CHAPTER 9

JUSTICE

TO MEN IN POWER in the Australian colonies the rule of law was fundamental to the working of a well-ordered society. The rule of law required a judicial system that was impartial in its dealings with the various ranks of humanity—or at least seemed so. But establishing such a system was no easy matter. Justice had to be seen to be done if people were to respect the law, and much depended on the dignity of the courts. In the smaller colonies of Western Australia and South Australia dignity was hard to come by. The law courts were new and poorly housed, and there was no settled pattern of authority and obedience; though there were usually a few gentlemen who could convey dignity in the most difficult circumstances. In the two convict colonies legal traditions were bound up with the penal system. Convicts and even ex-convicts were not always treated impartially and justice seemed far from blind. In weighing evidence, she sometimes handled her scales clumsily, especially in the lower courts, and seemed too eager to exchange them for the lash.

William Henry Mackie, chairman of quarter sessions, Western Australia. Undated photograph.
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THE THEATRE OF THE COURTS

The main showplaces of justice were the supreme courts in New South Wales and Van Diemen's Land, where the rituals of the mother country were played out as precisely as conditions allowed. Western Australia had only a court of civil jurisdiction, and quarter sessions for criminal cases. William Henry Mackie presided at both, usually sitting in Perth in a small courthouse, built in 1837, which doubled as a schoolroom. Quarter sessions were also held at Fremantle, and Mackie travelled occasionally, by Her Majesty's colonial schooner *Champion*, to hear both civil and criminal cases at Albany on the south coast. Procedure was simple and no elaborate argument was allowed.

In Adelaide the system was also rudimentary. The South Australians did have a supreme court, but with only one judge. Their original judge, Sir John Jeffcott, had come to the colony partly to escape his English creditors. He had drowned in 1837

Old supreme court building, Sydney. [A building of] handsome proportions, contains two courts for the administration of civil and criminal justice ... Over the courts, to which you ascend by a good geometrical staircase, in a circular lobby, surmounted by a neat dome—are a handsome suite of rooms, appropriated as offices to the Attorney and Solicitor Generals, the Sheriffs, Clerk of the Courts and Registrar, and other officials connected with the courts of law ... the Court House has latterly been found to be in a very perilous state ... finding that an effectual repair would be nearly equivalent to rebuilding the courts of law, His Excellency the Governor and Council, decided on the immediate erection of a New Court contiguous to the New Gaol, at Woolloomooloo, which is accordingly now in progress, from Mr Lewis's design, and is the first specimen of really good and handsome masonry.' *J. Maclehose,* Picture of Sydney, *118–20. Pencil sketch by T.S. Hatfull, 1839.* MITCHELL LIBRARY

and during 1838 a local barrister, Henry Jickling, was acting judge. Jickling wore half-length coat sleeves and green spectacles and, though a mild and pleasant man, he imposed scant order on proceedings. A visitor to the supreme court commented that during most of a six day libel case, 'the room resembled a bear garden more than a solemn Court of Justice'.

The judges in New South Wales and Van Diemen's Land were more experienced and better qualified to play the solemn part expected of them. Their courthouses were more imposing and they were surrounded by a host of lesser players who added to the effect of their performances. The chief justice of Van Diemen's Land was John Lewes Pedder—knighted in November. Pedder's attitude to his duties was humane but narrow and precise. More than most judges in the colonies he saw the law as entirely independent, its rules not subject to larger ideals or higher authorities, but following the strictest possible interpretation. Pedder believed that the law was not itself an instrument of change, and that as a judge he was above political considerations of any kind. He had the help of one puisne judge, Algernon Sidney Montagu, who was said to possess a 'peculiar foppish character' and a dangerous smile. His enemies called him mad. But like Pedder he was an able judge who took his duties seriously and kept up all the proper pomp.

The theatre of the courts affected different people in different ways. For some a trial in the supreme court was a chance to shine a little under the ancient panoply of the law. Others found it all tedious and time wasting. A juryman in the supreme court at Hobart Town, G.T.W.B. Boyes, recorded in a diary his impatience with longwinded lawyers, and even more with Mr Justice Montagu. It was too much to endure, he wrote,

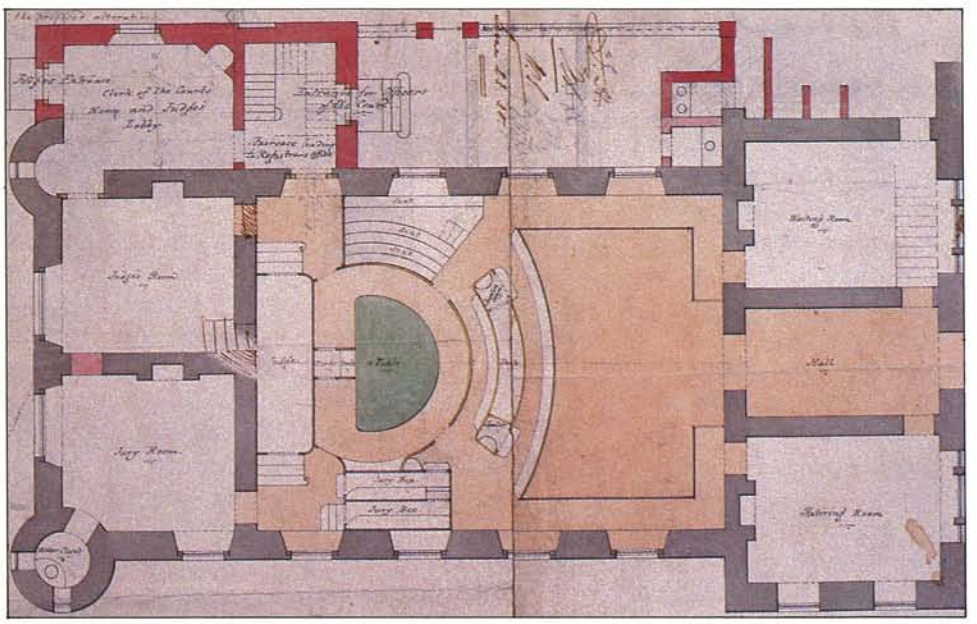
> to strain your ears in listening to the whispering summing up of the Judge, which if it has any tendency at all, it is to shake the opinion you have already come to from the evidence alone. He tells you if you think this you must find for the Plaintiff, if this, for the Defendant; that the law you have nothing to do with, it is a question of damages solely.

And after much else,

> He leaves the whole case in your hands. You have heard, he repeated, the evidence, and can of course form your own opinion.
>
> Thus having been brought fairly, or rather foully, into a quagmire, he leaves you to extricate yourself in the best way you can ...

The judges of Van Diemen's Land sat in a courthouse of imposing proportions in the centre of Hobart Town. Occasionally they visited Launceston to hear cases from the north of the island. The supreme court in Sydney was also a big building by colonial standards, though no longer big enough for the flourishing legal business of New South Wales. There were three judges, the chief being James Dowling—also knighted during the year. Among the numerous lesser officials were a sheriff, a registrar, a chief clerk, a crier, several messengers, and for each judge a clerk and tipstaff. The subservience of the tipstaves emphasised the personal dignity of the judges. They carried books, papers, letters and messages, fetched cloaks and carriages, and brought refreshments during prolix proceedings. The crier dealt with the court's collective dignity and proclaimed the approach and departure of the judges, calling the court to order and breaking it up.

Joseph Allott was crier of the supreme court of New South Wales. He was a former military man, now about eighty years old, with a good voice and a strong sense of ceremony. The clever young reporters who came to hear cases smiled at the way he said *sine die*, the Latin used when the court was to rise for an unspecified



Supreme court, Hobart Town. Plans proposing additions, here coloured pink, include an office for the clerk of the council, new lavatories and a new stairway to the registrar's office on the first floor. As in Sydney, accommodation was inadequate for the work of the court.

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time. Early in the year one of them told him that his 'shiny day' was not correct. The news alarmed Allott, and he looked forward anxiously to the next adjournment.

> At the termination of the ... Sessions [in April] the worthy old gentleman was desired by the Chief Justice to adjourn the Court in the usual form. Allott got through the Queen's English well enough, but when he came to these two ominous Latin words he cast a supplicating look at the reporter's box as if to ask for literary assistance.

The reporters answered only with a 'broad grin of anticipation'. Allott 'turned from them with an unutterable look', suddenly naked among the sublime forms of justice. But he soon recovered, and 'with a benign Pickwickian smile beaming forcibly over his good-natured face' declared as ever, 'shiny day'. In years of service he had learnt much about the law. Mr Justice Willis might call his learning 'sadly jumbled', but he knew as well as any judge that it was sometimes better to be consistent than perfectly correct.

A PICTURE OF THE BAR.—At the close of a trial for a riot at Liverpool the other day, two of the witnesses on leaving the Court were overheard canvassing the merits of certain counsel.—'Well,' said one of them, 'that ere a'Beckett's a reg'lar trump; I think he's a'most as good as Bob.' 'Aye, that he is,' said the other; 'how he did give it to them; he don't seem to care a bit for the Attorney General; didn't you see how he wos a laughin' at him.' 'But the Attorney General didn't see him,' observed the first speaker. 'Yes, he did,' was the reply; 'he laughed in his face!' This was conclusive, and did not admit of further argument.

Sydney Gazette, 14 Aug 1838

In this snippet of conversation, picked up by a reporter and published in the *Sydney Gazette*, 14 Aug 1838, 'Bob' is the patriot lawyer, George Robert Nichols. William a'Beckett is an Englishman who joined the New South Wales bar in 1837.

The theatrical aspect of the law was brought most to bear in criminal cases. During 1838 the supreme court of New South Wales tried 354 prisoners on a variety of criminal charges. The largest single categories were 'Highway robbery' —commonly called bushranging—and 'Stealing in a dwelling house and putting in fear'. These together made up about a third of the total number of charges. Accusations of other crimes against property were nearly as numerous, and other crimes against the person accounted for about a quarter of all cases. Forgery, perjury, conspiracy, fraud, and a single case of bestiality, made up the rest. Of those tried, over a third were acquitted.

The criminal justice administered by the supreme courts was based on British statutes and precedent. The use of British legislation caused problems. Some acts seemed unsuitable to colonial conditions, or even invalid here. In the case of Boyong, one of two Aborigines condemned to be hanged in Perth in 1838, distance confused the issue. On New Year's Day Boyong was found guilty of 'Feloniously Cutting and Stabbing with Intent to do grievous bodily harm'. But when his case came before the executive council soon after, members were told of an English newspaper report that the government at home had brought down legislation to reduce the number of capital offences. It seemed likely that Boyong's crime was no longer punishable by death. The colonial secretary argued that 'Newspaper Reports were never considered a very authentic source to derive Information from'. But Governor Stirling decided that Boyong should be given the benefit of the doubt and commuted his sentence to transportation to a penal settlement for life.

Such uncertainty was the last thing the dispensers of justice needed. If the law was to work as a deterrent, those likely to break it had to be assured that their fate would be all but inevitable, which meant that the certainty of the law itself had to

be matched by the efficiency of court proceedings. The judicial system, in all its branches, must appear a flawless engine, as perfect as human beings could make it.

Mistakes happened. In Sydney, Mr Justice Burton made one in the case of James Lyons, a chimneysweep in his mid-twenties who was accused of the rape and robbery of his landlady, Mary Larkins. The trial caused a sensation in Sydney, as the circumstances of the alleged offence were particularly brutal. Mrs Larkins, well known to locals as 'the Royal George', was 'hard upon 77'. During the assault her tongue was pulled with such violence that it was lifted from its roots by half an inch, leaving her mouth full of blood. For some days afterwards fears were held for her life.

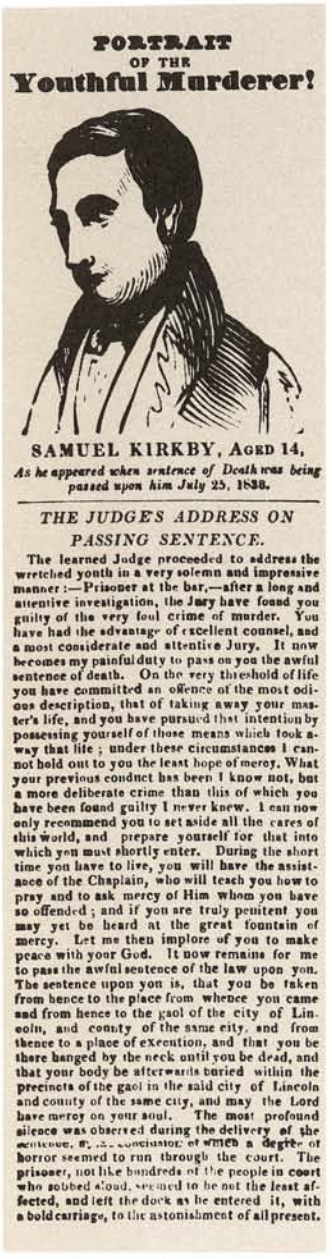
The offence took place on 16 January, and Lyons was brought to trial before Mr Justice Burton and a military jury of seven men on 7 February. By that time Mrs Larkins had recovered and was able to describe how the accused had come down the chimney and violated her. Dr Charles Smith, who had attended her soon after the attack, testified that the condition of her mouth was the result of 'very great violence'. She had claimed at the time to have been raped, though he had not examined her as it would have been 'both indelicate and useless'.

The court also heard that Lyons was getting his breakfast when confronted by an inspector of police and had shouted, 'So help me God I did not do it.' Susan Harding, who called Lyons her husband, claimed that he had been in bed with her the whole night and that Mrs Larkins had come home drunk the preceding evening. But her evidence was discredited: the prosecution cast doubt on her moral character, proving that she was not married to Lyons and suggesting that she and the other female who lived with him were 'women of the town'. The judge, scribbling in his notebook, underlined these points and they destroyed Lyons's defence. Mrs Larkins, on the other hand, convincingly denied that she was drunk on the night of the rape. She told the court that she was a Scotswoman who attended the Reverend Dr Lang's chapel, though she was not a regular communicant.

After retiring for about ten minutes the jury returned a verdict of guilty. Then, according to the reporters in their box, the learned judge delivered 'a most impressive and eloquent address to the prisoner upon the enormity of his crime', before passing sentence of death. He assured Lyons that, given the aggravated circumstances of the case, there could not be the slightest hope of mercy, and exhorted him to use the short time left to him 'in sincere contrition for his crimes, and to seek pardon from his offended God'. Lyons was then returned to his cell.

