The Local Courts on Victoria's Gold Fields, 1855 to 1857

by Dr R. L. Sharwood*

[Out of the stormy historic events at Eureka arose the Local Courts in Victoria. They proved within a few years to be a failure. In this paper, presented at the Law and History Conference, La Trobe University, May 1984, Dr R. L. Sharwood examines what was attempted, and seeks to understand the reasons for its lack of success. This historical analysis begins by looking at the discovery of gold in Victoria, the Gold Fields Commission and the subsequent Act of 1855. This is followed by an examination of the establishment and working of the Local Courts and then their abolition. The author concludes that while, overall, the legal regime for Victorian mining was developed with reference to essentially practical *considerations, in the case of the Local Court experiment* political *considerations strongly influenced both its introduction and its demise.]*

(1) *Introduction*

In the second half of the 19th Century, Victoria produced a mining law, a mining judicature and a mining regulatory system which were not only to become the model for the other Australian Colonies and for New Zealand, but to be widely admired internationally. Their day may long have passed, but that day was a great one. As Chief Justice Griffith said in 1897, 'It is a well known fact that the mining law of Australia was practically made by the decisions of Mr Justice Molesworth and the Supreme Court of Victoria.'[1] In fairness, he should, I think, have added: 'and the legislation of the Parliament of Victoria.'

But Victoria achieved its success in this area only by fits and starts.

It began with what I would call a 'fit' rather than a 'start', in that, faced with the emergency of its first gold rush, it tried, as New South Wales had just done, to graft its regulatory arrangements for the gold fields upon the existing system of Crown Lands Commissioners, only to find, to the great cost and distress of everyone involved, that that expedient would not work.

The regime of the Gold Commission, as it came to be called, was a disaster, ending, to all intents and purposes, with the Eureka Stockade. I deal shortly with that system in Section 2 of this paper.

The first purpose-built scheme for gold fields management, the true start of the Victorian system, was that which was instituted in 1855, following Eureka and a Royal Commission (the 'Gold Fields Commission'). It was that scheme which introduced the 'Local Courts', and it is with these 'Local Courts' that my paper is concerned.

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[1] *Theodore v. Theodore* (1897) 8 Q.L.J. 16 (F.Ct.).

When Raffaello Carboni published his marvellously idiosyncratic account of the Eureka Stockade, he proudly announced himself on the title-page as 'by the unanimous choice of his fellow-miners, member of the Local Court, Ballaarat', and, later in his book, he describes the Court as 'the off-spring of the Eureka Stockade'.[2] That was in 1855. Less than two years later, in August 1857, Peter Lalor, the hero of Eureka, told the Legislative Assembly that 'the majority of the thinking and intelligent men on the goldfields were opposed to the present Local Courts' and that he supported the proposal to 'abolish the system of elective judges'.[3] The irony is that both these old campaigners were right: the Local Courts on the gold fields *did* arise directly out of the events at Eureka, but this 'remarkable democratic experiment' (as Geoffrey Serle calls it),[4] marking what Geoffrey Blainey has described as 'probably the high tide of Australian democracy',[5] proved within a few hectic years to be a failure.

Let us examine what was attempted, and why; and endeavour to understand the reasons for the lack of lasting success.

(2) *From the Discovery of Gold to the Eureka Stockade*

In the first years after the discovery of gold in Victoria, law and order were maintained on the fields by the combined efforts of Gold Commissioners and police (or stipendiary) magistrates, operating initially under regulations of August 1851 and later under special statutes.[6] The magistrates dealt with offences, but shared with the Commissioners a jurisdiction to hear mining disputes of various kinds. To complicate the picture further, the Commissioners were also Justices of the Peace, and sat on the bench with the magistrates.[7]

It is quite certain, and, I think, well enough known, that the poor working of these somewhat confusing arrangements for the administration of justice was one of the major reasons for that collapse of confidence in government which preceded the Eureka Stockade of December 1854.

The Commissioners were especially unpopular. 'These persons', wrote the barrister John Atkins,[8] 'were, in some instances, little more than youths, and

[2] Carboni, Raffaello, *The Eureka Stockade,* first published by the author, Melbourne, 1855; M.U.P. paperback edition, 1963, facsimile of original title-page and p. 164.

[3] Victorian *Hansard* II (Session 1856-7) 1138. (Cited hereafter as *Hansard 1857).*

[4] Serle, G., *The Golden Age* (1963) 178.

[5] Blainey, G., *The Rush That Never Ended* (1963) 57.

[6] A Proclamation of 15 August 1851 was followed three days later by the first regulations for mining licences. The first statute was passed on 6 January 1852: 15 Vict. No. 15. The statute in force at the time of Eureka was 17 Vict. No.4 (1854), 'An Act for the better management of the Gold Fields of Victoria', together with the Regulations made under it.

[7] Latrobe to Grey, 8 July 1852, quoted in Clark, C. M. H., *Select Documents in Australian History 1851-1900 (1955) 11-12.*

[8] *Smyth, R. Brough, Gold Fields and Mineral Districts,* Melbourne, (1869); facsimile edition, Queensberry Hill Press, 1979. The section entitled 'Review of the Laws affecting Mining Interests' was contributed by 'John Atkins, Esquire, barrister-at-law'. Present reference, 381.

wholly inexperienced. To these, fit or unfit, as it might be, for judicial investigations, were entrusted the duties of deciding, by their own personal dictum, without the assistance of juror or assessor, disputes between miners, in cases where it was often mere oath against oath; and to them and to the police was entrusted the duty of collecting the licence fee.' That last duty undermined whatever respect the Commissioners might otherwise have commanded; the licence fees were hated, and Commissioners and police continually harried the diggers with their raids and inspections.

In October 1854, a disreputable pub-keeper named Bentley, accused (with two associates) of complicity in a murder, was discharged, against the weight of the evidence, by a bench of magistrates which included the Commissioner in charge of Ballarat, Robert Rede. Uproar followed. Bentley's 'Eureka Hotel' was burnt down and bitter complaints were made about the quality of Ballarat justice. The whole affair was one of the triggers for the later rebellion.[9] At the end of the month, in a long editorial prompted by the Bentley scandal, the *Ballarat Times* complained that 'the balance had been wrested from the hand of Justice, that she had been chased away from her court, and that Injustice with sword and chains, has usurped the throne, calling in to her aid Corruption, Bribery, Personal Animosity, Private Interest and Brutality', with a good deal more in the same vein. The paper identified the three principal demands of the residents of the gold fields as 'first, the abolition of the present obnoxious miners' licence; second, the representation of the mining interests in the councils of the colony; and third, an unbiased and equitable dispensation of justice.' 'Above all', the editorial concluded, 'we want justice.'[10]

(3) *The Gold Fields Commission*

This concern for a better system of justice on the gold fields was clearly demonstrated at the Royal Commission hearings which followed Eureka.[11]

[9] There are many accounts of this notorious incident, including Serle, *op. cit.* 163-4; Clark, *op. cit.* 56-8; Withers, W. B., *History of Ballarat,* 2nd ed.; Niven, Ballarat, 1887 (facsimile edition, Queensberry Hill Press, 1980), 82-92.

[10] *Ballarat Times,* 28 October 1854, adding 'These things we require, and these things we must have'.

[11] *Report of the Gold Fields Commission,* in *Votes and Proceedings (Legislative Council),* 1854-5, II, A 76. Governor Hotham decided to appoint a royal commission to report generally on the gold fields on 16 November 1854 — before Eureka. The Letters Patent, however, were dated 7 December, 1854, four days after the Stockade. The Commission met first in Melbourne on 14 December, and then in Bath's Hotel, Ballarat, on 18 December. Its Report is dated 27 March, 1855. The record of evidence runs to 361 foolscap pages, recording 6381 questions and answers, all verbatim.

The members of the Commission were:— William Westgarth (Chairman), John Hodgson, John Pascoe Fawkner, John O'Shanassy, William Henry Wright, and James Ford Strachan. Wright was Chief Commissioner of Gold Fields. All the others (except Westgarth) were members of the Legislative Council.

The Royal Commission was known as 'the Gold Fields Commission', *not* to be confused with 'the Gold Commission' which had the management of the gold fields prior to the 1855 Act.

