I have nearly done. In the last hour I have tried to give you some account of the man this lecture commemorates, and to make some observations and suggestions towards possibly beneficial changes that seem to me to be very relevant to the field in which he worked. The portrait of the man may be barely indentifiable by his family and intimate friends, but it will, I think, be readily recognizable by those who knew him more as a public figure. It is partial, no doubt, yet I hope not partisan, 'praising those things in his acts which are deserving of praise', with some criticism at times in accordance with the facts as they appeared, but in a spirit of impartiality; and its subject, with his rigorous standards of bibliographical accuracy and his seeking for historical truth, would scarcely have wanted it otherwise. For beyond doubt John Alexander Ferguson, knight, judge, scholar, bibliographer, was a man to honour and admire in his lifetime as he is now one to commemorate for what we may properly call his enduring labours for the instruction and good of his country.

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The Magistracy and the Supreme Court of New South Wales, 1824-1850: A Sesqui-Centenary Study*

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The Supreme Court of New South Wales, the 150th anniversary of whose inauguration is to be celebrated on 17 May 1974, has been of vital importance in many aspects of the development and history of our nation. It is my intention in this paper to consider one of these aspects—the effect of the Supreme Court upon, and its inter-relationship with, the administration of justice at its lowest level in the period from 1824 until 1850.[1]

Included in that panoply of civil, military and legal administration—ultimately to be the basis for the creation not of a mere convict settlement but of a great nation in a new continent —which Arthur Phillip brought to Australia in 1788 was the concept of a magistracy and the office of Justice of the Peace. (Throughout this paper the terms Justice of the Peace and magistrate will frequently be used interchangeably.[2])

The origins of the office of Justice of the Peace are not (as are so many developments important in the history of English law) clouded in antique uncertainty. The Justice of the Peace was in its inception a creature of statute (being totally unknown to the Common Law), and it has throughout its history of more than six centuries, even to the present day, ever remained so. From its creation in 1344 by 18 Edw. III, stat. 2, c.2 additional duties and functions were with increasing frequency being imposed upon the office, in England, and later in Australia, but the imposition of these duties and functions was invariably effected by statutory enactment.[3]

Not only did Justices of the Peace deal with all minor criminal offences and breaches of the peace, but new duties, especially of a police and administrative nature (such as administering the Poor Law, licensing ale houses, dealing with disputes between masters and apprentices, and organising the local militia), were constantly being assigned to the Justices, in addition to their judicial functions. As a result, the Justices of the Peace became throughout the sixteenth, seventeenth and eighteenth centuries the virtual rulers of the countryside in England, especially as, at least after the Restoration, it very rarely happened that a Justice once appointed was dismissed. Rural England was governed by country gentlemen by virtue of their office as Justices of the Peace.

Blackstone, in the middle of the eighteenth century, considered that the duties of Justices of the Peace

> are of such vast importance to the public as to make the Country greatly obliged to any worthy magistrate who, without sinister views of his own, engages in the troublesome service.[4]

Despite the high reputation of Justices in the country districts and their high standards of integrity, in the towns, and especially in London, the reputation and performance of Justices of the Peace was far less satisfactory. Many of these town Justices used their office merely as a means to make corrupt profits (for, although not paid a salary, they were entitled to receive certain fees). Such men became known as 'trading Justices'. Nevertheless, there were a number of notable exceptions, especially among the Bow Street magistrates, to this low standard of administration of summary justice in the towns.

Outstanding among these exceptions was the great Henry Fielding no less illustrious as a magistrate than as a writer and his hardly less distinguished brother, the blind Sir John Fielding, who successively presided over the Court at Bow Street in the middle years of the eighteenth century.[5]

The office of Justice of the Peace, which throughout a history of four and a half centuries had acquired important and powerful duties of both a judicial and administrative nature, and which well suited the English social content of its development, arrived in Australia with the First Fleet.[6]

The arrival of the First Fleet on the shores of New South Wales in January 1788 was not merely the inception of a penal settlement garrisoned by members of the Services. It was also the commencement of a free settlement for the civil administration of which the British government had already made adequate legal provision,[7] even though that administration took a secondary place for many years. Arthur Phillip, the Governor, was vested with authority far beyond that necessary or usual to a mere Commandant of a penal establishment, for he was also to be the Governor of a colony and, as such, head of a civil administration.[8] On 2 April 1787 there were issued Letters Patent[9] which clearly envisaged the establishment of a full colonial civil administration in the new settlement.[10]

In addition to the aforementioned basis of praetorial power and executive administration, there had at the same time been created the framework of an administration of justice for the new settlement by those same instruments upon which the settlement itself was founded.[11] The Letter Patent of 2 April 1787 provided for minor civil and criminal matters to be dealt with by the Governor, Lieutenant-Governor and Judge-Advocate (the chief judicial functionary in the new settlement) acting as Justices of the Peace,

> all and every such Justice and Justices of the Peace shall have the same power to keep the peace, arrest, take Bail, bind to good behaviour, suppress and punish Riots and to do all other Matters and Things with respect to the Inhabitants residing or being in the place or Settlement aforesaid, as Justices of the Peace have within that part of the Kingdom of Great Britain called England within their respective Jurisdictions.[12]

The ambit of power and jurisdiction thereby granted to Justices of the Peace for New South Wales were similar to those which had regularly been granted to Justices of the Peace in other colonies for more than a century previously.[13]

Phillip's second Commission, dated 2 April 1787, granted to him power to appoint Justices of the Peace in the following terms,

> and Wee do hereby authorise and empower you to constitute and appoint Justices of the Peace Coroners Constables and other necessary officers and ministers in our said territory and dependencies for the better administration of justice and putting the law in execution.[14]

The power to appoint Justices of the Peace was one regularly held by colonial Governors by virtue of their Commissions, as for example, in the case of Sir Thomas Modyford, Governor of Jamaica, by Commission dated 15 February 1663 and Captain Osborne, Governor of Newfoundland in the late 1720s.[15] The office of Justice of the Peace was well established, at least in Jamaica, by the time Colonel Edward D'Oiley received his commission from Charles II in 1660.[16]

In New South Wales the Governor, the Lieutentant-Governor and the Judge-Advocate[17] were themselves appointed Justices of the Peace by virtue of the Letters Patent of 2 April 1787.[18] Accordingly, from the very inception of the settlement it was intended that there should be Justices of the Peace in New South Wales and that their functions should be the same as those of Justices of the Peace in England.

No consideration whatever appears to have been given to the fundamental question of whether the legal institution of a Justice of the Peace was appropriate to the needs and circumstances of the new settlement. It seems to have been an unquestioned assumption by those preparing the framework of justice for the settlement that, since the office of Justice of the Peace existed in England and the holders of the office in that country fulfilled important judicial and administrative functions, and since the office and its functions had been successfully transplanted across the Atlantic to the British colonies in America and the West Indies,[19] the office should also exist in New South Wales where it was expected to serve the same purpose and to be occupied in a similar fashion as in England.

In summary, then, upon the foundation of the settlement of New South Wales, the Governor, the Lieutenant-Governor and the Judge-Advocate were by virtue of their respective offices to be Justices of the Peace. In addition the Governor had authority to appoint Justices of the Peace who were to have the same powers and were to exercise the same duties and functions as were at that time exercised by Justices of the Peace in

England—the administration of Justice at its lowest level, especially in regard to criminal offences, and usually in a summary fashion.

So long as New South Wales remained essentially a penal settlement and the Justices of the Peace were officials in the administration, either serving members of the armed forces or civilian functionaries, and those appearing before them were convicts, the system worked adequately. But once free settlers began to arrive and the number and proportion of emancipists began to increase, especially during and after Macquarie's tenure as Governor, the unsuitability of the system to the circumstances of the colony commenced to manifest itself. Justice at its lowest level being administered by unpaid magistrates without legal qualifications devoting only a little time to their duties may have been appropriate to England, but was totally inappropriate to New South Wales in the second quarter of the nineteenth century.

