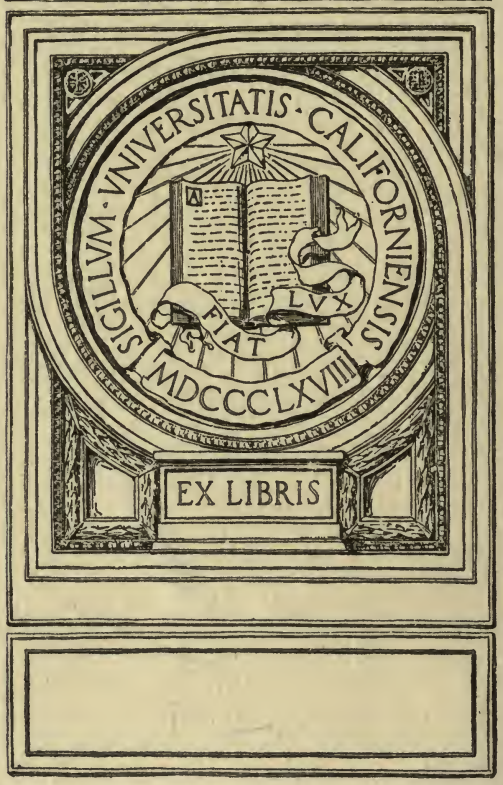
A COLONIAL AUTOCRACY

M. PHILLIPS



STUDIES IN ECONOMICS AND POLITICAL SCIENCE

EDITED BY THE HON. W. PEMBER REEVES
DIRECTOR OF THE LONDON SCHOOL OF ECONOMICS.

No. 16 in the series of Monographs by writers connected with the London School of Economics and Political Science.

A COLONIAL AUTOCRACY

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NEW SOUTH WALES UNDER GOVERNOR MACQUARIE

1810-1821

BY

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LONDON

P. S. KING & SON

ORCHARD HOUSE, WESTMINSTER

1909

This work is the Thesis on which the Author obtained the Degree of D.Sc. in the Faculty of Economics, of the University of London, June, 1908.

PREFACE.

THE selection of the period of New South Wales history covered by this book, of the years 1810 to 1821, may seem to call for explanation. The choice was not arbitrarily made, but was due to the fact that the publication of the historical records of the State commenced by the New South Wales Government in 1892 ceased in 1901 with the issue of the seventh volume of the series, containing the documents of the years 1809 to 1811. These documents consisted of official papers and a few private letters, and by their help the history of the Colony may be traced from Captain Cook's first voyage to the end of 1811. It was therefore obvious that further research should commence where this publication left off. By going back, however, to the commencement of Governor Macquarie's rule in 1810, the period is brought to a natural conclusion with his return to England in the beginning of 1822.

Very little has been written of the history of Australia apart from tales of exploration and travel. Each volume of the Historical Records of New South Wales, however, is prefaced by an introduction to some extent summarising the documents, so that an easily verifiable account of the history of the Colony may be obtained up to the end of 1811. But the documents are not well arranged, and the introductions are scanty and confused, and it is almost a matter of research, even before 1811, to gain a clear idea of the state of the country and the course of its development.[1]

[1] *The History of New South Wales from the Records*, by G. B. Barton, vol. i., gives a full and authentic account of the Colony up to 1792.

For these reasons it has seemed necessary to give an account in considerable detail of events taking place in the years immediately preceding Macquarie's arrival, and to describe fully the conditions of the Colony—social, economic and political—at that time.

From the beginning of 1812 the documentary evidence in the Public Record and Colonial Offices, the files of the *Sydney Gazette* (in the Public Record Office) and Parliamentary Papers have formed the basis of the following chapters in the history of New South Wales. All accessible printed books have also been examined, on the whole with very little result. The only contemporary historian of any note is W. C. Wentworth; but apart altogether from the narrow limitations of his book, no one in search of facts would find much profit from a study of his early work.

In later days G. W. Rusden is the only historian who has dealt in detail with the subject. In his *History of Australia* he devotes one chapter of more than a hundred pages to Macquarie's governorship, and he appears to have had before him many important official despatches and much private correspondence. Unfortunately Mr. Rusden made many errors in chronological and other facts which really vitiate the greater number of his conclusions, and this part of his history is not only too summary to be of great value, but too inaccurate to be of much consideration. Mr. Jenks' *History of Australia*, which is by far the best and most reliable book upon the subject, deals very lightly with early days, the years from 1801 to 1821 being passed over in two pages. Even in such a specialised treatise as that of Mr. Epps' *Land Laws of Australia*, the system of land distribution before Lord Ripon's Regulations in 1831 is accorded an equally unimportant position.

In spite of the fact that so little attention has been given to Macquarie's governorship, it is a time of considerable interest and importance. From a small settlement dependent even for

its food-supply upon other countries, New South Wales grew during this period into an agricultural Colony providing its own food, beginning to establish manufactures and exporting wool. A few years after Macquarie's return it was even able to support a civil establishment without help from the Imperial Treasury. In these years also is seen under peculiarly simple and isolated conditions the working of "military" government—a curious and anomalous system of autocracy working through the forms of civil law. It is in the study of this system that the true significance of what at first sight seems merely a series of personal quarrels between the Governor and the judges emerges as a conflict of principles, as the outcome of the real intellectual difficulty of reconciling the due administration of the law with a judiciary dependent upon an autocratic Governor. The fact that it was a one-man government also renders very important the study of this one man's character and training, his prejudices and opinions. Macquarie, himself a man of very ordinary ability, is an intensely interesting figure in Australian history, because for twelve years the development of the country was almost wholly dependent upon his guidance. The period illustrates too the almost inevitable failure of such an autocracy, and it comes to an end with the commission of J. T. Bigge, who was sent from England in 1819 to investigate on the spot the complaints against the Governor, and to inquire generally into the Colony's affairs. Acting upon the reports of the Commissioner, the Home Government in 1823 granted to New South Wales some measure of Constitutional Government, and thus accomplished the first step in that progress which led to the great autonomous measures of 1855. The years from 1810 to 1821 form a distinct period in this transition, and behind the simple constitutional history of the time are all the complex elements which went to make up the social and economic organisation of the people. These Englishmen settled in southern seas found that they had to face old problems as well as new, and

in dealing with both they reproduced with many interesting modifications the administrative methods to which they had been accustomed. Thus, for example, the magistrates had to deal with the evils of the liquor trade in a peculiarly acute form, and ways had also to be found for carrying out the easier duties of public benevolence. For the latter purpose many associations came into being, and it was largely through the sense of corporate existence gained by these means that the colonists began to demand towards the end of the period a fuller share in the work of Government. During these years also the questions of taxation, the organisation of trade, internal and external, the distribution of and above all the conditions of labour passed through important stages. Finally there was ever present the unsolved problem of the reform or restraint of the criminal. New South Wales at this period ceased to be a mere penal station and became a Colony. Although the convicts still formed the majority of the population, the free settlers and the convicts' children gained steadily upon them in numbers, wealth and influence. Macquarie deliberately adopted the principle that New South Wales was for the convict and not for the free colonist, and the story of his government is largely the story of the momentary success and final defeat of this policy, a defeat followed by some years of bitter class enmity.

Yet the idea which fired Macquarie's enthusiasm was worthy of attention, and to turn the criminal into a useful, self-respecting citizen populating the empty lands of a new country, and alone building up a new state, was a fine and generous plan.

The introduction of free settlers privileged to employ convict labour, the faults and weakness of an autocratic government, and above all the mental atmosphere of the beginning of the nineteenth century with its narrow religious outlook and severe class rigidity, made its complete realisation impossible. Nevertheless the experiment of colonising-transportation was not altogether a failure. If for the most part the convict remained

unreformed, his children, even those of the first generation, were creditable to the British stock from which they were descended. Between 1810 to 1821 this first generation of Australians reached the age of men and women. They bore no sign of a convict taint, no heritage of vice or weakness, and this strange method of colonisation which gave to the country a fast-increasing population, brought with it no penalty of physical or moral degeneration.

One other aspect of New South Wales history may be indicated here—the relation of the Home Government and the Imperial Parliament towards this infant Colony. By a study of Parliamentary Papers and Debates, as well as periodical literature and newspapers, an attempt has been made to set forth the attitude of English politicians towards New South Wales, and the result of that attitude as embodied in the work of inquiry and legislation.

The author cannot let this opportunity pass of recording her grateful thanks to Mr. Graham Wallas and Mr. Sidney Webb. Mr. Graham Wallas supervised her work in his official capacity, but he took a very generous view of his duties, and the author can scarcely measure the extent to which she benefited by his advice, admonition and criticism. To Mr. Sidney Webb her debt is also great, for he read this thesis in manuscript and made invaluable suggestions. She owes much too to the School of Economics, for no seat of learning could with finer generosity have welcomed the stranger within the gates.

MARION PHILLIPS.

LONDON, *July*, 1909.

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DOCUMENTS

I. COLONIAL OFFICE.

Manuscript.

1. Despatches from Secretary of State and Under-Secretary to Governor Macquarie.
2. Letters from Colonial Office to persons in New South Wales.
3. Letters to persons in United Kingdom (Domestic Correspondence).
4. Commissions of Government Officers in Colony.
5. Circular letters to Colonies, etc.

II. RECORD OFFICE.

Printed.

The *Sydney Gazette*. The only newspaper in the Colony and the official organ of the Government. Contains General and Government Orders, Proclamations, and all official notices and advertisements, as well as general news.

Manuscript.

1. Despatches from Governor of New South Wales to Secretary of State or Under-Secretary, with Enclosures.
2. Despatches from Secretary of State and Under-Secretary to Governor Macquarie.
3. Letters from Colonists to Secretary of State or Under-Secretary.
4. Letters from other Government Departments to Colonial Office.
5. Letters from private persons in United Kingdom to Colonial Office.
6. Correspondence between Bigge (Commissioner to New South Wales) and persons in the Colony.
7. Despatches of Bigge to Secretary of State or Under-Secretary.
8. Documents and Minutes of Evidence collected by Commissioner Bigge.
9. Reports of Commissioner Bigge.

III. PARLIAMENTARY PAPERS.

The following abbreviations are used in this list; H.C., 1812, II., signifying House of Commons' Papers, 1812, Volume II.

1798. Report respecting Convicts Transported to New South Wales and Norfolk Island. Select Committee on Finance. (H.C., 1798.)

1812. Report of Committee on Transportation with Minutes of Evidence and other Documents. (H.C., 1812, II.)

1816. Expenses (Annual) of New South Wales, 1812-1816. H.C., 1816, XVIII. Letters and Enclosures of Lord Bathurst to Governor Macquarie and of Governor Macquarie to Lord Bathurst concerning Report on Transportation. (H.C., 1816, XVIII.)

1819. Report of and Minutes of Evidence taken before Committee on Gaols and Prisons. (H.C., 1819, VII.)

1822. Report of Commissioner of Inquiry (J. T. Bigge) on the state of New South Wales and its Government, Management of Convicts, their Character and Habits. (H.C., 1822, XX.)

1823. Reports of the same on the Judicial Establishments of New South Wales and Van Diemen's Land. (H.C., 1823, X.)

1823. Instructions to J. T. Bigge, Esq., January, 1819. (H.C., 1823, XIV.)

1828. Letter from late Governor Macquarie to Lord Bathurst, 27th July, 1822. (H.C., 1828, XXI.)

IV. STATUTES.

The following short notes have been made in order to show the relative importance of different statutes and to facilitate reference.

A full account has been given of 4 Geo. IV., cap. 96, because of its great importance in Australian History.

1784. 24 Geo. III., cap. 56.
Gives permission to His Majesty in Council to transport convicts to some place beyond the seas.

1787. 27 Geo. III., cap. 2.
Establishes Criminal Court for New South Wales.

1790. 30 Geo. III., cap. 47.
Enables His Majesty to authorise his Governor or Lieutenant-Governor of places beyond the seas, to which felons or other offenders may be transported, to remit the sentences of such offenders.

1799. 39 Geo. III., cap. 51.
Continues various Acts referring to transportation of offenders.

1802-1803. 43 Geo. III., cap. 15.
Facilitates some details in carrying out the transportation of convicts.

1806. 46 Geo. III., cap. 28.
Continues the Transportation of Offenders' Act until 1813.

1813. 53 Geo. III., cap. 39.
Continues Transportation of Offenders' Act for one year.

1813. 54 Geo. III., cap. 15.
For the more easy recovery of debts in New South Wales.

1813. 54 Geo. III., cap. 30.
Continues Transportation Acts for two years.

1815. 55 Geo. III., cap. 156.
Continues Transportation Acts for one year and makes certain minor alterations therein.

1816. 56 Geo. III., cap. 27.
Continues Transportation Acts until 1821.

1817. 57 Geo. III., cap. 53.
For more effectual Punishments of Murders and Manslaughter committed in Places not within His Majesty's Dominions.

1819. 59 Geo. III., cap. 101.
Amends some minor points in 56 Geo. III., cap. 27.

1819. 59 Geo. III., cap. 114.
Stays proceedings for one year against any Governor or other persons concerned in imposing and levying duties in New South Wales; continues for one year certain duties; empowers Governor to lay duty on spirits made in New South Wales.

1819. 59 Geo. III., cap. 122.
Permits vessels under 350 tons to trade with New South Wales.

1820. 1 Geo. IV., cap. 62.
Continues 59 Geo. III., cap. 114 until 1822.

1821. 1 and 2 Geo. IV., cap. 6.
Continues for two years the Transportation Acts.

1821. 1 and 2 Geo. IV., cap. 8.
Continues 59 Geo. III., cap. 114 until 1823.

1822. 3 Geo. IV., cap. 96.
"An Act to continue until the First Day of January, 1824. An Act passed in 59 Geo. III . . . to authorise the imposing and levying other duties on goods imported into the said Colony; and to suspend, for ten years, the payment of duty on the importation of certain goods, the produce of New South Wales."
By this Act, Governor may impose by Proclamation or Orders rates and duties on importation of rum or spirits from United Kingdom or British West Indies not exceeding 10s., and on others not exceeding 15s. per gallon on tobacco 4s. a lb.; on all other goods not the produce or manufacture of United Kingdom, imported direct from United Kingdom—duty not exceeding 15 per cent. *ad valorem*.
He may also reduce and revive such duties.
He may make regulations for levying the duties.
He may impose fines and penalties for breach of the regulations, provided true copies of such regulations be transmitted to Secretary of State by Governor for His Majesty's Approbation.
The account of application of duties so collected to be transmitted to Treasury.

1823. 4 Geo. IV., cap. 47.
Continues Transportation Acts.

1823. 4 Geo. IV., cap. 96.
"An Act to provide until the First Day of July, 1827. . . for better administration of justice in New South Wales and Van Diemen's Land, and for more effectual Government thereof and for other purposes relating thereto."
The important sections of this Act provide as follows:—
1. Supreme Court for New South Wales, and one for Van Diemen's Land. Each to have one Judge called a Chief Justice paid by salary and not fees.

2. Courts to be Courts of Record. All pleas, Civil, Criminal or mixed, and Jurisdiction in all cases whatsoever.
3. Courts to have jurisdiction over Piracies and Offences committed at sea or in islands in India or Pacific Ocean.
4. Trial for crimes, misdemeanours and other offences cognisable by Court to be prosecuted by information and tried by Judge and seven Officers of Army or Navy. If there are not seven Commissioned Officers, Magistrates to be appointed who may be challenged.
5. Actions at Law to be tried by Chief Justice and two Magistrates. Right of challenge given.

If parties desire a Jury of twelve such Jury may be empanelled. Chief Justice is to be the Judge of the Law in all cases.

6. Qualification of Jurors is to be freehold of fifty acres or freehold dwelling of £300 value.
7. His Majesty by Order in Council may extend Jury Trial.
8. Supreme Court to have Equitable and Ecclesiastical Jurisdiction.
9. If amount of suit is above £500, appeal to be allowed to Court of Appeals.
10. Court of Appeal in New South Wales to consist of Governor assisted by Chief Justice of Van Diemen's Land. Similar Court for Van Diemen's Land.
11. Appeal from this Court to Privy Council under regulation by Charter or Letters Patent from His Majesty.
12. Courts of Session to be established with Summary Procedure and carefully defined Powers. To have jurisdiction in Criminal cases short of capital.
13. Courts of Request to be established for hearing Civil Suits under £10. Commissioner to preside. Paid by salary not fees.
14. Council to be established called a Legislative Assembly with power to make laws. To be appointed by Warrant by His Majesty.
15. His Majesty in Council may establish any Law dissented from by the Council.
16. No tax to be imposed by Governor and Council except for local purposes.
17. 59 Geo. III., cap. 114 made perpetual.
18. All laws to be laid before Chief Justice for his certificate that they do not contravene the Law of England.
19. All laws to be transmitted to His Majesty within six months.
20. Laws and Orders in Council to be laid before Parliament.
21. Pardons already given to convicts by Governors to have same effect as pardons under Great Seal.
22. In future pardons must be transmitted to His Majesty for approbation or allowance. Afterwards may have effect within New South Wales as if under Great Seal.
23. Any convict unduly returning to be punished by death.
24. Persons assisting convicts to escape to be guilty of misdemeanour. Penalty £500, or imprisonment for two years.
25. 2 Geo. II., cap. 36, extended to New South Wales.
26. Artificers, etc., may enter into indentures to serve any persons in or about to go to New South Wales.
27. Persons to whom they have contracted may maintain actions against any other persons employing them.

1824. 5 Geo. IV., cap. 84.
More strictly defines powers of Superintendents of Convicts on transports.
Convict whose sentence has been remitted by Governor, and who is free so long as he remains in Colony, may have right of owning property and being sued in the Courts.
Consolidates all the Transportation Acts.

DEBATES IN PARLIAMENTS CONCERNING NEW SOUTH WALES.

Important Debates are indicated thus *

1810. 4th May. (Hansard.)
9th May. Sir S. Romilly moved address to King to put in force 19 and 34 Geo. III. *re* Penitentiary Houses. Withdrawn. (Hansard.)
* 5th June. See above. Lost. 52-69. (Hansard.)

1811. 13th February. (Hansard.)
4th March. Committee on Penitentiary Houses appointed. (Hansard.)

1812. 4th February. Sir Samuel Romilly gave notice of motion to repeal 29 Geo. III. relative to transportation of convicts. (Hansard.)
12th February. Committee on Transportation appointed. (Hansard.)

1813. 8th January. (Hansard.)

1815. 22nd June. Bill to extend duration of Transportation Acts introduced (Hansard.)

1816. * 20th February. Offenders' Transportation Bill First Reading. (Hansard.) Same. Second Reading. (Hansard.)
3rd April. Tierney moved address to Prince Regent praying for abolition of Third Secretary of State. (Hansard.)

1817. * 10th March. Bennet presented petition from settlers in New South Wales. (Hansard.)
29th April. Tierney moved for Committee to inquire into advisability of abolishing Third Secretary of State. (Hansard.)

1819. * 18th February. Bennet moved the appointment of Committee to inquire into system of Transportation and State of New South Wales. Lost 93 to 139. (Hansard.)
1st. March. Lord Castlereagh moved appointment of Committee on Gaols and Prisons, which would also inquire into State of New South Wales. Carried. (Hansard.)
* 23rd March. Brougham presented petition of Blake and Williams. (Hansard.)
* 7th April. Bennet moved address to stay departure of female convict ship to New South Wales. Lost. (Hansard.)

1819. 29th June. First Reading of New South Wales Duties Bill. (*Times*, 30th June, 1819.)
2nd July. Committee stage of New South Wales Duties Bill. (*Times*, 3rd July, 1819.)

1823. 2nd July. Sir J. Mackintosh presented petition from Eager against New South Wales Jurisdiction Bill. (Hansard.)

*7th July. Mr. Wilmot Horton introduced further consideration of New South Wales Jurisdiction Bill. Went into Committee. (*Times*, 8th July, 1823.)

8th July. Sir James Mackintosh presented petition of the emancipists (*Times*, 9th July, 1823.)

9th July. New South Wales Jurisdiction Bill in Committee. (*Times* 10th July, 1823.)

10th July, 1823. New South Wales Jurisdiction Bill read a third time and passed. (*Times*, 11th July, 1823.)

CHRONOLOGY

(*Events taking place in England are in italics.*)

1808, January. Bligh deposed.

1809, May. *Macquarie appointed Governor; Ellis Bent appointed Judge-Advocate.*

1810, April, October. *Lord Liverpool becomes Secretary of State;* Bligh leaves Sydney.

1811, May, June, July. *Johnston's Trial.*

1812, June. *Lord Bathurst becomes Secretary of State; Committee of House of Commons on Transportation.*

1813. *New Charter of Justice issued for New South Wales; appointment of Jeffery Hart Bent as Judge of Supreme Court.*

1814, July. J. H. Bent arrives at Sydney.

1815, November. Death of Ellis Bent.

1816, January. *Recall of the Bents.*
January. *Appointment of Wylde and Field.*

1817, May. J. H. Bent leaves Sydney.

1819, January, March. *J. T. Bigge appointed Commissioner; appointment of Committee on Gaols.*

1820, July. *Macquarie's Resignation accepted.*
November. *Sir Thomas Brisbane appointed Governor.*

1821, February. Bigge leaves Sydney.
November. Brisbane arrives at Sydney.

1822, February. Macquarie leaves Sydney; *Bigge presents Report I.*

1823. *Bigge presents Reports II. and III.; 4 Geo. IV., cap.* 96.

1824. *Death of Macquarie.*

ABBREVIATIONS

R.O. = Record Office.
C.O. = Colonial Office.
MS. = Documents in Manuscript.
D. = Despatch.
Encl. = Enclosure to D., etc.
H.R. = *Historical Records of New South Wales*, 1788-1811 (published by New South Wales Government).
P.P. = Parliamentary Papers.
H.C. = House of Commons.
C. on T. = Report of Committee on Transportation, together with minutes of Evidence and Appendices, P.P., 1812.
C. on G. = Report of Committee on Gaols, etc., P.P., 1819.
Bigge's Report, I. = Bigge's Report on Convict System, P.P., 1822.
Bigge's Report, II. = Bigge's Report on Judiciary and Police, P.P., 1823.
Bigge's Report, III. = Bigge's Report on Agriculture and Trade, etc., P.P., 1823.
Appendix Bigge's Reports. = Appendices to Reports in R.O. consisting of minutes of evidence, documents, etc.
S.G. = *Sydney Gazette.*
G.G.O. = Government and General Orders.

CHAPTER I.

INTRODUCTION: THE LAND AND THE PEOPLE.

AUTHORITIES.—*Historical Records of New South Wales* (especially Volume VII.). Report on Transportation, P.P., 1812, II. Report on Gaols, P.P., 1819, VII. Bigg's Reports, P.P., 1822 and 1823, Vols. XX and X. Report of Trial of Lieut.-Colonel Johnston. Eden's *History of New Holland.* *Memoir of Samuel Marsden.*

WHEN Colonel Macquarie landed at Sydney at the close of 1809 the population of the settlement he was to govern was already over 10,000. In the twenty-two years which had passed since the foundation of the Colony of New South Wales in 1788, the numbers had increased at a rate of nearly 500 a year—an increase in population then without parallel in the course of modern colonisation. The cause was not far to seek; what would under a system of voluntary emigration have been remarkable, was but the natural result of forced emigration, of the system of "Colonising-Transportation" of which New South Wales was the first example. The custom of sending convicted criminals to the plantations was indeed an old one, and one not peculiar to England, but the system put into practice in 1788 differed in important features from any which had been practised before.

The final triumph of the North American Colonies in 1783, by closing that channel, had left a fast increasing number of prisoners on the hands of the Government. The previous course had been to send a large proportion of the convicts to serve as bond-servants to colonial planters and farmers. Once they were consigned to the masters of the merchant vessels who offered for this service, the direct responsibility of the Government was at an end, and the convicted criminal served out his sentence under a form of mild restraint. Indeed the mildness of the punishment was condemned in the House of Commons

so late as 1776 by Mr. William Eden,[1] who a few years afterwards suggested hard labour at home or slavery in Mohammedan lands in exchange for Christian captives as more efficacious punishments.[2]

Again, the bond-servants formed a minority and an unimportant minority of the whole colonial population.

When this system was interrupted by the revolt of the Colonies in 1776, and brought altogether to an end by the peace of 1782, the Government decided to recommence the transportation of convicts, apparently unconscious of the extent to which they were creating a new policy. Under the new scheme not only were the majority of the colonists convicts, but they were almost entirely, for the first few years wholly, under the direct control of the Government. By an Act of 1783, the King in Council was empowered to declare any territory in the foreign possessions of Great Britain to be a place to which convicts might be transported.[3] At the same time an expedition examined the West Coast of Africa in the search for territory, but reported that it was too unhealthy even for the social outcast. Yet to find some suitable country for the purpose became daily more urgent. With the growing humanity of the times the commutation of the death penalty grew increasingly frequent. England offered no places of confinement for the men whose sentences were thus commuted save the pestilent, over-crowded prisons or equally horrible river hulks.

Meanwhile the immediate settlement of New Holland[4] was being pressed upon the Government.[5] The opportunity of achieving both objects was too good to be lost, and in 1784 the scheme received the serious attention of Lord Sydney, the Secretary of State for Home Affairs. In 1786 a further step was taken, and Orders in Council issued which declared the East Coast of New Holland to be a place within the meaning

[1] Afterwards the first Lord Auckland.

[2] See *History of New Holland*, by William Eden, 1787, p. xxx. Discourse on Banishment.

[3] 24 Geo. III. cap. 56.

[4] *i.e.*, Australia. New Holland was the earlier name for the Colony. In Flinders' Charts, published in 1814, the name Australia was used, and Macquarie in D., 4th April, 1817, hoped that the name would be adopted. One of the earliest names given by the voyagers of the seventeenth century was Terra Australis.

[5] See H.R., I., Pt. II., Memorial of Matra to Lord Sydney, 23rd August, 1783.

of the Act of 1783. In the following year the project was put into execution and a small fleet dispatched under the command of Captain Arthur Phillip of the King's Navy, who was to establish the settlement and be its first Governor. His command consisted of 1,100 all told, including a military garrison, 500 male and 250 female convicts and a sprinkling of free emigrants. In January, 1788, he landed his people at Port Jackson, and founded on its shores the town of Sydney.[1]

The expedition created scarcely a ripple of excitement in England, full of interest though it was to a few students of criminal law. One of these, William Eden (afterwards the first Lord Auckland), wrote a *History of New Holland*, in the preface to which he discussed the new experiment.[2] The suggestions made by him in 1776 in the speech referred to above had apparently fallen on barren ground, and he took it as an accepted fact that so far no means of keeping convicts at home had answered "the end of their exemplary correction," and that some way must be found of "exonerating this country of its obnoxious members".[3] New Holland seemed a suitable location, and the annexation of that island was on other counts desirable. He spoke with careful vagueness of the considerable changes which had taken place since England first turned over troublesome subjects "to the use and benefit of its infant colonies"—changes "in the interests and political situation of many leading states of Europe".[4] Whatever the actual facts here alluded to, it seems at least worthy of note that two days after Phillip landed at Port Jackson a French fleet was sighted in the offing, and that for the next forty years each impulse towards extended exploration and settlement in Australia, which was fostered by Government, was almost without exception coincident with a similar enterprise rumoured or in course of execution by France.

However desirable such a settlement might be, Eden considered that to invite "the industrious and respectable artisan

[1] Named after Lord Sydney.

[2] The book was published in 1787. It gives an account of discovery and explorations from 1616 to 1787. Eden was an intimate friend of the younger Pitt, and probably expressed the views of the Government in regard to the new settlement.

[3] *History of New Holland*, Preface, p. v. [4] *Ibid.*, p. vii.

to exchange his own happy soil for the possession of territory, however extensive, in a part of the world so little known" would have been justly censurable. For such a purpose there remained criminals who, having forfeited their lives or liberties to justice, "have become a forlorn hope, and have always been adjudged a fair subject of hazardous experiments; . . . if the dangers of a foreign climate or the improbability of returning to this country be considered as nearly equivalent to death, the devoted convict naturally reflects that his crimes have drawn on this punishment, and that offended justice in consigning him to the inhospitable shore of New Holland does not mean thereby to seat him for his life on a bed of roses."[1]

There was, however, a difficulty in the likelihood that the punishment would not prove a heavy one, and would thus encourage the commission of offences (a condition said to have been realised thirty years later[2]) or might prove a fatal argument for the multiplication of capital penalties. On the whole the prospects of the new settlement were hopeful, the future home of the convicts was likely to be better than they expected or deserved, and "such of those unhappy people as testify an amendment in their morals, or an inclination to embrace the profession of honest industry, will probably not be shut out from enjoying in some measure even the comforts of life".[3]

Of the Colony as an instrument of commerce, and ultimately of profit to the mother country, he had high expectations, and he pushed aside the less optimistic views of colonisation to which the loss of America had given point. He argued that the errors and prejudices of past ages could not be fairly advanced "against the success of similar measures, when undertaken at this period with the assistance of superior lights".[4]

It is melancholy to reflect that the decree of the "superior lights" was the foundation of a penal settlement under military government. Having founded it, so lacking in forethought and energy were these high powers that delay in sending

[1] *History of New Holland*, Preface, pp. v-vi.
[2] See H. G. Bennet in House of Commons. Hansard, vol. 39, p. 478, 18th February, 1819.
[3] *Ibid.*, p. vi. [4] *Ibid.*, p. ix.

store-ships kept the little colony, cast out like a band of shipwrecked mariners on this uttermost island, for more than two years on the verge of starvation. With a population of criminals and soldiers whose character was little better, people in whom greed was a dominant sentiment and self-restraint non-existent, Phillip weathered through four years of Governorship beset on all sides by difficulties of almost incredible magnitude. The community was as much alone as a ship in mid-ocean until the hitherto uncultivated soil yielded crops, and the few head of cattle increased. There were no means of getting away. The merchant vessels which had formed the bulk of Phillip's fleet had returned, and the crazy old *Sirius*, the King's ship under his command, had been lost soon after. While the Government at home delayed in sending store-ships, they added to Phillip's difficulties by sending more convicts. However, by 1792, when Phillip, broken in health and spirits, returned to England, brighter prospects were dawning and the immediate danger of famine had been put to rest by more liberal supplies from home. Phillip never returned to New South Wales, for shortly after his arrival in England he succumbed to an illness from which he had long suffered. Three naval governors followed him, Hunter, King and Bligh. The last was deposed and arrested by the colonists at the beginning of 1808, and it was as his successor that Lachlan Macquarie, the first soldier to hold the command, took the oaths of office on New Year's Day, 1810.

The work of free settlement had made little progress. The stream of emigration from England to all parts of the world flowed very slowly, and no definite efforts were made to divert it towards New South Wales. Phillip's eager prophecy that, given fifty farmers, future prosperity would be assured, may have received theoretic approval, but was disregarded in practice. Nor was any enthusiasm felt for the new system of "colonising transportation". In 1798 a Select Committee on Finance declared that New South Wales was "already fully supplied with convicts" and advocated the establishment of home penitentiaries.[1] In 1803 Lord Hobart, Secretary of State for War

[1] See Report of Select Committee on Finance, P.P. 1798.

and the Colonies, said: "If you continually send thieves to one place, it must in time be super-saturated. Sydney is now, I think, completely saturated. We must let it rest and purify for a few years and it will again be in a condition to receive." [1]

Mr. Wyndham, who held the same office in the shortlived ministry of 1806, thought it well to encourage free emigration as a counter-irritant, so to say, to the convict population.[2]

Little was done to improve affairs in these directions. Certainly during Lord Hobart's term of office, after an unsuccessful attempt to form a penal colony at Port Phillip, two settlements were established at Hobart Town and Port Dalrymple in Van Diemen's Land. Nevertheless the vast majority of the convicts were still shipped to New South Wales, and when in 1811 the population of Van Diemen's Land had reached 1,300, not a fifth part were prisoners. In the older Colony the proportion was more than one-half.[3]

In the first seven years of settlement, from 1788 to 1795, 5,765 men and women were transported to New South Wales, and of these 3,377 either died or returned to England at the expiration of their sentences. But 1,633 men and 755 women remained in the Colony in 1795 who had either served their time, been pardoned or emancipated, or were still prisoners. In the next fifteen years, that is until the beginning of 1810, 6,525 convicts were despatched to Sydney. There is no reason to believe that the proportion of those who died or returned had greatly changed, for as the inducements to settle in the Colony increased so also with growing prosperity did the means of leaving it. Taking, therefore, the percentage of those who remained in the preceding seven years, there would in 1810 be 3,232 men and 1,905 women who had arrived as convicts.

As in the whole population of 10,452 there were 2,654 children, not more than 2,346 men and 315 women in the settlement had not been transported. Of the men the military

[1] See H.R., V., Appendix, p. 835. Quoted in letter of Banks to King, 8th April, 1803.

[2] R.O., Wyndham to Bathurst, 1806.

[3] Every year a "General Muster" was held and a fairly complete Domesday compiled of the inhabitants, cattle and crops throughout the Colony. That made in 1810 has been lost, and the basis of the calculations which follow is the record for 1811.

garrison accounted for 1,416 and the civil staff for 30. Many of the women were the wives of the soldiers and men on the civil staff. Certainly not more than 900 men and 300 women belonged to the class of free settlers. Some of these, it is impossible to say how many, were the first of the Australian-born, the offspring of the earliest settlers and convicts, then just reaching the borders of adult life.[1] There cannot under any circumstances have been in 1810 more than 600 or 700 voluntary adventurers.[2]

It was only natural that, at a time when in all countries the boundaries of class were well-marked, the ranks of a population so strangely recruited as that of New South Wales should be crossed and recrossed by lines of social distinctions. The broadest division was that between convict and free, which marked a man from the moment at which he first set foot in the territory. No matter what position he afterwards attained, whether he rose from prisoner to landed proprietor or fell from freedom to the ranks of the colonial gaol-gang, the important thing was not what he had come to be but how he had come to be there.[3] Among the convicts themselves new divisions came into existence—the chief of them that between the men who were and the men who were no longer prisoners. From the vocabulary of slavery this class gained its name, and a body of freed but not freemen was formed within the convict ranks. The distinction between "freed" and "free" cut deep into the social, economic and judicial structure of the Colony. By completing his sentence or by means of a free pardon or a conditional pardon or "emancipation," which gave him freedom so long as he remained within the colonial boundaries, a prisoner might join the ranks of the freed, but the taint of servitude kept him from the full rights of citizenship. It was, however, only as the Colony began under Macquarie to emerge from infancy,

[1] Probably 300 would be an outside limit.

[2] The estimate of the male convict population is probably too low. This should very possibly be larger and the free element smaller, for in 1820 the free settlers (excluding the Australian-born) were reckoned at as low a figure as 794. See Chapter V.

[3] The social, and to some extent the legal, consequences of imprisonment in a colonial gaol differed according to the nature of the crime, and also according to whether the offence was a crime by English or by Governor-made law only.

and gradually cast aside the chains of military government, that the full force of these restrictions came to be felt.

There was a second twofold division of an economic rather than social nature crossing that of convicts and free, the division, namely, between those who received rations from the Government stores and those who did not—between the "victualled" and the "not-victualled". To those who were "on the store," a ration of meat and grain varying with the harvests and the frequency of home supplies, was served out each week, and in 1811 Government provided 4,227 full rations.[1] As these included the half rations for women and quarter rations for children, the total number of persons for whose food-supply the Government was responsible was considerably over 4,000. The "victualled" included the civil department, the military and police forces with their families,[2] 1,347 convicts in Government employ, 80 land proprietors, the families of 40 of them and 90 of their convict servants. Rations constituted a great part of the remuneration of the small employees of Government, and in the lower ranks of the police force food and clothing formed the only wages. For the farmers the supply of rations was part of the system of land grants and "indulgences" to free and convict settlers.[3]

The establishment of these Government stores issuing rations to about half the population influenced strongly the agricultural development of the Colony. Government not only granted land and assigned convict servants, but was also the chief purchaser of the produce of farmer and grazier, and the Government price ruled the market.[4] Socially the stores in Sydney and in the townships were the chief rallying points for settlers and traders, who would come thither and loiter about, discussing the prospects of rain, and the laziness of convict servants, the findings of the Criminal Court and the struggle against Napoleon, the depredations of the natives on their peach trees, and the eternal glories of George III. and the

[1] In 1810 there were fewer rations served out, but it is impossible to find the exact increase.

[2] In a few cases the families were not "on the store".

[3] See later in this Chapter.

[4] In 1810 Government purchased three-fifths of the wheat grown in the colony. C. on T.

British flag. Indeed the popularity of these informal "club-rooms" was such that Macquarie found it necessary, in the interests of public business, to issue an order on the subject wherein he expressed "a hope, after this Notice of the inconvenience arising from such habit, that persons not having actual business at the said stores and granaries, will desist from lounging there in future."[1]

When Macquarie came to the Colony there were only three populated districts, Sydney, Paramatta and the Hawkesbury.[2] The first had a disproportionate share of the people; for with an acreage of 24,301, it had a population of 6,156—more than half of the whole. The area of Paramatta was nearly double that of Sydney,[3] but the population was only 1,807—and at the Hawkesbury River settlement there were 2,389 inhabitants occupying 28,704 acres.

The difference in kind between town and country populations was not so great as that in quantity. While the merchants and traders, who were usually landholders as well, belonged almost entirely to Sydney, in other respects the description of the people of one district serves equally well for that of all. Thus the classification given by Alexander Riley, a merchant of New South Wales, of the society of Sydney is not only an accurate account of that district, but well describes the whole settlement.[4]

In his first class, Riley placed the officers, civil and military, and gentlemen. To say that such and such men were gentlemen was easy enough—to assign reasons for saying so was more complex. Riley did not attempt to do it. Yet in so small a community, and one which from its isolated position was peculiarly self-centred, such distinctions counted for much in the amenities of colonial life. Broadly speaking, profession or birth formed the usual standard. But a merchant came within the charmed circle, and so might a retail trader if his

[1] *S.G.*, 7th August, 1813. Government Public Notice and Order.

[2] Far north of Sydney a small settlement had been established to work the coal mines at Newcastle at the mouth of the Hunter River. There seventy "incorrigible" convicts worked under guard of a garrison of thirty. The labour was more severe and the comfort less than in the southern settlements, and Newcastle (called also "Coal River") was used as a place to which the New South Wales Courts might order the transportation of prisoners.

[3] 42,627 acres.

[4] Evidence before C. on G., 1819.

wealth were great and his "address" conciliatory. In so small a population the claims of each individual could be tested, and occasionally—rigid as was the general rule—reason and humanity triumphed over the levelling of the criminal law, and an ex-convict returned to his previous rank in society.[1] The great test of a man's position and pretensions were the hosts with whom he dined. Save during Bligh's rule, to dine at Government House was a mark of gentility, while to dine at the regimental mess was even more decisive. A great number of the "gentlemen-settlers" were retired army and navy officers who applied with zeal the peculiar caste rules of the services. For the most part they were simple, commonplace men, physically courageous and intellectually vapid, men guided by a strange jumble of uncomprehended motives—blind loyalty to the King, their regiment or ship—blind acceptance of the Church of England—mingled with love of liquor, greed of gain and indifference to the usual tenets of morality. Few were men of striking ability or forceful character, for the colonial garrisons, which formed a back-water of the Service and the retired list, had little to show in those times of war in the way of brains or energy. All that was best was seeking promotion or glory on the field of battle.

The merchants were on the whole made of better stuff, for their business called for more intelligence and enterprise than the farming and grazing which usually occupied the gentleman-settler.[2]

Riley's next division consisted of the traders and settlers who had come to the Colony as free men. This included shopkeepers and tradesmen, and those who in England would have been tenant-farmers, together with schoolmasters and Methodist missionaries. The farmers amongst them were to be found chiefly on the small rich allotments along the banks of the Hawkesbury. Their intercourse with the traders and settlers

[1] Three examples may be given in which men who had been transported associated freely with the gentlemen settlers and Government officials, Ensign Barrallier, who had been transported for killing his opponent in a duel, the Rev. H. C. Fulton, for supposed complicity in the Irish Rebellion, and Sir H. B. Hayes, ex-Sheriff of Cork, for the abduction of a young girl.

[2] There were, however, probably few merchants who did not farm some land, and few settlers who were not interested in some trading project.

who had been convicts and who formed Riley's third class was comparatively free, and marriage between them and the children of freedmen or prisoners was frequent and generally approved. Indeed such connections were far more encouraged and less a matter for reproach in early years than at a later date.

The lowest rung of the social ladder was made up of convicts still under sentence and "free labourers". This was, of course, a social and in no sense a legal equality. The development of a class of "poor whites" was an inevitable consequence of the existence of servile labour. The free man fell from the social and economic point of view when he became a competitor of the bond-servant whose labour was compulsory although paid for by food, clothes and a yearly wage. The normal condition of a free man in a country where land might be had for next to nothing and cultivated with scarcely any capital was that of proprietor not labourer, and when Riley placed the latter beside the convicts, he described with perfect accuracy such a man's status in the Colony.

Probably no more extravagant and careless system of land distribution has ever been adopted in a British colony than that of the first fifteen years of Australian settlement, for already, at the beginning of 1811, 117,269 acres had been alienated. The administrators of the new Continent had two objects before them—one, to rid England once for all of her delinquent population—the other, to make the Colony self-supporting. In the beginning it was not thought necessary to do more than establish the convicts on the land at the expiration of their terms of servitude. Phillip's instructions were quite explicit.[1] Emancipists[2] were to receive grants of 30 acres if single, 50 acres if married, with 10 more for each child. The grants were to be free of all fees and taxes for ten years, after which a quit-rent, fixed at sixpence for every 30 acres, was to be charged.[3] In addition to these advantages, Government undertook to provide the ex-convict and his family with rations for twelve months, to give the necessary tools and seed

[1] See Instructions, H.R., I., Pt. II., p. 85, pars. 9, 10.

[2] *i.e.*, Men who had been convicts. This was a usual term in New South Wales.

[3] The amount of the quit-rent was left blank in Phillip's instructions, but was settled soon after at the above rate.

grain, and to allow him stock on easy terms. By Macquarie's time the period within which the settler remained "on the store,"[1] which had been left to the Governor's discretion in Hunter's instructions in 1794, had been generally accepted as eighteen months.

One reservation and one restriction were imposed. The Government reserved for itself timber suitable for naval purposes on all land granted by the Crown, and made the grants to ex-convicts conditional on residence by the grantee.[2] But to give or to withhold lay wholly in the Governor's discretion. The ostensible claim to a grant was good behaviour during servitude, but the standard of conduct might well vary as men of different character succeeded one another in the seat of patronage.

Though these convict farmers were intended to form the motive power of agricultural progress, Phillip was directed in his instructions to report on the best means of settling military and other subjects on the land. Finding convict labour of a low standard, and convict settlers lacking in energy, Phillip strongly recommended the emigration of trained agriculturists.[3] The Secretary of State disregarded this advice and began by authorising him to make grants to the non-commissioned officers and men of the garrison and later to the officers and civil staff. Finally the Governor was permitted to make grants to any free settler. The instructions laid down for Governor Hunter in 1794 were still in force in 1810. Any person applying for a grant might receive from the Governor land not more than a hundred acres above the amount granted to an emancipist and with similar freedom from taxes for ten years.[4] After that a quit-rent of one shilling for each fifty acres was to be paid. Under special circumstances, a full account of which had to be transmitted to the Secretary of State, grants of larger area might be made to free settlers or emancipists.[5] The former had to pay registration and surveying fees

[1] Colonial term for receiving rations from Government.
[2] See H.R., VII., p. 133, etc., par. 9. Instructions to Macquarie, 9th May, 1809.
[3] See above, p. 5.
[4] See Instructions to Macquarie, par. 12.
[5] *Ibid.*, par. 13.

in all cases before receiving their land. A free settler had, however, the right to receive convict servants if the Governor could spare them from the public services, and if he undertook to feed and clothe them satisfactorily.[1] Although nothing was said in the Governor's Instructions about victualling these settlers, they were usually placed on the store for the same time as the emancipists. This was one of the indulgences held forth to encourage emigration and settlement. While the giving of the grant, the extent of the indulgences, the number of servants, the situation, extent and quality of the land (apart from the general proviso that good and bad was to be equally distributed[2]) depended, in the absence of special orders from the Secretary of State, wholly upon the will of the Governor, the settler had on his side unfettered power to deal with his land in whatever way he pleased. He might or might not reside there, he might or might not clear or cultivate it, and finally he could sell it on the very day he took possession. The only restraint upon him was his expectation of favours to come, and his knowledge of each Governor's principles and prejudices.

These instructions suggest a multiplication of small holdings of thirty to two hundred acres each and that such was the intention of the Government is borne out by the clauses regulating the reservation of land for the Crown and public services.[3] The "planters" were to be settled in townships in order that as near neighbours they might better help and defend themselves and each other, and in each township was to be established a town in which special areas would be reserved for definite public purposes.[4] Further, between every 10,000 acres granted to settlers, the Governor was to set aside 500 acres for the Crown which might be leased for any term up to fourteen years. With the progress of the settlement the Crown would thus retain between every cluster of farms a tract of land of which the value would steadily increase. But the irregularity resulting from special grants of large areas, and the dangers and inconveniences in a new country of leaving broad belts of uncleared land between

[1] See Instructions to Macquarie, par. 14.
[2] *Ibid.*, par. 16. [3] *Ibid.*, pars. 17, 18, 19, 20.
[4] *e.g.* Fortifications, churches, markets, etc.

the cultivated sections, made the regulation unpopular with surveyors and Governors, and it was almost totally disregarded.[1]

The whole of the town of Sydney had been proclaimed by Phillip a Government reserve and thus brought under leasehold regulations.[2] Governor King had further restricted the leases of town lots to a period of five years.[3] This short time of certain occupation (for renewal was always problematical and there was no compensation for improvements) undoubtedly discouraged substantial building enterprises. In Sydney the houses were for the most part built of wood, with light flat roofs, varied occasionally by a stone building of similar shape and equally devoid of decoration. The town had rather the appearance of a cluster of sheds, and doubtless inspired by contrast in Macquarie that dream of architectural beauty which brought him later into much trouble and difficulty.[4]

Notwithstanding the intentions of the Government there was in 1810 anything rather than a regime of peasant holdings. In the General Muster only 808 persons were returned as proprietors though 95,937 acres were given as "settled," and the stock, exclusive of Government herds, which amounted to a few thousand head, was estimated at 49,587 head.[5] For a few years the practice of giving extensive grants to civil and military officers had been pursued, and in many cases these had been joined into single estates by private sale. Several members of the New South Wales corps had retired from the army before 1810 in order to devote themselves to their farms, and some who went with the regiment to England in that year returned to the Colony to live on the estates they had previously purchased or been granted. Occasionally also the Secretary of State had sent "gentlemen-settlers" to New South Wales with promises

[1] R.O., MS., Macquarie to Bathurst, D. 18, 4th April, 1817, in reply to D. 3rd, December, 1815. See also Chapter V.

[2] Crown reserves could be leased as the Governors thought fit. See Instructions above.

[3] He once contravened his own regulation by the simple if illegal method of incorporating in a five years' lease the promise of regular renewal up to twenty-two years. See D. 18, above.

[4] See especially Bigge's Report, I.

[5] Information on this subject is very scanty, and it is only by indirect evidence that the relative conditions of each district can be even approximately estimated.

of grants of three, four or five thousand acres in chosen localities. These great estates lay chiefly in the Sydney and Paramatta districts. In these, 66,938 acres were occupied, of which 56,939 were given over to pasture and less than a tenth to crops. At the Hawkesbury more than a third of the area occupied was under crop or lying fallow, and only 18,000 acres were used for pasture. In this district small holdings were the general rule.

As early as 1805 Governor King spoke of the scarcity and "exorbitant" cost of labour.[1] He attributed it to the common practice pursued by the colonists of obtaining larger grants than they could afford to cultivate themselves and then letting out the surplus. It was a bad system, and was one cause of the growing jealousy felt by Government against large estates. It created a wholly unnecessary class of middlemen, and by increasing the amount of land on the market weakened one of the incentives to good conduct for the convict, making it less important for him to earn his grant during the period of servitude. The need for labour, however, was not likely to be great so long as pastoral farming held first place, for climate and natural grasses favoured even careless breeding. While a few men of enterprise and foresight were occupied in improving fleeces with a view to exporting wool, both sheep and cattle brought large profits to those who bred for slaughter only. But the amount of stock in the Colony was not yet sufficient to guarantee a constant supply and salted meat was still sent from England. To check wasteful destruction of cattle and also cattle-stealing, Government officials supervised all slaughtering and received a fee for so doing.

There was, indeed, no freedom of trade, internal or external. The two staple products, meat and wheat, found their chief market with the Government, and were bought at a set price approved by the Governor. Following the English custom, the retail bakers sold their loaves at a cost fixed each week by the Sydney bench of magistrates, who based their decision on the price of corn in the market. The bakers were also ordered by the same authorities to make their bread of a certain fineness, or in times of scarcity of a certain coarseness of grain.

[1] H.R., VI., p. 39, King to Earl Camden, 15th March, 1805.

These restrictions were as nothing in comparison with those on the import trade, by which alone the colonists could be provided with manufactured goods, whether necessaries or luxuries. In the first place the Charter of the East India Company made it necessary for the Home Government to prohibit commercial relations with India, China or any "known South Sea island" without the express permission of the Governor.[1] The coasting trade, however, from Newcastle in the north to the Derwent at the south of Van Diemen's Land was in the hands of the New South Wales Government and the colonists. A clause in the Governor's instructions directed him not to allow the building of ships in the Colony for the China or East India trade, but it is doubtful whether the clause was ever enforced.[2] Governor Bligh introduced a very troublesome regulation in the interests of Sydney as the headquarters of the whole settlement which Macquarie allowed to remain in force. In accordance with this all ships bound for Van Diemen's Land from other than colonial ports had to put in first at Port Jackson in New South Wales. It was supposed that as Van Diemen's Land was on the direct route from India and the Cape, the port of Sydney would without this regulation be subordinated to that of Hobart.[3]

The port dues and customs were general and heavy. All imports save those from Great Britain paid a uniform *ad valorem* duty of 5 per cent., and duties were laid on colonial timber and coal brought to Sydney from other parts of the Colony. The products of the South Seas, sandalwood, pearl-shells and *bêche-le-mer* paid from £2 10s. to £5 per ton, and there was no drawback allowed on re-exportation.[4]

When the naval officer[5] who collected the duties had passed the cargo, the goods became subject to a curious regulation. In the earliest times the Government had been the only importer, and a system of investments in goods on behalf of

[1] Macquarie's Instructions. The permission of the Governor of Bengal also appears to have been necessary. See Chapter V.

[2] Bigge speaks of a colonial vessel of less than 350 tons register trading to Cape Colony and to Batavia. Report III.

[3] When the restriction was removed in 1812 it was not found that Sydney suffered at all.

[4] For fuller treatment of this subject see Chapter V.

[5] The Government official in charge of the port.

the Government to be bartered for corn and meat had been commenced. The growth of private trading enterprises had made this no longer necessary, and on Macquarie's assumption of office it was brought to an end.[1] For some time before that, however, the bulk of the trade had been in the hands of a few merchants who were able to charge exorbitant scarcity prices. To prevent such exploitation of the people's needs the Government placed a maximum price on imported goods, allowing in general 50 per cent. profit. In the dearth of competition the maximum price became the sole price of the merchant, though the retailer might still further heighten it.[2]

The trading population in these early years was indeed a strange one. Officers both civil and military were concerned in every kind of enterprise.[3] Division of employment was almost unknown. A man might be captain or commissariat officer in the army as well as sheep-breeder, farmer, butcher, merchant and ship-builder; and with scarcely one exception he was a rum-dealer as well. The subject of spirituous liquors, their importation, distillation, distribution and consumption, fills many pages of the history of New South Wales. It must be remembered that it was in England also an age of intemperance, and that the population of the settlement was recruited from the two classes most prone to drinking, the soldiery and the criminals. Amongst the rank and file as in the mess-room, a soldier was not long in learning to drink—just as a man who was a criminal, so to say, by accident, had little hope of escaping the vice in the prisons of England. The rest of the population, unprovided younger sons, failures and adventurers, were not men who would turn with horror from the excesses and immorality induced by reckless drinking. It is true that there were honourable exceptions, poor and rich,

[1] See Letter of Instructions to Macquarie, 14th May, 1809. H.R., VII., p. 143.

[2] There are no complaints to be discovered of the merchants against the fixing of the maximum price. This certainly suggests that the regulation was not strictly enforced.

[3] Marsden (Rev. S.) in *An Answer to Certain Calumnies in the Late Governor Macquarie's Pamphlet*, etc., published in 1826, pp. 8-10, explains that it was necessary in early times to give grants of land to officers of the Government in order to ensure enough corn being grown in the settlement to feed the people. This was undoubtedly the case before 1800.

and that there were some notably peaceful and happy homesteads—but it is unluckily true that in 1810 they were still exceptional.

Those in authority laid down the simple rule—never possible in practice—that the convicts were not to be supplied with liquor, and also sought to regulate the quantity to be imported. Yearly the growth of population made this task more difficult. Under the instructions drawn up for Admiral Hunter in 1794, it became necessary to produce the express permission of the Governor in writing before landing any spirits. Under regulations drawn up in the Colony this spirit, having paid a heavy duty, might be sold by the importers to officers and others in certain quantities decided upon by the Governor. It was, however, quite within the Governor's discretion to decide at any time that the settlement was already sufficiently supplied, and King, who followed Hunter in 1800, turned away more than one cargo of spirits and became extremely unpopular on that account. Officers of all ranks and the merchants threw themselves into the business of monopolising the spirit trade and raising the price for retailer and consumer. The convicts and emancipists, unable to obtain a regular supply, became more and more eager for the liquor. They were there, unwilling immigrants, deprived of liberty, living under better but less exciting conditions than in the hovels and slums of London; the pickpockets had no pockets to pick, the forgers and coiners no bank notes or coins to counterfeit. Those who had not been habitual criminals had endured a long schooling in degradation by constant companionship with their fellows—first while waiting for trial, then in prisons or river hulks, and finally packed close together for a six months' voyage. For these the separation from homes and families and fatherland was harder to bear. They had a chance to make a fresh start in New South Wales, but they had also the continual bitterness of self-reproach. Under these circumstances nearly all the prisoners drank, and drank wildly, a few perhaps seeking indifference—the majority to gratify a physical craving.

When spirit could be bought the poorest were willing to sell all they had to get it. The limits on importation caused a multiplication of illicit stills. The home authorities refused to

legalise colonial distillation, and the eagerness for drink was such that the Government could not prevent its illicit distillation. But far worse than this was the system of the "rum-currency," by which labour, land and produce were bartered for spirit.[1] It was a currency of great elasticity, affected by the personal equation and still more by the length of time between cargoes and the quantity landed. No method could have been more effective in the oppression and spoliation of the weak, poor and ignorant. Yet it became the general custom with all classes, and though King and Bligh both forbade payment by rum, Macquarie had still to face the difficulty in 1810 and found it impossible to bring it to an end.[2] The quantity of coin was next to nothing, the paper currency depreciated and the debtor as anxious as the creditor to be paid in liquor, while the small settler would exchange house, land and stock for a few days' orgie.

The state of drunkenness had its most serious side in the pauperism and misery into which the poorer classes were led, and the impulse it gave to evil ways of gaining wealth in the rest of the community. Immorality as well as drunkenness was rife. Marriages between the convicts were infrequent before 1810, but cohabitation was customary. The female convicts lived not only with prisoners but with men of all classes. Few of the women transported were of good character, and there were fewer still who could retain their decency in companionship with the wretched dregs of humanity who formed the majority, and in face of the terrible practices indulged in on the female transport vessels.[3] After the long voyage out the women were assigned as servants to the settlers and officers of the Government. There were no regulations as to these assignments,[4] and abuses whereby the servant became the mistress were general. So common were these and similar practices that when the New South Wales Corps left the Colony in 1810 Macquarie granted pardons to many female convicts in order

[1] *Cf.* "Gin-currency" of West Africa.

[2] See Chapter IV. and also Proceedings of a General Court Martial for the trial of Lieut.-Col. Johnston on a charge of mutiny exhibited against him by the Crown and for deposing W. Bligh, etc., London, 1811, p. 246.

[3] See also Chapter VIII.

[4] See Letter of Instructions to Macquarie, 14th May, 1809. H.R., VII. p. 143.

that the men and non-commissioned officers might marry and take with them the women who had been their companions and were the mothers of their children.

The women who were not thus assigned remained in Government employment, working in a woollen factory at Paramatta. But even these found homes with the male convicts in the town, many leading lives as shameful as those they had left behind them in the dens of London.

Yet in spite of this promiscuous breeding, in spite of the prevalence of the bar-sinister, the children of these unions were of strong physique, lacked neither mental nor moral force, and sought to live soberly and decently. The family affections, too, were strong, and child murder or even neglect practically unknown. That women tried to preserve their innocent but illegitimate babies was natural enough in a country where to be a mistress and not a wife was the more usual condition.

The established forms and conventions of civilisation were difficult to establish in a little penal settlement cut off by the seas from the whole world. The ordinary decencies and comforts of life were dispensed with as carelessly as the marriage laws. Macquarie was disgusted with the rough-built houses and the badly clothed, uneducated children of even prosperous settlers. Mud and paling huts or two-roomed houses with a lean-to or skilling at the back were the ordinary country dwellings. But the climate exacted little in the way of shelter and clothing and, save in time of flood or famine, convict and settler alike lived better than they had been accustomed to do in England. Only here and there, however, had families established themselves in the country as in a permanent home. For the majority of the "gentleman-settlers" it was a place to make money in, money which was to be spent in re-establishing themselves in the old country, and which might be easily made in the liquor traffic. In the twelve years which followed Macquarie's arrival, no change was more remarkable than in this feeling that New South Wales was only the scene of a temporary exile.

Rough and plain as was the life of the settler, at least the fear of fierce native raids which pressed upon the American pioneer was absent. The aborigines took quietly the establishment of the white folk upon one of their hunting grounds.

Phillip indeed did his best to conciliate them ; and though, until Macquarie came, his successors showed little interest in their condition, peaceful relations were customary. In law the native could claim equal protection with the white man, but this equality was difficult to enforce even in the Courts. Amongst the out-lying population, when a black man stole the corn or fruit of a settler, it was often impossible to prevent the injured party from wreaking summary vengeance upon a whole tribe, and that brought in its turn indiscriminate reprisals. The Governors attempted, with varying success, to put an end to all private punitive expeditions, and to secure that black and white should both be brought to justice. The worst offenders against the natives were the escaped convicts who sometimes led precarious lives in the forests.[1] On the whole the blacks suffered little. Missionary efforts were made to teach them Christianity, husbandry and the advantage of clothes and regular food. They learnt very little, and though some of them hung about the settlement, the greater number continued to wander through the forests where each tribe kept within its roughly marked boundaries, and where, save for occasional depredations on lonely farms, they interfered little with the colonists.

Such were the people and such their ways of living when Macquarie started on his difficult task of restoring peace and establishing good government after the long distractions which had led up to and followed the deposition of his predecessor, Captain William Bligh.

[1] See notes of a conversation with Rev. S. Marsden in a volume of *Essays Geographical, Commercial and Philosophical*, published anonymously in 1812. Royal Colonial Institute.

CHAPTER II.

THE DEPOSITION OF BLIGH.

AUTHORITIES.—*Historical Records of New South Wales* (especially Vol. VII.) Report of Trial of Lieut.-Col. Johnston. State Trials, vols. 21, 28, 30. Colonial Office, Domestic Correspondence, 1816.

ON the 26th January, 1808, Major Johnston, at the head of the New South Wales Corps, marched through Sydney to Government House and placed Governor Bligh under arrest. Leaving him there a prisoner, Johnston, urged by a number of civilians, at whose head stood John Macarthur, and with the ready support of his officers, took over the administration of the Colony under the title of Lieutenant-Governor.

When the first news of these events reached Downing Street in September, the Colonial Office were already aware that Bligh, the hero (or culprit) of the "Bounty" mutiny, was proving by no means a popular ruler. Complaints were often made against the best of Governors, but in Bligh's case they were forcible and unceasing. There was the case of D'Arcy Wentworth, an assistant surgeon on the staff, but a man of wealth and influence, who had been suspended without cause shown and with a lack of justice which the Minister himself censured.[1] Again, on the formal ground that he had received no public instructions, Bligh had refused to comply with the requests of some settlers coming from England for land, cattle and convict servants. These men, Townson, Doctor of Laws and man of science, the brothers Blaxland, who were graziers, and a Captain Short, had brought definite written promises from ministers of large indulgences adequate to the capital they proposed to expend. Disappointed in their hopes and impatient at the delay, they soon found themselves arrayed in the ranks of the

[1] Castlereagh to Bligh, 15th May, 1809. H.R., VII., p. 147.

discontented. Bligh's scrupulousness was treated with extreme dryness by the Colonial Office, and he was instructed to comply with the private agreements already before him.[1] Another important complaint was that lodged with the Commander-in-Chief by Major Johnston, and referred to the Colonial Office in June, 1808.[2] This letter dealt in detail with the Governor's harsh, arbitrary and abusive behaviour towards the military, and his occasional interference with the orders of their commanding officer.

But of many troubles the Colonial Office were informed by Bligh's accounts alone. More absorbing than all the rest were the tortuous windings of his quarrels with John Macarthur, that turbulent spirit who had been at daggers drawn with each succeeding governor, and who as agriculturist, merchant and trader stood head and shoulders above the rest of the colonists. Bligh, who had been warned of the temper and the guile of this "Botany Bay perturbator," as Governor King called him, was foolish enough to treat him with insulting lack of courtesy from the outset, and in the case of Bligh alone did Macarthur and not Macarthur's opponent have public opinion behind him.

The Home Government, long accustomed to these quarrels, were not much disturbed, and it was probably thought natural that some friction should arise between the military forces and the naval officer whom it was then thought fit to have at the head of the Colony. The responsible Minister may well have hoped to maintain Bligh's government undisturbed, supporting him against his turbulent subject, while admonishing him to adopt a more conciliatory tone towards the soldiery. At that moment, indeed, Lord Castlereagh and his Under-Secretary Edward Cooke, who were responsible for the administration of what was then the one Department of War and the Colonies,[3] had good reason to wish that New South Wales should remain

[1] Castlereagh to Bligh, 31st December, 1807. H.R., VI., p. 399.

[2] Johnston to Lieut.-Colonel Gordon, Military Secretary to Commander-in-Chief, 8th October, 1807. H.R., VI., p. 652. Sent to Colonial Office, 13th June, 1808.

[3] In 1794 "Mr. Dundas (afterwards Lord Melville), who was then Secretary of State dealing with the Home affairs of the Department, was appointed 'Secretary for War,' and also nominally Secretary of State for the Colonies, but the Departments of War and the Colonies were not actually united until 1801, when Lord Hobart was created Secretary of State for the War and Colonial Department." Colonial Office List, p. xi.

well in the background. It was the year in which the Peninsular campaign commenced, and in September the uproar raised by the Convention of Cintra was at its height. The events of January, however, the subversion of Bligh's government by the military garrison, demanded some attention, and when despatches arrived, scanty as was the information they conveyed, some course of action had to be agreed upon. On the one side, there were despatches from Bligh enclosing letters from Gore, his Provost-Marshal, who had been deprived of his office and suffered harsh treatment, and from Palmer, the Commissary, whose lot had been similar. From the revolutionary party came an official despatch, an interesting and partial account from the pen of John Macarthur, who then held the self-created and unsalaried office of Colonial Secretary. There were also two letters from Doctor Townson, the first explaining his reasons for supporting Johnston, the second his reasons for withdrawing his support. By neither action had he found himself any nearer to his prime object, the grant of land and servants promised him, and though he certainly gave both sides of the matter, his letters rather clouded than cleared the real issue. For he took both sides with a fiery vehemence and reckless zeal in searching out unworthy motives that created scepticism rather than assisted conviction.[1]

But whatever the final judgment was to be, it was impossible to pass over a successful mutiny, even of a far distant garrison, and immediate action had to be taken.

On the 20th October (and in pre-telegraphic days, with a great war in progress near at hand, this cannot be considered dilatory procedure), the Commander-in-Chief agreed with the Colonial Office that the New South Wales Corps should be immediately recalled. Originally enlisted in England for service in the Colony, it had been stationed there for nearly twenty years, and had conclusively proved the impolicy of permanently keeping any regiment in such a situation.[2] Even Macarthur, whose allies and tools they had been, wrote of the officers in 1810 that "a more improper set of men could not be collected together than they have latterly become."[3]

[1] For these letters see H.R., VI., pp. 299, 571, 575, 738.
[2] Castlereagh to Duke of York, 11th October, 1808. H.R., VI., p. 778.
[3] Macarthur to his wife, 3rd May, 1810. H.R., VII., p. 368.

The 73rd, a Highland regiment then in Scotland and under the command of Colonel Lachlan Macquarie, was selected to take its place. It was a gallant regiment, whose bravery at Mangalore was commemorated by the right to inscribe that word upon the colours. It was not until November that the next move was taken. Castlereagh then offered the Governorship to Brigadier-General Nightingall, departing for the first time from the precedent of appointing post-captains in the navy. It was thought necessary, he wrote, "that the Government should be placed on a more respectable basis, and that, for this purpose, a general officer, with a regiment of the line, should be sent there, to whom should be entrusted the administration of the Colony."[1] He considered a "military Governor" a necessity for the settlement.[2]

Nightingall accepted the post, but his departure was delayed by illness. Early in April of the following year, Castlereagh, feeling that some one should be sent at once, wrote to the King suggesting that Macquarie as Lieutenant-Governor should take out his regiment and set about restoring regular authority in the settlement, leaving Nightingall to follow as soon as he could. But before this could be done Nightingall resigned his appointment, and in May Macquarie sailed, bearing a commission as Governor-in-Chief and Captain-General of New South Wales and its Dependencies.

Although he had been highly recommended to the Colonial Office before the transfer was finally made, the appointment was largely due to accidental circumstances, and a series of chance occurrences thus led to the despatch of the Governor whose name and fame, for good and for evil, has been more distinctly written than that of any other over the Eastern half of the Australian Continent.

The first choice of the Colonial Office had fallen on a soldier of considerable distinction and wide experience.[3] In accepting,

[1] Castlereagh to Nightingall, 14th December, 1808. H.R., VI., p. 812.

[2] See Castlereagh's *Correspondence*, 1851, vol. viii., p. 205. Letter to H. Alexander, Esq., 13th May, 1809.

[3] Nightingall, afterwards Sir Miles Nightingall, entered the army in 1787. He served in India and in England with Lord Cornwallis, was with Abercrombie at Porto Rico, and at San Domingo with Maitland. He arranged the evacuation of Port-au-Prince. He commanded the 4th Battalion in Ireland during Cornwallis' Viceroyalty, and was on the staff when the latter went as Ambassador-Extraordinary to France in 1812. He was also Military Secretary during Cornwallis'

Nightingall had dwelt more on the drawbacks of the position than the advantages; the salary (£2,000) was small, the distance great, and in short, unless he was fairly sure of a pension of not less than £1,000 for the rest of his life, he could not undertake a service attended with so many disadvantages, and . . . which at the outset must be viewed as both difficult and unpleasant.[1] The near prospect, however, of obtaining a regiment would perhaps in the eyes of his friends justify his accepting a situation which otherwise might be considered by a military man of fair prospects and good expectations as little better than a waste of time.[2] Indeed the prospect of four or five years in New South Wales, "deprived of almost all communication with England," was for him a prospect of profitless exile.[3]

Very different was the view taken of the position by Sir Joseph Banks in 1795. "You have," he wrote to Hunter in 1795, "a prospect before you of no small interest to the feeling mind —a Colony just emerging from the miseries to which new colonists are uniformly subjected; to your abilities it is left to model the rising state into a happy nation, and I have no doubt you will effect your purpose".[4]

Such high aims and eager hopes had animated Phillip when he set out to found the Colony in 1788, but of his three naval successors not one echoed his enthusiasm. Hunter, for example, "a pleasant and sensible old man,"[5] after four years of office, put his view with much ingenuousness. "My former knowledge and acquaintance with this country,"[6] he wrote, "encouraged me in a hope, which, however, has in some respects proved delusive, that I should with ease to myself and with proper effect and advantage to the public" (a consideration he places second) "have been able to manage all the duties of my office".[7]

Viceroyalty in India. In 1805 he was made a K.C.B. After resigning his appointment as Governor of New South Wales he went again to India, where he was given the command in Bengal. He returned to England in 1819 and sat in the House of Commons for Eye from 1820 to 1826. See *Dictionary of National Biography*.

[1] Nightingall to Castlereagh, 6th December, 1808. H.R., VI., p. 810.
[2] *Ibid.* [3] *Ibid.*
[4] Sir Joseph Banks to Hunter, 30th March, 1797. H.R., III., p. 202.
[5] H.R., III., p. 730, 13th October, 1799. Letter from a ship's officer.
[6] He had been second in command in the fleet of 1788.
[7] Hunter to Sir Samuel Bentham, 20th May, 1799. H.R., III., p. 673.

The appointment was indeed one which a navy captain would covet. Promotion continued, a pension was a practical certainty, the salary sufficient, and a good field offered to advance a son or marry an unportioned daughter.[1] The qualifications required were such as every man and every man's friends would readily believe that he possessed—"Integrity unimpeached, a mind capable of providing its own resources in difficulties without leaning on others for advice, firm in discipline, civil in deportment, and not subject to whimper or whine when severity of discipline is wanted to meet emergencies."[2] But when Lord Castlereagh decided to look higher, he found the offer did not appeal strongly to a general officer of ability in time of war. This makes it all the more remarkable that, when Nightingall relinquished his appointment, the choice fell on a man whose whole heart exulted in the work, and who for twelve years bent the whole energy of mind and body with eager zest to what he felt to be the public good. It is true that Lachlan Macquarie was often wrong, was often vain, was often obstinate, but not infrequently he was right and he was never indifferent. Fitted by his training for the work of a military governor, hereditary instincts doubtless accounted for his leaning towards the patriarchal system, for he was the heir of the sixteenth chief of a clan of Ulva. But he had entered the army at a very early age, and by the time of his appointment had served thirty years in that "school of subordination."[3] He was a staunch Tory and Episcopalian, and appears to have had the manners of an Englishman rather than a Scotchman. He had seen much active service, chiefly in India, had been in America, at Alexandria, and for three years Assistant Adjutant-General in London, a post which had made him known in official circles and increased his good repute. In 1805 he had gone back to India, returning to take command of the 73rd in 1807. On the 15th May, 1809, he sailed with his regiment to New South Wales.[4]

[1] See, *e.g.*, Banks to Bligh, 15th March, 1805. H.R., VI., Introduction, xxxv.

[2] Banks to Bligh. *Ibid.*

[3] A favourite phrase of Macquarie's constantly recurring in his letters.

[4] For these details of Macquarie's career see *Dictionary of National Biography*.

With him there went as Judge-Advocate, Ellis Bent, Barrister-at-law and member of the Northern Circuit. The Judge-Advocate was the one judicial officer in the Colony, presiding in Civil and Criminal Courts, acting as chief judge and chief prosecutor. The appointment of Ellis Bent, a man learned in the law, to this post, marked an important development in the history of the settlement. Collins, who held the office first, was a captain of Marines,[1] and Gore, who succeeded him, had been without either legal or military knowledge. Then had come Richard Atkins, a hard drinker and a born fool. King had put the case in strong language. He had felt it "indispensable as well for the benefit of the inhabitants as for a guide to the Governor that a professional man be appointed, either as Judge-Advocate or Chief-Justice, who can give the Governor (who cannot be supposed to be a lawyer) that conclusive information which is so requisite, and who is able to counteract the chicane and litigious conduct of a few transported practisers, who have practised sufficient of the laws of England to know the chicanery and evil purposes a bad man can turn them to".[2] But the matter rested until the Bligh affair gave conclusive proof of the need, and Ellis Bent, apparently at the suggestion of Nightingall, obtained the appointment.[3] He was a Master of Arts of Cambridge and had been a gentleman commoner at Peterhouse. Some calamity involved his family in a ruin which induced him, while still under thirty, to give up his position and prospects at the Bar and accept this post in a far-off country for the sake of his wife and young family. He was a man of singularly sweet disposition, and for the four years which preceded his early death he fulfilled the multifarious tasks allotted him with justice, dignity and ability. There is little to be found which tells of him directly, but his judgments and expositions of the law, his official letters, and the opinions held of him by all sorts and conditions of men, all alike suggest a man of great delicacy of mind, gentleness of bearing and acuteness of intellect.

[1] He was afterwards Lieutenant-Governor at the Derwent, Van Diemen's Land, from 1803 to 1810.

[2] H.R., V., p. 188, 7th August, 1803.

[3] See Bent's letter to Castlereagh, 30th November, 1811. H.R., VII., p. 641.

During the long voyage he and Macquarie became close friends and must have discussed through many a long day in the windless tropics or southern seas the work which lay before them. Close allies they remained until two years before Bent's death, and this period when Macquarie could always call upon the serene intellect and judicial firmness of his Judge-Advocate covers by far the best years of his Governorship.

Before the new Governor was the double task of restoration and administration. But though he was to bring the guilty to justice, he was not to play the part of avenger. His instructions with regard to the recent disturbances were transmitted to him on the eve of his sailing, and so well was their secret kept that, twelve months after, the purport was known in England by rumour only.[1] In drawing them up, the Colonial Office had before them the additional information contained in Major Foveaux's despatches which had arrived in March, 1809. Foveaux had started from England on his return to Norfolk Island[2] of which he was commandant, before the news of Bligh's deposition had reached England, and landed at Sydney in July, 1808. He was senior to Johnston in the corps and also bore the commission of a Lieutenant-Governor. Bligh was in great hopes that Foveaux would take his part, and the other sides were correspondingly depressed. Not long, however, was the matter in doubt. On the very day of his arrival, Foveaux decided to accept the position as it stood, taking over the command himself and remaining at headquarters. The only changes he made were to remove Bligh from his dignified imprisonment at Government House and place him in an officer's barrack, and to treat his adherents with increased severity.

The officer in command of the whole New South Wales Corps, Colonel William Paterson, was then Lieutenant-Governor at Port Dalrymple in Van Diemen's Land. Several colonists considered that Foveaux's commission superseded

[1] Macarthur to his wife, May, 1810. H.R., VII., p. 370.

[2] In accordance with his instructions, Phillip had sent Lieutenant King to make a settlement at Norfolk Island early in 1788. The island had an area of about 13,000 acres and was situated off the coast to the north-east of Port Jackson. The settlement was not a success, and was finally abandoned in the first years of Macquarie's Governorship, the settlers receiving farms in Van Diemen's Land in a district to which they gave the name of New Norfolk.

Paterson's, which was of earlier date. But he and Foveaux decided that this was not the case, and the latter afterwards claimed that in continuing Bligh's arrest, he acted under the orders of his superior officer, Colonel Paterson. His first despatches, however, those which arrived in March, threw scarcely any light on the causes of his action.

In those days Secretaries of State for the Colonies had often to decide in the dark or at least the twilight, imagination filling in with more or less success the dim places in the story. The Presidency of Madras supplied a useful precedent, and so similar was the course followed on this occasion, that Lord Castlereagh probably considered that case before it was referred to by the law officers of the Crown in November, 1809.

It was the case of Lord Pigot, Governor of Madras, and four members of his Council. In 1776 a dispute arose concerning the affairs of a native prince, and each party in the Council strove by every means in its power to carry its own point. Both sides used very questionable methods, and finally the majority in the Council, who were opposed to the Governor's measures, by a high-handed and illegal action replaced the head of the forces by a partisan of their own, ordered him to arrest and imprison Lord Pigot, and took upon themselves the government of the Presidency. Corruption was at the root of the matter, and as usual in such cases the Court of Directors pursued a somewhat wavering course. They sent orders to reinstate Lord Pigot, but instructed him to embark for England within a week of such reinstatement. These orders came too late, for Lord Pigot died in prison a week before they reached Madras. They also gave directions to try the officers of the army who were concerned in the disturbance before Courts Martial in India, and recalled four members of the Council. There is nothing which shows that any officers were brought to trial, but some small officials were prosecuted. In England, after a pretence at an inquiry, the East India Company did nothing more with regard to the four members who were the real culprits. But Parliament took the matter up, and in 1779 the Attorney-General, in accordance with the terms of an address of the House of Commons, laid an information against them in the Court of King's Bench, where they were tried before

Lord Mansfield and a special jury for a misdemeanour. The jury brought in a verdict of guilty and they were fined in the penalty of £1,000 each, a purely nominal punishment for men who had grown rich in the service of the East India Company.[1]

In general outline Bligh's case was similar. He quarrelled with Macarthur, and very soon, by means which were not illegal, but had the savour of oppression, brought him before a Bench of Magistrates. It is unnecessary to relate the details of the affair. Macarthur was contumacious and was summoned to stand his trial before the Criminal Court, which was composed of the Judge-Advocate, Richard Atkins, and six military officers belonging to the garrison. Macarthur protested that as Atkins owed him large sums of money which he would not pay, and had for long been on the very worst terms with him, on this account he was not a fit and proper person to preside as Judge-Advocate at his trial. The Governor insisted that he had no power to dispense with his attendance as Judge-Advocate and the trial commenced. The prisoner at the bar read a long argument full of citations from legal authorities (though where in a Colony almost devoid of lawyers and lawbooks he found his Blackstone and the rest, it is hard to imagine), in which he sought to prove that the Judge-Advocate, not being an impartial person, could not legally form part of the Court. Atkins was bewildered though obstinate, but the weight of Macarthur's learning completely overwhelmed the six officers, unused as they were to the pomp of civil law. They unanimously upheld the objection and appealed to Bligh. He declared that he could do nothing. Without the Judge-Advocate, he claimed, there could be no Court; and in the Crown alone lay the power to recall Atkins and make a new appointment. The officers held to their point, remanded Macarthur to his bail, and adjourned. This took place in the morning. So soon as he heard of what they had done, Bligh summoned the six officers to appear before him on the afternoon of the following day. Rumour said that he intended to arrest them on a charge of high treason. At the same time he ordered Macarthur to be committed to the town gaol, claiming that, as without the Judge-Advocate there could be no Court, he could not have been legally remanded to his bail.

[1] See Mill, *History of India* and *State Trials*, xxi., 1,045.

That day Johnston, the officer in command of the forces, came up to town. On the following morning, January 26th, 1808, Macarthur was released by the soldiers from gaol and a requisition presented to Johnston calling upon him to arrest Bligh and take over the Government. This was immediately carried out. It was afterwards claimed that had the officers been sent to prison, the regiment would have mutinied and got beyond all control, and that Bligh's life was saved by his arrest. It was certainly a very peaceful revolution which was accomplished, for within two hours the "subversion" of Bligh's government was complete—with no shots fired nor violence of any kind.