On 19 March the *Sydney Herald* announced that James Lyons would be executed in Sydney gaol on the following morning. Yet three days later, the newspaper reported without explanation that he had been reprieved until 3 April. Then on 5 April the *Herald* reported that doubts had been raised about the evidence for the prosecution, and Lyons's execution had been stayed for a further fortnight. Rumours circulated that he had been reprieved. These were denied by the *Sydney Gazette*. It reported on 24 April that he was still in gaol, and for those inhabitants of Sydney whose information about the case came only from newspapers, that was the last heard of James Lyons.

Yet much was going on hidden from public view. The day after the trial Dr Charles Smith had written to Mr Justice Burton protesting that, although Lyons



PORTRAIT
OF THE
Youthful Murderer!

SAMUEL KIRKBY, AGED 14,
As he appeared when sentence of Death was being passed upon him July 25, 1838.

THE JUDGE'S ADDRESS ON PASSING SENTENCE.

The learned Judge proceeded to address the wretched youth in a very solemn and impressive manner:—Prisoner at the bar,—after a long and attentive investigation, the Jury have found you guilty of the very foul crime of murder. You have had the advantage of excellent counsel, and a most considerate and attentive Jury. It now becomes my painful duty to pass on you the awful sentence of death. On the very threshold of life you have committed an offence of the most odious description, that of taking away your master's life, and you have pursued that intention by possessing yourself of those means which took away that life; under these circumstances I cannot hold out to you the least hope of mercy. What your previous conduct has been I know not, but a more deliberate crime than this of which you have been found guilty I never knew. I can now only recommend you to set aside all the cares of this world, and prepare yourself for that into which you must shortly enter. During the short time you have to live, you will have the assistance of the Chaplain, who will teach you how to pray and to ask mercy of Him whom you have so offended; and if you are truly penitent you may yet be heard at the great fountain of mercy. Let me then implore of you to make peace with your God. It now remains for me to pass the awful sentence of the law upon you. The sentence upon you is, that you be taken from hence to the place from whence you came and from hence to the gaol of the city of Lincoln, and county of the same city, and from thence to a place of execution, and that you be there hanged by the neck until you be dead, and that your body be afterwards buried within the precincts of the gaol in the said city of Lincoln and county of the same city, and may the Lord have mercy on your soul. The most profound silence was observed during the delivery of the sentence, a conclusion of which a degree of horror seemed to run through the court. The prisoner, not like hundreds of the people in court who sobbed aloud, seemed to be not the least affected, and left the dock as he entered it, with a bold carriage, to the astonishment of all present.

The theatre of the courts reached a very widespread audience as readers of a newspaper in Hobart Town read in detail about the sentencing of a fourteen-year-old murderer in Lincolnshire, England, several months earlier. Bent's News, *21 Dec 1838.*

was no doubt a very bad man, he was innocent of rape. Smith argued that Mrs Larkins was an infamous female who had been 'beastly drunk' on the evening preceding the incident; that Lyons, 'whatever may have been the strength of his animal passions', would scarcely have raped an old woman when he 'should have the bed of two Girls'; and furthermore that the absence of soot on Mary Larkins' white nightgown proved that her assailant could not have entered by way of the chimney, as she had charged. Burton was annoyed: 'this person'—the doctor—had not questioned Mrs Larkins' credibility during the trial, as he had a duty to do; he—the judge—had commented fully on the other matters and the jury had made up its mind.

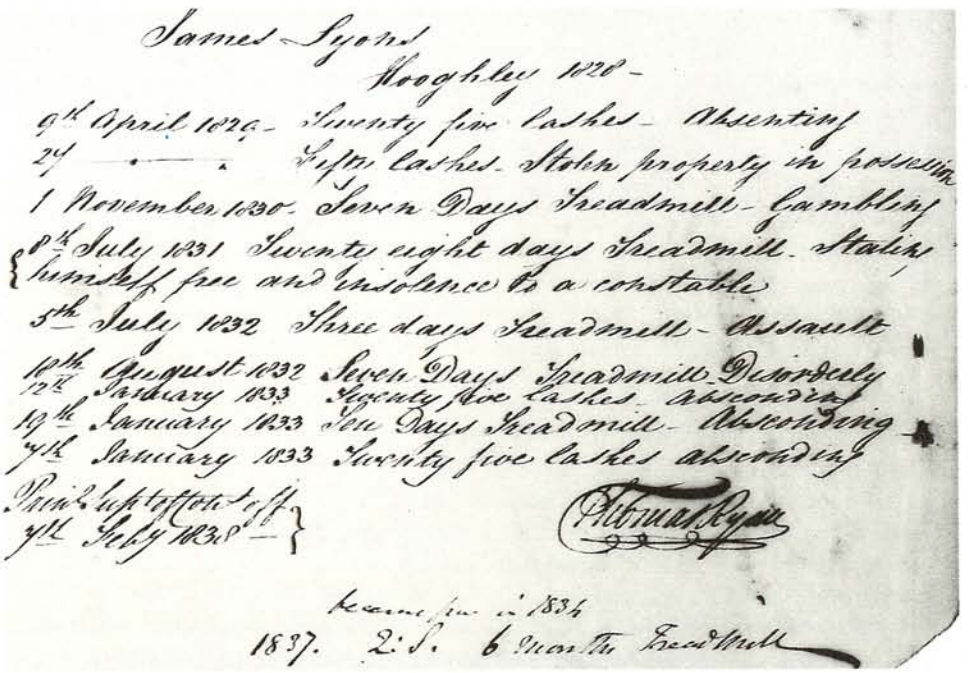
Thwarted by His Honour, Smith sought an interview with the governor. Sir George Gipps took the matter to the executive council and asked Dr Smith and Mr Justice Burton to attend. The judge excused himself on the grounds that 'his presence in the Supreme Court was unavoidably necessary'. But Smith repeated what he had written to Burton, mentioning that the old woman had smelt 'so offensive' that he had not gone close enough to discover whether any part of the smell was rum. Also, he said, she would have been incapable of identifying her assailant if only because her eyesight was so weak: even from the witness box she could not identify the prisoner in the dock. The council also examined, at his own request, the Reverend William Cowper, who had seen Lyons in gaol. In almost thirty years of visiting condemned prisoners he had, he said, never witnessed such agitation of mind. Lyons's conduct and his consistent pleas of innocence convinced him that he was not guilty of the rape or the robbery.

The council decided that there should be a stay of execution to allow further investigation. A note was sent to the sheriff, informing him of the reprieve and asking him to pass on the news to 'the unhappy man'—though without giving him the slightest hope that the sentence of the law would not be carried out. A few days before the revised execution date there was a second reprieve; and a fortnight after that the sheriff was simply told that Lyons was to be 'reprieved until further Orders'.

In the meantime inquiries initiated by the crown solicitor revealed that 'a strange man' had been present in Mrs Larkins' room on the night of the crime, and that he had robbed and 'ill-used' her. On receiving this report, Governor Gipps immediately asked Mr Justice Burton what was to be done. Burton was slow to reply. At last he conceded that the new evidence, had it been available during the trial, would have thrown serious doubt on the prosecution's case. He concluded that the conviction was mistaken and that Lyons ought to be pardoned. After further delays the prisoner was set free on 28 September. By that time he had been in gaol some eight and a half months, expecting to die. If any compensation was offered him, which is unlikely, there was no announcement of it.

James Lyons was apparently the victim of Mary Larkins' animosity or drunkenness. He was also the victim of the judicial system and of the attitudes of the men who administered it. First of all, he was handicapped by his criminal record. A note from the principal superintendent of convicts, which Burton had before him as he sat in judgment, indicated that the accused had arrived as a convict in 1828 and had since then been punished several times for various offences, including assault. In 1834 he had completed his original seven-year sentence, but in 1837 had been sent to the treadmill for six months for a new transgression.

The jury might not have been aware of these details, but they would certainly have been acquainted with the fact that Lyons had been a convict. The prosecution, in its account of him, drew a portrait of a man who had never reformed, and the unsavoury character of the defence witnesses simply completed the picture. Mrs



The criminal record of James Lyons.
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Larkins, on the other hand, was shown as a woman of relative virtue and sobriety, entitled to respect on account of her age, her property and her connection with Dr Lang. Mr Justice Burton had a keen distaste for the rapacious masculine society of the ex-convicts—as we will see again—and a high regard for good womanhood and the church.

If regard for character and conduct helped to convict Lyons, the same helped to save him from the gallows. The executive council's decision to look more closely into the case owed a good deal to Dr Smith's adverse comments on Mrs Larkins, and to the Reverend Mr Cowper's conviction that the prisoner's behaviour in Sydney gaol proved his innocence. This emphasis on character was a new aspect of the administration of law throughout the empire, as we will see later.

Lyons was the victim of a system in which the appearance of justice could be more important than its reality. The courtroom spectacle helped sustain the whole system of criminal justice and the authority of those who administered it. Burton's speech before pronouncing sentence both climaxed the drama and signified its larger intent: while he was, at one level, justifying society's claim for retribution and warning potential wrongdoers, at another he was proclaiming the authority of the law and the majesty of the judgment seat.

The judge's address made no allowance for fallibility. Burton was reluctant to reopen the case simply at the instigation of a witness who had failed to perform properly. He had played his own part so eloquently, even committing a defence witness for perjury. Faith in the forms of justice brought him close to holding that a correct ritual was proof in itself that justice had been done. For the same kind of reason, the colonial treasurer, C.D. Riddell, objected in the executive council to hearing evidence that might have been given at the trial. Court decisions, he argued, should be regarded as final, unless entirely new facts emerged. The council was not only making light of court ritual, it was also performing out of turn.

The courthouse at Berrima, on the Great South Road, 140 kilometres from Sydney. Berrima was intended as a significant regional centre for commerce, justice and law and order. Photograph 1985.
P. SPEARRITT

Beneath the supreme courts were various lesser tribunals. Courts of quarter sessions sat in all four colonies. In Western Australia, which had no supreme court, all serious criminal issues went to quarter sessions, even those that could end in the death penalty. New South Wales and Van Diemen's Land had courts of request for important civil cases; in South Australia such cases were tried in the resident magistrate's court. These lesser courts were more mobile than the supreme courts. In New South Wales the supreme court did not move beyond Sydney, but quarter sessions and courts of requests were held as far north as Maitland and as far south as Berrima. An act of council passed in August endowed Melbourne also with quarter sessions and a court of requests, but this had not taken effect by the end of the year.

The next level of jurisdiction was that of petty sessions. Courts of petty sessions sat once a week, or even daily, each in its own district, presided over by two or more magistrates. A few districts of New South Wales and Van Diemen's Land had substantial courthouses to accommodate petty sessions, but magistrates sat more often in bark huts or in their own homesteads. Here the dignity of the courts depended on the personality of the gentlemen in charge, and the way they conducted themselves behind makeshift benches.

Justice was not done, and the theatre of the courts was not complete, until convicted men and women had been punished in due form. Punishment itself was a form of ritual, less dignified than proceedings in court, but more dramatic and usually more public. As we see later, hangings could be a major spectacle, but even the lowest courts in the land could set men and women before the public gaze as miserable victims of justice.

Flogging was the usual punishment awarded to convicts. If it was convenient, other convicts were assembled to watch, in the hope that the sight would be an effective warning. But often it was not convenient, especially in the bush where there was too much work to be done and men were scattered too far. Besides, floggings were so commonplace that the sight of another one could never do much for convict behaviour.

Nevertheless, floggings were a public ritual, carried out according to a standard formal procedure. Men were stripped to the waist and tied usually to an upright

Flogging in Van Diemen's Land. A gentleman standing behind the scourger says, 'I will give the damned wretch 100 lashes and send him to be hanged'; another, near the gallows, says, 'Its complete butchery but I must must [sic] do it I suppose'. With this sketch a newspaper uses the ceremony of punishment as entertainment. Cornwall Chronicle, *9 Sept 1837.*

triangle of logs. At Windsor, in New South Wales, according to Samuel North the police magistrate, each stroke was counted aloud by a constable who stood by—'as in the army'—while the chief constable was also in attendance to make sure that the flogger did his duty. Alexander Harris, whom we met in earlier chapters, gives a more vivid account of the way things were managed:

> I heard the flogger say, 'Well, who's the first?' After an instant or two I heard the answer; it seemed to be the voice of a Scotch lad: 'Here, I'm the first, you — ; but — my eyes if I don't have satisfaction one way or another, if I get hanged for it'. I heard, awhile after, the dull, heavy fall of the cat on the flesh, and the constable's count—ONE, TWO, THREE, FOUR, &c., mingling with the flogger's *hiss* each time, as he sent the blows home, dallying between each to spin out the punishment to the utmost.

According to North, at Windsor each stroke took about five seconds. If this was slow, it was not only a result of the flogger's cruelty. Like any judge or lawyer, the flogger had to play a part in the theatre of the courts. Like them, he can hardly be blamed for believing that if a performance was any good at all it was worth spinning out.

Men who received the lash on their backs saw it as their role to stand up well to the punishment. Harris's young Scotsman made 'no cry, no groan, no prayer for mercy'. Men were known to put something in their mouths to bite on, a shirt screwed up, or a stone, so that whatever the agony—and it was often extreme—they would say nothing. There was dignity in silence, as well as in the longwinded speeches of counsel and judges.

Magistrates in the lower courts were also entitled to order men and women into the stocks. This was always a public punishment: the stocks were at town centres, usually in the marketplace, so that everybody could see the victims. Flogging was a convict punishment, part of the vulgar brutality of the penal system, and it was not carried out before free people, but the stocks were another matter. Imprisonment in the stocks was not a particularly brutal form of punishment, and it helped to point up distinctions of rank among the free. Only poor men and women were sent to the stocks—for disturbing the harmony of town life. Drunken disorder was punished in this way, as long as it had led to no more serious crime. Women who made a habit of shouting in public—called 'scolds'—might get to know the stocks very well.

Stocks came in various shapes. Ink sketch by George Frederick Dashwood, 1830–35.
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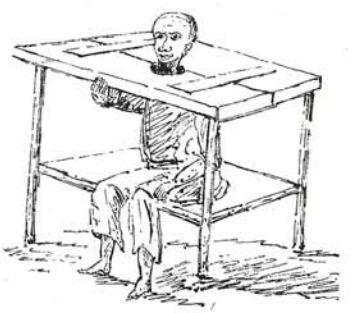


The stocks at Melbourne were typical of those in the bigger towns. There was a bench on which half a dozen people could sit: a riot involving this number was as much as Melbourne could expect in 1838. Attached in front were two beams hinged together at one end with a padlock at the other. Leg holes were cut into the beams so that when the upper one was let down on the lower and padlocked the occupant was stuck fast. This piece of machinery was placed a few metres from the door of the police magistrate's courthouse, in the market reserve, 'facing all who passed to and from the Court'. There was no doubting where the punishment came from and no chance of concealment.

