REPUTATIONS ON THE LINE IN VAN DIEMEN’S LAND:

a dissertation on the general theme of the Rule of Law as it emerged in a young
penal colony with particular emphasis on the law of defamation

by

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This thesis is presented for the degree of Master of Laws of Murdoch University, 2012.
I declare that this thesis is my own account of my research and contains as its main content work which has not been submitted for a degree at any tertiary education institution.

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ABSTRACT

This research focuses on the development of the jurisprudence of the infant colony of Van Diemen’s Land now known as Tasmania, with particular interest on the law of defamation.

During the first thirty years of this British penal colony its population was subject to changes. There were the soldiery, who provided the basis of government headed by a Lieutenant Governor, the indigenous people, the convicts, and gradually an influx of settlers who came enthused by governmental promises of grants of land. In addition to these free settlers there were a selection of convicts who, under a process of something akin to manumission under Roman Law, became upon completion of their sentence, eligible for freedom and possibly a grant of land.

There developed a spirit of competition amongst the settlers, each wanted to become more successful than the others. The favourite means of distinguishing oneself was the uttering or publication of damaging words against a person who was perceived to be a rival. Various defamation actions between 1805 and 1835 are discussed, providing a fascinating insight into the emergence of a Rule of Law, however imperfect, in the development of the colonial society of Van Diemen’s Land.
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CHAPTER ONE: THE AIMS AND PARAMETERS OF THE PROJECT

1. The Aim of the project

This study aims to identify the principles revealed in selected cases in colonial Van Diemen’s Land in the areas of defamation during the years 1805 to 1835.

This study is set in Van Diemen’s Land. Van Diemen’s Land is the name formerly given to the island state of Australia which is now known as Tasmania. According to James Boyce (2008)\(^1\) the name Tasmania was used as early as 1820 in a guide for settlers written by Charles Jeffreys. Boyce \(^2\) further explains that the name Tasmania gradually usurped the name Van Diemen’s Land as colonists endeavoured to avoid the convict attaint of the island’s use as a penal colony.

![Figure (1): Map of Van Diemen's Land constructed for Lieutenant Governor Arthur, circa 1826\(^3\)](image)

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\(^1\) James Boyce, *Van Diemen’s Land*, (Melbourne, Victoria: Black Inc., 2008), 158

\(^2\) ibid

\(^3\) Map of Van Diemen’s Land, circa 1826, original in National Archives Office, Kew, Great Britain
Van Diemen’s Land was discovered by Abel Jansen Tasman in 1642. He named it Van Diemen’s Land after the governor of Java, by whom he had been sent out with two small vessels to ascertain the extent of the great south land, New Holland. Van Diemen’s Land’s total area is sixteen million, seven hundred and seventy-seven thousand and six hundred acres.

The selected Van Diemen’s Land cases are investigated in accordance with the methodology explained in detail in Chapter Two of this thesis, to identify the power and powerlessness dichotomy and the values espoused. Through the identification of the power and powerlessness dichotomy and values upheld in decisions, the study aims to examine the extent to which the Rule of Law was followed in the selected slander, libel and criminal libel cases during the period 1805 to 1835. Being based upon selected cases, the study does not purport to be a complete nor continuous examination of defamation in Van Diemen’s Land between the years 1805 – 1835.

The doctrine of the Rule of Law is based upon the tenet that all men are equal before the law, whether they be officials or not (except the Queen). It follows that the acts of officials in carrying out the behests of the executive government are cognisable by the ordinary courts and judged by the ordinary law. Essentially this means that there is an absence of arbitrary power, with offenders only being punished for a breach of the ordinary law, and in the ordinary courts. The Rule of Law also upholds fundamental

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4 William Brackley Wildey, *Australasia and the Oceanic Region*, (Melbourne: George Robertson, MDCCCXXVI), 315
5 ibid
rights of the citizen, such rights being the freedoms of speech and of meeting and association. These freedoms, according to the Rule of Law, are rooted in the ordinary law, and not upon any special constitutional guarantees.\(^7\)

While the year 1803 was the year the English established their settlement on the island, the absence of defamation case reports prior to 1805 is the reason for the discussion of cases beginning in 1805. The study ends with cases in the year 1835 because in that year the Chief Justice ceased sitting on the colony’s Executive Council.\(^8\) In 1835 it was considered improper for the head of the judiciary to exercise executive functions.\(^9\)

Thus in 1835 the blurring of the judiciary with the exercise of executive function came to an end. This was of immense importance for the Rule of Law which, at that point, ceased to be fettered by the interdependence and intimacy of the official function and relationship of the Lieutenant Governor Arthur and the Chief Justice Pedder. The year 1835 was also important from an economic and sociological perspective. Roberts (1935)\(^{10}\) notes that Van Diemen’s Land in 1835 was at the beginning of a serious sixty year economic depression, noting that it was heavily overstocked with one million sheep,

\(^7\) ibid
\(^8\) W. A. Townsley, *The Struggle for Self-Government in Tasmania 1842 – 1856*, (Hobart: Government Printer, 1951), 27, relies on *The Van Diemen’s Land Executive Council Minutes* of 17/5/1839 which reveal that due to an administrative error by the clerks in the Colonial Secretary’s Office, Chief Justice Pedder was reappointed to the Executive Council and resumed his seat on 17 May 1839. The Minutes further reveal that in consequence of a memo from Lieutenant Governor Franklin to Goderich of 18/5/1839, the error was subsequently rectified. Correspondence from Russell to Franklin dated 15/10/1839 reveals that His Honour’s role was replaced on the Executive Council by the Chief Police Magistrate.
\(^9\) ibid, 6 and 26 and Gooderick to Arthur 13/3/1835
had a Caucasian population nearing forty thousand people, as many bond as free, extraordinarily unscientific agriculture, and an unceasing flood of convicts.

Through deliberation and reflection upon the selected comment of those who decided cases, counsel, parties, and the decisions themselves, the researcher retrieves specific material which discloses the power and powerlessness dichotomy and values. This material provides the basis for identifying the extent to which the Rule of Law was observed.

The intention of this project is not to legitimate particular decisions, methods or comment: rather, the intention is to determine the extent to which the Rule of Law was followed.

2. Definitions of key terms

Key terms used in the discussion of cases include the terms defamation, principle, value and law.

Defamation is used as a generic umbrella term for the species of slander, libel and criminal libel. Each of these terms is further defined according to common law and English statute later in this chapter.
The adoption of the essentially descriptive term ‘principle’ derives primarily from the work of Alex Castles (1982)11 who, in considering the introduction and role of unacted English law into Australia, defines unenacted English law as “a set of principles.” In this study the term ‘principle’ is defined as the determining concept for the establishment of a basic norm of right and wrong.

The term ‘value’ is used when discussing the comments and decisions of cases. ‘Value’ is defined as the foundation of a principle that determines the concept of a basic norm of right and wrong. For the purposes of the study, ‘value’ and ‘principle’ are considered to be consistent, thus, ‘principle’ is used concurrently with ‘value.’

In each case discussed, an attempt is made to identify the underlying value or principle that is upheld. It may well be that the principles which are identified are the ethics or values espoused by decision-makers, counsel or parties and may derive from English common law, statute and/or the specific context of Van Diemen’s Land.

The principles identified as determining the application of the law of slander, libel and criminal libel are taken to be indices of the extent to which the Rule of Law applied to defamation cases in Van Diemen’s Land during the years 1805 to 1835. They may also comprise the jurisprudence in this area of the law at that time and for the selected cases. The term ‘jurisprudence’ in this study is the term used to designate the total cohort of principles which define each of the three species of defamation: slander, libel and criminal libel.

11 Alex Castles, *An Australian Legal History*, (Sydney: Law Book Company, 1982), 495
3. English law receivable when the English community began in Van Diemen’s Land

No directives were given by England on the substantive law to be applied in Van Diemen’s Land. Thus, in reality English Common Law receivable at the time the English established their community on the island continued until modified by Australian Statute not English Statute.

Common law principles could be received subsequently if their character was such that they were capable of being received. Consequently, in regard to the law of defamation in the period 1805 - 1835, principles from subsequent English case law could be adopted in Van Diemen’s Land.

4. Principles of English common law

Brix (2006) defines English common law as the incremental development of the law by judges through deciding particular cases, with each decision being shown to be consistent with earlier decisions by a higher or co-equal court.

When the English arrived in Van Diemen’s Land they brought with them an unshakeable belief probably prevailing from Calvin’s Case (1608) that that the laws of a conquered,

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12 ibid, 499
13 ibid, 502
14 ibid, 505
non-Christian country, as they perceived Van Diemen’s Land to be, would immediately cease. In reality, however, the laws of the indigenous people in Van Diemen’s Land did not immediately cease. Thus, the indigenous people continued to endeavour to live by their rules while the English settlers endeavoured to impose English law. The resulting mix of the law of English community with that of the indigenous people can be seen as producing legal pluralism.

5. Legal pluralism and folk law

The most serious issue identified by Alison Dundes Reuteln and Alan Dundes (1995) concerning legal pluralism is that of individuals caught between the competing demands of two or more legal systems. In Van Diemen’s Land the result was continuing conflict between the indigenous people and the English community.

During the administration of Lieutenant Governor Davey 1813 - 1817, the operation of a single system of law in the colony of Van Diemen’s Land was promulgated through the publication of a Poster. This Poster reveals the English perspective that one law – English law – was to prevail in the colony, and the indigenous people would be treated in the same way as the non-indigenous people.

16 7 CX0 Rep  2a, 2 St. T 559, 77 English Reports, 377
18 The original of Governor Davey’s Proclamation to the Aborigines, 1815, is said to be in the metropolitan Art Gallery, New York
6. Definitions of law

The promulgation of the Lieutenant Governor Davey’s poster could be seen as fulfilling Lon Fuller’s (1964) definition of law as the enterprise of subjecting human conduct to the governance of rules. In Van Diemen’s Land law became what the people on whom power was conferred to determine disputes would do. This is similar to the notion of the

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19 Lieutenant Governor Davey’s Poster, 1815, National Archives, Kew, England
court’s function held by Oliver Wendell Holmes (1879). Such a notion can be said to acknowledge the unpredictability of court and administrative decisions. This tension of unpredictability and arbitrariness is apparent in the definition of the law offered by Karl N. Llewellyn (1930) with his statement that law is what officials do in disputes:

“The doing of something about disputes, this doing of it reasonably is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.”

In Van Diemen’s Land between 1805 and 1835, law can be seen as what officials did about disputes. Until 1824, when the Van Diemen’s Land Supreme Court was established, decisions involving disputes were made by officials and administrators from professions other than the law. By investigating the power and powerless parameters in each case as revealed in comment and the decisions, this study seeks to determine the extent of the subsistence of the Rule of Law in the selected cases.

7. Historical jurisprudence

The philosophical foundation of this study accords with historical jurisprudence in that it accepts that a community evolves or changes. Thus, the principles identified in the

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cases probably reflect aspects of the community at a particular time in its development. This study, however, differs from a strictly historical jurisprudential investigation in that it challenges the idea that a community’s stages of development are predictable. For example, in Van Diemen’s Land there were unusual features, the effect of which in combination could not be foretold, such as:

- it was a geographically isolated island,
- the English community consisted mainly of male convicts,
- there were increasing numbers of non-convicts, often having entrepreneurial intentions,
- the small indigenous community had a value system, legal regime and language unknown to the English, and importantly,
- the *raison d’être* for the English community was to find a place to syphon off the very worst offenders against the English law.

Thus, in colonial Van Diemen’s Land, the years 1805-1835 were years of unpredictable development. They resulted in:

- movement between individuals and groups,
- competition between individuals, and
- the rise of business and commerce,

in an unknown ethnographic environment.
8. Administrative response to context

This unknown context which confronted the English colonial administrators in Van Diemen’s Land required them to respond and adapt with the overall aim of controlling or governing. They knew the necessity of demonstrating to the English government that they could profitably run the colony. It is fair to say that the entire English community in Van Diemen’s Land was under the psychological imperative to show those ‘at home’ in England that they could succeed because of their own skills. Thus the proving of independence and wealth maximisation were priorities.

9. Roots of Van Diemen’s Land jurisprudence

Van Diemen’s Land defamation jurisprudence can be seen to have emerged from the seeds of English Law. These seeds were planted when the first consignment of convicts, free English and administrative personnel arrived in the island to establish their community. The seeds of English law were no different from the seeds of vegetables such as green peas, corn, potatoes and other plants brought from England. They were thrown onto the soil of the previously untilled soil. Sometimes they were pushed down deep into the earth, sometimes they were drilled into furrows, sometimes they were stamped on with feet held in shackles or the prongs of a rake held horizontally. Some of the seeds grew rapidly to be eaten by the native animals; others were strangled by the wilderness but persisted and eventually lived, different from the parent seed; yet others survived,
grew strong roots and became as if they had always been there, the same as the parent plant they had never known. So much for the analogy of the seeds of a foreign law planted in another land.

In the absence of legislation and other directives to the contrary, it can be inferred that English law – statute and common - was introduced in Van Diemen’s Land from the time of the landing ceremony conducted by Lieutenant Governor Collins on his arrival from England.

This body of English law continued in the colonies of New South Wales and Van Diemen’s Land up until 1828. It was then that the *Australian Courts Act (Imp.)*1828 was enacted, with section 24 directing that it shall be the duty of the Supreme courts to adjudge and decide as to the application of any such English laws and statutes in the colonies. It can thus be inferred that from 1828 it was up to the local colonial Supreme courts to determine whether the English statutes continued in the colonies.

**10.Relevant English statute law**

The relevant English Statute law for defamation goes back centuries. For example in the seventeenth century legislation was passed giving committees the power to eject schoolmasters found to be conducting a personal scandalous life or were ill affected to

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24 9 Geo. IV, *Imp.*, c. 83
the Parliament.\textsuperscript{25} The parameters of scandalous offences was further widened in 1643 in an *Ordinance for the Regulating of Printing to Suppress the Great Late Abuses and Frequent Disorders in Printing many False, Forged, Scandalous, Seditious, Libellous and Unlicensed Papers, Pamphlets and Books to the Great Defamation of Religion and the Government*.\textsuperscript{26}

*The Libel Act* (1792),\textsuperscript{27} known as *Fox’s Libel Act*, had a specific role in defamation law, being an *Act to remove Doubts respecting the Functions of Juries in Cases of Libel*.\textsuperscript{28} Defamation law was further formalised in the *Criminal Libel Act* of 1819,\textsuperscript{29} an *Act for the more effectual Prevention and punishment of Blasphemous and Seditious Libels*.

Importantly, for the purposes of this particular project, this latter *Act* enunciates the difference between libel and slander.

Firstly, the *Criminal Libel Act* of 1819\textsuperscript{30} defines defamation as the exposure of a person “…to hatred, ridicule or contempt which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade.” Secondly the *Act* states that an action for libel is grounded if such exposure is published in a form to which some

\textsuperscript{25} Thomas E. Tomlins (ed.), *Statutes at Large of England and Great Britain*, Vol. 1, (1643-4, Jan. 22), (London: George Eyre and Andrews Strahan, MDCCCXI), i. 371 - 372
\textsuperscript{26} ibid, 370 - 372
\textsuperscript{27} 32 Geo. 3, c. 60
\textsuperscript{29} 60 Geo. 3 and 1 Geo 4 c. 8, in *Complete Statutes of England*, Vol. X, T. Willes Chitty (ed.), (England: Butterworths, 1929), 399-400
\textsuperscript{30} ibid
degree of permanence attaches, while an action for slander is grounded if the exposure is in a transitory for such as an oral statement.

The *Criminal Libel Act* of 1819\(^{31}\) also provides essential details for bringing defamation proceedings. For example, the time set for bringing an action for slander is within two years and for libel within six years. Distinctions between the two actions are drawn. For example, libel may be prosecuted by criminal proceedings, while slander cannot. Another distinction made in the Act is that for slander, damage must be proved before an action can succeed, while for libel only proof of publication is required. The specific requirement relating to a criminal prosecution for libel is expressed, for example, that there can only be criminal prosecution for libel if the defamation is likely to cause a breach of the peace.

Thus the relevant English legislation applying to defamation law in Van Diemen’s Land between 1805 and 1835 was *The Libel Act* (1792),\(^{32}\) known as *Fox’s Libel Act*, which was of specific importance in the role respecting the function of juries in cases of libel\(^{33}\) and the *Criminal Libel Act* of 1819,\(^{34}\) which expounds the English law applying to defamation cases in Van Diemen’s Land between 1805 and 1835.

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\(^{31}\) ibid

\(^{32}\) 32 Geo. 3, *Imp.*, c. 60

\(^{33}\) C. H. Firth and R. S. Rait (eds.) *op. cit.* 401-402

\(^{34}\) 60 Geo. 3 and 1 Geo 4 c. 8, in *Complete Statutes of England*, Vol. X, T. Willes Chitty (ed.), *op. cit.* 399-400
11. English common law

English common law combined with English statutes to provide the legacy for the Van Diemen’s Land actions in defamation. Some of the early English cases providing seminal principles include:

*Lord Townsend v Hughes*,
*Gardener v Atwater*,
*Duval v Price*,
*Thorley v Lord Kerry*,
*R v John Wilkes Esq.*, 
*R v Bear*,
*Dominus Rex versus Bear*,
*The King v Alme and Nott*, also called *R v Orme and Nott*,
*Cropp v Tilney*,
*Dr Edwards v Dr Wooton (1608)*,
*The Queen v Drake*, and 
*John Lamb’s case*. 

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35 2 Mod. 151, 1 Mod 220 in *English Reports* 91, King’s Bench, 853 
36 4 Bac. Ab. 507, in *English Reports* 91, King’s Bench, 853 
37 1694, 15 Lds. Jo. 458, *English Reports* 1, House of Lords No. 12, 8 
40 2 Salk 417, 646, *English Reports* 91, KB, 791 
41 1 Ld Raymond, 414 SC, Pasch 9 Will 3 BR; *English Reports* 91, KB, 547 
42 1699, 3 Salk 225, 1 Ld Raym 486 SC; *English Reports* 91, 790 
43 1693, 3 Salk 225, *English Reports* 91, 791 
44 1608, 12 Co Rep 35, *English Reports* 77, 1316 
45 1 Salk 660, *English Reports* 77, 790
Essentially, following the case of *Lord Townsend v Hughes*, the rule laid down by the court was that words should not be construed either in a rigid or mild sense; but according to their genuine and natural meaning and agreeable to the common understanding of all men. This tenet was followed in *Gardener v Atwater*, and the rule became entrenched that words were to be understood in their usual and obvious sense. Thus for defamation cases, the meaning of the words was determined by the meaning which prevailed in the context.

This principle is important for the present study because in the penal colony of Van Diemen’s Land, where society comprised free people, serving convicts, free convicts or emancipists, administrators and indigenous people, it can be expected, that words took on meanings and innuendos with specific relevance to the place. It is not surprising, then, that cases for alleged defamatory words resulted in protracted argument and discursive advocacy in the Court of Van Diemen’s Land.

In the case of *Duval v Price*, an action on the case for slander to correct a judgment of error in the Court of the Exchequer, the offending words spoken were “He is disaffected to the Government”. The court held that these words were general and uncertain and reversed the judgement of first instance.

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46 1611, 9 Co Rep 596, *English Reports* 77, 822
47 2 Mod. 151, 1 Mod 232, Freem. 220 in *English Reports* 91, King’s Bench, 853
48 4 Bac. Ab. 507, in *English Reports* 91, King’s Bench, 853
49 1694, 15 Lds. Jo. 458, *English Reports* 1, House of Lords No. 12, 8
The principle therefore, was established that to make words actionable they must either tend to be scandalous and discredit the party, or if true, bring damage to the party of whom they are spoken. The possibility for endless litigation was introduced by the additional premise from this case that a man is actionable only for his own words, and not for those expounded or described in a manner other than the speaker intended.

While the potential for escalation in the number of slander actions was introduced by the premise of the ‘speaker’s intention’ in Duval v Price, a similar potential for burgeoning was instituted in libel cases with the case of Cropp v Tilney (1693). In this case the court opened a virtual flood-gate for libel actions when it held that inference imputing ill opinion is libel. The facts of the case are that Mr Tilney wrote a letter, stating that Mr Cropp, who was standing for parliament, had said:

“There is a war with France of which I can see no end, unless the young gentleman on the other side of the water (innuendo Prince of Wales) be restored”.

The court found for the plaintiff, on the basis that it is sufficient to ground a case of libel if the writing induces an ill opinion of the plaintiff, or if it makes him contemptible and ridiculous.

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50 1694, 15 Lds. Jo. 458, English Reports 1, House of Lords No. 12, 8
51 1693, 3 Salk 225, English Reports 91, 791
In John Lamb’s case\textsuperscript{52} the court held that to be convicted of a libel in the Star Chamber the party ought to be either a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be libel. This requirement for the maker or publisher to know that the writing is libellous before the charge can be grounded, can be seen as akin to the Rule of Law’s keystone guarantee of the absence of arbitrary power.

Further protection from arbitrary prosecution is found in the case of Dr Edwards v Dr Wootton,\textsuperscript{53} the facts are that Dr Wootton wrote a letter containing infamous, malicious, scandalous and obscene comments about Dr Edwards, in a letter to the said Dr Edwards. After sealing the letter, Dr Wootton directed his friend to deliver the letter to Dr Edwards. However, the friend opened the letter and read it. The court held that no action on the case lies against person who sends a libel in a letter sealed and directed to the party libelled, without any other publication. From this case comes the principle that to establish libel the publication must be by the person libelling to someone other than the person libelled. An important refinement of libel came in The King v Alme and Nott, also called R v Orme and Nott\textsuperscript{54} where the court defined a libel as writing to mankind in general with particulars about a specific individual.

The parameters of libel were further expanded in the case of Thorley v Lord Kerry (1812)\textsuperscript{55} which established that a written defamatory comment about a person’s dereliction of duty is libel. This case also established the principle that an action can be

\textsuperscript{52} 1611, 9 Co Rep 596, English Reports 77, 822
\textsuperscript{53} 1608, 12 Co Rep 35, English Reports 77, 1316
\textsuperscript{54} 1699, 3 Salk 225, 1 Ld. Raymond, 486 SC; English Reports 91, 790
\textsuperscript{55} 1812, 4 Taunt 355, Eng. 127 – 129, 1808 – 1819, English Reports 128, 370
maintained for written words which it could not if they were merely spoken. Thus, it implicitly determines that defamatory written words are more serious than defamatory spoken words. Implicitly it can be seen as an indication that the written word, because of its capacity for permanence, has the capacity to do more harm to a reputation than the transient spoken word. The principle established in *Thorley v Lord Kerry* (1812)\(^5\) is of particular interest to the discussion of the Rule of Law in Van Diemen’s Land defamation cases, where the plaintiffs were frequently officials and administrators complaining of defamatory comments made of them while undertaking their official duties.

The species of criminal libel was developed in the case of *R v John Wilkes Esq.* (1770)\(^7\). In this case Sir Fletcher Norton, H. M. Solicitor General, exhibited an Information against Mr Wilkes for having published an obscene and impious libel, entitled *An Essay on Woman*. This matter first came before the court in 1764 and repeatedly came before the court with various minor amendments to the Information. Mr Wilkes pleaded not guilty. Mr Wilkes subsequently printed and published *The North Briton* and for this he was charged with printing and publishing a seditious and scandalous libel.

During the life of the charge against him, Mr Wilkes travelled to France. He voluntarily returned to England just before a parliamentary election, at which he was duly elected to parliament.

\(^5\) ibid

\(^7\) 1770, 4 Burr KB Reports 2527, 1757 – 71, *English Reports* 98, 328
The writ of *Capias* was issued against him and he was convicted on Informations for Misdemeanours. He did not appear and at the fifth non-appearance Mr Wilkes was designated an outlaw. Subsequently, on 21 April 1768, Mr Wilkes voluntarily appeared. He published an article in newspapers stating that he had been tried upon altered facts. In Mr Wilkes’ view both judgments were rendered void because the alteration of facts was unconstitutional and illegal. Mr Wilkes also argued that there were errors of law and provided specific details. In the light of these errors, Mr Wilkes duly sought a Writ of Error, relying on precedent to amend the judgments or convictions.

Mr Wilkes’ argument, however, did not convince the Attorney General, who responded that there could be no *Writ of Error* and no *Fiat* when the party was not in custody. Mr Wilkes was not an outlaw for non-appearance but for conviction. This legal argument was contrived to ensure Mr Wilkes was not let off the hook, so to speak. The impropriety levelled against Mr Wilkes was that he, as defendant, came to court and was not brought.

On Monday 16 of May 1768 judgment was given for the Plaintiff, being the Crown. Mr Wilkes was given a severe sentence. He was fined five hundred pounds, imprisoned for ten months with a further fine of five hundred pounds and a further twelve months’ imprisonment. As well he was required to give security for seven years and one thousand pounds’ surety, and to remain in custody until the fines were paid. Amazingly, however, within fifteen days of being sentenced, Mr Wilkes was freed.
This case is of particular interest because it draws attention to the Rule of Law. The early release of Mr Wilkes suggests arbitrariness in the way that court-determined sentences were fulfilled by some convicted offenders. In *R v John Wilkes Esq. (1770)* 58 the offender was relieved of the custodial component of his sentence and there is no indication of whether the fines were paid. The fact that Mr Wilkes was an elected member of the English parliament can be used to infer that people in more influential positions in society may have received preferential treatment, rather than equal treatment before the law. The study of defamation cases in Van Diemen’s Land during the years 1805-1835 is undertaken with the aim of identifying if there were comparable examples of failures of the Rule of Law in the colony.

The case of *R v Bear* 59 was an Indictment against Mr Bear for making, writing, composing and collecting several libels. A verdict was given for the accused, because a transcript of the libel was tendered as evidence, instead of the actual libel itself. The court found that the transcript could only import an identity in sense, but not the words. This case established the rule that a transcript is not sufficient evidence of a libel and the libel itself must be tendered in court. This case has particular relevance for the consideration of Van Diemen’s Land cases. If the person holding the original libellous writing held a position of executive power, the writer of the libel could be outside of the court’s reach simply by the holder of the writing refusing to produce it. Thus, the Rule of Law, which claims all are equal before the law, could be circumvented.

58 1770, 4 Burr KB Reports 2527, 1757 – 71, English Reports 98, 328
59 2 Salk 417, 646, English Reports 91, KB, 791
The case of *Dominus Rex versus Bear* was an Indictment for libel following the defendant’s previous acquittal on the same facts. The matter returned to court with the Attorney General seeking a new trial. The court, however, relied on ancient precedent to hold there would not be a new trial in the absence of the verdict being shown to have been obtained by fraud or malpractice, for example, stealing a witness. A new trial is never granted just because the verdict is against the evidence. In Van Diemen’s Land this principle may have been used to avoid nuisance and potentially serial litigants.

The court standardised the parameters of libel in *The Queen v Drake*, where the Information for the libel differed in one word from the libel itself, despite the fact that there were several scandalous words and the mistake did not alter the sense. The defendant pleaded not guilty. The court gave judgment for the defendant, establishing the principle that the Information must exactly match what was written.

Thus, these English cases provide some of the essential principles comprising the foundation of the law of defamation which the English brought to Van Diemen’s Land.

### 12. Summation of defamation principles from English cases

Starting with the interpretation of words in defamation case of *Lord Townsend v Hughes*, the court held that words must be given their general and natural meaning while in *Gardener v Atwater* the English court held that words must be interpreted in

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60 Ld. Raymond, 414 SC, Pasch 9 Will 3 BR; *English Reports* 91, KB, 547
61 1 Salk 660, *English Reports* 77, 790
62 2 Mod. 151, 1 Mod 232, Freem. 220 in *English Reports* 91, King’s Bench, 853
63 4 Bac. Ab. 507, in *English Reports* 91, King’s Bench, 853
their usual and obvious sense. For words to be actionable in slander, the court in *Duval v Price*\(^{64}\) held that they must be certain, specific and scandalous and discredit the party of whom they are spoken.

Libel was defined by the court in *The King v Alme and Nott*, also called *R v Orme and Nott*\(^{65}\) as a writing to mankind in general with defamatory particulars about a specific individual. In *Cropp v Tilney*,\(^{66}\) the court established the principle that inference imputing ill opinion is libel. In *Thorley v Lord Kerry*,\(^{67}\) the court held that a written defamatory comment about a person’s dereliction of duty is libel. In *The Queen v Drake*\(^{68}\) the court held that the words on the Information for a libel must be exactly the same as the libel itself. In *R v Bear*\(^{69}\) the court laid down the principle that in a libel case the exact libel, as distinct from a copy of the libel, must be presented to the court. In *Dr Edwards v Dr Wooton*\(^{70}\) the court held that to establish libel the publication must be by the person libelling to someone other than the person libelled. In *John Lamb’s case*\(^{71}\) the court held that knowledge that a writing was libellous was essential by either its maker or publisher. In the libel case of *Dominus Rex versus Bear*\(^{72}\) the court held that a new trial would not be granted just because a verdict was against the evidence.

\(^{64}\) 1694, 15 Lds. Jo. 458, *English Reports* 1, House of Lords No. 12, 8
\(^{65}\) 1699, 3 Salk 225, 1 Ld Raym 486 SC; *English Reports* 91, 790
\(^{66}\) 1693, 3 Salk 225, *English Reports* 91, 791
\(^{67}\) 1812, 4 Taunt 355, Eng 127 – 129, 1808 – 1819, *English Reports* 128, 370
\(^{68}\) 1 Salk 660, *English Reports* 77, 790
\(^{69}\) 2 Salk 417, 646, *English Reports* 91, KB, 791
\(^{70}\) 1608, 12 Co Rep 35, *English Reports* 77, 1316
\(^{71}\) 1611, 9 Co Rep 596, *English Reports* 77, 822
\(^{72}\) 1 Ld Raymond, 414 SC, Pasch 9 Will 3 BR; *English Reports* 91, KB, 547
R v John Wilkes Esq.\textsuperscript{73} is a fascinating betrayal of the essential principle of the Rule of Law that all are equal before the law. As such it is of relevance to this study which sets out to identify the extent to which the Rule of Law was followed in defamation cases in Van Diemen’s Land between 1805 and 1835.

\textsuperscript{73} 1770, 4 Burr KB Reports 2527, 1757 – 71, English Reports 98, 328
CHAPTER TWO: METHODOLOGY

1. The research topic

The research topic is a discussion of defamation jurisprudence in Van Diemen’s Land from 1805 to 1835, with specific emphasis on the adherence to or neglect of the Rule of Law in selected cases. As such, the discussion of colonial cases from the courts in Van Diemen’s Land can be seen as an exercise in ethnography, in that it is a process that discovers and describes a people and their culture.74 The people and culture investigated in the present project comprise the non-convict English community in Van Diemen’s Land, between the years 1805 and 1835.75

The phenomena of Van Diemen’s Land defamation cases are unique because they emerged from within the context of a penal colony. Thus it follows that the methodology developed to consider these cases must have aspects unique to these phenomena.76 The methodology developed and used in this study is qualitative and shares with all qualitative methodology the resistance to standardization due to the novel situation of research.

Amanda Potter (2009)77 posits the notion of a reception theory for ethnographers where there is a researcher centric approach, that is, the researcher responds to the experience and that response is the reception. This particular project adopts Potter’s proposition and

75 The rationale for the selection of these years as parameters for the study is explained previously in Chapter 1.
76 Aaron Cicourel, *op. cit.*, 224
attempts to develop a method to investigate Van Diemen’s Land defamation cases from a researcher centric approach.

In this study of selected colonial defamation cases from 1805 to 1835, the researcher’s ‘relationality’ or engagement and response, is a site straddling three time zones, these being:

- selected early English common law cases and their precedents,
- English legislation which was planted and transferred to Van Diemen’s Land, and
- the twenty-first century interpretation of the Australian common law context.

Raffles (2002) points out that places are made by the combination of humans with non-human phenomena, such as physical labour, narrative, imagination, memory, political economy, animals, plants and the the agentive bio-physicality of tides. To these characteristics it is appropriate for this study, to include attributes specific to the context of Van Diemen’s Land, these being:

- its geographically remote island setting,
- England’s use of it as a prison to remove offenders from England, and
- the perceived indicia of power in colonial Van Diemen’s Land as the ownership of land, literacy, merchant entrepreneurship and the holding of administrative positions.

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79 ibid
These characteristics in combination contribute an intimacy particular to the island state of 19th century Van Diemen’s Land. It is in this particular context that cases in the genre of defamation emerged.

2. The underlying premise of the research

The premise underlying the research is that the context of the British penal colony of Van Diemen’s Land between 1805 and 1835 encouraged vigorous competition between the various elements of society - soldiers, convicts, free settlers, administrators, professionals, aboriginals and merchants. This competition fostered a desire to destroy competitors through defamation. Those who had sufficient self-confidence, education and money took legal action against their detractors in libel and slander suites.

This premise provides the foundation for investigation of the cases. The study aims to identify the extent to which the Rule of Law is either evident or absent in the cases. Thus, as in grounded theory,81 the data of the reports of cases is used to disclose a response to the aim of the investigation.

It is submitted that paramount power in the penal colony between 1805 and 1835 devolved on the administrators. Personnel with power deriving from holding any type of official office in the colony, such as the Lieutenant-Governor, the Justices of the Peace, the Magistrates, the Field Police, the Judges, the Government Surveyor, were the rulers

81 Olaf Helmer, *Multipurpose Planning Games*, (California: Institute of the Future, WP-17, California, 1971), 40
of the colony at the time. The Rule of Law, which insists that all people are equal before the law and are free from arbitrary power, was under severe stress as administrators struggled to retain control and supremacy in the colony. Thus, the selected cases are read in order to determine the extent to which administrative power prevailed over the Rule of Law.

3. The case investigation tool

The case investigation tool for this study is developed from several models used by various researchers. For example, the works of M. A. Franklin (1980)\textsuperscript{82} and Bezanson, Cranberg and Soloski (1987)\textsuperscript{83} are highly relevant for this particular study because these researchers have examined defamation and libel litigation. In both of these studies, the analysis tools consist of identifiers these being:

- the case name,
- place and date of hearing,
- the parties,
- the arbiter of fact,
- counsel, if any,
- the hurt or damage basing the complaint and
- the decision of the court.


Each identifier is applied to each case, generating data. In this way quantitative data is collected for the entire study. The data is then collated under various headings reflective of the study’s aim. From this accumulation of data, hypotheses are constructed.

The methodology developed by Christopher Enright (2008), although its specific example is for trespass to land as distinct from defamation cases, provides valuable insight into developing a foundation for the micro analysis of Van Diemen’s Land colonial defamation case law. Enright examines the structure of a law by segmenting it into its elements and consequences. Finally, he demonstrates linkage of the elements with consequences to constitute a breach of the law. Enright’s discussion of trespass to land is undertaken in three discrete stages, for example:

- elements defining the crime which must be met,
- particular facts of each case which reveal whether the crime is established, and
- consequences attendant upon the facts being found to exist in a specific case

If such a methodology had been adopted for the examination of colonial Van Diemen’s Land defamation cases, it would have necessitated separating the elements of the tort of defamation into subdivisions or sub-elements. Thus it was considered inappropriate.

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85 ibid, 30
86 ibid, 1
87 ibid, 8
88 ibid, 10
A methodology model of considerable use is that developed in the study by Andrew Kenyon (2004) comparing qualified privilege in defamation law in England and Australia with specific focus upon the media. The method Kenyon adopts to investigate this privilege in action is one hour, semi-structured, audio-taped and hand-written interviews with fifty practitioners in England, New South Wales and Victoria, those practitioners being judges, barristers, solicitors and in-house lawyers. Reliance for the use of interviews was placed upon the edict of Clive Searle (1997) that interviews can encompass activities across a wide range of times and locations. To achieve reliability, Kenyon uses recognised legal categories in transcription and coding of the interviews, while to attain validity he maintains the realistic representation of social phenomena.

The present Van Diemen’s Land project strives to maintain reliability by using recognised legal categories to select and discuss the cases, that is, the categories of slander, libel and criminal libel. Validity is maintained by the use of primary and secondary sources, to complement and further elucidate case report content.

Kenyon acknowledges the limited legal scope of his project, in that it is set within a twenty-year period and discusses just fifty cases. The present Van Diemen’s Land project also shares the weakness acknowledged by Kenyon in that it quotes a selection of cases

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89 Andrew Kenyon, ‘Lange and Reynolds, Qualified Privilege: Australian and English Defamation Law and Practice’, [28] MULR, 400-432
90 ibid, 420
91 ibid, 421, citing Clive Searle, The Quality of Quantitative Research, place of publication and publisher not provided, 1999), 59
92 ibid, 422
93 ibid
without indicating how representative they are and without providing contrary responses. Nevertheless, despite such weaknesses, Andrew Kenyon and Timothy Majoribanks received a Discovery Project\textsuperscript{95} grant from the Australian Research Council to undertake a comparative study of defamation law in context. This can be taken as recognition of the intrinsic value of qualitative methodology based upon a small selection of subjects.

In a subsequent paper based upon this Australian Research Council Discovery Project, Kenyon and Majoribanks (2005)\textsuperscript{96} expound upon the method they used. They state that the method fell into three stages. In the first stage, they analysed relevant legal and sociological resources, for example, case law, legislation, law reform reports and legal scholarship, which resulted in their identification of themes and issues to pursue.\textsuperscript{97} In stage two they undertook fieldwork investigation, involving interviews and observations.\textsuperscript{98} Stage three consisted of coding of the interviews and evaluation of the materials.\textsuperscript{99}

Much the same stages were used in the present Van Diemen’s Land study. Stage one consisted of researching and reading various materials including cases, legislation, historical writings about the period of 1805 to 1835 in Van Diemen’s Land and England, which identified the major issue of the power and powerlessness paradigm. In stage two,
cases were searched for under the categories of libel, slander and criminal libel. Cases identified as being sufficiently clearly written were selected for discussion. In stage three, the cases were investigated and discussed.

Thus, these four methodologies – Franklin’s (1980), Bezanson, Cranberg and Soloski’s (1987), Enright’s (2008) and Kenyon’s (2004) were of considerable value in the development of a procedure for the investigation of selected Van Diemen’s Land defamation cases.

4. Sources of data

Both primary and secondary materials are used in the research.

Primary sources used include:

- the reports of slander, libel, and criminal libel appearing in Van Diemen’s Land newspapers up to 1835, and
- accessible documents relating to relevant Van Diemen’s Land legal proceedings held in the Archives Office of Tasmania, State Records Office of New South

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102 Christopher Enright, op. cit.
103 Andrew Kenyon, op. cit., 422
Secondary sources used include:

- various historical commentaries and texts, and
- visual texts such as paintings and drawings.

Bibliographic details of the sources relied upon are provided in the Bibliography of this thesis.

5. The selection of cases to generate data

The three determinants for selecting the cases to be included in the study were:

- availability of the entire case report,
- comprehensibility of the language of the report, and
- relevance of the case content to the genre of defamation law.

When these three criteria were met, the case was accepted into the study.
6. The procedure

A systematic and interdisciplinary procedure is developed and implemented, following Olaf Helmer (1971),\(^{104}\) in order to provide focus for an otherwise diffuse and unmanageable task. As a result, both qualitative and quantitative data are generated and discussed in the investigation of the selected cases.

Firstly, each selected case is identified as belonging to a particular year and allocated to one of the particular categories - slander, libel and criminal libel – acknowledged in legal principles as being of the corpus of defamation.

Each case is then located within one of five categories, these categories being:

- Bench of Magistrates’ cases,
- Lieutenant Governor’s Court cases,
- New South Wales Supreme Court civil jurisdiction case heard in Van Diemen’s Land in 1819,
- Van Diemen’s Land Supreme Court cases 1820’s, and
- Van Diemen’s Land Supreme Court cases 1830 to 1835.

Objective data for each case is then recorded, providing the foundation to base numerical conclusions drawn from the cases selected for the study. For example, within a particular

\(^{104}\) Olaf Helmer, *op.cit.*, 28
jurisdiction, such as the Lieutenant Governor’s Court, it is possible from the objective data of the total number of cases discussed for slander, to calculate the number of decisions made for the plaintiff as distinct for the defendant. This quantitative data is arranged in charts to visually illustrate the findings for each of the five categories of cases identified above.

Secondly, the power and powerless polarities are interpreted in each case from comments by counsel, parties, judge and magistrates. In particular, the plaintiff and defendant are identified as either having power or being powerless. This qualitative data is arranged in charts to visually illustrate the findings for each of the cases. Importantly, the identification of the power and powerless polarities is the foundation for ascertaining the extent to which the Rule of Law was followed or ignored in defamation decisions.

Thirdly, the language of each case report is used to identify the principles and values espoused. These are summarized, with examples of the language grounding the identification, and located in a figure for each case. In this figure, the value identified as predominant is classified as either a negative value, being one which was discouraged, or a positive value, being one which was encouraged. These data are the basis for an interpretation of the prevailing values which materialized into the colony’s jurisprudence.

The conclusions and inferences drawn from the qualitative data are discussed in detail with the aim of generating a cultural text\textsuperscript{105} to base a foundation for comment upon the

\textsuperscript{105}Russell Beedles, 'Undertaking cross-disciplinary research', in So where is your research profile? Kate Beattie (ed.) (Melbourne: Union of Australasian Academics, 1993), 64
extent to which the Rule of Law was ignored or observed in selected defamation cases in the colony of Van Diemen’s Land between the years 1805 - 1835.

7. Weaknesses of the methodology

Clearly, the methodology devised for this research project is a quasi-experimental model. Some of its weaknesses are addressed in the discussion of Kenyon’s (2004)\textsuperscript{106} model, above. Being a quasi-experimental model, the methodology meets the definition of a new method described by Anoma Armstrong and Evelyn Ogren (1986)\textsuperscript{107} in that it is an attempt to draw causal inferences from the selected cases. Its problems are:

- the absence of a control group for comparison,
- the possibility of alternative interpretations of the data,
- the possibility that the selected cases may not be representative, and
- the subjectivity of the researcher.

These weaknesses are typical of those levelled at qualitative methodology, and identified by Lyn Richards (1993)\textsuperscript{108} as analysis that generates soft data, being vague, impressionable, disconnected and not rigorously sampled. Nevertheless, it is argued that the area of defamation jurisprudence in colonial Van Diemen’s Land could not be interpreted without vivid, contexted accounts.\textsuperscript{109} This justification accords with that of

\textsuperscript{106} Andrew Kenyon, op. cit., 422
\textsuperscript{108} Lyn Richards, ‘Writing a Qualitative Thesis or Grant Application’, in \textit{So where is your research profile?}, Kate Beattie (ed.) (Melbourne: Union of Australasian Academics, 1993), 40 - 41
\textsuperscript{109} ibid
Larry W. Isaac’s (1997), who identified the existence of three core discursive elements in historical sociology, these being time, causality and narrative, with social processes being dependent on local time and place. Hence, it is submitted that while the fingerprints of the researcher on the data in the present study can be seen, their visibility is justified.

A further criticism could be that this research relies solely on the cases as reported in the newspapers and a few other surviving case remnants. Thus the conclusions may be seen as:

- presumptive to make claims that the sample represents the whole, and
- that the selection is unrepresentative of the total body of cases.

Be that as it may, Metin M. Cosgel (2004) in a study of Ottoman tax registers, justifies the use of representative sampling rather than whole set examination, on the basis that it can facilitate comprehensive large-scale studies at a fraction of the cost. Cosgel identifies the advantage of sampling as providing the benefit of making general claims about the subject matter based on the presumption that the sample represents the whole. Cosgel’s taxpaying subjects had large quantities of information, similar to the defamation cases in the present study.

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112 ibid, 92
Problems regarding the accuracy of representativeness of samples were encountered by Rebecca Kippen (2005)\textsuperscript{113} when calculating nineteenth century maternal deaths in Van Diemen’s Land. Even though a maternal death may have been recorded, the actual cause may have been hidden under a non-maternal cause.\textsuperscript{114} This was due to the damage likely to be caused to a general practitioner’s reputation and practice if it became known in the community that a woman under his care had died from maternal causes. Such a death would have been interpreted by the local community as indicative of insufficient care, skill or management by the practitioner.\textsuperscript{115} The researcher places reliance on the content of the report, but in law, so in medicine and as Kippen finds, at times, historical facts are probably hidden from researchers, either by editorial bias and or efforts to protect the subjects of a report.\textsuperscript{116} Consequently, while it is acknowledged that problems exist in using a sample to make deductions, it is submitted that it is apposite in the present study which seeks to identify an understanding of the development of the jurisprudence of defamation from 1805 to 1835 in Van Diemen’s Land. This is because there are very few records of cases available and those which are available are usually in newspaper form. Thus it is impossible to obtain a chronological and complete series of the cases.

\textsuperscript{114} ibid, 18
\textsuperscript{115} ibid
\textsuperscript{116} ibid
A further possible criticism of this method is that of the intrusion of the researcher’s subjectivity and reality construction. It is a fact that the reality construction in this study can not reveal the Van Diemen’s Land colonial world from the inside, because the inside world of 1805 to 1835 is no longer available to a researcher two hundred years on.

Every place has temporal and place bases, identified by Doreen Massey (1994) as the uniqueness of place. Massey develops a notion of place as specific moments which are intersecting, spatialised, social relations, some of which are contained within the place and others of which stretch beyond it. Thus a particular locality is tied into wider relations and processes, implicating other places. These particular time and place moments are identified by Ann C. Stoler (2001) as cultural boundaries. The local knowledge of time and specific location is not available to the outsider. Thus, for the researcher in the twenty-first century investigating legal cases from colonial Van Diemen’s Land, the localised research site is nineteenth Van Diemen’s Land. The research, however, is intersected with the components of the twenty-first century researcher’s network. Consequently, the researcher’s individuality, context and time are the actual determinants of the reality constructed in the research. Thus, subjectivity is unavoidable.

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118 Doreen Massey, *Space, Place and Gender*, (Minneapolis: University of Minneapolis Press, 1994)
119 ibid
There is nothing new in the proposition that the researcher’s subjectivity influences the reality of the research subject. Numerous theorists acknowledge a researcher’s subjectivity. For example, Max Weber (1864 – 1920) emphasised the intentional subjectivity of the researcher during the research process. He identified the research process as the selection and abstraction of information; thus, reality is liable to distortion from the mere fact of selection. George Herbert Mead (1863 – 1931) saw the inevitability of subjective research in his notion that the individual is inseparable from myriad influences of society. The grounded theory methodology of Barney Glaser and Anselm Strauss (1967),\textsuperscript{121} which aims to have research data mould the researcher’s explanation of social action, can be seen as an attempt to minimise subjectivity.

Reports of Van Diemen’s Land law cases were published only in newspapers in the years 1805 to 1835. Very few actual court documents survive for inexplicable and unknown reasons.\textsuperscript{122} The accounts of cases written by nineteenth century newspaper journalists are, therefore, valuable primary research material. However, that primary material is the product of construction by a reporter. Ultimately, the report was written for publication in a commercial enterprise in a penal colony. Thus, as far as possible, reports of cases in different newspapers are accessed.

\textsuperscript{121} Barney G. Glaser and Anselm L. Strauss, \textit{The Discovery of Grounded Theory: Strategies for Qualitative Research}, (Chicago: Aldine, 1967)

\textsuperscript{122} Alex Castles, \textit{Lawless Harvests}, (North Melbourne: Australian Scholarly Publishing Pty. Ltd., 2007), 66, 70
The colonial newspapers in Van Diemen’s Land were not well-regarded by the judiciary of the day, for example Puisne Judge His Honour Algernon Montagu (1835) referred to the press in colonial Van Diemen’s Land as being licentious and degraded.

Within the confines of the infant island colony, according to John West (1852) there was a paucity of topics to write about. E. Morris Miller (1952) the foremost researcher of Van Diemen’s Land colonial newspapers, concurred with this and asserted that reader entertainment assumed priority in the reportage of court proceedings. The instigation of home-delivery of newspapers adds fuel to the hypothesis that their paramount value was entertainment. Possibly this is the reason why the newspaper reports of cases frequently describe the behaviour of counsel and parties as if the court room were a theatre of entertainment.

Some of the newspapers held the belief that the press greatly influenced the current of society. Such a belief gave rise to the colonial press giving itself a role of determining the colony’s thinking rather than merely reporting current thinking. For example, in March 1833 the Hobart Town Chronicle stated that it reported court proceedings for the

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125 E. Morris Miller, Pressmen and Governors: Australian Editors and Writers in Tasmania, (Melbourne: University of Melbourne, 1952)
126 James Fenton, A History of Tasmania, (London: Macmillan and Co, 1884), 142
127 Hobart Town Chronicle, 14 May 1833
sake of instruction and example.\textsuperscript{128} The colonial newspapers did have power, not only in the colony but also in England and other parts of the English-speaking world. Such power included the ability to influence the reputation of colonists through detailed transcripts of court proceedings of scandal, being read in England, with subsequent imperial ramifications.\textsuperscript{129}

A nineteenth century description of the newspapers published in Hobart Town at that time is provided by Henry Widowson (1829).\textsuperscript{130} Widowson\textsuperscript{131} identifies the \textit{Government Gazette} edited at that time by Dr Ross as being scarcely more than the organ for advertisements, notices of convicts and all official affairs, published on Saturdays. He also mentions the \textit{Tasmanian Gazette} which was published on Thursdays but states his preference, without providing a reason, for Andrew Bent’s \textit{Colonial Times} published each Friday.\textsuperscript{132} Thus, it is clear that the public had a choice of newspapers and that each newspaper had specific characteristics.

The early nineteenth century Van Diemen’s Land court reporters were men, thus it is a masculine perception of the cases that survive. It may be that the reporters wrote from a perspective of affective sociality, a phenomenon identified by Hugh Raffles (2002).\textsuperscript{133} This was an intimate lived experience of everyday life, undertaken in relationship with contemporaries and the physical environment of the place. The significance of this notion

\textsuperscript{128} \textit{Hobart Town Chronicle}, 5 March 1833
\textsuperscript{129} Kirsten McKenzie, \textit{Scandal in the Colonies: Sydney and Cape Town, 1820-1850}, (Carlton, Victoria: Melbourne University Press, 2005), 111
\textsuperscript{130} Henry Widowson, \textit{The Present State of Van Diemen’s Land}, (London: S. Robinson publishers, 1829)
\textsuperscript{131} ibid, 27
\textsuperscript{132} ibid
\textsuperscript{133} Hugh Raffles, op. cit.
to the present study is that the reporters knew and understood the values and mores of Van Diemen’s Land, the place in which the cases occurred. They also knew what the readers wanted to read in the newspapers.

An interesting example of one of the Van Diemen’s Land colonial court reporters is Thomas Richards. He worked for a time as a medical practitioner in Hobart before joining the Surveyor’s Department, a position which he left in 1837. He then began his work as court reporter for the Colonial Times and The Courier. Along with his court reporting, Thomas Richards conducted a correspondence service for poor people, assisting them to write memorials and petitions. Thomas Richards’ court reports were not always well-received. One of the critics who complained about Thomas Richards’ court reporting was Edward MacDowell, who published his criticism in the Colonial Times in June and September of 1841. Despite this criticism, Thomas Richards continued as a court reporter some years. Eventually, however, his career seemed to go full circle with his return to the practice of medicine in 1852.

Whether Thomas Richards was typical of nineteenth century Van Diemen’s Land court reporters is unclear. However, this cameo unmistakably emphasizes that such men possessed valuable literacy skills.

134 E. Morris Miller, op. cit., 99
135 Tasmanian Austral Asiatic Review, 14 July 1837
136 Colonial Times, 8 June 1841, 7 September 1841 and 28 September 1841
137 E. Morris Miller, op. cit., 101
138 The reporting method of Mr Thomas Wells is discussed at page 117 of this thesis.
9. The use of visual texts

Visual texts, comprising early nineteenth century paintings and drawings are used in this study of defamation cases in Van Diemen’s Land between 1805 and 1835, in order to enhance understanding of the context of the cases.

R. Foote Whyte (1949)\textsuperscript{139} contends that careful study of the content of paintings and drawings from the perspective of content, arrangement of subjects and space, provides valuable comment upon the society from which it emanated. Annsi Perakyla’s (1989)\textsuperscript{140} study built on this notion and revealed that spatial arrangements in visual texts differentiate groups of people. Thus, various visual materials are used in this study to widen the perspective on the context and people of Van Diemen’s Land. For example, The Sketchbook of George Tobin\textsuperscript{141} provides details of the encounter between European explorers and Van Diemen’s Land indigenous people and the Van Diemen’s Land physical environment in Adventure Bay in 1792.

\textsuperscript{139}R. Foote Whyte, ‘The social structure of the restaurant’, *American Journal of Sociology*, 54, 302-310  
\textsuperscript{140}Annsi Perakyla, ‘Appealing to the experience of the patient in the care of the dying,’ in *Social Journal of Health and Illness*, 11(2), 117-134  
\textsuperscript{141}Sketch Book of George Tobin, Original material, Closed Collection, Mitchell Library, Sydney
Figure (lll): Sketch of the Adventure Bay landing, 1792, from George Tobin’s Sketch Book

The sketch reveals disturbance in the unsettled flight of the native birds. The two European men in the landing party are together, the men in the row boat landing party are together and the Aborigines are together. Nevertheless, each group is separate from the other and in a different part of the painting. This demarcation in sectors of Van Diemen’s Land society is further revealed in the paintings and sketches of other colonial artists, with soldiers, free settlers and convicts being depicted in separate areas.

Thirty or so years later, the segregation of Hobart Town society into separate groups is portrayed in the following drawing by an unknown artist of 1820.

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142 George Tobin’s Sketchbook, (1792), Prints Collection, Mitchell Library, Sydney
The painting reveals on the left, high-ranking administrators, possibly the Lieutenant Governor because of his plumed hat, the jetty warehouses of the merchants are shown left centre, a woman and child in fine clothing are in the centre foreground, while on the banks of the river a convict chain gang is at work with a supervisor. In the middle centre free settlers can be seen chatting under a tree. On the far right foreground there are soldiers and on the far left bank across the river, a group of indigenous people. Many nineteenth century visual texts, such as this augment the identification made by Douglas Harper (2005) that pictures are valuable essays of social change and human interaction. It also complements the assertion made earlier in this study that the desire to conquer one’s competitors was a major reason for defamation actions in early Van Diemen’s Land.

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143 Artist unknown, Prints Collection Mitchell Library, Sydney, New South Wales
10. Conclusion

Thus, by reading the cases reported in newspapers, with texts written contemporaneously, and surviving official historical records, together with visual historical texts and a selection of contemporary and historical commentaries, the researcher addresses the problems of non-representative selection of materials, contradictory documentary evidence and researcher subjectivity.
CHAPTER THREE: DEFAMATION CASES FROM THE BENCH OF MAGISTRATES, YORKTON, PORT DALRYMPLE, VAN DIEMEN’S LAND

This discussion of the Proceedings before the Bench of Magistrates is prefaced with a brief investigation about men who sat on the bench as magistrates. In Van Diemen’s Land, a man was first appointed a Justice of the Peace; some Justices of the Peace were subsequently appointed magistrates.

1. Justices of the Peace

The importance of the role of Justices of the Peace in the maintenance of a society’s law and order is embedded in English history. For example in the English Parliament held at Westminster on the Sunday before the Feast of the Conversion of Saint Paul, A. D. 1360-1361, the sort of persons who could be Justices of the Peace and their powers were set in writing.\(^\text{145}\) It was determined that only the most worthy of the counties and some learned in the law could be admitted to this select group.

As a general rule, in each county the Justices of the Peace were comprised of one Lord and three or four of the most worthy. The Justices of the Peace had power over all offenders, rioters, barrators\(^\text{146}\) and vagabonds, to hear and determine felonies and

\(^{145}\) 34 Edw. Ill, Cap 1, AD 1360-1361, Statutes at Large of England and Great Britain, Vol 1., Thomas E. Tomlines(ed.), op. cit., 370
trespasses. The punishment the Justices of the Peace could inflict included fines, which were required to be reasonable.\textsuperscript{147}

In the Australian colonies, Captain Arthur Phillip, as first Governor-in-Chief, had authority to administer oaths of allegiance, appoint Justices of the Peace and other officers of the law.\textsuperscript{148} Captain Phillip was given specific criteria which a man needed to fulfil before he could be appointed of Justice of the Peace. For example, the governor could not admit to the office of Justice of the Peace any person whose ill-fame or conversation might occasion scandal. Thus, reputation was of paramount importance. The governor himself was required to ensure services of Christian worship were held in the colony every Sunday. At those services the \textit{Book of Common Prayer} was to be read every Sunday and Holy Day and the Blessed Sacrament was to be administered according to the rites of the Church of England.\textsuperscript{149}

The requirement of Church of England adherence as a foundational principle of the colony of Australia is a tenet that is frequently overlooked. However, the supremacy of the Church of England was embedded in the legal framework from the beginning of the English commune in the Australian colonies. This fact is relevant to a discussion of the appointment of Justices of the Peace, because a Justice of the Peace was required, on appointment, to sign a Declaration that he did not believe in substantiation of the

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\textsuperscript{147} 34 Edw. Ill, Cap 1., AD 1360-1361, \textit{Statutes at Large of England and Great Britain}, Vol. 1., Thomas E. Tomlines (ed.) op. cit., 370
\textsuperscript{149} C. M. H. Clark, ibid, 80, relying on Original text of Instructions to Phillip, 25 April 1787, (C.O.201/1)
\end{flushleft}
Sacrament. Thus, the three essential criteria for appointment as a Justice of the Peace in the colonies of New South Wales and Van Diemen’s Land were:

- to have good character and reputation,
- to be a communicant member of the Church of England and
- to be male.

Justices of the Peace undertook a wide variety of work in Van Diemen’s Land, including acting as coroners,\textsuperscript{150} punishing wrong-doers for minor offences and making determinations about weights and measures.\textsuperscript{151}

2. The magistrates of Van Diemen’s Land

As mentioned, the essential criterion for becoming a Magistrate in Van Diemen’s Land was to be a Justice of the Peace. Hence the essential criteria for appointment as Magistrate, in the colonies of New South Wales and Van Diemen’s Land were:

- to be a Justice of the Peace,
- to have good character and reputation,
- to be a communicant member of the Church of England, and
- to be male.

\textsuperscript{150} Judge Advocate’s Reports of Coroners’ Inquests, 1796-1820, County of Cornwall, New South Wales State Archives, Location 2/8286, 2
\textsuperscript{151} Alex Castles, (1982), op. cit., 67-68
Neither expertise nor experience in the law was a criterion. From this it can be inferred that the English administrators knew there were insufficient men with legal expertise in the Australian colonies to make it a requirement for appointment to the role of either Justice of the Peace or magistrate.