It was with Bligh, the mutiny's victim, with Johnston the commander and Macarthur, "the prime mover and instigator,"[1] and with Foveaux who had by implication approved the arrest, that Macquarie's instructions dealt.[2] Immediately upon his arrival, if he found Bligh still in Sydney, he was to reinstate him in the Government. But Bligh had disturbed the tranquillity of the Colony and of the Colonial Office. Complaints against him had been many and weighty. His temper too was one more inclined to indignant revenge that decent clemency. Influenced by all these things, the Colonial Office decided that discipline required only his nominal reinstatement, and he was instructed to hand over the Government to Macquarie within twenty-four hours and return as soon as possible to England, where he would be needed for the prosecution of the insurgents.

Major Johnston was to be placed under close arrest and sent to England, there to be tried by court-martial for mutiny. Foveaux's case was to be left over for the time being. He would return with the New South Wales Corps, and then a decision would be arrived at. It was more difficult to deal with Macarthur. The members of the Madras Council were tried in England by virtue of a statute[3] relating to offences committed in India, but for offences committed by a civilian in New South Wales he could be brought to trial in that Colony only. Macquarie's orders were that if Macarthur was still in New South Wales and charges were preferred against him, he was to be brought before the Criminal Court of the territory.

[1] Bligh's term for Macarthur.
[2] Letter from Castlereagh, 1809, 14th May. H.R., VII., p. 143.
[3] 13 Geo. III., cap. 63.

The progress of events in the Colony led to the complete abrogation of these instructions. By the end of 1809, of the four principal actors, Foveaux alone remained.

When Bligh's arrest had been accomplished, two courses were open to Johnston. One was to send for Paterson at Port Dalrymple and to administer the Government until his arrival by right of seniority alone. The other was the one he followed of proclaiming himself Lieutenant-Governor and thus performing a complete act of usurpation. It is true that within a week a despatch was sent to Paterson, but it did not contain an enthusiastic invitation for his presence. Paterson wrote at once to Lord Castlereagh and to the Commander-in-Chief and then relapsed into the helpless state of ill-health to which age and drink, or hard service, had brought him. A full year elapsed before he decided that there was a ship which would carry him with safety to Port Jackson, and long before that time Foveaux was in Sydney appealing to him as his superior officer for instructions and approval. Paterson was little fit to give either, and indeed took no real part in the whole affair.

The self-constituted Lieutenant-Governor had got quickly to work. On the 29th of January, 1808, a bell-ringer went through Sydney calling a meeting at the church for the evening. The triumphant party turned out in good array. An address and a sword of honour were voted to Johnston, and more addresses to Macarthur and the regiment. Macarthur thanked the people and made a flaming speech upon his wrongs. The hot excited crowd heard his pious hope that no harm would come to Bligh, but must have been far more thrilled by his furious denunciation of the Governor and the Magistrates as "blood-thirsty villains eager to drink his blood".[1] At the height of their enthusiasm, increased by the heat (it was mid-summer) and by liberal potations, the meeting agreed to send a delegate to England to state their case to Ministers, and forthwith appointed Macarthur. A subscription list for his expenses was opened and £400 promised on the spot. But by next day faction had broken out, the party split up, and

[1] Bligh to Castlereagh, 30th April, 1808. H.R., vi., p. 607.

Macarthur refused to go. The plan was abandoned and the money never collected.[1]

On the whole Sydney was for Johnston, but the small settlers from the Hawkesbury to Paramatta stood firm for Bligh, who had been popular with them from the beginning of his Governorship. Even stronger than their affection for Bligh was their hatred of Macarthur.[2] He had started as a Lieutenant of the New South Wales Corps, sold out as captain in 1804, and devoted himself to the cultivation of the finest estate in the Colony. It lay in the Cow Pastures, the richest tract of land then discovered. There he grew fine wool and made experiments in cultivating fruit and vines. He also carried on trade with China and the South Sea Islands, and was one of the biggest rum-dealers in a rum-dealing community. His enterprise and his success were alone enough to arouse envy. His hot, defiant temper, his commercial greed, his burning conviction that all who opposed his will sought only for his ruin, his power of raising a personal injury to the status of a national wrong, the very domestic virtue which made his home an example to the country-side—all marked him out as a man whose few friends would be far outbalanced by the number of his enemies. His multifarious interests brought him into connection, and with Macarthur that meant into collision, with nearly every man in the Colony, and his vigorous tempestuous spirit had left not one corner of the territory undisturbed. It was known to be by his persuasion that Johnston had taken the title of Lieutenant-Governor,[3] and it was supposed by the settlers to be for Macarthur's benefit that the Government was carried on. Although he would accept no salary when he took the office of Colonial Secretary and became the real head of the administration, they still believed that he was reaping a

[1] Bligh to Castlereagh, 30th April, 1808. H.R., vi., p. 607.

[2] In 1805 addresses were presented to King on his departure and Bligh on his arrival. They were signed by three persons—one representing the garrison, one the civil staff, and one the settlers. Macarthur signed for the settlers. A large number of these protested against this, alleging that his action was "unconstitutional and unauthorised," and that they never would or could accept him as their representative on any occasion. H.R., VI., p. 188.

[3] This was never proved in black and white, but short of that it was quite clear that the general impression that this was the case was in accordance with the facts.

profit somehow. Probably they were right, for Macarthur was not the man to hold power idly, and if he had ever suffered a grievance would have used every weapon that came to his hands to redress it. The officers themselves who had accepted his interpretation of the law and acted in ignorant good faith began to wonder if Macarthur, in seeking to form a new Government, had not been furthering some schemes of his own.

But however much the settlers feared and distrusted Macarthur, they had more to suffer under Foveaux. He and Macarthur had long been on bad terms, and with his arrival the Colonial Secretary fell into the background. The new Lieutenant-Governor was a clever and vigorous man, and had no need of the strengthening arm on which Johnston had leant. But his administrative training had been gained in the bad school of Norfolk Island, where harsh and rapid measures had been adopted to govern a small isolated community of convicts and soldiers, often on the verge of famine or insurrection. Foveaux could deal adequately with the commercial and agricultural needs of the country, but in ruling men he relied too much on the methods of sudden arrests and quick and arbitrary punishments. When Paterson did at last reach headquarters in January, 1809, Foveaux remained the real though no longer the nominal chief. Paterson went up to Paramatta and nursed his infirmities at the Governor's cottage in peaceful retirement. The Government went on in his name, and it was nominally under his orders that Macarthur and Johnston sailed for England in the *Admiral Gambier* merchant vessel in March, 1809. They went to lay their case against Bligh before the Home Government, and in the same month Bligh also set sail in His Majesty's Ship *Porpoise* of which he held the command. At first he was to have been sent off in the *Admiral Gambier*, but after long negotiations an agreement was drawn up and signed by him and Paterson, and he was allowed to set forth upon the journey on his own quarter-deck. By the terms of the agreement Paterson was to allow him the number of attendants and companions he desired, while he was bound on his side to sail straight to England. The terms were broken by both, and Bligh put in at Van Diemen's Land, where he remained until the beginning of 1810.

On his arrival Lieutenant-Governor Collins received him with the honours due to a Governor-in-Chief, but proclamations from Paterson and Bligh's own unreasonableness made him change his tactics, and Bligh had to take to his ship again. For some months a war of petty vexations and counter-proclamations was kept up. The *Porpoise* harassed the craft in the Derwent, while Collins cut off her communications with the shore.

It was while here that Bligh heard with satisfaction the rumours that a regiment and eight ships had sailed to his assistance. Probably he looked forward to the bombardment of Sydney, a course he had urged, when under arrest, upon Captain Kent of the *Porpoise* as a means of accomplishing his release.

Johnston and Macarthur were in England before Macquarie reached Sydney. The Colonial Office, probably hearing that they were on their way, sent all the papers bearing on their case for counsel's opinion. This was in September, 1809. Counsel declared that both Macarthur and Johnston were guilty of high treason and that the civilians and officers who aided them or confirmed their action afterwards, as Foveaux had done, were alike implicated in the crime. But though they had "levied war against the King in his realm," they could be tried only in the Colony, "and by the judicature there erected."[1] Johnston, however, was amenable to military law also and so might be tried by a court-martial in England for mutiny. Macarthur would have to be sent back to New South Wales to stand his trial there.

Before this advice could be acted upon, Macarthur was in England and actively at work seeking political support. Johnston's patron, the Duke of Northumberland, and the Honourable Arthur Elliot, Lord Minto's brother, seem to have been the allies upon whom chiefly he relied, but he was busy making acquaintance with many members of parliament. Ministers preserved complete secrecy as to any intentions they might have. In October Lord Liverpool, with C. C. Jenkinson as Under-Secretary, replaced Castlereagh and Cooke at the Colonial Office. The change was greeted with joy by Macarthur, who

[1] Opinion of Harris. H.R. VII., p. 209, 12th September, 1809.

considered Cooke "a northern bear" of autocratic principles. Cooke was specially likely to be unfavourable to Macarthur because he was a close ally of Sir Joseph Banks, one of Macarthur's most powerful enemies.

The new Ministers sought a fresh legal opinion, this time from the Attorney and Solicitor-General. This was given in November, 1809.[1] They suggested that Johnston might be tried by court-martial in England for mutiny, as had already been advised. With regard to the civilians concerned, their crime was softened from "high treason" to mere "misdemeanour," as in the case of the four members of the Madras Council in 1779. The trials of these persons, however, must take place in New South Wales.

Meanwhile Macarthur was preparing for a great fight with Bligh. At one time he thought of procuring a seat in Parliament to forward his cause. At another he proposed to bring a civil action against him and claim £20,000 damages. All the time he was vastly over-rating the interest felt by the British public and the venom of his opponents.[2] The Colonial Office bided their time. In the autumn of 1810 the New South Wales Corps, now gazetted the 102nd Regiment, arrived. Paterson had died on the voyage and Johnston was ordered to rejoin and take command. In October, 1810, Bligh reached England.

In Bligh's absence in Van Diemen's Land, Macquarie had taken over the government at once in accordance with the instructions entrusted to him in such a case. Bligh had come up to Sydney in February, 1810, and from then until the middle of May had busied himself collecting evidence and deciding what witnesses he would take home with him. Government were to pay their expenses, and of course those in Government departments could be ordered to go with him. Altogether he took ten, six of whom were private individuals who went voluntarily. He was eager to bring the civilians who had taken part against him, and who were still in New South Wales, before the Criminal Court on charges of treason. Intense, therefore, was his disgust when the Judge-Advocate hesitated, doubting if the

[1] See H.R., VII., p. 229, 17th November, 1809.
[2] See H.R., VII., Macarthur's letters to his wife, p. 239, 28th November, 1809, and p. 453, 11th November, 1810.

crime of treason attached to the Colony at all. And so "doubts and difficulties have arisen . . . as to what other charge or indictment can be laid," Bligh wrote sadly to the Secretary of State, regretting that he was unable to inform his Lordship of any proceedings against them.[1]

It is more than possible that in Bent's hesitation there was policy as well as legal caution. Macquarie certainly was eager to get Bligh out of the territory, and so have one element the less to disturb the tranquillity for which he hoped. In addition to this Bligh was detaining the King's ships, the *Hindostan* and *Porpoise*, and very considerably straining the resources of the Colony to provision them. Macquarie was ready to give him all the assistance which strict justice and a high sense of the position he held required, but not the zealous aid which would have been inspired by friendship. Indeed from the day his ship anchored in Port Jackson he had been much in sympathy with and wholly conciliated to the interests of Foveaux, whom he recommended in the highest terms for the post of Lieutenant-Governor of Van Diemen's Land.[2] But in spite of his partiality for Foveaux and his dislike of discussing the question, Macquarie could still give a fair account of Bligh's case. On 10th May, 1810, he wrote to Lord Castlereagh ". . . in justice to Governor Bligh I must say that I have not been able to discover any act of his which could in any degree form an excuse for, or in any way warrant, the violent and mutinous proceedings pursued against him on that occasion, very few complaints being made to me against him, and even those few are rather of a trifling nature.

"On the other hand there cannot be a doubt but that Governor Bligh's administration was extremely unpopular, particularly among the higher orders of the people; and from my own short experience, I must acknowledge that he is a most unsatisfactory man to transact business with from his want

[1] Bligh to Castlereagh, 9th March, 1810. H.R., VII., p. 309.

[2] It was expected that Collins' behaviour to Bligh (see above) would lead to his recall. However, before such an event could take place, even if it had been contemplated, Collins died in March, 1810. His funeral was arranged by Lieutenant Lord, his next in command, at a cost of £123. Macquarie referred home before paying it. The bill is printed in full in H.R., VII., and is a most interesting document of at least forty items.

of candour and decision, in so much that it is impossible to place the smallest reliance on the fulfilment of any engagement he enters into. . . . Thus far, My Lord, I have deemed it my duty to state my sentiments in a private letter, respecting Governor Bligh's conduct; but I trust that I shall be excused by Your Lordship for refraining from entering more fully into the merits of the transactions and disturbances connected with his arrest."[1]

Included in the instructions which dealt with individual persons concerned in Bligh's deposition had been some clauses of a general nature. Macquarie carried these out by three Proclamations, one issued on 1st January, the others on 4th January, 1810. Though it was impossible in Bligh's absence to reinstate him, the Instructions on this head were quoted in the first Proclamation in order to make it known that Bligh had the support of His Majesty's Ministers. Two years had passed since his arrest, and the enthusiast in the cause, John Macarthur, was absent. It was no wonder that those of his party who remained should have grown cool. They had gained little, and they had all to fear and nothing to expect from the decision of the Home Government. From the economic point of view, which consciously or unconsciously influenced their ardour, the most vehement of Bligh's opponents felt that the restoration of regular government would ease the situation. The Lieutenant-Governors, not feeling quite sure as to the legality of their position, had hesitated to draw heavy bills upon the Treasury, so that there was a scarcity of the only stable part of the currency. Major Abbott put the case very succinctly in 1808. "The Colony is quiet," he wrote. "There is no money."[2] But a Governor in whose title there was no flaw would of course not feel himself thus restricted.

Before Macquarie's arrival it had been rumoured that the Colonial Office had condemned the action of Johnston. His party found, however, that there was greater hope than they had expected of conciliating the authorities, and that hope they eagerly seized. The first Proclamation ended with a friendly

[1] See H.R., VII., Macquarie to Castlereagh, 10th May, 1810, p. 377.
[2] Abbott to Ex-Governor King, 4th September, 1808. H.R., VI., Appendix, p. 835.

paragraph in that style of paternal dignity touched with pomposity which became so familiar during Macquarie's rule. The Governor hoped "that all party spirit which has unfortunately resulted from the late unhappy disturbance will end, and that the higher classes will set an example of subordination, morality and decorum; that those in an inferior station will endeavour to distinguish themselves only by their loyalty, their sobriety and their industry, by which means alone the welfare and happiness of the community can be effectually promoted".[1]

In the later Proclamation issued on 4th January, Macquarie disclosed the remainder of his Instructions. Officials appointed by the rebel Government were to be replaced by those who had acted under Bligh, and grants of land and stock made by Johnston and Foveaux were declared null and void, but with a limitation which prevented hardship. Grants to officers or men of the New South Wales Corps were revoked altogether, and all grants were called in. But after full inquiry those which had been impartially given and not as rewards for joining the insurgents, or as mere acts of friendship, were to be renewed under such conditions as the Governor thought fit. Legal proceedings were to serve as useful guides, but not to be considered of a binding nature.[2]

The second Proclamation of 4th January safeguarded the officials of Johnston's government from the dangers to which the first, by declaring their appointments illegal, would have subjected them. They were protected from malicious or vexatious actions. "Deliberately unlawful assumptions of power" were not, however, included in the indemnity.

There was thus every prospect of laying old animosities to rest. The New South Wales Corps were to leave Sydney in April, and with Bligh also gone there would be hope of peace. But so long as he stayed, he and his friends kept party spirit alive. In the beginning of April the contents of Johnston's, or as it was usually called, Macarthur's first despatch to Lord Castlereagh became generally known. Copies of this and other

[1] H.R., VII., p. 252, 1st January, 1810.

[2] Amongst other trials the unfinished hearing of Macarthur's case had been completed. It was a good example of judicial farce, and needless to say he was acquitted. An account of the trial may be found in H.R., VII., pp. 465-510, 2nd February, 1808.

papers had been sent by Macquarie's hands to Bligh, not for publication but to assist him in preparing his case against the insurgents. Either by some breach of faith or culpable negligence, their contents were disclosed. At once Bligh's friends proposed to hold meetings at Sydney and the Hawkesbury to vote addresses of "condolence and congratulation," and to disavow a paragraph in the despatch which they considered false and malicious. The passage in question ran as follows:—

". . . it will be apparent that I had no alternative but to put Governor Bligh in arrest to prevent an insurrection of the inhabitants, and to secure him and the persons he confided in from being massacred by the incensed multitude."[1]

It was felt that such meetings would ease the fears of some, be valuable evidence for Bligh, and could not be opposed by Macquarie without giving great offence to his predecessor. Yet it was the very way to rouse feeling of the bitterest kind. A requisition was brought to Gore, now reinstated as Provost-Marshal. The Governor gave his consent, and a meeting was called for 11 A.M. on the 11th of April at Sydney. According to colonial custom, the Provost-Marshal took the chair.[2] The meeting was a large one. Although the New South Wales Corps had embarked a few days before, several of the officers were present. The chiefs of Johnston's party came in feudal bands, surrounded by their servants and dependents. The first resolutions dealing only with the address were declared carried amidst great confusion. Then Gore read the paragraph from the despatch and put the blunt question, "whether any person or persons at the meeting would avow that he or they had had a design to massacre the Governor and the officers in whom he confided, if Colonel Johnston had not seized and imprisoned the Governor?"

At this there was great uproar and cries of "No, no, no such intention," and D'Arcy Wentworth shouted across in just wonder and contempt: "What, man, do you think we are going to put a rope round our own necks?" A question so absurdly worded as that put by Gore could have only one answer, and

[1] See H.R., VI., p. 575, 13th June, 1808.

[2] For detailed account of way in which meetings were called, etc., see Chapter III.

in the roar which greeted it the meeting was doomed. The address was put, declared carried, signed by a few and carried away. Bligh's people retired, and the meeting was left to the other side. At once Simeon Lord and Gregory Blaxland,[1] two leaders in Johnston's party, brought forward two motions, condemning the meeting as likely to promote discord, and pledging themselves to Governor Macquarie to stand loyally by the Proclamation of 1st January.

Gore refused to put these motions, claiming that the business for which the meeting had been called was completed and that it could deal with nothing else. Blaxland and Lord hurried off to complain to the Governor. A few minutes later, Macquarie sent for Gore and rated him for his partiality. Gore was very aggrieved; and though he was with good reason partial to Bligh, was very likely, as he said, "only attempting to do his duty under extremely trying circumstances". But he gave in at once, saying he would put any questions that any one present should give him. All three returned to this very patient meeting and it was adjourned until three o'clock. Gore tried to get out of the distasteful business by refusing to take the chair, but the meeting would not forego the triumph, and declared that "usage and custom" required that he should preside. The following resolutions were then put and carried:—

"1. Resolved unanimously, That this meeting, convened for the purpose of addressing William Bligh, Esq., is calculated to provoke and renew animosities, which must tend to destroy that unanimity and good understanding so essentially necessary to the advancement and improvement of this infant and rising Colony.

"2. Resolved, That it is the firm and unanimous determination of this meeting to support and carry into full effect, as far as in them lies, His Excellency the Governor's Proclamation of the 1st of January, 1810, recommending harmony and a conciliatory spirit to subsist between every individual in the Colony.

[1] Report of Johnston's Trial, which is the authority for this account, has John, not Gregory, Blaxland. But John Blaxland had already left Sydney.

"3. Resolved, That these Resolutions be signed by the Chairman and printed twice in the *Sydney Gazette*."[1]

The promoters in strict consistency with the conciliatory character of the resolutions refused to sign them, for a few signatures would have detracted from the general unanimity of the proceedings, and poor Gore was therefore forced as chairman to affix his own signature in solitary grandeur according to "usage and custom". Into the *Gazette* the resolutions never found their way, though at first the Governor gave a gracious consent. Later on, however, he sent for Gore and told him that "upon reconsidering the last resolutions and the original address, as signed by the persons who made the requisition to me, he thought it would be partial and unfair to publish one and not the other; therefore he directed that neither of them should be published, and neither of them were".[2]

This was the last of Bligh's party as a party, and the project of holding a meeting at the Hawkesbury was dropped altogether. Bligh sailed in May, and the colonists were left to seek fresh quarrels whereby to train their newborn political instincts.

It was not until April, 1811, that Johnston was ordered into arrest, and in May his trial for mutiny commenced at London. It lasted until the 2nd July, and never perhaps was a court of military officers so bored by any judicial proceedings. The evidence was voluminous, full of repetitions and quite inconclusive. No legal justification was found for Johnston, but apparently the Court was satisfied that he had a moral justification, for though he was found guilty he was merely cashiered. Macarthur declared afterwards that Johnston was frightened into keeping back evidence.[3] He himself proved a most troublesome witness, pouring out with irrepressible volubility matter irrelevant to the questions of his examination, but skilfully designed to impress the Court. The Court, however, was not so easy to dominate as his friends of the New South Wales Corps.

[1] There was a fourth Resolution, "That the above Resolutions were carried unanimously". The promoters were evidently determined that there should be no possibility of mistake on that point.

[2] Gore's Evidence, pp. 102-3 and Appendix, p. 458, Johnston's Trial.

[3] H.R., VII., Introduction, xlii.

The Judge-Advocate General advised the Colonial Office to rest satisfied with Johnston's trial and to conduct no further prosecutions. In forming this decision he was influenced by the fact that none of the officers concerned were likely to return to the Colony in any public capacity.[1] Some, however, did return not long afterwards. Johnston himself ended his life quietly on his farm at Annandale near Sydney.

He was an insignificant man, made a leader against his will and afterwards used as a scapegoat, and his trial put an end to a military career not without its bright moments. In 1804 he had by courageous and prompt measures put an end to a convict rising which might have grown to formidable dimensions. With only twenty men he had met and dispersed some hundreds of rebels. It was strange that a simple military officer, quite without force of character and lacking in self-confidence, should play a leading part in two such important crises.

Johnston's trial showed the immense difficulty of dealing with political crimes committed at so great a distance and in so small a settlement. In a Colony without lawyers (save those convicted of felonies), the line between legal and illegal, so blurred and wavering to the layman's eye, must often be crossed. And when acts are called in question years after their accomplishment, before a court thousands of miles from the place of their commission, the severity of the judge is lessened, the vigour of the prosecution weakened. It is true that Wall, Ex-Governor of Goree, was tried, convicted and hanged for the murder of a negro subject twenty years before. General Picton also was convicted of illegally ordering the infliction of torture when Governor of Trinidad, five years after the commission of the crime.[2] But in both cases the crimes were acts of violence and cruelty. Johnston was guilty of mutiny certainly, but of neither a dangerous nor violent description, and he had obviously been another man's tool.

Bligh's story came to an end with the trial. Though technically he was triumphant, Government was chary of trusting commands to a man who had twice been the victim of

[1] H.R., VII., p. 553, 4th July, 1811.
[2] Trial of Wall, 28 State Trials, 51. Trial of Picton, 30 State Trials, 225.

a mutiny. His naval promotion went on and he died a Rear-Admiral of the Blue, but he never again had a ship nor administered a government. With poetic justice, Macarthur was the one of the three to suffer most. Ministers could not prohibit his return to New South Wales if he desired to go. But by a course of inaction they could effectually keep him an exile from the wife and daughters to whom he was sincerely devoted. For he knew that his enemies in New South Wales would set prosecutions on foot against him, and that his return thither was dangerous unless the Government would extend their protection to him. For five years he remained in Europe with his sons, superintending their education and studying fruit and vines and wool culture, while his wife managed the flocks and fields in New South Wales. Then in 1816 he approached the Colonial Office and asked that the past might be buried in oblivion. All seemed favourable until Macarthur discovered that Lord Bathurst, then the Secretary of State for War and the Colonies, promised the indemnity he asked for only under the belief that Macarthur was ready to express contrition and regret for his behaviour in the past. Macarthur refused such a condition with indignation.[1] He would not accept permission to return if it could even be supposed "to imply such an acknowledgment". Lord Bathurst was reluctant to let him go without his making some show of submission. Macarthur would do no more than promise to leave public affairs alone for the future. His family supported him in this stand.[2] It was claimed for him that his honesty and firmness of character were sufficient guarantee for the future.[3] Lord Bathurst thought that to let an impenitent rebel return without making a contrite confession was dangerous. After a long correspondence this opposition was withdrawn, and Macarthur and two of his sons returned to Australia. There is no record in the Colonial Office Papers of the reasons why this favour was granted. According to Macarthur it was due to his threat to disclose the facts which Johnston had been frightened into suppressing.[4]

For the remainder of Macquarie's governorship Macarthur

[1] C.O., Domestic Correspondence, 14th October, 1816.
[2] C.O. Same. Edw. Macarthur to Goulburn, 17th November, 1816.
[3] Same. [4] See H.R. VII., Introduction, xlii.

lived peacefully and much respected in his home on the Cow Pastures near Paramatta. The fiery days of his youth were passed, but he remained the same strenuous worker, persevering in all that he did, constantly setting on foot new enterprises, a brave man and a magnificent coloniser.

CHAPTER III.

THE ADMINISTRATIVE PROBLEM.

AUTHORITIES. — Despatches, etc. (See Bibliography) in Record and Colonial Offices. *Sydney Gazette.* P.P., H.C., 1812, II.; 1816, XVIII.; 1819, VII.; 1822, XX.; 1823 X. *Historical Records of New South Wales.* Rusden, *History of Australia.*

AS Governor-in-Chief of New South Wales and its dependencies, Macquarie ruled over an extensive area. New South Wales alone, by the words of his commission, included the Eastern half of the continent, then known as New Holland, from Cape York in the north to South Cape, the southernmost point of Van Diemen's Land. Although Bass Straits, which separated Van Diemen's Land from the mainland, were discovered in 1798, no alteration had been made in the terms of the Governor's commission, which were identical with those of Phillip's, and described the whole as one continuous stretch of country.

But beyond New Holland and Van Diemen's Land, the Governor's rule reached over all the islands adjacent in the Pacific Ocean, and in the same latitude. At Norfolk Island[1] only had any settlement been made, and at the beginning of Macquarie's period of office its abandonment had been decided upon. Over the remaining islands the Governor's control was a mere shadow. A considerable trade was carried on by English and colonial vessels with New Zealand and the South Sea Islands, and several missionary stations also had been established.[2] Moved by the missionaries' accounts of the violence and lawlessness of the traders, Macquarie made attempts to control their conduct. In January, 1814, he issued regulations for the masters of colonial vessels trading thither, and appointed one of the missionaries at Otaheite on the Commission of the Peace. At

[1] See Chapter II., p. 35.
[2] Chiefly by Church Missionary Society. Some were Methodist missionaries.

the end of the same year he made a similar appointment at the Bay of Islands, New Zealand. New Zealand was 1,500 miles away, Otaheite no less than 5,000. Macquarie claimed that both lay within the geographical limits of the territory of New South Wales.[1] They were so far as their latitude was concerned, but it is more than doubtful whether Otaheite could be called "adjacent". The appointments were passed over in silence by the Colonial Office, and though these magistrates kept Macquarie informed of events happening within their districts, there is no sign of their ever having acted in a magisterial capacity.[2] They did not materially improve the disorderly ways of the traders.

Over Van Diemen's Land, the Governor-in-Chief exercised general supervisory powers. Before Macquarie's arrival there had been two Lieutenant-Governors in the island, one at the Derwent[3] in the south, the other at Port Dalrymple in the north.[4] Both had previously been on an equal footing, and neither strictly subordinate to New South Wales. But from 1810 their relations were placed on a definite basis. Port Dalrymple lost its Lieutenant-Governor and received a commandant under the orders of the Lieutenant-Governor at Hobart Town in his place. The Lieutenant-Governor himself received his orders, and conducted his correspondence with the Colonial Office through the Governor at Sydney. The latter became his responsible chief, and being "held accountable by His Majesty's Ministers for the general control, improvements and expenses of those settlements,"[5] issued to the Lieutenant-Governor full and particular instructions. Collins' successor, Major Davey, an officer of Marines, who came out in 1813 bearing a bad reputation which his conduct in the Colony fully justified, received very "pointed and strict" directions from Macquarie.[6] His

[1] R.O., D. 1, 17th January, 1814. By a Proclamation issued on the 4th December, 1813, Macquarie attempted to restrain the masters of trading vessels from committing outrages on the South Sea natives. By its provisions only ships of British or Indian Registry were to be cleared out for these parts in the ordinary way. Masters of ships of the Plantation Registry were to enter into bonds with the naval officers in the sum of £1,000 to refrain from molesting the natives. There is no indication that the terms of the Proclamation were complied with, and it is unlikely that the amount of the bond could have been recovered in any case.

[2] See Chapter VI. On the High Seas, p. 167.

[3] Headquarters were at Hobart Town on the Derwent.

[4] Now Launceston. [5] D. 1, 28th June, 1813. R.O., MS. [6] *Ibid.*

expenditure of public money was to be supervised, and he was altogether forbidden to grant land or cattle[1] upon his own authority. But the distance from headquarters was great, the voyage often lasting more than three weeks, and on the plea of urgency instructions were constantly set aside. When Davey was recalled in 1815 at Macquarie's earnest request, and Lieutenant-Colonel Sorell succeeded him, the government of Van Diemen's Land fell into capable and trustworthy hands, and the Governor-in-Chief was relieved of a heavy and harassing responsibility. Until 1824, however, the settlement continued to be subordinate to that of New South Wales, and Macquarie relaxed his supervisory powers very little even with so capable an officer as Sorell.

In New South Wales the Governor's powers were more direct. But there was a distinction to be drawn between military and civil administration. Newcastle, for example, and Paramatta until 1814, were governed by military commandants. In the case of Newcastle, the Governor drew up a complete set of instructions which covered the whole ground of the commandant's duties and which he was obliged to obey, though of course the common law bound him also. There are no such instructions for Paramatta among the records, so that it is probable that being but a few hours' journey from Sydney, no written orders were found to be necessary. But at these military posts the whole system of administration emanated from the Governor. In the other districts, the basis of administration was the system of England supplemented and occasionally reversed by the regulations of the Governor.

However, as the responsible head of each department, his supervision and direction were constant. To the systematic and conscientious mind of Macquarie, it was necessary to attend fairly to each duty. No sooner had he taken over the Government, than he drew up the order of his working day. Each morning at ten o'clock he received the reports of civil officers, and of the military officers at eleven, and "gentlemen on business or visits of ceremony" between twelve and two. All applications for land, stock, or other indulgences had to be

[1] *i.e.*, from the Government herds.

presented in writing either as petitions or memorials before twelve o'clock every Monday. In cases of great urgency alone was any departure from these rules to be permitted.[1]

Governor King had once issued an order that no applications were "in future to be made to the Governor on Sundays, nor will (he) be interrupted when passing through the streets or speaking to an officer".[2] The order well illustrates the haphazard methods it sought to cure. It was not the smallest of his virtues that Macquarie accustomed the Colony to formal regularity in public business. But it was no easy task, and when he altered his hours in 1813 he concluded the order in the following terms:—

"In order to prevent frivolous and unnecessary applications in future, His Excellency desires it may be clearly and distinctly understood that having laid down the foregoing Regulations for his own government, he will not in any instance deviate from them."[3]

By the new order, requests of a general nature were to be made on the first Monday of each month. Applications for land and cattle were to be submitted once a year only, on the first Monday in June, and petitions and memorials for pardons and other mitigations of sentences on the first Monday in December.

During the Governor's occasional absences from headquarters, the commanding officer of the garrison took his place, under the commission of Lieutenant-Governor, receiving reports and conducting the ordinary business routine of administration. He could not, however, under Macquarie's instructions, call the courts together, grant land or stock, pardons or emancipations, or undertake new expenditure.[4] No difficulties arose under these instructions until 1821. In that year Macquarie made a tour of Van Diemen's Land, leaving Lieutenant-Governor Erskine in command at Sydney, with Major Goulburn lately arrived from England as Colonial Secretary. One day the latter called upon Mr. Justice Field and asked

[1] *S.G.*, G.G.O., 8th January, 1810.
[2] G.G.O., 24th January, 1801. H.R., IV.
[3] G.G.O., 9th January, 1813. P.P., H.C., 1816, XVIII.
[4] Macquarie's Instructions to Lieutenant-Colonel O'Connell. H.R., VII., p. 634, 30th October, 1811.

him to draw up a bye-law for the prevention of accidents from the removal of gunpowder in too great quantities. Field at once drafted a proclamation embodying the English law on the subject, and this was issued by the Lieutenant-Governor. So soon as Macquarie saw it, he wrote a letter of rebuke to Erskine, and on his return to Sydney recalled the proclamation by means of a Government Public Notification.[1] He did this without consulting his judicial officers, and in very clumsy style. "His Excellency the Governor," ran the notice, "from due consideration of the Powers and Authority vested by His Majesty in him *solely*, as Captain-General and Governor-in-Chief of this Territory and its Dependencies, has deemed it fitting and necessary . . . to declare and notify. And he does hereby make this public declaration and notification that the said Proclamation so issued and published, during His Excellency's late Public tour of inspection in the Southern part of this Territory . . . is wholly without force and authority."

"Fortunately," wrote Field to Lord Bathurst, "the private understanding between Governor Macquarie and Lieutenant-Governor Erskine was too good to permit a quarrel between them; but as this may not be the case with a future Governor and Lieutenant-Governor, I have thought it my duty to submit this question of authority to the decision of your Lordship."[2]

Field's legal opinion was that when the Governor "absents himself from the seat of government thither (Van Diemen's Land), but leaves the Lieutenant-Governor of the Territory of New South Wales . . . to administer the Government in *his* own name, and allows the Lieutenant-Governor of Van Diemen's Land to administer that Government in *his* own name, it amounts to an 'absence out of the Territory and its Dependencies'. . . so that the Lieutenant-Governor has then the power by his commission, even with no more oaths than those originally taken, to do whatever is necessary to carry on the Colonies both of New South Wales and Van Diemen's Land. . . . If nobody is authorised to make any law or regulation while the Governor is at sea within the Territory, how long is New South Wales to wait without necessary Laws and

[1] *S.G.*, 14th July, 1821.
[2] Field to Lord Bathurst, 1st August, 1821. R.O., MS.

Regulations (Martial Law for instance) in the case of the Governor's non-arrival at the dependency for which he sailed, or non-return home by stress of weather or perils of the sea."

He went on to discuss other powers of the Lieutenant-Governor. "As to the Lieutenant-Governor's power to appoint members of the Court, the Charter of Justice expressly gives him this 'in the absence of the Governor,' without saying 'from this Territory and its Dependencies'. But in both cases the word 'absence' must be construed *secundum subjectam materiam*. In the last case there is no question; and the question in the first case is, whether this is an absence to the intent and purpose of carrying on the state, which Governor Macquarie does not deny his late absence of three months was; for he allowed the Lieutenant-Governor to appoint and dismiss constables, to receive returns and reports, etc. Nor does he dispute the 'imminent risk' which called forth the regulation in question from the Lieutenant-Governor's 'zeal for the service'.[1] He only asserts '*Ita lex scripta est*': as long as I am 'geographically within the vast latitude and longitude of the Territory either on land or at sea, nobody else can make Laws or Regulations for the Colony'. This is a question which I think a new commission should set at rest."[2]

Field's view seems to be supported by law and commonsense. The Colonial Office, however, left his letter unanswered. It was considered again in 1824, but as the Governor no longer exercised legislative powers, it was a matter of no further importance.[3] It was not only during the Governor's absence that business suffered interruption. Sometimes the whole administration was brought to a standstill, and the Colony as it were hushed to silence while the Governor and his secretarial staff prepared despatches for England, and while the vessel which was to bear them waited impatiently in the Sydney Cove.[4] As the one direct channel of communication between Ministers in Downing Street and ten thousand British subjects in the

[1] Quotation from Government Notice, 14th July, 1821.

[2] Enclosure to Field's letter to Bathurst, 1st August, 1821. See Erskine's letter and its enclosures to Bathurst, 15th September, 1821. The discussion led to a violent quarrel between Erskine and Field. R.O., MS.

[3] C.O., MS. Papers for 1824 to 1825.

[4] See, *e.g.*, S.G., G.G.O., 22nd March, 1817.

Southern Seas, the Governor was bound to record every important occurrence and every measure he thought fit to take. Details of population, accounts of expenditure, judicial reports, all had to be copied in duplicate or triplicate and transmitted to the Colonial Office.

In the first year of Macquarie's rule, the means of conveyance were very irregular. By the most direct routes, by the Cape of Good Hope or Rio Janeiro, the voyage occupied from four to eight months. But many of the ships touching at Sydney returned to England by way of India or were bound for the whale-fisheries in the South Seas. The Colonial Office complained in May, 1812, that no public despatches had arrived since April, 1811, although two whalers, which had put in at Sydney, had since reached England.[1] Macquarie replied that these conveyances were not reliable. Whaling vessels often spent six or twelve months on their fishing stations. The voyage by India also was usually a protracted one.[2] Lord Bathurst replied that not having received a public despatch from the Colony for above fifteen months, he was anxious "to learn more in detail an account of its progress and prosperity, which you state to be still uninterrupted; and in order to prevent the inconvenience which results from so infrequent a communication between the Colony and the mother country, I have to request that for the future you will avail yourself of any opportunity which may offer of forwarding your despatches to India to be sent home by the first Company's ship which may be about to proceed to England".[3]

From this time Macquarie found himself making somewhat similar complaints of the Secretary of State. "I have much to lament," he wrote in March, 1816, "that I have not yet been honoured with communication from your Lordship on several very interesting and important points relative to the Colony . . . as contained in my despatches . . . in the years 1813, 1814 and 1815".[4] The Secretary of State in his reply reminded him "how much the length and uncertainty of the

[1] D. 5, May, 1811, C.O., MS.
[2] D. 6, 17th November, 1812, R.O., MS.
[3] *i.e.*, East India Company's ship. D. 21, 19th May, 1813., C.O., MS.
[4] D., 22nd March, 1816. R.O., MS.

voyage to New South Wales must at all times interfere with a very regular communication".[1] In this case Macquarie's complaint had been made before the answers could have reached him, for his previous despatches had been very much delayed.[2]

With the progress of the trade of New South Wales and the increasing frequency of convict transports from 1816 onwards, the difficulties of communication were lessened. But it did not become less difficult to ensure that attention should be directed to each important detail, either by Macquarie or by the officials at Downing Street, who were occupied with matters of more varied interest. The need of such intercourse was urgent because of the Governor's extensive powers. While the greater share of colonial patronage remained in the hands of Ministers[3] the Governor administered the oaths of office, might suspend or dismiss officials, appoint justices of the peace, coroners and all minor judicial and executive officers. He had power to pardon all offences save wilful murder or treason. He had the custody of lunatics and administration of the estates of minors. He might raise troops or declare martial law. He could alienate crown lands, appoint fairs and markets, ports and harbours. He could make regulations for shipping and trade. By his warrant alone could public money be issued.[4] He sat as a Court of Appeal in civil cases. Over the discipline, distribution and labour of the convicts he had complete control, and over the whole Colony a general power to "pursue such measures as are necessary" for its peace and security. Over the navy he had no jurisdiction, save that its members when on shore were amenable to the Colonial Courts for all breaches of the peace or of colonial regulations.[5]

Instructions under the sign-manual or simply transmitted by the Secretary of State might at any time modify these powers. In practice the Governor was expected to refer all

[1] D., 30th January, 1817. C.O., MS.
[2] *Ibid.*
[3] *i.e.*, the appointment of the officers on the colonial staff, judicial, administrative and medical.
[4] But it must be disposed of by him "for the support of the Government, or for such other purposes as shall be particularly directed and not otherwise". He had no power to raise money. See H.R., VII., p. 131, Commission, 8th May, 1809, and also Chapter X. later.
[5] *Ibid.*

important proceedings, especially such as involved expenditure, to the Secretary of State before taking action in regard to them.

In addition to his responsibility to the Ministers of the Crown, the Governor was under the restraining influence of English law. He looked forward to a return to England at some future time. When he did so, however, any illegality committed by him in New South Wales might be questioned in the English Courts. He could plead there neither Commission nor Instructions. For all practical purposes a despot in New South Wales, in England he was a plain citizen subject to the ordinary course of law.[1]

From the time of the Colony's foundation the Governor had acted without a Council. Hunter had keenly felt the need of one to share his responsibility and help him with legal advice. But he thought such a Council should consist of civilians, and to this there was an insuperable difficulty. For it was in the task of putting an end to the liquor trade that he wanted advice and support, and there was scarcely a civilian in the settlement who was not himself engaged in this "nefarious traffic".[2] King, who superseded Hunter in 1800, when the drink traffic was at its height, with "the unpopular task of becoming a reformer" before him, was well aware of the isolation in which he stood.[3] "Confidential persons to assist me," he wrote, "I brought none."[4] Yet even from Government officials he expected and obtained no support in his work of reformation.

With regard to King's successor Bligh, Crosley, a famous convict attorney, wrote in 1817 that he had been employed ten years before in "giving legal advice to the Governor and Magistrates of his Council assembled to oppose the rebel party".[5] The gathering, however, was not deserving of so fine a name, for it can have been nothing more than an informal meeting of

[1] The Commission and Instructions of the Governor of Cape Colony at this time were almost identical with those of the Governor of New South Wales. See those issued to Earl Caledon, 1st August, 1806, printed in Cape Records. See also Theal, *History of South Africa*, iii., pp. 133, 134. See also Chapter X.

[2] Evidence before C. on T., 1812.

[3] Memorandum of King, quoted in Rusden, *History of Australia*, vol. i., pp. 227, 228.

[4] Same. King did a great deal of good work in suppressing the drink traffic, but he had a very difficult and unpleasant term of office.

[5] Crosley's Petition to Lord Bathurst, 1817. R.O., MS.

Bligh's friends. Bligh himself was doubtful of the expediency of forming a Council, especially one with law-making powers. "It would," he said, "require a very just and wise man to go among them to form any code of laws."[1] John Blaxland, a "gentleman-settler," made a somewhat similar proposal for "a humane and enlightened Governor assisted by a Council".[2] A Committee of the House of Commons on Transportation, which examined witnesses on the condition of New South Wales in 1812, also recommended the formation of a Council.[3] They considered the power exercised by the Governor of issuing regulations which might create new offences and assign new punishments too great to remain in the hands of one man. It had, they pointed out, already created dissatisfaction, and it could not be expected that, however well exercised, it would ever cease to do so. They proposed that the Governor should retain a right to act contrary to the advice of his Council, but that the dissentient members of the Council should in such a case be entitled to protest, and to demand that their protests should be transmitted to the Secretary of State. "The acquiescence of the Council would give popularity to the measures of which it approved, and its expressed approbation might have the effect of checking such as were evidently inexpedient."[4]

This Report was sent to Macquarie in November, 1812. In the covering despatch Lord Bathurst wrote that to this recommendation "His Majesty's Government feel no disposition to accede". The Governor was to be left unfettered by a Council. The difficulty of selecting suitable members, the discussions to which their opposition to the Governor and their protest against his conduct might give rise, the consequent formation of parties, the long time which must elapse before decisions of the

[1] Evidence to C. on T., 1812. Bligh perhaps thought it better to leave things as they were than to attempt to find such a Governor.

[2] Blaxland to Liverpool. H.R., VII., p. 230, 27th November, 1809.

[3] There is also an interesting paper of suggestions in the Colonial Office Records for 1809, and printed in H.R., VII., p. 113, etc., written by a Mr. T. W. Plummer and endorsed in Macquarie's handwriting. Plummer was probably the friend mentioned in Macarthur's letters who was a merchant of London. He proposed a Council for the Governor with legislative and judicial but not executive functions. It was to consist of the Governor, three officials and two magistrates elected by the inhabitants. The Governor was to have the power of overruling a majority of the Council.

[4] C. on T., 1812.

Secretary of State could arrive, and the danger of weakening the higher authorities in a society composed of such discordant materials, all more or less influenced the determination of the Government.[1]

Macquarie agreed with this reasoning, and even indulged "a fond hope that this measure will never be resorted to in this Colony".[2] The result of the decision was that the party spirit which it was feared a Council might create was fostered and encouraged by the disappointment of not receiving one. The Governor, directed to consult with "the best-informed characters in the settlement,"[3] continued to seek advice in those quarters where he thought it would be most favourable to his own views. As the population and importance of the Colony became greater, he found himself more and more compelled to widen the circle of his counsellors.

The criminal judicature of the Colony had been established by statute[4] and a Commission under the Privy Seal in 1787,[5] the civil judicature by the latter only.

The Criminal Court convened by the Governor from time to time as occasion required, consisted of the Judge-Advocate and six officers of His Majesty's forces by sea or land. King's ships were so seldom in port that in practice the six officers came to be furnished entirely by the regiments stationed for the time being in New South Wales. They were selected in the same way as for a General Court-martial, and the aspect of the Criminal Court was wholly military, for they appeared in "the insignia of duty, the sash and sword".[6] Save that the Judge-Advocate presided, the procedure also was assimilated to that of courts-martial. Having administered the oath to the other members, the Judge-Advocate received it from them in his turn. He also exhibited the charge against the prisoners, being indeed the only Crown prosecutor. Procedure was by examination, the Court administering the oath to witnesses.

[1] D. 13, 23rd November, 1812. R.O., MS.
[2] D. 2, 28th June, 1813. R.O., MS.
[3] Instructions, H.R., VII., p. 133, etc.
[4] 27 Geo. III., cap. 2. See Bigge, Report, II., 1823, and Field to Bigge, 23rd October, 1820. R.O., MS.
[5] Usually called the Charter of Justice. The judicial constitution here described was altered in some respects in 1814. For these alterations see Chapter VI.
[6] Collins, *History of New South Wales*, 2nd ed. 1802, p. 11.

But the law was the law of England—not military law. In the times when six soldiers with another soldier as their President had done justice in the Court, this distinction had probably been more theoretical than real, but under the presidency of Ellis Bent the rule of law easily triumphed.

The Court took cognisance of "all such outrages and misbehaviours as, if committed within this realm, would be treason or misprision thereof, felony or misdemeanour.[1] After hearing the evidence, the Judge-Advocate addressed the members as a judge charges a jury. The Court then retired and decided upon the verdict, which was that of the majority,[2] and the sentence. Verdict and sentence were then pronounced by the President. The execution of the sentence was entrusted to the Provost-Marshal who had in each case to receive the Governor's warrant. The Governor thus passed in review every sentence pronounced by the Court.

The military appearance of the Court, and the absence of trial by jury, were both considered grievances by the colonists. The Committee on Transportation favoured the appointment of Petty Juries in Criminal trials.[3] They based this recommendation largely on the opinions in its favour expressed both by Bent and Macquarie.[4] The latter indeed was an advocate for Grand Juries as well as Petty ones. The Secretary of State did not think fit to adopt the suggestion, and trial by jury was not granted for many years.

The Court of Civil Judicature was composed of the Judge-Advocate and two magistrates appointed by the Governor. An appeal lay from this Court to the Governor and from him to the Privy Council. This arrangement was in many ways unsatisfactory. In the first place, the Governor, a man without technical legal knowledge, must either decide a case for himself or apply for advice to his only law adviser, the Judge-Advocate,

[1] 27 Geo. III., cap. 2.

[2] The agreement of at least five members was necessary for the immediate execution of the death penalty. If four only were in favour of it the case had to be referred for the consideration of the Crown.

[3] C. on T., 1812.

[4] Bent to Liverpool, 19th October, 1811. H.R., VII., p. 621. Macquarie's Despatches, *passim*. Especially see D., 28th June, 1813, R.O., MS. See also Appendix to C. on T., 1812.

against whose decision the appeal itself was made.[1] In the second place, if either side wished to appeal further and to carry the case to the Privy Council, the expense and delay were such as to make a creditor ready to accept any compromise, and thus to put a premium on sharp practice and vexatious proceedings.[2]

In early days the Civil Court had been occupied by small matters only, and to such a summary procedure was applicable. But by 1810 the causes had grown in complexity and in amount. Trained lawyers were necessary to expound the suits brought before it. But the Colony could only provide attorneys from the convict ranks. At first Ellis Bent, with the horror of a man who held high the honour of his profession, had determined to bring to an end their pollution of his Court. Realising, however, that such a course would have inflicted real injury on the parties, he gave way,[3] and drew up a Rule by which a special permission to plead might be given by the Court in each case. The attorney had, however, to exhibit a written instrument "duly executed by the person in whose behalf he shall be authorised to appear," and to lodge with the chief clerk a certificate from the Governor's Secretary declaring him a free inhabitant of the territory.[4] Under this regulation some emancipists, of whom George Crosley was the most prominent, engaged in lucrative practices.

In this Court a convict could neither sue nor be sued. According to Bligh this was one of "the old-standing regulations of the Colony".[5] It imposed a real hardship, for many of the convicts, and especially the ticket-of-leave men, entered freely into business contracts. Indeed it cut both ways, as may be seen from Crosley's case. When Dr. Harris was

[1] Of course the two magistrates in the Civil Court could have given a verdict in which the Judge-Advocate did not concur. In practice, however, this never occurred.

[2] D., 13, 23rd November, 1812, Bathurst to Macquarie. R.O., MS.

[3] See his letters of 1814 and 1815 to Lord Bathurst, especially that dated 1st July, 1815. R.O., MS.

[4] Rule of the Court of Civil Jurisdiction, *S.G.*, 5th October, 1812. "Free inhabitant" included those free by servitude or pardon. Parties might still appear in person if they wished to.

[5] Evidence before C. on T., 1812. There is no such regulation to be found in the colonial records. It was, however, the accepted custom of the Courts—and founded on the law of England.

examined as a witness for Johnston at his trial in 1811, he was asked why Governor King emancipated Crosley. "To put him within the power of the Colonial Courts," replied Harris, "that people might be able to recover their debts from him."[1]

Though in his commission the Governor's prerogative of mercy was expressed in general terms as the power to pardon offences, there were two distinct sides to its exercise. On the one hand, there was the power to the head of the executive to pardon men convicted of offences committed *within* the territory. On the other, there was the power exercised as Governor of a penal colony to pardon convicts transported for crimes committed *outside* the territory.[2] In the one case, the offence, in the other, the offender was the prime matter for consideration.

In pardoning men convicted in the Colonial Courts or in mitigating their sentences, the Governor was restricted in one respect only. In the case of murder or treason, he might grant a reprieve but not a pardon.[3] Macquarie used these prerogatives freely and constantly both with regard to sentences of the Criminal Courts and the magistrates. His warrant to the Provost-Marshal was not given without careful scrutiny of each case, and he was largely guided by personal opinion and knowledge of the individuals concerned. He did not, however, consider it necessary to consult the judge who had passed sentence. Ellis Bent sometimes learnt of a pardon or reprieve for the first time on meeting in the street a man who had lately stood before him in the dock under sentence of death.[4] Bent's successor, Judge-Advocate Wylde, admitted that the Governor only consulted him in capital cases, and that then he sometimes acted contrary to his advice.[5]

[1] Johnston's Trial, p. 327.

[2] This power was given in general terms by 30 Geo. III., cap. 47. The whole question of the effect of the Governor's pardons was raised in 1818 and will be treated in Chapter IX. See also Bigge Report, I., 1822, P.P., XX.

[3] In 1811 Macquarie pardoned two men convicted of murder. Finding that he was not authorised by his commission to do so, he at once wrote to the Secretary of State explaining the mistake. The pardons were confirmed by the Crown, and the men released accordingly. The incident affords a curious illustration of the neglect with which even a conscientious Governor treated the terms of his appointment. See H.R., VII., p. 613, D., 18th October, 1811.

[4] Bent to Bathurst, 1st July, 1815. R.O., MS.

[5] Wylde's Evidence, Appendix to Bigge's Reports. R.O., MS.

When the Governor did uphold the sentence of the Court, Bent frequently found that punishments were "frittered away and rendered nugatory in the execution".[1] This was one of the reasons why Bent resented the Governor's personal supervision of the gaols.[2]

Until 1815 the matter had not been brought before the Colonial Office. In so far as the Governor abused his power and weakened the punitive effects of the Criminal Law, it was illustrative of a defect inherent in small communities under any form of personal government. The population was small enough for the Governor to feel that he knew something of each man in it—it was large enough for him to be constantly misled by that belief.

In his treatment of the transported convicts this feeling of omniscience again led him astray. Colonial custom and the instructions to early Governors had long settled the three methods by which their sentences might be mitigated. The first of these was by the grant of a ticket-of-leave, which exempted a convict from labour for the Government or as an assigned servant, and allowed him to work for himself. The Government ceased to clothe or feed him, but he remained under the surveillance of the superintendent of convicts and was legally still a prisoner. The ticket-of-leave was granted during pleasure only, and might be recalled if its holder were guilty of misconduct, or if his labour were needed for the public works.[3] The "emancipation" or conditional pardon was the next grade. This gave a convict complete freedom within the territory, but within the territory only. Finally there was the "free" or absolute pardon which restored him to complete freedom within or without the Colony.[4]

In the first years of his rule Macquarie granted few remissions and those with great circumspection.[5] His predecessors had been less discriminating.[6] The Committee on Transportation in 1812 decided that the power exercised by the Governor was

[1] Bent to Bathurst, 1st July, 1815. R.O., MS. Of course the Governor could not *increase* a punishment.

[2] Bent to Bathurst. Above. [3] D. 2, 28th June, 1813. R.O., MS.

[4] Same. These remissions of sentence, etc., apply to male and female convicts alike.

[5] Bathurst to Macquarie, D. 13, 23rd November, 1812. R.O., MS.

[6] *e.g.*, King and Crosley. See above.

one which served no useful purpose and was open to great abuse. The Governors, they thought, had been more influenced by love of popularity and favouritism than by the desire to reward exemplary conduct.[1] They were shocked to find that so many as 150 pardons had been granted in one year. They proposed therefore that for the future all conditional and absolute pardons should be granted through the Secretary of State, the Governor having only the right to recommend. The delay of one year would, the Report stated, be the only inconvenience.[2] They also advised that an annual return should be made of the tickets-of-leave, together with the reasons for giving them.

Lord Bathurst was ready to accept these recommendations in their entirety,[3] Macquarie, however, argued ably and successfully against them.[4]

"It appears to me," he wrote, "by no means necessary, towards the internal management of this Colony, that the Governor of it should have the power of granting absolute pardons." But there were, he thought, objections to its withdrawal. "At the hour of death a convict feels more from the idea of dying a convict than for death itself. I have myself been more than once induced . . . to grant pardons to men in this state, who had . . . long been living as if they had been free, and possessed of large property, previous to my arrival in this Colony. . . . It would certainly prove a great drawback to their reformation and exertion to reflect that after meriting their pardons, death might intervene before they would be obtained."

To withdraw the power to grant conditional pardons he thought would greatly "retard the improvement and prosperity of this country. . . . Until a convict is emancipated he is not eligible to receive a grant of land, to act as a juryman,[5] or to be

[1] The evidence does not appear sufficient to warrant this statement.

[2] C. on T., 1812. This is a very sanguine view. The voyage to England and back again would take at the very least twelve months without allowing any time between receiving the Governor's recommendations and deciding to adopt them.

[3] D. 13, 23rd November, 1812. R.O., MS.

[4] D. 2, 28th June, 1813. R.O., MS.

[5] At this time Macquarie was looking forward to the immediate establishment of trial by jury. More than a conditional pardon, however, would have been necessary before a convict could act as juryman. See Chapter IX.

employed in any situation of trust or command." Again, "in some cases, the persons recommended will probably forfeit the indulgence for which they have been recommended, and before it is received they may be under various sentences here at the time their emancipations arrive from England, which could not then be well acted upon. All this would tend to endless trouble and confusion of representations backwards and forwards, which can only be imagined by those accustomed to these extraordinary persons who, while convicts, are panting for freedom, and when once restored to freedom too frequently forfeit it." He stated that it would be difficult to give a correct return of tickets-of-leave as they were issued during pleasure and liable to be recalled at any moment. As the holder remained under surveillance he did not think the indulgence would lead to mischief, and it had the advantage of saving the Treasury of expense.

Macquarie concluded his plea by enclosing for the Secretary of State's perusal an Order which he had drawn up for the regulation of all mitigations of sentence.[1] Petitions and memorials praying for these indulgences were to be presented once a year only, on the first Monday in December. Each application was to be signed and countersigned by the resident Magistrate and Chaplain of the district to which the convict belonged. If he lived in Sydney he must have a certificate also from the Superintendent of Police. The signatories must have known the applicant personally, and certify that he was "sober, industrious, and honest". A convict asking for an absolute pardon must have resided in the Colony for fifteen years if undergoing a life sentence, and for three-fourths of the period of any other. For a conditional pardon the necessary period of residence was ten years if a prisoner for life, or two-thirds of any other term. Before asking for tickets-of-leave the applicants must have been three years in the territory. Good conduct within the Colony was the only ground upon which a claim to any of these indulgences might be based.

Lord Bathurst was satisfied with the arguments and regulations put before him by the Governor, and pressed the matter

[1] G.G.O., 9th January, 1813.

no further. The regulations remained in force, and the Governor continued to exercise full powers of granting remissions of sentence throughout Macquarie's time. But in 1819 the question was again raised.

The Hon. H. Grey Bennet, a member of Parliament, who was instrumental in obtaining a House of Commons Committee on New South Wales in 1819, published in the following year "A Letter to Lord Bathurst," in which he commented on the evidence delivered before it.[1] He approved of Macquarie's regulations of 1813, but asked "Are they practically in force? Have any exceptions been made and in what instances? Were these rules meant to have any operation in New South Wales, or were they only to produce an effect on the Colonial Office, and obtain the rescinding of that Order, arising from the suggestion of the House of Commons Committee in 1812?" A comparison of dates at once shows that this last suggestion was without foundation. Macquarie published his regulations before he received the report of the Committee and Lord Bathurst's despatch proposing to adopt the suggestion. But Macquarie's own despatches and orders, the evidence before the Committee of 1819, and the information collected by Commissioner Bigge in 1819 and 1820—show that Bennet's other queries were fully justified.

In two respects Macquarie deviated greatly from the rules he had laid down—firstly, in regard to length of residence—and secondly, in regard to granting the indulgences at one time of the year only.

From 1813 to 1820[2] he granted 170 free pardons, and in twenty-six instances the necessary length of residence had not been reached. In the same period he granted 1,217 conditional pardons, 285 of which were exceptions, while amongst 1,716 tickets-of-leave no less than 450 had been issued before the recipients had been three years in the Colony.[3]

Macquarie undoubtedly considered that he had the right

[1] "A Letter to Earl Bathurst . . . on the condition of New South Wales and Van Diemen's Land as set forth in the evidence taken before the Prison Committee in 1819, 1820." A copy of this pamphlet is to be found in the Library of the Royal Colonial Institute and another in the Colonial Office Library. There is no copy in the British Museum.

[2] *i.e.*, from the time when the Order came into force.

[3] Appendix to Bigge's Report. R.O., MS.

in "the exercise of his supreme authority,"[1] to deviate in particular cases from the lines laid down by himself. He was supported in this belief by many colonists.[2] But he never made even an attempt to enforce rigidly the three years' residence in regard to tickets-of-leave. In the despatch of the 28th June, 1813, he wrote that they were frequently conferred immediately on the arrival of the convicts who had been "in the line of gentlemen" before their condemnation. Sometimes they were given very recklessly as in the following two cases. A convict was transported in 1815 *for the second time*. His sentence was a life one. Immediately he arrived at Sydney he was given a ticket-of-leave. He married the daughter of a publican, and with her dowry, and the proceeds of a tobacco investment he had been allowed to make on the voyage from England, he set up a licensed house in Sydney.[3] The other example is that of Lawrence Halloran who arrived in 1817. Macquarie was censured by the Colonial Office in 1820[4] for having granted him a remission of sentence. He explained that he had not done so, but had simply "exempted him from manual labour by giving him . . . a *ticket-of-leave*, which is revocable at the Governor's pleasure, or even by a single magistrate in case of an offence being proved against the holder. . . ." The man was advanced in years, had a short sentence of seven years, was "of liberal education," and so far as Macquarie knew there was nothing very serious against him.[5] Bigge, however, found out some curious facts about the matter.[6] Halloran had been known to the Governor's Secretary some years before as a schoolmaster at the Cape of Good Hope, and before he had entered on the career of blackmail and defamation against Earl Caledon and General Grey, the two successive Governors of that Colony, which had been the cause of his transportation. Not knowing of these facts, the Secretary had suggested to the Governor that

[1] See G.G.O., 24th March, 1814, in which he proposes to deviate from a rule laid down by himself as to the distribution of spirits. He uses the words quoted above in explanation of his action.

[2] *e.g.*, Riley. See Evidence before C. on G., 1819.

[3] The licence was in his wife's name. He could not hold one, being still technically a prisoner. His behaviour seems to have been good on the whole, but he had not been transported for a second time merely to increase his fortune!

[4] D., 14th July, 1820. C.O., MS.

[5] D. 10, 20th March, 1821. R.O., MS.

[6] Bigge Report., I., III., and Evidence in Appendix to Reports. R.O., MS.

Halloran should have a ticket-of-leave and follow his profession of teaching. As soon as he received it Halloran lodged a complaint against Captain Lambe, the master of the transport on which he had travelled, and the complaint was investigated by the Sydney Bench of Magistrates. They decided that it was unfounded and malicious, and ordered Halloran to give up his ticket-of-leave and return to Government labour. Halloran appealed to the Secretary for protection and kept his ticket-of-leave. The magistrates protested, and after some angry passages the ticket was finally withdrawn. But instead of being placed in a gang of Government workmen, Halloran was assigned as servant to Simeon Lord, his intimate friend, and after a few months was again in possession of a ticket-of-leave.[1] He soon had the largest and most fashionable school in the Colony.[2] The story is a startling commentary on Macquarie's despatch.

It was certainly very difficult to know what to do with men of Halloran's type, who were unused to any sort of manual labour. A few could be used as clerks, but the supply was far greater than the demand. To give them tickets-of-leave was an easy, and appeared to be a cheap way, out of the difficulty.

The case was different with regard to the free and conditional pardons. It was recognised that there might be many men who proved themselves fit to receive pardons before they had lived the necessary time in New South Wales. But there were instances in which pardons were given or withheld which showed no such grounds of reason. There were, for example, pardons free and conditional given not as rewards for good conduct but as recompense for working on the new road built over the Blue Mountains, or even for sending carts and horses to assist. There was no need to give this encouragement, nor was such a need ever pleaded. The absurdity of the thing is clear enough when the case of such a man as Hodge, one out of many, is considered. He hired a cart for a few pounds, sent it as his own, received an emancipation and at once opened a sly-grog shop.[3]

[1] Bigge's Report, I.

[2] *Ibid.*, III. Halloran apparently laid the foundation of secular education in Australia. Bigge was scandalised to find no Bibles or other books of religion in his school.

[3] *Ibid.*, I. Also Evidence in Appendix to Reports in R.O., MS.

Amongst those who fulfilled the requirement of residence many received pardons who were of known bad character.[1] On the other hand, several men who had been steady and industrious were retained in Government service because they had a knowledge of some trade useful in carrying out the Government works.[2] This created a feeling of indignation which need never have arisen, had not Macquarie's own order given the appearance of a *right* to what was only an *indulgence.*

The effects of the Governor's laxity was much increased by the carelessness of the magistrates who signed petitions without ascertaining that the prisoner had resided for the full number of years required.[3] Their lack of zeal in these duties was not to be wondered at. Throughout the year Macquarie was in the habit of granting pardons without consulting them,[4] and without requiring compliance to the forms of his regulations. But occasionally he rebuked them publicly for their use of what was after all a discretionary power in a manner which roused hot indignation.[5] Thus in 1814, he said in a General Order that he had been "forced to reject a number of applications . . . which, although they bore the signatures of the magistrates, were in many instances (within His Excellency's own knowledge) not entitled to the consideration they solicited".[6]

The second important breach of his regulations was the result of the irregular manner in which he granted indulgences from time to time on mere personal application.[7] When a convict became a freed man he might receive a grant of land, tools, stock and rations for one year, and thus become for the time being a heavier charge than before on the revenue. It was thus desirable to increase as little as possible the number of pardons for each year. Macquarie adopted a most remarkable system for achieving this object. In December, 1813, he

[1] See Bigge's Report, I. Also MS. Evidence in Appendix, *passim.*
[2] Bigge's Report, I. [3] *Ibid.*
[4] *Ibid.* The number of pardons varies little from year to year, but in some years Macquarie refused to receive any memorials at all at the fixed time, having granted all the pardons he intended to already. See later.
[5] Bent to Bathurst, 1st July, 1815. R.O., MS.
[6] G.G.O., 10th December, 1815.
[7] In 1819 he granted seventy-two pardons during the year and nearly 200 at the regular presentation. See Returns in Appendix to Bigge's Reports. R.O., MS.

sent a circular letter to the magistrates saying: "The number of applications made yesterday for free pardons or emancipations having far exceeded the Governor's expectations, and being in fact more than double the number he can comply with for two years to come, it is his desire that you shall not countersign any further or new applications of that nature, until those you have already certified shall have been finally disposed of".[1] In 1814 he received five hundred memorials, and consequently directed that no more should be presented in 1815,[2] and in 1816[3] he ordered that none should be presented in 1817. Finally in 1820 he refused to receive petitions for conditional pardons or tickets-of-leave.[4] Bigge was present when those for 1819 were presented to Macquarie, and gave an account of the proceedings.[5] "The crowd . . . was very great; and observing their impatience the Governor addressed them, and informed them that he would grant no tickets-of-leave to those who had not been three years in the country, nor any other indulgence, except in conformity to the terms of his Proclamation of the year 1813."[6] This address produced no effect. There was great difficulty in preserving order in the presentation of the petitions to the Governor, who, on perusing the statements and looking at the certificates, either wrote in pencil or in the margin the initial letters of the indulgence that was to be given, or rejected the petition altogether. The petitions exceeded seven hundred; they were collected by the major of brigade and two clerks, who, with the superintendent of convicts, were the only persons present.

From the returns sent in to Bigge it appeared that at this period Macquarie did actually grant two free and sixty-five conditional pardons as well as thirty-eight tickets-of-leave which were exceptions to his regulations.[7]

[1] Quoted in G.G.O., 10th December, 1814.
[2] G.G.O., 10th December, 1814.
[3] *Ibid.*, 1816.
[4] *Ibid.*, 11th November, 1820.
[5] Bigge's Report, I. The Governor was ill in December, 1819, and therefore received the petitions, etc., early in January, 1820.
[6] *i.e.*, G.G.O. of 1813.
[7] In Return in Appendix to Bigge's Reports. R.O., MS. The number of pardons granted varied little from year to year. In 1813 there were fifty-one free pardons given and in 1814 thirty-nine. But from 1815 to 1820 the number never rose above twenty. In 1818 there were 312 conditional pardons granted, but in other years, from 1813 to 1820, there were never more than 170.

The magistrates were the pivot on which the administrative organisation of the settlement turned. They not only conducted the business "usually transacted by Justices of the Peace in England,"[1] but were constantly engaged in enforcing order and discipline amongst the convicts. They gradually took over from the Civil Court all processes for the recovery of small debts. A Proclamation of July, 1810, laid down a summary procedure for such suits, and fixed a schedule of fees ranging from threepence to two shillings and sixpence. An Act of 1813 enabled debts to be proved on oath before a chief magistrate either by a private individual or the Crown, and also made provision for levying distress.[2] Finally in 1820 a Proclamation issued by the Governor conferred on the magistrates the jurisdiction given them in England by 20 Car. II., cap. 19, over questions arising upon wages or contracts for labour in husbandry under the sum of ten pounds.[3] They had in addition to all these duties the general supervision of their districts.[4]

Their most onerous tasks were those connected with the convict system. "All complaints either of neglect of duty or of ill-treatment on the part of Government men or their employers are to be made to the district magistrate, whose duty it will be to punish and redress mutually the ill-behaved and injured party."[5] They also investigated all complaints brought before them by gaolers and superintendents, and exercised over the convicts what would in the case of free men have been a criminal jurisdiction.[6]

No magistrate could order any punishment without examination on oath unless he actually saw an act of neglect, disorderliness or insubordination committed.[7] In no case

[1] Ellis Bent to Bathurst, 1st July, 1815. R.O., MS.

[2] 57 Geo. III., cap. 15. An Act for the more easy recovery of debts in His Majesty's Colony of New South Wales.

[3] *S.G.*, 5th February, 1820. See Wylde's Evidence, Appendix to Bigge's Reports, R.O., MS., and Bigge's Report, II. Both considered that the magistrates strained the meaning of the Act and were too ready to go outside the proper sphere of their jurisdiction.

[4] *e.g.*, Marsden was expected to supervise the asylum at Castle Hill in the Parramatta district.

[5] G.G.O., 10th September, 1814.

[6] See, *e.g.*, Bigge's Report, I. He thought this a wise arrangement.

[7] See Hunter's Evidence, C. on T., 1812.

could a single magistrate order a heavier punishment than fifty lashes.[1]

Before Macquarie's time a Bench, which usually consisted of three magistrates, had ordered floggings of three hundred lashes, and sometimes a resident magistrate in a distant part of the settlement exercised the powers of a Bench.[2] But such cases had been exceptional.

The usual punishments were flogging, imprisonment in the gaols and hard labour in the gaol-gangs, solitary confinement on bread and water, or transportation to the coal mines at Newcastle.[3] Except in the last case, the duration of a punishment ordered by the magistrates never lasted more than a year and seldom so long. Before Macquarie, all severe magisterial sentences had been reviewed by the Governor before being put into execution. Under his administration, however, an alteration was made in this system. All the proceedings of the Sydney magistrates were laid before him immediately after their meetings, and even the slightest sentences had to be approved by him.[4] But apparently no similar supervision was exercised over the magistrates of other districts. Even the quarterly returns of all fines and punishments ordered by them on delinquents of every description was very irregular, and the details recorded very scanty.[5] Transportation to Newcastle was carried out differently. The magistrates simply committed and the Governor allotted the term for which the prisoner would be kept there, and on the report of the Commandant that term might be lengthened or curtailed. Occasionally, however, the Superintendent of Police at Sydney sent a man thither without the Governor's order if he thought it necessary to separate him at once from his companions.[6] But neither

[1] It must be remembered that a hundred years ago this was a comparatively light punishment.

[2] Hunter's Evidence. See above.

[3] G.G.O., 10th September, 1814. There is a reference in this Order to imprisonment in the stocks as an alternative to corporal punishment, but no stocks seem to have been provided in any part of the settlement.

[4] Bent to Bathurst, 1st July, 1815. R.O., MS.

[5] G.G.O., 10th September, 1814. See also Bigge's Report, II. On one occasion, in 1819, the Sydney Bench took upon itself to reconsider and reverse a decision of the Resident Magistrate at Parramatta, Hannibal Macarthur. Macarthur wrote indignantly both to the Governor and to Bigge, and Macquarie directed the Bench to expunge the record from their Book of Proceedings. See correspondence on the subject, Appendix to Bigge's Reports. R.O., MS.

[6] Riley, Evidence, C. on G., 1819.

Governor nor magistrates had power to extend the servitude of the convicts by keeping them at Newcastle beyond the term of their original sentences. Often the only evidence before the Commandant of the length of a sentence was the assertion of the men themselves, and rather than incur the responsibility of false imprisonment he had to permit prisoners to return to Sydney.[1]

In all districts of New South Wales, by means of the reports of gaolers and superintendents which were made directly to him, the Governor for all practical purposes exercised a complete and important supervision over the punishment of prisoners by order of the magistrates. The whole management of the gaol-gangs was in his hands. In 1810 that at the Sydney gaol had been the only one, but in 1814 he established gangs at Parramatta and at Windsor and Liverpool, the two towns in the Hawkesbury district.[2] At the same time he limited the numbers in each, a restriction which owing to the smallness of the gaols and the growing population was difficult to maintain. It also made it impossible for the magistrates to carry out his Order in the spirit he wished. For Macquarie's chief object in forming the gaol-gangs was to lessen the necessity of resort to corporal punishment. But when there was no room in the gaols and the gangs were filled, the magistrates could enforce no other punishment.[3]

Macquarie was always inclined to clemency,[4] and in his management of the gaol-gangs Bent considered that he was far too indulgent.[5] The intention was that the men of the gang should work sometimes in chains, always wearing a "particoloured" dress, and be closely confined in the gaol at night. Their hours of work also were longer than those of other convicts in Government employ. "At present," wrote Bent in 1815, "the gaol-gang, in common with everything else,[6] is under

[1] Bigge's Report, I. See also Evidence in Appendix, R.O., MS. Of course the Criminal Court could impose sentences of transportation according to English law.

[2] G.G.O., 10th September, 1814.

[3] *Ibid.* See Bigge's Report, II. and Evidence, especially of Parramatta magistrates, in Appendix to his Reports. R.O., MS.

[4] See opinions of both Wylde and Bent. These judicial officers found Macquarie too ready to pardon.

[5] See Bent to Bathurst, 1st July, 1815. R.O., MS.

[6] *i.e.*, connected with the gaols and convicts.

the sole and immediate control and direction of the Governor, and it has of late been much employed in the rooting-up stumps and laying out a road in the Governor's domain, where much of the effect of the punishment is lost from its want of publicity."[1]

It was one of Macquarie's worst faults that he laid down rules for others from which he absolved himself. "Formerly," to quote Ellis Bent again, "no punishment was inflicted even on a prisoner, but by order of the magistrates or of the Criminal Court upon a hearing of the parties concerned—and I consider that it would have been better if that system had not been discontinued."[2] Governor King had taken the same view, that in such matters the Governor had rights equal and not greater than those of any other magistrates.[3] Macquarie took quite a different view. "The Governor," wrote Bent, . . . "upon the gaoler's reports orders the punishment of prisoners . . . without any hearing or examination before him and without the knowledge or intervention of the magistrates; instances of corporal punishment inflicted in the lumber-yard by the mere authority of the Governor, and without any previous hearing or trial, are frequent, and persons have been flogged in the public market-place by a similar warrant granted in the same manner.

"It is true that in all these cases the offenders have been persons in the service of Government or of individuals to whom their services have been assigned by Government."[4] The power which Macquarie thus indulged with respect to the convicts, in the end he exercised and defended in regard to free men.[5] That was, however, a momentary lapse from discretion; and with this one exception it was not an unjustifiable though, perhaps, an unwise exercise of power. Bigge found in 1820 that Macquarie was in the habit of ordering punishment for Government servants on the verbal report of the chief engineer, but only in cases where prompt action appeared

[1] Bent, 1st July, 1815. MS. R.O. Bigge thought the gaol-gang an ineffective form of punishment, but did not say whether it was inherently ineffective or merely badly organised. See Report I.

[2] Bent. See above.

[3] Evidence in C. on T., 1812.

[4] Bent. See above.

[5] See Chapter VIII., case of Blake and two others.

necessary. All others were reserved for examination by the Superintendent of Police or by the Bench of Magistrates.[1]

As a convict was not distinguishable from the rest of the inhabitants by any outward sign, escaped prisoners, run-away servants and ticket-of-leave men wandered about the country, passing themselves off as free, and cheating, trafficking and creating disorders. The Governor, to put an end to this vagrancy, issued an Order in August, 1810.[2] It provided that men free by servitude or emancipation must carry their certificates, ticket-of-leave men their tickets, and other convicts passes from magistrates or from their masters stating where they were going and what was their business. If these orders were neglected the convict might be sent to Sydney by any magistrate to work in the Government gangs. After 1814 the only magistrate in Sydney who could issue these passes was the Superintendent of Police.[3] It was an Order which was very difficult to carry out, and indeed was very imperfectly obeyed. Under it a very curious abuse grew up by which masters who did not wish to feed, clothe and pay their convict-servants gave them passes and allowed them to go about working for themselves. These passes were as valuable as tickets-of-leave, and from the frequency with which they were given by a certain magistrate, came to be known as "Captain Cox's Liberty".[4]

The establishment of the Sunday Muster rendered it easier to follow the movements of the convicts about the country. Until Bligh's time it had been the custom to muster the convicts in Sydney every Sunday morning and march them to church.[5] Macquarie revived it in Sydney at the beginning of 1810 and extended it by the advice of one of the chaplains[6] to the rest of the territory in 1814.[7] At headquarters the convicts and

[1] One case in which prompt punishment was thought necessary was that of a conspiracy to escape by cutting out a ship in the harbour; another was the case of two sawyers at Pennant Hills who tried to stir up their comrades to refuse to work. See Bigge's Report, I.

[2] G.G.O., 18th August, 1810. [3] *Ibid.*, 10th October, 1814.

[4] Evidence of Howe, Chief Constable at Windsor in Appendix to Bigge's Reports. R.O., MS. Cox was Resident Magistrate of the district.

[5] See C. on T., 1812.

[6] Rev. Mr. Cartwright. See his Evidence, Appendix to Bigge's Reports. R.O., MS.

[7] G.G.O., 10th September, 1814. The convicts called the Sunday Muster a "Full Bench". See Howe's Evidence above.

ticket-of-leave men were mustered for a special inspection by the chief superintendent and occasionally by the Governor. In the other districts "all the male convicts, whether assigned to settlers or on ticket-of-leave . . . (with the exception of stockmen and such other persons as the magistrates under special circumstances may see fit to exempt), are to assemble and be mustered by the district constable every Sunday morning at ten o'clock in such central part of the district as shall be pointed out by the magistrate; and to proceed from thence under the direction of the constable to the nearest church or place of divine service, in case there shall be one within three miles. . . . On these occasions it will be expected that the assigned servants and persons on tickets-of-leave shall not only be punctual . . . but also clean and decent . . . and any of them who shall attend either unshaved or intoxicated, or absent themselves except in cases of sickness or other unavoidable cause, are to be reported by the constable to the magistrate of the district, who is to reprimand for the first offence and punish every subsequent one by placing the offender in the stocks for one hour."[1]

The masters of assigned servants were enjoined to assist in carrying out this order on pain of having their men withdrawn. This threat was never enforced, though it was well known that some masters did their best to hinder their men from attendance. The muster rolls were to be kept in a uniform manner in all districts, and to be submitted every Monday to each resident magistrate that he might punish defaulters and those who had not conducted themselves with propriety. The magistrates were asked to attend the muster occasionally in person to assure themselves that the proceedings were carried out in an orderly manner.

