigation. This purely economic hypothesis does not take into account all of the motivations behind the 'absconsion mania' and assumes logical choices to be the only motivations behind human behaviour. It does not take into account pure laziness, abject loneliness, simple bloody-mindedness or alcohol dependency. It simply states *one* of the underlying realities controlling the colonial labour market. This particular underlying reality dated as far back as the First Fleet settlement in Sydney Cove and is crucial in understanding the social dynamics of Melbourne and the Port Phillip settlements. Fluctuation in labour resources is the singularly most important feature of the colonial social dynamic.<sup>38</sup>

These political and (ultimately) economic disputes were carried out, as remarked earlier, within the inexorable realities of a specific employment market. This market was

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<sup>37</sup> VPRS, *ibid*, Saturday 16 November 1844.

<sup>38</sup> 'More than any single other [factor], dictated colonial attitudes to the important national issues - to transportation, pastoral expansion, immigration, to the gold discoveries and gold rushes, to land policy and legislation, to political development and the rise of the Labor Party...In Victoria it likewise forms the undercurrent of social and political development, especially perhaps during these early years'; McGowan, Rose, M., *A Study of Colonial Life and Conditions in Early Melbourne Prior to Separation*, M.A. Thesis, University of Melbourne, 1951, p.75.

riddled with assumptions and 'perceptions'. Employers viewed the early supply of labourers in Port Phillip as being of the 'worst description'.<sup>39</sup> Those labourers from the 'Sydney side' as opposed to those from Van Diemen's Land were seen as being fairly tolerable. There was also a perception that labourers in Port Phillip, because of the labour supply 'problem', held the upper hand in the master-servant relationship, and that as a group they wielded more power than the authorities cared for. It was claimed that employers would overlook conduct which was otherwise justiciable before the magistrates for the sake of keeping their labourers, and that it promoted the social and political evils of making employers compete against each other. This sponsored notions of 'democracy' amongst the lower orders.<sup>40</sup> Rural employees, because of their scarcity, realistically often held the upper hand in the employment relationship.<sup>41</sup> These assumptions must be noted if the work of the early Port Phillip magistrates is to be understood.

## MASTERS AND SERVANTS

IN MASTER AND servant litigation the master would normally personally undertake the prosecution. The master's overseer, manager or agent could undertake the prosecution, if the master was absent or if there were 'absentee masters'. These persons would swear a complaint and obtain a warrant causing the servant to appear before the magisterial Bench. There were many such applications.<sup>42</sup> <sup>43</sup> At times the

<sup>39</sup>PPG \_ October 1838, cited in McGowan, *op.cit.*, p.81.

<sup>40</sup> Gov. Immigration Agent Pinnock (Sydney) to Lonsdale, 6 April 1839, C-S Inwards 39/168; 'Employees would ride rough shod over their employers', letters in PPP 14 September 1840, ...that in this colony they (servants) can have everything their way', PPH 23 March 1841; Councillor Stephen, PPH 29 October 1844; 'Nothing can be compared to the insolence and impertinence of this class (who at the merest remonstrance march themselves off', PPH 17 April 1846; Evidence of A. F. Mollison before the Commission on Immigration, NSW Leg. Council, 1847; Crowley, *Thesis*, p.364; Evidence of E. Macarthur, pp.311-312, before Committee on Colonization from Ireland, H. Of Lords, 1847, cited in Crowley, *Thesis*, *op.cit.*, p.364; cited in McGowan, *op.cit.*, p.82.

<sup>41</sup> 'I can easily fancy the annoyance and trouble that you must undergo with your men and how very much you must be in their power at times. There are great complaints on that head just now from all quarters, in fact they are more masters than servants in many places'; Graham to Dr. Edward Barker 17 April 1846, Graham, *op.cit.*, p.142.

<sup>42</sup> In *Boyd Cunninghame v James Orr*, involved an application for a warrant of arrest for absconsion, before C. J. Tyers and Lachlan Macalister and John King of the Alberton Bench'. Cunninghame, a settler, deposed that Orr was his

dispute revolved around the servant facing conflicting orders.<sup>44</sup> At other times, death itself would not deter a master's claim for contractual 'justice'. J. T. Gellibrand and his agents would pursue defaulting employees and enforced contractual compliance.<sup>45</sup> <sup>46</sup> After his death, his Estate continued this tradition.<sup>47</sup>

The legislation and early amendments<sup>48</sup> sought to regulate the fulfilment of employment engagements and to provide for the adjustment of disputes between master and servant. The jurisdiction extended to any artificer, manufacturer, journeyman, workman, shepherd, labourer or other servant engaged as a manual or house servant on any estate, farm, stock station, lands or any premises whatsoever, hired for a specific time or by job when the amount to be paid did not exceed 30 pounds. The offences under the

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servant and produced an employment agreement. Cunninghame stated that Orr had absconded from his service, having previously given a great deal of insolence and refused to work. The Bench issued a warrant of arrest; Alberton Court Register, 2 September 1846, p.84.

<sup>43</sup> In *James Ritchie v William Smith*, involving an application for a warrant of arrest for absconsion, before W. O. Raymond Esq JP of the Alberton Bench, Ritchie deposed that he had commissioned William Mason when he went to Hobart Town to hire a shoemaker for him at 4sh a pair. He 'brought over' and hired Smith, who only remained a few weeks and absconded. Ritchie requested that a warrant be granted for his apprehension. The Bench ordered the warrant of arrest; Alberton Court Register, 20 April 1847, p.112.

<sup>44</sup> In *James Davis v Robert Hubbard*, a case involving 'the disobeying of orders', before C.J. Tyers and John Reeves of the Alberton Bench, Davis, the superintendent for Mr. Mason deposed that on 12 December 1845, he ordered Hubbard to fetch his horse. Hubbard said he would not do it and neither would he obey his orders. The Bench dismissed the case after Hubbard produced a written order from Mason (the master) instructing him not to obey Mr. Davis's orders; Alberton Court Register, 7 January 1846, p.51.

<sup>45</sup> In *J. T. Gellibrand v Thomas Dunn*, Dunn was under a 12 month written contract from 22 September 1836. William Lindfield, Gellibrand's overseer, testified and confirmed that Dunn had left the station and had said that he would not return. Barry Cotter, Gellibrand's agent, testified and confirmed that Dunn was found near a public house in town. No penalty is recorded; Melbourne Court Register 13 December 1836, *HRV*, I, 358.

<sup>46</sup> In *J. T. Gellibrand v Alexander Gordon*, Barry Cotter, Gellibrand's agent, testified that Gordon was employed as a hutkeeper for 12 months from 18 February 1837. On Tuesday 21 March 1836 after dressing sheep Gordon and others got drunk. Gordon then threatened to strike him. The next morning he was insolent and lay down, refusing to do any work even with a threat of bringing him before the Bench. He was imprisoned for one calendar month and ordered to forfeit his due wages; Melbourne Court Register 25 March 1837, *HRV*, I, 361-362.

<sup>47</sup> In *Estate of J. T. Gellibrand v John Derbyshire*, Jonathan Clerke (in charge of Gellibrand's property) testified that Derbyshire was an indentured servant employed as a hutkeeper and was seen in town without permission thereby neglecting his duties and endangering his master's property. The Bench sentenced him to 7 days confinement; Melbourne Court Register 21 June 1837, *HRV*, I, 373.

<sup>48</sup> 4 Vic. No.23, 20 October 1840.

legislation included absence, failure or refusal of orders, lack of due diligence in completing work, or the spoiling or destruction of property under workers' care.

Prosecution of these cases would be initiated by a complaint on oath by one or more credible person before a single magistrate [later two magistrates or justices of the peace]. If the complaint was proved, the penalties included forfeiture of wages, payment for damage occasioned by the defendant and a maximum three-month's imprisonment with or without hard labour in the House of Corrections.<sup>49</sup> Breaches by servants of their employment agreements were common and persisted throughout the period notwithstanding the legislative initiatives. Absconsions were common, especially when the servant was in advance of his wages. One contemporary account regarding absconsions claimed that this 'mania amongst the lower classes for changing scenes and employers' directly led to the amending legislation.<sup>50</sup> The amending legislation did not result in the abatement of absconsions,<sup>51</sup> or the instances of refusal of orders,<sup>52</sup> neglect of duties, or prosecutions for damage to property or absence from work decreasing.<sup>53</sup> There were even some calls to increase the penalties proposed in the legislation.<sup>54</sup> Proof of non-fulfilment of the contractual obligations on the part of the servant, constituting disobedience, neglect and misconduct, rendered the servant liable to be sent to a House of Corrections for a 'reasonable time' not exceeding a period of three months. In lieu thereof, abatement could be made, in whole or part of wages owed, and, if the master, manager or agent concurred, an order could be made discharging the remainder of the

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<sup>49</sup> McGowan, *op.cit.*, pp.75–76.

<sup>50</sup> PPG 6 December 1838, 12 January 1839, 6 July 1839; PPP 20 July 1840; McGowan, *op.cit.*, p.76.

<sup>51</sup> PPP 7 December 1840, 1 January 1841, 15 January 1841, 2 February 1843; McGowan, *op.cit.*, p.76.

<sup>52</sup> PPP 24 December 1840, 9 January 1843, 9 June 1843, PPH 23 March 1841, 15 July 1841; McGowan, *op.cit.*, p.76.

<sup>53</sup> PPP 7 December 1840, 9 January 1843, 27 March 1843, PPH 30 July 1841; McGowan, *op.cit.*, p.76.

<sup>54</sup> PPP 16 July 1840, 7 December 1840, PPG 4 February 1843, 2 May 1844, 27 July 1844; McGowan, *op.cit.*, p.76.

employment contract.<sup>55</sup> Often the acts of disobedience were coupled with threats of violence and a campaign of workplace disruption.<sup>56</sup>

The concept of 'disobedience' to orders and what constituted reasonable and lawful orders enjoyed very flexible definitions during this period. In 1842 at the height of the recession, one matter before the magistrates' Bench at Melbourne demonstrated the flexible interpretation of labouring agreements. In *Holland v Trotman*<sup>57</sup> before the magisterial Police Court in Melbourne, in a matter brought by the plaintiff employee, the plaintiff employee established that he had been hired as a stock-keeper and had refused to work as a gardener when so directed by his master. This act of refusal was held to be in breach of his contractual obligations to provide his 'labour' and the plaintiff forfeited his due wages, amounting to five pounds. The decision and the interpretation of the employment contract, assumes that the magistrates apparently accepted the general proposition that the orders of the master were both reasonable and lawful and that obedience to such orders was an essential condition of the contract of employment.<sup>58</sup> It is not known whether the decision took into account the 'skills' component of the gardening work as opposed to the stock-keeping work and whether it was sufficient to

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<sup>55</sup> 9 Vict. No.27, c.II.

<sup>56</sup> In *J. M. Davis v Appleyard* before C. J. Tyers and John Reeve of the Alberton Bench, Davis stated that Appleyard was his servant from 7 September 1845 and beginning on Saturday 27 September 1845 began using abusing language towards him and his family whilst drunk. This continued on the Sunday, together with multiple acts of disobedience, such as not milking cows if Davis did not 'weigh him out his rations'; statements to the effect that he 'would come and go as I liked' and 'that there was no law to be got of him here'. On the 5 October he neglected his duties and acted in a like manner, again on 12 October, in not milking cows or feeding the calves. On 25 October Davis told him to ride in some steers. Appleyard replied 'By his God he would not' and walked away. On 28 October Davis told him 'to be more particular in milking the cows as he was then bringing in less milk than he had done'. Appleyard told him he was 'a bloody child', used other abusive language, whilst displaying a 'threatening attitude'. Davis' son James Davis provided corroborative testimony. Appleyard in his defence testified that he was engaged in Hobart Town, expected to have a place to keep his wife and child when he came over, and that his wife would 'have liked to have done work if she had been paid for it'. As a consequence he was forced to hire a house for 8 pounds per year in the town of Victoria and came back and forth from it. He claimed Davis had called him a vagabond and would give him a trip to Melbourne (implying a trip to the House of Correction, the gaol, in Melbourne) before he left his service. The Bench found Appleyard guilty of disobedience of orders and sentenced him to one month's imprisonment. The employment agreement was cancelled 'at the request of Mr. Davis'; Alberton Court Register, 7 January 1846, p.40-43.

<sup>57</sup> Reported in the *Melbourne Times*, 19 November 1842, cited in McGowan, *op.cit.*, p.82.

<sup>58</sup> For a 'modern' version of this dicta see *Laws v London Chronicle Ltd* [1959] 1 WLR 698, especially Lord Evershed, MR, at p.700.

differentiate the two as essentially separate jobs.<sup>59</sup> On other occasions, dismissals were sought simply on the grounds of incompetency.<sup>60</sup>

Often, the complaint was one of simple insolence. In *John Foster v Matthew Wilson*,<sup>61</sup> before Lachlan McAlister, C. J. Tyers, W. O. Raymond and Robert Thompson of the Alberton Bench, William Montgomery, superintendent for John Foster testified that he had hired Wilson in April 1845. He deposed that one week prior to the hearing, Wilson came up to him in the kitchen of the station 'and gave me a great deal of abusive language' and told him, 'in particular to take the sheep and be damned'. Montgomery ordered him out of the kitchen to which Wilson responded that if he was a stronger man than he then he should 'put him out'. Called to give his defence, Wilson admitted that he 'did make use of abusive language towards Mr. Montgomery'. The Bench found the charge proved and fined Wilson 'in the penalty of two months pay amounting to 3 pounds 6sh 8p for 'his impertinence to his master'.<sup>62</sup>

The burden of proof rested with the master, who was under an obligation to firstly 'prove' the agreement.<sup>63</sup> The 'proof' normally required was the existence of a written agreement, although parol contracts of service were also at times enforced. In *Henry Arthur v Thomas Beeson*,<sup>64</sup> Arthur, the nephew of the Governor of Van Diemen's Land and member of the Port Phillip Association, claimed that Beeson, his servant, had been employed as a shepherd under an oral agreement for 12 months from July 1837.

<sup>59</sup> For a 'modern' version of this see *Printing Industry Employees Union of Australia v Jackson and O'Sullivan Pty. Ltd* (1957) FLR 175.

<sup>60</sup> VPRS 34/P/1, 14 June 1842, In *Re Mary Pallas*, charged by Lovell Byass for being 'totally incompetent'. Agreement cancelled by the Portland Bench. 17 November 1842, In *Re Margaret Young*, charged by George Claridge for being 'incompetent'. Agreement cancelled by the Portland Bench.

<sup>61</sup> Alberton Court Register, 3 September 1845, p.13.

<sup>62</sup> *Ibid*, at p.14.

<sup>63</sup> In *William Bull v R.W. Tulloh*, before James Blair PM of the Portland Bench, there was no evidence of an employment agreement between the parties presented to the court. The case was simply dismissed; *Portland Guardian and Normanby General Advertiser* 24 December 1842.

<sup>64</sup> Melbourne Court Register 10 January 1838, HRI/, I, 381.

Arthur claimed that Beeson lost some sheep and left without permission on three occasions. He was recently found at *Carr's Public House* and was owed 10 pounds in wages. Beeson was sentenced to six weeks imprisonment and a forfeit of his wages. This can be contrasted with the decision in *Robert Robson v James Mitchell*,<sup>65</sup> where Robson, Master of cutter *Mary*, claimed the existence of an oral employment contract. There was no written agreement in existence, but it was orally agreed that Mitchell would work as a cook and general servant on board the *Mary* for the return trip to Launceston. The Bench dismissed the case. It was therefore prudent that the employment agreement be in writing, in order to prove, for example, that the servant refused to commence employment or otherwise breached an express or implied term of the undertaking. The master would thereafter need to prove that the servant absented himself without leave, disobeyed the orders of the master, or committed any other acts of misconduct.<sup>66</sup> In *W. O. Raymond JP v Thomas Jackson*,<sup>67</sup> before Lachlan Macalister JP, James MacFarlane JP and C. J. Tyers JP of the Alberton Bench, W. O. Raymond Esq JP, deposed that he had a verbal agreement with Jackson, a bullock driver, at 10sh per week and rations to drive his wool to Port Albert. He claimed that Jackson had revoked the agreement on the grounds that he was not capable of driving the dray, that he would not drive the dray, that there was no written agreement. He also defied Raymond to 'do his best' and to 'make him pay for it when he appeared in court'. In his defence,<sup>68</sup> Jackson claimed that Raymond had not supplied the ropes that were needed for the dray. He also claimed that Raymond criticized him for not being a 'first rate bullock driver'. Raymond, however, also stated that Jackson had always previously been a good servant, had never disobeyed him before this occasion and recommended him for 'favourable consideration by the Bench'. The Bench sentenced Jackson to one week's imprisonment in the House of Corrections in Melbourne.<sup>69</sup> This case can be contrasted with *Archibald Macleod v Samuel Johnson*,<sup>70</sup> before

<sup>65</sup> Melbourne Court Register 1 January 1838, *HRV*, I, 381.

<sup>66</sup> Plunkett, *op.cit.*, pp.294-295.

<sup>67</sup> Alberton Court Register, 6 January 1847, p.90.

<sup>68</sup> *Ibid*, p.92.

<sup>69</sup> *Ibid*, p.93.

Charles J. Tyers Esq JP and John King Esq JP of the Alberton Bench. Macleod deposed that Johnson (*Lady Nugent* 1835) had been engaged by his son Norman Macleod whilst in Hobart. The entry in the Court Register then ends abruptly. The Bench decided that there being no proof that Samuel Johnson was in fact a hired servant of Macleod, the case should be dismissed. The critical factor in this case seems to have been the absence of a written employment agreement between the parties.

The servant was invariably only allowed the defence of 'impossibility' of contractual performance, or by virtue of the intervention of some 'frustrating' event, such as illness or some other supervening event.<sup>71</sup> In *Lachlan Macalister JP v Frederick White*,<sup>72</sup> before W. O. Raymond JP and John King JP of the Alberton Bench, Macalister deposed that he hired White 'in the harbour' a short-time before as a shepherd under a written agreement dated 1 January 1847. White came to the station and commenced duties but returned to the station homestead and declared that he would not look after the sheep any more as the flock of 1,400 was too large. The Bench decided that White should be committed to the House of Corrections for one month and then to be returned to 'his master's service'.<sup>73</sup> Servants would also often plead ignorance, illness or 'fear' as their defence. In *James Simpson v Charles Penfold and John Lowell*,<sup>74</sup> Simpson stated that both men were under a 12-month contract as shepherds from 4 April 1836. Simpson stated that on the preceding Wednesday, both men refused orders to run stock 25 miles from his lower station. Lowell claimed that he was suffering the effects of venereal disease, and both now claimed that they 'knew nothing about sheep' and 'being overdrawn in their wages'. No penalty was recorded. In *Kenneth Clarke v Ralph Walton*,<sup>75</sup> Clarke claimed that Walton was a servant contracted as a shepherd for twelve months from 1 January 1837. Clarke

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<sup>70</sup> Alberton Court Register, 3 March 1847, p.108.

<sup>71</sup> Plunkett, *ibid*, p.294, \*footnote, 'The law does not compel a man to do impossibilities'.

<sup>72</sup> Alberton Court Register, 3 February 1847, p.96.

<sup>73</sup> *Ibid*, at p.98.

<sup>74</sup> Melbourne Court Register 7 January 1837, *HRV*, I, 358-359.

<sup>75</sup> Melbourne Court Register, 1 April 1837, *HRV*, I, 362.

claimed that Walton had left his station and was later discovered in a house in Melbourne. As to why he left, Walton claimed that he was 'afraid of the natives' and that 'he suffered rheumatism' and that 'he would not be able to follow the sheep when the winter arrived'. Clarke testified that Walton had been employed lame, but that it had not impeded his job performance. Walton acknowledged he had 'acted wrong' in leaving his master's service and was sentenced to three weeks imprisonment and a forfeiture of wages of 10 sh. The 'rheumatic' defence was partially successful however in *William B Taylor v Willaim Poole*.<sup>76</sup> This case was heard before Frederick Berkley St John PM and James Smith JP and involved Poole absconding from his service. In his defence the defendant servant complained of rheumatism. The court, instead of imprisonment, merely decreed the agreement cancelled and declared all wages forfeited.

Similarly, in *John Hodgson v Patrick Frazer*,<sup>77</sup> Hodgson claimed that Frazer was his hired servant (carpenter) for three months from 7 September 1838. In evidence it was claimed that he (Frazer) recently 'got tipsy' and had not been at work since, having frequently acted in the same way. Frazer in his defence claimed that he was sick. Hodgson claims that Dr Cotter had told him that Frazer had applied to him for medicine but that after receiving it he again got drunk. Hodgson therefore claimed that Frazer was not sick and did not do his work because he was simply drunk. The Bench sentenced Frazer to one-week imprisonment. In *William Smith v John Burkett*,<sup>78</sup> Burkett an articled seaman, appeared before William Lonsdale Esq. and George Brunswick Smyth to answer a charge preferred for absconding from the service of Smith, the master of the schooner *Bandicoot* on 10 December 1838 without permission. The prisoner pleaded in his defence that the ship was not safe. The Bench found the charge proved and sentenced Burkett to be committed to safe custody until the ship was ready to sail. Ironically, the master, Smith, was obliged by the court to pay 1 shilling per diem for the prisoner's maintenance in gaol and was ordered to give the court 24 hours notice of his intention to sail.

<sup>76</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845; Saturday 29 July 1843.

<sup>77</sup> Melbourne Court Register 2 November 1838, *HRV*, I, 399.

<sup>78</sup> Melbourne Court Register 11 December 1838, *HRV*, I, 403.

The Geelong Bench however, was noted for its sterner disposition and composition. In *Kenneth Clarke v John Muntton*,<sup>79</sup> before the Geelong Bench, Clarke testified that Muntton was engaged in Van Diemen's Land to serve as a hutkeeper, to shift the yards on a daily basis and to cook for the other men. Muntton had refused to shift the yards and did not sleep by the sheep at night. In his defence Muntton testified that he did not know how to make damper, was afraid of the blacks and had no bedding. Clarke claimed that he gave the defendant a plaid, a pair of double blankets and that two pounds were advanced to him in Van Diemen's Land for necessaries. The defendant was sentenced to two months imprisonment. Similarly and again before the Geelong Bench in *Somerville Learmonth v John Saunders (No.1)*,<sup>80</sup> Learmonth laid a complaint that Saunders, his indentured servant for two years, had refused to obey orders, in that on Tuesday 2 October 1838 he refused to 'sleep with the sheep and to cook for the men at the hut and that he did not shift the fold of sheep every day' claiming that the labour 'hurt him'. In *Somerville Learmonth v John Saunders (No.2)*,<sup>81</sup> the above allegations were tested and affirmed in court. The defendant Saunders claimed that he would not sleep by the fold, would sooner 'die that do it', had a 'pain in his back', was afraid of catching cold by exposure and refused to go to a doctor 'if his word was not taken as being truthful'. The Bench sentenced the defendant to two months imprisonment and ordered that at the expiration of the sentence he was to return to his former service.

At times, servants appearing before a Bench of magistrates put up defences that were either ill conceived or simply injurious to common sense. In *Archibald McLeod v Joseph Roberts*,<sup>82</sup> before William Odell Raymond Esq JP and John King Esq JP of the Alberton Bench, McLeod, a 'gentleman settler' deposed that he hired Roberts as a shepherd for twelve months and that fourteen days ago he left [absconded] with another man. In his defence Roberts claimed that he could not look after the sheep himself, he

<sup>79</sup> Geelong Court Register 26 September 1838, *HRV*, I, 407.

<sup>80</sup> Geelong Court Register 5 October 1838, *HRV*, I, 408.

<sup>81</sup> Geelong Court Register 11 October 1838, *HRV*, I, 408.

<sup>82</sup> Alberton Court Register, 4 February 1846, p.63.

feared he would lose them and that 'it would not benefit Mr. McLeod or himself'. The Bench sentenced Roberts to be confined for the term of three months' imprisonment and then to return to his master's service.<sup>83</sup> In *John White v John Wheeler*,<sup>84</sup> the complainant was a settler at Brien's Creek. He alleged that Wheeler had left his place of employment prior to the expiration of their employment agreement. He had been hired as bullock driver, at 40 pounds per year. After his first trip to Portland Wheeler left and was then engaged by a person at Pidgeon Ponds, by which conduct, White claimed, 'had cost him much time and money'. Wheeler in his defence stated that he could not read or write and always supposed the agreement was by weekly engagement. James Blair PM of the Portland Bench fined the employee defendant two pounds and 6sh 6p costs with forfeiture of all wages due.

In framing the legislation, the legislators saw certain acts as especially culpable. These included the act of collecting money as wages in advance by servants, or monies or goods taken in advance for the purpose of covering expenses or requirements in travelling to the place of business of the master and the servant then refusing or neglecting to perform services under their employment contract. The legislation directed that under such circumstances, whether the agreement be written or oral, and upon conviction before two justices, the servant was liable to be imprisoned in some common gaol or House of Corrections for a period not exceeding 3 calendar months and 'to be kept at hard labour for the whole or any part of the said term' of imprisonment.<sup>85</sup> Under this clause, the master again had to 'prove' the agreement and prove the receipt of money or goods.<sup>86</sup> There were many instances of servants taking monies as wages in advance or transportation benefits and then either absconding or refusing to take up their

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<sup>83</sup> *Ibid.*, at p.64.

<sup>84</sup> *Portland Guardian and Normanby General Advertiser* 7 January 1843; 2 January 1843.

<sup>85</sup> 9 Vict. No.27, c.III.

<sup>86</sup> Plunkett, *op.cit.*, p.296.

contractual performance.<sup>87</sup> At other times, given the shortage of labour, servants simply realised that they could find higher wages with other employers.<sup>88</sup> No doubt, some labourers saw free passage to Port Phillip as an attractive inducement to enter into a contract of employment and some no doubt took advantage of the opportunity of free transport to a booming economy. Even after contracting, masters would offer further inducements to keep their servants in the face of threatened absconsion.<sup>89</sup> Promises of early discharge of the employment contract would often not placate a potential absconder.<sup>90</sup> Some servants would abscond after only few days and would invariably be found at one of the local public houses.<sup>91</sup> Warnings from the Bench were not heeded. In *John Hodgson v James Blundell (No.1)*,<sup>92</sup> Hodgson claimed that Blundell was hired by his agent in Hobart Town to work as a plasterer and bricklayer for twelve months from 25 August 1838. On arrival in Port Phillip Blundell told him that 'he would not be much good' at his work. He then neglected his work and was absent on 11 September 1838,

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<sup>87</sup> In *John Pascoe Fawcner v Patrick Sullivan*, Fawcner claimed that Sullivan was engaged as his servant for three months from 31 July 1837 as a stonemason and quarryman. Sullivan drew money and left without doing any work. Fawcner had a warrant issued on 15 August 1837. Sullivan was seen and apprehended on 23 April 1838. No penalty is recorded; Melbourne Court Register 24 April 1838, *HRV*, I, 385.

<sup>88</sup> In *Dr A. Thompson v Cornelius Regan*, before Foster Fyans PM, at the Geelong Bench, Thompson deposed that having ascertained that he was a free man, he hired Regan (per *Portland*) on 12 October 1839. On 14 October 1839 Regan told him [Thompson] that he could earn more money elsewhere and left. Thompson found him at *Macnaughton's Public House*. He reported the matter to the police. Constable Job Williams then apprehended Regan at the *Wool Pack Inn*. Fyans ordered Regan imprisoned for two months for absconding; Fyans noted on the Bench records that Regan was a 'Free man'; Geelong Court Register 14 October 1839, *HRV*, I, 422.

<sup>89</sup> In *Thomas Watt v Edward Horace and William Hughes*, Watt claimed that Horace and Hughes were his servants, employed as sawyers for six months from 4 January 1838. They had been engaged in Van Diemen's Land and Watt had paid their passage from Launceston. Within two or three days of their arrival they refused to work. Watt attempted to bargain with them and to vary their pay. They still refused to work. No penalty was recorded in this matter; Melbourne Court Register 14 February 1838, *HRV*, I, 384.

<sup>90</sup> In *Sylvester John Browne v Davis Steadman*, Browne [Rolf Boldrewood's father] claimed that Steadman was contracted as his servant for twelve months from 1 January 1838. Steadman had also been given the undertaking of an early discharge at the option of Browne. Steadman had come with Browne from Launceston, with Browne paying his passage. Upon arrival at Port Phillip Steadman absconded and was not seen by Browne until the day of the trial. The Bench sentenced Steadman to four weeks imprisonment; Melbourne Court Register 10 February 1838, *HRV*, I, 383-384.

<sup>91</sup> In *John McNeill v Isaac Hall*, McNeill claimed that Hall came from Van Diemen's Land as a servant for a Mr. Coombes. When Coombes declined him, McNeill then contracted with Hall for 12 months as a general servant. After serving for one and one half days he left and was later arrested by Constables at *Carr's Public House*. William Frederick Augustus Rucker testified in support of McNeill and confirmed his evidence. The Bench sentenced Hall to five weeks imprisonment; Melbourne Court Register 22 November 1837, *HRV*, I, 379.

<sup>92</sup> Melbourne Court Register 12 September 1838, *HRV*, I, 392-393.

being drunk. On this occasion the Bench overlooked the offence. Blundell gave an undertaking or promise of future good behaviour. However, four weeks later in *John Hodgson v James Blundell (No.2)*,<sup>93</sup> Hodgson claimed that Blundell had constantly neglected his work and had left his place of work on 5 October 1838 without permission. Hodgson then took out a warrant of apprehension. Blundell was sentenced to two calendar months' imprisonment. Most of the absconding servant-defendants simply left their place of employment and refused to return when confronted.<sup>94</sup> Some arrived at the settlement, took provisions and equipment from their employer and then simply did not proceed to their place of employment.<sup>95</sup> In some instances, it was apparent that no matter how many times they faced imprisonment for absconding, servants would not honour their contractual obligations.<sup>96</sup>

The rural magisterial Benches took a very dim view of the 'free passage' absconders. In *David Fisher v John Cotter*,<sup>97</sup> Fisher of Barwon River, testified that Cotter was hired in Van Diemen's Land as a general servant for the Derwent Company and was paid his passage to Port Phillip and an advance of 14 pounds. Cotter then absconded from service not having worked at all. He was warned to come and work and refused. The agreement was produced to the Bench that then proceeded to illegally sentence

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<sup>93</sup> Melbourne Court Register 6 October 1838, *HRV*, I, 395.

<sup>94</sup> In *John Gray v Joseph Debnam*, Gray claimed that Debnam was hired by him in Van Diemen's Land to serve him for two years at Port Phillip. In August 1838 he was found to have left his service without permission of discharge and refused to return. The Bench sentenced Dedman to one calendar month's imprisonment; Melbourne Court Register 28 September 1838, *HRV*, I, 393.

<sup>95</sup> In *Duncan McFarlane v James Burnell*, McFarlane claimed that Burnell was his servant for 12 months, having been engaged on 21 September 1838 in Van Diemen's Land with his time commencing when he arrived in Port Phillip. When Burnell arrived he was directed to go out to McFarlane's station. Burnell complained that he had no shoes. McFarlane provided the shoes and some rations. Burnell never arrived at the station. He was sentenced to 2 month's imprisonment; Melbourne Court Register 27 October 1838, *HRV*, I, 397-398.

<sup>96</sup> In *Kenneth Clarke v John Muntton*, Clarke claimed that Muntton was his hired servant for 2 years from 8 September 1838 as a hut keeper. Soon after his arrival from Van Diemen's Land he was sentenced to two months imprisonment for refusing to do his work. Muntton was released in November 1838. He had not returned to his place of employment to complete his engagement. The Bench simply sentenced Muntton to a further two month's imprisonment; Melbourne Court Register 18 December 1838, *HRV*, I, 404.

<sup>97</sup> Geelong Court Register 27 August 1838, *HRV*, I, 407.

Cotter to 'four month's in the Gaol of Melbourne'. At the Alberton Bench in *J. Davis v Charles Wood*,<sup>98</sup> before C. J. Tyers Esq, Commissioner of Crown Lands, Davis laid a complaint that Mrs. Davis had hired Wood and his wife in Hobart Town as general servants, but that on their arrival at Port Albert they refused to enter his service. Davis therefore begged the court to grant a warrant for the apprehension of Charles Wood for absconsion from his hired service, under 2 clause of 9 Vict. no.7. At the hearing of the matter of *J. Davis v Charles Wood*,<sup>99</sup> before C. J. Tyers and Lachlan Macalister Esq JP of the Alberton Bench, Davis produced the agreement signed by Wood and was re-sworn to his deposition of 10 January 1846. In his defence Wood claimed that no proper accommodation had been provided on the vessel coming over to Port Albert and maintained that 'he had paid his own passage over'. The court chose not to believe this claim and sentenced Wood to six weeks (the word months being crossed out on the Bench book) imprisonment and his agreement to be cancelled at the request of Davis.<sup>100</sup>

The 'attitude' and 'disposition' of the servant was at times, more important a consideration to the Bench than the actual loss of passage monies by a master. In *Archibald McLeod v William Walsh*,<sup>101</sup> before William Odell Raymond Esq JP and John King Esq JP, McLeod, a 'gentleman settler' deposed that Walsh had been contracted as a shepherd or farming servant by his agent in Hobart Town. A few days after his arrival at the station Walsh came to him and declared that 'he did not like sheep or something of that sort'. He thereafter absconded. McLeod met him afterwards at the Port (Port Albert) and tried to reason with him to go back to the station. In his defence Walsh claimed he 'did not like shepherding' and had stopped after he 'had worked off his passage money'. The Bench decided that on account of the good character reference that McLeod provided, the Bench sentenced Walsh to one-month imprisonment and ordered that

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<sup>98</sup> Alberton Court Register, 8 January 1846, p.57.

<sup>99</sup> Alberton Court Register, 17 January 1846, p.59.

<sup>100</sup> *Ibid*, p.60.

<sup>101</sup> Alberton Court Register, 4 February 1846, p.64.

after the period of incarceration he was to return to his master's service.<sup>102</sup> Contrast this with the decision in *Frederick Jones v George Lincoln*.<sup>103</sup> The initial application involved a summons to appear before C. J. Tyers Esq, Commissioner of Crown Lands, by David Duncan. Duncan was an agent for Jones and deposed that Lincoln was hired in Hobart Town for 12 months. Eight days after arriving in Port Albert, Lincoln stated that 'he would not go to that gentleman's station'. This statement was made in the presence of Duncan and James MacFarlane JP.<sup>104</sup> At the hearing in the matter of *Frederick Jones v George Lincoln*,<sup>105</sup> before C. J. Tyers and Lachlan Macalister Esq JP of the Alberton Bench, Duncan being re-sworn to his deposition, stated that he did not pay Lincoln's passage from Van Diemen's Land. Lincoln admitted the employment agreement and re-stated his intention that he would not go to Jones' station. He gave no reason to the Bench. The Bench sentenced George Lincoln to three months imprisonment in the Melbourne gaol and ordered his agreement cancelled. Without aggravating circumstances, the Bench was entitled to simply admonish an employee and dismiss the charge.<sup>106</sup>

It was also incumbent upon the servant during the course of employment, to take care of his master's property, goods and chattels. In the event of the servant wilfully or negligently causing injury to or loss of property or livestock, the servant, upon conviction before two justices, was to forfeit wages and pay reasonable damages for the loss occasioned by their act or neglect. In default of such payment, the servant was liable to imprisonment for up to three months, with or without hard labour (at the discretion of the Bench). Single instances usually meant that the Bench would normally levy a fine to make up for the losses.<sup>107</sup> Multiple instances of neglect and consequential loss normally

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<sup>102</sup> *Ibid*, p.65.

<sup>103</sup> Alberton Court Register, 10 January 1846, p.58.

<sup>104</sup> *Ibid*, p.59.

<sup>105</sup> Alberton Court Register, 17 January 1846, p.60.

<sup>106</sup> VPRS 34/P/1, 5 July 1841, In *Re William Fletcher*, charged with refusing to do work for which he was engaged, admonished and discharged by the Portland Bench.

<sup>107</sup> In *William Roadknight v Thomas Banks*, the matter before the Geelong Bench related to an information laid by Roadknight against his hired servant Banks. It dealt with a dispute over instructions. The instructions were that he as

led to a period of incarceration.<sup>108</sup> In loss of stock matters, servants often used the defence of dog attack.<sup>109</sup> Proof of the loss, normally through the testimony of corroborative witnesses, was essential. *James Willis v John Rhoden*,<sup>110</sup> involved an allegation of neglect and damage to property. The matter was heard at the Alberton Bench before W. O. Raymond and John King. Willis deposed that through Rhoden's neglect of duty as a shepherd, five sheep perished by attacks from dogs. He claimed compensation of 10s per head of lost sheep. Rhoden claimed that the sheep died of natural causes. The Bench dismissed the case for want of evidence that 'the sheep were killed by dogs'.<sup>111</sup> Masters would at times attempt to deduct any 'loss' from their servants' wages. *James Kelly v Macmillian*,<sup>112</sup> involved a loss of property and a wages off-set dispute, before W. O. Raymond JP and John King JP of the Alberton Bench. Kelly deposed that he was initially employed for twelve months, then a further three months. Macmillian claimed that 47 sheep were lost during this period. This is the first time that the questions and answers put from the Bench to witnesses are noted in the Alberton Court Register.<sup>113</sup> It appears

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a hut-man and watchman should call to the shepherds if sheep broke loose through the night. The evidence of Erasmus Johnston Roberts, and another hired servant and shepherd was also called. Both witnesses claimed that Bank's dereliction cost a loss of five sheep. The Geelong Bench ordered that Banks pay for the five sheep lost, at an amount determined to be 3 pounds 15s 0d; Geelong Court Register 9 January 1839, *HRV*, I, 414.

<sup>108</sup> In *Charles Driver v John McDonald*, Driver claimed before the Melbourne Bench that McDonald was his servant hired for three months from 18 or 20 December 1837 as a shepherd and general hand. It was alleged that McDonald had lost several of his sheep through neglect. It was further alleged that he persisted 'in his negligence by coming home for his breakfast and dinner, leaving sheep unattended' and 'was found at least half a dozen times at home having dinner when instructed not to do so'. McDonald was sentenced to one month's imprisonment; Melbourne Court Register 9 March 1838, *HRV*, I, 384.

<sup>109</sup> In *John Batman v George Worthy*, George Hollins, Batman's overseer testified before the Melbourne Bench that 85 sheep that were left in the charge of Worthy had been found dead. They were part of a flock of 630 sheep. Worthy in his defence claimed that dogs caused the sheep to scatter. No bite marks, however, were found on the sheep. Hollins speculated that Worthy had allowed the lambs to attempt to cross a river to join the ewes and as a result, they had smothered each other. John Batman testified and confirmed that Worthy had been his servant for twelve months from 18 November 1836. He testified that the loss is calculated at 106 pounds 5 sh Michael Fogarty, another Batman shepherd, testified and confirmed the drowning of the sheep theory; he also conceded that one sheep was observed 'torn' as if by dogs. Worthy was sentenced to one calendar month imprisonment; Melbourne Court Register 24 April 1837, *HRV*, I, 363-364.

<sup>110</sup> Alberton Court Register, 5 November 1845, p.21.

<sup>111</sup> *Ibid*, p.22.

<sup>112</sup> Alberton Court Register, 4 February 1847, p.102.

<sup>113</sup> *Ibid*, p.104.

that the Bench entertained the notion that flocks belonging to different masters had become 'mixed'. The decision of the court was that the cost of the lost sheep be deducted from wages owing to Kelly, the balance being 8 pounds 13 sh 4p being due to him.<sup>114</sup> In *Timothy Cronin v James Willis*,<sup>115</sup> the matter involved a deduction from a servant's wages for the use of a bullock team, before W. O. Raymond and John King of the Alberton Bench. During his period of service with Willis, Timothy Cronin had been ordered to go with a bullock team, rendezvous with another man and load some hurdles. Cronin could not find the other man, and when his accounts were settled with Willis an amount of 10sh was deducted for use of the bullocks. The Bench dismissed the case, it 'considering a charge of 10sh for the time of the bullocks reasonable'.

Loss would arise at times, merely as the material culmination of a poor working relationship between the parties. A prior history of 'appearances' before the Bench understandably aggravated the employment relationship. This is evident in the Batman-Cummins / Batman-McManus series of court appearances. The matters involved neglect and insolence,<sup>116</sup> neglect and loss of stock,<sup>117</sup> absence, drunkenness and damage to stock,<sup>118</sup> continued disobedience and neglect.<sup>119</sup> Charles Ebdon, Thomas Glass,

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<sup>114</sup> *Ibid*, p.105.

<sup>115</sup> Alberton Court Register, 5 November 1845, p.20.

