Judge Willis in Port Phillip: 1841-1843

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STATEMENT OF AUTHORSHIP AND SOURCES

This thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma.

No parts of this thesis have been submitted towards the award of any other degree or diploma in any other tertiary institution.

No other person's work has been used without due acknowledgement in the main text of the thesis.

All research procedures reported in the thesis received the approval of the relevant Ethics/Safety Committees (where required).

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ABSTRACT

Aims:

This thesis aims to identify why John Walpole Willis, the first resident judge of the Supreme Court of New South Wales for the district of Port Phillip (now Melbourne), was removed from office in 1843. Willis subsequently appealed to the Privy Council. In 1846 the Privy Council upheld the appeal on the grounds that he should have been given an opportunity to respond to the complaints. Yet in spite of this, Willis was removed from judicial office for good reason. How can Willis's amoval be reconciled with the success of his appeal? It is the argument of this thesis that Willis was removed not because he had done anything unlawful but that he had diminished public confidence in the system of government, including the administration of justice. As will become apparent in the following pages Willis never understood this basic fact. This was his tragedy and the reason why, despite of the success of his appeal, he was a judicial failure.

Scope:

The Privy Council made a legal decision regarding Willis's appeal. It considered what the legal outcome was to be of Willis's behaviour in Port Phillip during the period 1841-1843. In order to understand the decision, the events in Port Phillip that Willis identified in his appeal to the Privy Council are placed in context. This material that has been sourced from the Privy Council archives is about a common law judge seeking to justify his behaviour. In this manner the thesis addresses the question of what are society's expectations of the judiciary in a common law system. In the nineteenth century there was no contemporary literature about such expectations. It was only in the twentieth century that common law systems began to write down guidelines or

provide a list of relevant ethical considerations for the judiciary. Although the process of removing a judge has changed, the story of Willis in Port Phillip during the period 1841-1843 still has currency today. In this way the thesis provides commentary on 'what the law is' with respect to judicial behaviour and 'how the law operates' when a common law judge misbehaves.

Conclusion:

The story of Willis in Port Phillip during the period 1841-1843 is a study of judicial failure. It is also a tragedy in that he was probably the last person to recognise the importance of the matters before the Privy Council as representing how a good common law judge should behave. Willis had to be dismissed because he failed to satisfy society's expectations as to how a judge should behave. In short, he diminished public confidence in the administration of justice, brought disrespect for the institution of the judiciary and did not protect the reputation of the judiciary or individual judicial officers. These matters are the very issues raised in Willis's appeal before the Privy Council. The stories of Willis's amoval and appeal are not only of historical interest. The issues raised continue to have resonance with respect to judicial authority today.

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This thesis would not have been possible without the support of many people.

Special thanks to Mum, Dad, Mary-Louise, John, Jo-anne and Terry. Valuable contributions have also been made by Jessica, Emma, Lucy, Penelope and Sophie.

Professor Bruce Kercher and Professor Andrew Buck have been wonderful supervisors.

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INTRODUCTION

What is a good common law judge? Is there a single model? How should a common law judge behave? The thesis examines these questions by investigating the story of John Walpole Willis, the First Resident Judge for the Supreme Court of New South Wales in the District of Port Phillip (now Melbourne). Within two and a half years of arriving in Port Philip he was dismissed or 'amoved' by Governor Gipps in June 1843 for misbehaviour.[1] Colonial judges during the nineteenth century did not have security of tenure. They held office at the pleasure of the Crown but this did not mean they could be removed without cause, as a disgruntled judge could appeal to the Privy Council. This is what Willis did and he was successful.[2] The implication from this outcome is that either Willis was in fact a good and capable common law judge, and should not have been removed or that he ought to have been given an opportunity to respond to the complaints prior to being dismissed given he had not met the criteria of being a good common law judge. In the nineteenth century there was no contemporary literature with which to assess the behaviour of a common law judge. Written guidelines containing society's expectations of the judiciary only became available in the twentieth century but the very issues that are played out in Willis's appeal to the Privy Council are reflected in this material.[3] This is why it is of value to understand or assess why Willis was removed from judicial office in Port Phillip.

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[1] 'An Act to Prevent in Future any Patent Office to be exercised in any Plantation or Colony, now, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed to shall discharge the Duty thereof in Person, and behave well therein' [1782] 22 Geo III c 75 (Burke's Act) Sections 2 and 3. After 1833 the Judicial Committee of the Privy Council heard appeals from colonial judges. 'An Act for the Better Administration of Justice in His Majesty's Privy Council' [1833] 3 & 4 Will III c 41 (*Judicial Committee Act* 1833). See also PA Howell *The Judicial Committee of the Privy Council 1833-187* (Cambridge University Press, England 1979) 14-71.

[2] *Willis v Gipps* (1846) 5 PC Moo 379.

[3] Australian Institute of Judicial Administration and the Council of Chief Justices of Australia *Guide to Judicial Conduct* (Australian Institute of Judicial Administration, Carlton 2007) in J Thomas *Judicial Ethics in Australia* (LexisNexis Butterworths, Chatswood 2009) 354-585. The *Guide* was first published in 1988.

In 1843 Willis was amoved from judicial office. He subsequently appealed to the Privy Council. In 1846 the Privy Council upheld the appeal on the grounds that he should have been given an opportunity to respond to the complaints. Yet in spite of this, Willis was removed from judicial office for good reason.

How can Willis's amoval be reconciled with the success of his appeal? It is the argument of this thesis that Willis was removed not because he had done anything unlawful but that he had diminished public confidence in the system of government, including the administration of justice. As will become apparent in the following pages Willis never understood this basic fact. This was his tragedy and the reason why, in spite of the success of his appeal, he was a judicial failure.

This thesis will explore the nuances involved in the difference between the good and the bad common law judge. Through this study attention will be drawn not only to the historical setting but reference will be made to contemporary guidelines pertinent to judicial conduct. In this way the thesis will develop a new and enriched understanding of judicial behaviour in a common law setting.

On 24 June 1843 Willis opened the court as usual at 10am. After a few minutes, he was called from the Bench into a private room to receive a 'sealed packet' that included a letter from Superintendent Mr CJ La Trobe.[4] The letter indicated that Lord Stanley, Secretary for the Colonies, having been directed by Governor Gipps, had issued a

[4] 'Letter: Willis to Stanley 27 June 1843' *Appendix to the Case for the Appellant* XXIV 66 and *The Case for the Appellant* 2-3 'Before the Judicial Committee of Her Majesty's Most Honorable Privy Council, John Walpole Willis against Sir George Gipps, On Appeal against an Order of Amotion from the Office of Judge of the Supreme Court of New South Wales' Volume 38 *Printed Cases in Indian & Colonial Appeals* kept in the archives of the Privy Council.

dispatch that the Executive Council of the Colony should consider representations about Willis as a matter of expediency.[5] The Executive Council of New South Wales comprised of the Governor, Sir George Gipps; Major General Sir Maurice Charles O'Connell, the Commander of Forces; Lord William Broughton, Bishop of Australia; Mr Edward Deas Thomson, the Colonial Secretary; and Mr Campbell Drummond Riddle, the Colonial Treasurer. A writ had subsequently been issued that Willis had misbehaved in office and a further writ, superseding and inhibiting him from the exercise of all power and authority as a judge, was also enclosed in the packet.[6] Willis returned to court only to declare an adjournment for an indefinite period.[7] On the same day, he wrote a letter to La Trobe protesting 'in the strongest manner against the proceedings'.[8] La Trobe responded and indicated that he 'was guided by the instructions' of the Governor.[9] Willis had been dismissed from judicial office without being informed about the nature of the accusations against him or having had an opportunity to defend his conduct.

A couple of days after being amoved, Willis received a copy of the Executive Council Minutes for 13 and 15 June 1843 from Superintendent Mr La Trobe.[10] With this information, Willis identified eleven complaints and in the first part of his appeal before the Judicial Committee he sought to have all of these charges dismissed.[11] Willis was

[5] 'Letter: La Trobe to Willis 24 June 1843' *Appendix to the Case on Behalf of the Appellant* IV 34.

[6] 'Letter: Gipps to Willis 17 June 1843' *Appendix to the Case on Behalf of the Appellant* V 34.

[7] 'Supreme Court 24 June 1843' Source: *Port Phillip Patriot and Melbourne Advertiser* 26 June 1843.

[8] 'Letter: Willis to La Trobe 24 June 1843' *Appendix to the Case on Behalf of the Appellant* VI 35.

[9] 'Letter: La Trobe to Willis 24 June 1843' *Appendix to the Case on Behalf of the Appellant* VI 35.

[10] *The Case for the Appellant* 3. See also *Appendix to the Case on Behalf of the Appellant* VII 36.

[11] Part A of the thesis discusses each of these eleven 'Complaints Before the Governor and Executive Council Minutes of the 13 and 15 June 1843'.

keen to return to England and commence proceedings but before departing he wrote to Lord Stanley, the Secretary of State for the Colonies, requesting further information as to why he had been amoved.[12] A copy of this letter was subsequently forwarded to Governor Gipps. Later Governor Gipps wrote to Lord Stanley and explained that Willis had not been 'removed from office on any single accusation, or for any precise number of improper acts, but for a long-continued course of 'misbehaviour''.[13] He then enumerated seven instances that were described as 'either errors in law,' or 'attempts to produce mischief', as constituting the grounds on which the Amotion was based.[14] Willis addressed these concerns in the second part of his appeal before the Judicial Committee.[15]

Statement of Methodology

This thesis has been written by a legal academic with an interest in history rather than a historian who has entered into the world of law. It has concentrated on those aspects of social practice that will appeal to lawyers, in particular the role of the judiciary in a common law system.

Musson and Stebbings have considered that lawyers operate in a different way to those of legal historians. They note,

> [t]he lawyer in search of "truth" requires certainty and the best, most convincing evidence under-scored with appropriate justification or legal authority. Legal historians, however, can show that legal 'truth' is no more in the past than in the

[12] 'Letter: Willis to Stanley 27 June 1843' *The Case for the Appellant* 2-3.

[13] 'Letter: Gipps to Stanley 19 July 1843' *The Case for the Appellant* 10.

[14] Ibid.

[15] Part B of the thesis discusses each of these seven 'Alleged "Errors in Law" or "Attempts to produce Mischief" not in the Minutes of the Governor and Executive Council but contained in a letter from Governor Gipps to Lord Stanley, Secretary of State for the Colonies 19 July 1843'.

> present and that a historical framework must take account of a number of different legalities. Indeed, they embrace a different kind of truth - a historical 'truth' that accepts uncertainty and appreciates the contingency of legal authority and the sometimes shaky foundations of the law (which lawyers rarely admit).[16]

This is a simple but useful demarcation largely based upon attitude. It identifies how a lawyer approaches the task of dealing with the law compared to that of a legal historian. A lawyer, especially a 'black letter lawyer' is most comfortable with following strict legal principles based upon a literal interpretation of a statute or binding precedent. A legal historian when confronted with the same material and the identical task will go beyond the written law and identify legal authorities from other sources. The approach used in this thesis is best described as that of a legal historian.

The Privy Council made a legal decision regarding Willis's appeal. It considered what the legal outcome was to be of Willis's behaviour in Port Phillip during the period 1841-1843. In order to understand the decision, the events in Port Phillip that Willis identified in his appeal to the Privy Council are placed in context. This material that has been sourced from the Privy Council archives is about a common law judge seeking to justify his behaviour. In this manner the thesis addresses the question of what are society's expectations of the judiciary in a common law system. In the nineteenth century there was no contemporary literature about such expectations. It was only in the twentieth century that common law systems began to write down guidelines or provide a list of relevant ethical considerations for the judiciary. Although set in nineteenth century, and the process of removal a judge has moved from the executive to the judiciary, the story of Willis in Port Phillip during the period 1841-1843 still has currency today. In this way the thesis provides commentary on 'what the law is' with

[16] A Mussen C Stebbings (ed) 'Introduction' *Making Legal History: Approaches and Methodologies* (Cambridge University Press, Cambridge 2012) 5.

respect to judicial behaviour and 'how the law operates' when a common law judge misbehaves. The former is consistent with how legal history has been explored and the latter is how legal history is emerging.[17]

Polden identified the need to be critical of existing commentaries on nineteenth century judges.[18] His comments are based upon the range and type of resources that have been used by legal historians. This thesis, through a forensic examination of the Privy Council archives with regard to the matters Willis raised in his appeal, addresses Polden's concerns. The thesis follows in Willis's footsteps and considers how he sought to respond each complaint or issue.[19]

Volume 38 of *Printed Cases in Indian & Colonial Appeals* in the Privy Council archives is devoted entirely to *Willis v Gipps* (1846) 5 PC Moo 379 and comprises of almost 300 pages.[20] The first 13 pages is the stated case of Willis appealing his removal from judicial office at Port Phillip. In addition, there is a substantial appendix and supplementary appendix containing supporting materials. Volume 38 also includes the 22 page stated case of Governor Sir George Gipps as the respondent, together with a

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[17] Mussen above n 16, 5. See also D Hay 'Archival Research in the History of Law: A User's Perspective' 24 (Summer 1987) *Archivaria* 36 Available at SSRN < http://ssrn.com/abstract=1945971 > (visited 1 August 2012).

[18] P Polden 'Judging Judges: the Reputations of Nineteenth-century Judges and their Sources' in A Musson C Stebbing (ed) *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012 Cambridge) 53-71, 71. See pages 26-27 of this thesis.

[19] H Lee *To Kill a Mockingbird* (Harper Collins, New York 2010) 33: Atticus' lesson to Scout that 'you never really understand a person until you consider things from his point of view — until you climb around in his skin and walk around in it'.

[20] 'Before the Judicial Committee of Her Majesty's Most Honorable Privy Council, John Walpole Willis against Sir George Gipps, On Appeal against an Order of Amotion from the Office of Judge of the Supreme Court of New South Wales' Volume 38 *Printed Cases in Indian & Colonial Appeals* kept in the archives of the Privy Council. See also B Kercher 'Unreported Privy Council appeals from the Australian Colonies before 1850' (2003) 77 *Australian Law Journal* 309. In January 2005 the Privy Council archives were visited.

significant appendix of relevant documents. By examining the archives, how Willis saw the complaints or charges against him can be identified and how he sought to justify his actions can be documented. The decision by the Privy Council can then be placed in context.

Literature Review

- Colonial Judges in the British Empire

Girard has noted that judicial biography enables not just the professional careers of judges to be identified, it allows for their workings with legal principles to be documented and their interactions with society to be observed. He referred to this as 'the windows on the age' approach.[21] Literature on the lives and times British colonial judges has steadily increased. The majority of this material is drawn from Canada. It covers a longer period in history and is more diverse because of the English-French context to that of Australia. Cahill and Phillips have chartered the history of the Supreme Court of Nova Scotia from its establishment in 1754 through to the Canadian Confederation.[22] McLaren in his work on Robert Thorpe has examined legal culture in Canada during the early 1800s.[23] Kolish and Lambert have investigated the attempted impeachment of Chief Justice Jonathan Sewell and Chief Justice James Monk during the period 1814-1815 in Canada.[24] Particular judicial officers in the Australian colonies

[21] P Girard 'Judging Lives: Judicial Biography from Hale to Holmes' (2003) 7 *Australian Journal of Legal History* 87.

[22] B Cahill, J Phillips 'The Supreme Court of Nova Scotia: Origins to Confederation' in P Girard, J Phillips, B Cahill (ed) *The Supreme Court of Nova Scotia1754-2004: From Imperial Bastion to Provincial Oracle* (University of Toronto Press for Osgoode Society for Canadian Legal History, Toronto 2004) 53-139.

[23] J McLaren 'The King, the People, the Law … and the Constitution: Justice Robert Thorpe and the Roots of the Irish Whig Ideology in Early Upper Canada' *People and Place: Historical Influences on Legal Culture* in J Swainger C Backhouse (ed) (UBC Press, Vancouver 2003) 11-24. See also B Brereton *Law, Justice and Empire: The Colonial Career of John Gorrie 1829-1892* (University of the West Indies Press, 1997 Jamaica).

[24] E Kolish, J Lambert 'The Attempted Impeachment of the Lower Canadian Chief Justices 1814-1815' in F Greenwood B Wright *Canadian State Trials* Vol 1 *Law, Politics, and Security Measures 1608-1837*

have been the focus of legal historians. Bennett has researched the *Lives of the Australian Chief Justices*.[25] Currey has examined Judge Advocate Ellis Bent and Judge Jeffery Hart Bent.[26] Howell, Keon-Cohen and Petrow have each considered Algernon Sidney Montagu in Van Dieman's Land.[27] Castles and Harris, and later Williams have focused on the judicial career of Benjamin Boothby in South Australia.[28] The Australian writing is responding to local circumstances, which are from a later historical timeframe and a different political setting to that of Canada. Several theses have also examined the judiciary in the Australian colonies.[29]

The first 'comparative examination of accountability and tenure of colonial judges within the British Imperial system' during the nineteenth century has recently been

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(University of Toronto Press for Osgoode Society for Canadian Legal History, Toronto 1996) 450-486. See also P Oliver 'Power, Politics and the Law: The Place of the Judiciary in the Historiography of Upper Canada' in B Baker, J Phillips (ed) *Essays in the History of Canadian Law* vol 8, *In Honour of RCB Risk* (University of Toronto Press for Osgoode Society for Canadian Legal History, Toronto 1999) 443-468.

[25] JM Bennett *Lives of the Australian Chief Justices: Sir Francis Forbes First Chief Justice of New South Wales 1823-1837* (Federation Press, Annandale 2001), JM Bennett *Lives of the Australian Chief Justices: Sir James Dowling: Second Chief Justice of New South Wales 1837-1844* (Federation Press, Annandale 2001), JM Bennett *Lives of the Australian Chief Justices: Sir William a'Beckett, First Chief Justice of Victoria 1852-1857* (Federation Press, Annandale 2001) and JM Bennett *Lives of the Australian Chief Justices: Sir John Pedder First Chief Justice of Tasmania 1824-1854* (Federation Press, Annandale 2003). See also JM Bennett *Colonial Law Lords: The Judiciary and the Beginning of Responsible Government in New South Wales* (Federation Press, Annandale 2006).

[26] CH Currey *The Brothers Bent: Judge Advocate Ellis Bent and Judge Jeffery Hart Bent* (Angus and Roberston, Sydney 1968).

[27] PA Howell 'The Van Dieman's Land Judge Storm' *University of Tasmania Law Review* 1966 (2) 253-269. BA Keon-Cohen 'Mad-Judge Montagu: A Misnomer?' 1975 *Monash University Law Review* 50-81. S Petrow 'Moving in an "Eccentric Orbit": The Independence of Judge Algernon Sidney Montagu in Van Dieman's Land, 1837-47' *The Grand Experiment: Law and Settler Culture in British Settler Society* H Foster, BL Berger AR Buck (ed) (UBC Press for the Osgoode Society of Canadian Legal History, 2008 Vancouver) 156-175.

[28] AC Castles, MC Harris *Lawmakers and Wayward Whigs: Government and Law in South Australia, 1836-1986* (Wakefield Press, Adelaide 1987). J Williams 'Justice Boothby: A Disaster That Happened', in G Winterton (ed) *State Constitutional Landmarks* (Federation Press, Sydney 2006) 21-55.

[29] PA Howell *The Boothby Case* Thesis (BA (Hons)) University of Tasmania 1965. J Raven *John Walpole Willis in Port Phillip or 'I Never Aspired to be a Popular Judge'* Thesis (BA (Hons)) Australian National University 1972.

completed by McLaren.[30] In this masterful study, colonial judges who had been dismissed from Australia, Canada, the Caribbean and Sierra Leone are examined. McLaren's work provides,

> insights into the administration of justice in the higher courts of the colonies; imperial and local expectations about judicial loyalty to the mission of colonial governance and the role of the judge within the colonial system; the systems for disciplining recalcitrant colonial judges; and the perils associated with a colonial judge speaking out in opposition to a colonial executive or legislature on a matter of law or politics or both. More broadly, these tales speak to competing interpretations of the rule of law in imperial, colonial, and judicial circles in the British Empire during that century.[31]

Amongst many of the important matters examined, the fragile nature of the colonial state is identified. McLaren in this context noted that 'it was perhaps inevitable' that the executive had control of the removal of misbehaving judges rather than parliament.[32] His study is wonderfully rich in that he also investigates how these judges were appointed and why, if they had misbehaved in one colony, they were frequently reappointed to judicial office in another part of the empire.[33] McLaren submits that generally reappointment was influenced by issues such as judge's experience in colonial matters, the small size of the pool from which to select applicants for particular colonies, the Colonial Office could have blamed local conditions and influential patrons may have been very persuasive.[34] While this thesis has been informed by the work of McLaren

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[30] J McLaren *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial 1800-1900* (University of Toronto Press, Toronto 2011) 5. See also J McLaren "Men of Principle or Judicial Ratbags? The Trials and Tribulations of Maverick Colonial Judges in the 19 Century" or "A Funny Way to Run and Empire" (2009) 27 *Windsor Review of Legal and Social Issues* 145 and J McLaren 'The Judicial Office…Bowing to No Power But the Supremacy of the Law: Judges and the Rule of Law in Colonial Australia and Canada, 1788-1840' (2003) 7(2) *Australian Journal of Legal History* 12.

[31] Ibid 4.

[32] McLaren above n 30, 278.

[33] McLaren above n 30, 291-5.

[34] McLaren above n 30, 291-5.

and others on colonial judges in the British Empire, its focus is more on the distinction between a good and bad judge.

Structure

Part A contains the 11 complaints that Willis identified from the Minutes of the Governor and Executive Council meetings for 13 and 15 June 1843.

> The first complaint concerned the Sentence on Mr Arden. In this matter Willis had used his judicial power to achieve personal goals. He had imprisoned the editor of the *Port Phillip Gazette* newspaper for publishing critical comments about his behaviour.
>
> The second complaint involved the allegation that he had made disparaging comments about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's will. Judges disagreeing with one another is common, but Willis publicly expressed a lack of confidence in his colleagues regarding the handling of Equity cases.
>
> The third complaint is the cases of Mr Carrington and Mr Arden. Here Willis's behaviour ultimately led to the first appeal from the court in Port Phillip to the Supreme Court of New South Wales at Sydney.
>
> The fourth complaint concerned Mr Curr who was a prominent merchant in Port Phillip. In a letter that was later published in the local newspapers, he documented that Willis was biased and had attempted to influence political

decisions.

The fifth complaint was that Willis had repeatedly in public complained about the Sydney Judges so as to damage their standing in the community.

The sixth complaint was from Mr Roger Therry, the Attorney General for New South Wales in that Willis had manipulated events so as to embarrass government officials.

Mr Sydney Stephen's Case is the seventh compliant. In this matter Willis had wrongly refused to admit him as a barrister of the Supreme Court of New South Wales in the District of Port Phillip.

The eighth complaint was in relation Mr Smith and how an officer of the court should behave. Remarkably Willis is able to justify his actions and defeat the charge of misbehaviour but this is the only occasion in which this occurs.

The ninth complaint is that Melbourne and the whole district of Port Phillip had been in a state of excitement or want of confidence in the administration of justice.

The tenth complaint is that Willis frequently used the guise of addressing juries to express opinions that were not relevant to the matter presently before the court.

The eleventh complaint was that he had sought to influence one of the Port Phillip newspapers into publishing favorable stories about his actions.

Part B discusses the 7 alleged 'errors of law' or 'attempts to produce mischief' that are not in the Minutes of the Executive Council but are contained in a letter from Governor Gipps to Lord Stanley dated 19 July 1843.

Numerous and insulting attacks on colleagues is the first charge. The issue is not that government officers are indulging in financial speculations but they degree to which it was occurring.

The second charge is that Willis declared Aborigines are not subject to British law. This occurred in *R v Bonjon*.

The sentence on Mr Arden is listed as the third charge although no further material or discussion takes place from that which occurred in Part A.

The fourth charge is that Willis denied the Crown the right to dispose of Land in the colonies. Willis had given advice with respect to how the proceeds of sale should be handled. This was technically correct but contrary to what the local authorities wanted to do.

Declaring the incorporation of the town of Melbourne to be invalid is the fifth charge.

The sixth charge was the opinion that all office bearers in government had not taken the appropriate oath or affirmation.

The final or seventh charge was the error in sentencing Manuel to death as an escaped convict when he had only absconded.

By investigating all of these matters, society's expectations on the judiciary are identified. A good common law judge resolves disputes and maintains confidence in the system of government.

The Biographical and Historical Context

- John Walpole Willis

John Walpole Willis was born on 4 January 1793 in Ireland and his father was a military officer.[35] He studied law and was called to the bar. Willis specialised in Equity and attracted attention having published three books in the subject area.[36] In 1824 Willis married Mary Isabella Bowes-Lyon and it was through this marriage that he gained significant social standing. The Colonial Office in 1825 was giving consideration to establishing equitable jurisdiction in Upper Canada (now Ontario) and a couple of years later he was appointed as a Judge to the Court of Kings Bench in the colony.

[35] JV Barry 'Willis, John Walpole (1793–1877)' *Australian Dictionary of Biography*, National Centre of Biography, Australian National University < http://adb.anu.edu.au/biography/willis-john-walpole-2797 > (visited 1 August 2012). See also Raven above n 29 and J McLaren above n 30, 74-87 and 170-189.

[36] JW Willis *A Digest of the Rules and Practice as to Interrogatories for the Examination of Witnesses, in Courts of Equity and Common law, With Precedents* (R Pheney, London 1816), *Pleadings in Equity: Illustrative of Lord Redesdale's Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (London1820-1), and *A Practical Treatise on the Duties and Responsibilities of Trustees* (London 1827).

He arrived in Upper Canada on 11 September 1827 and it was not long before he started to quarrel with his colleagues.[37] Commenting on Willis's conduct Kingsford has noted, '[h]is opinions were expressed with great positiveness. On the bench, he differed unhesitatingly with his brother judges, and not always in the most courteous manner'.[38] He not only argued with his colleagues, he questioned the legitimacy of the court when the Chief Justice was absent and became embroiled in local politics. The delay in establishing the Chancery Court exacerbated the situation. Within nine months of arriving in the colony, he was amoved by Lieutenant Governor Sir Peregrine Maitland on 27 June 1828.[39] According to Kinsgford part of the problem was that Willis, as '[a] stranger to provincial life, he thought everything that did not chime with his preconceived ideas of English habits to be wrong'.[40] This attitude dominated his entire career and is of assistance when seeking to explain his behaviour.

Leaving Mary, his wife in Upper Canada, Willis quickly returned to London but was unsuccessful in his appeal to the Privy Council.[41] It was about this time that his marriage to Mary collapsed and she had become involved with a Lieutenant Barnard. In

[37] McLaren above n 30, 75.

[38] W Kingsford *The History of Canada* (Trubneer, London 1888-98) Vol X 261.

[39] Volume 13 *Papers Relating to the Removal of the Honourable John Walpole Willis from the Office of One of Her Majesty's Judges of the Court of King's Bench of Upper Canada 1829* (kept in the office of the Judicial Committee of the Privy Council). See also A Wilson 'Willis, John Walpole' in J English (ed) *Dictionary of Canadian Biography Online* < http://www.biographi.ca/009004-119.01-e.php?id_nbr=5321 > (visited 1 August 2012).

[40] Kingsford above n 38, 276. See also Raven above n 29, 4.

[41] Volume 13 *Papers Relating to the Removal of the Honourable John Walpole Willis from the Office of One of Her Majesty's Judges of the Court of King's Bench of Upper Canada 1829* (kept in the office of the Judicial Committee of the Privy Council). See also J McLaren above n 30, 74-87.

February 1832 he took the now Captain Barnard to court.[42] It was not until June 1833 that Willis obtained a private act of parliament that was necessary for divorce.[43]

Willis was not put off by the Privy Council's decision and continued to complain to the authorities that he had not been given an opportunity to be heard.[44] With the change of government, a new minister for the Colonies was appointed. After two years in England, Willis was offered the position of Vice-President of the Court of Civil and Criminal Justice of British Guiana, and in this role Willis spent a considerable amount of time working on anti-slave legislation.[45] Prior to his arrival according to Raven, the colonists had largely ignored the legislation, and so after a short period of enforcing the payment of compensation to former slaves, Willis became increasingly unpopular with large sections of the population.[46] Due to ill health, which may have been malaria, Willis took leave and returned to England.[47]

When on leave back in London, Willis married his second wife, Ann Susanna Kent.[48] On the eve of returning to British Guiana, he was offered the position of *puisne* judge of the Supreme Court of New South Wales at Sydney. He took up this post on 3 November

[42] *Willis v Barnard* 5 C & P 342, 8 Bing 376. *The Times* 19 April 1832 p 4.

[43] *The Times* 19 June 1833 p 6.

[44] See McLaren above n 30, 170-171.

[45] 'Letter: Willis to Gipps 30 March 1839' F Watson (ed) *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Government Printer, Sydney 1914-1925) Series 1 Vol XXX 118.

[46] Raven above n 29, 6.

[47] BA Keon-Cohen 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703, 708.

[48] McLaren above n 30, 172.

1837.[49] Like his experience in Upper Canada, it was not long before Willis was quarrelling with many people.

In July 1838 when addressing a public meeting, he accused Roman Catholics of 'Idolatrous Worship'.[50] This upset Bishop Polding who expressed the opinion, 'You must move heaven and earth in this business, spare no expense, no trouble; oust Willis'.[51] Governor Gipps noted that Willis's outburst had caused 'considerable sensation in the Colony' and lamented that a Judge of the Supreme Court should, on an occasion when it was so entirely uncalled for, have given utterance to opinions offensive to a large body of the People of this Colony'.[52] This remark was one of the first for Willis to be removed from office or at least from Sydney.

Bennett when writing about the Lives of the Australian Chief Justices has documented Willis's activities when he was on the bench in Sydney, and in particular Willis's relationship with Dowling CJ at that time.[53] Willis's relationship with the Chief Justice, and the rest of the Sydney bench was stormy. In particular, Willis considered Dowling's practice of keeping aboriginal convicts as the equivalent of slavery. In *Walker v Hughes*

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[49] McLaren above n 30, 173.

[50] 'Letter: Gipps to Glenelg 17 September 1838' F Watson (ed) *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Government Printer, Sydney 1914-1925) Series 1 Vol IXX 587. See also BA Keon-Cohen 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703.

[51] M Roe *Quest for Authority in Eastern Australia* (Melbourne University Press, Parkville 1965) 119.

[52] 'Letter: Gipps to Glenelg 17 September 1838' F Watson (ed) *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Government Printer, Sydney 1914-1925) Series 1 Vol IXX 587.

[53] JM Bennett *Lives of the Australian Chief Justices: Sir James Dowling, Second Chief Justice of New South Wales 1837-1844* (Federation Press, Annandale 2001) 111-131.

when the matter before the court concerned the transfer of land, Willis used the opportunity to publicly attack Chief Justice Dowling.[54]

Another cause of friction between them was when Chief Justice Dowling appointed himself as the Equity Judge, given the background of Willis. Currey has acknowledged Willis's substantial contribution to Equity when he was on the bench in Sydney.[55] Bennett has also detailed Willis's role with respect such matters.[56] Bennett noted that,

> [t]he greatest stimulus to the growth of equity business was provided by the accession to the colonial bench of Mr. Justice John Walpole Willis… Willis did, however, make a constructive contribution to the law. He was mainly responsible for drafting the rules of Equity procedure in the Supreme Court (called the Standing Rules) in 1838. As measure of their value it may be noted that they were in use for over twenty years.[57]

It may be because of Willis's assumed authority on Equity, that Chief Justice Dowling considered Willis to be 'a fidgety, restless, self-opinionated fellow and it requires a good deal of forbearance and caution on my part to go on with him. Some people have the opinion that he is cracked'.[58] When the decision to establish the Supreme Court in Port Phillip arose, Chief Justice Dowling selected Willis as the first resident Supreme Court Judge. He noted 'Willis is going to Port Phillip as resident Judge, where I pray he may

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[54] *Walker v Hughes* [1839] NSWSupC 71 Supreme Court of New South Wales, Sydney. Before Dowling CJ and Willis J 2 March 1839 Source: *Australian 5* March 1839. See also Decisions of the Superior Court of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1839/walker_v_hughes/ > (visited 1 August 2012).

[55] CH Currey *Chapters on the Legal History of NSW 1788-1863* Thesis (LLD) University of Sydney 1929, 187, 188 and 240-242.

[56] JM Bennett *The Separation of Jurisdictions in the Supreme Court of NSW 1824-1900* Thesis (LLM) University of Sydney 1963, Equity Jurisdiction 13-40.

[57] JM Bennett *Equity Law in Colonial New South Wales 1788-1902* Research Project 59/20c University of Sydney 1962, Part 1 'The Equity Division of the Supreme Court', Section 7 'The Equity Revival Under Sir James Dowling' 34.

[58] JA Dowling 'The Judiciary' (1907) 2 (5) *Journal and Proceedings (Australian Historical Society)* 97, 98.

stick, and I pray I may never see his face again'.[59] Willis was dispatched to Port Phillip, not so much to address the needs of Port Phillip as to provide relief for those in Sydney.

There is a divergence of opinions as to how Willis in Port Phillip during the period 1841-1843 should be remembered.[60] Mullaly in researching *Crime in the Port Phillip District 1835-1851* noted that there 'seems to be little doubt Willis was a 'good' lawyer'.[61] A similarly positive appraisal of Willis has been made by Keon-Cohen on the basis that Willis 'possessed a brilliant, scholarly mind, sound legal knowledge, and was imbibed with the highest ideals of a judge's role'.[62] Some of Willis's contemporaries such as Redmond Barry regarded Willis as 'an able lawyer, honest and fearless, and alert to the poor against the wealthy', and Garryowen thought that he 'usually leaned toward the poor as against the wealthy and it was his pleasure to hawk at high rather than low game'.[63] Sullivan does not share this view and has noted that '[h]e may have given the laboring population some hope that the law was not weighted against them, but the rich, powerful and propertied were never seriously threatened'.[64] Other appraisals are more critical of the role Willis played in Port Phillip.

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[59] Dowling above n 58, 98.

[60] See HF Behan *Mr Justice JW Willis: With particular reference to his period as First Resident Judge in Port Phillip 1841-1843* (Harold Frederick Behan, Glen Iris 1979). This self-published book does not contain references.

[61] PR Mullaly *Crime in the Port Phillip District 1835-1851* (Hybrid Publishers, Melbourne 2008) 23.

[62] Keon-Cohen above n 50, 703.

[63] Barry and Garryowen quoted in AGL Shaw *A History of the Port Phillip District: Victoria Before Separation* (Melbourne University Press, Melbourne 2003) 181. See also M Cannon *Old Melbourne Town Before the Gold* Rush (Loch Haven Books, Victoria 1991) 63-4, 84-5 and 325.

[64] M Sullivan *Men and Women of Port* Phillip (Hale and Iremonger, Sydney 1985) 32.

The *Australian Dictionary of Biography* regards Willis as 'an able lawyer, honest and fearless' but he 'could not work in harmony with the executive or with his colleagues… His temperament and outlook led inevitably to clashes with powerful sections which in his view were intent only on furthering their own interests'.[65] Furthermore the *Australian Dictionary of Biography* noted that 'it must in fairness be said that often his censures were justified'.[66] In the same vein, but in more detail de Serville regards Willis as a complex character,

> Willis was a parcel of antithetical qualities. Highly sensitive of the honour of law and the dignity of the Bench, ever ready to commit offenders for contempt of court, his own violence of temper and insensate rages made a mockery of the legal proceedings. Willis expected behaviour of the highest principles and demanded a scrupulous attachment to the truth, yet he himself could be evasive and lacking in candour… Willis expected to be treated with courtesy but he could be abominably rude… He expected the executive to defend his office, and at the same time attacked many civil servants… with little justification. He could see only truth and justice on his side; lies, distortion and corrupt practices in the ranks of his opposition… Willis labeled the opposition as a conspiracy, determined to overthrow him and thwart his crusade against corruption in high places. He saw himself as a martyr, losing health of body and peace of mind in the cause of justice.[67]

The consensus is that Willis was a disagreeable person who never adapted to life in the colony. All of the commentaries focus attention on particular personal qualities that he lacked. The thesis is distinguished from this literature because it assesses Willis's conduct in Port Phillip with respect to society's expectations of a good common law judge.

Polden has noted that caution needs to be exercised when building up a picture of nineteenth century judges given that 'there is a considerable range of material… but

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[65] Barry above n 35.

[66] Barry above n 35.

[67] P de Serville *Port Phillip Gentlemen* (Oxford University Press, Melbourne 1980) 150-151.

most of it is scattered, elusive and fragmentary'.[68] This is a problem for judicial biography and he indicates that as a consequence there is a tendency to rely upon the *Oxford Dictionary of National Biography* and other similar resources.[69] Polden stresses the point that the value of these works is dependent upon what materials the authors have used. He acknowledges that such resources are useful and 'thus helpfully expand our knowledge of the attitudes, abilities and qualities of judges in the nineteenth century, their uncritical use can produce a distorted picture of legal lives'.[70]

This thesis embraces the call made by Polden with regard to the critical use of materials when judging a common law judge. It addresses the problems raised by Polden by retrieving the materials submitted by Willis to the Privy Council for his appeal. In this material, Willis himself identified the charges or complaints. It is also the means by which Willis seeks to justify his behaviour. This thesis can be further distinguished from the available literature on this basis.

- Port Phillip

Early British explorers arriving by sea, largely overlooked Port Phillip and the surrounding area because 'did not appear particularly attractive' and was considered not 'particularly fertile'.[71] The first attempt at settlement in 1804 was a failure and it was not until 1826, largely motivated with the fear that that the French would invade

[68] Polden anove n 18, 71.

[69] Oxford Dictionary of National Biography < http://www.oxforddnb.com/ > (visited 1 August 2012). See also the *Australian Dictionary of Biography, National Centre of Biography*, Australian National University < http://adb.anu.edu.au/ > (visited 1 August 2012).

[70] Polden above n 18, 71.

[71] Shaw above n 63, 75.

that another effort made but the settlement was later abandoned in 1828.[72] It was not until 1834 when commercial traders from Van Dieman's Land crossed Bass Strait in pursuit of new land and resources, that the Port Phillip was firmly established.[73] Boyce has noted that this is a distinguishing feature as the other Australian colonies had been founded 'by government sanctioned settlement parties sent from London or Sydney'.[74] This is not to say Port Phillip like other colonies did not have convicts, former convicts, free settlers and Aborigines, it is that commercial trading interests dominated the first few years of Port Phillip.

Port Phillip grew rapidly. The fast changing conditions are best assessed with reference what had occurred at Sydney. Within five years of establishment, the population of Port Phillip in 1841 had reached 10,000 people, with three newspapers and three banks.[75] Sydney by contrast with Port Phillip, had achieved the same population after twenty-two years, had only one newspaper after thirteen years and one bank after twenty-nine years.[76] Consequently Port Phillip may be distinguished from Sydney by reference to strong commercial interests and enormous growth in a very short period of time.

After 1841 Port Phillip suffered under economic depression until 1844. Many businesses went bankrupt and the better-educated or wealthier members of society used their knowledge of the law to limit their liabilities as Bridges has noted, '[t]he Madness of land dealing was flooding the Insolvency Court, which was to every rascal a

[72] AC Castles *An Australian Legal History* (Law Book Company, Sydney 1982) 229.

[73] J Boyce *1835: The Founding of Melbourne and the Conquest of Australia* (Black, Collingwood 2011) 17.

[74] Ibid.

[75] Shaw above n 63, 75.

[76] Ibid.

'City of Refuge' from his creditors'.[77] It was the smaller traders and businessmen who suffered the most. Garryowen described the financial shambles in the following manner,

> …most of the merchants and settlers of the time had got their affairs into such labyrinths of intricacy and roguery that it became almost an impossibility for any Judge, not gifted with the patience of a Job, to wade through the tangled mazes of chicanery, sharp practice and swindling…[78]

The Colonial Legislature of New South Wales had passed legislation to enable a Court of Quarter Sessions and a Court of Requests to be established by 1840 but all other more serious judicial matters had to be sent to Sydney.[79] This meant that it took almost a month before the necessary documents arrived back in Port Phillip so 'debtors [had] plenty of time to make arrangements to leave the colony' and avoid proceedings.[80] Effectively Port Phillip was in a state of chaos. In response to the difficulties presented by distance and the growing sophistication of legal matters in Port Phillip, further legislation was enabled to permit the Governor to appoint one of the judges from the Supreme Court to the District of Port Phillip.[81] Willis was appointed as the first Resident Judge and arrived in Port Phillip 9 March 1841.[82] It was not long before Willis's behaviour had attracted attention. Rizzetti has noted the precarious financial state of the affairs in light of the 1840s depression with respect to Willis's conduct on the bench.

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[77] R Bridge *One Hundred Years – The Romance of the Victorian People* (Herald and Weekly Times, Melbourne 1934) 222 quoted in Raven above n 29, 11.

[78] Edmund Finn *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal / By* 'Garryowen' (Melbourne, Fergusson and Mitchell 1888) 67 quoted in Raven above n 29, 12.

[79] Castles above n 72, 236-237. See also 'An Act to provide for Trial by Jury at the Courts of Quarter Sessions to be held at Melbourne and Port Macquarie' [1838] 2 Vic No 5 (*Courts of Quarter Sessions* (1838) and 'An Act to establish Courts of Requests at the Towns of Melbourne and Port Macquarie in the Colony of New South Wales' [1839] 3 Vic No 6 (*Court of Requests* Act (1839).

[80] *Port Phillip Patriot and Melbourne Advertiser* 9 January 1840 quoted in Castles above n 72, 237.

[81] 'An Act for the more effectual administration of Justice in New South Wales and its Dependencies' [1840] 4 Vict No 22 (*Administration of Justice Act* 1840) Section 4.

[82] Barry above n 35.

Since Willis was determined to find the cause for the economic depression and linked commercial speculation with local officials, this action according to Rizzetti was a catalyst in Willis's amoval.[83]

McLaren has noted that the power of the newspaper media in Port Phillip was pervasive.[84] With three newspapers publishing on alternate days, there was a continuous stream of commentary including court transcripts. The *Port Phillip* Gazette was founded in 1838 and was the first licensed newspaper.[85] Mr George Arden, the editor of the newspaper, consistently quarreled with Willis during the period 1841-1843.[86] In Willis's appeal to the Privy Council, Mr George Arden features prominently throughout. In 1839 the *Port Phillip Patriot* was established with Mr John Pascoe Fawkner as its editor but later, William Kerr took over the role.[87] The other newspaper was the *Port Phillip Herald* and was founded in 1840 by Mr William Dutton and Mr George Cavenagh. De Serville has briefly considered Willis as part of the depression in Port Phillip during 1842-1844 together with the role of newspaper media.[88] Sullivan also has noted the influence of newspapers in Port Phillip society and Willis's interaction with newspaper editors.[89] Adding to the economic turmoil operating in Port Phillip, all three of the Port Phillip newspapers, '… not only espoused the cause of separation of the

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[83] J Rizzetti 'Sifting to the Bottom of Financial Impropriety: Judge Willis and Insolvency in Port Phillip 1841-3' (2009) 2 *Journal of Historical and European Studies* 97.

[84] McLaren above n 30, 286-287.

[85] de Serville above n 67, 19-20.

[86] PL Brown 'Arden, George (1820–1854)' *Australian Dictionary of Biography,* National Centre of Biography, Australian National University < http://adb.anu.edu.au/biography/arden-george-1714/ > (Visited 1 August 2012).

[87] de Serville above n 67, 21.

[88] Ibid 150-154.

[89] Sullivan above n 64, 72-77.

Port Phillip District from New South Wales, but also began to agitate for it to come about'.[90] This was based on the perception that the government of New South Wales was neglecting Port Phillip.

On 14 July 1843 Willis boarded the ship, the *Glenbervie* together with his wife and children bound for London.[91] In the weeks leading up to his departure, Port Phillip society had been in state of disorder. Several public meetings had been held, and numerous petitions signed. Five days after being amoved, a large public meeting was called to show public support for Willis.[92] In addition Mr Condell the recently elected Mayor, organized an extensive list of names to be published in the *Port Phillip Patriot and Melbourne Advertiser* of ordinary people to express their support of Willis.[93] It was also during this period that an address was presented to Governor Gipps, in which almost 700 people expressed their gratitude for Willis being removed. It was signed by

> 2 members of the Legislative Council; 15 magistrates; 73 landholders, stockholders and retired officers; 9 merchants; 3 attorneys; 10 physicians and surgeons; 61 shopkeepers, brokers and other respectable persons; 527 householders, artificers and tradesmen, labourers &c.[94]

Willis's amoval divided Port Phillip society. There were people who wanted him to stay, and others who could not wait for him to leave. This state of upheaval was in keeping with the history of Port Phillip. Willis's interaction with many different members of

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[90] E Morrison *Engines of Influence: Newspapers of Colonial Victoria 1840-1890* (Melbourne University Press, Melbourne 2005) 57.

[91] Raven above n 29, 71.

[92] 'The Forthcoming Public Meeting 27 June 1843' Source: *Port Phillip Patriot and Melbourne Advertiser* 26 June 1843. See also 'The Public Meeting Today 29 June 1843' Source: *Port Phillip Patriot and Melbourne Advertiser* 29 June 1843.

[93] 'To the Honorable and Worshipful – Mayor of Melbourne 24 June 1843' Source: *Port Phillip Patriot and Melbourne Advertiser* 29 June 1843.

[94] *The Case for the Respondent* 21.

colonial society is discussed later in the thesis.[95] It was not so much Willis's personality flaws that led him to be amoved, rather it was that he failed to satisfy society's expectations as a good common law judge.

The Decision of the Privy Council in *Willis v Gipps* (1846) 5 PC Moo 379

The Judicial Committee of the Privy Council did not deliver a judgment, but made a report consisting of 14 pages, which was subsequently confirmed by Her Majesty, Queen Victoria.[96] The court noted that the Governor had the power to remove Willis, but that he should have been given an opportunity to respond to the complaints. When Willis was amoved from Upper Canada, the same issues arose, as it was a breach of procedural fairness. The Privy Council with regards to Willis's amoval from Port Phillip, focused their attention on discussing legislation and no particular complaints were identified. In concluding, they stated 'in this case, there were sufficient grounds for the amotion of Mr Willis'.[97] Willis was in Port Phillip for less than two and a half years, yet in that time he managed to lose the confidence of Governor Gipps and the Executive Council. Understanding how this was achieved, since he did not do anything unlawful, can only occur by examining the archives of the Privy Council. Willis did not satisfy society's expectations of how a judge should behave.

[95] Part A of the thesis discusses each of these eleven 'Complaints Before the Governor and Executive Council Minutes of the 13 and 15 June 1843'. Part B of the thesis discusses each of these seven 'Alleged "Errors in Law" or "Attempts to produce Mischief" not in the Minutes of the Governor and Executive Council but contained in a letter from Governor Gipps to Lord Stanley, Secretary of State for the Colonies 19 July 1843'.

[96] *Willis v Gipps* (1846) 5 PC Moo 379, 392. The Judicial Committee comprised of the following members: The Lord President (the Duke of Buccleuch), the Lord Chancellor [Lord Lyndhurst], Lord Brougham, Chief Justice Tindal, Mr Baron Parke, the Right Hon. T Pemberton, and the Right Hon. W.E. Gladstone.

[97] Ibid.

- The Case on Behalf of the Appellant, Mr Willis

Willis in his appeal, sought to establish two matters.[98] First, that there was no power in the Governor and Executive Council to remove a Judge of the Supreme Court of New South Wales. The basis for this submission was that Burke's Act did not apply, as there had been

> a subsequent Act of Parliament, which expressly vests the power of appointment and removal in the Crown, and gives to the Governor no other power other than to appoint a substitute in case of absence, resignation, death or incapacity to act, of the Judge, until the return of such Judge to the execution of his duties, or until a successor be appointed by the Crown.[99]

The Imperial Act referred to by Willis, provided for the administration of justice in New South Wales and gave power to His Majesty to establish the Supreme Court. The second matter concerned procedure. Willis submitted that prior to amoval, the accused person should have been given an opportunity to know that nature of the complaints and be afforded an opportunity to be heard. Since his amoval from Port Phillip 'proceeded without the observance of the first rule of justice', Willis maintained that decision was 'wholly void'.[100] In support of this idea, he referred to a statement by Governor Gipps who admitted in a letter to Lord Stanley, the Secretary for the Colonies, that

> If Mr Willis means by this that he was not called before the Executive Council, or that Commissioners were not sent to Melbourne to inquire into his conduct, he is undoubtedly right; but your Lordship but your Lordship will not fail to remember that Melbourne is six hundred miles distant from Sydney, neither could a commission have been sent to Melbourne without the greatest public inconvenience. [101]

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[98] *The Case for the Appellant* 4.

[99] 'An Act to Prevent in Future any Patent Office to be exercised in any Plantation or Colony, now, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed to shall discharge the Duty thereof in Person, and behave well therein' [1782] 22 Geo III c 75 (Burke's Act). See also 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[100] *The Case for the Appellant* 4.

[101] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Appellant* XXV 76.

Despite being 'being unconscious of any mis-beviour', Willis then identified the charges brought against him by Governor Gipps and the Executive Council 'on which they [had] animadverted on his conduct'.[102] In examining the Minutes of the Governor and Executive Council for the 21 December 1842, and 16, 17 and 20 January 1843, Willis identified 11 complaints; namely,

1. Sentence on Mr Arden.
2. Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will.
3. The Cases of Mr Carrington and Mr Ebden.
4. Mr Curr's Case.
5. Complaints from the Judges at Sydney Subsequent to Mr Batman's Case.
6. The Attorney General's Complaint.
7. Mr Sydney Stephen's Case.
8. Mr Smith's Complaint.
9. State of Excitement in which the Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge.
10. The Delivery of Charges to Juries (which his Excellency is pleased to term harangues).
11. An Evasive, if not Untrue Statement Regarding a Loan of Money to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot* with a View of Influencing its Articles.[103]

The list is how Judge Willis perceived the complaints against him. He then proceeded to refute each of these charges individually. He considered,

> the conclusions formed by the Executive Council upon the … eleven Charges are

[102] *The Case for the Appellant* 5.

[103] These matters are discussed in Part A 'Complaints Before the Governor and Executive Council, Minutes of the 13 and 15 June 1843'.

> erroneous, and that they do not furnish any just ground for imputing to the Appellant misbehaviour in his office of Judge, though they evidence, as the Appellant submits, abundant anxiety on the part of His Honour the Superintendent to fix, and too great readiness on the of the Governor and Council to entertain accusations against him.[104]

Throughout his appeal, Willis never admitted that he might have done things differently even with the benefit of hindsight. He was absolutely sure, that he acted appropriately. Having convinced himself that he has done nothing wrong, and that his amotion from Port Phillip was not based on the charges brought before the Governor and Executive Council, he then highlighted a letter he received from La Trobe on 23 May 1843.[105]

The letter indicated that a number of inhabitants of Port Phillip had addressed a memorial to Governor Gipps, 'praying' for an inquiry into the judicial conduct of Willis. The memorialists noted,

> it is Mr Willis's practice to treat truth as a libel, and all observations reflecting on his own judicial conduct, as contempt of court. We find it dangerous to assemble in public meeting, to state the facts which have caused us to lose our confidence in the Resident Judge; unless under the immediate protection of the Executive.... But if it shall have appeared to you Excellency, after an experience of two years, that the office of sole Resident Judge, at a distance of six hundred miles from the seat of Government, opposed as we submit it is, to sound constitutional principle, and universal practice, has failed to work well, that your Excellency will take the earliest possible steps to procure the repeal of the law which established that office, substituting for it such mode of administering justice in this district, as will guard against the evils of the present system.[106]

A large proportion of the population had lost confidence in Judge Willis. The memorial had been sent to the Superintendent, so that it may be forwarded to the Governor.

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[104] *The Case for the Appellant* 9.

[105] 'Letter: La Trobe to Willis with copy of Memorial 23 May 1843' *Appendix to the Case on Behalf of the Appellant* XXI 64.

[106] Ibid.

Approximately 573 people from Port Phillip had signed.[107] In a letter of explanation from the memorialists, it was noted that the petition was

> signed by eighteen magistrates, by all the resident candidates for the representation of the borough and the district, in the new Legislative Council, by many government officers, Bankers, merchants, and landholders, and with reference to the title by which is seems Judge Willis's advocates wish him to be known "The Poor Man's Friend," by many mechanics and labourers.[108]

They further noted that Willis 'does not occupy the neutral position of a judge but of a partisan', and 'very grave charges' have been 'preferred against him by the highest functionaries in New South Wales, judicial as well as civil', that he has made numerous attempts to label those respectable members of the community charges of perjury when they have complained and that he 'has frequently indulged in expressions sweeping condemnation of the whole district'.[109] In closing they noted that 'the evils of which we complain have reached an intolerable height, producing a growing feeling that no man's character is safe from Judge Willis's calumnies, nor any man's person or properly from his vindictiveness'.[110] In short, they sought to have Judge Willis suspended.

La Trobe sent Willis a copy, but had removed the identity of the memorialists.[111] On 25 May 1843 Willis wrote to La Trobe denying he had 'ever treated truth as libel', refuted he had ever misbehaved and requested the names of the memorialists.[112] Willis also

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[107] 'Dispatch: La Trobe to Thomson 23 May 1843 Enclosure No. 2' *Appendix to the Case on Behalf of the Appellant* VIII 39.

[108] Ibid.

[109] 'Dispatch: La Trobe to Thomson 23 May 1843 Enclosure No. 2' *Appendix to the Case on Behalf of the Appellant* VIII 39-40.

[110] Ibid.

[111] 'Letter: La Trobe to Willis 23 May 1843 Enclosure No. 1' *Appendix to the Case on Behalf of the Appellant* VIII 40.

[112] 'Letter: Willis to La Trobe 25 May 1843' *Appendix to the Case on Behalf of the Appellant* XXII 65.

claimed that the memorial would not have occurred had it not been for the actions of the Colonial Secretary in distributing a letter from Lonsdale. La Trobe subsequently wrote to Lonsdale to inquire into the matter.[113] In response Lonsdale affirmed that the letter was published in the *Port Phillip Herald* newspaper on 22 April.[114] He also noted that indications of the memorial were contained in the *Port Phillip Herald* newspaper for the 18, 21 and 25 April.[115]

Reflecting upon the memorial, La Trobe when writing to the Colonial Secretary posed the rhetorical question 'if the existing arrangement of state of things consequent on being allowed to continue, can the Government be reasonably be expected to maintain itself in public confidence and respect?'.[116] Later in the same letter La Trobe noted

> … to justify the removal of Mr Justice Willis from the office he now holds, it were scarcely necessary to determine the merits of each and all charges brought against him. It appears to me that the most conclusive evidence for his unfitness for that peculiar and delicate duty which is here committed to him, could not fail to be adduced by any impartial person from his own acts, language and writing'.[117]

This view is reflected in the Minutes on 13 June 1843. On that occasion the Council considered that it was not necessary to provide an opportunity for Willis to explain his conduct prior to amotion '*because the grounds on which this decision is based are not*

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[113] 'Letter: La Trobe to Lonsdale 26 May 1843 Enclosure No. 3' *Appendix to the Case on Behalf of the Appellant* IX 41.

[114] 'Letter: Lonsdale to La Trobe 26 May 1843 Enclosure No. 4' *Appendix to the Case on Behalf of the Appellant* IX 42.