How far the Sunday Muster was successful it is hard to say. If it was held near a licensed (or unlicensed) house, drinking and intoxication were the inevitable result. When it brought the convicts into a town as it did at Parramatta, it was an unmixed evil. Marsden, the senior chaplain, and Hannibal Macarthur, the two chief magistrates at Parramatta, opposed it strongly and refused to enforce the order; and Bayly, Townson

[1] G.G.O. See note on stocks above.

and Sir John Jamison agreed with them. Anything which brought the convicts together in large numbers was open to serious objections, and these were all the stronger if after the muster there was no church within three miles for them to go to. Often, too, when they were being marched to church they took the opportunity of stealing all kinds of portable articles from the houses they passed. At the same time the muster gave undoubted assistance in securing a reliable register of the prisoners' whereabouts, and was a means of tracing escaped convicts. Unfortunately the constables were for the most part too illiterate to do the work properly, and the registers were very badly kept. With the exception of Marsden the chaplains seemed to approve of the musters, but they were naturally prejudiced in favour of any regulations which secured them a good congregation. Bigge had little to say for the attention which the convicts gave to the service. They had no bibles or prayer-books, and though quiet on the whole they were occasionally guilty of irregularities of conduct which caused the preacher to interrupt his discourse for the purpose of rebuking them.[1]

The only remuneration received by the magistrates consisted of four convict servants each, clothed and "on the store". Their appointment and dismissal was in the hands of the Governor, and was not until 1820 in any way controlled by the Ministers at home.[2] The whole duty of selection belonged to Macquarie alone, and the task was no easy one. Marsden rightly considered that "the happiness and prosperity of this country depend very much upon the selection of proper men as magistrates".[3] Governor Hunter had felt this so strongly that he had urged the Government to obtain suitable men from England.[4] This had not been done, and he had therefore been forced to appoint the only available persons, members of the civil and military staff. Bent thought "the procedure of the Bench of Magistrates had been much affected by the number of military

[1] For whole of this subject see Macquarie's Despatches, *passim*, and letters of Bayly to Marsden. See also Bigge's Report, I., and Evidence in Appendix, R.O., MS., *passim*, 8th December, 1817, Letter to Sir Henry Bunbury.

[2] In 1820 the appointment of Dr. Redfern was objected to by the Secretary of State. See Chapter IX.

[3] Marsden to Wilberforce. Correspondence of Wilberforce, published 1840, vol. ii., p. 183, 27th July, 1810.

[4] C. on T., 1812.

officers who had acted upon it," and in particular that the system of laying the Book of Proceedings before the Governor immediately after the meeting was a bad survival of those times.[1] Though the Governor was no longer compelled to select as magistrates officers of the military or civil staff, it was not easy to find good men for the duties, such as were capable of carrying out the laws and not mere "agents of the Governor".[2]

Bent suggested that the judicial officers should be consulted in such appointments, but Lord Bathurst disregarded his advice. The deterioration in the character of the magistracy, which took place in the first five years of Macquarie's governorship, Bent thought was due to bad selections and to the Governor's habit of not merely supervising but interfering in their judicial and administrative actions.[3]

There were not more than eight magistrates in the Colony when Macquarie added to their number Andrew Thompson and Simeon Lord.[4] Both had come to the Colony as convicts, and both had been under twenty at the time of their conviction. They were illiterate, ignorant men, and when they were placed on the Commission of the Peace both were living "openly in profligacy".[5] Thompson had for some time been chief constable at Windsor, kept a shop and owned several houses there, and was strongly suspected of illicit distilling. Lord was a retail merchant, afterwards an auctioneer who sold "small articles by the hammer,"[6] and finally a manufacturer. Not content with making them magistrates, Macquarie shortly afterwards named them as Road Trustees with the Rev. Samuel Marsden. The chaplain, however, refused to act with them, basing his refusal not on their convict status but on the notorious immorality of their lives. After angry communications both by letter and by word of mouth, Macquarie accepted this refusal, but he never forgave Marsden for thus opposing his plans.[7] He treated Marsden's action as a deliberate censure on his scheme

[1] Bent, 1st July, 1815. R.O., MS. [2] *Ibid.*

[3] See above and also Chapter IV., the Governor's interference with regard to the grant of licences.

[4] Thompson in January, 1810, and Lord in August, 1810.

[5] Marsden to Wilberforce. See above. Neither of them had been transported for very serious crimes.

[6] Riley, C. on G., 1819.

[7] See Marsden's Evidence, Appendix to Bigge's Reports. R.O., MS.

of raising "emancipists" to the magistracy, which was throughout his governorship one of the main planks of his policy. Marsden certainly did not approve of it, and without doubt it made the few men of standing in the Colony less ready to take a magisterial office, and lowered its character in the eyes of the colonial population.[1]

The police constables throughout the country were appointed by the Governor. He acted, however, on the recommendation of the resident magistrates of the various districts or the Superintendent of Police in Sydney.[2] Macquarie was the first Governor to set about organising this force, and in 1810 he established a complete system of police for Sydney. The town was divided into five districts with forty-five petty constables, five district constables, one of whom acted as chief constable, an assistant superintendent, and finally a superintendent of police.[3] To this post was annexed a salary of £200 a year from the Police Fund, and except for a short interval in 1820 it was held throughout Macquarie's governorship by D'Arcy Wentworth, the chief surgeon and Treasurer of the Police Fund.[4] The pay of the district constables consisted of £10 a year, slop-clothing (continually in arrears), an allowance of spirits, a ration and a half for themselves and rations for their families. The petty constables received the same without the salary of £10. In 1817 the district constables lost the rations for their families and received another £10 a year as compensation. The country police received the same remuneration and were drawn from the same class of men. Nearly all of them were convicts or ex-convicts, and very few free men of decent character could be persuaded to undertake the duties. The method of payment was thoroughly bad and degrading, and one of the greatest difficulties in enforcing order and protecting property in the

[1] For fuller treatment of this subject of the position of "emancipists" see Chapter VII.

[2] Wentworth, in evidence before Bigge, said that he himself had the whole power of appointing and dismissing constables. Perhaps he had the *real* power, but he certainly had not the *nominal* power. See *S.G., passim.* The Governor appoints or dismisses "on the recommendation of" is the form used.

[3] G.G.O., October, 1810, and G.G.O., December, 1810. Number of petty constables was increased to fifty in 1819, and to sixty-four in 1820. Bigge Report, II.

[4] Almost all the revenue raised in the Colony went into the Police Fund, which was used for many purposes besides those of police. See later.

Colony was due to the fact that the constables themselves were not to be trusted.

The Police Regulations published on the 1st of January, 1811, were of an exceedingly stringent character, but not more so than the turbulent and peculiar population of Sydney required. Lord Bathurst approved them but took exception to one clause. His objection was that "it gave power to a single magistrate to inflict corporal punishment on free men as well as on convicts."[1] Macquarie denied that it did so, adding "No free man is ever corporally punished by the sentence of the superintendent of police or any single magistrate. *Free men*, whatever their offence may be, are always brought before and tried by a Bench of Magistrates whose sentences must be approved by me before they are carried into execution."[2] The line between the man who had been and the man who ought to have been transported was sometimes hard to draw. Governor King and Macquarie each failed to do so on one occasion at least.[3]

Some important clauses of the Regulations were very imperfectly carried out. The registration of the places of abode of all persons, free and convicts alike, at the superintendent's office at Sydney and at the magistrate's office in the other districts was difficult to enforce and allowed to fall into neglect. The regulation would have required free men to submit themselves to the inquiries of convict police officers. The chief constables too were, for the most part, too illiterate to carry out the work. Wentworth substituted a census taken by his assistant which was altered from time to time as occasion arose.[4] It was very difficult also to trace the movements of the convicts from one master to another, a difficulty which was increased by the fact that the escape of Government or settlers' servants was made known not to the police but to the superintendent of convicts, who inserted a notice in the *Gazette* but made no other communication of the fact.[5]

The revenue of the Colony rested on a remarkably insecure basis. In his evidence before the Committee on Transportation,

[1] Pars. 5, 6. This seems the natural interpretation of the clause. See D. 12, 23rd November, 1812. R.O., MS.
[2] D. I., 28th June, 1813. R.O., MS.
[3] See Wentworth's Evidence, Appendix to Bigg's Reports. R.O., MS.
[4] Bigge's Report, II. [5] *Ibid.*

Bligh admitted that the Governor imposed "duties on trade and on merchants and exports at his own pleasure".[1] But he added "the Governor had the power of levying duties at his own will, and *was justified in that power by his orders from home*". The trace of misgiving apparent in this answer was not without cause. The assumption of power, though unquestioned until 1815 and exercised by each Governor from 1794, was quite without legal foundation. Yet the Governor's Instructions assumed it, and though not especially mentioned in his Commission it was taken for granted by Secretaries of State and Governors alike. It could not indeed have been conferred without an Act of Parliament, for New South Wales was not a Colony obtained by conquest; and even had it been originally conquered, Parliament had already intervened in its affairs by the Act establishing the Criminal Court in 1787.[2]

But the assumption of power went farther than the raising of revenue. The Governor made laws "of a most important and penal nature," as well as imposing duties and taxes, though "such a power is not founded on any Act of Parliament nor provided for by the Governor's Commission."[3] The Secretary of State said in 1815 "The power of the Governor to issue Government and General Orders in the absence of all other authority, and the necessity of obeying them, rests now on the same foundation on which it has stood since the first formation of the Colony".[4] In that position the matter rested until 1817.[5]

The chief items of revenue were the duties on imports and port dues. Of these Macquarie allocated three-fourths to the Police Fund and one-fourth to the support of the Orphan School.[6] The other sources of revenue were fees and fines and

[1] Evidence to C. on T., 1812.

[2] 87 Geo. III., cap. II. The law on the subject before 1810 may be found in Cowper's Reports of Cases in the King's Bench, 1774 to 1778, pp. 204-214. Campbell *v.* Hall, 1783. See opinion quoted there of Sir Clement Wearye and Sir Philip Yorke in 1722, p. 211. See also Sir Samuel Romilly's opinion *re* Trinidad, 26th June, 1806, printed in *Memoirs*, published 1814, vol. ii., p. 149.

[3] Bent to Bathurst, 14th October, 1814. R.O., MS.

[4] Bathurst to Bent, 11th December, 1815. C.O., MS. In a memorandum by Governor King, 2nd January, 1806 (H.R. VI., p. 1) he records that Macarthur told him of the opinion of an English barrister that the local regulations were illegal. Macarthur, however, did not name the barrister, and King gave no further attention to the subject.

[5] See Chapters VIII. and X.

[6] After 1816 seven-eighths went to the Police Fund and one-eighth to the Orphan School. The latter had been founded by Governor King.

the payments for licences. There is no need to include quit-rents, as none were collected before 1822. In 1811 the Police Fund reached £10,000, and by 1820 it had risen to £25,884.[1]

The objects for which the Fund was established were specified as "gaol and police expenses of every description . . . together with such other expenses as might necessarily be incurred in ornamenting and improving the town of Sydney and in constructing and repairing the quays, wharfs and bridges, streets and roads within the limits thereof".[2] But there was in fact no charge which could be incurred which was not from time to time defrayed out of the Police Fund.[3] It went, however, but a little way in meeting the needs of the Colony. The burden on the Imperial Treasury before 1817 was nearly £240,000 per annum, and after that year it increased in consequence of the increase in the number of convicts transported. In 1814, a fair average year, the expenditure in round numbers was as follows[4]:—

1. Transportation of convicts . .	£55,000
2. Food sent from England for the convicts (salt pork, etc.) . .	23,000
3. Clothing, tools, stationery and other manufactured goods sent from England for the use of Government	31,000
4. Expense of Marine Establishment (vessels which went to and fro from Van Diemen's Land to Newcastle)	1,700[5]
5. Expense of Military Establishment	20,000
6. Expense of Civil Establishment .	13,000
7. Bills drawn by the Governor, Commissioner, etc., for the purchase of provisions, etc., for the use of the Colony, and paid by the Treasury.	83,900
Total, £227,600.	

[1] See Appendix to Bigge's Reports. R.O., MS.
[2] Wylde's Evidence, Appendix to Bigge's Reports. R.O., MS. Wylde quotes Macquarie's Order, 1810.
[3] *Ibid.* [4] P.P., 1816.
[5] These are the figures belonging to 1813, as in 1814 there were some exceptional expenses under this head.

The Governors were expected to send to the Colonial Office quarterly, or if that were impossible, yearly accounts of the expenditure under the last head.[1] By this means any financial excesses or improper payments might be checked, for the Treasury, when the bills were presented for payment, appealed first for the advice of the Colonial Office. This was one of the reasons why the irregularities of communication were considered so regrettable.[2] The Secretary of State in a despatch of 1812 dealt with the whole financial position very severely. "Although," he wrote, "bills have been presented for payment dated the 11th March, 1811, I have received from you no information in regard to any payments which have been made in the Colony subsequently to 30th September, 1810. . . . From that period . . . notwithstanding the accounts you then transmitted of the flourishing state of the Colony, the expenditure has continued to increase.

"In giving my opinion to the Lords Commissioners of the Treasury that the bills which had been presented for payment should be accepted, I have been governed solely by a consideration of the hardship which individuals would sustain and the additional expense to which Government might be eventually liable had they been protested."[3]

No Secretary of State was likely to go further than this. Rebuke and reproach, and as a last resort perhaps recall, were the only weapons of financial control so long as the Governor was honest and the calls on the Treasury not absurdly extravagant. "It is impossible," wrote the Minister in the despatch just quoted, "for me to point out what expenses have been unnecessarily incurred, or in the execution of what services retrenchments might have been made." He could only enjoin rigid economy in general terms, and urge that in undertaking public work "your first object should be to make the colonial revenue applicable to that part of the expenditure of the Colony which now falls so heavily upon the Treasury of this country".[4] Nor were such works to be commenced "without

[1] D. 20, 4th May, 1812. Liverpool to Macquarie. R.O., MS. [2] *Ibid.*
[3] *Ibid.* The despatch is signed by Lord Liverpool, then Secretary of State for War and the Colonies, but was probably written by Robert Peel, then beginning his illustrious career as Under-Secretary.
[4] D. 21, 5th May, 1812. R.O., MS.

having the previous sanction of His Majesty's Government for their construction, or without being enabled to prove most clearly and satisfactorily that the delay of reference would be productive of serious injury to the public service." [1]

With regard to the Governor's legislative powers, his right to regulate the lives of the convicts was, of course, beyond question. But the regulations issued from time to time by each successive Governor and upheld by the Colonial Courts, dealing with all subjects from illicit distilling to observance of the Sabbath, touched all the inhabitants—free, freed, and in servitude. The claim to this right was based on the words of the Governor's Instructions,[2] the needs of a penal settlement and the status of a military Governor. The last claim had neither validity nor logic. For though in name a "military Governor" he ruled through a civilian staff with a judicial establishment appointed under Act of Parliament. The Criminal Court itself with all its military appurtenances and its summary procedure was a Court of Record and administered the law of England. It was this law which the Judge-Advocate was sworn to administer, yet by his Commission he was brought under the orders of the Governor.[3] It was an impossible position. If the Governor promulgated orders which were opposed to law, was the Judge-Advocate to enforce them in the Court? Bent protested that he was bound by his oath not to do so—the Colonial Office held that he was bound by his Commission to obey the Governor.[4] The magistrates might be placed in an equally difficult dilemma. An instance occurred under Governor King in 1806. He had reissued an Order of Governor Hunter's and enjoined the magistrates to enforce it more rigorously. The Order, intended to put an end to illicit distilling, prescribed the punishment of "banishment" for all free persons convicted of the offence. A Bench of seven magistrates refused to pronounce

[1] D. 20, 4th May, 1812. R.O., MS. Shortly after this, Lord Bathurst and Henry Goulburn replaced Liverpool and Peel at the Colonial Office. In financial matters they were less exigent than their predecessors.

[2] The terms in the Instructions were very general, contained in the duty "to pursue such measures as are necessary," for the peace and security of the Colony. See H.R., VII., p. 133, par. 2.

[3] See Commission, H.R., VII., dated May, 1809.

[4] See correspondence of Bent with Colonial Office, 1814 to 1815, R.O., MS. See also Chapter VII.

this sentence. The Governor demanded an explanation, and they replied that they considered it their duty to enforce to the utmost of their power the Order which "the executive power has issued for the public weal, but at the same time they do not think themselves vested with sufficient authority to send every person out of the Colony for any disobedience of a colonial order, which they conceive would be infringing the power of the Governor; and they further are of opinion that it is a matter of great delicacy for them to pass any judgment on orders issued by the executive authority; that the power of the magistrates extends no further than finding the culprit generally guilty of Governor Hunter's Order . . . leaving it to the Governor to inflict the prescribed penalties".[1]

In other words "we think your Order is illegal and refuse to take the responsibility of breaking the law". To plead the orders even of a military Governor would not have availed in an English Court.

There was, however, a middle path which, more often than not, remained open. So long as the Governor's regulations were within reasonable bounds, supplementing and not conflicting with the law, the necessities of the Colony formed a sufficient justification for the colonial judges and magistrates.[2] This was the view generally held in the settlement. An address to Macquarie in 1812, for example, thanked him for "the considerable approaches already made under your Excellency's Government, to model the laws that rule us after their revered original, the blessings of which we sanguinely look forward to your paternal efforts procuring us (in) all the plenitude we may deserve".[3]

The Colonial Regulations took the form of Government and General Orders or Proclamations. "At all times," wrote Bent, "they emanate from the sole authority and will of the Governor, and are made, revoked, altered or partially dispensed with as that will directs."[4] But the Governor sometimes required the

[1] Rusden, *History of Australia*, vol. i., p. 252. See also H.R., VI., p. 104, 1st July, 1806.

[2] This was the view held by Judge-Advocate Wylde and Judge Field. See Evidence of both in Appendix to Bigge's Report. R.O., MS.

[3] *S.G.*, 18th January, 1812.

[4] Bent to Bathurst, 14th October, 1814. R.O., MS.

help of his only law adviser, the Judge-Advocate, to ensure legal accuracy in the phraseology of his regulations. Macquarie claimed that when so called upon, the Judge-Advocate had no option but to obey. Bent held that he was bound to give advice, but that he might refuse to draw up any particular order desired by the Governor if he considered it illegal, since he might in such a case have to give judgment against it in the Courts.[1] Wylde held a similar opinion but gave way on the Governor's insistence.[2] Orders and Proclamations were published by insertion in the *Sydney Gazette*. As no Governor had ever considered himself bound by the laws of his predecessors, and no orderly record of them had ever been kept, Bent found in 1811 that no one really knew what laws were in force, and that many of them were quite inconsistent one with another. He began to collect and revise them, but was hindered by pressure of work, and in 1819 his successor, Wylde, was similarly prevented from completing the task.[3]

The *Gazette* was under official superintendence and had been published weekly from the time of its establishment in 1803.[4] It contained much news from English papers, of war, scandal and politics, as well as the chronicles of New South Wales and Government notices. Before going to press the whole contents were approved by the Governor's Secretary who was referred to as the "censor of the press".[5] The price, three shillings a month, was admittedly high, but the price of paper was exorbitant. All Orders and Proclamations were published on three successive Saturdays[6] and as much publicity as possible given to them. Probably they were posted in the towns and townships. Sometimes the chaplains were ordered to read them during service, an order disliked by several of them and disobeyed by Marsden. He declared that such a practice was "irregular and improper," and that the subjects

[1] Bent to Colonial Office, 1811 to 1815, *passim*. R.O., MS.
[2] Wylde's Evidence, Appendix to Bigge's Reports. R.O., MS.
[3] Bent, see above. Bigge's Report, II.
[4] Before 1810 the publication had been on two occasions discontinued for a few weeks owing to lack of paper. The type was occasionally peculiar—capital letters replacing worn-out small letters, etc.
[5] He had, of course, no legal right to such a title.
[6] The day on which the *Gazette* was published. In Bligh's time it came out on Sunday. Macquarie, who was a strict Sabbatarian, altered the day of issue to Saturday.

and their treatment were often quite unsuitable to a place of worship.[1]

It was natural that under this despotic Government, and in a Colony peopled for the most part by outlaws, criticism of those in authority should not be allowed. Petitions, Public Meetings, Associations were all hedged round by restrictions. But in that era of Tory reaction and the Six Acts, the colonial population had remarkably little to complain of. They could not complain, for example, when King in 1803 refused to allow Sir Henry Brown Hayes, a convict who had been "in the line of a gentleman," to hold a Free Masons' Lodge and initiate new members. Nor was it surprising that when in spite of his prohibition a meeting was held, he passed an "exemplary sentence" on Hayes of hard labour at the settlement then just about to be formed at Van Diemen's Land.[2] Two years afterwards King conducted a curious campaign against petitions. He prohibited the landing of a cargo of spirits. Thereupon some settlers presented a petition praying that the prohibition be removed. King refused the prayer of the petitioners and summoned the magistrates to consider whether the signatures had been properly obtained. The magistrates recommended the "discharge of the delinquents" and quoted the Bill of Rights. The petition they said had perhaps been irregular in form but that was the result of ignorance only. King then drew up regulations of the manner in which future petitions to the Governor were to be presented.[3] Three magistrates were to give their consent to the promotion. When the petition had been signed by one person, its purport was to be submitted to the Governor. He might then allow more signatures to be obtained, and when the petition was finally presented would "consider and decide on its propriety". His object was to prevent "seditious and ill-disposed persons going about getting up petitions signed by the credulous and unwary for the most

[1] See Marsden to Bathurst, 1818. R.O., MS. The Orders often referred to public-house licenses, price of spirituous liquors, the carrying of waddies by the natives, etc. See Vale to Bathurst, 16th April, 1818. R.O., MS.

[2] See *S.G.*, G.G.O., 17th May, 1803. It is surprising that later in the year Hayes was still in Sydney and that so far as appears he never did go to Van Diemen's Land. A Masonic Lodge was afterwards formed in New South Wales, but not by the convicts.

[3] See for this episode Rusden, *History of Australia*, vol. i., p. 250.

destructive purposes". Petitions requiring one signature only[1] were exempted altogether from these provisions. The penalties were those "provided on that behalf by the laws of England".[2]

These regulations appear to have remained in force up to the time of and after Macquarie's arrival. They embody indeed the whole attitude of the Government towards any form of political activity in the colonists. Macquarie's attention was first directed to such matters by an association formed between "diverse Victuallers, Publicans and others" who combined together and "injuriously, with a view only to their own interests, without due notice or just cause, altered the then subsisting rate of exchange between the bills drawn for the public service and the promissory notes issued by different individuals, known by the name of currency, by means whereof great confusion had been introduced into all private dealings and transactions". This form of association was to be prevented for the future and for that purpose it had become "highly necessary to define more specifically the regular form of assembling the inhabitants of this territory".[3]

In accordance with the Proclamation issued, any meeting of more than six persons was an unlawful assembly unless the following regulations had been observed. First, a requisition stating the purpose of the proposed meeting must be made to the Provost-Marshal, signed by at least seven householders resident in the district in which the meeting was to be held. The Provost-Marshal, within twenty-four hours, if possible, must submit the requisition to the Governor. If the latter consented, the Provost-Marshal convened the meeting through the medium of the *Sydney Gazette* stating its time, place and purpose. This notice must be inserted at least five days before the meeting, and the Provost-Marshal had to attend and preside at it when it took place. The necessary powers were given to Judges and Justices of the Peace to disperse unlawful assemblies and to inflict fines and imprisonment on those infringing the regulations. Any publican permitting the unlawful assembly at his house would immediately forfeit his license,

[1] *e.g.*, petitions for remissions of sentence. [2] G.G.O., 8th June, 1805.
[3] Proclamation, 27th November, 1813, *S.G.*, drawn by Ellis Bent. See Wylde's Evidence in Appendix to Bigge's Reports. R.O., MS.

ipso facto, on summary conviction before one magistrate on the oath of one credible witness, and even then would be liable to proceedings in the Criminal Court. The Proclamation ended with special provisions against unlawful combinations in restriction of the currency.

The Governor thus exercised complete control over all public discussion. No newspaper was printed except the official *Gazette*; the Government owned the only printing-press, and no meeting could take place without the Governor's consent, nor continue in session in the face of his prohibition. His official representative occupied the chair at all meetings. In fact it was the Governor who decided whether his Government should be criticised, and when, and by whom. Thus unfavourable criticism—which is healthy criticism—was choked and confined, and dissatisfaction found its only outlet in "midnight cabals" and factious resistance.

CHAPTER IV.

THE LIQUOR TRADE.

AUTHORITIES.—Despatches, etc., in Record and Colonial Offices. *Sydney Gazette.* P.P., 1812, II.; 1819, VII.; 1822, XX.; 1822, X. Report of Trial of Lieut.-Colonel Johnston.

"THE great objects of attention," wrote Castlereagh to Macquarie on the 14th May, 1809,[1] "are to improve the morals of the colonists, to encourage marriage, to provide for education, to prohibit the use of spirituous liquors, to increase the agriculture and stock so as to ensure the certainty of a full supply to the inhabitants under all circumstances."

Each of these was important in itself—but by far the most urgent was the question of the liquor trade, on which the whole progress of the Colony, agricultural and moral, in no small degree depended.[2] To prohibit the importation and "use" of spirits altogether was a counsel of perfection which it would have been utterly impossible to carry out.[3] Nor was it possible to prevent convicts being supplied with liquor, for there was no outward sign, no distinctive dress which marked them off as belonging to that class. Even if it had been made an offence for publicans to serve them, assigned servants might still have received liquor in lieu of wages from their masters.[4]

Putting aside therefore any form of direct prohibition, three suggestions were made for regulating the liquor traffic.[5] In the first place it was suggested that importation should be free—but subject to a high duty. In the second, that sale after importation should be by permit only. Thirdly, that all private barter of spirits for corn or necessaries should be strictly prohibited.

[1] H.R., VII., p. 143. [2] See Introduction, Chapter I.

[3] If the settlement had been made a "prohibition area" the garrison would have become mutinous and discontented.

[4] See Wentworth's Evidence, Appendix to Bigge's Reports. R.O., MS.

[5] H.R., VII. See above.

Against this evil system of barter, to begin with the third suggestion, there was needed something more powerful than prohibition, mightier even than the "strong personal laws"[1] of the Governors. Had these sufficed, it would have been brought to an end by Bligh. But this was very far from being the case. Lieutenant Minchin of the New South Wales Corps, who was a witness at Johnston's trial in 1811, asserted that it was a necessary custom owing to the lack of other currency, that it had been sanctioned by every Governor except Bligh, carried on by all descriptions of persons in the Colony, and still continued. "You don't mean," exclaimed a member of the court, "that it has continued without intermission?" "It ceased for a short time," replied Minchin, "but was begun again by Governor Macquarie; he saw the necessity of it, and suffered it to go on; he himself made a purchase of land off me with spirits."[2]

In April, 1811, the Governor made an agreement with Nicholas Bayly, a gentleman-settler, in which one of the conditions was, "That the Governor gives me 500 gallons of good Bengal rum".[3] Macquarie's first Order on the subject was as late as 1815, and strictly forbade the barter of spirits "for the produce of the Colony or for manual labour".[4] But the penalty attached to disobedience was the indefinite one of incurring "the displeasure of Government" and ceasing "to derive any indulgence from it in future". Wentworth said in 1819 "that he had heard of settlers up the country paying in rum, but he knew nothing of that practice among the civil and military *officers*".[5] But although the Government had by that time ceased to use the rum-currency, and perhaps the "higher orders" of settlers had followed their lead, the practice of barter was still general among small settlers, and many unlicensed dealers bought spirit to exchange with them for pigs and wheat.[6] In

[1] This phrase is used by Jones in his Evidence before C. on G., 1819.
[2] See Report of Johnston's Trial, Evidence of Lieutenant Minchin, p. 246.
[3] Bayly to Sir H. Bunbury, 8th December, 1817. Enclosure dated 1st April, 811. R.O., MS.
[4] G.G.O., 19th August, 1815.
[5] See Evidence in Appendix to Bigge's Reports. R.O., MS.
[6] See Evidence of various convicts in Appendix to Bigge's Reports in R.O., MS.

fact the inducement to this kind of traffic was far too great to be overcome by the mild methods of Macquarie's Order.

Lord Castlereagh's second proposal referred to the custom already in force of allowing certain persons only to purchase spirit in wholesale quantities. Their numbers were not so small as to make the trade a close monopoly, though small enough to allow the Governor to control its distribution. A few months after his arrival, however, Macquarie adopted a course which not only created a monopoly, but closed the Colony to free importation for some years.

He found that there was great need for improved hospital accommodation in Sydney. The building in use was little better than a ruined shed, and yet the Government had to care for all the sick convicts and many amongst the poorer class of settlers. Macquarie was reluctant to place so heavy a charge as the building of a hospital on the revenue at this early period of his governorship and listened willingly to any alternative proposal. He accepted the one put before him by Simeon Lord, D'Arcy Wentworth and Garnham Blaxcell. The two first were high in his favour and had just been appointed on the Commission of the Peace. Blaxcell was a typical colonial adventurer. He had held many posts under the Government, knew the settlement from one end to the other, and had had a hand in every kind of colonial enterprise.

These three offered to build a hospital within three years on a plan approved by the Governor, receiving in return the sole right of importing liquor into the Colony for general consumption. The amount fixed upon was 15,000 gallons a year, and this of course was exclusive of the supplies imported for the garrison and for the private use of the civil and military staff. The terms were accepted. The contract was signed on the 6th November, 1810, and came into force at the beginning of 1811. Macquarie had not referred to the project in his despatch of the 27th November, 1810, and the Colonial Office heard of it for the first time in 1812 when his despatch of 18th October, 1811, reached England.

This long interval was productive of difficulty. Early in 1810 Macquarie had strongly recommended the opening of the ports, saying "it would be good and sound policy to sanction

the free importation of good spirits under a high duty of not less than 3s. or 4s. a gallon."[1] But he had added that he would wait until he received further instructions from the Secretary of State before carrying out this proposal.

The Secretary of State sent extracts from the despatch to the Lords of the Committee of the Privy Council for Trade, and was informed on the 7th March, 1812, that they concurred with Macquarie's views. At once several licenses were given to export cargoes of merchandise and spirits to New South Wales.[2] These cargoes had already been despatched when the Colonial Office heard of the hospital contract.[3] "Many objections," wrote Lord Bathurst, "might be urged to an engagement of this nature, under any circumstances. But I am surprised that you did not foresee the embarrassment which would inevitably be occasioned in the execution of this contract by the adoption of the suggestions contained in your despatch of the 30th April, 1810. . . . It must be left to your own discretion to take such measures as may appear to you to be best calculated . . . to do justice to the several parties whose interests are affected by the arrangements which have been made in New South Wales and in this country."[4]

The Governor made the best he could of the difficulty he had created by permitting the spirits to be landed and indemnifying the monopolists for this breach of contract by extending its duration for another twelve months. He justified his conduct in originally making the agreement rather quaintly. "When I recommended that measure" (of free importation) he wrote, "I had no idea of the restriction being taken off by the Government at home. I expected instructions from Your Lordship, authorising me to open the Port here when I conceived it best so to do. . . . Your Lordship will be pleased to recollect that one half of that period" (of the monopoly) "must have nearly expired before I could expect to receive an answer from Your Lordship, besides concluding that it would be left to me, if permission was given, to make use of it as I saw best and most conducive to the welfare of the Colony."[5]

[1] D. 30, 1810. Printed in H.R., VII., p. 335.
[2] D. 34, 19th May, 1812. Liverpool to Macquarie. R.O., MS.
[3] *Ibid.* [4] *Ibid.*
[5] For further effects of the hospital contract see later in this chapter.

In the despatch of April, 1810, he had strongly recommended the establishment of a distillery. By this means a market would be provided for the surplus grain of the Colony. Otherwise there was not sufficient encouragement for the farmers. When seasons were good and the crops heavy there was no means of selling the surplus corn, the area of cultivation for the next year was reduced and the food-supply in lean years seriously threatened.[1]

The Committee on Transportation in 1812 adopted this proposal. But they regarded it as an alternative to free importation, and stated in their Report "that they are of the opinion that an unlimited supply of spirits may be furnished to the Colony in a manner much more conducive to its interests than by a free importation". They regretted "that the hospital contract prevented the immediate establishment of a distillery."

Lord Bathurst refused to adopt the suggestion and stated his views at large to Macquarie.[2] "By a reference to Mr. Campbell's evidence,"[3] he wrote, "it will appear, and indeed you must be aware from your own experience, that the Colony does not produce more than sufficient for its own consumption, and consequently that whatsoever proportion of the corn crop were now applied to distillation must be withdrawn from the subsistence of the inhabitants.[4] . . . Whether the quality of the spirit made in the Colony will be superior to that now imported from Bengal or America is a point on which I possess no very adequate means of deciding.[5] I confess myself in some degree at a loss to comprehend the effect which the proposed measure is intended to produce upon illicit distillation; unless it is understood that the distillation of spirits should henceforth be generally permitted without any restriction or limitation whatsoever; for if duties are to be imposed they will be met by the same desire for evading them; and if they are altogether withdrawn

[1] See also Chapter V. [2] D. 13, 23rd November, 1812. R.O., MS.
[3] Before C. on T. Mr. Robert Campbell, not the Governor's Secretary, J. T. Campbell.
[4] This is only partly true. The small encouragement to farmers kept the area under cultivation at a low figure.
[5] This was one of Macquarie's arguments. H.R., VII., p. 335. D., 30th April, 1810.

there is too much reason to apprehend the consequences which may result from the reduced price of an article, the injurious effect of which upon the morals and health of the inhabitants is only equalled by the avidity with which it is required." He concluded by asking the Governor to express an opinion on the subject, a somewhat farcical request, since it was upon the Governor's opinion that the Committee had founded their proposal which he was thus invited to criticise.

Macquarie reiterated his previous arguments, but it was not until 1819 that the Colonial Office gave way. Even then they had misgivings. Commissioner Bigge, who went to New South Wales in that year, was instructed to inquire whether "distillation in the Colony could be so checked and controlled as to prevent the indiscriminate and unrestrained dissemination of ardent spirits throughout a population too much inclined already to immoderate use of them, and too likely to be excited by the use of them to acts of lawless violence."[1]

There was no doubt in Bigge's mind as to the economic advantages to be expected from permission to distil, and in 1822 distilleries were established under very stringent regulations.[2]

The hospital contract expired on the 31st December, 1814, and the building was completed shortly afterwards. Macquarie always held that the contract had been very advantageous to the Government, who had gained much and lost nothing by its means. The contractors had paid duty on the spirits they imported, and laying stress on this, and on the fact that there was now a hospital of an imposing description to beautify the town of Sydney, Macquarie neglected all other sides to the matter. He overlooked, for example, the fact that the hospital was much larger than was necessary, so much larger indeed that for some years half of it was set aside and used as a court-house. Its architecture, too, was of so ornate a description and so far beyond the skill of the workmen that the building was already falling into decay in 1820.[3] However, the rum hospital, erected "by such a sacrifice of public morals and expediency,"[4] still forms part of the Parliament House of New South Wales at the present day.[5]

[1] Instructions to Bigge. P.P., XIV., 1823. [2] See Chapter V.
[3] See Bigge's Report, III. Also despatch to Bathurst, D. 9, 24th August, 1820. R.O., MS.
[4] *Ibid.* [5] *i.e.*, the columns and portico.

"Public morals" were affected in several ways. There was in the first place the impropriety of permitting an officer of the Government already filling so many important posts as D'Arcy Wentworth, to become a party to such a contract. There was sufficient evidence to show that he reaped to the full the advantage placed in his hands. As Superintendent of Police his influence was great both in regard to the licensing and conduct of public houses. The four years during which the contract lasted were generally regarded as those in which the licensed houses were most disorderly. Wentworth would not agree that their number was too great, replying to remonstrances that it was good for trade and good for the Police Fund.[1] Thirty-one annual licenses were issued in 1810, but in the following four years the numbers were sixty, one hundred and seventeen, ninety-three and one hundred and ten, numbers which were not reached again in Macquarie's time.[2]

The amount of spirit which the contractors were allowed to import was placed at 45,000 gallons or 15,000 gallons a year. When the time of the contract was extended to four years the amount was increased proportionately. It was only in 1812 that any spirit but that assigned to the contractors was landed, and the amount of this extra importation was 10,000 gallons. Leaving this out, the total number of gallons imported during the four years was 144,000 gallons.[3] One-third of this was probably on Government account,[4] but even allowing for that the contractors imported at least 40,000 gallons more than was allowed to them in the original covenant. Macquarie seems to have thought that because the Government received a greater sum in duties by this means, the violation of the terms of the contract was of no account. The profits of the monopoly were immense, for spirit sold during its currency at 30s. the gallon was in 1815 selling at 17s.[5]

So soon as the hospital contract expired Macquarie issued

[1] Evidence of Dr. Harris. See Appendix to Bigge's Reports. R.O., MS. See also evidence of H. Macarthur and others.

[2] Return in Appendix, Bigge's Reports. R.O., MS.

[3] This is calculated on the returns of 1819 and 1820. In previous years there is no separation made.

[4] See Return, Appendix to Bigge's Reports, R.O., MS.

[5] Evidence of Lara. Appendix to Bigge's Reports. R.O., MS.

an Order declaring the ports of New South Wales and Van Diemen's Land open for the importation of spirituous liquors as well as all other merchandise, "subject, nevertheless, to such duties as are now, or shall hereafter be laid upon them by the authority of this Government".[1] The duty on spirits was fixed at 7s. a gallon. It was levied on the quantity and not the strength, and consequently merchants imported spirit from 20 to 30 per cent. above London proof.[2] In 1818 the duty was raised to 10s. a gallon. There are no means of calculating the amount of liquor smuggled into the Colony, nor of deciding whether it increased when the duty was raised. Wentworth said it was very great, and with untrustworthy constables and so high a tax it is sure to have been considerable.[3]

From the year 1800 the retail trade in liquor had been regulated by a licensing system similar to that of England. Governor King was the first to deal with the subject, and his Orders were dated 27th October, 1800. Unlicensed vending was to be punished by a fine of £10 or two months' hard labour "on the hulk" for the first offence, and three months for the second.[4] In such cases a magistrate might issue warrants to the constables to search unlicensed houses and seize any spirits which they found. Half of it was to go to the informer and half to be sold for the benefit of the colonial revenue.

Under this Order licenses were granted annually by the Governor on the recommendation of the magistrates. The licensee paid £3 and gave security himself in £20 and two others in £10 each. No publican was allowed to sell liquor in the forenoon or during the time of Divine service on Sunday, and all public houses were cleared at the beating of "tap-too".[5] The penalty for infringement of these regulations was deprivation of the license and a fine of £5. Seamen, soldiers and convicts could not be given credit above 20s. A publican who sued such a customer for any sum above this was non-suited and had to pay treble charges.

[1] Government Public Notice, 31st December, 1814.
[2] Appendix to Bigge's Report. R.O., MS.
[3] Evidence, Appendix to Bigge's Reports. R.O., MS.
[4] In 1810 there was no "hulk" nor was there any trace of such a thing.
[5] *i.e.*, at 9 o'clock.

In 1804 licenses for beer only were issued at a lower rate than spirit licenses, but appeared to have been discontinued before 1810.

Macquarie found that in spite of these regulations there were numbers of unlicensed houses in Sydney, and a great many more licensed ones than were at all necessary.[1] Taverns were found thickly clustered, especially in the wildest and wickedest part of the town, known as "The Rocks". The spirits sold, the Bengal and Jamaica rum, were of a particularly fiery kind, though probably not as deleterious as the gin which had wrought such havoc in England. Macquarie sought at once to bring the trade within reasonable limits. The cost of the license was raised to £20 and the number of houses reduced to thirty-one for the whole settlement. Twenty only remained in Sydney. The penalty for unlicensed vending was raised to £20, half of which together with half the stock was to go to the informer.[2]

The illicit trade continued, and probably the drastic reduction in the number of licenses tended to encourage it. In June the Governor gave notice that he was "resolved to prosecute such persons" (the unlicensed publicans) "with the utmost rigour of the law, and to have them most severely punished for so daring a breach of the Orders and Regulations of Government."[3] The gains of illicit dealing, however, far out-balanced the fines imposed.

In the same year the question of beer licenses was again brought forward. When the grant of separate licenses had been discontinued those houses and those houses only which were licensed for wine and spirit could retail beer. The reduction in their number curtailed the brewers' market, and a revival of beer licenses was suggested as profitable for them and also for those publicans whose houses had been closed by the reduction in the numbers of licenses. Some of the latter petitioned the magistrates on the 22nd June, praying for licenses to retail beer and ale. As they were "reputable housekeepers" the Bench recommended nearly fifty of them to the Governor.[4]

[1] In 1809 there were 101 unlicensed houses.
[2] G.G.O., 17th February, 1810.
[3] G.G.O., 9th June, 1810.
[4] *S.G.*, 23rd June, 1810.

A month later the Governor adopted their recommendation and issued a General Order in which he explained what he meant to do and why he meant to do it.[1] It had, he said, been represented to him "that it would be a great accommodation to the labouring people, and to the lower classes of the inhabitants in general, to have plenty of good wholesome beer brewed for their drinking and permitted to be retailed to them at a moderate price; his Excellency the Governor in view to their convenience as well as to encourage the settlers . . . to grow barley for this and other purposes, has been pleased to direct licenses to be granted to fifty persons at Sydney to vend and retail beer. . . ." The licensee was to pay £5 and give security in £25 for himself and produce one surety in like sum, promise to keep an orderly house and not to sell wine or spirits.

But there was an illicit trade in beer as well as spirits of which the suppression had to be attempted. In December an Order was issued imposing a fine of £20 on unlicensed vendors, half to go to the informer.[2] Applications were at the same time invited for four licenses in the country districts in order that the advantages of "good wholesome beer" might be enjoyed in all parts of the settlement.

In the following year a Proclamation dealt at large with the retail liquor trade.[3] The process for levying fines for unlicensed vending was strengthened, but the magistrate was given power to mitigate the penalty in any sum not less than £5.[4] The sworn testimony of one trustworthy witness was declared sufficient evidence for a conviction, and the proceedings might take place before a single magistrate. The prosecution must be initiated within three months of the offence, and a conviction disqualified a publican from receiving a license at any future time. To sell in quantities of less than two gallons was to retail, and any one therefore selling in such quantities must have a license.[5] Payments by pawn or pledge were forbidden, and no sum of less than 20s. contracted at one time would be recovered in the Courts.

[1] G.G.O., 23rd June, 1810. [2] *Ibid.*, 22nd December, 1810.
[3] Proclamation, 30th March, 1811.
[4] In 1816 the penalty was reduced from £20 to £10 with an additional £5 for every fresh offence. G.G.O., 27th January, 1816.
[5] In 1817 the limit was raised to five gallons.

The number of licenses was increased in 1811 and again in 1812, and all publicans were enjoined to keep "decent and comfortable houses."[1] In 1813 there were ninety-three and in 1814 one hundred and ten, but in 1815 they were reduced to eighty-five and remained at about that figure until 1820.[2]

A change was made in 1816 with reference to the beer trade. All those who received wine and spirit licenses were compelled to take out beer licenses also, and were bound under a penalty of £10 to furnish it when called for. There were no longer to be separate houses for the sale of beer and ale.[3] As the number of houses was slightly decreased the brewers made a great outcry, and in accordance with truly British sentiment they carried their point. The regulations were recalled and the Governor granted twenty beer licenses for Sydney and twelve for the other districts.[4]

Macquarie's final attempt to close the unlicensed houses was made in 1817. The amount of the fine was raised to £30 and the whole was to go to the informer. Conviction had to be sought before a Bench of Magistrates however, and not as formerly before a single Justice of the Peace.[5] Yet the offence continued and convictions were remarkably few. Two reasons for this were suggested to Bigge, one, that certain of the magistrates, notably the Superintendent of Police at Sydney and the Resident Magistrate at Parramatta, sold spirits wholesale and did not favour the prosecution of any of their customers. Bigge, however, came to the decision that although it was a mistake for any magistrates to be interested in this trade, no such charges could be supported.[6] The other reason given for the failure of prosecutions was that the witnesses were very seldom such as could be relied upon. This certainly had something to do with it, but the real cause lay in the fact that the punishment was not sufficiently severe and that the Governor treated delinquents too leniently. A conviction for unlicensed vending should have been a disqualification for a future license. Macquarie, however, did not invariably follow that course. In one instance a man

[1] Public Notice, 25th January, 1812. [2] See above.
[3] G.G.O., 27th January, 1816. It was hoped that this would encourage the drinking of beer instead of spirits.
[4] G.G.O., 25th May, 1816. [5] Proclamation, 22nd February, 1817.
[6] Bigge's Report, II.

who had been successfully prosecuted for unlicensed vending four times in two years was permitted to take a license in the third year.[1] It was obviously important that drinking should not be encouraged by a multiplication of facilities, and that the public houses should be decent and orderly. The issue of licenses gave the Government considerable power in regulating the number and conduct of these houses and it also brought in a considerable revenue.[2] It is difficult to say what was understood by an "orderly house". Governor King forbade gambling and drunkenness, probably with very little effect. Macquarie laid stress on the house being "commodious" and fit for the reception of travellers, and warned the publican not to allow "low and profligate characters" to make it a resort or the centre of disturbance. Nine o'clock was the closing hour for them all, but on "The Rocks," at least, the police made few efforts to enforce this rule. To distinguish licensed from unlicensed houses the former were ordered to hang signboards before their doors and a list of these was published in the *Gazette*.[3] The tavern company was often riotous and the inn parlour the place of brawls.[4] The duty of the Government was to lessen these evils by selecting suitable "housekeepers," and by keeping them strictly to the conditions under which the licenses were granted. By no means could it have been easy to find amongst the population of Sydney, licensees of undoubted propriety. But Macquarie's system had obvious faults. He reversed the former custom by which the Governor granted licenses on the advice of the magistrates, thus leaving the real power to them; putting in its place one by which the magistrates granted the licenses by direction of the Governor.[5] " . . . I have always understood," wrote Bent in 1815, "that licenses to vend spirituous liquors has

[1] Evidence in Appendix to Bigge's Reports. R.O., MS.

[2] The revenue was from £1,400 to £2,000 annually. Macquarie laid great stress on its importance. Thus in G.G.O., 7th August, 1813, in speaking of unlicensed retailing, he said, "Magistrates and other peace officers are called on to exert themselves in detecting and punishing all such frauds on the revenue".

[3] The police often allowed dances to take place in the licensed houses, during which there were scenes of great disorder.

[4] See G.G.O.'s 1810 to 1817, *passim*. The public houses were probably not so bad as those in England, and especially those in London.

[5] Bigge says Macquarie continued the old custom. See Report, II. This, however, is a mistake. See G.G.O. of King in 1800 and the notices in *Sydney Gazette*, which show that the system of 1800 continued until 1810. See also, Bent's letter quoted below.

always been not only nominally but actually granted by the magistrates at each district; and I think your Lordship will agree with me . . . that such a system is most accordant to the law of England and the dictates of reason. . . . The influence and patronage arising from this source is now wholly engrossed by the Governor to the injury of the public . . . and greatly to the diminution of the influence of the magistrates."[1]

The procedure was settled by Macquarie in the Order of 1813.[2] Applications for licenses or renewals were sent in the form of memorials to the office of the Governor's Secretary. Those which were approved by the Governor were handed over to the Bench of Magistrates, or rather a list of their names was transmitted to them. The applicants attended the meeting of the Bench with their sureties, paid over their fees and securities and received their licenses. "I am sure," wrote Bent, "your Lordship will be surprised on hearing that this list was never in any instance previously committed to me or to any of the magistrates, nor was I ever consulted with regard to a single person named in the list."[3]

Every memorial had, according to the regulations, to be accompanied by certificates from the resident chaplain and magistrate of the district in which the applicant resided. After 1815 the Superintendent of Police was for this purpose the Resident Magistrate of Sydney. But the Bench, who technically granted the licenses, really acted as "the clerks of the Governor". "And I cannot but think," said Bent, "that it would have been much more delicate and less injurious to the credit of the magistrates, as well as equally legal, if his Excellency had directed them to have been made out and granted exclusively by his Secretary".[4]

The certificates of the magistrates and chaplains attached to the memorial were to certify the applicants' "correct, orderly and strictly moral conduct," and each applicant was to possess a good and commodious house.[5] But the Governor frequently

[1] Bent to Bathurst, 1st July, 1815. R.O., MS.
[2] G.G.O., 30th January, 1813.
[3] Bent, see above. From 1816 to 1820 the only magistrate who attended the meeting of the Bench at which licenses were granted was Wentworth, and he came in order—as Treasurer of the Police Fund—to receive the fees. See Wylde's Evidence, Appendix, Bigge's Report. R.O., MS.
[4] See above. [5] G.G.O., 19th August, 1815.

dispensed with these requirements, and even applicants to whom the Superintendent had refused certificates obtained licenses by the Governor's order.[1] Nor had the chaplain's signature always been attached to the successful memorials. In the case of Sydney this laxity might well have been justified by the dictates of common-sense, for the Rev. Mr. Cowper was inclined, like many other clergymen, to regard attendance at church as the final test of morality.[2] At the same time the neglect of their recommendations or refusals to recommend made the magistrates perfunctory in their duties, and to a large extent accounts for the number of worthless persons to whom they gave certificates. The combined opinion of the Bench would have given far greater security than a testimonial signed by an irresponsible magistrate and confirmed or set aside by the Governor. It was impossible for the latter to "have individually so many opportunities of becoming acquainted with the characters of the inhabitants as the magistrates, who have them more immediately under their control".[3] In the few instances in which the Bench did offer their opinion, Macquarie acted in opposition to it. A license given in spite of their contrary advice had later to be withdrawn,[4] while in another case his independent mode of action led to a shameful abuse. "A man . . . convicted of felony before His Majesty's Court of Criminal Jurisdiction, and sentenced to hard labour at the Coal River,[5] not only succeeded in obtaining his remission from that sentence, but actually received and still has a license to keep a public house, and this only a short time after he had received the sentence of the Court."[6]

One regulation was rigorously adhered to. "No person," declared the General Order of 30th January, 1813, "who is still under sentence of the law as a convict, will receive a license, neither are any constables, clerks or other persons in the service of Government to be licensed as publicans". However, the disqualification did not extend to the free wives of male convicts or the free husbands of female convicts.[7] Probably the

[1] Evidence of Assistant Superintendent of Police, Appendix to Bigge's Reports. R.O., MS.
[2] Riley, C. on G., 1819.
[3] *Ibid.*
[4] *Ibid.* Case of Mrs. Packer.
[5] *i.e.*, Newcastle.
[6] Bent, 1st July, 1815. R.O., MS.
[7] Riley, C. on G., 1819.

wives of "constables, clerks and other persons" were similarly admitted to a share in this profitable trade.

The method of withdrawing licenses was open to objection on grounds both of law and policy. Bent pointed out that the magistrates had no power to act in the matter, but that the license was withdrawn by the Governor "simply on the report of the magistrates not stated to be made after an examination on oath or any judicial examination whatever—and that the punishment is not to take place immediately but prospectively. . . . As all persons taking out licenses pay to the Colonial Fund . . . the sum of £20 . . . I cannot but think that the Governor in such measures has exercised a species of Criminal Jurisdiction not only not granted to him by his Commission but expressly given to the Court of Criminal Jurisdiction."[1] The fact of prospective deprivation was generally made known by orders published in the *Gazette*, and these show not so much a salutary severity as deplorable capriciousness. A few examples suffice to illustrate this.

In September, 1812, Joseph Chitham, a publican of Pitt Street, lost his license because it "clearly appeared" that he had been "in the habit of purchasing and vending a base kind of spirits, clandestinely distilled, and that his conduct in other respects had been highly reprehensible".[2] There is no reference at all to any judicial proceedings upon which these opinions are based.

The case of Elizabeth Watson of York Street was more curious. The following account appears in a Government and General Order:—

"From the evidence lately brought forward on the trial of Ormsby and Eleanor Irvine, on an indictment for the wilful murder of Serjeant Robert Morrow, of His Majesty's 73rd Regiment, in a public house in York Street, Sydney, it appeared that Michael Casey, the occupier of that house, did not by any means exercise the authority which it was his duty to have done in his own house to restrain those altercations which unhappily took place and terminated in the death of a well-behaved and loyal subject: And a license having been granted to that house, in

[1] Bent, 1st July, 1815. R.O., MS. [2] G.G.O., 12th September, 1812.

the name of Elizabeth Watson (resident therein), for the retail of spirituous liquors and wines; and the conduct of the said Michael Casey in the foregoing instance being highly culpable, his Excellency the Governor is pleased to direct and order that from the 1st day of August next ensuing, the license granted to that house in the name of the said Elizabeth Watson, for the retail of wine and spirits as aforesaid, shall cease and determine and be held forfeited and cancelled; and that no spirits or wine shall be sold by retail or otherwise in that house, from and after the said 1st day of August next, on pain of prosecution of the offending party in the same degree as if no license as aforesaid had ever been granted to the said house."[1]

Now in this trial nothing in the evidence proved particular negligence on the part of Casey, and the license was not in his name. It had not been proved, nor had any attempt been made to prove, that the house was badly conducted or frequently the scene of disorder. The deceased had certainly met his death in the place, and it had been the outcome of a drunken brawl in which the dead man had borne a part. But the evidence had shown that his death was accidental and the prisoners had not received capital sentences. The licensee herself had not been called nor was she even referred to in the evidence, yet she suffered quite as severely as the principals. Macquarie appears to have acted in her case without any recommendation from magistrates or judge.[2]

He refused, on the other hand, to renew a license for a man who kept a good house and was *recommended* by the Bench, on the ground that he had signed a petition to Parliament which Macquarie considered of a seditious nature.[3]

The whole effect of the Governor's system was to lessen the severity of the magistrates and cause them to leave to him the responsibility and unpopularity of regulating the trade. It is characteristic of the administration that from 1810 to 1820 there is not one instance of the securities of the licensee being called for. The requirement was treated as a mere formality, and it

[1] G.G.O., 9th July, 1814.

[2] Elizabeth Watson may, of course, have lived with Casey, but there is no evidence as to their connection.

[3] Riley, C. on G., 1819.

was the general custom for one publican to offer himself as security for another.[1]

In 1820 there was a complete revolution. For some time Hannibal Macarthur and Judge-Advocate Wylde had been urging Macquarie to revert to the English system, and relegate the granting of licenses to the magistrates altogether. One abuse on which they laid great stress was the frequency with which retail shop-keepers and bakers were licensed to sell spirits, thus giving the greatest encouragement to their customers to stay in the shop drinking.[2] Macquarie was ready to meet their wishes, and when the time drew near at which the licenses would be renewed, Wylde wrote a letter of reminder. So far, the concession proposed was "to leave to the magistrates convened for that purpose the discretion at least of recommending to your Excellency in the first instance such persons as would seem to them in full Bench most fit in respect of general character or otherwise to obtain such indulgence—even if the grant itself of the license, as in England, should not yet be wholly left with the Bench".[3] The Governor replied that he intended to follow the old custom for one year more. His reason was that he intended greatly to reduce the number of licenses. Then having, as it were, put everything in order, he would "gladly leave the matter in the hands of the magistrates".[4]

Shortly afterwards a difficulty arose through the decision of the chaplain at Sydney not to sign any of the memorials "on grounds not exactly relevant to the general competency of those persons to keep respectable houses of entertainment".[5] The Governor made up his mind to cut the knot by referring "the several petitions to the knowledge and discretion of the Bench of Magistrates, only desiring that the whole numbers to be granted . . . shall not on any account exceed the number

[1] Evidence of Assistant Superintendent of Police, Appendix, Bigge's Reports. R.O., MS.

[2] They seemed to think that the magistrates could put an end to this and that the Governor could not.

[3] Wylde to Macquarie, 1st January, 1820, in Appendix, Bigge's Report. R.O., MS.

[4] Macquarie's reply, 22nd January, 1820. See above.

[5] Campbell (Governor's Secretary) to Wentworth, 11th February, 1820, Appendix to Bigge's Reports. R.O., MS.

licensed for the last year; and desirous that you will reject *in toto* all those persons whose names are now transmitted in a list from the Governor, and who are ascertained to be unfit for or unworthy of such indulgence".[1] On receipt of this letter Wentworth, who was at the time chairman of the Bench, wrote to Judge-Advocate Wylde proposing that on this occasion the latter should preside.[2]

Wylde acted upon the suggestion and laid down for the assembled magistrates the principles of the English licensing laws. In spite of Wentworth's opposition they decided on putting these principles into practice, with the result "that the number of licenses was greatly reduced, some of the most respectable people did not obtain licenses, and those who had purchased liquor and built houses in expectation of having their licenses continued have suffered very great injury".[3]

They inquired very thoroughly[4] into the situations and trade of the parties, the accommodations and the local wants of the town of Sydney, and adopted the two licensing statutes 2 Geo. II., cap. 28, and 21 Geo. II., cap. 37 as their guiding lights. They declared very firmly that they would "exercise no further power as to granting licenses for the ensuing year *after that day*".[5]

Some of the former licensees and some new applicants were apparently not fully aware of the new departure, and had not sent in their applications in time. The Governor had frequently given orders for the issue of licenses during the year, and they relied on this. Several of them, to the number of fifteen, presented their memorials to the Judge-Advocate, who simply quoted the law and refused to consider them. But with Macquarie they were more successful. On the 4th March he sent to the Bench orders directing that licenses be granted to four of the applicants. Unfortunately the Judge-Advocate was out of town. But there were license forms in blank signed by

[1] Campbell (Governor's Secretary) to Wentworth, 11th February, 1820, Appendix to Bigge's Reports. R.O., MS.

[2] He had only lately given up the chairmanship.

[3] Wentworth's Evidence to Bigge. See Appendix to Reports. R.O., MS.

[4] See J. A. Wylde to Wentworth, 7th March, 1810, Appendix. R.O., MS.

[5] They met on the 19th February to grant the licenses. See J. A. Wylde to Wentworth, 7th March, 1820, Appendix. R.O., MS.

the Judge-Advocate at the office of the Clerk of the Peace, and these were sent down to the Court House. The magistrates thought Wylde had left them already signed for this purpose, and allowed them to be granted to the four publicans. When Wylde heard of what had happened he wrote to Wentworth explaining the mistake, and pointing out that such a course would not be admissible in the future.[1] He also sent a copy of this letter to Macquarie, who replied in his very worst style. "I return you *my best thanks for informing me in this manner of the law* respecting licenses, which had you condescended to have made me acquainted with sooner I should have been fully disposed to *have regulated my conduct by.* But not knowing the law on this particular subject, and the persons who had subsequently to the 19th February applied for spirit licenses being *equally* ignorant of it, I exercised my own judgment and what I considered my prerogative—agreeably to the customs and usages observed and acted upon in this Colony for the last thirty-two years—in promising a few additional licenses for the current year to persons under peculiar circumstances. . . . These persons, therefore, to whom such promises have been made by me, of receiving spirit licenses for the present year, *must* receive them accordingly."[2] The Judge-Advocate answered shortly. In effect he said that the Governor had handed over the matter to the magistrates, who had at their meeting publicly stated their policy, and now the Governor was taking the matter out of their hands again. "On the present occasion," he concluded, "it is for your Excellency to determine as to the obligation of promises made (as your Excellency suggests) under an ignorance of the law—a plea, however, which cannot at all stand the applicants in stead".[3]

In accordance with this opinion, when the memorials came before the Bench on the 11th March, 1820, an entry was made in the Book of Proceedings that they did not consider it competent for them to make for the ensuing year any additional

[1] Wylde to Wentworth, 7th March, and to Macquarie, 1820, Appendix, Bigge's Reports. R.O. See also Wentworth's and Wylde's Evidence, Appendix, Bigge's Reports. MS.

[2] Macquarie to Wylde, 10th March, 1820, Appendix as above.

[3] Wylde to Macquarie, 10th March, 1820, as above.

grants for spirits or other licenses, and the statement was signed by those present, Wylde, Wentworth, Lord and Brooks.[1]

Nevertheless two of the applicants did receive licenses, though how they got them neither Bigge nor any one else seemed able to discover.[2]

The magistrates in this first year reduced the number of licensed houses from sixty to forty-one, and a new era of order and strict regulation set in. As they had for many years complained of Macquarie's lax administration they naturally started with vigorous severity, but probably settled down before long into an easier pace.

It is impossible to calculate with absolute accuracy the amount of liquor consumed in the Colony, or to compare the conditions before and after 1810. The only evidence is that of Lara, a decent publican of Parramatta, who declared that three times as much liquor was drunk in his house after 1810 as had been before.[3] It is probable that all the liquor imported at any time would have easily sold, and that a steady supply, such as was procured by the hospital contract and by opening the ports in 1815, did not appreciably affect the amount of drunkenness, but did lessen the amount smuggled into the Colony, and brought to an end the worst features of the rum traffic.

It is not even possible to find the exact quantity imported after 1810; for only that which paid duty, and therefore no supplies on Government account, were entered in the Naval Officers' books[4] before 1819. But the supplies for Government may be reckoned on the basis of 1819 and 1820. The consumption, so far as it can be ascertained from the amount imported, can only fairly be reckoned over a number of years, for the importations varied a great deal. Taking the four years of the hospital contract, the consumption of imported spirit appears to have been about 3·5 gallons per head of the whole population, or 4·6 gallons per head of the adult population. From 1815 to 1820 it averaged 4·3 gallons for the whole and 5·6 gallons for the adult population. Over the whole period the consumption

[1] Appendix to Bigge's Reports. R.O., MS. [2] Bigge's Report, II.
[3] Appendix to Bigge's Reports. Evidence of Lara. R.O., MS.
[4] The spirit imported by the contractors paid duty, and was therefore entered by them.

must have been nearly 5 gallons per head, and the women probably drank as much as the men. This calculation, of course, leaves out altogether the smuggled spirit and the beer and ale brewed in the settlement.

In England the consumption of spirit doubled between 1807 and 1827, and the spirit licenses increased by 11,000.[1] Nevertheless, the average amount consumed in 1830 was only $\frac{6}{7}$ gallon per head.[2]

As the young Australians drank little,[3] the remarkably large consumption of liquor in New South Wales must be attributed to the convicts. But in spite of this the death-rate was low,[4] and crimes of violence were not so frequent in proportion to the population as in England.[5] The clear sunlight, the fine spaciousness of the new country had given strength, vigour and hope to the thieves and pickpockets, the drunkards and profligates, the sinned against and the sinning, whose presence made the very name of Botany Bay a by-word.

[1] Goulburn, Chancellor of Exchequer in 1830. Quoted in Webb's History of Licensing Laws, 1902, p. 113.

[2] Twenty-eighth Report of Commissioners of Inland Revenue, 1885. Quoted in Webb, see above, p. 109.

[3] See Evidence, C. on T., 1812. Riley, C. on G., 1819. Bigge's Reports, *passim*. Macquarie's Despatches, *passim*, etc.

[4] The death-rate from 1810 to 1820 was about 20 per 1,000. This is low for the period and considering the number of old men sent out. The figures are, however, very rough. The birth-rate—calculating on somewhat incomplete returns which include only the children baptised—for the same period was nearly 30 per 1,000. Appendix, Bigge's Reports. R.O., MS.

[5] Wylde's Evidence, Appendix, Bigge's Reports. R.O., MS. From 1816 to 1820 (the only years for which returns are available) there were 100 cases of crimes of violence before the Criminal Court. See Appendix, Bigge's Reports. R.O., MS.

CHAPTER V.

LAND, LABOUR AND COMMERCE.

AUTHORITIES.—Despatches, etc. (especially Appendix to Bigge's Reports). Record and Colonial Offices. *Printed: Sydney Gazette.* P.P., 1812, II.; 1816, XVIII.; 1819, VII.; 1822, XX.; 1823, X.

IN 1820, 356,845 acres of land had been granted by the Crown in New South Wales.[1] Macquarie was responsible for grants amounting to 239,576 acres—the remaining 117,269 acres having been alienated by his predecessors. Thus in the twenty years before his arrival less than half as much land had been lost to the Crown as was granted by Macquarie in ten years. But the increase was fully justified by the growth of population from 10,452 in 1810 to 24,939 in 1820, and, according to the ideas of the time, he had shown great moderation. With regard to the distribution of the land the returns of 1819 are found to be more complete and more accurate than those of 1820. Referring, therefore, to the muster of 1819 it appears that 337,114 acres were then held by settlers in the Colony, of which 145,054 acres belonged to free emigrants or native-born, and 192,060 acres to those who had been convicts and had become free by pardon or servitude.[2] At this time[3] there were in the whole population 2,804 persons (excluding children) who had never been convicts, and 1,497 of these had been born in the Colony. The whole adult population reached 19,232, so that the number of men and women who had been transported and were still in New South Wales was 16,428. The free population, hardly a

[1] The figures are those in Appendix to Bigge's Reports, R.O., MS., reduced by one-twelfth in accordance with his statement as to their accuracy in Report III.

[2] The returns (Appendix, Bigge's Reports) give 1,502 free proprietors and 9,861 freed. But the wives and families of the proprietors appear to be counted—so that these figures are quite misleading. There were in 1819, 794 free men, and 4,002 freed. A few ticket-of-leave men held land.

[3] 1819.

fifth of the whole, held more than half the land. Naturally the "emancipists" looked with jealousy on the free settlers, who swallowed up vast estates, while they in return regarded the "emancipists" and convicts in the light of labourers for their benefit and resented their establishment upon the land. "Both parties," as Bigge said, "look upon each other as intruders."[1]

The "emancipists" did not owe all their land to the Government. Nearly two-thirds had been acquired by purchase from private individuals, a fact which illustrates the wealth they had at their command as well as the extent to which Crown grants changed hands.[2] But in spite of the ease with which land could be obtained, or more likely because of it, agriculture made very slow progress. In 1820 Oxley, the Surveyor-General, one of the most cautious of men, declared that not one-eighth of the people were occupied in farming, and he condemned unsparingly the careless and indolent means of production pursued by the majority of emancipists.[3]

What the Colony wanted, if its staple produce was to be found in agriculture, was men trained to farming, or else with money enough to employ those who were. The Colonial Office, however, long entertained a doubt whether New South Wales should be treated as an agricultural or pastoral country, and this doubt was reflected in their regulation of free emigration.

Before 1810 the number of emigrants had been so small that each individual case had been treated on its own merits. No general lines had been laid down, but the tendency was to make large grants. In 1804, for example, Macarthur was promised 10,000 acres (afterwards reduced to 5,000) in the Cow Pastures, on the tacit understanding that he was to carry on sheep-farming on a large scale.[4] Blaxland, who went out in 1806, engaged to employ a capital of £6,000 in the Colony, and was to receive 3,000 acres. In his case there was no reference to the use to be made of the land. Townson, in 1807, was promised 2,000 acres, but owing to the overthrow of Bligh's government his grant was not made out until 1810, nor received

[1] Bigge's Report, I.

[2] The figures in 1820 of land held by emancipists give (in round numbers) 35,000 acres by grant and 50,000 by purchase.

[3] See Evidence in Appendix to Bigge's Report, R.O., MS.

[4] Macarthur to Bathurst, 18th October, 1821. R.O., MS.

by him until May, 1811. He found in the grant certain conditions of which he complained angrily, stating that in the original compact in 1807 there had been no mention of conditions as to capital, cultivation or residence.[1] Sir John Jamison, who had some property left to him in New South Wales and went out in 1814, asked for a grant of 2,500 acres. His request was refused, and Goulburn wrote to him that such promises had been made in the past "when the inconvenience of improvident grants had not been sufficiently known".[2]

These words give the key to the policy pursued with tolerable consistency from 1812 until Bigge's Report of 1823, a policy to which Macquarie fully assented.[3] "Large grants of land to individuals," wrote Goulburn in 1820, "have been the bane of all our Colonies, and it has been the main object of Lord Bathurst's administration to prevent the extension of this evil by every means in his power."[4]

From 1810 onwards no acreage was specified in any order for land given by the Colonial Office, but settlers were furnished with letters to the Governor from the Secretary or Under-Secretary of State directing him to grant them land in amounts proportionate to the capital of which they could show themselves to be possessed. The area and location of a grant was thus placed within the Governor's discretion. His Commission restricted the former to 2,000 acres, unless special recommendation were transmitted to the Secretary of State. The Colonial Office was probably not aware how often Macquarie overstepped these limits without making any reference to the subject in his despatches.[5]

In 1812 the following circular letter was drawn up for the information of applicants:—

"Mr. Peel is directed by Lord Liverpool to acquaint . . .

[1] Townson, enclosure to letter of Wilberforce to C.O., 19th April, 1817. R.O., MS.

[2] Goulburn, Under-Secretary of State to Jamison, 3rd January, 1814. C.O., MS.

[3] D., 30th April, 1810. H.R., VII., p. 335.

[4] Goulburn to the Lord-Register of Scotland, 1st December, 1820. R.O., MS. He mentions 1,500 acres as too large a grant to be given to one man.

[5] Jamison, who only received a grant of 1,500 instead of 2,000 acres, gives five instances of grants of 3,000 and four of 2,000 acres each. No special representations had been made of any of these. Letter to C.O., 10th July, 1819. R.O., MS.

in answer to his application for permission to proceed to New South Wales, that no persons are allowed to go out as free settlers to that Colony, unless they can prove themselves to be possessed of sufficient property to establish themselves there without the assistance of Government, and who can produce the most satisfactory testimonials and recommendations from persons of known respectability."[1]

Free passages on convict transports were granted to suitable emigrants.

In 1813 there were twenty-nine applications for permission to go to New South Wales. Ten of these were accepted, sixteen refused, and to the remaining three no answers appear to have been given. From the correspondence in this and other years one or other out of four qualifications seem to have always been necessary. They were (1) a capital of at least £400; (2) references as to character; (3) friends or relatives in the Colony who could provide the applicants with a home or with employment;[2] (4) influential friends in England. There was not much patronage to dispense in regard to offices in New South Wales, but a gift of land was valuable, and there were many applications from political allies urging the claims of relations or dependents. Such men were not usually the best of emigrants[3] and occasionally the Colonial Office refused to pass them altogether.[4] But Macquarie had already reason to complain in 1812 that it was "becoming almost a constant practice for persons who wish to get rid of some troublesome connections, to obtain permission from the Secretary of State's Office for their being allowed to come out here".[5]

[1] See Appendix 36, C. on T., 1812.

[2] An "emancipist," *e.g.*, wrote to his wife, "with the affection of a friend and the sincerity of a husband," urging her to join him in Sydney. R.O., MS.

[3] They were often bad Government servants too. Davey, *e.g.*, who was a very expensive failure as Lieutenant-Governor of Van Diemen's Land, was forced on Lord Bathurst by Lord Harrowby. See Correspondence. R.O., MS.

[4] They refused one man who had lost all his money on the race-course and whose friends wished to give him a fresh start. They also declined to assist in sending out a young man whose father deplored that the Grand Jury, "out of mistaken clemency," had thrown out a bill for theft against him. The father had hoped that his son would have been safely transported and England well rid of him. R.O., MS.

[5] D. 6, 17th November, 1812. R.O., MS. He thought too much attention was paid to friends in England. "Mr. Lord," he wrote in 1813, "thinks, because he happens to have a wealthy brother who is a Member of Parliament, he ought

He was indeed constantly impressing upon Ministers that gentlemen-settlers, encouraged by "extraordinary concessions," did not further the Colony's progress in agriculture, and that they were the most discontented, unreasonable and troublesome persons in the whole country.[1] Macquarie firmly believed that the best settlers were the emancipated convicts, and he put this view forward so often and so urgently that the Colonial Office naturally accepted it. But English sentiment could not allow them to submit without misgiving to the whole Colony being turned into a penal settlement, and in various ways free emigration was continued.

In 1814 the custom was still followed of placing new settlers "on the stores" and providing them with convict servants, also "on the stores," for eighteen months. Macquarie was urgent for some reduction in this, and readily agreed to Lord Bathurst's proposal to reduce the time to six months.[2] But when the latter suggested in 1816 doing away with the indulgence altogether, Macquarie demurred, and although in the following year he admitted that there was no longer any need to put free settlers on the stores, he took no step in that direction.[3] The difficulty was that many of the "gentlemen-settlers," or settlers of the "first class," came out so miserably poor that in the absence of Government assistance they would have starved. But before 1817 the Colonial Office had much relaxed their regulations. In 1814 they had given up the practice of granting free passages, largely because they found that many emigrants who pleaded the costli-

to receive whatever he asks for." D.1, 28th June, 1813. R.O., MS. Lord (Lieutenant Edward Lord of Van Diemen's Land) did receive an extra grant through his brother's intercession a little later.

The more suitable type of emigrant was the one thus described ". . . he would be everywhere and under any Government a peaceful subject. I believe he has no taste whatever for politics, and a natural dislike . . . for all those discussions which are so common, so bitter and so calculated to alienate the mind from the Government and introduce malevolent feelings." See Letter to C.O., 1821. MS., R.O.

[1] D. 8, 17th November, 1812. MS., R.O. The persons to whom Macquarie refers are mostly those who came out in Bligh's time with promises from the Secretary of State, which for one reason and another were never fully carried out. But Macquarie's opinion of "gentlemen-settlers" never materially altered.

[2] Bathurst to Macquarie, D. 4, 3rd February, 1814. C.O., MS., and Macquarie's reply, D., 7th October, 1814. R.O., MS. Also G.G.O., 28th December, 1816. Reduction of time to six months then first put in force.

[3] D. 3, 31st March, 1817. R.O., MS. He wished emancipists still to have the six months' indulgence. In 1821 all settlers, emancipists and free, were still allowed to be six months on the stores.

ness of the voyage returned whenever they found their private business required it without suffering any severe hardship. On rare occasions passengers were still permitted to make the voyage on transport vessels, but they had to pay for their own provisions, which was then no small item of expense.[1] In 1815 emigrants were openly discouraged, doubtless owing to Macquarie's representations, and emigration to the North American Colonies suggested in place of New South Wales. In 1816 the Government removed all restrictions on emigration, allowing any persons to go to New South Wales on private vessels without further question, but did not in all cases give them letters to the Governor supporting their requests for land.[2] The consequence was that in 1816 many settlers arrived in New South Wales without letters to the Governor, who was in some doubt what to do with them. Several had no means of maintaining themselves, and one was a Methodist preacher, or, as Macquarie said, a sectary, and, the Governor thought, unsuitable to such a Colony.[3]

He therefore proposed "that instructions should forthwith be given by His Majesty's Government to the Commissioners of the Customs (more particularly at all the out-ports) never to permit any person whatever, whether male or female, to embark or sail in any private trading-ships or vessels bound for this Colony, unless they produce properly authenticated passports from your Lordship's office, authorising them to come to this Colony and specifying in what capacity."[4]

This step was not taken, for emigration, which had during the war been anxiously restrained, was now eagerly desired.[5]

In 1818 Macquarie again urged that no poor settlers, but only monied men of respectability, should be sent out. The Colony did not need "decayed adventurers" who as soon as they took possession of their farms sought to sell them and engaged in objectionable pursuits, keeping public houses, hawking

[1] See C.O. Domes. Corresp., 1814. MS.

[2] C.O. Domes. Corresp., 21st August, 1816. MS.

[3] "We require regular and pious clergymen of the Church of England, and not sectaries, for a new and rising Colony like this." D. 7, 1816. R.O., MS.

[4] D. 7, 1816. R.O., MS.

[5] Becket, *e.g.*, Under-Secretary at the Home Office, wrote to Goulburn in 1820: "Can you not tempt some of our superabundant population to go to New South Wales?" and an official at the Treasury wrote: "Is there no way for a man to get there but by stealing?" R.O., MS., 1820. There are numbers of letters in which the need of emigration is taken for granted and the means discussed.

and the like.[1] He thought an emigrant should have at least £500, and so be able to take "six or eight male convicts *off the store*," and reduce the expenses of the Colony.

The stream of emigration, good and bad, was very slow. In the four or five years before 1818 Riley could not remember that more than twenty settlers had arrived. Many of these knew nothing of farming, and if they stayed on their land had a hard struggle to make a living after the six months for which they were "on the stores" had elapsed. If there was any delay in getting the land the six months' indulgence counted for nothing at all.[2] There was an effort made to prevent this from occurring in 1817, but it does not appear to have been enforced.[3]

In 1819, the Secretary of State began to advertise New South Wales as a good place for emigration.[4] A short note in the *Gentleman's Magazine* reported his intention to encourage free settlement there, and stated that emigrants should be persons "possessing considerable science, activity, integrity and property". Such "alone could redeem the character of the Colony and make it a fit residence for civilised man," and "enable it to become an assistance instead of a burden to the mother country".[5]

The way in which emigration was encouraged was simply by making it easier to obtain grants. But the increase in the number of settlers in 1819 and 1820 was remarkable. A merchant ship from Leith took out seventy passengers early in 1820, and as many more were expected to leave the same port in June. This sudden influx piled up great arrears of work in the Surveyor's office, and Macquarie had much difficulty in finding

[1] D. 8, 16th May, 1818. R.O., MS.

[2] Riley and Jones, Evidence to C. on G., 1819. Riley probably refers only to emigrants who had some property or standing, not to the many labourers and artisans who were for the most part the husbands of convicts.

[3] Riley makes no mention of it. It was an Order of the 24th May, 1817. "The public will take notice that persons seeking to be put on the stores and to obtain other indulgences by virtue of their having obtained locations or promises of grants of land will not be considered as having any claim thereto until they shall have taken out their grant, cleared a portion of the lands assigned to them, and built a dwelling-house thereon; and none of the accustomed indulgences will be extended in future unless where a full and complete compliance has been rendered to the present rule on that head." See later in this chapter.

[4] It became a more frequent subject of reference in the English newspapers generally at about this time.

[5] *Gentleman's Magazine*, February, 1819, p. 175.

land for the newcomers and the growing numbers of emancipists. One numerous class of settlers whom he much disliked were discharged soldiers who had served in the Colony, and were permitted the usual indulgences by the Secretary of State. Macquarie characterised them in the lump as "lazy, dissipated, turbulent and discontented".[1] These old soldiers were allowed grants of land without having any capital at all, but other emigrants had to be possessed of a capital of £400 or £500. However, the Colonial Office did not inquire very particularly into its existence, and Macquarie often found that it was "fictitious". In many cases the settler brought goods on credit, and his "capital" was simply his expectation of profit on the adventure. In order to find out more certainly what was the real amount of an emigrant's resources Macquarie adopted the system of requiring any one he suspected of exaggeration or fraud to make an affidavit of the exact value of his property and of the uses to which it was to be turned.[2]

By 1821 the majority of emigrants were going to Van Diemen's Land instead of New South Wales. This change was due in part to the favourable reports of the island colony circulating in England, and in part to the fact that all the land within one hundred miles of Sydney had already been granted.[3] Since Macquarie's arrival he had opened for settlement the district of Airds, near Sydney, in 1810, and in 1816 the plains of Bathurst, one hundred and forty miles away over the Blue Mountains. Port Jervis would have been settled in 1818, but that the military strength in Sydney was too weak to allow of a detachment being sent thither. Illawarra and Emu Island[4] had been opened for selection in 1819, and by 1821, 20,550 acres had been granted there. There was, however, one tract of land within easy distance of Sydney to which only two settlers had access. This was the famous Cow Pasture country where Macarthur and his friend Davidson had their estates long before Macquarie's arrival. Over the rest of the pastures the wild cattle roamed at will. The history of this herd is both quaint and interesting. When Phillip arrived in 1788 he brought with

[1] D. 19, 22nd August, 1820. R.O., MS.
[2] D. 32, 28th November, 1821. R.O., MS.
[3] *Ibid.*
[4] This was a tract of land in the interior.

him a few cattle from England. Almost the whole herd[1] escaped from a careless herdsman and were given up for lost. But a few years afterwards they were discovered already greatly multiplied in the rich pasture land beyond Parramatta. Here they remained, and when Macquarie made a tour of the country in 1811 he reckoned their number at several thousands. As in theory they belonged to the Government, great efforts were made to preserve them,[2] but they were a standing menace to security, for the pastures made a fine hiding-place for evildoers and the herds provided a constant temptation to cattle-stealing. Stringent regulations were made forbidding any one to cross the river which formed their eastern boundary, and killing or stealing the wild cattle was made a felony without benefit of clergy.[3] No one could go into the pastures without a pass from the Governor except, of course, Macarthur, Davidson and their families, friends and servants. The regulations were so stringent that they were very reluctantly enforced, and the preservation of the cattle became altogether too troublesome. A determined effort was made to tame as many as possible and to shoot the rest, using the skins and carcases. Macarthur was eager to assist in getting rid of them, for they were a temptation to his servants and a danger to his crops. Finally in 1819 Macquarie decided to incorporate as many as he could with the tame Government herds during the next twelve months and then open the whole area to settlement.[4] In 1820 he had gathered in about 320, but he delayed making any grants in the Cow Pastures, and by the end of 1821 it was still a project and nothing more.[5]

Besides the settlers from England and those who had been transported, there were the native-born colonists whose demands for land had to be satisfied. This class were indeed at some disadvantage, for the convicts on regaining their freedom had a

[1] *i.e.*, about five or six head!

