

THE ROLE OF THE LAW IN THE FOUNDATION AND
SETTLEMENT OF THE COLONY OF NEW SOUTH WALES
PRIOR TO 1828, IN RELATION TO THE ABORIGINAL
INHABITANTS

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P R E F A C E

For Australian legal historians the early years of the colony of New South Wales have been a fruitful field of research and interest. Extensive treatments of the foundation of the law and constitution include works of A.C.V. Melbourne (Early Constitutional Development in Australia), Dr. C.H. Currey ("Chapters on the Legal History of New South Wales, 1788-1863"), and Dr. S.H.Z. Woinarski ("The History of Legal Institutions in Victoria"), together with the recent publications of Professors A.C. Castles (An Introduction to Australian Legal History), and L.A. Whitfield (Founders of the Law in Australia). More specialised treatments of particular topics include those in other works of Dr. Currey (The Brothers Bent, Sir Francis Forbes), and works by Mr. J.M. Bennett (A History of the Supreme Court of New South Wales, "The Vice-Admiralty Court of New South Wales", "Equity Law in Colonial New South Wales", A History of the New South Wales Bar, etc.), Mr. K.G. Allars ("The Development of the Legal Profession in New South Wales until 1850"), Dr. H.V. Evatt (The Rum Rebellion), Mr. J. Ritchie (Punishment and Profit), Mr. J.K. McLaughlin ("The Magistracy in New South Wales 1788-1850"), and Professor P.N. Grabosky ("Public Order in Sydney: Crime, Dissent and Official Reaction, 1788 to 1973"). In the study of the administration of Police procedure there is the thesis of Dr. A.H. King ("Police Organisation and Administration in the Middle District of New South Wales, 1825-1851").

In addition to the above mentioned works there

are numerous articles in learned journals by the same authors and others, such as Professor E. Campbell and Sir Victor Windeyer.

It is not intended that this thesis retrace ground already so thoroughly explored. The purpose of this thesis is two-fold: to consider the degree to which certain legal doctrines and practices developed or adopted in other British colonies and in England were applied in Australia in duplication of the manner in which they were applied in their place of origin or development; and to consider the operation of those doctrines and practices in the particular social context of contact between British settlers and Australian Aborigines. Whereas two recent works by Mr. B. Bridges ("Aboriginal and White Relations in New South Wales, 1788-1855") and Mr. C.D. Rowley (The Destruction of Aboriginal Society) have also examined the nature of this contact, the viewpoint of those works was substantially different. In this thesis the official treatment of the aborigines is related both to the experience in other colonies and to the law as it was administered otherwise in the colony throughout the first forty one years of the colony.

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I must acknowledge the helpfulness of the staff of the Library of the Sydney University Law School, the Library of New South Wales and the

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INTRODUCTION

It is unlikely that there was ever a stage during the formative years of the Colony of New South Wales when an adequate appraisal of the application of English law to the Aborigine could have been attempted. The conceptual basis of the two societies' understanding of law, of social and of political organisation were too remote, the necessity of understanding and the will to understand were never generated. Europeans were accustomed to seek certain indices of civilisation and found them lacking in the naked Australian savages: many of the indices existed in fact but in forms so alien that even today they are considered incapable of reconciliation to the common law.¹ This limitation in perception was experienced by the Aborigines in common with other primitive races encountered by European colonising nations.

Other colonial experience was of little assistance. In their relationship with India the British had been obliged to treat native princes as international sovereigns, of a position of equality, until political activity, diplomacy, military action and a coincidental decline in native administration succeeded in supplanting equality by Imperial rule. Holdsworth considered that the problem facing Parliament in its consideration of the India Bill of 1773 was "both new and difficult":

In the first place there was
the difficulty of adapting
British ideas of law and

government to a country possessed of totally different ideas on these matters. This was then and always has been a difficult problem - a problem the difficulty of which has been materially increased in our own day by the wholly false assumption that there is in fact no such problem, and that British ideas of law and government can be transplanted en bloc to a country with a totally different past, and totally different moral and intellectual ideas.²

The problem of adapting British law to Australian conditions was not recognised. Unlike the position in India, the natives were not considered important. In North America the relationship with the Indian tribes was more ambiguous: there existed the possibility of native sovereignty. The difficulties of classification of the Indian tribes being great the task was postponed until its necessity had ceased. In Australia, classification in terms of sovereignty was automatic and negative: at no time was the Aborigine in a position of such economic, political or military importance to require a reassessment of that first determination. Without recognition of his sovereignty the Aboriginal was subject to the municipal law of the colonial power.

As a result of the experiences of European colonising nations International law contained a number of ill-defined concepts relevant to the position of primitive peoples. The municipal law and official policies and practices in the various colonies also reflected the attempts of the colonisers to deal with the issue. The boundaries of the several categories, international law, municipal law, colonial policy, or practical measure, were uncertain although the incidents would vary considerably from category to category. The doctrines were caught in a process of change during which they were in turn introduced into ^{international} ~~municipal~~ law, adopted as official policy, applied on occasions in practice and, finally came to be incorporated in the municipal law of the United States of America and Canada.

In issues which were recognisably those of municipal law, there was nothing within the concepts of English law or English legal experience capable of immediate application in a judicial context to the Aborigine.³ To any contact, the white authorities brought a fabric of formalised responses that denied any effective relationship. Some of the substantive law and procedures were relevant to the condition of the Aborigines but required adaptation; this was, not only a task at which the authorities would hesitate but one, to a class not yet touched by Benthamite controversy, that was largely meaningless.⁴ Fundamental social and religious assumptions ensured that the task remained un contemplated. In America, the similarities in institutions, law and mental

outlook of the settlers and home government had blinded the latter to the need for a reconsideration of their relations.⁵ Although later statements of the principles applying English law to settled colonies stressed that only so much was applied as was "applicable to their own situation and the condition of an infant colony",⁶ there was no recognition of the need for a wholesale adaptation of English law. It was apparent to the colonists that any adaptation must be by the Aborigine : were he capable of intelligence it was certain that he must perceive the obvious advantages of British civilisation.⁷ The denouement merely required time, patience and, perhaps, education.⁸ Adaptation did occur, but not as the result of a conscious considered process, and it was, therefore, imperfect in concept, erratic in practice and subject to considerable variation according to the place, time and personae of application.

The eighteenth century treatment of law as a repository of rights and privileges was far from acknowledging duties towards those so weak as to be incapable of effectively invoking the law's protection as were the Aborigines. In Britain the concepts of equality before the law of the oppressed were the property of only the fashionable radicals: the humanitarian movement had not progressed so far.⁹ The underprivileged of Britain were left undefended by the common law, or worse, were its very victims.¹⁰ Those in whom lay the power to shape and guide the law were subject to the fashionable prejudices

established by orthodox protestantism and pointed by mercantilism, that poverty was, if not itself a crime, then at least evidence of wickedness, immorality or an invincible corruption. Where the infirm of mind or body, English-born child, married woman or pauper could look for no protection there could be none for a remote and unattractive savage, uninterested in British civilisation.

The period selected for this study is that from the foundation of the colony until 1828. The year 1828 has been chosen for two reasons: firstly the following year was the first year of operation of the statute 9 Geo. IV. c. 83, and there was, following that chapter, a greater degree of certainty as to the operation in the colony of English law; secondly the years after 1828 saw the rapid spread of settlement with the squatting era and a consequent complication of the picture of racial contact.

FOOTNOTES.

1. E.g. Milurpum v Nabalco Pty. Ltd. and The Commonwealth of Australia, 1971 F.L.R., p. 1 at pp. 128-133, per Blackburn J. who said at p. 133:

In my opinion, therefore,
there is so little
resemblance between property,
as our law, or what I know
of any other law, understands
that term, and the claims of
the plaintiffs for their
clans, that I must hold that
these claims are not in the
nature of proprietary
interests.

The relationship between Aboriginal and land has been described as one in which the land "owns" the Aboriginal - A.P. Elkin, "Elements of Australian Aboriginal Philosophy", Oceania (December, 1969), Vol. XL, No. 2, p. 85, at pp. 95-8.

2. Holdsworth, op. cit., XI, p. 162. Although Holdsworth considered the attempt to apply in India the English principle of the ministerial responsibility of the servants of the government to the law to have had unfortunate results he believed the eighteenth century statesmen to have been no slaves of a political theory and to have been ready to admit and rectify mistakes. (p. 189).

3. The Aborigines were recognised to be entitled in law to the same protection as any other British subject, but subject to the same judicial procedures - in effect limiting the applicable law to the criminal law to be applied to a white transgressor.
4. The difficulty of protecting the civil rights of the Aborigine due to his inability to take an oath appears to have been first raised officially by Forbes C.J. Bannister to Horton, 16 August, 1824, H.R.A., IV, I, pp. 554-5. Bannister's expressed concern was for the application of a recent Act of Parliament that would be inoperative in the absence of native witnesses (n. 250 at p. 952): this may have been a mere device to obtain the concurrence in reform of the British Government.
5. Holdsworth, op.cit., XI, pp. 102-6, 229.
6. Sir William Blackstone, Commentaries on the Laws of England (London, 1770), 4th ed., I, 107.
7. E.g. de Brosses proposals of 1756, see George Mackaness, op. cit., pp. 268-71.
8. E.g. Macquarie to Lord Bathurst, 8 October, 1814, and the Proposal of the Native Institution in Shelley to Macquarie, April 8 and August 20, 1814, H.R.A., I, VIII, pp. 367-373.

9. E.g. the Penal Laws against Catholics were not finally lifted until 1829 (10 Geo. IV, c. 7) and earlier attempts to mitigate their severity met with extreme hostility, the Gordon Riots following the Catholic Relief Act of 1778 (18 Geo. III, c. 60). See S. Maccoby, English Radicalism 1762-1785 (London, 1955), p. 305. Most philanthropists tended to concern themselves with particular issues rather than general philosophies with some exceptions, such as William Goodwin in his Enquiry Concerning Political Justice (edited and abridged by K. Codell Carter), (Oxford, 1971), Book I, Ch. II.

10. E.g. the English peasants during the Parliamentary Enclosures of the eighteenth century - see J.L. & B. Hammond, The Village Labourer (London, 1966), Ch. II: J.L. & B. Hammond, The Town Labourer (London, 1919), Ch. IV.

ABBREVIATIONS USED IN THE THESIS

Arch.	Archives.
A.Y.I.L.	American Yearbook of International Law.
B.T.	Bonwick Transcripts.
B.Y.I.L.	British Yearbook of International Law.
D.L.	Dixon Library.
H.R.A.	Historical Records of Australia.
H.R.N.S.W.	Historical Records of New South Wales.
J.R.A.H.S.	Journal of the Royal Australian Historical Society.
L.Q.R.	Law Quarterly Review.
M.L.	Mitchell Library.
M.L.R.	Modern Law Review.
P.P.	Parliamentary Papers.

PART I

INTERNATIONAL LAW AND COLONIAL PRACTICE

- THE STATUS AND TITLE OF ABORIGINAL TRIBES

CHAPTER IA ROLE FOR INTERNATIONAL LAW

The First Fleet landed in Botany Bay on January 20, 1788, but moved on to establish a settlement in Port Jackson on 26 January. Shortly thereafter a further settlement was established at Norfolk Island on February 19 of that very year. A short pause in the process of expansion followed, then in May 1801 settlement occurred at the mouth of the Hunter River, and in December 1802 King Island in Bass Strait was formally annexed without settlement. The following year three further developments were undertaken: Lieutenant-Colonel David Collins was directed to the recently discovered Port Phillip in January, Lieutenant John Bowen to the river Derwent in May, and Lieutenant-Colonel Paterson to Port Dalrymple in June. The Port Phillip attempt proving abortive, the prospective settlers joined with those of Lieutenant Bowen. The seaward expansion declined in impetus and was supplanted by exploration by land: the colony at Sydney spilled out-westward to Parramatta, the Hawkesbury, Toongabbie and Castle Hill and, after 1813, to Bathurst and Mudgee - northward along the Hunter River - southward to Illawarra and the Goulburn Plains. The hiatus in maritime endeavours terminated in the twenties which saw the foundation of several new coastal establishments. Port Macquarie was settled in April 1821 and Moreton Bay in September 1824. The short lived imitation of Singapore at Port Essington was proposed in

September 1823 and the log fort of Fort Dundas constructed on Melville Island late in 1824. In June 1827 Captain James Stirling, directed to found a second northern settlement, selected Raffles Bay, a site some 200 miles east of Fort Dundas: both settlements were abandoned by late 1829. Meanwhile Western Port had been settled in November 1826 and abandoned in April 1828, not to be officially recognised again until 1836. In a curious episode in 1826 Lord Bathurst ordered settlement at Shark Bay and almost immediately countermanded this instruction in favour of King Georges Sound some 700 miles to the south. The contingent of soldiers and convicts landed on December 26, 1827. In a ceremony at the mouth of the Swan River on May 2, 1829, Captain C.H. Fremantle of the Challenger took possession in the name of His Britannic Majesty of the whole of the continent not then forming part of New South Wales. Captain James Stirling established a colony at the river in June 1829. Consolidation of English influence on the continent was achieved with the settlement of Adelaide in 1836.

A little credited element in the influences resulting in this pattern of activities was that of the contemporary law of nations. At once more flexible and more attuned to existing prejudices than bodies of municipal law, it both guided and reflected state practices. The period of discovery and settlement of Australia marked also the rapid development of the conglomerate of precepts and practices forming international law into a self-contained legal discipline. Of

especial importance to the British Government was that branch affecting the rights and interests of nations in newly discovered lands.

British expansion of the colony was a model of settlement in a situation where British rights of acquisition were questionable. At least two nations, Spain¹ and the Netherlands², would have been consistent with their earlier practice had they asserted claims to portions of the Australian continent at the time of foundation of the British colony. Indeed Dutch claims might well have been successful.³ The colonists were also acutely conscious of the possibility of France also successfully staking claims to a part of the territory and for much of this period French interest in the region was considered to pose a real threat.

The legal rationale for the acquisition of new found territories, and the modes of acquisition that the rationale justified, had become issues of major international significance following upon the discovery, first of the Guinea coast, and then of the West Indies. The older discoverers, Spain and Portugal, stressed the validity of a series of Papal Grants which, together with several treaties between the two nations, appeared to divide all the New World between them.⁴ These grants remained fundamental to Spain and Portugal although the emphasis placed upon them varied and was both contrary to the opinions of leading jurists of the two nations and wider than the traditional usage of the grants would allow.⁵ These Papal Bulls were unacceptable to England, Holland and France as title

to the new lands⁶.

Of greater importance were assertions founded on discovery and occupation, and on conduct approximating to the shades of meaning between the two. Neither in this early age of discovery of the New World nor at any later date did the mere finding of territory confer more than the right to later appropriate that territory, and perhaps not even this if alternate claims were established⁷. But whereas the right to possess territory was established by something more than discovery it was arguable that the boundaries of the territory to be claimed were related to what was discovered⁸.

What further was required to transmute finding into the taking of possession was not always certain and neither jurists nor governments were consistent and unambiguous in their attitudes to appropriation by formal acts falling short of effective occupation⁹. It was certain that full possession was obtained by occupation and that such conferred a perfect title. To establish possession of this character emphasis was placed on the juristic nature of state behaviour rather than its physical quality¹⁰. Occupation involved both the intention to exercise exclusive control for an indefinite period, and the physical act of control, eg by settlement or exercise of civil authority¹¹.

The jurist, Vattel, whose writings were accepted as authority in England, developed the principle of what is now known as the inchoate right established by discovery and symbolic annexation, and perfected by actual occupancy¹².

There was no accepted time limit within which the consolidation of an inchoate title must have been achieved save that it be reasonable. The reasonableness of the time taken depended on numerous factors: international anity required that a claimant be permitted the opportunity to consider the feasibility and value of effective occupation; the physical character of the territory determined not only the nature of effective occupation but also the time within which such occupation was possible; the activities of rivals may have significantly affected the reasonableness of hesitation, delay or niggardliness in the establishment of governmental institutions and control.¹³

The extent of the territory acquired remained an issue of importance. Territory effectively reduced into control was recognised as belonging to the occupying nation in most situations: adjacent territory not yet controlled, but of which control was contemplated was normally allowed to remain undisturbed by other nations in the interests of international anity. However, territory remote from settled areas was normally considered to be open to the first settler subject to any existent inchoate right. In the ceremony of taking possession the extent of the territory claimed was sometimes declared, depending upon the state of geographical knowledge and the degree of prior exploration. International consideration of the declared boundaries was resolved according to their reasonableness. The declaration operated to mark out areas claimed for intended future occupation.

The effectiveness of any occupation varied with political and geographic factors. On occasions the enquiry centred on the sufficiency of certain types of occupation per se.¹⁴ Increasingly, the issue revolved about the exercise of sovereignty, and civil control. The nature of the authority to be exercised would naturally vary according to the particular exigencies of the situation. Difficult and inhospitable terrain would require a lesser performance as an indication of willingness to exercise sovereignty. Not only the degree, but also the regularity of the control was fundamental. The important question was not whether the force established was sufficient to repel foreign intrusion but rather, whether the sovereign powers were sufficient, and were employed, for the protection of life and property in the region.¹⁵ The presence of a high degree of criminal activity may have indicated a lack of effectiveness.

When a territory consisting of a single geographical unit was annexed it was presumed that the annexation applied to the whole unit. Concentration of acts of sovereignty to one portion and neglect of the remaining portion during the period within which it was reasonable to expect occupation would result in the abandonment of the right to extend sovereignty to the remaining portion.¹⁶ A similar regard was had to the existence of natural boundaries enclosing an area of reasonable proportions: the area was regarded as if it were such a natural unit.¹⁷

When the territory claimed was not a natural unit or was too large to be accepted as reasonably

encompassed by the inchoate right or the title by occupancy, other doctrines of a geographical nature were developed. Of these, the doctrines of the hinterland and contiguity had the force of antiquity. However the doctrines only operated to delineate the effectiveness of occupation and would not operate as independent titles.¹⁸

It is likely that at least the early and naval Governors of New South Wales would have possessed a working knowledge of the conduct expected to establish title to newly discovered lands. This knowledge would have formed part of the professional expertise required of a naval officer in an era of active exploration and colonial expansion. Certainly they were expected to know the ceremony associated with a formal taking of possession.¹⁹

The activities of the British in their occupation of the continent and their expansion of settlement and sovereignty indicate, and sometimes clearly reveal, such an awareness of the relevant concepts of international law and a desire to avoid conflicts with the possible rights of other nations.²⁰ The initial settlements were ordered at Botany Bay and Norfolk Island, both areas to which the British, under contemporary international law, possessed recognisable but inchoate rights which were perfected thereby, only eighteen and fourteen years after their respective creations. Shortly afterwards projects were commenced at other apparently strategic positions on the east coast: these projects not only established full title to the vicinity of the settlements but also manifested an intention to exercise sovereignty throughout the

entire territory previously annexed. The positions selected for these projects were potentially of strategic value in the reinforcing of British control of Bass Strait.²¹ The settlements along the coast established full title only to the area occupied and to a reasonable portion of the hinterland: whether contemporary doctrines of geographic unity or watershed were applied in the early title would extend to, but not beyond, the Great Dividing Range. Meanwhile, the process of exploration continued without which properly controlled occupation could not proceed. Inward expansion occurred slowly and at a pace matched by the exercise of governmental functions thus satisfying the obligations of sovereignty. Later expansion outstripped governmental activity but by then satisfactory power had been established over the coastal areas and foreign settlements were no longer a danger. Consolidation of sovereignty was then able to proceed at a slower pace.

The colonial government performed overt acts of possession and authority in the presence of all known foreign voyagers and displayed all the relevant indications of sovereignty both actual and intended. Their conduct indicated both the willingness and power to exercise authority in protection of the territory and its non-native inhabitants, and occurred at reasonable intervals throughout the waters of the south-eastern coast. It would have been obvious to all visitors that no settlements formed by other nations would have been acceptable within the territory claimed by Cook.²² The only flaw in this spread of sovereignty was the

lawless conduct of whalers and sealers in Bass Strait and the southern waters which the government had been unable to control and which had led to press demands for naval action and the establishment of military outposts.²³

The first interference with the Dutch interests occurred with the establishment of settlements on the Derwent and at Port Dalrymple. Not until 1824 was there any further interference and then only on an island off the northern coast. As no reaction by the Dutch resulted during the next five years, the remainder of the continent was taken by a formal act on May 2, 1829. Dutch inaction ensured the extinguishment of any of their potential rights which may have remained.

Of more immediate concern to both the colonial and British officials was the interest shown in the continent by the French. The activities of Baudin were a major factor in the establishment of settlements in Tasmania.²⁴ ^{proposed} The visit by De Freycinet/^{which occurred} in 1819 led Lord Bathurst, the Secretary of State, to write a private and confidential warning to Macquarie of French intentions.²⁵ Macquarie replied that he was sensible of the importance of preventing settlement in the continent by the French or any other European nation.²⁶ The visit of D'Urville in L'Astrolabe to the southern coast of Australia in 1826 rearoused fears which had been quieted by the absence of French activity in the intervening years. Darling was moved to establish settlements at King George's Sound and Western Port in March 1826.²⁷ The directions to occupy Western Port from Lord Bathurst to Darling

emphasized the need to anticipate any designs the French may have entertained. Bathurst also emphasized the need to avoid any expression capable of construction as an admission of non-occupancy, no doubt alluding to the abandonment of the earlier attempt at settlement by Collins.²⁸ In ordering occupation of King George's Sound, Darling was aware that he was exceeding his authority and sought every ratification of his conduct and a fresh commission comprehending that territory, without which the occupation would have been ineffective.²⁹ In 1832 concern at possible French or Dutch settlements in unoccupied northern Australia, concern unsupported by any evidence, resulted in another settlement at Port Essington. It also was abandoned, some ten years later.³⁰

Neither in the proposals and plans for the initial settlement, nor in the later process of expansion, were the Australian aborigines considered to be of significance in the establishment of sovereignty over the territory.³¹ The first advertance to the issue occurred when, in September 1843, on the arraignment before the Supreme Court at Melbourne of an aborigine, "Bonjon" for the murder of another aborigine, Judge Willis declared that Australia was acquired by discovery of simple occupation.³²

In 1889, the Privy Council expressed the view that at the time of establishment of the colony of New South Wales, Australia was terra nullius.³³ The Privy Council/^{was}only concerned with categorising the rules whereby the laws of England would apply to the State of New South Wales and were not

concerned with possible international issues arising out of the establishment of the colony. It would not have been proper for the court to have raised issues affecting the validity and, perhaps, the propriety of the conduct of the British Government in its relations with other nations. The court therefore accepted that interpretation the Government placed on its own conduct. It is also apparent that the issue of the nature of the territory at the time of settlement was not questioned before the Privy Council and there was no reason for the court to examine the issue at length. Again, there was no substantial reference to the aboriginal inhabitants.

Some doctrines of international law were, therefore, relevant to the settlement of Australia and were applied. In the application to the continent of these doctrines of discovery occupation and sovereignty of new territories, the aborigines were of little moment and this insignificance was in full accord with the contemporary state of the doctrines. But during the later years of the eighteenth century and the early portion of the nineteenth century new doctrines of international and municipal law were emerging which were directly relevant to the aborigines. The nature of these doctrines and the degree to which they were given effect in the official treatment of the aborigines are topics considered in the following chapters in this part.

FOOTNOTES

1. The evidence of Spanish exploration of the coast of Australia is slight and, at its most concrete, supports only the possibility that Torres sighted the northern coast at a distance and without interest or exploration (Letter, Torres to the King of Spain, July 12, 1607 in R.H. Major, Early Voyages to Terra Australis now called Australia (London, 1859), p. 30 at pp. 39-40: F.J. Bayldon, "Voyage of Luis Vaez de Torres from the New Hebrides to the Moluccas June to November, 1606", J.R.A.H.S., (1930), Vol. XVI, pp. 133-146: A. Sharp, The Discovery of Australia (London, 1963), pp. 24-30. Spain would therefore have been forced to rely on papal donations which had never been accepted by England as a legitimate source of sovereignty. (See T.W. Fulton, The Sovereignty of the Sea (Edinburgh, 1911), pp. 102-8: M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (London, 1926), p. 127: A. Pearce Higgins, "International Law and the Outer World, 1450-1648" in The Cambridge History of the British Empire (Cambridge, 1960), Vol. I, p. 183 ff.) Spanish claims if they had been made, would have been consistent with Spanish claims and activities in relation to southernmost South America, the Falkland Islands and Tahiti (B.G. Corney (ed), The Quest and Occupation of Tahiti by Emissaries of Spain during the Years 1772-76 (London, 1913-19), Vol. I, pp. 27-8: R.E. Gallagher (ed), Byron's Journal of his Circumnavigation 1764-1766.

(Glasgow, 1964), p. 161: Address Die Jovis, 14 February, 1771-Dissentient, in Annual Register: World Events 1771 (7th Edn.), (London, 1817), p. 252.) It is unlikely that claims would have been made at the time of original settlement of New South Wales as Spain would have jeopardised thereby the negotiations between the British East India Company and the Spanish Royal Phillipine Company which was formed in 1785. Following the Nootka Sound incident relations between the two countries worsened and thereafter protests by Spain would have had little effect (See B. Atkins, "Australia's Place in the 'Swing to the East', 1788-1810: Addendum", Historial Studies: Australia and New Zealand (November, 1958), Vol. 8, p. 315 at pp. 315-7: Wheaton, Elements of International Law (ed. G.G. Witson), (London, 1936), p. 167: J.M. Norris, "The Policy of the British Cabinet in the Nootka Crisis", English Historical Review (1955), Vol. 70, p. 562.

2. Dutch claims would have rested upon discovery followed by appropriation in some circumstances. For Dutch voyages of discovery see J.E. Heeres, The Part Borne by the Dutch in the Discovery of Australia 1606-1765 (London, 1899): G.A. Wood, The Discovery of Australia (Hong Kong, 1969), Ch. 14: C.M.H. Clark, A History of Australia (Melbourne, 1962), Vol. I, Ch. 2: Sharp, op. cit., pp. 32-96.
3. See A.S. Keller, O.J. Lissitzyn and F.J. Mann, Creation of Rights of Sovereignty through

Symbolic Acts, 1400-1800 (New York, 1938), pp. 133-5: Sir Ernest Scott, "Taking Possession of Australia - The Doctrine of 'Terra Nullius' (No-Mans Land)", J.R.A.H.S. (1940), Vol. XXVI, Part I, p. 6: Wood, op. cit., pp. 238-9.

4. F.G. Davenport, European Treaties bearing on the History of the United States and its Dependencies (Gloucester, Mass., 1919), Vol. I, pp. 9-112: H. Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal", American Historical Review (October, 1916), Vol. xxii, p. 1 at pp. 9-11. For the difficulties in calculating this line of demarcation see R.B. Merriman, The Rise of the Spanish Empire in the Old World and in the New (New York, 1918), Vol. II, p. 202: E.G. Bourne, Spain in America (New York, 1906), p. 131: O.H.K. Spate, "Terra Australis - Cognita?", Historical Studies: Australia and New Zealand (November, 1957), Vol. 8, p. 1 at p. 14n.
5. F. de Vitoria, De Indis, pp. 349-359 trans. in J.B. Scott, The Spanish Origin of International Law, Part I, Francisco de Vitoria and his Law of Nations (Oxford, 1943), at pp. xx-xxiv. F.A.F. Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law", 29 A.J.I.L. (1935), p. 448 at pp. 451-2: J. Goebel, Jr., The Struggle for the Falkland Islands (New Haven, 1927), pp. 48, 79-83.

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10. Goebel, op. cit., pp. 67-8, 72-3.

11. C. Wolff, Jus Gentium Methodo Scientifica Pertactatum (trans. J.H. Drake), (Oxford, 1934), § 85 at p. 50 and § 291-2 at pp. 47-8: Twiss, op. cit., pp. 157-9: C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", B.Y.I.L. (1948), Vol. xxv, p. 311 at pp. 314-7 and 334: Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Points of Substantive Law, Part II", B.Y.I.L. (1955-6), Vol. xxxii, p. 20 at pp. 52-63.

12. Vattel, op. cit., p. 84. For the authority attributed in England to Vattel see The "Maria" (1799), 1 C. Rob., p. 363. For application of the principle see The "Fama" (1804), 5 C. Rob., p. 106 at p. 115: Penn v Lord Baltimore (1750),

- 1 Vesey's Reps. per Lord Hardwicke at p. 451:
Twiss, op. cit., pp. 166-7: Lord McNair (ed),
International Law Opinions (Cambridge, 1956),
Vol. I, pp. 285-6.
13. Lindley, op. cit., p. 187: Westlake, op. cit.,
pp. 163-5: Fitzmaurice, op. cit., pp. 66-7.
14. Lindley, op. cit., p. 141.
15. der Heydte, op. cit., p. 467.
16. Waldock, op. cit., p. 345.
17. Lindley, op. cit., pp. 272-3.
18. Westlake, op. cit., pp. 168-9: Westlake,
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19. Keller, Lissitzyn and Mann, op. cit., p. 49:
J.M. Ward, "British Policy in the Exploration
of the South Pacific 1699-1793", J.R.A.H.S.
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20. J.C. Beaglehole (ed), The Journals of Captain
James Cook on his Voyages of Discovery
(Cambridge, 1955), Vol. I, p. 387, n. 4 and 5.
See also pp. cclxxxiii, 312, 387-8.
21. G. Blainey, The Tyranny of Distance (Hong Kong,
1969), pp. 80-1.
22. E. Scott, The Life of Matthew Flinders
(Sydney, 1914), Appendix B, at pp. 442-5.
23. G. Greenwood, "The Contact of American Whalers,
Sealers and Adventurers with the New South
Wales Settlement", J.R.A.H.S., (1943), Vol., 29,
p. 133.

24. H.R.A., I, 4, p. 338. See also King to Nepean, 9 May, 1803, H.R.A., I, 4, p. 249: King to Portland, 21 May, 1802, H.R.A., I, 3, p. 490: Memorandum of a proposed settlement in Bass Strait, H.R.A., III, 1, pp. 1-3. Contra see J.D. Mack, "Matthew Flinders and the British Admiralty Orders to H.M.S. 'Investigator'", J.R.A.H.S. (1957), Vol. 43, p. 205 at pp. 208-9.

25. Goulburn to Macquarie, February 4, 1817, H.R.A. I, 9, p. 206: Macquarie to Goulburn, September 24, 1817, H.R.A. I, 9, p. 488.

26. Ibid. See also H.R.A. III, 2, p. 297.

27. Bathurst to Darling, March 1, 1826, H.R.A., I, 12, pp. 194-5.

28. Bathurst to Darling, March 1, 1826, H.R.A., I, 12, pp. 194-5: E. Scott, "Taking Possession of Australia...", op. cit., pp. 13-15.

29. Darling to Hay, October 9, 1826, H.R.A., I, 129, p. 639: Darling to Lockyer, November, 1826, H.R.A., I, 12, p. 01: Darling to Bathurst, November 24, 1826, H.R.A., I, 12, p. 700.

30. J. Bach, "Melville Island and Raffles Bay 1824-9 - An Unsuccessful Settlement", J.R.A.H.S. (1959), Vol. 44, p. 222 at p. 232.

31. See G. Mackaness, "Some Proposals for Establishing Colonies in the South Pacific", J.R.A.H.S. (1943), Vol. 29, p. 261 at pp. 268-271, 273-7: H.R.N.S.W., Vol. I, Part 2, pp. 1-8 and 11-13.
32. Parliamentary Papers: Aborigines - Australian Colonies 1844, p. 146 at pp. 152-3. See also C. Clark, A Summary of Colonial Law (London, 1834), pp. 21-2.
33. Cooper v Stuart (1889), 14 A.C., p. 286 at p. 291.

CHAPTER IIINTERNATIONAL LAW DOCTRINES OF STATUSA. SOVEREIGNTY

The early discussion of the principles applicable to the status of non-Christian natives was complicated by religious issues, the variety of native organisations and the conduct of European states.

Early Christian and non-Christian relations were marked by the Crusades and prohibitions on trade and intercourse with Islam. Although these prohibitions were unsuccessful and evasions of them numerous, they did reflect the Church's concern over Islamic power. Despite that concern, in the thirteenth century St. Thomas Aquinas allowed that non-Christian rulers possessed sovereign status within the law of nations: the later view of Wycliffe denying exercise of sovereign power to any ruler not in a state of grace was condemned at the Council of Constance (1414-8).¹ Not until 1492 were the Moors subdued and expelled from the Iberian Peninsula and still Islam remained a danger in the Balkans and the Mediterranean. The Portuguese fleet under da Gama arrived in India in 1496 to attack Islamic expansion and to destroy its monopoly of the European trade in spices.² Meanwhile diplomatic relations were maintained between the Ottoman Empire and several Christian states.³ Any relationship was strained by the Muslem doctrine of jihad, or holy war against the infidels, which did not permit the creation of a permanent treaty.⁴ A countervailing consideration

in Europe was exemplified by a dictum of Coke's in Calvin's Case that all infidels were permanent enemies for the law presumed they would not be converted.⁵ In East India Co. v Sandys it was argued by counsel that the enmity was not merely spiritual but was also temporal.⁶ The Portuguese belief that no faith need be kept with infidels led to opprobrium in their contact with Indian rulers.⁷

Both Grotius and Vattel recognised that the law of nations applied equally to Christian and non-Christian countries. In Mare Liberum Grotius denied the validity of the titles of Portugal in the East Indies by stressing the existent titles of the Indian rulers and his introduction asserted that the relevant legal principles were such that "no Christian ought to refuse to a non-Christian" and were the same among all nations.⁸ Again in De Jure Belli ac Pacis he reiterated the secular view that religion was an irrelevant consideration in questions of sovereignty.⁹ Vattel insisted that any sovereign and independent state, governing itself by "its own authority and its own laws" was subject to the law of Nations.¹⁰ During the nineteenth century the positivist school of international law by emphasis on the European qualities of international law removed from its sphere relations with non-European states, a process reflecting the decreasing influence of those states.¹¹ This treatment has been rejected by other authors¹² and is clearly contrary to the pre-nineteenth century practice of European States.¹³ Even during the nineteenth century some recognition

was given by Britain to the international status of some states in India.¹⁴

In the establishment of relations with Asian states, attention was given to the status of the Sovereign and any errors in the classification and treatment merited difficulties at a later stage. The Ottoman, Moghul and Chinese Emperors were clearly of the status of independent heads of state and entitled to full international recognition: all received ambassadors from England. Persia, Ceylon, Burma and Siam were likewise independent and their princes accorded equality with European sovereigns. Minor rulers presented further difficulties of classification, owing allegiance to other rulers but possessing various measures of independence. Despite its essentially Christian origins the pre-nineteenth century law of nations gave *de jure* recognition to what existed *de facto* in the East. Thus both authors¹⁵ and governments¹⁶ accepted the authority of such rulers and granted them full international significance until changes in the political relationship between European and native states during the nineteenth century altered the *de facto* position to accord with what the positivist ideology of the nineteenth century was claiming as *de jure*.¹⁷ On a more cursory scale and with more ambiguity a similar process was enacted in the American colonies.

B. CATHOLIC DOCTRINE

The initial activity of European states in the Americas was primarily concerned with the opportunities afforded for trade and looting but after a short period, conquest and territorial expansion were emphasized. The foundation for their involvement was religious: The Papal Bulls Dum diversas of June 18, 1452 and Romanus pontifex of January 8, 1455 approved the conquest and enslavement of all pagans in Africa and the appropriation of their lands.¹⁸ In Africa this operated as a sanction for the traffic in slaves in return for their conversion. The series of Bulls distributing rights in the later discovered Americas similarly approved expansion for missionary activities. The Bull Inter caetera of May 4, 1473 required Ferdinand and Isabella to instruct the inhabitants of their American lands in the Catholic faith and in good morals.¹⁹ The process of expansion however, involved the destruction of the native empires, the establishment of European landholdings, forced labour and exaction of tributes.²⁰

The activities of the conquistadores were opposed by the reformed conquistadore-turned-Dominican friar Bartoleme de Casas who, from 1514 to his death in 1567, waged a campaign against the enslavement of the Indians. In 1516 he had been appointed "General Protector of all Indians". His work Brief Relations of the Destruction of the Indians was published in six languages in at least forty-one editions during the sixteenth and seventeenth centuries.²¹

De Casas' charges were submitted to a commission of jurists and theologians for investigation and report and the conclusions of the theologians expounded by Fray Matias de Paz, in favour of the Indians, were the forerunners of the similarly inclined conclusions of Vitoria.²² In 1532 Vitoria delivered his Readings De Indis Noviter Inventis and De Jure Belli in which he analysed the respective claims of Spain and the Indians. He considered that there was a certain order in the Indian affairs, they had "polities which are orderly arranged", and "definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange".²³ He recognised that they were in occupation and had both dominium and imperium: they had perfect public and private ownership.²⁴ He also disposed of the popular arguments in justification of Spanish activities that the natives were sinful, unbelievers, brutish and lacking in reason, of unsound mind and slaves by nature. However both Vitoria and Grotius considered that the law of nations recognised the right of trade with the natives, and Vitoria also asserted the right to convert the heathen.²⁵ Vitoria considered that hindrance of these activities could found a just war resulting in the establishment of Spanish dominance. The Indians could otherwise come under the sway of Spain, by voluntary choice or by alliance and friendship, and intervention by Spain would be justified if it were necessary to protect converts, to free the Indians from tyrannical laws, or, perhaps, to protect them in the same manner as infants were protected from their own ignorance.²⁶

The Readings only escaped the Index by the death of Pope Sixtus V, but in 1537 Paul III in the Bulls Pastorale officium and Sublimis Deus condemned the enslavement of Indians, and forbade that they be in any way deprived of their liberty or property whether they were Christians or Heathens.²⁷ A royal edict of 1533 prohibited slavery in Peru. In 1543 Charles V promulgated "The New Laws of the Indies" adopting the views of de Casas and aiming at the extinction of the system of *encomienda* (or *repartimiento*) and seriously prejudicing the economic interests of the colonists. The Indians were for no cause to be made slaves, those already enslaved were to be released unless a legitimate title to them was shown and those to whom a legitimate title was shown were gradually to be released.²⁸ Considerable opposition and neglect was shown to these laws by the colonists.

In a debate instigated by Charles V of Spain in 1550 between de Casas and de Sepulveda it was argued by the latter that the slavery of the Indians was justified by their sins of idolatry and sins against nature, their natural inferiority, their weakness and the need for their conversion. The view of de Casas (and Vitoria) again prevailed and in 1573 the legal status and rights of Indians were established.²⁹ The Spanish Laws of the Indies consistently maintained racial equality and interceded for the protection of the Indians.³⁰ The regularity with which these protective enactments were repeated indicates that they were as regularly ignored in practice.³¹

Although the practice fell short, Catholic doctrine had come to recognise the existence of some personal rights in the subject natives, irrespective of issues of sovereignty, but, this conclusion was reached through a combination of postulates from both International and Municipal law. What part would hold the wider significance was to be determined by the Protestants. It was the Protestants also who would develop specific theories of native entitlement to realty.

C. PROTESTANT DOCTRINE.

The later and Protestant authors adopted doctrines more rigid, intolerant and ethnocentric. In most instances outside the Indian sub-continent questions of sovereignty were decided against the native inhabitants, and for these authors international law accepted the sovereignty of the colonising nation. This had the result that the personal rights of the natives were to be determined, not by an idealised natural law, but according to the domestic law of the colonial sovereign.³²

Doctrines originating in feudalism were applied to non-feudal peoples to supplant the natives' understanding of rights and property. Initially there was concentration on rights in property other than land. Pufendorf wrote of the need for a people to take only so much land as they needed or could defend.³³ He went on to consider rights to hunting and concluded that occupancy

established for the occupiers, the exclusive right to use or capture wild animals and birds, and that the right inhered in the sovereign who might grant the right to individuals.³⁴ His treatment derived from his acquaintance with the feudal notions of royal prerogatives in the game and chase rather than from any advertence to the existence of peoples depending for their entire subsistence on hunting³⁵: he did not, therefore, consider the property rights of such a people in the lands over which they hunted. The application of his writings to the rights of newly found peoples could only have resulted in artificial reasoning.

The proprietary rights arising from the hunting activities of a tribe were considered by Wolff, whose conclusions, derived from natural law postulates, were unacceptable to the increasingly positivist trend in international law. In substantially a Roman law form, he recognised title to things held in common or in "the primitive joint holding" of the nation, which things had not been reduced into the ownership of individuals: this class of things included "fish, birds and four-footed wild animals".³⁶ His recognition extended further, to the rights of families with no settled abode which "wander through uncultivated wilds", and he denied that there existed any right to subject them to civil sovereignty in order that they be rendered more civilised, to provide better for their welfare, or to ensure that lands did not remain uncultivated.³⁷ For, he remarked, "if such reasons were to prevail, it would even be allowable to subject barbarous and uncultivated nations to

your sovereignty, in order that they might experience what is better for them"; in the same paragraph he disposed of any justification founded on religious activities.³⁸

The contrary doctrine of Vattel, in most other respects a follower of Wolff, was to be more acceptable to the Protestant colonists and the pragmatic Imperial governments. As he gave direct consideration both to issues of sovereignty over territory and personal interests of the inhabitants in land, the writings of Vattel were more capable of application than the majority of writings of his predecessors. Vattel distinguished the conquest of the empires of Peru and Mexico, "a notorious usurpation", from the colonisation of North America which, "if done within just limits" might have been "entirely lawful".³⁹ He pointed out that wandering tribes whose small numbers could not populate the whole country, could not "take to themselves more land than they had need of or can inhabit and cultivate".⁴⁰ It was not "departing from the intentions of nature" to "restrict the savages within narrower bounds", and to take possession of lands for which they had no special need and of which they were not making present and continuous use. This view was matched by condemnation of the activities of hunting, fishing and gathering wild fruits. Elsewhere Vattel condemned "those rights of common which deprive an owner of the free use of his lands and prevent him from inclosing and cultivating them to best advantage", as being "contrary to the welfare of the State".⁴¹ And again:

"There are others who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase... Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labour, and they may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands."⁴²

Vattel was here indebted to Locke, but the preference expressed for intensive agricultural activities was at least as old as More's Utopia, which was first published in 1516.⁴³ In The Second Treatise on Civil Government Locke asserted that in the state of nature each has a right to what he requires to sustain him: that natural fruits and beasts belong to mankind in common.⁴⁴ But a private property could be created by a man mixing his labour with it and thereby removing it from the common state in which nature placed it: this natural right he extended to land for, by tilling, planting, improving and cultivating, a man is by his labour enclosing it from the common. The right to so appropriate land was said to be limited to so much as he could develop and use. It was further justified by the biblical command to subdue the earth.⁴⁵ The practices of the American colonists and of agricultural economy in England were elevated by Locke to the stature of natural rights. By Vattel they were transformed into legal principles. To men of a country engaged over

several centuries, as was Britain, in the process of converting its commons into private land, the doctrines of Locke and Vattel were readily appreciated as self-evident truths. Both were to be cited in the American and Australian colonies, for preferring agricultural pursuits to hunting, and horticulture to grazing.⁴⁶

Other prejudices supported the acceptance of these principles. In considering issues of sovereignty and personal title it was normal for the commentators on colonisation to display, consciously or not, a contempt for the persons and civilisation of the natives which was, in part, an inheritance of the slave trade. The trade in slaves from Guinea had commenced during the fifteenth century, and the English had soon become privately involved in the trade. Official recognition was given to the employment of slaves in the British West Indies during the Interregnum and for about a century and a half officially supported British companies were engaged in the trade and employed slave labour.⁴⁷ Slavery in Britain was, by 1778, clearly illegal but it was still recognised in the British colonies.⁴⁸ The trade, but not the institution, was declared illegal in the Abolition Bill in 1807⁴⁹ and made a transportable offence in 1811.⁵⁰ The institution of slavery was finally abolished in British colonies in 1833.⁵¹ Not until the later years of the trade was there anything approaching a general revulsion of feeling in Britain against the trade and that revulsion was limited to the British Isles and was not shared by the colonists.⁵² In other European countries the position was similar.⁵³ It

was not surprising, therefore, that the writings displayed a consciousness of European superiority.

Aspects of the institutionalised racism of the nineteenth century were foreshadowed in earlier ages. The humane reasoning on which the North American reservation system was to be based is found in Vitoria's suggestion that in South America Spain might undertake the administration of the Indians' country for the welfare and in the interests of the natives.⁵⁴ In his speeches on Fox's India Bill of 1783 Burke similarly expressed the view that the interests of the inhabitants were of paramount importance and suggested that the government consider its role as that of administering a trust⁵⁵ - a concept later embodied in Chief Justice Marshall's decision in Cherokee Nations v Georgia.⁵⁶

By the late eighteenth century international doctrine largely denied sovereignty to the aboriginal inhabitants of America, Africa and the Pacific. There existed conflicting doctrines and practices regarding the personal and property rights of the aborigines. In British colonies and in the United States of America there developed doctrines and practices that were not certainly of a uniquely international or domestic character. It is certain however, that whatever the source, these doctrines came to be incorporated in the domestic law and practice of the United States and some British colonies.

FOOTNOTES

1. Alexandrowicz, op. cit., p. 55.
2. Ibid., p. 14.
3. Nussbaum, op. cit., pp. 54-65.
4. Ibid., pp. 51-4.
5. 17 Coke, 77.
6. (1685) 1 Skinner, 165.
7. P. Spear, A History of India (England, 1956), p. 63.
8. H. Grotius, The Freedom of the Seas or the Right which belongs to the Dutch to take part in the East Indian Trade (cited as Mare Liberum), (R. Van Deman Magoffin trans.), (New York, 1916), p. 5.
9. H. Grotius, De Jure Belli ac Pacis. I, iii, 20; ii, 15.
10. Vattel, op. cit., I, i, 4, at p. 11.
11. Alexandrowicz, op. cit., pp. 10 & 235. See e.g. Oppenheim, op. cit., pp. 45-8; Nussbaum, op. cit., p. 190 et seq; Westlake, op. cit., p. 81 et seq. (but see his treatment of the once international status of Indian states at p. 193 et seq).
12. e.g. Phillimore, op. cit., pp. 20-4.
13. e.g. the position of Turkey. The treaty of 1535 between France and Turkey against the Holy Roman Empire was justified by Francis I of France by the universality of the family of

nations (Alexandrowicz, op. cit., pp. 37 & 236: Hussbaum, op. cit., p. 64). Relations with Arab, Chinese and East Indian states were conducted on the basis of mutual international standing (Alexandrowicz, op. cit., pp. 10 & 224: Lindley, op. cit., pp. 197-200: Keller etc., op. cit., p. 10).

14. Lindley, op. cit., p. 199.
15. e.g. Gentili, De Jure Belli, iii, 19: Grotius, De Jure, op. cit., ii, 15: Wolff, op. cit., § 429: Vattel, op. cit., II, xii, 162.
16. V.A. Smith, The Oxford History of India (Oxford, 1958), II, VI, p. 2 and III, VII, p. 2: Alexandrowicz, op. cit., Chs VIII & IX.
17. Alexandrowicz has traced the progression from the early capitulation arrangements whereby Indian sovereignty continued but jurisdictional and other rights were conferred on the English settlements in India, through treaties distinguishing in favour of England in trade and politics, to the reduction of the princes to vassaldom. (Loc. cit.). See also the account of this process in Westlake, loc. cit.
18. Davenport, op. cit., p. 12ff.
19. Ibid., p. 56.
20. For the operation of the encomienda system and the efforts to regulate and, finally, to destroy it see Lesley Byrd Simpson, The Encomienda in New Spain - Forced Native Labour in the Spanish Colonies 1492-1550 (Berkeley, 1929), and Lewis Hanke, The Spanish Struggle for Justice in the Conquest of America

(Philadelphia, 1949).

21. These included an English edition of 1689 entitled "Popery Truly Displayed in its Bloody Colours: Or, a Faithful Narrative of the Horrid and Unexampl'd Massacres, Butcheries, and all manner of Cruelties, that Hell and Malice could invent, committed by the Popish Spaniard Party on the Inhabitants of West India. ...Composed first in Spanish by Bartholomew de la Casas, a Bishop there, and an Eye-Witness to most of these Barbarous Cruelties; afterward translated by him into Latin, then by other hands into High Dutch, Low Dutch, French and now taught to speak Modern English...." - cited in Simpson, op. cit., at pp. 2-3.
22. J.B. Scott, The Spanish Origin of International Law, op. cit., p. 78.
23. Vitoria, op. cit., I, 23 at p. xiii.
24. Ibid., I, 4 at p. vi and I, 24 at p. xiii. See the similar view of Grotius, Mare Liberum, op. cit., pp. 13 & 19.
25. Ibid., ch. viii: Vitoria, op. cit., III, at p. xxxv.
26. Loc. cit. That Vitoria's arguments finally conceded "enough rights to the Spanish Crown to enable it to do about what it was doing", has been attributed to the dilemma of an appeal to accepted ethical principles "at a time when the moral consensus of Europe was less secure than it had been for centuries". Gerald Mattingly, Renaissance Diplomacy (London, 1955), p. 292.

27. F.S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States", 31 Georgetown Law Journal (November, 1942), p. 12; K.R. McConnochie, Realities of Race (Sydney, 1973), p. 46.

28. Henry Stevens & Fred W. Lucas (translated & edited) The New Laws of the Indies for the Good Treatment and Preservation of the Indians (London, 1893), at pp. vii, xii-xvii and xxv-xxx.

29. Ibid., pp. 47-8.

30. Cohen, op. cit., at pp. 12-15 points to laws of:- 1554 providing legal representation for Indians in suits with the Crown; 1571 providing representation by the King's attorneys in cases involving land; 1593 requiring injuries against Indians by Spaniards to be punished more severely than injuries against Spaniards by Indians; 1594 & 1596 protecting land rights of the Indians; and 1637 prohibiting trespass upon Indian lands.

31. Stevens & Lucas, op. cit., Introduction at pp. xc-xciii.

32. A.H. Snow, The Question of Aborigines in the Law & Practice of Nations (New York, 1921), pp. 63-7; Goebel, op. cit., pp. 106-7; Johnson v McIntosh, (1823), 8 Wheat. p. 543.

33. S. Pufendorf, De Jure Naturae et Gentium Libri Octo (trans. C.H. & W.A. Oldfather), (Oxford, 1934), IV. VI. 3 at p. 570.

34. Ibid., IV. VI. 4 & 5, at pp. 571-2.
35. Chitty cites Pufendorf as authority for the Royal prerogative (op. cit., p. 135).
36. Wolff, op. cit., § 87-3, 274, 280.
37. Ibid., § 310, 312-3.
38. Ibid., § 313.
39. Vattel, op. cit., § 81, at p. 38.
40. Ibid., § 209, at p. 85.
41. Ibid., § 78, at p. 36.
42. Ibid., § 81 at p. 37.
43. Sir Thomas More, Utopia (Everyman Edn), (London, 1910), pp. 60-1.
44. It has been suggested that here Locke adopted the Medieval doctrine that common ownership is a more perfect and natural right than private ownership. George H. Sabine, A History of Political Theory (New York, 1961), 3rd. Edn. p. 527.
45. John Locke, The Second Treatise on Civil Government (Ed. Howard R. Penniman), (New York, 1947), Ch. V.
46. Macquarie shared these prejudices, which were fundamental to his land policy, on several occasions referred to the occupation of grazing in terms such as "the lazy object of rearing cattle" (e.g. Macquarie to Bathurst, 17 November, 1812 H.R.A., I, VII, p. 557 at p.

559), and preferred the emancipists who cultivated the land.

