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Early History of the Victorian Legal System*

The Early Court System in the District of Port Phillip

In 1835, John Batman's schooner *Rebecca* ventured about six miles up the Yarra River and set foot on land which Batman considered an ideal place for a village. Batman encouraged the Aborigines he met there to sign a deed for the transfer of 600,000 acres of land in exchange for a yearly supply of blankets, knives, looking glasses, clothing and flour. This was the Batman treaty. Soon after, as other ships brought settlers in vast numbers, the yearly tribute to the local tribes was forgotten and the settlement of a permanent white population began to take root.[1] In 1836 this tiny village that was to one day become Melbourne had a population of only 166.[2] Professor Blainey described the place as 'a hillbilly town'. That year the Governor in Sydney authorised a larger settlement in the Port Phillip district, but it remained part of the colony of New South Wales and was

[1] Carroll, Brian, Melbourne, An Illustrated History (Lansdowne Press, 1972), 12-16.
[2] The Supreme Court of Victoria, *A Short Account of the Law Court and the Library* (The Hawthorn Press, 1976, Melbourne), 3.

largely governed by the Sydney administration. During a public meeting in June 1836, the settlers voiced dissatisfaction with this state of affairs and expressed a desire for independence. They decided to establish a temporary mode of self-government and requested the Colonial authorities to appoint a resident Magistrate at Port Phillip.[3] In September of that year, Captain William Lonsdale was appointed to command a detachment of troops sent to Port Phillip and as Police Magistrate for the District of Port Phillip in the Colony of New South Wales. He was also given the '*general superintendence in the new settlement of all such matters as require the immediate exercise of the authority of Government*.' One of the army officers who accompanied Lonsdale, Ensign George King, was appointed a Justice of the Peace so that cases requiring the presence of two Justices, that is, most summary offences, could be dealt with in Melbourne.[4]

However Captain Lonsdale was far from enamoured with the site that was to become Melbourne, and instead considered whether Williamstown or Port Melbourne should be the main town. However, the modern site of Melbourne as we know it was eventually chosen because of its ready supply of fresh

[3] The Supreme Court of Victoria, *A Short Account of the Law Court and the Library* (The Hawthorn Press, 1976, Melbourne), 3.
[4] Mullaly, Paul, *Crime in the District of Port Phillip* (Hybrid Press, 2008), 6.

water. It was officially named after the Prime Minister of England, Lord Melbourne. On June 1 of that same year the first blocks of land were sold, with a block on the north east corner of Collins and Williams streets fetching 95 pounds, and a block in the valley of Collins Street costing 18 pounds. To provide some context to these prices, a half lame horse in those days would have also been sold for 18 pounds.[5]

In May 1839 Captain Lonsdale held his first court. Initially hearings were held in a tent. Later they were in a storehouse belonging to John Batman, near the corner of Market Street and Flinders Lane. This Court was known as the General Quarter Sessions and for the first time conducted trials of indictable offences.[6] Prior to this, serious offenders had been sent to Sydney for trial, requiring military or police escorts at great expense to the public purse.[7] If we reflect on the length of the modern Hume Highway we can contemplate the high level security risks then faced. In July of that year, Mr Charles Joseph La Trobe, an official sent out from England, was made Superintendent of Port Phillip. La Trobe began to realise that the prospering settlement of Melbourne could no longer

[5] Blainey, Geoffrey, *A History of Victoria* (Cambridge University Press, 2006, Melbourne), 21.
[6] Mullaly, 19.
[7] MacFarlane, Ian, *1842 The Public Executions at Melbourne* (PROV, FD Atkinson Government. Printer Melbourne, 1984), 1.

properly be administered from Sydney, and there was a growing feeling amongst Melbourne's early residents that separation from New South Wales was necessary. By January 1841, arrangements had been made for the Supreme Court to sit in Melbourne and it was vested with the jurisdiction to hear indictable offences.[8] Originally, the Supreme Court was housed in a brick building on the corner of King and Bourke Streets, and on March 9, 1841, Mr Justice John Walpole Willis arrived as the first Resident Judge of the Supreme Court.[9] The State Library has an illustration showing the citizens of Melbourne lining up to enter the court.