[2] It was expected that they might in time spread over the whole continent. Many strayed cattle belonging to settlers mixed with the original stock, but the original breed remained easily recognisable, and on this ground the Government claim the whole number.

[3] See enclosure to D. 18, 4th April, 1817. R.O., MS.

[4] D. 20, 24th March, 1819. R.O., MS.

[5] See Macarthur to Bigge, Appendix to Reports, 8th October, 1811. R.O., MS.

certain right to a grant[1] and the settlers from England had the support of the Secretary of State, while the native-born had only their own unaided merits. Bigge thought that these young people had been treated with neglect, especially those who were the children of convicts. He suggested that the same capital need not be required from them as from immigrants, and that they might receive small grants of land with greater generosity.[2] In general, land was given to any one who asked for it and who had the means of cultivating and stocking it. But the Governor had complete, unfettered and unquestioned power to refuse such a request without further explanation.[3] Under these circumstances some obtained land very easily while others had to wait for it. Occasionally old settlers received new grants and with them the indulgences of new settlers; but though, on the face of it, this seemed a corrupt practice, Bigge, who inquired into it, decided that it had only been permitted in cases of hardship where the settler had suffered some unexpected or overwhelming misfortune.[4]

The failure to increase in any great degree the agricultural output of the Colony is obvious from the figures alone. While Macquarie was writing vague but favourable accounts of progress, the returns of the General Musters were telling a tale of agricultural stagnation. In 1810, 21,000 acres had been cleared, and 7,500 acres had been under cultivation. In the five years which followed some progress was made, for in 1815, 36,700 acres were returned as cleared and 19,000 under cultivation; and the progress is the greater because the population had altered very little.[5] But between 1815 and 1820 the popula-

[1] See Governor's Instructions, H.R., VII. The "right" was, of course, not a legal right, but it was a kind of moral one.

[2] Bigge's Report, III. Bigge also suggested the foundation of a school of agriculture where youths of this class especially might learn practical farming at Government expense.

Macquarie refused altogether to give grants to single women. A Miss Walker, a woman of some fortune, asked for one and received the answer that, "according to the regulations laid down," the Governor could not give grants to ladies. See Correspondence with Bigge, 19th January, 1821. R.O., MS. Appendix to Bigge's Reports.

[3] This was recognised by the Colonial Office, who seldom took up any settler's complaint.

[4] Bigge, Report III.

[5] The figures are given in round numbers. In 1810 the population was 10,452, in 1815 it was 12,911.

tion nearly doubled. Nevertheless in 1820 the acreage under crop was only 31,000 and the area cleared 55,000.[1]

The agricultural future of the Colony was therefore not regarded as hopeful. It was suggested in 1819 that Van Diemen's Land would become the great wheat-producing centre, supplying New South Wales as well as herself, and that New South Wales would be to her as Ireland then was to England.[2] Yet it had already been found from experience that there was no product of the Temperate Zone which could not be cultivated with success in New South Wales.[3] The profound discouragement of the colonists was not therefore based upon any particular vagaries of climate. The leading settlers all gave three reasons, the ignorance and indolence of the small proprietors, the restricted market, and the inefficiency of labour.

The worst of the small proprietors were the emancipists, who were totally unused to farming, and cropped their land continuously until it reached the stage of exhaustion, and then sold it for what it would fetch. Macquarie, who always wrote as though he held a brief for the emancipists, blinded himself to the fact that the majority of them would not farm and did not care to learn to do so. They took all they could out of the land in as short a time as possible, and returned with their profits to the delights and dissipations of the town.

The need of a wider market for grain was a more serious trouble. An attempt to export flour to the Cape of Good Hope in 1815 proved a failure and was not repeated. All distillation being forbidden, the demand of the people for food alone regulated the corn supply. The Government was the greatest buyer

[1] The following table may describe the position more clearly:—

1788-1810, 21,000 acres cleared.
7,500 acres under crop.
Population in 1810, 10,452.

1810-1815, 17,500 acres cleared.
11,500 acres under crop.
Population in 1815, 12,911.

1816-1820, 18,300 acres cleared.
12,000 acres under crop.
Population in 1820, 23,939.

Figures for 1820 are slightly over-stated. See Bigge, III. Appendix, Bigge's Reports. R.O., MS.

[2] Riley, C. on G., 1819.

[3] *Ibid.*, 1819. He gives a long list of successful experiments.

and consequently the farmers were at the mercy of the Governor's regulations. In 1810 the Government had given 3,630 weekly rations, and in 1819 the number had increased to 7,292, *i.e.*, the Government which victualled 34 per cent. of the population in 1810, victualled 28 per cent. in 1819. In the latter year the ration consisted of seven pounds of meat and seven pounds of wheat a week, a slight increase in the ration of earlier years.[1]

The Government did not go into the market and buy wheat at a competitive price, nor did it call for tenders. It simply fixed a price per bushel and opened the Government stores at certain times and allowed the settlers to bring in their wheat in the amount required. In 1813 the price fixed by Macquarie was eight shillings a bushel, which he considered would "repay the expense of labour and allow a reasonable profit".[2] In 1814 he raised it to ten shillings per bushel. "The principal farmers," he wrote, "all acknowledge that ten shillings per bushel for wheat is a fair liberal price and that it allows them a handsome profit. Yet in scarce and unfavourable seasons these same persons will not sell their wheat to the Government under fifteen or sixteen shillings, and they have repeatedly[3] even raised the price on Government to twenty shillings per bushel".[4]

This puts the real ground of the farmer's complaint in a nutshell, and the Treasury suggested to Lord Bathurst in 1816 that the stores should be supplied by tender at a competitive price. The Deputy-Commissary in New South Wales had favoured this alteration, pointing out that the fixing of a low price in times of scarcity made it impossible to get all the grain required, while in years of plenty the Government paid too much.[5] Macquarie, however, thought the fixed price necessary to afford protection to the poorer settlers,[6] and gave no opportunity or temptation to the rich to buy up and engross the corn. On one occasion in 1814 "there was an artificial scarcity created

[1] This was the ration for prisoners, and was less than the ration to Government officials and gentlemen-settlers.

[2] D. 1, 28th June, 1813. R.O., MS.

[3] This is a mere rhetorical flourish. It had happened twice only.

[4] D. 40, 12th December, 1718. R.O., MS.

[5] Enclosure. Treasury to C.O. R.O., MS.

[6] D. 3, 31st March, 1817. R.O., MS. Macquarie suggested that the system of supplying by tender might be safely introduced by the end of 1818, but let the matter rest and made no such change when the time arrived.

and industriously circulated by a few capricious and wealthy settlers on the plea of the unproductiveness of the three past harvests. On this . . . taking place I called on the grain growers to give in tenders for supplying the King's stores—on which the Government was compelled to pay as high as fifteen shillings per bushel for the greater part . . . although afterwards it was proved that there was more than a sufficient supply of wheat in the Colony at that moment for maintaining the whole of the population."[1]

That was the way in which the matter presented itself to Macquarie, but it takes on a rather different light when the whole of the facts are laid bare. In 1813 the harvest was so bountiful that in Macquarie's words it could have supplied twice the population, but in consequence of the restricted demand the greater part of it was wasted. The Government bought what they required at eight shillings a bushel, and much of what was left, instead of being bought at a low price and stored against a bad season, was thrown to the pigs and cattle and treated as valueless.[2] Under any circumstances the position would have been discouraging, but on this occasion there were specially disastrous features. In 1812 there had been a scarcity, and Macquarie had imported from Bengal a shipment of corn at eight shillings the bushel which arrived in 1813. Thus even the Government made a very small demand upon the settlers; and as the harvest was so plentiful, prices in the open market fell as low as three shillings and sixpence a bushel.[3] In the following year (1814) only 1,300 acres were put under crop, although an additional 4,000 acres of land was alienated by the Crown within the same period.

In 1817 the settlers were again in difficulties. "Proceeding to the year 1817," said Riley, in his evidence before the Committee on Gaols, "I see by the *Gazette* the stores were ordered by the Governor not to open until the 1st of March, and then only one day in the week. The harvest is so early in New South Wales that the settlers would have been able to commence supplying in the middle of January. Previous to the 1st of March . . .

[1] D. 3, 31st March, 1817. R.O., MS.
[2] The Government and perhaps a few landowners alone had storage room.
[3] The demand even at that price was very weak. Riley, C. on G., 1819.

a most disastrous flood took place and overwhelmed the unfortunate cultivators of the Hawkesbury and Nepean in ruin; the greatest distress was also experienced throughout the Colony from the consequent scarcity. In February this year wheat was reduced as low as seven shillings and maize to two shillings and sixpence sterling in the market, as in consequence of the stores not being opened the growers were compelled to sell it at this low rate; but in October in the same year the average of wheat rose to twenty-five shillings and sixpence sterling per bushel and maize to twenty shillings."

This was stated before the Committee on Gaols, who asked:—

"Was that part of a general system—the opening of the stores at so late a period in the year. . . . ?"

"Of late years it has been," Riley answered.

"Can you give to the Committee any reason why such order was issued?"

"I really cannot."[1]

Riley laid great stress on the injuries suffered by the settlers from the importations of Bengal, several of which took place between 1812 and 1817. The injudiciousness of the Government in taking such a course is obvious. The whole *raison d'être* of a fixed price was to give constant encouragement to growers and to equalise the ups and downs of the market. By importing from India, Macquarie made the demand quite as precarious as it could have been under a competitive system, while the producers gained none of the profit to be reaped from a free trade. The farmers were unable to take full advantage of a scarcity, and yet not allowed the compensation of a fair price in time of surplus. The small settlers suffered severely in 1813 and 1814, although a few wealthy men may, as Macquarie said, have been lucky in extorting high prices from the Government.

Macquarie himself was ready to admit that something further in the way of encouragement was needed by the settlers.

He thought much would be accomplished by permitting the establishment of distilleries which would provide a wider market for surplus grain.[2] The opposition of the Colonial Office being

[1] Examination of Riley, C. on G., 1819. Out of the seven floods on the Hawkesbury between 1806 and 1820 five were in February, March or April. See Appendix, Bigge's Reports. R.O., MS.

[2] See above, Chapter IV.

finally overcome in 1819, Bigge and Macquarie held consultations with leading colonists in 1820 as to the regulations for the trade.[1] These were published in 1821[2] and distillation commenced in 1822. Wheat, rye, barley, oats and Indian corn were to be used in the distilleries, but if on two successive days the price of wheat in the market was above ten shillings a bushel, the Governor might prohibit distillation from any grain, and peaches could be used as a substitute.

To prevent distillation falling into the hands of a few wealthy settlers only, the license to distil was issued at the moderate cost of £25, and stills with as small a capacity as forty-four gallons might be used. The distilleries might be established in any district, and it was hoped that the settlers would thus be able to dispose of their grain without having the expense of bringing it down to Sydney.

At the end of Macquarie's governorship, therefore, the future for the agriculturist was considerably brighter than it had been for the preceding ten years.

The other important branch of production was that of stock-raising. The Government ration included a pound of meat a day, and so constituted the chief market for the settler's supplies. The reasons against supplying the stores by tender were even stronger here than in regard to grain, for it would have been far easier to engross stock than wheat. The system adopted, however, was not quite the same.

The Governor issued an order stating the price at which meat would be received, and stock-owners then tendered a certain number of pounds at that price. Soon after the Commissary published in the *Gazette* a list of names of those whose tenders were accepted, the amount which would be received from each, and the dates and place of delivery. Only the actual owners of the stock could tender supplies, a rule enforced with some strictness to prevent engrossing and check cattle-stealing.[3]

For some time after Macquarie's arrival the price of meat

[1] *S.G.*, 30th December, 1820. [2] Regulations, 10th February, 1821. *S.G.*

[3] If a man tendered cattle for the stores who had not given in any returns of cattle at the previous General Muster, his tender was refused unless he could make some conclusive explanation of how he became possessed of it. See *S.G.*, 9th January, 1817.

stood at 9d. a lb. In December, 1816, the Governor, finding that the herds and flocks were greatly increased, reduced the price to 6d. from the 24th of the following January.[1] Tenders which had been made at 9d. were declared null and void and new tenders at 6d. called for.[2] Riley described the results of this measure in 1819.[3] "I consider," he said, "that they (the settlers) have also suffered severely by the reduction of the price of meat . . . by which the property of every stock-holder in the Colony was most considerably lowered, so much so, that many settlers, when sued to pay their debts to Government for cattle purchased at £28 per head, were incapable of finding a market for them at £10; it was a measure that injured the property of every individual in the Colony. . . ."

In 1818 the price was further reduced to 5d. a lb., and Macquarie congratulated himself on the savings he was making for the Government. These amounted to no less than £9,000 for the year; but it is doubtful whether, when the effects on the settlers are taken into account, the real saving amounted to anything at all. It was, as Riley said, "a very expensive economy".[4] Macquarie's own theory differed rather from his practice. Thus he wrote in 1819:[5] "Such is the overruling influence that this Government must necessarily possess in the market, that were a Governor to order the price of animal food to be reduced from its present rate of 5d. per lb. to 2d., and that of wheat from 10s. to 5s. a bushel, I have no doubt the grazier and cultivator would furnish the stores so long as their present stock on hand would enable them; but such would be the inhuman policy of doing so, that in less than two years' time there would not be a bushel of wheat grown for the supply of the stores, nor further attention paid to the increase of herds or flocks, and the country, so far as it depended on the free population, would be abandoned and once more become a desert."

As it was, Bigge thought the cattle were being slaughtered in too great a number, and that the herds were not increasing rapidly enough. The great number of convicts arriving in

[1] *S.G.*, 28th December, 1816. [2] *S.G.*, 18th January, 1817.
[3] C. on G., 1819. [4] *Ibid.*
[5] D. 26, 12th June, 1819. R.O., MS.

1819 and 1820 had placed a severe strain on the colonial resources, for their rations had to be provided from the time of their disembarkation. Bigge urged that the old practice of sending salt-meat provisions sufficient to supply each batch of convicts for six months should be reverted to.[1] In 1810 the cattle, sheep and pigs in the settlement numbered 57,000.[2] In 1820 they numbered 178,000. The pasture lands in 1810 had covered 75,000 acres, and in 1820 they covered 334,000 acres. The increase was of course great, but the land was less heavily stocked than it had been, and Bigge's precautionary advice was probably needed.

So far comparatively few settlers had turned their attention to wool-growing. In fact for practical purposes Macarthur may be said to be the representative of the whole wool-trade of the Colony. It was he who first brought New South Wales wool to England, and it was on account of this wool that he received his grant of 5,000 acres in the Cow Pastures with a promise of 5,000 more when his flocks had so increased as to require them. Above all it was his triumphant success that stirred others to follow in his footsteps.

The first notice of New South Wales wool sold in England appeared in the *Sydney Gazette* in 1813.[3] "Ten or twelve packs" had been sold and had averaged 5s. a lb. The duty was then 7s. 11d. per cwt.[4] From that time each year some wool was exported. In 1818 it amounted to 71,299 lb., in 1819 to 112,616 lb. and in 1820 to 175,433 lb. The price in 1820 ranged from 10s. 4d. a lb. for one especially fine bale to 1s. 2½d. per lb. for coarse wool. The duty was then increased to 1d. a lb. and the freight varied from 3d. to 4½d. a lb.[5]

In 1819 Riley stated that the settlers in general wished to cultivate wool, but the Government offered them no assistance.[6] Both Macquarie and Lord Bathurst, in discouraging large estates, effectually discouraged sheep-farming. Macarthur, for example, had not received his additional 5,000 acres, and although in 1821 he had altogether 9,600 acres, it was not all in one place, and

[1] Macquarie to Bathurst at suggestion of Bigge, D. 11, 3rd July, 1821. R.O., MS.
[2] In round numbers.
[3] *S.G.*, 17th April, 1813.
[4] *S.G.*, 10th September, 1814.
[5] Bigge's Report, III.
[6] Riley, C. on G., 1819.

he considered himself unable to add to his flocks, which then amounted to 7,000 head. He occupied by permission 1,000 acres besides his own estate in the Cow Pastures, and was anxious to have it granted him outright so that he need have no fear of suddenly being deprived thereof.[1]

Bigge was altogether in favour of large grants and of fostering by every possible means the wool-trade of the Colony. A proposal submitted to Macquarie in 1820 with this purpose in view met with his approval. The promoters proposed to form a joint-stock company for the growth of fine wool and "pecuniary assistance was requested by advances from the Police Fund; the assignment of agricultural labourers as they arrived from England; an unlimited range for flocks of sheep in the interior, not approaching nearer to the settled estates than five miles, and an importation of sheep of the pure Merino breed at the expense of Government, the cost of which was to be repaid at a future period, and in the meantime to be secured upon the shares of the subscribers and the flocks of sheep as they might be produced.

"The objection made by Governor Macquarie to this proposal appears to have arisen from an apprehension of the consequences of placing so many convict labourers in remote situations, under no better control than that of the individual superintendent of the establishment whom it was proposed to appoint. This circumstance forms certainly the essential objection to the extension of settlements in which convicts are employed, or their removal to a great distance from the residence of some individual clothed with authority to control and punish them; and as far as the proposal made to Governor Macquarie limited the number of superintendents, I concur with him in the objection he made. I am not aware that the proposal was founded upon any general support from individuals in the Colony; I am disposed to believe that, from the indisposition already adverted to in the proprietors of stock to leave their establishments in the settled districts and to repair to those more remote for the purpose of devoting themselves more exclusively to the growth of fine wool, they would gladly have

[1] Macarthur to Bigge, 18th October, 1821, Appendix to Bigge's Reports. R.O., MS. He held 7,000 acres by grant or permission and 2,600 by purchase.

embraced any proposition that had a tendency to exempt them from individual exertion, and in which no other or greater degree of risk or expense was to be incurred than that of paying the salary of the superintendent and the subsistence of a certain number of convicts."[1]

The uncertain conditions of labour due to the convict system, which raised a difficulty in this case, affected every kind of colonial enterprise. Yet the existence of a supply of servile labour was considered in England to be one of the great advantages of emigration to New South Wales.[2] Convict servants were held out to intending settlers as a kind of bait, not only those servants for whose keep the Government made themselves responsible during a short period for the benefit of new settlers, but also the convict servants whom they were allowed to receive at any period under conditions laid down by the Governor.

Owing partly to these conditions, and partly to the bad qualities inherent in all forms of servile labour, convict labour was not a success. The whole tendency of this branch of Macquarie's policy was to raise the status of the assigned servant to that of a free labourer, but he could not alter the legal condition of prisoner or the moral irresponsibility of forced labour. In 1820 there were 8,864 men and 587 women who were still prisoners. Of the women there is little to be said. About 250 worked in the Government wool factory at Parramatta and the remainder either went into domestic service, married,[3] or lived with convicts or free men in Sydney or the other districts. Some of them were joined by their husbands from England and started with them in trade, usually as licensed victuallers.[4] In accordance with Government Orders female convicts were assigned as domestic servants only to married men, and the master had to enter into indentures to keep the servant three years, to clothe and feed her suitably, and pay her wages amounting to £7 a year.[5] For the most part they

[1] Bigge's Report, III.

[2] See, *e.g.*, *Westminster Review*, April, 1825, Article on Emigration. Also Wentworth's *Account of Australia*, first published 1819, 3rd ed., 1824, p. 92.

[3] If they married they were usually given tickets-of-leave, sometimes pardons. There were 270 women with tickets-of-leave in 1820.

[4] These also usually received tickets-of-leave.

[5] The cost of clothing appears to have been deducted from the £7.

made very bad and quarrelsome servants, and complaints were universal.

The male convicts were assigned to settlers or kept to work for the Government. At the end of 1819 there were in Government service altogether 2,476 male convicts, and 200 were serving colonial sentences at Newcastle. The remaining 6,388 prisoners were in the service of the inhabitants of the Colony both free and freed. Their masters were not all employed in agricultural pursuits. In Sydney, for example, and the district surrounding it, there were 2,368 assigned servants, most of the masters of whom were occupied in the town. Great landowners, such as Macarthur and William Cox, had as many as a hundred convicts, and Wentworth and an emancipist named Terry, who owned the two largest estates in the Colony, probably had still more. Settlers with farms of five to fifty acres usually received one servant with their grant, and were allowed to retain him at their own expense if they wished. This was something of an innovation, for before 1811 a convict servant was not allowed to any one farming less than twenty acres.[1] For reasons which will appear later it was an innovation which received little approval from the magistrates.

While the convicts were being thus distributed over wider and wider areas their distribution was in another way restricted. It had for long been customary to allow to each of the civil officers of the Government and of the officers of the garrison a domestic servant subsisted at Government expense. Lord Bathurst learnt of this practice for the first time from one of Macquarie's despatches, and immediately directed him to bring it to an end. This was done by a Government Order in 1814, and at the same time it was announced that Government would no longer give rations to the families of officers on the civil staff.[2] It was thought necessary, however, to exempt from this rule the subordinate officers, the superintendents, overseers, clerks and

[1] According to the scale drawn up by Oxley in 1821, servants were thus allotted. Farms of 100 acres or less, 1 servant; 200 to 400, 2; 500 to 750, 3; 1,000 to 1,700, 4; 2,000 to 2,500, 5; 3,000 or over, 6.

[2] G.G.O., 3rd September, 1814. The Order quotes the words of Lord Bathurst's Despatch, which was usually done when an order likely to be unpopular had to be enforced. Of course officers could still have convict servants if they undertook to provide for them.

members of the police force, to whom convict servants on or off the stores were assigned as part of their remuneration. The only advantage to these employees from the possession of servants was the chance of hiring them out to others or permitting them, in return for their weekly rations and a payment of a few shillings, to work for themselves or, as it was called, "be on their own hands". The superintendent of convicts in 1819 reckoned that such a servant "on the store" was worth 10s. a week, and "off the store" was worth 5s. Thus the remuneration was equal to a salary of £13 to £26 a year. Indirectly it cost more than this to the Government, for these servants were the worst class of people in the Colony and it was almost impossible to control them. Macquarie made an attempt to improve the system in 1814. In order that these convicts should be known and their place of residence properly registered, all those masters (who were, many of them, convicts themselves) who hired out their servants "shall immediately send in to the principal superintendent a report in writing, and signed by them, of the names and present places of residence of their said Government men, and also the names of the persons by whom they are hired. On receiving this report the principal superintendent is to grant a certificate to each man so transferred, specifying to whom he belongs and how, where and by whom employed.

"The Government men thus disposed of, when possessed of the prescribed certificate . . . are not to quit the employ of the person or leave the district mentioned therein without applying to and obtaining the permission of the next District Magistrate, the person obtaining it is to obtain a fresh certificate from the principal superintendent . . . surrendering the certificate granted on the former occasion. . . .

"All such lists and changes are to be transmitted once in each month to the respective magistrates concerned therein."[1]

These regulations did not touch the evil of the servants who did odd jobs on their own account, or carried on iniquitous practices such as the receiving of stolen goods for their masters. Nor was it strictly enforced, and by 1819 had been completely forgotten. In 1817 Macquarie wished to abolish this mode of

[1] G.G.O., 1st October, 1814.

payment, but hesitated to do so under the impression that the colonial funds did not warrant the commutation. He could not grasp the fact that the "unseen" expense was far greater than the "seen". The whole system was unsparingly condemned by Bigge in his report of 1822. It had indeed no possible ground of justification. It gave practical freedom, without even an obligation to work for a living, to a class of men neither able nor anxious to profit by it, and it let loose upon the town some hundreds of convicts ripe for every dissipation that was offered them.

The number of convicts not in Government service who received Government rations amounted in 1819 to 1,821, while there were 4,567 who did not receive them assigned to settlers. It was this body of men who constituted the most important factor of the labour problem.

The following method was that adopted in their distribution. After the arrival of a convict transport the prisoners were mustered on board by the Governor's Secretary, who inquired into their treatment on the voyage. The chief engineer[1] and superintendent of convicts then asked each man what was his trade or to what work he was accustomed. All those who were artisans or mechanics were at once set aside for the Government gangs, where their knowledge was needed to carry out the public works. As men of skill were few, a good workman was kept a long time in the service, and found it difficult to procure tickets-of-leave or other mitigations of sentence, and the more skilful and steady he was the less chance he had of freedom. The good mechanics, hearing of these things from old hands transported for a second time, or in some of the mysterious ways in which they managed to procure information which the authorities studiously strove to keep back, would try to conceal their trade from the superintendent. On the other hand unskilled workmen who wanted to stay in Sydney, instead of being sent to the country, often made a pretence of being mechanics and skilled labourers.[2]

The Government having thus attempted to pick out the most useful men and any others that were needed, the servants

[1] He was the head of the Public Works Department of Government.

[2] Notice in *S.G.*, 12th April, 1817. Convicts who do this are threatened with hard labour at Newcastle.

for settlers were selected from the remainder. Applications were made for them to the principal superintendent, who sent whomsoever he thought fit. Occasionally the Governor gave him directions to supply some well-known settler with men of a particular stamp.[1] But the settlers generally were not permitted to apply to the Governor, and applications for men of particular trades were forbidden.[2] Those prisoners who were still left were sent to country districts in numbers proportionate to the requisitions made by the resident magistrates. Large proprietors applied to the superintendent, but smaller folk applied through the magistrates who distributed the convicts on their arrival from Sydney. A few even of the large landowners preferred to get their servants in this way, not caring to have anything to do with the superintendent, who had himself been a convict. They disliked Macquarie's system, which took the place of drawing lots and then choosing from the whole number of convicts in the order thus ascertained. The magistrates often conducted the distribution in this way, and Marsden introduced a refinement upon it which was very illustrative of colonial feeling. The lots were drawn in two divisions, and those of the first division chose their men before the second draw took place. The first division consisted of free men and the second of emancipists.

Such was the manner of distributing the prisoners on the arrival of a transport. But throughout the year constant applications for servants were made both to the superintendent and the magistrates. These were satisfied by assignments from the Government gangs in Sydney by the superintendent and in the other districts by the magistrates. But in 1820 the latter were ordered to refer all applications to Sydney on the ground that the superintendent would best know what men could be spared from Government service.[3]

[1] *e.g.*, Some for Sir John Jamison; a gardener for Hannibal Macarthur; a blacksmith for Cox. Appendix, Bigge's Reports. R.O., MS.

[2] G.G.O., 10th January, 1817. Humbler persons found it very hard to get mechanics. A tanner, who had great difficulty in getting a workman fit for his trade, said, "I did apply and was told none had arrived; but I know that one was sent to Mr. Cox, another to an overseer as an assigned man on the store; this man I employed by paying the overseer 5s. per week!" Evidence, Appendix to Bigge's Reports. R.O., MS.

[3] From 1814 to 1820, 2,418 mechanics arrived and of these 1,587 were assigned to Government. Macquarie to Hannibal Macarthur, 20th November, 1820. For the whole of this subject see Evidence and Documents in Appendix to Bigge's Reports. R.O., MS.

In this service the work was very varied. A few men were employed in the Commissariat and Secretarial Departments but the great majority of them were put to manual labour. They were employed in clearing the land, in making roads and bridges, public buildings and churches, lighthouses and fortifications and processes subsidiary to these, brick-making, stone quarrying, sawing timber, rough carpentering, nail-making and rough iron casting.[1] A small Government farm and a market garden required the labour of a few gangs, but both these enterprises were commenced only a few years before Macquarie's departure.

The increase in the number of convicts transported necessarily increased the number employed by the Government. Between 1810 and 1820, 16,943 male convicts arrived at Sydney, and 11,250 of these came after 1816.[2] Macquarie had great difficulty in supplying work for them, and it was impossible to assign all that he did not require to the settlers. He attributed their inability to take a greater number off his hands to losses due to two floods of the Hawkesbury and Nepean Rivers in 1816 and 1817.[3] Another flood in 1819 caused many settlers to send back their servants, whom they were no longer able to support, and this further increased the Governor's difficulties. In 1820 Macquarie wrote that "if any more male convicts arrived he would have to settle Port Macquarie[4] or Port Jervis," and the necessity of detaching some of the garrison at Sydney to protect and keep order in the new settlement was, in the weak state of the 48th regiment, a very heavy responsibility.[5] Meanwhile the scale and expense of the public works were increasing at a furious rate. In 1811, £3,005 were disbursed from the Police Fund on their account, and in 1815, £6920, but in 1819 and 1820 the amount reached £16,486 and £14,568 respectively. In the face of this Macquarie wrote: "The cost and expense of these public buildings and other works consist chiefly in the number of artificers and labourers employed in them, the feeding and clothing of them being almost the entire expense—the whole of the material

[1] *i.e.*, Of imported iron, chiefly odd pieces from the transport vessels, etc.
[2] All were embarked before the end of 1820. Some may have arrived early in 1821. Appendix to Bigge's Reports. R.O., MS.
[3] D. 8, 16th May, 1818. R.O., MS. [4] Now Brisbane, Queensland.
[5] D. 28, 1st September, 1820. R.O., MS. The garrison received reinforcements, and it was decided to settle Port Macquarie in 1821.

(with the exception of the iron-work, glass and paint) being made and procured by these Government men—and as such a vast number of male convicts at present unavoidably remain in the hands of Government, who must be clothed and fed at all events, the expenses of erecting these public edifices are comparatively small, whilst they afford employment for the prisoners who could not be distributed amongst the settlers".[1] This statement of the case is disingenuous, for the iron, glass and paint could not amount to £14,000. Much of the labour indeed was paid for, being done either by free or freed men or in overtime by prisoners, and much of the raw material was bought from private individuals who supplied the Government by tender. The expense too of superintending the work was often heavy, and occasionally the whole undertaking was carried out by contract.[2] Bigge considered many of Macquarie's public buildings unnecessary, all of them too ornate and most of them jerry-built, and the section of his first report which deals with the subject is admirably scathing.[3]

Until 1819 the Government servants were not housed in barracks but left to find their own lodgings. In order that they might have money for this purpose they were allowed to work for themselves—"to be on their own hands"—after three o'clock each day. On the whole, the men thus left at liberty found it easier to rob and plunder for this money than to work for it. Indeed for the ordinary workman there was not much employment to be found, though a man with a trade had no difficulty.[4]

But in 1819 a new convict barrack was opened at Sydney, and at the end of the year there were 688 men lodged within it. This left 1,252 prisoners outside who regarded it as a special favour that they were allowed to find their own lodgings. The men in barracks having no longer any need to work for themselves, the hours were extended to six o'clock, and somewhat unreasonably the longer hours were required of the men outside as well as inside. But all the convicts were allowed to "be on their own hands," on Saturday and Sunday, although on the

[1] D. 20, 24th March, 1816. R.O., MS.
[2] See any of quarterly accounts of the Police Fund, and also Evidence in Appendix to Bigge's Reports. R.O., MS. and Report III.
[3] See also Bigge's Ds. to Lord Bathurst, 1819 to 1820. R.O., MS.
[4] Riley, C. on T., 1819.

latter day they still had to muster for church-parade, "shaved and in clean clothes". At the same time an increase in rations which brought them up to 1 lb. of meat and 1 lb. of wheat a day was expected to compensate them for the increase in the hours of labour.[1] Those within barracks enjoyed also a liberal supply of vegetables, and they were, on the whole, the only men who greatly benefited by the change. In the summer Government gangs commenced work at six o'clock, had one hour off for breakfast and one for dinner, and thus had a ten hours' day and a fifty hours' week. In the winter they commenced work after breakfast at nine o'clock and continued until six, with an hour's intermission for dinner, thus doing eight hours' work or forty hours in the week.

The Saturday holiday was necessary for the men out of barracks that they might make their lodging money, to the men in barracks that the overseers might bring their men's rations from the Government store. But this freedom on Saturday and Sunday to a great extent undid the wholesome effects of the restraint throughout the week. Wentworth found that Monday was his heaviest court-day and that most of the Government servants spent their free time in drinking, fighting, gambling and committing petty larcenies.[2]

When Macquarie wrote to Lord Bathurst about the new barracks, the latter was rather troubled by the account of its advantages given by the enthusiastic founder. He feared that Macquarie's attention to the convict's comforts rendered transportation an ineffective punishment.[3] The rations were too liberal and the week's work too easy.[4]

This opinion was shared by most of the colonists, especially those who were not themselves in Government service. As interested spectators they quickly saw that discipline in the Government gangs was very slack,[5] and that the work was done in a leisurely and slovenly manner. Much was to be accounted

[1] There was nearly a mutiny among the sawyers at Penmant Hills on account of the longer hours. See Evidence of Major Druitt, Appendix, Bigge's Reports. R.O., MS.

[2] Wentworth's Evidence, Appendix, Bigge's Reports. R.O., MS.

[3] D. 5, 27th March, 1820. C.O., MS. [4] *Ibid.*

[5] Discipline in the Government service naturally affected the men in the settlers' service.

for by the inefficiency of the overseers, who were usually convicts themselves and had little influence over the men. The overseers and men played into each other's hands, and the former were reluctant to report misconduct or neglect of work.[1] It was also the unanimous opinion of the magistrates and landowners that "the convicts" did best at task-work as long as it was strictly measured. Druitt, the chief engineer, opposed such a system, giving as sufficient reason that if put to a task the men scamped the work, and that it was unfair to conscientious or slow workers. He pointed also to its failure when he did give it. But he really never allowed it a fair trial, for no man was permitted to leave the labour yard until the six o'clock bell whether his task were finished or not. Occasionally work had been allotted in weekly tasks, but in such a way that the men often finished on Wednesdays and spent the remainder of the week in idleness.[2]

It was no wonder that the Government service became popular amongst all the prisoners except the good mechanics[3] and that the landowners thoroughly disapproved of Macquarie's system. It was not merely their poverty which prevented them from taking men off the Government's hands. The disinclination of the men themselves to go into the settler's service, their consequent unwillingness to work, and the cost of their keep and wages, all constituted serious hindrances.

In 1804 a Colonial Regulation had decreed that every master to whom a servant was assigned must agree to feed and clothe him in a satisfactory manner and to give him £10 a year as wages. No agreement was drawn up, but by taking a convict servant a settler necessarily accepted the conditions. The rations were expected to be equal to those given by Government and the wages were in payment for work done after three o'clock. These regulations were republished by Macquarie in 1814[4] and in 1816 he ordered the wages to be paid, if the

[1] Major Druitt did not agree in this opinion. According to him it was easy to keep discipline in the barracks because the men were always ready to inform against each other. But the man who tells tales is quite a different individual to the man who reports neglect of duty. See, however, Druitt's Evidence, Appendix, Bigge's Report. R.O., MS.

[2] *e.g.*, in the saw-mills and on the road-gangs. For the discussion in regard to task-work see magistrates, etc., to Bigge in Appendix to Reports. R.O., MS.

[3] One mechanic was kept for fifteen years in Government service. See Riley, C. on G., 1819.

[4] G.G.O., 10th September, 1814.

servants desired it, in money,[1] but a deduction of £3 might be made for clothing.[2]

The Order issued in 1814 discloses the difficulties of the small settlers with their Government men.

"It having come to the knowledge of the Governor," the Order runs, "that the practice of remunerating Government men for their extra time and labour either by permitting them to employ certain portions of their time for their own benefit, wherever they may choose to engage themselves, or to cultivate grain or rear pigs or other animals in lieu of giving them the wages prescribed by the established regulations of the Colony, his Excellency cannot avoid calling the attention of the public to the consideration of the ill consequences necessarily resulting from either the one commutation or the other. Those persons who have been in the habit of giving up portions of their[3] time to their Government men, must be aware that they thereby enable idle and disorderly persons in the class of assigned convicts to pass into parts of the country where their persons are not known; whilst the latter, availing themselves of that circumstance, commit the most flagrant and atrocious acts under the idea that they will avoid detection.

"That robberies very frequently escape detection by the sudden retreat of the perpetrators from that part of the country where they committed their depredations, is too notorious to be controverted: This fact fully evinces the necessity for doing away the practice.

"Those Government men who have the indulgence of cultivating ground and rearing stock instead of receiving their prescribed wages, frequently become the receivers of stolen grain and provisions, which, being blended with that of their own rearing, baffles detection, and justice is thereby defeated.

"Settlers or others who do not require the entire services of the men assigned to them, or who cannot afford to pay them for their extra labour, are required to return them forthwith to the principal superintendent of convicts at Sydney, or to the magistrates of the district to which they respectively belong."[4]

But the evil against which this Order was directed was the

[1] G.G.O., 7th September, 1816.
[2] *Ibid.*, December, 1816.
[3] *i.e.*, The servants.
[4] G.G.O., 10th September, 1814.

result of collusion between master and man, and therefore one which was difficult to stamp out.

The payment of wages in money was very generally condemned by masters on the ground that their servants spent the money as soon as they could on liquor. The settlers preferred to pay the regulation wages and any extra remuneration in what was called "property"—that is, tea, sugar and tobacco. This was profitable to the master because the price of these goods was usually from 40 to 70 per cent. above ready-money wholesale cost, and 25 to 35 per cent. above the Sydney retail price.[1] On the other hand the servant did in reality get more for his money in this way than if it went straight into the publican's pocket.

The servants of small settlers usually sat at their master's tables and shared their food. Their ordinary diet consisted of tea, sugar, bread and meat, and spirits as often as possible. The social position of the poor man's servant, who sometimes farmed a few acres of his master's land for himself and often married his master's daughter, was higher than that of the servants of wealthy settlers, but the latter were better fed. They received the Government rations with an additional 7 lb. of wheat, tea, sugar, milk and vegetables. Compared with the diet of the peasants and artisans of the United Kingdom they lived exceedingly well.[2] Their clothing, however, was bad. In the Government service, owing to delays in sending slop-clothing, the men were often very ragged. It was costly to supply them with colonial-woven garments, and the Governor would not risk such an expense. Bigge, however, stoutly condemned this economy, saying that the convicts might have been justified in revolting, forced to go about, as they were, indecently clothed in rags.[3]

The settlers' complaints of their servants were very numerous and of increasing frequency during Macquarie's governorship. In earlier days severe punishment for insubordination, and a more suitable class of field labourers, had largely accounted for

[1] See Appendix, Bigge's Report. R.O., MS.

[2] *Cf.*, *e.g.*, Sir F. Eden's *The State of the Poor*, 1797, vol. i. Meat even once a week was a luxury with many, wheaten bread a rarity, and tea and sugar scarcely used at all.

[3] Report I. It was, however, very difficult to prevent the men from selling their new clothes.

the smaller number of complaints. Cox described the convicts who arrived in 1819 as a quarter boys under twenty-one and more than half the remainder artisans, factory-hands or "forgers who were not used to any work at all".[1] Riley also described the majority as being quite useless and not worth their keep to the settlers. The Governor by an Order in 1815[2] and another in 1818[3] tried to stifle the settlers' complaints and force them to keep whatever men were sent to them, but the Orders were never enforced.[4] As the class of labourer deteriorated, their demands rose. Many indulgences which had previously been given as rewards of merit were now claimed as matters of right. Good and bad servants alike had to be paid the minimum wage of £10, and masters found themselves forced to offer more than that in order to secure good workmen. Some of the settlers, who had, or were supposed to have, influence with the Governor in gaining pardons for their men,[5] had no difficulty in making them work, but others, although they treated them well, found them more insubordinate every year. Of these Macarthur was the most notable, and he gave a full account of his methods to Bigge.[6] "My servants," he wrote, "are not often tasked, for they will not perform a task without continual reference to the magistrate to compel them by punishments, which I always very reluctantly do.[7] The method I adopt is to find them well, clothe them comfortably, and give sometimes extra rewards. I cannot, however, boast of my success, for most of the farm servants are idle and neglectful, and the losses I sustain amongst my stock, in consequence of their carelessness, are alarmingly great. . . . I require my servants to work from sunrise to sunset, allowing them one hour for breakfast and another for dinner.

"Each man receives weekly 7lb. of beef or mutton and one

[1] Cox's Evidence, Appendix, Bigge's Reports. R.O., MS.

[2] G.G.O., September, 1815.

[3] *Ibid.*, 18th January, 1818. If a servant were returned as useless, the settler was not to receive any more Government men in the future. In 1819, 234 boys arrived and 2,708 men. See statistics in Appendix to Bigge's Reports, MS. (Boys probably include only those under eighteen).

[4] Evidence of Superintendent of Convicts. Appendix, Bigge's Reports. R.O., MS.

[5] *e.g.*, William Cox. See Bigge's Reports, I. and III.

[6] Macarthur to Bigge, Appendix to Reports. R.O., MS. Macarthur had then about 100 convict servants.

[7] He would have to pay their wages whether they finished their tasks or not, unless they absolutely refused to work at all.

peck of wheat; in clothes, tea, sugar, tobacco and money to the value of £15 a year, unless they are idle and worthless, when I confine the allowance to £10, which is the rate of wages established by Government. To those who behave well I give gratuities varying from £1 to £5, but I regret to say this practice does not much swell the amount of my expenditure."

His house-servants he paid from £10 to £15, and that he was a good master is evinced by the fact that not one of his servants ever attempted to run away.

In addition to the convicts he employed some ticket-of-leave men and free labourers, whom he paid according to contracts made with each of them individually, and not in accordance with the scale of wages drawn up by the Governor in 1816. Cox, who had 120 convict servants as well as some who were not convicts, paid his ploughmen (convict or free) £10 to £15 a year, and his mechanics £15 to £25, but as he may have paid the whole amount in "property" it is difficult to draw any comparison between Macarthur's and his methods.[1]

Work.	*King's Scale.*	*Macquarie's Scale.*	*Week's Work, King.*
	£ s. d.	£ s. d.	
Felling forest timber per acre .	0 10 0	0 8 0	1 acre.
Burning off forest timber per acre .	1 5 0	1 0 0	65 rods.
Felling timber brush ground per acre		0 12 0	
Breaking up new ground per acre	1 4 0	1 0 0	65 rods.
Chipping in wheat . . .	0 6 8	0 6 0	1½ acres.

These are about half the items. The lower price in Macquarie's scale is due to the fact that the wages are to be paid in sterling money. In King's scale they are "colonial currency," which was much depreciated. In King's time, the working hours were fifty a week.

Such were the general conditions of the workmen in the settlement in 1821. There was practically no distinction between free and convict labourers.[2] In Sydney the wealthy ticket-of-leave men, who had in many cases brought money

[1] See Appendix, Bigge's Reports. R.O., MS. The G.G.O., 7th December, 1816, regulates the wages of labourers, making no distinction for a few agricultural operations between convict and free. It may be compared with the scale drawn up by King, 31st October, 1801. *H.R.*, III., p. 252.

[2] The convict, however, was subject to what was really a criminal jurisdiction of the magistrates.

with them from England, insulted the eyes of the free with their lavish ostentation, their rings and chains and their dashing curricles.[1] The old distance and respect were things of the past. The convict prisoner or ticket-of-leave man passed the civilian without salute—nay, he even took the inner side of the path. Labour was fast becoming an ordinary market commodity to be bought and paid for, instead of a debt due from the outcast to those within the ranks of respectability. Meanwhile as the economic power of the convict labourer increased, his social ostracism became yet more rigorous.[2] An objection universally taken by the colonists to the convict system throughout this period was that large bodies of convicts were kept in Government service in the towns, and that by such an arrangement the object of their reform was lost. Macquarie himself felt the truth of this, but could see no alternative. Bigge collected the opinions of the magistrates and other leading settlers, who showed a quite remarkable agreement.[3] They suggested the distribution of the convicts over the country and their employment in agriculture. All of them, they considered, would be fit, no matter what their previous lives had been, to clear the ground, grub up the stumps and burn off the wood. Thus employed they would have hard work for their bodies, be separated from bad associates, and enjoy time for reflection on past misdeeds. The difficulties of superintendence were admittedly great. Convict overseers were not approved of, some considering that the convicts gained great advantages simply from having "gentlemen" set over them.[4] Macarthur said frankly that there never had been a good system of convict management and evidently thought there never would be. As he was himself a strong man with a gift for organisation, he favoured a system which gave more freedom to the employer.

[1] See, *e.g.*, Sir John Jamison. Correspondence with Bigge. Also Dr. Harris, same, Appendix to Bigge's Reports. R.O., MS.

[2] There is not the least doubt that the feeling between convict and free was far more bitter at the end of 1820 than it had been at the beginning of 1810. See whole of Bigge's Reports and Evidence and Documents, *passim*.

[3] See answers to circular sent by Bigge in Appendix to Reports. R.O., MS. The worth of the answers, of course, varies very much, and the fact that they were more or less all agriculturists probably gave them a bias in favour of that form of labour.

[4] See, *e.g.*, Lieutenant Bell's reply. Whether the convicts would profit by the severity or by the example of the "gentleman," he does not say.

"If a large body of respectable persons could be induced to settle in the Colony," he wrote, "much good might be accomplished. Provided the new settlers were of a description to compel their servants to execute a due quantity of work to determine the amount of their rewards, and to make the quality and to some extent the quantity of their food depend upon the convicts' industry and good behaviour. . . . I am sensible that such an authority as I have described would sometimes be misused by harsh and selfish men . . . and that such abuses of power might escape detection. But that portion of evil, or, I fear, a greater one, must be submitted to; for experience has proved . . . the pernicious and demoralising operation of general regulations which place the good and bad servant, the honest man and the thief, upon the same footing, and authorising him not only to claim but to insist upon the same indulgence." He summarised his views by saying that a convict should be compelled to work for his living and to refrain from vicious practices, but that he should be duly rewarded for good work and good conduct.

Thomas Moore, an experienced settler and magistrate, made a proposal of a novel kind to which unfortunately no attention was paid.

"All persons," he suggested, "receiving convicts into their employ should take the entire management and superintendence of them themselves, and in every agricultural district I would recommend a village or small town to be established in the most central part of it, where there should be fixed such Government mechanics as may be necessary for the benefit of that particular district. In each of these towns a magistrate should preside, and three respectable settlers should be appointed to act as appraisers, who, with the magistrate, should be empowered to fix the quantity and price of every kind of agricultural labour that may be performed by convicts within that district."[1]

No one approved of the method of payment. Some considered it inconsistent with a state of servitude that convicts

[1] This is, perhaps, too simple and patriarchal—but it would have been a good idea to form such small settlements of Government men all over the country. Fixed regulations were a virtual necessity for convict labour unless Macarthur's view was to be adopted.

should receive wages at all, food, clothing and shelter being all to which they had a right. Cox objected that that would have placed them altogether in the position of slaves. Marsden, after thirty years' experience, could suggest no alternative scheme and yet condemned the one in force. The opinion of the majority was that the Regulations had not sufficient elasticity and gave no opportunity for grading the men according to their merits.

Bigge himself came to the very lame conclusion that Government servants ought not to receive wages but only occasional rewards, and that more settlers should be encouraged to come from England. Thus more employment would be provided for the convicts and less encouragement for them on regaining their freedom to become "prematurely proprietors and masters". Like those who were sheep-farmers, he dwelt much on the moral value of shepherding, and indeed there was a certain fascination in the picture of the London thief watching his lambs beneath the she-oaks and haply repenting on the evil of his past.[1] The ignorant townsman, used to the noise and hubbub of cities, must have trembled at many a ghost in the quiet melancholy of the Australian forest.

Riley, who with the exception of Macarthur was the most far-sighted of the settlers, and who seems to have been slightly inoculated with the theory of free trade, put his finger on the real need of the Colony—free labourers with a knowledge of agriculture. He thought more convicts would then be employed, for "the settlers would be enabled so to extend their cultivation in many instances, that they would require the addition of other servants to assist them. I know that many persons are at this moment prevented entering into the cultivation of hemp and flax solely from the want of servants who are adapted to the raising and preparing these articles, and one man capable of giving directions for the produce of them could give occasion to the employ of many inferior labourers."

He calculated that £30 a head would cover the cost of sending out such labourers, and that immediately on their arrival at Sydney they would find masters ready to give them £20 a year and their board. The masters might then become responsible

[1] See Reports III. and I.

to the Government for the passage money, and Riley suggested that it should be repaid in three yearly instalments of £10, deducted from the man's wages.[1] There were not sufficient colonists who recognised the great "indirect" cost of convict labour to press this experiment upon the Government, and no attempt was made to carry it out. Many contented themselves by agreeing with Cox that after all the work of the convicts during thirty-two years had been incredibly great and successful, especially when it was called to mind that "a great many of them never did nor could be made to labour in England".[2]

From the first Macquarie attempted to make the occupation of the land a real thing. All grants issued by him contained three conditional clauses which had not been included before. The chief one was the prohibition of any transfer or alienation within five years of the receipt of the grant. If the condition were violated, the transfer or alienation would be null and void and the land revert to the Crown. The other two directed, under the same penalty of reversion to the crown, the clearing and cultivation of certain proportions of the whole area within five years.[3]

Theoretically the conditions were admirable, in practice no one paid any attention to them. Judge-Advocate Bent himself sold his own grant and a grant made to his twin sons before five years had passed, and his case was not an isolated one.[4] Many emancipists being devoid of inclination and capital, sold their farms immediately at about 5s. an acre. Sometimes a grantee was allowed to occupy his land before it had been measured or the grant made out. In such cases the land was frequently sold and another owner in possession under the "permissive occupation" before the first grantee had completed his title; and instances

[1] Riley, C. on G., 1819.

[2] Cox, Reply to Bigge's Circular. See above.

[3] This condition was suggested in letter of Plummer. See Chapter III. above. Macquarie in his first despatch (30th April, 1810. See *H.R.*, VII.) wrote as though he varied the proportion according to the circumstances of each grant. Bigge (Report III.), wrote as though the same proportion was named in each. In Townson's grant the amount to be cultivated was 167 acres out of 2,000, a rather odd number (enclosed in one of Wilberforce to Cox, letter R.O., MS., 1817). This is the only case in which the amount is mentioned. Probably custom regulated the proportion, and, in any event, no attention was paid to the condition, and "an appearance of an attempt to cultivate" was considered sufficient compliance.

[4] D. 1, 24th February, 1815. R.O., MS.

had occurred of the Provost-Marshal carrying out execution against the "permissive occupant".[1] Sometimes the land was not sold outright but purchased by instalments, and when the five years were up the "tenant" applied to have the grant made out in his name.[2] In no case within Oxley's knowledge had the Crown resumed or threatened to resume any grant even though the violation of the conditions had been notorious.[3]

The others had been equally disregarded. If the farm was small and the owner continued in possession, he did as a rule clear and cultivate the required area.[4] If it was too small for pastoral purposes he had indeed no other way of making a living. But the restricted and uncertain market, the great varieties of soil and climate, made it impossible to carry them out in all cases—and to enforce the conditions would have been unjust and impolitic. Marsden attributed the delay in getting the land under cultivation to lack of discrimination in making grants to emancipists who did not attempt to cultivate but sold it at once, thus reducing the supply of labour and increasing the amount of land on the market; especially as the land purchased was usually added to the great estates for pasture. This was probably true[5] and much good might have been done by requiring the emancipists to produce at least £20 before making them grants of more than ten acres.[6] Bigge thought that when distillation should be permitted, the conditions might well be enforced.[7]

While the conditions laid down by Macquarie were neglected by the colonists, those laid down by the Secretary of State were neglected by Macquarie. His Instructions ordered him to

[1] Bigge's Report, I. Sometimes they borrowed money on it at a dollar (5s.) an acre.

[2] Oxley's Evidence. He was Surveyor-General. Appendix, Bigge's Reports. R.O., MS.

[3] In August, 1804, a grant was held to be cancelled by reason of non-fulfilment of conditions. No other case arose on the point until March, 1821, when Judge Field, on circuit in Van Diemen's Land, reversed the previous judgment. He gave judgment as follows: "In the case of a conditional grant, though the condition be unperformed, the king cannot regrant without office found, by 18 Henry VI., c.6; that is, without the inquest of a jury to ascertain whether the condition be performed or not. . . . If this were not so all the grants of the Colony would be mere tenancies at the will of the Crown." See Appendix, Bigge's Reports. R.O., MS.

[4] Bigge's Report, I.

[5] Marsden to Bigge in Appendix to Reports. R.O., MS.

[6] Bigge's Report, III.

[7] *Ibid.*

reserve 500 acres for the Crown adjacent to every 1,000 acres allotted to settlers.[1] In 1815 Lord Bathurst called his attention to the neglect of these Instructions and directed his compliance therewith.[2] Macquarie consulted Oxley, and they agreed in opposing this policy. It had not been done in other colonies, and the Crown, Oxley said, had not suffered from its neglect, and in New South Wales it had been wisely disregarded from the first. Lord Bathurst admitted the first part of the statement and the second so far as to agree that the Colony's progress had been ameliorated by these means.[3] But he went on to say: "I see no reason why in future the reserves on behalf of the Crown should not be in such situations as to ensure the rapid augmentation of their value from the cultivation of the adjoining allotments. It may, indeed, in some cases expose settlers to temporary inconvenience to have their respective establishments separated by an uncultivated reserve, but it must be recollected that this inconvenience is in general the only price paid for the land they cultivate, and it is not therefore just that the Crown should lose the only benefit which it derives from its liberality to them. I must therefore leave it to your discretion in future to make these reserves in such a manner as may give to the Crown every fair advantage without materially interrupting the comfort and safety of the inhabitants."[4]

Macquarie, relying upon his discretion, therefore made no change in his previous practice, reserving pieces of land here and there for the Crown as he thought fit.

The next omission was in the collection of the quit-rents. In 1814 Lord Bathurst proposed to raise them 1s. an acre on the land of free settlers. Macquarie, with the advice of the Surveyor-General, demurred.[5] Macquarie proposed a rate of 2d. an acre for emancipists and 1s. for fifty acres for free settlers. Oxley suggested that there should be a diminution in the rate for grants of 500 and over, but Macquarie pointed out that the larger the grant was the more easily could the owner pay the

[1] Par. 17, *H.R.*, VII. See above. See also Chapter I.
[2] D. 57, 3rd December, 1815, C.O., MS., and D. 18, 4th April, 1817, R.O., MS.
[3] D. 16, 24th August, 1818. R.O., MS. See quotations from Oxley in this despatch.
[4] See D. 11, 7th October, 1814. R.O., MS.
[5] *Ibid.*

quit-rent.[1] Finally no alteration was made. The exact amount was for the moment quite unimportant, as few quit-rents were collected before 1821 at the earliest.[2] In 1820 the Assistant-Surveyor was appointed collector and assigned an extra allowance for that duty. He proposed that where old grants had been consolidated and new ones given he should wait until the quit-rent became due under the new grant; and that where land had been transferred he should collect from the last person to whom it had been transferred.[3] The amount then due including arrears was no more than £375.[4]

In 1821 Macquarie found that so many settlers arrived by each ship that his old system of inquiring separately into each case and giving grants in accordance with the settlers' merits was no longer practicable. With Oxley's help he drew up a scale of grants proportionate to the amount of capital at the settlers' disposal, which came into force in 1821.[5]

Settlers with a capital of £100 received grants of 100 acres.

„	„	„	200	„	„	200	„
„	„	„	300	„	„	300	„
„	„	„	400	„	„	400	„
„	„	„	500	„	„	500	„
„	„	„	750	„	„	640	„
„	„	„	1,000	„	„	800	„
„	„	„	1,500	„	„	1,000	„
„	„	„	1,700	„	„	1,280	„
„	„	„	2,000	„	„	1,500	„
„	„	„	2,500	„	„	1,760	„
„	„	„	3,000	„	„	2,000	„

To those who had larger capital than this Oxley proposed to sell Crown lands at 10s. or 7s. an acre. He proposed, also, the following changes in the system of land distribution, all of which met with Bigge's approbation.

[1] See D. 11, 7th October, 1814. R.O., MS.

[2] *i.e.*, since 1809. Certainly none had been collected in the towns, and there are no accounts of its collection anywhere else.

[3] See Meehan to Macquarie, 3rd February, 1821. Appendix to Bigge's Reports. R.O., MS.

[4] Bigge's Report, III.

[5] Bigge recommended this scale. See Report, III., and D. 32, 28th November, 1821. R.O., MS.

"(1) That the country intended to be settled should be previously surveyed and laid out in districts, subdivided into farms of such sizes as are most usually granted, and that with reference to the localities of the country and its natural divisions, each district should not contain more than thirty-six square miles, and that the farms should form squares in similar proportions. . . .

"(2) That the districts should be surveyed and submitted to the approval of the Governor at least six months prior to being open to the selection of individuals. The maps of the different and vacant districts being open to the inspection of all persons having orders for land, would enable such persons to know what lands the Governor intended to settle, and also give them sufficient time to examine the lands and make their selection, which having done, the settler could experience no delay in being put in possession or receiving their title deeds.

"(3) Whatever portion of land may be given to the free settlers, it should be optional for them to purchase a further quantity in addition to their *free grant*, in proportion to that grant, at 5s. an acre, paying a deposit of 10 per cent., and the remainder by instalments every six months, giving in the whole a credit of three years, when, on the purchase being completed, a grant should pass to them. A failure in payment of any instalments should not deprive the purchaser of his right, provided the whole arrears were made good with interest at the period the last payment came due; a failure in the ultimate would necessarily subject the original purchaser to the loss of his deposits, and the land would revert to the disposal of the Governor.

"(4) Certain portions of each district should also be set apart for public sale to individuals who have already received grants as settlers. . . . A similar deposit should be paid by and credit given to purchasers of this description as to those of the first, and the lowest price at which the public lands should be set up for sale should be 5s. an acre."[1]

Oxley thought he could carry out all these reforms with the addition of two assistants to his staff. He had, however, very

[1] Bigge's Report, III.

heavy arrears to make up in 1821, and numbers of settlers were waiting for their land to be surveyed and grants made out.

It was at this time unusual to give leases of Crown lands except in the towns. Occasionally permission was given to pasture sheep on vacant land adjoining an estate, and rights of common had been given to settlers at Richmond in the Hawkesbury district as early as 1804.[1] In 1820 many farms were let by their owners on leases of seven or fourteen years at rents of 20s. an acre if paid in money, and 30s. if paid in grain. These were usually small estates of five to twenty acres.[2]

The land in the townships, in Parramatta and in Sydney, was generally leased from the Crown for periods of seven or fourteen years. Before Macquarie's time it had never been made the subject of grants, but in 1810 he strongly advised that good building should be encouraged by alienating the land outright, and his advice was adopted.[3] On the Hawkesbury the settlers had built their houses on the low lands in the midst of their corn-fields, and whenever the river rose in flood their houses were devastated. Macquarie offered them additional allotments on the high land, to be considered inseparable from their farms, that they might build homesteads above the danger line, but very few consented to move. Probably they were afraid to leave their corn unprotected in the fields below.[4]

The houses in the country were very plain and cheap, costing as a rule no more than £100. The convict servants on large estates built huts of mud and bark, each two sharing one between them. Macarthur had thought of building them large mess-houses, but they had a distaste of living in great numbers, due, he suspected, to the fear of each that plans of mischief, and especially cattle-stealing, would be discovered and betrayed by others.[5]

Riley believed house rent to be higher in Sydney than in

[1] Bigge's Report, III. It was granted by Governor King, and the document which is printed in Report III. is a very strange one. Bigge held that it was good in law. Macquarie set aside commons for some of the townships he founded. See H.R., VII., p. 468. G.G.O., 15th December, 1810.

[2] Cox, Evidence to Bigge, Appendix to Reports. R.O., MS.

[3] D., 30th April, 1810. H.R., VII. See also Plummer's letter, Chapter III., above.

[4] G.G.O., 15th December, 1810, p. 468. H.R. VII. He made similar efforts later.

[5] Macarthur's Evidence, Appendix to Bigge's Reports. R.O., MS.

England, and building was costly if much imported material was used.[1] In 1820 there were 1,084 houses in Sydney, thirty-one of which belonged to the Government. Sixty-eight were built of stone and 259 of brick, but they were not of an imposing appearance.[2] The situation of the town, however, was so lovely that under any circumstances its appearance must have been attractive.

At this time more than half the population of the Colony lived in the town, 12,079 men, women and children being housed in 1,084 buildings.[3] Such a population was wholly disproportionate to the rest of the settlement, and sufficient employment could not be found for its inhabitants. Riley, speaking of the condition of things in 1817 or 1818, said that there were at least a hundred convicts and a majority of the ticket-of-leave men who could find nothing to do,[4] and this number must have greatly increased by 1821. It was not possible that there could in so young a settlement be enough work to employ so large a city population. There were, according to Riley, six or eight people who would have been called merchants in England, and a considerable number of traders, but how many he did not say.[5] At least the civil and military officers were no longer ostensibly amongst that number. After a long fight Macquarie had succeeded in putting an end to their open trading operations. At the end of 1810 he had begun by writing to O'Connell, who was in command of the 73rd regiment, pointing out that his instructions both from the Secretary of State and the Commander-in-Chief forbade his officers to carry on commercial, agricultural, cattle or grazing speculations, "as being derogatory to the character of any officer, subversive to military discipline and contrary to the customs of the army". But having heard that certain officers had been engaged in such enterprises, he requested O'Connell to inform them publicly that these practices must not continue, and that if such facts came to his notice in

[1] Riley, C. on G., 1819.

[2] Appendix, Bigge's Reports. R.O., MS.

[3] The population includes the people in the surrounding districts, and the houses are probably those within the town limits only. The barracks is, of course, counted as one building and so is the gaol. But nevertheless there seems a great number of people in excess of the houses. Probably there were some huts not included in the Return.

[4] Riley, C. on G., 1819.

[5] *Ibid.*

the future the offenders would be brought before a court-martial.[1] In 1814 a somewhat similar warning was given to the civil officers,[2] and in 1816[3] the warning was made stronger by quotations from a despatch of Lord Bathurst's. After that time there were no complaints of a public nature, and though Macquarie wrote to the Secretary of State that several officers of the 46th had entered into grazing speculations, he took no action against them in the Colony. Very likely they managed their business through agents, or at least made it appear as though they themselves were not actually engaged therein. So long as grants of land were given to civil and military officers, it was of course impossible to prevent them turning their estates to as profitable uses as they could. The civil staff continued throughout this period to have grants almost as matters of right, and indeed to the judges they were offered as inducements to taking the posts. But with regard to the military officers, Macquarie as early as 1813 asked for written instructions prohibiting him from making them grants, wishing to have Lord Bathurst's support publicly given in following an unpopular course.[4] Although Lord Bathurst did not give the instructions required, Macquarie consistently refused to give further grants to any officer or officer's wife.[5] As land was selling at as low a price as 5s. an acre, those who wished to have farms of their own might purchase them, but in many ways the Governor strove to prevent them from touching trade concerns. Thus in 1814 he put an end to a profitable business which had long been carried on by Government servants of buying articles from the King's stores ostensibly for their own use and then selling them with great profit to the settlers.[6]

[1] H.R., VII., p. 471, 15th December, 1810.
[2] G.G.O., 1814. [3] *Ibid.*, 1816.
[4] D., July, 1813. R.O. He had up to that time given only three grants to members of the garrison. One to Lieutenant-Colonel O'Connell, "in his civil capacity of Lieutenant-Governor, on his marrying the daughter of Governor Bligh," the second, to the wife of Major Geils, because "they had so large a family"; and the third, to the wife of Paymaster Birch, made at the time when the latter was insane "as a provision for his young family, he having purchased a large stock of horned cattle while he was labouring under that mental derangement."
[5] Lieutenant Blomfield complained to the Colonial Office that the Governor refused to give him a grant when he married Miss Brooks, which he thought a very great hardship as her dowry consisted of a herd of cattle.
[6] See G.G.O., 1814, above.

The markets of the Colony had been opened to importation at the beginning of 1815, and apparently at that time, or more likely before that time, the placing of a maximum price on imported goods came to an end.[1] But when there were no longer any Government regulations the magistrates controlled in many ways the price of goods on the market. Thus they ordered a shoemaker brought before them to sell boots at the reasonable price of 10s. instead of the exorbitant cost of 25s. Butchers and bakers had both to take out licenses and to conform to a fixed scale of prices. Hawkers also had to take out licenses, but that was for reasons of order and policy rather than anything else, for servants assigned to the lower officials of Government or poorer settlers, escaped prisoners, ticket-of-leave men and all the disorderly characters in the settlement, made a pretence of hawking goods to cover every sort of fraud and knavery. To prevent this the hawker's license was placed at the high price of £20 a year, and the applicant had to produce a certificate as to character before getting it. These regulations were only issued in 1818, and their effect cannot be computed, for there are not any means of knowing whether the conditions were strictly enforced.[2]

The business population was almost entirely engaged in trading, and there was but one factory owned by a private individual in the whole Colony. That was the establishment of Simeon Lord, where cloth, hats, blankets and stockings were manufactured. But on many estates home industries were carried on, and in the Government labour yard many articles were made by the convicts. The colonial-made goods, however, were still so costly that it was more economical to buy imported wares.

All imports save those of British manufacture were subject to duties, but these might often be evaded. The masters and officers of the convict transports, for example, made a practice of bringing trade adventures of all kinds. Sometimes they brought

[1] G.G.O., 31st December, 1814. There is a passage in D. 74, 24th July, 1816, C.O., MS., from Lord Bathurst which implies that the prices were still fixed; but that is an error of the Secretary of State.

[2] Proclamation, 2nd May, 1818. In connection with this subject of trading facilities attention may be called to a curious monopoly created by Macquarie by G.G.O., 7th June, 1816. A merchant of Hobart Town fitted out a vessel which circumnavigated Van Diemen's Land and discovered Macquarie's Harbour and Port Davey. As a reward Macquarie gave him the monopoly of trading to both these ports, *at which there were no settlements*, for twelve months.

goods from England, more often spirits and tobacco from Rio Janeiro or the Cape. In the first case the goods were not entered at the Customs House in England, in no case did they pay any freight, and finally Macquarie often allowed shipments (especially of tobacco and spirit) to be landed by the master or surgeon without paying even the colonial dues.[1]

In 1816 Riley and Jones, the largest firm of merchants in Sydney, complained to the Colonial Office [2] pointing out that these trade ventures were an infringement of the Charter-party [3] and took up the tonnage which properly belonged to the convicts. What was more important from the merchants' point of view was that these surreptitious cargoes injured their custom.

The Colonial Office, who heard of these practices for the first time, at once instructed Macquarie to bring them to an end. He was directed to order a careful examination of the stores brought by the convict vessels, and a comparison between those and the official list sent in the Charter-party. He was not to allow any surplus to be sold in Sydney.[4] Macquarie received this despatch on the 11th May, 1818, but did not at once impose any order. There were at the moment several transports in the harbour, and to prohibit the sale of their cargoes would, he thought, have been unjust to them as well as a "loss to the *revenue*".[5] They had so long been allowed to break the law that perhaps he had some reason to speak of the "injustice" of making them suddenly conform to it. Eventually he made a prohibitory order in October.[6] A few weeks later he received a memorial from "many principal inhabitants" including Macarthur, Lord and Townson, praying that the prohibition might not be continued.[7] They pointed out that it would greatly check "the diffusion of manufactures of the mother-country," but admitted that their chief reason for advocating the

[1] See case of Dr. Bromley. Bigge's Report, III. and also Piper's Evidence in Appendix. R.O., MS.

[2] 2nd November, 1816. R.O., MS.

[3] *i.e.*, Charter-party entered into by Masters of Transports and Navy Board.

[4] D. 101, 12th December, 1817. C.O., MS.

[5] D. 2, 1st March, 1819. R.O., MS. Evidently he meant to make these pay duty.

[6] It was an order given to the naval officer, not a public Government Order.

[7] Enclosure to D. 2, 1st March, 1819. Memorial is dated 19th November, 1818. R.O., MS.

continuance of the importation of goods by the transports was the restrictive nature of the Charter of the East India Company. According to its regulations no vessels of less than 250 tons could trade with New South Wales. The return freights were so small that under this restriction the incentive to private owners to send vessels to New South Wales was very weak, and the cost of freight thither exceedingly high. Thus the convict transports were a valuable channel of trade. But there would be no need of them if vessels of, say, 150 tons were permitted to trade with the Colony. According to Macquarie the transports and the ships belonging to Riley and Jones carried on the whole import trade, and Riley and Jones sold badly selected shipments at "griping extravagant prices". He was therefore very ready to comply with the memorial and removed the prohibition until further representations should have been made to the Secretary of State.[1] Thus the matter remained until 1820, when the restriction as to tonnage was removed by Act of Parliament.[2] There remained then no reason for the continuance of the indulgence, save Macquarie's desire to retain it. In 1820 Goulburn, the Under-Secretary of State, proposed that private ventures might be taken on board the convict transports on payment of the usual freight, and the Treasury were asked to make arrangements for carrying this out, not only in England but at the Cape and Rio Janeiro also.[3] Shipowners of course protested, but without success, and the trade continued to be carried on under these regulations.[4]

The eagerness which Macquarie showed throughout to permit this indulgence to masters and officers of transports was probably due to his great liking for all "discretionary" powers, a liking shared by every autocratic Governor. It was a tolerated illegality and therefore wholly dependent on his favour. His obstinacy had also been aroused by the attempt made by a colonist to seize two convict ships, the *Tottenham* and the

[1] G.G.O., 21st November, 1818.

[2] 59 Geo. III., c. 122. Passed in 1819 but came into force in 1820.

[3] Goulburn to Treasury, 20th March, 1820. C.O., MS.

[4] Jackson to C.O., 1st April, 1820. R.O., MS. There is no doubt that Macquarie greatly overrated the need of this trade. In 1820, between January and April, six private merchant vessels of tonnage from 370 to 500 sailed to New South Wales. See Jackson above.

Elizabeth in the act of landing goods.[1] The *Tottenham* brought a varied cargo valued at more than £1,000[2] and was seized by Mathew, a Sydney trader, on the 20th November, 1818, while she was landing goods under the Governor's permit. Mathew had great difficulty in getting his information against the ship sworn to, and after some trouble it was accepted by the Registrar of the Court of Vice-Admiralty.[3] The Judge-Advocate proposed to open the court for the hearing of the case on the 19th December. This long delay seemed to Mathew a proof that the Judge-Advocate desired to deny him justice. The truth of the matter was that Wylde, who knew very little Vice-Admiralty law and was in that respect not unlike the rest of the colonists, was at first in doubt whether the matter was one for his court to take cognisance of, and when he had persuaded himself that it was, had the more difficult task of persuading the Governor. Macquarie insisted that in allowing Mathew to bring his case, the Judge-Advocate was acting in a manner hostile to the Governor's measures and derogatory to his authority. When the Judge-Advocate persisted, a complete estrangement took place between them which lasted until the 29th of December.

When the court opened on the 19th, Mathew claimed that the cargo should be condemned on the grounds that the goods had been shipped contrary to the regulations of the Navy Board and without paying customs duties, and that the ship had no legal clearance. The information against the *Tottenham* was thus laid for a breach of the Revenue and Plantation Laws, and Wylde saw no way in which he could refuse to adjudicate. Macquarie, however, held that once his permission had been given to the ship's master to land the cargo, any attempt to seize the ship or goods or question the legality of the ship's clearance was an insult to his supreme authority as Governor, and as such not within the jurisdiction of any court in the Colony. Wylde was by nature a placid man and had borne with Macquarie for two years, but he knew that in giving way here he would be taking upon himself a very grave responsibility. However,

[1] The case of the *Elizabeth* was never proceeded with.
[2] See Ship's Manifest, Appendix, Bigge's Report. R.O., MS.
[3] J. T. Campbell, the Governor's Secretary.

though he went through with the hearing of the case, he probably felt relieved that he was able to give judgment against Mathew, "dismissing the information with costs". The grounds of the decision were a want of legal right in the party to seize boat or goods, that right being limited to certain parts of the coast and to certain customs officers,[1] and also a want of jurisdiction in the court as a court of revenue to take cognisance of mere disobedience to the orders of the Navy Board.[2]

The revenue collected by the naval officer who was the chief customs official consisted of duties and taxes on shipping. The latter were exceedingly heavy, the dues on clearances, permission "to wood and water," to anchor, to land goods, varying from £1 to £7 according to tonnage. Coasting vessels paid the same rates as vessels from England or elsewhere, and found these taxes very burdensome at the end of each short voyage.[3]

The duties levied in New South Wales comprised the 5 per cent. *ad valorem* on all goods and manufactures *not* the produce of Great Britain, first levied in 1805; the duties on spirits of 7s. a gallon and on wine of 9s. dating from December, 1814; the duties on whale-oil, skins and timber, from June, 1813; and on shells, sandalwood and *bêche-de-mer* from the South Sea Islands, levied from 1807.[4] Those on oil, timber, shells, etc., were practically duties on export. The sperm and black whale oil

[1] 12 Geo. I., cap. 28, and 26 Geo. III., cap. 40.

[2] This is a doubtful point. Of course, as constituting a breach of contract, it might have been heard in the Civil Court. For whole matter see Mathew to C.O., 26th March, 1819, R.O., MS., and Evidence of Wylde, Appendix, Bigge's Reports, R.O., MS.

[3] See enclosure to D. 4, 23rd February, 1820. R.O., MS. See also Appendix to Bigge's Reports, R.O. A distinction had been made before Macquarie's time between foreign and British vessels and between the latter and colonial vessels, but it was discontinued.

The dues at the port of Sydney for five ships all under 500 tons were as follows:—

	£
Ocean	52
David Shaw	38
Fame	41
Melville	44
Recovery	33

They were more than double the dues at the Cape of Good Hope. See Appendix, Bigge's Reports. R.O., MS.

[4] See enclosure to D. 4 above. Macquarie was not sure of the accuracy of the Return, and some alterations have been made when no Orders of the dates given in the Return could be found. Probably some of the dates given are those of Orders re-enforcing older Orders.

which paid £2 10s. and £2 per ton respectively, were not for home consumption but for the English market, and no drawback was allowed on exportation. So also with the duties of ½d. and 1½d. on fur and hair sealskins, and of ½d. on kangaroo-skins. The duty on cedar of 1s. a solid foot or £1 on twenty spars was likewise a tax paid in the Colony on exportable produce. For these reasons such duties were unhesitatingly condemned by Riley in 1819, and by his brother in his evidence before Bigge in 1820. The only argument in their favour was the revenue to be thus obtained, but as they nearly succeeded in putting an end to the whaling trade, at any rate, even this purpose was not achieved.[1] The duty on sandalwood and pearl-shells of £2 10s. a ton, and on *bêche-de-mer* of £5 a ton, put a severe burden on commerce in the South Seas, but the trade was not injured so much as the whaling trade, probably because the pressure of the duty had merely the effect of increasing the pressure exercised by the masters and crews of the South Sea vessels on the natives who collected these products. The New South Wales duties, combined with those levied in England, brought the whole amount paid on each ton of oil placed on the English market up to £27 8s. 9d., while the Americans, who were the most prominent rivals in the South Seas, paid £7 more. But the freight from New South Wales was high, being £3 a ton to India alone. In 1817 there were forty tons of oil in bond at Sydney[2] waiting until the owners could pay the duty, and in 1819 a shipment was bonded in England for the same reason.[3] The duty as it stood altogether crushed the trade. Riley advocated a bounty in place of the tax on oil, for whaling would have been a good occupation for young colonials and have provided freight for ships returning to England.[4] The Government would have profited indirectly, for transport vessels were paid by tonnage, and the easier it was for them to find return cargoes, the lower would be the cost for their trip outwards.[5]

[1] Edward Riley's Evidence, Appendix, Bigge's Reports. R.O., MS.
[2] Riley, C. on G., 1819.
[3] Evidence, Edward Riley. See above. R.O., MS.
[4] C. on G., 1819, and Edward Riley. See above. R.O., MS.
[5] Bigge's Report, III.

The duties on South Sea products, save those on oil, had been levied first by Bligh, and those on oil by Macquarie.[1] But the latter was far from defending them, and wrote that they were "as impolitic in principle as they have been proved by the experience of several years to be unproductive in revenue".[2] He dwelt on the lack of other exports and the expensive outfit necessary for whaling, proposing that a drawback should be allowed. Lord Bathurst agreed to this, and by an Act of Parliament of 1819 this drawback was permitted.[3] The duties on timber were withdrawn by order of the Governor in 1821.[4] Two additional imposts were laid in 1818, a duty of 6d. a lb. on tobacco and an increase in the duty on spirits, which brought the whole up to 10s. a gallon. The purpose of the latter was "to lighten the burthen of this Colony on the mother country" as well as to restrain "the present immoderate consumption of spirituous liquors".[5] The actual effect of the measure was to increase the revenue without achieving any reduction in consumption. As a matter of fact it could not have done both. The tax on tobacco—a tax which it could easily stand—was intended to serve as a protective duty and foster home-production; but towards that end it was ineffective.

The duties were not exacted very strictly, and the Government were usually ready to take security for their payment. In 1820 no less a sum than £4,024 was owing, and the Governor held unrealised securities, some of which dated back to the time of King and Bligh.[6]

The cotton goods, sugar, rice and tea, which formed a great part of the colonial trade, were imported direct from India and China under licenses from the Bengal Government and the regulations of the committee of super-cargoes at Canton.[7] The voyage to and from China lasted about three or four months, and the delays in port at Sydney were the cause of many com-

[1] G.G.O., 26th June, 1813. [2] D. 21, 15th May, 1817. R.O., MS.
[3] 59 Geo. III., cap. 114. [4] G.G.O., 31st March, 1821.
[5] D. 3, 15th May, 1818. R.O., MS. Macquarie was always dissatisfied with the 5 per cent. *ad valorem* duty, wishing to substitute a more complicated scale at a higher rate levied on weight and quantity, but Bathurst did not approve it. See D. 3.
[6] Bigge's Report, III. See also Chapter X.
[7] In accordance with Charter of East India Company.

plaints. These delays were due to the system of "detainers" and the manner of mustering the ship's crew.