47. Cambridge History of the British Empire Vol. I, "The Old Empire", pp. 379-80, 436-59.
48. per Lord Mansfield C.J. in the Case of James Somersett, a negro, on a Habeas Corpus, T.B. Howell, Complete Collection of State Trials (London, 1816-1828), Vol. XX, pp. 1-82, at p. 82.
49. 46 Geo. III, c. 36.
50. 51 Geo. III, c. 23. Between 1792 & 1815 the trade was also prohibited by Denmark, the United States, Portugal, Holland, Sweden & France - The Cambridge History of the British Empire Vol. II, p. 853.
51. 3 & 4 Wm. IV, c. 73: The Cambridge History of the British Empire Vol. II, Chs. V & IX.
52. Loc. cit.
53. The First French decree in 1793 was ineffective and not until 1848 was there any effective governmental action and it was then opposed by the colonists. Rene Maunier, The Sociology of Colonies (trans. E.O. Lorimer), (London, 1949), I, pp. 293-4.
54. Vitoria, op. cit., III, 18 at pp. xiv-xvii
55. Hansard, Parliamentary History 23, Cols 1316-7. See also Sutherland, op. cit., pp. 330 & 367 and Lindley, op. cit., p. 330.
56. 30 U.S. (5 Pet.), 1 (1831).

CHAPTER IIIBRITISH COLONIAL LAW AND PRACTICEA. EXPERIENCE IN INDIA

The British experience in the East, and especially in India, was of a markedly different nature from its experience of the less sophisticated communities it encountered in North America and Australia. In the East the process of expansion was one of politics and diplomacy, the management of complex relations with Indian rulers and the consolidation of negotiated interests.¹ The purpose was trade rather than territory; and the Indian population was intended to remain undisturbed, whilst the administration was substantially altered.² Despite increasing governmental involvement in its activities the East India Company continued to assert commercial rather than imperial objectives.³ Not until the India Act of 1784 transferred effective control to the Imperial Government acting through the Governor-General in India did the emphasis slip from trade.⁴ Reorganisation by Cornwallis established the Indian Civil Service and effectively divided it from the Company's mercantile activities.⁵ Henceforth imperial objectives were dominant.

At all stages it was intended to avoid settlement by British colonists, and the Empire was to consist of a chain of trading posts inhabited by Asians but ruled by a bureaucracy directed from London.⁶ The Cornwallis reforms were aimed at the creation of a British pattern of landed property held by Indians, and supported by a British type of

judicial system largely administered by Englishmen. Although the Act of 1784 had required the establishment of permanent rules for collecting the land revenue to be "according to the laws and constitution of India", the adoption of the Cornwallis model was destined to undermine the rights of the ryots, who worked the land; to create a massive load of litigation; and to wholly alter the structure of the Bengalese rural life. The adoption of the Munro system in Madras was designed to restrain the process of change in patterns of land holding and to protect the interests of Indian rural society: curiously, the latter system was to establish, ultimately, a paternalistic executive impossible under the Cornwallis scheme.⁷

It was intended that British activities in India would protect native land rights: the resulting interference and disruption arose through official misunderstanding of the complexities of the existing rural practices.⁸ Similarly other personal rights of the natives were to be protected.

This experience was of virtually no assistance in dealing with the circumstances that faced the Australian settlements. But the North American experience was of a different nature.

B. EXPERIENCE IN NORTH AMERICA

1) SOVEREIGNTY

The earliest arguments in favour of British colonisation of North America were based on the need to bring Christianity and civilisation to a race then thought to be sub-human heathens. The ideal was expressed in the Royal Letters Patent of 1606 for the colonizing of Virginia, and repeated many times during the early seventeenth century.⁹ The ease of making converts was assumed, for man "easily yields to discipline and government".¹⁰ Despite some uneasiness caused by Indian antagonism, this confidence was to persist in Virginia until April 1622 when the Indians arose suddenly over a hundred-mile area and attempted to massacre all English settlers: 347 Englishmen were killed. English punitive expeditions followed.¹¹

A similar pattern was followed in the formative years of the other North American colonies.¹²

There was another argument - the right of the English to the land in North America. In 1630 in his farewell sermon for Winthrop's company, on its journey to found a colony at Massachusetts Bay, the puritan John Cotton said:

Where there is a vacant place,
there is liberty for the sonnes
of Adam or Noah to come and
inhabite, though they neither
buy it, nor ask their leaves ...
And in this case if the people
who were former inhabitants did
disturbe them in their possessions,

they complained to the King, as of wrong done unto them: As Abraham did because they took away his well in Gen. 21, 25. For his right whereto he pleaded not his immediate calling from God, ...but his owne industry and culture in digging the well, verse 30. Nor doth the King reject his plea, ...but admitteth it as a Principle of Nature, that in a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is. And the ground of this is from the grand Charter given to Adam and his posterity in Paradise Gen. 1. 28. Multiply, and replenish the earth, and subdue it. ...Indeed no Nation is to drive out another without special Commission from heaven such as the Israelites had, unless the Natives do unjustly wrong them, and will not recompence the wrongs done in peacable sort, and then they may right themselves by lawful war and subdue the Countrey unto themselves.¹³

Land tenure was therefore to be derived from theology: God had meant the land for the English (or, perhaps, other Puritan peoples) and to this end had sent plagues to destroy the savages and

leave the land free for His chosen people.¹⁴ It has been suggested (without identification of the authority on which it is based) that a New England assembly adopted the following resolutions "1. The earth is the Lord's and the fullness thereof. Voted. 2. The Lord may give the earth or any part of it to His chosen people. Voted. 3. We are His chosen people. Voted."¹⁵ The Puritans were, therefore, of little mind to allow the Indians rights to land.

By 1641 the Virginian Indians were defeated, with only occasional outbreaks to bother the settlers. In New England the Puritans fought and defeated the Pequots in 1637 and the Wampanoags in King Phillip's War in 1675-1676: despite these victories they continued to experience smaller incidents until, in the last decade of the seventeenth century, the presence of Indian "devil-worshippers" was taken as evidence of a great visitation of witches to New England.¹⁶

In Puritan eyes these disorders provided a further justification - the evil qualities of the heathen, and his possession by Satan. The initial hospitality of the Indians had been suspected to hide hostility and treachery: the Virginia massacre proved to them the correctness of this view. Henceforth a state of war was recognised to exist with the Indian as the natural enemy to be destroyed by treachery, massacre and enslavement.¹⁷

The less religiously inclined settlers made use of similar but secular justifications. The viewpoint of Vattel was popular in the United States and was adopted on the frontier¹⁸: the right

to land according to one's needs¹⁹ and the preference shown for agriculture were regularly cited as reasons for the dispossession of the native.²⁰ Of more immediate impact were the barbarian qualities of the Indian, and it was easy to depict him as less than human.²¹

Whilst it may not have accepted all these reasonings, the British Parliament did not demur from what they implied. Despite the occasional favourable report on Indian civilisation and the spectacular visits of Indian personalities to the English Court the information which the government possessed was largely dictated by those opposed to Indian interests.²² By the bulk of reports, the Indian was pictured as being without the outward trappings of civilisation²³ - the government was not concerned to carry out an independent enquiry as to his entitlement to sovereignty. All European nations involved in the development of North America usually concurred in disregarding the Indians as a factor in determining territorial rights,²⁴ although, on occasions, the position of the Indians appeared to be allowed a different significance.²⁵ In all the relations between Whitehall and the governing bodies of the colonies the former continually asserted, in the face of strong colonial opposition, the right of the Crown in demesne to all land within the claimed territory in reliance on the doctrine attendant on a colony established by settlement.²⁶

In both international and colonial intercourse therefore, the British Government never acknowledged that the Indians possessed any sovereignty.

In its dealings with the Indian tribes the British Government was less obvious. It was usual for the government to deal with the tribes directly through its local representatives: and Indian affairs were normally conducted by the Governors of the states.²⁷ It was certain that the Indian leaders were unaware of the distinction between the Governors as acting in internal affairs and as representing the English Crown in an international significance: on occasions the colonial representative presumed to act on behalf of the Crown, an authority he undoubtedly possessed.²⁸ It has been suggested that the British Government was rarely a party to treaties with the Indians as it was plainly reluctant to be committed to anything partaking of Indian sovereignty.²⁹ However, it is possible that this apparent reluctance was simply one aspect of the confusion in British policy and practice concerning the Indians. Certainly, prior to the appointment of Sir William Johnson as a representative of the Crown as Superintendent of Indian Affairs for the Northern District in 1756, the British Government was not involved in Indian affairs in its own name.³⁰ It has also been argued that his appointment was not one of diplomatic representation: but Johnson, in his official activities, and, before him, the governors and commissioners involved in negotiations for Indian support, were participating in what was recognisably a diplomatic process, the acquisition of allies for a war against the French or, failing an alliance, the neutrality of the tribes. Without the usual trappings of diplomatic representation it was nonetheless a diplomatic function.³¹

Warfare with the French had accentuated the role of the Indians and had made relations with them of major importance, the government finding the maintenance of the Indian alliances obligatory. Several schemes were proposed for consolidating this relationship, culminating in the appointment of the Indian agents and the Royal Proclamation of 1763.³² The Indian negotiators were unaware that the tribes were considered to be of the status of pupillage or domestic independant nations³³: it is possible that they were not so considered by the British. The apparent effect of the treaties, as with those later with United States, was the recognition of the tribes as sovereign nations.³⁴ The tribes, whilst allying themselves to the British, did not in terms surrender their independence or assign their lands.³⁵

The early English colonies in America were established by royal charters to individuals or commercial or religious groups and possessed considerable autonomy, much exaggerated by the neglect during the Interregnum. Later colonies were established by conquest from Holland and France and were subject, as were the already established colonies, to increasing interference by the Crown and Privy Council. Colonial affairs were dictated by rivalry between local interests and royal appointees whose offices were regarded as gifts of patronage but whose duties were dictated by English ministers.³⁶ The absence of direct negotiations with the Indians was probably no more than a symptom of the decentralised method of colonial control. The concern for colonial matters was largely subordinated to their primary

concern with the war with France: the colonial policy was one of "salutary neglect", and the colonies were allowed to develop policies for defence and Indian affairs in addition to or contrary to British proposals.³⁷ The result was, until after 1756, one of confusion for Indians, colonists and officials alike. Prior to the war of 1754 the British had no Indian policy and their practice had been limited to the issue of occasional directives which were either ignored or denigrated by the colonial authorities.³⁸ The preoccupation was with the activities of the French: colonial policy was a mere adjunct. Regulation of colonial proceedings was limited to matters affecting the strategic and commercial interests of the government.

The question of the entitlement of the Indians to recognition of their sovereignty was not easily dismissed. The Indians possessed many of the attributes which the authors of works on the law of nations were accustomed to recognise as entitling the community to sovereignty. They possessed self government, laws and an orderly way of life within territorial boundaries. The Iroquois, with whom the primary British experience was obtained, was a complex civilisation with large townships of up to 4,000 people surrounded by palisades.³⁹ However, within the white man's experience, the nature of the communal ownership of land and the loose democratic structure of civil government were rarely comprehensible; the Indians' practices of theft, raids, and torture were abhorrent.⁴⁰ Sovereignty was therefore denied.

2) LAND RIGHTS

It was usual for the first settlers to negotiate with the Indians for the land they occupied, although the original charters and crown grants of title made no such stipulation. The Indian tribe was normally recognised by the settlers as being in possession of land whatever the reason for recognition: a consciousness of a moral or natural right or a desire to avoid friction and keep the goodwill of the tribesmen on whom the survival of the colony depended.⁴¹ This treatment of the tribes was not adopted consistently throughout the colonies, nor was it maintained.⁴² Later practice involved either forcible expulsion or fraud, and indeed these activities were a major cause of Indian complaint and racial conflict: they were even indulged in by the officials appointed to treat with the Indians.⁴³ Land frauds continued throughout the period of Imperial control, with the Indian vendors being rendered stupified with rum or offered consideration which was worthless or unlikely to be paid. The resulting conflict was then seen as a justification for expulsion or enslavement of the Indian tribes.

Even in those colonies in which the policy of purchasing land was consistently adhered to by the government and substantially complied with by the colonists, it is doubtful if there was any mutuality in the contract. In the pre-colonial Indian culture territorial land was not a commodity capable of being traded, but many tribes welcomed the use of the land by the whites in return for which hospitality, they expected aid against other tribes, or the continuing provision of white

hospitality and the expression of white friendship by wampum.

Whilst evincing little real concern for protecting Indian interests the British Government did take some steps to protect the Indian lands from intrusion. These steps were not purely altruistic - the role of the Indian was considered to be a likely determining factor in the struggle against France. Equally important, the government was protecting its own declared interests in the lands for by legal theory the lands were vested in the Crown and only the Crown could grant title. A Royal Proclamation of 1763 was designed as a first step in determining a policy for those lands still retained by the Indians: it was, so far as it adverted to the Indians, a statement of the existing policy in respect of those lands together with provisions designed to prevent encroachments.⁴⁴ The Proclamation was designed as merely a temporary measure but even as such was a source of conflict with the Indians, both in the determining of the lands to which it applied, and in the lack of respect for the Proclamation in the conduct of the colonists.⁴⁵ The Proclamation also included the proposition that any alienation of the lands must be to the Crown or persons authorised by the Crown. This proposition was later incorporated in the doctrine of native title developed by Marshall C.J. and other members of the Supreme Court of the United States.⁴⁶ The Proclamation is still in effect in Canada and is a major source of Indian rights. It is still a question of considerable difficulty whether the rights exist independently of the Proclamation.⁴⁷

It has been held recently that the doctrine of communal native title has never applied to Australia.⁴⁸ Although the principal U.S. cases were not decided until towards the end of the period considered in this thesis and were unlikely to have been in consideration by English authorities, or by the relevant authorities of Australia, the British practice, later embodied in the cases decided in the U.S. Supreme Court, was continued in Canada throughout the period.⁴⁹ This practice involved the recognition that the prior occupation conferred certain limited rights over tribal territory to occupy and use the territory or dispose of it to the Crown. Such a practice was justified by combining with the attributes of title by discovery and settlement the attributes conferred by international and municipal law on title by conquest: the ultimate right was acquired by settlement but title as against the interest of the Indians was one of conquest or purchase.⁵⁰

In Fletcher v Peck, Chief Justice Marshall expressing the view of the majority of the Supreme Court suggested that: "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state".⁵¹ Mr. Justice Johnson suggested that everything but full ownership was in the Indians.⁵²

In Johnson v McIntosh the Chief Justice said:
 ...the original inhabitants...
 were admitted to be the rightful
 occupants of the soil, with a

legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.⁵³

The exclusive title by discovery conferred an absolute and exclusive right to extinguish the Indian title of occupancy by purchase or conquest. Until extinguished the occupancy might bar an ejectment as effectually as a lease for years, but a purchaser from the Indians acquired a title subject to Indian laws and subject to extinguishment equally with other Indian title.⁵⁴

In Cherokee Nation v Georgia, Mr. Justice Baldwin considered the Indian right of occupancy to be "as sacred as the fee simple absolute title of the whites".⁵⁵ The following year in Worcester v Georgia the Chief Justice declared that discovery "gave the exclusive right to purchase but did not found that right on a denial of the right of the possessor to sell".⁵⁶ In 1835 the Supreme Court recognised the prevalence of the rule:

...that friendly Indians were protected in the possession of the lands they occupied and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation... until they abandoned them, made a cession to the government or an authorised sale to individuals.⁵⁷

The ultimate fee was in the Crown and could be granted by the Crown but possession of the land could not be taken without the consent of the Indians then in possession.⁵⁸

It was clearly recognised that the tribes possessed a peculiar interest in their tribal territory but the extent of that interest and the legal incidents to it were not yet fully ascertained.

3) RIGHTS IN PERSONAM

The application of English law to the Indians was a process that varied sharply between colonies. In commercial transactions the Indian was rarely a match for the colonist: price-establishing combinations and outright fraud on the part of the traders could rarely be matched by the Indians once they became dependent on rifles, gunpowder and rum. The bargaining power of the Indian was further reduced once the encroachments of British settlers and others had destroyed the game in his territory. Trade was usually the first contact the natives had with the colonists and cheating was widespread and the cause of constant native complaint.⁵⁹ Due to the importance of Indian trade, especially that in furs, and to preserve the Indian alliance, the British government departed from normal mercantile principles of refusal to interfere with freedom of contract and attempted on a number of occasions to regulate trade, including provisions for licensing traders in the Proclamation of 1763.⁶⁰ The attempts to ensure fair dealings, like those to prevent the rum trade, were invariably unsuccessful, the officials responsible for enforcing the regulations often being themselves involved in the abuses.⁶¹

Nor was there equality in normal social activities. Except during the early colonial period, intermarriage was unusual and subject to decided social stigma despite a recommendation in its favour from the Board of Trade⁶²: temporary use of the Indian women was common. Slavery, although not common except in Massachusetts, was practised in a number of colonies.⁶³ The Indians experienced

difficulty in obtaining redress for trespass and damage to their person or property. In New York, a special court was established to deal with interracial conflicts and Indians did appear as plaintiffs and witnesses: due to discrimination against them aggrieved Indians preferred to request governmental action.⁶⁴ On a number of occasions Indians were promised equality of treatment in the criminal law courts and in New York normal criminal procedures were followed in trials of Indians.⁶⁵ In 1638 in Plymouth Colony, despite hostile demonstrations by the settlers, a white man was tried, convicted and executed for the murder of an Indian.⁶⁶ However, the usual practical effect of contact with white man's law was to expose the Indian to unequal treatment. Indian courts were proposed on a number of occasions. The Indian village system in Massachusetts provided for the inhabitants to choose their own magistrates: but the system soon collapsed with the measures taken against the Praying villages during and after King Phillip's War, and thereafter white magistrates were appointed.⁶⁷ The contact with white law was certain to undermine, if not destroy, the foundations of Indian society: indeed in some New England towns the religious laws of the Puritans were rigidly enforced against the natives living in the vicinity.⁶⁸

Accordingly, despite their early advantages in numbers, their importance for the very survival of the early settlements, their role in the fur trade, and the need for their military services, the Indians were unable to establish for themselves any adequate protection against the haphazard, irregular

and discriminatory application of English law.

After the War of Independence, in Worcester v Georgia, Chief Justice Marshall, in a decision ignored by the unsuccessful defendant,⁶⁹ gave as his opinion of the status of an Indian tribe that:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.⁷⁰

This conclusion he reached as a result of his view that:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed...

and the international law doctrines that in accepting the protection of a stronger power a weak state does not surrender its independence thereby.⁷¹

In 1883 the Supreme Court recognised that Indian self-government included the right to maintain "order and peace among their own members by the administration of their own laws and customs", and therefore possessed exclusive jurisdiction over crimes committed by one Indian against the person or property of another Indian.⁷² The jurisdiction was held to be subject to any intervening legislation of Congress. Tribal sovereignty was held to include jurisdiction in civil litigation in 1896,⁷³ and tribal law has been applied in civil cases in courts of whites as early as 1847.⁷⁴

4) THE LATER BRITISH PRACTICE

Following the Revolution, Britain continued the policy declared in the Proclamation, and from about 1791 began to liquidate Indian land title in return for compensation by purchase moneys, annuities and trust funds, and the adoption of the reservation system. The fur and liquor trades were regulated and, despite abuses, efforts were made to preserve Indian culture.⁷⁵

The Practice of purchasing lands from the Indian inhabitants was continued in Canada,⁷⁶ although some tribes had land allocated to them; the Indian tribes which had fled the territory of the United States in fear of the reprisals carried out by the victorious revolutionaries were amongst the first to be so settled when they were allocated some 260,000 acres on the banks of the Grand River.⁷⁷

In 1829 it was suggested that:

The most effectual means of ameliorating the conditions of the Indians...and of eventually relieving His Majesty's Government from the expense of the Indian department, are...

To collect the Indians in considerable numbers, and to settle them in villages, with a due portion of land for their cultivation and support.⁷⁸

They were to be instructed in husbandry and assisted by the supplying of agricultural equipment.

This was adopted as the best policy when the Indians were willing to be settled.⁷⁹ The application of both old and new policies permitted the continuation of old abuses.⁸⁰ The land on which the villages were settled was sometimes inadequate,⁸¹ and the Indians to whom land was assigned sometimes sold it or were defrauded of it by the colonists.⁸² Those Indians inhabiting unpurchased lands experienced the continued inroads into their territory of white settlers, and bloodshed resulted.⁸³ The government officials were in sympathy with white expansion although efforts were made to protect the Indian who was considered "little better than a child, as respects any land or other property assigned for his support".⁸⁴ Unfortunately the Indian Department was understaffed, and its activities had to be largely devoted to the distribution of presents, subject to numerous requests from Whitehall to practise economy.⁸⁵

The former Attorney General of New South Wales, Saxe Bannister, in giving evidence on the condition of the North American Indians (based on his reading rather than on any personal experience), suggested that "the general desire of the white people to get possession of the land of the Indians has ever prevailed over better considerations; and frauds in trading, with oppressions in the ordinary intercourse of the strong with the weak have never been duly provided against".⁸⁶ He considered that:

The right of the natives to their own land should be protected, not only by the ordinary legal remedies, but also by a fairer valuation of what they cede in treaties, and by a vigorous armed pursuit of squatters and intruders, so as to ensure their expulsion and punishment.⁸⁷

In practice, in British North America, the ordinary legal remedies were disregarded in favour of protection of the Indians by executive action. For this reason commentators and, later, the Canadian courts, found it necessary, when considering Indian status and rights, to rely on the statements contained in judgments in the U.S. Supreme Court.⁸⁸

In a series of cases Canadian Courts have treated the decisions of the United States Supreme Court as reflecting the policy of the British Government towards Indian title to tribal lands. In 1887 in referring to the early decisions of the U.S. Supreme Court, Mr. Justice Strong of the Supreme Court of Canada stated that:

The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognised and applied in British North America.⁸⁹

Later cases have adopted a similar attitude to the U.S. statements.⁹⁰

Although it was usual for statements of the nature of the right to refer to it as being founded on British "policy", a number of official statements referred to it more directly as resting on legal doctrine. The difference was significant for if the title rested merely upon policy, it could only be protected by executive action, but if it were a right in law, it could be enforced by a Court. The nature of the title in Canada is still not beyond doubt.⁹¹ It is possible that this uncertainty as to the status in law of the doctrines of Indian title has been the reason for the paucity of cases on the issue in British courts.

FOOTNOTES

1. Smith, op. cit., pp. 332-5.
2. Ibid., pp. 449-51.
3. Lucy S. Sutherland, The East India Company in Eighteenth-Century Politics (Oxford, 1952), pp. 44-8, 353-9.
4. J.A. Williamson, A Short History of British Expansion (London, 1956), p. 133: Sutherland, op. cit., pp. 413-4.
5. Spear, op. cit., p. 95.
6. Vincent T. Harlow, The Founding of the Second British Empire 1763-1793 (London, 1952), Vol. I, p. 4.
7. T.H. Beaglehole, Thomas Munro and the Development of Administrative Policy in Madras 1792-1818 (Cambridge, 1966), pp. 2-11.
8. Loc. cit.
9. Roy Harvey Pearce, Savagism and Civilization (Baltimore, 1967), p. 6. See also Richard Eburne, A Plain Pathway to Plantations (ed. Louis B. Wright), (New York, 1962), pp. 24-30.
10. Robert Gray, A Good Speed to Virginia (1609), ed. W.F. Craven (New York, 1937), Sig. (C1^V) - C2^R. cited in Pearce, op. cit., p. 10. See also Eburne, op. cit., pp. 55-6.
11. Pearce, op. cit., pp. 10-11.
12. Pearce, op. cit., pp. 17-19, 25, 35-7.

13. Reverend John Cotton, "God's Promise to His Plantations" extracted in Wilcomb E. Washburn (ed.) The Indian and The White Man (New York, 1964), p. 103. The Instructions to the Company ordered that the Indians be done no injury, that transgressors be punished and that Indian claims to land be appeased by purchase. D'Arcy McNickle "Indian and European: Indian White Relations from Discovery to 1887" in R.C. Owen, J.J.F. Deetz and A.D. Fisher (eds.) The North American Indians - A Sourcebook (New York, 1969), p. 622 at p. 626. As McNickle points out, a Virginia Statute of 1633 also cites Genesis, 1.28.
14. Pearce, op. cit., pp. 19-21.
15. Mattingly, op. cit., p. 290. Whether apocryphal or not this accurately states the viewpoint of the New England puritan.
16. Pearce, op. cit., pp. 20-3.
17. Wilcomb E. Washburn, "The Moral & Legal Justification for Dispossessing the Indians" in James Morton Smith (ed.) Seventeenth Century America - Essays in Colonial History (North Carolina, 1959), (Uni. of N. Carolina Press), p. 15 at pp. 20-2: Pearce, op. cit., pp. 11, 22-4.
18. Pearce, op. cit., pp. 70-1.
19. e.g. "It may be said that the cultivation or melioration of the earth, gives a property in it. No - if an individual has engrossed more than is necessary to produce grain for him to

live upon, his useless gardens, fields and pleasure walks, may be seized upon by the person who, not finding convenient ground elsewhere, choose to till them for his support." Hugh Henry Brackenridge, Indian Atrocities, cited in Washburn, The Indian and the White Man, op. cit., p. 111 at pp. 113-4. See also the Report of the Committee on Indian Affairs of the United States House of Representatives (21st. Cong., 1st sess., H.R. Rep. No. 227, Feb. 24, 1830) extracted in Snow, op. cit., at p. 34.

20. Washburn, "Moral & Legal Justifications..." op. cit., pp. 22-3 points out the myth in treating Indians as mere nomadic hunters; the conspicuous role of agriculture in Indian life being well known to the colonists who were sustained by it during the early years of settlement. It has been estimated that horticultural products furnished about 75% of all food consumed by North American Indians. Harold E. Driver, Indians of North America, 2nd ed. (Chicago, 1969), p. 66. See also on Indian agriculture Alvin M. Josephy Jnr, The Indian Heritage of America (London, 1972), pp. 93-8.

21. e.g. Brackenridge, loc. cit. See also Wilbur R. Jacobs, Dispossessing the American Indian-Indians and Whites on the Colonial Frontier (New York, 1972), pp. 108-112. The Sydney Gazette revealed similar prejudices when, in the edition of June 24, 1804, it was said of the Australian aborigine that:-

...no set of people in the known world were ever so totally destitute as these are of industry and ingenuity, or whose innate indolence rendered them so wretchedly inattentive to the very means of subsistence...none aspires to the superior comforts of civilization, none attempts to erect a hut for himself or his little naked progeny...none contrives a garment...nature is wholly unassisted, and the increase of the herb and the animal alike neglected.

22. Pearce, op. cit., Ch. 1; Washburn, The Indian and the White Man, op. cit., pp. 14, 20, 35-8, 44-50; Jacobs, Dispossessing the American Indian, op. cit., pp. 108-116; Josephy, op. cit., pp. 301ff; Peter Faab, Man's Rise to Civilization (London, 1969), p. 245; Milton W. Hamilton, Sir William Johnson and the Indians of New York (New York, n.d.), p. 6.
23. But see Nancy Oestreich Lurie, "Indian Cultural Adjustment to European Civilisation" in Smith (ed.), Seventeenth Century America, op. cit., p. 33ff.
24. Keller et al., op. cit., pp. 11-2: Snow,

op. cit., pp. 19-20, 191-5; Johnson v McIntosh, op. cit., pp. 573-588.

25. Frank B. Higgins, "International Law Consideration of the American Indian Nations by the United States", (1961) Arizona Law Review, 3, p. 74 at pp. 80 ff: Annie H. Abel, "Proposals for an Indian State 1778-1878", in Annual Report of the American Historical Association (1907), Vol. I, p. 90. In the peace negotiations of 1814 between the United States and Great Britain, the British proposed the recognition of the Indian country between the U.S. and Canada as a buffer state under joint protection. The United States Commissioners objected that the Indian tribes were already under U.S. sovereignty as domesticated communities. Snow, op. cit., p. 24. The Proponents of similar schemes in the U.S., also in 1814, had taken a view of Indian sovereignty similar to that of the British. Abel, loc. cit.
26. Washburn, The Indian and the White Man, op. cit., pp. 106ff, 340: Goebel, op. cit., pp. 105-8. See also the land cases discussed in Julius Goebel Jnr and T. Raymond Naughton, Law Enforcement in Colonial New York (New York, 1944), p. 206-220.
27. Foreign relations were normally outside the scope of a Governor's authority but he did possess powers to make treaties with the Indians, or to make war with them. Berriedale Keith, The First British Empire (Oxford, 1930), pp. 220-1: Holdsworth, History, op. cit., XI, p. 51.

28. e.g. Peter Wraxall, An Abridgment of the Indian Affairs (ed. Charles Howard McIllwain), (Cambridge, 1915), pp. 19 (1692-3), 25 (1694), 94 (1712), 99 (1714), 172 (1728).
29. Keller et al., op. cit., p. 12.
30. The British government had often provided presents, or wampum, in its own name for the Indians prior to the appointment of Johnson. Such presents played an important role in Indian life and often governed relations between tribes and confederacies. The British government accepted this practice as requisite for good relations with the Indians. Wilbur R. Jacobs, Diplomacy and Indian Gifts (Stanford, 1950), pp. 17, 29-45.
31. It was certainly regarded as a diplomatic process by the Indians and the conduct of negotiations proceeded in a manner dictated by the Indians rather than the British or colonial forces. Loc. cit.
32. The development of these proposals and the background to the Royal Proclamation is treated in John Richard Allen, John Stuart and The Southern Colonial Frontier (New York, 1966): McNickle, "Indian and European...", op. cit., pp. 627-9: Francis Paul Prucha, American Indian Policy in the Formative Years (Massachusetts, 1962), Ch. I: Jack H. Sosin, Whitehall and the Wilderness, The Middle West in British Colonial Policy, 1760-1775 (Lincoln, 1961), pp. VII-X, 27-33.

33. As was the view of Marshall C.J. in Cherokee Nation v Georgia, op. cit., at p. 17 and Worcester v Georgia, 31 U.S. (6 Pet.) 515 (1832) at p. 559.
34. It is noteworthy that it was customary for the colonial commissioners and governors on the one hand and the Indian spokesmen on the other, to refer to the allied tribesmen as subjects of His Majesty. It is probable that there was not mutual understanding of the term, the Indians using it as a polite form of indication of alliance. See Wraxall, op. cit.
35. Higgins, op. cit., at p. 80.
36. Cambridge History of the British Empire, op. cit., Vol. I, Chs. III, V, VIII & XXV.
37. Sosin, loc. cit.
38. Loc. cit.: McNickle, "Indian and European...", op. cit., p. 627: Jacobs, Dispossessing the American Indian, op. cit., p. 123.
39. Josephy, op. cit., pp. 91-8: Driver, op. cit., Ch. 17.
40. Josephy, op. cit., pp. 283-4.
41. D'Arcy McNickle, The Indian Tribes of the United States - Ethnic & Cultural Survival (London, 1962), pp. 13-16. In keeping with the sentiments expressed in the sermon by Reverend Cotton, Massachusetts recognised as Indian only those lands actually under cultivation. Roger Williams, the founder of the colony of Rhode Island was previously

expelled from Massachusetts for his objections to this practice and, consistent with his views on Indian title, his attacks on the validity of the Royal charter on which Massachusetts was founded. Cambridge History of the British Empire, I, pp. 163-4: William T. Hagan, American Indians (Chicago, 1961), p. 13.

42. Cohen argues that the land encompassed by the United States was substantially purchased from the Indians and deprecates suggestions that the price paid was generally unfair. He cites in agreement the views of Thomas Jefferson and the Commissioner of Indian Affairs for 1872. Felix S. Cohen, "Original Indian Title", Minnesota Law Review, 32:28 at pp. 34-7.
43. Yasu Kawashima, "Legal Origins of the Indian Reservation in Colonial Massachusetts", (1969) American Journal of Legal History, Vol. 13, p. 42 at pp. 50-2: Jacobs, Dispossessing the Indians, op. cit., pp. 37, 79-82, 121-2: Josephy, op. cit., pp. 301-3. Goebel & Naughton, loc. cit., detail from the records of colonial New York, some of the considerable matter of land frauds on Indians which occurred throughout the later colonial period; there were difficulties of procedure and proof in the way of obtaining judgments against those engaged in such practices.
44. The Proclamation is reproduced in Arthur Berriedale Keith (ed.), Selected Speeches and Documents on British Colonial Policy 1763-

1917 (London, 1918), Vol. I, at p. 3.

45. Alden, op. cit., Ch. XIII: Hagan, op. cit., p. 26.
46. The doctrine of Indian communal title has been developed in a long string of cases in most of which the references to it have been obiter. The cases have been subjected to an, at least, equally long string of academic reviews. The important early cases, Marshall v Clark (1791), 1 Kentucky Reports, 77; Fletcher v Peck (1810), 10 U.S. (6 Cranch); Johnson v McIntosh, op. cit.; Cherokee Nation v Georgia, op. cit.; Worcester v Georgia, op. cit.; Mitchell v United States (1835), 9 Pet. 711, are of interest as being indicative of the contemporary treatment of native issues. It is no part of this thesis to consider the later development of the doctrine. The doctrine has been analysed at length in Higgins, op. cit.; Cohen, op. cit., and Neil H. Mickenburg, "Aboriginal Rights in Canada and the United States", (1971) Osgoode Hall Law Journal, Vol. 9., No. 1, pp. 119ff. The cases were considered by Blackburn J. in Milurrrum v Habalco Pty. Ltd., op. cit. pp. 209-233.
47. Mickenburg, op. cit. See also L.C. Green, "Canada's Indians: Federal Policy, International and Constitutional Law", Ottawa Law Review (Summer 1970), Vol. 4, p. 101 at p. 116 et seq. The question was considered by Blackburn J. in the Milurrrum case and he decided, on the basis of Calder v Attorney General of British Columbia (1971), 13 D.L.R. (3d) 63, that no

such rights existed "except such as can be shown by prerogative or legislative act, or a course of dealing" (p. 83). However Mickenburg argued that:

- (a) "the proposition that aboriginal rights exist independently of the Royal Proclamation has received judicial approval" (p. 143) (in cases which were not referred to by Blackburn J.);
- (b) the existence of the right has been given express recognition in Canadian legislation, and
- (c) Calder's case proceeded on a misconstruction on the "Act of State" doctrine and was, therefore, incorrectly decided.

- 48. Milurrrpum v Nabalco Pty. Ltd., op. cit., pp. 104-5.
- 49. Mickenburg, loc. cit.
- 50. Johnson v McIntosh, op. cit., at pp. 588-92.
- 51. Fletcher v Peck, op. cit., p. 79.
- 52. Ibid., p. 80
- 53. Johnson v McIntosh, op. cit., pp. 572-3.
- 54. Ibid., pp. 587 & 592-3.
- 55. Cherokee Nation v Georgia, (1831), 30 U.S. (5 Pet.) p. 1, at p. 47.
- 56. Worcester v Georgia, (1832), 6 Pet. p. 515, at p. 544.
- 57. Mitchell v United States, op. cit., pp. 745-6.
- 58. Loc. cit.

59. Wilbur R. Jacobs (ed.), The Appalachian Indian Frontier - The Edmond Atkins Report and Plan of 1755 (Lincoln, 1954), pp. 24-36: Jacobs, Dispossessing the Indians, op. cit., pp. 32-7: Allen W. Trelease, Indian Affairs in Colonial New York, The Seventeenth Century (New York, 1960), pp. 189-192, 223.

60. Jacobs, Dispossessing the Indians, op. cit., pp. 37ff, 109ff: Jacobs, The Appalachian Indian Frontier, op. cit., pp. 13ff. See Joseph H. Smith (Ed. & Introduction), Colonial Justice in Western Massachusetts (1639-1702) - The Pyncheon Court Record (Cambridge, Massachusetts, 1961), pp. 122-3, 150, 235, 271-2. It would appear that the local laws against supplying liquor to the Indians were enforced on occasions, as also the laws against drunkenness were enforced against Indians (Ibid., pp. 262-3, 281-2).

61. Jacobs, Dispossessing the Indians, op. cit., p. 82.

62. Jacobs, Dispossessing the Indians, op. cit., pp. 97ff, 116-9: But see Kawashima, op. cit., pp. 54-5.

63. Jacobs, Dispossessing the Indians, op. cit., pp. 122-3: Trelease, op. cit., pp. 202ff.

64. Trelease, op. cit., pp. 181-6, 197. In Massachusetts the Indian was, after King Phillip's War, required to go to the Inferior Court of Common Pleas, as was any white party. Kawashima, op. cit., p. 48. See also Smith, Colonial Justice, op. cit., pp. 123-4, 243, 268-9, for details of some cases where Indians

proceeded against white defendants in civil suits and won, for personal assault and injury to crops and personal property.

65. Trelease, op. cit., pp. 186ff. The Pyncheon Court Records appear to indicate that in Massachusetts trials of whites for offences against Indians and of Indians against whites were alike subject to the usual criminal procedure once the offender came within the courts. Smith, Colonial Justice, op. cit., pp. 72, 85-6, 123-4, 142, 223-4, 274-5.
66. Washburn, The Indian and the White Man, op. cit., pp. 310ff.
67. Kawashima, op. cit., pp. 43-9: Jacobs, Diplomacy, op. cit., pp. 94-5.
68. Washburn, The Indian and the White Man, op. cit., pp. 183ff: Jacobs, Dispossessing the Indians, op. cit., p. 110.
69. Felix S. Cohen, "Indian Rights and the Federal Courts", 24 Minnesota Law Review (January, 1940), p. 145, at p. 149.
70. Worcester v Georgia, op. cit., p. 560.
71. Ibid., pp. 559-60.
72. Ex parte Crow Dog, (1883), 109 U.S., p. 556, at pp. 568-9. 3 Sup. Ct., p. 396.
73. Standley v Roberts (1896), 17 Sup. Ct., p. 999.
74. Jones v Laney (1847), 2 Tex., p. 342, 21 S.W., p. 297.

75. A. Grenfell Price, White Settlers and Native Peoples (Cambridge, 1949), p. 68-9.
76. Major-General Darling to Lord Dalhousie, July 24, 1828, British Parliamentary Papers: Aboriginal Tribes in British Possessions (referred to hereafter as "P.P.:Aboriginals") (1834), p. 22, at pp. 29-30. Sir James Kempt to Sir George Murray, June 22, 1829, ibid., (1834), p. 53 at pp 54-5: G.R. Dawson to R.W. Hay, Nov. 20, 1829, ibid., p. 59.
77. Darling to Dalhousie, July 24, 1828, ibid., p. 28.
78. Sir James Kempt to Sir George Murray, May 16, 1829, ibid., p. 37, at pp. 40-1.
79. Darling to Dalhousie, July 24, 1828, ibid., p. 22, at pp. 27-8; Dawson to Hay, ibid., p. 59: Sir James Kempt to Sir George Murray, February 23, 1829, ibid., p. 36, at p. 39. (See also Enclosure at pp. 42 & 51-2): Sir George Murray to Sir James Kempt, Jan. 25, 1830, ibid., pp. 87-9: Sir James Kempt to Sir George Murray, May 20, 1830, ibid., pp. 95-8.
80. It was said that widespread corruption existed among the officers of the Indian Department and the recipients of the sums expended by the British Government were often the officers rather than the Indians. H.T. Manning, British Colonial Government after the American Revolution 1782-1820 (Hamden, Connecticut, 1966), pp. 214-5.

81. Darling to Dalhousie, July 24, 1828, P.P.:
Aboriginals, (1834), p. 24. Memorandum of a
 Conference held between Sir George Murray and
 a Deputy of the Huron Tribe, at Downing Street,
 January 15, 1830, ibid., pp. 64-5. The later
 documents in the Parliamentary Papers indicate
 that the Huron claims were flimsy, see pp.
 65-87.

82. Darling to Dalhousie, July 24, 1828, ibid.,
 p. 23. In 1821 the Lieutenant-Governor of
 Upper Canada proposed that the reserve
 appropriated to the larger tribes be sold in
 part and the proceeds be used to defray the
 expenses of the Indian Department, the balance
 of the land being held in trust for the tribes:
 the proposal appears to have been ignored. Sir
 Peregrine Maitland to Lord Bathurst, November
 29, 1821, extracted in Vincent Harlow &
 Frederick Madden (eds), British Colonial
Developments 1774-1834 (Oxford, 1953);
 Memorandum of a Conference between Sir George
 Murray, and two Deputies of the Iroquois Nation
 held in Downing Street on January 15, 1830,
P.P.: Aboriginals (1834), p. 63.

83. Darling to Dalhousie, July 24, 1828, ibid.,
 p. 24: Peter Jones to Viscount Goderick, July
 26, 1832, ibid., pp. 135-6.

84. Darling to Dalhousie, ibid., p. 30.

85. Loc. cit. See also Sir George Murray to James
 Kempt, December 3, 1828, ibid., p. 36, and
 December 1, 1829, ibid., p. 60. The amount of
 presents were reduced from £117,500 in 1816 to

about £16,000 in 1831 and the charge of the establishment and pensions from £16,200 to about £4,400. Viscount Howick to J.K. Stewart, Feb. 14, 1832, ibid., p. 138.

86. Evidence of Saxe Bannister, March 14, 1837, P.P.: Aborigines (1837), p. 5, at p. 12.
87. Ibid., p. 19.
88. Mickenburg, op. cit., pp. 144-9.
89. St. Catherines Milling^{Co.} v The Queen (1837), 13 S.C.R. 577 at p. 610.
90. e.g. R v White & Bob (1964), 52 W.W.R. (B.C.C.A.), p. 193 at pp. 212, 218. R v Sikyea (1964), 43 D.L.R. (2d), p. 150 at p. 152.
91. See e.g. Calder v Attorney-General of British Columbia (1971), 13 D.L.R. (3d), p. 64, at p. 73.

CHAPTER IVTHE STATUS OF THE AUSTRALIAN ABORIGINE

The rational-minded Industrial-Age settlers of the late eighteenth century were little more capable of establishing an empathy with the Australian Aborigines than were the Puritans of the seventeenth century with the American Indians. At least the culture of the Indians touched upon that of the white man in many respects, the culture of the Aborigines did not touch that of the white man at all. The Indian was essential to the survival and prosperity of the American colonists, the Aborigine could contribute nothing to the material welfare of the Australian colonists and gave every appearance of being both a burden and a nuisance.

Aboriginal culture was so perfectly self-integrated, so closely related to the natural environment and so remote from European belief in dominating nature that it required experienced anthropologists of the twentieth century to understand and explain its character.¹ It was hardly surprising that subscribers to the ideology fostered by mercantilism and the Industrial Revolution should have had scant regard for the nature of Aboriginal civilisation.

In England, little was known of the character of Aboriginal society prior to the visit of Cook. The earliest source of any value, Dampier's Journal of his travels, including his visit to the west coast of Australia in 1688, was published in 1697.

In it he described the natives as being without "Houses and Skin Garments, Sheep, Poultry and Fruits of the Earth...." He considered them to be personally unattractive, brutish and "the miserablest People in the World". His picture of their hard won existence in a barren land, their lack of interest either in European culture, or in enterprising work were to establish images that were often to be repeated.² His second voyage confirmed the early opinion he had formed of the natives' defects.³

The reports of a number of the Dutch voyages were published in Harris' Navigantium atque itinerantium bibliotheca in 1705, a new edition of which was published in 1744-8 and reprinted in 1764.⁴ De Brosse's History published in 1756 contained narratives of forty seven voyages in the South Seas: John Callander's Terra Australis Cognita published in 1766-8 was largely a free translation of De Brosse's work.⁵ Alexander Dalrymple published two works on explorations of the South Pacific in 1769 and 1770.⁶ These works added little to what had been said by Dampier but raised hopes that further exploration would result in discoveries of more useful peoples.

Although there was curiosity in scientific groups, and some degree of public interest was demonstrated by the market for these reports, for a long period there was no demonstration by the English Government of an official interest in the South Pacific. A proposal by Captain John Welbe in 1713 was rejected apparently in suspicion as to his ability, and reluctance to relieve his

financial distress at the risk of a vessel and crew.⁷ Other proposals soon followed for this was a time of scientific and geographical interests when it was a popular pastime to put forward disinterested schemes for the advantage of science and the Empire.⁸ The independent merchants were unconvinced, the East India Company was antagonistic and the government was busy elsewhere. Anson's voyages were primarily privateering as were most of the other British voyages in the Pacific at this time. Not until the end of the Seven Years War in 1763 did the series of official expeditions commence. It was clearly a fundamental purpose of those voyages to discover and take possession of strategically and otherwise useful land - Byron in 1764, Wallis and Cartaret in 1766 and Cook in 1770 were instructed to discover and seize any such islands.⁹

The Government placed no reliance on the published reports of the Aborigines at the risk of disregarding potential native sovereignty. Cook received three sets of instructions: the ordinary sailing Instructions and the Secret Instructions referred to the geographical and astronomical purposes of the voyage. The additional Secret Instructions (first published in 1928) ordered Cook "with the Consent of the Natives, to take possession of Convenient Situations in.....(The Southern Continent).....in the Name of the King of Great Britain; or, if you find the Country uninhabited, take Possession for His Majesty by setting up Proper Marks and Inscriptions as first discoverers and possessors".¹⁰ During the seven

days spent at Botany Bay Cook "caused the English Colours to be display'd ashore every day and an inscription to be cut out upon one of the trees near the watering place seting forth the Ship's name, date and c^a.¹¹ At several unspecified places on the east coast Cook formally took possession and at Possession Island on August 22 recorded that:

I now once more hoisted English
coulers and in the Name of His
Majesty King George the Third
took possession of the whole
Eastern Coast from the above
Latitude down to this place by
the name of New South Wales,
together with all the Bays,
Harbours, Rivers and Islands
situate upon the said coast,
after which we fired three
Volleys of Small Arms which
were Answered by the like
number from the Ship.¹²

Although Cook made no attempt to obtain the consent of the natives as was apparently required by his Instructions, it is likely that the English authorities would have interpreted the Instructions in the same manner as they were applied by Cook: to be relevant only to civilised natives capable of sovereignty.¹³ Nothing in the English observations of the natives would have suggested that the Australian natives possessed a degree of divilisation capable of territorial sovereignty. For all relevant purposes of international law the country could be treated as uninhabited.

The report of Banks suggested that the numbers of Aborigines were necessarily small owing to the barrenness of the country, and that the Aborigines were by nature cowardly and nasty tempered.¹⁴ In his evidence before the Select Committee of the House of Commons he suggested that the natives were "naked, treacherous and armed with Lances, but extremely cowardly, and constantly retired from our People when they made the least Appearance of Resistance".¹⁵ The descriptions by Cook were more favourable. He found them a timorous and inoffensive race, in "no ways inclined to cruelty", of small numbers and no fixed abode and occupied with hunting and fishing, possessing few material possessions, and only grass huts for housing.¹⁶

However, he concluded that "in reality they are far more happier than we Europeans; being wholly unacquainted not only with the superfluous but the necessary Conveniences so much sought after in Europe, they are happy in not knowing the use of them".¹⁷

Thereafter there was tacit rejection of any entitlement of the Aborigines to sovereignty.

Those English who proposed the establishment of a colony in Australia considered the native population to be of little importance¹⁸: Matra was content to accept the evidence that the numbers were few: Young ignored their existence.¹⁹ Lord Sydney, however, reported to the Admiralty that "some military establishment shall be made at the new intended settlement, not only to enforce due subordination and obedience (of the convicts), but

for the defence of the settlement against incursions of the natives....".²⁰

Phillip expressed hopes that no dispute would arise with the natives whom he would attempt to civilise but, cautiously, he proposed the erection of a slight work as a defence against both the natives and convicts. He futilely intended to prevent contact between convicts and natives for, he believed, the natives' spears would be formidable in the hands of the convicts, the women would be abused and the natives disgusted. He proposed that useful goods for barter be included in the provisions of the First Fleet.²¹

All Governors prior to Darling were instructed that:

You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any necessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.²²

In the colonists experience of the natives there was nothing to require a revision of the

original determination of the absence of native sovereignty. Early relations with natives were amicable although the natives displayed suspicion initially.²³ However it soon became clear that the English intended to stay and clear the land and several incidents occurred to mar the friendship of the two peoples. Thieving occurred by both races and, at a short distance from the English settlement, La Perouse's men fired on the natives on a number of occasions.²⁴ It was not known whether the natives recognised that the English and French were separate, and such incidents jeopardised relations between the colonists and the natives. Orders that the natives were not to be offended or molested and that only mild means were to be taken to recover anything stolen by them, were ignored²⁵ and the contact between whites and blacks became increasingly violent, resulting in the deaths of four convicts and an unknown number of natives in 1788.²⁶ The attacks on the convicts were possibly in retaliation for injuries to the persons or property of the natives²⁷: details of attacks on the natives by convicts were scarce and unsatisfactory.²⁸ On several occasions the Governor ineffectually despatched the military on punitive expeditions to deter the natives.²⁹

The measures taken to win the confidence of the Aborigines were clumsy and unsatisfactory. During the early years of the colony the natives were objects of interest, and attempts were made, with little real success, to understand them. The common views of the Aboriginal character and culture were formed during this period and continued as the dominant themes of statements and decisions

concerning the Aborigines made by the settlers and authorities throughout the period studied.

Rousseau's Social Contract was published in 1762 and the vogue of the "Noble Savage" persisted into the early years of the colony.³⁰ It was soon to be replaced by disgust of the state of nature. The two conflicting philosophies of the state of nature as ran through eighteenth century thought were, in Australia, to have only a brief co-existence before the overwhelming victory of the Hobbesian view of the state of man outside society, that "the life of man is solitary, poor, nasty, brutish and short", and there is "war of every man against every man".³¹ The conflict was apparent in the work of Tench who concluded of the Aborigine that "they certainly rank very low, even in the scale of savages".³²

Without succumbing to the view of the noble savage, Phillip was consistent in his optimism for the development of the Aborigines to civilisation.³³ However, he had no policy whereby he might bring this about, nor had any Governor during the period of this study other than Macquarie.³⁴ Phillip offered the natives his friendship along with presents and the benefits of English civilisation. His method of approaching the natives was to capture a number of them, teach English to those who survived and release them to bring in their fellows. When it appeared that these measures were unsuccessful he ordered punitive military expeditions which were similarly unsuccessful.³⁵ His officers did not share his optimism and early lost interest in the culture of the Aborigines.

Aborigines remained a problem, but to the colonists' material progress, not to their consciences.

The information supplied by Phillip and his officers was not likely to predispose the officers of the Home Department to re-consider the status of the natives. They were reported to be personally unattractive and unclean,³⁶ usually shy of contact with the whites but likely to attack small numbers of whites when unarmed,³⁷ and of primitive habits in the way of manners, habitation, clothing and food³⁸: it was even suggested that they might be cannibals.³⁹ They were known to ill-treat their womenfolk.⁴⁰ The most complete report was that of Collins and the first volume of his Account was published in 1798.⁴¹ He, like Phillip, attributed to the tribes government by chiefs, and reported that each "family" had a particular place of residence, that they had some idea of a future state after death, but without any deity to worship or to determine morality. They were not monogamous: wives were obtained by kidnap and rape. Their customs following a death by either murder or natural causes were sanguinary and required someone to be punished, usually in the "contests" (of which several accounts were given).⁴² They were "vengeful, jealous, courageous and cunning". He concluded, "that they were ignorant savages cannot be disputed; but it is hoped that they do not ... appear to be wholly incapable of becoming one day civilised and useful members of society".