<sup>116</sup> In *John Batman v Phillip Cummins (No.1)*, Batman claimed that Cummins was his hired servant for twelve months from 29 August 1836. Cummins had been recently released from gaol for neglect of work and was told that he was expected to show up for work. He did not do so, but asked for his discharge and that he 'would not serve him (Batman) another hour'. Cummins acknowledged his refusal before the court. He was sentenced to one month's imprisonment; Melbourne Court Register 17 June 1837, HRV, I, 372.

<sup>117</sup> In *John Batman v Phillip Cummins (No.2)*, Batman claimed that Cummins was his hired servant for twelve months from 29 August 1836. On 24 June 1837 Batman alleged that Cummins had allowed sheep in his care to escape into the town. There was also evidence that dogs had bitten some of the sheep. Robert William Lyatt, a Batman house servant, confirmed that he together with four Sydney blacks had found the sheep in question, recovered them and placed them in a yard. The yard was found unsecured the next morning with the sheep missing. They were later found bitten by dogs. Cummins was found guilty and sentenced to three weeks imprisonment and a forfeit of wages; Melbourne Court Register 25 June 1837, HRV, I, 373.

<sup>118</sup> In *John Batman v Luke McManus (No.1)*, Batman claimed that McManus was indentured for twelve months from November 1836 as a shepherd and other like employment. He was found away from his flock and at town, drunk and was abusive to Batman. Batman claimed that the ewes and lambs under McManus's care would have suffered considerably being unattended in the yard without food. George Hollins also testifies and confirms that McManus was in town and was drunk. McManus was sentenced to two months imprisonment and forfeit wages that were due; Melbourne Court Register 6 March 1837, HRV, I, 360-361.

Alexander Mollison and George Smith also undertook multiple employee prosecutions of single employees. These matters involved absence in town,<sup>120</sup> absconding,<sup>121</sup> absence,<sup>122</sup> refusing to obey orders,<sup>123</sup> refusal to obey orders (carry a gun) and insolence,<sup>124</sup> and absence from place of employment and contracting with another master during the currency of an employment agreement.<sup>125</sup> Often, servants would 'play' masters against each other. Invariably, however, in a small 'new' settlement, these games soon became unstuck.<sup>126</sup> <sup>127</sup> In the Mollison–Hilton series of appearances, the allegations were again

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<sup>119</sup> In *John Batman v Luke McManus (No.2)*, Batman claimed that McManus had refused an order to assist in fitting up a stockyard and 'has refused to do any work' as a protest against the fact that he had previously been punished for neglect of work and had previously been sent to gaol by Batman. McManus was again sent to gaol, this time for one calendar month's imprisonment; Melbourne Court Register 16 May 1837, *HRV*, I, 365.

<sup>120</sup> In *Charles Ebden v James Coyle (No.1)*, Robert Webb claimed that Coyle was an indentured servant of Ebden's for twelve months from 10 February 1837 and had been employed for the past month sawing timber about 9 miles from town. He claimed that Coyle had left his work without permission and had remained in town. John Wood, an Ebden overseer, testified and confirmed these allegations. Coyle was sentenced to 14 days imprisonment; Melbourne Court Register 25 May 1837, *HRV*, I, 366.

<sup>121</sup> In *Charles Ebden v James Coyle (No.2)*, Ebden testified that Coyle was an indentured servant of Ebden for 12 months from 10 February 1837 and had recently returned from gaol in Melbourne in June. Ebden testified that Coyle then worked for about 1 week and absconded with another man, Jones, having received rations. Ebden claimed that his absence had caused considerable inconvenience and loss. Coyle was sentenced to 3 calendar months' hard labour; Melbourne Court Register 28 August 1837, *HRV*, I, 377.

<sup>122</sup> In *Charles Ebden v John McLise (No.1)*, Robert Webb claimed that McLise was an indentured servant of Ebden for twelve months. He was employed for the past month splitting shingles 9 miles from town. It was claimed that he left his work without permission and remained in town drinking. John Wood, an Ebden overseer, again testified and confirmed the allegations. McLise was sentenced to 14 days imprisonment; Melbourne Court Register 25 May 1837, *HRV*, I, 367.

<sup>123</sup> In *Charles Ebden v John McLise (No.2)*, Robert Webb claimed that McLise was directed to do different work and then to go to another station. This he refused to do. He was overdrawn on his wages and then refused to work. McLise was sentenced to one month's imprisonment; Melbourne Court Register 17 June 1837, *HRV*, I, 372.

<sup>124</sup> In *Thomas Glass v William Cane (No.1)*, Glass claimed that Cane was his servant for 12 months from 25 April 1837. On the Friday prior to the court appearance Cane was ordered to take a gun with him to a sheep run. He refused and used 'very gross language'. Glass stated that his general conduct lately has been bad and that he had refused to do any work. W. Maxwell testified and confirmed the refusal to take the musket instead of the carbine. Cane was sentenced to two months imprisonment; Melbourne Court Register 20 June 1837, *HRV*, I, 372.

<sup>125</sup> In *Thomas Glass v William Cane (No.2)*, Glass claimed that Cane had come from gaol (Sunday last), had collected his clothes and claimed that he was unfit for work and went to town without leave. He had also hired himself to another person. Cane was sentenced to two months hard labour; Melbourne Court Register 22 August 1837, *HRV*, I, 376.

<sup>126</sup> In *Thomas Glass v Benjamin Jones (No.1)*, Glass claimed that Jones was his servant for three months as a general servant. He was presently making brush fences for sheep yards, and on the previous morning he left and come to town without permission, taking his clothes, etc, with him. Jones acknowledged the offence and he was sentenced to one month's hard labour; Melbourne Court Register 7 September 1837, *HRV*, I, 377.

loss of stock together with first<sup>128</sup> and second absconsions.<sup>129</sup> In the Smith–Curnow series of appearances, the allegations were that the servant had left his employer to work for another, had returned prior to the court hearing, had left again,<sup>130</sup> been neglectful in his work,<sup>131</sup> and had then committed one further act of absconsion.<sup>132</sup> The Bench could make ‘allowances’ for damaged or lost ‘employer property’. In *Michael Morgan v John Broadhurst*,<sup>133</sup> a young boy servant shepherd, John Broadhurst, had his wages withheld and was dismissed from his employment for losing some cattle. After his mother Mary Morgan testified on her son’s behalf, the court ordered the master, Michael Morgan, to pay young John his wages of 2 pounds and ordered the master to pay costs of 3/6.

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<sup>127</sup> In *Thomas Glass v Benjamin Jones (No.2)*, Glass claimed that Jones approached him after his release from prison. He asked Jones if he was back to complete his service. Jones replied ‘no’ and that he wanted pay for the period he spent in gaol. It was claimed that he was very insolent and defied him to be ‘punished’ as he was now Mr. Fergusson’s servant. Whilst going to obtain a warrant to compel him to return to service, Jones escaped. Edmund Ferguson testified and claimed that he had hired Jones in March 1837 and that he had left in August 1837. He had later been informed that he was then in the service of Mr. Glass, from whence he went to gaol. Glass was this time sentenced to six weeks imprisonment; Melbourne Court Register 15 November 1837, *HRV*, I, 378.

<sup>128</sup> In *Alexander Fullerton Mollison v James Hilton (No.1)*, Mollison claimed that Hilton was his servant for two years from December 1837 as a shepherd or to shift hurdles or to wash sheep and be watchman on the Coliban near Mt Macedon. On the previous Friday a lamb was bitten and a ewe was killed whilst in his charge. Hilton then left the following Saturday. He was sentenced to two calendar month’s imprisonment; Melbourne Court Register 10 February 1838, *HRV*, I, 383.

<sup>129</sup> In *Alexander Fullerton Mollison v James Hilton (No.2)*, Hilton appeared by warrant before William Lonsdale ‘Esq.’, to answer a complaint by Mollison for again leaving his service without permission on 20 April 1838. Hilton, the ‘prisoner’ pled guilty and was sentenced by the court to be imprisoned for one calendar month; Melbourne Court Register 29 October 1838, *HRV*, I, 398.

<sup>130</sup> In *George Smith v Thomas Curnow (No.1)*, Smith claimed that Curnow was his servant for one month, being hired on 21 March 1838. He left the following day to work for Mr Ebdon. He returned to Smith one week prior to the court appearance stating he would complete his engagement. However he only worked until Thursday last and left. He was sentenced to fourteen days imprisonment; Melbourne Court Register 30 June 1838, *HRV*, I, 389.

<sup>131</sup> In *George Smith v Thomas Curnow (No.2)*, Curnow appeared by warrant before William Lonsdale Esq., to answer a complaint by Smith for neglecting his work on 2 August 1838. Curnow, the ‘prisoner’ pleads guilty and is sentenced to another fourteen days imprisonment; Melbourne Court Register 4 August 1838, *HRV*, I, 387.

<sup>132</sup> In *George Smith v Thomas Curnow (No.3)*, Curnow appeared by warrant before William Lonsdale Esq., to answer another complaint by Smith against him for again leaving his work on 4 December 1838 without permission. Cumow, the ‘prisoner’ pled guilty and was this time sentenced to one calendar month’s imprisonment; Melbourne Court Register 12 December 1838, *HRV*, I, 403.

<sup>133</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845; 17 August 1843; before Frederick Berkley St John PM JP and James Smith Esq JP.

Compensable injury or loss seemed at times to have been given a very liberal and sophisticated interpretation. In *Joseph Sutherland v Joseph Bagnall*,<sup>134</sup> before the Geelong Bench, Sutherland deposed that Bagnall had worked as a shepherd and that his dog was constantly chasing down sheep and worrying them, causing psychological damage to ewes who would not take to their lambs after being worried by the dog. Bagnall had refused to tie up the dog. The court ordered that he forfeit one month's wages and to return to his former employer.

The legislation also seemed to require the magistrates to exhaust any alternative methods of satisfying the loss to the master, before resorting to imprisonment of the servant.<sup>135</sup> At times, the parties, whatever the allegation and with the concurrence of the Bench, could settle the matter amicably and 'out of court'.<sup>136</sup> It seems that the servant was able to rebut the claims of damage to employer property by convincing the magistrates that he or she acted and had 'exercised due care and attention'.<sup>137</sup> This was often hard to achieve.<sup>138</sup>

During the mid-1840s economic recession there was a notable decrease in the number of 'absconsion' cases and a significant increase in the number of 'wages owed' matters heard before the Port Phillip magistrates. All classes suffered during the

<sup>134</sup> Geelong Court Register 15 June 1838, *HRV*, I, 406.

<sup>135</sup> 9 Vict. No.27, c.IV.

<sup>136</sup> In *Dr Patrick Cussen v William Leary*, regarding allegations of neglect of duty and absconding for a period of four days, the matter was settled out of court; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845; 8 August 1843, Special Petty Sessions: before Frederick Berkley St John PM, George Sherbrooke Airey Esq OCL, James Frederick Palmer JP, James Smith Esq JP.

<sup>137</sup> Plunkett, *op.cit.*, p.296.

<sup>138</sup> Before the Geelong Bench, for example, in *George Russell v Robert Marsden*, Russell of Moorabool River, testified that Marsden had been in his employ for about a month as a shepherd. The agreement was that he was to stay with his sheep and eat in the field. Instead Marsden would be found at the hut a distance away. Through the alleged neglect, Russell claimed that he lost 59 sheep 'by them rushing to a river and drowning and lost others on another occasion'. Marsden in his defence testified that he had been with Russell since the beginning of March at a rate of 13s 0d weekly and remained there four weeks and has not been paid save for two shirts and some tobacco (12s 0d) with total wages owing 2 pound 18s 6d. The court ordered the defendant Marsden to forfeit all of his wages; Geelong Court Register 16 August 1838, *HRV*, I, 406-407.

recession. The recession left some squatters completely ruined, unable at times to even raise the fare necessary to beat a hasty and embarrassing retreat home to England.<sup>139</sup> The well connected were not spared the ignominious fate of ruin, as James Macarthur found when 'parleying with his creditors'.<sup>140</sup> Port Phillip servants, those lucky enough to find work, for the first time, experienced a 'labour market correction'. The 1840s recession led to 'the novelty and misery of unemployment'. Immigrant families experienced pressing circumstances and protested in the Streets carrying a loaf of bread atop a pole and bearing petitions to the Town Council. The Crown was forced into providing relief work, but maintained that the unemployed should move to the countryside to seek employment.<sup>141</sup> Some chose to leave the district.<sup>142</sup> The influx of immigrants just as Melbourne and Port Phillip were sinking into recession was an unfortunate synchronicity of events which led to criticism of the government<sup>143</sup> for the misery passed onto the 'starving wives and children' of the immigrants.<sup>144</sup> The Imperial authorities in England, as with all requests from the Australian colonies, hesitated in heeding their demands for labour, and had miss-timed their immigration policy to coincide with the recession.<sup>145</sup> The working classes, as always, bore the brunt of the misery occasioned by capitalist speculation and economic mismanagement.<sup>146</sup>

<sup>139</sup> *Graham Papers, op.cit.*, p.83, Graham to Elliot Heriot, regarding the plight of John Thompson.

<sup>140</sup> *Graham Papers, ibid*, pp.87-88, Graham to John Hay 10 November 1843; Graham to James Macarthur 1 February 1844, *ibid*, p.92.

<sup>141</sup> Arden, G, *Recent Information*, *op.cit.*, p.109; PPH 27 July 1841; *Melbourne Times* 23 April 1842, PPG 20 April 1842; Town Council Proceedings, reported in PPP 2 March 1843; PPH 13 August 1841, PPG 12 January 1842, 6 April 1842, Gipps to Stanley 23 May 1842, *HR*, I, xxiii, p.212; PPG 19 November 1842, cited in McGowan, *op.cit.*, p.77.

<sup>142</sup> By 1843 desperate unemployed persons invented the 'Valpariso Solution' whereby they would go to South America to seek work. This expedition failed, although a similar expedition to Adelaide, though also unsuccessful, was decidedly less desperate; Meeting at the Royal Hotel in October 1843 workers sought to gamble upon such an expedition, PPP 19 October 1843; PPP 2 November 1843, PPH 4 June 1844; PPH 6 September 1844; cited in McGowan, *op.cit.*, pp. 77-78.

<sup>143</sup> PPH 20 August 1841, 12 January 1844, cited in McGowan, *op.cit.*, p.78.

<sup>144</sup> PPH 30 January 1844, cited in McGowan, *op.cit.*, p.78.

<sup>145</sup> Madgwick, R. B., *Immigration into Eastern Australia 1833-51*, pp.130-217, cited in McGowan, *op.cit.*, p.78.

<sup>146</sup> At the azimuth of the recession, a public meeting at the *Royal Exchange Hotel* proposed petitions and made resolutions to address the Legislative Council with the unemployment problem: this problem 'at last reduced to

Thankfully servants were able to sue for unpaid wages due and owing to them under their contracts of employment. If the amount claimed was less than thirty pounds, the servant was able to make complaint on oath before a single magistrate 'where or near to the place where the party or either of the parties, upon whom the claim is made, shall be or reside' to summon the master to appear before the Bench of two justices. Upon being satisfied that the monies were in fact due and payable, the Bench could order the master to pay such monies and associated costs in obtaining the judgement. If the order was not obeyed within ten days of judgement, the magistrates could issue a levy by a warrant of distress and sell goods and chattels owned by the master to satisfy the judgement amount. If the amount raised was insufficient to satisfy the judgement, the Bench could issue a warrant of apprehension. Under this warrant the master could be imprisoned for a period not exceeding three months.<sup>147</sup> There were often simple and deliberate instances of non-payment of wages due to a servant. Employers who did not honour their obligations under the employment agreement were penalised.<sup>148</sup> Where there were no aggravating factors or applications, the Port Phillip magisterial decisions were swift and just.<sup>149</sup>

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distress, bordering on destitution, a large portion of the mechanics of Melbourne'; PPH 29 October 1844, cited in McGowan, *op.cit.*, p.78.

<sup>147</sup> 9 Vict. No.27, c.V.

<sup>148</sup> VPRS 34/P/1, 9 February 1842, In *Re Edward Barnett*, where the defendant master had refused to receive Fanny White as a servant pursuant to an employment agreement. The employer Barnett was fined 15 sh with 10/6 costs by the Portland Bench.

<sup>149</sup> In *George Whitborn V James Kill*, before Frederick Berkley St John PM and James Smith JP involving a dispute over wages due of 2 p 10sh 9p, the court simply ordered the payment of the wages due, with costs of 3sh 6p; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 27 July 1843. In *Michael Punch v Henry Kent Hughes*, before Frederick Berkley St John PM [followed by a blank space and then Esq JP, suggesting that St John had filled out the headings of the Deposition Books in advance of the appearance of the assisting justices], involving another dispute over wages due, the court decreed that the defendant master pay 29 pounds 3sh 7p plus costs of 3 pounds 5sh 6p; VPRS 2136, Saturday 5 Aug 1843. In *Matthew Turnball v Andrew Thomson*, a case involving monies owed as wages, before C. J. Tyers and John Reeves of the Alberton Bench, the employee Turnball deposed that he was engaged as a brewer for a period of 12 months under an agreement dated 12 July 1845. Pay was to commence on his return from Melbourne. He returned from Melbourne on 20 August and 'was not idle since'. Thomson testified that he did not consider Turnball his servant 'until the time he commenced brewing'. The Bench found for the servant Turnball and ordered the balance of his account of 8 pounds 3 sh to be paid within ten days and that the employment agreement be cancelled; Alberton Court Register, 7 January 1846, pp.45-46.

To succeed in an action, a servant needed to 'prove the agreement' and prove that the summons was indeed served upon the defendant master either personally or at his place of abode.<sup>150</sup> At times, a master simply refused payment of wages and sought from the Bench a period of time to pay those wages.<sup>151</sup> At times employers simply refused to pay wages owed and refused to provide the servant with the necessary discharge papers. In *William Grant v James Miller*,<sup>152</sup> before C. J. Tyers and John King Esq JP of the Alberton Bench, William Grant, a labourer, deposed that he was hired as a hutkeeper between September 1845 and February 1846. When his time was completed he applied for his wages and his discharge and 'they would not be given to him'. Another settler, John Scott,<sup>153</sup> had also hired Grant during this time on a piecemeal weekly basis to wash sheep and at night he would go to Millers to water sheep. The Bench decided that Miller was to pay Grant his wages amounting to 5 pounds 12sh together with costs of 2sh 6p an amount in all to 7 pounds 17sh and allowed 10 days 'to pay it in' (into court).<sup>154</sup>

Non-appearance before the court, by either of the parties, was treated as a contempt of court and invariably proved fatal to their chances of success. In *James Fisher v Henry Bodman*,<sup>155</sup> involving a claim for non-payment of wages, before Charles J. Tyers Esq JP and John King Esq JP of the Alberton Bench, Fisher deposed that he had procured a summons for Bodham to appear at the Police Office at Alberton (this day) and produced the original. He deposed that he was hired by Bodham and served 21

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<sup>150</sup> Plunkett, *op.cit.*, p.297.

<sup>151</sup> In *David Winslow v Joseph Hooson*, a dispute regarding the payment of wages, before C. J. Tyers and John Reeves of the Alberton Bench, it was established that Hooson, the pound keeper of Tarraville, had hired Winslow as a servant on 27 May 1845 at a rate of 20 pounds per annum. After working several months Winslow asked for his 'wages due' being 11 pounds 13sh This was refused. Hooson in his defence stated that the man's agreement was correct and that he only wanted a few days to pay him. The Bench allowed Hooson two days to pay Winslow his wages; Alberton Court Register, 8 January 1846, pp.53-54.

<sup>152</sup> Alberton Court Register, 1 April 1846, p.76.

<sup>153</sup> *Ibid*, p.78.

<sup>154</sup> *Ibid*, p.79.

<sup>155</sup> Alberton Court Register, 3 March 1847, p.109.

weeks from March 1846. James Aitcherson, a fellow labourer, testified for Fisher and confirmed that Bodham had refused to sign Fisher's discharge and that he would give Fisher his money but 'that he had not got it'.<sup>156</sup> The Bench held that the service of the summons being proved and upon the contempt of defendant in not appearing the Bench, having heard the complainant and his witness on oath, that Henry Bodham pay to James Fisher 10 pounds 4 sh 9p and costs amounting to 15sh.<sup>157</sup>

Attitude and disposition of the servant, however, again seemed an important factor in the minds of the magistrates even when determining a seemingly clear-cut 'wages owed' matter. In *James MacFarlane JP v William Moore*,<sup>158</sup> before C. J. Tyers, John Reeve and J. King of the Alberton Bench, the plaintiff MacFarlane, who was also a justice of the peace and member of the Alberton magisterial Bench, deposed that Moore had been engaged in his service for a six month period from 3 March 1845 as a general servant at a rate of 26 pounds p.a. By the 24 May 1845 he was due 8 pounds wages. Moore demanded this amount from MacFarlane, who in turn told him to return to his work. This was refused and Moore stated that he would 'go to the justices and try and get paid' and commenced speaking to MacFarlane 'in a very violent manner'. MacFarlane then went to the residence of Mr. Reeve, JP, and swore out a summons against Moore.<sup>159</sup> Moore then absconded for six days, apparently travelling to the residence of C. J. Tyers for assistance! Moore in his defence claimed that he did not refuse to work and simply asked MacFarlane for his due wages. Moore also claimed that his absence was on account of him seeking 'justice'. The decision of the Bench was that Moore forfeit three months wages amounting to 6 pounds 10 sh and that his employment agreement be cancelled.<sup>160</sup>

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<sup>156</sup> *Ibid*, p.110.

<sup>157</sup> *Ibid*.

<sup>158</sup> Alberton Court Register, 4 June 1845, p.3.

<sup>159</sup> Note that John Reeve issued the summons to MacFarlane and now sits upon the Bench adjudicating the matter.

<sup>160</sup> *Ibid*, p.5.

There is some evidence to suggest that being a Port Phillip justice of the peace had surprisingly little effect upon the outcome of any master and servant wages dispute. In *J. D Lyon Campbell JP v Ross*,<sup>161</sup> Ross was Campbell's groom. Campbell brought charges for neglect of duty, disobedience of orders and destruction of his property. The property was a valuable mare, lamed in consequence of Ross taking her out contrary to express directions. Campbell laid charges that Ross had gone to town on his orders but had returned intoxicated. On other occasions he had also 'grossly misbehaved'. The Bench held Ross forfeit his wages and that the agreement be cancelled. In *Michael Lysaght v Thomas Wills JP*,<sup>162</sup> before Henry Condell Esq JP, James Smith Esq JP, Frederick Berkley St John JP of the Melbourne Bench, the matter dealt with an alleged breach of the employment agreement and a dispute over rations. Wills, a justice of the peace, objected to the amount of rations as 'being larger than he would allow'. The servant was not punished for his breach and the case was merely dismissed. There was a similar result in *William Firbrace Esq JP v John Acron*,<sup>163</sup> before James Smith Esq JP of the Melbourne Bench. This dispute involved allegations of neglect of duties and disobedience of orders. The court ordered the servant to forfeit wages owed and cancelled the agreement. In *John Gartley v Malcolm MacFarlane*,<sup>164</sup> before C. J. Tyers, John Reeve and J. King of the Alberton Bench, the plaintiff in this matter was the servant John Gartley who deposed that he had been engaged by Malcolm MacFarlane as a shepherd for a period of six months from 1 July 1844 at a rate of 20 pounds. On 20 November a certain Mr. Walker appeared to be taking over the station, and later had to go to Sydney, leaving MacFarlane again in charge of the station. The Bench decided 'that the man Gartley receive his wages which are to be paid into court in a fortnight'.<sup>165</sup> On the same day and immediately after this decision,

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<sup>161</sup> PPP Monday 9 January 1843.

<sup>162</sup> VPRS 2136, Thursday 12 October 1843.

<sup>163</sup> VPRS 2136: Deposition Register 1845-1855, Saturday 13 September 1845.

<sup>164</sup> Alberton Court Register, 4 June 1845, p.5.

<sup>165</sup> *Ibid*, p.6.

James MacFarlane took action against Gartley. *James MacFarlane JP v John Gartley*,<sup>166</sup> involved a masters and servant dispute before C. J. Tyers, John Reeve and J. King of the Alberton Bench. The plaintiff in this matter was James MacFarlane, J P,<sup>167</sup> who deposed that Gartley was his servant shepherd engaged for six months from 1 March 1845 at a rate of 25 pounds per year. That on 23 May 1845, Gartley came up to him and claimed his 'time was up' and demanded payment of wages. James MacFarlane made up an account and an order on Mr. Taylor for 4 pound 11 sh 7p and gave this to Malcolm MacFarlane. Gartley refused to take this. Without any explanatory Bench notes, the case was dismissed.<sup>168</sup> A similar result occurred in *John Humor v W. O. Raymond JP*<sup>169</sup> In this dispute before C. J. Tyers, John Reeve and J. King, the plaintiff in this matter was the servant Humor who claimed non-payment of wages from Raymond. Raymond in his defence claimed that 'he never disputed the man's account' but withheld payment as he suspected him of stealing. No further evidence was presented to substantiate this 'suspicion'. The Bench was of the opinion that an amount of 4 pounds 17sh 10p was due and ordered that the defendant, W. O. Raymond, Justice of the Peace, pay the money into court.<sup>170</sup> The Portland Bench records likewise indicate that simply being a magistrate did not automatically influence those presiding on the Bench in masters and servant disputes.<sup>171</sup>

Interestingly, masters imprisoned for non-payment of wages were to be discharged from prison as soon as sequestration procedures commenced linked to

<sup>166</sup> Alberton Court Register, 4 June 1845, p.6.

<sup>167</sup> This is James MacFarlane's second appearance before the Alberton Bench on this day as a plaintiff squatter.

<sup>168</sup> Alberton Court Register, 4 June 1845, p.7.

<sup>169</sup> Alberton Court Register, 4 June 1845, p.8.

<sup>170</sup> *Ibid*, p.9.

<sup>171</sup> VPRS 34/P/1, 8 December 1840, *Stephen George Henty JP v William Lawrence*, under a charge of absenting himself from his master's service, the defendant was discharged by the Portland Bench. 20 October 1841, In *Re Mary Curley (Isabella, 1840)* 7 years, assigned to Police Magistrate James Blair, was charged with insolence to her master. The Portland Bench simply admonished and discharged her.

insolvency proceedings.<sup>172</sup> No such advantage was given to a servant. The legislation also allowed for managers, superintendents, agents or overseers to be served with proceedings for non-payment of wages and for the action to progress to satisfaction of the debt, if proved, to distress of goods. This substitution was permitted on account of the great distances within the districts and the prolonged absences of masters.<sup>173</sup>

The master and servant legislation demonstrated an intimate knowledge of rural, especially stock rearing, work practices. It understood that timing was everything in rural work and that there were crucial periods during the rural calendar when the absence or absconscion of labourers resulted in insurmountable difficulties for the master of the rural enterprise. In *Frederick Jones v Higgins*,<sup>174</sup> before Lachlan Macalister JP, James MacFarlane JP, W. O. Raymond JP and C. J. Tyers JP of the Alberton Bench, Jones, a settler, deposed that his agent hired Higgins in Hobart Town. Higgins came to him on Saturday 26 December 1846 and asked 'if he would give them grog in the wheat fields'. Jones answered that he did not propose to do that 'as they had too much grog lately'. Higgins then claimed that 'the wheat might drop in the fields'. He was told he would be sent to gaol and he replied that he would sooner go there than do any more work for Jones. The Bench sentenced Higgins to 3 months in the House of Corrections in Melbourne.<sup>175</sup> The legislation therefore specifically listed and targeted artificers, splitters, sheep shearers and washers and persons engaged in reaping and gathering of hay or corn who absented themselves before their contractual obligations expired.<sup>176</sup> In *Archibald McLeod v Thomas Moore*,<sup>177</sup> before William Odell Raymond Esq JP and John King Esq JP of the Alberton Bench, McLeod, a gentleman settler residing on the River Mitchell,

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<sup>172</sup> 9 Vict. No.27, c.VI.

<sup>173</sup> 9 Vict. No.27, c.VII.

<sup>174</sup> Alberton Court Register, 6 January 1847, p.89.

<sup>175</sup> *Ibid*, at p.90.

<sup>176</sup> 9 Vict. No.27, c.VIII. Upon complaint before a justice of the district, a warrant would be issued and upon apprehension and the charge being proved to the satisfaction of the Bench, the servant was to be imprisoned for a period not exceeding 3 months.

<sup>177</sup> Alberton Court Register, 4 February 1846, p.62.

deposed that he had engaged Thomas Moore, shearer, first at Buchan then Bairnsdale. On 27 January 1846 Moore came and asked for money and was given a cheque for 10 pounds. Two days later he came and asked for his discharge. McLeod refused this until he had finished shearing at Bairnsdale. Moore said he did not 'care a damn' and left. In his defence, Moore claimed that McLeod made an agreement with John Moore not Thomas Moore and that he was only to shear at Buchan. The Bench sentenced Thomas Moore to 1 month's imprisonment for having committed a breach of his employment contract.<sup>178</sup>

This same class of rural servants could also maintain an action for non-payment of wages. They also had at their disposal the defences that the master misused them, refused to provide necessary provisions, furnished bad quality provisions, failed to pay their wages, and subjected the servant to cruel or other ill treatment. Masters could not assault their employees.<sup>179</sup> Magistrates had complete discretion in the disposition of such matters and were to dispose of such matters in a manner that they determined to be 'fair and reasonable'.<sup>180</sup> In *Margaret Young v George Claridge*,<sup>181</sup> the complainant employee alleged that the employer assaulted her by breaking a plate over her head and allowing the food upon the plate to fall upon her dress and by throwing a rock at her. The defendant employer claimed sufficient provocation, 'that she had a habit of absenting herself from her work and neglecting her duties and had spoilt the dinner by placing her dirty hands on the food'. He had given 'her the plate and that it had fallen and that he had thrown the stone at some cats near her in the yard'. James Blair, Police Magistrate of the Portland Bench, remarked that there was some provocation but that the defendant should not have taken the matter into his own hands but should have applied to the court and had the agreement cancelled. The employer was fined 5sh and 6p costs. The defendant then

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<sup>178</sup> *Ibid*, at p.63.

<sup>179</sup> VPRS 34/P/1, 17 November 1842, In *Re George Claridge* for assault against his employee Margaret Young. Found guilty and order to pay fine of 5 sh to Benevolent Society with costs of 6/6 by the Portland Bench.

<sup>180</sup> 9 Vict. No.27, c.IX.

<sup>181</sup> *Portland Guardian and Normanby General Advertiser* 19 November 1842, on 17 November 1842.

charged the employee with being absent from his premises without permission and the Bench directed that the employment agreement be cancelled but that she was to receive the balance of her wages. In the case of *Henry Williams v L. W. Davis*,<sup>182</sup> before W. O. Raymond and John King of the Alberton Bench, Williams deposed that pursuant to an agreement made, that he work for Davis for one month, then weekly thereafter at a wage of 5sh per week and a quarter pound of tobacco, Williams gave one weeks notice after serving three days of the further period. He claimed that Davis after hearing of his intention to leave, shook him and threatened him with the treadmill. The Bench found in favour of Williams and ordered the master Davis to pay the complainants wages in the amount of 17sh 6d. The court ordered this to be paid within fourteen days.

Servants often claimed that the master provided them with poor or insufficient rations and living conditions. In *John Batman v Phillip Carmody*,<sup>183</sup> Batman claimed that Carmody was an indentured servant from 29 August 1836 for 12 months, engaged for the care of cattle, sheep and other like labours. Carmody lost several sheep. When he was asked to retrieve them he asked to be discharged, claiming that the water at the sheep station was bad, and refused to continue working. The Melbourne Bench sentenced him to six weeks imprisonment. In *Arundel Wrighte v Samuel Turner*,<sup>184</sup> Wrighte claimed that Turner was an indentured servant for 12 months from 7 January 1837 as a shepherd. It was claimed that he came to town without leave, disobeying specific instructions to the contrary. Turner claims he came to town because the rations he had been given by Wrighte were insufficient. Wrighte claims that he offered him more but Turner refused to return. The Bench sentenced him six weeks' imprisonment. Wrighte also applied to the Melbourne Bench in *Arundel Wrighte v John Donovan*.<sup>185</sup> Wrighte claimed that Donovan was his servant for 12 months from 2 January 1837 as a shepherd. Donovan complained about his rations and was instructed by Wrighte not to leave his station. Wrighte claimed

<sup>182</sup> Alberton Court Register, 5 November 1845, p.25.

<sup>183</sup> Melbourne Court Register 11 February 1837, *HRV*, I, 359-360.

<sup>184</sup> Melbourne Court Register 16 March 1837, *HRV*, I, 361.

<sup>185</sup> Melbourne Court Register 18 April 1837, *HRV*, I, 363.

that Donovan used gross expressions, took his dog and left. Wrighte procured a warrant for his apprehension, and as Donovan was his only shepherd he claimed that his absence caused loss and inconvenience. The Bench sentenced Donovan to one months' imprisonment. In *George Greeves v William McGrath and James Hood*,<sup>186</sup> before Frederick Berkley St John PM and James Frederick Palmer JP, the employer 'charged' that two servants absconded from his service. In their defence they claim that the meat supplied to them by the employer was unfit for consumption. The court held the agreement cancelled and that each of the defendants were to forfeit two pounds of their wages.

A similar attitude was apparent amongst the rural Benches. In *Robert Sutherland v John King*,<sup>187</sup> Sutherland, a resident of the Moorabool River, appeared before Foster Fyans 'Esquire' at the Geelong Bench. Sutherland deposed that his hired servant had absconded this day [25 March 1839]. He was apprehended by warrant issued the same day and pleaded not guilty. Sutherland deposed that even though King had complained that there was no cooked food or bread for him, that King had also refused to fetch water, was generally bad tempered and had been negligent in his work as a shepherd having lost many sheep to 'the wild and to dogs'. King was ordered by the court to forfeit all wages dues to him for the first period of his employment. In *Archibald McLeod v John Gale & John Winstanley*,<sup>188</sup> before C. J. Tyers and James MacFarlane and John King of the Alberton Bench, John Marshall McLaren, superintendent for McLeod, deposed that the two had absconded, were still under their agreements, and that both men were in debt of 12sh 7p and 2 pounds 7sh 10p respectively. He also stated that he had objected to give them further rations because there were sufficient rations at the head station. In their defence the men maintained that they believed that their agreements had been breached and had left to seek redress.<sup>189</sup> The Bench held that they both be sentenced to be 'committed to the House of Corrections for one calendar month'.<sup>190</sup>

<sup>186</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, Wednesday 26 July 1843.

<sup>187</sup> Geelong Court Register 25 March 1839, *HRV*, I, 416-417.

<sup>188</sup> Alberton Court Register, 2 September 1846, p.85.

<sup>189</sup> *Ibid*, p.86.

It seems that where there were no aggravating circumstances of misconduct, lack of proper provisioning in itself often gave the servant sufficient grounds to take action against his master. In *Richard Barry v Joseph William Hooson*,<sup>191</sup> involved an allegation by the servant that the master had failed to provide adequate provisions. This matter was heard at the Alberton Bench before W. O. Raymond and John King. In this case Barry deposed that pursuant to an agreement [produced before the court] he had served Hooson for three months and that no flour had been supplied after requests had been made and assurances given 'that he could have some in a few days'. John Bruce, another of Hooson's servants confirmed that Barry had not received the allotment of flour. The Bench ordered Hooson to pay the complainant his wages due within fourteen days of the date of the hearing, thereby impliedly cancelling the employment agreement.<sup>192</sup>

Servants who were paid in the form of cheques or drafts that were subsequently dishonoured were also able to mount an action for proper payment of wages, together with recompense in damages sustained as a result of the dishonour.<sup>193</sup> Servants could also take action against masters based solely upon allegations of 'ill-use' and seek 'amends' of their employment contract.<sup>194</sup> The servant necessarily needed to establish the instance or instances of ill treatment according to the rules of evidence and procedure.<sup>195</sup> More often than not, however, servants would only make allegations of 'ill-use' when they themselves were being prosecuted for contractual breach. In *Sylvester John Browne v Cornelius McDonnell*,<sup>196</sup> Browne claimed that McDonnell had been engaged for six months or until the ship *Denmark* returned from Sydney. The articles had been signed in Sydney

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<sup>190</sup> *Ibid*, p.86A.

<sup>191</sup> Alberton Court Register, 3 November 1845, p.23.

<sup>192</sup> *Ibid*, p.24.

<sup>193</sup> 9 Vict. No.27, c.X.

<sup>194</sup> 9 Vict. No.27, c.XI.

<sup>195</sup> Plunkett, *op.cit.*, p.300.

<sup>196</sup> Melbourne Court Register 19 November 1838, *HRV*, I, 400.

on 30 September 1838 and he absconded on 9 November 1838. McDonnell claimed that he could not get meals without applying to Captain Browne and was subjected to bad language. He also claimed that the vessel was not seaworthy and that he had not signed articles for any period. He was nevertheless sentenced to 14 days imprisonment. In *J. W. Davis v William Carrington*,<sup>197</sup> involving a master and servant dispute and an absconsion, before Charles J. Tyers JP and John King JP of the Alberton Bench, Davis deposed that Carrington was hired in Hobart Town, under an agreement produced to the Bench. His passage to Port Albert was paid, but after a month in service he absconded with 13 sh wages due to him. In his defence Carrington claimed that he left 'as a consequence of some language used by Mr. Davis'.<sup>198</sup> The Bench sentenced William Carrington to three months imprisonment in the House of Corrections in Melbourne and ordered that afterwards he was to return to 'his master's service'.<sup>199</sup>

At the end of the employment period, save and except for servants hired on a weekly basis, servants were to receive a discharge of service certificate from their employer. Refusal by the employer was punishable by a fine of five pounds, whereupon a magistrate was empowered to make out such a certificate of discharge that had been unreasonably withheld by an employer.<sup>200</sup> Servants were required to produce these certificates to new employers, save and except where they were a newly arrived immigrant, first-time employee, or a previously employed employee. The penalty for a breach of this provision was the hefty sum of 10 pounds, with, interestingly, the legislation specifying that half of the amount paid was to go to the informer in the matter.<sup>201</sup> The same penalties were to apply to when false discharge certificates were produced or passed off.<sup>202</sup> The legislature also took a dim view of any employer who

<sup>197</sup> Alberton Court Register, 3 March 1847, p.105.

<sup>198</sup> *Ibid*, p.106.

<sup>199</sup> *Ibid*, p.107.

<sup>200</sup> 9 Vict. No.27, c.XII.

<sup>201</sup> 9 Vict. No.27, c.XIII.

<sup>202</sup> 9 Vict. No.27, c.XIV.

purposefully employed, received or entertained any servant already in the employ of another. Upon conviction, the employer was liable to a fine not exceeding twenty pounds, with the informer again, specifically to receive half of the amount determined by the court.<sup>203</sup> In *Archibald McLeod v James Aitken*,<sup>204</sup> before William Odell Raymond Esq JP and John King Esq JP of the Alberton Bench, McLeod, a 'gentleman settler' deposed that Aitken had harboured his absconded servant William Walsh and had employed him. In his defence Aitken stated that he 'was sorry', that 'the man was in his service' but that Walsh had represented that 'he was discharged from McLeod's service'. The Bench found James Aitken guilty of harbouring McLeod's servant William Walsh and fined him the penalty of five pounds with ten days to pay the fine.<sup>205</sup> The allegations were not always sustainable, even if the complainant was himself a senior magistrate. In *W. O. Raymond JP v William Perry*,<sup>206</sup> involving an allegation of taking another's servant, before Lachlan McAlister JP and John King JP of the Alberton Bench, Raymond deposed that Perry took his servant, 'a black boy named Malyar' to help him search for Perry's lost bullock. He claimed that they went to Mr. Willis's station, then returned and then left again. The Bench held that the case be dismissed for want of proof.<sup>207</sup>

It has been argued that these 'anti-poaching' provisions were an attempt to stabilise the workforce in the 'tight labour market' during the period. It has also been suggested that these types of provisions are consistent with the principles established by the Statute of Labourers 1351. This legislation sought to punish and penalise those who induced breaches of contracts of employment and which were later used to fight the development of unionism<sup>208</sup> and their interference with the sanctity of the contract of

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<sup>203</sup> 9 Vict. No.27, c.XV.

<sup>204</sup> Alberton Court Register, 4 February 1846, p.65.

<sup>205</sup> *Ibid*, p.66.

<sup>206</sup> Alberton Court Register, 3 February 1847, p.98.

<sup>207</sup> *Ibid*, p.101.