The system of detainers was an old one in the Colony, and except for the period of Johnston's and Foveaux's administration had been always in force. Macquarie had reimposed it immediately on his arrival and made no alterations in the system from that time.[1] In accordance with his regulations any person about to leave the Colony must give notice of his intending departure in the *Sydney Gazette* at least ten days before sailing. This notice had to be inserted in two successive issues. At least eight days subsequent to the first notice the person about to depart had to procure from the Judge-Advocate's office a certificate stating that no detainer had been lodged against him. Until 1817 any one might lodge a detainer without even swearing to the debt therein alleged, but Wylde insisted on this being done. The total number of detainers lodged between 1816 and 1820 was 671, and in 1820 they showed a distinct falling off.[2] Wylde stated that under his administration the number had decreased, but no record has been kept of those in previous years. When the Supreme Court of Civil Judicature was closed, from 1815 to 1816, the only way in which to secure payment was to lodge a detainer and so prevent the debtor from leaving the country,[3] and detainers for as much as £3,000 were lodged. They could at any time be made the means of fraud. A man who had arranged all his affairs for departure could be hurried into giving security even for a debt which he did not owe, and might in the end have to pay it. Those upon whom the regulation fell most hardly were the masters of ships frequenting the ports. When Wylde became Judge-Advocate he found that the greater number of detainers were lodged by publicans against men of the ships' crews. The masters, impatient to weigh anchor, would either have to pay the debts or leave the men behind. At Wylde's suggestion Macquarie included in the Port Regulations issued in 1819 a clause which

[1] Government Public Notice, 10th February, 1810.
[2] Wylde's Evidence and Return in Appendix, Reports. R.O., MS.
[3] Moore's Evidence, Appendix, Reports. R.O., MS.

gave them some alleviation, by allowing masters to cry down[1] the credit of their men. Only masters of British or Indian vessels, however, were allowed this privilege, and not those of colonial ships unless the names of the crew had been advertised in the *Gazette*. This was reasonable, for the crews on the colonial ships were constantly changing. The detainers were intended to serve the double purpose of preventing the escape of prisoners and securing the payment of debts, which under the colonial system of judicature could not be recovered in the court against persons out of the Colony. With all its defects and possibilities of imposing hardships, it was found on the whole to serve its purpose with tolerable efficiency.[2]

But the regulations for mustering the ship's crew and passengers were more burdensome and less efficient. It was obviously the duty of the Government to make sure that no prisoners escaped, and for that reason it was necessary to make a thorough examination of each ship before its departure, to muster its crew and see the passengers. But the work was badly done, and by holding the muster on shore at the Secretary's office, instead of on the ship, no useful purpose was served. The following description sent to Bigge by the master of a convict ship shows clearly the objections to Campbell's methods.

"The —— was in the first place detained ten days after it was advertised ready for sea; at the expiration of which time the Secretary would not muster the crew though applied to for an earlier muster. On the tenth day, as some of my crew had deserted, Mr. Campbell appointed that day week for the purpose; . . . I wrote to the Governor . . . on which an earlier day was fixed by him. That day came, and I brought my crew on shore (the ship at this time being left entirely to the mercy

[1] *i.e.*, to publish a notice warning publicans and traders that they would not be responsible for debts incurred by their crews.

[2] One objectionable feature was the tax paid to the Judge-Advocate's clerk for each certificate of "no detainer," which amounted in four years to £3,000. This of course was specially heavy for the masters of ships who had to pay for all their crew. Appendix, Bigge's Reports. R.O., MS. Sometimes persons against whom detainers were lodged did get away without paying. Blaxcell, *e.g.*, left the Colony in 1817 when there was a detainer lodged against him for duties due to the Crown of £2,385. There were probably many similar instances in which private and no less important creditors were involved.

of those who might plunder her),[1] some of whom thought proper to go into the town against all the efforts used by the officers and myself to prevent them; I represented this to Mr. Campbell, showed him the men walking away, asked what I was to do? how I could act? was in a manner laughed at by him; during that day I was employed in looking after magistrates, sending constables after my people; still unable to clear my ship for sea—I threatened again to write the Governor on the subject. The next day I received information that my clearance was made out, on getting which I had to pay £20 16s. without any reason given why, nor could I gain any information on the subject, nor even a receipt for the money.[2] The departments of Government receive with pleasure the penalties and forfeitures on the ship and crew, without a wish or effort to assist the captain in the execution of his duty, though robberies of every description are practised to (and) from his ship."[3]

To supply the Colony with a sound currency had been one of the problems before each Governor since the time of its foundation. In the very early days there had been no metal coinage at all. Two legitimate substitutes—the Government store receipts and bills on the Treasury—and the promissory notes of individuals, the so-called "Colonial Currency," had competed at a considerable disadvantage with the rum-currency. The former —the Government bills—were the more stable of the two, for the colonial currency was subject to continual fluctuations. Attempts were several times made by colonists to regulate the value of these notes by combining among themselves to raise or lower their exchange against the Government issues. To prevent this Macquarie forbade these combinations, and also the issue of promissory notes with the exchange value named upon them. This was in 1813, when a supply of silver dollars had been received from India, and from that time it was declared that only those notes which were payable on sight in sterling money were to be legal tender. To keep the silver coins in the country

[1] According to Piper, the Naval Officer, no ship ever had been robbed or in any way injured during these occasions. Evidence, Appendix, Bigge's Reports. R.O., MS.

[2] These were fees on clearance and on certificates from the Secretary's office after the muster had been held.

[3] Appendix, Bigge's Reports. R.O., MS.

Macquarie mutilated each by cutting out a small coin for exchange. The value of the large coin was 5s. and of the small 1s. 3d.[1]

The Proclamation insisting that the notes should be immediately payable in sterling money was a failure, and the courts were unable to enforce it.[2] Its objects were made more unattainable by the action of Commissary Allan, who arrived in June, 1813. He persuaded the Governor to allow him to replace the old system of store receipts at the Commissariat by the issue of promissory notes signed by the Commissary, pointing out the greater convenience and simplicity of the method. But Allan issued notes for private as well as public purposes, and improved his own while injuring the Government's credit. Had he kept, as he promised to do, within his monthly estimate, he would have run no risk. But he did not, and Macquarie was practically forced to restore the old custom of store receipts. He did it, however, so suddenly as to cause Allan great financial embarrassment, and to procure him the sympathy of the whole settlement.[3] In 1816 a determined effort was made to do away with the depreciated paper currency. At the end of November the tender of sterling money for the face value of the currency notes was again made compulsory, but finding that this could not be enforced, on the 7th December a Proclamation was issued containing a schedule of the rates at which they were to be exchanged, and this was carried out very leniently.[4] Wylde in his desire to find a stable currency to replace the promissory notes proposed that a bank should be established, a scheme

[1] D. 5, May, 1812, Bathurst to M., R.O., MS. also D. 1, 28th June, 1813. R.O., MS.

[2] Proclamation, 11th December, 1813. Bent and Wylde both admitted actions founded on the notes which by this Proclamation were declared illegal. See Evidence of Wylde, Appendix, Bigge's Reports. R.O., MS.

[3] D. 6, 23rd June, 1815. R.O., MS. A similar attempt was made by Allan's successor in 1817 with precisely the same result.

[4] Wylde described the state of affairs when he arrived in 1816 in the following words: . . . "I very soon . . . had to discover, that to give effect and validity to any of the currency notes, for the non-payment of which actions were brought, it would be necessary altogether to overlook and dismiss from the consideration of the Court in Judgment several colonial Proclamations and Orders not only of old but of very recent date, which declared all such notes as (were) in question and their negotiations to be absolutely null and void". Wylde to Goulburn 3rd March, 1817. R.O., MS. The Proclamations were those of 1813. It was this state of affairs which gave rise to the above-mentioned meetings, etc., and the Proclamation, 7th December, 1816.

which had long been advocated by Macquarie but opposed by the Colonial Office.[1] Now, however, without further consultation with Downing Street, Macquarie went straight ahead. The project was mooted in November, and the foundation of the Bank of New South Wales was decided upon at a meeting held on 22nd of that month, 1816. Macquarie granted a Charter of Incorporation, and in 1817 the bank opened for ordinary business and for the issue of notes.[2] In 1820 it had a capital of £20,000 in shares of £100 each, of which 120 were paid up and the shares stood at par. The expectations of the founders had been fulfilled and the circulating medium of the Colony for the first time placed on a satisfactory basis.

Macquarie granted the charter for seven years with "the usual rights and privileges of a corporation . . . provided the same shall meet . . . the approbation of His Royal Highness the Prince Regent".[3] This was the only support lent by the Government, except that after 1819 the colonial revenues were deposited with it.

The Governor considered that his Commission empowered him to grant the charter and Wylde agreed with him. The latter based his opinion on the fact that the Commission "allowed the Governor to raise boroughs, create turn-pikes and tolls, impose port duties and imposts, and determine from time to time the legal tender, regulate the value of the sterling medium and of the public money and interest thereon, establish and direct public markets, and to dispose at discretion of the Crown lands of the territory".[4] But Wylde would gladly have made a reference home upon the question before taking any steps had he not thought the delay likely to hasten the "almost inevitable final consequences of such a fictitious capital and circulating medium". Only by the establishment of a bank could the colonial currency be checked. An attempt had indeed been made to check it, but had met with signal

[1] D. 2, 29th March, 1817. R.O., MS. See also Ds. of 1810 and 1811. H.R., VII., especially 30th April, 1810.

[2] The notes were of value of 2s. 6d., 5s., 10s., £1 and £5. See D. above. In 1821 notes in circulation amounted to £5,902. See Bigge's Report, III.

[3] D. 2, 29th March, 1817. R.O., MS.

[4] Wylde to Goulburn. Enclosure to D. 26, 1st September, 1820. R.O., MS. Macquarie had done these things, but many of them were not justified by his Commission.

failure. "And yet," he continued, "in a community like this no great public confidence can perhaps be even expected for some years to be found, and no contributions could have been *obtained* for a common stock but on the strongest *Government* and legal assurance of personal indemnity from all general liability or partnership risk. Such an indemnity could only and reasonably satisfy, and such it appeared to me could only be afforded, as in the one usual way, in the grant of Letters of Incorporation and the constitution of a Joint Stock Company."[1] But the charter met with disapproval from the Secretary of State who, after consulting the Law Officers, informed the Governor that he was not legally empowered to grant it and that it was consequently null and void.[2] "You will therefore," wrote Lord Bathurst, "intimate to the gentlemen composing that establishment that they can only consider themselves in the situation of persons associated for the purposes of trade, and as such not entitled to any of those special privileges which it was the object of the charter to confer." "So long as the bank is conducted on sound principles it will of course derive from the Government a due degree of support; but you will carefully avoid incurring any responsibility on account of it, or in any degree implicating the faith of the Colonial Government in its pecuniary transactions."

Macquarie in reply referred to Wylde's opinion and enumerated the advantages which had already accrued. "Antecedent to the opening of the bank," he said, "there was scarcely a mercantile transaction which did not become the subject of a lawsuit before payment could be effected. . . . Now in consequence of the facilities rendered by the bank, mercantile contracts and payments are as punctually observed and as promptly made, as they could be among the most eminent merchants on the Royal Exchange. These, my Lord, are effects that could never have been looked forward to, by any other means, in a new country like this, unprovided with any kind of specie, except what may remain of the ten thousand pounds in dollars sent . . . by order of Government from India."[3]

[1] Wylde to Goulburn. Enclosure to D. 26, 1st September, 1820. R.O., MS.
[2] D. 22, 29th October, 1818. C.O., MS.
[3] D. 26. See above.

The charter apparently remained in force although it had been declared null and void.[1] Bigge considered the bank a beneficial institution, but that no royal charter was necessary. Without it indeed he thought a more cautious policy would be ensured.

A curious incident had arisen when the Articles of Incorporation were drawn up and put before a meeting of the shareholders, which was described by Wylde in his evidence to Bigge. The Governor was dissatisfied with the 7th article, which excluded persons who had been convicts from the direction of the bank. "But," said Wylde "had an ex-convict been appointed (and it was known that one would be proposed) all the other directors would have resigned." Wylde saw what was the feeling of the meeting, and proposed and carried the exclusion clause. When he waited upon the Governor later to submit the articles to him, he found that this affair had already been reported, with the result that it had "excited in him a strong opinion and feeling insomuch that I retired from all explanation."[2]

The New South Wales Bank was nevertheless largely patronised by the convict and ex-convict class. They much preferred its facilities to those of the Savings Bank, which gave a lower interest and from which it was troublesome to draw money at short notice.[3] The Savings Bank was founded by the exertions of Mr. Justice Field in June, 1819, for the benefit of convicts and the poor people generally; and its rules, prefixed by "A Plain Address," were printed and distributed to all convicts arriving in the Colony.

"Many of you," so ran the address, "bring small sums of money from England, your own savings or the bounty of your friends, and have no place of safe deposit for them upon landing in this Colony. Instead of trusting those sums to any private individual, you are recommended to place them in the Public Savings Bank". . . . The convicts, however, responded feebly to this invitation. They preferred to trust to some friend who knew of an investment which promised quick though uncertain

[1] This seems the only inference to be drawn from the statement of Bigge in 1823 that the "present" charter will expire in 1824. Report, III.
[2] Wylde's Evidence, Appendix, Bigge's Reports. R.O., MS.
[3] Interest in Savings Bank was 1s. 6d. per £1.

profits or to leave their money in the New South Wales Bank, from which they could draw it at a moment's notice. The principal superintendent of convicts also acted in his private capacity as banker and money-lender, a calling not very consonant with his official station.

With a sounder currency, a more hopeful agricultural outlook, a prospect of encouragement to the wool-trade and lighter duties on South Sea products, the future looked brighter in 1821 than it had done for many years. But the social conditions of the Colony were very troubled. The increasing number of free settlers, both those from England and those born in the Colony, even the children of the convicts, began to gather together against them. These, as they grew richer and freer, became more disliked, and after 1821 began to lose ground. Under Macquarie's rule they reached their highest point socially and economically, and with his departure their day declined.

CHAPTER VI.

ON THE HIGH SEAS.

AUTHORITIES.—Despatches etc. (especially for 1817) in Colonial and Record Offices and *Sydney Gazette*. P.P. 1812, II.; 1819, VII.; 1822, XX.; 1823, X. Jenkyns (Sir H.), *English Rule Beyond the Seas*.

THOUGH the Judge-Advocate had a Commission as Judge of the Court of Vice-Admiralty, there were but few matters with which his court, being one of instance only, could deal. There was, for example, no Commission giving jurisdiction in cases of prize, and when, during the American War, British vessels put in bringing prizes for adjudication, they had to be sent on to India or Ceylon.[1] The court might take cognisance of "all breaches of the laws of trade, navigation and revenue, as well as suits for the recovery of seamen's wages".[2] There was, however, a great ignorance of Admiralty law in Sydney, and in point of fact the only case brought before the Court of Vice-Admiralty from 1810 to 1821 was that of the *Tottenham* in 1818.[3] Questions of seamen's wages were generally submitted to the magistrates, and the Judge-Advocate's Commission was thus for all practical purposes non-existent.

Macquarie had, of course, no control over commanders of the Navy, and occasionally found his powerlessness in this respect inconvenient, though visits from King's ships were not frequent. During the war with America a few put in for refreshments and repairs, and amongst others the *Samarang*, sloop of war, with Captain Chase in command. He brought with him from India a supply of £10,000 worth of silver dollars for use in the Colony, and stayed some time in the harbour, "most tyrannically trampling upon the personal freedom of His Majesty's sub-

[1] D. 28, June, 1813, and D. 11, of 1814. R.O., MS.
[2] Bigge, Report II.
[3] *Ibid.* See Chapter V.

jects ".[1] The truth was that Captain Chase was preparing to take the sea once more, and not wishing to fall in with an American vessel without his full crew on board, was filling vacancies by the method of the press-gang. As he kept to his ship, and as pressing for the Navy was legal, Macquarie could not restrain him, and by Chase's orders men were impressed "both afloat and ashore". The Governor pointed out to Lord Bathurst how unsuitable was the "Impress Service" to a country where the "great mass of the population is made up of *Convicts*," to press whom was "at direct variance with the object of their transportation". The Secretary of State agreed and made representations to the Admiralty, but as the war soon came to an end no more was heard of such practices and the matter dropped.[2] Except for naval store-ships coming to New South Wales or New Zealand for timber, or vessels on voyages of discovery, the whole territory lay beyond the track of the Navy. It was in the trade with New Zealand and in the South Sea Islands and in transportation of convicts that the limits of the jurisdiction of the courts of New South Wales were most severely felt.

The traders in the South Seas were rough, adventurous men ruling with foul speech and brutal punishments their wild and turbulent crews.[3] The annals of the Pacific are filled with stories of murder and revenge. They tell of outrages on the natives followed by fierce reprisals, mutinies successful or unsuccessful alike ending in bloodshed, and scarcely credible oppressions practised by the captains on their crews.[4] Macquarie's missionary-magistrates had jurisdiction only when crimes were committed on land. Even then, being wholly without coercive powers, they could do nothing effective. In New South Wales itself there was no court which could take cognisance of offences committed on the Islands or on the High Seas. The only thing

[1] D.8, 14th August, 1813. R.O., MS.

[2] See D. above and correspondence of C.O., MS., 1814.

[3] These vessels were of varying size, from 250 tons to 800 tons, for no vessel of less than 250 tons might navigate in these seas according to the East India Charter. The cargoes taken to the natives consisted of Bengal prints, slates and pencils, gunpowder and muskets. The Marquesas Islands, however, were so well supplied with muskets from America that they would take no English ones. See Appendix, Bigge's Reports. R.O., MS.

[4] *e.g.*, the master of a ship would entice men to join his crew and then starve and ill-treat them, apparently for no reason save the gratification of his brutality. See case of "General Gates," Appendix to Bigge's Reports. R.O., MS.

that could be done was to hold an investigation into any charge brought against a ship's master or crew—a purely magisterial inquiry which was only effective if followed by committal and then the trial of the accused in England.

The case of Theodore Walker illustrates many of the evils of the South Sea trade, and shows how incurable they were while the scope of the colonial courts was so restricted.

Early in 1813 a small vessel, the *Daphne*, was trading in the South Sea Islands. At Otaheite the master added to his crew by carrying off four or five natives. These natives, joining with some coloured men of the ship's company, mutinied, killed the master, took possession of the vessel, and either killed the remainder of the crew or put them ashore without food or water on adjacent islands. Some of them, however, survived, and spread the story of the mutiny. The death of the master, said Macquarie, though lawless, was no more than fitting retribution, for he had been guilty of the most wanton and vicious crimes. On one occasion some friendly natives came on board his ship to trade with him, and looked with the greatest respect and curiosity at all it contained. The captain, wishing to get quickly away, ordered the crew to clear the visitors from the ship, and they were flogged and beaten off. Their canoes had meanwhile been swamped, and the natives, unable to get to them, were drowned in full view of the *Daphne* as she stood off to sea. The savagery to which her captain afterwards fell a victim could scarcely equal the cold cruelty of this episode.

The crime of mutiny did not go unavenged. A short time afterwards, when the *Daphne* was in the Bay of Islands, the brig *Endeavour*, Theodore Walker, master, came into harbour there. Walker at once attacked the mutineers, and after some shots had been exchanged the firing from the *Daphne* ceased, and word was brought that her crew had abandoned her. Walker boarded the ship immediately and ordered a search. One man, a Lascar, who had been one of the leaders of the mutiny, was found in hiding. Walker ordered him to be taken on board the *Endeavour* and hanged him at the yard-arm. Henry, one of the missionary magistrates, reported these events to Macquarie, November, 1813, and the story was known when Walker reached Sydney. The Governor ordered the magistrates to

hold an inquiry into the death of the Lascar, as a result of which Walker was committed to gaol until future proceedings might be decided upon. The evidence was sufficient to support a charge of murder, and, on the advice of the Judge-Advocate, Walker was admitted to bail, and the matter referred to the Secretary of State.[1]

Lord Bathurst consulted the Home Office and the Law Officers, and in July, 1815, instructed Macquarie to send Walker and the necessary witnesses to England in order that he might be tried at the Admiralty Sessions under a special Commission.[2]

It was not easy for the Governor, when he received these instructions at the end of 1815, to get together the witnesses who had been examined by the magistrates in 1813, nor could they be compelled to go to England.[3] In the end he sent Walker home with as many witnesses as he could. Nothing further appears of the case in any Colonial Office Documents. It seems that Walker was never tried, and the only result of Macquarie's labours was the ineffective Act of 57 Geo. III., cap. 53.

By this Act "murders and manslaughters committed on land at the settlement of Honduras by any person within the settlement, or committed on the islands of New Zealand or Otaheite or within any other islands or places not within the British dominions, nor subject to any European state or power, nor within the territory of the United States of America, or any person sailing in or belonging to a British ship, or who had sailed in or belonged to and had quitted any British ship to live in any such island or place, might be tried and punished in any

[1] D. 1, 17th January, 1814. R.O., MS.

[2] In accordance with 46 Geo. III., cap. 54. This was an extension of the two statutes, 22 Hen. VIII., cap. 15, and 11 Will. III., cap. 7. The first of these gave power to try offenders of treason, felony, and robbery or conspiracy at sea to a Commission of Oyer and Terminer issued under the Great Seal. The second gave power to try piracies or robberies committed at sea by a Commission of Oyer and Terminer issued under the Great Seal either in the Colonies or at sea. The 46 Geo. III., cap. 54, extended this power to the trial of any offence committed at sea. Bent thought "it would be advisable either to issue a Commission for the trial of such offence pursuant to the statute" above, in New South Wales, or to establish there a Supreme Court of Judicature with power to take cognisance of such offences. Letter to C.O., 14th October, 1814. R.O., MS.

[3] D. 7, 18th March, 1816. R.O., MS.

part of the dominions of the Crown under the Act".[1] But the scope of the Act was restricted and no Commission issued for the trial of such offences nearer than Ceylon. Bigge reported that it might be efficacious if extended so as to cover all offences committed by British subjects *on the high seas*, and if a Commission were issued for their trial in New South Wales.[2] But up to 1822, at any rate, the Act had never been enforced.

There was, however, in the transportation of the convicts, a whole chapter of events taking place on the high seas which had a peculiarly strong interest for New South Wales. It was practically impossible between the Colonial Government, with its limited jurisdiction, and the Home Government, so remote from the point of disembarkation, to enforce efficient safeguards for the good treatment of the convicts. The statistics in themselves suggest that, due consideration being had to the sentiments and appliances of the period, the service was not badly carried out. From 1810 to the end of 1819, 18,761 convicts were despatched to Sydney, and only 236 died on the voyage.[3] But now and again this favourable picture was obliterated, and in the light of judicial inquiry horrors such as those on board the *Chapman*, or hideous depravity such as that on the *Friendship*, took its place.[4] These inquiries made only too clear the helplessness of the Government adequately to punish or prevent.

Between 1810 and 1820 many improvements were made in the organisation of the transport service. In 1812 it was carried out by a Transport Board under the orders of the Treasury and Home Office.[5] The Treasury sent an order to the Board to take up vessels which were engaged through the underwriters at so much a ton for the voyage. Provisions were supplied for the convicts for the voyage and for nine months after their arrival by the Victualling Board.[6] The convicts and their services were assigned to the master of the ship, who had

[1] See Jenkyns, *English Rule Beyond the Seas*, 1902, p. 143.

[2] Bigge's Report, II.

[3] See Appendix, Bigge's Reports. R.O., MS. Figures of number of convicts landed only given up to end of 1820.

[4] See later in this Chapter.

[5] See Evidence of McLeay, Secretary to the Transport Board, before the Committee on Transportation, 1812.

[6] This provision for use in the Colony was discontinued before 1819. See Chapter V. Hospital comforts, clothes and bedding, were also put on board.

complete control over them during the voyage. The master of the ship and the owners signed a Charter-party whereby the master was bound to hand over the convicts in safety to the Governor at the end of the voyage and was liable to heavy penalties if he did not. He was also bound by Instructions from the Board to fit up the ship in particular ways for the reception of the convicts, to allow them on deck as much as possible, and to note in his log-books all that happened on the voyage. The log-book was submitted to the Governor's inspection at Sydney, and if he was satisfied that the master had carried out his contract satisfactorily, treating the convicts fairly, serving out their rations regularly and in the right amounts, he gave him a certificate to that effect. If no certificate were given, or if the Governor gave a bad report of the master's behaviour, he might be prosecuted in England or lose part of the payment for his services. If the certificate were in order, however, he received an honorarium from the Treasury. The owner or master of the transport was under the further obligation of providing a surgeon, whose duty it was to care for the health of the prisoners, and to keep a full and particular diary of the voyage. This diary also was submitted to the Governor, who might, if he felt any suspicion of its genuineness, require the surgeon to make an oath on the subject.[1]

The duty of the surgeon was to keep the convicts in good health just as that of the master was to keep them "safe," and the surgeon received a reward if the Governor's certificate was satisfactory.[2] It was, of course, a very difficult thing to decide whether illness on board was or was not the fault of the surgeon. On the *General Hewitt* there was an outbreak of fever and great mortality,[3] but Macquarie, after an inquiry held in Sydney, did not consider himself justified in withholding the surgeon's certificate. The Home Office, however, refused to recommend him for a gratuity to the Treasury, and the Under-Secretary wrote to Goulburn asking that Macquarie should be more strict in future.[4] In 1815 a change was made and the Government

[1] See later for effect of this clause in the Instructions.

[2] See Instructions to Masters and Surgeons from Transport Board, issued in February, 1812. See C. on T., Appendix.

[3] More than forty died and sixteen were landed ill.

[4] See Beckett to Goulburn, 19th December, 1815. R.O., MS.

placed the convicts in the charge of a surgeon-superintendent appointed by the Transport Board from the naval surgeons.[1] This officer was responsible, not to the master of the ship, but to the Board. The guard of soldiers who always accompanied the transports, and were usually under the command of a young officer of the rank of lieutenant, was under the joint control of the surgeon and the captain. The naval surgeon was a great improvement on former transport doctors, and the death-rate fell considerably.[2] At the same time the system introduced a new difficulty by dividing the power between surgeon and master. This difficulty was in no way lessened by the new and more detailed Instructions issued by the Board in 1819.

"The two points," wrote Bigge in his first Report, "on which such a collision of authority have most frequently occurred are the admission of the convicts to the deck, and the taking off their irons at an early period after leaving England; both, it has been observed, of considerable importance to the maintenance of their health and discipline.

"It is to the interest of the surgeon-superintendent to deliver the number entrusted to him in a good state of health; it is to the interest of the master to deliver them only in safety; and the heavy penalty into which he enters, for the punctual fulfilment of this part of his duty, must naturally outweigh the contingent value of the remuneration that is promised for his general good conduct and humane treatment; or the consideration of prejudice or loss that an opposite line of conduct may occasion to his owners. It is the opinion of Mr. Judge-Advocate Wylde, that to remedy these doubts and discussions which take place between the masters and surgeon-superintendents

[1] This was done at the recommendation of Dr. Redfern (of N.S.W.), who had reported to Macquarie on the case of the *General Hewitt*, and suggested this amongst other improvements. See MS. letter in R.O. Correspondence for 1814.

[2] From 1810 to 1815—

Number embarked	5,178
Number of deaths	131

From 1816 to 1820—

Number embarked	13,583
Number of deaths	105

See Returns in Appendix, Bigge's Reports. R.O., MS. See Evidence of Dr. Bromley, C. on G., 1819, which clearly shows the improvement which had taken place. He used to keep the whole number of convicts on deck during the day, but that was an unusual course.

of convicts, the authority of the surgeon should be more defined, and that to him should also be given the property in their services and the safe custody of their persons." [1]

Bigge thought that such a course would have been a dangerous one, for the master who was responsible for the safe navigation of his ship should have power to interpose whenever he considered it endangered by any concessions or laxity of discipline amongst the prisoners. He thought the only remedy lay in the fearless exercise by the surgeon of the right to enter in his journal any refusal of the master to do what the surgeon considered necessary for the health and fair treatment of the convicts.[2] If the master and surgeon agreed in treating them badly there was no remedy.

From 1810 to 1820 the average length of the voyage was four months. No description can include all the variety of good and evil conditions which existed on different ships. The character of master and officers affected the convicts no less than that of the surgeon-superintendent. But in general outline life on one transport differed little from that on another. The convicts slept in long prisons below deck, in bunks and hammocks.[3] In these prisons they worked and ate their food and spent the greater part of the day. They were allowed on deck in small parties, well guarded and for but a few hours at a time. When they first came on board they wore double irons, but these were usually struck off as soon as the voyage commenced. They were occasionally replaced as punishment for insubordination or disobedience, and corporal punishment was often inflicted. The surgeon was bound, however, to make an entry in his journal of all punishments. The hospital which was fitted up on each transport was a favourite resort, for there discipline was relaxed and more liberal rations given. But the surgeon had stringent instructions only to admit those who were suffering from severe or contagious diseases.

The voyage must have been intolerably tedious. The men

[1] Bigge's Report, I. [2] *Ibid.*

[3] The boys slept five in one berth and the men four. See Evidence, Bromley, C. on T., 1819. See also Evidence of Bedwell before C. on G., 1819. He had gone out as surgeon in 1812, and stated that the men slept six in a berth of $4\frac{1}{2}$ feet by $3\frac{1}{2}$ feet.

came, not from the disciplined prisons of the present day, but from the ill-regulated gaols and hulks of a hundred years ago. There life had been brutal and squalid, but full of excitement. On the transport there were long days of idleness, varied by agonies of sea-sickness. As they became used to the movement of the ship they found no way of filling the hours save gambling (nominally forbidden), quarrelling and plotting. The plots ranged from mean tricks to get another man's rations or to get an extra hour on deck, to conspiracies to gain possession of the ship and sail to far-off climes. The surgeon usually kept a school for the boys and such of the men as cared to learn to read or write. Far more fascinating must have been the school of crime of which the old and seasoned convicts were dominies and ushers. There they learned a new tongue, that strange and debased English which has a peculiar vigour in spite of its sordidness. Some of the surgeons compiled vocabularies of this thieves' patter or "flash" slang. These, and some rather frivolous collections of anecdotes, are all that remain of their observations—for a unique opportunity for the student of criminal psychology was wasted in the hands of the naval surgeons.

A scanty supply of bibles formed the prison library, and a few of the convicts hoarded greasy volumes, telling tales of crime and horror, which would have been confiscated on discovery. No occupation could be permitted for which tools which could be turned into weapons of offence were necessary, and by 1820 no surgeon had discovered any employment not requiring them. The men were in this respect worse off than the women, for the latter could at least sew.

The fear of mutiny made convict transports insecure for the conveyance of passengers, though as a matter of fact no mutiny did actually occur in these years.[1] It was, however, a good introduction to service in the Colony, for the voyage provided ample opportunity for gaining a knowledge of part of the population. While probably the worst type of convict was most prominent on board the ship, it must be admitted that many

[1] Judge Field wrote in reference to the *Chapman* in 1817: "... The question is not whether the free men believed the convicts intended to take the ship, which I make no doubt the former did believe, and think it very likely the latter did intend, as perhaps there never was a ship full of convicts yet that did not intend—if they could". See Field to Wylde, 29th September, 1817. R.O., MS.

behaved with a quiet resignation and decency which commended them to officers and passengers.[1]

The treatment of the female convicts differed little from that of the men. There was no punishment by flogging, nor were the women put in irons, and the usual punishments were the wearing of a wooden collar and in extreme cases the cutting of their hair.

The chief evil on the female transports was of a very insidious and terrible nature. The usual conditions of the voyage were first made known to the Colonial Office through a letter from Nicholas Bayly, a gentleman-settler, to Sir Henry Bunbury. "Women and sailors," he wrote, "live together on the ships coming to the Colony, and remain on board when the ship gets into port until it leaves."[2]

The Secretary of State was genuinely horrified and directed Macquarie to make immediate inquiries.[3] This was but one of several complaints made by Bayly, and anonymous extracts from his letters were included in Lord Bathurst's rather peremptory despatch. Macquarie at once concluded that Marsden, with whom he was on the worst of terms, had written the letter, and was furiously angry.

". . . I need only appeal to your Lordship's candour," he wrote, "with the question: How is it possible that I, dwelling in New South Wales, can prevent or be answerable for the prostitution of the female convicts antecedent to their arrival within my Government. . . . All therefore that remains for me to remark . . . is that I have never for an instant, directly or by connivance, sanctioned or allowed any prostitution of female convicts, after their arrival in this Colony."[4]

The case of the *Friendship* a few months later made it perfectly clear that he was well aware of the circumstances. This vessel carried female convicts, and when it came into port the complaints of some of the women and the report of the surgeon

[1] Men recommended by master or superintendent were supposed to be treated better than other prisoners on arrival at Sydney, but it is doubtful whether such recommendations were of value. Men who behaved well on the voyage frequently turned out badly. See Evidence of Principal Superintendent, Appendix Bigge's Reports. R.O., MS.

[2] Bayly to Bunbury, 13th March, 1816. R.O., MS.

[3] Bathurst to M., D. 82, 24th January, 1817. C.O., MS.

[4] D. 32, 4th December, 1817. R.O., MS.

caused Macquarie to order a magisterial inquiry.[1] Already one inquiry had been held into the conduct of officers and crew at St. Helena by a British admiral stationed there. But the surgeon wrote to the Governor "from whatever circumstances that transpired at the investigation the effrontery of the aggressors was considerably increased, and every act of profligacy appeared to have received the sanction of law, ocular demonstration being considered indispensably necessary for conviction; and even then it was held that there was no power vested in the authority of New South Wales to punish the offenders."[2]

The Bench of Magistrates at Sydney absolved the master of the ship and the surgeon-superintendent of all blame, saying that they had done what they could to restrain the officers and crew.[3]

In his report to Lord Bathurst, Macquarie said: "Your Lordship will perhaps conceive . . . that I have been aware of these abuses having frequently existed heretofore, and of course that I should have reported them before the present time. In explanation, I have only to observe that the present time is the first occasion where the facts have been brought to view at all, whilst there is reason to apprehend that on similar occasions the officers were as generally guilty as the crews, and that a good understanding was thereby preserved between all parties, and of course no complaints were made."[4] "It is true," he continued,

[1] These inquiries were not infrequent and were held at the Governor's order to investigate complaints made by any of the officers or by the convicts at the Secretary's muster or afterwards. Thus in the case of the *Janus* in 1819, an inquiry was held in consequence of complaints made by Bayly, to whom two women who had been assigned from that ship as domestic servants confessed that they had lived with the captain and surgeon throughout the voyage. See Bigge, I., and Bayly to C.O. 1819, R.O., MS. The right of the magistrates to hold these inquiries was based on the instruction which allowed the Governor to make the surgeon swear to the truth of his report. See above. See also Wylde's Evidence, Appendix to Bigge's Reports, R.O., MS. and Bigge's Report, I.

[2] D. 1, 3rd March, 1818. Enclosure, R.O., MS. [3] *Ibid.*

[4] D. 1, 31st March, 1818. R.O., MS. When convicts and those who were set over them conspired together it was difficult to punish the guilty. Several times the men, *e.g.*, were given short rations and then bribed or promised bribes so that they should not complain at the muster. On two occasions these promises were not fulfilled, and then the men complained. The magistrates held in such case the masters and surgeons were no more guilty than the prisoners who had been, as it were, accomplices, and therefore dismissed the complaints. This was, of course, an error, for the masters and surgeons had been guilty of dereliction of duty in disobeying the instructions of the Board whose servants they were, and in not carrying out the stipulations of the Charter-party.

"I have incidentally learned that such mal-practices did exist among the men and women in some of the female transports, but I have not felt myself warranted in making any direct report of such circumstances until the present time, as no complaints were made to me thereon."

He suggested no remedy, though he expressed himself as eager to carry out any directions which his Lordship might give "in order to save the poor unprotected creatures from being involved in a profligacy during the passage which perhaps the natural inclinations of many of them might be averse to, but which, I have no doubt, when once forced upon them, will tend strongly to render them abandoned during their future lives".

With all his humanity Macquarie never displayed genuine interest or care for these women. He seemed to turn with loathing from the terrible subject. He knew his prohibitions were disregarded, but he made as few inquiries as possible, as though he feared to touch one abuse lest a thousand should show themselves.[1]

Bigge believed that the evil might be brought to an end by giving the master more control over his crew in this respect, and power to the New South Wales magistrates to punish them further, if necessary. by forfeiture of their wages, right of appeal being allowed to the Court of Vice-Admiralty at Sydney. This, however, would not have touched the evil when the master himself was implicated.

Macquarie was unsparing in hunting out the perpetrator of any crime against the male convicts, and no more awful example of the tragedy possible under the system of transportation could be found than that afforded by the case of the *Chapman*.

The arrival of this transport with Captain Drake in command from Ireland on the 26th July, 1817, was the signal for a remarkable outburst of feeling throughout the town of Sydney. The publication of the *Gazette* was delayed a little that news of the arrival might be inserted, for the shipping news was, of course,

[1] *e.g.*, the state of the wool factory where the women worked at Parramatta was disgraceful. A new factory, which had been urgently required since 1815 (when the need was pointed out to Macquarie by Marsden), was built in 1819, but was little better than the former one. See Bigge's Report, I.

of great interest to the people of this remote Colony. In this instance there was a thrilling adventure to report: "The complement of prisoners received on board the *Chapman* was nearly 200," said the *Gazette*, "seven of whom, we have unhappily to deplore, were killed in a daring mutiny, and a number of others wounded. The attempt was made to take the ship, and what is still more terrible to relate, the mutineers were joined by several of the ship's company; who, with the ringleaders, have been kept in confinement ever since." Such was the story circulating in the town that evening.

The muster was not held immediately, and on the 30th July Campbell, the Governor's Secretary, wrote thus to Captain Drake:—

"The Surgeon-Superintendent of Convicts on board your ship . . . informed me yesterday that you had declined striking the irons off the convicts previous to the muster which I am to hold on board to-morrow morning unless you received special instructions from me." He therefore desired that unless there was strong cause to apprehend danger the usual custom should be complied with and the men relieved of their irons.[1]

He received no answer to the letter, and when he went on board next day found that his request had not been complied with. Drake said "he had received them in irons and would land them in irons".[2] Campbell then proceeded to the work of the muster, and carried it out with such thoroughness that it occupied him for fully two days.

The condition of the men who had worn double irons for almost the whole voyage was such as to move him to pity and anger. The more he pressed his inquiries the more cause did he have for indignation. For the first month, from 17th March to 12th April, nothing had gone seriously amiss. But on the 12th, two of the convicts reported that the rest of the prisoners were conspiring to take the ship. On the night of 17th April an alarm was given that they were trying to force the grating of the hatchway which formed the prison door. It was a hot night, and the convicts were many of them lying on the floor of the

[1] 30th July, 1817. Enclosure to D. 29, 1817. R.O., MS.
[2] Campbell's Report to Macquarie, 1st August, 1817. Enclosure, D. 26, 1817. R.O., MS.

prison where it was cooler than in the bunks. When the alarm was given the soldiers fired and continued to fire for some time through the grating. They killed three men and wounded twenty-two. Frightened to go down in the dark, the surgeon left the wounded and the dead uncared for through the long stifling night. From that time only half rations were served out, and every night seventy (sometimes a hundred) men had been chained naked to an iron cable in the prison. These were the chief facts reported by Campbell to the Governor in one of the most terrible documents of the convict times.

The master and surgeon had acted throughout without waiting for proofs and in blind terror. There was much reason to doubt whether there had ever been any real cause for this terror, whether a plot had ever been formed, and whether the story of two tale-bearers, confirmed by conversations overheard by terrified and suspicious men, had not been a complete fabrication.

When Macquarie received the report he was much disturbed. An examination of the hatchways made it quite certain that no attempts had been made to force the gratings.[1] That much being known, he determined to detain the *Chapman* until further inquiries had been made, and Captain Piper, the naval officer, was instructed to retain the ship's register and not to let it out of his hands without special authority from the Governor. "The object of this injunction," wrote Campbell, "is to guard against any risk of the master of the *Chapman* endeavouring to escape from the harbour, which would be facilitated by his possessing the register."[2] This was on the 9th of August, and four days later Macquarie appointed by warrant a Court of Enquiry, consisting of Judge-Advocate Wylde, D'Arcy Wentworth, Superintendent of Police, and J. T. Campbell, the Secretary, to investigate the occurrences of the voyage. The court had power to demand the presence of witnesses, to administer oaths and require the production of documents.[3]

"Not having any court in this Colony," wrote the Governor to Lord Bathurst, "competent to take final cognisance of crimes

[1] 4th August, 1817, D. 29, 1817. R.O., MS.
[2] Campbell to Piper, 9th August, 1817. Enclosure, D. 29, 1817. R.O., MS
[3] 13th August, 1817. Enclosure, D. 29, 1817. R.O., MS.

committed on the high seas, I will feel it my duty so far to exercise the general powers with which I am entrusted for the protection of His Majesty's subjects in the territory as to send home prisoners these persons who shall be deemed most criminal (if criminality be attached to the proceedings by the Court of Enquiry), for your Lordship, and His Majesty's Government, to adopt such measures thereon as may appear due to the circumstances of the case."[1]

The court met for the first time on the 20th August and closed its proceedings—protracted by reason of Wylde's other judicial duties—on the 4th of October.

The period was not a tranquil one. The position of the officers and crew of the *Chapman* was dangerous, for the Sydney people knew, most of them from personal experience, the miseries of the voyage and the helplessness of the prisoners under harsh discipline. Stories told by the convicts from the *Chapman* were repeated in every tavern, and it was little wonder that there was talk of vengeance in the air. Drake, the master of the *Chapman*, wrote to Campbell on the 19th August:—

"In consequence of ill-treatment my ship's company have received from the *people here*, particularly on Sunday night, when several of them were unmercifully beaten, and their lives threatened, as was mine and my officers, and as we are to attend to-morrow at the court-room, I beg you will have the goodness to give us protection to and from that place. Several of the people on shore were heard to say last night, that to-morrow should be their day for revenge and that they would have my life. Under these circumstances I beg you will take it into consideration."[2]

Campbell asked Wentworth to provide special police protection, and told Drake of the arrangement without concealing his contempt and scepticism; but there is no reason to suppose that Drake exaggerated the case.

The forced detention of the *Chapman* of course caused the captain great loss and injury, and he was probably uneasy as to the result of the inquiry. While Macquarie was at Parramatta, and Lieutenant-Governor Molle in charge at Sydney, Drake

[1] D. 29, 12th September, 1817. R.O., MS.
[2] Drake to Campbell, 19th August, 1817. Enclosure, R.O., MS.

made an attempt to leave the port. Molle and Macquarie were on bad terms, and Campbell, always very faithful to his chief, was anything but cordial to the Lieutenant-Governor; but at midday on the 2nd September he warned him that the *Chapman* was to be carried off the next night. No attempt was made, however, until next morning, when she "hoisted a Blue Peter and fired a gun as a signal for her leaving the port". Molle did not know what to do, and sent round to Campbell, who refused to assist or suggest. He pointed out that he had warned Molle the day before, and as he had not heard what measures had then been taken, he could not presume to offer advice on the situation.[1]

Molle then sent a military guard on board with orders to fire on the officers "in case the ship offered to move".[2]

On the 4th September, Drake wrote to the Governor stating that his ship was ready for sea and demanding the cause of detention; and not receiving an answer, applied to the Judge-Advocate. He learned that certain officers must be detained, but the ship might depart as soon as he had replaced them.[3] On the 24th he asked for the ship's register, and the naval officer of course refused to give it up.

"I stated," Drake wrote to Macquarie on the 14th October, "to the Special Committee . . . *on the 4th instant*, that I had nothing further to offer in evidence. The same indecision seems still to pervade their councils, the ship's register is withheld, the ship is occupied by a military force and laying at heavy expenses ready for sea."[4] He wrote again in a similar strain on 28th October. The Secretary replied: "I have it now in command from his Excellency to inform you that he cannot possibly interfere in your case until the Court of Enquiry shall have reported on the circumstances of the charges alleged against you. His Excellency desires it to be perfectly understood that the detention of certain officers of the ship *Chapman* on criminal charges need not at all interfere with the ship proceeding

[1] Campbell to Molle, 11., 3rd September, 1817. R.O., MS.
[2] Drake to Macquarie, 14th October, 1817. R.O., MS.
[3] J. A. Wylde to M., 20th September, 1817. R.O., MS.
[4] Drake to Macquarie, 14th October, 1817. R.O., MS.

conformably to the port regulations from hence . . . on proper officers being appointed to take charge of her." [1]

Drake wrote again, and his letter concluded in these words:—

"If there be specific charges against any of the officers or crew of the ship *Chapman*, I have to solicit that those of the officers and crew of the said ship so charged be withdrawn from on board by the proper authorities, that arrangements may be forthwith made for their being properly succeeded in their different stations on board." [2]

It was the difficulty of deciding on the specific charges which was the cause of the delay. Though the court held its final sitting on the 4th October, it did not report to the Governor until the 17th November. On the 9th, Wylde wrote to him describing his efforts to obtain a unanimous report, but he was unsuccessful, and on the 17th Campbell presented one report and Wylde and Wentworth another.

On many points the same views were put forward in both. No proof had been forthcoming that a mutiny had ever been projected. The means taken to arrest what those in command deemed to be mutinous attempts (though on amazingly little evidence) had been far in excess of necessary self-defence. One night an alarm was given that the convicts were trying to seize the boats, and that night four innocent men were shot down. The alarm was proved at the inquiry to have been utterly without foundation. The proofs of shooting by three soldiers of the guard were quite conclusive, and they were committed to the Sydney gaol to be tried for murder in England. It was in regard to the captain of the ship, the surgeon-superintendent, the officer of the guard, and the three mates, that the reports differed. Campbell proposed that these men should all be committed for trial on criminal charges of varying heinousness from murder downwards, and Macquarie concurred. He had read through the evidence, depositions, log-books and journals which had been before the Court, and discussed the matter with Campbell and probably with Field, the Judge of the Supreme Court. Field had also communicated his opinions to Wylde,

[1] Campbell to Drake, 29th October, 1817. R.O., MS.
[2] Drake to M., 8th November, 1817. R.O., MS.

who had sent him notes of the evidence, and on this occasion Field and Macquarie had been in agreement.[1]

Thus fortified in his opinion, Macquarie wrote to the Judge-Advocate, so soon as he had received the reports, that he felt himself compelled by his sense of public duty "to dissent entirely from the opinion given by you and D'Arcy Wentworth, Esq. . . . as to the degree of criminality of the parties concerned, and of there not being sufficient grounds for committing them for trial in England. . . . I feel it my indispensable duty to request you will as soon as practicable reassemble your Committee of Enquiry for the purpose of revising your own and Mr. Wentworth's report. I must also request that the Hon. Mr. Justice Field may be solicited to join the Committee and give his *legal* opinion as to the course which ought to be adopted in regard to the commander of the *Chapman*, the surgeon-superintendent, the officer commanding the military guard, and three mates of the *Chapman*, one of whom, Mr. Baxter, appears to have been the most active and sanguinary in the long series of cruelties and atrocities committed on board the *Chapman*." There followed a paragraph of which the unconscious and impertinent patronage must have made Wylde's blood boil. "After having revised your report," wrote the Governor to his chief Law Officer, "and added thereto the Hon. Mr. Justice Field's legal opinion, I request you will favour me as soon as possible with the result, that I may adopt such measures as may then appear expedient on the occasion."[2] Thus Wylde was to learn worldly wisdom from Mr. Campbell and law from Mr. Justice Field.

Field wisely declined to join the Committee. "I beg leave to submit to your Excellency," he wrote, "that not having had the benefit of *hearing* all the evidence and inspecting all the documents before that Committee, it is too late for me to come in as a member of the Committee, and give an opinion against

[1] Field was never friendly with the Governor, and by 1820 was scarcely on speaking terms. The division between them was due to the emancipist policy of Macquarie, and especially to the fact that when Field opened his Court early in 1817, Macquarie appointed Lord and Wentworth to sit on the Bench with him without telling him of the convict status of Lord and the all but convict status of Wentworth. See Field's Evidence, Appendix, Bigge's Reports. R.O., MS.

[2] Macquarie to Wylde, 17th November, 1817. R.O., MS.

that of two members who heard all the evidence as it came from the mouths of the witnesses, and were able to judge of their veracity from their *manner*, which in *trial* is always considered as important as the matter, although it undoubtedly is less so in examinations in order to committal *for trial*. . . . I shall be very happy," he continued, "to give Mr. Wentworth my opinion upon the Criminal Law of any state of facts he may lay before me; but if *he*, as a magistrate, has any *doubt* whether certain facts amount to murder or not in law, it is his duty to commit for trial and the opinion of the judges, and not to take upon himself to dismiss. . . . As far as the Judge-Advocate, it is not for me to presume to advise him: at your Excellency's request, I *read* the whole of the evidence and the superintendent's journal: upon these I had no doubts of the steps which ought to be pursued, and wrote two friendly letters of advice as to the law and facts to the Judge-Advocate. . . . But if after Mr. Wentworth is apprised of my legal opinions he shall still persist in the tenour of his report, I can only say that I shall be most happy to give the same opinion publickly and officially to your Excellency which I have given privately and friendlily to the Judge-Advocate." [1]

Wylde himself replied to the Governor with admirable patience and restraint. He pointed out that in his report he had "not gone the length of asserting the opinion that there was not sufficient grounds for committing the parties concerned . . . for trial in England," but only that there was not sufficient evidence "to justify the commitment of the officer of the guard, the superintendent, or the master of the ship, *on a charge of murder or on any other charge of a criminal nature*, as would exclude them from being admitted to bail thereon". He expressed himself as quite willing to meet Field, and he had already called a meeting of the Committee for the next day.[2]

The Governor received this letter at a "quarter past ten in the evening," and replied early next morning that Wylde might know of Field's refusal.[3]

The Committee met, and Wylde and Wentworth sent a

[1] Field to Macquarie, 17th November, 1817. R.O., MS.
[2] Wylde to Macquarie, 17th November, 1817. R.O., MS.
[3] Macquarie to Wylde, 18th November, 1817. R.O., MS.

message to the Governor by Campbell. The Governor then wrote to Wylde in the following terms:—

"I have received a communication from you by Mr Secry. Campbell to the effect that you and Mr. Wentworth feel yourselves so fully satisfied of the accuracy of your late report . . . that you do not conceive you can by any further revision be induced to alter it, and at the same time suggesting that in the present stage of the business, you can conceive that the proceeding most proper for me to adopt would be to call on you as chief Law Officer of the Crown to furnish me with your opinion and advice in regard to the measures to be adopted in the further prosecution of this affair."[1] This advice Macquarie asked for and received a few days later.[2]

Wylde proposed to send the officer in command of the guard and the surgeon, who held a naval commission, to England to answer either before a Court-Martial or a Court of Criminal Jurisdiction. To secure the due appearance of the master and three mates, he proposed to take recognisances or to hypothecate the ship. The latter course, which was the one adopted, "whether ultimately valid or not, is justified by the occasion and *in terrorem*". In the case of the three soldiers already mentioned, the ordinary course could be followed. The witnesses, he thought, should enter into recognisances of £100 each to appear when called upon, except, of course, the soldiers and convicts, who would simply be sent home by the Government.

There was a possible difficulty in regard to the arrest of the surgeon, but Wylde was of opinion that "whatever question might be raised as to his being amenable to a Court-Martial in respect of charges arising in service as a surgeon and superintendent of a convict transport during the passage, yet in consideration of the full and general powers of your Excellency's Commission as Governor, I can only give it as my *opinion* that your Excellency will be equally empowered and justified, upon the report made, to adopt, at least *in limine*, the same measure and proceeding as against Lieutenant Busteed" (the officer of the guard) "leaving Surgeon Dewar 'to be in England proceeded against and tried as the merits of his offence shall require'."

[1] Macquarie to Wylde, 19th November, 1817. R.O., MS.
[2] Wylde to Macquarie, 24th November, 1817. R.O., MS.

Macquarie very reluctantly consented to all these arrangements except with respect to Baxter, the third mate, "who appears to have taken all along so very prominent and sanguinary a part in the various enormities committed on board the *Chapman*," and whom he wished to send home a prisoner.[1]

The Judge-Advocate went into the whole matter once more. He thought this difference in opinion arose from the Governor's regarding everything which occurred on the whole voyage as one continuous act—"whereas it appears to me, that in legal consideration and principle—and your Excellency can be aware that I can know of 'Justice and Expediency'[2] in no other sense—the occurrences necessarily divide themselves . . . " and must be considered separately. Baxter, he thought, was not sanguinary, and his prominence was due simply to the fact that the convicts were his especial charge. "If," he added, "your Excellency 'is so decidedly of opinion that he should be sent home a prisoner,' I am not aware of any reason why your Excellency should hesitate to act upon it, for I have already suggested, that it remains a mere point of discretion in the committing magistrate, and that under all the circumstances I am not prepared to say that the commitment of any of the officers, and of course of Baxter, would under any circumstances induce any consequences upon the magistrates to suit or indictment, and if not on a magistrate, *a fortiori*, I consider not on your Excellency as Governor—but such a step cannot consistently surely be taken by a magistrate who views the whole case in a light which reflects nothing of the wilful, malicious murderer, who breathes in malice prepense and moves not in apprehension and alarm, but in atrociousness, consciousness and purpose." Wylde could not conclude without giving Macquarie a short lesson, in somewhat involved phrases, on the correct judicial attitude. Referring to a passage in the Governor's letter, he said: "With respect to your Excellency's observation, that your opinion on this case has not been formed upon 'the influence of Mr. Justice Field's or any other person's opinion on the subject, however much I[3] may and do respect that gentleman's high legal

[1] Macquarie to Wylde, 27th November, 1817. R.O., MS.
[2] Quoted from Macquarie's letter, 27th November, 1817. R.O., MS.
[3] Wylde has "you," but clearly he means Macquarie, and as he is quoting from Macquarie's letter the pronoun has been altered.

authority'—I beg leave, with submission, to express my hope, that your Excellency on reconsideration will be satisfied that the tendency of my observations as to any influence goes no further than as to legal construction and principle—not upon the facts merely, but on the facts as involving legal distinctions, proceedings, etc., and in this sense I trust I may be free from any apprehension that your Excellency would think it unfit to be observed that your opinion *ought* to be influenced—not upon the facts abstractly considered—but 'by high legal authority' on legal considerations and points arising from these facts—and to which I myself thought it due, on a difference of opinion, to enter so at large into the grounds, as was the only motive that urged me at all to the remark in general excuse and explanation. I trust that no assurance on my part will be requisite to satisfy your Excellency that I could not have any intention of even in the least remarking upon that independence of judgment and conduct which so peculiarly belong to your Excellency's measures and Government."[1]

The Governor closed the correspondence in a conciliatory fashion, adopting all Wylde's proposals and expressing his feeling "that in such cases as the present, involving 'questions of a legal nature and construction,' it is peculiarly the province of the first Law Officer of this Government not merely to suggest but also to carry into effect the measures to be adopted for the ends of justice."[2]

All the papers bearing on the case, the witnesses, including ten soldiers and fourteen convicts, the three soldiers and the two officers, were sent to England early in December. They arrived in June, 1818. The surgeon at once applied to the Navy Board to be released from his arrest. The Board wrote to the Colonial Office supporting his petition and stating that they could not find that he had been to blame for what had happened. The matter was referred to the Home Office, who decided that the surgeon must remain under arrest until the case had been inquired into by the magistrates.

The inquiry was held and a prosecution instituted against the three soldiers. In January, 1819, six months after their

[1] Wylde to Macquarie, 28th November, 1817. R.O., MS.
[2] Macquarie to Wylde, 29th November, 1817. R.O., MS.

arrival in England, they were tried—and acquitted. Macquarie had later the humiliation of receiving through the Colonial Office the following letter to Goulburn from the Home Office:—

"I am directed to request you that you will call Lord Bathurst's serious attention to the public inconvenience which attended these trials. To omit several points of minor importance, it may be sufficient to particularise that it has been necessary to set at large no less than thirteen convicts (some of them of the worst description) who were sent to England as witnesses, but were incompetent without a free pardon to give evidence in this country. Lord Sidmouth [1] is well aware that as Governor Macquarie is not invested with jurisdiction to try any offences committed on the high seas, no prosecution could in this case have been instituted in New South Wales. But his Lordship recommends that the Governor should be apprised of the serious inconvenience attending such a trial in England, and should be enjoined, in the event (Lord Sidmouth trusts the very improbable event) of the recurrence of so unfortunate a transaction as has led to the present inquiry, not to send a case for trial in this kingdom unless he shall be strongly impressed with the belief that the crime imputed to the accused will be proved to the satisfaction of a jury by a body of evidence worthy of credit." [2]

When Macquarie had sent the last papers concerning the *Chapman* to England in 1817, he had written:—

"Altho' I cannot but despair of effectual justice being rendered by the mode I have, under the advice of the Judge-Advocate, been induced to adopt, yet I still hope that sufficient may be effected at least to protect the persons of convicts in future on their passage hither from the cruelties and violence to which they have heretofore been, in a certain degree, exposed, chiefly owing to the rude and boisterous description of men who generally command merchant ships, and to the little care they take to prevent their petty officers from exercising tyrannical and unnecessary severities towards them." [3]

He little thought that the evidence which had been accepted

[1] Secretary of State for Home Affairs.
[2] Hobhouse to Goulburn, 29th January, 1819. R.O., MS.
[3] D. 37, 12th December, 1817. R.O., MS.

in Sydney would be so scouted by a British jury, that the chance of punishing the men responsible for the infliction of three months' misery upon two hundred helpless prisoners would be so lightly weighed against the "inconvenience" of setting free thirteen criminals, or that the nightmare voyage of the *Chapman* would be dismissed quietly as "so unfortunate a transaction".

CHAPTER VII.

THE STRUGGLE BETWEEN THE EXECUTIVE AND THE JUDICIARY.

AUTHORITIES.—Despatches, etc., in Record Office (especially for the years 1814, 1815, 1816). Colonial Office (especially for the years 1815, 1816). *Sydney Gazette.* P.P., 1819, VII. *Historical Records of New South Wales*, Vol. VII.

IN 1809 the Secretary of State expressed the opinion that, however suitable the judicial arrangements of the Colony had been to its infancy, they had already been outgrown. He therefore instructed both Macquarie and Ellis Bent to report on the changed conditions and the alterations which they considered advisable in the Charter of Justice. Macquarie was ready at that period to accept Bent's lead in such matters, and it is therefore to Bent's letters that most importance attaches. Writing to Lord Liverpool[1] on the 19th October, 1811,[2] Bent described in detail the judicial needs of the settlement, laying stress on five main points. In the first place, he advised that Criminal and Civil Courts should be established in Van Diemen's Land. A Deputy Judge-Advocate had been appointed for that settlement and had been paid a salary since 1803, but had never received any patent of justice or commission, and consequently had never held a court.[3] The New South Wales judicature served very inadequately for the whole settlement.

Turning then to New South Wales, he dealt with the defects of the Civil Court. In the two years during which he had been in the Colony, 1,008 cases had come before him, involving sums amounting to £184,500. The costs of these suits had

[1] Castlereagh was Secretary of State until October, 1809, and was followed by Liverpool, who held office until June, 1812.

[2] See *H.R.*, VII.

[3] According to Rusden, *History of Australia*, vol. i., p. 503, Collins, Lieutenant-Governor of Van Diemen's Land, considered the commission of the Deputy Judge-Advocate related only to Port Phillip. He says that he had been appointed to act in that district, where an attempt at settlement was made in 1803.

reached £2,000 and the amounts recovered £59,000. The growing importance and complexity of the work necessitated, he thought, an additional judge, and lawyers to conduct the pleadings.

He suggested also that some restrictions should be laid on the right of appeal from this court to the Privy Council.

In the Criminal Court he urged that Trial by Jury should replace the present system, and that prosecutions should be conducted by a Crown solicitor.

Finally he reviewed the commission, status, and functions of the Judge-Advocate, and recommended a complete change in his position.

His commission was a military one while his duties were civil. It placed him under the orders of the Governor, while at the same time he was sworn to administer the law of England. "... I can assure your Lordship," wrote Bent, "that the comfort and happiness of any Judge-Advocate, nay, even the proper discharge of his duty, must depend entirely upon the personal character of the person in whose hands the executive power of the Colony happens to be vested."

The duties of the office he considered too heavy for one man, and in many ways inconsistent with one another. Thus in the Criminal Court he acted as judge in cases for which he had himself prepared the indictment, and in which he had the conduct of the prosecution.

This letter of Bent's was accepted in its entirety by the Committee on Transportation of 1812, and they embodied its proposals in their Report. But Lord Bathurst, the new Secretary of State, held different views. He described in a letter to the Governor, in 1812,[1] the reforms which were to take effect in a new Charter of Justice to be issued for the Colony.

He agreed that thorough changes were necessary in the Civil Court, that the cases required "more elucidation than what the parties, as they have no professional assistance, are able to produce," and that the decisions "are frequently too summary, while they are at the same time not sufficiently conclusive, and from most of them an appeal to His Majesty in Council is allowed".

[1] D. 13, 23rd November, 1812. R.O., MS.

He proposed to "divide the labour" and establish two courts, the Supreme Court and the Governor's Court. In the latter the Judge-Advocate would preside and the court be constituted "as the Civil Court of Judicature now appears to be".[1] It was to take cognisance only of cases in which the amount at issue was below £50. A similar court was to be established at Van Diemen's Land, presided over by a Deputy Judge-Advocate.

The Supreme Court was to consist of a Chief Judge and two magistrates appointed by precept by the Governor. This Court was to have an equity jurisdiction as well as cognisance of all civil cases in which the amount at issue was over £50.

Procedure in the Governor's Court was to be summary and subject to regulations drawn up by the Judge-Advocate. In the Supreme Court solicitors were to be employed on either side, and for this purpose the Government would encourage their emigration. The rules of this court and the fees of both were to receive the Governor's approval before publication. No appeals were to be entertained against the decisions of the Governor's Court and the judgment of the majority was to be final. From the Supreme Court appeals might go to the Governor, who was to be assisted by the Judge-Advocate. If the amount concerned were over £3,000, an appeal might be taken from the Governor to the Privy Council. There were also to be safeguards with respect to majority decisions in this court. If the Chief Judge were in the majority, the decision was to be binding. If he were in the minority, and protested against the decision, the protest was to be duly recorded, and appeal might then be made to the Governor, who would, as in other appeals, be assisted by the Judge-Advocate.

The Criminal Court was to be left unaltered, and the Court at Sydney to continue the administration of criminal justice for Van Diemen's Land, a settlement six hundred miles away.

In refusing to accept the recommendations of Macquarie, Bent, Bligh, Hunter (both ex-Governors) and the colonists examined by the Committee on Transportation in favour of petty

[1] He was not quite accurate. The Civil Court in 1812 consisted of the Judge-Advocate and two *magistrates*. The Governor's Court consisted of the Judge-Advocate and two *respectable inhabitants*.

juries, the Colonial Office took a strong step. But the experience of the following seven years, and the lack of unanimity among the colonists when the question was revived in 1819, go far to justify this hesitation, and it is probable that in 1812 much had passed in private conversation and in private correspondence at Downing Street, which made Lord Bathurst slow to accept without further inquiry Macquarie's urgent appeal for the establishment of juries.[1]

"It is, however," wrote Lord Bathurst, "a question how far in criminal cases the trial by jury may not be advantageously introduced. It is not necessary to dilate on the beneficial effects to be derived by that system of dispensing justice, but before it is adopted in New South Wales, it is very necessary gravely to consider how far the peculiar constitution of that society of men will allow of the application of this distinguished feature of the British Constitution: are there settlers in number sufficient, capable and willing to undertake the duties. In a society so restricted is there not reason to apprehend that they may unavoidably bring with them passions and prejudices which will ill dispose them to discharge the functions of judgment? The great principle of that excellent institution is that men should be tried by their Peers—would that principle be fairly acted upon, if free settlers were to sit in judgment on convicts; and that too in cases where free settlers might be a party? Would it be prudent to allow convicts to act as jurymen? Would their admission satisfy free settlers? Would not their exclusion, etc., be considered as an invidious mark, placed upon the convicts, and be at variance with the Great Principle upon which the institution itself is founded?

"These are questions which it will be very desirable should be well weighed, and on which I shall be happy to have your opinion. The proposed alterations in the (civil) Court of Judicature need not wait for their solution.

"On the contrary it may perhaps be desirable that altera-

[1] *Cf. e.g.*, the statement of Atkins, late Judge-Advocate of New South Wales, in regard to settlers at the Hawkesbury: "I think, Sir, that except a very few, a glass of gin would bias them". (Johnston's Trial, p. 17, 1811). Again Dr. Townson in 1814 thought "jury tryal" dangerous at a time when "corruption by spirits was so easy". Enclosure in letter from Wilberforce to Colonial Office, 19th April, 1817. R.O., MS.

tions in so important a part of the internal policy should be gradually introduced."

In his reply Macquarie carried his proposals further than before. He suggested that the Supreme Court should have the power to order Trial by Jury in all civil cases in which they thought "that mode of trial would be best calculated to do justice between the parties".[1] He again proposed the abolition of the office of Judge-Advocate, substituting an assistant or puisne judge, and leaving one of the solicitors to act where necessary at General Courts-Martial.[2] Another assistant judge might be appointed to act with the Chief Judge in the Supreme Court and thus relieve the magistrates "of a duty (which they much dislike on account of the great length of time occupied by these courts in civil cases) and the court and the public gain an accession of professional knowledge and intelligence".

Before this despatch reached Downing Street the new charter, on the lines laid down by Lord Bathurst, had received the assent of the Crown and been published as Letters Patent.[3]

The new Chief Judge of the Supreme Court of Civil Judicature, Jeffery Hart Bent, Barrister-at-Law of Lincoln's Inn, and brother of the Judge-Advocate, had been appointed and had left England early in 1814. At the same time two solicitors, with salaries of £300, had been sent out to conduct the business of the new court.

J. H. Bent arrived in Sydney at the end of July and at once delivered to the Governor the Charter of Justice with which he had been entrusted. He took the oaths of office, and the charter was published on 12th August, 1814. Macquarie wrote that he had every reason to believe "that this gracious measure of His Royal Highness the Prince Regent will prove highly beneficial to His Majesty's subjects in this remote and improving country."[4]

Ellis Bent, however, was deeply mortified by the scant attention paid to his letters, and hoped that this was due to their late arrival when the charter had already been decided upon.

[1] D. 2, 28th June, 1813. R.O., MS.
[2] From 1810 to 1814 only three General Courts-Martial were held.
[3] 13 & 14 Geo. III., Roll of Letters Patent.
[4] D. 11, 7th October, 1814. R.O., MS.

As the Criminal Court had yet to be reformed he thought it worth while to press his former suggestions, and to point out inconveniences that might yet be removed. Of these the chief was the establishment of two courts of concurrent jurisdiction.[1] The division of duties between the Chief Judge and Judge-Advocate altogether was confusing, for the former had civil, ecclesiastical and equity, the latter criminal, admiralty and civil jurisdiction. A minor difficulty arose from the fact that the two civil courts would have to sit at the same time, thus requiring two court-rooms and the attendance of four "of the most respectable inhabitants of the Colony".[2] He was strongly in favour of substituting an assistant judge for these members of the court, who found attendance a burden and were of little assistance to the judge.[3] They were, indeed, either nonentities or obstructionists. Their lack of legal knowledge placed them at a fatal disadvantage when they disagreed with the judge, with the result that they gave an easy assent to his decisions, or if they persisted in opposition found themselves reduced to mere obstinate reiteration.[4]

Bent repeated his recommendations for trial by jury in criminal cases, and thought that grand juries also might be introduced. As, however, there were not more than forty persons for this duty, he suggested as a more convenient method the practice followed in Scotland of trying cases on information filed *ex-officio* by law officers of the Crown.

The provision made for Van Diemen's Land he considered utterly inadequate.

There was one very disquieting feature in this letter. In 1811 the Judge-Advocate had pointed out that under the commission he held difficulties might arise between the executive and judiciary. In 1814 he made it equally clear that those difficulties had arisen. At the beginning of the year Macquarie and the Judge-Advocate had ceased to be on terms of personal

[1] He suggested that a better principle of division might be founded on the nature of the relief sought.

[2] Bent to Bathurst, 14th October, 1814. R.O., MS.

[3] See also letter of 19th October, 1811. H.R., VII.

[4] See, *e.g.*, J. H. Bent's description of Riley and Broughton. Letter to Lord Bathurst, 1st July, 1815. R.O., MS.

friendliness, and at its close they were openly opposed on matters of official concern.

The ostensible cause of the quarrel was a difference in opinion as to the duties of the Judge-Advocate, but the real force pushing them apart, and making both ready to seize on any matter for offence, lay in their entirely different attitudes towards the emancipated convicts.

Writing to Commissioner Bigge in 1819, Macquarie gave the following account of his feelings towards them: "At my first entrance into this Colony," he wrote, "I felt as you do, and I believe I may add every one does—at that moment I certainly did not anticipate any intercourse but that of control, with men who were or had been convicts. A short experience showed me, however, that some of the most meritorious men of the few to be found, and who were most capable and most willing to exert themselves in the public service, were men who had been convicts! I saw the necessity and justice of adopting a plan on a general basis which had always been practically acted upon towards those people."[1] The plan was that once free, whether by servitude or pardon, no retrospect should be held into any convict's former history, but that the emancipist should be placed on precisely the same footing as any other inhabitant of the settlement. Macquarie subscribed to this doctrine early in 1810[2] and the Committee on Transportation gave him their hearty support.[3] But they did so in ignorance of the practical deductions Macquarie had already drawn from it. Although he had spoken of Lord, Thompson and Redfern as "deserving emancipists," he had said nothing of the appointment of Thompson to the magistracy in January, and delayed announcing Lord's appointment in August.[4] Macarthur, who was in England, was astounded by the news. Until then he had been very favourably inclined towards Macquarie and was still ready to absolve him from blame.

"I urge," he wrote to his wife, "that the Governor has been misled, and involved in a mist through which it is impossible he yet can see, by the artifice and falsehood of some persons

[1] Macquarie to Bigge, 6th November, 1819. R.O., MS.
[2] D., 30th April, 1810. H.R., VII. See above.
[3] R. on T., 1812. [4] See Chapter III.

by whose opinions he would naturally be guided on his first arrival."[1]

He laid the blame on Foveaux, who steadily denied any responsibility, saying that he cautioned Macquarie against both men.[2] Bigge heard in 1820 that Foveaux had recommended Thompson, then Chief Constable at Windsor, as "a useful man," a recommendation not inconsistent with cautious treatment, and in no way implying that he would make a good magistrate.[3] The appointment was a precipitate and remarkable one for which the whole responsibility belonged to the Governor.

In the case of both Lord and Thompson the measure was counter to colonial opinion. Reference has already been made to Marsden's views[4] and those of Riley were similar. He declared "that there was no person capable of reflecting on the measure, who did not regret that the Governor had taken so premature and unexpected a step; and I think this sentiment has equally prevailed on the minds of the discriminating proportion of those who had originally been prisoners themselves, as among the inhabitants who came free into the Colony. The appointment[5] unquestionably lessened the respect of the inhabitants towards the magistracy; it was viewed by the mercantile connections of the Colony abroad, and by every stranger who visited it, in the same light."[6]

Thompson died just after his appointment, and beyond a supposition that "the Governor had formed too sanguine an expectation, and that it was unlikely he could have commanded the respect of the district,"[7] there was nothing to be said of his magisterial capabilities. But Lord, though not lacking in natural sagacity, was ignorant and illiterate, and followed the trade of auctioneer and retail shopkeeper. These means of

[1] Macarthur to his wife, 21st April, 1811. H.R., VII., p. 524.
[2] *Ibid.*
[3] Bigge's Report, II.
[4] Bigge shared this view of Riley's, Report II.
[5] *i.e.*, of Lord.
[6] Riley, C. on G., 1819. When Macarthur heard of Thompson's will he wrote to his wife, 21st April, 1811, H.R., VII.: "How, how could Governor and Mrs. Macquarie be imposed upon as they have been? I think the last stroke, of leaving the Governor part of his property, is by far the deepest he ever attempted, whether I view it as an act done in contemplation of death or in expectation of raising himself to higher favours should he live."
[7] *Ibid.*

earning a livelihood were thought to be derogatory to the office of magistrate. His convict origin also was sometimes recalled by prisoners brought before him, and on such occasions unseemly reproaches passed between the Bench and the dock.[1] Finally the irregularity of the private lives of both Thompson and Lord was notorious.

The circumstances of these two men have been thus discussed in detail because it was by their appointment to the magistracy that Macquarie first made known to the settlement the policy he intended to pursue. Had he selected more suitable men probably no opposition would have been roused. No complaint was ever made against the inclusion of the Rev. Henry Fulton in the Commission of the Peace, although he had been transported to the Colony. His crime had been *suspected* complicity in the Irish Rebellion, and he had borne himself in New South Wales with quiet self-respect. His convict origin seems to have been forgotten—that of Lord never was. The other emancipists who were most favoured by the Governor and were admitted to his table on public as well as private occasions, were Redfern, an assistant surgeon; Robinson, chief clerk in the Secretary's office and unofficial poet to the Government; Meehan and Evans, assistant surveyors; Lord and one or two others. Redfern, who had a large private practice, was on intimate terms with a few of his patients, but none of the others were ever invited to the houses of the "more respectable settlers".[2] In 1812 Macquarie asked for the support of His Majesty's Ministers, and particularly for the opinion of the First Gentleman of Europe.

"Some men," he wrote, "who had been convicts, have been appointed magistrates by me;[3] some of the same description of men have been honoured with his Majesty's Commission,[4] which in my mind is alone sufficient proof of the eligibility

[1] See Evidence of Harris, Appendix to Bigge's Reports. R.O., MS.

[2] Redfern had been transported for complicity in the mutiny at the Nore. Robinson's crime was the writing of threatening letters. He was called the Poet Laureate, and used to recite odes, etc., of his own composition, on the King's birthday, at the Governor's leveé and on similar occasions. These effusions may be read in the *Sydney Gazette*.

[3] This was the first official intimation of these appointments.

[4] *i.e.*, Fulton, Redfern, Evans and Meehan.

of these persons to any society."[1] He had found them zealous and faithful officers and ready to assist the Government on all occasions.

In 1813 he pressed the matter once more, and made the first of his bitter attacks upon those who opposed his policy. It was, he said, his invariable opinion "that once a convict has become a *Free Man* . . . he should in all respects be considered on a footing with every other man in the Colony according to his rank in life and character[2] . . . ; on the other hand, while a man is under the sentence of the law he is not eligible to be employed in any place of trust; he is incapable of holding a grant of land, and it would be highly indecorous to employ him as a juryman or in any other public situation of respectability. Persons may be found who . . . may say: 'Is not the man equally to be trusted as a convict, who can be trusted, having ceased to be one?' To this I answer that independent of the merits of the man . . . it is a disrespect to the Laws . . . . It is a necessary respect to the Laws that the sentence should be acted upon as long as it exists. No doubt many of the Free Settlers (if not all) would prefer (if they had *their* choice) never to admit persons who had once been convicts to any situation of equality to themselves. But . . . in coming to New South Wales, they should consider that they are coming to a *Convict Country*, and if they are too proud or too delicate in their feelings to associate with the population of the country, they should consider it in time. . . . No country in the world perhaps has been so advantageous to adventurers as New South Wales. The *Free Settlers* who have come out as adventurers have never felt their dignity injured by *trading* in every way *with convicts* . . . but further than it suits their interest to have intercourse with them, they would rather be excused. I must, however, in justice to the original Free Settlers, observe that . . . they are not all of one mind in this respect. Amongst them some few liberal-minded persons are to be found who do not wish to keep those unfortunate persons for ever in a state of degradation."[3]

[1] D. 6, 17th November, 1812. R.O., MS.

[2] He forgot this when he asked Lord to dinner, for neither his rank nor character entitled him to mix with "respectable" men.

[3] D. 2, 28th June, 1813. R.O., MS.

The Secretary of State agreed in cautious terms with the general principle, for he thought "perpetual exclusion" would be an obstacle to the reform of the convicts of the settlement. "But this principle," he continued, "may be carried too far, and I confess that I am not as yet prepared to say that it would be judicious, unless under very peculiar circumstances, to select convicts for the office of magistrates. The illiberal, though not unnatural, prejudice which you have had to encounter in your endeavour to restore meritorious convicts to their former rank in society would be still more violently excited by their elevation to the magistracy; and the hostile spirit which prevails between the two classes . . . if it did not influence the conduct of the magistrate himself, would at least diminish the respect and deference which ought to be paid to his decisions. A failure also in an experiment of this kind would not only render it difficult to recur to it again, but would confirm those prejudices against associating with convicts which I trust that time and a proper exercise of discretion on your part will ultimately overcome." [1]

Before he left for New South Wales, J. H. Bent, in conversation with Goulburn, suggested that Lord Bathurst had not expressed his disapproval of the appointment of convict magistrates with sufficient distinctness, and received the answer that as "Governor Macquarie had adopted this policy without acquainting His Majesty's Government that he had done so, Lord Bathurst thought that those words would be a sufficient hint to him to withdraw from it, and that it would be fair to give him that opportunity of silently altering his system".[2] Bent rightly doubted "from Governor Macquarie's known obstinacy of character, whether anything less than a positive command would be attended to," for Macquarie treated Lord Bathurst's letter as giving unequivocal approval to his policy.

"It has," he said, "afforded me the most sincere gratification to find . . . that your Lordship approves of my motives and conduct in regard to the re-admission to society of certain persons who had formerly been convicts. . . ." He proposed

[1] Bathurst, D. 24, 8th February, 1814. C.O., MS.

[2] J. H. Bent to Goulburn, 25th June, 1818, recalling a conversation held in 1813. R.O., MS.

to be "particularly cautious" not to advance to the magistracy any person "who shall not appear . . . fully and respectably qualified". He considered that he had heretofore acted on this principle.

He thought at this time that the "illiberality of sentiment" of which he had complained was growing weaker, though those who still felt it were to be found in the higher class, "where a more enlightened and liberal sentiment might have been reasonably expected to be cherished".[1]

It was unfortunate for the peaceful administration of the Colony that he placed Ellis Bent within this unenlightened class.

Macquarie made the protection of the emancipists his great work. He was their special providence, visiting with swift displeasure all who looked at them askance or were even indifferent in their cause. He was as zealous for them and for all that concerned them as ever a man could be for his own children. In every sense "respectable" himself, stiff and unbending in conduct,[2] he easily condoned in this favoured class vices which would have deeply shocked him in others. He had, as it were, "discovered" the emancipist, and he had all the eager advocacy of a pioneer in the cause. Because Bent did not go so far as the Governor, the real liberality of his opinions was overlooked. He felt that "such persons ought not to be forced forward into office or society contrary to the current of general feeling; and that the early received and honest prejudices of others . . . are entitled to much regard and consideration". He disapproved of Simeon Lord's appointment because Lord had neither the respectability nor influence to make him useful as a magistrate, and Bent considered that his elevation "was as contrary to publick opinion as it was painful to my own feeling as a member of the English Bar".[3]

To the Governor, on fire with the vision of leading the lost lambs of society back within its bounds, the Judge-Advocate's sentiments appeared in quite a different light. Macquarie declared himself "particularly hurt by the illiberal manner in which

[1] D. 11, 7th October, 1814. R.O., MS.

[2] Macquarie's ideal of a man and a gentleman would probably have been Sir Thomas Bertram of "Mansfield Park".

