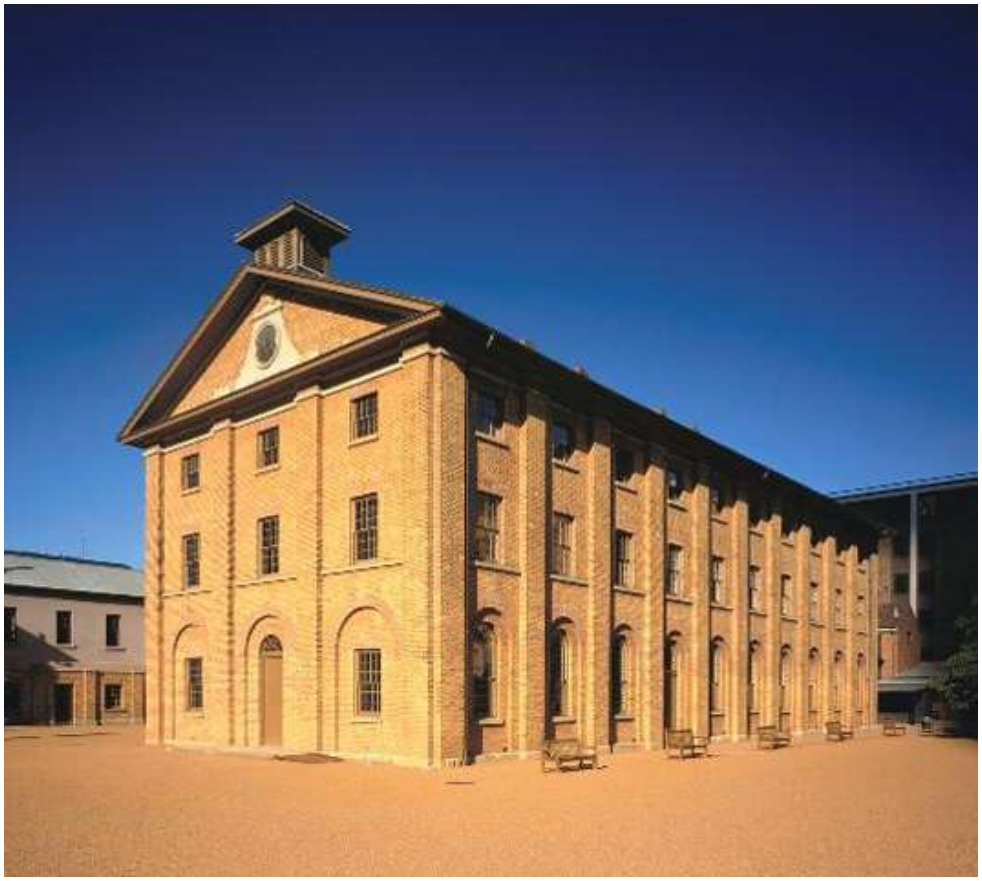
Attainted No More



How Convicts Became Citizens

John Walter Ross

Cover photographs:

Top: Hyde Park Barracks, designed by Francis Greenway, 1819
Lower left: William Charles Wentworth, 1872
Lower right: Edward Eagar, c1863

Source:

Top: Historic Houses Trust
Lower left and right: Mitchell Library, State Library of New South Wales

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Felony attaint:

In English common law, this is the termination of the civil rights of a person upon a sentence of death or outlawry for treason or a felony. An attainted person is denied the right to own or transmit property, cannot be a witness in court, and cannot sue another person. In short, the person is dead in law.

An attainted person's civil rights are only restored after an absolute pardon or after the sentence is completed.

An unpromising beginning:

"The story begins in the depths of the Nether World. It is as if a deliberate experiment was being tried to test the quality of the British race in the most unfavourable circumstances that could be invented. We have the careful selection of the unfit, a society of criminals and the government of a prison. Then, very gradually, change and progress begin. Free colonists arrive. Criminals become emancipists. The first generation passes and gradually a homogeneous British society is formed."

Professor G A Wood, quoted in *Sorely Tried – Democracy and trial by jury in New South Wales*, by Ian Barker, QC.

Foreword

Before the nineteenth century, the English justice system was very different from today. In the small-scale agrarian society of the time, crime was viewed as a breach of the social contract to be dealt with locally by compensation between individuals. There were no places of long-term incarceration (except for debtors), no police force and no statute law in the modern sense.

Serious criminals were exiled to the American colonies after 1615 to work out their sentence on cotton and tobacco plantations. This was regarded as a successful system: it cost the government little, it removed the worst criminals from the streets and it contributed to the American (and hence the British) economy. However, the sudden end of this system with American independence in 1776 and the growing crime rate during the Industrial Revolution caused a crisis in Britain. Prison ships were used as holding places, but they were filling up rapidly. A new destination was needed for convicts.

The British government's solution was a unique social experiment: to establish a penal colony in distant New South Wales, previously mapped by Captain Cook in 1770, but uninhabited by Europeans. This would serve two purposes – it would empty the overflowing prison ships and it would discourage French colonisation of the South Pacific area. But it would be very different from the previous experience of transportation. Unlike the American system, this would be funded by the British government, and there was no established economy for the convicts to blend into. The colony was intended to be permanent, self-sustaining, and the convicts were not expected to return to Britain.

This raised many questions. How would English law be applied in a community dominated by convicts and former convicts? The law of felony attaint was a particular concern - in England, a person convicted of a capital offence had all legal rights suspended until pardoned or on completion of sentence. The system of tickets of leave and pardons meant that convicts could work and acquire property before their sentence had expired, and the legal status of this property was in doubt for a long time. Would the restrictions of felony attaint be applicable to the unusual environment of a penal colony?

Also, how would British attitudes to class operate in the new colony? There were only military officers and some government officials to represent the old upper classes, but some people of modest birth would amass a great deal of wealth, some of them former convicts. This would create a new class of nouveau-riche who valued land ownership as the measure of social status. Finally, how would the colony sustain itself until free settlers with farming and other useful skills arrived? Because of the shortage of tradesmen, professionals and merchants in the early days, convicts with ability and entrepreneurial flair were given early pardons by the Governors and encouraged to develop prosperous businesses. A few of these former convicts formed much of the backbone of the colony's early economy, amassing great wealth in land, shipping, warehouses, sheep and cattle.

The early administration of the penal colony was a source of conflict for all colonists, both free and freed. For a long time, New South Wales was run like a military outpost. The autocratic governors were all former naval commanders or army officers, there was no legislative body, and the courts operated very much like military tribunals with juries of army and naval officers. No-one liked the

involvement of the military in the judicial system, not least the officers themselves, and there were demands almost from the beginning for civilian juries. The idea of serving on civilian juries became a strong symbol of citizenship for the population of New South Wales, and for the ex-convicts in particular it represented their complete reformation and acceptance back into society. Nearly all colonists wanted civilian juries, but the free settlers did not want former convicts serving on them, especially in criminal matters. In any case, the British government wasn't keen on the idea of civilian juries while the majority of the population were convicts or ex-convicts.

Until Lachlan Macquarie took over as Governor in 1810, former convicts did not have any real conflict with free settlers, as both groups were busy taking advantage of the many commercial opportunities in the growing colony. But Macquarie actively encouraged convicts to return to their former occupation and rank in society after they had been pardoned or completed their sentence. He appointed some of them as magistrates and to other senior positions and invited a chosen few to dine at Government House. This policy brought to a head the conflict between emancipated convicts and other colonists such as wealthy landholders, military officers and government officials, who became known as the exclusivists. The emancipists wanted to share in the success of the new colony, while the exclusivists wanted it all to themselves.

Following much energetic campaigning by colonists like Edward Eagar and William Charles Wentworth, Britain agreed to establish a Legislative Council in 1823, with members nominated by the Governor. This was the beginning of the road to self-government, but trial by jury was still some years off, except in a very limited way. It would take the efforts of liberal-minded officials such as Chief Justice Francis Forbes and Governor Richard Bourke in the 1830s followed by the end of convict transportation in 1840 for Britain to agree to civilian juries in both civil and criminal cases. Even then, it was not until 1847 that all former convicts were included in jury lists.

With the end of transportation, Britain thought that Australia was ready for a greater degree of self-government, and with the leadership of Eagar and Wentworth, New South Wales was granted its own constitution in 1842, along with a partly-elected Legislative Council. This marked the beginning of the country's parliamentary system, although it took until 1856 for the modern system of two houses of parliament to be established: a nominated Legislative Council and an elected Assembly based on a broad property franchise.

This then is the story of how a group of people, many of them transported to Australia for crimes that would attract only a small fine today, overcame the reluctance of the British government, and the small-minded attitudes of many free settlers, to achieve the legal and civil rights that were expected by all free British subjects.

This document was researched and written as an exercise to gain technical writing experience. It is not intended for general publication, and no permission has been sought for any of the source material. The intended audience is anyone with an interest in the history of New South Wales in its formative years.

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Sydney, November, 2012.

Early convict transportation to America

The American colonies

When the first convicts arrived at the shores of Botany Bay in January 1788, the British government was continuing a long tradition of exiling its criminals to the distant parts of its empire. The Age of Discovery, pioneered by Spain and Portugal in the fifteenth and sixteenth centuries, had prompted the British to establish their own colonies and trade networks in the Americas and Asia. By the eighteenth century, Britain was the dominant power in both North America and India[1].

From about 1615, less than ten years after the founding of the first North American colony of Virginia, Britain began transporting serious convicts to the American colonies where they would be put to work on plantations growing sugar cane, cotton and tobacco. The convicts worked alongside indentured servants from Europe and slaves from Africa. Indentured servants were British workers who were attracted by the greater availability of work in America than at home, and who migrated for a fixed period to work in the plantations, being paid only for their keep until the cost of their passage was paid off.

The transportation system was privately operated, with no real cost to the government. The ships' captains paid the cost of taking the convicts to North America, and then recovered their expenses by selling the labour of each convict to a plantation owner. Eventually, some 30,000 prisoners were sent to America during the eighteenth century. While they were free to live in America after completing their sentence, the convicts did not form a significant part of the New World society.

The American transportation system was regarded as a great success, as it emptied the streets of felons, contributed to the material development of the American colonies (and therefore to Britain), and cost the government hardly anything to run. The system had also introduced a new idea, which was that convicted criminals could work their way back to rehabilitation. Britain may well have been happy to maintain this system indefinitely.

The continuation of the transportation system in Australia would be very different for the British government, however. There was no established economy for the convicts to be absorbed into, there were no useful goods sent back to the mother country for a long time, the colonies would be dependent on supplies from Britain for several years, and the British government bore the whole cost of transporting, feeding and clothing the convicts.

The War of Independence halts transportation

Transportation to America was proceeding satisfactorily until Britain made a big mistake: they tried to directly tax the Americans to help pay for the so-called French and Indian War of 1754-1763, which was fought by the British with the assistance of the American colonists to throw the French out of continental North America[2].

Growing opposition to British rule in North America, especially to the proposed war tax, resulted in the War of Independence starting in 1776, after which the newly-independent Americans refused to take any more convicts from Britain. The British suddenly had a crisis on their hands:

crime was on the increase, they did not have enough gaols, and now they had nowhere to send their convicts.

The continuing need for transportation

When transportation to America began, Britain was an agrarian society, made up of small-scale tradesmen working in shops in villages and small towns, and agricultural labourers growing crops on common land. Two major changes took place in the eighteenth century that had dramatic and permanent effects on the lives of all Britons, and also on the crime rate. The first was the enclosure movement, during which the open land that had traditionally been farmed in common was fenced off and belonged only to the owner[3].

The other change was the Industrial Revolution, which started in Britain around the 1750s, and ran until roughly the 1850s. This saw the creation of the world's first industrial economy. The changes were all-embracing and permanent: initially there was the mechanisation of the textile industry, then the development of iron smelting, and the increased use of coal.

The ramping up of the Industrial Revolution coincided with the peaking of the enclosure movement, which had created a landless working class that provided a labour force for the factories opening in northern England at the time. The effects of the Industrial Revolution were falling wages, higher prices, and high unemployment caused by mechanisation of work processes. There was also a large migration from country areas to the cities to find work in factories.

Industrialisation spawns criminal law

Historians believe that property crime in Britain increased during the Industrial Revolution[4]. Prior to this time, the justice system had been based on the old idea of torts, or wrongs, that were seen as simply a breach of trust between individuals, to be compensated directly by the offender to the offended. But with the increase in crime, the concept of criminal law that we have today gradually evolved. The new approach was to view any wrongs as crimes, which were defined in new laws, with specified fines that went to the public treasury, often with incarceration as punishment.

One of the aspects of criminal punishment that arose in England, and which was to be at the heart of the Australian emancipist struggle for equality, was the loss of civil rights for anyone convicted of a serious crime. This policy, called felony attaint, was a law under which a death sentence for a capital offence (even if commuted to imprisonment) led to the loss of all civil rights, in particular the right to own and transmit property (including to heirs), the right to bring a legal action, to give evidence in court, and to sit on a jury. A person so attainted was dead in law.

By the start of transportation to Australia, capital offences were amazingly common in England: in 1800, the English system of laws and punishments listed 222 crimes that attracted the death penalty. The system was later dubbed The Bloody Code for this reason. Property crime was then considered to be much more serious than personal crime, presumably because the population was much poorer, and there was no widespread use of insurance to replace stolen goods.

One unusual feature of eighteenth century justice was that both forgery and counterfeiting attracted a mandatory death sentence. They were regarded as a threat to the financial system at a time when most documents, even the promissory notes used for documenting loan amounts, were hand-written and so were easier to tamper with than today. Several convicts who were destined to make important contributions to Australia's development were sent out for forgery, such as the Irish lawyer Edward Eagar, and the English architect Francis Greenway. In Eagar's case, his attainted status, thanks to his commuted death sentence, was to become the flashpoint for the future emancipist movement in the colony.

Floating prisons

The cessation of transportation to America caused a crisis in the British criminal justice system, as the number of convicted criminals at home quickly grew. At this time, the British government estimated it would need alternative accommodation for about 1,000 new convicts each year. The government wasn't keen on building more gaols at this stage, still preferring the policy of sending convicts overseas.

As an emergency measure, criminals were housed in the hulks of old ships after the American War of Independence, and they eventually became overcrowded. Around forty decommissioned ships of the Royal Navy were used as floating prisons in the eighteenth and nineteenth century. This was authorised by parliament in 1776 as a temporary policy for two years, but in the end the policy lasted 80 years. The ships typically had the rigging, masts and rudders removed, so they were rendered inoperable or at least unseaworthy[5].

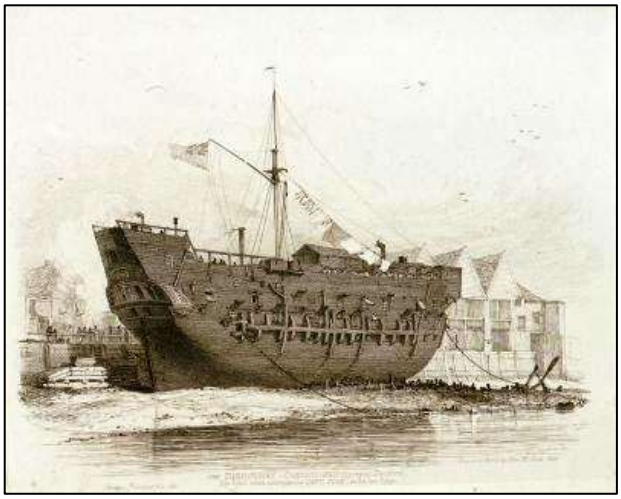

Figure 1: *Discovery*, Deptford, 1808 - 1834

Nearly every convict who arrived in Australia from Britain had spent some time aboard one of the prison hulks, either moored in the Thames or elsewhere in the country. The convict farmer James Ruse, for example, had served five years of his seven year sentence on a hulk before setting foot in New South Wales. Many convicts sent from the hulks to New South Wales carried typhoid and cholera with them, resulting in epidemics on some of the convict ships.

While the transportation system to America had cost the government little, the hulks were expensive, as the government had to pay for the whole system, despite efforts to keep the costs down - by minimising the amount spent on food and clothing, and by putting convicts to work on projects such as dredging the Thames and building up the docks and nearby Woolwich Arsenal[6]. This was the first use of the idea of rehabilitation through public works, something that was continued in Australia.

Transportation to Australia

Transportation empties the prison hulks

To relieve the pressure on the overflowing prison hulks, Britain looked around the Empire for another destination for their convicts. A number of English laws up to 1783 had authorised transportation to anywhere overseas and from 1786 to the east coast of Australia, and it was under these Acts of parliament that transportation to Australia commenced.

The legal framework for the new colony was defined by the New South Wales Courts Act of April 1787. This established New South Wales as a British colony, setting up the first court, called the Court of Criminal Judicature. The Act also allowed for a more abbreviated legal proceeding than was usual in Britain, adapting court procedures to the conditions of a convict colony. A Civil Court was also established, with Captain David Collins appointed Deputy Judge-Advocate to preside over the two new courts. The Governor had to approve any death sentences, and could pardon convicts.

The British government's intention was to transport English law and judicial proceedings to New South Wales, but in practice significant departures occurred, due to the unique conditions of a colony in which the entire population consisted of a large number of convicts and a small number of looking after them. The contradictions between the strict letter of the law and its application in the colony were to plague the colonists for years, in particular those convicts and former convicts whose legal rights were restricted by felony attaint. The efforts to overcome these contradictions define much of the journey from convict status to citizenship.