In the country districts of New South Wales into which settlement was spreading with increasing impetus from 1820 onwards, the magistrate was the only agent of civil government.[20] As the population of the country districts increased, the magistrate's power and importance increased proportionately. His activities included not merely the primary function of exercising his judicial role in Court. In addition he was in control of the police in his district,[21] was responsible for the assignment of convicts as servants, organized musters of convicts and other inhabitants,[22] drew up jury lists (after the introduction of trial by jury), organized and presided at public meetings, presented petitions on behalf of the inhabitants to the appropriate authorities in Sydney, was responsible for taking the local census and carried out many other non-judicial functions.

Such wide powers were open to grave abuse. As early as 1 January 1823, before he had become Chief Justice of New South Wales, before that office had even been created, Francis Forbes, whilst assisting in the preparation of the *New South Wales Bill*, had become aware of the shortcomings of the magistrates of the colony and of the illegality of many of their sentences.[23] He had written:

> The magistrates in New South Wales have passed sentences upon persons convicted, which have been rendered necessary by circumstances, but which have not been sanctioned by law.[24]

It is surprising that neither Forbes nor James Stephen (the other co-author of the *New South Wales Bill*) appeared to give any thought whatever to fundamental concepts concerning the administration of justice in New South Wales at its lowest level. Such troublesome problems as Ann Rumsby's case (of which more anon) would surely have given Stephen and Forbes cause to reflect upon the adequacy of the existing magisterial system in New South Wales. But perhaps because of the fact that the system of Justices of the Peace was by 1823 so widespread and of such long standing throughout Britain's colonies, especially those in America[25] and the West Indies,[26] its very existence was accepted as axiomatic. The peculiar circumstances of New South Wales in 1823 after thirty-five years of existence and the needs of a legal and judicial system caused by such circumstances, were disregarded just as totally as the peculiar circumstances surrounding the creation of the settlement, and the needs arising therefrom, had been disregarded when the original judicial arrangements had been made in 1786 and 1787.

In the event, the existing magisterial system continued without being in any substantial way affected by the *New South Wales Act* (4 Geo. IV c.96). To this extent the Act was superimposed upon the already existing system of the administration of justice by magistrates, and the Act left their functions and procedures largely unaffected. An outstanding opportunity was thus totally lost whereby the legal administration at the level below the Supreme Court could have been organized to result in greater justice for those persons who were affected by its decisions, greater competence in those administering it, and greater efficiency in its procedural arrangements.

The wasting of this oustanding opportunity resulted, as will be seen, in the administration of justice at its lowest level in New South Wales deteriorating, especially in the rural areas, throughout the second quarter of the nineteenth century to a level of ineptitude and injustice that at times became a public disgrace. It was only fitting, however, that Forbes himself, who with Stephen must bear at least some of the responsibility for this wasted chance, had many opportunities in the course of his judicial career in the colony to experience the unsatisfactory manner in which justice was administered by the magistrates of New South Wales.

Much has been written of the case of Ann Rumsby.[27] This case and its ramifications occupied the attention and, in some instances, plagued the lives of a considerable number of persons, of both high and low degree, in London and in New South Wales for several years after July 1822. In essence, the case (which is outlined and discussed in considerable detail by Dr C. H. Currey that outstanding pioneer in the field of Australian legal history) involved an attempt by the Exclusives, in particular the Parramatta Party, to destroy the Governor, Sir Thomas Brisbane by destroying his good friend and trusted official Dr Henry Grattan Douglass (just as, several years earlier, they had attempted to destroy Macquarie by attacking D'Arcy Wentworth). Although not immediately successful, the Parramatta Party eventually achieved its aim, and the Governor was recalled in May 1825.

The significance of Ann Rumsby's case in a consideration of the magistracy of New South Wales lies not in the devious and improper means whereby the Reverend Samuel Marsden,

Hannibal Macarthur and the other members of the Parramatta Party, abetted if not aided even by Sir John Jamison, the hospitable Knight of Regentville, achieved their unworthy ends, but rather in the fact that those of this group who were magistrates were willing, nay eager, to use their positions on the Bench to further these ends. For this blatant breach of their oath of office and disregard of their duty and position, the five magistrates who composed the Parramatta Bench and who refused to sit thereon with Dr Douglass were dismissed. These were Marsden, Hannibal Macarthur, the brothers John Palmer and Thomas Palmer, and John Blaxland.

The author of the following editorial appearing in the *Sydney Gazette* in 1825 may have been indulging in a certain degree of journalistic hyperbole, but the passage contains a very considerable element of truth in its criticism of the magistracy:

> In former times ... the Magistrates were armed with a power that excelled in despotism the far-famed Ruler of France.
>
> Previous to the introduction of this safeguard [freedom of the press] it was by no means unusual in Magistrates, from a variety of causes to overstep the bounds of the law; and there are many yet alive, who, in the early stages of the Colony, experienced all that brutal inhumanity, for which some of the yet living and defunct magisterial Nero's of New South Wales will ever be distinguished.[28]

The existence of a free press in the colony was not sufficient, however, to prevent abuses of the kind there described from continuing into the 1830s and 1840s.[29]

The fair-minded and humane Sir Roger Therry, who devoted thirty years of his life to the administration of justice in New South Wales, described the country magistrate as:

> a little magnate of the land. His powers were large and almost irresponsible, as far as related to his rule over the convict population. A facility for the abuse of it was afforded by the prevalent practice of entertaining the complaints of masters against their assigned servants in the private residences of magistrates, where they were exempt from public criticism.[30]

In Therry's view the essential cause of this situation was the poor quality of the persons available for appointment as Justices of the Peace, especially in the country districts:

> Much of the maladministration of the law may no doubt be attributed to the improper materials of which the magistracy at an early period was composed. Many of its members had been commanders and mates of convict and other ships, and of small coasting vessels; and the 'rough-and-ready justice' of the quarter-deck was transferred to the magisterial benches of New South Wales. Not a few were needy and selfish settlers who sought to extort by the lash the maximum of labour from prisoners assigned to them.[31]

In thus criticizing the magistracy, Therry doubtless had in mind that disgrace to the magisterial bench, the eccentric and malevolent James Mudie, who as a petty tyrant exercised the functions of his office from Castle Forbes ('the high-sounding name that, in compliment to his benefactor [Sir Charles Forbes], Mudie bestowed upon a number of detached slab-huts and rickety wigwams huddled together on his establishment'[32]),

and who had so savagely attacked Therry in his warped and libellous publication, *The Felonry of New South Wales*.[33] Mudie was an outstanding example of a man totally unsuited by his temperament, experience and intellectual capacity to administer justice to his equals, let alone to convicts, whom he regarded as beyond possibility of redemption into free society, and whom, in consequence, he treated with the utmost savagery.[34] Moreover, in Therry's view, the quality of the magistrates declined even further in the thirty years following 1828.[35]

Therry was not alone among his contemporaries in criticizing the performance of the magistrates in country districts and the manner in which justice was there administered.[36] Even as late as 1845 such a responsible publication as the *Atlas* thought itself justified in criticizing the magistracy in the following terms:

> In this Colony the commission of the peace is filled with persons in every respect unfitted to perform the duties of a Magistrate. Among the number, military officers, youths just escaped from school, and ignorant and vulgar men scarcely able to write their own name, may be found in the most luxuriant profusion. ... But in this Colony there is no local press to check the petty tyrants of our remote police offices, nor are there lawyers scattered throughout the country to call them to account; and besides this, the difficulties of communication are so great that none but wealthy people can obtain redress for wrongs which they may suffer at the hands of Justices of the Peace.[37]