The early settlers had soon recognised that the Aborigines were not always honest in their replies to questioning,⁴³ although not all of their

reputation for dishonesty was earned: the statements of relationship amongst the Aborigines did not correspond to the European understanding of the terms,⁴⁴ and the Aboriginal custom of using several names was also regarded with suspicion. The tribes with whom initial contact was made did on occasions endeavour by falsehoods to persuade the whites to make war on other tribes.⁴⁵ It is possible that suspicion of native truthfulness inhibited any thoughts of allowing them to act as witnesses,⁴⁶ although the convicts were certainly no more truthful. If this were the reason or not the inhibition was well founded: later experience revealed the Aborigines to be unsatisfactory witnesses,⁴⁷ for they would often be evasive or untruthful with an unsympathetic white or in a situation of embarrassment or possible serious consequences; equally they might give the answers believed to be desired, expected or such as to preserve the status quo between questioner and native.

The view of the natives, soon to prevail, was that shared by an officer of the marines who, in a letter to Banks, considered that:

The natives do not appear numerous, but the most wretched of the human race. They are dressed in nature's garb, subsist chiefly (sic) on fish and roots we are unacquainted with. They inhabit chiefly (sic) the cavities of rocks and trees; their miserable huts, which are few, are constructed of the bark of trees. They do not wish to cultivate our

acquaintance or friendship. They are treacherous, for they have murdered (sic) several of the convicts and one marine, besides wounding many more. Indeed, they attack every person they meet unarmed and appear civil to all those they meet armed.⁴⁸

This view was also to be expressed in the contemporary art and perfected in the caricature of Cunningham's account, drawn largely from experience of the debased survivors of contact with Europeans.⁴⁹

At the end of his Australian career, King was to categorise the natives in those familiar terms as being treacherous and aggressive, but remarked that he had "ever considered them the real Proprietors of the Soil".⁵⁰

It was natural that the English should have considered themselves justified in disregarding any potential claims to sovereignty of the natives. Sovereignty involved a political relationship with territory and an exercise of control over that territory. Even if there were definite indications of such control the English, and all other European nations, were accustomed to look for a satisfactory level of civilisation, for regard was had also to the nature of the sovereignty. They would, therefore, look at the nature of the political system and its orderliness, and look for laws and law enforcement authorities, an economy founded on trade and individual rights in land and other property.⁵¹ These could not be discerned in the natives who were considered, therefore, little more civilised

than animals.⁵²

The Europeans were in some confusion over the political structure of the Aboriginal groups, and experienced some doubt whether there existed any such structure. As information about the Aborigines of the eastern coast is lacking in adequate anthropological detail that information today must be considered in the light of the research into the society of the tribes of Central Australia and Arnhem Land. The settlers and officials of the colony were supported by no such anthropological guidance and the information we possess today reflects the uncertainties with the material of these settlers and officials. It is little wonder that they found the tribal structure confusing or even ludicrous, when today it remains difficult for a professional anthropologist to describe.⁵³

Having negligible trade and no material possessions, other than those few objects necessary for survival or for tribal ceremonies, the economic purpose of government was foreign to the Aborigines.⁵⁴ Other purposes of government, in a European context, were equally foreign: the regulation of social interaction and the alteration of forms of social behaviour required no formalised structure of authority. Changes to their culture occurred as a result of a communal decision making process which was only partly conscious, if at all - it was achieved by incorporation of the variation into tribal lore, ceremony and art and only when the cultural assimilation was complete could it be said that the change was effectively adopted.⁵⁵ Such changes rarely occurred as the result of an

exercise of political authority, although leadership and the manipulation of authority or "political" influence did occur. Usually, however, power was derived from the position held in the religious life and in most Aboriginal societies the roles of elders and leaders controlled the conduct of the holders of the "offices" in both religious and secular activities. Political authority was limited in a rigid manner, and organisation was poorly developed; formal proceedings of a legislative nature were unusual.⁵⁶ The English could therefore identify no sovereign capable of the exercise of sovereignty.

The English expected a sovereign to exercise control within his territory. This control, and its nature were demonstrated by attainment of certain measures of civilization. Important among these measures were laws and authorities to enforce them. But the laws of the Aborigines were not easily understood by the English for the customs of the tribe were its law: these customs were not easily explained by the natives for they were founded on perceptions of existence and causality quite unlike those of the white man. These difficulties were aggravated by language problems.

It would appear that custom circumscribed the range of possible offences for, as the Berndts discovered in their study of one tribe:

There is concentration on certain kinds of offence, and this contrasts with a complete absence of others, even conceptually.

People do not quarrel over land:

Stealing, except in sexual relations

(for example, stealing a wife),
was not seen as a problem.

Apart from dogs, and occasionally
food or small belongings, property
offences were relevant only in
this sense of 'persons-as-property'
mostly women; men are not usually
spoken of in those terms. 57

The methods of enforcement of these customs
were also not easily appreciated by the white man.
Formal proceedings of a recognisable judicial nature
were not typical of Aboriginal culture.⁵⁸ The
lesser offences would normally lead to chastisement
at the hands of an individual entitled by custom to
so chastise the offender.⁵⁹ In more serious
instances the offender might be punished similarly
by such an individual. As such individual
retribution was itself likely to spark off a chain
of violent retributive conduct seriously affecting
the peace of the tribe, the more serious offences
were often dealt with by tribal action of a ritual
nature, such as "inquests", divination, arranged
settlements between parties, public duels and trials
by ordeal.⁶⁰ These activities were, to white
observers, no more than superstitious or barbarous
practices indicating a total absence of the
necessary degree of civilised behaviour.

Sovereignty, in European terms, involves a
relationship of man with territory. As was to be
expected of persons living in as intimate a
relationship with nature as did the Aborigines,
there was a close relationship with their land. The
Aborigine was only partially nomadic and then only
over a limited territory. Territorial disputes

were few, and the tribal territory of others was recognised. However, the nature of the Aborigines' relationship was not simply translated into the property terminology of sovereignty. The relationship was, in essence, spiritual, and it could be said of the Aborigine that he was held by the land in these spiritual ties instead of him or his tribe having a property in the land.⁶¹

To the English, the Aboriginal tribes appeared without a level of civilisation sufficient to warrant consideration as international persons. The status of their members and the rights attaching to that status were to be determined by English law and any lacunae were the responsibility of the Governor to fill.

In Tasmania Governor Arthur advised the Secretary of State that he considered that much of the mischief in relations with the Aborigines might have been averted if Collins and the earlier Lieutenant-Governors had made treaties with the Aborigines and thereby avoided "that sense of injustice ... they have always entertained".⁶² However, neither Arthur nor any Tasmanian Lieutenant-Governor acted towards the natives as if they possessed a degree of sovereignty. Instead the natives were expected to accept English law and the authority of the English sovereign.⁶³ Colonial officials may have entertained themselves with discussions of Grotius and Vattel and issues of the status of Aborigines as British felons or warring enemies but the legal dogma were accepted in practice.⁶⁴ As any acceptance of native sovereignty would have implied that the whites ought to have lived under native "law" no other practice would

have been acceptable.

Some confusion remained as to native status. Pedder, the Chief Justice in the Supreme Court in Tasmania objected to proposals to confine the Aborigines of Tasmania on an island, for he considered that this could only have been forcibly done to those who had the status of enemies captured in war; but he suggested instead that treaties be entered into with the native tribes and a European agent lodged with them - this implied that he considered them as neither enemy aliens nor British subjects.⁶⁵

FOOTNOTES

1. The earliest writings of value on the Aboriginal culture are Brough Smyth, The Aborigines of Victoria (Melbourne, 1878); J.D. Woods, The Native Tribes of South Australia (Adelaide, 1879); E.M. Curr, The Australian Race (Melbourne, 1886); W.E. Roth, Ethnological Studies in North-west Central Queensland (Brisbane, 1897); and B. Spencer & F.J. Gillen, The Native Tribes of Central Australia (London, 1899). The major studies are works of the present century.
2. William Dampier, A New Voyage Round the World, 3rd ed. (London, 1698), Vol. I, pp. 462-7.
3. Wood, op. cit., p. 230
4. Ibid., pp. 208, 239-242.
5. Ibid., pp. 244-254: George Mackaness, "Some Proposals for Establishing Colonies in the South Seas", J.R.A.H.S., (1943), Vol. XXIX, p. 261 at pp. 271-3.
6. Wood, op. cit., pp. 254-6.
7. Mackaness, op. cit., pp. 264-5: John M. Ward, op. cit., p. 29.
8. See Mackaness, op. cit., for an analysis of the texts of numerous proposals including those of Callander, Matra and Young.
9. John M. Ward, op. cit., pp. 36-45.
10. Beaglehole, op. cit., Vol. I, p. cclxxxiii: Scott, op. cit., p. 8. See also the

examination of the objectives indicated in the Instructions, and their relative importance in Ward, op. cit., pp. 40-3.

11. Beaglehole, op. cit., Vol. I, p. 312.
12. Ibid., pp. 387-8.
13. G.K. McCallum, "A Date with Cook", J.R.A.H.S., Vol. 57 (1971), p. 3 at pp. 6-7 suggests that the actions of Cook were in excess of his orders and were "a naked assumption of power".
14. J.D. Hooker (ed.), Journal of the Right Hon. Sir Joseph Banks during Captain Cook's First Voyage in H.M.S. Endeavour in 1768-71 to Terra del Fuego, Otaheete, New Zealand, Australia, the Dutch East Indies etc. (London, 1896), pp. 286-7. The nasty temper was displayed when the English refused to share with the natives turtles taken in the natives fishing grounds - See Beaglehole, op. cit., Vol. I, pp. 361-2.
15. "Journals of the House of Commons", Vol. XXXVII, p. 311 reprinted in C.M.H. Clark, Select Documents in Australian History 1788-1850 (Sydney, 1950), p. 26.
16. Beaglehole, op. cit., pp. 395-9, especially at p. 399.
17. Loc. cit.
18. De Brosses had suggested conciliation and non-violence as the means to win over the natives. He considered that self-control, restraint from generalised punitive measures

and the establishment of trust were necessary.

See Mackaness, op. cit., pp. 260-71.

19. Ibid., pp. 273-7: H.R.N.S.W., Vol. I, Part 2, pp. 1-3 at p. 1 & pp. 11-13.
20. H.R.N.S.W., Vol. I, Part 2, p. 21.
21. H.R.N.S.W., Vol. I, Part 2, pp. 52-3.
22. E.g. Instructions to Governor Phillip, H.R.N.S.W., Vol. I, Part 2, p. 85 at p. 89: Instructions to Governor Brisbane, H.R.A., I, X, p. 596 at p. 598.
23. Phillip to Sydney, May 15, 1788, H.R.A., I, I, pp. 24-5, H.R.N.S.W., I, Part 2, pp. 128-9: John White, Journal of a Voyage to New South Wales, (ed. Alec H. Chisholm), (Sydney, 1962), pp. 108, 152-4: John Hunter, An Historical Account of Events at Sydney and at Sea 1787-1792, (ed. John Bach), (Sydney, 1968), pp. 28, 38-41, 56-7: Watkin Tench, A Narrative of the Expedition to Botany Bay, (ed. L.F. Fitzhardinge), (Sydney, 1961), pp. 40, 46-53.
24. David Collins, An Account of the English Colony in New South Wales, (ed. James Collier), (Place and Date of Publication not known), pp. 18-20: Tench, op. cit., p. 55: William Bradley, Journal, 1786-1792 (Sydney, 1969), pp. 81, 84-5 & 126.
25. Phillip to Sydney, October 30, 1788, H.R.A., I, I, p. 96, H.R.N.S.W. I, Part 2, p. 207 at p. 208: Tench, op. cit., p. 39: George Barrington, The History of New South Wales, (London, 1810), 2nd Edn., pp. 54 & 65.

26. Collins, op. cit., Ch. II: M.L., c 830
George Worgan, May 31, p. 33: Phillip to
Sydney, July 9, 1788, H.R.A., I, I, p. 49.
27. Phillip to Sydney, October 30, 1788, H.R.A.,
I, I, p. 96: White, op. cit., p. 135.
28. E.g. Worgan, loc. cit.
29. Phillip to Sydney, July 9, 1788, H.R.A., I, I,
p. 49, H.R.N.S.W., I, Part 2, p. 148. Phillip
indicated that he merely wished to obtain an
explanation of the native attacks which he
believed to be done in self-defence or defence
of their property. Tench, op. cit., p. 52
attributes a punitive purpose. See also Collins,
op. cit., pp. 29-30, & 38, Tench, op. cit.,
pp. 209-15.
30. For an analysis of the application of the
doctrine see Bernard Smith, European Vision
and the South Pacific 1768-1850 (Oxford, 1960).
The appeal of the primitive was of two kinds,
the soft primitivism of Polynesians and the
hard primitivism of the Australians and the
Maoris: as Smith indicates (p. 7) the hard
primitivism was more congenial to Calvinism.
The different approaches are exemplified in
the works of Banks and Cook.
31. Thomas Hobbes, Leviathan (Oxford, 1909),
(O.U.P. Edn), Ch. XIII.
32. Tench, op. cit., p. 281.
33. A. Phillip, The Voyage of Governor Phillip to
Botany Bay (Sydney, 1970), (ed. J.J. Auchmuty),
pp. 36, 45, 78-9.
34. The best treatment of the relationship between

government and the Aborigines is to be found in Barry Bridges, Aboriginal and White Relations in N.S.W. 1788-1855 (Sydney, 1966), (M.A. thesis unpublished).

35. Bridges, op. cit., Ch. 3. M. Barnard Eldershaw, Phillip of Australia (Sydney, 1972), Ch. VII. Eldershaw is not always accurate for it is stated that Phillip only once sent out a punitive expedition after the murder of his game-keeper by a party of natives. The first expedition of May 31, 1788 which was led by Phillip may not have been punitive (infra fn. 29.). However a further expedition was despatched in October of 1788 (Collins, op. cit., p. 38) and the expedition of which Eldershaw writes, on December 14 and again on December 22 (See Tench, op. cit., pp. 209-215; Collins, op. cit., pp. 104-5).
36. Phillip to Sydney, May 15, 1788, H.R.A., I, I, pp. 16ff; White, op. cit., p. 137; Hunter, op. cit., p. 41; Collins, op. cit., pp. 303-5.
37. Hunter, op. cit., pp. 53-4, 56-7; White, op. cit., pp. 132-3, 154-5, 165.
38. Phillip to Sydney, May 15, 1788, loc. cit.; September 28, 1788, H.R.A., I, I, pp. 70ff; February 13, 1790, H.R.A., I, I, pp. 155ff; See also White, op. cit., pp. 157, 160-1. Hunter, op. cit., p. 55.
39. Ibid., pp. 53-4.
40. Phillip to Sydney, May 15, 1788 and February 13, 1790, loc. cit.

41. The following treatment is from Collins,
op. cit., Ch. XVI.
42. Loc. cit.
43. "Proofs are not wanting of their being adepts
in the arts of evasion and lying". Collins,
op. cit., p. 328.
44. Elkin, The Australian Aborigines (Sydney,
1964), 4th Ed., p. 95.
45. Hunter, op. cit., p. 327.
46. E.g. Opinion of Judge-Advocate Atkins July 8,
1805, H.R.A., I, V, p. 502 et seq.
47. T.G.H. Strehlow, "Notes on Native Evidence and
its Value", Oceania (March, 1936), VI, No. 3,
p. 323: A.P. Elkin, "Aboriginal Evidence and
Justice in North Australia", Oceania (March,
1947), XVII, No. 3, p. 173. It is interesting
that in Milirrroum, Blackburn J. gave greater
weight to his understanding of the statements
of the Aboriginal witnesses as to native
customs than to the evidence of the
anthropologists, Professors Stanner & Berndt.
48. November 18, 1788, H.R.N.S.W., I, Part 2,
pp. 222-3.
49. Peter Cunningham, Two Years in New South Wales,
(ed. David S. Macmillan), (Sydney, 1966),
Letter XX at pp. 183ff. See also D.J.
Mulvaney, "The Australian Aborigines 1606-
1929: Opinion & Fieldwork", Historical Studies:
Australia & New Zealand (May, 1958), Vol. 8,
p. 131 at pp. 138ff; and Smith, European Vision,

- op. cit., pp. 139, 165, 201-3, 254. The caricature was to prevail in popular publications, e.g. Mrs. Charles Meredith, Notes & Sketches of New South Wales (Victoria, 1973), (facsimile edition), Ch. X.: R. Therry, Reminiscences of Thirty Years Residence in New South Wales and Victoria, (Facsimile Edn by J.M. Bennett), (Sydney, 1974), Ch. XVI.
50. M.L., c 189, P.G. King Papers, Vol. II, p. 275.
51. E.g. Vitoria, op. cit., I, 23 at p. xiii: Vattel, op. cit., § 209, at p. 85.
52. E.g. Sydney Gazette, June 24, 1804.
53. Elkin, op. cit., Chs. III & V: R.M. & C.H. Berndt, The First Australians (Sydney, 1969), 3rd Edn., Ch. III: T.G.H. Strehlow, "Culture, Social Structure & Environment in Aboriginal Central Australia", in R.M. & C.H. Berndt (eds), Aboriginal Man in Australia (Sydney, 1965), pp. 121ff: R.M. & C.H. Berndt, Man, Land and Myth in North Australia (Sydney, 1970), Ch. 4: A.R. Radcliffe-Brown, "The Social Organisation of Australian Tribes", Oceania (1930-1), Vol. I, pp. 34ff, 206ff, 322ff, 426ff: M. Berndt, "The Concept of 'The Tribe' in the Western Desert of Australia", Oceania (December, 1959), Vol. XXX, no. 2, p. 81: Peter Corris, Aborigines & Europeans in Western Victoria (Canberra, 1968), Ch. 2.
54. Elkin, op. cit., Ch. II: R.M. & C.H. Berndt, The First Australians, op. cit., Chs. IV & V: Strehlow, loc. cit.: Charles P. Mountford, Ayers Rock, Its People, Their Beliefs and

Their Art (Sydney, 1965), Chs. 2 & 3: R.M. & C.H. Berndt, Man, Land etc., op. cit., Ch. 3.

55. Elkin, op. cit., chs. III, V & XIV: R.M. & C.H. Berndt, The First Australians, op. cit., Chs. XV, XVI & XX: R.M. Berndt, "Law and Order in Aboriginal Australia" in R.M. & C.H. Berndt (eds), Aboriginal Man, op. cit., p. 167: A.R. Radcliffe-Brown, Structure & Function in Primitive Society (London, 1952): K. Maddock, The Australian Aborigines: A Portrait of Their Society (London, 1972): R.M. & C.H. Berndt, Man, Land etc., op. cit., Ch. 7.
56. Peter Corris, op. cit., pp. 35-7, considers that the view of Dawson that the sub-tribes of the Western District of Victoria were governed by chiefs bears no similarity to the authority-structures found elsewhere in Aboriginal Australia. Dawson has been criticised elsewhere (see Ibid., pp. 16-19) but, as Corris points out, the evidence for his view is impressive and, if true, may explain the strong opposition the Aborigines of this area offered to the white intruders.
57. R.M. & C.H. Berndt, Man, Land etc., op. cit., p. 187.
58. According to the early studies the "court" of the Jaraldi in the lower River Murray area, South Australia, was much more formalised than was common with Aboriginal communities. Berndt, "Law & Order", op. cit., pp. 177-181.
59. R.M. & C.H. Berndt, Man, Land etc., op. cit., Ch. 7.

60. Loc. cit.
61. A.P. Elkin, "Elements of Australian Aboriginal Philosophy", Oceania (December, 1969), Vol. XL, No. 2.
62. M.C.I. Levy, Governor George Arthur (Melbourne, 1953), p. 105.
63. Ibid., pp. 98, 105.
64. Ibid., p. 105.
65. Ibid., p. 120.

CHAPTER VABORIGINAL INTERESTS IN LANDA. ABORIGINES, DOCTRINES OF COMMUNAL NATIVE
TITLE, AND GOVERNMENT POLICY.

At the foundation of the colony of New South Wales, no recognition was given to Aboriginal interests in land. At that date the U.S. doctrine of communal native title was yet to be formulated: the only clear legal doctrine of the British was that asserting the dominium of the King by virtue of his prerogative. The practice of recognising native occupation and of extinguishing it by purchase had been adopted by some of the American colonies and was implicitly approved by the Royal Proclamation of 1763.¹ The Proclamation had legal force only over the area to which it was addressed, but was considered to have expressed British policy in relation to the native inhabitants of all British territory. Later it was treated as expressing English law in relation to native races inhabiting the British colonies.

Despite the developments in the form of Governors' Commissions and Instructions during the eighteenth century,² the Commissions of Phillip and the later Governors made no mention of natives, and their Instructions were substantially in the same terms, as those from Charles II who, in his Instructions of 1670 to the Council of Foreign Plantations, commanded all the governors:-

...that they do not only
carefully protect and defend
them from adversaries, but

that they more especially
take care that none of our
own subjects, nor any of
their servants, do any way
harm them.

And that if any shall dare
to offer any violence to
them in their persons, goods
or possessions, the said
governors do severely punish
the said injuries, agreeably
to justice and right. ³

Neither Instruction referred expressly to land.

In 1825, James Stephen commented of the
Instructions to Governor Brisbane and earlier
Governors that, in the mention of the Aborigines,
"The objects of these Instructions are exceedingly
indefinite", and "can afford little or no assistance
to the Governor in the execution of his duty",
however, "it may yet be fit to repeat because they
are at least a record of the general feeling of the
English Government on the Subject, and because the
omission of them, might possibly be construed into
some change in that feeling".⁴

The Instructions to Darling varied only
slightly from those of his predecessors in regard to
the natives and again no mention was made of any
policy concerning land.⁵

The first expression of any official concern
for native interests in land was made by Governor
King who, in a private memorandum for his successor,
Bligh, remarked with only partial accuracy:-

Much has been said about the propriety of their being compelled to work as Slaves, but as I have ever considered them the real Proprietors of the Soil, I have never suffered any injury to be done to their persons or property.⁶

There is no evidence that his view of them as the "real Proprietors of the Soil" was reflected in his conduct towards them, and certainly he did nothing positive to preserve any proprietary rights for the natives, or prevent white encroachment on their lands.

Without formulating any view as to the rights of the Aborigines to occupy land within the colony, Macquarie's policies for their civilisation required that they be offered land, as individuals, as families, or as beneficiaries of the occupation of land by those Europeans concerned in the process of civilising the natives.⁷ Almost without exception his efforts were of no avail.

Governor Brisbane was the first to recognise a right in the native inhabitants similar to the rights afforded the North American Indian. That he did so may be due in part to his having served in Jamaica from 1800 to 1803 and in Canada during 1814, and having observed personally the application of British native policy.⁸ In his reception of William Walker in 1821 he was reported as saying:

Write down ... Some plan, and bring it up to Govt House, that we may digest the subject. -
That which I do for these

people, I do from choice, Mr. Walker, and not because I promised your friends in London. Everything that Govt can do for you, shall be done. Great things ought to be done. The Mother Country is transmitting annually from 30 to 40,000 £ of goods to the American Indians, as a compensation for their country: we have taken the land from the Aborigines of this country, and a remuneration ought to be made, and as far as I can prevail with the Ministers of His Majesty at home, I will, for the amelioration of their sufferings.⁹

Despite his mandate, indeed obligation, to further the betterment of the Aborigines, Darling displayed little interest in them and his only positive effort, the trial of Lieut. Lowe, was certainly inspired by politics, and failed.¹⁰

At a later stage, express consideration was given to the natives' entitlement to territory. However, there followed no recognition of native title to land: instead, there followed the establishment of reserves to which the Aborigines were to be attracted for employment and training.¹¹

The Select Committee of the House of Commons of 1837 on Aboriginal Tribes was chaired by Sir Thomas Buxton and represented the view of the various groups urging governmental protection of

native interests, and especially the views of the Aborigines Protection Society, first organised in 1835. In what was to be "the high-mark of this self-accusatory line of argumentation",¹² the Committee reported of the Aborigines of British settlements, including Australia that:

Too often, their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilisation impeded.

It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood. Europeans have entered their borders uninvited, and, whenthere, have not only acted if they were undoubted lords of the soil, but have punished the natives as aggressors if they have evinced a disposition to live in their own country. ¹³

In express advertance to the Aborigines of Australia the Committee reported that:

These people, unoffending as they were towards us, have, as might have been expected, suffered in an aggravated degree from the planting amongst them of our penal settlements. In

the formation of these settlements it does not appear that the territorial rights of the natives were considered, and very little care has since been taken to protect them from the violence or the contamination of the dregs of our countrymen. 14

Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force... 15

In their proposals for reform, the Committee said:

When it is remembered that unsettled land has been sold by the Government of New South Wales, yielding in a single year returns to the local Treasury exceeding 100,000 l., and that in the recollection of many living men every part of this territory was the undisputed property of the Aborigines, it is demanding little indeed on their

behalf to require that no expenditure should be withheld which can be incurred judiciously for the maintenance of missionaries, who should be employed to instruct the tribes, and of protectors, whose duty it should be to defend them. Especially they (the Protectors) should claim for the maintenance of the Aborigines such lands as may be necessary for their support. So long as agriculture shall be distasteful to them, they should be provided with the means of pursuing the chase without molestation. 16

The Select Committees of 1837-40, and 1844 inquiring into the state of New Zealand deplored the abandonment of the usual policy of recognising both the rights of the Crown as the sole proprietor and the possessory rights of the natives subject to the exclusive right in the Crown "of pre-emption over all such lands as they may be disposed to alienate". 17

In his address to the Bill for the regulation of New Zealand, submitted to the New South Wales Legislative Council, Sir George Gipps stated as general principles:

first ... that the uncivilised inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and

that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals not of their own tribe any portion of it, for the simple reason, that they have not themselves any individual property in it.

Secondly, that if a settlement be made in any such country by a civilised power, the right of pre-emption of the soil, or in other words, the right of extinguishing the native title, is exclusively in the government of that power, and cannot be enjoyed by individuals without the consent of their government. 18

This speech the Committee recognised as stating accurately "one of the fundamental principles of colonial law and policy".¹⁹

In 1841 during the hearing of issues preliminary to the trial of an Aboriginal, Bon-jon, for the murder of another Aboriginal, Willis J. held that the court had no jurisdiction, the Aborigines not being amenable to the laws of the colony for offences committed inter se.²⁰ The lengthy judgement was read to the court without any break in the proceedings having occurred for a

length of time sufficient to have allowed its preparation. According to the only account of the trial the judgement had been prepared prior to the trial.²¹ The judgement was, therefore, a carefully considered if deliberately provocative decision by a very experienced judge²²: in his judgement Willis referred to the situations in the U.S.A., Canada, Jamaica, St. Vincent and India. Prior to his appointment to the New South Wales Bench this energetic and argumentative judge had held judicial offices in Upper Canada and British Guiana, and in colonial service had had wider experience than had any other member of the New South Wales Bench, save Sir Francis Forbes, although the quality of Willis' experience may be open to doubt.²³ His judgement on the substantive issue was contrary to an earlier decision on demurrer, of a Supreme Court consisting of Forbes C.J. and Dowling and Burton J.J., the unanimous decision being drawn up by Burton J.²⁴

Willis devoted a large part of his judgement to a consideration of the status of Aboriginal tribes. The Aborigines were not a conquered people, nor did they tacitly surrender their rights as a distinct people, therefore, he considered, their rights could not differ from those of other Aboriginal tribes within the limits of the same government. Willis cited as authorities Gipps' speech (above), and Storey's and Kent's Commentaries on American law, and concluded that the passages were equally applicable to the Aborigines, who "must be considered and dealt with as distinct though dependent tribes governed among themselves by their own rude laws and customs".²⁵ The passage cited from Storey's Commentaries

asserted that the Aboriginal inhabitants had a legal and just claim to retain possession of the soil which they occupied.²⁶

Although these various statements referred to 'rights' and 'title' there was no attempt to determine the legal quality and implications of the natives' interests. Willis' attempt to incorporate the contemporary American doctrine did not extend to any analysis of the content of the doctrine and, the substantive issue being considered as contrary to decided authority, the secondary issue of native title was henceforth ignored by colonial authorities.

B. THE SETTLEMENT OF ABORIGINES.

In 1805 Governor King permitted an Aborigine known as Charley to use some four acres of land for agriculture. This occupancy was permissive only and no title passed. It is not possible to say whether this was intended as an experiment, which if successful would be repeated by the Governor. Charley was killed by white settlers after he and other aborigines had unsuccessfully raided the settlers.²⁷ Whatever his original intentions King afforded no other native such a privilege as the recognition of an interest in a particular parcel of land. This one instance was later reflected in the activities of Macquarie, but on a larger scale.

Macquarie was the first Governor to develop a policy of land grants for Aboriginal purposes. In

1814 he advised Earl Bathurst of his intention to settle in Port Jackson, some natives "Who have promised to Settle there and Cultivate the Ground".²³

On January 31, 1815, some sixteen families of the Broken Bay tribe under Boongaree, selected as their "Chief" by Macquarie after prior consultation with the natives, were settled at Georges Head in huts previously erected for them and they were presented with a fishing boat, agricultural and domestic utensils and clothing.²⁹ Although a sow and pigs were purchased for the settlement late in 1816³⁰ the experiment was recognisably a failure during 1815.³¹ An attempt was made to re-establish the settlement the day before Macquarie boarded ship to return to England: the farm was put in order, new huts were erected, a road built, and Boongaree and his fifteen followers were recommended to the good offices of Sir Thomas Brisbane.³² However on neither occasion was the land formally granted to the native settlers.³³ Some remnants of the tribe still dwelt in the area in the 1870's.³⁴

In 1820 Macquarie settled some natives in Elizabeth Bay,³⁵ on land recovered from its former owner. Huts were erected, gardens laid out and a convict on the government store assigned to assist in cultivation. Again the settlement failed, the huts being broken up and the materials sold or burnt.³⁶ There appears to be no record of this settlement being favoured with a formal grant either in favour of the tribe, or of any one of the individuals settled on the land. If any grant was to be made it would probably have been made in favour of one of the individuals.

During his disputes with Darling in 1828, E.S. Hall the editor of the Monitor claimed that the land at Elizabeth Bay which was being granted away by Darling to "his own particular friends" was that which had earlier been reserved for the Aborigines by Macquarie, and as a site for a Lunatic Hospital by Brisbane. He stated that the area, which was popular with the local natives, had initially been settled by an old soldier, O'Donnell, upon the promise of a grant. This interest had later been sold to one who considered the land as his own for, during Macquarie's time, "possession by promise either verbal or written ... was considered ... as good as parchment and the Seal of the Colony". Macquarie was said to have obtained the land from its purchaser in return for land elsewhere, and had settled natives on it.³⁷ The Governor's Order Book records that in 1813 Macquarie had promised on Thomas O'Donnell a grant of 40 acres and, consistently with the above explanation, no such grant was ever recorded.³⁸ At that time, inconsistency in spelling surnames was a common occurrence, and the inconsistency is of little significance in considering the truth of the Monitor's account. Darling concluded that the whole of Hall's story was a fiction³⁹ and reasserted his proposals for the subdivision of Woolloomooloo and Elizabeth Bay.⁴⁰

In his Report on his administration of the Colony, Macquarie wrote that he had "prevailed on five different Tribes to become Settlers ... Three of the Tribes chose to settle on the Shores of Port Jackson, in the vicinity of Sydney ..." whilst the remaining tribes "preferred taking their Farms in

Interior".⁴¹ This summation was somewhat optimistic. The third settlement at Port Jackson was at Kissing Point. An entry in the Governor's Order Book for Feb. 16, 1816 indicates that a grant of an unstated number of acres was promised to Bidgee Bidgee who was the appointed "chief" of the tribe at Kissing Point - the entry is followed by the remark "not granted".⁴² Although not rewarded by a grant of land to their tribal territory the "chief" received the gift of a boat purchased for him from the Police Fund in 1818.⁴³

The remaining two settlements were on South Creek and Eastern Creek. In a letter to Macquarie of April 8, 1814, William Shelley, an ex-missionary to the Pacific Islands, proposed the establishment of a Government boarding school for native children of both sexes,⁴⁴ and in a letter of August 20, 1814, he developed his proposal further.⁴⁵ The scheme was accepted by Macquarie, proclaimed by him in a General Order of December 10, 1814, and Shelley given the responsibility of effecting it.⁴⁶ This responsibility was to include the supervision of any adult natives who accepted the Governor's offer to provide land for those wishing to cultivate it and so become settlers.⁴⁷ The Governor's Order Book recorded on December 12, the promise of a grant of 500 acres at Parramatta to Shelley.⁴⁸ The grant was not formalised until January 13, 1818⁴⁹ - Shelley had died on July 6, 1815, but his wife Elizabeth continued the work of the Institution. It would have been in accord with the usual practices of the period if Shelley had taken possession of the land on the basis of the promise. The granted land was 2½ miles from South Creek but only just over a mile from one

of its tributaries.⁵⁰

In 1816, Macquarie recorded that "To Mary Mary, Mulgowy Joe, and Charley Mulgrave, I have promised small Farms between Mulgowy and South Creek".⁵¹ Mary Mary, a male, was the appointed "chief" of the Mulgoa blacks. "Mulgowy" is presumably the modern district of "Mulgoa". The Parish of Mulgoa adjoins that of Claremont in which lies the 500 acres granted to Shelley. It would appear, therefore, that the natives were being promised farms in their territory. There appears to be no record of any of these natives receiving formal grants to land in this vicinity.

In 1821 two of the female pupils of the Native Institution, Polly -- and Betty Fulton, were married by the Reverend Richard Hill to two "quiet" but unschooled blacks, Michael Yarringguy, native Constable at Richmond, and Robert Narringuy, son of Creek Jemmy. Subsequently one or more of the other females from the Institution were so married.⁵² Of the original marriages, the Sydney Gazette recorded that huts were erected for the couples; furniture, stock and farming utensils were supplied them, and the farms granted them at South Creek by Macquarie were to be measured out by the Deputy Surveyor.⁵³ No records of formal grants appear to exist. The most probable sites for these farms would have been in the vicinity of the farm of their mentor, Elizabeth Shelley. Although some of the surrounding area had already been granted or was subject to promises from the Governor there was, amongst other ungranted lands, an area of 500 acres which was not granted away until late 1831 which extended from the

Shelley's farm almost to the South Creek.

These farms were later abandoned⁵⁴ but not until after Macquarie had left the colony.⁵⁵

During the military exercises of the first part of 1816 designed to subdue black resistance, Macquarie received assistance from several friendly natives and, in his diary for May 25 recorded that:

To each of the three Black Guides Nurragingy, Colebee and Tindall I gave 7 days Provisions, a Quarter Pound of Tobacco and a Blanket for each of their Gins ... On this occasion I invested Nurragingy (alias Creek Jemmy) with my Order of Merit ... as Chief of the South Creek Tribe - I also promised him and his friend Colebee a grant of 30 acres of land on the South Creek between them as an additional reward for their friendly fidelity to government and their recent good conduct. ⁵⁶

The promise to Colebee and Nurragingy was recorded in the Governor's Order Book of May 16, without reference to any location.⁵⁷ By a deed of grant of August 31, 1819 "Colebee, aboriginal native" was granted 30 acres of land at "Bathurst", the grant being subject to the usual conditions restricting dealings with the land within five years of the grant, requiring the cultivation within that period of at least ten acres and reserving rights

of making a public road and removing timber for naval purposes.⁵³ The availability of the grant for collection was announced in the Sydney Gazette in a notice from the Surveyor-General's Office referring to a number of grants.⁵⁹ The deed to Colebee was registered in the Colonial Secretary's office on September 14, 1820.⁶⁰ On September 23, Colebee's name was included amongst those who were warned to apply for their grants by October 13, or forfeit all claims to the allocated land.⁶¹ One author has concluded that Colebee did not apply for the grant, due to the remoteness of the land and cites this as "another example of Macquarie's good intentions frustrated by failure to comprehend and allow for difficulties".⁶² The author has, however, confused the district of "Bathurst" which was one of the areas into which the Cumberland Region was divided, with the vicinity of the town of Bathurst.⁶³ The grant of thirty acres was taken up alongside the Richmond Road.⁶⁴ Nurranginy settled there⁶⁵ and was joined by Colebee and several other natives.⁶⁶ A house was erected and a herd of cattle purchased for him.⁶⁷ By 1827 Nurranginy was tired of life as a settler, he had hired a herdsman to relieve him of the burden of caring for the herd, and wished to sell the herd.⁶⁸ The failure of the formal grant to recognise the promised interest of Nurranginy is, perhaps, due to the attribution of his other title "Creek Jemmy" to Colebee: both a map in the Lands Department and a pencilled notation on the Register of Grants suggests incorrectly that Colebee was otherwise known as Creek Jemmy.⁶⁹

The removal of the Institution was proposed by the Rev. Robert Cartwright late in 1819, in a grandiose scheme for a native settlement removed

from contagion of contact with white settlers.⁷⁰ Macquarie tentatively set aside 10,000 acres in the vicinity of Moss Vale but the proposal was never confirmed by Bathurst.⁷¹ In 1818 Cartwright had been promised 600 acres.⁷² It is not certain what was the purpose of this promised grant; and the circumstances surrounding it were curious. It pre-dated his proposal in 1819 for removal of the Institution and appears to be unconnected with it. He only received an official grant of 500 acres. However, this property, which was called "Bethel Grove" was almost adjacent to that of Colebee and the official grants to both were made on the same day, August 31, 1819, also prior to the date of Cartwright's proposal,⁷³ but one week after he had signed a petition for a public meeting to discuss the extension of the work for the Aborigines⁷⁴ - the petition was forwarded to Macquarie on December 6, 1819.⁷⁵ "Bethel Grove" was also on the Richmond Road and touched on Eastern Creek. Either property could fit the description of Black Town given by Horton in 1824,⁷⁶ but other evidence would suggest that it was Cartwright's property, or the two properties together which formed the native settlement.⁷⁷ Cartwright's grant was not registered until February 22, 1821 and at the meeting of the Committee of the Native Institution on December 28, of that year, it was resolved that:

Past circumstances having excited a hope in the minds of the Committee that the Aborigines in New South Wales may become farmers etc., and conform in some degree, to civilised life; which the Committee think may be much encouraged and promoted, by a greater share of

attention being paid to the settlement at East Creek ... The Committee also beg to recommend that 500 acres of land adjoining the present settlement be reserved for the use of the Institution that the Committee may be enabled to assign, according to circumstances, farms etc., to such natives as may have afforded by their previous conduct a real hope of their forsaking their vagrant habits. 78

Curiously, Cartwright was a member of the Committee at this time.⁷⁹ This sequence is reasonable if previous discussions or verbal agreements occurred between Cartwright and Macquarie, to the effect that the land would be used for the purpose of civilising the natives.

On January 1, 1823 Brisbane approved the removal of the Institution but in terms referring to South Creek. It is possible that despite the decline of the earlier settlement the two were not considered by the government as separate. In 1824 the Committee was abolished and William Walker, one of the Wesleyan missionaries to the colony, was placed in charge of the settlement.⁸⁰ A visitor to Blacktown during 1824 described it as:

...in an unpromising state.
There are at present only 4
black children in the school.

There are 6 little cottages
with land annexed to each
for such of the natives as
can be persuaded to settle
here, but only 3 are
inhabited.⁸¹

However Walker only remained a year and the Institution collapsed.⁸² The girls were left in the care of Walker and the boys were placed in the care of Cartwright.⁸³ A brief revival occurred between 1827 and 1829 under the control of William Hall⁸⁴ and then the school was abandoned.⁸⁵ But, by a deed of release of September 25, 1830, Cartwright sold the property of 500 acres to William Hall for £300.⁸⁶ It would appear that Hall did not consider the land to be held for the purposes of the natives for he mortgaged the property for the same sum in 1839, well after the abandonment of the project.⁸⁷ The land and buildings of the school were reported to have been sold in 1833.⁸⁸ It appears that the land so sold was that granted originally to Colebee for the area sold was measured to be 29 acres, 2 roods and 24 perches.⁸⁹

In 1815 it was reported that a native who had been raised by an English settler had applied for, and received, a grant of land which he proceeded to cultivate properly.⁹⁰ It is not possible to identify this grant, if indeed any formal grant was made. If it were, he would have been only the second Aboriginal during this period to receive legal title to land.

Less hesitation was shown in conferring legal title on whites working for the cause of

Aboriginal advancement. The grants to William Shelley and Robert Cartwright have already been considered.⁹¹ Elizabeth Shelley continued to manage the Institution after her husband's death until her retirement in 1823.⁹² She received several leases and when, in January of 1823, the remaining pupils in the Institution were moved to Black Town she received a grant of the land on which the Institution had stood.⁹³

It appeared to be Macquarie's policy to create small communities of Aborigines - in so doing he had little regard for the customary niceties of Aboriginal society. In most instances neither the communities nor the individuals received legal title. It is probable that the lack of title was not a deliberate policy aimed at the natives: during much of Macquarie's term of office he was careless in the matter of land grants and Brisbane when he succeeded him discovered that some 340,000 acres were held as permissive occupancies.⁹⁴ For over nine years Macquarie had not forwarded a return of land grants to the Colonial Office.⁹⁵ The Aborigines' occupancy was no different in kind from that of many white settlers. Unlike the white settlers, the Aborigines were not favoured by the later execution of their promissory interests and their lands were later granted to other white settlers.⁹⁶

Macquarie's practice of grants to natives was not based on any acknowledgement of native entitlement to land - it was his view that British settlement had excluded natives only from the enjoyment of animal and other production of the territory settled - the wandering tribes ideology.⁹⁷

He would grant land to the Aborigines only when they indicated a desire to settle in the manner of the British. In almost all instances the natives were settled on what appears, from the slight evidence available, to have been tribal territory. Remnants of a tribe were still to be found in the Georges Head vicinity in the 1870's. Elizabeth Bay was, according to Hall, popular with the natives prior to the settlement established there. The land promised at Kissing Point was promised to the "Chief" of the Kissing Point tribe. From the similarity of names it appears likely that the farms promised near South Creek were also in tribal territory. Despite this, there appears to have been no recognition of a right of the tribe in that territory but merely the reasonable practice of promising or granting land familiar to the native recipient.

C. THE ESTABLISHMENT OF MISSIONS.

Brisbane's term of office was too short to allow any real development in the concepts of Aboriginal title to land. As he was the most capable theoretician of the early governors, and one with experience of the American colonies,⁹⁸ it is reasonable to surmise that his slight efforts to establish landholdings in trust for the Aborigines were the first steps towards the adoption in Australia of the British policy for North America. On one occasion he requested, and received, gifts to be distributed amongst the natives,⁹⁹ a practice common in North America.

In 1825 Brisbane promised a grant of 10,000

acres to the London Missionary Society to be held in trust for the improvement of the conditions of the Aborigines. It was to be subject to the condition that it would revert to the Crown should the project fail.¹⁰⁰ On January 31, 1825 the Auxiliary Church Missionary Society for Australasia was formed¹⁰¹ and it also received a promise of 10,000 acres on a similar trust.¹⁰² Unlike the earlier promise it was not referred to London.¹⁰³ However on being pressed in the matter his successor, Darling, referred it to London and both promises were approved by the Secretary of State.¹⁰⁴

This was the totality of Brisbane's actions in the cause of Aboriginal land grants. Under his successors they came to nothing.

During Macquarie's administration, Carvosso, the first Wesleyan missionary to the colony, had suggested that the Methodists form an agricultural establishment for the civilisation of the Aborigines. Macquarie responded that a year earlier Cartwright's proposal had been made and the reply from His Majesty's Ministers must be awaited¹⁰⁵ - none arrived. In October of 1824 John Harper was sent to the Wellington Valley and it was reported that he was to be given land there for a mission.¹⁰⁶

In June of 1826 Governor Darling was presented with a memorial requesting a grant of 10,000 acres to the Wesleyan Missionary Society. This grant he refused as the other societies had received land for the same purposes and had achieved nothing.¹⁰⁷ This refusal was tempered by Lord Bathurst who approved of affording the Wesleyans "the same opportunity of exerting themselves towards the attainment of so

laudable an object, so soon as its success shall have been established in the two former instances".¹⁰⁸ Some time later the Wesleyans were given the use of land at Port Phillip but the mission was unsuccessful and closed down.¹⁰⁹

The grant to the London Missionary Society was the first to be taken up. Threlkeld selected land at Reid's Mistake (Belmont) and settled there in 1826.¹¹⁰ Shortly after the selection of the land, the directors expressed doubts about the large size of the grant and the secular duties it would impose on the missionary - they had never intended any plan involving colonisation.¹¹¹ Following Threlkeld's constant disputes with Marsden, the Society's agent, and the directors in London over finance and expenditure,¹¹² the directors abandoned their hopes for government assistance¹¹³ and proposed to sell the property and terminate the mission.¹¹⁴ The following year, on Threlkeld's deliberately misunderstanding their orders and returning to Lake Macquarie the directors removed their confidence in him and refused further payments to him or the mission.¹¹⁵ Threlkeld again informed them that the land would revert to the Crown on his relinquishing possession.¹¹⁶ However he received support from Darling who allowed him a salary of £150¹¹⁷: compensation to the Society for the buildings erected on the land was considered unnecessary as they would continue to be used for the purpose for which they were erected by the Society.¹¹⁸ The Society thereupon resolved to donate the buildings to the New South Wales Government.¹¹⁹ Shortly thereafter Threlkeld moved to Ebenezer (Toronto) on the other side of Lake Macquarie where he continued his work till the mission was officially closed on December

31, 1841.¹²⁰

The Church Missionary Society took up their land on October 8, 1832 when they were given occupation of the government buildings at Wellington Valley on the breaking up of the convict agricultural establishment.¹²¹ Other than Threlkeld's mission at Lake Macquarie no other land was then held for missionary activities to the Aborigines. The Church Missionary Society made numerous requests for legal title to the land but were met firstly with governmental inaction and later, disapproval.¹²² By 1844 this mission also had been abandoned as a failure.¹²³

D. TASMANIA

In Tasmania the situation in respect of land rights, as in many other respects, was quite unlike that in New South Wales. As in New South Wales there was no recognition of any right to the land, but unlike New South Wales no land was conferred on individual ^{Aborigines} nor were there established settlements of Aborigines. The earliest suggestions of land to be devoted to the use of Aborigines were made at a time when reports of the conduct of the Aborigines, in retaliation for the injuries they had suffered, were causing concern. In 1826 a Tasmanian newspaper proposed that the natives be rounded up and removed to the coast of New Holland or to King's Island where they could be guarded by a small number of soldiers and compelled to undertake agriculture, to lose their roving disposition and to acquire some

slight habits of industry.¹²⁴

In 1828, Governor Arthur wrote that, on the occasion of the unexpected appearance of a tribe in Hobart Town, he had formed the plan "of establishing an institution, to which they might resort, in the hope that some might be persuaded to adopt the habits of civilised life". The tribe left Hobart and did not return and the plan was not brought to fruition.¹²⁵ In the same letter he mentioned, but rejected, the proposal to remove the natives to some Island in Bass Strait. Instead he proposed:

to settle the Aborigines in some remote quarter of the island, which should be strictly reserved for them, and to supply them with food and clothing, and afford them protection from injuries by the stock-keepers, on condition of their confining themselves peaceably to certain limits, beyond which, if they pass, they should be made to understand they will cease to be protected. ¹²⁶

On April 15, 1828 was issued the Proclamation declaring the method by which Arthur would effect his scheme to restrict the natives to certain areas. A line of military posts was to be established along the borders of the settled districts and all Aborigines were, by the Proclamation, ordered immediately to retire from the settled districts and never re-enter "on pain

of forcible expulsion therefrom".¹²⁷ One exception was made, for the Proclamation was not to apply to prevent the Aborigines from travelling annually, according to their custom, through the settled districts to the sea, provided that their respective leaders were provided with a general passport under the Governor's hand and seal.

As there was little or no communication of a friendly nature between the two races at that time the Proclamation was of no effect¹²⁸ and in November 1828 martial law was proclaimed in the settled districts until such time as the natives removed themselves to that part of the island left for their purposes.¹²⁹ There was no suggestion that the several Proclamations were intended to recognise native title in the area to which they were to be restricted. In September 1830 there was proposed and implemented a monumental plan for rounding up all the native tribes by troops and colonists advancing in line across the island and driving the natives before them to a peninsula where they could be captured.¹³⁰ It was reported that some four or five of the troops were killed by accident, the expedition cost upwards of £35,000 and only one native was captured - he afterwards escaped into the bush.¹³¹ Martial law was lifted at the end of 1833.¹³²

It was subsequently decided to accept the plans proposed by the Tasmanian press and remove the natives to islands in Bass Strait. Several white men made contact with the natives and by their efforts and, those of others, about three hundred and ten natives¹³³ were brought in, by persuasion or capture.¹³⁴

As there was high death rate on Gun Carraige Island, the first island on which the natives were held, they were moved to Flinders Island. Later some removed to Port Phillip. In both places the natives continued to experience a high death rate and the race became extinct. At no time had they had acknowledged in their favour any title or interest in land. The only land they were officially allowed to occupy was allowed them only for the purpose of removing them from their tribal territories - it was to become their prison or, ultimately a place to await their death.¹³⁵

As in New South Wales, it was sometimes profitable to work for the civilisation of the Aborigines. By a Government Notice of February 19, 1831 Mr. George Augustus Robinson, was rewarded with the grant of 2,560 acres of land for his efforts in bringing in the natives to be exiled to Gun Carraige Island.¹³⁶ If one except the poor attempts made at training the Aborigines held on Flinders Island, it can be said that no missions were established or attempted on behalf of the Tasmanian Aborigines.

E. CONCLUSION.

Although this period marked the development in the U.S.A. of the legal doctrine of communal title, and in Canada, of a similar practice, apparently with the force of law, there was no similar development in New South Wales or Tasmania. That this was so may, in part, have been due to lack of legal knowledge or colonial experience on the part of the Governors.

In the United States the doctrines were developed by the Supreme Court. Although the practice in Canada was not very dissimilar to the doctrines of the Supreme Court it was necessary for British proponents of the doctrines and practices to refer to the formulations of the doctrines in the U.S. Supreme Court for neither British courts nor courts in British colonies had developed independent formulations. In the British colonies, therefore, the development of the doctrines was dependent upon the Colonial Executive. If they were interested, and had the requisite experience of the doctrines the doctrines would be put into practice.

The only governor of New South Wales with such experience commenced the process whereby such doctrine might have been developed but subsequent governors took it no further. Although not by design and with one or two minor exceptions, the only interests in land conferred on Australian Aborigines during this period were permissive occupancies - the very status the Marshall doctrine would suggest they already possessed. The bestowing of this interest was haphazard and experimental and in no way implied the recognition of a right in the natives either of a legal or moral nature: a moral duty to the natives was recognised to exist, and it pressed heavily or light upon respective governors, but it was not seen as being connected with land. Although it seems that natives were "settled" within their customary territories there appears to have been no acknowledgement of native interest in particular land. This was not due to a lack of acquaintance

with the native attachment to their territory.¹³⁷
 A typical reaction was that of William Walker that
 "they are a most bigoted race of people to the
 ground on which they were born".¹³⁸

In North America the early adaptation of the Indian to the white man's judicial system, and the support he received in bringing his grievances into court, fostered the development of the doctrines through the medium of the courts. The Australian Aborigine adjusted more slowly and his supporters appeared unaware of the possibility of enforcing title to tribal territory per medium of the courts. An opportunity was presented in the case of R v Jack Congo Murrell for an Australian court to pronounce on the doctrine.¹³⁹ The court showed no measure of innovation or deviation from the precise issue before it, and the opportunity was lost. It was never regained.