Shame was supposed to be an important aspect of public punishment, but imprisonment in the stocks did not always seem to be regarded as particularly shameful. At Melbourne passers-by would stop to talk, and friends would offer sympathy and figs of tobacco. The culprit was merely an actor, though an involuntary one, playing out the last section of an interesting episode. In May an old woman was sent to the stocks in Sydney as a scold: she had abused a gentleman in the streets. Her sentence was six hours. As she sat there the same gentleman passed by and she shouted at him again, firm in the belief that while she was in the

stocks 'she might offend with impunity'. The gentleman complained once more to the town magistrate and the woman, 'to her unspeakable amazement', was arrested when she had finished her six hours, and tried again next morning. Her logic is clear: how could a new performance begin, with the very same actors, before the old one was properly finished—before she had left the stage a free woman?

Hangings were the most dramatic and awe-inspiring of all public rituals, and the ultimate means of upholding the law and enforcing respect for those who administered it. They were usually performed at a central place, and often before a large crowd.

Men and women could be condemned to death only by the highest courts, quarter sessions in Western Australia and the supreme courts elsewhere. The sentence had then to be confirmed by the governor and the executive council, acting on behalf of Her Majesty who had ultimate authority over the lives of her subjects. More often than not councils let the law take its course. Nineteen men were hanged in New South Wales in 1838, and the executive council exercised the Queen's prerogative of mercy nine times and pardoned one man—James Lyons.

In Van Diemen's Land three bushrangers, whom we meet later, went to the scaffold, and a fourth was saved from death by Governor Franklin's executive council. South Australia had only one execution, and Western Australia none. Two Aborigines were condemned to death by quarter sessions in Perth, but Sir James Stirling and his council sent them instead to Rottnest Island.

South Australia's only hanging, the first the colony had seen, was shockingly bungled. The man who was to die, Michael Magee, had been found guilty of attempting to shoot the sheriff. A crowd of more than five hundred turned out on 2 May to witness his execution, which was to take place under a gum tree beside the River Torrens. As the masked hangman greased the rope, the prisoner prayed

The hanging of Michael Magee. Preparations for the first hanging in South Australia, on 2 May 1838, when Magee was executed for attempted murder of the sheriff. The artist, J.M. Skipper, sketched the scene on the spot.
SOUTH AUSTRALIAN ARCHIVES

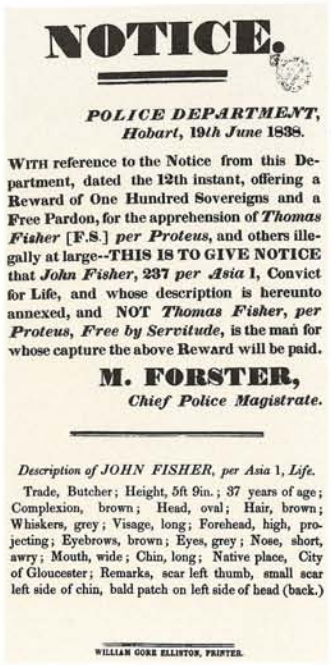
fervently and then addressed the crowd, admitting his guilt and acknowledging the justice of his sentence. The cap was drawn over his face; the signal was given; the executioner whipped the horses.

The rest was anti-climax. The cart on which Magee stood moved away very slowly, so that he slid off it little by little. His wrists had been badly tied and he had time to free his hands and grab the rope above his head. There he hung, 'turning round like a joint of meat before the fire', half-choking but still able to scream, 'Oh, God! Oh, Christ! Save me!' The crowd was in tumult. They had come to witness the re-enactment of an ancient spectacle; what happened was a ghastly travesty. Amid cries of 'shame' and 'murder', the sheriff did his best to restore order. Meanwhile the hangman had bolted, and had to be brought back by a constable. He finished his work by leaping upon the dying man, forcing him to let go of the rope. All this took thirteen minutes. The appearance of justice was ruined.

A more perfect piece of theatre took place when William Moore was hanged on 27 February. Moore was a convict assigned to John Hoskins, a butcher, of Maitland in the Hunter valley. One morning, after Hoskins had dragged him home from the local tavern, Moore decided that he had been submissive long enough. He seized a meat knife and thrust it six times into his master. Finding the neighbours gathering at the door, he drew his fingers over the blade, licked the blood off his hands, swallowed it, and announced 'This is flash Hoskins' heart's blood, and thank God, I have good appetite to eat it.' Moore was taken to Sydney and tried before Mr Justice Burton. The jury handed down its inevitable verdict and the judge donned his black cap and passed the death sentence. Moved by the revolting nature of the crime and the prisoner's defiant manner, Burton then added an unusual rider. He ordered that the execution take place not at Sydney, where it might have been done quickly and at minimum expense, but at Maitland, as close as possible to the house of the murderer's victim.

Before the appointed day a dray with military escort made its way from Sydney gaol to the quay, where all boarded the steamer for Maitland. During this most public part of the journey the executioner sat beside Moore on the coffin that was destined to receive his remains. A reporter who watched the dray pass said that death was stamped on the condemned man's countenance, and that the 'awful procession ... evidently made a strong impression on the minds of those who witnessed it'. Every detail was considered and no expense was spared: ten guineas went to the executioner, 7s 6d to the carrier in Sydney, and £2 to the owner of the bullock team and dray that carried the frame of the scaffold. Once on the scaffold, attended by two clergymen, Moore showed none of his former bravado, but seemed 'extremely penitent'. 'Before the cap was drawn over his face he uttered a few words to the spectators, desiring them to take warning by his fate and not to fall into the same excesses.'

All this was in accordance with tradition. It was an old ideal of English law that criminals should be punished where they had offended, so that the fabric of society, rent by the original violence, might be restored at the very point of injury. Riding on one's coffin was also an old custom, enacted in London. Criminals riding from Newgate gaol up to the gallows on Tyburn Hill had always been seated on their coffins. The message was clear: the law having spoken, the offender was as good as dead already. The custom had fallen into disuse in the colonies. Among the convicts and ex-convicts who saw Moore pass, the sight must have awakened many memories of hangings in England. Moore himself had shown a high sense of theatre at the murder itself and now, as one newspaper pointed out, he was 'the hero of the scene'. His final words were just as correct as Burton's arrangements: men had been saying much the same on the scaffold for generations.



NOTICE.

POLICE DEPARTMENT,
Hobart, 19th June 1838.

WITH reference to the Notice from this Department, dated the 12th instant, offering a Reward of One Hundred Sovereigns and a Free Pardon, for the apprehension of *Thomas Fisher* [F.S.] *per Proteus*, and others illegally at large--**THIS IS TO GIVE NOTICE** that *John Fisher*, 237 *per Asia* 1, Convict for Life, and whose description is hereunto annexed, and **NOT** *Thomas Fisher, per Proteus, Free by Servitude*, is the man for whose capture the above Reward will be paid.

M. FORSTER,
Chief Police Magistrate.

Description of JOHN FISHER, per Asia 1, *Life.*

Trade, Butcher; Height, 5ft 9in.; 37 years of age; Complexion, brown; Head, oval; Hair, brown; Whiskers, grey; Visage, long; Forehead, high, projecting; Eyebrows, brown; Eyes, grey; Nose, short, awry; Mouth, wide; Chin, long; Native place, City of Gloucester; Remarks, scar left thumb, small scar left side of chin, bald patch on left side of head (back.)

WILLIAM GORE ELLISTON, PRINTER.

MITCHELL LIBRARY

Despite the good intentions of William Moore and Mr Justice Burton, some Sydney people were shocked by this re-enactment of old forms. A growing body of educated opinion in Britain and the colonies said that legal process ought to be regulated less by tradition and more by the power of human reason—that there should be less pure theatre and more concern for the moral aspects of trial and punishment. It was such an attitude that made G.T.W.B. Boyes, as a juryman in Hobart Town, impatient with Mr Justice Montagu. A right decision would have been more certain, Boyes believed, had Montagu relied more on the jury's common sense, and not taken so much trouble to go through everything that judges always said on these occasions. The editor of the *Australian* in Sydney, G.R. Nichols, also expressed horror at the 'unnatural drama' of Moore's execution. Such a display of vengeance on the part of the authorities must harden those who watched and make them insensitive to human suffering. It could never improve them. Nichols believed that all capital punishment should be carried out quietly, behind high prison walls. Men and women ought to be impressed by the intelligence and virtue of their judges, so Nichols believed, not by their theatrical skills, let alone their brute authority. There was a revolution of belief in this argument, as we will see.

For his part Mr Justice Burton was both a man of passionate virtue and a conservative judge. When he saw wickedness so gross, so violent, so glaring, he would not shrink from using every instrument at hand to proclaim his abhorrence.

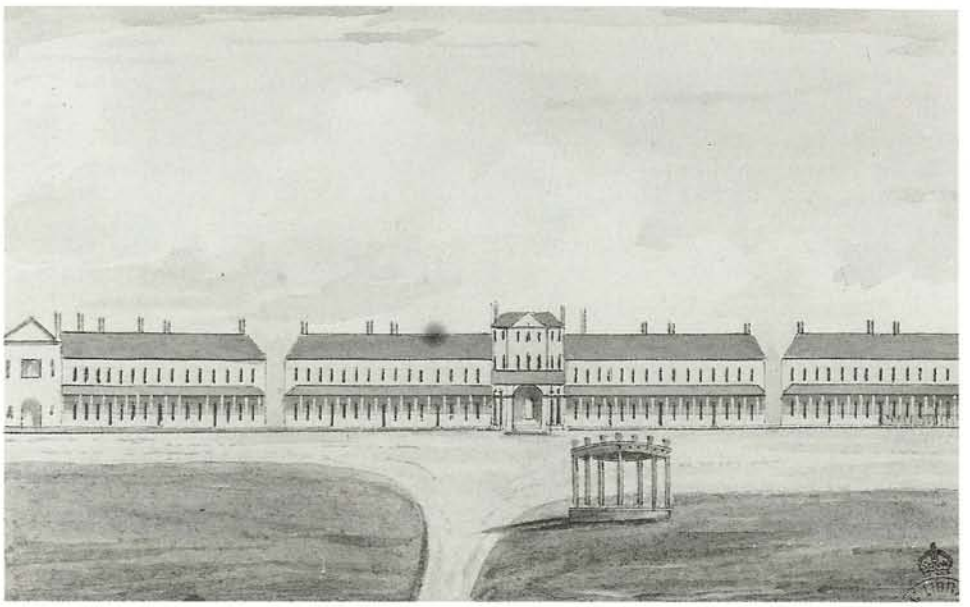
LAW AND ORDER

Colonial methods of law enforcement, like the laws themselves, followed English traditions. The English countryside had a tradition of great local autonomy in matters of law and order. The aristocracy and gentry interpreted—and in some cases laid down—rules for the orderly functioning of society. From among their ranks, honorary justices of the peace were appointed to exercise wide-ranging legal and administrative functions within their local area. With the help of constables, they kept the peace and apprehended lawbreakers, relying on outside assistance, usually from the military, only in rare cases of general public disorder. As magistrates they presided at the quarter sessions, or dealt with lesser matters, on their own. In the colonies, leading members of local societies were expected as far as possible to look after themselves in the same way. The weakness of the policy was that the colonies lacked the local loyalties and community solidarity that gave it acceptance in England.

Captain Richard Tasker Furlong, 80th (Staffordshire) Regiment of Foot, was stationed with a detachment of the 80th at Newcastle. Detail on an oil painting by an unknown artist.
MITCHELL LIBRARY

Colonial elites did their best. They often formed associations for the suppression of cattle stealing or bushranging, or whatever seemed to threaten their property and peace of mind; just as gentlemen in England formed anti-felon associations to uphold the law. In neither situation was this a symptom of failure on the part of the government, for those in power in British society had always relied on the active co-operation of the rich and respectable. When an anxious magistrate on the Canning River in Western Australia urged the authorities in Perth to act firmly against the Aborigines, he was told that the peace of the district was to be provided for, as in England, by the people acting under the direction of their magistrates. The main responsibility for protecting the property of settlers rested with themselves.

Some security was provided by the military. As in England troops were garrisoned in the town and countryside. In Western Australia their chief purpose was to protect the immigrant community against the Aborigines, though they also performed other tasks for settlers—to the annoyance of the local commandant—



Military barracks, Sydney. Watercolour by Joseph Fowles, c1842–45.
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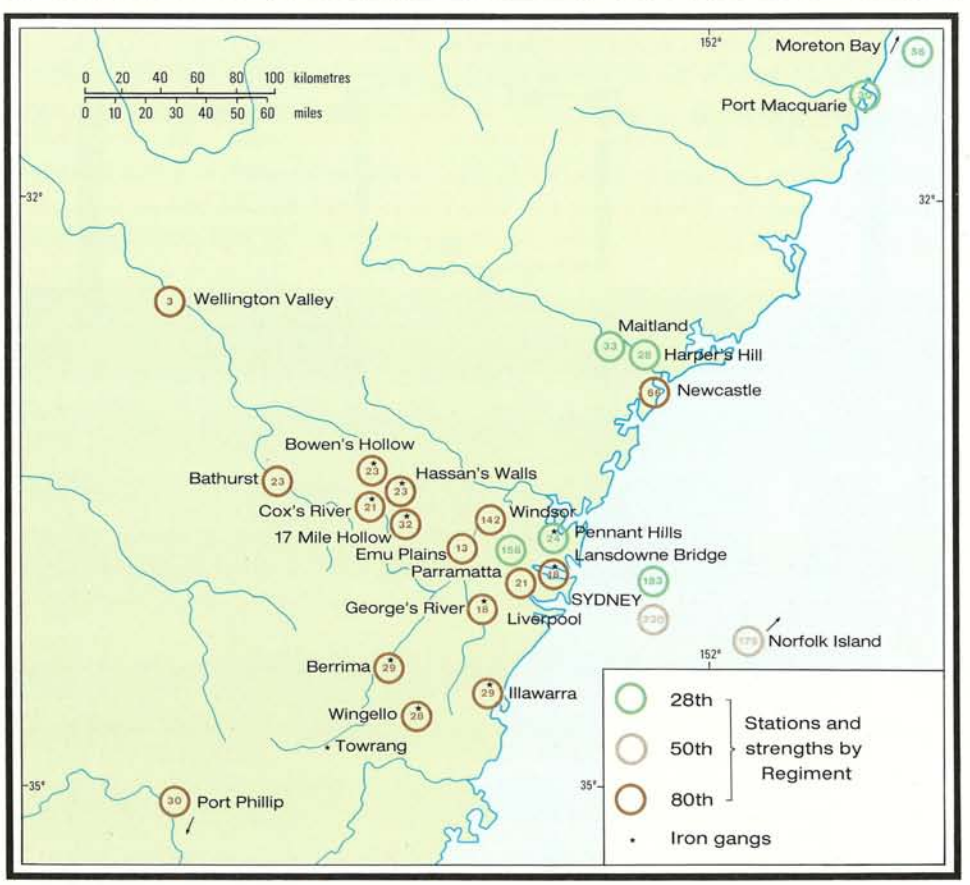
The Military Barracks lie about the centre of the town, in George Street, from which they are enclosed by a very strong and lofty wall. These buildings were erected by Lachlan Macquarie, Esq., Governor of New South Wales, in the year 1815... The mess-room of the officers is a splendid building, perhaps not to be excelled in the world for its size and comfort. To add to the beauty of the above, is the surrounding dwellings of the officers, built in a very regular style. In the centre of the square is a beautiful fountain, erected by Lachlan Macquarie, supported by nine pillars, with an attached sun-dial. On entering the George Street gate, on the left hand stands the guard-house.
J. Maclehose, Picture of Sydney, *122–23.*



Distribution of the military garrisons in New South Wales. Based on a map by Peter Stanley.
N. DUFFEY, ANU

such as helping to bring in the harvest. In the convict colonies they controlled the prisoners in penal settlements and in iron gangs on the public works throughout the countryside. In New South Wales they also provided men for the mounted police, which chased bushrangers, cattle thieves and convict bolters, and did their best to suppress the Aborigines.