[3] Bent to Bathurst, 14th October, 1814. R.O., MS.

he had always treated persons who had at any time been convicts, however remote the period of their offences, and however meritorious their subsequent conduct may have been". From this course Bent had only deviated "in a few particular instances, where he found his pecuniary interest and other personal accommodation concerned, and on such occasion he is not at all scrupulous . . . which conduct shows that his motives in the one case or the other are not those arising from a strict sense of propriety."[1]

The justification for this statement was probably the fact that Bent distinguished between friendly and business relations, and considered the latter separable from the former. Macquarie, however, made no such distinctions. He held a very exalted notion of his position as the head of New South Wales society, and had neither the education nor the natural good taste which would have induced him to distinguish one man from another in the ranks below him. But Ellis Bent was something of a scholar, and, with a delicacy of mind probably heightened by ill-health, shrank from intercourse with ignorant men of doubtful character such as Lord or Thompson.

The division of opinion between the Governor and the Judge-Advocate existed from the beginning, but for long Bent preserved a studious discretion and kept the subject in the background. In all that concerned the Charter of Justice they agreed, and in 1811 Macquarie urged that Ellis Bent should be at the head of the new judiciary. He spoke of him as having "most happily blended the mildest and gentlest disposition with the most conciliating manners, great good sense and accurate legal knowledge".[2]

It was Macquarie also who recommended Jeffery Hart Bent, the Judge-Advocate's brother, to the Colonial Office.[3]

In 1813 several causes for friction occurred. The Judge-Advocate complained unavailingly of the small size of his court-room.[4] The Governor complained that the Judge-Advocate failed to rise with the rest of the congregation when he, the representative of the Crown, entered the church. In

[1] D.1, 24th February, 1815. R.O., MS.
[2] D., 18th October, 1811. H.R., VII.
[3] *Ibid.*
[4] It was an office attached to his house.

November a Government and General Order, signed by the Major of Brigade, forbade "any officer on the civil or military staff of the Colony residing at head-quarters . . . ever to absent himself from thence for a whole day or night without previously obtaining the Governor's permission".[1] Bent, not considering that he was comprehended in such an Order, took no notice of it. Macquarie sent for him, and an angry interview was the result. The Governor said it was Bent's duty to wait every morning at Government House to receive his commands, and "unequivocally informed him that he considered him as an officer on the Civil Staff".[2] Bent replied that he was not bound to obey the Order and "that he was not subject to military discipline".[3] He was indignant that he should be treated merely as a "subaltern officer—a mere cypher—a person sent out simply for his (Macquarie's) convenience and merely to execute his commands".[4]

Such was the state of their relations when the tempestuous presence of Jeffery Bent tore them further asunder.

He was younger than his brother and had been six years at the Bar. He was hot-tempered, abusive when roused, and quick to resent a real or fancied slight. During the three years he remained in New South Wales he waged unceasing war, and his behaviour was scarcely that of a normal man. Loyalty and affection for his brother appear to have been the only gentle aspects of this enraged judge, and never had any Governor to deal with so angry an official. Before he left the Colony every spark of opposition in the length and breadth of the land had been fanned into flame. Under his malevolent eye no abuse could slumber, and under his watchful care was fostered a fresh growth of political activity which bore plentiful fruit in succeeding years. Yet he was moved by no high ideal nor steadfast principle. He was not in any way a vicious man. In all the disputes in which he engaged, wherein many hard things were said or implied against either side, there was never an accusation against his honesty or his sobriety. The primary

[1] The object of the Order was to prevent officers going up to their farms in the country and spending "several days there to the neglect of their public duty". Macquarie did not even pretend to think that Bent neglected his.

[2] Bent to Bathurst, 1st July, 1815. R.O., MS.

[3] See above, 1st July, 1815. R.O., MS.

[4] *Ibid.*

elements of his character were a domineering temper, an overweening conceit and a love of opposition. If he did in fact give his support always to the weaker side, this was not so much because he hated oppression as because he breathed hot enmity against the Governor and the Government.

He had scarcely left England before his troubled spirit found an inattention of which to complain. He was disappointed that he had not been presented to the Prince Regent and received "the honour usually conferred upon professional gentlemen filling similar positions to the one I now hold". He had desired the honour not for himself but in order that "the character of the Colony might be raised a little in the eyes of the world".[1] The reply was that the honour of knighthood was not usually conferred in such cases, and that as the Judge-Advocate was "for various reasons" to remain the head of the judicial establishment, there would in this case have been particular objections to such a course.[2] Thus a grievance existed before the new judge reached land, and he was not long in finding another. "Mr. Jeffery Bent applied to me on his arrival," wrote Macquarie, "to furnish him with a house in Sydney at the expense of the Crown[3] . . . considering himself entitled to that accommodation by virtue of his commission as judge".[4]

The Governor knew that Indian judges were not furnished with houses, and refused Bent's request. But he offered to hire a house for him and await the decision of the Colonial Office if the judge would promise to refund the rent paid by the Government in the event of the decision being unfavourable. "Mr. Bent," wrote Macquarie, with an abruptness which suggests that the battle between them had already been joined, "has declined these terms." The judge took up his quarters at Ellis Bent's house (which was provided by the Government) and remained there for the next two years. His next demand was for chambers, which he said were always allowed to English judges in distant settlements; Macquarie acceded to this request, "in

[1] Letter to Bathurst from Corunna, 21st February, 1814. R.O., MS.
[2] Goulburn to Bent, 1814. C.O., MS. The Judge-Advocate's four years' service and his success in the office, as well as the fact that he had a military commission, were the chief reasons. Some acquaintance with Jeffery Bent may have supplied others.
[3] D. 11, 7th October, 1814. R.O., MS. [4] *Ibid.*

order," he said, "to accommodate him as far as I felt myself justifiable". After that the Governor doubtless expected to carry his plans for the court-house without further opposition. In 1813 it had become clear that if another court was to be established, the Judge-Advocate's office would not provide sufficient space. Macquarie proposed to build a court-house, and a voluntary subscription list was opened which the Government headed with £500. The cost of the materials Macquarie calculated at £5,000, and he wanted a Parliamentary grant of £2,000 to help out the subscriptions. The labour was to be supplied by the convict gangs. Although tenders were called for and accepted, the whole project was abandoned in November, very much to the disgust of Ellis Bent, who blamed Macquarie for not "withdrawing the artificers and labourers from other public works".[1]

In 1814 the Governor put forward a new plan. The hospital was almost completed and was on a scale far too extensive for present needs. It consisted of a main building containing four large wards, and two detached wings of considerable size intended for the residences of the chief surgeon and his two assistants. Macquarie thought that half of the main building—what he called "a wing of the hospital," should be appropriated for the sittings of the courts. The Colonial Office, as well as the Bents, took this to mean one of the detached wings, and agreed that the arrangement was a suitable one. But when the judges discovered that Macquarie meant to use two of the hospital wards they were very indignant. After a long discussion the matter was referred home, but it was of course too late to make any alteration in Macquarie's plans, and His Majesty's Court of Justice were "compelled to sit in the wards of a common hospital".[2] Goulburn, writing to Bent in 1815, hoped that this minor matter would not disturb his

[1] D. 1, 24th February, 1815. R.O., MS. There is no reason given for abandoning the scheme. Perhaps the subscriptions came in too slowly.

[2] Bent (J. H.) to Goulburn, 16th December, 1814. R.O., MS. The wards were used exclusively as court-rooms and fitted up as such. In 1820 at Bigge's suggestion the plan originally advocated by the Bents was carried out with Macquarie's full concurrence, and one of the surgeons' residences turned into a court-house. D. 12, 28th February, 1820. R.O., MS.

"cordial relations" with the Governor.[1] Alas, their cordial relations have long been broken past repair.

Close upon the court-rooms dispute had followed the Judge-Advocate's retirement from the Magisterial Bench and his quarrel with Macquarie over the Port Regulations.

"From the earliest establishment of this Colony," wrote Macquarie, "it has been the invariable custom for the Judge-Advocate to preside (when his health permitted) at the Bench of Magistrates at Sydney, and Mr. Bent continued to do so from the time of his arrival until the 31st of December last."[2]

When the Book of Proceedings was laid before Macquarie on the 31st of December he read the following entry: "On this day the Judge-Advocate stated to the magistrates that a due attention to his leisure, his health, and the other functions of his office, rendered it necessary for him to decline presiding at their meetings in future". He had told the Governor nothing of his intention to withdraw, though he had probably formed it some time beforehand. "Notwithstanding it has greatly interfered with my other functions," he wrote to Lord Bathurst, "and was in my opinion improper that the Principal Judge of the Criminal Court should perform the ordinary duties of a Police Magistrate, a wish to render myself as useful as possible has induced me till of late to preside at the weekly meetings of the magistrates."[3] He was, however, thoroughly dissatisfied with the position assigned by the Governor to the magistrates, and with the fact that he was not consulted as to their appointments or in reference to Orders concerning them published in the *Gazette*.[4] The Order of the 10th December, 1814, had deeply offended him.[5] He had indeed made a fruitless protest to the Governor, who "seemed to consider that my feelings were too acute, and added that he would cashier any magistrate who would not attend to his Orders".[6]

The office in which the Bench met was small, the time mid-

[1] Goulburn to J. H. Bent, 11th December, 1815. C.O., MS.
[2] *i.e.*, December, 1814. Macquarie's D. 1, 14th February, 1816. R.O., MS.
[3] 1st July, 1815. Bent to Bathurst. R.O., MS.
[4] See Chapter III.
[5] *Ibid.* The Order censured the magistrates for the careless way in which they granted certificates for pardons.
[6] 1st July, 1815. R.O., MS.

summer, and the Judge-Advocate in bad health. It was natural enough that he should wish to give up this extra duty, though his manner of doing so could hardly help giving offence to Macquarie. But Bent was afraid that, should he mention his intention, the Governor would "misconstrue the communication and consider me as applying for permission to do that which I conceive His Majesty's Charter placed within my own discretion".[1] His retirement was followed by a stormy but resultless interview, and an Order was published in the *Gazette* which announced that the Judge-Advocate had thought fit to decline presiding for the future at the weekly meetings of the Bench.[2] This announcement, curt and unfriendly in tone, was the first public indication of the strained relations between them. On the day on which he ceased to preside on the Bench the Judge-Advocate sent to the Governor his Observations on the Port Regulations.

These Regulations formed the special Trade and Navigation Laws of the Colony. In October, 1810, Macquarie had re-issued those of his predecessors, but in 1814, in view of the opening of the ports, he decided to issue a new edition. He sent a rough draft to the Judge-Advocate for his "revisal and correction". For nearly twelve months pressure of work and illness delayed the task. But on the 31st December the Governor received from Bent a Report on the Regulations which was little likely to please him. Instead of a corrected proof wherein exact legal point was given to the layman's English, he received a criticism condemning practically all the new clauses in the draft.

After considering each clause and noting its defects, Bent proceeded to add some "General Observations".

"Having given much attention to this subject," he wrote, "I may venture to express my opinion thus: the laws enacted at different times by the British Legislature for regulating the trade with the plantations, should be the basis of the Port Regulations here. That they are supposed to apply to this Colony is sufficiently clear, because every Governor, previous to assuming his Government, is commanded by his Commission, to take an Oath for the due execution of them; and I may further add that

[1] 1st July, 1815. R.O., MS. [2] G.G.O., 28th January, 1815.

they cannot be legally altered or dispensed with by any authority short of that of the British Legislature.[1] . . . Those laws are much more ample in their provisions on almost all points mentioned in these regulations themselves—which if they are considered as comprehending the whole law of the Colony on this subject are very defective, as they totally omit several important matters, and from the unavoidable looseness with which they are worded afford but too many loopholes through which offenders may escape, as it is a known principle of our laws that all penal laws must be construed strictly, and no offender punished unless he is brought within their very letter. To introduce an abbreviation of the laws relative to the plantations in the Port Regulations would be a work of great labour, would swell them to an enormous size, and might be attended with the mischievous consequences which would result from any inadvertent omission. For these reasons I consider it more advisable simply to notify the masters of ships that in their trade and intercourse with this Colony they must govern themselves by those laws of which they cannot plead ignorance. The local purposes of the Colony undoubtedly demand consideration, but in providing for them the liberties and conveniences of others, should be as little restrained as the nature of the case will admit. Local circumstances, so far as they are connected with this subject, seem to be confined to the provisions necessary to adopt to prevent the escape of convicts and the indiscriminate importation of spirituous liquors; and excepting such provisions as may be necessary on these accounts, I see no reason why the intercourse with the Colony should not be on the same footing as the rest of His Majesty's foreign dominions. I know of no Act of the Legislature which directs otherwise."[2]

Macquarie attempted to combat Bent's legal argument by the usual resort to "the peculiar circumstances of the Colony". If it should happen that any of the regulations were contrary to a statute, then "the Port Regulations should be considered as the Warrant of Authority".[3]

As Bent persisted in his refusal to correct the draft,

[1] He gives as authority for this statement 49 Geo. III., cap. 17, section I.
[2] Enclosure to D.1, 24th February, 1815. R.O., MS.
[3] Enclosure to same.

Macquarie began to lose his temper. On the 9th January he wrote, "I was very much chagrined and disappointed to find on conversing with you this day on the subject of the Port Regulations of this Territory, that you were unwilling to frame them in the manner and on the principle proposed by me in the manuscript draft I had some time since the honor to submit for your revisal and correction, on the plea that you did not conceive the proposed regulations were warranted by the law. In this opinion I must beg leave to differ from you . . . ; and as you are the only Law Officer now here belonging to the Crown, I must still call upon you, in this official manner, to revise and frame the proposed Port Regulations . . . so as to enable me to publish them with as little delay as possible. . . . Trusting you will see the propriety on more mature reflection of complying with my present request, and thereby prevent my being compelled to resort to the unpleasant alternative of making a reference to His Majesty's Ministers on this subject,

"I am, etc.," [1]

Bent took a rather high line in reply—

"His Majesty," he wrote, "has been graciously pleased to confer upon me the offices of Judge of the Court of Vice-Admiralty and Judge-Advocate in this Territory. By virtue of the first office I have to exercise various and important judicial functions. By virtue of my office as Judge-Advocate I am a magistrate throughout this Territory, and have to officiate at general Courts-Martial whenever called upon by your Excellency, to preside at the Chief Criminal Tribunal in the Colony, at one of the Civil Courts of the Territory, and judicially to assist at the Court of Appeal. To these duties I may also add that of giving my legal opinion to your Excellency on such matters as you may think fit to submit to me for that purpose. These various duties are as much as one man can properly perform, and I hope are sufficiently laborious to excuse my declining other labours not distinctly attached to my office and which I never did or could imagine would be required of me.

"I have," he continued, "to the utmost of my ability, fur-

[1] Enclosure to same.

nished your Excellency with my observations on the proposed Port Regulations, and beg leave to say that some of these deviate so much from the known laws of the realm that I do not think they can be legally enforced on your Excellency's authority alone. . . . If your Excellency . . . chooses to take . . . the responsibility of acting contrary to my opinion, I think it becomes a delicacy due to my judicial character to select some other person to draw them up; for . . . I cannot in the due discharge of my duty to my Sovereign or to my conscience consent to attempt to give legal form to that which is illegal, or to frame or draw up regulations many of which in the due exercise of my functions as a judge, and with proper regard to my oath to administer justice according to law, I cannot enforce in my judicial capacity. . . . Your Excellency will excuse me for saying that your orders would be no justification to me in my own eyes or in the opinion of His Majesty's Ministers, more particularly if I am right in my opinion that it is no part of my official duty to draw up your Excellency's Regulations." [1] Macquarie had no answer to make, and could only refer the matter home.[2] A few months later Bent also appealed to His Majesty's Ministers, reviewing very fully the Governor's exercise of legislative powers and making a powerful plea for its restraint. "My Lord," he wrote, "I feel it my duty humbly to offer my opinion . . . that when there is reason to suppose that local circumstances require extraordinary deviations from the Laws of England, that the Governor should first point out those circumstances to His Majesty's Ministers, and that the remedy should come from that quarter which can alone give it legality. But that a Governor of New South Wales of his own authority, implied from but by no means granted by the words of his Commission, should make laws imposing penalties of £500, or hard labour at the coal mines for three years, upon free British subjects, to be inflicted at the discretion of magistrates, . . . is a circumstance which I cannot but consider to be wholly unknown to His Majesty's Ministers[3]. . . . in far the greater number of cases this power is exercised without the smallest reference to His Majesty's Law Officer and without any inquiry

[1] Enclosure, D. 1, February, 1815. R.O., MS. [2] *Ibid.*
[3] This was penalty for taking away convicts from New South Wales.

how far the Law of England may have provided for the subject matter of them,[1] and they are not regularly registered in any of the Courts of Justice here nor . . . submitted to His Majesty for approval.

"I hope that I am not presuming too much when I express a humble confidence that it never could be intended that so vast a power should be placed in the hands of any one man without the smallest provision against its abuse; a power which, as far as this Colony is concerned, and under the bare pretence of local circumstances, I will be bold to say sets the Governor of New South Wales above the Legislature of Great Britain, and at once resolves the rule of action here into the mere will of the Governor, a will not subjected to any previous advice or controul."[2]

So far as these considerations affected him as a judge he had no longer any doubts. "I am now convinced," he wrote, "that it is impossible for me, unless some alteration takes place in the opinions and conduct of Governor Macquarie, honestly and uprightly to perform my duties under such a commission without a total sacrifice of my peace of mind and injury to my health, already much broken." He asked that "with the functions of a judge" he should also have the title, and "that independence of the Colonial Government which . . . is so essential to the upright execution of my office".

Macquarie's exasperation compares badly with Bent's dignity. He wrote that Bent was "insubordinate and disrespectful," and that he would have suspended him or sent him to England had there been any one in Sydney capable of performing his duties.

At the same time the Governor's faith in the Port Regulations had been severely shaken, and he transmitted them both old and new for the opinion of the law officers of the Crown.[3]

[1] An instance of this occurred some years later when Macquarie published some Orders increasing the penalties on trespassing. Judge Field pointed out that they went far beyond the English Law on the subject, and persuaded the Governor to revise the Orders. See Appendix, Bigge's Reports. R.O., M.S.

[2] 1st July, 1815. R.O., M.S.

[3] D. 1, 24th February, 1815. R.O., MS. No opinion appears to have been given, and in 1819 Macquarie, apparently taking silence for consent, gave them to Judge-Advocate Wylde to put into shape. The Judge-Advocate objected to some of them, but Macquarie replied simply that the law officers had allowed them

The Colonial Office had to deal with this dispute together with the difficulties arising over the emancipist attorneys, and their action must be considered with a knowledge of both.

By February, 1815, all but official intercourse between Governor and Judges had come to an end. The court-rooms at the hospital were ready for use, and that fact "had been officially signified to Mr. Justice Bent."[1] The Governor had taken that opportunity to suggest "the expediency and necessity of appointing an early day for the opening of the Supreme Court". Bent declined to do this until Mr. Garling, the solicitor, arrived, a reason which Macquarie characterised as "very frivolous and ridiculous . . . as it is very possible that Mr. Garling may never arrive at all in this Colony, and as there are several attorneys (exclusive of Mr. Moore, the solicitor, already arrived) here who have hitherto practised before the former courts . . . but," he added ruefully, "as I have no control over Mr. Justice Bent, in virtue of the new patent, I can only remonstrate with him . . . which I have already done more than once without effect".

The pretext was not really a frivolous one. The presence of the two solicitors sent out by Government would have been invaluable to Bent in the coming struggle. But Garling's arrival was so long delayed that finally the opening of the courts could be no longer postponed.[2]

It was true that there were other attorneys in the Colony, and the conditions under which they practised have been already described.[3] Moore and Garling had been encouraged to emigrate, and given salaries by the Government for no other reason than to bring to an end the employment of these convict attorneys.

The chief was George Crosley, who had for a long time held the whole of the law business of the Colony in his hands. But a year before J. H. Bent's arrival, Eager, another convict,

to pass and their authority was higher than Wylde's. After that Wylde said no more, and the Regulations, with some alterations from those submitted to Bent, were published in 1819. See Appendix, Bigge's Reports. R.O., MS.

[1] D. 4, 24th March, 1815. R.O., MS.

[2] Garling came in the *Frances and Eliza*, a male and female convict transport, which was captured by an American privateer and afterwards recaptured. He arrived after many adventures late in 1815.

[3] Chapter III.

had entered into competition with him, and in the last term of the old Civil Court, Chartres had appeared for the first time. J. H. Bent thus described the three men.

"George Crosley was struck off the rolls of the court of King's Bench and transported to this Colony for perjury. . . .[1] Eager has been transported here within the last six years for forgery, and has never, as far as I can learn, been admitted an attorney of any court. And Chartres has been sent here for a species of the *crimen falsi* within the last five years, and at the moment keeps a public house, and both[2] are under the sentence of the law."[3]

The new judge had heard of these men from his brother before he left England, and had endeavoured without success to obtain a definite statement from Lord Bathurst "with regard to the practice of the convict attorneys".[4] In the Colony the divergent views of the Governor and the Bents were well known, and trouble was probably anticipated. On the 22nd April the first sittings of the new courts were summoned, and the Governor's precept appointing Hook and Brooks as members of the Governor's Court, Broughton and Riley as members of the Supreme Court, was published on the same day. The Supreme Court was to meet on the 1st May and the Governor's Court on the 8th.

The emancipist attorneys decided that to appeal straight to the courts was dangerous. They looked upon the Governor as a higher authority and sought his support first. Macquarie explained the situation in an official letter to J. H. Bent dated 18th April, 1815.

"I have," he wrote, "lately received memorials from some of those attorneys who have hitherto been allowed to practise in the line of their profession in the Courts of Civil Jurisdiction . . . who being now apprehensive that it is in contemplation to exclude them from that indulgence in the courts about

[1] See Chapter II. for reasons why King pardoned Crosley.

[2] *i.e.*, Eager and Chartres. Both held tickets-of-leave. Eager received an emancipation a few years later and a free pardon in 1819. Chartres' license must have been in his wife's name.

[3] Bent to Goulburn, 1st July, 1815. R.O., MS.

[4] Letter to Goulburn, 25th June, 1815. R.O., MS. See also earlier in this Chapter.

to be opened under the new patent, solicit my interference in their behalf." He supported their claim on two grounds. One was that their exclusion would bear hardly on those of their "constituents" who were out of the Colony and whose causes were pending. The attorneys would suffer too, for they asserted that they had already advanced large sums in these cases. The other reason was that exclusion without specific cause would cut them off from all means of obtaining a livelihood by the practice of the profession in which they had been brought up.[1]

Macquarie thus altogether ignored the real point at issue, which was whether men struck off the rolls in England could properly continue in an English Colony to practise the profession they had disgraced. Bent, of course, was furious.[2] Though in comparison with later correspondence the tone of his answer is calm, there is in it no sign of yielding. "As I am under the necessity," he wrote, "of seeing the subject in a very different light from that in which it is viewed by your Excellency, and therefore of withholding my assent to the application of those petitioners, the respect which I entertain for your Excellency makes me feel it desirable to lay before you the reasons by which I am influenced."

By the Governor's support of the petitions he felt himself "placed in a most unpleasant and delicate situation, and the other members of the court, in coming to a judicial decision, will be subjected to the operation of an influence which ought never to be applied to, and is inconsistent with the independent deliberation of an English Court of Justice. I mean the open, avowed and direct communication of the opinion of the Executive Government on a point under judicial discussion. I am perfectly alive to the importance of a candid union between the Executive and Judicial Departments in this Colony, but I must observe that the functions of each are distinct and should

[1] 18th April, 1815. Enclosure to Bent (J. H.) to C.O., 1st July, 1815. R.O., MS.

[2] In 1819 many colonists who had known Bent intimately told Bigge that it was this interference on Macquarie's part with the business of the court that "first excited resistance" in Bent against the Governor's measures; but, as has already been seen, it did not create it. See, however, Bigge's Report I., and Harris' Evidence, in Appendix to Reports. R.O., MS.

be exercised without collisions, and therefore I cannot but think the conduct of the Petitioners most blameable, highly disrespectful to the courts of which they wish to be admitted as attorneys, and calculated to occasion divisions between the Executive and Judicial Departments, by requesting your Excellency in a most unprecedented and unprofessional manner to exercise undue influence in their favour with the Supreme Court; thereby insinuating most unworthily and manifestly that the court would grant to the recommendation of your Excellency what they would not grant to the merits of their respective cases."[1]

This description of the facts was perfectly accurate, and Bent proceeded to drive home his points in workmanlike fashion. The petitioners (and by implication the Governor) appeared to be ignorant of the law which gave to each court "the discretion to admit or strike off the roll of their attorneys such persons as they may think worthy or unworthy". Were men so ignorant of their profession to be allowed to practise it?

But that was a small matter in comparison with others. There was, for example, the fact that the petitioners omitted the important fact that they had been transported for the crimes of perjury and forgery. Yet these were the facts on which the whole case turned. Crosley and Eager (and again, by implication, Macquarie also) had disingenuously omitted all mention of them.

The injury, he proceeded, to distant clients was materially lessened by recalling that under the rule of 1812 the emancipist attorneys had practised on sufferance, only until other provision might be made. There might even be a doubt whether any such clients existed, for their names had not been given.[2] The story of the money which had been advanced he treated with frank scepticism. Was it likely, he asked, that Eager, for example, who had been in the Colony less than six years, should be in a position to advance large sums? But if he had done so, he had done it knowing how small were the probabilities of his being allowed to practise when free attorneys had come out

[1] The petitions forwarded by Macquarie were those of Crosley and Eager, not Chartres.

[2] Their names never were given.

under the sanction of the Government. His concluding words were decisive.

"In a word," he wrote, "it is my object and my duty to render the Supreme Court of Judicature in this Territory as respectable as possible, in the eyes not only of the Colony, but of the world—an object which must be defeated by my compliance with the Petitioners' request. In no other part of His Majesty's dominions would they be allowed to practise as attorneys, and whatever reason may have existed before this time for extending such an indulgence to them, none can be now pretended to exist after the liberal provision which His Majesty's Government have made for this purpose by the appointment of respectable solicitors at a considerable expense to the Crown—an appointment which would be rendered wholly unnecessary by granting the Petitioners' application." [1]

The Governor made no reply to this letter, and when the court met on 1st May he was making a tour in the Blue Mountains from which he did not return until the 19th of the month. He thought that the admission of the emancipists was assured, for whatever Bent might think, the two magistrates who were to sit with him had seen the Governor's letter and stated their agreement with its contents.[2] However, matters did not go as smoothly as he had anticipated.

At its first meeting the court decided to hear the petitioners on 6th May. On that day Crosley and Chartres were heard, but Eager was ordered to prepare a new petition, his first one not being properly drawn.

On 9th May, Bent held a consultation with the other members of the court and attempted in vain to bring them over to his view. He argued that "If . . . those who had been convicts were admitted, how would it be possible to refuse to admit any persons coming from England or Ireland struck off the rolls at home, or of bad conduct and with the fear of it before them. Such would naturally flock here; and if it is not possible for the judges at home, with the assistance of an honourable and learned Bar, and every means that attorneys and officers habituated to correctness in business can give, to

[1] 22nd April, 1815. Enclosure to Bent's letter, 1st July, 1815. R.O., MS.
[2] This is quite clear from Bent's letter, 1st July, 1815. R.O., MS.

prevent the frauds and mischiefs which individuals suffer from the mal-practices of those who are a disgrace to the profession and a menace to the public, how could judges here without such assistance or means of prevention guard against the chicanery and the never-ceasing tricks of those who have been expelled their profession and transported here in punishment of their misconduct." He did not, however, desire to give the two solicitors sent by the Crown a perpetual monopoly. "The rule I should have proposed to adopt was the rule in India, *viz.*, that all admitted attorneys in England or Ireland, or articled clerks to such, bringing with them their certificates of good conduct, and all persons who had been articled clerks to attorneys admitted here, should be admitted attorneys of the respective courts; and that without any limitation as to number. . . ."[1]

Broughton and Riley, the two men whom he tried to convince, were of very different calibre, but alike in knowing little of the law. Riley, who has been frequently mentioned, and who was the chief witness before the Committee on Gaols in 1819, was a successful merchant and an honest, straightforward and intelligent man. He was not in any respect dependent on the Governor's favour, but did in this case hold the same opinion. He had sat many times with the Judge-Advocate in the Civil Court, and had not once dissented from his views.[2] Broughton, who had begun his colonial career very low down on the Commissariat Staff and slowly risen to be Deputy-Commissary General,[3] was a burly, blusterous man, ignorant and blunt, but nevertheless a great favourite with Macquarie. Riley was under no obligations to the Governor and was soon afterwards sharply opposed to him in a matter of trade,[4] but Broughton was very much under Macquarie's influence.

On neither could Bent make any impression. "The statute 12 Geo. I., cap. 29, s. 4" and "the case *ex-parte* Brownsall," they

[1] See Bent, 1st July, 1815. R.O., MS. This rule would not have necessarily excluded convicts who had become articled clerks in the Colony and had not previously been attorneys in England or Ireland.

[2] Bent, 1st July, 1815. R.O., MS.

[3] It is significant that, although Macquarie several times urged Broughton's claims, he never reached a higher rank than this.

[4] The trading ventures on transport vessels. See Chapter V.

passed over to dwell upon the Report of the Committee on Transportation which set forth Macquarie's principle "that long tried good-conduct should lead a man back to the rank of society he had formerly filled," leaving out, said Bent, the next words, "as far as the case could admit".

"Without inquiring," he wrote, "what shall be the marks by which to discover long tried good-conduct, or whether the mere circumstance of not having been brought before a Criminal Court in the Colony is a proof of it—I may safely assert that the good-conduct of the persons in question, . . . had neither been long nor tried."

The two magistrates told him that the local circumstances of the Colony made it necessary to deviate from the strict custom of other countries. "The local circumstances of this Colony," he replied caustically, "have from its first formation been an excuse for every illegality that caprice or ignorance could dictate. . . ."

Finding them immovable in their opinion, Bent felt himself "obliged to come to a determination to refuse to admit or swear in persons so circumstanced, and to declare that if the attempt were persisted in to force them upon me, till His Majesty's pleasure should be known, I should be compelled to discontinue the sitting altogether".[1]

Riley and Broughton declared that Bent wished to make a rule of general application altogether excluding emancipists from practice.[2] Bent on his side declared that it was the magistrates who "endeavoured to mix a general abstract principle with the case before the court". The fact was that Bent placed before them the general principles by reason of which he proposed to reject the petitions in question, and that the magistrates confused the premises and the conclusion.[3]

The court met again on 11th May without having agreed upon their course of action. W. H. Moore, one of the Government solicitors, as he and Garling were called in the Colony, was admitted, and Bent administered the oaths. Crosley then

[1] 1st July, 1816. R.O., MS.
[2] Report to Macquarie in his D. 4, 24th March, 1815. R.O., MS.
[3] Bent's letter, 1st July, 1815. R.O., MS. See rule suggested by Bent above, which shows clearly that he did not wish to exclude all emancipists indiscriminately.

attempted to address the court. The judge declared that he had been heard already, and after a hot dispute he was forced to desist. Bent then pointed out to the court that the petitions of Eager and Chartres were inadmissible as neither of them had ever been admitted as attorneys. The issue was thus narrowed and the case of Crosley alone remained in question. Bent stated his determination not to admit him or any persons of his description. Broughton was undecided about Crosley, but would not exclude all such persons. Riley concurred in this. The judge made a violent speech, flinging accusations against the good faith and the characters of the two magistrates on the Bench beside him. As soon as the court adjourned Riley and Broughton drew up a report of the whole affair for the Governor. They refused to sit with Bent again, and resigned their appointments as members of the Supreme Court. But the Governor refused to accept their resignation and the court met again on 25th May. A few minutes' talk in the judge's chambers showed that no essential change had been brought about by the adjournment. Broughton was more eager than before to express his views, and signified his intention of making a speech in court. Bent proposed that further discussion should cease until His Majesty's pleasure be known. The case of Crosley, which the magistrates had considered a doubtful one the week before, might stand over, and as Garling would soon arrive no inconvenience need be suffered. The compromise was a fair one and should have been at once accepted. The fact that it was not was due to Bent's violence on the 18th May, and Macquarie's zealous encouragement of the magistrates after his return from the country.[1]

When this moderate proposal was refused and Broughton persisted in his intention to address the crowd in the court-room, Bent refused to open the proceedings at all and sent his clerk to adjourn the sitting, for without the chief judge the court could do nothing. At first the two members declined to adjourn and threatened to commit the clerk to gaol. Finally they gave in, and the ridiculous scene came to an end.

The Supreme Court never again sat under the presidency

[1] This is quite clear from the despatches of Macquarie, especially D. 4 of 1815, Bent's letter of 1st July, 1815. R.O., MS.

of Jeffery Hart Bent. For two years the judicial interregnum lasted, and Bent, the first Supreme Court Judge of Australia, never heard a cause nor delivered a judgment.

It is difficult to say what other course he could have followed. Diplomacy and conciliatory speech might have done much, but the Governor would only have been satisfied by Crosley's admission, and it was the Governor who was Bent's real antagonist. Had the judge given way and admitted Crosley, the principle of the admission of emancipist attorneys would have been established, and there is no reason to believe that the Colonial Office would have interfered afterwards to reverse it.[1] Yet even Riley saw that he had committed an error of judgment. "I am compelled to admit," he said, "that during this period [2] I had occasion to observe that numbers of the very class of men [whose cause] I had strenuously advocated, acted with so little consideration towards each other during the suspension of the law, and took such advantage of the merchants and those to whom they were indebted, that I could not but regret the line I had pursued." [3] He would not say definitely that the admission of emancipists would have been actually mischievous, but only that it was "advantageous to the territory that there are sufficient free solicitors . . . to enable the courts to proceed without resorting to that necessity," and that it was "desirable that not any persons should now officiate in the courts, who have not gone free to the Colony".

Amongst the convict and emancipist population the emancipist attorneys had considerable popularity. This was born partly of long intimacy and private association, but it was increased by the mode they adopted of charging their clients. The emancipist attorney took a percentage on the amount recovered in place of ordinary fees, and was therefore willing to undertake risky suits at no expense to his clients. So long as the fees of the courts went to the judges this practice was to their advantage also, for certainly it augmented the number of cases brought before them! [4]

[1] They would probably have acted as they did in regard to the first convict magistrates. See above.

[2] *i.e.*, while the court was closed. [3] C. on G., 1819.

[4] See Evidence of Wylde, Appendix, Bigge's Reports. R.O., MS. Business in the Governor's Court fell off when emancipists were excluded.

In the Governor's Court matters took a different turn. As the procedure there was summary, and suitors were not called upon to employ solicitors, and as the amounts recoverable were below £50, the emancipist attorneys were less eager for admission and did not seek the Governor's intervention. They knew too that the Judge-Advocate was opposed to them, and when the court met after a short postponement on 15th May, there were no petitions for admission brought before it. Associated with Ellis Bent were Richard Brooks and Charles Hook, both respectable and undistinguished colonists. They agreed at once to the adoption of the rules proposed by the Judge-Advocate, of which the first ran as follows :—

"It is ordered by this court that no person whatsoever who has been struck off the rolls of attorneys of any Court of Justice in any part of His Majesty's dominions for any offence for which such persons are liable by the Laws of England to be transported, shall on any account be admitted to practise as an attorney of this court."[1]

The court then proceeded to hear suits brought before it. A month afterwards Macquarie asked for a copy of the Rules and Regulations, "conceiving myself entitled," he wrote, "to such information from you according to the tenor of the new patent".[2] Since the 22nd of April he had known that the Judge-Advocate concurred in his brother's opinion,[3] and had of course heard of the rule which had been passed in the Governor's Court.

Ellis Bent sent the copy asked for, but added, "I respectfully beg leave to be understood as by no means admitting a right on the part of your Excellency to controul that court in the adoption of such rules as it may think proper to form as the basis of its practice".[4]

The closing of the Supreme Court created great commotion. The emancipist attorneys proposed to hold a public meeting, and brought a requisition to the Provost-Marshal. But when it was laid before the Governor, he felt that the signatures were

[1] Enclosure to Macquarie's D. 5, 22nd June, 1815. R.O., MS.
[2] Macquarie, D. 5, 1815. See above.
[3] Bent (J. H.) stated the fact on his brother's authority in his letter of 22nd April, 1815. R.O., MS.
[4] Letter to Macquarie, 18th June, 1815. Enclosure, D. 5, 1815.

not of sufficient weight to justify him in allowing the meeting to take place. Simeon Lord was the only magistrate who had signed the requisition, and of the eight others five had been convicts. An attempt was made to secure the support of "more considerable persons," but without success, and no meetings were held. The purpose of the meeting as described in the first requisition was "to inquire into the circumstances which had taken place in the Law Courts". In the second it was more obscure, for the meeting was "to inquire into the Judicial, Commercial and Agricultural state of the Colony". Meanwhile a very extraordinary correspondence took place between Macquarie and Jeffery Bent. It was commenced by the former on the 29th May, ten days after his return to headquarters. He had been surprised at not receiving a personal communication from Bent, but had learned of the differences which had arisen, and of the closing of the court, from the other members. As a Civil Court had not sat for ten months[1] "the security of persons and property, and the best interests of the Colony" both internal and external, were being seriously affected. These matters had apparently escaped his attention while he had allowed "points of minor importance" to frustrate the great design "for which," added Macquarie, in a sentence admirably suited to inflame the temper of the judge, "I had assembled the Supreme Court".

"I cannot," he proceeded, "forbear to express to you that I feel much surprise, mingled with sentiments of regret" (a constant combination of sensations in Macquarie), "that you have not made me as Governor of this Territory any official or other communication on this very important occasion, the publicity of which could leave no doubt of its existence. If official duty had not imperiously demanded a prompt communication, I should have been disposed to expect it even as a point of courtesy . . . in our relative situation in this country." He felt bitter chagrin that he had himself to open a correspondence which he had hoped would "long ere this have commenced on your part, as well from a sense of personal respect as from the more distinct feeling of its being a duty incumbent on the

[1] *i.e.*, since the publication of the new charter.

Principal Judge of the Supreme Court to make me a report on an event wherein the Colony at large is so deeply interested".[1]

Bent replied with considerable zest. If the Governor had to complain of discourtesy, Bent also had to lament the "unprecedented disrespect and indignity with which as one of His Majesty's Judges" he had been treated. It was not a matter of minor importance "whether persons so peculiarly circumstanced as George Crosley, Edward Eager and George Chartres should be solemnly accredited, not to this Colony but to the whole world, as in every respect fit persons to be entrusted with the management of all legal concerns whatever". . . when I well know that it is an object of numerous Acts of Parliament, and of the regulations of all His Majesty's Courts of Justice, to do all that lies in their power not to admit as attorneys those whose characters were disreputable or suspicious". But this matter had been already discussed, and he turned from it to a more particular criticism of the Governor's communication. It was not his duty, and he had not considered it expedient, to report the differences which had arisen on a subject which the Governor had already prejudged. "My functions," he continued, "are entirely distinct from those of your Excellency, and in the exercise of them I am not accountable to any but to those to whom your Excellency is also accountable; I am not placed under your Excellency's command either by the tenor of my commission, by His Majesty's charter, or by any official instruction from His Majesty's Ministers". Macquarie had assumed a superiority and a right of command over him which he did not legally possess and to which Bent refused to submit. The only effect of such a tone and language, he went on, was to produce a useless irritation of his feelings. The Governor had, by the charter, no legal right to assemble or adjourn the court, nor had he any right to refer to Bent as the "Principal Judge of that Court". He was, on the contrary, the only judge, and was denominated "*The Judge*" in his commission and in the charter. In that connection the Governor had been guilty of a grave discourtesy in not addressing him as "*The Honourable*," which was as much his title as "His Excellency" was the Governor's.

[1] Macquarie to Bent, 29th May, 1815. Enclosure, D. 5, 1815. R.O., MS.

"Can your Excellency," he continued, "really expect that I should under these circumstances make a communication to you from motives of cordiality and courtesy, which I am not bound to do officially, on the very point wherein your Excellency's conduct towards me has been so deficient in the delicacy, the etiquette, and the courtesy due to my rank and station? or that I should make an appeal to you[1] on a matter in which you not only formed but publicly expressed an opinion so opposite to my own? I have felt that on this subject, tho' from my commission I am peculiarly entitled to your Excellency's confidence, I am wholly without your Excellency's support; although I have every reason to believe that the steps which your Excellency has taken were without the knowledge and against the wishes of His Majesty's Ministers.

"Feeling it to be inconsistent with my dignity and independence as a judge to submit to any interference, or investigation, into my judicial conduct on the part of the Executive Government of this Colony, I shall decline entering into any further discussion with your Excellency on this subject except we are understood to meet on terms of equality and independence of each other: and have only to add that I have submitted to the magistrates in question such terms of accommodation as they may accept without compromising their own opinions, and which, if they refused, I shall be justified in considering that an improper attention to the interests and feelings of Mr. George Crosley (my own feelings being considered as a matter of minor importance) is the sole cause of the mischiefs and inconveniences which will result from the interruption of the proceedings of the Supreme Court. I beg to assure your Excellency that I shall be always anxious to evince my personal respect and to do all in my power that can contribute to the welfare of your Excellency's Government, and sincerely lament that any difference should have arisen to disturb our cordiality, which I shall be happy to restore in any way not inconsistent with my own honour, that of my profession and my station."[2]

[1] According to the charter, when the Judge of the Supreme Court was in a minority, the party against whom judgment was given might appeal to the Governor. But in such a case as this, of admission to practise, it is difficult to see how this cause could have been put into action.

[2] Bent to Macquarie, 31st May, 1815. Enclosure, D. 5, 1815. R.O., MS.

In reply Macquarie proposed to discontinue a correspondence which would probably subject him to further insult. While thus securing the last word he referred very shortly to Bent's letter as being in many parts inconsistent and containing many insinuations "as unjust as they were illiberal".[1]

Both judges and the Governor immediately referred the whole correspondence to the Secretary of State, each adding to the enclosures characteristic explanations and comments. Ellis Bent put the whole position with such lucidity and moderation as to be well worth quoting.

"It must also be considered," he wrote, "that offices are not made for the individuals who may be selected to fill them, but for the benefit of the publick; and to answer the purpose of their institution the respectability of their characters must be supported; it is not sufficient to them that the habits of a person convicted of felony have been so far improved as to qualify him to exercise the office of magistrate or the duties of an attorney with propriety, but it is necessary also to be satisfied in the one case that the character of the office, in the other that that of the court, may not be injured by the introduction of persons so circumstanced. A long exercise of the duties of a magistrate in this Colony enables me to say that the character of the magistracy has been much injured by the introduction into it of persons who came out as transports to this Colony; and I am sure that respectability of the Courts of Justice will be utterly destroyed if a similar class of persons be admitted as attorneys."[2]

The estrangement between Macquarie and the Bents remained complete. In October the Judge-Advocate became so ill that Macquarie agreed to allow him leave of absence in order to try the effects of a long sea voyage. Jeffery Bent at once offered his services as Judge in the Criminal Court. He was willing to act under the Governor's warrant, but as he might incur a heavy responsibility by so doing he proposed certain restrictions. The principal one was that the sentence of death

[1] Macquarie to Bent, 2nd June, 1815. Enclosure, D. 5, 1815. R.O., MS.
[2] Bent to Bathurst, 1st July, 1815. R.O., MS.

should not be executed until the pleasure of the Prince Regent should be known.[1]

Macquarie refused his offer. "The disposition you have so openly manifested to counteract my public measures," he wrote, "and treat my authority with marked disrespect, would of itself be a sufficient objection to my appointing you to that office, but independent of so strong an objection I should consider it as highly irregular as well as illegal, your officiating as Judge-Advocate; the duties of that office being in my opinion quite incompatible with those of the office you hold as Judge of the Supreme Court of Civil Judicature."[2]

To the Colonial Office the Governor wrote that the postponement of the execution of death sentences would have rendered altogether nugatory the purposes of a Criminal Court.[3]

No arrangement had been made for holding the Criminal Court when Ellis Bent's departure was first postponed and then put off altogether. By the end of October his disease so much increased that all thought of the voyage was given up. On the 10th November, 1815, he died at Sydney in his thirty-second year. Macquarie would not forgive him, but he tried to be just. "I still feel," he wrote to Lord Bathurst, "that I should write to your Lordship in those terms which his administration of the law in his official capacity here seems to me to merit."[4]

Jeffery Bent wrote in a strain of sadness not without dignity, and the Colony mourned sincerely the loss of the young Judge-Advocate. Poems to his memory were printed in the *Gazette*, Marsden preached a sermon in his praise, and was reprimanded by the Governor for a simile which he deemed blasphemous.[5]

[1] Bent to Macquarie, 24th October, 1815. Enclosure, D. 1, 1815. R.O., MS.

[2] Macquarie to Bent. Enclosure, D. 1, 1819. R.O., MS.

[3] D. 1, 20th February, 1816. R.O., MS. It is quite clear, however, that Macquarie's real objection was Bent's behaviour towards him. The Supreme Court was not likely to sit for another six months at the earliest, and the delay in regard to death penalties was not of much importance.

[4] D. 1, 20th February, 1816. Lord Bathurst recommended Bent's widow and four young children for a pension, and one of £200 a year was granted. Later she was given £200 to help in educating the boys. See Correspondence in R.O. and C.O.

[5] There is some confusion in this matter. Marsden and Riley both gave the same account, but Macquarie said that Marsden's report was not true, that his reprimand had nothing to do with the part about Bent. See Appendix, Bigge's Reports, Evidence of Marsden. R.O., MS. Also Marsden's Memoirs.

"I the more particularly remember it," said Riley, "from my surprise at the circumstances, as I considered the Governor had respected Mr. Bent, whose memory was revered throughout the Colony."[1]

Another colonist wrote of him: "He was mild and merciful, in all legal decisions firm and just. No power could bias him to act contrary to his convictions. His life was an example of every public and private virtue. His death is deeply lamented and this Colony most sincerely feels his loss."[2]

In these sad circumstances an acting Judge-Advocate had to be appointed. Macquarie's choice fell upon Garling, who was the senior "Government" solicitor, and had arrived a few months before. He needed much persuasion before he would accept a position of such responsibility, and it was not until the 11th of December that he consented. "Recollecting the enlightened mind, profound erudition, and vast legal knowledge that distinguished the late Judge-Advocate, whose persuasive eloquence and peculiar suavity of manner adorned his character on the judicial seat and endeared him to all ranks of society in this Colony," he felt natural diffidence in his own powers. He felt, too, that so long as Jeffery Bent was in Sydney the position would be a difficult and delicate one.[3]

Bent indeed was very angry, and the humiliation was the keener because it was he who had originally recommended Garling to the Colonial Office. He could now do no more than declare that he had been wholly mistaken in Garling's character and acquirements. He said also that his appointment as Judge-Advocate was a piece of bribery, and had been made in order to admit the emancipist attorneys once more to practice.[4] In 1820 Garling denied this altogether, and stated that the Governor never even mentioned the matter to him.[5] They

[1] Riley, C. on G, 1819.

[2] Bayly to Bunbury, 13th March, 1816. R.O.

[3] Garling to Macquarie, 11th December, 1815. Enclosure to D. 2, R.O., MS., 1816. Macquarie had no power under the charter of appointing an acting judge or a permanent judge in case of a sudden vacancy. It was one of the omissions pointed out by Field in 1820 (Appendix, Bigge's Reports). R.O., MS. The general powers of the Governor's Commission and the necessities of the case in this instance amply justified his action in making such an appointment.

[4] Bent to C.O., 1st March, 1816. R.O., MS.

[5] See Evidence, Appendix, Bigge's Reports. R.O., MS.

were admitted, however, and probably Bent's opinion, though unfounded, was the one generally held. Macquarie approved of Garling's behaviour as Judge-Advocate so much as to recommend that his appointment should be made permanent.[1]

He had, however, neither the standing nor education to fit him for such a post, and in any event other circumstances had made such a course impossible.

Ellis Bent's letter criticising the new patent and Macquarie's administration[2] reached England in June, 1815. In December the Governor's despatch of February, 1815, which described the dispute over the Port Regulations, was received. The Secretary of State addressed a reply to Bent on the 11th December, 1815.

"I should," he wrote, "willingly have taken your observations into consideration if there had been any intention . . . of remodelling the charter . . . so lately promulgated." Bent's commission also must remain unaltered, for "The Colony did not appear to His Majesty's Government sufficiently advanced to admit of withdrawing that appearance of military restraint which had been found necessary in its first foundation, and which the composition of its population had rendered it indispensable subsequently to maintain. The continuance therefore of a judicial officer who bore a commission exclusively military, and who, though a military officer, was by the charter placed above the civil judge, appeared to have many advantages with a view to the maintenance of that due subordination in the settlement upon which its welfare depends."[3]

Bent's proposal to register the Governor's regulations in the courts was opposed as "tending to give but little if any additional publicity . . . while it tends to encourage an opinion that the sanction of the court is necessary to give validity to the acts of the Governor".

His conclusion conveyed a warning. "There could not exist a greater misfortune," he wrote, "to a settlement of so peculiar a nature . . . than a spirit of resistance, or anything

[1] D. 2, 24th February, 1821. R.O., MS.
[2] *i.e.*, letter of October, 1814. R.O., MS.
[3] It appears from the foregoing pages that the military commission of Judge-Advocate had so far created nothing but confusion, and had not in the least fulfilled the objects for which, according to Lord Bathurst, it was retained.

more calculated to produce such a calamity than an appearance of misunderstanding between the Governor and yourself, or a suspicion that you were disposed to question or disobey his orders."

In fine, the Secretary of State preached endurance, patience and submission on the part of all officials, and expected peace to be maintained under the contradictory and incomprehensible system of civil Government by military officers.[1]

Soon after this letter was despatched arrived the reports of the emancipist attorney's difficulty. The recall of the Bents was at once decided upon, and by the end of January, 1816, John Wylde and Barron Field were appointed respectively Judge-Advocate and Chief Judge of the Supreme Court.[2] Wylde had started as a solicitor and been called to the Bar in 1805, but Field, although he had been entered at the Inner Temple in 1809, had not been called until 1814. In character Wylde was a typical respectable attorney with plenty of public spirit and a strong wish to conciliate all parties.[3] His most noticeable fault was inability to write plain, straightforward English, or indeed to speak it.[4] Field, on the other hand, was a lawyer with a love for the humanities, a considerable amount of youthful impetuosity, a sense of humour and a hot temper.[5]

The Secretary of State had for some time thought that this step would prove necessary, and though he had little sympathy with Jeffery Bent, he intended to offer Ellis Bent a post elsewhere.[6] There was no hope of reconciliation between the Bents and Macquarie, and there was no alternative but to recall them.

[1] Bathurst to Bent, 11th December, 1815. C.O., MS.

[2] The Colonial Office found it difficult to procure suitable men for these appointments, and had more than one refusal. The commissions of Wylde and Field are dated 1st and 25th May, 1816. See C.O., MS., 1816.

[3] Wylde's father, who was a solicitor, went out with him to New South Wales and became Clerk of the Peace, and practised in the courts. Wylde's younger brother, who spelt his name Wilde, became Lord Chancellor of England with the title of Lord Truro. He also entered the legal profession as a solicitor.

[4] See Bigge's Correspondence with C.O., 1822 to 1823. R.O., MS. Wylde's confused speech was an especially great drawback owing to the peculiar constitution of the Criminal Court. His expositions of the law were very difficult to follow.

[5] Field was a schoolfellow and friend of Charles Lamb. Before he went to New South Wales he published an edition of Blackstone and occupied himself in journalistic work. He wrote for the *Reflector* and was dramatic critic on *The Times*.

[6] Letter to R. Bent, 31st January, 1816. C.O., MS. He was the father of the judges.

Macquarie's forbearance in not exercising his power of immediately suspending in extreme cases the officers under his command was highly commended, but not the policy he had advocated.

"It is not," wrote the Secretary of State, "against the opinions entertained by them, but against the manner in which they were brought forward and acted upon, that the displeasure of His Royal Highness is directed; it was certainly competent to the Judge-Advocate to express any legal doubts which he might entertain as to the propriety of the new Port Regulations; feeling those doubts, it was equally his duty to have lent his assistance in rendering the regulations finally determined on by you as free from objection as possible. The remonstrances of Mr. Jeffery Hart Bent against the employment of convicts in the confidential situation of attorneys was equally proper, nor am I disposed to sanction their employment in the Colony under any other circumstances than those which existed at the time, namely, there being but one other attorney in the Colony.

"Both gentlemen had clearly a right to protest against any act of yours which they conceived to be illegal or improper, and to transmit that protest to His Majesty's Government; but they were not authorised, on the ground of difference of opinion, either to withhold from you the legal assistance which you required or to interrupt the course of judicial proceedings."

At the same time the Governor was reminded that "the Laws which regulate trade are, generally speaking, as applicable to New South Wales as to any other British colony, and all additional restrictions not heretofore observed must derive their justification from the necessity of the case, from their expediency with a view to the security of the convicts or the maintenance of public tranquillity. The internal government of the Colony must equally be guided by the English Laws, modified by the usages which have always subsisted there, nor can I perceive the necessity of applying to the present state of the Colony any more restrictive measures of police than those which were adopted in its infancy. You will therefore regulate your future conduct as far as possible on this principle."[1]

[1] Bathurst to Macquarie, D. 66, 9th April, 1816. C.O., MS.

To Ellis Bent, Lord Bathurst wrote in a tone of moderate rebuke. Recent correspondence had pointed out "too clearly that your uneasiness is excited . . . by the feeling that the system of government . . . and the nature of the situation which His Majesty's Government have thought it advisable that you, as its principal judicial officer, should continue to hold, render it impossible for you to discharge your duty with advantage to your country or to the Colony".[1]

The despatch to his brother was curt and uncompromising.

The Judge-Advocate was no longer alive when his letter of recall was written. Wylde thus filled an office left doubly vacant when he and Field left England in May, 1816. Shortly before their departure Wylde happened to see a newspaper paragraph referring to the emancipist attorneys in New South Wales. This was the first time he had heard of the matter, and at once he and Field pressed Goulburn to give them instructions how to act if further attempts were made to allow these attorneys to practise. Goulburn then told them that the Governor knew Lord Bathurst's opinions, and they must apply to him when they reached New South Wales. This they did, addressing to Macquarie a joint letter requesting to be furnished with instructions "in conformity with the directions and pleasure of his Majesty's Government as made known to your Excellency".[2] Macquarie quoted in reply a passage from Lord Bathurst's despatch of 9th April, 1816.[3] This he said was the only instruction on the point with which he had been honoured.

He gave, however, no publicity to this despatch, and to Riley and Broughton he stated simply that Lord Bathurst "did not confirm the practice of the men we had supported".[4] But for a few years after the arrival of Wylde and Field the question remained in the background, and the emancipists no longer appeared in the courts as attorneys.[5]

[1] Goulburn to Wylde, 20th May, 1816. C.O., MS.

[2] See letter in Appendix, Bigge's Reports. R.O., MS.

[3] Macquarie to Field and Wylde, 11th March, 1817. Appendix, Bigge's Reports. R.O., MS. Macquarie says 18th April, but the despatch is dated 8th April. See extract above, p. 230.

[4] Riley, C. on G., 1819.

[5] The question arose again in 1819. Crosley and a free settler, who was a solicitor, entered into a partnership, the former to do the real work, the latter to appear in court. The compact coming to the knowledge of Field, he crossed the

Jeffery Bent was furiously indignant at being recalled and protested hotly against his treatment. Until the beginning of 1817 he remained in New South Wales, harassing the Governor and stirring up discontent. He arrived in England after a long voyage by way of India in May, 1818, and began an attack on the Colonial Office. His first demand, for a refund of the expenses of his homeward voyage, was successful, but he failed in the next. This was a request for a clear acknowledgment that he had been recalled for political reasons, and also for a temporary provision till he should regain his position at the Bar. He also suggested that he should be appointed Civil Governor of New South Wales. Finally his persistency was rewarded by the Chief Justiceship of Grenada.[1] From that time he passed altogether out of the history of New South Wales. But during the period between the closing of the Supreme Court in 1815 and his departure in 1817 he had by no means been idle, nor had his zeal been altogether fruitless.

free solicitor off the rolls of his court. There was much discussion in the Colony upon the matter. The free solicitor died soon after—some said from a broken heart, others from injuries received in a fall from his horse owing to his great corpulency. There were few free attorneys left, and Crosley and Eager were allowed to practise occasionally under the same terms as previously before Ellis Bent. Crosley was a rascal but competent, and one of the few attorneys who understood court business. See Appendix, Bigge's Reports, R.O., MS. and Report II.

[1] See Colonial Office Correspondence, 1818 to 1820, R.O. Major-General Bayly to Goulburn, 3rd January, 1820, R.O., MS., speaks of him as Chief Justice for Grenada.

CHAPTER VIII.

THE EMBARRASSMENTS OF AN AUTOCRAT.

AUTHORITIES.—Despatches, etc. (especially for years 1816-1817, and Appendix, Bigge's Reports) in Record and Colonial Offices, *Sydney Gazette*, 1816-1817-1818. P.P., 1819, VII.; 1822, XX.; 1823, X.

NO sooner was the question of the emancipist attorneys at rest than Bent found a fresh outlet for his spirit of opposition. This time it was against the payment of tolls on the Parramatta Road that he took his stand, and the ground was well chosen, for it opened up the whole question of the legality of the system of Government in New South Wales.

The road ran from Sydney to Parramatta and thence to Windsor, a distance altogether of thirty-six miles. It had been built by Macquarie in the early years of his Governorship, and though executed by convict labour, had been a heavy charge upon the colonial revenue. In order to liquidate "the debt contracted to the Police Fund" by its original construction, as well as to provide from time to time for necessary repairs, Macquarie erected turnpikes and ordered tolls to be levied.[1] In 1810 he appointed three Road Trustees, Simeon Lord, Andrew Thompson and the Reverend Samuel Marsden. Marsden refused to act with the others, and Wentworth was appointed in his stead. Shortly afterwards Thompson died, and Macquarie made no further appointment to fill his place.[2] In March, 1811, the Governor published a Proclamation naming the rate at which the tolls were to be levied and other details of management. The Proclamation received the approval of Lord Liverpool in a despatch of 1811.[3]

Macquarie's scheme for the administration of the road was

[1] See D. 1., 20th February, 1816, R.O., MS. for history of the road.
[2] See before, Chapter III.
[3] D., 22nd November, 1811. H.R., VII.

certainly just and reasonable. It was probably very seldom that the Governor of a remote colony described with exact accuracy the working of any Government department. Approval was sought for the course which was to be pursued, and approval once obtained, the Governor felt under no obligation to report the many divergences into which practical administration might lead. Thus the three Road Trustees were reduced to two, and of these two D'Arcy Wentworth alone conducted the business. Bent stated in 1815 that Wentworth was the only trustee, and in the same year Macquarie claimed that there were three; but two, and two only, appeared in any record.[1] This uncertainty was not very important, for the only duty of the trustee or trustees was to farm the tolls to the highest bidder. This was done annually, and the sum realised paid straight into the Police Fund. All further control belonged to the Governor. It was constant matter for complaint in the Colony that the roads and bridges were neglected and repairs urgently needed; but the Road Trustees were in no way responsible, nor was any part of the Police Fund ear-marked for such purposes. The revenue benefited yearly by about £400 from the farming of the tolls, but this amount was not set aside to pay for repairs, nor was it used to repay the charge for construction, but simply went into the general fund. Thus in practice Macquarie disregarded the principles he had laid down for Lord Liverpool's approval.[2]

To one section of the Proclamation of 1811 the Governor strictly adhered. That was the section which relieved the Governor and Lieutenant-Governor, with their families and suites, from the payment of toll, since their duties required that they should from "time to time pass into the interior". He offered a similar favour to the Judge-Advocate, "rather, however, as a courtesy and acknowledgment for his having obligingly framed the Proclamation and antecedently rendered me other legal assistance and advice, than from his having any public duties to perform which could warrant such exemption." Ellis Bent refused the offer, thinking with Macquarie that his

[1] See D. 1, 20th February, 1816, and Enclosure, Bent to M., 25th August, 1851. R.O., MS. Bent said that in the "General Almanac, published by authority and submitted to your Excellency's inspection" there was only one Trustee named.

[2] See Wentworth's Evidence, Appendix, Bigge's Reports, R.O., MS. for duties of a Road Trustee.

public duties as Judge-Advocate did not call for such an indulgence, and that his inclusion might be followed by demands from other magistrates for such exemption *by right*.[1]

Jeffery Hart Bent had no such delicacy. In August, 1815, he decided that the exaction of toll was altogether illegal, and determined not to pay it. His absurd sense of personal dignity was outraged by the distinction drawn between himself, one of His Majesty's Judges, and the Governor and Lieutenant-Governor, a distinction not to be found, he asserted, in "His Majesty's Most Gracious Charter," where equal civil rights were assigned to each.[2] He warned Macquarie of the course he intended to pursue, on the 18th August, and marched boldly to the attack. "But notwithstanding your Excellency has made so mortifying a distinction between the Lieutenant-Governor and His Majesty's Judge," he wrote, "and notwithstanding I am well aware of the illegality of the demand, and that your Excellency possesses no legal power or authority whatever to levy taxes upon the subject, I am so much alive to the advantages arising from good roads that I should have most willingly contributed my quota towards their maintenance had I not from the neglected state of the roads sustained considerable personal risque (*sic*), and had I not found that instead of the system general in England with respect to the turnpike roads being resorted to here, *viz.*, the appointment of trustees for the purpose of collecting the tolls and seeing to the due appropriation of the money, on the roads, from which it was collected, and who are responsible for the good state and repair of the roads, a new and arbitrary mode has been adopted, and only one person appointed by your Excellency, whose duty seems only to be to let the tolls to farm, and who has not the slightest power to lay out anything upon the roads . . . and whose office . . . appears to me to be a mere blind for those who have not the means of personal information on this point; and had I not also found that the sums levied are carried to a general account, and no part appropriated to the repair of the road on which they were collected. . . .

"Under these circumstances I feel myself justified in de-

[1] D. 1, 20th February, 1816. R.O., MS.
[2] Bent to M., 18th August, 1815. Enclosure to D. 1, 1816. R.O., MS.

clining to pay a demand absolutely illegal, or to submit to a burthen from which your Excellency has relieved yourself and the Lieutenant-Governor and your respective families and suites. As I must," he concluded, "always feel great reluctance to disturb any arrangements of your Excellency, or to impede in any manner the execution of any measures adopted previous to my arrival at this Colony, I thought it proper before my determination became public to apprise your Excellency, in order that an opportunity might be afforded of removing the necessity that leads to it."[1]

Macquarie made one of those answers in the third person which are the usual refuge of persecuted dignitaries. Without easing the situation, it inflated him with a sense of virtuous indignation and stifled any question of right and wrong. Insolent and turbulent though Bent was, he knew the ways of the law. In such matters Macquarie was at sea without chart or pilot, and he was more than a little uneasy under the judge's onslaught.

And so he took a bold line and wrote: "The Governor has received a most insolent and disrespectful letter of this day's date from Mr. Justice Bent, full of gross misrepresentations and calumnies, which merits no other answer than his expression of contempt for the weak and ineffectual efforts of the writer to disturb the peace of the Colony and to counteract the measures of his administration".[2]

Bent easily refuted the charges of "misrepresentation and calumny." Having once more gone over the ground covered by his previous letter, he proceeded:—

"I may again say that such a system is contrary to that established in England by numerous Acts of Parliament in cases of turnpike roads; and that it is (to me at least) both new and arbitrary. I feel justified in the inference I drew from these facts that there is no person in England, hearing that a trustee of the roads had been appointed, but would conclude that he had the same powers and was subject to the same responsibilities as similar trustees at home, and no one could conceive that such person was a mere non-efficient, or that

[1] Bent to M., 18th August, 1815. Enclosure, D. 1, 1816. R.O., MS.
[2] M. to Bent, 18th August, 1815. Enclosure, D. 1, 1816. R.O., MS.

your Excellency (as the fact undeniably is) had the sole and entire control of the repairs of the roads and as to the expenditure of the tolls levied from them." [1]

This was irrefutable, and Lord Bathurst would undoubtedly have taken his view. [2]

The correspondence came to an end with a very queer letter from Bent, which illustrated his attitude towards Macquarie from the moment when he had first set foot in the territory.

"The Judge of the Supreme Court," he began, "begs to remind Governor Macquarie that all his relations with this Colony, and his late as well as former correspondence with his Excellency, have resulted solely from his judicial station, and he had to express his sincere regret that his correspondence should have been hitherto principally confined to a resistance to Governor Macquarie's improper interference with him as judge; and a remonstrance against measures touching (in) his opinion on the Liberty of the Subject." [3]

Macquarie expressed to Lord Bathurst the uneasiness which he would not show to Bent. It was apparently the first time that he had really faced the question of his right to lay taxes, and he was surprised at the consequences which would logically follow from Bent's doctrines. But he considered that the absurdity of the conclusion was so obvious as to discredit the premises. He described Bent's letters, and then proceeded: ". . . he subsequently adds that the demand of toll is illegal, as I possess no legal power or authority whatever to levy *taxes* upon the subject—a position which not only goes to the rendering the tolls so collected illegal, but by its indefinite nature equally affects all other duties or imposts, and consequently strikes at the existence of any colonial fund whatever—for all duties on imports or exports—the sums levied upon licenses for the keeping of public houses, and all others which constitute and go to the support of that fund have been laid on by the Governors from time to time, and of course are fit subjects for this doctrine of resistance by all those who are required to pay them.

[1] Bent to M., 25th August, 1815. Enclosure, D. 1, 1816. R.O., MS.
[2] See D., 23rd November, 1812, from Lord Bathurst. R.O., MS.
[3] Bent to M., 28th August, 1815. Enclosure, D. 1, 1816. R.O., MS.

"It is not for me to expatiate to your Lordship on the dangerous consequences of any man under a colonial Government presuming to oppose the ordinary measures of that Government, but more particularly on the extraordinary impropriety of a Law Officer of Mr. Bent's rank enlisting himself as the champion of a weak and wicked faction to impede the just measures of Government, to increase the taxes on the mother country by annihilating all those levied in the Colony itself, and to pronounce on the illegality of measures which he might possibly have to pass legal judgment upon in his own Court of Justice, were other persons to be found who would render such an appeal necessary." [1]

Macquarie thus confused the legal aspects of the question with the personal one of respect to his authority, and whatever his opinion as to the first, let no doubts disturb the decisiveness of his action. After his declaration in August, Bent had soon commenced hostilities. On the 6th September Redman and Cullen, the proprietors of the Toll Gate at Sydney, made a complaint to Wentworth, the Superintendent of Police. From the depositions sworn by them it appeared that Bent not only refused to pay toll, but when the gates were shut against him shook them open and drove through at a gallop, making use of language natural to an angry Englishman on such an occasion.[2]

Wentworth did not issue a summons immediately, but seeing Bent passing his office he went out to him and tried unsuccessfully to reach an amicable settlement. The summons was therefore issued and duly served.[3] Bent at once wrote pointing out that as Judge of the Supreme Court he was "by no means amenable to any criminal jurisdiction in this territory," and that he could not appear in answer to the summons.[4]

"It seems very extraordinary," he concluded, "that such a measure should have been adopted on your own authority towards one of His Majesty's Judges, without any avowed communication with His Excellency the Governor." [5]

The suggestion was an ugly one, but it was probably justi-

[1] Macquarie, D. 1, 20th February, 1816. R.O., MS.
[2] Enclosure, D. 1, 1816. R.O., MS.
[3] Wentworth to M., 9th September, 1815. Enclosure, D. 1, 1816. R.O., MS.
[4] Bent to Wentworth, 8th September, 1815. Enclosure, D. 1, 1816. R.O., MS.
[5] *Ibid.*

fied. The pretence on the part both of Macquarie and Wentworth that they had not consulted together, and that they had nothing to do with the action of the toll-keepers, was stultifying. It was quite unlikely that the latter would have taken up the matter without some encouragement from high quarters. Bent was not a frequent traveller, and as Macquarie pointed out with scorn, kept no carriage, but usually rode or walked.[1] Pedestrians paid no toll and equestrians only a mite of 3d. Such a loss would scarcely have been sufficient to make ignorant men like the turnpike-keepers enter of their own accord into conflict with an officer of high judicial standing.

The case came on before the police superintendent and was heard *ex-parte* on the 8th September, and a fine of 40s. was imposed. This was the lowest penalty which the Proclamation of 1811 allowed. Needless to say, Bent did not think of paying it, and Wentworth took no further steps, but simply referred the conduct of the affair to the Governor.[2]

Macquarie at once published an Order in the *Gazette* in which he referred to the recalcitrant judge, not by name, but as "an officer of very high rank in the Civil Service of this Colony".[3]

The most important part of the Order ran as follows:—

"Whilst the Governor laments that any person should be found in the Colony so wanting in public spirit, as to wish to evade contributing his mite towards the support of so useful and beneficial an establishment for the country and community at large, he cannot allow any person whatever, however high his rank may be, to break through or set at defiance the established regulations of the Colony, and he thus publicly declares that no person whatever can or shall be exempted from paying the tolls in question, excepting those few already specified in the Government Orders." The farmers of the tolls were authorised "to instruct and direct their respective toll-gate keepers to enforce the orders and regulations," and to use force and call the police to their assistance if necessary. The magistrates were enjoined to look to it that this assistance should be efficient.

Bent of course retorted and commented at some length on

[1] D. 1, 1816. R.O., MS. [2] Wentworth to Governor above.
[3] G.G.O., 9th September, 1815.

the conduct of Macquarie and Wentworth. He claimed again that judges were exempt from all criminal process save for treason or felony, a statement to which Macquarie gave no direct answer. It may be observed, however, that Barron Field, Bent's successor, held that this exemption did not extend to the colonial judges, and proposed that it should be conferred by statute.[1]

Macquarie's description of his position deeply injured Bent. "Your Excellency," he wrote, "has . . . considered me as an officer under your command and not as a judge holding a commission from His Majesty, and who is not bound by any instructions or by the tenor of his commission to take any orders from your Excellency, and whose commission was so given for the express purpose of rendering him independent of the Governor of this Colony."[2]

He avoided further conflict by abstaining from any use of the turnpike road, and thus carried his point of never paying toll. The apparent victory lay with the Governor, but Bent had thrown a doubt on his power to tax, and offered to the malcontents a tenable ground of attack against the Government.

He soon found a more efficacious and subtle manner of harassing the Governor, using as his tools the Rev. Benjamin Vale, a discontented young chaplain, and W. H. Moore, a mischievous young solicitor, one of the two who had been sent out by the Government.

Vale had left England early in 1814 to take up the duties of assistant chaplain on the colonial staff. Like all the chaplains in New South Wales, with the exception of Marsden, he held a staff commission which placed him under "the Rules and Discipline of War". Marsden had originally held one of this kind, but when he visited England, in 1808, he persuaded Lord Castlereagh to replace it by a civil commission, fearing that the other might render him amenable to a Court-Martial. Castlereagh had denied that he could in any event be court-martialled, but yielded to Marsden's persistence, and had a

[1] Field to Bigge, Appendix to Bigge's Reports. R.O., MS.
[2] Bent to M., 20th October, 1816. Enclosure, D. 1, 1816. R.O., MS.

new commission of a purely civil nature made out, for which Marsden had afterwards reason to be thankful.[1]

However, Vale gave no consideration at all to the terms of his commission and suffered no misgivings. When he reached Sydney he was bitterly disappointed with the position assigned to him. Instead of having the duties of a single parish with a dwelling and glebe attached, he found that he must provide his own lodgings and be constantly moving from place to place as his assistance was required now by one and now by another of the chaplains. He had to support his wife and family on his salary of 10s. a day without further help from the Government. Under these conditions he obtained the Governor's permission to return to England in 1816. The Governor indeed was glad enough that he should go—for the disappointed clergyman was troublesome with his constant complaints.

Before the time came for his departure, Vale thought he saw an opportunity of recouping himself for his expenses in the Colony. On the 19th February, 1816, the *Traveller*, an American schooner carrying teas and other merchandise, arrived at Port Jackson bearing a clearance in proper order from Canton. She was the first American ship which had visited Sydney since the conclusion of peace, and Macquarie gave her permission to unload her cargo. He was absent from Sydney for a few days, and when he returned on the 29th February, he found that the unloading had been stopped and the schooner seized as a lawful prize under the Navigation Act by the Rev. Mr. Vale and W. H. Moore. The Governor immediately removed the "arrest or restraint which had been thus laid on the discharge of the cargo, and continued the permission of landing," which he had previously granted.[2] Moore, who acted as Vale's attorney, petitioned the Governor to appoint a Judge of the Vice-Admiralty Court, but received no answer—and so far as the *Traveller* was concerned the matter ended there.[3]

[1] Marsden to Wilberforce, 20th May, 1818. Private Papers of William Wilberforce. Macquarie once told Marsden that under the old commission he would have brought him before a Court-Martial and tried him for sedition. See also Evidence of Marsden, Appendix, Bigge's Report. R.O., MS.

[2] D. 4, 8th March, 1816. R.O., MS.

[3] Moore's Evidence, Appendix, Bigge's Reports. R.O., MS. There was no Vice-Admiralty Judge in the period between Bent's death and Wylde's arrival.

Macquarie was not sure whether he had been right in allowing the schooner to enter and unload. He had followed the colonial precedent of the time before the war[1] without at the moment having any doubts at all. He had not then, at the beginning of 1816, received a despatch from the Colonial Office of December, 1815, warning him "that the trade of foreign vessels with a British Colony is directly at variance with the Navigation Laws of this country, and although this infraction of them might have been tolerated at earlier periods upon the plea of necessity, it cannot now be defended upon any such grounds." . . .[2] After the seizure had been made he felt uneasy and pointed out to Lord Bathurst that even if he had felt any doubts before, he had no one in the Colony to whom he could turn for advice, for he naturally shrank from appealing to J. H. Bent, and he was "debarred from reference to the statutes themselves by Mr. Bent retaining both the sets which Government had at different times assigned for the use of the Law Court".[3] He felt, however, that the precedents would go far to justify him, but as it was probable that Vale and his "abettors" would prosecute the business elsewhere," he asked for an Act of Indemnity in case he should be proved to have contravened the Navigation Act.[4]

With regard to Vale and Moore, however, he had not a moment's hesitation. "Mr. Vale's conduct," he wrote, "and that of Mr. Moore (both officers receiving pay under the Government) being highly disrespectful, insolent and insubordinate, in making seizure of a vessel during my absence which they were fully aware had received my sanction for entry and discharge, I felt it my duty to remark so much to Mr. Vale, whom I sent for on the 27th ulto. and admonished him on the impropriety and great indelicacy of his conduct in this instance towards me as his Governor and Commander-in-Chief. . . instead of any expression of regret, he even attempted by argu-

[1] Before this time forty-two ships under American colours had entered and been cleared out. Enclosure to D. 4, 8th March, 1816. R.O., MS.

[2] D. 60, 11th December, 1815. R.O., MS.

[3] Bent did not give them up until October, 1816. See correspondence on subject. R.O., MS.

[4] The Colonial Office took no steps in the matter, evidently considering the entry of one American ship of very little importance.

ment to vindicate the measure . . . I ordered him into a military arrest, his commission as assistant chaplain specifically rendering him amenable to Martial Law . . . and ordered a Court-Martial." According to Vale, the Governor charged him with mutiny and had him marched through the town like a deserter.[1] Marsden attempted to dissuade Macquarie from bringing Vale before a Court-Martial, and told him of Castlereagh's opinion that even under staff commissioners the chaplains were not amenable to military law, but Macquarie was determined and himself drew up the charges.

There were four charges, of which the first three differed little from one another. Vale was accused of conduct "highly subversive of all good order and discipline," of insolence, disrespect and insubordination towards the Governor and Commander-in-Chief, of "disgraceful and ungentlemanly conduct highly derogatory to his sacred character as assistant chaplain" in seizing the *Traveller* after "his Excellency the Governor and Commander-in-Chief . . . had permitted and regularly sanctioned the said schooner to be entered at this port with leave to land certain parts of her cargo". Further, his action "tended to bring odium and disrepute on the public measures of the Governor," and Vale had acted "from seditious, unworthy and sordid motives". The fourth charge dealt with his letters to Lieutenant-Governor Molle, which were characterised as seditious and insolent. The court found him not guilty of the last charge, but guilty of the first, and of parts of the second and third,[2] and ordered him to be "publicly and severely reprimanded and admonished". The Governor, however, directed that "in consideration of his sacred character as a clergyman," he would dispense with the public reprimand, and ordered Vale to attend at Government House to have his sentence and the order upon it read to him by the Major of Brigade, and be privately admonished by his Excellency in the presence of his personal military staff and the naval officer.[3]

As to Moore, "I have," wrote Macquarie, "deemed it

[1] Vale to Bathurst, 22nd March, 1816. R.O., MS.
[2] Enclosure to D. 9, 23rd March, 1816. R.O., MS. Vale was declared not guilty of insolence and not guilty of disgraceful and ungentlemanly conduct.
[3] D. 9, 23rd March, 1816. R.O., MS.

necessary to mark my sense of it" (his conduct) "in such a manner as I considered his insolence merited, and for this purpose I have given directions for his salary of £300 to be discontinued to him from the Police Fund from the day of his assisting Mr. Vale . . . in making the seizure, and I have ordered him not to be continued on the Government stores;[1] at the same time withholding every other indulgence from him which I might, under other circumstances, have been disposed to extend to him".[2]

These appear remarkably severe measures and much beyond the occasion. What spurred Macquarie on to such a vindictive course was certainly the fact that he knew Vale and Moore were not acting on their own initiative.

"I have to state to your Lordship," he told Bathurst in his first despatch on the subject,[3] "that Mr. Vale and Mr. Moore on the occasion of the seizure proceeded direct from the house of Mr. Justice Bent (with the notifications of seizure ready drawn up) on board the *Traveller*, and I have besides much reason to apprehend that their proceedings herein were under the private advice and recommendation of that Law Officer."

It is impossible to say to what extent Bent was responsible for their action. He admitted himself that he warned Captain Piper, the Naval Officer, "that he would do well to do nothing with regard to her" (the *Traveller's*) "entry without authority from the Governor,"[4] but said he had no more to do with it. In any event, after the seizure he was active in his support of both Vale and Moore. Moore, he said, who had acted only as an agent, had been more severely punished than Vale, and without any examination into his conduct having been held. As to Vale, Macquarie had acted illegally in bringing him to a Court-Martial, and Bent condemned Macquarie's behaviour to both in a letter to the Colonial Office.[5] Vale also wrote to Lord Bathurst, taking somewhat the same line as Ellis Bent had taken a few years before . . . "I trust if it should be

[1] He had received rations for himself as a member of the civil staff.
[2] D. 4, 8th March, 1816. R.O., MS.
[3] D. 4, 8th March. R.O., MS.
[4] Evidence before C. on G., 1819, and letter to Lord Bathurst, 11th March, 1816. R.O., MS. His evidence on this subject is very confused.
[5] Letter, 11th March, 1816. R.O., MS.

decided that the colonial clergy are subject to Courts-Martial, your Lordship will, in justice to my sufferings under the unknown circumstances, order me all the allowances to which military chaplains are entitled from the earliest date of my commission, and that if it should be decided, as I trust it will, that the colonial clergy are *not* subject to Courts-Martial, your Lordship will order me those allowances from the time I was put under a military arrest."[1]

While Moore and Vale both sought the sympathy of the Colonial Office, they were by no means inactive in the Colony. In June, 1816, Vale drew up a petition to the House of Commons describing the conduct of Governor Macquarie, who unfortunately chose this very moment for making the most indefensible mistake of his whole administration.