Later developments in the United States and in Canada were to demonstrate that neither governmental policy nor judicial determination was sufficient alone to preserve the Indian land rights. Even together they required an accompanying policy of government that there would be restraint in the process of extinguishing native title for neither method otherwise restrained the exercise of government powers: they could only be effective against private individuals. The Australian Aborigines were afforded no protection by any such measures. Whereas the Indians retained some remnants of their tribal territories the Aborigines were mostly reduced to landless fringe dwellers.

FOOTNOTES

1. James Stephen considered the British policy to be law in Canada and to^{be}/more humane than the American law - whereby "the Indians were mere possessors of the soil on sufferance" - for in Canada "the Crown purchases of the Indians before it grants to its own subjects". The American law he considered to "give to rapacity and injustice, the most decorous veil which legal ingenuity can weave". Memorandum, Stephen to the Parliamentary Under Secretary, Vernon Smith, July 28, 1839, C.O., 209:4., quoted by Paul Knaplund, James Stephen and the British Colonial System 1813-1847 (Madison, 1953), p. 89.
2. Cambridge History of the Empire, i, pp. 418-420: Halsbury, op. cit., XI, p. 48.
3. Parliamentary Papers: Aborigines, 1837, p. 4. For the Instructions to Phillip see H.R.A., I, I, p. 9 at pp. 13-4. The repetition of seventeenth century forms is not unusual in any portion of a Governor's Commission or Instructions - See W.J.V. Windeyer, "Responsible Government - Highlights, Sidelights and Reflections", J.R.A.H.S., (1956), Vol. 42, Pt. 6, p. 257 at pp. 264-5.
4. James Stephen Jr., to Under Secretary Horton, March 27, 1825, H.R.A., IV, I, p. 591 at P. 611.
5. H.R.A., I, XII, p. 107 at p. 125.
6. M.L., c 189, P.G. King Papers, Vol. 11, p. 275.

7. Infra pp.117-128.
8. Douglas Pike (ed.), Australian Dictionary of Biography (Melbourne, 1966), Vol. I, p. 151.
9. W. Walker to R. Watson, Nov. 29, 1821, B.T. Box 52, pp. 1043-4.
10. Infra pp.323-5.
11. B. Bridges, "The Aborigines and the Land Question: New South Wales in the Period of Imperial Responsibility", J.R.A.H.S., (June, 1970), Vol. 56, Pt. 2, p. 92 at pp. 102-5.
12. Klaus E. Knorr, British Colonial Theories 1570-1850 (Toronto, 1944), p. 383.
13. P.P.: Aborigines, 1837, p. 5.
14. Loc. cit.
15. Ibid., p. 82.
16. Ibid., p. 83.
17. Parliamentary Papers: New Zealand (1), 1837-40, pp. vii-ix: Parliamentary Papers: New Zealand (2), 1844, pp. iii-iv.
18. Loc. cit.
19. Ibid., pp. v-vi.
20. Parliamentary Papers: Australia (8), 1844, p. 149. The Report is from a newspaper account but was accepted by Willis as a "tolerably correct report" (Ibid., p. 146).

21. Ibid., p.148.
22. Ibid., pp.149-155.
23. Willis had the remarkable distinction of having being twice removed from the bench, first from the Equity Court of Upper Canada where he had sat only a short term, and secondly from the Supreme Court of New South Wales. He was vice-president of the Court of Civil and Criminal Justice of British Guiana for five years from 1831. Sir Francis Forbes was appointed Attorney-General of Bermuda in 1810 and King's Advocate in the Court of Vice-Admiralty at St. George's in 1813. In 1816 he was appointed Chief Justice of the Supreme Court of Judicature in Newfoundland, a position he held for five years. Of the other members of the Court prior to 1841, Sir James Dowling had had no previous colonial experience, Sir William Burton had sat for four years as second puisne^{judge} of the Supreme Court at the Cape of Good Hope, John Stephen had been in private practice in St. Kitts, West Indies, and for a while had been Solicitor-General prior to his appointment to New South Wales. Sir Roger Therry, if one except his Irish boyhood, had no previous colonial experience. Australian Dictionary of Biography, op. cit., Vol. I, pp. 392-3, 317, 184; Vol. 2, pp. 602-3, 476-7 & 512: C.H. Currey, Sir Francis Forbes (Sydney, 1968), Chs. I & II: Therry, op. cit., Introduction: J.M. Bennett, A History of the Supreme Court of New South Wales (Sydney, 1974), Ch. 3.
24. R. v Jack Congo Murrell, loc. cit. It is

possible that during his earlier years in the colony Forbes may have held the view that was later held by Willis, for in his opinion of January 3, 1842, on the issue of jurisdiction raised by Willis, Dowling remarked that:

It is true that soon after my arrival in the colony, in 1828, I found an opinion prevailing that the Supreme Court could not take cognizance of offences committed amongst the aborigines, and in one or two instances the court, from the difficulty of administering justice between them, according to the rules of English law, forbore trying those individual cases. The question of jurisdiction was not, however, argued at the bar, and from the great infrequency of such cases, the course taken was silently adopted, from conformity rather with the impression prevailing, than as the result of deliberate judgment.

Parliamentary Papers: Australia (8), 1844,
p. 145. Certainly in 1826, a native charged with attempted murder was considered to be not amenable to punishment by British law (Archives, 1161, Bundle 86 and see infra fn 339-342) and in 1829, Forbes and Dowling advised the Attorney-General that it would be unjust to apply British law to a native, Bob Barrett, for the murder of another native,

"Dirty Dick". (Sydney Gazette, April 4 & June 16, 1829). See also Arch., 1123, pp. 85-7.

25. Parliamentary Papers: Australia (3), 1844, pp. 152-5.
26. Joseph Storey, Commentaries on the Constitution of the United States (Massachusetts, 1833), C.1, ss. 6, 7 & 8. The view expounded is substantially that of Marshall in Johnson v M'Intosh (op. cit.). See also the treatment of the issue by James Kent, Commentaries on American Law (New York, 1827), Vol. III, Lecture L I.
27. Sydney Gazette, May 5 & 12, 1805: B. Bridges, op. cit., p. 97.
28. Macquarie to Bathurst, October 8, 1814, H.R.A., I, VIII, p. 367 at p. 369.
29. Macquarie to Bathurst, March 24, 1815, H.R.A., I, VIII, p. 464 at p. 467: Sydney Gazette, Feb. 4, 1815.
30. Sydney Gazette, Feb. 8, 1817.
31. M.L., C720, Dr. Joseph Arnold, Journal (1815) p. 401 - "They will not work their farm ... no good was done." According to Macquarie, some progress was made in clearing the ground. M.L., D75, Governors Despatches, 1815-16, Vol. I, pp. 11-2.
32. M.L., A774, L. Macquarie, Diary, Feb. 11, 1822, pp. 258-60.
33. There is no record of any formal grant to Boongaree or his tribe being made on either

occasion in the Grant Index 1792 - 1826 held by the Register General although this Index appears to be more complete than those held in the Archives or the Mitchell Library. Nor is there any record in The Governor's Order Book 1811 on (Archives, 2/1934); Register of Grants & Leases for the County of Cumberland and Elsewhere, No. 2, 1810-1821 (Archives, 7/447); Ibid., No. 3, 1816-1821 (Archives, 7/448); Ibid., No. 4, 1822-1836 (Archives, 7/449); Index to the Register of Grants & Leases for the County of Cumberland and Elsewhere 1792-1865 (Archives, 7/443); Index to the Register of Land Grants 1821-1832 (Archives, 7/443A); Index to Registers of Land Purchases (Archives, 7/499). Not unexpectedly, there is nothing amongst the letters collected in Colonial Secretary: Letters re Land (Archives, 2/7970).

34. J. Carrol, The Selection and Growth of Mosman (Mosman, 1953), p. 3.
35. M.L., A774, Macquarie, Diary, Mar. 28, 1820, pp. 119-123.
36. E.S. Hall to Sir George Murray, November 26, 1825, H.R.A., I, XIV, p. 596 at p. 597. See also W. Walker to R. Watson, Nov. 8, 1821, B.T. Box 52, p. 983 at p. 984.
37. E.S. Hall to Sir George Murray, November 26, 1828, H.R.A., I, XIV, pp. 596-9.
38. M.L., 2/1934, Governor's Order Book 1811 on. The promise was recorded on October 30, 1813, but does not record the location of the promised area. There appears to be no record

of a Thomas O'Donnel(1) amongst the regiments serving in N.S.W. prior to 1813, although there was an Edward and a Bryan in the 102nd, an Ian in the 46th, and a James and Hugh in the 73rd Regiment. Of course, the grantee may not have been in service in N.S.W. but may have come to the colony as a free settler. M.L., P.R.O. (Public Records Office), Reel 3906, pp. 5 & 11; Reel 3908, p. 367; Reel 3795.

39. Darling to Murray, January 2, 1829, H.R.A., I, XIV, p. 578 at p. 579.
40. Ibid. The proposals were made in Despatch 46, Darling to Murray, March 26, 1828, H.R.A., I, XIV, p. 41ff. Descriptions of the grants are to be found in H.R.A., I, XIV, Note 21 at p. 908.
41. Copy of a Report by the late Major General Macquarie, July 27, 1822, reprinted in H.R.A., I, X, p. 671 at pp. 677-8.
42. Archives, 2/1934, Governor's Order Book 1811 on.
43. Sydney Gazette, June 6, 1813: M.L., D.I. Wentworth Papers, "Police Reports and Accounts", p. 175.
44. Shelley to Macquarie, April 8, 1814, H.R.A., I, VIII, pp. 370-1.
45. Shelley to Macquarie, August 20, 1814, H.R.A., I, VIII, pp. 371-2.
46. Macquarie to Bathurst, October 8, 1814, H.R.A., I, VIII, pp. 368-9: Sydney Gazette, December 10, 1814: Arch., 4/1730, N.S.W. Colonial Secretary In-Letters (1814), pp. 341-5.

47. Loc. cit.
48. Archives, 2/1934, Governor's Order Book 1811 on,
December 12, 1814.
49. Archives, 7/447, Register of Grants and Leases
for the County of Cumberland and Elsewhere (2),
1810-1821, p. 146, Grant 1307, Reg. 2, Fol.
146. Shelley had received several other
interests in land prior to this grant. On
January 1, 1806 he had received a lease for 14
years of an area of 54 rods -Registrar General's
Department, Grant Index 1792-1826: Archives,
7/443A, Index to Land Grants, 1821-32: Archives,
7/448, op. cit., p. 10 - and on August 25, 1812,
received a grant of 400 acres in Cabramatta for
the farm of Hanley Green, also adjoining South
Creek but some distance from the later grant,
and a lease for 21 years of 165 rods at Cockle
Bay in Sydney for the erection of a dwelling-
house - Grant Index 1792-1826:Registrar-General
Register of Grants 3c, p. 194: Archives, 7/447,
op. cit., Grants No. 321, Reg. No. 3, Fol. 41,
and 594, Reg. No. 3, Fol. 119.
50. Lands Dept., Map of Parish of Claremont,
Portion 18.
51. D.L. Add. 85, Memorandum relative to Friendly
Black Natives, November 20, 1816.
52. Sydney Gazette, March 17, 1821: Bridges, "The
Aborigines and the Land Question", op. cit.,
p. 100.
53. Sydney Gazette, March 17, 1821.

54. Bridges, "The Aborigines and the Land Question",
loc. cit.
55. Copy of a Report by the late Major General
Macquarie, H.R.A., I, X, p. 676 at pp. 677-8.
56. M.L., A773, Macquarie's Diary, 10 April, 1816 -
1 July, 1818, pp. 15-6.
57. Archives, 2/1934, op. cit. Nurragingy's place
of residence was stated to be South Creek.
58. Registrar-General's Department, Grant Index
1792-1826, and Serial 12, p. 65.
59. Sydney Gazette, August 26, 1820.
60. Notation on Grant, Serial 12, p. 65.
61. Sydney Gazette, September 23, 1820.
62. B. Bridges, Aboriginal & White Relations in
New South Wales 1788-1855, M.A. Thesis,
unpublished, pp. 282-3: B. Bridges, "Aborigines
and the Land Question: New South Wales in the
Period of Imperial Responsibility", op. cit.,
pp. 99-100.
63. For the divisions into which settlements were
divided see the map in Clark, op. cit., Vol.
I, p. 353.
64. Lands Department, Map of Parish of Gidley,
County of Cumberland, Portion 27: Registrar-
General's Department, Crown Grant, Ser. 12,
p. 65: Archives, 7/448, Register of Grants and
Leases for the County of Cumberland and
Elsewhere, No. 3, 1816-1821, Fol. 40.

65. Cartwright to Macquarie, January 18, 1820, H.R.A., I, X, p. 266 at p. 268.
66. B. Bridges, Aboriginal and White Relations, op. cit., pp. 281-2: B. Bridges, "The Aborigines and the Land Question", loc. cit.
67. Rev. Robert Cartwright to Governor Macquarie, January 18, 1820, H.R.A., I, X, p. 268: M.L., D.I., Wentworth Papers "Police Reports and Accounts, 1810-1827", p. 214.
68. Archdeacon Scott to Governor Darling, August 1, 1827, H.R.A., I, XIV, p. 63.
69. Lands Department, Plan C192 OR : Archives, 7/448, Register of Grants and Leases for the County of Cumberland and Elsewhere, No. 3, 1816-1821, Fol. 40.
70. Cartwright to Macquarie, December 6, 1819, Archives, 4/1743, N.S.W. Colonial Secretary In-Letters (1819), pp. 157-163; H.R.A., I, X, p. 265: Cartwright to Macquarie, January 18, 1820, Archives, 4/1744, N.S.W. Colonial Secretary In-Letters (1820), pp. 115-129; H.R.A., I, X, p. 266.
71. Macquarie to Bathurst, February 24, 1820, H.R.A., I, X, pp. 262-3: Bridges, Aboriginal & White Relations, op. cit., pp. 255-6. A year later Macquarie indicated that the formation of any agriculture establishment must await the reply from His Majesty's Ministers. Macquarie to Carvosso, March 12, 1821. B.T. Box 51, pp. 781-2.

72. Governor's Order Book, op. cit., September 12, 1818.
73. Registrar-General's Department, Register of Grants, Serial 12, p. 25.
74. Archives, 4/1743, N.S.W. Colonial Secretary In-Letters (1819), August 24, 1819, pp. 166-8.
75. Ibid., December 6, 1819, pp. 164-5.
76. B.T. Box 52, p. 1354 at p. 1356, Extract from Wm. Horton's Journal 1824 - "about 10 miles from Windsor, on the road between Richmond and Sydney."
77. Walker several times refers to the Aboriginal settlement at Bethel - B.T. Box 52, pp. 998-9, Walker to Watson, November 15, 1821. On one occasion he referred to Black Town as Boongarrunbee - B.T. Box 52, p. 1047, Walker to Watson, December 5, 1821.
78. M.L., FM 4/1498, CN/013, Minutes of the Committee of the Native Institution, December 18, 1821.
79. M.L., A339, p. 105, Government & General Order, September 23, 1819.
80. M.L., B.T. Box 53, pp. 1401-2, Walker to Watson, March 19, 1824: M.L., A1267-4, Transcript of Missing Despatches from Governor of N.S.W. 1823-32, No. 90, p. 104, October 3, 1825.
81. M.L., B.T. Box 52, p. 1357, Extract from Wm. Horton's Journal, May 13, 1824.

82. M.L., B.T. Box 53, pp. 1401-2, Walker to Watson, March 13, 1824.
83. Loc. cit.
84. Scott to Darling, August 1, 1827, H.R.A., I, XIV, p. 56.
85. M.L., B.T. Box 53, pp. 1727-8, Marsden to Coates, February 9, 1827: Bridges, "The Aborigines and the Land Question", op. cit., pp. 100-1.
86. Registrar-General's Department, Register of Deeds, Book D, No. 76.
87. Registrar-General's Department, Register of Deeds, Book P, No. 921, Mortgage by demise, dated October 30, 1839.
88. New South Wales Government Gazette, 1833, pp. 388 & 484.
89. Loc. cit.
90. M.L., C720, Journal of Dr. Joseph Arnold (1815), p. 402.
91. Supra, pp. 120-1.
92. Evidence to Committee on the Aborigines, 1838, p. 54.
93. Registrar-General's Department, Grant to Elizabeth Shelley, Reg. No. 1, p. 5, June 13, 1823: Archives, 7/483, Surveyor General, Register of Land Grants & Leases, p. 6: D.P. 15108 described the land as having been granted to Mrs. Shelley on June 30, 1823.

94. Brisbane to Bathurst, April 10, 1822, H.R.A., I, X, pp. 630-2; May 30, 1823, H.R.A., I, XI, pp. 83-6; November 29, 1823, H.R.A., I, XI, pp. 179-184. The difficulties resulting from Macquarie's administration are considered by T.M. Perry, Australia's First Frontier (Melbourne, 1963), pp. 44-5: Sir Stephen Roberts, History of Australian Land Settlement (Melbourne, 1924), Chs. 2 & 4.
95. Under Secretary Goulburn to Macquarie, March 15, 1821, H.R.A., I, X, p. 408.
96. See e.g. Sydney Gazette, June 11, 1821; May 8, 1823; November 8, 1826.
97. E.g. Archives, 4/1730, N.S.W. Colonial Secretary In-Letters (1814), pp. 41-5, Government Order.
98. M.L., A1267-4, Transcript of Missing Despatches From Governor of N.S.W., 1823-32, No. 33, p. 31: Brisbane to Bathurst, February 8, 1825, enclosing draft deed of trust, H.R.A., I, XI, pp. 512-4.
99. B.T. Box 53, p. 1464, S. Marsden to J. Pratt, February 7, 1825.
100. In December, 1825, Walker referred to a promised area of 20,000 acres. B.T. Box 53, p. 1554, Walker to Watson, December 23, 1825. Bannister to Darling, February 6, 1826, H.R.A., I, XII, p. 364.
101. Aust. Dictionary of Biography, op. cit., pp. 151-4.

102. Brisbane to Bathurst, February 14, 1824,
H.R.A., I, XI, p. 226: Bathurst to Brisbane,
August 19, 1824, H.R.A., I, XI, p. 350.
103. Bathurst to Darling, January 10, 1827, H.R.A.,
I, XIII, pp. 14-5.
104. Bathurst to Darling, July 31, 1825, H.R.A., I,
XII, p. 46: Darling to Bathurst, July 19, 1826,
H.R.A., I, XII, p. 364: Bathurst to Darling,
January 10, 1827, H.R.A., I, XIII, pp. 14-5:
B.T. Box 53, p. 1671 at p. 1675, District
Despatch, No. 37, July 19, 1826.
105. B.T. Box 51, pp. 781-2, Macquarie to Carvosso,
March 12, 1821, referring to a letter from
Carvosso of March 6.
106. B.T. Box 53, pp. 1500-1, G. Erskine to Sec's.
Weslyan Missionary Society, May 24, 1825.
107. B.T. Box 53, pp. 1665-1670, District Despatches,
No. 38, July 19, 1826: Darling to Bathurst,
July 19, 1826, H.R.A., I, XII, p. 364.
108. Bathurst to Darling, January 10, 1827, H.R.A.,
I, XIII, pp. 14-15.
109. Gipps to Stanley, March 21, 1844, H.R.A., I,
XXIII, p. 484.
110. B.T. Box 52, pp. 1144-74. Threlkeld's Account
of Mission to the Aborigines, October 16, 1824,
to July 2, 1825: M.L., A1559-2, Brisbane's
Letter Book, 2, pp. 83-4, Brisbane to Rev. D.
Tyerman & G. Bennett, January 26, 1825: M.L.,
A1207, Governor's Despatches (1829), p. 483:
M.L., A1278, Despatches, p. 523.

111. M.L., A1995, Marsden Papers, Vol. 4, pp. 156-9, Bunderberg to Marsden, March 1, 1826.
112. M.L., A1995, Marsden Papers, Vol. 4, pp. 156-178, Bunderberg to Marsden, March 1, 1826; March 3, 1827: B.W. Champion, "L.E. Threlkeld", J.R.A.H.S., (1935), Vol. 25, pp. 279ff at p. 341ff.
113. M.L., A1995, op. cit., pp. 207-210, Hodson to Marsden, February 8, 1823.
114. M.L., A1995, op. cit., pp. 211-214, Orme to Marsden, May 31, 1828. The directors appeared to be under some confusion as to their right to dispose of the land - in October of 1827, Threlkeld had informed Marsden that no sale was possible and that the land reverted to the Crown - to which Orme answered that the grant was conditional on confirmation by the government for which they had not applied nor did they intend to apply: in the same letter he stated that the directors wanted legal title in order to dispose of the land and recover the expenses incurred by them.
115. M.L., A1995, op. cit., pp. 219-20, Orme to Marsden, April 15, 1829. It was proposed to advertise the dissolution of the relationship if necessary and this was ultimately done - Orme to Marsden, August 3, 1829 (pp. 227-30); Hankey to Marsden, July 20, 1830 (pp. 244-7); Hankey and Clayton to Marsden, February 28, 1832 (p. 265).
116. M.L., 382, Threlkeld Papers, p. 33. Threlkeld to Marsden, December 15, 1829.

117. Darling to Murray, August 9, & September 20, 1830, H.R.A., I, XV, pp. 672-725: Goderich to Darling, January 8, 1831, H.R.A., I, XVI, p. 14.
118. Extract from Minute No. 18 of the Proceedings of the Executive Council of June 12, 1830, H.R.A., I, XV, pp. 674-5.
119. M.L., A1995, op. cit., pp. 252-3, Hankey & Clayton to Marsden, January 1, 1831.
120. Final Report of Mission to the Aborigines, December 30, 1841, H.R.A., XXI, pp. 739-742.
121. Goderich to Bourke, December 21, 1831, H.R.A., I, XVI, p. 447: Bourke to Goderich, August 5, 1832, H.R.A., I, XVI, pp. 691-2: Coates to Glenelg, October 31, 1838, H.R.A., I, XX, pp. 660-5.
122. Hay to Darling, February 11, 1827, H.R.A., I, XIII, p. 107: Glenelg to Bourke, August 11, 1836, H.R.A., I, XVIII, pp. 484-5: Extract from Instructions of Committee of Church Missionary Society to Porter, February 2, 1838, H.R.A., I, XX, pp. 303-4: Glenelg to Gipps (with enclosures), November 10, 1838, H.R.A., I, XX, pp. 659ff: Russell to Gipps, August 5, 1840, H.R.A., I, XX, pp. ⁷³⁴~~73~~ ff : Gipps to Russell, April 5, 1841, H.R.A., I, XXI, pp. 308-9.
123. Gipps to Stanley, March 21, 1844, H.R.A., I, XXIII, p. 484.
124. C. Turnbull, Black War (Melbourne, 1974), (3rd Edn.) pp. 75-7 quoting the Hobart Town

- Colonial Times, November or December, 1826:
Henry Melville, The History of Van Dieman's Land (ed. G. Mackaness), (Sydney, 1965), p. 55.
125. Arthur to Goderich, 10 January, 1828, Turnbull, op. cit. p. 81. Rules were drawn up for the Institution at the Lieutenant-Governor's request. B.T. Box 53, p. 1508. Rev. R. Mansfield to Methodist Missionary Society, June 30, 1825.
126. Arthur to Goderich, 10 January, 1828, Turnbull, op. cit. p. 82.
127. Melville, op. cit., pp. 72-4n, 72-76: Turnbull, op. cit., Appendix A, pp. 243-7: J. Bonwick, The Last of the Tasmanians (London, 1870), pp. 78-81.
128. Melville, loc. cit.: Turnbull, op. cit., pp. 85-93.
129. Ibid., p. 94, & Appendix B, pp. 247-9: Melville, op. cit., pp. 76-9: Bonwick, op. cit., pp. 81-2.
130. Ibid., pp. 84-7, 131-179: Melville, op. cit., pp. 89-102: J. West, The History of Tasmania (ed. A.G.L. Shaw), (Sydney, 1971), Section VI, pp. 292-301.
131. Loc. cit.: Melville, op. cit., pp. 102-3: Turnbull, op. cit., pp. 117-123.
132. West, op. cit., p. 632n.
133. Melville, op. cit., pp. 105-7.
134. West, op. cit., pp. 303-9: Bonwick, op. cit., Ch. VI: Turnbull, op. cit., pp. 124-159.

135. West, op. cit., pp. 310-318: Bonwick, op. cit.,
Chs. VII & VIII: Turnbull, op. cit., pp. 124-
236.
136. Turnbull, op. cit., pp. 129-130.
137. E.g. Collins, op. cit., Vol. I, pp. 545 & 559.
138. B.T. Box 52, pp. 998-9, Walker to Watson,
November 15, 1821.
139. Loc. cit.

PART 2

THE CRIMINAL LAW - THE PERSONAL
RIGHTS AND DUTIES OF ABORIGINES

CHAPTER VIABORIGINES AND THE ADMINISTRATION OF THE
CRIMINAL LAW - THE ESTABLISHMENT OF THE
PATTERNA. FIRST CONTACTS

During the early years of the colony its administrators were concerned to ensure its survival. To that end it was necessary to reduce the threat potential in the Aborigines. Injuries to their persons or property were, if detected and proved, punished, and injuries by the Aborigines were discouraged by the display of military prowess. Later, the survival of the colony was secured and its frontiers extended. Inter-racial conflict then assumed greater dimensions, but of a different character. At times it became so consistent and ferocious as to amount nearly to warfare, but warfare in which the existence of the colony was not endangered. Although it would have been possible to exercise a degree of authority over the Aborigines, for the first twenty seven years of the colony it was accepted that they were not susceptible to judicial process (See Chapter IX).

In dealing with the problems of black and white conflict in the colony the colonial officials had a number of options: they could treat the situation of the Aborigines as one to which the criminal law did not apply, for the protection or punishment of the Aborigines; they could apply the criminal law in part only, or with a disregard for the finer issues; they could adapt the criminal law and legal remedies to the colonial situation; or they could

apply the criminal law with a strict regard to its contemporary content in England. All of these options were exercised on various occasions throughout the period of this study. The early years usually saw the adoption of the first option, but later this came to be replaced by a partial application or a variation of the law - either could have been on occasions the result of inadequate knowledge of the law rather than the exercise of a conscious decision.

Contact with the Aborigines was quickly marred by theft and violence on both sides.¹ It is not possible to determine the numbers killed, but most estimates suggest that many more blacks than whites died in these conflicts. It is unlikely that this imbalance was a consequence only of the nature of the weapons available on each side, for a musket was an unsatisfactory weapon in many respects, the number of muskets available was limited, and the Aborigines had superiority in numbers and bushcraft. The first certain killing of a white man occurred on May 22, 1788² and two more convicts were killed eight days later.³ It was believed that these killings were in retaliation for the deaths of several Aborigines - the inquiry into the alleged murder of one Aborigine discovering no proof, no case was brought before a criminal court.⁴ What was perhaps a judicial investigation into the rumoured murder of another two natives by 3 convicts who were taken on suspicion, resulted in their being "acquitted".⁵ Phillip led the first armed party in search of the Aborigines responsible for the deaths of the convicts but failed to meet with any natives. Tench recorded as the purpose of

the party, "to inflict a memorable and exemplary punishment", but Phillip disclaimed any such intent.⁶ Amongst a number of other incidents,⁷ a fourth convict was killed in October.⁸ A second armed party fired amongst some natives to discourage them from the vicinity of the settlement.⁹

The incidents continued¹⁰ and on March 6, 1789 occurred the first large conflict.¹¹ A party of sixteen convicts, armed with stakes, set off towards Botany Bay for a purpose variously described as stealing fishing tackle and spears or avenging the ill-treatment of a fellow convict on whatever natives they should meet. When they encountered a larger body of natives than expected, the convicts were routed, and one of the whites was killed and six or seven were wounded. An armed party was dispatched but met with no natives. Seven of the survivors, Henry Humphreys, John Turner, James Neal, James Stow, Cross, Day and Martin were ordered by the Governor "to receive each 150 lashes and to wear an Iron on the Leg for a year...for Disobedience of an order repeatedly given, to prevent their straggling beyond the Limits prescribed them".¹² The Governor directed that the like punishment be inflicted upon those in hospital when they were recovered,¹³ and a week later another convict was ordered 150 lashes for being in the party.¹⁴ On April 4, Jeremiah Hurley, James Holloway, James Peaulet and Brown, all convicts, were ordered the same punishment as the others for their role in the affair.¹⁵ Nonetheless, two armed parties were sent out "that

the natives might see that their late act of violence would neither intimidate nor prevent us from moving beyond the settlement whenever occasion required".¹⁶

In December 1789, following the probably and illegal capture of Bennelong and Colebee/^{and} the escape of the latter,¹⁷ William Moore, Colebee's guard was ordered by Governor Phillip to receive 100 lashes "for suffering the Native under his care to escape thro' his excessive carelessness and want of Attention".¹⁸ The order was initialled by the Judge Advocate. At common law it was an offence punishable by fine or imprisonment or both for a person to negligently suffer the escape of a prisoner lawfully in his custody.¹⁹ For the escape to be punishable criminally the imprisonment must have been for a criminal offence. As there was no criminal charge against the two Aborigines their detention had no legal justification; similarly the punishment of Moore was illegal, and appears to smack rather of naval discipline than of a judicial determination.

On occasions through 1789 and 1790 clashes occurred, several convicts were killed and others attacked and wounded.²⁰ At times the natives fired the bush²¹ and they developed the habit of threatening any white alone and unarmed.²² A convict was speared on December 10, 1790 and died in January, 1791,²³ bringing the number of killed and wounded whites to seventeen.²⁴ Phillip ordered out a party to search for the native who was responsible for the death of the convict and to make a severe example of his tribe, this being thought to be the most effective manner of

convincing them of the superiority of the colonists and of infusing "an universal terror, which might operate to prevent further mischief".²⁵ Initially Phillip had intended to capture two natives and have ten put to death, but was persuaded by Tench to amend this to require the capture of six, or if that was impracticable, to put that number to death. Phillip decided to hang two, presumably without a trial, and send the rest of them to Norfolk Island for a certain period. No women or children were to be injured but all their spears and other weapons were to be destroyed.²⁶ The order forbade "any soldier or other person not expressly ordered out for that purpose, ever to fire on any native, except in his own defence, or to molest him in any shape, or to take away any spears or other articles which they may find belonging to those people".²⁷ The expedition returned without having injured or captured any native. A second expedition was similarly unsuccessful.²⁸ There could have been no legal justification for issuing or executing these instructions if the natives were legally British citizens. Implicit in these activities was the assumption that the natives could be regarded as aliens, of a sometimes hostile nature.

On December 28 one of several natives detected stealing potatoes threw a "fiz-gig" at a person who endeavoured to drive them from the garden.²⁹ Phillip led a party after them and two were seized, but escaping they were fired at, and one was wounded. He died of his wounds on January 3 and proved to be the native who threw the "fiz-gig". Two women and a child were brought in by the party but they were released the following day. If

justification was considered necessary, it could have been founded on the law relating to the arrest of a felon and the force permissible in such instances (See Chapter VII, Section B).

Bennelong robbed a fishing boat and, on being confronted by the fishermen in the Governor's presence threatened Phillip who was unwilling to destroy Bennelong's confidence in him by punishing or confining him. Bennelong was allowed to leave but on his stealing a hatchet from the wheelwright's shop he was pursued, but escaped.³⁰ No further measures were taken against him.

On April 20, 1791 it was recorded that someone named Dawkins was sentenced by the Bench of Magistrates to receive 50 lashes for stealing a fishing line from an Aborigine,³¹ and in May a convict who had stolen fishing tackle from Colebee's "wife" was flogged in front of natives assembled for the occasion.³²

In June, six convicts smashed the canoe of Ballooderry, a native who supplied the Parramatta settlement with fish. The convicts were punished within several days, in Ballooderry's presence, and he was informed that one of them had been hanged, but he prosecuted his own revenge by wounding a straying convict.³³ Phillip instructed that he be seized and on several occasions the natives were informed that he would be killed for wounding a white man.³⁴ On August 23 he appeared near Sydney and a party of soldiers was sent after him. A fracas resulted in which a spear was thrown and a native was shot in the leg.³⁵ Again justification could have been founded on the law of arrest. An

officer was sent out with a strong party to disperse an assembly of natives near the brickworks and to make a severe example of them if any spears were thrown, but the party met with no natives.³⁶ The following day an order was promulgated that Ballooderry was to be captured if possible.³⁷ It is uncertain whether Phillip intended to put him on trial for the various assaults. However, when Ballooderry was ill in December he was forgiven and brought in to the hospital.³⁸

B. THE SPREAD OF VIOLENCE

With the new instructions to Phillip to make allotments of land,³⁹ and the consequent spread of settlement during 1791⁴⁰ several incidents occurred that were to set the pattern for inter-racial conflict on each new frontier. Late in July a large body of natives assembled in the grounds of one of the new settlers at Prospect Hill who fired his musket at them. They then destroyed his nearly completed hut and perhaps would have killed him had not a neighbouring settler arrived and fired on them.⁴¹ A party of soldiers was despatched from Parramatta, and on nearing an assembly of about fifty natives, forced them to disperse.⁴² No native casualties were mentioned. The action could have been justified by reference to the power to disperse a riot (See Chapter VIII). Other such incidents occurred.⁴³ Convicts who had absconded from the settlement at Parramatta, with the idea of walking to China were attacked by natives, and one, at least, was killed.⁴⁴

On May 18, 1792 confirmation was received of suspicions that the natives had been stealing corn. A number of them were observed leaving a hut with clothing and corn and on one preparing to throw his spear, he was shot and, probably wounded. The natives fled, abandoning their spoils, but on May 27 a convict was found killed in revenge and his possessions stolen.⁴⁵ This may have been the death about which Charles Cross made a declaration before the Judge Advocate on June 12. Cross reported that about the same time as the murder, five or six natives stopped him on the road between Prospect Hill and Parramatta and took corn from him.⁴⁶

In the following April a convict was wounded and robbed on the same road.⁴⁷ By the end of June, Collins recorded that the natives had lately become troublesome in lurking between the settlements and robbing travellers. Several convicts having been wounded, small armed parties were sent out with orders to drive them away by firing amongst the natives but they were to take care not to take a life.⁴⁸ Similar complaints were made in December, January and February and the wife of a settler was seriously wounded. Throughout this period the natives stole great quantities of corn.⁴⁹ One party of natives being driven from the corn fields at Toongabbie was pursued by the settlers and three natives were reported killed. The head of one native was brought back by the victorious watchmen.⁵⁰ At the Hawkesbury a settler and his servant were attacked and a few days later another attack resulted in a pursuit in which seven or eight natives were killed.⁵¹

Not all the conflict was the responsibility of

the natives. It was believed that many natives had been wantonly fired upon, and any native children captured by the settlers had been detained by them.⁵² A report was received from the Hawkesbury in 1794 that four settlers had tortured a native boy by dragging him through a fire, and had then thrown him bound into the river and shot at and killed him. The four settlers, Alexander Wilson, Robert Forrester, Michael Doyle and Roger Twyfield, were brought before the magistrates at Parramatta where they explained that they had believed the boy to be a spy sent by a large body of natives to discover what arms the settlers possessed. He had been tied, they explained, and deposited in Doyle's hut, but on his escaping into the river he had been shot by Forrester. Although Alexander Wilson told the slightly different tale that the boy had been shot from humanity, as a death preferable to drowning, after the settlers had thrown him bound into the river, and despite the doubts of the magistrates, there was no evidence sufficient to put them on trial, and they were discharged.⁵³ The problem of obtaining satisfactory evidence was to trouble officials in many other instances. The natives determined to revenge their injuries on the settlers Doyle, Forrester and Nixon, and in mistake for them attacked and wounded two other settlers.⁵⁴

Shortly afterwards "an open war seemed...to have commenced between the natives and the settlers" at the Hawkesbury, and several whites were killed or wounded.⁵⁵ Captain Paterson directed a party of troops from Parramatta to destroy as many of the wood tribe as they might

meet, and hang their bodies on gibbets. Several were killed or wounded, including one baby which died shortly after being captured, and another female captive was delivered of a child which died immediately.⁵⁶ In December another armed party was sent out and killed four men and a woman, badly wounded a child and took four men prisoner.⁵⁷

These manouvres were certainly of a military nature suitable only against enemy aliens and unjustifiable against British subjects. However the troubles at the Hawkesbury continued with slowly decreasing ferocity.⁵⁸ Governor Hunter felt it necessary to issue a general order requiring the settlers to assist each other whenever any numerous bodies of natives were reported, but warning the settlers not to "wantonly fire at or take the lives of any of the Natives, as such an Act would be considered a deliberate Murder, and subject the offender to such punishment as...the law might direct to be inflicted".⁵⁹ Subsequently Hunter threatened to hang in chains any native detected in the act of robbing the settlers.⁶⁰

When a young native girl, aged six or seven, who had lived in the settlement since her parents' deaths in a pursuit at the Hawkesbury, was murdered by the Sydney blacks, Hunter formed the intention to punish the offenders but as they had withdrawn into the bush, he was unable to do so.⁶¹

In June 1796, occurred the first clash between Port Stephens' natives and the crew of a fishing vessel when the latter behaved improperly and in consequence suffered one death and one wounding.⁶² That region was to remain dangerous to seamen who dared venture on shore.

In May 1797, the settlers of Kissing Point and Lane Cove experienced difficulties with the natives.⁶³

In October 1797 William Millar and Thomas Bevan were tried by the Court of Criminal Judicature for the murder of a native known as Tom Rowley. The court records recite that they were acquitted for lack of evidence, and no evidence was recorded, but Collins stated that the acquittal resulted from it appearing to the court that the victim had been shot by accident.⁶⁴ Hunter again asserted his determination to make an example of the first person convicted of wantonly taking the life of a native.

By the end of the first decade all elements of the pattern had occurred, and were to be repeated on numerous occasions during the following three decades, sometimes as scattered incidents, sometimes as general throughout the colony and sometimes, and with especial ferocity, on a particular frontier. These elements involved native attacks on isolated huts, thefts from fields and the destruction of stock;⁶⁵ the robbery, and perhaps wounding and murder of the travellers and absconding convicts⁶⁶; attacks on shipwrecked mariners and the crews of vessels upon their landing for supplies⁶⁷; the killing or wounding of natives during the above activities, or in later pursuit⁶⁸; the frequent lack of discrimination in those acts of retribution between the particular offenders, or even the tribes to which they belonged, and natives not involved in depredations⁶⁹; and, finally, those acts of provocation and destruction by whites which

could not be regarded as justified even on the broad interpretation adopted by colonial authorities.⁷⁰ Those acts of provocation and destruction were rarely to be punished.

In the future, civil authorities, magistrates, constables and the higher courts were to play a greater role but the pattern of contact changed little.

C. THE ROLE OF THE COURTS

In November, 1798, two white men William Barr and Joseph Smith were committed to Gaol to work in the Gaol Gang until further orders, "having been apprehended for wantonly firing at and wounding a native, and being in the habit of associating with and herding amongst the natives and using them barbarously and indecently".⁷¹

From the prolix and imprecise nature of the charge it is likely that the evidence for it was slight, and was insufficient to justify bringing the charge before the Court of Criminal Jurisdiction. In the exercise of their role in supervising and disciplining convicts, magistrates were not restricted to the procedures and rules they followed upon the hearing of a charge against a free man. Rules of evidence were often ignored, or charges proceeded with that bore no relation to offences in English law. Even where the evidence was insufficient to justify a determination of the guilt of the accused, magistrates had the power to direct convicts to serve

their term in a particular place or manner, subject to the Governor's approval, which normally was given.⁷² It is possible that the sentence against Barr and Smith was of this latter nature.

It is known that magistrates when hearing charges against convicts for offences not involving Aborigines, did make use of expediciencies of that nature: for instance a man charged with breaking into a hut, upon failure of proof was ordered to Toongabbe to work because he had a bad character⁷³; a woman examined on suspicion of poisoning her infant son by the administration of spirits, was ordered to be imprisoned for one month for keeping a riotous and disorderly house⁷⁴. Other instances might also be cited.⁷⁵ The practice must have been considered to have official sanction for as late as December 1823, three Liverpool magistrates wrote to the Attorney General concerning their investigation of a murder: they, and the coroner's jury, considered that the murder was committed by one or more of four named prisoners, but as there was not sufficient evidence to warrant a committal for trial they suggested that the master of the prisoners might make a complaint against them for riotous and licentious behaviour where upon the prisoners could be punished summarily.⁷⁶

The following case is a similar instance but involving Aboriginal victims. There the magisterial powers were exercised by the members of the Court of Criminal Jurisdiction.

On January 26, 1799 Thomas Hewitt was examined by the Sydney Bench of Magistrates on a charge of having shot and murdered Willie Guthrie, an Aborigine.

As it appeared to the bench that there were "circumstances of great criminality...against the prisoner" he was committed to be tried before the criminal court.⁷⁷ The trial occurred on February 1, but no prosecutor appeared and, "the native widow of the deceased being incapacitated from giving testimony admissible in law to affect the Life of the Prisoner", he was acquitted. He was convicted instead, of being an incorrigible rogue and vagabond and was sentenced to receive 300 lashes in public at a time when the greatest number of natives could be gathered to observe the punishment.⁷⁸ He was then to work for twelve months in the Gaol Gang. The corporal punishment was duly performed in the presence of several natives who, Collins reported, witnessed his sufferings with perfect indifference.⁷⁹

During the continuing disturbances at the Hawkesbury a native woman and child were killed by a soldier named Cooper, according to Hunter "in a most shamefull and wanton manner". Despite his disapproval Hunter required no investigation into these killings, perhaps because they came to his knowledge long after their commission.⁸⁰ As a result of the deaths the natives resolved to come down from the Blue Mountains in numbers and to kill whites especially soldiers: subsequently a number of whites were killed.⁸¹

In 1798 the natives Major White, Little George, Jemmy, Charley and Terribandy with a large number of other natives were associated in the deaths of Joseph Collins (speared by Terribandy) and Nicholas Redman, the wounding of Thomas Malloy

(or Malong) and John Tarlington (speared by Little George, Jemmy and another), the beating of Tarlington's wife (by Charley) and the looting of his possessions.⁸² A few days later a white man was killed on the Race Ground, possibly by Charley,⁸³ Terribandy⁸⁴ or Jemmy.⁸⁵ About August of 1799 was circulated the report of the natives' determination to kill whites and one Small-Salts was attacked by natives on the road to Parramatta but escaped.⁸⁶ A party of seventeen natives including Jemmy, Charley and Major White plundered the house of William Blady, and Major White threatened to kill Blady.⁸⁷

At about the same time the settler William Goodall, previously the senior sergeant in the Detachment at the Hawkesbury, was speared and beaten by a party of about twelve natives including Charley.⁸⁸ On being informed by Corporal Farrell that he knew where to take the natives who assaulted Goodall, Lieutenant Hobby ordered him to take a soldier with him and pursue them, but not to fire on the natives unless they made resistance in which case they were to be brought in "dead or alive". Lieutenant Hobby, the Commanding Officer at the Hawkesbury had earlier been directed by Hunter to act against the natives at his discretion.⁸⁹ One native was wounded whilst escaping, but Charley was taken and escorted to Governor Hunter who was reported as having petulantly informed the escort that "it was not in his power to give Orders for the hanging or shooting of such Ignorant Creatures who could not be made sensible of what they might be guilty of, therefore could not be treated according to our Laws". Hunter,

it was said, suggested that in cases such as this, immediate retaliation should be made, or so soon as they could be caught. This report was circulated amongst the settlers. Although those instructions could not have been justified in law, Hunter would have been restricted from advising any other action against Aboriginal offenders for at this time it was believed that they could not be brought to trial. Charley was directed to be returned to Mr. Cummings with whom he had lived, to be admonished and released.⁹⁰ Charley had denied wounding Goodall and attributed it to Major White.⁹¹

A short time later, Major White, Terribandy and another native killed Thomas Hodgkinson and a man named Wimbo (or Wimbolt), either for the sake of their provisions or because Wimbolt had the daughter of one of the natives living with him.⁹² Lieutenant Hobby ordered a party of soldiers to accompany the men who were to bury the bodies of the two white men, and, if they met any natives on the road, they were to fire upon them.⁹³

Jemmy, little George and another native, all three of whom, it appeared, had been with the two white men when they were killed, brought back one of their muskets. At the request of Hodgkinson's widow that they be killed, and on being informed by Edward Powell, a constable, that it was the Governor's and Commanding Officer's Orders that the natives should be killed wherever they could be met, a group of settlers seized them and killed Jemmy and George. The third native escaped. Powell and four others were tried for the murders in October, 1799. The trial is notable for a number of

deviations from normal procedure.

The prisoners produced a defence in writing which was included in the records of the court.⁹⁴ The third paragraph commenced "Edward Powell Deposes..." but at this time an accused person was not entitled to give evidence on oath,⁹⁵ and certainly the usual form of record of an oath included the additional words "being duly sworn". The form may have been adopted due to Powell's experience as a constable as this portion of it was clearly the particular defence of Powell and would represent an attempt by Powell to add greater force to his statement. The Defence was in four parts, the first three being the denial respectively of their presence at the time of the killings by Metcalfe, Powell and the remaining three. The defence continued with the argument that the natives were "a Treacherous Evil minded Bloodthirsty set or Description of Persons" and "it was generally understood that it was a standing Order...to kill any of the Natives found in their way". Seven witnesses were called on behalf of the Prisoners to prove the "general offensive conduct of the Natives", and the orders respecting them.⁹⁶ In addition to the conduct already discussed, the youngest, George, was said to have stolen corn.⁹⁷

Two of the officers comprising the court had been in command at the Hawkesbury and evidence was given that one of them, Captain John Macarthur, frequently had sent out parties of soldiers to kill natives committing depredations.⁹⁸ Another member of the Court, Lieutenant Neil McKellar, was questioned by one of the accused about orders,

issued by him and not countermanded since, to destroy the Natives "whenever they were met with after having been guilty of outrages, except such Native children as were domesticated amongst the Settlers". In his answer McKellar remarked that "it was understood that Natives were not to be injured except in retaliation for any outrage recently committed".⁹⁹

All five of the accused were found guilty of killing the natives but in varying terms, only Captain Waterhouse adopting the term "murder". He and the other two naval officers, Lieutenants Flinders and Shortland, considered the case to be one for corporal punishment rather than death, but the Judge-Advocate and the three officers of the N.S.W. Corps required that the case be reserved "until the sense of His Majesty's Ministers at home is known on the subject".¹⁰⁰ This sentence met with the disapproval of Governor Hunter as it by-passed his authority as Commander-in-Chief to approve or moderate the severity of any sentence.¹⁰¹ The terms of the decision were curious, as there was no endeavour, except by Captain Waterhouse, to categorise the form of homicide. If it were murder the only penalty that could have conformed with the law as it was applied in England would have been that of death, and the body to be dissected and anatomized:¹⁰² (In 1844 the N.S.W. Supreme Court concluded that failure to add the order for the body to be dissected and anatomised did not invalidate the death sentence.¹⁰³) If it were manslaughter that offence was punishable by burning in the hand, and at the discretion of the court, the additional penalty of imprisonment for any term not exceeding

a year. After the Statute 19 Geo. III, c. 74, ss. 3 & 4, of 1779 the court also had the alternative of a moderate fine, but not of whipping.¹⁰⁴ However whipping or imprisonment were the usual penalties imposed for manslaughter in the colony.¹⁰⁵

To Hunter's disgust the prisoners were released on bail by the court and Powell was ordered to be suspended, but not removed, from his office as a constable.¹⁰⁶ One of the witnesses, Thomas Sanbourne, a settler who had been admitted to give evidence for the Crown, and who thereby avoided being tried for the murder with the other prisoners, had given evidence inconsistent with that given before the examining magistrate¹⁰⁷ and he was committed by the court to answer "such charges as shall then be preferred against him", at the next Criminal Court. It does not appear that this trial ever occurred. Sanbourne was brought before the next court, later that month, but his trial was postponed, as some of the members of the later court had sat on that from which the charge originated. For some considerable time thereafter subsequent courts were similarly barred from trying him.¹⁰⁸

It is uncertain what part local politics played in the determination of the Court. The disagreement of the Court divided into two parties, the Judge-Advocate and the Military Officers on the one hand and the Naval Officers on the other, was reminiscent of the Isaac Nichols case of March of that same year, which controversy was still current.¹⁰⁹ Certainly an effect of both cases was

damage to the standing and power of the Governor and was so considered by Hunter.¹¹⁰ Here, not only was the Court effectively expressing its distrust of the Governor's exercise of his powers with respect to sentences passed by the Court, but also was bringing to the attention of the British Government evidence which portrayed the Governor, at best as indecisive, and at worst as having ordered the illegal killings of natives. Much of this evidence was hearsay, as was that in Nichols' case, and of dubious relevance.¹¹¹ In determining the matter the British authorities would have been precluded from insisting upon the full rigour of the law as the conduct of the convicted men had resulted from a mistake of law apparently inspired by the Governor. In the event the British Government directed Governor King in 1802 to issue pardons for the offence, with such conditions as King thought adequate for the attainment of justice.¹¹² To this direction were added some censures on the earlier conduct of relations with the natives and an assurance that future injustices or wanton cruelty towards the natives would be punished "with the utmost severity of the law".

D. TASMANIA

Unlike the early conflicts in New South Wales the first known clash in Tasmania between the members of the English settlement and the Aborigines had an official imprimatur. The first of the expedition under Lieutenant Bowen arrived at Risdon Cove on September 7, 1803. Bowen had been

instructed by Governor King to choose a suitable place for an establishment in Tasmania. Collins moved his establishment from Port Phillip on January 30, 1804 and they arrived in Tasmania variously on February 9 & 15, 1804.¹¹³ The first clash with the natives occurred at Risdon on May 3, 1804.¹¹⁴ The various accounts of the transaction are in conflict. The official account was that of Lieutenant Moore who was then in charge at the camp. He explained that the natives had approached the camp in a hostile manner and, after the natives had used violence to a settler's wife and Moore's own servant, he had given orders that they be fired upon. Other accounts suggested that Moore had been drunk and had either panicked or decided to fire on the natives for the fun of seeing them run. From the presence of women and children with the natives it was unlikely that they had approached with any hostile intent. It was estimated that fifty natives were killed.¹¹⁵

A party under Colonel Paterson settled at Port Dalrymple on November 11, 1804. The following day the natives attacked the settlement and were repulsed, one of the natives being killed. During 1805 Paterson sent an Aborigine's head to Governor King.¹¹⁶

On September 30, 1804 Governor King wrote to Lieutenant-Governor Collins that he deplored the necessity of firing on the natives,¹¹⁷ and the following year Collins received instructions from Downing Street to afford the protection of British law to the person and property of the natives.¹¹⁸ These instructions were embodied in a general order

issued on January 7.¹¹⁹ From time to time other orders were issued to the same purpose¹²⁰: none had much effect on the populace.