Military barracks, Hobart Town. Like the Sydney barracks they occupy a commanding position above the town, on a hill to the southeast. In the foreground is the name board of the Waterloo Hotel, a name calculated to attract British soldiers. Lithograph by Charles Atkinson, 1836.
TASMANIAN MUSEUM AND ART GALLERY

NOTICE.

WANTED,
FOR THE
Police Force
ABOUT TO BE RAISED
TWENTY ACTIVE
YOUNG MEN.

Persons desirous of entering this Service are requested to make application at this Office.

T. BEWES STRANGWAYS,
Colonial Secretary pro tem.

COLONIAL SECRETARY'S OFFICE,
April 12th, 1838.

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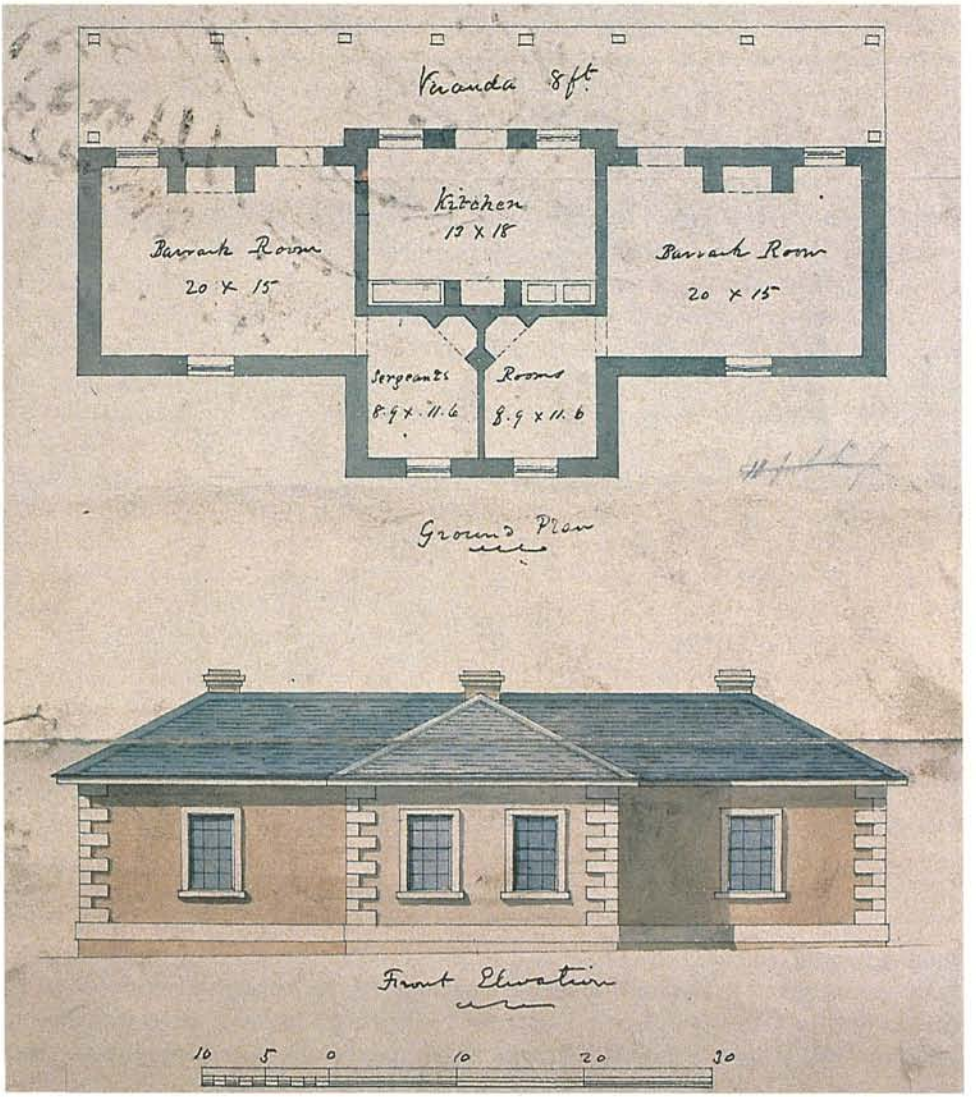


Military barracks, Richmond, Van Diemen's Land. Plan and front elevation sketch of accommodation for sergeants and men. Ink on paper, 1833.
ARCHIVES OFFICE OF TASMANIA

Though they were themselves upholders of order, the military were anything but orderly. No love was lost between soldiers and citizens and, as we have seen in chapter 6, this communal resentment was sometimes expressed in open warfare. An officer in one of the three regiments stationed in New South Wales described his men as 'the least soldier-like and worst conducted' in Queen Victoria's army. They resented coming to Australia, 'the worst country on earth for a soldier'. Once here, they hated having to supervise iron gangs, especially when convicts assigned to indulgent masters appeared to be faring better than they. The regiments were undermanned and discipline suffered from the troops being widely scattered and from their association with the convicts. Soldiers in the mounted police were largely independent of government control. They could be reclaimed by their own regiments at any time, leaving the depleted police force unable to carry out its duties. This again did not help soldiers' attitude to the maintenance of law and order.

Settlement in South Australia had begun in strict obedience to the principle of self-help. The colonisation commissioners, having an eye to economy, decided that because the inhabitants would be 'of a purer character than usually found' they should be able to look after themselves. But people had better things to do, such as building houses, planting crops and working for the handsome wages that employers were forced to offer, and they viewed the idea of acting as constables with 'the greatest repugnance'. In order to protect the colony from the growing numbers of runaway soldiers and from fugitives who came by land and sea from the penal colonies, Governor Hindmarsh had to rely on a few volunteer constables and a small detachment of unruly marines. When it appeared that the marines were to be withdrawn, he took—'with extreme regret'—the liberty of drawing £1000 on the British government in order to form a mounted police. A notice pinned to trees around Adelaide in April 1838 signalled to the inhabitants the formation of South Australia's first police force.

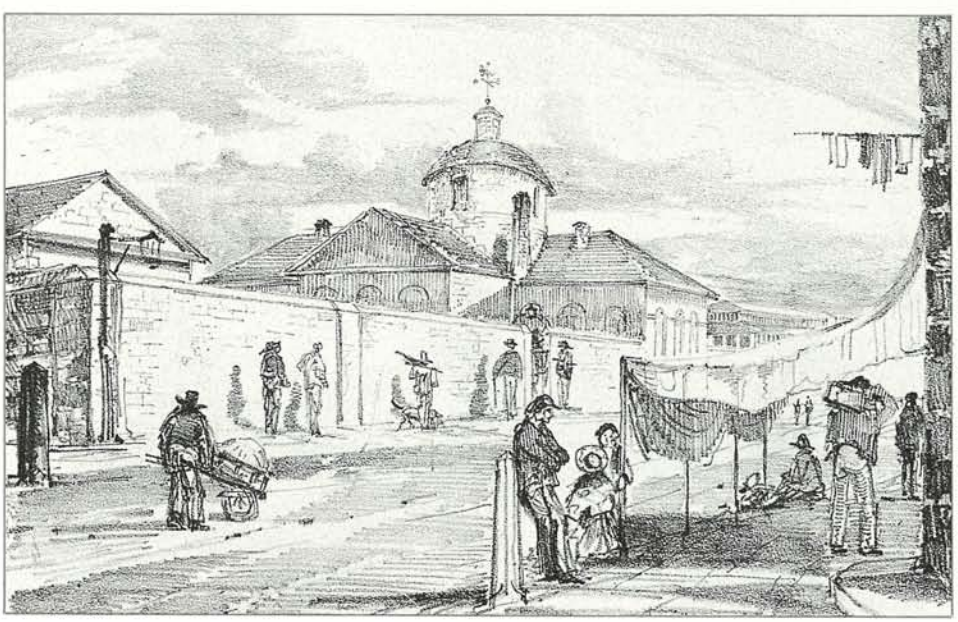
Bushrangers and constables. A skirmish in the Illawarra after bushrangers have been surprised at their campfire by police. Undated watercolour by Augustus Earle.
NATIONAL LIBRARY

After struggling on for several months against financial stringency, the force was consolidated under Governor Gawler. Gawler approved an increase in its numbers to 30 men and the preparation of legislation to govern it. By the end of 1838 the police, on the initiative of their superintendent, Henry Inman, had extended their influence up to fifty kilometres beyond the town. A mounted detachment, well armed with pistols and carbines, patrolled the countryside in pursuit of bushrangers. Inman believed that no force could be well organised unless it bore some outward sign of its authority, so he planned to clothe these men in a uniform modelled on that of the dragoons who had fought at Waterloo, of tight breeches and jackets buttoned up to the neck. This outfit, supremely ill suited to hot Adelaide summers would certainly distinguish his men from ordinary horsemen.

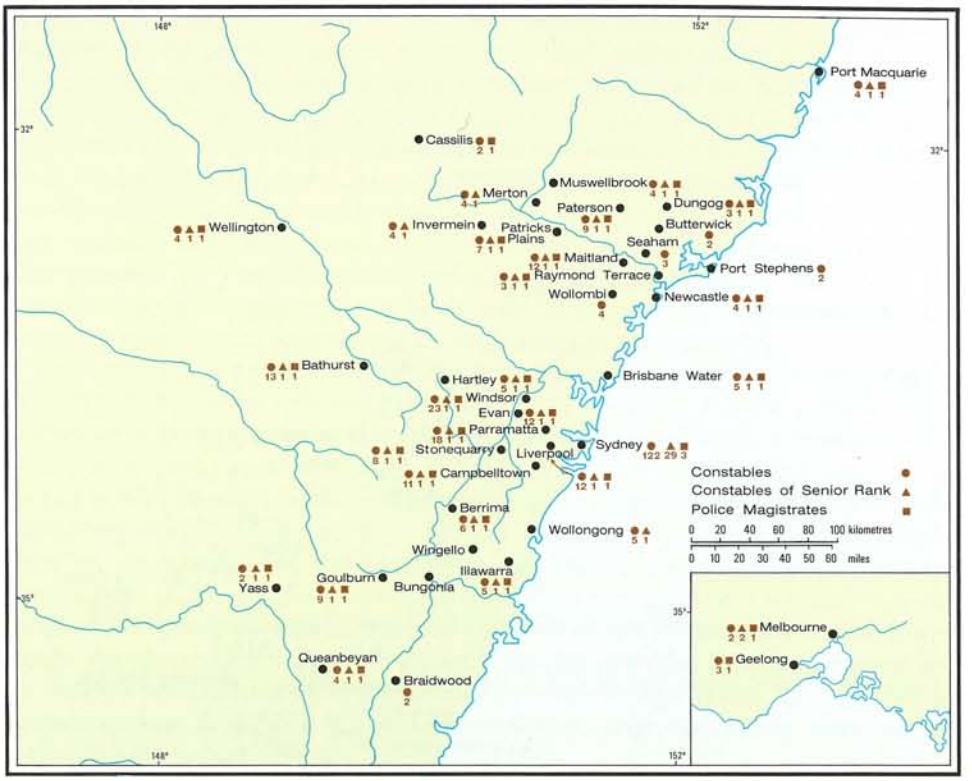
The mounted police symbolised the visible extension of government into the bush. Their formation also implied a time of reckoning in Adelaide, when the ideals put forward by Wakefield and his followers of concentrated settlement and orderly growth were confronted most severely by Australian reality.

By this time both the convict colonies had well-established police forces, with firm hierarchies and clearly defined responsibilities for keeping order among the free and convict populations. In no colony did much prestige attach to being in the force, and least of all in New South Wales and Van Diemen's Land. William Wright, the chief constable at Port Phillip, was the kind of man who gave the police their rough and unattractive image. He was commonly known as 'the Tulip', and according to a settler who knew him, 'he almost invariably wore a green cloth coat ... and ... had a big bulbous purply face, somewhat carbuncularly inclined'. His authority depended partly on his bulk: 'He had a neck nearly as thick as a bullock's, firmly set in a massive frame', all shaded with 'a cabbage-tree hat, and screwed into a pair or cords or moleskins, and a set of stout riding boots'.