<sup>208</sup> Merritt, A., 'Forgotten Militants: Use of the New South Wales Masters and Servants Acts by and against female employees 1845-1930', *Law and History in Australia*, Law and History Conference Papers, May 1982, pp.54-108, at p.64.

employment. The legislation also contained an umbrella provision that decreed a general jurisdiction to a Bench of magistrates in all master and servant disputes that have not been particularised within the legislation. The Bench was empowered to again issue summons upon sworn complaints, hear the submissions of parties and make any and all determinations including the ordering of fines, warrants of distress and commitments to prison.<sup>209</sup> A similar umbrella approach was also followed in terms of the power of magistrates to rescind employment contracts.<sup>210</sup> The legislation also gave legal standing to foreign masters and masters from other portions of the Empire who contracted by way of indenture with persons who were present within this Colony. In the event that any such person attempted or affected the concealment of that servant, upon conviction they were bound to pay triple costs in such adjudications.<sup>211</sup> The legislation also formalised the powers of two justices to deal with such breach of indentures by way of fine or imprisonment.<sup>212</sup>

The definition clause in the legislation allowed the definition of a 'servant' to 'include all agricultural and other labourers and workmen, shepherds, stockmen, and artisans, domestic and other servants'. This is further evidence that the master and servant legislation was specifically designed to address and include 'rural' master and servant disputes.<sup>213</sup> Romantic notions of rural mechanics being sylvan heroes of the bush should be approached with caution. Some rural labourers, especially the shepherds, were 'a very rough lot'.<sup>214</sup>

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<sup>209</sup> 9 Vict. No.27, c.XVI.

<sup>210</sup> 9 Vict. No.27, c.XVII.

<sup>211</sup> 9 Vict. No.27, c.XIX.

<sup>212</sup> 9 Vict. No.27, c.XX.

<sup>213</sup> 9 Vict. No.27, c.XXI.

<sup>214</sup> 'The shepherd's life is celebrated, in prose and verse, as being one of peace and happiness, but to see a shepherd here would quite do away with all that. He is more like a Spanish brigand or freebooter than anything else, with a gun and a bayonet on his shoulder, an old rusty sword at his side and a brace of pistols stuck in his belt'; *Graham Papers, op.cit.*, p.43.

The legislation did discriminate on the grounds of gender, specifically stating that ‘nothing’ in the legislation should be interpreted to authorise the imprisonment of any female servant for any offence under the legislation.<sup>215</sup> Prior to this enactment, the Port Phillip magistracy in their adjudications were somewhat inconsistent in their dispositions when the defendant servant was female. In *Arundel Wrighte v Sarah Caraboyne*,<sup>216</sup> Wrighte claimed that Caraboyne was indentured for six months from the date of his arrival at Port Phillip on 25 January. Wrighte claimed that on the morning of 28 February 1837 she refused orders from Mrs Wrighte and then Mr Wrighte. She had been asked to clean the iron boiler. It was also claimed that she was insolent, that she has also been absent from her work and had exhibited other previous acts of insolence. She was sentenced to three weeks imprisonment and forfeiture of the last part of wages due. On the other hand, in *Dr Barry Cotter v Jane Stanbury*,<sup>217</sup> Cotter claimed Stanbury to be his servant for three months having been hired as a general house servant on 27 August 1838. Cotter alleged that she had left his service without permission and that she had taken her things away in a clandestine manner. He added that since then ‘she has set me a defiance.’ The Bench initially sentenced her to be imprisoned for 14 days, but promising to do her duty, the Bench agreed to not enforce the judgement. In *Mrs Eliza Coulson (Batman) v Ellen Ryan*,<sup>218</sup> Ryan appears by warrant before William Lonsdale Esq. to answer a complaint by Coulson for leaving her service on 23 October 1838 without permission. Ellen Ryan, the ‘prisoner’ pleaded guilty and was sentenced to fourteen days imprisonment. Similarly in *Joseph Solomon v Catherine Hollins*,<sup>219</sup> Hollins appeared by warrant before William Lonsdale Esq. to answer a complaint by Solomon for leaving his service yesterday (27 December 1838) without permission. Catherine Hollins, the ‘prisoner’ pleaded guilty and was sentenced to fourteen days imprisonment. By the early 1840s, the Melbourne Bench seemed less

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<sup>215</sup> 9 Vict. No.27, c.XXII.

<sup>216</sup> Melbourne Court Register 28 February 1837, *HRI*, I, 360.

<sup>217</sup> Melbourne Court Register 29 September 1838, *HRI*, I, 394.

<sup>218</sup> Melbourne Court Register 29 October 1838, *HRI*, I, 398.

<sup>219</sup> Melbourne Court Register 28 November 1838, *HRI*, I, 401.

inclined to imprison female servant defendants. *Peter Miller v Mary Milt*<sup>220</sup> involved Miller seeking a warrant for a servant absconding from his service. Milt was presented before the Bench on the same day. It appears that she was an apprentice as per the indentures produced before the court and that she had absconded from Miller's service. The court ordered her back to his service and simply admonished her for her absconscion. The legislation also allowed appeals from any decision of one or two justices in their masters and servant jurisdiction that resulted in a conviction under that jurisdiction, to the next court of Quarter Sessions within the district. Such appeal however, required the lodgement of sureties equal to double the amount of the penalty incurred at the original hearing. The decision of the Quarter Sessions was to be final,<sup>221</sup> as no conviction under the legislation or decision of the Quarter Sessions acting as an appellate court was to 'be quashed for want of form' or subject to a writ of certiorari or subject to any review by the Supreme Court of the Colony.<sup>222</sup> A six-month limitation of actions was also placed upon matters justiciable under the master and servant legislation.<sup>223</sup>

It has been argued that a great divide exists between the property-less classes and the bourgeoisie in terms of their legal equality<sup>224</sup> and that the English Master and Servants legislation typified the systemic inequality of the pre-modern period,<sup>225</sup> where deference became a crucial element underpinning the philosophy of the eighteenth and nineteenth century employer. The 'doffing' of the workman's cap and the unreciprocated greeting were part and parcel of the purchase made by the master<sup>226</sup> with substantive

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220 VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845; 22 August 1843: before Frederick Berkley St John PM and James Smith JP.

221 9 Vict. No.27, c.XXV.

222 9 Vict. No.27, c.XXVI.

223 9 Vict. No.27, c.XXVII.

224 Weber, M., *On Law in Economy and Society* (New York, 1967) p.355; McQueen, R., 'Master and Servants Legislation in the 19 Century Australian Colonies', *Law and History in Australia Vol.IV*, Conference Papers 4th-5th Law in History Conferences, La Trobe University 1985-1986 p.78.

225 Webb, S. & B., *Industrial Democracy* (London, 1962) p.149; McQueen, R., *op.cit.*, p.81.

226 Webb, *ibid*, p.842n; McQueen, *op.cit.*, p.84.

inequalities undermining the fiction of 'legal equality' within the employment relationship.<sup>227</sup> This 'fiction' is demonstrated in the belief that employment contracts have always been unable to 'anticipate all relevant contingencies'. It is also demonstrated in the ability of the employer to arbitrarily determine whether the acts of their employees were reasonable, which would sometimes result in fair conduct being judged according to unfair precepts.<sup>228</sup>

The Colonial Masters and Servants Acts allowed employees to make claims against their employers. These were essentially civil claims. On the other hand the employer was able to take action before the magistrates for claimed breaches of the employment contract on claims for neglect, loss of property, misconduct and absconding, which were criminal in nature.<sup>229</sup> The claims under the Masters and Servants Acts thereby bridged the gulf between civil and quasi-criminal prosecutions, although it should be noted that by 1857, imprisonment was only an option if financial penalties were not paid or satisfied by an action in distress and sale of goods.<sup>230</sup> The Colonial Master and Servants legislation was indeed welcomed by sections of the community who saw the disrespectful actions of the servant class as a grave problem in the colonies. These actions, apart from being an affront to their master's temporal authority, challenged the master class's sense of moral authority,<sup>231</sup> and formalised a control over the employee by linking behaviour with employment status.<sup>232</sup> It has been argued that the legislation codified the perceived need to preserve subordination and discipline within the ranks of the servant class,<sup>233</sup> with

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<sup>227</sup> McQueen, R., *op.cit.* pp.78-79.

<sup>228</sup> Fox, A., *Beyond Contract: Work, Power and Trust Relationships* (London, 1974) pp.183-184; McQueen, R., *op.cit.*, p.79.

<sup>229</sup> McQueen, R., *op.cit.*, pp.79-80.

<sup>230</sup> Merritt, *op.cit.*, p.63.

<sup>231</sup> *Sydney Gazette*, 15 August 1839; McQueen, R., *op.cit.*, p.80; Davidson, A. P., 'A Skeleton in the Cupboard; Master and Servants Legislation and the Industrial Torts in Tasmania', 5 *University of Tasmania Law Review*, (1975) pp.123-146 at p.129.

<sup>232</sup> Crowley, F. K., 'Working Class Conditions in Australia 1788-1851', PhD Thesis, 1949, University of Melbourne, p.486; McQueen, R., *op.cit.*, p.81.

<sup>233</sup> Sullivan, M., 'Master and Servant in New South Wales before 1850', 3 *Push from the Bush*, 1979, p.45; McQueen, R., *op.cit.*, p.81.

imprisonment and indeed solitary confinement a likely punishment for 'free' men as dangerous criminals'.<sup>234</sup>

It has been argued that colonial employees faced with institutional inequalities and their presumed status of deference and subordination 'tenaciously clung to their self respect' either during the magisterial adjudication,<sup>235</sup> in organised protests,<sup>236</sup> or in printed protests.<sup>237</sup> There seems to have been a 'push' by rural servants during the mid 1840s,<sup>238</sup> although there has been some suggestion that this 'agitation' was based upon a desire to distinguish themselves from those elements of the convict labour force. Indeed, attempts to improve the lot of the workingman in pre-Separation Melbourne were hazardous, given the *Masters and Servants Act* and the Combination laws. Most importantly however, the move to industrial action lacked widespread political support in the early Port Phillip settlement. Bakers' assistants attempted to artificially raise the price of bread in 1840 and refused to work for those who undersold that price. They were charged with conspiracy and convicted before the Melbourne Bench of magistrates and either fined or gaoled.<sup>239</sup> A similar event occurred in late 1840 with the Melbourne butchers and their combination to artificially maintain the price of meat. Their actions were denounced in the press as being 'an offence punishable by law'<sup>240</sup> for at the time, and even in the liberal newspaper the *Gazette*, it was believed that 'nothing can be more injurious to small communities than combinations of any description'.<sup>241</sup> Magisterial master and servant adjudications in the

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<sup>234</sup> Davidson, *op.cit.*, p.125.

<sup>235</sup> *Re Higgins* (shepherd), 6 January 1847, Alberton Bench Books, 5905/1; McQueen, R., *op.cit.*, p.82.

<sup>236</sup> 30 September 1840, Sydney; McQueen, R., *op.cit.*, p.82.

<sup>237</sup> *The Standard*, 1 November 1845; McQueen, R., *op.cit.*, p.82.

<sup>238</sup> PPP, 17 December 1845; PPH 25 December 1845; Hughes, H., 'The Eight Hour Day and the Development of the Labour Movement in Victoria in the Eighteen Fifties', *Historical Studies*, 9, 1960, p.269; McQueen, R., *op.cit.*, p.83.

<sup>239</sup> PPP 15 March 1840, 30 March 1840, 9 April 1840, cited in McGowan, *op.cit.*, p.72.

<sup>240</sup> PPH 27 August 1841, cited in McGowan, *op.cit.*, p.72.

<sup>241</sup> PPG 12 April 1845, cited in McGowan, *op.cit.*, p.72.

colonial period must be viewed within the context of the English *Combination Acts*<sup>242</sup> and the apparent fear in the ruling elite class that the labouring classes were a constant threat to political and industrial stability.<sup>243</sup> Even with the 1825 amendments to the Combination Acts, which allowed for the negotiation of hours of work and wages, the Crown still feared any attempt by the labouring class to bind together; it feared and anticipated violence and intimidation from the lower orders.<sup>244</sup> The prosecution of six Dorset farm labourers under the *Unlawful Oath Act*, the now famous *Tolpuddle Martyrs*, who were transported to the Australian colonies for their oath of industrial allegiance, determined in 1834, was a matter therefore generally falling within the time-frame under present examination.<sup>245</sup> In Port Phillip, trade associations were slowly but eventually formed and made demands on behalf of builders,<sup>246</sup> water carriers,<sup>247</sup> domestic servants,<sup>248</sup> tailors, dressmakers and labourers.<sup>249</sup> Parallel moves began in professional circles in the same period. The legal profession sought to combine, when, for example, in 1845 solicitors in Melbourne 'formed an association to protect the profession from interlopers of which there were plenty'.<sup>250</sup>

Up until the latter part of the nineteenth century, the Australian colonial economy was based upon small-scale capitalist operations<sup>251</sup> that by their nature, especially in the

<sup>242</sup> 1799 39 *Geo. III*, c.81; 1800 39 & 40 *Geo. III*, c.60.

<sup>243</sup> The infection of the English working class by the principles of the French Revolution, The Irish Rebellion and the 1797 Naval mutiny (see *Unlawful Oath Act 1797* and *Unlawful Societies Act 1799*); to guard against 'the ruinous extortions of workingmen', see Webb, S. & B., *History of Trade Unionism*, p.65, all cited in McGowan, *op.cit.*, p.82.

<sup>244</sup> See *R v Rowlands* (1851) 5 Cox CC 436.

<sup>245</sup> *R v Loveless* (1834) 174 ER 119.

<sup>246</sup> PPP 14 September 1840, cited in McGowan, *op.cit.*, p.83.

<sup>247</sup> PPG 12 February 1843, *Argus* 11 June 1847, cited in McGowan, *op.cit.*, p.83.

<sup>248</sup> PPG 14 May 1845, cited in McGowan, *op.cit.*, p.83.

<sup>249</sup> PPH 24 April 1846, 30 April 1846, 5 May 1846, 7 May 1846, 26 May 1846, cited in McGowan, *op.cit.*, p.83.

<sup>250</sup> PPG 26 July 1845, cited in McGowan, *op.cit.*, p.87.

<sup>251</sup> Hughes, *op.cit.*, p.264.

urban centres of Sydney and Melbourne, demanded close quarter inspections between the master and the servant class. It has been argued that the Colonial Master and Servants legislation left an indelible imprint upon the system of labour relations well into the twentieth century,<sup>252</sup> although there has been some question as to whether this proposition relates more to members of the rural than the urban employee class.<sup>253</sup> In terms of magisterial adjudications, it has been argued that generally, urban employees made claims for smaller amounts of unpaid wages with a median of between 1–5 pounds, as opposed to rural claims that averaged between 10–20 pounds. The differing contractual periods of engagement seems to explain this finding. Rural engagements were for substantially longer periods and with circumstances of high demand and rising wages more apparent in rural areas,<sup>254</sup> absconsions were an inherent ‘occupational’ risk undertaken by both parties to the employment contract. Masters were advised to take advantage of the low wages during the recession years and to engage their servants immediately on 12-month contracts. Some masters would also participate in the truck system, or charge high rates for consumables on the station, or pay their servants, especially rural labourers in bank notes which the servants could only cash ‘in Town’. Masters could also simply not pay their employees, either because they could not or because they wanted to try their luck before the magisterial Bench. By the middle of the recession years the magisterial Bench in Melbourne was flooded with master and servant adjudications which were now in the main being brought by unpaid labourers instead of employers complaining about their lazy, rude or absconding labourers.<sup>255</sup> A typical day at the Melbourne Bench during this period, 17 August 1843, supports the proposition that

<sup>252</sup> Merritt, A., ‘The Historical Role of Law in the Regulation of Employment - Abstentionist or Interventionist?’, Vol.1, No.1, *Australian Journal of Law and Society*, 1982, p.61; McQueen, *op.cit.*, pp.84–85.

<sup>253</sup> Fry, E. C., *The Condition of the Urban Wage Economy Class in Australia in the 1880’s*, PhD Thesis, 1956, ANU, pp.480–481; McQueen, *op.cit.*, p.85.

<sup>254</sup> McQueen, *op.cit.*, p.87.

<sup>255</sup> PPG 15 April 1842; Giving stock to servants instead of wages, De Labilliere, F. P., *Personal Remiscences*, *op.cit.*, p.329; PPH 13 January 1844; PPP 13 February 1843; PPP 16 March 1843, with so many matters being heard or listed the *Port Phillip Patriot* seemed to be asking servants to hold off enforcing their actions lest they ‘compel their masters to seek refuge in the Insolvency Court’; by May 1843, so many masters and servant applications were before the court that the court indicated that it would only hear matters supported by written agreements, which did not help either party in enforcing their rights if a written agreement did not exist, PPP 8 May 1843, 29 May 1843; cited in McGowan, *op.cit.*, pp. 83–84.

the recession was having an enormous effect upon the employers' ability to pay wages of their employees. On that day there were five masters and servant matters. All involved wages being due and unpaid. All were before Frederick Berkley St John PM JP and James Smith Esq JP. The plaintiff servants were successful in all applications.<sup>256</sup> Negotiated settlements, whatever the economic climate, it seems, always paid off.<sup>257</sup>

It has also been suggested that ex-convicts were subject to harsher imprisonment rates for breaches of employment agreements than non-convict employees as part of a moral categorisation that assumed that harsher discipline was needed for those hardened by their earlier experiences.<sup>258</sup> The available case records do not seem to entirely support this proposition, although it is interesting to note that the Bench records included phrases such as 'free by servitude' and / or 'free immigrant' to distinguish between those who had served government terms and those who had not. The Port Phillip Bench book records do not reveal 'terror as the nexus between Master and Servant'<sup>259</sup> nor identify 'the vehicle' of such terror as being the legislation that regulated the relationship.<sup>260</sup> Real 'terrorism' would have denied servants their right to claim wages instead of a statutory right to do so. It has been argued, for example, that the 1845 amendment to the *Masters and Servants Act* sought to empower rather than further punish servants, in terms of wage recovery rights, ill treatment provisions, appellate mechanisms and the prohibition of

<sup>256</sup> In *John Anderson v Henry Kent Hughes* the court ordered payment of wages 15 pounds 11 sh and costs of 10s, a total 16 pounds 1sh. In *John McConochie v William Furstbrig*, the court heard that McConochie had been engaged as a shepherd and was owed wages. The court awarded him a massive 30 pound with costs of 1pound 3sh and 6p. In *William Kirkpatrick v John Reed*, the court awarded wages owed of 9 pounds 12 sh 6p, costs 18s and 6p. In *James Carlton v John Mildred Sawyer* the court ordered the defendant employer pay wages of 10pounds 7sh 4p and costs of 3/ 6. In *Joseph Suwart v James Kell* the court ordered the defendant employer pay wages of 2pounds 10sh and costs of 3/ 6; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 17 August 1843; see also Tuesday 9 January 1844, before Henry Condell and Charles Payne Esq JP, three matters regarding suspicion of being run away or illegally at large and five wages owed matters.

<sup>257</sup> *William Gray v William Kilgore*, before Frederick Berkley St John Esq PM JP and James Smith Esq JP, involved a master and servant matter concerning wages owed of 30 pounds. A counter-claim of a breach of the agreement was alleged. By consent of both parties, Kilgore was only ordered to pay 5 pounds; VPRS 2136, *op.cit.*, 26 August 1843.

<sup>258</sup> McQueen, *ibid*, p.88.

<sup>259</sup> Clark, C. M. H., *A History of Australia, Vol. III: The Beginning of Australian Civilization* (Melbourne, 1973) p.182; McQueen, *op.cit.*, p.96.

<sup>260</sup> McQueen, *ibid*, p.96.

magistrates adjudicating in matters concerning their own servants.<sup>261</sup> This moderation of attitudes, no doubt reflected a sober assessment of labour supply realities. Outright terror would not have led to the imprisonment of masters for ignoring orders to pay wages held to be owed. A reign of terror would have made protest impossible and would have aborted insolence at a level well prior to inception. A 'French Terror' would have bloodied the streets in a mass collision of 'rights'.

The Port Phillip evidence instead tends to suggest that working mechanics, given the economic realities of colonial labour shortages in the pre 1850 period enjoyed a social status and economic independence denied them in England. This was because the English social and economic construct was not fully adaptable to colonial conditions. The demographic colonial reality was that mechanics were in essential demand in the small-scale capitalist enterprises that dominated the colonial period and their masters, especially the woollen squatters, would fail without them and their full co-operation. This meant that labourers, especially rural mechanics, were more ready to speak their mind, challenge authority, demand more than their entitlement and generally undermine the entire work relationship. It has been observed that the fluctuations in the labour market generally affected the master class in terms of inconvenience and a barrier to greater profits, more than it affected the servant class. The demand for labour in Port Phillip in both urban and rural centres had long been a problem.<sup>262</sup> Labour demands also included demands for 'quality labour'. As early as 1838, for example, Police Magistrate Lonsdale argued that an immigrant ship sent to the settlement would be a 'very great boon', as the current supply of labour was 'of a very bad description'.<sup>263</sup> The inferiority of convict labour<sup>264</sup> and the cessation of the assignment system<sup>265</sup> eventually forced employers to the

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<sup>261</sup> Vic. No.27, 12 November 1845, amended in 1847, 11 Vic. No.9, 16 August 1847; McGowan, *op.cit.*, p.76.

<sup>262</sup> Lonsdale to Col. Sec. 21 July 1838, C-S Outwards, 38/93, cited in McGowan, *op.cit.*, p.77.

<sup>263</sup> Lonsdale to Col. Sec. 10 November 1838, C-S Outwards, 38/155, cited in McGowan, *op.cit.*, p.79.

<sup>264</sup> Even though escaped convicts were at times illegally harboured and employed by desperate employers, Baker, *op.cit.*, p.125, cited in McGowan, *op.cit.*, p.76.

<sup>265</sup> Government Notice, 17 January 1839, effective from 1 July 1839, cited in McGowan, *op.cit.*, p.76.

immigrant market. Urban and rural employers were constantly seeking servants, with female domestic<sup>266</sup> and skilled labour particularly at a premium.<sup>267</sup> In the final analysis, however, wages in colonial Australia were relatively high,<sup>268</sup> conditions were better than in England,<sup>269</sup> and Port Phillip was perceived as being 'one of the finest [colonies] in the world: a land of peace and plenty'.<sup>270</sup> There was a perception that the colonies were a workingman's paradise, where 'artisans of whatever denomination, in this part of the world, must be either thoroughly idle, or irreclaimable drunkards not to prosper'.<sup>271</sup> There appeared to be a loss of Englishness under a peeling colonial sun, which baked the senses of the isolated populace and rapidly stripped away subservient conduct that had taken centuries to establish in England. The Port Albert mechanic might doff the cap initially and instinctively as a Dorset farm hand must, but continued subservience was only conditionally purchased according to a master's future conduct. The magistrates adjudicated on these social relations within the context of defined social hierarchy. Social hierarchy and property relations go hand in hand. The magistracy was a key agency in keeping social and spatial relationships operating in tandem. These relationships were most observable in urban spatial relations.

## URBAN SPACE & SOCIAL ORDER

THE INCORPORATION OF the cities of Sydney<sup>272</sup> and Melbourne<sup>273</sup> was of paramount importance to the office of the magistracy. The legislation declared Sydney to

<sup>266</sup> PPG 6 November 1839, 11 January 1845 (25% of shops had placards for female servants), 30 April 1845 (the ladies of Melbourne are in perfect misery for want of good servants), cited in McGowan, *op.cit.*, p.77.

<sup>267</sup> Lonsdale to Col. Sec., 25 March 1837, C-S Outwards 37/25, *Melb. Adv.* January 1838, PPG January 1839, cited in McGowan, *op.cit.*, p.77.

<sup>268</sup> McGowan, *op.cit.*, p.84 and Appendix of Wages.

<sup>269</sup> PPG 27 July 1839, Cluttbuck, J. B., *op.cit.*, pp.109-110, Fowler, F., *Southern Lights and Shadows*, *op.cit.*, p.78, cited in McGowan, *op.cit.*, p.84.

<sup>270</sup> PPP 19 October 1843, cited in McGowan, *op.cit.*, p.84.

<sup>271</sup> PPG 11 January 1839, cited in McGowan, *op.cit.*, p.84.

<sup>272</sup> Plunkett, cited hereafter, *op.cit.*, pp.147-148; 6 Vict. No.3.

be a city and both places to have its inhabitants 'constituted into a body corporate and body politic'. The legislation made the Mayors of both centres *ex-officio* Justices of the Peace during the term of their office and for the year following the year in office.<sup>274</sup> The Governor, however, still retained the power to appoint justices of the peace for both Sydney and Melbourne.<sup>275</sup> The Councils of both Sydney and Melbourne were empowered to make *bye laws* for their regulation, good rule and government, with the rider that these *bye laws* must not be repugnant to the 'laws of the Colony'.<sup>276</sup> The town limits were to be marked by the Surveyor-General and published in the Government Gazette, with their servants immune from action in trespass in the furtherance of such matters<sup>277</sup> with surveyors and their legislative powers undisturbed by the powers contained within the Police Act.<sup>278</sup>

The Police Magistrate of each Town was also obliged to annually perambulate the town limits.<sup>279</sup> Police Magistrates were empowered to affix street names and allot street numbers, and, after 14 days' notification, upon conviction for non-compliance occupiers could be fined 10 shillings and a like sum for every week of such refusal or neglect.<sup>280</sup> As an adjunct to the incorporation of the city of Sydney and the town of Melbourne, the Councils of both places were empowered to regulate the operation of markets<sup>281</sup> within

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<sup>273</sup> 6 Vict. No.7.

<sup>274</sup> *Ibid*, s.62.

<sup>275</sup> *Ibid*, s.64. A jurisdictional restriction was eventually placed upon justices. The territorial justices lacked jurisdictional competency to automatically act within the limits of Sydney and Melbourne, 'to act or intermeddle in any matters or things arising within the said city or town, in any manner whatsoever' (7 Vict. No.25, s.3). where warrants, for example, issued by territorial justices, needed to be endorsed by an urban magistrate and vice versa. (6 Vict. No.13, s.2.)

<sup>276</sup> 6 Vict. No.7, s.92.

<sup>277</sup> 2 Vict. No.2, s.43.

<sup>278</sup> 2 Vict. No.2, s.51.

<sup>279</sup> 2 Vict. No.2, s.44.

<sup>280</sup> 2 Vict. No.2, s.52..

<sup>281</sup> See Markets, in Plunkett, *op.cit.*, p.293.

their limits.<sup>282</sup> Legislation was also enacted to govern market practices within country towns throughout the Colony and for the appointment of Market Commissioners.<sup>283</sup> These colonial enactments were consistent with the Crown policy of regulating and regularising commercial and social intercourse within colonial population centres. The degree of Crown regulation of commercial and social public intercourse in public streets therefore meant, in real terms, that the streets did not belong to the public. There was no presumption of public ownership of public places, with, in fact, specific regulations that aimed at any person who, in whatever manner, wilfully obstructed, hindered or molested any person 'having control of the streets' in the execution of their duties. This type of legislation was designed to protect surveyors or other public officials, including magistrates and constables, in their dominance of day-to-day civic intercourse.<sup>284</sup>

Further legislative evidence of this 'state ownership' of public places can be found in the *Processions (Party) Act*,<sup>285</sup> designed to meet public order demands subsequent to the outbreak of electioneering riots and the accompanying religious strife in Melbourne in the early 1840s.<sup>286</sup> During the early part of the Melbourne settlement, a religious harmony existed which was noted and commended in the newspapers. This harmony was first disrupted during the election campaign for the Port Phillip representative in the New South Wales Legislative Council in 1843 where the two major candidates were the Presbyterian Reverend John Dunmore Lang and the Catholic Edward Curr. Letters began appearing in the *Patriot*.<sup>287</sup> Some suspected William Kerr,

<sup>282</sup> 6 Vict. No.8, s.71, *ibid*, p.293.

<sup>283</sup> 5 Vict. No.2, *ibid*, p.293.

<sup>284</sup> 2 Vict. No.2, s.55.

<sup>285</sup> See Processions, in Plunkett, *op.cit.*, pp.368-370.

<sup>286</sup> Processions Act 1846, 10 Vict., 'An Act to prevent for a limited time, party processions and certain other public exhibition in the Colony of New South Wales', LCNSW. This was one of Plunkett's landmark pieces of legislation, widely praised; see Ronayne, *op.cit.*

<sup>287</sup> One letter from a 'Scottish Highlander' raised the 'bigotry' of Lang; an editorial raised Curr's possible 'Jesuit' origins and abject 'popery'; another from a 'lowland Scot' added nothing to the broth, save and except sensationalism and a bitter end to Christian religious harmony in Port Phillip; PPH 13 February 1844, *Argus* 13 August 1847; PPP 9 March 1843, 16 March 1843, 27 March 1843, cited in McGowan, *op.cit.*, p.95.

editor in time of the *Patriot*, the *Courier* and the *Argus*, of being responsible for lighting and fanning the sectarian fires that eventually consumed much of Melbourne in the late 1840s.<sup>288</sup> When Curr was defeated in the election campaign and Lang and freemason Henry Condell were elected, the 'electioneering riots' erupted. Generally the blame for these riots has been placed upon Catholic shoulders. According to the *Patriot*, the 'southern Irish' troublemakers featured in the 'exertions of the un-soaped to create a disturbance'. The resulting disturbance required a reading out of the *Riot Act*, a call out of the 80th Regiment, a discharge of a volley of shots into the air and an order to fix bayonets, before the crowd would disperse. Shortly thereafter an Orange Society and a Protestant Confederation of Australia Felix<sup>289</sup> were formed. There was also a proposal to celebrate the anniversary of the Battle of the Boyne on the 12 July 1844, by marching in the streets of Melbourne. Catholic leaders called for peace and a memorial was sent to La Trobe to assist in preserving the peace of Melbourne.<sup>290</sup> Some of the outbursts of sectarian violence found their way to the magisterial Bench.<sup>291</sup> Outbursts of violence also occurred in a Melbourne theatre in September 1844,<sup>292</sup> but the main point of ethnic-sectarian violence erupted at the *Pastoral Hotel* on 13 July 1846 when an armed mob of Irish Catholics, firing weapons, descended upon an Orange Anniversary Dinner at the hotel. The battle continued the next day. The police and the military were again called in. The *Riot Act* was read twice, with the military eventually ending the confrontation: the police, whose numbers included men from both Irish persuasions, decided against direct action.<sup>293</sup> The Mayor decided that action was needed, and legislation was drafted and

<sup>288</sup> La Trobe to Col. Sec. 20 January 1848, C-S Outwards, 48/36, cited in McGowan, *op.cit.*, p.96.

<sup>289</sup> PPP 15 June 1843; PPP 19 June 1843; PPH 5 January 1844; PPH 9 January 1844; cited in McGowan, *op.cit.*, p.96.

<sup>290</sup> PPH 9 July 1844, cited in McGowan, *op.cit.*, p.97.

<sup>291</sup> In *Richard Jordan v George Donaldsey*, the Catholic plaintiff Jordan sought an order from the Bench for Donaldsey to be bound over to keep the peace. According to Jordan, who also claimed that 'his house was situated between those of two Orangemen', Donaldsey had broken down his door the previous Saturday night and had danced therein to the tune of 'It will soon be seen what we can do with the Papists'; PPH 1 October 1844; McGowan, *op.cit.*, p.97.

<sup>292</sup> Matters contained in a theatre program were objected to by Catholic members of the audience, a scuffle ensued, the matter went before the Bench of magistrates the following morning and dismissed, PPH 6 September 1844, cited in McGowan, *op.cit.*, p.97.

<sup>293</sup> La Trobe to Town Council, 17 July 1846, C-S Outwards, 46/832; Report Mayor J. F. Palmer 20 July 1846; Report of Chief Constable Sugden 20 July 1846 in Town Council Letters, Inwards, No.322, cited in McGowan, *op.cit.*, p.97.

enacted in the New South Wales Legislative Council. Additional troops were dispatched to Melbourne the following year.<sup>294</sup>

This outburst of sectarian feeling was outside the span of control exercised by the magistrates in colonial Australia. The problem was resolved at a higher level in the political system, with an Act to forbid religious parades drafted by the New South Wales Attorney General of the day. Such legislation, however, provided no long-term solution to the problem of social conflict in the young colony. The solution was inevitably found in the development of civil society. Civil society may be defined as the web of voluntary associations and networks that emerges as colonists move beyond strictly economic objectives over time. The denser the civil society the more likely the work of the magistrates became one of dealing with exceptional circumstances and less on attempting to impose social conventions from above. A well-formed civil society tends towards self-regulation in its everyday life; the business of the magistrates in this context shifts toward problems and conflicts left unresolved in the margins of civil society. The institutions created in the making of civil society do not, however, prosper equally. Early Melbourne is littered with new constructions that were the brainchild of colonial leaders motivated to influence the development of society. Private gentlemen's clubs, mechanics institutes and even a college were mooted.

The resulting legislative initiative was aimed at processions and meetings and any 'emblem, flag or symbol' associated with those processions and meetings which 'may create religious and political animosities between different classes of Her Majesty's subjects ... calculated to occasion riots, tumults and breaches of the public peace'. Meeting, parading and assembling, particularly 'in any public house, tavern or other place within the colony' which by design was 'for the purpose of celebrating, or commemorating any festival, anniversary, or political event relating to or connected with any religious or political distinctions or differences between any classes of Her Majesty's

<sup>294</sup> Fitzroy to Grey, 9 January 1847, *HR4*, I, xxv, pp.307-308; Col. Sec. To La Trobe, 21 September 1846, C-S Inwards, 46/1414; La Trobe to Town Council: Letters Inwards, No.340; Fitzroy to Grey, 30 April 1847, *HR4*, I, xxv, p.532, cited in McGowan, *op.cit.*, p.97.

subjects' was specifically outlawed, declared a misdemeanour, punishable accordingly. Significantly, the Legislative Council gave exception to processions or assemblage connected to itself or its own election.<sup>295</sup>

Justices of the Peace were given the task of enforcing this legislation<sup>296</sup> and were bound, upon detecting such an unlawful assemblage or procession, to read out loud a notice to disperse.<sup>297</sup> The legislation specified that persons upon hearing the notice to disperse had 15 minutes to disperse and to depart the scene, failing which, the magistrate was authorised to arrest 'by warrant' those who remained. The matter was justiciable before two justices. Upon conviction, 'on the oath of one or more credible witness or witnesses' the offender was subject to imprisonment within a House of Corrections for a time not exceeding one calendar month, and for a second and subsequent offence, for a term not exceeding three calendar months.<sup>298</sup> The magistrates and constables also possessed the ancient duty of quelling riots<sup>299</sup> and other disturbances of the peace in the form of riotous assemblies.<sup>300</sup> The Justices of the Peace had long entertained these powers, and were obliged to restrain, pursue, arrest, charge and imprison all rioters.<sup>301</sup> The Justices were themselves liable by fine or imprisonment in default of their sacred and cornerstone duty of preserving the peace.<sup>302</sup> All of the King's loyal subjects were also duty bound under the principle of *posse comitatus* to assist the justices in the suppression of

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<sup>295</sup> Processions (Party) Act 1846, 10 Vict. s.1.

<sup>296</sup> Processions (Party) Act 1846, 10 Vict. s.2.

<sup>297</sup> 'Our Sovereign Lady the Queen doth command and charge all persons being here assembled immediately to disperse themselves, and peaceably to depart, upon the pains contained in the Act of the Governor and Legislative Council of New South Wales'.

<sup>298</sup> Processions (Party) Act 1846, 10 Vict. s.3. The legislation also possessed a sunset clause of three years. (Processions (Party) Act 1846, 10 Vict. s.4.).

<sup>299</sup> See Riot, in Plunkett, *op.cit.*, pp.417-427.

<sup>300</sup> 1 Hawk, c.65, s.11, *ibid*, p.421.

<sup>301</sup> 34 Ed. III., c.1, *ibid*, p.422.

<sup>302</sup> *R v Pinney*, 3 B. and Ad. 947, *ibid*, p.422.

these riots,<sup>303</sup> and being legally sanctioned to carry weapons in this pursuit, were in ancient times permitted to beat, wound and kill any rioter resisting them.<sup>304</sup> Justices of the Peace could also appoint 'Special Constables' from amongst 'respectable householders' to assist in the preservation of peace during times of civil unrest.<sup>305</sup> A riot was defined as 'a tumultuous disturbance of the peace' by an assembly of three or more persons, possessing an intention of mutual assistance, opposing others to the terror of the public.<sup>306</sup> The rioters' criminal intent could be inferred by their actions. The grievance of the rioters must be a private grievance, such as the pulling down of fences which enclose particular lands within which persons have an interest or are involved in legal dispute over, otherwise as a public grievance, where a crowd wishes to pull down all enclosure fences, or to reform religion in general or to remove office-holders, the acts constitute a treason against the monarch and are to be prosecuted as a high treason.<sup>307</sup> The law even condemned self-help in these instances, as even a lawful purpose, such as the abatement of a nuisance, if done in company and creating a disturbance of the peace, was actionable by prosecution.<sup>308</sup> Spontaneous arguments were not considered riots, but merely sudden affrays.<sup>309</sup> Further, if the group did not follow any common purpose, they were again not rioters, but merely an unlawfully assembled group.<sup>310</sup> Threats and circumstances of terror also seemed to be constituent elements of the offence of riot.<sup>311</sup> Women might properly be prosecuted for rioting, but minors could not be subject to the

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<sup>303</sup> 2 H. V., c.8, s.2, *ibid*, p.423.

<sup>304</sup> 1 Hawk, c.65, s.21, *ibid*, p.423.

<sup>305</sup> 1 G. IV., c.37, s.1, *ibid*, p.421.

<sup>306</sup> 1 Hawk, c.65, s.1, *ibid*, pp.417-418.

<sup>307</sup> 1 Hawk, c.65, s.6, *ibid*, p.418.

<sup>308</sup> 1 Hawk, c.65, s.7, *ibid*, p.418.

<sup>309</sup> 1 Hawk, c.65, s.3, *ibid*, p.419.

<sup>310</sup> 1 Hawk, c.65, s.8,9, *ibid*, p.419.

<sup>311</sup> 1 Hawk, c.65, s.5, *ibid*, p.420.

offence.<sup>312</sup> Justices of the Peace, County Sheriffs and Mayors were empowered, when aware of a riotous assembly of 12 persons or more, to make a proclamation of the *Riot Act*.<sup>313</sup> The proclamation was to be read precisely or it would fail in legal effect.<sup>314</sup> Any person opposing the proclamation<sup>315</sup> or refusing to disperse<sup>316</sup> was guilty of a felony and was able to be arrested. Those arresting or assisting in the arrest were granted immunity from prosecution for killing, maiming or hurting the rioters.<sup>317</sup>

Apart from sporadic public riotous explosions, the more immediate and daily pressing concern of the colonial magistrate seemed to be the hordes of dogs that roamed the urban settlements. The colonial obsession with the Dog Acts has been a source of amusement for some historians, but the control of dogs, apart from the immediate public risk-health concerns may be conceptually linked to the overall control of human populations within prescribed urban settings. Contemporary accounts describe how one of the greatest animal dangers in the early Melbourne settlement was the presence of stray dogs. Seventy-five stray dogs were once counted within two streets in December 1838.<sup>318</sup> There were many newspaper reports and complaints concerning the constant attacks and harassment from dogs ‘of the most ferocious aspect’: indeed there were reports that entire packs would commonly follow pedestrians.<sup>319</sup> It was reported that some of these dogs, ‘starved, mangy creatures’ were brought into the town by aboriginal

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<sup>312</sup> 1 Hawk, c.65, s.14, *ibid*, p.420.

<sup>313</sup> ‘Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George the First for preventing tumults and riotous assemblies. God Save the Queen’; 1 G. I., st.2, c.5, s.2, *ibid*, p.424.

<sup>314</sup> *R v Child*, et al. 4 Car. and P.442, where the words ‘God save the Queen’ were omitted, *ibid*, p.424.

<sup>315</sup> 1 G. I., st.2, c.5, s.5, *ibid*, p.424.

<sup>316</sup> 1 G. I., st.2, c.5, s.1, *ibid*, p.424.

<sup>317</sup> 1 G. I., st.2, c.5, s.3, *ibid*, p.424.

<sup>318</sup> PPG 15 December 1838, cited in McGowan, *op.cit.*, p.4.