A famine was experienced during late 1805 and in 1806 and the convicts were turned loose to forage food for themselves. The results were disastrous for the natives: not only did the convicts compete on the natives' hunting grounds for the scarce food resources, but they developed the slaughter of the natives as a sport. The settlements were made up predominantly of males: the aboriginal women were an available outlet for the convicts' sexual drives with little danger of punishment to the convicts.¹²¹

A later Lieutenant-Governor, Sorell, spoke of firing on the natives as a habit and of the practice of stealing native children.¹²² Other reports speak of rapes and murders of the natives by the white settlers, convicts and bushrangers.¹²³ By the end of 1807 only two white men had been killed by the natives.¹²⁴

Again unlike the position in New South Wales, in Tasmania there was little official action to protect the natives other than the occasional issue of a General Order prohibiting injury to the natives. However it does appear that on occasions offences against the Aborigines were punished, for one historian, on the evidence of an eye witness, reported that "a man was severely flogged for exposing the ears of a boy he had mutilated; and another for cutting off the little finger of a native, and using it as a tobacco stopper".¹²⁵

There is no evidence that official acts of reprisal against the natives were necessary during the early years: later the acts of reprisal were

usually carried out by groups of the settlers, although on occasions the military were involved.¹²⁶

E. CONCLUSION

In many respects the early contact with the Aborigines was a paradigm of black-white contact. After an initial period of curiosity, tensions between the two races developed finally to erupt into violence. Ineffective measures were employed against whites who injured the natives, and military measures were employed against the natives. The former measures were ineffective because the procedures and rules whereby the courts acted were not designed to deal with cultural conflicts where one side was incapable of presenting its case to the court. The latter measures were only able to be effective if their implementation proceeded on the basis that, for an offence by an individual, retribution could be effected against any of the tribe or race. Those difficulties facing the colonial executive were compounded by doubts and confusions as to the legal status of the natives. Whether they were genuinely concerned or not the officials could do little more than utter threats of dire retribution to any settler who harmed the natives without due cause. The settlers had merely to wait until due cause presented itself, to manufacture a cause, or to act secretly without any cause.

In the New South Wales situation there were several unique features. The speed with which violence occurred has been attributed to the

settlement being constituted of a bulk of convicts.¹²⁷ However in cases involving the convicts the officials were afforded a greater degree of freedom than they possessed in dealing with cases involving free persons - this additional power was sometimes exercised for the punishment of offenders against Aborigines.¹²⁸ The use of the courts for political purposes was a feature of New South Wales society during this early period,¹²⁹ although the exercise of such political functions occurred at irregular intervals, and not throughout the whole period. When applied to the first case involving offences against the Aborigines which could be clearly proved, it resulted in the setting at liberty of persons guilty of a blatant murder. The example set in this manner was clearly not of the deterrent import intended to be achieved by both the Governor and the British Government: moreover the British Government was forced to connive at the setting of this bad example.

In most instances where the courts were ineffective to protect the Aborigine or punish his aggressor, it was the very nature of the criminal justice system which was responsible. The criminal law and procedure was not suited to issues involving the Aborigines, and in the absence of suitable adaptation the Aborigines were in a legal vacuum. It is, perhaps, remarkable that the normal criminal procedures were so regularly employed in these instances.

During the first twelve years of the colony eight white men had been tried for the murder of natives, three had been acquitted and five convicted

of an offence of an uncertain nature. Only one had been punished, and then for vagrancy: the five persons convicted all received pardons. During this same period another twenty four persons had been tried for murder of whites, eight had been convicted of murder, six had been convicted of manslaughter and ten had been acquitted.¹³⁰ All of those convicted of murder had been sentenced to death and, as there exists no record of any pardons for them, it may be presumed that they were executed. Of the six persons convicted of manslaughter, five were sentenced to corporal punishment and one to be burnt in the hand and to serve twelve months imprisonment. In addition, another two persons were charged and convicted of manslaughter but it is not possible to discover the nature of the sentence.¹³¹ It would appear therefore that it was much safer to murder a native than a white person.

In Tasmania the situation was aggravated by the lack of interest and determination on the part of officials and by the greater degree of freedom allowed the convicts. In New South Wales there could have been little doubt that the Government disapproved of misconduct towards the natives and that it would, if able to prove the misconduct, endeavour to ensure that the offenders were punished. There could have been equally little doubt that the Government was likely to be ineffective in its attempts to prove the misconduct. Although the Governors were responsible for ordering acts of reprisals against the natives, and approved of similar acts not ordered by them, care was taken to ensure that the reprisals were kept within certain

bounds. In Tasmania, however, the conduct of the officers of the Government amounted almost to connivance in the mistreatment of the Aborigines, or, at least, considerable neglect in the conduct of their duty to protect the natives. The white inhabitants were allowed to deal with the natives with unbounded liberty and little fear of punishment.

FOOTNOTES

1. G. Barrington, The History of New South Wales, 2nd ed. (London, 1810), pp. 23, 54 and 59: M.L., C116 Arthur Bowes, A Journal of a Voyage from Portsmouth to New South Wales, March 8, 9 and 15, 1788: Bradley, op. cit., pp. 60, 85, and 95-7: Collins, op. cit., pp. 17, 36 and 42-3: Tench, op. cit., p. 135: White, op. cit., p. 151: Worgan, op. cit., pp. 25-6: Phillip to Nepean July 10, 1788, H.R.A., I, I, pp. 66-7: Phillip to Sydney, July 10, 1788, H.R.A., I, I, p. 68: Extract from a letter by an officer of the Marines, November 19, 1788 (Banks Papers), H.R.N.S.W., I, Part 2, p. 221 at pp. 222-3.
2. Bradley, op. cit., pp. 107-9: White, op. cit., pp. 132-3. Bowes, loc. cit., recorded on March 8 that several absconders had been killed, but one of the "murdered" men turned up the next day.
3. Bradley, op. cit., p. 111: White, op. cit., p. 134: Phillip to Sydney, July 9, 1788, H.R.A., I, I, p. 48: Phillip to Stephens, July 10, 1788, H.R.A., I, I, p. 62.
4. Bradley, op. cit., p. 108: J. Cobley, Sydney Cove 1788 (London, 1962), pp. 153 & 157. The investigation occurred on June 1, 1788.
5. Worgan, op. cit., p. 33. Collins, op. cit., I, p. 30, suggested that an inquiry indicated that the two whites had earlier stolen a native canoe. The existing records for this period of the Bench of Magistrates (Archives, 1/296) and the Court of Criminal Jurisdiction (Archives, 1147A)

make no mention of such inquiries, but neither record appears complete.

6. Tench, op. cit., p. 52: Phillip to Sydney, July 9, 1788, H.R.A., I, I, p. 49.
7. Bradley, op. cit., pp. 118 & 124: Collins, op. cit., I, pp. 36, 40 & 44: Tench, op. cit., p. 137: White, op. cit., p. 155.
8. Ibid., p. 165: Collins, op. cit., I, p. 43.
9. Ibid., I, pp. 44-5.
10. Ibid., I, pp. 52-3.
11. Ibid., I, pp. 57-8: Tench, op. cit., pp. 144-5.
12. Copley, Sydney Cove, 1789-1790 (Sydney, 1963), p. 19.
13. Collins, loc. cit.
14. Copley, Sydney Cove, 1789-1790, op. cit., p. 20.
16. Collins, loc. cit.
15. Copley, Sydney Cove, 1789-1790, op. cit., p. 25.
17. Bradley, op. cit., pp. 181-5: Collins, op. cit., I, pp. 86-7: Hunter, op. cit., p. 116.
18. Arch., 1/296, Bench of Magistrates - Minutes of Proceedings, February, 1788 to 1799, p. 246.
19. J. Jervis and W.N. Welsby (eds.), Archbold's Pleading and Evidence in Criminal Cases, 14th Edn. (London, 1859), p. 671: Sir William Blackstone, Commentaries on the Laws of England, (R.M. Kerr, ed.), (London, 1857), Vol. IV, pp. 133-4: R. Burns, The Justice of the Peace, and

- Parish Officer (T. D'Oyly and E.V. Williams, eds.), (London, 1836), Vol. III, pp. 186-191: William Hawkins, A Treatise of the Pleas of the Crown (8th Edn.), (London, 1824), Vol. 2, c. 19, §§ 3 & 31, C.20, §§ 1 & 6: Sir Matthew Hale, History of the Pleas of the Crown (Ed. Geo. Wilson), (London, 1778), Vol. I, pp. 600-605.
20. Collins, op. cit., pp. 81-2, 94 & 133-6: Tench, op. cit., p. 151: Bradley, op. cit., pp. 177, 179-81, 225-31: Hunter, op. cit., pp. 140-3, 306-10, 314-5: Phillip to Sydney, February 2, 1790, H.R.A., I, I, p. 146.
 21. Loc. cit.: Hunter, op. cit., p. 336.
 22. Hunter, op. cit., pp. 113 & 331.
 23. Ibid., pp. 326-8, 334-5: Collins, op. cit., Vol. I, pp. 143 & 148: Tench, op. cit., pp. 205-6.
 24. Tench, op. cit., p. 205.
 25. Ibid., p. 207.
 26. Ibid., pp. 207-9.
 27. Hunter, op. cit., pp. 328-9.
 28. Tench, op. cit., pp. 207-215: Collins, op. cit., pp. 143-4: Hunter, loc. cit.
 29. Collins, op. cit., pp. 146-7: Tench, op. cit., pp. 215-6: Hunter, op. cit., pp. 331-4.
 30. Ibid., pp. 333-4.
 31. Arch., 1/296, p. 304.
 32. Tench, op. cit., p. 221.

33. Hunter, op. cit., pp. 352-3: Tench, op. cit., p. 239: Collins, op. cit., pp. 165-6.
34. Hunter, op. cit., p. 357.
35. Ibid., pp. 358-9: Barrington, op. cit., pp. 98-9.
36. Hunter, loc. cit.
37. Cobley, op. cit., 1791-1792, p. 105.
38. Hunter, op. cit., p. 374.
39. Phillip's Instructions re Land Grants, H.R.A., I, I, pp. 124-8: Collins, op. cit., Vol. I, pp. 127-8.
40. Ibid., pp. 159-60, 172-3 & 189: Hunter, op. cit., pp. 351, 355-6 & 363-5.
41. Collins, op. cit., p. 173: Hunter, op. cit., p. 355.
42. Ibid., p. 356.
43. Phillip to Grenville, November 5, 1791, H.R.A., I, I, pp. 267 at p. 272.
44. Tench, op. cit., pp. 244 & 246-7.
45. Collins, op. cit., p. 213: M.L., M.S.S. 737-1, Richard Atkins Journal, May 18 and 26, pp. 13 & 15-16.
46. Arch., 1/296, op. cit., p. 367.
47. Collins, op. cit., Vol. I, p. 284.
48. Ibid., Vol. I, p. 297.
49. Ibid., Vol. I, pp. 328, 340-1, 349.

50. Ibid., Vol. I, pp. 364-5.
51. Ibid., Vol. I, p. 390.
52. Loc. cit.
53. Ibid., Vol. I, p. 394: Arch., 1/296, op. cit., p. 375.
54. Collins, op. cit., Vol. I, p. 407.
55. Ibid., op. cit., Vol. I, pp. 405, 413, 415-7: M.L., C188, P.G. King Papers, p. 132, June 11, 1795.
56. Collins, op. cit., p. 416: Paterson to Dundas, June 15, 1795, H.R.A., I, I, p. 499: Paterson to Dundas, September 16, 1795, H.R.A., I, I, pp. 529-530.
57. Ibid., p. 444.
58. Collins, op. cit., Vol. I, pp. 453 (January), 458-9 (February), 468 (March) and 482 (June), Vol. II, pp. 13, 27 (March, 1797), 31 (April), 56-7 (October), 114-5 (May, 1798).
59. Hunter to Portland, H.R.A., I, I, p. 674, pp. 688-9: Arch., 1161. Miscellaneous Correspondence re Aborigines, 24 (1). Extract from Orderly Book 11 September, 1795 to 31 December, 1797. (But note that this incorrectly gives the date as February 22, 1797 whereas it was issued on the same day but in 1796): M.L., A 1787, Letters of Governor Hunter, 1795-1802, p. 13, Hunter to Banks, August 20, 1796.
60. Collins, op. cit., Vol. 2, pp. 34-5: Barrington, op. cit., p. 193.

61. Collins, op. cit., Vol. 2, p. 13.
62. Ibid., Vol. I, pp. 484-5.
63. Ibid., Vol. 2, p. 33.
64. Ibid., Vol. 2, p. 54: Arch., 1147B, Proceedings of the Court of Criminal Judicature, April 1795 to December 1797, pp. 353-4.
65. Collins, op. cit., Vol. 2, pp. 93 (Toongabbe, February, 1798) and 209 (George's R, May, 1799): M.L., A79⁻¹, Banks Papers - Brabourne Collection, Vol. 8, 1795 - 1801, p. 91, Caley to Banks, August 25, 1801 (Parramatta): Gazette, 1803, April 10: M.L., A1677⁻³, Hassall Correspondence, Vol. 3, pp. 4099-4102, Byrnes to Thos. Hassall, not dated: Gazette, 1804, June 3 (Portland Head), 17 (Hawkesbury R.), and 24 (Portland Head, South Creek and Tenchs R.); August 19, 1804 (George's R.); September 2, 1804 (Lane Cove); Gazette, 1805, March 3; April, 21 (Hawkesbury) and 28; May 5 (Seven Hills and elsewhere), 12 and 19 (numerous); June 2 (Hawkesbury R.), 9 (George's R.), 16 (Prospect and Hawkesbury R.), 23 and 30 (Portland Head); September 8 and 15 (Hawkesbury); December 22 (Hawkesbury): M.L., B.T. Box 49, p. 251 Crook to Missionary Society, May 5, 1805: Gazette, 1806, May 4 and 11 (Prospect): Gazette, 1808, October 30 (Hawkesbury): Gazette, 1809, September 3 (Parramatta), and 10; October 1 (George's R.) and 15 (Parramatta): Gazette, 1811, July 20 (Hawkesbury): M.L., A78⁻³ Banks Papers, Brabourne Collection, Vol. 4, 1801-1820, pp. 323-4, G. Suttor to Banks, November 12, 1812: Gazette, 1814, May 7 (Mulgoa), 14 (Appin and Cow Pastures); June 4, 11 and 18 (Bringelly, Appin and Airds); July 23 (Mulgoa):

M.L., A2801, Macarthur Papers, Vol. 5, p. 63ff at pp. 65-7, H. Macarthur to John Macarthur, May 16 and 18, 1814: Gazette, 1815, August 5, (Bringelly): Arch., 4/1733, N.S.W. Colonial Secretary In-Letters, 1815, pp. 128-9, Blaxland to Macquarie, December 29, 1815: Gazette, 1816, March 9 (Bringelly and Nepean), 16 (Cow Pastures), 30 (Nepean and Lane Cove); August 31 (Mulgoa): M.L., A752, Wentworth Papers, pp. 183-4, Throsby to Wentworth, (1816): B.T., Box 5, Bigge, J.T. - Report and Evidence, p. 2031, Evidence of A. Bell, November 27, 1819: Gazette, 1822, June 14, (Illawarra): Gazette, 1824, January 8 (Bathurst); June 10 (Bathurst); August 5, 12 & 19 (Bathurst); September 16 & 30 (Mudgee); December 2 (Port Macquarie): M.L., B.T., Box 52, pp. 1359-60, Extract of Wm. Horton's Journal, May 1824: M.L., A1194, N.S.W. Governor's Despatches, Vol. 5, 1823-4, pp. 555-7, 559-61, Despatch No. 13, June 10, 1824: M.L., A1677⁻³, Hassall Correspondence, Vol. 3, p. 1563, Fisher to Rev. T. Hassall, July 20, 1824.

66. Collins, op. cit., Vol. I, pp. 408-9 (Port Stephens, March 1795): Gazette, 1804, June 10 (Port Stephens); September 16 (Parramatta - Hawkesbury); November 11 (Parramatta-Sydney) and 18 (Hunter's R.); 1805, March 3 (Newcastle); April 23 (Broken Bay); May 12 (Parramatta Rd); 1807, March 3 (Hunter R. - Broken Bay); 1809, September 10 (Hawkesbury); October 15 (Parramatta Rd); December 10 (Newcastle-Broken Bay); 1813, February 13 (Hunter's R.); 1815, February 25 (Shoalhaven); June 3 (Parramatta Rd); December 23 (Parramatta); 1816, March 16;

August 31 (Newcastle); October 5; 1821, May 26 (Bateman's Bay); 1824, December 2 (Port Macquarie).

67. M.L., A1787, Letters of Governor Hunter, pp. 34-42 (August 1 and 15, 1797): Collins, op. cit., Vol. 2, pp. 204-5 (Hunter's R., April, 1797): Gazette, 1804, July 22 (Two Fold Bay) and 29 (Hunter's R.); 1805, April 28 (Pittwater); May 5 (Pittwater); October 27 (Jervis Bay); November 3 (Port Stephens); December 6 (Port Jervis); 1806, April 6 (Two Fold Bay); May 18 (Two Fold Bay); July 27 (Two Fold Bay): 1808, May 15 (Bateman's Bay); November 6 (Hunter's R.); 1812, September 19 (Two Fold Bay); 1815, October 7 (Green Cape); 1816, July 6 (Port Stephens); 1821, June 23 (Two Fold Bay).
68. Collins, op. cit., Vol. 2, p. 73 (February, 1798): Gazette, 1804, June 17 (2 killed and some wounded in pursuit); July 22 (one killed in defence) and 29 (one killed in defence); 1805, May 5 (six or seven killed in reprisal) 12 (one native killed) and 19 (one killed); June 16 (one killed in defence); September 8 (2 killed); October 27 (2 killed); 1806, April 6 (9 killed); 1808, October 30 (one killed and 2 wounded); 1810, February 24 (one wounded); 1814, May 14 (four killed including a woman and 2 children); 1816, May 11 (fourteen or sixteen killed); 1822, June 14 (one killed and one wounded); 1824, June 10 (three killed); August 12 (3 killed); September 16 & 30 (19 killed). A number of other incidents occurred which fitted within this category but are dealt with in detail later. As will be apparent from

comparison with the records of whites injured by natives (footnotes 65-7) little interest was shown in recording native losses.

In 1800 estimates of deaths in the Hawkesbury district alone for short periods were - 2 months, 2 natives and 2 whites killed, one white wounded; twelve months, four whites killed, one wounded and five natives killed; five or six years, 12 whites killed and 20 natives; four and a half years, twenty-six whites killed and thirteen wounded. H.R.A., I, pp. 410, 411, 413 and 421. Hunter suggested that the number of natives killed was astonishingly greater than the number of whites. Ibid., p. 402.

69. Arch., 1161, Extract from Orderly Book, November 24, 1797: Collins, op. cit., Vol. 2, p. 93 (February, 1798): Gazette, 1804, June 17: Arch., 1161, Extract from Orderly Book, April 19, 1805: Gazette, 1805, April 28; May 5 & 12; 1814, May 14; 1816, May 4 & 11: Arch., 4/1734, N.S.W. Colonial Secretary In-Letters, 1816, pp. 149-168, Instructions to Captain Schaw, April 9, 1816, esp. at pp. 152 & 155: Arch., 4/1735, N.S.W. Colonial Secretary In-Letters, 1816, pp. 1-13, Instructions to Lieut. Dawes and Capt. Wallis, April 9, 1816; pp. 44-9, Instructions to Sgt. Broadfoot, May 8, 1816; pp. 29-32, Lieut. Dawes to Macquarie, May, 1816; pp. 33-41, Schaw to Macquarie, May 8, 1816; pp. 50-62, Wallis to Macquarie, May 9, 1816; pp. 72-3, Broadfoot to Macquarie, May 23, 1816; pp. 22-4, Proclamation, May 4, 1816, at p. 23: Gazette, 1824, June 10; and letters

to the editor in July 29, August 5, 12 & 19; September 30.

70. H.R.A., I, II, p. 401 at pp. 402-3: N.L., A79⁻¹ Banks Papers, p. 71, Caley to Banks, August 25, 1801: Gazette, 1812, January 11 and June 11: N.L., A78⁻³, Banks Papers, pp. 323-4, Suttor to Banks: N.L., A752, Wentworth Papers, pp. 183-4, Throsby to Wentworth: Gazette, 1817, May 31; 1822, April 26; 1824, August 12; October 14; November 18. In most instances the authorities suspected that natives were being ill-treated but were unable to find confirmatory evidence. Further specific instances are dealt with in detail later.
71. Arch., 1/297, Bench of Magistrates, Sydney, June 23 to December 1, 1798, p. 145.
72. See McLaughlin, op. cit., Ch. 12 regarding the authority of the magistrates over convicts.
73. Arch., 1/297, Proceedings of Bench of Magistrates, Sydney, June 23 - December 1, 1798, p. 1.
74. Ibid., pp. 35ff.
75. Arch., 1/300, Bench of Magistrates, Sydney, January 13, 1806 to August 5, 1812, p. 29: Arch., 1/301, Bench of Magistrates, Sydney, August 16, 1808 to March 10, 1810, January 17, 1809: Arch., 1/302, Bench of Magistrates, Sydney, April 14 to July 14, 1810, May 12: Arch., 2/8323, Bathurst Bench Books, September 27, 1825 to August 8, 1826, p. 163.

76. Arch., 2/8238, Colonial Secretary, Coroner's Inquests, 1823, pp. 399-424.
77. Arch., 1/298, Bench of Magistrates, Proceedings, December 3, 1798 to March 5, 1800, p. 43.
78. Arch., X905, Court of Criminal Judicature, Proceedings, March 29, 1798 to December 23, 1800, pp. 68 and 90. Collins, op. cit., Vol. 2, p. 196 recorded the sentence as being imposed upon him for having shot a native at Botany Bay, which appears more likely than the very transparent pretext upon which the Court operated.
79. Ibid., Vol. 2, p. 197.
80. Hunter to Portland, January 2, 1800, H.R.A., I, II, p. 401 at p. 403.
81. Arch., X905, op. cit., pp. 298-320 and 329-362, Trial of Edward Powell, Simon Freebody, James Metcalfe, William Timms and William Butler for the murder of two aborigines, Jemmy and little George. The report of the trial is reproduced in all substantial respects in H.R.A., I, II, pp. 403-422 and all references will be to that report.
82. Evidence of John Tarlington, ibid., pp. 419-420.
83. Evidence of Lieut. Hobby, ibid., pp. 409-410.
84. Evidence of Jonas Archer, ibid., p. 410 that he was informed by Jemmy that the man was murdered by Jemmy's brother. According to John Pearson, Terribandy was the reputed

brother of Jemmy (p. 407).

85. Evidence of Thomas Rickerby, ibid., p. 405 and Isabella Ramsey, p. 406. Presumably this was based on a misunderstanding of reports by Jonas Archer (see f.n. 84).
86. Evidence of Lieut. Hobby, ibid., pp. 408-9.
87. Evidence of William Blady, ibid., pp. 420-1.
88. Evidence of William Goodall, ibid., p. 417.
89. Evidence of Lieut. Hobby, ibid., pp. 408-9.
90. Evidence of Corporal Farrell, ibid., pp. 418-9.
91. Evidence of Lieut. Hobby, ibid., p. 409. Major White was killed in June, 1804 (Gazette, 1804, June 17 and July 1 & 15) and Charley on April 28, 1805 (Gazette, 1805, May 5 & 12).
92. Evidence of Jonas Archer, op. cit., p. 412-3.
93. Evidence of Lieut. Hobby, ibid., pp. 408 & 410.
94. Ibid., pp. 413-6.
95. Stephen, op. cit., Vol. I, pp. 439-441.
96. Op. cit., pp. 416-420.
97. Evidence of Thomas Rickerby, op. cit., p. 405.
98. Evidence of William Goodall, ibid., p. 417.
99. Ibid., p. 421.
100. Ibid., p. 422.
101. Hunter to Portland, op. cit., pp. 401-3.
102. Blackstone, op. cit., Vol. 4, pp. 224-5 (202).
The form of sentence prescribed by the statute

- 25 Geo. II. c.37, was later to be customarily used in New South Wales. But Arch., 1147B, Court of Criminal Jurisdiction, 1795-1797, pp. 129ff, 195ff and Arch., 1149, Court of Criminal Jurisdiction, 1801-1803, pp. 79ff & 235ff record merely the sentence of death.
103. R v Knatchbull (1844) Legge, p. 176.
104. Sir Matthew Hale, A History of the Pleas of the Crown (Ed. G. Wilson), (London, 1778), Vol. II, pp. 387-390: Edward Hyde East, A Treatise of the Pleas of the Crown (London, 1803), Vol. I, p. 218.
105. E.g. Arch., 1147A, Court of Criminal Jurisdiction, 1788-1794, pp. 65ff: Arch., 1147B, Court of Criminal Jurisdiction, 1795-1797, pp. 111ff: Arch., 1149, Court of Criminal Jurisdiction, 1801-1803, pp. 7ff. But in one instance, on the conviction of John Norris for manslaughter in October, 1797, the prisoner was sentenced to be burned in the hand, and twelve months close imprisonment. Arch., 1147B, op. cit., pp. 373ff.
106. H.R.A., I, II, p. 422.
107. Arch., 1152, Court of Criminal Jurisdiction, Miscellaneous Papers, p. 53. Deposition of Thomas Samburn.
108. Arch., X905, Court of Criminal Jurisdiction, 1798-1800, pp. 394ff.
109. Hunter to Portland, February 21, 1799 and enclosures, H.R.A., I, II, pp. 278-338. The case is discussed in H.V. Evatt, Run Rebellion

- (Sydney, 1933), Ch. VI. and C.H. Currey, The Brothers Bent (Sydney, 1963), pp. 22-5.
110. Hunter to Under-Secretary King, September 21, 1801, H.R.N.S.W., 4, pp. 521-2.
111. This was especially applicable to the evidence of the two members of the N.S.W. Corps, Lieutenant Hobby and Corporal Farrell.
112. Under-Secretary Sullivan to Under-Secretary King, December 16, 1801, H.R.N.S.W., 4, pp. 639-40: Hobart to King, January 30, 1802, H.R.A., I, III, pp. 366-7.
113. West, op. cit., pp. 30-3: Bonwick, op. cit., pp. 31-2: Turnbull, op. cit., pp. 17-22.
114. Ibid., pp. 30-5: West, op. cit., p. 262: Bonwick, op. cit., pp. 32-6.
115. H.R.A., III, Vol. I, pp. 238-243: West, loc. cit.
116. Turnbull, op. cit., pp. 35-7: M.L., A78⁻³, Banks Papers - Brabourne Collection, Vol. 4, Australia 1801-1820, Paterson to Banks, November 27, 1804.
117. M.L., A2015, P.G. King's Letter Book, p. 450, King to Collins, September 30, 1804.
118. M.L., A605, Calder Papers, Miscellaneous, p. 714.
119. M.L., A341, General and Garrison Orders, No. 132, January 7, 1805.
120. E.g. M.L., A341, General and Garrison Orders, No. 318, February 10, 1803: West, op. cit., p. 264: Turnbull, op. cit., pp. 47, 55-6, 57-9.

121. Turnbull, op. cit., pp. 37-40: West, op. cit., pp. 263-4. Turnbull cites authorities for his statements that Aboriginal women were enslaved, flogged with kangaroo hide cats, burned with brands and roasted alive, that men and children were emasculated and otherwise mutilated, and that men were shot and children were destroyed by dashing out their brains.
122. West, op. cit., p. 265.
123. Turnbull, op. cit., pp. 41-2, 48, 53-4.
124. West, op. cit., p. 263.
125. Ibid., pp. 264 & 623n.
126. E.g. The Hobart Town Gazette, March 29, 1817: Levy, op. cit., pp. 106-8.
127. Bridges, Aboriginal & White Relations, op. cit., p. 39.
128. Infra, pp. 167-8.
129. E.g. H.V. Evatt, Run Rebellion (Sydney, 1938), Chs. VI, VIII, XVIII, XIX, XX XXI.
130. Arch., 1147A, op. cit., pp. 65-86, 405ff: Arch., 1147B, op. cit., pp. 111-128, 129-142, 143-150, 167-194, 195-214, 373-8, 435-450, 461ff: Arch., X905, op. cit., pp. 165ff, 199-207, 225-252.
131. Collins, op. cit., Vol. II, p. 9.

CHAPTER VIIABORIGINES AND THE ADMINISTRATION OF THE
CRIMINAL LAW - THE EXERCISE OF POLICE
FUNCTIONSA. POLICE POWERS AND THE AUTHORITY FOR THEIR USE

Violence towards the Aborigines could have been justified on several grounds: self-defence; prevention of crime; the performance of a lawful arrest; dispersal of a riotous mob; or by martial law. All but the last were clearly legitimate defences. The incidents attaching to these defences, and, in particular, the degree of force they justified, were of principal importance in the colonists undertakings against the Aborigines. All but self-defence related to the powers of police.

According to Blackstone, a homicide was justifiable:

1. Where an officer, in the execution of his office, either in a civil or a criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him....3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them,

both at common law, and by the Riot Act....But in all of these cases there must be an apparent necessity on the officer's part, viz., that the party could not be arrested or apprehended, the riot could not be suppressed... unless such homicide were committed: otherwise without such absolute necessity, it is not justifiable. ¹

Homicide was also justifiable for the prevention of any forcible and atrocious crime.² It was no defence to kill a person on an attempt to arrest that person for a misdemeanour unless the person being arrested assaulted the officer arresting him with an intent to make his escape.³

To these rules Hale added a warning:

...tho a private person may arrest a felon, and if he fly so as he cannot be taken without he be kild (sic), it is excuseable in this case for the necessity,... yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at least before the arrest, seems at least manslaughter ...for an innocent person is not bound to take notice of a private person's suspicions. ⁴

This aspect of the law relating to arrests was ignored in the colony.

At common law a private person was empowered to do anything reasonably necessary, and might have employed violence, to prevent the commission of any crime; and he might have detained the intended criminal until the danger had passed.⁵ If the offence were a felony, or a dangerous wound was given, he might have arrested the offender either during or after its commission: indeed, there was a legal duty to do so, on pain of fine or imprisonment for neglect.⁶ If he were not present when the felony was committed, he might have arrested upon a strong and reasonable suspicion if, in fact, such a felony had been committed,⁷ or even without grounds for such suspicion if he arrested the actual offender.⁸ Certain grounds for suspicion were customarily recognised by the courts.⁹ Only upon the hue and cry upon a felony were the rights of a private citizen wider, as then he had the same powers and protection for the force used by him as if he were acting upon the warrant of a justice of the peace.¹⁰ By the end of the eighteenth century the term "hue and cry" was normally reserved for occasions when the warrant of a justice of the peace was issued.¹¹ If the offence were a breach of the peace, or a misdemeanour with violence the offender might have been taken during its commission, but not afterwards, and if it were a mere misdemeanour without violence, not even during its commission.¹² Very little violence was permissible in cases of misdemeanours or breaches of the peace.

The office of constable conferred on its holder an authority not only in excess of that of a private citizen but one that extended to the

requiring of assistance from that individual. A constable might have arrested any person against whom a reasonable charge of felony had been made, or on reasonable suspicion of felony, and would have been held justified in using force to perform the arrest despite that person's innocence, or even the fact that no felony had been committed.¹³ A constable might also have arrested for a mere misdemeanour or breach of the peace, without violence, if it were committed in his presence, or perhaps, upon fresh and immediate pursuit, but not otherwise.¹⁴

In addition, a constable might have commanded a private citizen to arrest another guilty of a felony or in the commission in his presence of such a breach of the peace as an affray or riot, and that citizen was both authorised and bound to assist the officer.¹⁵ The constable was one of the officers entitled and required to raise a hue and cry upon receiving information of a felony, and most private male citizens were required to assist in it.¹⁶

The constables were the proper officers, to whom magistrates' warrants for arrest were usually addressed, and in the execution of such warrants, they were protected.¹⁷ As this was the usual mode of proceeding,¹⁸ they rarely acted independently of magisterial instruction, and even in the exercise of their duty to raise the hue and cry, it was believed to be **preferable** for them to obtain the warrant of a justice of the peace.¹⁹

The magistrate was, therefore, the person primarily responsible for the administration of

the police. It was he who raised forces to pursue and arrest persons committing felonies or disturbing the peace, and he was entitled to the aid of "all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other such persons being above the age of fifteen years and that are able to travel".²⁰ Reliance on the authority of a magistrate cast a certain protection over the actor. This protection was of value to parties of white men deployed against the natives.

There remained another possible justification for action against Aborigines: the quelling of a riot.²¹ One of the major obligations on magistrates was the preservation of public order. This obligation was not on them alone, but lay on every subject. Private citizens might have armed themselves and used those arms, if necessary, in suppressing a riot or disturbance, but it was not considered prudent or advisable for them to do so, except under the authority of the Justices or Sheriffs.²² Constables were bound to do all that was possible for them to do to suppress a riot or disturbance and to this end they might have commanded the assistance of all other persons.²³ But the primary responsibility lay upon the magistrates, by several statutes. By the liberal interpretation of the statute 34 Ed. III. c.1, any one Justice had the power given by the statute to the Justices, to restrain rioters and arrest them, and to verbally authorise others to arrest them. If Justices failed to exercise these duties they were guilty of a high misdemeanour punishable by fine or imprisonment or both.²⁴ By 13 Hen. IV.

c.7. it was required that at least two justices should arrest offenders if any riot was made, upon pain of a penalty of £100.²⁵ By 2 Hen. V. c.8. the justices were given the right (and duty) to call upon the neighbourhood for aid in repressing a disturbance, and both they, for failure to summon aid, and any who failed to respond to a summons, could have been penalised.²⁶ By 1780 it had been suggested that this power could be exercised by one justice.²⁷ The Riot Act (1 Geo. I. st. 2. c.5.) also gave power to one justice to disperse a riotous or unlawful assembly of 12 or more persons.²⁸

English justices could obtain assistance to quell a riot from a number of sources. They could appoint special constables for a particular emergency, and frequently did so, for both civil disturbances, and ordinary crime.²⁹ They could call in the military or yeomanry.³⁰ They could call for aid from the army.

Herein, perhaps, lay the most probable justification in law for action taken against Aborigines en masse in response to the criminal conduct of individual Aborigines. If the activities of a group of Aborigines could have been regarded as a riot, the members of the gathering could have been fired on, with impunity, for the purpose of dispersing them. The reports of some clashes with Aborigines implied that dispersal of unlawful assemblies or riotous mobs were the objectives of the actions taken by the whites. If the whites were acting under the control of a magistrate, as was the practice both in England and Australia, and obeyed his instructions to fire on the natives, there would have been little likelihood

of a successful prosecution against any of the whites. There was a heavy responsibility on the magistrates to act reasonably in these matters. It must be feared that some behaved badly.

Only when the venture was by private citizens would reliance on that justification be of doubtful value, and require dependance on the alternative justifications of prevention of crime, arrest of a felon, or self-defence. During the period of martial law in the Bathurst region in 1824 (see Section D) private citizens were recognised as then possessing the same degree of immunity as they would have had if they had been accompanied by magistrates. Private action then resulted in the deaths of an unknown number of Aborigines.

The expediency of summoning the army to dispell disorderly gatherings was adopted in England with increasing frequency throughout the eighteenth and early nineteenth centuries, in the face of frequent criticism from persons of various political beliefs to whom the existence of a standing army was anathema: to Blackstone it appeared a threat to freedom.³¹ Notwithstanding this criticism and the limited statutory authority for the practice, the use of the military in police activities had become common by the end of the century.³² By a little after the middle of that century the practice of requiring the central Government to consider and, if necessary, approve requests for troops was relaxed and it was accepted that the magistrates could call for such assistance from troops as they could from other

citizens, but no more.³³ There remained many doubts about the legal status of members of the military who were potentially liable at the hands of civil juries for their conduct whilst engaged in those activities. Many of these questions were a matter of open discussion, inside and out of Parliament and the courts of law, following the Gordon Riots in 1780.³⁴

It was stated by Lord Mansfield in the House of Lords and, later, in the trial of the Lord Mayor of London that every man might, and was legally bound in his private capacity to, suppress riots and acts of felony, treason and rebellion, and was punishable for refusal after being called upon by a magistrate: in this respect the military were in no separate case from other citizens.³⁵ Issues relating to the degree of authority the magistrates might exercise over the military, and the extent of the power of the military to act independently of the magistrate, were only slowly determined during the period of this study and many uncertainties remained.

The military were similarly employed in Australia (See Sections C & G).

B. THE POLICE ESTABLISHMENT

Upon the extension of the Magistracy beyond Sydney³⁶ and the appointment of district constables,³⁷ responsibility for relations with the Aborigines automatically devolved upon them. This was not the result of any conscious decision or policy but

rather a mechanical falling into the English cast of magisterial responsibility for civil order.³⁸ Reaction to native and white conflict was regarded as a matter of police administration, and to this end, and for the preservation of civil security, the magistrates had access to the military. This was in adoption of the English model, and was in no way a response or adaptation to colonial conditions. It was in consequence of this acceptance of the **formalities** of the English practice at the level of magisterial conduct that relations with the Aborigines were treated as a matter of administrative expediency when any situation arose which affected civil order and then, the level of police activity being low, only where the security of the district was involved.

Some of the magistrates' functions in relation to the Aborigines were diplomatic and educative. On a number of occasions magistrates negotiated with tribes of Aborigines to persuade them to keep the peace, at times when other tribes were on the rampage.³⁹ In return for their keeping the peace they were to be afforded the protection of the magistrates during retaliatory measures.⁴⁰ Associated with this activity were the inquiries made of dissatisfied tribes as to their complaints of specific wrong doings.⁴¹ The magistrates were responsible for communicating to the natives, any governmental orders concerning them, and informing them of the implications of the orders.⁴² They were also employed in distributing rewards to the natives for assistance supplied by them, especially in the capture of bush rangers.⁴³

In one respect the police establishment was quite unusual: the appointment of Aborigines as police officers. It would appear that this measure was adopted in response to the difficulties of preserving peaceful relations with the Aborigines through more normal police measures. From time to time some Aborigines were appointed to be constables,⁴⁴ and in one instance to be an assistant constable.⁴⁵ It has been suggested that the function of native constables was to keep order amongst their fellows, and that they were appointed by settlers in much the same way as were the tribal "kings".⁴⁶ It would have been curious if they had been appointed in that manner for neither Bigge in his reference to the native made constable at Windsor, whom, he reported, discharged his duty with fidelity and intelligence,⁴⁷ nor the official notices of appointment of constables indicated that such was the case.⁴⁸ Until April 1820 the appointment of constables lay in the hands of the magistrates of the various districts, and thereafter they were appointed by the Governor upon the recommendation, presumably, of the magistrates.⁴⁹ On several occasions the notices appointing constables included the name of an Aborigine who was not otherwise distinguished from the whites so appointed except that he was described as a "Black Native". There was no reference made to any differentiation in function.⁵⁰ As the magistrates of a district would have recommended the appointee it could have been expected that he would have been one believed reliable for their purposes, and as the magistrates, who usually were settlers, also supervised the activities of the constables it is

reasonable to suppose that they may have instructed the native constables to perform limited functions without informing them of the amplitude of their powers concerning white offenders. The practice described by Bridges may have developed at a later date or parallel to the official appointments.⁵¹

The few records that exist of the activities of the native constables do not indicate that their function was very different from that of other constables except that they were occasionally required to use their greater bushcraft in tracking white offenders.⁵² If their appointment was a response to the difficulties of policing Aboriginal offences, in the hope that the appointees would exercise supervision over others of their race, there is no evidence that the response achieved any marked result.

C. POLICE AND MILITARY ACTIVITIES AGAINST ABORIGINES

The early measures adopted to capture, or punish, Aboriginal offenders have been considered in Chapter VI. Although these measures consisted mostly of ventures by military personnel, on some occasions the parties were made up of settlers or convict stockmen. Again, although most of these expeditions occurred under official supervision, a number were composed entirely of private citizens. There was little difference between these activities and those designed for use against bushrangers.

In 1804, troops were despatched to the magistrates at the Hawkesbury to deal with native forays at Portland Head, and under instructions "promptly to adopt such measures as the exigency of the case required". It was not recorded whether they were to act independently of the magistrates or not.⁵³ It appeared that if an area contained no magistrate troops would still be despatched, presumably to act at the discretion of their senior officer.⁵⁴ The magistrates controlled the policing of native disturbances, and it was they who despatched parties to recover stolen property and arrest offenders.⁵⁵ At least on one occasion a reward was offered by a magistrate for the capture of a native, in that instance for attacking, bruising and robbing a defenceless boy.⁵⁶ On another occasion the reward was offered by the Governor.⁵⁷

On several occasions Governors initiated, and in Macquarie's case designed, operations to quell native disturbances. In many of these operations the magistrates were given a major role, although in Macquarie's first exercise in 1814 they had no part.⁵⁸ In his later exercise of 1816 the magistrates, according to William Cox, participated by leading and advising the military parties and they also acted as recipients of prisoners taken.⁵⁹ Cox also stated that, with the exception of the party of Captain Schaw, settlers never attacked the natives except when led by a magistrate, or in self-defence. Implicit in this was the presumption that, ^{provided those} preconditions were satisfied, and even if only as a formality, there was considerable freedom allowed the settlers in their actions against the Aborigines.

In his instructions to the military parties ⁱⁿ 1816, Macquarie insisted that all Aborigines, men, women and children were to be taken prisoner if possible, but, if they resisted capture by fight or escape they were to be shot and their bodies hung from trees in conspicuous places.⁶⁰ No attempt was made to justify the legality of these measures, although the only authority in law to take such action would have rested on the law relating to riotous and unlawful assemblies: any other justification would have been relevant only if the measures had been adopted against individuals known or suspected to have been implicated in misdeeds. Those taken captive by the parties were to have been hostages for the surrender of the natives actually guilty of the crimes. On the surrender of the latter Macquarie intended to inflict a summary punishment upon them.⁶¹ The expeditions resulted in the deaths of at least 14 or possibly 16 male Aborigines and several women and children⁶² and it does not appear that there was any real attempt to take prisoners, the natives being fired upon on sight.⁶³ However, five prisoners were taken.⁶⁴

Following the military ventures in 1816, Macquarie declared by a Proclamation of July 20 that three separate military detachments were to be stationed convenient to the Nepean, Grose and Hawkesbury Rivers to assist and protect settlers "when Occasion may require it, when called upon by the nearest Magistrate, for that Purpose". The district magistrates were to provide each detachment with a European and a native guide. Similar Instructions were issued to the military parties at Parramatta, Liverpool and Bringelly.⁶⁵

In disturbances at Bathurst in 1824⁶⁶ seven stock keepers were murdered on the one day⁶⁷ and the total death toll of whites rose to nineteen.⁶⁸ Any agricultural or pastoral activity became dangerous.⁶⁹ One magistrate, Rev. Thomas Hassall, proposed the establishment of a yeoman cavalry of settlers on the pattern of English yeomanry.⁷⁰ Brisbane declared that the anxious exertion of the ordinary powers of the magistrates had proved insufficient and "by Experience, it hath been found that mutual Bloodshed may be stopped by the Use of Arms against the Natives beyond the ordinary Rule of Law in Time of Peace, and to this End Resort to summary Justice has become necessary". On August 14 he proclaimed martial law for the whole of the country west of Mt. York.⁷¹ The soldiers were ordered to assist and obey their lawful superiors (which category would have included magistrates) in suppressing the violence, and all subjects were called on to assist the magistrates in executing such measures as any one or more of the magistrates direct. At this time it was reported that there were only five magistrates, four constables and a few soldiers in the region beyond the mountains.⁷²

In the management of the state of martial law magistrates played a leading role. Major Morisset, the Commandant and Magistrate at Newcastle from late 1818, had been appointed to the similar positions at Bathurst in November 1823. His body of troops was enlarged and they were divided into several small parties, each controlled by a magistrate, which patrolled the country.⁷³ It appeared that they met with no blacks,⁷⁴ but the activities of groups of settlers did result in the deaths of a

number of Aborigines.⁷⁵ Martial law having proved successful, and the tribes having responded to overtures of peace,⁷⁶ the repeal of martial law was proclaimed on December 11, 1824.⁷⁷

The distinction between military law, the jurisdiction in which was exercised by courts-martial, and martial law was a distinction which was not always clear even during the early part of the nineteenth century.⁷⁸ The military law was a body of law which had initially rested upon Royal prerogative but, following the Petition of Rights and the Declaration of Rights, it had required Parliamentary sanction: this was given by annual Mutiny Acts. Courts-Martial were a recognised part of the judicature of the realm, the jurisdiction of which is limited to the military and naval forces of the Crown.⁷⁹

By contrast, martial law was an extraordinary proceedings founded on the justification of necessity.⁸⁰ It entitled the King, and, in the colonies, the Governor as representing the King,⁸¹ to exercise or authorise the exercise of, naked force to the extent necessary to prevent invasion, rebellion or riot. A proclamation of martial law had no effect to suspend the operations of the legislature, if any, or the normal proceedings of courts of justice, and it conferred no additional powers on the King or the Governor which he would not have possessed without it.⁸² The proclamation only gave notice to the inhabitants of the course necessary to be taken to restore order. If the regular civil courts were able to operate and persons taken by the civil or military authorities might have been brought before the courts, then no other course was legal: a purported exercise of

jurisdiction by a court-martial in those circumstances was not legal if the prisoner was a person not normally subject to military law.⁸³ A rebel or rioter might while under arms be put to death lawfully, and he might also be put to death while a prisoner if his execution was necessary for the restoration of tranquillity.⁸⁴ Martial law was, therefore, indistinguishable from the common law relating to the duty of each man and each magistrate to use any degree of physical force necessary for the suppression of insurrection. Once the insurrection was quelled there was no justification for the infliction of summary punishment.⁸⁵

Martial law was declared in the colony on several occasions.⁸⁶ In 1804 a rebellion amongst the Irish convicts was suppressed and the ringleaders were tried by court-martial by a group of military officers acting as a tribunal. Some of the insurrectionists were sentenced to be hanged, some to be flogged, and some to be transported to Newcastle.⁸⁷ In view of the complete defeat of the rebels there was no immediate necessity for the summary trial and the action was taken to establish a long term deterrent. The legality of these trials must be doubtful: according to one authority, it was doubtful if any sentence other than death could properly have been imposed by a tribunal acting under martial law and not exercising its normal criminal jurisdiction.⁸⁸ A sentence other than death would have been a denial that there had been such expediency and need for self-preservation by terror as alone could have justified the trial.

The measures adopted in 1804, some of the reports of the activities of the settlers during and shortly after the period of martial law at Bathurst in 1824,⁸⁹ the nature of the suggestions that martial law be similarly declared in the Hunter Valley in 1826,⁹⁰ and the use of martial law in Tasmania after 1828,⁹¹ would suggest that the proclamation of martial law was seen by the colonists as providing them with perfect liberty to act as they chose against those causing the disturbance. When the disturbances were by the natives the ambiguities in the law were construed to provide liberty to attack any Aborigines in the region in which martial law was in force.

During the period of martial law in 1824 in Bathurst the activities of the whites were described as amounting to "wholesale reprisals". No accurate account of the numbers of Aborigines killed⁹² was possible,⁹³ but at least nineteen were killed in one well-published encounter.⁹⁴ No attempt was made to distinguish peaceful from warlike Aborigines or from those known to have committed offences against the whites.

Following the declaration of martial law in Tasmania, a party of blacks were chased and a native woman was shot dead. An inquiry took place but the Solicitor General, after "anxious attention to the case...of great importance" advised against taking it to Court. His reasoning displayed considerable confusion as to the nature of martial law for he stated that there was some doubts to whether Martial or Common Law prevailed at the actual moment of killing. He continued that "since

no reasoning would lead the great bulk of the people to see nice shades of difference between murder, manslaughter and justifiable homicide" a trial might have resulted in indiscriminate murders under Martial Law or if Common Law was held to run colonists would have hesitated before going out in capture-parties for fear that a death would lead them to the gallows.⁹⁵ Nothing further was done in the matter, and in this disregard the Solicitor General was supported by the Secretary of State.

On the development of conflicts in several of N.S.W. districts/in 1826, troops were again employed. In February, David Reid, magistrate in the County of Argyle, requested the assistance of troops which were despatched after a delay of a few months.⁹⁶ The detachment was ordered to communicate with the magistrates and act in conjunction with them as the circumstances might render necessary. Two stockmen were killed but an investigation revealed that the first killing was justifiable.⁹⁷ No deaths followed the arrival of the troops.⁹⁸ The troops were then removed from Argyle and ordered to the Shoalhaven to form a garrison for the assistance of the magistrates who had complained of native outrages in that district.⁹⁹ On this occasion the exercise of restraint on the part of both local officials and military commander brought about a peaceful resolution. This resolution was only achieved because, in addition to the restraint, a proper investigation was made. The result of the investigation afforded no excuse for destruction of the natives.

By 1820 four soldiers had been stationed at each of the settlements of Paterson's Plains and Wallis Plains in the Hunter Valley to assist the constables and to protect the settlement against attack by natives.¹⁰⁰ At Port Macquarie parties of cedar cutters were protected by a guard of soldiers.¹⁰¹

Disturbances in the Hunter Valley commenced in October 1825 when a settler and two stockmen were murdered and another stockman experienced a close escape.¹⁰² The Commandant at Newcastle, on hearing of the deaths, despatched a party of ten soldiers accompanied by some bush constables. They, unfortunately, fired on a friendly tribe wounding one and capturing a female prisoner who was released after giving them information about the murderers.¹⁰³ It was reported that several natives known or suspected to have been involved in the murders had been arrested but all had later escaped despite being fired on,¹⁰⁴ Further disturbances occurred,¹⁰⁵ and the Hunter River detachment of the newly formed Mounted Police entered the fray from its station of Wallis Plains.¹⁰⁶ Their intervention resulted in the deaths of several natives. In these activities of a police nature, again no attempt was made to single out the genuine offender, although no doctrine of law permitted attacks of this nature by the police.

In July 1826, Darling had warned against ill-treatment of the blacks in the neighbourhood in consequence of some individuals having committed excesses.¹⁰⁷ He resisted advice to declare martial law as Brisbane had done in 1824.¹⁰⁸ Troops were,

however, despatched from Newcastle and Windsor,¹⁰⁹ although when William Ogilvie the Resident Magistrate in the district beyond Patrick's Plains was offered the assistance of troops he rejected them as unnecessary.¹¹⁰ Parties operating against the natives included magistrates, settlers and their men, troops and the Mounted Police.¹¹¹ Several natives were taken prisoner by the Mounted Police, four of them later being shot dead, and three being lodged in the Gaol at Newcastle.¹¹² It was also reported that a native detected stealing corn from a paddock had been shot and the body hung from a tree with a cob of corn between the teeth.¹¹³ Following representations from Ogilvie,¹¹⁴ Mirroul or Denis, one of the natives sent to Newcastle Gaol on August 16, was released during September or October, and another, Tolou or Ben, was released later.¹¹⁵ Ogilvie had been able to give both men alibis. The third prisoner, Billy, was held longer despite a suggestion from Threlkeld that he be released to appease the blacks upset at his imprisonment.¹¹⁶ It is not discoverable what happened to him but certainly he was never tried for his alleged role in the murder of two men on Dr. Bowman's farm at Edinglassie. In August 1826 the Gaoler's List of Prisoners confined awaiting trial indicated that he had been charged with throwing spears at Mr. Wall with intent to murder him, but he was not tried at the subsequent Quarter Sessions.¹¹⁷

An investigation into the deaths of the four natives at the hands of the Mounted Police resulted in their commander, Lieutenant Lowe, being tried for the murder of one of them. He was acquitted.¹¹⁸

The situation at the Hunter River remained difficult for some years, with misconduct on both sides.¹¹⁹ During 1826 small detachments of troops and Mounted Police were distributed throughout the areas endangered.¹²⁰ Later in the year troops and police were ordered to repel all acts of violence and depredation on the part of the Aborigines but not to act offensively against the natives in the existing circumstances.¹²¹ Here at least was indicated an awareness of the relevant legal doctrines.

