

Early Legal Institutions in Victoria by Patrick Street

This study describes the legal institution which existed in Melbourne from 1835-1838, i.e. the period from the beginnings of the Settlement at Port Phillip until the introduction of Courts of Petty Sessions in 1838. This short period of 3 years saw the appearance of two distinct types of legal institutions: First, an informal, democratic type of authority “where the functions of law and order fell to the lot of the civilians”¹ and the second, an autocratic legal authority dispensed by Captain William Lonsdale, Police Magistrate for the district of Port Phillip. It is proposed to examine and compare various aspects of these two periods so as to determine the actual extent of the judicial institutions, their jurisdictional powers and the development of the system itself. A short historical outline of the main events will suffice to establish a perspective.

When John Batman signed his famous treaty with the Natives, there was no official legal authority in the Settlement. The nearest Police would have been at George Town at the mouth of the Tamar, so naturally, it was every man for himself. Threats of attacks from the Aborigines² did not deter those adventurous souls “infected with the Port Phillip mania”³ from selling up their holdings in Van Diemen’s Land and sailing across the Strait to the new Settlement.

When John Pascoe Fawkner arrived at the Settlement in August 1835, he found a “thriving village boasting less than a half dozen wattle and daub huts and a dozen or so tarpaulin shelters”⁴. But there was no Magistrate, no Justice of the Peace, no Police and no Gaol — Port Phillip had to wait for another 12 months for that protection.

On 26th August 1835, when Gov. Bourke heard about the unauthorised incursions into the southern part of the Colony of New South Wales, his first reaction was to reserve the rights of the Crown. Thus he issued a Proclamation reciting that, “Divers of His Majesty’s subjects have taken possession of vacant lands of the Crown within the limits of this Colony, under the pretence of a treaty, bargain or contract for the purchase thereof with the aboriginal natives”⁵ and declaring that every such arrangement “is void and of no effect against the rights of the Crown”, and that all persons found in possession of any such lands would be treated as trespassers.

Despite this “thunderbolt”⁶ from Sydney, the new settlers still continued to arrive, and by February 1836 there were 50 whites in the Settlement, 100 head of cattle, 1400 sheep, six horses and a stock of poultry.⁷ In March 1836, Dr A Thomson, “the *soi-disant* catechist of the Batman regime”⁸, James Simpson and John Aitken — men who were to provide the first outward sign of democratic law and order — arrived at the Settlement to add materially to the sense of substantial prosperity which was just beginning to develop. November of that year saw Dr Thomson with 4 acres of barley, oats and potatoes sown, 1750 sheep, 50 cattle and 8 horses,⁹ and both Simpson and Aitken both had large flocks and land holding: so it is to be expected that any disputes they arbitrated upon would be disposed of in a businessman-like manner.



The early Settlement by the Yarra

Meanwhile, as the Colony was steadily progressing, a “flagrant outrage was committed on the natives”¹⁰. As a result, Gov. Bourke sent George Stewart, Police Magistrate for the District of Goulburn to investigate this “outrage”, to look at the treatment of the Natives generally, and to distribute the Proclamation of 26th August 1835 warning off trespassers. Stewart arrived at Port Phillip on 25th May 1836 and began his duties which included the apprehension and committal for trial at Sydney of the offenders responsible for the “outrage”. Thus, Stewart was probably the first governmentally constituted legal authority in Victoria.

Whilst Stewart was in the Colony, the inhabitants held a public meeting on 1st June 1836 whereat various resolutions were passed, *inter alia*, that “James Simpson be appointed to arbitrate between individuals disputing of all questions excepting those relating to land, with power to him to name two assistants when he may deem fit”¹¹. It is curious that despite this clear legal mandate to Simpson, research has failed to locate any dispute upon which he adjudicated. It is granted that he was absent from the Colony for a while during 1836¹², but it was to be expected that Simpson would have decided a few small disputes at least.