The Report of the Gold Fields Commission will be cited hereafter as *G.F.C. Report.*

Thus, the first witness to be examined by the Commission (in Ballarat, on 18 December 1854) was John Humffray, described (by the Commission) as 'one of the delegates nominated by the diggers'.[12] Humffray confirmed that 'the complaint has been that many incompetent parties, under the name of Commissioners, have been sent to settle these disputes [between miners], men of little experience in mining operations, and who have used their power rather harshly, and often partially . . '.[13] Overall, the Commission itself was satisfied that the unsatisfactory arrangements for the administration of justice, especially the absence of any locally-based honorary magistracy, were a prime cause of the general and deeply-rooted 'spirit of dissatisfaction' on the gold fields, 'lamentably illustrated in the first or Eureka outbreak at Ballarat'.[14]

The Gold Fields Commission presented its Report on 27 March 1855. It proposed, amongst other things, an extensive revision of the justice system. The Gold Commission and its Commissioners were to go, and 'instead of the present detached arrangements and divided authority, there [should] be one head upon each of the principal Gold District [sic]' — Ballarat, Castlemaine, Sandhurst (later renamed Bendigo) and Beechworth.

> As this would form an office of great honor and grave responsibilities, it should correspondingly be occupied by one of competent attainments, and matured years and experience. From the paramount importance of matters connected with the administration of justice for the auriferous districts, their novel developments, their valuable interests, and large population, this chief office should be of the nature of a magistracy. . .[15]

The Commission suggested that this new officer should be given a new title, that of 'Warden' ('so long familiar in English mining'),[16] although he would be 'in effect . . . a senior police or stipendiary magistrate'.[17]

Despite the Gold Fields Commission's criticism of 'detached arrangements and divided authority', it is clear that it nevertheless envisaged that the existing system of magistrates' courts would still work alongside special gold fields institutions, albeit now under a single head, the Warden.

The most important of these new and special institutions was to be the 'Local Board'. The role of the Local Board was to be 'the framing of by-laws

[12] *G.F.C. Report* p.lix. Humffray, who had a Welsh Chartist background, was very much one of the Ballarat miners' leaders, and was a founder and secretary of the Ballarat Reform League, but he had not supported the action of the Stockaders.

[13] *G.F.C. Report,* 2-3. Other witnesses were critical of the Commissioner system — *e.g.* Holyoake *(sic), ibid.* 25; Wanliss, *ibid.* 32.

[14] *Ibid.* paras. 51, 52 (p. xxi). Note that this reference to Eureka is *specifically* linked with the unsatisfactory justice system. The sentence quoted continues: 'and the Commission are impressed that the institution, in a cordial spirit, of the honorary magistracy they allude to, forming a link, as it were, between the people and the Government, might have tended to prevent those magisterial improprieties exposed by the present and the preceding Commission, and which had assuredly some effect in stimulating prevailing dissatisfaction and occasioning amongst a section of the miners the extremes of the subsequent outbreak'.

The reference to 'the preceding Commission' is a reference to the Board of Inquiry set up by the Governor after the Bentley affair: Serle, *op. cit.* 163.

[15] *Ibid.* para. 86 (p. xxx).

[16] The reference is to the office of Warden of the Stannaries, in the mining districts of Cornwall and Devon. The various specialised mining judicatures in England are examined in Section 4 of this paper.

[17] *Ibid.* para. 87 (p. xxxi).

suited to the special circumstances of gold mining and other vocations within [the Wardens'] circuit',[18] and it was to be composed largely of miners, selected by the Executive from those holding Miner's Rights.

> These boards might therefore be expected to be composed of the officers in charge upon the spot, assisted by intelligent miners. These arrangements, which no system of general legislation could properly provide for under the various and changing circumstances of each Gold Field, are calculated to promote general harmony, and an efficient and pacificatory as well as an economic management.[19] [Paragraph 95].

Were the Local Boards also to have a *judicial* function, in relation to the settling of mining disputes? The Commission's Report is diffuse and ambiguous in this area. The answer is by no means clear. Certainly the Commission did envisage some sort of localized dispute-settling mechanism with which miners themselves would be associated, as a number of witnesses had recommended — for example, Humffray: 'I suggest the employment of a jury of practical miners to decide any disputed claim.'[20] Paragraph 94 of the Commission's Report deals specifically with the question of settling mining disputes:

> There should therefore be an officer upon each Gold Field to settle as to mining disputes, by aid of stipendiary magistrates and assessors, with right of appeal.[21]

The matter is taken up again in Paragraph 95:

> With reference to mining differences, lists of jurors, qualified with the Miner's Right, should be made out, and from these the Executive might nominate magistrates for each Gold Field, and fill up places at the local boards proposed for framing by-laws suited to each district.

Paragraph 95 then continues and concludes as quoted earlier.

It is all very confusing. My present view is that the Gold Fields Commission, working (as it did) under intense pressure, simply failed to think through the details of the local dispute-settling procedure it contemplated, and in particular failed to clarify the relationship (if any) between that procedure and the Local Boards. Only in the subsequent legislation was the question finally settled.

The Commission was clear, however, that miners should be represented on the bench of the magistrates' courts:

> a few of the more prominent and respectable amongst the miners should be invited by the Executive to act as honorary justices.[22]

The Commission's proposals for an honorary magistracy, to be drawn at least in part from the ranks of the miners, were taken almost verbatim from the evidence of John Humffray.[23]

[18] *Ibid.*
[19] *Ibid.* para. 95 (pp. xxxii-xxxiii).
[20] *Ibid.* 3. And see Wanliss, 32; Holyoake, 25. The Board of Inquiry into the burning of Bentley's Hotel had recommended that a panel of diggers should arbitrate when a Commissioner's decision on a disputed claim failed to satisfy one or both parties: *Votes and Proceedings (Legislative Council),* 1854-5, 1A, 27.
[21] *Ibid.* xxxii.
[22] *Ibid.* para. 95, xxxii.
[23] *Ibid.* Questions 40-48. In fact, this proposal, though adopted, was not particularly successful: Just, Donald, *The Victorian Mining Judicature under the Gold Fields Act 1855,* LL.B. (Hons) thesis, University of Melbourne, 1971 (unpublished), 25-27. See footnote 52 below.

(4) *The Act of 1855*

It is a measure of the concern felt by government at the gold fields' situation that this remarkably prompt Report of the Gold Fields Commission was followed up by equally prompt legislation.

The Bill in which we are interested — the Gold-Fields Law Amendment Bill — was given its Second Reading speech by the Colonial Secretary on 9 May 1855, and it received the Governor's assent on 12 June 1855: 'An Act to amend the laws relating to the Gold Fields', 18 Vict. No. 37.

The Act began by tackling the licence question. Following the recommendation of the Gold Fields Commission, it substituted an annual 'Miner's Right', at a fee of £1, which authorized the holder to mine for gold on waste lands of the Crown. One major grievance of the diggers was thus disposed of. The very name — 'Miner's Right' — was, as Serle puts it, 'a stroke of genius'.[24]

Sections XI to XV of the Act set out a procedure for dealing with complaints that another person had encroached upon a miner's claim. Jurisdiction to hear such complaints was conferred on Justices of the Peace who, at the request of either party, were to be assisted by four 'assessors', being persons holding the Miner's Right (or 'a lease under this Act' — that is, a lease of auriferous lands).

There follow the sections establishing a quite new institution in place of the former Gold Commission — the 'Local Court' (Sections XVI-XXV, XXXII).

Gold field districts were to be proclaimed by the Governor for the purpose of forming Local Courts. Every such Court was to consist of a Chairman appointed by the Governor-in-Council 'and five at the least of nine persons holding the Miner's Right or a lease under this Act to be elected as hereinafter directed' (XVII).

The procedure for the election of members of the Local Court was set out at length, principally in Section XIX.[25] The appointed Chairman was to call a public meeting 'of persons usually residing within [the] district and holding the Miner's Right or a lease under this Act'. The Chairman was to preside at the meeting,

> and upon the name of any person qualified as aforesaid being proposed and seconded by persons also qualified as aforesaid as a member of such local court such name shall be submitted to the meeting . . . [for either approval or disapproval, and so on] until nine persons . . . shall have been duly elected . . .

In cases of 'dispute or doubt', the Chairman was to resolve the matter 'by the best means available to him', either by calling for a division or otherwise.

[24] *Op. cit.* 177; he (and others) credit the choice with O'Shanassy. The principal sections of the Act on the Miner's Right are ss. II and III.

[25] s. XXI dealt with vacancies, and s. XXII with the half-yearly elections following the original elections.

The Chairman 'or any person qualified as aforesaid' could in case of any doubt or dispute require a person to produce his Miner's Right or lease.

Elected members were to hold office for six months. Five members with the Chairman were to form a quorum. Decisions were to be made by majority vote, and in the case of an equality of votes the Chairman was to have an additional or casting vote (Section XX).