Governor Phillip starts the penal colony

The First Fleet arrived in Sydney Harbour on 26 January 1788, consisting of eleven ships containing 504 male convicts, 192 female convicts, 212 marines (including officers), 28 wives and 17 children of marines, and 81 free persons[7]. On board were Arthur Phillip, the new Governor, as well as three men who were to become future Governors: Captain John Hunter (the second Governor of New South Wales from 1795), Lieutenant Philip Gidley King (the third Governor of New South Wales from 1800) and Captain David Collins (the first Lieutenant-Governor of Van Diemen's Land from 1803).

Figure 2: Arthur Phillip

One immediate problem for the Governor was that, amazing as it seems, no records of the convicts were left behind when the transport ships returned to England. Transportation had been arranged by private contractors, and on arrival the ships' captains handed the passenger records over to the agents, who promptly sent them back to the ships' owners in England.

So Phillip had to hastily organise interviews with each convict to try and get details of them: their crimes, sentences, how long they had been incarcerated already and what useful skills they had. It is easy to imagine that much of this information was unreliable. In any case, many were soon claiming that their sentences had expired, because they had already spent years on a prison hulk. This may well have been true, as in the case of James Ruse mentioned earlier.

The colony was established with few supplies or farming knowledge. Phillip tried to make the most of very limited human and material resources, and his efforts managed to save the colony from failure in the first two or three years. He made prompt use of some of the skilled convicts, such as the master brickmaker and builder James Bloodworth, the farmer James Ruse and the surgeon John Irving.

Phillip was to show that he had a greater vision for the new colony than the British authorities. He intended to encourage free settlement in the long term, partly by reforming the convicts (as well as disciplining them when necessary). He had a rational approach to life as well as an indifference to religious fervour that was fairly advanced for his day.

The British government, for its part, wanted little more than to clear out the prison ships and in the process establish a British presence in the South Pacific to discourage French colonisation. The colony was meant to be permanent, and the convicts were not wanted back in Britain after their period of servitude. There was no real planning for the future beyond that, and it was fortunate for Australia that Phillip could imagine a future society of free settlers not unlike Britain, whether or not the settlers came here voluntarily, or "left their country for their country's good"[8] and were later emancipated. This was the vision that guided his administration.

On completion of their sentence or being pardoned, convicts couldn't be legally prevented from returning to Britain, but Home Secretary Lord Grenville told Phillip in February 1791 that it would be desirable to offer "every reasonable indulgence" to induce them to stay in New South Wales. The most feasible way was to offer them land grants and to encourage participation in the colony's life, hopes and future[9].

The colony grows

In June 1790, the Second Fleet arrived, with many sick convicts. Of the 1,026 convicts who left Britain, 267 died on the trip, the highest death rate in the history of transportation. Unlike the First Fleet where great efforts had been made to keep the passengers healthy, the Second Fleet was contracted to different operators, who kept the convicts in horrific conditions. The first detachment of the New South Wales Corps regiment arrived as guards on these convict ships, including Lieutenant John Macarthur. Macarthur basically started out as he later continued in New South Wales by squabbling with the captain of the ship, fighting a duel with him, transferring his family to another ship, and again squabbling with the captain of the second ship.

In the period July to October 1791, the ships of the Third Fleet arrived. Over 2,000 convicts left Britain, and 182 died on the voyage. While this was high, it was nowhere near the mortality rate of the Second Fleet. Even though these ships carried supplies, the arrivals still caused new food shortages in the colony. Many of the men and women who were destined to help shape the future of the colony arrived in these early years. John Macarthur arrived as a Lieutenant in the New South Wales Corps with the Second Fleet in June 1790. The convicts Isaac Nichols and Simeon Lord arrived on the Third Fleet. Andrew Thompson arrived in February 1792 and Mary Reibey in October 1792. The Reverend Samuel Marsden arrived in March 1794.

Phillip returned to England in December 1792 because of ill health, intending to resume his governorship of New South Wales when he was well. However, in England he was placed on active duty in the Napoleonic Wars, and never returned to the colony. He was not replaced as Governor for two years and nine months.

The New South Wales Corps takes control of the colony

From Phillip's departure to the arrival of the next Governor, John Hunter in September 1795, New South Wales was run by the commanding officers of the New South Wales Corps. The first was Major Francis Grose, who had arrived in February 1792 as both commandant of the Corps and Lieutenant-Governor. Grose had been a professional soldier since 1775, and had seen active service in the American War of Independence, returning to England in 1779 after being wounded. He then spent two years as a recruiting officer, which was valuable experience when he helped to raise the New South Wales Corps during 1789[10].

When he took over from Phillip, Grose made it plain from the start that he was not at all interested in Phillip's egalitarian vision of a society with opportunities for all, where the very limited resources had been shared equally, the convicts had been rewarded for good behaviour and the indigenous people had been treated reasonably well. He was only interested in the traditional type of military rule, where his fellow officers and troops were placed at the highest rank of society, and would be treated as such.

He quickly reversed Phillip's policy of equal rations for all by increasing the food allowance for the troops and giving them better housing. He issued land grants to serving officers who asked for them (without specific instructions from Britain to do so), and encouraged the officer farmers to increase the food production, permitting the assignment of a large number of convicts to work on each farm. He replaced several civil officials with military officers, including the civil magistrates, the supervisor of convicts at Parramatta and the inspector of public works, a position he gave to John Macarthur[11].

However, his hope of a widespread benefit coming out of private farming did not happen, and before long some of the officers and civil officials began to trade, especially in liquor, at a great profit to themselves. Rum (a general name used for all spirituous liquors) became a method of incentive payment to convicts, in the absence of any other real form of currency. Because officers were supposed to be gentlemen and above common activities such as trade, entrepreneurial ex-convicts were utilised to act as agents on their behalf.

The British government was unhappy with the cost of the colony under Grose's leadership. The reduction in public farming meant that the Treasury had to buy food which the convicts should have been producing at no cost to the government, when in fact they were working privately on the officers' farms while being supported by the government. By encouraging the New South Wales Corps officers to farm and engage in trade, Grose allowed them to gain a hold over the emerging economy which they soon exploited to their own advantage with trade monopolies and huge profit margins. In this way he helped to create problems for the colony that his successors were unable to overcome for nearly twenty years.

In December 1794, Francis Grose returned to England because of ill-health, and his second-in-command, William Paterson took over, pending the arrival of Governor John Hunter nine months later. Paterson was an honest man, but fairly weak, and was unable to stop the New South Wales Corps officers increasing their wealth and power.

Governor John Hunter fails to control the Corps

John Hunter arrived as the new Governor in September 1795, having previously spent much of the first four years of the colony there. Arriving with the First Fleet, he then spent eleven months at Norfolk Island, and later in Port Jackson as a surveyor and magistrate.

Figure 3: John Hunter

On returning as Governor, he found that no land had been cleared for public purposes or public works built in the three years since Phillip left, as almost all convict labour was occupied in private farm labouring on the officers' land grants. In fact, the public economy created by Phillip was steadily turning into a private economy run by the Corps officers and the few free settlers, in which in a good year they were also self-sufficient in grain. All other essentials had to be imported, including cattle.

The officers had a near-monopoly on trade in many goods, and they were inflating the landing prices many times before selling goods to the colonists. However, apart from trying to court-martial George Johnston for sharp practice in the rum trade in 1800, Hunter's efforts to put a stop to the illegal rum trade and the monopoly of the New South Wales Corps officers (including John Macarthur) were failures. He tried to wrest control of the colony from the military back to a civil administration, but was rendered almost helpless.

The perennially disgruntled Macarthur ran a determined campaign to undermine his administration by complaints to the Duke of Portland, who was the Home Secretary and Hunter's immediate superior. As a result, Hunter was recalled in September 1800.

Governor Philip Gidley King encourages emancipists

Figure 4: Philip Gidley King

Philip Gidley King had earlier arrived with the First Fleet, and soon afterwards oversaw the establishment of the Norfolk Island settlement, which he commanded until 1796, apart from a period of eighteen months in England. He had been recommended by both Arthur Phillip and Joseph Banks as a future Governor of New South Wales, and eventually succeeded John Hunter in September 1800.

He tried to reform the administration of the colony by attacking the misconduct of the officers in the illicit liquor trade. He was able to reduce the amount of spirit imports to about a third, although this simply caused an increase in illicit distilleries. To counter this, he set up a brewery as a better alternative to the manufacture of spirits, but it wasn't operational until 1804. He faced disobedience from the New South Wales Corps, and was not supported from England when he tried to court-martial John Macarthur for fighting a duel with his commandant William Paterson.

King was an able and experienced administrator, but faced with serious problems like these, he was forced to do some hard thinking about how to improve the conditions in the colony. He made efforts (with varying success) to regulate the hours of work, wages, prices, interest rates, financial deals and the employment of convicts, reducing the number assigned to each officer to two (as instructed by Britain years before). He encouraged the construction of basic infrastructure such as barracks, wharves, bridges and houses. He tried to keep the peace with the indigenous people, and started the first newspaper in 1803.

His contribution to the emancipist cause was to give opportunities to ex-convicts, appointing them to responsible positions and enrolling them in the Loyal Associations. The most notable of these were:

- George Bellasis, a former lieutenant in the East India Company's artillery who was transported for killing a man in a duel, arriving in January 1802. He was conditionally pardoned and then appointed commandant of the Governor's bodyguard of cavalry.
- Richard Fitzgerald, transported for 7 years, arriving in August 1791, was appointed superintendent of convicts in 1792, superintendent of public agriculture in 1798, and inspector of agriculture settlements in July 1802.
- James Meehan performed most of the departmental duties for the acting surveyor-general in 1803-1806 during the surveyor-general's absence on leave.
- David Dickenson Mann was transported for life for forgery and arrived in July 1799. He was appointed clerk assessor to the Naval Officer in October 1800, and to other committees.
- Andrew Thompson prospered under King, who allowed him to establish a brewery in 1806, and continued to employ him as a police constable (having first been appointed in 1793).
- Reverend Henry Fulton was fully pardoned while working on Norfolk Island in 1805, and then served on the Civil Court and the Commission of the Peace.

- Reverend James Dixon was transported for life for his part in the Irish Rebellion of 1798, arriving in January 1800. In April 1803, King conditionally pardoned him, and allowed him to work as a Catholic priest.
- George Howe, appointed government printer, started the colony's first newspaper, the *Sydney Gazette*, in March 1803.

At one point during his Governorship, whether he intended to or not, King made a declaration of the legal rights of ex-convicts. He reminded George Johnston, the commandant of the Corps, that his power to emancipate convicts was not intended to consign them to disgrace forever, and that he would support the principle that every one of them had the same rights as free-born Britons, whether they were conditionally or absolutely pardoned. Of course, at the time they did not.

What had provoked this declaration was his anger at the behaviour of the officers who were avoiding contact with the convicts. Some of them even refused to co-operate with the administration of the convict system, claiming that it was beneath them as officers and gentlemen. Further to this, some officers refused to have a conditionally-pardoned man in the New South Wales Corps. Thus the first statements in the colony in favour of trial by jury and the rights of emancipists were actually made as by-products of these angry exchanges between Governor King and the military officers.

King founded the ticket of leave system in Feb 1801 for well-behaved convicts. This was a forerunner of parole, and was intended to encourage good conduct by convicts, as well as reducing the cost of their administration, as ticket of leave holders could work for themselves, and so were taken off the government's accounts. The British government saw the benefit of this system, and approved of it, although it was not fully validated in law until 1832, when the New South Wales Legislative Council finally declared all holders to be free of attaint.

In Nov 1801, the Governor sent John Macarthur to England to be tried in a military court after a duel with his commander, Colonel William Paterson, in which Paterson was severely wounded. But Macarthur returned in triumph in 1805, by then a civilian and untried by any British court, with a government order for 5,000 acres of the colony's best land for sheep breeding, which King was obliged to honour. Macarthur had had the foresight to take samples of his own fleeces with him to England, and had gained powerful patronage for the idea of a great Australian wool industry that would supply the exploding demand by British woollen mills, with himself at the head.

Figure 5: 1966 $2 note featuring John Macarthur

Two convicts who would have a major impact on the colony arrived in 1801, during King's time: Samuel Terry[12] and William Redfern[13]. Redfern was a qualified surgeon became one of the most respected members of the colony, and due to his character and ability, much of the social prejudice against ex-convicts was suspended for him. He also made an important contribution to the improvement of transportation conditions by submitting a report to the government on the overcrowding, shortage of fresh food and lack of hygiene on the transport ships, based on his experience.

Figure 6: Samuel Terry

Figure 7: William Redfern

Governor William Bligh and the Rum Rebellion

Figure 8: William Bligh

Captain William Bligh arrived in New South Wales in August 1806 at double the salary of his predecessor, and on the urging of the influential Sir Joseph Banks[14]. He arrived to find a colony in great distress. This was partly due to the disastrous Hawkesbury floods, partly by the falling off of supplies and convict labour after the resumption of the Napoleonic Wars, and partly by the effects of trading monopolies controlled by the army officers and officials. He set about trying to implement urgently needed reforms to the economy, but faced strong opposition due to his high-handed and uncompromising approach.

He had special instructions to stop the traffic in spirits that was rife in New South Wales. But in this and other reforms, he was hampered by incompetent officials. In an extremely litigious colony, his greatest handicap was the uselessness of the Judge-Advocate Richard Atkins. He was the senior legal official in the colony, but was drunken, dishonest and forever in debt. The only other legally-trained men in the colony were ex-convicts, and Bligh was forced to rely greatly on one of them, George Crossley, for advice.

Despite his problems in the colony, most citizens of New South Wales were apathetic about the Governor, and in fact many of the Hawkesbury settlers supported him after his efforts with flood relief on their behalf. But he had antagonised many of the leading men in the colony, and was not equipped to deal with the worsening situation. With John Macarthur agitating for Bligh's removal behind the scenes, nine men signed a petition asking the New South Wales Corps commandant George Johnston to take over the government in 1808.

One major grievance was centred on legal actions taken by Bligh's officials against John Macarthur, which persuaded that stubborn and fractious man that Bligh was a tyrant and had to go. In January 1808, Bligh was arrested in the Rum Rebellion, and remained in confinement in Sydney for over a year. In March 1809, he sailed to Hobart, hoping Lieutenant-Governor David Collins would support him, but Collins did not.

The New South Wales Corps returns to power

In July 1808, Colonel Joseph Foveaux of the New South Wales Corps arrived back in Port Jackson from Norfolk Island. He was very surprised to find Major George Johnston in charge and Governor Bligh under arrest. As the senior officer of the Corps, he assumed command, pending orders from Britain.

Johnston, Macarthur and a small band of supporters returned to England to press for an investigation that they hoped would justify their conduct. However, in the end Johnston was court-martialled and received the mild penalty of being cashiered out of the military, and was allowed to return to New South Wales as a civilian to resume a respectable life on his large landholdings.

In his short time in charge, Foveaux attacked the liquor trade, and tried to improve public works. However, he was seen in Britain as having sided with the rebels. In January 1809, Lieutenant-Governor William Paterson returned to Sydney from Van Diemen's Land to take over. He had been away establishing the settlement at George Town and Port Dalrymple (present day Launceston) when the Rum Rebellion occurred.

The contradictions of law and local practice in a penal colony

The unique experiment of a penal colony that was distant from England but operating under English law provided a strange environment. It was not clear whether the Governor was like earlier kings prior to the mid-seventeenth century who had complete power to make legislation, or like the Georgian kings of the late eighteenth century whose power was limited by the 1689 Bill of Rights and was dependent on an elected parliament for legislative authorisation.

In addition, English judges were appointed for life (by a committee of fellow judges) from the ranks of practising barristers, and were entirely independent of the King. The King could not tell them what to think or do. What about the Governor, his representative in New South Wales? The contradiction in New South Wales was that while the rule of law was strongly linked to liberty and a free society, New South Wales was almost entirely a penal colony for many years.

In New South Wales, early Judges-Advocate had no formal legal training, could be dismissed by the British government, and were subordinate in rank to the Governor. This subordination applied to the first professionally-qualified judge, Ellis Bent, when he arrived in 1810.

It was not even a foregone conclusion that courts would be established in the new colony at all. The British cabinet discussed whether to simply use military law for the whole colony, both for convicts and for the soldiers, entirely administered by the Governor. There was also a question of whether convicts were subject to military law. In the end, the parliament decided that a Criminal Court would be necessary to deal with felonies or misdemeanours in the colony, but "to proceed in a more summary way than is used within this realm"[15].

In this way, legislation provided due process of law for convicts and free settlers alike, similar to the English system. However, there were serious differences from the English process in the Criminal Court: there was no committal hearing to decide if the evidence warranted a trial; indictments were not drawn up by an independent prosecutor but by the judge-advocate, who was not only the judge but part of the jury; the court was not composed of a judge and a civilian jury, but a judge-advocate and a jury of six military officers. It hardly differed from a military Court Martial.

A Civil Court was also established by charter. It consisted of the Judge-Advocate and two "fit and proper persons" to be appointed by the Governor. It heard non-criminal cases between individuals, including disputes over wills. By English law, this court was only available to the very few free people in the colony, but in reality the convicts used it as well.

The establishment of a Civil Court in New South Wales maintained the principle that English people, even convicts, carried with them the same rights everywhere in the Empire. This was despite the special conditions of a penal colony or a military outpost. Thus a paradox was created that was both a benefit and a problem for serving and former convicts for many years until after Macquarie's term in office. It was a long time before the conflict between the three main elements of the colony, the civil, penal and military, would be resolved.