Castles (1982)\(^{152}\) notes that magistrates often exceeded their jurisdiction and there is at least one example of a Lieutenant Governor doing similarly. For instance, in 1814 Lieutenant Governor Davey promised to pardon the commission of all crimes, except murder, committed by convicts who had become bushrangers, if such convicts turned themselves in by 1 December 1814.\(^{153}\)

In 1816, New South Wales Governor Macquarie vested magistrates\(^{154}\) with jurisdiction in regard to:

- labour,
- the wages of free men, and
- the regulation of apprenticeships.

This jurisdiction applied in Van Diemen’s Land, because Van Diemen’s Land was not independent of New South Wales until 1824. In Van Diemen’s Land the magistrates determined the price of bread, frequently termed an assize of bread. This bread price, which fluctuated according to the availability of wheat flour, was published regularly in

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\(^{152}\) ibid, 80
\(^{153}\) Proclamation 14 May 1814, \textit{H.R.A.}, Ser. 1, Vol. 8, 264
\(^{154}\) \textit{Government and General Order}, 7 December, 1816, Van Diemen’s Land,( Archives Office of Tasmania)
At various times up to 1814 magistrates were also given authority to deal with payment defaults on small debts. Castles (1982) uses records from the Hobart Town Gazette as evidence that a local Bench of Magistrates regularly sat in Hobart Town by 1816 and a Bench of Magistrate’s clerk was being paid fifteen pounds per annum in Port Dalrymple.

The cases of Proceedings of the Bench of Magistrates against Charles Barrington and James Page discussed in this study confirm that a Bench of Magistrates sat in Port Dalrymple as early as 1805. By 1821, there were eight magistrates in Van Diemen’s Land: 4 in the north and 4 in the south. From 1825, Van Diemen’s Land magistrates were not to give judgment in cases of difficulty unless they were in the presence of Chief Justice Pedder. The notion of difficult cases is not defined so presumably a magistrate knew when a case was difficult.

3. Backgrounds of some of the Van Diemen’s Land magistrates

The Colonial Secretary’s Records identify some of the men holding office as magistrates in Van Diemen’s Land up to 1825. Their backgrounds are important in seeking to establish a perspective on the colonial system of justice. Primary reliance for biographical

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155 Alex Castles, (1982), op. cit., 82
156 ibid, 90
157 Hobart Town Gazette, 14 December 1816
159 A. Evans, A Geographical and Topographical Description of Van Diemen’s Land, (1822, reprint 1972 K. Von Stieglitz (ed.), 138 Hobart Town, 139 Port Dalrymple
160 Promulgation of Letters Patent, Hobart Town Gazette Supplement, 12 April 1825, and 29 April 1825, in Alex Castles,(1982), op. cit., 284
161 Index to Colonial Secretary’s Papers 1788 – 1825, Archives Office, New South Wales, 4999 – 5000
details of the magistrates is placed upon entries in the on-line Australian Dictionary of Biography. The magistrates of Van Diemen’s Land whose lives are briefly considered in this study are Thomas Bell, George Gatehouse, George Prideaux Robert Harris, Adolarius William Henry Humphrey, Jacob Hackett Mountgarrett, Francis Williams, Reverend Robert Knopwood, Richard Fryett, Thomas William Birch, and David Lord.

It is of relevance and interest, particularly to an investigation of the extent that the Rule of Law was observed by decision-makers, to explore the backgrounds of some of these men. After all, they wielded immense power and influence over the lives of people who, in the main, were powerless.

**Thomas Bell**

Thomas Bell arrived in Hobart Town to take command of the military garrison of Hobart Town in 1818 and was appointed Inspector of Public Works, Justice of the Peace and engineer.\(^{162}\) As a Justice of the Peace he often sat with another assessor and the Deputy Judge Advocate on the Lieutenant Governor’s Court. He was responsible for overseeing the building of many public buildings in Hobart Town and the stone bridge at Richmond, the oldest bridge still standing in Australia.\(^{163}\) As a supervisor of public works it is recorded that he never ordered a convict to be flogged nor permitted overseers of gangs

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\(^{163}\) ibid
to strike the convicts in the gangs. In this he seems to have been unique in not misusing his power.

Thomas Bell left Van Diemen’s Land in 1824 and was given a fond farewell: Hobartians remembered with gratitude that he had brought his troops to their rescue against the notorious bushranger Matthew Brady.

George Gatehouse

George Gatehouse is identified as a magistrate in the Colonial Secretary’s Records. It is more likely than not that he was the George Gatehouse who was tried as John Simpson at the Middlesex Gaol Delivery, England on 14 September 1803 and subsequently sentenced to seven years’ transportation for stealing from a dwelling house. After serving his sentence as John Simpson in New South Wales he returned to England in December 1812. There he raised funds and, with a new identity, returned to New South Wales in 1816 and was granted four hundred acres of land by Governor Macquarie. George Gatehouse subsequently took up this land in Hobart Town. He established a successful mercantile business with Anthony Fenn Kemp, using the business name of Kemp and Gatehouse.

164 ibid
165 ibid
George Gatehouse won the respect of the Van Diemen’s Land community, including that of the Lieutenant Governor’s Sorell and Arthur. An indication of this respect was his appointment to the committee of five who superintended the distribution of merino rams in 1820. In Van Diemen’s Land George Gatehouse continued to amass land through grants and by purchase. He diversified his business interests. He became a brewer, miller, maltster and gardener, acquiring a reputation for the finest garden and orchard in New Town, harvesting one hundred and fifty pounds of tobacco in April 1821. He was an original pew-holder in St David’s church and one of the first shareholders in the Bank of Van Diemen’s Land.

George Prideaux Robert Harris

George Prideaux Robert Harris was a surveyor who spent his early life in Devon, England. Appointed in England in 1803 to be Deputy Surveyor of Van Diemen’s Land, he accompanied Lieutenant Governor Collins to Hobart Town in February 1804. Some of the initial surveys he undertook were of Betsy Island and the Hobart Town Rivulet, which he traced to its source on Mount Wellington or Table Mount as it was then called. He undertook an important exploration of Bruny Island, Storm Bay Passage and the Huon River, endeavouring to find cedar for Lieutenant Governor Collins.

167 ibid
168 ibid
169 ibid
He was appointed a magistrate in June 1804, by which time the colonial administration was building a town house for him and he had begun to cultivate a farm at Sandy Bay, having received a one hundred acre grant of land there. He was also appointed collector of quitrents in the colony, these being moneys to be paid to the colonial administration in order to discharge the land-owner from further burdens.

An artist, George Harris painted water-colours of birds. He commemorated himself for posterity by including his name in particular items of Van Diemen’s Land fauna which he studied. For example, in 1806 he sent to England the first descriptions of the Tasmanian devil *sarcophilus harrisii* and later a specimen of the razor grinder cicada *tettigonia harrisii*. According to E. R. Prettyman, George Harris had a dispute with another Van Diemen’s Land magistrate, Edward Lord, and in 1808, he sent a memorial to the Colonial Office about this. It is claimed that in 1810 he edited Hobart’s first and short-lived newspaper the *Derwent Star and Van Diemen’s Land Intelligencier*.

### Adolarius William Henry Humphrey

According to G. H. Stancombe, Adolarius William Henry Humphrey was a mineralogist, who sailed from England with Lieutenant Governor David Collins in 1803. He was one of a party of men sent by Lieutenant Governor Collins in a vessel across

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treacherous Bass Strait from Port Philip to Port Dalrymple in Van Diemen’s Land, to
search for fresh water. The party found the Supply River, now named the South Esk
River. At this site Adolarius Humphrey chiselled and hammered into the dolerite rock his
initials ‘a.h.1804.’ This act of vandalism distinguishes him as one of Van Diemen’s
Land’s early graffitists.

In 1807 he accompanied surveyor Charles Grimes to Launceston and discovered the salt
pans at Tunbridge. From 1810 he held a temporary appointment as a magistrate; this was
made official in 1814 when it was confirmed by Governor Macquarie.

In this role he meted out harsh punishments, for which he was loathed by the convicts. In
retaliation, Michael Howe and other banditti burned his stacks and ransacked his house at
Pittwater while the Brady band slaughtered many of the stud pigs and Saxon merino
sheep he bred. For this, Mr Humphrey sought compensation from the government for his
losses in 1815.

Figure V: Convicts in a chain gang and marching back to prison barracks

Mr Humphrey was appointed a coroner in 1818, and Superintendent of Police and Chief Magistrate in Hobart. This appointment gave him enormous power. He was one of several witnesses to Commissioner T. J. Bigge’s enquiry, and gave evidence on licensing control, convicts, police, weights and measures and transportation.

Mr Humphrey was well-liked by the executive administrators in Van Diemen’s Land, and in 1825 was appointed a member of both the Legislative Council and the Executive Council. In 1826 he sat on the inquiry into the conduct of Attorney General Gellibrand who was subsequently dismissed because of the finding. He retired in 1828 and died in 1829. Both Lieutenant Governors Sorell and Arthur commended Mr Humphrey particularly for not seeking personal gain. However, it must be remembered that Mr Humphrey did receive a land grant – that surely was personal gain.

**Jacob Hackett Mountgarrett**

The factual content of this discussion of Jacob Hackett Mountgarrett derives from the *Colonial Secretary’s Index* and from the biography written by Isabella Mead.

Mr Mountgarrett came as a free surgeon on the vessel *Glatton* in 1803. He was appointed surgeon at Norfolk Island on 18 March 1803 and then appointed to act as surgeon at

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174 *Colonial Secretary’s Index*, Reel 6037; sz991, 2, reel 6039, sz756, 23
Lieutenant Bowen’s southern settlement in Van Diemen’s Land on 29 March 1803.\textsuperscript{176} Between 1806 and 1808 his name is on the list of civil and military officers with a second class\textsuperscript{177} spirit ration.

When Lieutenant Governor Collins arrived in the Hobart Town settlement with his own medical personnel, Mr Mountgarrett’s medical services were no longer required there.\textsuperscript{178} Thus he was appointed surgeon at Port Dalrymple and magistrate on 31 August 1804.\textsuperscript{179} He subsequently received a grant of six hundred acres in the north of the island.\textsuperscript{180} However his services as a magistrate at Port Dalrymple were terminated on 19 April 1808.\textsuperscript{181}

Magisterial duty at Port Dalrymple was clearly a lingering source of rancor to Mr Mountgarrett because he complained of an insult received from Sergeant Hughes on 26 January 1809.\textsuperscript{182} On 20 February 1809 he repeated his complaints of having been grossly insulted by Sergeant Hughes whilst in the execution of his duty as a magistrate.\textsuperscript{183} Mr Mountgarrett was also a farmer at the Derwent settlement and upon his dismissal as magistrate\textsuperscript{184} his request to purchase two more working bullocks from the government stock\textsuperscript{185} was granted. His grant of land was confirmed on 12 February 1811.\textsuperscript{186}

\textsuperscript{176} ibid
\textsuperscript{177} Colonial Secretary’s Index, Reel 6041; 4/1721, 63 - 4
\textsuperscript{178} Isabella J. Mead, op. cit.
\textsuperscript{179} Colonial Secretary’s Index, Reel 6037, SZ992, 94
\textsuperscript{180} Isabella J. Mead, op. cit.
\textsuperscript{181} Colonial Secretary’s Index, Reel 6001; SZ757, 40a, 42a
\textsuperscript{182} ibid, 50a
\textsuperscript{183} ibid, 48a-49a
\textsuperscript{184} ibid, 40a, p42a
\textsuperscript{185} Colonial Secretary’s Index, Reel 5001, 18 February 1809, SZ757, 48a
\textsuperscript{186} Colonial Secretary’s Index, Reel 6003, 4/3490A, 160
Records of 31 July 1813 show he was paid from the Police Fund on account of his labour for the government.187 As a farmer he supplied cattle to the government herds at Port Dalrymple in 1817.188 Mr Mountgarrett is one of many listed as owing quit rents.189 He was subject to supervision as to when he left the colony. For example, on 25 May 1812 he was permitted to return to Sydney to settle his private affairs190 and he was ordered not to absent himself from public duties except in an emergency on 30 April 1813.191 In 1814 it was alleged he connived in the escape of convicts George Williams and Peter Mills from Port Dalrymple,192 the allegations being so strong that he was summoned to appear before a Civil Court in Sydney on this matter.193 He was subsequently acquitted of any wrong-doing.194

While in Sydney, however, Mr Mountgarrett became ill and one of his arms was amputated.195 Despite this physical handicap he continued as a surgeon at Port Dalrymple.196 It was not until 1821 that Mr Mountgarrett was replaced as surgeon at Port Dalrymple, when he was then placed on half-pay.197 It does not do to ponder the surgical services which would have been meted out to the residents of Port Dalrymple by a one-armed surgeon in the years from 1814 to 1821.

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187 Colonial Secretary’s Index, Reel 6038; SZ758, 399
188 Colonial Secretary’s Index, Reel 6005, 19 February, 21 February, 1817, 4/3496, 5,9,14-15
189 Colonial Secretary’s Index, Fiche 3270, 1819-1822, X19, 38
190 Colonial Secretary’s Index, Reel 6038, SZ758, 4/426, 70
191 Colonial Secretary’s Index, Reel 6003, 4/3492, 216
192 Colonial Secretary’s Index, Reel 6004, 11 February 1814, 4/3493, 35-36, Reel 6004, 21 May 1814, 4/3493, 176
193 Colonial Secretary’s Index, Reel 6004, 18th February 1814, 4/3493, 49
194 Isabella J. Mead, op. cit.
195 ibid
196 Colonial Secretary’s Index, Reel 6045, 1 January 1816, 4/1734, 12
197 Isabella J. Mead, op. cit.
When Mr Mountgarrett died in 1828 he was insolvent and his widow, who died in 1829, was destitute.\textsuperscript{198}

**Reverend Robert Knopwood**

Reverend Robert Knopwood, a Church of England vicar, was the first clergy person in Van Diemen’s Land, having arrived with Lieutenant Governor Collins’ expedition in February 1804.\textsuperscript{199} He had previously served as a navy chaplain and in the West Indies.\textsuperscript{200} He served as a magistrate from 1804 to 1828,\textsuperscript{201} a role which was onerous in more ways than one. For example, on 26 July 1826 Reverend Robert Knopwood records in his Diary that he sat on the Bench with Chief Justice Pedder from 10.00 am until midnight.\textsuperscript{202}

Reverend Knopwood held a Master of Arts degree from Cambridge University. However, he was not just an academic. He had a background of familiarity with the countryside and the English seeds he brought with him became the first introduced crops on the island. An avid diarist\textsuperscript{203} his diary provides a rich word picture of his life in colonial Van Diemen’s Land.

\textsuperscript{198} ibid
\textsuperscript{200} ibid
\textsuperscript{201} ibid
\textsuperscript{202} Robert Knopwood, *Diary*, 26 July 1826, reproduced in Alex Castles, (1982), op. cit., 263
\textsuperscript{203} Linda Monks, op. cit.
Reverend Knopwood received generous land grants, for example, about one thousand acres at Clarence Plains, thirty acres in Hobart Town, together with the land where he built his house at Cottage Green, Battery Point. Be that as it may, towards the end of his life he encountered financial hardship. The monument erected over Reverend Robert Knopwood’s grave is an enduring reminder of his work in the colony.

SACRED
TO THE MEMORY
OF
THE REVD ROBERT KNOPWOOD AM
who died 18 September 1838
Aged 77 Years
He was the first COLONIAL CHAPLAIN
IN VAN DIEMEN'S LAND
Having arrived in 1804 with
LIEUT GOVERNOR COLLINS
He was a steady and affectionate friend. A man of strict integrity and active benevolence; ever ready to relieve the distress and ameliorate the condition of the afflicted.
This monument was erected by an obliged and grateful friend as a mark of her respect.

Figure VI: The memorial to Reverend Robert Knopwood in a Hobart church yard

Francis Williams

Reliance is placed on the biography by R. F. Holder for information about Francis Williams. Mr Williams was a mariner and merchant, who arrived in Sydney, New South Wales in April 1806. He did not have official permission to enter the colony but quickly set up as a merchant with Simeon Lord. He was subsequently deported by Governor

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204 ibid
205 ibid
206 The memorial to Reverend Robert Knopwood erected above his grave in a Hobart churchyard
208 ibid
Bligh in 1807 and after applying for permission to settle in New South Wales in 1809, returned to Sydney in January 1810. This may well be one of the earliest examples of illegal immigrants being deported from Australia.

Upon his return he again went into business with Simeon Lord and together they founded the wholesale and retail business named *Lord and Williams*. He was granted land and began farming in the Hawkesbury River area and was appointed trustee and commissioner of the turnpike between Sydney and the Hawkesbury River. After one of his mercantile voyages for the firm in the vessel *Hope* in October 1812, his return journey was diverted to Hobart Town on Governor Macquarie’s orders. While there, Mr Williams bought stock to set up as a Van Diemen’s Land farmer and grazier.

In March 1813, having returned to Sydney, Mr Williams was granted permission to exchange his eight hundred acres in the Hawkesbury district for a similar grant in Van Diemen’s Land. He dissolved his partnership with Lord, and relocated to Van Diemen’s Land in July 1813. In 1814 he was appointed a magistrate in Hobart Town.

Mr Williams was unsuccessful as a farmer in Van Diemen’s Land and in February 1818 returned to Sydney, accepting appointments at the Bank of New South Wales, firstly as an accountant and later as senior cashier. He was asked to resign in September 1820 when it appeared he had made an unauthorized transaction of two thousand pounds. Shortly after his resignation it was discovered that the sealed bags of notes he had left for his successor were twelve thousand pounds short. He was tried and convicted of
embezzlement in March 1822 and sentenced to transportation for fourteen years which he served as a clerk for government stores and later as a clerk to the Bench of Magistrates in Newcastle.

He was granted a ticket-of-leave in 1828 and he set up as an agent in Newcastle until his death in 1831.\(^\text{212}\)

**Richard William Fryett**

For information about Richard William Fryett reliance is placed upon the *Australian Dictionary of Biography*\(^\text{213}\) which indicates that he left England for Sydney in November 1814 as a free man, carrying funds of between one thousand and one thousand two hundred pounds with the intention of farming. Upon arrival, he was granted two hundred acres of land at Drummond, New South Wales, by Governor Macquarie.

In 1818 Mr Fryett moved to Hobart Town, opened a store at his house in Bathurst Street and obtained an auctioneer’s licence. His business boomed and he supplied meat and grain to the government. In 1820 he bought four of the merino rams which Lieutenant Governor Sorell imported from Sydney and in 1821 received a grant of five hundred acres on the River Jordan in the island’s midlands.

\(^{212}\) ibid

He became clerk and salesman to the Cross Marsh Market Committee. He undertook auctioneering, and dealt in cattle and land. His fortunes changed in the 1842 depression and he became insolvent.

**Thomas William Birch**

Thomas William Birch, according to his biographer G. H. Stancombe, arrived in Hobart Town in May 1808 as a medical officer on the whaling ship *Dubuc* and remained as a settler.

In Hobart Town he embarked upon activities of whaling, sealing, boat building and chartering. He also became a merchant, specializing in the export of whale oil and seal skins. He exploited the Huon pine forests in Port Davey, having been given the sole right to cut Huon pine there for a year in consequence of his claim to have discovered Port Davey in 1815.

Mr Birch received land grants and acquired considerable land holdings in the colony.

**David Lord**

Susan Allen writes that David Lord arrived in Hobart Town in March 1817 as a free settler, in order to join his emancipist father who had attained considerable wealth after

completing his seven year convict sentence. David Lord received a land grant of one hundred acres in 1817 and a further grant of seven hundred acres in 1819. Upon his father’s death in August 1824 his wealth increased further and by 1829 he owned two thousand acres through grants, eleven thousand, five hundred and sixty acres by purchase and four thousand, one hundred and fifty acres by lease.

The Land Commissioners of Van Diemen’s Land noted in April 1827 that David Lord was the richest man in the island. These Commissioners cited him as an example of the defects of the colony’s land system wherein grantees who had improved their farms the least and defied all regulations, had become the only rich men on the island. The Land Commissioners further noted that David Lord neglected his cattle, allowing them to roam over an area of between eighteen and twenty miles. The content of the Land Commissioners’ report resulted in Lieutenant Governor Arthur ordering an investigation into David Lord’s grants of land in 1828.216 The result of the investigation did not auger well for Mr Lord’s reputation. The Surveyor-General found that David Lord had obtained large tracts of land in the eastern marshes by securing waterholes in the area. He had made very few improvements to any of his holdings. Despite this damaging report, official penalties seem not to have been imposed.217

Mr Lord’s ability to contrive land deals to his benefit can be found in his exchange of ninety acres, in 1824, to the colonial administration for the establishment of the town of

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216 ibid
217 ibid
Richmond. He had acquired these ninety acres as payment for a debt. As exchange for them, David Lord received from the colonial administration five hundred and sixty seven acres of land near Oatlands.218

From 1820 David Lord had a pew in St David’s Anglican Church, and in 1822 donated the land for a Methodist church in Melville Street. His multi-denominationalism is further demonstrated in 1823, when he became a member of a committee seeking the establishment of a Presbyterian Church.219

4. Deductions from the magisterial appointments

These magisterial appointees have four characteristics in common:

- they were men,
- they had the ability to use the Van Diemen’s Land opportunity for personal power acquisition to their advantage,
- they were not of the Roman Catholic religious persuasion, and
- they had no formal legal training.

While each magistrate was able to initially gain from the Van Diemen’s Land experience, the ability to retain that bounty differed. This is demonstrated in the following figure:

218 ibid
219 ibid
<table>
<thead>
<tr>
<th>Magistrate</th>
<th>Skills on arrival in the colony</th>
<th>Government job in the colony</th>
<th>Land grant in the colony</th>
<th>Subsequent destiny</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas Bell</td>
<td>Engineer</td>
<td>Commander of Military Garrison, Inspector of Public Works</td>
<td>Unknown</td>
<td>Left colony in 1824, having arrived in 1818; well liked by administrators, convicts and free people</td>
</tr>
<tr>
<td>George Gatehouse</td>
<td>First arrived as convict John Simpson; returned as free immigrant</td>
<td>Not employed by government; member of the Government Committee of Sheep Distribution; private enterprise: maltster and farmer</td>
<td>Granted land</td>
<td>Remained in colony; good fortune continued</td>
</tr>
<tr>
<td>George Harris</td>
<td>Surveyor</td>
<td>Deputy Surveyor in Van Diemen’s Land</td>
<td>Granted land</td>
<td>Remained in colony; good fortune continued</td>
</tr>
<tr>
<td>Rev’d Knopwood</td>
<td>Anglican Clergyman</td>
<td>Colony’s First Chaplain</td>
<td>Granted land</td>
<td>Remained in colony; good fortune changed</td>
</tr>
<tr>
<td>Jacob Mountgarrett</td>
<td>Surgeon</td>
<td>Port Dalrymple Surgeon and private enterprise: farmer and merchant</td>
<td>Granted land</td>
<td>Remained in colony; good fortune changed</td>
</tr>
<tr>
<td>Adolius Humphrey</td>
<td>Mineralologist</td>
<td>Superintendent of Police; Chief Magistrate in Hobart Town</td>
<td>Granted land</td>
<td>Remained in colony; good fortune continued</td>
</tr>
<tr>
<td>Francis Williams</td>
<td>Mariner</td>
<td>free enterprise: merchant and banker,</td>
<td>Granted land</td>
<td>Left colony for New South Wales where good fortune changed</td>
</tr>
<tr>
<td>David Lord</td>
<td>Free immigrant farmer</td>
<td>Farmer; private enterprise</td>
<td>Granted land</td>
<td>Remained in colony; Good fortune continued</td>
</tr>
<tr>
<td>Richard Fryett</td>
<td>Free immigrant</td>
<td>Private enterprise: auctioneer; merchant; clerk</td>
<td>Granted land</td>
<td>Apparently remained in colony; Good fortune changed</td>
</tr>
<tr>
<td>Thomas Birch</td>
<td>Medical officer</td>
<td>Private enterprise: whaler, sealer and merchant</td>
<td>Granted land</td>
<td>Apparently remained in colony; Good fortune continued</td>
</tr>
</tbody>
</table>

**Figure (VII): The fortunes of some Van Diemen’s Land magistrates**

In any case, regardless of the material achievements of each man during life in the colony of Van Diemen’s Land, death, the great leveller, eventually seized whatever power each magistrate may have wielded upon those appearing before him during life.
Castles’ (1982)\textsuperscript{220} conclusion that “overall the magistrates were for the most part, no more than representatives of their day and age working in the context of a convict colony” is open to discussion. For example, it is hardly accurate to describe each of the magistrates described above as being representative of the people in Van Diemen’s Land because each magistrate:

- was literate,
- had an acknowledged skill, trade or profession,
- had secured an official appointment,
- had paid employment, and
- had a position of power over others.

By comparison, most people in both Van Diemen’s Land at that time were:

- illiterate,
- unskilled,
- unemployed, and
- powerless.

Thus it seems inaccurate to suggest that the members of the Van Diemen’s Land Bench of Magistrates were representatives of their day and age.

\textsuperscript{220} Alex Castles, (1982), op. cit., 88
5. Stipendiary magistrates

It is to be remembered that the first magistrates in Van Diemen’s Land – some of the men whose lives have just been discussed - undertook magisterial duties without receiving payment. Thus, they were men who gave their time, without remuneration, to perform tasks which most people would consider onerous. For this, they must be commended.

In the course of time, the many official obligations together with the associated travel required to undertake magisterial duties, demanded too much time away from a magistrate’s personal work, for the honorary appointments to remain viable.221 Thus, it became necessary to have a paid magistracy. From the commencement of his term of office in 1824, Lieutenant Governor Arthur made Stipendiary Magistrates the focal point for regulating the administrative and judicial business of magistracy in the island’s separate districts.222 Castles (1982)223 informs that in Van Diemen’s Land there was strong reliance upon a paid magistracy.

6. Police

The role of police in managing law and order in Van Diemen’s Land cannot be overlooked. Before 1824, policing was overseen by local magistrates. Service in the constabulary was one way convicts could move towards respectability and freedom in the penal colony. The best behaved convicts were recruited as Field Police or ‘petty

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221 ibid, 212
222 ibid, 281
223 ibid, 211
constables.224 Such convicts who were chosen to serve as Field Police were also
disparagingly termed ‘felon police.’

Castles (1982)225 informs that as early as 1796 a rewards system was introduced for
convicts who undertook policing duties in New South Wales. Such rewards included a
weekly ration of spirits and remission of sentence after carrying out duties to the
satisfaction of magistrates for a specified period.226 It could be that a similar reward
system operated in Van Diemen’s Land for the Field Police.

An attempt to regularize policing in the island came in The Van Diemen’s Land Police
Act, 1833.227 This legislation consisted of sixty-seven clauses, all of which regulated the
behaviour of all people in the colony. It included matters such as curfews and the entry of
police into private homes.228 Thus, it can be concluded that, while magistrates seemed to
have had administrative functions such as the organisation and control of law
enforcement at the local level,229 the field police had responsibility for observing and
reporting breaches of regulations.

224 ibid, 287
225 ibid, 87
226 ibid, relying on Hunter to Portland, 30 April 1796, HRA., Ser. 1, Vol. 1, 566
227 Police Act 1833, 4 Will. IV, No. 11
228 Alex Castles (1982), op. cit., 288
229 ibid, 85
7. Police magistrates

At the instigation of Lieutenant Governor Arthur, the island of Van Diemen’s Land was divided into five police districts in 1827.²³⁰ Police Magistrates were appointed for each district and paid from the beginning of 1827. This innovation can be seen as the first action to officially regularize the administration of local justice in the colony.

Police Magistrates were provided with accommodation as revealed in the following figure:

![Figure (VII): Depiction of Police Magistrate’s house at Oatlands, Van Diemen’s Land²³¹](image)

Police Magistrates, being lay people, untrained in the law, required guidance as to legal procedures and processes. For this purpose, Charles Rocher assembled a guide entitled

²³⁰ ibid, 284, relying on Arthur to Bathurst, 16 March 1827, HRA, Series III, Vol 5, 608-609
²³¹ Dan Sprod, Depiction of Police Magistrate’s house at Oatlands, The Usurper, (Hobart: Blubber Head Press, 2001)
An Analysis of the Criminal Laws of England as Applicable to the Colony Giving and General and Comprehensive View of Crimes, their Punishments and the Evidence to Support them with the Statues by which they are created Appended.\textsuperscript{232} There is a second part to this text. This was a Coroner’s Guide and it was written by P. S. Tomlins, in 1837, the Chief Clerk of Police in Van Diemen’s Land at the time. The instructions in Rocher and Tomlins’ text are important in that they are definitive of the criminal law in Van Diemen’s Land in the 1830’s. It is of interest that Rocher (1837)\textsuperscript{233} cautions that the English criminal law is not wholly applicable in Van Diemen’s Land. Thus, variants in the colony’s criminal law had emerged by 1833, due to the island’s context.

7. Proceedings of the Bench of Magistrates, Yorktown, Port Dalrymple, to investigate the conduct of Charles Barrington alias Hacket, 9 March 1805,\textsuperscript{234} on the bench magistrates Mr Riley, J. P. and Captain A. F. Kemp, J. P.\textsuperscript{235}

The English community of Port Dalrymple began on 5 November 1804, when Lieutenant Governor Paterson, and Mrs Paterson and seventy-four male convicts, two convict’s wives, sixty-four New South Wales’ corps and twenty women and fourteen children arrived.\textsuperscript{236} Within four months, competition, jealousy and selfishness had led to gossip,

\textsuperscript{232} Charles Rocher, (1839), An Analysis of the Criminal Laws of England as Applicable to the Colony Giving and General and Comprehensive View of Crimes, their Punishments and the Evidence to Support them with the Statues by which they are created Appended, (Hobart Town: Government Printer, 1839)

\textsuperscript{233} ibid, Preface

\textsuperscript{234} Supreme Court of Van Diemen’s Land Papers, 1805-1810, Proceedings of the Bench of Magistrates, Port Dalrymple, 9 March 1805, 5/1160, COD, 281A, State Records Office, New South Wales, 21 - 28

\textsuperscript{235} ibid

innuendo and ill-feeling between the members of the small, transplanted community, as the case against Charles Barrington reveals.

The case against Charles Barrington appears to be the oldest official written record of the first Proceedings for defamation from the Bench of Magistrates in Van Diemen’s Land. The case began in March 1805. Charles Barrington, an emancipated convict, was accused of the alleged slander of several administrators at Port Dalrymple and a libel on Mr Mountgarrett, surgeon, magistrate and farmer. The charges were brought by Mr Mountgarrett.

As an emancipated convict, Mr Barrington had been given the position of Principal Overseer of convicts, with authority to set convicts to work for the government projects. On Sundays the convicts were free to labour for farmers for private emoluments. Some farmers, however, wanted to have the additional benefit of convict labour on weekdays. Mr Mountgarrett was one such farmer.

The libel charge evolved from a letter dated 3 March 1805 written by Charles Barrington to Lieutenant Governor Paterson. In the letter Mr Barrington informs Lieutenant Governor Paterson at Port Dalrymple that Mr Mountgarrett:

- sought increasing numbers of convicts to work on his farm on weekdays, and

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237 *Proceedings of the Bench of Magistrates*, op. cit., 21
238 ibid, 23 - 4, 26
239 ibid, *General Orders*, 11 March 1805, 26
240 ibid, *Letter No. 1*, 3 March 1805, 25
• sought government iron and steel for his private purposes.

Mr Barrington, quite rightly, refused to grant these requests. As a consequence, Mr Mountgarrett caused trouble for him by insisting to the Lieutenant Governor that the content of Mr Barrington’s letter was untrue and consequently a libel.

The slander charges evolved and were proved by having several convicts collaboratively testify that Mr Barrington had made various defamatory comments about various administrators. These comments included:

• allegedly referring to magistrate Mr Riley as “a damned ill-looking fellow” and “a common dirty bloody shoe-boy with not a penny to bless himself only what he was supplied by Governor King,”
• allegedly referring to magistrate Mr Mountgarrett as “a damned rascal” and “a black snake,” and
• allegedly referring to magistrate Captain Kemp as “a mean pitiful scoundrel.”

Charles Barrington appeared before magistrates Riley and Kemp, who at first instance, decided the case was too serious for them to pass judgment. Nevertheless, Lieutenant Colonel Paterson desired them to continue investigating that matter, which they did. Magistrate Mr Riley had lobbied successfully for land grants in New South Wales. The following figure indicates that his New South Wales’ property was impressive:

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241 ibid, 21
242 ibid, 23/4, 22
243 ibid, 23/4, 23
In light of the alleged slander of themselves, it is little wonder that Mr Barrington was found guilty by Captain Kemp and Mr Riley and on 25 May 1805 was sentenced by these magistrates to three hundred lashes plus a further three-year’s labour for the Crown. Lieutenant Governor Paterson, however, on 2 June 1805, sought a review of this punishment from the Judge Advocate in Sydney. Mr Barrington was kept in close confinement while the Judge Advocate’s opinion was awaited.

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245 *Proceedings of the Bench of Magistrates*, op. cit., 23/4, 26
246 ibid, 23/4, 27
247 ibid, 27, 23/4
That opinion, under the hand of the Governor in Chief in Sydney dated 7 November 1805, confirmed that the Port Dalrymple magistrates had power to inflict the harsh punishment. However, Lieutenant Governor Paterson remitted the corporal part of Charles Barrington’s punishment because of the length of time the man had been held in close confinement. The Lieutenant Governor confirmed the sentence of three year’s labour for the Crown, as well as confirming the sentence of another two year’s labour for the Crown meted out by the magistrates in August 1805.


The second defamation case before the Bench of Magistrates at Port Dalrymple was that of Proceedings against James Page. The record of the Proceedings against James Page consists of a transcript apparently written by the magistrates, or a clerk, of the investigation of an instance of the behaviour of one man, James Page.

The magistrates on the bench were Anthony Fenn Kemp, J. P., Jacob Mountgarrett, J. P., and Alexander Riley.

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248 ibid
249 ibid, 27-28, 23/4
250 ibid, 28, 23/4
251 Supreme Court of Van Diemen’s Land Papers 1805 -1810, Proceedings of the Bench of Magistrates, Port Dalrymple, 12 November 1805, NRS 16024, 1805 -1814, 5/1160, Reel 1932, COD 281A&B, State Records Office, New South Wales, 16 - 21. The Record of Proceedings documents this case before that of Charles Barrington, suggesting that the official record was not made contemporaneously with the event.
252 ibid
This was an action for slander. The Proceedings document indicates that the investigation was instituted because there was a ‘rumour’ which had come to the attention of the bench, that is magistrates, Kemp, Mountgarrett and Riley. The content of the rumour was that James Page, Constable in the colony of Van Diemen’s Land, had stated that Captain Symonds,\(^{253}\) the Commander of H. M. supply vessel \textit{Lady Nelson}, was off-loading government supplies to Mr Mountgarrett’s wharf. Interestingly, Mr Mountgarrett was one of the three magistrates hearing this Proceeding. There is no mention of any complaint having come from Captain Symonds. In actual fact, Captain Symonds was essentially the person being defamed. He had due grounds for complaining that of the rumour that he was off-loading the supplies for the government settlement to a private individual.

![Figure (X): Drawing of a sailing vessel similar to H. M. S. Lady Nelson\(^{254}\)](image)

\(^{253}\) The transcript of Proceedings at times shows Captain Symonds’ name as ‘Symonds’ and at other times as ‘Symmons’ or ‘Symons.’ It is assumed that this is an indication of the loose spelling characteristic of the early nineteenth century, when literacy was uncommon. The spelling in this thesis for this case adopts the Proceedings’ record.

\(^{254}\) Martin Terry, \textit{Maritime Paintings of Early Australia}, (Melbourne: Melbourne University Press, 1998), 38
It can be inferred, in the absence of evidence to the contrary, that Mr Mountgarrett was both a complainant as well as being one of the three adjudicators.

The Proceedings consisted of three witnesses to the alleged slander - James Field, William Owen and Thomas Kilberry - giving sworn evidence before the bench. Each witness was then examined on his evidence. Each of the witnesses concurred that James Page had, while doing his rounds of the huts in which they lived at Port Dalrymple, had said that Captain Simmons, Commander of H. M. vessel *Lady Nelson*, was landing government stores, including rice and peas, at Mr Mountgarrett’s wharf, therefore leaving sailors short of their allowance on the Sydney run.²⁵⁵

Some of the comments in this testimony are so much embedded within the historical context that they require explanation. For example, the term ‘hut’ was used to describe the primitive houses the convicts built for themselves when they arrived in the colony of Van Diemen’s Land. They cut down trees, split the timber and made the primitive accommodation huts while living in tents. The bark covering some species of the native timber in Van Diemen’s Land was highly prized being used either as fuel for fires or for lining buildings. The Proceedings indicates that the Lady Nelson carried loads of bark from Van Diemen’s Land to Sydney.

²⁵⁵ *Proceedings of the Bench of Magistrates*, op. cit., 16
James Page, the defendant, presented a written defence to the bench which is interesting because literacy was not a common characteristic of convicts in 1805.

His defence stated:

“I have never spoken anyway disrespectful of Mr Simmons. I never mentioned Mr Mountgarrett’s name. But such is the envy of those persons who appeared against me that they would swear away my life on account of my doing my duty strictly as a constable. I declare myself innocent. I entirely leave myself to the mercy of the Bench (sic), having no friends to call on or to interfere on my behalf.”

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257 It can be assumed that James Page was literate because the document was signed in his own hand as distinct from his mark, as was the practice with illiterates.
258 *Proceedings of the Bench of Magistrates*, op. cit., 17
259 ibid., 18
The bench found James Page guilty of wantonly defaming the character of Lieutenant Symmons. Basing their decision for punishment on the current insolence of many of the prisoners, they considered it their duty to take decisive steps to end such behaviour which had caused dissention and trouble in the colony from its establishment. The Charles Barrington\textsuperscript{260} case gave them a precedent for the punishment they would award for the offence. They considered the conduct of James Page\textsuperscript{261} to have dangerous consequences such as promoting a mutinous disposition on board the *Lady Nelson*. Despite the exemplary manner in which he had done his duty as constable, the bench dismissed him from that position, sentenced him to one hundred lashes and labour for the Crown for one year to commence from the expiration of his original sentence.\textsuperscript{262}

The magistrates regarded gossip and rumour to be a reason for the insolence of many of the prisoners and regarded it as their duty to take the most decisive steps to put a stop\textsuperscript{263} to rumour-mongering and slander. The magistrates had manifold tasks in the colony essentially being administrators, guardians of the colony’s morality, prison warders, upholders of the law, makers of the law, pioneer farmers and town planners. However, their first essential was to have a supply of manageable workers to attend to the tasks. The moment a worker became unmanageable he became a target for the horrendously hard punishments inflicted by the magistrates of Van Diemen’s Land.

\textsuperscript{260} ibid, 28
\textsuperscript{261} ibid, 18
\textsuperscript{262} ibid
\textsuperscript{263} ibid, 17
The accused man, James Page, as a serving convict on whom the role of ‘constable’ had been conferred, was in an invidious position. The practice of choosing convicts to serve as constables had inherent potential problems. Castles (1982) notes that the appointment of convicts as ‘petty constables’ was not always filled with universal approbation, and the press sometimes referred to them as ‘Felon Police.’

While the procedure of having trusted convicts fulfilling the role of police began when the English community began in Van Diemen’s Land, as mentioned in passing previously, Lieutenant Governor Arthur is credited with formalizing it. Lieutenant Governor Arthur, upon his arrival in Van Diemen’s Land, commissioned the best behaved convicts as ‘Field Police’ to assist in tackling the rise of bushranging. According to the Lieutenant Governor, the impact was “a most powerful effect in suppressing Bush-ranging by creating distrust and disunion among the Prisoner-population.” However, as the example of James Page shows, the manifestation of the jealousy and resentment of other convicts who were subjected to the authority of one of their peers, could be destructive.

An undated listing for James Page in the Index to Land Grants in Van Diemen’s Land suggests that he was one of the early land grantees who subsequently failed to take up the land. After James Page completed his sentence it is more than likely that he wanted to exit Van Diemen’s Land. In this regard, the Colonial Secretary’s correspondence reveals

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264 Alex Castles, (1982), 287
265 ibid
267 Index to Colonial Secretary’s Correspondence, State Records Office, The Rocks, Sydney, Reel 3790 and Fiche 3262, 4/438, 2
that James Page accompanied the master mariner Eber Bunker through the New South Wales Cowpastures on 27 February 1821.268

Eber Bunker was master of *The Albion* between 1799 and 1800 and in that vessel accompanied the *Lady Nelson* to establish the Derwent Settlement in 1803.269 In 1806 Eber Bunker brought his family to the colony of New South Wales and settled there.270 If James Page had been in the first group of convicts sent to Van Diemen’s Land, it is plausible that he came to know Eber Bunker during the voyage and also at Port Dalrymple. Perhaps the two men shared a view of Van Diemen’s Land in which they preferred New South Wales. Thus the James Page noted as accompanying Eber Bunker, the master mariner, may well have been the same James Page who was punished for words which he maintained he never said in this Proceeding.

The three witnesses who gave evidence to the bench clearly knew each other and the evidence indicates that they lived together in the same hut. It is not unreasonable to expect that cohabitation in an unfamiliar environment resulted in dialogue of a type in which the paucity of outside news generated a climate conducive of gossip, rumour and plotting.

One of the witnesses, convict, William Owens arrived in Australia in 1797 on the ship *Ganges* and is listed as receiving an absolute pardon. An undated listing in the *Index to

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268 *ibid*, Reel 6007, 4/3503, 143
269 *ibid*, 641
270 *ibid*
Land Grants in Van Diemen’s Land\textsuperscript{271} indicates a land grant to William Owens. Castles (2007) confirms that it was the practice in Van Diemen’s Land to issue land grants to convicts\textsuperscript{272} upon completion of their sentences or the granting of an absolute pardon.

The total reliance upon oral evidence of peers who were subject to oversight by the accused is fraught with the potential for corruption. From 1788, when Van Diemen’s Land Lieutenant Governor Collins, was acting in the position of Judge Advocate in New South Wales, he refused to convict on the unsupported evidence of one person, according to Castles (2007).\textsuperscript{273} This convention clearly was followed in the investigation of James Page at Port Dalrymple. However, it meant that the three men who gave evidence against him collaborated in their hearsay evidence and it was on this evidence that the bench convicted James Page.

The very fact of their magisterial appointment elevated the men on the Bench of Magistrates giving them preferential material rewards. For example, Henry Melville (1835)\textsuperscript{274} informs that while magistrates were not paid a salary, they received other benefits such as rations for themselves and up to four of their servants as well as grants of land. Castles (1982)\textsuperscript{275} notes that the appointment to the position of magistrate gave power and prestige.

\textsuperscript{271} ibid, Reel 3775 and Fiche 3262, 4/438, 68
\textsuperscript{272} Alex Castles, (2007), op. cit., 30
\textsuperscript{273} ibid, 29
\textsuperscript{275} Alex Castles, (1982), op. cit., 71
Mr Mountgarrett, one of the three magistrates making a decision on the case, is also implicated in the slander. It is of interest to ponder the conflict of interest in this overlap together with the biographical details of the man. As well as being a government medical officer, Mr Mountgarrett was also a farmer at both the Derwent the northern settlements, receiving land grants in both places. He received approval to purchase animals from the government stock and sold produce from his farming activities to the government. He also supplied cattle to the government herds at Port Dalrymple in 1817. As well, Mr Mountgarrett dabbled in merchandising, being identified as a merchant in the Colonial Secretary’s papers. Records of 31 July 31 1813 show he was paid from the police fund on account of his labour for the government. Yet, despite being paid by the government for his services, Mr Mountgarrett did not pay his dues to the government of Van Diemen’s Land, being one of many men listed as owing quit rents.

Mr Mountgarrett can also be identified as a serial complainant: James Page was his second subject at Port Dalrymple, Charles Barrington being the first. Mr Mountgarrett also made official complaints about Sergeant Hughes on 26 January 1809, while on 20 February 1809 he repeated his complaints of having been grossly insulted by Sergeant Hughes during the execution of his duty as a magistrate. During his life, therefore, Mr Mountgarett can be seen as not having been a stranger to causing trouble: a serial

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276 Colonial Secretary’s Index, 19 February and 21 February 1817, Reel 6005, 4/3496, 5, 9, 14-15
277 Index to Colonial Secretary’s Papers, 1788 – 1825, State Records, New South Wales, Reels 4999 – 5000
278 Colonial Secretary’s Index, Reel 6038, SZ758, 399
279 Colonial Secretary’s Index 1819-1822, Fiche 3270; X19, 38
281 Colonial Secretary’s Index, Reel 6001, SZ757, 50a
282 ibid, 48a-49a
complainant himself, he surely gave others reason to complain about him. Mr Page was very unfortunate to have been his second victim of complaint in Port Dalrymple.

The other person impliedly defamed was the master of the vessel, Captain Symmons, the person allegedly off-loading provisions at Mr Mountgarrett’s wharf. If Captain Symmons did off-load cargo at Mr Mountgarrett’s wharf, there are two possibilities: either he did so in accordance with instructions from Mr Mountgarrett or he was complicit with Mr Mountgarrett in an underhand business project. Thus, the alleged conversation could have been as defamatory to Captain Symmons as Mr Mountgarrett claimed it was to himself. However, the Captain is not present at the Proceedings, nor does he provide an affidavit about whether or not he did off-load goods at Mr Mountgarrett’s wharf.

This is an indication of the inherent bias of the Bench of Magistrates’ Proceedings. Mr Mountgarrett was considered by his fellow magistrates to be beyond reproach: thus, there was no attempt to determine the accuracy of the conversation. Similarly, the possibility that the Captain and Mr Mountgarrett were complicit in the off-loading of cargo is presumably not contemplated by the magistrates.

The punishment was threefold: whipping, removal from the office of police constable and an extra year of servitude. Van Diemen’s Land was a harsh physical environment and this may have been one of the reasons why punishment was so harsh. For example, Castles (2007)\textsuperscript{283} notes that convicts were regularly whipped for minor offences, and probably more harshly disciplined than the convicts in New South Wales. The loss of

\textsuperscript{283} Alex Castles, (2007), op. cit., 35
official records for the early period, however, prevents verification of this notion.\textsuperscript{284} Nevertheless, Castles provides compelling anecdotal examples which point to such a conclusion. For example, he quotes an Order given for Port Dalrymple, where the Proceedings against James Page were held, declaring: “Any convict showing the least disposition to behave idly or disorderly shall be severely punished.”\textsuperscript{285}

![Cartoon depicting convict whipping in Van Diemen’s Land](image)

**Figure (XII): Cartoon depicting convict whipping in Van Diemen’s Land**\textsuperscript{286}

### 9. Conclusion

This discussion of the *Proceedings of the Bench of Magistrates* in Port Dalrymple, Van Diemen’s Land, 1805, indicates the threads of misrepresentations and misconceptions which occurred in the attempts of government officials to administer justice. The fundamental principle of the Rule of Law, that all men are to be treated equally before the law, is not found in either of these cases.

\textsuperscript{284} ibid, 35  
\textsuperscript{285} ibid  
\textsuperscript{286} Unidentified author, Cartoon, *Cornwall Chronicle*, 9 September 1837
Reliance on the testimony of witnesses reveals the potential for collaboration while the conflict of interest surrounding Mr Mountgarrett in both matters, supports the uncomfortable conclusion that injustice, rather than justice, was meted out to the defendants. In both of these cases before the Port Dalrymple Bench of Magistrates, the unrepresented defendants were of convict attaint and were found guilty on the collaborative testimony of convicts over whom they had authority.

Importantly, the decisions in the two cases indicate that the administrative hierarchy protected itself. The magistrates accepted the evidence of the convicts without any hesitation. There is no evidence of the magistrates having contemplated the possibility of witnesses’ collaboration or malice towards the two men with convict attaint who were fulfilling positions of responsibility.

In the case of Charles Barrington, Lieutenant Governor Paterson failed to conduct an independent investigation regarding the complaints the convict supervisor made about Mr Mountgarrett. In the case of James Page, hindsight suggests it would have been appropriate that the complaint brought by Mr Mountgarrett against James Page, should have prompted the Lieutenant Governor to investigate the claims of misappropriation.

Thus, in both of these cases, the administration can be seen to have protected itself. Those holding executive positions of trust and responsibility apparently cocooned themselves within the belief that they were beyond corruption. The absence of an independent voice
of power resulted in arbitrary decision-making. The Rule of Law, as known in Australia in the twenty-first century, is not observed in either of these cases.
CHAPTER FOUR: DEFAMATION CASES FROM THE LIEUTENANT GOVERNOR’S COURT OF VAN DIEMEN’S LAND

1. The Lieutenant Governor’s Court of Van Diemen’s Land

The Second Charter of Justice of New South Wales\textsuperscript{287} promulgated on 4 February 1814, dealt only with civil matters. It abolished the Court of Civil Jurisdiction and created a Supreme Court, to be presided over by a judge appointed by a commission. The judge was required to sit with two lay persons appointed by the governor. This Second Charter has relevance for Van Diemen’s Land because it established two other civil courts: the Governor’s Court for New South Wales and the Lieutenant Governor’s Court for Van Diemen’s Land.

The Deputy Judge Advocate in Van Diemen’s Land would sit with two fit and proper persons appointed by the Lieutenant Governor of Van Diemen’s Land. Both of these courts - the Governor’s Court in New South Wales and the Lieutenant Governor’s Court for Van Diemen’s Land - were vested with jurisdiction to deal with civil claims in which the money or property did not exceed fifty pounds. Thus there was a monetary jurisdictional limit for matters brought to the Lieutenant Governor’s Court, that limit being fifty pounds. Thus, in Van Diemen’s Land the first established court can be

identified as the Lieutenant Governor’s Court. In actual fact it was presided over by Deputy Judge Advocate Edward Abbott.

Records from the Judge Advocate’s Office of New South Wales, dated 26 December 1816 are illuminative of the work and responsibilities of the Judge Advocate in New South Wales. They can be applied to the work required done by the Deputy Judge Advocate in Van Diemen’s Land. The tasks included:

- the examination of the Depositions taken upon the committal of offenders,
- preparation of the Informations upon which they are tried,
- summoning of the necessary witnesses,
- exhibition of Informations to the court,
- conduct of the trial,
- taking down the evidence,
- recording decisions, and
- taking charge of the records of the court.

The major problem revealed in these duties is that the Judge Advocate simultaneously performs the offices of:

- magistrate,
- public prosecutor,
- judge,
• determiner of the legality of the Informations drawn up and exhibited by himself.

Thus, as the Judge Advocate was intimately involved in the preliminary areas of the prosecution, it was inconceivable that he could remain unbiased in determining the issues.

Mr Samuel Bate was appointed first Deputy Judge Advocate for Van Diemen’s Land and arrived in Hobart Town on 14 May 1806. However, he acted only as a magistrate because

Figure (XIII): Depiction of Lieutenant Governor Collins’ arrival at Hobart Town, in 1804

288 ‘Depiction of Lieutenant Governor Collins’ arrival in Hobart Town’, Tasmanian Mail, 11 October 1934
of the absence of courts of law. Lieutenant Governor Collins granted him leave of absence from the position on 8 September 1807. Governor Macquarie was not favourably impressed with Mr Bate’s performance in this role, complaining that he was totally ignorant of the law. Mr Bate was subsequently dismissed from the position by Lord Bathurst in February 1814, following a recommendation from Governor Macquarie.

Deputy Judge Advocate Edward Abbott was duly commissioned in February 1814 to preside over the first Lieutenant Governor’s Court in Van Diemen’s Land, opening his court in December 1815. He had a military background and was untrained in the law, but this seemed not to matter. Mr Abbott saw his court as a court of justice and right, being neither a court of equity nor law. What he meant by this is a matter of conjecture. Perhaps he was indicating that it was presided over by one who had no legal training. John West (1852) identifies this court as a court of request. Again, this definition is open to conjecture: perhaps it suggests that persons with a problem made a request to the Deputy Judge Advocate, who would sit with two assessors, in order to formulate a solution.

Deputy Judge Advocate Abbott did not collect fees for litigation involving amounts less than five pounds. His official salary was eight hundred pounds per annum and, in

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290 ibid
291 ibid
293 John West, op. cit., 56
294 Alex Castles, (1982), op. cit., 116
practice, the additional court fees which he was entitled to charge barely equalled this amount.\(^{295}\) Thus, it can be inferred that Mr Abbott was not an overly greedy man, at least in regard to those who took their matters to his court. Importantly, because the jurisdictional limit for matters brought to the Lieutenant Governor’s Court was fifty pounds, the court can be seen as a forum for resolving disputes between the citizens, such as the non-payment of debts. It was, however, also a forum for the resolution of defamation matters.

Townsley\(^{296}\) notes that Mr Abbott was a very successful Deputy Judge Advocate and highly regarded in Hobart Town. One of the reasons for this may well have been because Mr Abbott, being a lay-person, adopted simplified procedures, reduced fees, argued by common sense and, with his two assessors, made decisions which the community regarded as fair.\(^{297}\) There was no appeal from the Lieutenant Governor’s Court\(^{298}\) but with ‘fair’ decisions being made an appeal structure was unnecessary. Mr Abbott continued as Deputy Judge Advocate until the office was abolished with the commencement of the Van Diemen’s Land Supreme Court in 1824.

2. Defamation cases in the Lieutenant Governor’s Court of Van Diemen’s Land

The defamation cases considered in this study are:

\(^{295}\) ibid
\(^{296}\) W. A. Townsley, op. cit.
\(^{297}\) ibid
\(^{298}\) Alex Castles (1982), op. cit., 116
• *Rowland Walpole Loane v William Butcher*,\(^{299}\)
• *James Doharty v Thomas Mason and Eleanor his wife*,\(^{300}\)
• *Charles McDonald v William Presnell*,\(^{301}\)
• *John McCarron v William Cook*,\(^{302}\) and
• *William Jennett v Richard Barker*.\(^{303}\)

These five cases came before the Van Diemen’s Lieutenant Governor’s Court during two sessions in 1820.\(^{304}\) The dates of the cases in court, the magistrates sitting with Deputy Judge Advocate Abbott, and the decisions are shown in the figure below:

<table>
<thead>
<tr>
<th>CASE</th>
<th>DATE</th>
<th>MAGISTRATES</th>
<th>DECISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rowland Walpole Loane v William Butcher</td>
<td>17 January 1820</td>
<td>Birch &amp; Fryett</td>
<td>For the complainant</td>
</tr>
<tr>
<td>James Doharty v Thomas Mason and Eleanor his wife</td>
<td>21 January 1820</td>
<td>Birch &amp; Fryett</td>
<td>For the complainant</td>
</tr>
<tr>
<td>Charles McDonald v William Presnell</td>
<td>5 July 1820</td>
<td>Bannister &amp; Lord</td>
<td>For the complainant</td>
</tr>
<tr>
<td>John McCarron v William Cook</td>
<td>5 July 1820</td>
<td>Bannister &amp; Lord</td>
<td>For the complainant</td>
</tr>
<tr>
<td>William Jennett v Richard Barker</td>
<td>2 August 1820</td>
<td>Bannister &amp; Lord</td>
<td>For the complainant</td>
</tr>
</tbody>
</table>

Figure (XIV): Defamation cases, dates, magistrates and decisions, Lieutenant Governor’s Court, Van Diemen’s Land, 1820

\(^{297}\)Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 17 January 1820  
\(^{300}\) Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers *James Doharty v Thomas Mason and Eleanor his wife*, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820  
\(^{301}\) Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers *Charles McDonald v William Presnell*, 5 July 1820  
\(^{302}\) Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 5 July 1820  
\(^{303}\) Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 2 August 1820, Bannister, Lord and Abbott on the Bench  
\(^{304}\) As far as revealed in the Box of Lieutenant Governor’s Court of Van Diemen’s Land papers located in the Archives Office of Tasmania during research for this study, these were the only defamation cases in the two sessions.
At the beginning of the session on 17 January 1820 a Memorandum of 13 January from His Honour Lieutenant Governor Sorell was read, appointing Mr Birch and Mr Fryett as magistrates. It is interesting that His Honour Lieutenant Governor Sorell had just appointed Richard William Fryett and Thomas William Birch as members of the Lieutenant Governor’s Court and the Deputy Judge Advocate swore them in before this session of hearings began. Thus, for the case of Loane v Walpole, magistrates Thomas William Birch and Richard William Fryett were sitting on the bench for the first time with Deputy Judge Advocate Abbott.

Figure (XV): Portrait of Lieutenant Governor Sorell

3. Rowland Walpole Loane v William Butcher

Rowland Walpole Loane v William Butcher is an action for slander which came before the Lieutenant Governor’s Court on 17 January 1820.

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305 Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 17 January 1820
306 Portrait of Lieutenant Governor Sorell, Small Portraits Collection, Mitchell Library, New South Wales
307 Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 17 January 1820
The facts of the case are that on or about 16 December 1819 in a public street of Hobart Town William Butcher maliciously accused Mr Loane of being a ‘sloviafer,’ a word which is interpreted in this study as ‘slavedriver.’ Mr Loane alleged that this naming resulted in causing great injury and detriment to his character. Despite his frequent requests to Mr Butcher to pay damages or make reparation, Mr Butcher had refused to do so. Mr Loane, therefore, sought damages of fifty pounds in court.

The court found for the complainant and awarded damages of five pounds.

In this case, both the complainant and respondent appeared before the court. From this it can be inferred that the parties acknowledged:

- their own inability to resolve the problem, and
- the court’s capacity and power to do so.

The offending word is difficult to read on the original, old court document. The closest interpretation is ‘slavdriver,’ bearing in mind phonetic variations and writing differences in the colony. If the offending word is, in actual fact, ‘slavedriver’ the harm it caused to a person being so-labelled could have its origin in the ill-treatment of assigned convicts under the convict assignment system. Under this system, free settlers could apply to the Administration to have convicts as labourers.

308 ibid
Just fourteen years further into the future from this case, in 1833, Lieutenant Governor Arthur wrote that the assigned convict’s condition differed from that of a slave only in that the convict had a right to make a complaint to a magistrate, the master was not entitled to undertake corporal punishment of the assignee himself, and had property in him for a limited period only.\textsuperscript{309}

William Douglas Forsyth (1935) compares convict assignment with slavery\textsuperscript{310} and concludes that indeed assignment was slavery. His reasoning is that, in assignment, a convict was compelled to obey every command of the master, on pain of being sentenced by a magistrate to flogging or worse, and in which his liberty of action is nullified.\textsuperscript{311} Forsyth (1935) maintains that New South Wales and Van Diemen’s Land were Colonized because of Britain’s need for a transportation system and further, that they were Colonized by slave labour.\textsuperscript{312} He relies on the affirmation of Lord Russell, who considered the convict assignment system in the Australian colonies was pure slavery.\textsuperscript{313} While these acknowledgements that assignment was slavery came fifteen years after this case, nevertheless, they provide a base for the inference that the term ‘slavedriver’ in 1820 was considered highly prejudicial and harmful to reputation in Hobart Town.