The Court could appoint a clerk (Section XVII).

The Local Courts were quite specifically given both legislative and judicial powers.

As to the former, it was provided in Section XVII that the Court should

> have power to frame rules and regulations for determining the extent and position of any claim the conditions on which it shall be worked and the application and use of any machinery and such local rules and regulations relating to mining and applicable to the district for which the members may be elected as they shall deem most beneficial . . .

Such rules and regulations required the assent of the Governor, and were to be published in the *Government Gazette* and laid before the Legislative Council (Sections XVII, XVIII).

The judicial powers of the Local Courts were set out in Sections XXIII, XXIV and XXX.

The Court could 'take cognizance' of any breaches of its own rules and regulations, and impose fines of up to £10 for a first offence and £20 for a second offence (XXIII).

It could hear partnership disputes between miners, compelling appearances if necessary, and could dissolve partnerships and determine amounts to be paid to members up to an amount of £200 in relation to any one partner (XXIV).

It could summon witnesses, compulsorily if necessary, and examine on oath; it could commit for contempt for a period of up to 14 days; 'and shall possess generally the powers of a Court of Petty Sessions', including powers as to the awarding of costs (XXV).

While 'no proceedings in such Court shall be quashed for want of form or be removed into the Supreme Court by *certiorari* or otherwise' (XXV), an appeal to General Sessions was provided for in cases of fines of £10 and upwards (XXXII).[26]

It can of course be seen readily enough that the provisions of this Act derived in a general way from the recommendations of the Gold Fields Commission.

But there were very significant differences.

[26] The final sections of the Act punished forgery and personation (XXVI) and fraud (XXVII), made stealing gold from any claim or mine the equivalent of larceny (XXVIII), preserved the Royal prerogative in respect of gold mines and gold fields (XXIX), made provision for the appropriation of fines (XXXI — half to go to the informer or party complaining), and repealed Act 17 Vict. No. 4. s. XXX provided that proceedings for infringement of the Act or rules 'not herein otherwise specially provided for' were to be determined summarily by any two Justices of the Peace, 'and no such proceedings shall be removed by *certiorari* into the Supreme Court'.

In the first place, the Commission's 'Local Board' was now very firmly a court, as well as a rule-making body, with a considerable if limited jurisdiction. No ambiguity on that point now remained. The Local Court was to provide much, though not all, of the localized dispute-settling mechanism which the Commission had envisaged; why the 'encroachment' jurisdiction was vested separately in Justices of the Peace (with or without assessors) is not clear, especially when it is borne in mind that the Local Court could make regulations in relation to claims, and fine for breaches of those regulations.[27]

Secondly, the miners on the Local Court were to be *elected,* and in open public meeting at that, rather than be *selected* by the Executive, as the Gold Fields Commission had recommended in relation both to assessors and members of the 'Boards'.

Why *election?*

It seems clear enough, as already indicated, that the main reason advanced by witnesses at the Gold Fields Commission, and by the Commission itself, for proposing the introduction of miners into the system was to secure down-to-earth, practical expertise and local knowledge. No particular political point was being made, or certainly none was emphasised (with the exception of the quite separate recommendations for an extension of the honorary magistracy). I know of only one instance at the hearings of the Gold Fields Commission when the possibility of the *election* of judicial officers was raised in relation to what was to become the jurisdiction of the Local Courts. The instance is not without interest.

The witness was Henry Holyoake, who had been a digger and storekeeper 'on the Bendigo' for some 13 months and then a storekeeper at Ballarat for seven months. Or so runs the innocuous description of him in the Minutes of Evidence. It is more important to know that he had been in the van of the miners' movement on both gold fields, a founder (with Humffray) of the Ballarat Reform League, and that he was a chartist, and a brother of the leading London chartist and secularist G. J. Holyoake.[28] In the passage that follows (Questions 450-452), the member of the Commission is not identified (assuming there was only one such involved):-

> 450. . . . [Holyoake] I think the Gold Commission should be reduced or abolished, and there should be two paid magistrates; and when a dispute arose, it should be in the power of a magistrate to go down to the disputed claim and select from each party a jury of six, and then for the jury to decide, and the magistrate only to enforce the decision.
> 451. Is there not a great objection on the part of the mining population that a paid officer does not care for them six straws? — I think they might elect them.
> 452. You cannot have an elective magistracy under the British Constitution, you must have a Republic for that? — I was not aware of that.

[27] The division of jurisdictions in mining disputes does not seem to originate in the *G.F.C. Report* (mainly because that Report is so unclear on curial matters), nor was it explained in the Legislative Council debate on the subsequent Bill, not at any rate at it was reported in *The Argus.*

[28] Serle, *op. cit.* 113. In the *G.F.C. Report,* the surname is spelt (incorrectly) without the final 'e'.

The incident is intriguing. It almost seems that Holyoake was deliberately led into declaring his chartist preference for popular election[29] in order to be put sharply in his place, with a constitutional rap over the knuckles. However, if the Gold Fields Commission considered election to judicial office to be out of the question in a British colony, clearly the Legislative Council did not, although four members of the former were also members of the latter.[30]

The debate in the Council on the Bill,[31] in so far as it touched upon the matter, confirmed that the principal reason for involving the miners was to take advantage of their local knowledge and special experience. Thus O'Shanassy, who had been a very prominent member of the Gold Fields Commission,[32] told the Council that

> when persons talked of this [i.e. the provision for Local Courts] being a peculiar law, they should also understand that the occupations of the gold-mining population were of a peculiar character, and must have laws to suit their peculiarities . . . It was necessary, therefore, to have some local tribunals to regulate disputes, for no doubt the Council was aware that there were peculiar regulations in reference to every particular gold-field.[33]

The Attorney-General, too, William Foster Stawell (later Chief Justice),[34] justified the Local Courts to the Council in terms of the necessity for 'peculiar local information', as he similarly justified the provisions for 'assessors' on the grounds that the miners would be 'well conversant with the rules of the place'.[35]

It has been suggested that the framers of the 1855 Act were influenced by English mining law, some of the special institutions of which had been re-organised by statute not many years previously; indeed, amending legislation in relation to the Stannary Courts for the mining areas of Cornwall and Devon was passed in the same year as the Victorian Act.[36]

Direct evidence for the influence of this English legislation is very thin. Certainly, as has already been noted, the Gold Fields Commission cited English usage (in Cornwall and Devon) for their choice of the title 'Warden',[37] but I know of no other reference in their Report to English models. When O'Shanassy, who had been a member of the Commission, was defending the

[29] The 'People's Charter' of 1837 was exclusively concerned with reform of the electoral system, including manhood suffrage: see Hanham, H. J. *The Nineteenth Century Constitution 1815-1914: Documents and Commentary* (1969) Extract 214 (270). For Chartism in Victoria at this period (the 1850's), see Serle, *op. cit. passim.*

[30] See Note 11, *supra.*: Hodgson, Fawkner, O'Shanassy, Strachan.

[31] I am relying on the report in *The Argus,* 10 May 1855, p. 4, Second Reading debate (the paper does not report on the Committee stage). There was no *Victorian Hansard* in this period.

[32] A self-educated Irishman, Melbourne's leading lay Roman Catholic, and three times Premier.

[33] *The Argus, loc. cit.*

[34] An educated Anglo-Irishman from Trinity College, Dublin, and one of Melbourne's leading lay Anglicans. Chief Justice 1857-1886.

[35] *The Argus, loc. cit.*

[36] Just, *op. cit.* 3-8. 'These English developments were thus available to the Victorian law-makers not as obscure precedents, but on the contrary, as precedents very much under notice and scrutiny in the home country *at that very time*' (p. 8; the author's own emphasis).

[37] *G.F.C. Report,* para. 87, xxxi; Note 16 *supra.*

Local Court system in the Parliamentary Debate of 1857, he claimed, however, that, in vesting the Courts with both executive and judicial functions, 'they had but acted in accordance with English precedents'.[38]

While it may safely be assumed that the existence of a special mining judicature in various parts of England, recently revived and re-organised, would have encouraged, in a general way, the formation of such a judicature in Victoria,[39] an examination of the relevant English legislation does not suggest that it provided the pattern for Victoria's Local Courts, certainly not as to their constitution.

In 1836,[40] the ancient Cornish mining 'Courts of the Stannaries' were re-established under (appointed) Vice-Wardens, being barristers of at least five years' standing, assisted by jurors selected in the usual way — *not,* that is, by election by and from the miners. The Courts had no legislative functions (save in relation to their own procedures). The Stannary Act of 1855[41] merely amended the earlier Act in matters of detail and extended the jurisdiction of the Courts to Devon.