An early example that the law would be applied differently in the new colony was the case of Kable v Sinclair in July 1788. Two condemned First Fleet convicts, Henry and Susannah Kable, had been given a parcel of charitable goods in England to take to the colony, and the parcel was broken into on board the ship of Captain David Sinclair. In the first case brought before the Civil Court, they sued the captain for the loss of their property, and were awarded compensation. In England, the law of felony attaint would have prevented this action by condemned prisoners, but the judge-advocate David Collins, with Phillip's approval, decided to allow it.

Figure 9: David Collins

The doctrine of felony attaint would be raised on both sides of legal disputes in years to come, but in the year of the colony's foundation, the precedent had been set for a more liberal application of the law to convicts and ex-convicts, and for an informal recognition that the rights of Englishmen ought to apply to everyone, free or bonded.

In 1808, Bligh was given a petition with 800 signatures by the colonists requesting civil juries, largely because of the perceived lack of impartiality of the court system at the time. He told the Colonial Secretary that the courts were mockeries of what they represented, and that the colonists wanted the military to have nothing to do with them, either as magistrates or as jurors. The resemblance to Courts Martial had become irksome to the citizens of New South Wales.

Summary of this period

Except for political prisoners, it was not difficult to win emancipation, and emancipists could easily obtain land grants, on which they could prosper. The era of the colony up to Macquarie's arrival in 1810 saw the rise of the exclusivists, mainly the officers of the New South Wales Corps, some wealthy settlers and senior officials such as Samuel Marsden.

A very prominent and sometimes turbulent part was played by the New South Wales Corps. Though it was designed to aid the Government, it strove to become its master. Every Governor after Phillip until the Corps was replaced by Macquarie's 73rd Regiment had trouble with it. Its officers flouted Governor Hunter, who had to complain that it violated peace and order and defied the law. It insulted Governor King, and overthrew Governor Bligh. In the absence of formal political mechanisms in which they had a say, the exclusivists used unorthodox methods to challenge the Governors, most notably the Rum Rebellion when Bligh was deposed in January 1808.

Figure 10: Mary Reibey

However, this period also saw the rise of some ex-convicts to wealth and influence: William Redfern, Samuel Terry, Simeon Lord, Andrew Thompson, Isaac Nichols, William Hutchinson, George Crossley and James Meehan. This was the period before extensive free settlement, and New South Wales was dominated by ex-convicts who had time to be active in money-making activities or to reach influential positions in the administration of the colony.

The place of former convicts was not yet a political issue. While a few of them were appointed to responsible positions or had become respectable citizens (such as Nichols, Redfern, Hutchinson, Meehan), there was evidently no conflict with the exclusivists as yet. The exclusivists had been busy creating and expanding their power bases, and had only been in conflict with the Governors.

Despite the turbulence of the last few years, England recognised that by 1810 the colony had achieved its purpose, and could receive more convicts. French settlement intentions had been thwarted, and Van Diemen's Land was well established. The population was 12,000 and some schools, churches and a port office had been built. Fruit and vegetables grew profusely around Sydney, and the land was explored up to 100 miles to the south-west. Horse-racing, cricket, primitive football, cock-fighting and other English sports were in wide use, and the upper classes of society held evenings of refined entertainment[16].

Figure 11: Simeon Lord

Some individuals, both free such as John Macarthur and ex-convicts such as Simeon Lord and Samuel Terry, while immensely fractious and litigious, were able to imagine the immense potential of the colony in their own areas of enterprise, and to make great strides to realise that potential. A few of the ex-convicts were bywords for commercial success: Mary Reibey owned several ships, warehouses, shops and farms, and Simeon Lord and Henry Kable were pillars of a small commercial empire.

Lachlan Macquarie, the emancipists' ally

Macquarie takes stock of the colony

Figure 12: Lachlan Macquarie

Governor Lachlan Macquarie arrived at the end of December 1809, with instructions from the British government to ensure the survival of the penal colony. He had been a professional soldier from the age of fifteen, and had reached the rank of colonel in the 73rd Regiment. He was distantly related to the Scottish landed gentry through his father but more closely through his mother. While he had moved in royal circles in later life, he always felt at heart an "awkward, rusticated jungle-wallah" after long service with the army in India.

Macquarie admired Arthur Phillip, and had corresponded with him since Phillip's return to England in 1792. He was also an admirer of William Wilberforce, the slave abolitionist politician. Macquarie thought that deserving ex-convicts should be readmitted to the occupation and rank of society that they had forfeited. This would be a new direction for the colony since Phillip's departure, but the new Governor thought it essentially continued the spirit of Phillip's original approach to the new colony, by viewing it as a permanent settlement that was intended to develop into a self-sustaining community.

He arrived as the first non-naval Governor of the colony, and with his own regiment, which was sent out to replace the mutinous New South Wales Corps. Viscount Castlereagh, Secretary of State for the Colonies, was anxious that the anarchy and frontier state that existed by then was quickly turned around to become a colony that could absorb more convicts and begin to receive substantial numbers of free settlers.

Macquarie's instructions from Castlereagh were that "The Great Objects of attention are to improve the Morals of the Colonists, to encourage Marriage, to provide for Education, to prohibit the Use of Spirituous Liquors, to increase the Agriculture and Stock, so as to ensure the Certainty of a full supply to the Inhabitants under all Circumstances"[17].

At the time of his arrival, there was a labour shortage because the Napoleonic Wars caused a shortage of ships to transport convicts until the wars ended at Waterloo in 1815. After 22 years of colonisation, there were 16,428 convicts or ex-convicts owning 192,000 acres and 2,804 adult free settlers in New South Wales owning 145,000 acres[18]. Until then, there had been no real conflict between ex-convicts and free settlers. Ambitious people were becoming wealthy in many areas of enterprise as opportunities arose, and there was a certain amount of commercial and social interaction between free and freed citizens.

Also on board Macquarie's transport ship was Ellis Bent, the newly-appointed deputy Judge-Advocate, and his family. He was appointed to replace Richard Atkins, and would be presiding in the civil and criminal courts, as well as the Vice-Admiralty Court (this was a special court for hearing maritime disputes, for example between merchants and seamen). Bent had practised as a barrister in England for five years, and was well thought of by Castlereagh.

So the colony's first properly trained (non-convict) law officer came to Australia with the last of the autocratic, pre-constitutional Governors.

Figure 13: Ellis Bent

Macquarie implements his pro-emancipist policy

Macquarie's first acts after his swearing in on New Year's Day 1810 were to reinstate all office-holders who had been removed after Bligh's arrest and to annul all other acts of the mutinous government. Then in January, he started to demonstrate his emancipist policy by appointing Andrew Thompson as the first ex-convict Justice of the Peace and chief magistrate at the Green Hills (a village that became the town of Windsor) in the Hawkesbury district, where he had lived since 1796. Within a few months, Simeon Lord and D'Arcy Wentworth were also appointed magistrates.

In the same month, Macquarie released the ex-convict lawyer George Crossley from the Coal River prison at Newcastle. He had been sentenced to imprisonment there by the Bligh mutineers in 1808, on a trumped-up charge, essentially brought because of his support and legal advice to Bligh. The ex-convict Reverend Henry Fulton was also restored to his situation as Anglican assistant chaplain.

In February 1810, Reverend Samuel Marsden, the principal chaplain, returned to New South Wales, having been in England for most of the time since 1807, recruiting chaplains for the colony. Marsden was one of the exclusivists who did not approve of ex-convicts being elevated to positions of trust in the colony. In March, the first blow was struck against Macquarie's support of emancipists after he appointed Simeon Lord, Andrew Thompson, D'Arcy Wentworth and Samuel Marsden as trustees to the proposed Parramatta turnpike road. Unfortunately, Marsden refused to work with the other three, claiming that they were immoral and that he could not associate himself with them.

Figure 14: Samuel Marsden

The ex-convict Michael Massey Robinson was appointed chief clerk to the secretary's office under Macquarie in April. He was also appointed the first (and last) Poet Laureate to the colony, and began to compose annual birthday odes for the King and Queen. Robinson had practised law in England before being prosecuted and transported for blackmail after trying to extort money from a London alderman about whom he had written a satirical verse.

In May 1810, the deposed Governor William Bligh finally departed for England, along with William Paterson and members of the New South Wales Corps who did not wish to remain in the colony or join the 73rd Regiment.

In April 1811, George Johnston, the coup leader in 1808 against Bligh, was court-martialled In England. Despite his central role in overthrowing the colonial representative of His Majesty, he received the light sentence of being cashiered out of the military and allowed to return to his extensive lands in New South Wales. John Macarthur was still in England, and while he was not tried there for his part in the coup, which was critical but behind the scenes, Castlereagh instructed Macquarie that Macarthur should be tried in New South Wales on his return. Learning of this, Macarthur decided to remain in England for some years afterwards.

In July 1811, the Irish lawyer Edward Eagar arrived in the colony, having received a mandatory death sentence for forgery in Ireland, later commuted to transportation. Eagar had become a Wesleyan in Cork prison while awaiting the noose, and after his sentence was commuted to transportation, Samuel Marsden was sent a letter of recommendation by the Wesleyan chaplain at the prison, Boyd Davies. A few days after his arrival in Sydney, Eagar was assigned to the Reverend Robert Cartwright, chaplain of Hawkesbury district, to teach his five children. He received a ticket of leave the same day. Both of these events were probably arranged by Samuel Marsden. At the time, the Church of England was the only official church in the colony, although Macquarie encouraged other faiths later in his administration.

In February 1812, the British parliament appointed a select committee to inquire into transportation. The committee, together with the Earl of Liverpool and William Wilberforce approved Macquarie's policy of appointing and generally encouraging ex-convicts, but in New South Wales the policy quickly alienated free settlers and military officers. The committee also recommended an appointed Legislative Council for New South Wales to advise the Governor, but Lord Bathurst, the new Secretary of State for the Colonies, wasn't keen on limiting the Governor's power at the time.

Despite this, the mere suggestion of a Legislative Council for the colony effectively created a group which began to work towards one from this time onwards. This was the beginning of the movement towards representative government, and as the number of free settlers grew, the demands became stronger.

The Judge-Advocate, Ellis Bent, worked well with Macquarie, and they developed a friendship. Bent was interested in the improvement of the judicial and administrative systems in the colony, and he wrote reports to the British government making a number of recommendations. He favoured the introduction of trial by jury, and didn't object to respectable and affluent ex-convicts serving on juries. Bent's proposals did not attract interest in England at the time, but some of them were eventually included in the New South Wales Act of 1823.

In 1813, Ellis Bent permitted three ex-convict lawyers to appear in his court as legal agents for their clients, in order to avoid the time-wasting situation of untrained litigants trying to represent themselves. They were Edward Eagar, George Crossley and George Chartres. There were no free lawyers in the colony at the time, and Bent recommended that the British government should encourage the migration of a few free attorneys to New South Wales, after which he would withdraw the temporary permission for the ex-convicts to appear. By then, Edward Eagar had received a conditional pardon from the Governor, and was operating a prosperous law practice in Sydney.

In February 1814, the architect Francis Greenway arrived in Sydney, and immediately started private practice. He arrived as a convict, originally sentenced to death for forging a document, but commuted to fourteen years transportation. By the time of his arrival, he was a highly experienced and talented designer who knew how to make best use of the available resources (for example, a great deal of Hawkesbury sandstone, but unfortunately no skilled stone carvers), and an understanding of how to blend a structure in its environment. As a result, his buildings are a triumph of grace and form over ornamentation. His personality was self-confident, temperamental and easily offended, but Macquarie appointed him Civil Architect in March 1816 to design a series of much needed public works.

Figure 15: 1966 $10 note featuring Francis Greenway.

Also in February 1814, the 46th Regiment replaced the 73rd Regiment. The commandant was Colonel George Molle, who also took over as Lieutenant-Governor. Molle had originally been friendly with Macquarie while they both served in India, but in time he thought that Macquarie did not allow him the authority he thought he deserved.

Most of the officers of the new regiment disliked Macquarie's emancipist policies. They decided that while they couldn't object to meeting ex-convicts at the Governor's table, they wouldn't invite any to the mess, or socialise with them. Macquarie was very angry with this, as he declared that dining at his table should set the rule for the whole colony. However, the officers regarded their own mess table as the highest standard of society, and many free settlers thought the same. This was another blow to Macquarie's attempts to return former convicts to their pre-convict status[19].

New civil courts are established

In April 1814, the British government implemented the Second Charter of Justice, which reorganised the judicial system in New South Wales. By this time the court system in use since 1788 was considered too primitive for the expanding colony. The court was made up of a Judge-Advocate and six naval or military officers, and was more like a military tribunal than the court of a civilian society. There was no appeal to any other court (only to the Governor). Neither the military nor the civilians liked having military officers involved in the administration of justice,

especially in cases involving the military, where they were sitting in judgement of their colleagues.

Prior to Macquarie's arrival, the three Judge-Advocates since 1788 were David Collins, Richard Dore, and Richard Atkins, none of them qualified lawyers. Collins was an able man who did fairly well in ten years of this demanding role, but Dore was incompetent and was removed by Governor Hunter in 1800 after two years. Atkins, who had held the post since then, was not only completely unqualified for the job, but was a reprobate addicted to alcohol, immorality and frequent insolvency.

Colonial Secretary Bathurst thought it would be a useful reform to separate the civil and criminal courts and head them with legally qualified men, although he still considered that the colony was not ready for trial by jury while it was still dominated by former convicts. Accordingly, the old Court of Civil Jurisdiction was replaced by three new civil courts: A Supreme Court (for matters over £50, headed by a judge and two assessors), a Governor's Court (for matters under £50 and headed by the Judge-Advocate) and a Lieutenant-Governor's Court (in Van Diemen's Land).

Jeffery Hart Bent, Ellis Bent's older brother, was appointed the first judge of the Supreme Court, assisted on the bench by two appointed civilian assessors (initially William Broughton and Alexander Riley). The Criminal Court, with Judge-Advocate Ellis Bent still in charge, was unaffected by these changes.

Figure 16: Jeffery Hart Bent

The two assessors appointed to the Supreme Court, while not legally trained, were still important, as they could outvote the judge on contentious questions, which became an issue in the following year. William Broughton had arrived with the First Fleet as the servant of physician John White. He worked his way up in the commissary office to become assistant commissary in 1814, and had been a magistrate since 1809. Alexander Riley had been in the colony since 1804, one of the first free settlers to migrate to Sydney. He was appointed magistrate at the new settlement at Port Dalrymple (the present-day Launceston) soon after his arrival, and eventually became a successful merchant and pastoralist with a large sheep station near Liverpool.

Jeffery Bent arrived in July to take up his appointment. He gave an early sign of his vanity and self-importance by refusing to land until Macquarie had given him a gunfire salute. He was the older brother of Ellis, who had recommended him, although Macquarie's expectation had been that Ellis would become the first judge of the new Supreme Court and Jeffery would take over Ellis's position as Judge-Advocate. However, Bathurst had reversed the expected appointments, and Jeffery arrived as the Supreme Court judge.

By August, when the new Charter of Justice came into operation in the colony, Ellis Bent was estranged from the Governor, due to differences in how the judiciary (run by the Bents) and the

executive (run by Macquarie) should interact. Ellis Bent saw the judiciary as essentially independent of the executive, as it was in England. However, Macquarie wanted complete control, as per his original instructions on taking up office.

Two other prominent ex-convicts were making their mark at this time. James Meehan was appointed to additional roles of collector of quitrents and superintendent of roads, bridges and streets. William Redfern investigated the heavy mortality on three convict ships this year, recommending many improvements, including the use of naval surgeons on each ship. This largely ended the abuses of the past on convict transports, and was the first major contribution to public health in Australia.

Free lawyers arrive in the colony

In January 1815, William Moore arrived from England as the first free attorney in the colony, having been recommended by Jeffery Bent, and promised a large salary as an inducement to undertaking the risks of a legal practice in New South Wales. Moore was to show a strong partiality for anti-emancipist politics during almost forty years in the colony. The second free attorney enticed out to the colony, Frederick Garling did not arrive until August 1815 .

The intention of the Bent brothers was that when two free attorneys had arrived, the ex-convict lawyers would cease to practise in the courts, giving the free attorneys a monopoly of all cases, until the arrival of more free lawyers at some time in the future. Meanwhile Eagar, Crossley and Chartres, the trio of ex-convict lawyers, applied by petition to be admitted to practise as attorneys or law agents in the new Governor's Court. Ellis Bent refused the request, as the two free attorneys were expected to be available soon. Eagar then applied directly to Macquarie.

In the same month, the trio were also refused permission to act in the Supreme Court by judge Jeffery Bent, because of their convict backgrounds, and because of the imminent arrival of Moore and Garling. In response to this refusal, Eagar and Crossley submitted a further petition to Macquarie stating their case for admission to appear in the Supreme Court, and asked him to recommend this to the Court. He did this, but Jeffery Bent complained about the interference in his court. Jeffery, unlike his brother Ellis, was not an employee of the Governor, but of the Crown, as he would have been in England where judges could not be dismissed by parliament, only by the monarch.

At the time, Eagar was acting as a law agent in about 200 cases, which were not yet finished. In addition, he had 25 untried cases before the Supreme Court. He pointed out to Macquarie that he had paid about £1,000 in court fees and expenses that he would not recoup unless the cases were brought to completion, and would not be paid for his services[20]. The attempts by the ex-convict attorneys to gain permission to practise in the new courts led to a crisis in the judicial system that was indicative of the power struggle going on in the colony at this stage in its development.

In May 1815, Jeffery Bent opened the newly established Supreme Court with himself as judge, and the magistrates William Broughton and Alexander Riley beside him on the Bench. He refused to hear a request by the trio of ex-convict attorneys to practise in the court. After objections to this refusal by Broughton and Riley, Bent met the two in his chambers a few days later and told them that two free attorneys from England (Moore and Garling) had been

promised the exclusive practice of the Court, and that no ex-convict attorney would practise with them. Broughton and Riley replied that their impression was that the British government saw the colony as a place of reformation of convicts and not of permanent punishment and irremovable degradation. To prevent a man from practising his profession would remove the most important stimulus for reform.