\textsuperscript{310} William Douglas Forsyth, \textit{Governor Arthur’s Convict System}, (London: Longmans, Green and Co., 1935), 96
\textsuperscript{311} ibid, 96-97
\textsuperscript{312} ibid, 97
This case can be said to reveal the powerlessness of the complainant and the court’s power to right a wrong. It identifies and denounces derogatory name calling as a negative value.

4. James Doharty v Thomas Mason and Eleanor his wife

The case of *James Doharty v Thomas Mason and Eleanor his wife* is an action for defamation and came before the court on 21 January, 1820, with Deputy Judge Advocate Abbott sitting with magistrates Richard William Fryett and Thomas William Birch.

The facts of the case are that James Doharty complained that the respondent and his wife Eleanor had assaulted the person of Judith, the complainant’s wife, by striking her repeatedly in the face and calling James ‘a robber’ and Judith ‘a whore.’ Damages of fifty pounds were sought. The court gave a verdict for the complainant and awarded sixteen pounds damages. Both the complainant and the two respondents appeared in court.

The fact that the two respondents appeared in court suggests that the custom of defendants being joined and appearing together was followed in Van Diemen’s Land. The enjoinder of the criminal elements of assault - striking - and derogatory name-calling for a civil matter are of interest. There is the combination of fear, threat and physical damage with the assault, as if it were a criminal matter, together with the derogatory name calling as in a civil matter.

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314 *James Doharty v Thomas Mason and Eleanor his wife*, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820
315 ibid
In colonial Van Diemen’s Land, where there was a disproportionate number of male and females, the ratio in 1820 being about six men to one woman, a woman’s reputation was very important. It was established by her own behaviour, economic situation and the status of her male relatives.\textsuperscript{316} Thus the labelling of Mrs Doharty as ‘a whore’ was serious defamation.

The labelling of Mr Doharty as a ‘robber’ was also highly defamatory in the colonial environment. This was due to the fact that bankruptcy was a common occurrence for settlers in early Van Diemen’s Land. The punishment for bankruptcy was imprisonment which compounded the problem. While languishing in gaol the bankrupt’s property was likely to be stolen and, while any grant of land was likely to be usurped by squatters, with stock and equipment being stolen. Thus, labelling Mr Doharty ‘a robber’ was tantamount to putting him in the same category as felons in the colony, while the labelling of Mrs Doharty ‘a whore’ was tantamount to implying she was a prostitute.

Clearly the bench agreed that damage had been caused because they found for the complainants, awarding damages of sixteen pounds. This amount was lower than the fifty pounds damages sought by the complainant. Nevertheless, as the jurisdictional limit for the Lieutenant Governor’s Court was fifty pounds, it could be that the maximum amount was sought as a matter of course.

\textsuperscript{316} Kirsten McKenzie, \textit{Scandal in the Colonies: Sydney and Cape Town, 1820 -1850}, (Carlton, Vic.: Melbourne University Press, 2005), 93
The report can be said to reveal the powerlessness of the complainant in the face of a physical and verbal assault and the court’s power to right a wrong. It identifies and denounces derogatory name calling as a negative value.

5. Charles McDonald v William Presnell

The case of Charles McDonald v William Presnell is an action for libel and came before the Lieutenant Governor’s Court on 5 July 1820. Deputy Judge Advocate Abbott was sitting with magistrates William Bannister and David Lord.

The facts of the case are that the defendant William Presnell was in debt to Charles McDonald. In order to pay his debt, Mr Presnell gave Charles McDonald two promissory notes. Mr Presnell publicly asserted - through placing an advertisement in The Hobart Town Gazette and Southern Reporter, and by broadcasting by delivery of hand bills and word of mouth - that Mr McDonald had forged the promissory notes. The amount for which the promissory notes were drawn is not stated. It was not unusual for promissory notes to be drawn for very small amounts.

Promissory notes were a common method of payment in the colony because supplies of notes and cash were limited. The essential characteristic of a promissory note is that it becomes due and payable. The defences of a forged signature and signature under duress

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317 Charles McDonald v William Presnell, 5 July 1820, Lieutenant Governor’s Court, Van Diemen’s Land, Archives Office of Tasmania
318 ibid
319 ibid
or intoxication became common in order to evade payment of just debts.\textsuperscript{320} Thus, by publicly asserting that the defendant had forged the promissory notes enormous damage was wrought upon his character. Further, the defendant refused to pay the debt to the plaintiff. Thus this case has two matters: one is of libel and the other is failure to pay a debt.

The practice of hearing two matters simultaneously seems to have been adopted in the Lieutenant Governor’s Court, as revealed in the previously discussed case of \textit{James Doharty v Thomas Mason and Eleanor his wife}.\textsuperscript{321} Perhaps this practice was implemented as a means of expedience to get as many matters through the court in as little time as possible.

The bench clearly found Mr Doharty’s complaint proved, however, the damages awarded are small, just one shilling, together with costs of one shilling for bringing the action. This could indicate that the promissory notes were for small amounts. It also relieved the complainant of being out of pocket for the expense of bringing the action to court. The bench’s judgment clearly indicates its disapproval of the publication of a false statement about a person’s credit.

\textbf{6. John McCarron v William Cook}\textsuperscript{322}

\footnotesize
\textsuperscript{320} Dunn v Stynes, Supreme Court of Van Diemen’s Land, 12 May 1830, reported in \textit{Tasmanian and Asiatic Review}, 14 May 1830
\textsuperscript{321} James Doharty v Thomas Mason and Eleanor his wife, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820
\textsuperscript{322} John McCarron v William Cook, Lieutenant Governor’s Court, Van Diemen’s Land, 5 July 1820

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The case of *John McCarron v William Cook*\(^{323}\) came before the Lieutenant Governor’s Court on 5 July 1820. Deputy Judge Advocate Abbott and magistrates William Bannister and David Lord were on the bench.

The facts of the case evolve from John McCarron’s work as pound-keeper, a role in which his duty was to impound any straying animals. On one particular day Mr McCarron was driving strayed bullocks belonging to William Cook to the pound. Mr Cook verbally publicly abused him, to the extent that Mr McCarron felt fear for his own physical safety. The comments Mr Cook directed to Mr McCarron were scandalous and tended to injure Mr McCarron’s character. Mr McCarron sought damages of twenty pounds.

In this case there are three matters:

- Mr Cook’s obstruction of Mr McCarron in the lawful undertaking of his duties as pound-keeper,
- Mr Cook’s slandering of Mr McCarron, thus injuring his character, and
- Mr Cook’s assault upon Mr McCarron, resulting in Mr McCarron’s fear for his physical safety.

However, the only matter which is of concern in this discussion is Mr Cook’s slandering of Mr McCarron.

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\(^{323}\) ibid
The importance of a town pound is discussed in the article *Town Pound of Corinth, Maine*[^324] where it is noted as a significant reminder of eighteenth and early nineteenth century agricultural-based life. The pound was an enclosure where strayed farm animals were kept until claimed by their owners, the fee for retrieval of the animals being determined by the length of time the animal stayed in the pound. The pound keeper had the task of capturing stray animals, taking them to the pound and caring for them until claimed by their owners. In the case of animals not being claimed the pound keeper had to arrange sale for its sale.

The necessity of having a pound in a developing agricultural colony such as Van Diemen’s Land is illustrated in the case of *Morrisby v Olding* (1830)[^325] where the straying of cattle upon sown land was said to have resulted in damage to crops. That case also suggests that in Van Diemen’s Land a pound keeper was either appointed by the Lieutenant Governor or slipped into the role by custom and subsequently approved by the Lieutenant Governor. By the authority of Van Diemen’s Land *Government Orders*, all stray cattle were to be driven to the nearest pound and a notice published in the *Hobart Town Gazette* three times advertising that the cattle would be put up for public sale on a particular date, if not claimed beforehand. If the owner of the animals collected them before the auction date, pound fees and damages were to be paid to the pound keeper. On the other hand, if the animals were sold, the pound keeper deducted his fees and damages from the sale.

[^325]: *Morrisby v Olding*, Supreme Court of Van Diemen’s Land, 14 May 1830, *Tasmanian and Austral-Asiatic Review*, 14 May 1830
A typical example of an Impounding Notice is found in the *Hobart Town Gazette and Van Diemen’s Land Advertiser* of Friday 24 December 1824:

“Impounded at the Coal River on 17 December (Instant) a large mousecoloured Working Bullock, no brand marks, wide horns, off horn broke (sic) at the tip, and blind of the near eye. If not owned within 14 days he will be sold to defray expenses. Apply to Mr Puckett Pound Keeper Coal River Bridge.”

In *Morrisby v Olding* (1830), one of the witnesses, Mr Ayton, who was pound keeper at Newtown, stated the customary charges of pound keepers as being six pence a head for the first ten days, and six pence a day for feeding. The amount of the charge, however, seemed to be at the discretion of the pound keeper.

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326 Man with cattle, undated photograph from a private collection
327 *Hobart Town Gazette and Van Diemen’s Land Advertiser*, 24 December 1824
Mr Ayton’s testimony in that case also reveals some of the problems associated with pound keeping. For example, he states that some pound keepers sold cattle twice, while other pound keepers went out of their way to find cattle – not necessarily straying cattle - which could be brought to the pound, presumably more for the purpose of engendering income for the pound keeper than for a proper purpose. Perhaps it was the malpractice of pound keepers that caused Mr Cook’s outburst to Mr McCarron. Perhaps, too, the prevalence of this malpractice was the reason behind the lower award of damages.

The bench found for the Mr McCarron, thus acknowledging his complaint was made out. However, the award of damages was one guinea, considerably lower that the complainant’s request for twenty pounds.

7. William Jennett v Richard Barker 328

The case of William Jennett v Richard Barker 329 is an action for slander and came before the Lieutenant Governor’s Court on 2 August 1820, with Deputy Judge Advocate Abbott and magistrates Bannister and Lord on the Bench.

The facts of the case are that William Jennett alleged Mr Richard Barker did unjustly and maliciously propagate a certain wicked report that he (William) did take away or convert to his own use a set of Bills of Exchange to the value of five hundred pounds, the property of the late Denzil McCarthy. This slander injured William Jennett’s good name, fame, credit and reputation and Mr Barker was refusing to pay damages to Mr Jennett.

328 William Jennett v Richard Barker, Lieutenant Governor’s Court, Van Diemen’s Land, 2 August 1820
329 ibid
Mr Jennett did not seek a specific amount of damages: clearly he had confidence in the discretion of the court. Mr Jennett was a non-convict police officer. The slander was that he had stolen from a deceased person. Hence, the defamation could be said to have been aggravated. It hit at the role of law and order in the colony.

The bench found for the complainant, setting the damages at three pounds, with costs to be no more than the damages, that is, a maximum of three pounds.

8. Summation of content from the Lieutenant Governor’s Court cases

The figure below shows the content of the selected Lieutenant Governor’s Court cases:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>SPECIES OF DEFAMATION &amp; DAMAGES SOUGHT</th>
<th>OUTCOME</th>
<th>AWARD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roland Walpole Loane v William Butcher</td>
<td>Slander – named a ‘slavedriver’; Sought £50 damages</td>
<td>Deputy Judge Advocate &amp; Magistrates Birch &amp; Fryett found for Complainant</td>
<td>Damages of £5</td>
</tr>
<tr>
<td>James Doharty v Thomas Mason &amp; his wife Eleanor</td>
<td>Defamation – called James a ‘robber’ and wife ‘a whore’; Sought £50 damages</td>
<td>Deputy Judge Advocate &amp; Magistrates Birch &amp; Fryett found for Complainant</td>
<td>Damages of £16</td>
</tr>
<tr>
<td>Charles McDonald v William Presnell</td>
<td>Libel – published a notice in a newspaper that Charles McDonald had forged Promissory Notes; Sought £50 damages</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister &amp; David Lord found for Complainant</td>
<td>Damages of 1/0 and 1/0 costs</td>
</tr>
<tr>
<td>John McCarron v William Cook</td>
<td>Defamation – publicly abused John McCarron, the pound-keeper while fulfilling his official duties; Sought £20 damages</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister &amp; David Lord found for Complainant</td>
<td>Damages of £110/0</td>
</tr>
<tr>
<td>William Jennett v Richard Barker</td>
<td>Slander- said William Jennett stole £500 Bill of Exchange; No specific amount of damages sought</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister &amp; David Lord found for Complainant</td>
<td>Damages of £3/0/0 and costs not to exceed £3/0/0</td>
</tr>
</tbody>
</table>

Figure (XVII): Summation of content from the selected Lieutenant Governor’s cases
9. Underlying values, and power and powerless polarities

The underlying values and power and powerless polarities identified in the selected Lieutenant Governor’s cases are shown in the following figure:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>ARBITER</th>
<th>VALUE</th>
<th>POWER &amp; POWERLESSNESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roland Walpole Loane v William Butcher</td>
<td>Deputy Judge Advocate &amp; Magistrates Birch &amp; Fryett</td>
<td>Necessity of treating convict assigned servants appropriately</td>
<td>Power of the court to maintain standards of behaviour</td>
</tr>
<tr>
<td>James Doharty v Thomas mason &amp; his wife Eleanor</td>
<td>Deputy Judge Advocate &amp; Magistrates Birch &amp; Fryett</td>
<td>Importance of maintaining a man’s credit worthiness and a woman’s chaste reputation</td>
<td>Power of the court to maintain standards of behaviour</td>
</tr>
<tr>
<td>Charles McDonald v William Presnell</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister and David Lord</td>
<td>Importance of maintaining a man’s credit worthiness</td>
<td>Power of the court to maintain standards of behaviour</td>
</tr>
<tr>
<td>John McCarron v William Cook</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister and David Lord</td>
<td>Importance of supporting an official in undertaking his administrative duties</td>
<td>Power of the court to maintain standards of behaviour</td>
</tr>
<tr>
<td>William Jennett v Richard Barker</td>
<td>Deputy Judge Advocate &amp; Magistrates William Bannister and David Lord</td>
<td>Importance of maintaining a man’s credit worthiness</td>
<td>Power of the court to maintain standards of behaviour</td>
</tr>
</tbody>
</table>

Figure (XVIII): Summation of values, power and powerless polarities from the selected Lieutenant Governor’s cases

10. The species of defamation

The species of defamation is the type of defamation, that is, whether it is slander or libel.

Of the five cases considered from the Lieutenant Governor’s Court, four were for slander and one was for libel. Thus the figures indicate that the more prevalent species of defamation action was slander. This is not surprising considering the general lack of
literacy in the community. The species of defamation for the selected Lieutenant Governor’s cases is depicted in the following figure:

![Figure (XIX): Identification of the species of defamation in the selected Lieutenant Governor’s Court cases](image)

11. The values supported by the Lieutenant Governor’s Court

There were five Lieutenant Governor’s Court cases selected for discussion. Within those five cases, four values were attacked by defamation. These values were a man’s credit worthiness, the support of an official undertaking duties, appropriate treatment of assigned servants and a woman’s sexual propriety. The decisions show that in the five cases, these four values were upheld by the court.

In one case, that of *James Doharty v Thomas Mason and his wife Eleanor*, there were two values attacked: one was for calling James ‘a robber’ and one was for calling his wife ‘a whore.’
The following figure indicates the values:

- column 1 = a man’s credit worthiness
- column 2 = the support of an official undertaking duties
- column 3 = appropriate treatment of assigned servants
- column 4 = a woman’s sexual propriety

The figure shows the maintenance of a man’s credit worthiness occurring in the ratio of 3:1. The chart also indicates the support of an official in undertaking duties occurring in the ratio of 2:1. Thus the figures support the conclusion that a man’s credit worthiness was:

- a vulnerable aspect of reputation,
- a likely aspect of a man’s reputation to be attacked, and
- a likely subject for defamation actions.

As well, the figures support the conclusion that:

- an official, fulfilling his official duties, was a likely target for public criticism,
- likely to be defamed in the course of his official duties, and
- the court would act to protect his reputation.
12. Conclusion

In each of the five cases considered, the complainants sought the assistance of the court to protect reputation and in each case the court found for the complainant. In three cases, the complainants were private members of the public, while in two cases the complainants were individuals who held official administrative positions. For example, Rowland Walpole Loane,\textsuperscript{330} James Doharty\textsuperscript{331} and Charles McDonald\textsuperscript{332} sought the protection of the court for having been defamed in a private capacity, while John McCarron\textsuperscript{333} and William Jennett\textsuperscript{334} sought a remedy from the court after having been defamed in their official capacity, Mr McCarron as pound keeper and Mr Jennett as non-convict police officer.

\textsuperscript{330} Roland Walpole Loane \textit{v} William Butcher, Lieutenant Governor’s Court of Van Diemen’s, 17 January 1820
\textsuperscript{331} James Doharty \textit{v} Thomas Mason and Eleanor his wife, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820
\textsuperscript{332} Charles McDonald \textit{v} William Presnell, 5 July 1820, Lieutenant Governor’s Court, Van Diemen’s Land
\textsuperscript{333} First Term, Lieutenant Governor’s Court, Van Diemen’s Land, 5 July 1820
\textsuperscript{334} William Jennet \textit{v} Richard Barker, Lieutenant Governor’s Court, Van Diemen’s Land, 2 August 1820
It can, therefore be inferred, that the Lieutenant Governor’s Court acted to protect the reputation of private individuals and individuals working in official administrative capacities equally.

Although the damages awarded in each case were not high, the court’s decision affirmed the importance of protecting reputation.

It is of interest to note that of these five cases, three had combined causes. For example:

- in *James Doharty v Thomas Mason and Eleanor his wife*\(^{335}\) there was physical assault of the woman, in combination with slander of Mr Doharty with the labelling of the term ‘robber’ and of Mrs Doharty with the labelling of the term ‘whore,’
- in *Charles McDonald v William Presnell*\(^{336}\) the two causes were Mr Presnell’s libelling of Mr McDonald as well as Mr Presnell’s failure to pay his debt to Mr McDonald, and
- in *John McCarron v William Cook*\(^{337}\) Mr McCarron, the pound keeper, was slandered by Mr Cook as well as being assaulted by him through the creation of fear for his life..

\(^{335}\) *James Doharty v Thomas Mason and Eleanor his wife*, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820

\(^{336}\) *Charles McDonald v William Presnell*, Lieutenant Governor’s Court, Van Diemen’s Land, 5 July 1820

\(^{337}\) *John McCarron v William Cook*, Lieutenant Governor’s Court, Van Diemen’s Land, 5 July 1820
Thus, it can be inferred that the Lieutenant Governor’s Court, be it for reasons of efficiency or whatever, accepted cases where an apparent criminal cause was concealed behind a civil cause.

These selected cases support the conclusions that:

- the individual, alone, was powerless to protect his reputation,
- it was acknowledged that the individual was entitled to seek the court’s assistance to protect reputation, whether an official or private individual,
- the Lieutenant Governor’s Court had power to act to protect the individual’s reputation, and
- the Lieutenant Governor’s Court considered the individual’s reputation worthy of protection.

Thus in the Lieutenant Governor’s Court of Van Diemen’s Land, the selected cases seem to reveal that:

- slander was the most common form of defamation in Van Diemen’s Land up to 1820,
- a man’s credit worthiness was the most common attribute attacked in defamation, and
- the Lieutenant Governor’s Court was the individual’s protector.

These decisions of the Lieutenant Governor’s Court show that the court protected the reputations of individuals in a private capacity, as well as individuals who were working in an official capacity. Thus, the Rule of Law appears to have been upheld with both private and official complainants being given relief.
CHAPTER FIVE: THE NEW SOUTH WALES SUPREME COURT SITTING IN ITS CIVIL JURISDICTION IN VAN DIEMEN’S LAND

1. Introduction

The first sitting of the New South Wales Supreme Court in Van Diemen’s Land in its Civil Jurisdiction was held when Judge Baron Field visited Hobart Town from Sydney in February, 1819, and heard the case of *Barker v Jennett*.338

As mentioned previously, the *Second Charter of Justice of New South Wales*339 promulgated on 4 February 1814, created a civil jurisdiction in a Supreme Court, to be presided over by a judge appointed by a commission. As well as being a Civil Court, this court was ordained a Court of Equity, and was empowered to administer justice in a summary manner according to or as near as possible to the Rules of the High Court of Chancery in Great Britain.340 The judge was required to sit with two lay persons appointed by the Governor.341

Judge Baron Field was commissioned as judge of the Supreme Court of New South Wales on 14 May 1816.342 Castles (1982) informs that Judge Baron Field, in addition to writing poetry, wrote treatises on the law. For example, in 1811 Judge Field wrote an

338 *Hobart Town Gazette*, 6 February 1819
340 Alex Castles, (1982), op. cit., 105
341 ibid
342 *H.R.A.*, Ser. IV, Vol. 1, 202
Analysis of Blackstone’s Commentaries. In Australia, the judge put his literary skills to use in drafting a set of Rules for the Supreme Court. These Rules were approved by Governor Macquarie in April 1817. Judge Field’s regular yearly salary was eight hundred pounds, augmented with income from court fees, which Governor Macquarie approved, increasing the judge’s salary to two thousand pounds per annum.

Judge Baron Field visited Van Diemen’s Land, with his wife, in 1819, to hold a sitting of the Supreme Court in the colony. He was welcomed to Hobart Town with all the pomp and ceremony that the small community could muster, including a procession and military gun salute.

Figure (XXI): Raising the flag on the Derwent River

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343 Alex Castles, (1982), op. cit., 109
347 *Hobart Town Gazette*, 2 January 1819
348 ibid
349 Unidentified drawing from the Tasmanian/Van Diemen’s Land Small Prints Drawers, Mitchell Library, Sydney
At the time of this visit, the judge admitted former convict English solicitor Mr Brodribb *pro tempore* as Attorney of the Court and indicated that suitors could appear through their agents or by themselves. This can be taken as a consequence of the lack of trained legal personnel in Van Diemen’s Land at the time.

2. The case of *Barker v Jennett*  

The case of *Barker v Jennett* is an action for slander and is reported in the *Hobart Town Gazette* of 6 February 1819. As mentioned previously, Judge Baron Field heard this case on his first visit to Van Diemen’s Land from Sydney, to adjudicate civil cases with damages above fifty pounds. This civil case was the only case ready to be heard at the time of Judge Baron Field’s first visit to the island colony.

The origins of this case lie in October 1818, when the plaintiff, Mr Barker, was arrested because someone had complained to the magistrates that Mr Barker had said he intended horsewhipping another man. As a result, Mr Barker was arrested and kept in a prison cell overnight. The following day he was publicly exonerated when the magistrates dismissed the charge because it was based upon unsubstantiated hearsay. However, when Mr Barker walked away from the magistrates’ decision, Mr Jennett, who was in conversation with a group of people, upon seeing Mr Barker, was heard to exclaim the words, “There stands a

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350 *Hobart Town Gazette*, 23 January 1819  
351 *ibid*  
352 *Hobart Town Gazette*, 6 February 1819  
353 *ibid*  
355 *Hobart Town Gazette*, 6 February 1819  
356 Alex Castles, (1982), op. cit., 117
public perjured informer.” Mr Barker was enraged by this comment and subsequently instituted the present action against Mr Jennett for defamation.

The *Hobart Town Gazette* headlines the report of the case: “An action for damages for slanderous words spoken.”357 This headline attracts attention to the nature of the action and predicts the possibility of damages being awarded. Legalistic language is used, for example, long sentences with a cause and effect style. The first sentence with its statement of the facts in a particularly long sentence is a good example of the heavy style:

“In October last the defendant brought an action in the Lieutenant Governor’s court to recover from the plaintiff his expenses in consequence of being summoned and bound over to keep the peace following a complaint to the Magistrates by Anthony Fenn Kemp based on a report to him by the plaintiff’s clerk of threats imputed to the defendant towards Mr Kemp to horsewhip him.”358

The writer of this report was apparently Mr Thomas Wells, an emancipist and an accountant.359 His method of writing court reports was confirmed in his evidence to the Bigge Commission in 1820.360 Mr Wells stated that he attended court and made contemporaneous notes of proceedings. Later, away from the court, he revised and developed the notes into publishable report format. After this revision, Mr Wells gave his draft report to either the Lieutenant Governor’s office or the judge, to be read by either

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357 *Hobart Town Gazette*, 6 February 1819
358 ibid
359 E. Morris Miller, (1952), op. cit., 54-55
the Lieutenant Governor or the judge, who corrected the reports at their discretion. The revised report was then given to the printer. This method can be said to account for the dense style of writing in this report. It also reveals the supervision that was exercised over court reporters. Despite being a competent writer and having authored a book about Michael Howe, one of Van Diemen’s Land’s most violent bushrangers, Thomas Wells’ court reporting was subject to strict supervision.

The fact that Judge Field tampered with the reporter’s notes of this trial also accounts for the report being written as a lesson to the community. For example, it states that the judge “emphatically counselled against the tendency of people living in a settlement in a small society” such as Van Diemen’s Land, to “avoid bringing into the courts of law suits founded on tale telling, as in the present case.” It seems that the judge took upon himself the role of the determiner of values to be upheld in the colony. Thus, the court report advocated and set appropriate community standards.

After considering the facts of the case, Judge Baron Field decided that the justification for Mr Jennett’s statement was completely made out and pronounced the deposition made by the plaintiff to be a perjury. Thus, the judge decided for the defendant, Mr Jennett.

361 ibid
362 Thomas Wells, Michael Howe, the last and worst of the Bush Rangers of Van Diemen’s Land, (Hobart Town: Andrew Bent publisher, 1818)
363 Hobart Town Gazette, 6 February 1819. The report in the Hobart Town Gazette omits a comma between law and suits.
364 Hobart Town Gazette, 6 February 1819
Of particular interest is the fact that in the Lieutenant Governor’s Court sitting of 2 August 1820, the same William Jennett was the complainant in a slander case against Richard Barker,\textsuperscript{365} a case discussed in the chapter of Lieutenant Governor’s Court cases in this thesis. It would seem there is evidence to infer that the parties in these two cases were the same and Mr Barker had on-going difficulty with the administrative duties of Mr Jennett.

Mr Jennett was the Chief Constable at Kangaroo Point,\textsuperscript{366} a position of high authority which bases the inference that he came to the colony as a non-convict. As a police officer in the colony he had an administrative role of responsibility in maintaining law and order. As a police officer he had the specific task of arresting Mr Barker and imprisoning him overnight, following Mr Kemp’s report to the magistrates of an impending horse-whipping to be given him by Mr Barker. Thus, Mr Jennett was an official performing a task in his official capacity when he arrested Mr Barker. However, he was not performing an administrative task when he audibly stated of Mr Barker, in public, “There stands a public perjured informer.”\textsuperscript{367} The justification Mr Jennett gave in court for this comment is not stated in the report. However, the judge accepted it.

The report’s conclusion that:

“The learned judge reprobated in strong terms the idea that a clerk or servant deserved praise for carrying to his employer tails(\textit{sic}) and reports of every

\textsuperscript{365} \textit{William Jennett v Richard Barker}, 2 August 1820, Lieutenant Governor’s Court, Van Diemen’s Land
\textsuperscript{366} \textit{Jennett v Baudinet}, Police Reports, Hobart Town, 15 January 1835
\textsuperscript{367} \textit{Hobart Town Gazette}, 6 February 1819
incidental expression which he might hear spoken against him in moments of irritation,”\textsuperscript{368}
is significant. It identifies there were different strata in the colony’s populace, and affirms the importance of preventing intimacy in the relationship of clerks and servants with employers. This establishes the base for the arbitrary practice of justice in the society. Judge Baron Field reveals an unsympathetic attitude towards the plaintiff. His Honour’s comments suggest a lack of warmth towards the small island community, particularly the report’s final comment:

“The learned judge emphatically counselled the people of the settlement, in such dissentions as small societies are most peculiarly liable to, to avoid bringing into a court of law suits founded like the present upon tale bearing.”\textsuperscript{369}

At times, the meaning intended in the report is almost unintelligible, due to the density of its language. For example:

“His Honour expressed his opinion that the garbled repetition of expressions of that kind, more particularly when guarded by a qualification repeated over and over again, at the moment of them being used like the present, was pernicious and meriting the most pointed reprobation, as tending to encourage assault where the

\textsuperscript{368} ibid
\textsuperscript{369} ibid
person spoken of had spirit to resist the reflection, or to appeal to the protection of the magistrates, which could only be supported by perjury.”

The underlying foundation is a hierarchical attitude towards a small society wherein sectors in the community are maintained. There is inherent criticism of the development of intimacy in a master – servant relationship. Clearly Judge Baron Field takes the view that masters and employers must keep their servants and employees at a distance. While it was feasible to maintain distance between master and servant and employer and employee in a structured and established society, Van Diemen’s Land was an unstable community. The various strata – convicts under sentence, emancipated convicts, free, aboriginals, and administrators - were themselves experiencing a transition of identity. Thus, they sought stability in relationships, bonding with others as best they could. The employer and master, respectively relied heavily upon the servant or employee for labour. Out of this reliance for labour came other species of alliance developed, such as camaraderie, companionship and friendship.

The judge pronounces judgment from his own elevated station in life, without taking account of the differences of the lives of those seeking a remedy in court. His Honour had a generous salary, position, prestige, the intellect and education which enabled him to write, and the necessary influential contacts which enabled him to have his writings published. On the other hand, the plaintiff, Mr Barker, was fighting to retain his reputation in a small community, in the face of a damaging comment made by a police officer in a public place. In accepting the justification of the defendant police officer,

370 ibid
Judge Baron Field concedes that there are times when it is acceptable to speak ill of a person in moments of irritation. Regrettably for Mr Barker, and any other defamed person, the judge does not understand the disastrous consequences of those careless words for a person’s reputation.

3. Conclusion

Clearly, Mr Barker’s reputation was likely to have been damaged by the defamatory comment made by Mr Jennett in public. The Rule of Law which insists that every person is subject to the ordinary law in the jurisdiction seems to have been practised more in Mr Jennett’s favour than Mr Barker’s. The decision indicates that Mr Jennett was justified in defamatory name-calling of Mr Barker, yet the actual justification is omitted. This omission grounds the inference that it was an arbitrary decision, based upon protecting those holding positions of power in the administration. Also, Judge Baron Field’s use of the defendant’s justification to base his decision, suggests that the Rule of Law was not followed in this decision. The attitude expressed by the judge indicates that His Honour identified different strata within the colonial society and seems to hint that these sectors ought to be kept separate. Thus, it can be inferred that His Honour is prefacing the notion that different standards of access to the law is appropriate for different groups, for example, employees and servants. If this is an accurate interpretation of the judge’s comments, it strongly suggests that the judge’s philosophy, in this case, was contrary to the Rule of Law.

371 ibid
372 Bryan A. Garner, (1999), (ed.,) op. cit., 1332
CHAPTER SIX: VAN DIEMEN’S LAND SUPREME COURT SLANDER CASES

1. Introduction

The establishment of the Supreme Court of Van Diemen’s Land under the *New South Wales Act 1823 (Imp.)* 4 Geo. IV, c. 96, separated Van Diemen’s Land from New South Wales and provided for Van Diemen’s Land to have its own Legislative Council.\(^{373}\) There were to be between five and seven people on the Legislative Council, but only the Lieutenant Governor was empowered to initiate legislation. Under section 24 of the said *New South Wales Act 1823 (Imp.)* it was possible for the proposed legislation to become law if just one member of the Legislative Council agreed with it, provided that the Lieutenant Governor held the belief that such legislation was essential for the peace and safety of the colony.\(^{374}\) Section 26 allowed a law to be approved by the British parliament even if all members of the Legislative Council opposed a law it, while section 25 vested a special emergency power in the Lieutenant Governor, empowering him to make laws without the assistance of the Council if there were actual or threatened insurrection or rebellion in the colony. The only real brake on the Lieutenant Governor’s legislative power came from section 29, which required the Chief Justice to certify that a proposed law was not repugnant to the Laws of England, and consistent with them, so far as the colony’s circumstances would permit.

Sections 24, 25 and 26 of the *New South Wales Act 1823 (Imp.)* show that executive power was firmly entrenched in the colony. Also, section 29 indicates the embedded

\(^{373}\) Alex Castles, (1982), op. cit., 130
\(^{374}\) ibid

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close relationship of the Lieutenant Governor and Chief Justice. This is cause for concern for the contemporaneous subsistence of the existence of the Rule of Law in the colony of Van Diemen’s Land.

Be that as it may, the Act provided Van Diemen’s Land with some autonomy in its practice of justice, by giving it a Supreme Court with its own judiciary. Importantly, the Supreme Court of Van Diemen’s Land was given jurisdiction to hear civil matters beyond the fifty pound damages limit. As well, the criminal jurisdiction enabled ex officio prosecutions for criminal libel.

The selected slander cases in the Supreme Court of Van Diemen’s Land discussed in this chapter are:

- *Thomson v Clark*, March 1825\(^{375}\)
- *Lucas v Copperwaith*, 8 May 1833\(^{376}\)
- *Benjamin v Griffiths*, 9 July 1834\(^{377}\)
- *Houghton v Reid*, 22 August 1834\(^{378}\)
- *Jennett v Baudinet*, 15 January 1835\(^{379}\) and
- *Wise v Kemp*, 17 October 1835\(^{380}\)

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\(^{375}\) Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Archives Office of Tasmania
\(^{376}\) *Tasmanian*, 10 May 1833
\(^{377}\) *Colonial Times*, 15 July 1834
\(^{378}\) *Launceston Independent*, 23 August 1834
\(^{379}\) *True Colonist*, 16 January 1835
\(^{380}\) *Tasmanian*, 23 October 1835
2. Establishment of the Van Diemen’s Land Supreme Court

Essentially, then, the *New South Wales Act 1823 (Imp.)* 4 Geo. IV, c. 96\(^{381}\) provided for the establishment of a Legislative Council in New South Wales and Van Diemen’s Land and separated Van Diemen’s Land and New South Wales. Thus, this *Act* gave Van Diemen’s Land independence from New South Wales. To this end, Van Diemen’s Land attained a degree of autonomy in its ability to make laws relevant to its own context.

Section 1 of this *Act* abolished the first Supreme Court established under the 1814 *Charter*, and in its place two new Supreme courts were to be established by the Crown. The colonial judges in these courts were to have the same powers as the English judges.\(^{382}\)

There were four elements in the jurisdictions of the three courts of common law granted to the two new supreme courts, that is, the Van Diemen’s Land Supreme Court and New South Wales Supreme Court. These were:

- criminal jurisdiction to try all serious criminal offences including treason, murder, rape and stealing,\(^{383}\)
- authority to deal with civil cases, for example use and ownership of land, contracts, torts (previously in England referred to as ‘fictions’ when merchants

\(^{381}\) *New South Wales Act 1823 (Imp.)*, 4 Geo. IV, c. 96
\(^{382}\) Alex Castles, (1982), op. cit., 133
\(^{383}\) ibid
said contracts were made overseas when actually they were alleged to have been made in “St. Mary-le-Bow” in Cheapside), 384

- Court of Exchequer powers, for example levy taxes to the Crown, plus Court of Equity powers, under section 6, and
- the control and supervision of inferior courts and government officials, such as the prerogative writs of prohibition, mandamus, certiorari and habeas corpus. 385

For the purposes of this particular research project, it is the authority to deal with civil cases which is of interest. Under this arm, the court had power to hear civil matters such as private actions of defamation. The criminal jurisdiction is relevant because it provides authority for the ex officio prosecutions for criminal libel to be brought.

Castles (1982) 386 discusses other relevant sections in the New South Wales Act of 1823, including:

- s.1: whereby the judge was to receive a salary in lieu of all court fees;
- s.2: whereby both the New South Wales and Van Diemen’s Land Supreme courts were “at all times Courts of Oyer and Terminer and General Gaol Delivery”, that is, they had full jurisdiction for criminal cases;
- s.3: which gave the Supreme Courts jurisdiction for piracy and other criminal offences committed at sea;

384 ibid, 134
385 ibid, 135
386 ibid, 132 - 152
• s.4: authorising trial by jury for criminal proceedings in the Supreme Court. Such a jury would consist of seven commissioned officers of the armed services who could be challenged on the basis of interest or affection. Also under this section, Attorneys General could proceed against accused persons by way of Informations in the Supreme Court, with the judge making a determination with two Justices of the Peace, referred to as Assessors;

• s.6: giving authority for Justices of the Peace to join the judge as assessors of fact. Under this section, if both parties in a civil matter agreed, there could be juries of twelve;

• s.15: giving authority to the Governor to convene a Court of Appeals as one appellate court for both New South Wales and Van Diemen’s Land. In cases where a determination had been made by a jury of twelve, only errors of law could be appealed. This section provided that in Appeal cases from Van Diemen’s Land, the Governor would be assisted by the Chief Justice of New South Wales;

• s.16: allowing appeals to the Privy Council for amounts exceeding two thousand pounds, with the Court of Appeal being required to determine the security;

• s.18: giving the Supreme Courts jurisdiction for minors and mentally incapacitated;

• s.19: authorising local authorities to create Courts of General or Quarter Sessions to determine matters summarily without juries, such courts having jurisdiction for criminal matters and special powers with respect to convicts, including
jurisdiction to hear offences committed by convicts on the voyage out, with jurisdiction to extend transportation for three years on a charge being made out;

- s.20: authorising the Governor to establish a Court of Requests for matters not exceeding ten pounds;

- s.21: authorising the Governor and Chief Justice to develop rules and procedures for the Court of Requests. Importantly, for the attempt to stifle arbitrariness in the practice of the law, under this section Justices of the Peace were prevented from meeting “out of sessions;” thus one magistrate alone could not punish; and

- s.22: giving the Supreme Courts jurisdiction for all suits and complaints for Debts and Contracts for the payment of money due up to the time of insolvency, thereby giving authority for the appointment of trustees to sell up debtor’s assets and distribute proceeds to creditors.

Overall, then, these sections demonstrate a movement towards increasing the colonies of New South Wales and Van Diemen’s Land practice of justice according to their own contextual requirements.

A more humane approach to the implementation of justice is discernible in section 21, which attempts to curb the indiscriminate and unconscionable behaviour of individual magistrates in misusing their power to punish convicts. There is a move towards acknowledging the different vulnerabilities in society, with section 18 giving jurisdiction to the court for minors and mentally incapacitated persons. This is a particularly important in a society where children were being apprenticed in trades, as in the case of
Lucas v Copperwaith,\textsuperscript{387} and young girls were sexually vulnerable in a male-dominated society, as in the case of Houghton v Reid,\textsuperscript{388} discussed in this chapter.

3. Chief Justice Pedder and Puisne Judge Montagu

Chief Justice Pedder officially opened the Van Diemen’s Land Supreme Court on 31 March 1824.\textsuperscript{389} Chief Justice Pedder had been admitted to the Bar in 1820 in England and had practiced in Chancery matters.\textsuperscript{390} Thus, His Honour had limited experience in the practice of the law at the time of his appointment.

In Van Diemen’s Land Chief Justice Pedder developed a very close professional and personal relationship with Lieutenant Governor Arthur, as revealed in his letters to the Lieutenant Governor.\textsuperscript{391} The case of \textit{R v Magistrates of Hobart Town}, 8 July 1825, Chief Justice Pedder shows that His Honour did not consider Van Diemen’s Land ready for the trial of criminal offences by civilian juries\textsuperscript{392} at that time. Hence, it was not until 1834 that jurors determined civil matters in Van Diemen’s Land.

In 1833 Algernon Montagu was commissioned as Puisne Judge, having been admitted to the Bar in England in 1826 and appointed to the position of Attorney General of Van Diemen’s Land in 1828.\textsuperscript{393} Castles (1982)\textsuperscript{394} informs that Algernon Montagu was not the

\textsuperscript{387} \textit{Tasmanian}, 10 May 1833
\textsuperscript{388} \textit{Launceston Independent}, 23 August 1834
\textsuperscript{389} Sorell to Bathurst 31 March 1824, \textit{HRA}. Ser. Ill, Vol. 4, 126
\textsuperscript{390} Alex Castles, (1982), op. cit., 266
\textsuperscript{391} Letters of Chief Justice Pedder, in \textit{Papers of Sir George Arthur, 1821 – 1831}, Mitchell Library, A2169
\textsuperscript{392} Alex Castles, (1982), op. cit., 268
\textsuperscript{393} ibid, 276
first Puisne Judge commissioned for Van Diemen’s Land. Alexander McDuff was appointed to that role under the Second Charter of Justice, but failed to undertake the position. Puisne Judge Montagu, then, can be seen to have shared with Chief Justice Pedder limited experience in the practice of the law in England. Nevertheless, having fulfilled the role of Attorney General in the colony for five years, Judge Montagu brought experience of the context of Van Diemen’s Land to the bench.

4. The case of Thomson v Clark, Supreme Court of Van Diemen’s Land, March 1825

Chief Justice Pedder on the bench

This was a case of defamation by slander. On the court documents the matter is noted as ‘trespass on the case’. The facts of the case are that the plaintiff, James Thomson, had established a successful school for young men in Hobart Town, Van Diemen’s Land. He alleged that on 26 October 1824, George Carr Clark, a wealthy Hobart Town merchant, had a conversation with John Montagu, a nephew of Lieutenant Governor Arthur. The conversation was held in a public place in Hobart Town and it was heard by many bystanders.

During the conversation, Mr Montagu told Mr Clark, in the presence of others, that Mr Thomson had left his country in disgrace. Further, that Mr Thomson had concealed himself in the coal-hole of the Brig Urania to journey to Van Diemen’s Land, and was

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394 ibid, 269
395 Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Archives Office of Tasmania
now constantly intoxicated and unable to pay his debts. Mr Clark advised Mr Montagu to inform his uncle, the newly arrived Lieutenant Governor Arthur, of this.

The impact of this public conversation on Mr Thomson was enormous and immediate. Thereafter, people of standing in Hobart Town, such as Roderic O’Connor and Jocelyn Thomas, ignored Mr Thomson. As well, several children were withdrawn from his school. As a result, Mr Thomson’s school business was severely injured.

Mr Thomson sought the assistance of Mr Thomas Young, a solicitor who had been admitted to the Roll of Practitioners in the Supreme Court of Van Diemen’s Land on 14 October 1824. Mr Young, on behalf of Mr Thomson, instigated an action of trespass on the case against Mr Clark, claiming two thousand pounds in damages.

In his affidavit attached to the summons, Mr Thomson states he was a good, true, honest, just and faithful servant of Great Britain, currently a subject of the colony of Van Diemen’s Land. He states he had always behaved and conducted himself appropriately. He was respected, esteemed and accepted by and amongst all of his neighbours and other good and worthy subjects of Van Diemen’s Land. Thus, the affidavit indicates that there was not a scintilla of truth in Mr Clark’s comments to Mr Montagu.

Mr Clark ignored the first summons, so a second summons was sent which he wisely did not ignore. If Mr Clark had ignored the second summons, his default would have been

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396 Alex Castles, (2007), op. cit., 223
397 Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Archives Office of Tasmania, Document 4
recorded. The plaintiff, James Thomson would then have been at liberty to proceed to trial \textit{ex parte},\footnote{Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Archives Office of Tasmania} that is, in the absence of the defendant. Mr Clark then formally denied Mr Thomson’s allegations.\footnote{ibid, Document 2} The plaintiff’s pleadings\footnote{ibid, Document 4} re-iterated the allegations, noting, additionally, that Mr Clark was well aware of the happy state and premises of Mr Thomson’s school and his good standing in the community in Hobart Town.

In court, however, James Thomson was \textit{non-suit ed}.ootnote{ibid} The term \textit{non-suit} indicates that a case is abandoned at trial, with judgment being given against the plaintiff.\footnote{P. G. Osborn, \textit{A Concise Law Dictionary}, (5th edn.), (London: Sweet and Maxwell, 1964), 223} In other words, the defendant submits that the plaintiff has insufficient evidence to ground the complaint and the court agrees. In this particular matter the court provided no salve for the damage caused to Mr Thomson’s credit worthiness by the slanderous words allegedly spoken by the defendant.

The result of this case can be taken as a comment on the influence of the Hobart Town merchants, of which George Carr Clark was a member. They wielded influence and power through their money and real estate. There is no way of knowing whether it was Mr Clark’s influence and power which resulted in the judge agreeing with his \textit{non-suit} submission. There is, however, a sinister side to this case which, when disclosed, highlights the competitive nature of the entrepreneurial merchants in Hobart Town.
George Carr Clark settled in Hobart Town, Van Diemen’s Land in 1823, carrying a letter of recommendation from Downing Street, London. He had formerly been a partner in a London silk firm which, despite some good times, had run into debt. Upon his arrival in Hobart Town, Mr Clark received a two thousand acre grant of land. He also began buying property in Hobart Town and by August 1828 his real estate in the town was valued at five thousand, six hundred and eighty-four pounds. His wealth in Van Diemen’s Land continued to increase throughout his life.

In June 1823, Hannah Davice, a teacher, arrived in Hobart Town from England. She brought with her a business partner and an apprentice teacher, as well as equipment for a school. Upon arrival in Van Diemen’s Land, Miss Davice received a two thousand acre grant of land in the island. On 18 December 1824, Hannah Davice married George Carr Clark and opened a school in Hobart Town. In 1825, she moved her school to Carr Field.
House in Murray Street, Hobart Town. These new premises were custom built as a school by her husband, George Carr Clark.\textsuperscript{406}

The result of this case is a comment about the substantial influence wielded by the Hobart Town merchants, of which George Clark was a member. It seems that this merchant’s power had increased to the extent that it enveloped wide aspects of the colony’s society. People apparently believed comments made by this member of the Hobart Town merchant fraternity. The influence and power of this particular businessman may have impacted upon the Rule of Law in the decision of non-suit. Independent assessment may not have been undertaken by the court. The decision exemplifies the powerlessness of a person such as James Thomson to influence the court, when pitted against a person of wealth, prestige and social standing such as George Clark. Certainly the danger of slander in the small Hobart Town community is clearly shown, with Mr Thomson’s business being severely damaged.

The case can also be read as an indicator of a devious tactic used by a particular business person in 1825 to damage competition. Interestingly, as a further indication of the power of George Clark, this case seems not to be reported in the Hobart Town press.

\textsuperscript{406} ibid
5. Lucas v Copperwaith*407 Supreme Court of Van Diemen’s Land, 8 May 1833, Chief
Justice Pedder on the bench

This case was an action for slander. Counsel for the plaintiff was Mr Gellibrand while the
defendant was represented by Mr George Hesse, a lawyer who was admitted to the Roll
of Practitioners of the Van Diemen’s Land Supreme Court on 25 April 1833.408 The
matter came before Chief Justice Pedder who was assisted by assessors Andrew Crombie
and Roderick O’Connor.409

The facts of the case are that the fifteen year-old son of Mr Lucas was apprenticed to Mr
Copperwaith, a wheel-wright. After about six months, the lad left the position. Mrs
Copperwaith subsequently visited a legal practitioner and had a writ prepared in which
the lad was described as a “runaway” and stating further that he had “taken with him a
quantity of property.”

Mrs Copperwaith subsequently met the lad’s grandfather, Mr Faulkner, in Mr Swan’s
shop, and told him that his grandson had “taken four shillings and sixpence in copper out
of a basin that lay on the mantelpiece.” When the lad subsequently visited his uncle at
Brown’s River, he was refused admittance to the house in consequence of Mrs
Copperwaith’s statement to the grandfather. Mr Lucas took action against Mr
Copperwaith on behalf of his son. He did not specify a particular amount of damages
being sought.

407 Tasmanian, 10 May 1833
408 Alex Castles, (2007), op. cit., 223
409 The names of assessors are not consistently provided in newspaper reports of cases.
In this case a parent is taking legal action to protect his slandered minor child. Mr Copperwaith is the defendant, even though it was his wife, Mrs Copperwaith, who slandered the lad, for example, “The defendant is a wheelwright, residing at the corner of Bathurst and Argyle streets.” It is, however, Mrs Copperwaith’s verbal statement to the grandfather, Mr Faulkner, informing him that his grandson was a “runaway” and had taken money from their home, which grounds this action for slander. The impact of Mrs Copperwaith’s statement to the grandfather reveals the incestuous, gossip-ridden nature of the small island community of Van Diemen’s Land. The comment was first made in a public place of commerce, Mr Swan’s shop, and was subsequently broadcast throughout the family, reaching family members as far away as Brown’s River.

The use of the term “runaway” by Mrs Copperwaith to describe the behaviour of the lad is deeply offensive because at the time, convicts who absconded from their assigned masters or the government work gangs were described as “runaways.” Thus the use of the term, “runaway” to describe the lad’s behaviour in leaving his employment, subtly relegated the apprentice to the status of an absconded convict. The following advertisement from the Hobart Town Gazette of 18 March 1825 is illustrative of the term “runaway” being used by the Hobart Town Police Office for escaped convicts:

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410 Tasmanian, 10 May 1833
Numerous examples of harsh punishment inflicted upon convict boys who absconded can be found in the newspapers. For example, in the Hobart Police Court of 9 January 1835, John McGuinnes, a boy assigned to Mr Steward, was charged by his master with absenting himself from his master’s service twice within a fortnight. Without having any opportunity to give a defence, and with no adult to assist him in defending himself, the

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[41] Hobart Town Gazette, 18 March 1825
convict boy was sentenced to twelve lashes on the breech.\textsuperscript{412} Similarly harsh punishment of convict absconders is demonstrated in the Country Police Court report of 13 January 1835, with two convict boys, John Knott and Giles Brown being ordered to spend twelve months at Point Puer, the Van Diemen’s Land correction centre for absconding boys.\textsuperscript{413}

An apprenticeship was relegated to the same status as a convict assignment in servitude by the act of verbally labelling the Lucas lad as a “runaway” because he had left his apprenticeship. In combination with the allegation that the lad had “taken four shillings and sixpence in copper out of a basin that lay on the mantelpiece,” this slander was particularly serious.

In 1835, people convicted of theft at the colony’s Quarter Sessions were regularly imprisoned with hard labour. For example, in the Quarter Session on Friday 9 January 1835, Peter Williamson, who was convicted of stealing four pounds of salt pork, was sentenced to twelve months’ of hard labour.\textsuperscript{414} Thus there were precedents for dealing harshly with young lads who absconded and people convicted of theft.

\textsuperscript{412} The Morning Star and Commercial Advertiser, 13 January 1835
\textsuperscript{413} ibid
\textsuperscript{414} ibid
The *Tasmanian* of 10 May 1833 reports that Mrs Copperwaith had “dictated a ‘whereas’” to Dr Ross’ law clerk regarding the Lucas lad. This “whereas” refers to the writ, and the comment is indicative of the fact that Mrs Copperwaith had taken the first step towards instituting civil action. It is difficult to find the reason for this action and it suggests that there was some confusion about the appropriate legal process. For example, if the lad’s apprenticeship had been evidenced in documentation, and depending upon the wording of such documentation, it is possible that an action for breach of contract could have been grounded. Such action would have lain against the father, rather than with his minor son. The probability ought not to be overlooked that Mrs Copperwaith’s motive in instituting civil action was to extort damages from the lad’s father, perhaps for the skills which had been taught to the lad in the six months of the apprenticeship.

The court found for the plaintiff. This indicates that the bench recognized the importance of protecting a minor’s reputation in regard to honesty and credit worthiness, with the

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415 J. H. Donohoe, (1991), op. cit., 105
assessors under the direction of His Honour finding for the plaintiff and awarding damages of twenty pounds. The report emphasizes the assessors’ subordination to the judge with the words, “the assessors under the direction of His Honour.”416 The decision could also be interpreted as being as much determined by the importance of maintaining the family’s reputation as the lad’s. For example, the inherent values of respect for the Lucas lad’s family are apparent in the *Tasmanian*’s description of the grandfather as “a respectable old gentleman.”417

This is a very important decision in that it acknowledges the rights of a worker to leave employment at will. The Rule of Law principle founds this decision, in that the apprentice’s essential freedom of choice regarding his life choice of work is protected.

From the perspective of the slander species of the jurisprudence of Van Diemen’s Land defamation, the essential elements can be identified as:

- a statement,
- by word of mouth,
- to another person, and
- which brings another person into ill repute.

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416 *Tasmanian*, 10 May 1833
417 ibid
6. Benjamin v Griffiths, Supreme Court of Van Diemen’s Land, 9 July 1834, Chief Justice Pedder on the bench

This was an action for defamation and malicious prosecution. The case was before a civil jury whose names were: R. O’Ferrell, J. Petru, Nathaniel Olding, Nathaniel Lucas, Charles Read, William Omega, James Priest, David Lord, G. F. Read, George Peart, J. C. Pinker and Thomas Pearce. The plaintiff was represented by Mr Gellibrand while the Attorney General, and the Solicitor General represented the defendant.

The facts of the case are that the plaintiff, Mr Benjamin, was the proprietor of the York and Albany Hotel in Oatlands, a settlement located in central Van Diemen’s Land. On the night of 13 January 1834 the defendant, Mr Griffiths, in an intoxicated condition, sought, and was given accommodation for the night at the York and Albany. On 15 January, 1835, Mr Griffiths attended the Police Station at Oatlands and informed the Police Magistrate, Mr John Whiteford, that Mr Benjamin had beaten him and robbed him of four five-pound notes, when he stayed at the York and Albany, the previous night. Mr Griffiths alleged that the four five-pound notes, being twenty pounds in total, had been pinned to the inside of his waistcoat pocket.

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418 Colonial Times, 15 July 1834
419 In the reports of cases, the names of jurors are sometimes written with initials and sometimes with Christian names. A consistent pattern is not distinguishable.
420 The names of practitioners are not consistently provided in newspaper reports of cases.
The report in the *Colonial Times* of 15 July 1834 gives full coverage of the testimony and cross-examination of the witnesses. All witnesses testified to the honesty of Mr Benjamin and the serious deterioration of his business since Mr Griffiths had begun speaking about being robbed and beaten by the publican. All witnesses also testified to having observed Mr Griffiths drinking gin on the night of 13 January, and acknowledged his subsequent state of intoxication. Mr J. C. Stracey, a man commissioned to sell the Inn in the months following the slander of Mr Benjamin, had been unable to find a buyer because of the serious diminution of the Inn’s business and goodwill since the event.

The plaintiff’s barrister wished to examine Mr Sutton, the defendant’s solicitor, on the extent of the defendant’s property, clearly with a mind to damages. The defendant’s solicitor objected on the grounds of solicitor-client confidentiality. However, Chief Justice Pedder over-ruled the solicitor’s objection, whereupon Mr Sutton replied that he believed Mr Griffiths to be a man of property. From the perspective of twenty-first century Australian legal practice, Chief Justice Pedder’s over-ruling of the solicitor’s objection is not easy to understand. It is mandatory for Australian legal practitioners to observe solicitor-client privilege on pain of disciplinary action by the relevant professional body for breach. This can be seen as an example of executive power intervening in and controlling the delicate relationship of the practice of the profession.

The Attorney General, for the defendant, stated that he was without a brief, due to the instructing solicitor, Mr Sutton, having misunderstood the date of the trial. Consequently

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421 *Colonial Times*, 15 July 1834
the Attorney General sought to have the trial postponed. Mr Gellibrand, for the plaintiff, refused the adjournment. Thus, no witnesses were called for the defendant.

Chief Justice Pedder directed the jury that they must be convinced the defendant charged the plaintiff without any reasonable or probable cause and also that he was injured in his name and business by the reports circulated by the defendant. After retiring for a short time the jury returned a verdict for the plaintiff on the charge of slander and assessed damages at sixty-five pounds. The judge reminded the jury that they had not given a verdict for the charge of malicious prosecution, to which the foreman stated that they acquitted the plaintiff of any knowledge of the robbery.

The jury asked the court if they could bring in a general verdict, that is, a verdict by which the jury gives one verdict for both charges, as opposed to resolving specific fact questions. The court assented. Subsequently the jury brought in a verdict for the plaintiff generally and again set damages at sixty-five pounds.

The request to bring in a general verdict is important. It indicates that the jury had paid careful attention to the evidence given by the Acting Police Magistrate at Oatlands, Mr Whiteford. Mr Whiteford testified that on 15 January the defendant formally complained to him on oath that he had been robbed by Mr Benjamin. The Police Magistrate asked the defendant to return in two or three hours, in order to give Mr Whiteford time to consult with a colleague. As the defendant did not return, the Police Magistrate considered the charge had been abandoned. Consequently, the Police Magistrate did not issue a warrant.

422 Bryan A. Garner, (1999), (ed.) op. cit., 1555
because he considered it was a “vague charge.”423 This begs two tantalizing questions to which there appear to be no obvious answers:

- Firstly: was there, in actual fact, a malicious prosecution if the Police Magistrate did not issue a warrant and indeed took no further action on the defendant’s complaint?
- Secondly, albeit the Information was read out in court, how did the plaintiff know about the “malicious prosecution” if the Police Magistrate had taken no further action on the Information?

The matter of *Benjamin v Griffiths* returned to the Supreme Court of Van Diemen’s Land on 5 September 1834, when it was heard by Chief Justice Pedder and Puisne Judge Montagu. This time, the Attorney General sought a new trial because he claimed the previous single general verdict given for the two charges was contrary to evidence. At the heart of the Attorney General’s plaint was the difference in costs attached to a general verdict as distinct from a verdict on each count. A general verdict required the defendant to pay the costs of the plaintiff’s witnesses, while a verdict on each of the counts would have required the plaintiff to have paid the costs of his witnesses.

Additionally, the Attorney General complained that the defendant’s case had not been heard in court, due to the fact that the instructing solicitor Mr Sutton had misunderstood the date when the case was set down for trial.424 The Attorney General endeavoured to foist all the blame for the instructing solicitor’s error on the Clerks of the Court, who,

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423 *Colonial Times*, 15 July 1834
424 *Colonial Times*, 9 September 1834
according to the Attorney General had verbally indicated the incorrect day for the trial to Mr Sutton and maintained unclear written records of court timetables. However, the Chief Justice remained loyal to the Clerks of the Court, stating that the solicitor was in error for not checking the Court Diary himself and relying on a verbal statement from the clerks, “made perhaps in the hurry of business.”

Their Honours did not consider the General Verdict of 9 July in any way contrary to evidence. Nevertheless, their Honours reserved their decision on the request for a new trial until they had spoken to the Clerk of the Court, Mr Rocher. On 12 September 1834, Mr Rocher was unable to attend court because of illness. Consequently their Honours refused a new trial and reiterated that it was Mr Sutton’s own fault for relying on a mere verbal communication.