<sup>319</sup> PPP 2 December 1839, 30 April 1840, 14 May 1840, 26 November 1840; PPH 27 April 1841; PPG 19 November 1842, cited in McGowan, *op.cit.*, p.4.

groups.<sup>320</sup> On the other hand, the ‘new Australian’ white settlers were very attached to their dogs. Some colonials saw their dogs as ‘noble’ and complained at their untimely deaths<sup>321</sup> or theft.<sup>322</sup> They were seen as loyal as ‘pilot fish’, beautiful and savage, the best would ‘not make any distinction between a white or black man, but would tear them indiscriminately.’<sup>323</sup> European settlers, however, were the major passive and active stakeholders in ‘dog crime’. Some settlers were prone to ‘setting’ their dogs at strangers,<sup>324</sup> whilst others were prosecuted for keeping savage dogs. Whatever the particular circumstances, the ‘dog prosecutions’ were a staple part of the regular Port Phillip Bench proceedings.<sup>325</sup>

The enactment of colonial Dog legislation<sup>326</sup> underlines the public health and safety issues related to the presence of dogs within urban centres in colonial Australia. The title itself denotes this relevance.<sup>327</sup> All resultant legal actions were justiciable in a summary fashion before any justice of the peace,<sup>328</sup> within one month of a complaint.<sup>329</sup>

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<sup>320</sup> PPG 19 November 1842, 1 March 1845, cited in McGowan, *op.cit.*, p.4.

<sup>321</sup> Graham, S., *Pioneer Merchant: The Letters of James Graham 1839-1854* (Melbourne, 1985) p.40, whilst overlanding to Port Phillip one such noble creature was killed by a falling tree.

<sup>322</sup> *Ibid*, p.80, Graham to William Elliot 12 July 1842, Graham suspected that Elliot’s men had stolen his ‘very nice Newfoundland puppy’ and urged him to make enquiries.

<sup>323</sup> *Ibid*, pp.56–57.

<sup>324</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 10 August 1843; In *William Rofs v Henry Borne* before Frederick Berkley St John PM and James Smith Esq JP of the Melbourne Bench, upon a charge of settling dog upon the complainant, the case was dismissed because the complainant had kicked the dog when it came near him, then it proceeded to bite him.

<sup>325</sup> VPRS 2136, *ibid*, Saturday 22 June 1844, Under bye law no.9 Town Council Straying Animals; In *R v Peter Whelan*, before James Smith Esq JP, upon a charge of a dog rushing at and attacking one person, Whelan was fined 20sh with costs of 7/6, and damages of 5sh. Later that day Smith presided over five other straying animal matters, including one for an unregistered dog.

<sup>326</sup> 6 W. IV. No.4.

<sup>327</sup> ‘An Act for abating the nuisance occasioned by dogs in the streets of certain towns and on highways in New South Wales’.

<sup>328</sup> 5 W. IV., No.22.

<sup>329</sup> 5 W. IV., No.22, s.17.

The legislation maintained that all dogs over the age of six months needed to be registered with the police office,<sup>330</sup> with a current list being maintained by the Clerk of the Police Office.<sup>331</sup> Those dogs not registered could be seized and killed by order of a magistrate. Dogs were required to be collared, with ownership details attached and whilst in public were to be 'in the immediate control of some competent person'. All bulldogs, mastiffs and mongrels also had to have muzzles attached. If these requirements were not met, any person could immediately kill the dogs, in particular, any constable who found such wandering animals.<sup>332</sup> The dog nuisances continued in Melbourne and in May 1841 it was decided that the Constables, would kill all dogs found in the streets of Melbourne without collars.<sup>333</sup> The owner, if detected by the constables, would be prosecuted before the town magistrates. During a one-week period in November 1842, 59 owners were prosecuted before the magistrates for breaches of the *Dog Act*.<sup>334</sup> The dog prosecutions before the magisterial Bench tended to be grouped together on the hearings list. Therefore before Henry Condell Esq JP on Tuesday 24 October 1843 twenty persons were prosecuted for unlicensed dog offences.<sup>335</sup>

The public health issues were obvious, but the solutions, quite complicated. Constables killing the dogs was one thing; disposal of the dead bodies was altogether another matter. During one period, the *Port Phillip Herald* complained that the constables would place the dead bodies of the dogs in a loosely covered heap in Elizabeth Street.

<sup>330</sup> 6 W. IV. No.4, s.5, with a penalty for non-registration being not less than 10 and not more than 20 shillings.

<sup>331</sup> 6 W. IV. No.4, s.6: 'all persons are hereby authorised, and all constables especially ordered and required to seize, kill and destroy every such dog so found at large accordingly'.

<sup>332</sup> 6 W. IV. No.4, s.7.

<sup>333</sup> PPP & MA 28 May 1841, cited in McGowan, *op.cit.*, p.5.

<sup>334</sup> PPG 9 November 1842, cited in McGowan, *ibid.*, p.5.

<sup>335</sup> R v Michael Horrigan, charged with having 1 unlicensed dog, fined 10sh, costs 7/6; R v Edward Millar, charged with having 1 unlicensed dog, fined 10sh, costs 7/6; R v Archibald Cunninghame, gentleman, charged with having 1 unlicensed dog, fined 10sh, costs 7/6; R v John Mooney charged with having 1 unlicensed dog, fined 10sh, costs 7/6; R v Archibald Sutherland charged with having 1 unlicensed dog, fined 10sh, costs 7/6; R v Thomas Halfpenny charged with having 3 unlicensed dog, fined 30sh, costs 7/6. Fourteen other matters appeared on this day concerning unregistered dogs; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, Tuesday 24 October 1843.

Their bodies were later dug up and eaten by wandering pigs. The stench was reportedly 'insufferable'.<sup>336</sup> Later when the policy developed that the bodies were thrown into the Yarra River, the same newspaper complained that the constables would throw them into the river just where the water carriers drew their water to supply the population.<sup>337</sup> One account lists the bodies of 11 dogs, 4 cats and 'other substances which cannot be particularised' seen floating in the Yarra above the falls.<sup>338</sup> The Town Council was finally forced to act and made it an offence to throw animal carcasses into the Yarra River within the town boundaries.<sup>339</sup> By 1847, 124 dogs were killed during a three-week period with their tails duly presented to the Clerk of Police.<sup>340</sup> One account relates that when the summer sun dried up a huge waterhole in Lonsdale Street in January 1848, a putrid seething mass of dead animals [dogs, cats, goats] was exposed. Because of the disposal dispute between the Town Council and the Police as to who was to dispose of such material, the population was forced to live in a town that 'stunk at every corner'.<sup>341</sup> These disposal issues underscore a very basic failure in civic governance. The removal of animal carcasses was horrible enough. The thought, however, of a human corpse rotting in the sun and being slowly eaten to bits by wild animals for a period of over one month as it lay on a beach fifteen miles from the township, made a mockery of civilized codes of governance.<sup>342</sup> Constables were under a traditional 'positive duty' to report unregistered dogs to the Police Magistrate or Justices in Petty Sessions, and were themselves liable to punishment if they neglected 'to destroy dogs improperly at large'.<sup>343</sup> On the other hand, if a constable improperly, 'wilfully and maliciously' destroyed any dog not improperly at

<sup>336</sup> PPH 12 February 1841, cited in McGowan, *op.cit.*, p.5.

<sup>337</sup> PPH 26 October 1841, cited in McGowan, *op.cit.*, p.5.

<sup>338</sup> PPP 23 February 1843, cited in McGowan, *op.cit.*, p.57.

<sup>339</sup> Bye Law No.10, 2 March 1844, Town Council Papers, TC Letters Inwards, 6 March 1844, cited in McGowan, *op.cit.*, p.57.

<sup>340</sup> *Argus* 23 March 1847, cited in McGowan, *op.cit.*, p.5.

<sup>341</sup> *Argus* 4 January 1848, cited in McGowan, *op.cit.*, p.57.

<sup>342</sup> PPP 25 November 1841, under the newspaper line - Where is the Coroner?, cited in McGowan, *op.cit.*, p.57.

<sup>343</sup> 6 W. IV. No.4, s.12, 13, with a constable to be fined not less than 10 and not more than 20 shillings.

large, they were also liable to pay compensation to the owner and be liable to penalties.<sup>344</sup> Constables were under a positive duty to act and prosecute the owners of unregistered dogs, or face prosecution themselves.<sup>345</sup>

The legislation codified the common law recognition of owners enjoying certain property rights in their dogs and of the magisterial jurisdiction in such matters.<sup>346</sup> Originally, the common law considered that apart from mastiffs, hounds and spaniels,<sup>347</sup> that no dog had any intrinsic value and was not subject to the laws for larceny.<sup>348</sup> The common law and English legislation reflected this change with the serious penalty provisions related to the larceny of dogs and other like creatures<sup>349</sup> (ie. birds) and the discovery of skins and plumage of such stolen domestic animals.<sup>350</sup> If dogs 'rushed at' or attacked any person, horse or bullock and thus endangered the 'life and limb' or actually injured a person or their property, the registered owner was subject to a fine.<sup>351</sup> Interestingly, in the original legislation, a reward was offered of 2sh 6p, for every dog so seized, destroyed and disposed of. This section was however suspended.<sup>352</sup> Ownership of a dog was to be imputed to the occupier of a house and to the master of a servant.<sup>353</sup>

<sup>344</sup> 6 W. IV. No.4, s.14, fined not less than 20sh, and not more than 5 pounds.

<sup>345</sup> In one newspaper Editorial, concerning enforcement of the *Dog Act* by the Portland magisterial Bench, it was argued that the Act did 'open prosecution' of a constable who detects an unlicensed dog and did not lay an information against the owner of that dog. Kennedy declared when proceedings closed on 13 October 1842, that he wished to lay similar information against Chief Constable Finn. Police Magistrate James Blair advised Kennedy to lay the information in the usual fashion. The following day, 14 October 1842, Kennedy appeared and after the matter was dismissed, Chief Constable Finn immediately made an application for Kennedy to be charged with having one further unlicensed dog! Blair however, refused this as 'savouring too much like retaliation', *Portland Guardian and Normanby General Advertiser*, 15 October 1842.

<sup>346</sup> 7 & 8 G. IV., c.29, s.31.

<sup>347</sup> 1 Saund.84.

<sup>348</sup> 4 Bl.Com.236.

<sup>349</sup> 7 & 8 G. IV., c.29, s.31, for a first offence not exceeding 20 pounds over and above the value of the dog; for a second offence, imprisonment at hard labour for a term not exceeding 12 months, and if defendant be male and convicted before two justices of the peace, to also be whipped.

<sup>350</sup> 7 & 8 G. IV., c.29, s.32, penalties as above.

<sup>351</sup> 6 W. IV. No.4, s.8, not less than 20sh not more than 5 pounds per offence as well as the damages complained of.

<sup>352</sup> 6 W. IV. No.4, s.9.

Interestingly, the act did not apply to sheep dogs or any other dog accompanying a cart through the town if it was secured to the cart and muzzled.<sup>354</sup>

Cannon claims that the magisterial dog bounty and the frenzied hunting of dogs in the streets of Melbourne by members of the Police Force<sup>355</sup> was a vain attempt to supplement their incomes. The poorly-paid constabulary were attracted to the system of 'moieties of fines for police'. The moiety system was an entrenched practice during the colonial period.<sup>356</sup> The moiety system was later extended when the Executive sought to keep its police from fleeing to the goldfields. These legislative based 'moieties' served as a payment incentive system which allowed for police to keep a portion of the fines levied by the magistrates when persons were prosecuted and convicted of certain offences.<sup>357</sup> They became especially important in the later 'Gold Fever' period when 'police and public alike had ceased to think calmly or to act decently' and many 'able-bodied males' all 'hell bent upon seeking gold' sought their fortunes on the gold fields. The payment incentive system was seen as just one method of stemming the tide of police resignations. La Trobe later vainly tried to stem the tide of police resignations by also increasing salaries by 50 per cent and threatening that all who left their posts without leave would not be employed again. The situation became so bad that at one point during the Gold Rush, only two policemen were left in Melbourne.<sup>358</sup> The police can hardly be criticised

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<sup>353</sup> 6 W. IV. No.4, s.10.

<sup>354</sup> 6 W. IV. No.4, s.11.

<sup>355</sup> Cannon, M., *ibid*, pp.323-324.

<sup>356</sup> Note Fawcner's comments concerning the practice in Launceston, Van Diemen's Land, where he believed he was 'fair game' for the Constables who he believed continually harassed him to get their share of fines and rewards if he was successfully prosecuted by the local magistrates based upon information and charges prosecuted by them, see Billot, *op.cit.*, p.82.

<sup>357</sup> An Act to Restrain the Practice of Gambling and the use of Obscene Language, 15 Vic., No.12, s.2 (section 1 allowed for a fine of 5 pounds for using obscene language); an Act to Restrain by Summary Proceeding Unauthorized Mining on Waste Lands of the Crown, 15 Vic., No.15, s.7; an Act to Consolidate and Amend the Laws relating to the Licensing of Public-houses, and to Regulate the Sale of Fermented and Spiritous Liquors in New South Wales, 15 Vic., No.14, s.1, cited in Haldane, *op.cit.*, ft.33 & ft.34, p.329.

<sup>358</sup> O'Callaghan, T., Police in Port Phillip and Victoria, 1836-1913, *The Victorian Historical Magazine*, Vol. XII, No. 4, pp.186-187, cited in Victoria Police Management Services Bureau, *op.cit.*, p.6; Billot, *op.cit.*, p.284.

for participating in a scheme designated by the Crown to be an appropriate and proper augmentation of their wages. As for the 'dog bounty' it has been described as more of a prize contest, where 'city aldermen', sitting now as 'Melbourne Corporation Magistrates', offered a 1st (3 pounds, 3sh) and 2nd (2 pounds, 2sh) prize to the Constables who could kill the most unregistered dogs within a three-month period. The dog problem was however a real civic concern and had been for some time.<sup>359</sup> There is however, little doubt that the 'moiety' system was capable of abuse. La Trobe, as Governor, became the co-author of some 'moiety' legislation.<sup>360</sup> A Police Reward Fund was established that provided for a half share of fines not to be given to the arresting Constable but to be placed in a fund for future distribution amongst force members. This 'fund' enjoyed little success.<sup>361</sup> The problems facing the Constabulary, as the 'agents' of the Port Phillip magistracy, simply added to the difficulties faced by the magistrates of Port Phillip. As the primary agents of social order and economic regulation in colonial society, the magistrates were burdened with a daunting array of tasks. The following chapter outlines only the summit of the mountainous civic compliance regime scrutinised by these frontier regulators.

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<sup>359</sup> *Argus*, 21 January 1852, cited in Haldane, R. K., *ibid*, pp.20-21; A nuisance of even longer standing than the pigs and goats was the horde of dogs which infested the town. This was remarked on by Lonsdale as early as 1838, and ten years later it was reported that the police had slaughtered upwards of 1,200 dogs in twelve months. To use the words of an elderly resident, "Every family had a dog, and some had a dog for every one of their children."; Grimwade, W. R., *op.cit.*, p.113.

<sup>360</sup> 'I regret to say that the very inducement held out to the Constable by our recent Act of Council to exert himself in the suppression of this particular offence, necessary and judicious as it might appear to be, would seem to carry with it the disadvantage of inducing the Police to neglect, in the diligent prosecution of this branch of their duty, other functions equally important but less remunerative'; La Trobe Correspondence, VPRS, vol.1, 161, p.512, cited in Haldane, R. K., *op.cit.*, p.21.

<sup>361</sup> Described as a form of Workers Compensation, the system was essentially flawed as it did not equal payments under the 'moiety' system and was subject to and administered by senior officers; Haldane, R. K., *ibid*, p.22.

# CHAPTER 7:

## URBAN TRADES IN PORT PHILLIP

### URBAN TRADES AND BUSINESSES

THE CONDUCT OF business in urban centres was tightly controlled by the state during the colonial period. The state's agenda was mostly hygienic, built around the concerns of public health as understood at the time. In a time when 'miasma' or vapours were thought to be the key to 'modern' disease control, the actual stench of the 'butchers shambles' and the irreligious social stench emanating from the public house made them objects of special interest to the Port Phillip magistrate. Butchers<sup>1</sup> were regulated by magistrates via prosecutions effecting prohibitions against the selling or slaughtering of victuals on the Sabbath,<sup>2</sup> and the special enforcement of health regulations designed to suppress the spread of meat infected with scab or catarrh and the destruction of such infected meats.<sup>3</sup> To further the interests of public health,<sup>4</sup> and to preserve 'the cleanliness of the said Towns and the health of their inhabitants' any justice of the peace was given legislative authority to enter and inspect from time to time any butchers' shambles and slaughter-houses and give directions as to the cleansing of such premises. Any refusal, molestation or obstruction on the part of the butcher would make them liable, upon conviction, to a fine not exceeding two pounds and not less than 10 shillings. Magistrates could also properly delegate this duty, in writing, to a constable.<sup>5</sup>

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<sup>1</sup> See Butcher, in Plunkett, *op.cit.*, pp.70-71.

<sup>2</sup> 3 Ch. 1, c.1, fine of 6sh. 8d.

<sup>3</sup> 10 Vict., No.8, s.8.

<sup>4</sup> See Police, in Plunkett, *op.cit.*, pp.350-351.

<sup>5</sup> 2 Vict. No.2, s.26.

During the colonial period there was general urban disquiet concerning the presence of 'scabby sheep' and the consumption of mutton from diseased animals. The prosecutions for breaches of the scab regulations were relatively straightforward.<sup>6</sup> One contemporary newspaper account headed *In the Matter of Scabby Sheep, William Joachim*, described how Joachim, employed by a Mr. Docker, was fined 10 pounds for driving a flock of scabby sheep through the run of Mr. Hamilton on the Goulburn River. The report stated that 'the sheep were very scabby, and taken to Melbourne, so that scabby mutton', according to the editor, 'would be eaten by Melbournians'. The editor then reminded the readers and traders of the five-pound penalty for butchers selling such meat.<sup>7</sup> The issue of 'scabby sheep' was most important, however, in rural areas. In a *Magisterial Investigation*<sup>8</sup> regarding sheep within the District of 'Gipps-Land' suspected of being infected with 'Catarrh' before Charles J. Tyers JP and John King JP of the Alberton Bench, Constable Cornelius Sullivan deposed that 'he had every reason to believe that sheep presently depasturing at Tarraville were infected with Catarrh and had been driven through the District contrary to Act 2 of Vict. No.12'. Archibald Macleod, 'gentlemen settler', being deposed stated 'that after hearing that some of the sheep of Mr. Foster had the catarrh at Tarraville, he went to see them with Dr. Arbuckle but could not say that they had catarrh or not. One of the sheep was distended but that this could have been caused by drowning'.<sup>9</sup> Dr. Arbuckle's testimony supported Macleod's deposition, although he added that 'he was not a judge of catarrh in sheep'.<sup>10</sup> One rural editorial dealing with the scab and the selling of adulterated meat from sheep, again warned butchers of the application of s.5 of Act and 'that it was the responsibility of magistrates to enforce the provisions of the Act'. The article reported that on the previous Monday, before the Portland Bench, the matter of *R v T. Norris* was heard. Norris of Coonabring

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<sup>6</sup> VPRS 2136, Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 12 August 1843; In *R v Hugh MacCraken* before Frederick Berkley St John PM and James Smith Esq JP of the Melbourne Bench, upon a charge of scabby sheep on premises, MacCraken was fined 5sh for each sheep, a total of 45 sh with 7/6 costs.

<sup>7</sup> PPG Saturday 28 August 1841.

<sup>8</sup> Alberton Court Register, 3 March 1847, p.107.

<sup>9</sup> *Ibid*, p.107.

<sup>10</sup> *Ibid*, p.108.

was before the court on an information brought by J. G. Robertson of Wando Vale. Robertson alleged that Norris 'had driven through his run with a flock of sheep he knew were infected with the scab'. The Bench fined the defendant 20sh with costs of 4sh 6p. Robertson then directed the magistrate to hand over the 'moiety of the fine' to which he was entitled as the party laying the information. He declared that 'he was to put it towards the use of some Benevolent Institution'.<sup>11</sup>

The slaughtering of cattle<sup>12</sup> was also a matter to be controlled and regulated by the magistrate and his officers. The control over the industry, as with most other colonial endeavours that the Crown sought to regulate and ultimately profit from, was the licensing of slaughterhouses and the management of those licences from the magisterial Bench.<sup>13</sup> After 31 August 1834, all slaughterhouses in New South Wales were to be licensed,<sup>14</sup> and all licences were to be issued by a Bench of two or more Justices to persons of 'unexceptional character' at an initial cost of 2 sh. 6p.<sup>15</sup> Police Magistrate Lonsdale, confirmed the fact that slaughterhouses could be placed within the town boundaries of Melbourne. He later formally approved the establishment of slaughterhouses on dedicated reserves for a period of one year.<sup>16</sup> Magistrates in the rural settlements also sought to license slaughterhouses. One typical example was the *License Granted* procedure undertaken before Charles J. Tyers Esq JP and John King Esq JP of the Alberton Bench to Joseph Varney to permit him to slaughter cattle.<sup>17</sup>

Inspectors of slaughterhouses were appointed throughout colonial settlements and they were to make report to every Quarter Sessions and if necessary make weekly

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<sup>11</sup> *Portland Guardian and Normanby General Advertiser*, 17 December 1842.

<sup>12</sup> See Slaughtering of Cattle, Plunkett, op.cit., pp.439–444.

<sup>13</sup> 5 W. IV., No.1, *ibid*, p.439.

<sup>14</sup> 5 W. IV., No.1, s.1, *ibid*, p.439.

<sup>15</sup> 5 W. IV., No.1, ss.2, 3, *ibid*, pp.439–440.

<sup>16</sup> VPRS 6920, 205, 29 September 1838. Approved for one year VPRS 6920, 3, 7 January 1839.

<sup>17</sup> Alberton Court Register, 3 March 1847, p.109.

reports to the Bench of Justices in the District.<sup>18</sup> The first Inspector of slaughter-houses in Melbourne was Constable William Wright.<sup>19</sup> Private residences and farms were exempt from the provisions of the Act.<sup>20</sup> Justices could make a demand to inspect any skins produced within a slaughterhouse.<sup>21</sup> This was an attempt to suppress cattle duffing and the trade in stolen cattle for slaughter, as it was a separate offence to interfere with a brand upon a skin,<sup>22</sup> and to purchase a skin whose brand has been interfered with.<sup>23</sup> Magistrates, Inspectors and constables were given the power to enter these premises at any time of the day or night,<sup>24</sup> with hindrance thereto being made a separate offence.<sup>25</sup> Magistrates were also given the power and authority to order, after inspection or information, the cleansing or rectification of defects within any slaughter-house, butchery or shambles,<sup>26</sup> with the power to issue summons or warrants in the event of a breach of any provisions of the Act.<sup>27</sup> Appeals under the legislation were allowed to Quarter Sessions, with again the rider that those who had been transported felons or offenders lacked the capacity to undertake such appeals.<sup>28</sup> The legislation also provided that no writ of certiorari or other Supreme Court action could prevail in these matters.<sup>29</sup> Finally, the legislation allowed, subject to the discretion of the magistrate, the moiety of fines, with half or part thereof to be paid to the informer, the remainder to the Crown.<sup>30</sup>

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<sup>18</sup> 5 W. IV., No.1, s.4, Plunkett, *op.cit.*, p.440.

<sup>19</sup> VPRS 6920, 5, 7 January 1839.

<sup>20</sup> 5 W. IV., No.1, s.7, *ibid*, p.441.

<sup>21</sup> 5 W. IV., No.1, s.8, *ibid*, p.441.

<sup>22</sup> 5 W. IV., No.1, s.9, *ibid*, p.441.

<sup>23</sup> 5 W. IV., No.1, s.10, *ibid*, p.441.

<sup>24</sup> 5 W. IV., No.1, s.11, *ibid*, p.441.

<sup>25</sup> 5 W. IV., No.1, s.12, *ibid*, p.442.

<sup>26</sup> 5 W. IV., No.1, s.15, *ibid*, p.442.

<sup>27</sup> 5 W. IV., No.1, s.17, *ibid*, pp.442–443.

<sup>28</sup> 5 W. IV., No.1, s.19, *ibid*, p.443.

<sup>29</sup> 5 W. IV., No.1, s.20, *ibid*, p.443.

<sup>30</sup> 5 W. IV., No.1, s.21, *ibid*, p.444.

No person was permitted to cast filth or rubbish in any water-course, sewer, or canal, within any town, and, upon conviction, was liable to pay a fine not exceeding 5 pounds and not less than 1 pound.<sup>31</sup> There was also a general prohibition against the dumping of dead animals in any street, lane, public place, or into any river, creek or stream. Upon conviction, the defendant was liable to pay a fine not exceeding 1 pound and not less than 5 shillings.<sup>32</sup>

The office of the magistracy had long concerned itself with the preservation of 'public health'.<sup>33</sup> In previous times, persons infected with the plague were ordered by local magistrates to remain quarantined at home. Infecting another person with the plague was seen as a 'great misdemeanour' but not to be seen as murder.<sup>34</sup> Likewise, infection by smallpox by a person known to have that 'contagious disorder' was seen by the common law as a common nuisance and subject to prosecution.<sup>35</sup> Most injuries to the public health were occasioned by the sale of 'unwholesome food'. Therefore the distribution by sale of unwholesome food was made an indictable offence, with masters vicariously and criminally liable for the acts of their servants and the dangers they posed to the public by the mixing of unwholesome ingredients and sale of the same to the public.<sup>36</sup> It had been established that if a person knowingly gave another person food that was 'injurious to eat', the common law allowed for action to be taken.<sup>37</sup>

Bread being the main staple food for the period, meant that special attention was paid to the practices of bakers, the falsification of sale weights and the ingredients of their breads. The issue of common weights and measures is obviously an important

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<sup>31</sup> 2 Vict. No.2, s.13.

<sup>32</sup> 2 Vict. No.2, s.36.

<sup>33</sup> Re Public Health, in Plunkett, op.cit., pp.407–408.

<sup>34</sup> 1 Russ. 113, 4, *ibid*, p.409.

<sup>35</sup> 4 M. and S. 73, *ibid*, p.409.

<sup>36</sup> 3 M. and S. 11, *ibid*, p.408.

<sup>37</sup> 2 East, P. C. 822.

component of real market regulation. The magistrates were again responsible for enforcing a common weighting regime. Police Magistrate Lonsdale had formalised the procedure by 1838.<sup>38</sup> Any over portion by bakers of 'alum' in bread that 'deranges the stomach and occasions constipation of the bowels' was actionable both criminally and as a civil remedy.<sup>39</sup> This legal responsibility in producing materials designed for mass consumption by the public can properly be viewed as the genesis of the modern concepts of the duty and responsibilities owed by manufacturers to ultimate consumers. The Bench prosecutions demonstrate this state concern. The Melbourne Bench, in one sitting in 1843, dealt with five persons charged with breaches of these regulations.<sup>40</sup> The 'message' from the Bench was obviously not heeded by traders and three months later in *R v Isaac Lincoln*, before James Palmer Esq and James Smith Esq JP, on a charge of using false measures, Lincoln was fined 20sh and costs of 7/6.<sup>41</sup> Eventually an Inspectorate for weights and measures was established in Melbourne to properly regulate traders and their conduct.<sup>42</sup>

During the colonial period, and in the furtherance of public health and safety, no person was permitted, to beat carpets, fly kites, or 'break in' horses in a public place. They were also not permitted to 'kill, slaughter, dress, scald, or cut up any beast, swine, calf, sheep, lamb or cattle' in any place proximate to the street or any other public place,

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<sup>38</sup> PROV, Copy Registry Book September 1836-December 1839, Progressive Number 148, 10 July 1838. Lonsdale to Colonial Secretary. This correspondence dealt with standard weights and measures for Melbourne. These were to be kept at the Police Office.

<sup>39</sup> 4 M. and S., *ibid*, p.408.

<sup>40</sup> VPRS 2136, Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, Wednesday 23 Aug 1843; Before Frederick Berkley St John Esq PM JP and J. F. Palmer Esq JP, in *R v William Grant*, a baker, it was alleged that four 4lb loaves of bread were deficient in weight under 6 Will 4 No.1, 1835, s.3. Grant was fined five pounds with costs of 7/6. Grant also appeared on the same day in *R v William Grant (No.2)* with not having scales and weights in his shop. He was convicted and fined 20sh and costs of 7/6. In *R v John Hudson*, Hudson, a baker, was prosecuted for selling one 4lb loaf under weight. He was found guilty and fined 40sh and costs of 7/6. In *R v James Role*, Role had been charged with not having scales and weights in shop. He was also fined 20sh and costs of 7/6. In *R v William Jackson*, Jackson was charged with not having scales and weights in shop, and fined 20sh with costs of 7/6. Finally and again on the same day, in *R v David Creighton*, Creighton appeared upon a charge of also not having scales and weights in his shop. The charge however, was withdrawn, with no reason recorded in the register.

<sup>41</sup> VPRS 2136, *ibid*, Tuesday 7 November 1843.

<sup>42</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, Saturday 29 July 1843, before Frederick Berkley St. John PM and James Smith JP, Thomas Lawrence was sworn in as the Inspector of Weights and Measures for the Town of Melbourne.

so that any blood or like filth might flow onto or into such streets, carriageways or public places. Upon conviction, a defendant was liable to pay a fine not exceeding 40 shillings, and not less than 5 shillings.<sup>43</sup> Magistrates and constables were also required to regulate the proper removal of 'night soil' from premises within city or town limits, with offenders liable upon conviction for removing night soil outside of proper hours, to a fine of 5 pounds.<sup>44</sup> This offence was seen as so serious that any person who found another breaching the hours of removal ordinance, could lawfully and without warrant, apprehend and convey such offender to a watch-house for presentment before a magistrate.<sup>45</sup>

Likewise, no person was permitted to block or obstruct streets, carriageways or footways with carriages, goods, timber, bricks, baskets, wares, merchandize, casks, or any other goods, save for the purposes of legitimate loading and unloading of said same. The purpose of these ordinances was not only to prevent obstructions, but also to regulate the physical makeup of the marketplace and stop shopkeepers from displaying goods outside of their premises. These items were to be removed by order of a magistrate or constable. Failure to do so, upon conviction, would result in a fine, as a first offence, a sum not exceeding 40 shillings and not less than 5 shillings, with those goods of a perishable nature able to be seized and delivered to the storekeeper of the local Benevolent Society, and those not perishable able to be sold if not claimed, with proceeds again directed to the Benevolent Society, or if none existed, to any charitable purpose.<sup>46</sup> It seems that the Melbourne Bench of magistrates were determined to free 'footways' or 'footpaths' from all obstructions and 'ill-use'. There were prosecutions for driving on footpaths,<sup>47</sup> riding upon footpaths,<sup>48</sup> and obstructing footpaths by leaving

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<sup>43</sup> 2 Vict. No.2, s.15.

<sup>44</sup> 2 Vict. No.2, s.33.

<sup>45</sup> 2 Vict. No.2, s.34.

<sup>46</sup> 2 Vict. No.2, s.16.

<sup>47</sup> In *William Cuthbert v G. Cavanagh* before Frederick Berkley St John PM and Frederick Armand Powlett Esq CCL, Cavanagh was convicted with driving on 'the footpath'; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, 4 Aug 1843.

doors ajar or leaving bullocks and drays in an obstructing fashion.<sup>49</sup> Magisterial discretion was also apparent in these matters. In *R v John Quinn*, Quinn was charged with obstructing a footpath. Quinn pleaded with the Bench that 'he was a poor man' and begged the Bench not to fine him. He was fined 5sh, with costs of 7/6. On the other hand on the same day in *R v Arthur Bradley*, Bradley, also charged with obstructing a footpath, was fined 10sh and 7/6 in costs. The Bench may therefore have taken the plea of poverty in Quinn's case into account.<sup>50</sup> Finally in *R v J. Buggs* before Henry Condell Esq JP, appearing upon a charge of blocking the footpath in Elizabeth Street, Buggs was found guilty and fined 20sh with costs of 7/6.<sup>51</sup>

The application of such regulation to the frontier settlement of Melbourne prior to separation was almost ridiculous. In 1841, the corner of King and Lonsdale Streets was regarded as an outpost of the Town. By 1850 'the town' had only spread to La Trobe and Spring Streets in the east and Batman's Hill to the west.<sup>52</sup> The streets in Melbourne during the period were a frightful mess: indeed to call them 'streets' is to do great injury to the definition of the word. The newspapers were full of protest.<sup>53</sup> With the fallen logs and stumps of three to four feet in height,<sup>54</sup> rutted and pitted with chasms eight foot

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<sup>48</sup> In *R v James Sutherland*, before Frederick Berkley St John Esq PM JP and J. F. Palmer Esq JP, Sutherland was charged with riding on the footpath, found guilty and fined 20sh with costs of 7/6; VPRS 2136, *op.cit.*, Wednesday 23 Aug 1843.

<sup>49</sup> In *R v John McCrudden*, before Frederick Berkley St John Esq PM JP, McCrudden was charged with obstructing the footpath 'by an opened door to a theatre'. He was found guilty and fined 20 sh. On the same day in *R v James Owens*, Owens was charged with leaving his bullocks and dray on the footpath, found guilty and fined 20sh with costs of 7/6; VPRS 2136, *ibid*, 3 September 1843.

<sup>50</sup> VPRS 2136, *ibid*, Friday 13 October 1843. Interestingly the 'before' section in the Register is blank with no indication as to who was presiding or which other magistrates were sitting upon the Bench. Condell signed off at the conclusion of the notations regarding proceedings. The same thing occurs for the following days proceedings on Saturday 14 October 1843.

<sup>51</sup> VPRS 2136, *ibid*, Tuesday 24 October 1843.

<sup>52</sup> McCrae, G. G., *Recollections of Port Phillip and Early Melbourne*, p.7, notes in ML; Chandler, J., *40 Years in the Wilderness* (Melbourne, 1893) p.13, and De Labilliere, F. P., *Personal Reminiscences* (London, 1878) p.339; cited in McGowan, *op.cit.*, p.1.

<sup>53</sup> PPP & MA, 21 November 1839, PPH, 23 March 1841, cited in McGowan, *op.cit.*, p.2.

<sup>54</sup> PPH 7 May 1841; Phillips, J., *Reminiscences of Australian Early Life*, p.8; Chandler, J., *op.cit.*, p.13; Murray, R. D., *A Summer at Port Phillip* (Edinburgh, 1844) p.36, see McGowan, *op.cit.*, p.2.

deep and fifteen to twenty feet wide,<sup>55</sup> which when it rained became great torrents and pools,<sup>56</sup> Melbourne streets during rainy periods became impassable,<sup>57</sup> full of beds of deep mud. Vehicles routinely became firmly stuck and stranded in the streets.<sup>58</sup> During the summer periods, the dust made a cloud like a London fog<sup>59</sup> that filled homes, wardrobes and clocks.<sup>60</sup> Requests to water down the streets were not heeded until 1845 when residents in Collins Street themselves paid sixpence each to employ water carriers to spray their street.<sup>61</sup> Sporadic efforts were made to cure these infrastructural defects, which, without government intervention, remained a constant problem up to at least 1850.<sup>62</sup>

Persons living within the limits of a town were not permitted to keep swine within forty yards of a public street or place. Swine, horses, asses, mules, sheep, goats or other cattle were also meant to be tethered so as to not allow them to stray or depasture in any street or public place. Upon conviction, the defendant was to be liable to a fine not exceeding 40 shillings and not less than 5 shillings.<sup>63</sup> There were constant dangers to pedestrians not only from the poor state of the streets, but also from stray and runaway animals. Cattle would be driven through the streets of Melbourne. Horses and bullocks,<sup>64</sup> attended or unattended, sometimes attached to their carts, would frequently bolt through the streets of Melbourne. This caused great injury and fear to the population of the

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<sup>55</sup> Curr, E. M., *Recollections of Squatting in Victoria*, *op.cit.*, p.6.

<sup>56</sup> Baker, C. J., *Sydney and Melbourne* (London, 1845) p.35, cited in McGowan, *op.cit.*, p.2.

<sup>57</sup> PPG 20 August 1842; In 1845 'the paths were like porridge, the streets like water gruel', McCrae, G. G., p.162, cited in McGowan, *op.cit.*, p.2.

<sup>58</sup> PPH 2 July 1841, reported 15 vehicles stuck in the bog traps outside their offices in Elizabeth Street, cited in McGowan, *op.cit.*, p.3.

<sup>59</sup> Murray, R. D., *op.cit.*, p.36, cited in McGowan, *op.cit.*, p.2.

<sup>60</sup> Baker, C. J., *op.cit.*, p.36, cited in McGowan, *op.cit.*, p.2.

<sup>61</sup> PPG 31 December 1845, cited in McGowan, *op.cit.*, p.3.

<sup>62</sup> *Argus* 28 October 1850, cited in McGowan, *op.cit.*, p.3.

<sup>63</sup> 2 Vict. No.2, s.23.

<sup>64</sup> PPH 13 July 1841.

Town. The fear of one of them 'horning' and the other kicking 'your brains out' was ever present in the minds of Melburnians during the 1840s<sup>65</sup> until steps were eventually taken by the Town Council<sup>66</sup> to address some of these issues.<sup>67</sup>

The magistrates and the Police Office were constantly prosecuting persons for the straying of animals and the dangers that the practice occasioned.<sup>68</sup> Goats and pigs presented a special problem. There were complaints that pigs were allowed 'to mingle with Christians'<sup>69</sup> even though they were technically not allowed within 40 feet of a public street within the Town limits. However, by 1846 there were an estimated 672 swine in the Town.<sup>70</sup> There were many 'pig' prosecutions. The Port Phillip Bench records indicate that offenders were most often fined 5 shillings per animal, with some variations. In *R v Thomas Robinson*, before Frederick Berkley St John PM and James Smith Esq JP of the Melbourne Bench, upon a charge of allowing two pigs astray, Robinson was fined 20sh costs with costs of 7/6. On the same day and before the same Bench, in *R v James Lahey*, upon a charge of allowing six pigs astray, Lahey was fined 30sh, with costs of 7/6 costs.<sup>71</sup> Magisterial discretion was also evident in *R v Thomas Griffiths*, again before Frederick Berkley St John Esq PM JP and James Smith Esq JP, on a charge of allowing six pigs to stray, when Griffiths was only fined 5sh with costs of 7/6.<sup>72</sup> Likewise in *R v Henry Clunes*, this time before Frederick Berkley St John Esq PM JP sitting alone, on a

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<sup>65</sup> PPG 15 December 1838.

<sup>66</sup> Bye Law 24, 22 May 1849 whereby it was forbidden to drive cattle through the city (La Trobe, Spring, Spencer, Yarra River) for slaughter, sale or shipment, or any other reason except between midnight and 8 a.m.; cited in McGowan, *op.cit.*, p.3.

<sup>67</sup> Bye Law 9, 4 March 1844, Town Council Letters Inward No.132, wherein it became unlawful for any kind of swine, or any horse, ass, mule, sheep, goat or other cattle to be at large in any street or public place; cited in McGowan, *op.cit.*, p.3.

<sup>68</sup> PPP & MA 30 November 1840, 13 April 1843; PPH 26 October 1841, 16 March 1841, 6 July 1841, 28 June 1844, 12 March 1846, cited in McGowan, *op.cit.*, p.3.

<sup>69</sup> PPG 15 December 1838, 26 October 1841, 16 November 1841, cited in McGowan, *op.cit.*, p.3.

<sup>70</sup> PPH 22 January 1846, cited in McGowan, *op.cit.*, p.4.

<sup>71</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 10 August 1843.

<sup>72</sup> VPRS 2136, 7 September 1843.

charge of allowing six pigs to stray, Clunes was again only fined 5sh with costs of 7/6.<sup>73</sup> Great herds of goats were to be found in the northern part of the town,<sup>74</sup> although they did provide amusement for the children of the settlement who would often chase and ride them for recreation.<sup>75</sup> The owners of straying goats would also be prosecuted. The magisterial fining and discretionary regime was also apparent in these prosecutions.<sup>76</sup> Nevertheless, the newspapers were filled with reports of the 'crying evil' of 'draymen' abandoning their carts and animals in the streets whilst they 'adjourned to a nearby hotel' and being fined by the town magistrates for continuing this practice.<sup>77</sup>

## PUBLIC HOUSES

OF ALL THE urban trades and businesses, perhaps none received as much magisterial attention as the hotels, usually known as 'public houses'. The magistracy played a pivotal role in all matters concerning the regulation of 'public houses' during the colonial period in Australia. The office of the magistrate had long enjoyed jurisdiction over public houses since the English Crown first attempted to legislatively regulate and licence public houses in 1552.<sup>78</sup> In the Australian colonies, the Crown by the 1830s had sought to regulate the alcohol trade that had, because of the basic and elemental role played by alcohol in colonial Australian society, almost cost it, during the Rum Rebellion, the management rights over its Australian penal colonies. The Crown also realised the amount of revenue that could be generated by the orderly administration of the liquor trade.<sup>79</sup> The 'right' to

<sup>73</sup> VPRS 2136, 22 September 1843.

<sup>74</sup> PPP 27 April 1840, cited in McGowan, *op.cit.*, p.4.

<sup>75</sup> De Labilliere, F. P., *op.cit.*, p.337.