Clearly, the magistrates were in favour of the ex-convicts being allowed to practise, at least until Garling's arrival. Bent, fearing overrule by his two lay associates, decided to simply close his court and write to England for instructions, leaving the colony with no Supreme Court for almost 18 months. Part of Bent's hardline attitude was the fear that if attorneys who had been struck off the rolls were allowed to practise in New South Wales, then other disbarred attorneys from Britain would flock here and there would be no means of preventing them from practising. Bent thought this would bring disgrace to the legal profession in the colony.

At the same time in Ellis Bent's Governor's Court, the two appointed associates, Richard Brooks and Charles Hook, made it easier for Ellis than for his brother by deciding that no attorney who had been struck off the rolls anywhere in the King's dominions should practise in the Court. Ellis was quite ill by then.

This judicial crisis illuminated the evolution of the power structures in the colony at the time: the Governor, who represented both the King and the British parliament in Australia, thought of himself as being in total control, as he understood from his original instructions on arrival, and as a military officer used to being obeyed. The Judge-Advocate was an employee of the Governor, but he expected some independence from the Executive (ie the Governor), as he would in England. The Judge, who was appointed directly by the independent King's Bench of England, expected to be completely independent of the Governor's authority and interference.

The two magistrates Broughton and Riley, were wealthy and respected men in the colony, and understood the need to move Australia forward from a penal colony to a mature and self-sustaining society. Finally, the ex-convict attorneys who found themselves at the centre of this crisis were themselves critically important to a very litigious community where the only way of gaining satisfaction in a dispute was to take the other party to court, in the absence of a government bringing in civil laws in the modern sense. This is shown by the very large volume of unresolved court cases being handled by the trio of ex-convict attorneys.

It can be seen from this that Macquarie's original autocratic commission was becoming outdated as contemporary British institutions were introduced in the colony. He had showed himself to be a benevolent autocrat in building the colony's infrastructure and in encouraging the rehabilitation of ex-convicts, but both his commission and his nature prevented him from adjusting to the winds of change that brought a more modern judicial system run by experienced legal practitioners from England who expected the same relationship to the government that they enjoyed at home.

Macquarie's commission, as the sole representative of the British government, gave him wide powers of patronage and discretion in running the colony (such as the power to pardon prisoners, bestow land grants to colonists and former prisoners, and make public appointments), and his attempt to wield this power over the Bent brothers on behalf of the ex-convict attorneys

became the catalyst for a series of events over the next five years that started the long struggle for the recognition of the legal and civil rights of all former convicts.

The Governor's Court commenced operation in July 1815. Edward Eagar, as litigious as anyone, brought the second case before the court, and in fact brought eleven of the first twenty cases[21]. Most of Eagar's cases were for non-payment of promissory notes. These were commonly traded by buying them up, collecting payment and interest afterwards, and profiting from the transaction.

The early days of colonial commerce were strange times, with civil court actions between close friends and confidants. For example, Eagar loaned £2,500 to his friend Edward Smith Hall, secured with a mortgage. Default occurred, and Eagar sued Hall, getting a judgement in his favour for £1,554. Despite this, Hall later received a loan of £700 from Eagar to buy part of Eagar's cattle herd, with a mortgage over the herd[22].

The Bent brothers were never far from the news in the time they were in the colony. In September 1815, Jeffery became an object of widespread ridicule by refusing to pay toll fees on the new turnpike roads, claiming that as the Governor did not pay them, neither should he. For this display of overblown self-importance, he was fined in absentia 40 shillings by D'Arcy Wentworth, JP, despite his further protests that as a judge he should have been immune from criminal prosecution in New South Wales.

Then in November, his brother Ellis died, after his health had been in decline for some years. Ellis had got along well with Macquarie in the years until his brother Jeffery arrived, and the Governor thought of him as a good friend and spoke well of him. Despite their recent differences, Macquarie showed his appreciation of Ellis' contribution to the colony by giving him a State funeral. At the funeral, the Principal Chaplain Samuel Marsden delivered a eulogy that was widely seen as a criticism of the Governor.

Ellis Bent was an amiable, competent and hard-working man who had made a real effort to suggest improvements to the administration system of the colony. He never saw them implemented in his lifetime, but the changes for better governance brought in by the British parliament from 1823 onwards owed much to his contribution. Jeffery, on the other hand, was not so much hard-working as hardly working at all - his court was almost never in session, he spent most of his time squabbling with Macquarie, and he showed no interest in the improvement of the colony.

Following Ellis Bent's death in office, the free attorney Frederick Garling was appointed acting Judge-Advocate, which left William Moore as the only free attorney available to practise. Garling, in the interest of keeping the courts operating, allowed ex-convict attorneys to recommence practice in both of his courts, the Governor's Court and the Criminal Court.

Jeffery Bent, on the other hand, was less interested than Garling in keeping the wheels of justice moving, and kept the Supreme Court closed until October 1816, much to Macquarie's great frustration. Two things happened during this month. Firstly, Bent received an instruction from Bathurst that ex-convict attorneys could not practise if two free attorneys were available. Secondly, the new Judge-Advocate John Wylde arrived in the colony in October. This allowed

Frederick Garling to return to his legal practice, and to his position as crown solicitor. Bent eventually reopened his Supreme Court in December 1816.

By this time, Bent had attracted an opposition faction against the Governor, which included the Reverend Samuel Marsden, senior military officers, public officials, and some wealthy settlers. The faction expanded and became more intense after John Macarthur's return to New South Wales in 1817. These men had powerful friends in England, who were made aware of their complaints. Marsden in particular was energetic in writing scathing letters to his contacts in the mother country, such as William Wilberforce, criticising many aspects of the Governor's policies, especially the appointment of former convicts to responsible positions such as the Bench of Magistrates.

The people's bank begins operation

The small but growing colony had no banking system to finance business activities. Nor was there a reliable currency until Macquarie followed the lead of other overseas colonies by importing a shipload of Spanish dollar coins in January 1814, punching out a small coin-shaped "dump" from each one, and stamping each one with "New South Wales" to prevent them being exported and traded elsewhere. They became known as holey dollars – the outside part was worth 5 shillings, and the dump was worth 15 pence. Business finance was raised privately, a system in which wealthy settlers loaned funds to others, using promissory notes to record the exchange.

Figure 17: NSW Holey Dollar, 1813

Figure 18: NSW Holey Dollar dump, 1813

By 1816, Macquarie thought it was time for a bank to be established in the colony. So, despite the opposition of the British government, he encouraged the prominent settlers and ex-convicts to get together and set up the charter of a new bank. This became the Bank of New South Wales, and it opened for business in April 1817, operating in Mary Reibey's house in Macquarie Place. The ex-convicts on the establishing committee were William Redfern, Edward Eagar and Simeon Lord.

The first board of directors of the bank included William Redfern as the only ex-convict. Edward Eagar wanted to be on the board as well, but he only had a conditional pardon at the time, and four of the other directors refused to sit with him if elected, because he was not "absolutely and unconditionally free". This bank was referred to as the "People's Bank", as a broad mixture of colonists, including ex-convicts, contributed to its formation.

Justice Barron Field arrives

Macquarie complained to Bathurst in 1815 that he could not work with the Bent brothers, and that either they went or he would. Bathurst decided to remove the Bents. Ellis died in office before learning of his dismissal, and Jeffery refused to leave office until his replacement had arrived, although he did very little work in the months before this.

Figure 19: Barron Field

Barron Field arrived in the colony in February 1817 to replace Jeffery Bent as Justice of the Supreme Court. An English barrister, he had also been a literary and theatrical critic, and was a close friend of the essayist Charles Lamb.

The attorney George Crossley submitted an application for readmission to practise at the court, and Justice Field supported this. However, the two magistrates then on the bench, Simeon Lord and D'Arcy Wentworth, opposed it so the application failed.

Despite Field's sympathetic attitude to Crossley's request, he was an exclusivist at heart, being opposed to trial by jury and an elected Legislative Assembly. In his time in Sydney, he involved himself in many public institutions such as the Benevolent Society, the Church of England, and was a founder of the New South Wales Savings Bank.

Following Field's arrival, Jeffery Bent returned to England to mount a campaign against Macquarie in the House of Commons. This was one of the strongest motivations for Bathurst to send the lawyer John Thomas Bigge to New South Wales two years later to inquire into the state of the colony.

Soon after he took up his post in Sydney, Field instructed the solicitor Thomas Amos to sue the merchant Joseph Underwood (brother of the ex-convict businessman James Underwood) for money owed to a London merchant who had given Field power of attorney for the purpose. This was in the Supreme Court with Field presiding. In doing this, he showed that he was prepared to

sit in judgement in a case that he initiated and was the real plaintiff. This was a sign that he was willing to exploit the letter of the law rather than its spirit when it suited his needs. This willingness would have dramatic consequences for the ex-convicts before long.

In August 1817, the 48th Regiment arrived and took over from the 46th regiment. As its commandant, Colonel James Erskine replaced George Molle as Lieutenant-Governor. Unlike his predecessor, Erskine went along with Macquarie's emancipist policies and was willing to socialise with respected ex-convicts such as William Redfern. He invited the ex-convict Reverend Henry Fulton to the officers' mess. Erskine tried to cultivate friendliness with Macquarie's chosen band of ex-convicts. However, this sentiment was not shared by his fellow officers: on one occasion when Erskine took Redfern to dine at the officers' mess, the entire group of junior officers rose and left the table.

By the end of 1817, Macquarie tried to resign his Governorship, but his resignation was rejected by Bathurst. The first five years of his rule had been a productive and satisfying time for him. But from about the time of the reformed judicial system and the arrival of Jeffery Bent in 1814, he had faced increasing challenges to his authority by the courts and a steady undermining of his reputation by the exclusivists. These were frustrating his ability to run the colony in the way he had been able to previously.

Another problem looming for Macquarie was that, in England, Bathurst had formed the opinion that the Australian colonies were not a sufficient means of deterrence or reformation for criminals and they were becoming far too expensive to maintain. He decided to instigate a thorough investigation, with the view of making them once more a place of real terror for British criminals. In January 1818, Bathurst commissioned the London lawyer John Thomas Bigge to conduct this investigation.

At the end of 1818, D'Arcy Wentworth resigned as principal surgeon in the Sydney Hospital. William Redfern had been the assistant surgeon but was effectively in charge of the hospital, as Wentworth was mostly occupied with the Magistrate's Bench and other activities. Despite a strong recommendation by Macquarie that Redfern be appointed principal surgeon, a naval surgeon James Bowman was appointed. This was apparently because Bathurst didn't like ex-convicts being appointed to senior positions by this time.

As a consolation, Macquarie later appointed Redfern as a magistrate, an appointment that Bathurst unsuccessfully tried to get him to cancel. These two events involving Redfern raised the temperature of political debate in the colony. While he was universally respected as the best surgeon in the colony who had treated the illnesses and delivered the babies of both the Macquaries and the Macarthurs, he had become a powerful symbol of the emancipist struggle for equal footing with free settlers.

The colonists' petition on trial by jury and economic issues

By 1819, New South Wales was rapidly expanding its commercial activities, but was also encountering the restrictions placed by Britain on its distant colonies, which were designed to protect its own trading advantages. Much of this was expressed as tariffs imposed on shipped goods and tightly controlled trading movements between colonies. The East India Company had a trading monopoly between the Asian colonies and the home country, which was enforced by

the British Navy. The colonies were not normally permitted to trade between themselves, but this is just what the Australian colonists wanted to do, in order to expand the local economy.

The British system of government at the time allowed petitions to be presented by the people to the House of Commons, including those from the overseas colonies. These requests for rights or other favours were not guaranteed to produce a result, and in fact were generally ignored if they were not supported by a well-organised campaign of lobbying by the requestors and sponsorship by a sympathetic Member of Parliament.

At this time, ex-convicts and free settlers had a number of common interests, and in January 1819 a petition was drawn up by a committee made up of representatives of both groups. At the time, the British government required that vessels plying the trade routes between Britain and the colony be at least 350 tons. The meeting proposed to change this to a minimum of 150 tons, to allow their smaller ships to compete. Secondly, that the duties imposed in England on oils, skins, wool, timber and other goods imported from the colony be repealed. The meeting also decided to request trial by jury and permission for the distillation of spirits.

These concerns were essentially economic, and apart from trial by jury, did not project any sense of a vision for the future. The ex-convicts on the committee were Edward Eagar (who initiated his career as a civil libertarian with this petition), William Redfern and Simeon Lord. Petitions were circulated throughout the main centres of the New South Wales colony: in the Windsor area, in Parramatta, and in Sydney Town. Eventually over 1,200 signatures were obtained. It was presented to the Governor, who forwarded it to England for consideration.

During 1819, a court case was conducted in England that caused great disquiet in New South Wales. This was the case Bullock v Dodds (1819). The plaintiff was Bullock, an ex-convict who was sentenced to death in Britain but commuted to transportation to Australia and subsequently pardoned here. He tried to sue Dodds for non-payment of a bill in an English court, but it was ruled he could not, as his pardon was only an informal governor's pardon, and not confirmed under the Great Seal of England. That is, despite being pardoned in New South Wales, he remained attainted, or legally dead, in England. This raised again the spectre of felony attaint in the colony, potentially disrupting the rights of all ex-convicts to own property, initiate a court action and give evidence in court.

Meanwhile, Commissioner John Thomas Bigge arrived in Sydney in September 1819 to begin his inquiry into the colony. Macquarie was both surprised and dismayed at this, as he was awaiting a reply from Bathurst to his resignation request (Bathurst's conciliatory reply had been delayed in the mails somewhere around the world), and he took the sudden arrival of Bigge and his commission to conduct an inquiry as a slight to himself.

Bigge had been a barrister and Chief Justice of Trinidad. He was aristocratic, academic, snobbish, inclined to judge everything he saw by English standards, and completely ignorant of any special local problems in the colony. He soon gravitated towards the exclusivists, socialising frequently with the Macarthurs, who consequently influenced his view of the state of the colony.

Figure 20: John Thomas Bigge

Macquarie's mood was not improved by Bathurst's instructions that Bigge was to be placed alongside him in seniority, and not answerable to the Governor. Bigge soon got into the swing of this by cancelling some of Macquarie's more expensive projects, criticising some of his appointments (such as Redfern as magistrate), and generally disrupting the sole authority that Macquarie had enjoyed until then.

Bigge's reports to the British parliament were wide-ranging, comprehensive, very useful when impartial, but were tainted by a prejudgement of Macquarie's rule and the convict system. He accepted unsworn testimony from the likes of Samuel Marsden and John Macarthur virtually as fact, reflecting the attitudes of the exclusivists in his analysis of the Governor's administration. On the other hand, his reporting of the economic situation was much more accurate.

In 1819, the first book written by a native-born Australian was published in London. It was titled *A Statistical, Historical, and Political Description of the Colony of New South Wales, and Its Dependent Settlements in Van Diemen's Land (London, 1819*), written by William Charles Wentworth. A second and enlarged edition was published in 1820, and a third with Edward Eagar's help a few years later. This book was an outstanding achievement by the young Wentworth, and showed the value of his broad education by covering the fields of mathematics, science, economics, and law to produce an influential work that provided a great stimulus for emigration to Australia in the years to come, and which helped to shape the future Acts of Parliament which gradually granted free institutions to the colony.

In the book, Wentworth proposed and argued for many of the reforms that would come into being in time: a nominated Legislative Council and a Legislative Assembly elected on a broad property franchise that included ex-convicts as members and voters, trial by jury, a proper appeals process, free migration, and no taxation without local parliamentary approval.

By September 1819, Edward Eagar had given up his legal career in the face of refusals for ex-convicts to be admitted to practise in the courts, and had turned to trade. He set up the firm Eagar & Forbes with the ex-convict Francis Ewin Forbes.

Felony attaint is upheld in court

Two court cases involving Edward Eagar in 1820 had a devastating effect on the security of the assets held by ex-convicts in the colony. By this time, many of them were very wealthy men and women, owning business premises, shipyards, farms, and were profitably involved in the

speculative buying and selling of land that characterised the colony during its early development. As an example of this wealth, the former convict Samuel Terry, who became known as the "Botany Bay Rothschild", held more mortgages in value than the Bank of New South Wales, and owned almost exactly half of all land held by ex-convicts.

The financial dealings of former convicts involved free settlers as well, as there were no restrictions on business transactions between the colonists. A free settler could quite possibly have bought land from a man who had previously been a convict sentenced to death, that is, who by English law should have been prevented from owning any property, due to his attainted status. As the customary practice since 1788 had been to overlook this, it was widely assumed that purchase and sale of property by attainted convicts was acceptable. This assumption was about to change.

In April 1820, in the case Eagar v Field, Edward Eagar decided to start a civil court action against Justice Barron Field. The first reason was for alleged defamation in an earlier case in which, in a heated exchange, an exasperated Field had called Eagar a seditionist and a revolutionary. The other reason was that Eagar was frustrated that Field charged very high court fees (paid by attorneys representing clients), and that these fees were not distributed to the staff of the court, only the judge, contrary to instructions from Britain. The case was heard in the Supreme Court, and because Justice Field was the defendant, the Judge-Advocate John Wylde presided in his place.