As a result of Stewart’s report and the Petition of the 1st June 1836, Gov. Bourke appointed Capt. William Lonsdale to be resident magistrate of the Settlement, and he duly arrived on the 29th September 1836. With this arrival, the “democratic interlude”¹³ ended and a new formal legal institution took its place. This was the autocratic style of government where the regulation and maintenance of law and order rested upon the shoulders of one man.

Evidence of Law and Order during the 'Democratic' period.

As stated previously, the preservation of law and order in the Colony resided in the hands of the settlers themselves. It was a country where "every man was a law unto himself"¹⁴. But, in the early days of the Settlement, the members of the Port Phillip Association had made a definite attempt to put the responsible arbitration of disputes on a solid basis. In July 1835 they executed a deed between themselves that, "in case of any dispute, the community stood pledged to "accept the arbitration of three persons, one appointed by "each of the aggrieved parties and the third by the arbitrators".¹⁵ The same concern that a remedy should be provided for in case of disputes may be inferred from a letter which John Batman wrote on 23rd October 1835 to Gov. Arthur complaining that trespassers were occupying land in the new settlement "and serious apprehensions are entertained that they will materially check if not destroy the principles of civilisation unless controlled by a competent authority and I am therefore requested most respectfully to suggest the propriety of proper authority being given to some individual to carry on the principle of colonisation"¹⁶. Perhaps this need for a supreme authority in the Colony is explained by Bonwick¹⁷.

"A law-abiding people could not rest satisfied without some organisation for the preservation of order and the redress of grievances. Disputes would continually arise."

And as Forde said¹⁸,

"British people have an instinctive love of law and order. Where 70 or 80 persons are settled in a British community, the policeman is sure to appear and there will never be difficulty in obtaining the services of a local tradesman or local orator as a Justice of the Peace."

By March 1836, Dr A Thomson was able to say that he was the arbitrator at Melbourne:

"I did so by common consent, my tent being the police office. Many felt a pride in showing an example in upholding order, which was done without much trouble".¹⁹

Thus it is not unexpected to find Dr Thomson as one of three arbitrators deciding a dispute on the 2nd May 1836 between Henry Batman and John Pascoe Fawkner. Described as the first legal decision given in the district²⁰ the 'award' is first quoted in GW Rusden's pamphlet²¹ wherein he states:

"We award in the disputes between Mr Henry Batman and Mr John Pascoe Fawkner — on the first claim, Thirty Shillings, on the second claim, nothing, although a "strong presumption is in our minds that some hasty expressions of Mr Batman's may have led Bullett to destroy the rabbits. On the third claim, damages Five Shillings, and a fine of Twenty Shillings, in consideration of it being an act of unauthorised aggression, and in the fourth claim,

nothing, as it does not appear that Mr Batman set the dogs on the calf. We cannot omit remarking that there has been a degree of forbearance on the part of Mr Fawkner highly gratifying to us, and if generally practised very conducive to the general good. (Signed) A. Thomson, John Aitken James Simpson.

Mem. — The fines to be appropriated to some general purpose."

Dr Thomson, in company with George Robson and eight others acted as arbitrator in a case of assault by one Jemott and another on Capt. Hunter. The case was heard in the Yarra Yarra Inn on 20th September 1836 before these "city fathers" and as the prisoners apologised to the complainant, the Bench decided:

"We ... express ourselves in the strongest terms against such conduct, but think it so far a redeeming quality on their part that they acknowledge their fault that the prisoners may be allowed to leave."²²

Despite the fact that Whitfield²³ says that the informal arrangement of appointing James Simpson as arbitrator worked, "and some arbitrations were carried out", no case wherein Simpson arbitrated as a result of the power given him on 1st June 1836 can be located.