<sup>76</sup> In *R v Mathew Burbell*, before Frederick Berkley St John Esq PM JP and James Smith Esq JP of the Melbourne Bench, upon a charge of allowing one goat to stray, Burbell was fined 5sh with costs of 7/6. On the same day and before the same Bench of magistrates in *R v John Lynch* upon a charge of allowing four goats to stray in Lonsdale Street, Lynch was only fined 10sh with costs of 7/6; VPRS 2136, *op.cit.*, 7 September 1843.

<sup>77</sup> PPP & MA 22 May 1843, cited in McGowan, *op.cit.*, p.3.

<sup>78</sup> Osborne, B., *Justices of the Peace 1361–1848* (Dorset, 1960) pp.12–13.

<sup>79</sup> Interestingly, the heaviest penalties for a breach of the Licensing Act were reserved for defendants who did not pay or defaulted in the payment of penalties levied by the magistrates in their licensing jurisdiction. In particular, 2 Vic. No.18, s.74, allowed a defaulting defendant to be committed to prison for between two and six months for non payment of penalties.

trade in alcohol and the regulation of the industry that dispensed it was quite rightly placed in the hands of the Crown's most trusted servant, the magistrate. The most extensive and effective legislation in the area, which consolidated the laws relating to the legal disposal of alcohol in the Australian colonies, was finally created in 1838<sup>80</sup> and made operative as from 1 January 1839.

The licensing requirements within the Act made the unlicensed sale or disposal of any fermented or spirituous liquors both a personal liability and a liability that would attach to any occupier of an unlicensed house wherein such items were sold or disposed. The penalties for unlicensed trading were harsh. A first offence would attract a fine of 30 pounds; subsequent offences would attract fines of 50 pounds, justiciable before two justices. Further, upon conviction, that person would be incapable of enjoying any such license for a period of 3 years.<sup>81</sup>

As a demonstration of the seriousness with which the Crown viewed unlicensed trading in liquor, the singularly heaviest fine levied by the magistrates of Melbourne during the period of examination occurred in the case of *Major Frederick Berkeley St John v David Young* before James Smith Esq JP and W. B. Wilmott of the Melbourne Bench on a charge of offering to sell certain quantities of illicit spirits contrary to act of council 2 3Vict, No.9. The defendant pleaded not guilty to the information. He was found guilty and fined 100 pounds 'paid forthwith, in default 12 months gaol'. No costs order was made.<sup>82</sup> The following week, on Wednesday 3 July 1844, again before James Smith and W. B. Wilmot in *R v David Young*, [Bench depositions noted s.43 3 Vic No. 9] the decision was confirmed to be a fine 100 pounds with the defendant given one month to pay the fine with a default resulting in a 12 month period of detention. The rural Port Phillip Benches were equally severe with cases dealing with the unlicensed sale of liquor.<sup>83</sup>

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<sup>80</sup> 2 Vic. No.18.

<sup>81</sup> 2 Vic. No.18, s.1.

<sup>82</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, Saturday 29 June 1844.

<sup>83</sup> VPRS 34/P/1; 29 December 1840, In *Re Samuel Turley*, free by servitude, under a charge of selling liquor without a licence, fined a massive 30 pounds with 8 sh costs by the Portland Bench. 13 January 1841, In *Re Cecil P. Cooke*,

The actual licences themselves were technically to be issued by the various colonial Treasurers, with the magistrates acting as agents their issuing agents. The licences were divided into different categories, all of which were renewable from 1 July every year.<sup>84</sup> The categories were the Publicans General License,<sup>85</sup> Wine and Beer License,<sup>86</sup> Packet Licences<sup>87</sup> and Confectioners Licences.<sup>88</sup> The legislation also allowed for licences to be transferred to fairs and races so long as they were to be held no further than 10 miles from the district of the licensed person.<sup>89</sup> A typical example was the *Licence Hearing*<sup>90</sup> before a special meeting of Justices in Petty Sessions of the Alberton Bench, where Abraham Hodgkinson together with his sureties David Duncan of Tarraville and Robert Turnball of Port Albert were to be bound in a recognizance of 50 pounds and the usual certificate granted for a Beer and Wine licence in his house. The establishment was to be named the *Travellers Rest* situated at Merriman's Creek.

There were classes of persons specifically excluded from obtaining licences, including persons under government office, including constables, deputies or bailiffs, licensed auctioneers, any person or the wife of any person under criminal sentence unless pardoned. Constables were also prohibited from owning or having an interest in any establishment that sought to be a site for such licence.<sup>91</sup> Magistrates who by trade or employment or by business partnership had an interest in such establishments, were

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under a charge of selling liquor without a licence, fined 30 pounds with 13/6 costs by the Portland Bench. 24 August 1841, In *Re George Harewood*, under a charge of selling liquor (half a pint of rum) without a licence, fined 30 pounds with 2 pounds costs by the Portland Bench. 22 January 1842, In *Re William Johns*, under a charge of selling liquor without a licence, fined 30 pounds with costs by the Portland Bench.

<sup>84</sup> 2 Vic. No.18, s.3.

<sup>85</sup> 2 Vic. No.18, s.4.

<sup>86</sup> 2 Vic. No.18, s.5.

<sup>87</sup> 2 Vic. No.18, s.6.

<sup>88</sup> 2 Vic. No.18, s.7.

<sup>89</sup> 2 Vic. No.18, s.8.

<sup>90</sup> Alberton Court Register, 4 August 1847, p.144.

<sup>91</sup> 2 Vic. No.18, s.9.

precluded from sitting on the Bench whilst licensing matters were determined.<sup>92</sup> Applications were to be lodged with the Clerk of Petty Sessions on or before the first Tuesday in April of every year,<sup>93</sup> and where there were no local Petty Sessions, applications were to be lodged at the nearest district sessions therein.<sup>94</sup> 'Packet' licences were also available for shipping either from an authorised justice,<sup>95</sup> or via direct application to a Colonial Treasurer.<sup>96</sup>

The procedural requirements for obtaining a licence were also quite technical and strictly enforced. The license applications were to be reviewed at the Annual Licensing Meeting of the Justices of Petty Sessions in each district of the Colony, with adjournments restricted to fall within three weeks of the scheduled meetings,<sup>97</sup> with notifications being gazetted and posted upon the doors of the Court House. Failure to abide by these requirements could result in the Clerk being fined an amount of 5 pounds.<sup>98</sup> Magistrates themselves were also liable to a fine of 20 pounds should they not attend an adjourned session after properly being notified by any justice in attendance, that the hearing, on account of their absence, was necessarily adjourned.<sup>99</sup> The Clerk was also duty bound to post up public notices containing the names and licence details of the applicants before the Sessions period.<sup>100</sup>

A Recognizance with two sureties each of 50 pounds was required by each applicant for a Publican's General Licence,<sup>101</sup> save where the applicant through illness

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<sup>92</sup> 2 Vic. No.18, s.10.

<sup>93</sup> 2 Vic. No.18, s.11.

<sup>94</sup> 2 Vic. No.18, s.12.

<sup>95</sup> 2 Vic. No.18, s.13.

<sup>96</sup> 2 Vic. No.18, s.24.

<sup>97</sup> 2 Vic. No.18, s.14.

<sup>98</sup> 2 Vic. No.18, s.15.

<sup>99</sup> 2 Vic. No.18, s.23.

<sup>100</sup> 3 Vic. I, No.13, s.2.

<sup>101</sup> 2 Vic. No.18, s.16.

could not be present when three sureties were required,<sup>102</sup> as normally personal attendance before a majority of the justices was required.<sup>103</sup> The *Annual Licensing Meeting* for 1846<sup>104</sup> was one typical example. It was held 'before the majority of justices in the District', before C. J. Tyers and James MacFarlane of the Alberton Bench, and a number of licences were granted. William Howden at the *Port Albert Hotel*, Robert Fitchet at *The Tarraville Inn*, Alexander Frazer at the *Squatters Rest*, Hugh Buntine at *The Bush Inn*. Interestingly, the Bench noted that Hugh Buntine 'was to maintain and keep on foot better accommodation for travellers and guests and their servants than had hitherto been provided otherwise his license was to be cancelled'. John McNaughton also had a licence granted for the *Victoria and Albert Inn* even though he was 'unavoidably' absent from the hearing, the Bench nevertheless granted him a wine and beer license under cl.17 of the Act. The lists of granted certificates were to be forwarded by the Bench of magistrates to the Colonial Treasurer within 14 days,<sup>105</sup> who if received by the office of the Treasurer before the 30th day of June, would issue the licences.<sup>106</sup> Defaulting notices could be remedied by the additional payment of between 5 and 25 pounds.<sup>107</sup> The Governor also possessed reserve powers under the legislation to grant licences where the default was not occasioned by the negligent actions of the applicant.<sup>108</sup> The Governor was also able to entertain irregular applications if the defaulting application was supported by a majority of justices on the grounds of fairness, with an appropriate fee covering the irregularity.<sup>109</sup>

Licences could also be transferred on the first Tuesday of September, December and March of each year.<sup>110</sup> The process involved a magisterial endorsement being made,

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<sup>102</sup> 2 Vic. No.18, s.17.

<sup>103</sup> 2 Vic. No.18, s.18.

<sup>104</sup> Alberton Court Register, 21 April 1846, p.81.

<sup>105</sup> 2 Vic. No.18, s.20.

<sup>106</sup> 2 Vic. No.18, s.21.

<sup>107</sup> 2 Vic. No.18, s.22.

<sup>108</sup> 2 Vic. No.18, s.25.

<sup>109</sup> 2 Vic. No.18, s.26.

<sup>110</sup> 2 Vic. No.18, s.27.

recognizances entered into and the transferor's authority being made available.<sup>111</sup> The death or insolvency of a licensee did not affect the validity of the license and trade was sustainable subject to the laws of succession and insolvency for a period of 6 months subsequent to the event.<sup>112</sup> A transfer of licences was possible at any time if the majority of magistrates were convinced that the interests of justice demanded such transfer.<sup>113</sup> The transfer of licences was normally a straightforward matter. Before Frederick Berkley St John PM and James Smith JP on Tuesday 25 July 1843 there was one application before the Bench; *Re Michael Lynch*, where Lynch applied for the transfer of a publican's licence from John Ritchie's *Black Bulls Hotel*. The application was granted.<sup>114</sup> Two days later on 27 July 1843, the same Bench entertained two Special Applications. The first *Re Harvey James Hill* sought removal of a public licence to a house lately occupied by Henry Batman of Richmond. The matter was adjourned with the application granted at the later hearing on 29 July 1843. The second matter *Re Michael Lynch* sought a publican's general licence for the *Black Bull Hotel* in Elizabeth Street. The matter was adjourned. The application was recorded as 'not granted by Bench' at the later hearing held on 29 July 1843.<sup>115</sup> At the Melbourne Bench on 19 August 1843 in a Special Petty Sessions hearing before Frederick Berkley St John Esq JP and PM, G. S. Airey JP CCL and J. F. Palmer Esq JP, two licensing matters were heard. In *Re Thomas Gibson* was an application for the renewal of the licence for the *Collingwood Hotel*, to be known as the *Clarence Hotel*. The application was granted. It is interesting to note that G. S. Airey voiced a dissenting opinion, evidenced by a simple notation of the word 'no' against his name. The second matter, *Re Isaac Lincoln*, an application for a night licence for *Builders Arms Hotel*, was granted.<sup>116</sup> At the 5 September 1843 Special Petty Sessions hearing before 'Chairman' Frederick Berkley St John Esq PM JP, James Smith Esq JP, J. F. Palmer Esq JP, F. A. Powlett JP CCL and G.

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<sup>111</sup> 2 Vic. No.18, s.28.

<sup>112</sup> 2 Vic. No.18, s.29.

<sup>113</sup> 2 Vic. No.18, s.30.

<sup>114</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, Tuesday 25 July 1843.

<sup>115</sup> VPRS 2136, *ibid*, 25, 27, 29 July 1843.

<sup>116</sup> VPRS 2136, 19 August 1843.

S. Airey JP CCL thirteen licensing applications were heard. *Re James Reardon* dealt with a transfer of a publican's general licence regarding the *Stars and Garters Hotel*. The application was granted. *Re John Levien* dealt with the transfer of a publican's general licence regarding the *British Hotel*. The application was granted. *Re Patrick Burke* dealt with an application for a publican's general licence to be transferred to the *Australian Hotel*. The application was granted. There were four other applications for the transfer of publican's general licences. All applications were granted. There were also six applications for new licences, all of which were granted.<sup>117</sup>

The rural Port Phillip Benches proceeded along similar lines. One typical example of a licence transfer can be seen at A *General Meeting of Justices*<sup>118</sup> 'assembled at the Police Office Alberton on Tuesday 5 December 1848 Convening in Conformity with the 27 Sect of the Act 2 Vict No.18', before George Stewart Esq PM and A. Meyrick Esq JP of the Alberton Bench. The meeting approved the transfer of a license from A. Hodgkinson to John Milne at the *Traveller's Rest*. A typical example of a licensing hearing can be seen at the *General Meeting of Justices*<sup>119</sup> 'assembled at the Police Office in Alberton on Tuesday the 18th day of April 1848 convened in conformity with 14th Clause of 2 Vict. No.18 to take into consideration all applications presented under the Act'. There were seven successful applications and two unsuccessful applications. David Duncan and Thomas Smith, both of Tarraville, made the unsuccessful applications. The Bench refused these applications on the basis that 'these houses were not required for the accommodation of travellers and that the licensing of their premises would [somehow] be 'injurious to the community''.<sup>120</sup>

The legislation also specifically forbade the playing of dice, cards or skittle-board, which attracted upon conviction before two justices, a fine no greater than 20 pounds and no less than 40 shillings, although a separate billiards licence was available for a fee of

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<sup>117</sup> VPRS 2136, 5 September 1843 Special Petty Sessions.

<sup>118</sup> Alberton Court Register, 5 December 1848, p.182.

<sup>119</sup> Alberton Court Register, 18 April 1848, p.157.

<sup>120</sup> Alberton, *ibid*, p.157.

10 pounds.<sup>121</sup> Upon conviction for gaming upon licensed premises, recognizances entered into for wine and beer licences would be forfeited.<sup>122</sup> One example of such a prosecution occurred in *R v John Ritchie* before Frederick Berkley St John PM and James Smith JP of the Melbourne Bench. In this matter Ritchie was charged with allowing card playing in a licensed house, contrary to s.33 of Act. The Deposition Register reveals that he was initially fined but the record has a line drawn through the fine notation with the word 'dismissed' placed thereupon.<sup>123</sup> The rural Port Phillip Benches also strictly enforced the card playing and after hours trading legislative requirements.<sup>124</sup>

The name of the licensee was to be displayed on a conspicuous part of the house and a lamp was to be kept constantly lighted and burning over the door of the premises from sunset to sunrise. Failure to abide by these requirements rendered the licensee liable, upon conviction, to a fine of not less than 1 and not more than 5 pounds.<sup>125</sup> In relation to the lighted lamp, legislation vested discretion in the magistrate to accept an argument by a licensee that accident or boisterous weather caused the extinction of the lamp. The burden of proof in establishing this was placed upon the licensee.<sup>126</sup> The 'lit lamp' prosecutions tended to be straightforward matters. On Saturday 17 February 1844 James Smith Esq JP and James F Palmer Esq JP of the Melbourne Bench disposed of a number of licensing matters including four 'lamp out' charges. Two defendants pleaded guilty resulting in fines of 20sh with costs of 2/6 in each matter. In the third lamp matter however, *R v Richard Dowling*, Dowling was successful in his defence that the lamp was

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<sup>121</sup> 2 Vic. No.18, s.33.

<sup>122</sup> 2 Vic. No.18, s.34.

<sup>123</sup> VPRS 2136, Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, Tuesday 25 July 1843.

<sup>124</sup> VPRS 34/P/1; 28 December 1840, In *Re John Cronin (No.1)* for allowing cards to be played at his public house, fined 5 pounds, 6 sh costs. In *Re John Cronin (No.2)* sale of liquor after licensed hours, namely 9.06 pm, fined 2 pounds, 6 sh costs by the Portland Bench.

<sup>125</sup> 2 Vic. No.18, s.35; VPRS 34/P/1; 26 October 1841, In *Re John Cronin (No.1)* charged with failing to keep night lamp alight outside his public house, fined 20 sh with 3/6 costs by the Portland Bench. 5 January 1842, In *Re George Dale*, charged with failing to keep night lamp alight outside his public house, fined 40 sh with 3/6 costs by the Portland Bench. 21 July 1842, In *Re Daniel O'Neil* charged with failing to have his name and words 'licensed to retail spiritous and fermented liquors' painted on his public house; fined 3 pounds with 7/6 costs by the Portland Bench.

<sup>126</sup> 3 Vic. I, No.13, s.3.

extinguished as a result of 'boisterous wind'.<sup>127</sup> In *R v William Howden*,<sup>128</sup> before John King Esq JP of the Alberton Bench, dealt with an information laid by Constable Sullivan against Howden for a breach of a his Recognizance. Given the requirement of the presence of two magistrates, the Bench adjourned the case until the arrival of another magistrate 'when the case can be gone through with'. C. J. Tyers then arrived and with a duly constituted Bench, the case proceeded.<sup>129</sup> The matter involved charges against Howden for 'having his light out contrary to the 35th clause of the *Publicans Act*'. The Bench found 'that in consequence of the information being 'informal' and also for want of sufficient evidence'<sup>130</sup> the case was dismissed. Interestingly, two Portland publicans successfully used a defective oil defence to a prosecution under the Act. The Henty brothers, Stephen and Edward, who both regularly sat upon the Portland Bench, had supplied the oil.<sup>131</sup>

Licensees were also obliged to provide a minimum of two sitting and two 'sleeping' rooms independent of the apartments of the licensee, together with stabling and provisions for horses. Failure to provide or maintain adequate accommodation allowed two justices to declare the license void.<sup>132</sup> Bona fide travellers were given the right of accommodation and it was a condition of the license that they may not refuse accommodation to a traveller, breach of which rendered the licensee liable to a fine, upon conviction, of not more than 20 pounds and not less than 5 pounds.<sup>133</sup> For example in *R v William Sharp*, before Frederick Berkley St John PM, George Sherbrooke Airey Esq CCL, James Frederick Palmer JP, James Smith Esq JP of the Melbourne Bench, Sharp appeared upon a charge of being in breach of publicans recognizance in not keeping

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<sup>127</sup> VPRS 2136, *op.cit.*, Saturday 17 February 1844.

<sup>128</sup> Alberton Court Register, 1 April 1846, p.75.

<sup>129</sup> Alberton, *ibid*, p.75.

<sup>130</sup> Alberton, *ibid*, p.76.

<sup>131</sup> VPRS 34/P/1; 6 September 1841, In *Re George Dale*, charged with failing to keep night lamp alight outside his public house. His defence that the oil supplied by the Henty's was faulty (being the last portion in the drum and unduly thick) was successful. Same facts and argument used successfully in *Re William Frost*.

<sup>132</sup> 2 Vic. No.18, s.37.

<sup>133</sup> 2 Vic. No.18, s.38.

sufficient accommodation for travellers and guests as required by act of council s.33 2 Vic No 10 1838. He was found guilty and fined 40 sh with costs of 7/6.<sup>134</sup> Classified as 'common inns' the licensee of a public house was not able to seize or distrain the property of a traveller for the payment of rent.<sup>135</sup> Payment for alcohol and liquors supplied by a licensee of a public house was not to be in kind, but only in metallic or paper money, breach of which, upon conviction before two magistrates, rendered the licensee liable to a fine not more than 20 pounds and not less than 5 pounds.<sup>136</sup> Imperial measures of liquors were always to be used,<sup>137</sup> and no spirituous liquors were to be dispensed by 'tap'.<sup>138</sup>

Convicts, unless in receipt of conditional pardons, were not to be employed in public houses. Breach of this was punishable before two magistrates, by a fine of 50 pounds. Convicts without conditional pardon who sold liquor either for themselves or for any other unlicensed person were liable to be sentenced to work in irons upon the roads of the Colony for a term not exceeding two years and not less than 3 months. If female, the defendant was to be confined for a similar period in any gaol or factory approved for the confinement of female prisoners.<sup>139</sup> Publicans were also not permitted to receive convicts upon their premises without the written directions of the convict's master, upon a fine of 5 pounds.<sup>140</sup> They were also not permitted to sell or dispose of alcohol to convicts, upon a fine for a first conviction of 5 pounds, second conviction, 10 pounds and third and subsequent convictions 20 pounds. Ordinary precautions were to be undertaken by the licensee to avoid such disposal of alcohol to convicts, with the

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<sup>134</sup> VPRS 2136, *op.cit.*, 8 August 1843, Special Petty Sessions.

<sup>135</sup> 2 Vic. No.18, s.39.

<sup>136</sup> 2 Vic. No.18, s.42.

<sup>137</sup> 2 Vic. No.18, s.43.

<sup>138</sup> 2 Vic. No.18, s.44.

<sup>139</sup> 2 Vic. No.18, s.45.

<sup>140</sup> 2 Vic. No.18, s.46.

magistrates enjoying the discretion to take into account mitigating circumstances and remission of fines if the situation dictates the same.<sup>141</sup>

In *R v Michael McEachan* before Frederick Berkley St John Esq PM JP and F. A. Powlett Esq JP CCL of the Melbourne Bench, McEachan was prosecuted for a breach of the recognizance entered into as publican for supplying a prisoner of the Crown with spirit at the Keilor Inn, contrary to s.33 2 Vic No.10. Four members of the Border Police were drinking at the Inn. According to the testimony of Trooper Thomas Slow they saw John Flynn drinking liquor. This account was supported by the testimony of Trooper James Husband. The Bench found the charge proved and defendant was fined 20 pounds and costs 7/6, in default 6 months gaol.<sup>142</sup> Chief Constable of Melbourne, Charles Brodie prosecuted *In the Matter of John Clarke*, before James Smith and James Cain of the Melbourne Bench on a charge of serving a convict with liquor contrary to Act of Council s45 2 Vic 18 (1838). The charge was proved and the defendant was fined 50 pounds, with seven days for payment, in default 3 months gaol. The defendant John Clarke was the licensee of the *Travellers Rest Inn*. The prosecution's case was based upon the evidence of George Gordon Wise Sargent of police of the Murray District, who testified that he witnessed Clarke serving a convict with rum.<sup>143</sup> Similar restrictions applied to the disposal of alcohol to 'the aboriginal natives of New South Wales and New Holland'.<sup>144</sup> *In the Matter of Ronald McDonald*, before James Smith Esq JP and Archibald McLaughlin Esq JP of the Melbourne Bench, McDonald was charged on information with 'supplying liquor to an aboriginal native of New South Wales', upon the information of Maurice O'Connor. The matter was, however, dismissed by the court with no explanation.<sup>145</sup>

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<sup>141</sup> 2 Vic. No.18, s.47.

<sup>142</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, 15 September 1843.

<sup>143</sup> VPRS 2136: Deposition Register 1845-1855, 6 May 1845.

<sup>144</sup> 2 Vic. No.18, s.49; penalty of 5 pounds attached thereto.

<sup>145</sup> VPRS 2136: Deposition Register 1845-1855, Saturday 20 September 1845.

Assigned servants were also another special category when it came to the consumption of alcohol. The legislation specifically states that such consumption 'has been the cause of frequent crimes' within the Colony. It was therefore an offence for any person [including masters] to supply or give alcohol to assigned servants, punishable upon conviction before one or more justices in the amount of 5 pounds. The exceptions to this prohibition are worth noting. The exemptions included medicinal portions, an amount of one measured gill within a 24-hour period, or when a servant was 'actually engaged in sheep washing'.<sup>146</sup> In the case of masters and servants, the legislation specifically forbade the payment of wages to take place inside public houses, which upon conviction, made the master liable to a fine of 5 pounds for every single instance of payment.<sup>147</sup>

Justices were authorised to enter licensed premises, and Constables, if authorised by the said justices were also authorised to enter premises, at any time of the day or night. If the licensee allowed any delay in admittance, the matter was justiciable before the next Quarter Sessions. Breach of this obligation to allow inspection was punishable by the forfeiture of the license and a moratorium of three years imposed before a further application for a license could be made by the former license holder.<sup>148</sup> The legislation also dictated the hours of operation; 4 am to 9 pm from 1 October to 31 March, and 6 am to 9 pm from 1 April to 30 September. No trading was permitted on Sundays, Good Friday, Christmas Day. Exceptions to this were the delivery of liquor to lodgers and bona fide travellers seeking refreshment on journeys. As always, special exemptions for extended trading, including Sundays, Good Friday and Christmas Day [except between 1 and 3 o'clock] was possible upon the payment of a fee of 10 pounds together with a special written authority provided by a majority of justices within a district.<sup>149</sup>

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<sup>146</sup> 2 Vic. No.18, s.48.

<sup>147</sup> 2 Vic. No.18, s.65.

<sup>148</sup> 2 Vic. No.18, s.50.

<sup>149</sup> 2 Vic. No.18, s.52.

The most common prosecutions under the Licensing Act were for 'tippling on Sunday' and late operation, which constitutes service in breach of both a Sabbath observance and a license recognizance undertaking. On Tuesday 25 July 1843, for example, the Melbourne Bench before Frederick Berkley St John PM and James Smith JP heard a number of licensing matters. In *R v John Smith (No.1)*, Smith was charged with 'tippling on Sunday' contrary to s51 of 2 Vict. 10. He pleaded guilty and was fined 40sh with 7sh 6p costs. On the same day in *R v John Smith (No.2)* Smith was charged with selling spirits after 9.00 pm. The defendant pleaded guilty and was fined 40sh with 7sh 6p costs. The Bench also heard *R v Henry Campbell* another 'tippling on a Sunday' matter. He was found guilty and fined 40sh with 7/6 costs. The Bench also heard *R v Kenneth Bethune*, another 'selling spirits after 9.00 pm' matter. The defendant pleaded guilty and was fined 40 sh with 7s 6p costs.<sup>150</sup> In *R v John Boulivant*, before Frederick Berkley St John PM and James Smith Esq JP, Boulivant faced a charge brought by the informant Constable John Corn who deposed that on Sunday 30 July 1843, he found that 'new milk and brandy were served' by the defendant. Boulivant was found guilty and fined 40sh with costs of 7/6.<sup>151</sup> The rural Port Phillip magisterial Benches also commonly prosecuted 'late traders'. In *R v Donald Cameron*, Cameron was summoned before the Portland Bench by Chief Constable Finn to answer a charge that he sold spirits after 9.00 pm on the night of 16 December 1842 and 'he not having a night licence'. The Bench fined Cameron 20sh with 13sh costs.<sup>152</sup> *R v James Wilson*,<sup>153</sup> involved the same breach of the Licensing Act, before George Stewart PM and A. Meyrick Esq JP of the Alberton Bench. Under the information of the Chief Constable, it was alleged that Wilson, innkeeper of the *Royal Hotel* at Tarraville, kept his public house open until 12 o'clock midnight on 12 March 1848. Henry Griffiths also deposed in support of the prosecution, claiming that 'the door was open at the time and liquid being poured'. Wilson pleaded not guilty. No decision however, is recorded in the Court Register.

<sup>150</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843–1845, Tuesday 25 July 1843.

<sup>151</sup> VPRS 2136, 12 August 1843.

<sup>152</sup> *Portland Guardian and Normanby General Advertiser*, 24 December 1842; matter heard on 20 December 1842.

<sup>153</sup> Alberton Court Register, 21 March 1848, p.155.

Licensed persons who employed unlicensed persons to sell or dispose of liquor were also subject, upon conviction before two justices, of a fine of 50 pounds.<sup>154</sup> Liquors found within unlicensed premises,<sup>155</sup> or found being 'hawked about',<sup>156</sup> were liable to seizure and destruction. Spirit found in 'disorderly houses' ie. unlicensed premises were also subject to seizure.<sup>157</sup> Persons found drinking in 'disorderly houses' were also liable upon conviction to be fined not more than 5 pounds and not less than 5 shillings.<sup>158</sup> In 'disorderly house' prosecutions, in order to make convictions easier, the legislation allowed 'the proof of the reputation of such house, and of any person or persons being found drinking therein shall be deemed full and sufficient evidence to warrant such Justice or Justices in convicting the person or persons so found drinking in such house, and the proprietors thereof'.<sup>159</sup> Mere delivery to the premises was also taken as proof of sale of liquor!<sup>160</sup>

Any adulteration or mixing of liquors or fermented materials was also in breach of the legislation and upon conviction before two justices, made the seller liable to a fine of not more than 50 and not less than 10 pounds.<sup>161</sup> Witnesses who were properly summoned to appear before the Bench of magistrates, either as witnesses for the prosecution or the defendant, who without reasonable excuse did not appear, or refused questions by the justices present, were liable, upon conviction before two magistrates, to a fine not exceeding 30 pounds and not less than 2 pounds.<sup>162</sup> Appeals from convictions under the *Licensing Act* were justiciable before the next court of Quarter Sessions.<sup>163</sup>

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<sup>154</sup> 2 Vic. No.18, s.53.

<sup>155</sup> 2 Vic. No.18, s.54.

<sup>156</sup> 2 Vic. No.18, s.55.

<sup>157</sup> 2 Vic. No.18, s.57.

<sup>158</sup> 2 Vic. No.18, s.62.

<sup>159</sup> 2 Vic. No.18, s.63.

<sup>160</sup> 2 Vic. No.18, s.64.

<sup>161</sup> 2 Vic. No.18, s.58.

<sup>162</sup> 2 Vic. No.18, s.75.

<sup>163</sup> 2 Vic. No.18, s.72.

Persons aggrieved by any fine or penalty greater than 5 pounds levied by a justice, was also able to appeal to the court of Quarter Sessions.<sup>164</sup> Unsuccessful appeals however were subject to an award of costs, which in the event of non-payment or default, rendered the appellant liable to commitment to gaol, and to remain there until the amount is paid.<sup>165</sup> Justices of the Peace and Constables were immune from prosecution for matters undertaken in the execution of their duties under the Licensing legislation, unless there was 'direct proof of corruption or malice' on their part and the prosecution against them was commenced within three months after the cause of action or complaint arose.<sup>166</sup> One example of an appeal before the Melbourne Quarter Sessions occurred on 2 January 1843 before Chairman His Honour Justice Willis, with F. A. Powlett JP CCL, G. S. Airey JP, and A F Mollison JP as Assessors. The matter was R (noted in Deposition Register as 'Queen') v *Jordan*, an appeal from conviction under the licensing act 2 Vic No.18. The Bench confirmed the conviction with costs. Interestingly the contemporary account notes that 'the exchanges between the Bench and the Crown Prosecutor Croke demonstrated the distance between the two'. Barry appeared for the appellant, and argued that there were faults in the form of the conviction, in that personal details were omitted and that therefore the original conviction was flawed. Prosecutor Croke referred to s.78 of the Act that maintained that 'no conviction shall be quashed for want of form'.<sup>167</sup>

Constables who neglected their duties under the *Licensing Act*, or who failed to report neglect of duties of their superior officers to the Police Magistrate or other Justice of the Peace, or who failed to report violations of any of the provisions of the Act, were liable, upon conviction, to a fine not exceeding 10 pounds and not less than 1 pound.<sup>168</sup> There was some evidence of disquiet amongst Melbourne publicans, however, on the question of how 'anxious' the constables were to detect breaches and undertake

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<sup>164</sup> 2 Vic. No.18, s.76.

<sup>165</sup> 2 Vic. No.18, s.77.

<sup>166</sup> 2 Vic. No.18, s.79.

<sup>167</sup> PPP Thursday 5 Jan 1843; Report of Quarter Sessions, matter was heard on 2 January 1843.

<sup>168</sup> 2 Vic. No.18, s.73.

prosecutions for breaches of the Licensing Act. On Wednesday 25 June 1845 for example, *A Memorial* of Certain Publicans was formally presented to the Melbourne Bench complaining of certain Constables for improper conduct in endeavouring to outrage them in a breach of the licensing act before His worship the Mayor and W. Wilmott Esq JP.<sup>169</sup> The basis of their complaint could possibly be founded in the fact that the Licensing Act directed that the 'moiety of fines and penalties' under the act 'shall go to the use of the party or parties informing and suing for the same'. After the moiety deduction, the remainder was to go to the Colonial Treasurer 'and be appropriated to the use of Her Majesty, Her Heirs and Successors for the public uses of the said Colony and the support of the Government thereof'.<sup>170</sup>

## SABBATH OBSERVANCE

THE COLONIAL LAWS dealing with Sabbath observance appear anachronistic to the modern reader. They are however, reflections of their time. They also tended to reflect an enforcement of British rather than colonial belief systems. The colonial magistracy sought to bridge the gap between the two vastly different societies by enforcing a religious belief system supposedly common to both cultures. The state sought to regulate or at least direct the spiritual belief systems held by the native and settler inhabitants of Port Phillip. This is consistent with the colonial convict policies of enforced 'spirituality' or divine observance and the attempts to Christianise the native and convict populations in New South Wales. On the other hand, contemporary accounts indicate a perception that the majority of the free population of colonial Australia sought to ignore religious attendance and observance.<sup>171</sup> Native religious indoctrination began when George Langhorne arrived in Port Phillip aboard the *Swallow* on 24 January 1837 to take up his post of 'Missionary to the Aborigines'.<sup>172</sup> This appointment has been ascribed to the

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<sup>169</sup> VPRS 2136: Deposition Register 1845-1855, Wednesday 25 June 1845.

<sup>170</sup> 2 Vic. No.18, s.80.

<sup>171</sup> 'the Sabbath is not well observed anywhere in New South Wales except by a few Persons of Sober habits', Kiddle, M., *op.cit.*, p.36 citing Journal kept by Sir Richard Bourke.

<sup>172</sup> William Lonsdale to Sir Richard Bourke, 1 February 1837, HRV, I, p. 87.

lobbying of J. H. Wedge of the Port Phillip Association<sup>173</sup> and therefore was not solely and initially a direct example of Crown policy. The Crown did however encourage Langhorne upon his arrival, to split his spiritual affections between the native and white settler population of the settlement as Police Magistrate Lonsdale felt that the vast majority of the Van Diemen's Land were far from respectable and in fact were considered by him to be undesirable as 'members of any community.'<sup>174</sup>

An aboriginal mission was established in the settlement on the banks of Yarra River near the present botanical gardens. John Thomas Smith was appointed Langhorne's assistant. Langhorne's was to be a 'social' as well as a 'spiritual' experiment. Langhorne had been the secretary of the Auxiliary Church Missionary Society in Sydney. Apart from religious conversion, Langhorne sought to 'teach' the natives; inculcate them with the virtues of the Protestant work ethic and 'merge' them into the working class as 'mechanics'. He made the natives 'work' for their 'presents', two hours for eight ounces of meat and twelve ounces of flour.<sup>175</sup> It is estimated that the native population within a thirty-mile radius of Melbourne was approximately 700, consisting of three main tribes.<sup>176</sup> Contemporary accounts painted a grim picture. Natives would wander aimlessly around the new settlement, conspicuous by their nakedness, attempting to append themselves to the new society by chopping wood, trading in brooms and carrying water. These pitiful groups were followed by half-starved packs of dogs 'who scavenged the streets like their masters'.<sup>177</sup> George Langhorne was also destined to take over from Christian L. J. de Villiers [upon his first resignation, 1 January 1838] as Superintendent of the Native Police Force until de Villiers was reappointed on 18 September 1838.<sup>178</sup>

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<sup>173</sup> Foxcroft, E. J. B., *Australian Native Policy* (Melbourne, 1941) p.37, cited in Kiddle, M., *op.cit.*, p.38.

<sup>174</sup> William Lonsdale to Sir Richard Bourke, 1 February 1837, *HRV*, I, p. 87.

<sup>175</sup> Grimwade, W. R., *op.cit.*, p.138.

<sup>176</sup> The Wawoorong (Yarra to Westernport-Dun Tin Bear/Ginger Beer Creek), The Boonoorong (small tribe) and the Watourong (Geelong-William Buckley's tribe), see Gurner, *op.cit.* p. 33.

<sup>177</sup> Grant, J., *op.cit.*, p.37 citing Curr, E. M., *Recollections of Squatting in Victoria* (Melbourne, 1883) p.20.

<sup>178</sup> Victoria Police Management Services Bureau, *op.cit.*, p.4.

Langhorne's arrival also meant that a semblance of permanent religious succour could also be provided to the white settlers, even though Langhorne was not an ordained minister,<sup>179</sup> was not the first man of the cloth in the settlement<sup>180</sup> and did not conduct the first religious services in the settlement<sup>181</sup> or indeed the district.<sup>182</sup> Correspondence indicates that Police Magistrate Lonsdale was gratified to have Langhorne present in the settlement; a person who would perform Divine Services and who would also establish a school. Lonsdale temporarily obtained one of the few freestanding buildings in the settlement for these dual purposes. After a subscription<sup>183</sup> was launched for the construction of a building to house the dual responsibilities of the Church, those of spiritual guidance and temporal instruction, it eventually grew to become St James Church of England, Port Phillip's first church and schoolhouse. Lonsdale at this time was also waiting with anticipation for the planned visit by Bourke.<sup>184</sup> The building held around 100 persons, with the convicts segregated from the congregation.<sup>185</sup> This very first 'religious structure' in Port Phillip was not an initiative of the Crown until it was formally sought and commandeered by the settlement's magistrate. This act also reinforced the time-honoured magisterial-spiritual link characterised by the English magisterial office.

Lonsdale's zealous pronouncements regarding the commencement of Divine Services were not merely 'elite' echoes or a 'respectable pretence', as by all accounts he

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<sup>179</sup> Finn, E., *op.cit.*, 95.

<sup>180</sup> The Wesleyan Minister, Rev. Joseph Orton visited the settlement together with Batman's family in April 1836, conducting the settlement's first service on 25.4.1836; see Finn, E., *ibid*, p.94.

<sup>181</sup> Billot, *op.cit.*, pp. 140–141, citing Memorandum of J. Orton, quoted by J. C. Symons, *The Life of the Revd. Daniel James Draper* (London, 1870) p.136.

<sup>182</sup> Henry Reed, who owned whaling stations in Portland and Kangaroo Island was also a Wesleyan Missionary, gave a sermon at Indented Head before Henry Batman and his family, see Billot, *ibid*, p.134.

<sup>183</sup> This according to Fawkner was not the first subscription, as subsequent to the first death in the settlement (Baby Goodman) on 28 June 1836, a site for the first Cemetery (present Flagstaff Gardens) and Church was selected by the settlement's leaders, Fawkner, Gellibrand, Simpson, Wedge, Dr Thompson, Dr. Cotter and Tom Armytage, all save Wedge made a contribution for the construction of a Church, see Billot, *op.cit.*, p.157.

<sup>184</sup> Correspondence, William Lonsdale to Sir Richard Bourke, 1 February 1837, *HRV*, I, pp. 87–88.

<sup>185</sup> Finn, E., *op.cit.*, p.95.

was a religious man. Further, although a devout Anglican, Police Magistrate Lonsdale was instrumental in the advance of Catholic worship within the Port Phillip community. He did so by allowing the Franciscan Father Patrick Geoghegan to occupy and construct, without 'Executive' approval from Sydney, a wooden structure in the 'bush' at the northeast corner of Elizabeth and Lonsdale Streets.<sup>186</sup> This was to evolve into St Francis Church, which stands on the same site to this day. Therefore in May 1839, when Police Magistrate Lonsdale assisted Father P. B. Geoghegan in choosing a site for the first Catholic Church in Melbourne,<sup>187</sup> he was not acting under Crown orders as a mere 'martinet'. Lonsdale demonstrated a religious tolerance uncommon for the time; a tolerance apparently lacking in the Moravian Superintendent La Trobe. The later development of religious intolerance in Port Phillip is perhaps best demonstrated by the actions of the first Bishop of the Anglican Church in Melbourne, Rev. Dr Charles Perry. Bishop Perry not only refused to meet Geoghegan when he arrived in Melbourne in 1848 but also returned Geoghegan's visiting card.<sup>188</sup> This attitude can be compared with Geoghegan's liberal acceptance of other non-Catholic denominations and their temporal aspirations.<sup>189</sup>

As part of his general duties, the magistrate was to 'cause the Lord's Day to be properly observed'. He was to prevent any trading or business premises to remain open, save and except for apothecaries who could operate at any hour, and butcher, fishmongers and greengrocers who were permitted to trade until 10.00 am, and bakers who were allowed to trade until 10.00 am and then for one hour in the afternoon. Breach of this ordinance, upon conviction before the magistrate, made one liable to a fine for every single offence, a sum not exceeding 3 pounds, not less than 1 pound.<sup>190</sup> Publicans were also placed on notice that if they allowed any 'disorder', tippling or drinking at any

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<sup>186</sup> Finn, E., *op.cit.*, pp.100–101.

<sup>187</sup> Shaw, *op.cit.*, p.84.

<sup>188</sup> Finn, E., *op.cit.*, pp.98–99.