Field instructed his attorney William Moore to claim in his defence that the English court judgement in Bullock v Dodds (1819) meant that Eagar, having been an attainted convict, couldn't bring an action in court. In the past, when this was argued in the colony's courts, judges avoided the issue by asking for a criminal record, then refusing a request for an adjournment to obtain the record from Britain on the grounds that the courts would be unduly delayed. In this case, however, John Wylde decided to agree to an adjournment to wait for Eagar's criminal record to be sent out from Ireland. This was the first time the defence of felony attaint had been accepted for consideration in the colony, and it set a precedent for later court actions. The case remained unresolved until Eagar left New South Wales in 1821.

The willingness of Wylde to consider the defence of felony attaint caused great hostility with the emancipists, as it reactivated the old restrictions on former and serving convicts. As a sitting judge, Field had been willing to follow local custom until that time (and even Bigge approved it as a practical measure), but he showed that he could suddenly abandon this custom when his own interests were threatened. He apparently gave no thought to the great impact this action would have on the rest of the colony. The court case had managed to throw into doubt the legal validity of a wide variety of transactions in the colony – even for free settlers who had had any business dealings with ex-convicts since the first days of the colony.

In September of the same year, a second court case reinforced the fear that felony attaint had come back to life in the colony. In the case Eagar v DeMestre, Edward Eagar sued an American merchant Prosper DeMestre to try and prevent him from trading in Australia. Eagar used an old British law which stated that no alien (that is, someone who was not a citizen of Britain or one of its colonies) could conduct trade in a British colony. DeMestre, through his attorney, used the earlier case Eagar v Field as precedent, claiming that Eagar couldn't sue because he had

reputedly been attainted and his pardon had no effect, and requested a twelve month postponement to obtain his criminal record to confirm his attainted status.

This was also heard in the Supreme Court, but this time Justice Barron field was back on the bench. He allowed the postponement to get Eagar's record sent out, saying that he had discretion whether or not to call for proof of conviction from Britain, and that the courts had discretion whether to hear cases brought by convicts or evidence from them, according to the merits of the case, as they saw fit. This case also remained unresolved until after Eagar left the colony in 1821.

So two cases in succession had reactivated the issue of felony attaint, both involving the judge of the Supreme Court. The cases showed how precarious the civil rights of ex-convicts seemed to be. In contrast to the earlier case which concerned Eagar's profession of lawyer, the action against DeMestre concerned Eagar as a merchant.

In the` first case, Field had less to say, because he was the defendant, and he only had to get the presiding Judge-Advocate to agree to a request for Eagar's criminal record to get the result he wanted. However, in the second case, Field was the presiding judge, and had more to say about his attitude to attainted convicts and ex-convicts and the limits of their legal rights. He made it clear that he was primarily interested in the letter of English law, and not much in whether this law was relevant to a colony consisting largely of convicts and ex-convicts but which was developing into a self-sustaining community. He had shown that he had no vision or imagination to make a positive contribution to the future of the colony.

Eagar's motives in raising these court actions were not completely altruistic, but a desire for justice emerged from them. It could be argued that if he hadn't brought these two cases, the local custom of ignoring the restrictions on convicts and ex-convicts might have continued indefinitely. But Eagar's actions had the positive effect of highlighting the need for validation of pardons under the Great Seal, which was supposed to have been happening, but due to the negligence of all Governors from Phillip onwards had never been done. Obviously, he didn't know that Field would raise the issues of felony attaint and the validity of pardons when he started the two court actions, or even more surprisingly that they would be upheld in court.

Macquarie, for his part, on hearing the news from the court cases, hastily gathered copies of all the pardons he had issued since 1810 and despatched them to Britain, with a request that they be entered in the general pardon under the Great Seal.

The devices used by local courts to avoid legal restrictions on the population were not really satisfactory, and they could have become unworkable in the face of a serious challenge to assert the letter of the law. Field supplied that challenge in 1820. At the time, there was no appeal beyond the Governor, and since Phillip, all Governors had supported the judicial practice of turning a blind eye to claims of felony attaint.

The emancipists' petition for legal rights

The emancipists decided that it was time to do something about the uncertainty of their legal status. So in January 1821, a meeting of ex-convicts was initiated by Edward Eagar to create a petition on behalf of their legal and civil rights.

This public meeting was very different from the first one held in 1819, in which both emancipists and free settlers combined to promote common economic interests. This time only former convicts were involved, although it was serious enough to attract the interest of all the prominent ex- convicts in the colony. Eagar led the meeting, assisted by William Redfern, Samuel Terry, Simeon Lord, Reverend Henry Fulton, James Meehan and Francis Greenway.

The meeting adopted several resolutions. The main points were that all pardons issued by the governors should be validated by being entered in the general pardon under the Great Seal of England, and that at the expiry of their term of pardon (if conditional), emancipists could acquire and possess land and other property, and enjoy the civil rights of free citizens. They also requested that all such validated pardons also affected other colonists who bought land and property from emancipists.

They decided to appoint an agent to convey the petition to England, and to represent their interests there. A standing committee was formed to manage the petition, collect subscriptions, pay costs and appoint an agent. Other prominent ex-convicts on this committee were James Underwood, William Hutchinson and Daniel Cooper. Edward Eagar was elected secretary and Samuel Terry treasurer. The committee met twice a week for several months in Edward Eagar's Pitt Street house to finish the petition before forwarding it to England.

In August 1821, another court case involved Edward Eagar and his trading activities. The case was Henry v Eagar, and was held in the Supreme Court, with Justice Barron Field presiding. It involved a dispute about ownership of goods in Eagar's trading ship after it returned from Samoa. The ship's master, Samuel Henry, had at different times been the agent for both parties in a trade of pork and other produce between Edward Eagar and King Pomare of Samoa.

Eagar had been trying to monopolise trade with the Society Islands, which in those days was not an unusual situation. His rival in trade was the London Missionary Society, which was allied with the Reverend Samuel Marsden in this venture. Henry was the son of William Henry , a missionary from the Society.

After hearing the evidence, Barron Field brought down a mixed judgement, awarding Eagar the full amount of his costs for the goods, but not the commission, but also awarding a large balance of £1,200 to Henry. This judgement caused Eagar substantial losses, and effectively ended his venture into Pacific trade. Some years later, he took the case to the Privy Council in England, finally winning in 1827.

Edward Eagar and William Redfern were nominated to carry the emancipists' petition to England, and they sailed in October 1821. They carried with them several letters of introduction to Bathurst, the Marquis of Londonderry and several private friends. Eagar also carried a letter of recommendation from the Methodists to the Methodist Missionary Society.

In England, Eagar was to represent the interests and views of colonists in general and ex-convicts in particular in matters that concerned them, such as the validity of pardons, trial by jury, taxation issues, trade rights, land issues, and the system of transportation.

At this time, the British government was considering the introduction of a constitution for New South Wales. A range of resources were available to guide them, such as Bigge's reports into the

state of the colony, William Wentworth's book, (the criminal law reformer) Henry Grey Bennet's critical speeches in parliament, and the colonists' petitions.

Macquarie's impact and his legacy

In November 1821, Sir Thomas Brisbane arrived in Sydney to replace Macquarie as Governor, his resignation finally accepted by Bathurst. Macquarie had arrived in 1810 to a colony in a state of near-anarchy and some turbulence under the management of the New South Corps officers after the overthrow of William Bligh in 1808. Almost no public infrastructure had been built for some years. Despite this, Macquarie was surprised to find on his arrival that the colony was in a state of calm, with a flourishing economy.

Figure 21: Sir Thomas Brisbane

On his departure in February 1822, the population of New South Wales had grown to 25,000, two-thirds of these being serving or former convicts. It was remarkable that both groups behaved very differently from the behaviour that caused their transportation. Even more so, their children did not show a tendency to crime. This was in direct contrast to the popular perception throughout Britain at the time, a view shared by the exclusivists in the colony. It was a good indication of the reforming impact of placing convicts in an environment where they had hard work, more food, better living conditions and the absence of their old partners in crime from the big cities of Britain.

The colony had cost England a total of £3 million during Macquarie's time, a great amount for a colony not sending any useful goods back. The Governor had reduced the cost per convict by two-thirds in his time, but Britain was mainly interested in the overall cost, which had doubled because the number of convicts had increased almost ten times by 1821. This high overall cost was one of the motivations for sending Bigge out to conduct his enquiry.

In his final report to the British government, Macquarie listed 256 public works of varying scale that had been constructed in his time in the colony. The most notable of these were the Macquarie Lighthouse on South Head, the Hyde Park Barracks and nearby St James Church, all designed by Francis Greenway. In addition, there were well-built roads to the settlements outside Sydney Town, such as Windsor and Parramatta. Macquarie also instigated a market and a general hospital in Sydney Town and a Female Factory in Parramatta. With these projects, He transformed Sydney into a settlement of some substance graced by public buildings of which the inhabitants could be proud.

Macquarie had been consistent and tenacious in his policy of encouraging former convicts to return to the society and employment they had forfeited in Britain, despite widespread opposition among the wealthy free settlers, the military officers and government officials. His emancipist policy would probably have been better accepted if he had been more careful with the ex-convicts he favoured. Men like Meehan, Redfern, Fulton and Greenway were not regarded as bad men. But others like Andrew Thompson, Samuel Terry, George Crossley and Edward Eagar were known for continuing sharp practice (that is, behaviour that was not illegal but hardly ethical) as they became wealthy and successful.

As an example, many free settlers were dismayed when he wrote a long and glowing epitaph for Andrew Thompson following his untimely death in Windsor in October 1810. Thompson had been reviled by the exclusivists because (as mentioned in official documents) he ran an illicit still near his salt works on Scotland Island, and had displayed lax morality.

On Macquarie's departure there were 40,000 people in all the Australian colonies, with about 350,000 acres of land occupied and more free settlers arriving with every ship. Wide areas of land had been opened up to settlement, including west of the Blue Mountains. A bank had been founded and a savings bank was founded a year later. The ground was prepared for rapid progress and an improved system of administration in the near future.

Macquarie had succeeded in giving former convicts hope of a new and improved life in the colony after their sentences were finished. Unfortunately, his innate fairness, humanity and generosity were in contrast to the extremely provincial attitudes of those free settlers and officials who had also come from nowhere in a generation to become very wealthy and powerful. The exclusivists had built their fortunes with the benefit of free convict labour and generous land grants, and then increased their wealth through speculation as land became more valuable. They brought out from Britain attitudes to class and criminality that made many of them determined to keep former convicts as a subservient class of menial labourers who could not own land, while only they enjoyed the fruits of the vast bounty that was unfolding around them.

Until now, many former convicts had been promoted to senior positions and had amassed great wealth, encouraged to a varying extent by a succession of governors from Phillip and King to Macquarie. This golden period of emancipist opportunity was about to end for some years as a result of concern in Britain that the colony was costing too much and was providing too good a life for serving and former convicts. Macquarie's departure marked the beginning of the long campaign by emancipists to achieve equality in Australia, but it also marked the start of a period of greater restrictions on serving convicts and reduced opportunities for former convicts.

Bigge's recommendations had a major impact on the progress of the colony for some years. While acknowledging the need to move away from the autocratic rule by a governor alone, and to continue the development of a civic community, he imagined a society based on privilege and not on merit. He reflected the view of the exclusivists, which was the opposite of the egalitarian view that Macquarie had tried hard to implement. After Macquarie left, former convicts were hardly ever promoted to public office, and very few of them made fortunes, although in time many of their children did.

The long period from Macquarie's departure in 1822 to the achievement of self-government in 1856 saw the gradual evolution of Australia from a penal colony under autocratic rule to a free society with all of the institutions of government that were available to British citizens everywhere. For the emancipists, there were three main issues in their struggle for equality – trial by jury, felony attaint, and representative government. While these issues were pursued simultaneously by the emancipists, they can be described separately. The final chapters of this document cover in turn these three areas of concern from 1822 onwards.

Evolution of trial by jury

The problems with military juries

The use of military panels as juries in the courts was one of the major areas of discontent in the early years of the colony. It is understandable that in a community made up almost entirely of convicts, the common practice in Britain and its colonies of using civilian juries was not at all practical in New South Wales. So Governor Phillip's commission was to establish a rudimentary court system headed by a deputy Judge-Advocate (which in itself was a military title), assisted by two assessors and a panel of officers of the land and sea forces, nominated by the commanding officer. It was really a military tribunal by another name.

It was soon clear that the involvement of the military in the judicial system was problematic. The military thought jury duty was beneath them as officers and gentlemen, and in any case was not part of their job as defenders of the King's dominions. Furthermore, those on trial suspected that the officers were not impartial, especially if the military was involved in the case. It was feared that if the commanding officer had an interest in the outcome, he would influence the jury, as they were beholden to him as their commander. Basically, nobody liked the system. As early as 1808, prominent colonists petitioned Governor Bligh to do away with military involvement in the judicial system, saying that the resemblance to a court-martial had become irksome.

But for a long time, the British government was not interested in granting trial by civilian juries to the colony, certainly as long as convicts and former convicts dominated the population. The early attitude of the British government mainly arose from the idea that the colony was to be maintained as a place of imprisonment. Lord Bathurst thought that the welfare of the settlement depended on the continuation of a military-style administration. Criminal matters were more contentious than civil ones, and the British (and the local exclusivist faction, who felt the same way) held off as long as they could before agreeing to change the system.

The question of former convicts serving on juries was always a major obstacle to progress on the issue. By the time of Macquarie's arrival in 1810, there was a fairly clear-cut social hierarchy among the Europeans in the colony: at the top were the military officers, merchants and wealthier free settlers. Next down the scale were the children born in the colony, either of convict or free parents. Further down were the emancipated convicts, whether pardoned or with expired sentences, who still bore the stigma of having been transported to the colony. At the bottom of the heap were the serving convicts.

Much of the emancipists' wish to serve on juries was a desire to raise their social status to the level of the exclusivists, and in time to take their part in running the colony. By 1819, wealthy emancipists controlled the commerce of the colony, and they wanted the political power to go with it. While most free settlers wanted the military panels replaced by juries of their peers, many still preferred the unpopular military system to the prospect of emancipated convicts sitting next to them on the jury bench. Both sides recognised the political significance of the jury issue, although their arguments were framed as a debate over its practicality and judicial significance.

Trial by jury was the lead issue in the 1819 colonists' petition, and a major part of the 1821 emancipists' petition. The emancipists thought the matter was so important that they sent Edward Eagar and William Redfern to England in 1821 to argue it for them in the corridors of power. New South Wales was the only British colony that had to fight for the right to trial by jury, due to its penal origins. To some extent, it symbolised the emergence of a democratic society from a virtual police state. To the free settlers, trial by jury represented citizenship. To the emancipists it represented acceptance and restoration of their rights as members of the community.

Bigge sets back the cause

John Thomas Bigge's second report to the British parliament in 1822 was on the judiciary system, and he sided with the exclusivist faction by saying that the time had not yet arrived for trial by civilian juries. His recommendation undid all the progress made by the colonists so far, and effectively sealed the fate of jury trials for a generation.

Bigge's reports were clearly flawed and biased against the non-exclusives and in particular against the emancipists. Essentially, Bigge seemed to look for evidence to confirm Bathurst's suspicions, which were that the colony was proving too expensive, and was not a sufficient deterrent to crime in Britain. Wentworth later accused Bigge of having raked together all the scandal and calumnies in the colony and taken them virtually as fact. But with a lack of other information in England on the real state of the colony (apart from Wentworth's book), Bigge's reports were taken seriously by the Colonial Office and the parliament, and formed the basis of British colonial policy for many years. Bigge did acknowledge, however, that there was a desire for trial by jury in all classes of colonial society, and in all trials both civil and criminal.

To try and redress the distorted view given by Bigge, and in his capacity as the colonists' agent in London, Edward Eagar wrote a long letter to Earl Bathurst in April 1823, countering Bigge's claims about the readiness of the colony for jury trials[23]. Firstly, Bigge had claimed that the 1819 petition was not really understood by some of the signatories. Eagar countered this by saying that trial by jury was in fact the main substance of the petition, and was discussed at length at two public meetings attended by all of the notable citizens of the colony.

Bigge also claimed that the figures of those men available for jury duty, as collected by magistrates, showed that only a small number were listed. Eagar, in response, said that the magistrates' figures did not include a large number of traders and merchants with the necessary property qualifications, or the number of eligible men in Van Diemen's Land. Eagar also asserted that the 1820 listing of population showed that the magistrates' figures were wrong in any case, and that many more men could have been called upon. He concluded this point by saying that by 1823, there were at least 1,000 eligible jurors in New South Wales.

One of Bigge's other objections was that there was too much class distinction and political party feeling in the colony for a jury system to operate impartially. To this, Eager pointed to the united group of free colonists and emancipists who had signed the 1819 petition. Finally, Bigge claimed that jurors would be involved in undue inconvenience and expense. Eagar pointed out that this was not peculiar to New South Wales, and it existed in the same degree in England. As far as inconvenience went, he conceded that jury duty was generally viewed as something to be avoided, as it was everywhere. Eagar concluded his arguments by noting that the citizens of every other British colony had the right to trial by a civilian jury.

Francis Forbes arrives and civilian juries begin

The New South Wales Act of 1823[24] came out of Bigge's findings, and introduced trial by jury in a very limited way. Civil cases in the Supreme Court could now be heard by a jury of twelve civilians, but only if both parties agreed. To be selected as a juror, a man was required to own land of 50 acres or more, or a house of £300 or more. Criminal cases were still heard by a panel of seven commissioned officers.