In addition to those institutions which were clothed with an air of consensus legality, there were other more informal agencies operating in the community ensuring that "everyone did not do as he liked."²⁴ As an instance of this *ad hoc* justice, Buckley²⁵ describes that when one of the shepherds tied up a native woman, Mr. Gellibrand²⁶

"immediately sent for the man accused, but he denied all knowledge of the woman or of the circumstances to which she had referred. Mr. Gellibrand²⁶ had, however, good proof of his guilt; and therefore after severely reprimanding him for his brutality, dismissed him from the Company's service and ordered his return immediately to Van Diemen's Land."

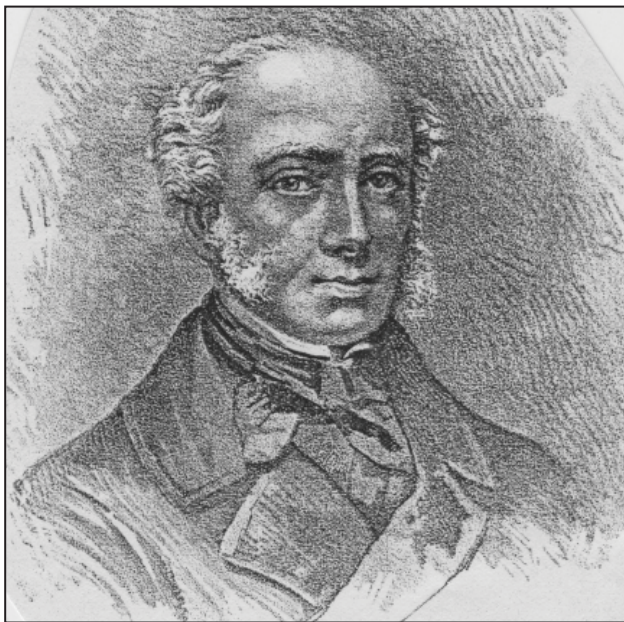
A similar type of case is briefly referred to by Geo. Stewart in his letter to Gov. Bourke²⁷ where he says at paragraph 4,

"The only aggression known to have been attempted by an European at Port Phillip upon any of the blacks was committed by a stockman, who some time ago attempted forcibly to violate the person of one of their females, and who, on that account, was sent back to Van Diemen's Land by Messrs. Wedge and Batman, with which punishment the friends of the female were quite satisfied."

Another type of 'justice' which existed in those primitive days²⁸ is that referred to by GA Thomson in his *Reminiscences*²⁹. He states:

"On our arrival in June 1836 we heard that a murder had been perpetrated some mile or two out of Melbourne by the natives. The victims were a Mr Smith and his herdsman. A party of seventeen went out after the murderers all armed with guns and seventeen of the natives were killed."³⁰

When we add this 'outrage' to the fact that both Batman and Fawkner's men were armed so as to repel attacks by Aborigines³¹ and Dr Thomson with a "formidable brace of pistols in his belt"³² it is a simple matter to state that every man was a 'legal institution' in his own right. A system of "natural justice". As Garryowen observed "it was a somewhat anomalous state of society."³³ At least we can be sure that "the affairs of the little settlement on the banks of the Yarra had become sufficiently important to require the attention of a resident representative of the Government"³⁴ That representative was Captain William Lonsdale, Police Magistrate.



Capt. William Lonsdale

Legal Institutions during the Autocratic Period

Lonsdale arrived at the settlement on 29th September 1836 with a detachment of his Regiment, one District constable and 2 ordinary constables. For the next two years, Lonsdale with the assistance of two Justices of the Peace, Ensign King, Lieut. Hawkins and James Simpson³⁵, went about his duties administering justice "free from prejudice"³⁶ holding his Court in the most convenient place, "sometimes under the vault of heaven, blue or otherwise."³⁷

When Lonsdale was appointed Police Magistrate he received two sets of instructions — one military and one civil. At this stage, it might be appropriate to consider the nature of his jurisdictional powers.