For petty constables in the convict colonies the work was often dangerous, the wages were low, and they were entirely at the disposal of the senior men, such as 'the Tulip', or local magistrates. No wonder that in prosperous times free immigrants and ambitious colonials looked elsewhere for employment. Even ticket-of-leave holders were generally able to find better-paid jobs, so that the police in New South Wales and Van Diemen's Land chiefly comprised well-



Police office, George Street, Sydney. Designed by Governor Macquarie's architect, Francis Greenway, as a market house, the police office is next door to the town markets. Joseph Fowles, in his book published in 1848, called it, 'as far as the exterior is concerned, ... certainly creditable to the Colony', but described its internal arrangements as 'both unsightly and incommodious'. The artist, Robert Russell, has depicted types of people who regularly appeared before magistrates inside the building. Lithograph published in Sydney in 1836.
MITCHELL LIBRARY



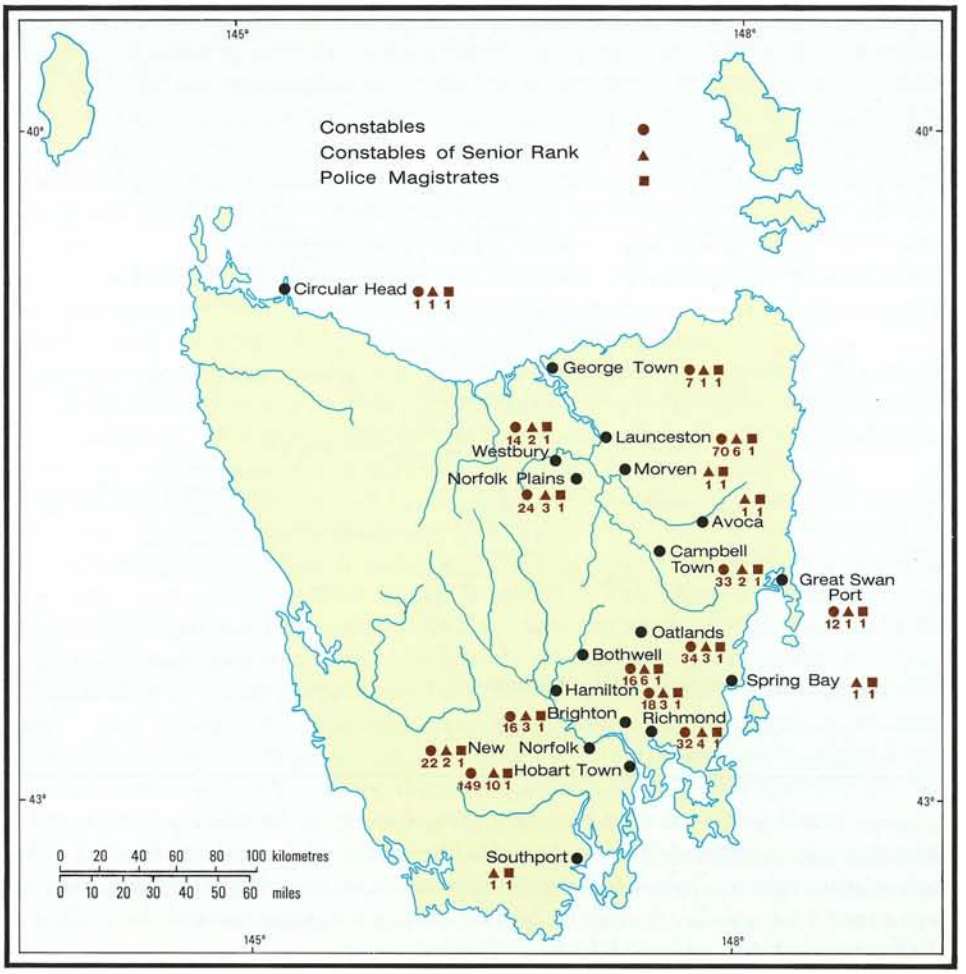
Distribution of police in Van Diemens' Land 1838. The map shows the headquarters of each police district. Constables are placed at strategic places throughout each district. 'Morven' is the official name for Evandale.
N. DUFFEY, ANU

behaved convicts. In South Australia Acting Governor Stephen was annoyed to learn that a convict serving seven years had been taken into the new force. Stephen asserted the right to approve all future appointments and dismissals; but given the urgent need for a police force, the lack of money to support it and the reluctance of free men to join, he could do little to keep it pure.

As the social gap between pursuer and pursued was usually narrow, constables often had difficulty getting anyone to take them seriously. When a constable from Campbell Town in Van Diemen's Land was sent to apprehend two assigned servants, he discovered them with four other men drinking toasts to one another in an abandoned hut. Instead of quivering in fear before the face of the law, they told their pursuer that he was too late—they had just emptied the bottle—but they invited him to sit down anyway.

The dignity of constables was not helped by the fact that the discipline to which they were subjected differed little from punishments meted out to the people they arrested. Two other constables at Campbell Town who were found guilty of neglect of duty were placed in solitary confinement for ten days on bread and water and deprived of their pay. In both convict colonies there were frequent dismissals and appointments, which affected the efficiency of each force.

The constables in their various ranks were responsible to the magistrates who were either salaried or honorary justices of the peace. The colonial magistrate was meant to be a close copy of his English counterpart, whose functions were described by Blackstone, the great commentator on the laws of England, as 'maintaining good order in his neighbourhood', 'punishing the dissolute and idle', 'healing petty differences' and so on. When the marines left South Australia and Governor



Distribution of police in New South Wales, 1838. The map shows the headquarters of each police district. Constables were posted at strategic places throughout each district. 'Constables of senior rank' included mainly chief constables and district constables.

N. DUFFEY, ANU

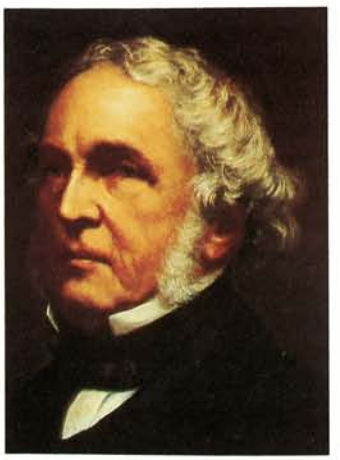
Hindmarsh faced the prospect of lawlessness throughout the colony, one of his remedies was to appoint 'a few influential gentlemen to the Magistracy', who might bring order to their neighbourhoods. Here, as elsewhere, gentlemen were ready to do the work unpaid. In England the letters 'J.P.' traditionally carried immense prestige and local authority. They were something gentlemen aspired to. In the colonies, where knighthoods and similar signs of social distinction were hard to come by, the magistracy was for many the highest available honour. When men with doubtful claims to gentility were appointed as magistrates, their gentleman colleagues, sometimes expressed concern that the letters after their names—the 'patent of gentility', as the lawyer Roger Therry called being a justice of the peace—could easily be devalued.

As well as elevating the status of its holder, the office of magistrate enhanced his patronage and power, giving him both access to the government house circle and a share in maintaining law and order. When Peter Roberts, a landholder near Oatlands in Van Diemen's Land, applied to be appointed, he did so in order to protect his property from being plundered by a neighbour. Similarly, James Mudie, a Hunter River landholder with a reputation for treating convicts harshly, complained to the Molesworth committee that his removal from the magistracy by Governor Bourke had exposed his home and property to convict lawlessness.

Most magistrates were unpaid. In the three older colonies some were salaried, and by 1838 these had come to occupy positions of great local influence. In

Western Australia they were known as 'resident magistrates' or 'government residents'. In the convict colonies they were called 'police magistrates' or 'assistant police magistrates', a title signalling their responsibility both for police and for the day-to-day administration of justice. Outside Sydney and Hobart Town the police magistrates performed additional administrative functions for the central government, keeping it informed of any trouble in their communities. When a group of New South Wales magistrates pressed for a pay rise to match their status and duties, they declared that they were locally regarded as 'the representatives of the Government'. In Van Diemen's Land almost the entire colony was under the control of police magistrates—or in the case of Launceston a commandant—the honorary magistrates being simply their assistants in time of need.

The activities of a police magistrate could greatly affect people's lives for good or ill, as we can see by following the fortunes of Frederick Roper, assistant police magistrate at Brighton, some twenty-five kilometres northwest of Hobart Town. One winter evening in 1837 Roper had met several other leading men of the district at Mrs Burnip's public house to plan action against bushrangers who were marauding along the highway from Hobart Town to Launceston. After helping to form an Association for the Detection and Suppression of Felonies and Misdemeanours, Roper had adjourned in pursuit of the publican's sixteen-year-old daughter and persisted until he was well and truly drunk. Frustrated in his intentions by the daughter's deft footwork, he took revenge on Mrs Burnip, harassing her for nearly a year. In June 1838 she decided to leave the district and, having 'nothing further to fear from Mr Roper's Persecutions', told the whole story to the authorities in Hobart Town.



Honorary magistrate, Hannibal Hawkins Macarthur, appointed a magistrate by Governor Macquarie, lived at Parramatta and as a magistrate helped govern the town for more than twenty years. Oil by Robert Hawker Dowling, c1845–55.
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By this time Roper was squabbling with his immediate subordinate, the chief district constable, William Grover, who had for many years been his closest friend. One morning in March at about nine o'clock, when Grover was accustomed to muster his force of sixteen or so men, he discovered that three of them were, as usual, detained by the assistant police magistrate. Roper, on being challenged, told Grover in front of some of the constables, 'You are of no use to me'—and promptly suspended him. Grover then complained to the chief police magistrate in Hobart Town about Roper's practice of employing constables for his own private purposes. He backed up his charge by producing a letter written by Roper, shrewdly preserved from the time when the two were still friends:

> My dear Grover The Missus wants a constable to go to Town to change her books & get some things—send a good steady fellow, not a babbler—I hate them.—
>
> I am off to the Ponds
> Ever yours,
> Freddy R.

Roper complained in turn that the chief constable was utterly unsuited to his office, that he used constables on his own private business and that he failed to conduct the morning musters on time. Grover replied to the last charge by saying that the three clocks in Brighton often showed times half an hour apart, which implied dilatoriness on the part of the police magistrate.

As each combatant collected statements from local worthies attesting his good conduct and dedication to duty, the people of Brighton were drawn into the fight. One landholder reported that he had twice travelled the fourteen miles to Brighton to get his convict cook punished, only to find first that the magistrate had gone shooting and then that he had 'gone a hunting with Mr. Gregson's hounds'. Another said that Roper allowed a brothel to be carried on within sight of his


Lake Echo
MARLBOROUGH
Woods Lake
INTERLAKEN
Crescent
Table Mountain
EXMOUTH
DULVERTON
OATLANDS
BRISBANE
SLIGO
Crown Lagoon
CORNWALLIS
DURHAM
EAST GRINSTEAD
LARGO
AMHERST
BOTHWELL
BATH
NEWICK
YORK
WINTERTON
GUILDFORD
VINCENT
HENRY
BEAUFORT
PELHAM
HUNTINGDON
BUCKLAND
Mosquito Plains
SUTHERLAND
GRAFTON
PEMBROK
BRIGHTON
DRUMMOND
ULVA
ARUNDEL
UXBRIDGE
NEW NORFOLK
CANNING
FORCETT
SORELL
PITT WATER
HOBART TOWN
BAIE du NORD
FREDERICK HENRY BAY
QUEENBOROUGH
SUMMERLEAS
Open Plains
NORFOLK BAY
North West Head
C. Direction
One tree Pt.
STORM BAY
WEDGE BAY
Yellow Bluff
Trumpeter Bay
Great Bay
C. Frederick Henry
CAPE RAOUL
ADVENTURE BAY
CONNINGHAM
HUON
Penguin I.
C. Conacle
Fluted Cape
COOKVILLE
Adamsons Peak
Peaked Hill
Very high woody Mountains
Esperance or Adamsons Harbour
N
T

home. Under the strain of charge and countercharge the Association for the Detection and Suppression of Felonies and Misdemeanours split in two, and rival meetings were held at local public houses.

These events may seem petty. Yet for three or four months the two thousand people of the Brighton district, worried about bushrangers, had to endure the feuding of the two men chiefly responsible for maintaining harmony among them and protecting their lives and property. The centre of their political world was not government house at Hobart Town, half a day's ride away, but the police magistrate's headquarters.

Although the governor was well informed about the problems of the district, it was over four months before he decided that enough was enough. Not only the police magistrate but Grover and the entire constabulary of Brighton were then replaced.

Roper was a nuisance to the administrators. But some other magistrates, paid or unpaid, raised even greater problems for colonial governments through their ignorance or misuse of the laws they were supposed to enforce. Magistrates were not required to have formal legal training, but they were expected to become familiar with local laws and ordinances and relevant imperial legislation. In New South Wales all they needed to know was conveniently set out in *The Australian magistrate*, a guidebook prepared by the attorney-general John Hubert Plunkett. Here were listed alphabetically all major matters on which a magistrate might need guidance, such as 'Arson', 'Bodies (dead)', 'Bushranger', 'Distress', 'Public House', 'Ticket of Leave'. But Plunkett's book was not necessarily valid for the other colonies. They had no comparable primer, though in Van Diemen's Land one was in the course of preparation.

Even when texts were available magistrates might not read them. Nor did they always follow the most obvious legal principles. At Hamilton on the River Clyde, 50 kilometres northwest of Hobart Town, three magistrates convicted District Constable Clark of speaking disrespectfully about the assistant police magistrate, Mr Torlesse. The matter had been reported to them by Torlesse. When asked to consider the case, the attorney-general Edward Macdowell concluded that the proceedings were not merely illegal but unconstitutional, since Clark was entitled to trial by jury. The magistrates of the colony, he warned, had ample powers over the convict population; 'but over its free Inhabitants they must understand that their powers exceed in no respect those possessed by the Magistracy of England'. Matthew Forster, the chief police magistrate, thought that the whole irregularity arose from the assistant police magistrate's want of judgment and uncommon ignorance of the law.

Equally at fault was Major Benjamin Sullivan, police magistrate at Butterwick on the lower Hunter River in New South Wales, whose sentences on three assigned servants were deemed to be both illegal and excessively severe. Governor Gipps wondered whether a magistrate who had given such decisions ought to be retained in the commission of the peace, and contemplated taking the opinion of the executive council or the judges. In the event he saw Major Sullivan in person and expressed himself, as he put it, 'very freely', which he was adept at doing.

Because they received a salary, police magistrates were more exposed to the governors' wrath than were the honorary justices, and they were supposed to set them an example. The very model of a good police magistrate, Edward Denny Day, worked further up the Hunter valley. Day was based at Muswellbrook,

Opposite page.
Van Diemen's Land, drawn by the surveyor-general, George Frankland, and published in 1839. This section includes the densely settled regions north of Hobart Town, including the towns of Richmond, Brighton and Bothwell.
NATIONAL LIBRARY

Opposite page.
The Liverpool Plains and western slopes of New England, showing the head stations of squatters' runs associated with the Myall Creek massacre, and Edward Denny Day's movements. Based on a map by B. and H. Wilson.
N. DUFFEY. ANU

having been moved there in 1837 from Maitland to make way for the appointment of Lord Glenelg's kinsman, Patrick Grant. His reputation was established during the winter of this year by his pursuit of the men responsible for the Myall Creek massacre.