[115] Newspaper reports referred to Letter: Lonsdale to La Trobe 26 May 1843 Enclosure No. 4 *Appendix to the Case for the Appellant* 42 but not contained in the Appendix. See 'The Resident Judge' Source: *Port Phillip Herald* 18 April 1843, 'The Resident Judge' Source: *Port Phillip Herald* 21 April 1843 and 'The Resident Judge' Source: *Port Phillip Patriot and the Melbourne Advertiser* 24 April 1843.

[116] 'Letter: La Trobe to Colonial Secretary 29 May 1843 Enclosure A3 to Minute No. 10 of 1843' *Appendix to the Case on Behalf of the Appellant* X 43.

[117] Ibid 45.

such as to admit of either explanation or justification. They consist chiefly of acts which would be admitted by Mr Willis, although he might deny their tendency and effects.'[118] Furthermore the Council '*conceive, therefore that Mr Willis will have no just ground of complaint, that this case has been decided without affording him a hearing*.'[119] In his appeal, Willis noted that although the memorial '*praying for inquiry only'* was placed before the Executive Council together with the Mr La Trobe's letter,

> urging the Appellant's immediate removal … the Governor and Council forthwith proceeded, - not to *grant inquiry as prayed* by the Memorial, but at once to condemn the Appellant, *unheard and without inquiry* … to amotion from the office as a Judge, for misbehaviour in that office.[120]

Willis asserted in his appeal that had he been given an opportunity to address the complaints, he would have established that the people who were involved with the Memorial 'had justly either incurred, or stood in dread of, judicial censure; and that they had personal motives for seeking, not merely the removal of the judge; but also the abolition of his office, to which length the prayer of their memorial went'.[121] He also indicated, that Henry Fondell, the recently appointed Mayer of Melbourne, had expressed 'approval of and confidence in your Honor's administration of justice in the district'.[122] In order to further strengthen his point, Willis referred to several instances where significant numbers of the inhabitants of Port Phillip had expressed support. Amongst these five addresses is one from the Australia Felix Lodge of Odd Fellows, a further address that comprised of 1,425 signatures, another with the signatures of 300 settlers (stockholders and landed proprietors), an address from James Thomson with 79

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[118] *The Case for the Appellant* 36. Italics appear in the original document.

[119] Ibid. Italics appear in the original document.

[120] *The Case for the Appellant* 9. Italics appear in the original document.

[121] *The Case for the Appellant* 9. Italics appear in the original document.

[122] 'Letter: Fondell to Willis 14 March 1843' *Appendix to the Case on Behalf of the Appellant* XXIII 65.

signatures and a petition from William Kerr, Thomas Warrington and Gillion.[123] In all of these addresses little or no detail is provided about the occupation or position in society these people occupied.

Willis in his appeal then considered that even if, he had been given an opportunity to respond, he would have been unable to do so 'on the real grounds on which his amotion proceeded'.[124] On 27 June 1843 he wrote to Lord Stanley, Secretary for the Colonies seeking to be informed as to the specific cause for his amotion. He noted that

> On Saturday, the 24th instant, while engaged on the Bench in the discharge of my judicial duties, I was called into my private room, and there received, *without any previous notice, opportunity of defence, or explanation of any kind whatever*, a packet containing a letter from Mr CJ La Trobe, announcing "that in conformity with the provisions of the Act of Parliament 22 Geo. 3, c 75, I was amoved from the office, not only of Resident Judge of Port Phillip, but as a Judge of the Supreme Court of New South Wales," and forwarding to me an enclosed writ of *supersedeas* (as it is called), and also what is termed a certified copy of a writ of "*amotion," the original of which I have never seen…*[125]

Willis also forwarded a copy of the letter to Governor Gipps. On 19 July 1843 Willis again wrote to Lord Stanley, Secretary for the Colonies. In this letter, Willis 'complained in this letter of what I believed to be the arbitrary, unjust, and illegal attempts of Governor Sir George Gipps, acting on the private and confidential misrepresentations of Mr Superintendent Charles Joseph La Trobe to remove me'.[126] He also noted the great number of signatures for support he had received from several public meetings.[127]

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[123] *Appendix to the Case on Behalf of the Appellant* XVIII 61-62.

[124] *The Case for the Appellant* 10.

[125] 'Letter: Willis to Stanley 27 June 1843' *Appendix to the Case on Behalf of the Appellant* XXIV 66. Italics appear in the original document.

[126] 'Letter: Willis to Stanley 14 July 1843' *Appendix to the Case for the Appellant* XXIV 72.

[127] References are made to 'Public Meeting' Source: *Port Phillip Patriot and Melbourne Advertiser* 3 July 1843, 'Lodge of Australia Felix Address' Source: *Port Phillip Patriot and Melbourne Advertiser* 6 July 1843, the *Port Phillip Gazette* 12 July 1843 and *Port Phillip Patriot and Melbourne Advertiser* 13 July 1843.

It is in the letter from Governor Gipps to Lord Stanley dated 19 July 1843 that Willis drew upon to substantiate his claim that his amotion was made 'on other grounds than those stated in the Minutes of Council of the 13 and 15 June 1843'.[128] After acknowledging receipt of Willis's letter of the 27 June, Gipps then noted whilst Government officers in Port Phillip have indulged in financial speculations in which they should have restrained is not questioned, the extent of such activities as stated by Willis is called into question.[129] Gipps remarked,

> *Mr Willis has not been removed from office on any single accusation, or for any precise number of improper acts; but for a long continued course of misbehaviour, which, in the opinion of myself, and my sworn advisers, rendered his further occupation of the judgment seat incompatible with the peace and good government of the Colony.* [130]

He then referred to events involving Willis before he arrived in Port Phillip, as an indication of the 'character of the Appellant', '[h]e quitted Demerara under circumstances which did not vouch much for the amenity of his disposition, and he had been previously amoved from Upper Canada'.[131] Willis refutes these statements by reference to a number of documents including, a letter from Lord Goderich, Secretary of State for the Colonies dated 9 March 1831 whereby the actions both personal and professional in Upper Canada were 'clear from reproach' and a confidential letter from Lord Goderich to Major General D'Urban of the 30 December 1832 regarding British Guiana.[132] Gipps further noted that,

> [H]ad Mr Willis confined his attacks on me or my government, I might have continued to let them pass without notice; but, in a newly occupied district, like

[128] *The Case for the Appellant* 10.

[129] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Appellant* XXV 76.

[130] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Appellant* XXV 76. See also *Case for the Appellant* 10. Italics appear the original document.

[131] Ibid.

[132] *Appendix to the Case on Behalf of the Appellant* XXVI 78-79.

> Port Phillip, six hundred miles from the seat of Government, I could not avoid feeling, that the authority of Mr La Trobe required support, and that there was no one who could afford him ready support, but myself.[133]

Governor Gipps did not want to amove Willis, but he was compelled to protect confidence in the government.

In the same letter Gipps 'descends to particulars', and enumerates seven several instances which he describes as 'either errors in law', or 'attempts to produce mischief', as constituting with others, the grounds on which the Appellant's amotion was based. They include,

1. Numerous and Insulting Attacks on Colleagues.
2. Aborigines Not Subject to British Law.
3. Mr Arden's Sentence.
4. Denied the Crown of the Right to Dispose of Land in the Colonies.
5. Incorporation of the Town of Melbourne Invalid.
6. Information Conveyed to the Executive on an 'erroneous point of law'.
7. Sentence of Death on Manuel. [134]

After considering each of these grounds individually, Willis deemed that there are no valid reasons for his amotion.[135]

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[133] *Appendix to the Case on Behalf of the Appellant* XXVI 77.

[134] Ibid 78-79. Note that Mr Arden's Sentence appeared as the first ground for amotion in Part A 'Complaints Before the Governor and Executive Council, Minutes of the 13 and 15 June 1843'.

[135] See Part B 'Alleged "Errors in Law" or "Attempts to Produce Mischief" Not in the Minutes of the Governor and Executive Council – Letter: Governor Gipps to Lord Stanley, Secretary of State 19 July 1943'.

- The Case on Behalf of the Respondent, Sir George Gipps, the Governor of the Colony of New South Wales

In his stated case on the Appeal of Willis to the Judicial Committee of the Privy Council, Gipps chronologically recorded events as they occurred involving the Appellant. He recounted the establishment of the Supreme Court of New South Wales when in November 1837 Sir James Dowling was appointed the Chief Justice, and Mr Justice Burton and Mr Justice Willis were Puisne Judges.[136] Gipps noted,

> [s]hortly after the appellant took his seat on the bench, it was evident that the harmony and good understanding which had previously existed on the bench no longer existed, and that the appellant had contrived to create disputes between himself and the other judges, which very materially interfered with the usefulness and efficiency of the court'.[137]

Willis quarreled with his brother judges including Justice Stephen as Justice Burton had taken leave.[138] When on the bench he also 'made observations publicly reflecting on the character of his colleagues, and attributing to them want of knowledge of their profession'.[139] In particular he attacked the Chief Justice, Sir James Dowling for accepting the service of aboriginal convicts, an activity that Willis thought amounted to slavery.[140] Further examples of Willis criticizing Dowling include, Willis claiming that

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[136] 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[137] *The Case for the Respondent* 1.

[138] Sir Alfred Stephen was appointed a Judge of the Supreme Court of New South Wales at Sydney. His brother Mr Sydney Stephen was a barrister who came into conflict with Justice Willis in Port Phillip. See Part A-7 'Mr Sydney Stephen's Case'.

[139] *The Case for the Respondent* 2. Willis continued this practice in Port Phillip. See Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Batman's Will', Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case' and Part B-1 'Numerous and Insulting Attacks on Colleagues' in this thesis.

[140] Letter: Gipps to Russell, 3 January 1841 in *HRA* xxi, 163. See *Walker v Hughes* [1839] NSWSupC 71 Supreme Court of New South Wales, Sydney Before Dowling CJ and Willis J 2 March 1839 Source: *Australian 5* March 1839. See also Decisions of the Superior Court of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/

the Chief Justice had concealed the truth in a case and the dissenting judgment of Willis in Bryne's case when he openly mocked Dowling.[141] In the same letter to Gipps, Willis asserted that

> whatever private feeling the circumstances I have adverted to might be supposed to generate (though indeed, my only feeling is that of regret for such untoward occurrences), by should feel unworthy of the office I have the honor to hold, were I ever to permit it in any way whatever to interfere with the faithful discharge of my public duty.[142]

Willis in this statement acknowledged that even though his comments may have caused unrest, they were only being expressed as part of his public duty as a judge and were not a personal criticism of Dowling CJ.

Gipps noted that the newspapers in Sydney, although the same comment could be made in Port Phillip,

> many of which are in the habit of opposing all the measures of the governing powers, soon took advantage of these disagreements, which the appellant seemed to seek opportunity to make public, and many very violent articles appeared in several newspapers on the subject. In these attacks the newspapers made use of the statements of the appellant as the grounds of attack on the judges and on the administration of justice generally, and great dissatisfaction was in consequence created in the public mind the colony. [143]

Another contentious matter that was to be aired in public was the appointment Chief Justice Dowling as a Judge in Equity.[144] Willis was both surprised and annoyed at this development since he had been a Chancery barrister in England, and his brother judges including Chief Justice Dowling were common lawyers. In the circumstances he had

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research/colonial_case_law/nsw/cases/case_index/1839/walker_v_hughes/ > (visited 1 August 2012). See also Keon Cohen above n 50, 705.

[141] Letter: Willis to Gipps 22 March 1840 *Appendix to the Case on Behalf of the Respondent* 56-57.

[142] Ibid.

[143] 'Letter: Willis to Gipps 22 March 1840' *Appendix to the Case on Behalf of the Respondent* 56-57.

[144] 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic Act No.22 (*Administration of Justice Act* 1840).

entered in to a '(private) sort of arrangement amongst the Judges that he heard the equity cases alone'.[145] Willis was himself expecting to receive the appointment but this was not to occur. Largely due to animosity, Chief Justice Dowling claimed the title.[146] The public nature of this disagreement was also portrayed in one of *The Australian* in the following terms, '[w]e believe that His Honour the Chief Justice *never* practiced as an Equity lawyer, and that he understands about as much of the principles of *legal* Equity as one of our printer's "devils". We think the selection is very unfortunate'.[147] The term printer's devil refers to one of the apprentice printers.

In his stated case, Gipps discussed the eleven complaints that Willis had identified from the minutes of the Executive Council.[148] He also focused on the matters Willis deemed to be 'Alleged 'Errors in Law' or 'Attempts to Produce Mischief ' not in the Minutes of the Governor and Executive Council but which were contained in a letter from Governor Gipps to Lord Stanley, Secretary of State for the Colonies'.[149] In particular Gipps expanded upon the category 'Numerous and insulting attacks on Colleagues' by documenting the complaints of Mr A MacKenzie the Deputy Sheriff, Captain Lonsdale, Superintendent Mr La Trobe, and other government officers together with those of Mr

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[145] Dowling above n 58, 98. See also Keon-Cohen above n 50, 705.

[146] 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic Act No.22 (*Administration of Justice Act* 1840). Section 22 vested the equitable jurisdiction of the court in one judge. See Letter: Gipps to Russell 1 January 1841 *Historical Records of Australia* Series 1 Vol XXI 155. See also SH Woinarski *The History of Legal Institutions in Victoria* Thesis (LLD) University of Melbourne 1942, 311-53 and 291-292.

[147] *The Australian* 1 December 1840 < http://nla.gov.au/nla.news-page4257320 > (visited 1 August 2012) quoted in Letter: Willis to Gipps 7 January 1841 *Appendix to the Case on Behalf of the Respondent* 57.

[148] See Part A 'Complaints Before the Governor and Executive Council, Minutes of the 13 and 15 June 1843'.

[149] Letter: Gipps to Stanley 19 July 1843 *Appendix to the Case for the Respondent* 91. See Part B 'Alleged "Errors in Law" or "Attempts to Produce Mischief" Not in the Minutes of the Governor and Executive Council – Letter: Governor Gipps to Lord Stanley, Secretary of State 19 July 1943' in this thesis.

Croke and Mr JB Were.[150] Based upon all of this material Gipps made five submissions before the Judicial Committee of the Privy Council.

His first submission was that the Governor and Executive Council had the power to remove the Appellant.[151] Burke's Act[152] 'was in no degree repealed or altered' by later legislation for the establishment of the Supreme Court of New South Wales as argued by Willis.[153] Furthermore Gipps noted, 'independently of the before-mentioned Acts, the Governor in Council, have power to remove any officer for misbehaviour in his office, where such misbehaviour is of such a nature as to endanger the peace and tranquility of the colony, as was the case in this instance'.[154] This anxiety about Willis creating a state of excitement in Port Phillip is a strong theme throughout Gipps's stated case.[155]

Gipps's second submission is connected with political expediency in that given the nature of the proceedings to avoid 'excitement' there was no need to give notice to Willis of the Executive's activities.[156]

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[150] See Part B-1 'Numerous and Insulting Attacks on Colleagues'.

[151] *The Case for the Respondent* 22.

[152] 'An Act to Prevent in Future any Patent Office to be exercised in any Plantation or Colony, now, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed to shall discharge the Duty thereof in Person, and behave well therein' [1782] 22 Geo III c 75 (Burke's Act).

[153] 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[154] *The Case for the Respondent* 22. See also Part A-9 'State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[155] The term 'Excitement' is not used by Governor Gipps as a separate matter, but Willis uses the term in his stated case as a complaint he identified from the Minutes of the Governor and Executive Council 21 December 1842 and 16, 17 and 20 January 1843.

[156] *The Case for the Respondent* 22.

The third submission was that although Willis before the Privy Council noted,

> that if he had been afforded an opportunity he would have shown the groundless of the accusations against him… he always refused to admit the power of the Executive Council over him, and he never denied, and does not now deny, any of the material facts on which the accusations made against him are founded.[157]

Gipps asserted that if Willis had been given an opportunity to be heard, it 'would have been altogether useless and merely formal'.[158] The fact that Willis had already had notice of the complaints against him was the fourth submission of Governor Gipps. Reference was made a letter that Mr La Trobe to Willis that included a copy of the Memorial that had requested his removal. Willis received this document before the Governor. On 25 May 1843 Willis wrote a letter to Mr La Trobe 'to be forwarded with such Memorial as is answer to the charges made against him'.[159] Willis further noted 'in the Minute of the Executive Council of 20 January 1843, it was expressly stated by them, that in the event of any fresh occasion of complaint, the Council would recommend his immediate suspension from his office; and his previous letter of 8 February 1843 contained his answer to the charges previously made against him, and referred to in that Minute'.[160] Gipps's final submission was simply to restate that the Governor and Executive Council had the power to amove Judge Willis and 'the circumstances of this case do justify' this course of conduct.[161]

A Good Common Law Judge

In the nineteenth century, Willis was not the only judge to be amoved from the

[157] *The Case for the Respondent* 22.

[158] Ibid.

[159] *The Case for the Respondent* 22.

[160] Ibid.

[161] *The Case for the Respondent* 22.

Australian colonies, but he was the only one to have his appeal upheld by the Privy Council.[162] Algernon Sidney Montague was appointed to the Supreme Court of Van Dieman's Land in 1833 and was amoved in 1847 for refusing to pay personal debts. His appeal to the Privy Council was dismissed in 1849.[163] Benjamin Boothby was appointed to the Supreme Court of South Australia in 1853 and was amoved in 1867 for a number of constitutional issues, although he died the following year before the Judicial Committee considered his appeal.[164]

Willis's appeal to the Privy Council was successful. The court found that he should have been given an opportunity to defend his conduct prior to any action being taken to remove him.[165] It is a significant decision that has been cited and followed in a number of cases.[166] It is also remarkable in that the judgment contains no commentary regarding the grounds for amotion. The method used in this work, forensically examining the Privy Council archives breaks new ground. The complaints about Willis,

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[162] *Willis v Gipps* (1846) 5 PC Moo 379.

[163] PA Howell 'Montague, Algernon Sidney (1802-1880)' *Australian Dictionary of Biography*, National Centre of Biography, Australian National University < http://adb.anu.edu.au/biography/montagu-algernon-sidney-2470 > (visited 1 August 2012). See also PA Howell 'The Van Dieman's Land Judge Storm' (1966) 2 *University of Tasmania Law Review* 253-269, BA Keon-Cohen 'Mad-Judge Montagu: A Misnomer?' (1975) *Monash University Law Review* 50-81 and S Petrow 'Moving in an "Eccentric Orbit": The Independence of Judge Algernon Sidney Montagu in Van Dieman's Land, 1837-47' in H Foster, BL Berger, AR Buck (ed) *The Grand Experiment: Law and Settler Culture in British Settler Society* (UBC Press for the Osgoode Society of Canadian Legal History, 2008 Vancouver) 156-175.

[164] AC Castles 'Boothby, Benjamin (1803-1868)' *Australian Dictionary of Biography*, National Centre of Biography, Australian National University < http:// http://adb.anu.edu.au/biography/boothby-benjamin-3025 > (visited 1 August 2012). See also PA Howell *The Boothby Case* BA (Hons) Thesis 1965 University of Tasmania and AC Castles, MC Harris *Lawmakers and Wayward Whigs: Government and Law in South Australia, 1836-1986* (Wakefield Press, Adelaide 1987) and J Williams 'Justice Boothby: A Disaster That Happened' in G Winterton (ed) *State Constitutional Landmarks* (Federation Press, Sydney 2006) 21-51.

[165] *Willis v Gipps* (1846) 5 PC Moo 379, 392.

[166] Cited in these cases: *Algernon Montagu v The Lieutenant-Governor, and Executive Council, of Van Dieman's Land* (1849) 6 Moo PC 489; 13 ER 773, *Ex parte John Anderson Robertson* (1858) 11 Moo PC 288; 14 ER 704, *Shenton v Smith* [1895] AC 229 PC (Aus), *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735 PC (HK) and *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482; [1953] 3 WLR 331; [1953] 2 All ER 490; (1953) 97 SJ 507 QBD. Followed in this case: *Ex parte Thackeray* (1874) 13 SCR (NSW) 1.

as he perceived them are revealed and also how he responded.[167] When this information is carefully considered a different story emerges not of success but of judicial failure.

Judges are functionaries of the state, who resolve disputes and maintain public confidence in the system of government.[168] A good common law judge in this context is one who satisfies the expectations of society. Willis had to be removed. Not because he had done anything unlawful like Montague and Boothby, but because through his behaviour he had diminished confidence in the system of government that was operating in Port Phillip during the period 1841-1843.

In judging Willis a judicial success or judicial failure it might be said that it is inappropriate to use the material he raised before the Privy Council. The archives reveal that Willis used his judicial power to achieve personal goals,[169] made disparaging comments about the judges of the Supreme Court of New South Wales at Sydney,[170] sought to influence political matters,[171] manipulated events to embarrass government officials,[172] kept the whole district of Port Phillip in a state of excitement,[173] expressed

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[167] 'Before the Judicial Committee of Her Majesty's Most Honorable Privy Council, John Walpole Willis against Sir George Gipps, On Appeal against an Order of Amotion from the Office of Judge of the Supreme Court of New South Wales' Volume 38 *Printed Cases in Indian & Colonial Appeals* kept in the archives of the Privy Council. See B Kercher 'Unreported Privy Council appeals from the Australian colonies before 1850' (2003) 77 *Australian Law Journal* 309. See also *Willis v Gipps* [1846] Colonial Case Law, Privy Council Decisions Macquarie Law School < http://www.law.mq.edu.au/research/colonial_case_law/privy_council_decisions/cases/case_index/willis_v_gipps_1846/ > (visited 1 August 2012).

[168] JAG Griffith *The Politics of the Judiciary* (Fontana Collins, Glasglow 1979) 213.

[169] Part A-1 'Sentence on Mr Arden' and Part A-4 'Mr Curr's Case'.

[170] Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-3 'The Cases of Mr Carrington and Mr Arden' and Part A-5 'Complaints of the Judges at Sydney Subsequent to Mr Batman's Case'.

[171] Part A-4 'Mr Curr's Case'.

[172] Part A-6 ' The Attorney General's Complaint'.

personal opinions not relevant to matters currently before the court,[174] and sought to influence the newspaper media for favorable coverage.[175] In addition he made a number of 'errors in law' or 'attempts to produce mischief'.[176] In many respects, Willis was probably the last person to realise that many of the reasons for him being a judicial failure was that he did not recognise the importance of these matters in his appeal before the Privy Council.

If such mistakes had been infrequent then they might have been discretely dealt with and dismissed as isolated events. This was not the case and being a single judge, located more than a thousand kilometers from Sydney made his errors of greater consequence. Conditions in Port Phillip at the time were turbulent. The district had experienced tremendous growth in its short history and it was suffering under economic depression by the time Willis arrived. The publication of anonymous letters in the local newspapers that were highly critical of Willis's actions exacerbated the situation. Governor Gipps carefully considered his options and amoved Willis to avoid further lack of confidence in the government.

By examining the Privy Council archives this study reveals that in the nineteenth century, judges were expected to resolve disputes and maintain confidence in the

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[173] Part A-9 'State of Excitement in which the Whole Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[174] Part A-10 'The Delivery of Charges to Juries (which His Excellency is pleased to term harangues) of an Improper Character'.

[175] Part A-11 'An Evasive, if not Untrue Statement Regarding a Loan of Money to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot* with a View of Influencing its Articles'.

[176] Part A-7 'Mr Sydney Stephen's Case'. See also Part B-1 'Numerous and Insulting Attacks on Colleagues', Part B-2 'Aborigines Not Subject to British Law', Part B-3 'Mr Arden's Sentence', Part B-4 'Denied the Crown of the Right to Dispose of Land in the Colonies', Part B-5 'Incorporation of the Town of Melbourne Invalid', Part B-6 'Information Conveyed to the Executive on an "erroneous Point of Law"' and Part B-7 'Sentence of Death on Manuel'.

system of government. Willis in Port Phillip during the period 1841-1843 failed to satisfy these expectations. Today society still expects common law judges to conduct themselves accordingly. For almost 140 years after Willis was dismissed from judicial office in Port Phillip, '[p]eople [in Australia] trusted judges to do the right thing'.[177] It was during the 1980s, when allegations of misconduct were made against Justice Lionel Murphy of the High Court of Australia and later, Justice Angelo Vasta of the Supreme Court of Queensland that 'an apparent drop in public respect for the judiciary that made some soul-searching necessary'.[178] In response, a number of retired judges put together the Australian *Guide to Judicial Conduct* that was first published in 1988.[179] A second edition was published in 1997 and a third edition was produced in 2007. The *Guide* is a joint production of the Australian Institute of Judicial Administration and the Council of Australian Chief Justices.[180] It currently comprises of 35 pages and is founded upon 'impartiality, judicial independence and integrity'.[181] It notes that the guiding principles 'applicable to judicial conduct have three main objectives: To uphold public confidence in the administration of justice; To enhance public respect for the institution of the judiciary; and To protect the reputation of individual judicial officers and of the judiciary'.[182] It is a guide and not a strict code. It seeks to indicate how judicial officers should deal with particular circumstances such as conduct in court, activities outside the courtroom, non-judicial conduct and post-judicial activities. The experience of Judge

[177] Thomas above n 3, 1.

[178] Thomas above n 3, 155-157, 220-231.

[179] Thomas above n 3, 2.

[180] Thomas above n 3, 354-385.

[181] Thomas above n 3, 356.

[182] Thomas above n 3, 356.

Willis in Port Phillip during the period 1841-1843 underpins many of the matters raised in the Australian *Guide to Judicial Conduct.*

- No Single Model

My analysis focuses on the purpose of the judiciary in society rather than attempting to identify particular judicial qualities that a judge should posses. Philosophers, judges and academics, however, have wrestled with the question of what makes a good common law judge for many years. Despite many attempts, a complete satisfactory model remains elusive. In ancient times Socrates noted, a judge would have '[t]o hear courteously, to answer wisely, to consider soberly, and to decide impartially'.[183] During the 1600s Sir Mathew Hale, Lord Chief Justice of England provided more detail when he outlined his 'Rules for his Judicial Guidance',

> Things necessary to Be Continually Had in Remembrance …
>
> 4. That in execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.
>
> 5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unreasonable, and interruptions.
>
> 6. That I suffer not myself to be possessed with any judgment at all, till the whole business and both parties heard.
> …
>
> 18. To be short and sparing at meals, that I may be fitter for business.[184]

These qualities, like those of Socrates above, could apply to other participants such as administrators. Rather than reflect upon judicial conduct, Mills writing at the start of the twentieth century imagined the 'ideal judge' in the following terms,

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[183] Attributed to Socrates 470-399BC.

[184] M Hale 'Rules for his Judicial Guidance' quoted in J Campbell *The Lives of the Chief Justices of* England: *From the Norman Conquest Till the Death of Lord Mansfield* (Murray, London 1874) 207-09.

> The ideal judge is a man of strong physique. One who is a stranger to fatigue; whose nerves are of steel, and who can sit unruffled and serene day after day and listen to the endless grind of lawyers and witnesses, and yet lie down at night to a dreamless and refreshing sleep. The ideal judge is a man of big brain, capable of weighing every detail of a case, and of looking at its many phases at a single glance. His brain compasses more than the law; it looks into the motives of men, and reads their inner thoughts…
>
> He is a scholar, whose knowledge reaches beyond the leather bound volumes of his professional library, and delves into science, and art and literature; …
>
> He is a man of exact justice; a man whose personal character is above reproach; … Long live the ideal judge.[185]

This idealised model portrays a good judge as being 'superhuman' or possessing no human flaws. The alternative is to identify 'Bad Judges', with the implication being, that this would result in finding what qualities a good judge must possess.[186] A similar method has been to assess the number of successful appeals that have been upheld against a particular judge. Such attempts are problematic as there may be other explanations for a significantly high rate such as workload considerations.[187] All of these attempts are flawed as they focus tightly on the judge as a person, without taking into account the context in which a judge operates. For example, an appellate judge is different to a trial judge. Mason has noted,

> [t]he requisite qualities of the appellate judge – knowledge and understanding of the law, capacity to articulate and develop legal principles and to write persuasively – differ in degree from those usually possessed by the trial judge. The trial judge's capacity to find facts, to divine the truth from the conflicting accounts of witnesses, to put a jury in possession of the salient features of the case, do not loom as high on the appellate judge's list of requisite qualities.[188]

Another distinction between judges is the basis of specialised jurisdictions; for example,

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[185] WS Mills 'The Ideal Judge' (1905) 4(3) *Oklahoma Law Journal* 67, 68-69.

[186] GP Miller 'Bad Judges' (2004) 83 *Texas Law Review* 431.

[187] PW Young 'What Makes a Good Judge?' (1994) 68 *Australian Law Journal* 485, 485.

[188] A Mason 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156, 161.

family law matters are fundamentally different to commercial law disputes. This is evident in the selection criteria for appointment to the Family Court of Australia.[189] In short, there is no single model for a good common law judge. Rather than attempt to identify judicial qualities, it is better to understand upon the purpose of the judiciary in society.[190]

- A System of Government

Griffith writing in the late 1970s noted that the judiciary 'is an essential part of a system of government and its function may be best described as underpinning the stability of that system from attack by resisting attempts to change it'.[191] In other words, the administration of justice is a means for resolving disputes and of maintaining public confidence in the system of government. Judges are functionaries of the state and are concerned with maintaining order in society. Brennan has noted '[i]t is not an overstatement to say that public confidence in a judiciary is a condition precedent to an ordered society and social stability'.[192] A good judge is one who satisfies the expectations of the system in which they operate by maintaining public confidence in the government.

In simple terms, government consists of three branches. The legislature or parliament is the arm of government that enacts the law. The executive arm administers the law and carries it into effect. The judiciary then defines the law and applies it to resolving

[189] *Federal Court Act 1976* (Cth) s 6(2), *Family Law Act 1975* (1975) s 22. This matter is discussed below in 'Selection, Appointment and Tenure'.

[190] DR Meagher 'Appointment of Judges' (1993) 2 *Journal of Judicial Administration* 190, 193-194.

[191] Griffith above n 168, 213.

[192] FG Brennan 'Limits on the Use of Judges' (1978) 9 *Federal Law Review* 1, 1.

disputes that are justiciable.[193] The courts have the authority to determine whether the other branches of government have exceeded their power and this is the intrinsic nature of the rule of law.

Griffith further noted, that common law judges can create new legal concepts when circumstances change, '[b]ut their function in our society is to do so belatedly'.[194] In this manner, there is no conflict with the legislative power of parliament. As Mason has commented, it is hardly worth mentioning 'that anyone with any understanding of the judicial process now believes the fairy tale that judges "discover" the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods Judge'.[195] This notion that judges 'declare' the law is the doctrine of legalism. According to this view '[i]f it is law, it will be found in our books; if it is not to be found in there, it is not law'.[196] Judges in Australia, as Mason indicated above, practice a form of legal realism.[197] Some measure of judicial creativity is occasionally required of common law judges in carrying out their work. When a common law judge does create new law, the development is usually labeled 'judicial activism' suggesting perhaps that judicial power has been used for an extraneous purpose.[198] Gleeson has noted,

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[193] *Marbury v Madison* 5 US 137; 1 Cranch 137,176-178 (1803), 10 Marshall CJ. See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 per Fullagar J at 262-263.

[194] Griffith above n 168, 214.

[195] Mason above n 188, 163.

[196] *Entick v Carrington* (1765) 19 St Tr 1030; [1765] 95 ER 807; [1765] EWHC KB J98 (2 November 1765) British and Irish Legal Information Institute < http://www.bailii.org/ew/cases/EWHC/KB/1765/J98.html > (visited 1 August 2012).

[197] M Kirby 'A Darwinian Reflection on Values and Appointments in Final National Courts' in J Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart, Oxford 2011) 9-34.

[198] See D Heydon 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

> [I]ndividual judges, perhaps because of differences in legal philosophy, or personal temperament, may be more or less 'activist', or more or less 'conservative', in their approach to such matters as the weight to be given to precedent, the importance of legal certainty and predictability, or the proper relationship between the courts and parliaments in an area of legal change. But in truth, for the excitement that erupts occasionally about activism, the capacity for judicial creativity is, by comparison with other forms of human inventiveness, limited.[199]

Where a judge has exceeded expectations in creating law, there is nothing to prevent parliament from enacting legislation so as to clarify, amend or override such a development. Another means by which order is maintained is when the matter is heard on an appeal to a higher court, if such an avenue is available. This is the common law in action.

Gleeson has further noted, '[t]he most important measure of the performance of the court system is the extent to which the public have confidence in its independence, integrity and impartiality'.[200] Given the role of the judiciary, judges must be independent of both the legislature and the executive. They must also be independent of external influences. Integrity, the second idea listed by Gleeson, is connected with the public having confidence that the judge is honest. In the common law it is of 'fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen, to be done'.[201] This principle is of great significance in maintaining the confidence of the people in the system of government. The third requirement that Gleeson identified, is that judges must be impartial and this is evident in the oath or affirmation prospective judges take upon being invested with judicial

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[199] M Gleeson 'Courts and the Rule of Law' *The Rule of Law Series* University of Melbourne 7 November 2001 < http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm > (visited 1 August 2012).

[200] M Gleeson 'The State of the Judicature' *Australian Legal* Convention Canberra 10 October 1999 < http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sta10oct.htm > (visited 1 August 2012).

[201] *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 257 per Lord Hewart CJ at 259.

power. In all jurisdictions through Australia, the oath or affirmation is similar to that used in the United Kingdom.[202] The crucial words being to 'well and truly serve' in the particular judicial office and to 'do right to all manner of people according to law without fear or favour or affection or ill will'.[203] A judge in these circumstances through their oath or affirmation promises to carry out their duties within the law, without interference.

The idea that judicial officers together with all public officials should swear an oath can be traced back to the *Royal Ordinance of Justices* 1346, the *Corporations Act* 1661, the *Test Act* 1672 and the *Parliamentary Test Act* 1678.[204] The effect of these English laws was to exclude people who were not of the Church of England faith. Other laws required allegiance to the monarch and a declaration against transubstantiation.[205] The *Sacramental Test Act* 1828 simplified the process and required the office bearer to declare they would not 'injure or weaken the Protestant church or disturb the church, or the bishops and clergy of the said church, in possession of rights and privileges to which such church, or the said bishops, and clergy, are or may be by law entitled'.[206] The applicable law for the Australian colonies was assumed to include those laws of England

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[202] See E Campbell 'Oaths and Affirmations of Public Office' (1999) 25(1) *Monash University Law Review* 132.

[203] 'An Act to amend the Law relating to Promissory Oaths' [1868] 31 & 32 Vict c 72 (*Promissory Oaths Act 1868*) section 4.

[204] (1346) 20 Edw 3 cc 1-6 (*Royal Ordinance of Justices* 1346) Note: the equivalence of State and Church only became problematic after Henry VIII, 'An Act for the Well Governing and regulations of Corporations' (1661) 13 Car II st 2 c 1 (*Corporations Act* 1661), 'An act for preventing dangers which may happen from popish recusants' (1672) 25 Car II st 2 c 2 (*Test Act* 1672) and 'An act for the more effectual preserving the Kings person and Government by disableing Papists from sitting in either House of Parliament' (1678) 30 Car II st 2 c 1 (*Parliamentary Test Act* 1678) quoted in E Campbell 'Oaths and Affirmations of Public Office' (1999) 25(1) *Monash University Law Review* 132, 134.

[205] See E Campbell 'Oaths and Affirmations of Public Office' (1999) 25(1) *Monash University Law Review* 132, 133-134.

[206] 'An act for repealing so much of several Acts as imposes the Necessity of receiving the Sacrament of the Lord's Supper as a Qualification for certain Offices and Employments 9 May 1828' (1828) 9 Geo IV c 17 (*Sacramental Test Act* 1828) section 2.

that were then in force on 25 July 1828 together with legislation that had been enacted for the particular colony or colonies generally.[207] Providing advice to the executive regarding those laws applicable was expected of the colonial judiciary.[208]

- Selection, Appointment and Tenure

English judges until the *Act of Settlement 1701* held judicial office at the pleasure of the Crown.[209] In the sixteenth and seventeenth centuries the judiciary was part of the royal administration. The independence of the judiciary was not in issue if they did not come into conflict with Parliament or the Monarchy.[210] In the seventeenth century both the Parliament and the Monarchy appealed for support from the law in order to fight the other. In the Stuart period the function of the judiciary was questioned and Chief Justice Coke was of the view that the judiciary was not subservient to the Parliament or to the Monarch. The judges could declare an act of parliament illegal or the actions of the Monarch unlawful. Ultimately Coke's views survived the Glorious Revolution.[211]

McLaren has noted that appointments to the Colonial Judiciary were made on the basis because that they were 'gentleman' and that by definition having achieved the status of a barrister meant that they were suitable.[212] The other requirement identified by McLaren was one of patronage, in that 'someone of substance, an aristocrat, judge,

[207] 'An act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effective government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828) section 24.

[208] See Part B-4 'Denied the Crown the Right to Dispose of Land in the Colonies', Part B-5 'Incorporation of the Town of Melbourne Invalid' and Part B-6 'Information Conveyed to the Executive on an "erroneous point of law"'.

[209] 'An Act for the further limitation of the Crown, and Better Securing the Rights and Liberties of the Subject' (1701) 12 & 13 Will III c 2 (*Act of Settlement* 1701).

[210] See S Shetreet *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland Publishing Co, Amsterdam 1976) 2-12.

[211] Ibid.

[212] McLaren above n 30, 49.

academic, educator, or even a senior practitioner … was willing to vouch for the talent, experience, and morals of an applicant for preferment to the colonial bench'.[213] This approach was based on the belief that if an appropriate person was selected on such terms, then they would know how to behave as a judge.

The Australian Constitution does not specify any particular criteria that need to be satisfied by those seeking judicial appointment. To be eligible for appointment as a Federal Judge, a person must have been a legal practitioner for at least five years or have been a judge in another court.[214] An additional requirement for the Family Court is that 'by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.[215] To become a Federal Magistrate, five years experience as a legal practitioner is the only requirement.[216] The traditional means to select and appoint judges has been based on 'merit' and they have been drawn from the ranks of senior barristers. Spigelman has noted '[e]veryone agrees that judicial appointment should be based on merit. There is less unanimity on precisely what that means, or by whom, it should be assessed'.[217] In the confusion of differing opinions, concerns have been expressed that the judiciary should be more representative of society. Shetreet has noted 'a reflective judiciary is imperative for maintaining the value of public confidence in the courts'.[218] Statistics across all jurisdictions within Australia for the number judges

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[213] McLaren above n 30, 49.

[214] *Federal Court Act 1976* (Cth) s 6(2),

[215] *Family Law Act 1975* (1975) s 22

[216] *Federal Magistrates Act 1999* (Cth) Schedule 1 Part 1.

[217] J Spigelman 'Judicial Appointments and Judicial Independence' 17(2008) *Journal of Judicial Administration* 139, 139.

[218] S Shetreet 'Who Will Judge: reflections on the Process and Standards of Judicial Selection' 61 (1987) *Australian Law Journal* December 766, 776. See also Shetreet above n 210.

indicate that approximately 30% are female as at 2011.[219] The Australian Capital Territory has the most (45%) and Tasmania the least (25%).[220] There is room for improvement with these figures but it must be remembered that parity should not be the primary goal, rather selecting the best people to enter judicial office. Once appointed, federal judges in Australia hold office until they turn 70 years of age and this again reinforces stability and certainty of the judiciary.[221]

Judging Judges

The removal of a judge is not a regular event and nor should it be. It is a traumatic process for all involved but is an essential phase by which confidence is to be restored in the system of government. During the twentieth century, judges acquired security of tenure in Australia in that they could only be removed by Parliament. Section 72(ii) of the Federal Constitution of Australia provides,

> The justices of the High Court and of the other courts created by the Parliament – (ii) Shall not be removed except by the Governor–General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. [222]

This provision is largely modeled on England's *Act of Settlement 1701* and the *Commissions and Salaries of Judges Act 1760*.[223] The latter provided that the judges' commissions should continue notwithstanding the death of the monarch.

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[219] Australian Institute of Judicial Administration 'Gender Statistics - 22 March 2011' < http://aija.org.au/JudgesMagistrates.pdf > (visited 1 August 2012).

[220] Ibid.

[221] *Commonwealth of Australia Constitution Act* 1900 (Cth) s 72(iii). The *Constitution Alteration (Retirement of Judges) Act* 1977 (Cth) introduced 70 years as the maximum age for retirement.

[222] *Commonwealth of Australia Constitution Act* 1900 (Cth).

[223] 'An Act for the further limitation of the Crown, and Better Securing the Rights and Liberties of the Subject' (1701) 12 & 13 Will III c 2 (*Act of Settlement* 1701). See also 'An Act to further implement the Act of Settlement' [1760] 1 Geo III c 23 (*Commissions and Salaries of Judges Act* 1760).

In the Commonwealth there are particular criminal offences for those holding judicial office that are found to have been involved with corruption or acting oppressively.[224] Despite these provisions, there is no independent body that entertains complaints of judicial behaviour of federal judges. Apart from the High Court, each of the other federal courts has complaint procedures.[225]

In the State and Territory Supreme Courts, there is some variation as to how such judges are to be held accountable for their actions or removed from office. In the Australian Capital Territory, a judicial commission must first be established to ascertain the facts and express an opinion if misbehaviour or physical or mental incapacity is present. The Attorney-General must then put a motion before parliament if removal is sought.[226] The same process operates in Victoria.[227] In the Northern Territory, South Australia and Tasmania the process is identical to Victoria and the Australian Capital Territory, but there is no requirement for a judicial commission.[228] This omission can give rise to legal arguments that no misbehaviour or incapacity is required to remove a judge but this reasoning has constitutional difficulties especially with judicial independence. The position in Queensland is identical to that of Victoria and the Australian Capital Territory, but the Queensland Crime and Misconduct Commission is charged with

[224] *Crimes Act 1914* (Cth) s 32-34.

[225] Federal Court of Australia < http://www.fedcourt.gov.au/contacts/contacts_other_complaints.html >, Family Court of Australia < http://www.familycourt.gov.au/wps/wcm/resources/file/eb75ee08e3d015b/FS_Complaints_feedbackV3.htm >, Federal Magistrates Court < http://www.fmc.gov.au/html/complaints.htm > (visited 1 August 2012).

[226] *Australian Capital Territory (Self- Government) Act 1988* (Cth), s 48D and *Judicial Commissions Act 1994* (ACT).

[227] *Constitution Act 1975* (Vic), Part IIIAA.

[228] *Supreme Court Act* (NT), s 40. *Constitution Act 1934* (SA) ss 74, 75. *Supreme Court (Judges' Independence) Act 1857* (Tas).

investigating criminal conduct.[229] News South Wales follows the Queensland structure with the Independent Commission Against Corruption of New South Wales investigating inappropriate behaviour by 'public officials'.[230] This definition includes judges and magistrates.

New South Wales is unique in that the Judicial Commission of that state is charged with providing judicial education, monitoring sentencing and hearing complaints about judges.[231] It is the only permanent body in Australia to be a point of contact if there are concerns involving the behaviour of a judge.

In 1984 allegations were made about Justice Lionel Murphy of the High Court of Australian misbehaving, in that he had perverted the course of justice in a matter that was proceeding before the New South Wales courts.[232] After several Federal Senate Committee hearings, a criminal trial commenced and a conviction was recorded but this was subsequently overturned on appeal.[233] Further allegations arose and a Judicial Commission of Inquiry was established but before this body made any findings, Justice Murphy had died.[234] This episode involving the investigation of complaints regarding the behaviour of a High Court judge was very awkward. It highlighted that the process was difficult. For some people Justice Murphy was a controversial character, but at different stages in his professional career, he had occupied leading positions in the

[229] *Constitution of Queensland Act* 2001 (Qld) s 61 and *Crime and Misconduct Act 2001* (Qld).

[230] *Commission Against Corruption Act 1988* (NSW) s 53.

[231] *Constitution Act 1902* (NSW) s 53(2). See also *Judicial Officers Act* 1986 (NSW).

[232] Thomas above n 3, 220-231.

[233] Australia, *Senate Select Committee on the Conduct of a Judge* (1984) (reported 24 August 1984). Australia, *Senate Select Committee on the Conduct of a Judge* (1984) (reported 31 October 1984). *R v Murphy* (1985) 4 NSWLR 42. See also *R v Murphy* (1985) 158 CLR 596 and *R v Murphy* (1986) 5 NSWLR 18.

[234] *Parliamentary Commission of Inquiry (Repeal) Act* 1986 (Cth) s 6. See also Thomas above n 3, 220-231.

legislature, executive and the judiciary.[235]

A few years later, and allegations were made against Judge Angelo Vasta of the Queensland Supreme Court.[236] At the time the Queensland Crime and Misconduct Commission was not in existence so the allegations were discussed before the Queensland Parliament. Judge Vasta was subsequently removed from judicial office on the basis of several criminal convictions. The process like that of Justice Murphy was difficult, but Vasta did not successfully appeal his sentence. The amoval of Willis in 1843 is a revealing precursor to these 20th century developments.

[235] J Hockey *Lionel Murphy: A Political Biography* (Cambridge University Press, Oakley 1997).

[236] M Kirby 'Discipline of Judicial Officers in Australia' The Judicial Group on Strengthening Judicial Integrity, Second Meeting, Bangalore, India. 24-26 February 2001 < http://www.michaelkirby.com.au/> (visited 1 August 2012). See LJ King 'Removal of Judges' (2003) 6 *Flinders Journal of Law Reform* 169. See also Thomas above n 3, 155-157.

Part A COMPLAINTS BEFORE THE GOVERNOR AND EXECUTIVE COUNCIL, MINUTES OF THE 13 AND 15 JUNE 1843

After receiving a copy of the Executive Council Minutes for the 13 and 15 June 1843 Willis identified 11 complaints and these form the basis for Part A of his appeal. They were the following,

1 Sentence on Mr Arden

2 Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will

3 The Cases of Mr Carrington and Mr Ebden

4 Mr Curr's Case

5 Complaints from the Judges at Sydney Subsequent to Mr Batman's Case

6 The Attorney General's Complaint

7 Mr Sydney Stephen's Case

8 Mr Smith's Complaint

9 State of Excitement in which the Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge

10 The Delivery of Charges to Juries (which his Excellency is pleased to term harangues) of an Improper Character

11 An Evasive, if not Untrue Statement Regarding a Loan of Money to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot* with a View of Influencing its Articles

Willis did not place the complaints in chronological order but preferred to largely follow the structure that the Executive Council had produced in their Minutes. There are two exceptions to this approach. The first is the grouping together, as a single complaint, the concerns of Deputy Sheriff Mr Mackenzie, Captain Lonsdale, Mr Superintendent La

Trobe, Mr Croke and Mr JB Were regarding the 'State of Excitement'.[237] The use of such words by Willis is significant, as 'Excitement' or unrest is the antithesis of what a good common law Judge should seek to achieve. Although the term 'Excitement' appears in the Executive Council Minutes, Governor Gipps did not refer to it in his response before the Privy Council. The second exception is the inclusion by Willis of 'Mr Sydney Stephen's Case' as it does not appear in the Executive Council Minutes.[238]

The selection of 'The Sentence on Mr Arden' as the first complaint is notable since the issues it involves reverberates throughout the remainder. It is the only one to appear in both Part A and Part B. Willis's treatment of Mr Arden, who was editor of the *Port Phillip Gazette,* was unduly harsh and is very revealing as to the Resident Judge's opinion of his role in Port Phillip. The Port Phillip newspapers including the *Port Phillip Herald* and the *Port Phillip Patriot* were a powerful force in setting the agenda. They not only reported Willis's actions in court but maintained critical commentary regarding his behaviour. The third complaint 'The cases of Mr Carrington and Ebden', also raises issues which echo throughout Willis's appeal before the Privy Council as it focuses attention on his demeanor. The same applies to fourth complaint, 'Mr Curr's Case' with its emphasis on Port Phillip society being strongly divided into those who supported Willis and those who despised him.

Throughout his appeal, Willis never admitted to having misbehaved. He was supremely confident that his conduct at all times was appropriate for a Supreme Court judge. He valiantly sought to defend his actions and to convince the court that other factors,

[237] Part A-9 'State of Excitement in which the Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[238] Part A-7 'Mr Sydney Stephen's Case'.

beyond his control were influencing events in Port Phillip.[239] In particular Port Phillip, located more than one thousand kilometers from Sydney was a tough, almost lawless place, in which to be the only Supreme Court judge.

[239] 'Letter: Willis to Stanley 14 July 1843' *Appendix to the Case of the Appellant* XXIV 72. See also Part B which discusses each of the seven 'Alleged "Errors in Law" or "Attempts to produce Mischief" not in the Minutes of the Governor and Executive Council but contained in a letter from Governor Gipps to Lord Stanley, Secretary of State for the Colonies 19 July 1843'.

PART A-1 THE SENTENCE ON MR ARDEN

Willis did not take kindly to any form of criticism. During the period July 1841 to February 1842 a number of anonymous newspaper articles were published that cast aspersions on his character. In response Willis imprisoned Mr Arden, the owner and editor of the *Port Phillip Gazette*. Rather than bring the matter to an end, it only inflamed the situation and the other Port Phillip newspapers expressed dismay over the proceedings. In his appeal before the Privy Council Willis attempted to justify his actions on the basis that he was simply defending the administration of justice. This is not entirely convincing. A better description is that Willis abused the position he held as the first Resident Judge for the Supreme Court of New South Wales in the District of Port Phillip. He allowed his personal feelings to encroach upon the exercise of judicial authority when dealing with the matter. The sentence on Mr Arden was the first complaint before the Governor and Executive Council but its importance reverberates throughout the other complaints. Judicial power must not be exercised to achieve personal goals. If the media make critical remarks involving the actions a particular judge, then that judicial officer should not reply as it diminishes public respect for the judiciary. The Port Phillip newspapers were a dominating force to be reckoned with and this is reflected in the eleventh complaint before the Governor and Executive Council, where it was alleged that Willis lent money to the editor of the *Port Phillip Patriot and Melbourne Advertiser* with a view of influencing its articles.

The first article was based upon a civil dispute between the firm of Willis & Co and Dutton, Darlot and Simson.[240] The matter involved the recovery of £1,000 due on a dishonoured £5,000 bill of exchange. A default judgment had been awarded to the plaintiffs.[241] Dutton, Darlot and Simson sought to have this judgment set aside on the basis that they had not been served with notice of the proceedings.[242] Mr Simson swore an affidavit stating that no notice had ever been served on him or any of his partners. The dispute arose because an affidavit by Mr Cadden, who was employed by the solicitors acting for the plaintiff contradicted what Mr Simson had stated. Mr Cadden maintained he had personally served the summons on Mr Simson. Willis declined to set aside the default judgment. He instructed Mr Croke, the Crown Prosecutor to charge Mr Simson with perjury.[243] At the hearing, a servant came forward and testified that he was the person served by Mr Cadden and that he had handed the document to Mr Steinforth who was a guest at Mr Simson's house. The jury returned a verdict of not guilty and Mr Simson was discharged.

A number of articles that were critical of the Resident Judge in this matter were published in the local newspapers.[244] They emphasised the idea that Willis was biased towards Mr Simson and had failed to examine Mr Cadden's affidavit. The Resident Judge

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[240] *Willis and Another v Dutton, Simson and Darlot*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 13 July 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 15 July 1841.

[241] Summons issued 15 April and returnable on 19 April 1841, Judgment 7 June 1841.

[242] *Willis and Another v Dutton, Simson and Darlot*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 13 July 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 15 July 1841.

[243] 'Perjury - *Willis and Another v Dutton, Simson and Darlot*' Supreme Court of New South Wales in the District of Port Phillip, Before His Honour Judge Willis 17 July 1841 Source: *Port Phillip Herald* 20 July 1841.

[244] 'Trial of Simson' Source: *Port Phillip Gazette* 21 July 1841, 'The Perjury Case' and 'His Honor Judge Willis' Source: *Port Phillip Herald* 23 July 1841. See also 'His Honor Judge Willis' Source: *Port Phillip Herald* 27 July 1841.

regarded criticism as a serious matter and directed Mr Croke, the Crown Prosecutor to have the editor of the *Port Phillip Gazette* brought before the Court. In chambers, Willis warned Mr Arden of his concerns and wanted him to publish a withdrawal of the suggestion of bias, since it had the potential to injure 'a gentleman holding the position of a British Judge'.[245]

In August 1841 the *Port Phillip Gazette* published a small article written by Willis, in which he expressed the importance of newspapers in providing impartial reporting of events.[246] Reflecting upon what had occurred the previous month, Willis noted that he sought not to control the newspaper media,

> but, as I before said, I will do everything in my power to crush its licentiousness. I care not what may go forth to the public, or be presented to the world. I wish my conduct to go forth, and be criticized upon as minutely as possible, but I will not endure that any individual shall publish willful and malicious reports, merely because he has the use of press and type.[247]

Willis sought to publicly justify his actions in an attempt to avoid any further criticism, but he did not achieve his goal. Throughout his time in Port Phillip, there was ongoing commentary in the newspapers regarding his behaviour and how he administered justice.

On 29 September 1841 the *Port Phillip Gazette* published a letter signed 'Scrutator'.[248] This item was later referred to as the climax of the dispute between the Resident Judge

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[245] 'The Judge and the Press' Source: *Port Phillip Gazette* 24 July 1841.

[246] 'Contempt' Source: *Port Phillip Gazette* 25 August 1841.

[247] Ibid.

[248] 'Letter signed 'Scrutator' Source: *Port Phillip Gazette* 29 September 1841.

and Mr Arden.[249] The letter was highly critical of the actions of the Willis in failing to enhance public respect for the institution of the judiciary. It highlighted how he allowed his personal feelings to influence the exercise of judicial power. 'Scrutator' noted,

> His Honor's practice of giving his opinion and directing the proceedings, not only in matters co-lateral, but even in those totally unconnected with the question he is called upon to decide … No opportunity escapes him for scattering his dicta, for stating what he believes to be the law and merits of every subject, no matter how extraneous to that under consideration, if it happened to strike his fertile fancy.[250]

'Scrutator' focused attention on Willis's habit of using the courtroom for the purpose of delivering opinions on any subject whether or not it was relevant with the matter before him. A good example of this had occurred when Willis noticed an advertisement indicating that a thoroughbred stallion 'Hound's Foot' was for sale by Mr A Cunninghame.[251] Since this was the name of a local barrister, the next day in court, the Resident Judge made it known that such advertisements did not benefit the dignity the bench or bar. He made no effort to determine whether it was the same person. Willis suggested a more extreme advertisement 'Business done at the Horse and Jockey "MONTEZUMA" – This splendid ass will stand during the season, at the stables of His Honor Judge Willis, at Heidleberg?'[252] It was later determined that Willis had wrongly accused the barrister. People began to question the actions of Willis to make such references. In another case on a similar basis, a solicitor aspiring to new fashions appeared in court with an extensive moustache. Willis took one look at Mr Sewell and

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[249] 'The Climax - Provincial Politics' Source: *Port Phillip Gazette* 6 October 1841.

[250] 'Letter signed 'Scrutator' Source: *Port Phillip Gazette* 29 September 1841.

[251] 'Hound's Foot advertisement' Source: *Port Phillip Patriot and Melbourne Advertiser* 30 August 1841.