Capt Lonsdale's Jurisdictional Powers

Without describing the long history of Justices of the Peace and the reception of English Law into Australia³⁸, it is stated that as a Justice of the Peace, Lonsdale had power to keep the Peace, arrest, take bail, bind to good behaviour, suppress and punish riots and do all other matters and things with respect to the inhabitants residing in the Settlement as Justices of the Peace had within the part of the Realm called England. As to civil matters, Justices in England had power to hear and determine matters of petty debt such as small debts of forty shillings or less and disputes between

masters and servants where the amount involved did not exceed £8.³⁹ The only case which appears in the Court Register of 1836-8⁴⁰, which might have been in the civil jurisdiction was a dispute between one Bolger and Fletcher wherein a contract had been made to make and burn 25,000 bricks in return for a free passage from Launceston and two months' rations. When the contract was breached, it came on for hearing on 26th September 1837 before Lonsdale and Hawkins, but the matter was settled out of Court. It would seem that the civil jurisdiction of Justices was restricted to the matters relating to master and servant and that no other civil matters could be litigated until a Court of Petty Sessions was established in 1838. If the dispute just mentioned was not within the ambit of Act 9 Geo. IV. No. 9, then Lonsdale and Hawkins had no lawful jurisdiction⁴¹ to deal with the matter.

As a Justice of the Peace, Lonsdale possessed considerable powers which he could exercise sitting alone. Under the English Act 9 Geo. IV, c83 of 25th July 1828, certain English Acts which were in force in New South Wales came within the jurisdiction of one Justice, e.g. 1 Chas.1.c.1 which dealt with Sunday observance; Act 3 Wm IV. No.8 of 13th June 1833 was the *Licensing Act* which gave power to one Justice to punish licensees who failed to provide accommodation for travellers, etc.

As to Lonsdale's appointment as Police Magistrate, the position is far from clear.⁴² Such an office was created by Act 4 WmIV No. 7 which came into force on the 30th September 1833. This Act dealt with the appointment of Police Magistrates and for removing and preventing nuisances in the Town and Port of Sydney, but no similar provision existed outside Sydney until Act 2 Vict No. 2 — An Act for Regulating the Police in the Towns of Parramatta etc., and it was extended to Melbourne on 5th November 1838 and came into force on 1st January 1839. Thus it would seem that Lonsdale's appointment as a Police Magistrate had no legislative authority for over two years.

Nevertheless, there was a certainty about Lonsdale's administration. He was a man of unblemished character and impartial in the conduct of affairs.⁴³ And there was plenty of work to be done in the community. When Lonsdale met Batman, Thomson and Wedge on 2nd October 1836 they complained that "they were in a most lawless state, and always in dread of being assaulted".⁴⁴ The Establishment which Gov. Bourke had set up "had become absolutely necessary for their safety, as many of the lower order of people who had come over on adventure, were taking advantage of the absence of power to behave in a lawless and intimidating manner".⁴⁵ By 1st February 1837, Lonsdale wrote to the Colonial Secretary saying that:

"180 persons have come over from Van Diemen's Land since the census was taken, but scarcely any of them are persons of respectability,⁴⁶ and further that many of the servants are troublesome, ill-disposed men"⁴⁷.

The Sydney Gazette of 26th January 1837 confirms this aspect of the community, stating:

“the greater part of the settlers who have emigrated thither are said to be a drunken, worthless set and a complete pest to the place.”⁴⁸

Naturally, with the influx of this type of settler, the work at the Police Office increased and some details of the cases dealt with will confirm this fact.

The earliest record of proceedings at the Police Office was on 17th October 1836. “Wm. Lonsdale J.P. Police Magistrate Thomas Brown – a runaway from Van Diemen’s Land ordered to be returned to that place. Proved by letter to be the Resident Magistrate at George Town to be Thomas McMenemy.” The decisions of the Justices at the Police Office are all recorded in the Court Register and there are many convictions of convicts for drunkenness and being absent from their masters’ premises without leave. They were punished by a number of lashes, usually 25 for drunkenness and 50 for more serious offences. These penalties were usually imposed by one Justice, usually Capt. Lonsdale, but for the more serious matters, the two Justices, i.e. Lonsdale and King or Hawkins sat together. Such cases include smuggling, assault, larceny of growing vegetables, drinking on unlicensed premises etc. and occasionally a committal for trial to the Court of Quarter Sessions at Sydney is recorded.