Concerning country magistrates specifically the editorial continued:

> In nine cases out of ten where they proceed summarily, they act contrary to law. And, considering their entire ignorance of legal principles, it cannot be otherwise. But ignorance is not the only fault with which they are chargeable; for in many instances they scruple not to pervert their office to purposes of the grossest oppression. In some parts of the interior they rule with all the authority of eastern despots— and this they do with impunity, in consequence of the immense obstacles which distance from the metropolis throws in the way of redress.[38]

It will be appreciated that none of these magistrates had any legal training whatsoever. Indeed, it took a very long time for the concept that magistrates should be persons possessing legal qualifications to gain acceptance in the colony. Mr Justice Dickinson, of the Supreme Court, in 1858 recalled that his recommendation (made when a member of the Royal Commission set up in 1848 to inquire into the constitution and practice of the Courts of the Colony), that no person should be appointed to the Commission of the Peace without certain legal qualifications, was 'rather laughed at at the time'.[39]

One of the reasons for the shortcomings of the administration of justice at its lowest level was that, for the first thirty-six years of the existence of the settlement, the magistracy in New South Wales was subject to no control by any superior judicial tribunal. Until the creation of the Supreme Court of New South Wales by the Letters Patent of 13 October 1823[40] (known as the Third Charter of Justice) no appeal existed from

the decision of a magistrate. Proceedings before magistrates were either commital proceedings, or summary hearings. In respect of the more serious criminal charges, if a prima facie case were made out, the defendant was committed for trial before the court of Criminal Jurisdiction. But most of the matters which were heard by magistrates were criminal charges that were dealt with in a summary fashion. No appeal, either against conviction or against sentence, lay from such a summary decision of a magistrate, although, the Governor sometimes of his own accord remitted entirely, or reduced, the sentence imposed. This action by the Governor could in no way be considered in the nature of an appeal; it was in no way a rehearing of the case; it did not result from any application by the defendant; it did not contemplate that there had been any error of law in the original hearing. It constituted an exercise by the Governor, *ex proprio motu*, of the royal prerogative of mercy, which was expressly granted to him by the terms of his Commission.[41]

Judicially, however, the decision of a magistrate was final and conclusive. This situation completely changed with the establishment of the Supreme Court on 17 May, 1824.[42] The *New South Wales Act* (4 Geo. IV, c.96) pursuant to which were issued the Letters Patent of 13 October 1823 (the Third Charter of Justice) provided (in section 2) that the Supreme Court of New South Wales (as also the Supreme Court of Van Diemen's Land) should be a court of record and

> shall have cognizance of all pleas, civil, criminal, or mixed, and jurisdiction in all cases whatsoever, as fully and amply to all intents and purposes in New South Wales ... as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer at Westminster, or either of them, lawfully have or hath in England; and the said Courts respectively shall also be at all times Courts of Oyer and Terminer, and General Gaol Delivery. ...

An ancient and very important power of the Court of King's Bench was a general supervisory jurisdiction over inferior tribunals. This power was exercised by way of the prerogative writs of prohibition (preventing an inferior tribunal from exceeding its authority) mandamus (requiring a public official, including an inferior tribunal, to carry out its public duties) and certiorari (bringing up the record of an inferior tribunal into the court of Kings Bench so that a conviction based upon any defect appearing on the face of such record could be quashed). In addition, the Chancellor and the three English Courts of Common Law had jurisdiction to issue the writ of habeas corpus, whereby the legality of the imprisonment of any subject could be questioned. The writ of habeas corpus, which had its origins as a prerogative writ, was given a statutory basis as a result of several legislative enactments, in particular the *Habeas Corpus Act* of 1679, 31 Car. II, c.2.

By virtue of its jurisdiction to issue the prerogative writs of prohibition, mandamus and certiorari and the statutory writ of habeas corpus, the Supreme Court of New South Wales from its inception was able to exercise a considerable degree of control over inferior judicial tribunals in the colony. Decisions of magistrates could thus be reviewed by the Supreme Court, and to this extent the Supreme Court, in effect, although not in form, exercised an appellate jurisdiction in respect of decisions of magistrates.

Two of the earliest and most important judicial decisions by the first Chief Justice, Sir Francis Forbes, came before him by way of applications for the issue of writs of mandamus. These were the decision in *R.* v. *Magistrates of Sydney* in October 1824 which required cases in the Courts of Quarter Sessions to be tried by jury,[43] and the decision in *R.* v. *Sheriff of New South Wales* in January, 1825, which decided whether emancipists should be entitled to sit upon such juries.[44]

But it was not merely in cases relating to matters of such public importance as trial by jury that the Supreme Court exercised control over the magistrates of the colony. That such control was very necessary was manifest from the numerous applications made to the Supreme Court for the review of decisions of magistrates who, through the complicated or confused state of the law,[45] or their own ignorance, excess of zeal, stupidity, or even self-interest, perpetrated injustices, sometimes in a manner and to a degree almost defying belief.

It would appear that, in the early days of the Supreme Court, at least, the Judges regarded themselves as having a general supervisory control over the magistrates, and that such control empowered the Supreme Court to free prisoners detained under sentence of magistrates, without resort to the technical procedure of the prerogative writs. For example, on 16 August 1828, the three Judges of the Supreme Court, Forbes, John Stephen and James Dowling visited the prison hulk *Phoenix* moored in Sydney Harbour. Five of the prisoners on this vessel complained to the Judges that they were being held illegally, that while on ticket of leave they had been sentenced by magistrates to terms of imprisonment in excess of the balance of their original sentences. Depending upon the nature of the crime for which these prisoners had originally been sentenced, the subsequent sentence of the magistrate in this manner could have been contrary to the provisions of 4 Geo. IV c. 96.

The Judges considered the complaints of these five prisoners, apparently without any formal Court hearing, and without the issue of any Court process (for example a rule nisi for a writ of habeas corpus),[46] and on 30 September 1828 they stated their opinion of the legality of the sentences under which these five convicts were being held. In the course of this opinion, which was expressed to be the joint opinion of the Court, they stated :

> In both these two cases it appears to the Court that the Justices below have exceeded their jurisdiction, and the Court by virtue of its super-

intending authority over inferior jurisdiction in this Colony doth order and adjudge that these prisoners be discharged from their commitments respectively.[47]

Accordingly, these two prisoners were released. Of the remaining three, two were held to be lawfully in custody, and the third was released on the ground that the magistrates had exceeded their authority in imposing on him a sentence extending beyond the expiry of his original term. This opinion and order of the Supreme Court resulted in a Circular being sent to the magistrates of the colony on 30 September 1828 (the same date as the decision) setting forth a conspectus of the summary jurisdiction conferred upon magistrates by section 19 of 4 Geo. IV c.96 and by 6 Geo. IV c.69. This circular was apparently drafted by the Judges although, presumably, it would have been issued under the name of the Colonial Secretary, Alexander McLeay.[48]

The Circular, however, apparently did not achieve its desired purpose, since three months later, on 7 January 1829, the Judges held a meeting to consider 'the petition of certain prisoners seeking relief from confinement on board HM's prison hulk *Phoenix*, on the ground of unlawful detention', and once again it was necessary for the Judges to issue, for the guidance of the magistrates, an exposition of the law relating to the summary jurisdiction of magistrates over convicts and men on tickets of leave.[49]

The interest of these cases relating to prisoners who maintained that their detention on board the *Phoenix* was illegal lies not so much in the interpretation and effect of section 19 of 4 Geo. IV. c. 96 and the question of the summary jurisdiction of magistrates, but in the manner in which these complaints by the prisoners came before the Supreme Court.