The illustration shows a mixture of gentlemen wearing top hats and ordinary labourers and sailors. There is a token bonnet-wearing woman. There are three barristers carrying their briefs into court wearing tails in the traditional form of the Windsor jacket. A gentleman toffs his hat to the barristers as they enter the courthouse door.

Sitting as we do in the premier building of the modern Supreme Court complex we may be in awe of the majesty of the building. It was built on gold rush money and no

[8] Mullaly, 19-20.
[9] MacFarlane, 1.

expense was spared. Opened in 1884 it was intended to sit upon the William Street hill as a strong symbol of the force of the law looking down on and intimidating the citizenry. Such a contrast to the modern setting of the first court house.

Before we reflect on the occasion of the first sitting it is relevant to reflect upon what was happening around the world and in Australia. Our map of history shows the 1840s depression was starting to strike. Having ridden on the back of the wool industry the Australian colonies had experienced rapid economic growth. The continued low price of wool in the London market after 1837, the 1839 English recession and the collapse of the mainland markets for grain and livestock would see the pastoral boom reach its nadir during 1842 to 43. Deprived of further expansion of land, the control on vast tracks by squatters and the lack of investment in infrastructure would see a slump in the pastoral industry and by extension the mercantile industry.

Elsewhere, around the world the European revolutions were yet to happen. The impact of the 1848 revolution and the publication of the *communist manifesto* were yet to ring out across Europe. The uprising in France, Germany and the Hapsburg empire pursuing the ideals of female suffrage,

liberalism, freedom of the press, restriction on the power of the church and state and the enshrinement of individual rights together with promotion of socialism where workers were able to control the means of production were yet to happen.

In Ireland the great famine was yet to happen where over 1.5 million people would die. Of course, the famine would lead to the massive immigration to places like Australia with its significant impact on the constitution of colonial society with the English and Scottish protestant domination of Melbourne slowing waning with the injection of Irish Catholic settlers. And so, we came to see the significant impact of the Irish on the development of the law here in the district of Port Phillip. The then Bar, later the Victorian Bar, was dominated by Irish men who brought with them strong Irish traditions of justice. Many were educated at Trinity College in Dublin. In turn, they came to be the judges of the Supreme Court of the colony of Victoria in 1852. So enamoured were they with Irish traditions that they persuaded the government of the day to appoint the judges to hold a royal commission into the future Supreme Court building. Surprise surprise they resolved the construction of the magnificent Italian renaissance revival building now the main building of the Supreme Court today, very much

modelled on the Four Courts building in Dublin. Thus, they ensured the establishment and application of the rule of law in the colony of Port Phillip.

From the humble origins of the Supreme Court we now have a court that hears hundreds of criminal and civil appeals each year, over 7,000 civil matters and over 100 serious criminal, mostly murder cases. The modern Supreme Court is the superior court for the State sitting at the apex of the Victorian judiciary and subject only to the High Court of Australia. The court exercises a supervisory jurisdiction over all other Victorian Courts and Tribunals. It is comparable in jurisdiction and size to the Supreme Court of New South Wales and the Federal Court of Australia. The court currently comprises 43 judges, 9 associate judges and 2 judicial registrars, a total of 54 judicial officers.

So let us hark back to our humble origins. Our history begins 170 years ago.

The first sittings of the Supreme Court were held on Monday 12 April 1841 and proceedings commenced with the reading

of the Proclamation against Vice and Immorality and the Proclamation of the Authority of the Court.[10]

The Resident Judges

The early judges sent to the district of Port Phillips were called the resident judges. Let us now look at the profiles and characteristics of these men.

John Walpole Willis

Ian MacFarlane in his book *1842 The First Public Executions in Melbourne*, describes Willis as the 'most quarrelsome member' of the NSW Supreme Court Bench who had a knack for unsettling each of the Colonies in which he served. Willis used his position to make personal and political observations on leading colonial personalities from the Bench, as well as '*pungent commentaries on current affairs'*.