The cold-blooded killing of about 28 Aborigines at Henry Dangar's cattle station in New England has been described in chapter 2. Day first heard about it from the squatter Frederick Foote, while Foote was on his way to Sydney to make an official report. Myall Creek was more than a week's journey beyond the official limits of settlement, and far outside Day's district, but he was nevertheless the closest police magistrate. He immediately made some enquiries of Dangar himself, and later received orders from Governor Gipps to proceed to Myall Creek and the Gwydir valley, and to bring in the murderers.

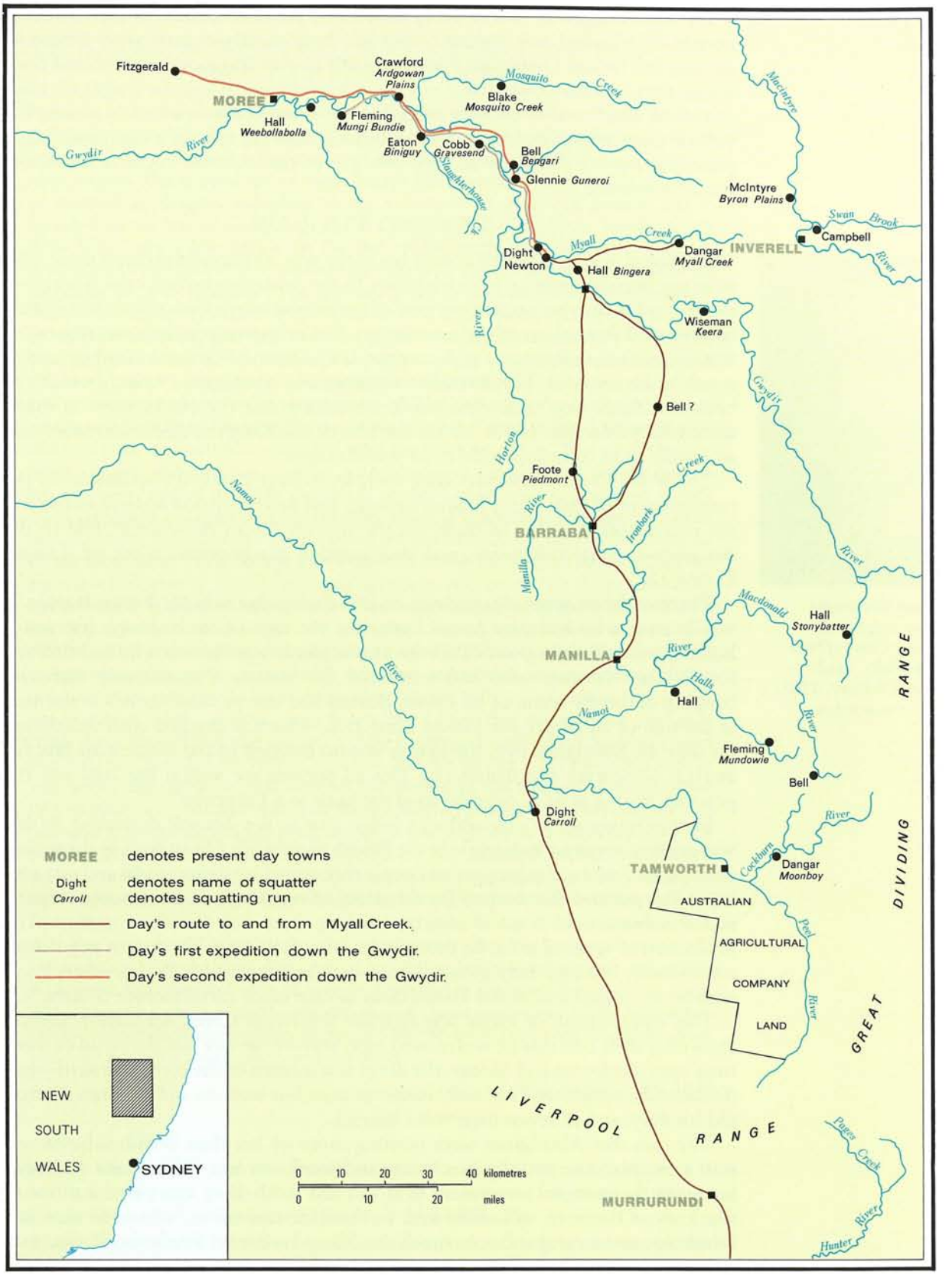
Day took a party of mounted police under the command of Lieutenant George Pack. The expedition arrived at Dr Newton's station, near Myall Creek, on 28 July, seven weeks after the massacre had taken place, and there established their headquarters. A loose network of tracks was already in use in this part of New England, and Newton's was conveniently placed within it. Witnesses were brought into Newton's for examination, and prisoners were kept there under the eye of the mounted police.

For four nights Day slept at Newton's, spending a good deal of time at Myall Creek. Newton's superintendent, Thomas Foster, had been one of the original informants, and he and Dangar's superintendent and hutkeeper were among the first to be questioned about the event. Day began to draw up a list of possible murderers, and he took into custody Dangar's stockman, Charles Kilmeister, who was deeply implicated. Corporal McKnight of the mounted police brought in three other men. At this stage the inquiry began to resemble full-scale court proceedings, as witnesses were assembled and reassembled to be cross-examined by the growing number of accused men. However, the murderers did not make much use of their right to cross-examine. It hardly affected the inquiry, beyond proving Day's scrupulous care with legal procedure.

On 1 August Day set off down the Gwydir, calling at stations on the way. He spent about four days travelling, and succeeded in arresting six more stockmen. These were brought back to Newton's and once again there was examination and cross-examination. Day now decided that his work was substantially complete, and he committed nine men for trial, while one other, hitherto under suspicion, was discharged. The two leaders, John Henry Fleming and John Russell, were still missing. Russell was taken within a week, witnesses were reassembled for his benefit, and he too was committed. But Fleming was gone.

The party remained a fortnight longer, vainly hoping to catch Fleming, and Day spent part of the time on another trip downriver, where he investigated the murder of a stockman by Aborigines. Then, having made one more arrest, he started for home with the police and eleven prisoners. He also took with him Anderson, the hutkeeper at Myall Creek, as a vital witness for the prosecution. Anderson rightly considered his life in danger from those who sympathised with the murderers, and the success of the whole operation depended on his being brought safe and sound to testify at the supreme court.

Day had not simply brought back eleven men for trial. His witnesses had given their evidence on oath, and he had kept a written record of all they said. He had also required each man to hear his evidence read back and then to sign it as a true statement, adding his own signature beneath. The result was a record of proceedings as good as any taken at petty sessions within the settled districts, and better than most.


Fitzgerald
Crawford
Ardgowan
Plains
Mosquito Creek
Blake
Mosquito Creek
MOREE
Hall
Weebollabolla
Fleming
Mungi Bundie
Eaton
Biniguy
Cobb
Gravesend
Bell
Bengari
Glennie Guneroi
McIntyre
Byron Plains
Swan Brook
Campbell
INVERELL
Dight
Newton
Hall Bingera
Myall Creek
Dangar
Myall Creek
Wiseman
Keera
Bell ?
Foote
Piedmont
BARRABA
Ironbark Creek
MANILLA
Hall
Stonybatter
Macdonald River
Hall
Halls Creek
Fleming
Mundowie
Bell
Dight
Carroll
TAMWORTH
Dangar
Moonboy
Cockburn River
AUSTRALIAN
AGRICULTURAL
COMPANY
LAND
Peel River
GREAT DIVIDING RANGE
LIVERPOOL RANGE
MURRURUNDI
Pages Creek
Hunter River
Gwydir River
Namoi River
Manilla River
Horton River
Macintyre River
Slaughterhouse Ck
MOREE denotes present day towns
Dight Carroll denotes name of squatter denotes squatting run
Day's route to and from Myall Creek.
Day's first expedition down the Gwydir.
Day's second expedition down the Gwydir.
NEW SOUTH WALES
SYDNEY
0 10 20 30 40 kilometres
0 10 20 miles

He had managed as well to bring back a few physical remains of the murdered people. The hacked and burned bodies had been mostly cleared away before he arrived, but he and Lieutenant Pack were able to find fragments of teeth and bone which they carefully collected as evidence. In particular, it was the fragile rib bone of a child which was to become central to the prosecution—picked up among the yellow grass, wrapped close in Day's saddlebag like the relic of a saint, and finally presented among the black and red panoply of the supreme court as conclusive proof of murder.

BEYOND THE LAW

William Westbrooke Burton, judge in the Supreme Court of New South Wales, Sands' Sydney Directory, 1867.
ANGUS & ROBERTSON

The ultimate test of any legal system lies in the way it treats and protects those who have not been brought up in its traditions. In the Australian colonies the Aboriginal people had their own ancient notions of justice and retribution which were often far removed from those of the newcomers. Yet, at least in principle, the Aborigine was subject unambiguously to European law; Attorney-General Plunkett said as much in his entry in *The Australian magistrate* on 'Aboriginal Native' (which fell between 'Abduction' and 'Abortion'), remarking that the blacks were as much under the protection of the law as the rest of the King's subjects, and were also amenable to its rules and liable to its punishments.

The Myall Creek murderers were unlucky to have Plunkett responsible for the management of their trial. Plunkett's energy and determination secured in the end the conviction of seven of them for the murder 'of an Aboriginal child to the Attorney-General unknown', and thus justified the previous work of Edward Denny Day.

The murderers were also unlucky in that their judge was Mr Justice Burton. It was Burton who had tried James Lyons for the rape of his landlady, afterwards holding out as long as possible for his execution. It was Burton who had ordered for William Moore, who had murdered his master, a grotesquely elaborate hanging at the the scene of his crime. Burton had also presided earlier in the year at the trial of an Aborigine named Long Jack, who was charged with murdering his wife. In Aboriginal eyes the killing was no business of the white man. But for Burton, 'wherever the British flag flies all persons are within the law, and the prisoner, savage as he is, must be tried the same as a European'.

Burton might seem a bloodthirsty judge. But he saw himself defending all that was orderly, virtuous and gentle in the British way of life. His attitude in these cases showed his concern for propertied people threatened by their tenants and servants, but it also points to his anxiety for the safety of womanhood. Burton saw women as the substance of a good society, holding men and families together. The protection of women must, he thought, be one of the main interests of any British community, but especially a community such as New South Wales, where most men were vicious and brutal. Distinctions of race made no difference to him.

This combination of ideals was fatal for the Myall Creek murderers. Burton showed at their trial that he was moved especially by the fact that they—all of them men very like Lyons and Moore, the dregs as it seemed of the convict system—had deliberately slaughtered not only innocent men but women and children. Burton did his duty, and all seven men were hanged.

The idea that Aborigines were nothing more or less than British subjects was not a popular one among stockmen and stock owners. Aborigines not only hindered the outward movement of flocks and herds, they also posed a threat to the lives of the men who followed. In these circumstances, when the race as a whole seemed to jeopardise so much wealth and security, surely the blacks must be regarded as outlaws beyond the protection of the state—even leaving aside the

MR JUSTICE BURTON PRONOUNCES SENTENCE ON THE MYALL CREEK MURDERERS

Prisoners at the bar, ... you have been found guilty of the murder of men, women and children, and the law of the land says, whoever is guilty of murder shall suffer death, and this sentence it is imperative in all Courts which are called on to try such cases, to pass. This is not a law of mere human convenience which may be adopted or rejected at pleasure, according to the conventional usages of society, but is founded on the law of God, given at the earliest period of scripture history when there were only a few people on the face of the earth; and from these few are descended all the people that are now in existence, men of all kindred, men of all languages, men of all colour. The law was given in imperative terms, whosoever sheds man's blood, by man shall his blood be shed, and I doubt whether this law can be varied from, at any rate there will be a great national guilt incurred by those who dare to depart from it. No civilised country has a right to vary the construction of this law in order to declare to what objects it shall be applied, for the terms of the law are express and cannot be misunderstood. The circumstances of the murder of which you have been found guilty are of such singular atrocity that I am persuaded that you long ago must have expected what the result would be. This is not the case where a single individual has met his death by violent means; this is not the case, as has too often stained indelibly the annals of this Colony, where death has ensued from a drunken quarrel; this is not the case, when, as this session the Court has been pained to hear, the blood of a human being and the intoxicating liquor were mingled on the same floor; this is not the case where the life or property of an individual has been attacked, ever so weakly, and arms have been resorted to. No such extenuating circumstances as these, if any consider them extenuating, have taken place. This is not the case of the murder of one individual, but of many—men, women, and children, old men and babes hanging at their mothers' breasts, to the number in all, according to the evidence, probably of thirty individuals, whose bodies on one occasion were murdered—poor defenceless human beings ... I cannot expect that any words of mine can reach your hearts, but I hope that the grace of God may reach them, for nothing else can reach those hardened hearts which could surround that fatal pile, and slay the fathers, mothers, and the infants ... I cannot but look at you with commiseration; you were all transported to this Colony, although some of you have since become free; you were removed from a Christian country and placed in a dangerous and tempting situation; you were entirely removed from the benefit of the ordinances of religion; you were one hundred and fifty miles from the nearest Police station on which you could rely for protection—by which you could have been controlled. I cannot but deplore that you should have been placed in such a situation;—that such circumstances should have existed, and above all,—that you should have committed such a crime. But this commiseration must not interfere with the stern duty, which, as a Judge, the law enforces on me, which is to order that you, and each of you, be removed to the place whence you came, and thence to a place of public execution, and that at such time as His Excellency the Governor shall appoint you be hanged by the neck until your bodies be dead, and may the Lord have mercy on your souls.

Sydney Herald, 7 Dec 1838

question, which more and more settlers seemed to be asking, as to whether they were human beings at all. The Myall Creek murderers were tried twice, on different charges, after the jury at their first trial refused to convict. One juryman said later: 'I knew well they were guilty of the murder, but I for one would never see a white man suffer for shooting a black'.

This approach had some support in legal circles. The opinion held by Plunkett and Burton was the dominant one. But Chief Justice Pedder in Van Diemen's Land was probably not alone in doubting its correctness. Pedder was not sure whether Aborigines who threatened the life and property of settlers were to be seen as British subjects breaking the law, or as aliens making war on the Queen. If they were aliens it was easier to justify their slaughter.