In the first instance, that of August 1828, the prisoners made their complaints to the Judges in person while the Judges were actually on board the *Phoenix*. In the latter instance the complaint appears to have been conveyed directly to the Judges by way of written petition. In neither case was there any hearing in open Court, or any oral evidence, or even evidence on affidavit, no representation of the magistrates who had imposed the sentences under challenge, and no legal arguments presented by anyone on behalf of the prisoners. The Judges clearly considered that they had a general supervisory jurisdiction to grant immediate redress (without being trammelled by legal technicalities) in cases of flagrant injustice by inferior tribunals. (It must, however, be said in fairness to the magistrates that the law in regard to this matter was anything but clear.) That the Judges held this view of their powers and jurisdiction is clear from the use by them in their Opinion of 30 September 1828 of the phrase, 'the Court by virtue of its superintending authority over inferior jurisdiction of the Colony'.[50]

The Judges expressly stated their considered opinion of the role of the Supreme Court in relation to the magistrates in *R.* v. *Rossi and ors.*[51] (proceedings which arose out of the trial of Edward Smith Hall, editor of the *Monitor*[52]). On 1 July 1829 the unanimous judgment of the Supreme Court (Forbes C.J., John Stephen and Dowling JJ.) was delivered by Dowling J., who in considering the conduct of the respondent magistrates said, 'One of the incidents of our jurisdiction is a supreme and paramount control over inferior Magistrates'.[53]

An arresting example of the type of outrageously improper conduct in magistrates with which the Supreme Court had to concern itself in early years was the celebrated case of *Broadbear* v. *Macarthur and ors.*[54]. This case arose out of problems relating to the female Orphan School at Parramatta and the claims of Archdeacon Thomas Hobbes Scott, erstwhile wine merchant and kinsman of Mr Commissioner Bigge. As a result of criticism by Archdeacon Scott, William Walker, the master of the Orphan School, resigned and intimated to the government that two of the staff of three, Richard and Mary Broadbear, whom he had engaged and whom he regarded as his servants, would be leaving at the same time. This they did, to the very great inconvenience of the school. Thereupon the Archdeacon, in his capacity as King's Visitor, took out a summons in the Magistrates' Court at Parramatta against the Broadbears for breaching their contract of employment and leaving 125 young children, fifteen of them babies, in the manner that they had. The Broadbears were brought before the Bench on 6 April 1826.

Normally the Parramatta Bench was then constituted by Dr John Harris, William Lawson, John Palmer and George T. Palmer. When the Broadbears' case was called on three other Justices of the Peace were sitting with the regular magistrates. They were James Macarthur, his brother-in-law Dr James Bowman, and Lachlan MacAlister, who had a sheep run adjoining Macarthur's in the Picton district. The Broadbears were duly convicted by this packed Bench, and were sentenced to three months' imprisonment in Parramatta Gaol for their 'gross inhumanity'. Each of the seven magistrates signed the warrant for their committal. By an appropriate writ, the conviction was brought before the Supreme Court. On 9 June 1826 Forbes quashed the convictions.[55]

The Broadbears next brought separate actions for false imprisonment against the seven magistrates who had sat upon the Parramatta Bench. These actions were heard by Mr Justice John Stephen sitting with two assessors.[56] William Charles Wentworth appeared for the plaintiffs and, in the course of his address, said 'how astonishing, that they should have all dropped, as it were, from the clouds on that particular occasion'.[57] The Court found for the plaintiffs and Mrs Broadbear was awarded £210 whilst her husband received a

verdict of £80. The defendant magistrates then applied to the Supreme Court for a new trial. This application was refused, Chief Justice Forbes later observing :

> It is remarkable that this should be one of only two cases which have occurred since the opening of the Supreme Court, of gentlemen filling the office of ministers of justice, or conducting themselves, as to leave it open to inference that they have availed themselves of their office to gratify their personal feelings; and it is no less remarkable that both these instances should occur in the same family; the first was the memorable presentment of the grand jury at Parramatta, of which Hannibal Macarthur was foreman; and the next is the case before us.[58]

To a modern lawyer it appears extraordinary that until as late as 1831 it was a matter of doubt whether a defendant charged before magistrates, whether constituting Quarter Sessions or sitting out of sessions, was not, as of right, entitled to legal representation. It is even more extraordinary that in 1831 the Court of King's Bench in *Collier* v. *Hicks*[59] resolved that doubt by holding that the defendant was not so entitled, the Lord Chief Justice, Lord Tenterden, stating that :

> In general the ends of justice will be sufficiently well attained in summary proceedings before Justices by hearing only the parties themselves, and their evidence, without that nicety of discussion and subtlety of argument which are likely to be introduced by persons more accustomed to legal questions.[60]

Obviously the noble lord was unacquainted with the manner in which justice was being dispensed in the country districts of New South Wales at that time. Even in England the decision was regarded as being so out of keeping with the social and legal development of the period that its effect was specifically negated by the government which, in 1836, secured the enactment of 6 and 7 Wm. IV, c.114, the *Prisoners' Counsel Act* of 1836, section 2 of which Act provided :

> that in all cases of such conviction persons accused shall be allowed to make their full answer and defence, and to have all witnesses examined and cross-examined by Counsel. ...

On 5 September 1836 the Secretary of State, Lord Glenelg, directed the Governor Sir Richard Bourke to take appropriate measures for extending to New South Wales the provisions of this Act.[61] Such a clear intimation of opinion by the British government did not however carry sufficient authority for some of the country magistrates in the colony. In 1837 for example (before the appropriate colonial legislation had come into effect), the Justices of Bathurst, assembled in Quarter Sessions, purported to promulgate a rule intended to prevent attorneys from being heard before that Court. Since, by section 19 of 9 Geo. IV., c.83, the rule-making power in respect of Courts of Quarter Sessions was vested, not in those Courts themselves, but in the Governor, an application was swiftly made to the Supreme Court for the issue of a mandamus. The Bathurst Justices, realizing, no doubt, the impropriety of their conduct, did not oppose the making of the order.[62] But other country magistrates were not to be so easily deterred, and insisted that they had the right to grant audience to or withhold it from legal

representatives, who were usually solicitors, barristers rarely appearing outside Sydney until the inauguration of the circuit sittings of the Supreme Court in 1840.[63] In 1839 Mr John Dillon, a solicitor, was refused audience before the magistrate at Port Macquarie and, as a consequence, he sought mandamus from the Supreme Court. But, there being no appearance for him on the return of the order nisi, the matter was struck out.[64]

Not long afterwards the same problem squarely confronted the Supreme Court in *Ex parte Nichols*.[65] Major Henry Colden Antill, Police Magistrate at Stone Quarry (in the Picton District), in other regards a fair-minded and reasonably competent magistrate, refused to allow Mr G. R. Nichols, a solicitor, to conduct the defence before him of one Charles Morris. However, Antill did, at least, adjourn the case until the opinion of the Supreme Court could be obtained on the point. Nichols thereupon sought a writ of mandamus from the Supreme Court requiring Major Antill to allow him to conduct the defence of Morris. The application was heard by Dowling C.J., Willis and Alfred Stephen JJ. in October 1839. All three Judges (albeit for differing reasons) agreed that the mandamus should issue.[66]

An example of the manner in which some of the magistrates conducted their judicial proceedings came to the notice of the Supreme Court (Dowling C.J., Burton and Alfred Stephen JJ.) on 18 April 1844 in *Arnold* v. *Johnston*.[67] That was a civil action for assault and imprisonment brought against a magistrate, Major Johnston, before whom Arnold had appeared on a charge relating to stolen goods, which charge was subsequently dismissed. The jury awarded Arnold the quite considerable verdict of £150, and although this verdict was set aside because of the non-compliance with the requirements relating to notice, provided by 24 Geo. II, c.22, Burton was severely critical of Johnston's conduct