<sup>189</sup> Note the donation of money towards the construction of the first Presbyterian Church in Melbourne. Geoghegan and Father R. Walshe apparently donated between 1 and 3 pounds for the fund, according to Finn, E., *ibid*, pp.104–105.

<sup>190</sup> 2 Vict. No.2, s.10.

hour on Sundays, they would forfeit their licensing recognizance and be liable to other penalties.<sup>191</sup> The magistrates did not enforce the dire consequence of loss of recognizance for Sunday 'tippling' and the breach was most commonly dealt with by way of fine.<sup>192</sup> 'Disorder' in licensed premises on Sundays was also commonly dealt with by way of fines and not 'loss of recognizance'.

There were some successfully defended matters that were simply dismissed by the Bench. In *R v Donald Cameron*, before the Portland Bench, Cameron the licensee of the *Portland Bay Hotel* was charged with allowing intoxicated persons on his premises on a Sunday. In his defence he stated that the intoxicated persons were in fact lodging at his hotel and that they had returned in a drunken state from an excursion. The Bench dismissed the prosecution.<sup>193</sup> The magisterial Bench did not seem to differentiate between simple drunkenness and prosecutions for drunkenness on a Sunday. The normal penalty for drunkenness in colonial Port Phillip was 10s. For example in *R v James Clancy*,<sup>194</sup> Clancy, 'free by servitude', appeared before George Stewart Esq PM of the Alberton Bench upon an information by the Chief Constable for being drunk on the streets of Tarraville on the night of the preceding Sunday. Clancy pleaded guilty and was sentenced to pay a fine of 10sh with 5s costs. In default of payment, he was to spend 24 hours confinement in the lockup.

The prohibition against Sunday trading enjoyed a long tradition in England. As the Australian colonial judiciary saw themselves as extensions of the English legal hierarchy, the realities were that the common law and legislative pronouncements of the English courts and legislature were as valid in Sydney and Melbourne as they were in Bow Street. The defences and exemptions contained within the English precedents

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<sup>191</sup> Plunkett, citing s.33 Licensing Act, p.454.

<sup>192</sup> In *R v Kenneth Bethune* before Frederick Berkley St John Esq PM JP, Bethune was charged with offering liquor to be used on the Sabbath. Bethune admitted the offence and was simply fined 40s with costs of 7/6 by the Melbourne Bench; VPRS 2136, Deposition Register 1843, August 1843; VPRS 34/P/1; 19 April 1842, In *Re John Cronin*, charged with selling liquor on a Sunday, fined 20 sh with costs 3/6 by the Portland Bench.

<sup>193</sup> *Portland Guardian and Normanby General Advertiser* 19 November 1842; matter heard 15 November 1842.

<sup>194</sup> Alberton Court Register, 29 November 1848, p.181.

therefore applied in the colonial courts. To avoid liability for labouring on the Lord's Day, one had to be younger than 14 years of age. Works 'of necessity' and 'charity' were however, exempt under the law.<sup>195</sup> One early Port Phillip 'labouring on the Sabbath' prosecution can be found in *R v Cotter* where Police Magistrate Lonsdale fined Dr. Barry Cotter five pounds for breaching the regulations. This was a huge fine and one of the largest recorded to be levied by Lonsdale during the early Port Phillip period. Cotter was a 'respectable' person and the settlement's temporary assistant Surgeon. He was prosecuted for non-observance of the Sabbath in hiring Batman's labourers to wash his sheep on a Sunday.<sup>196</sup>

There was English authority to support the proposition that under s.1 of the legislation, the phrase 'or other person whatsoever' was to be interpreted *ejusdem generis* and therefore would only apply to a class of persons created by the words tradesmen, artificer, workman and labourer and not to members of other social or professional classes.<sup>197</sup> The legislation did also not apply to the dressing of meat for families, cook shops, victualling houses or inns, or apply to the 'crying or selling of milk' before 9 o'clock in the morning or after 4 o'clock in the afternoon.<sup>198</sup> The ban extended to travel by the labouring class,<sup>199</sup> but not to journeys by stagecoach,<sup>200</sup> or to those who would encounter tolls, turnpikes and ferries and be charged the double Sunday tariff.<sup>201</sup> To promote, or at least not hinder Church attendance, those travelling to and from worship were deemed exempt from tolls.<sup>202</sup>

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<sup>195</sup> 29 Car.2, c.7, s.1, Plunkett, *op.cit.*, p.456.

<sup>196</sup> Clark, C. M. H., *History of Australia* (Melbourne, 1968), Vol. II, pp.182-220; Wilkins, *op.cit.*, p.43.

<sup>197</sup> *Sandiman v Breach*, 7 B. and C. 96, Plunkett, *op.cit.*, p.456.

<sup>198</sup> 29 Car.2, c.7, s.3, *ibid*, p.456.

<sup>199</sup> 29 Car.2, c.7, s.2, *ibid*, p.456.

<sup>200</sup> *Sandiman v Breach*, 7 B. and C. 96, Plunkett, *ibid*, p.456.

<sup>201</sup> 2 W. IV., No.12, s.5, *ibid*, p.456.

<sup>202</sup> 2 W. IV., No.12, s.8, *ibid*, p.457.

Curiously, for a new society still hacking its shape into the landscape and seeking to feed and protect itself from both real and perceived dangers, the Sabbath regulations banned the carrying or discharge of firearms. In *R v James Campbell and George Barber* a matter before the Portland Bench, both men were charged with carrying firearms on Sunday 11 September 1842, in contravention of the Act for the better observance of the Sabbath. They were found guilty and fined two pounds each and costs.<sup>203</sup> Similarly, in *R v James Allison*, also before the Portland Bench, Allison appeared on a similar charge prosecuted by George Barber. Charged with carrying firearms in contravention of the Act for the better observance of the Sabbath, he successfully pleaded in his defence that he had gone horse riding to view the country around Bridgewater and had only taken a carbine and a few ball cartridges for self defence. The case was dismissed.<sup>204</sup>

The role of the magistrate in protecting the 'Lord's Day' extended to protecting the Lord's House and the congregation encamped therein from 'affrays and disturbances' interrupting services held in Church.<sup>205</sup> The common law recognized activities that profaned the Lord's Day<sup>206</sup> as offences that were in the nature of 'Sabbath Breaking',<sup>207</sup> which made commercial trading a 'notorious indecency and scandal' and tended to corrupt morals as the day should be spent in relaxation, refreshment and public worship.<sup>208</sup>

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<sup>203</sup> *Portland Guardian and Normanby General Advertiser*, Saturday 17 September 1842; matter heard on Wednesday 14 September 1842. See also; VPRS 34/P/1; 10 January 1842, In *Re Benjamin Reynolds*, charged with discharging a firearm on the Lord's Day, fined 40 sh by the Portland Bench.

<sup>204</sup> *Portland Guardian and Normanby General Advertiser*, Saturday 17 September 1842; matter heard on 16 September 1842.

<sup>205</sup> See Public Worship, in Plunkett, *op.cit.*, pp.408–409.

<sup>206</sup> See Sunday, in Plunkett, *op.cit.*, pp.454–457.

<sup>207</sup> *Blackstone Commentaries*, vol4, p.63, *ibid*, p.454.

<sup>208</sup> 'Humanizes by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people, the sense of that duty to God, so necessary to make them good citizens, which would be defaced by an unremitted continuance of labour, without any stated times of re-calling them to the worship of their maker'; Plunkett, *ibid*, p.454.

The regulation of trading on the Sabbath and the promotion of Church attendance were in reality attempts to regulate individual conduct and shape individual belief systems consistent with long established acceptable patterns of behaviour apparent in England. The colonial reality, created by its establishment history and physical climate, both vastly different from its English social template, provided the magistracy with unique circumstances and inappropriate base expectations, especially when attempting to regulate conduct on the Sabbath. The act of 'sea bathing', a pastime not especially high in English priorities, is but one example. One contemporary Port Phillip newspaper account in January 1843 contained a notice concerning an event on the preceding Sunday when two or three men had decided to go swimming 'and were seen by respectable ladies who were taking a walk at the beach'. A report was made to Police Magistrate James Blair. Blair stated that in order to preserve public decency, he would issue a notice proclaiming that prosecutions would occur against any persons found undertaking such activities and that he would enforce the provisions prohibiting bathing within view of any public place between the hours of 6.00 am and 8.00 pm.<sup>209</sup>

'Irreverent' behaviour that disturbed public worship was made a criminal offence and prosecutions resulted from actions which would otherwise be considered 'bare quarrelsome words' if made outside of the sphere of the religious gathering.<sup>210</sup> Therefore, upon entering a Cathedral, church, chapel or other congregation, any person who disturbed proceedings or misused the preacher, was to be brought before a justice and if the allegation was supported by two witnesses, was liable to an order of two sureties and a recognizance of 50 pounds in default of which he would be committed to prison until the General or Quarter Sessions, and liable thereto to a fine of 20 pounds.<sup>211</sup> Church services during the early Port Phillip settlement period appear to have been serious but quite robust affairs. In *R v Thomas Napier*,<sup>212</sup> Napier was brought before the Melbourne Bench of magistrates for striking Catherine Smith with a book on the

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<sup>209</sup> *Portland Guardian and Normanby General Advertiser*, 21 January 1843.

<sup>210</sup> Plunkett, *ibid*, p.409.

<sup>211</sup> 1 W. and M. sess. 1, c.18, s.18, and 1 G. I., st.2, c.5, s.4, *ibid*, p.409.

<sup>212</sup> Melbourne Court Register 5 January, 1837, HRV, I, 317-318.

shoulder whilst they were in Church. Apparently Napier took exception to Smith talking to a certain Mrs. Craig during the service. Napier called out 'Shame, Shame' and struck her, in what Smith calls 'a rude and uncalled for manner'. Napier was found guilty but only fined 'one pound in *cash*'.

According to the traditions of the English magistracy the colonial magistrates were also duty bound to prosecute blasphemy and profaneness.<sup>213</sup> This included prosecutions for blasphemies against God in denying his existence or providence, 'all contumelious reproaches of Jesus Christ, contempt or ridicule of the latter two, being an impostor in Religion, falsely pretending extraordinary commissions from God, terrifying or abusing people with Judgement'.<sup>214</sup> In the interests of context, it should be remembered that such were the devotions of the day, that even the correct reporting of such court proceedings would constitute a blasphemous libel 'if such account contain matter of a scandalous, blasphemous, or indecent nature'.<sup>215</sup> The prosecutions for 'profane speech' seemed quite straightforward. If the charge was proved to the Bench's satisfaction, a fine would be ordered. In one example, *R v Charles Redding*,<sup>216</sup> involving a charge of using profane language, before George Stewart PM of the Alberton Bench, Redding 'free by servitude' was found guilty and ordered fined in the amount of one pound.

There were similar restrictions placed upon the playing of 'games' on Sunday. The English legislation forbade the 'concourse of people, out of their own parishes, on the Lord's Day, for any sport or pastimes' or activities within their parishes. If convicted before a single magistrate, the defendant would forfeit 3s 4d to the poor and in default would be sent to the stocks for 3 hours.<sup>217</sup> The Australian colonial version not only applied to any occupier of public billiard rooms or places of public amusement, but also

<sup>213</sup> See Blasphemy and Profaneness, in Plunkett, *op.cit.*, p.55.

<sup>214</sup> 1 E. P. C. 3, *ibid*, p.55.

<sup>215</sup> *R v Carlisle*, 3 B. and A. 167, Plunkett, *ibid*, p.55.

<sup>216</sup> Alberton Court Register, 22 September 1848, p.171.

<sup>217</sup> 1 Car. 1, c.1, Plunkett, *op.cit.*, p.457.

to private residences. The legislation furthermore allowed the magistrate to take action to physically disperse all such activities in public or open places that were being used for gambling or the playing 'at any game' and to seize 'any implements, instruments or animals used or intended to be used therein' and to have the power under law to destroy those said same things. Upon conviction, the fine was not to exceed 5 pounds and be not less than 3 pounds.<sup>218</sup> Under these provisions, no Sunday cricket or race meetings were legal within town limits in colonial Australia.

The Port Phillip magistracy were therefore responsible for regulating the secular and spiritual activities of all inhabitants, native and imported, within their jurisdiction. They regulated the flow of alcohol by controlling those authorised to dispense it. They determined when, where and to whom it was to be legally sold and politely collected the fees for the privilege of doing so. They encouraged church attendance and regulated activities on the Sabbath. They failed however, as the following Chapter demonstrates, to produce the servient public behaviour they demanded. Defeated by alcohol, the frontier nature of the settlement and the people that such adventures attract, the magistrates simply gnashed their teeth and punished those whose behaviour threatened the peace, order and tranquillity of their misshapen county.

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<sup>218</sup> 2 Vict. No.2, s.11.

# CHAPTER 8:

## PUBLIC BEHAVIOURS IN PORT PHILLIP

### SWEARING

IN THE MATTER of magisterial adjudications involving swearing,<sup>1</sup> under the relevant applicable legislation,<sup>2</sup> the offence was committed if an act of profanity, cursing or swearing was heard by any person and, if that person was not a magistrate or constable, it could be reported on oath to a magistrate for a summons to be sworn out for their appearance before the Bench to answer the charge. If a person swore in the presence or within the hearing of any magistrate, the justice had the power to immediately convict ‘without further proof’.<sup>3</sup> If the swearing occurred within the presence or hearing of a constable, then the defendant was to be seized and brought before a justice or an information sworn out against the defendant if they were known to the constable.<sup>4</sup> Upon conviction before the magistrate, the legislation mandated that if payment of the fine and costs were not immediately paid, then the defendant was to be sent to the House of Corrections under sentence of hard labour for 10 days<sup>5</sup> and for a further 6 days if the fees remained unpaid.<sup>6</sup> Any magistrate neglecting or ‘omitting’ this duty was himself liable to a

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<sup>1</sup> See Swearing, in Plunkett, J. H., *Plunkett's Australian Magistrate, A Guide to the Duties of A Justice of the Peace with Numerous Forms*, ed. by Edwin C. Suttor Esq. Barrister, Chief Commissioner of Insolvent Estates and a Magistrate of the Colony of New South Wales (Sydney, 1847) 3<sup>rd</sup> ed, pp.464–465.

<sup>2</sup> 19 G. II. c.21.

<sup>3</sup> 19 G. II. c.21, s.2.

<sup>4</sup> 19 G. II. c.21, s.3.

<sup>5</sup> 19 G. II. c.21, s.4.

<sup>6</sup> 19 G. II. c.21, s.10.

penalty of 5 pounds!<sup>7</sup> A constable likewise would be liable to a fine of 40sh.<sup>8</sup> These fines were payable in equal portions to 'the poor' and to the informant before a court of record.

As a 'masculinist' colonial frontier settlement, early Port Phillip was awash with bad language. The early Melbourne and Geelong magisterial courts normally disposed of these matters by way of a fine.<sup>9</sup> The singing of ribald songs was also prohibited, especially if sung within the presence of the women folk of the District.<sup>10</sup> Evidence of 'aggravating circumstances' resulted in higher fines being handed down by the magistrates. This included resisting arrest,<sup>11</sup> or assaulting police.<sup>12</sup> Where there were no aggravating circumstances and where there were sufficient displays of 'remorse' the Bench would often simply admonish and discharge the defendant. This included instances of clear expressions of regret,<sup>13</sup> and apparently where 'bad language' was the only charge, even if it was expressed on the Sabbath.<sup>14</sup> Contrast these cases with *R v John Griffiths*,<sup>15</sup> where

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<sup>7</sup> 19 G. II. c.21, s.6.

<sup>8</sup> 19 G. II. c.21, s.7.

<sup>9</sup>In *R v John Gunn*, James Newman, a shoemaker, testified that Gunn 'abused him and used gross language'. The constable was sent for. The Melbourne Bench found Gunn guilty and fined him one pound or 14 days imprisonment in default of payment; Melbourne Court Register 23 January 1838, *HRI*, I, 328.

<sup>10</sup> VPRS 34/P/1; 18 October 1841, In *Re John Johnson* (Waterloo, 1838) life, charged with singing obscene songs with the purpose of offending a female. He was sentenced to receive 50 lashes by the Portland bench, to be given in the presence of the Surgeon who stated that 'he was well able to bear it'. Only 25 lashes were given 'at the desire of the magistrate'.

<sup>11</sup>In *R v John Tomlinson*, Constable James Rogers testified that Tomlinson was drunk and using 'very indecent language'. He claimed that Tomlinson also resisted arrest. Constable Edward Freestun testified in support. Tomlinson was found guilty and fined five pounds or two months imprisonment; Melbourne Court Register 12 February 1838, *HRI*, I, 329.

<sup>12</sup>In *R v Charles Culling*, James Newman, a shoemaker, testified that he heard Culling using abusive language. Culling then proceeded to knock him down three times. John Connell gave evidence substantiating the allegations. He claimed that he 'had witnessed all'. Connell also gave evidence that there 'was no resistance'. The Melbourne Bench fined Culling five pounds; Melbourne Court Register 26 December 1838, *HRI*, I, 339.

<sup>13</sup> In *R v Robert Yule*, before Foster Fyans of the Geelong Bench, upon the sworn information of Constable Finnegan, Finnegan testified that Yule had publicly insulted him. Yule plead guilty and expressed regret. The matter was dismissed; Geelong Court Register 11 April 1839, *HRI*, I, 350.

<sup>14</sup>In *R v George Austin and George Niven*, also before Foster Fyans, again upon the sworn information of Constable Finnegan, Finnegan testified and that on *Sunday* 21st instant George Austin and George Niven used bad language. This case was also dismissed; Geelong Court Register 29 April 1839, *HRI*, I, 350.

<sup>15</sup> Geelong Court Register 27 September 1839, *HRI*, I, 355.

having been charged with a breach of the peace and with abusive language, even though Griffiths entered a plea of guilty, Fyans proceeded to fine him 10s for this, his first offence.

The later Melbourne and wider Port Phillip decisions also illustrate the weight given to considerations of aggravation and remorse. Obscene language, if coupled with assault,<sup>16</sup> contempt of court,<sup>17</sup> indecent exposure,<sup>18</sup> or drunkenness,<sup>19</sup> was frowned upon and penalised by the bench. These same general principles were applied to women settlers who used obscene language. In *Re Mary Ann Mills*,<sup>20</sup> involved a charge upon summons 'for making use of threatening and disgusting language', before George Stewart Esq JP of the Alberton Bench. In this case Elizabeth Martin, wife of Captain John Martin of Port Albert, deposed that on the previous day the defendant 'made use of obscene and threatening language to her and placed her in fear that Mills would do her some grievous bodily harm'. The dispute apparently revolved around an accusation regarding the interference with the defendant's clothes washing line. Martin's servant Joseph Platt supported her testimony. The Bench bound over the defendant to keep the peace for 12 calendar months and 'binds her in her own recognizance'.<sup>21</sup> *R v Caroline Farrell* <sup>22</sup>

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16 In *John M. Ardlie v Thomas Tool*, before Frederick Berkley St John Police Magistrate of the Melbourne Bench, dealt with an allegation of assault and obscene language. Ardlie was found guilty and fined 10s with costs of 3/6; VPRS 2136, Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, Friday 28 July 1843.

17 In *Re Thomas Armstrong*, before Henry Condell Esq JP and William Hull Esq JP, Armstrong was charged with 'disrespect to the Bench and use of profane swearing'. Charles Swedle claimed that he heard 'their Worships caution the defendant not to make use of bad language within the court' and 'eventually heard him say 'I didn't care a damn''. No result is recorded in the court register; VPRS 2136, *ibid*, Monday 19 February 1844.

18 In *R v John Masterman*, Masterman appeared before the Melbourne Bench charged by Constable Lawrence with 'using indecent language and exposing his person on the previous day'. Police Magistrate St John reportedly stated that 'this was not the first time he had been brought before him' and that 'he was a most desperate character'. Masterman was found guilty and fined five pounds, in default of payment, two months gaol; PPP Thursday 5 Jan 1843, Police Office, 'Thursday last'.

19 In *R v Henry Windeyer*, upon the information of Constable Machonichie, Windeyer was charged with being drunk and using obscene language. Police Magistrate James Blair of the Portland Bench reportedly stated that 'using obscene language was an aggravation of the offence of drunkenness and that the only way to put a stop to such behaviour was to inflict the highest penalty'. Windeyer was fined 20s, with 6s6p costs in default of payment, imprisonment for 24 hours; *Portland Guardian and Normanby General Advertiser*, 19 November 1842.

<sup>20</sup> Alberton Court Register, 19 July 1848, p.166.

<sup>21</sup> *Ibid*, at p.167.

<sup>22</sup> Alberton Court Register, 6 October 1848, p.171.

involved a charge of drunk and disorderly, before George Stewart Esq PM and A. Meyrick Esq JP of the Alberton Bench. In this matter Farrell, a 'free emigrant', was charged on the information of the Chief Constable with 'being drunk and disorderly on the evening of 5 October 1848 in the Township of Victoria'. According to the depositions, the defendant was fighting with her husband and 'making use of horrid disgusting language'. The Chief Constable gave her into the charge of Constable Hill.<sup>23</sup> William Lugson [scourger or surgeon] also testified that the defendant was using 'disgusting language and was violent'. Charles Whitehall, James Whitehall<sup>24</sup> and John Griffiths supported this testimony. On the other hand, James Dobson, who 'went bail for the defendant' maintained that she was sober but was 'labouring under a little excitement'.<sup>25</sup> The Bench found her guilty and 'sentenced her to a fine of 15sh with 2sh costs'.<sup>26</sup>

## VIOLENCE, ALCOHOL, AND DRUNKENNESS

THE OVER-CONSUMPTION of alcohol in the Port Phillip settlement appeared to be a cross-cultural phenomenon that overcame class boundaries and social gatherings. Alcohol would be consumed at licensed premises, unlicensed 'sly-grog' shanties and 'premier' social events. 'Premiere' events they may have been, however, the notable thirst for alcohol which had taken grip of Melbourne from early times was only satiated at the early Melbourne horse races by 'refreshment' booths manned by the town publicans.<sup>27</sup> The presence of alcohol at these 'premier' events was ridiculed in contemporary accounts.<sup>28</sup> At times, the police were forced to keep the peace by extraordinary methods. There were examples of persons found drunk and disorderly at the races being chained to

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<sup>23</sup> *Ibid*, p.172.

<sup>24</sup> *Ibid*, p.173.

<sup>25</sup> *Ibid*, p.174.

<sup>26</sup> *Ibid*, p.175.

<sup>27</sup> From 4 booths in 1840 the number increased to 10 in 1843, *PPP* 24 February 1840, 2 February 1843, 9 February 1843, *PPG* 2 March 1842, cited in McGowan, *op.cit.*, p.115.

<sup>28</sup> *Melbourne Advertiser* 12 March 1838, *Argus* December 1850, cited in McGowan, *op.cit.*, p.115.

a stake in the ground for some time prior to being taken back to the police lockup in preparation for their appearance before the magistrates the following morning.<sup>29</sup>

Alcohol and the role played by it and the public houses that dispensed it were central to the life of early Melbourne. The magistrates and police, by controlling not only the licenses and regulations which guided the actual selection of persons operating the hotels and the running of these establishments, also regulated the conduct of patrons and prosecuted those who breached the peace as a result of their hotel patronage. Colonial 'hotel patronage', according to any cursory examination of the magisterial Bench records of the period, could be viewed as a euphemism for 'place to get drunk' and/or 'precursor to violent behaviour'. The Bench book evidence suggests a clear nexus between the consumption of alcohol and violent behaviour. There is also evidence that the hotels themselves became the focal point of violent behaviour in early Port Phillip. There were instances of unprovoked assaults upon publicans,<sup>30</sup> assaults 'over beer',<sup>31</sup> assaults outside public houses,<sup>32</sup> and pub 'skylarking'.<sup>33</sup> Pub 'skylarking' often escalated to pub 'stabblings'.<sup>34</sup> At times, the publicans themselves were prosecuted for assaulting their

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<sup>29</sup> There were 'a dozen human beings bound, body and limb, to a huge chain, their clothes rent, their faces begrimed [sic] with dirt and sweat, and streaked in many cases with the blood received in the previous fray...using the rights of the law to brutalized human beings...these poor wretches who, lead [sic] by the examples of their betters, have been made the scapegoats of the general excitement'; PPG 5 March 1842, PPP 9 March 1840, cited in McGowan, *op.cit.*, p.115.

<sup>30</sup>In *R v Thomas Bullock*, Peter Scott, publican, testified and claimed that Bullock has struck him without provocation whilst on his premise [*Scott's Hotel*]. John Nichols' testimony confirmed the allegations. Jonathan Smith testified and gave evidence for Bullock. Bullock was found guilty and fined five pounds; Melbourne Court Register 13 October 1838, *HRV*, I, 335.

<sup>31</sup>In *R v Thomas Lowry*, Special Constable Henry Grimaldi testified and claimed that Lowry was drunk at *Carr's Public House* and was arguing with Elizabeth Nash 'over beer' and then struck her. Elizabeth Nash claimed that Lowry 'shoved her on the neck causing her to fall'. Lowry claimed nothing in his defence, was found guilty and fined two pounds; Melbourne Court Register 26 October 1838, *HRV*, I, 336.

<sup>32</sup> *David Waugh v Thomas Cunninghame*, before Frederick Berkley St John PM and James Smith Esq JP of the Melbourne Bench, involved a similar assault. Waugh was leaving *Andersons Public House* when Thomas Cunninghame struck him. Cunninghame was found guilty and was fined 13s 6p plus costs; VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, 10 August 1843.

<sup>33</sup> In *R v Peter Perkins and Henry Clape*, again before Frederick Berkley St John PM and James Smith Esq JP, upon a charge of fighting in a public house, the matter was discharged after testimony that 'the men were 'just skylarking'; VPRS 2136, *ibid*, 10 August 1843.

<sup>34</sup> VPRS 34/P/1; 25 September 1841, In Re Thomas Groves, free by servitude, charged with stabbing bonded man (scourger) Thomas Lehey at Evans' Public House on 13 September 1841. Committed to trial at Melbourne by the Portland Bench.

patrons.<sup>35</sup> It appears that at times the lubricant provided by the hotels simply set the mind of the colonist to violence and that nothing could then deter them from the fight that they longed for.<sup>36</sup>

The effects of alcohol and the violence that it unleashed were also felt in Port Phillip homes. In *R v William Mooney*,<sup>37</sup> it was alleged before the Melbourne Bench that Mooney struck William Winberry and Thomas Bullock. Both 'victims' testified that they were in Mooney's hut with Mooney's wife. Mooney ordered them out of his house and struck them with an axe. Mooney maintained that they were 'in the habit of visiting his wife and encouraging her to drink'. Mooney was found guilty and fined 10sh. The parties within a fortnight were again before the Melbourne Bench. In *William Mooney v William Winberry and Thomas Bullock*,<sup>38</sup> Mooney, on this occasion 'the victim' claimed that he went home one night and found his wife absent. She later came home drunk. The following day, a Sunday, he saw her at the hut of Winberry and Bullock. He ordered her out and whilst approaching the hut was assaulted by Bullock. Mathew Collins, a witness, testified and stated that Mooney was drunk and was trying to retrieve his wife who did not wish to leave. Collins claimed that Mooney shoved Bullock a few times and that Bullock and Mooney's wife (who had a stick) attacked Mooney. The case was dismissed. In *R v John Bell (No.1)* <sup>39</sup> alias 'Jack the Flat', Bell was charged with being drunk and 'maltreating his wife'. At 11.00 pm on sat 27 August 1842, the town constables were alerted by the cries

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<sup>35</sup> In *R v George Smith*, Smith was the licensee of the *Lamb Inn*. Dr Cotter testified and claimed that Smith had assaulted him. George Scarborough and Mary Ann Scarborough supported Smith's testimony. Smith was found guilty and fined five pounds; Melbourne Court Register 21 February 1837, *HRV*, I, 314–315.

<sup>36</sup> In *R v John Walker*, involved a charge of drunkenness and breach of the peace, before C. J. Tyers and John Reeve of the Alberton Bench. Messrs. Streader and Murphy made depositions regarding the events of 31 December 1845. It was claimed that Walker was drunk and had 'stripped apparently for the purpose of fighting' with their servants in the taproom of the *Port Albert Hotel*. Walker was told that if he wanted to fight he should leave the premises. Constable Sullivan was called and attempted, with Streader and Murphy's assistance, to subdue Walker who 'tossed about in a state of madness'. Afterwards, having been released into the charge of Morris Coxswain, Walker returned to the window of Streader's private rooms and broke panes of glass whilst challenging Streader 'to come out and fight'. The Bench found the charge proved and fined Walker one pound, with 14sh damages. The Bench also ordered that he be bound over to keep the peace himself in the amount of twenty pounds and two sureties of ten pounds each; Alberton Court Register, 7 January 1846, pp.44–45.

<sup>37</sup> Melbourne Court Register 18 September 1837, *HRV*, I, 321.

<sup>38</sup> Melbourne Court Register 3 October 1837, *HRV*, I, 322–323.

<sup>39</sup> *Portland Guardian and Normanby General Advertiser*, 3 September 1842; matter heard 29 August.

of 'murder' coming from the house. They found the defendant 'ill treating his wife' and took the defendant into custody to the watch house. He appeared before the Portland Bench and was ordered to provide sureties for his future good behaviour in sum of twenty pounds as two ten pound sureties. *R v Joseph Ellis, Alex Hutton, John Coulton, William Varley*,<sup>40</sup> a case that primarily involved allegations of assault also involved what we would now describe as a 'home invasion'. *William Day* was separately prosecuted for drunkenness and assault. On 3 January *R v Day* was heard separately and he was sentenced to three days solitary confinement for being 'out without a pass'. On 4 January, upon the information of Chief Constable Finn, the court heard that the drunken group of *Ellis, Hutton and Coulton entered the house of Henry Fitzgibbon and 'started a row and made use of low and unseemly language to his wife Mrs Fitzgibbon'. They were ordered to leave and Fitzgibbon was struck. Police Magistrate Blair of the Portland Bench found evidence of aggravation, but also held 'that the charges were proved against only one of the defendants', Joseph Ellis. Ellis was fined 40sh with 4sh costs with one-month imprisonment in default. The other defendants were, surprisingly, discharged.*

As substantial structures, hotels were often used as meeting places for groups and social clubs during the colonial period. These meetings were also subject to violence and disruption. Colonial 'bouncers' or 'crowd controllers' often bore the brunt of this violence.<sup>41</sup> Often the violence and assaults outside the drinking establishments resulted in very serious outcomes.<sup>42</sup>

*Contemporary accounts confirm that 'an extraordinary quantity of liquor was being drunk' in the settlement.*<sup>43</sup> The contemporary assessments do not include all of the

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<sup>40</sup> *Portland Guardian and Normanby General Advertiser* 7 January 1843; matters heard on 3 January 1843 and 4 January 1843.

<sup>41</sup> In *R v Michael MacNamara* before Henry Condell Esq JP of the Melbourne Bench, MacNamara appeared on a charge of assault upon Robert Stayers at a meeting at the *Royal Exchange Hotel*. Stayers had been the doorkeeper of the meeting the previous Friday night, when MacNamara appeared and assaulted him. MacNamara was found guilty and fined 40sh with costs of 8/6; VPRS 2136, Tuesday 14 November 1843.

<sup>42</sup> *In the Matter of Hemingsley*, involved a *Magistrates Investigation* regarding a charge of manslaughter. Hemingsley, a tobacconist, had caused the death of a man Shea, during an affray outside a Richmond hotel, *Palmer's Public House* on 30 December 1842; *PPP* Monday 2 January 1843.

<sup>43</sup> *Argus* 29 November 1849, cited comparative figures of gallons consumption per head in: England 0.51, Scotland 2.46, Ireland 1.52, Sydney 2.13, Port Phillip 2.89, cited in McGowan, *op.cit.*, p.120.

liquor sold in the sly grog shops, which again according to contemporary accounts, were alarming in number.<sup>44</sup> The consumption of alcohol also had an effect on the attempts by the 'respectables' to 'civilize' Melbourne. Cultural endeavours and commercial traders became victims of alcohol. There was riotous behaviour and disturbances in Melbourne's early theatrical productions.<sup>45</sup> Shopkeepers were not safe from violent drunkards.<sup>46</sup> One could literally measure the effect that alcohol had upon the Port Phillip population by simply observing the proceedings at any given time at any of the Port Phillip magisterial Benches. This measure did not escape contemporary comment.<sup>47</sup>

The social life of early Melbourne was filled with social gatherings both formal and informal, designed it seems, to celebrate almost every happening.<sup>48</sup> Melbourne was developing a reputation, according to one contemporary account, which celebrated anything<sup>49</sup> and everything.<sup>50</sup> In the formality stakes, the visit of Lady Franklin, the arrival of La Trobe and the vice-regal inspection by Governor Gipps stand out as the most important of the period.<sup>51</sup> The most consistently important and formal social gatherings in early colonial Melbourne were the *Quarterly Assemblies*,<sup>52</sup> begun with the celebration of the Queen's birthday in 1841 lapsing only after 1846. These gatherings were seen as the

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<sup>44</sup> *PPP* 30 March 1840, 17 December 1840, *PPH* 23 February 1841, 10 August 1841, 27 August 1841, cited in McGowan, *ibid.*, p.120.

<sup>45</sup> McGowan, *ibid.*, pp. 127–129.

<sup>46</sup> In *Benjamin Hawkins v John Finlay*, before Henry Condell and James Smith, Esquires JP of the Melbourne Bench, Finlay faced a charge of assault. The complainant Hawkins, a shopkeeper residing in Collins Street, claimed that when Finlay came into his shop he was 'very tipsy and assaulted him'. The court found the offence proved and fined Finlay 50s with costs of 3/6 in default 1 month gaol; VPRS 2136, Wednesday 29 November 1843.

<sup>47</sup> *Portland Guardian and Normanby General Advertiser*, Monday 19 September 1842, an editorial statement that 'very little has been doing in police office this week and not one drunkard has been brought forward before the Bench'.

<sup>48</sup> *PPP* 16 February 1843, cited in McGowan, *op.cit.*, p.120.

<sup>49</sup> Welcoming persons of substance to the colony was a top social priority and necessitated a party; J. D. Lang *PPH* 6 February 1846, Gipps 15 October 1841, Yaldwyn departure *PPH* 2 March 1841, Justice Jeffcott in *Georgiana's Journal*, *op.cit.*, p.148, cited in McGowan, *ibid.*, p.120.

<sup>50</sup> *PPH* 24 March 1846, cited in McGowan, *ibid.*, p.120.

<sup>51</sup> *PPG* 6 April 1839, 10 April 1839, Lady Franklin; *PPG* 31 August 1839, La Trobe; *PPH* 24 October 1841, Gipps; cited in McGowan, *ibid.*, p.122.

<sup>52</sup> Baker, C. J., *op.cit.*, p.30, cited in McGowan, *op.cit.*, p.122.

consummate conglomeration of 'the good set'<sup>53</sup> and 'exclusives' within the settlement. Alcohol was involved in most of these occasions, save of course for the massive Teetotal Society's annual dinner-dance that in 1846 lasted three full days.<sup>54</sup>

Christmas and New Year celebrations were held with enthusiasm, mindful however that they were being celebrated in a strange hot, dry, dusty, non-English southern hemisphere environment.<sup>55</sup> *Not surprisingly, drunkenness abounded on Christ's birthday in this 'topsy-turvy' world.* The drunkenness would lead to assaults on the street during conversations investigating previous assaults,<sup>56</sup> or threats whilst in ones home on Christmas Day.<sup>57</sup> Alcohol consumption became all the more dangerous when it occurred whilst at work. *One of the earliest examples of the district's 'drink driving' fatalities or drink affected workplace deaths and a demonstration of the inherent dangers of drink in Port Phillip occurred in Western Victoria in 1843.*<sup>58</sup>

In adjudications concerning charges of drunkenness, conviction was possible before one justice 'on view, confession, or the oath of one witness'. For a first offence, a fine of 5sh, was to be payable within one week of conviction.<sup>59</sup> If not able to pay the fine,

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<sup>53</sup> Christina Cunninghame, who decorated the rooms, cited in McGowan, *op.cit.*, p.122.

<sup>54</sup> PPH 14 April 1846, 16 April 1846, cited in McGowan, *op.cit.*, p.121.

<sup>55</sup> 'clouds of dust - myriads of flees [flies] - an almost intolerable heat - the grass is all but parched up - the flowers have lost their lustre by the heat and dust; in short, everything is turned upside down'; PPG 1 January 1845, cited in McGowan, *op.cit.*, p.121.

<sup>56</sup> In *R v Robert Walker*, James Newman, a shoemaker, testified that on 25 December [Christmas day] 1838 he was met by Walker, who was drunk. He was then questioned about men whom Newman had recently claimed had assaulted him. Walker then assaulted him. Newman 'went for the constables' and upon return learnt that Walker had also assaulted his wife. Walker was fined five pounds in default 'to be imprisoned for two months if fine not sooner paid'; Melbourne Court Register 27 December 1838, HRI, I, 340.

<sup>57</sup> In *R v Francis O'Reilly*, Richard Grayling testified that on 25 December [Christmas day] 1838 he was threatened in his home by O'Reilly. John James testified and confirmed the threats and the allegation that O'Reilly 'was very drunk'. Given that no battery occurred, O'Reilly was discharged on payment of 5s costs; Melbourne Court Register 27 December 1838, HRI, I, 340.

<sup>58</sup> The contemporary account recounts the 'fatal accident occurred where James Amos, bullock driver, in the employ of John Henty, was crushed by the cart he was driving after he fell in front of it whilst driving. He was drunk at the time'. Police Magistrate James Blair held an inquest. He was assisted by Dr James Martin District, Colonial Surgeon; Portland Guardian and Normanby General Advertiser, 18 March 1843.

<sup>59</sup> 21 Jac. 1, c.7, s.1., See Drunkenness, in Plunkett, J. H., *op.cit.*, p.158.

the defendant was liable to commitment to imprisonment. Upon second conviction, the defendant was to be bound in a recognizance with two sureties in the sum of ten pounds to be of good behaviour.<sup>60</sup> Apparently, crimes committed whilst drunk were to be treated as if the defendant committed them sober ‘and the party shall be punished in precisely the same manner as if he were sober at the time he committed the act’.<sup>61</sup> The *Publicans Act* further stated that there was to be no differentiation between the laws of England and the laws of the Colony with respect to drunkenness.<sup>62</sup> Defendants were therefore liable, upon prosecution, to a fine wherever they were detected, for non-public drunkenness.

*The vast majority of the prosecutions for drunkenness were however for ‘public drunkenness’. It was the sworn ‘duty of a constable to apprehend any person whom he finds drunk in any highway, street, road or public place, and to convey that person before a Justice of the Peace, to be dealt with according to law’.*<sup>63</sup> Once before the magistrate, the legislation allowed that upon conviction for drunkenness and being fined not more than 1 pound and not less than 5 shillings or placed in the stocks. In the event of default of payment the magistrate was able to sentence the defendant to be imprisoned to solitary confinement upon bread and water, for a period not exceeding twenty-four hours or to be ‘worked’ on the treadmill for a period not exceeding twelve hours. If the defendant has previous convictions for drunkenness, the magistrate had the discretion to augment the penalty commensurate with the number of previous convictions.<sup>64</sup> Non-pecuniary sentences for drunkenness were rare, but were at times ordered by the Port Phillip magistracy, primarily against convict defendants. In *R v Thomas Fitzmaurice and George Penfold*,<sup>65</sup> Fitzmaurice and Penfold were charged with being ‘drunk and fighting’. John Batman testified against Fitzmaurice and Constable Mathew Tomkin testified and

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<sup>60</sup> 21 Jac. 1, c.7, s.3.

<sup>61</sup> *R v Carroll*, 7 C. and P.145; *R v Meakea*, id. 297, in Plunkett, *op.cit.*, p.158.

<sup>62</sup> 2 Vic. No.18, s.66.

<sup>63</sup> 2 Vic. No.18, s.67.

<sup>64</sup> 2 Vic. No.18, s.68.