There is a photographic portrait of Mr Justice Willis in the State Library of Victoria. He presents as a tall and angular man with a very strange look in his eye. He appears to be a contrary-looking man. He has stylish wavy hair, mostly grey and wears a finely tied bow-tie.

[10] Mullaly, 21.

Willis, born in England in 1793, had demonstrated his erratic and unpredictable nature during his judicial appointments in the Supreme Court in Canada in 1827 and British Guiana in 1831. In Canada he did not get on well with his fellow judges, the legal profession or the public and was removed. He again became a controversial figure in British Guiana and after taking 12 months sick-leave in England his return was successfully resisted. While in Canada, Willis was left devastated after his wife ran off with a military Officer.[11]

Sent to sit on the bench in Sydney in 1837, Willis immediately took a dislike to the Chief Justice, Sir James Dowling. He began to attend Dowling's judgments where he interrupted the Chief Justice with exclamations like '*Why does he not get his facts straight?'* and *'Did you ever hear the like!'* Dowling's solution to such odd behaviour was to send Willis to Melbourne as Resident Judge, with a salary of 1500 pound. Here, Willis continued to cause problems, including an incident in 1843, where Willis illegally sentenced a man to death for a misdemeanour. He was eventually removed from the bench in Melbourne in June 1843. Governor Gipps considered that a British Judge had never had so many acts of impropriety and misbehaviour established against him, and Willis was the only Judge in

[11] MacFarlane, 2.

British history to be twice removed from the bench.[12] Willis appealed his removal to the Privy Council who held that though there were grounds for removing him, he should have been given the opportunity to be heard. Willis resigned after receiving arrears of salary and costs.

Sir William Jeffcott

After Willis' removal, Sir William Jeffcott was appointed Chief Justice. Jeffcott was born in Ireland in 1800, and after graduating from Trinity College, was called to the Irish Bar in 1828.

In 1843, Sir William accepted the appointment of a Judge of the Supreme Court of New South Wales, and subsequently became Resident Judge of Port Phillip. Jeffcott was concerned about the legality of his appointment on foot of Willis' removal, especially since he believed that if he was found to be illegally appointed, and had imposed the death penalty during his term, he could be held guilty for murder. Thus, during the time that Willis's appeal was before the Privy Council, none of the prisoners sentenced to death in the Port Phillip District were executed. In May 1844, John Abbott was convicted of robbery with wounding and had to be sentenced to death. Jeffcott was reported by the

[12] MacFarlane, 2.

newspapers as being 'visibly affected' when the verdict was given and had to leave the bench, pronouncing the '*mere form of sentence'* upon his return. Jeffcott resigned in 1845, with the Crown Prosecutor, James Croke, referring at the farewell dinner to his dignity, courtesy and amenity of temper towards the profession. Jeffcott was appointed to the Bench in Singapore in 1849 and is said to have died, in 1855, before hearing the news of his promotion to knighthood.[13]

Roger Therry

The third Chief Justice of the Port Phillip District was Roger Therry. Therry was born in Cork in 1800 and became a member of the Irish Bar. He was active in the Catholic Emancipation movement and in 1829 was appointed Commissioner of the Court of Requests in NSW with the right to practice at the NSW Bar.

There is a handsome portrait of Mr Justice Therry in the State Library of New South Wales. He presents as a dark haired, dapper and francophile looking man. He is very elegantly dressed and adorned. Interestingly, the portrait seems to present him as having different coloured irises –

[13] Mullaly, 24-25.

one brown one blue. He was indeed a very handsome judge.