> in allowing the plaintiff to remain twelve hours in the lock-up, before he went into the examination, and his subsequent refusal to give bail, or to send to a second magistrate for that purpose, which was to say the least of it, very improper. It was not because a prisoner was brought in a little while after the usual hour for Bench business that he was to be detained in custody without a hearing until the business-hour the next day, and [His Honour] hoped to see the very wholesome practice of the English Magistracy, who disposed of cases with as little delay as possible as they were brought in, adopted in the Colony more generally. The conduct of the constable, who thought fit upon his own responsibility to put handcuffs upon the Defendant, was unjustifiable in the extreme, and a person capable of doing so, was very unfit to retain an office of that nature. In refusing to take measures for admitting the Plaintiff to bail, Major Johnston had likewise acted very harshly, as even supposing a case to have been made out, the offence charged was undoubtedly such a one as admitted of bail being given; but in the present instance, there was not a tittle of evidence to substantiate the charge which had been brought against the Plaintiff, for even assuming that the property had been stolen, still there was not a shadow of proof that the Plaintiff could have had any knowledge of it.[68]

In April 1844 the Supreme Court (Dowling C.J., Burton and Alfred Stephen JJ.) in the celebrated case of *R.* v.

Hodges[69] considered the nature and history of the supervisory control exercised by the Supreme Court over inferior tribunals, in particular, over Courts of Quarter Sessions. In the course of the Supreme Court's judgments on the preliminary question as to whether certiorari was the appropriate procedure whereby the matter could be brought within the cognizance of the Supreme Court, Dowling said :

> In the absence of any express authority fettering the salutary control which this Court ought to exercise over the proceedings of inferior Courts of this Colony, I do not see how we can resist the present motion. The Court has no desire to claim to itself a jurisdiction which might interfere with the fair and legitimate discharge of the functions of such Courts, but living in a remote English Colony, this Court is bound not to abridge the rights of Her Majesty's subjects, in having the mode in which the law is administered in subordinate jurisdiction, tested by the principles of English jurisprudence. It is possible, though I persuade myself utterly improbable, that in such jurisdiction grievous errors in fact might be committed, even in violation of the first principles of natural justice; yet if this Court were not open to afford a speedy remedy, public justice might be brought into contempt.
>
> It may be that the wretched men whose interests are conserved in the present application, may have been righteously convicted on the merits of their case, but if there be any well-founded objection to the legality of their conviction, this Court cannot deny them any remedy which the law will afford. We cannot look to the convenience or inconvenience to which this, as a precedent, may, be supposed to lead, but are bound to discharge the functions it committed to us by expounding and upholding those principles of justice which are the best safeguard of society.[70]

The nature and history of the Courts of Quarter Sessions, and the jurisdiction of justices out of sessions occupied the consideration of the Supreme Court (Stephen C.J., Dickinson and Therry JJ.) in June 1847 in *R.* v. *Windeyer,*[71] which came before the Supreme Court on an application for mandamus. In that case it was contended, *inter alia,* that the form of the Commission of the Peace was defective, being in a form different from the ancient form used in England. But this argument found little favour with the Court, Stephen C.J. saying :

> It is, indeed, a great error to suppose, that every doctrine of every kind established for a settled and ancient kingdom is to be applied, under all possible circumstances, to things and persons in new and distant dependencies. In this Colony, the erection of Courts of Quarter Sessions was provided for; but with a new and unprecedented jurisdiction, and an equally novel species of trial. To adapt the power given, to the exercise of that jurisdiction, and the working of that mode of trial, a variation from the English form became, as we apprehend, unavoidable.[72]

A most extraordinary set of facts was revealed in *R.* v. *Marrington,*[73] concerning the ways in which some magistrates exercised their judicial functions, when that case came on appeal before the Supreme Court (Stephen C.J., Dickinson and Therry JJ.) in July 1850. Marrington was indicted at Quarter Sessions on a charge of nuisance. The trial lasted two days, but the magistrate, besides the Chairman of the Quarter Sessions, who presided at the commencement of the trial, did not remain on the Bench throughout, but on the contrary three or four different magistrates sat for a time during the trial. When the

verdict was given and sentence passed, the Chairman was the only magistrate on the Bench, although he stated that the absent magistrate (originally with him) had concurred, in the event of a verdict of guilty being found, that the fine should be £50. The absent magistrate, however, had not heard the recommendation to mercy accompanying the verdict of the jury.

Such outrageously improper conduct disclosed a total lack of understanding on the part of both the Chairman of Quarter Sessions and his fellow magistrates as to fundamental principles of justices and judicial propriety. The Chairman of the Quarter Sessions even had the temerity to attempt to support the conviction. The able and fair-minded Dickinson[74] exercised considerable restraint of language when, in delivering the judgment of the Court he said:

> The Statute clearly confers jurisdiction on two magistrates only; and it seems to us as unreasonable to hold that a prisoner is lawfully under trial because two are present at the verdict, although not the same two who were present at any former portion of the case, or because two are present on the second day of the trial who were not present on the first day of the same trial, as it would be to hold that one Judge of this Court, trying a man for murder, might abandon his post on the second day, or for the latter half of one day to a colleague, who should eventually be succeeded by a third, by whom, in the absence of the others, the case should be summed up, and the prisoner condemned.[75]

In such cases as these and in many others the Judges of the Supreme Court exercised a very necessary degree of control over the official conduct of the magistrates of the colony. But of course, for every magisterial decision that was challenged before the Supreme Court, there were countless similar decisions that went unchallenged. Although the control that was thus exercised by the Supreme Court in proceedings for one or other of the prerogative writs or of habeas corpus constituted, in effect, an appellate jurisdiction in respect of decisions of magistrates, the Judges of the Supreme Court adhered strictly to the principle that the Supreme Court was not a court of appeal from judgments of Courts of Petty Sessions.

This principle was expressly enunciated in *Ex parte Weinholt*[76] an application for a rule nisi for a writ in the nature of a writ of mandamus, which was heard by the Supreme Court (Stephen C.J., Dickinson and Therry JJ.) on 11 December 1851. Weinholt had been the defendant in a small debts action heard by two Justices of the Peace at Warwick (at that time still part of New South Wales). The Justices refused to hear Weinholt in answer to the claim and gave judgment to the plaintiff for nine pounds nineteen shillings. The Chief Justice, Sir Alfred Stephen, drew a distinction between a judicial tribunal (such as a Court of Petty Sessions) acting within its jurisdiction, even if its decision was entirely unjust and absolutely wrong, and such a tribunal acting beyond its jurisdiction. In the former case the Supreme Court had no power to interfere.

An extension of this general rule that the Supreme Court was not a court of appeal from decisions of Courts of Petty Sessions was embodied in section 37 of 10 Vic., No. 10 the *Small Debts Recovery Act* of 1846, which provided that all orders made by Courts of Petty Session 'shall be final and conclusive to all intents and purposes whatsoever'.

There were occasions, apart from the judicial pronouncements from the Bench, when the Judges of the Supreme Court had opportunities to express their opinions of the manner in which justice was being administered at its lowest level in the colony.