Although the terrain and the description of people against whom they were deployed were very different, the use of the military force as an instrument for the protection of civil order differed little from the nature of their use in England. Neither in England nor New South Wales was the army unpopular with the civil authorities as an instrument for the preservation of peace and order. The presence of troops in the country districts was usually regarded as desirable. Elsewhere in New South Wales the standing of the army was often low and affrays occurred between military personnel and the general populace.¹²² In England also the army was usually unpopular with the greater bulk of the population.¹²³ This unpopularity in the colony was rarely to affect the civil liability of the personnel as it did in England for in New South Wales virtually the only civil jury in criminal matters was that in the Courts of Quarter Session, the jury in the Supreme Court in criminal matters consisting of military and naval officers. The care with which the army was subjected to the civil authorities,¹²⁴ especially in

later years, precluded any separation of aims, and reduced to a minimum the likelihood of prosecution.

In 1826 the Gazette floated the rumour that the settlers, especially the small ones, would be overjoyed if it were true the Governor was planning to distribute the regiments throughout the country rather than housing them in barracks.¹²⁵ As no objections were made by the settlers the rumour was proved correct, and the following month it was announced that troops would be distributed "with a view of aiding the Civil Power and the effectually putting down the bush rangers". The officers, it was declared, would communicate with the magistrates with whom they would be pleased to co-operate to the utmost of their power. They were recommended to employ the more intelligent natives who would be rewarded at the discretion of the officers.¹²⁶

Later in 1826, eleven landholders of the Upper Hunter region petitioned the Governor against removing troops or police from the region and thereby weakening the protection afforded the area.¹²⁷ As the purpose for which these persons were recalled was the giving of evidence at investigations into the deaths of the native prisoners, it is possible that the petitioners were concerned more with the investigations and less with the weakening of protection; more so since not one of the petitioners lived in the region.¹²⁸ In his reply Darling repeated the refrain of all governors, that the settlers ought to act in their own defence and in defence of their fellows. Here again the English pattern was repeated of emphasis on the community as the fundamental unit in law enforcement, to be supported as necessary by other

forces. In 1827 three magistrates of Argyle suggested the necessity of a non-commissioned officer and three or four privates being sent to the Goulburn Plains until the agitation of the moment settled down.¹²⁹

D. THE MOUNTED POLICE

The first genuinely Australian solution to the problems of policing inter-racial contacts was devised by Brisbane. His first proposal, during 1824, suggested the raising of a troop of cavalry,¹³⁰ but on being met with questions as to the effectiveness of existing measures at Bathurst,¹³¹ the proposal was amended. His later suggestion, was for the establishment of a mounted police to combat bush ranging, and this was approved by Bathurst, who also authorised the provision of cavalry equipment to those men in the Veteran Companies selected for use in the Mounted Police.¹³² The force was composed of persons drawn from infantry regiments who remained as supernumeraries on the regimental rolls and, on the regiment being moved, transferred to the rolls of the new regiment.¹³³ They remained, therefore, subject to military discipline. Amongst expedients submitted in England were the quartering of a regiment of Light Horse in the environs of London to act as sentinels and pursuers, suggested by Sir John Fielding about 1762,¹³⁴ and the enrolment of military pensioners, suggested by several persons in 1819.¹³⁵ Expedients adopted in England included the allocation of infantry and

cavalry to affected areas, stationing detachments in villages when trouble was expected and performance of patrols from village to village.¹³⁶ The closest approximation to the Mounted Police to be found in English precedents was the Horse Patrol formed in 1805 and consisting chiefly of men who had served in cavalry regiments, their duty being to patrol the principal roads round London.¹³⁷ This Patrol had no prescribed limit and endeavoured to be useful whenever wanted.¹³⁸ Brisbane's police force was, in effect, an amalgam of the several English schemes and was peculiarly adapted to conditions in the out-settlements and to the policing of racial conflict.

E. COMMUNAL SELF-PROTECTION

In one other respect official reaction to the problems of policing hostile Aborigines was unique. During the Hawkesbury troubles of the mid-1790's Hunter had found the settlers to be so careless of their mutual safety as to render it necessary to declare that residents of the different districts should, when large bodies of natives were reported on their own or others farms, assemble and render such assistance as each man would, if attacked, wish himself to receive. Any settler who withdrew or kept back his assistance would be proceeded against for disobeying the rules and orders of the settlement.¹³⁹ Similar orders were issued by King in 1805,¹⁴⁰ by Macquarie more than once in 1816¹⁴¹ and Bathurst in 1824.¹⁴² Although these orders embodied classic common law theory of the duty of

individuals to act to prevent felony and the obligations of the community in law enforcement there were, in addition, several interesting features. In England the responsibility to prevent crime or take offenders lay upon the community rather than its individual members, and it was the community which was fined or required to recompense those suffering through its failure.¹⁴³

Responsibility of citizens was placed only on those present when crime was committed, when help was demanded from an officer, or when the hue and cry or posse comitatus was raised by a proper officer.¹⁴⁴

Associations of citizens, although at first suspected by civil authorities, came to be recognised and their assistance accepted: however such associations were voluntary.¹⁴⁵ The English institution closest in character to the method of mutual aid proposed in the colony was the posse comitatus, although in practice that had become merely a potential instrument of civil power, usually in the control of justices.¹⁴⁶ However in a pamphlet on the Legal Mode of Suppressing Riots, published in 1780 and reprinted in 1782 and 1819, Sir William Jones delved into ancient law to support the right and duty of citizens to act as such a body as was later ordered by Hunter, and without requiring the imprimatur of an officer.¹⁴⁷ Whether the pamphlet, or others developing the same theme, were known to the authorities in the colony is not discoverable, but such knowledge would offer a reasonable explanation of the method chosen.

F. POLICE AND MILITARY ACTIVITIES IN TASMANIA.

In Tasmania there were only occasional police activities against the Aborigines.¹⁴⁸ However, late in 1828, public disquiet over reports of violent conduct by the Aborigines led the Governor to attempt to allay these fears by the declaration of martial law.¹⁴⁹ The proclamation was followed by a circular to the magistrates, informing them that the proclamation was "a measure adopted not with the view of seeking the destruction of the Aborigines, but rather punishing the leaders in the several atrocities committed".¹⁵⁰ It was reported that the effect of this proclamation was to destroy more than two-thirds of the natives within twelve months.¹⁵¹ In May 1829 the parties involved in the operations to kill or capture the natives were organised and every month they were required to submit a report on their activities.¹⁵²

In September 1829 it was considered that more energetic steps were necessary and an additional force of constabulary was attached to the field police to assist them in their pursuit of the native tribes and the efforts to drive the tribes from the settled districts.¹⁵³

Public disquiet continued, and so Arthur fixed on the "Black Line", as a remedy if not to the problem then at least to the public fears.¹⁵⁴ This measure was a total failure, but within several years a continuation of the use of the capture parties and the negotiations of a few concerned white men had resulted in the capture and banishment of almost all of the surviving native population.¹⁵⁵

When authorising both police activities, and the operations to enforce martial law, the Governor was careful to insist that the natives should be captured whenever possible and that the natives should only be killed when it was necessary. Although many of the parties operated under the control of the magistrates, there was little supervision at either magisterial or gubernatorial levels.¹⁵⁶ In Tasmania during that period it was not even thought necessary for whites to establish the few formalities necessary in New South Wales in order to achieve complete liberty to deal as they chose with the natives.

In consequence the police procedures were merely a cloak for destruction of the Aborigines.¹⁵⁷

G. THE NATURE AND ROLE OF POLICE ACTIVITIES

At the time of settlement of the colony in New South Wales it was expected that any of the necessary functions of police or gaoler would be performed by the Marine Corps which accompanied the convicts. As the officers of this Corps were unwilling to ensure the performance of these functions it was found necessary to establish a separate police force.¹⁵⁸ In the establishment and later development of this force English models were adopted,¹⁵⁹ with perhaps two exceptions, the use of natives as constables, and the development of the Mounted Police. Both developments were, in part, a response to the difficulties of applying more customary procedures to the Aborigines.

In the conduct of police functions English precedents were followed: the activities of the police personnel were under the control of the magistrates;¹⁶⁰ those activities were expected to be complemented by the employment of military forces, and the activities of private individuals.

In the use of military forces for police functions Australian conduct adhered faithfully to British practice, with, perhaps, two exceptions. First, it was apparent that a standing military force was required by the colony, and, despite criticism of the conduct of some of its members, in the colony there could have been no serious repetition of the English fear that the existence of a standing army was a threat to civil freedom. This acception of the military as integral to the community might, perhaps, have been in anticipation of later British politics but it is more likely that it reflected the realities of the British practice. Second, without the suspicions aroused by the army in Britain, and possibly as a result of the absence of civil juries in criminal courts, the uncertainty and hesitancy of military officers in Britain in involvement in civil matters was not repeated in the colony.¹⁶¹ The validity of their conduct was assessed by their fellows, and no gap in sympathies was to be expected. As, in the exercise of civil responsibilities, the military personnel were subject to the supervision of the civil authorities and, in particular of the magistrates, they could be confident that their conduct would not be censured by the magistrates. On several occasions the magistrates acted to protect members of the army from the civil consequences of their actions against Aborigines.¹⁶²

Precedents for the use of the military in the preservation of public peace had been established in England during the eighteenth century, and had become a matter for public discussion only a short while before the colony was established. It may be presumed that many of the public officers of the colony would have been aware of the discussions, and this awareness may have influenced the manner of employment of the military forces against the Aborigines.

In the complementary police activities of private citizens emphasis was placed on compliance with the formalities of the relevant English law. Colonial practice was unique, however, in the compulsory nature of those activities. Compliance with the English formalities was of special significance when the activities were directed against the Aborigines.

Official acts of reprisal against Aboriginal offenders were gradually supplanted by normal police activities but once the Aborigines were taken the authorities considered themselves constrained from taking further action. However, on at least two occasions, Aborigines were punished by the imposition of a sentence at the instigation of the Governor without reference to the courts. The sterility of the police activities encouraged those white settlers who participated in legitimate police activities to turn them into ventures for reprisal, preferring to take the law into their own hands rather than allow the Aborigines to go free through the application of the proper procedures.¹⁶³

If some measure of arrest or self-defence was involved, no penalty would ensue, and no regard was had to strict legalities.

Ill-treatment of the persons of Aborigines normally would be punished only if credible evidence - that is the evidence of a white man - was available and there appeared to be no prima facie justification for the alleged wrong. There was little effort to protect the property of Aborigines, but it is likely that such offences were few after the initial bout of curiosity during which Aboriginal artifacts were often sought after.

Certainly the Aborigines possessed little property which could have been of much value to the whites but the Aborigines complained on occasions of theft and destruction by whites of their little property and in particular of the destruction of their spears and other hunting equipment. Sexual assaults on women of the other race certainly occurred more frequently than judicial records would suggest but the only conviction for rape was that of a black man in 1816 for the rape of a white girl.¹⁶⁴

The elements of the process that became a ritual of revenge against the Aborigines were not always understood by the settlers, nor were officials much the wiser. The status of the Aborigines was ambiguous; were they to be treated as British subjects they were entitled to the protection of British law, but British law in certain instances limited the protection it offered. Persons aware of those instances had merely to establish as a formality that police functions had been necessary, and they would have established for themselves a considerable liberty of action

against the Aborigines, with confidence that magistrates, and coroners and their juries would not inquire too deeply into the exercise of those police functions. Those unaware of the terms of the ritual necessary to satisfy that formality were at risk of criminal prosecution and execution but the numbers of such colonists diminished once publicity was given the encounters.

Throughout the period of this study, therefore, the magistrates bore the primary responsibility for relations with the Aborigines and especially in activities of either a diplomatic or police nature. The magistrates for the country regions were usually selected from amongst the ranks of the wealthier landholders, and in many instances the Governor had few alternative candidates from whom to choose.¹⁶⁵ In their twin roles as magistrates and landholders, the justices had real interests in ensuring that disorders by the Aborigines were suppressed. In their former role the magistrates were expected to abide by rules and procedures which were poorly suited to the situation of the Aborigines in the colony: a strict compliance with those rules and procedures would normally have restricted the magistrates in the punishing of Aboriginal offenders. In their latter role the magistrates had need for forceful measures. The evidence suggests that in their control of police conduct the magistrates allowed the latter need to override the expectations of magisterial conduct. Similarly, it is possible that there were irregularities in their conduct of their judicial functions (see Chapter VIII).

The position of the magistrates was unenviable: were they to have acted with full regard for legal

technicalities they would have been ineffective in restraining what they perceived to be the danger inherent in the Aborigines; were they to have acted as the occasion seemed to demand they would have been breaking the law. As they were in no danger of prosecution for such breaches of the law, many chose that solution to their difficulties, and either disregarded the legal forms or applied them with only partial adherence to the appropriate legal doctrines.

FOOTNOTES

1. Blackstone, op. cit., Vol. IV, pp. 179-180.
2. Loc. cit.
3. Burn, op. cit., Vol. 3, p. 45.
4. Hale, op. cit., Vol. 2, p. 119.
5. Hale, op. cit., Vol. I, p. 589: Hawkins, op. cit., Vol. 2, c. 12, s. 19: Burn, op. cit., Vol. 3, pp. 36 & 39: Edwin C. Suttor (Ed.), Plunkett's Australian Magistrate (Sydney, 1847), (hereafter cited as Plunkett), p. 21.
6. Hawkins, op. cit., Vol. 2, c. 12, s. 1: Blackstone, op. cit., Vol. 4, p. 293: Burn, op. cit., Vol. 3, p. 38: Plunkett, op. cit., p. 24: Stephen, op. cit., Vol. I, p. 193.
7. Blackstone, loc. cit.: Burn, op. cit., Vol. 3, p. 37: Plunkett, op. cit., p. 25: Stephen, loc. cit.
8. Hawkins, loc. cit.: Blackstone, loc. cit.
9. Hawkins, op. cit., Vol. 2, c. 12, s. 9 & 14: Burn, op. cit., Vol. 3, pp. 35-6: Plunkett, op. cit., p. 24.
10. Blackstone, op. cit., Vol. 4, pp. 293-4: Burn, op. cit., Vol. 3, pp. 358-9.
11. Stephen, loc. cit.
12. Plunkett, op. cit., pp. 22 & 24-5: Stephen, loc. cit.
13. Blackstone, op. cit., Vol. 4, pp. 292-3: Burn, op. cit., Vol. 3, pp. 36-7: Plunkett, op. cit., pp. 23, 24-5 & 114: Stephen, loc. cit.

14. Blackstone, loc. cit.: Burn, op. cit., Vol. 3, pp. 38-9: Plunkett, op. cit., pp. 22 & 114.
15. Burn, loc. cit.: Plunkett, op. cit., p. 114.
16. Burn, op. cit., Vol. 3, pp. 356-9: Stephen, op. cit., Vol. I, pp. 189-191.
17. Blackstone, op. cit., Vol. 4, pp. 290-2: Burn, op. cit., Vol. 3, pp. 39-40: Plunkett, op. cit., pp. 115-7.
18. Stephen, loc. cit.
19. Burn, op. cit., Vol. 3, p. 357.
20. Michael Dalton, Officium vice comitum (London, 1682), c. 95 at p. 355.
21. According to Burn, op. cit., Vol. 3, p. 738 it is an unlawful assembly "when three persons or more shall assemble ... with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful". If after this meeting they move forward towards the execution of any such act this is a rout, and if they execute their intended purpose it is a riot.
22. Hawkins, op. cit., Vol. I, c. 65, s. 11.
23. Loc. cit.
24. Plunkett, op. cit., p. 422.
25. Hawkins, op. cit., Vol. I, c.65, ss. 21-8:

- Burn, op. cit., Vol. 3, pp. 749-753: Plunkett, op. cit., pp. 422-3.
26. Blackstone, op. cit., Vol. 4, p. 121.
 27. Leon Radzinowicz, A History of English Criminal Law (London, 1968), Vol. 4, p. 107, citing Sir William Jones, An Inquiry into the Legal Mode of Suppressing Riots (1780, reprinted 1819), p. 22.
 28. The act is substantially reproduced in Burns, op. cit., Vol. 3, pp. 745-8.
 29. Radzinowicz, op. cit., Vol. 2, pp. 215-224.
 30. Ibid., Vol. 4, pp. 110-5. Neither special constables nor military were entirely satisfactory in the industrial riots from the latter part of the eighteenth century. See J.L. & B. Hammond, Town Labourer, op. cit., Ch. V.
 31. Blackstone, op. cit., Vol. I, pp. 408 & 413: J.L. & B. Hammond, Town Labourer, op. cit., Ch. 5: Radzinowicz, op. cit., Vol. 2, p. 29; Vol. 4, pp. 116-121, 153-157.
 32. Ibid., Vol. 4, pp. 117-124, 130-157: J.L. & B. Hammond, Town Labourer, loc. cit.: Maccoby, English Radicalism 1762-1785, op. cit., pp. 65, 96-8, 114-5, 458-9.
 33. Radzinowicz, loc. cit.
 34. Treatments of the Gordon Riots and the discussions of the relevant legal principles may be found in Stephen Watson, The Reign of George III 1760-1815 (Oxford, 1960), pp. 235-

- 239: Holdsworth, op. cit., Vol. X, pp. 706-713: Burns, op. cit., Vol. 3, pp. 748-9: and especially in Radzinowicz, loc. cit.
35. R. v Kennett, 5 Carr. & P., p. 282 n: Holdsworth, op. cit., Vol. X, pp. 706-8: Radzinowicz, op. cit., Vol. 4, pp. 124, 136-7.
36. J. McLaughlin, "The Magistracy in New South Wales, 1788-1850" (L1.M thesis, unpublished), (Sydney, 1973), Ch. 4.
37. M.L., Safe 1, 88, Instructions for Constables of County Districts, November 16, 1796.
38. McLaughlin, op. cit., pp. 24-5, 516-520: Dr. Hazel King, "Some Aspects of Police Administration in New South Wales, 1825-1851", J.R.A.H.S. (1956), Vol. 42, pp. 205 at p. 215.
39. E.g. Gazette, July 1, 1804; May 5, 1805; June 11, 1814.
40. Ibid., May 5 & June 9, 1805; May 11, 1816; May 6, 1826: Arch., 1161, op. cit., Order, June 9, 1805; Order, May 3, 1805.
41. E.g. Gazette, December 22, 1805; January 11, 1812; May 6, 1826: M.L., A1941, Papers of C. Throsby, Throsby to N.S.W. Colonial Secretary, September 7, 1824.
42. Gazette, June 11, 1814; May 5, 1816; May 6, 1826: Bridges, Aboriginal and White Relations, op. cit., pp. 211-2.
43. E.g. Gazette, 1825, April 7: M.L., A664, Letters from Government Offices, N.S.W. Colonial Secretary to Magistrates, Inverary,

- January 29, 1828 and February 12, 1830, pp. 28 & 89. See also Arch., 4/1791, N.S.W. Colonial Secretary In-Letters, 1826, p. 314, Bannister to Colonial Secretary, June 17, 1826: McLaughlin, op. cit., pp. 450-4.
44. E.g. Parliamentary Papers: Australia, Vol. 3, Report of the Commissioner of Inquiry on the State of Agriculture and Trade, p. 117 at p. 199: Gazette, March 17, 1821; July 12, 1822 and October 27, 1825.
45. Gazette, March 29, 1822.
46. B. Bridges, "The Native Police Corps, Port Phillip District and Victoria, 1837-1853", J.R.A.H.S., (1971), Vol. 57, p. 113 at p. 114: Gazette, January 22, 1829: Arch., 1161 (83), Alex Berry, "Recollections of the Aborigines", gives an early instance of an offer to create such a native "Constable".
47. P.P.: Australia, Vol. 3, p. 199.
48. E.g. Gazette, March 29 and April 12, 1822; October 27, 1825. It should be noted that extant lists of Constables did not contain the names of natives. However most such lists named only the Chief Constable and, perhaps, the District Constables. The only complete lists are for Sydney and Parramatta in the mid-1820's and these lists contain no native Constables. But such Constables were usually to be found in the more remote areas. Arch., 4/7016A, C & D; 4/7017 A & B.
49. Report of the Commissioner of Inquiry into the State of the Colony of New South Wales

(Facsimile Edition), (Adelaide, 1966), p. 106:
 John Ritchie (Ed.), The Evidence to the Bigge Reports, (Melbourne, 1971), Vol. I, pp. 43-4.
 The constables in England were normally appointed by the Justices of the Peace.
 Holdsworth, op. cit., Vol. IV, pp. 123-5:
 Radzinowicz, op. cit., Vol. 2, pp. 181-4. It has been suggested that throughout Macquarie's term of office the Governor had exercised at least the nominal power of appointing and dismissing constables. Marion Phillips, A Colonial Autocracy (London, 1909), p. 77 (Sydney Uni Press Impression). She is incorrect in this assumption.

50. Gazette, March 29 and April 12, 1822; October 27, 1825. Cunningham, op. cit., p. 189, describes the use as bush-constables of three, Aborigines, Johnny M'Gill, Jemmy Jackass and Bob Barret, by Captain Allman. It is not clear in what manner they were so appointed by Allman who was a magistrate at Port Macquarie and later at Newcastle. See also Gazette, June 30, 1825. The recommendation of Colebee as a Constable, in the room of Yarramoroo, in 1825, was couched in terms in no way dissimilar to those recommending the appointment of a white man as a Constable. Arch., 4/1783, N.S.W. Colonial Secretary In-Letters, 1825, p. 106, Cox to Goulburn, October 22, 1825.
51. Bridges, Aboriginal and White Relations, op. cit., pp. 269-70.
52. E.g. Arch., 4/1791, N.S.W. Colonial Secretary In-Letters, 1826, p. 314, Bannister to Colonial Secretary, June 17, 1826.

53. Gazette, June 3, 1804.
54. E.g. Ibid., August 19, 1804: Macquarie to Bathurst, March 13, 1816, H.R.A., I, IX, pp. 53-4.
55. E.g. Gazette, May 19, June 13 & 30, 1805; June 4, 1814.
56. Arch., 1161 (9). Notice of four dollars reward by Robert Scott, J.P., August 6, 1824. In issuing the reward for a native known in common with several others as "Jerry" Scott was aware of the possibility of the wrong Jerry being taken. Ibid., (8), Scott to Earl, August 6, 1824. This in fact occurred resulting in reprisals by a body of natives, although the mistaken native was released the morning following his capture. Arch., 1161 (10). Report to the Governor on the hostilities of the Black Natives (Hunter River): Darling to Hay, September 11, 1826, H.R.A., I, XII, pp. 574 and 612. But see Wood, Dawn in the Valley (Sydney, 1972). Ch. 14.
57. Gazette, August 26, 1824. The reward (of 500 acres of land) was offered for the capture of Saturday a leading native in the Bathurst disturbances in 1824.
58. Arch., 4/1730, Colonial Secretary In-Letters, 1814, July 21 & 22, pp. 213-230: Macquarie to Bathurst, October 7, 1814, H.R.A., I, VIII, p. 312.
59. Gazette, 1824, August 12 (Evidence of Wm. Cox): Arch., 4/1734, Colonial Secretary In-Letters,

- April 9, 1816, pp. 149-168: Arch., 4/1735, Colonial Secretary In-Letters, April 9, 1816-May 1816, pp. 1-41, 44-62, 72-3: Macquarie to Bathurst, June 8, 1816, H.R.A., I, IX, pp. 139-40: Macquarie to Bathurst, April 4, 1817, H.R.A., I, IX, p. 362: D.L. 81 William Cox to Macquarie, July 11, 1816.
60. Arch., 4/1734, Colonial Secretary In-Letters, pp. 149-168: Arch., 4/1735, Colonial Secretary In-Letters, pp. 1-6, 7-13.
61. M.L., A773, Macquarie's Diary, 1816-18, pp. 2-3, April 10, 1816.
62. Arch., 4/1735, op. cit., pp. 29-32, 56: H.R.A., I, 9, n. 36 p. 854: Gazette, May 11, 1816: H.R.A., I, 9, pp. 139-140, Macquarie to Bathurst, June 8, 1816.
63. Arch., 1161, (102a) Bowman to Scott, January 5, 1839.
64. H.R.A., I, 9, pp. 139-140, Macquarie to Bathurst, June 8, 1816.
65. Gazette, July 20, 1816. The Proclamation of May 4, 1816 similarly declared the presence of detachments at Sydney, Parramatta and Windsor to aid the settlers of any district should aid be requested by the Magistrates of the district. Gazette, May 11, 1816.
66. Gazette, 1824, January 3, February 19, June 10, July 22 and 29 and October 30.
67. M.L., B.T. Box 52, pp. 1359-60, Extract from Wm. Horton's Journal: Brisbane to Major-General Sir H. Taylor, June 10, 1824, H.R.A., I, XI,

- p. 282: Brisbane to Bathurst, June 13, 1824, H.R.A., I, XII, p. 283.
68. Bannister to Darling, September 3, 1826, H.R.A., I, XII, p. 578.
69. M.L., A1677⁻³, Hassall Correspondence, Vol. 3, p. 1563, T. Fisher to Rev. T. Hassall: Gazette, 1824, August, 5.
70. Gazette, August 5, 1824, Letter from "A Subscriber". Bridges, Aboriginal and White Relations, op. cit., pp. 306-7 ascribes this letter to Hassall.
71. Proclamation of Martial Law, August 14, 1824, H.R.A., I, XI, pp. 410-411: Gazette, August 19, 1824.
72. Gazette, August 12, 1824.
73. Brisbane to Bathurst, December 31, 1824, H.R.A., I, XI, pp. 431-2. Some parties were quite large - the Gazette of September 30 1824 reports one party consisting of the Commandant, four magistrates about 40 soldiers and 6 mounted settlers.
74. Loc. cit.
75. E.g. Gazette, August 12, September 30, 1824: M.L., B.T. Box 53, p. 1433, Walker to Central Secs. Wesleyan Missionary Society, September 14, 1824: M.L., B.T. Box 53, p. 1464, Marsden to Pratt, February 7, 1825. These losses must have been known to Brisbane when he reported in December that "neither was a life sacrificed or even Blood spilt", for in November he had

conjectured that the number of natives killed was not more than twice the number for whites. Brisbane to Bathurst, November 3 and December 31, 1824, H.R.A., I, XII, pp. 409ff & 430ff.

76. Gazette, 1824, October 21 & 28.
77. Gazette, December 16, 1824.
78. Stephen, op. cit., Vol. 1 , p.207.
79. Wolf Tone's Case, 27 St. Tr. p. 615ff: W. Forsyth (ed.), Cases and Opinions on Constitutional Law (London, 1869), p. 209. See also J. Stuart-Smith, "Military Law: Its History, Administration and Practice", LQR, 85 (October, 1969), p. 478 et seq at pp. 479-483: R. O'Sullivan (ed.), Military Law and the Supremacy of the Civil Courts (being the Judgment of the Hon. Mr. Justice McCardie in Heddon v Evans, 35 T.L.R. 642), (London, 1921), Introduction: G. Borrie, "Courts - Martial, Civilians and Civil Liberties", M.L.R., Vol. 32 No.1 (January, 1969), p. 35ff: Chitty, op. cit., p. 46: C.M. Clode, The Administration of Justice under Military and Martial Law (London, 1872), pp. 43-9.
80. For the following, see Forsyth, op. cit., pp. 189-215, 552-561: Stephen, loc. cit.
81. C.J. Tarring, Chapters on the Law relating to the Colonies (London, 1893), pp. 38 & 42.
82. Forsyth, loc. cit.
83. Loc. cit.
84. Loc. cit.

85. Loc. cit.
86. Phillip was authorised, by his second Commission dated April 2, 1787, to levy armed forces "for the resisting and withstanding of all enemies and rebels both at sea and on land..." and to execute martial law. H.R.A., I, 1, p. 2 et seq.
87. Sydney Gazette, March 11, 1804: King to Hobart, March 12, 1804, H.R.A., I, 4, p. 563 et seq: Clark, op. cit., Vol. I, pp. 172-3.
88. Forsyth, op. cit., p. 211.
89. E.g. Gazette, 1824, August 12, September 16 & 30: M.L., B.T. Box 53, p. 1433, Walker to Central Secs. Wesleyan Missionary Society, September 14, 1824: M.L., B.T. Box 53, p. 1464, Marsden to Pratt, February 7, 1825.
90. Attorney-General Bannister to Darling, September 5, 1826, H.R.A., I, 12, pp. 577-9: M.L., A2264, Scott Family Papers, Vol. 5, Helenus Scott to Augusta Scott, September 25, 1826.
91. Turnbull, op. cit., pp. 94, 96, 247-9.
92. M.L., B.T. Box 53, p. 1433ff, Walker to Methodist Missionary Society, September 14, 1824.
93. H.R.A., I, 11, p. 409, Brisbane to Bathurst, November 3, 1824.
94. Gazette, September 16 & 30, 1824.
95. Levy, op. cit., pp. 102-3 citing Colonial Secretary, Hobart C.S. 19172; Stephen to

Lieutenant-Governor 3/2/1830.

96. M.L., 664, Letters from Government Offices, pp. 11-2. N.S.W. Colonial Secretary to David Reid, May 2, 1826, in reply to his letter of February 27.
97. Darling to Bathurst, May 6, 1826, H.R.A., I, XII, p. 269: Government Notice, May 5, 1826, H.R.A., I, XII, p. 270 and Gazette, May 6, 1826. The conflicts were, as Darling stated, almost certainly the fault of some of the whites in the district as complaints of whites abducting and raping native women were made as early as 1824. M.L., A1941, Papers of C. Throsby, 1822-5, Throsby to N.S.W. Colonial Secretary, September 7, 1824. The first stockman killed, Lynch, was speared when he attempted to abduct the native's wife by force whilst armed with a musket. Government Notice, May 5, 1826.
98. Darling to Bathurst, May 25, 1826, H.R.A., I, XII, p. 324: Gazette, June 7, 1826.
99. Gazette, July 18, September 6, and December 20 and 27, 1826.
100. M.L., B.T. Box I, Bigge, J.T., Report, Evidence, pp. 477-8, Evidence of Major Morisset.
101. Gazette, 1824, December 2.
102. Cunningham, op. cit., pp. 197-8: The Australian, November 10, 1825. It is possible that the disturbances had commenced earlier with thefts of maize by the Aborigines and retaliation by the owners and their servants. However the only authority for this is

unsatisfactory in a number of respects, not least of which is its chronology, and the retaliation was mentioned only cursorily.

M.L., A1197, Governor Darling's Despatches, 1826, pp. 341ff at p. 341, Report to the Governor on the Hostilities of the Black Natives by Scott and McLeod, J.P.'s, October 3, 1826; also at Arch., 1161 (10)

Miscellaneous Correspondence concerning Aborigines, and at H.R.A., I, XII, p. 610ff.

For a consideration of the Report see W. Allan Wood, Dawn in the Valley (Sydney, 1972), Chapters 13-15.

103. Cunningham, op. cit., pp. 198-9.
104. Report to the Governor, H.R.A., I, XII, pp. 610ff. It is possible that this report is merely a different version of the events recorded by Cunningham and the Australian.
105. The Australian, June 82 and September 9, 1826: Report to the Governor, H.R.A., I, XII, pp. 610ff: Darling to Hay, September 11, 1826, H.R.A., I, XII, p. 574: Wood, Dawn in the Valley, loc. cit.
106. Report to the Governor, H.R.A., I, XII, pp. 610ff.
107. Gazette, July 8, 1826.
108. Attorney General Bannister to Darling, September 5, 1826, H.R.A., I, XII, pp. 577-9: Darling to Hay, September 11, 1826, H.R.A., I, XII, p. 574: M.L., A2264, Scott Family Papers, Vol. 5, Helenus Scott to Augusta Scott, September 25, 1926.

109. Report to the Governor, H.R.A., I, XII,
pp. 610ff.
110. M.L., A1197, Governor Darling's Despatches,
p. 56, Allman to de la Condamine, July 18,
1826, H.R.A., I, XII, pp. 622-3.
111. Report to the Governor, H.R.A., I, XII,
pp. 610ff.
112. Loc. cit.: D.L. 78. Letter Wm. Ogilvie to
Colonial Secretary, September 26, 1826: The
Australian, August 26, 1826.
113. M.L., B.T. Box 53, pp. 1682ff at p. 1685,
Threlkeld to Burder and Hankey, August 10,
1826.
114. D.L. 78. William Ogilvie to Colonial
Secretary, September 26, 1826. No evidence had
been brought against these two natives. Capt.
Foley to de la Condamine, September 22, 1826,
H.R.A., I, XII, pp. 617-9.
115. Loc. cit.: Report to the Governor, H.R.A., I,
XII, 610ff: Wood, Dawn in the Valley, op. cit.,
pp. 121-2.
116. Arch., 1123, pp. 43-4, 46-7, Threlkeld's
Account of 24 years Residence as a Missionary,
Threlkeld to Attorney General; August 8, 1826,
and September 4, 1826.
117. Arch., Not yet numbered. Clerk of the Peace,
Quarter Sessions, Newcastle, August, 1826.
118. Infra pp. 323-5.
119. Gazette, 1827, January 12; March 22; April ;
and October 19: The Australian, August 8, 1827:

Arch., 1123, op. cit., pp. 43ff, Threlkeld to Attorney General, August 3, and September 4, 1826: Arch., 1161, op. cit., (19) & (20), Claris to Scott, March 25, 1827: (21), Deposition of Samuel Owen, March 28, 1827; (22), Complaints of James Glennie and Benjamin Singleton, March 28, 1827; (23) & (24), Colonial Secretart to Robt. Scott, April 7, 1827; (25) & (26), Scott to Colonial Secretary, May 17, 1827.

120. Captain Foley to Lieutenant de la Condamine, September 22, 1826, H.R.A., I, XII, pp. 617ff: M.L., A1197, Governor Darling's Despatches, 1826, pp. 227-30, Bannister to Darling, September 5, 1826.
121. Lieut. de la Condamine to Capt. Foley, October 3, 1826, H.R.A., I, XII, pp. 619-620.
122. Gazette, March 17, 1825; January 30 and February 3, 1827. The Gazette of March 17, 1825 reported a brawl between the military and some native-born youths and in the following edition the editor remarked on the ill-feeling that existed between the two groups. However the native-born youths were not, at this stage, influential in legal determinations. In December 1825, the magistrates at Windsor suggested that the trial of a native-born youth for an assault on two soldiers should be brought before the Supreme Court rather than Quarter Sessions as the young men who constituted the juries showed an antipathy to the military. Apparently on the suggestions of the Attorney General the magistrates agreed

- to the case going on at Quarter Sessions.
Arch., Not yet numbered, Clerk of the Peace, Quarter Sessions, Windsor, May, 1826.
123. Radzinowicz, op. cit., Vol. 3, P. 96.
124. E.g. Arch., 4/1783, op. cit., p. 46. Keddall to Goulburn, December 27, 1825, and memo on reverse.
125. Gazette, February 16, 1826.
126. Ibid., March 22, 1826.
127. Petition, September 4, 1826, H.R.A., I, XII, p. 576.
128. Darling to Landholders at Hunter River, September 5, 1826, H.R.A., I, XII, pp. 576-7.
129. Archives, Temporary Number 27/55 (441) in Index to Papers of Clerk of the Peace, Vol. 3, Supreme Court, Criminal Jurisdiction, 1824 on, Trial of John Jamieson, May 16, 1827, containing letter Reid, Macallister and Throsby, J.P.'s to Colonial Secretary, January 8, 1827.
130. Brisbane to Bathurst, June 18, 1824, H.R.A., I, XI, p. 383.
131. Bathurst to Brisbane, December 22, 1824, H.R.A., I, XI, p. 423.
132. Brisbane to Bathurst, November 8, 1824, H.R.A., I, XI, pp. 897-8: Bathurst to Darling, June 6, 1826, H.R.A., I, XII, p. 341.
133. Loc. cit: Bridges, Aboriginal and White Relations, op. cit., pp. 312-3.

134. Radzinowicz, op. cit., Vol. 3, pp. 477-9.
135. Ibid., Vol. 3, pp. 389-90.
136. Ibid., Vol. 4, pp. 122-3.
137. Ibid., Vol. 2, pp. 193, 425-7, 511-7. Dr. H. King, op. cit., pp. 223-4, considered that the N.S.W. Mounted Police had much in common with the Royal Irish Constabulary. The similarity was greater in organisation and operation after the expiry of the period her studied than it was during its first two years. Ibid., pp. 212, 223-6.
138. Ibid., Vol. 2, p. 177.
139. Collins, op. cit., Vol. I, pp. 458-9 gives as the date for this order, February 1796: Arch., 1161 (1), Extract from Orderly Book II September, 1795 to 31 December, 1797 dates it as February 22, 1797. The earlier date is probably correct.
140. Gazette, April 28, 1805: Arch., 1161, (4), Extract from the Orderly Book, October 14, 1804-5, dated April 19, 1805.
141. Gazette, May 11 and July 20, 1816.
142. Proclamation of Martial Law, August 14, 1824, H.R.A., I, XI, p. 410 at p. 411.
143. Radzinowicz, op. cit., Vol. 4, p. 105.
144. Supra. pp. 199-200.
145. Radzinowicz, op. cit., Vol. 2, pp. 209-11; Vol. 3, pp. 101-3; Vol. 4, pp. 101-110.
146. Stephen, op. cit., Vol. I, pp. 185-192.

147. Radzinowicz, op. cit., Vol. 3, pp. 93-6.
148. E.g. The Hobart Town Gazette, March 29, 1817
Turnbull, op. cit., pp. 57-9: Bonwick, op. cit.,
pp. 50-1, 62, 64.
149. Turnbull, op. cit., pp. 94, 96, 247-249:
Melville, op. cit., pp. 72-9: Bonwick, op. cit.,
pp. 81-2, 84-7.
150. Turnbull, op. cit., p. 94.
151. Melville, op. cit., p. 79.
152. Turnbull, op. cit., p. 98: Bonwick, op. cit.,
p. 84.
153. Turnbull, op. cit., p. 101.
154. Turnbull, op. cit., Ch. 5: Melville, op. cit.,
pp. 89-105.
155. Turnbull, op. cit., Ch. 6: Melville, op. cit.,
pp. 105-7.
156. Turnbull, op. cit., pp. 73-5, 78-80, 101,
102-3, 110-6: Bonwick, op. cit., pp. 53-5, 63,
64, 69, 74.
157. E.g. Bonwick, op. cit., pp. 99, 110-1, 112-3,
114-5, 120-1: Levy, op. cit., pp. 108-9.
158. Dr. H. King, op. cit., pp. 215-7.
159. Loc. cit.: Dr. H. King, "Problems of Police
Administration in New South Wales, 1825-1851",
J.R.A.H.S. (1958), Vol. 44, p. 49ff.
160. McLaughlin, op. cit., pp. 441-3.
161. Dr. H. King, "Some Aspects ...", op. cit.,
pp. 225-6, indicates that the Magistrates were

unsure of their powers over the Mounted Police which body tended to regard itself as being independent of the civil power. The situation of the army was more certain (see Section C Infra).

162. Infra Chapter VIII.

163. See Infra Chapter VI, footnote 68 for some instances of native deaths from police actions and pursuits of Aboriginal offenders; footnote 69 for instances where the retribution was wreaked on Aborigines indiscriminately; and footnote 70 for instances of blatant ill-treatment of Aborigines without excuse.

164. Infra pp. 300-1.

165. McLaughlin, op. cit., pp. 101-2, 285-6, Ch. 13.

CHAPTER VIIIABORIGINES AND MAGISTERIAL PROCEEDINGSA. THE ACTIVITIES OF MAGISTRATES

The belief prevalent in New South Wales, until 1816, that Aborigines were not amenable to judicial proceedings for offences committed by them, must have hindered the operations of magistrates if they acted upon that belief. It would appear that a number of administrative expediciencies were adopted in order to avoid this problem, and it is even possible that magistrates took it upon themselves to act judicially where the Court of Criminal Jurisdiction would not. If the magistrates did act judicially to hear and punish offences by Aborigines, prior to 1816, it would have been in defiance of the legal doctrine accepted in the Court of Criminal Jurisdiction, and would have been one of the most extreme instances of adaptation of legal doctrine to colonial needs. On a number of recorded occasions natives known or suspected to have been involved in depredations were taken and brought before the magistrates to be dealt with by them. None of the records indicate that a formal hearing, conviction and punishment occurred, but the records are unsatisfactory in other respects, and the absence of such reports is in no way conclusive.

From the extant records it appears that the measures most usually adopted by magistrates was to use their power to remand suspects for examination to hold offenders in custody for a period sufficient to create a salutary impact and then to release them upon their agreement to assist the magistrates in

some respect or to behave better in the future. Similar measures were adopted even after it was decided that Aborigines could be tried for crimes, probably because of doubts that a trial before the Court of Criminal Jurisdiction or Supreme Court would result in a conviction, or that a subsequent sentence would be carried out. Hence some of the magistrates adapted one of their powers to meet the unusual circumstances.

On May 13, 1805 a notorious offender, Tedbury, was captured at Pendant (sic) Hills and taken before Major Johnston and the Rev. Samuel Marsden. He was questioned by them and persuaded to name the Aboriginal murderer of white stockmen at Prospect, and to conduct a party to the spot where the victims' property was hidden. He also confessed himself a party to most of the robberies that had occurred near Parramatta.¹ He remained in custody. On June 22 a party of natives attacked a farm at Portland Head, and shortly afterwards nine of them were apprehended and taken into Parramatta. Two of them were, reportedly, so impressed by their treatment by the magistrates that they volunteered to guide parties after the native leaders.² The remaining seven were committed to the Parramatta Gaol by Marsden but were released on July 2 on their promise to capture Musquito, the principal offender - Musquito was lodged in Parramatta Gaol four days later.³ Later that month Tedbury was released at the entreaty of those natives released earlier and upon their pledging themselves to "bear every severity that any future mischief on the part of Tedbury should expose them to"⁴: they were the first Aborigines to be accepted as sureties for the

good behaviour of another Aboriginal. There is no record of any repetition of this experiment in the use of magisterial powers to establish peaceful race relations. It is unlikely that the Aborigines understood it, that it would have deterred Tedbury, or that any action could have been taken against the sureties either in practice, or with proper regard to the law. During August 1805, Musquito and another Aboriginal prisoner attempted to escape but were prevented.⁵ Governor King thereupon ordered that the two be transported to Norfolk Island although there was no trial.⁶

Government orders, on three occasions, implied that Magistrates would exercise their authority by punishing Aboriginal offenders. The first, on June 9, 1805 ordered that native offenders were to be reported to the magistrates who would order them to be confined.⁷ The order of June 11, 1814 declared that outrages by natives were to be reported to magistrates as they would be if "British subjects only" were involved.⁸ The third, on July 20, 1816 declared that ten named natives were to be treated as outlaws and if captured were to be delivered up to the nearest magistrate "to be dealt with according to Justice".⁹

There is other evidence to suggest that magistrates may have exercised judicial functions over the Aborigines. On the inquest in 1811 into the death of Robert Luttrell, who was killed by a blow on the head by a native, numbers of natives awaited the issue with "much visible anxiety", as a "chief" had pledged to give up the offender, if demanded. Natives collected in numbers at Windsor.

The jury returned the verdict "that the deceased came to his death by means of a blow from a native; which blow was given in consequence of the deceased breaking the spears of the natives, and taking away their women". Intelligence of this decision was conveyed to the Magistrates at Windsor and was by them related to the assembled natives, who thereupon dispersed when satisfied they had nothing to apprehend from the affair.¹⁰ At the inquest in 1814 into the death of William Reardon, evidence was given that the deceased was unfortunately mistaken for another white man, Denis McDonald, and speared in his place. Prior to the spearing McDonald had discovered that natives had largely destroyed his vegetable garden and, knowing their probable location, had gone to the house of William Cox a magistrate at Windsor. Finding the natives there he grabbed one boy and threatened to take him before Cox for the damage to the garden. The boy denied the offence, blamed it on natives not present, and was released. The threat of being taken before the magistrate was sufficient for one of the natives to return that evening and spear Reardon by mistake.¹¹

On June 1, 1815 a native was apprehended for robbing a cart, on the Parramatta Road, of a coat with £2 of bills in the pocket. The native had later passed the bills. He was taken before the Police Magistrate, D'Arcy Wentworth, and held in custody for the purpose of recovering the lost property.¹² He was discharged after being held in solitary imprisonment for several days and promising not to offend again.¹³ Here the more usual use of the remand procedure was followed.

Although it was decided in 1816 that natives could be tried for criminal offences, the number of recorded instances of hearings before magistrates were few. Those cases do not indicate that any special provision was made for those few Aboriginal offenders during the conduct of the hearing. In March 1821, Major Morisset sentenced Flathead, a native, to receive 25 lashes "for stealing Blankets and provisions and being with a man who speared a White Man".¹⁴ In January 1824, a "chief", and principal trouble maker in the Bathurst district, named Saturday was captured after a furious struggle which required six men to secure him, and then only after breaking a musket over him. He was sentenced, for his exploits, to a months imprisonment in irons.¹⁵ When later released he reverted to his previous ways, but after peace was restored to the Bathurst district he attended the annual dinner for the natives provided by the Governor.¹⁶ Having been appointed Commandant and magistrate at Bathurst in November 1823 it is possible that Morisset sentenced both natives.¹⁷

In October 1824, Amy or Amry Dunn, described as "a black" was brought before the magistrates at Sydney on suspicion of "robberies" and sentenced to serve in a clearing gang for twelve months. She (or he) was already a prisoner at the time of the offence.¹⁸ She (or he) may not have been an Aboriginal, for the convicts transported to Australia included in their number some negroes, Indians and West Indians all of whom were sometimes described as "blacks". There is some confusion over the name and sex of the accused due to the illegibility of the records.

On April 27, 1826 it was recorded that Charles Mulgrave, probably the same person as he to whom Macquarie promised a farm in 1816,¹⁹ was convicted by the Sydney magistrates of being in a state of intoxication, disorder and riot in George Street and having presented a loaded pistol to several persons passing in the street. He was sentenced to the stocks for two hours.²⁰ In November a black man known as "Black Joe" was charged before Windsor Police Court with aiding and abetting a white man in the escape of a prisoner. His accomplice could not be positively identified and on the complainant admitting that Joe "hadn't done much" the complaint was dismissed.²¹ It seems that in 1827 a black man was confined on a charge of drunkenness but the penalty was not recorded.²²

Throughout the whole of the period studied, there are records of only those five or six Aborigines having charges against them determined by magistrates although several more were detained without the imposition of a formal penalty. It is apparent therefore that there was no comprehensive application of English law to the Aborigines. Certainly their amenability to English law was not considered as certain or safe, and it was always possible that an attempt to enforce the law by a magistrate of a frontier region might have resulted in extensive retaliation in which he and his neighbours would suffer. During the troubles in the Hunter Valley a child of a settler named Hunt was abducted by the Aborigine Bit of Bread, and the magistrates were afraid to act against him once they were informed that any such attempt would result in wholesale war. The position was similar

with other offenders.²³ One such incident did occur when a native known as Jerry was apprehended in mistake for another of the same name for whom a reward had been offered. Although he was released the next morning, reprisal raids were carried out against two farms.²⁴ Similar considerations were presented by Threlkeld when, in August and September 1826, he argued that Billy, the native held in the Newcastle Gaol on a charge of murder, should be released to pacify the blacks who resented his gaoling.²⁵ The magistrates further up the Hunter River requested the Governor to send Billy to Norfolk Island,²⁶ in disregard of the effect this would have on the already hostile natives.

Some of the hesitation to act may have been due to confusion over the status of Aborigines notwithstanding several well publicised trials in the Court of Criminal Jurisdiction and the Supreme Court. There was a discrepancy between the numbers of natives apprehended on serious charges and the numbers tried, and, it was believed that during 1826 the Supreme Court discharged an aborigine charged with the attempted murder of a white man on the ground that he was not amenable to English Law.²⁷ It was certain that Aborigines taken on other occasions were released without further proceedings of a judicial nature.²⁸ This uncertainty, exacerbated by trials of whites who performed a summary justice upon native offenders, led to widespread insecurity amongst the settlers,²⁹ and was certainly reflected in the conduct of magistrates towards Aboriginal offenders. It is probable that the Aborigines would have been better

treated if the magistrates had regularly disregarded legal technicalities and inflicted a punishment following normal judicial process: instead the frustration of that process led to the more usual infliction of a summary and severe punishment in the course of police action.

On only several occasions did magistrates ignore the restrictions of their power or devise expedient variations in their procedures to enable them to deal with the Aborigines. There is no indication in those records that have survived, to suggest that either response to the problem was widespread. The more typical response was to initiate violent police action as described in Chapter VII.

There exist no records of the exercise by Tasmanian magistrates of judicial power to hear charges against Aborigines during the period studied.

B. THE APPREHENSION OF ABORIGINAL OFFENDERS

There were other difficulties experienced by the magistrates which restricted the application of their powers. It was difficult to apprehend known Aboriginal offenders and equally difficult to discover the perpetrators of other offences. One endeavour to overcome this difficulty, by Macquarie in 1816, was of some novelty. In the proclamation on July 20 he named ten natives as "being known to be principal and most violent instigators of late murders", and proclaimed that they were "deemed and considered to be in a State of Outlawry, and open

and avowed Enemies to the Peace and good order of Society and therefore unworthy to receive any longer the Protection of that Government which they have so flagrantly revolted against and abused". He thereupon authorised all British subjects to apprehend them and bring them before the nearest Magistrate, or if they could not be apprehended then those subjects "shall be at Liberty by such means as may be within their Power, to kill and utterly destroy them as Outlaws and Murderers". A reward of £10 was offered for each "outlaw" captured or killed.³⁰

Although outlawry was a quite normal process in England, its formalities rendered it unsuited to New South Wales. Outlawry, due to its extreme legal consequences, required an exactness of procedure: outlawry in felony amounted to a conviction for the offence charged as much as if the person had been convicted by a full trial.³¹ Although it was earlier considered that the justices of the peace could not declare a man an outlaw, it was later decided that they possessed this authority, as they had authority to commence the procedure whereby he was outlawed.³² However the procedure required that the sheriff of the county in which the accused resided, proclaim him on five days of sittings of the county courts of that and other counties, and only after that had been done could he be outlawed. By the statute 4 and 5 W: 3. c. 22., s. 4. upon the issue of the writ of exigent out of any of the King's courts for a criminal matter the sheriff should have made a proclamation at the county court, at the general quarter sessions, and on a Sunday, after Divine service, at the church of the accused's place

of residence.³³ In N.S.W. in 1816 there were no sheriffs, their functions being performed by the Provost Marshal; no county courts, nor, indeed, counties; no general quarter sessions; and, in the areas in which the ten natives dwelt, there were probably no churches or chapels. However, it appears that Macquarie disregarded these inconvenient formalities and disposed of judicial process altogether - there are no records or reports of any attempt to modify the procedures to the existing court structure. It would seem from the wording of the Proclamation - "deemed and considered to be in a State of Outlawry" - that Macquarie was legislating as to their status rather than proclaiming a status derived from the proper procedure.