The case indicates that the court required legal practitioners then - as it does now - to be vigilant and maintain a high standard of professional practice. By refusing to allow a new trial simply because the instructing solicitor had made a mistake, the court showed it would not allow its time to be wasted. This aspect of the decision, being an insistence upon appropriate standards to be observed by practitioners, can also be seen as an endeavour to protect the practice of court procedure from degenerating into the realms of randomness and arbitrariness.

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425 ibid
426 Colonial Times, 23 September 1834
The court’s decision to allow the jury to deliver a general verdict can be seen as an indication of sympathy for the good-natured publican plaintiff whose credit worthiness reputation had suffered damaged by the slander of the unappreciative drunken patron. In a way, the decision it can be seen as protection of the commercial or merchant sector of society.

7. Houghton v Reid, Supreme Court of Van Diemen’s Land, 22 August 1834

Judge Montagu on the bench

This was an action for slander brought by Mr James Houghton, on behalf of his daughter, Emma Houghton, a minor, against Mr Charles Reid. The plaintiff was represented by Mr Gellibrand, and the Solicitor General represented the defendant. The plaintiff alleged that on 27 January 1834 in his house, in the presence of several men, the defendant stated that Mr William Field was responsible for making Miss Emma Houghton pregnant and had then abandoned her.

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427 Launceston Independent, 23 August 1834
428 Launceston Advertiser, 28 August 1834
The case was heard before a civil jury comprised of William Barnes, George Allen, William Burnley, Patrick Carolon, Andrew Burrell, William Bonnolly, John Anderson Brown, John Bickerton, George Aylwin, William Bransgrove, Joseph Atkinson and Edmund Bartlett.

Several of the men who were at the Houghton home for a dinner party that evening were called to court to prove the statement. However each man refused to name the conversation which had taken place at a private dinner party. One man, however, Mr Gavin Ralston, stated that he had made a memorandum of the conversation soon after it had occurred. He thus testified to the correctness of Mr Reid’s slanderous statement. The Solicitor General submitted that the plaintiff be non-suited. However, his Honour, Judge Montagu, allowed the case to go to the jury. The jury returned a verdict for the plaintiff and awarded damages of one hundred pounds.

Figure (XXV): Scrimshaw painting of a grieving woman

Unknown artist, Scrimshaw painting of a grieving woman, (National Maritime Museum, Sydney)
The attempt by the Solicitor General to non-suit the plaintiff may well have succeeded had it not been for the one witness, Mr Gavin Ralston, who had made a contemporaneous note of the conversation. This witness was also sufficiently independent to have broken ranks with the other men at the dinner party, who chose to remain silent about the slandering of a young woman.

There is an underlying potential for criminal action to be taken in this matter, in that Emma Houghton was a minor. Consequently, Mr William Field, the man named in the conversation as having caused Emma Houghton’s pregnancy, and subsequently abandoning her, was in jeopardy for having sexually consorted with a minor. Alex Castles (1982) mentions that a man was executed after a conviction for carnal knowledge in 1844, even though the colonial authorities were well aware that this was no longer a capital offence in Britain. Thus, if the content of the rumour were true, Mr Field would have had every reason to fear the consequences.

On the other hand, if the content of the rumour were untrue, Mr William Field, the man held out by Mr Charles Reid as being responsible for Emma Houghton’s purported misfortune, was slandering Mr Field. Thus, Mr Field had the basis for an action of defamation against Mr Reid and possibly against the newspapers for the publication of the report of this case.

The report in the Launceston Independent is ambiguous in that it states:

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430 Launceston Advertiser, 28 August 1834
431 Alex Castles, (1982), op. cit., 261
“That Mr William Field, who had paid his attention to the plaintiff, Miss Emma Blauchard Houghton, had ceased to pay his address to her, after having got her in the family way and that he had gone to George Town for the benefit of her health.”

The use of the pronoun ‘he’ in the final line may have been an intentional attempt to disguise the suggestion that the lady had gone to George Town for the birth of a baby. From the perspective of the slander species of the jurisprudence of Van Diemen’s Land defamation, this case is important because it introduces a new element to the essential elements, that is, publication in a private place, as well as a public place. For example, slander is:

- a statement,
- by word of mouth
- to others,
- in a private or public place, and
- which brings another person into ill repute.

The slander in this case attacks a young woman’s sexual propriety and the court acts to provide solace in the form of monetary damages. Unfortunately, the publication of the case in the local newspapers would have resulted in further damage in the local community to the young woman’s reputation.

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432 *Launceston Independent*, 23 August 1834
8. Jennett v Baudinet, 15 January 1835, before Assistant Police Magistrate Mr Thomas Mason

This case did not come before the Supreme Court of Van Diemen’s Land. It came before the colony’s Police Magistrate in the Police Court. It is included, in this study, however, because it was published in the newspaper and provides an interesting perspective on the way information about the components of slander were broadcast to the community.

This was an *ex parte* complaint by Mr Jennett, Chief Constable of Kangaroo Point, to the Assistant Police Magistrate, Mr Thomas Mason, in the Police Court. Mr Jennett complained that Mr Baudinet had slandered and defamed him in private, without any third party being present. Mr Mason informed Mr Jennett that in complaints of this nature the prosecution must be conducted at the expense of the private prosecutor. Further, Mr Mason stated that the allegedly slanderous words were addressed only to prosecutor himself and not published by Mr Baudinet, the alleged defamer, in any other way or to any other person. Thus, the slander’s essential element of publication was not made out. In fact, in this instance, the publication of the words was made by Mr Jennett himself to Captain Forster. The matter was postponed.

This case is an example of an informal complaint made by an official - the Chief Constable at Kangaroo Point - in the course of his duties, possibly in order to determine

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433 *The True Colonist*, 16 January 1835
whether the Assistant Police Magistrate would take action for him. Perhaps at best it can be categorised as a ‘test case.’ The response of Mr Mason is important because it:

- sets out the essential for publication criterion for defamation, and
- clarifies the distinction in legal costs between private actions for slander brought by individuals and criminal actions brought by the Crown.

For slander, the words must be published by the defamer to a person or persons other than the subject. In private actions, the individual complainant is personally responsible for legal costs, while in a criminal prosecution, costs are met by the Crown.

The publication of *Jennett v Baudinet* under the heading ‘Police Reports’ in the newspaper *True Colonist*\(^{434}\) can be seen as providing an important educational service to the colony. Mr Jennett’s interest in taking action diminished when he was informed he would be responsible for costs and, most importantly, the essential of publication had not been met. Thus, the publication of this report would leave readers with no doubt that to establish grounds for an action for slander, the words must be published by the alleged slanderer and defamer, as distinct from publication by the person allegedly slandered and defamed.

This case is important from the perspective of the slander species of defamation, because it demonstrates that the essential elements are:

\(^{434}\) *The True Colonist*, 16 January 1835
• a statement,
• by word of mouth,
• to another person,
• in either a public or private place, and
• which brings another person into ill repute.

9. Wise v Kemp, Supreme Court of Van Diemen’s Land, 17 October 1835

Justice Pedder on the bench

In this case the plaintiff, John Wise, brought an action for slander against the defendant, Anthony Fenn Kemp. The Attorney General represented Mr Wise and the defendant was represented by the Solicitor General. The matter was heard before a jury. 436

Mr Wise, a publican, alleged that Mr Kemp used offensive expressions regarding the way he conducted his business. Specifically, the plaintiff alleged that the defendant had, while in a crowded public street, called him a “swindler” in the way he conducted his business in a crowded public street.

Witnesses were called to give testimonial evidence. Mr W. Wise, brother of Mr John Wise, testified that Mr Kemp had approached him in a crowded street on 4 or 6 April. On

435 Tasmanian, 23 October 1835
436 The names of the jury are not provided.
that day, Mr Kemp referred to the fact that Mr John Wise had called his creditors together and stated that Mr John Wise, the publican, was a swindler. Mr W. Wise was, at the time of the conversation, owed one hundred pounds by his brother John.

Mr John Wise had called together his creditors, of his own accord, in an endeavour to make arrangements to pay his debts. At that meeting he had debts of about eight hundred pounds and was unable to pay his debts as they became due. Mr Swanston, witness for the Derwent Bank, testified that the plaintiff had been endeavouring to obtain a bank loan of about three hundred pounds in April or May. However, the bank had not been satisfied with the security offered, so the loan request was declined. The defendant did not provide any evidence but apparently relied on the cross-examination of the plaintiff’s witnesses by the Solicitor General.

In summing up for the jury the Chief Justice directed the jury to find for the plaintiff if they were satisfied that the expression of “swindler” was used to describe the plaintiff with respect to his business. However, His Honour said it is not actionable to call a man a “swindler” who is not in business, or if the term is not in respect to his business.

The jury took some time to reach a decision for the plaintiff. The decision was four counts for the plaintiff with special justification for the defendant on the first, second and third counts. Damages of one farthing were awarded on each of the four counts with His
Honour deciding in regard to costs. This decision was so inconsistent and contradictory that on 17 November 1835 the court agreed that a second trial was required.\textsuperscript{437}

The second trial was held on 11 December 1835.\textsuperscript{438} After deliberating for twelve hours, the jury could not agree. Thus the jury was discharged and the cause was to be tried a third time. Whether the matter did, in fact, return to court for the third time is unknown.

The importance of this case for the slander species of defamation in Van Diemen’s Land is to be found in the comment of His Honour Chief Justice Pedder, to the jury, that is, that the term “swindler” is only slanderous when it is directed at a man in the course of his business. It would seem that the comment was made in this case in regard to the plaintiff’s course of business. The comment certainly attacked his creditworthiness. The award of one farthing damages at the first trial is important because it relieves the plaintiff from having to pay costs.

\textsuperscript{437} Hobart Town Courier, 20 November 1835
\textsuperscript{438} Hobart Town Courier, 23 October, 18 December 1835
10. Summation of content from the selected Supreme Court slander cases

The figure below shows the content of the selected Supreme Court slander cases:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>SPECIES &amp; DAMAGES</th>
<th>OUTCOME</th>
<th>AWARD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomson v Clark</td>
<td>Slander D Attacked P’s credit worthiness: said he could not pay his debts; said he stowed his way to VDL in a vessel’s coal hole; said he was always intoxicated; P sought £2,000 damages</td>
<td>CJPedder non-suited the plaintiff</td>
<td>non-suited</td>
</tr>
<tr>
<td>(1825)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lucas v Copperwaith</td>
<td>Slander – credit worthiness ; D said the apprentice P stole 4/6; &amp; D called the lad a ‘runaway’; No quantum of damages sought</td>
<td>CJ Pedder and assessors Andrew Crombie and Roderick O’Connor. Found for the plaintiff</td>
<td>Damages of £20</td>
</tr>
<tr>
<td>(1833)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Benjamin v Griffith</td>
<td>Slander – credit worthiness attacked; D said the Plaintiff publican stole £20; No quantum of damages sought</td>
<td>CJ Pedder and a civil jury of 12 men. Found for the plaintiff</td>
<td>Damages of £65</td>
</tr>
<tr>
<td>(1834)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Houghton v Reid</td>
<td>Slander - D verbally attacked a young woman’s sexual propriety; No quantum of damages sought</td>
<td>Puisne Judge Montagu and a civil jury of 12 men. Found for the plaintiff</td>
<td>Damages of £100</td>
</tr>
<tr>
<td>(1834)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jennett v Baudinett</td>
<td>Test case before Police Magistrate; P said D verbally attacked him in private in the course of his public duties</td>
<td>Police Magistrate; Found requirements of publication were not met</td>
<td>Test case abandoned</td>
</tr>
<tr>
<td>(1835)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wise v Kemp</td>
<td>Credit worthiness: D called P ‘a swindler’ in the way he conducted his business; No quantum of damages sought</td>
<td>CJ Pedder and a jury of 12; First trial found for the jury; Second trial jury could not decide; Third trial decision unknown</td>
<td>First trial 1 farthing damages on each count; Second trial jury could not decide; Third trial decision unknown</td>
</tr>
<tr>
<td>(1835)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure (XXVI): Summation of content from the selected Supreme Court slander cases

11. Underlying values, and power and powerless polarities

The underlying values and power and powerless polarities identified in the selected Supreme Court slander cases are shown in the following figure:
CASE NAME | ARBITER | VALUE | POWER & POWERLESS POLARITIES
--- | --- | --- | ---
Thomson v Clark (1825) | CJPedder | Importance of maintaining a businessman’s credit worthiness reputation | Powerlessness of the slandered P when the court accepts the D’s non-suit rejoinder |
Lucas v Copperwaith (1833) | CJ Pedder and assessors Andrew Crombie and Roderick O’Connor. | Importance of maintaining a male minor’s credit worthiness | Power of the court to protect a male minor apprentice’s reputation |
Benjamin v Griffith (1834) | CJ Pedder and a civil jury of 12 men. | Importance of maintaining a businessman’s credit worthiness reputation | Power of the court to protect a publican’s reputation from slanderous attacks by an intoxicated patron |
Houghton v Reid (1834) | Puisne Judge Montagu and a civil jury of 12 men. | Importance of maintaining a minor female’s sexual propriety reputation | Power of the court to compensate a minor female whose sexual propriety reputation has been destroyed by a male |
Jennett v Baudinett (1835) | Police Magistrate; | Importance of protecting a public officer’s reputation in the course of his duties | Powerlessness of the government official to take legal action when he is verbally abused in private in the course of undertaking his official duties |
Wise v Kemp (1835) | CJ Pedder and a jury of 12; | Importance of maintaining a businessman’s credit worthiness reputation | Powerlessness of the P whose credit-worthiness reputation as a businessman is slandered when the court seems unable to make a conclusive decision |

Figure (XXVII): Underlying values and power and powerless polarities identified in the selected Supreme Court slander cases

12. The species of defamation

The species or type of defamation in these cases is slander. The specific quality attacked in the slander is identified. There were six cases selected for discussion, one being a matter before the Police Court. Of the five cases considered from the Supreme Court for slander, four were for credit worthiness of a businessman in the performance of his business, one was for the destruction of a woman’s reputation of sexual propriety. The one case before the Police Court was for verbal abuse of an official in private. Thus the
figures indicate that the more prevalent cause of court proceedings for slander was for an attack of a businessman’s creditworthiness in business. This is not surprising, considering the competition between businessmen in the community. The following figure indicates the specific nature of the attack:

![Figure (XXVIII): The specific nature of the slander attacks compared](image)

**13. The values supported by the court**

As mentioned previously while there were six cases selected for discussion, one was just a mention in the Police Court. Thus, within those five Supreme Court cases, six values were attacked by slander. In the case of *Thomson v Clark*, three values were attacked: credit worthiness, sobriety and appropriate migration. However, in this case the court declared a *non-suit*.

Thus, in the five cases, two values were upheld by the Court decisions: the maintenance of a man’s credit worthiness and the maintenance of a woman’s sexual propriety.
The chart indicates the values, with the maintenance of a man’s credit worthiness occurring in the ratio of 3:1,

series 1 = maintaining a man’s credit worthiness, and

series 2 = maintaining a woman’s sexual propriety reputation

In the case of *Jennett v Baudinett*, a test case before the Police Court Magistrate, there was no support offered to the official who had been privately verbally abused in the course of his duties: slander’s essential element of publication of the slander was missing. Thus the figures support the conclusions that a man’s credit worthiness was:

- a vulnerable aspect of reputation,
- a likely aspect of a man’s reputation to be attacked, and
- a likely subject for slander actions, and

that a woman’s sexual propriety was:

- a vulnerable aspect of reputation, and
- a likely aspect of a woman’s reputation to be attacked,

in the Van Diemen’s Land community at that time.

The following figure represents these values as identified in the selected cases:
Figure (XXIX): The values identified in the Supreme Court slander cases

14. Conclusion

In each of the five Supreme Court slander cases considered, the plaintiff sought the assistance of the court to protect reputation. The court found for the plaintiff in four cases, initially, and then, because of lack of clarity, in the jury’s award of damages, in three cases. The court allowed a *non-suit* for one case, *Thomson v Clark*, the case where a very powerful defendant had a vested personal business interest in destroying the plaintiff’s business reputation.

Damages in two cases seemed adequate, being twenty pounds and sixty-five pounds respectively, for the slandering of a man’s creditworthiness in business. Damages awarded to the minor female whose sexual propriety reputation was damaged were high, being one hundred pounds.
The case in which damages of one farthing were initially awarded and then subsequently set down for another trial, can be seen as an example of the court’s inability to give appropriate direction to a jury. This inability allowed the plaintiff to suffer further damage to reputation.

The jurisprudence of these sampled cases supports the conclusion that:

- the individual, alone, is powerless to protect his reputation,
- the individual is entitled to seek the court’s assistance to protect reputation,
- the court has power to act to protect the individual’s reputation, and
- the court is subjective in determining whose reputation is worthy of protection.

Thus in the Supreme Court of Van Diemen’s Land, the selected cases support the conclusion that:

- a man’s credit worthiness in business was the most common attribute attacked in slander, and
- the Supreme Court was selective in determining which individual’s reputation it would protect.
This final conclusion is based upon the apparent arbitrariness in the court’s decision in the case of *Thomson v Clark*\(^{439}\) and a degree of incompetence in *Wise v Kemp*.\(^{440}\) Both of these cases suggest that consistency in following the Rule of Law was absent.

\(^{439}\) Box SC 101 A282/6, State Archives Office, Tasmania

\(^{440}\) *Tasmanian*, 23 October 1835, *Hobart Town Courier*, 20 November 1835 and 18 December 1835
CHAPTER SEVEN: VAN DIEMEN’S LAND SUPREME COURT LIBEL CASES

1. Introduction

In this chapter selected libel cases brought before the Supreme Court of Van Diemen’s Land between the years 1826 and 1835 are discussed. The facts of each case are stated and the case and decision are discussed. The power and powerless polarities and values are identified. Finally, deductions from the overall selection of libel cases are made. The selected cases are:

- **Murray v Stephen**, 12 April 1826\(^{441}\)
- **Butler v Bent**, 12 January 1830\(^{442}\)
- **Kennedy v Bent** 15-16 January 1830\(^{443}\)
- **Butler v Bent**, 10 May 1830\(^{444}\)
- **Fereday v O’Connor**, 13-16 December 1831\(^{445}\)
- **Meredith v Murray**, 11 June 1833\(^{446}\)
- **O’Connor v Meredith**, 10 July 1833\(^{447}\)
- **Schaw v Meredith**, 17 July 1833\(^{448}\)
- **Cookney v Brodie**, 17 December 1833\(^{449}\)
- **Murray v Murray**, 11 December 1835\(^{450}\)

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\(^{441}\) *Colonial Times*, 14 April 1826
\(^{442}\) *Tasmanian and Austral-Asiatic Review*, 15 January 1830
\(^{443}\) *Tasmanian and Austral-Asiatic Review*, 22 January 1830
\(^{444}\) *Tasmanian and Austral-Asiatic Review*, 14 May 1830
\(^{445}\) *Tasmanian*, 17 December 1831
\(^{446}\) *Tasmanian*, 12 July 1833
\(^{447}\) ibid
\(^{448}\) *Tasmanian*, 19 July 1833
\(^{449}\) *Tasmanian*, 20 December 1833
\(^{450}\) *Hobart Town Courier*, 18 December 1835
2. Murray v Stephen 12 April 1826, Chief Justice Pedder on the bench

In this case Mr Murray brought five charges of libel against Mr Stephen, writer of the letter, the colony’s Solicitor General. Mr Murray alleged that Mr Stephen had written a letter to the Lieutenant Governor stating that Mr Murray:

- had written hostile letters to the colonial government signed ‘Colonist,’
- was a former convict,
- had been dismissed from being Superintendent of Police in New South Wales,
- had been brought to the Police Office on charges affecting his character, and
- had lived in a state of concubinage.

Mr Murray sought damages of two thousand pounds.

Figure (XXX): Pencil drawing of Mr Alfred Stephen

451 Colonial Times, 14 April 1826
452 Thomas Wainewright, Pencil drawing of Mr Alfred Stephen (1839), (Hobart: Allport Museum)
Mr Murray had sought the letter from the Lieutenant Governor but His Excellency refused to provide it. Mr Murray’s witnesses, Captain Montagu and Mr Charles Arthur, proved that the original letter was in the possession of the Lieutenant Governor. Mr Charles Arthur had made a copy of the original letter in his own hand-writing. This was produced in court. Mr Arthur’s evidence was ruled inadmissible by Chief Justice Pedder, on the basis that the copier was as liable as the original writer of the libel. Chief Justice Pedder further ruled that secondary evidence of the existence of the letter could not be received while the original document was in existence. Thus, by refusing to give up the original document, the Lieutenant Governor stymied proceedings. As the Lieutenant Governor’s power was beyond the reach of the judicial process, the letter could not be obtained.

Chief Justice Pedder concluded that the plaintiff must be *non-suited*.

Mr Murray cited the case of *Campbell v McArthur*, a Sydney case, in which a Bill filed in Equity resulted in a Decree for the defendant. The plaintiff had then lodged an appeal and that case subsequently went to the Privy Council in England. Mr Murray agreed to a decision being recorded for the defendant so that he could move for an appeal. However, instead of seeking an appeal, on 19 April Mr Murray sought a new trial,\(^\text{453}\) which apparently did not eventuate.

This case is important because it shows the ability of the Lieutenant Governor to stifle libel proceedings in a court of law merely by refusing to produce a key document. Thus,

\(^{453}\) *Colonial Times*, 21 April 1826
the colony’s penultimate executive administrative officer used his power to block a libel action. The colony’s chief judicial officer used his power to protect the Solicitor General through offering the plaintiff the choice of a non-suit or a decision for the defendant. Instead of the Rule of Law being applied, this is an example of what may well be termed the Rule of the Administration.

3. Butler v Bent, 12 January 1830.\textsuperscript{454} Chief Justice Pedder on the bench

The court used the time in this matter on 12 January 1830, by Chief Justice Pedder explaining his understanding of the ‘new libel Act,’ frequently referred to as Mr Fox’s Act. Under this Act juries are judges of fact and law in libel cases. His Honour declared that in all future libel cases between private persons he would, in consequence of the Act, consider it proper for trial by juries. His Honour reminded the court that before Mr Fox’s Act the judge was only required to leave the fact of printing or publishing to the jury. However, His Honour continued, since Mr Fox’s Act juries now had the full right of judging both the fact and the law: the jury is to decide the whole case.

4. Kennedy v Bent, Supreme Court of Van Diemen’s Land 15-16 January 1830.\textsuperscript{455}

Chief Justice Pedder on the bench, Captain Bell and Mr Beaumont, Assessors

This was an action for libel brought by the plaintiff Mr Kennedy, the Under Sheriff of Van Diemen’s Land, against Mr Bent, proprietor, printer and publisher of the Colonial

\textsuperscript{454} Tasmanian and Austral-Asiatic Review, 15 January 1830
\textsuperscript{455} Tasmanian and Austral-Asiatic Review, 22 January 1830
The facts basing the case are that in November 1828, Mr Thomas Wells was declared insolvent by the Supreme Court of Van Diemen’s Land. Messrs Cook and Mather were appointed trustees. On 1 March 1829 the Act under which Mr Wells was declared insolvent, expired. At that time the trustees had not gone into possession of Mr Wells’ property. Thus Mr R. L. Murray, a judgment creditor, issued a writ of Fieri Facias under which the sheriff levied Allendale, Mr Wells’ property.

Mr Wells informed the sheriff that a portion of Allenvale belonged to his insolvent estate and was vested in his trustees, while another portion of the property belonged to other persons. Mr Wells entered into an agreement with the sheriff that the property should be sold and the sheriff hold the proceeds until it could be determined who should be paid.

On the advertised auction day, Mr Kennedy proceeded to Allenvale with the trustee, Mr Cook, and two other persons. He put up Allenvale for sale half an hour before the appointed hour of noon, contrary to the notice he had received from Mr Wells. Several people had gone to Allenvale for the sale but when they arrived at noon the sale was ended. The evidence of the other sheriff in regard to selling property was that he always
waited but Mr Kennedy did not.456 The property was sold in five lots. Mr Cook purchased three lots, together with a horse, a cart and bullocks and three hundred sheep. Mr Cook’s friends, Mr Haywood and Mr Marshall, purchased the other two lots, as well as another horse and a winnowing machine, which was not exhibited, at prices far below their value.

The next day Mr Cook sold the horse he had purchased for thirteen pounds and ten shillings for thirty pounds, and exchanged the cart and bullocks which he had purchased for six pounds, for the other horse which his friend Mr Haywood had purchased for nine pounds.

An article was subsequently published in the *Colonial Times*, which included the statement that:

“Mr Kennedy exhibited a precipitancy and a disregard to the interests of one party by leaning towards the other in a manner perfectly new and altogether irreconcilable with the impartiality which ought ever to attend the proceedings of justice.”

The use of the term ‘insolvent’ is, in the early twenty-first century, a term reserved for companies which are unable to pay their debts as they fall due. The term ‘bankrupt’ is currently used for individuals in the same situation. Alex Castles (2007)457 discusses the distinction made in English law between the terms ‘bankruptcy’ and ‘insolvency’ noting that ‘bankruptcy’ was limited to acknowledged traders who were irrevocably in debt,

456 ibid
457 Alex Castles, (2007), op. cit., 116
while non-traders in the same position were termed ‘insolvents.’ Castles informs that while in England the goods of bankrupt traders were sold and the proceeds shared equally amongst creditors, insolvent traders were often imprisoned until they could meet their financial obligations. The English distinction, therefore, survives in *Kennedy v Bent*, with Mr Wells being described as an insolvent.

This case is notable in that it was the first instance in the colony of the defendant giving his case first. Mr Stephen saw this as an advantage\(^458\) to the defendant. Mr Gellibrand, in defence, made the following points:

- there was no intention to impute to Mr Kennedy anything dishonest, dishonourable or corrupt,
- there was a very wide distinction between an attack upon the public conduct of a man in his public duties and the character of a private individual,
- the article was about the conduct of Mr Kennedy in his public role, and
- the whole of the article was true.

Mr Gellibrand relied upon the dictum of Lord Ellenborough in the English case of the *King v Lambert and Perry* to support the defence. Mr Stephen spoke in strong terms of the way the defendant conducted the *Colonial Times*. Indeed, the personal attack by Solicitor General, Mr Stephen, upon Mr Bent suggests that the plaintiff was motivated as much by the government’s stand against those who wanted a free press, as it was upon those who criticised government officials in the exercise of their official work.\(^459\) In turn,

\(^{458}\) *Tasmanian and Austral-Asiatic Review*, 22 January 1830

\(^{459}\) ibid
Mr Gellibrand attacked Mr Stephen for attacking his client and his newspaper.\textsuperscript{460} Thus, both parties had able legal representation.

From the report it can be inferred that counsel’s oral ability was highly valued by the colonial community. For example, Mr Stephen, Solicitor General and counsel for the plaintiff, is reported as speaking for four hours “with the greatest zeal, talent, energy and eloquence,”\textsuperscript{461} while Mr Gellibrand, counsel for the defendant, was reported as having addressed the court in a manner which “we are utterly unable to do justice,”\textsuperscript{462} his speech occupying two hours while “his exertions were equally able and animated.”\textsuperscript{463} Clearly, barristers then, as now, vocalised enthusiastically in court. Chief Justice Pedder stated he was “so fatigued after having sat twelve successive hours” that he adjourned the court until the next day.\textsuperscript{464}

The underlying theme of this case is that insolvent debtors should be protected from being sacrificed by the improper behaviour of sheriffs. For example, the evidence of the sheriff, Mr Fereday, shows the unfairness of sheriffs’ sales in general, in his statement, “I waited for the plaintiff’s solicitor who came specifically to bid for the property.”\textsuperscript{465} This statement shows that a plaintiff who was a creditor with a mind to obtaining particular property, could wait for the defendant to be unable to pay his debts as they fell due, issue proceedings, institute sale of the property and legitimately purchase it.

\begin{itemize}
  \item \textsuperscript{460} ibid
  \item \textsuperscript{461} ibid
  \item \textsuperscript{462} ibid
  \item \textsuperscript{463} *Tasmanian and Austral-Asiatic Review*, 12 February 1830
  \item \textsuperscript{464} *Tasmanian and Austral-Asiatic Review*, 22 January 1830
  \item \textsuperscript{465} ibid
\end{itemize}
Mr Gellibrand reminded the court of the difference between a civil action and a criminal information for libel, emphasising the great difference being that in criminal libel, whether the matter is true or false, it cannot be justified, whereas in civil libel, if the defendant can justify what he said, that is, if he proves that what he wrote is true, he is entitled to the verdict.\textsuperscript{466} Thus, Mr Gellibrand submitted, the court need only decide if what had been written was true. Mr Gellibrand did not, however, mention the civil standard of proof being on the balance of probabilities.

In summing up for the assessors, Chief Justice Pedder stated that in all cases where the justification is made out, the assessors must find for the plaintiff. If the justification is not made out there must be a finding for the defendant.\textsuperscript{467} If Mr Kennedy had acted precipitously and the article means that, only the smallest damages were appropriate. The judge urged the assessors to apply the real meaning of the words\textsuperscript{468} used in the article. In particular, the assessors were to distinguish whether the defendant meant that the sheriff made an honest error which worked injury or, on the contrary, took advantage over the power of the sale and actively sought to favour one party over the other. It was upon these principles that the assessors were to regulate damages.\textsuperscript{469}

\textsuperscript{466} ibid
\textsuperscript{467} ibid
\textsuperscript{468} ibid
\textsuperscript{469} ibid
The judge then indicated that his role was to go through each of the counts and consider them separately, to decide the extent to which they are borne out by the evidence.\textsuperscript{470} This judicial comment indicates that the determination of whether or not the pleas were made out by the evidence would be made by the judge, not the assessors.

The judge and assessors retired together to make a determination. They found for the plaintiff on all six counts pleas but in two counts found in part for the plaintiff: that is, they found the plaintiff did not wait a reasonable time for persons expected to come to bid at the sale and two lots sold for considerably less than their value.\textsuperscript{471} They awarded damages of one hundred pounds to the plaintiff, these being assessed generally.

This was an extraordinary result. The two main thrusts of the defendant’s complaint in the article against the sheriff were found to have been made out, yet the damages awarded to the plaintiff were considerable. This decision clearly favoured the official in the course of public duties over a private individual.

On 6 February 1830 Mr Gellibrand sought a new trial for the matter.\textsuperscript{472} He gave a two hour speech\textsuperscript{473} advocating that the damages awarded were excessive, and, in particular, Mr Kennedy did not follow the custom of waiting for buyers, selling the winnowing machine without it being present.\textsuperscript{474} This request for a new trial is tantamount to an

\begin{footnotesize}
\begin{enumerate}
\item ibid \textsuperscript{470}
\item ibid \textsuperscript{471}
\item Tasmanian and Austral-Asiatic Review, 12 February 1830 \textsuperscript{472}
\item ibid \textsuperscript{473}
\item ibid \textsuperscript{474}
\end{enumerate}
\end{footnotesize}
appeal. Chief Justice Pedder was asked by counsel to look again at the decision he had made regarding the damages and the pleas.

The judge’s comments upon the assessment of damages for libel are of particular interest, based apparently, upon a time when feelings were of limited consequence in determining damages. For example, the judge commented:

“I know of no standard by which the injury to feelings can be measured in cases such as the present. It is utterly impossible in cases of libel, slander, seduction or others similar, to establish any given principle upon which to estimate the amount of injury sustained.”

Following submissions from both Mr Gellibrand for the defendant and Solicitor General Mr Stephen for the plaintiff, the judge decided that the real question to be investigated was, “what is the nature of the libel and the situation of the party libelled.” Based upon those two factors the judge decided immediately that the damages were not excessive. In regard to the pleas, however, the judge concluded that he would fully reconsider them and return to court as soon as possible.

The decision in this case indicates that the court favoured the interests of administrative officers in the performance of their official duties over the interests of members of the

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475 ibid
476 ibid
477 ibid
478 ibid
general populace. The Rule of Law was subverted behind the Rule of the Administration. While legal practitioners who represented members of the general populace endeavoured to have justice accorded to their clients, those in positions of administrative power ensured that arbitrary arguments prevailed.

5. Butler v Bent, Van Diemen’s Land Supreme Court, 10 May 1830.479 Chief Justice Pedder on the bench

This was the first civil trial by jury under Fox’s Libel Act. A method of selecting the jury had to be determined. Forty-eight persons were summoned for jury service. The first idea was to write the names of the forty-eight men on cards and place the cards in a box. The first twelve names drawn from the box would comprise the jury. This lucky-dip method was abandoned. Instead, it was decided that counsel for each party would select twenty-four men and from these each counsel would strike out six. The remaining twelve would comprise the jury. In this case, the twelve men who were selected to comprise the jury were: Dr Ross, foreman, Messrs Mawle, Watchorn, Bunster, W. Lewis, Guy, Hopkins, Mather, Wilson, Wise, Stokell and Walker.480 The case for the plaintiff, Mr Butler, was stated by the Solicitor General. There were six charges in all for articles inserted in the Colonial Times by Mr Bent, the proprietor, printer and publisher.

The first article described a visit to a lawyer’s office. The lawyer demonstrated an uncaring attitude about a debtor’s inability to pay and the debtor’s personal liabilities.

479 Tasmanian and Austral-Asiatic Review, 14 May 1830
480 In reports, the names of the jurors were not written uniformly, sometimes initials are used for Christian names, at other times just the surnames are provided.
Finally the article states that the original debt is swollen by the lawyer’s extortionate fees. The article is written in the first person and names are not mentioned. The second article was based upon the detail of a visit by Dr Crowther to the plaintiff, lawyer Mr Butler, wherein Mr Butler and Dr Crowther had a fight over Mr Butler’s exorbitant fees. The third article was entitled *From Loo Choo* and applied the analogy of a reptile to Mr Butler.

Various witnesses were called to testify that they recognised Mr Butler as the person described in the articles. The first article is probably based upon the case of a real debtor, Mr Wilson, who was taken into custody on 8 April 1829 and discharged on 6 January 1830 for inability to pay a debt of twelve pounds and ten shillings, to which were added Mr Butler’s legal costs of seventeen pounds and fourteen shillings and seven pence.

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481 *Tasmanian and Austral-Asiatic Review*, 14 May 1830
482 *ibid*
Of the thirteen prisoners incarcerated for debt on 9 October 1829 in Hobart Town, six of the thirteen were in prison under a writ issued by Mr Butler and three had detainers against them by Mr Butler.484

In Van Diemen’s Land the arrest of debtors for non-payment of debts was a harsh reality. The amount of the debt incurring the penalty of imprisonment increased over time from ten pounds to fifteen pounds. In England, legislation known as Mr Weston’s Act was passed in 1827 requiring the amount of the debt to be twenty pounds before the debtor could be arrested. The English legislation came into operation in Van Diemen’s Land in March 1829.485 Therefore, the imprisonment of Mr Wilson on 8 April for non-payment of his debt of twelve pounds and ten shillings was illegal. However, when the amount of Mr Wilson’s original debt of twelve pounds and ten shillings was added to Mr Butler’s legal costs of seventeen pounds, fourteen shillings and seven pence, Mr Wilson’s total debt was in excess of twenty pounds.

The second libel was based upon a disagreement between lawyer Mr Butler and medical practitioner Dr Crowther.486 Mr Butler issued Dr Crowther with a bill giving him ten days’ to pay, while issuing a summons on the same day as the bill. When Dr Crowther attended Mr Butler’s office to pay the account and persuade the lawyer to abate his costs, Mr Butler threatened Dr Crowther.487 The details of this visit were subsequently published in letters which were signed The Hermit, a pseudonym for a man whose name

484 Tasmanian and Austral-Asiatic Review, 14 May 1830
485 ibid
486 ibid
487 ibid
was Simon Stukley. Mr Butler accused Dr Crowther of writing and publishing these letters. Dr Crowther, however, did not write *The Hermit* articles. He admitted he had recounted details of his fearful visit to Mr Butler to about fifty persons,\(^{488}\) in particular the fact that Mr Butler came near Dr Crowther asking if he had iron in his face.\(^{489}\)

The third libel was based upon the attribution of iron-heartedness to Mr Butler,\(^{490}\) and emanates from the imprisonment of Mr Wilson for five months upon the writ issued by Mr Butler.\(^{491}\) In defence, counsel admitted publication of the articles but insisting that the identity of the author was unknown. Mr Bent published the articles because he considered them to be necessary in order:

> “to advance morality and to correct evil, to shew (sic) the rise and progress of the colony, to mark evil doers, and by the force of example shame them for their misdeeds.”\(^{492}\)

Mr Butler had been admitted to the Roll of Legal Practitioners in Van Diemen’s Land on 26 July 1824.\(^{493}\) The onerous responsibilities attaching to a legal practitioner were stated by counsel, who stated that “every member of this court is a public character and every public character is public property.”\(^{494}\)

The anonymous writer of the libels considered it proper to bring before the public the parts of the lawyer’s professional conduct considered to be highly injurious to the public

\(^{488}\) ibid  
\(^{489}\) ibid  
\(^{490}\) ibid  
\(^{491}\) ibid  
\(^{492}\) ibid  
\(^{493}\) Alex Castles, (2007), *op. cit.*, 223  
\(^{494}\) *Tasmanian and Austral-Asiatic Review*, 14 May 1830  

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interests, in particular, the high costs of legal services. However, no attack is made upon the lawyer’s private life, leaving the domestic scene and private life untouched. Mr Gellibrand instructed the court of his view of the difference between criminal libel and civil libel. In criminal libel there is a breach of the peace, while in civil libel the defendant can use justification, that is prove that what is written is justified, such as publication providing a service to the public.

His Honour Chief Justice Pedder summed up for the jury after the trial of nine and a half hours. The judge told the jury that no public man is to have his conduct subjected to public animadversion and reproach. Regarding the plea of justification, the jury were to determine if what the defendant had written was untrue and if so was it about the plaintiff in his professional character with a view to bring him into public hatred and contempt. Finally the judge directed that if the material facts are proved, the jury were to find for the defendant; if not, the finding was to be for the plaintiff. The judge’s meaning in this direction is ambiguous, as could be expected after such a lengthy hearing. The jury returned at midnight, deciding for the plaintiff on all counts except the conversation which occurred between Mr Butler and Dr Crowther, which they decided was justified. They awarded damages of eighty pounds to the plaintiff.

495 ibid
496 ibid
497 ibid
498 ibid
499 ibid
500 ibid
501 ibid
502 ibid
James Dally’s (2003)\textsuperscript{503} limited edition publication of R. L. Murray’s reports of the case of \textit{Butler v Bent}, 1830, provides the reader with all of the reports of the case, in one readable format.

The decision validates the legal practitioner’s high costs. This can be read as an acknowledgment that the price of legal advice and representation was high, thereby putting it out of reach of the general populace. While the legal practitioner, Mr Butler, was working in private practice, as distinct from working in an administrative position, nevertheless, his knowledge, skill and expertise put him as a member of a privileged profession. The decision virtually endorses the imposition of high fees upon debtors in Van Diemen’s Land, a practice which created severe injustice. By this decision the court can be seen to approve miscarriage of equitable principles by those whose skills and professional expertise enabled them to occupy positions of trust and service in the colony.

\textit{6. Fereday v O’Connor, Supreme Court of Van Diemen’s Land, 13-16 December, 1831,}\;\textsuperscript{504} \textbf{Chief Justice Pedder on the bench}

In this case the plaintiff, Mr Dudley Fereday, Sherriff of Van Diemen’s Land, brought twelve counts in all - seven for malicious prosecution, four for slander and one for libel\textsuperscript{505} - against the defendant, Mr Roderic O’Connor, Surveyor General of Main Roads.

Solicitor General Mr Stephen represented the plaintiff, Mr Dudley Fereday. Mr Gellibrand represented Mr O’Connor. Assessors were A. Moodie and J. Beaumont, Esqs.

\textsuperscript{503} James Dally, \textit{R. L. Murray’s Reports of the Proceedings in the Libel Case of Butler v Bent, 1830, Heard in the Supreme Court of Van Diemen’s Land}, Oliver Kain, (ed.) (Adelaide: James Dally, 2003)

\textsuperscript{504} \textit{Tasmanian}, 17 December 1831

\textsuperscript{505} ibid
The facts of the case are selectively harvested\textsuperscript{506} from *The Tasmanian* 21 December, 1831, *Colonial Times* 14 and 21 December 1821 and *The Courier* 17 December 1931.

In October 1828 Mr Fereday discounted a Bill of Exchange for Mr McShane. Before the bill was due Mr Fereday paid it to Mr Young for consideration of an IOU.\textsuperscript{507} Mr Young paid the Bill into the Derwent Bank but it was dishonoured. Mr Young took legal action, obtained judgment and Mr McShane’s property was sold. On the morning of the sale Mr McShane asked the sheriff, Mr Fereday, to postpone the sale. Mr Fereday referred Mr McShane to Mr Young, the man who had brought the action on the dishonoured bill.

Mr McShane returned to Mr Fereday with Mr Roberts. Mr McShane had sold sheep to Mr Roberts for one hundred pounds but had not delivered the sheep. Together, the men agreed that Mr Roberts would accept a Bill of Exchange for one hundred pounds, which would be held by the sheriff, Mr Fereday, as a deposit. It was agreed that if Mr McShane did not deliver the sheep to Mr Roberts, the Bill would be given to Mr Roberts.

The sale of Mr McShane’s property took place as advertised and sold for one hundred and seventy guineas, a price higher than expected. At the sale various other lots were sold first. Mr Hays, the under sheriff, conducted these earlier sales, after which he momentarily stopped proceedings, being unsure of whether the McShane property was to be sold. One of the lots at the sale was under an execution order from the case of *Murray v Wells*. This advertised property had been claimed, so the under sheriff decided not to put it up.

\textsuperscript{506} Selective harvesting, whereby issues which appear to be of critical importance, are identified, is applied in this case. While it is a subjective process, it is essential in this case due to the length of the its various reports.

\textsuperscript{507} Bryan A. Garner, (1999), (ed.), op. cit., 833, defines an IOU as a memorandum acknowledging a debt.
Shortly after the sale ended, Mr Carron, one of the sheriff’s bailiffs, informed Mr McShane of the price his property had fetched. Mr McShane appeared pleased and returned to the sheriff’s office, demanding the difference between the sale price, one hundred and seventy guineas, and the amount owed to Mr Young, which was one hundred pounds. There the matter rested.

In May or June 1829, Mr Fereday dismissed Mr Hays from the office of under sheriff. Mr Hays vowed to take revenge on Mr Fereday for this. Mr Hays persuaded Mr McShane to write to the Lieutenant Governor, complaining of the way Mr Fereday conducted the sale of his property. This letter was written in Mr Hays’ writing. Mr McShane’s complaint was that the sheriff consented to take Mr Roberts’ Bill of Exchange in part payment of the execution, and in consideration of which he agreed to postpone the sale, but instead, he sold the property. Mr Hays swore to this. The matter then rested.

In June 1830 Mr McShane met Mr O’Connor and told him of his complaint against Mr Fereday.

In May 1831, Mr O’Connor agreed to purchase privately, for three hundred pounds, from the executors of the late Mr Hammond, land adjoining his property at Cottage Green. This property was subject to an execution order issued by Mr Gavin for an amount less than three hundred pounds which was owed to Mr Gavin. Mr O’Connor sought to purchase the property for three hundred pounds from the sheriff, but the sheriff considered it necessary, in the proper discharge of his public duties, to sell the property by public auction. This he did and on 5 April the property was bought by Mr Hewitt for four hundred and thirty pounds at public auction. This annoyed Mr O’Connor.
Consequently, he wrote to the Lieutenant Governor accusing Mr Fereday of auctioning Mr Hammond’s land to gratify a personal grudge against Mr O’Connor. Mr Fereday replied with a libel action against Mr O’Connor.

Figure (XXXII): Cattle on Cottage Green

On 19 May Mr O’Connor visited the Police Office to have Mr Fereday charged with perjury for having sworn to the order in which the sales wrongly took place. This was despite the fact that Mr O’Connor was not personally involved in the matter. Contemporaneous notes of this visit were made by Mr Boyd, the Chief Clerk. On 28 May Mr O’Connor again visited the Police Office seeking to have a further charge of perjury.

508 Cattle on Cottage Green, Battery Point, Hobart Town, source unknown, original in the Allport Museum, Hobart
against Mr Fereday. The examinations at the Police Office, together with Mr O’Connor’s behaviour, apparently caused havoc with Mr Fereday’s reputation. Thus Mr Fereday took this private action against Mr O’Connor in the Supreme Court.

The reports of this case are challenging to read, with counsel for both parties making lengthy representations. For example, the Solicitor General’s opening address for the plaintiff occupied approximately four hours\(^{509}\) of the court’s time. Counsel for the defendant, Mr Gellibrand, occupied three hours in his summing up submissions, merely outlining the case.\(^{510}\) The case itself occupied four days of the court’s time,\(^{511}\) a fact which the *Courier* decried:

> “We lament extremely that the trial should have taken place at all, so little creditable to either party and we sincerely hope that we shall never again see the valuable time of a court of justice nor the labour and attention of men of legal talent employed on such occasions.”\(^{512}\)

However, the court case was not the only misuse of public time in this matter. Mr O’Connor’s claims had been investigated at the Police Office for twelve days, prior to this Supreme Court action.

In the Supreme Court proceedings the Solicitor General read all of the twelve days’ of Police Office evidence, including the statements of witnesses Mr Hugh McShane, Mr Adey, Mr Young, Mr Collins, Bernard Carron, Mr Hays, Mr Crouch, Mr Patsons, Mr

\(^{509}\) *Tasmanian*, 17 December 1831  
\(^{510}\) *Tasmanian*, 14 April 1832  
\(^{511}\) *Courier*, 17 December 1831  
\(^{512}\) ibid
Sorell, Mr McShane, Mr Smith, another of Mr Hayes, Mr Roberts, Mr Butler, Mr Risely, Mr Bilton and Mr Gellibrand, all of which were contemporaneously notated in shorthand and transcribed by Mr Ross.513

The magistrates at the Police Office dismissed Mr O’Connor’s request for court action without calling Mr Fereday. Thus, Mr O’Connor failed at the Police Office, with Mr Mulgrave, Mr Mason and Mr Hone finding no further proceedings should take place because the evidence produced was insufficient514 to ground a prosecution. Hence Mr Fereday’s action against Mr O’Connor for the damage caused to his reputation. In the Supreme Court there were twelve counts in all: seven for malicious prosecution, four for slander and one for libel. The court placed an order against publication of the count of libel. The defendant pleaded not guilty generally, to the counts for malicious prosecution, that is, the general issue. Thus for these seven counts all facts of the charge are put in issue. For the charges of slander, the defendant pleaded that he did not speak as charged. To the count of perjury the defendant pleaded justification of perjury.

In court Mr Gellibrand, for the defence, made much of the expression “passed away,” the term used by Mr Fereday in his affidavit to describe the manner in which Mr McShane’s bill was handed over to Mr Young. However, the Solicitor General testified in court that he himself had changed this expression to “paid away,” considering the term “passed away” to be a “Scoticism.” It was this term “paid away” which gave rise to the inference of dishonesty and the subsequent attempt by Mr O’Connor to charge Mr Fereday with

513 *Tasmanian*, 17 December 1831 per Police Inspector Mr Mulgrave to Chief Justice Pedder: “Mr Ross was present taking notes in shorthand, during the whole proceedings, noting every circumstance.”
514 ibid
perjury, even though Mr O’Connor had no part in the transaction. Thus, the vulnerability of the common instruments of commercial transaction is highlighted in this case. In the colonial society where currency was scarce, the IOU and Bill of Exchange were necessary instruments of transaction. Nevertheless, their potential to be misinterpreted, whether innocently or by design, was a fact of life.

Mr Hone, barrister and Master of the Court, summoned by the Police Magistrate, Mr Mulgrave to assist with the investigation at the Police Office, gave the court a clear interpretation of “paying away” in commercial transactions. Mr Hone considered if a party hands over an unendorsed Bill of Exchange, thereby making himself liable for its amount to another party, for the express purpose of suing upon it, that is a “paying away.” However, if an IOU is given for a Bill of Exchange, and the giver thereby becomes liable for the amount, that is a giving away. The giving of a Bill of Exchange, without an endorsement, Mr Hone concluded, to be strong presumptive evidence of its being no payment; but, if an IOU were given, that would rebut the presumption.515 The clear testimony of Mr Hone indicates his commercial legal acumen.

The plaintiff’s case unfolds more as a defence of Mr Fereday than a plaint against Mr O’Connor. For example, the Solicitor General attacks each of the charges made by Mr O’Connor, as if in defence of Mr Fereday. In other words, the justification of Mr Fereday appears to be of primary importance in attacking Mr O’Connor’s claims. For the charges of perjury made by Mr O’Connor, the Solicitor General identifies the essential elements

515 ibid
of perjury as the mind being in fault and directed by a wicked and fraudulent design. Counsel then shows how these elements were not met by Mr Fereday through a candid discussion of the circumstances.

The primary attack made upon Mr O’Connor by the Solicitor General on behalf of Mr Fereday, is that the defendant is a public officer, a wealthy capitalist, large landowner, and large stock-owner. Thus, the qualities regarded as being positive elements in an individual are attacked. However, in the case of Mr O’Connor, the inference is that these qualities of power are used inappropriately. The defendant’s hatred towards the plaintiff is revealed.

The Solicitor General details the circumstances surrounding each of the claims made by Mr O’Connor to reveal their lack of substance. The absurdity of Mr O’Connor’s claims is further emphasized by the testimony of Mr Fereday’s witnesses, who explain and clarify circumstances. For example, solicitor, Mr Young, explains to Chief Justice Pedder the circumstances surrounding the settling of the affidavits in Mr Stephen’s office and the alteration of the “passed away” to “paid away.” He states,

“In the original affidavit of Mr Fereday, the following words were originally inserted, the bill was “passed” to the plaintiff. Upon the above consultation, the word “passed” was altered to “paid away,”

thus corroborating the testimony of counsel Mr Stephen. Similarly, Mr Young dispels the shadow of dishonesty attempted to be cast by Mr O’Connor concerning the payment of the Bill of Exchange:

516 ibid
“I prepared a warrant of attorney from McShane to Mr Fereday, to secure payment of the bill; I delivered it when executed to Mr Fereday; Mr Fereday deducted from the one hundred and fifty pound bill eighteen pounds and fifteen shillings discount, and the whole which I received was two guineas for the warrant of attorney.”

The Solicitor General uses metaphorical language, which in the twenty-first century would generally be considered politically and culturally offensive, to describe Mr O’Connor’s behaviour towards Mr Fereday. For example,

“Why, like the savage Indian place him at a stake to inflict upon him the severest tortures, severer than the savage Indian inflicts, for he gives a final blow and strikes his victim dead.”

However, at the time of the case, it was barely three decades since Captain La Perouse had suffered death at the hands of indigenous islanders in other parts of the world. As well, relations between the indigenous people of Van Diemen’s Land and the English settlers were troubled, and indigenous peoples were, at the time, generically known as ‘Indian.’ Thus, apparently no offence was taken at the use of this language.

Mr Stephen sought punitive damages for two reasons: not merely to compensate Mr Fereday for the treatment to which he had been exposed, but because it was appropriate. For example he states, “It is the only method of shewing (sic) your sense of his atrocity.” Mr Stephen’s plea for the verdict for the plaintiff is an important revelation

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517 *Tasmanian*, 17 December 1831
518 ibid
519 ibid
520 ibid
of the underlying reason for taking legal action against attacks upon the character of another person, that is, to maintain the peace and harmony of the community, for example,

“I ask by your verdict to prevent the peace and comfort of the community from being disturbed by such malicious proceedings – to protect others from being subjected to such base and cruel attacks.”

Testimonial evidence given by Mr Mulgrave, Police Magistrate, to the court revealed an unflattering character portrait of Mr O’Connor. For example, when Mr O’Connor appeared before the Police Magistrate on 19 May 1831, Mr Mulgrave understood Mr O’Connor to say he not only did so for the purpose of justice, not just to prove the perjury, but also to show something deteriorating Mr Fereday’s character, who had brought an action for damages against him. Mr Mulgrave understood Mr O’Connor to say that if he could prove Mr Fereday had been guilty of perjury it would reduce the amount of damages Mr O’Connor would have to pay for libelling him. Fortunately for Mr Fereday’s case, Mr Ross had made shorthand notes of the entire proceedings at the Police Office. Thus this damaging evidence against Mr O’Connor could be verified in court.

A further aspect of Mr Mulgrave’s evidence which tended to adversely impact upon Mr O’Connor’s defence was that a Mr Jennings, acting on behalf of Mr O’Connor, wrote to Police Magistrate, Mr Mulgrave, stating that Mr O’Connor did not want the magistrates

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521 ibid
522 ibid
523 ibid
to adjudicate as to whether a case was made out to prosecute Mr Fereday for perjury. Instead, Mr O’Connor wanted the Attorney General to make the determination. The Attorney General, Mr Gellibrand, subsequently represented Mr O’Connor at the Supreme Court trial, so it can be inferred that Mr O’Connor held the belief, whether it be grounded in fact or fantasy, that Mr Gellibrand would give him a more sympathetic hearing than the magistrates at the Police Office.

Surprisingly, Mr O’Connor rarely attended the examinations of witnesses, according to Police Magistrate Mr Mulgrave524 and it can be inferred he was not in court for the first day of the trial, in the light of the Solicitor General’s comment: “I wish he was here to hear me.”525

The court deliberated for four hours, deciding for the plaintiff on charges one to eleven inclusive.526 On counts one, three, five and seven damages of two hundred pounds were awarded, on counts two, four, six and eight damages of one hundred pounds were awarded and on counts of ten and eleven damages of one hundred pounds were awarded, with a total damages award of four hundred pounds. The court found for the defendant on count twelve. Of the verdict, the Colonial Times comments:

524 ibid
525 ibid
526 Colonial Times, 21 December 1831
“Mr Fereday has the satisfaction of his capital being increased by four hundred pounds and Mr O’Connor has to pay tolerably dear for having a lesson which we hope if not useful to him may be of service to others.”

The jury’s statement is almost incomprehensible, it being, “On the plea of justification we are not unanimous but we find for the plaintiff against them.” The decision was met in court by Counsel for the defendant requesting both a new trial for some of the counts and a non suit for other counts.

The *Tasmanian* of 14 April 1832 indicates that the matter returned to court with Mr Gellibrand, Attorney General, again for the defendant, arguing for a new trial. Mr Fereday was again represented by the Solicitor General, however Mr Stephen had, by then, been replaced in that role by Mr Ross. In giving his decision, His Honour was critical of a third person, that is, Mr O’Connor, becoming involved in the original matter, that is, the loan to Mr McShane, the selling of the late Mr Hammond’s land, the Sheriff’s action and the IOU and the Bill of Exchange. For example, His Honour stated, “We found nothing to justify a 3rd party, wholly unconcerned in the affair, standing forth to institute a proceeding.” Nevertheless, His Honour was prepared to grant a new trial for the counts of slander. This did not satisfy the Attorney General, who harangued the

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527 ibid
528 ibid
529 ibid
530 *Tasmanian*, 14 April 1832
531 *Tasmanian*, 7 April 1832
court for another three hours seeking a new trial\textsuperscript{532} for all counts. His Honour deferred giving a decision on that day.

On 17 April 1832 the \textit{Tasmanian} reports that His Honour Chief Justice Pedder, after due consideration, decided to grant the \textit{rule nisi}\textsuperscript{533} that is a new trial for the counts of slander allegedly perpetrated by Mr O’Connor on Mr Fereday.

The case of \textit{Fereday v O’Connor} highlights the critical importance of land ownership to settlers in colonial Van Diemen’s Land. Disappointment at being prevented from purchasing the property at Cottage Green at his own price festered in Mr O’Connor’s mind, causing him to defame Mr Fereday. The \textit{Courier} of 17 December 1831 provides a revealing comment about the colony’s press: “Were we to detail the whole of the recriminatory expressions used by both sides we should expect ourselves to be the subject of a trial for defamation.”\textsuperscript{534}

Of the trial itself, it is as if the \textit{Courier} had a prescient expectation the case would be discussed some day in the future because it concludes, “It can only be accounted for among the other anomalous practices of the present day which posterity will gape at.”\textsuperscript{535}

This case reveals the vulnerability of persons holding positions of administrative responsibility in the colony. The defendant, an individual with economic power

\begin{flushright}
\textsuperscript{532} \textit{Tasmanian}, 14 April 1832  \\
\textsuperscript{533} \textit{Tasmanian} 17 April 1832  \\
\textsuperscript{534} \textit{Courier}, 17 December 1831  \\
\textsuperscript{535} ibid
\end{flushright}
endeavoured to circumvent appropriate procedures in order to ensure his own ends were met. The court acts in this case to protect the reputation of persons holding administrative positions of responsibility in accordance with the Rule of Law.

7. Meredith v Murray, Supreme Court of Van Diemen’s Land 11 June 1833\textsuperscript{536} Chief Justice Pedder on the bench, assessors William Wilson and Adam Turnbull MD, esquires\textsuperscript{537}

In this case Mr Meredith is the plaintiff, bringing an action for libel against the defendant, Mr Murray. The Attorney General and Messrs Cartright and Allport represented the plaintiff and Mr Gellibrand and Mr Thomas Young appeared for the defendant.

The plaintiff alleged that Mr Murray, while editor and proprietor of the Tasmanian newspaper, published a libel on 14 January 1832. The libel was about a public meeting held at the Hobart Town Court House on 23 May 1831, regarding the writing of a petition to the British Parliament. At that meeting a committee was appointed consisting of Messrs Kemp, J. T. Gellibrand, Horne, Gregson, Edward Abbott, Smith and Meredith.\textsuperscript{538} Two members, Mr Meredith and Mr Smith, however, could not continue to sit on the committee because of their absence from Hobart Town.