The mining legislation of 1838[42] for the Forest of Dean replaced the 'Gavellers' with Commissioners. The Commissioners could make rules and regulations in relation to mining, but their functions were principally of an executive nature (granting mining leases, keeping mining registers, and so on), and they had no true judicial functions. Nor was there any provision at all for the involvement of the 'Free Miners' in the work of the Commissioners, even if anciently the situation had been otherwise.[43]

For the mining areas of Derbyshire, an Act of 1851[44] had redefined the jurisdiction of the 'Great' and 'Small' Barmote Courts, presided over by a legally-qualified Steward. Jurors were used in the work of the Courts, but, again, selected, not elected, though it was provided, in relation to the Great

[38] *Hansard 1857,* 941. O'Shanassy's 'they' may mean the Gold Fields Commission, but it could mean the Lesiglative Council which passed the 1855 Act. The phrase 'executive and judicial' is that used by O'Shanassy, and hence I have retained it, but almost certainly he meant what others called 'legislative and judicial'.

[39] Captain Clarke in the 1857 Legislative Assembly debate is reported as saying: 'It has been urged that this was exceptional legislation; he granted this, but would any one say that it was not required? But were not the Mining Courts of the Duchies of Lancaster and Cornwall, the Barristers Court of one, the Stamers Court of the other, exceptional to the other tribunals of the mother country, arising from and sustained in deference to and in consonance with a peculiar and exceptional state of circumstances . . . ' *(Hansard 1857,* 944). He (or the reporter) has got the names wrong, but the passage does show that there was some local knowledge of the English situation.

[40] (U.K.) Stannary Act, 1836, 6 & 7 Wm. IV, c. 106.

[41] 18 & 19 Vic. c. 32. On the Stannaries, see Holdsworth, W. S., *History of English Law,* I, 151-165. From the early 16th century, there were also Stannary Parliaments in Devon and Cornwall; though apparently never formally abolished, they ceased to meet in the mid-18th century; 'they represented rather the large mine owners and dealers in tin than the working miners' *(ibid.,* 159).

[42] Dean Forest (Mines) Act, 1838, 1 & 2 Vic. c. 43. The old term 'Gaveller' was (as the Act indicates) a corruption of 'Gawle-under-the-Wood'.

[43] Just, *op. cit.* 5.

[44] High Peak Mining Customs and Mineral Courts Act, 1851, 14 & 15 Vic. c. 94.
A 'local' Act of 1852, not printed in the *Statutes at Large,* defined and amended certain 'mineral customs' and made better provision for the administration of justice in certain named Barmote Courts: Derbyshire Mining Customs and Mineral Courts Act, 1852, 15 & 16 Vic. cl. xiii.

Barmote Court, that so far as possible Jurors should be 'persons experienced in practical mining' (Section XXII). While the principal role of the Barmote Courts was judicial, the Great Barmote Court was empowered 'to make such new and additional Customs, Articles, Rules and Orders as to them shall seem expedient for the better Regulation of the working and carrying on of the Mines within the District under the provisions of this Act', subject to disallowance by the Chancellor of the Duchy of Lancaster or by Parliament (Section LVI).

The conclusion must be that the early 19th Century English legislation on the mining judicature had comparatively little to do with the detail of the Victorian scheme for Local Courts, and nothing at all to do with the decision to make their membership elective.

Nor is the Californian experience of much significance. True, the early gold-fields there were largely self-governing, but of necessity, because central government was so remote and California had not been incorporated as a State of the Union.[45] Very temporarily, California-style self-government prevailed on the Ballarat fields, but only until central government could assert itself, which it did with some speed, as we have seen.[46] There is, so far as I am aware, no evidence at all for any Californian influence on the formation of the Local Court system.

To the question, then, why were these Courts constituted as *elected* bodies, we are left, in the end, with a rather general and imprecise answer, but the only answer, I believe, to which on the evidence we can properly come.

It is this.

The decision to make the positions on the Courts elective (save for that of the Chairman) seems to have been just another instance of the government's general anxiety (at the prompting of the Gold Fields Commission) to meet the miners' political aspirations, which were now recognized as legitimate. The Gold Fields Commission had referred over and over again, using much the same words, to 'the absence of political and social status in the great population of the mines'.[47] At the beginning of its Report, it identified three principal causes of discontent — the licence fee; the land grievance; and

> (3) The want of political rights and recognized status, the mining populati . . of this colony having been hitherto, in fact, an entirely non-privileged body, invidiously distinct from the remainder of the colonists, consisting of large numbers without gradations of public rank, political representation, or any system for self-elected local authority . . .[48]

[45] California was ceded to the United States in 1848. The great gold rush occurred in 1849. In 1850, California became the 31st State of the Union. On law and order on the Californian gold fields, and comparisons with Australia, see Nicholson, J., 'Procedures and Perceptions of Authority: the Gold Rush Camps in Australia, Canada and the United States' (1973) 32 *Public Administration* (Australian series) 392.

[46] Serle, *op. cit.* 20. Clarke, *op. cit.* 17-19.

[47] The quoted words are from *G.F.C. Report,* para 51, xxi. Similar phrases appear, *inter alia,* on p. xi.

[48] *Ibid.* para. 15 (3).

In explaining and commending the Miner's Right to the Legislative Council, the Colonial Secretary, William Haines (later Victoria's first Premier),[49] expressly linked its political aspects with the proposed Local Court system:

> There were also certain political privileges attached to [the Miner's Right], one of those being the possession of the franchise, under the Act recently sent home [i.e. the new Constitution Act]. He was enabled to sit as a member of the local court; and at any meeting for the election of members of that court, he was entitled to give expression to his opinions.[50]

The proper conclusion, I believe, is that the provision for elections was a genuinely democratic gesture, adopted under the political pressures of the day, and superimposed, as it were, upon a court structure devised primarily by reference to highly practical and non-political considerations 'peculiar' to the gold fields. The elective aspect of the Local Courts was the icing on the cake. The editorial comment of *The Argus* is worth quoting:

> That portion of the bill which possesses the greatest importance, and the greatest novelty, relates to the establishment of certain local courts . . . The proposed constitution of those courts appears to be broad and popular.[51]

(5) *The Establishment and Working of the Local Courts*[52]

Following the appointment of the first Resident Wardens (all of whom, incidentally, had previously been the Resident Commissioners) at Ballarat, Sandhurst, Avoca, Beechworth and Castlemaine, the first Local Court elections were held, beginning with the Ballarat election on 14 July 1855. This was a predictably exciting occasion, held in the open air on Bakery Hill, and attracting a great crowd.[53] It was at this meeting that Raffaello Carboni (and four others) were elected unanimously to the Court, and the remaining members by majority, all on a show of hands. Later in July, there were elections at Beechworth, Sandhurst and Castlemaine; the first election for the Avoca district was held in August. In the course of time, Sub-Wardens were appointed and additional Local Courts were elected within the five principal districts. By the end of 1857, when the system was abolished, there were 21 Local Courts in operation.[54]

The Courts were active in the exercise of their legislative powers. Some 170 submissions of new or amended rules have been recorded. The Ballarat 'code' submitted at the end of 1857 contained 101 separate regulations.[55]

[49] After medical training in England, he had migrated in 1841 and farmed near Geelong. 'Known widely as "Honest" Haines, he was affable and kindly in manner and looked the old-fashioned country gentleman he was': Serle, *op. cit.* 189.

[50] *The Argus, loc. cit.*

[51] *Ibid.*

[52] In this section of the paper, I have made considerable use of the analysis of the Gold Fields files of the Colonial Secretary made by Donald Just: see Note 23 above. It is to be regretted that Mr Just's thorough and detailed thesis has not resulted in any publication, as there is certainly nothing in print to match it. A copy is lodged in the separately catalogued thesis collection in the Law Library of the University of Melbourne.

[53] Withers, *op. cit.* 186. Carboni, *op. cit.* 164-5. Bate, W., *The Lucky City* (1978) 79.

[54] Just, *op. cit.* 39, 42, 44-5.

[55] *Ibid.* 66.