[252] 'The Law and the Ass' Source: *Port Phillip Herald* 31 August 1841.

told him that if he wished to act as a barrister he should have the decency to look like one, and sent him away again until his moustache was removed.[253]

As a result of the letter published on 29 September and signed 'Scrutator', Mr Arden was arrested and charged with criminal libel.[254] The Resident Judge noted,

> [h]ad the attack been personal, the scurrility would have been beneath my voice, emanating from a ruffian without a name; but being an attack on the administration of justice I am bound to take cognizance of it. It is not the first time that I have been attacked through the same source - the Port Phillip Gazette. On the 21st of July, on the trial of Simson, to which I allude without wishing to hurt the feelings of any one, I am accused of partiality as a Judge; the words are in italics *"This impartial summing up."*[255]

Willis argued that his actions were not based upon personal hurt or injury arising from the article. He had little choice but to defend the administration of justice, when scurrilous reporting had attacked it.

The trial was irregular for the Resident Judge, ensured by taking out an affidavit that the only defence Mr Arden could make was in writing. Mr Arden was fined £400 and ordered to produce by the next day, two sureties of £200. When the time came, the Police Magistrate reversed the decision on the grounds that in the affidavit Willis had not said he was in bodily fear of Mr Arden or that libel was a breach of the peace.[256] In response Willis made a new affidavit, and on the following Monday the magistrate conducting Quarter Sessions in lieu of Willis, decided that Mr Arden did have to give

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[253] JL Forde *The Story of the Victorian Bar* (Whitcombe and Tombs, Melbourne 1913) 69.

[254] 'Provincial Politics - Judge Willis' and 'Law Intelligence, Supreme Court – Friday, October 1' Source: *Port Phillip Gazette* 2 October 1841.

[255] Ibid. Italics appear in the original document.

[256] 'Provincial Politics - The Climax' Source: *Port Phillip Gazette* 6 October 1841.

sureties, but made no mention of the fine.[257] Mr Arden in what can only be regarded as a rather childish retaliation, also made out an affidavit seeking to have Willis bound over to keep the peace but it was dismissed.[258]

There was a great deal of discussion about the merits of the case in general and Willis's actions in particular.[259] People felt that the Resident Judge had been carried away by his dislike of Mr Arden. Even the *Port Phillip Patriot* published an editorial on the affair and concluded:

> The administration of justice in the persons of his Honor Mr Justice Willis, will not meet in this Province with the respect to which it is entitled, and without which it cannot safely be carried on. We think therefore, that whether His Honor is right or wrong, whether he has erred 'in toto', or only to a certain extent, the effect is the same, and that it is expedient, for the proper and effectual administration of justice, that he should resign the office of Resident Judge into the hands of one or other, of his brethen on the bench.[260]

These were strong words from a newspaper that was later to be described 'as the organ of the Resident Judge'.**[261]** After October 1841 the press was relatively quiet in their commentary about Willis's actions. It was not until early in new year that this situation changed.

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[257] 'Law Intelligence - Quarter Sessions, Monday 4 October 1841' Source: *Port Phillip Gazette* 6 October 1841.

[258] 'PPG – Scrutator' *Port Phillip Patriot and the Melbourne Advertiser* 4 October 1841 and 'The Bench and the Press' Source: *Port Phillip Patriot and the Melbourne Advertiser* 7 October 1841.

[259] 'Provincial Politics - The Last Defence of Judge Willis' Source: *Port Phillip Gazette* 10 November 1841. See also 'Provincial Politics - The Government and the Press' Source: *Port Phillip Gazette* 20 November 1841. See also 'Liberty of the Press – Letter to Judge Willis' Source: *Port Philip Herald* 5 October 1841.

[260] 'The Bench and the Press' Source: *Port Phillip Patriot and the Melbourne Advertiser* 7 October 1841.

[261] 'Provincial Politics - Junius and the Patriot' Source: *Port Phillip Gazette* 26 February 1842 and 'The Patriot's Respectability' Source: *Port Phillip Gazette* 16 March 1842.

In February 1842 the Resident Judge was conducting an insolvency case when evidence was produced that a deed was in the possession of Mr Cavenagh in his private capacity.[262] Mr Cavenagh arrived at the courthouse having been requested verbally, but not ordered to attend. When asked to produce the deed he refused, on the grounds that he was not obliged to do so. Willis labelled Mr Cavenagh as a dishonest, dishonourable, selfish, shameless person, without character and guilty of perjury and prevarication.[263] The Resident Judge then threatened that unless the deed was produced, Mr Cavenagh could 'rot in jail' until it appeared. It did so the next day.[264]

On 12 February Mr Arden's paper carried an article that was deeply and comprehensively critical of the Resident Judge,

> [f]rom the hour that Mr Justice Willis landed in the Colony his personal behaviour on the bench has been that of an 'infuriate' …That he has injured the characters of others; that he has created confusion in civil and social life; and that he has lost that public respect from the unruly use of his tongue, both in private and public is undeniable.[265]

These were very strong words and as they were published in the *Port Phillip Gazette*, three days later Mr George Arden found himself in court again. The Crown Prosecutor sought a rule 'nisi' for an attachment for a 'shameful' libel on the judge, his past and present. Proceedings became more complicated when, during questioning, Mr Arden was very evasive believing falsely, that as the law stood, he could not legally be proved

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[262] 'In the matter of the arbitration of Dutton, Simson and Darlot, Supreme Court, Chamber Sittings 8 February 1842' Source: *Port Phillip Patriot and the Melbourne Advertiser* 10 February 1842.

[263] 'Provincial Politics- Mr Cavenagh's Case 12 February 1842' Source: *Port Phillip Gazette* 14 February 1842.

[264] 'Law Intelligence, Supreme Court - Chamber Sittings, Wednesday 8 February 1842' Source: *Port Phillip Gazette* 14 February 1842.

[265] 'Provincial Politics- Mr Cavenagh's Case 12 February 1842' Source: *Port Phillip Gazette* 14 February 1842.

the editor, printer and publisher of the Port Phillip Gazette under the *Newspaper Act* enacted by Governor Darling 1837. His Honour Mr Justice Willis declared this perjury and contempt of court.[266] Mr Arden was sentenced to 12 months prison and a fine of £300.

Willis's intense hatred of Mr Arden is the only possible explanation for the severity of the punishment. What made the case notorious was the fact that Willis placed himself in the position of the injured party, judge and jury. Therry explained,

> [a] proceeding for attachment for libel which subjects the accused party to answer interrogatories framed by the judge, is besides unusual, and naturally regarded as a harsh if not despotic exercise of judicial authority, for it deprives the accused party of the intervention of a jury.[267]

In addition to the unfairness of the trial the Resident Judge further lowered his reputation by announcing triumphantly, '[t]his is a personal sentence of a Judge for contempt to his court, *and would be a difficult matter to be got rid of by the Crown without my intervention*.'[268] This extraordinary statement by Willis in open court did not assist the matter and the newspapers reacted immediately.[269] They discussed the nature of arbitrary power, freedom of the press and questioned whether Willis was the best person to be the Resident Judge of Port Phillip. The *Port Phillip Patriot* hoped that

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[266] *The Queen v George Arden*, Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 16 February 1842 Source: *Port Phillip Gazette* 19 February 1842.

[267] R Therry *Reminiscences of Thirty Years' residence in New South Wales and Victoria* (Sydney University Press, Sydney 1974) 344.

[268] *The Queen v George Arden*, Supreme Court of New South Wales in the District of Port Phillip, Before His Honour Judge Willis 16 February 1842 Source: *Port Phillip Gazette* 19 February 1842. Italics appear in the newspaper account.

[269] 'To John Walpole Willis, Resident Judge of the District of Port Phillip' Source: *Port Phillip Herald* 11 February 1842. See 'Letter by George Arden to the Debating Society – reference to letter by Debating Society' Source: *Port Phillip Herald* 1 March 1842. See also 'Judge Willis and the Press' Source: *Port Phillip Herald* 22 March 1842.

Willis having shown he was in possession of the power to punish would also demonstrate the capacity to forgive.[270]

Other anonymous letters were also published in the Port Phillip newspapers that were disparaging of Willis. On 25 February 1842 the *Port Phillip Herald* published a letter signed by 'Junius'.[271] It was subsequently republished in both the *Port Phillip Gazette and the Port Phillip Patriot.*[272] In the letter 'Junius' made critical comments and challenged the historical accuracy of many historical quotes Willis had used when sentencing Mr Arden. 'Junius' firmly asserted that

> if Mr Justice Willis or any other Judge, unsupported and consequently unrestrained by co-ordinate authorities, is to be the sole exponent of the liberty of the press, with power to inflict fine and imprisonment at will, on constructive libellous productions, without appeal, and beyond remit (as is exultingly advanced), and there is an end of our liberty.[273]

The Resident Judge ought to have shown restraint in his handling Mr Arden. Arbitrary power had to be avoided. Judge Stainforth of the Bengal Civil Service in a letter to the editor of the *Port Phillip Herald* on 22 March 1842 also commented on the proceedings involving Mr Arden.[274] After reviewing a matter involving a newspaper in India expressing critical comments about the Colonial Government he noted 'I am confident that no Indian Judge (in a country too where British power is entirely supported by

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[270] 'The Supreme Court' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 February 1842. 'The Patriot's Respectability' Source: *Port Phillip Gazette* 16 March 1842.

[271] 'Judge Willis and the Press - Letter published in the *Port Phillip Patriot and the Melbourne Advertiser* yesterday reproduced signed by Junius' Source: *Port Philip Herald* 25 February 1842.

[272] 'Letter by Junius' Source: *Port Phillip Gazette* 26 February 1842. 'Provincial Politics - Junius and the Patriot' Source: *Port Phillip Gazette* 26 February 1842. See 'Letter by Junius' Source: *Port Phillip Patriot and the Melbourne Advertiser* 21 February 1842.

[273] Ibid.

[274] 'Letter to the Editor - Mr Justice Willis by Judge Stainforth, Bengal Civil Service - Sentence Disproportionate' Source: *Port Phillip Herald* 22 March 1842.

public opinion) would notice the effusions of a newspaper.'[275] Furthermore after discussing the actions of Horne Tooke in writing an atrocious libel during the First American War against the English army he noted:

> [t]he idea that Mr Willis' court can be in reality lowered in public estimation by an attack in a newspaper is to me ludicrous. Admitting, however, that Mr Arden's libel ought to have been noticed, still I consider the punishment so greatly disproportionate to the offence as to argue that the person who could inflict it must have a bad head or a bad heart.

These comments were made by another common law judge and highlight the inappropriate sentence that the Resident Judge had imposed on Mr Arden. All of the Port Phillip newspapers were also upset.[276] The *Port Phillip Gazette* claimed that 'the sentence is altogether in point of severity without a parallel in the annuals of British history'.[277] Furthermore the paper noted Willis's conduct in deciding his own case, was an act calculated to bring the administration of justice into contempt. It would awaken sympathies in the people for its unfairness, while the actual offence would sink into oblivion and people would be suspicious of the quality of justice administered in his court.[278] Governor Gipps stated before the Privy Council that Willis in dealing with Mr Arden had 'created a violent feeling in the district', and that 'the law officers having advised the Governor that the proceeding was illegal, he was obliged to remit the sentence'.[279] After a week in the Melbourne gaol, the Resident Judge agreed to Mr

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[275] 'Letter to the Editor - Mr Justice Willis by Judge Stainforth, Bengal Civil Service - Sentence Disproportionate' Source: *Port Phillip Herald* 22 March 1842.

[276] 'Provincial Politics - Mr Arden and the Judge' Source: *Port Phillip Gazette* 19 February 1842. 'Letter by Juvenis' Source: *Port Phillip Patriot and the Melbourne Advertiser* 21 February 1842. 'The Supreme Court' Source: *Port Phillip Patriot and the Melbourne Advertiser* 3 March 1842.

[277] 'Provincial Politics - Mr Arden and the Judge' Source: *Port Phillip Gazette* 19 February 1842.

[278] Ibid.

[279] *The Case for the Respondent* 3.

Arden's removal to the more comfortable confinement of the Watch-house on Eastern Hill.[280] He was later released in April.[281]

The notoriety of the case spread rapidly.[282] In Sydney the *Herald* of 8 March published a very long article about the matter and this was reproduced in the *Port Phillip Gazette*,

> [the article] was highly offensive and entirely unjustifiable, yet we cannot help thinking that the sentence is by far too heavy. Mr Willis should be the last man in the world to be too severe upon a party for losing his temper, seeing that, unless he has changed since he left Sydney, he displays bad temper on the Bench much too often to make a dignified Judge … we never heard of a Judge rejoicing because a sentence he had passed could not be touched. …That the papers in Melbourne have played upon Mr Willis's bad temper, that they have taken advantage of it, is clear, but His Honor's conduct is so intemperate, that there is no excuse for it. He must be removed.[283]

Concern was increasingly being expressed about the need to remove the Resident Judge from the bench in order to safeguard the administration of justice in Port Phillip. Lord Stanley when informed about the matter expressed his regret,

> Mr Justice Willis, by not applying, as it was in his power to have done, for the provisional appointment of another Judge of the Supreme Court to try the case in which he was personally concerned, should have given colour to accusations of being influenced in the discharge of his judicial functions by personal motives. At the same time, I feel it due to Mr Willis to express my conviction that he was influenced by no such motives in adopting the course he did. [284]

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[280] 'The Judge and the Press' Source: *Port Phillip Herald* 22 February 1842.

[281] *The Queen v George Arden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 15 April 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 18 April 1842. See 'Mr Arden's Release' Source: *Port Phillip Herald* 19 April 1842.

[282] 'Opinions of the Press on Judge Willis' Source: *Port Phillip Gazette* 23 March 1842.

[283] '*Sydney Herald* 8 March 1842' reproduced in the Supplement to the *Port Phillip Gazette* 23 March 1842.

[284] 'Letter: Stanley to Gipps, 19 December 1842' F Watson (ed) *Historical Records of Australia* Series 1 Vol XXII 435 also quoted in AGL Shaw (ed) *Gipps - La Trobe Correspondence 1839-1846* (Melbourne University Press, Melbourne 1989) 127.

Willis in handing down sentence on Mr Arden had allowed his personal interests to cloud the exercise of judicial power. By not making alternative arrangements for another Supreme Court Judge to hear the matter, he had diminished public confidence in the administration of justice. These ideas were reinforced by the Executive Council that noted, 'even supposing he had been warranted in law, he did *what was scarcely decorous or necessary* in acting as a Judge in his own cause, and pronouncing a very serious sentence in a case wherein he was so clearly interested'.[285] Willis's behaviour when dealing with Mr Arden could not be justified on any basis and raised doubts as to how judicial power was being dispensed in Port Phillip.

In his appeal before the Judicial Committee of the Privy Council, Willis referred to a letter written by Superintendent Mr La Trobe on 17 February 1842 in which Mr Arden was labelled a 'gross libeller'.[286] In the document La Trobe expressed reluctance

> to offer any opinion under the mode or the measure in which punishment has been awarded… [but he] unhesitatingly agreed… that such statements could not be allowed with due regard to the dignity of the bench, and your own character as the Resident Judge, to pass unreproved.[287]

La Trobe on this occasion supported Willis's actions in that something had to be done with respect to anonymous letters in the Port Phillip newspapers that were bringing the institution of the judiciary into disrepute. Note that La Trobe did not endorse the means Willis had used in the circumstances.

The Resident Judge also attempted to justify his actions before the Privy Council by referring to a decision by Chief Justice Pedder of the Supreme Court of Van Dieman's

[285] *The Case for the Appellant* 5. Italics appear in the original document.

[286] 'Letter: La Trobe to Willis 17 February 1842' *Appendix to the Case on Behalf of the Appellant* XI 48.

[287] Ibid.

Land.[288] Mr Melville was the publisher and proprietor of the *Colonial Times.* In an editorial he criticised how Chief Justice Pedder had conducted the trial of Mr Robert Bryan who had been charged with stealing cattle. Mr Melville asserted that, in his capacity as Executive Councillor, Chief Justice Pedder had 'already decided' against Bryan.[289] The Attorney General prosecuted Mr Melville for contempt of court as the article was 'calculated to bring the public administration of Justice in that Court into ridicule'.[290] Willis used the *Melville* case as a precedent for his own action against Mr Arden. Mr Melville was sentenced to twelve months imprisonment with a fine of £100 and required to enter into recognizances to be of good behaviour for two years.[291] This sentence was almost identical to that imposed on Mr Arden.

Although Willis had cited Chief Justice Pedder's decision in his appeal before the Privy Council, he did not mention the reaction of the Colonial Office. The Colonial Office looked disapprovingly on the use of contempt proceedings to silence a critic, lecturing Lieutenant Governor Arthur that:

> It is a practice foreign to the habits of English tribunals and condemned by the prevailing opinions of the people of this country. There was, therefore, the strongest motive for avoiding such an innovation, in a case in which personal

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[288] *In re Melville* Supreme Court of Van Dieman's Land, Before Pedder CJ 6 November 1835
Source: *Hobart Town Courier* 13 November 1835. See also Decisions of the Nineteenth Century Tasmanian Superior Courts. Published by Macquarie Law School, Faculty of Arts, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/in_re_melville/ > (visited 1 August 2012).

[289] JM Bennett *Lives of the Australian Chief Justices: Sir John Pedder* (Federation Press, Annandale 2003) 94.

[290] *In re Melville* Supreme Court of Van Dieman's Land, Before Pedder CJ 6 November 1835
Source: *Hobart Town Courier* 13 November 1835. See also Decisions of the Nineteenth Century Tasmanian Superior Courts. Published by Macquarie Law School, Faculty of Arts, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/in_re_melville/ > (visited 1 August 2012).

[291] Ibid. See also Bennett above n 289.

> feelings, if not indeed the personal interests, of the judge were so directly involved.[292]

Chief Justice Pedder, rightly in his present view, adhered to his position. 'I doubt not', he wrote to Mr Justice Willis in Victoria,

> That a judge may punish by attachment for the contempt, scandalous reflexions on his judicial capacity, even tho' no cause be pending, that is, altho' no particular case be adverted to, and the reflexions be only on the Judge's general conduct in his office, provided they be scandalous. There is a very old case which appears to establish this point. It is cited from the Year Book in 3rd *Inst. 174.*[293]

The Colonial Office was not persuaded by Chief Justice Pedder's opinion and Lieutenant Governor Arthur immediately released Mr Melville from gaol.[294] Bennett has noted that '[t]he Melville case prompted the resignation of Chief Justice Pedder from the Executive Council'.[295]

Another relevant matter that Willis omitted in his appeal before the Privy Council was to explain what is understood by the expression 'bringing the administration of justice into contempt'. The *Port Phillip Gazette* considered it as possessing an arbitrary definition which,

> places the dignity of his judgment in ambiguous ordour. The records of the English Courts of Law, will scarcely furnish an instance of a Judge committing an offender to prison upon the mere arbitrium of "the Court", whose dignity may have been assailed by "an attempt" to bring its administration of justice into contempt; and no precedent can be found under such circumstances of imposing

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[292] 'Letter: Glenelg to Arthur 1 June 1836 CO 408/12 p 102' quoted in Bennett above n 426, 94.

[293] 'Letter: Pedder to Willis n d New South Wales Governor's Despatches (ML A1238) 228 at 233-234' quoted in Bennett above n 289, 95.

[294] Bennett above n 289.

[295] Bennett above n 289, 26

> the *dreadful sentence of twelve months imprisonment, and three hundred pounds fine*.[296]

In searching for a precedent, the *Port Phillip Gazette* discussed the Melville case and then identified an incident in Newfoundland that had occurred six years earlier.[297] The editor of the Newfoundland *Patriot* newspaper published critical comments about how Chief Justice Bolton had decided a case. Instead of having this libel brought to the attention of the Attorney General, Chief Justice Bolton called the editor before him and sentenced him to three months imprisonment together with a fine for £50. The *Port Phillip Gazette* equated the actions of Chief Justice Bolton to those of Justice Willis in the sentencing of Arden and noted that the press,

> is a giant power for evil or for good. Attempt to repress it by measures such as this of Judge Willis, if successful, we at once recede to the unbridled license of the dark ages, when power was justice, and might was right. If we fail (which is much more likely), we at once give the rein to licentiousness and personality, and in taking off the wholesome check of opinion, allow the press to run riot in evil, and effectively destroy the power of doing good. No. In any case let a jury be the judges of the law and of the fact.[298]

The *Gazette* article emphasised that no person should be judge and jury in their own case. Furthermore that the press has a role to play in balancing power and to allow Willis to exercise absolute authority is dangerous for the administration of justice in Port Phillip. In Newfoundland, Governor Sir George Grey found the conduct of Chief Justice Bolton to the individual who had commented on his conduct as judge 'was going back to the practices of other days, which Government was not disposed to renew' and

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[296] 'Provincial Politics - Mr Arden and the Judge' Source: *Port Phillip Gazette* 19 February 1842. Italics appear in the original document.

[297] 'The Patriot's Respectability' Source: *Post Phillip Gazette* 16 March 1842.

[298] Ibid.

he immediately acceded to the petition to remit the remaining portion of the sentence.[299]

In early March 1842 stories began to circulate of a 'Hole in the Corner' petition for the removal of His Honour Mr Justice Willis.[300] The *Port Phillip Patriot* considered,

> If Judge Willis, either from his decisions, or from his conduct on the bench, has done ought to deserve the loss of the public confidence, then let that feeling be publicly demonstrated – call a public meeting and put it in the power of every man to record his assent or dissent, but let there be no "midnight assassin" work such as is now in operation.[301]

It was not long before other matters involving the Resident Judge occurred which would further test public confidence. Willis in his appeal before the Privy Council, accounted for his actions on the basis of the *Melville* case but failed to address the other matters that the three newspapers in Port Phillip had identified when Mr Arden was being sentenced. Mr Roger Therry, Attorney General in reviewing the actions of the Resident Judge noted,

> [i]t was an oversight of the Act constituting this Court not to have enacted 'that all cases, where the rights, character, and property of the judge were concerned, should be triable in Sydney'. Personally, I found no inconvenience from this position; but other Judges, especially Mr Justice Willis … had just reason to complain of the omission of the enactment.[302]

Whilst it may have prevented in some measure the controversy regarding the sentencing of Mr Arden, it is nevertheless problematic to rely upon omissions in the legislation constituting the Supreme Court of New Wales at Port Phillip as explaining the situation. Willis had travelled extensively throughout the British Empire and had held

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[299] 'The Bench and the Press' Source: *Port Phillip Herald* 18 March 1842.

[300] 'The "Hole in the Corner" Petition' Source: *Port Phillip Patriot and the Melbourne Advertiser* 14 March 1842.

[301] 'The Supreme Court' Source: *Port Phillip Patriot and the Melbourne Advertiser* 10 March 1842.

[302] Therry above n 267, 343.

judicial appointments in Upper Canada, British Guiana and Sydney. He ought to have administered colonial justice involving Mr Arden in a better manner. The idea of the constitution of the Court providing another source of difficulty for Willis is further considered with respect to the cases of Mr Carrington and Mr Ebden.[303]

[303] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

PART A-2 DISPARAGING WORDS ABOUT THE JUDGES OF THE SUPREME COURT AT SYDNEY IN A CASE INVOLVING MR BATMAN'S WILL

Willis was always self-assured that he had done nothing wrong, even with the benefit of hindsight. A judge should respect the reputation of individual judicial officers and not do anything that may lower the public's opinion of the judiciary. If a disagreement arises between judicial officers it should not be conducted in open court. The second complaint brought before the Governor and Executive Council concerned Willis having publicly made disparaging comments about Chief Justice Dowling, Justice Stephen and Justice Burton of the Supreme Court of New South Wales at Sydney.[304] It was in the administration of Mr John Batman's estate that Willis noted that there had been a number irregular processes. Initially Willis cast doubt upon the idea he had used offensive language and preferred to blame inaccurate reporting by the Port Phillip newspapers. In his appeal before the Privy Council Willis asserted that such a complaint 'furnish[ed] no adequate ground of complaint against him'.[305] As discussed earlier, Chief Justice Dowling selected Willis to be the first Resident Judge not so much because of the needs of the Port Phillip community, but rather to put some distance between himself and Willis.[306]

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[304] *The Case for the Appellant* 5. See also *Appendix to the Case on Behalf of the Appellant* XII 48.

[305] Ibid.

[306] See 'The Biographical and Historical Context - John Walpole Willis' at pages 24-25 of this thesis.

John Batman is usually considered 'one of the founders of Melbourne'.[307] He had been a very successful commercial trader but when he died in 1839 his family was almost without the basic necessities. He and his wife had eight children. Prior to his death his wife travelled to England and upon her return, she married Mr William Willoughby. Batman had effectively made little provision for his wife and children. Batman's estate came before Willis several times during his tenure as the first Resident Judge in the District of Port Phillip. The first occasion was on 30 March 1842 where Willis noted '[t]he family are in a most distressed and destitute state, and anxious to have the case heard'.[308] Mr Carrington highlighted the difficulties in obtaining the official documents from Sydney and Willis noted 'the Sydney Court has no jurisdiction over this Court'.[309] No disparaging words about the Judges in Sydney were made on this occasion. The matter came before Willis again on 22 June 1842 and it was on this day that the Sydney Judges claim is centered.

In responding to the allegation that he had made 'disparaging words about the Judges of the Supreme Court at Sydney' Willis noted that different versions of the events were published in the Port Phillip newspapers.[310] The account provided in the *Port Phillip Herald* is identical to the *Port Phillip Gazette* but the information in the *Port Phillip Patriot and Melbourne Advertiser* for the same day was substantially different.

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[307] M Cannon *Old Melbourne Town Before the Gold Rush* (Loch Haven 1991 Melbourne) 76. See also Boyce above n 73 and B Attwood *Possession: Batman's Treaty and the Matter of History* (Miegunyah Press, Carlton 2009).

[308] *In Re Batman Deceased* Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 30 March 1842 Source: *Port Phillip Gazette* 2 April 1842.

[309] Ibid.

[310] *Batman v Lonsdale* Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 22 June 1842 Source: *Port Phillip Herald* 24 June 1842 and *Batman v Lonsdale*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 22 June 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 23 June 1842. See also *Appendix to the Case on Behalf of the Appellant* XII 49-50 that contains only the *Port Phillip Herald* accounts for the 24 and 30 June 1842.

The *Port Phillip Herald* version noted that Willis had remarked 'the original will had been detained in Sydney' and that 'when the judges of Sydney sent down the other proceedings here, the will should also had been sent. [The Sydney Judges] were culpable in not doing this'.[311] Furthermore the newspaper recorded that Willis remarked,

> he would have everything correct in the first Chancery suit in the colony; he did not think the probate worth a farthing, as it had been granted subsequently to the passing of the Act, which gave him exclusive jurisdiction in all matters originating in this district. The probate was signed by A Stephen, on the 29th April 1841, he could only grant probate of will relating to property with in the jurisdiction of Sydney.[312]

This claim that there was something wrong with how the matter had been handled by the Judges in Sydney in granting probate was further elaborated by Willis. In that 'the will had been proved in October 1840' and this was after the act establishing the Supreme Court of New South Wales in the District of Port Phillip had been enacted.[313] Willis is further recorded as having said that '[t]he act might have had a retrospective effect perhaps; it was at any rate a great irregularity; it was issued by Mr Justice Stephen when he had no jurisdiction'.[314] More colourful language about the same event is contained in the *Port Phillip Patriot and Melbourne Advertiser*. Willis is noted as having stated

> it being necessary for that document to be here, in order that the proceedings might go on. The judges, by withholding this will, have nearly ruined a poor family; I do not say, that it has been willfully withheld, but I think it was from

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311 *Batman v Lonsdale*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 22 June 1842 Source: *Port Phillip Herald* 24 June 1842.

312 Ibid.

313 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic Act No.22 (*Administration of Justice Act* 1840).

314 *Batman v Lonsdale*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 22 June 1842 Source: *Port Phillip Herald* 24 June 1842.

> their ignorance of Chancery practice: however, you can prove your will upon the day on which the cause comes on for hearing.[315]

Willis then questioned the actions of Dr Thomson as the guardian of the children indicating that if something was improper 'he would be guilty of contempt of court'.[316]

After probate was proved,

> upon his honour looking over it, he said, that a question would arise, as to whether the probate was worth a farthing; he did not think it was; for it appeared, that it had been granted in Sydney, on the 29th of April 1841, other time when he alone, by the passing of the act, had exclusive jurisdiction in the district; therefore, he repeated, that unless the probate relates to property in the Sydney district, as well as this, it was not worth a single farthing; if the property mentioned in the probate of that will was only in this district, the judges had not jurisdiction to grant probate; this was a grievous irregularity.[317]

It was these strong disparaging words about the Sydney Judges, contained in the *Port Phillip Patriot and Melbourne Advertiser* that indicate Willis had gone too far in publicly expressing his displeasure as to Equity knowledge and practice. The matter only became worse when it next came before Willis 6 days later.[318]

It was on this occasion that the will from Sydney was expected to be presented to the court in Port Phillip together the marriage certificate of the testator and Mrs Batman. Unfortunately this did not occur as Willis stated,

> I am sorry to say that Mr Pinnock has received a letter from the registrar of the supreme Court at Sydney, dated June 18th, respecting the application of Mr Clay for the transmission of the will to this district, by which it appears the judges at Sydney had declined allowing the will to be sent here, unless approved Security to the amount of £ 5,000 be granted by bond for its safe security to the files of the court at Sydney within a reasonable time. I do not see what right the judges at

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[315] *Batman v Lonsdale*, Supreme Court of New South Wales in the District of Port Phillip Before Willis J, 22 June 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 23 June 1842.

[316] Ibid.

[317] Ibid.

[318] *Batman v Lonsdale,* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 28 June 1842 Source: *Port Phillip Gazette* 29 June 1842 and *Batman v Lonsdale,* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 28 June 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 30 June 1842.

> Sydney have to detain this will, because I believe by whole the testator's property to be in this district, and Mr Justice Stephen affixed his name to the probate of the will subsequent to the formation of the supreme Court in this district; the judges moreover ordered all proceedings in this matter to be sent down here, of which the will was a part, and they have sent all the documents connected with this matter, but have withheld the foundation of them all, mainly the will; I must express my regret, that Justice should be impeded in this manner, and shall feel bound to communicate to his honour the superintendent upon the matter; it is really absurd to expect that the attorney for the infants will enter into a bond for £5,000, for the safe transmission of the will from Sydney to this place.[319]

This account is from the *Port Phillip Patriot and the Melbourne Advertiser*. The *Port Phillip Gazette* provides a more moderate account; where after the handwriting of Mr Gibbons, the clergyman of Launceston on the marriage certificate had been proved, Willis remarked,

> I am sorry the judges in Sydney have refused to send down the will. They have sent down the other proceedings without the foundation of them all, the will itself, which they retain unless Mr Clay, the infants' attorney, enter into a bond for the payment of £5,000. I cannot see justice impeded in this way, and was just going to Mr La Trobe's on the subject.
>
> Mr Barry was of the opinion they would not be able to recover upon the bond if entered into by Mr Clay, and would suggest that an officer of the court be sent to Sydney for the will.
>
> The uncertainty of transmitting valuable deeds with safety from Sydney to this place was very great, from bushrangers and small coasting vessels, and he would not advise the solicitor for the plaintiff to incur such a large responsibility, attended with such contingencies. He much regretted the delays which had taken place in the adjudication of this important case, and the more especially as some of the parties interested were in a state of starvation.[320]

This issue of the *Port Phillip Patriot and Melbourne Advertiser* providing a different view of events is constant theme during the time Willis is in Port Phillip.[321] After expressing

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[319] *Batman v Lonsdale,* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 28 June 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 30 June 1842.

[320] Ibid.

[321] See Part A 11 'An Evasive, if not Untrue Statement Regarding a Loan of Money to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot* with a view of influencing its articles'.

his views publicly from the bench, Willis then wrote to the Judges in Sydney to express privately his disappointment about their actions with regards to Batman's will.

In a letter Willis wrote to the Sydney Judges, he noted,

> Probate of this will was not issued from the supreme Court of Sydney, *until long after that court ceased to have original jurisdiction the in this district.*
>
> The probate, therefore, granted by Mr Justice Stephen, may possibly be voidable, if not absolutely void, especially as it is said to relate, solely to property with the in the District of port Philip. Under these circumstances, to deny the parties possession of the will, unless security to the amount of five thousand pounds be given for its return to Sydney, seems to amount almost to such a denial of Justice, as the resident Judge feels assured, when their honours shall at length had made themselves acquainted with all the circumstances, they would extremely regret. The family of the testator are in extreme destitution, and the creditors deprived of their claims on the testator's property, by reason of this detention of the will.[322]

The Sydney Judges responded by asking Willis to confirm what had appeared in the *Port Phillip Patriot* of the 23 June 1842, '[i]n which remarks are attributed to you, when sitting in equity, at the hearing of that case, which appeared to us to demand serious notice. We beg the favour of your stating, whether those remarks, or others of like purport, were, in fact, made by you'.[323] In reply Willis affirmed,

> Sirs, I really cannot charge my memory with the precise terms I main used in the case you mention, nor do I consider myself answerable for newspaper reports, which are frequently, and, probably, in this case, very incorrect; but I must candidly state, I do remember having expressed myself as very great be surprised, that proceedings should have been sent down here, in the way there is were are in the case you allude to, without the *will* itself, the foundation of the proceedings being sent also, which certain appeared to me to be owing to neglect. *In any observation I may have made, no disrespect nor offence whatever was intended to be offered to the Judges on the Supreme Court.*

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[322] 'Letter: Willis to Sydney Judges (Dowling CJ, Burton J, and Stephen J) 29 June 1842' *Appendix to the Case on Behalf of the Appellant* XII 50. Italics appear in the original document.

[323] 'Letter: Sydney Judges (Dowling CJ, Burton J, and Stephen J) to Willis 7 July 1842' *Appendix to the Case on Behalf of the* Appellant XII 50. The document also appears in the *Appendix to the Case on Behalf of the Respondent* 48.

> At the same time, I by no means consider myself responsible for any expressions I may think fit to use, in the conscientious discharge while my legal duty, whether palatable or impalatable to others.[324]

Note the language expressed by Willis, regardless of any upset he may of caused, he was only carrying out his duties as a judge. It is difficult to agree with Willis on this point. In a further letter sent to the Sydney Judges the following week, Willis noted,

> I find the newspaper you allude to makes me say, "that the Will was withheld *owing to the ignorance of the Judges of Chancery Practice*, and not willfully." Now I really cannot charge my memory with what I did say, save that *I am sure* I mentioned the many recent changes in the supreme Court Office at Sydney, since the resignation while the late Chief Clerk, Mr Gurner, as a probable cause. I say, as his honour the Chief Justice is reported recently to have said in the Legislative Council, with regard to the term "*pusillanimous*") that I am not aware that I made use of the term, although I do not assert that I did not do so, but I certainly did not mean to attach any personal or offensive meaning to it." (See Australian newspaper, June 16th, 1842).[325]

Willis further stated that the matter is reported differently in three local newspapers when only one newspaper, the *Port Phillip Patriot and Melbourne Advertiser* was substantially different to the accounts provided in the *Port Phillip Gazette* and the *Port Phillip Herald.*

In August 1842 Willis wrote to Gipps indicating that he 'entirely' disagreed how the Judges in Sydney have conducted themselves regarding Batman's estate, lodged an official complaint to Her Majesty's Government and indicated that 'the inhabitants of this district would much rather be without a *Supreme Court* then that it should be thus

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[324] 'Letter: Willis to Sydney Judges (Dowling CJ, Burton J, and Stephen J) 19 July 1842' *Appendix to the Case on Behalf of the Appellant XII* 50. Italics appear in the original document. The document also appears in *Appendix to the Case on Behalf of the Respondent* 2.

[325] 'Letter: Willis to Sydney Judges (Dowling CJ, Burton J, and Stephen J) 25 July 1842' *Appendix to the Case for the Appellant XII* 50. Italics appear in the original document. The document also appears in the *Appendix to the Case on Behalf of the Respondent* 4.

interfered'.[326] The issue of jurisdiction for the Supreme Court of New South Wales in the District of Port Phillip is revisited in detail with the cases of Carrington and Ebden.[327]

Willis in his appeal before the Privy Council, identified 'disparaging words alleged to have been spoken in a case growing out of a Mr Batman's Will' as a separate and independent ground for his amotion. Gipps however, did not separately address the matter and only dealt with it in the context of other individuals that had brought complaints against Willis.[328] These included Arden, Carrington and Ebden.[329] In particular Gipps noted that the Executive Council did not hesitate in expressing,

> disapproval of the studied personal references, amounting to actual insults, indulged in by Mr Justice Willis towards colleagues, whether from the bench, or in open court, or in his correspondence with the Colonial Government. The un-courteous exhibitions would of themselves go far towards rendering it questionable, in the judgment of the Council, how far Mr Justice Willis is a person qualified to fill a situation, among the first essentials to which his discretion in the use of language, more especially when any unadvised expressions may have a tendency to detract from the dignity of the Bench, and thereby to bring the administration of justice itself into contempt.[330]

Furthermore the Executive Council was concerned with how differences between judges might be resolved. It was noted that

> they ought to be treated as dry legal questions to be disposed of by a temperate appeal to a higher legal or legislative authority; but it seems to the Council that there was a total departure from sound judgment and propriety, in that course of personal remark into which Mr Justice Willis appears to have habitually betrayed as often as any question arose to occasion a difference of opinion between himself and the other judges of the Supreme Court, whose language, it should on

[326] 'Letter: Willis to Gipps 23 August 1842, which was later transmitted to Lord Stanley, 10 September 1842' *Appendix to the Case on Behalf of the Respondent* 4-5.

[327] Discussed in Part A 3 'The Cases of Mr Carrington and Mr Ebden'.

[328] Copy of Dispatch from Gipps to Lord Stanley, Secretary of State for the Colonies 13 October 1842 No. 191 with Enclosures No. 151 - 27 August 1842 and No. 163 – 10 September 1842 *Appendix to the Case on Behalf of the Respondent* 5-6

[329] Part A-1 'Sentence on Mr Arden' and Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[330] 'Minute of the Executive Council, Min 43/3A 20 January 1843' *Appendix to the Case on Behalf of the Respondent* 27.

> the other hand be observed, with reference to their colleague is always becomingly guarded.[331]

The confidence in which the Council made these remarks is reflected in that they 'do not think it necessary to offer special instances in support of the opinion thus expressed'.[332] Furthermore they considered that 'there is scarcely any portion of Mr Justice Willis's correspondence relating to the differences with the other Judges, which is not in greater or less degree open to censure'.[333] This opinion is further supported in a letter written by the Judges in Sydney to Lord Stanley, Secretary of State for the Colonies.[334] In this letter, Chief Justice Dowling, Justice Burton and Justice Stephen, reviewed how the Supreme Court of New South Wales handled Batman's estate. They acknowledged in March 1841 when Willis was appointed to be the resident judge of Port Phillip, the suit *Batman v Lonsdale*' was pending in Sydney. They also noted that when the will was proved in October 1840, Willis was on the bench in Sydney. The instrument bearing the seal of the Court was not acted upon until April 1841 when Willis at this time, was in Port Phillip. With regards to the payment of a bond the judges in particular stated the matter arose between the Registrar and the Deputy Registrar about a security deposit. In conclusion they noted that comments,

> …made by a Judge from the bench in reference to his colleagues, those colleagues being also Judges possessing appellate, and therefore superior, jurisdiction, call for very serious notice. Mr Justice Willis certainly disclaims the having intended by them any disrespect or offence towards us. Your Lordship cannot fail, however, to perceive that observations of such a nature are in themselves unbecoming and unavoidably offensive; and we must express it as our opinion

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[331] 'Minute of the Executive Council, Min 43/3A 20 January 1843' *Appendix to the Case on Behalf of the Respondent* 27.

[332] Ibid.

[333] 'Letter: Sydney Judges (Dowling CJ, Burton J, and Stephen J) to Stanley 17 August 1842' *Appendix to the Case on Behalf of the Respondent* 2.

[334] Ibid.

> that they tend directly to lower the judicial character, and bring the administration of justice into contempt.[335]

The concern by the Judges in Sydney was that the statements by Willis would disrupt peace, order and tranquility. In particular it may encourage people to question in a greater degree the authority of the courts and the administration of justice.

The best means by which to explain why Willis was highly critical of the Judges in Sydney with regard to Batman's estate is to reflect upon his character. Willis had been leader in Equity at the Bar in England before he had embarked on a judicial career. When he was appointed to the Supreme Court in Sydney, he anticipated that he would be Judge in Equity at Sydney and have the title 'Chief Baron'.[336] This did not happen. Amongst other concerns when he was on the bench in Sydney, he challenged the legitimacy of Chief Justice Dowling.[337] Willis had a high opinion of his knowledge of Equity and in *Ex parte Roxburgh* publicly expressed his disapproval of Dowling when he said 'I bow with deference to the opinion of the Court, but I trust the Chief Justice will not think it nonsense when I say I cannot agree'.[338] It was not Willis's knowledge that questioned, but the manner in which he expressed his views.

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[335] 'Letter: Sydney Judges (Dowling CJ, Burton J, and Stephen J) to Stanley 17 August 1842' *Appendix to the Case on Behalf of the Respondent* 2.

[336] Votes and Proceedings, New South Wales Parliament 1840, 169 quoted in J Bennett *Equity Law in Colonial New South Wales 1788-1902, University of Sydney Research Project 59/20(c).* Part 1: The Equity Jurisdiction of the Supreme Court, Section 7: The Equity Revival Under Sir James Dowling 34.

[337] See 'The Biographical and Historical Context - John Walpole Willis' at pages 20-27 of this thesis.

[338] *R v Wilson and Windeyer* [1838] NSWSupC 62 (Reported as *Ex parte Roxburgh)* Supreme Court of New South Wales at Sydney. Before Dowling CJ, Burton and Willis JJ 23 June 1838 Source: *Sydney Morning Herald* 25 June 1838. See also Decisions of the Superior Court of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1838/r_v_wilson_and_windeyer/ > (visited 1 August 2012).

Willis's intellectual talent is recognised by Bennett as '[t]he greatest stimulus to the growth of equity business was provided by the accession to the colonial bench of Mr Justice Walpole Willis'.[339] He was responsible 'for drafting the rules of Equity procedure in the Supreme Court (called the Standing Rules) in 1838. As measure of their value … they were in use for over twenty years'.[340] Willis was appointed to Port Phillip not so much as he was the best candidate for the position but rather to remove him from Sydney since he had been rather disruptive. In these circumstances, it is not entirely surprising that Willis when afforded an opportunity to criticize the Judges at Sydney did not fail to act and this is what occurred with the estate of Mr Batman.

[339] J Bennett *Equity Law in Colonial New South Wales 1788-1902, University of Sydney Research Project 59/20(c).* Part 1: The Equity Jurisdiction of the Supreme Court, Section 7: The Equity Revival Under Sir James Dowling 34. See also 'The Biographical and Historical Context - John Walpole Willis' at pages 20-27 of this thesis.

[340] Ibid.

PART A-3 THE CASES OF MR CARRINGTON AND MR EBDEN

The third complaint against the Resident Judge arose in the context of insolvency proceedings *In the Estate of Peter Snodgrass*.[341] Mr Horatio Nelson Carrington who was an attorney, had been formerly employed by the insolvent. In court, Mr Carrington undertook to produce the accounts and documents in his possession. Upon failing to do so, he was committed by the Resident Judge to prison for contempt and his name was removed from the roll of attorneys in Port Phillip. Mr Carrington later petitioned the Supreme Court of New South at Sydney to appeal the decision regarding his committal, and a writ of *habeas corpus* and *certiorari* was subsequently granted.[342] In serving notice of the appeal it was alleged that both Mr Carrington and Mr Ebden had assaulted the Resident Judge, although the charges were later dismissed. In considering the appeal, the Supreme Court at Sydney examined the issue of jurisdiction. The relationship between the Supreme Court of New South Wales at Sydney with that of the Supreme Court of New South Wales in the district of Port Phillip was clarified. Chief Justice Dowling together Justice Burton and Justice Alfred Stephen in Sydney, determined that such appeals from Port Phillip could be heard and that the actions of the Resident Judge were unlawful. This caused great concern amongst those people in Port Phillip that sought independence.[343]

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341 *In the Estate of Peter Snodgrass, An Insolvent,* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J and W Verner, Chief Commissioner of Insolvent Estates 28 April 1842 Source: *Port Phillip Gazette* 30 April 1842 and *Port Phillip Patriot and Melbourne Advertiser* 2 May 1842. See also *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

342 'Judges and Magistrates (Opening of the Supreme Court)' Source: *Port Phillip Gazette* 1 May 1841 and 'Supreme Court – Civil Side (Admission of Solicitors)' Source: *Port Phillip Gazette* 5 May 1841. See also 'Law Intelligence, Thursday 28 April – Peter Snodgrass' Source: *Port Phillip Gazette* 30 April 1842.

343 'The Carrington Case' *Port Phillip Patriot and the Melbourne Advertiser* 15 September 1842. See also Shaw above n 63, 238-248.

In May 1839 Mr Carrington met Mr McFarlane in Port Phillip. They discussed the idea of purchasing overland stock and transporting them to Adelaide. These activities, it was decided, might be done under a contract or on speculation of obtaining a good price in South Australia. Mr Peter Snodgrass was then employed to select the cattle and sheep. He was also to manage the stock on their journey to South Australia. Snodgrass had arranged finance by using bills of exchange but a number of these were later dishonoured. As an act of friendship, Mr Carrington gave a personal bond for the payment of the balance on the basis that Mr Rucker would keep all the records of the accounts. The total liabilities were approximately £ 10,000.[344]

Mr Snodgrass subsequently informed Mr Carrington that Mr Rucker was the principal partner in the speculations and Mr Carrington was keen to have a settlement of accounts. In September 1840 Mr Carrington produced sundry accounts for the money he had paid on behalf of Mr Snodgrass.[345] Upon settlement, Mr Snodgrass then wrote a memorandum of acknowledgement that all such documents including receipts had been delivered, so that he could settle his own accounts with other parties concerned in the speculation. Later there were other financial dealings between Mr Carrington and Mr Snodgrass. In these circumstances Mr McDonnell was employed to keep the accounts.[346]

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[344] *In the Estate of Peter Snodgrass, An Insolvent,* Supreme Court of New South Wales, District of Port Phillip. Before Willis J and W Verner, Chief Commissioner of Insolvent Estates 28 April 1842 Source: *Port Phillip Gazette* 30 April 1842 and *Port Phillip Patriot and Melbourne Advertiser* 2 May 1842. See also *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[345] Ibid.

[346] Ibid.

By 1842, Mr Snodgrass' creditors applied to the Court for the compulsory sequestration of his estate in insolvency.[347] When the insolvent estate came before the Court for examination on the 18 April, the trustees appointed were unable to unravel the affairs of Mr Snodgrass. Mr Snodgrass's sole answer to all questions was that Mr Carrington would be able to supply the information. He first denied giving Mr Carrington a release. When Mr Carrington produced the document to the court, he acknowledged that his signature was attached. He then asserted it was done under duress as Mr Carrington had threatened to mix up the accounts so they would never be able to be straightened out. Willis further questioned Mr Snodgrass as to land at Heidelberg that he had purchased from Mr Carrington, on which there was a mortgage for £ 300 at the time he bought it. Mr Carrington gave him a conveyance of land, but he did not bother to discharge the mortgage, or even to tell him of the existence of the mortgage.[348]

Mr Carrington was then called to give evidence before the Court. He maintained that accounts had been made up and given to Mr Snodgrass for his verification at the time he signed the memorandum of release, and Mr Snodgrass either had these accounts or had lost them. Mr Carrington further stated that Mr Snodgrass was not his client. If he had helped him at any time it was as a friend.[349] He was under no obligation to keep accounts for him. The Court then ordered Mr Carrington to furnish on the following

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[347] *In the Estate of Peter Snodgrass, An Insolvent,* Supreme Court of New South Wales, District of Port Phillip. Before Willis J and W Verner, Chief Commissioner of Insolvent Estates 28 April 1842 Source: *Port Phillip Gazette* 30 April 1842 and *Port Phillip Patriot and Melbourne Advertiser* 2 May 1842. See also *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[348] Ibid.

[349] Ibid.

Monday 25 April, a full account of all the transactions between himself and Mr Snodgrass.[350]

On the day appointed, Mr Carrington filed an affidavit, indicating that he did not have the documents. Mr Carrington was asked to enter the witness box again where he re-iterated what he had previously said. Willis considered this to be unsatisfactory, and again ordered the documents to be produced on the 28 April.[351] On that day Mr Carrington failed to produce the requested documents. In response the Resident Judge had Mr Carrington's name struck off the rolls of Attorneys and committed him to the 'Rules of the Debtors' prison' (an area bounded by Collins, Spencer, Lonsdale and Queen Streets).[352] Bail was granted and Mr Carrington gave a £ 500 surety. Mr George Arden and Mr William Harper each also put forward a surety of £ 500. Unbeknown to Willis, Mr Carrington already lived in that area. Raven has noted that a couple of days later, when the Resident Judge met Mr Carrington, he was so incensed at Mr Carrington riding a horse, he sent him to jail as being in contempt of 'the order of the Court'.[353]

Mr Carrington through his agent in Sydney, sought to petition the Supreme Court in Sydney for a writ of *habeas corpus*.[354] The application was heard in chambers by His Honour Mr Justice Burton and dismissed 'on the ground, that the Court had no

[350] *In the Estate of Peter Snodgrass, An Insolvent,* Supreme Court of New South Wales, District of Port Phillip. Before Willis J and W Verner, Chief Commissioner of Insolvent Estates 28 April 1842 Source: *Port Phillip Gazette* 30 April 1842 and *Port Phillip Patriot and Melbourne Advertiser* 2 May 1842. See also *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[351] Ibid.

[352] 'Law Intelligence, Thursday 28 April – Peter Snodgrass' Source: *Port Phillip Gazette* 30 April 1842.

[353] Forde above n 353, 72. See also J Raven above n 29, 36.

[354] 'Domestic Intelligence' Source: *Port Phillip Gazette* 25 June1842.

jurisdiction in Port Phillip, except in cases of appeal'.[355] Counsel for Mr Carrington were advised to petition for a writ of certiorari and *habeas corpus* to bring himself and the whole affair before the Full Court in Sydney.[356] The Petition of Appeal was granted by Chief Justice Dowling, Justice Burton and Justice Alfred Stephen on 4 July 1842. The 29 August was the day 'appointed for the proof and hearing of the matters contained in the said petition and appeal'.[357] Mr Carrington was instructed to serve notice of the appeal within twenty-one days on the Resident Judge and the Chief Commissioner of Insolvent Estates in Port Phillip.

Mr Carrington with his friend, Mr Ebden chose to serve the papers personally. Mr Ebden was to act as a witness. Mr Carrington wrote to the Resident Judge about the matter in chambers. Willis responded by refusing to accept the writ, indicating that, '[a]ny person wanting anything with me, can come into open court for the purpose'.[358] When Mr Carrington sought service in court, the Resident Judge,

> threatened to commit both parties for contempt – denied the right of Sydney Judges to interfere in the case – declared himself supreme in the province – and after having used many contemptuous epithets in regard to the gentlemen, ordered them to be turned out of court.[359]

After numerous abortive attempts to serve the documents, in court, in Willis's chambers and at his home on 3 August Mr Carrington and Mr Ebden achieved success.[360] The Resident Judge was walking with Mr Pinnock, the Deputy Registrar in Bourke Street and

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[355] 'Colonial Politics – The Carrington Case' Source: *Port Phillip Gazette* 6 August 1842. See also 'The Late Outrage – The Carrington Case' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 August 1842.

[356] Ibid.

[357] Ibid.

[358] Ibid.

[359] Ibid.

[360] Ibid.

the documents were served. The papers accidentally touched the arm of His Honour Mr Justice Willis. The Judge considered that such action amounted to an assault.

Willis delivered both Mr Carrington and Mr Ebden into the custody of his Tipstaff. They were then lodged in gaol and arraigned for assaulting the Judge. The bench consisted of Mr Major St John (chairman), Messrs Campbell, Verner, Griffith, Stainforth, McCrae and Mercer.[361] Willis under oath, stated that 'at the time of delivering the notices, Mr Carrington had flung them at his head, with the clear intention of committing an assault'.[362] Mr Ebden aided and abetted the assault.

The Resident Judge through Mr Croke, the Crown Prosecutor, brought three witnesses before the court.[363] Mr Kerr gave evidence that Mr Carrington had pressed the Judge with the notices but had no observations regarding the actions of Mr Ebden. Mr Verner, Chief Commissioner of Insolvent Estates stated that he had seen Carrington was 'excited' but that Mr Ebden was respectful of the Resident Judge. Mr Lyon Campbell supported this evidence. The Resident Judge then withdrew the charge of assault from Mr Ebden. Mr Croke closed the case. Mr Carrington then proceeded to call Mr Ebden as a witness. Evidence by Mr Ebden denied that there was any intention to assault or insult the Resident Judge. Mr Baxter corroborated this evidence. The bench were of the unanimous decision that the charges should be dismissed.

[361] 'Supreme Court – Civil Side 3 August 1842' Source: *Port Phillip Gazette* 6 August 1842 Supplement.

[362] Ibid.

[363] Ibid.

On 31 August the Supreme Court of New Wales at Sydney considered Mr Carrington's appeal.[364] The full court comprising of Chief Justice Dowling, Justice Burton and Justice Stephen upheld the appeal. Each gave a separate judgment but for different reasons. Attention was focused on the jurisdiction of the Court in Sydney and the local *Insolvency Act* 1841.[365]

Chief Justice Dowling noted that there were certain irregularities in the insolvency proceedings undertaken by the Resident Judge. The *Insolvency Act* 1841 authorises ordinary examinations to be before the Chief Commissioner and certain examinations to be before the Judge. There is no provision for a combined sitting of both the Judge and Chief Commissioner. His Honour observed that the minutes to the proceedings were noted 'Before the judge and the Chief Commissioner'.[366] His Honour also noted that there was no information to explain 'under what circumstances or for what purpose, Mr Carrington was present at the insolvent's examination'.[367] The order of the learned judge, made on the occasion, recites that the petitioner

> being an attorney, solicitor, and proctor of the court, appeared before his honour the resident charge in the matter of the insolvency of Peter Snodgrass, and was examined touching a claim of about £ 2,000, sworn by the insolvent to be made by Carrington against his estate, and touching a counter claim of about £ 2,000 made on Carrington by the insolvent.[368]

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[364] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[365] 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841).

[366] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[367] Ibid.

[368] Ibid.

The order minuted by the Chief Commissioner is as follows: - 'that all vouchers, documents, and papers, in the position of HN Carrington, and the accounts, should be produced on the 28th inst.; and there is a memorandum, that was consented to by Carrington and his Counsel'.[369] His Honour noted the vouchers, documents, and papers considered to be in Carrington's possession were never identified in the proceedings.