Capt Lonsdale’s House, Melbourne

Before mentioning the number of cases actually dealt with at the Police Office, it should be observed that there is a distinct dualistic approach taken by the Court in dealing with free citizens in contrast to those who were convicts. On 3rd November 1836, Will Davis, a free man, was fined five shillings for drunkenness whereas on 1st December 1836 Benjamin Taylor, a convict serving 7 years, received 25 lashes for the same offence.⁴⁹

From 17th October to 31st December 1836, Lonsdale and King dealt with 14 cases relating to offences of drunkenness, irregularity⁵⁰, being a runaway from Van Diemen’s Land, insolent and disorderly and refusing to work. During 1837, 283 cases were disposed of, wherein 145 were complaints against convicts and 138 were complaints against Free Persons. For the month of December 1837, the Police Office dealt with 61 cases, thus in the short space of one year the work had increased by 400%. And yet the figures increased by 100% the next year, when

the December, 1838 return of cases showed that 112 persons had passed through the Police Office, 69 Free persons, 39 convicts and 4 released on Bonds. Thus, it would be safe to say that “Captain Lonsdale had his hands full of business”.⁵¹

On 17th July 1838, Melbourne was gazetted as a place at which a Court of Petty Sessions was established,⁵² and on 31st August 1839 Courts of Quarter Sessions and Requests were appointed to be held. The legal institutions in Victoria had finally matured after years of growing pains, through times of stress and turbulence.

Conclusion

In the three short years of the Settlement, the legal institutions had undergone major changes. There were still many disputes which required the intervention of some legal authority, but by 1839 the Sydney Government had provided an efficient administration to cope with the steadily increasing business. When the first settlers arrived at Port Phillip, it was a struggle for survival. “Cost of living was high from the outset”⁵³ and the settlers were obliged to unite for their mutual protection. It was a case of every man a law unto himself. When Lonsdale arrived at Port Phillip in 1836, he brought some degree of legal stability to the community thereby marking the end of an era of summary justice and *lex populi*.

¹ AG Brown, *The Summons*, vol vii No 2 Dec 1897, p5.

² “harmless and unoffending race” per J Wedge in a letter to Col Sec on 15 March 1836.

³ Letter Lieut-Gov Arthur to Col Sec upon resignation of James Simpson, ex-Police Magistrate in Van Diemen’s Land.

⁴ H Anderson, *Out of the Shadow*, Melbourne, 1962, p82.

⁵ NSW Government Gazette, 2 Sept 1835 at p613.

⁶ HG Turner, *A History of the Colony of Victoria*, vol 1, Melbourne, 1973 edn, p135.

⁷ *ibid.* p142.

⁸ Apt description by Georgiana McCrae, *Georgiana’s Journal*, ed H McCrae, Melbourne, 1966 edn, p39.

⁹ per Lonsdale’s Census Return of 1836, Archives Lt 36/28b.

¹⁰ Letter of J Wedge to Col Sec 15th March 1836.

¹¹ The whole account reproduced in Bonwick, *Port Phillip Settlement*, London, 1883 and in HG Turner *op cit* p150.

¹² Lonsdale’s letter to Gov Bourke. Archives No 36/1.

¹³ W Westgarth, *The Colony of Victoria*, London, 1864, p68.

¹⁴ HG Turner, *op cit*, p123.

¹⁵ J Bonwick, *John Batman the Founder of Victoria*, Melbourne, 1867, pp33-4, esp p34.

¹⁶ J Bonwick *ibid.*, p34.