On 4 January 1834 the Judges (Forbes, Dowling and Burton) reported to the Governor on the necessity for the reform of criminal justice in the colony.[77] They complained of faulty preparations of cases for trial, lack of due investigation into the alleged offence, trivial cases being sent for trial before the Supreme Court, instead of being tried by the magistrates summarily, or by magistrates assembled at Quarter Sessions.[78] The Judges listed eight causes of these problems, and made recommendations for their solution. After recommending the establishment of circuit sittings of the Supreme Court the Judges went on to recommend the appointment of

> a Stipendiary Magistrate in each district, possessing the requisite qualifications, who should unite the duties of Police Magistrate and Chairman of Quarter Sessions, and who should hold a Court as often as necessary at one or more convenient places within the district [and, further, the appointment of] a professional person as Clerk to the Magistrates in each district.[79]

It is interesting to note that one of the recommendations made by the Judges was that the Clerk to the magistrates in each district should communicate with the Attorney-General.[80] In June 1829 the Secretary of State, Sir George Murray, had specifically directed Governor Darling that no magistrate should communicate directly with the Attorney-General except through the Governor or the Colonial Secretary :

> The necessity of obtaining your previous sanction to every such enquiry will prevent the multiplication of unnecessary and frivolous applications, by which the Magistrates might otherwise seek to relieve themselves from responsibility, and increase, to an indefinite extent, the labour of the Attorney General's Office.[81]

Despite the 1834 recommendations of the Judges, most of the problems which they had listed continued for many years. In 1842, for instance, the patience of Mr Justice Burton was pressed to such an extent that when counsel appearing before him complained that depositions taken by the magistrate at the committal proceedings were so badly written that they could not be easily read, His Honour said that if he too should find them illegible he would impose a fine upon the magistrate before whom the deposition had been taken.[82]

In addition, instances of magistrates being held personally liable for acting in excess of their jurisdiction were by no means

unknown in the colony. In *R.* v. *Rossi and ors.*[83] in 1829, the Supreme Court had been severely critical of the conduct of the Sydney Bench (consisting of Rossi, the Police Magistrate, George Bunn, Edward Wollstonecraft and Warren Jemmett Brown) in convicting E. S. Hall in the face of a binding decision and specific direction of the Supreme Court to the contrary dealing with the legal point involved. There had been so much obliquity in the conduct of the magistrates that the Judges dismissed an application on behalf of Hall to exhibit a criminal information against them only upon the magistrates paying the costs of the application.[84] In delivering the unanimous judgment of the Court, Dowling J. said :

> It is the conduct of the magistrates in the instances thus pointed out, that induces us to think that there was some obliquity in the proceeding, inconsistent with that straight-forward, upright and impartial administration of justice, which the public have a right to expect at their hands, and, this Court is bound on all occasions to enforce.[85]

In 1835 Captain Alured Tasker Faunce, the youthful Police Magistrate at Brisbane Water, had, on insubstantial evidence, caused three leading citizens of that district, two of them his fellow magistrates, to be imprisoned in irons for alleged complicity in a cattle stealing offence. This rash behaviour resulted in very substantial damages of £1500 being awarded in the Supreme Court against Faunce.[86]

Ten years later, in August 1846, a somewhat smaller verdict, £30, was awarded to the plaintiff in *Moore* v. *Furlong*,[87] an action in trespass brought against a magistrate who had wrongly issued a document purporting to be a warrant for seizure of certain goods of the plaintiff, and the constable who had effected the seizure. In dismissing a motion for a new trial in July 1847, Chief Justice Alfred Stephen, delivering the unanimous judgment of the Supreme Court (Stephen C.J., Dickinson and Therry JJ.), observed:

> as to the damages being excessive, doubtless under the circumstances it was a case of hardship on both of the defendants, especially as their intentions were laudable, but yet they might have exercised a little more caution in their proceedings.[88]

Only three months later the Supreme Court was again required to consider the conduct of a magistrate in relation to seizure of goods. In *Charman* v. *Flanagan*[89] the defendant magistrate, entirely without jurisdiction in the particular circumstances, had issued a document purporting to be a warrant authorizing the seizure of certain goods. Stephen C.J. in delivering the judgment of the Court pointed out that this was not a case merely of excess of jurisdiction, but was a case where the magistrate had no jurisdiction whatever. Accordingly, a belief by the magistrate (without any reasonable grounds to support it) was not sufficient to entitle him to the appropriate statutory defence in an action brought against him by the owner of the goods.

The foregoing decisions are only examples of what was a considerable part of the business of the Supreme Court, which consisted in reviewing decisions of magistrates against whom could frequently be laid the charge of remissness in the discharge of their functions, be it from whatever cause or motive. There were many instances where the decision of the Supreme Court resulted in magistrates being held personally liable in damages, usually in civil actions for trespass, as a result of their official conduct.

The procedures available whereby summary decisions of magistrates could be reviewed by the Supreme Court, and the numerous instances of these procedures being availed of by dissatified defendants, reveal how necessary it was to the due administration of justice that the very considerable powers of the magistrates in the colony during the second quarter of the nineteenth century should not be permitted to be final and beyond recall.

At the time when New South Wales was founded the concept of justice at its lowest level being administered by unpaid Justices of the Peace who devoted only a limited part of their time to this activity, had developed in England over a period of more than four centuries. In that country, for historical, sociological and geographical reasons, such a system worked satisfactorily.

When arrangements for the administration of justice in the proposed settlement in New South Wales were under contemplation, it was assumed without question that the same system should obtain there. No consideration whatever was given to the question whether the system could work equally satisfactorily in a totally different context—sixteen thousand miles away, in a colony founded as a penal settlement, with a tiny population (composed at the outset entirely of those who had arrived in custody and those who had arrived as their custodians), on the edge of a vast and remote continent.

So long as New South Wales remained essentially a penal settlement and the Justices of the Peace were officials in the administration, while those appearing before them were convicts, the system worked adequately. But once free settlers began to arrive and the number and proportion of emancipists began to increase, the unsuitability of the system to the circumstances of the colony commenced to manifest itself.

Persons unfitted by education, intelligence, personality or social background were, for want of any better being available, appointed Justices of the Peace, and, especially in the country districts, were placed in positions of almost unlimited power over convicts and men on ticket of leave—a situation which was open to grave abuse. Not only were many of the honorary magistrates totally unqualified for the office, but the standard of justice at its lowest level was further reduced by the completely

inadequate physical surroundings in which it was usually required to be administered, a reflection of the lack of interest both in Sydney and in London regarding the entire subject.

Neither at the foundation of the colony nor at any time thereafter was the slightest consideration given to the fundamental question of how justice at its lowest level should be administered. That the administration of justice in New South Wales should proceed on a stratified, later a hierarchical, system has never been questioned. But even within the wide limitations of such an arrangement, the question was never considered (not even at such logical opportunities as the Bigge Inquiry or the preparation of the *New South Wales Bill*), whether the concept of Justices of the Peace was appropriate to the colony.

Throughout the period from the foundation of New South Wales until 1850 it was assumed without question that the only way in which justice could be administered at its lowest level was by Justices of the Peace. The experience of the first sixty-three years of the colony reveals that the administration of justice at its lowest level was unsatisfactory, and was unsuited to the circumstances of the colony.

If it worked adequately at certain periods and in certain areas, this was more as a result of the personality or conscientiousness of individual magistrates, rather than of any elements inherent in the system itself. That the ends of justice were not more frequently defeated in proceedings at the lowest level was due to the availability, from 1824, of procedures whereby the decisions of magistrates could be reviewed by superior judicial tribunals in the colony, procedures which were very necessary and frequently used.

By exercising this vital and essential control over the enormities, excesses and injustices perpetrated by the magistracy in the second quarter of the nineteenth century, the Supreme Court of New South Wales promoted in no slight degree the development of Australia from a penal settlement into a nation.