\textsuperscript{536} Tasmanian, 12 July 1833
\textsuperscript{537} Hobart Town Courier, 12 July 1833
\textsuperscript{538} Tasmanian, 12 July 1833
Mr Murray was subsequently asked to publish, a copy of correspondence between the committee and the sheriff regarding the meeting.\textsuperscript{539} In response, Mr Murray published an article, the final paragraph of which constituted the alleged libel upon Mr Meredith. This paragraph was:

\textit{“Still, however, if the five gentlemen, Messrs Kemp, Abbott, Gellibrand, Horne and Gregson yet wish us to insert the correspondence, we certainly shall not hesitate to do so because a name, which we apprehend every man of common feeling in the whole colony, will never hear without horror, is carefully omitted throughout.”}\textsuperscript{540}

The plaintiff sought damages of five thousand pounds.\textsuperscript{541}

The damages sought are extremely high, so high, in fact, that it can be wondered if the plaintiff was serious. The Attorney General, for the plaintiff, stated that, at first glance, the person alluded to could be either Mr Meredith or Mr Smith. However, it could not be Mr Smith because, upon reading the article, Mr Smith immediately hastened from the Coal River, visited Mr Murray and was re-assured it was not himself.\textsuperscript{542} Thus the court was required to make a determination of the identity of the person allegedly libelled, essentially through inference.

\begin{footnotesize}
\begin{enumerate}
\item ibid
\item ibid
\item ibid
\item ibid
\item ibid
\end{enumerate}
\end{footnotesize}
The apparent irregularity of Mr Gellibrand acting for the defendant, and being mentioned in the offending article as having been on the committee, is not canvassed. The Attorney General informed the court that the two issues to be decided were: whether the paragraph applied to Mr Meredith and if so, is it libel. The Attorney General insisted that the assessors alone were to determine the case. His Honour Chief Justice Pedder could assist them with his opinion but the assessors were to be the judges of the whole matter.\textsuperscript{543}

Mr Melville’s testimony reveals that the script of the \textit{Tasmanian} was burnt every fortnight by Mr Murray and manuscripts were customarily returned to their authors after publishing.\textsuperscript{544} This is helpful in explaining the scarcity of original early Van Diemen’s Land documents. Alex Castles (2007)\textsuperscript{545} frequently remarks upon the problem of ascertaining accuracy due to the loss or disappearance of records. It could be that the enormity of effort required for survival in a penal colony meant that the early colonists were tunnel-visioned on the present, with little regard for the future.

Notably, Mr Edward Abbott, called twice as a witness for the plaintiff, did not appear.\textsuperscript{546} Mr Abbott, as Van Diemen’s Land’s Deputy Judge Advocate, had presided over the Lieutenant Governor’s Court for the life of that court. Mr Gellibrand, for the defendant, sought a \textit{non-su\textsuperscript{i}t} based upon several grounds. The first – that the paper produced could not be received in evidence because it was not signed and delivered by the printer himself, at the office of the Colonial Secretary, according to the provisions of the

\textsuperscript{543} ibid
\textsuperscript{544} ibid
\textsuperscript{545} Alex Castles, \textit{(2007)}, op. cit., 51, 66 and 70
\textsuperscript{546} \textit{Tasmanian}, 12 July 1833
Newspaper Act - was overruled by Chief Justice Pedder, because the paper signed and delivered was sufficient. The other grounds for non-suiting, however, were that the allegations could not be maintained, and there was no proof that the plaintiff attended the meeting, nor of nomination of persons to the committee, nor that Mr Murray was the author of the article. These grounds were accepted by the court.

The plaintiff was subsequently non-suited, with leave to apply to the court for a new trial.\(^547\)

It is pertinent to consider details of Mr Robert William Felton Lathrop Murray’s life\(^548\) in seeking to understand this case. Early in life Mr Murray claimed descent from a Scottish baron and in English journals in the early 1800’s he was referred to as Sir Robert Lathrop Murray.\(^549\) He attended Cambridge University and became an officer in the 2\(^{nd}\) Royal Manx Fencibles in 1795.\(^550\)

In 1797 Mr Murray married Alicia Marshall in Northern Ireland. Of this marriage a daughter was born, and this child was living with Mr Murray’s relative, Ann Lathrop, in 1803. Mr Murray declared he did not regard his marriage to Alicia Marshall as legal and in 1801 he married Catherine Clarke and this woman bore him a daughter. English law, however, did regard Mr Murray’s marriage to Alicia Marshall as legal. Thus, he was tried for bigamy and found guilty. Unhappy with his conviction, Mr Murray had Catherine

\(^{547}\) ibid
\(^{549}\) ibid, 273
\(^{550}\) ibid, 272
Clarke\textsuperscript{551} write a petition to the Prince Regent. This petition was published, together with Mr Murray’s objections to his conviction and a report of the trial as \textit{An Appeal to the British Nation}\textsuperscript{552} and forwarded to the House of Commons, supported by Sir Samuel Romilly. The House of Commons rejected Mr Murray’s appeal. Thus, in 1815 Mr Murray was convicted of bigamy and transported to Sydney, New South Wales, for seven years. However, he was pardoned in Sydney shortly after his arrival. Tough luck for the two women - Alicia Marshall and Catherine Clarke - who had been duped into an alliance which clearly they considered legal and had borne children to Mr Murray.

In New South Wales after receiving his pardon for bigamy he used his linguistic and literary skills to work his way up from clerk to Assistant Superintendent of the Police Office. He then left New South Wales for Van Diemen’s Land and over the next eight years was given large land grants in the island, becoming a successful farmer.

Mr Murray was also a gifted writer. In Van Diemen’s Land he engaged in letter writing under the pseudonym of ‘\textit{A Colonist}’ between 1824 and 1825, attacking, amongst other topics, the administration’s attempts to control the press. He continued his verbal attacks on the administration as editor of the \textit{Hobart Town Gazette} on 8 July 1825 and of the \textit{Colonial Times} from 19 August 1825 to 4 August 1826. E Morris Miller (1952) points

\textsuperscript{551} Despite the petitions said to have been written by Catherine Clarke to the Prince Regent, Mr Murray showed minimal loyalty to her. In 1806 Lydia Marriott bore him a son and the child was named Edward Kent Stratheam Murray. Lydia was ‘said’ to be married to him despite the fact that Alicia Marshall and Catherine Clarke were neither deceased nor divorced.

\textsuperscript{552} R. L. Murray, \textit{An Appeal to the British Nation}, (2\textsuperscript{nd} ed.), (London, 1815)
out that Mr Murray was careful to criticise the officials and administration of Lieutenant Governor Arthur, as distinct from the Lieutenant Governor himself.553

Mr Murray’s saving grace appears to have been his practice of Freemasonry in Van Diemen’s Land. When he began Murray’s Austral-Asiatic Review on 6 February 1828, continuing under various titles and eventually becoming the Tasmanian and Austral-Asiatic Review until it ceased publication on 26 June 1846, he demonstrated a mellow attitude to the administrators in the colony. Much, therefore, can be said for the civilising influence of Freemasonry and the woman he married on 1 December 1827. This lady, Mr Murray’s fourth wife, was Eleanor Dixon, whose parents were close friends of Lieutenant Governor Arthur.554

It seems a legitimate case can be made out for the relationship between such biographical details and a defendant whose plaintiff is non-suited. Mr Murray’s determination to escape from marriages which clearly were not to his liking, reveals an indomitable spirit, which carried through to his predisposition to find loopholes to avoid prosecution, for example, ensuring that there was no proof that he was the author of the offending article. His ability to find excuses and pose them as legitimate reasons is as evident in the argument that there was no proof of nominations of the persons to the committee, as the argument that the marriage to Alicia Marshall was invalid because the woman was under age. The capacity to disregard convention in the quest for getting his own way is as apparent in ensuring that there was no proof that the plaintiff was at the meeting, as it is

553 E. Morris Miller, (1952), op. cit., 70
554 H. M. Murray, Australian Dictionary of Biography, op. cit., 273
in having Catherine Clarke write a letter of appeal to the Prince Regent. The ability to recognise opportunity, and act upon it to advantage, is as discernible in his use of Freemasonry to achieve respectability in the opinion of the colony’s administration, as it was in his development of a fortnightly procedure whereby all manuscripts of the newspapers were burnt, thereby ensuring the legitimate expunging of evidence.

Mr Meredith, the complainant of the libel, was Mr Murray’s materially successful equal in Van Diemen’s Land, having established himself as a flourishing sheep-farmer from the parent flock he brought with him from England, together with developing a profitable sealing and whale oil export trade, a thriving boat-building and hiring business, and lucrative seasonal cropping and flour-milling activities. However, Mr Meredith developed an antagonistic attitude towards Lieutenant Governor Arthur’s policies, in particular the licensing of the press and his biographer suggests this antagonism constituted a severe restriction on Mr Meredith’s personal life and public spirit.

On the other hand, Mr Murray learned to restrain his criticism, realising this was essential for him to thrive in Van Diemen’s Land. Thus, Mr Murray’s indomitable personal spirit and ability to accurately interpret the parameters of power, are exemplified in the present case. These qualities, in conjunction with the good offices of his counsel Mr Gellibrand, and the concurrence and good will of the court, ensured that the plaintiff’s allegations could not be maintained.

555 David Hodgson, *Australian Dictionary of Biography*, op. cit., 225
556 ibid
The decision is important in that it reveals the court’s *non-suit* decision when contextual evidence shows the defendant is an intimate of those with administrative power. The Rule of the Administration seems to be conveniently applied, rather than the Rule of Law.

8. *O’Connor v Meredith*, Supreme Court of Van Diemen’s Land, 10 July 1833, Chief Justice Pedder on the bench\textsuperscript{557} with assessors Charles Swanston and Charles McLachlan\textsuperscript{558}

This libel action was brought by the plaintiff, Mr O’Connor, proprietor of the *Colonist* newspaper, against the defendant Mr Meredith, for printing and publishing an article in *The True Colonist* of 14 May 1833, entitled ‘Private and Confidential.’ Messrs Gellibrand and Ross appeared for the plaintiff and the defendant appeared for himself, with assistance from Messrs Cartwright and Allport.

The article of 14 May is not republished in the *Tasmanian* but it is published in the case report in *The True Colonist* of 16 July 1833\textsuperscript{559} and was read in court by Mr Gellibrand. The article is a description of an “arrant adventurer” who is “loathed and hated by all good men,”\textsuperscript{560} for example: “The Governor, being under the thumb of an errant adventurer - more acres - large landed proprietor – more money. Is he a moral man? A spy and reporter?”\textsuperscript{561}

\textsuperscript{557} *Tasmanian*, 12 July 1833
\textsuperscript{558} *The True Colonist*, 16 July 1833
\textsuperscript{559} ibid
\textsuperscript{560} *Tasmanian*, 12 July 1833
\textsuperscript{561} ibid
The implication is that Mr O’Connor, as Inspector of Roads and Bridges, where he placed many convicts for employment in the colony’s works, could place convict men for private purposes, including the private purposes of the Lieutenant Governor. The name ‘O’Connor’ is absent from the article.

A further article was published in *The True Colonist* of 25 June, its offensive words including the following:

> “Another attempt is now being made, and by the same parties to deal a blow at the Press, for an article in the *Colonist* of 14 May, which one of the worthies has claimed applicable to himself. How this man, who it is well known has been the author of most of the stiletto attacks upon private individuals, which have week after week appeared in the *Colonial Times* and its twin brother, the *Tasmanian*, can exhibit himself before the public as a prosecutor in a case, and call upon persons to give an identity to an ideal picture, to which a personal application can only be given by means of perjury, and to his own disgrace, we cannot, for the soul of us, conjecture.”

These extracts comprised the essential cause of the action.

Counsel for the plaintiff, Mr Gellibrand, identified the two critical questions to be determined. These were, did the article apply to Mr O’Connor and if it did, was it

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562 *The True Colonist*, 25 June 1833
563 *The True Colonist*, 16 July 1833
The issue of press independence is introduced. Mr Gellibrand identifies a free press as an inestimable blessing, as distinct from a licentious press which “attacks the private history of individuals, insults their morals, outrages the usages of society and becomes a curse instead of a blessing.”

Motivation for the article may well have been jealousy over the amount of land owned by Mr O'Connor. Roderic O'Connor sailed into Van Diemen’s Land with his two sons, William and Arthur, in his own ship, *Ardent* in May 1824. Mr O'Connor immediately received a one thousand acre land grant on the Lake River. Within four years he had trebled the size of his land-holdings, and upon his death in July 1860, he owned eleven properties, totalling sixty-five thousand acres and had ten thousand acres leasehold. The extent to which this was due to the patronage of Lieutenant Governor Arthur enjoyed by Mr O’Connor, remains a matter of conjecture.

Appointed as the colony’s third Commissioner of Survey and Valuation in 1826, for two years Mr O’Connor examined all of the island’s settled districts, providing detailed reports and surveying a road route from north to south of the island. In his subsequent appointment as Inspector of Roads and Bridges, he had control of hundreds of convicts employed in public works. He employed convict labour, through the assignment system, on his own properties and was a strong supporter of the transportation system.

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564 *Tasmanian*, 12 July 1833
565 ibid
566 A. McKay, (ed.), *Journals of the Land Commissioner for Van Diemen’s Land, 1826-1828*, (Hobart: Publisher unknown, 1962), 296
Mr O’Connor was a magistrate and a member of the Caveat Board, a body established to investigate disputed land claims. Thus Mr O’Connor was powerful and wealthy. He superintended New Wharf improvements on land which, known as Cottage Green, once belonged to Reverend Mr Robert Knopwood. It was subsequently sold at public auction to Mr Jennings, and at the time of this case, it was in the possession\textsuperscript{568} of Lieutenant Governor Arthur.\textsuperscript{569}

Witnesses mention the land ownership of the parties. For example, Dr Turnbull, having resided in the colony for eight years, understood Mr Meredith to be one of the largest landholders in the colony\textsuperscript{570} and Dr Ross considered Mr Meredith to be a rich man.\textsuperscript{571} Mr Meredith’s own words in court suggest his gentrification, saying he had been “dragged up from my residence in the country.”\textsuperscript{572} Perhaps the status accorded land ownership emanates from the reason given by one of the witnesses, Mr Thomas Young that the

\begin{itemize}
  \item \textsuperscript{567} Edwin Barnard, ‘Convict gang,’ Exiled, (Canberra: National Library of Australia, 2010), 63
  \item \textsuperscript{568} The True Colonist, 16 July 1833
  \item \textsuperscript{569} Tasmanian, 12 July 1833
  \item \textsuperscript{570} The True Colonist, 16 July 1833
  \item \textsuperscript{571} Tasmanian, 12 July 1833
  \item \textsuperscript{572} The True Colonist, 16 July 1833
\end{itemize}
English free settlers had come to the colony as “adventurers.”\textsuperscript{573} The colonial adventure included land ownership, something which, in England, was difficult, save for a minority through inheritance.

In court, procedure ensuring untainted testimony was followed, with all witnesses, except the one under examination, ordered to leave the court.\textsuperscript{574} All advocates used rhetoric in court, perhaps playing to the entertainment aspect the court scene provided. Being duly reported in the newspapers, the media acknowledged the entertainment value of court cases for readers, aside from the legal principles. For example, Mr Gellibrand “impulsively gave vent to a fine and manly burst of indignant feeling”\textsuperscript{575} and “displayed considerable animation,”\textsuperscript{576} while, when “Mr Meredith rose to reply, at first he appeared to struggle with a sudden rush of feeling, which for a few moments, overpowered the faculty of speech.”\textsuperscript{577} Mr Meredith’s father had been a barrister and solicitor in England, so perhaps some of the father’s advocacy talents persisted in the son.\textsuperscript{578} Mr Meredith used various analogies, some of which relied upon Biblical motifs while others spoke of the hobbies of the English gentry, such as portraying himself as a hunted hare being pursued by lawyer hounds.\textsuperscript{579}

Mr O’Connor and Mr Meredith entered Van Diemen’s Land in similar ways, obtaining land and increasing personal fortunes. For example, Mr George Meredith, with partners

\textsuperscript{573} ibid
\textsuperscript{574} \textit{Tasmanian}, 12 July 1833
\textsuperscript{575} ibid
\textsuperscript{576} ibid
\textsuperscript{577} \textit{The True Colonist}, 16 July 1833
\textsuperscript{578} David Hodgson, ‘George Meredith,’ \textit{Australian Dictionary of Biography}, op. cit., 224
\textsuperscript{579} \textit{Tasmanian}, 12 July 1833
Joseph Archer and T. G. Gregson, chartered the ship, *Emerald* for his voyage to the colony. With his wife Mary, five children and passengers including the Amos family, John Kerr, Francis Desailly and cousin, John Meredith, they sailed into Hobart Town as free settlers on 13 March 1821. They also brought farm equipment and a small flock of merino sheep.

David Hodgson in the *Australian Dictionary of Biography* clearly describes how, through letters of introduction to Lieutenant Governor Sorell, Mr Meredith selected land at Oyster Bay, on the island’s east coast, giving him access to the sea for marketing. At Oyster Bay, he diversified from grazing to whaling, sealing, tanning and flour milling. Unlike Mr O’Connor, Mr Meredith, came into conflict with Lieutenant Governor Arthur over matters such as seeking an elected legislature and freedom for the press. He also had problems with bushrangers who raided his house and killed a servant. Nevertheless, in material wealth, possessions and land, Mr Meredith was Mr O’Connor’s equal.

Mr Meredith reveals an irresponsible attitude to peoples’ reputations in explaining the origin of the libellous article. He states the article was:

“The production of an after dinner joke, the contribution of several individuals. It was a sort of experimental cap, thrown out in a moment of conviviality to fit any person who might please to wear it.”

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580 David Hodgson, op. cit., 225  
581 ibid, 224  
582 *Tasmanian*, 12 July 1833
In summing up to the assessors, Chief Justice Pedder commented “very forcibly” upon Mr Meredith’s admission, stating it “filled him with horror.” Chief Justice Pedder directed the assessors to consider the whole of the article, rather than taking passages singly. His Honour also stated the publisher of a journal is liable for its contents regardless of where he is residing when the journal is published.

Chief Justice Pedder and the two assessors deliberated for half an hour and gave a verdict for the plaintiff, awarding damages of two hundred pounds.

This case reveals the vulnerability of holders of administrative positions in colonial Van Diemen’s Land due to the underlying jealousy of free settlers who have power themselves because of personal wealth. The decision shows the court making determinations which protect the reputations of those who hold such administrative positions of power.

9. Schaw v Meredith, Supreme Court of Van Diemen’s Land, 17 July 1833. Chief Justice Pedder on the bench

The plaintiff, Major Schaw, was commander of the convict ship Lotus, and provided rescue to the shipwrecked victims of the Hibernia. The Colonist published an article

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583 ibid
584 Hobart Town Courier, 12 July 1833
585 ibid
586 Tasmanian, 12 July 1833
587 Tasmanian, 19 July 1833
imputing that Major Schaw ill-treated the rescued victims. The plaintiff sought damages of one thousand pounds for the false, scandalous, defamatory, cruel and malicious libel, published in the Colonist, under the title ‘Loss of the Hibernia’ 28 May 1833.588

Mr Ross represented Commander Schaw. The defendant, Mr Meredith, proprietor of the Colonist, represented himself, assisted by solicitors Cartwright and Allport.

The twelve men selected from the thirty-four men summoned to form the civil jury were: John Dunn, banker, William Goulston, chandler, Benjamin Guy, general dealer, George Gatehouse, brewer, Thomas Haskell, victualler, James Clarke, butcher, John Folley, farmer, William Clark, cooper, Bernard Hill, sawyer and violin player, William Cowley, brewer, John Hanson, carpenter and Edward Howard, general dealer. In this case the occupations of the members of the jury are given. This was not the usual practice in the selected cases.

![Figure (XXXIV): The convict hulk Dougherty (1819) a vessel probably similar to the Lotus](image)

The True Colonist published a paragraph on 9 July 1833, attempting to mollify the plaintiff’s damage,590 interestingly, just eight days before the matter went to trial. In court the defendant attempted to avoid liability by insisting he had privately offered the

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588 The True Colonist, 23 July 1833
590 Tasmanian, 19 July 1833
plaintiff reparation, which was refused,\textsuperscript{591} and he was the proprietor of the \textit{Colonist}, as distinct from the writer of the offending article.\textsuperscript{592} Interestingly, Mr Andrew Bent, as Treasurer of the newspaper, deposed how he obtained the story. He had eavesdropped on survivors of the \textit{Hibernia}, the people who had been rescued by the \textit{Lotus}, and heard them complaining of Captain Schaw’s treatment.\textsuperscript{593} Without making further enquiry about the veracity of the comments he had heard while passing by in the street, Mr Bent wrote the story.\textsuperscript{594} The defendant reminded the jury, by quoting Fox’s \textit{Libel Act}, that they were to judge the law as well as the fact.\textsuperscript{595} The entertainment value caused by the case is apparent from the newspaper’s comment that the trial lasted from eleven in the morning until half past ten at night, and the court was crowded throughout.\textsuperscript{596}

In summing up, His Honour Chief Justice Pedder, informed the jury that the defendant’s absence when the libel was written was immaterial in law; further it was no answer to say the article was published “by report.”\textsuperscript{597} Also, if the defendant had wished to offer up the author of the libel – that is the particular people complaining about Captain Schaw - he ought to have done so in time.\textsuperscript{598} His Honour cautioned the jury that while the defendant’s evidence to justify the writing of the libel must be rejected, nevertheless, Mr Meredith, the proprietor of the newspaper, was not to be considered in a worse point of

\begin{itemize}
\item \textsuperscript{591} ibid
\item \textsuperscript{592} ibid
\item \textsuperscript{593} ibid
\item \textsuperscript{594} ibid
\item \textsuperscript{595} ibid
\item \textsuperscript{596} \textit{The True Colonist}, 23 July 1833
\item \textsuperscript{597} ibid
\item \textsuperscript{598} ibid
\end{itemize}
view. His Honour’s dislike of Fox’s Libel Act is evident in the comment that while the jury was to determine the whole case, nevertheless, His Honour’s functions were not absolutely taken away and he was entitled to make some observations on the subject. This His Honour did, stating that he considered the article was a libel.

After deliberating for two hours, the jury returned to ask the judge if they could return a Special verdict, to which His Honour agreed. After further deliberation the jury returned a verdict for the plaintiff with damages of fifty pounds.

In this decision the court protects the plaintiff who acted from the humanitarian and age-old mariner’s duty to give aid to all in peril on the sea. Commander Schaw was also a member of the colonial administration as the vessel under his command, the Lotus, was a convict transport.

10. Cookney v Brodie, Supreme Court of Van Diemen’s Land 17 December 1833.

Puisne Judge Montagu on the bench

This action for libel was brought by Mr Cookney against Mr Brodie, for printing and publishing a libel in the Independent newspaper. The plaintiff was represented by Mr Gellibrand and the Solicitor General represented the defendant.
The libel consisted of an advertisement stating that Mr Cookney had sent his belongings in a bullock cart to Hobart Town and secretly left his residence in Launceston. The advertisement concluded with the words, “An honest man is the noblest work of God.” The plaintiff interpreted the article as suggesting that Mr Cookney left Launceston without paying his debts. This caused distress and loss of “peace of mind” to both Mr and Mrs Cookney.

Mr Henry Melville was at the time the proprietor of the Independent newspaper. Mr Tremlett, in the Independent office, refused to insert the advertisement without authority. This authority was subsequently given by Mr Brodie, who paid for one insertion of the advertisement.

Judge Montagu stated that Mr Brodie incurred liability for the consequences of publication by paying for the insertion of the advertisement. Thus the judge determined the defendant’s liability during the case. The defendant pleaded the general issue without

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605 The actual date of the edition in which the advertisement was placed is not available.
606 Tasmanian, 20 December 1833
607 Edwin Barnard, Exiled, (Canberra: National Library of Australia, 2010), 97
608 Tasmanian, 20 December 1833
justification interpreted by Mr Gellibrand as the defendant’s admission that the content of
the libel is false.\textsuperscript{609}

The plaintiff’s character was then put in issue, with Mr Tremlett giving evidence of
rumours in Launceston that the plaintiff was “considerably in debt” and his “character,
according to rumour, was very indifferent.”\textsuperscript{610} Dr Ross gave his interpretation of the
advertisement, acknowledging that it imputed Mr Cookney is a swindler, not to be trusted
and a man who desires not to pay his debts.\textsuperscript{611} The Solicitor General’s address to the
assessors continued to destroy the plaintiff’s character, insisting that “rumours were
afloat injurious to the plaintiff’s character” and that unless the assessors considered the
plaintiff had a character to lose they could not “give anything more than the very smallest
amount of damages.”\textsuperscript{612} Judge Montagu continued the destruction of Mr Cookney’s
character in summing up. The judge relied on the testimony of the two witnesses, one
who gave evidence that “there were rumours about”\textsuperscript{613} and Dr Ross’ interpretation of
what “the advertisement imputes to Mr Cookney,”\textsuperscript{614} to conclude the plaintiff’s
character is poor.

After retiring to deliberate together for just ten minutes, the judge and the assessors
returned a verdict for the plaintiff and assessed damages of twenty pounds.\textsuperscript{615}
The libel in this case is an example of an attack upon a man’s credit-worthiness through inference. Although the court’s decision was for the plaintiff, this case reveals prejudicial and biased judicial comment towards the libelled plaintiff. The damage caused to the plaintiff by the libel was exacerbated by the comments of the bench and certainly by the publication of the court report.

11. *Murray v Murray, Supreme Court of Van Diemen’s Land, 11 December 1835*

Chief Justice Pedder on the bench

In this case the plaintiff, Mr Alexander Murray, took action for a libel against the defendant, Robert Lathrop Murray. It is unclear whether the parties had legal representation.

A civil jury was empanelled but subsequently dismissed by Chief Justice Pedder because the pleas contained matter which His Honour considered would be improper to place on the court records. The pleas were not signed by a legal practitioner.

Mr Alexander Murray, the plaintiff, was the Town Surveyor. Mr Robert Lathrop Murray, the defendant, was the publisher of the *Tasmanian* newspaper. It can be inferred that the matter involved land.

Interestingly the case does not appear to have been reported in the *Tasmanian*.

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616 *Hobart Town Courier*, 18 December 1835
The dismissal of the jury by the Chief Justice because of the content of the defendant’s pleas, suggests the colony’s land grant methods may have been involved. His Honour’s reason for discharging the matter was that the content of the defendant’s pleas was “improper to place upon court records.” Thus, the judge was aware of the possible judgment of history upon the matter in the pleas.

The defendant, Mr R. L. Murray, was married to the daughter of people with whom Lieutenant Governor Arthur appeared to have a friendly relationship; Lieutenant Governor Arthur and Chief Justice Pedder had a close friendship, as revealed in continuing correspondence over the years, and they were both members of the Legislative and Executive Councils. It may have been that the material in the pleadings would have embarrassed the executive or revealed the administration in an unflattering light.

It may have been a convention at that time in Van Diemen’s Land that legal practitioners signed the pleas they drafted. The probable inference that the judge was trying to make was that because the pleas were not signed by a legal practitioner, it is likely they were not drafted by a legal practitioner. If the pleadings had not been drafted by a legal practitioner, they may have contained evidence instead of fact. Thus they could have been struck out by the defendant. The Chief Justice’s dismissal of the jury, then, can be seen as a way of striking out, what could have been, in law, defective pleadings. This is, however, conjecture. It seems clear that Chief Justice Pedder took steps to ensure that

617 ibid
618 Alex Castles, (1982), op. cit., 268 – 269, citing Pedder to Arthur, 31 Dec., 1827
619 ibid, 265
matters which could possibly be viewed as improper in the way the colony’s land survey was undertaken, would be hidden from history’s view.

In this case Chief Justice Pedder prevented a plaintiff from bringing a libel case against a member of the administration. Whatever the judge’s motivation, this is an example of the Rule of Law being overridden by the Rule of the Administration. The plaintiff was prevented from having the matter dealt with in court by what appears to have been an arbitrary act of the judge. As the plaintiff, Mr Alexander Murray, was a member of the colony’s administration, it is probable that the defendant, Mr R. L. Murray, had defamed him in the performance of his official duties. It is open to conjecture that the judge prevented the action because of His Honour’s personal relationship with the defendant.

12. Summation of content from the selected Supreme Court libel cases

The following figure shows a summation of the content identified in the selected Supreme Court libel cases:
<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>SPECIES &amp; DAMAGES SOUGHT</th>
<th>OUTCOME</th>
<th>AWARD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murray v Stephens</td>
<td>£2,000.</td>
<td>CJ Pedder found for the defendant</td>
<td>nil</td>
</tr>
<tr>
<td>Butler v Bent</td>
<td>Not Applicable: Fox’s Libel Act explained</td>
<td>CJ Pedder</td>
<td>Not Applicable: Fox’s Libel Act explained</td>
</tr>
<tr>
<td>Kennedy v Bent</td>
<td>No specific amount of damages sought</td>
<td>CJ Pedder and the assessors Captain Bell and Mr Beaumont, found for the plaintiff</td>
<td>£100 damages</td>
</tr>
<tr>
<td>Butler v Bent, 10 May</td>
<td>No specific amount of damages sought</td>
<td>CJ Pedder and a civil jury of 12: Dr Ross, foreman, Messrs Mawle, Watchorn, Bunster, W Lewis, Guy, Hopkins, Mather, Wilson, Wise, Stokell and Walker, decided for the plaintiff on all counts except the conversation with Dr Crowther, which they said was justified</td>
<td>£80 damages</td>
</tr>
<tr>
<td>Fereday v O'Connor,</td>
<td>Punitive damage sought</td>
<td>CJ Pedder and assessors A. Moodie and J. Beaumont, Esqs. found for the plaintiff</td>
<td>£400 damages</td>
</tr>
<tr>
<td>Meredith v Murray, 11</td>
<td>£5000^626.</td>
<td>CJ Pedder and 2 assessors: William Wilson and Adam Turnbull MD, Esqs^627 non-suited the plaintiff</td>
<td>Non-suit</td>
</tr>
<tr>
<td>O’Connor v Meredith, 10</td>
<td>No specific amount of damages sought</td>
<td>CJ Pedder with 2 assessors Charles Swanston and Charles McLachlan^629 found for the plaintiff</td>
<td>£200 damages</td>
</tr>
<tr>
<td>Schaw v Meredith</td>
<td>£1,000</td>
<td>CJ Pedder and a civil jury of 12 found for the plaintiff</td>
<td>£50 damages</td>
</tr>
<tr>
<td>Cookney v Brodie, 17</td>
<td>No specific amount of damages sought</td>
<td>Puisne Judge Montagu and 2 assessors found for the plaintiff</td>
<td>£20 damages</td>
</tr>
<tr>
<td>Murray v Murray, 11</td>
<td>Not disclosed</td>
<td>CJ Pedder and a civil jury – subsequently dismissed because CJ Pedder considered the pleas contained matter which would be improper to place on the Court record</td>
<td>Case dismissed</td>
</tr>
</tbody>
</table>

Figure (XXXVI): Summation of the content in the selected Supreme Court libel cases

^620 Colonial Times, 14 April 1826
^621 Tasmanian and Austral-Asiatic Review, 15 January 1830
^622 Tasmanian and Austral-Asiatic Review, 22 January 1830
^623 Tasmanian and Austral-Asiatic Review, 14 May 1830
^624 Tasmanian, 17 December 1831
^625 Tasmanian, 12 July 1833
^626 ibid
^627 Hobart Town Courier, 12 July 1833
^628 Tasmanian, 12 July 1833
^629 The True Colonist, 16 July 1833
^630 Tasmanian, 19 July 1833
^631 Tasmanian, 20 December 1833
^632 Hobart Town Courier, 18 December 1835
13. Underlying values, and power and powerless polarities in the libel cases

The following figure shows the underlying values and power and powerless polarities identified in the select Supreme Court libel cases:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>ARBITER</th>
<th>VALUE</th>
<th>POWER &amp; POWERLESSNESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murray v Stephens</td>
<td>CJ Pedder</td>
<td>The law of evidence takes precedence over providing redress for individuals injured by libel; eg Secondary evidence of a document will not be received when the original document is in existence</td>
<td>Powerlessness of the plaintiff whose reputation is attacked in writing and the libelling document remains in the possession of the Lieutenant Governor</td>
</tr>
<tr>
<td>Butler v Bent</td>
<td>CJ Pedder</td>
<td>Fox’s Libel Act explained</td>
<td>Juries have power to judge fact and law under the Act</td>
</tr>
<tr>
<td>Kennedy v Bent</td>
<td>CJ Pedder with</td>
<td>Official duties, undertaken by public duties, are of greater value than the rights of private individuals</td>
<td>Powerlessness of an insolvent debtor to achieve fairness in forced creditor sales</td>
</tr>
<tr>
<td>Butler v Bent</td>
<td>a civil jury</td>
<td>No public man is to have his conduct subjected to public animadversion and reproach</td>
<td>Powerlessness of the indigent debtor when debt collecting legal costs are added to the original debt; Powerlessness of the colonial indigent debtor when a new Act providing relief is not known in the colonies. Power, residing in the dominion of a few intimates, has a high potential for corruption</td>
</tr>
<tr>
<td>Fereday v O’Connor</td>
<td>CJ Pedder and 2</td>
<td>The ill of defamation is that it disturbs the peace and harmony of the community; The court’s time is too valuable to be wasted</td>
<td>Power of court to make suppression orders to protect a party’s reputation; Vulnerability of government who, in the course of official duties, follow procedures which conflict with the desires of the public; Vulnerability of government</td>
</tr>
<tr>
<td></td>
<td>assessors, A.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Moodie and J.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Beaumont, Esqs.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

633 Colonial Times, 14 April 1826
634 Tasmanian and Austral-Asiatic Review, 15 January 1830
635 Tasmanian and Austral-Asiatic Review, 22 January 1830
636 Tasmanian and Austral-Asiatic Review, 14 May 1830
637 Tasmanian, 17 December 1831
<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Parties</th>
<th>Court组成</th>
<th>Procedural Details</th>
<th>Legal Implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meredith v Murray</td>
<td>11 June 1833</td>
<td>CJ Pedder and 2 assessors: William Wilson and Adam Turnbull MD, Esqs</td>
<td>Procedural</td>
<td>Powerlessness of plaintiff to sustain an action without sufficient evidence; Power of the court to nonsuit the plaintiff if the defendant shows insufficient evidence to ground the action</td>
<td></td>
</tr>
<tr>
<td>O’Connor v Meredith</td>
<td>10 July 1833</td>
<td>CJ Pedder with 2 assessors, Charles Swanston and Charles McLachlan</td>
<td>Negative value of writing and publishing a libel as a joke is denounced</td>
<td>Power of the court to compensate, through damages, a public official who is labelled in the performance of his duties. A Government official’s vulnerability in the performance of his work to claims of partiality</td>
<td></td>
</tr>
<tr>
<td>Schaw v Meredith</td>
<td>17 July 1833</td>
<td>CJ Pedder and a civil jury of 12</td>
<td>‘False, scandalous, defamatory, cruel and malicious libel’, published in a newspaper is denounced by the court’s decision.</td>
<td>Power of the court to ameliorate the damage caused by a libel</td>
<td></td>
</tr>
<tr>
<td>Cookney v Brodie</td>
<td>17 December 1833</td>
<td>Puisne Judge Montagu and 2 assessors</td>
<td>Paying for the insertion of an advertisement and directing it to be inserted incurs liability; colonial court takes account of ‘rumours’</td>
<td>Powerlessness of the colonial plaintiff to protect his reputation from further assassination in court before an unhelpful and biased judiciary; Power of a judge to cause further harm to a libelled plaintiff in court</td>
<td></td>
</tr>
<tr>
<td>Murray v Murray</td>
<td>11 December 1835</td>
<td>CJ Pedder and a civil jury – subsequently dismissed because CJ Pedder considered the pleas contained matter which would be improper to place on the Court record</td>
<td>Legal practitioners are legal specialists and thus pleadings ought to be drafted by lawyers not laypersons</td>
<td>Absolute power of the judge to dismiss a case to prevent matter being on court records; Powerlessness of the plaintiff to be heard in court if the judge dismisses the case</td>
<td></td>
</tr>
</tbody>
</table>

Figure (XXXVII): Values, power and powerless polarities identified in the selected libel cases

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638 Tasmanian, 12 July 1833<br>639 Hobart Town Courier, 12 July 1833<br>640 Tasmanian, 12 July 1833<br>641 The True Colonist, 16 July 1833<br>642 Tasmanian, 19 July 1833<br>643 Tasmanian, 20 December 1833<br>644 Hobart Town Courier, 18 December 1835

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14. The species of defamation

Of the ten libel cases selected from the Van Diemen’s Supreme Court, one case, that of *Butler v Bent*, 12 January 1830 was for direction about legislation, that is, *Fox’s Libel Act*. Of the nine remaining cases, one case, that of *Cookney v Brodie*, 17 December 1833 is for the personal credit worthiness of a man in his private life, one is for the practice of a profession by a lawyer *Butler v Bent*, 10 May 1830 one is for personal background – in particular, male sexual impropriety *Murray v Stephen*, 12 April 1826, one is for personal dislike probably driven by jealousy *Meredith v Murray*, 11 June 1833, five were for the administration by government officials in their work, *Kennedy v Bent*, 15-16 January 1830, *Fereday v O’Connor*, 13-16 December, 1831, *O’Connor v Meredith*, 10 July 1833, *Schaw v Meredith* 17 July 1833, and *Murray v Murray*, 11 December 1835.

Thus the figures indicate that the more prevalent cause of court proceedings for libels was for an attack on a government official’s performance of his official duties.

This is indicative of the fact that it was a penal colony. In that context, the administrators were developing regulations, and government officials were required to implement the

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645 *Tasmanian and Austral-Asiatic Review*, 15 January 1830
646 *Tasmanian*, 20 December 1833
647 *Tasmanian and Austral-Asiatic Review*, 14 May 1830
648 *Colonial Times*, 14 April 1826
649 *Tasmanian*, 12 July 1833
650 *Tasmanian and Austral-Asiatic Review*, 22 January 1830
651 *Tasmanian*, 17 December 1831
652 *Tasmanian*, 12 July 1833
653 *Tasmanian*, 19 July 1833
654 *Hobart Town Courier*, 18 December 1835
regulations. A large proportion of members of the English community in Van Diemen’s Land did not want to be bound by regulations. For example, the preponderance of the colony’s English population had some convict connection, such as people who had been transported to the colony as convicts and subsequently been emancipated, as well as the relatives and descendants of current and former convicts. Such people could be expected to have an intense dislike of regulations and laws. As well, the population consisted of increasing numbers of free settlers, including ex-servicemen who had served with the British administration. Such people had entrepreneurial ambition and aims. In particular, they wanted the maintenance of societal order and sought it through the implementation of laws regulations.

15. The values supported by the Supreme Court

The values supported by the Supreme Court in the selected libel cases are depicted in the following figure and discussed below:

Figure (XXXVlll): Values supported in the Supreme Court libel cases

There were ten cases selected for discussion. Of these ten Supreme Court cases, five values were attacked by libel. There were five attacks upon government administrators in
the performance of their official duties, one each for personal credit worthiness, sexual impropriety, the performance of a profession and one for an indistinguishable personal attack. These attacks are illustrated in the figure above. Keeping in mind that Butler v Bent, 12 January 1830 was for direction about legislation, that is Fox’s Libel Act, it can be broadly classified as having the value of maintaining government procedures or government administration.

In the nine cases which were decided by the court, there was only a finding for the defendant in one case, that is, the case of Murray v Stephens 12 April 1826. In that case the Chief Justice allowed the plaintiff chose to have a decision for the defendant rather than a non-suit, in order to have an option of subsequently appealing the decision to the Privy Council. There were two non-suit decisions, these being Meredith v Murray, 11 June 1833 and Murray v Murray, 11 December 1835. The defendant in both of these cases was Mr R. L. Murray, the man who established freemasonry in the colony and whose wife’s family were said to have an intimate relationship with the Lieutenant Governor.

The predominant value upheld by the court was the performance of government officers of their official administrative tasks. Other values which were upheld were:

- the personal credit worthiness of a private citizen, and
- the performance of a profession.

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655 Tasmanian and Austral-Asiatic Review, 15 January 1830
656 Colonial Times, 14 April 1826
657 Tasmanian, 12 July 1833
658 Hobart Town Courier, 18 December 1835
The figure below indicates the values:

column 1 = the performance of government officers in their official administrative tasks,

column 2 = the performance of a profession, and

column 3 = a private citizen’s personal credit worthiness.

![Figure (XXXIX): A comparison of the values identified in the selected Supreme Court libel cases](image)

The figures support the conclusions that government officials' performance of administrative tasks were:

- a vulnerable aspect of reputation,
- a likely aspect of a man’s reputation to be attacked, and
- a likely subject for libel actions,

in the Van Diemen’s Land community at that time.

**16. Conclusion**

In each of the ten Supreme Court libel cases considered, and of those the nine which were trials, the plaintiff sought the assistance of the court to protect reputation. The case found for the plaintiff in six of the nine cases, initially.
The court gave the plaintiff a choice of being *non-suited* or a finding for the defendant in one case, *Murray v Stephen*, and because the plaintiff wanted the option of appealing the decision to the Privy Council, he chose to have the finding for the defendant.

In two cases the plaintiff was *non-suited*, *Meredith v Murray*, 11 June 1833,\(^{659}\) and *Murray v Murray*, 11 December 1835.\(^{660}\) In *Meredith v Murray*, 11 June 1833,\(^{661}\) the plaintiff was *non-suited* because he could not provide sufficient proof of evidence, such as identity of the person nor presence at the meeting. In the other case, *Murray v Murray*, 11 December 1835,\(^{662}\) the Chief Justice dismissed the jury because the pleadings contained matter His Honour deemed inappropriate to be included on court records. The plaintiff in that case was a government administrator - town surveyor - . In both of these *non-suited* cases, the defendant was Mr R. L. Murray, the initiator of Freemasonry in the colony and currently married to a woman whose family, it is implied by the biographer, was on friendly terms with Lieutenant Governor Arthur.\(^{663}\)

Damages were given in six cases ranging from twenty pounds for libelling a man’s creditworthiness in private life, while in the case where a man in the practice of his profession was attacked, damages were set at fifty pounds. The three cases in which the highest damages were awarded - the amounts being one hundred pounds, two hundred pounds and four hundred pounds – were for government officers libelled for the

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659 *Tasmanian*, 12 July 1833
660 *Hobart Town Courier*, 18 December 1835
661 *Tasmanian*, 12 July 1833
662 *Hobart Town Courier*, 18 December 1835
663 H. M. Murray, op. cit., 273
performance of official duties. The awarding of highest damages for public officers indicates the court’s determination to send a very strong message to the community that criticism of government officers in the performance of their official duties would not be tolerated. Thus the power of the government was emphasized.

The jurisprudence of these selected libel cases supports the conclusion that:

- the individual, alone, is powerless to protect his reputation,
- the individual is entitled to seek the court’s assistance to protect reputation,
- the court has power to act to protect the individual’s reputation through amelioration by awarding monetary damages, and
- the court may well have been motivated by arbitrary administrative considerations as distinct from the Rule of Law principle that all persons are to be treated equally before the law.

Thus in the Supreme Court of Van Diemen’s Land, the selected cases support the deductions that:

- a man’s performance of his official duty for the government in his role as a government officer was the most common attribute attacked in libel, and
- the Supreme Court would protect the reputation of a government official in the performance of his official duties.
CHAPTER EIGHT: VAN DIEMEN’S LAND CRIMINAL LIBEL CASES

1. Introduction

In this chapter, the facts of each case are provided followed by a discussion of the case. An attempt is made to identify the values, power and powerlessness polarities of the plaintiff and defendant. The extent to which the Rule of Law endures in decisions is discussed.

The following criminal libel cases are discussed:

- *R v Bent (No 1)*, 26 July 1825\(^{664}\)
- *R v Bent (No 2)*, 1 August 1825\(^{665}\)
- *R v Bent*, 15 April 1826\(^{666}\) – the return to court of *R v Bent (No 1)* for a retrial
- *R v Bent*, 15 May 1827\(^{667}\)
- *R v Montagu*, 22 June 1829\(^{668}\)
- *R v Gregson*, 2-3 November and 8 November 1832\(^{669}\)
- *R at the prosecution of J. T. Gellibrand v Gregson*, 3 November 1832\(^{670}\)
- *R v Browne (No 1)*, 14 August 1833\(^{671}\)

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\(^{664}\) Hobart Town Gazette, 29 July 1825
\(^{665}\) Hobart Town Gazette, 5 August 1825
\(^{666}\) Colonial Times, 15 April 1826
\(^{667}\) Hobart Town Gazette, 19 May 1827
\(^{668}\) Colonial Times, 26 June 1829
\(^{669}\) Tasmanian, 9 November 1832
\(^{670}\) Tasmanian, 9 November 1832
\(^{671}\) Tasmanian, 16 August 1833
• R v Browne (No 2), 14 August 1833
• R v Robertson (No 1), 9 March 1835
• R v Robertson (No 2), 7 April 1835
• R v Murray, 25 and 29 September 1835

2. R v Bent (No. 1) 26 July 1825

Chief Justice Pedder on the bench

The case of R v Bent (No. 1) came to the Van Diemen’s Land Supreme Court for the first time on 26 July 1825. The colony’s Attorney General commenced this action because Andrew Bent printed defamatory comments about Lieutenant Governor Arthur. Hence it is known as an ex officio prosecution.

The matters in this case are complex. On 8 October 1824 the Hobart Town Gazette published an article which labelled the colony’s Lieutenant Governor Arthur, the “Gideonite of tyranny.” Then, on 11 February 1825 the Hobart Town Gazette published an article referring to two unflattering incidents in Lieutenant Governor Arthur’s previous administration in the Honduras.

The first incident mentioned in the Hobart Town Gazette of 11 February 1825 relates to Lieutenant Governor Arthur’s investigation of Honduras missionaries’ cruelty to slaves.

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672 The True Colonist, 20 August 1833
673 The True Colonist, 11 and 14 March 1835
674 The True Colonist, 17 April 1835 and 15 May 1835
675 Tasmanian, 2 October 1835
676 Hobart Town Gazette, 29 July 1825
677 ibid
This investigation was undertaken by Lieutenant Governor Arthur, then Colonel Arthur, before he came to Van Diemen’s Land. Colonel Arthur found the missionaries’ behaviour towards the slaves abhorrent and he wrote a Memorandum to England which was highly critical of the missionaries. The missionaries retaliated by publishing a pamphlet, *Defence of the Settlers of the Honduras* (1825)\(^{678}\) in which they condemned Colonel Arthur’s findings as unjust and unfounded.\(^{679}\) The *Hobart Town Gazette* actually printed extracts of the pamphlet which had been published in the London papers.

The second incident mentioned in the *Hobart Town Gazette* of 11 February 1825 related to Lieutenant Governor Arthur’s disciplining of a British Army Officer, Colonel Bradley, in the Honduras. Again, this incident occurred before Lieutenant Governor Arthur came to Van Diemen’s Land. Colonel Bradley took legal action against then Colonel Arthur when he returned to London. Colonel Bradley received a small amount of compensation for his claim but he was eventually dismissed from the service for writing offensive letters to the Duke of York’s Military Secretary. These two publications, then, were the basis for the case which came for trial on 26 July 1825.

The report of the trial provides *verbatim* questions by counsel and the judge, together with the answers given by Crown witnesses. The result is a word picture of the proceedings before the court. Long sections of counsel’s dialogue are reproduced. Commonly there are thirty lines of print with an average of twenty words in each line,

\(^{678}\) Unnamed author, *Defence of the Settlers of the Honduras*, (London: Cradock and Joy, 1825)

\(^{679}\) *Colonial Times and Advertiser*, 2 September 1825
with very little punctuation. This imposes on the reader the discipline of concentrating on a stream of consciousness of the speaker during the trial.

The report emphasises the court’s power in two ways. Firstly, it portrays the law as a specialist body of knowledge. For example the report reproduces citations of the legal sources on which counsel and the judge rely during the trial. Secondly, it reports the direct speech of the judge and counsel, emphasising judicial power. For example: “The Chief Justice Pedder acknowledges the right of the press to make fair and temperate comments of public measure”680 but “insists it is libel to impute malicious or tyrannical motives to the Lieutenant Governor and to hold him up for obloquoy.”681

The jury found Mr Bent guilty but did not specify on which counts. Thus, the judge ordered a re-trial. This re-trial was \textit{R v Bent 15 April 1826},682 a case which is discussed later in this chapter.

The case can be said to reveal the powerlessness of the defendant. It identifies judicial reliance on, and adoption of, English legal principles and precedent. It identifies and denounces attempts to establish a defendant’s guilt on insufficient evidence as a negative value. The judicial insistence on the prosecution’s provision of adequate evidence is an indication that the Rule of Law was being applied in that the defendant was protected from arbitrary prosecution. Nevertheless, the apparent error of the jury in not specifying

\begin{footnotesize}
\begin{itemize}
  \item[680] E. Morris Miller, (1952), op. cit., 86
  \item[681] ibid, 87
  \item[682] \textit{Colonial Times}, 15 April 1826. At the retrial, the jury again found Mr Bent guilty and did specify the counts. Mr Bent was subsequently imprisoned and fined.
\end{itemize}
\end{footnotesize}
the counts on which they found Mr Bent guilty, subjected him to a re-trial on the same facts. The principle of double jeopardy wherein a defendant can not be prosecuted twice on the same facts\textsuperscript{683} ought to have protected Mr Bent.

3. \textit{R v Bent (No. 2), Supreme Court of Van Diemen’s Land, 1 August 1825}\textsuperscript{684} Chief Justice Pedder on the bench

This trial for three different alleged libels was before a military jury consisting of Major Kirkwood, Captain Morrow, Captain Hibbert, Lieutenant Curtis, Ensign Moore, Major De Gillern, half pay, and Cornet Gage, J. P., half pay, all from the Fortieth Regiment. The Solicitor General, Alfred Stephen stated the Information filed by the Attorney General, for libels composed, printed and published by Mr Andrew Bent, the defendant, printer and publisher of the \textit{Hobart Town Gazette} on 18 February 1825, 25 February 1825, and 20 May 1825.

The first alleged libel of 18 February is published in the report of the case. Essentially it exhorts:

“Our official guardians to remember that public money and public confidence require a public display of grateful conduct; and although power, mere power unallied to virtue may strut and fret its hour on the stage, yet it must be followed by abasement and remorse for every action it has mal-performed.”\textsuperscript{685}

\textsuperscript{683} Bryan A. Garner, (1999), op. cit., 506
\textsuperscript{684} \textit{Hobart Town Gazette}, 5 August 1825
\textsuperscript{685} ibid
The second alleged libel published on 25 February is also published. It criticises the salaries paid to the administrators, for example, “a Naval Officer and a Treasurer at £700 per year,” and comments that more official administrative positions have been created since the departure of Lieutenant Governor Sorell, and with larger salaries, than considered necessary in New South Wales. It labels the Van Diemen’s Land positions “sinecures.”

The third alleged libel printed on 20 May is also republished. It is prolonged criticism of administrators with ambiguous characters and names. For example, the article suggests that the officials are “men of office without either talent to discern or perseverance to achieve public benefit.” This alleged libel seems to be a sustained comparison between the previous administrators and the current administrators, with the current administrators painted most unflatteringly. There is a direct reference to Lieutenant Governor Arthur in the sentence:

“Nevertheless, as our Monarch’s delegate may yet become popular if he will condescend to learn wisdom from experience and henceforth legitimately use his power for the welfare of all who are committed to his care.”

His Honour Chief Justice Pedder asked the Attorney General how these matters could be shown applying to the Lieutenant Governor, to which the Attorney General replied it was the “obvious meaning of words” with the libels imputing corrupt motives to the Lieutenant Governor.
In a written defence Mr Bent stated the articles were only “fair political discussion,” relying on English case law which held that the conduct of the administration of government is a fair subject of legitimate discussion. Mr Bent also contended that he was being charged with composing, printing and publishing matter when Mr Evan Henry Thomas was the editor and indeed, the writer. Evan Henry Thomas, a free settler, had arrived in the colony on 19 August 1822, a talented young man, whose literary skills included shorthand.

In his summing up for the jury, Chief Justice Pedder conceded that every man has a right to express his sentiments upon the administration of the public affairs provided that it is done fairly and properly. Nevertheless, the judge pointed out that it was libel to import corrupt or tyrannical motives to any government or administrative officer. His Honour was not interested that the defendant offered to give up the name of the writer; the mere facts of publication and the meaning and intention of the matter were the real issues.

His Honour left it to the jury to come to a conclusion as to whether the defendant was guilty. The jury deliberated for two hours and thirty minutes hours and returned with a finding that the defendant was guilty on all counts. The defendant returned to court on 29 March 1826 for sentencing. In pronouncing the sentence, the judge observed that it cannot but be highly libellous to impute to any government a wilful system of mal-administration – that its acts are wicked and corrupt. The judge relied on the current position in England, stating:

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686 Hobart Town Gazette, 24 August 1822
687 Tasmanian Almanack, 1825. (Hobart: Andrew Bent, 1825)
688 Hobart Town Gazette, 5 August 1825
689 Colonial Times, 31 March 1826

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“If libels upon the government are considered highly criminal in England how much more so must all such libels be in a colony constituted as is this, at such distance from the parent state.”

Such judicial comment is evidence that the difference of the unique penal colony context was apparently not realized. The judge stated he was unable to see any difference between the writer of the libel and the publisher. The judge further stated he had discretion in sentencing, which can be taken as an indication of his desire to remind those in court of his power. Chief Justice Pedder sentenced Mr Bent to imprisonment for three months, to pay a fine of two hundred pounds, and to give recognizances of good behaviour of two hundred pounds as well as two sureties of one hundred pounds each. Recognisances are obligations or bonds, acknowledged before a court of record and afterwards enrolled on the court records. The object is to secure the performance of some act, for example to keep the peace or to be of good behaviour.

This case clarifies the elements of criminal libel as they were identified by the Supreme Court of Van Diemen’s Land at that time: the intention and the actual publication of the material. The individual’s right of freedom of speech was curtailed. The acceptable parameters set down by the judge were observations without criticism of those who held administrative positions. This decision shows that the principle underpinning the Rule of Law, that of the individual’s right of freedom of speech, is severely curtailed.

690 ibid
4. R v Bent 15 April 1826\(^{692}\) — the return to court of R v Bent (No. 1) for a retrial.

**Chief Justice Pedder on the bench**

The facts grounding this case are stated previously in R v Bent (No. 1) 26 July 1825.\(^{693}\)

The reason for the publication likening Lieutenant Governor Arthur to a “Gideonite of Tyranny” can be seen from a dispute over the ownership of the press. Mr Bent claimed he was entitled to ownership of the *Hobart Town Gazette*, based upon transactions he had made with former Lieutenant Governor Sorell. Despite documentary evidence of these transactions Lieutenant Governor Arthur claimed the newspaper belonged to the Government. Mr Bent thus sent Mr Evan Henry Thomas as his agent to Sydney to gain a decision from Governor Brisbane. Governor Brisbane agreed that the paper belonged to Mr Bent. In the article of 8 October Mr Bent announced Governor Brisbane’s decision to the public: Mr Bent owned the type and the only press on the island.

The Crown’s case against Mr Bent was based upon the philosophy that a newspaper was entitled to discuss fairly and respectfully public men and public measures, however the offending articles, had caused the greatest injury and would detach the people from the government.

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\(^{692}\) *Colonial Times*, 15 April 1826  
\(^{693}\) *Hobart Town Gazette*, 29 July 1825
The Attorney General considered the consequences of allowing such writings to go unpunished would be that the administration would lose control. Thus the Attorney General’s argument was based upon the fear that an example had to be set by the court to prevent an outbreak of libel – maybe promote civil unrest - in the community. His fear could have been grounded in a knowledge of the Van Diemen’s Land community which bred individual competition and harboured bitterness towards those who appeared to do well. Mr Gellibrand for the defendant put all the blame upon Mr Thomas who wrote the article upon his return from visiting Governor Brisbane.

In summing up for the jury Chief Justice Pedder insisted that there was not any direct evidence that Mr Bent instructed Mr Thomas to write the articles. The inference being, therefore, that Mr Bent was the writer. The two essential questions for the jury were whether the facts proven and the intention of the words. His Honour mentioned several

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694 J. W. Beattie, *Governors of Tasmania*, (Hobart: Mercury printers, 1896), unnumbered
cases in which it was held that all publishers are liable for what they make public, even in cases where they do not actually know the content. According to the judge, the entire proof rested on Mr Thomas’ testamentary evidence. The judge exhorted the jury to give the words their plain and fair construction, not exactly from themselves alone, but from the whole context. This instruction in itself is somewhat ambiguous because words have a meaning independent of context, yet their meaning is altered by context. Finally, the judge told the jury that to accuse the Governor of tyranny is a libel.

After such judicial comment it is little wonder that the jury within one hour found the defendant guilty of printing and publishing the article containing the expression “Gideonite of tyranny” and not guilty on the other counts. On 15 May 1826, when Mr Bent was to be sentenced, Mr Gellibrand made representations for an arrest of judgment upon the ground that Mr Bent had been found guilty of printing and publishing the article, whereas evidence had only been of publishing, and Chief Justice Pedder had ruled that printing was to include publishing. This can be seen as a valiant effort on the part of counsel to gain justice for the client. It had the effect of delaying the sentence while the judge apparently considered it.

On 22 May 1826 before delivering the sentence, Chief Justice Pedder received further argument from Mr Gellibrand that printing and publishing were in law separate arts. The defence raised two points, these being that the judge had misdirected the jury and there was insufficient evidence for the matter to go to the jury. This was akin to an appeal, albeit that the judge at first instance was also the appeal judge.

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695 Colonial Times, 19 May 1826
696 Colonial Times, 26 May 1826
Chief Justice Pedder responded energetically. Mr Gellibrand had argued that the fact of publishing includes printing and is established by the Appeal Case of *Elphinstone v Baldwin*, a case for libel, decided by two judges in 1771 and cited in Blackstone. Chief Justice Pedder gave an exposition of that case, citing that Lord C. J. de Grey had stated that the act of printing must include publication. Chief Justice Pedder concluded his summation of his reading of *Elphinstone v Baldwin* with the comment: “So much for the objection that I mis-directed the jury.” It is as if Chief Justice Pedder has validated his behaviour and is patting himself on the back.

The Chief Justice then responded to Mr Gellibrand’s objection that there was insufficient evidence to go to the jury. The judge expounded upon the English case of *King v White*, where a libel written on the Government by an Independent Whig, was considered a parallel with the present case. Chief Justice Pedder relied upon the statement of the principal witness, Mr Thomas, that the paper was printed and published by Mr Bent, leaving the onus of proving he did not print and publish the paper with Mr Bent. The judge also cited the case of *Duke of Athol v Pearse*. In that case, despite there being no proof that the paper which was produced was published by the printer, Lord Kenyon held it was unnecessary to prove that the identical paper produced was actually published by the defendant. Thus the judge decided Mr Bent’s verdict must stand.