¹⁷ J Bonwick, *Port Phillip Settlement*, London, 1883, p415.

¹⁸ JL Forde, *The Story of the Bar of Victoria*, Melbourne, p10.

¹⁹ TF Bride, *Letters from Victorian Pioneers*, Melbourne, 1898, p130.

²⁰ H Anderson, *op cit*, p86.

²¹ *The Discovery Survey and Settlement of Port Phillip*, London, 1872, p47.

²² AG Brown, *op cit.* Jemott is again mentioned by Lonsdale in relation to a smuggling charge. Archives No 37/8 Latrobe.

²³ LA Whitfield, *op cit.* p116.

²⁴ Garryowen said 'everyone seemed to do much as he liked'. Quoted by M Weidenhofer, *Garryowen's Melbourne* p8.

²⁵ J Morgan, *Life and Adventures of W Buckley*, *op cit* p96.

²⁶ Ex-A-G of Van Diemen's Land. On GA Thomson's trip to Van Diemen's Land in July 1836, "Mr Gellibrand in the evenings used to delight us by personating the Constituent members of a Court of Justice all by himself: he was prisoner, he was Counsel, he was Judge and Jury and everybody else."

²⁷ Dated 10 June 1836 and reproduced in Bonwick's *Port Phillip Settlement*.

²⁸ Description by GA Thomson in his *Reminiscences* p36.

²⁹ *Early Australian Reminiscences of GA Thomson* of Belfast, Ireland.

³⁰ *ibid* p4.

³¹ H Anderson, *op cit*. p90.

³² TF Bride, *Letters*, p130.

³³ E Finn, *Chronicles*, p5.

³⁴ E Scott, *Vict Hist Magazine*, vol IV, No 3, Mar 1915 at p99.

³⁵ Hawkins appointed magistrate 17 March 1837, Simpson appointed magistrate on 4 October 1837.

³⁶ J Morgan, *Life of Buckley*, *op cit*. p110.

³⁷ JL Forde, *Story of the Bar*, p 13. On 20 December 1836 Lonsdale took evidence on the banks of the Barwin (sic). p48 of Court Register, Police Office, Archives, Latrobe.

³⁸ Valuable reference may be had to TA Plucknett, *Concise History of the Common Law*, p167, Potter's *Historical Introduction to English Law*, 4th ed Kiralfy p228 and WJ Windeyer, *Legal History* p132.

³⁹ W Paul, *Justices of the Peace*, 1st ed. pp49-59.

⁴⁰ At Latrobe Archives. Safe 6b.

⁴¹ The law regarding the settlement of disputes between master and servant was eventually clarified by the passing of Act 9 Geo IV No 9 which provided that cases of ill-usage of servants could be tried before one or more Justices and this Act was not repealed until 20 October 1840 by Act 4 Vict No 23 which brought disputed regarding wages not exceeding £30 before Courts of Petty Sessions.

⁴² *Australian Dictionary of Biography*, Melbourne 1967 at p124 states that Lonsdale's powers were less precise than his duties.

⁴³ Edmund Finn, quoted by Whitfield *op cit*. 116.

⁴⁴ TF Bride, *Letters*, p134.

⁴⁵ Letter to Gov Bourke, Achives Lt No 36/1.

⁴⁶ Letter to Gov Bourke dated 1 February 1837, No 36/5.

⁴⁷ *ibid* at p4. He says: "Mr Faulkner (sic) had generally been a troublesome person, a self-constituted lawyer."

⁴⁸ Cited by Bonwick, *Port Phillip Settlement*, at p427.

⁴⁹ Case numbers 5 and 6 of 1836.

⁵⁰ 'by going into the tent of women and frightening them.'

⁵¹ *The Sydney Gazette* of 26 January 1837.

⁵² *NSW Government Gazette*, 1838, p547.

⁵³ Rose Mary McGowan, *A Study of Social Life and Conditions in Early Melbourne prior to Separation 1836-1851*.

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