REFERENCES

1. This paper is largely based upon John Kennedy McLaughlin, "The Magistracy in New South Wales, 1788-1850, University of Sydney, LL.M. thesis, 1973, Chapter 14. The author is particularly indebted to J. M. Bennett, M.A., LL.M., F.R.A.H.S., for his help, guidance and encouragement.
2. Magistrate (from the latin, *magistratus*, denoting the holder of an elective office primarily of political and executive, rather than of legal, significance) is the generic term, encompassing not only Justice of the Peace, but also such later statutory offices as Stipendiary Magistrate, Police Magistrate and Special Magistrate. (As to the terms Stipendiary Magistrate and Police Magistrate, see T. P. Fry, *Australian Courts and Administrative Tribunals*, University of Queensland, Brisbane, 1946, 96.
3. These statutes include 34 Ed. III. c.1 (1361) (known as the *Justices of the Peace Act*); 12 Ric. II, c. 10 (1388); 14 Ric. II, c. II (1390); 5 Hen. IV, c. 10 (1403-1404).

4. Blackstone, *Commentaries*, I, IX.
5. See Alice Hazel King, Police Organisation and Administration in the Middle District of New South Wales, 1825-1851, University of Sydney, M.A., thesis, 1956, Part I; Gilbert Armitage, *History of the Bow Street Runners, 1727-1829*, London, 1932; P. Fitzgerald, *Chronicles of Bow Street Police-Office*, 1888; John Moylan, *Scotland Yard and the Metropolitan Police*, London, 1934.
6. Generally, for the history and development of the office of Justice of the Peace, see Blackstone, *Commentaries*, IV, 20, 1, 9; Halsbury, *Laws of England*, 3 ed. (1958), Vol. 25, 103-105; Sir William Holdsworth, *A History of English Law*, Vol. 1, 285 f; F. W. Maitland, *Constitutional History of England*, Cambridge University Press, 1963, 206-9, 231-3, 493-9; Esther Moir, *The Justice of the Peace*, Penguin Books, 1969; Harold Potter, *Historical Introduction to English Law*, 4 ed., 227-230; Sidney and Beatrice Webb, *English Local Government; The Parish and the County*, Longmans, 1906; W. J. V. Windeyer, *Lectures on Legal History*, 2 ed. (rev.), Sydney, 1957.
7. The chief constitutional instruments upon which the foundations of the settlement was based were :
   Commissions issued to Arthur Phillip. Commission dated 12 October 1786, *H.R.A.*, Ser. i, Vol. I, p. 1; Commission dated 2 April, 1787, ibid., p. 2.
   Letters Patent dated 2 April 1787, *H.R.A.*, Ser. iv, Vol. I, 6.
   Instructions to Governor Phillip dated 25 April 1787, *H.R.A.*, i, I, p. 9.
   Act 27 Geo. III, c. 2 (1787), *H.R.A.*, iv, I, p. 3.
   The forms used in the Commissions and Instructions were not newly created specially for the settlement in New South Wales. Similar Commissions and Instructions were being regularly issued to other Colonial Governors and Governors-General at the same period.
   Phillip's second Commission was modelled upon the Letters Patent formerly issued to Governors in the American colonies, the first being to Sir Walter Raleigh in 1584. That part of Phillip's second Commission which conferred upon him power to levy armed forces for defence and to redress pirates and rebels followed the form and phraseology used in the Letters Patent whereby Sir Ferdinando Georges was constituted Governor of Maine in 1639. (*H.R.A.* iv, I, p. 903 Note 1.) See also W. J. V. Windeyer, 'Responsible Government: Highlights, Sidelights and Reflections', *J.R.A.H.S.*, Vol. 42, Pt 6, 1956, 'But here were plenty of precedents for the Governor's Commissions and Instructions. Despite the loss of the North American colonies, Britain still had many colonies for which Commissions were being regularly issued to Governors or Governors-General. We can only understand Phillip's Commissions and Instructions if we read them as variants of the standard forms in use at the time, and if we look at the history of those forms, tracing the phrases of the Commissions back to the days of the American colonies, or back to the commission issued to Colonel D'Oyley [sic] as Governor of Jamaica by Cromwell and confirmed by Charles II in 1661'. (Page 264 and works there cited.) As to the commission granted to Colonel Edward D'Oiley on 8 February 1660 as Governor of Jamaica, see the joint opinion of the Attorney- General, Sir Philip Yorke, and the Solicitor-General, Sir Clement Wearg, 18 May 1724, George Chalmers, *Opinions of Eminent Lawyers*, 2 ed. London, 1858, 215 at 217. A.C.V. Melbourne contends that 'it is probable that, since the days of Gilbert and Raleigh, no one had sailed from England armed with such an extensive delegation of authority', *Early Constitutional Development in Australia*, p. 6. This contention can be supported, if at all, only in so far as it related to the considerable number of individual and specific matters upon which Phillip received detailed and particular directions. The scope and ambit of Phillip's Commissions and Instructions were clearly based upon the precedents that had been used over the preceding three centuries in relation to the American and West Indian colonies (see Windeyer, op. cit., 257, 264.) See also C. H. Currey, *The Brothers Bent*, Sydney University Press, 1968, 10-13, and works there cited.

8. See W. J. V. Windeyer, '"A Birthright and Inheritance", The Establishment of the Rule of Law in Australia', (1962) *Tasmanian University Law Review*, Vol. I, p. 635.
9. *H.R.A.*, iv, I, 6.
10. See Enid Campbell, 'Prerogative Rule in New South Wales, 1788-1823' (1964) *J.R.A.H.S.*, Vol. 50, Pt 3, 167-8; Windeyer, '"*A Birthright and* an Inheritance," The Establishment of the Rule of Law in Australia', cit. supra, 646.
11. See annotation 7 (supra).
12. *H.R.A.* iv, I, 12.
13. See George Chalmers, op. cit., pp. 218-221, 536-540.
14. *H.R.A.* i, I, 4.
15. See Chalmers, op. cit., pp. 221, 536-540.
16. See joint opinion of the Attorney-General, Sir Philip Yorke, and the Solicitor-General, Sir Clement Wearg, 18 May 1724, Chalmers, op. cit., p. 218.
17. See J. M. Bennett, 'The Status and Authority of the Deputy Judge-Advocate of New South Wales' (1958), 2 *Sydney Law Review*, p. 501.
18. *H.R.A.* iv, I, pp. 11, 12 Cf. the appointments of D'Oiley and members of his Council as Justices of the Peace in Jamaica in 1660, Chalmers, op. cit., p. 218.
19. See, for example, Chalmers, op. cit., pp. 218, 221, 472 (as to Jamaica), 462 (as to Bermuda) 476-478 (as to South Carolina), 536-540 (as to Newfoundland).
20. Final Report of Committee on Police and Gaols, *L.C. V. & P.*, 1835, 28; Gipps to Russell, 14 September 1841, *H.R.A.*, i, XXI, 507; Sir Roger Therry, *Reminiscences of Thirty Years Residence in New South Wales and Victoria*, 2 ed., London, 1863. Generally, as to the administration of justice in the country districts, see J. M. Bennett, 'Early Days of the Law in Country Districts' (1972), 46, *Australian Law Journal*, 4,578.
21. As to the functions of the country magistrates in relation to the police, see King, op. cit., Chapter 11, pp. 257f.
22. Responsibility for holding regular musters of convicts had been the duty of magistrates in country districts from very early times; see King to Hunter, 6 July 1800, *H.R.A.*, i, II, 657; Proclamation of Macquarie, *Sydney Gazette*, 10 September 1814; J. T. Bigge, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales*, 78; Government and General Order 15 August 1822, *Sydney Gazette*, 15 August 1822; Minutes of Evidence of Committee on Police and Gaols, *L.C.V. & P.*, 1839, Vol. 2, evidence of H. F. Gisborne, 19.
23. As to the role of Forbes in the preparation of the *New South Wales Bill*, see C. H. Currey, *Sir Francis Forbes*, Sydney, 1968, pp. 21-50.
24. Points for consideration in proposed *New South Wales Bill*, by F. Forbes, 1 January 1823, *H.R.A.*, iv, I, 417.
25. Even in the unusual settlement of Newfoundland (not until 1824 constituted a colony), with its unique form of administration, where from 1817 until 1822 Forbes had held office as Chief Justice, the office of Justice of the Peace had long been an integral part of the judicial arrangements (Opinion of Sir Philip Yorke, Attorney-General, 27 April 1830, in Chalmers, op. cit., p. 536, Opinion of Sir Philip Yorke, Attorney-General, 29 December, 1730, ibid., p. 538. See Currey, op. cit., pp. 11-13.
26. See, for example, Chalmers, op. cit., pp. 218, 221, 472 (as to Jamaica), p. 462 (as to Bermuda).
27. Brisbane to Earl Bathurst, 6 September 1882, *H.R.A.*, i, X, 744; Stephen to Wilmot Horton, 2 September, 1824, *H.R.A.* iv, I, 556. See Currey, op. cit., Chapter vi; C. H. Currey, 'Chapters on the Legal History of New South Wales', LL.D. thesis, University of Sydney, not dated [1929].
28. *Sydney Gazette*, 17 November 1825.
29. See, for example, *Australian*, 1 October 1840.
30. Therry, op. cit., 47.
31. Ibid., 46.
32. Ibid., 167.