<sup>65</sup> Melbourne Court Register 21 July 1837, *HRV*, I, 317.

against Penfold. They were both found guilty and sentenced to four hours in the stocks. In *R v Joseph Farley (No.1)*<sup>66</sup> Constable Williamson testified that when summoned by Private Mark Colman, a brick-maker of the 80th Regiment, he was informed that Farley (*Surrey*, 1836, life) had been drunk and abusing Mrs Colman. Farley then hit Williamson with a stick. Lewis Pendrana, Overseer of Works, testified in support. Farley was found guilty by the Melbourne Bench and sentenced to fifty lashes. In *R v George Rhodes*,<sup>67</sup> before Foster Fyans and W. Sievwright of the Geelong Bench involved a charge brought by Constable McKeever and upon the sworn information and testimony by Foster Fyans PM. *The allegation was that Rhodes 'had come drunk to court to complain about being summonsed to appear for drunkenness'. Rhodes was fined 10sh for drunkenness and sentenced to one months gaol 'for disrespect to Foster Fyans magisterial Bench'. This was not an isolated incident.*<sup>68</sup> If fines were not paid, the defendant would normally be imprisoned for the offences drunk and disorderly,<sup>69</sup> or drunk and riotous behaviour,<sup>70</sup> for a period of 24 hours. Incarceration would also be ordered if the drunkenness was aggravated by contempt. In *R v Thomas Farrell*,<sup>71</sup> involving a charge of being drunk before the Bench, before George Stewart JP, where Farrell, "free by servitude", appeared within the precincts of the Court [there are no indications as to why he appeared] 'in a state of

<sup>66</sup> Melbourne Court Register 9 April 1838, *HRV*, I, 330.

<sup>67</sup> Geelong Court Register 17 July 1839, *HRV*, I, 351.

<sup>68</sup> *In the matter of Lorenzo Gilbert*, Gilbert is confined [no time specified Court Register] for 'being drunk and using threatening and abusive language towards a magistrate in the execution of his office, by the hand of Lachlan Macalister'; *Alborton Court Register*, 4 November 1846, p.87.

<sup>69</sup> In *R v John Winstanley*, involving a charge of drunk and disorderly, before George Stewart PM of the Alborton Bench, John Winstanley, free by servitude, was found drunk and disorderly at the Township of Tarraville at about midnight on 31 January 1848. He pleaded guilty. The Bench sentenced him to pay a fine of 10sh with 1sh costs in default of payment to be confined to a solitary cell in the lock up for twenty-four hours. A note in the Register reveals that the fine was not paid and Winstanley was sent to the lock up; *Alborton Court Register*, 1 February 1848, p.146.

<sup>70</sup> In *R v Richard Barry*, involving charges of drunkenness and riot, before George Stewart ESQ PM and James MacFarlane Esq JP, Barry, free emigrant was charged with being drunk and riotous at Tarraville on 24 February 1848 by Constable William Moulding. Moulding alleged that Barry was 'drunk and fighting within a group of men who were making a great noise'. The Bench found the defendant guilty of being drunk and disorderly and sentenced him to pay a fine of 20sh and 1 sh costs in default twenty-four hours imprisonment. A Bench note records that the fine 'is not paid and the defendant is sent to the lock up'; *Alborton Court Register*, 25 February 1848, pp.149–150.

<sup>71</sup> *Alborton Court Register*, 1 May 1848, p.160.

intoxication and interrupting the court, is sentenced by the Bench to be confined in the lockup for 48 hours’.

The final amount of the pecuniary penalty and the ‘in-default’ imprisonment terms ordered by the Port Phillip magistrates tended to reflect their ‘knowledge’ of the defendant by their prior appearance before the Bench. When charged with *drunkenness simpliciter* and if a first offence, the penalties generally fell within the lower end of the penalty scale. The Bench however took into account any aggravating circumstances; conduct during the offence and during the arrest procedure and at times, the financial circumstances of the defendant. An account of these circumstances was made in the minds of the Bench, the tally was to be found in the final amount levied as a fine and the time to be spent in detention if ‘in-default’ of payment. In *R v William Grice*,<sup>72</sup> Grice ‘a ticket of leave man’ appeared before the Portland Bench on a charge of drunkenness. ‘It being his first offence’ and ‘he being of good character’, after being berated by the court, the matter was simply dismissed. In *R v William Patfield*,<sup>73</sup> Patfield appeared before the Portland Bench on a charge of drunkenness. The matter being proved, he was fined 10sh plus 9sh 6p costs ‘for his first offence’. On the same day in *R v William Moore*,<sup>74</sup> Moore, described as an ‘inveterate drunkard’ was ‘brought up on charge of drunkenness’. He was fined 20sh with costs. In *R v William Stuckey*,<sup>75</sup> Stuckey was summoned to appear on charge of drunkenness and being found guilty, was simply fined 10sh and costs. In *R v Daniel Hall*,<sup>76</sup> Hall appeared on a charge of drunkenness. It was his second offence and he was fined 10sh in default twenty-four hours solitary confinement ‘on bread and water’. In *R v Ramsay, Baker and Mackenzie*,<sup>77</sup> the men appeared before the Portland Bench for offences that had occurred on Monday 19 September 1842. The assault charges were

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<sup>72</sup> *Portland Guardian and Normanby General Advertiser*, 31 December 1842; matter heard 27 December 1842.

<sup>73</sup> *Portland Guardian and Normanby General Advertiser*, 3 September 1842; matter heard 2 September 1842.

<sup>74</sup> *Portland Guardian and Normanby General Advertiser*, 3 September 1842; matter heard 2 September 1842.

<sup>75</sup> *Portland Guardian and Normanby General Advertiser*, Saturday 24 September 1842; matter heard 17 September 1842.

<sup>76</sup> *Portland Guardian and Normanby General Advertiser*, Saturday 24 September 1842; matter heard 20 September 1842.

<sup>77</sup> *Portland Guardian and Normanby General Advertiser*, Saturday 24 September 1842; matter heard on 20 September 1842.

dismissed. Baker was found guilty and fined 20sh for drunkenness and obscene language. *Police Magistrate Blair commented that not one of the offences were 'of sufficient importance to commit for trial in Melbourne at Quarter Sessions because of the expense connected with doing so'. Stephen Henty was also present on the Bench, 'but declined to interfere in the matter'. In R v Charles Taylor aka Parr,*<sup>78</sup> Taylor appeared on charges of 'repeated drunkenness'. He was found 'guilty as charged' and fined 'on first charge 10sh and on the second charge 20sh'. In *R v Peter Aitchinson,*<sup>79</sup> Aitchinson appeared upon a charge of drunkenness. This was his second appearance. He was found guilty and fined 20sh in default twenty-four hours detention. In *R v George Barber,*<sup>80</sup> Barber appeared 'for the third time in the current year before the Bench charged with drunkenness'. The defendant argued that he suffered from 'an impediment of walk' and that even though he did fall down he did not 'wallow in the mud'. Amusing as it was, his defence failed and Barber was fined a massive 60sh with 7sh 6p costs.

In *R v William Clancy,*<sup>81</sup> before C. J. Tyers and Robert Thomson Esq JP, Constable Owen Cowen deposed that on 2 April 1846 he found Clancy in a state of intoxication at the Racecourse on the Port Albert side of the Tarraville Bridge and at the Inn. In his defence Clancy admits his drunkenness and was 'sentenced to a fine of 10sh or in default of payment to be kept in solitary confinement for 24 hours on bread and water'. In *R v Emma Butters,*<sup>82</sup> involving a charge of drunk and disorderly, before George Stewart Esq PM, Edward Hobson Esq JP and H. Loughman Esq JP of the Alberton Bench, Emma Butters, 'free by servitude', was found drunk and disorderly at the Township of Tarraville about midnight on 31 January 1848. Emma Butters pleaded guilty. The Bench sentenced her to pay a fine of 10sh with 1sh costs 'in default of payment to be confined to a solitary cell in the lock up for 24 hours'. In *R v John Brereton,*<sup>83</sup> involving a charge of being drunk

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<sup>78</sup> *Portland Guardian and Normanby General Advertiser*, 1 October 1842.

<sup>79</sup> *Portland Guardian and Normanby General Advertiser* 31 December 1842; matter heard 29 December 1842.

<sup>80</sup> *Portland Guardian and Normanby General Advertiser*, 1 October 1842.

<sup>81</sup> Alberton Court Register, 6 April 1846, p.80A.

<sup>82</sup> Alberton Court Register, 2 February 1848, p.147.

<sup>83</sup> Alberton Court Register, 18 April 1848, p.156.

and disorderly, before George Stewart Esq PM and A. Meyrick Esq JP, Brereton, 'free by servitude', pleaded guilty of being drunk and disorderly 'last night at Tarraville'. The Bench sentenced him to a 'fine of 6sh and 1sh costs in default of payment to be imprisoned for twelve hours'. In *R v Thomas Fell*,<sup>84</sup> involving a charge of being drunk and disorderly, before George Stewart Esq PM and A. Meyrick Esq JP, Fell, 'free by servitude', pleaded guilty of being drunk and disorderly 'last night at Tarraville'. The Bench sentenced him to a fine of 6sh and 1sh costs in default of payment to be imprisoned for twelve hours'. In *R v Benjamin Shorten & Thomas Williams*,<sup>85</sup> involving a charge of drunk and disorderly, before George Stewart PM and A. Meyrick JP, the defendants, both 'free by servitude', were found guilty of being drunk and disorderly in the streets of the Township of Victoria, the Bench sentencing them to a fine of 15sh and one pound costs, 'in default to be confined to the lockup for 24 hours'. In *R v Dominick Campbell*,<sup>86</sup> involving a charge of drunk and disorderly, before George Stewart PM, the charge was withdrawn [no reason] by the Constable [no name] and consequently the case was dismissed. In *R v John Swapp*,<sup>87</sup> involving a charge of drunk and disorderly, before George Stewart Esq PM, Swapp, 'free by servitude', pleaded guilty to a charge of being drunk and disorderly at Tarraville on 12 October 1848 and was 'fined 10sh and 3sh 6p costs, in default of payment to be confined to the lockup for 24 hours'.<sup>88</sup> In *R v John Wilson*,<sup>89</sup> before George Stewart Esq PM, on the information of Constable John Partington, who charged that he had 'found Wilson drunk last Thursday at Tarraville at about 2 o'clock in the afternoon and obtained a summons against him to appear this day'. The Bench sentenced Wilson to a 'fine of 10sh and costs in default to be confined to the lockup in Alberton for 24 hours'. In *R v Catherine Farrell*,<sup>90</sup> Farrell, a 'free emigrant', appeared before George Stewart Esq PM and A. Meyrick Esq JP of the Alberton Bench,

<sup>84</sup> Alberton Court Register, 18 April 1848, p.156.

<sup>85</sup> Alberton Court Register, 22 September 1848, p.175.

<sup>86</sup> Alberton Court Register, 22 September 1848, p.175.

<sup>87</sup> Alberton Court Register, 16 October 1848, p.177.

<sup>88</sup> *Ibid*, p.178.

<sup>89</sup> Alberton Court Register, 31 October 1848, p.179.

<sup>90</sup> Alberton Court Register, 6 November 1848, p.180.

by summons for being 'drunk and disorderly in the morning of last Saturday in the Township of Victoria'. The defendant pleaded guilty and was sentenced to a 'fine of 28sh and costs of 3sh 6p in default to be confined to a cell of the lockup at Alberton for 48 hours'.

On the other hand, when conduct demanded heftier penalties, the magistrates were quick to oblige. In *R v Patrick Mahony*,<sup>91</sup> Chief Constable Henry Batman testified that Mahony was 'drunk, using indecent language and had assaulted Constable James Rogers' and also 'tore his shirt'. Mahony was found guilty by the Melbourne Bench and fined one pound. In *R v Thomas Hartnall and William Field*,<sup>92</sup> Constable George Vinge testified and claims he was assaulted by Hartnall. Hartnall, a labourer, was drunk at the time and was being arrested by Vinge. Field, a labourer, testified and claimed that both Vinge and Hartnall were drunk. Hartnall testified and claimed that he struck the constable 'because he was being handcuffed'. Both Hartnall and Field were found guilty. Both were fined five pounds each, in default two months imprisonment. In *R v Hugh Lowry*,<sup>93</sup> Special Constable Henry Grimaldi testified and claimed that Lowry was 'drunk and abusive at Fleming's Public House and scuffled with him and (he) was kicked'. Fleming, the publican, testified and claimed that Lowry was abusive but that he saw no assault. Lowry testified and stated that he did not remember abusing anyone and denied striking Grimaldi. Lowry was found guilty and was fined two pounds.

In the case of 'incurable drunkards' the legislation also allowed for two justices to make a written order that prohibited licensed premises from serving alcohol to a nominated drunkard for a period of one year,<sup>94</sup> and if the nominated drunkard had not demonstrated a reformation within the space of that year, the prohibition notice could be

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<sup>91</sup> Melbourne Court Register 20-21 December 1837, *HRV*, I, 327.

<sup>92</sup> Melbourne Court Register 20 November 1838, *HRV*, I, 337.

<sup>93</sup> Melbourne Court Register 6 December 1838, *HRV*, I, 337-338.

<sup>94</sup> 2 Vic. No.18, s.69. VPRS 34/P/1; 12 May 1842; In *Re John Connelly (No. 1)*, charged with being continually drunk and using most obscene language; matter dismissed but a notice issued to all publicans by the Portland bench prohibiting them from serving him any drink for 12 months. VPRS 34/P/1; 30 September 1842, In *Re George Barber*, 'a prohibited drunkard' charged with drunkenness, fined 60 sh with costs 7/6 or 72 hours gaol in default, by the Portland bench.

renewed thereafter,<sup>95</sup> with a fine of five pounds to be levied against any who served alcohol to the drunkard during the prohibition period.<sup>96</sup> In *R v James Connelly (No.2)*,<sup>97</sup> Connelly appeared before the Portland Bench on a charge of being drunk. He was found guilty, was fined 40sh and costs and again prohibited from drinking within the town limits. In *Re John Halloran*,<sup>98</sup> on a charge of being repeatedly drunk before Henry Condell Esq JP of the Melbourne Bench, Halloran was found guilty. Because of his multiple offences and appearances before the Bench, Condell ordered that 'his name be entered into *The Drunkard Book*'. Some colonists persisted in their 'binge-drinking' and were obligingly 'serviced' by the local magistracy. *R v Thomas Ralston (No.1)*<sup>99</sup> involved a charge of drunk and disorderly, before George Stewart PM of the Alberton Bench. Thomas Ralston, 'free by servitude', was found drunk and disorderly at the Township of Tarraville about midnight on 31 January 1848. He pleaded guilty. The Bench sentenced him to pay a fine of 10sh with 1sh costs 'in default of payment to be confined to a solitary cell in the lock up for 24 hours'. A note in the Register reveals that Ralston was unable to pay the fine and that he therefore was to 'be sent to the lock up'.<sup>100</sup> In *R v Thomas Ralston (No.2)*,<sup>101</sup> involving another charge of drunk and disorderly, again before George Stewart PM of the Alberton Bench, Chief Constable Manton Flinn found Thomas Ralston, "free by servitude", drunk and disorderly at the Township of Tarraville opposite the Tarraville Hotel on 2 February 1848. Ralston pleaded not guilty. The Bench sentenced him to pay 'a fine of 10sh with 1sh costs in default of payment to be confined to a solitary cell in the lock up for 24 hours'. A note in the Register reveals that Ralston did not pay the fine and 'was sent to the lock up'.<sup>102</sup> In *R v Thomas Barleycorn (No.1)*,<sup>103</sup> Barleycorn, 'free by

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<sup>95</sup> 2 Vic. No.18, s.70; providing a fine of 5 pounds to any serving liquor to the drunkard during the term of the prohibition.

<sup>96</sup> 2 Vic. No.18, s.71.

<sup>97</sup> *Portland Guardian and Normanby General Advertiser*, 31 December 1842; matter heard 28 December 1842.

<sup>98</sup> VPRS 2136, op.cit., Wednesday 6 March 1844.

<sup>99</sup> Alberton Court Register, 1 February 1848, pp.146–147.

<sup>100</sup> *Ibid*, at p.147.

<sup>101</sup> Alberton Court Register, 3 February 1848, p.148.

<sup>102</sup> *Ibid*, p.148.

*servitude*, appeared before George Stewart Esq PM of the Alberton Bench, by information of the Chief Constable of being drunk and riotous in the Streets of Tarraville on 3 December 1848. The defendant 'pleading guilty of the charges against him' and as 'he committed the same under aggravated circumstances' [no details provided] was sentenced to pay a fine of 20sh and 4sh 6p costs in default of payment to be confined to the lockup of Alberton for 24 hours. On the same day in *R v Barleycorn (No.2)*,<sup>104</sup> Barleycorn, 'free by servitude', again appeared before George Stewart Esq PM of the Alberton Bench. Barleycorn this time appeared before the Bench charged with 'being drunk in the Streets of Tarraville on the morning of the 4 December 1848'. Barleycorn again pleaded guilty and was sentenced to 'pay a fine of 30sh with 4sh 6p costs, in default of payment to be confined to the lockup at Alberton for 48 hours'. In *R v James Sadwell Partridge*,<sup>105</sup> before C. J. Tyers and John King Esq JP of the Alberton Bench, Constable Cornelius Henry Sullivan deposed that he arrested Partridge for 'being in a state of intoxication at Tarraville on the previous Monday'. Sullivan claimed that 'his conduct had been the same for the past few months', that Partridge had been cautioned by Sullivan on a number of occasions, but that 'he still persists in getting drunk'. The Bench fined Partridge in the sum of one pound 'in default of the payment he is to be kept in solitary confinement for 2 weeks on bread and water'.<sup>106</sup>

## PUBLIC DECENCY

THE COLONIAL MAGISTRATE was also the keeper of public morals and the standards of public decency. At common law the test was 'whatever outrages public decency and is injurious to public morals'.<sup>107</sup> At one quaint extreme, bathing,<sup>108</sup> for example, near or within view of a public wharf, street, or place of public resort, 'between

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<sup>103</sup> Alberton Court Register, 7 December 1848, p.183.

<sup>104</sup> Alberton Court Register, 7 December 1848, p.183.

<sup>105</sup> Alberton Court Register, 1 April 1846, p.74.

<sup>106</sup> *Ibid*, at p.75.

<sup>107</sup> 4 Bl. Com. 65.

<sup>108</sup> See Bathing, in Plunkett, *op.cit.*, p.54.

the hours of six in the *morning and eight in the evening*, or when in the view of a justice of the peace, upon conviction, would be liable to pay a fine not exceeding 1 pound. Constables were also empowered to bring such persons before a magistrate.<sup>109</sup> On the other hand there were examples of conduct that would be considered offensive to even the most 'modern' notions of decency. In *R v James Gill*,<sup>110</sup> Joseph Hodgson [servant of John Moss, publican] testified that whilst trying to catch a runaway horse in the bush at the rear of town, he came across Gill, a labourer employed by James Connell to complete fencing, having carnal knowledge of a calf. John Moss Jnr. testified and confirmed the testimony as an eyewitness. Hodgson was committed for trial at the Criminal Court in Sydney. Likewise *In the Matter of John Hilton*,<sup>111</sup> before \_\_\_\_\_ [blank space in Register] of the Melbourne Bench [no notation regarding members on the Bench; judging from the handwriting it may have been either James Smith, Charles Payne, or William Hull] Hilton appeared on a charge of bestiality. There was neither record nor notation of proceedings or the result. In *R v David Christmas*,<sup>112</sup> District Constable Henry Batman testified and *alleged that Christmas was drunk and was found by him in a woman's house refusing to leave and 'ill treating her'*. *He was found guilty by the Melbourne Bench and fined 5s.* In *R v Edward Tue*,<sup>113</sup> Fanny Griffin alleged that whilst her husband Joseph Griffin was away travelling to Melbourne, Tue, their servant, who had been instructed to care for Mrs Griffin in her husband's absence, *took it upon himself to sleep in the same tent with her.* He also attempted to enter her bed and take off her nightgown. James Keefe, of the 28th Foot, testified and confirmed the complaint and testified that he stayed with her until her husband returned. *Tue was arrested and in his defence claimed that he had 'mistook his bed'.* C. W. Sievwright of the Geelong Bench remanded the defendant in custody and committed Tue to appear for trial before the next Quarter Sessions in Melbourne.

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<sup>109</sup> 2 Vict. No.2, s.21.

<sup>110</sup> Melbourne Court Register 20 July 1837, *HRI*, I, 480-481.

<sup>111</sup> VPRS 2136 Police Office Port Phillip Court of Petty Sessions Deposition Registers 1843-1845, Saturday 29 March 1845.

<sup>112</sup> Melbourne Court Register 27 March 1837, *HRI*, I, 480.

<sup>113</sup> Geelong Court Register 12 June, 17 August 1839, *HRI*, I., 488-489.

Similarly in *R v James McEvoy*,<sup>114</sup> Mrs Ann Quinn testified and claimed that McEvoy had come into her room at 3.00 am and 'proceeded to force himself into her bed, take indecent liberties with her and tear her night clothes'. She testified that she 'then escaped and sought refuge at the barracks and later at Joseph Griffin's home'. Her son Michael Quinn [7 years of age] confirmed her testimony. John Fitzsimons, of the 28th Regiment, testified and confirms her coming to the barracks. District Constable McKeever testified and confirmed Mrs Quinn's state of distress and the torn gown. McEvoy was committed to trial at Quarter Sessions and was transported to Melbourne on 23 November by HM cutter *Ranger* to the Melbourne Gaol. In the matter of *Benjamin March v Thomas Mooney*,<sup>115</sup> before James MacFarlane Esq JP and W. O. Raymond Esq JP of the Alberton Bench, Mooney, a ticket of leave holder for the District of Port Phillip, was brought before the Bench on a charge of 'stealing the wife of March, a servant of Joseph Davis of Tarraville, on 4 April 1847'. March deposed that Mooney 'came to his house to get some clothes washed and with alcohol and made his wife drunk'. Mooney then threatened to 'knock his [March's] bloody head off' and 'jump his guts out'.<sup>116</sup> He then took March's wife out of the house and returned with her the next morning.<sup>117</sup> The master, Joseph Davis deposed as to the good character of March but also to 'the bad character of his wife' and revealed that he had discharged his wife for being of bad character.<sup>118</sup> The Bench cancelled Mooney's employment agreement and decreed that 'he be turned over to the Court'. Sadly, the rest of the notations are undecipherable.<sup>119</sup>

A very common prosecution in early Port Phillip was the offence of 'indecent exposure'. In a community yet to develop an extensive network of public conveniences and dominated by hard drinking free-urinating frontier men, it was indeed a very popular, heavily policed and profitable offence. Any person found exposing himself or

<sup>114</sup> Geelong Court Register 22 November 1839, *HRV*, I, 491.

<sup>115</sup> Alberton Court Register, 12 May 1847, p.114.

<sup>116</sup> *Ibid*, p.115.

<sup>117</sup> *Ibid*, at p.116.

<sup>118</sup> *Ibid*, at p.117.

<sup>119</sup> *Ibid*, at p.118.

herself in any street or public place within the town, or in view thereof, was liable, upon conviction, to pay a fine not exceeding ten pounds and not less than five pounds.<sup>120</sup> In *R v Captain Joseph Steven Pollack*,<sup>121</sup> District Constable Patrick McKeever testified that he saw Pollack coming out of *Tim's Store* and was walking towards *Macnaughton's Public House*, with his trousers down, exposing his person. Constable Job Williams testified and confirmed the testimony. Thomas Benson testified that he was with the defendant and claimed that *'he was making water at the time'*. *The defendant was 'fined 5 pounds or gaol'*. *District Constable Patrick McKeever testified and confirmed that Pollack 'was very drunk'*. *For this offence he was fined 10sh 'or time in the stocks'*. In *R v Andrew Brown*,<sup>122</sup> Constable Job Williams testified that he was *'clearing'* persons from the *Wool Pack Inn* public house when he saw Brown indecently exposing his person under the door lamp. Constable George Lee testified and confirmed this testimony. The defendant was fined five pounds, with costs as: summons 2sh 6 d, two oaths 2sh. What may have been Port Phillip's first prosecution for *'streaking'* occurred in *R v John Perks*.<sup>123</sup> In this case Constable George Lee testified that Perks, on 2 November 1839, was outside the *Wool Pack Inn*. Perks proceeded to unbutton his trousers near the entrance of the public house, and then ran through the house with his *'privates'* in his hands. *The evidence revealed that 'two females were present when the act occurred'*. Perks declined *'entering further into the case'* and was fined five pounds.

In many cases the Bench records only indicate the name of the defendant, the charge and the resulting fine. This tends to suggest that these matters were merely *urination simpliciter* with no aggravating circumstances. One example is *R v John Sullivan*,<sup>124</sup> before Frederick Berkley St John Esq PM JP and R. H. Bunbury Esq JP of the Melbourne Bench, where Sullivan was charged with indecent exposure. He was found guilty and fined five pounds and costs 7/6. At times, the only other information recorded

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<sup>120</sup> 2 Vict. No.2, s.22.

<sup>121</sup> Geelong Court Register 20 July 1839, *HRV*, I, 486–487.

<sup>122</sup> Geelong Court Register 20 August 1839, *HRV*, I, 489.

<sup>123</sup> Geelong Court Register 11 December 1839, *HRV*, I, 492.

<sup>124</sup> VPRS 2136, 13 September 1843.

was the location of the offence. One example is *R v Lewis Clafe*,<sup>125</sup> before Frederick Berkley St John Esq PM JP and James Smith Esq JP, where Clafe was charged with ‘*exposing his person in a public place to wit Collins Lane*’. He was *fined five pounds with costs of 7/6*. Otherwise, matters that influenced the Bench in its decision were noted. In *Re Tim Colihuan*,<sup>126</sup> for example, before Henry Condell Esq JP, Colihuan was sentenced to one month in the Melbourne gaol for the circumstances that drove him to commit the *indecent act*. The Bench held the ‘*defendant clearly insane, had been arrested the previous day by Constable Higgins, in an insane state of mind, had his ‘clothes off, and his behaviour unsafe*’. His landlady also testified as to his insanity, but also stated that ‘*he had recently been working and had been given a cheque for 21 pounds*’.

The Bench records do reveal some inconsistent penalty decisions in the exposure cases. In *R v Mathew Truman*,<sup>127</sup> before Henry Condell Esq JP, Truman appeared charged with *exposing his person*. According to the deposition of Constable Turner ‘*the defendant was not drunk at the time of the offence*’. The defendant was simply admonished by the Bench and discharged. This could be seen as a liberalisation of the attitude by the Melbourne Bench to this offence; even though Truman’s sobriety should logically have weighed against him in this case. Condell Esq JP [sitting with William Hull Esq JP] some months later in *R v John English*,<sup>128</sup> noted that English *had ‘indecently’* exposed his person and proceeded to fine him 20sh. One can only speculate as to how the two matters differed in degrees of ‘*indecentcy*’. Condell [noted as Esq. ‘*The Mayor*’] and Andrew Russell Esq JP, were not so troubled when in *R v George Stanhooke*,<sup>129</sup> concerning another charge of ‘*indecently*’ exposing his person, the Bench sentenced the defendant to no less than three months in the Melbourne gaol. The key to understanding their decision can be found in the deposition book notation describing Stanhooke as being ‘*a rogue and a vagabond*’.

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<sup>125</sup> VPRS 2136, 28 September 1843.

<sup>126</sup> VPRS 2136, Friday 27 October 1843.

<sup>127</sup> VPRS 2136, Monday 6 November 1843.

<sup>128</sup> VPRS 2136, Monday 15 January 1844.

<sup>129</sup> VPRS 2136, Thursday 11 April 1844.

In *R v William Hilton*,<sup>130</sup> before W. B. Wilmott of the Melbourne Bench, Hilton was charged with 'exposing his person'. William Hooson deposed that he was standing in Queen Street and saw the defendant coming out of *Baker's Public House* between the Bank and Baker's establishment. He then proceeded to 'expose his person' [an act of urination]. He was found guilty and fined five pounds and 5s costs. A similar result occurred in *R v Alexander Welsh*,<sup>131</sup> before James Smith and W. B. Wilmott. On the other hand *In the Matter of Henry Thurgate*,<sup>132</sup> before Charles Payne JP of the Melbourne Bench, the defendant on a charge of exposing his person was fined 100s with costs of 5s. Circumstances of aggravation were relevant here. Constable Higgins deposed, for example, that the defendant 'exposed himself in Lt Bourke Street and was abusive and disorderly as well'. Contrast this with *In the Matter of John Murray*,<sup>133</sup> before William Hull Esq JP. This matter concerned another charge of 'exposing his person' near the corner of Flinders Lane and Flinders Street. No penalty was recorded even though the evidence indicated he was seen 'with his trousers unbuttoned in view of persons residing close by'. This decision did not indicate a softer approach to the offence or penalty trend as indicated by *In the Matter of William Dobell*,<sup>134</sup> before Edmund Westby Esq JP of the Melbourne Bench. On a charge of exposing his person, the defendant was found guilty and sentenced to a five pound fine in default one month's imprisonment in the Melbourne gaol. The Portland Bench consistently displayed a very harsh attitude to indecent exposure and penalised defendants accordingly.<sup>135</sup>

As previously stated, the Port Phillip constable was obliged to apprehend any drunken person he found in the streets or public places and to bring them before a

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<sup>130</sup> VPRS 2136, Wednesday 17 July 1844.

<sup>131</sup> VPRS 2136, Saturday 26 October 1844, charge of exposing his person in a public place, fined 5 pound and 5sh costs.

<sup>132</sup> VPRS 2136, 5 December 1844.

<sup>133</sup> VPRS 2136, Friday 2 May 1845.

<sup>134</sup> VPRS 2136, Friday 4 Nov 1845.

<sup>135</sup> VPRS 34/P/1; 20 January 1841, In *Re Thomas Moran*, free by servitude, under a charge of wilfully and indecently exposing his person in the Town of Portland, sentenced to 3 months gaol by the Portland bench. In *Re Thomas Heathcock*, private 80<sup>th</sup> Regiment, charged with indecent exposure on the highway. Sentenced to 3 months gaol at Melbourne by the Portland bench.

*Justice of the Peace. The constable was also to concern himself with 'all idle, drunken, or disorderly persons found between sunset and the hour of eight in the forenoon, lying or loitering in any street, highway, yard, or other place in the town' without satisfactory explanation, and deliver them to the nearest watch-house so as to be dealt with by the Justice, by immediate presentment or bail.*<sup>136</sup> Bail could be granted by recognizance, with or without sureties, by any constable attending the watch-house, noting details within the watch-house book. Non-observance of the bail conditions by the defendant was justiciable at the next General Quarter Sessions.<sup>137</sup> The Bench book evidence reveals that *'idle' persons were in fact common vagrants or indigent persons. They also reveal that males accused of being 'disorderly' were often just drunk, drunk and boisterous, or merely idle, drunk and boisterous. On the other hand the term 'disorderly' when applied to females, was meant as a euphemism for simple prostitution. Alcohol once again seemed to play a major part in these offences.*

*The magistrates applied the term 'vagrant' to those who appeared idle, without work and with no visible means of support or permanent residence. The term was often conjoined with the phrase 'rogue'. The Port Phillip Benches, like their ancestral English counterparts, were suspicious of all strangers and often dealt with vagrant defendants in a fashion that underscored either their corporate hatred or fear of this class of persons. The penalties handed down by the magistrates reflected this contempt. There were isolated incidents of vagrant defendants being dismissed without penalty, although generally speaking, vagrant defendants enjoyed a higher imprisonment rate than any other class of colonial Port Phillip defendants. It should also be noted that this may simply reflect the vagrant's inability to service pecuniary fines. Speculation is necessary as again, the deposition notes are tantalisingly brief. Defendants were most commonly imprisoned for one month, although there were cases where the defendant was incarcerated for as little as seven days and as much as three or even six months, with or without 'hard labour'. In *R v Michael Power*,<sup>138</sup> before Frederick Berkley St John Esq JP and PM, Power,*

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<sup>136</sup> 2 Vict. No.2, s.6.

<sup>137</sup> 2 Vict. No.2, s.7.

<sup>138</sup> VPRS 2136, 14 August 1843.

under 'a charge of idleness' was found guilty and sentenced to one month in the Melbourne gaol 'as a vagrant'. In *R v John Burns*,<sup>139</sup> before Henry Condell Esq Mayor and Edward Westbuy, Burns, a vagrant was apprehended by Constable O'Connor and 'could not give any account of himself'. He was sentenced to one month in the Melbourne gaol. In sentencing vagrants, the magistrates did not discriminate on the grounds of sex. In *R v Mary McGlynn*,<sup>140</sup> before Henry Condell Esq JP 'Mayor' and Andrew Russell Esq JP, under charge of vagrancy, McGlynn was found guilty and sentenced to three months in the Melbourne gaol. The rural Port Phillip Benches undertook similar sentencing patterns.<sup>141</sup>

On the other hand there were instances where cases were simply dismissed by the Bench or withdrawn by the prosecutor. In *the Matter of Samuel Petheu*,<sup>142</sup> before Andrew Russell Esq JP of the Melbourne Bench, Petheu appeared on a charge of being a vagrant. He had been arrested outside the *Adelphi Hotel*. The prosecutor [unnamed in records] claimed that the defendant 'was known to the prosecutor for 6-8 months'. The prosecutor also testified that the defendant 'has not done a days work during that time and frequents tap houses in the company of reputed thieves'. After considering the evidence, Russell, surprisingly, dismissed the prosecution and discharged the prisoner. In *R v Thomas Ralston No.3*,<sup>143</sup> involving a charge 'under the Vagrant Act', before George Stewart Esq PM of the Alberton Bench, where Ralston, 'free by servitude', was 'charged under the Vagrant Act with having no visible means of support and of having no fixed home [address]. The Chief Constable having withdrawn the complaint the case is dismissed'. *R v James Rencher*,<sup>144</sup> involved a charge 'under the Vagrancy Act and wandering

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<sup>139</sup> VPRS 2136, Wednesday 1 May 1844.

<sup>140</sup> VPRS 2136, Tuesday 6 Aug 1844.

<sup>141</sup> VPRS 34/P/1; 4 January 1842, In *Re George Wilson*, being found at Donald Cameron's Public House at an 'unseasonal hour of the night' and charged with being a rogue and vagabond, sentenced to 1 month in the Melbourne gaol by the Portland bench. 18 October 1841, In *Re Jane alias Jenny Horam*, charged with being an idle and disorderly character, sentenced to 1 month in the Melbourne gaol by the Portland bench.

<sup>142</sup> VPRS 2136, Friday 18 April 1845.

<sup>143</sup> Alberton Court Register, 15 March 1848, p.154.

<sup>144</sup> Alberton Court Register, 1 May 1848, pp.159-160.

among the aboriginal nations', before George Stewart Esq PM of the Alberton Bench. Chief Constable Flinn deposed that he came across Rencher, 'free by servitude', 'last Friday at Tarra Creek taking some damper to a small temporary hut where he had a blanket and that he was seen in the company of a large group of blacks wandering in the District'. The Bench remanded him until the following day and upon reconvening, having found no other witnesses, the information was withdrawn and the case dismissed.<sup>145</sup> On other occasions, one hopes that the light imprisonment term may have been a reflection of pity rather than punishment. *In the Matter of Mary McGlinn*,<sup>146</sup> before William Hull and Sidney Stephen Esq of the Melbourne Bench, McGlinn appeared on a charge of being 'a vagrant and dangerous lunatic'. Constable Stapleton testified that McGlinn was 'found under order of Mr. Hull JP as a vagrant, about the streets with no visible means of subsistence'. She was found guilty and sentenced to seven days in the Melbourne gaol.

Another sentencing issue apparent in the records is the use of magisterial discretion in applying the 'hard labour' option within the sentence. It is almost impossible, because of the poor documentation of the magistrate's *ratio decidendi* in the Bench documents to generalise as to why and under what circumstances the Port Phillip Bench would order a prisoner to serve their time under 'hard labour'. One can only speculate that the defendant was either 'known' to the Bench or had otherwise aggravated the offence by deed or word. Two cases demonstrate this problem. *In the Matter of James Minchin*,<sup>147</sup> before William Hull Esq JP and George Keyne Esq JP of the Melbourne Bench, Minchin appeared under a charge of vagrancy. He was found guilty and sentenced to one month in the Melbourne gaol 'without hard labour'. On the other hand, *In the Matter of George Reynolds*,<sup>148</sup> before Alderman Condell and Alderman Rapale also of the Melbourne Bench, Reynolds appeared charged with the same offence. On this occasion the defendant was found guilty and sentenced to one month's 'hard labour'. To other magistrates, the fact that a vagrant was 'found under suspicious circumstances' as *In*

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<sup>145</sup> *Ibid*, at p.160.

<sup>146</sup> VPRS 2136, Thursday 12 December 1844.

<sup>147</sup> VPRS 2136: Deposition Register 1845-1855, Tuesday 29 April 1845.

<sup>148</sup> VPRS 2136, Wednesday 14 May 1845.

*the Matter of James Clifford*,<sup>149</sup> before Charles Payne Esq JP and Sidney Stephen Esq JP of the Melbourne Bench, was enough to sentence the defendant to '3 months gaol as vagrant'. William Hull Esq JP of the Melbourne Bench, *In the Matter of William Allen*,<sup>150</sup> simply sentenced Allen to '3 months gaol as a vagrant'. High office did nothing to dampen the enthusiasm for prosecuting vagrants. *In the Matter of Richard Harris*,<sup>151</sup> 'before His Worship the Mayor' (Moor) and Charles Payne Esq JP, Harris 'on warrant' received a sentence of '6 months gaol as a vagrant'.

There were instances where the fact that a defendant was 'known' to the Bench did not result in a severe sentence. For example, a certain David Donley was 'known' to the Alberton Bench and appeared before the Bench twice within the space of as many days. In *R v David Donley (No.1)*,<sup>152</sup> involving the attempted rescue of a prisoner, before John King Esq, 'one of Her Majesty's Justices of the Peace in and for the said Colony of New South Wales at Tarraville', Constable Cornelius Sullivan, being duly deposed, stated that 'on the night of 30 July 1846 he had a prisoner John Whiteman in custody for drunkenness when the defendant Donley attempted to rescue him. Constable Owen Cowen supported his testimony'. The sentence of the court was that the prisoner be fined three pounds. In *R v David Donley (No.2)*<sup>153</sup> involving a charge of 'no visible means of support and the possession of gaming dice', before John King Esq, 'one of Her Majesty's Justices of the Peace in and for the said Colony of New South Wales at Alberton', Constable Cornelius Sullivan deposed that Donley 'has no visible means of support, had a large amount of money on him and was in possession of gaming dice' upon the information of some 'respectable' residents of the town. In his defence Donley claimed that he had been in the service of Mr. Reece of Gipps Land for two years. The matter was apparently stood down.<sup>154</sup> The matter was reconvened at a later date,<sup>155</sup>

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<sup>149</sup> VPRS 2136, Thursday 29 May 1845.

<sup>150</sup> VPRS 2136, Tuesday 12 August 1845.

<sup>151</sup> VPRS 2136, Tuesday 27 Nov 1845.

<sup>152</sup> Alberton Court Register, 31 July 1846, p.82.

<sup>153</sup> Alberton Court Register, 1 August 1846, p.87.

<sup>154</sup> *Ibid*, p.84.

presumably for enquiries to be made, and the Bench decided that Donley be bound over in his own recognizance in the sum of 100 pounds.

One 'decency' case underscores a surprising level of sophistication and commitment to fairness in the Port Phillip magisterial adjudications. This is in the case of *R v John Swap*,<sup>156</sup> where Swap, 'free by servitude', although not a vagrant, was still a 'stranger' in the parish and therefore liable to be viewed with suspicion until he had become a community 'familiar'. He appeared before George Stewart Esq PM of the Alberton Bench, on a prosecution brought forward by the Chief Constable Manton Flinn upon a charge of 'enticing a female child at Tarraville into the Bush for the purpose of committing an indecent act upon her person'. The Chief Constable wished the defendant remanded until the following day to 'establish' [gather] further evidence. The Chief Constable also submitted that 'it is not the first time in this District that the defendant has been accused of a similar offence'. The Chief Constable also submitted that 'he is informed and will be able to prove that the defendant was 'hounded out' of Manaroo for something of a similar nature'. Under these circumstances, the defendant appeared doomed. The Bench remanded the defendant until the next day for examination. When the matter resumed on 7 December 1848 before George Stewart Esq PM and A. Meyrick Esq JP, June Cummins, the mother of the child Mary Anne Cummins, deposed<sup>157</sup> that the defendant 'took the child by the hand and asked the female child to expose her person to him, the child then ran away'. The defendant was then further remanded until 11 December 1848. When the Bench reconvened<sup>158</sup> the matter on 11 December, with no further witnesses being brought forward, 'the prisoner was discharged immediately'.

*The 'idle', 'disorderly' or 'vagrancy' prosecutions against women were in reality*

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<sup>155</sup> Alberton Court Register, 3 September 1846, p.87.

<sup>156</sup> Alberton Court Register, 6 December 1848, p.181.

<sup>157</sup> Alberton Court Register, 7 December 1848, p.184.