In 1815 he had laid out the Government House Domain as pleasure gardens for the use of the public, and enclosed them with a stone wall. There were three entrances to the park, but the townsfolk, to save themselves the trouble of walking round to any one of the three, and also that they might enter unobserved, were continually breaking down the wall and climbing over. The favourite spot for this mode of entrance was a corner by a small plantation, which was the haunt of a very bad class of persons. Here they would drink and gamble or exchange stolen goods with one another, and Macquarie determined to prevent them making bad use of the Domain by continuing to enter it surreptitiously for these purposes. He issued no order on the subject, but on the 18th April he directed the chief constable to place one of his men *inside* the wall, who was to arrest and lodge in gaol any one attempting to climb over. The constable during the first day of his watch, the 19th April, arrested three men and two nursemaids. The latter, greatly to the indignation of their mistresses, were kept in gaol all night, but were sent home next day. But the three men were flogged in the gaol yard by warrant from the Governor before they were released. One of the three was a convict, one an emancipist, and one a free man. Not one of them had—as colonial reputations went—a bad name, and Riley, who had been many

[1] Vale to Bathurst, 22nd March, 1816. R.O., MS. See Chapter III., Bent to C.O., 1814.

years on the Sydney Bench, could not remember any of them having been brought before him for any offence. Two days afterwards, the emancipist Henshall, and the free man Blake, made affidavits describing their treatment, which were taken by J. H. Bent, because, by his account, no other magistrate in the Colony would dare to take them.[1]

Macquarie's conduct was unjustifiable from the beginning. The constable had been placed by his orders not to warn but to trap offenders. Once arrested the only charge to be laid against the men was that of trespassing, and the fact of trespass should have been inquired into by a magistrate. Macquarie might, had he so desired, have conducted the inquiry himself, but he had no more power than any other magistrate to order punishment without examination on oath. The punishment of the convict was not perhaps illegal, for such summary discipline was occasionally exercised over the prisoners. But there was no such jurisdiction over Henshall and Blake, and the Governor's action had not even a suspicion of legality. The free and freed inhabitants of the Colony did not consider themselves amenable to the "same coercive measures of Government which are judged necessary for keeping the prisoners in order."[2] Those who saw the warrant before its execution were much alarmed, and Wentworth had serious thoughts of suppressing it. The gaoler was in a quandary, afraid to obey and afraid to disobey the order.[3] The latter fear was the most pressing and he obeyed.

The news of what had happened spread quickly over the town, and whenever a group of people gathered together it was the subject of discussion. "The inhabitants of all ranks," said Riley, "were surprised and alarmed; until that moment the humblest freemen in the Colony had considered their persons safe under the Government of General Macquarie; it was an unguarded measure, condemned and lamented by his best friends; and from the knowledge I conceive I have of Governor Macquarie I think he must himself have regretted that he gave the order."[4]

[1] Evidence, C. on G., 1819. Bent did not know if the men had asked any other magistrate to take their affidavits. Probably he asked them to make them.
[2] Riley, C. on G., 1819.
[3] Wentworth's Evidence, Appendix, Bigge's Reports. R.O., MS.
[4] Riley, C. on G., 1819.

Bent did his best to foment the excitement, and it is a remarkable testimony to Macquarie's essential uprightness of character and to the respect with which, in spite of all his faults, the colonists regarded him, that no rioting or disorder resulted. But the incident created a great deal of uneasiness, which did not die out so long as the Government remained in the hands of one man. No reference to the matter was ever made in official despatches, and when Macquarie did later defend his action, his arguments were wholly irrelevant to the point at issue. He had given way to irritation, acted precipitately, and the only way to retrieve himself was by not repeating the mistake and hoping that it might be forgotten.[1]

A little later another rather unfortunate incident occurred. Some years earlier, in 1813, two lieutenants of the 73rd Regiment had been tried for the murder of a man "in the lower ranks of life" in the streets of Sydney. The Criminal Court, in the face of much conflicting evidence, found them guilty of manslaughter only, fined them 1s. each, and ordered them to be confined for six months in the Parramatta gaol. Macquarie thought the verdict too lenient and the sentence too light. He published a lengthy Order of Reprimand and reported the matter fully to the Commander-in-Chief.[2] In due time the 73rd was relieved by the 48th and sent to Ceylon, and while there the two officers were dismissed the service in accordance with orders from the Commander-in-Chief. In May, 1816, one of them returned to Sydney in order to marry. Macquarie ordered him to return by the ship on which he had come. This did not leave time to put up the banns and the Governor refused the young man a license. Bent took up the cause of the bridegroom and wrote two letters to Macquarie, calling in question his right to keep any British subject from coming

[1] See his defence in letter to Lord Bathurst published in 1822. Bent persuaded Blake to go to England, and in 1819 prepared a petition which was presented to Parliament on Blake's behalf. See Chapter IX. It is rather strange that the measures taken by Macquarie which reflected such great discredit on him were at the same time quite ineffective. On 6th July, 1816, he published an Order threatening the "most summary and exemplary" punishment for those who injured the wall, etc., of the Government Domain.

[2] In the course of this Order he forbade any officer to go about the town out of uniform.

into the Colony and also his right to refuse a marriage license.[1] The Governor in reply "wished Mr. Bent had spared himself the trouble of writing them; as his unsolicited opinions can in no way alter the resolution of Governor Macquarie in the case alluded to in those letters".[2] The young man had to return unmarried, and whether or no the lady followed him is not recorded.

Both these incidents were included in the petition. The document was first drawn up by Vale and submitted to Bent. Bent characterised it as a "miminy-piminy thing, not half severe enough," and wrote one out himself. To this draft Vale made a few additions and brought it to be engrossed on parchment by a certain emancipated clerk.[3] It was then deposited in Moore's office and all who came by were invited in to sign it.

Vale left, taking the petition with him, in June, 1816, and just before his departure Macquarie, thinking perhaps to conciliate him, gave him a grant of land. But when he learnt more exactly what were the contents of the petition, he withdrew the grant.[4]

"This memorial," wrote Macquarie to Lord Bathurst in April, 1817, "was sent from hence for England in June last . . . which I was aware of at the time, but not being so fully informed of its object as I have become since, I did not feel it necessary to make your Lordship any communication at that time in regard to it.

"Since that time a copy of the memorial having been

[1] Macquarie sent one other man out of the Colony, an Irish Roman Catholic priest, whose coming had not been sanctioned by the head of his Church in England. Such a power was exercised also by the Governor at the Cape of Good Hope. It was assumed that a Governor could prevent any one who did not bring special authority from the Secretary of State from settling in a Colony. See Campbell's Evidence, Appendix, Bigge's Reports. R.O., MS. Macquarie frequently interfered to prevent marriages. In one case he refused to allow a marriage on the ground that the woman was too old for the man. The couple therefore lived together unmarried. See Vale to C.O., 16th April, 1818. R.O., MS.

[2] Bent to C.O. with enclosures, 12th June, 1816. R.O., MS.

[3] This man wrote a letter to Macquarie in 1821 giving this account of the petition. See letter, 29th January, 1821. Appendix, Bigge's Reports. R.O., MS. There is no copy of the petition to be found, and its contents can only be discovered by indirect means. Jones, in 1819, said the bulk of the contents were true, some things perhaps incorrectly stated and some a little exaggerated. See his Evidence, C. on G. The sort of document may be easily imagined—a basis of fact distorted by the anxiety of two aggrieved men to impute bad motives and see each deed in an evil light.

[4] Vale to C.O., 16th April, 1818. R.O., MS.

privately taken by a person who had frequent and unsuspected access to it, it had come to light that the signatures of several persons had been put to the memorial without their having any knowledge whatever of the circumstances, and some of these people . . . finding their names had been affixed to it and justly dreading my displeasure, have come forward and disclaimed on oath their ever having authorised any one else to sign for them the paper in question, and at the same time reprobated the false and malevolent assertions contained in it. As soon as it was discovered that I meant to withhold grants of land and other indulgences from any persons then about to receive such, whom I should find had been concerned in the business of the memorial, some persons getting alarmed immediately set about exculpating themselves. And it is an extraordinary fact that Mr. Solicitor Moore had the audacity to address a letter to me, in behalf of his brother (to whom I had promised a grant of land, but had cancelled it, on finding his name was affixed to the memorial), declaring that he had himself put his brother's name to the memorial without his privity or consent, at a time his brother was in the country and unacquainted with its contents." [1]

In November, 1816, both the Moores had written to the Colonial Office complaining of their wrongs, the younger one because he had lost his land, the elder because he had lost land and salary. To the former the Colonial Office replied that the Governor had been directed to issue his grant and to the latter that his salary would be paid, together with its arrears. But his conduct had not met with approval, and he was warned that if any more complaints were made of his behaviour he would be dismissed.

To Macquarie, Lord Bathurst wrote that he had not been justified in withdrawing Moore's salary, and then dealt severely with his treatment of Vale. "It was not without considerable surprise," he wrote, "that I learnt your deter-

[1] D. 14, 3rd April, 1817. R.O., MS. The sworn statement of Samuel Terry (an enclosure to this despatch) is rather curious. Moore was his solicitor and Terry saw the petition in his office but refused to sign it. "Mr. Moore," he said, "this is a very improper paper . . . and I am satisfied if his Excellency the Governor was to know this paper lay at your house he would send his dragoon both for you and it."

mination of bringing him to a Court-Martial upon the charges which you ultimately preferred against him. Admitting that it was matter of doubt whether Mr. Vale's appointment might not be considered so far a Military Commission of Chaplain to His Majesty's Forces as to bring him within the Provisions of the Mutiny Act, yet had you proceeded with that consideration which would have but befitted the occasion, and referred as it behove you to the Act under which you claimed the authority so to try him, you would have seen that Military Chaplains can only be brought to trial for the offences specified in the 4th and 5th Articles of the first Section of the Articles of War, and that those offences are either absence from duty, drunkenness, or scandalous and vicious behaviour derogatory from the sacred character with which a chaplain is invested. That Mr. Vale was guilty of any such offence cannot be pretended, it is not even imputed in the charges that there was any vice or turpitude reflecting on his moral character in the act which he had committed, and the decision of the court still further negatives any such supposition. The whole of your proceedings against him were consequently illegal, and it is therefore utterly out of my power to give them any sanction or approbation; and although I feel that Mr. Vale's conduct was in many points of view extremely reprehensible and should willingly have interfered with a view to its correction, yet I have now only to lament that you should in a moment of irritation have been betrayed into an act which at the same time as it exposes you personally to considerable risk, cannot fail to diminish your influence among the more respectable part of the community, who justly look upon the law as the only true foundation of authority."[1]

Macquarie's reply was a double-barrelled one. On the 24th November, 1817, he warmly defended the Court-Martial and refused to authorise the payment of Moore's salary, and on the 1st December, 1817, he tendered his resignation. He wrote: "Finding with deep regret that certain measures of mine, alluded to in your Lordship's Public Despatches bearing dates

[1] D. 86, 6th February, 1817. R.O., MS.

24th January,[1] 6th February,[2] 22nd April[3] and 15th July[4] last, have been disapproved and incurred your Lordship's displeasure; and that from the tone and manner of conveying sentiments of disapprobation and censure, I have had the misfortune to lose that confidence which your Lordship has hitherto been kindly pleased to repose in me; I could not with any satisfaction to myself, nor consistently with my own feelings of propriety and sense of public duty, any longer wish to retain the high and important office I had so long had the honour to hold as Governor-in-Chief of this Colony; the arduous duties of which I had every reason to hope and believe I had discharged with credit to myself and advantage to the public service.

"I therefore most respectfully request your Lordship will do me the favour to tender my resignation . . . for the gracious acceptance of his Royal Highness the Prince Regent; humbly and dutifully submitting to His Royal Highness that he may be graciously pleased to nominate another Governor to relieve me—and that I shall remain here until the arrival of my successor, or at least until I am honoured with your Lordship's commands after the receipt of this."[5]

His defence in Vale's case was not lacking in confidence. " . . . however much I esteem and respect your Lordship's superior judgment, good feelings and high station, and however much I may consider myself bound to submit to your Lordship's authority and opinions, I trust that on a further review and consideration of my conduct in this instance it will not be deemed presumption, in a case where my public authority, character and feelings as a man are so deeply involved, if I take the liberty to dissent from the conclusions your Lordship has been pleased to draw from my conduct in regard to Mr. Vale; for I cannot at all admit that it has been either illegal or unjust, whilst on the contrary, I feel the consciousness of

[1] D. of 24th January, asked Macquarie to make full inquiries into some complaints made in Bayly's letter, especially into the treatment of female convicts. See Chapter X.

[2] D., 6th February, 1817, dealt with the case of Vale.

[3] D., 22nd April, 1817, dealt with the case of Moore.

[4] D., 15th July, 1817, dealt with the case of T. Moore, whose land had been taken from him because he had signed the petition. All are in C.O., MS.

[5] D., 1st December, 1817. R.O., MS.

having treated him with much more lenity than his mutinous, seditious conduct deserved.

"If, however, it should appear hereafter that I have acted illegally towards Mr. Vale, I am aware of the high responsibility I have incurred thereby, as also of the *personal risk* such illegal conduct exposes me to, as intimated by your Lordship, and with all deference to your Lordship I must add that I cannot possibly subscribe to the inference drawn from my conduct towards Mr. Vale, that it has the effect of 'diminishing my influence among the more respectable part of the community in this Colony,' for I believe there is not one . . . who did not highly disapprove and execrate the mutinous, seditious and insolent conduct pursued towards me by that depraved, hypocritical, unprincipled man."[1] He proceeded "with great submission to your Lordship's superior judgment," to state that his charges against Vale were fully warranted by the Articles of War, for Vale's conduct in seizing the American vessel in the capacity of the meanest excise officer was not only "insolent . . . but also derogatory to the sacred character *with which he was invested as chaplain* and consequently *scandalous and vicious* . . . your Lordship has mistaken my motives in supposing that in my conduct to Mr. Vale, I acted under the influence of sentiments of irritation or passion. . . . I have been bred in the school of subordination too long not to respect it; and your Lordship must be fully aware how necessary it is to support it, in a distant Colony like this, and composed of such discordant materials; assured at the same time that your Lordship would not wish to see me degraded by tamely submitting to the subversion of my authority as Governor-in-Chief of this Colony, either by Mr. Vale or any other seditious unprincipled person."

Turning then to Moore he continued: "It is with sentiments of real concern that I feel myself compelled, from a sense of public justice and the respect due to my own high station in this Colony, to decline being in any way instrumental to the reinstating Mr. William Henry Moore in the appointment he held in the Colony as solicitor. This man has acted in a most

[1] *i.e.*, Vale.

daring and insulting manner, in direct opposition and open violence to my authority, in being one of those who seized the American schooner. . . . This Act is of too much importance (connected as it certainly was with the seditious and violent cabal headed by Mr. Justice Bent and some other disaffected persons then here) to the respectability of the Government, and stands in too prominent a point of view in regard to the future tranquillity of this Colony, to be passed over unpunished.

"At the distance at which your Lordship is placed, and the number of subjects which press on your consideration, I cannot but think that this matter has not met with that attention which its importance merited, as it regarded me or this Government in whatever hands it may be placed.

"My mind and time are exclusively bestowed here. I have no object but the upright fulfilment of my duty towards my Sovereign, and I am not without hope that your Lordship will approve of my acting according to what I consider my duty, although in this instance I am thereby deprived of the pleasure of paying that implicit obedience to your Lordship's commands which has at all times been my wish, and which but in this solitary case I have always had the satisfaction of doing.

"In regard to the grant of land promised to Mr. Moore, I have very good and strong reasons for declining to confirm it. Subsequent to his first mutinous conduct . . . he has set on foot a petition to the House of Commons. . . . I fully expected your Lordship would have sent me a list of the names of the persons who signed this false and slanderous petition, in order to enable me to prosecute them here for a libel, which I could easily have proved it to be. All those persons whom I knew had signed it I struck off the list of names for whom lands had been previously designed. Mr. Moore and his brother being the most culpable of all . . . their names were struck off the list as a matter of course."

He went on to state with perfect lucidity the whole duty as he understood it of a *military* governor.

"It would," he wrote, "be a very different line of conduct from that I have pursued from the period I had the honour to enter His Majesty's service, were I not to restrain and put

down mutiny and disaffection wherever detected, and I should think I had neglected to do so, were I to be in any way instrumental in bestowing favours on persons who have set themselves up, in open defiance of the legal authorities of this Colony, and who have exerted themselves so earnestly to contaminate the minds of others to the disturbance of the public peace and violation of all decency of conduct."[1]

Macquarie's despatch of April, 1817,[2] which had prepared Lord Bathurst for this refusal to pay Moore's salary, had been answered on the 12th May, 1818, before the despatch, from which the quotations above have been made, had reached England. Moore's conduct in affixing signatures to the petition without the knowledge of the persons whose signatures they were was severely reprobated, and Lord Bathurst would have acquiesced in Macquarie's attitude towards him "had it not been for the information conveyed in the letters . . . enclosed in your Despatch, which while they afford the strongest proof of Mr. Moore's misconduct, develop a proceeding on your part which calls equally for my most serious animadversion.

"It appears that you have had no hesitation in considering the signature of a Petition to the House of Commons as an Act of Sedition, and as deserving such punishment as it was in your power to apply; and that you have, in two cases stated, made it the ground for withholding indulgences to individuals which it was previously your intention to bestow. It is my duty to apprise you that in thus attempting to interfere with the right which all His Majesty's subjects possess of addressing their petitions upon every subject to the House of Commons, by making the exercise of that right prejudicial to their interests, you have been guilty of a most serious offence.

"In signifying to you, therefore, His Royal Highness the Prince Regent's entire disapprobation of your conduct in having so acted with respect to some of the petitioners to whom your despatches refer, I have only to caution you most strongly against any proceeding in future which can have a tendency to check the Right of Petitioning either House of Parliament, as

[1] D. 31, 24th November, 1817. R.O., MS.
[2] See above, D. 14, 3rd April, 1817. R.O., MS.

such conduct on your part cannot fail to call forth from His Royal Highness the strongest marks of displeasure." [1]

Angry though he felt on the receipt of this letter, Macquarie gave orders for the payment of Moore's salary, and in 1820 he offered him a grant of 1,000 acres.[2] He acted too precipitately in reinstating him, for Bathurst, after reading Macquarie's despatch of November, 1817, decided that Moore should be dismissed. What chiefly influenced him was Moore's untruthfulness in trying to save his brother's grant by telling Macquarie that he had signed the brother's name to the petition without his knowledge—a statement utterly without foundation. As affairs had been settled before this despatch [3] reached Sydney, Moore retained his position. Macquarie was completely puzzled by the censures he had drawn upon himself. "If, my Lord, I had prevented, or even thrown any obstruction in the way of any of His Majesty's subjects under my Government addressing the House of Commons on any subject whatever, I am aware I should have merited the royal censure and displeasure which your Lordship has conveyed to me; but when I feel that my conduct has not only on this, but on every other occasion, exhibited the reverse of such arbitrary and unconstitutional exercise of power, I am at a loss for language sufficiently strong to give adequate expression to the regret I feel in the consideration that either my former communication should not have been sufficiently explicit, or that it should have induced His Royal Highness and your Lordship to conceive that I meant to prevent or restrain the general right of British subjects to address Parliament on any real or imagined grievance whatever." [4] This despatch was certainly written with perfectly serious intentions, and Macquarie was honestly unaware that in allowing Vale to take the petition home with him he was not doing all that could be required of him.

He understood just as little the position of Lord Bathurst in regard to Vale. The Secretary of State wrote: "Upon a

[1] D., 12th May, 1818. C.O., MS. In that year two assistant chaplains were sent to New South Wales, but the words "according to the Rules and Discipline of War" were omitted from their commissions. See C.O., 1818.
[2] Evidence, Appendix, Bigge's Reports. R.O., MS.
[3] D. 14, 26th July, 1818. R.O., MS.
[4] D. 1, 1st March, 1819. R.O., MS.

point of this nature I of course deferred to the opinion of those who are the law servants of Crown, but finding their opinion to be that the trial of Mr. Vale by Court-Martial upon the charges preferred against him was altogether contrary to law, it was impossible for me not to pronounce your conduct . . . illegal. I am sure you cannot but admit that the presumable guilt of any individual affords no justification for adopting towards him any course of proceeding other than what the law prescribes; and I feel confident that you will allow also that violations of the laws, whatever be their object, can never add strength to a Government or increase its influence."[1] All Macquarie could reply was that "it having been the unceasing study of a long life, spent in the service of my country in every quarter of the globe, to conform myself in every particular to its establishments, founded as they are in wisdom and matured by the experience of ages, I am unable to express the mortification I suffer at this time, from finding myself liable to be shaken in the good opinion of my Sovereign, by the imputation of a conduct which I reprobate on every ground of right and of political expediency".[2]

Macquarie's resignation was not immediately accepted, nor was the letter in which he tendered the resignation answered until another year had passed. The Secretary of State apparently expected that it would be withdrawn, and thought it the result of merely temporary irritation. That this was not the case appeared later, and the resignation was finally accepted and Macquarie's successor appointed in 1820.[3]

It is thus clear that while Macquarie brought about Bent's dismissal, Bent succeeded in revenging himself to a considerable extent. Even after Vale had left the Colony, Bent continued to harass the Governor in many small ways. Finally, at the beginning of December, 1816, he attempted to reopen the Supreme Court and ordered Riley and Broughton to attend at the court-house for that purpose. Riley was the only one of the two in Sydney, and he did not attend. To prevent Bent from taking any steps to enforce his attendance, Macquarie

[1] D. 14, 26th July, 1818. R.O., MS.
[2] D. 1, 1st March, 1819. R.O., MS.
[3] D., 15th July, 1820. R.O., MS.

inserted a notice in the *Gazette* on the 10th of December releasing the two magistrates from further duty in the Supreme Court.[1]

Bent at once wrote to Macquarie that on reference to the letters-patent for the establishment of the court he found that the Governor had "no power of discharging from that duty, . . . the only mode by which they can be relieved . . . being the appointment of new members in their stead. A discharge of the members without the appointment of others would be a virtual dissolution of the court; and were any Governor entrusted with such authority it would be in his pleasure to postpone or prevent the trial of any actions which might be disagreeable to him and materially to injure persons obnoxious to him, by the expenses consequent thereupon. . . . Should your Excellency persist in the right of discharge, and refuse to nominate other members, I shall leave to your Excellency the responsibility attending such an extraordinary attempt at an avoidance of His Majesty's Charter; satisfied with the full confirmation of my opinion, that while such extravagant notions of authority and such measures of arbitrary tendency characterise the administration of this Colony, it would be impossible to give effect to the present establishment of the Courts of Justice, except by an utter dereliction of every sound principle of English Law, an adoption of maxims suited only to a military despotism, and a servile submission to the views and wishes of your Excellency."[2]

Bent's successor had not yet arrived, but Judge-Advocate Wylde was already in Sydney. Macquarie, at the end of all patience, appealed to Wylde and asked him to draw up an order suspending Bent and enforcing his recall. A copy of the Order was at once sent to Bent, who returned the packet unopened. It was then published in the *Sydney Gazette* of the 14th December, 1816.

The Order quoted the despatch from Lord Bathurst in which Bent's recall had been announced, and went on to describe his recent actions in issuing "certain process, directing the Provost-

[1] See *S.G.*, 10th December, 1816.

[2] Bent to Macquarie, 10th December, 1816. Enclosure to D. 12, 3rd April, 1817. R.O., MS.

Marshal . . . to summon Alexander Riley, Esq., to attend *at his chambers*, as a member of the said Supreme Court; and further, that the said Jeffery Hart Bent, Esq., since and after a public notification that the members of the said Supreme Court were discharged from all further duty in that respect, has also presumed . . . to issue other process, directing the Coroner of this territory to attach and have the body of William Gore, Esq., the Provost-Marshal . . . before the Supreme Court.

"His Excellency the Governor, in consideration of the circumstances of the authorities with which he is invested, and of the positive directions of His Majesty's Government, . . . can no longer feel himself justified in forbearing to notify and put in force the commands of His Royal Highness and His Majesty's Ministers with regard to the removal of the said Jeffery Hart Bent, Esq., as Judge of the Supreme Court in and Magistrate of this territory. And His Excellency the Governor does hereby accordingly declare order and make known that the said Jeffery Hart Bent, Esq., is positively and absolutely removed from the said appointment, and has no authority or jurisdiction whatever in this territory or its dependencies with regard to or by virtue of the same."[1]

Bent protested against his removal and also against the publication of the Order without communication with him, which under the circumstances was sheer insolence. He claimed that his authority could not be legally "determined till the arrival of a new judge," or by his exercise "of that liberty which has been given me of returning whenever it may suit my convenience".[2]

There was, however, not the least doubt that the Governor was acting within his rights, and his justification was quite complete. Bent had of course to acquiesce in his dismissal, and he left the Colony a few months later. His last argument with the Government took place over some detainers lodged against

[1] G.G.O., 14th December, 1816. There is a great deal more of the Order, which is written in very involved and redundant language, as all Wylde's Orders were. It was not only inserted in the *Gazette* but also placarded about the town. See Bent's letter below.

[2] See his Evidence, C. on G., 1819. This liberty had been given in the letter recalling him.

him, and in regard to these Bent was victorious.[1] In the course of the correspondence he took the opportunity in a letter to the Governor's Secretary of thus contrasting his own and Macquarie's tempers.

"I regret," he wrote, "that I have now before me but too many convincing proofs under Governor Macquarie's hand, that in respect to acrimony of language, I have been more sinned against than sinning; I heartily agree that difference of opinion need not excite a spirit of hostility, and if his Excellency Governor Macquarie had felt the force of his own observation, he would never have authorised the latter paragraph of your communication, a paragraph which might be returned with double force upon himself, and which it would have been more becoming to have omitted. Our local rank places but a shade of distinction between us, and I have yet to learn what decorum of language ought to be adopted by me in correspondence with any Governor of New South Wales which I am not (even as a private individual) entitled to have observed towards me in return, and I will further add that whatever may be my irritability of temper it has never led me into acts either of illegality or oppression." [2]

[1] Bent to Macquarie, 25th December, 1816. Enclosure to D. 12, 1817. R.O., MS.

[2] Bent to Campbell, enclosure, D. 12, 3rd April, 1817. R.O., MS.

CHAPTER IX.

THE STIRRING OF POLITICAL ASPIRATIONS.

AUTHORITIES.—Despatches, etc. (especially Appendix to Bigge's Reports) in Record and Colonial Offices. *Sydney Gazette* (especially 1819, 1820). P.P., 1819, VII.; 1822, XX.; 1823, X.

AFTER Bent had left for England, and Field, who arrived early in 1817, had opened his court, the Colony settled down to a time of comparative tranquillity. A change had come over the settlement since 1810, which grew more and more marked as each year passed. The day of the adventurers had gone—men no longer grew suddenly rich by trade monopolies and by traffic in spirits. Between 1810 and 1820 the lot of the settlers was no easy one, and those who came intending to amass a fortune and return to England found their project a mere dream, and that they needed steady perseverance before they could make their way in the Colony itself. Bigge noticed that New South Wales was unlike any other British Colony, inasmuch as the colonists looked upon it as their future home.[1] This was not only because sudden fortunes could no more be made. The deeper and more fundamental cause lay in the fact that the children of the convicts felt that New South Wales offered them a chance of free and honourable careers such as, weighted with the shame of their parentage, could not have been before them in the older country. Nationalism, the strongest characteristic of the Australian of to-day, is a legacy from these sons of exiles for whom Australia was a land of hope and promise, and the sense of a national character seems even at that early time to have impressed itself upon the observer. The young Australian was constantly referred to as though he could already be differentiated from the Anglo-Saxon. The youths were described

[1] Bigge, Report III.

as tall, loose-limbed and fair, with small features, and though strong, not so athletic looking as Englishmen. They made clever and daring sailors,[1] were already proud of their horsemanship[2] and were willing and quick to learn any trade. It was of course impossible that in one generation a new type could have been evolved, and the fact was that the children of the convicts, born into better conditions and growing up in a healthier environment, reverted to the type of which their parents were debased examples. It must also be remembered that many men were at that time transported for very slight offences, and that political prisoners from Ireland at the time of the Rebellion and from England and Scotland in the years of reaction after 1795, gave to Australia a fine and sturdy stock.[3]

The convict parents were in general anxious that their children should grow up decent and honest, and desired them to have the advantages of schooling and the ministrations of the Church.[4] In cases where the parents were dissolute and disreputable, their example was said to act rather as a deterrent than a temptation.[5] Under Macquarie there was an increase in the number of schoolmasters, and two of the chaplains sent out had some training in the National Schools in London. Though there were neither schoolmasters nor schoolhouses in sufficient numbers to cope with the population, there were Government schools of some sort in each district, and in Sydney there were also several private "seminaries".

[1] When Bigge was going from Sydney to Van Diemen's Land the ship was manned exclusively by Australians in order to ensure a trustworthy crew. See Report III.

[2] There were many complaints in the *Gazette* of reckless riding and driving. A favourite trick was to drive through the town without reins. Macquarie wished to raise a volunteer corps of mounted dragoons from amongst the young men.

[3] It is rather curious that the only prisoners against whose character Macquarie was ever warned were five men who had been convicted of High Treason and were transported in May 1820. He was cautioned against their designing characters and the "wicked principles which they may attempt, if not narrowly watched, to instil into the minds of others". See letter from Home Office with assignment of convicts, 11th May, 1820. R.O., MS. Hunter (C. on T., 1812) and Riley (C. on G., 1819) both gave very favourable accounts of the Irish convicts.

[4] The Rev. Mr. Cross said that he had heard "a man who was a Catholic say: 'I have been very bad myself and I don't wish my child to be as bad; I would rather he should be a Protestant than that'." Appendix, Bigge's Reports. R.O., MS.

[5] See Bigge, III. and Evidence of Riley, C. on G., 1819; also Evidence of several colonists in Appendix to Bigge's Reports. R.O., MS.

The gentlemen and the wealthy emancipists sent their sons to learn Latin at Halloran's School, by far the most popular in the Colony, while the poorer folk usually sent their boys to the free Government schools, where they learned little more than the three "R's". Education a little bridged the social chasm between the wealthy emancipists and the colonial gentlemen, for in Halloran's schoolroom the sons of both sat on the same bench, learned the same lessons, and whimpered under the same ferule.

As the colonists began to feel that New South Wales was their home the sociability of the settlement increased. The ceremonies of the Old World—dinners, evening parties, race-meetings, became frequent, and were varied by the more distinctive entertainments of water-parties and kangaroo-hunting. The officers of the garrison were the centre of all social gatherings, and for this reason their attitude towards the emancipists was a matter of considerable importance to the settlement. During Macquarie's time three regiments were stationed in New South Wales, the 73rd from 1810 to 1814, the 46th from 1813 to 1817, and the 48th from 1817 until after his departure.

The New South Wales Corps, which was relieved by the 73rd Regiment in 1810, after a service of thirty years, had kept with some strictness to a policy of exclusion. General Grose, who had originally raised the corps, and who for some years commanded it, thought that no officer should stay in the company of a man who had been a prisoner, and that any officer who did do so ran the risk of losing his commission.[1] The 73rd had not considered the subject when they came out, and as Macquarie was their Colonel they were much under his influence. The officers consequently associated with and entertained the emancipists whom they met at the Governor's table, though they distinguished these from the remaining freed-men. Indeed one of their officers was tried by Court-Martial and dismissed from his regiment because he played cards with a man who had been a convict.

"I know," said Riley, "that he pleaded the precedent of

[1] See Riley, C. on G.

persons in that situation having dined at the Governor's house; but with respect to this particular individual, unquestionably he never did so. He pleaded . . . that he had no intention of sitting at table with a person who had been a convict, as he had uniformly dissented from such a measure. The person alluded to accidentally came in and took a seat at the card-table, and the officer had not presence of mind enough to retire immediately. . . .[1]"

He was afterwards reinstated in the Army, though not in the same regiment.

The reports of the intercourse between the 73rd and the emancipists had not a good effect upon their reputation. The 46th Regiment, having heard what was said of this intercourse in the talk of the mess-rooms, and seen some scurrilous paragraphs in the Press,[2] determined not to lay themselves open to the same reproach.

On their arrival in Sydney, Macquarie welcomed them warmly, for Lieutenant-Colonel Molle, their commanding officer and the new Lieutenant-Governor, was an old companion-in-arms, and on his account alone the Governor was eager to show them hospitality. The officers were frequently invited to Government House, and Macquarie noticed that though they met several emancipists at his table, none were invited to theirs. Believing that Molle held the same views as he did himself on the treatment of this class of persons, Macquarie became curious to know the reason for their exclusion from the mess. He discovered "that the Officers of the 46th Regiment, on the particular recommendation of their commanding officer, Colonel Molle, had previous to their arrival in the Colony bound themselves never to admit into their society or hold any intercourse with any of those persons who had arrived here under sentence of transportation. They also entered into another resolution at the same time never to engage in any Trading, Farming or Grazing concerns in the Colony, the observance of which, although by no means exceeding what should be expected from their profession, would at least have reflected credit on them as military men. Their adherence to this rule," said Macquarie,

[1] See Riley, C. on G.
[2] Bigge's Report, I.

"has been by no means so rigid as that in regard to the other." [1]

Though Macquarie freely admitted their right to act as they pleased in drawing up rules for their mess, he felt "that a courtesy was due to me as their General and Governor of this territory, in regard to making my table the rule or standard for the admission of persons into society, and I could not but feel chagrined that a courtesy so usual and so becoming should have been withheld by a corps of officers to whom I had shown a particular inclination to pay every personal respect and attention within my power. The officers of the 46th Regiment in adopting a Rule of Exclusion, previous to their having acquired any local knowledge of the country, could not impress me with a very high opinion either of their good sense or their liberality: but I was peculiarly hurt at the consideration that Colonel Molle, in whose friendship and candour I had so fully reposed, and who constantly expressed himself in terms of admiration of the principles I was acting upon, should have privately lent himself to a measure which he was either ashamed to avow, or had not candour enough to make me acquainted with." [2]

Outwardly all remained on friendly terms until Captain Sanderson of the 46th joined the regiment from England in 1815. This officer came before the magistrates for some petty misdemeanour and treated their authority with contempt. For this he was "reproved and admonished privately" by Macquarie, whose admonitions had the result of turning Sanderson into the leader of what Macquarie called a faction against him. The truth was that amongst a certain set of officers it became the correct thing to make fun of the Governor and his friends and all that they did. Even Molle, who was on intimate terms with those colonists who were least friendly towards Macquarie with Bent, Harris, Jamison and others, sometimes had to lecture his officers on the "bold license they gave to their tongues". [3] Finally a young ensign, spending a dull day on duty at the

[1] See D. 27, 25th July, 1817. Enclosure to Commander-in-Chief. R.O., MS.

[2] D. 27, 25th July, 1817. R.O., MS. Probably this means no more than that Molle refrained from adverse comment. Macquarie would be quite ready to take that for approval. See, *e.g.*, his belief that Lord Bathurst approved of his emancipist policy. Chapter VI. and later in this chapter.

[3] See Macquarie to Commander-in-Chief, above.

Guard House, chalked up a caricature of the Governor on one side of the wall. Older officers came in to look at it, and though they should have been wiser, encouraged the lad by their laughter, and even wrote "scurrilous labels" around it. The matter was reported to Molle, who was of course officially severe, and held an inquiry at which the young officer confessed that the drawing was his. Macquarie was furiously angry and proposed to Court-Martial the boy, who only escaped by making a contrite apology and begging that he might be allowed to return home to his family and friends and not have to stay longer in this remote country where he was so miserable and so lonely. The boy's pitiful letters were full of terror and dismay, and the Governor allowed him to go back to England.

As Molle made no inquiry into the conduct of the officers who had allowed the caricature to remain upon the Guard House wall, and had added to its humour by their comments, the relations between Macquarie and the regiment became strained and the officers began to decline invitations to Government House. Just at this moment two lampoons appeared one after another and were distributed about Sydney. These "pipes," as they were called in the Colony, contained a very bitter and libellous attack on Molle, who being a very excitable and enthusiastically sentimental man, was much perturbed. He was exceedingly anxious to discover the author and ready to suspect every one about him. Even his officers, for whom he had a sincere affection, came in for some of his suspicion, which was finally laid to rest by Wentworth, who told Molle that he had accidentally discovered that the first "pipe" had been written by his son William who had just left Sydney to finish his education in England.[1] Molle was for the time completely satisfied with this knowledge, and a reconciliation took place between his officers and himself. The officers presented him with an address, to which he replied in writing, and Macquarie was asked to publish the documents in the *Gazette*. This he refused to do, and they were circulated in manuscript. The officers' address,

[1] This was the famous William Charles Wentworth, who was at this time sowing his literary wild oats in a defence of the wealthy emancipists, in which class his father, who had as a matter of fact never been a convict, was placed by common consent of the gentlemen-settlers and officers.

a sincere and unconsciously comic document, after referring to the "scurrilous anonymous productions" continued in these words:—

"These we see issuing from the pens of men so much our inferiors in rank and situation that we know them not but among that promising class which (with pride we seek it) have been ever excluded from intercourse with *us*.[1] And here, Sir, allow us still more to approve and applaud that system of exclusion which even prior to our arrival in a colony of this description was wisely adopted—the benefits of which we have reaped with advantage to ourselves as officers and gentlemen, and which although it may have prompted the malignity of those whom we have kept aloof, has established the name of the 46th Regiment on a most respectable basis. And, Sir, we presume that so salutary a rule will obtain the most perfect approbation of His Royal Highness the Commander-in-Chief and be as tenaciously adhered to by every regiment that may in succession compose this garrison.

"Henceforth we are confident no hostile inventions can disturb that union which it will be our zealous purpose to cultivate and support, and the prospect of shortly quitting this (a quarter in no point of view congenial to military feelings) will we hope afford us ample opportunities to evince that our hearts steadily accompany you no less in the active duties of our profession than they will keep pace with you in the social walks of life and in every wish for your domestic felicity and prosperity."[2]

One sentence had been deleted before the address was circulated, though not before Macquarie had seen it. This was an assertion "that the mess-table of the 46th Regiment was regarded as the standard of society in the Colony".

The Governor was very indignant with the whole tone of the document, and sent to Molle the heads of charges which he proposed to lay against the officers of the regiment collectively at a general Court-Martial. He offered the officers the alternative of trial or the withdrawal of the address, and they accepted the former. But as in New South Wales the members of the court would have been themselves members of the regiment, Macquarie gave up the scheme and contented himself with

[1] The italics are in the original document.
[2] See enclosure to Macquarie's despatch above.

laying the whole matter of their insubordinate behaviour towards him "at the foot of the throne" by writing to the Commander-in-Chief. Molle, meanwhile, attempted to bring Wentworth to a Court-Martial on the ground that he had aided and abetted the publication of the libellous "pipe," but Wylde decided that Wentworth's military commission as surgeon did not make him amenable to a Court-Martial for such an offence.

Luckily the regiment was then, in 1817, on the point of departure, and they left at the end of the year amid the general regrets of the inhabitants, except indeed of Macquarie and the emancipists.[1]

The behaviour of the 48th was rather different. Lieutenant-Colonel Erskine, the Lieutenant-Governor; Major Morriset, afterwards Commandant at Newcastle; and Major Druitt, the Chief Engineer, were all on friendly terms with emancipists. They even took Redfern to call on other officers, though not one received them.[2] When Redfern appeared at mess as Erskine's guest, the junior officers immediately rose from the table, and Erskine in consequence of this occurrence promulgated a mess-rule "that no officer should quit the table until the first thirds were drunk".[3]

In spite of the ill-feeling between Macquarie and the majority of the officers, he and Erskine continued on such excellent terms that the situation with the 48th never became so strained as that with the 46th.[4] But the discussions aroused by

[1] See Riley, C. on G., 1819, and Harris, Evidence in Appendix to Bigge's Reports. R.O., MS. Harris was a leading member of a Masonic Lodge founded in Sydney some time before 1817, of which Molle and J. H. Bent were members. When they left the Colony the Lodge presented them with addresses, of which Harris was an active promoter. Macquarie regarded this as a proof of Harris's hostility to his Government. Rusden, in vol. i., p. 546, writes, "Many regiments bear on their banners mottoes telling of their past services, but it may be questioned whether the scutcheon of the 46th could be more nobly adorned than by the memory of their conduct in New South Wales, which smells sweet across the lapse of half a century".

[2] In referring to this episode Rusden makes an insinuation against the character of Macquarie's Brigade Major which appears to be wholly unfounded. See *History of Australia*, i.

[3] Bigge's Report, I.

[4] Bigge remarks that the intercourse between the commanding officer of the 48th and emancipists encouraged an objectionable intimacy between the private soldiers and the convicts, which caused uneasiness in the Colony generally. See Report I. Probably it had always been impossible to prevent this intercourse between the rank and file and prisoners, and there is no evidence which distinctly shows that it was greater with the 48th than the 46th.

these attempts made at the desire and with the support of the Governor to force the emancipists upon the company of the officers, made their social exclusion more rigid than ever. The feeling of antagonism, though manifested only by exclusion from social gatherings, was a factor to be reckoned with in all the affairs of the Colony, and was especially to be regretted at this moment when the colonists as a whole were looking forward to the end of military Government and to some diffusion of political power.

The desire to bear a part in the management of the affairs of the Colony grew stronger year by year, and from 1816 Macquarie himself gave recognition to the feeling by frequently calling together the magistrates or a selected number of settlers to discuss measures that he had in contemplation.[1] At these meetings Wylde, who would have made an excellent borough councillor, played an active part, and he took a great interest in the many associations formed for various purposes during these years.

A small society had been established in Sydney so early as 1813, for "Promoting Christian Knowledge and Benevolence," and the first of these objects formed the purpose of "The Auxiliary Bible Society of New South Wales," a larger organisation founded in 1817 to co-operate with the British and Foreign Bible Society. This and the Benevolent Society were the only organisations of any size which had the distinction of combining all classes of the population, emancipist and free, in their management.

The Benevolent Society was founded to succour the poor in 1818. The poor were for the most part the old and infirm, many of them men who had been sent to the Colony as prisoners when they were already aged, and were no longer able to work for themselves. There were also many of the middle-class prisoners who had been given tickets-of-leave because they were unsuited to manual labour and were unable to find other work. Riley spoke of the "hard position of certain classes of prisoners—old or young people of the middle class—who from the multiplication of persons of this type can find no means of making a living".[2]

[1] *e.g.*, to discuss currency proposals, the question of poor relief, etc.
[2] Riley, C. on G., 1819.

In Sydney the Society for Promoting Christian Knowledge and Benevolence had given relief from funds raised by private subscriptions, and the Government did not allow any one to perish by actual starvation. But in 1817 Macquarie thought that some scheme should be organised for relieving the poor, and called a meeting of magistrates[1] and other principal inhabitants, at which Wylde, who had, however, not been consulted as to the objects of the meeting, presided.[2]

He proposed that a duty on tea and tobacco and an increased duty on spirits should be levied, and the proceeds devoted to the relief of the poor, thus leaving the fund to be raised and administered by the Government, and treating it as a national (if the word can be used for the Colony) service belonging not to each locality but to the Central Government.[3]

Macquarie had expected the meeting to make arrangements for raising a private fund, and though he laid the extra duty on spirits and the new duty on tobacco, he did not utilise the proceeds as the meeting had suggested. His idea was that the people of each district should "support their own *free*, poor and decayed settlers".[4]

The meeting on the other hand thought that "all expenses in regard to ticket-of-leave men and emancipated convicts should be borne by the Crown, especially in those cases where persons very far advanced in age were sent out under sentence of transportation, and also in the cases of prisoners who had been many years retained as mechanics by the Government".[5]

Something of a compromise was finally reached by the establishment of the Benevolent Society first mooted in April, and founded at a public meeting on the 6th June, 1818. The chief rules were that persons applying for relief must be recommended by a subscriber, and that relief was so far as possible to be given in kind and not in money. The objects of relief were

[1] *S.G.*, 5th July, 1817. Notice does not say for what purpose the meeting is called.

[2] Meeting took place on 13th August, 1817.

[3] The taxes suggested were 6d. a lb. on tobacco, 1s. or 2s. a lb. on tea, and another 3s. on spirits. See Wylde's Evidence, Appendix, Bigge's Reports. R.O., MS.

[4] Macquarie, D. 20, 24th March, 1819. R.O., MS. In "free" he certainly included emancipists and possibly ticket-of-leave men.

[5] Wylde, see above.

the "poor, distressed, old and infirm," and no distinction of bond and free was drawn. The funds were purely voluntary, and the management vested in a General Committee, an "Acting" Committee of seven, both of which met in Sydney, and five District Committees. The subscriptions in 1820 amounted to £434, and many poor settlers were amongst the subscribers. To have laid any compulsory obligation on any district to support its own poor would have been unjust as well as inexpedient, for there was no Law of Settlement, and population moved very freely from one place to another. The system of voluntary subscriptions to a central fund, assisted by local subscriptions which were also voluntary, worked fairly well, and between 1818 and 1820 the Society relieved 201 cases. The Government built a house for the reception of aged people just outside the town of Sydney, and handed it over to the management of the General Committee, and also gave to the Society a piece of land at Richmond, in the Hawkesbury District. Rations from the Government stores were also issued to seventy-seven persons recommended by the magistrates.[1]

An attempt at this time to form an Agricultural Society came to an untimely end. Wylde hoped by means of balloting for the election of members to prevent the necessity of excluding or including ex-convicts by any rule. With a ballot he thought some would have been elected and others, who were personally undesirable, would not. But the Governor refused to be the patron of the Society unless the emancipists were freely admitted; and, lacking his support, the scheme was dropped.

Wylde was probably right in thinking that with the ballot the exclusion would only have been partial, for even Bell, one of the strongest opponents of convict magistrates and of Macquarie's emancipist policy generally, said he "would not confound a man sent out for a political crime with a common felon or man guilty of an immoral offence."[2]

[1] See Wylde's Evidence, Appendix, Bigge's Reports. R.O., MS. See Bigge's Report III., and *Sydney Gazette* for June, 1818. The absence of any compulsory Poor Law organisation making each district self-supporting for purposes of poor relief probably accounts very largely for the slow growth of local Government institutions in Australia. The administration was from the first very much centralised.

[2] See Evidence of Wylde and Bell. Appendix, Bigge's Reports. R.O., MS.

Men like Lord would have been excluded, but men like Fulton received.

During 1818 the hostility between Marsden and Macquarie culminated in the dismissal of the former from the magistracy; and the events leading up to his dismissal bore not only a personal but a political aspect of considerable interest. The bad feeling of the Governor towards the chaplain (for Macquarie seems from the beginning to have been the offender) had been much increased by Macquarie's mistake in attributing to Marsden Bayly's letter describing the treatment of the female convicts.[1] It was further strengthened by the fact that Marsden, acting as a magistrate, had taken the affidavits of the public flogger and gaoler in regard to the flogging of Blake and Henshall in 1815.[2] The Governor's sense of propriety was so far overcome by his bitterness that he allowed his secretary, who was a magistrate of the territory, to examine the gaoler on oath and try, without success, to obtain an admission that Marsden had solicited him to come forward and make his declaration.[3] Marsden was also summoned to Government House, and in an official interview, in the presence of one of the chaplains and of Macquarie's personal staff, accused of seditious and turbulent conduct. At the same time the Governor strongly opposed Marsden's desire to retire from the magistracy.

A trivial incident was sufficient in such a state of affairs to bring about a crisis. In 1815, while Marsden had been in New Zealand on missionary business, Macquarie had established a Native Institution for teaching the children of the blacks. The school was at Parramatta, but nevertheless Macquarie did not include Marsden in the Committee of Management. To Marsden, the Principal Chaplain and Resident Magistrate at Parramatta, this presented itself as a deliberate slight, and he studiously avoided taking the least interest in its progress. Thus in 1816, when the Governor paid his annual official visit to the school, Marsden did not wait upon him. J. T. Campbell, the Governor's Secretary, who loyally detested his chief's opponents, irritated by what he considered a discourtesy, inserted in the

[1] See Chapter VI. [2] See Chapter VIII.
[3] See Appendix to Bigge's Reports. Copy of this examination. R.O., MS.

Gazette, over the signature of Philo Free, a violent attack upon the moral and commercial honesty of Marsden as agent of the Church Missionary Society.[1]

Marsden immediately wrote to Wylde calling upon him as Judge-Advocate to institute criminal proceedings for libel against the printer. Wylde attempted to bring about a peaceful solution of the difficulty and wrote to Macquarie pointing out the impropriety of the publication and suggesting that a public apology should be made. Macquarie, who was quite ignorant of Campbell's part in the letter and was sensible of the wrong done to Marsden, published a Government General Order expressing regret that in the hurry of getting the paper to press the objectionable nature of the contribution had been overlooked.[2] As Marsden had in the interval gathered evidence which showed him quite clearly that Campbell had not only passed but written the letter, it was not to be wondered at that the apology in no wise appeased him. He desired the Judge-Advocate to proceed this time not against the printer but against the Secretary. The Judge-Advocate demurred, and a long correspondence ensued in which Marsden claimed that Wylde must file depositions relating to the prosecution *ex officio*, and Wylde claimed that he had a discretionary power.[3] The best of the argument seemed to lie with Marsden, for he had the support of the late Ellis Bent's authority, while Wylde could only reply in the confused unintelligible language at his command.[4] In the end Wylde gave way, and the case came on for trial in October. Following the Judge-Advocate's charge, as his summing up may fairly be called, the officers who constituted the court gave a peculiar

[1] *S.G.*, 4th January, 1817. Marsden's name is not mentioned, but there was no possible doubt of the application of the libel.

[2] G.G.O., 18th January, 1817.

[3] For all the correspondence see enclosure to D., 20th March, 1821. R.O., MS.

[4] See especially Marsden to Wylde, 24th April, 1817, in above D. "He always gave it as his opinion that it would be extremely dangerous to the administration of public justice if the same authority was vested in the Judge-Advocate for the time being as that possessed by the Grand Jury in England, and I may venture to say that he never acted upon this principle while he had the honour to preside as Judge-Advocate in our Criminal Courts. He considered that it was a matter of too great importance to every member of the community to be left to the discretion of one man to determine whether a cause should or should not be heard before a legal tribunal, and that it was the sole province of the Criminal Court, and not of the Judge-Advocate alone, to decide upon the evidence in such cases."

verdict simply declaring Campbell to be guilty of writing the letter, and the letter to be a libel. But Marsden did not press for judgment, declaring his intention, through his solicitor, of proceeding no further in that court.

The worst feature of the affair was the report of the trial inserted in the *Gazette* on 1st November, 1817, which so described it as to be little short of a fresh libel upon Marsden, and implied that Campbell had been not only guiltless in fact but even in the opinion of the court.[1]

It was so bad that even Wylde, who according to evidence given to Bigge had displayed some clear bias towards Campbell during the trial,[2] went so far as to call upon Garling, Campbell's solicitor, for an explanation of this improper report. "Upon his suggestion that he had no knowledge of it I required him to address a letter to the printer, which he afterwards showed me, correcting the general account as well as the principles that were stated to have regulated the decision of the court. It does not appear that any such letter was inserted in the *Gazette*. Mr. Garling informed me that the letter had been returned from the printer, he stating that he had instructions not to insert it."[3]

Wylde could do nothing more. He thought it inadvisable to proceed against the printer as the account was in a "leader" not a report, and he found the Governor quite unapproachable. The subject aroused in him, according to Wylde's diplomatic phrase, "such disagreeable sensations".[4]

Marsden, dissatisfied with the criminal trial, took proceedings against Campbell in the Supreme Court, and was there awarded £200 damages. Altogether Campbell lost much of his reputation and £500 as the result of his fit of temper.[5] No report was made by Macquarie of these transactions, but hearing of the matter indirectly, Lord Bathurst sent through the Governor a severe reprimand to Campbell[6] and afterwards instructed

[1] See *S.G.*, 1st November, 1817.

[2] See Bigge's Correspondence with C.O., 1823, R.O., MS. Wylde was himself apparently aware that his conduct of the case was open to objection. See his long confused account in enclosure to D. above.

[3] Wylde's Evidence, Appendix to Bigge's Reports. R.O., MS.

[4] See Appendix, Bigge's Report. R.O., MS.

[5] See Campbell to Macquarie. Enclosure to D. 25, 31st March, 1819.

[6] See D. 25, 1819.

Macquarie to transmit a full report of the trial.[1] He was, however, ready to let the matter rest, and did not express sympathy with Marsden's desire for Campbell's dismissal.[2]

Marsden for a time very unwillingly continued to act as magistrate at Parramatta. In March, 1818, the Judge-Advocate being in the town, visited the gaol, and on his return to Sydney suggested that the Governor should release some of the prisoners in order to lessen the pressure on the gaol accommodation. This was done without further communication with Marsden, who had been the committing magistrate. Already bitterly hurt by Wylde's behaviour in the libel action, and always very ready to accept any action as a criticism on his magisterial sternness (for his severity was probably often brought into invidious comparison with Macquarie's clemency), Marsden at once wrote to Macquarie resigning his office. This was on the 18th March, 1818, and the only answer Marsden received was a copy of a General Order which stated curtly, "that his Excellency the Governor had been pleased to dispense with the services of the Rev. Samuel Marsden as justice of the peace and magistrate at Parramatta and the surrounding districts".[3]

Although from this time Marsden might with good reason have displayed a greater hostility towards the Governor, there appears no evidence to connect him with any hostile demonstration. Under the circumstances the clergyman, who was a hot-tempered, full-blooded man, behaved with remarkable self-control, and showed himself more sinned against than sinning. The chief interest of the whole affair lay, however, in the fact that this was the first trial for libel in the Colony, and that in the criminal trial and in the civil trial which followed it the defendant was not merely a Government official, but one in very close and intimate connection with the representative of the Crown, and one who styled himself the Censor of the Press. More important still was the fact that judgment was given against this official, and that the Censor of the Press learnt how narrowly the law limited his functions. In short, the action in the

[1] Given in D. 8. See above.

[2] See Bigge, Report I.

[3] For facts of this quarrel see Bigge's Report, I. Bigge gives a very full account, and it appears, from all the evidence, to be a very just one. The G.G.O. appeared in *S.G.*, 21st March, 1818.

Supreme Court marked a very definite stage in the growth of civil liberty, and proved not only how far the Colony had outgrown the simple governmental needs of earlier times—but also what an anomalous confusion of military autocracy and civil liberty had been created. By Macquarie the decision of Mr. Justice Field in the Supreme Court was doubtless taken to express the latter's hostility to his government.

The beginning of 1819 was a very busy time in the Colony. An influential body of settlers, with Sir John Jamison at their head, had decided that the time was ripe to petition the Prince Regent to grant a more liberal form of Government, an improved judiciary, and a freer trade. Early in the year, with Macquarie's full permission, a public meeting was held with Jamison in the chair, and a committee appointed with Eager as secretary to draw up the petition. At a second meeting their draft was adopted and copies sent to the magistrates and members of the committee that they might collect signatures.[1]

The petition "though perhaps," wrote Macquarie, "in no very courtly language," [2] asked for trial by jury, the replacement of military officers of Government by civil officers, the reduction of duties on New South Wales products imported into England, permission for ships of less than 250 tons to trade with the Colony, and permission to distil from their own grain.

It was signed by 1,260 persons "including (with the exception of a very few persons, most of whom, holding official situations, did not consider themselves warranted) all the men of Wealth, Rank, or Intelligence throughout the Colony".[3] The promoters had difficulties of many kinds to contend with; in February and again in March the flood waters were up at Parramatta and the Hawkesbury. Cox wrote to Jamison from his house at Windsor on the 13th February at the early hour of 6 a.m.

"My dear Sir John,

"I feel with many others much disappointment in being deprived the pleasure of attending the Committee and meeting

[1] See *S.G.*, January and February, 1819.
[2] See D., 22nd March, 1819. R.O., MS. Petition was sent by Macquarie with this despatch.
[3] D., 22nd March, 1819, above.

to-morrow, but the waters are too much out to attempt it. . . . The joint letter and return I enclose you signed by the magistrates of these districts, and I would much wish the question as to who should act as jurymen should not be agitated at this meeting. I have no doubt the Legislature will form their own opinion on that subject and lay down the law for us—but should they not, it will be time to canvas it here. If done now it will create division which in my humble opinion is better avoided if possible."[1]

Cox's advice was taken, and nothing in the petition suggested that there was any ill-feeling in the Colony between emancipists and free men.

Marsden, who was collecting signatures at Parramatta, also had trouble from the floods. He wrote to Eager: "I am sorry that the weather was so bad some persons could not be visited. I sent a man on horseback to Mr. Bayly's, but he came back not being able to cross the creeks. I had left a place for his signature . . . and I have sent it to him at Sydney."[2]

Jenkins in Sydney had troubles of a different nature.

"I return you the skin of signatures," he wrote to Eager "with the addition of only one name (Mr. Secretary Campbell's). I have been and solicited the following persons:—

Mr. Wentworth.
„ Broughton.
„ Garling.
„ Harris (I believe Harris is out of town)
„ Oxley.
„ Johnston.[3]

but without effect. Some declare their signing would be improper while holding the King's Commission. Mr. Johnston thinks his name might injure our petition. Mr. O. dislikes the Trial by Jury. Mr. Garling will consider about the propriety of signing. Mr. Campbell signed very cheerfully and freely."[4]

Campbell's readiness to sign was a good indication of the Governor's hearty approval of the petition. Indeed Macquarie

[1] Appendix to Bigge's Reports. R.O., MS.
[2] *Ibid.* Dated 18th March, 1819. [3] The deposer of Bligh.
[4] Appendix, Bigge's Reports. Dated 18th March, 1819. R.O., MS.

had himself recommended to the Colonial Office the greater part of the measures which it argued. The most difficult and important of these was trial by jury.

Field dealt thus with its legal aspects. "Except in certain classes of misdemeanours, which do not induce legal incompetencies, and except in case of pardon under the Great Seal, which removes them, men convicted of felony or misdemeanour, after the expiration of their terms of transportation or (after being) pardoned by the Governor, are liable to challenge as jurors. The pardon of the King under Sign-Manual is sufficient in the case of transportation."[1]

There was, of course, the property qualification, and in accordance with the returns sent by the magistrates to Sir John Jamison there were 614 persons free and emancipated owning freehold property and so entitled to act as jurors. But amongst these there were fifty-one officers of Government and many others who, as Bigge pointed out, were "raised too high above the condition of the ordinary description of offenders that come before the Criminal Court to be selected as jurors".[2] Those born in the Colony and resident on their own property numbered no more than eighty-seven, and though equal, if not superior in intelligence and moral conduct, to the class from which petty jurors were taken in England, would find it burdensome and expensive to leave their farms to attend the sittings of the Criminal Court.[3] Apart altogether from the legal aspect, it was necessary to consider what would be the actual effect of jury trial, and whether it would secure a more efficient administration of justice. It was in the Criminal Court that it was felt to be most needed, and the petitioners gave little consideration to its use in the Court of Civil Judicature.

Since the time when Ellis Bent and Macquarie had urged it upon the Government, feeling on the subject had undergone some changes. Jeffery Bent doubted whether petty juries would be an advantage and Riley was quite against it. "It is certainly most natural," he said, "that Englishmen should wish for so great a blessing, but according to my opinion the present state

[1] Field to Bigge, 23rd October, 1820. Appendix to Reports. R.O., MS. The last sentence refers to misdemeanours not entailing legal incompetencies.
[2] Bigge's Report, II. [3] *Ibid.*

of the territory does not warrant it in New South Wales; and I think, if immediately extended to it, it would become an evil. In saying this I believe I deliver the sentiments of a majority of the inhabitants who are capable of duly appreciating the result of so important a measure. When I left the Colony I thought many years must elapse before it would be capable of producing a sufficient number of proper jurymen."[1]

Cox, Macarthur and Bell, who all signed the petition, were opposed to the establishment of petty juries, and Marsden was opposed to ex-convict jurors.[2] The fact that in spite of their feeling on this point they did sign was a proof of the development of a spirit of party government, all of them sinking their feelings on this point in the hope of gaining the others. It is noticeable that no one, with the exception perhaps of Marsden, thought it would be possible to exclude ex-convicts altogether. Field, for example, thought the danger of petty juries would lie in the fact that emancipists would be legally entitled to sit upon them, and that jury trial would therefore be the means of still further embittering feeling between themselves and the free population.[3]

It is probable that the military officers who acted as judges and jury in the Criminal Court were as impartial and as intelligent as an average English jury. The great objection to the peculiar organisation of the court was that it was unnatural and inimical to the ideas of the people. It often happened also that the decision of questions of guilt lay with a young and inexperienced officer who knew nothing of New South Wales, and very little of the world.[4] Wylde complained that the officers, aware that the court was unpopular merely because it was military, too often erred on the side of leniency from a fear of raising ill-feeling, while if a member of their regiment were tried before them, from the same fear they were inclined to be too severe. The officer in command of the garrison complained that the demands of the Criminal Court interfered seriously with the military duties of his officers, and to the regiment the

[1] Riley, C. on G., 1819.
[2] See Appendix, Bigge's Reports. R.O., MS.
[3] Field to Bigge. See above.
[4] See Bigge's Report, II. The verdict was a majority and not a unanimous one.

court work was thoroughly distasteful. Thus dislike of the military court and hesitation as to the wisdom of introducing jury trial were balanced against one another, and the scale just dipped in favour of the latter. The opinion of Bigge and Field was that a little time should elapse to allow the exceedingly bitter feelings, aroused against the emancipists by Macquarie's policy, to subside before trial by jury could be safely established.[1]

Lord Bathurst received the petition in 1820 and already much had been done on the lines suggested. Trade regulations had been relaxed and permission had been given to establish distilleries. Before making any further changes, the Secretary of State proposed to wait until he received the report of Commissioner Bigge.[2]

A decision of the Court of King's Bench in 1817 came as an unexpected and heavy blow to the emancipists.[3] The old custom of the Colonial Courts had been that a convict could not sue or be sued, but that the convict free by servitude or pardon stood in the courts as a free man. Field modified this by allowing a convict to sue or be sued in his court, on the ground that a record or office copy of his conviction was necessary as proof of his status, though if such record were produced the convict had no standing. The case of Bullock *v.* Dodds, heard by the Court of King's Bench, decided that the Governor's pardons had only the power of pardons under the sign-manual and did not allow a convict attainted of felony to give evidence, maintain personal actions, or acquire, retain and transmit property. Up to that time the Act, 30 Geo. III., cap. 14, which conferred on the Governor the power to pardon had been interpreted as giving to his pardons the same force as pardons issued under the Great Seal, so that the news of the decision in Bullock *v.* Dodds which reached New South Wales in 1818 came as an unwelcome surprise.

[1] Bigge proposed that the emancipist should fulfil the condition of cultivating a certain proportion of his land before he should be eligible as a juror, and also he should have "the free and unencumbered possession of not less than fifty acres of land granted or of a house of the value of £100". See Report, II.

[2] See D. 3, 24th March, 1820. C.O., MS. For new trade regulations see Chapter V. and see also Chapter X.

[3] See Report of Bullock *v.* Dodds in Barnewell and Alderson, Reports of Cases in the King's Bench, vol. ii., pp. 258-278. Judgment of Bayley, J., and Abbott, C. J.

In ten years, from 1810 to the end of 1819, only eleven pardons had been granted or confirmed by His Majesty, and a minority of these had been passed under the Great Seal. As the Governor's pardon was effective in the case of crimes which did not carry legal incompetencies, Field succeeded in somewhat alleviating the hardship of the new doctrine. Thus when attorneys, being hard-pushed, took the "objection of attaint" against witnesses, Field said that he "never allowed the witnesses to answer the question, as I think it a dilemma too hard to place any witness in, as if he tells the truth he disgraces himself. I always tell the party who produces the witness to exhibit the office copy of the record of the conviction. In cases of this kind I have consulted the members of the court as to the general character of witness produced.

"Nor," continued Field, "can a man be examined himself in those things, for he may not say anything to injure or incriminate himself.

"The sting of the law is therefore, in this remote Colony, where it would only sting itself to death, well and wisely taken away by the law itself."[1]

This rule he applied throughout, but it was clearly one which "gave to the judicial authorities, the great power of determining how long and in what cases they may exercise that right".[2] This power "may equally be applied," wrote Bigge, "to the convict whose term of service is expired, and who to all intents and purposes is a free man, as to the convict whose term of service has been remitted by the Governor of the Colony, and who stands in the situation of a person holding a sign-manual pardon".[3]

Under these circumstances the emancipists were naturally uneasy, and two decisions, one by Wylde in the Governor's Court, and one by Field in the Supreme Court brought their anxiety to a head.

In the Governor's Court, Eager proceeded against Mr. Justice Field on a charge of slander contained in a rebuke administered by Field when acting as Chairman of the Bench of Magistrates at Parramatta. Field pleaded that Eager could not bring a personal action, having been convicted of forgery and not having

[1] See Field to Bigge, above. [2] Bigge's Report, II. [3] *Ibid.*

since been included in any issue of pardons under the Great Seal. Stay of proceedings was allowed for eighteen months in order that Field might procure from England an office copy of the record of conviction.[1]

In the Supreme Court it had been adjudged "That persons arriving in this Colony under sentences of transportation and afterwards receiving instruments of absolute and conditional remissions . . . were not thereby restored to any civil rights of free subjects unless and until their names should be inserted in some general pardon under the Great Seal of England; but on the contrary that they still remained convicts attaint, incapable of taking by grant or purchase, holding or conveying any property real or personal, of suing in a Court of Justice or of giving evidence therein—and upon the sole ground that the name of the plaintiff did not appear in any general pardon under the Great Seal of England, decreed that the plaintiff . . . could not maintain his action. . . ."[2]

The emancipists obtained Macquarie's permission to hold a public meeting and to petition the Crown to remove these disabilities. The meeting was duly advertised in the *Gazette* on 7th January, 1821. Field and Wylde, who were on the point of sailing to Van Diemen's Land on circuit, at once wrote to the Governor, thinking it their duty "to apprise your Excellency that if you had been pleased previously to such sanction, to have consulted us upon the law, we could have demonstrated . . . that none of the civil privileges of the above mentioned persons (the emancipated convicts and expirees), have been affected by any rules of law lately pronounced by us; and we beg to add that we make this declaration with no view of interfering with any measure of your Excellency's Government, or on the ground of any objection on our part to the meeting proposed, but solely for the purpose of absolving ourselves from any consequences which the convention of such a meeting may occasion, during a probably three months' closure of the Courts of Civil and Criminal Judicature."[3]

[1] See Petition of Emancipists, enclosure D., 22nd October, 1821. R.O., MS.
[2] *Ibid.*
[3] See letter, Appendix, Bigge's Reports, 7th January, 1821. R.O. The advertisement of the meeting stated that it was called for the purpose of petitioning the King and Parliament for relief from the consequences of certain rules of

Macquarie replied expressing his regret that they disapproved of the advertisement of the meeting, and adding, "Had I conceived anything illegal or even irregular in the wording . . . I should certainly have consulted you on the occasion, before I gave my sanction to the publication of it. But, impressed as I am with the firm conviction of the serious grievance this description of people labour under at present, from the late explanation of the law, as it regards themselves and their property, I consider it my indispensable duty to sanction their meeting for the purpose of seeking relief from the injurious consequences of the present state of the law, not contemplating that such a measure would have proved in the smallest degree annoying to you, as the judges who had expounded the law."[1]

Bigge agreed with Macquarie, and no harm came of the meeting. Dr. Redfern presided and Eager acted as secretary. The petition was signed by 1,360 persons, and the secretary and chairman both went to England to forward the cause.[2]

There can be no doubt that the emancipists and expirees[3] had never been intended to occupy the precarious position which resulted from the decision of Bullock *v.* Dodds, and that some alleviation might fairly be asked for.

Bigge thought that the Governor's pardon should be given the power of a pardon under the Great Seal, within the boundaries of New South Wales, and that some such statutory provision was safer than a discretionary power which was open to abuse so long as the reasons for its exercise remained as Field would have said "in the breast of the court".[4]

Bigge's commission in New South Wales gave him the

law, lately pronounced in the Courts of Civil Judicature in the Colony, affecting the civil privileges of the above mentioned colonists.

[1] Macquarie to Wylde and Field, 7th January, 1821. Appendix, Bigge's Reports. R.O., MS.

[2] Redfern had private business of his own, but Eager's visit had to do only with the petition. He was a restless, troublesome man, and Field wished the Secretary of State to forbid his return. See his letter to Bigge, Appendix, Reports. R.O., MS.

[3] In the Colony "emancipists" was used to cover both.

[4] Bigge thought "that all felonies committed by convicts during their term of punishment or by remitted convicts after their remission, shall be held to deprive them of all future personal right of action and of serving as jurors, and should also create a forfeiture of all lands granted to them by the Crown, or held by other title". Report III., 30th January, 1819. See Chapter X. See Bathurst to Macquarie, C.O., MS.

right to remonstrate with Macquarie, and even direct his administration as well as to inquire into the whole conditions of the Colony. He arrived in 1819 and left in 1821, and, as was perhaps inevitable, he and Macquarie were more than once engaged in arguments. Twice their disputes led to a complete rupture in their relations, and on each occasion Macquarie was certainly in the wrong. It is useless to raise the dust over all these past contests again, for the time was not one when they could lead to further result. It was a period of waiting; the time of Macquarie's departure was growing near; the Governor's administration had been assailed in the House of Commons and in two pamphlets by the Hon. H. Grey Bennet, M.P., and it was well known that, so soon as Bigge's Report had been presented, great changes would be introduced.[1] It was what had happened before Bigge's arrival rather than what happened while he was in the Colony that was of real importance. That Macquarie should dislike the commission was natural, for whatever Bigge's finding, his appointment in itself was a reflection upon Macquarie's administration by showing that inquiry was felt to be necessary.[2] His resignation also had been neglected, and he wrote in 1820 in a tone of extreme depression to Lord Bathurst, saying, "Two years and two months having now elapsed since the sailing of the *Harriett* for England, I cannot conceal from your Lordship the regret and mortification I feel at your Lordship's not condescending even to notice the receipt of my letter of resignation, and thereby leaving me utterly at a loss to know when I am to be relieved.

"After the arduous and harassing duties I have had to perform in the administration of the Colony for now upwards of ten years, the constant counteraction I have experienced here even to my best measures, and the cruel and base calumnies circulated to the prejudice of my character at home, I must confess, my Lord, I am now heartily tired of my situation here, and anxiously wish to retire from public life as soon as possible.

[1] See Chapter X.

[2] Macquarie did all that was fitting in the way of public ceremonial with a very good grace, and wrote of Bigge—except when quarrelling with him—with respect and admiration.

"I therefore most earnestly entreat your Lordship will be so good as to move His Royal Highness the Prince Regent to accept this second tender of my resignation, and to be graciously pleased to appoint another Governor to relieve here as soon as a competent person can be selected for that purpose."[1]

Lord Bathurst replied, "I regret to find that you had not at the date of your former despatch received my communication of October, 1818[2]. . . as it would have fully explained the reasons on which alone I had thought it my duty to decline submitting your resignation to the King[3] until you had an opportunity of reconsidering the ground upon which it was then tendered. Finding, however, that your anxiety to resign your command has no longer any reference to the circumstances stated in your despatch of December, 1817, I have thought it encumbent upon me to submit your request to the King, and have the honour to acquaint you that His Majesty has been graciously pleased to accept your resignation."[4]

On the 5th of August, 1820, Major-General Sir Thomas Brisbane, having heard that Macquarie was returning, asked for the command. He had already been suggested for the post by the Duke of Wellington and the late Sir Joseph Banks. Of his own qualifications he refused to say anything save to assure Lord Bathurst of his "utmost assiduity in behalf of that infant Colony".[5]

On the 3rd of November, the appointment was offered to him and at once accepted. He was a soldier of distinction with a knowledge of astronomy and kindred sciences, and it was on account of these that he was anxious to go to New South Wales. He sailed in May, 1821, and arrived in November after a five months' passage by Rio Janeiro. But before speaking of Macquarie's departure, some account must be given of his last attempt to honour, in the person of Dr. Redfern, the class to whom he had throughout his administration shown so much favour.

Redfern had been an assistant surgeon in the Navy when at

[1] Macquarie to Bathurst, 20th February, 1820. R.O., MS.
[2] This was not a despatch but a private letter, and it does not seem to have been sent. In any event Macquarie did not receive it.
[3] George IV. [4] D. 14, 15th July, 1820. C.O., MS.
[5] Brisbane to Bathurst, 5th August, 1820. R.O., MS.

the age of eighteen he had been sentenced to death for complicity in the mutiny at the Nore. His complicity had been proved by his being overheard in urging the mutineers to greater unity among themselves. On account of his youth his sentence had been commuted to transportation for life, and after being some years in the Colony he had received a free pardon and in 1812 a commission of assistant surgeon, a post which he occupied until 1819.

Wentworth, the principal surgeon, retired in 1818, and Macquarie assisted Redfern in bringing to bear as much influence as possible upon the Colonial Office in order to secure for him the higher post. To Macquarie's surprise, Lord Bathurst passed over Redfern in silence and appointed Dr. Bowman, a skilful naval surgeon who had been a remarkably successful superintendent of transports.[1] Redfern, indignant at being thus overlooked, resigned his position of assistant, and Macquarie promised to appoint him to the magistracy, apparently in compensation for his disappointment. Bigge urged the Governor not to take such a step, pointing out that the Secretary of State had already expressed disapproval of such a policy, and that by doing so Macquarie would be giving to Redfern a higher rank than that to which Lord Bathurst had tacitly declined to raise him. Macquarie submitted reluctantly to Bigge's authority though not to his arguments, but two days later changed his mind. Bigge wrote indignantly to ask the reason, and Macquarie replied, . . . "I was and am fully bent on according with you in every measure you can suggest, however different from my previous opinions and conduct . . . providing the alterations you propose are calculated in my mind, after the most mature consideration of the subject, to promise that advantage which I am well aware it is your intention they should. . . . I am willing to make every reasonable sacrifice of my own feelings to the wishes and views of His Royal Highness the Prince Regent, and His Majesty's Ministers—but I feel that I should be no longer worthy of the situation I hold in this Colony, were I to make so complete an abandonment of my authority, honour and principle, as to cancel an appointment

[1] Bathurst to M., April, 1819. Macquarie, C.O., MS.

after the precept had been made out actually signed by me in conformity to a promise made before your arrival in this Colony. . . .

"With all due deference to your acquirements and the superior faculties of your mind, I consider myself at least your equal in the consideration of a subject *new* to you, but familiar to me in my daily and hourly duties for now nearly ten years, and I cannot let this opportunity pass without dwelling a little longer on the subject which has given rise to this communication. The most virtuous and best disposed of the free people of this Colony agree with me in the adoption of this principle. The malcontents who since Governor Phillip's time to the present moment have ever been the burden and turmoil of this Colony have free access to you." The blandishments of these people, he continued, usually brought newcomers to their way of thinking, a matter of little importance when the strangers were birds of passage. "But you and I, who have voluntarily undertaken a duty which combines us equally with all, must, in the just fulfilment of those duties, lay aside our own personal feelings—for if we are so delicate in our moral sentiments as to be unapproachable by the general mass of the population of this Colony, or so refined in our senses as to be unable to bear the approach of a naked and generally filthy native, it will be difficult, if not impossible, to form a just estimate of the wants and claims which all alike have upon us.

"The class of persons here who must ever be considered as the first . . . have overturned the Government of this Colony—they have occasioned the retirement of every Governor who had held the Government, they are factious, discontented and turbulent. . . . Let not the disposition with which nature seems to have endowed you for doing good," he concluded with a sudden flight into rhetoric, "be overwhelmed by an overstrained delicacy, or too refined a sense of moral feelings, for such I consider the preference given to a bad man who perhaps narrowly escaped the stigma of having once been a convict—to one who is *now good*—but who has been proved not to have been always so. Avert the blow you appear to be too much inclined to inflict on these unhappy beings (if you make them so!), and let the souls now in being, as well as millions yet

unborn, bless the day on which you landed on their shores—and gave them—(when they deserve it) what you so much admire—Freedom!"[1]

Bigge was not much affected by the rhetoric, and easily cut the ground from beneath Macquarie's arguments. The question had nothing to do with vague generalities, but dealt simply with the wisdom of making Dr. Redfern, an emancipist, whose promotion had not been continued beyond the post of assistant surgeon, a magistrate, against the known opposition of Lord Bathurst.

"Your Excellency must be well aware," he wrote in one part of his letter, "that not only in this Colony but in England likewise, the admission of convicts to the magistracy, the distinguishing feature of your administration, has been more than questioned." And again, "I never can admit that the faithful discharge of the duties of assistant surgeon can ever form a claim to the honours of the magistracy, even among the limited number of aspirants to that office in this Colony".[2]

His arguments were of little use, for Redfern held Macquarie to his promise. "Honour, Character and Principles" were so deeply involved that the Governor felt bound to fulful his pledge.[3]

Redfern was appointed and held his coveted rank for nearly a year. But when the new King came to the throne and a new commission of the peace was issued, Macquarie received orders from Lord Bathurst to omit Redfern's name. Thus when Sir Thomas Brisbane took up the reins of Government no convicts sat upon the Bench, for Lord, persuaded by both Macquarie and Bigge that the trade of auctioneer was unsuited to one of magisterial rank, had retired on the plea of ill-health on the same occasion.[4] Early in 1821 Macquarie made a tour of Van Diemen's Land, and on his return to Sydney was received, as he had been in 1812 with an address of welcome and a general illumination of the town.[5] Soon afterwards he started on his last progress through New South Wales, and it was while he

[1] 6th November, 1819. Enclosure, D. 2, 22nd February, 1820. R.O., MS.
[2] 10th November, 1819. See above, R.O., MS.
[3] Macquarie to Bigge, 12th November, 1819. See above, R.O., MS.
[4] Bigge's Report, I. [5] See *Gazette*, 23rd November, 1821.

was absent that Brisbane arrived at Port Jackson. On the 21st of November Macquarie returned to headquarters, and Sydney saw the spectacle of "Their Excellencies" riding through the streets together. Brisbane was sworn in on the 1st of December, 1822, and a fortnight later addresses—one of welcome, one of farewell—were presented, in the preparation of which, the *Gazette*[1] recorded that "a deplorable lack of unanimity was shown".

Macquarie with his wife and little son sailed for England on 12th February, 1822. He lived just long enough to publish a defence of his administration in response to the earlier attacks of Bennet, and died in London in 1824. He had governed New South Wales for eleven years, and if good intentions, unremitting labour and honesty of purpose were the only qualities called for in a Governor, Macquarie had indeed deserved well of his country. But before estimating his services there is still another side of his administration to be considered, that side which presented itself to the Imperial Parliament and became in a dim and hazy manner impressed upon the British public.