Therry was appointed as Resident Judge in Melbourne upon Jeffcott's resignation and sat there from January 1845 to January 1846, when he returned to Sydney and sat on the NSW bench until 1859. In contrast to Willis, Therry is reported in 1845 to be '*a great favourite [in Melbourne]… [he] pays attention to business, impartial, lives quietly, not mixing in society… keeping altogether aloof from any political matters*.' He wrote, upon his return, *Reminiscences of Thirty Years of Residence in New South Wales and Victoria,* and refers to the volume of criminal business in the court in Melbourne due to the influx of convicts mainly from Van Diemen's Land and the arrival of those who had been exiled from Ireland and England. Therry died in England in 1874.

William a'Beckett

The Supreme Court of Victoria was established in 1852 and William a'Beckett was its first Chief Justice. A'Beckett was born in London in 1806 and was called to the Bar at Lincoln's Inn in 1829. He was appointed to the NSW Supreme Court in 1844 and came to Melbourne in February 1846.

We have portraits of a'Beckett in both the Supreme Court library and Court 13. The judge presents as a small dour man concerned with tradition, pomp and circumstance. He is portrayed as seated reclining usually at a desk busy at his work.

As a result of an injury to his legs, he occasionally had to be physically assisted in moving in court. Former County Court judge, Paul Mullaly QC, in his significant work *Crime in the Port Phillip District,* considered a'Beckett was much more lenient than his predecessors when sentencing in some cases. He retired in 1857 and returned to England where he died in 1869.[14]

Crime in the District of Port Phillip

The laws that Mr. Justice Willis administered in Port Phillip were largely based on the Laws of England, with local enactments added by the NSW Government to meet unique features of the domestic situation including a significant convict population, bushranging and hostilities between Europeans and Aborigines.[15] It is estimated that between 11,000 and 15,000 Aborigines were living in the Port Phillip

[14] Mullaly, 25-26.
[15] MacFarlane, 3.

district at that time, belonging to 38 different tribes, and in the face of numerous murders and battles, some settlers took justice into their own hands.

In response to reports of criminal activity by white men against Aborigines, Governor Bourke published a proclamation notifying all subjects of 'His Majesty' that the land on the southern coastline was within NSW and people residing there were subject to all laws in force in NSW. He said that '*the promptest measures will be taken by me to cause all persons who may be guilty of any outrage against the Aboriginal natives, or any breaches of the said laws, to be brought to trial before the Supreme Court of New South Wales, and punished accordingly.*' [16] However, the reality was that many settlers were not charged with crimes against Aborigines, and when charges were brought, the settlers were easily acquitted by juries, or received minor punishment from judges.

Aborigines and the law

Aborigines in the Port Phillip District not only suffered discrimination at the hands of the government and the Settler population, but were also made subject to British laws that were strange and contrary to their culture and

[16] MacFarlane, 5.

customs. In the 1820's the judiciary in NSW had ruled that Aborigines were subject to the law and in 1839 Governor Gipps declared his intention to bring the settlers and the Aborigines '*to equal and indiscriminate justice'*.[17] Often, disputes and collisions between settlers and Aborigines ended up in court. However, despite being subject to the British legal system, Aborigines were not permitted to give evidence and, needless to say, such constraints resulted in unfavourable outcomes and glaring injustice for Aboriginals that faced the courts.

In *The Queen v Bonjon*, Mr. Justice Willis questioned the prevailing view that Aborigines were amenable to British law. Here, Bonjon was brought to trial in 1841 on the charge of having murdered a fellow Aborigine. Counsel for the accused argued that Port Phillip '*became appended to the British Crown by occupancy, and no treaty had been entered into by the natives. They were not subjects, neither had they submitted themselves to the British Crown'*. Two juries deliberated on Bonjon's competency to stand trial. As to whether the accused had sufficient capacity to understand the nature of the plea, the first jury responded that he had not. The second jury found that although he had capacity to say whether he killed someone, he was unable to decide

[17] Governor Gipps, *Government Gazette*, May 1839.