In the colony of New York the problem of the lack of the proper courts had been met by the use of the existing court structure, and the retention of procedures as similar as possible to those applied in England.³⁴ Outlawry was also considered to be applicable in Canada.³⁵

In New South Wales outlawry had been used on at least three other occasions. Edward Corbett, a convict who had taken to the woods, was outlawed during June 1788 but the decree was revoked by the Governor after Corbett gave himself up, thereby enabling him to be tried, convicted and executed.³⁶ No reference was made to any attempt to modify the procedures to the circumstances of the colony and it appears that this decree was also improperly proclaimed. In 1797 a proclamation was issued respecting some runaway convicts who associated with natives and, it was believed, led them on to

destroy farms. The proclamation called on them to surrender themselves within fourteen days, declaring them outlaws if they refused, and requiring the inhabitants to apprehend them.³⁷ Later in the year an order was issued by Hunter requiring all constables and other officers to detect them and to convey the information to both the whites and the natives with them that if they could not be apprehended they would be fired upon, as would the natives if white men were seen amongst them.³⁸ From the wording of the order it appears unlikely that the courts were employed on that occasion either. However in a Sydney Gazette of 1803 a notice to the Provost Marshal and all constables and other officers commanded them to demand an offender until he be outlawed if he did not appear within three weeks, and to take him into custody if he did appear and bring him "before His Majesty's Justices assigned to keep the peace" at "the Criminal Court by Royal Letters Patent here established".³⁹ The form of the notice was substantially that of the usual writ of exigent but amended so as to fit, albeit somewhat uncomfortably, the circumstances of the colony.⁴⁰ It was signed by the erratic Judge Advocate, Richard Atkins, and may have represented a genuine attempt to modify the procedures to enable them to be used by the Court of Criminal Jurisdiction. There exists no record of the matter of outlawry having been presented to the Court.⁴¹ The notice continued, to threaten any persons harbouring the fugitive with a fine of £50 payable to any person prosecuting them to conviction.

Macquarie's proclamation was not, therefore,

original, but was remarkable, at a time when legal advice was available, for its disregard for legalities. This was so not merely for the outlawry but for his granting permission for them to be put to death. As Blackstone said:-

...though anciently an outlawed felon was said to have caput lupinum, and might be knocked on the head like a wolf by any one that should meet him: because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is held that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him.⁴²

Macquarie imposed no such limitation, nor did Hunter before him.

The use of outlawry in the form adopted in New South Wales represents a definite adaptation of English criminal procedures to the colony. This adaptation was not originally devised in response to the problems arising from the presence of the Aborigines but later was used for that purpose. It is quite likely that the adaptation was accidental and established in ignorance of the appropriate procedures. If this adaptation had been regularly employed it may have resulted in official authority being given to the murder of certain Aborigines but

it could have supplanted the more usual and more violent police measures taken against the rest of the Aboriginal population.

C. ABORIGINAL EVIDENCE

A further difficulty was experienced by the magistrates, that of obtaining adequate evidence when the Aborigines, in some circumstances the most knowledgeable witnesses, were unable to testify. This difficulty was especially acute in the proceedings against whites for offences committed against Aborigines. Judge-Advocate Collins early discovered that although the Aborigines had some idea of a future state after death they were without any deity to worship or to determine morality.⁴³ It does not appear from the extant records that it was necessary for Collins to consider the issue of Aboriginal evidence: other than the trial of Dawkins in 1791 all matters of inter-racial conflict that came before him in a judicial capacity could have been decided without inquiry of the natives, and in the report of the hearing of Dawkins' case there was no reference to the nature of the evidence before the court.⁴⁴ Although he did enquire into the reported murder of an Aborigine in 1788 there was at that date no possibility of questioning the natives and certainly no question of using them as witnesses.⁴⁵ In the similar inquiry in 1794 there was no indication of any native having material evidence to contribute.⁴⁶

The earliest reported consideration of Aborigines as witnesses was by Judge-Advocate Dore who, in the trial of Hewitt in 1790, assumed that they were not competent.⁴⁷ His successor, Atkins, gave advice to the same effect to Governor King in 1805.⁴⁸ That this was the view generally adopted in the colony was indicated by Attorney General Bannister in 1824.⁴⁹ This opinion certainly accorded with the state of the law in England, for the rigidity of the law, as expounded by the older authorities⁵⁰ rendered all non-Christians incompetent as witnesses and, although this had been relaxed, it had not gone so far as to admit persons who did not believe in a God, in a future state of rewards and punishments, and in the moral obligations of the oath he was to take.⁵¹

This difficulty was, perhaps, felt more by the Court of Criminal Jurisdiction, and, later, by the Supreme Court, than it was by the magistrates. There were devices by which native evidence might be brought before the court, especially in trials of convicts before magistrates, for in those trials there was little indication of a scrupulous attention to the laws of evidence. In the trial of Hewitt, the native evidence contributed to the court's determination to punish him as an incorrigible rogue and vagabond. It is likely that in other instances magistrates paid attention to statements of natives in determining charges and convictions. In 1824 Charles Throsby, in informing the Colonial Secretary of the dangers arising from the abduction and rape of native women, remarked on the difficulties of obtaining native evidence and accepted that free stockmen could not be summarily

punished.⁵² Presumably convict stockmen could have been so punished for offences disclosed by Aboriginal evidence, even if the charges for which they were punished bore little relation to the primary offences disclosed by the Aboriginal evidence, which offences usually would have been outside the jurisdiction of a justice of the peace. Some instances of this form of proceedings have been given in Chapter VI.

On a number of occasions magistrates openly heard and acted upon native evidence. In the trial before the Magistrates at Newcastle in 1825 of Beckett and Kennedy, native evidence was given but not on oath.⁵³ In the trial of Haze and Ray before the Police Magistrate at Parramatta on January 6, 1827, three Aborigines gave evidence, It would appear from the report that on the strength of their evidence, the two prisoners were convicted of theft and sentenced to a penal settlement for three years. The only other reported evidence was the identification of the stolen property by its owner but this was insufficient without the native evidence to connect the property with the accused. This case is singular, for the natives in this instance were responsible for the apprehending of the prisoners without white direction.⁵⁴

Another device was employed to bring native evidence before the Supreme Court. On the trial before the Supreme Court in 1824, of two white men, Fitzpatrick and Colville, for the murder of another white man, Bentley, Forbes C.J., discovering that Bulwaddy, a native, had information of value, had him brought before the court and examined. He

appeared to know truth from falsehood but had no belief in a Superior Being and as he had no belief in a future state of rewards and punishments he was incapable of taking an oath. However, as he had repeated the information before competent witnesses in the presence of Colville, the witness to Bulwaddy's statements was called to repeat them. The evidence could only have been properly admissible against Colville although it mostly concerned Fitzpatrick, but Colville was acquitted and Fitzpatrick convicted. For that conviction it would seem that Bulwaddy's statements were influential.⁵⁵ Forbes, C.J. was unhappy about this exclusion of the only witness of the killing, as a proper examination of Bulwaddy may have revealed the truth of the prisoners' plea of accidental killing and, therefore, of mere manslaughter. He respited the execution of the death sentence until the Governor's pleasure was made known. He wrote to the Governor accordingly and, after interviews with the Chief Justice and Bulwaddy, the Governor replied that he had no doubt that Fitzpatrick had committed a cool and deliberate murder and that the sentence should be carried out.⁵⁶

On several occasions in the performance of inquests strict rules of evidence were not followed in order to exclude native evidence. On the inquest into the death of Benjamin Moody on March 6, 1812, Goyez, "a black man" was recorded as being present and, on examining the body, declaring the cause of death to be snake bite.⁵⁷ On June 4, 1817, an inquest was held into the death of an Aborigine known as Nanny Cabbage, and after hearing the evidence of two native girls, Norry and

Curramburn, through the assistance of another Aboriginal as interpreter, the jury returned a verdict of wilful murder against two white soldiers. The girls were not sworn.⁵⁸ At the inquest on August 31, 1823 into the death of a white hut keeper, a native "chief" accompanied the jury and described the tracks of the murderers as those of four natives, Jacky, Taylor, Charley and Congogal. The jury returned the verdict of wilful murder by person or persons unknown with the rider that the jury "were of the opinion from the statement of Earing, native chief of the...(illeg.) ... tribe that it was by... (the four named Natives)..."⁵⁹

A similar attitude was taken by at least one magistrate in his conduct of committal proceedings. The depositions taken in 1820 by Major Morisset, the committing magistrate on the examination of Kirby and Thompson for the murder of the native chief Burrigong, contain reports of statements made by two Aborigines Nerang Jack⁶⁰ and McGill, who were permitted to give unsworn evidence.⁶¹ It does not appear that the natives were permitted to repeat these statements at the trial,⁶² but Kirby was convicted on the basis of the remaining evidence.⁶³ Two years later, Major Morisset again included unsworn native evidence amongst depositions taken at Newcastle upon the examination of two other natives Hatherly and Jackie for the murder of a white man.⁶⁴ This evidence was purely hearsay and there is no report of it having been heard at the trial.⁶⁵ British law required that witnesses whose evidence was taken at such examinations should make depositions upon oath.⁶⁶

It is possible that this was merely an aberration of Major Morisset's who was remarkably even-handed in his treatment of whites and blacks. However statements elsewhere would leave open the possibility that other magistrates heard the unsworn testimony of natives in these proceedings, although without recording them.

In the several preliminary investigations prior to the trial of John Jamieson Jnr for the manslaughter of an Aborigine in 1826, natives were examined,⁶⁷ but as these examinations were conducted with a view to the potential criminal liability of some or all of the natives, no oath would have been proper even were they whites.⁶⁸

In the depositions taken for the trial at Windsor Quarter Sessions in July 1826 of William Brennan for stealing thirteen pigs, Long Bill, a native, gave unsworn evidence through the medium of another native as interpreter, of tracking the stolen pigs and securing the prisoner. A true bill was found but the prisoner escaped before trial and the issue of native evidence did not come before the court.⁶⁹ For the evidence to have been admissible it would have been necessary for both witness and interpreter to have been sworn.

As the duty of magistrates and coroners in the investigation of violent deaths was substantially the same⁷⁰ it is likely that there were no great divergencies in practice. In other instances magistrates received information from natives, sometimes whilst on the bench or investigating the commission of offences.⁷¹ It is difficult to see how some of the investigations

by magistrates could have been conducted otherwise than by questioning natives.⁷²

In the treatment of Aboriginal evidence, can be seen several adaptations of legal practices which were devised to overcome the difficulties which would arise if the evidence were not heeded. These adaptations were a necessary part of the operation of the criminal law, particularly at the lower levels. That they were not used more often was probably due to the reluctance of some magistrates to punish a white man, even a convict, on the word of an Aborigine, and to the reluctance of other magistrates to punish any white man for ill-treatment of a native.

D. MAGISTRATES AND THE PROTECTION OF ABORIGINES

Although it was recognised that the magistrates had a duty to protect the Aborigines from ill-treatment by the settlers and their men, that duty was not often performed with enthusiasm or diligence. The difficulties of enforcing the law in this regard were considerable, and the magistrates who performed the task efficiently would have incurred the displeasure of others of the class to which he belonged. As he was always a landholder, and often a victim of the ravages of the natives, there was little inducement for him to disturb his neighbours, or his own or his neighbours' servants in their treatment of the natives.

On some occasions it was necessary to do so

for the preservation of the peace of the district and the duty was then performed with care. This was recognised as an acute problem in the early days of the colony and resulted in the public punishment of white offenders in the presence of Aborigines,⁷³ and in numerous assurances being made to them that white offenders would be punished.⁷⁴ At those times when the relations with the natives were worst, convicts wilfully ill-treating them were in greater danger of punishment by the magistrates. In addition to those cases mentioned in Chapter VI, in 1804 Thomas Brown, a prisoner, was brought before the justices at Parramatta for wantonly striking a native and ordered to work in the gaol gang until further orders.⁷⁵ The following year the Gazette referred to an otherwise unreported case occurring late in 1804 or early in 1805 in which a free man was committed from Hawkesbury to the County Gaol for the assault upon a native, which, he claimed, was merely a blow to a native who designed to plunder him. He was still in the gaol gang in April.⁷⁶ There was then a period of relative peace for almost ten years. The troubles that occurred in 1814 and 1816 were resolved by the use of troops and without inquiry into native grievances.

There was a break of almost fifteen years when no case was discoverable in which a white man was tried by the magistrates for an offence against an Aborigine. Then, on two recorded occasions whilst he was magistrate at Newcastle, Major Morisset punished whites for offences against the local natives. In September 1819 he sentenced a

dangerous offender Henry Langton to 75 lashes for stabbing a native.⁷⁷ In October 1820, Robert Davies was sentenced to receive 50 lashes for "inhumanly ill-treating and cutting a black native and intimidating him against bringing in Bush Rangers", and for abusing and similarly intimidating the natives, William Page and Thomas Franklin were each sentenced to 25 lashes.⁷⁸

Other magistrates were to follow these examples. In 1824 John Radford for ill-treating a native was sent to the treadmill for one month by the Sydney magistrates.⁷⁹ Several months later Thomas Fearbry was apparently committed for trial before the Quarter Sessions for wantonly and violently assaulting two natives in the streets of Sydney but the court's record recites that he was committed to be disposed of by the Attorney General.⁸⁰ The actual record of the court was certainly peculiar but might be explained by uncertainty as to the mode of committal to the Courts of Quarter Sessions.⁸¹ It seems that no trial occurred.

When serious uprisings were threatened, once again magistrates took action. In 1824, Throsby recorded the Argyle magistrates' attempts to deal with native complaints of rapes of their womenfolk.⁸² One stock-keeper at Lake George, for the abduction of a young native girl, was bound over to keep the peace towards "the King and all His Liege Subjects but more especially to the aboriginal natives of New South Wales" for 12 months.⁸³ The following year Thomas Dignum was charged before the Sydney bench on the evidence of two constables with having assembled riotously with others on the Rocks and

beaten and otherwise ill-treated some of the natives. He was ordered to find sureties to keep the peace and, being unable to procure such sureties, he was committed to gaol.⁸⁴

Several cases were recorded during 1826. In February, Richard Rochford, a free man, for an assault on a black man named Riley, was bound over to keep the peace by the Sydney Bench.⁸⁵ In April, two prisoners, Thomas Moore and Richard Martin were brought before the magistrates at Bathurst by Thomas Everndon on a charge of aiding and assisting a bushranger, Johnston, and endeavouring to entice away a black woman from Everndon's care and return her to Johnston. Both were convicted and sentenced, Moore to Port Macquarie, or such other penal settlement as the Governor may think proper, for three years,⁸⁶ and Martin to be worked in double irons in the Gaol Gang for six months.⁸⁷ At about the same time the Bathurst magistrates reported to Darling that a party of natives had been fired on and several wounded. One of the whites believed responsible, McTeague, was reported as being in custody⁸⁸ but the records of the Bench make no reference to the event and there is no record of any subsequent trial.⁸⁹ It is possible that the magistrates lost interest when it became clear that no repercussions were to follow the assault. Alternatively it may have been impossible for them to obtain any evidence of the assault.

On December 26 William Thomas, a crown prisoner, was brought before the Sydney Police Court on a charge of kicking and otherwise maltreating a native woman without any just cause or provocation. He was sentenced to receive 25 lashes.⁹⁰

The charge had been brought by another magistrate, Hely.

On June 20, 1827, John Dooley, a free man, was charged before the Sydney Bench, with having assaulted a black man with intent to rob him, the black being confined in a ward on a charge of drunkenness. The assault alone was proved for which Dooley was ordered to find sureties to keep the peace "towards all His Majesty's subjects".⁹¹

In a period of forty one years only thirty seven whites were recorded as having been punished by sentence of the magistrates for offences against Aborigines. The reason for this small number is not certain: some magistrates did display a repugnance for the natives and a disinclination to protect them; other magistrates may have felt constrained by laws such as the rules of evidence, to refrain from ordering punishment when a major element in the prosecution case was Aboriginal testimony: others may have punished the white offender by charging him with an offence that did not specifically refer to Aborigines so preventing the case from being distinguished as one relating to injuries to Aborigines. Whatever the reason it is apparent that magistrates were not very active in preparing and hearing charges against those whites who injured Aborigines.

On a number of occasions inquiries were commenced but failed to achieve a result. In January, 1812 upon the complaint of the Windsor natives that one of the tribe had been shot at and killed, Locke the Chief Constable at Windsor investigated, and a man and woman were taken to

Windsor for further examination.⁹² Nothing further may be discovered of the matter but it is certain that no trial for the murder of a native occurred during that or the following year.⁹³

According to Macquarie's General Order of June 11, 1814 an investigation before the Bench of Magistrates failed to produce sufficient clear and satisfactory evidence to warrant the institution of a criminal prosecution, but was sufficient to convince any unprejudiced person that the conflicts between settlers and convicts in Bringelly, Appin and Airds were the result of the settlers and their servants making the first personal attacks.⁹⁴ The minutes of the proceedings of the Bench record the commission of the investigation but the deposition taken were not included in the record.⁹⁵ Presumably they were returned to the Colonial Secretary.

A similarly unsatisfactory result was obtained by an inquiry in 1818. The minutes of the Sydney Bench record that the Governor referred to the Bench a letter from Charles Throsby alleging that certain natives were wantonly fired upon by O'Brien, McTeish, Weston and others residing in Illawarra. The minutes continue "When after hearing several witnesses whose examinations were reduced into writing the charges were considered as not proved and the same Reported to His Excellency accordingly".⁹⁶ Although the Bench comprised the Judge Advocate, Simeon Lord and Richard Brooks beside himself, it was D'Arcy Wentworth who reported the proceedings to Macquarie⁹⁷ and incurred Macquarie's "surprise regret and displeasure at the Bench of Magistrates treating a wanton attack on natives with so much levity and indifference".⁹⁸

Hence Macquarie inferred that he considered that the Sydney Magistrates had not been sufficiently active or punctilious in the exercise of their duty. The same accusation could not have been levelled at Charles Throsby.

On several occasions, well publicised attacks on natives appear not to have inspired any response in the responsible Police Magistrate. Late in May 1817, some white youths chased, and threw stones at, a group of natives, and seized another native passing by and threatened to dash out his brains. The murder was prevented by a white observer.⁹⁹ On April 19, 1822 whilst lying intoxicated in George Street a native named Terribolong was beaten with a cudgel by an intoxicated white man, William Brown.¹⁰⁰ In 1825 an Aborigine was reported murdered in Parramatta.¹⁰¹ In none of those cases was there any record of a magisterial inquiry. It is possible that no official complaint was made, but it was the duty of the magistrates to inquire into crimes brought to their attention irrespective of whether a charge was made and it is unlikely that the magistrates would have been ignorant of those reports. It must be surmised that they were not interested in proceeding in those matters.

There exists more positive evidence of the disinclination of some magistrates to proceed with inquiries into allegations of mistreatment of natives. The successors to Major Morisset at Newcastle were less even-handed than the Major. On several occasions Threlkeld complained of the hostility of the settlers to the mission at Lake Macquarie, of their ill-treatment of natives and of the lack of sympathy demonstrated

by officials.¹⁰² In one instance, a complaint by Threlkeld resulted in two prisoners, Samuel Beckett and Duncan Kennedy, being brought before the Newcastle Police Court on charges of being out of quarters at unseasonable hours and on suspicion of attempting a robbery at Threlkeld's cottage. Threlkeld gave evidence that on the dogs giving alarm he had attended the blacks' camp where he had been informed that some white men had been there and had struck one of the natives and told him to be gone. Upon a search of the grounds Kennedy was seen and fired at by "Throsby" the black, Threlkeld's nam-servant having misfired. "Throsby" and another native, Purcell, were allowed to make unsworn statements that they saw four men, the two prisoners and two free men, Leary and Lowe, and that it was Leary who had struck Throsby with his musket. At this stage the Chief Constable intervened and informed the court that he had received certain private information, and it was probable that on further inquiry the intentions of the prisoners on going to the farm would be brought to light. The court adjourned till the following day when it was declared that "it appearing that the object of the Prisoners on going to the Farm...was not for the purpose of plunder, but with the very reprehensible intention of communicating with the female servants of the Rev. Mr. Threlkeld and the Black Native Girls encamped in the vicinity....", the most serious part of the charge was withdrawn and the prisoners were sentenced to be confined at night to the prisoners' barracks. No further attention was paid to the allegation of the assault by Leary.¹⁰³ The magistrates would have been in difficulties in

proceeding against Leary for he was a free man and the only evidence against him was that of the two Aborigines.

However, on another occasion a white man, while drunk, assaulted and beat an old native and, at Threlkeld's request, received a caution from the Newcastle Bench.¹⁰⁴ If not for Threlkeld's intervention the Bench would probably have imposed a more severe penalty. A white man who assaulted Threlkeld, when Threlkeld stopped him beating an Aboriginal woman, was sentenced to receive 75 lashes.¹⁰⁵

It appears that coroners and those officers responsible for the action to be taken following an inquest were as disinclined as magistrates to act on the natives' behalf. Although an inquest was held in 1803 on the body of a native found dead,¹⁰⁶ the lack of records would suggest that such inquests were not usual. Inquiries held in 1823¹⁰⁷ and 1828¹⁰⁸ were not recorded in the usual manner of inquests although depositions were taken: on the former occasions the Aborigine had been shot dead while stealing potatoes from a farm at Shoal Haven, but no further action was taken following the inquiry. In one other incident the coroner's jury returned a verdict of wilful murder against Peter Watson and James Rattray, two soldiers of the 46th Regiment.¹⁰⁹ The victim was a young Aboriginal girl known as Nanny (or Nancy) Cabbage. The lack of action following this verdict, which operated as a committal for trial,¹¹⁰ may have been due to the recognition that the only relevant witnesses being Aborigines there was no admissible evidence to be put to the Court.

The performance of inquests was one of the few methods whereby malicious treatment of the Aborigines might have been brought to light. The failure to perform this duty probably operated to the disadvantage of the Aborigines but the few exercises do not permit any analysis of the potential of coroners' functions.

On some occasions magistrates intervened in a positive manner to protect persons charged with misconduct towards Aborigines. During the investigation into the death of the Aborigine, commonly called Hole-in-the-brook, killed by John Jamieson, Jnr a well-known landholder, in 1826, several of the magistrates of the Argyle district wrote in defence of Jamieson arguing that he "acted with great forbearance" and that they "should have acted in similar manner" and were "of opinion that the death of the Black native in question will be fraught with beneficial results so far as the peace and good order of this part of the country is concerned".¹¹¹ The acting Attorney General William Henry Moore, also took heed of Jamieson's standing when he wrote to Jamieson informing him that he, Moore, thought that for public satisfaction the incident should be brought before the Supreme Court. Moore added that he saw no point in subjecting Jamieson "to personal restraint or inconvenience than was necessary to ensure you will appear so will consent to you entering into recognisances before the Chief Justice to that effect". He would also, he promised, confer with Jamieson about the time of the trial so as to render it as little inconvenient as possible.¹¹² No doubt Moore retained in mind the difficulties he had incurred earlier in his

investigation into the possible murder of an Aborigine by Lieutenant Lowe of the Mounted Police.

When a street orator and prisoner, John Wilson, abused Jamieson for the killing of the aborigine and held his hands over his head saying that Jamieson was the first man that should be gibbeted, magistrates again intervened on Jamieson's behalf and Wilson was sent to the treadmill for 14 days by the Parramatta bench.¹¹³

While the difference in the treatments of Jamieson and Wilson respectively indicate a certain partisanship, the following case revealed a definite and considered bias. The conduct of the magistrates in the Hunter Valley during the investigation of the charges against Lieutenant Lowe amounted to deliberate interference and hindrance. One magistrate at least, Robert Scott, had known of the death of one, and perhaps all four, of the natives killed by the Mounted Police,¹¹⁴ but had ignored the occurrence rather than report the deaths to the coroner or investigate them himself. The deaths were reported by the author of an anonymous letter in the Monitor,¹¹⁵ by Threlkeld who had received the information from his native assistant McGill,¹¹⁶ and by Captain Allman of Newcastle.¹¹⁷ It appeared from these reports that three of the prisoners, had been shot while walking to Wallis Plains under the escort of Mounted Police, while the fourth, Jacky-Jacky, who had been placed in the lock-up at Wallis Plains had been taken out and shot, without trial, upon the orders of Lowe. The Australian, quick as usual to express the views of the settler, reported that all four had been shot while attempting to escape.¹¹⁸ Upon Darling's orders an enquiry was

conducted by Scott and another magistrate Close,¹¹⁹ but as they failed to concern themselves with the death of Jacky-Jacky the enquiry was unsatisfactory and their report met with a reprimand from Darling.¹²⁰ All the witnesses had held to the story told in the Australian and the deaths of the three natives led to no further action.

Darling resolved to investigate the death of Jacky further and sent William Carter, Master of the Supreme Court and Chairman of Quarter Sessions and, after Carter was shipwrecked, Moore the acting Attorney General, to the Hunter River.¹²¹ Unable to administer on oath or to examine witnesses personally, Moore experienced considerable difficulties in working through the reluctant magistrates.¹²² He received no assistance from their fund of local knowledge and, in his private inquiries, met with untruths or silence. Some witnesses could not be discovered and all were unsatisfactory. It was implied in one of Moore's letters that one potential witness was convicted of perjury, presumably by the same bench, in order to render his evidence worthless.¹²³ The sole official inquiry conducted in Moore's presence, on January 12, 1827, was treated by Close, the presiding magistrate, as an inquiry into, and exculpation of, the earlier conduct of the magistrates.¹²⁴ Close was rebuked by Darling,¹²⁵ replied stiffly and was invited by the Colonial Secretary to resign.¹²⁶ Darling wrote that Close had been removed from the Bench.¹²⁷ Upon his resignation it was decided at a meeting of Magistrates and others to present him with a letter and a piece of plate valued at £50 sterling as a testimonial to his impartial and upright conduct.¹²⁸

It is possible that the magisterial support for Close was not in support of his actions to suppress inquiries into the deaths of natives, but rather they may have been seizing that opportunity to express their opposition to Darling, and the question of the inquiries and the native deaths were incidental. Having regard to the general mood towards the Aborigines in the Hunter Valley during this period, it may be surmised that both explanations were partly correct.

Lowe was charged with the wilful murder of Jacky-Jacky, alias Commandant, alias Jerry, thereby continuing the pretence that the dead native might have been the same one wanted for the murder of a white watchman, although the Mounted Police were still looking for the latter, where he was known to be at large, in the Hunter Valley.¹²⁹ Threlkeld prophesied correctly that Lowe would be acquitted, for, he alleged, all the magistrates "had previously signed a letter thanking him for his conduct in taking upon himself the responsibility of shooting his prisoners while in his safe custody".¹³⁰ If Threlkeld's allegation was correct the magistrates had not only been guilty of a serious impropriety, but had also furnished strong evidence of partiality on their part towards a person guilty of murdering a native and a deliberate condonation of the activity of murdering natives.

Upon another report from the Hunter River of twelve natives being shot while stealing maize in March 1827, no Justice of the Peace was near enough to cause an immediate inquiry, nor was there any later report of an inquiry. However the original

report indicated that the natives attacked with spears and the killings were in self-defence.¹³¹ It would have been surprising if most of the inhabitants of the Hunter River region did not know by then the appropriate story to tell. The previous conduct of the magistrates would have afforded them every ground for believing that they need have had no fear of prosecution.

There are few recorded instances of Tasmanian magistrates inflicting punishments on whites for offences against the natives. West records on the information of a supposed eye witness, that a man was flogged for exposing the ears of a boy he had mutilated and another was flogged for cutting off the little finger of a native and using it as a tobacco stopper.¹³² On another occasion, in April, 1818, an Irish convict was sentenced to labour for 14 days for the same hours as the Gaol Gang and to be confined at night for an assault on, and ill-treatment of, a native girl.¹³³ In 1824 some whites were each punished with 25 lashes for firing on an inoffensive party of natives.¹³⁴

The lack of records of magisterial hearings of charges against blacks or whites for inter-racial conflict would suggest that in Tasmania the aborigines were considered as being outside the ordinary civil law.

In N.S.W. the use of magisterial power to punish white persons for the ill-treatment of natives was an irregular process, that varied according to the contemporary state of race relations in the colony and to the personality of the magistrate. Other than in the occasional reliance on native testimony for the right to use

that power there was no need to vary or adapt the law to the peculiarities of the Aborigines' situation. The device of punishing an offender for another, but more easily proved, offence was an adaptation of normal magisterial procedure but one which was not made peculiarly for the difficulties of dealing with Aboriginal victims.

It is concluded that the magistrates were, in the main, not interested in acting to protect the Aborigines. This resulted in a disinclination to carry out proper inquiries, magisterial support for those responsible for the injuries of the Aborigines, and in one case at least, a positive endeavour to conceal the commission of a serious (and capital) offence against the Aborigines. Some few magistrates, in particular David Collins, Charles Throsby and Major Morisset, acted fairly, if not quite properly, in performing their duties to protect British subjects, including the Aborigines. It was not their behaviour, however, which established the customary pattern of magisterial conduct.

FOOTNOTES

1. Gazette, May 10, 1805.
2. Ibid., June 30, 1805.
3. Ibid., July 7, 1805.
4. Ibid., August 4, 1805.
5. Ibid., August 11, 1805.
6. M.L., A2015, Governor King's Letter Book 1797-1806, p. 495, King to Piper, August 10, 1805: M.L., Letters King, Bligh etc., 1803-1810, p. 41, King to Piper, August 18, 1805.
7. Gazette, June 9, 1805.
8. Ibid., June 11, 1814.
9. Ibid., July 20, 1816.
10. Ibid., November 16, 1811.
11. Arch., 4/1819, N.S.W. Colonial Secretary, Coroners Inquests, 1809-1822, pp. 539-545.
Inquest on William Reardon on March 2, 1814, taken at Jamieson's farm at Castlereagh.
12. Gazette, June 3, 1815. The practice of detaining and punishing prisoners until they revealed the location of stolen property, though illegal, was commonly practiced. Currey, Sir Francis Forbes, op. cit., Ch. XV.
13. Gazette, June 17, 1815.
14. - Arch., 4/1718, N.S.W. Colonial Secretary, Monthly returns of punishments at Newcastle, December 1810 to October 1825, p. 125.

15. Gazette, January 3, 1824.
16. Ibid., December 30, 1824. During August a reward of 500 acres of land had been offered for his apprehension. Gazette, August 26, 1824. He was later killed. Arch., 1161, (82).
17. Australian Dictionary of Biography, Vol. 2, p. 260.
18. Arch., 4/6671, Sydney Bench, October 2, 1824 to December 31, 1824.
19. Infra p. 121.
20. Gazette, April 29, 1826.
21. Gazette, November 18, 1826,
22. Gazette, June 22, 1827.
23. Arch., 1161, (19) & (20) George Claris to R. Scott, J.P., March 25, 1827; (23) & (24) Colonial Secretary McLeay to R. Scott, April 7, 1827; (25) & (26) Scott to MacLeay, May 17, 1827.
24. Ibid., (10) Report to the Governor on the hostilities of the Black Natives at the Hunter River, pp. 610ff at p. 612: Darling to Hay, September 11, 1826, H.R.A., I, XII, pp. 574-6.
25. Arch., 1123, op. cit., pp. 43-4, 46-7.
26. Ibid., p. 46.
27. Arch., 1161, (86), "Notes taken in 1838 of Outrages committed by the Blacks at Port Macquarie and also Memoranda relative to their ravages in the early days of the colony."

The aborigine Devil-Devil was, in fact tried and convicted, but never sentenced.

28. E.g. Arch., 1161, (82) Lawson, Account of Aborigines, 1838; (10) Report the Governor on the hostilities of the Black Natives, loc. cit.
29. E.g. Arch., 1161, (13) Scott to Colonial Secretary, May 17, 1826 and enclosed deposition.
30. Gazette, July 20, 1816.
31. Blackstone, op. cit., Vol. 4, pp. 319-320.
32. Hale, op. cit., Vol. 2, p. 52: Burns, op. cit., Vol. 3, pp. 712-3: Archbold, op. cit., pp. 72-3.
33. Burns, loc. cit.: Archbold, loc. cit.
34. Goebel and Naughton, op. cit., pp. 443-5.
35. Forsyth, op. cit., p. 455.
36. Collins, op. cit., Vol. I, p. 32: White, op. cit., pp. 142-4: Cobley, op. cit., pp. 167-9.
37. Collins, op. cit., Vol. 2, p. 34. Further reports of these white men are to be found in Collins, op. cit., Vol. I, pp. 458-9 and Vol. 2, pp. 299-300.
38. Arch., 1161, (2). Extract from Order Book, September 11, 1795 to December 31, 1797, Extract dated November 24, 1797.
39. Gazette, 1803

53. M.L., M.S.S. 2482/4 Return of Prisoners tried at Newcastle Police Court, 1823-5, August 8, 1825, pp. 149-51. See Infra, p.
54. Gazette, January 9, 1827.
55. Gazette, June 10, 1824.
56. C.H. Currey, Sir Francis Forbes (Sydney, 1968), p. 103.
57. Arch., 4/1819, Colonial Secretary-Coroners Inquests, 1809-1822, p. 464.
58. Arch., 2/8286, Judge-Advocate, Reports of Coroners' Inquests, 1796-1820, pp. 97-112.
59. Arch., 2/8287, Judge-Advocate, Reports of Coroners' Inquests, 1821-2, pp. 299ff: Gazette, October 30, 1823.
60. Nerang Jack had been involved with British Law on earlier occasions, having been one of the ten natives "outlawed" by Macquarie. He had given himself up on January 12, 1817.
M.L., A773, Macquarie's Diary, p. 79.
61. Arch., Temporary Number 20/98, Court of Criminal Jurisdiction, Trial of John Kirby and John Thompson.
62. Gazette, December 16, 1820.
63. Arch., X725, Court of Criminal Jurisdiction - Returns of Prisoners Tried, October 1816 to February 1824, p. 107: Arch., X820, Reports of Prisoners Tried - Court of Criminal Jurisdiction 1820-4, p. 31.

64. Arch., Temporary Number 22/162 (1), Court of Criminal Jurisdiction, Trial of Hatherley and Jackie.
65. Gazette, January 2, 1823.
66. Hale, op. cit., Vol. I, p. 586.
67. Arch., Temporary Number 27/55 (441), Trial of John Jamieson, Jnr.
68. Hale, op. cit., Vol. I, p. 585.
69. Arch., not yet numbered, Clerk of the Peace, Windsor Quarter Sessions, July 1826.
70. Stephen, op. cit., Vol. I, pp. 216-221;
Holdsworth, op. cit., Vol. I, pp. 84-5, 295-7;
Vol. XIII, p. 396.
71. E.g. Gazette, May 5 & 19, and December 22, 1805; April 7 and June 30, 1825; January 10, 1827.
72. E.g. Gazette, February 17, 1804; April 21, 1805; January 11, 1812; June 11, 1814; January 19 and June 22, 1827.
73. Infra, pp. 161, 169.
74. Infra, p. : Gazette, December 22, 1805; January 11, 1812; May 6, 1826.
75. Gazette, February 17, 1804.
76. Gazette, April 21, 1805.
77. Arch., 4/1718, Colonial Secretary - Monthly Returns of Punishments at Newcastle, December 1810 to October 1825, p. 89. Langton had

- earlier received the same number of lashes for fracturing the skull of a fellow prisoner with intent to murder. Ibid., p. 87. See also M.L., B.T. Box 12, Bigge J.T., Appendix, pp. 291-295, Names of Persons tried before Bench of Magistrates at Newcastle, July 14, 1818 to January 11, 1820, at p. 294.
78. Ibid., pp. 296-300. Names of Persons tried before Bench of Magistrates at Newcastle, January 11, 1820 to January 1, 1821, at p. 300: Arch., 4/1718, op. cit., p. 115.
79. Arch., 4/6671, Monthly Returns of trials of Convicts before Benches of Magistrates, July 1823-1824, Sydney, July to September 1824. The magistrate was D'Arcy Wentworth.
80. Arch., 4/6671, op. cit., Sydney, October 2, December 31, 1824. The magistrates were D'Arcy Wentworth and J.T. Campbell.
81. C.H. Currey, Chapters on the Legal History of New South Wales 1788-1863, (unpublished doctoral thesis) pp. 410-412.
82. Infra, pp. 261-2.
83. M.L., M.S.S. 2482, Goulburn Bench Book, Vol. I, September 1 & 7 and November 5, 1824.
84. Gazette, September 22, 1825.
85. Gazette, February 25, 1826.
86. Arch., 2/8323, Bathurst Bench Books, September 27, 1825 to August 1, 1826, pp. 103-7, April 11, 1826.

87. Ibid., pp. 108-111, April 12, 1826.
88. Gazette, May 6, 1826.
89. Arch., 2/8323, op. cit.
90. Gazette, January 1, 1827.
91. Gazette, June 22, 1827.
92. Gazette, January 11, 1812.
93. No record of such a trial may be found in the relevant records for that period, i.e. Arch., 1120, Proceedings of Court of Criminal Jurisdiction, September 13, 1811 to March 23, 1813; Arch., 1121, Proceedings of Court of Criminal Jurisdiction, March 25, 1813 to July 3, 1815; and P.P.: Crime and Punishment - Prisons, Vol. I, pp. 512ff, Reports and Returns of Prisoners tried before the Courts of Criminal Jurisdiction at Sydney, 1811-1817.
94. Gazette, June 11, 1814
95. Arch., 2/1958. Minutes of the Proceedings of the Bench of Magistrates, April 10, 1813 to December 31, 1814. The entry reads "The Magistrates proceeded to take certain depositions relative to the killing of certain natives in pursuance of a letter addressed to the Judge-Advocate by His Excellency's Secretary, dated the 11th Inst_____".
96. Arch., 7/2691, Sydney Magistrates Bench Book, 1815-1821, p. 146, October 27, 1818.
97. M.L., A753, Wentworth Papers, p. 199.
Magistrates' Opinion.

98. Ibid., p. 207, Macquarie to Wentworth.
99. Gazette, May 31, 1817.
100. Gazette, April 26, 1822.
101. Gazette, October 13, 1825.
102. M.L., B.T. Box 53, pp. 1462-3, Threlkeld to Burder, February 2, 1825; pp. 1631-52, Second Half-yearly Report of the Lake Macquarie Mission, June 21, 1826; p. 1682, Threlkeld to Society, August 1, 1826; pp. 1683-5, Threlkeld to Burder and Hankey, August 10, 1826; 1686-7, Threlkeld to Burder and Hankey, September 4, 1826: Arch., 1123, op. cit., pp. 52-3.
103. M.L., H.S.S. 2482, Vol. 4, Newcastle Bench Books, December 1823 to March 1827, pp. 149-51, No's. 192 and 193.
104. M.L., B.T. Box 53, pp. 1631ff at pp. 1640-1, June 21, 1826: Arch., 1123, pp. 37-8.
105. M.L., B.T. Box 53, p. 1685a, Threlkeld to Jones, August 10, 1826: Arch., 1123, pp. 41-2. According to the latter report the accused was also turned in to the Road Gang for 12 months.
106. Gazette, 1803, April 10. See also Bridges, Aboriginal and White Relations, op. cit., p. 827.
107. Arch., 2/8288, Judge Advocate, Reports of Coroner's Inquests, 1823, pp. 71-9. Inquiry made on March 1, 1823.
108. Arch., 2/8290, Reports of Coroner's Inquests, June 1828, pp. 1-4, Inquiry into death of

Nerang Jenny Jackass on June 9, 1828.

109. Arch., 2/8286, Judge-Advocate, Reports of Coroner's Inquests, 1796-1820, pp. 97-112, Inquest on Nanny Cabbage, June 14, 1817. This case was the more horrible for the light it threw on the attitude to the aborigines of the ordinary population of the colony. The girl, who had been living as a servant of a white woman, was stabbed at Cockle Bay. Her cries and moans aroused a number of the white inhabitants of this area who, on discovering them to emanate from a wounded native, henceforth ignored her and returned to their dwellings (some to their evening dinners), abandoning her to be mauled to death by dogs during the night.
110. Blackstone, op. cit., Vol. I, p. 341: Archbold, op. cit., p. 104.
111. Arch., Temporary Number 27/55 (441). Trial of John Jamieson, Jnr - Letter Reid, Macallister Throsby and Latter to Colonial Secretary McLeay, January 12, 1827.
112. Ibid., Moore to Jamieson, January 22, 1827.
113. Gazette, March 1, 1827.
114. Arch., 1161 (14) Scott to Dunn, August 29, 1826. See also Arch., 1161 (14) Bannister to R. Dunn (coroner) July 29, 1826; (14) Dunn to Scott, August 26, 1826; (14a) Scott to Dunn, August 25, 1826.
- * 115. The Monitor,

116. Arch., 1123, p. 43, Threlkeld to Bannister, July 25, 1826: M.L., B.T. Box 53, p. 1682, Threlkeld to London Missionary Society, August 1, 1826.
117. Allman to Colonial Secretary, August 18, 1826, referred to in Colonial Secretary to Allman, August 28, 1826, H.R.A., I, XII, p. 624.
118. The Australian, August 26, 1826.
119. Allman to Colonial Secretary, September 15, 1826, and enclosed depositions, H.R.A., I, XII, pp. 624-8: Darling to Bathurst, October 6, 1826, H.R.A., I, XII, p. 623.
120. Darling to Hay, March 23, 1827, H.R.A., I, XIII, p. 178ff at p. 179.
121. Loc. cit.
122. Arch., 1123, p. 51, Moore to Threlkeld, January 6, 1827: Moore to Colonial Secretary, January 22, 1827, H.R.A., I, XIII, pp. 399ff.
123. Moore to Colonial Secretary, January 27, 1827, H.R.A., I, XIII, p. 405.
124. Loc. cit.
125. Darling to Bathurst, June 4, 1827, H.R.A., I, XIII, pp. 399ff at p. 400.
126. Gazette, March 1, and 6, 1827.
127. Darling to Bathurst, June 4, 1827, H.R.A., I, XIII, p. 400.
128. Gazette, March 1, 1827: Wood, Dawn in the Valley, op. cit., p. 131.

129. Ibid., p. 132.
130. M.L., B.T. Box 53, p. 1688, Threlkeld to Burder and Hankey, September 11, 1826.
131. Gazette, March 22, 1827.
132. West, op. cit., p. 264.
133. M.L., P.R.O. microfilm, Reel 77, Van Dieman's Land - Punishments 1817-1821, p. 20.
134. West, op. cit., p. 269.

CHAPTER IXABORIGINES AND THE JUDICIAL PROCESSA. ABORIGINES AND THE COURTS - INTER-RACIAL
CONFLICTS

It is strange that there was a delay until 1816 before Aborigines were considered as fit to be tried by British law. The early years presented obvious difficulties of enforcement but these difficulties had largely vanished well before 1816. Neither legal theory nor practice was certain but there was no definite prohibition to be found in British law that would operate to exclude the Aborigine from the ambit of the criminal law. Indeed, the authorities and precedents would seem to render them amenable to normal judicial proceedings. The North American Indian had been held to be susceptible to colonial laws albeit that determination was made at a time of rigid law and rigid religious dogma inapplicable to the late eighteenth century pragmatists. It was, perhaps, this very pragmatism that accepted the realities of racial contact in the young colony and decreed that to that degree British law would not operate in the colony. There remained until 1816, a lacuna that was not and could not be filled by any recognised measure, for none existed, nor by any novel adaptation, for none was considered permissible and there was no legitimate avenue whereby the adaptation might be made. The events of 1816 render the volte-face explicable.

The decision that they could not legally be tried and punished wrought harm to the Aborigine for, even after 1816, those persons wishing to wreak

a private vengeance or an anticipatory deterrance, argued that these were the only means whereby the natives could be restrained.¹

On what grounds were the Aborigines to be excluded? It was a firmly based aphorism that ignorance of the law afforded no excuse for a failure to comply with it.² Nor were doubts whether the Aborigine was a British subject relevant, for ignorance of the law was no defence even for a foreigner within British jurisdiction,³ - as Blackstone reasoned, even an alien owed local allegiance for so long as he continued within the King's dominion and protection. In 1838 the Queen's Advocate, the Attorney General and the Solicitor General presented the united opinion that an alien, of a country at peace with England, owed allegiance to the Queen within her dominions, and was liable to be tried for treasonous acts.

In New South Wales the reasoning of Judge-Advocate Atkins proceeded, in an emotional manner, along different lines. He argued that natives would be unable to plead to an indictment, "the meaning and tendency of which they must be totally ignorant of".⁴ He concluded that to bring them before a Criminal Court "would be a mocking of Judicial Procedure and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit".⁵ In earlier days it seems to have been considered that a trial could not proceed further unless a prisoner upon arraignment pleaded to the charge and "put himself upon the country".⁶ For this reason until 1772 a person considered to be mute of malice was subject to the peine forte et dure, until he

pleaded or died. Following the Act, 12 Geo. III, c. 20, of that year, standing mute of malice was rendered equivalent to a confession and conviction.⁷

If it were determined that he were "mute by visitation of God" the result was not certain. The very method of determining the issue was uncertain for it was at the judge's discretion whether he would have a jury decide the issue⁸: otherwise, presumably, he decided it for himself. The inquest by jury was the more usual method.⁹ It was generally accepted that a person of non-sane memory, a lunatic or idiot "of natural fatuity", should not be arraigned or tried while his state continued for he would be unable to plead or make his defence with advice or caution.¹⁰ In such instances the accused was remanded, sometimes with, and sometimes without, a subsequent trial.¹¹ The problem of the deaf mute was more complex. According to Hale, a person deaf and dumb from birth was, in presumption of law, an idiot because "he hath no possibility to understand what is forbidden by law to be done, or under what penalties", but if he had "the use of understanding which many of that condition discover by signs to a very great measure", he might be tried.¹² It would follow, therefore, that such a person should not be tried without such understanding. But in 1787 the deaf Elizabeth Steel was arraigned, twice found by juries to be mute by visitation of God, tried as if upon a plea of not guilty entered for, but not by, her, convicted and sentenced to seven years transportation.¹³ This latter practice was approved by Blackstone¹⁴ and Hawkins.¹⁵

In 1800 the Act 39 and 40 Geo. III, c. 94, s. 2, provided that if a person was found by a jury to be insane upon arraignment or during the trial, he was to be kept in strict custody until His Majesty's Pleasure was known.¹⁶ At a later date, perhaps even from the passing of the Act, this provision was considered to apply to states other than insanity (such as deafness or idiocy),¹⁷ perhaps upon the presumption mentioned by Hale, although a number of authorities mention also the inconsistent practice of proceeding in such cases as if upon a plea of not guilty.¹⁸ The inconsistency does not appear to have been observed or it may have been that the courts had a choice as to the issue to be put to the jury, insanity or muteness by visitation of God. Ultimately the test for "insanity" prevailed.¹⁹

Although the disabilities of the Aborigines might be equivalent to, they were not within, the recognised categories of muteness by visitation of God. Their difficulties may have been more akin to those of a non-English speaking alien who was afforded no such protection, than to lunatics, idiots and deaf mutes; their lack of understanding was a social not a physical infirmity. If it were possible to try even deaf mutes why not the Aborigine?

The early Governors expressed intentions of punishing the Aborigines, perhaps intending judicial proceedings, but these remained unrealised.²⁰ King was precluded by Atkins' advice from taking such action against two natives, Bull Dog and Musquito, given up by the other natives. Instead he proposed to those other natives the expedient of

sending the two to another settlement and received approval of the measure.²¹ They were sent to Norfolk Island shortly afterwards²² with orders that if they were unable to support themselves they should receive the favour of being victualled from the stores.²³

Later Musquito was transferred to Tasmania and after receiving some ill-treatment there he became a leader in intermittent guerrilla warfare of the Aborigines against whites. In 1824-1825 he was tried, convicted and executed for the murder of a white stockman.²⁴ In writing of this trial Bonwick repeated what was, presumably, the popular version of the offence for which Musquito was transported, when he said that Musquito and Bull Dog waylaid a woman, ill-used her, murdered her, ripped open her body and destroyed the infant she carried.²⁵ The New South Wales records contain no evidence in support of Bonwick's assertion.²⁶ The story does illustrate the need for the whites to justify the treatment of one of the few Aborigines to lead resistance to white rule by denigrating him by a horrific tale. Bonwick continued that Musquito and his companion in crime were sent to Norfolk Island "Strange to say, for want of some European evidence...".²⁷ Although it is possible that King was fettered in the action he could take against the two borigines because of lack of adequate evidence it is more likely that the restriction was the opinion he had received from the Judge-Advocate that the Aborigines were not amenable to trial.²⁸ The action he did choose was unsupported by any legal power possessed by him. The action was to be repeated some years later by Macquarie in the case

of Dual.²⁹ Both Governors were obliged, by the lack of any available judicial procedure, to disregard legal modes and introduce novel measures. If the reports were correct, Hunter before them had considered that the problem should be solved by the infliction of an immediate summary punishment.

At a number of inquests prior to 1816 the Aboriginal murderers of white men were identified and verdicts of wilful murder returned against them.³⁰ There appears to have been no constant endeavour to apprehend them and bring them before the Criminal Courts, although such findings of coroners' inquests were equivalent to an indictment by a grand jury.³¹ Nor was there any change in this respect after 1816.³²

During the disturbances of 1816 Macquarie recorded his intention to inflict a summary justice upon Aboriginal offenders.³³ Later in the year he ordered any outlawed Aborigines who might be apprehended to be delivered to the nearest magistrate "to be dealt with according to Justice".³⁴ However on November 2 he revoked the proscription of the outlaws and offered pardons to those of them not killed or apprehended who surrendered themselves.³⁵ Two weeks later he recorded that five natives had been pardoned and another, Jubbinguy, kept in gaol "on account of his cruel and sanguinary character".³⁶ The names of the two sets of natives do not match, and either those pardoned were not all amongst the list of outlaws, or they were recorded under different names. One of the "outlaws" gave himself up the following January.³⁷

Macquarie's attitude to the trial of Aborigines during this period appears to have been one of confusion, for, in his expressed intentions he wavered between inflicting summary and extra-legal punishment and holding formal trials of Aboriginal offenders before the Court of Criminal Jurisdiction.

In a Government Order of July 30 Macquarie reported the apprehension of an offender known as Dewal or Dual and the necessity that, as a leader of his people, and for his "flagrant and sanguinary Acts", he meet with "condign Punishment". Accordingly he announced that by virtue of his power as Governor, and in compassion towards the criminal "in Consideration of his Ignorance of the Laws and Duties of civilized Nations", he would "remit the Punishment of Death which his repeated Crimes and Offences had justly merited and incurred", and commute the same into banishment to Port Dalrymple in Van Dieman's Land for the term of seven years.³⁸ This action was taken by Macquarie without any trial having taken place, although such action went beyond his legal authority. Bigge was later to learn of the punishment but it would appear from the context in his report that he believed it to have been imposed by the normal process of law.³⁹ Bigge had access to the returns of this court but apparently did not bother checking, thereby over-looking another of Macquarie's illegal acts. The subsequent fate of this offender is a matter of some confusion for Bigge claimed to have seen Dual in Van Dieman's Land in 1820.⁴⁰ but a Government and General Order of May 31, 1819 reported the award of clothing and

a badge of Merit to him for his services as a guide on a journey by Charles Throsby from the Cowpastures to Bathurst.⁴¹ In 1826 he was a Constable to the Gaol at Argyle and with other natives was rewarded for apprehending house breakers.⁴²

The outbreaks of 1814 and 1816, the display of military prowess and the infliction of a dramatic rebuke to the natives culminated in the report of a rape of a fifteen year old white girl by an Aborigine. Whether due to the abhorrence of the crime, the fact that the Aborigine accused had been taken to England and been feted there, or to the prevalence of a different opinion among the legally qualified in the community than had earlier been held, this case marked a reversal of the earlier practice. The Aborigine, Daniel Mowwatling, otherwise "Daniel" or "Mowwatling" was brought to the bar of the Court of Criminal Jurisdiction on September 23, and charged with the rape of Hannah Russel.⁴³ Another Aborigine, Bioorah, was charged with being an accessory but before his arraignment the Judge-Advocate observed that there did not appear to be sufficient cause in the depositions "under the peculiar circumstances in which he stood" for him to be tried and he was ordered to be discharged.