Chief Justice Dowling noted that the subject of the appeal is not Carrington's name being stricken from the roll of attorneys, but rather his committal as being contrary to the law. Mr Carrington's petition sets forth his grounds for appeal; namely,

> Firstly, - That the petitioner was not regularly before the Judge.
>
> Secondly, - That there was no evidence against him to justify the committal.
>
> Thirdly, That the petitioner had shown his utter inability to comply with the Judge's orders.
>
> Fourthly, That he was never called upon to show cause why he should not be committed, and was in fact never heard against the committal.
>
> Fifthly, That he was never served with notice of the order for such hearing.
>
> Sixthly, That the proceedings were not set in motion against him by any person to whom he might look for redress and
>
> Seventhly, That neither he, nor his conduct was regularly under the Judge's review.[370]

In short, the question before the court was whether the petitioner was amenable to the jurisdiction of the Resident Judge. His Honour upon examining the warrant of commitment considered it as having been made under section 70 of the *Insolvency Act* 1841, entitled, 'An Act for giving relief to Insolvent Persons, and providing for the due

[369] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[370] Ibid.

collection, administration, and distribution of Insolvent Estates, within the colony on New South Wales and for the prevention of frauds affecting the same'.[371] The warrant was not under summary jurisdiction of the Court 'or the appellant, as an attorney and officer of the court'. [372]

His Honour asserted that though Mr Carrington happened to be an attorney before the Court, he was not acting in the capacity in his dealings with Mr Snodgrass. Mr Justice Dowling, Chief Judge then proceeded to discuss section 70 of the *Insolvency Act* 1841 of New South Wales that is compounded to sections 33, 34 and 37 of the English Bankrupt Act, 6 Geo. IV 16. Section 70 of the local *Insolvency Act* 1841 provides that after surrender or adjudication of sequestration of an estate, the Supreme Court may, on the application of the trustees, summon any interested party concerning the financial activities of the insolvent.[373] The Court may further require the production of any books, papers, deeds, writings or other documents in their custody or power.[374] Such examination ought to be reduced to writing and signed on oath by the interested party before the Court or Commissioner.[375] If the party refuses to produce the required books, papers, deeds, writings or other documents, or refuses to sign the transcript of their

[371] 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841).

[372] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[373] Ibid. See also 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841) section 70.

[374] Ibid.

[375] Ibid.

examination, serious consequences occur.[376] The Court or Commissioner, may by warrant commit the person to prison, there to remain without bail, until they comply with the orders of the Court.[377]

His Honour highlighted that section 70 of the *Insolvency Act* 1841 of New South Wales whilst similar to the English Bankrupt Act, omits the following clause; namely, '[t]hat upon the appearance of any person so summoned or brought before the Commissioner as aforesaid, or is any person be present at any meeting of the Commissioners'.[378] This provision removes the need to summons as noted in section 70 of the Local *Insolvency Act* 1841.

In section 70 of the Colonial Act, the Judge or Commissioner only has jurisdiction over the party, if they are summoned upon the application of the trustees. It is different to the position under the English Bankrupt Act, where if present, without being summonsed, they may be required to answer question under oath, and if fail to do so, be committed to prison. His Honour observed that,

> There is nothing to show, in these proceedings, that this appellant was previously summoned at all; still less, that he was summoned on the application of the insolvent's trustees. He may, in fact, have been present at the examination of the insolvent; but that alone, according to the act, would not give the Judge or Commissioner jurisdiction over him. [379]

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[376] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. See also 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841) section 70.

[377] Ibid.

[378] Ibid.

[379] Ibid.

The necessity for a party to be summonsed was 'to guard against abuse of the liberty of the subject'.[380] The substance of the appeal by the petitioner, was that the orders indicated in the warrant of commitment,

> required the appellant to do, what neither the judge nor the commissioner had any power to require, by the Act, that he should do. The appellant was committed to the gaol at Melbourne, there to be kept, without bail, until he should produce 'the accounts', and such papers and vouchers relating there to, said to be in his custody or power, or until the Judge should further order. He is ordered to furnish the court 'with a full account of all transactions between the insolvent and him, the said Carrington from the beginning'.[381]

His Honour noted that even if Mr Carrington had been summonsed, section 70 of the Act does not authorise the Judge to order Mr Carrington to furnish a full account of all the transactions involving of his dealings with Snodgrass. Chief Justice Dowling observed,

> All that the court was authorised to require, was 'the production of any books, papers, deeds, writings or other documents, in his custody,' that is proved to be in his custody) 'which may appear necessary to the verification or disclosure of any other matters aforesaid.' Even if it had been proved, that there were accounts between him and Snodgrass in his possession or control, it is doubtful whether they could be required to be produced; - but require him to render a full account of all transactions between him and insolvent from being was, in our opinion, quite beyond the scope of the Judge's authority.[382]

His Honour granted the appeal not because of the problems associated with the warrant but 'on the manifest want of jurisdiction;- first, in dealing with the appellant without being duly summoned, and secondly, in ordering him to do what the Judge had no authority by the act to require him to do'.[383] The gravity of the situation is most apparent when His Honour indicated,

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[380] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[381] Ibid.

[382] Ibid.

[383] Ibid.

> It may be that the Insolvent Act makes no provision for an appeal to this Court, or to higher tribunal; but regarding this proceeding as altogether *coram non judice*, the Majesty's subjects in this remote territory, would indeed be in a lamentable state of hopelessness, if this court could not remedy the evils of an excess of authority, arising from error, misapprehension, or other cause.[384]

The appeal was upheld on these grounds. The order of committal was overturned and the appellant was discharged from prison.

Justice Stephen clearly stated at the beginning of his judgment that the Supreme Court in Sydney had jurisdiction and 'that the order appealed from is illegal and must be reversed'.[385] In considering the issue of appellate jurisdiction, His Honour found the language used in the committal order was 'peculiar'. It was not clear whether it was being made under the *Insolvency Act* 1841 or under the Common Law governing officers of a court. Justice Stephen noted,

> [i]f an order under the Insolvent Act, there was no occasion for a reference to Mr Carrington's position as an attorney. If an order against him as an attorney, there was no occasion for adopting the terms or phrases of the Insolvent Act. But it may be said, that the order is framed to embrace *both* points of view… But, in determining whether it be good or bad the order at must be look that with reference to reach ground *separately*. So, in determining the question whether an appeal lies from it, we cannot form a sort of neutral ground, by the mingling together of both grounds. If an appeal will lie, whether the order be regarded as resting on the one ground or the other, the right to appeal cannot be destroyed, by attributing to the order a kind of *mixed character*.[386]

After examining the actions of Willis closely, he formed the opinion that the Resident Judge intended to rely upon the general jurisdiction of the Court rather than the

[384] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[385] Ibid.

[386] Ibid. Italics appear in the original document.

Insolvency legislation. He observed that it was not a 'warrant' or order, but a 'writ of attachment' that was issued. Furthermore that in all circumstances Judge Willis referred to Mr Carrington as being 'attorney, solicitor, and proctor' and that expression is consistent with the general jurisdiction of the Court.

Justice Stephen was convinced that an appeal was possible. He considered that such an order, may only be made by the Full Court in Sydney. His Honour noted,

> that the Act of Council, in carving out a particular jurisdiction for Port Philip, gave to the resident judge there, the powers of the whole Court, and it's judges, - in and for that district, - *subject expressly to appeal.* Consequently, none of those powers, (ie powers which, in Sydney would properly belong to the full court) can have been exercised by His Honour, without the condition of appeal.[387]

On this basis, an appeal to the Court in Sydney could be made. His Honour then considered the express words used in the Act indicating 'that no appeal shall Iie from (amongst other things) any writ of attachment, or interlocutory order only, not conclusive of the *merits of the case*'.[388] He noted,

> But it will surely not be contended that an order of committal to prison, without bail, for contempt, in disobeying a previous order, such committal too, being after, and consequent on an attachment issued for the same cause,) can be deemed interlocutory only, with in the meaning of the exception, or otherwise conclusive of the merits. For, even so far as Mr Carrington is concerned, the case was at an end; and there was no other matter or cause then pending. In this respect, the addition of the words 'until compliance' or 'until further order' seems to me to constitute no material difference.[389]

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[387] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. Italics appear in the original document. See also 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No 22 (*Administration of Justice Act* 1840) section 5.

[388] Ibid. Italics appear in the original document.

[389] Ibid.

Justice Stephen in focusing upon the words used by Judge Willis in the committal order, and the language in the Act of Council establishing the Court in the District of Port Phillip had no doubt that an appeal to the Court in Sydney could be made. His Honour commented that if the proceedings were under the *Insolvency Act* 1841 'and for any of the purposes which that act contemplates, I must confess myself to be by no means satisfied, that an appeal would lie'.[390] In conclusion he noted this '[i]s not an order under the Insolvent Act, properly speaking, but one only which forms, in part, *assumes* to be so, by the adoption of some of its terms'.[391] After declaring that the Supreme Court of New South Wales at Sydney had jurisdiction, he then proceeded to consider the appeal itself.

His Honour began by indicating that if the decision at Port Phillip is viewed as arising under 'the provisions of the Insolvency Act, its defects are at once perceptible'.[392] The purpose of the Act is to prevent fraudulent activities by the insolvent in attempting to conceal debts or property. His Honour noted section 17 of the Act,

> To this end, the court, or Chief Commissioner, *on application of the trustee*, may summon any person known or suspected to be a debtor, or to posses any of the insolvent's property and compel a full disclosure; and, as incident thereto, may require the production of papers and documents. Such person so summoned is to be *examined* touching the dealings of the insolvent; and if he do not produce any such papers or documents, *in his power or custody*, he may be committed to prison.[393]

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[390] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. See also 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841).

[391] Ibid. Italics appear in the original document.

[392] Ibid.

[393] Ibid. Italics appear in the original document.

In applying this section on the facts presented before the Court, His Honour was at a loss as to why this Act was relevant. There were a number of inconsistencies in the proceedings at Port Phillip. The first being that the insolvent was not concealing any debts but actively putting forward the name of Carrington as a debtor. There was also doubt as to whether Carrington was summoned to appear on the first occasion when the order for the production of documents, vouchers and accounts was made. His Honour noted that 'it does not appear *how*, or that *whose instance* or on *what information*, such order was given; nor is the fact of any such summoning any were are recorded'.[394] Furthermore no application was made by the trustees, and at no stage of any of the proceedings were particular documents specified. In the affidavit by Carrington, he declared that it was '*not in his power to produce any '.*[395] According to Justice Stephen it was done,

> to force and compel the alleged debtor, to *make up and state accounts with the insolvent*, which he was (as he swore) not prepared to do, and their by, and by the production of *his own papers and vouchers*, summarily to furnish evidence and proofs *against himself*… In short, nothing could well have been more irregular; the object, and requisites, of the clause, and its most essential parts meaning are like lost sight of. [396]

His Honour identified a number of serious flaws with respect to the application of section 17 of the *Insolvency Act* 1841. He then discussed the illegality of the order of committal, as an order on an attorney of the court, without reference to the Insolvency Act. In undertaking this process, His Honour noted the following five elements that make such an order illegal.

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[394] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. Italics appear in the original document.

[395] Ibid. Italics appear in the original document.

[396] Ibid. Italics appear in the original document.

The first element was that no such order should have been made regarding the production of documents unless it was properly supported by appropriate affidavits. His Honour noted that 'the accidental presence of the attorney, or his being present in another capacity, would not dispense with this'.[397] The second element was the prohibition of a Court to interfere in the relationship between an attorney and client, 'unless the transactions are relevant to the employment of him, in the *capacity* of an attorney'.[398] In the circumstances the documents sought were not connected with any such employment. The third comment was that in a dispute regarding the right to possession, it is a matter for the jury to determine. The fourth element also involved the accounts, vouchers and statements. His Honour noted that such documents must be the property of the client. Furthermore His Honour noted it would be remarkable to order an attorney to produce such documents 'in order to furnish evidence against himself'.[399] The final comment by Justice Stephen was that even if such an order for the provision of documents was lawful,

> [the]*committal* is illegal. The only legal or proper course was, after the issue a return of the attachment, to have exhibited interrogatories to Mr Carrington. On that occasion the vouchers or other papers required should have been specified, and distinctly demanded; … of … being in Mr Carrington's custody, power, should have been made to appear: - and thus, the order of committal would only have been issued, in the last extremity.[400]

In short, Justice Stephen held that the Court at Sydney had jurisdiction to entertain appeals from the Court in Port Phillip. Furthermore that the order made by the Court

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[397] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. Italics appear in the original document.

[398] Ibid. Italics appear in the original document.

[399] Ibid.

[400] Ibid. Italics appear in the original document.

was illegal in both form and substance. Justice Burton reached the same conclusion but in a different manner.

Justice Burton first addressed the general jurisdiction of the Supreme Court of New South Wales in Sydney. Section 1 of *Australian Courts Act* 1828 stated that it shall be called 'the Supreme Court of New South Wales', and 'shall beholden by one or more judge or judges not exceeding three, (and number which has, it is well-known, been recently increased by local Act 4 Vic., No 22)'.[401] Section 3 of that Act establishes the jurisdiction,

> that it shall have cognisance in all pleas – civil, criminal, or mixed – and jurisdiction in all cases whatsoever, as fully and amply, to all intents and purposes, in New South Wales and all and every the islands and territories which now are, or hereafter may be, subject to, or dependent upon, the Government thereof, as his (then) Majesty's courts of King's Bench, common pleas, and Exchequer at Westminster, or either of them, lawfully have or hath in England … [and] the judges (appointed as there in mentioned) shall have and exercise such and the like jurisdiction and authority in New South Wales thereof, as the Judges of the Court's of King's Bench, Common Pleas, and Exchequer in England, or any of them, lawfully have and exercise, and shall be necessary for carrying into affect this several jurisdictions, powers and authorities committed to this said Court.[402]

The Supreme Court of New South Wales was given the same jurisdiction as the Court of Queen's Bench, and those powers of control over the other courts within the territory, which the Court Of Queen's Bench has over all other courts of record in England.

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[401] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828). See also 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No 22 (*Administration of Justice Act* 1840).

[402] Ibid.

Justice Burton makes reference to Lord Coke in stating that the Court has three qualities.[403] The first quality is that it can hear all pleas of the Crown. The second is it may examine all errors of law and fact in judgments or processes,

> of all the judges and justices of the realm, in their judgements, process, and proceedings in courts of record, and not only in pleas of the crown, but in all pleas, real, personal, and mixed (the court of Exchequer excepted, as hereafter shall appear); and I may add, common pleas being restrained to C.B. by Stat. Mag. Carta., 9. 11. III., c. II.[404]

The Court has extensive jurisdiction in all matters. In addition to these powers, the third quality of the Supreme Court of New South Wales at Sydney is that it has the power to correct errors in other areas,

> tending to the breach of the peace, or oppression of the subject, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or jury, either public or private can be done, but that, this shall be reformed or punished in one Court or other, by due course of law. As if a person be committed to prison, this Court upon motion, ought to grant a *habeas corpus*, and upon return of the cause do Justice and relieve the party wronged. And this may be done, though the party aggrieved hath no privilege in this Court. It granteth prohibition to courts temporal and ecclesiastical, to keep them with in their proper jurisdiction.[405]

His Honour also quoted from Blackstone,

> The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bound of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom, it commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition.[406]

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[403] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. Coke 4 Institute fo 71 quoted by Burton J.

[404] Ibid.

[405] Ibid.

[406] Ibid. Blackstone 3 Com fo 44 quoted by Burton J.

His Honour concluded that the status and jurisdiction of the Court of Queen's Bench, and the likewise the Supreme Court of New South Wales at Sydney, 'cannot be taken away or abridged, except by authority equal to that which conferred it, and by express words; and as has not been so it taken away or abridged'.[407] This point has critical importance for the nature of the Supreme Court of New South Wales in the District of Port Phillip. Under the local *Administration of Justice Act* 1840 and *Advancement of Justice Act* 1841, Parliament gave jurisdiction to one of the judges to co-exercise within the limits of Port Phillip.[408] Justice Burton then considered the jurisdiction of the Supreme Court of New South Wales over these Acts. This is dependent upon two aspects. The first relates to the general superintending jurisdiction over all other courts within the territory. The second aspect is to what extent local legislation affects its jurisdiction. The *Administration of Justice* Act 1840 section 4, enables the Governor,

> to appoint, from time to time, one of the judges, of this Court, not being the Chief Justice, 'to reside in the District of Port Philip,' and by proclamation for that purpose, issued with the advice of the Executive Council, to declare and define the limits and with the in which such Resident Judge shall exercise jurisdiction; and enacts, that within those limits 'the said judge, whilst so resident therein, shall have, exercise and enjoy, all such and like powers, jurisdiction, and authority, as now is, or are, or can be legally exercised by the said supreme Court, or by all or any of the judges thereof collectively or individually.

Section 5 of the Act noted,

> that the decision of every such Resident Judge in any matter only which would in Sydney properly belong to the full court, and every general rule made by any such judge, may be brought under the review of the judges of the said court, sitting in Sydney in Banco, by way of appeal or otherwise, in such manner and form, and on such terms, to be imposed on the litigating parties respectively, and subject to such rules and regulations, in the all other respects, as the said last mentioned Judges shall from time to time in that behalf make and prescribe:

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[407] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[408] 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No.22 (*Administration of Justice Act* 1840). See also 'An Act for the further amendment of the Law and for the better advancement of Justice' [1841] 5 Vict No 9 (*Advancement of Justice Act* 1841).

> Provided always, that no appeal shall be allowed from the order of the granting of a rehearing only, or of a new trial, or writ of attachment, or of any interlocutory order, merely, whereby the merits of the case shall not be concluded.

Section 7 that

> the said Resident Judge shall or will lawfully may, on all occasions whereby seal of a court is used, have and use a duplicate or *facsimile* while the seal of the supreme Court of the South Wales, provided that on the seal used by the Judge resident at Port Philip, the words 'Port Philip' shall be engraven.[409]

The Court at Port Phillip has co-extensive jurisdiction within that territory, with that of the Supreme Court of New South Wales in Sydney. The former is subordinate to the latter. Justice Burton arrived at this conclusion on the following reasoning. The original superintending jurisdiction, as the Queen's Bench conferred when it was created has not been taken away by any of the Local Acts. Furthermore there are no express words such as 'Supreme Court of the South Wales *shall not have or exercise any control or jurisdiction over the court but the Resident Judge, except such as is given by allowing of appeal by local act*'.[410] His Honour noted that the local *Administration of Justice* Act 1841, does give exclusive jurisdiction to the Court of the Resident Judge on matters within the limits of Port Philip. In addition Section 5 of the Act,

> the decision of any such resident judge in any matter only which would in Sidney properly belong to the full Court, and *every general rule* made by any such judge may be brought under the review by the judges of the said Court sitting in Sidney in banco, *by a way of appeal or otherwise*, in such manner and form, and on such terms to be imposed on the litigating parties respectively, and subject to such rules and regulations, in the all other respects, as the said last mentioned judges shall from time to time in that behalf make and prescribe.[411]

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[409] 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No.22 (*Administration of Justice Act* 1840).

[410] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. Italics appear in the original document.

[411] 'An Act for the further amendment of the Law and for the better advancement of Justice' [1841] 5 Vict No 9 (*Advancement of Justice Act* 1841). Italics appear in the original document.

His Honour made reference to the words themselves 'appeal' and 'review' as indicating that one court is inferior and the other is superior. His Honour concluded,

> that with respect to the court at the Resident Judge at Port Philip, the Supreme Court of New South Wales has the same jurisdiction and authority, and may exercise it in the same way as the court of Queen's Bench at common law with respect to any inferior Court with in the realm of England.[412]

In other words, the Supreme Court at Sydney had the same powers, status and jurisdiction of the Queen's Bench in England. The Supreme Court of New South Wales at Sydney had supervisory jurisdiction over the Court of the Resident Judge at Port Phillip.

The next issue discussed by His Honour was the subject matter of the appeal that he considered to be entirely appropriate. His Honour noted that personal service on Willis was not necessary, nor intended by the Court. It would have been sufficient to simply leave the notice of appeal at the residence of Willis, 'there was no more necessity for, or *propriety* in personal service in one case than in the other'.[413] His Honour further noted that

> if Mr Carrington made use of that order to affront the judge, he's guilty of contempt of this Court, and punishable for it; but he makes affidavit that, he did so under the *bona fide* belief that the order required personal service; and that any unpleasantness in the mode arose from His Honour's opposition to receive the documents in any way.[414]

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[412] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[413] Ibid. Italics appear in the original document.

[414] Ibid. Italics appear in the original document. See also 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841).

In the opinion of Justice Burton, the actions of Mr Carrington in delivering personal service on Willis were unnecessary, but were carried out under a misguided belief. His Honour then embarked upon a brief review of the writs of Habeas Corpus and Certiorari before moving to discuss the merits of the appeal. Justice Burton noted that Mr Carrington had not be summoned under section 70 of the *Insolvency Act* 1841 to be examined regarding the production of papers and documents in his possession.[415] The appeal he declared was 'not from a decision of the court under the insolvent act; but against an act of the judge unauthorized by that act'.[416] His Honour further noted that whilst the warrant of committal has the character of a commitment under section 70 of the *Insolvent Act* 1841, it was done for a different cause,

> because having been already ordered, *while an attorney of the supreme Court*, to furnish an account of all his transactions with Mr. Peter Snodgrass, and to produce his vouchers, which he, Carrington, by himself and is Counsel undertook, and consented to do, and he is now imprisoned for his contempt in *not* obeying the order thus considered to. Signed John Walpole Willis.[417]

Justice Burton considered that the committal was for contempt and declared it to be 'bad'. His Honoured noted that a Court is not competent to bring proceedings against a person unless permitted by statute or the common law. Furthermore the Court cannot 'summarily *demand accounts* from a party not brought by an antagonist, in a regular way before it, and if not produced to commit that party for contempt'.[418] Justice Burton also dismissed the situation whereby a person brought before the Court assents to the

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[415] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[416] Ibid.

[417] Ibid. 'Commissioner of Insolvent Estates, Minute Book 12 May and Contempt of Court 28 April, Order of the Supreme Court of New South Wales in the District of Port Phillip' quoted by Justice Burton. Italics appear in the original document

[418] Ibid. Italics appear in the original document.

production of documents and later retracts consent. His Honour then indicated that where a writ of attachment is issued to bring a party before the court to answer interrogatories, and the person fails to adequately answer, then they may be committed. In the circumstances of Mr Carrington, no interrogatories were filed and he was immediately committed to gaol which is not the process associated with a writ of attachment.

His Honour confirmed that the transactions between Carrington and Snodgrass did not arise out of his employment as an attorney. Carrington was only acting in his personal capacity and he ought not have been summarily dealt with simply because he happened to be an attorney in Court on the day.[419] Justice Burton upheld the appeal and ordered Mr Carrington to be discharged from custody.

The third complaint in the Executive Council, as identified by Willis was with respect to the cases of Mr Carrington and Mr Ebden, that since these matters were not settled 'much excitement might still grow out of them'.[420] In addressing the charge, Willis recited the facts of the matter. Emphasis was placed on the undertaking by Mr Carrington 'in person, and by his counsel' to produce the papers and vouchers in his possession. [421] The Resident Judge then quoted Mr Barry, legal counsel for Mr Carrington on the occasion of the refusal to produce the documents. Mr Barry stated,

> [I]t is with the deepest regret I have to state that the documents are withheld by Mr Carrington against me express wish that they should be forthcoming this day,

[419] *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[420] *The Case for the Appellant* 5.

[421] Ibid.

> having pledged myself to the Court for their production. Knowing my client's determination, which I deeply regret, I feel it a paramount duty to decline proceeding further with this gentleman's case. **[422]**

Willis considered the appeal to the Supreme Court in Sydney was contrary to the provision of the local *Administration of Justice Act* 1840, 'that no appeal should be allowed from any order for the granting of any writ of attachment, or of any interlocutory order whereby the merits of the case should not be concluded'.[423] Willis was also deeply troubled by the '*personal service of the appeal',* and considered it 'being an indignity to the Court wholly unprecedented, the Appellant refused to receive such service, believing that he should thereby compromise the jurisdiction of his Court'.[424] The Resident Judge was troubled with these events occurring 'in the open street, in the immediate vicinity of the Courthouse'.[425]

Willis emphasised that in hearing the appeal the Judges at Sydney strongly censured the conduct of Carrington and Ebden. His final comment was with respect to a letter he received written by the Judges at Sydney in response to his request that the Governor 'transmit the whole of the proceedings to Her Majesty's Government'.**[426]** In a letter dated 2 September 1842 they note,

> It is due, however, to your Honor, and indeed to ourselves, that we should distinctly disclaim the having intended to cause annoyance to your Honor in the course of these proceedings. The direction for delivering to your Honor a copy of the appeal and of our order, did not imply the necessity for a personal service, or, in fact, any service at all in the usual sense of the term. We adopted the phrase, and the proceeding itself from our standing rules regulating motions for new

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[422] *The Case for the Appellant* 5.

[423] Ibid. See also 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No.22 (*Administration of Justice Act* 1840).

[424] Ibid. Italics appear in the original document.

[425] Ibid.

[426] Ibid.

> trials; and your Honor will perceive that one of us, with the express approval of all, has publicly from the Bench repudiated the course taken by Mr Carrington as to that measure in the most decided terms of disapprobation. [427]

The Resident Judge submitted that his actions were justified in attempting to repel the indignity on his character of receiving the appeal papers. He further stated that 'the bringing this case forward as an accusation against him marks strongly the disposition of the Executive to lend a willing ear to complaints against the resident Judge, rather than to assist him in supporting his authority'.[428]

Before the Judicial Committee of the Privy Council, Governor Gipps emphasised that these matters 'appear to have led to fresh attacks by the Appellant on the Judges of the Supreme Court, and on the executive Government of the Colony'.[429] In supporting this statement reference was made to the 15 August 1842 where the Resident Judge was making an address to a jury in the Supreme Court. Willis frequently engaged in such activities. On this occasion the Resident Judge referred to the judgment of the Supreme Court in the appeal of Mr Carrington, read in open court a private letter from Justice Burton and then proceeded to make disparaging comments about the Judges at Sydney.[430] An example highlighted by Governor Gipps was 20 September 1842, where the Resident Judge in the case of *Bragg and Askew v Williams* provided commentary on

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[427] 'Letter: Dowling CJ, Burton J and A Stephen J to Willis 2 September 1842' *Appendix to the Case on Behalf of the Appellant* XIII 51.

[428] *The Case for the Appellant* 5.

[429] *The Case for the Respondent* 4.

[430] 'Supreme Court – (Criminal Side) 15 August 1842 *Port Phillip Patriot and Melbourne Advertiser*' enclosure (No.1) in a letter from James Dowling CJ, WW Burton J and Alfred Stephen J to The Right Honourable Lord Stanley, Secretary of State for the Colonies 10 October 1842 (No.1 in 831, New South Wales) *Appendix to the Case on Behalf of the Respondent* 12.

the judgment of the Supreme Court in Sydney and quoted an offensive passage from one of Junius's letters against the Sydney judges.[431]

The cases of Mr Carrrington and Mr Ebden were a significant event for the administration of justice in Port Phillip. Willis strongly disagreed with not just the process of appeal but also the decision, that the court at Port Phillip was inferior to that of the Supreme Court of New South Wales in Sydney. The Resident Judge maintained this view throughout his remaining time in Port Phillip. In not accepting the decision, Willis through his conduct showed appalling behaviour to both the law and his colleagues on the bench in Sydney. This idea recurs throughout the other Complaints Before the Executive Council. These include those relating to Mr Batman's Will and Charges to Juries.[432] Numerous and Insulting Attacks on Colleagues is also an additional matter. [433]

[431] *Bragg and Askew v Williams* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 20 September 1842 Source: *Port Phillip Patriot and Melbourne* Advertiser 20 September 1842. See also *Appendix to the Case on Behalf of the Respondent* 13.

[432] Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case' and Part A-10 'The Delivery of Charges to Juries (which his Excellency is pleased to term harangues) of an Improper Character'.

[433] Part B-1 'Numerous and Insulting Attacks on Colleagues'.

PART A-4 MR CURR'S CASE

In his appeal before the Judicial Committee of the Privy Council, Willis identified the claim made by Mr Curr as the fourth complaint. Mr Curr who was a prominent merchant in the district, had described the 'bitter party spirit of the place' that had been created by the Resident Judge in a letter to Superintendent Mr La Trobe.[434] In short, Willis in administrating justice in Port Phillip had been biased. In the letter, Mr Curr referred to several matters including the cases of Mr Ebden and Mr Carrington.[435] He also documented the circumstances of what came to be regarded as 'The Cook's Case'.[436] In the same letter he referred to a libel action involving Mr Kerr, who was editor of the *Port Phillip Patriot* and Police Magistrate Major St John.[437] Mr Curr also noted another libel action that was brought against another Port Phillip newspaper, the *Port Phillip Gazette* and involved Mr Marshall.[438] In all of these cases, Willis had a central role. The general claim put forward by Mr Curr was that Willis favoured certain individuals in Port Phillip, and that this transcended his official public duties. Mr Curr also documented the Resident Judge's attempt to influence political decisions, most notably the election of members to represent the District of Port Phillip in the New South Wales Legislature.[439] Willis as a single judge for the District of Port Phillip, faced many challenges. His conduct in these matters infringed public confidence in the

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[434] 'Letter: Curr to La Trobe 31 August 1842' published as 'The Resident Judge' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[435] See Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[436] The Cook's Case' Source: *Port Phillip Herald* 26 August 1842.

[437] 'The Police Act' Source: Port Phillip Patriot and Melbourne Advertiser 8 August 1842.

[438] *Thomas Mulcaster Marshall v George Arden*, Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Gazette* 20 August 1842.

[439] 'The Mayor – A Candidate' Source: *Port Phillip Herald* 6 June 1843.

administration of justice and diminished public respect for the institution of the judiciary.

'The Cook's Case' occurred on the 17 August 1842 when Mr Lyon Campbell was charged by Mr Edward Curr with 'inveighing, enticing, and seducing' his cook from service.[440] Mr Curr conducted the prosecution, and the Police Magistrate Major St John was assisted on the Bench by Mr Verner and Mr Manning. The charges were ultimately dismissed since Mr Curr had failed to show the existence of any agreement between himself and the cook.[441] In short, no improper means had been used to entice the female Cook away from his service.[442] Mr Curr did not consider this a satisfactory result and deemed the outcome of the matter as simply one of bias.

Mr Curr wrote a letter about his feelings to the Superintendent Mr La Trobe on the 31 of August 1842.[443] He noted that Mr Verner gave favour to his own personal friends. In the memorandum he referred to the case where Mr Verner had recently been associated with Willis, in a charge brought by the Judge for assault against Mr Ebden and the solicitor Mr Carrington with regards to the service of legal process. Mr Curr emphasised that the Resident Judge, had relied upon the assistance of Mr Verner to further his cause against Mr Ebden and Mr Carington. The letter stated that both Mr Verner and Willis had exhibited gross partiality in administering justice in the district.

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[440] 'Caution to the Hirers of Cooks' Source: *Port Phillip Herald* 23 August 1842.

[441] 'The Cook Case' Source: *Port Phillip Herald* 26 August 1842.

[442] 'Domestic Intelligence, Semi-Weekly Abstract' Source: *Port Phillip Gazette* 20 August 1842.

[443] 'Letter: Curr to La Trobe 31 August 1842' published as 'The Resident Judge' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842. See also 'Letter: Thomson to La Trobe 6 October 1842' *Appendix in the Case for the Respondent* 58.

In his letter, Mr Curr noted that Port Phillip 'is of a nature entirely different from the party dissensions of the other capitals of these colonies', and warned that 'it is far more dangerous and distressing'.[444] Furthermore, Mr Curr stated,

> [p]arties elsewhere *are for and against the Government*, here they are for and against *the Judge*, and a person must have had experience of both kinds of parties to know how much more bitter are those of which one seems to contend for the favours of the law courts, and the other to resent the injustice, or supposed injustice of the courts.[445]

Mr Curr then compared the situation in other parts of New South Wales, indicating that '[w]hen in Sydney, persons speak of the "Government party"', but indicated that in Port Phillip 'we hear speak of the "Judge's party"'.[446] Mr Curr noted the Resident Judge as being the 'ablest person in this community, and that he was at least was at least originally acquainted by the very best intentions'.[447] Mr Curr then noted,

> ... in my six months' residence I have heard in numerous cases of the judge being opposed, or having an unfavourable opinion of certain individuals, and afterwards making decisions against them: and, what is unheard of I believe elsewhere, these decisions were frequently, it is alleged, on points not brought before the court by the interested parties, but by the judge himself. It is notoriously a common practice "to go to the judge," when a person should "go to his lawyer," and whether the judge is aware of it or not, parties constantly speculate on being the first to obtain the judge's ear, and I have heard of several opinions said to be given by the judge on matters not yet before Court, but probably or certain to come before it.[448]

Mr Curr was very clear about the fragmenting of justice in Port Phillip. His concern was for the community and the breakdown of order. He also had little hesitation in nominating Willis as being the source of the problems. In his letter, Mr Curr noted,

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[444] 'Letter: Curr to La Trobe 31 August 1842' published as 'The Resident Judge' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[445] Ibid. Italics appear in the original document.

[446] Ibid

[447] Ibid

[448] Ibid

> These evils are generally traced here to the personal character of the judge, to his listening to ex parte statements, advising with parties out of court, originating or suggesting proceedings on which he is afterwards to judge, and, what in his particular position aggravates All other defects of character, an openly declared contempt of public opinion. At person of this character, it is obvious must be violently attacked, and of course as violently supported and hence the division of the community into a judicial and anti judicial party, each of which lately addressed their respective petitions to execute for and against the judge's removal. This may be all true as far as it goes; but I submit that the evils I complain of have deeper root in the very peculiar position in which a resident judge at port Philip is necessary placed. Party will always array itself for and against that power which holds in its hand, the great interests of the community, here we may be said to have no government, and the judge becomes every point of view the Chief power in the community, and I believe that whoever is appointed resident judge here and also *sole* Judge; the evil I complain of will exist in a greater or less degree.[449]

Upon receipt of the Memorandum, Superintendent Mr La Trobe forwarded copies of it to both Willis and the Magistrate Mr Verner seeking their comments. The Resident Judge replied on behalf of himself and the Magistrate, Mr Verner, in that they should be protected in carrying out the duties in the administration of Justice from charges such as those made by Mr Curr, which he characterised as libellous and false.[450] Willis noted 'Mr Verner and Mr Lyon Campbell are, in my opinion, two of the *most respectable magistrates and honourable men in this district,* and I *do not believe* that the one or the other, would either publicly or privately, act in anywise inconsistently with the character of a gentleman'.[451] Willis then denied that he knew anything about the spirit of the place. He noted that,

> It is my anxious endeavour, as the resident judge, to suppress *knavery and fraud, to prevent litigation*, to obviate by all means in my power *impending ruin*, and to accommodate disputes; therefore the applications made to me by *all classes*, both in public and private, are *very numerous*; but I indignantly pronounce this Mr

[449] 'Letter: Curr to La Trobe 31 August 1842' published as 'The Resident Judge' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[450] 'Letter: Willis to La Trobe 9 September 1842' *Appendix for the Appellant* XIV 52.

[451] Ibid. Italics appear in the original document.

> Curr's daring assertion, an assertion that cannot be with in his own personal knowledge according to his own statement, that I give such advice as affects or prejudices my decisions, or duties as the judge, or that I am or ever have been guilty of partiality in any case whatever, to be *utterly false*, and I call the Government for protection from these libels.[452]

Willis was agreeable to further inquiries being made,

> I am and have always been most willing that my conduct, public and private, should if necessary undergo *the strictest possible investigation in the proper quarter*; but I think the dignity of the office I have the honour to hold requires that I should not be harassed by the impudent and libellous complaints of this Mr Curr, (who ever he may be).[453]

In short, the Resident Judge considered that Mr Curr's letter amounted to gross contempt. Some commentators were concerned as to the conduct of Superintendent Mr La Trobe in providing a copy to Willis.[454] This act was deemed to be in breach of convention, since the letter had been sent 'through' La Trobe to His Excellency Governor Gipps. Mr La Trobe considered it necessary since the letter reflected on the character of the Judge.[455]

Willis requested Superintendent Mr La Trobe to place the memorandum in the hands of the Crown Prosecutor for libel charges to be laid. The Superintendent declined to follow such a request, and considered that he was compelled to forward the letter to Governor Gipps.

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[452] 'Letter: Willis to La Trobe 9 September 1842' *Appendix to the Case on Behalf of the Appellant* XIV 52. Italics appear in the original document.

[453] Ibid.

[454] 'The Administration of Justice 16 September 1842' Source: *Port Phillip Herald* 16 September 1842 and 'Mr Curr's Case 20 September 1842' Source: *Port Phillip Herald* 20 September 1842.

[455] *Appendix to the Case on Behalf of the Respondent* 29. See also 'Letter: Curr to La Trobe 12 September 1842' *Appendix to the Case on Behalf of the Respondent* 31.

Controversy also surrounded how detailed extracts of Mr Curr's letter were published in the *Port Phillip Patriot and Port Phillip Herald.*[456] Whilst the Superintendent had sent copies of the letter to both Mr Verner and Willis, Mr Verner 'distinctly' denied that he had been involved in the publication. Superintendent Mr La Trobe enquired of Judge Willis about the matter.[457] The Resident Judge responded by indicating the letter had become a 'matter of public notoriety' long before it reached him.[458]

Mr Curr's letter was highly critical about the administration of justice in Port Phillip. Mr Curr noted that over five consecutive days justice was anything but impartial. The first matter mentioned involved the cases of Mr Ebden and Mr Carrington.[459] The second reference was to the purported criminal libel of the Police Magistrate Major St John by Mr Kerr, editor of the *Port Phillip Patriot.*

Mr William Kerr was not only editor of the *Port Phillip Patriot*, but was also an Alderman of the Melbourne Town Corporation. On 8 August 1842, a small paragraph appeared in the *Port Phillip Patriot* reflecting upon a decision by the Police Magistrate, Major F. B. St. John.[460] The article ridiculed Major St John by making disparaging comments about him such as, '[t]he worthy Major is, we believe, a very well meaning man, and, apart from his public career, an estimable member of society, but he seems, when on the bench, as

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[456] 'Letter: Curr to La Trobe 31 August 1842' Source: *Port Phillip Patriot* 15 September 1842. See also 'Letter: Curr to La Trobe 31 August 1842' Source: *Port Phillip Herald* 14 September 1842.

[457] 'Letter: La Trobe to Willis 16 September 1842' *Appendix to the Case on Behalf of the Appellant* III 32 (B 10).

[458] 'Letter: Willis to La Trobe 20 September 1842' *Appendix to the Case on Behalf of the Appellant* III 32 (B 11).

[459] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[460] 'The Police Act' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 August 1842.

much out of his element as a fish out of water'.[461] This criticism so angered the Magistrate that he issued a summons for Mr Kerr to appear before the Court immediately, and a constable was sent to the offices of the *Port Phillip Patriot* to escort Mr Kerr to the Court under arrest.[462]

At the hearing of a charge, to show cause why he should not be attached for criminal libel in respect of the newspaper article in question, Mr Kerr was asked to state reasons why he should not be attached. In the subsequent questioning, Mr Kerr did his best to provoke Major St. John, and was openly offensive to the Bench, and finally, Major St. John lost his temper, and committed Mr Kerr to gaol for twenty-four hours for contempt of Court.

The morning after Mr Kerr had been incarcerated, the Resident Judge sent for Major St. John to appear before him in the Supreme Court. Major St. John was keen to attend as he thought Willis would overturn his decision.

When examining the warrant, Willis noted that there were numerous errors and omissions. The Resident Judge then discharged Mr Kerr. This action of Willis in releasing Mr Kerr brought critical comment from the press largely because it had only been a short time since he had dealt harshly with Mr Cavanagh and Mr Arden.[463] The *Port Phillip Gazette* published an article headed, 'Excellent Judgment of a Splenetic

[461] 'The Police Act' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 August 1842.

[462] 'Local Intelligence - Major St John and the Patriot' Source: *Port Phillip Patriot and Melbourne Advertiser* 11 August 1842.

[463] Part A-1 'The Sentence on Mr Arden' and Part A-3 'The Cases of Mr Carington and Mr Ebden'.

Judge'.[464] The inconsistency in the handling Mr Kerr's case was firmly established.

In responding to the criticism, a few days after Mr Kerr's release, he addressed the jury at the opening of the Court, on the subject of 'the liberty of the subject', saying, *inter alia*

> To vindicate this liberty, to support this freedom, and protect these rights all, as British subjects, are entitled to the regular administration and free and unpolluted course of justice in the courts of law. It is the praise and boast of our native land that her courts of law are learned, impartial and uncorrupt ... But the ordinary duty of a British Court of criminal jurisdiction is this - that the Court, as distinguished from the Jury, should take especial care not to allow the crimes distinct in their nature to be confounded - to see that all charges affecting life or liberty be stated according to the precise provisions of the law -that evidence in its nature leading to ambiguous or false conclusions be excluded-that a watchful anxiety be observed regarding the general rights of the accused ... This, then, gentlemen, this is the liberty, the glorious liberty of British subjects - liberty shielded by law and secure by Justice - liberty which can only be upheld by the righteous administration of law in every court of judicature: aided by that bulwark which you, gentlemen, this day form - that corner - stone of freedom, 'Trial by Jury'.[465]

Later Mr Kerr issued a Supreme Court writ against the Police Magistrate, Major St. John, seeking £ 1,000 damages for wrongful arrest and imprisonment. After several attempts to change the venue to Sydney, it was ultimately heard in Port Phillip during May 1843. The jury found for the plaintiff and awarded £ 50 damages with costs, an award which pleased the Judge.[466]

The next matter that Mr Curr mentioned in his letter to Mr La Trobe concerned Mr

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[464] 'Colonial Gazette - Faults of Colonists' Excellent Judgment of a Splenetic Judge' Source: *Port Phillip Gazette* 13 August 1842.

[465] 'Supreme Court - Criminal Side: Address to Jury 15 August 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 18 August 1842. See also 'Supreme Court – Criminal Side: Address to Jury 15 August 1842' Source: *Port Phillip Gazette* 17 August 1842 and 'Supreme Court – Criminal Side: Address to Jury 15 August 1842' Source: *Port Phillip Herald* 16 August 1842.

[466] *Kerr v St John* Supreme Court of New South Wales in the District of Port Phillip, Before His Honour Judge Willis 12 May 1843. See 'Supreme Court (Civil Side)' Source: *Port Phillip Herald* 16 May 1843, *Port Phillip Patriot and the Melbourne Advertiser* 15 May 1843 and *Port Phillip Gazette* 13 May 1843.

Marshall, a commission agent who thought he had been libeled by an article in Mr Arden's newspaper, the *Port Phillip Gazette* on 17 August 1842.[467] The matter involved the expression of opinions about legislation that was to be introduced in the New South Wales Parliament for the establishment of the Melbourne Corporation Act, under which Melbourne was to be given local government. Many different views were held in Port Phillip.[468]

Mr Marshall had expressed his views at a public meeting and the *Port Phillip Gazette* did not agree with his ideas. A bitter article reporting the event was published which personally attacked Mr Marshall's bona fides.[469] Reference was made to Mr Marshall's earlier career before he had migrated to the colony, his former bankruptcy status and questioned a number of his financial dealings. In the proceedings Mr Marshall was called as a witness and was forced to admit the truth of statements made in the *Port Phillip Gazette*. The only exception was the claim in the article that he had absconded to avoid paying his creditors. Willis when addressing the jury focused upon the latter and stated that on this point Mr Marshall's reputation had been libeled.

The jury found Mr Arden guilty of criminal libel and the Resident Judge ordered him to enter into a bond for two years, and to find sureties for such, himself in the sum of £ 500, and two sureties in £ 250 each, and in default he was to be goaled until the fine was

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[467] *TM Marshall v George Arden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Patriot and the Melbourne Advertiser* 18 August 1842. The libelous article had been published in the *Port Phillip Gazette* 22 July 1842. See also *Port Phillip Gazette*, Supplement 20 August 1842.

[468] Part B-5 'Incorporation of the Town of Melbourne Invalid'. See also 'An Act to Incorporate the Inhabitants of the Town of Melbourne' [1842] 6 Vic No 7 (*Melbourne Incorporation Act* 1842).

[469] *TM Marshall v George Arden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Patriot and the Melbourne Advertiser* 18 August 1842. The libelous article had been published in the *Port Phillip Gazette* 22 July 1842. See also *Port Phillip Gazette*, Supplement 20 August 1842.

paid.[470]

Mr Arden was financially broken. In earlier times he had always been willing to help others when he felt that they were being victimised by Willis such as Carrington and Cavanagh.[471] Unable to arrange the bond, or to find two sureties, he several times surrendered himself before the Resident Judge for imprisonment but each time Willis gave him further time to pay.[472]

The Executive Government did not respond immediately to Mr Curr's letter. In 1843 elections to appoint a representative for Port Phillip in the New South Wales legislature took place. Initially there were several candidates, but eventually the field was reduced to two candidates; namely, Mr Edward Curr, who had expressed his concerns in a letter to Governor Gipps about Willis being biased and Mr Henry Condell, who was Lord Mayor of Melbourne. The former was well known in Melbourne and had the support of the business community. The latter had received negative public reaction since being elected as Lord Mayor.[473] It was generally regarded in the district of Port Phillip that Mr Curr would be the successful candidate.[474]

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[470] *TM Marshall v George Arden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Patriot and the Melbourne Advertiser* 18 August 1842. The libelous article had been published in the *Port Phillip Gazette* 22 July 1842. See also *Port Phillip Gazette*, Supplement 20 August 1842.

[471] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[472] *TM Marshall v George Arden* Supreme Court of New South Wales, Before Willis J 23 August 1842 Source: *Port Phillip Herald* 23 August 1842.

[473] 'The Mayor - A Candidate' Source: *Port Phillip Herald* 6 June 1843.

[474] 'Meeting of Mr Curr's Friends' Source: *Port Phillip Gazette* 11 March 1843.

The Resident Judge was not delighted by the prospect of Mr Curr being appointed the Member for Port Phillip. Willis thought that if Mr Curr was located in Sydney, he would strongly campaign against him. The Resident Judge decided that he ought to assist Mr Henry Condell, who was Mr Curr's rival candidate in the forthcoming election.

During May and June in 1843, Willis canvassed for Mr Henry Condell by going from house to house and shop to shop. Since Mr Condell was Church of England, and Mr Curr was Roman Catholic, support for the candidates became sharply divided on this basis.[475]

The two parties soon met one another, face to face. The drapery store of Mr Charles Williamson, known as Alston and Brown's store was on the corner of Collins and Elizabeth streets. The *Port Phillip Herald* published an account of the Resident Judge rapidly entering the shop and meeting Mr Curr 'full in the face'.[476] In the dialogue that transpired, Willis addressed Mr Williamson whilst looking at Mr Curr. When the Judge rhetorically asked Mr Williamson whether he would be supporting the Mayor, the Judge stated 'he's (the Mayor) an honest man, which is more than *some* people are, - I hope he'll get in.'[477] This idea of emphasising the honesty of Mr Condell, was the Willis's attempt to avoid any libel actions. The Resident Judge used this slogan repeatedly throughout his campaigning for the Mayor. [478] Mr Curr after hearing this statement by the Judge, then moved into the inner office and requested a pen and paper to record the exchange. He soon exited the store and sought the Police Magistrate Major St John.

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[475] Behan above n 60, 240.

[476] 'Extraordinary Dialogue (No. 2)' Source: *Port Phillip Herald* 6 June 1843.

[477] Ibid. See also 'The Judge Refused' Source: *Port Phillip Herald* 23 June 1843.

[478] 'Letter: Curr to Gipps 5 June 1843' *Appendix in the Case for the Respondent* 74.

Mr Curr was intent on bringing a charge of assault or at least a breach of the peace against the Resident Judge. The Police Magistrate, Major St John however held a different view and refused to arrest Willis. Major St John was appalled at the prospect of taking the Resident Judge into custody. The incident at Alston's corner and Major St John's refusal to take any action against Willis was reported in the *Port Phillip Patriot and Melbourne Advertiser*.[479] Mr Curr and his supporters were frustrated by the situation.

A few days later, the *Port Phillip Herald* provided a report of the Judge's solicitor, Mr Ross who had contacted the Police Magistrate Major St John to investigate the circumstances.[480] Major St John stated that although he 'did not precisely recollect' Mr Curr made his application in the street since he 'feared Mr Willis wished to excite him to commit a breach of the peace'.[481] After some discussion about the words used by Judge Willis, Mr Ross made the remark; '[a]s they say in this country "a penny cat can look at a king". His Honour is at the supreme court now, and if Mr Curr or any one else has any thing to say to him, there he will be found'.[482] The item concluded with the statement by the editor '(No doubt of it, thank you Mr Ross, for His Honour's liberal offer !)'.[483]

On the 23 June 1843 the *Port Phillip Herald* reported that according to the Judge's own newspaper, the *Port Phillip Patriot,* the Judge's efforts were in vain, since Mr Williamson

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[479] 'The Resident Judge - Mr Curr' Source: *Port Phillip Patriot and the Melbourne Advertiser* 5 June 1843. See also 'Letter: Curr to Gipps 5 June 1843' *Appendix to the Case on Behalf of the Respondent* 74.

[480] 'The Judge at the Police Office' Source: *Port Phillip Herald* 9 June 1843. Reference to 'Local Intelligence - The Resident Judge - Mr Curr' Source: *Port Phillip Patriot and the Melbourne Advertiser* 5 June 1843.

[481] Ibid.

[482] Ibid.

[483] Ibid.

'exercised his undoubted right of voting according to his own conscience, and gave his support at the poll to Mr Curr! We trust this may have the effect of inducing his Honour to confine himself strictly to his official duties.'[484] In the election that was held on 15 June 1843, Mr Condell was elected Mayor.

Governor Gipps in a letter to Lord Stanley, the Colonial Secretary stated that the complaint of Mr Curr was 'founded on the general deportment of Mr Willis, rather than on any specific act' and that 'there is no point directly at issue in them'.[485] Willis in his appeal to the Privy Council identified Mr Curr's case as one of the Complaints before the Executive Council. This might be viewed as indicating that Willis took the claims made by Mr Curr regarding the bias administration of justice in Port Phillip not just on a professional or public level but also a personal slight. In late 1842 until his amoval in 1843, a number of petitions had been circulated, some in support of the Resident Judge and others critical of him much excitement in Port Phillip had been created by Willis.[486]

After having had no success with the Police Magistrate Major St John, Mr Curr wrote a letter to His Excellency, the Governor of New South Wales, Sir George Gipps documenting the incident at Alston's corner. In that letter, he reinforced his earlier concerns about Willis being partisan and not being fit and proper to hold judicial office.[487] He also indicated that if an investigation should be undertaken, and more

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[484] 'The Judge Refused' Source: *Port Phillip Herald* 23 June 1843.

[485] 'Dispatches to Secretary of State 13 October 1842, No. 191 (B)' *Appendix to the Case on Behalf of the Respondent* 25.

[486] 'Letter: La Trobe to Thomson 13 December 1842' *Appendix in the Case for the Respondent* 43 (F11). See also Part A-9 'State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[487] 'Letter: Curr to Gipps 5 June 1843' *Appendix to the Case on Behalf of the Respondent* 74.

damaging material critical of the Judge would be found such as the sentence imposed upon Mr William Manuel (alias Fergusson).[488] This complaint that Willis was not impartial was a significant concern for the Governor and Executive Council. Willis had allowed personal feelings to affect the administration of justice, there was no doubt that this would lead to a want of confidence in the government.

[488] 'Letter: Curr to Gipps 5 June 1843' *Appendix to the Case on Behalf of the Respondent* 74. See also 'Dispatch with enclosures: Gipps to Stanley 2 July 1843' and 'Letter: Curr to Gipps 13 June 1843' *Appendix in the Case for the Respondent* 81-82. See also Part B-7 'Sentence of Death on Manuel'.

PART A-5 COMPLAINTS FROM THE JUDGES AT SYDNEY SUBSEQUENT TO MR BATMAN'S CASE

It has already been established that Willis made disparaging public comments about Chief Justice Dowling, Justice Burton and Justice Stephen of the Supreme Court of New South Wales at Sydney with respect to Mr Batman's will.[489] The fifth complaint 'preferred by his Excellency the Governor', was that Willis continued the practice of 'not only held [the Judges in Sydney] up to contempt from the bench but caused the same to be done through the medium of the popular press' after Batman's will.[490] The charges are contained in a letter from the Sydney Judges to Lord Stanley, Secretary of State for the Colonies. The Judges were at the end of their patience with Willis,

> [t]he conduct of that gentleman leaves us, however, no alternative. We must either passively witness a continued series of injurious and affronting observations upon us, emanating from him, or we must request, as we now do, the interposition of your Lordship's authority effectually to prevent their recurrence.[491]

It would be a mistake to over look this concern as a simple disagreement, as the Sydney Judges were fearful 'that Mr Willis's conduct tends to degrade the judicial office, and bring the administration of Justice into a contempt'.[492] The Sydney Judges distinguish the case of Carrington that had been recently determined on appeal to the Supreme Court of New South Wales at Sydney and focused their attention on six new occasions in which Willis had ridiculed them.[493] The Sydney Judges were concerned since each time

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[489] Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will'.

[490] 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842' *Appendix to the Case on Behalf of the Appellant* XV 53. See also *Appendix to the Case on Behalf of the Respondent* 10.

[491] Ibid.

[492] Ibid.

[493] Part A-3 'The Cases of Mr Carrington and Mr Ebden'. *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842

they were out of context and had no relevance with the present matter at hand before the court in District of Port Phillip.

The first occasion was in September 1842. In an address from the bench, Willis discussed the rule of law.[494] It is in this context when referring to *habeas corpus* that Willis felt compelled to quote from a letter by Mr Justice Burton about Mr Carrington's case. Willis remarked,

> You have doubtless heard (says Judge Burton) that Carrington applied to me for a writ of *Habeas Corpus*, which (*after conference with the Judges*,) I refused to grant, you being, as Resident Judge, the only *lawful tribunal* to which a person complaining of unlawful imprisonment within the District of Port Phillip can apply for that writ. The Attorney General and Mr Windeyer appeared on behalf of Carrington, and produced a copy of his affidavit said to have been filed in the Court of Melbourne on the subject of two accounts between him and Snodgrass, and of course a copy of '*warrant of commitment* which appeared to have been framed on the 70th section of the Insolvent Act and *on the facts stated in the warrant, perfectly regular.*[495]

Willis then continued, 'if Mr Justice Burton's opinion delivered in chambers *after conference* with the other judges, were correct, what becomes, I repeat of the weight to be attached to the recent judgment'.[496] He then asked those in court to note that,

> Laws, gentlemen, to be respected, to be beloved, and to be obeyed, must be steadily and uniformly administered. If in their administration Judges can go one way to-day, and another way tomorrow, - if they will thus oscillate backwards

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Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[494] 'Extract from Port Phillip Newspaper 15 September 1842, Headed: Supreme Court (Criminal Side)' Annexure 1 Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131 *Appendix in the Case for the Appellant* XV 58. See also *Appendix in the Case for the Respondent* 11. No particular newspaper is given as the authority but the same address is presented in 'Judicial Intelligence, Supreme Court (Criminal Side) 15 September 1842' Source: *Port Phillip Gazette* 17 September 1842, 'Supreme Court –Criminal Side 15 September 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 19 September 1842 and 'Supreme Court –Criminal Side 15 September 1842' Source: *Port Phillip Herald* 16 September 1842.

[495] 'Letter: Sydney Judge (Burton J) to Willis 18 July 1842' quoted in 'Supreme Court (Criminal Side) 15 September 1842' Source: *Port Phillip Gazette* 17 September 1842. Italics appear in the original document.

[496] Ibid.