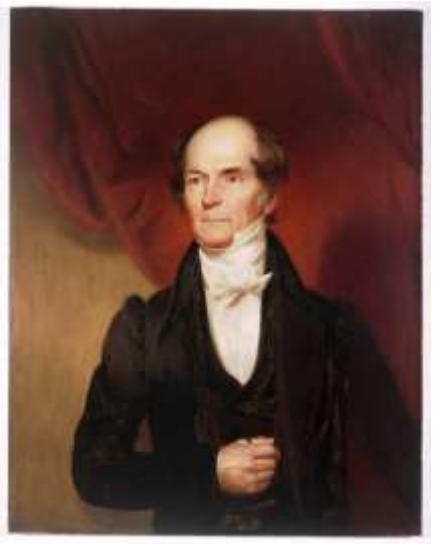

Figure 22: Francis Forbes

A significant development in this Act was the establishment of Courts of Quarter Sessions, which convened every three months to hear lesser crimes before a magistrate. The Act gave no details on how these new courts were to be constituted. This presented both a problem and an opportunity. To address the problem, the magistrates decided that as juries were not mentioned in the Act, there would be none. So they started operating Quarter Sessions Courts without them. The opportunity came in the form of Francis Forbes, the first Chief Justice of the Supreme Court, who arrived in Sydney in March 1824. He was a liberal-minded man with extensive colonial experience in North America and a history of interpreting the law to suit local conditions. Significantly, he was one of the two men who had drafted the New South Wales Act in London (along with James Stephen, counsel for the Colonial Office), and so he knew its ambiguities very well.

By this time there was widespread support for the extension of trial by jury to all trials, and the senior law officers were discussing the possibility of introducing it for the new Quarter Sessions Courts. Forbes was in favour of juries, so a test case was set up to force the magistrates to use civilian juries in criminal cases. This was the case R v Magistrates (1824)[25], following which Forbes made a judicial declaration (a mandamus, in legal terms) to the effect that the Court of Quarter Sessions would use a jury of twelve men, although the Supreme Court would continue with the military panel of seven officers. Forbes' view was that because in England the equivalent Courts of General Quarter Sessions heard criminal cases with civilian juries, the local one should do the same.

The magistrates duly prepared jury lists, although emancipists were excluded from them, and the court began operating with juries of twelve men. After some time, the first Chairman of Quarter Sessions, John Stephen, reported that the system was working well. The Governor reported to Britain the general view that there was a great improvement in the administration of justice under the jury system. The magistrates praised the system, and the public favoured it. Emancipists (and their supporters such as William Wentworth) were not happy that they were excluded from the jury lists, and there were a number of court cases from this time in which emancipists sought to be included in juries. However, the exclusives still wanted the colony's courts to be free of the taint of convicts, so conservative judges and magistrates declined the applications. One example was the case R v Sheriff (1825)[26], in which Wentworth argued unsuccessfully in favour of allowing emancipists to sit on juries.

So the extension of juries to criminal trials had come about, not by legislation or Royal order, but by a judge's declaration, and was the first example of judicial activism in Australia. It happened almost by accident and through a loophole in the law. Despite the disappointment of the emancipists, it seemed that good progress was being made towards the goal of using civilian juries in all trials.

Even though jury trials were by then available, the only civil case ever tried before a jury under the New South Wales Act (before it expired in 1828) was R v Cooper in 1825[27], and this was after the Attorney-General consented to it. This concerned the alleged illegal occupation of land near Blackwattle Swamp by the ex-convict distiller Robert Cooper (the owner of Juniper Hall in Paddington), the Crown claiming that his land grant was never formally completed. The result was that Chief Justice Forbes recommended that the Cooper be given a formal grant of the land. It is not known how the jury was summoned or empanelled for this trial, and Forbes seems to have simply followed English procedure.

Britain clamps down on criminal juries

The Australian Courts Act (1828)[28] was the British reaction to the progress made in extending juries, and it was largely a setback for the colony. The Act required both the Supreme Court and Quarter Sessions Court to use panels of seven military officers. At a stroke, this abolished the civilian juries introduced by Forbes in 1824. The Colonial Office had persuaded the parliament to abolish civilian juries in criminal trials in the lower courts until they were established in the Supreme Court at some time in the future.

As a small step forward, the use of civilian juries in civil cases was broadened to allow them if either party requested one, not both parties as before, but still at the judge's discretion. Otherwise a judge and two assessors were used. The only glimmer of light was the section in the Act which gave the King the power, with advice from the New South Wales Legislative Council to "extend the manner of proceeding by Grand and Petit Juries" in the future. This was the real beginning of civil juries, although it was left to local legislation to set the regulations for how juries would be constituted.

For the next four years, criminal trials remained unaffected, but the Legislative Council brought in laws that reflected the prevailing views about those men in the community who were fit or unfit to sit in juries in civil cases. Those who qualified were men residing within 22 miles of Macquarie Place in Sydney who were aged from 21 to 60, owning real estate bringing in an income of £30 pa or more, or with a personal estate valued at £300 or more[29]. Some occupations were exempt, such as military officers, pilots, ships' captains and schoolmasters. Those disqualified from jury service were men who were attainted by felony or convicted of infamous crime, unless pardoned, and those reconvicted after expiry of their sentence. Obviously, this made it almost impossible for any former convict to qualify.

Police and magistrates were required to prepare jury lists of "men of good fame and repute", which were made public on the doors of courthouses and churches. Local anecdote at the time suggested that the lists would have had a wider audience if they were attached to the doors of public houses instead. Publication of these lists meant that some details of a man's income or ownership of land became public knowledge, in an era when privacy notions were not such a concern as they are today.

During the turbulent rule of the autocratic and thin-skinned Governor Ralph Darling (1825 – 1831), the editors of the free press regularly appeared in court for criminal libel against the Governor and other senior officials. Edward Smith Hall, the fearless editor of the *Sydney Monitor* from 1826, was prosecuted about a dozen times for libel and imprisoned for twelve months in April 1829 after one such outrage against the prickly Darling in his paper[30], from where he wrote several more libellous articles, resulting in more gaol time.

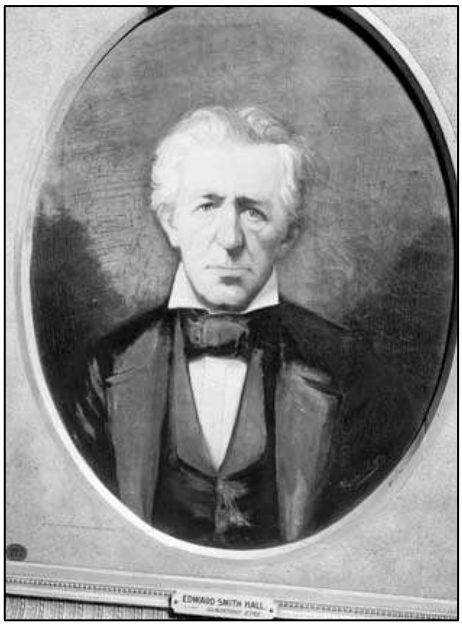

Figure 23: Edward Smith Hall

Robert Wardell of *The Australian* newspaper also felt the Governor's wrath, and was several times prosecuted for seditious libel. At one of his four trials in 1827[31], Wardell was defended by the redoubtable William Wentworth, who unsuccessfully tried to challenge the whole military panel, on the ground that the prosecution had been directed by Darling, who was their commanding officer. This ground was certainly reasonable, but it had no foundation in law at the time. Despite this, Wentworth's argument did not fall entirely on deaf ears, as it helped bring about the limited reintroduction of juries in criminal cases a few years later.

In June 1830, the British Parliament issued an Order in Council which allowed the colony to make up its own mind about juries in criminal trials. But this Order was not welcomed by the conservative Legislative Council, because to the exclusives, any extension of the jury system was the thin edge of the emancipists' wedge. In fact extending criminal juries was the last thing the Council had in mind. Forbes wrote to Darling with his views on juries: he said juries would only be free of influence and would represent public opinion if they were made up of the entire middle classes of the colony, not military officers. But Darling was unmoved.

Figure 24: Ralph Darling

There were more public petitions calling for the extension of trial by jury by this time. Sir John Jamison, a wealthy pastoralist with liberal principles, prepared one after a meeting in February 1830[32]. A petition was also inserted in an address on the ascension of William IV to the throne in June 1830.

Richard Bourke invigorates the campaign

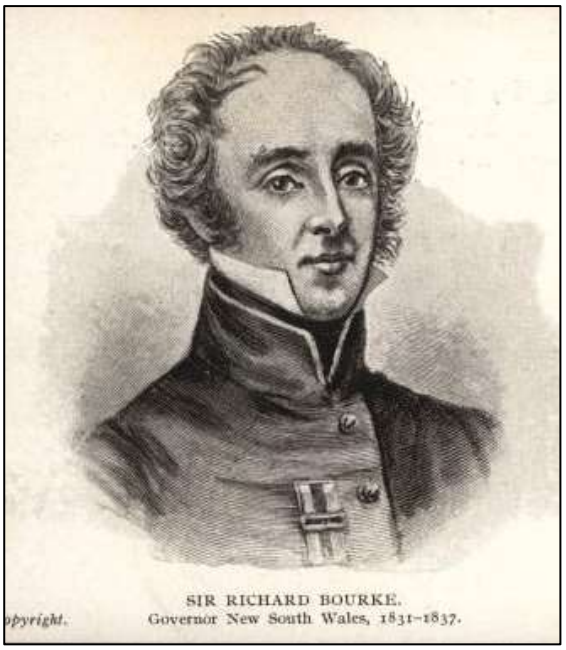

Figure 25: Richard Bourke

Darling was recalled in December 1831 to joyous celebrations throughout the colony, led by William Wentworth from his home in Vaucluse. His replacement was Richard Bourke, an Irish army officer who was a liberal, and a supporter of jury trials. He had been acting Governor in the Cape Colony (the present day South Africa) a few years earlier, where he had introduced trial by jury there in 1828. It was notable that John Thomas Bigge had recommended trial by jury after an inquiry into the Cape in 1827.

Before arriving, Bourke had discussed with the Colonial Office the replacement of the military juries with civilian juries in criminal cases, and was authorised to make this change in New South Wales. So by this time, Britain thought the colony was ready to move on from military tribunals. There was still the reactionary Legislative Council to deal with, but the Governor was very determined to make liberal reforms in his new posting.

Bourke had in his hand the proposed Jury Trials Act (1832)[33], based on the 1830 Order in Council, which provided for the first time for a limited form of trial by jury in criminal matters in the Supreme Court. In particular, Section 40 stated that if any of the senior officers of the colony - the Governor, the Executive Council, the army or navy officers, were involved in a court case in any way, then the trial would be by a jury of twelve civilians. The Act also removed the disqualification from jury service to those whose sentence had expired, whether pardoned or not. This was a step forward for the emancipists (although it proved to be a temporary one). Despite this progress, the continuing disqualification of men of "bad fame" still made it almost impossible for former convicts to be included in jury lists.

When opening the session of the Legislative Council in January 1832, Bourke urged the Council to pass the Act without delay, as he believed from talking to the judiciary in New South Wales that it was time to try criminal matters before a civilian jury. Bourke also favoured the inclusion of emancipists in the juries. However, the Council, made up of exclusivists who had been nominated by Darling, was strongly opposed to the measure.

The next year, the Legislative Council passed a modified version as the Jury Trials Amending Act (1833)[34]. This Act granted trial by a civilian jury of twelve in criminal cases in both the Supreme Court and Quarter Sessions Court. But as a compromise, the accused could still elect to be tried by the military panel of seven officers. A backward step for emancipists was that to be eligible for jury service under this Law, they again required a pardon. The Act did not have the "bad fame" disqualification, which was a concession to the Governor. This Act almost marked the end of the fight for complete trial by jury, but not quite. At least the citizens could have trial by jury in all courts in all cases and the emancipists now had the right to serve as jurors. The identity of the first emancipist juror is not known, but Daniel Cooper was one of the first to serve.

It was later found that 38% of Supreme Court defendants and 68% of Quarter Sessions defendants chose the military panel[35]. Forbes told Bourke that, from his observations, defendants in cases of aggravated violence seemed to choose the military panel apparently in the hope of receiving mercy from gentlemen disconnected from the daily life of colonists. On the other hand, Forbes thought that in cases of a conflict of testimony, a civilian jury of twelve men of different opinions about the testimony was more likely to result in an acquittal.

A few years later, in 1836, the exclusivist faction tried to fight back against the Governor's liberal reforms by preparing two petitions arguing against the inclusion of emancipists in jury lists. In response, the emancipists prepared their own counter-petition. The exclusivists complained about emancipists being placed as jurors on the same footing as magistrates and men of unblemished reputation. James Macarthur, the son of the wool pioneer John Macarthur, wrote a manifesto on behalf of the exclusives, not opposing trial by jury as such (which showed that they had largely accepted the new system by then), but arguing that those with a convict record were unfit to serve on a jury.

In 1837, Macarthur published a book in England titled *New South Wales, its present state and future prospects*. The book was essentially written to support the emigrant cause, but it dealt at length with the petitions against jury trial, in particular that emancipists should be left out of juries and kept from political power. The exclusivists' petition was not successful, as by then they represented a minority of signatories on all the petitions (400 exclusivists compared with 6,000 emancipists), and in any case they were not correct in their claims that the experiment of including emancipists in juries had failed.

George Gipps finishes the job

Richard Bourke left the colony at the end of 1837 without seeing his jury reforms completed, although he made more progress than any other Governor. He was replaced in February 1838 by Sir George Gipps. The new Governor was more reactionary than his predecessor and less enthusiastic about trial by jury. But he reluctantly agreed that the vast majority of colonists wanted trial by jury established, so he used his influence to steer the issue towards its goal in the eight years of his rule.

Figure 26: Sir George Gipps

By this time, emancipists were being included in jury lists, and were only kept out if they failed the property qualification, like other less well-off colonists. In January 1839, the Sydney list of eligible jurors included 145 emancipists and 153 publicans among the names[36]. The conservative *Sydney Morning Herald* claimed that if the emancipists and publicans were removed from the lists, there would still be enough jurors available. In 1839 and 1840, the press reported that in session after session of the courts, respectable gentlemen were fined for not turning up for jury duty, as they did not like to be associated with the likes of emancipists (or publicans, perhaps!), so the *Herald* reported. This showed the lingering resistance among free settlers to having former convicts on juries.

1839 was a landmark year in the fight for jury trials, as the Jury Trial Act of that year finally abolished the widely despised military panels in criminal trials. The large increase in the colony's population meant that there was a readier supply of jurors in all areas where courts were in operation. This Act also restored emancipists to their 1832 position, which is that they were eligible for jury duty if pardoned, or if their full sentence had expired. So all colonists had the right to a jury trial in criminal cases, and everyone except serving convicts could sit on a jury, subject only to the property qualification.

The right to a jury trial in civil cases had not yet been achieved, however, as the 1840 Administration of Justice Act[37] confirmed the existing arrangement that the use of a jury in a civil trial was still at the judge's discretion. But the day was approaching when the right to a jury trial in all cases would be established, and there was much discussion in judicial circles about the final form of juries. In particular, Justice Alfred Stephen had long argued for a smaller jury of four in civil cases.

At last, in 1844, the Jury Trials Act[38] of that year declared the right to a jury trial in all civil cases. Civil cases in the Supreme Court would be heard be a judge and a jury of four "special jurors". In some cases the court could order a jury of twelve ordinary jurors. This is how juries are constituted today, except that there are no special jurors. Along with this change, the old method of trial by a judge and two assessors was abolished.

The use of special jurors was taken from the English system, in which qualification was restricted to a small range of the more respectable citizenry, such as Esquires (member of the gentry), Justices of the Peace, merchants (but not retail shopkeepers), or bank directors. They were paid much more than ordinary jurors. Special jurors had actually been introduced during Governor Bourke's time, and was one of his ways of trying to get emancipists included in the jury lists, as he knew that some of them were by then very wealthy merchants or bank directors. Special juries performed a useful function at the time, especially in civil commercial cases, as the class of people on special juries included men with mercantile expertise not possessed by most ordinary jurors.

The final legislative change was the Jurors and Juries Consolidation Act of 1847[39], which removed the disqualification of emancipists whose term had expired but who had not been pardoned. By this time, transportation to New South Wales had ceased seven years ago, the colony was thought of as a community of free settlers, and there were hardly any convicts still serving sentences.

The 1847 Act essentially consolidated the complex mass of legislation relating to juries over almost twenty years, and reflected public opinion that former convicts were by then largely accepted back into the community as being competent to sit alongside free settlers in judging their peers in the courts. The great bitterness between exclusivists and emancipists had largely died away by this time, and the rival groups had more issues in common, such as the campaign for representative government, and local control over land allocation and taxation revenue.

The achievement of the right to trial by jury also reflected the leadership of a number of men over the long period since 1810: Governors Lachlan Macquarie and Richard Bourke, judicial officers Ellis Bent, Francis Forbes and Alfred Stephen, and liberal agitators William Wentworth and Edward Eagar.

Removal of felony attaint

Felony and the forfeiture of property

The word felony originated in feudal times, and originally denoted the value of someone's entire property. By the time of the start of transportation to New South Wales, felony had come to refer to a wide range of serious crimes. William Blackstone, in the *Commentaries on the Laws of England* in 1765 wrote that "felony comprises every species of crime, which occasioned at common law the forfeiture of lands or goods"[40]. He also wrote that there was a misconception that a felony is simply a capital offence (that is, punishable by death). However, not every felony is capital, and not every capital offence is a felony. However, he admits that felony is generally associated with the death penalty, and it was hard to separate them.

At its height in the early nineteenth century, English criminal law had some 220 crimes punishable by death, including "being in the company of Gypsies for one month", and "blacking the face or using a disguise whilst committing a crime". Many of these crimes had been introduced to protect the new wealthy class that emerged in the first half of the eighteenth century. An infamous example of the early laws was the Black Act of 1723, which created 50 capital offences for various acts of theft and poaching. But during the nineteenth century, criminal law reform gradually reduced the number of capital offences to five by 1861.