whether he committed a crime since '*murder is not always considered murder among the Aborigines*'. Despite the earlier NSW decision of *Murrell*,[18] in which it had been decided that the Aborigines were Her Majesty's subjects and therefore amenable to the penalties under English law, Willis held that Aborigines are not subject to the law of the colony for offences committed amongst themselves. In his contrary manner, perhaps Willis displayed the kernel judicial reflections of *Mabo* and its recognition of terra nullius. Bonjon was remanded by Willis and later discharged. Chief Justice Dowling, of the NSW Supreme Court, pointed out that the decision had already been determined in *Murrell* in opposition of the views entertained by Willis. Despite being overruled by Sydney, Willis continued to assert his belief. Lord Stanley of the Colonial Government in London finally settled the matter by confirming Dowling's position and refusing to refer the case for the opinion of the Attorney and Solicitor-General.[19]

In the *Bolden* case in 1841, a Western District settler was acquitted by a jury, on direction by Willis, of having shot an Aborigine on his property.[20] Willis went much further, and ruled that where there was no grant, lease or licence, a

[18] *The Queen v Jack Congo Murrell*, NSW Supreme Court, 1836.
[19] Mullaly, 35-36.
[20] Supreme Court of New South Wales, Port Phillip, Willis J., 2 December, 1841.

possessor may expel from the land any person who '*should trespass on his run'*. Superintendent La Trobe, concerned with the ramifications of this ruling, noted that settlers would thus be justified in using violent means against the Aborigines. It should be noted that Bolden himself was described by Willis as 'the brother of a near and respected friend', which may have something to do with his acquittal rather than legal principles.[21]

Ultimately the rulings of Mr. Justice Willis in Melbourne enabled several settlers suspected of the murders of Aborigines to be set free. In 1843, NSW Governor Gipps labelled him an '*apologist of the cruellest practices by some of the least respectable of the settlers on the Aborigines'*.[22] However, several newspapers reported the treacherous nature and ferocity of the Aborigines and as a result, the settlers, as well as people in England and Ireland, began to express outrage at the '*daily murders'* committed by the Aboriginal population.[23]

Inter-racial conflict

The seemingly unwarranted murder at Mt Rouse of a white settler, Mr P. Codd, by a group of Aborigines in May 1840

[21] MacFarlane, 19.
[22] MacFarlane, 3.
[23] MacFarlane, 41-2.

sparked immediate retaliation and four Aborigines were killed the following day. Such summary justice was not uncommon however, and in fact, between twenty five and fifty Aborigines had been massacred in Hamilton in March that year. The exact figures are unavailable but Chief Prosecutor Robinson's annual report for 1840 lists numerous cases where Aboriginals were reputedly killed.

The year following *Bolden* saw another glaring example of injustice in the courts. The Muston's Creek Massacre in February 1842 was '*one of the most shameful episodes in inter-racial conflict*' and proved the difficulties in bringing white men to justice when Aborigines were killed. Here, three Aboriginal females and an infant had been murdered by a party of Europeans. La Trobe offered a 100 pound reward or a Conditional Pardon and passage to England as a reward for the perpetrators, but nothing eventuated for quite some time. Three men were eventually tried for the murders – Hill, Beswicke, and Betts – and Willis presided over the initial hearings. He seized the opportunity to express his outrage at the failure of the government to locate the murderers of a settler killed in another incident, while such a fuss had been made to locate the murderers of the three Aboriginal women and baby. The trial itself took place in front of the new Resident Judge Jeffcott, in August

1843. After several inconsistencies in the evidence, as well as other serious flaws, the jury interrupted the proceedings with a verdict of not guilty while the prosecution was still presenting its case. A payment of 50 pounds was made to the defendants to assist them in being removed immediately from the Port Phillip District. The House of Commons eventually considered the case in 1844, but no further action ever eventuated. It is noteworthy that no European was convicted in the District of Port Phillip for killing an Aborigine until 1848, and that person only received 2 months imprisonment. Meanwhile, during the 1840s five Aborigines were publicly hanged in Melbourne.