> and forwards, it is high time to beseech the Legislature to fix the law in such a manner.[497]

This critical comment about the apparent differences of opinion by the Judges at Sydney is yet another attempt by Willis to express his anger over the court's decision. The Sydney Judges noted that Willis,

> took occasion to comment on our judgment in their appeal case; and, reading an extract from a private letter of one of us (Mr. Justice Burton) to him, but of which he withheld the greater part, submitted our judgment in the matter of the appeal, to the review of the persons he addressed, accompanied with the most disrespectful observations concerning us.[498]

The second occasion identified by the Sydney Judges in that Willis brought them into contempt was on 20 September 1842.[499] Before the court adjourned, Willis

> said the he should make a few remarks on the subject of the late decision of the Judges at Sydney in the Carrington case – That no erroneous impression might go abroad of his conduct in this matter. When he sat in insolvency he sat in equity also, and the court of Chancery had power *ex parte* over persons who had refused to deliver up any documents when required to do so by the court, and it could proceed in a summary way to appeal to commit those persons who refused.[500]

After quoting from Lord Mansfield, Willis declared,

> I do not think their Honours at Sydney have sinned against knowledge; I do not think them capable of acting so; but I am so satisfied in my own mind that their decision is wrong, and the authorities I have quoted so fully bear me out, that I shall continue to act as if their decision has never been arrived at, until the question is decided elsewhere.[501]

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[497] 'Letter: Sydney Judge (Burton J) to Willis 18 July 1842' quoted in 'Supreme Court (Criminal Side) 15 September 1842' Source: *Port Phillip Gazette* 17 September 1842. Italics appear in the original document.

[498] Ibid.

[499] 'Extract from Port Phillip Newspaper 20 September 1842 Headed Equity Side *Ex parte Bragg and Askew v Williams*' Annexure 2 Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131 *Appendix in the Case for the Appellant* XV 58. See also *Appendix in the Case for the Respondent* 12. No particular newspaper is given as the authority but the same address is presented in '*Bragg and Askew v Williams* Supreme Court – Equity Side, 20 September 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 22 September 1842.

[500] Ibid.

[501] Ibid.

The Sydney Judges were concerned because Willis,

> when sitting in equity, and when the subject was in no way before him, addressed to the persons assembled, a comment upon our judgment in that case, and quoted a passage from one of the letters of Junius to Lord Mansfield, in which the satirist charges that learned Judge with having acted illegally, and with having sinned against knowledge, and against conviction; Mr. Justice Willis evidently intending to apply the offensive language of Junius to us, and to have it inferred that we had acted in a manner not warranted by law, and against our "conviction", although it might be admitted that we were "ignorant".[502]

Willis continued to ridicule the Sydney Judges. On the next occasion, being the third identified by the Judges at Sydney, Willis referred to their knowledge of Equity principles and practice.

On 10 September 1842 Willis addressed the court in *Welsh and Others v Riddle* about how a judge in equity makes a decision.[503] After reviewing extensive authorities he concluded his address in the following terms,

> To liberate Judges from any obligation to conform themselves to the decisions of their predecessors, would be able to lay open a latitude of judging which, I think, should never be entrusted to any one; it would be to allow space for the exercise of concealed partialities, which cannot by human policy be excluded, and ought therefore to be confined by definite boundaries. Diminishing the danger of partiality is one thing gained by adhering to fixed principles formed on proper precedents, but not the principal thing. In every system of laws, he who is engaged in a law-suit must expect the same decision in his own case which he knows others have obtained in similar cases. If he expect not this, he can expect nothing.[504]

The Sydney Judges fully agree with these sentiments but they are offended by other

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[502] 'Letter: Sydney Judge (Burton J) to Willis 18 July 1842' quoted in 'Supreme Court (Criminal Side) 15 September 1842' Source: *Port Phillip Gazette* 17 September 1842. Italics appear in the original document.

[503] 'Extract from Port Phillip Newspaper 10 September 1842 Headed Equity Side *Welsh and Others v Riddle'* in Annexure 3 Letter: Sydney Judges to Stanley 10 October 1842 No. 131 *Appendix in the Case for the Appellant* XV 76. See also *Appendix in the Case for the Respondent* 13. No particular newspaper is given as the authority but the same address is presented in '*Welsh and Others v Riddle* 10 September 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 12 September 1842 and '*Welsh and Others v Riddle* 10 September 1842' Source: *Port Phillip Gazette* 14 September 1842.

[504] Ibid.

parts of his address that seem to make reference to the Supreme Court of New South Wales at Sydney. In particular they took offence to,

> were not plain that Mr. Justice Willis insidiously intended his auditors to apply a certain passages of it to us, and to draw the conclusion that we are incompetent in our duties as judges in equity. We believe that Mr. Justice Willis meant by other words "equity, therefore, as well as law is a science, as science not to be *obtained by six months' reading*", to imply, but such was the qualification of the Chief Justice; that other words "*some knowledge of the civil law*", he meant to imply that such was the pretension of Mr. Justice Burton; and that by the words "*merely once been a year or two in chambers of a Chancery draftsmen*" he referred to Mr. Justice Stephen.[505]

These critical comments are very similar to those made by Willis in the context of Batman's will.[506] On the fourth occasion, the same sentiments are also expressed by Willis.

The fourth occasion identified by the Sydney Judges was related to two anonymous articles published in the *Port Phillip Patriot and Melbourne Advertiser* on 18 August 1842 and 15 September 1842.[507] The three previous occasions identified by the Judges in Sydney concerned Willis making addresses from the bench in open court.

In an article published on 18 August, the author reviewed the legislation establishing the Supreme Court of New South Wales in the district of Port Phillip and the appeal of Mr

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[505] 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842' *Appendix in the Case for the Appellant* XV 58. The document also appears in the *Appendix to the Case on Behalf of the Respondent* 10.

[506] Part A-2 'Disparaging Words about the Judges of the Supreme Court in a case involving Batman's Will'.

[507] 'Extracts from the *Port Phillip Patriot and Melbourne Advertiser* 18 August 1842, leading article, and the leading article in the same newspaper 15 September 1842 Headed, *The Carrington Case'* Annexure 4 Letter: (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131 *Appendix to the Case on Behalf of the* Appellant XV 76. See also *Appendix to the Case on Behalf of the Respondent* 13. The complete references to the newspaper articles: 'The Supreme Court' Source: *Port Phillip Patriot and Melbourne Advertiser* 18 August 1842 and 'The Carrington Case' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

Horatio Nelson Carrington to the Supreme Court at Sydney is revisited.[508] The author expressed both anger and disbelief that the Supreme Court in Port Phillip is held to be subordinate to that of the court in Sydney. The author noted that the consequence is that,

> renders the proceedings here, in every case, liable to be appealed against at every stage; in short it opens the door to interminable litigation, and puts it completely out of the power of the honest poor man to obtain justice of the fraudulent rich man. We do not think this is the law, nor do we suppose it was ever intended to be the law, but such it seems is the practice.[509]

In addition there was a call to every man with a view of 'convening a public meeting … to consider the propriety of petitioning the British Parliament to protect the province'.[510]

In the article published on 15 September, the author continued to reflect upon Carrington's case in that the Court at Sydney had 'inflicted upon us the *curse* of a subordinate and inferior judicature, every step of which is liable to be appealed against'.[511] The author, after reviewing the relevant legislation and the judgment of the Supreme Court at Sydney considered that the decision is 'queer'.[512]

The Judges at Sydney were very upset over these 'anonymous' articles published in the *Port Phillip Patriot and Melbourne Advertiser.* In their letter to Lord Stanley, Secretary of

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[508] Part A-3 'The Cases of Mr Carrington and Mr Ebden'. *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[509] 'Extracts from the *Port Phillip Patriot and Melbourne Advertiser* 18 August 1842, leading article, and the leading article in the same newspaper 15 September 1842 Headed, *The Carrington Case'* Annexure 4 Letter: (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131 *Appendix for the* Appellant XV 76. See also *Appendix in the Case for the Respondent* 13. The complete references to the newspaper articles: 'The Supreme Court' Source: *Port Phillip Patriot and Melbourne Advertiser* 18 August 1842 and 'The Carrington Case' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[510] Ibid.

[511] Ibid. Italics appear in the original document.

[512] Ibid.

State for the Colonies they noted,

> our proceedings are misrepresented and unfairly commented upon. *We believe these comments to emanate directly or indirectly from Mr. Justice Willis.* We form this belief as to *the whole of them*, on the following grounds: first, from the general reputation that Mr Justice Willis communicates his opinions to conductors of that paper; their they are in frequent communication with him; and that one of them is so intimate *with Mr Willis, as to have been under very considerable pecuniary obligations to his honour*. Secondly, because the extract, 18th August 1842, *is an echo while Mr. Justice Willis's view of the case, there commented upon*, as communicated to us by him; and no one at Melbourne, but his honour, could have suggested such arguments. Thirdly, because the extract, 15th September, 1842, refers to Mr. Justice Stephen, as the judge by whom the act, 4 Victoria, No.22, was drawn; and adds, " but at that time Mr. Stephen expected to obtain the resident Judgeship." These facts were known to Mr Justice Willis, but could not have been known to the conductors of the paper, or the public; and the same facts are stated by Mr Willis, the in his letter to the governor, respecting Mr Carrington's case, dated the 14th September, 1842.[513]

The Sydney Judges had no doubt that Willis was the author of both articles since he alone possessed certain information, and that this information had been published in the newspaper.

The fifth occasion identified by the Sydney Judges was in a letter by Willis to Governor Gipps discussing Carrington's case. In this letter dated 14 September 1842, Willis demanded that all documents associated with Mr Carrington's appeal should be forwarded to Her Majesty's Government immediately since the Sydney Judges had 'no legitimate jurisdiction to entertain' the matter.[514] He again asserted his knowledge of the law is correct. Willis noted,

> I have yet to learn, after being six-and-twenty years a Chancery Barrister and a Judge, that a *supreme* court is an *inferior* one; that a court possessing in every respect, within certain limits, the *same powers* as another *supreme court* must be

[513] 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131' *Appendix to the Case on Behalf of the* XV 58. See also *Appendix to the Case on Behalf of the Respondent* 10. Italics appear in the original document.

[514] 'Letter: Willis to Gipps 14 September 1842' Annexure 5 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842' *Appendix to the Case on Behalf of the* XV 58. See *Appendix to the Case on Behalf of the Respondent* 14.

> considered as an *inferior court*; that an attorney who prepares deeds for his client does not act as an attorney; and that in any proceedings in equity (and proceedings in insolvency are proceedings in equity) when an attachment issues for disobedience of an order (especially an order made by the consent of the party, and that party a solicitor of the court) it is requisite, as at common law, to examine him on interrogatories before commitment for contempt; surely those who hold such doctrine *must be ignorant of Chancery practice.*[515]

Publicly and privately, on numerous occasions Willis has expressed his displeasure of the Judges at Sydney. There is no doubt he had little respect or time for his colleagues on the bench at Sydney. These views are again repeated publicly on the sixth occasion identified by the Judges at Sydney.

The sixth occasion identified by the Sydney Judges concerned an anonymous article published in the *Port Phillip Patriot and Melbourne Advertiser* on 26 September 1842.[516] The author reproduced 'two passages, of which one is nearly verbatim, and the other is entirely verbatim, the same as occur in the above mentioned letter of Mr Justice Willis, of 14, September, 1842'.[517] The Sydney Judges in their letter to Lord Stanley conclude that Willis holds them in contempt both from the bench and through the local newspapers.

In his stated case before the Privy Council, Willis maintained 'that he did not, in any of [the addresses from the Bench] transgress the limits which the constitution assigns as to the province of a Judge' and he

> denies that he ever caused three Sydney Judges to be held up to contempt through the medium of the public press, or was party or privy to the publication of the paragraphs which were offensive to them, and he submits, on the evidence,

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[515] 'Letter: Willis to Gipps 14 September 1842' Annexure 5 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842' *Appendix to the Case on Behalf of the* XV 58. See *Appendix to the Case on Behalf of the Respondent* 14. Italics appear in the original document.

[516] 'The Carrington Case' *Port Phillip Patriot and the Melbourne Advertiser* 26 September 1842' Annexure 6 Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Stanley 10 October 1842 No. 131 *Appendix to the Case on Behalf of the Appellant* XV 58. See also *Appendix to the Case on Behalf of the Respondent* 10.

[517] Ibid.

> that this accusation has no better foundation than the surmises of the Sydney Judges.[518]

It is difficult to agree with such a claim after what had transpired. In regards to the newspaper articles, given how they are constructed with legal argument, it is apparent that he wrote or at least heavily influenced the author of such items. It is not surprising that Gipps before the Privy Council remarked,

> When differences between the judges of the Court arise, they ought to be treated as dry legal questions to be disposed of by a temperate appeal to a higher legal or legislative authority; but it seems to the Council that there was a total departure from sound judgment and propriety, in that course of personal remark into which Mr Justice Willis appears to have habitually betrayed as often as any question arose to occasion a difference of opinion between himself and the other judges of the Supreme Court, whose language, it should on the other hand be observed, with reference to their colleague is always becomingly guarded.[519]

Governor Gipps in a dispatch to Lord Stanley, Secretary of State for the Colonies as early as 13 October 1842, expressed the view 'Mr Willis is afflicted with an infirmity of temper which, not withstanding his varied requirements and acknowledged talents, go far to unfit him for the calm and dispassionate administration of Justice'.[520] It was very difficult for Willis to combat this damning view. Again, as in earlier complaints, it is the conduct of Willis that is the main problem.

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[518] *The Case for the Appellant* 7.

[519] *The Case for the Respondent* 9.

[520] 'Dispatch No. 191 with Enclosures: Gipps to Stanley 13 October 1842' *Appendix to the Case on Behalf of the Respondent* 5. Underlining appears in the original document.

PART A-6 THE ATTORNEY GENERAL'S COMPLAINT

Manipulating events so as to embarrass government officials is not an appropriate way for a judge to behave. Mr Roger Therry was the Attorney General of New South Wales who had been considered a candidate for the position of Resident Judge at Port Phillip, when Mr Justice Willis was appointed and it was well known there was some animosity between them.[521] Criminal information of Mr TM Marshall was brought against Mr George Arden, before the Resident Judge.[522] Mr Arden was convicted, but prior to sentencing, Willis wrote a letter to Mr James Erskine Murray who was acting as legal counsel for Mr George Arden.[523] The letter drew attention to a published speech that had purportedly been made by the Attorney General and suggested that as it would help his client, he should raise the item in court.[524] It was later established, that the speech was nothing more than a newspaper squib that had been falsely attributed to Mr Roger Therry.[525] Furthermore both Mr James Erskine Murray and the Attorney General held the view that Willis was aware of this fact before writing the letter. The sixth complaint before the Governor and Executive Council was that Willis had contrived a situation whereby he could criticise the Attorney General and also censure Mr George Arden.

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[521] CH Currey 'Therry, Sir Roger (1800–1874)', Australian Dictionary of Biography, National Centre of Biography, Australian National University < http://adb.anu.edu.au/biography/therry-sir-roger-2723/text3837 > (visited 1 August 2012). See also *Case for the Respondent* 5.

[522] *R v Arden* (Conviction) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Gazette* 18 August 1842. See also Part A-4 'Mr Curr's Case'.

[523] 'Letter: Willis to Murray 13 September 1842 with *The Australian* 29 April 1841' *Appendix to the Case on Behalf of the Appellant* XVI 56.

[524] *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842 Source *Port Phillip Patriot and Melbourne Advertiser* 19 September 1842. See also *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842. Source: *Port Phillip Gazette* 17 September 1842.

[525] 'Letter: Therry to Hesketh 4 October 1842' and 'Letter: Hesketh, to Therry 4 October 1842' *Appendix to the Case on Behalf of the Respondent* 9.

Mr George Arden as editor of the *Port Phillip Gazette* was alleged to have libelled Mr TM Marshall on 2 July 1842.[526] There was a large discussion in the court, as to what is meant by libel and the activities of newspaper editors. In this context, the Resident Judge made reference to a prior decision in which he had fully explored the issue, when he was on the bench in Sydney.[527] Mr Arden was subsequently convicted and Willis noted '[I]t might be supposed, that I had some feelings against the defendant; and in order to remove such erroneous impression sentencing is deferred till another day'.[528] Bail was imposed and sureties were provided.

The Resident Judge later wrote a letter to Mr James Erskine Murray, who was the barrister representing Mr George Arden with an extract of the Sydney newspaper, *The Australian* which contained a speech by the Attorney General.[529] The Resident Judge considered it relevant to bring this matter to his attention, as it 'may possibly be of use to your client in mitigation on punishment'.[530] Commenting on the speech purportedly made by the Attorney General about the nature of the press, Willis noted, 'surely such language, if uttered by the grand and public prosecutor of the colony, might well make a

[526] *R v Arden* (Conviction) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 17 August 1842 Source: *Port Phillip Gazette* 18 August 1842.

[527] *In re Williams* [1838] NSWSupC 85 Supreme Court of New South Wales at Sydney, Dowling CJ, Burton and Willis JJ, 15 September 1838 Source: *Sydney Herald* 17 September 1838. See also Decisions of the Superior Court of New South Wales, 1788-1899, Published by the Division of Law, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1838/in_re_williams/ > (visited 1 August 2012).

[528] *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842 Source *Port Phillip Patriot and Melbourne Advertiser* 19 September 1842. See also *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842. Source: *Port Phillip Gazette* 17 September 1842.

[529] 'Letter: Willis to Murray 13 September 1842 with *The Australian* 29 April 1841' *Appendix to the Case on Behalf of the Appellant* XVI 56.

[530] Ibid.

young editor of a newspaper, suppose he could print and publish what he pleased with impunity'.[531] The power of the press according to the Attorney General,

> *could distort - to wrest from the meaning, style, and spirit in which a sentence was uttered,* that you would be put to the blush; you would be reported for saying things most uncommon; your every public action would be watched. The agency would induce some scores to arrest your decision, by bringing about an appeal in the Supreme Court; And if then, they did not succeed, the press, acting in concert, which they can, with very little industry, be brought to do, they would enter upon that dangerous ground of warfare, *which, under other circumstances, no man in social life would justify.*[532]

Mr James Erskine Murray accepted the advice he had received from the Resident Judge that 'his client had been led away by the speech of the Attorney General'.[533] On 15 September 1842 Mr James Erskine Murray subsequently raised the matter in court.[534] In pronouncing the sentence on Mr Arden, the Resident Judge acknowledged that the newspaper editor '*may have been misled*' and a £50 fine was imposed with security of £1,000 over two years for good behaviour.[535] Mr Arden was imprisoned until the fine was paid and security given.

On 4 October Mr Roger Therry, Attorney General, wrote a letter to The Reverend HM Hesketh, Editor of *The Australian* seeking clarification over the matter. The Editor confirmed that the paragraphs that had been published in the newspaper on 29 April

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[531] 'Letter: Willis to Murray 13 September 1842 with *The Australian* 29 April 1841' *Appendix to the Case on Behalf of the Appellant* XVI 56.

[532] Ibid. Italics appear in the original document.

[533] 'Letter: Willis to Murray 13 September 1842 with *The Australian* 29 April 1841' *Appendix to the Case on Behalf of the Appellant* XVI 56.

[534] *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842 Source *Port Phillip Patriot and Melbourne Advertiser* 19 September 1842. See also *R v Arden* (Sentencing) Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 15 September 1842. Source: *Port Phillip Gazette* 17 September 1842.

[535] Ibid. Italics appear in the original document.

1841 were a hoax.[536] This information further encouraged the Attorney General to inform Governor Sir George Gipps about the behaviour of the Resident Judge.[537] The Attorney General expressed great displeasure, with respect to the private letter of the Willis to Mr Murray,

> against the propriety of a Judge *instructing an advocate as an attorney would a counsel* in a matter in which the Judge is called upon to *pronounce a solemn judgment* affecting the property, liberty, and reputation of a fellow subject.[538]

Furthermore, the letter by the Resident Judge, was 'so revolting to all notions of legal and moral propriety, as must manifestly bring the administration of Justice, where such a practice is prevalent, into just suspicion and merited distrust'.[539] Mr Therry then noted, the

> … great irregularity of introducing his own motion facts into the case, *apparently for the subject of enabling him to pass a mitigated sentence ,* but really, and mainly, for the purpose of censuring me, and "*expressing a hope that what had just been read by Mr Murray, would come under the notice of the Home Government*." Moreover, I submit, the suggestion of such a defence was *discreditable*, as one which might be probably unfounded, and *false in fact!* And, further, I venture to submit that it could not be deemed decent in a Judge to *invent such a defence if the truth were, as no doubt it was, that Arden either never saw, or never thought of, and, consequently, never was misled by my imaginary speech.*[540]

The Attorney General stated that the Resident Judge must have known for the speech to have been considered 'legitimate or admissible evidence in mitigation of punishment' there should have been an affidavit of Mr Arden, stating that he had read the speech and

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[536] 'Letter: Therry to Hesketh 4 October 1842' and 'Letter: Hesketh, to Therry 4 October 1842' *Appendix to the Case on Behalf of the Respondent* 9.

[537] 'Letter: Therry to Gipps 4 October 1842' *Appendix to the Case on Behalf of the Appellant* XVI 58-59.

[538] Ibid. Italics appear in the original document.

[539] Ibid.

[540] Ibid. Italics appear in the original document.

it had misled him but this did not occur.[541] Mr Therry considered the whole proceedings to be '*all the Judge's own'* and 'without parallel, will I trust, continue without imitation in any Court, in which British justice is assumed to be administered'.[542] The Attorney General noted that the Resident Judge had used the speech in the trial of Mr Arden as means of attacking him both personally and professionally.

Willis, in a letter to Governor Gipps dated 25 October 1842, responded to the concerns of the Attorney General.[543] His opening remark indicated how he as a judge would act in a criminal matter; namely, *'I fully admit.* In every case of conviction for *crime* I always look about me for *any mitigating circumstances that may exist* before awarding punishment, I did so in this case, in the discharge of my duty as a Judge sworn to *administer justice with mercy'.*[544] He supported this approach by indicating that this a common practice by the judges in England. The Resident Judge seems to have taken offence to the comments by the Attorney General as to the manner in which the speech was drawn to the attention of Mr Murray. Willis noted that despite the *Australian* newspaper being published in Sydney, it would have been circulated in Melbourne. The Resident Judge considered that it was appropriate to mention the article, just as other factors were identified as influencing Mr Arden. These included '*pecuniary embarrassment*, his *physical temperament, and state of health*'.[545] Furthermore, Judge Willis asked the rhetorical question,

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[541] 'Letter: Therry to Gipps 4 October 1842' *Appendix to the Case on Behalf of the Appellant* XVI 58-59.

[542] Ibid. Italics appear in the original document.

[543] 'Letter: Willis to Gipps 25 October 1842' *Appendix to the Case on Behalf of the* Appellant XVI 59. See *Appendix to the Case on Behalf of the Respondent* 7.

[544] Ibid. Italics appear in the original document.

[545] Ibid.

> *Why did the attorney general suffer such a statement to pass unnoticed, knowing, as he must have done, the mischief it was calculated to produce?* Whether *he did, or did not, thus speak on the occasion REFERRED TO,* the magistrates then present best-know, and *Captain Innes possibly could state what really passed*.[546]

There is no information in the documents submitted before the Judicial Committee of the Privy Council, from the Appellant or Respondent with regards to the knowledge of the Magistrates and Captain Innes. The Port Phillip newspapers are also silent about this matter. Willis concluded his letter by reference to Mr Therry's recent refusal to prosecute for a gross libel on the Resident Judge in the *Sydney Herald* and a restatement that Mr Therry had originally wished to be the Resident Judge of this District.[547]

The opinion of Governor Gipps with respect to the Resident Judge imposing sentence on Mr Arden is clearly expressed in his letter to Lord Stanley, Secretary of State for the Colonies. In this letter he transmitted an account 'in the confident hope and expectation the some effectual means may be taken to prevent the repetition of a proceeding calculated to affect most injuriously the character of the administration of Justice in this colony'.[548] It was Willis's conduct that was causing the greatest problems.

The Complaint by the Attorney General highlights a number of factors influencing the administration of justice operating in Port Phillip. The first concerns the duty of a judge when imposing a sentence and the proper procedure to be followed. The second is the influence of the press upon the exercise of judicial power. The account of the purported speech made by the Attorney General in *The Australian* newspaper seemed to be

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[546] 'Letter: Willis to Gipps 25 October 1842' *Appendix to the Case on Behalf of the* Appellant XVI 59. See *Appendix to the Case on Behalf of the Respondent* 7. Italics and words in capitals appear in the original document.

[547] Ibid.

[548] 'Letter: Gipps to Stanley 13 October 1842' *Appendix to the Case on Behalf of the Respondent* 7.

sufficient to compel Willis to bring it to the attention of Mr Murray, acting on behalf of Mr Arden. Another factor is the personal relationship existing between Mr Roger Therry and the Resident Judge as there was some tension existing between them. This aspect re-appears in other Complaints Before the Executive Council. Willis's behaviour in orchestrating events is not an appropriate role for a judge to perform.

PART A-7 MR SYDNEY STEPHEN'S CASE

Towards the end of 1842, Willis seemed to have become a casualty of the highly charged environment in Port Phillip and made another error of judgment. Although the matter did not appear in the Minutes of the Governor and Executive Council, Willis identified the case of Mr Sydney Stephen as the seventh complaint in his appeal to the Privy Council regarding his amotion. In September 1842, Mr Sydney Stephen sought admission as a barrister of the Supreme Court of New South Wales in the District of Port Phillip.[549] Willis refused the application because in 1839, when Willis was a Puisne Judge of the Supreme Court in Sydney, he had dealt with a case involving Mr Sydney Stephen engaging in improper conduct by attempting to sell assigned servants.[550] Mr Sydney Stephen considered that Willis had misstated the facts of this matter. A few weeks later however, the Resident Judge considered his opinion as being confirmed, when a decision of the Supreme Court of Van Diemen's Land ordered the name of Mr Sydney Stephen to be removed from the role of practitioners for unprofessional conduct.[551] It was not until 1846, that Mr Sydney Stephen successfully overturned the

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[549] 'Colonial Politics: Mr Justice Willis and Mr Sydney Stephen' Source: *Port Phillip Gazette* 7 September 1842.

[550] *Walker v Hughes* [1839] NSWSupC 71 Supreme Court of New South Wales, Sydney Before Dowling CJ, Willis J 2 March 1839 Source: *Australian 5* March 1839. See also Decisions of the Superior Court of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1839/walker_v_hughes/ > (visited 1 August 2012). See also *Carr v Stephen* [1839] NSWSupC 13 Supreme Court of New South Wales at Sydney Before Willis J 20 March 1839. Source: *Sydney Gazette* 23 March 1839. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1839/carr_v_stephen/ > (visited 1 August 2012).

[551] *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

decision of the Supreme Court of Van Diemen's Land, on appeal before the Judicial Committee of the Privy Council.[552]

Willis refused to admit Mr Sydney Stephen as a barrister of the Supreme Court of New South Wales in the District of Port Phillip, due to what he regarded as unconscionable conduct. Willis was on the bench in Sydney, it had been ascertained that,

> Mr Stephen had entered into an agreement for the sale of certain land, and convict servants with Mr Carr; that *he afterwards wished to break the bargain*, and with this intent, *he sought to nullify is own act by setting up it's illegality*, and that, accordingly by arguing that was contrary to law to sell assigned servants, he *therefore* withdrew them from the farm *having previously obtained others in their stead.*[553]

Mr Sydney Stephen questioned Willis as to whether this was a correct statement of what had occurred in the matter heard in 1839 at Sydney.[554] The Resident Judge indicated that 'he would read his notes – notes taken upon the trial'.[555] Willis noted that 'it was obvious Mr Stephen had been in error in maintaining that at the time of the trial it had not being heard. The facts contained the notes he had read were on record at the

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[552] *In re Stephen*, Judicial Committee of the Privy Council Appeal from Van Diemen's Land 1847. Source: *Printed Cases in Indian & Colonial Appeals*, Heard in 1847, Vol. 42 (kept in the office of the Judicial Committee of the Privy Council). See also Unreported Judicial Decisions of the Privy Council, on Appeal from the Australian Colonies before 1850, Division of Law, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/privy_council_decisions/cases/case_index/in_re_stephen_1847/ > (visited 1 August 2012).

[553] 'Mr Sydney Stephen's Case' Source: *Port Phillip Herald* 6 December 1842. Italics appear in the original document.

[554] *Walker v Hughes* [1839] NSWSupC 71 Supreme Court of New South Wales, Sydney Before Dowling CJ and Willis J 2 March 1839 Source: *Australian 5* March 1839. See also Decisions of the Superior Court of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1839/walker_v_hughes/ > (visited 1 August 2012). See also *Carr v Stephen* [1839] NSWSupC 13 Supreme Court of New South Wales at Sydney Before Willis J 20 March 1839. Source: *Sydney Gazette* 23 March 1839. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1839/carr_v_stephen/ > (visited 1 August 2012).

[555] 'Re Sydney Stephen' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 September 1842.

Supreme Court, and to this day remain unimpeached'.[556] The Resident Judge maintained that Mr Sydney Stephen, sought to avoid his obligations under the contract by asserting the illegality of the contract with respect to the assignment of convicts.[557] Willis,

> felt it a duty to the bench and the bar to prevent Mr. Stephen practicing as an officer of the court. A lawyer or a magistrate who comes into court and repudiates his own acts, is not a fit and proper person to be admitted into this Court, and either as a barrister or a judge, he would not be acting rightly if he allowed gentlemen of the bar to practice under such circumstances.[558]

Mr Sydney Stephen contacted Mr G Allen, his solicitor in Sydney and sought advice. After researching the matter, Mr Sydney Stephen addressed a letter to the Editors of the *Sydney Morning Herald* and refuted the allegation made about him by Mr Justice Willis. The letter contained a statement made by His Honour Mr Justice Dowling, Chief Judge and was on the 22 November 1842. His Honour noted,

> '[a]t the trial no objection whatever was taken to the legality of the *contract itself*, but when the case came on the hearing, on the judge's report, *the attention of counsel was directed by his honour Mr Justice Willis to that question, and that point was directed to be argued'.* In fact, the objection imputed to *Mr. Stephen* was raised and insisted on *by Mr Willis himself* ![559]

Emphasis was now placed on the actions of Willis in conducting the trial. Mr Sydney Stephen then published in the *Port Phillip Herald* a statement of facts regarding the earlier matter that the Resident Judge had relied upon to refuse his admission as

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[556] 'Re Sydney Stephen' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 September 1842.

[557] 'Notes on Mr Sydney Stephen's Application for Admission to Practise at the Bar of the Supreme Court of Port Phillip' *Appendix to the Case on Behalf of the Appellant* XVII 60.

[558] Ibid.

[559] 'Mr Sydney Stephen's Case' Source: *Port Phillip Herald* 6 December 1842. Italics appear in the original document. Dowling CJ quoted and reference is made to *The Sydney Morning Herald* 22 November 1842. The *Port Phillip Herald* refers to Mr Sydney Stephen as Mr Sidney Stephen.

barrister to the Supreme Court of New South Wales in the District of Port Phillip.[560] That statement indicated Mr Carr on 4 May 1838, entered into a written contract with Mr Sydney Stephen to purchase an estate called Mount Edgecombe, near Murramorang for £4,900.[561] The sale included,

> 'every advantage connected with the same, as then enjoyed by Mr Stephen', excepting certain chattels belonging to his son, then on the farm. And Mr Stephen undertook, 'to use his best endeavours to get the assigned servants on the farm, transferred or assigned to Mr Carr'.[562]

The procedure for the assignment of convicts placed the onus on the purchaser to notify to the Court at first instance. The matter would then be forwarded to the Board of Assignment. Until such a process was completed, Mr Sydney Stephen would be held responsible for the convicts 'due maintenance and control'.[563] Mr Carr paid the deposit, obtained possession of the farm and notice was given to the court regarding the assignment of servants. Other aspects of the contract remained uncompleted. Problems arose about the articles that were claimed by the son of Mr Sydney Stephen. These articles were not transferred, so Mr Sydney Stephen directed all of the servants to be taken from the farm, as he was still the registered owner of them. This action occurred in December but it was not until January the following year, that the transfer was completed and the servants returned.

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[560] 'Mr Sydney Stephen's Case' Source: *Port Phillip Herald* 6 December 1842. The *Port Phillip Herald* refers to Mr Sydney Stephen as Mr Sidney Stephen.

[561] 'Supreme Court – Equity Side, 6 September 1842' Source: *Port Phillip Gazette* 7 September 1842.

[562] 'Mr Sydney Stephen's Case' Source: *Port Phillip Herald* 6 December 1842. The *Port Phillip Herald* refers to Mr Sydney Stephen as Mr Sidney Stephen.

[563] Ibid.

Since Mr Carr had incurred significant loss, he brought an action for *Assumpit* and sought a declaration that Mr Stephen had breached the contract for failing 'to use his best endeavours' to have the convicts assigned.[564] Mr Sydney Stephen stated that he had never agreed for Mr Carr to have the use and enjoyment of the convicts prior to completion. Up until December of that year, the convicts were '*still* in his *legal custody*: since, by the regulations, he was expressly held *responsible for their control*'.[565] On 20 March 1839 the matter was heard before Chief Justice Dowling and Justice Willis. The Plaintiff, Mr Carr was awarded damages.[566]

After the Resident Judge refused to admit Sydney Stephen as a barrister of the Supreme Court of New South Wales at Port Phillip, the battle was aired in the local newspapers. The general consensus was that Willis had acted in an 'unfair manner' in dismissing his application based upon a previous matter in Sydney.**[567]** It was with delight, then that Willis read out in court on 4 January 1843 an extract from the *Hobart Town Courier* regarding *In re Stephen; Fisher v Thorne*.**[568]** This was a decision of Chief Justice Pedder and Justice Montagu in the Supreme Court of Van Diemen's Land, that Mr Sydney Stephen should no longer be a member of the bar. When Mr Justice Willis, 'came to a particularly strong passage', he added,

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564 'Mr Sydney Stephen's Case' Source: *Port Phillip Herald* 6 December 1842. The *Port Phillip Herald* refers to Mr Sydney Stephen as Mr Sidney Stephen.

565 Ibid.

566 'Re Sydney Stephen' Source: *Port Phillip Patriot and Melbourne Advertiser* 8 September 1842.

567 'Sydney Stephen' Source: *Port Phillip Gazette* 7 September 1842. See also 'Colonial Topics' Source: *Port Phillip Gazette* 17 September 1842.

568 'Supreme Court – Civil Side, 4 January 1842' Source: *Port Phillip Herald* 6 January 1843. See also 'Supreme Court – Civil Side, 4 January 1842' Source: *Port Phillip Patriot and The Melbourne Advertiser*6 January 1843. See also *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

> 'in every syllable of that I entirely agree,' or 'I quite agree with that opinion.' At the conclusion his honour said, I do not think I ever read anything with more satisfaction, if I can separate the feelings of pain which every man must feel for a fallen fellow - creature. I never heard opinions expressed in which I so fully concurred in my life.[569]

The Supreme Court of Van Diemen's Land considered the unprofessional conduct of Mr Sydney Stephen. Chief Justice Pedder maintained that 'an attorney was the channel through which the barrister received remuneration for his services'.[570] A barrister did not have the legal capacity to bring an action against a client to receive payment. Only an attorney would be recognised in such circumstances. Mr Sydney Stephen had persuaded Mr Fisher to become the ostensible plaintiff to enforce certain bills of exchange, which Mr Stephen had accepted from his client.

In late January, Mr Sydney Stephen wrote a letter to Mr Roger Therry, and Mr William A'Beckett, Attorney and Solicitor-Generals of New South Wales attempting to fully explain the situation in Van Diemen's Land.[571] In February he received a response indicating that they had accepted his explanation. This was also endorsed by the

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[569] 'Supreme Court – Civil Side, 4 January 1842' Source: *Port Phillip Herald* 6 January 1843. See also 'Supreme Court – Civil Side, 4 January 1842' Source: *Port Phillip Patriot and The Melbourne Advertiser*6 January 1843. See also *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

[570] *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

[571] 'Letter: S Stephen to Therry and W A'Beckett 23 January 1843 [from the *Sydney Herald* 16 February 1843] Source: *Hobart Town Advertiser* 28 February 1843. See *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

signatures of all the barristers of the Bar of New South Wales, with the exception of Mr Gordon who had recently arrived in the colony.[572] Mr Sydney Stephen later successfully appealed to the Judicial Committee of the Privy Council, which restored his name to the rolls.[573]

Governor Gipps in a letter to Lord Stanley, the Secretary of State for the Colonies noted that the case of Mr Sydney Stephen is absent from the Minutes of the Executive Council 21 December 1842, and 16, 17 and 20 January 1843. He further stated it is not a case 'to which, in as far as Mr Willis is concerned, I attach any great degree of importance'.[574] There is no reference to Mr Sydney Stephen in the Minutes. Willis held a different view. The Resident Judge in his appeal before the Judicial Committee of the Privy Council against his amotion, noted that his conduct regarding the application by Mr Sydney Stephen for admission as a barrister of the Supreme Court of New South Wales at Port Phillip was a separate complaint.[575]

This confusion can be resolved in part, by acknowledging the charged close environment that must have existed within the colony of New South Wales. Two factors add weight to

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[572] 'Letter: S Stephen to Therry and W A'Beckett 23 January 1843 [from the *Sydney Herald* 16 February 1843] Source: *Hobart Town Advertiser* 28 February 1843. See *In re Stephen; Fisher v Thorne*, Supreme Court of Van Diemen's Land, Before Pedder CJ and Montague J 17 December 1842 Source: *Hobart Town Courier*, 23 December 1842. See also Decisions of the Nineteenth Century Tasmanian Superior Courts, Division of Law, Macquarie University and the School of History and Classics, University of Tasmania < http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/in_re_stephen/ > (visited 1 August 2012).

[573] *In re Stephen*, Judicial Committee of the Privy Council Appeal from Van Diemen's Land 1847. Source: *Printed Cases in Indian & Colonial Appeals*, Heard in 1847, Volume 42 (kept in the office of the Judicial Committee of the Privy Council). See also Unreported Judicial Decisions of the Privy Council, on Appeal from the Australian Colonies before 1850, Division of Law, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/privy_council_decisions/cases/case_index/in_re_stephen_1847/ > (visited 1 August 2012).

[574] 'Letter: Gipps to Stanley 4 February 1843' *Appendix to the Case on Behalf of the Respondent* 22.

[575] *Appendix to the Case on Behalf of the Appellant* XVII 60.

this analysis. The first concerns the announcement of Mr Sydney Stephen arriving from Van Diemen's Land in Port Phillip. According to the *Port Phillip Gazette* rumour turned this,

> into the arrival of his brother by the judge Stephen from Sidney to relieve Mr. Justice Willis. We smiled to see the sensation everywhere created- and smiled more when we saw the scurvy wretches who have been the flatters or fearers of the resident judge, daring, with a smirk on their faces, to make a shew of independent opinion respecting the same functionary on whose footsteps they have crawled any day these last eighteen months…'Ay,' said one who had busied himself in a former demonstration in favour of the judge, 'Ay, well it *really* Is time to have a change – people *do* get tired of his overbearing temper…'[576]

Whilst this desire to bring about a change in the person who held the position of Resident Judge may be discarded on the basis of a perceived bias on behalf of the *Port Phillip Gazette* after the case of Mr Arden. It nevertheless highlights a particular mood in some parts of Port Phillip. The second factor regarding the charged environment is that Mr Roger Therry, before he was appointed Attorney General, was counsel Mr Sydney Stephen. A separate complaint before the Executive Council, was made by Mr Roger Therry, as Attorney General.[577] It may have been that Willis disliked certain individuals within the colony and this may in part explain why the First Resident Judge of Port Phillip considered Mr Sydney Stephen's case as a separate complaint before the Executive Council.

[576] 'Colonial Politics' Source: *Port Phillip Gazette* 31 August 1842. Italics appear in the original document.

[577] See Part A-6 'The Attorney Generals' Complaint'.

PART A-8 MR SMITH'S COMPLAINT

The eighth complaint was made Mr John Mathew Smith and is rather unusual in that Willis is able to persuasively justify that his behaviour was appropriate. In his appeal Willis identified the complaint, as 'documentary' and as another instance of the over-encouragement given by the Executive to complaints'.[578] Having made this assertion, no supporting documentation is provided in the Appellant's appendix, nor is Mr Smith mentioned in the Respondent's case. The only reference to Mr Smith appears in a document contained in the Respondent's Appendix in a letter by Willis to Lord Stanley, where he reviews his time in Sydney and Port Phillip.[579] It is only by examining the local newspapers that the merits of Mr Smith's complaint can be established.

Behan has noted it was by association with Mr Carrington, that Judge Willis directed his dislike to Mr Smith, who was the managing clerk, not an articled clerk of the legal firm established by Mr Carrington, Messrs. Carrington and Clay.[580] There is little doubt that Willis did not find Mr Carrington agreeable. This was examined in the third complaint in Minutes of the Governor and Executive Council.[581] This approach by Behan needs to be carefully considered since Willis preferred legal practitioners to follow proper procedures.

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[578] *The Case for the Appellant* 7.

[579] 'Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the Respondent* 45.

[580] Behan above n 60, 198-201.

[581] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

The first meeting between Mr Smith and the Resident Judge took place on 13 July 1841. Before dealing with an application to set aside judgment obtained on a bill of exchange for £ 500 on the ground of irregularity, Willis asked Mr Smith to introduce himself. Mr Smith declared that '[a]t home the most in-experienced clerks are permitted to go before the judges in chambers'.[582] Willis agreed but noted, 'any professional man who allows an inexperienced clerk to act for his client, does not do his duty to that client. If you had a lawsuit, Mr Smith, upon which the whole of your fortune depended, how would you like that to be trusted to an inexperienced clerk?'.[583] After asking the rhetorical question, the Resident Judge acknowledged that Mr Smith might continue with presenting the application.

On 10 August 1841, the matter again came before Judge Willis. On this occasion Mr Smith was called upon by Willis to see if he could substantiate an expression that he had used at the Chamber sittings in July about the profession; namely, 'the veracity of the profession nor of any body was to be taken'.[584] When questioned about the matter,

> Smith asserted as a reason for not allowing a private arrangement to be made in the cases, that he had been once deceived in a similar transaction, and also that his observations were not intended to apply to the whole of the profession but to one individual, Mr Montgomery, whom he charged with being guilty of a breach of faith towards him. His Honour had considered that Smith's conduct on the occasion showed a very great want of respect both to himself as Judge, and to the profession generally.[585]

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[582] *Willis and others v Dutton, Darlot and Simpson* Supreme Court of New South Wales in the District of Port Phillip (Chamber Sittings) Before Willis J, 13 July 1841 Source: *Port Phillip Herald* 16 July 1841. See also *Port Phillip Patriot and the Melbourne Advertiser* 15 July 1841.

[583] Ibid.

[584] *Re JM Smith, Clerk to Messrs. Carrington and Clay, and J Montgomery* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 10 August 1841 Source: *Port Phillip Patriot and the Melbourne Advertiser* 12 August 1841. See also *Port Phillip Herald* 13 August 1841 and *Port Phillip Gazette* 11 August 1841.

[585] Ibid.

Willis was 'anxious to administer Justice' and 'having by virtue of his office as Judge, full power to investigate the conduct of any officer of the Court charged with improper conduct by any creditable person' directed that Mr Smith establish his assertion by affidavit.[586] Mr Montgomery, who was an attorney also prepared a written statement. In short, Mr Smith was claiming that Mr Montgomery had gone back on his word after entering into several private arrangements.

Willis maintained that if he became aware 'of any member of the profession being guilty of a breach of faith towards [their] client,' such an offence would be met with 'extreme punishment', as 'a more serious charge could not be brought against any officer of this Court'.[587] The Resident Judge, after investigating the claim made by Mr Smith, noted,

> In conclusion I trust that the members of the profession, will for the future be enabled to attend in a Court of Justice, without being subject to the ill-bred, ill-natured and unprovoked aspersions of the clerks of their brethren. They would themselves it is to be hoped be incapable of such conduct.[588]

Willis further noted that,

> I think Messrs. Carrington and Clay show a great want of respect to the judge, when they entrusted the business of their clients to their clerk, who is only a young man of 20 or 25 years of age before me at chambers. If I was ill and sent for a physician, should I like the physician to send an apothecary's apprentice to attend upon me, and this I take to be a similar case to the one before me. Mr. Smith is only a hired clerk in the employ of Messrs. Carrington and Clark, and may tomorrow be clerk to a druggist – and the next day to a merchant; there is a great difference between a hired and articled clerk. In this case Mr Montgomery does not appear to deserve the imputation thrown upon him by Mr Smith, and in order to put an end to these proceedings, I have directed a rule of court to be made excluding all persons except attorney's, or Counsel for them, or articled clerks of two years standing, to

[586] *Re JM Smith, Clerk to Messrs. Carrington and Clay, and J Montgomery* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 10 August 1841 Source: *Port Phillip Patriot and the Melbourne Advertiser* 12 August 1841. See also *Port Phillip Herald* 13 August 1841 and Source: *Port Phillip Gazette* 11 August 1841.

[587] Ibid.

[588] Ibid.

> appear before me at Chambers in the future. I have gone into this matter very fully in order that the respectability of the profession be supported, and that I may have an opportunity to punish any mal-practice that comes before me.[589]

Willis made these comments only after he had carefully examined the supporting statements made by Mr Smith and Mr Montgomery.

In the following year when a number of witnesses failed to appear before the court in which Messrs. Carrington and Clay were acting for the defendant, Willis re-iterated his former remark 'this comes of trusting business to clerks, and not even articled clerks'.[590] Whilst Port Phillip might have been considered an outpost from Sydney, Willis was determined that all proceedings of the Supreme Court of New South Wales in the District of Port Phillip should be conducted appropriately. Perhaps in this respect, Willis viewed himself as a highly educated figure, largely isolated in a frontier colony.

Later, another occasion arose, whereby the conduct of Mr Smith was further questioned.[591] This matter involved an action upon a bill of exchange and the firm of Carrington and Clay, had entered a defence on the basis that the signature on the bill was a forgery.[592] Mr Clay who had filed the notice of defence but had later withdrawn it was in court. Willis addressed Mr Clay and indicated that such activity in filling a plea and then failing to substantiate it was contempt of court. Mr Clay stated,

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[589] *Re JM Smith, Clerk to Messrs. Carrington and Clay, and J Montgomery* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 10 August 1841 Source: *Port Phillip Patriot and the Melbourne Advertiser* 12 August 1841. See also *Port Phillip Herald* 13 August 1841 and *Port Phillip Gazette* 11 August 1841.

[590] *Queen v Heany* is referred to in 'Attornies' Clerks' Source: *Port Phillip Herald* 8 April 1842.

[591] *Fletcher v Lee* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 27 April 1842 Source: 'Law Intelligence' *Port Phillip Gazette* 30 April 1842. See also 'Supreme Court, Civil Side' *Port Phillip Patriot and the Melbourne Advertiser* 27 April 1842 and *Port Phillip Herald* 29 April 1842.

[592] Ibid.

> that the defendant had given him written instructions that he had never signed the bill and that his purported signature on the bill was a forgery. After taking up the case, he entertained doubts of the truth of the defendant's allegations, and this, coupled with the fact of his inability to pay our of pocket expenses of the defence of the suit, let alone the cost of employing a counsel to appear, and led him to decline appearing further, and he had already notified the defendant to that effect, and had also notified the Court of his firm's intention to withdraw from the case.[593]

Mr Smith was then called upon to enter the witness box. He declined, indicating that he was a not a witness. The Resident Judge then directed Mr Smith to enter the witness box. Mr Smith asserted 'I always understood, your Honor, that a witness was not compelled to give his testimony without being subpoenaed'.[594] Willis responded '[t]he subpoena, Mr. Smith, is only to bring you to Court where I can direct you to give evidence. I exercise supreme jurisdiction in this Court, and I order you to go into that witness box'.[595] Under oath Mr Smith explained that his firm had withdrawn since they understood that there was another matter that remained unsatisfied, and regardless of the outcome, they would not be able to recover costs.

Mr Smith was then asked whether he considered the signature on the bill was a forgery. He declined to comment and stated that he could only be questioned on facts. The Resident Judge intervened by stating 'you're not an officer of this Court, Mr. Smith, and if you go on in this way you probably never will be. I am not here to parlay with you, Mr. Smith'.[596] Mr Smith under cross examination stated, '[j]udging by comparison, having

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[593] *Fletcher v Lee* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 27 April 1842 Source: 'Law Intelligence' *Port Phillip Gazette* 30 April 1842. See also 'Supreme Court, Civil Side' *Port Phillip Patriot and the Melbourne Advertiser* 27 April 1842 and *Port Phillip Herald* 29 April 1842.

[594] Ibid.

[595] Ibid.

[596] Ibid.

requested the defendant to write his name on a piece of paper, these considered to the best of his knowledge and belief, that the signatures on the bill and on the piece of paper were the hand writing of the same person'.[597] Willis responded by noting that the Court had heard,

> the evidence of that gentleman who has given it so reluctantly and has cut such a sorry figure in the witness box where he has so exposed himself, but which conduct I hope will be a sufficient caution to that respectable attorney, Mr Clay, how in future to trust this person with his business, or rather not trust him; nor do I ever wish to see him conduct a case for any officer of this Court in the future'.[598]

Judgment in the matter was entered for the Plaintiff. Tension between Mr Smith and the Resident Judge however, increased the following day when Smith wrote a letter to one of the local newspapers.[599] In the letter he complained of being 'browbeaten by the Judge', forced to go into the witness box even though he was not a witness.[600] Willis was incensed. In open court, Willis when addressing Mr Clay remarked that the clerk, John Mathew Smith

> is too insignificant for the issue of an attachment; his law is as absurd and insignificant as himself; I acted in perfect conformity with the practice both here and at home; and there was an instance which occurred in Sydney, where a clerk in the Registrar's office refused to come downstairs to give his evidence unless subpoenaed; but when ordered into Court, Chief Justice Dowling read him such a lecture as he well merited. I have summary jurisdiction in this Court, and can order the evidence of any party in court to be given if necessary. I sincerely regret that I should be obliged to inflict inconvenience on any respectable attorney of this Court, and particularly on one who has ever conducted himself with such honour in his profession and respect for this court; but I wish to be distinctly understood, that I will never recognise John Matthew Smith in any transaction of

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[597] *Fletcher v Lee* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 27 April 1842 Source: 'Law Intelligence' *Port Phillip Gazette* 30 April 1842. See also 'Supreme Court, Civil Side' *Port Phillip Patriot and the Melbourne Advertiser* 27 April 1842 and *Port Phillip Herald* 29 April 1842.

[598] Ibid.

[599] 'Letter: Smith to Willis' Source: *Port Phillip Gazette* 4 May 1842. Discussed in 'Supreme Court, Civil Sitting' 4 May 1842 Source: *The Port Phillip Herald* 6 May 1842. See also *Port Phillip Patriot and Melbourne Advertiser* 4 May 1842.

[600] Ibid.

> this Court, or allow the Registrar or Officers of this Court to have official communication with him in any way whatsoever. I must protect this Court from insult of parties even as insignificant as Mr Smith. But I reiterate how sincerely I regret, Mr Clay, that you should have to suffer the inconvenience which I am aware will ensue from my prohibiting this person's appearance in court, but I cannot prevent you employing him in your office.[601]

Behan has noted that this exchange between Willis and Smith that lasted over several years was 'another incident arising out of the Carrington vendetta'.[602] Behan has also noted that Carrington had been in partnership with Mr Clay.[603] Willis had strong feelings of friendship for Mr Clay who had in his employ Mr Smith after Mr Carrington had been struck off the role of solicitors.[604] Mr Smith according to Behan, had acquired the same manner as Mr Carrington.[605] The Carrington matter was the third complaint against Willis which in the Minutes of the Governor and Executive Council.[606]

The interaction between Willis and Smith raises the issue of the behaviour of an officer of the Court. Willis would most likely justify his actions as protecting the court from parties who are intent on causing mischief. Examining the social context and financial conditions of Port Phillip during the period when Willis was on the bench would support this conclusion. In this manner, Willis has effectively responded to Mr Smith's Complaint and it is the first time Willis has overcome one of the complaints he identified

[601] 'Letter: Smith to Willis' Source: *Port Phillip Gazette* 4 May 1842. Discussed in 'Supreme Court, Civil Sitting' 4 May 1842 Source: *The Port Phillip Herald* 6 May 1842. See also *Port Phillip Patriot and Melbourne Advertiser* 4 May 1842.

[602] Behan above n 60, 198. See also 198-201.

[603] Ibid.

[604] Ibid.

[605] Ibid.

[606] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

from the Minutes of the Executive Council. After carefully examining the Carrington matter the claim by Behan cannot be substantiated.

PART A-9 STATE OF EXCITEMENT IN WHICH THE TOWN OF MELBOURNE, AND THE WHOLE DISTRICT OF PORT PHILLIP HAS BEEN KEPT IN BY THE PROCEEDINGS OF THE RESIDENT JUDGE

The ninth complaint to Executive Council concerned excitement, or the want of public confidence in the administration of justice. Based upon the letters of Superintendent La Trobe, 'the town of Melbourne, and indeed the whole district of Port Phillip has been kept by the proceedings of the Resident Judge - almost ever since he arrived there'.[607] La Trobe wrote many letters to Lord Stanley about many matters involving Willis. There are five letters during the period September 1842 to May 1843. They include allegations that Willis made private letters public,[608] that Government Officers were more involved in private speculations than carrying out their responsibilities,[609] that a public meeting in support of Willis was to be held,[610] that the Government officers in Port Phillip prayed for an inquiry in to Willis's conduct[611] and, that Willis after being informed as to the Executive Council minutes of January 1843 had not modified his behaviour.[612] Another way of looking at these circumstances is to indicate that during this period Willis managed to annoy not just Superintendent La Trobe, but also Deputy Sheriff Mr Mackenzie, Crown Prosecutor Mr Croke, Mr Curr and Mr William Lonsdale. Willis also upset Mr JB Were who was described by 'Garryowen' as one of the twelve apostles in

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[607] Minutes of the Governor and Executive Council (Min 42/28 E. 21 December 1842) *Appendix to the Case on Behalf of the Respondent* 25. See also *Case for the Appellant* 7-8 and *Appendix to the Case on Behalf of the Appellant* XVIII 61.

[608] 'Letter: La Trobe to Stanley 21 September 1842' *Appendix to the Case on Behalf of the Respondent* 31.

[609] 'Letter: La Trobe to Stanley 24 October 1842' *Appendix to the Case on Behalf of the Respondent* 20. See also Part A-10 'The Delivery of Charges to Juries (which His Excellency is Pleased to Term Harangues) of an Improper Character'.

[610] 'Letter: La Trobe to Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38.

[611] 'Letter: La Trobe to Stanley 23 May 1843' *Appendix to the Case on Behalf of the Respondent* 66. See also *Appendix to the Case on Behalf of the Appellant* X 43.

[612] 'Letter: La Trobe to Stanley 29 May 1843' *Appendix to the Case on Behalf of the Respondent* 67. See also *Appendix to the Case on Behalf of the Appellant* VIII 38.

Port Phillip.[613] Mr JB Were was one of the major financial and commercial entrepreneurs of the district.

Willis consistently responded to all of these allegations by denying 'any excitement was caused by his proceedings, save that which always accompanies the exposure of guilt, or that the excitement ever reached a point at which the interference of Government became necessary'.[614] He further maintained that 'the interference of the Governor and Council with the resident Judge was calculated to do injury to the province, by holding out prospects of impunity to the frauds and misdeeds he had censured'.[615] Willis was self-assured. In response to the charge of causing excitement in Port Phillip, Willis before the Privy Council documented the numerous petitions of support he had received and did not refer to any letters from Superintendent La Trobe.

The first matter was that Willis had publicly disclosed the contents of private letter. When Superintendent La Trobe wrote to Lord Stanley on 21 September 1842, he was concerned about the 'unauthorised, and, in [his] view, improper, appearance of portions' of a letter by Mr Curr appearing in the *Port Phillip* newspapers.[616] La Trobe admitted that he given a copy of Mr Curr's letter to Willis and noted,

> [h]owever great respect for his honour, I cannot look upon the use thus made of the document in question otherwise than as an unjustifiable one under any

[613] Edmund Finn *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal / By* 'Garryowen' (Melbourne, Fergusson and Mitchell 1888) quoted in Rizzetti above n 87, 101-102.