<sup>158</sup> Alberton Court Register, 11 December 1848, p.185.

prosecutions against women who lived as prostitutes.<sup>159</sup> Contemporary newspaper reports of the court proceedings that involved some of the more unfortunate female defendants, invoke pity. One report in the *Port Phillip Patriot* under the banner 'Female Drunkards' reveals the miserable life circumstances that some Port Phillip women experienced.<sup>160</sup> Often, the evidence and supporting testimony made the 'disorderly' prostitution prosecutions quite straightforward affairs. Constables who knew or suspected a woman to be 'of ill fame' would arrest the defendant and present them to the Bench. On other occasions, constables would come across a 'known' prostitute behaving in a manner that constituted a breach of the peace and likewise present them before the Bench. In *R v Sarah Holway*,<sup>161</sup> before Frederick Berkley St John Esq PM JP and James Smith Esq JP of the Melbourne Bench, Holway appeared charged 'as a prostitute'. She was remanded in custody. Upon the hearing of the matter, the evidence of Constable O'Connor was that 'she had been a prostitute for 3 months'. This allegation was supported by testimony of Constable Higgins. No decision was recorded on the day. Holway was however fined on an appearance three days later on 10 September 1843. On that occasion the Bench ordered 'a fine of 20s and 5s costs or 3 months gaol in default of payment'. In *R v Mary Anne Williams*,<sup>162</sup> before Henry Condell Esq JP and Andrew Parnell Esq JP, Williams appeared charged with 'disorderly conduct and obscene language at 9.30 pm' [the previous evening]. The informant Sivendell stated that he saw her in Bourke Street. He stated that she was being 'very disorderly in her conduct and using very

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159 VPRS 2136, 28 August 1843; In *R v Elizabeth Pezal*, before Frederick Berkley St John Esq PM JP [the word 'and' appears, then a blank space, then the words 'Esq JP' were written in at the end of the sentence] Pezal appeared on charges for a breach of the peace and for being a common prostitute. She was found guilty. The court sentenced her to one week in the Melbourne gaol. Constable Larkins deposed that 'he saw defendant making a disturbance in Bourke Street' and that he had seen her in the company of many 'strange' men. Constable Lawrence also stated that he had known the defendant for two years and that 'she was in a brothel'.

160 'A most notorious drunkard appeared in *R v Anne Mitchell*, on many occasions apprehended for drunkenness appeared before St John on Tuesday. He recognised her as one of the old familiar faces. The woman begged hard to be set at liberty and that she would never offend again, but go at once to her husband who was working in the bush. St John said her husband was a great simpleton to allow her to come to town at all, he discharged her this time. Another woman appeared in *R v Mary Anne Murphy* and had been found in Bourke Street drunk and behaving in a disorderly manner. St John asked her how she got her living, she replied 'the best way I can Your Worship', very well he said 'you shall go to gaol for a month', 'thank you Your Worship, that will do me good', she replied. In *R v Mary Doyle* a woman was similarly charged; she claims to have just arrived from the bush and 'got tossed on a sudden'. St John said he would discharge her this time but hoped it would be a lesson for the future'; PPP Thursday 5 January 1843.

161 VPRS 2136, 7 September 1843.

162 VPRS 2136, 23 Feb 1844.

obscene language with a great number of persons out at the time'. The Bench found her guilty and sentenced her to one month in the Melbourne gaol. In *R v Anne Extoff aka Anne Rose*,<sup>163</sup> before William Hull JP of the Melbourne Bench, Extoff was sentenced to one month in the Melbourne gaol 'with hard labour' for pulling down fence palings from the fence of John Robinson at 2.00 am. She was also drunk and 'disorderly'. The destruction of property and breach of the peace at 2.00 am in the morning in this case sealed her fate.

The most common 'aggravating circumstances' in these matters seemed to be a 'reputation' as a prostitute, acts in breach of the peace and evidence of 'bad character' and conduct. In *the Matter of Margaret O'Halloran*,<sup>164</sup> before Henry Moor Esq [Mayor], Henry Condell Esq JP [immediate past Mayor], O'Halloran was prosecuted as a vagrant but 'found to be a common prostitute'. She had been apprehended 'in the act of breaching the peace'. No sentence was recorded. In *the Matter of Mary Anne Roache*,<sup>165</sup> before the same two justices, Roache was sentenced to 24 hours imprisonment for 'breaching the peace'. It was stated that she 'was of bad character and a frequenter of brothels'. This should be compared with the penalty handed down in *the Matter of Pauline Learne*,<sup>166</sup> before Andrew Parnell Esq JP of the Melbourne Bench, where Learne, declared 'a common prostitute', was sentenced to three months gaol as a 'vagrant'. There is no record in this matter of the aggravating circumstances unlike *In the Matter of Grace Fadden*,<sup>167</sup> before William Hull Esq JP, where the defendant was charged with 'exposing her person' and sentenced to three months in the Melbourne gaol. Constable O'Connor deposed that she was 'a difficult and disorderly character and a common prostitute'. Thankfully, those men who frequented brothels were also prosecuted, though not as often and as forcefully as one might have hoped. In *R v Thomas Tyler*,<sup>168</sup> before Henry

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<sup>163</sup> VPRS 2136, Monday 7 October 1844.

<sup>164</sup> VPRS 2136, Deposition Book 2, 1844-1845, Wednesday 17 December 1844.

<sup>165</sup> VPRS 2136, Deposition Book 2, 1844-1845, Wednesday 17 December 1844.

<sup>166</sup> VPRS 2136, Deposition Book 2, 1844-1845, Wednesday 26 March 1845.

<sup>167</sup> VPRS 2136, Deposition Book 2, 1844-1845, Friday 2 May 1845.

<sup>168</sup> VPRS 2136, Deposition Register, Book 2, 1844-1845 Begins; Monday 8 April 1844.

*Condell Esq JP and William Hull Esq JP, Thomas was charged with being 'in a house of ill fame at an unreasonable hour of the night'. He was found guilty and fined 40s, in default of payment one month in the Melbourne gaol.*

Any person who assaulted police or resisted police in the execution of their duty, or aided or incited any other to do so was liable to a fine not exceeding 5 pounds.<sup>169</sup> In Port Phillip, assaulting or abusing police was so common an occurrence it almost gained recognition as a legitimate spectator sport. Constables were hit and threatened with pieces of lumber,<sup>170</sup> and often called for assistance when arresting drunken and violent persons.<sup>171</sup> The affrays and assaults were often very violent affairs.<sup>172</sup> There were often multiple violent and inebriated defendants who at times would use knives to make their riotous point.<sup>173</sup> The instruments of peace, at times, also clashed violently in public. *R v Constable Job Williams and Corporal Brock (Mounted Police)*<sup>174</sup> before Foster Fyans and E. Addis JP, dealt with a prosecution arising out of a dispute between a constable and member of the mounted police. Brock, acting in a 'disorderly' manner had interfered with Williams when he had a person in custody. The case was dismissed, with an admonishment from the Bench.

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<sup>169</sup> 2 Vict. No.2, s.8.

<sup>170</sup> In *R v Peter Riley*, Constable James Rogers testified that Riley was drunk and when he was apprehended 'he struck the constable and later threatened him with a piece of wood'. Riley was found guilty and fined 5 pounds; Melbourne Court Register 13 December 1837, *HRV*, I, 325.

<sup>171</sup> In *R v George McQueen*, Constable Patrick McKeever testified and that McQueen was drunk. When he was apprehended he struck the constable and said, 'You bugger stand back'. The constable called for assistance and a 'black native' helped him take McQueen to the watch house. McQueen was found guilty and fined two pounds, 10 sh. or imprisonment for one calendar month. The fine was paid; Melbourne Court Register 13 December 1836, *HRV*, I, 326.

<sup>172</sup> In *R v Robert Marsden*, Constable James Rogers testified that whilst investigating an affray in *Carr's Public House*, he found Marsden 'being particularly disorderly'. He then attempted to arrest him. It was alleged that Marsden then resisted arrest, 'kicking violently, escaped and was recaptured'. Rogers testified that he was then 'assisted by unknown persons'. No penalty was recorded; Melbourne Court Register 13 February 1838, *HRV*, I, 329–330.

<sup>173</sup> In *R v Richard Hutchins, George Allan, Gregory Patrick Anderson, John Morgan, Mary Anne Morgan*, under a charge of General Affray at North Geelong, before Foster Fyans and Andrew Forlonge. Hutchins was charged with 'violently assaulting' Constable George Lee with a knife and 'for cutting three of his fingers'. Constable Job Williams, also assaulted by George Allan, testified and confirmed this. It was established that Hutchins was drunk at the time. The Morgans were charged with interfering with constables. Gregory Patrick Anderson was charged with abuse and interference with constables. Hutchins was committed for trial at Quarter Sessions; Allan received two months gaol. The case against the Morgans, 'on account of their good character', was dismissed. Anderson was fined two pounds and costs; Geelong Court Register 14 November 1839, *HRV*, I, 355–356.

<sup>174</sup> Geelong Court Register 6 December 1839, *HRV*, I, 356–357.

*The Bench, at times, demonstrated a surprising leniency in some 'assaulting police' matters. In R v Ellen Sheehan,<sup>175</sup> before Henry Condell Esq JP, Sheehan was charged with assaulting Constable Cronin on Sunday night 10 December 1843. Cronin deposed that 'she came up and struck him with her fist and took hold of his hair'. For good measure, he also deposed that 'she was being disorderly'. The matter was surprisingly discharged. In the Matter of Moses Thierry,<sup>176</sup> Thierry refused to leave the police office when requested and began 'threatening to cut the police constable into chunks and deposit the portions in a harness cask'. Surprisingly, Thierry was discharged. On the other hand, when the Special Constables were appointed for the Town of Melbourne, the Bench took steps to protect them from the verbal and physical abuse that followed them throughout the township. In R v Robert McEachen,<sup>177</sup> before Henry Condell Esq JP, one of the special constables William King was assaulted and called a 'clown constable'. McEachen was found guilty and fined 50sh with costs of 5/11.*

Although required by their work to attend public houses, Constables were not permitted to drink at these establishments. In fact, any victualler, licensed publican or any other person, who knowingly harboured or entertained, or permitted any member of the police force to remain in their house, shop, room or premises during any part of the time appointed for that constable to be on duty elsewhere, was liable to a fine, upon conviction, not exceeding 5 pounds.<sup>178</sup> The constables would also be liable to prosecution if they were found drinking or drunk in the course of their duties. For example, in a matter of a *Police Disciplinary Hearing*,<sup>179</sup> Patrick Keating a Constable attached to the Alberton Police, was discovered drinking and drunk at *Patrick's Inn* by Chief Constable Manton Flinn, and not being in a fit state to be seen in public was ordered by Flinn to his quarters. He refused and made use of obscene language. The Bench decreed that Constable Keating be removed from his office of Constable in the Police.

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<sup>175</sup> VPRS 2136, Monday 11 December 1843.

<sup>176</sup> PPG Wednesday 11 August 1841.

<sup>177</sup> VPRS 2136, Tuesday 31 October 1843. Citing s.69 of Act of Council 6 Vict No.7. The Special Constables were required to act within the Town of Melbourne.

<sup>178</sup> 2 Vict. No.2, s.9.

<sup>179</sup> Alberton Court Register, 20 April 1848, p.158.

Linked to his duties to protect religious observance, the magistrate also played an important role in legitimizing the marriage of minors as being *in loco parentis*. As a relatively demographically youthful society, and given the common law requirement that parental consent must be obtained before an act of marriage could lawfully proceed,<sup>180</sup> colonial legislation allowed a magistrate to provide consent in *loco parentis*.<sup>181</sup> Some of these cases were almost comical. In *R v John Hore*,<sup>182</sup> Hore appeared on a charge of abduction and was 'heard at the Police Office 17 January 1843' upon the complaint of Mrs Webb, a greengrocer. Mrs Webb made the complaint 'regarding the abduction of her daughter, a girl under 16 years of age'. Mrs Webb stated that her daughter had left on 9 January 1843 and 'that she had not seen her since'. Mrs Webb had received reports that 'her daughter was keeping company with the wicked man who was now before the Bench'. It was revealed that Mrs Webb had in fact given her consent for the pair to be married but only 'in a proper manner before a Roman Catholic minister but John Hore being a thorough heretic had refused this conditional permission'. St John said the case clearly came within the meaning of the Act. He was about to commit the prisoner to trial when the girl said that he had not taken her away but she had left by her own free will, was living with a family in Eastern Hill and was working as a dressmaker. On hearing this St John dismissed the case and told Hore 'he ought to marry her immediately'. They were married the following day.

Since 1576 English magistrates had been made responsible for issues of bastardy: 'The Justices shall take order as well for the punishment of the mother and reputed father, and for the better relief of the parish shall make order to charge the father and mother as they shall think meet and convenient' thereby proscribing an action with a criminal prosecution and a civil penalty'.<sup>183</sup> The Port Phillip magisterial Bench saw many

<sup>180</sup> See Minors, in Plunkett, *op.cit.*, p.309.

<sup>181</sup> 2 Vic. I., No.13, 29 August 1838; 'the consent of any Magistrate...to the marriage of any person under the age of twenty-one years obtained in manner hereinafter provided, shall be of the same force and effect to all intents and purpose, as the consent of a parent or guardian'.

<sup>182</sup> PPP Thursday 19 January 1843.

<sup>183</sup> Osborne, B., *Justices of the Peace 1361-1848* (Dorset, 1960) pp.12-13.

applications by mothers seeking support for their illegitimate children.<sup>184</sup> Henry Moor, Mayor of Melbourne, entertained such an application on his very first day on the Melbourne Bench in *Margaret McKee v William Rennie*.<sup>185</sup> *Anne Proir v Charles Henley*,<sup>186</sup> involved a typical prosecution of this type, this time before the Portland Bench. The prosecution against Henley was based upon his refusal to support his illegitimate child. The prosecutrix did not appear when called upon, and 'the justices on the Bench were made aware that an arrangement had been reached in the matter out of court. The matter was then formally dismissed'. In *John Hazel v Samuel Smith*,<sup>187</sup> Smith appeared before Frederick Berkley St John PM, George Sherbrooke Airey Esq CCL, James Frederick Palmer JP and James Smith Esq JP of the Melbourne Bench, on a charge of refusing to maintain his child. There was no appearance. The matter was then heard on 10 August 1843 before Frederick Berkley St John PM and James Smith Esq JP, where it was decided that the defendant take back his child from Hazel who had been looking after the child. The defendant was discharged from the court after paying 20sh in costs. In *R v Hugh Connors*,<sup>188</sup> before Frederick Berkley St John PM and blank space and then Esq JP (implying that St John had filled out the headings of the Deposition Books in advance of the appearance of the assisting justices) the matter involved a Geelong Bench warrant on a charge that Connors deserted his wife and children. The matter was discharged, 'the wife not wishing to continue pressing charges against her husband'. In *Georgianna Doigs v Charles Barnes*,<sup>189</sup> before Condell and Charles Payne JP of the Melbourne Bench, Doigs made an application for maintenance for an illegitimate child. The facts disclosed that Doigs had arrived in the colony 'about 2 years ago' and had become 'acquainted with Barnes last December 12 months ago'. Quite remarkably the court 'was not convinced of

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<sup>184</sup> VPRS 34/P/1; 18 October 1842, In *Anne Prior v Henry Huntly*, charged with failing to maintain his illegitimate child, matter remanded by the Portland bench.

<sup>185</sup> VPRS 2136, Monday 18 November 1844, before Henry Moor Esq The Mayor (1st appearance on Bench). Regarding maintenance of a child, there was no appearance of either party.

<sup>186</sup> *Portland Guardian and Normanby General Advertiser*, 5 November 1842.

<sup>187</sup> VPRS 2136, 8 August 1843, Special Petty Sessions.

<sup>188</sup> VPRS 2136, Saturday 5 Aug 1843.

<sup>189</sup> VPRS 2136, *ibid*, Tuesday 23 January 1844.

the paternity' and dismissed the case. In *Jane Buchanan v Joseph Braithwaite*,<sup>190</sup> before Henry Condell Esq 'The Mayor' and Andrew Russell Esq JP of the Melbourne Bench, Buchanan made an application for maintenance of illegitimate child. The defendant admitted being the father of the child, and 'they agreed to be settled the matter out of court'.

In those maintenance matters that did reach the magistrates, the amounts ordered by the Bench varied between 5sh and 20sh per week. The following cases were typical examples. In *the Matter of Amelia Mann v Richard Mann*,<sup>191</sup> before JB Were Esq JP and Edmund Westby Esq JP of the Melbourne Bench involved an application by Amelia Mann against her husband for refusing her 'means of support'. The court ordered the husband to pay his wife 20sh per week, to be paid on a weekly basis, 'commencing this day'. In *the Matter of Phillipi Jenkins v John Patinson*,<sup>192</sup> before 'his Worship the Mayor' [Moor], Frederick St John Esq JP and William Wilmott Esq JP, involved an application for maintenance for an illegitimate child, with the court ordering the father to pay 12sh and 6p per week in advance for 12 months. In *the Matter of Jane Quayle v James Bonwick*,<sup>193</sup> before Alderman Russell and Archibald McLaughlin Esq JP, in an application for maintenance for an illegitimate child, the court ordered the father to pay 5 sh per week from the date of the child's birth and 1 pound 5sh in costs.

The Port Phillip magistrates were obviously kept busy in their attempts to regulate public conduct in this evolving frontier settlement. The offences, at times, enjoy a modernity that is both enlightening and alarming. Whatever the causation, the unruliness and profane nature of early Port Phillip shines through the court records and underscores the difficulties facing its magistracy and the exhaustive nature of their order maintenance responsibilities.

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<sup>190</sup> VPRS 2136, *ibid*, Thursday 11 April 1844.

<sup>191</sup> VPRS 2136: Deposition Register 1845–1855, Monday 28 April 1845.

<sup>192</sup> VPRS 2136, Saturday 31 May 1845.

<sup>193</sup> VPRS 2136, Friday 15 August 1845.

# Conclusion

LEGAL HISTORY OFFERS new perspectives on the Australian past. Many historians rely upon political or ideological frameworks in attempting to understand the ways in which Australia was constructed as a colonial settlement. A typical strategy, following Louis Hartz, has been to identify 'fragments' of the European ideological landscape and then trace this imprint in settler societies. A legal approach works inside this broad-brush canvas to examine forensically the day-to-day workings of the justice system. The magistracy is the institution of interest here, particularly in its role in the administration of the colonial population.

The magistrates of Port Phillip played a central role in establishing and maintaining norms of appropriate behaviours in a society that was still developing. Yet this was not merely a case of the upper class disciplining the lower classes. Whilst working-class men were the bulk of defendants, males from polite society, including magistrates, also disobeyed the law, most noticeably in their propensity for duelling. The early colony was a rough place, lacking many stabilising social forces found in England. Misbehaviour was inevitable in a society composed primarily of young men, with very few women, and little entertainment. Alcohol was a constant presence, and both binge drinking and an aggressive culture kept magistrates occupied doling out punishments. Men who were magistrates were, or aspired to be, gentlemen. The bestowal of a commission of the peace was akin to the granting of aristocratic titles in England. In this strange, harsh land, the upper class sought to transplant English institutions, though with limited success. Most of these efforts to emphasise social importance were urban endeavours. Away from the 'cities', rural folk struggled to survive in an unfamiliar climate and country.

Charged with the responsibility of establishing the office of the magistracy in Melbourne, William Lonsdale was scrupulous in his work. Magistrates were as much political as administrative tools in this work, for their summary decisions about a range of matters, supported by a constabulary, made them crucial to the young colony's economic

success. In the hinterland the Commissioners of Crown Lands served to enforce the law, gather its tithes and maintain order in the country. They were automatically part of the rural social elite and exercised a wide range of powers, from regulating food prices to issuing public house licenses.

The office of the justice of the peace must be viewed as a quintessentially English institution that only gradually developed its colonial idiosyncrasies. Early origins of the magistracy presumed an English social structure in which knights and subjects were bound together by mutual obligations. But the magistrate was not primarily the servant of the Crown that officially bestowed his authority, but rather was deeply embedded in local systems of power within his parish. The English justices of the peace came from the gentry class. The gentry class commanded deference from the lower classes yet enjoyed less prestige than the nobility. As their social standing was fundamentally based upon land ownership, magistrates were predictably eager to enforce property laws. Yet in charting arguments of different historians as to the social impact of the magistrates' power, this analysis has demonstrated that their role cannot be simplistically reduced to a single conclusion. Marx, for example, failed to appreciate that magistrates owed loyalties not just to the Crown and Parliament, but also to the gentry and to their local community. Despite a broad adoption of the English legal system, the Australian office of the magistrate necessarily differed from its imperial ancestor because it was transplanted to a radically different society. Magistrates played a key role in the transition from a penal colony to a settler society. These elite men assisted the transplantation of institutional forms of social control, notably by instilling respect for the English systems of political governance and social hierarchy. Colonial conditions quickly changed the office of the magistracy from how it had functioned in England, for it was felt that a militaristic judicial style was necessary to control the largely convict population. Minor infringements were met with draconian punishments. Yet the job of the magistrate was not easy, as he had jurisdiction over a huge range of issues.

The early colonial magistrates, moreover, lacked the security of their English prototypes and owed no specific class or district any allegiance. Geographical and social isolation challenged the early Australian magistrates, who were usually ambitious men not

quite possessing the wealth and status of their English counterparts. In practical effect, colonial magistrates controlled both the fledgling economy and local government. Given their significant power, it is not surprising to learn that many magistrates profited from the office. These were highly desirable positions, filled by some of the most influential men in New South Wales. In response to fears that these unpaid judicial officers were too independent, eventually salaried Police Magistrates were appointed. The courts were also significant as the only forum of debate of political and economic issues in the young colony. In the Rum Rebellion, the magisterial Bench clearly symbolised the locus of colonial power. The dispute between the exclusivists and the emancipists was essentially class-based, but elitism was slowly declining, aided by newspaper iconoclasm, as New South Wales moved from a hierarchical to a democratic society.

The Port Phillip District struggled for some time to lawfully and successfully establish itself. Knopwood carried out its first magisterial adjudication in the failed Sorrento settlement of 1803. Some three decades later, following another failed settlement at Western Port in 1827, Batman's expedition landed in 1835 and attempted to gain control over the lands around Port Phillip in accordance with the contemporaneous principles of International Law. There followed a protracted dispute between the Crown and private interests over the right to control and settle the area. Eventually the Crown sought to take economic advantage of the settlement. Batman and his Port Phillip Association members ignored proclamations as to their illegal occupation and sought the introduction of the magistracy as a means to legitimise the settlement. Both New South Wales and Van Diemen's Land fought for control of the Port Phillip District, particularly the local magisterial post. Concern about the potential for racial strife finally prompted the Governor of New South Wales to act, and with the approval of the Home Office he officially opened the district for lawful settlement in 1836, appointing William Lonsdale first resident Police Magistrate and Government Agent for the Port Phillip District.

This was not just an imposition of Crown authority, for, despite the illegality of their first settlement, the settlers understood the importance of the magistracy in maintaining social order. Lonsdale was typical of the early colonial elite; from an English military background and a well-connected family, he was typical of his office and almost

designed for the post. By contrast, Fawkner, the long time rival with Batman for the title of Melbourne's founder was a self-made, anti-authoritarian man who went from being a convict to a politician and magistrate. His life was an example of the kinds of colonial opportunities not possible in England. Lonsdale's magistracy was guided by Plunkett's magisterial handbook, but he was forced to combine civilian and military styles of policing in this lawless colony. It was difficult to maintain social order with so few 'respectable' gentlemen to set an example. Exposure to these savage, foreign Australian conditions fundamentally altered many English characteristics of the magistracy, as is also evident in the settlement of Port Phillip. Not unexpectedly, Bourke's attempt to restrict the powers of the colonial magistracy<sup>1</sup> was only partially successful. Bourke himself felt uneasy about the reserve powers held by magistrates, especially under s.16 of the legislation which gave two or more magistrates wide summary powers, which would be 'out of place in any but a Slave Code ... a most serious trust is here reposed in the Magistrate'.<sup>2</sup>

The colonial magisterial appointee needed to be able to achieve a degree of deference both to himself personally and to the office which he held. The process of finalizing the *net* amount of accrued deference shown to the English magistracy had taken five hundred years to refine. It remained and remains a subtle yet complex form of behaviour.<sup>3</sup> There were no such deferential subtleties in colonial Australia. This forced the colonial magistrates to be harsh when they were asked to deal with insolent or non-deferential conduct. In the early days, convicts were sentenced to fifty lashes for not doffing their hats to a passing magistrate.<sup>4</sup> Such deference did not seem to flow naturally in the colonies. At its core, deference to the magisterial office was linked to a curious mixture of fear and gratitude felt by defendants as they appeared before the bench for the

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<sup>1</sup> 3 William IV, No.3 (1832).

<sup>2</sup> Bourke to Stanley, 15 January 1834, *HR4*, I, XVII., pp. 313–330.

<sup>3</sup> Malcolmson, R. W., 'A set of ungovernable people: The Kingswood colliers in the Eighteenth Century', in Brewster, J. and Styles, J., (eds) *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (London, 1980) p.85.

<sup>4</sup> Therry, *op.cit.*, p.43.

disposition of their matter.<sup>5</sup> Amongst the other accoutrements necessary to achieve this deference, the manor house and other similar symbols of power, wealth and dominance took generations to accumulate.<sup>6</sup> It was also important, especially in the hinterland rural sectors of the colony where most of the convicts were employed as labourers,<sup>7</sup> that the magisterial appointee was able to foster and promote feelings of safety and security amongst the free settlers. This was especially so in the pre-1828 period when assigned convicts outnumbered settlers four to one.<sup>8</sup> The magisterial appointments were also important in securing a 'rule of law' superstructure and fashioning the badges of 'material success' and social hierarchy necessary in new societies.<sup>9</sup> This process was necessarily repeated in Port Phillip where a 'new' society was being formed from the fragments of the old. The harshness of Fyans and Blair, apprenticed in their magisterial judgements in the older settlements of Sydney, Norfolk Island and Moreton Bay, was to be expected. The convict presence in the ostensibly free settlement of Port Phillip triggered a mechanism that made it so.

Any attempt to socially engineer the office to reflect a more socially representative magisterial bench was doomed to fail. The attempt to allow emancipist lawyers to practice before the colonial courts was met with similar resistance; Judge Advocate Bent felt that these ex-convict lawyers would 'defile his court' and queried whether Macquarie

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<sup>5</sup> Hay, D., 'Property, Authority and the Criminal Law', in Hay, D., Linebaugh, P., and Thompson, E. P., *op.cit.* p. 55.

<sup>6</sup> The foundations of authority in the Old World were absent in rural society in New South Wales. In England, Scotland and Ireland the local Justice of the Peace lived in an imposing mansion; in New South Wales he often lived in a sod hut. In England, Scotland and Ireland the local justice was distinguished by dress, speech and deportment from those to whom he dispensed justice; in New South Wales bush life stripped away most of the differences between man and man; Clark, C. M. H., *A History of Australia* (Melbourne, 1962) Vol. III, p.182.

<sup>7</sup> Hirst, *op.cit.*, p.149.

<sup>8</sup> Neal, *op.cit.* p.133 citing Stewart, G., 'Convict Rebel: Ralph Entwistle' in Fry, E., *Rebels and Radicals* (Sydney, 1983) p.30.

<sup>9</sup> 'The operation of the rule of law at local level forms the other dimension ... Through the local courts and their control of the police, the magistrates were the main source of legality in the rural areas. But as local landowners and employers of labour, they also posed a threat to the lawful exercise of power. The desire to exercise power on the larger plane deepened this tension. The badge of the magisterial office publicly recognized other achievements, notably material success and respectability. Once gained, however, a seat on the bench endowed the incumbent with lawful authority to make court orders about people's liberty and to prescribe punishments which would be enforced by the state'; Neal, *op.cit.* p.131.

would likewise allow former convicts commissions as officers in his own regiment.<sup>10</sup> That the magisterial bench reflect the society was a noble ambition, especially within the confines of what was essentially still a continental gaol. This was a gaol which between the years 1826 and 1830 enjoyed an execution rate exponentially higher than England's,<sup>11</sup> whose capital (Sydney) had become London's stolen goods receptacle,<sup>12</sup> and whose populace had become hardened beyond redemption by a social construct within which mercy - delivered by a judicial system which sought to exclude emancipists as jurymen<sup>13</sup> - was a luxury. The Colonial Office, the Governor's *only* master, was notably and desperately advised that magisterial appointments could also be used as a means of controlling the troublesome colonial upper classes by using the device of installing one of their own to the post of senior magistrate.<sup>14</sup> The appointment as a colonial magistrate became the definitive badge of class success.<sup>15</sup> The magistracy of colonial New South Wales fought the Governors in matters of reform and indeed plotted against the Governors. Neal gives us numerous examples of the tensions and eventual conflicts that arose between the Governors and their magistracy. The most stunning example was the *Rum Rebellion*.<sup>16</sup> Brisbane likewise removed four magistrates from the commission for not

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<sup>10</sup> Hirst, *op.cit.*, p.156.

<sup>11</sup> Therry, R., *op.cit.*, p.17.

<sup>12</sup> Therry, R., *op.cit.*, p.40.

<sup>13</sup> Note the opposition of the magistracy to the inclusion of emancipated convicts as members of any colonial jury: see correspondence related to petition, Bigge Report Appendix, cited in Phillips, M., *op.cit.*, pp.275-276.

<sup>14</sup> So soon as the division of the colonies into Counties can be carried into effect, it will probably be convenient that a Commission of the Peace should issue, as in England, for each particular County; and I would also submit to you that it might be convenient to follow the course, as in Jamaica, of investing in each County, some Magistrate with the office of 'Custos Rotulorum' [keeper of the rolls, i.e. head magistrate], selecting for that purpose the person in whom the local Government might place the greatest confidence. I need not observe on the value of distinctions of this nature, the influence of which is felt in all societies, and which have the effect of securing to the Government the cheapest and most effectual influence over the higher classes of society; James Stephen to Under Secretary Wilmot Horton, 27/3/25, *HR* IV, I, 602-603; cited in Neal, *op.cit.*, p.120.

<sup>15</sup> In Justice Therry's testimony before Commissioner Bigge, he stated that, 'The Committee must bear in mind, that in general estimation to be in the Commission of the Peace is considered a decisive test of belonging to the rank of a gentleman'; Neal, *op.cit.*, p.120 citing Bennet, J., and Castles, A. C., *A Source Book of Australian Legal History* (Sydney, 1979) p.99.

<sup>16</sup> Neal, *op.cit.*, p.120 citing *HRNSW* VI, 518 and Evatt, H. V., *Rum Rebellion* (Sydney, 1938) p.75.

supporting him.<sup>17</sup> Bourke also dismissed recalcitrant magistrates.<sup>18</sup> One of the most celebrated of these dismissals was Governor Macquarie's dismissal of the Reverend Samuel Marsden from the Parramatta Bench in 1818.<sup>19</sup> Marsden had long been a thorn in the side of Governors.<sup>20</sup> Marsden was seen by some to be an evil, vile tormentor of all labourers and convicts. He was at the core of the exclusivist set and armed with a commission of the peace his meanness echoed throughout the judgements he handed down from the bench. Even Bigge averred to his cruelty.<sup>21</sup> The Port Phillip magistracy never experienced this 'type' of political-legal scandal and was lucky enough to escape the vile excesses of some of the appointees to the New South Wales Bench. Lonsdale, Simpson, French, Smith, Tyers and Stewart, given the precedents offered by some of the magistrates of the mother colony, were indeed noble by comparison.

The movement to create a Bunyip Aristocracy must be viewed within the wider context of an English system of class-consciousness that saw respectable colonists rubbing shoulders with convicts, who later became emancipated, with some becoming prosperous. This meant that mere economic prosperity would make a felon or former felon an equal with a respectable free settler. This prosperity then threatened those class-conscious free settlers who had been trained by a class system that forced them to hold a proportion of their own Australian countrymen in contempt. The reins of authority in such a society naturally must be placed in the hands of those persons respectable enough to value the importance of the role, and could not be handed over to a mob of criminals, no matter how hard they scrubbed with the soap of respectability.

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<sup>17</sup> Currey, C. H., *Sir Frances Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Sydney, 1968a), pp.51-66.

<sup>18</sup> Roe, M., *The Quest for Authority in Eastern Australia* (Melbourne, 1965) pp.25-27.

<sup>19</sup> Neal, *op.cit.* citing *Sydney Gazette* 28/3/1818.

<sup>20</sup> 'He came to the colonies in 1794 as an Assistant Chaplain and was stationed at Parramatta. He was appointed a magistrate (honorary justice of the peace) in 1795. He became a wealthy man accumulating thousands of acres of land and thousands of heads of livestock'; Castles, *op.cit.* p.71 citing Clark, M., *A History of Australia* (Sydney, 1968) vol.1., pp.139-141.

<sup>21</sup> 'Without stating it as my opinion that he acted with undue severity, it is in proof, that his sentences are not only, in fact, more severe than those of other magistrates but that the general opinion of the colony is, that his character, as displayed in the administration of the penal law in New South Wales, is stamped with severity'; Castles, *op.cit.* p.73 citing Bigge, *Report, op.cit.* p.91.

Of the twenty-three men who established the Melbourne Club in 1838, by the early 1850s only five remained in Port Phillip, the rest having returned to England, died or left for other colonies. Of the 'gentlemen by birth' traced by de Serville as having settled in Port Phillip during the period under examination, less than one third remained in the colony after 1850. The inheritors of polite society and social precedence in the new colony of post-1851 Victoria were the low-born squatters of the Western District, previously scorned by Melbourne polite society, but eventually heirs to the throne of colonial Port Phillip good society. Gentle society in Port Phillip Melbourne had brought the idea of class structure and standards of English civilization to the settlement. It was the low-born Scottish squatters of the Western District, however, who survived the financial collapse of the 1840s and left their imprint on Victorian society.<sup>22</sup> Their experiences, in the harshness of a new frontier, in their war with the original inhabitants, and the vicissitudes of the capitalist modes of production and the relationship between capital and labour, forged a new class of southern Australian gentry that had so eluded their more birth proper urban neighbours.

Gipps felt that separation of the Port Phillip District from New South Wales was desirable,<sup>23</sup> that there were no conspiracies to keep the District for the sake of additional revenues to New South Wales, and that if the people of Port Phillip were patient, they would get what they desired.<sup>24</sup> But for as long as the District, under La Trobe's leadership, answered to New South Wales, La Trobe was operating within the constraints of the original 'mother' colony of new South Wales, its legal system and social 'baggage'. Part of this 'social baggage' was the convict origins of New South Wales and the social class struggles that it fostered. The Port Phillip inhabitants sought to distance themselves from the legal, financial and social ties that bound the two societies. Interestingly, Plunkett ridiculed the assertion by the inhabitants of Port Phillip that it was not a convict settlement or society. He quipped that there were 'not quite such pure merinoes as they would have it appear' and cited the fact that in only one month of 1847, thirty-four

<sup>22</sup> McNicoll, *op.cit.*, pp.95-96; *Kenyon Cards*, La Trobe Collection; de Serville, *op.cit.*, pp.160, 162, 167, 169.

<sup>23</sup> Shaw, A. G. L. (ed.), *Gipps-La Trobe Correspondence 1839-1846* (Melbourne, 1989), Let.370, p.373.

<sup>24</sup> Shaw, *GLC, ibid*, Let.373, p.376.

convicts had been criminally prosecuted within the District.<sup>25</sup> Interestingly, the plan to dispatch Pentonville 'exiles' to the Australian colonies,<sup>26</sup> met with approval from La Trobe<sup>27</sup> and Gipps<sup>28</sup> who thought it would be an 'advantage to the District [Port Phillip] to have them'.<sup>29</sup> It seems strange that Gipps as the 'chief keeper of the peace' in the Australian colonies would welcome the introduction of criminal labourers within his boundaries during his regency. The rest of the Port Phillip community, the squatters<sup>30</sup> and the 'lower classes' were divided on the issue.<sup>31</sup> Gipps however could only see resistance to the scheme coming from the 'labouring class'.<sup>32</sup> Despite the opposition, and Gipps's incomplete advice as to future destinations,<sup>33</sup> the next shipment of exiles aboard the *Stratheden* deposited some of its exiles in Hobart and then brought fifty-one to Port Phillip on 27 January 1846. They were all soon employed.<sup>34</sup>

There were signs that the outstanding criminality of the early Australian colonial period was diminishing through the transition years.<sup>35</sup> The social life, culture and belief systems and practices that it fostered however, had left a mark. Alcohol consumption and the social costs of drunkenness was one of these cultural by-products. By 1849, half of

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<sup>25</sup> *Sydney Morning Herald* 14 June 1847; Malony, *op.cit.*, p.77.

<sup>26</sup> Stanley to Gipps, 27 July 1844, *HRA*, xxiii, 699.

<sup>27</sup> La Trobe to Gipps, 30 November 1844, PROV, Supt., O/L, 44/1815; *GLC*, p.298, f.1.

<sup>28</sup> Gipps to Stanley, 13 December 1844, CO, 201/352, f.459; *GLC*, p.298, f.1.

<sup>29</sup> Gipps to La Trobe, 7 December 1844, *GLC* p.298, *SLV* H7266.

<sup>30</sup> Magistrate William Yaldwyn squatted on the Campaspe River. He represented one portion of the rural population, the squatter class, who supported the program. He came to the District with the first Pentonville transport *Royal George* and indeed employed a number of the exiles at an agreed rate; Gipps to La Trobe, 23 November 1844, *GLC* p.297, *SLV* H7265.

<sup>31</sup> According to La Trobe, opposed the scheme of exile, but their opinions would be 'of little weight'; La Trobe to Thomson, 28 December 1844, 31 December 1844, PROV, Supt., O/L, 44/1961, 44/1970; *GLC*, p.297, f.3

<sup>32</sup> La Trobe to Gipps, 25 December 1844, *GLC* p.302, *SLV* H6955.

<sup>33</sup> Gipps to La Trobe, 7 November 1845, *GLC* p.365, *SLV* H7330.

<sup>34</sup> *GLC*, p.366, f.5.

<sup>35</sup> Between the years 1843 and 1848, total colonial executions dropped from 69 to 23 per annum and the overall criminal conviction rate dropped 43 per cent; *Sydney Morning Herald* 10 October 1849.

all criminal prosecutions before the colonial magistracy were for public drunkenness.<sup>36</sup> Attorney General Plunkett, in his role as Crown Prosecutor, witnessed the direct results of the consumption of hard liquor in colonial Australia. Convinced of the nexus between alcohol and crime, he targeted the licensees of public houses as the fountainheads of misery within the colonies.<sup>37</sup> Plunkett later claimed victory in his campaign against the excesses and social cost of liquor. In 1846, he maintained that it was 'intemperance rather than to convictism' that one should look to when trying to understand the crimes and horrors in colonial Australia.<sup>38</sup>

It was also widely believed that by the late 1840s, life in Australia, limited as it could be, was in certain matters comparatively better than life in Europe.<sup>39</sup> Into this southern Arcadia came the Melbourne religious riots of July 1846. Plunkett's Party Processions legislation<sup>40</sup> armed the Australian colonial magistracy with the traditional tools of European State repression and rights censorship, underscoring the inevitable conclusion that the inherent tensions and inherited animosities that Europe had exported southward could only be regulated by an office likewise transferred. Despite their many imperfections, the early magistrates of Port Phillip, housed in their shanty legal ciboriums, were instrumental in creating and maintaining the social stability necessary to allow this new society to develop and prosper in a fashion only possible in a settler society tainted by convictism and trespass.

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<sup>36</sup> *Sydney Morning Herald* 21 September 1849: Of a total 19,296 prosecutions, 8,922 were for public drunkenness, including 83 charges for furious driving; Malony, op.cit., p.79.

<sup>37</sup> Plunkett personally drafted and presented 2 Vic. No.18 to the Legislative Council. He argued that by differentiating the licensing costs, consumers should be pointed away from hard liquor and instead to beer and wine. He therefore made the beer and wine licences cheaper and raised the spirit licence. Plunkett was also sympathetic to the lot of the labourer who, being normally paid on a Saturday, could not indulge in some 'consumption' on a Sunday. Plunkett therefore proposed 'an hours opening on Sundays' as appropriate; *Sydney Herald* 14 September 1838, Legislative Council Proceedings; Malony, op.cit., p.180.

<sup>38</sup> Before a Temperance Society Meeting held to honour the departing Gipps, Plunkett stated that in the colony in 1836 there had been 196 deaths directly linked to alcohol, whilst during the 1845–1846 period, with a trebling of population, there had only been 43 deaths linked to alcohol; *Sydney Morning Herald* 29 June 1846; Malony, op.cit., pp.180–181.

<sup>39</sup> It was argued that free trade, free press, trial by jury, a partly elective legislature, equal laws and 'perfect religious liberty' substantiated this assertion; *Sydney Morning Herald* 26 July 1848; Malony, op.cit., p.72.

<sup>40</sup> *Sydney Morning Herald* 15 October 1846, 22 October 1846; *Morning Chronicle* 21 October 1846; Malony, p.72.

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