Those few Europeans who were concerned about the legal circumstances of the Aborigines were not always convinced that they were being justly treated. The Reverend James Gunther, a Church of England missionary in the Wellington valley, thought there was little justice in applying the law of a Christian nation to savages for whom civilisation had done so little. Others argued that treating Aborigines as British subjects took no account of their own wishes, so that it was an act of tyranny and one that could never be consistently carried through.

This last point was the most difficult one for officials to cope with. In principle there could be no serious question about the prosecution of white men, like the Myall Creek murderers, who committed crimes against Aborigines. Government could also, with a relatively clear conscience, punish Aborigines who mistreated Europeans. But what about Aborigines who mistreated each other? If they were British subjects then all their dealings, even among themselves, should be regulated by British law.

It is not surprising that governments refused to go so far. Thomas Harington, the assistant colonial secretary in Sydney, argued that Aborigines had the right to maintain 'their own ancient usages' in disputes among themselves. Governor Gipps, after some initial uncertainty, decided that magistrates need not enforce British laws in such conflicts, unless the offences came under the 'immediate notice' of civilised subjects. Whether or not it was so intended, this policy was an implicit invitation to colonists to turn a blind eye.

There was another problem, which Plunkett acknowledged in *The Australian magistrate* by noting under the heading 'Evidence', that atheists or persons who had no belief in a future state of rewards and punishments could not give evidence. The Aborigines were therefore incompetent to testify. Although both Plunkett and Gipps thought it absurd, so the law stood and so it was applied. One magistrate reported listening to an Aboriginal witness's account of a murder, conveyed in perfect English, and then preventing any record being taken of it.

When an Aborigine appeared before the courts European participants seemed uncomfortable, as no doubt did the accused. It was as if an inept amateur had joined a group of professional troupers to take a leading part in an otherwise well-rehearsed play. The result could be ridiculous. When Mr Justice Burton asked Long Jack whether he was guilty or not guilty, or more familiarly, whether he had killed his wife, and the Aborigine was about to say that he had, Burton interrupted and ordered that a plea of not guilty be entered.

This particular performance was also undermined by uncertainty about the role of the interpreter M'Gill, an Aboriginal assistant to the missionary Lancelot Threlkeld. At the outset of the trial a long discussion took place between the judge, the attorney-general, the prisoner, the missionary and M'Gill about whether M'Gill could act as a sworn interpreter. The judge questioned M'Gill about God, truth, eternal punishment, and the nature of an oath, and (according to Threlkeld) so intelligent were the answers that the judge enquired whether the missionary had

baptised him. This question was less innocent than Threlkeld supposed, for what Burton really wanted to know was whether M'Gill qualified as a true believer. Surely, he reasoned, if the Aborigine *did* believe, the missionary would have baptised him. This had not happened. It turned out, however, that Long Jack knew enough English for the trial to proceed without the interpreter.

An Aborigine in the dock could be disadvantaged in many other ways. In cases involving European defendants, judges and juries could consider character and motivation as possible mitigating circumstances; but where the defendants were Aborigines, their characters and motives were likely to be mysteries. Summing up in the case of Long Jack, Mr Justice Burton regretted there was no way of finding out what had led to the violence, nor of uncovering circumstances that might have made the case manslaughter rather than murder.

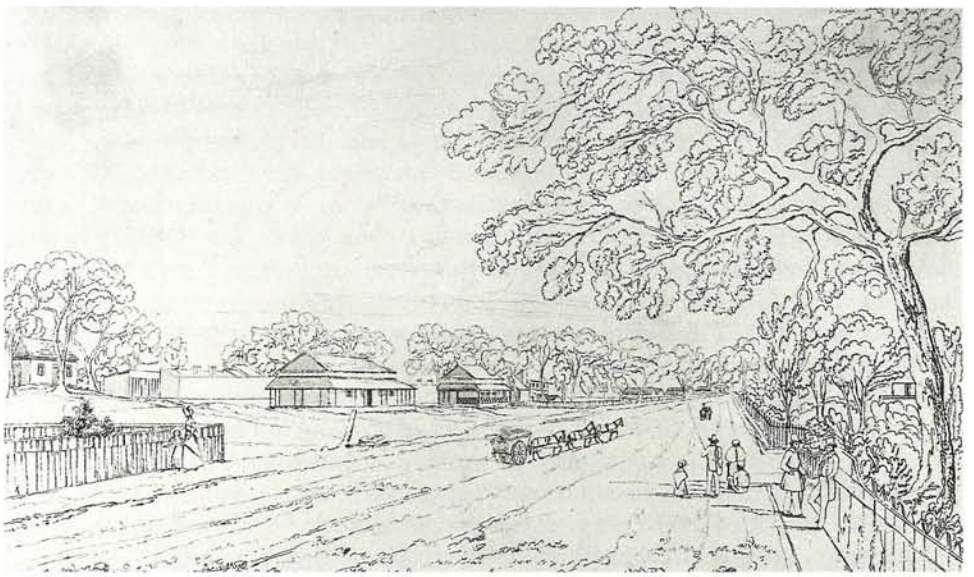
In Perth a storekeeper convicted of arson was earnestly recommended for mercy by jury and magistrates on the grounds of his previous good conduct. Boyong, on the other hand, who was convicted at the same quarter sessions of intent to do grievous bodily harm to a settler, received no such recommendation. His crime was simply described by the magistrates as very daring and deliberate, and as setting a dangerous example to other blacks.

Many leading custodians of the law—judges and members of the executive councils—were nevertheless reluctant to impose the supreme penalty on Aboriginal offenders. Before Boyong was reprieved, because of expected changes in the English law, the advocate-general George Fletcher Moore had argued for commutation on other grounds, including the supposed distinction in 'the natural mind' between murder and offences falling short of murder—a distinction which Moore thought should be encouraged. He also doubted whether it was wise to acquaint the natives with 'new Forms of Death', which might lead them to retaliate by inflicting on white people a greater and more lingering torture than they had previously practised. Similarly, Mr Justice Burton advocated mercy on behalf of Long Jack, citing the prisoner's 'savage state', his evident contrition, and the fact that white men had induced the drunkenness that contributed to the crime. Eventually he was sentenced to three years at the penal settlement at Moreton Bay.

An incident in the High Street of Perth, noticed briefly in chapter 2, offered a direct and violent challenge to the justice of the white man's law. One day in April about thirty Aborigines were quarrelling among themselves watched from a safe distance by a small group of white men, and by Mrs Inkpen, wife of the town combmaker, from the window of her house. Several spears were thrown, and some of the black men bled from their wounds. Suddenly an old man, well known to the whites as Helia, rushed towards a woman, Yatoobong, who was seated with her head bent forward, and hurled a spear from his throwing stick into the back of her neck. As she slumped forward, several other men thrust their spears into various parts of her body, making one of the more squeamish observers, a baker, turn away and go home.

Two other whites ran up to Helia, who had struck the first blow, and took him into custody. Within fifteen minutes he was brought before three magistrates and charged with 'feloniously, wilfully and of his malice aforethought' murdering Yatoobong, against the Queen's peace, crown and dignity.

At the trial on 2 July the interpreter Francis Armstrong explained to Helia the nature of the charge against him. Helia in turn explained to the court how he had



Perth street scene. White settlers in Perth were never far from the bush, and Aborigines like Helia, who murdered a woman named Yatoobong in front of white settlers in 1838, still regarded the settlement as part of their domain where traditional customs were not out of place. Lithograph by J. Hensall, 1839, after pencil drawing by Charles Wittenoom.

ART GALLERY OF WESTERN AUSTRALIA

speared Yatoobong, but not with the intention of killing her. He had heard that his daughter Wilgup had been speared to the north of the town by some of Yatoobong's relatives. Evidently this was a retributive punishment of the kind described by the explorer George Grey and others, and discussed in chapter 2. If a member of one clan died at the hands of another, the victim's relatives were expected to avenge the killing by taking the life of one of the offender's kin. The Quaker missionary James Backhouse described how one death led to a series, each avenging the other and keeping up a balance of power. The 'first great principle' of punishment, Grey observed, was that all the relatives of a culprit were implicated in his guilt, and if the offender could not be caught his brother or father or, failing that, any other male or female relative would answer nearly as well. 'The holiest duty a native is called on to perform', he wrote, 'is that of avenging the death of his nearest relation'.

All this was irrelevant to the court that tried Helia. Though detailed evidence was taken from white witnesses as to the manner of the killing and the extent of the injuries, no Aborigine could testify in the court and no white person spoke on Helia's behalf. The jury found that he had murdered Yatoobong 'with a certain wooden spear of the value of sixpence', and the judge ordered that he be hanged by the neck until he was dead.

In the privacy of the executive council, however, Governor Stirling frankly acknowledged the moral problem. It was notorious throughout the settlement, he observed, that such acts of violence were considered by the Aborigines to be 'Moral Duties'. So many of them had committed or been a party to similar outrages that 'to apply strictly and impartially the British Law to this particular Offender would be to pass Sentence of Death upon the whole Race'. The advocate-general, Moore, agreed. The Aborigines had their own 'Regulations for the Guidance of their Conduct' and Helia, though he had broken British laws, had obeyed the laws of his own people. To punish the Aborigines for every contravention of laws of which they had no knowledge would be 'contrary to sound Policy, to common Humanity and to impartial Justice'.

Justice therefore demanded that British law be set aside until the Aborigines were able to understand and obey it. For Helia, already convicted of murder, the executive council's solution was to remit his sentence until Her Majesty's pleasure

was known. In the meantime he was sent, with five other Aboriginal prisoners, to Rottnest Island, where Stirling planned to establish a native penal settlement. One night during a violent storm the Aborigines escaped from the island aboard a whaleboat and navigated the twenty or so kilometres to the mainland. As they neared the end of their journey the boat capsized and, though the others were able to save themselves, the old man Helia was not strong enough to swim to the shore.

It was rumoured among Aborigines and colonists that Helia had been thrown overboard by his enemies in the boat, and this provoked further retribution. The colonists were not in a situation to decide between conflicting accounts of what had happened, or to make judgments about Aboriginal ideas of justice. As the violence persisted, the *Perth Gazette* counselled its readers to protect their own interests and leave the Aborigines to look after themselves in accordance with their own laws.

Equality before the law was a fundamental principle of British justice. It rested on the assumption that every individual was not only equally entitled to protection, but also equally capable of obeying the law. It was an idea closely connected with arguments about contracts. There were two ways in which individuals could enter into contracts with each other: either one party might act under duress, in which case the contract had no standing in law; or else both were free and equal and the contract was good. Both in contracts and more generally, the law made no allowance for the possibility that one party, though free and willing enough, was weak, foolish, inexperienced or ignorant of British laws and customs.

Aborigines, if they were British subjects, had to be regarded as quite capable of obeying the law, and of keeping to agreements freely entered into. The problems were obvious, but they were not peculiar to Aborigines. Society was made up of many distinct types of men and women, variously qualified by rank, education, character and experience to act as subjects of the Queen. Even without the distinction between free people and convicts, there was not much real equality in the colonies. The principle of equality before the law was, in short, a legal fiction.

Edward Smith Hall, editor of the Sydney Monitor, *pressed for legislation to regulate the bringing of Indian workers into the colony. Undated oil by Gladstone Eyre.*
MITCHELL LIBRARY

The fiction led to injustice as well as to justice. A few days before the end of 1837 a party of Indians had arrived in New South Wales, contracted as servants to a gentleman named John Mackay, whom we have met already in chapter 4. They were among the first Asian labourers to arrive in the Australian colonies. The editor of the *Sydney Monitor*, Edward Smith Hall, had foreseen some of the problems of Indian immigration as early as June 1837. He had then assumed that Indians would come in large numbers, and that they would have a radical effect on colonial society. He devoted three columns of his newspaper to the question of their future status before the colonial courts of law. What concerned Hall was that, in principle, adults who were British subjects were perfectly equal in the eyes of the law, and that those binding themselves as servants did so as free agents. 'The question', he said,

> with respect to the apprenticing or hiring the King's Indian subjects is, whether because the law interferes not with the agreements entered into between British born men and women, it should interfere with those entered into between the simple uninformed people of India, and our adroit and politic colonists?

As things stood, common legal assumptions would lead to 'a system of virtual slavery'.

Hall had then urged the legislative council to enact a code of laws to regulate Asian labour, which might perhaps be enforced by 'Commissioners for the Indians', one for every district in the colony. The legislative council took no notice. For his part, by 1838 Hall found that the Indian labour agreements themselves, however unequal, provided a minimum standard which was, in any case, hard enough to achieve.

The Indians, as we have seen in chapter 4, were assigned by Mackay to other masters. In February, fifteen of them left their employment and headed west, apparently with the hope of getting back to India. Four constables chased and caught them. Before the police magistrate's court in Sydney they explained that they had been starved and that they had worked for two months without being paid. Mackay offered an explanation, and the Indians were told that if they had any further complaints they should bring them to the magistrates rather than run away. Mackay agreed to give them more food and more regular pay, and all parties left the court.

This was not good enough, Hall protested. As labourers these men were incapable of looking after themselves—'for how can wild benighted Indians avail themselves of the factitious and hair splitting laws of a civilised nation?' They had accused Mackay of letting them starve: 'After Mr Mackay had withdrawn his complaint, why was not *this* charge against Mr Mackay, heard by the Bench? No *evidence* was required to shew their misery'. Nor was '*wordy* eloquence' necessary for their defence.

I, Madhoo engage to serve John MacKay Esqr. or such person as I may be transferred to by him as a free Labourer with mutual consent to be declared before a Public Officer for the period of five(5) years from the date of this contract on a monthly salary of Company's Rupees five(5) and food and clothing as follows vizt.

Rice ½ chittaks *Dhall 2 chittaks* *Ghee ½ chittaks* *Salt ½ chittaks*	*Daily*	*One blanket* *Two Dholies* *One chintz Jacket* *One Lascars Cap* *One wooden bowl*	*Yearly*

also one lota or brass cup between Four persons and medical attendance and medicine when required and to be sent back to Calcutta at the expiration of my term of service free of all expense to myself sould such be my wishes subject to the terms of my general agreement executed this 18th day of August Calcutta. Madhoo his mark 1837.

Height 5 ft 4 ins
Age 25 years
Color Black
Particular marks none
Caste Dhangar Hazurubang

I hereby certify that this memorandum of Contract has been inspected by me and the content thereof fully explained to the within named.