The trial of Mowwatling was conducted in a manner which was scrupulously fair. He was assigned a competent person to assist him in his defence, and a number of natives present, several of whom could speak and understand English "and converse upon all ordinary topics" were admitted near to him. The testimony of the prosecutrix was

corroborated by a stockman who had heard her cries and had seen her, but not the defendant, shortly after the rape, and also by her mother to whom she had made an early complaint. In addition property stolen from her was recovered. Such evidence would have been more than sufficient to convict any defendant, white or black, unless there were serious grounds for disbelieving the witnesses. No such grounds appearing, the Constable was questioned concerning the defendant and on being told that he had been brought up by Europeans, had worked as a labourer for wages since he returned from England, and was able to discriminate between good and evil, he was found guilty. Some days later sentence of death was passed upon him,⁴⁴ and he was executed on November 1.⁴⁵ The nature of the inquiries of the Constable suggest that the court would not have proceeded to a determination of guilt or to sentence if the native did not have that understanding that was reported by the Constable. It is unlikely that Mowwatling had sufficient understanding of white culture to enable him to make an appropriate defence, but similar comments could have been made of many of the white convicts.

Another Aborigine, unlucky or unwise in committing his crime at this period, was brought before the court for stealing a cart and harness, value £16.⁴⁶ The Aborigine, John Munday was convicted and sentenced to three years confinement in the gaol at Liverpool.⁴⁷ Although neither report of the sentence included such a stipulation, the sentence was regarded as one to be served on bread and water.⁴⁸ Upon representation to the Governor by Thomas Moore, a Liverpool magistrate, Macquarie ordered Munday's release.³⁹ The reports of this

case do not suggest that such pains were taken as upon the trial of Mowwatling. There is no record of provision of assistance with his defence, or of any enquiry as to his knowledge of the language or cultural understanding. As this was not a capital charge the Court was less scrupulous than it was in Mowwatling's case or in the following case.

No further trials occurred until the end of December 1822 when two Aborigines, Jackie and Hatherly were committed for trial by Major Morisset, on a charge of having murdered John McDonald, a Government Servant, at Nelson's Plains near Newcastle.⁵⁰ The offence occurred on October 10, was reported to Richard Binder, the District Constable at Patterson's Plains on October 28, and the prisoners examined on October 31. The tempo of the proceedings then slowed for the Judge-Advocate experienced doubts about continuing to trial and on November 19 he requested information concerning possible motives for the assault.⁵¹ On receiving Morisset's reply, that no further evidence could be procured there being no doubt of the murder but some doubt of any robbery by the prisoners,⁵² Wylde again wrote, for any information concerning the deceased, the prisoners and the alleged confessions:-

...on considerations of public
Justice I would implead your
particular attention and
Exertions, if any light can be
thrown upon the facts
immediately preceding or
attendant upon the commission
of so heinous an offence by

parties so ill-able and with so much difficulty, if at all, to be instructed as to the grounds of defence upon trial before the Court.⁵³

The evidence of another native, George, being inadmissible at the trial, although it was included amongst the depositions, there was no evidence to connect the prisoners with the murder save the confessions made by them on two occasions. The court stated that these declarations "could not legally in this instance, be construed into a confession" and found them "Not Guilty".⁵⁴ Their hesitation about accepting the prisoners' statements as confessions may have been well justified for Morisset's report of their examination declared that "they confessed voluntarily, as far as they could be understood from their broken English..." that the statements of the District Constable, which had to be explained to them was correct.⁵⁵ Confessions obtained in circumstances so potential with error could have had little value. In addition, even if the confessions were legitimate the natives would have had no understanding of the possible legal implications of their statements and would not have possessed sufficient understanding of the defences that might have been open to them.

Two years later the new Supreme Court was faced with the problem of trying an Aborigine for his life and an opportunity was presented for a reconsideration of the issue of native amenability for trial. Again there was a delay in proceeding with the matter for the white man Charles Tinkley

died at Port Macquarie on March 23, depositions were not taken until May 17 and the trial took place on August 17. The delay may have been due to continued uncertainty as to the amenability of Aborigines or to a desire to try the principal offenders. It appeared that those chiefly involved could not be apprehended and the sole prisoner could only be charged as an accessory. Certainly the official papers suggest the intention to try more than the solitary figure, Foley, for the depositions named also his father, Mineminee, and also referred to 2 unnamed natives, while the information was against Foley, Billy Boote and 2 unknown natives. However Mineminee was lodged in the Sydney Gaol in June, from Port Macquarie, and returned from the Gaol to Port Macquarie on July 9, 1824, as a "Prisoner of the Colonial Secretary". There is no indication why he was not brought to trial.⁵⁶ The depositions and the report in the Gazette were inconsistent but it seemed that the court accepted the evidence of dying declarations of the deceased as exculpating the prisoner Foley whose only role was in running off with Tinkler's musket. Tinkler had then been speared by Foley's father when he started after Foley. Other evidence showing Foley to have always behaved as a quiet inoffensive native, who occasionally had lived with Tinkler and other whites, he was acquitted.⁵⁷

There may have remained some uneasiness in the minds of the Attorney General and Chief Justice. In August 1824 Taylor, a member of one of the Bathurst tribes who had been held in the Sydney Gaol since April 1824 on charges of housebreaking, cattle stealing and attempted murder was released

first to act as a guide to the mounted patrols and later as an emissary of peace to the belligerents.⁵⁸ Any proceedings against him were discontinued. In September a native known as Divil Divil, Devil Devil or Bumblefoot, committed an assault on Jeremiah Buffy with a tomahawk from which Buffy was two months convalescing. This assault occurred at Newcastle and was accompanied by the robbery of food and clothing.⁵⁹ The native was apprehended on October 29.⁶⁰ There was again a delay, initially to ascertain whether Buffy would survive. On January 31, 1825 Bumblefoot was arraigned, but as he could not understand English and, as no one was able to interpret for him, he was remanded. Forbes pointed out to the Attorney General the difficulty of proceeding with a charge of assault with intent to murder, under Lord Ellenborough's Act, and suggested the propriety of framing an information for aggravated assault which was indictable at common law.⁶¹ The prisoner was again brought before the court on June 3, tried, convicted and remanded for sentence.⁶² No interpreter had been found and the native having had no opportunity of answering the charge, he was detained in prison for some time and then set at liberty with no sentence having been recorded.⁶³ He was certainly at liberty, and again threatening trouble (which did not transpire) by October 1828.⁶⁴

In 1826 Thomas Taylor, a white stockman, was murdered by Aborigines in Argyle, and shortly afterwards another white named Lynch was killed. An Aborigine named Burbon or Raw-head was apprehended for the first and an inquiry into the second killing revealed it to be justifiable. Some eight

months after the death of Taylor and after efforts had been made to inquire into the killing, the Attorney General abandoned the case and Raw-head was released without any judicial proceedings.⁶⁵

In October 1828, an Aborigine, Willimare, was recorded as being held in the Sydney Gaol on committal by Alex Nesbitt, J.P., for spearing a man. It does not appear that he was tried.⁶⁶

All the above cases were inconclusive in deciding how far the ordinary criminal procedures would be applied to the Aborigines. Each issue was treated gingerly and with discretion, and questions of law were presented to the jury in such a manner that any doubt must have been construed in favour of the native. Even following the conviction of Bumblefoot no punishment was inflicted.

In only one case were the issues presented in the harsher manner that was customary on the trial of a white man.

On June 20, 1827, Geoffrey Connell, a white man, was murdered near Bathurst and a native named Tommy was apprehended shortly afterwards. He was removed to the County Gaol on September 11, indicted on November 22 and tried and convicted two days afterwards.⁶⁷ Threlkeld and a native "chief" attended the trial as interpreters but could get nothing from the accused except a denial of having taken part in the murder. The case against the prisoner was strong, he had been camped with two native women near the deceased's hut, had been found with property that had been in the hut and had fled when had seen mounted stockmen

approaching. The case was not as conclusive as the Chief Justice suggested however, for it was surely unrealistic of the Chief Justice to interpret the flight of a native on the approach of a mounted white man as a sign of guilt when it was general knowledge that natives had been wilfully abused by whites on other occasions and only six months earlier that same area had been the scene of racial warfare. In addition, there was reason to believe that the native had been warned that whites were looking for him for no friendly purpose. As the issue was put to the jury they could only acquit if they supposed that the witnesses had conspired with each other to take away Tommy's life. Execution of the sentence was respited sine die, resulting in sharp clashes of opinion in the newspapers. The Gazette pointed out with some force that the accused was not in reality capable of making a defence and that possible issues of provocation, or the conduct of the two women who had been with Tommy had not been raised.⁶⁸ Blackstone's doubts, as to the legality of putting to death a person who never pleaded and was mute by visitation of God, were cited by the Gazette in answer to the Monitor's demands for the execution.⁶⁹ It would seem that the execution did take place.⁷⁰ It was likely that if the issues in this case had been presented to the jury in the sympathetic manner adopted in the earlier cases, there would not have been a conviction, or the sentence would not have been carried out. This case occurred following two years of racial conflict and it would seem that the Court had decided that the time for soft measures had passed.

During the period of this study, therefore, ten Aborigines were charged with offences cognisable by the highest courts exercising criminal jurisdiction in New South Wales. Only seven of these natives were tried, and four were convicted. The sentences of three, two of death and one of imprisonment, were put into effect. During the last five years of this period on a number of occasions persons referred to as "blacks" were charged with property offences or less serious offences against the person.⁷¹ The majority of these charges were heard in Quarter Sessions. As the Quarter Sessions papers made no reference to these persons being Aborigines it may be presumed that they were of other coloured races, and have not been dealt with in this chapter. Those seven cases mentioned were the totality of trials of natives for serious criminal offences. It is hardly surprising that persons who resented native insurrection preferred to employ extra legal methods of dealing with troublesome Aborigines.

In Tasmania four Aborigines were tried by the Supreme Court. In the first year of the court's existence, in December 1824, Musquito, the mainland Aborigine, and a Tasmanian Aborigine Black Jack were arraigned as principals in the second degree to the murder of a white stockman during 1823. Neither of the natives understood much English and they were not provided with any assistance in the preparation of their defence.⁷² The evidence of the sole eye witness to the murder, Radford a convict, does not suggest that the role of Musquito in the murder was of any importance.⁷³ The deceased, the convict witness and a Tahitian

were together in the witness' hut when a band of up to 60 natives visited the area. The following day Musquito began to steal Radford's dogs and the other natives prevented Radford from making any effort to recover them. Upon Radford and the deceased attempting to flee the natives, Radford was wounded and his companion was killed. The Tahitian, Mammoa, was also killed. In these killings Musquito had no part. Bonwick recorded that Black Jack had speared Radford but there was no evidence to this effect.⁷⁴ Musquito was convicted, and Black Jack acquitted, after the jury had retired a few minutes. The conviction, upon such poor evidence was almost certainly based upon the bad reputation of Musquito rather than on any objective consideration of the evidence.⁷⁵ Both Aborigines were again tried the same day upon charges of having been principals in the second degree to the murder of Mammoa, but both were acquitted. Musquito was executed on February 24, 1825. Black Jack was executed with him, having been convicted upon yet another charge of murdering another stock-keeper.⁷⁶

The manner in which these Aborigines were tried displayed none of the sympathetic care of the New South Wales Bench in the trial of Aborigines. The trials aroused differences of opinion in Tasmania as to the propriety and legality of the trial and execution.⁷⁷ When two other Aborigines, "Jack" and "Dick", were tried in May 1826 for the murder of a white man the Chief Justice appointed counsel for them and an interpreter was employed. On the evidence of convicts they were convicted and executed.⁷⁸ The proprieties had been observed

but the result was no different. It is unlikely that any one of the natives had been capable of making a defence if he had a legitimate defence to proffer. It is doubtful if the greater consideration shown the accused in the last mentioned trial was more than a token gesture to the concern expressed in the colony. The New South Wales procedure displayed more substance in its concern for the native prisoners.

B. ABORIGINES AND THE COURTS - TRIBAL CUSTOMS
AND MINOR OFFENCES

Discrimination in the sections of the criminal law to which Aborigines were held susceptible was an automatic process, but one that functioned rationally. Unlike the New England settlements where Indians were subject to even the religious law of the Puritans, the greater bulk of the criminal law was not applied to the Aborigine. Only those laws going to the security of persons, and, to a lesser extent, their property, were brought into play and then only sometimes and then when the victims were colonists. Even in these instances the selection involved a basic justness for all those natives who indulged in warlike conduct against European settlements could have been charged, in a purely formalistic community, with treason. In practice only a few, certain offenders suffered and then for offences equally recognisable to the natives.

The offences committed by the natives in

many instances justified self-help by the victim although the operation of the criminal law would not have been invoked against the offender.

Offences in this category included a couple of attempts at piracy, escapes, rescues and breaches of prison, riotous assemblies, affrays and malicious destruction of property and livestock.

Other offences which went only to the niceties of social activity were not considered as relevant. The range of offences against God and religion, blasphemy, swearing and cursing, profanation of Sunday and lewdness, and offences against decency, as of offences against public police, such as vagrancy and gaming, were ignored. Cunningham delightfully depicted the "colonial climatised females mincing it past these undraperied beaux, or talking with them carelessly face to face, as if unconscious of their nudity while the modest new-comers...giggle, blush, cover their eyes with their fingers, and hurry confusedly by".⁷⁹ Slops provided to the natives were worn rarely or inappropriately. Only towards the conclusion of the period of this study were any natives punished for such offences, and one case, that of Charley Mulgrave, possessed aggravating factors.⁸⁰

Nor were offences involving only Aborigines brought within the notice of the authorities. Although it was recognised that the usual form of courtship amounted to rape this inspired only amusement in the first Judge-Advocate and led to no apparent reaction by any later judicial figure.⁸¹ The regular "contests" of the

Aborigines similarly inspired little reaction.⁸² What was presumably the view of the government was indicated by a leader in the Gazette which remarked on the absurdity of arraigning a native whose offence was required by his tribal customs.⁸³ Even the death of a "contestant" brought no change of attitude.⁸⁴ White "spectators" attended these affrays and on one occasion when the press of spectators stopped the contest several "Officers and Gentlemen" were reported to have said that no interruption should be offered to their customs.⁸⁵ The same attitude was taken by Governor King.⁸⁶ The first attempt to prevent such occurrences was by Macquarie in his proclamation of May 3, 1816 forbidding natives to assemble near European settlements in order to fight or punish one and other according to their customs such being "a barbarous Custom repugnant to the British Laws". No native was to appear armed in the vicinity of any settlement and in the interior any group of more than six natives loitering about a farm was liable to be treated as enemies.⁸⁷ This proclamation was insufficient, for the contests continued: in 1817 a native was killed and his assailant was taken into custody by an officer of the police present at the time in order to protect him from the revenge of friends of the deceased.⁸⁸ Following complaints in 1818 that white men encouraged the natives to fight and to this end made them intoxicated,⁸⁹ Macquarie forbade the supply of liquor to the natives, and threatened to prosecute any offenders as "Excitors and Promoters of Public Disturbances".⁹⁰ The police were instructed to secure rioters of whatever

description. Still the white-inspired contests continued.⁹¹

It was generally considered throughout the colony and throughout the period of this study that natives were not amenable to the criminal law for offences against other natives.⁹² Shortly afterwards, in 1829, the Chief Justice and Mr. Justice Dowling advised the Attorney General that it would be unjust to apply English law to an Aborigine Bob Barrett, who killed another in a contest near the Domain.⁹³ There the position was to rest until its reversal in 1836 in R v Jack Congo Murrall,⁹⁴ and the later revival in R v Bon Jon.⁹⁵

C. THE COURTS AND THE PROTECTION OF ABORIGINES

The superior courts were, of course, dependent on the competence and enthusiasm of the magistrates in their investigations of reported crimes. Lack of either commodity resulted, as often in cases involving Aborigines, in a dearth of trials and convictions. In thirty-six years, eleven white men appeared before the Court of Criminal Jurisdiction on charges of murder and six were convicted, five of these being pardoned and one executed. One man was tried for an assault but acquitted. In only five years the Supreme Court heard charges of murder against five white men, and of manslaughter against six. The four convictions for murder (there were none for manslaughter) were not followed by the execution of any of the murderers.

In addition, one white man was convicted by the Sydney bench of Quarter Sessions of an assault with intent to rape an Aboriginal woman. The likelihood of conviction was reflected in the gravity of the crime charged for the charge was initiated by the Attorney General and did not always represent the conclusion of the committing magistrate.

The three trials before the Court of Criminal Jurisdiction between Octobers 1797 and 1799 have been discussed.⁹⁶ The next case to arise was the prosecution of Edward Luttrell in 1810 for shooting the Aboriginal Tedbury and wounding him in the mouth.⁹⁷ The episode demonstrated the latitude allowed self-defence, Tedbury was intoxicated at the time and, after a quarrel with his "wife", had thrown a spear at Luttrell's young sister but had missed her. One witness for the prosecution deposed that Tedbury was shot while talking to her and a black woman, Luttrell calling out "damn your bloods, do not fling your spears here". The accused asserted in his defence that he had heard the day before that some of the natives would assassinate some of his family, and, on hearing a servant call that the natives had speared his sister he went out and shot the black as he was running away. Other witnesses corroborated the spear throwing and the servant's call but not the running away. If the principal witness for the crown were to be believed there could have been no justification for a plea of self-defence, for the exigency had passed,⁹⁸ nor for a plea of reasonable force in

arrest for no effort was made to arrest Tedbury.⁹⁹ The court may well have been influenced by the victim's deplorable reputation for violence¹⁰⁰ to consider the wounding to be a well-earned rebuke. The decision was not, however, consonant with a strict regard for legalities.

For another ten years the court heard no cases of injury to an Aborigine then, in 1820, they considered the case of two escapees from Newcastle, John Kirby and John Thompson, charged with the murder of Burrigan, the "chief" of the Newcastle tribe, on October 27, 1820.¹⁰¹ Burrigan was stabbed by Kirby on that date and died on November 7, and depositions were soon taken by Major Morisset on November 17 and 18. There then occurred a delay of less than a month before the trial on December 14. The speed of these proceedings was in marked contrast to the delays that occurred in bringing natives to trial. Thompson was acquitted and Kirby convicted. At the time of the murder the two escapees were being returned to the settlement after having been captured by the natives. When Kirby saw soldiers and constables proceeding towards him he stabbed Burrigan and threw the knife away. No European was sufficiently close to see the blow given or the knife in Kirby's possession but the evidence of his actions that they did observe, coupled with evidence of subsequent statements by Kirby, regretting his not having "cut the buggers head off", provided a strong case. Kirby was executed within a week of the trial.¹⁰² Doubtless Kirby's status as a prisoner of a settlement designed for recalcitrants, and as a runaway were influential in

the decision to carry out the sentence.

In 1822, Seth Hawker was charged with the murder of an unnamed native woman at Illawarra on the prosecution of a local constable.¹⁰³ The shooting occurred on April 15, he was committed for trial on April 24, further inquiries were made on June 3, and the trial proceeded on June 14, all in 1822. The woman was shot, at night, after a disturbance by the farm's dogs in the cornfield, and, she died as a result either of that wound or the later attacks of the dogs as she lay where she was wounded. There was little doubt that the shooting was done under orders of his overseer and in protection of the crop. The victim was found to have had corn in her possession. There had been no attempt by Hawker to call her to stop but that would probably have been impracticable in the woods at night. He was acquitted after the Judge-Advocate warned that Aborigines had as much right as Europeans to expect justice at the hands of British law. The trial was interesting for the admission of evidence, of dubious relevance, of the natives' activities in clearing corn from the properties, and of the wounding of an Aboriginal, Couta Couta, by another settler, William Graham. The latter incident had been investigated by the magistrate at about the same time as the shooting by Hawker but the wounding having occurred in a struggle after Graham had attempted to apprehend the native for theft of corn, no trial was considered necessary.¹⁰⁴ Again the case illustrates the scope allowed to self-defence, or defence of property.

The first case to come before the Supreme Court was the trial of five stockmen for the manslaughter of a native woman near Bathurst, which case was heard in August 1824.¹⁰⁵ After the wounding of a stockman by a party of blacks the prisoners and another stockman had set off armed and mounted to pursue and drive them away. There was evidence for the prosecution that the prisoners had reported meeting with a body of blacks and, on the blacks preparing to throw spears, the whites had fired on the natives and some of them fell, the remaining blacks being pursued but without further injury. On passing the fallen blacks one of the prisoners, Henry Castles, stabbed one of the women with his cutlass. There were three victims, all females. The sixth member of the party, Alexander Clark, having been separated from the other five prior to this incident he was not tried. The prisoners, in their original defence before the committing magistrate, Major Morisset, denied having met with the blacks and attempted to establish doubt that any had been killed on the basis that no inquest had been held. At the trial the prisoners were represented by the solicitor, Rowe, who contended that there was no evidence of the charge, that the indictment was incorrect as it charged offences within the wrong county, and that in any shooting the prisoners were acting on the basis of Macquarie's proclamation of May 4, 1816 forbidding natives to approach the farms on pain of being considered to be in a state of aggression. After evidence was adduced as to the proclamation and the circumstances in which it was made, and acted

upon, the Chief Justice pointed out to the jury that the deference to the source of the proclamation it could afford no protection to individuals. In his opening address the Attorney General had explained that the circumstances of danger had prevented a capital charge being preferred but that the circumstances had not sufficed to justify the measures adopted. In his closing address he returned to this theme and stressed that if the conflict had occurred as described it was curious that three women only and no men were killed. If the conflict had occurred it was irrelevant that the offenders who were killed were women, but that fact cast doubts on the story of the conflict. He suggested that the three women were killed by the prisoners while the prisoners were in a state of "terror on the mind". The direction of the Chief Justice was in favour of the prisoners who, he said, were justified in taking arms against the natives, it being known of their cruelty, and the circumstances having been sufficient to justify the act as it would have been too late to seek the protection of the magistrates or military which they might otherwise have obtained. He left it to the jury to determine if the prisoners had acted with sufficient authority and, after a short consultation, the jury acquitted the prisoners.

That trial indicated that the Chief Justice, who had had previous colonial experience, was not about to inquire too deeply into acts of self-defence but rather would accept the realities of the inter-racial warfare of 1824. As reported, the Chief Justice said nothing of the doubts of the

Attorney General as to the necessity of self-defence on the immediate occasion when the women were killed. It also demonstrated the increase in technical content in the arguments in court, which content was directed to the formalities of the wording of the indictment and the validity of a Governor's Proclamation rather than to the nature of the substantive law. There was no attempt to particularise the legal avenues whereby such killings could be justified nor, in the state of the law in 1824, would it have been a simple matter to do so. The prisoners had not set out with any intent to apprehend felons nor was there any attempt by them to perform an arrest: their avowed object was to drive the natives away. It was generally considered that killing in self-defence was excuseable only if there was no opportunity for escape,¹⁰⁶ but in this instance the prisoners not only were mounted but had voluntarily moved into the dangerous position. Nor was there any immediate reason for them to act to prevent an apprehended felony until their own conduct had brought about the situation that gave rise to the apprehension. There was some possible justification in that they were acting to suppress a riot but at this date the right of individuals to so act independently of civil authority was uncertain.¹⁰⁷ Nor was it certain that at the time of the alleged offence by the accused, the deceased were involved in an activity of a riotous or unlawful nature. The court was not directed on this issue.

In the same year Thomas Fearbry was committed

for trial at Quarter Sessions for assaulting some natives but, perhaps from uncertainty as to the mode of proceeding in Quarter Sessions, no trial took place.¹⁰⁸

In 1826 four prisoners murdered Tommy, a young Aboriginal boy who lived in their camp at the Myall River, Port Stephens.¹⁰⁹ The killing was apparently motiveless, but the evidence was strong and the explanations of the prisoners unsatisfactory. Ridgeway, Chip and Colethurst were tried on September 20 and after a direction by the Chief Justice in which he asserted as an obvious truth that whites were as amenable to the law for violence on the persons of natives as on any others, they were convicted. Sentences of death were passed three days later but the sentences of Ridgeway and Colethurst were commuted by the Governor to transportation to Norfolk Island and hard labour in chains for the term of their lives. The fourth murderer, Stanley, had escaped from custody and a reward of £50 for his apprehension was offered by the Governor.¹¹⁰ He was later captured, tried, convicted and sentenced to death.¹¹¹ His sentence was respited until the Governor's pleasure was made known but the Governor and Council authorised the sentence to be effected.¹¹² Delays in carrying out the execution of first Chip and then both Chip and Stanley resulted in the Council reconsidering their death sentences and respiting them until His Majesty's pleasure was known. Darling recommended that they be commuted on the same terms as those on Ridgeway and Colethurst and this recommendation was accepted by the authorities in England.¹¹³ The father of the

murdered boy had arrived at the camp two days after the murder, with a kangaroo as a present for the men. He was dissatisfied with their explanation of the boy's absence and some time later took his revenge in killing an innocent white man.¹¹⁴ No action was taken against the father.

In 1827, James Hunter was tried before the Sydney bench of Quarter Sessions and convicted of having assaulted an Aboriginal woman with intent to rape her. He was sentenced to serve two years on the iron gang.¹¹⁵ According to the witness who reported the matter to the police, the offence was one of pack rape by six or eight men. When the constable arrived he found the accused on top of her, pulled him off and arrested him. Another man was taken but after causing a mob to form he escaped.¹¹⁶ As the woman's name was unknown, no evidence of penetration was possible and the lesser charge was presented.

In May 1827, John Jamieson, Jnr was arraigned on a charge of manslaughter at Argyle of an Aboriginal, Hole-in-the-Brook.¹¹⁷ The charge was not one of murder as the prisoner had acted under the impression that the deceased had murdered a white stockman. During the search for the missing stockman a party of natives were met who explained that the man had been killed by Hole-in-the-Brook, cut up and eaten. This party was apprehended and placed in custody for further examination by the coroner and magistrates at Sutton Forest. Jamieson continued his search now for Hole-in-the-Brook. On coming upon him, the native fled, having been warned that Jamieson was after him, and after several

warnings called by Jamieson, he was shot dead this being the only means of apprehending him.¹¹⁸ The missing stockman turned up during the investigation, and on his confronting the gaoled natives they expressed surprise - "What, Harry jump up again" - and adhered to their story of having eaten some white man (one woman claimed through the interpreter that she had eaten of three - particularly of Mr. Sherwin's stockman).¹¹⁹ Some bones, apparently of a human, were produced by two native women together with some dog and mutton bones, all of which were very mutilated.¹²⁰ The magistrates reported that at that date, January 8, 1827, 2 white men were missing, one of whom had been accompanied by a dog.¹²¹ In a letter of January 12 they expressed the view that Hole-in-the-Brook, who was described as a notoriously bad character and troublesome to the white men, had certainly murdered some white man.¹²² A similar view was expressed by the coroner's jury. According to the report in the Gazette, Stephen, J., directed the jury that the only question was whether there were reasonable grounds for Jamieson to suppose that a felony had been committed by the deceased. There upon, the jury immediately returned a verdict of not guilty. The Attorney General in a report to the Colonial Secretary stated that the acquittal was the result of Jamieson's having used every possible exertion in endeavouring to take the black, on the strong suspicion of murder, before resorting to the extremity of firing at him.¹²³ An interesting feature of the trial was the reading to the court of the letter from the magistrates, which could not have been legitimate

evidence.

Neither report would suggest that the court displayed a close attention to the current law of arrest for a private citizen was only empowered to arrest for a felony when a felony had in fact been committed and he had reasonable grounds to suspect the person arrested to have been the culprit.¹²⁴ There was no satisfactory evidence before the court that a felony had been committed, nor did the summation, as reported, direct the jury's attention to the importance to this factor. In the absence of native witnesses it would have been difficult to establish the felony - even then the magistrates who interrogated the native prisoners were unable to obtain anything establishing the identity of the person whose bones were produced.

Two days after the trial of Jamieson Lieutenant Lowe was arraigned on two counts, for the wilful murder of Jacky-Jacky and of an Aboriginal, name unknown.¹²⁵ At the commencement of the trial counsel for the prisoner, Dr. Wardell and W.C. Wentworth questioned the jurisdiction of the court for, the deceased being a black native who was not amenable to be tried by the court, the only way in which he might have been punished was, as the law of nations prescribed for persons living in a state of nature, by punishing him as the natives would have punished a person falling into their hands. Also, there being no fair measure of punishment on both sides as contemplated by British law, there could not be jurisdiction. The last argument was rejected by the Chief Justice,

the offence having been committed within the territory over which the British claimed sovereignty, and the legislature having prescribed the mode of trial. The first argument was ignored by the Chief Justice. The three witnesses for the prosecution were Farnham, the constable responsible for escorting the captured native to the lock-up at Wallis' Plains, and Salisbury, both of whom testified to observing the shooting, and Constantine, who testified to the burial of the body. Farnham's evidence was damaged by production of the deposition he made at an earlier examination before Close, J.P., when he had denied any knowledge of the matter: as the Chief Justice pointed out, he had clearly perjured himself on one of the two occasions. Salisbury's evidence was of dubious value as it added nothing to what was said by Farnham, and might, therefore, have been fabricated - certainly it had been communicated to only one person before he had been put in prison in Sydney. Salisbury was, moreover, a convicted perjurer (although it would appear that the conviction was by that same bench whose investigation of the allegation was so unsatisfactory)¹²⁶ and amongst the witnesses who impugned his general character was a magistrate, McLeod, who testified that he would not have believed Salisbury. Constantine's evidence was contradicted by several witnesses for the defence, including some that Constantine had referred to in his testimony. The Chief Justice directed the jury that the natives were entitled to the protection of British law but that the issue for the jury was one of the credibility of the witnesses, no question of their competence having been raised. He analysed

the evidence and suggested that the case was still shrouded in mystery as other respectable persons were mentioned in the evidence but had not been called. After this very fair treatment of the case, the jury retired for only a few minutes before returning an acquittal. The trial had always looked hopeless for the prosecution, but the determination to proceed was explained by Threlkeld as a matter of politics. After his release Lowe was removed from the Mounted Police and sent to rejoin his Regiment in Tasmania. The body of the native had been dug up and removed, to preclude any further investigation.¹²⁸

There is only one instance recorded of the trial of a white man for the killing of a native in Tasmania. The prisoner was charged with manslaughter and convicted. Afterwards his sentence was reversed and he was discharged.¹²⁹ In one other incident mentioned in Chapter VII the Solicitor General of Tasmania advised against proceeding against a white man who killed a native woman because of the uncertainty such a trial would cause in the colony. In Tasmania the policy of marked inequality in the treatment of whites was thus followed by the courts: four Aborigines were executed, but not one white despite official acknowledgement of the many injuries suffered by the natives.¹³⁰

In New South Wales the courts had made a much more determined effort to be fair, but, by the end of the period of this study the Court had come to display some impatience with the natives and had accepted the colony's adaptation of the

law relating to police activities when those activities were addressed against the natives.

FOOTNOTES

1. E.g. Cunningham, op. cit., pp. 196-7: The Australian, September 9, 1826: Alexander Harris (?), Settlers and Convicts (Melbourne Uni Press edn.), (Melbourne, 1964), Chs. XIX and XX.
2. Blackstone, op. cit., Vol. 4, p. 27: Hale, op. cit., Vol. I, Ch. VI: Archbold, op. cit., pp. 19-20.
3. R v Esop, (1836) 7 C. and P., p. 456; 173 E.R., p. 203.
4. Judge-Advocate Atkins' Opinion on the Treatment of Natives, July 8, 1805, H.R.A., I, 5, p. 502 at p. 503.
5. Ibid., p. 504.
6. Stephen, op. cit., Vol. I, pp. 297-301.
7. Loc. cit. See also Blackstone, op. cit., Vol. 4, pp. 324-9.
8. Hale, op. cit., Vol. I, pp. 34-5: Archbold, op. cit., p. 129.
9. Blackstone, op. cit., p. 324: Stephen, op. cit., Vol. I, p. 298: Archbold, loc. cit.
10. Hale, op. cit., Vol. I, pp. 34-7: Blackstone, op. cit., Vol. 4, pp. 34-5.
11. N. Walker, Crime and Insanity in England (Edinburgh, 1968), Vol. I, pp. 222-4.
12. Hale, op. cit., Vol. I, p. 34.
13. R v Steel (1787), 1 Leach p. 451; 168 E.R.,

- p. 328. See also R v Jones (1773), 1 Leach, p. 102; 68 E.R., p. 153, where a deaf mute who could receive intelligence from another person by means of signs was arraigned, convicted and sentenced to transportation for stealing in a Dwelling house.
14. Blackstone, op. cit., Vol. 4, p. 324. See also Stephen, op. cit., Vol. I, p. 298.
 15. Hawkins, op. cit., Vol. 2, p. 327.
 16. Archbold, loc. cit.: Walker, op. cit., pp 224-5.
 17. Loc. cit.
 18. E.g. Archbold, loc. cit. (but see p. 13 where he cites the passage from Hale): Chitty, Criminal Law (,), Vol. I, p. 417: Blackstone, op. cit., (New Edn. R.M. Kerr, ed., 1857), Vol. 4, p. 385.
 19. Walker, op. cit., Ch. 14.
 20. Infra, pp. 161-2, 165.
 21. King to Camden, July 20, 1805, H.R.A., I, 5, p. 496 at p. 497.
 22. M.L., A2015, Governor King's Letter Book, 1797-1806, p. 495, King to Piper, August 10, 1805.
 23. M.L., Letters King, Bligh, etc., King to Piper, August 18, 1805.
 24. Melville, op. cit., pp. 32, 33, 37-9: Turnbull, op. cit., pp. 61-3: West, op. cit., pp. 267-9: Bonwick, op. cit., pp. 92-103.
 25. Ibid., p. 92.

26. It would have been reasonable to assume that if such an event had occurred either the Gazette or the official correspondence would have contained some reference to the story but there was no contemporary report of such a murder.
27. Bonwick, loc. cit.
28. H.R.A., I, 5, pp. 502ff.
29. Infra, pp. 299-300.
30. Arch., 4/1819, op. cit., pp. 193-8, Inquest on the death of Richard Evans, January 3, 1813 (Verdict - Wilful murder against Guttermutting, Munninjoy, Dick-Coochairy, Mary Ann, Yaring and one unknown): Arch., 4/1819, op. cit., pp. 539-545, Inquest on the death of William Reardon, March 2, 1814 (Verdict - Wilful murder by a native, name unknown): See also Gazette, November 2, 1808, for inquest on John Spillers murdered by Port Stephens Robert.
31. Archbold, op. cit., Ch. III.
32. E.g. Arch., 4/1819, op. cit., pp. 449-454, Inquest on death of William Maybrow, March 30, 1822 (Verdict - Wilful murder against Guyatt and three other Black Natives): Arch., 2/8288, op. cit., p. 299ff, Inquest on Peter Bray, August 31, 1823 (Verdict - Wilful murder by person or persons unknown and jury are of opinion...that it was by...Jacky, Taylor, Charley and Congogol): Arch., 4/8288, pp. 425ff, Inquest on death of William White and

Peter Grennan, November 22 & 24, 1823
(Verdict - murder by natives, names unknown).

33. M.L., A773, Macquarie's Diary, 1816-18, pp. 1-2, April 10, 1816.
34. Gazette, July 20, 1816.
35. Gazette, November 2, 1816.
36. M.L., A773, op. cit., p. 65, November 16, 1816.
37. Ibid., p. 79, January 12, 1817.
38. Gazette, August 3, 1816.
39. Report...on the State of Agriculture and Trade, op. cit., at p. 199.
40. Loc. cit. It is interesting that Dual also was to be villified by later report as was Musquito, for West reports of Dual that he was transported from Sydney for chopping off the right arm of his wife to prevent her from having further half-caste children (West, op. cit., p. 266). There is no evidence to support this story and, at that time, it was not customary to punish natives for offences against other natives (see Section B).
41. Gazette, June 5, 1819: Government and General Order, May 31, 1819, H.R.A., I, X, p. 182 at p. 183.
42. Arch., 4/1791, N.S.W. Colonial Secretary In-Letters, 1826, p. 314, Bannister to Colonial Secretary, June 17, 1826.
43. P.P.: Crime and Punishment, Prisons, 1819, p. 523. This and the following paragraph are

largely based on the Supplement to the Gazette of September 28, 1816. The original information and depositions cannot be located.

44. Gazette, October 12, 1816.
45. Gazette, November 2, 1816.
46. Gazette, October 5, 1816: P.P.: Crime and Punishment, Prisons, 1819, p. 523.
47. Loc. cit.: Gazette, October 12, 1816.
48. Moore to Campbell, November 25, 1817, H.R.A., I, IX, p. 533 at p. 534.
49. Loc. cit.
50. Arch., X725, Court of Criminal Jurisdiction - Returns of Prisoners Tried, October 1816 to February 1824, p. 177: Arch., X820, Reports of Prisoners Tried in Court of Criminal Jurisdiction, June 15, 1820 to November 22, 1820, and February 25, 1822 to January 19, 1824, p. 73: Arch., Temporary number 22/162 (1), Information on Depositions on the trial of Hatherly and Jackie.
51. Ibid., Wylde to Morisset, November 19, 1822.
52. Ibid., Morisset to Wylde, December 2, 1822.
53. Ibid., Wylde to Morisset, December 17, 1822.
54. Gazette, January 2, 1823.
55. Ibid., Depositions taken before James Thomas Morisset, J.P., re death of John McDonald.
56. Arch., 4/6428, Sydney Gaol, Entrance Book, 1822-1824, p. 302.

57. Arch., X727, Supreme Court, Criminal Jurisdiction, Annual Returns of Prisoners Tried, 1824-1832, p. 2: Arch., Temporary Number 24/50, Trial of Foley and Mineminee: Gazette, 1824, August 19. The depositions and the report of the trial in the Gazette differ in several important respects, and the report of the Gazette has been accepted as being the most consistent with the verdict. The depositions of both Edward Ford and Francis Moran reported Tinkler as having asserted that Foley was the first to spear him. If this was repeated to the Court it is difficult to see how they could declare that Foley's only offence lay in running off with the gun.
58. Arch., 4/6428, op. cit., p. 233. Arch., 1161 (82) Lawson, Account of the Aborigines (1838). The native was released from custody to act as an emissary and the measure was successful for the tribes came in to make peace.
59. Arch., 25/90, (Temporary Number), Supreme Court, Criminal Jurisdiction, Papers on Trial of Divil Divil, Information.
60. Ibid., Depositions. The depositions and statement of Captain Brabyn J.P., except insofar as they narrated the seizure of a musket from the native and his later capture, consisted entirely of hearsay concerning the actual offence and indeed all persons concerned believed that the victim had died.
61. Gazette, February 3, 1825.

62. Gazette, June 9, 1825. See also Arch., 1161 (87), Mr. Justice Burton's Notes relating to preliminary proceedings in the trial of Kiliminafor and others. The native's (Devil-Devil) defence was provocation and threats by Buffy to shoot him.

63. Gazette, March 29, 1827: Arch., X727, Supreme Court, Criminal Jurisdiction, Annual Returns of Prisoners Tried, 1824-1832, p. 9: Arch., 1161, (86), op. cit.: Arch., 1123, op. cit., p. 65. When released Devil-Devil attached himself to Threlkeld's Mission while Buffy, his victim, was working for Threlkeld.

64. Loc. cit. (Circular to L.M.S., October 8, 1828).

65. Gazette, May 6, June 14 & 28, 1826; January 4, 1827: Arch., 4/6429, Sydney Gaol, Entrance Book, October 4, 1825 to January 1828, June 3.

66. Arch., Not yet numbered, Clerk of the Peace, Quarter Sessions, Sydney, October 1828, Gaol Report dated October 10, 1828.

67. Gazette, September 12, November 26 & 28, 1827: The Monitor Arch., 27/134 (Temporary Number), Supreme Court, Criminal Jurisdiction, Trial of Tommy, otherwise called Jacky Jacky. Information.

68. Gazette, November 30, 1827.

69. Gazette, December 5, 1827.

70. Arch., 1161 (49), List of Aborigines tried and convicted before the Supreme Court 1824-36.

71. Gazette, 1825, March 17, October 10 & 20,
November 14, December 1: 1826, February 11 &
November 29.
72. Melville, op. cit., p. 56.
73. Melville, op. cit., pp. 38-9: Bonwick, op. cit.,
pp. 100-103.
74. Ibid., p. 98.
75. E.g. Melville, op. cit., pp. 32-3: Bonwick,
op. cit., pp. 92-104.
76. Ibid., p. 103: Melville, op. cit., p. 39.
77. Ibid., pp. 56-7: West, op. cit., p. 624, n. 23.
78. Melville, loc. cit.: West, op. cit., pp. 271-2.
79. Cunningham, op. cit., p. 186.
80. Infra, p. 253.
81. Collins, op. cit., pp. 559-560.
82. Ibid., pp. 586-592: Gazette, 1803, October 16;
1804, March 18, October 21, and December 16
and 23; 1805, January 13, July 14 and December
15, 22 & 29; 1806, January 12; 1808, December
25; 1809, January 15.
83. Gazette, 1805, December 22.
84. Gazette, 1805, November 10; 1806, January 19,
February 2 and March 16 & 23.
85. M.L., C189, op. cit., p. 275. "It would seem
almost necessary on human principles to check
these acts (aboriginal battles) but being an
interference with their customs and prejudices

none has been offered."

86. Gazette, 1805, December 29.
87. Gazette, 1816, May 4.
88. Gazette, 1817, August 23.
89. Gazette, 1818, October 31.
90. Gazette, 1818, November 7.
91. Gazette, 1818, November 14: Cunningham,
op. cit., p. 187: Alexander Harris (?),
op. cit., p. 128: Wood, op. cit., p. 158.
92. P.P.: Australia (8), 1844, p. 145.
93. Gazette, April 4 and June 16, 1829.
94. R v Jack Congo Murrell, 1 Legge, p. 72.
95. P.P.: Australia (8), 1844, p. 149.
96. Infra, Chapter VI.
97. Gazette, 1810, February 24 and March 17:
Arch., 1119, Court of Criminal Jurisdiction,
March 1810 to August 1811,
98. Blackstone, op. cit., Vol. IV, p. 184:
J. Chitty, The Practice of the Law (London,
1833), Vol. I, Part II, pp. 586-597, 613-4.
99. Ibid., Vol. I, Part II, pp. 617-620.
100. Gazette, 1805, May 19 and August 4; 1809,
September 3, October 1 & 15.
101. Gazette, 1820, December 16: Arch., X725, p.
107: Arch., X820, p. 31: Arch., 20-98
(Temporary Number) Trial of John Kirby and

John Thompson.

102. Gazette, 1820, December 23.
103. Gazette, 1822, June 14: Arch., X725, p. 159:
Arch., X820, p. 55: Arch., 22/96 (13),
(Temporary Number), Trial of Seth Hawker.
104. The papers on the trial of Hawker also contain
a deposition and letter concerning the Graham
incident. This evidence was given at the
trial, according to the account in the Gazette.
105. Gazette, 1824, August 12: Arch., X727, p. 2:
Arch., 24/41 (Temporary Number), Trial of
John Johnston, William Clark, James Crean,
John Nicholson and Henry Castles.
106. E.g. Blackstone, op. cit., (New Edition, 1857),
pp. 207-9: Plunkett, op. cit., p. 319.
107. Hawkins, op. cit., Vol. I, c. 65, s. 11.
108. Infra, p. 286.
109. Gazette, 1826, September 23: Arch., X727, p.
23: Arch., 26/145 (Temporary Number)
Information and depositions.
110. Gazette, 1826, September 27.
111. Gazette, 1827, March 6: Arch., 27/31
(Temporary Number), Information.
112. H.R.A., I, XIII, p. 858, Note 77.
113. Darling to Bathurst, May 13, 1827, H.R.A., I,
XIII, pp. 300-1: Huskisson to Darling,
November 29, 1827, H.R.A., I, XIII, pp. 625-6.

114. M.L., A1819, Chief Justice Forbes, Private letters to R. Wilmot Horton, 1825-7, pp. 170-2, Forbes to Horton, May 15, 1827.
115. Gazette, 1827, January 19.
116. Arch., Not yet numbered, Clerk of the Peace, Quarter Sessions, Sydney, January, 1827, Depositions and Information.
117. Gazette, 1827, May 18: Arch., X727, p. 47: Arch., 27/55 (Temporary Number), information and depositions etc.
118. Gazette, 1827, May 18: Arch., 27/55 (Temporary Number), Depositions, etc. The witnesses were unanimous on the extenuating circumstances.
119. Arch., 27/55 (Temporary Number), Letter Wm. Ellyard, coroner to Attorney General, January 14, 1827.
120. Arch., 27/55 (Temporary Number), Deposition of Wm. Ellyard.
121. Arch., 27/55 (Temporary Number), Letter, Reid, Macallister and Throsby, J.P.'s, to Colonial Secretary, January 8, 1827.
122. Arch., 27/55 (Temporary Number), Letter, Reid, Macallister, Throsby and Latter, J.P.'s, to Colonial Secretary, January 12, 1827.
123. Arch., 27/55 (Temporary Number), Letter, Attorney General to Colonial Secretary, May 17, 1827.
124. Blackstone, op. cit., Vol. 4, p. 293: Chitty, op. cit., Vol. I, Part II, pp. 617-620: Stephen, op. cit., Vol. I, pp. 192-4.

125. Gazette, 1827, May 21 & 23: Arch., 27/56
(Temporary Number), Information, depositions
etc.: H.R.A., I, XIII, pp. 858-9, Note 80.
126. Moore to Colonial Secretary, January 27, 1827,
H.R.A., I, XIII, p. 405.
127. Arch., 1123, pp. 53-4.
128. Loc. cit.
129. West, op. cit., p. 625, n. 27.
130. Turnbull, op. cit., pp. 47, 55-9, 65-6.

CONCLUSION

The English settlers of New South Wales carried English law with them to the Colony. They also carried with them the practices and habits that determined the manner in which English law was applied. Those responsible for the application of the of the law were often ignorant of its substantive elements but consciously applied them faithfully as their capabilities allowed. On a less conscious level they adopted the practices and habits of the English system. Neither process involved a consideration of the degree to which the laws were those most suitable for the conditions of the colony.

When the dichotomy of social need and legal rule became too apparent to be ignored, several alternatives were available: the rule could be rejected as not applying to the colony; the rule could be limited to only a partial application to some situations and not others; the rule could be applied in form only or in a manner that avoided the difficulties of applying the intricacies of the rule, in favour of a more generalised application; there could be a variation in the nature of the rule; or the rule could be applied in full with a disregard for its inappropriate nature. Most of these alternatives were applied to the problem of extending English law to the Aborigines from time to time and sometimes consciously and at other times without any indication that the application was the result of a conscious process.

The only area of purely English law, capable of general application to the Aborigine, was the criminal law: the nature of Aboriginal culture and property and the relationship of the two races afforded little opportunity or likelihood of invocation of the civil law. Such cases could only have arisen from Aborigines developing an understanding of both the legal rights of a British subject and the methods by which the rights were enforced, or upon their receipt of the assistance of white men: only three cases might be found in which purely civil issues were raised. The first two cases arose in 1811 from the practice of employing aborigines on sealing expeditions!

In February a complaint to the Governor of some unstated nature was presented by a native who had shipped on a voyage to Tasmania. The matter was referred to A. Riley the sitting magistrate. It appearing that the native had deserted the ship at Port Dalrymple and had "put the owners to the expense of a reward for his caption", the charge was dismissed². In October the Sydney Bench of Magistrates were referred a petition from a native originally addressed to the Governor in the following terms:

My name is Merute an Inhabitant and Native of this Country, I agreed verbally for plenty of money and Clothes and can obtain nothing! Is this an Incouragement to us?

Two years in the employ of Mr Jas Underwood at Macquarie Island and did double duty to a white man.³

Upon examination of the native, and Underwood, it was discovered that the native had been left at Macquarie Island for more than two years by the vessel the Sydney Cove. Merute had been obliged to leave the Island for want of provisions, and this departure had been effected by his stowing away on another vessel. Underwood was the agent for the Sydney Cove but as the owners had gone bankrupt he offered to pay Merute £10, half in money and half in goods, in return for discharge of all Merute's claims upon the ship: to this Merute agreed and the matter ended.

In 1834 the Clerk of Petty Sessions, Raymond Terrace wrote to the Supreme Court in Sydney that at the close of a magisterial inquiry into the death of an Aboriginal, the principal witness handed into court the sum of 9/6^d belonging to the deceased. The clerk was perplexed whether he should act in the case as agent for the curator of intestate Estates⁴. The letter was answered, but to what effect may not be discovered. It is interesting to contemplate the difficulties the Clerk would have experienced in tracing the heirs of the deceased through the complicated pattern of kinship - it is unlikely that the deceased had contracted a valid marriage and his children would have been illegitimate.

The criminal law afforded the only formal means by which racial contact might have been ordered and some measure of peace achieved. Application of criminal laws and procedures if done with full attention to detail as and when relevant, would have ruled out any likelihood of the application having the desired results.

There were, as a result, a number of adaptations to the colonial realities. As there were no procedures whereby adaptations might have been formalised and applied generally throughout the colony, the adaptations were made by individuals and were of only limited application - they were, as a consequence, adopted without any consideration of whether the adaptations were those most suitable to the needs of the colony.

The majority of the settlers, and of those responsible for the government of the colony and the enforcement of the law, were lacking in adequate experience of other British colonies. Measures and policies adopted in those other colonies were of relevance to the situation found in New South Wales - ignorance or lack of experience of these measures forced the colonists to decide, fitfully, their own solutions. The criminal law was English law and was able to be applied in imitation of a system to which most colonists were accustomed. Colonial practice with regard to Aboriginal land rights was not clearly law or policy and was purely colonial in nature. Criminal law was enforced on many levels in the community, issues of status and land rights were decided at gubernatorial level. Doctrines of criminal law were, therefore, applied so far as they were understood, and with some measure of adaptation: aborigines were not given land rights as the only governor with an understanding of the issues commenced the process whereby the rights might have developed, but later, interest was lacking and the measures came to nothing.

FOOTNOTES

1. For this practice see e.g. Gazette, 1805, March 17; April 21; and September 15.
2. Gazette, February 23, 1811.
3. Arch., 1/303, op. cit., October 12, 1811.
4. Arch., not numbered, Supreme Court of New South Wales Probate Files, Letter No 54/66 dated 23 July 1834. It was received on July 27 and answered the following day.

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Arch., 1147B, Court of Criminal Jurisdiction - Minutes of Proceedings, April 1795 to December 1797 (also to be found on Reel 45).

Arch., X905, Court of Criminal Jurisdiction - Minutes of Proceedings, March 1798 to December 1800.

Arch., 1149, Court of Criminal Jurisdiction - Minutes of Proceedings, February 1801 to December 1808.

Arch., 1150, Court of Criminal Jurisdiction - Minutes of Proceedings, February 1809 to March 1810.

Arch., 1119, Court of Criminal Jurisdiction - Minutes of Proceedings, March 1810 to August 1811.

Arch., 1120, Court of Criminal Jurisdiction - Minutes of Proceedings, September 1811 to March 1813.

Arch., 1121, Court of Criminal Jurisdiction -
Minutes of Proceedings, May 1813 to
 July 1815.

Arch., 1145, Court of Criminal Jurisdiction -
Indictments, Informations and
Depositions, February 1796 to December
 1808.

Arch., 1146, Court of Criminal Jurisdiction -
Indictments, Informations and
Depositions, February 1809 to November
 1812.

Arch., 1144A, Court of Criminal Jurisdiction -
Indictments, Informations and
Depositions, August 1812 to December
 1813.

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