Complete statistics on the judicial work of the Courts are not available. Such figures as do exist show that, with the exception of Beechworth (35 cases by August 1856), the breach of regulation cases were of minor significance (Sandhurst recorded 23 in the same period, Ballarat only nine, and seven Courts recorded none at all). By contrast, the jurisdiction to hear partnership disputes was much more frequently invoked, although even here there were marked differences amongst the Courts (Ballarat headed the list with 502, Sandhurst recorded 150, and Avoca 36; the figures at all other Courts were lower, declining to one at Yackandandah).[56] Ballarat had by far the busiest Local Court; Withers, the 19th Century historian of the city, claims that 'some 1600 cases were adjudicated upon by the Ballarat Local Court during its twenty months' existence'.[57]

Additionally, although not contemplated in the legislation, the Courts came to involve themselves in the exercise of certain essentially executive powers — the granting of leases under the Act (eventually formalized by Regulation), the appointment of surveyors in relation to claims, and (at any rate at Ballarat) the approval of claim amalgamations and the granting of water-rights.[58]

Courts also acted to some extent as vehicles for the application of general political pressure;[59] we surely hear the voice of the fiery Carboni in the indignant letter of the Ballarat Local Court of 25 September 1855 to the Colonial Secretary, protesting at the lack of government response to a proposed regulation:-

> It is with feelings of regret and dying confidence in the Government, that the members of the Local Court have observed the indifference with which the Executive Government has treated these and other matters of paramount importance to the miners. We are alone the sinews of the entire colony, aye, even very life . . .

As Withers comments, 'the document seems to have about it the odour of the old Bakery Hill meetings'.[60]

Yet for all the vitality to which the early Ballarat records, at least, appear to testify, the Local Courts were to have a short life — in some cases, quite remarkably short (seven of the Courts were elected for the first time only in 1857, that at Mt Ararat as late as 12 September 1857, when the Bill for their abolition had already passed its Second Reading in the Legislative Assembly).[61] In terms of sheer survival-power, they must be accounted a failure.

For this failure, a number of reasons may be adduced.

[56] *Ibid.* 83.

[57] Withers, *op. cit.* 189. Carboni claimed that by 30 September 1855 the Local Court 'had already settled . . . 201 disputes, and given their judgment, involving some half a million sterling altogether, for all what they knew': *op. cit.* 16.

[58] Just, *op. cit.* 86-93. As to water-rights, see also *ibid.* 74; Withers, *op. cit.* 189.

[59] Just, *op. cit.* 94.

[60] Quotation and comment from Withers, *op. cit.* 190.

[61] Just, *op. cit.* 39. The Bill was read a second time in the Assembly on 9 July 1857 and passed its third reading on 29 September. It passed in the Council on 13 October.

One reason was the deadly democratic disease of sheer apathy.

> Apathy [comments Just] delayed Local Court establishment at Avoca, Waranga and Fryers Town and at Beechworth the Warden reported apathy a handicap. The first Dunolly Local Court was elected by about thirteen persons and at Avoca the members of one court were 'almost entirely elected by each other'. Even at Sandhurst, one by-election at the Shamrock Hotel brought forward no candidates.[62]

Captain Clarke, speaking in the Assembly debate in July 1857, confirmed the dismal story, adding Castlemaine and Ballarat itself to the list.[63]

There were other problems, some relatively minor, some more serious.

The method of election, as laid down in the Act, was very loose and really very odd. In particular, there was no requirement for the formal nomination of candidates in advance of the public meeting, so that those attending did not necessarily have any idea of who were offering themselves. Names were simply voted upon as the Warden announced them. At Sandhurst, the Warden drew the names one by one out of a hat; 'he saw the absurdity', he said, 'but . . . his place was to carry out the law'.[64] Warden Daly, chairing a Ballarat election meeting in July 1857, admitted that the procedure 'scarcely gives to candidates a fair chance'.[65] The checking of qualifications (the Miner's Right or a lease under the Act) and the counting of votes were both frequently disorderly to the point of farce.[66] After the Ballarat election of 15 July 1857, the *Ballarat Star* commented:

> No body of sensible and thinking men will long continue satisfied with such a method of providing themselves with Judges . . .[67]

Faction-fighting affected both the election process and the actual working of the Courts. The bitterest disputes were between the 'big men' and the 'small men', the former being large groups of miners and (increasingly) limited

[62] Just, *op. cit.* 47, citing official correspondence. Brown, G. O., *Reminiscences of Fryerstown,* Castlemaine, n.d. (c. 1980), 29-30: 'Eight months after the proclamation announcing the formation of the Local Court at Fryerstown, nothing had been done. Disputes amongst the miners grew at an alarming rate, and conditions were becoming chaotic with no court to give their jurisdiction'; the members were finally elected early in 1857.

[63] *Hansard 1857,* 944: 'He had been present on the gold-fields during five elections of members of local courts — on Bendigo, Castlemaine, and Ballaarat. On Ballaarat very little excitement existed, and the great body of diggers appeared totally indifferent as to what was going on. At another time he was present when nine members had to be elected, and when five or six persons came up to vote for one another. On another occasion the election had to be postponed because no persons came forward to vote. This was at Castlemaine, and in consequence there was no local court established therefor *[sic]* sometime *[sic]*'.

Apathy probably was also a reason for the difficulties in getting quorums: Just, *op. cit.* 57.

On the other hand, a Ballarat Local Court election as late as July 1857 could still draw a crowd of 3000, with speeches, a German band, 'chaffing, cheering and intense exhilaration' and a general atmosphere of 'holiday': Just, *op. cit.* 46, quoting the *Ballarat Star,* 15 July 1857.

[64] Brown, H., *Victoria As I Found It,* London (1862) 269. At 270-277, Brown gives a long and entertaining account of a Local Court election at Bendigo.

[65] Just, *op. cit.* 49, quoting *The Ballarat Star,* 15 July 1857. Just records some unofficial experiments to improve the procedure.

[66] Just, *op. cit.* 47-8, 49-50. The *Ballarat Star* described the July 1857 election as 'as usual . . . a disgraceful farce' and accused many miners of voting twice. Just, *op. cit.* 50, quoting the *Ballarat Star,* 15 July 1857.

[67] Quoted Just, *op. cit.* 50.

liability companies interested in obtaining leases or extensive claims for the mining of deep leads and quartz lodes, the latter being chiefly alluvial miners working singly or in small partnerships. Many believed that the whole Court system was weighted in favour of 'small men', and worked against the best interests of the industry as a whole. As one contemporary observer wrote, the Local Court 'did more harm than good; it discouraged all capital and companies, and did its best to encourage each man to work on his own account'.[68]

When Haines, now Premier, rose in the Legislative Assembly on 9 July 1857 to move the Second Reading of the Bill which was to abolish the Local Courts, he began his speech with a reference to this very problem:

> It is my opinion that the system has not worked so well as might be desired. The effect of our former legislation seems to be prejudicial to the co-operation of miners and capitalists, and also to be productive of antagonism between those who have only their labor to give and those who possess capital to employ.[69]

There were also accusations of 'partisanship' in the election process of a rather different nature — 'the Irish endeavouring to elect Irish members; the Scotch doing their best to secure the election of Scotch members, — the object of each faction being to elect its own partizans.'[70]

Not surprisingly, perhaps, the actual working of the Courts attracted charges of partiality and even corruption. Atkins, writing in the 1860's in Brough Smythe's definitive account of the gold fields, thought suspicions of this kind an inevitable consequence of combining in the Courts 'the rights of making and of administering their own laws',[71] a point to which we shall return. But sometimes the charges were much more blunt and direct. Peter Lalor made a very strong statement on the point in the Parliamentary Debate of 1857:

> The members of the Local Courts exercised a species of terrorism over the persons within their jurisdiction — to such an extent that they were afraid to complain of the judges, who would perhaps have to decide on their cases the next day. This he positively asserted.[72]

Earlier in the debate, other speakers had adverted to the problem. Mr Sitwell quoted from a resolution of 'a large meeting of miners at Ballaarat' protesting at 'the disgraceful proceedings of some of the members of the Local Court' and referring to 'the extraordinary number of shares held on nearly all the leads in the district by some of the members of the Local Court'.[73]

[68] Brown, *op. cit.* 277. See also Serle, *op. cit.* 221-2; Bate, *op. cit.* 79, 91. 'The regulations framed by the Court also expressed a small-man bias, which has been questioned by students of mining from Brough Smyth to Blainey, because it impeded the economic extraction of gold. But it had a social foundation, and from its concern for the underdog came many of the most admirable achievements of Ballarat society': *ibid.* 79.

[69] *Hansard 1857,* 931.

[70] *Ibid.* 936 (Sitwell). The *Ballarat Star,* in reporting the election of July 1857, claimed the old members had been re-elected simply because they 'had managed to rally round themselves a tolerable body of partisans': quoted Just, *op. cit.* 50. And see Bate, *op. cit.* 91.

[71] Smyth, *op. cit.* 386.

[72] *Hansard 1857,* 1138.