Attaint (sometimes called attainder) was the state of having forfeited one's lands and property when convicted of a felony. It also involved the loss of legal rights, such as the right to sue and to appear as a witness in court. Essentially, it meant legal death. A person's rights were only restored following a pardon or expiry of a (commuted) sentence. The penalty of forfeiture of property was not abolished until 1870 in England[41]. In England, loss of civil and legal rights was one thing for the very small percentage of the population that was affected, but in the penal colony of New South Wales it had a much greater impact, as very many people had been convicted of capital offences in Britain.

The colony sidesteps the law of attaint

It was mentioned earlier that the application of the law of felony attaint was tested in New South Wales almost immediately, in the case of Kable v Sinclair in July 1788. Following the decision of David Collins, the deputy Judge-Advocate, to ignore the Kables' attainted status, a convict's legal status was irrelevant to the common interest of all the colonists, which was to take advantage of the many opportunities for wealth. While all the laws of England were supposed to apply in the colony, the courts decided early on that the law of attaint was unworkable in a community of convicts, whose criminal records were unknown to local courts in any case. The judges decided to ignore attaint, or, when challenged, to use the device of declaring that criminal records were not available here, and then refusing to adjourn to wait for them to be sent out from Britain.

Attaint is upheld in court and changes everything

In 1820, a carefully worked out local practice that had been successfully matched to local conditions was suddenly swept away. This was followed by twenty years of uncertainty as a series of conflicting laws from Britain and the local Legislative Council moved haltingly towards a reconciliation of local practice with statutory law.

The practice in the colony until 1820 had been that ticket of leave or pardon holders were restored to complete civil rights. This all changed in 1820 with the Edward Eagar court decisions, in which felony attaint was upheld, removing Eagar's right to sue. Eagar held an absolute pardon, but the Supreme Court ruled in two court cases that the Governor's pardon was informal had no effect on his status. Even worse, Justice Barron Field said that it was up to the judge in a case whether to allow attainted people to bring a court action or give evidence in them, depending on the judge's attitude to the merits of the case. Even Bigge criticised this decision by Field. This meant that much of the wealth of the colony was at the whim of judges who may decide to ask for proof of conviction from Britain, or else ignore attaint.

After this episode, the validity of convict pardons became an immediate concern for ex-convicts. They pointed out to the British government that they dominated the colony, their labour had built it, they possessed much of its wealth, and that the validity of pardons had not been questioned until Edward Eagar's two cases. Their reputation, credit, and incentive for hard work had all been destroyed by the court decision. To have allowed former convicts to accumulate wealth for over thirty years since 1788 and then to disallow it left the colony in an impossible situation.

The Eagar decisions were so out of step with accepted local practice that either the law or the local practice had to change. In fact, both were modified, but it took over twenty years before something like the local custom prior to 1820 was restored. In the meantime, it was still accepted that convicts could own property. The first step was to rectify local pardons.

The British government restores some security

In 1823, the British government enacted the New South Wales Act, which included a section that validated the colonial Governors' pardons. This section was largely the result of zealous lobbying and correspondence with the Colonial Office by Edward Eagar, as the emancipists' representative in England. The Act stated that all pardons issued in the colony, retrospective to 1788, would have the effect of being entered under the Great Seal of England. The early governors Philip King and Lachlan Macquarie were willing to pardon convicts who showed ability and enterprise, in the hope that this would aid the colony's development. By this time, there was an undue concentration of wealth in the hands of pardoned convicts, and they were doing business with free settlers, so it was vitally important that their right to own property was not vulnerable to the whim of an unsympathetic judge who chose to challenge their status.

A further Act in 1824[42] included a section that extended the validity of colonial pardons throughout the British Empire. Edward Eagar wrote later the Home Secretary Robert Peel agreed to this section after two interviews with Eagar. Despite these successes, the Acts did not help the large proportion of the colony that had not received pardons and were serving convicts, including ticket of leave holders. They could not sue, hold property or give evidence in court, if a court chose to use the law of attaint against them.

Other problems took longer to resolve, and local courts had to decide what to do in the meantime. On Bigge's recommendation in 1822, a system of convict bank accounts was introduced, in which serving convicts had to deposit their wages in the Bank of New South Wales. When they received a ticket of leave, or a pardon, or after expiry of sentence, they could withdraw the money. These compulsory deposits were consistent with the more restrictive convict management after Bigge, but not with the law of attaint, which would have forfeited all money of felons to the Crown. The practice, if not the law, was that convicts could own property. The emancipists were very unhappy with this situation, and demanded the certainty they thought they had until 1820, not just judicial discretion.

Francis Forbes puts necessity ahead of the law

Francis Forbes, the newly appointed Chief Justice in 1824, was determined to continue the approach he used in North America, which was to adapt English law to local conditions wherever possible. He and his colleagues relied on technicalities to keep out whatever English law was unavoidable. They sidestepped the law of attaint by requiring strict proof of conviction and attaint, such as in the court case R. v. Cable (1826). In this case, Charles Kable (sometimes called Cable) allegedly stole a horse from a serving convict, George Seymour. Kable's defence was that as Seymour was still a convict, he couldn't own property. There was no formal proof available of Seymour's attaint, and Forbes brought down a judgement saying that since a convict was encouraged to work for himself and acquire property as part of his reformation, that property had to be protected by the law. There was a certain irony that Kable tried to benefit by claiming attaint, as it was his own convict parents, Henry and Susannah Kable, who benefited from the exact opposite in 1788 when their own attaint was ignored to allow them to sue to retrieve stolen goods.

An attainted status acquired in Britain could be easily bypassed in court, but if a person was convicted of a felony in Australia, their criminal record was easily available. This became a problem through the 1820s, as restrictions on convicts became greater, and more places of secondary punishment were built: Port Macquarie was established in 1821, Moreton Bay was established in 1824 and Norfolk Island was reopened in 1825. These penal settlements were often violent places, and the only witnesses to crimes committed there may be attainted as well, and so could be disqualified from testifying – a person might get away with murder. Judges had to work out how to reconcile this with the need to make the justice system operate effectively.

A court case in 1829, R. v. Gardener & Yems, was one such case, involving prisoners in Port Macquarie. All the witnesses were convicts who were attainted from crimes committed in the colony, meaning that their records were available. The defence objected that the witnesses were incompetent to testify, by the law of attaint. In his judgement, Chief Justice Forbes pointed out that there had been no objection in the past, where nine out of ten of the trials he had heard might have qualified for the same objection. He said the uniform practice had been to hear testimony of attainted persons from necessity. Forbes concluded that this rule of attaint did not apply to the conditions in the colony. Juries could hear such evidence, even if they were likely to be sceptical about it. So the court's ruling was to allow the evidence "from necessity", and this ruling was used as a legal precedent for some years.

A further court case used the defence of witness incompetence because of attaint in 1831. This involved the audacious Bank of Australia robbery in 1828, when a very large amount of money was stolen by a group of men who burrowed into the bank's vault from a drain that ran underneath. Two of the robbers (George Farrell and James Dingle) and the receiver (Thomas Woodward) were being tried, principally on the evidence of another robber, William Blackstone, who had turned State's Evidence in return for freedom. Blackstone, described by one of the judges in the trial as a "worthless villain", had been attainted in England prior to arrival in Sydney, and then re-attainted in Sydney after another felony. The defence argued that the witness could not give evidence for this reason. On the other hand, the prosecution argued that his evidence should be admitted, using the "from necessity" ruling in 1829.

This was a very high profile trial, involving barristers Robert Wardell and William Wentworth for the prosecution, and the three senior judges of the Supreme Court, Chief Justice Francis Forbes, and Justices James Dowling and John Stephen. After a trial and two separate sentence hearings, in which the witness's attainted status was raised at every stage, the judges returned a majority ruling, which produced a mixed result for the defendants. Dowling and Stephen's opinions were to allow Blackstone's evidence, but, surprisingly, Forbes' opinion was to disallow it. The upshot was that Farrell and Dingle were found guilty by the majority ruling of the Bench, but were given relatively light sentences (i.e. they were spared the noose) in deference to Forbes' dissenting opinion. By 1832, judges were very reluctant to allow attaint as a defence in cases where convicts sued to protect their property, such as the case Belcher v. Deneen in 1832, in which a convict with a ticket of leave was allowed to sue to protect his property, thus assuming he was able to own it.

One step forward but two steps back

Both the British authorities and the colonists thought it was about time the law caught up with customary practice, as all serving convicts and those with tickets of leave were left in a very uncertain position whenever they were involved in a court case in any capacity: as defendants, plaintiffs or witnesses. Unfortunately, the first government actions were very confused, as the British and New South Wales legislative bodies passed contradictory laws in 1832. The British Act[43] stated that even ticket of leave holders were subject to the full law of attaint, until expiry of sentence or pardon. The law came in spite of numerous emancipist petitions through the 1820s and the campaigns of Edward Eagar in London.

This effectively wrecked the ticket of leave system, which had been a great success, and was designed to reduce the relatively high cost of the penal colony (which the British government had long complained about), and Britain had approved the system for this reason. Governors were forced to award conditional pardons to ticket of leave convicts in order to revive their legal status. This showed that as long as Australia was still being treated as a penal colony by Britain, they found it easier to restrict the convicts than to exercise their minds on the future of the colony. It was still a few years before the ending of transportation was engaging the attention of British officials, at which time they would start thinking a bit harder about conferring rights to the citizenry rather than taking them away. It was to be another ten years before the Governors' protests about the impact of this law had an effect.

The New South Wales version of the British Act[44], enacted in August 1832 without the knowledge that the British government had already contradicted it, declared in section 36 that ticket of leave holders were free of attaint. The aim was to return the colony's formal law to the customary practice since 1801. Another section of the Act declared that a convict's indent was sufficient of a conviction resulting in transportation. But it didn't prove attaint, as the indent records rarely stated the nature of the crime, or whether the convict was originally sentenced to death. Faced with these legal contradictions, New South Wales judges agreed that the British law must override the local law. They also noted the implication of the law was that ALL serving convicts (not just attainted ones) were subject to the restrictions of attaint. This suddenly swept aside the customary practice.

Despite this setback for convicts and ticket of leave holders, and the ruling that an indent proved that a person was a convict, Forbes continued to insist on strict proof of convict status. In this, Forbes was strongly resisting Imperial law. He still believed in the legitimacy of local customary practices. Clearly, this was a period of conflict between the British and colonial authorities on the relationship between English common law and local practice in Australia.

The one section in the local Act of 1832 not overruled by the British Act was that a convict's indent had a legal validity in proving transportation had occurred. A controversial court case the next year attempted to take this a step further by claiming that if an indent showed transportation was for life, this established that a felony had been committed in Britain (as a life sentence normally resulted from a commuted death sentence), so establishing that the person was attainted. The case, Septon v. Cobcroft and Others in October 1833, was an action of trespass for breaking into Septon's premises. The defence argued that Septon (by then a ticket of leave holder) was transported to the colony with an indent which showed he had a life sentence (although it did not state his offence). The lone judge, James Dowling, told the jury that the indent did not in itself prove felony, so the plaintiff was not proved to be attainted. Dowling basically directed the jury to find for the plaintiff, but the jury ignored this and found for the defendants.

A request for a new trial was held two months later before the full Supreme Court Bench of Francis Forbes, James Dowling and William Burton, on the grounds that the jury's verdict was contrary to evidence, to law, and to the direction of the judge[45]. Justices Forbes and Burton gave opinions that it appeared from the evidence that the plaintiff was a transported felon. Dowling differed by saying that the defendants relied on the plaintiff's incapacity by law to maintain any action on the ground of being a transported felon, and in this way they expected to get away with their crime. The court's majority ruling established that a life sentence established felony attaint.

Felony attaint is finally legislated out of the colony

Finally in 1843, three years after the end of transportation in New South Wales, the uncertainty about the validity of convict evidence was removed once and for all by an Act passed firstly in Britain, then by the New South Wales Legislative Council[46]. This law removed from incompetency as witnesses anyone who had a material interest in the case, infamous persons or those who had been convicted of a crime.

Still there remained the problem of ticket of leave holders. Their rights had been swept away by a stroke of the pen ten years earlier. This was finally redressed with the Transportation Act[47] in the same year. Under this Act, ticket of leave holders were finally given the formal right to hold goods and leases of land and to sue in the courts to protect them. This reverted the law to the customary practice since tickets of leave were begun by Governor King way back in 1801, but which had been revoked by the Imperial Act in 1832. So it took from 1788 until 1843 for all of the local customs in New South Wales to receive imperial approval from Britain.

The long struggle over more than fifty years to convince the British government to acknowledge the realities of life in a penal colony that was rapidly growing towards self-sufficiency and self-government and helped in no small way by the industry of people who would have had no legal rights in Britain, was glaring evidence of how absurd it was to thoughtlessly impose the English law of felony attaint on a completely different society. It was only through the determined common sense of people like Francis Forbes and Edward Eagar that the British authorities were finally forced to acknowledge that the local custom was the most effective procedure, and to finally legitimise it. In Britain, the penalty of forfeiture of property after a conviction for felony was finally abolished in 1870[48].

Self-government at last

Early pressure for representative government

The colony of New South Wales was established at a time of growing interest in liberalism and democracy in some parts of the Western world. The Americans had declared their independence in 1776, fought a war with French assistance to throw out the British monarchy, and then established their own elected government with a constitution and a President as head of state. The French then overthrew their absolute monarchy in 1789, establishing the first modern republic in Enlightenment-era Europe in 1792. By this time, Britain itself was a constitutional monarchy, where significant elements of the Westminster system of government were emerging, such as an elected lower house of parliament with a property-based franchise for electors and a class-based party system.

But constitutional government was not transported to New South Wales in 1788, as the colony was not originally intended to be a place of migration of free settlers in any large numbers. From 1788 to 1823, all administrative power was in the hands of the seven Governors, as derived from their Commission from the King. They could make laws, grant land, control commerce, appoint magistrates and pardon or execute criminals. However, there was recurring conflict between the Governors and prominent colonists, such as the officers of the Royal Marines and large landholders, over the degree of authority granted to the Governor. But these demands by colonists were intended to further only their interests, not those of everyone, so they were not democratic as such.

By Macquarie's time, this conflict had coalesced into a battle between the exclusivists (privileged free settlers such as John Macarthur who had been granted vast areas of land and who wanted to influence the governing of the colony to their own benefit), and the emancipists (former convicts who were becoming successful but were restricted in their activities). Macquarie chose to exercise his authority in the interests of the wider colony, but was still a benevolent dictator. A major concern with this system of authority was that a Governor legislating without the involvement of a representative element of the citizenry was contrary to English constitutional law at the time[49].

One solution to this concern was some form of a Legislative Council to validate the Governor's decisions. However, the Colonial Office believed that in a penal colony the Governor still needed to have strong executive authority unhindered by local factions. Bigge reported that while the colony should move on from rule by the autocratic Governors, he thought there was not much demand for representative government, and in any case he even doubted there were enough suitable persons available for such a Council.

The first Legislative Council

To satisfy the constitutional problem of the Governor's rule, and as a direct result of Bigge's report on the state of the colony, Britain enacted the New South Wales Act in 1823. This established a Legislative Council of five to seven members who were to be nominated by the British Secretary of State on the advice of the Governor. At first, Britain was not sure how to implement such a Council in the colony, and in the early drafts of the proposed Bill, the problem of the illegality of the autocratic Governor was addressed with the Governor legislating with the consent of the magistrates. The final Bill was enacted with a provision for a Legislative Council was only added at the last minute. This was partly because James Stephen of the Colonial Office thought it was wrong to give so much power to an unrepresentative group like magistrates.

The other reason for the final form of the Bill was that the drafting of adequate legislation in New South Wales to implement all the complex changes required by the Bill would be a difficult task, and this would be better done by a more dedicated local legislature than by magistrates who were already fully occupied in their judicial duties. So, while the establishment of a Legislative Council to advise the Governor was only added at the last minute, it was actually central to the idea of the New South Wales Act. This showed how unsure the British authorities were about how to proceed in the novel situation of legislating for a penal colony.

The nominated Legislative Council was only meant to be an advisory body. But in reality it went a long way to destroying the arbitrariness of the Governor's powers. Apart from the new requirement that the Chief Justice Francis Forbes had to give his approval that any proposed law by the Governor did not conflict with the laws of England, the Governor had to work with a small body of Councillors who were able to bring him in touch with public opinion. The Council could in theory reject by majority vote a proposal by the Governor, but he could still bring it into law by referring it to the British government.

The first Council consisted of the colony's most senior officials at the time: Lieutenant-Governor William Stewart, Chief Justice Francis Forbes, Colonial Secretary Frederick Goulburn, Principal Surgeon James Bowman and Surveyor-General John Oxley. This was an interim group while the Secretary of State pondered a list of ten names submitted by Governor Sir Thomas Brisbane, from which he would select three non-official members. There was no intention that those selected would be anything but supportive members of the colonial elite. Brisbane was instructed to include only the principal merchants and landowners. The first meeting of the Council was in the Court House in Sydney in August 1824[50].

In August 1825, the Legislative Council was expanded to its maximum number of seven members. By then, the official members were Lieutenant-Governor Stewart, Chief Justice Forbes, Colonial Secretary Alexander Macleay and the Archdeacon of New South Wales Thomas Hobbes Scott. Three non-executive members were appointed, representing landed interests and other wealthy settlers. They were John Macarthur, doyen of colonial landowners, Charles Throsby, also a large landed proprietor, and Robert Campbell, a wealthy merchant. There was sometimes vigorous debate and dissent in the Council during its sessions, but the similarity of interests of the members meant that the Governor found no serious obstruction to his Bills. The emancipists had no direct voice in these deliberations, although liberal opinion was represented to some extent by Francis Forbes.