This judicial reasoning is evidence of Chief Justice Pedder’s ability as a legal researcher, his determination to show that he knew the law and his ability in advocacy to develop the reasoning best suited to his purpose. It can also be seen as an effort to justify himself to

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697 ibid
698 ibid
the audience of the colonial court as being worthy of holding the position of Chief Justice. It would have been known in the colony that he had only been admitted to the English Bar in 1820, just six years before this case. Also, just one year before this case he had been directly involved in the plot which had Mr Gellibrand, the colony’s then Attorney General, dismissed from office.699

Mr Solicitor Ross provided an affidavit from Mr Bent in mitigation of punishment, the content of which being that Mr Thomas wrote the article, Mr Bent, upon understanding the writing was objectionable, had dismissed Mr Thomas, and Mr Bent had a wife and five dependent children.700 Despite these factors, the judge sentenced Mr Bent to imprisonment for three months, to commence when his current sentence expired, to pay a further fine of one hundred pounds and to be imprisoned until the fine be paid. The judge’s final comment to Mr Bent was: “I hope that this will prevent your newspaper continuing to be the tool of a faction.”701

This judicial comment is unfortunate because it overlooks the reason why the article was written. That reason was that the man who had bought a newspaper press from the previous Lieutenant Governor, and had documentary evidence to prove the transaction, and the legitimacy of the transaction had been accepted by Governor Brisbane in New South Wales, was being denied legitimacy of ownership of the press by the present Lieutenant Governor. Such a foundation hardly seems the fuel to motivate a faction into action.

699 Alex Castles, (1982), op. cit., 266
700 Colonial Times, 26 May 1826
701 ibid
The *Colonial Times* of 12 January 1827\(^{702}\) published a comment upon this judgment pointing out that the only proof of printing and publishing was the production of a newspaper, without showing where it was printed or published or from whom it came. English case law, as provided by counsel for the defence, Mr Gellibrand, showed that the defendant ought to have been acquitted on the lack of proper evidence, instead of sole reliance upon the testimony of Mr Thomas, an employee who had been sacked.

Mr Thomas’ invidious position, as the writer of the article and the chief witness against Mr Bent, the man who had employed him as editor, is canvassed by E. Morris Miller (1952).\(^{703}\) The subsequent retirement of Mr Thomas from newspaper writing after this case is not surprising. Was it just coincidental, however, that Mr Thomas received a one thousand acre grant of land in northern Van Diemen’s Landon 11 January 1826?\(^{704}\) It is not so difficult to rationalize that the land grant was a reward by the Lieutenant Governor to Mr Thomas for being a Crown witness against Mr Bent. However as E. Morris Miller points out, it was hardly a secret that Mr Thomas was the writer of the articles.\(^{705}\)

However, there could well have been another motive for the grant. It is highly likely that Lieutenant Governor Arthur was aware of the talents of Mr Thomas as a writer and realized that his youthfulness made him a target for other less literary-gifted anti-government thinkers, to hire him to write for them. Thus, the granting to Mr Thomas of one thousand acres of land in the north of the island, put the young writer out of easy

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\(^{702}\) *Colonial Times*, 12 January 1827  
\(^{703}\) E. Morris Miller, op. cit., 71  
\(^{704}\) ibid, 74  
\(^{705}\) ibid, 76
reach of such potential anti-government factions, and gave him something of immediate concern: the clearing and bringing into production of one thousand acres of land.

As it turned out, Mr Thomas did not sustain an interest in the land he had been granted. E Morris Miller’s painstaking research reveals Mr Thomas’ grant was transferred to Robert Bostock on 13 October 1836, just fourteen months before Mr Thomas died on 26 December 1837 aged thirty-six years.

The consequences of the decision for Mr Bent were severe. He was imprisoned for six months, fined three hundred pounds, together with costs amounting to almost six hundred pounds. The final sentence in the Colonial Times’ article reveals a serious problem confronting litigants in Van Diemen’s Land, that of difficulty of appeal. The article states:

“The best of judges are liable to err; and it is clear to us that if we had been tried by the Chief Justice of England, instead of Van Diemen’s Land, that we must have been acquitted.”

There could well have been a bitter-sweet note for Lieutenant Governor Arthur about Governor Brisbane’s determination that Mr Bent had proprietary rights over the Hobart Town Gazette and the printing equipment. The equipment sold to Mr Bent had been working for many years in the colony. With its ownership passing to Mr Bent, Lieutenant

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706 ibid, 74
707 Bent’s News, 30 December 1837
708 Colonial Times, 12 January 1827
Governor Arthur had a legitimate reason to the provision of a replacement printing press for the colony as soon as possible.

E. Morris Miller (1952)\textsuperscript{709} discusses the role of Evan Henry Thomas in relation to Andrew Bent’s \textit{Hobart Town Gazette} saga. Mr Thomas arrived as a free settler on the \textit{William Shand} on 19 August 1822 at just twenty-one years of age\textsuperscript{710} and married Sarah Wallis on May 23 1823.\textsuperscript{711} In the two years following his arrival in Van Diemen’s Land he dabbled in various occupations, including real estate agent, inn-keeping, teaching, pastry-cooking and then became Mr Bent’s editor and agent.\textsuperscript{712} His success in gaining Governor Brisbane’s concurrence, based upon the documentary evidence, that Mr Bent was the rightful owner of the \textit{Hobart Town Gazette} and plant, no doubt would have boosted his self confidence. His first editorial published in the \textit{Hobart Town Gazette} of 18 June 1824 illustrates Mr Thomas’ lyrical and figurative style of writing as he espouses his aim for the \textit{Hobart Town Gazette}:

\begin{quote}
“We esteem ourselves as a Beacon placed by divine graciousness on the awfully perilous coast of human frailty, to warn the inexperienced, direct the benighted, and impress with confidence the vacillating. We view ourselves as a sacred sentinel bound by allegiance to our Country, our Sovereign and our God. We contemplate ourselves as winnowers for the public, to dispense the chaff of folly or the tares of depravity, and to refine the grain of reason or of virtue. And with a
\end{quote}

\textsuperscript{709} E. Morris Miller, op. cit., 62
\textsuperscript{710} ibid, 63 and 74
\textsuperscript{711} ibid, 64
\textsuperscript{712} ibid
deep conviction, that not alone the prostitution, but also the neglect of power, would be highly criminal in us and baneful to the community, we unite a most ardent wish to effect all we can in furtherance of ethics, literature and science."713

The language of this editorial tells as much about the colonial society as it was at that time as it does about the literary skills of Mr Thomas. Firstly, the memory of the hazardous sea voyage to the island is conjured up in the first sentence: the sailing boats were in peril on the dark oceans, the fear of shipwreck never far away, the possibility of uncharted rocks and the absence of warning beacons on the coasts of a land as yet virtually unexplored. The second sentence plays upon the known stabilizing elements of the society of Britain: Country, Sovereign and God. These words are offered as stays in the uncertain and unknown colonial experience. In the third sentence, metaphors of agricultural harvest are introduced with the press portrayed as ‘winnowers’ separating ‘grain’ from ‘chaff’, just as the punishment of convict life was expected to bring forth a better harvest in the populace of both Britain and the colonies. The final sentence cleverly mentions one of the colony’s banes: ‘prostitution,’ linking it with the word ‘criminal’. In a community where the population of men far outweighed the women, this technique was couched to have universal appeal to readers, uniting those who decried prostitution, those who practiced it and those who just knew it existed.

The editorial concludes with a mention of the three universal salves for society’s ills: ethics, literature and science. Mr Thomas thus reveals himself to be one with exceptional

713 Hobart Town Gazette, 18 June 1824
literary talent. E. Morris Miller (1952), having fully examined the editorial work of Evan Thomas, concludes that:

- he employed the customary classical illusions of the time,
- was bi-partisan in his consideration of issues, and
- had a style probably lacking appeal to the more politically-action-oriented members of the community.\(^{714}\)

It was the article of 20 May which E. Morris Miller (1952) posits:

“settled Bent’s guilt as printer-publisher and proprietor according to the law of libel as interpreted in the year 1825 and the military jury of seven had no doubts on the question.”\(^{715}\)

This case is strong evidence that Chief Justice Pedder applied the English statute and common law for libel currently in England in accordance with his interpretation of it. This interpretation was determined by the context of Van Diemen’s Land, where those in administrative positions were intent upon maintaining power over a predominantly convict population. The individual’s freedom from arbitrary court decisions was jeopardized by the Crown’s reliance upon the testimony of one witness. The substantial grant of land to the Crown witness consequent upon the decision is strongly suggestive of the conclusion that the Rule of Law was not adhered to in this case.

\(^{714}\) E. Morris Miller, op. cit., 67  
\(^{715}\) ibid, 69
5. *R v Bent*, Supreme Court of Van Diemen’s Land, 15 May 1827

Chief Justice Pedder on the bench

The facts of the case are that Mr Andrew Bent was accused of printing and publishing two “scandalous and malicious” libels in the *Colonial Times* of 2 February 1827. The first alleged libel was an extract copied without comment from the Sydney published newspaper *Australian*. The article concerned a head-money fee, instituted by Governor Macquarie on 12 October 1811. The head-money fee required all free persons leaving the Port of Hobart Town to pay two shillings and sixpence. In December 1826 the crew and passengers of the vessel *Australia* were required to pay the fee. The article imputed “improper motives” to Lieutenant Governor Arthur in exacting the fee from the vessel *Australia*.

The second alleged libel was an article claiming that Lieutenant Governor Arthur paid Mr Thomas, the Colonial Secretary, six shillings and six pence per bushel for one thousand bushells of wheat when other settlers were only being paid five shillings per bushel.

In court witnesses proved the wheat payment was incorrect; in particular, Mr Thomas proved that he tendered at five shillings and six pence per bushel. In response to the second libel, the Chief Clerk in the Colonial Secretary’s Office, Mr Emmett, gave evidence about the fate of the two shillings and six pence head money. Up until April

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716 *Hobart Town Gazette*, 19 May 1827
717 *Colonial Times*, 18 May 1827
1826, one shilling of each two shillings and six pence had gone to the Chief Clerk’s use and one shilling and six pence had gone to the Colonial Secretary’s use.\textsuperscript{718}

After April 1826 the Secretary’s portion went to the Public Fund, while the Chief Clerk, Mr Emmett, continued to receive his one shilling from every two shilling and six pence head-tax until 1 January 1827, when, by direction from the local government, the entire two shillings and six pence went to Colonial Revenue, on the basis that it was considered public money.\textsuperscript{719} According to Mr Emmett, the head money was abolished completely six weeks ago. However, the vessel \textit{Australia} left Hobart Town in December, prior to the tax being abolished.\textsuperscript{720}

The revelation by Mr Emmett that free persons sailing out of Hobart Town had apparently been funding the personal enrichment of the Chief Clerk and Colonial Secretary since the tax had been introduced in 1811, can be expected to have received a hostile response from the colonists. This issue, however, is not canvassed in the report of the case.

Mr Bent represented himself. He read a short written defence, showing he had contradicted the statements about the wheat in his newspaper the following week.\textsuperscript{721} Mr Bent was refused the right to read the apologies he had made in the newspaper on the ground that it was inadmissible in law, having been published in a different edition of the newspaper from that in which the offending articles were published. The judge did not provide authority for this ruling and was not challenged by the unrepresented defendant,
Mr Bent.\textsuperscript{722} The judge, however, stated that the corrections Mr Bent had made in the newspaper could be offered in mitigation of judgment at a later stage in proceedings.

The judge directed the jury to consider whether there was any malice on the part of the defendant in publishing the articles. They were to determine the issue of malice from the general tendency of the articles. If they found the articles were published with the intention of bringing the Lieutenant Governor into contempt and hatred they were libels. However, if the jury had any doubt about the defendant’s “malicious intention” at the time of publication, acquittal was appropriate.\textsuperscript{723}

The jury found Mr Bent guilty.\textsuperscript{724} Mr Bent was thus required to enter into recognizances of one hundred pounds and two sureties of fifty pounds each, and to appear at a later date for sentencing.\textsuperscript{725}

The \textit{Colonial Times} adds the comment from the prosecutor, Solicitor General Mr Stephen, that had Mr Bent disclosed the name of the person who gave the misinformation about the wheat, Mr Bent would not have been brought to trial.\textsuperscript{726} This may or may not have been correct. After all, in the prior cases of \textit{R v Bent}, the Chief Justice appeared to be only interested in the publication of the article.

This case highlights the corruption which was practiced by those entrusted with administrative positions of responsibility in Van Diemen’s Land. The original specified use to which Governor Macquarie’s head-money tax was to be applied is not mentioned.

\begin{flushright}
\textsuperscript{722} ibid
\textsuperscript{723} ibid
\textsuperscript{724} \textit{Hobart Town Gazette}, 19 May 1827
\textsuperscript{725} \textit{Colonial Times}, 18 May 1827
\textsuperscript{726} ibid
\end{flushright}
Without legal representation Mr Bent was not in a position to seek access to official documentation for it, that is if any existed. The fact that the vessel *Australia* left port before the head-money tax was rescinded clouded the issue of misappropriation of government-derived funds. Clearly officials had ‘feathered their own nests’ with the head-money tax for sixteen years. It would seem that the tax had only been rescinded when Mr Bent’s article was published.

The case also demonstrates the helplessness of an unrepresented defendant. For example, while Mr Thomas may well have tendered five shillings and six pence per bushel for the wheat, however that was not evidence that he had been paid five shillings and sixpence per bushel. Mr Bent had neither the means nor legal knowledge to call for appropriate documentary evidence to prove the actual amount of money paid to him and received by him.

Certainly the case indicates that the Rule of Law was subverted by the arbitrary practice of those entrusted with administrative roles in Van Diemen’s Land. Mr Bent was punished for alerting the public to corrupt practices of those entrusted with administration.

**6. *R v Montagu, Supreme Court of Van Diemen’s Land, 22 June 1829,***

*Chief Justice Pedder on the bench*

The facts of the case are that Mr Gellibrand sought a criminal information against Mr Montagu, for libel. Mr Montagu had written a letter to a solicitor apparently about Mr
Gellibrand’s private money matters. Mr Gellibrand apparently had seen the letter and considered it libellous.

Chief Justice Pedder refused the motion and advised Mr Gellibrand to take civil action if he considered himself aggrieved. The case is important because Mr Gellibrand had been dismissed from his position as the Attorney General in 1825.\textsuperscript{728} Mr Montagu, who would have been the defendant in this matter, was the Colonial Secretary and the nephew of Lieutenant Governor Arthur.\textsuperscript{729} Chief Justice Pedder therefore protected the Lieutenant Governor’s nephew. The report in the \textit{Colonial Times} states its abhorrence of “\textit{ex officio} and criminal prosecutions for civil offences”\textsuperscript{730} and the experience of “a Printer or Publisher” being “dragged upon such nice hair-drawn questions as supposed libels to a common prison” and subsequently incarcerated “in a damp cell among persons of every grade.”\textsuperscript{731}

The \textit{Colonial Times} uses the names of “Captains Bunn and Mackellar” as examples of the “learned and competent witnesses” who prove that the content of the “supposed libels” are actually libel.\textsuperscript{732} Clearly the \textit{Colonial Times} is mocking the notion of Captains Mackellar and Bunn being “competent witnesses” but the identity of these fictitious personages is not easy to determine, as would have been the intention of the \textit{Colonial Times}. The newspaper’s fear of prosecution is evident in the words, “We cannot find

\textsuperscript{728} Alex Castles, \textit{(1982), op. cit., 266}
\textsuperscript{729} James Fenton, \textit{History of Tasmania}, (Hobart; J. Walch and Sons, 1884), 142
\textsuperscript{730} \textit{Colonial Times}, 26 June 1829
\textsuperscript{731} \textit{ibid}
\textsuperscript{732} \textit{ibid}
words sufficient; nor, if we could find them would it be prudent to express in adequate terms our reprobation.”

Nevertheless, the report of R v Bent (No. 1), 1 July 1825 in the Hobart Town Gazette, indicates it was Captain Cotton who testified that Lieutenant Governor Arthur was the “Gideonite of tyranny” and Major Lord who testified that Colonel Arthur and Lieutenant Governor Arthur were one and the same. When this case was re-tried on 15 April 1826, it was Mr Gilbert Robertson who testified that he thought the expression “Gideonite of tyranny” was a most offensive expression to be applied to the Lieutenant Governor.

Thus, considering the names and their sounds, Captain Bunn could well have been Captain Cotton, because of the name link with cotton imports in round bunting bundles, and Captain Mackellar could have been Gilbert Robertson, because of the Scottish name connection. Another possibility is that Captain Mackellar could be the fictitious name for Major Lord, the other former soldier who testified that the Colonel Arthur and Lieutenant Governor Arthur were one and the same.

The Colonial Times further states its hope that the improper use of the ex officio prosecution will be curtailed by the legislature. The newspaper accords Chief Justice Pedder respect and approbation, referring to his manner of judgment as having been performed “manfully and constitutionally.” In the report the surnames of the parties – Montagu, Gellibrand and Pedder, are written in Capital letters, suggesting the writer’s

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733 ibid
734 Hobart Town Gazette, 9 July 1825
735 Colonial Times, 21 April 1826
736 Colonial Times, 26 June 1829
desire to draw the reader’s attention to the fact that this article is about particular people in power, people seen in the colony as the power-determiners in the colony. It is interesting to remember that in an *ex officio* matter the cost of bringing the plaintiff’s side of the action would not have been met by the complainant personally – thus it would have been a cost-effective measure for him.

The case reveals a person in the colonial administration being protected from prosecution. The judicial reasoning is, on the surface, plausible, however, it could be a camouflage to protect the Lieutenant Governor’s nephew from prosecution. It could be said that the refusal to allow the prosecution was an arbitrary decision, aimed at protecting those who held administrative positions of power. As such, it is an example of a breach of the Rule of Law, as known in the twenty-first century.

7. *R v Gregson*, Supreme Court of Van Diemen’s Land 2-3 November and 8 November 1832 ⁷³⁷ Chief Justice Pedder on the bench

This case consists of two separate matters: the first, *R on the prosecution of Roderic O’Connor v Thomas George Gregson* was heard and decided in court on 2 November 1832.

In that matter Mr Gregson was charged with publishing and printing a false, scandalous and malicious libel entitled ‘Inquisition Again’ against Mr Roderic O’Connor, published in the *Colonist* of 27 July 1832. The content of the article decried an attempt to sack a

⁷³⁷ *Tasmanian*, 9 November 1832
public officer, Mr John Lee Archer, who worked from a home office. The article is critical of the general practice of obtaining evidence from convict clerks and employees to base charges against their masters, and in the present case, making specific secret enquiries of convict clerks in the Engineer’s Department, for the purpose of bringing charges against Mr Archer, Civil Engineer.\(^{738}\) These enquiries were made in response to allegations about irregularity in contracts of the lumber yard, a facility under the control of Mr Archer, and in consequence of which a report had been called for by the Colonial Secretary, Mr Burnett, and issued under Government Order of 19 July 1832.

At the commencement of the case, the Attorney General instructed the jury on the elements of libel, because they had not tried a libel case since arriving in the colony. The military jury was employed for criminal trials until 1840 and this was a criminal trial.\(^{739}\) Interestingly, the jury is not instructed that for criminal matters they must be sure beyond reasonable doubt. The critical elements of libel the Attorney General put to the jury were:

- words spoken are not libel unless and until they are put into writing immediately after they are spoken,
- the pen may not be used to prejudice others, a principle espoused by Starkie in The Law of Libel, and
- when the pen becomes a medium of private rancour and malice that is intolerable and that is libel.

\(^{738}\) ibid
\(^{739}\) E. Morris Miller, op. cit., 140
The common law as derived from the English case of *King v Editor and Proprietor of the Morning Chronicle* 2 October 1809 was quoted to the jury, informing them that if they considered nothing bad or immoral was imputed they were to acquit the defendant, but if the words used imputed guilty motives there is libel. The final instruction the Attorney General left with the jury was that any language used to degrade or lessen a man in society, is libel, words are not to be taken by themselves, but what the writer intended to convey, must be considered, and finally, the person who publishes is as guilty as he who writes. The Attorney General attacked the press for its abuse and licentiousness and the imputation of improper motives for the base purpose of removing a public officer. He warned that if the licentiousness of the press were to prevail there would be an end to all society.\textsuperscript{740}

Mr Gregson, representing himself in defence, did not call any witnesses. He, like the Attorney General, relied on *Starkie* as authority, and used the same reference source to show that unless it can be proved that a person is actuated by malice in what he writes, it cannot be called libel.\textsuperscript{741} Mr Gregson then set about showing that his own writing had not been motivated by malice towards an individual but towards a system wherein “convict clerks in the absence of their masters”\textsuperscript{742} were examined for evidence. Mr Gregson also used the example and words provided by the Attorney General himself who, a few days previously, in the same court, had stated that “in a given number of hours, he would get plenty of witnesses who for a shilling each, would swear to any thing.”\textsuperscript{743} Mr Gregson

\textsuperscript{740} *Tasmanian*, 9 November 1832
\textsuperscript{741} ibid
\textsuperscript{742} ibid
\textsuperscript{743} ibid
concluded his defence by mentioning his bewilderment at the law of libel and noted that even with judges there was the “greatest discrepancy on the subject.” Mr Gregson’s own definition of libel was whether or not the writing was likely to constitute a breach of the peace. This was the question he asked the jury to decide.

Chief Justice Pedder, in summing up for the jury, advised them to consider the intent of the words. This was a nebulous and difficult criterion and can be expected to result in questionable decisions. The judge advised the jury not to judge words by themselves alone, but to take them in conjunction with what followed. His Honour further stated to the jury that “Whatever a man holds up in contempt as acting in a dishonourable manner, is clearly a matter of libel.” His Honour then suggests the appropriate decision to the jury:

“I am obliged to tell you my opinion, that it would be a libel: it goes very near to be an indictable offence to all those gentlemen, as it looks like a conspiracy to put Mr Archer out of his office.”

It is a matter of conjecture and quite immaterial whether or not the jury could comprehend the advice given by the judge and the Attorney General. Upon deliberation,
the jury found the defendant not guilty. The *Tasmanian* notes this decision was “warmly received by Mr Gregson’s friends.”749

This is a surprising and very interesting decision in that the jury does not follow the advice of the judge. A reason for their independence could be that they had not been long in the colony. As virtual newcomers they had not come become subject to the influence of the colony’s distinctive characteristic of favouring the administration over the non-administration. Thus this decision reveals an independent-minded jury, deciding free from arbitrariness and with the defendant enjoying the principle of the Rule of Law.

8. *R at the prosecution of J. T. Gellibrand v Gregson, 3 November 1832, Chief Justice Pedder on the bench*750

In this matter Mr Gregson was charged with printing and publishing two false, scandalous and malicious libels against the plaintiff in the *Colonist* newspaper on 31 August and 5 October 1832.

The jury sworn to try the previous case was also sworn to try this case, albeit for a different cause.751 Having the same jury to make a determination of two separate matters strongly suggests the potential for a faulty and biased decision, yet Chief Justice Pedder did not concede this.

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749 ibid
750 ibid
751 ibid
The facts of the case became clear when the prosecutor began with a description of the background leading up to the publications. A meeting was held in Hobart Town court on 24 August to compose a petition to the King calling for the creation of a domestic legislature. At the meeting, Mr Gellibrand and Mr Gregson had taken opposite sides. Each had written letters on the subject. Mr Gellibrand had a letter published in the *Colonist* of 24 August explaining the view he espoused in the meeting. Mr Gregson replied to this letter in the *Colonist* of 31 August, charging Mr Gellibrand with a “gross and deliberate violation of truth and integrity.” It was this comment which was the basis for the libel allegation.

On 5 October Mr Gregson published a letter signed “Hampden.” In the *Tasmanian’s* report of the case only excerpts from the letters are published, thereby ensuring it avoids charges of libel publication itself. One of the excerpts from 5 October is:

“Colonel Archer can always strike without shewing (sic) his hand or weapon, when it suits him to conceal them. And he can always find an O’Connor or a Gellibrand to deal the blow.”\(^\text{752}\)

Thus, this publication can be seen as a criticism of named administrators who are seen to behave corruptly and connive together to conceal their improper behaviour. In court, the prosecutor referred to libel as “the greatest pest which could creep into a community.”\(^\text{753}\)

\(^{752}\) ibid  
\(^{753}\) ibid
The prosecutor further stated that in a criminal prosecution truth is no justification. This comment is noteworthy because it introduced truth into libel. The aim in bringing the action was to curb the licentiousness of the press so that the interests of society would be promoted.\textsuperscript{754} It can be inferred, however, that the interests to be promoted were those preferred by the members of the colony’s administration, as distinct from competing and different interests. Underlying such a notion is the philosophy that there is only one acceptable view. Counsel uses an impressive allegory of the sun to describe the moral influence of the press, stating:

“Similar to the genial warmth of the sun, which renovated us by its benign rays: but when once the channels of the press become polluted, for the base unworthy purpose of gratifying private malice, instead of warming us by its influence, society becomes disorganised; it hunts down and paralyzes its victim; it destroys his peace at home and his reputation abroad.”\textsuperscript{755}

Counsel uses a similar allegory in the comment that libel is “the greatest pest which could creep into a community.”\textsuperscript{756} The notion of an underlying animal waiting to attack may have been a linguistic tactic. On the other hand, it could have its origin in the frontier nature of the colonial society, a paradigm adopted for Van Diemen’s Land by Castles (2007).\textsuperscript{757} There were native animals in Van Diemen’s Land which were unknown to the English. The experience of the English in Van Diemen’s Land was an exercise in pitting

\textsuperscript{754} ibid
\textsuperscript{755} ibid
\textsuperscript{756} ibid
\textsuperscript{757} Alex Castles, (2007), op. cit., 37
themselves against the forces of nature, native animals, the banditti and indigenous people. Thus the press is relegated to the same category.

Mr Gellibrand’s stated reason for bringing the action as a criminal prosecution as distinct from a civil action was to protect himself from charges that he was greedy for compensation. It cannot be overlooked, however, that a military jury was required to try criminal matters in Van Diemen’s Land until 1840, whereas a civil jury could try civil matters from 1830. Thus it may have been that Mr Gellibrand did not want to risk a civil jury, suspecting that Mr Gregson’s views, as expressed in the published letters, were generally held in the community.

The jury issue in Van Diemen’s Land is worthy of comment. As Castles (1982) points out, from 1830, civilian juries of twelve could try issues of fact under Jury Act, 1830, 11 Geo. IV, No. 5, however trial by jury could be refused by the presiding judge. When a jury was not empanelled, the judge continued to sit with two assessors. The Jury Act 1834, 5 Will. IV, No. 11, abolished assessors in the Supreme Court and section 1 of this Act allowed juries of four on a special list to be empanelled in civil cases. These four people were ‘special jurors’ selected from amongst ‘reputable citizens of good, solid standing in the community.’ Nevertheless, section 2 of the Act continued to allow a jury of twelve to be called on the application of one of the parties. If jurists could not reach a decision after six hours, a verdict could be entered by three-quarters of them.

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758 Tasmanian, 9 November 1832
759 Alex Castles, (1982), op. cit., 273
760 ibid, 274
761 ibid, note 25
762 ibid, 275
under section 4,763 thereby assisting the efficiency of the court. In criminal matters, section 6 of the Act stated that where Government or Executive or Legislative Council members were involved, civilian juries of twelve were to replace military juries to try both fact and law,764 a move which can be seen to be an effort to boost confidence in the transparency and fairness of justice in the colony. Military juries were abolished under the Jury Act 1840 4 Vict., No. 33 but Castles (1982) informs that military juries actually continued in Van Diemen’s Land until 1841.765

Mr Gregson was a self-represented litigant of necessity because there were no counsel available in the colony at that time to assist him.766 Chief Justice Pedder refused to put off the trial until the next week because the jury had been sworn to try both matters. In the light of the irregularity of having the same jury determine two different matters in two different trials, it can not be underestimated that the refusal to delay the trial may have been motivated by the desire to deny the defendant access to legal representation.

Mr Gregson’s own witnesses were Captain Glover, Reverend Mr Connolly and Mr Robertson, editor of the Colonist. Captain Glover bordered on being of the ilk of a hostile witness in his testimony that the letter signed ‘Hampden’ meant that Mr O’Connor and Mr Gellibrand would use their influence to do what they could to put down the Colonist newspaper. Reverend Mr Connolly stated he had no intimation that he would be called upon to give evidence, however, he consented to be examined and showed he was a

763 ibid  
764 ibid  
765 ibid  
766 Tasmanian, 9 November 1832
match for the rude prosecutor, responding to prosecuting Counsel’s, “I must have a direct answer to my question else I will keep you here all morning,” with the reply, “If you keep me here till doomsday you will get no other answer from me than what my conscience dictates.”767

Reverend Mr Connolly also revealed himself to be a wily linguist stating that in an anonymous publication such as the letter under discussion, he considered the words “Mr O’Connor and Mr Gellibrand” as “figurative expressions.” Mr Robertson, editor of the Colonist, stated that he considered it was because Mr Gellibrand had a “friendly feeling” towards Mr Robertson that he, himself, was not prosecuted. This comment indicates that Mr Gellibrand’s prosecution of Mr Gregson may have been more against Mr Gregson personally than the actual content of the publication. Mr Robertson testified that Mr Gellibrand had seen the offending letter when it was printed but before it was published and had not stated it was a libel but had laughed about it. Therein is an interesting technicality about the printing and publishing of the libel. Chief Justice Pedder insisted that the paper was published to all intents and purposes when it was shown to Mr Gellibrand. However, Mr Gellibrand was the person allegedly libelled: thus the publication of a libel could not occur until somebody other than the person allegedly defamed was shown the writing. As only fifty copies had been struck off the press at that time, Mr Robertson stated that had Mr Gellibrand identified the content as a libel, the paper would not have been published. Indeed, the publication was stopped when Mr Robertson realised something was wrong. It would seem, therefore, that by not voicing an

767 ibid
objection when shown the writing, Mr Gellibrand was contriving to set a bait to catch Mr Gregson.

The judge summed up by charging the jury with making up their own minds, but nevertheless, giving them the benefit of his opinion that a gross libel had been published. The fact that the judge gave the jury his opinion can be taken as an indication of pressure upon them to concur. The importance of Mr Gregson’s reminder to Chief Justice Pedder, at the conclusion of His Honour’s summing up to the jury, that Mr Gellibrand was the standing Counsel for the *Colonist* newspaper and had seen the article charged as libellous before its publication, was deemed by the judge to be of no consequence. It would seem that Mr Gellibrand allowed the article to be published and then later decided he had been libelled by it. This seems to be an example of malevolence by Mr Gellibrand towards Mr Gregson.

The jury gave a verdict of guilty on the fifth count, that is, of the publication on 5 October of the letter signed “Hampden.” Mr Gregson was given bail for two hundred pounds, with Mr Meredith and Captain Glover providing one hundred pounds each. Public interest in the case was demonstrated by the court being crowded at nine o’clock at night when the trial ended.768

On Thursday 8 November the day set down for sentencing, Mr Gregson argued that the judge had misdirected the jury and the ‘Mr Gellibrand’ mentioned in the information was not the same ‘Joseph Tice Gellibrand’ mentioned in evidence. On the strength of Mr

768 ibid
Gregson’s argument, the sentencing date was delayed until Saturday, however the judge refused to delay the matter further because he had to attend a Council meeting later in the week.

This is evidence of a remarkable conflict of powers, with the judge being a member of the Executive Council as well as the judiciary. It flies in the face of the long-established Westminster doctrine of the separation of powers. Clearly, at this time in Van Diemen’s Land, the separation of powers doctrine was not observed in Van Diemen’s Land. Chief Justice Pedder was the colony’s chief judicial officer as well as being a member of the Executive and Legislative Councils. Be that as it may, in the sentencing on Saturday Mr Gregson was fined eighty pounds. This fine was paid by public subscription an acknowledgment of the public’s gratitude to him for having begun the Colonist newspaper in July 1832 as ‘The Journal of the People’ and providing a strident voice against Lieutenant Governor Arthur’s incestuous administration.

This case is evidence of the potential for corruption where the Chief Justice is a member of both the Legislative and Executive Councils as well as being the colony’s chief judicial officer. It is also an example of the inherent corruption that occurred when administrators had unfettered power in consequence of the tyranny of distance. From the point of view of the law of libel the case is evidence of the settlers’ battle against corrupt administrative practice and the personal sacrifice they made in the pursuit of their goal. From the perspective of the Rule of Law, it is an example of the battle waged by

769 The True Colonist, 16 November 1832
members of the administration to stifle opposing members of the populace through arbitrary tactics.

9. R v Browne (No. 1) 1833, Supreme Court of Van Diemen’s Land, 14 August 1833,
Puisne Judge Montagu on the bench

This criminal libel case was brought by the Attorney General for libel published by Mr Browne in the *Colonist* newspaper in April 1833. The libel referred to the flogging to death of a man at the Hobart Town Prisoners’ Barracks. The libel was not published in this particular report of the case.

The Attorney General opened the case by indicating that it was about the authorship of the libel. Witness Mr Bent acknowledged that the *Colonist* is published at his office, but denied any knowledge of the author of the articles because he did not have control over the manuscripts. Witness Mr Gellard acknowledged that although he was the publisher he was not the editor in April 1833. He agreed that Mr Browne had read the offending article to him but Mr Gellard did not see the hand-written article, he only saw it in print. The four compositors were examined were Mr Matthew Hopwood, Mr Robert Fergie, Mr Robert Wilson and Mr Hugh Green. None of these men could recollect ever

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770 *Tasmanian*, 16 August 1833
771 ibid
772 ibid
773 ibid
having seen the article in manuscript form. Thus, because Mr Browne’s authorship of the article could not be proved, he was acquitted.

If this had been a civil case, it would have been a non-suit based upon defence counsel’s submission to the judge that: “This is no case at all.” However, as it was a criminal prosecution, the defendant had to be acquitted.

The report states that the case “rested merely upon legal technicalities which were fully admitted by the court.” However these legal technicalities are not identified. Thus, it is open to inference that because Mr Browne could not be proven to be the writer of the article, the Crown’s case was doomed. The defendant was acquitted because the writer of the libel could not be identified.

10. R v Browne (No. 2), Supreme Court of Van Diemen’s Land, 14 August 1833.

Puisne Judge Montagu on the bench

Extraordinarily, on the same day, Mr Browne was prosecuted in the same court for writing and publishing an article in the Colonist newspaper of 16 April 1833. The Attorney General prosecuted and Mr Browne, the defendant, was represented by Messrs Cartright and Allport.

774 ibid
775 ibid
776 ibid
777 ibid
778 The True Colonist, 20 August 1833
779 ibid
At this hearing, the article was read in court. It is as follows:

“Our blood chills in our veins as we write the disgraceful truth, that on Friday last a human being – a Colonial subject – an Englishman, expired under the tortures of the lash! This, in the nineteenth century, in a Christian land, and under a religious administration, is what few will give credence to, but such is the lamentable and disgraceful fact. We have heard that the influence of a bribe was in operation on this occasion; but as the Colonial Authorities, of course, for their own credit’s sake, cause a full investigation of the circumstances to take place, we shall wait a reasonable time before we drag the parties before the light of the day; in the hope that they will meet the reward due to their barbarity.”

The article is ambiguous, in that the reader can infer either that the convict’s alleged misdeed was bribery or the severity of the lashing was due to a bribe. Whichever meaning is correct, the third sentence in the article indicates prevalence in the colonial Van Diemen’s Land society to act upon rumour. For example, “We have heard that the influence of a bribe was in operation in this occasion.” The Attorney General did not offer any witnesses, insisting to the jury that they must draw their own inference of the tendency of the article.

\[ \begin{align*} \text{780 ibid} \\
\text{781 ibid} \\
\text{782 ibid} \end{align*} \]
Mr Andrew Bent testified that while the *Colonist* newspaper was published at his printing office, he had no knowledge of the specific manuscript.\textsuperscript{783} Mr G. H. B. Gellard, the publisher of the *Colonist*, testified that he had not seen the article but Mr Browne had read it aloud to him; from hearing Mr Browne read it he considered it would have been in Mr Browne’s hand-writing.\textsuperscript{784} The compositor, Mr Matthew Hopped testified that he had never seen the manuscript of the particular article, as did Mr Bent’s printers Mr Robert Fragile, Mr Robert Wilson and Mr Hugh Green.\textsuperscript{785}

Counsel for the defendant submitted that there was no case to go to the jury. The particular article had not been read and indeed, as only a copy of it in printed newspaper form was in the court, there was no original manuscript of the libel to be read. Thus, counsel submitted there was nothing to go to the jury.

His Honour Judge Montagu concurred with defence counsel. His Honour instructed the jury that there was nothing to put before them and the foreman instantly returned a verdict of not guilty.\textsuperscript{786} *The Colonist’s* report of the case concludes:

“The result of this trial appeared to give evident satisfaction to the whole court, except the Attorney General, who intimated that he should put another bill upon the file against Mr Meredith for the same article!”\textsuperscript{787}
This concluding statement is a deplorable example of court reporting. It is unclear whether or not the Attorney General actually did make the comment because of the verb ‘intimated.’ It would have been a most unwise comment for Counsel to have made and it seems unlikely that such a senior lawyer would have done so in court.

It could well be that this is an example of the Colonist’s reporting which was criticised by others in 1833. For example, lawyer Mr Thomas Young testified in the case of O’Connor v Meredith\(^{788}\) that he had given up The Colonist some months previously, being apprehensive that what was contained therein may make an inroad on his morality, while George Henry Melville (1835) commented:

“The editor and proprietor of the Colonist became obnoxious to the ruling powers - that journal had been since its establishment conducted with a spirit too violent for a government constituted as it is in this colony.”\(^{789}\)

The indices of powerlessness and the identification of values for R v Browne (No. 1) and R v Browne (No. 2) remain the same.

This case is an example of a defendant being prosecuted and tried on the same facts. This breaches the rule against double jeopardy, the fact of being prosecuted twice for substantially the same offence\(^{790}\). Clearly the Rule of Law which protects the individual from arbitrary prosecution was ignored. From the perspective of the jurisprudence of

\(^{788}\) The True Colonist, 16 July 1833  
\(^{789}\) George Mackaness, (ed.), (1959), op. cit., 38  
\(^{790}\) Bryan A. Garner, (1999), (ed.) op. cit., 506
defamation, this case demonstrates that unless the prosecution can produce the original libellous document in court, the court will not convict. In this instance, the original document was not produced nor read in court; only a copy of it in printed newspaper form was in the court.

11. *R v Robertson (No. 1)* Supreme Court of Van Diemen’s Land, 9 March 1835.  

Chief Justice Pedder on the bench

The facts of the case are complicated probably because there were three charges in this case. The Attorney General and Solicitor General were the prosecutors. They alleged that the defendant, Mr Gilbert Robertson, proprietor of the *True Colonist* newspaper, falsely and maliciously published two libels tending to bring into contempt the Lieutenant Governor of Van Diemen’s Land, and also published a libel on Hobart Town lawyer, Mr Rowlands.

On the first day set down for the trial, the defendant objected to being tried by a military jury of seven men from the Twenty-First Foot Regiment. On that day, when the jury was about to be sworn, the defendant, Mr Robertson challenged the array because officers of the Twenty-First Foot Regiment had united to incite and persuade John Thomas Leahy, their colonel, to institute a criminal prosecution against Mr Robertson in Leahy’s name. Chief Justice Pedder over-ruled Mr Robertson’s objection, advising him to challenge

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791 *The True Colonist*, 11 and 14 March, 1835
each individual. Mr Robertson accepted the advice of the judge. He did not object to the first juryman, Lt Arthur Corbett, but did challenge the next man called, Paymaster Jean. Mr Robertson and Mr Gellibrand, Counsel for the prosecution, then argued. This indicates the defendant’s confidence in public speaking and preparation for the case. As a result of the defendant’s challenge, the jury was dismissed and the matter adjourned. Chief Justice Pedder required the defendant to promise not to publish the name of the libelled lawyer, who was, in fact, Mr Thomas Wood Rowlands. However, the lawyer’s name had already been published on 23 January 1835 in an editorial in the *True Colonist*, which announced that the editor had received a summons for libelling Thomas Wood Rowlands.

Thus, after the first adjournment in consequence of Mr Robertson’s successful challenge to the military jury, the three libel charges were brought for hearing by a civil jury.

The jurymen were W. W. Barrow, Esq., retired officer, H. J. Emmett, sen. Esq., Government officer, Arthur Davis, Esq., half-pay R. N., Andrew Crombie, Esq., J. P., merchant; John Boyes, Esq., merchant, George Bilton, Esq., merchant, John Bell, Esq., J. P., George Watson, Esq., J. P., merchant, George Gatehouse, Esq., merchant, H. J. Emmett, jun. Esq., Government officer, John Lee Archer, Esq., Government officer, Michael Vicary, Esq., retired officer. Thus, for this case it was a civil jury that was empanelled, apparently the first time a civil jury had ever tried a criminal case in Van

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792 *The True Colonist*, 9 March 1835
793 ibid
794 *The True Colonist*, 23 January 1835

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Diemen’s Land. The array of men, however, can be seen as having a decidedly ‘service’ and ‘administrative’ predominance. For example, W. H. Barrow and Michael Vicary were ‘retired officers,’ while Arthur Davies was a half-pay Royal Navy officer. H. J. Emmett, sen., H. J. Emmett jun., and John Lee Archer, were termed ‘Government officers.’ John Bell, Andrew Crombie, George Watson, were Justices of the Peace and consequently would have been appointed by the Lieutenant Governor. Thus, it can fairly be concluded that the only three jurymen who could be regarded as ‘civil’ in that they did not have obvious links with the colony’s administration were John Boyes, George Bilton and George Gatehouse, who were termed ‘merchants.’

It can be inferred, therefore, that the chances of Mr Robertson’s case receiving consideration by a jury free from bias towards the Lieutenant Governor remained slim. *The True Colonist* of 14 March 1835 made a similar observation of the jury and attributed the root of the problem to the *Jury Act*, of whom the architect was Mr Alfred Stephen. Under the *Act*, for a man to be eligible as a juror, he had to be an ‘esquire.’

The use of the term ‘esquire’ after each juryman’s name is set in its English historical context by Alex Castles (2007). In England, the term ‘esquire’ was used to refer to men who were socially placed between ordinary gentlemen and knights. In the colony of Van Diemen’s Land the term ‘esquire’ was used to include former service officer, lawyers, Church of England clerics and those without a convict background who had

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795 *The True Colonist*, 11 March 1835
796 *The True Colonist*, 14 March 1835
797 Alex Castles, (2007), op. cit., 194
considerable wealth, provided Lieutenant Governor Arthur approved of them. Thus the term of ‘esquire’ introduced a particular division or class within Van Diemen’s Land society.

Captain Forster and the Chief District Constables had power under the *Jury Act* to create esquires for the jury service. *The True Colonist* states that in this case, of the eighteen men from whom the twelve jurors were selected, the defendant was not allowed the right to challenge. This comment is somewhat confusing because the report further states that while the *Act* allows challenge, it only permits the striking out of six of the eighteen men.

In this case, the coupling of the matters of the prosecution of Gilbert Robertson for the alleged criminal libel of Mr Rowlands with that of the Lieutenant Governor appeared incongruous to Chief Justice Pedder, who commented: “I think it is to be regretted that the case was brought forward at the same time with the others, which are infinitely more important.” This judicial comment is important in that it can be taken to indicate that in the mind of the judge, the libelling of the Lieutenant Governor was more serious than the libelling of a private citizen in the exercise of a profession.

The defendant, Mr Gilbert Robertson, had arrived in Hobart Town in 1822 with his wife and family. Mr Robertson was employed as Superintendent of the Government Farm at

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798 ibid
799 *The True Colonist*, 14 March 1835
800 ibid
801 *Hobart Town Courier*, 9 & 13 March 1835
New Town from 1825 to 1827 and obtained his own grant of land in 1828, continuing as a farmer and official and lecturing in agriculture and colonization at the Hobart Town Mechanics’ Institute. He was the first editor of the newspaper *The True Colonist*, founded in 1832, with the aim of being a voice for the people as distinct from a voice of the administrators. It was this aim of voicing concerns of the people that resulted in this libel action being taken against Mr Robertson.

**The first matter: The alleged libel on Mr Rowlands for charging excessively high legal fees**

The summons for the matter of libelling Mr Rowlands was served on Mr Robertson while he was incarcerated awaiting trial for charges of alleged libel on the Lieutenant Governor. On 3 February 1835 he was liberated on the bail of James Gordon and Hugh Murray to answer the alleged libel on Thomas Wood Rowlands.

This alleged libel charge derived from an article that Gilbert Robertson had published an account of the impact of legal costs made by Mr Rowlands upon a poor man with a large family. The man’s possessions were sold and he was imprisoned for his debt to Mr Rowlands. He was only released from prison when he mortgaged the land he had worked for two years to defray costs. Mr Robertson published his continuing concern at the

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802 E Morris Miller, (1952), op. cit., 179  
803 ibid  
804 ibid  
805 *The True Colonist*, 4 February 1835  
806 *The True Colonist*, 9 March 1835
price of legal action in the colony in an article in *The True Colonist* of 15 January 1835, when he wrote:

“The ruinous price of justice whereby not only the lawful debtor is ruined but the just creditor loses his right by appealing to the law for its recovery, for the effects of the debtor are swallowed up with court fees and lawyers’ costs so that too often there is nothing left for the creditor.”

Mr Robertson had previously published general criticism of the professional practice of the colony’s law and justice. For example, in *The True Colonist* of 9 January 1835, he wrote:

“It is true that in England many of the justices are arrant asses. But in England the duties and powers of individual justices are limited by comparison with what they are here.”

Clearly, the Crown considered specific criticism of Mr Rowland’s professional fees, as distinct from the fees demanded by the legal profession in general, amounted to criminal libel. Hence, these criminal proceedings had been initiated against Mr Robertson.

Mr Robertson asserted in *The True Colonist* of 4 February 1835 that this should have been a civil matter but a choice was made to prosecute criminally to prevent him from

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807 *The True Colonist*, 15 January 1835
808 *The True Colonist*, 9 January 1835
answering with a plea of justification. The Summons delivered to Mr Robertson for this matter was defective in that it failed to identify the nature of the Information and Complaint on which he had been summoned.

The second matter: The alleged libel of Lieutenant Governor Arthur for using government hay to feed his own cattle, the hay matter

The delivery of the Summons, however, was not the first indication Mr Robertson received of the impending action against him. The initial intimation had come on 19 January 1835 while Mr Robertson was attending the Police Office to report on police matters for publication in the *True Colonist*. During an adjournment in court proceedings the Solicitor General, Mr McDowell, applied for a Summons against Mr Robertson for having libelled the Lieutenant Governor. The Assistant Police Magistrate, Mr Mason, reminded the Solicitor General that an application at the Police Office was the inappropriate procedure for a Crown Prosecution. The Solicitor General’s reply was that he wanted “to give Mr Robertson no surprise.”

Mr Robertson considered the Solicitor General’s application to the Assistant Police Magistrate inappropriate procedure, being, a new system of libel prosecution and an Irish

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809 *The True Colonist*, 4 February 1835
810 *The True Colonist*, 20 January 1835: “We saw a very extraordinary instance yesterday at the Police Office. During a cessation of business the Solicitor General applied for a Summons against Mr Gilbert Robertson, proprietor of this journal, for having published what the learned gentleman was pleased to call a libel on the Lieutenant Governor, charging him with something like a forgery. Mr Mason’s words did him honour: “Mr McDowell,” said he, “If you mean to prosecute Mr Robertson on behalf of the Crown there is no necessity for applying to the Police Office. Why not go direct to the Attorney General who will file the Information if there are any grounds for it. But if you come here it’s a private prosecution and there must be Affidavit.” Mr McDowell replied he only made application to give Mr Robertson no surprise.”
811 ibid
sort of trial.\footnote{ibid} Such comment no doubt created tension in Hobart Town, denigrating, as it did, the place of origin of some of the colony’s free immigrants and convicts. Nevertheless it can be seen to have stemmed from Mr Robertson’s dismay at the apparent abandonment of English legal procedure. In the passage of time, Mr Robertson subsequently aired his dissatisfaction with the colony’s legal procedures and system to His Majesty’s Secretary of State for the Colonies in London and published this in an Open Letter in \textit{The True Colonist} of 5 February 1835.\footnote{\textit{The True Colonist}, 5 February 1835}

\textit{The True Colonist}’s ‘Editorial’ of 20 January 1835 republishes the stories which gave rise to the charges of the two libels on the Lieutenant Governor. In essence they were that the Lieutenant Governor used the Crown supply of hay to feed his own cattle and altered the date on a Deed of Land grant.\footnote{\textit{The True Colonist}, 20 January 1835: “Mr Robertson doesn’t know for which story he is to be tried – the hay story or the account of Mr O’Connor’s grant, so readily obtained by his agent Captain Forster, and so conveniently altered in the date after enrolment. The other case the Attorney General had better prosecute – we have stated that when the Government bullocks on the Government domain were starving for want of hay, Colonel Arthur did (we will not say feloniously or by force of arms) take or cause to be taken away a great quantity that is about 3 tons of dry cattle fodder hay the property of the King and gave it to his own cattle at The Marsh, his private farm. After publication some of the hay was returned.”}

The delivery of the Summons to Mr Robertson meant that from noon 23 January 1835 he was imprisoned until 3 February, when his two friends, James Gordon and Hugh Murray, bailed him to answer the alleged libel on Thomas Wood Rowlands.\footnote{\textit{The True Colonist}, 4 February 1835} From 3 February until 3 March 1835, \textit{The True Colonist} published several editorials on the Law of Libel. These articles appear to be the basis of Mr Robertson’s defence to the charges. The Assistant Police Magistrate had power to investigate the complaints in a Summons prior
to sending it to trial in the Supreme Court, as evidenced by *The True Colonist’s* Report of 3 March 1835. This investigation was conducted over five days at the Police Office, which was crowded due to the public interest in the matter.

Important information given during the examinations at the Police Office included that from the Government farm overseer, Mr Fitzpatrick, who had informed Mr Robertson that approximately three tons of hay were transferred from the Government farm to the Lieutenant Governor’s farm by Mr Compton, the Lieutenant Governor’s farm overseer. The hay was later replaced. Mr Davidson stated that he knew that three or four loads of hay were sent to the Government Gardens from the Domain Farm to feed the stabled bullock belonging to the Lieutenant Governor. Following examination, the Assistant Police Magistrate concluded that as the hay had been taken by authority, the farm overseers were not at fault. No doubt this would have been of immense relief to Mr Compton and Mr Fitzpatrick, who could have suffered severe punishment had they been found to have stolen Government property.

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816 *The True Colonist*, 3 March 1835
817 ibid
818 *The True Colonist*, 5 March 1835
819 *The True Colonist*, 3 March 1835
The Police Magistrate’s refusal to allow questions regarding the identity of the person who authorised the removal of the hay\textsuperscript{821} can be seen as an attempt to protect the Lieutenant Governor. Clearly the Police Magistrate concluded after five days of examination that the matters would need to be taken to the forum of the Supreme Court of Van Diemen’s Land.

**The third matter: The alleged libel of Lieutenant Governor Arthur for alteration of Mr O’Connor’s Deed of Land grant, the deed matter**

Mr Robertson published an article in which he stated that Lieutenant Governor Arthur altered the date on a Deed of land grant after it had been enrolled.\textsuperscript{822} The Attorney General admitted in court that this allegation was true.\textsuperscript{823} The Attorney General defended the action, insisting, “It is no crime to alter an enrolled deed: it may be altered for the best

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\textsuperscript{820} John Glover, *Patterdale landscape*, (1835) Tasmanian Museum and Art Gallery, Hobart
\textsuperscript{821} *The True Colonist*, 5 March 1835
\textsuperscript{822} *Hobart Town Courier*, 13 March 1835
\textsuperscript{823} *The True Colonist*, 12 March 1835
of motives, to do justice."824 Thus the content of the publication was true. *The True Colonist* defended its publication on 12 February 1835, stating:

“No punishment whatever should attach to a public writer for stating the truth in any terms, where Government as a whole, or where a public functionary as part of such whole, is guilty of acts inimical to the public weal.”825

It was this philosophy, then, which probably motivated Mr Robertson to write about the Lieutenant Governor’s alteration of the date on the enrolled Deed.

In court, Mr Robertson told the jury that it was his duty as the conductor of a public newspaper to publish to the world such actions of public officers and others which were either oppressive, unjust or otherwise injurious to the interests of society.826 Further, he contended that the alteration of a Deed after enrolment was an act injurious to the interests of society because it tended to destroy people’s confidence in the instruments by which they held land. It seems that Mr Robertson was not in trouble for merely publishing that the Lieutenant Governor had altered the date on the Deed after its enrolment: it was because Mr Robertson was alleged to have attributed “unfair purposes” to the Lieutenant Governor in altering the date of the Deed. This was the offending aspect of the publication, according to the prosecution.

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824 ibid
825 *The True Colonist*, 12 February 1835
826 *Hobart Town Courier*, 13 March 1835
The Attorney General pointed out that he had instituted the prosecution of Mr Robertson himself as Attorney General of His Majesty, whose commission he held, and not by the Lieutenant Governor, who, indeed, had no knowledge of the prosecution. The Attorney General stated he had prosecuted Mr Robertson because it was his duty to protect the servants of His Majesty.

The background to the alteration of the date of the Deed arose in a dispute over the ownership of a parcel of land. In 1835, Attorney General of Van Diemen’s Land, Mr Alfred Stephen, demonstrated the invalidity of the early land grants. The New South Wales Governors Macquarie, Brisbane and Darling, had granted land in their own names instead of in the name of His Majesty the King. Van Diemen’s Land was not independent of New South Wales until 3 December 1825, thus all Van Diemen’s Land real estate grants prior to that date, having been made in the names of the successive New South Wales Governors instead of the English monarch, were shown by Mr Stephen to be invalid. Grantees who had acquired land under the old grant system were competing with new would-be land proprietors for their land. The Van Diemen’s Land Caveat Board was established in 1835 to adjudicate in regard to these disputed land titles. While those who had been granted land under the old system were entitled to use the land during their lifetime, upon decease, their widow, heirs and descendants would have no claim to the land. This inequitable consequence was repeated with many old land grants and caused enormous hardship and anguish for widows and children after the decease of a husband and father, in whose name land had been granted.

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827 *The True Colonist*, 14 March 1835
Be that as it may, by publishing the articles which stated that the Lieutenant Governor had altered the date of a Deed of land grant and fed the government hay to his own cattle, and that Mr Rowlands’ legal fees were excessive, Mr Robertson was found guilty by the jury in less than fifteen minutes. The strength of Mr Robertson’s conviction that the articles for which he had been found guilty of criminal libel were properly written, is apparent in his comment:

“The trial is over. We stand convicted wanting sentence of the Court. Thank God for no dishonourable offence, not for anything we or our children will ever have to blush or regret.”\textsuperscript{829}

Despite being found guilty - but before receiving a severe sentence from the Bench - Mr Robertson wrote of his respect for the personage of Chief Justice Pedder, albeit disagreeing with His Honour’s view of the law of libel.\textsuperscript{830} It is a matter of conjecture whether Mr Robertson would have had the same degree of respect for the personage of Chief Justice Pedder upon discovering the severity of the sentence the judge inflicted upon him. Mr Robertson received a fine of twenty pounds fine and imprisonment for one month for libelling lawyer Mr Rowlands,\textsuperscript{831} a fine of one hundred and twenty pounds, and imprisonment for eight months after the expiration of the first sentence, and further imprisonment until the fine be paid, for accusing the Lieutenant Governor of using

\textsuperscript{829} \textit{The True Colonist}, 12 March 1835
\textsuperscript{830} \textit{The True Colonist}, 11 March 1835
\textsuperscript{831} George Mackaness, (ed), (1959), op. cit., 39 - 41
property belonging to the Crown for his own private purposes, and a fine of sixty pounds and imprisonment for four months and continuing imprisonment until the fine be paid, for accusing the Lieutenant Governor of “dishonourable and unworthy conduct” in regard to the alteration of the date of the Deed of land grants.

This case is an example of how the Rule of Law was subverted in Van Diemen’s Land. Those in positions of power were determined to prevent criticism of their administration. The evidence showed that government property was appropriated for personal use by those in administrative positions of responsibility. Evidence also showed that those in positions of administrative responsibility exercised their power to circumvent the rules which members of the general populace were required to follow. Evidence also showed that a member of a revered service profession, the law, was behaving unconscionably to those requiring his professional service. Despite this evidence, a civil jury found that ordinary members of the populace, who published true accounts of such inequitable behaviour being perpetrated, were guilty of criminal libel.

This case reveals that the people in power were protected by a jury system which ensured jurors were selected from their own ranks. Far from being fair, the jury system was manipulated to ensure that the practice of justice remained arbitrary and power was retained by those in the administrative hierarchy.

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832 ibid
833 ibid
12. R v Robertson (No. 2) Supreme Court of Van Diemen’s Land, 7 April 1835

Chief Justice and Puisne Judge Montagu on the bench

In this case Mr Gilbert Robertson was charged with criminally libelling Captain Montagu on three occasions. These being:

- on the 23 January 1835 he published an article in The True Colonist that Captain Montagu used the Crown’s building material to build his own private home, in particular loose quarried ironstone, and
- on 23 February and 26 February 1835 he published articles in The True Colonist stating that Captain Montagu was embezzling Crown property, in particular using Crown labourers and Crown materials in the building of his private home.

For this case, Chief Justice Pedder sat with Puisne Judge Algernon Montagu. Algernon Montagu had been appointed Attorney General of Van Diemen’s Land in 1826, just two years after being called to the English bar. Thus he had very little experience in the practice of the law. In 1833 he was appointed Puisne Judge of Van Diemen’s Land. The defendant, Captain John Montagu, was the Colonial Secretary and it is important to note that he was the nephew of Lieutenant Governor Arthur.

834 The True Colonist, 17 April 1835 and 15 May 1835
835 ibid
836 Alex Castles, (1982), op. cit., 276
837 ibid
838 James Fenton, (1884), op. cit., 142
The True Colonist’s report of the case on 15 May 1835 published the affidavit of Captain John Montagu in which the Captain admits to having used about fifty or sixty cartloads of iron stone used in the wall enclosing a small space adjoining the house. He also states that this stone was obtained from Government excavations near the Wharf, and he believed he was entitled to it because he was the proprietor of the land from which the stone had been quarried. 839 John Anderson Brown, Building Superintendent for Captain Montagu’s house, stated in his affidavit that while it was his task to pay for all the materials used in the building, he did not pay for the ironstone which was on the ground and some free stone obtained from Mr Hone’s quarry at New Town. 840

Figure (XLII): Prisoners quarrying stone and wharf-building 841

Mr Roderic O’Connor, Inspector of Roads, stated in his affidavit that the proprietors of land by the river had agreed with the Government some years previously to give up part of their land for public purposes. The Government gangs had levelled the land, leaving

839 The True Colonist, 15 May 1835
840 ibid
841 Edwin Barnard, Exiled, (Canberra: National Library of Australia, 2010), 9
ironstone on the ground. This stone was taken by the original private land-owners. The original owner of Captain Montagu’s land was Mr W. H. Hamilton and the Inspector of Roads considered Captain Montagu’s right to take the ironstone on the ground derived from the original owner. The Inspector of Main Roads further stated in his affidavit that several other proprietors of the land had taken stone by permission.