[73] *Ibid.* 936. Sitwell also quoted a letter written by Humffray to the *Ballarat Times,* 22 April 1856, in relation to the Local Court in which he had referred to 'the liability to party influence or private interest in their judicial capacity': *ibid.* 937.

Mr Baragwanath admitted that 'as a member of a Local Court, he felt on one occasion that they were open to the imputation of questionable motives, and rather than subject himself to such, he then stated he would resign'.[74] Archibald Michie reported that 'he had heard suspicions as to the want of impartiality of the judges in the Local Courts on the gold-fields, and he had heard them frequently uttered — and from that he had gleaned the presumption that the suspicion was not entirely unfounded'.[75] On the other hand, it must be said that other speakers in the debate insisted that accusations of partiality and corruption could not be sustained.[76] There seems no doubt that there was real concern on the point.[77] Perhaps the position was most fairly summed up by the lawyer John Wood:-

> He would not and did not charge the members of the Local Courts with corruption or partiality; but remembering that they were identified with the interest — with the cases upon which they had to record a decision — be thought there was at any rate room for suspicion, and be considered that they should be, like Caesar's wife, 'above suspicion'.[78]

Although on the whole there seems to have been a considerable measure of satisfaction with the actual decisions of the Courts in both their legislative and judicial capacities, there was some unease at these lay tribunals (for not even the Wardens were legally qualified) handling legal issues which were by no means always straightforward. Indeed, over the years in which they operated mining litigation was becoming increasingly complex.[79] The point was raised a number of times in the Parliamentary Debates of 1857. Haines, in introducing the Bill, had commented that 'justice administered in a rough and rugged manner is not always satisfactory, nor so perfect as it should be'.[80] Michie said that 'he was at an utter loss to conceive why the gold fields . . . should not, as well as any urban population, receive the highest order of judicial Courts, or why they should be excluded from the highest juridical principles which could be introduced'.[81] Wood thought it important 'that there should be a professional man engaged in the judicial functions of a court of this kind'; as did some other speakers, he rejected 'the absurd principle

[74] *Ibid.* 942. Mr Baragwanath's name does not appear on Just's (incomplete) list of Local Court members: *op. cit.* 51-3.

[75] *Hansard 1857,* 1138. Earlier in the debate, Michie had commented that 'the members who composed [Local Courts] were too intimately connected with the interests which they were daily and hourly called on to adjudicate in . . . ': *ibid.* 945. Archibald Michie was a very highly regarded lawyer and Parliamentarian; he had been one of the barristers defending the Eureka rebels in 1855.

[76] *Ibid.* 935 (Humffray), 1138-9 (Owens), 1139 (Blair). Withers wrote that 'few substantial complaints were made against the decisions delivered by the law magistrates thus newly called by the will of the miners from their ordinary and so different avocations': *op. cit.* 189.

[77] Just, *op. cit.* 57-9, brings forward some additional evidence.

[78] *Hansard 1857,* 939. Wood, a native-born Tasmanian, had read his Law at the University of Edinburgh.

[79] Smyth, *op. cit.* 386. Serle, *op. cit.* 223. Bate, *op. cit.* 79.

[80] *Hansard 1857,* 933.

[81] *Ibid.* 946; and see his remarks at 945.

so often enunciated, that because a man was not a miner therefore he could not understand mining disputes'.[82]

The problem of the lack of legal skills in the courts themselves was compounded, some believed, by the reluctance of some Local Courts (those at Castlemaine, Ballarat and Avoca) to admit lawyers to their hearings. This was to be one of the most contentious issues in the Courts' brief history. In response to a question raised by the Warden at Castlemaine, the Law Officers of the Crown gave a written opinion that persons appearing before Local Courts were entitled to be represented by lawyers.[83] In Ballarat, this ruling caused the greatest indignation. At a meeting on 25 September 1855, the Court resolved (by a majority of eight to one) that, in effect, it would not accept the ruling, and it called a public meeting on the question on 29 September on Bakery Hill. In one of his more subdued passages, Raffaello Carboni told the crowd that 'the admission of lawyers into the Local Court would give rise to endless feuds, where valuable interests were concerned, and so much time would be lost in useless litigation . . . [A]re you to allow the Ballaarat lawyers to fleece you of your hard earnings?' The meeting enthusiastically supported the Court's stand, and most of its members resigned (although later re-elected).[84] In the end, however, the Courts bowed to the inevitable and allowed the lawyers in; and it was inevitable because, as Weston Bate points out, the Courts were 'already deeply involved with the legal technicalities of complicated partnership agreements, drawn up by lawyers and vital to the development of mining'.[85]

> . . . [A]fter a little while [records Withers] the storms blew over, Ariel [i.e. Carboni] did his best to fold his wings and keep quiet, and the lawyers having won their battle, pocketted many fees by way of first fruits of a heavier harvest yet to come.[86]

Difficulties of a rather different nature arose as a result of the division of jurisdiction in mining disputes amongst Local Courts and Justices, especially when the Resident Warden himself was operating independently and the Local Court was chaired by a Sub-Warden, as increasingly became the case.[87] The

[82] *Ibid.* 939; he continued 'or just as well might it be said that a grocer and sugar merchant having a dispute, it could only be decided by a jury of grocers and sugar merchants. (Hear, hear.)' *(ibid.).* Wood and others repeated the point later in the debate: 1137-8. But compare defences of the constitution of the Courts by Blair and Humffray. Blair said: 'he was bound to say that these popular institutions worked as well as any other popular institutions. (Hear, hear) . . . He viewed with suspicion this measure, because the law element was too strong in it. He thought the fewer paid legal officials there were in a country the better chance there was for justice' (942). (Blair was a Northern Ireland clergyman turned journalist). Humffray said that 'if the miners were canvassed through, ninety per cent of them would be in favor of the continuance of the existing courts, with all their defects' (1138).

Just has noted that a local barrister, McDonough, served for three terms as a member of the Castlemaine Local Court: *op. cit.* 53-4.

[83] Quoted in Just, *op. cit.* 77. His account of this controversy is at 77-9.

[84] Withers, *op. cit.* 189-192. Carboni, *op. cit.* 15-16, 32-4. Bate, *op. cit.* 79.

[85] *Op. cit.* 79.

[86] *Op. cit.* 192.

[87] Just, *op. cit.* 59-60.

apparent overlap between the 'encroachment' jurisdiction of the Justices and the 'breach of regulation' jurisdiction of the Local Courts has already been mentioned. There is evidence that there was a good deal of confusion and uncertainty on jurisdictional issues, both in theory and in practice.[88]

A major argument for the Local Court system had been that it would allow both regulations and decisions to be those most appropriate to the 'peculiar' (to use the favoured adjective) circumstances of the district. But there was another side to the coin — a bewildering diversity of regulations and some lack of consistency, at least, in decision-making. The former seems to have been the more serious problem, rendered even more exasperating by the existence alongside Local Court Regulations of several sets of regulations made by Government under the Act.[89] The local historian of Fryerstown recalled that miners themselves complained of the situation:

> Many of the regulations framed by these Local Courts caused confusion among the moving population. Miners coming from one goldfield where certain regulations applied, arrived at Fryerstown and were bewildered to find them totally different and inadequate.[90]

Withers of Ballarat also wrote of 'the multiplicity of courts being followed by a multitude of varying regulations', forming 'another element of dissatisfaction . . . to quicken the desire for further reform'.[91]

(6) *The Abolition of the Local Courts*

The Local Courts met for the first time in July of 1855. Before the year was out, they were once again under the scrutiny of the Legislature: on 11 December, 1855, a Select Committee of the Legislative Council was appointed 'to take into consideration the powers and regulations of the Local Courts on the Gold Fields, and the necessary means for carrying out their arrangements'. It reported on 19 February 1856.[92]

Although it recorded the receipt of a number of petitions from mining districts, the Select Committee appears to have held only one public hearing, on 21 December 1855, and the only witness examined at that hearing was J. A. Panton, the Resident Warden at Sandhurst.[93] Panton favoured abolishing

[88] *Ibid.* 84-5.
[89] *Ibid.* 66-9.
[90] Brown, G. O., *op. cit.* 29.
[91] *Op. cit.* 188; 'the larger views and wants of the miners required the abolition of the Local Courts in order to do away with vexatiously numerous and conflicting regulations . . . ': *ibid.* Just contends that 'there is no specific evidence' that the large number of varying regulations 'led to confusion' *(op. cit.* 76), but the local traditions to that effect, as testified to by Withers and Brown, are strong, and Just's own catalogue of the variations lends credence to the charge *(ibid.* 66-75).
Certain other aspects of the working of the Courts have not been dealt with in this paper — for example, the vexed and interesting question of payment of members (members were paid at Ballarat, and, briefly, at Sandhurst, but the practice was of doubtful legality), accommodation arrangements, and the appointment of clerks.
[92] *Report from the Select Committee of the Legislative Council on Gold Fields Local Courts, Votes and Proceedings of the Legislative Council, Session 1855-6,* II, D. 8.
[93] Efficient and highly respected, Panton was only 25 at the time. His whole career was in the magistracy; he was Melbourne's Senior Magistrate from 1874 to 1907.

the Local Courts, replacing them with a Local Council, which would not have either judicial or executive powers. He thought mining disputes should be heard by a Justice of the Peace and four Assessors, with an appeal to General Sessions. 'The Local Courts, as at present constituted', he said, 'do not answer the purpose for which they were established; their decisions do not give universal satisfaction . . '[94]

Despite this evidence, the Select Committee reported very differently.