Calcutta, 22 August 1837

T.N. Yuil
Supt. Calcutta Police

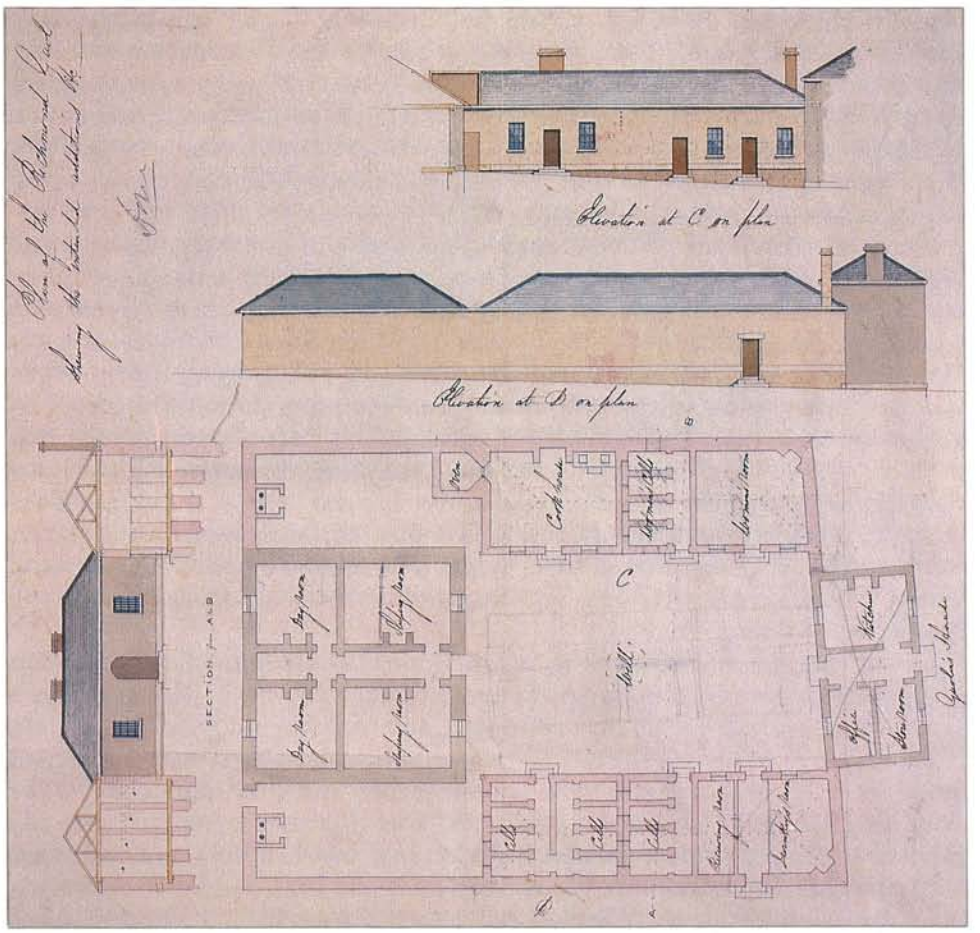
The court, said Hall, had not even asked Mackay to produce the labour contracts. Instead the magistrates had taken it for granted that the master had a right to coerce them and to send the police after them:

> They take his *word* for it. They take a man's word for keeping, in a state of slavery, 15 *British subjects*, whose situation, compared with that of the slaves of the West Indies, will bear no comparison for misery.

Here Hall touched on the essence of inequality before the law. Mackay belonged to the same rank in society as those who administered justice. The magistrates took it for granted until they could be persuaded otherwise—almost as a presumption in law—that the gentleman in the case was the one who told the truth.

THE PURPOSE OF JUSTICE

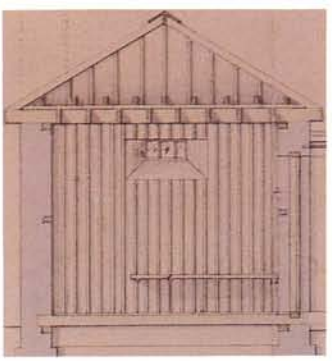
The executive councils in the convict colonies and Western Australia spent much time considering the fate of prisoners condemned to death. Members took their review function seriously, enquiring minutely into any capital case where the evidence or judgment was at all doubtful. In the case of James Lyons, the New South Wales executive council functioned as a sort of court of appeal. More often, however, there was no question that prisoners were guilty. The councils had only to decide whether they should be hanged or whether they were fit objects for the Queen's mercy.



Richmond gaol, Van Diemen's Land. Plans for the addition of a gaoler's house to the gaol complex drawn in 1835. The house had been completed by 1838, when four bushrangers were held in the gaol under sentence of death.
ARCHIVES OFFICE OF TASMANIA

As meetings of the executive councils were always confidential, members spoke freely about possible reasons for mercy, and about the purposes of justice. When the council in Van Diemen's Land considered the case of four bushrangers who had been sentenced to death by Chief Justice Pedder in June, some members were troubled about the *number* of men sentenced to hang. Governor Franklin asked whether the ends of justice might be met if one of the four men was spared, while another member urged that the hanging of two would be enough. The chief justice himself, summoned to appear, suggested that it would be good policy to save one of the men, 'simply upon the ground of their number'. The colonial secretary, John Montagu, remarked caustically that such a principle would encourage reprobates to band together in large gangs. For Montagu and the chief police magistrate, Matthew Forster, the security of the colony demanded that all bushrangers should look forward to certain hanging.

But there was another problem. On the face of it the crimes committed by the four men were not equally reprehensible. Two of them had terrorised residents from Campbell Town south to Richmond over a period of several weeks and had taken part in an especially cold-blooded murder. But the other two had shorter and less violent careers and claimed to have joined the gang under duress. Should their punishments be equal?



Condemned cell, Oatlands gaol, Van Diemen's Land, 1830s. A cut-through elevation, showing tiny window and bench for sleeping.
ARCHIVES OFFICE OF TASMANIA

This question led the council to look into the characters of the two less culpable men. Anthony Banks had the support of Father Joseph Therry, who told the governor that Banks's youth, his ignorance and his penitence made a case for mitigation. The chief justice appealed in favour of George Davis. The distinction between Banks and Davis was, he said, that 'whilst the former is intelligent, the latter is stupid and much more likely to be led by others'. In arguing that they should all be hanged the chief police magistrate, Forster, offered yet another point of view. Banks and Davis, he argued, were in fact *more* wicked than the other two because they had been free men, though one was serving a colonial sentence. Not being transported convicts, he said, they had had a better chance to choose a path of virtue. Yet they had not done so.

Here were conflicting viewpoints about the nature of moral responsibility and the rule of law. From one perspective, the purpose of hanging was to deter others from crime; to do this effectively it had to be held up as the certain end for all who committed capital offences. In the words of the *Hobart Town Courier*, hanging was 'the inevitable, fatal, and disgraceful termination of a *bushranger's* career'. From another point of view, the power to hang and commute showed the power of government, over and above the law, to distinguish shades of evil and to punish the guilty accordingly. Through its exercise of the royal prerogative of mercy, the council also showed that it had discretion over life and death. Careful use of the power to reprieve 'deserving' offenders thus enhanced the power of law enforcers and contributed to social obedience. Judges and executive councillors wavered between these two views, their arguments often showing confused ideas and conflicting emotions.

Forster's argument was, at first sight, a perverse elaboration on the second point of view. But it was a good example of a new interest in the way in which the minds of criminals worked. Forster was up to date, and his logic had radically different implications from either of the other two approaches. He implied that government ought to be hanging and otherwise punishing men and women, not simply for what they had done, but also because of the *kind of people* they were. Banks and Davis had done less actual harm than the other two, but their behaviour suggested to Forster that they were more vicious than their associates.

Of the four bushrangers, only one was eventually saved from the gallows. After

hearing the arguments for and against reprieving two of the party, the governor concluded that George Davis alone should be granted a respite, partly because he had not carried arms for several days and had been first to surrender, but mainly because he had been wrongly assigned to private employment before he became a bushranger. He had been serving time for a criminal offence, and assignment was a punishment reserved for transported convicts. As an assigned servant he had been exposed to temptations which, said the governor, he would not otherwise have faced. Thus Franklin himself looked into Davis's mind. What was seen as 'an illegal act of Government', contributing to a bushranger's predicament, became for the governor a means of extricating himself from his own.

The criminal law in Britain and its colonies was undergoing some major changes because of this new interest in criminal psychology. Methods of punishment had already been affected. We have seen in chapter 7 how new efforts were being made to build solitary cells for convicted men and women. Instead of punishing the body, up-to-date penologists aimed to punish—and if possible to reform—the mind. Solitary cells seemed to be the best means by which authority could reach the minds of wicked men and women.

Judges in England were showing an increasingly flexible approach to the question of criminal intent. It was beginning to be easier, for instance, for accused men and women to plead that they had broken the law without knowing what they were doing, because they were either mad or drunk at the time. Formerly, being drunk was no excuse at all. Indeed, it only made things worse: drinking in excess was wrong in itself, so the accused was guilty of two misdeeds. Madness was traditionally a very insubstantial defence. Now judges were beginning to penetrate beyond the outward actions of the men and women who came before them, in an attempt to assess the inward actions of their minds. Drunkenness and insanity were beginning to be treated more carefully, to see how they affected motives.

In February a case came before the chief justice of New South Wales, James Dowling, which suggested that he for one was aquainted with the growing concern about intent. Henry Hammond, otherwise Fleming, was charged with cutting the throat of a little girl named Jane Boyle, the daughter of an innkeeper at Bathurst, while she was playing at school. Hammond had used a razor, but the cut was slight. Jane was bandaged up and she 'did not bleed much'. Hammond had been her schoolteacher until a few days before, when he was dismissed for getting drunk.

Everybody liked Hammond. Because his attack on Jane seemed out of character, it was suggested that he was mad—though there was almost no other evidence of insanity. The chief justice seized on the possibility of madness, and fixed a new legal principle on the wild and fleeting impulses of Henry Hammond's mind. He instructed the jury that if they

> considered that either from the effects of drink, or grief of mind at losing his situation, the prisoner was at the time insane, they would return a verdict of not guilty.

This the jury did. A more conservative judge, such as Pedder or Burton, would never have given Hammond such a means of escape. Dowling had no good legal precedent to rely on. He was simply following current opinion, which no senior judge in England had yet stamped with his authority.

A similar cell to that opposite, recently restored at Richmond gaol.
R. SCHORN

These new ideas about intent made the problem of the Aborigines even more pressing. Their lands had been explored, measured, mapped and brought under control, but their minds were still largely unconquered. How could judges take it upon themselves to punish the criminal intent of men and women so different from themselves? The same question might well have been asked of others. What about the poor and often illiterate men and women whom the courts tried and condemned every day? Generally speaking, the minds of the rich and the minds of the poor were different countries.

The poor knew nothing about the arguments that exercised the minds of up-to-date lawyers. The former governor of Van Diemen's Land, Colonel Arthur, explained to the Molesworth committee how convicts thought about their crimes. He had spoken to a good many, he said, and they generally told the same story: 'that having committed a first petty offence, from bad association and Sabbath-breaking, they have been led to the commission of another, and so forth'. Intention was irrelevant. They saw behind them merely a chain of events—their own bad deeds—in which they had been caught up. Any number of men, standing on the scaffold condemned to die, gave the same account of themselves in their final words to the crowd beneath. The speech of William Moore, whom we saw hanged at Maitland, was typical.

Convicts saw punishment partly as a series of chances. According to Arthur, 'they have always hoped to escape detection, and, if detected, to escape conviction; or, if convicted, that they might get off with a year or two in the hulks or penitentiary'. For the rich and educated the processes of criminal justice were designed to impress and terrify potential wrongdoers—to show them the power of government and the law. Or else it was a machine to reshape the minds of the wicked. In contrast poor men and women saw it as a game, though a deadly one.

The game had ancient rules, which some of the poor knew better than others. Some had a remarkable and unreasonable faith that the rules would be maintained. All had some inkling of the fundamental framework of the law and its part in their own lives. They were perfectly aware of inequality, but they clung to the rules and did what they could to benefit by them.

Individual magistrates often won a reputation either for severity or leniency in the eyes of those who came before them. Assigned servants would 'shop around' for justice, as did Samuel Dutton whose master refused to propose him for the ticket of leave to which he believed he was entitled. Rather than take his case to the local bench at Cassilis, Dutton walked the 170 kilometres to Maitland where the police magistrate, Patrick Grant, Lord Glenelg's kinsman, was well regarded by the convict population. Grant verified Dutton's claim and sent him back to Cassilis with a letter of support. This greatly annoyed the man's master, who complained that every convict on his estate might now march to Maitland to seek protection from imagined injustice. Nevertheless, Dutton's conduct was rewarded. Sir George Gipps ended the affair by stating that when a man's ticket was overdue 'any deviation from strict rule was to be looked on with indulgence'.

There were many convicts who, like Samuel Dutton, knew—or thought they knew—their legal rights and were vigilant in seeking to defend them. Maria Healy was an assigned servant in the lower Hunter valley. Having suffered what she considered to be an injustice at the hands of Major Sullivan, the police magistrate at Butterwick, she too decided to appeal to Patrick Grant, as 'a friend of the

oppressed'. Sullivan had sentenced her to twelve months imprisonment for running away, although she claimed to have been absent with her mistress's permission. While telling her story to Grant, she also pleaded the cause of another convict, Edward Gruby, a ticket-of-leave holder whom Sullivan had sentenced to twelve months in irons for aiding and abetting her. 'Can such be?' she demanded. 'Was there ever a more unjust or more cruel sentence?' Gruby was not out of his district and had his mistress's permission to be away. It was Sunday. His work had not suffered. During eighteen years in the colony his name had not once appeared in police records, and now he was 'dwindling into age'. 'Was anyone offended? How was society injured? How was the law transgressed?'

Maria Healy may have been unusually articulate, and her understanding of the law was perhaps more precise than that of most men and women of her rank in life. But her outrage at the idea of a magistrate breaking the rules was typical of conversations that might have been heard almost daily in convict huts and road gangs throughout New South Wales and Van Diemen's Land, and among the free poor in all four colonies. Men and women like her may have had difficulty in obeying the law. But that did not mean they lacked a clear perception of their rights. And in fact Maria Healy's appeal was well directed—hers and Gruby's were two of the three sentences by the Butterwick bench that Gipps inquired into and overturned.

Aborigines stand, depicted like ancient Greeks or Hebrews, looking into the nineteenth century. Their vantage point is Collins Street, Melbourne. Watercolour attributed to William Knight, 1839. Lithographed by E. Noyce.
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