[614] *Case for the Appellant* 7.

[615] Ibid. See also *Appendix to the Case on Behalf of the Appellant* XVIII 61.

[616] 'Letter: La Trobe to Stanley 21 September 1842' *Appendix for the Respondent* 31. Reference is made to *Port Phillip Patriot and Melbourne Advertiser* 15 September 1842 and *Port Phillip Herald* 14 September 1842. See also Part A-4 'Mr Curr's Case'.

> circumstances; and I think that the principles avowed by his honour are hardly consistent with official propriety.[617]

La Trobe also indicated to Lord Stanley, that he had inquired of the Resident Judge as to the means by which the letter had been made public.[618] Willis denied

> any knowledge whatever of the very clever article in the *Patriot*, which you allude to, until I read it when published in that paper; neither can I tell by what means the letter itself got into the *Herald* newspaper, although I have been, as I hope I shall ever be, perfectly candid with your honour on this and all other occasions, I think I might well question your right to require from me as a judge, against team you have received such charges, and from such a person as this Mr Curr, any answer as to the course I deem fit to adopt.[619]

Willis was critical of La Trobe asking him about whether he had made a private letter public. Viewed in light of the prevailing circumstances, it is clear that Willis had been involved in publicly making known the contents of the letter by having quoted and commented on an extract in his address to a Jury.[620]

The issue of quoting from a private letter also arose later in 1842, when the claim was made that Willis had made public use of a letter from Judge Burton.[621] Willis asserted that the letter was franked O.H.M.S. as '*On Her Majesty's Service without any impress whatever of being made private*'.[622] He noted that 'a judge of New South Wales can only frank for public business ... otherwise it would be chargeable with postage'.[623]

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[617] 'Letter: La Trobe to Stanley 21 September 1842' *Appendix to the Case on Behalf of the Respondent* 31 [B2].

[618] 'Letter: La Trobe to Willis 16 September 1842' *Appendix to the Case on Behalf of the Respondent* 31 [B10].

[619] 'Letter: Willis to La Trobe 20 September 1842' *Appendix to the Case on Behalf of the Respondent* 32 [B11].

[620] Ibid.

[621] 'Letter: Willis to Gipps 28 October 1842' *Appendix to the Case on Behalf of the Respondent* 41.

[622] 'Letter: Willis to Burton 25 October 1842' *Appendix to the Case on Behalf of the Respondent* 15.

[623] 'Letter: Willis to Gipps 15 November 1842' *Appendix to the Case on Behalf of the Respondent* 42.

The second matter concerned the state of the economy which was the focus of an address to a Jury by Willis on 15 October 1842.[624] Many businesses had gone bankrupt and depression followed. Garryowen described the situation in the following terms,

> … most of the merchants and settlers of the time had got their affairs into such labyrinths of intricacy and roguery that it became almost an impossibility for any Judge, not gifted with the patience of a Job, to wade through the tangled mazes of chicanery, sharp-practice and swindling disclosed by the *Nisi Prius*, Equity and Insolvency suits which engaged the attention of the court.[625]

In his address to the Jury, Willis began by making some comments in relation to poverty, vagrancy and the 'most unprecedented pecuniary pressure'.[626] Willis observed that principals in this economy could no longer look after their dependents. He stated

> *Not very long since I was informed by the foreman of the jury of this court, that no less than 200 convicts were at large in this district; assigned servants brought from the Middle district to this free settlement, whose masters were unable to provide for them. If there be 200 or even 100 convicts in this position, how many emigrant labourers must there be?*[627]

In his letter to Lord Stanley, La Trobe quoted this passage. He noted that the Foreman to the jury who was 'a publican in this town' and that the statement to be 'incredible as absurd' and that '[i]f the statement is to be understood literally, his Excellency will

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[624] 'Address to Jury, Supreme Court – Criminal Sessions' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 October 1842. It is reproduced in the *Appendix to the Case on Behalf of the Respondent* 16-19. See also 'The Judge's Speech' Source: *Port Phillip Herald* 21 October 1842 and 'The Judge's Speech' Source: *Port Phillip Gazette* 19 October 1842. See also Part A-10 'The Delivery of Charges to Juries (which His Excellency is Pleased to Term Harangues) of an Improper Character'.

[625] Edmund Finn *The Chronicles of Early Melbourne 1835 to 1852: Historical, Anecdotal and Personal / By* 'Garryowen' (Melbourne, Fergusson and Mitchell 1888) 67.

[626] 'Address to Jury, Supreme Court – Criminal Sessions' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 October 1842.

[627] Ibid. Italics appear in the original document. These words were quoted 'Letter: La Trobe to Stanley 24 October 1842' Source: *Appendix for the Respondent* 20. See also Part A-10 'The Delivery of Charges to Juries (which His Excellency is Pleased to Term Harangues) of an Improper Character'.

pardon my saying that I do not believe there is the slightest foundation for it'.[628] La Trobe then explained that,

> The prisoners of the Crown in this district consists properly three classes; 1stly. Those in government employment; 2ndly. Those assigned to parties who have, under permission of the Governor, brought them over from the Middle district; and, 3rdly. Ticket of leave holders. With the latter, we have here, in considering the statement, nothing to do.[629]

Having specified that Willis's statement related to only the first two classes of convicts, La Trobe focused on the accounting matters. In dismissing the claim made by Willis, La Trobe noted,

> [t]he number of absentees from government employment and service recorded at this police-office is but twenty-five. If there were double the number, there is no reason to believe that they are not employed somehow or other. That a very large proportion of the 270 assigned servants, originally introduced into the district under authority, are at this time, from one cause or another, in the employment of settlers, not legally possessed of a claim on their services, there can be no doubt; but I am assured that the names and abodes of both the employers and employed, in by far the majority, if not all the cases, unknown to the authorities at this very time the reason why it has not been deemed expedient to withdraw them from such service, need not be entered into here.
>
> Next, that there may be a number of convicts and service under feigned names or otherwise in this district, either absentees from the government gang or private service, or runaways from the Middle district, is very possible; but their number cannot in the opinion of the best informed, the very great. To the inquiry which I have made of the police magistrate and the Crown Commissioners within reach, what number of convicts may be wandering about in this district, either within or without the bounds of location, without either control or employment, all have returned the answer in writing, "None".[630]

The other matter that La Trobe raised in his letter to Lord Stanley, was Willis's statement regarding accommodation bills or paper money. In particular La Trobe took offence to the following,

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[628] 'Letter: La Trobe to Stanley 24 October 1842' Source: *Appendix to the Case on Behalf of the Respondent* 20. See also Part A-10 'The Delivery of Charges to Juries (which His Excellency is Pleased to Term Harangues) of an Improper Character'.

[629] Ibid.

[630] Ibid.

> *and last,* but *not least, to the pernicious practice, in my opinion, government officers, either openly or covertly, in lands, farms, stations, sheep, cattle, horses, shares in joint stock companies and merchandise, either for themselves or for their relatives or friends, or for all*;–a practice tending, I conceive, to distract the attention of a public officer from his public duty, to lower such officer in public estimation, to prevent his creditors or those complaining of his dealings proceeding for redress with the same freedom, at least, as with regard to others; and should his percolations fail, involving not himself alone, but that government which he served (and ought to have solely served) in difficulties and 'disgrace'.[631]

La Trobe quoted this passage in his letter to Lord Stanley and refuted the application of such aspersions to the government officers in the district. La Trobe acknowledged these comments were 'malevolent and unjust' and that he could only 'detect the names of two' subordinate officers that had made use of the insolvency law and possibly 'at most one or two others, who have been … in serious difficulties'.[632] Above all La Trobe noted,

> … without instituting any comparison between the conduct of the officers of this district and those of the older colonies around me, when I consider the circumstances in which government officers of this district have been placed, and the times in which they have lived, with the temptation that has existed not only to engage in apparently sober and legitimate modes of investing capital, but in that illegitimate kind of speculation without capital which is akin to gambling; I bare my witness, that no body of men similarly situated and tempted, could have behaved with more moderation…[633]

La Trobe also indicated that he wanted to avoid 'a desire to retaliate, or to return injury for injury' against Willis.[634]

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[631] 'Letter: La Trobe to Stanley 24 October 1842' Source: *Appendix to the Case on Behalf of the Respondent* 20. Italics appear in the original document. See also Part A-10 'The Delivery of Charges to Juries (which His Excellency is Pleased to Term Harangues) of an Improper Character'.

[632] Ibid.

[633] Ibid.

[634] Ibid.

The third matter concerned Willis's desire for a public meeting. La Trobe when writing to Lord Stanley on the 22 November 1842 considered it his 'duty at the present time to draw His Excellency's attention to the extraordinary excitement now reining in Melbourne, and its causes'.[635] It was in *Kerr v St John* that Willis,

> took occasion to allude to various rumors and scandals existing against his character; for example, that there was a connection between him and the prosecutor, as editor of the *Port Phillip Patriot*; that there was a want of tranquility in the province, and of confidence in his administration of justice.[636]

It was also on this occasion that Willis was quoted as having referred to Chief Justice Dowling as having as much knowledge of equity as our 'printer's devil', a claim that he subsequently denied.[637] Willis considered that those people who were making these rumours or claims were slanderers, and

> [t]hose who knew the slanderers, and did not do all in their power to contradict them, were as bad as the parties themselves, and he had his opinion with regard to them. 'I challenge' said his honour, 'those parties who are the authors of those slanders to come forward and prove one word of what they have stated, if they do dare to do so'.[638]

This was effectively calling upon those members of society who were against Willis to show cause and prove their claims. The speech was also published as a leading article in the *Port Phillip Patriot and Melbourne Advertiser*.[639] This article according to La Trobe, 'opens the people's eyes to the fact that there is a diabolical plot afloat to the prejudice of

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[635] 'Letter: La Trobe to Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38.

[636] Ibid. See *Kerr v St john* Supreme Court of New South Wales in the District of Port, Phillip Before Willis J, 3 November 1842 Source: *Port Phillip Gazette* 5 November 1842. See also *Appendix to the Case on Behalf of the Respondent* 70 [F5]. The decision is also reported in Source: *Port Phillip Patriot and the Melbourne Advertiser* 3 November 1842.

[637] *The Australian* 1 December 1840 quoted 'Letter: Willis to Gipps 7 January 1841' *Appendix to the Case on Behalf of the Respondent* 57.

[638] Ibid.

[639] 'The Resident Judge 3 November 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 3 November 1842.

the judge, and that the Superintendent is very probably at the bottom of it'.[640] It simply added to the drama by drawing attention to Willis's claims.

A further article in the *Port Phillip Patriot and Melbourne Advertiser*, noted that 'the reports against his Honour's character and administration of justice, which had been alluded to, had been broadly stated in an epistle by their Honours the Judges at Sydney to the Right Honourable the Secretary of State'.[641] The article indicated that he refuted all of the claims made,

> [h]is honour has never, to our knowledge, written a single syllable for publication in the Patriot, beyond his addresses to the jury at the commencement of each criminal sessions, and his judgements on important points arising from the proceedings in the Supreme Court; and he is never even prompted the publication of any article, or, with the exceptions before mentioned, had any knowledge as to the intended publication of any article that has ever appeared in the Patriot. [642]

The item also denied that there was any pecuniary relationship between Willis and the *Port Phillip Patriot and Melbourne Advertiser* or that the *Port Phillip Patriot and Melbourne Advertiser* is a hired advocate. Furthermore the article indicated,

> it rests with the public Australia Felix to refute the assertion made by the honor's (it is said on the authority of Mr La Trobe), to the effect that the public have lost confidence in the administration of justice in the Supreme Court of the province, and that the tranquility of the community is in consequence disturbed. We unhesitatingly proclaim this false, emanate from what quarter it may, and we call upon the public Australia Felix to bear witness, in public meeting assembled, that there exists in the minds of the community the most unlimited confidence in his honour as a judge, and the warmest esteem for him as a man.[643]

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[640] 'Letter: La Trobe to Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38.

[641] Ibid.

[642] 'The Resident Judge 7 November 1842' Source: *Port Phillip Patriot and the Melbourne Advertiser* 7 November 1842.

[643] Ibid.

This was a 'call to arms' for those people who supported Willis to publically declare their confidence in his administration of justice. The *Port Phillip Patriot and Melbourne Advertiser* later published a requisition that was directed to Mr A Mackenzie, the Deputy Sheriff at Melbourne, to call a public meeting.[644] Mr Mackenzie subsequently placed an advertisement in the *Port Phillip Herald* that denied,

> [his] name was never appended to any document containing expressions which the said requisition sets forth, viz. '*it having been falsely stated in a high quarter;*' and I do further intimate, that any meeting held in terms of the aforesaid requisition, is entirely without my sanction of authority.[645]

La Trobe wrote to Mackenzie, indicating that he seen the advertisement and was satisfied with Mackenzie's conduct in this matter.[646] Mackenzie later wrote to Willis inquiring about the matter and he responded by denying he had 'taken any part in the proceedings'.[647]

William Dodd who was one of the requisitions, signed a statement or certificate about the events.[648] In the certificate, Dodd noted that he was acting on behalf of the Requisitions and met with Mackenzie on the 10 November for the purpose of receiving

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[644] 'Letter: La Trobe to Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38.

[645] 'Advertisement – To the Editor of the *Port Phillip Herald* 14 November 1842' Letter: Mackenzie to La Trobe 14 November 1842 *Appendix to the Case on Behalf of the Respondent* 39 [F4]. See also 'Letter: Mackenzie to La Trobe 15 November 1842' *Appendix to the Case on Behalf of the Respondent* [F.3] 38.

[646] 'Letter: La Trobe to Mackenzie 15 November 1842' *Appendix to the Case on Behalf of the Respondent* 39 [F4].

[647] 'Letter: Willis to MacKenzie 16 November 1842' *Appendix to the Case on Behalf of the Respondent* 39 [F7].

[648] 'Certificate of William Dodd 17 November 1842' *Appendix to the Case on Behalf of the Respondent* 40 [F9].

'the Deputy Sheriff's sanction to the said requisition' which was the appropriate step to take.[649] The Deputy Sheriff,

> could not consent to convene any meeting until the words, "it having been falsely stated in a high quarter," were expunged. I, William Dodd, then replied, that rather than throw any obstacle in the way of the meeting, that I, on the part of the requisitionists, would undertake to expunge the words objected to. I then took a pen, which I ran through the words alluded to; viz. "It having been falsely stated in a high quarter," substituting (by interlining)" a report having been circulated," or words to that effect. The alteration having been completed, and the objectionable expressions withdrawn by me on behalf of the requisitionists, the deputy sheriff then signed a notice convening a public meeting, in terms of the requisition in its altered form, to be held at the Royal exchange hotel, on Friday the 18th instant.[650]

Dodd then proceeded to deliver the amended requisition to Mr Kerr, Editor of the *Port Phillip Patriot and Melbourne Advertiser.* Mr Kerr told Mr Dodd, that the document would 'not be admissible in that shape' and that he would contact the Deputy Sheriff.[651] This did not occur according to Mr Mackenzie who counter-signed the certificate by Dodd and the *Port Phillip Patriot and Melbourne Advertiser* published the original requisition.[652] The newspaper also reviewed what had transpired over the last few days. It noted that the requisition had been signed by 'upwards of 90 persons' when it was presented to the Deputy Sheriff. It further noted that 'some expressions in the opening of the requisition prov[ed] offensive to the delicately strung nerves' of Mr Mackenzie. Those particular words had to be amended to make a '*rumour* which the Judge on the bench had declared to be a *fact*'.[653] Mr Kerr, the Editor of the *Port Phillip Patriot and Melbourne Advertiser* in defending his actions to publish the unaltered requisition

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[649] 'Certificate of William Dodd 17 November 1842' *Appendix to the Case on Behalf of the Respondent* 40 [F9].

[650] Ibid.

[651] Ibid.

[652] 'The Expected Meeting' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 November 1842.

[653] Ibid.

considered the amendment 'an unwarrantable tampering with a public document' and then noted

> Mr MacKenzie is grossly ignorant of his duty. When the requisition was presented to him, he ought either to have assented to its prayer, or at once refused it… It is the duty, therefore, of the sheriff to call all meetings for legitimate purposes, whether these purposes meet with his approbation or not, and from a pretty long experience in such matters, we are enabled to say, that Mr Deputy Sheriff Mackenzie is the first officer of the kind who has had the impudence to propose a material alteration in any document lay before him under such circumstances.
>
> What is the position of the colonists Port Phillip placed in by the fact of the deputy sheriff? Is it not that all future public meetings must jump with his views and wishes, else they cannot take place?
>
> Mr MacKenzie is evidently in the position of the man in the play, who, between two stools was unfortunate enough to hurt 'the small of his back'. On another occasion he may learn probably to steer clear of such an awkward dilemma.[654]

A couple of days later, after reading this disparaging article, MacKenzie wrote to La Trobe to give his version of events.[655] When writing about the matter to Lord Stanley, the Secretary for the Colonies, La Trobe supported MacKenzie in the following terms,

> I have to regret that Mister Mackenzie's inexperience in the state of affairs and parties here, and his ignorance of the characters and standing of individuals signing the requisition… but I entirely acquit him of an intention to act in an improper manner, or to be knowingly a party to such unwarrantable proceedings as those that were manifestly contemplated by the main agent in this matter, Mr Kerr, the editor of the Port Phillip Patriot.[656]

La Trobe after having examined the signatures to the requisition determined that 'there is not a single name of a magistrate or gentleman of standing in the town or country, not

[654] 'The Expected Meeting' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 November 1842.

[655] 'Letter: Mackenzie to La Trobe 19 November 1842' *Appendix to the Case on Behalf of the Respondent* 39-40 [F8].

[656] 'Letter: La Trobe to Lord Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38 [F8].

one of the principal merchants'.[657] He also noted that early on the morning the meeting was to be held, 'the town appears decorated with black printed placards from Mr Kerr's office, stating that by desire of the Judge the meeting would not take place'.[658] The day before, Willis wrote to Mr Kerr and indicated that he had spent the last week at home in Heidelberg as he had 'been too unwell to reach Melbourne'.[659] The letter continued,

> [I] am this moment informed that a public meeting intended for tomorrow, may probably create considerable *commotion*. It is my first duty to my Soveriegn, and to myself as Resident Judge of this district, to preserve the public tranquillity; however flattered, therefore, I must ever be with the kindly feelings of the 'requisitionists, and so great a number of the inhabitants of this district, I must most earnestly request that the meeting may not take place, and that an advertisement be inserted in tomorrow's paper, and due notice given to that effect'.[660]

The letter was also published in the *Port Phillip Patriot and Melbourne Advertiser*.[661] Willis wrote to Mr Croke, the Crown Prosecutor and reaffirmed that 'public tranquillity should not be disturbed' and that he 'would gladly forego' any demonstration of public support 'than … any public excitement should be created'.[662] Willis also noted '[t]hat the *Patriot* is my *organ*, or that I have anything to do with its contents, is altogether untrue, and I am ready to make an affidavit to that effect'. [663] The relationship between Willis

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[657] 'Letter: La Trobe to Lord Stanley 22 November 1842' *Appendix to the Case on Behalf of the Respondent* 38 [F8].

[658] Ibid.

[659] 'Letter: Willis to Kerr 20 November 1842' *Appendix for the Respondent* 54. See also 'The Public Meeting 21 November 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 21 November 1842. Italics appear in the original document.

[660] Ibid.

[661] 'The Public Meeting 21 November 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 21 November 1842. Italics appear in the original document.

[662] 'Letter: Willis to Croke 19 November 1842' *Appendix to the Case on Behalf of the Respondent* 54-55.

[663] Ibid. 54. Italics appear in the original document.

and the *Port Phillip Patriot and Melbourne Advertise* is identified as a separate complaint before the Governor and Executive Council.[664]

The fourth matter was that Government officers in Port Phillip wanted an inquiry into Willis 's conduct. When La Trobe wrote to Lord Stanley in May 1843, he included a memorial.

> May It Please your Excellency
>
> We, the undersigned inhabitants of the district of Port Phillip, venture to approach your Excellency, humbly and respectfully to represent that a large proportion of the inhabitants of this district have lost confidence in the administration of Justice by his honour the resident Judge. We beg to represent to your Excellency, that as it is Mr. Willis's practice to treat truth as libel, and all to assemble in public meeting to state the facts which have caused us to lose our confidence in the Resident Judge, unless under the immediate protection of the executive.
>
> We, therefore, pray your Excellency to institute such an enquiry into the judicial conduct of his honour as shall give us an opportunity of stating our complaints against him under your Excellency's protection, with a view to induce your Excellency to remove him. But if it shall have appeared to your Excellency, after experience of two years, that the office of sole resident Judge, at a distance of six hundred miles from seat of government opposed, as we submit it is, to sound constitutional principle and universal practice, has failed to work well, that your Excellency will take the earliest possible steps to procure the repeal of the law with established that office, substituting for it such mode of administering justice in this district as will guard against the evils of the present system.[665]

The memorial was signed by the following people; namely,

> CH Ebden, Landowner and Bank Director
> James Simpson, JP , Landowner
> Edward Curr, JP, of Van Dieman's Land
> William Lonsdale, JP, Sub-Treasurer
> L. McKinnon, Settler
> George Ward Cole, Lieutenant RN, Merchant
> Edward S Parker, assistant protector of Aborigines

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[664] Part A-11 'An Evasive, if not Untrue Statement Regarding a Loan of Money to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot* with a View of Influencing its Articles'.

[665] 'Memorial to Governor Gipps, 22 May 1843, Enclosure No.1, Minutes of the Executive Council (Min. 43-11) 15 June 1843' *Appendix to the Case on Behalf of the Appellant* VIII 38-39.

John Cox, JP, of Van Dieman's Land
Thomas Wills, JP, Landowner
James Smith JP, Landowner

And 563 other signatures.[666]

La Trobe noted that Willis had been provided with a copy of the memorial but without the signatures attached.[667] Willis replied to La Trobe and stated that '[i]t is very common for the convict to revile the Judge', and he denied that he 'ever treated truth (a very rare commodity in New South Wales) as a libel…'[668] Willis further stated,

> I have yet to learn why it would be dangerous for *honest men* to assemble in public for any *honest purpose.* I know that a public meeting to malign the resident Judge would meet *with every mark of indignation* by the vast majority, by all, in fact, of the independent and respectable inhabitants, whether rich or poor, in this province…
>
> I should have been glad to have been favoured with the names of the petitioners that I might have pointed out *seriatim* their motives. The names of Ebden, Curr, and Cavenagh need no further comment than their former proceedings, and the fact that they are each connected very materially with insolvencies now before the Supreme Court.[669]

In conclusion Willis noted that to 'expose as I recently have done in this court that frightful system of deceit and falsehood which has so long disgraced this province, must necessarily have excited the intense animosity of the wicked and the guilty. I prefer their hatred to their praise'.[670] He requested this his letter accompany the Memorial to Her Majesty's Government and sought relief 'from such calumnious and secret

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[666] 'Copy of Signatures to the Memorial, Enclosure No.2 Minutes of the Executive Council (Min. 43-11) 15 June 1843' *Appendix to the Case on Behalf of the Appellant* VIII 39.

[667] 'Letter: La Trobe to Willis 23 May 1843 No. 43-826 No. 1' *Appendix to the Case on Behalf of the Appellant* IX 40-41.

[668] 'Letter: Willis to La Trobe 25 May 1843 No.2' *Appendix to the Case on Behalf of the Appellant* IX 42.

[669] Ibid. Italics appear in the original document.

[670] Ibid.

proceedings'.[671] An explanatory letter 'by a committee chosen from amongst the memorialists' was enclosed with the Memorial.[672] The letter noted that to comment on Willis's conduct would subject them to contempt of court and so asked that the memorial be privileged. They noted that the memorial had been,

> signed by eighteen magistrates, by all the resident candidates for the representation of the borough and the district, in the new Legislative Council, by many government officers, Bankers, merchants, and landholders, and with reference to the title by which is seems Judge Willis's advocates wish him to be known "The Poor Man's Friend," by many mechanics and labourers.[673]

They wanted to express the 'people's feelings … on the spot' and urged the following considerations:

> *First*, that the alternate addresses for and against Judge Willis, proves that he does not occupy the neutral position of a judge but of a partisan.
>
> *Secondly,* that the knowledge of His Excellency's statement, published in our newspapers, "that Judge Willis lies under very grave charges which have been preferred against him by the highest functionaries in New South Wales, judicial as well as civil," renders it impossible that Judge Willis can retain he seat on the bench, except in defiance of public feeling.
>
> *Fourthly,* the remarkable and strong fact, to the truth of which we pledge ourselves, that the reason assigned by numerous individuals for not signing their present address, "*their fears of the judge",* lest in these disastrous times their possible appearances in his whether as parties or witnesses, should subject "then to insult or injury", is in itself a stronger condemnation of Judge Willis then any language or arguments contained in the Memorial.
>
> *Fifthly*, That Judge Willis has made numerous attempts to fix upon respectable individuals of the community charges of perjury, sometimes as if with a view to discredit a particular complainant against himself, sometimes as if to throw discredit on the public complaints against him.
>
> *Sixthly and finally,* That Judge Willis has frequently indulged in expressions of sweeping condemnation of the whole district.[674]

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[671] 'Letter: Willis to La Trobe 25 May 1843 No.2' *Appendix to the Case on Behalf of the Appellant* IX 42.

[672] 'Explanatory Letter to the Memorial 18 May 1843 [No. 3]' *Appendix to the Case on Behalf of the Appellant* VIII 39-40.

[673] Ibid.

[674] Ibid. Italics appear in the original document. There is no Third consideration.

Understanding the considerations raised in the Memorial is achieved by reviewing the conduct of Willis in Port Phillip. Examining the events in April and May 1843 just prior to the memorial being presented, explains the mood in Port Phillip. Willis was deeply concerned about the economic conditions prevailing in the District. During a criminal matter in early April 1843, involving the passing of a sentence of transportation on Phoebe Watts for forgery, Willis made reference to what he believed 'to be the chief causes of the pecuniary distress of this province … of government officers being engaged in private speculations'.[675] This statement about Government officers had little relevance to the criminal matter before the court.[676]

Many leading members of Port Phillip society had become insolvent over the last few years.[677] In *Batman v Lonsdale* the actions of two government officers, Sub-Treasurer Captain Lonsdale and Crown Prosecutor Mr Croke were brought under close examination.[678] Lonsdale and Simpson were the executors and trustees of Batman's estate.[679] Patricius Welsh had bought 25 shares in the Union Bank of Australasia Ltd from them, and some time later sold these shares to Lonsdale. Effectively Welsh was

[675] *R v Phoebe Watts* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 7 April 1842 Source: *Port Phillip Gazette* 8 April 1843.

[676] 'Government Speculators' Source: *Port Phillip Herald* 11 April 1843.

[677] See Rizzetti above n 87. See *In the Estate of PW Welsh* Insolvency Proceedings, Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 16 March 1843 Source: *Port Phillip Gazette* 18 March 1843; *In the Estate of PW Welsh* Insolvency Proceedings Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 31 March 1843 Source: *Port Phillip Gazette* 1 April 1843; *In the Estate of PW Welsh* Insolvency Proceedings Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 20 April 1843 Source: *Port Phillip Gazette* 22 April 1843 and *In the Estate of PW Welsh* Insolvency Proceedings Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 7 June 1843 Source: *Port Phillip Gazette* 10 June 1843. See also 'Report of Proceedings in the Estate of Watson and Hunter' 11 April 1843 Source: *Port Phillip Gazette* 29 April 1843 and, 'The Dignity of the Bench 18 April 1843' Source: *Port Phillip Herald* 18 April 1843.

[678] *Batman and others v Lonsdale and others* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 29 April 1843 Source: *Port Phillip Herald* 1843.

[679] See Part A-2 'Disparaging Words about the Judges of the Supreme Court in a case involving Batman's Will' and Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case'.

acting as an agent of Lonsdale. Early in 1843 Willis met Welsh and Lonsdale in the street, and was handed a written statement. It indicated that the shares in Batman's estate had been sold in the usual manner of winding up an estate. The statement also documented that Lonsdale had been made an offer to be appointed as a director of the Bank, but a precondition was that he become a shareholder. It was on this basis that he contacted Welsh about the shares. Both Welsh and Lonsdale submitted affidavits on the matter. When the matter was before the court, Willis noted that there were a number of inconsistencies and that payment had not been by cash, but by accommodation bills drawn The first installment involved Lonsdale personally, and the second installment involved the partnership of Lonsdale and Langhorne that had been involved in cattle speculations. On the 6 May 1843 Willis noted that the 'transaction was altogether the most disgraceful he had ever heard of…it was another of those bill transactions only to be met with in such a place as Port Phillip'.[680] Willis stated that,

> Capt Lonsdale had sworn that he never possessed any part of the estate as property, while he must have known that the shares were part of a testator's estate, and also that he had purchased them under his name. He (Judge Willis) considered the trust reposed in an executor to be a most sacred one, and when such trust is betrayed he considered it the greatest moral delinquency man could be guilty of.[681]

Willis ordered that the shares together with any dividends and interest should be transferred to the Registrar of the Supreme Court.

In the same matter, Willis discovered that Mr Croke, the Crown Prosecutor had purchased land from Lonsdale by accommodation bills and noted that such method of

[680] *Batman v Lonsdale* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 4 May 1843 Source: *Port Phillip Gazette* 1843. See also *Batman v Lonsdale* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 4 May 1843 Source: *Port Phillip Herald* 5 May 1843.

[681] Ibid.

payment was 'extremely improper' for an 'officer of this court, and a gentleman'.[682] Mr Croke emphatically stated that his 'private affairs should not be brought before Her Majesty's public court'.[683] Mr Croke was later taken into custody over the matter.

Members of the Port Phillip Bar wrote to Mr Croke to express their concern for the actions of Mr Justice Willis in making an unwarranted attack 'by mixing up both your private pecuniary affairs with your duties as a barrister and a public officer'.[684] All members of the bar had signed the letter.[685] Croke replied expressing his thanks for their support.[686] At the same time as these events were taking place it was reported that Willis 'did not care how those acted over whom he had control, for he (Mister Willis,) could, if necessary, do as Sir Edward West did, which was, to do so without a bar after six months".[687] The *Port Phillip Herald* did not know of this person and commented 'Who the Dickens is Sir Edward West?'[688] Mr Croke wrote to Superintendent La Trobe to explain how he had purchased land from Lonsdale in an effort to clear his name. He noted,

> Mr Gurner and I, in the month of August last (1842), purchased a piece of ground from captain Lonsdale for £ 500. The terms of the agreement between us were, that we should pay in cash £ 300 (which we did), and the remaining £200 by a

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[682] *Batman v Lonsdale* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 4 May 1843 Source: *Port Phillip Gazette* 1843. See also *Batman v Lonsdale* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 4 May 1843 Source: *Port Phillip Herald* 5 May 1843.

[683] Ibid.

[684] 'Letter: Members of the Port Phillip Bar to Croke 1 May 1843' Source: *Port Phillip Herald* 5 May 1843. See also *Appendix to the Case on Behalf of the Respondent* 80.

[685] They included Edward Eyre Williams, Arch. Cunninghame, S Raymond, Redmond Barry, Robert W Pohlman and W Foster Stawell.

[686] 'Letter: Croke to Members of the Port Phillip Bar 1 May 1843' Source: *Port Phillip Herald* 5 May 1843. See also *Appendix to the Case on Behalf of the Respondent* 80.

[687] 'The Bench and Bar 5 May 1843' Source: *Port Phillip Herald* 5 May 1843.

[688] Ibid.

> bill at 12 months, which Bill we took up eight months before its arrival at maturity, in order to save the interest. This is the only dealing, this is the only *connexion*, the only transaction of any nature or kind I have ever had with Captain Lonsdale.[689]

Mr Croke also indicated that up until recently he had always been on good terms with Willis and wanted to have the matter referred to Governor Gipps. The *Port Phillip Herald* when commenting on Willis in early May noted,

> [t]he unmistakable observation of his Excellency in reference to the unwarrantable criminations of Captain Lonsdale by His Honour Judge Willis, coupled with the severe and most unqualified rebuke of the Sydney bench through the Chief Justice in the affair of the 'quo warranto' case, has put the cap–piece to the pile of stones which Mister Willis has been so sedulously keeping up only to find and recording on his own head.[690]

The 'Quo Warranto' reference refers to the opinion of Willis regarding the incorporation of Melbourne being invalid.[691] Together all of these events formed the immediate background to the memorial.

In his fifth letter to Lord Stanley, La Trobe asked the rhetorical question, 'if the existing state of things consequent be allowed to continue, can the Government be reasonably expected to maintain itself in public confidence and respect?'.[692] Throughout the letter La Trobe expressed frustration that despite Willis being informed that there were a number of complaints against his character and conduct, he always denied that he was at fault.[693] La Trobe noted that Willis might probably ask that if Government 'had really

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[689] 'Letter: Croke to La Trobe 4 May 1843' *Appendix to the Case on Behalf of the Respondent* 79.

[690] 'The Resident Judge' Source: *Port Phillip Herald* 5 May 1843.

[691] See Part B-5 'Incorporation of the Town of Melbourne Invalid'.

[692] 'Letter: La Trobe to Stanley 29 May 1843' *Appendix to the Case on Behalf of the Respondent* 67.

[693] 'Willis's Response to the Executive Council Minutes, Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the Respondent* 45. See also 'Remarks from Mr La Trobe' 20 February 1843, on the letter of Mr Willis dated 8 February 1843, which were transferred to the Colonial Office from

believed half' of that which it had been told about Willis 'why had it not removed him at once from his seat?'.[694] In summarizing the situation La Trobe stated Willis denies '*in toto* the truth of the allegations against him' and,

> considers himself as the party aggrieved, believes that none but the vile, criminal or debased can possibly find cause of complaint in his administration of Justice; asserts the confidence felt by the vast majority of the community in his proceedings, and holds himself justified in availing himself of every means, offensive or defensive, to the vindicate himself from all aspirations. Regarding this defence as a duty he owes to his station, as well as to his personal character, he employing his official Power to peruse it through every possible means, whether his efforts be directed against bodies or individuals.[695]

After reviewing how every part of Port Phillip society has been affected, including the people who are divided into two groups – those pro and anti Willis, he concludes that if nothing is done 'the consequence may be fatal to the character of the District, if not to the Government under whose charge and care it is placed'.[696] In conclusion, La Trobe cast doubt upon the constitution confiding judicial functions in 'one sole resident Judge', because 'I have such convincing proofs before my eyes of the evils to which such arrangement may lead, that I cannot but consider it against the spirit of the Constitution, and deprecate its adoption here or anywhere else, as scarcely with the maintenance of British Justice and British Liberty'.[697] These are very strong words and indicate the charged or excited environment existing in Port Phillip.

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the Colonial Secretary of New South Wales 4 March 1843 *Appendix to the Case on Behalf of the Respondent* 60-64.

[694] 'Letter: La Trobe to Stanley 29 May 1843' *Appendix to the Case on Behalf of the Respondent* 67.

[695] Ibid.

[696] Ibid.

[697] Ibid.

Governor Gipps felt compelled to first bring Willis and what had been occurring in Port Phillip to the attention of the Executive Council on 21 December 1842.[698] In August of that year, Willis had applied for sick leave so that he could retire to England but a dispute arose concerning the payment of salary and Willis withdrew his application.[699] Since Willis was not going to leave, Governor Gipps,

> saw no way by which the excitement so long existing in the District of Port Philip could be allayed, and confidence restored in the administration of justice by the local tribunal of that district, without some interference on his part, and he, therefore, had resolved to seek the advice of the Council. First, as to whether such interference been necessary; and, secondly, should any be deemed necessary, as to the nature of the measures which ought to be adopted.[700]

Governor Gipps reminded the Council that Willis arrived in Sydney at the end of 1837 but it was no long before a number of disputes arose and the decision was made to appoint him to Port Phillip. It was in March 1841 that Willis took up the post of First Resident Supreme Court Judge in Port Phillip. Unfortunately controversy soon erupted involving his colleagues on the bench, members of the Executive and many of the inhabitants of Port Phillip society.[701] The matter was then further considered on the 16 January and 17 January 1843.

After examining the associated documents brought forward by Governor Gipps, the Executive Council on the 17 January could not avoid the 'very unfavourable general impression' of the 'extent and variety of quarrels' and acknowledged,

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[698] 'Minutes of Proceedings of the Executive Council 21 December No. 42-28' *Appendix to the Case on Behalf of the Appellant* III 2.

[699] Ibid.

[700] Ibid.

[701] See Part A and Part B of this thesis for a detailed account of these matters.

> this state of excited feeling could never have arisen if the Resident Judge had better known how to maintain the dignity of his station, by exhibiting that unimpassioned and unassailable character, by which all attempts to invade the decorum and dignity of the seat of justice are much more effectively foiled and overawed then by the continual threats of commitment for contempt, or angry altercation with parties altogether unworthy of so much attention.[702]

Whilst this comment contained strong language, the Council focused their attention upon 'special facts' that included following matters; namely, the 'contemptuous tone in which Mr. Justice Willis habitually indulges with reference to his learned brethren, the Chief Justice and Justices of the Supreme Court in Sydney', the nature of the relationship between Willis and the *Port Phillip Patriot and Melbourne Advertiser*, that Willis 'avail[ed] himself of his position on the Bench to lay a train of gratifying his feelings of private animosity', and the proposed public meeting.[703] The Council considered that these 'special facts' are of such significance 'to render it indispensable necessary that he should be removed from his office of Resident Judge in the District of Port Phillip'.[704] After acknowledging that Willis did have some supporters, and that it would be inconvenient to suspend him, the Council concluded that he should not be removed and that he should be informed about the Council's deliberations.[705]

After receiving the minutes of the Council, Willis made an extensive reply.[706] He denied that there was any excitement since he had been in Port Phillip except '*through the instrumentality of those who had their own purposes to answer, by endeavouring to raise a*

[702] 'Minutes of Proceedings of the Executive Council 21 December No. 42-28' *Appendix to the Case on Behalf of the Appellant* III 2.

[703] Ibid.

[704] Ibid.

[705] 'Letter: La Trobe to Willis 6 February 1843' *Appendix to the Case on Behalf of the Appellant* III 9.

[706] 'Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* III 9.

clamour against the due course of Justice' with regard to the cases of Mr Carrington and Mr Ebden.[707] Willis also asserted in this context 'the right if a judge, to express his honest opinion, in a fair and becoming manner' with reference to his comments about the Judges in Sydney.[708] He further sought to clarify that during his time on the bench in Sydney, it was not until the appointment of Mr Justice Stephen in 1839 that disagreements arose amongst the Sydney judges.[709] Willis also declared that at this time, he did not cause the purported disputes with Dowling CJ.[710] In continuing to refute the claims that been brought before the Council, especially those of Mr Curr, he referred to a letter from Mr Kerr.[711] He also denied that there was any pecuniary relationship between himself and those involved with the *Port Phillip Patriot and Melbourne Advertiser.*[712] La Trobe responded to these comments by writing to Lord Stanley, the Secretary of State for the Colonies.[713]

On the 13 June 1843 Governor Gipps informed the Council,

> that he considered the excitement caused by conduct of the judge in the district of Port Phillip had reached a point at which the interference of the Government

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[707] 'Letter: Willis to Gipps 20 October 1843, Annexed Document No.1 Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* 20. Italics appear in the original document.

[708] 'Letter: Willis to Gipps 28 October 1842, Annexed Document No.2 Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* 20.

[709] 'Letter: Willis to Gipps 22 March 1840, Annexed Document No.3 Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* 22.

[710] 'Letter: Willis to Gipps 7 January 1841 Annexed Document No.3, with enclosure (A) Letter: Willis to Nicoll 5 January 1841 and enclosure (B) Letter: Nicoll to Willis 6 January 1841, Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* 23-24.

[711] 'Letter: Kerr to Gipps 29 October 1842, Annexed Document No.7 Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* 25-26.

[712] Ibid. See also 'Letter: Fawkner to Gipps 15 November 1842, Annexed Document No.8 Letter: Montgomery to Willis 5December 1842, Annexed Document No.9 Letter: Willis to La Trobe 8 February 1843' *Appendix to the Case on Behalf of the Appellant* III 26-27.

[713] 'Letter: La Trobe to Stanley 29 May 1843 *Appendix to the Case on Behalf of the Respondent* 67. See also *Appendix to the Case on Behalf of the Appellant* VIII 38.

> had become absolutely necessary, and that the urgent appeals which have been made to him by Mr. La Trobe, the superintendent of the district could no longer be disregarded.[714]

The letters from Superintendent La Trobe that were laid before the Council were those dated 23 May 1843 and 29 May 1843 that are discussed above. The council referred to their Minutes of 17 January and noted that care had been exercised to prevent any publicity and, that 'the forebearance then shewn to Willis, in abstaining from recommending his immediate suspension, appears rather to have incited him to fresh acts of impropriety, than to have restrained him within the due bounds of his duty and office'.[715] It was upon examining the letter from La Trobe dated 29 May 1843 in particular, that the Council have considered,

> that the time is arrived when it has become the imperative duty of the executive government to interpose its authority, to put an end at once to the causes which have created so much inconvenience and embarrassment to the local authorities, so much excitement amongst all classes in the Port Phillip district. The Council consequently advise that in conformity with the provisions of the act of Parliament 22 Geo. 3, c.75, Justice Willis be forthwith removed from his office, not only as Resident Judge of Port Phillip, but as a judge of the supreme Court of New South Wales, and that another judge be appointed to supply the vacancy which will thus be created, until the pleasure of her Majesty be known.[716]

After arriving at this decision for amoval, the Council noted that they had not recommended

> *an opportunity be afforded to Mr. Justice Willis justify his conduct previously to adopting a measure they have advised, because the grounds on which this decision is based are not such as to admit of either explanation or justification. They consist chiefly of acts which would be admitted by Mr Willis, although he might deny their tendency and effects.* Of their injurious consequences, however, the

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[714] 'Minutes of the Proceedings of the Executive Council 13 June 1843 (Min 43-10) *Appendix to the Case on Behalf of the Appellant* VII 36.

[715] Ibid.

[716] Ibid. See also 'An Act to Prevent in Future any Patent Office to be exercised in any Plantation or Colony, now, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed to shall discharge the Duty thereof in Person, and behave well therein' [1782] 22 Geo III c 75 (Burke's Act).

> council considers that there are sufficient proofs now before them. *They conceive, therefore, that Mr Willis will have no just ground of complaint, that this case has been decided without affording him a hearing.* He will of course have an opportunity of making such a defence of his conduct to the secretary of State as he may deem necessary.[717]

On the 15 June 1843, the previous minutes of the Council were confirmed and Governor Gipps provided three additional letters from La Trobe, that he had received after the previous Council's meeting. Gipps acknowledged that 'although he did not consider them at all necessary to support their decision which they had adopted, he thought that as they afforded further proof of the necessity of the step which the Government was about to take' it might be appropriate to bring them to the attention of the Council.[718]

The first letter from La Trobe, dated 5 June was in regard to the imprisonment of Mr JB Were, who had written to him seeking assistance.[719] In *Atkins v Manton*, JB Were was a witness being examined about the use of a promissory note.[720] After indicating that the bill was exchanged, JB Were expressed reluctance or 'caution' about the conversation that must have taken place between the parties. Willis warned Were not to prevaricate, and was determined for him to answer properly. Were was put into custody for contempt of court and Willis declared to those present in the court, '[i]n exercise of this salutary jurisdiction I possess, I have committed this person who has disgraced himself as a magistrate of this territory, as a magistrate of this town, and as an honest

[717] 'Minutes of the Proceedings of the Executive Council (Min No. 43-10) 13 June 1843 *Appendix to the Case on Behalf of the Appellant* VII 36. Italics appear in the original document.

[718] Minute of Proceedings of the Executive Council (Min No. 43-11) 15 June 1843 *Appendix to the Case on Behalf of the Appellant* VII 37. Note that the letters are not provided in this Appendix. See also Minute of Proceedings of the Executive Council (Min No. 43-11) 15 June 1843 *Appendix to the Case on Behalf of the Respondent* 71.

[719] 'Letter: La Trobe to Stanley 5 June 1843, Enclosure (A1) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 72.

[720] *Atkins v Manton* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 2 June 1843 Source: *Port Phillip Herald* 6 June 1843.

merchant'.[721] JB Were later described the event as Willis having twisted the evidence.[722] After the verdict in the case had been handed down, counsel for JB Were also approached Willis with a request to provide a written explanation for JB Were's conduct, Willis declined 'and remarked, that he was perfectly satisfied *with his own notes*'.[723] JB Were then asked for a copy of Willis's notes and continued to protest the matter, Willis then progressively committed JB Were from 1 month to 6 months.[724] JB Were rightly considered that he had been imprisoned unjustly and supplied the names of seven gentlemen who were present in court when he was attacked by Willis.[725]

After receiving a copy of JB Were's letter from La Trobe, Willis 'protest[ed] in the strongest possible terms against any interference on the part of the Executive on this occasion'.[726] In conclusion Willis noted 'that it would… be most *unconstitutional, unprecedented and illegal*, for the Executive to attempt in any wise to interfere in this matter, saved by depriving Mr Were of his commission as a magistrate'.[727] This reveals that even Willis was becoming tired of the situation in Port Phillip.

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[721] *Atkins v Manton* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 2 June 1843 Source: *Port Phillip Herald* 6 June 1843.

[722] 'Letter: JB Were to La Trobe 3 June 1843, Enclosure No.1 Letter: La Trobe to Stanley 5 June 1843 Enclosure (A1) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 72.

[723] Ibid.

[724] *Atkins v Manton* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 2 June 1843 Source: *Port Phillip Herald* 6 June 1843.

[725] 'Letter: JB Were to La Trobe 5 June 1843 Enclosure (No. 4) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 73.

[726] 'Letter: La Trobe to Willis 3 June 1843, Enclosure (No.2) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 73. See also Letter: Willis to La Trobe 3 June 1843 *Appendix to the Case on Behalf of the Respondent* 73.

[727] Ibid. Italics appear in the original document.

The second letter from La Trobe also dated 5 June 1843 and laid before Council, concerned a complaint against Willis by Mr Curr who was one of the candidates for the Legislative Council.[728] Mr Curr noted that on 3 June 1843,

> as I was walking from the back-office of a draper's shop (Mr Williamson's) towards the street door, Judge Willis entered from the street, and we passed each other in the shop. Judge Willis and myself are now perfectly known to each other by "sight". As the judge passed me, he addressed Mr Williamson in these words: " So I hear the Mayor is coming forward for the borough; I hope you'll vote for him; *he ought to* get in." I staid a moment at the counter of the shop near the door, when judge Willis who had gone towards or into the back office I have left, returned towards me, and addressing Mr Williamson, but looking and "speaking at me," exclaimed in an excited manner, " He is an honest man, which is more than *some* people are, and I hope he'll get in."

This caused Mr Curr much alarm as these comments were obviously intended to prejudice him on the local elections. In reflecting upon Willis, he made several observations; namely,

> 1st. A notorious and violent partisan as he is, he has now taken part in the contest of election. If he never opens his mouth again, it will still go forth to his whole party, that the judge supports the mayor against Mr Curr.
>
> 2nd. The pure wantonness with which the judge has just brought his office in collision with parties, showing that he has no proper sense of its dignity, or of the sacredness of that neutrality which is sworn to observe.
>
> 3rd. Suppose any cause arising out of the approaching election to come before his court, what reasonable or fair prospect can I or my supporters have of receiving justice at the hands of a judge who, in this public and most offensive manner, has declared himself a partisan against me?
>
> 4th. If a judge, by studied insolence of demeanour and language, provokes contempt and insult to himself, is he a fit person to be intrusted with the guardianship of the dignity of his office?[729]

Mr Curr concluded that the only way to explain Willis's conduct is that he 'is not entirely sane'.[730]

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[728] 'Letter: La Trobe to Stanley 5 June 1843 Enclosure (No. 2A) to Minute 11 of 1843 (No. 43/883)' *Appendix in the Case for the Respondent* 74.

[729] Ibid.

The third and final letter from La Trobe to Lord Stanley dated 2 June, and presented before the Council concerned a matter involving Willis and Captain Lonsdale.[731] The *Port Phillip Herald* on 29 April 1843 published an edited account of a conversation between Willis and a number of gentlemen that took place in Collins Street regarding Captain Lonsdale being involved in private land speculations. The editor also included a statement from another source, indicating that Captain Lonsdale is not one to indulge in such commercial matters.[732] On 1 May 1843 Mr Robert Dunlop wrote to Willis in which he indicated that Lonsdale has defrauded the Government by not paying a depasturising licence for the cattle he has' on the run of Messrs. Hill and Coates'.[733] Dunlop further noted that there was no ill will between himself and Lonsdale but that, 'I hold it to be the duty of every man (however high or low in society), to come forward and state any facts that may have come under his observation, that would tend to sift to the bottom such conduct'.[734] The matter was subsequently referred to La Trobe who wrote to Messrs. Hill and Coates.[735] Robert Dunlop replied on their behalf to La Trobe.[736] The matter was further considered by GS Airy, Commissioner in the Crown's Commissioner's Office who wrote to La Trobe and indicated that Dunlop had been motivated by 'having retained of

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[730] Letter: La Trobe to Stanley 5 June 1843 Enclosure (No. 2A) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 74.

[731] 'Letter: La Trobe to Stanley 2 June 1843 No. 43/881 Enclosure (A3) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 75.

[732] 'Her Majesty's Government and Judge Willis - Extraordinary Dialogue' Source: *Port Phillip Herald* 29 April 1843.

[733] 'Letter: Dunlop to Willis (together with a newspaper extract) 1 May 1843' *Appendix to the Case on Behalf of the Respondent* 76.

[734] Ibid.

[735] 'Letter: La Trobe to Hill and Coates 4 May 1843 (no.2) No. 43/774' *Appendix to the Case on Behalf of the Respondent* 76.

[736] 'Letter: Dunlop to La Trobe 7 May 1843 (No. 3)' *Appendix to the Case on Behalf of the Respondent* 77.

feeling against Captain Lonsdale' and that there was no problem in the matter. [737] When La Trobe informed Lord Stanley about the matter, he expressed the idea that such action on the part of Willis together with Hill and Coates 'merits punishment; but the difficulty is how to punish'.[738]

Willis received several public representations in support of his actions. When documenting these activities, Willis frequently omitted details involving the names of the people and occupations of the people who expressed their support. A good example was the address he received on the 11 March 1843 with 325 signatures that affirmed his,

> firmness and honesty of purpose,–proud in the reflection, that in our resident judge we have a sound and able lawyer,–knowing, too, your honour's just and inflexible administration of the laws, without partiality to rich or poor, and your kind and courteous demeanour to all who approached you we venture to express the hope, that your honour may long remain amongst us to administer those laws with effect, to benefit us by your people admonitions from the bench, and to watch over and protect the interests of the district with which we are more immediately connected.
>
> We desire to tender you, sir, our warmest wishes for your health, and welfare, and happiness, and to venture the hope, that you may very long precise over the Supreme Court of Port Phillip.[739]

In addition there was an address of 1,425 inhabitants of Port Phillip that also expressed regret for the amoval of Judge Willis and praised his independence.[740] A further address from 300 settlers publicly expressing support for his actions 'both as a gentleman and a

[737] 'Letter: GS Airy to La Trobe 22 May 1843 (No.4)' *Appendix to the Case on Behalf of the Respondent* 77.

[738] 'Letter: La Trobe to Stanley 2 June 1843 No. 43/881 Enclosure (A3) to Minute 11 of 1843 (No. 43/883)' *Appendix to the Case on Behalf of the Respondent* 75.

[739] *Appendix to the Case on Behalf of the Appellant* XVIII 61.

[740] 'Address of 1425 Inhabitants of Port Phillip to Judge Willis (100 signatures added subsequently)' *Appendix to the Case on Behalf of the Appellant* XVIII 62.

judge' but once again, little detail was provided regarding names and occupations[741]

In documenting the address of the Australia Felix Lodge of Odd Fellows on 5 July 1843, Willis provided details of those who signed. They were Ralph Walton, John McCabe and Augustus Greeves who acted on behalf of all members of the Lodge in expressing their regret for Willis being removed. Another petition in support of his conduct was signed by William Kerr, Thomas Warrington and John Gillion.[742]

There was no doubt that Port Phillip was in a state of excitement. Having experienced a rapid period of growth followed by depression created a charged environment. Willis was not a neutral player and he contributed through his words and conduct to a want of confidence in the government.

[741] *Appendix to the Case on Behalf of the Appellant* XVIII 62.

[742] Ibid.

PART A-10 THE DELIVERY OF CHARGES TO JURIES (WHICH HIS EXCELLENCY IS PLEASED TO TERM HARANGUES) OF AN IMPROPER CHARATCER

The tenth complaint brought before the Executive Council was that Willis had delivered charges to juries of an improper character. In addressing the issue, Willis referred to two speeches; namely, 'Government Officers and Private Speculations' on 15 October 1842, and 'Newspaper Libels and the Toast of the Press' on 26 November 1842.[743] Willis submitted that 'in neither of these instances ha[d] he transgressed the limits within which judges feel themselves authorized on such occasions to remark on topics affecting the well being of society in the district of their duty'.[744] Willis firmly believed that making statements in public about the colony was part of his judicial role. Before the Privy Council, Gipps identified two further speeches that he deemed to have been inappropriate. The first occasion was when Willis quoted from a private letter he had received from Justice Burton on 15 August 1842, and the other time was when Willis made critical comments about Carrington's appeal when it was not relevant to the matter before the court on 20 September 1842.[745] Examining each of these speeches in chronological order enables them to be placed in context.

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[743] 'Government Officers and Private Speculations Supreme Court (Criminal Sessions) 15 October 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 October 1842 and 'Newspaper Libels and the Toast of the Press Supreme Court (Criminal Sessions) 26 November 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 26 November 1842 *Appendix to the Case on Behalf of the Appellant* XIX 63.

[744] *The Case for the Appellant* 8.

[745] 'Letter: Burton to Willis 18 July 1842 Supreme Court (Criminal Side) 15 August 1842 (no newspaper reference available)' and 'Carrington's Appeal' *Ex parte Bragg and Askew v Williams* Supreme Court (Equity Side) 20 September 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 22 September 1842 *Appendix to the Case on Behalf of the Respondent* 11.

The first speech was an address to a common jury on the 15 August 1842, in which Willis referred to the judgment that the Supreme Court of New South Wales in Sydney had delivered with respect to Carrington's appeal.[746] It is a common occurrence for a judge to address to a jury, to outline the matters that will arise in the cases that are about to be heard but this matter had no value for the jury. It simply enabled Willis to express his abhorrence about the Sydney Judges upholding Carrington's appeal.[747] In an effort to strengthen his opinion, Willis read an extract from a letter he had received from Justice Burton who was on the bench in Sydney. He quoted,

> "you have doubtless heard (says Judge Burton) that Carrington applied to me for a writ of *Habeas Corpus* to which (*after conference with the judges*,) I refused to grant you being as Resident judge, the only *lawful tribunal* to which a person complaining of unlawful imprisonment and within the District of Port Philip can apply for that writ. The Attorney General and Mr Wyndeyer appeared on behalf of Carrington, and produced a copy of his affidavit said to have been filed in the Court of Melbourne on the subject of two accounts between him and Snodgrass, and of course a copy of *your warrant of commitment* which appeared to have been framed on the 70th section of the Insolvent Act, and *on the facts stated in the warrant, perfectly regular*."[748]

After indicating that Justice Burton had at one time, in chambers, held a contrary view to that of the other judges on the bench in Sydney (Dowling CJ and Stephen J), Willis then cast doubt over Carrington's successful appeal. He considered that the Sydney Judges 'appear to me to set at nought the Acts of the Local Legislature of 4 Vict. No. 22, and 5 Vict. No. 9'.[749] The legislation he noted was the power to appoint a resident Supreme

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[746] 'Letter: Burton to Willis 18 July 1842 Supreme Court (Criminal Side) 15 August 1842' (no newspaper reference available) *Appendix to the Case on Behalf of the Respondent* 11. Italics appear in the original document.