33. James Mudie, *The Felonry of New South Wales* (1837) (ed. Walter Stone, Lansdowne Press, Melbourne, 1964), p. 127. The anonymous pamphlet, *Observations on the 'Hole and Corner Petition' in a Letter to the Right Honourable Edward G. Stanley Principal Secretary of state for the Colonial Department*, by an Unpaid Magistrate (Sydney, 1834) which was almost certainly the work of Therry, provoked Mudie into making some of his criticisms against the Irish lawyer.
34. Mudie, op. cit., especially Chapter XI; Therry, op. cit., 164-178.
35. Select Committee of Legislative Assembly on colonial magistracy, Minutes of Evidence, evidence of Sir Roger Therry (1858) *L.A. V. & P.*, Vol. 2, 105 (this Committee is hereinafter referred to as '1858 Committee').
36. See, for example, Alexander Harris, *Settlers and Convicts*, London, 1847, pp. 19-28, 138-154; *Sydney Gazette*, 17 June 1824 (letter from A Settler, Coal River, 7 June 1824), 1 September 1825, 17 November 1825.
37. *Atlas*, 22 March 1845.
38. Ibid., Cf. *Australian*, 1 October 1840.
39. 1858 Committee. Minutes of Evidence, evidence of Sir John Dickinson (1858) *L.A.V. & P.*, Vol. 2, 129.
40. *H.R.A.*, iv, I, 509.
41. Phillip's Second Commission, 2 April 1787, *H.R.A.*, i, I, 4.
42. See, generally J. M. Bennett, *A History of the Supreme Court of New South Wales*, Sydney, 1974, especially Chapter II.
43. *Sydney Gazette*, 21 October 1824.
44. *Sydney Gazette*, 13 January 1825.
45. Bourke to Goderich, 30 October 1832, *H.R.A.*, i, XVI, 779.
46. Currey states that Forbes referred the matter to the Attorney-General for report before the Judges reached their decision thereon (Currey, *Sir Francis Forbes*, 315). But the only authority he cites in regard to the incident is 'Dowling, *Letters and Opinions*, Vol. I, 137 et seq.', which, however, makes no reference to any participation by the Attorney-General in the matter. Currey is incorrect when he states that 'on 30th August 1828 the Judges announced their decision'. (Currey, loc. cit.) The Opinion of the Court contained in Dowling's letter book is clearly dated 30 September 1828 (Sir James Dowling, Letters and Opinions, Vol. I, p. 137, N.S.W. Archives, 2/3470.)
47. Ibid., pp. 145-146.
48. Circular to the Magistrates, 30 September 1828, Sir James Dowling, Letters and Opinions, Vol. I, 146-147, N.S.W.A., 2/3470.
49. Ibid., 187-188.
50. Ibid., 145.
51. *Sydney Gazette*, 4 July 1829.
52. As to the case *Hall* v. *Hely* and other proceedings arising from the same incidents, see Hall to Murray, 12 March 1829, *H.R.A.*, i, XV; Darling to Murray, 12 April 1830, ibid., 418; Darling to Murray 2 August 1830, ibid., 648; Darling to Murray, 4 October 1830, ibid., 756. See also Currey, *Sir Francis Forbes*, 345.
53. *Sydney Gazette*, 4 July 1829.
54. *Sydney Gazette*, 29 March 1827; See also Forbes to Wilmot Horton, 22 March 1827, *H.R.A.*, iv, I, 711; Currey, *Sir Francis Forbes;* 181-184.
55. Darling to Bathurst, 24 May 1827, *H.R.A.*, i, XIII, 358-361.
56. Ibid., 325; See also Forbes to Wilmot Horton, 22 March, 1827, *H.R.A.*, iv, I, 711-712.
57. *Sydney Gazette*, 29 March 1827.
58. Forbes to Wilmot Horton, 22 March 1827, *H.R.A.*, iv, I, 712-3.
59. (1831) 2 B. & Ad. 663; 109 E.R. 1290.
60. (1831) 2 B. & Ad. 663 at 670; 109 E.R. 1290 at 1292.
61. Glenelg to Bourke, 5 September 1836, *H.R.A.*, i, XVIII, 526.
62. *Ex parte Nichols* (1839), per Dowling C.J., at 124, J. Gordon Legge (ed.), *A Selection of Supreme Court Cases in N.S.W. from 1825 to 1862, Sydney*, 1896, I, 123.
63. J. M. Bennett (ed.), *A History of the New South Wales Bar*, Sydney, 1969, 42, 69-70.
64. *Ex parte Nichols* (1839), 1 Legge 123, per Dowling C.J.

65. *Sydney Herald*, 30 October 1, 13 November 1839; 1 Legge 123.
66. Six years later the same Mr Nichols was refused audience by the Parramatta Branch, *Atlas*, 25 January 1845.
67. *Sydney Morning Herald*, 19 April 1844; 1 Legge 198.
68. Ibid., 199.
69. *Sydney Morning Herald*, 27, 30 April, 3, 4, 14, 15, 22, 24 May 1844; 1 Legge 201.
70. Ibid., 206.
71. *Sydney Morning Herald*, 16 April, 14 June 1847; 1 Legge 366.
72. Ibid., 370.
73. *Sydney Morning Herald*, 27 July, 3, 10 October 1850; 1 Legge 643.
74. J. M. Bennett and J. K. McLaughlin, 'Sir John Dickinson: Almost a Chief Justice' (1970), *J.R.A.H.S.*, Vol. 56, 315.
75. 1 Legge 643 at 644-645.
76. *Sydney Morning Herald*, 13 December 1851.
77. Judges to Bourke, 4 January 1834, *H.R.A.*, i, XVII, 360.
78. Ibid., 361.
79. Ibid., 363-364.
80. Ibid., 363.
81. Murray to Darling, 5 June 1829, ibid., XV, 10.
82. *Sydney Herald*, 14 July 1842.
83. *Sydney Gazette*, 4 July 1829.
84. Ibid.
85. Ibid.
86. Errol Lea-Scarlett, *Queanbeyan*, Queanbeyan, 1968, pp. 27-28; Bennett, 'Early Days of the Law in Country Districts' (1972) 46 *A.L.J.*, 578 at 579-580.
87. *Sydney Morning Herald*, 9, 13 July 1847; 1 Legge 397.
88. Ibid., 398.
89. *Sydney Morning Herald*, 12 October 1847.

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