As its recommendations were not destined to be implemented, we need not examine them too closely. Suffice it to say that the thrust of the recommendations was to *extend* the jurisdiction of Local Courts. The Court was to become 'the authorized tribunal to deal with all matters relative to the general working of the Gold Fields', and was to be given an appellate jurisdiction in 'encroachment' cases. While the Courts were to remain elective, it was proposed that nominations should be in at least ten days before election, with names published in the local press, and the election was to be by ballot if ten or more so requested. It was further recommended that no person should act as a member of a local court, arbitrator or assessor 'in any case in which he may have a personal interest'.[95]

Clearly, then, the Select Committee supported the system, while acknowledging that it could and should be improved.

But the Legislative Council was by this stage in its dying days. The new Constitution had been proclaimed the previous November, and elections were pending for the first Parliament under responsible government. In this confusing and difficult transitional period,[96] the Report was simply shelved.

The new Parliament was opened with pomp and ceremony on 29 November 1856. On 9 July 1857, the Premier, Haines, introduced the Bill which was to abolish the Local Courts.[97] There had been no further inquiry into the matter, a point which rankled with some members,[98] and the policy of this Bill (and the resulting Act) was certainly very different to that proposed by the Select Committee in February 1856.

The main features of the new legislation might be conveniently outlined at this stage.[99]

The Local Courts as such were abolished. Their *legislative* powers were transferred to mining boards, each comprising ten members elected by secret ballot and selecting their own Chairman. Here there was, quite deliberately, a degree of continuity with the system under replacement. 'It is proposed'

[94] *Op. cit.* Minutes of Evidence, 4. Under strong questioning from Humffray and Lalor in particular, Panton unreservedly supported the admission of lawyers to the Local Courts: *ibid.* 5-6.

[95] Other recommendations included provision for the appointment of arbitrators elected by the miners in relation to encroachment disputes, and the regularisation of payment of members.

[96] On the problems of this transitional period, see Serle, *op. cit.* 199-203.

[97] *Hansard 1857,* 931. Humffray had introduced a reform measure earlier in the Session, but had withdrawn it in deference to the Government's Bill: *ibid.* 934.

[98] *Ibid.* 941-2 (O'Shanassy), 942 (Blair), 943 (Clarke).

[99] Gold Fields Act, 1857, 21 Vict. No. 32. What follows is in broad outline, omitting detailed section references.

said Haines, '. . . to deprive the Local Courts of their judicial functions, and confine them merely to legislation . . . It is absolutely necessary these courts should exist for the purposes of legislation.'[1] So the mining boards were to be the Local Courts under another name — but with *legislative* functions only (and amended in other details as well).

The *judicial* powers of the Local Courts were now transferred to Courts of Mines, each presided over by a judge appointed from barristers of at least five years' standing. Appeals were provided to the Supreme Court. Parties were entitled to legal representation.

Additionally, although subject to some amendments, the existing jurisdiction of Wardens acting with or without assessors was retained.

It was a neat and tidy re-arrangement, but it marked, nevertheless, the end of a unique experiment.

The Bill was vigorously debated in the Legislative Assembly (less so in the Council). Many members spoke against it,[2] and on a critical division during the Second Reading Debate there were 27 in favour of the Bill (in effect) and 11 against.[3] Members differed sharply in their views on the attitude of the miners themselves, some claiming that miners welcomed such reforms,[4] some asserting the contrary.[5] There were protest meetings at Ballarat and Sandhurst,[6] and the Local Courts themselves, naturally enough, were in strong opposition;[7] but the gold fields press, on the other hand, was divided.[8]

At all events, the Bill did pass and was assented to in November 1857. The new mining regime came into being on 1 January 1858.

[1] *Hansard 1857,* 932. He continued: 'A great benefit has accrued to the miner from their legislation, and from the knowledge they brought to bear upon the subjects before them. I am sure the Government could have not framed laws so satisfactory, and, in fact, I am not aware that, in any other way, such useful regulations for the miners could have been made; in fact, the Government must have been quite in the dark, for nothing but experience would enable any body of men to legislate on such a subject. Therefore the Government is prepared to maintain the legislative powers of these courts': *ibid.* 932-3.

[2] In the Legislative Assembly, Humffray, Owens, O'Shanassy, Baragwanath, Blair, Greeves, Grant, Fyfe. In the Legislative Council, only Hood voiced hesitations.

[3] *Ibid.* 947.

[4] Haines so claimed, in introducing the Bill: 'this bill is the result of a desire to meet fairly and in every way the wants of the miners'; *ibid.* 934. See also 936 (Sitwell); 942 and 1138 (Lalor); 943-4 (Clarke); 945 (Michie); 1307 (Mitchell — Legislative Council); 1309 (Urquhart — Legislative Council).

[5] *Ibid.* 935 and 1138 (Humffray); 938 (Owens); 939, 940 (Wood); 940-1 (O'Shanassy); 942 (Baragwanath); 942 (Blair). Wood made the interesting comment that 'one reason he conceived why the bill was so generally unpalatable to miners was, that it was brought forward by a Government who had also introduced a very objectionable Land Bill, and the feeling of dislike entertained towards the one had been transferred to the other': *ibid.* 940.

[6] Just, *op. cit.* 99-100.

[7] *Ibid.* 99. Miller, in the Legislative Council said that 'he had seen a petition from the Local Court of Sandhurst against' the Bill: *Hansard 1857,* 1308.

[8] Lalor cited the *Ballaarat Star* as 'strongly in favor of the Bill', and the *Courier of the Mines* and the *Ballaarat Advertiser* as 'opposed to the present system of Local Courts': *ibid.* 942. Just notes that the *Maryborough and Dunolly Advertiser* also supported the Bill, but that *The Bendigo Advertiser* regarded it as objectionable: *op. cit.* 99-100.

When the Parliamentary debates of 1857 are examined, it appears that two principal lines of argument prevailed. True, a number of particular criticisms of the working of the Local Courts were made, as we have already seen, but two matters which might fairly be described as concerns of principle dominated the Parliamentary discussion.

The first of these concerns was that the members of the Local Courts were popularly elected. Though Humffray remained a vigorous supporter of the elective principle for a mining court,[9] most of those who spoke on the point were against him. Sitwell, who followed Humffray in the debate, said that 'with the exception of members of the Local Court, no person that he had ever heard, had approved of the principle of elective judges', and he claimed (inaccurately, of course) that the system was on the way out in America because it 'tended to the introduction of abuses'.[10] Peter Lalor was firmly against election: 'the elective system did not work well, nor was it approved by the miners'.[11] The most forceful statement in opposition to the elective principle was made by John Wood at the Committee stage in the Assembly:

> He disapproved of an elective judiciary, and he was confirmed in his opinion by the example of America. He believed purity of the administration of the laws dated from the abolition of that principle, and that the existence of an elective judiciary was a curse to any community. Men holding such appointment were frequently subjected to charges of partiality; and how injurious must this prove. How little could the conscientious administration of justice be looked for under such circumstances? If the principle was good at the gold-fields, it should be good for the metropolis and should be extended to the Supreme Court of the colony. But he believed there were many advantages in having a professional judge, properly appointed, for then it would be known that he would have no reasons for giving decisions founded on partiality. He would be glad to see the principle of an elective judiciary for ever abolished . . .[12]

This is a strong statement, and it is quoted at length, because it represents the view which was to prevail. The 'icing on the cake' had proved unpalatable.

The second matter of principle to receive attention was the vesting in a single institution (the Local Court) of both legislative and judicial functions.