[747] Part A-3 'The Cases of Mr Carrington and Mr Ebden'. See also *In the Matter of Horatio Nelson Carrington* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Stephen J and Burton J 31 August 1842 Source: *The Port Phillip Patriot and Melbourne Advertiser* 15 September 1842.

[748] 'Letter: Burton to Willis 18 July 1842 Supreme Court (Criminal Side) 15 August 1842' (no newspaper reference available) *Appendix to the Case on Behalf of the Respondent* 11. Italics appear in the original document. Double inverted commas used by Willis when quoting from a quote.

[749] Ibid. See also 'An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies' [1840] 4 Vic No.22 (*Administration of Justice Act* 1840). 'An Act for the further amendment of the Law and for the better advancement of Justice' [1841] 5 Vict No 9 (*Advancement of*

Court Judge in Port Phillip and the ability for questions of law to be referred from that court to the full bench in Sydney.

Willis was appalled by the decision in Carrington's appeal. He did not accept it and thought that the Judges in Sydney had attempted 'to degrade the "Supreme Court for this district," to an inferior one' and that this was 'contrary to all law'.[750] To provide further gravitas, Willis reflected upon the time he was on the bench in Sydney, and disclosed the opinions of Burton J and Dowling CJ to the establishment of a resident Judge of the Supreme Court of New South Wales in Port Phillip. He stated,

> True, Mr. Justice Burton plan's with regard to the administration of justice in these problems was not adopted by local legislature. 'Tis true also out that all the judges, with the exception of myself, where opposed to the direction of a separate Supreme Court for this district; and that his Honor the Chief Justice proposed, and his proposal was sanctioned by Mr. Justice Stephen, (as appears by the papers on the proposed judicial and legal improvements, laid before the legislative Council 1840), a Circuit Court *thrice in two years, or every eight months.*[751]

These thoughts that the administration of justice in Port Phillip could be adequately handled by not having a resident Supreme Court Judge were ridiculed in his address to the jury. Willis further remarked,

> Look at the goal gentlemen. Remember the number of prisoners tried here monthly, and then, independently of every other consideration, contemplate the justice and humanity of such a state of things - of prisoners remaining eight months in jail previously to trial - and the *Habeas Corpus Act* itself affording men no relief. But, gentlemen, if Mr. Justice Burton's opinion, delivered in chambers *after conference* with the other judges, were correct, what becomes, I repeat, of the weight to be attached to the recent judgments. Mr Justice Burton in his letter says –"*the warrant of commitment was perfectly regular*" – "the resident Judge is the only legal tribunal." Laws, gentleman, to be respected, to be beloved and to be obeyed, must be steadily and uniformly administered.[752]

Justice Act 1841).

[750] 'Letter: Burton to Willis 18 July 1842 Supreme Court (Criminal Side) 15 August 1842' (no newspaper reference available) *Appendix to the Case on Behalf of the Respondent* 11. Italics appear in the original document.

[751] Ibid. Italics appear in the original document.

[752] Ibid. Italics appear in the original document.

This address to the jury on 15 August 1842 was another occasion where Willis was self-assured, in that he was right. It is also a further example of his fiery temper. Willis deeply troubled that the Supreme Court of New South Wales at Sydney had overturned his decision about Carrington's case.

On the 10 October 1842 the Judges in Sydney wrote to Lord Stanley to express their concern of the 'unjust reflections' that Willis has imposed upon them, and that 'Willis's conduct tends to degrade the judicial office, and bring the administration of justice into contempt'.[753] When commenting on Willis reading an extract of a private letter by Justice Burton to the jury, they noted that 'he withheld the greater part, submitted our judgment in the matter of the Appeal, to the review of the persons he addressed, accompanied with the most disrespectful observations concerning us'.[754] When Willis heard of these remarks, he wrote to Stanley and denied that the letter he had read in court, 'was or could be considered as " private;" indeed, the envelope of the letter itself, now before me, is marked, O.H.M.S., meaning I believe, "On Her Majesty's Service".[755] Willis went further and stated, 'Did the learned Judge do this to *defraud the revenue* or does he now mean to insist that his letter (without any such impress) was private? Ultrum, horum, mavis accipe. The insinuation I think wholly unworthy of an *"honest Judge".*[756] These were very strong words by Willis, and indicated that he was still rather upset about the decision in Carrington's appeal.

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[753] 'Letter: Sydney Judges (Dowling CJ, Burton, A Stephen) to Stanley 10 October 1842' includes newspaper extracts *Appendix to the Case on Behalf of the Appellant* XV 53.

[754] Ibid.

[755] 'Letter: Gipps to Stanley 28 October 1842 No.2' *Appendix to the Case on Behalf of the Respondent* 14.

[756] Ibid. Italics appear in the original document.

The second speech by Willis on the 20 September 1842 in the matter *Ex parte Bragg and Askew v William*, and again he remarks about the decision in Carrington's appeal.[757] On this occasion, Willis was sitting in Equity and Carrington's appeal was not connected to any matter before the court. He quoted a letter from the satirist Junius to Lord Mansfield,

> "[t]his letter, My Lord, is addressed to *you*, as to the public. Learned as you are, and quick in apprehension, few arguments are necessary to satisfy you that you have done that which by law you were never warranted to do. Your conscience or it tells you that you have sinned against knowledge, and that whatever defence you make contradicts your own internal conviction. But other men are willing enough to take the law upon trust. They rely upon your authority, because they are too indolent to search for information; or conceiving that there is some mystery in the laws of their country, which lawyers only are qualified to explain, they distrust the judgement, and voluntarily renounced the right of thinking for themselves. We saw the events of history before them, from *Tresillian* to *Jefferies*, from Jefferies *to Mansfield*, they will not believe it possible that although the Judge can act in direct contradiction to those laws, which he is supposed to have made the study of his life, and which he has sworn to administer faithfully. Superstition is certainly not the characteristic of this age; in some men are bigoted in politics who are infidels in religion. I do not despair in making them ashamed of their credulity."[758]

After quoting Junius, Willis then made the following remark about the Judges in Sydney,

> I do not think their honours at Sydney have sinned against knowledge; I do not think them capable of acting so; but I am so satisfied in my own mind that the decision is wrong, and the authorities so fully bear me out, that I shall continue to act as if there decision has never been arrived at, until the questions decided elsewhere.[759]

These were damning words. The Judges in Sydney were offended. They were concerned that public confidence in the administration of justice would be undermined.

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[757] 'Carrington's Appeal' *Ex parte Bragg and Askew v Williams* Supreme Court (Equity Side) 20 September 1842 Source: *Port Phillip Patriot and Melbourne Advertiser* 22 September 1842 quoted in *Appendix to the Case on Behalf of the Appellant* XV 53.

[758] Ibid. The letter from Junius does not appear in the *Appendix to the Case on Behalf of the Respondent.* Italics appear in the original document.

[759] Ibid. See also 'Carrington's Appeal' *Ex parte Bragg and Askew v Williams* Supreme Court (Equity Side) 20 September 1842 *Port Phillip Patriot and Melbourne Advertiser* 22 September 1842 quoted in *Appendix to the Case on Behalf of the Respondent* 11.

The third speech occurred on 15 October 1842 and Willis expressed his thoughts about the causes of economic distress currently prevailing in Port Phillip. He identified that

> reckless unscrupulousness *in contracting engagements*, and heedless negligence in *their discharge; and last,* but *not least, to the pernicious practice, in my opinion, government officers, either openly or covertly, in lands, farms, stations, sheep, cattle, horses, shares in joint stock companies and merchandise, either for themselves or for their relatives or friends, or for all*;–a practice tending, I conceive, to distract the attention of a public officer from his public duty, to lower such officer in public estimation, to prevent his creditors or those complaining of his dealings proceeding for redress with the same freedom, at least, as with regard to others; and should his percolations fail, involving not himself alone, but that government which he served (and ought to have solely served) in difficulties and disgrace.[760]

It was not so much that government officers were involved in private speculations, but that they might use their official position to discourage their creditors from commencing proceedings to recover money. Willis preferred real or 'metallic' to paper bills.[761]

The Judges at Sydney wrote to Gipps over these statements, as Willis had imputed that the local *Insolvency Act* 1841 'had greatly augmented the pressure of the times' and Willis had recommended 'its immediate modification or repeal' because,

> three of its defects: the delay in advertising in Sydney – the provision which invalidates securities taken within a certain period previously to sequestration–(a provision which to my own knowledge has not on frequently prevented that friendly assistance which would otherwise have been given; and enabled the debtor to escape insolvency)–and the want of any enactment for the future care and maintenance of servants after the master has been declared insolvent. Hence his unhappy dependents to frequently are cast upon the world, homeless and houseless wanderers. In all these respects the insolvent act, as it now stands, may indeed be in accordance with the law of England, and very suitably, when limited to *mere mercantile traders in a country like England*; but they are obviously

[760] 'Government Officers and Private Speculations Supreme Court (Criminal Sessions) 15 October 1842' Source: *Port Phillip Patriot and Melbourne Advertiser* 17 October 1842. See also *Appendix to the Case on Behalf of the Appellant* XIX 63.

[761] Ibid. Italics appear in the original document. 'An Act for giving relief to Insolvent Persons and providing relief for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same' [1841] 5 Vic No 17 (*Insolvency Act* 1841).

prejudicial in their new pastoral and cultural country Australia Felix.[762]

The Judges at Sydney note that Willis had made an error when attributing the *Insolvency Act* 1841 for contributing to the financial troubles Port Phillip experienced. They are 'surprised how he could have fallen into, or for a moment sanctioned, such an error' since the law was 'so very plain and free from ambiguity'.[763] The purpose of the legislation was 'to place all creditors, having equal claims only, on the same footing' so as to prevent preferential treatment. Willis had referred to section 8, which avoided,

> all mortgages, judgments and securities made or given under such circumstances, "*and* having the effect of preferring any THEN EXISTING creditor to another." It is obvious from this, that where the object of the debtor is to make a selection between any " then existing" creditors, and to give one or more of such creditors and undue preference over the others, the transaction is invalidated. But, where a man shall desire to contract an entirely *new debt*, for the payment of which a security is *stipulated* for, and the giving of which have security, indeed, forms a *part of the transaction* from its very commencement, *there*, whether the transaction be one of loan or not, the object of the law is clearly not interfered with; and neither its terms nor its spirit can, without a great misconception of both, be said to stand in the way of such arrangement.[764]

In other words, if people have been forced into insolvency, 'the law is not to blame' it is the interpretation that is wrong. Willis in the same outburst remarked 'that the "general ruin"… has been *accelerated* by certain of our Supreme Court Rules', but the Sydney Judges do not understand this comment.[765] What most concerned the Sydney Judges was 'whether, in the discharge of an unavoidable duty, we are thus to be held up to the public as authors of their misfortunes'.[766] They also referred to Willis's judgment in

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[762] 'Letter: Sydney Judges (Dowling CJ, Burton J, Stephen J) to Gipps 4 November 1842' *Appendix to the Case on Behalf of the Respondent* 19. Italics appear in the original document.

[763] Ibid.

[764] Ibid. Italics and words in capitals appear in the original document.

[765] Ibid. Italics appear in the original document.

[766] Ibid.

Carrington's case when Mr Snodgrass being insolvent 'swore that Mr Carrington was indebted to him, and on this Carrington's property was forthwith taken'.[767] They considered that this was yet another misinterpretation of the local *Insolvency Act* 1841, in particular s21 regarding attachment upon the estate and how it was to be made.

The fourth speech took place on 26 November 1842 and Willis recalled a matter that took place more than year ago which had caused great excitement.[768] Having been concerned with the increasing number of libelous accounts in the local newspapers, Willis considered that 'it was an act of justice to those gentleman-who had long endured the blame, and who constantly upbraided by the Press for their supposed conduct', that when Governor Gipps was visiting Port Phillip, La Trobe had omitted the toast of 'The Press' at a public dinner.[769] When questioned later about the veracity of his address, Willis remarked '*I saw* Mr La Trobe strike out the toast of "The Press"'.[770] Willis also indicated that when he had returned home after the particular event, he had spoken to Mr Bolden and Mr Verner and they could corroborate his account. Willis further asserted, 'had I been Chairman I should have acted as Mr La Trobe did, and struck it out, but then I would have acknowledged the fact openly and fairly, and not had permitted others to be reprehended for my act'.[771] La Trobe later commented,

> Willis's accusation that I had erased the toast of the "Press", that the time and manner, and the circumstances under which such accusation was preferred after

[767] 'Letter: Sydney Judges (Dowling CJ, Burton J, Stephen J) to Gipps 4 November 1842' *Appendix to the Case on Behalf of the Respondent* 19. Italics appear in the original document.

[768] 'Newspaper Libels including the Toast of the Press' Address to Jury, Supreme Court (Criminal Sessions) 26 November 1842 *Appendix to the Case on Behalf of the Appellant* XIX 63.

[769] Ibid.

[770] *The Case for the Appellant* 14. See also 'Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the* Appellant III 14-15. Italics appear in the original document.

[771] Ibid.

> the interval of an entire year, must tell their own tale, no official complaint was preferred against me on this head.[772]

It was clear that Willis account of the toast of the press was not a true account. It was yet another means by which by casting aspersions on La Trobe, Willis had endeavored to direct people's attention against the government.

In many of his addresses, Willis referred to ancient Greece and Rome and what had been happening in other parts of the Empire. On this level, it is clear that Willis must have put considerable effort into their composition. Bridges noted, these literary masterpieces were an imitation of the English Judges' addresses to Grand Juries, although most of the inhabitants of Port Phillip were astounded by the learning, classical allusions and high-flown rhetoric.[773] Willis defended his actions by declaring that addressing the jury on the state of the colony was an accepted practice by the colonial judiciary and he believed that they were 'truly delivered for inculcating peace'.[774] It is when Willis used these opportunities to attack the Government, the press and the people that the value or message was lost. It is not surprising then Gipps referred to them as harangues given 'the want *of* moderation and decorum' that was surprising since he was part of the machinery of Government.[775] Willis continued the practice into the following year and on 16 May 1843 the *Port Phillip Herald* reported,

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[772] 'Remarks of La Trobe 4 March 1843 on the letter written by Willis dated 8 February 1843' *Appendix to the Case on Behalf of the Respondent* 63.

[773] R Bridges *One Hundred Years: The Romance of the Victorian People* (Melbourne, Herald and Weekly Times) 222.

[774] 'Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the* Appellant III 14. See also *The Case for the Appellant* 8.

[775] 'Letter: Gipps to Stanley 12 November 1842' F Watson (ed) *Historical Records of Australia* Series 1 Vol XXII 351. Italics appear in the original document.

> The address was an attack upon *malice* and *revenge*, which seemed to astonish the jury, as it had no reference whatever to the cases on the calendar for trial; the address was evidently intended for *somebody*. We should say, however, that having perused his Honor's address *we* should be sorry to be convicted of either the one crime or the other, and have to look at Mr Justice Willis for judgment.[776]

The address could be understood given the excited mood in Port Phillip as it was in the same month that a memorial comprising of in excess of 500 names prayed for an inquiry into his conduct. Willis overstepped society's expectations with respect to making public addresses. Referring to matters that were not relevant to the matter before the court, was too great a temptation for Willis not to take advantage of expressing his opinions on particular individuals.

[776] 'Criminal Side – Monday' Source: *Port Phillip Herald* 16 May 1843.

PART A-11 AN EVASIVE, IF NOT UNTRUE STATEMENT REGARDING A LOAN OF MONEY TO MR FAWKNER, WHICH THE SYDNEY JUDGES ALLEGED WAS LENT TO THE EDITOR OR CONDUCTOR OF THE *PORT PHILLIP PATRIOT* WITH A VIEW OF INFLUENCING ITS ARTICLES

The eleventh Complaint to Executive Council was that Willis had made an evasive, if not untrue statement regarding a loan of money on mortgage to Mr Fawkner, which the Sydney Judges alleged was lent to the editor or conductor of the *Port Philip Patriot* newspaper, with a view of influencing its articles. Willis denied that this had been attempted or had ever occurred. The matter was one of public perception.

Shortly after he had arrived in Port Phillip, Willis asked Mr Montgomery, the then Crown solicitor to invest a sum of money by way of mortgage. No particular person or entity was identified. Montgomery wrote to Willis on 5 December 1842 to document the financial arrangements he noted,

> [t]he entire transaction was one entirely unconnected with the *Patriot* newspaper and its pecuniary engagements. That the money was not lent by you with any view of influencing the articles in that paper. I can most distinctly aver. The security was prepared to you by me, and the matter entirely arranged by me.[777]

Montgomery described the circumstances in the following manner; namely,

> Mr. Fawkner had applied to me to procure him a loan of One thousand pounds, which he told me was intended to assist Kerr and Holmes in liquidating their engagements, and proposed to secure the money by a mortgage on his own property. On your arrival here you asked me to lend out Seven hundred pounds for you. I considered the security offered by Mr. Fawkner was a good one, and with your sanction I negotiated the loan. I do not believe you had a meeting until he was signing the mortgage. The matter was entirely arranged by me. I prepared security to Mr. Fawkner from Kerr and Holmes, for whose benefit it was borrowed, and afterwards, when Kerr retired from the bookselling business and confined himself to the *Patriot*, Mr. Fawkner, at my suggestion, cancelled the security of Messrs. Kerr and Holmes, and took a new one, Holmes alone, thus releasing Kerr from all responsibility. The entire transaction was one entirely unconnected with the *Patriot* newspaper and its pecuniary engagements. That

[777] 'Letter: Montgomery to Willis 5 December 1842' *Appendix to the Case on Behalf of the Appellant* XX 26.

> the money was not lent by you with any view of influencing the articles in that paper I can (not is crossed out) distinctly aver.
>
> The security was prepared to you by me, and the matter entirely arranged by me. The interests agreed to be paid to the mortgagee was Twenty pounds per cent. This was, I considered, a fair rate at the time; but whatever may be thought or said of it, I must take the blame, as you put yourself entirely in my hands in the transaction; and I bear the most willing testimony to your expressions of disinclination to take an interest that the borrower could pay or that would be considered exorbitant.
>
> I may also state that about the time the first half-year's interest was due you expressed to me your intention to reduce it to Seventeen or Sixteen and a half per cent, which I know was done.[778]

In this letter, Mr Montgomery enclosed letters from Kerr and Fawkner, to indicate that the loan did not exist and could not influence the newspaper. Both Kerr and Fawkner flatly denied that Willis exerted any influence or control of the editor of the conductors of the newspaper.[779]

On the 29 October 1842 Kerr wrote to Gipps to outline what had occurred and to assure him, there was no impropriety by Willis, a Supreme Court Judge. He noted,

> the Judges at Sydney had been pleased to assert that His Honor the Resident Judge of this Province "is in constant and confidential communication with one of the conductors of the *Port Phillip Patriot* newspaper, and in the habit of writing for and communicating intelligence to that journal, and farther that one of the conductors of the *Patriot* is under heavy pecuniary obligations to His Honor," I think it a duty I owe alike to the respected Judge thus aspersed and to myself, that I should at once come forward to rebut their Honor's assertions, which are utterly unfounded.

In the letter Kerr stated that at best, he has only ever exchanged half a dozen words with Willis, that apart from the addresses at the opening of Court and important legal cases,

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[778] 'Letter: Montgomery to Willis 5 December 1842' *Appendix to the Case on Behalf of the Appellant* XX 26.

[779] 'Letter: Kerr to Willis 7 February 1843' *Appendix to the Case on Behalf of the Appellant* III 15. See also 'Letter: Willis to Watson 2 December 1842' *Appendix to the Case on Behalf of the Appellant* III 29.

Willis never wrote a single line of the newspaper. Kerr then denounced he had or would be 'a hired advocate' for Willis.

Fawkner expressed similar sentiments.[780] Mr Holmes was a bookseller, who had been heavily indebted to Mr Fawkner. In an effort to enable Mr Holmes to keep carrying on the business, Fawkner was encouraged to borrow money,

> I did borrow the sum of Seven hundred pounds through Messrs. Montgomery and McRae, who were that the time engaged for me; I learn't that the money was Mr. Justice Willis's. Mr. Holmes not been possessed of landed property, I gave security on a town allotment of my own. The money was solely borrowed and used for the stationery business, and the interest was paid by Mr. Holmes, and I believe to Mr. Justice Willis.

Furthermore Fawkner stated that after 30 June 1841 he had ceased to have any connection with the *Patriot*. The only means by which Fawkner could express his thoughts through the newspaper, was via a letter to the Editor.

In responding to the Executive Council Minutes of January, after denying that any relationship of influence existed, Willis provided further particulars of the arrangement.[781] The original sum of money was directed to Mr Holmes, a bookseller and it was only later that the additional amount was only granted to Mr Fawkner, after he 'had ceased to be virtually interested in the paper'. Willis rejected the accusation and remarked, 'If their Honours, the Sydney Judges, are really aggrieved by any falsehood or

[780] 'Letter: Willis to Watson 2 December 1842' *Appendix to the Case on Behalf of the Appellant* III 29 [No. 12].

[781] 'Letter: La Trobe to Willis – with Minutes of Executive Council 6 February 1843' *Appendix to the Case on Behalf of the Appellant* III 9. See also 'Letter: Willis to Stanley' 8 February 1843 *Appendix to the Case on Behalf of the* III 9.

any article which has been published in this newspaper, let legal measures be taken at once, and thus bring the whole matter before a public tribunal'.[782]

On the 28 October 1842 Willis when writing to Gipps, denied that certain elements in the *Port Phillip Patriot* had 'emanated from him directly or indirectly'.[783] Gipps before the Privy Council referred to the matter in the following manner. He referred to a Despatch he had sent to Lord Stanley on 4 February 1843 and his primary concern was not on the actual arrangements between Willis, Kerr and Fawkner but that of the public perception. When reviewing what Willis had submitted about the matter Gipps noted, 'the distinction between proprietor and conductor of the paper does, I must say, it appeared to me to involve a quibble upon words altogether unworthy of a judge'.[784] In particular Gipps commented,

> The Sydney judges meant, I think, only to say, that Mister Justice Willis had lent money to some person exercising, or in a situation to exercise, a control over the paper; and Mister Fawkner, the proprietor of it, whatever might be the nature of his private engagements with the editor, was evidently before the public in such a situation. It seems to me, indeed, scarcely too much to say, that whilst Mr Justice Willis insultingly accused his colleagues of a falsehood, he himself suppressed the truth.[785]

Eroding confidence in the machinery of government occurred, if the public had doubts about the administration of justice.

This matter about an evasive statement by Willis erupted late into Willis's term of judicial office in Port Phillip. It was perhaps not just that there had been a relationship

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[782] 'Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the Appellant* III 9.

[783] 'Letter: Willis to Gipps 28 October 1842' *Appendix to the Case on Behalf of the Appellant* III 20.

[784] 'Letter: Gipps to Stanley 4 February 1843' *Appendix to the Case on Behalf of the Respondent* 22.

[785] Ibid.

between the newspaper and Willis, but that in combination with all the other matters that had transpired, the relevant parties had lost trust and respect for one another. In this regard, it was impossible for Willis to extricate himself.

Part B: Alleged 'Errors in Law' or 'Attempts to Produce Mischief ' Not in the Minutes of the Governor and Executive Council Letter: Governor Gipps to Lord Stanley, Secretary of State 19 July 1843

Willis having considered he had refuted the grounds for his amoval based upon the Minutes of the Governor and Executive Council, then focused upon a letter from Governor Gipps to Lord Stanley.[786] In this document Governor Gipps 'enumerates' seven instances that he describes as 'either errors in law,' 'or attempts to produce 'mischief', as constituting with others, not specified, the grounds on which the Appellant's amotion from office was based'.[787] The seven matters were,

1 Numerous and Insulting Attacks on Colleagues

2 Aborigines Not Subject to British Law

3 Mr Arden's Sentence

4 Denied the Crown of the Right to Dispose of Land in the Colonies

5 Incorporation of the Town of Melbourne Invalid

6 Information Conveyed to the Executive on an 'erroneous point of law'

7 Sentence of Death on Manuel

Most of these events occurred in late 1842 or early 1843. This was a critical time for Willis. He had been in Port Philip for almost two years and he had managed to upset various parts of the Port Phillip community together with his judicial colleagues in Sydney. The First meeting of the Governor and Executive Council to discuss 'Willis the Judge' occurred at this time. As previously discussed, the Port Phillip newspapers in

[786] *Appendix to the Case on Behalf of the Appellant* XXV 76.

[787] *The Case for the Appellant* 10.

reporting contemporary activities kept 'Willis the Judge' on the agenda.

When Willis addressed Part A 'Complaints Before the Governor and Executive Council, Minutes of the 13 and 15 June 1843' extensive materials were provided and two appendices were required.[788] When responding to the matters appearing in Part B, Willis provides very few documents other than what is referred in his stated case. This difference in style may indicate that Willis was more concerned in dealing with the complaints in Part A. This view is consistent given the comparative weight of concerns. It may also suggest that if the matters in Part B by themselves had only occurred, they would not have resulted in Willis being amoved.

Providing advice to the Legislative Council about the repugnancy or validity of local laws was a well-established role for the Supreme Court judiciary in the Colonies. When Willis expressed his opinions regarding the Crown's Right to Dispose of Land in the Colonies and the Incorporation of Melbourne they were viewed as seeking to diminishing confidence in the system of government.

[788] *Appendix to the Case on Behalf of the Appellant* and *Additional Appendix to the Case on Behalf of the Appellant.*

PART B-1 NUMEROUS AND INSULTING ATTACKS ON COLLEAGUES

Willis denied the claim that he had attempted to produce mischief or had made 'numerous and insulting attacks on his colleagues'.[789] Willis asserted that in performing his judicial duties he had acted appropriately. He explained 'the hostility of the Government officers in Port Phillip' was because he had exposed 'their participation in the over-trading and speculations which led to the embarrassments of the present times'.[790] This idea is reasonable given the ruinous financial state of Port Phillip. Governor Gipps did not deny Willis's assertion but questioned the extent of speculations by Government officers. He noted 'even if it were true it would be no justification of the strain of studied insult in which he has long been in the habit of speaking of [the Government officers], even when their conduct was in no way whatever before him'.[791] This is an accurate description of Willis's behaviour in Port Phillip and is reflected in many of the complaints before the Governor and Executive Council minutes of the 13 and 15 June 1843.[792] Governor Gipps stressed in particular, that Mr La Trobe and Captain Lonsdale were 'honest men, and conscientious servants of the Crown'.[793] He also acknowledged that Captain Lonsdale's actions in purchasing the bank shares from Mr Batman's estate was not 'altogether free from blame', but nevertheless was 'very far,

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[789] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

[790] Ibid.

[791] Ibid.

[792] See Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case', Part A-6 'The Attorney General's Complaint' and Part A-9 'State of Excitement in which the Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[793] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

indeed, from deserving the censures so uncharitably heaped upon him'.[794] Willis had rightly castigated Captain Lonsdale, who as one of the executors and trustees of Mr Batman had purchased the shares from the estate.[795]

Reference was also made to a matter that occurred prior to Willis being appointed to Port Phillip, when he was a member of the Supreme Court of New South Wales in Sydney. The relationship between the office of the Chief Justice and that of Judge of the Vice Admiralty had been unclear for many years, but Willis made it personal against Chief Justice Dowling.[796] In 1839 Willis had expressed the opinion that Chief Justice Dowling had forfeited his position by acting as a Judge of the Vice Admiralty. Willis had based this view on advice he had obtained from Serjeant Henry Merewether.[797] The matter concerned statutory interpretation of the *Vice Admiralty Courts Act* 1832 (Imp) and the New South Wales Third Charter of Justice.[798] Willis was certain that Chief Justice Dowling did not have to accept commission as a Judge of the Vice Admiralty upon succeeding Chief Justice Forbes. Furthermore whether or not Chief Justice Dowling had accepted emolument, the commission would amount to such and consequently, he should reconsider his position as Chief Justice. Mr Serjeant Merewether reinforced this view by sending Willis a letter indicating that the Colonial Office is of the 'SAME

[794] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

[795] See Part A-9 'State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[796] JM Bennett *Lives of the Australian Chief Justices: Sir James Dowling* (Federation Press 2001, Annandale) 114-115.

[797] *Appendix to the Case on Behalf of the Appellant* XXVII 80.

[798] 'Third Charter of Justice of New South Wales' (Letters Patent 13 October 1823) section 7 and 'An Act to regulate the Practice and the Fees in the Vice Admiralty Courts Abroad, and to obviate Doubts as to their Jurisdiction' [1832] 2 & 3 Wm 4 c 51 (*Vice-Admiralty Courts* Act 1832) section 4.

OPINION'.[799] Bennett has noted that 'the Law Officers of the Crown, in England, advised differently' and Willis later changed his mind.[800] Willis's actions in this matter diminished confidence and respect Chief Justice Dowling may have had for him from the outset. It is also significant that Governor Gipps in his letter to Lord Stanley 19 July 1843, referred to this event which occurred in 1839, as another example of Willis insulting and attacking a colleague. An 'error in law' or 'an attempt at mischief' which Willis cannot defend himself from in his appeal to the Privy Council.

[799] 'Letter: Merewether to Willis 13 September 1839' *Appendix to the Case on Behalf of the Appellant* XXVII 80. Words in capitals appear in the original document.

[800] Bennett above n 25, 115.

PART B-2 ABORIGINES NOT SUBJECT TO BRITISH LAW

The second 'error in law' or 'attempt to produce mischief' was tightly focused on Willis having had declared that Aborigines are not subject to British law.[801] In this cause, Willis proceeded to indicate what had occurred in *R v Bonjon*, when an Aborigine had murdered another Aborigine.[802] He outlined the prevailing Government policy at the time and his own thoughts that questioned the official attitude. Although not mentioned by Willis, another matter involving the Resident Judge and an Aborigine is also relevant in this context but it is associated with management issues. In *R v Bolden* a settler had been accused of the attempted murder of an Aborigine and in these circumstances Willis declared that there was really nothing to worry about, as the accused is a good person and was my neighbor.[803] Governor Gipps in his response before the Privy Council does not mention either of these matters**,** but refers to a number of instances where Willis had expressed the concern that equal justice was not being dealt to all.[804] There is no explanation as to why the material submitted by the Appellant and the Respondent before the Privy Council disconnect. Governor Gipps would have received Willis's case prior to the matter proceeding. A possible explanation for both parties not having

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[801] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

[802] *R v Bonjon* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 16 September 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 20 September 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/ > (visited 1 August 2012).

[803] *R v Bolden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 2 December 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 6 December 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bolden/ > (visited 1 August 2012).

[804] *Ex parte Moore, In re Beswick* Supreme Court of New South Wales in the District of Port Phillip Before Willis J 3 June 1843 Source: *Port Phillip Gazette* 7 June 1843 and *R v Hill* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 9 June 1843 Source: *Appendix to the Case on Behalf of the Respondent* 89.

referred to *R v Bolden* is that the issue before the Privy Council was that of policy and not management.[805] It was Willis's conduct in diminishing public confidence in the system of government that was the concern, rather than that of Aboriginal – Settler relations.

In his appeal before the Privy Council, Willis made a spirited response with respect to the suggestion that in *R v Bonjon* he had questioned Colonial Policy for the Aborigines.[806] He noted the matter had involved an Aborigine being charged with the murder of another and then documented instances where the official government policy was for the laws of England not to intervene in such affairs. In this regard, Willis submitted he had acted in conformity with Government Policy and simply followed the Governor's directions. He also indicated that other members of the Colonial Judiciary had also adopted this approach. In particular,

> late as November 1840, Chief Justice Dowling, in passing sentence of death on Billy Billy, otherwise Neville's Billy, an Aboriginal, (according to the report originally printed as was understood from his own notes), said "That as between the aborigines themselves, the Courts have never interfered for obvious "reasons", and yet the Judges in Sydney, on the question which arose in Bonjon's case, state officially in 1841 or 1842, (the Chief Justice himself first signing the report), that the Court had desired in the year 1836 (before the Appellant's arrival in the Colony), that a plea to jurisdiction should be put in for an aboriginal, (a plea which must be verified by affidavit, and few, if any of the natives are capable of being put upon oath), stating that they had certain punishments of their own; and that after argument the plea was overruled.[807]

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[805] *R v Bolden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 2 December 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 6 December 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bolden/ > (visited 1 August 2012).

[806] *R v Bonjon* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 16 September 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 20 September 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/ > (visited 1 August 2012).

[807] *The Case for the Appellant* 11.

Willis carefully composed his thoughts and drew upon legal authorities involving the treatment of native peoples in other jurisdictions. Many commentators have closely examined the substance of Willis's arguments.[808] The context of Willis's judgment has also been carefully considered.[809]

Before judging Willis's behaviour with regard to 'Aborigines no being subject to British Law' consideration must also be given to his actions in another matter. On 2 December 1841, Mr Sandford George Bolden was accused with the attempted murder of an Aborigine named Talkier on Bolden's property near Port Fairy on 26 November 1841.[810] This matter did no so much concern Government Policy, but rather how Willis managed himself in Port Phillip. Mr Bolden and two others were on horseback when they detected a group of Aborigines near a waterhole and suspected them of stealing cattle. Mr Bolden fired his rifle wounded one of them and the victim later took refuge in a waterhole. His body was never found. Before the court, the prosecution acknowledged that there was difficulty in identifying the deceased. One of the witnesses was an Aboriginal boy aged 10 or 11. Willis expressed surprise but this was reasonable in the circumstances since Aborigines could not give sworn evidence before a court at this time.

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[808] See H Reynolds *The Law of the Land* (Penguin 2003, Camberwell), B Kercher 'Recognition of Indigenous Authority in New South Wales' 1998 (4) 13 *Indigenous Law Bulletin* 7-9 and B Kercher '*R v Ballard, R v Murrell, and R v Bonjon*' 1998 (3) 3 *Australian Indigenous Law Report*er 410-425.

[809] J Rizzetti 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' [2011] *Australia and New Zealand Law and History E-Journal* Refereed Paper No 5 < http://www.anzlhsejournal.aucland.ac.nz/papers/papers-2011.html > (visited 1 August 2012).

[810] *R v Bolden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 2 December 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 6 December 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bolden/ > (visited 1 August 2012).

Willis then identified to the jury his personal relationship with Mr Bolden,

> that the prisoner at the bar was the brother of a neighbor of his, [but] he disclaimed having any feeling in this case more than he had in any other, and it was always his study to administer the same justice to the poor as to the rich man. If his (Judge Willis') brother were placed in that dock to be tried before him for any criminal offence, he solemnly declared he would deal with him in the same manner as he would with the greatest stranger.[811]

Rather than procure an alternative means by which the matter could be heard, he preferred to proceed. This statement is another example of Willis having absolute self-confidence in his abilities. Willis then sort to distinguish the matter at hand, from that of *Bonjon* on the basis that this matter involved aggression between Settlers and Aborigines and as such the laws of England apply. At the conclusion of Willis's address, he reminded the jury 'that there was no evidence against the prisoner and that they must acquit him. The Jury without retiring pronounced a verdict of not guilty'.[812] In the period of less than four months, Willis has varied his mind as to how British law should apply to Aborigines. The suggestion that there is a difference between Aborigine and Settlor with that of Aborigine and Aborigine is not convincing.

As indicated previously, Governor Gipps did not refer to either of these matters before the Privy Council. He preferred to identify a further two instances where Willis had made disparaging comments regarding Government Policy. In *Ex parte Moore, In re Beswick,* when a settler was charged with a felony, although it was not relevant to the matter at hand, he stated

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[811] *R v Bolden* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J 2 December 1841 Source: *Port Phillip Patriot and Melbourne Advertiser* 6 December 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bolden/ > (visited 1 August 2012).

[812] Ibid.

> *His Honor hoped that equal justice would be done to the whites as well as blacks.* There had been a commission to discover the murderers of the black lubras constituted, yet he had heard nothing of a commission to discover the murderers of Mr Allan. *I like equal justice done to both parties, blacks and whites.*[813]

These comments, made in open court caused significant concern. The Chief Protector of Aborigines wrote to Mr La Trobe to indicate his disgust.[814] He concurred the comments of Mr Assistant Protector Parker.[815] In that letter Mr Parker refuted that allegation made by Willis in asserting firstly that '[e]very possible effort was made, and that is promptly as the circumstances admitted, to discover and apprehend the murderers of Mr Allan'[816] The second statement made by Mr Parker was to acknowledge that the Aboriginal murderers had been discovered, but appropriate evidence was not available.[817] In conclusion he stated,

> I feel myself compelled, by sense of duty to the government, and to the aborigines themselves, to state, that the remarks made by his honor were calculated most seriously and alarmingly to impede the course of justice, by inducing a prejudice in the public mind against the government, and leading to the belief that it was not disposed to deal equal justice to the white as well as the black, and I am compelled sorrowfully, but solemnly, to record my opinion that, after these remarks, it will be impossible to obtain a fair and unprejudicial trial in the court under Mr Justice Willis's superintendence of any case, whatever maybe its character as between the black and white subjects of her Majesty.[818]

These were strong words that expressed disapproval of Willis's behaviour or misbehaviour. Mr Parker asserted that through his conduct, Willis has brought the

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[813] *Ex parte Moore, In re Beswick* Supreme Court of New South Wales in the District of Port Phillip Before Willis J 3 June 1843 Source: *Port Phillip Gazette* 7 June 1843, Italics appear in the original document.

[814] 'Letter: Robinson to La Trobe 13 June 1843' *Appendix to the Case on Behalf of the Respondent* 87.

[815] 'Letter: Parker to Robinson 9 June 1843' *Appendix to the Case on Behalf of the Respondent* 87.

[816] Ibid.

[817] Ibid.

[818] Ibid.

administration of justice in Port Phillip into disrepute. It would not be possible to obtain a fair trial if Willis was on the bench.

Governor Gipps before the Privy Council referred to further matter in which Willis brought the administration of justice into disrepute. In *R v Hill*, bail was sought for the accused so that he could prepare for the trial in the Port Fairy massacre.[819] In reflecting upon the death of Mr Allen by some Aborigines, Willis was upset that there were no European witnesses who could give evidence in court and stated his preference for equal justice for everyone. This he noted was Government policy. He expressed the idea that bias was evident in how government officers had carried out their duties with regard to investigation. Mr Robinson, the Chief Protector of Aborigines wrote to La Trobe over these words and stressed that 'every possible endeavor had been used by government in Allan's case, and that the murderers were known; but as they were aborigines who committed the crime… nothing could be done'.[820] Mr Robinson considered that Willis's observation were unwarranted and that he was 'quite unconscious of being guilty of any the slightest dereliction of duty in this respect'.[821] Mr Croke also wrote to La Trobe to express support for Robinson's opinion that Willis,

> ascribing partiality to the executive in following up discovery of the murderers of the blacks by white people, while on the other hand, apathy was exhibited by the government in the instance of the blacks who murdered Mr Allan, have a strong tendency to prejudice the public mind, and influence the jury in deciding upon the guilt or innocence of the prisoners now in gaol, charged with the murder of the aboriginal female shot at Mr Osbrey's station.[822]

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[819] *R v Hill* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 9 June 1843 Source: *Appendix to the Case on Behalf of the Respondent* 89.

[820] 'Letter: Robinson to La Trobe 16 June 1843' *Appendix to the Case on Behalf of the Respondent* 88.

[821] Ibid.

[822] 'Letter: Croke to La Trobe 17 June 1843' *Appendix to the Case on Behalf of the Respondent* 90.

On 15 June Mr Parker wrote to Robinson with respect to Willis's statements of 8 June regarding the proceedings for Mr Allan's murder.[823] He enclosed a letter from Mr WH Allan, the brother of the deceased that expressed satisfaction for the manner in which the matter had been handled.

It would be easy to label Willis in this context being as anti-government but this would not be correct. The first public executions in Port Phillip had been brought before Willis. They involved Bob and Jack, who were two Aborigines that had been convicted of murdering two whalers from Van Dieman's Land. They were executed 22 January 1842.[824] The only way to understand Willis's approach about Aborigines and the application of British law is to consider it from a number of perspectives. The Privy Council archives make it clear that in *Bonjon*, Willis was doing what any other Common Law judge would do in like circumstances; namely, consider the applicable law and government policy and apply it to the matter before the court. This would account why Governor Gipps does not reference the decision. He prefers to note other cases as examples of misconduct. The decision of Willis in *Bolden*, although it involves Aboriginal – Settler issues is more akin to the 'Sentence on Mr Arden', in that matter Willis also infringed protocol as to how a judge should conduct themselves in court.[825]

[823] 'Letter: Parker to Robinson, 15 June 1843' *Appendix to the Case on Behalf of the Respondent* 90.

[824] *R v Robert Timmy Jimmy Small-boy, Jack Napolean Tarrapaerrura, Lallah Rooke Truganini, Fanny Waterfordea & Maria Matilda* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 22 December 1841 Source: *Port Phillip Gazette* 22 December 1841. See also 'Domestic Intelligence, First Public Executions' Source: *Port Phillip Gazette* 22 January 1842.

[825] Part A-1 'Sentence on Mr Arden'.

PART B-3 MR ARDEN'S SENTENCE

The third error or attempt at mischief imputed by Gipps was the sentence imposed on Mr Arden for contempt. This matter was discussed in Part A -1 'The Sentence of Mr Arden,' and no further material is provided by Willis. Reference to this matter for a second time, highlights the gravity of Willis's actions of imprisoning a newspaper editor although Willis was of a firm belief that he had not overstepped society's expectations in how he had handled the matter.

PART B-4 DENIED THE CROWN OF THE RIGHT TO DISPOSE OF LAND IN THE COLONIES

The fourth 'error in law' or 'attempt to create mischief' was that the Willis had 'denied the right of the Crown to dispose of lands in the Colonies, in direct opposition to the unequivocal declaration of that right, contained in Lord Normanby's Dispatches to the [Governor]'.[826] After reviewing the relevant authorities, Willis had formed the opinion that money received from the sale of Crown lands had to be directed to the Consolidated Fund for the provision of services in New South Wales. Since the Colonial Executive had directed the proceeds of sale to support the migration of labourers from England, Willis was of the view that these actions 'unsanctioned as they are by an Act of Parliament, are not in accordance with the … law, and, that therefore, under them, *no valid title* can be derived'.[827] It was on this basis that Willis identified that the Crown did not have the ability to dispose of Crown Lands.

Upon being provided with a copy of Willis's legal opinion, Governor Gipps expressed that he had read it with much interest.[828] He acknowledged that it was carefully researched and indicated that he had learnt from the observations contained in it. He noted that it was his contention 'for the unqualified right of the Crown to dispose of land in the Colonies' and admitted '*that since the passing of the recent Civil List Act the*

[826] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

[827] 'Concluding Summary of Judge Willis's notes of 23 April 1841, on the Alienation of Crown Lands in Port Phillip, under Regulations of 5 December 1840, and 21 January 1841 issued by His Excellency Governor Gipps' *Appendix to the Case on Behalf of the Appellant* XXVIII 80. Italics are in the original document. See *The Case for the Appellant* 11. See also 'Memorandum on the Disposal of Lands in the Australian Colonies by Governor Sir George Gipps' Source: *Port Phillip Gazette* 4 June 1842.

[828] 'Letter: Gipps to Willis 29 May 1841' *Appendix to the Case on Behalf of the Appellant* XXVIII 80.

proceeds arising from the sale of lands should be carried to the Consolidated Fund'.[829] Gipps was referring to the Australian Colonies Waste Lands Legislation.[830] Willis viewed this remark as confirming his opinion that such an act was necessary and noted,

> [t]his act, however, merely applies to future sales and the appropriation of future proceeds. It leaves the question of the expenditure of large sums of money arising from the sale of Crown lands by his Excellency the Governor, which ought to have been paid into the Consolidated Fund, altogether untouched.[831]

In his letter, Governor Gipps noted that the earlier legal authorities that Willis had mentioned in support of his opinion 'can only, I allow, be got rid of by arguing that they were passed only in England, and that accordingly to our convenient expression they are *not applicable* to New South Wales, or indeed to any colony'.[832] After receiving these comments from Governor Gipps, Willis sent a copy of 'Notes on the Regulation for the Sale of Crown Lands' to Lord Stanley, Secretary of State for the Colonies.[833] He also sent a copy to Gladstone who felt 'incompetent to give any positive opinion on such a document', but it appeared 'to him to merit the commendations which it had received from the Governor of New South Wales'.[834] The unrest or mischief that was created by Judge Willis about the sale of Crown Lands was expressed in a letter addressed to the Editor of the *Port Phillip Gazette* on 29 September 1841.[835] In this letter which was

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[829] 'Letter: Gipps to Willis 29 May 1841' *Appendix to the Case on Behalf of the Appellant* XXVIII 80. Italics appear in the original document.

[830] 'An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies' [1842] 5 & 6 Vict C 36 (*Australian Colonies, Waste Lands Act* 1842).

[831] *The Case for the Appellant* 11.

[832] 'Letter: Gipps to Willis 29 May 1841' *Appendix to the Case on Behalf of the Appellant* XXVIII 80. Italics appear in the original document.

[833] 'Letter: Wilbraham, Private Secretary to Lord Stanley to Willis' 9 July 1842 *Appendix to the Case on Behalf of the Appellant* XXVIII 80.

[834] 'Letter: Rawson to Willis 28 June 1842' *Appendix to the Case on Behalf of the Appellant* XXVIII 80.

[835] 'Letter to the Editor signed 'Scrutator'' Source: *Port Phillip Gazette* 29 September 1841. See also Part A-1 'Sentence on Mr Arden'.

signed 'Scrutator', the author commented generally on the activities of Willis 'in giving his opinions and directing proceedings, not only in matters collateral, but even those totally unconnected, with the question he is called upon to decide'.[836] To confirm that this is inappropriate behaviour, 'Scrutator' reflects upon what occurs in the English courts and noted that those judges refrain from making such allusions. Furthermore 'Scrutator' affirmed '[n]o opportunity escapes him for scattering his dicta, for stating what he conceives to be the law and merits of every subject, no matter how extraneous to that under consideration, if it happens to strike his fertile fancy'.[837] These comments about Willis have been previously discussed.[838]

In particular, 'Scrutator' referred to the sale of Crown lands and Willis's opinion that such titles to land were inoperative and that the consolidated fund was illegal. Furthermore 'Scrutator' noted,

> whether in or out of court, the sole result of [Willis's] unfortunate temper and his distorted judgment in raising disputes, and fomenting instead of suppressing litigation. Is this a fit or proper person to fill the highest judicial chair in the province? Judge he is not, nor ever will be, being in every case so much a creature of deluding impulse.[839]

Rather than settle disputes, Willis created them, and through his behaviour diminished confidence in the administration of justice. Willis might be technically correct regarding the right of the Crown to dispose of land in the colony. If this had been an isolated

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[836] 'Letter to the Editor signed 'Scrutator'' Source: *Port Phillip Gazette* 29 September 1841. See also Part A-1 'Sentence on Mr Arden'.

[837] Ibid.

[838] See Part A-1 'Sentence on Mr Arden', Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-3 'The Cases of Mr Carrington and Mr Ebden', Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case' and Part A-9 'State of Excitement in which the Whole Town of Melbourne, and the whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[839] 'Letter to the Editor signed 'Scrutator'' Source: *Port Phillip Gazette* 29 September 1841. See also Part A-1 'Sentence on Mr Arden'.

comment upon the actions of Governor Gipps, then it would have been consistent with his position, as the First Resident Judge for the Supreme Court of New South Wales in the district of Port Phillip, to provide advice with respect to the validity of laws. It was not the first, and certainly not the last critical opinion that Willis expressed. It is not surprising, that when Willis expressed such comments, on matters that were not expressly within his jurisdiction or related to a matter before him in court, that spirited individuals such as 'Scrutator' might take offence.

PART B-5 INCORPORATION OF THE TOWN OF MELBOURNE INVALID

The 'fifth error in law', or 'attempt at mischief' against Willis was that he declared the local *Melbourne Incorporation Act* 1842 invalid, despite it having been passed by the Legislature of New South Wales on 12 August 1842.[840] Willis maintained that it was not in 'strict conformity' with the law, since the *Australian Courts Act* 1828 only grants the Governor the ability to make 'such laws and ordinances *as are not repugnant to the laws of England*'.[841] Willis drew further support for this approach from the *Rules and Regulations for the Guidance of the Principal Officer in her Majesty's Colonial Possessions*.[842] In particular Willis considered it was 'repugnant to the law of England that a corporation should be created without the assent of the Crown; and this prerogative of the Crown has never been delegated to the Governor'.[843] Willis thought that any attempt to carry it into operation directly infringed the Royal prerogative. He noted that difficulties would emerge if elections were held and the resulting legislative assembly sought to impose taxation provisions. The colonists in these circumstances would be taxed without representation.

On this occasion Willis followed protocol and wrote a letter to La Trobe in which he expressed his concerns.[844] Willis insisted that he was not attempting to embarrass the government. He was simply seeking to carry out his duty as a judge and provide advice

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[840] *The Case for the Appellant* 12. See also 'An Act to Incorporate the Inhabitants of the Town of Melbourne' [1842] 6 Vic No 7 (*Melbourne Incorporation Act* 1842). See also 'Sydney News' Source: *Port Phillip Herald* 26 August 1842.

[841] Ibid. See also 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828) section 21.

[842] Great Britain, Colonial Office, *Rules and Regulations for the Guidance of the Principal Officer in her Majesty's Colonial Possessions* (W Clowes, London 1837) Chap 3 div 2 s 5 p 24.

[843] *The Case for the Appellant* 12.

[844] 'Letter: Willis to La Trobe 30 May 1842' *Appendix to the Case on Behalf of the Appellant* XXIX 82.

regarding local laws being repugnant to the laws of England. He noted that as a Judge of the Supreme Court of New South Wales,

> I am to protest against any act of Council repugnant in my opinion to the laws of England. *My residence here,* and the manner in which the official papers are transmitted, in a great measure prevent me from doing so, nor, were it otherwise, would I willingly do that which might embarrass the local Government which I am bound to support; but I do not wish so far to neglect a duty that is imposed upon me, or (as appears to me to have been the case elsewhere,) *to pass over in silence* that which merits, I think, further discussion from its seeming repugnance to the laws of England. I, therefore, prefer thus writing to you privately, and begging you, should you deem it advisable, to communicate with His Excellency the Governor in the same manner...[845]

Willis was acting in an appropriate manner given his judicial responsibilities in Port Phillip. In the following year, he brought the matter to the attention of the authorities, this time by writing to Governor Gipps. On this occasion he indicated that it was not just the *Incorporation of Melbourne Act* 1842 that was questionable but other legislation regarding Public Works.[846] He also drew attention to the idea that Governor Gipps himself may be subject to proceedings regarding the invalidity of the legislation and any subsequent taxing provisions. He noted that if such 'an act were promulgated by a Colonial Governor, he might be possibly subjected to the proceedings mentioned in "*Clarke's Colonial Law,"* p 35 (see the case of *Fabricus v Mostyn,* best reported in "*State Trials",* vol. 20, I think)'.[847] It would be easy to label these remarks as simply a further example of Willis's disagreeable character but this would not be accurate. Willis sought to compel Governor Gipps to explain what had occurred. He posed the rhetorical question,

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[845] 'Letter: Willis to La Trobe 30 May 1842' *Appendix to the Case on Behalf of the Appellant* XXIX 82. Italics appear in the original document.

[846] 'Letter: Willis to Gipps 2 February 1843' *Appendix to the Case on Behalf of the Appellant* XXIX 84.

[847] Ibid.

> What, then, under these circumstances I venture most respectfully to solicit is, that I may be informed (if your Excellency will so far condescend) *of the precise nature of the authority* under which the Melbourne Municipal Corporation Act was promulgated, as law, previously to *the act itself* receiving the Royal assent, and that you would favor me with your view on the subject. [848]

The comments may best be described as Willis being helpful but also troublesome. In an effort to avoid criticism Willis stated that in expressing this opinion he was only carrying out the duties expected of a Supreme Court Judge of New South Wales. He noted,

> [i]t is my earnest wish, and has ever been, to support to the best of my humble ability all acts of the Government, so far as I can do so, consistent with my judicial functions; but I humbly conceive that my duty to the Crown, on the one hand, forbids me to permit what I believe to be the just Prerogative of the Queen to be "diminished" or "infringed", or the right of the subject on the other to be disturbed or interfered with, except in due course of law. I, therefore, have this ventured (either privately or officially, as your Excellency may prefer) to trouble you with this letter.[849]

This expression could have been understood as a threat to pursue the issue officially rather than privately, but without doubt Willis was not going to simply forget about the matter nor were events in Port Phillip going to allow it to fade away. The Colonial Secretary acknowledged the letter but no further discussion took place.[850]

In December 1842 municipal elections were held in Port Phillip with Mr John Pascoe Fawkner being elected as one of the four councilors. In January 1843 a by-election was conducted to fill a vacancy of another councilor and it was on this occasion that Mr John Stephen was elected. Mr John Stephen had two brothers, Justice Alfred Stephen of the

[848] 'Letter: Willis to Gipps 2 February 1843' *Appendix to the Case on Behalf of the Appellant* XXIX 84. Italics appear in the original document.

[849] Ibid.

[850] 'Letter: Thomson to Willis 8 February 1843' *Appendix to the Case on Behalf of the Appellant* XXIX 84.

Supreme Court of New South Wales at Sydney and Mr Sydney Stephen who had previously sought admission to the bar in Port Phillip.[851]

Mr Fawkner amongst others took offence to the appointment of Mr John Stephen and sought to challenge the validity of the by-election process. He filed 'an information' in the nature of a *quo warranto* against Mr John Stephen and the action was brought under the *Melbourne Municipal Incorporation Act* 1842.[852] It was in these circumstances that Willis had an opportunity to publicly express his opinion about the legislation. Attention focused upon three matters. The first was that the legislation was illegal since 'the Royal Assent to the incorporation of Melbourne has never hitherto been legally *specifically obtained*'.[853] The second was '[t}hat a power of taxation is given by the act of Council, which the statute 9 Geo. 4, c. 83, gives to the Legislative Council alone'.[854] The third concerned statutory interpretation on the basis that Act was effectively void.[855] Willis in a carefully crafted manner gave a very extensive, 'honest and conscientious *opinion*

[851] See Part A-7 'Mr Stephen's Case'.

[852] 'An Act to Incorporate the Inhabitants of the Town of Melbourne' [1842] 6 Vic No 7 (*Melbourne Incorporation Act* 1842).

[853] 'Letter: Willis to Gipps 2 February 1843' *Appendix to the Case on Behalf of the Appellant* XXIX 84. Italics appear in the original document.