[1] *Gazette*, 14th January, 1822.

CHAPTER X.

NEW SOUTH WALES AND THE IMPERIAL PARLIAMENT.

AUTHORITIES.—Despatches, etc., in Record and Colonial Offices. Hansard, 1809-1822. *The Times*, 1819-1823. *Edinburgh Review*. *Memoirs of Romilly*. *Life and Letters of W. Wilberforce*. *H. G. Bennet's Letter to Lord Bathurst*. *Jeremy Bentham's Plea for the Constitution*. *Macquarie's Letter to Lord Sidmouth*. P.P., 1812, II.; 1819, VII.; 1822, XX.; 1823, X.; 1823, XIV.

IT was many years after its foundation that New South Wales began to attract any attention in England. Here and there, however, men of influence and importance followed with interest the development of the far off penal station. Sir Joseph Banks, the President of the Royal Society, who had been with Cook on his voyage of exploration, busied himself constantly in the Colony's affairs, and for many years was the chief adviser of the Government both in England and New South Wales in regard to its pastoral and agricultural needs.[1]

Equally zealous was William Wilberforce in watching over another branch of colonial activities—those of religion and education. It was he who selected the Rev. Mr. Johnston, the first chaplain, and the Reverend Samuel Marsden who replaced him in 1793, the latter one of the most famous of the early pioneers. Wilberforce was also active in urging the despatch of schoolmasters to the infant state,[2] though perhaps his chief interest lay in the possibilities presented by the settlement as a centre for missionary enterprise in the South Seas.[3] Later, when

[1] Practically, however, he ceased to concern himself in its affairs after the Bligh affair.

[2] Letter from Dundas (afterward Lord Melville) to Wilberforce. Correspondence of W. Wilberforce, 1840, vol. i., p. 105, August, 1794.

[3] See letter of Rev. J. Newton to Wilberforce in Correspondence of Mr. Wilberforce. London, 1840, p. 11, vol. i., 15th November, 1786. "To you, as the instrument, we owe the pleasing prospect of an opening for the propagation of the Gospel in the Southern Hemisphere. Who can tell what important consequences may depend upon Mr. Johnson going to New Holland."

he came to act in closer connection with prison and criminal law reformers in the House of Commons, his interest in New South Wales was placed on a wider basis. But in earlier years when he and Pitt were close friends it was the religious interests of the Colony alone which he attempted to influence.

From 1803 to 1812, Lord Hobart, Mr. Wyndham, Lord Castlereagh and Lord Liverpool held successively the seals for War and the Colonies. But in June of the latter year Lord Bathurst came into office and he remained Secretary until 1827. In August, 1812, Henry Goulburn, as Under-Secretary for the Colonies, replaced Robert Peel, who had in that position made his entry into official life. Goulburn remained in this office until the end of 1821.

At that period the parliamentary chiefs of the department appear to have been in every sense the administrators, and the permanent officials of the Colonial Office held an altogether unimportant position. But even the Secretary of State, as has been seen in earlier chapters, often had insurmountable difficulty in enforcing his policy upon the colonial Governors. Nevertheless the personality and opinions of the Secretary and Under-Secretary were of importance in affecting the development of the Colony, and it is of interest to know what manner of men they were.

Lord Bathurst was a kindly Tory of the old school, well fixed in the old ways, and was one of those who retired altogether from politics with the passing of the Reform Bill. He was industrious and religious, with a strong inclination towards the Clapham sect, and he had plenty of plain common-sense. During a long Parliamentary career he made one speech only, and that a short one, which rose above the merest mediocrity.[1] He was a high-minded public-spirited aristocrat, who had probably gone into politics as a kind of family duty, was a tolerably competent official, had a close regard for routine and a total lack of imagination.

It is very difficult to describe Goulburn. He was even at this time a very close friend of Peel's, and his relations with all his colleagues, so far as they can be judged from the semi-

[1] On the treatment of Bonaparte 1817. Hansard, vol. xxxv., pp. 1146-1160, March, 1817.

official and private letters amongst the Colonial Office papers, appear to have been of the pleasantest kind. But he seems to have been then, as he was in after life when he had attained high office, one of the most colourless of men. He was of much the same type as Lord Bathurst, but having been born a commoner, found it necessary to be just a little better informed, a shade more efficient, than his titled chief. Though a Tory, he was inclined to more liberal views that Lord Bathurst, though in regard to New South Wales no opportunity was taken for putting them in practice. His colonial policy was vague and rather inconsistent.

"We were not to consider," he said on one occasion, "these Colonies merely as the appurtenances of grandeur, and the gratification of national vanity, but to weigh the right of the people and their individual happiness. . . . To those who thought that the Colonies were only an encumbrance on the country, it might be that these reasons would have little weight; but with those who like himself considered them one of the great sources of our glory, and one of the great supports of our power, affording resources in war, and increasing our commerce in peace, with those who thought them important under every consideration, it would not be doubted that they had a right to due attention. . . ."[1] Two years later in a debate on Army Estimates in new colonies, he said:—

"The effect of that principle (on which was founded our colonial policy) was, in compensation for a monopoly of commerce, to maintain the civil and military establishments of the Colonies. Whenever that branch of the subject should be brought forward he trusted he would be able to show that this system of retaining in our own hands the sources of commercial profit was justified by sound *policy*, and ought not to be rashly *abandoned*."[2]

These two utterances, the only statements of general colonial policy which he can be found to have made, are scarcely illuminating. The consideration of the "rights" of colonists and their support in war consort but ill with this statement of

[1] Hansard, vol. xxxvi., p. 68, 29th April, 1817. Debate on abolition of Third Secretary of State (for War and Colonies).
[2] *Ibid.*, vol. xl., p. 267, 10th May, 1819.

commercial monopoly. It would, however, be equally difficult to give any clear account of the colonial policy of the whole Tory party at this period, though the principles upon which New South Wales was founded and governed were sufficiently lucid.

At the time of its foundation it was necessarily a mere military station under autocratic rule. That such a form of Government continued so long may be considered as due to a deliberate policy and as a natural outcome of the Tory principles of the period of reaction. For this theory there is support in the fact that the only other Colony of which England at this time became possessed which was at all similar to New South Wales, the Cape of Good Hope, shared the unenviable distinction of being placed under an autocratic Governor unrestrained by a Council. Both Colonies were to be agricultural, and both were expected to prove self-supporting.[1] Neither could be considered as a mere military station, and the plea that one contained a hostile Dutch, and the other a hostile convict population was not a rational one. In the case of New South Wales at least such a position was ridiculous. In spite of the rising in 1805, no sign of a convict rebellion ever again occurred, either under the military government or after the establishment of a Council in 1825. Yet from 1805 to 1821 the opportunity of the convicts was unique. They far outnumbered the rest of the population, and from 1815 to 1821 the military protection of the Colony was admittedly insufficient.[2] Yet the garrison constituted the only efficient and reliable police. The Home Government did not until 1821 increase it, but they did year by year increase the number of convicts. If the reply to Ellis Bent was that it was still considered necessary to preserve military government, the reason must have been, not fear of risings which would have to be dealt with by rapid decrees (indeed by declaring martial law, that might have been done under any Government), but rather a belief in the efficiency of an autocracy.

Probably the Secretary of State feared more from the

[1] See Chapter I.

[2] See Correspondence of C.O. with Treasury, 1818 to 1821 (R.O. and C.O). See also Riley, C. on G., 1819.

colonists' discontents than from convict rebellions. The Bligh affair cast an unpleasant shadow long after tranquillity had been restored. But the presence in the Colony of what Goulburn called "such inflammable material" as the convicts, and past troubles with Bligh, probably did no more than give a colour of reason to the Tory principle of the period. It was after all a time when government by the benevolent despot was a favoured system. The people were to be ruled by those selected for that purpose by the highest authority, and due subordination was to be preserved. A belief in inequality was not questioned as a prejudice, but firmly adhered to as a fundamental principle. For a small Colony it appeared obvious that such a system was a fitting one. The settlers belonged to a comparatively low stratum of society, the convicts of course lower still. It was but natural and proper that all should be governed by a superior (though not necessarily an exalted) intelligence selected for them by the Government at home. Lord Castlereagh, who was perhaps the harshest of this set of reactionaries, wrote of colonists in an undoubted tone of contempt.[1] Lord Liverpool, much more liberal in his opinions, yet considered the Constitutional Act for Canada of 1791, with its moderate constitutional freedom, as a fatal error.[2] But though from the scanty materials at hand this suggestion cannot be too much pressed, it is at least strange that the reasons for continuing the peculiar form of Government in New South Wales were never set forth more at large. From 1800 the policy was one of pure negation and only one definite advance, the reform of the courts in 1814, can be recorded until in 1817 the Government began to falter in their reiteration of the necessity for a military government and finally set out to modify the system.

Under these circumstances it fell naturally to the lot of the opposition to champion the cause of discontented colonists. It is one of the ironies of history that the retired army and naval officers, gentlemen farmers and graziers, all of them men with a natural bias towards Toryism, being discontented with the

[1] See, *e.g.*, Lord Castlereagh's *Correspondence*, 1851, vol. viii., p. 187. Letter Duke of Manchester, Governor of Jamaica, 11th February, 1809.

[2] *Life of Lord Liverpool*, by C. D. Yonge, 1838, vol. i., p. 31. Letter to Sir J. Craig, 1810.

autocracy at Sydney, were driven into the arms of the Whigs and the Radicals in England.[1]

It was without their solicitation and apparently without their knowledge that Jeremy Bentham took up the subject of New South Wales in 1802. In this year he wrote his two letters to Lord Pelham. The first compared the system of dealing with criminals by transportation to New South Wales with his own scheme of the Panopticon, the second described the home penitentiaries of America. His attention was thus called to the condition of New South Wales by the neglect of his Panopticon, and in 1803 he pursued the subject in a pamphlet entitled "A Plea for the Constitution," in which he discussed not the "policy of the settlement," but its "legality".[2]

The only material before Bentham in writing of New South Wales was that provided by a few remarks by the Select Committee on Finance in 1798, and the *History of New Holland* by Lieutenant-Governor Collins, of which a second edition was published in 1802 and which gave in diary form a naïve account of colonial life.[3]

Little noticed as these writings of Bentham's were, it seems worth while to give some account of his treatment of the Colony's affairs for two reasons, first because each point to which he turned his attention came to be discussed afterwards, and because the two men who chiefly bestirred themselves in New South Wales affairs between 1810 and 1820, Sir Samuel Romilly and the Hon. H. Grey Bennet, both came within the influence of Bentham.[4]

In the first letter to Lord Pelham,[5] Bentham sought to dis-

[1] The Canadians took much the same course. See letter above, Lord Liverpool to Sir J. Craig. "You may rely upon it, that if the subject of the constitution of Canada was brought under the discussion of Parliament, the cause of the Canadians would be warmly supported by all the democrats and friends of reform in the country."

[2] The letters to Lord Pelham were published in 1802. The Plea for the Constitution in 1803. See Romilly's *Memoirs*, 1791, vol. i., p. 417, published in 1840. The copy of the Plea in the British Museum belonged to Sir S. Romilly (a gift from the author).

[3] This volume, with a very inferior production by Mason in 1811, remained the only sources of information in regard to New South Wales available in England up till 1812. See Romilly's Speech in House of Commons, 12th February, 1812. Hansard, vol. xxii., p. 762.

[4] Romilly of course directly, and Bennet through Francis Place. See later, p. 302.

[5] P. 68. Letter to Lord Pelham.

cover what profit New South Wales brought the mother country. He held of course in the most extreme sense the theory that from the point of view of economics, colonial expansion was utterly mistaken.[1] After a short resumé of the economic argument he thus summarised the position.

"Thus then stands the real account of profit and loss in respect of Colonies in general. Colonies in general yield no advantage to the mother country, because their produce is never obtained without an equivalent sacrifice, for which equal value might have been obtained elsewhere. The particular Colony here in question yields no advantage to the mother country, and for a reason still more simple—because it yields no produce."

The only real acquisition, he concluded, was two hundred and fifty new-discovered plants, "but plants, my Lord, as well as gold, may be bought too dear. . . . In return for so many choice and physical plants, transplanted from the Colony, there is one plant, though it be but a metaphorical one, which has been planted *in* the Colony . . . and that is—the plant of *military despotism*."

It was this form of Government which he analysed in the *Plea for the Constitution* in the following year.[2]

He discussed very minutely the illegal assumption of legislative powers, powers however, which he admitted had necessarily been exercised in the beginning and on many occasions in a praiseworthy manner. No Colony, he said, had ever started so badly equipped with legal rights. To give a Royal Charter would indeed have been impossible, for to a charter there were needed two parties and a forced exile, a convicted criminal could not be one of them.

"Instructions and counter-instructions, insinuations and counter-insinuations," he wrote, in a characteristic passage, "instructions in form and instructions not in form; despotism

[1] See the brilliant little pamphlet, "Emancipate your Colonies," written, 1793, first published for sale, 1830.

[2] The full title was *A plea for the Constitution, shewing the Enormities committed to the oppression of British Subjects Innocent as well as Guilty in Breach of Magna Charta, The Petition of Right, The Habeas Corpus Act, and the Bill of Right; so likewise of the Several Transportation Acts; in and by the Design, Foundation and Government of Penal Colony of New South Wales: including an Inquiry into the Right of the Crown to legislate without Parliament in Trinidad and other British Colonies.*

acting there by instructions and *without* instructions and *against* instructions; all these things there may be and there will be in abundance. But of *charters* . . .; of *constitutions* . . .; of *lawful warrants*, unless from Parliament; from the present day to the day of judgment there will be none."[1]

No blame, however, was to be attached to the Governor. "Whatsoever were given to him for law, by his superiors at the Council Board, or the Secretary of State's office, would naturally enough, one may almost say unavoidably, be taken by this *sea-captain* for law."[2]

The Home Government were the real culprits, and either they had knowingly persevered in an illegal course or had ignorantly blundered. The latter theory seemed unlikely, for the power of Parliament had been invoked to give New South Wales a Criminal Court, and "wherefore apply to Parliament for powers for the organisation of a judicial establishment in that Colony". Judicial power is in its nature inferior, subordinate to legislative. If the Crown had an original right to create the superior power, how can it have been without the right of creating the subordinate?[3]

After closer discussion Bentham concluded, "But all collateral questions dismissed, thus, on the ground of law, stands the Government of New South Wales. Over Britons or Irishmen, in or out of Great Britain and Ireland, the King, not being himself possessed of legislative power, can *confer* none. To confer it on others, those others being his instruments, placeable and displaceable by himself at any time, is exactly the same thing as to possess and exercise it himself. The displaceable instruments of the Crown—the successive Governors of New South Wales—have, for these fourteen years past, been exercising legislative power without any authority at all from anybody, or at most without any authority but from the King; and all along they have been, as was most fit they should be, placed and displaced at His Majesty's pleasure."[4]

In 1803 New South Wales enjoyed some amount of notice, for Collins' book was reviewed in April by Sydney Smith in the

[1] P. 24. [2] P. 8. This is a reference to the naval governors.
[3] P. 24. [4] P. 35.

Edinburgh Review.[1] It was a very characteristic piece of writing, and altogether condemnatory of the settlement and all thereto belonging.

"With fanciful schemes of universal good," he wrote, "we have no business to meddle. Why we are to erect penitentiary houses and prisons at the distance of half the diameter of the globe, and to incur the enormous expense of feeding and transporting their inhabitants too, and at such a distance, it is extremely difficult to discover. It is certainly not from any deficiency of barren islands near our own coasts, nor of uncultivated wastes in the interior; and if we were sufficiently fortunate to be wanting in such species of accommodation, we might discover in Canada, or the West Indies, or on the Coast of Africa, a climate malignant enough, or a soil sufficiently sterile to revenge all the injuries which have been inflicted on society by pick-pockets, larcenists and petty felons. . . ."

"It is foolishly believed that the Colony of Botany Bay unites our moral and commercial interests, and that we shall receive hereafter an ample equivalent, in bales of goods, for all the vices we export."

The writer was, however, thoroughly hopeless. "It is a Colony besides begun under every possible disadvantage; it is too distant to be long governed, or well defended; it is undertaken, not by the voluntary association of individuals, but by Government, and by means of compulsory labour. . . . It may be a curious consideration to reflect what we are to do with this Colony when it comes to years of discretion. Are we to spend another hundred millions of money in discovering its strength, and to humble ourselves again before a fresh set of Washingtons and Franklins? . . . Endless blood and treasure will be exhausted to support a tax on kangaroo skins; faithful Commons will go on voting fresh supplies to support a *just and necessary* war; and Newgate, then become a quarter of the world, will evince a heroism not unworthy of the great characters by whom she was originally peopled."

From this time until 1810 the Colony sunk again into

[1] See vol. ii., 2nd April, 1803, pp. 30, 42. The *Edinburgh Review* took more notice of colonial subjects than any other periodical of the time, probably because the Whigs had a very definite (though negative) colonial policy.

complete obscurity, from which it gradually emerged through the agency of Sir Samuel Romilly. His work in the reform of Criminal Law naturally led him to inquire into the concerns of New South Wales, and the little he could learn left him extremely dissatisfied as to its condition and the probable effect of transportation upon the convicts.

On the 9th of May, 1810, he moved in the House of Commons that an address be presented to the King praying that the Penitentiary Acts of 19 Geo. III. and 34 Geo. III. should be put into force.[1]

The motion was withdrawn at the request of Ryder, the Under-Secretary for Home Affairs, who stated his sympathy but asked for delay. On the 5th of June Romilly renewed the motion, but found Ryder "as little prepared now as he had been before"[2] and he again asked for delay and suggested a committee. The matter, however, was pressed to a division, and Romilly made a long speech during the debate, basing his remarks chiefly on Collins.[3]

"In whatever light we consider it," he said . . . "we shall find it extremely inefficacious. As an example the effect of the punishment is removed to a distance from those on whom it is to operate. It is involved in the greatest uncertainty, and is considered very differently according to the sanguine or desponding disposition of those who reflect on it, or according to the more accurate or erroneous accounts of the Colony which may happen to have reached then."

He spoke of Collins as "the panegyrist of the Colony," and yet, he said, "his history is little more than a disgusting narrative of atrocious crimes and most severe and cruel punishments.[4] It is indeed a subject of very melancholy, and to this House of very reproachful reflection, that such an experiment in criminal jurisprudence and colonial policy as that of transportation to New South Wales should have been tried, and we should have suffered now twenty-four years to elapse without examining or even inquiring into its success or its failure."

[1] See Romilly's *Memoirs*, vol. ii., p. 319.
[2] Romilly's *Memoirs*, vol. ii.
[3] See Hansard, vol. xvii., pp. 322-329, 5th June, 1810.
[4] This statement is a great exaggeration. There is much information of a hopeful and cheerful nature in Collins' book.

"The punishment of transportation has indeed been sometimes considered as one of no great severity, and I have been very sorry to hear it so represented by those on whom the inflicting it depends . . ; it is sometimes inflicted on boys at a very early age merely as a means of separating them effectually from the bad companions they may have formed at home. It were much to be wished that those who consider transportation in this light would impose upon themselves the duty of reading Mr. Collins' history of the settlement that they might acquire a just notion of all the complicated hardships and sufferings to which transported convicts are exposed."

The motion was lost, but not by a great majority, the number being fifty-two to sixty-nine.[1]

During the vacation Romilly prepared a pamphlet on New South Wales which was, however, never published, perhaps never completed.[2] Early in 1811, a Committee of the House of Commons was appointed on Ryder's motion "to inquire into the expediency of erecting penitentiary houses".[3] Romilly moved an instruction for the Committee "to inquire into the effects which have been produced by the punishment of transportation to New South Wales and of imprisonment on board the hulks, and the motion was accepted".[4]

The Committee reported in June, but without having made any inquiry at all into the affairs of New South Wales. Their report was incomplete in other respects also, and Ryder moved for its reappointment, "to consider of the expediency of erecting penitentiary houses, and that it be an instruction to the said Committee to inquire into the effects produced by transportation to New South Wales."[5]

To this Romilly objected. He hoped "the latter subject, which had originated with himself, would not be thus thrown into the background". The Committee, with so much work to do, would not be able to report to the House that session, and New South Wales affairs called for immediate inquiry. He used one argument which was comically beyond the facts

[1] Romilly's *Memoirs*, vol. ii., p. 332.
[2] *Ibid.*, p. 342.
[3] 4th March, 1811. See Romilly's *Memoirs*, ii., p. 367.
[4] *Ibid.* Hansard, vol. xix., 4th March, 1811, p. 186.
[5] Hansard, vol. xxi., p. 603, 4th February, 1812.

of the case. "It was," he said, "of the utmost importance, in a political point of view, and as it affected other countries. Those who escaped from New South Wales were well calculated to give a new character to the South Seas and to form dangerous nests of pirates." [1]

Ryder withdrew the latter part of his motion and Romilly gave notice "that he should on Friday move for leave to bring in a Bill for repealing 29 Geo. III., relative to the transporting of convicts".[2]

This drastic step was not taken, but on the 12th February Romilly moved for the appointment of a Committee on Transportation, and the motion was carried without opposition.[3] Mr. George Eden[4] was named as chairman, and amongst the members were Sir Samuel Romilly, Robert Peel, and Henry Goulburn.

The Committee took evidence on thirteen days, extending over a long period of four months, and finally presented their report on the 10th of July, 1812. The recommendations of the report have been already referred to, and the scant attention paid to them by Government commented upon. It is, however, interesting to see what were the materials at the command of the Committee. Fourteen witnesses were examined, two of whom were transportation officers in England who had never been in the Colony, and one, Captain Flinders the discoverer, who gave evidence as to the Australian coasts only. Of the remaining eleven, four were ex-convicts who had but little to say, two were former Governors, Hunter who had left the Colony in 1800, and Bligh who had anything but happy recollections of it. The Rev. Mr. Johnston, another witness who had been the first chaplain and had been back again in England some fifteen years, showed that in addition to his long absence from the Colony, his observations themselves had been to very little purpose. Two colonists who had come home as witnesses for Bligh spoke with some intelligence of the condition of affairs in 1810, and Johnston, the leader of the mutiny, who had left the

[1] Hansard, vol. xxi., p. 604. [2] *Ibid.*
[3] Hansard, 1812, 12th February, vol. xxi., pp. 761, 762.
[4] Son of first Lord Auckland; afterwards succeeded to the title and became Viceroy of India.

Colony in 1808, also gave evidence. The most recent arrival and the most intelligent witness was Lieutenant Edward Lord of Van Diemen's Land, but he had no knowledge of the parent Colony. The evidence on the whole was very weak. Few witnesses appeared sure of their facts and fewer still to have observed with closeness or accuracy the colonial Government or the condition of the population. Far more valuable was the small collection of extracts from Macquarie's despatches and the letter of Ellis Bent to Lord Liverpool,[1] and it was on these that the Committee based the greater part of their report.[2] That report was on the whole sanguine. New South Wales was "in their opinion in a train entirely to answer the ends proposed by its establishment. It appears latterly to have attracted a greater share of the attention of Government than it did for many years after its foundation; and when the several beneficial orders lately sent out from this country[3] and the liberal views of the present Governor[4] shall have had time to operate, the best effects are to be expected. The permission of distillation and the reforms of the Courts of Justice are two measures which your Committee above all others recommend as most necessary to stimulate agricultural industry, and to give the inhabitants that confidence and legal security which can alone render them contented with the Government under which they are placed."[5]

The report was no doubt very unsatisfactory to those who had promoted the Committee, and for some time New South Wales was neglected by the Opposition. In 1815, however, when the Government brought in a Bill for renewing the Transportation Laws, they met with strong opposition, and the Bill was passed as a temporary measure for one year only.

On this occasion Romilly and the Hon. Henry Grey Bennet were the most prominent speakers against the Bill. Bennet had entered Parliament in 1814 as member for Shrewsbury,

[1] Quoted in Chapter III. above.
[2] See P.P., 1812, vol. ii., Appendix.
[3] The most important was the order for opening the ports.
[4] The hearty endorsement by the Committee of Macquarie's Emancipist Policy exerted far greater influence on the development of the Colony than any other part of the report.
[5] See conclusion of C. on T.

and was not returned in the new Parliament in 1821. Strictly he belonged rather to the Radical left than to the regular Whig opposition, and he took a prominent position on questions of prison reform and criminal law. Miss Martineau refers to him in conjunction with Sir Francis Burdett as a popularity hunter, and one of those who made "frenzied declamations against individual members of the Government".[1] This, indeed, appears to have been his favourite form of debate, and not particularly liked by some who supported him. "Bennet very coarse but very strong," Wilberforce records in his diary on one occasion.[2] He used to be coached in his Parliamentary business by Francis Place. "I told Bennet," he wrote in 1819, "from the first that I should wear him out, that he would be obliged either to shun me or lead a dog's life with his party. He said, 'No,' I said 'Yes'. He has done so. But next session he will come again, and as he certainly means well, I shall be pleased to see him."[3]

In these slight criticisms, and in the light of his writing and speeches, Bennet appears as a rather blusterous Radical of no remarkable ability, but active, clever, and ready to take up the cause of those he thought oppressed. The official Whigs, as Place observed, disliked him; and he rather shocked the gentle Wilberforce. He was, however, very active in the cause of New South Wales, and in these years not without influence in its affairs. When in 1816 the Transportation Act was about once more to expire, Bennet urged that the Bill to renew it brought in by the Government should not be rushed through the House, as had been done in the previous year. He expressed himself as opposed altogether to the principle of transportation, and proceeded to the inaccurate and startling statement, made probably on hearsay evidence only, that the whole system of management at Botany Bay tended so little to reform the convicts that "the numbers of executions in that settlement far exceeded the average of natural deaths'.[4] In the second reading Bennet spoke again to much the same effect,

[1] Martineau's *History of the Peace*, vol. i., p. 149, referring to debate on Habeas Corpus Suspension, 23rd June, 1818.

[2] *Life of Wilberforce*, February, 1818, vol. iv., p. 369.

[3] *Life of Francis Place*, Graham Wallas, p. 178. Place to Hobhouse, 16th August, 1819.

[4] Hansard, vol. xxxiii., p. 595, 16th March, 1816.

and was answered by Goulburn,[1] who pointed out the fallacy of his arguing from the information before the Committee of 1812 (really describing the Colony before 1810) as to the present conditions. There had, he said, been only six executions within the last two years.[2] Reference was made in the course of the debate to the fact that the House knew nothing of the result of the 1812 Committee, and shortly afterwards the despatches of Lord Bathurst and Governor Macquarie were laid on the table in accordance with a request of the House.[3] No discussion, however, took place upon them.

In April the Opposition proposed that the Third Secretary of State for War and the Colonies should be abolished. A lively debate and a fairly large division in favour of the Government resulted, 182 voting for and 100 against them,[4] and just a year later another similar attempt resulted in another defeat, the division showing 190 votes to 87.[5] In the course of both debates New South Wales was proclaimed by the Opposition as belonging by logic and convenience alike to the Home Office as part of the prison system of the country. It was true that the Home Office had much to do with its administration in regard to the number and class of convicts sent thither, but the penal character of the Colony was yearly becoming less prominent, and this change was marked by an event in 1817. Bennet presented a petition, on the 10th of March, from free British subjects in New South Wales.[6] It was the document brought to England by Vale, and exaggerated and possibly false though it was, it was the cry not of convicts but of free settlers oppressed by the weight of an autocratic Government. Lord Castlereagh "took occasion to observe that he rose only at present to say a few words for the purpose of guarding the reputation of the gallant officer (General Macquarie) from being prejudiced in any way. . . . He had filled the office of Governor many years; he had been brought under his (Lord Castlereagh's) notice, when

[1] Hansard, vol. xxxiii., p. 990, 5th April, 1816.
[2] See Hansard, above. The number of executions between 1816 and 1820 was sixty-nine. See Appendix to Bigge's Reports, R.O., MS.
[3] *House of Commons Journal*, 11th April, 1816.
[4] Hansard, vol. xxxiii., p. 922, 3rd April, 1816.
[5] *Ibid.*, vol. xxxvi., p. 82, 29th April, 1817.
[6] *Ibid.*, vol. xxxv., pp. 920-921, 10th March, 1817.

at the head of the colonial department, solely by his personal merit, and he believed had fulfilled the sanguine expectations which were formed of his competency for the discharge of all the duties belonging to that arduous and distant station. Mr. Bennet entirely agreed in the high character of General Macquarie."[1] Amid this general atmosphere of compliment to Macquarie the petition was read and no further proceedings taken upon it.

But the Government, while loyally supporting their officer in Parliament, were somewhat disturbed by reports from the Colony. The affairs of Vale and Moore, the condition of the female convicts as they learned of it in Bayly's letter to Sir Henry Bunbury, the strained relations between Governor and free settlers created a sense of strong misgiving. Meanwhile in England the number of crimes to which the punishment of transportation was affixed was rapidly increasing. On 23rd April, 1817, Lord Bathurst proposed to Lord Sidmouth that they should send a Commission of Inquiry to New South Wales. The important question was whether New South Wales was still a suitable place for a penal settlement. "So long," he wrote, "as the Colony was principally inhabited by convicts and but little advanced in cultivation, the strictness of police regulations and the constant labour, under due restrictions, to which it was then possible to subject the convicts, rendered transportation, as a punishment, an object of the greatest apprehension to those who looked upon strict discipline and regular labour as the most severe and least tolerable of evils".[2]

The conditions were changed, and he proposed "to recommend to His Royal Highness the Prince Regent the appointment of Commissioners to proceed to those settlements, with power to investigate all the complaints, which have latterly been made, both in respect to the treatment of the convicts and the general administration of the Government".[3]

Lord Sidmouth at once consented,[4] and in the course of the next two years sought for a suitable person or persons with

[1] *S.G.*, 9th August, 1817, quoting from *Courier*, 11th March, 1817.
[2] Letter, printed in P.P., XIV., 1823. [3] *Ibid.*
[4] Sidmouth to B., 25th April, 1817. R.O., MS.

whom to entrust these difficult and important investigations. Finally it was decided to send one Commissioner only, and Mr. J. T. Bigge accepted the post with a salary of £3,000 a year. He had held judicial offices in Trinidad, and was a high-minded, conscientious, intelligent man, well fitted for his post. With him as Secretary with a reversion to the Commissioner-ship went Mr. Thomas Hobbes Scott, but whether or no he played any important part in preparing the reports it is quite impossible to say.

Bigge's commission was dated 6th January, 1819, but he did not sail until April, and his appointment was spoken of in the House of Commons as about to be made as late as March, 1819.

The year was an important one for the Colony. Bennet published his letter to Lord Sidmouth, in which he described the settlement as he knew it from the reports of Marsden, Vale and J. H. Bent, and W. C. Wentworth, the eldest son of D'Arcy Wentworth, published the first edition of his description of New South Wales, which contained some information of the agricultural condition of the Colony and an enthusiastic account of its capabilities, and put very strongly in Wentworth's rather perfervid style the need for jury trial and a legislative council.[1] It took the place of a history of New South Wales up to 1812 written by a Mr. O'Hara, who had, however, no first-hand knowledge of the Colony.[2] Still the interest in New South Wales was keen, for the book published in 1812 went into a second edition in 1818. The three books were criticised in the *Edinburgh Review* of July, 1819, by Sydney Smith with his usual colonial pessimism, and he accepted much more readily the denunciations of Bennet than the hopeful patriotism of W. C. Wentworth.

"Thus much," he concluded, "for Botany Bay. As a mere Colony it is too distant and too expensive; and, in future, will involve us of course in many of those just and necessary wars which deprive Englishmen so rapidly of their comforts, and

[1] This book went through a second edition, and in a much enlarged form into a third edition in 1824. This last contained a long account of Macquarie's government and a violent attack on Marsden.

[2] *History of New South Wales.*

make England scarcely worth living in. . . . One of the principal reasons for peopling Botany Bay at all, was, that it would be an admirable receptacle and a school of reform for our convicts. It turns out that for the first half century it will make them worse than they were before. . . ."[1]

Bennet was active in Parliament as well as without. On the 18th February, 1819, he moved the appointment of another Committee to inquire into the effects of Transportation to New South Wales. His speech was the most comprehensive and important which had as yet been delivered in England upon the affairs of the Colony, and showed both in its weakness and its strength the difficulties under which any unofficial inquirer then laboured in gaining a knowledge of so remote a country.[2]

Having dealt first with the condition of the hulks and the effects of imprisonment upon them (matters which he understood from personal observation) and the mode of transporting the convicts to New South Wales, he turned to a description of the colonial Government.

"The Governor of this Colony," he said, "assumed to settle the price of all labour and also of all provisions; and the orders upon this subject were issued by the Governor himself without referring to the opinion of any council; an extraordinary stretch of power. . . ."

He proceeded: "the Governor had the power of opening and shutting the public stores and the ports of the island[3] at his own pleasure". The consequences of this and of the sudden reduction in the price of meat he described much as Riley described them later in his Evidence before the Committee on Gaols.

Turning to the Colonial Judiciary he said, "The Committee of 1812 had recommended the introduction of trial by jury into this Colony. . . . He would not say at present that juries ought to be introduced into New South Wales; but he thought it most inexpedient that the question should be determined in consequence of any sort of communication made at the office of the Secretary of State. He wished to hear the opinion of

[1] *Edinburgh Review*, July, 1819, vol. xxxii., pp. 23-47.
[2] See Hansard, vol. xxxix., pp. 464-478, 18th February, 1819.
[3] "Island" is a very remarkable description of New South Wales.

those who advocated and those who objected to such a measure stated openly, and to let Parliament judge with respect to the wisdom of adopting the recommendation he now alluded to."

In reference to the appointment of magistrates he was rather confused. He referred to the appointment of Lord and Johnson (probably a reporter's error for Thompson) as the appointment of the *convict attorneys*, adding that the appointments "were improper, and that it was the duty of the noble lord at the head of the colonial department to reprimand the Governor for so gross an outrage on property and justice".

Coming to the power of the Governor to inflict punishments he trod on firmer ground. "Governor Macquarie had thought fit, of his own free will, to cause three free settlers [1] to be flogged for what was called a contravention of the orders of the Governor in going through a hole in a wall into what the Governor called his park. . . . He understood indeed that the person in question [2] intended to institute a prosecution against the Governor on his return home, but that was no reason why the House should shut its eyes to the transaction. . . . Had the Governor had the good fortune to have a council, this and many other transactions of a like nature would never have occurred. Governor Macquarie might be unwilling to receive such a council, but why Lord Bathurst should put 20,000 persons and their properties under the unlimited control of one individual without any council to advise him, he was altogether at a loss to conceive."

The state of morals, the neglect of the female convicts, the number and unsuitable character of the licensed publicans, the giving of tickets-of-leave to persons "who had come out with their pockets filled by the crimes which they had committed in England," were all touched upon.

"The subject of the taxes levied in this Colony," he went on, "was also well worthy of attention." The Governor had levied taxes on commodities and there appeared to be nothing to prevent them from going further and levying a property tax; yet as New South Wales was not a conquered Colony, there

[1] Only one was a free settler. See before, Chapter IX.
[2] *i.e.*, Blake.

was no power but Parliament which could legally raise money within it.

"Were we to plant a Colony on the other side of the globe and to take no care as to the manner in which it was . . . administered? He had no hesitation in saying, that if the settlement were well governed and its resources wisely drawn forth, it might be made, instead of a seat of immorality and a nursery of vice, a source of great profit to the country."

Wilberforce, who supported the motion, dealt rather hardly with the faults of Macquarie's government and the failure to reform the convicts.

Goulburn opposed the motion on reasonable grounds. "If, . . . the report of 1812 was meagre," he asked, "why was it so? It was because the committee had to investigate at a distance of thousands of miles from the subject of their investigation. . . . In 1812 they could only procure information to 1810, and in 1819 the proposed committee could only gain a knowledge of the transactions of 1817. . . ."[1]

Lord Castlereagh pointed out that there was no need of a Committee, for "before the honourable gentleman gave notice of the present motion, his noble friend at the head of the colonial department had instituted a Commission and had obtained the consent of an individual . . . to go out to the Colony and make a detailed inquiry on the spot, for the purpose of ascertaining whether the Colony could be made more auxiliary (*sic*) to the administration of justice in this country, and how far its moral and religious improvements might be promoted." The motion was lost.[2]

Then suddenly the Government made a *volte face* apparently without further solicitation. On the 1st March, twelve days after Bennet's motion, Lord Castlereagh proposed the appointment of a Committee to inquire into Gaols, Prisons and Transportation. He made clear what were the Government's feelings towards New South Wales.[3]

"It would," he said, "be necessary to inquire if Botany Bay, as it had lately and as it still existed, had not a character more

[1] Communications had so much improved that information of as late a date as half-way through 1818 might have been received.

[2] See Hansard, vol. xxxix., 18th February, 1819.

[3] 1st March, 1819, p. 742.

colonial than belonged to a place appropriated to the punishment of offenders." He passed on to a queer piece of philosophy. "It would be necessary to inquire whether the period had not arrived when it might be relieved from being the resort of such characters as had hitherto been sent to it, and might be permitted without interruption to follow the general law of nature by a more rapid approximation to that state of prosperity to which, it was to be hoped, every part of the world was destined to arrive." He finally stated that the Government "had it in contemplation to propose some place nearer home to which convicts might be transported" at a more moderate cost.

The Committee was an important one, including Castlereagh and Canning, and Sir James Mackintosh, Fowell Buxton, Bennet, Brougham and Wilberforce, amongst its members. But the affairs of the Colony remained still before the House. On the 12th March, Wilberforce notes in his diary that Brougham had consented to present the New South Wales petition,[1] and on the 23rd he did so. The petition was signed by Blake and Williams, the former one of the men who had been flogged by the Governor's orders, the latter a man who had been dismissed from the Government printing-office by Macquarie's direction because he had signed the petition of Vale. The document had been prepared by J. H. Bent and contained much extraneous matter which it was doubtful whether Blake had known about or wished to have included. It was even doubtful whether it had been read over to him before he had placed his mark upon it.[2] These facts were not, however, known when Brougham, in a temperate speech, presented the petition.

"With respect to the conduct of Governor Macquarie, he should say, that if culpable, he was disposed to consider such conduct rather as a fault of the system than of the man. . . .[3] The Colony in question was extremely important, and might very soon be the most so of all our foreign Colonies. This was the very time for inquiry, when its Governor seemed to be entering upon a wrong course and might therefore be the more

[1] See *Life of Wilberforce*, 1848, vol. v., p. 15.
[2] See Evidence of J. H. Bent, C. on G., 1819.
[3] See Hansard, vol. xxxix., p. 1124, 23rd March, 1819.

easily set right. He thought that any charges which could justify a parliamentary inquiry into his conduct would also justify his recall. His Majesty's subjects in that distant Colony had an indefeasible and, till now, an unquestioned right to ask Parliament to redress their wrongs. It might be urged that the individual of whom they complained was absent; that was his misfortune; unless, against that misfortune, he chose to set off his being Governor of the settlement. While he continued to exercise his functions as Governor the petitioners could not enter actions against him; if he quitted the Government, but did not come home, they were still incapacitated from bringing their actions against him, because no process could be served upon him."[1]

In the discussion that followed, Forbes, a friend of Macquarie's, defended him with an inaccuracy which is worthy of note.[2]

"Governor Macquarie," he said, "resolved to allow individuals who had been hitherto excluded to practise, and in the exercise of his authority ordered the judge to receive them as barristers and solicitors accordingly. This measure was afterwards communicated to His Majesty's Government and received *its approbation*."

Wilberforce urged inquiry, saying ". . . with all his respect for Governor Macquarie, he would confess that he should think him something more than human if, vested with almost uncontrolled authority, his conduct had not been in some degree affected by that circumstance. It commonly had the dangerous effect of shutting up, or of corrupting, the channels of information to him who was so unhappy as to possess it. . . . He was anxious for inquiry also on this additional ground, that Governor Macquarie might be made acquainted with all that was known in this country."[3] Goulburn, who spoke for the Government, promised inquiry into Williams' case (which was indeed made by Bigge with the result that his right to a grievance was proved) and touched lightly on Blake's affair, but his defence of this was very weak.[4] One other matter of importance had been raised by the petitioners and commented upon by Brougham —the action of the Governor in raising £24,000 a year by

[1] See Hansard, vol. xxxix., p. 1127, 23rd March, 1819.
[2] *Ibid.*, p. 1129. [3] *Ibid.*, p. 1133. [4] *Ibid.*, p. 1134-1137.

taxes without being warranted by his commission to do so—even supposing such a power could have been legally granted to him by the King. The position was at the moment rather peculiar. Shortly before, the Colonial Office had received a despatch from Macquarie conveying important news.[1]

"... I have to observe," he wrote, "that a serious and weighty difficulty has been started *by our present Judge of the Supreme Court* in regard to the legality (of the colonial duties) ... which until obviated by some measure from Home will necessarily tend to render the raising of a revenue in this country, by the present mode, at once precarious and dangerous. A letter from Mr. Justice Field ... on this subject being in my mind very full and clear, although I cannot altogether accede to the expediency or even propriety of our Law Courts acting thereon at this time, I do myself the honour to transmit your Lordship a copy of it. ..."

The Judge's letter (dated 23rd February, 1818) had been called forth by the Governor's intention "to institute several suits in the Supreme Court for the recovery of customs duties". On considering the question, Field decided that as he could not "cherish the least doubt that we must (and as I understand that we *soon shall*) have an Act of Parliament for the purpose of legalising those duties *which your Excellency had thought it* expedient to impose, may I be forgiven if an anxiety to prevent the public discussion of a question, in which I might perhaps be forced to give an official opinion against the present legality of such duties, induces me to request your Excellency to instruct the solicitor for the Crown to forbear to proceed in the suits in question for the present.

"I am informed that the payment of these duties has never yet been attempted to be legally enforced in the Colony, and that your Excellency is so satisfied that there ought to be an Act of Parliament for them, that you have hitherto only reported defaulters home, and not felt yourself justified in arresting their flight from the Colony.[2] I have not the least doubt that the

[1] D. 3, 15th May, 1818. R.O., MS.

[2] The only case on which there is any evidence is that of Blaxcell, and in that instance Macquarie did his best to prevent his escape. There is nothing in Macquarie's despatches which suggests that he took the views here attributed to him by Field.

only reason why your Excellency has not yet been armed with such an Act of Parliament is that his Majesty's Government are not sufficiently aware of the great amount of the duties, or of the rising importance of the Colony".

Macquarie somewhat reluctantly did as Field advised. Field wrote himself to Goulburn on the same subject in November, saying, "If the Act of Parliament alluded to be not already passed, I am sure that the Earl Bathurst will see the necessity of an early consideration of the subject, since our duties are now so high that the practice of smuggling is already begun, and it is not to be wished that such a community as this should know that the law is impotent to enforce the payment of those duties."[1]

Apparently it had come before them in another way also, for Goulburn now explained, 23rd March, 1819, that "of late several persons had refused to pay, and their representations brought the matter for the first time under the notice of Government". It had not previously been thought of because when he came into office the duties were already in existence. The case was referred to the Crown Law Officers and their opinion was that it was illegal. The opinion was given on the 9th March, and the Government intended to bring in a Bill on the subject.[2]

However, the Government were willing to wait until the Commissioner had been to New South Wales before making any further changes. After a speech from Bennet[3] in which he made the totally inaccurate statement that the "single difference" between the power of punishing criminal offences in New South Wales and in England was that in the former "trial by jury was not necessary if the alleged crime were committed by a convict," the discussion on the petition came to an end. It had, however, the result of hastening the investigations by the Committee on Gaols, and a few days later Bennet informed the House that the Committee had decided to enter immediately upon the subject.[4]

They began forthwith to take evidence, and on 7th April

[1] Field to Goulburn, 13th November, 1818. He drew attention to another matter which was also taken up by Bigge later, namely, the fact that the Act 27 Geo. III., c. 2, related only to the Criminal Court, that the Civil Charter of Justice was not based on any Act of Parliament.

[2] Hansard, vol. xxxix., 23rd March, 1819, p. 1136. [3] *Ibid.*, p. 1137.

[4] *Ibid.*, p. 1168, 26th March, 1819.

Bennet, on the strength of the important evidence before them, and the proofs they had of the terrible conditions under which the female convicts lived in the Colony, proposed to the House, by means of an address to the Regent, to delay the sailing of a vessel with female convicts until the Report of the Committee had been made. "Never was a clearer case," wrote Wilberforce. "I seconded it in order to soften, and to induce them to stop the ship by stating that its being thought that some remedy might be devised for the evils of the middle passage and of New South Wales was a reason sufficient. Greatly beat, alas!"[1]

The Committee went on gathering evidence, and meanwhile the Government brought in their Bill for legalising duties in New South Wales and also indemnifying the Governor for having previously levied them. But in this form it was strenuously opposed, especially by Bennet, and the indemnity clauses had to be dropped. Bennet "thought it strange that in the last week of the session the Hon. Gentleman should call on the house, not only to legalise the duties but to indemnify the person who had unwarrantably imposed them. Governor Macquarie was not here, nor likely to be here for some time, and therefore such an Act could not be necessary at present. There could be no need for the Bill before the next session of Parliament, when the Governor might be in this country, when he might be examined on the subject, and when circumstances might be brought to light either to criminate or exculpate him. He complained of the taxes imposed by Governor Macquarie as most injudicious and ruinous, being twice as high on exports as on imports, and that the moment these things were made known to the public the Hon. Gentleman came down to the house to propose the continuance of the taxes and the indemnification of the Governor. Among other duties he stated that a poll-tax was levied on every person who left the Colony, and that it was not applied to the payment of the naval officer or to any other public service but went into the pocket of Governor Macquarie's secretary. Upon the whole, when he looked to the circumstances of the Governor's case, and considered that Parliament would meet in time to adopt any measure that

[1] Hansard, vol. xxxix., p. 1434-1441, 7th April, 1819, and *Life of Wilberforce*, vol. v., p. 16.

might be necessary, he for one could not give his consent to this Bill at present, and he should therefore propose the entire omission of the first clause."[1]

This opposition was unreasonable, for the Government had not stated their intention of bringing in a Bill before any evidence had been heard at all. But a misconception had roused Bennet's suspicions. Jones, a Sydney merchant, in giving evidence before the Committee had referred to the meeting of magistrates at which it was proposed that an increase in the customs duties should be made in order to provide for the poor. It has already been seen that Macquarie adopted the proposed increase but did not appropriate the taxes to these purposes.[2] Jones[3] appeared in his evidence to treat this as an unjustifiable breach of faith if not an illegal act—and this wholly erroneous impression had been adopted by Bennet. The Bill as finally passed legalised for one year the duties then in force in New South Wales, empowered the Governor to levy a duty on spirits manufactured in the Colony whenever a distillery should be established, and declared that no action might be brought against the Governor for recovering duties exacted in the past within one year from the passing of the Act.[4] A similar statute was placed on the roll in the following year, and thus the Governor was for the time being effectually enough protected. But the form which the Bill took prevented the Government from recovering unpaid duties and realising the securities which they held.[5]

The Committee took evidence on twelve days between March and July. The most important witness was Alexander Riley, who was examined on nine days, and whose evidence has been so frequently quoted already. It was and is indeed more valuable than the evidence of any one man in the voluminous notes collected by Bigge, and it ranged over the whole field—social, economic and political—of colonial activities. J. H. Bent gave rather confused evidence on the subject of Blake and his own quarrels with Macquarie; and Jones, Riley's partner, gave information on matters of general concern. John Macarthur,

[1] See *Times*, 3rd July, 1819. [2] See Chapter IX.
[3] See Evidence, C. on G. [4] 59 Geo. III., cap. 114. [5] See Chapter V.

junior (a son of the more famous colonist), a young barrister, described the wool trade, and several officers of the Transport, or, as it was then called, the Navy Board, explained the arrangements of the voyage.

Anxious to present this important body of information before the end of the session, the Committee made practically no report, simply laying the minutes of evidence before the House on the 11th July, 1819.

Partly no doubt from this fact, and partly because the more important work of Bigge would soon be completed, the work of the Committee was neglected; and in 1820 Bennet published in the form of a letter to Lord Bathurst, a short resumé of the evidence.[1]

"I have," he wrote, "no cause to complain of the Prison Committee; on the contrary, I found in it a great willingness to hear all the evidence I had to offer, written as well as oral; and though, in some few instances, I think, evidence was excluded which before a House of Commons' Committee might have been reasonably admitted, yet the general object of all concerned seemed to be a fair, candid and impartial inquiry. . . ."[2]

Bennet admitted that to wait the return of Bigge was natural, but he thought some steps should be taken by the Government at once. These were the restriction of the number of convicts transported, the provision of civil and criminal courts, the pledge of granting jury trial in the near future, and the establishment at once of a council for the Governor.

"What is to become of the settlement? Is it to be a gaol or a Colony?—if a gaol you must bring back again to Europe all the free settlers—if a Colony, in order to maintain those who are already there in a flourishing condition, as well as to induce persons of character and property to settle within its territories, a rational, limited, legal Government must be established. Martial law[3] may be a fit mode of Government for felon con-

[1] See Report, etc., of C. on G., 1819.

[2] The written evidence was in some cases very wrongly admitted. See, *e.g.*, some letters by J. H. Bent. Those, however, came from the Colonial Office.

[3] It is perhaps worth while to point out that the term "martial" is quite inaccurate. It was military not "martial".

victs; but free settlers will be ruled by nothing short of a system of civil liberty. It would be idle to construct a constitution beyond the wants of the people who are to be benefited by it, or beyond their capability of enjoying it. Thus a representative Government in New South Wales would at present be a wild and futile scheme. But the protection of an authority, limited and regulated by law, they have a right to demand; and if English statesmen do not bestow it, other means will assuredly be taken by which it will be obtained." This theme he returned to later in the pamphlet, saying:—

"I cannot refrain again here (from) entreating your Lordship to reconsider the opinion you have given on the propriety of continuing the Governor of New South Wales in his present authority unchecked and uncontrouled except by the Colonial Office at home; which . . . is fourteen thousand miles distant. The recommendation of the Committee in 1812 ought to have carried some weight in influencing your opinion; but the events of the Colony since that period demonstrate the necessity of that measure. A consistent and intelligent administration of the affairs of the Colony is of primary importance . . . which cannot be obtained under the present vicious establishment, and which is essential to the wellbeing of the settlement."

The actual reforms suggested by Bennet were moderate enough, and indeed were very similar to the final recommendations of Bigge himself.

The commission with which Bigge was invested gave him power "to examine into all the Laws, Regulations and Usages of the settlements[1] . . . and into every other matter or thing in any way connected with administration of the Civil Government, the Superintendence and Reform of the Convicts, the state of the Judicial, Civil and Ecclesiastical Establishments, Revenues, Trade and internal resources thereof, and to report to us the information which you shall collect, together with your opinion thereupon".[2]

In order that he might take evidence on oath, Macquarie was to make him a magistrate of the territory.[3]

But more important than his commission were the instruc-

[1] Van Diemen's Land as well as New South Wales.
[2] See C.O., 5th January, 1819. MS. [3] *Ibid.*

tions[1] which gave in full detail the objects of his inquiry. He was first to direct his attention to ascertaining "what alteration in the existing system of the Colony can render it available to the purpose of its original institution, and adequate for its more extended application. With a view to this you will examine how far it may be possible to enforce, in the Colonies already established, a system of general discipline, constant work, and vigilant superintendence; the latter must necessarily be understood to comprise complete separation from the mass of the population, and more or less of personal confinement, according to the magnitude of the offence. . . . Should it appear to you, as I have too much reason to apprehend will be the result, that the present settlements are not capable of undergoing any efficient change, the next object will be the expediency of gradually abandoning them altogether as receptacles for convicts; and forming on other parts of the coasts, or in the interior of the country, distinct establishments for the reception and proper employment of the convicts, who may hereafter be sent out."

In such a case the annual charge must be carefully inquired into, "in order to enable His Majesty's Government to decide whether it is advisable to continue or to alter or to abandon the system which for near forty years has been pursued. . . ."

Lord Bathurst concluded with a vigorous description of transportation as it should be and as it had become " . . . you will in the whole course of your inquiries constantly bear in mind that transportation to New South Wales is intended as a severe punishment, applied to various crimes, and as such must be rendered an object of real terror to all classes of the community." This it had ceased to be. "For mere expatriation is not in these days an object of considerable terror. The intercourse which it breaks is readily re-established; and the mystery which used to hang over the tale of those condemned to it can never long exist. . . . If, therefore, by ill-considered compassion for the convicts, or from what might, under other circumstances, be considered a laudable desire to lessen their sufferings, their situation in New South Wales be divested of all

[1] P.P., XIV., 1823. Instructions to Bigge, 6th January, 1819.

salutary terror, transportation cannot operate as an effectual example on the community at large, and as a proper punishment for those crimes against the commission of which His Majesty's subjects have a right to claim protection, nor as an adequate commutation for the utmost rigour of the law."

There had been a change, Lord Bathurst pointed out, from the time when convicts sought to have the sentence of transportation commuted "even for the utmost rigour of the law," to the present when men convicted of slight offences sought the punishment of transportation which was the penalty of greater crimes. Altogether the conditions of the Colony had altered. The free settlers had increased, many convicts had become settled on the land, population and wealth had become great. The growing number of convicts transported made it more difficult than in earlier years to enforce discipline; the problem of housing them had become formidable. Judging by the information before him in Macquarie's despatches, it appeared to Lord Bathurst that this increase of numbers had made it necessary to distribute greater numbers amongst the settlers, and that under this system it had also been necessary to give the convicts "greater freedom than is consistent with the ends in view in transporting them," an impression curiously at variance with the facts of the case as Bigge afterwards saw them.[1]

While the primary object of his inquiry was to study the convict establishment, Bigge was also required to report "upon a variety of topics, which have more or less reference to the advancement of those settlements as Colonies of the British Empire".[2]

The special subjects were the judicial establishment, the social conditions, educational and religious, the economic conditions, commercial and agricultural.

As to the first, he had to consider whether Van Diemen's Land should have a separate judicature and whether the changes made by the charter of 1814 were still adequate for the judicial needs of the Colony. Finally was there any necessity to

[1] See Chapter V. The Government discipline was much slacker than that of the settlers.

[2] P.P., XIV., 1823. Instructions to Bigge, second letter, 6th January, 1819.

continue the specially severe police regulations which had been required to control the convict population?

As to the Colony's trade, "it will . . . be for you to report to me whether the market may not be freed either gradually or all at once from such restrictions, whether the competition of traders will not here as elsewhere produce the most beneficial effects, and whether the Government stores may not be supplied (as in other Colonies) by public tender, with equal advantage both to the public and to the individual cultivator". "There is one other point also," Lord Bathurst added, "which I cannot avoid recommending to your consideration, though I fear there is not much prospect of your being able to reconcile that difference of opinion which has prevailed in the Colony. I allude to the propriety of admitting into society persons who originally came to the settlement as convicts. The opinion entertained by the Governor, and sanctioned by the Prince Regent, has certainly been, with some few exceptions, in favour of their reception at the expiration of their several sentences, upon terms of perfect equality with the free settlers." Lord Bathurst felt, however, that as the measures taken in this direction had certainly roused hostility in the Colony, it was important to inquire fully into the merits of the system.

The task entrusted to Bigge was indeed a heavy one, and his inquiries[1] kept him in the Colony for over a year. Four months of the time he devoted to Van Diemen's Land, and the remainder he spent in exploring New South Wales and collecting an invaluable mass of documents and evidence. He returned to England on 3rd July, 1821, and within a year the Colonial Office was put in possession of his first report, though it was not until 1823 that this was followed by the second and third.

The reports were exceedingly voluminous, containing many detailed accounts of what now seem trivial events. The cause, however, of their extreme length and minuteness was due to two facts, one that the Colonial Office were anxious for full reports on many disputes which had been communicated to them by interested parties only, and the other that it was deemed inadvisable to print the minutes of evidence on which Bigge's conclusions

[1] For exact titles of the reports, see Appendix.

were based. The reasons for this were not far to seek. Many individuals in the Colony had given information to the Commissioner which they did not wish their neighbours to peruse. All the quarrels and petty disagreements which were probably unavoidable in such a remote and curious settlement as that of New South Wales might have been roused afresh by the publication of all the correspondence and evidence, and to publish a selection only was thought unwise.[1] The most important witnesses also were as a rule those who most desired their evidence to be treated as confidential. Even as it was Bigge was forced to insert in his third report a virtual apology for the references to W. C. Wentworth's "Pipe" on Molle which he had made in the first report.[2] On the whole, however, his work is a monument of official discretion; though a glance at the unpublished evidence shows that to make it so must have been a matter of no small difficulty.

As the main object of his mission had been to consider the fitness of New South Wales for a penal station, Bigge's first Report dealt almost entirely with the subject of the convicts and "their treatment, character and habits". Already his description of their actual conditions has been many times quoted, and in this place it is more important to consider his recommendations for their future treatment. In this respect the most striking note of his report is its absolutely conservative character. Whether or no the Government had been sincere in their suggestion of bringing transportation to New South Wales to an end, such a project never seems in Bigge's mind to have come within the sphere of practical politics. This was not because he approved of the system enforced by Macquarie, but rather because he did approve the system advocated by the land-owning agriculturalists, and because he saw quite clearly that New South Wales might, with profit to the mother country and to at least a portion of her inhabitants, be turned into a great wool-producing country under one of the simplest systems of capitalist production ever established. This project was foreshadowed in

[1] See letter from Bigge to Lord Bathurst, 5th May, 1822. R.O., MS.

[2] See end of Report III. See Correspondence of Bigge with C.O., 1823. R.O., MS. Wentworth appears to have threatened him with legal proceedings though without denying in so many words that Bigge's statement was true.

his first and clearly outlined in his third report. The faults of the Government service were in his opinion that it kept the convicts gathered in large numbers in the towns where discipline was difficult to enforce and where the object of their reform was lost sight of, and also where they were put to work on ornamental and often unnecessary public buildings, at great expense to the Crown and with little advantage to the Colony. Nor could he see by what means an efficient scheme of overseeing could be established and the convict overseers done away with. He considered the employment of the prisoners in agricultural and pastoral pursuits as more conducive to their reform than their employment on town buildings, but he was not satisfied that the Government could carry on farming or grazing with advantage. The exact reason why he was averse to such a scheme is not clear, but probably lay in the fact that he wished primarily to forward the cause of the sheep farmer and to make the convict labour subservient to that purpose. Thus he came to the conclusion that all convicts should be distributed to the fullest possible extent amongst the settlers, and that those who remained over from the distribution should be dealt with in the following ways. Some would be placed in gangs for the purpose of clearing away the virgin forest; others for making roads; and the old men and boys only be left in Sydney. Further he proposed that three new settlements (Moreton Bay, Port Bowen and Port Curtis) should be founded and used rather as punishment stations for the prisoners, Newcastle being abandoned, so far as that purpose was concerned, as being too easily accessible to the rest of the settlement. One notable recommendation was to the effect that the whole number of mechanics should be assigned to settlers, though each settler taking a useful tradesman was to take also one or two inferior workmen. The degrading communication of settlers and ex-convict superintendent should, he thought, be brought to an end, and the assignment of servants become one of the duties of the Colonial Secretary.[1]

[1] Major F. Goulburn arrived in the Colony as Colonial Secretary in 1821, taking the place, under a higher title, of Campbell, who had become Provost-Marshal in 1819, though he continued until Goulburn's arrival to act as Secretary to the Governor.

Bigge's criticism of convict discipline has been set forth already in Chapter V. It is unsatisfactory to find that beyond proposing that the magistrates should have the power of transporting offenders to other parts of the Colony for periods which might exceed their original sentences, he could offer no important change in what he felt to be an inefficient system. He hoped for great improvements, however, from the dispersion of the prisoners, the cessation of their wages, and a stricter regulation of remissions of sentence, including a complete prohibition of giving tickets-of-leave to new arrivals.

The great difficulty of the settlement's future, he thought, lay in the lack of demand for the produce of the convicts' labour. It was with the view of increasing this that he advocated encouragement for the export of wood, mimosa bark (for tanning), and wool, by a decrease in the duties levied in England on these productions. It was also with this view that he supported the establishment of distilleries.[1]

Putting aside for the moment the second report dealing with the judicial establishment, it is well to pass on to the third, which dealt with the trade and agriculture of the Colony and with all subsidiary features. The whole tendency of that report was to favour the aggregation of large areas under private ownership; to make it easy for the capitalist to procure land, and thus, with the convict labour, develop the wool export of the country. It was practically a repudiation of the policy so long attempted by the Home Government of establishing a régime of small proprietors. Bigge looked for the prosperity of the Colony to capitalist farmers with large estates, cultivated by forced labour, or to proprietary companies holding sway over immense tracts where great herds of sheep would be guarded by lonely convict shepherds. He looked with a cold and unfeeling eye upon the Colony's attempt to start manufactures, regarding them as of doubtful value to New South Wales, and as directly injurious to the mother country. At the same time he desired greatly to foster the South Sea trade, not only for the profit it might bring, but also to give an outlet for the

[1] These proposals were carried out by 3 Geo. IV., c. 96. Duty on New South Wales wool for ten years was to be 1d. per lb., extract of bark for tanning to be allowed in duty free, and timber also duty free.

adventurous sons of the new country. In fine, minor trading ventures were to be allowed a chance of existence, and men with small capital to be given land though with a sparing hand. But to the wealthy land and labour were to be dispensed liberally, with two chief objects in view—one to encourage emigrants who might relieve the Government of the charge of the convicts, and the other to provide England with an important raw material.

The main recommendations of the second report have been already discussed. The chief subject of judicial interest was that of juries, and the decision of Bigge was for delay. The Criminal Court, with some modifications, he thought might still be sufficient, and he followed the counsel of Mr. Justice Field in proposing a judicial establishment with one judge only for both Civil and Criminal Courts. The office of Judge-Advocate, however, was to be done away with and an Attorney-General to take his place as Crown Prosecutor. One abuse, the part payment of the salary of the chief judge by fees of his court, was also to be abolished. It was an abuse to which the high fees of the court had given an unpleasant prominence, and it had at no time been a necessary system.[1] As to the police establishment, the recommendations were of minor importance, and related chiefly to the appointment from England of a superintendent, and a better system of payment in the service.

The reports also urged the separation of Van Diemen's Land from New South Wales, and the establishment of a complete and independent judiciary for the former.

One further matter must not be neglected. Bigge realised very fully the trouble that had been caused by Macquarie's autocratic rule, and though he was perhaps severe upon the Governor's many mistakes, he recognised also that they were faults of the system as well as the man. He saw, as probably ministers at home had already seen, that the end of military

[1] He also called attention to a subject suggested to him and also to Goulburn by Judge Field—the fact, namely, that 27 Geo. III., cap. 2, related only to the criminal part of the Charter of Justice, so that the Civil Court of the Colony was founded only by Royal Charter and not authorised by Parliament, "and as our present Civil Charter takes away from His Majesty's subjects their constitutional right of appealing to the King in Council unless the matter in dispute is above £3,000, . . . such Charter had better have been authorised by an Act of the Legislature". Field to Goulburn, 13th November, 1818. R.O., MS.

government had arrived, and no part of his reports was of greater value to the Colony than that which recommended the formation of a Legislative Council to assist the Governor. Valuable too was his proposal that all laws should first be submitted to the Chief Justice and receive his certificate that they did not contravene the laws of England.[1] Needless to add, the council was to be a nominated and not an elected body, but to it was to be entrusted the power of law-making and revenue raising, which had previously been exercised (though not legally) by the Governor alone.

Macquarie was already in England when Bigge's Reports were laid before Parliament by the Colonial Secretary, and had in the previous year[2] published his own Apologia in the form of a reply to Bennet's Letter to Lord Sidmouth. He also sent to Lord Bathurst in July, 1822, a report on his Governorship and a justification of his measures.[3] Both these documents were in their manner able statements of his case, but both dealt rather with persons than principles. Thus the published letter contained a violent attack on Marsden and an allegation quite unfounded that he dealt in spirits, and several gibes at Bennet more abusive than relevant.[4]

The chief result of the pamphlet was that it called forth a rejoinder from Marsden, published a few years later, in which he not only disproved Macquarie's allegations, but stated with admirable force and clearness the circumstances of New South Wales from the time of his arrival as chaplain in 1793 up to 1820.[5]

Meanwhile the Colonial Office prepared to act upon their Commissioner's reports, and at the beginning of July, 1823, a Bill was introduced into Parliament and quickly passed through both houses, based upon his recommendations. This Bill, known afterwards as the New South Wales Jurisdiction Act, as finally

[1] Put into force by 4 George IV., cap. 96, s. 18.

[2] "A letter to the Right Honourable Viscount Sidmouth in refutation of statements made by the Honourable Henry Grey Bennet, M.P., in a pamphlet 'On the Transportation Laws, the State of the Hulks, and of the Colonies in New South Wales'". By Lachlan Macquarie, Major-General and Governor-in-Chief of New South Wales. London, 1821.

[3] P.P., H.C., 1828, XXI. [4] See pp. 14 and 53.

[5] "An answer to certain Calumnies in the late Governor Macquarie's pamphlet and the third edition of Mr. Wentworth's Account of Australasia". By the Rev. Samuel Marsden, London, 1826. See especially pp. 8-10, 15, 1829.

passed, provided for the government of the Colony until July, 1827, and was thus only a temporary measure.[1] The main lines of the Bill followed Bigge's Reports very closely and need not be recapitulated.

The delay in granting trial by jury in criminal cases roused considerable opposition, and Sir James Mackintosh moved in committee for its immediate introduction, but without success.[2] The Criminal Court remained little altered, an additional officer being added, or failing an officer a magistrate against whom the right of challenge might be exercised.[3] But in the Civil Court, where the Chief Justice was in general to be assisted by two magistrates (the right of challenge being again allowed), it was also possible at the desire of the parties that a jury of twelve might be called.[4] Nor was any qualification required in a juror other than the possession of fifty acres of freehold land, or a freehold dwelling valued at £300.[5]

At any time jury trial might be adopted in the Criminal Court by the issue of an Order in Council, which suggests that the Government thought that this further change might be made before the expiration of the Act in 1827.

The Bill contained very little relating to the convicts, but two provisions closely affected emancipists.[6] By these the remissions already given by the Governor were declared to have the power of pardons under the Great Seal, but future remissions were to have that power *within New South Wales* only.[7]

The emancipists, or Edward Eager representing them in England, decided that the Bill did not offer them sufficient redress; and at his request Sir James Mackintosh presented to Parliament the petition which had been drawn up in 1819.[8] Mackintosh also opposed the provisions in Committee,[9] though in this instance also he was unsuccessful. It is notable that

[1] This limitation of the Act was made in committee on the motion of Canning. See *Times*, 8th July, 1823.

[2] See *Times*, 8th July, 1823. A division was taken, but the motion was lost by thirty votes to forty-one.

[3] 4 George IV., cap. 96, s. 4.

[4] *Ibid.*, s. 5.

[5] *Ibid.*, s. 6.

[6] See s. 21 and s. 22.

[7] All remissions were also to be transmitted to His Majesty for approbation or allowance, s. 22.

[8] See Chapter IX.; p. 275. Petition was presented and read on 8th July, 1823. See *Times*, 9th July, 1823.

[9] See *Times*, 10th July, 1823.

the Government were throughout the passage of the Bill supported by H. G. Bennet,[1] and that the whole work of the opposition was left to Sir James Mackintosh.[2]

Bigge's work was finally completed by a Bill passed in the following year dealing with the government of the convicts.[3] By its provisions the Governor of New South Wales was empowered to establish out-settlements and to send thither those convicts who appeared in need of severer discipline, and whose bad example was likely to influence other prisoners.

This statute, which embodied the remainder of Bigge's recommendations (except for a few minor changes in administration which were carried out by the instructions of the Secretary of State), brought to an end the period of Macquarie's rule, which formed the final phase of military government in New South Wales. Macquarie himself had returned to England in 1822, burdened with the consciousness that not only colonial opinion but that of Ministers also was opposed to the main object of his Governorship, namely, the social re-establishment of the emancipists. Indeed the prominence given to this one aspect caused much of the disinterested energy which he had thrown into his work to be overlooked, and for the time being he was judged only as the patron of the emancipated convicts. It is, indeed, almost solely in this light that his work is still regarded by Australian writers.

The preceding pages, however, have shown him dealing with problems of many kinds, problems intensely difficult, and requiring for their successful solution ability and training of a rare kind. For example, the granting of licenses and of remissions of sentences, the distribution of land, and the enforcement of convict discipline were all matters in which skilful administration was requisite, and it was scarcely surprising that a man who had spent his whole life in the military service should prove himself unable to originate or control administrative expedients

[1] See his speech, *Times*, 8th July, 1823.

[2] A further clause giving power to the Governor, "on the affidavit of an unknown informant," to send any convict who had just completed his sentence to England without trial appears to have been dropped, probably as the result of a petition presented through Sir James Mackintosh by Eager. See Hansard, *House of Commons' Journal*, 2nd July, 1823, pp. 1400-1403.

[3] Geo. IV., cap. 84.

under conditions of such a peculiar nature as those obtaining in New South Wales. Nor were the instruments at his command, the members of the civil staff, such as would give him adequate aid. Chosen for the most part by the Home Government, without special reference to their suitability for the work before them, they constituted a corps of officials of exceedingly meagre possibilities.

The Governor had the disadvantage also of being in no way compelled to consult with any one of them or of the judicial staff, and thus fell inevitably into the habit of seeking advice (if he sought it at all) from those to whom he knew his views to be acceptable or from whom he could easily compel acquiescence. Macquarie naturally exercised the autocratic vice of favouritism, and unfortunately selected his favourites rather because they were personally agreeable and publicly submissive towards himself than because they displayed particular ability. Indeed the man who gave him the readiest support at once presented himself as the most suitable councillor.

There was, however, more than laxity of administration at fault in Macquarie's system, for in matters of principle also he was apt to be uncertain. Thus his liquor policy varied between two extremes, that of strictly restricting the number of houses and ensuring their respectability, and, on the other hand, of attempting to cure drunkenness by multiplying opportunity and increasing the number of licenses. So also he wavered from the principles laid down by himself for the remission of convicts' sentences, and again in permitting settlers to disregard the conditions of their land grants.

This looseness of principle was itself a natural outcome of the autocratic system. It has been pointed out that Macquarie, regarding himself as the supreme power in the Colony, considered that he might make laws for others to obey with which he himself might if need be dispense. He attempted always to enforce a policy of personal government, constantly dispensing in individual cases with his general regulations. This was almost a possible system with 10,000 inhabitants, but became both unjust and ineffectual when the population was doubled. In this respect, as in many others, Macquarie was merely following in the footsteps of his predecessors. Much of the criticism

of his government both within and without the Colony should have been directed not to Macquarie, but at the original founders of New South Wales. Its affairs had never run smoothly, and Governors had always been on bad terms with one or other of the colonists, a fact due probably to the confusion and lack of definition of the Governor's powers. But so long as the number of the inhabitants was small, and so long as there was no man learned in the law amongst them, disputes, oppressions and severities might continue without check. When quarrels were referred to the Colonial Office they were treated wholly in their personal aspect and disclosed no difficulties nor doubts as to the Governor's legal powers. The growth of population, the improved judicial constitution, and, more still, the advent of Ellis Bent had brought about a new phase.

The struggle between Ellis Bent and Macquarie no doubt originated in a divergence of opinion on other matters, but it has been shown how their opposition gathered round the totally different conceptions held by each of the rights of the executive. Macquarie, in exercising the powers of legislation, taxation, and judicial control, had simply accepted the traditional rights of his position, and up to that time these powers had not only been adopted by each Governor with the tacit support of the Colonial Office but had been accepted in the Colony without declared opposition. No sooner, however, had Ellis Bent become Judge-Advocate than he found himself forced to contest the huge assumption of previous Governors, and to fight for judicial independence and the supremacy of the law. While he fought alone against Macquarie for this doctrine of judicial integrity, his brother banded himself with each opposing faction and gave voice to every complaint which arose or could be invented against the Governor. It was in great measure owing to the dignified protests of Ellis Bent and the turbulent fury of Jeffery Bent that Macquarie was the last Governor of New South Wales who exercised control over the courts, made laws and levied taxes at his own will, and ordered a punishment without trial. Still, in justice, it must be remembered that Macquarie did not originate the system of military government, but that he had the misfortune of carrying it on in a Colony which was clearly outgrowing its possibilities.

In any final estimate of Macquarie's rule, the quality which stands forward most prominently is its humanity. The period was a harsh one, and the circumstances of New South Wales encouraged that harshness. Macquarie steadily sought to introduce more humane methods, and to encourage gentler views. His "emancipist" policy was part of this larger ideal; and one of the reasons of its failure, in addition to the unwise selection of the individuals and of the times for bringing them forward, was the lack of humanity shown by many of the free settlers. Macquarie's clemency was even made a ground of complaints, and possibly with reason, for though punishments during his government were lighter they were more frequent than in earlier days, and laxity of discipline brought corresponding evils. To the last moment Macquarie remained averse to signing death warrants, and during Wylde's last circuit in Van Diemen's Land it was only after the greatest persuasion that Macquarie would consent to the execution of eight brushrangers, which Wylde considered absolutely necessary to bring to an end the state of insecurity in that island.[1]

It is to this humanity, often short-sighted and mistaken in its actions, that Macquarie's measures in regard to the convicts' wages, rations, and treatment generally may be traced. It was probably from this desire to give a gentler aspect to colonial life that he was so eager to ornament the town of Sydney with architectural beauty and to spread amongst the people opportunities for education and a knowledge of religion. He even attempted to bring within reach of the black natives the virtues of the civilisation he so greatly respected. He founded a school for the native children, and sought, though unsuccessfully, to establish the adults as tillers of the soil. He also instituted a yearly gathering of the tribes at Parramatta which took place in the summer heat of December, and at which he promoted good feeling by a liberal dinner of roast beef and ale. His relations with these people were indeed of the best description and his feeling towards them consistently humane.

In the face of these facts his neglect of the female convicts

[1] See Correspondence, 1821, in Appendix to Bigge's Reports. R.O., MS. Rusden (*History of Australia*, vol. i.), has, quite wrongly, taken these executions as a proof of Macquarie's embittered sentiments.

is nothing less than startling. Two reasons only seem forthcoming, the one that he regarded the women as incapable of reform and that he felt himself incapable of dealing with the problem they presented. The other, a less creditable but not less human cause, that he was the more unwilling to give time and energy to improve their dwelling and discipline, and to put aside other projects originated by himself, because it was Marsden, whom he so bitterly detested, who first called his attention to the frightful abuses which were occurring.[1] His neglect remains, however, a blot upon his reputation for an almost sentimental humanity.

There can remain no doubt that the post filled by Macquarie was one of exceeding difficulty, nor can it be said that he filled it without credit. He was probably mistaken in overlooking altogether the previous convict status of many of his favourites. It was a policy which he was unable to carry through, and one which at that time must inevitably have created ill feeling between freed and free. It would have been better had he bent his energies not to forcing forward the men and women who had been branded with crime in their mother country, but rather that stalwart generation which sprang from them and which in these years he saw growing up around him.

Yet even when Macquarie failed in his essays to introduce a new system—even when he must be blamed for his administration of the old, there remains much in the long period of his rule for which respect is due. He had definite aims and high ideals, and he spared himself neither in his efforts to enforce these, nor in his attempts to administer what he rightly called "the least grateful and most arduous Government in the King's dominions".[2]

The chief difficulty of the task consisted in the fact that no one at that time was able to lay down a complete and consistent policy for governing the Colony. Nor would it be possible at the present time to speak without hesitation upon the subject. The problem of colonisation is still unsolved, and the problem presented by the criminal seems to grow each year more difficult. New South Wales presented them both, inextricably enwound one with the other.

[1] Marsden's letter, 1st July, 1815.
[2] Letter to Lord Sidmouth, 1821, p. 3.

It has been comparatively easy to show how autocracy brought about its own peculiar difficulties, to see in particular instances the difficulties of administration, of legislation and of jurisdiction. The faults and follies of "personal" Government, the gradual growth of political interest, the powerful sentiment of budding nationality, all these are plainly written in the history of the period. Criticism too of many sides of governmental activity has been called for, and the lines of that criticism, and the suggestion of alternative policy, have for the most part been obvious enough. But, looking at the subject as a whole, the task of criticism becomes infinitely greater.

By the foundation of New South Wales the Government offered a solution of the two problems of how to people a new country and how to get rid of convicted criminals. The experiment proved in the end a remarkably successful one, and it had from the beginning one great advantage. The method placed upon the Government the responsibility for the welfare of the prisoners and thus indirectly of the whole country, and for this reason New South Wales received in its early years a greater share of attention and revenue than any previous British Colony at the time of its establishment.

The introduction of free settlers was probably inevitable, but their introduction gave a distinct character to the Colony's development. The double enticement was held out to them of free labour and free land. But in agriculture pure and simple the convict labour was found to be inefficient, and it was thus impossible to carry out the policy of granting land in small holdings. The use of convict labour led directly to an increase in pastoral farming, to the aggregation of small freeholds into large sheep runs, and to an ever greater area of Crown grants. Especially after 1821 the pastoralist with his thousands of acres began to take the place of the farmer with his few hundreds as the real instrument of colonial progress. Macquarie fought against this tendency, trying to hold the small agriculturist, emancipist or free, above the sheep-farmer, but he could not (though he did his best) bring servile labour to an end, and so long as this lasted his attempts were bound to fail.

The presence of a convict population, the growth of capitalist farming, and the increasing area of land granted away by

the Crown, had important political effects. The convicts showed from the first a tendency to gather about Sydney, and a preference for town life. The free settlers, finding that the land available was each year more remote, began to seek means of livelihood in the city. The free labourer whose labour was not needed by the pastoralist, fully supplied from the ranks of prisoners, and who had not the capital to start farming on his own account, also turned towards Sydney. Thus the preponderance of the town population, so marked a feature of Australian life to-day, and so potent a cause of the democratic sentiment of the country, had already, by 1820, begun to show itself and grew yearly more marked.

Sociologically the history of New South Wales must remain for the present a complete puzzle. No one would at that time have prophesied, and no one would prophesy to-day, that the children born of convict parents would show no sign of their origin. Yet this was what happened, and the fact is not to be belittled by laying stress on the number of political prisoners or the harshness of the criminal laws. The political prisoners formed a very small minority, and though many convicts were transported for small offences, they were usually offences of a low type such as pocket-picking or receiving stolen goods. There is also no reason to suppose or at least no proof that the thieves, forgers, coiners and highway-robbers died childless; and as there were but few free women in the Colony, the female convicts must necessarily have been the mothers of the greater part of the first generation of Australian born. New South Wales thus carries before the world a banner of hope and a promise that future generations may yet escape from the bondage of past evils. Perhaps also the final justification for every mistake of Secretary of State or Governors, for the careless selection of administrators and subordinates, the continuance of an anomalous, unworkable and unpopular form of Government, may be found in the fact that the establishment of New South Wales led to the rehabilitation in a new environment of those who had fallen out of the social struggle, and gave to their descendants a part in the task of the present, the task of forming a nation high in ideals and in achievements, worthy of their heritage in the wide acres glowing in the golden sunlight of the Australian continent.

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