The First Public Executions

It is also worth noting that the first two people to be publicly hanged in Melbourne were Aboriginal. They were known as “Bob” and “Jack” and were Tasmanian Aborigines, brought over to Port Phillip in 1838 by George Robinson, the “Chief Protector of Aborigines” in the Port Phillip District. Bob and Jack were part of a group of sixteen Tasmanian Aborigines who travelled with Robinson from Flinders Island over to Port Phillip so that they could be “civilised”. However, once arriving in Port Phillip the sixteen Aborigines were effectively abandoned by the colonial Government and, despite Robinson’s best efforts, the group were left to their own

devices. Bob, Jack and three Aboriginal women, including Truganini who eventually came known as the last of the Tasmanian Aboriginals, took to wandering the bush and turned to crime.

By 1841 the group had arrived in Westernport, the site of countless previous clashes between Aborigines and settlers. It was here that Bob and Jack were said to have murdered two whalers, William Cook and “the Yankee”, as well as committing a string of robberies. Aboriginal trackers were sent by Superintendent La Trobe to assist in the capture of Bob and Jack and they, along with their three female companions, were eventually apprehended after a pursuit through the bush lasting six weeks and involving no less than twenty-seven people. The five prisoners were taken before the Police Magistrate, Major St John, who committed Bob and Jack for the murder of the whalers, and the three women as accessories after the fact.

On 20 December 1841 the group were tried by jury before Mr Justice Willis. Redmond Barry, who was later to become acting Chief Justice of Victoria, appeared for the five accused. Barry argued that half the jury should consist of people who were able to speak the language of the accused, but Justice Willis refused this application. Undeterred, Barry

conducted rigorous cross examination of the evidence and Chief Protector Robinson testified as to the character of his former charges, especially for the three women, Matilda, Martha and Truganini. Barry, in his closing address, highlighted the circumstantial nature of the evidence, including the fact that none of the witnesses in the vicinity of the murder scene could identify the five accused. Willis urged the jury to be compassionate, but to fulfil its duty to prevent the "recurrence of similar acts of aggression". In total the trial of the five accused lasted only three days, and was based largely on circumstantial evidence. The jury returned after half an hour of deliberations with a verdict of guilty for Bob and Jack, and an acquittal for their three female companions. Despite the jury calling for mercy of Bob and Jack due to '*the general good character and the peculiar circumstances in which they are placed*', the Colonial Secretary authorised the execution of the two men on 20 January 1842.[24]

The site of the execution was to take place by the walls of what today is known as the Old Melbourne Gaol in Russell Street. The scaffold that was built to carry out the hangings was said to be a "narrow shaky stage"[25] comprised of two

[24] MacFarlane, 10 – 11.
[25] The Chronicles of Early Melbourne: "Garryowen" (Edmund Finn).

posts twelve feet apart and a beam nailed on top, over which the ropes were slung. A mass of bricks and wood was used for the men to stand on, which could be tugged away by a rope so that the prisoners could drop to their deaths. A convict named John Davies, who had no experience of acting as a hangman, was chosen to carry out the sentence and another prisoner was chosen to tug away the pile of bricks. On the day of the execution the *Port Phillip Gazette* reported that from the earliest hour people began to gather at the execution site in order to secure the most favourable viewing positions. The newspaper stated that three thousand people eventually gathered to watch the hanging, displaying the '*most disgusting spirit'*, with some spectators gaining a better vantage point by standing on the coffins set aside for the bodies of Bob and Jack. Eventually Bob and Jack were led to the execution site by horse and cart, taking a circle route along Collins, William, Lonsdale and Swanston Streets. Bob and Jack were clad entirely in white and wore calico caps, which were pulled down over their eyes before the execution. With their arms tied, Bob and Jack were directed to climb the scaffold, with the crowd in what was described as '*explosions of merriment'*. However, their merriment was short lived, as the scaffold that was to deliver a swift death by hanging failed to properly 'drop', and the prisoners only fell half way. The result was a slow,

painful death by strangulation, where they '*twisted and writhed convulsively in a manner that horrified even the most hardened*'.[26] The crowd was appalled, and the Assistant Protector of the Aborigines, James Dredge, who was present, later wrote that he had never viewed a more disgusting scene.[27] Once the bodies of Bob and Jack had been left to hang for the legally prescribed hour, they were cut down and buried in the Aboriginal section of the cemetery. This cemetery is now the site of the Queen Victoria Market.