[854] Ibid. See also 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[855] See 'An Act for the government of New South Wales and Van Dieman's Land' [1842] 5 & 6 Vict c 76 (*Australian Constitutions Act* 1842).

reserving, however, the *decision* of the point, for their Honors the Judges in Sydney'.[856] It took Willis 'nearly two hours' to deliver his 'opinion'.[857]

The Sydney Judges subsequently dismissed the matter.[858] They were critical of Willis's conduct in that,

> it was the province of the Court below to determine on this specific proceeding was whether the relator had made out such a constat of facts as to justify the granting of a *quo warranto* information. That question was to be determined on consideration of the affidavits on both sides. The learned Judge below has not drawn any conclusion from the affidavits, nor certified his opinion thereon. He has sent them in the gross for our determination, leaving us to extract and decide upon the question or questions therein presented.[859]

Willis had failed to carry out his judicial duties.[860] He had passed the matter to the Judges in Sydney without having arrived at a decision.

The best description of Willis might be that he was attempting to assist the Government. By taking a strict interpretation of the law Willis only caused upset. It was almost as if, by sticking to what would happen in England he had forgotten where he was, in the colony of New South Wales. There were different parameters to be considered in this

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[856] 'Letter: Willis to Gipps 2 February 1843' *Appendix to the Case on Behalf of the Appellant* XXIX 84. See also 'An Act for the further amendment of the Law and for the better advancement of Justice' [1841] 5 Vict No 9 (*Advancement of Justice Act* 1841) section 11.

[857] *Fawkner v Stephen* Supreme Court of New South Wales, Before Willis J, 14 March 1843 Source: *Port Phillip Patriot and Melbourne Advertiser* 16 March 1843.

[858] *Melbourne Corporation, In re Fawkner* Supreme Court of New South Wales at Sydney, Before Dowling CJ, Burton and Stephen JJ 18 April 1843 Source: *Port Phillip Herald* 29 April 1841. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1843/melbourne_corporation_in_re_falkener_1843_nsw_sel_cas_dowling_247_1843_nswsupc_18/ > (visited 1 August 2012).

[859] Ibid.

[860] See *Ex parte - Fawkner v Stephen* 31 January 1843 Source: *Port Phillip Gazette* 1 February 1843 and 'Port Phillip Gazette' Source: *Port Phillip Gazette* 1 February 1843. See also *Ex parte Fawkner v Stephen* 30 January 1843 Source: *Port Phillip Patriot and Melbourne Advertiser* 2 February 1843.

emerging society. In this context it was Willis's conduct that caused a significant of want of confidence. Before he had expressed his opinion, Mr Fawkner had advised Willis to 'pause before you set the whole colony in a flame'.[861] It needs to be remembered that the events regarding Willis and the Melbourne Incorporation legislation took place towards the end of 1842 and early 1843. Given what had transpired since Willis had arrived in Port Phillip, his conduct in this matter represents a symbolic turning point. Within six months he was amoved.

[861] 'Letter: Fawkner to Willis' Source: *Port Phillip Patriot and Melbourne Advertiser* 27 February 1843.

PART B-6 INFORMATION CONVEYED TO THE EXECUTIVE ON AN 'ERRONEOUS POINT OF LAW'

The sixth 'error in law' or 'attempt at mischief' concerned the necessity of compliance with the 'Declaration for the *Corporation and Test Act*'.[862] In a letter to Governor Gipps dated 27 February 1843, Willis expressed doubts as to whether all office bearers had made the required declaration.[863] He noted that he, himself '*made* and subscribed, and required all officers sworn in before me in this district, to make and *subscribe* the "Declaration" contained in the stat. 9 Geo. 4, c. 17, which is substituted in this respect for the *Corporation and Test Acts'*.[864] Willis further noted,

> [t]he second section of this statute requires "all *Mayors, Recorders, Aldermen, and Corporate Officers*, within one month before, or upon their admission to office, to make and subscribe the declaration set forth in the Act, to the effect that they will not use the power or influence of their office to injure or weaken the Protestant Church, or disturb the Bishops and Clergy in the rights and privileges to which they are by law entitled." The Mayor, when he took the oaths as a Magistrate before me, duly made and subscribed this Declaration, but neither the Aldermen nor Corporate Officers have done so, nor was it done to others holding office under the Crown, and declares their office to be *void*, unless such "declaration" shall have been made within six months; and the sixth section specifies the Courts in which it is required to be made.[865]

Willis was concerned that not every office bearer had taken the oath and that they may be acting without authority so there was a need for legislation to be enacted to correct this error. He noted the *Sacramental Test Act* 1828 'is *applicable to and forms a part of the law of the Colony*, which I am bound to administer; others (especially if amenable to

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[862] 'An Act for repealing so much of several Acts as imposes the Necessity of receiving the Sacrament of the Lord's Supper as a Qualification for certain Offices and Employments' [1828] 9 Geo IV c 17 (*Sacramental Test Act* 1828).

[863] 'Letter: Willis to Gipps 27 February 1843' *Appendix to the Case on Behalf of the Appellant* XXX 84.

[864] ibid. Italics appear in the original document.

[865] Ibid. Italics appear in the original document. See also 'Another Screw Loose in the Corporation' Source: *Port Phillip Herald* 7 March 1843.

its operation) may not agree with me'.[866] In particular, he placed attention on his role as a judge of the Supreme Court of New South Wales in providing advice to the Legislative Council regarding the application of the laws and statutes of England.[867] In concluding his letter Willis observed,

> I am aware that I have done *more* than my judicial duty strictly requires; but when I contemplate the evils (should your Honor, His Excellency, the Judges, and many others holding office under the Crown, not have complied with the act, and the act be applicable) that might arise to the Colony without some legislative interference, I am sure you will duly appreciate my motives and pardon this departure from the ordinary course.[868]

Once again, like the earlier discussion about the *Incorporation of Melbourne Act* 1842, Willis is asserting that his actions are only in the performance of his duties and he did not seek to cause unrest. Governor Gipps was not moved by these comments. Willis in these circumstances was seeking to safeguard public confidence in the colonial administration. In a letter to Lord Stanley, Secretary of State for the Colonies, Governor Gipps deemed that,

> Mr Willis has erroneously in law, and with no conceivable object in view but that producing mischief, declared that the Governor, the Judges, the Superintendent of Port Phillip, and I believe all other persons holding office in the colony, except himself, have forfeited their offices, by reason of their not having made the declaration required by the 9th Geo. 4. Cap. 17, notwithstanding that the act in question is declared on the face of it to have been in operation only in England, and that persons abroad are not required to make the declaration until they returned to England; notwithstanding, moreover, that annual Acts of Indemnity, such as the 4th Vict., No. 11, and 5th and 6th Vict., No. 10, have passed, which would protect the officers of this government from the penalties of the 9th Geo. 4, cap. 17, even were that act of any force in New South Wales, which it clearly is not.[869]

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[866] 'Letter: Willis to Gipps 27 February 1843' *Appendix to the Case on Behalf of the Appellant* XXX 84.

[867] 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828) section 24.

[868] 'Letter: Willis to Gipps 27 February 1843' *Appendix to the Case on Behalf of the Appellant* XXX 84.

[869] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 91. See 'An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employment, and to extend the time limited for those purposes respectively until the 25th day of March 1842, and for the relief of clerks to attorneys and solicitors in certain cases' [1841] 4 & 5 Vict 1841 c 11

This was a damning indictment of Willis's behaviour. Before the Privy Council, Willis felt 'deeply injured by this unjust misrepresentation of his motives, and assert[ed] that he is not "erroneous in point of law"'.[870] To support his claim, he referred to the actions of Mr A'Beckett, whom upon being appointed as Acting Judge of the Supreme Court of New South Wales, subscribed to the declaration.[871] In this matter is was not so much his knowledge of the law, but being aware of the sensitivities in the local area. By itself Willis's concern over the matter did not amount to much grief, but viewed collectively with his other conduct, it is easy to understand how Governor Gipps responded since it could be viewed as another attempt to diminish confidence in the government. Willis brought this matter to the attention of Governor Gipps in early 1843 and by this time respect or trust between Willis and Governor Gipps had largely dissipated.

(*Indemnity Act* 1842). See also 'An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employment, and to extend the time limited for those purposes respectively until the 25th day of March 1843, and for the relief of clerks to attorneys and solicitors in certain cases' [1842] 5 & 6 Vict 1842 c.10 (*Indemnity Act* 1842).

[870] *The Case for the Appellant* 12.

[871] Ibid.

PART B-7 SENTENCE OF DEATH ON MANUEL

The seventh 'error in law' or 'attempt at mischief' involved Judge Willis 'ignorantly and erroneously' recording the sentence of death on man called Manuel (alias Ferguson).[872] The matter first came before Judge Willis in April 1843 and in May the opinion of the Judges at Sydney was sought. As a consequence of this action, the conviction was overturned. Willis subsequently used the matter to attack the Judges at Sydney by indicating that they had decided differently on another occasion and this development impressed upon Governor Gipps the need to remove Willis from the bench.

William Manuel who was using the false name of Ferguson was a convict under sentence of transportation for life.[873] Early in 1843 he was found to have boarded a small vessel in Hobson Bay that was bound for New Zealand. Manuel pleaded guilty to escaping from transportation and sentence of death was recorded. William Robinson who had arranged passage for Manuel was charged with aiding and abetting. He pleaded not guilty and a jury was empanelled which later returned a guilty verdict. Willis was adamant 'although, according to the law of England, the offence was mitigated' the relevant legislation 'had not been adopted by the Governor and his Legislative Council' and so it is not 'the law of the place'.[874] Willis knew that the applicable English law mitigated the offence of escaping from transportation, but as a consequence of the *Australian Courts Act* 1828, there was a requirement to be specifically adopted and this

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[872] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

[873] *R v William Manuel alias Ferguson* Supreme Court of New South Wales in the District of Port Phillip Before Willis J 7 April 1843 Source: *Port Phillip Gazette* 7 April 1843. See also *Port Phillip Herald* 11 April 1843.

[874] *The Case for the Appellant* 11.

had not occurred.[875] In these circumstances Willis reasoned that the sentence of death should be recorded. In support of this approach he referred to the similar case of John Ryall,

> tried in Sydney before the Appellant [Willis], on 9th November 1838, for escaping from transportation, on the information of Mr Attorney general Plunkett, the prisoner being found guilty, was remanded, in order that the Appellant [Willis] might consult his brother Judges how to act, in consequence of the statute repealing the sentence of death not being adopted; after such consultation, the Appellant, on 14th February following, with the ascent of the other Judges, ordered sentence of death to be recorded…[876]

Willis felt bound to follow the precedent of Ryall but due to a number of objections by Mr Redmond Barry who was representing Mr Robinson, Willis deferred pronouncing sentence on both men and referred the matter to the Judges at Sydney.[877]

On 6 May 1843 Chief Justice Dowling, Justice Burton and Justice Stephen wrote to Governor Gipps to express their opinion with respect to William Manuel (alias Ferguson) and John Robinson who were then both in gaol at Port Phillip.[878] The Sydney Judges were of the view that the men 'should be forthwith pardoned and released without further prosecution'.[879]

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[875] 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[876] *The Case for the Appellant* 11.

[877] *R v William Manuel alias Ferguson* Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, 7 April 1843 Source: *Port Phillip Herald* 11 April 1843. See also *Port Phillip Gazette* 8 April 1842.

[878] 'Letter: Sydney Judges (Dowling CJ, Burton J, Stephen J) to Gipps 6 May 1843' *Appendix to the Case on Behalf of the Respondent* 83-85.

[879] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

The Judges at Sydney examined the legislation upon which both prisoners had been indicted; namely 'Sir Robert Peel's Transportation Act'.[880] They noted that s22 'extends only to cases of escape from the place or colony to which the convict had been transported, and where the convict shall be found at large, within some part of Her Majesty's dominions other than such place or colony'.[881] The Sydney Judges then considered four matters. First, they examined the relevant legislation and determined,

> [f]rom the reason and nature of the thing; a convict is transported to a particular settlement. If he will not remain there he evades his sentence, and justly incurs severe punishment. But whilst within such settlement he continues under his sentence and is amenable to the provisions of local laws.[882]

This was a clear statement regarding the applicable law involving transportation in that when Manuel was apprehended he had not yet escaped. Manuel was still within the settlement. The second consideration was that,

> [t]he offence of being at large within settlement (so far as New South Wales is concerned) is in fact specifically punishable by such laws. It is defined by the Quarter Sessions Act 3 Will. IV, No. 3, as "absconding", and is punishable after a summary trial before two Justices by flogging, imprisonment or treadmill (ss 18,19 and 21).[883]

Applying the relevant statute, Manuel and Robinson had been absconding and that the appropriate punishment was not having the sentence of death recorded, but rather 'flogging, imprisonment or treadmill'. It should also be noted that it was to be a summary trial before two judges. The Sydney Judges then discussed the distinction

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[880] 'An act for the transportation of offenders from Great Britain' [1824] 5 Geo 4 c 84 (*Transportation Act* 1824) Section 22.

[881] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

[882] Ibid.

[883] Ibid. See also 'An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto' [1832] 3 Wm IV No 3 (*Quarter Sessions and Justice of the Peace Act* 1832).

between absconding and escaping as reflected in legislation. This was the third matter they considered and they noted that,

> [t]he British Parliament has recognised, and in a similar manner, the distinction pointed to by us. The 5 Geo 4, c 84 having provided for the offence of escaping from the colony, a subsequent statute, the 6 Geo. 4, c. 69, s. 3, provided for that of being unlawfully at large within it. The offence of "absconding" (over which jurisdiction was given to the courts of quarter sessions by 4 Geo. 4, c. 96, s 19) may by the last mentioned statute of 6 Geo. 4, be inquired of and punished in certain cases by any one Justice. But if escaping from one part of the colony to another was at that time felony, and punishable by death, such a provision would have been nugatory and idle.[884]

Willis had made an error in identifying the relevant law. The *Transportation Act 1824* defined the offence of a prisoner escaping from the colony.[885] The *Transportation Act 1825* provided the offence for a prisoner being unlawfully at large within a colony.[886] Jurisdiction for absconding was given to the judiciary by the local *Quarter Sessions and Justice of the Peace Act* 1832.[887] When reading the legislation together, the Sydney Judges identified that the sentence of death when escaping from one part of the colony to another would be read down and cease to operate.

The fourth and final consideration the Sydney Judges considered was the offence of aiding and abetting. They noted,

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[884] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

[885] 'An act for the transportation of offenders from Great Britain' [1824] 5 Geo 4 c 84 (*Transportation Act* 1824) Section 22.

[886] 'An Act for the Summary Punishment of Misbehaviour or Disorderly Conduct in any Offender in the service of the Government or of any inhabitant in New South Wales or Van Dieman's Land' [1825] 6 Geo 4 c 69 (*Transportation Act* 1825) s 3.

[887] 'An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto' [1832] 3 Wm IV No 3 (*Quarter Sessions and Justice of the Peace Act* 1832).

> If such an offence were felony under the 5 Geo 4 c 84 the offence of contriving or aiding in and abetting such offence would also be a felony. On that principle the prisoner Robinson is charged accordingly in this case with felony. But by the 9 Geo 4, c 83, s 34, persons so offending ("who shall contrive, aid, abet or assist in the escape or intended escape", of any transported offender) are expressly declared guilty of a misdemeanor only, punishable by fine and imprisonment.[888]

Under the *Transportation Act* 1824 persons who aid and abet such as Mr Robinson may be guilty of a misdemeanor and be such to fine and imprisonment.[889] The Sydney Judges also noted that '[i]t is unnecessary to cite authorities to show that a person charged as accessory in any case may controvert the guilt of his alleged principal, notwithstanding the latter's conviction'.[890] Since the offence against Manuel failed, so too does the charge against Robinson. The nature of absconding does not change with respect to the amount of time without leave or the distance they travel. These matters only go to punishment and not the nature of the offence.

The Sydney Judges made additional comments regarding procedure with which objections were raised to the convictions at trial when the matter was before Judge Willis. They noted that

> [the] clerk's indorsement of Manuel's plea, and of the judgment or sentence thereon, was inadmissible in evidence - First: because on that information, in which both prisoners were jointly indicted, every allegation should have been proved in the ordinary manner.

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[888] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

[889] 'An act for the transportation of offenders from Great Britain' [1824] 5 Geo 4 c 84 (*Transportation Act* 1824) Section 34. See also 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[890] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-84.

> The conviction of one prisoner, as it appears to us, on an information so framed, cannot be evidence against the other under any circumstances. But secondly; because, at all events, the record is the only legal evidence of a conviction; and such indorsement was, in our opinion, not equivalent to a record. The authorities in the books as to this point are quite decisive. The point has also been already so determined incidentally by this Court, in two cases (Rex v Baxter, and Cooper v Clarkson) in the years 1830 and 1831 respectively.[891]
>
> The indent (or book or paper so called) was, in our opinion, equally inadmissible. The Quarter Sessions Act, 3 Will. 4 No. 3, s. 35, provides that the indent, properly so termed, or a copy, duly examined and compared therewith (ie with the original, in the office of the Colonial Secretary), shall be evidence in certain cases, provided it be also shown that such indent has been in fact there deposited and kept, and the party named therein arrived as a convict, and has always been reputed to be and dealt with as such.[892]

These comments are consistent with the notes made by Mullaly, when he reviewed the bench books of Judge Willis and documented the objections raised by Mr Redmond Barry who was acting for Mr Robinson, about the actions of the Crown Prosecutor, Mr Croke when the matter was before Judge Willis.[893]

The opinion by the Sydney Judges was comprehensive. In conclusion they noted, '[t]he result at which we have thus arrived renders it unnecessary to express any opinion as to the proper sentence against Robinson, supposing his conviction to have been

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[891] *Rex v Baxter* (1830) appears as *R v Baxter* [1829] NSWSupC 9; sub nom R v Baxter (No 1) (1828) NSW Sel Cas (Dowling) 202. See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_baxter/ > (visited 1 August 2012). *Cooper v Clarkson* [1831] NSWSupC 34; sub nom Cooper v Clarkson (No 2) (1831) NSW Sel Cas (Dowling) 974 See also Decisions of the Superior Courts of New South Wales, 1788-1899. Published by Macquarie Law School, Faculty of Arts, Macquarie University < http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1831/cooper_v_clarkson_1831_nswsupc_34_sub_nom_cooper_v_clarkson_no_2_1831_nsw_sel_cas_dowling_974/> (visited 1 August 2012).

[892] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

[893] P Mullaly above n 61, 686-688. See also *R v William Manuel Ferguson*, Supreme Court of New South Wales in the District of Port Phillip, Before Willis J, Source: *Port Phillip Herald* 11 April 1843 and 'Judicial Intelligence, William Manuel alias Ferguson, Supreme Court – Criminal Side' Source: *Port Phillip Gazette* 8 April 1842.

sustained'.[894] In short, the convictions of Mr Manuel and Mr Robinson were erroneous. Upon receiving the opinion of the Sydney Judges, Willis wrote to Governor Gipps and sought leave to apply for Mr Manuel and Mr Robinson to be pardoned accordingly.[895] In the same letter, Willis affirmed that this opinion was different to his and that the opinion of the Sydney Judges contravened a similar case, that of *R v John Ryall* which he had decided in Sydney.

On 13 May 1843 when Willis opened the court, he referred to the opinion of the Sydney Judges and indicated that pardons were to be issued to both Manuel and Robinson. He expressed the view that 'this decision was more unsatisfactory to him than in the *quo warranto* case, though he was obliged to submit to the decision of three to one; but notwithstanding, the convictions were, in his opinion, correct'.[896] This account from the *Port Phillip Patriot and Melbourne Advertiser* is different to the material contained in the other Port Phillip newspapers. After documenting the opinion of the Sydney Judges, the *Port Phillip Gazette* simply stated 'His Honor then made some observations on the subject when the matter dropped'.[897] The *Port Phillip Herald* noted 'Notwithstanding, he was still of the opinion the convictions were good'.[898] This diversity amongst the newspaper accounts is significant with *Port Phillip Patriot and Melbourne Advertiser* presenting the most favorable portray in support of Willis's views.

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[894] 'In the matter at certain points raised by his Honor *John Walpole Willis*, Resident Judge at Port Phillip, for the opinion and decision of the judges at Sydney, in the case of the Queen v William Manuel (alias Ferguson), and John Robinson, convicted respectively of felony' *Appendix to the Case on Behalf of the Respondent* 83-85.

[895] 'Letter: Willis to Gipps 13 May 1843' *Appendix to the Case on Behalf of the Respondent* 86.

[896] 'Supreme Court 13 May 1843' Source: *Port Phillip Patriot and Melbourne Advertiser* 15 May 1843.

[897] 'Judicial Intelligence, Supreme Court 13 May 1843' Source: *Port Phillip Gazette* 17 May 1843.

[898] 'Supreme Court 13 May 1843' Source: *Port Phillip Herald* 16 May 1843.

In June 1843 Mr William Curr wrote to Governor Gipps and expressed 'the necessity of preferring a complaint against His Honor Justice Willis'.[899] After documenting concern with regards to Willis's actions in the recent mayoral election, he stated that there was only 'one rational mode of accounting for many parts of Judge Willis's conduct, and that is, by believing, as I do, that he is not entirely sane'.[900] Mr Curr further noted '[t]his is a point on which I shall offer no argument' but he encouraged Governor Gipps to reflect upon what Willis had done with imposing a death sentence on Manuel.[901] This idea that Willis had erred in law was further reinforced in a subsequent letter by Mr Curr to Governor Gipps where he noted,

> the law of England is applicable to Judge Willis's conduct in the case: "If a judge ignorantly condemn a man to death for felony when it is not a felony, he shall be tried and imprisoned, and loose his office." Not having access to books of law, I quote from Rees' Cyclopedia, article "Judge".[902]

These are critical comments about Willis's behaviour or rather misbehaviour. Mr Curr concluded this letter to Governor Gipps by requesting an inquiry into Judge Willis's conduct regarding this matter 'and that on being satisfied that a *prima facie* case exists against him, your Excellency will be pleased to order his Honor's immediate suspension, and direct a criminal information to be filed against him'.[903] The letter is of further significance when it is to be remembered that Willis was amoved the following month.

In July 1843, the Sydney Judges wrote to Governor Gipps expressing displeasure at a newspaper report about Judge Willis with reference to their opinion in the case

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[899] 'Letter: Curr to Gipps 5 June 1843' *Appendix to the Case on Behalf of the Respondent* 86. See also Part A-4 'Mr Curr's Case'.

[900] Ibid.

[901] Ibid.

[902] 'Letter: Curr to Gipps 13 June 1843' *Appendix to the Case on Behalf of the Respondent* 83.

[903] Ibid.

involving Mr Manuel and Mr Robinson.[904] The *Port Phillip Gazette* on 7 July 1843 published the following item,

> Manuel had pleaded guilty to a charge precisely similar to that of a man named John Ryall, tried in Sydney, before me, on the 9th November 1838, on the information of Mr Attorney General Plunkett. He was found guilty and remanded, in order that I might consult the Judge as to the Act repealing sentence of death imposed by the former Act being adopted here. After such consultation, on the 14th February following; I ordered, with their concurrence, sentence of death to be recorded, at the same time as recommending that sentence to be commuted to transportation for life.[905]

In 1838 Willis was on the bench in Sydney with Chief Justice Dowling and Justice Burton.

Both Chief Justice Dowling and Justice Burton,

> have no recollection of the consultation stated; it is by no means improbable , however, that such a consultation may have taken place; but if it did, Mr Willis himself only alleges that the point brought under notice was, whether in that particular case, the proper sentence was death or transportation.[906]

The Sydney Judges then compare the facts involved in the Ryall matter with those of Mr Manuel and Mr Robinson. They noted,

> that the charge against Ryall so far from being "*precisely similar"*, is (as we expected) correctly framed on the statute for an actual escape *from and out of the colony*, and for being at large elsewhere "within the Queen's Realm," to wit, at "*Launceston* in Van Diemen's Land"; whereas the charge on the face of the information in Manuel's case is that simply of *absconding* from one part to another of *the same district.*
>
> On an information such as that described in the case of Ryall, supposing the conviction to have been proper, a sentence as for felony was proper. But the circumstances having now led us to consider the conviction and trial, we find it necessary to report to your Excellency that neither of these can be justified. The Statute 5 Geo. 4, authorizes the trial to be either in the place whence the prisoner was originally transported, or in the place where he is apprehended.

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[904] 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Gipps 20 July 1843' *Appendix to the Case on Behalf of the Respondent* 93.

[905] Ibid. See also 'Police Office, Port Phillip Gazette 7 July 1843' Source: *The Australian* (Sydney, New South Wales) 17 July 1843.

[906] Ibid.

> But in Ryall's case the former place was in Surry, in England, and the latter was in Van Dieman's Land, consequently Mr Justice Willis had no jurisdiction to try him for it. We must therefore recommend that a pardon be granted to this prisoner.[907]

They also noted that at the time Ryall was brought to trial, he was under sentence for life and that he should be returned to that punishment. On the 22 July 1843 Governor Gipps wrote to Lord Stanley, Colonial Secretary for the Colonies and enclosed by request of the Sydney Judges a copy of their opinion.[908] In this letter Governor Gipps indicated the case of *R v John Ryall* 'on which Mr Willis relied on for justification of his sentence on Manuel, is not one in point, although even in that case an error was committed, which renders it necessary that the person convicted should receive a pardon'.[909] By this time it was clear that something had to be done about Willis.

The *Port Phillip Herald* after reviewing the sentence of death on Mr Manuel by Willis, demanded action with respect to removing him from the bench,

> according to the law of the land, "if a Judge *ignorantly* condemns a man to death for felony, when it is not felony, for this offence the Judge shall be fined, imprisoned, and *lose office." Jenk. cent. 162*, (quoted in Jacob's Law Dictionary). Again, "a Judge cannot give judgment of death where the law does not give it; if he does, it is misprision, *he shall lose his office*, and make fine for misprision." *Br. Judges, pl. 33, cites R.3.9.*[910]

It was now not only abundantly clear but it was being expressed publicly that something had to be done about Judge Willis. Governor Gipps when writing to Lord Stanley,

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[907] 'Letter: Sydney Judges (Dowling CJ, Burton J and Stephen J) to Gipps 20 July 1843' *Appendix to the Case on Behalf of the Respondent* 93. Italics appear in the original document.

[908] 'Letter: Gipps to Stanley 22 July 1843' *Appendix to the Case on Behalf of the Respondent* 93.

[909] Ibid.

[910] 'The Deposed Judge V. The Government' Source: *Port Phillip Herald* 7 July 1843. Italics appear in the original document.

Secretary of State for the Colonies repeated these sentiments.[911] It was only a short time before the inevitable occurred and Willis was amoved.

[911] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Respondent* 92. See also *The Case for the Appellant* 11.

CONCLUSION

When the Privy Council's decision is examined, Willis was successful in that his appeal was upheld. The court found that Governor Gipps and the Executive Council ought to have given him 'some opportunity of being previously heard, against the amotion'.[912] When the Privy Council archives are considered a different story is revealed. Willis in Port Phillip during the period 1841-1843 was unsuccessful as a judge since he failed to satisfy society's expectations as to how a judicial officer should behave.

In seeking to identify the primary reasons why Willis was removed, McLaren has noted that the idea Willis brought the administration of justice into disrepute is a 'credible argument… at least in a symbolic sense'.[913] To support this idea he refers to the work of Rizzetti, in that 'equally important was the threat that Willis and his scattergun approach to exposing dishonesty and deceit in the governmental, business, and commercial communities presented to an increasing number of gentlemen in the district'.[914] These thoughts are attractive given the uncertain economic conditions existing in Port Phillip and are certainly involved in Willis's amoval. But is there a danger of being too conspiratorial? Is the reason for Willis's amoval more prosaic, although of great importance? Is the reason that Willis, by his actions, had diminished public confidence in the administration of justice, had displayed bias, had engaged in conflict of interest, had not been impartial? The Privy Council archives reveal not just the complaints about Willis, as he perceived them, but also how he responded. As we have seen, when this material is carefully examined Willis is unable to persuasively defend all of his actions. If he could have conclusively justified his behaviour, then

[912] *Willis v Gipps* (1846) 5 PC Moo 379, 392.

[913] McLaren above n 30, 189.

[914] Ibid. See also Rizzetti above n 83, 104-106.

Rizzetti's ideas would have greater significance. It is clear that it was Willis's unbecoming conduct as a judge that ultimately led him to being removed from office. Willis in Port Phillip during the period 1841-1843 is a study of judicial failure.

Before the Privy Council there was only one complaint or charge in which Willis effectively defended his conduct. As previously identified, this was in relation to Mr JM Smith.[915] The complaint was exceptional for two reasons; namely, Willis did not submit any supporting material and the matter is not mentioned in the Respondent's case. The only relevant documentation was a letter written by Willis to Lord Stanley that appeared in the Respondent's Appendix.[916] The contents are considered with reference to accounts in the *Port Phillip Gazette,* the *Port Phillip Herald* and the *Port Phillip Patriot and Melbourne Advertiser*.

Society's Expectations and Judge Willis in Port Phillip

Judges are functionaries of the state who resolve disputes and maintain confidence in the system of government. Judicial impartiality and independence are essential elements.[917] In the nineteenth century there was no contemporary literature with regards to assessing the behaviour of a common law judge. It was only in the twentieth century that guidelines indicating society's expectations of the judiciary were published. This is why reference has been made to the Australian *Guide to Judicial Conduct* as the same issues dealt with in that guide are played out in Willis's appeal to the Privy Council. The Australian *Guide to Judicial Conduct* considers impartiality and independence

[915] Part A-8 'Mr Smith's Complaint'.

[916] 'Letter: Willis to Stanley 8 February 1843' *Appendix to the Case on Behalf of the Respondent* 45.

[917] S Shetret (ed) 'Introduction' *The Role of Courts in Society* (Martinus Nijhoff 1988, Dordrecht) 3.

together with 'conduct generally and integrity' as the 'Guiding Principles' for judicial behaviour.[918]

According to the *Guide,* impartiality is the absence of 'bias, conflict of interest or prejudgment of an issue'.[919] A good common law judge must be impartial. Willis had a significant number of problems regarding impartiality during his term in Port Phillip. Willis imprisoned Mr Arden, editor of the *Port Phillip Gazette* newspaper for publishing critical comments about his behaviour. In this matter Willis was acting as a judge in his own cause.[920] The same issue is present in the cases of Mr Carrington and Mr Ebden, and this led to the first appeal from the court in Port Philip to the Supreme Court of New South Wales at Sydney.[921] Another example is the letter by Mr Curr who was a prominent Port Phillip merchant, which documented events in which Willis had not been impartial. The letter was subsequently published the local newspapers.[922] Mr Roger Therry, the Attorney General also documented events in which Willis sought to manipulate government officials in the presentation of cases before the court.[923] Willis is also guilty of pre-judgment in the manner in which he handled Mr Sydney Stephen's admission to legal practice in Port Phillip.[924] A further example is the attempt by Willis

[918] Australian Institute of Judicial Administration and Council of Australian Chief Justices above n 3.

[919] Ibid 361-368.

[920] Part A-1 'Sentence of Mr Arden'.

[921] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[922] Part A-4 'Mr Curr's Case'.

[923] Part A-6 'The Attorney General's Complaint'.

[924] Part A-7 'Mr Sydney Stephen's Case'.

to influence the editor of the *Port Phillip Patriot* to distribute positive stories about his conduct.[925]

The *Guide* defines judicial independence as the inclusion of both constitutional arrangements and the 'discharge of judicial duties'. [926] The latter is the idea that a judge should at all times be 'seen to be, independent of all sources of power or influence in society, including the media and commercial interests'.[927] Willis during his tenure in Port Phillip was not beholden to any particular interest or power, except himself.

'Conduct generally and integrity' in the *Guide* is a reminder that judges 'on' and 'off' the bench must behave in a manner which does not bring themselves into disgrace nor the judicial office they occupy. Judges of course, are people who live in the society in which they exercise judicial authority, they have an

> entitlement to exercise the rights and freedoms available to all citizens. It is in the public interest that judges participate in the life and affairs of the community, so that they remain in touch with the community. On the other hand, appointment to judicial office brings with it some limitations on private and public conduct. These two general considerations have to be borne in mind in considering the duty of a judge to uphold the status and reputation of the judiciary, and to avoid conduct that diminishes public confidence in, and respect for, the judicial office'.[928]

Achieving an appropriate balance, between these competing priorities may be difficult if public respect for the judiciary is to be maintained. Failing to obtain a satisfactory

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[925] Part A-11 'Evasive, if not Untrue Statement Regarding a Loan to Mr Fawkner, which the Sydney Judges alleged was lent to the Editor or Conductor of the *Port Phillip Patriot*, with a View of Influencing its Articles'.

[926] Australian Institute of Judicial Administration and Council of Australian Chief Justices above n 3, 358-359.

[927] Ibid.

[928] Ibid 359-360.

equilibrium was the source for almost all of Willis's problems in Port Phillip. Examples include disparaging comments about the Judges at Sydney and the delivery of charges to juries, in which personal opinions were expressed about government officials that were irrelevant to the matter before the court.[929] Causing excitement or want of confidence in the system of government was a product of Willis's conduct.[930] Highlighting these difficulties was the perilous economic state of the Port Phillip economy. Being a single judge located more than one thousand kilometers from Sydney was detrimental because his isolation from other judges did not provide opportunities to consult or moderate his views.

The *Guide* is also useful regarding 'Conduct in Court'.[931] Matters include the conduct of hearings, participation in the trial and private communications.[932] Once again Willis in Port Phillip failed to observe these standards with reference to the cases of Mr Carrington and Mr Ebden.[933] The Attorney General's complaint is in the same vein.[934]

[929] Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-10 'The Delivery of Charges to Juries (which his Excellency is pleased to term harangues) of an Improper Character'. See also Part B-1 'Numerous and Insulting Attacks on Colleagues'.

[930] Part A-9 'State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the Proceedings of the Resident Judge'.

[931] Australian Institute of Judicial Administration and Council of Australian Chief Justices above n 3, 368-371.

[932] Ibid.

[933] Part A-3 'The Cases of Mr Carrington and Mr Ebden'.

[934] Part A-6 'The Attorney General's Complaint'.

'Activities outside the Courtroom' is also contained within the *Guide.*[935] In particular judges should refrain from participating in public debates or in discussing judicial decisions.[936] Willis failed to observed this safeguard on several occasions by making critical comments about the judges at Sydney. This issue was also identified in Mr Curr's letter that was published in the Port Phillip newspapers.[937]

Another component is the provision of legal opinion to a government advisory body or committee.[938] Providing advice to the Legislative Council about the repugnancy or validity of local laws was a well-established role for the Supreme Court judiciary in the Colonies.[939] Willis provided such advice regarding the sale of Crown Lands, the incorporation of Melbourne and the requirement for public officials to make an appropriate oath to the monarch.[940] These opinions were considered as 'attempts to produce mischief' and were disregarded at the time because the government had largely lost confidence in Willis.

The story of Willis in Port Phillip during the period 1841-1843 is a study of judicial failure. It is also a tragedy in that he was probably the last person to recognise the

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[935] Australian Institute of Judicial Administration and Council of Australian Chief Justices above n 3, 371-376.

[936] Part A-2 'Disparaging Words about the Judges of the Supreme Court at Sydney in a case involving Mr Batman's Will', Part A-5 'Complaints from the Judges at Sydney Subsequent to Mr Batman's Case'.

[937] Part A-4 'Mr Curr's Case'.

[938] Australian Institute of Judicial Administration and Council of Australian Chief Justices above n 3, 371-376.

[939] 'An Act to provide for the administration of justice in New South Wales and Van Dieman's Land, and for the more effectual government thereof and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act* 1828).

[940] Part B-4 'Denied the Crown the Right to Dispose of Land in the Colonies', Part B-5 'Incorporation of the Town of Melbourne Invalid' and Part B-6 'Information Conveyed to the Executive on an "erroneous point of law"'.

importance of the matters before the Privy Council as representing how a good common law judge should behave. Willis had to be dismissed because he failed to satisfy society's expectations as to how a judge should behave. In short, he diminished public confidence in the administration of justice, brought disrespect for the institution of the judiciary and did not protect the reputation of the judiciary or individual judicial officers. These matters are the very issues raised in Willis's appeal before the Privy Council. The story of Willis's amoval and appeal are not only of historical interest. The issues raised continue to have resonance with respect to judicial authority today. In this thesis we have seen the power of a historical episode to illuminate an ongoing issue of great importance to the administration of justice.

The historical struggle to define judicial function and the role of the judge in the common law system has been limited, haphazard and most recent in origin. Nonetheless, there has been a longstanding common law tradition that began to address the essential nature of judging. The issue of judicial corruption was aired in the early modern period.[941] Within less than ten years of the events involving Judge Willis in Port Phillip, the House of Lords determined that the then Lord Chancellor, Lord Cottenham, should not have sat on a case as he held shares in the company concerned and established automatic disqualification for pecuniary interest in the British Commonwealth.[942] The story of Judge Willis in Port Phillip during the period 1841-1843 assists in clarifying the fundamentals of judging, of what it means to be a judge and what the discharge of that duty entails.

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[941] W Prest 'Judicial Corruption in Early Modern England' (1991) 133 *Past & Present* 67.

[942] *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HLC 759, (1852) 10 ER 301. See also G Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford 2009).

APPENDIX

A Chronology of Significant Events Involving Willis in Port Phillip

1841-1843

There was no single event that precipitated Willis's amoval 'but for a long-continued course of misbehaviour'.[943] The Resident Judge arrived in Port Phillip on 9 March 1841 and within twenty-two months the Governor and Executive Council met to discuss Willis's conduct. It was as if considerable doubts had arisen about his ability to resolve disputes and maintain public confidence in the system of government. Further meetings were held but just over five months later on 24 June 1843 he received notice. In the intervening period, the Governor and Executive Council felt that they were compelled to act. A chronology of significant events enables a clearer picture of Willis in Port Phillip to emerge. Almost every fortnight something had occurred. Indication is provided as to where a full discussion occurs in the matters raised by Willis in his appeal.

1841	9 March	Willis arrived in Port Phillip.
	23 April	Willis formed the opinion that the Crown does not have the authority to dispose of land in the colonies. Money received from sales should be directed to consolidated funds and not English migration. Although technically correct based upon the reception of English law, Willis's advice was controversial given that the Port Phillip economy had

[943] 'Letter: Gipps to Stanley 19 July 1843' *Appendix to the Case on Behalf of the Appellant* XXV 76.

expanded rapidly with the sale of land in the late 1830s. His views were severely criticized in the newspapers as being based upon 'impulse' and casting doubt upon the actions of Governor Gipps. See also the letter to the editor, signed 'Scrutator' which is published in *Port Phillip Gazette* on 29 September 1841. **Part B-4 Denied the Crown of the Right to Dispose of Land in the Colonies.**

1841 13 July Mr JM Smith, the managing clerk of the legal firm Messrs. Carrington and Clay introduced himself in chambers to Willis. Although the practice of sending clerks to represent parties before court is accepted in England, Willis expresses doubt about allowing the same to occur in Port Phillip since he is not an articled clerk. This event is the first part in a larger story involving Mr Carrington and the other legal practitioners in Port Phillip. In August, Smith would appear again before Willis. **Part A-8 Mr Smith's Complaint** and **Part A-3 The Cases of Mr Carrington and Mr Ebden**

21-23 July The *Port Phillip* Gazette published an article that alleged that Willis had exhibited bias in a recent case. Appalled by the suggestion, Willis warned Mr Arden,

		the editor about the need for impartial reporting of events. This was the first exchange between Willis and Arden. See also 29 September 1841 when Arden is charged, 15 February 1842 when he is on trial and the 25 February 1842 when further newspaper articles critical of Willis are published. **Part A-1 Sentence on Mr Arden** and **Part B-3 Sentence on Mr Arden.**
1841	10 August	Mr JM Smith, the managing clerk of the legal firm Messrs. Carrington and Clay expressed doubt upon the legal profession in open court. Willis took offence to the statement and made an order that only legally qualified people attend court. **Part A-8 Mr Smith's Complaint.**
	30 August	Willis considered that a newspaper advertisement for the sale of a horse called 'Hounds Foot' that had been placed by Mr Cunningham, a barrister, brought the legal profession into disrepute. This was a simple mistake by Willis. **Part A-1 Sentence on Mr Arden** and **Part B-3 Sentence on Mr Arden.**
	16 September	In *R v Bonjon* an Aborigine kills another Aborigine, and Willis questions whether the accused is

competent to understand the proceedings. He also ponders whether English law should intervene in such a matter. Willis's response is contrary to government policy, the matter is subsequently sent to Sydney and his opinions are overturned. See also the later decision of Willis in *R v Bolden* on 1 December 1841. **Part B-2 Aborigines not subject to British Law.**

1841 29 September A letter to the editor, signed 'Scrutator' is published in *Port Phillip Gazette*. It reviews Willis's conduct in Port Phillip and is very critical. Mr Arden, the editor is arrested for criminal libel. See also 21-23 July 1841 where Willis had warned Arden about such behaviour and the later events of 15 February 1842 where Arden is on trial and 25 February 1842 when further newspaper articles critical of Willis are published. **Part A-1 Sentence on Mr Arden** and **Part B-3 Sentence on Mr Arden.**

1 December In *R v Bolden* a colonist is charged with attempting to kill an Aborigine. On the available evidence, Willis considers that 'his neighbour' would not have done such an act and dismisses the matter. Management to avoid any perception of bias is the issue. See also

		the earlier decision of Willis in *R v Bonjon* on 16 September 1841. **Part B-2 Aborigines not subject to British Law.**
	22 December	In *R v Robert Timmy Jimmy Small – boy, Jack Napolean Tarapaerrura,* two Aborigines (Bob and Jack) are convicted for murdering two whalers. See also the earlier decisions of *R v Bonjon* on 16 September 1841 and *R v Bolden* on 1 December 1841. **Part B-2 Aborigines not subject to British Law.**
1842	22 January	First public executions occur in Port Phillip. They are Bob and Jack who were found guilty of murdering two whalers in December. See *R v Robert Timmy Jimmy Small – boy, Jack Napolean Tarapaerrura* on 22 December 1841. See also the earlier decisions of *R v Bonjon* on 16 September 1841 and *R v Bolden* on 1 December 1841. **Part B-2 Aborigines not subject to British Law.**
	12 February	Mr Cavanagh had a deed in his personal possession. When requested by Willis to produce the document in an insolvency matter he declined on the basis that he was not obliged to do so. Willis replied that he

could ‘rot in jail’ until it was produced. The next day the document was produced. Willis’s comments were reported in the *Port Phillip Gazette*. The article noted that ever since he arrived in Port Phillip, his outbursts from the bench had created great confusion ‘and that he had lost public respect’. **Part A-1 Sentence of Mr Arden** and **Part B-3 Sentence on Mr Arden.**

1842 15 February In *R v George Arden*, Mr Arden, the editor of the *Port Phillip Gazette* is before Willis for ‘shameful libels on the Judge, his past and present’. He is sentenced to 12 months imprisonment and a fine of £ 300. Willis in these proceedings was the judge, jury and the only injured party. **Part A-1 Sentence on Mr Arden** and **Part B-3 Sentence on Mr Arden.**

25 February A letter to the editor, signed ‘Junius’ is published in the *Port Phillip Herald.* It is then republished in *Port Phillip Gazette* and *Port Phillip Patriot and Melbourne Advertiser.* The letter is highly critical of Willis’s conduct in the trial of Arden regards the whole matter as an exercise of arbitrary power. **Part A-1 Sentence on Mr Arden** and **Part B-3 Sentence on Mr Arden.**

1842 27 April In *Fletcher v Lee*, Willis called upon Mr JM Smith the managing clerk of the legal firm Carrington and Clay, to enter the witness box since he was present in court. Mr JM Smith stated that he had not been subpoenaed. Willis ordered him and Mr JM Smith reluctantly gave evidence. The following day Mr JM Smith wrote a letter to the editor of the *Port Phillip Gazette* indicating that he had been 'browbeaten by the judge'. See also 13 July 1841 when Mr JM Smith first met Willis, and 10 August 1841 when Mr JM Smith made disparaging comments about the legal profession and Willis made regulations as to who could attend court. **Part A-8 Mr Smith's Complaint**

28 April *In the Estate of Peter Snodgrass*, Mr Carrington, an attorney fails to produce accounts for the insolvency proceedings. He is subsequently imprisoned by Willis for contempt and his name is removed from the roll of practitioners for Port Phillip. Bail is granted and provided by Mr Carrington (£500), Mr Arden (£500) and Mr Harper (£500). **Part A-3 The Cases of Mr Carrington and Mr Ebden.**

22 June In *Batman v Lonsdale* Willis criticized the Sydney Judges in open court about their lack of knowledge

about Equity. Willis noted '… probate not worth a farthing as it had been granted subsequent' to the establishment of the court in Port Phillip. He was also alarmed that they required a £5,000 bond to be paid before the will would be sent to Port Phillip. The Sydney Judges ask Willis to confirm if he had said these words as reported in the newspapers. **Part A-2 Disparaging Words About the Judges of the Supreme Court at Sydney in a Case Involving Mr Batman's Will.**

1842 25 June Mr Carrington's agent in Sydney petitions the Supreme Court in Sydney for a writ of *habeas corpus*. The application is heard in chambers by Burton J and dismissed since there is no jurisdiction in Port Phillip, except in appeal cases. The agent is encouraged to petition for a writ of certiorari and habeas corpus to bring the whole matter to Sydney. See 28 April 1842 when Mr Carrington is imprisoned by Willis for contempt of court. **Part A-3 The Cases of Mr Carrington and Mr Ebden.**

4 July Petition of Appeal in Mr Carrington's case is granted by the Sydney Judges (Dowling CJ, Burton J and A Stephen J). See 28 April 1842 when Mr Carrington is

imprisoned by Willis for contempt of court and 25 June 1841 regarding the first proceedings in Sydney. **Part A-3 The Cases of Mr Carrington and Mr Ebden.**

1842 18 July In *R v Roger* an Aborigine is found guilty of the murder of Mr Codd. See also the earlier decisions of *R v Bonjon* on 16 September 1841, *R v Bolden* on 1 December 1841, *R v Robert Timmy Jimmy Small – boy, Jack Napolean Tarapaerrura* 22 December 1841 and the first public executions 22 January 1842. **Part B-2 Aborigines not subject to British Law.**

3 August Mr Carrington and his friend, Mr Ebden had attempted to serve papers personally on Willis in chambers, court and at his home. Finally it is achieved in the street, with the papers just touching Willis's arm. Mr Carrington is charged by Willis with assault and Mr Ebden with aiding and abetting. Charges are later dismissed. See 28 April 1842 when Mr Carrington is imprisoned by Willis for contempt of court and 25 June 1841 when Mr Carrington's agent initiates proceedings in Sydney. See also 4 July when the Sydney Judges grant the Petition of

Appeal. **Part A-3 The Cases of Mr Carrington and Mr Ebden.**

1842 8 August *Kerr v St John*: Mr Kerr was the editor of the *Port Phillip Patriot* and also an Alderman of the Melbourne Town Corporation. In an article published in the newspaper Police Magistrate Major FB St John was considered 'as a fish out of water when he was on the bench'. Major FB St John issued a summons for his arrest. Upon seeing the warrant, Willis identified a number of inconsistencies and dismissed the charge. This action was viewed as giving Mr Kerr favourable treatment and was criticized in the article 'Excellent Judgment of a Splenetic Judge' which was published in the *Port Phillip Gazette* on 13 August 1842. See also 12 May 1843 when Mr Kerr successfully sued Major St John for wrongful arrest. **Part A-4 Mr Curr's Case.**

17 August 'The Cook's Case' – *Curr v Campbell*: Mr Campbell was charged with enticing Mr Curr's cook to his employ. The charges later dropped but Mr Curr regarded this matter as Willis being biased. **Part A-4 Mr Curr's Case.**

Thomas Mulcaster Marshall v Arden: This was a dispute regarding Mr Marshall's bona fides to represent people in local government. The article was published in the *Port Phillip Gazette*, and Mr Arden the editor, was found guilty of criminal libel and fined £50. **Part A-4 Mr Curr's Case.**

1842 18 August In the leading article of the *Port Phillip Patriot and Melbourne Advertiser*, the author expressed anger at the Supreme Court in Port Phillip being inferior to the court at Sydney. A call is made to convene a public meeting. The Judges in Sydney form the view that this article was written by Willis. **Part A-5 Complaints from the Judges at Sydney Subsequent to Mr Batman's Case.**

31 August *In the Matter of Horatio Nelson Carrington:* Mr Carrington's appeal is heard in the Supreme Court at Sydney. Dowling CJ, A Stephen J and Burton J write individual judgments and the Supreme Court of NSW in the district of Port Phillip is inferior to the Court at Sydney. See also 28 April 1842, 25 June 1842, 4 July 1842 and 3 August 1842. **Part A-3 The Cases of Mr Carrington and Mr Ebden.**

1842 8 September Roger who is an Aboriginal is executed for the murder of Mr Codd. See 18 July 1842 for his trial. See also See also the earlier decisions of *R v Bonjon* on 16 September 1841, *R v Bolden* on 1 December 1841, *R v Robert Timmy Jimmy Small – boy, Jack Napolean Tarapaerrura* 22 December 1841 and the first public executions 22 January 1842. **Part B-2 Aborigines not subject to British Law.**

10 September *Welsh v Riddle*: In an address to the jury, Willis made disparaging comments about the Sydney Judges – 'equity, therefore, as well as a law is a science, a science not to be obtained by six months reading'. **Part A-5 Complaints from the Judges at Sydney Subsequent to Mr Batman's Case.**

15 September Mr Curr's letter that Port Phillip is a 'bitter party spirit of the place' and that Willis is biased is published in *Port Phillip Patriot and Melbourne Advertiser*. Reference is made to 8 August 1842 decision of *Kerr v St John* and 17 August 1842 'the Cook's Case'. **Part A-4 Mr Curr's Case.**

Willis addresses a jury and makes disparaging comments about the Sydney Judges because Mr

Carrington's appeal is successful. Willis quoted from a private letter written to him by Burton J. See also 28 April 1842, 25 June 1842, 4 July 1842 and 3 August 1842. **Part A-6 The Attorney General's Complaint.**

Mr Arden as Editor of *Port Phillip* Gazette was alleged to have libeled Mr Marshall. Willis wrote a letter to counsel about an item in *The Australia* in 1841 that could be used in court. A fine £50 imposed on Mr Arden with £1,000 bond for good behaviour. Later it was determined that information supplied by Willis was false. See 17 August 1842. **Part A-4 Mr Curr's Case.**

1842 15 September Leading article in the *Port Phillip Patriot and Melbourne Advertiser*, that Mr Carrington's successful appeal had 'inflicted upon us a curse of subordinate and inferior judicature, every step of which is liable to be appealed against' – although anonymous Sydney Judges alleged Willis was the author. See also 28 April 1842, 25 June 1842, 4 July 1842, 3 August 1842 and 31 August 1842. **Part A-5 Complaints from the Judges at Sydney Subsequent to Mr Batman's Case.**

1842	20 September	*Ex parte Bragg and Askew v Williams*: Address to the Jury by Willis with more disparaging comments about the Sydney Judges and Mr Carrington's successful appeal in that they did not know the law. **Part A-10 The Delivery of Charges to Juries (Which His Excellency is Pleased to Term Harangues) of an Improper Character.**
	26 September	'The Carrington Case', an anonymous article published in *Port Phillip Patriot and Melbourne Advertiser* that contains the contents of a letter from Willis to Governor Gipps 14 September 1842. Sydney Judges alleged the author is Willis. See also 28 April 1842, 25 June 1842, 4 July 1842, 3 August 1842 and 31 August 1842 and 15 September 1842. **Part A-5 Complaints of the Sydney Judges Subsequent to Mr Batman's Case.**
	22 November	A public meeting to express support for Willis is proposed but then cancelled. **Part A-9 State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the proceedings of the Resident Judge.**

1842	21 December	Governor and Executive Council meet to discuss Willis (First Meeting).
1843	16 January	Governor and Executive Council meet again to discuss Willis (Second Meeting).
	17 January	Governor and Executive Council Meeting to discuss Willis and they note the State of Excitement. It is necessary for Willis to be dismissed since it is inconvenient and some people in Port Phillip still support him (Third Meeting).
	27 February	Willis expressed doubts that all government officers had taken the appropriate oath to the Monarch when they took office. **Part B–6 Information Conveyed to the Executive on an 'erroneous point of law'.**
	14 March	'*Quo Warranto* Case' - *Fawkner v Stephen*: Willis does not make a judgment but provides an extensive opinion and concludes that the incorporation of Melbourne is invalid. He referred the question to the Supreme Court in Sydney. **Part B-5 Incorporation of the Town of Melbourne Invalid.**

1843	7 April	*R v William Manuel alias Ferguson*: Sentence of death recorded on Mr Manuel, for escaping transportation. See 6 May 1843 when the Sydney Judges indicate Willis's knowledge of the law was wrong. **Part B-7 Sentence of Death on Manuel.**
	29 April	*Batman v Lonsdale*: Captain Lonsdale as one of the executors of Batman's estate had purchased a parcel of Union Bank shares from trust property, so that he could accept an offer to become a director. **Part A-9 State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the proceedings of the Resident Judge.**
	29 April	The Sydney Judges dismiss the '*Quo Warranto* Case' – *Fawkner v Stephen*. See also 14 March 1843. **Part B-5 Incorporation of the Town of Melbourne Invalid.**
	4 May	*Batman v Lonsdale:* Willis discovered that Mr Croke, the Crown Prosecutor had acquired land from Captain Lonsdale by using accommodation bills. Mr Croke imprisoned for contempt of court. Members of Port Phillip Bar write letter of support. **Part A-9**

State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the proceedings of the Resident Judge.

1843 6 May *R v William Manuel alias Ferguson:* The opinion of Sydney Judges in this matter was that Manuel was not escaping but absconding, so the sentence of death was not appropriate and he is pardoned. See 7 April 1843 for Willis initial decision. **Part B-7 Sentence of Death on Manuel.**

12 May Mr Kerr the editor of the *Port Phillip Patriot and Melbourne Advertiser*, sued for arising from false imprisonment and wrongful arrest. He received damages of £50. See *Kerr v St John* on 8 August 1842. **Part A-4 Mr Curr's Case.**

29 May La Trobe wrote to Lord Stanley, Secretary of State for the colonies and indicated – if nothing is done about Willis, he questioned whether the people would still have confidence in the Government. **Part A-11 An Evasive, if Not Untrue Statement regarding a loan of money to Mr Fawkner, which the Sydney Judges Alleged was lent to the Editor or**

Conductor of the Port Phillip Patriot with a View to Influencing its Articles.

1843 2 June *Atkins v Manton:* Mr JB Were a financier in Port Phillip, while giving evidence is imprisoned for contempt of court by Willis. **Part A-9 State of Excitement in which the Town of Melbourne, and the Whole District of Port Phillip has been kept in by the proceedings of the Resident Judge.**

5 June The Incident at Alston's Corner' – There are only two candidates (Mr Condell and Mr Curr) for the position of Mayor in the forthcoming local council elections. Willis openly supported Mr Condell 'as he the only honest candidate'. Mr Curr is furious but Major St John refuses to take action against Willis. Incident reported in the newspapers. Mr Condell is elected Mayor on 15 June. **Part A-4 Mr Curr's Case.**

13 & 15 June Governor and Executive Council Meeting to discuss Willis, it had become absolutely necessary for the Government to intervene.

24 June Willis received notice while he was on the bench he had been amoved by Governor Gipps.

14 July Willis departs Port Phillip.

It is only by a close examination of the Privy Council archives that it is possible to appreciate how Willis managed to lose the confidence of the Governor and Executive Council. The material presented, involving a common law judge seeking to defend his actions, is useful as a means of identifying society's expectations of a judge. In Part A and Part B Willis fails to conclusively explain that he acted appropriately at all times during the period 1841-1843 in Port Phillip.

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