Mr Robertson, in his affidavit, states that ironstone had been refused to another proprietor of the land, Mr Askin Morrison. In consequence of this apparent unfair and differential treatment of landowners, Mr Robertson, in company with Mr Henry Melville, visited New Wharf to view the situation for themselves.

A lack of procedural fairness accorded Mr Robertson in this matter is obvious. For example:

- He was served with a Writ while confined in prison;
- The Writ was based on affidavits, copies of which were not provided to Mr Robertson,
- Being imprisoned he could not appear before the court to show cause why a Criminal Information should not be exhibited against him, thus he provided the court with a petition to that end, which the court would not allow to be read;

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842 The True Colonist, 10 April 1835
843 ibid
844 ibid
845 The True Colonist, 17 April 1835
846 ibid
847 Hobart Town Courier, 17 April 1835
848 The True Colonist, 8 May 1835
The court ordered that the Rule of a Criminal Information against Mr Robertson be made absolute without hearing Mr Robertson;

On 5 May Mr Robertson was assaulted by the keeper of the prison and dragged into court without a *Writ of Habeus Corpus* and ordered to plead to the Information without having received a copy of it;

While imprisoned he was visited by a Frederick Manning and shown an affidavit by Mr Pendleberry, Superintendent of Government Brickmakers. Mr Pendleberry’s affidavit indicated that Mr Pendleberry and Captain Montagu had a contract, the content of which was that Mr Pendleberry would provide bricks to Captain Montagu in consideration for brickmakers being lent to Mr Pendleberry by Captain Montagu;

Mr Robertson was given an opportunity to retract his alleged libel on the basis of seeing just one affidavit, Mr Pendleberry’s affidavit, acknowledging that on the basis of its content, Mr Robertson had been “misinformed,” and Mr Pendleberry’s affidavit was not produced nor read in court.

This catalogue of inequities leaves no doubt about the procedural unfairness accorded Mr Robertson.

Be that as it may, Mr Robertson was found guilty.

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849 *The True Colonist*, 15 May 1835
850 ibid
851 *The True Colonist*, 17 April 1835
852 ibid
The sentencing address by Chief Justice Pedder is extraordinary in its content, which includes a personal attack upon Mr Robertson, the judge’s views about the press and the judge’s self-justification. The judge proposes a motive for Mr Robertson’s writing, considering that Mr Robertson is not acting alone, stating:

“I believe you have become the tool of a faction. I have no doubt Mr Robertson but that you are goaded on by these agitators who are disaffected to the government. I consider you are the tool of a miserable party of agitated disturbers by whose directions you have been acting and sorry I am to see you prostrating your intellects in so debased detestable and abominable a service.”

E. Morris Miller (1952) notes that Lieutenant Governor Arthur frequently used the terms “faction” or “factious party” to describe opponents of the government. He also used it to identify the “licentious press” in his reply to the Memorialists on bushranging. This use of the term by Chief Justice Pedder in sentencing Mr Robertson suggests the judge was id idem with the Lieutenant Governor, a point made by Alex Castles (2007) who notes that Lieutenant Governor Arthur and Chief Justice Pedder were close in political temperaments, and the judge was an ally of the Lieutenant Governor.

The Lieutenant Governor and Chief Justice had ample opportunity to develop proximate political temperaments considering that the Chief Justice had a seat on both the Executive and Legislative Councils until 1835. It was in that year that Chief Justice Pedder resigned.

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854 ibid
855 E. Morris Miller, (1952), op. cit., 192
856 Colonial Times, 20 December 1825 and Hobart Town Gazette, 7 January, 1826
857 Alex Castles, (2007), op. cit., 122
his seat on the Executive Council in light of the Secretary of State’s declaration in Parliament that the legislative and executive offices were incompatible with the proper functions of a judge.\textsuperscript{858}

Chief Justice Pedder states his views on the Van Diemen’s Land press, labelling it “licentious” and “degrade”\textsuperscript{859} and one of the worst features in the colony. Nevertheless, the judge denies being anti-press insisting that he would support a free and independent press.\textsuperscript{860} The judge probably meant a press which was not critical of the government.

Mr Robertson was sentenced to imprisonment for twelve months,\textsuperscript{861} to begin at the expiration of the current sentences, together with a fine of fifty pounds, and to be further imprisoned until the fine be paid.\textsuperscript{862} The sentence and sentencing tirade can be seen as a sad example of misuse and abuse of power by those with power.

This matter in this case exemplifies how people in positions of administrative power appropriated government materials for their own use. The decision reveals the power of the administration to justify this use. Those with administrative power, through manipulation of the law, ensured they retained power. It could well be termed the Rule of the Van Diemen’s Land Administration, as distinct from the Rule of Law.

\textsuperscript{858} John West, \textit{History of Tasmania}, Vol. 1, (Launceston: Henry Dowling: 1852), 182
\textsuperscript{859} George Mackaness, (ed.), (1959), op. cit.
\textsuperscript{860} ibid
\textsuperscript{861} James Fenton, (1884), op. cit., 140
\textsuperscript{862} George Mackaness (ed.), (1959), op. cit.
13. *R v Murray*, Supreme Court of Van Diemen’s Land, 25 and 29 September 1835

**Chief Justice Pedder and Puisne Judge Montagu on the bench**

This was an application to the court by the Solicitor General to show why a Criminal Information should not be filed against Mr Robert Lathrop Murray for publishing a gross, scandalous and malicious libel in the *Tasmanian* of 18 September 1835. The alleged libel is contained in a letter, dated 14 September 1835, purportedly written by Mr Sly, a bootmaker. Mr Sly states that between six and eight months ago, he put in a tender to make boots for six employees of the Town Surveyor at the price of two pounds per pair of boots. At the time, the Town Surveyor owed Mr Sly money. The Town Surveyor offered to pay Mr Sly two pounds and ten shillings per pair because, “They have always charged me two pounds and ten shillings per pair and I see no reason why you should not have that sum, as well as anybody else.”

The letter is introduced with a remark upon the appropriate standard of behaviour expected of those holding public office, that is:

“Every public functionary is bound to do his utmost, for the protection of the public property, especially for that portion of it which comes within his own cognisance. Has the Town Surveyor done this? We could mention some instances of a rather equivocal nature. One will suffice. The individual with whom it occurred, shall speak for himself.”

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863 *Tasmanian*, 2 October 1835
864 *Tasmanian*, 18 September 1835
The inference is that the Town Surveyor is not sufficiently careful with public funds. Mr Sly confirms the inference with his statement that while his asking price for the boots was two pounds per pair, the Town Surveyor insisted he be paid two pounds and ten shillings per pair. This additional expenditure which the Town Surveyor required to be paid by the Government for the boots, supports the inference that the Surveyor is needlessly incurring unnecessary expenditure for the government. That, in itself, suggests an appalling misuse of Government funds. However, that is not the end of the inference. Mr Sly’s letter continues:

“The Town Surveyor was at this time, in my debt, and I had sent in my bill. He asked me, “Would two pounds pay me for the boots.” I said “Yes”. He said, “I may as well put something in your pocket, as not; they have always charged me two pounds, ten shillings, and I see no reason why you should not have that sum, as well as any body else.” I thanked him kindly.”

This confirms the inference that the Town Surveyor increased the price of the boots in order to offset the money he, himself, owed to Mr Sly. Thus, as well as inferring that the Town Surveyor is squandering public money by increasing the price of the boots, it is open to the reader to surmise that the Town Surveyor is inappropriately using Government funds to pay his own debts. The Solicitor General’s application to show cause why a gross, scandalous and malicious libel should not be filed against Mr R. L. Murray can well be understood. In court on 25 September 1835, Mr Sly’s letter was

865 Tasmanian, 2 October 1835
read, together with affidavits of Mr Sly and Mr A. Murray. This article which appeared in the *Tasmanian* of 18 September 1835 is then published in the report of the case in the *Tasmanian* of 2 October 1835 – thus the content is repeated to the public. This technique is a clever way of legally republishing an alleged libel.

The Chief Justice’s comments are revealing in regard to the bench’s notion of the elements of criminal libel. The Chief Justice stated that for a matter to be considered appropriate for prosecution as a criminal libel, the sole question to be determined was whether or not the publication was done with a malicious intent. However, in his determination of this sole issue, the judge showed that there were actually three criteria which had to be decided. For example, His Honour concludes that the publisher had:

- merely fulfilled his duty as a public writer,
- the affidavits were evidence indicating that Mr R. L. Murray had endeavoured to determine the real truth before publication, and
- the publication had not been made with any malicious intent.

Puisne Judge Montagu concurred with the Chief Justice.

On 29 September 29 1835, their Honours gave their considered decision that the facts did not support a criminal prosecution for libel. From this judicial determination, then, it can be inferred that the essential elements to ground a prosecution for criminal libel were:

- publication for a reason other than public duty,
no evidence to show that the publisher had investigated the truth of the content before publication, and

the publication was made with malicious intent.

In this case, Chief Justice Pedder considered whether there was any evidence of the publisher’s investigation of the truth of the content prior to publication. When evidence was tendered to show there had been investigation of the truth of the content, this established to the bench’s satisfaction that the publication was not of malicious intent. The fact that the bench considered whether the publisher had investigated the truth of the content introduces a question about an underlying criterion: is the publication of truthful content, with evidence to show there had been proper investigation of its truth, sufficient to negate any suspicion of malicious intent in publication? Further, the Solicitor General’s application was for a rule to show cause why a gross, scandalous and malicious libel should not be prosecuted against Mr Murray. The Court, however, chose to ignore the “gross and scandalous” elements.

In piecing together the underlying components for this change of heart by the bench about the elements of libel, it is worthwhile considering the backgrounds of the people involved in the case. Mr Alexander Murray was Town Surveyor and Mr R. L. Murray was the editor who published the letter from Mr Sly. Mr Murray, the editor, was at this time married to a woman who was the daughter of people with whom Lieutenant Governor Arthur appeared to have a friendly relationship. A further point to be remembered is that Lieutenant Governor Arthur and Chief Justice Pedder had a close
friendship, as revealed in continuing correspondence over many years. They were also both being members of the Legislative and Executive Councils. Mr R. L. Murray had ceased his attacks on Lieutenant Governor Arthur and was now deeply immersed in bringing freemasonry to Hobart Town.

It is, therefore, plausible, taking into consideration the colonial community where power rested in a few who were known to each other, that the court manipulated the criteria in order to protect Mr R. L. Murray. The final sentence in the Tasmanian’s report of the case is difficult to reconcile with the court’s finding there was no malice in publication. For example,

“Deep as have been the injuries we have received at the hands of Mr A. Murray, we should scorn, maliciously, to present them.”

That concluding sentence strongly suggests that the Tasmanian’s publisher, Mr R. L. Murray, did have a motive for malice against Mr A. Murray, the Town Surveyor. The Tasmanian’s use of italics for the word “maliciously” could well be seen as rubbing salt into the wound of Mr A. Murray. It also emphasises the sole criterion which the court apparently held, in this case, as essential to be met to ground a criminal prosecution for libel, that is, publication with ‘malicious intent.’

866 Alex Castles, (1982), op. cit., 268 – 269, citing Pedder to Arthur, 31 Dec., 1827
867 ibid, 265
868 Tasmanian, 2 October 1835
869 ibid
The decision in this case demonstrates how the court manipulated decisions in order to protect those who were in favour with the administrative hierarchy. In previous criminal libel matters, intention, truth and research before publication were considered irrelevant in determining whether a case had been made out. In previous cases the act of publication was the sole criterion for the defendant to be found guilty of criminal libel. In this instance, however, because the defendant had an association with those who held positions of administrative power in the colony, the judges stage-managed the criteria in order to decide in his favour. This case exemplifies an arbitrary practice of justice where the Rule of Law succumbed to the Rule of the Administration.

14. Summation of the data from the selected Supreme Court criminal libel cases

The summation of the data from the selected Supreme Court criminal libel cases is shown in the following figure:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>LIBEL CONTENT</th>
<th>OUTCOME</th>
<th>AWARD</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Bent (No 1) 26th July 1825&lt;sup&gt;870&lt;/sup&gt;</td>
<td>Labeled LG Arthur ‘Gideonite of tyranny’ &amp; referred to punishment of Colonel Bradley in the Honduras &amp; LG Arthur’s criticism of the missionaries’ ill treatment of &amp; the missionaries’ response</td>
<td>The jury found the defendant guilty but did not specify counts</td>
<td>Retrial because the jury failed to identify the counts</td>
</tr>
<tr>
<td>R v Bent (No 2), 1 August 1825&lt;sup&gt;871&lt;/sup&gt;</td>
<td>Administrators misuse public money, receive excessive salaries &amp; men in public office have no talent</td>
<td>The jury found the defendant guilty on all counts</td>
<td>Imprisoned for 3 months, pay a fine of £200 and recognizances of good behavior of £200 and two sureties in £100 each.</td>
</tr>
<tr>
<td>R v Bent 15 April 1826&lt;sup&gt;872&lt;/sup&gt; – the return to court of RvBent (No 1)</td>
<td>Labelled LG Arthur ‘Gideonite of tyranny’ &amp; referred to punishment of Colonel Bradley in the</td>
<td>The jury found the defendant guilty on all</td>
<td>Imprisonment for 3 months, to commence when his current</td>
</tr>
</tbody>
</table>

<sup>870</sup> Hobart Town Gazette, 29 July 1825
<sup>871</sup> Hobart Town Gazette, 5 August 1825
<sup>872</sup> Colonial Times, 15 April 1826
<table>
<thead>
<tr>
<th>Date</th>
<th>Case Description</th>
<th>Outcome</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1827</td>
<td>For a retrial &amp; &amp; LG Arthur’s criticism of the missionaries’ ill treatment of &amp; the missionaries’ response</td>
<td>Counts</td>
<td>The jury found the defendant guilty on both counts. Recognizances of £100 and two sureties of £50 each to appear at a later date for sentencing.</td>
</tr>
<tr>
<td>1827</td>
<td>R v Bent, 15 May 1827</td>
<td>The AG brought the action in the wrong forum</td>
<td>Nil Case dismissed</td>
</tr>
<tr>
<td>1827</td>
<td>R v Montagu, 22 June 1829</td>
<td>The AG brought the action in the wrong forum</td>
<td>Nil Case dismissed</td>
</tr>
<tr>
<td>1827</td>
<td>R v Gregson (1832) 2-3 November and 8 November 1832</td>
<td>Criticises secret evidence-gathering from convicts/employees against their masters</td>
<td>Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”. Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”.</td>
</tr>
<tr>
<td>1832</td>
<td>R v Browne (No 1), 14 August 1833</td>
<td>The libel referred to the criminal flogging to death of a man at the Prisoners’ Barracks</td>
<td>Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”. Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”.</td>
</tr>
<tr>
<td>1832</td>
<td>R v Browne (No 2), 14 August 1833</td>
<td>The same article as above, criticised the Colonial Authorities, in a Christian country, for allowing a man to be flogged to death AND The article mentioned a ‘rumour’ that a bribe had been in operation</td>
<td>Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”. Guilty on the 5th count, that is, of the publication on 5 October of the letter signed “Hampden”.</td>
</tr>
<tr>
<td>1835</td>
<td>R v Robertson (No 1), 9 March 1835</td>
<td>The coupling of three libels: *the high price of justice, in particular Mr Rowland’s fees; * Lieutenant Governor’s using government hay to feed his own cattle;</td>
<td>Guilty *£20 fine and imprisonment for 1 month for libelling lawyer Rowlands. *£120 fine and imprisonment for 8 months.</td>
</tr>
</tbody>
</table>

873 Hobart Town Gazette, 19 May 1827
874 Colonial Times, 18 May 1827
875 Colonial Times, 26 June 1829
876 Tasmanian, 9 November 1832
877 Tasmanian, 9 November 1832
878 Tasmanian, 9 November 1832
879 The True Colonist, 16 November 1832
880 Tasmanian, 16 August 1833
881 The True Colonist, 20 August 1833
882 The True Colonist, 11 and 14 March 1835
**Lieutenant Governor's “dishonourable and unworthy conduct” in inappropriately altering the date on a Deed of land** months after the expiration of the first sentence and further imprisonment until the fine be paid for accusing the Lieutenant Governor of feeding his own animals with Crown hay and *£60 fine and imprisonment for 4 months and continuing imprisonment until the fine be paid for accusing the Lieutenant Governor of “dishonourable and unworthy conduct” in altering the date of the land grant Deed*.  

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
<th>Verdict</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Robertson (No 2) 7 April 1835</td>
<td>Captain Montagu used Crown materials and labourers to build his own house</td>
<td>Guilty</td>
<td>12 months’ gaol to begin at the expiration of the current sentences, together with a fine of 50 pounds, and to be further imprisoned until the fine be paid.</td>
</tr>
<tr>
<td>R v Murray, 25 and 29 September 1835</td>
<td>A letter stating the Town Surveyor paid off his personal debts by using Government money through the increase of tender prices</td>
<td>Not guilty</td>
<td>Not guilty</td>
</tr>
</tbody>
</table>

**Figure (XLIII): Summation of data from the selected Supreme Court criminal libel cases**

**15. Underlying values, and power and powerless polarities**

The following figure shows the values, power and powerless polarities identified in the selected Supreme Court criminal libel cases:

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885 *ibid*
886 *The True Colonist*, 17 April 1835 and 15 May 1835
887 *James Fenton*, (1884), op. cit., 140
889 *Tasmanian*, 2 October 1835
<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>ARBITER</th>
<th>VALUE</th>
<th>POWER &amp; POWERLESSNESS</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>R v Bent</em>(No 1), 26th July 1825</td>
<td>CJ Pedder and a military jury</td>
<td>LG’s harsh treatment of subordinates;</td>
<td>Judicial reliance upon English legal precedent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>misuse of position</td>
<td></td>
</tr>
<tr>
<td><em>R v Bent</em> (No 2), 1 August 1825</td>
<td>CJ Pedder on the Bench and military jury of 7 men</td>
<td>Misuse of public money by unnamed officials –</td>
<td>Powerlessness of the incarcerated defendant</td>
</tr>
<tr>
<td></td>
<td></td>
<td>credit worthiness</td>
<td></td>
</tr>
<tr>
<td><em>R v Bent</em> 15 April 1826972 – the return to court of <em>RvBent</em> (No 1) for a retrial</td>
<td>CJ Pedder on the Bench and military jury of 7 men</td>
<td>LG’s harsh treatment of subordinates; misuse of position</td>
<td>Power of the judge to influence the jury by his advocacy in summing up; powerlessness of the dissatisfied VDL litigant subjected to a seemingly totalitarian legal system</td>
</tr>
<tr>
<td></td>
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<tr>
<td><em>R v Bent</em>, 15 May 1827893, CJ Pedder on the bench</td>
<td>CJ Pedder on the bench</td>
<td>LG’s credit worthiness eg improper use of Head Tax; misuse of position</td>
<td>Powerlessness of an unrepresented defendant</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><em>The evidence disclosed the power of unsupervised officials to abuse a system designed to raise state funds</em></td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><em>R v Montagu</em>, CJ Pedder on the bench, 22 June 1829894</td>
<td>CJ Pedder on the bench, 22 June 1829895</td>
<td>Wrong forum</td>
<td>The court will not entertain actions in the inappropriate jurisdiction Powerlessness of the plaintiff to bring an action in an inappropriate forum</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>R v Gregson</em> (1832) 2-3 November and 8 November 1832,986 before CJ Pedder and a jury</td>
<td>CJ Pedder and a jury</td>
<td>Secret evidence gathering; misuse of position</td>
<td><em>Power of those with money to pervert the course of justice;</em> Powerlessness of a convict worker with a corrupt master AND Vulnerability of an overseer of convicts to fabricated corrupt charges against him based upon</td>
</tr>
</tbody>
</table>

890 *Hobart Town Gazette*, 29 July 1825  
891 *Hobart Town Gazette*, 5 August 1825  
892 *Colonial Times*, 15 April 1826  
893 *Hobart Town Gazette*, 19 May 1827  
894 *Colonial Times*, 26 June 1829  
895 ibid  
896 *Tasmanian*, 9 November 1832
<table>
<thead>
<tr>
<th>Case</th>
<th>Judge/Parties</th>
<th>Evidence/Powerlessness</th>
</tr>
</thead>
<tbody>
<tr>
<td>R at the prosecution of J.T. Gellibrand v Gregson, Supreme Court</td>
<td>CJ Pedder on the bench and the same jury sworn for the preceding case</td>
<td>Corrupt behaviour of named officials, officials; misuse of position</td>
</tr>
<tr>
<td>3 November 1832, CJ Pedder on the bench and a sworn jury</td>
<td></td>
<td>Powerlessness of self-represented litigants in a colony where there were few legal practitioners; Power of the legal fraternity to diminish a defendant’s case by 'not being available’ to provide legal assistance</td>
</tr>
<tr>
<td><strong>R v Browne (No 1) 1833, 14 August 1833, Judge Montagu on the bench</strong></td>
<td>Judge Montagu on the bench</td>
<td>Harsh punishment of named officials, officials; abuse of power</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The court will not entertain a criminal prosecution against an unidentified writer;</td>
</tr>
<tr>
<td><strong>R v Browne (No 2), Supreme Court of Van Diemen’s Land, 14 August</strong></td>
<td>Judge Montagu on the bench</td>
<td>Harsh punishment of named officials, officials; misuse of position</td>
</tr>
<tr>
<td>1833, Judge Montagu on the bench</td>
<td></td>
<td>Powerlessness of criminal prosecutor to prosecute an individual for writing a libel without disclosing the original manuscript; a copy is not sufficient for a criminal prosecution.</td>
</tr>
<tr>
<td><strong>R v Robertson (No 1), 9 March 1835</strong></td>
<td>CJ Pedder on the bench and a civil jury. The names of the jurymen are published: W.W. Barrow, Esq., retired officer: H.J. Emmett, sen. Esq., Government officer; Arthur Davis, Esq. Half-pay RN; Andrew Crombie, Esq. JP, merchant; John Boyes, Esq. merchant; George Bilton, Esq, merchant; John Bell, Esq., JP; George Watson Esq JP, merchant; George Gatehouse, Esq. merchant; H.J. Emmett, Esq., jun., Government officer; John Lee Archer, Esq., Government officer; Michael Vicary, Esq.,</td>
<td>Unfairness of high costs of justice; corrupt behaviour of LG in using government property for personal ends eg using government hay to feed his own cattle; misuse of position</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The power of the court to punish harshly – by fine and imprisonment until fine is paid;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Powerlessness of the press to write critical sentiments about public measures and practices.</td>
</tr>
</tbody>
</table>

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897 ibid
898 ibid
899 Tasmanian, 16 August 1833
900 ibid
901 ibid
902 The True Colonist, 20 August 1833
903 The True Colonist, 11 and 14 March 1835
| Case | Date | Judges | Description | Powerlessness
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Robertson (No 2)</td>
<td>7 April 1835</td>
<td>CJ Pedder and J Montagu</td>
<td>Named officials using government property for own ends e.g. Montagu using government stone &amp; government labour to build his own house; misuse of position</td>
<td>Powerlessness of the indigent, imprisoned and unrepresented defendant to take appropriate defensive legal action. Power of the court to put a defendant in a position of powerlessness by refusing legal assistance and by disregarding procedural fairness</td>
</tr>
<tr>
<td>R v Murray</td>
<td>25 and 29 September 1835</td>
<td>CJ Pedder and Montagu</td>
<td>Unnamed officials using government money; credit worthiness</td>
<td>Powerlessness of a plaintiff to gain the Crown’s assistance to protect his reputation from libelling by the press when the court applies the subjective criterion of malicious intent to the alleged libel: “… The court’s potential power for corrupt decision-making is enhanced by the introduction of the subjective element ‘malicious intent’ as the indicia for criminal libel</td>
</tr>
</tbody>
</table>

Figure (XLIV): Values, power, powerlessness identified in the selected Supreme Court criminal libel cases

16. The species of defamation

Of the twelve selected cases considered from the Van Diemen’s Land Supreme Court for criminal libel, the case of R v Bent (No.1) 26 July 1825\textsuperscript{907} returned to court as R v Bent, 15 April 1826\textsuperscript{908} for a retrial, because the first jury did not specify the counts for which

\textsuperscript{904} *The True Colonist*, 17 April 1835 and 15 May 1835

\textsuperscript{905} *Tasmanian*, 2 October 1835

\textsuperscript{906} *ibid*

\textsuperscript{907} *Hobart Town Gazette*, 29 July 1825

\textsuperscript{908} *Colonial Times*, 15 April 1826
the defendant was found guilty. The case of *R v Montagu*, 22 June 1829\(^909\) was brought in the wrong forum and subsequently dismissed.

Thus, the data from ten cases are considered. Some of these cases had multiple causes. Of these ten cases, there were three which defamed the Lieutenant Governor. These three cases are: *R v Bent (No. 1)* 26 July 1825\(^910\) returned to court as *R v Bent*, 15 April 1826\(^911\) for retrial; *R v Bent*, 15 May 1827;\(^912\) *R v Robertson (No. I)*, 9 March 1835.\(^913\) In each of these three cases that name and attack the Lieutenant Governor, the defendant is found guilty.

Aside from the direct and named attacks upon the Lieutenant Governor, three of the total selected criminal libel cases name and attack a government official. These three cases are: *R v Robertson (No. I)*, 9 March 1835,\(^914\) *R v Robertson (No. 2)*, 7 April 1835,\(^915\) and *R at the prosecution of J. T. Gellibrand v Gregson*, 3 November 1832.\(^916\) In each of the three cases which name the public official attacked, the defendant is found guilty.

Of the total selected criminal libel cases, four attack unnamed government officials, these cases attack men who hold particular administrative roles, without identifying the specific person by name. These four cases are: *R v Bent (No. 2)*, 1 August 1825,\(^917\) *R v Browne*

\(^909\) *Colonial Times*, 26 June 1829
\(^910\) *Hobart Town Gazette*, 29 July 1825
\(^911\) *Colonial Times*, 15 April 1826
\(^912\) *Hobart Town Gazette*, 19 May 1827
\(^913\) *The True Colonist*, 11 and 14 March 1835
\(^914\) ibid
\(^915\) *The True Colonist*, 17 April 1835 and 15 May 1835
\(^916\) *Tasmanian*, 9 November 1832
\(^917\) *Hobart Town Gazette*, 5 August 1825
In three of these cases which attack an unnamed government official, the defendant is found not guilty. The exception is *R v Bent (No. 2)*, 1 August 1825, where, although the officials attacked are not specifically identified by name, they are nevertheless identifiable from description, one being the Lieutenant Governor himself, for example, “our sovereign’s representative.” Thus, in *R v Bent (No. 2)*, 1 August 1825, the defendant is found guilty.

These findings are depicted in the following figure:

Figure (XLV): Illustration of the attacks on officials, including Lieutenant Governor

If the Lieutenant Governor is included in the number of cases in which the government official who was attacked is named, there are six cases in which a government official

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918 *Tasmanian*, 16 August 1833
919 *The True Colonist*, 20 August 1833
920 *Tasmanian*, 2 October 1835
921 *Hobart Town Gazette*, 5 August 1825
was attacked for the performance of his public duties. In each of those instances, the defendant was found guilty. This finding is depicted in the following figure:

![Pie chart showing comparison of attacks on named and unnamed government officials](image)

**Figure (XLVI): Comparison of the number of attacks on named government officials, including the Lieutenant Governor and unnamed government officials**

Thus the data generated by the selected cases indicate that in court proceedings for criminal libels:

- it was more likely that the defendant attacked a government official’s performance of his official duties than his personal qualities.

The data also indicates that:

- when the identity of the public official being criticized was withheld in the publication, either by name or description, the court found the defendant not guilty, and
• when the identity of the government official being criticized was disclosed in the publication, the court found the defendant guilty.

This finding is shown in the following figure:

![Bar graph showing comparison of not guilty and guilty decisions cases with specific and unnamed government officials.](image)

**Figure (XLVII):** Comparison of the number of not guilty decisions and guilty decisions cases, with cases on specific but unnamed government officials, and named government officials, including the Lieutenant Governor

This finding is indicative of the fact that in the penal colony of Van Diemen’s Land, administrators were developing regulations, which the government officials were required to implement. Also, many of the English community in the colony resented the regulations and the actions of those who were implementing them. As well, the potential for corruption through connivance of government officials, where the power was in the hands of an intimate few, opened the way for improper practice.

It can be further inferred from the figures that it is the disclosure of the identity of the public official which influenced the court to make a finding of guilt, as distinct from the attack upon a public figure *per se.*
17. The values supported by the court

As mentioned previously, of the eleven selected cases considered from the Supreme Court for criminal libel, the case of *R v Bent (No. 1)* 26 July 1825\(^ {922}\) returned to court as *R v Bent*, 15 April 1826\(^ {923}\) for a retrial, because the first jury did not specify the counts for which the defendant was found guilty, while he case of *R v Montagu*, 22 June 1829\(^ {924}\) was brought in the wrong forum and subsequently dismissed. Consequently, the withdrawal of these two cases from the eleven, results in the generation of data from 9 cases. Some of those nine cases have multiple causes, and these are identified in the figure below:

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>SPECIFIC ATTACKS</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>R v Bent (No. 2), 1 August 1825</em>(^ {925})</td>
<td>3 attacks: unnamed but so clearly described as to be recognizable government officers: *misused money and *received excessive salaries and *lacked administrative talent</td>
<td>2 credit worthiness, 1 misuse of position</td>
</tr>
</tbody>
</table>
| *R v Bent, 15 April 1826*\(^ {926}\)  
– the return to court of *R v Bent (No. 1)* for a retrial | 3 attacks: on LG Arthur  
* labeled a Gideonite of tyranny;  
* his harsh treatment of Colonel Bradley;  
* and the reply by the missionaries to LG Arthur’s criticism of missionaries treatment of slaves; | 3 misuse of position |

\(^ {922}\) *Hobart Town Gazette*, 29 July 1825  
\(^ {923}\) *Colonial Times*, 15 April 1826  
\(^ {924}\) *Colonial Times*, 26 June 1829  
\(^ {925}\) *Hobart Town Gazette*, 5 August 1825  
\(^ {926}\) *Colonial Times*, 15 April 1826
| **R v Bent, 15 May 1827**<sup>927</sup> | 2 attacks: on LG Arthur  
*the misuse of the Head tax  
*the arbitrary payment of wheat; | 2 credit worthiness |
|---|---|---|
| **R v Gregson, 2-3 November and 8 November 1832**<sup>928</sup> | 1 attack: unnamed government officers  
*gathering evidence in secret from convicts: | 1 misuse of position; |
| **R at the prosecution of J. T. Gellibrand v Gregson, 3 November 1832**<sup>929</sup> | 1 attack: named officials,  
*corrupt behaviour | 1 misuse of position |
| **R v Browne (No. 1), 14 August 1833**<sup>930</sup> | 1 attack:  
*convict flogged to death | 1 misuse of position |
| **R v Browne (No. 2), 14 August 1833**<sup>931</sup> | 2 attacks: unnamed government officials  
*convict flogged to death and  
*rumours of bribery | 1 misuse of position 1credit worthiness |
| **R v Robertson (No. 1), 9 March 1835**<sup>932</sup> | 3 attacks:  
*named lawyer’s exhorbitant legal fees,  
*LG Arthur’s use of government hay for private purposes,  
*LG Arthur’s improper changing of a deed date | 2 credit worthiness 1 misuse of position |
| **R v Robertson (No. 2), 7 April 1835**<sup>933</sup> | 1 attack: named Government official  
*use of government labourers and building materials to construct a private residence | 1 misuse of position |
| **R v Murray, 25 and 29 September 1835**<sup>934</sup> | 1 attack: named government officer, | 1 credit worthiness |

<sup>927</sup> *Hobart Town Gazette*, 19 May 1827  
<sup>928</sup> *Tasmanian*, 9 November 1832  
<sup>929</sup> ibid  
<sup>930</sup> *Tasmanian*, 16 August 1833  
<sup>931</sup> *The True Colonist*, 20 August 1833  
<sup>932</sup> *The True Colonist*, 11 and 14 March 1835  
<sup>933</sup> *The True Colonist*, 17 April 1835 and 15 May 1835  
<sup>934</sup> *Tasmanian*, 2 October 1835
The values attacked in the nine cases can be located within two clusters:

- credit worthiness, when the value attacked involved misuse of government money or government goods, and
- misuse of official administrative position, that is, when the official attacked seemed to exercise his official authority for purposes outside the jurisdiction for which it had been granted, or failed to exercise his official authority for the purposes for which it had been granted.

In all, there were eighteen attacks in the selected cases. Of these, ten attacks were upon credit worthiness and eight were upon misuse of official administrative position. Thus the predominant value attacked was credit worthiness.

This finding is depicted in the following figure:
The decisions reveal that when the Crown alleged the values under attack in the libel were:

- credit worthiness, and
- performance of official tasks by a government administrator,

the court protected the government administrator.

The court consistently rejected hostility to the government and criticism of named government officers.

The figures support the conclusion that a government official’s performance of his administrative tasks were:

- a vulnerable aspect of reputation,
- a likely quality of a government official to be attacked, and
- a likely subject for criminal libel actions,

in the Van Diemen’s Land community between the years 1825 and 1835.

18. Conclusion

In each of the ten selected criminal libel cases which went to trial, the Crown sought the assistance of the court to protect reputation. The court found for the Crown in six of the
ten cases. In four cases the court found for the defendant. In two of those cases, the
government officer was not named and not identifiable, that is in *R v Browne (No. 1)*, 14
August 1833\(^{935}\) and *R v Browne (No. 2)*, 14 August 1833.\(^{936}\) In these two cases, both on
the same facts, the defendant had written about the flogging of a convict which had
resulted in the convict’s death. It was the practice in Van Diemen’s Land to have convicts
officially appointed as convict flagellators, and it was their task to inflict the whipping
penalties. Thus it would have been a convict who was actually inflicting the punishment
which killed his fellow convict. Castles (2007)\(^{937}\) informs that:

> “Top officials normally stood by to ensure the knotted cat o’nine tails was applied
> with diligence by those appointed to ply the brutal craft.”

Thus, it can be inferred that it would have been of little concern to the administrators that
a convict flagellator had misused his position and a convict had subsequently died.

In the case where the official was not named yet the court found for the defendant, was
the case of *R v Gregson* (1832) 2-3 November and 8 November 1832.\(^{938}\) In that case the
defendant criticized the practice of secret evidence gathering from convicts by
government officials and employers. It could have been to the advantage of the
administration to agree that secret evidence-gathering was improper in that it created a
façade to the colony that the administration was honest.

\(^{935}\) *Tasmanian*, 16 August 1833

\(^{936}\) *The True Colonist*, 20 August 1833

\(^{937}\) Alex Castles, (2007), op. cit., 21

\(^{938}\) *Tasmanian*, 9 November 1832

302
In the other case where the official was named yet the court found for the defendant, was the case of *R v Murray*, 25 and 29 September 1835.\(^939\) In that case the court developed the criterion of proper investigation of the truth of the matter before publication to prove that there had not been an intentional malicious publication by the defendant. This decision, however, has the shadow of the possible relationship of the family of the publisher’s wife with Lieutenant Governor Arthur, and the possible influence of that relationship upon the court. This finding is depicted in the following figure:

![Figure (L): Comparison of findings for the Crown defendants in the selected criminal libel cases](image)

Punishments in six cases consisted of considerable fines ranging from twenty pounds to two hundred pounds, together with periods of imprisonment set between one month and one year. The serious consequence of the fines, however, was that the court insisted that the defendant remain in prison until the fines be paid. Also, the terms of imprisonment inflicted for each charge were to be served separately, as distinct from concurrently. Thus the effect was that a convicted defendant could be incarcerated indefinitely. The

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\(^939\) *Tasmanian*, 2 October 1835
advantage of this consequence for the administration was that the person was prevented from publicly criticizing the government, being imprisoned.

The highest fines were awarded for libels on named government officers, in particular libels of the Lieutenant Governor. These high fines were one hundred and two hundred pounds, and cumulatively up to four hundred pounds. Doubtless the strong message sent to the community was that criticism of government officers in the performance of their official duties would not be tolerated. They also emphasize the power of the administrative officers, in particular, the judiciary.

The jurisprudence of these sampled cases supports the premise that:

• the court exercised its power to protect the reputation of a government officer in the performance of his public and official duties through punitive measures such as fines and imprisonment, and

• the court developed subjective criteria for the determination of criminal liability in defamation.

The subjectivity revealed in the decisions for the selected criminal libel cases provides a foundation for the conclusion that the Rule of Law was not adhered to in the Supreme Court of Van Diemen’s Land. The decisions reveal a strong bias towards the protection of the government administrators. The judiciary supported the administrative officers and punished those who were bold enough to publicly offer criticism. The judiciary’s support
of the government administrators resulted in their arbitrary implementation of established legal principles, English legislation and time-honoured precedent from English common law. It seems appropriate to label the practice of justice at that time and in the selected decisions as a regime of the Rule of the Administration rather than the Rule of Law.
CHAPTER NINE: CONCLUSION

This chapter considers aspects of jurisprudence from the theorists and attempts to locate the findings of the discussion of the Van Diemen’s Land cases within the values, power and powerlessness paradigm.

Based upon the decisions in the selected cases discussed and the harsh punishments inflicted on defendants convicted of defamation counts from the Bench of Magistrates at Port Dalrymple to the Supreme Court of Van Diemen’s Land, between 1805 and 1835, it could be said that Jeremy Bentham’s\(^{940}\) (1748-1832) view of the way judges make law operated in Van Diemen’s Land between the years 1805 and 1835. For example, Bentham acknowledges that judges make the common law and then proceeds to state how, in his opinion, judges actually do make common law. He writes:

“Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way judges make laws for you and me.”\(^{941}\)

Surely the defendant editor in several of the above cases, Mr Robertson, would have agreed with Bentham’s sentiments: incarcerated, denied access to legal assistance and powerless to appropriately address the charges against him for publishing information


\(^{941}\) ibid, 235
about named public officials which revealed such officials as having misused their positions. The determinations of the Bench of Magistrates and the Van Diemen’s Land Supreme Court in the selected cases discussed, reveal that so far as the legal rights of the public and press alike, criticism of named government officials in the course of their official duties, would not be tolerated.

While that was the seemingly blanket view, nevertheless, the court showed a willingness to make an exception when it chose so to do. For example, the Supreme Court introduced the subjective element of ‘malicious intent’ as the essential criterion to ground a prosecution for criminal libel in *R v Murray*, 25 and 29 September 1835. As the criterion could not be satisfied, the defendant was acquitted. Comment in the case reports reveals that this criterion could capriciously be abandoned in Van Diemen’s Land. For example, the requirement that the defamed government official be identified by name before a criminal libel prosecution could succeed, is not followed in *R v Murray*, 25 and 29 September 1835, thereby revealing an inconsistency. In that case although the official was identified by name the prosecution did not succeed because a new criterion was added: ‘malicious intention’.

It could be argued that such apparent capriciousness is similar to the ‘free law’ movement *freirechtsbewegung*, established in the late nineteenth and early twentieth centuries in Germany and France. The courts in those two European countries, as in Van Diemen’s

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942 *R v Robertson (No. 1)*, Supreme Court of Van Diemen’s Land, 9 March 1835
943 *Tasmanian*, 2 October 1835
944 ibid
Land in the early nineteenth century, used local contextual knowledge of society, together with social consciousness, to fill in the apparent gaps in the law. In Van Diemen’s Land the skeleton of English common law and applicable statute law formed the frame upon which the colony’s law of defamation would be established. However, the Van Diemen’s Land decisions in the selected cases indicate that the court wanted security and stability. The administrators had to contend with the ebb and flow oscillations of a colony which barely knew itself. On an island, thousands of ocean miles away from the ‘mother’ country, the administrators in the ‘infant’ colony were likely to bend the law to discipline the ‘child.’ This resulted in arbitrary decision-making, with the court frequently entering into disparaging and derogatory denigration of the parties who came before it. Such arbitrariness resulted in animosity towards those in administrative positions of power in the colony. The decisions reveal that those who dispensed the law ensured they protected their own reputations by defaming and vilifying those who dared to criticised them.

Thus, it can be suggested that the reason for the decisions of Deputy Judge Advocate Edward Abbott in the Lieutenant Governor’s Court being accepted by the community is that they were based upon the constant premise that a person’s reputation was not to be damaged by slanderous words. The plaintiffs in the selected cases who took their plight to the Lieutenant Governor’s Court were confident that this long-established doctrine would be adhered to by the court. They were not disappointed. Regardless of the pressures of the context of Van Diemen’s Land, Deputy Judge Advocate Abbott’s decisions reflected the established premise that a person’s reputation was not to be damaged by the slanderous words of another. Similarly, it can be said that the Rule of
Law was applied in the Lieutenant Governor’s Court, with the reputations of all plaintiffs being respected equally, regardless of whether they were male or female, private citizens or business men, or public officials in the exercise of their administrative functions.

On the other hand, when Judge Baron Field visited Van Diemen’s Land from Sydney for the first sitting of the Supreme Court in its civil jurisdiction in the island, His Honour had a different perspective. The judge reprobated against bringing complaints of slander to court. His Honour seemed to assume that slandering was normal and expected in a small community, and while he deprecated this behaviour, he also warned citizens not to bring cases to court based upon mere verbal insults. It is as if Judge Baron Field accepts the inevitability of verbal denigration. However, this judicial attitude is inconsistent with the Rule of Law, where all persons are deemed equal before the law, whether holding administrative positions in the colony or not.

The selected decisions from the Supreme Court of Van Diemen’s Land consistently identify the harm caused by defamation, be it slander or libel, in that it brings discredit to the reputation of an individual and society’s peace of mind is disturbed. However, the decisions also show that the court’s sympathy was more readily extended to individuals who were defamed in the exercise of their official administrative roles, and the peace of mind which was disturbed was that of the administration, rather than the peace of the ordinary private community. Thus, it may well have been from such a perspective that contemporary rules in operation in England were regarded by the English administrators on the ground in colonial Van Diemen’s Land, as being relevant and operational in the
island. Certainly the obligations to obey and consent to obey are revealed in the consequences of the administrative decisions of the Dalrymple Bench of Magistrates. However, the Supreme Court decisions reveal that the court manipulated the obligations differently for different people in the colony. Such manipulation was contrary to the Rule of Law which requires that rules and obligations are constant and framed for the whole community of men, as distinct from some and not others.946

Jonathon Crowe (2009) identifies law as a set of social rules, normally accepted as binding, whose purpose is to promote the common good.947 In colonial Van Diemen’s Land the evolution of legal standards can be seen as the determination of what was ‘right’ as distinct from what was ‘wrong’ for the administration and the administrators. Those with official positions of power sought to maintain their power and control over the populace. Thus, the Rule of Law was replaced by a regime which can be identified as the Rule of the Administration.

The impact of the practice of arbitrary justice meant that people who were not from the administration were subject to heavy fines, imprisonment and physical punishment. There was social injustice. For example, the cases where the defamed plaintiffs had their financial affairs made public in court, did little to implement social justice for them. Not all people in Van Diemen’s Land were similarly powerful or powerless. For example, in Van Diemen’s Land between 1805-1835 absolute power rested with the Lieutenant Governor, whose penultimate power over human beings extended to signing death

947 Jonathon Crowe, Legal Theory, (Australia: Law Book Company, 2009), 3-5
warrants. As the selected libel and slander cases show, the Lieutenant Governor was especially vulnerable to accusations of tyranny because in order to administer the colonial experiment he had virtually absolute power.\textsuperscript{948}

The judges and magistrates, who determined penalties, be they fines, imprisonment or physical torture, also were at the apex of the power structure. Such people had the power to alter the state of a person’s life by their decisions. Men holding administrative decisions determined where others would work and the type of work they would do. Men who had received land grants were provided with convict labourers, over whom they wielded enormous power, including the provision of food and bedding. Although under the convict assignment system farmers were not permitted to punish convicts personally, the magistrates were given such power. By 1825 they could order unspecified lashes providing life and limb were not endangered.\textsuperscript{949}

Traders, too, were in a very strong position. They could pursue economic self-interest and had no hesitation in pressuring London to achieve their own ends.\textsuperscript{950} However, as an individual’s power, prestige and wealth increased, so too did their vulnerability to defamation attacks increase. Thus they were criticised in action and words. For example, six armed bushrangers, including the infamous Michael Howe, fired the harvest of the government mineralogist and severe magistrate A.W.H. Humphrey, in May 1815. They

\textsuperscript{949} ibid, 157
\textsuperscript{950} ibid, 116
rampaged through his house and threatened to deal with his ex-convict wife while he watched helplessly.\textsuperscript{951}

The selected Van Diemen’s Land Supreme Court libel and criminal libel cases reveal that power and disparity became increasingly polarised.\textsuperscript{952} Manning Clark (1993) posits this alienation of the powerless from those with power in his comment that “the governor, military, civil officers, chaplains, magistrates, superintendents, overseers believed, one and all, that physical terror was the effective restraint.”\textsuperscript{953} Certainly the decisions in the defamation cases selected for discussion in this study support the identification of that polarity. It was the government officers ‘on the ground’ in the island who had the power. The powerless were, more often than not, the vanquished respondents who suffered severe penalties of whippings, incarceration and fines imposed by those in power with a mandate to restrain.

The following chart summarises and compares the qualities protected by the various courts and tribunals in the cases selected and discussed in this study. The vertical axis of the chart contrasts the areas in which the slander, libel and criminal libel cases attacked individuals: personal, officials of the government in their administrative duties, creditworthiness, sexual propriety, and the practice of a profession. The horizontal base identifies the courts/tribunals and specific case causes. Left to right these are: Port Dalrymple Bench of Magistrates, First Supreme Court civil matter heard by Judge Baron

\begin{itemize}
\item\textsuperscript{951} ibid, 160, 166
\item\textsuperscript{952} Jonathon Crowe,(2009), op. cit., 90
\item\textsuperscript{953} Manning Clark, \textit{History of Australia}, Michael Catcart, (ed.), (Melbourne: Melbourne University Press, 1993), 47
\end{itemize}
Field from Sydney, Lieutenant Governor’s Court, Supreme Court Slander cases, Supreme Court Libel cases and Supreme Court Criminal Libel cases.

Figure (LI): Comparison of the qualities protected by the various courts and tribunals in the cases selected and discussed in this study.

In libel cases, people holding administrative positions in Van Diemen’s Land were frequently libelled and defamed. In the colony such people had power of control over the distribution of limited essential resources, including currency, animals and food. Thus they had power through the positions they occupied. Their misuse of their position impacted upon those without power.
An underlying reason for libel attacks upon the administrators could have been that such people were seen, by those who had been rejected by England, as representatives of that country. For example, the administrators were:

- appointed by the English Government,
- formulated and implemented rules,
- the rules reduced freedom of choice and
- the rules abridged freedom.

On the other hand, the slander cases were predominantly attacks upon a private person’s credit-worthiness. This may have been fuelled by:

- the colony’s shortage of currency and
- the personal value held by ordinary people of being able to pay their debts as they fell due.

Some slander cases revealed attacks upon a woman’s sexual propriety. These may have been fuelled by:

- the predominance of men in the colony,
- the value of marriage to soothe the tempestuous human male, and
- the problem of unwanted children resulting from sexual impropriety.
The colony’s prevailing ideology between 1805 and 1835 came from the people who held the highest administrative power. Their ideology emerges from the measures of satisfaction identifiable in the judgments, for example:

- respect for authority,
- credit worthiness,
- marriage, child-rearing, chastity and family life, and
- the fruit of education.

Identifiable measures of dissatisfaction revealed in the judgments and the reports of judgments include:

- lack of respect for authority,
- financial ineptness,
- over-indulgence in intoxicating liquor,
- idleness, and
- sexual promiscuity.

The tandem application of both quantitative and qualitative methodology is this project’s response to the challenge of ethnographic investigation of the development of law and jurisprudence in the English penal colony of Van Diemen’s Land.
The specific tools developed to investigate the question required originality, creativity and subjectivity. However, the rigorous and uniform application of the tools encouraged a more objective and uniform focus. The resulting data and its documentation provide the objective foundation required to achieve credibility for the research in both the academic and wider communities. The interpretation of this data provides freedom for qualitative dissemination of meaning, including that of visual association.

Throughout the project, the aim to show the theory emerging from the data as grounded theory has been maintained by:

- the discussion of reports from newspapers and other available materials,
- the identification of values, power and powerlessness polarities, and
- the development of figures to represent the identified values, power and powerless polarities.

The data results in the following identifiable values exorted in the judgments:

- respect for authority,
- credit worthiness,
- marriage, child-rearing, chastity and family life,
- education.

The following qualities are deplored in the judgments:

- lack of respect for authority,
- over-indulgence in intoxicating liquor,
• promiscuity, and
• financial ineptness and credit unworthiness.

The discussion of the cases supports the premise underlying the research that the context of the English penal colony of Van Diemen’s Land between 1805 and 1835 encouraged vigorous competition between the various elements of society - soldiers, convicts, free settlers, administrators, professionals, indigenous people and merchants. This competition led to an environment which fostered the desire to destroy others who were considered competitors, through defamation. Those who had sufficient power instituted legal action against their detractors in libel and slander suites. In particular, those in administrative positions took legal action to maintain their positions of power, authority and dominance.

The decisions indicate that the Rule of Law as known in the twenty-first century was in eclipse in Van Diemen’s Land by the determination of those with power to maintain their supremacy and dominance. Individuals who were not in administrative positions were denied access to justice through the shrewd practices of those in positions of administrative power. Those in administrative positions wielded power so that they received special privileges or exemptions which they subsequently denied to those without such powers. The cases indicate that the fundamental rights of the person, freedom of speech and association, integral to the Rule of Law, were not equally available to the populace of Van Diemen’s Land between the years 1805-1835.
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Halliday Sutherland, *Southward Journey*, (London: Geoffrey Bles, 1942)


Thomas Wells, *Michael Howe, the last and worst of the Bush Rangers of Van Diemen’s Land*, (Hobart Town: Andrew Bent publisher, 1818)


R. Foote Whyte, ‘The social structure of the restaurant,’ *American Journal of Sociology*, 54, 302-310


William Brackley Wildey, *Australasia and the Oceanic Region*, (Melbourne: George Robertson, MDCCCXXVI)
APPENDIX: DATA GENERATED FROM INVESTIGATION OF THE CASES

CHAPTER THREE: PROCEEDINGS BEFORE THE BENCH OF MAGISTRATES, YORKTOWN, PORT DALRYMPLE

Proceedings of the Bench of Magistrates, Yorktown, Port Dalrymple, 9 March 1805, to investigate the conduct of Charles Barrington alias Hacket, on the bench Magistrates Mr Riley, J.P., and Captain A. F. Kemp, J.P. ¹

Samples of language basing deductions from the Proceedings against Charles Barrington

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>A former convict, in a position of authority, is vulnerable to improper demands made</td>
<td>Magistrates, by the very nature of their appointment, are</td>
</tr>
<tr>
<td>upon him by persons with no convict attain in positions of power: “Have you,</td>
<td>bound to punish those who publish libels reflecting upon</td>
</tr>
<tr>
<td>Barrington, any witnesses to bring forward any witnesses to substantiate any of the</td>
<td>the character of magistrates and those who speak disrespectedly of magistrates, inferred</td>
</tr>
<tr>
<td>charges contained in the letter respecting Mr Mountgarrett?” “None, but I says</td>
<td>from charge sheet, 9th March 1805</td>
</tr>
<tr>
<td>everything in the letter is true’, Bench to Mr Barrington and his reply, 9th March</td>
<td></td>
</tr>
<tr>
<td>1805</td>
<td></td>
</tr>
<tr>
<td>An unrepresented defendant is powerless when confronted by collaborative testimony,</td>
<td>Predominant indices:</td>
</tr>
<tr>
<td>including hearsay: “Have you heard Chas Barrington make use of disrespectful words</td>
<td>Predominant values:</td>
</tr>
<tr>
<td>reflecting on any officer in this colony?” “Yes I have heard him call...”Witness</td>
<td>Negative values of defamatory comment about free persons holding positions of power is</td>
</tr>
<tr>
<td>questioned by the bench at the request of Mr Mountgarrett, 9th March 1805</td>
<td>identified and denounced by the Bench’s decision to harshly punish Charles Barrington</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of the unrepresented convict attain defendant, when persons with administrative power act on and believe a free person in a position of power

Predominant values:

Negative values of defamatory comment about free persons holding positions of power is identified and denounced by the Bench’s decision to harshly punish Charles Barrington

Principles identified in the Proceedings against Charles Barrington

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the unrepresented defendant before an inquiry which grounds its</td>
<td>Power of bench of magistrates, with a conflict of interest, to make decisions on the guilt</td>
<td>Defamatory comment about free persons holding positions of power is identified and denounced</td>
</tr>
<tr>
<td>decisions upon collaborative testimony and hearsay.</td>
<td>of an accused: Bench of magistrates found against the defendant</td>
<td>without investigating the truth or otherwise of the comment: The magistrates sentenced the</td>
</tr>
<tr>
<td></td>
<td></td>
<td>defendant to:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*300 lashes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*3 years’ servitude</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*an additional 2 years’ servitude</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*Lieutenant Governor removed him from position of Convict Overseer</td>
</tr>
</tbody>
</table>

¹ Supreme Court of Van Diemen’s Land Papers, 1805-1810, 5/1160, COD, 281A, Proceedings of the Bench of Magistrates, Yorktown, Port Dalrymple, 9 March 1805, State Records Office, New South Wales, 21 - 28
The Proceedings of the Bench of Magistrates, Yorktown, Port Dalrymple, 12 November 1805 to investigate the conduct of James Page, on the bench Magistrates Anthony Fenn Kemp, J. P., Jacob Mountgarrett, J. P., and Alexander Riley, J. P. 

Samples of language basing deductions from the Proceedings against James Page

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>An unrepresented defendant is powerless before a Bench of magistrates, one of whom is the complainant: “Proceedings before magistrates Kemp, Riley &amp; Mountgarrett...investigating Captain Simmons offloading government biscuit at Mr Mountgarrett’s wharf”, Proceedings, 12th November 1805</td>
<td>Magistrates, by the very nature of their appointment, are bound to prevent dissention and trouble, thus peace in the community is highly valued: “…think it their duty to take the most decisive steps to put a stop to those proceedings which create dissention in the colony…” Bench decision, 12th November 1805</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of the defendant when persons in administrative positions of power act on rumour and collaborative testimony: “…having no friends to call upon I leave myself entirely to the mercy of the Bench”, James Page’s written defence, 12th November 1805

Predominant values:

Negative values of defamatory comment about free persons holding administrative positions of power is identified and denounced by the bench’s decision to punish James Page: “…referring to the Minutes they see that the contemptuous and outrageous conduct of the prisoner before them…” Bench decision, 12th November 1805

Principles identified in the Proceedings against James Page

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the unrepresented defendant before an inquiry which grounds its decisions upon collaborative testimony and hearsay.</td>
<td>Power of bench of magistrates, with a conflict of interest, to make decisions on the guilt of an accused: Bench of magistrates found against the defendant</td>
<td>Defamatory comment about free persons holding positions of power is identified and denounced without investigating the truth or otherwise of the comment: The magistrates sentenced the defendant to: *100 lashes *An extra year’s servitude *Removal from role of field police</td>
</tr>
</tbody>
</table>

---

2 Supreme Court, Van Diemen’s Land Papers 1805-1810, Bench of Magistrates, Yorktown, Port Dalrymple, 12 November 1805, NRS 16024, 1805-1814, Location 5/1160, Reel 1932, COD281A&B, State Records Office, New South Wales, 16 - 20

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CHAPTER FOUR: DEFAMATION CASES FROM THE LIEUTENANT GOVERNOR'S COURT OF VAN DIEMEN'S LAND

Rowland Walpole Loane v William Butcher

Samples of language of the report of Rowland Walpole Loane v William Butcher

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent refused plaintiff’s requests to make reparation…or to pay damages</td>
<td>Derogatory verbal labelling in a public street</td>
</tr>
<tr>
<td>The court awarded the plaintiff £5 damages</td>
<td>Caused great injury to complainant’s character</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of the plaintiff when another person publicly attacks his character and the power of the court to right a wrong

Predominant values:

Negative values of derogatory name calling in a public place are identified and denounced by the court’s decision to award £5 damages

Principles identified in Rowland Walpole Loane v William Butcher

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the plaintiff when another person publicly attacks his character</td>
<td>Power of the court to right a wrong</td>
<td>Derogatory verbal labelling of a person is unacceptable.</td>
</tr>
</tbody>
</table>

James Doharty v Thomas Mason and Eleanor his wife

Samples of language in the report of James Doharty v Thomas Mason and Eleanor his wife

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is no indication that the Defendant offered to make reparation or showed remorse to the plaintiff.</td>
<td>Derogatory verbal labelling - associating the wife with a ‘whore’</td>
</tr>
<tr>
<td>The court awarded the plaintiff £16 damages</td>
<td>Derogatory verbal labelling – labelling the husband a ‘robber’</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of a person when two other persons physically assault and verbally defame the person and the power of the court to right a wrong

Predominant values:

Negative values of derogatory name calling in a public place are identified and denounced by the court’s decision to award sixteen pounds damages

---

3 Archives Office of Tasmania, Box of Lieutenant Governor’s Court of Van Diemen’s Land papers, 17 January 1820
4 James Doharty v Thomas Mason and Eleanor his wife, Lieutenant Governor’s Court, Van Diemen’s Land, 21 January 1820
**Principles identified in *James Doharty v Thomas Mason and Eleanor his wife***

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of a person when other persons verbally defame him or her</td>
<td>The court’s power to right a wrong</td>
<td>Derogatory name calling in a public place is unacceptable</td>
</tr>
</tbody>
</table>

**Charles McDonald v William Presnell**

Samples of language of the report of *Charles MacDonald v William Presnell*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff’s powerlessness in the face of someone’s false publication of his credit worthiness</td>
<td>Disapproval for false publication that a promissory note was a forgery</td>
</tr>
<tr>
<td>The court awarded the complainant one shilling damages and costs of one shilling</td>
<td>Disapproval for not honouring a promissory note</td>
</tr>
</tbody>
</table>

Predominant indices: Power of the court to right a wrong

Predominant values: Negative values of false publication and failing to honour a promissory note are identified and denounced by the court’s decision to award one shilling damages and one shilling costs

**Principles identified in *Charles MacDonald v William Presnell***

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the plaintiff in the face of a false publication of his creditworthiness</td>
<td>Power of the court to right a wrong</td>
<td>False publication, in particular in regard to credit worthiness, is disapproved</td>
</tr>
</tbody>
</table>

**John McCarron v William Cook**

Samples of language of the report of *John McCarron v William Cook*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant is unable to prevent a public officer from the proper performance of public duties</td>
<td>Approval of the proper performance of public duties by public officers</td>
</tr>
<tr>
<td></td>
<td>Disapproval for verbally injuring a person’s reputation</td>
</tr>
</tbody>
</table>

Predominant indices: Power of the court to uphold the reputation of a public officer in the proper performance of duties

Predominant values: Negative value of defamation of a public officer for properly performing his duties are identified and denounced by the

---

5 *Charles McDonald v William Presnell*, 5 July 1820, Lieutenant Governor’s Court, Van Diemen’s Land, Archives Office of Tasmania

6 *John McCarron v William Cook*, Lieutenant Governor’s Court, Van Diemen’s Land, 5 July 1820
his public duties  
court’s decision to award £1/0/0 damages.