In fact Bob and Jack were the first of six public executions to take place in Melbourne that year. Three Bushrangers were executed in June, and another Aborigine was sent to the gallows in September. The latter was named Roger, and he was identified as being responsible for the murder of Mr. Codd in 1840. Roger, his family, and the Assistant Protector of Aborigines at the Aboriginal Refuge, Charles Sievwright, continually asserted Roger's innocence from the beginning.[28] However when Sievwright's wife and daughter made claims of moral indecency and impropriety against him, he was suspended from his post. Roger faced trial in July 1842 and Redmond Barry again acted for the defence. Despite Roger

[26] 'Garryowen'.
[27] In his diary, located in the manuscript collection at the La Trobe Library.
[28] MacFarlane, 46.

speaking a dialect that was unable to be interpreted for the Court, the jury found that he had capacity to stand trial. Therefore, it is likely that Roger only had a slight conception of what was actually occurring during his trial. Sievwright's brother, Mr John Sievwright, served ostensibly as his interpreter, although he himself admitted that he understood very little of what the accused was saying.

A question was raised as to whether Roger's brother, who looked like the accused, was in fact the true killer, but both witnesses swore that they could not be mistaken as to the prisoner's identity. After only ten minutes of deliberating, the jury returned with a verdict of guilty.[29] Roger, when asked if he had anything to say before the judgment of the court was pronounced upon him, claimed, through John Sievwright, that he had been elsewhere at the time of the murder and repeated it was his brother who was involved in the incident. Willis replied '*It is no use you saying it was not you but some wild black-fellow that committed the murder*', and sentenced Roger to death by hanging. Willis was confident in the verdict and saw no mitigating circumstances in the case. His Honour even noted that the '*example would have much better effect if the execution took place at Mt Rouse rather than at Melbourne*'.

[29] MacFarlane, 52.

La Trobe noted that he was not aware that '*Sievwright or any other individual at the trial of Roger was or could be employed as interpreter – it being notorious that his language was not understood by anyone'* and expressed his opinion that the murder was a result of great provocation. He wrote to the Executive Council of NSW, urging clemency, but the Council nonetheless authorised the execution to proceed.[30] Roger continued to protest his innocence to the end but was publicly hanged in Melbourne on September 5, 1842. The *Port Phillip Gazette* speculated as to whether Mr Codd had been perhaps freer with the local Aboriginal women than he should have been, and questioned whether the punishment of death was '*an efficacious means of preventing crime by modern legislators*'. The editorial stated, '*We regret most deeply, the existence of a law that subjects the Aborigines to the same mode and measure of justice as the white man*'.[31] Lord Stanley, in London, also reprimanded Governor Gipps for a failure to enquire into this matter, and the execution was the last to take place in Port Phillip for several years.

[30] MacFarlane, 51-54.
[31] MacFarlane, 56.

In contrast to the lack of mercy Bob, Jack and Roger received, the sentence of death that Mr Justice Willis imposed on the settler Thomas Leahy for murdering his wife, was eventually commuted to transportation.

The bush rangers

Of course it was not only the Aboriginal population of Victoria that felt the full brunt of the law in the 19th century. Bush rangers also became a hot law and order topic in the 1840s. Towards the end of April 1842, the number of armed robberies rose dramatically in the area around Dandenong. On 27 April, Ship's Master Christopher Gwatkin and Frederick Pittman were robbed of £63 and their coach-horse by four armed Bushrangers who abandoned them on the Dandenong Road. In a separate incident, Mr Thomas Napier reported that his companion, Darling, had a watch and 2 pound stolen from him by two men, whom he later identified as John Williams and Martin Fogarty. Napier, who believed they had been the first to be robbed by the bushrangers, had at the time, sat and drank a tot of rum with them. On their return journey to Melbourne, Napier and Darling encountered two bands of armed men searching for the Bushrangers in light of the Gwatkin hold-up.[32] By this time, the Bushrangers had moved their operations to the Plenty

[32] Letter from Thomas Napier, *The Argus*, August 11, 1880.