While, again, there were those such as Humffray[13] and O'Shanassy[14] who were prepared to defend the situation, at least in the special circumstances of the gold fields, the weight of opinion was opposed to it.[15]

[9] *Hansard 1857,* 935: 'The proof of the confidence of the mining community in those courts was to be found in the fact that the members of those courts were repeatedly re-elected. He must contend for the continuance of the power of exercising the judicial function, because they would then be carrying out a principle, the advantage of which all acknowledged, the advantage of self-government . . . He would be glad to see the establishment of two courts, . . . — one court to have the legislative, and the other the judicial function — both popularly elected. The courts thus elected would retain the confidence of the miners, and would carry out what it must be the desire of the Government to establish, a fair and speedy administration of justice to the miners'.

[10] *Ibid.* 936.

[11] *Ibid.* 942; and see also Lalor at 1138.

[12] *Ibid.* 1137-8.

[13] *Ibid.* 935. But Sitwell was able to demonstrate that Humffray, on other occasions, had conceded that there was a problem here: *ibid.* 936, 937.

[14] *Ibid.* 941. Greeves said that he had earlier been a 'decided opponent', but now thought the present system ought not to be interfered with: *ibid.* 945.

[15] Just agrees that 'the argument was strictly one of principle', adding that '[t]here is no evidence in the debates *or in the Chief Secretary's files* to show any detrimental effects having actually occurred from the continuation of the two powers: *op. cit.* 97 (emphasis added).

Haines, speaking for the Government, referred to the matter in his opening speech:

> I am of the opinion that the principle always seemed bad that the power of making the law and administering it vested in the same body. The experience we have had of the gold-fields does not tend to show that the principle is a sound one . . ![16]

Lalor[17] and Clarke[18] both noted that the principle had been strongly criticized in the press, and Sitwell[19] read out a condemnatory resolution passed by a meeting at Ballarat. Wood said that 'during his canvass among his constituency, he told them that, while his views were opposed to the continued union of the legislative and judicial functions in these courts, yet he would waive his prejudices on the question if it was their wish that the present system should be continued. But in no case did he find any body of miners in favour of the continuance of the system . . '.[20]

Contemporary historians singled out this combination of functions as the major weakness of the Local Court system. It 'did not work satisfactorily', wrote Withers,[21] and Atkins concluded that it 'was productive of effects which awakened, whether rightly or wrongly, suspicions of partiality and corruption'.[22] Their successors of today have tended to agree: Serle describes the complaints about the court's combination of legislative and judicial functions as 'proper'.[23]

With English mining experience to cite (I have in mind the Great Barmote Court), it would in fact have been possible to make a case for this aspect of the Local Court's constitution. Moreover, specific evidence that it had worked badly was not really brought forward. But the combination of functions was so alien to ordinary British constitutional theory and practice that, when added to the other problems which had emerged, it led finally to a fatal undermining of such cautious support as the radical Local Court experiment had managed to attract.

(7) *Conclusion*

Our overall judgment on the Local Courts can, I believe, be relatively favourable.

They may not have worked very well as 'courts' in the ordinary sense, but they did allow 'practical miners' to contribute their extensive local knowledge

[16] *Hansard 1857*, 932. Haines did insist, however, that he did not mean 'to cast any reflection on the mode in which the Local Courts have discharged their judicial functions': *ibid.*
[17] *Ibid.* 942.
[18] *Ibid.* 944.
[19] *Ibid.* 936.
[20] *Ibid.* 939. He also claimed that some members of Local Courts felt likewise.
[21] *Op. cit.* 118.
[22] Smyth, *op. cit.* 386.
[23] *Op. cit.* 222-3.

and experience to rule-making and dispute-settling in their various districts,[24] and in this way to lay the foundations for the specialized mining law and practice which was to develop in Victoria over the following years. The Local Courts represented a stage, perhaps a necessary one, in the development of what was to become a highly sophisticated and admired mining judicature and regulatory system.

In the short term, moreover, they had been unquestionably successful at a political level. The prompt establishment of the Courts had played a major role in meeting the miners' demands for a measure of self-government. 'They should look at the good the present system had accomplished', said Greeves in the 1857 Debate, 'for it certainly had been successful in restoring order and tranquility on the goldfields'.[25] However unorthodox and ultimately unsuccessful the elective nature of the Courts may have been, a vote had been given to the general body of miners months before they obtained their Parliamentary franchise under the new Constitution. It was in the Local Courts that the goldfields found 'a first taste of democracy'.[26]

Withers' conclusion[27] may serve as my own:

> They were creations of the times, and served the times faithfully. As experiments they proved defective, but their work has been a part of our mining progress, and will remain an honorable portion of colonial history.

I would add a final reflection.

Overall, my paper demonstrates, I believe, that political considerations played as large a part as practical considerations in shaping the nature of the Local Courts in the first place, and especially in bringing about their later fall from favour.

[By 'political' in this context, I do not mean 'party political'; I mean 'political' as 'pertaining to the state or its government' (to quote the *Macquarie Dictionary*). I mean 'political' as that word shades into 'constitutional'.]

Take the most distinctive, and the most surprising, element in the character of these Courts — their elective nature. Or, to be precise, the fact that, although their chairman was an appointee of the government, their nine members were elected in open public meeting by and from those holding a Miner's Right (or a lease under the Act — that is, a lease of auriferous lands).

Where did this idea of a largely elected Court come from?

As I have indicated, it is possible, with confidence, to reach some *negative* conclusions on the matter.

First, election was certainly *not* recommended by the Gold Fields Commission. I drew attention in Section 4 to a revealing passage in the

[24] *Ibid.* And see Haines' tribute, recorded in Note 1 above.
[25] *Hansard 1857,* 945. 'The courts . . . had served their purpose well in a period of crisis. As Hotham said, they had 'cushioned the shock' between miner and government': Serle, *op. cit.* 223.
[26] Bate, *op. cit.* 78.
[27] *Op. cit.* 188-9.

examination of the Chartist and Ballarat mining leader Henry Holyoake, in which at least one member of the Commission showed that he regarded the idea of an elected judiciary as 'un-British'. Whether or not that was the general view of the Commission, it is undoubtedly the case that they envisaged that miners would become members of Local Boards (and assessors in matters handled by Justices) by appointment and not by election.

The second negative conclusion which can be stated with complete confidence is that the elective principle did not derive from the (then) recently revived *English* mining judicatures.

Finally, while there were, indeed, many Americans on Victoria's gold fields in the '50's', there is really no evidence that I have come across to suggest that the Californian experience of self-governing gold fields had any bearing on the decision to make Victoria's Local Courts primarily elective.

So why, then, were they constituted on an elective basis?

At this stage, all I have been able to do is offer an hypothesis. To quote briefly from Section 4 above:-

> The decision to make the positions on the Courts elective (save for that of the Chairman) seems to have been just another instance of the government's general anxiety (at the promoting of the Gold Fields Commission) to meet the miners' political aspirations, which were now recognised as legitimate . . .
> The proper conclusion, I believe, is that the provision for elections was a genuinely democratic gesture, adopted under the political pressures of the day, and superimposed, as it were, upon a court structure devised primarily by reference to highly practical and non-political considerations 'peculiar' to the gold fields. The elective aspect of the Local Courts was the icing on the cake.

And, as a *political* gesture, the decision to make the Courts elective was, in the short term, clearly successful, as I have shown.

Let me now turn to the debate in 1857 on the abolition of the Courts.

In a number of ways, the Local Courts had not worked very well. I have set out the principal problems associated with their working in Section 5. All, or almost all, of these particular problems were mentioned in the abolition debates of 1857.

Yet I have suggested that the concerns which ultimately counted, which moved the government of the day to abolish the Courts, were concerns of a more general nature — concerns of *principle*, of political or constitutional principle.

The first of these was the elective nature of the Local Courts. Whatever may have been thought of the point in 1855, by 1857 this aspect of the system had come to be seen as fundamentally objectionable.

The second matter of concern was the vesting in a single institution (the Local Court) of both legislative and judicial functions. This, too, was simply no longer acceptable in principle. I would stress that it really was a matter of political principle: no specific evidence that the combination of functions had actually worked badly was ever brought forward.

Let me, then, sum up.

While, on the whole, the development of the Victorian mining legal system was governed by highly *practical* considerations (which is why it was overall

so successful), in this instance — the Local Court experiment — *political* considerations (in the sense in which I am here using that term) played a crucial part both in the initial shaping of the experiment and in its comparatively abrupt conclusion, less than two years later. In that respect, as I read the story, the Local Court episode was unique. At no later stage were political considerations to play so open and decisive a role in the evolution of the Victorian system.