**Principles identified in *John McCarron v William Cook***

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of a public officer who is verbally publicly attacked in the course of undertaking his public duties</td>
<td>Power, of the court to right a wrong</td>
<td>It was unacceptable to make public defamatory comments of a public officer in the undertaking of his public duties</td>
</tr>
</tbody>
</table>

**William Jennett v Richard Barker**

**Samples of language of the report of *William Jennett v Richard Barker***

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent refused complainant’s plaintiff’s requests to pay damages</td>
<td>Disapproval for false publication that Bills of Exchange were taken from or converted from a dead person</td>
</tr>
<tr>
<td>The court awarded the complainant £3/-/- damages and costs of a maximum £3/-/-</td>
<td>Disapproval of unjust and malicious publication</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Predominant indices:</th>
<th>Predominant values:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power of the court to right a wrong</td>
<td>Negative values of unjust and malicious publication are denounced by the court’s decision to award £3/-/- damages and costs of a maximum £3/-/-</td>
</tr>
</tbody>
</table>

**Principles identified in *William Jennett v Richard Barker***

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of person who is defamed by another and refuses to make a settlement in reparation outside of court</td>
<td>Power of the court to right a wrong</td>
<td>Disapproval of making a false statement about a person’s credit trustworthiness</td>
</tr>
</tbody>
</table>

**CHAPTER FIVE: THE NEW SOUTH WALES SUPREME COURT SITTING IN ITS CIVIL JURISDICTION IN VAN DIEMEN’S LAND**

**Barker v Jennett**

**Samples of language of the report of the case *Barker v Jennett***

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the plaintiff when another person publicly attacks his character and the court believes the defendant</td>
<td>The reporting of derogatory verbal labelling in public, is censured – as being liable to upset a small community: “The learned judge reprobated in strong terms the idea that a clerk or servant deserved praise for carrying to his employer</td>
</tr>
</tbody>
</table>

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7 *William Jennett v Richard Barker*, Lieutenant Governor’s Court, Van Diemen’s Land, 2 August 1820
8 *Hobart Town Gazette*, 6 February 1819
tails(sic) and reports of every incidental expression which he might hear spoken against him in moments of irritation”.

Predominant indices:
The power of the court to determine values of right and wrong for a community

Predominant values:
Negative values of bringing to court cases based upon tale-telling is emphasised: “The learned judge emphatically counselled the people of the settlement, in such dissentions as small societies are most peculiarly liable to, to avoid bringing into a court of law suits founded like the present upon tale bearing”.

Principles identified in Barker v Jennett

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the plaintiff</td>
<td>Court determines what is sufficient justification on the part of the defendant to excuse the defendant for defaming the plaintiff</td>
<td>Servants and employees must not report to their employers defamatory comments they hear spoken of their employers</td>
</tr>
</tbody>
</table>

CHAPTER SIX
SUPREME COURT SLANDER CASES

Thomson v Clark, March 1825,
Chief Justice Pedder on the bench

Samples of language of the report of Thomson v Clark

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard-working, school-teacher plaintiff is powerless against the slander of a person of wealth and prestige, with a hidden agenda; ‘The court non-suited the plaintiff’.</td>
<td>Negative values identified in the slander are: Leaving Great Britain in disgrace, stowing away in a vessel, intoxication, inability to pay debts</td>
</tr>
<tr>
<td>Predominant indices: The determination of powerful colonials to succeed in business ventures motivates unprincipled behaviour towards competitors, per the plaintiff’s pleadings: “Mr Clark was well aware of the happy state and premises of Mr Thomson’s school and his good standing in the community in Hobart Town.” AND “In 1825, Mrs Clark moved her school to a new premises built as a school, by her husband George Carr Clark”.</td>
<td>Positive values identified in Mr Thomson’s Affidavit are: ‘good, true, honest, just and faithful servant of Great Britain’</td>
</tr>
</tbody>
</table>

9 Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Archives Office of Tasmania
10 Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Document 4, Archives Office of Tasmania, 11 G. T. Stilwell, op. cit., 224-225
Principles identified in *Thomson v Clark*, March 1825

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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<th>VALUES</th>
</tr>
</thead>
</table>
| James Thomson was non-suited on the submission of the powerful defendant | A powerful, wealthy man with an introduction to the colony from Downing Street, London, has power to influence others with his slanderous words and power to persuade the court | The commercial enterprise of a powerful, wealthy, prestigious man is more valuable than that of a ‘good, true, honest, just and faithful servant of Great Britain’.

**Lucas v Copperwaith, 8 May 1833** Chief Justice Pedder on the bench

Samples of language of the report of *Lucas v Copperwaith*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>A minor is unable to take legal action to protect his or her reputation thus legal action must be taken by a parent or next friend: “This was an action for slander brought by the plaintiff to recover damages for slander...the plaintiff, Mr Lucas, put his son, a youth between 15 and 16 years of age, as apprentice about 6 months ago...” Per Tasmanian, 10 May 1833</td>
<td>The publication of an apprenticed lad’s decision to leave an apprenticeship as if it were an assigned convict’s absconding will not be tolerated: “…the assessors under the direction of His Honour, found for the plaintiff,” per Tasmanian, 10 May 1833</td>
</tr>
<tr>
<td>Predominant indices: Powerlessness of the minor male plaintiff to protect his reputation when another person slanders him: “This was an action for slander brought by the plaintiff to recover damages for slander...the plaintiff, Mr Lucas, put his son, a youth between 15 and 16 years of age, as apprentice about 6 months ago...” Per Tasmanian, 10 May 1833</td>
<td>Predominant values: The court will act to protect a minor who is slandered by an employer in the course of an apprenticeship: “…the assessor under the direction of His Honour, found for the plaintiff,” per Tasmanian, 10 May 1833</td>
</tr>
<tr>
<td>The court, by its decision, is shown to distinguish between the rights of a free individual to leave employment and the liability of a convict assigned to a master as punishment</td>
<td></td>
</tr>
</tbody>
</table>

Principles identified in *Lucas v Copperwaith*

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>A minor is powerless to take legal action to protect his reputation, hence his parent or next friend takes action for him.</td>
<td>Court will protect the reputation of a minor apprentice.</td>
<td>Apprenticeship is not servitude and an apprentice is entitled to choose to leave an apprenticeship</td>
</tr>
</tbody>
</table>

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12 Supreme Court of Van Diemen’s Land, Box SC 101 A282/6, Document 4, Archives Office of Tasmania
13 ibid
14 ibid
15 ibid, Box SC 101 A282/6, Document 4
16 *Tasmanian*, 10 May 1833
**Benjamin v Griffiths, 9 July 1834**<sup>17</sup> Chief Justice Pedder on the bench

Samples of language in the report of Benjamin v Griffiths

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</thead>
<tbody>
<tr>
<td>The business person who assists a drunk person is vulnerable and his actions of assistance can jeopardise his reputation: “It was cruelty in the extreme, after being allowed to enter the house of the plaintiff in a beastly state...to turn around and accuse him of robbery...to charge him with basely violating all the laws of hospitality,” per Mr Horne, for the plaintiff, in court 9 July 1835, published in Colonial Times 15 July 1834</td>
<td>Slandering of a business person in the proper exercise of his commercial activity is actionable in the Supreme Court.</td>
</tr>
<tr>
<td>Predominant indices:</td>
<td></td>
</tr>
<tr>
<td>Powerlessness of the business person to protect his reputation when a drunk person attacks his character: “The effect of such scandalous proceedings was that a man had his character secretly and silently destroyed, with almost no possibility of a remedy,” per Mr Horne, for the plaintiff, VDL Supreme Court 9 July 1835, published in Colonial Times 15 July 1834</td>
<td>Predominant values:</td>
</tr>
<tr>
<td></td>
<td>Positive value of the court as protector of the business person in the exercise of his commercial activity: “His Honour then addressed the jury, pointing out to them the necessity of their being convinced that the defendant charged the plaintiff without any reasonable or probable cause; and also that he was injured in his name and business by the reports circulated by the defendant,” per CJ Pedder, VDL Supreme Court 9 July 1834 published in Colonial Times 15 July 1834</td>
</tr>
</tbody>
</table>

Positive value of the court to provide relief to the slandered plaintiff by allowing a general verdict, thereby providing costs relief

Principles identified in Benjamin v Griffiths

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<tr>
<th>POWERLESSNESS</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Vulnerability of a business man who assists an intoxicated person</td>
<td>The court will provide relief to a slandered plaintiff by allowing a general verdict, thereby providing costs relief</td>
<td>The court will protect the reputation of a business man acting in the proper exercise of his duty</td>
</tr>
</tbody>
</table>

**Houghton v Reid, 22 August 1834**<sup>18</sup> Puisne Judge Montagu on the bench

Samples of language in the report of Houghton v Reid

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>A minor is unable to take legal action to protect his or her reputation thus legal action must be taken by a parent or next friend: “This was an action for slander brought by</td>
<td>The publication of a woman’s jilting and unexpected pregnancy is inappropriate, regardless of such publication occurring in a private house: “His Honour allowed the case to go to the jury....” per Court Report, Launceston</td>
</tr>
</tbody>
</table>

<sup>17</sup> Colonial Times, 15 July 1834  
<sup>18</sup> Launceston Independent, 23 August 1834
Mr James Houghton, on behalf of his daughter, Emma Houghton, a minor…” per Launceston Advertiser, 28 August 1834

The plaintiff who takes legal action against slander is further injured by the subsequent publication of the action in the media.

Independent, 23 August 1834.

Contemporaneous documentary evidence of an alleged slander is sufficient to quash a non-suit application by the defence: “Mr Gavin Ralston, one of the witnesses, declared, that he had made a memorandum of the conversation soon after it had taken place…” per Court Report, Launceston Independent, 23 August 1834

Predominant indices:

Powerlessness of the minor female plaintiff to protect her reputation when another person slanders her:

“This was an action for slander brought by Mr James Houghton, on behalf of his daughter, Emma Houghton, a minor…” per Launceston Advertiser, 28 August 1834

Predominant values:

The court will act to seek redress for a minor female who is slandered by a male: “…His Honour allowed the case to go to the jury…” per Launceston Independent, 23 August 1834

Principles identified in *Houghton v Reid*

<table>
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<th><strong>VALUES</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of a minor to bring legal action to protect her reputation, hence her parent or next friend can take action on her behalf. The plaintiff who takes legal action to protect her reputation from slander, is further injured by publication of the law report in the media.</td>
<td>Court will seek to redress the destruction of a minor’s reputation with an award of damages</td>
<td>The publication of a woman’s jilting and unexpected pregnancy is inappropriate, regardless of such publication occurring in a private house. A contemporaneous documentary note of an alleged slander is good evidence</td>
</tr>
</tbody>
</table>

*Jennett v Baudinet, 15 January 15 1835,* before Assistant Police Magistrate Mr Thomas Mason

Samples of language in the report of *Jennett v Baudinet*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Without money to meet legal costs, a plaintiff is unable to take legal action to protect his or her reputation. Plaintiff is personally responsible for payment of legal costs in a civil defamation suit</td>
<td>Derogatory verballing of a public officer in private in the exercise of his/her official duties - on its own - is not actionable in a Police Court.</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of the indigent plaintiff to take legal action when another person privately attacks character

Predominant values:

Positive value of the elements of defamation to be met before the court will accept an action for defamation – ie the publication of the alleged slander by the slanderer.

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19 ‘Police Reports,’ *The True Colonist*, 16 January 1835
An official is vulnerable to verbal abuse in the exercise of his duties

Principles identified in *Jennett v Baudinet*

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<tr>
<th>POWERLESSNESS</th>
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</tr>
</thead>
<tbody>
<tr>
<td>An official is likely to receive verbal abuse in the exercise of his duties and is vulnerable to such verbal abuse.</td>
<td>Court will not protect the reputation of officials who, in the course of their duties, say they are verbally abused, without further evidence</td>
<td>Derogatory verbal abuse to an official in private, without a witness, is not actionable as defamation, nor, on its own, is it actionable in a Police court</td>
</tr>
</tbody>
</table>

*Wise v Kemp, 17 October 1835* 20 Chief Justice Pedder on the bench

Samples of language in the report of *Wise v Kemp*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>A businessman taking action to protect his business reputation, is in jeopardy of having his financial health made public: “C. Swanston, recollects a negotiation being carried on between Mr Wise and the Derwent Bank ...it eventually failed...it was for a loan...witness was not satisfied with the securities offered,” per Tasmanian 23 October 1835.</td>
<td>The jury is liable to confuse its role of deciding the facts, that is, whether a comment is or is not slanderous and the law, that is, whether or not the comment is justifiable: “…the jury returned a verdict for the plaintiff on each of the four counts, on the second special plea of justification – found for the defendant on the first and third special pleas of justification,” per Tasmanian 23 October 1835.</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerless of a client to retain confidentiality of his financial business when his bank gives evidence in court: “C. Swanston, recollects a negotiation being carried on between Mr Wise and the Derwent Bank ...it eventually failed...it was for a loan...witness was not satisfied with the securities offered,” per Tasmanian 23 October 1835.

Predominant values:

The court, by the direction of CJPedder, distinguishes between the personal and commercial activities of an individual: “…it is not actionable to call a man a swindler who is not in business, or unless it is respecting his business” per CJ Pedder, Tasmanian, 23 October 1835.

Principles identified in *Wise v Kemp*

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>A businessman, taking action to protect his business reputation, is powerless to maintain confidentiality of his finances.</td>
<td>Court will only protect a person being called a 'swindler’ if he is so called in respect to his business.</td>
<td>The court distinguishes between the personal and commercial activities of an individual</td>
</tr>
</tbody>
</table>

20 *Tasmanian, 23 October 1835*
CHAPTER SEVEN: SUPREME COURT LIBEL CASES

Murray v Stephen 12 April 1826, Chief Justice Pedder on the bench

Samples of language in the report of Murray v Stephen

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</thead>
<tbody>
<tr>
<td>Plaintiff’s powerlessness to bring an action for libel if the Lieutenant Governor refuses to produce a key document: <em>CJ Pedder ruled that secondary evidence of the existence of the letter could not be received while the original document was in existence, Colonial Times 14 April 1826</em></td>
<td>Secondary evidence of a document will not be received when the original document is in existence: <em>CJ Pedder ruled that secondary evidence of the existence of the letter could not be received while the original document was in existence, Colonial Times 14 April 1826</em></td>
</tr>
</tbody>
</table>

Predominant indices:

- Powerlessness of the plaintiff when another person attacks his character in writing and the libelling document remains in the possession of the Lieutenant Governor: *CJ Pedder ruled that secondary evidence of the existence of the letter could not be received while the original document was in existence, Colonial Times 14 April 1826*

Predominant values:

- The age-old doctrines enshrined in the law of evidence take precedence in court over providing redress for individuals injured by libels: *CJ Pedder ruled that secondary evidence of the existence of the letter could not be received while the original document was in existence, Colonial Times 14 April 1826*

Principles identified in Murray v Stephen

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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</thead>
<tbody>
<tr>
<td>The powerlessness of a libelled plaintiff to obtain the original document from the Lieutenant Governor</td>
<td>The Lieutenant Governor displayed absolute power in refusing to produce a document for litigation and the court acceded; The hazardous consequences of an interlocked judicial and executive head of government</td>
<td>Secondary evidence of an original document will not be received while the original document is in existence</td>
</tr>
</tbody>
</table>

Butler v Bent, 12 January 1830, Chief Justice Pedder on the bench

Kennedy v Bent, 15-16 January 1830, Chief Justice Pedder on the bench, Captain Bell and Mr Beaumont, Assessors

Samples of language in the report of Kennedy v Bent

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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<tbody>
<tr>
<td>Powerlessness of an insolvent debtor to achieve fairness in forced creditor sales: “I waited for the plaintiff’s solicitor who came specifically to bid for the property” : per evidence of Sheriff Mr Fereday in Court 15-16 January 1830</td>
<td>“It is utterly impossible in cases of libel, slander, seduction or others similar, to establish any given principle upon which to estimate the amount of injury sustained”: per CJ Pedder in Court 15-16 January 1830 in <em>Tasmanian and Austral-Asiatic Review</em>, 22 January 1830</td>
</tr>
</tbody>
</table>

21 Colonial Times, 14 April 1826
22 Tasmanian and Austral-Asiatic Review, 15 January 1830
23 Tasmanian and Austral-Asiatic Review, 22 January 1830
16 January 1830 in *Tasmanian and Austral-Asiatic Review*, 22 January 1830

**Predominant indices:**

The finding that the Sheriff plaintiff did not wait a reasonable time for persons expected to come to bid at the sale and 2 lots were sold for considerably less than their value, resulted in the Sheriff plaintiff being awarded damages of £100!

The decision supports the inference that the court upholds officials in the course of their public duties against private individuals.

**Predominant values:**

*The real question is: “What is the nature of the libel and the situation of the party libelled”* per CJ Pedder in Court 6 February 1830 in *Tasmanian and Austral-Asiatic Review*, 12 February 1830

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**Principles identified in *Kennedy v Bent***

<table>
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<th><strong>VALUES</strong></th>
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</thead>
<tbody>
<tr>
<td>Powerlessness of an insolvent to attain fairness in a Sherriff’s sale</td>
<td>Power of the court to protect officers acting in the course of their duties, even if those duties are improperly undertaken</td>
<td>The court will uphold government officials undertaking their official duties even when the officials improperly perform those duties</td>
</tr>
</tbody>
</table>

**Butler v Bent, 10 May 1830**

**Chief Justice Pedder on the bench**

**Samples of language in the report of Butler v Bent**

<table>
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<tr>
<th><strong>Indices of powerlessness</strong></th>
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<tbody>
<tr>
<td>Powerlessness of the indigent colonial debtor to avoid imprisonment for debt: <em>Mr Weston’s Act</em> was passed in 1827 requiring the amount of the debt to be £20 before the debtor could be arrested and came into operation in Van Diemen’s Land in March 1829. Mr Wilson was imprisoned on 8 April for non-payment of his debt of £12/10/0. Vulnerability of the indigent debtor when debt collecting legal costs are added to the original debt: <em>Mr Wilson’s original debt of £12/10/0 is added Mr Butler’s legal costs of £17/14/7</em>, per p13 of web report.</td>
<td>Sanctity of the individual’s personal and home life: “…the domestic scene is neither invaded nor any of the relations of private life”: per Mr Gellibrand, defending in Court, 10 May 1830, p6 of web report. “In civil libel the defendant can use justification, that is, prove that what is written is justified,” per Mr Gellibrand, defending in Court, 10 May 1830, p7 of web report.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th><strong>Predominant indices:</strong></th>
<th><strong>Predominant values:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The vulnerability of the practice of the law when court sittings extend beyond tolerable hours: “I have endeavoured to explain to you the real questions in this case. If I have failed in so doing I should despair at this hour of</td>
<td>The court protects an individual’s professional reputation: “… no public man is to have his conduct subjected to public animadversion and reproach,” per CJ Pedder, addressing the jury, in Court, 10 May 1830, p13 of web report.</td>
</tr>
</tbody>
</table>

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24 *Tasmanian and Austral-Asiatic Review*, 14 May 1830

25 *Tasmanian and Austral-Asiatic Review*, 14 May 1830
night, of more fully informing you,” per CJ Pedder summing up after a hearing of 9 ½ hours, near midnight, 10 May 1830, p14 of web report.

### Principles identified in Butler v Bent

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the indigent colonial debtor to avoid imprisonment for debt</td>
<td>Power, residing in the province of a few intimates, has a high potential for corruption</td>
<td>No public man is to have his conduct subjected to public animadversion and reproach</td>
</tr>
</tbody>
</table>

### Fereday v O'Connor, 13-16 December, 1831. CJ Pedder on the bench

**Samples of language in the report of Fereday v O'Connor**

**Indices of powerlessness**

- A colonial party is disadvantaged by the use of terms in formal documents which have different meanings according to the locale of their origin: “…some stress is laid upon the term “paid away” used by Mr Fereday… the expression originally inserted…was “passed away”…considering that expression to be a Scotticism, I myself struck it out and inserted the words “paid away” in its room” per Solicitor General Mr Stephen to the Court 13 December 1831 in Tasmanian 17 December 1831 p5

**Identification of values**

- The reputation of an individual is worthy of protection hence the court will act to protect reputation by making Suppression Orders: (re libel content): “I shall be forced to abandon in consequence of an Order of this Court, that the proceedings at the Police Office shall only be produced in reference to the malicious prosecution,” per Solicitor General, Mr Stephen, Opening Address to Court, 13 December 1831, in Tasmanian, 17 December 1831

**Predominant indices:**

- Vulnerability of a government official who, in the course and furtherance of his official duties, follows appropriate procedures which conflict with the desires of others: “Mr O’Connor (privately contracted to purchase property for £300…Mr Fereday considered it necessary to the proper discharge of his official duty to sell it by public auction…for £430…to the great disappointment of Mr O’Connor. Hence that deadly enmity which vented itself”, per Solicitor General Mr Stephen in Court 13 December 1831 in Tasmanian 17 December 1831 p3

- Vulnerability of government officials to become ensnared in conflict of interest matters if they mix their professional and personal activities: “In the month of October 1828 Mr Fereday discounted a bill of

**Predominant values:**

- The ill of defamation is identified as disturbing the peace and harmony of the community: “I ask by your verdict to prevent the peace and comfort of the community from being disturbed by such malicious proceedings – to protect others from being subjected to such base and cruel attacks.” per Solicitor General Mr Stephen, Tasmanian, 17 December 1831

- The court is critical of time wasting by parties: “In consequence of affidavits up comes a 3rd person in no way concerned in the matter and charges Mr Fereday with perjury…We found nothing to justify a 3rd party wholly unconcerned in the affair standing forth to institute a proceeding,” per His Honour CJ Pedder giving judgment and referring to Mr O’Connor, as reported in Tasmanian 14 April 1832 AND

“If there were a new trial the whole case would be thrown into confusion utterly unnecessarily, except for 2 counts for slander enough cause to show why a verdict should not be

---

26 Tasmanian, 17 December 1831
exchange for a man named …a few days’ before the bill became due Mr Fereday paid it away to Mr Young…He did not receive any money for it but he did receive consideration for it He took what is called an IOU. Mr Young paid it into the Derwent Bank and it was dishonoured” per Solicitor General Mr Stephen, in court, 13 December 1831, in Tasmanian, 17 December 1831, p2

The court is critical of litigants who litigate without appropriate cause, such as Mr O’Connor’s charges against Mr Fereday, eg “Assigning so many charges of perjury without as the jury considered, any probable cause,” per His Honour CJ Pedder giving judgment and referring to Mr O’Connor, as reported in Tasmanian 14 April 1832

Principles identified in Fereday v O’Connor

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Parties are disadvantaged by the use of unfamiliar terms: ‘paid away’</td>
<td>Court will protect the reputation of individuals</td>
<td>Defamation disturbs the peace of the community</td>
</tr>
<tr>
<td>Vulnerability of government officials undertaking official duties</td>
<td></td>
<td>Court does not want its time wasted by 3rd parties and litigants without a proper cause</td>
</tr>
</tbody>
</table>

Meredith v Murray, 11 June 1833\textsuperscript{22} Chief Justice Pedder on the bench, assessors William Wilson and Adam Turnbull MD, esquires\textsuperscript{23}

Samples of language in the report of Meredith v Murray

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Plaintiff is powerless to sustain an action without sufficient evidence: The court non-suited the plaintiff</td>
<td>The assessor alone were to determine the case; the judge could assist them with his opinion but the assessor are the judges of the whole matter, per the Attorney General in court Tasmanian, 12 July 1833, web p2.</td>
</tr>
<tr>
<td>Predominant indices:</td>
<td>Predominant values:</td>
</tr>
<tr>
<td>A plaintiff requires sufficient evidence to ground charges</td>
<td>Positive value: The court will uphold a defendant’s call for non-suit if the defendant can show sufficient evidence to ground the action has not been provided to the court.</td>
</tr>
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</table>

Principles identified in Meredith v Murray

<table>
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</thead>
<tbody>
<tr>
<td>Powerlessness of plaintiff with insufficient evidence</td>
<td>The court will uphold a defendant’s call for non-suit if there is</td>
<td>Assessors alone determine the whole case</td>
</tr>
</tbody>
</table>

\textsuperscript{22} Tasmanian, 12 July 1833

\textsuperscript{23} Hobart Town Courier, 12 July 1833
O’Connor v Meredith, 10 July 1833, Chief Justice Pedder on the Bench\textsuperscript{29} with assessors Charles Swanston and Charles McLachlan\textsuperscript{30}

Samples of language in the report of O’Connor v Meredith

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>A Government official’s vulnerability in the performance of his work to claims of partiality: per the court, awarding the plaintiff £200 damages</td>
<td>The whole of the article must be considered, rather than taking passages singly: per CJ Pedder, summing up in court 10 July 1833, Hobart Town Courier, 12 July 1833, web p13.</td>
</tr>
<tr>
<td>Predominant indices:</td>
<td>Predominant values:</td>
</tr>
<tr>
<td>Powerlessness of the plaintiff when another person publicly attacks character and the court’s power to right a wrong</td>
<td>Negative value of composing a libel as a joke: His Honour CJ Pedder, commented “very forcibly” upon “the convivial origin of the libel” stating it “filled him with horror” per CJ Pedder, in Court, Tasmanian, 12 July 1833, web p6</td>
</tr>
</tbody>
</table>

Principles identified in O’Connor v Meredith

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Government official’s vulnerability to claims of partiality in the performance of his work</td>
<td>Power of the court to protect a government official in the performance of his work from the wrong of a libel</td>
<td>A libel must not be composed as a joke</td>
</tr>
</tbody>
</table>

Schaw v Meredith, 17 July 1833,\textsuperscript{31} Chief Justice Pedder on the bench

Samples of language of the report of Schaw v Meredith

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent refused plaintiff’s requests to make private reparation. The court awarded the plaintiff £50 damages</td>
<td>“False, scandalous, defamatory, cruel and malicious libel reported in the Colonist newspaper”, per the claim of the plaintiff</td>
</tr>
<tr>
<td>Predominant indices:</td>
<td>Predominant values:</td>
</tr>
<tr>
<td>Powerlessness of the plaintiff when another person publicly attacks character and the power of the court to right a wrong</td>
<td>Negative values of “False, scandalous, defamatory, cruel and malicious libel” comments in a newspaper are identified and denounced by the court’s decision to award</td>
</tr>
</tbody>
</table>

\textsuperscript{29} Tasmanian, 12 July 1833  
\textsuperscript{30} The True Colonist, 16 July 1833  
\textsuperscript{31} Tasmanian, 19 July 1833
£50 damages

“It is immaterial that the publisher did not write the libel and was not present when the libel was written and had written the libel by report”: per CJ Pedder to the jury per Colonist 23 July 1833

**Principles identified in Schaw v Meredith**

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of a person who has his reputation defamed to undo the damage without the assistance of the court</td>
<td>Court will seek to ameliorate the damage caused to an individual's reputation through the publication of a libel by an award of money</td>
<td>The publication of “False, scandalous, defamatory, cruel and malicious libel” by the press is denounced by the court</td>
</tr>
</tbody>
</table>

*Cookney v Brodie, 17 December 1833* 32 Puisne Judge Montagu on the bench

**Samples of language of the report of Cookney v Brodie**

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>The plaintiff’s powerlessness when Counsel fails to object to the admission of evidence which is prejudicial, biased or obvious hearsay: “Mr Tremlett testified, “There were rumours …” in court, 17 December 1833, <em>Tasmanian</em> 20 December 1833</td>
<td>Liability ensues by paying for the insertion of an advertisement and directing it to be inserted, per Judge Montagu in court 17 December 1833, <em>Tasmanian</em> 20 December 1833</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of the colonial plaintiff to protect his reputation from further assassination in court before an unhelpful and biased judiciary

Predominant values:

“It certainly appears to me that Mr Brodie’s conduct, although not proper, is still not particularly bad, for it might have happened that the advertisement had never been read by him”, per Judge Montagu in court 17 December 1833, *Tasmanian* 20 December 1833

**Principles identified in Cookney v Brodie**

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the plaintiff to prevent a biased judiciary from attacking his reputation</td>
<td>Power of a judge to cause further harm to a libelled plaintiff</td>
<td>The colonial court takes account of ‘rumours’ when published by witnesses in court</td>
</tr>
</tbody>
</table>

*Murray v Murray, 11 December 1835* 33 Chief Justice Pedder on the bench

**Samples of language of the report of Murray v Murray**

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Plaintiff is powerless, on the day, to challenge the court’s discretionary decision that the content of the pleadings is improper:</td>
<td>The court has power to frustrate a plaintiff’s civil prosecution for libel by exercising its discretion to dismiss a jury: “His Honour the Chief Justice dismissed the jury on</td>
</tr>
</tbody>
</table>

32 *Tasmanian*, 20 December 1833
33 *Hobart Town Courier*, 18 December 1835
“His Honour the Chief Justice dismissed the jury on account of the pleas of the defendant containing matter which His Honour thought would be improper to place amongst the records of the court,” per Hobart Town Courier, 18 December 1835

The court has power to make a determination upon the appropriateness of pleadings: “His Honour the Chief Justice dismissed the jury on account of the pleas of the defendant containing matter which His Honour thought would be improper to place amongst the records of the court,” per Hobart Town Courier, 18 December 1835

Predominant indices:

Powerlessness of a plaintiff to bring a civil action for libel if the bench determines to frustrate it on the day in court: “His Honour the Chief Justice dismissed the jury on account of the pleas of the defendant containing matter which His Honour thought would be improper to place amongst the records of the court,” per Hobart Town Courier, 18 December 1835

Predominant values:

The Chief Justice of wielded absolute power over the content of matters brought in the civil court: “His Honour the Chief Justice dismissed the jury on account of the pleas of the defendant containing matter which His Honour thought would be improper to place amongst the records of the court,” per Hobart Town Courier, 18 December 1835

**Principles identified in *Murray v Murray***

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party is powerless to bring a libel action if the court refuses to receive pleadings.</td>
<td>Court will protect the reputation of individuals by banning pleadings from being on court records</td>
<td>Pleadings are a specialist skill of lawyers and ought not to be drafted by laypersons</td>
</tr>
</tbody>
</table>

**CHAPTER EIGHT: VAN DIEMEN'S LAND CRIMINAL LIBEL CASES**

* * R v Bent (No. 1) 26 July 1825*34, Chief Justice Pedder on the bench

**Samples of language of the report of *R v Bent(No. 1)***

<table>
<thead>
<tr>
<th>Indices of power</th>
<th>Identification of values</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>I am a plain man</em>35 per defendant in court</td>
<td><em>The difficulty with this case is...upon which species of evidence to rely</em>38 per CJ Pedder in court</td>
</tr>
<tr>
<td><em>I never had the remotest intention of printing a libel</em>36 per defendant in court</td>
<td>*What is the defendant legally found guilty of?*39 per CJ Pedder in court</td>
</tr>
<tr>
<td><em>I have earnestly to entreat that Your Honour and you gentlemen of the jury will afford me your favourable consideration</em>37 per defendant in court</td>
<td><em>I have no precedent shewn to me</em>40 per CJ Pedder in court</td>
</tr>
</tbody>
</table>

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34 *Hobart Town Gazette*, 29 July 1825
35 *Hobart Town Gazette*, Defendant’s Defence, 29 July 1825
36 ibid
37 ibid
38 *Hobart Town Gazette*, 29 July 1825, Judge’s Summary to the Jury,
39 ibid
Lord Mansfield (in the English Woodfall libel case) chose to give the benefit of the doubt to the defendant: I shall adopt the same principle\(^4\) per CJ Pedder in court

**Predominant indices:**

- Powerlessness of the defendant

**Predominant values:**

- The negative value of attempting to ground a decision of guilt on insufficient evidence is identified and denounced

### Principles identified in *R v Bent (No. 1)*

<table>
<thead>
<tr>
<th><strong>POWERLESSNESS</strong></th>
<th><strong>POWER</strong></th>
<th><strong>VALUES</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of the defendant: “I am a plain man”(^4) the defendant in court</td>
<td>Court will give the defendant the benefit of the doubt. Lord Mansfield (in the English Woodfall libel case) chose to give the benefit of the doubt to the defendant: I shall adopt the same principle(^4) per CJ Pedder in court</td>
<td>A finding of guilt can not be grounded on insufficient evidence, What is the defendant legally found guilty of(^4) per CJ Pedder in court</td>
</tr>
</tbody>
</table>

### *R v Bent (No. 2), 1 August 1825*\(^4\) Chief Justice Pedder on the bench

**Samples of language of the report of *R v Bent (No. 2)***

<table>
<thead>
<tr>
<th><strong>Indices of power</strong></th>
<th><strong>Identification of values</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>“I am again here called upon to answer for the writing of others” per Mr Bent’s written address to the court in <em>Hobart Town Gazette</em> 5 August 1825</td>
<td>“...a man may express things which are disagreeable to hear...resulting in unpleasant constructions drawn by the public, but if motives and constructions are left untouched, observations are confined to mere measures whether they are beneficial or otherwise to the community ...the doing so is the fair right of every public writer”, per CJ Pedder summing up for the jury in <em>Hobart Town Gazette</em> 5 August 1825</td>
</tr>
<tr>
<td>“…the great weight and influence of the name of His Honour the Lieutenant Governor, is besides brought forward against me, by the conversion of what appeared in the plainness of my comprehension to be only fair political discussion” per Mr Bent’s written address to the court in <em>Hobart Town Gazette</em> 5 August 1825</td>
<td>“It is impossible that the government of any country can be charged with acting tyrannically and oppressively without such charge being a libel.” per CJ Pedder, summing up for the jury, in <em>Hobart Town Gazette</em> 5 August 1825</td>
</tr>
</tbody>
</table>

\(^{40}\) ibid  
\(^{41}\) ibid  
\(^{42}\) *Hobart Town Gazette*, Defendant’s Defence, 29 July 1825  
\(^{43}\) ibid  
\(^{44}\) ibid  
\(^{45}\) *Hobart Town Gazette*, 5 August 1825
disadvantage when attempting a written defence: “It is totally out of my power to attempt to defend the articles which form the subject matter of the present information” per Mr Bent’s written address to the court in Hobart Town Gazette 5 August 1825

Responsibility for content of articles is imputed to the proprietor of a newspaper eg “I cannot understand why it is inserted here that Mr Evan Henry Thomas was the Editor, while I am charged with composing…I am not the composer” per Mr Bent’s written address to the court in Hobart Town Gazette 5 August 1825

Predominant indices:

Powerlessness of the incarcerated defendant

Predominant values:

Regarding the distinction between composing and publishing libellous materials: “I recollect that you urged in your defence that you did not compose any of these libels. I confess I can discover but a very slight difference between the person who composes the poison, and he who disseminates it”. – per CJ Pedder sentencing Mr Bent, 29 March 1826 in Colonial Times 31 March 1826

The negative value of libelling the Government is identified and denounced by the court: “If libels upon the government are considered highly criminal in England how much more so must all such be in a colony constituted as is this, at such distance form the parent state”. per CJ Pedder, sentencing Mr Bent, 29 March 1826 in Colonial Times 31 March 1826

“...the best way is for me to state the law and leave you (the jury) to come to your conclusion”, per CJ Pedder summing up for the jury in Hobart Town Gazette 5 August 1825

“The dry matter of fact of publication and the meaning and intention of the matter so published, is the real question” per CJ Pedder summing up for the jury in Hobart Town Gazette 5 August 1825.

“If the intention was to impute to the Lieutenant Governor he acts corruptly and tyrannically and treats the complaints of people with derision…it is libellous…but if it is meant as mere supposition, hypothetical argument, a mere possible case, it is not libellous”. per CJ Pedder summing up for the jury in Hobart Town Gazette 5 August 1825.

“Every man has a right to express his sentiments upon the administration of the public affairs provided he does so fairly and properly. But if he imports corrupt or tyrannical motives to any Government it is certainly a libel...it is impossible for any govt to exist if the governors are to be charged to be actuated by corrupt and tyrannical motives,” per CJ Pedder summing up for the jury in Hobart Town Gazette 5 August 1825.
Principles identified in *R v Bent* (No. 2)

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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</thead>
<tbody>
<tr>
<td>An incarcerated defendant denied legal representation is powerless.</td>
<td>Court has the power of discretion in sentencing</td>
<td>The press has a right to make observations and fair and proper comment on public affairs of government: nobody has a right to import corrupt or tyrannical motives to the government</td>
</tr>
</tbody>
</table>

*R v Bent* 15 April 1826⁴⁶ – the return to court of *R v Bent* (No 1) for a retrial, Chief Justice Pedder on the bench

Samples of language of the report of *R v Bent*

<table>
<thead>
<tr>
<th>Indices of power</th>
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</thead>
<tbody>
<tr>
<td>“The article upon which he had been found guilty was wholly written by Mr. E. H. Thomas; that upon understanding his writings were objectionable, he had dismissed him from the situation of Editor”; affidavit in mitigation from Mr Bent, read in court 22 April 1826 in <em>Colonial Time</em> 26 April 1826</td>
<td>“The circumstance of having a wife and children ...(together with) current imprisonment... and a considerable fine” are legitimate circumstances for mitigation of a penalty; per CJ Pedder, in sentencing, in court 22 April 1826 <em>Colonial Times</em> 22 April 1826</td>
</tr>
<tr>
<td>“I saw the article of the 8th of October before it was published. I assisted to correct the press, I believe I did. The manuscript is in my hand-writing; the manuscript produced is [t];” per Mr Thomas under cross-examination, in court 15 April 1826, in <em>Colonial Times</em> 21 April 1826</td>
<td>In determining whether a publication is libellous, the questions are: “whether the facts are proved, and secondly, what is the intent;” per CJ Pedder addressing the jury in court 15 April 1826 reported in <em>Colonial Times</em> 21 April 1826.</td>
</tr>
<tr>
<td>“Mr. Bent was Printer and Publisher. Mr. Bent claimed to be Proprietor during the time I was Editor. I penned nearly all the articles for that Paper. The articles I wrote were uniformly by his direction, and by his control. I was subservient to him. He uniformly exercised the privileges of rejecting or altering any article I wrote”, per Mr Thomas giving evidence, in court 15 April 1826, in <em>Colonial Times</em> 21 April 1826.</td>
<td>“Printing and publishing are one and the same” per <em>Duke of Athol v Pearse</em>, relied upon by CJ Pedder, in sentencing, in Court 22 April 1826 <em>Colonial Times</em> 26 April 1826</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of an incarcerated defendant

“…We find Mr. Thomas, the author, |

Predominant values:

English statute and common law for libel prevails in Van Diemen’s Land eg the case, Elphinstone v. Baldwin, for a Libel per CJ

⁴⁶ *Colonial Times*, 15 April 1826
brought here as a witness, or, to use his own expression, puts Mr. Bent upon a pinnacle to plunge him into the gulph of danger!” per Mr Gellibrand, Counsel for defendant in Court 15 April 1826 in Colonial Times 21 April 1826

Pedder, in sentencing, 22 April 1826 in Colonial Times 26 April 1826

Principles identified in R v Bent

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
</table>
| Powerlessness of dissatisfied Van Diemen’s Land litigants subjected to what seemed to them to be an absolute and totalitarian judiciary | Power of the judge to influence the court through advocacy in summing up | Being married, having children, current imprisonment and a considerable fine are viewed as legitimate responsibilities deserving of circumstances for mitigation of a penalty

R v Bent, 15 May 182747 Chief Justice Pedder on the bench

Samples of language of the report of R v Bent 15 May 182748

<table>
<thead>
<tr>
<th>Indices of power</th>
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<tbody>
<tr>
<td>The defendant, who was not attended by any Counsel, said, were he to attempt to defend, by a lengthened discussion, the charges exhibited against him, it would perhaps be only to occupy more time than was necessary, per Mr Bent in court 15 May 1827 per Colonial Times 18 May 1827</td>
<td>An article is libellous if there was any malice displayed in the articles in question, on the part of the defendant, per CJ Pedder in Court directing jury, 15 May 1827 per Colonial Times 18 May 1827 Malice is determined from the general tendency of the articles; Per CJ Pedder in Court directing jury, 15 May 1827 per Colonial Times 18 May 1827 If the publication was made with intent to bring (a person) into contempt and hatred, there is libel; Per CJ Pedder in Court directing jury, 15 May 1827 per Colonial Times 18 May 1827</td>
</tr>
</tbody>
</table>

Predominant indices:

Powerlessness of an unrepresented defendant: The defendant, who was not attended by any Counsel, said, were he to attempt to defend, by a lengthened discussion, the charges exhibited against him, it would perhaps be only to occupy more time than was necessary, per Mr Bent in court 15 May 1827 per Colonial Times 18 May 1827

Predominant values:

The elements of libel are the general tendency of writing to show malice and intent to bring a person into contempt and hatred per Per CJ Pedder in Court directing jury, 15 May 1827 per Colonial Times 18 May 1827

47 Hobart Town Gazette, 19 May 1827
48 Hobart Town Gazette, 19 May 1827

345
Principles identified in R v Bent 15 May 1827\(^{49}\)

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of an unrepresented defendant</td>
<td>Power of unsupervised officials to abuse a system designed to raise state funds</td>
<td>Pre-occupation with the elements of a law can inhibit the ability to see the underlying ethics</td>
</tr>
</tbody>
</table>

**R v Montagu, 22 June 1829**\(^{50}\) Chief Justice Pedder on the bench

Samples of language of the report of **R v Montagu**

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Personal legal action for a private matter must be taken in the civil jurisdiction: “If he thought himself aggrieved...commence a civil action for the alleged injury” per CJ Pedder in court 22 June 1829 in Colonial Times 26 June 1829</td>
<td>Negative value of attempting to bring a personal civil action in the inappropriate proceeding and forum of the criminal jurisdiction: “The Attorney General could not file a criminal information against himself, nor could any other person do so;” per CJ Pedder in court 22 June 1829 in Colonial Times 26 June 1829</td>
</tr>
<tr>
<td>Predominant indices:</td>
<td>Predominant values:</td>
</tr>
<tr>
<td>Powerlessness of the plaintiff to bring an action in an inappropriate forum</td>
<td>The court will not entertain actions in the inappropriate jurisdiction</td>
</tr>
</tbody>
</table>

Principles identified in **R v Montagu**

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of ex-officials to use official proceedings to their own ends</td>
<td>Power attaches to an official position as distinct from the person holding the official position</td>
<td>Official power is for official use</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Personal and official matters are separated</td>
</tr>
</tbody>
</table>

**R v Gregson, 2-3 November and 8 November 1832**\(^{51}\) Chief Justice Pedder on the bench

Samples of language of the report of **R v Gregson**

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Inherent corruption of a system of justice which relies upon the payment of convict witnesses for evidence against their masters: “...in a given number of hours, he would get plenty of witnesses who for a shilling each, would swear to any thing” Mr Gregson in</td>
<td>Control of the press is essential: “If the licentiousness of the press prevails there is an end to all society,” per AG in court 2 November 1832.</td>
</tr>
</tbody>
</table>

\(^{49}\) ibid

\(^{50}\) Colonial Times, 26 June 1829

\(^{51}\) Tasmanian, 9 November 1832
court 2 November 1832 quoting comments by AG Gellibrand

<table>
<thead>
<tr>
<th>Predominant indices:</th>
<th>Predominant values:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vulnerability of an overseer of convicts: “…heard there was a secret inquiry going on at the police-office relative to his department: Thomson told him so; he is a prisoner and has been long looking for indulgences, not right to examine witness in private, whereby the interests of masters may be affected,” per John Lee Archer, Colonial Architect being examined in court, 2 November 1832</td>
<td>For libel, “Whatever a man holds up in contempt as acting in a dishonourable manner, is clearly a matter of libel” per CJ Pedder, directing the jury 2 November 1832</td>
</tr>
<tr>
<td>Vulnerability of a convict worker to a corrupt master: “…he is a prisoner and has been long looking for indulgences, it is not right to examine witness in private, whereby the interests of masters may be affected” per John Lee Archer, Colonial Architect being examined in court, 2 November 1832</td>
<td>It is not libel if: “The mere purpose of the writing ...is for the public good,” per CJ Pedder, summing up for the jury 2 November 1832.</td>
</tr>
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</table>

### Principles identified in R v Gregson

<table>
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<tr>
<th>POWERLESSNESS</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Vulnerability of government officials working with convicts to</td>
<td>Power of those who have money to</td>
<td>Focus is maintained on the technicalities of the law, for example the elements of libel, thus preventing perception of inherent ills of the justice system</td>
</tr>
<tr>
<td>accept offers of money in return for providing evidence</td>
<td>pervert the course of justice</td>
<td></td>
</tr>
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</table>

### R at the prosecution of J. T. Gellibrand v Gregson, 3 November 1832, Chief Justice Pedder on the bench

**Samples of language of the report of J. T. Gellibrand v Gregson**

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>The defendant’s vulnerability when the judge does not mention to the jury evidence of potential bias: eg, Mr Gregson asked CJ Pedder, at the conclusion of His Honour’s summing up to the jury, to inform the jury that Mr Gellibrand was the standing Counsel for the Colonist newspaper and had seen the article charged as libellous before its publication, the judge, replying that he “…did not know that it was of any consequence”, Tasmanian, 9 November 1832</td>
<td>Denigration of the press and its publication of libels: “…when once the channels of the press become polluted, for the base unworthy purpose of gratifying private malice, instead of warming us by its influence, society becomes disorganised; it hunts down and paralyzes its victim; it destroys his peace at home and his reputation abroad” … libel is “the greatest pest which could creep into a community”, per Mr Horne, prosecuting in court, Tasmanian, 9 November 1832</td>
</tr>
<tr>
<td>Vulnerability of a witness in the court forum: eg Counsel Mr Horne’s threat: “I must have</td>
<td></td>
</tr>
</tbody>
</table>

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52 ibid
**a direct answer to my question else I will keep you here all morning**” per Counsel Mr Horne to witness Reverend Mr Conolly in court, Tasmanian, 9 November 1832

Powerlessness of self-represented litigants in a colony where there were few legal practitioners: “Mr Gregson was a self-represented litigant of necessity because no counsel was available in the colony at that time to assist him,” Tasmanian, 9 November 1832

Predominant indices:

Powerlessness of an unrepresented Van Diemen’s Land defendant in a criminal prosecution where, until 1840, the trial was before a military jury instead of a civil jury: “Mr Gellibrand’s stated reason for bringing the action as a criminal prosecution as distinct from a civil action was to protect himself from charges that he was greedy for compensation,” Tasmanian, 9 November 1832

Predominant values:

The paramount value was the maintenance of “the peace of society” per Mr Horne, in court Tasmanian, 9 November 1832

The control of the press was essential: “…curb its licentiousness” and return the press to “that wholesome state whereby the interests of society would be promoted”, per Mr Horne in court, enunciating Mr Gellibrand’s wish for the press, Tasmanian, 9 November 1832

### Principles identified in *J. T. Gellibrand v Gregson*

<table>
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<tr>
<th>POWERLESSNESS</th>
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</thead>
<tbody>
<tr>
<td>Powerlessness of an unrepresented defendant in a criminal prosecution</td>
<td>Power of the legal fraternity to diminish a defendant’s case by ‘not being available’ to provide legal assistance</td>
<td>The press must be prevented from disturbing the peace of the community</td>
</tr>
</tbody>
</table>

### *R v Browne (No. 1)* 1833, 14 August 1833, Judge Montagu on the bench

Samples of language of the report of *R v Browne (No. 1)*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</thead>
<tbody>
<tr>
<td>Witnesses were unable to testify to the identity of the writer of the offending article</td>
<td>The identity of the writer of a libel must be proven for a valid prosecution for writing criminal libel</td>
</tr>
</tbody>
</table>

*The court acquitted the defendant.*

Predominant indices:

Powerlessness of criminal prosecutor to prosecute an individual for writing a libel without proving that the individual was the

Predominant values:

Negative value of issuing a criminal prosecution against an individual for writing a criminal libel without proving that the individual prosecuted was the actual writer is identified

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53 *Tasmanian*, 16 August 1833
Principles identified in *R v Browne (No. 1)*

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
<th>POWER</th>
<th>VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of Crown prosecutor to prosecute an unknown writer of libel</td>
<td>The court will not entertain a criminal prosecution against an unidentified writer</td>
<td>The identity of the writer of a libel must be proven for a valid prosecution for writing criminal libel</td>
</tr>
</tbody>
</table>

*R v Browne (No. 2)*, 14 August 1833. Judge Montagu on the bench

Samples of language of the report of *R v Browne (No. 2)*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
<th>Identification of values</th>
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</thead>
<tbody>
<tr>
<td>The original manuscript of the libel must be produced in court; to prove it was a libel: a copy is not sufficient. <em>The court acquitted the defendant.</em></td>
<td>Merely owning the premises where a newspaper is published does not incur liability for content of a publication</td>
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</table>

<table>
<thead>
<tr>
<th>Predominant indices:</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Powerlessness of criminal prosecutor to prosecute an individual for writing a libel without disclosing the original manuscript; a copy is not sufficient for a criminal prosecution.</td>
<td>Negative value of issuing a criminal prosecution against an individual for writing a criminal libel without proving that the individual prosecuted was the actual writer is identified in the court’s acquittal of the defendant</td>
</tr>
</tbody>
</table>

Principles identified in *R v Browne (No. 2)*

<table>
<thead>
<tr>
<th>POWERLESSNESS</th>
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</thead>
<tbody>
<tr>
<td>Powerlessness of criminal prosecutor to prosecute an individual for writing a libel without disclosing the original manuscript;</td>
<td><em>Power of court to reject a prosecution when the identity of the writer is unknown</em></td>
<td>Ownership of publishing premises does not incur liability for content of a publication</td>
</tr>
</tbody>
</table>

*R v Robertson (No. 1)*, 9 March 1835. Chief Justice Pedder on the bench

Samples of language in the report of *R v Robertson (No. 1)*

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</thead>
<tbody>
<tr>
<td>Defendant’s powerlessness to write or speak critical sentiments about public measures and practices. The court punished the defendant with fines and imprisonment, and continuing imprisonment until the fines be fully paid.</td>
<td>Disapproval of adverse comment of the conduct of public officers: “You set yourself up as a self-elected commentator upon the conduct of public officers” and “Your paper is a guillotine...(by which)...you endeavour to rob men of their characters”, per CJ Pedder in court</td>
</tr>
</tbody>
</table>

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54 *The True Colonist*, 20 August 1833
55 *The True Colonist*, 11 and 14 March, 1835
56 *ibid*
writings would disturb and destroy the peace and happiness of society and it was with that intention they were written,” per CJ Pedder in court

Approval of a well-regulated press, “…the advantages that might result to a community through the medium of a well regulated press” per Attorney General in court

Predominant indices:

Power of the court to attempt to alter the defendant’s view of and practice of the role of newspaper reporters and publishers through infliction of harsh punishment eg fines and imprisonment

Predominant values:

Positive value of the court to regulate and modify the behaviour of individuals through punishment: eg “I most sincerely trust that at the expiration of the sentence of imprisonment which I shall pass upon you, you will entertain far different views of a public writer from those which you say you now entertain” per CJ Pedder giving judgment

Negative values of adverse comment upon the conduct of public officers, disturbing unjust and malicious publication are denounced by the court’s decision to punish the defendant with fines and imprisonment, eg:

(a) £60 fine and imprisonment for 4 months and continuing imprisonment until the fine be paid for accusing the LG of “dishonourable and unworthy conduct” in regard to alteration of the date of the land grant Deed

(b) £120 fine and imprisonment for 8 months after the expiration of the first sentence and further imprisonment until the fine be paid for accusing the LG of using property belonging to the Crown for his own private purposes, viz feeding his own animals with Crown hay

(c) £20 fine and imprisonment for 1 month for libelling lawyer Mr Rowlands, viz writing about the consequences of the lawyer’s high charges on clients

Principles identified in R v Robertson (No. 1)

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<tbody>
<tr>
<td>Powerlessness of press to write critically of public measures and practices</td>
<td></td>
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<tr>
<td>The court has power to punish harshly – by fine and imprisonment until fine is paid</td>
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<td></td>
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<tr>
<td>Society’s peace of mind and happiness are paramount</td>
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<tr>
<td>The press must be well regulated</td>
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</table>

**R v Robertson (No. 2) 7 April 1835**

Chief Justice and Puisne Judge Montagu on the bench

Samples of language in the report of R v Robertson (No. 2)

<table>
<thead>
<tr>
<th>Indices of powerlessness</th>
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</thead>
<tbody>
<tr>
<td>A defendant in prison – without legal representation - is powerless to adequately respond to criminal charges:</td>
<td>Publication of defamatory material about a public officer in the exercise of his/her powers</td>
</tr>
</tbody>
</table>

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57 ibid
58 ibid
59 The True Colonist, 17 April 1835 and 15 May 1835
“We wrote a note to Mr Gellibrand, requesting him to call, that we might make a motion for our being allowed to come into Court to shew cause. We waited until 10 o'clock on Tuesday in expectation of seeing him, and when we lost all hope of his coming, we wrote off a petition to the Clerk of the Court. Mr George Stephen...declined to receive it. We then sent it to their Honours...and the Chief Justice directed Mr George Stephen to read it...” Affidavit of Mr Gilbert Robertson, True Colonist 17 April 1835;

AND

“Mr Robertson prayed for more time as he had not received copies of the Information and Affidavit,” True Colonist, 8 May 1835

AND

“On Tuesday 5th May this deponent was assaulted by the keeper of the prison and by him forcibly and violently dragged and pushed out of the prison wherein he had been confined under sentence of this honourable court, and without any writ of Habeus Corpus, was forcibly taken into court and...ordered to plead to the said Information, which the deponent refused to do because he had not received a copy of the Information or the Affidavits on which the Court had granted the rule,” Affidavit of Gilbert Robertson, True Colonist, 15 May 1835

Predominant indices:

Powerlessness of the indigent, imprisoned and unrepresented defendant to take appropriate defensive legal action:

“Your petitioner being now confined in prison, cannot even swear an affidavit himself, much less procure the other affidavits necessary in this case”, Affidavit of Gilbert Robertson, True Colonist 17 April 1835;

AND

“ It is extremely hard that a man is to be charged with an offence, and put upon trial, and then made to pay for not knowing what he is charged with...” per Gilbert Robertson, in court to Montagu J., 7 May 1835

Predominant values:

Negative values of the potential for corruption in an incestuous colonial system of justice wherein power resides in the hands of a few: R v Robertson(No2) Supreme Court of VDL, 7 April 1835, Pedder, CJ and Montagu, J – an alleged criminal libel by Mr Robertson on Captain John Montagu, Acting Colonial Secretary, nephew of LG Arthur and brother of Judge Montagu, sitting on the Bench with CJ Pedder:

“On account of the high official situation of Captain Montagu, and his near connection with the head of government, persons who could give evidence for your petitioner are afraid to make any voluntary affidavits in this case,” per Affidavit of Gilbert Robertson, True Colonist 17 April 1835

Principles identified in R v Robertson (No. 2)

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<tbody>
<tr>
<td>Powerlessness of an unrepresented defendant in prison</td>
<td>The publication of defamatory material about a public officer in his private undertakings is actionable as criminal libel</td>
<td>Power, residing in the dominion of a few intimates, has a high potential for corruption</td>
</tr>
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Denial of legal assistance renders
**R v Murray, 25 and 29 September 1835.** Chief Justice Pedder and Puisne Judge Montagu on the bench

Samples of language in the report of **R v Murray**

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<tr>
<td>The Crown will not prosecute for criminal libel unless a malicious intent is apparent ... “His Honour the Chief Justice considered the only question in this case was whether the article complained of was published with malicious intent or not” per Tasmanian, 2 October 1835</td>
<td>The publication of content without a malicious intent is not criminal libel “… His Honour the Chief Justice considered the only question in this case was whether the article complained of was published with malicious intent or not” per Tasmanian, 2 October 1835</td>
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To protect himself from prosecution for criminal libel the defendant can use the defence of publication without malicious intent and tender independent evidence of showing the truth of the content was investigated prior to publication: “The judges only appreciated the motives of our whole conduct which induced this matter. Malice never yet, we hope and believe, formed a part of our constitution.” per Tasmanian 2 October 1835

Predominant indices:

Powerlessness of a plaintiff to gain the Crown’s assistance to protect his reputation from libelling by the press when the court applies the subjective criterion of malicious intent to the alleged libel: “… His Honour the Chief Justice considered the only question in this case was whether the article complained of was published with malicious intent or not,” per Tasmanian, 2 October 1835.

Predominant values:

A publisher is entitled to print matter which has been investigated for truth – apparently even if it is subsequently found not to have been truthful – so long as it is not published with malicious intent:

“…R.L. Murray had done nothing more than fulfil his duty as a public writer ...taken great pains to ascertain what was the real truth before he published it...neither had the publication been made with any malicious intent,” per CJ Pedder Tasmanian, 2 October 1835

Principles identified in **R v Murray**

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<tr>
<td>Party is powerless to obtain the assistance of the Crown to bring an action for libel when the court applies the subjective criterion of ‘malicious intent’ to the publication</td>
<td>Court will protect a publisher who shows a publication was not with malicious intent</td>
<td>A publisher is entitled to publish material if it has been investigated for truth and is not published with malicious intent</td>
</tr>
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60 *Tasmanian*, 2 October 1835