River district and, after robbing him, forcibly induced settler George Rider to act as their guide. A group of gentlemen, known as the 'fighting five', set out from Melbourne to capture the Bushrangers. The attacks on properties in Plenty River continued, and when their pursuers eventually caught up with them, the Bushrangers engaged in a long and ferocious gun-battle. Williams was killed and Ellis, Jepps and Fogarty were captured and brought back to Melbourne to face trial.[33]

Mr. Justice Willis quickly wrote a startling letter to Superintendent La Trobe informing him that he had taken steps to advance out speedy justice to the Bushrangers and urged La Trobe to seek permission for the death sentence to be passed without the usual recourse of sending the proceedings for consideration by the Executive Council in Sydney.[34] The idea was decisively stamped out by the Sydney Government and the trial proceeded as normal.[35] Fogarty, in an unsuccessful bid to be pardoned, offered to give evidence against his co-accused and also implicated William Camm, in the affair, who Fogarty claimed was an associate of the Bushrangers. Some stolen property was found at Camm's residence, and though he protested his

[33] MacFarlane, 24-26
[34] *Letter from Resident Judge Willis to CJ La Trobe*, 3 May 1842
[35] *Letter from Colonial Secretary to CJ La Trobe*, 16 May 1843

innocence, he was sentenced to 14 years transportation in Van Dieman's Land. On May 11 1942, Ellis, Jepps and Fogarty were found guilty of wounding with intent to murder. Willis, who had applauded the captors of the Bushrangers for their 'dreadful daring' at the outset of the case,[36] sentenced the prisoners to death. On June 28, the Bushrangers were escorted to the gallows in Melbourne and, after Jepps bestowed a final oration to the crowd, the three were duly executed.

A study of the early legal history of Victoria exposes that Aborigines and Bushrangers received little mercy, perhaps reflecting that their crimes challenged the power and authority of the fledgling settlement.[37] The flood of public executions only ceased in mid 1843 when Justice Willis was removed as Resident Judge and replaced by Justice Jeffcott, who refused to order the death sentence until the legality of the dismissal had been confirmed. In fact in 1854 public executions were halted altogether in Victoria and legislation provided that the executions should from then on be held within the closed yard of a gaol.[38] It was to be more than a century, however, before the death penalty itself was formally abolished in 1975.

[36] 'Garryowen'.
[37] MacFarlane .
[38] 'An Act to regulate the Execution of Criminals', 28 November, 1854, Section I.

Conclusion

The early developments of the Victorian legal system provide an insight into just how different the lives of early Victorians were to ours today. The 19th Century in Victoria witnessed upheavals and tragic events, but also signalled the birth of a strong democratic legal system that has served us well for over a century and a half. A study of the legal history of Victoria painfully highlights that whilst white settlers prospered during this period, the Aboriginal population of Victoria was dispossessed of their land and suffered at the hands of the Colonial Government. The discrepancies within the early legal system are evident at a glance, with settlers rarely convicted of crimes against Aborigines, while the death sentence was meted out arbitrarily to Aborigines who were alleged to have murdered a settler. It is questionable whether it was appropriate at all to impose the English legal system on the Aboriginal people, whose tribal conception of justice was quite different to that of the white man.

Those accused of being bush rangers or rebels were also treated harshly by the legal authorities as they were perceived as threats to the fledging government. The first signs of civil unrest proved that notwithstanding the iron fist

of the Colonial Government, the settlers still possessed the power to demand their rights and freedoms. With the dawn of the 20th century, Australia began to assert itself as a country independent from British rule and on January 1, 1901, the Australian Constitution established a federal system of government in Australia. Federation remains today, a profound achievement of the people, marking the efforts of Australian settlers in forging an identity separate from that of Britain.

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