The reduction in the Governor's power did not do much to quieten the calls for representation in government, and in January 1827, a well-attended public meeting in Sydney demanded an elected Legislative Assembly based on manhood suffrage for the entire free population, as well as taxation by representation. A petition drafted at the meeting called for an elected assembly of at least 100 members.

The Council is expanded to include more settlers

The Australian Courts Act of 1828 expanded the Legislative Council to a minimum of ten and a maximum of fifteen members, comprising seven citizens, and the rest government officials. This was a concession to the demands of liberal opinion in the colony, and the Secretary of State said that he hoped this would allow the non-official members to be more representative of the population.

It was now officially intended that the Council proceedings should reflect a broader range of colonial opinion. To help achieve this, the oath of secrecy that had surrounded the proceedings of the earlier Council was dropped. The expanded Legislative Council was still nominated by the Governor, but it now had the power to reject, by a majority, any proposal made by the Governor. This would mean the end of the proposal, as the Governor could no longer refer it to Britain for approval. Members of the Council were now able to request that a Bill be introduced. While the Governor could refuse, his reasons had to be made public, thus making it harder for him to act capriciously.

The background to the 1828 Act was that the 1823 New South Wales Act was due to expire in 1827, but was renewed for one more year. Britain received plenty of advice from the colony about the content of the replacement Act. The exclusives, including Governor Ralph Darling, wanted to retain a nominated Legislative Council and even add a similar Upper House to reinforce their hold on power. On the other hand, William Wentworth and the emancipists (including Edward Eagar in London) campaigned for an elected legislature. Darling's main concern was to limit the power of Chief Justice Forbes, after several clashes with him. Forbes advocated a less autocratic government and a legislature more representative of the colonists, and not just the wealthy landowners. However, the Colonial Office distrusted the emancipists and favoured the views of the exclusivists. They strongly believed that New South Wales was not ready for a properly representative government. So the 1828 Act made incremental changes only.

In 1829, the third Legislative Council with the full complement of fifteen members was sworn in. The membership of the Council changed often over the years, but the structure did not – it was always dominated by the exclusivists, and there were still no former convicts. There was little evidence of the promised diversity of opinion among the members. Among the non-official members appointed in 1829, John Macarthur, Alexander Berry and John Blaxland were large landowners, Robert Campbell and Richard Jones were wealthy merchants and Edward Close was a landowner associated with the exclusives.

John Thomas Campbell was the exception. He had been Macquarie's secretary and by this time a large landowner, but he supported liberal causes. However, he died in January 1830 after only a year on the Council. His biography credits his and Forbes' efforts in the Legislative Council with the emancipists gaining the right to sit on juries in the 1830s[51]. After his death, Campbell was replaced by Hannibal Hawkins Macarthur, John's nephew and an enthusiastic exclusivist.

Agitation for constitutional change in the 1830s

The decade of the 1830s was an eventful time in Britain and its larger colonies. In New South Wales, the liberal-minded Governor Richard Bourke took over from the reactionary Ralph Darling. Bourke had many attitudes in common with William Wentworth, but could not persuade him to accept nomination for the Legislative Council. Wentworth had long thought that he could achieve more reform from outside the system than within it.

There was a rising tide of free immigrants to the colony during the 1830s, which greatly reduced the proportion of former convicts: there were only 407 immigrants in 1831, but this had grown to 10,549 in 1839[52]. By 1841, 64% of the population was free[53]. Workers were becoming organised into trade unions and workers' mutual benefit societies. While these labour organisations were designed to protect the interests of the members involved, there were elements of democracy in them, as they demanded more participation in government decisions by the establishment of institutions that

allowed them to have this voice. It was generally acknowledged that the nominated Legislative Council represented only the exclusivist faction, but the possible wholesale handover to the emancipists (if there were elections with a broad property franchise) was also unacceptable. All the same, the old divisions between exclusivists and emancipists were becoming less relevant, and colonial society seemed more suited to an English-style constitutional government.

In June 1835, at the suggestion of the British parliamentarian Lytton Bulwer, the Australian Patriotic Association (APA) was formed to present the colonists' views on representative government to the British authorities. Bulwer had written to the colonists that the Australian situation was not well understood in England, and that an organised association should be formed, with a parliamentary agent in London. The liberal landowner Sir John Jamison was elected president, William Wentworth vice-president, William Bland secretary and Bulwer appointed as its representative in London.

The APA started with a flurry of enthusiasm, and was supported by all groups of colonists. Over the next few years Bland and Wentworth drafted two alternative bills for a New South Wales Constitution, for the consideration of the British government. One provided for a nominated Council and an elected Assembly on the Canadian model. The other provided for a blended model: a single House of 50 members, one-fifth nominated and the rest elected on a property franchise similar to that of the 1832 Reform Act[54] in Britain.

Towards the end of this decade, Sir John Jamison was an important figure, as he was the only liberal on the Legislative Council from 1837 to 1843 (the end of the Council in its unelected form). Unusually for a free settler and a large landowner, he was at the forefront of all of the progressive campaigns of the time. The Colonial Office's hope of broadening the membership of the Legislative Council was frustrated by two factors: The exclusivist Macarthur family had much influence in London, and their persistent lobbying was a major reason for the dominance of the exclusives. The other factor was a lack of liberals who the Colonial Office thought were suitable for office. Apart from Jamison, William Wentworth was the only other contender, and he was not acceptable to London because of his record of unrestrained opposition to the Governors Darling and Gipps and to British policy in general.

Figure 27: Sir John Jamison

While the Governors generally tried to legislate for the benefit of the whole colony, the Colonial Office's assumption that they would be aided by the appointment of members of the elite to the Council was wrong. The Council members simply supported their own class, appropriated the general revenue for themselves, and generally embarrassed the government in other ways. This was especially a problem for a liberal Governor like Richard Bourke, as he found when he tried to introduce trial by jury in criminal cases in 1833, and was met with furious opposition in the Council.

A select committee of the House of Commons in 1837-8, run by Sir William Molesworth, reviewed the policy of convict transportation, and concluded that it should be ended. There had been a brisk controversy in Britain for some years on this subject. Lytton Bulwer was supposed to represent the views of the emancipists to the committee, but in the end he proved to be inept and did not attend the hearings. So Edward Eagar arranged to appear before the committee himself. The system was costing Britain a great deal of money: £400,000 to £500,000 per year[55]. Some clergymen were claiming transportation did not deter crime, had not resulted in the reformation of criminals, and it produced a terrible state of depravity in the colony. But the convict system had served one important purpose: it gave a start to the occupation of a country that proved to be a valuable resource to Britain, and which, if the circumstances in Britain in the late 18th century had not been what they were, would have been very unlikely to happen.

Subsequently in May 1840, a British Order in Council ended transportation of convicts to New South Wales. This was a turning point for New South Wales, as it ceased to be a penal colony, and was then defined as a free colony in which institutions of a free and ultimately democratic society could evolve. The Colonial Office became more sympathetic to greater democracy here after the cessation of transportation in 1840. Britain had thought that while this was a penal colony, democratic government was impractical. But after 1840, rapid progress was made towards granting responsible government to the colonies.

The APA needed a replacement for Lytton Bulwer, someone who would be paid by them, and therefore obliged to help them. Eagar recommended Charles Buller, an able lawyer, a former member of the Select Committee on Transportation, someone of influence, and a resident of London. Buller started working for the colonists, but the British government instructed him to consult both Edward Eagar and James Macarthur, and not to simply represent one side of the issue. By way of explanation, the Undersecretary of State told Eagar that the Crown might accept a joint plan for a representative Assembly.

Two overseas events at this time played important roles in the development of representative government in Australia. The first was the British Chartist movement in the 1830s and 1840s. Following agitation from British workingmen's associations and other political unions, a People's Charter was drawn up proposing very modern-looking political changes such as universal manhood suffrage, secret ballots, equal-sized electorates, abolition of property qualification for the lower house, and payment of Members of Parliament. While Chartism effectively collapsed in Britain by the 1850s without achieving any of its aims, it had a greater political impact here.

The other crucial event was the release of the Durham Report[56] (called the Report on the Affairs of British North America) in 1839, which recommended responsible government in Canada: a constitutional monarchy with a Governor-General and an elected Legislative Assembly. This report became the model for Australian government, as well as in New Zealand and other mainly ethnically British colonies. It became a sort of Magna Carta for representative self-government. The parallel nature of government in Canada and Australia today is testament to the enduring effects of the report's recommendations.

By the end of the 1830s, the Colonial Office realised that the system of government in New South Wales needed reforming, but was not sure how to proceed. They wanted the government to represent broad popular opinion much more than it had until then, but were still nervous of introducing an elected legislature, in case there was a wholesale handover of power to former convicts. The stigma of a convict past still resonated in British minds. One scheme being considered was indirect election. Under this scheme, elections would be held for municipal councils, which would then provide members who were nominated for the Legislative Council. This would be representative of the popular will, but in a diluted and safer form. When Governor Sir George Gipps took office in 1838, he argued strongly against the indirect option, and in favour of a blended Council.

Lobbying by both parties continued in London, but not without problems for the emancipists, as both Macarthur and Buller initially supported the system of indirect elections. Meanwhile, faced with changes that were taking place in New South Wales, James Macarthur changed his mind and decided that self-government was the surest way to protect the interests of the landed gentry that he represented. Macarthur's real aim was to forge an alliance between the exclusives and the wealthier emancipists to create a new dominant group in a self-governing New South Wales.

In the end, Britain decided that a blended Council was a safe compromise for a society still divided and politically inexperienced. The Colonial Office supported the inclusion of former convicts as both electors and representatives, and the emancipists' lobbying was finally successful because of the efforts of Eagar and not Buller. Despite his involvement, Eagar was no longer officially representing the colonists and was not being paid by them.

Edward Eagar was an enigmatic figure who was often misunderstood in his motives, but he continued to be the man who appeared when needed with the ability and will to back up the colonists in their demands for the rights of Englishmen. He had diligently kept the colonists informed of progress in England over the years with frequent letters to Australian newspapers, and in 1842 he had the great satisfaction of forwarding to Sydney an early copy of the Bill that granted the first representative institutions to Australia. So after twenty years in England, he had achieved his goal, and then slipped into obscurity, dying in November 1866 at Kensington in London.

Partially representative government commences

In July 1842, the Australian Constitution Act[57] established a system of representative government. It would consist of a blended Legislative Council of 36 members, 24 elected and the rest appointed by the Governor. No more than six of the nominated members could be government officials and all members of the Council, appointed and elected, would serve terms of five years. Thus, Wentworth and Bland's second option was adopted, following support in Sydney from Governor Bourke and later Governor Gipps, and in London from Charles Buller. The Act allowed the Legislative Council the power to increase its size, provided it kept the same ratio of one third of members nominated. So New South Wales was allowed to determine the future size of the legislature according to population changes.

A high property value was set to vote and be elected: ownership of a property valued at £200 or more, or householders who paid £20 per annum or more in rent. This meant that only about one third of the entire adult male population could vote. In addition, members of the Legislative Council must hold freehold property to the value of £2,000 or more, or be producing £100 a year in rent. So only the relatively well-off could stand for election because of the very high property ownership requirement for office. The British government maintained control of land policy and revenue.

The Act did not establish "responsible government" because the Governor retained overriding authority and Ministers of State were not Members of Parliament, but were appointed by the Governor. Despite all of these restrictions, the Act was an acknowledgement by the British government of the maturity of colonial society, and it inaugurated a new era in the colony. It placed a large share of the direction of the colony in the hands of the people for the first time. While serving convicts were excluded from the franchise, former convicts who had completed their sentence or had conditional or absolute pardons were included. So an important milestone was reached because former convicts could now vote and be elected.

Throughout the preceding decade, the British Government had struggled with the prospect of granting some self-government to the colonies. At first, both Whigs and Tories could not understand how self-government could be reconciled with the long-standing practice of the House of Commons issuing orders to the colonies through the Governors. But the American experience showed that no great harm came when the British Parliament and the Governors no longer gave the orders and the colonies ran themselves. Eventually it was agreed that the self-governing principle would inevitably be adopted. However, the British government retained control over the important areas of land policy and revenue. In the colony, both liberals and Macarthur's allies were disappointed in the limited powers of the new Council.

The first elections were held in June and July 1843. William Wentworth was elected at the head of the poll for Sydney. Another milestone for the former convicts was that William Bland was elected for Sydney as the first emancipist Member of Parliament. However, not all emancipists did so well. The convicted smuggler and thief Robert Cooper stood for election, but failed spectacularly and came last in the ballot. He owned a distillery and a brewery in Sydney, and had built the stately Juniper Hall mansion in Paddington in about 1825. His campaign included building cottages for many of his workers to ensure their vote, but it came unstuck when his colourful past was publicised in the conservative press. The election was described in the press as the dawn of political liberty in the colony, an opinion shared by many in New South Wales.

Figure 28: William Bland

The new Legislative Council met for the first time in August 1843, conducting its sessions in a newly-constructed chamber in the present Parliament House in Macquarie Street. The operation of the fledgling system was very unusual by today's standards in which there are dedicated full-time MPs and an organised party system. While the Council thought of itself as divided into the Government and opposition, there were no parties in the modern sense, and members took pride in their independence. Voting results were unpredictable, particularly because absenteeism was high. The unifying force for the opposition was the desire for the Council to have more power, combined with a shared antipathy for the policies of New South Wales and British governments.

Figure 29: Opening of Parliament House in 1843

The members of the first representative Council took their parliamentary responsibilities seriously and believed in their importance. Speeches were long, well-researched and well-argued. In the first

few years, a small band of energetic individuals grasped their opportunity with both hands and enacted a large amount of legislation, encroaching on areas of policy that had only been the privilege of the Governor in the past. The unofficial leader of the Opposition was William Wentworth, and his chief ally was Richard Windeyer, the two making a formidable team. Edward Deas Thomson, Colonial Secretary and member of the Council from 1843 until after responsible government started in 1856, commented in later life that the array of talent in the first elected Legislative Council was not equalled by any later assembly.

The first Councils were part-time affairs for the members, especially those with large properties to manage outside Sydney, or with private businesses in the city. The parliamentarian Roger Therry complained at one point of too many members not arriving until after their counting houses had closed for the day, and then leaving just in time to attend a fashionable dinner. Wentworth also complained about rural members absenting themselves in spring to supervise the sheep shearing on their estates. He made unflattering comparisons in the House between their patriotism and that of their herds of sheep.

Britain contemplates self-government for the colony

The 1842 Act had aroused widespread hostility in NSW and consequently a desire for greater autonomy. A sore point was the sections of the Act which allocated the Governor a certain amount of money annually to distribute to himself, the judiciary and other government officials as salaries. The Council had no control over this. Lack of control of land policy was also a major complaint, especially the sale of Crown land. Land was an issue which concerned just about all colonists - those with a lot of it wanted to hold onto it, while those with none saw land acquisition as the way to better themselves.

Throughout the 1840s, the old division between liberal and conservative groups was fading and a process of political realignment was underway. The two questions being debated were: was New South Wales ready to govern itself instead of being ruled from the other side of the earth by Britain, and which people in New South Wales should do the governing? Probably the first question was only being asked in Britain, because the colonists were almost unanimous in their desire for self-rule. However, the second question had many different views in the colony. Should government be only by the educated, or the well-to-do, or those with a stake in the country, or should it be spread among all citizens?

William Wentworth was by then moving towards a conservative political alliance with his former enemies, now convinced that all wealthy citizens should combine together to defend their interests. James Macarthur's vision was of rule by landed gentry with a sense of *noblesse oblige*, rather like the English squires who looked after their local community. However, many merchants and professional men didn't want the landed gentry to have all the power, but did not want to widen the franchise either. On the other side, democrats had visions of a new egalitarian society.

Both the British Prime Minister William Gladstone and Wentworth were distrustful of democratic tendencies, and both wished to see the progress of true democracy checked by stabilising institutions in Australia. Wentworth's dream was the creation of a hereditary class, titled as baronets, which would provide the members of an upper legislative house – called a "bunyip aristocracy"[58]. It was greeted with ridicule and indignation here, and had no support in Britain. One of the most vigorous opponents was the young Henry Parkes, who would in time become the most important force in Australian politics.

In 1850, Britain enacted the Australian Constitution Act No 2 which, apart from separating Victoria from New South Wales as a new colony, contained a number of sections that pointed to a more democratic future for the Australian colonies. Section 4 liberalised the franchise qualifications for the Legislative Council, so a much greater percentage of colonists could vote. The Act also removed the right of the British government to amend any laws passed by the colonies. In addition, the Act allowed the Australian colonies to impose any customs duties on imported goods from anywhere. This gave them some economic freedom.

But the 1850 Act was criticised in New South Wales, as there was not enough local control over revenue, and for not giving full powers to the Legislative Council. The growing demands for self-government in the colony were not satisfied by the Act. However, more important than the limited amount that the Act itself did was the power it gave the Australian colonies to do things for themselves. The 32nd section enabled them to constitute legislatures, to fix the voting franchise to suit their own wishes, to alter their constitutions. In short to clothe themselves in the constitutional garments that would fit them best. This was another milestone for the Australian colonies, as the British authorities had acknowledged that responsible government was inevitable, and they were allowing the colonists to design it themselves, subject to final approval by Britain.

The gold discoveries of the early 1850s brought an immense tide of immigrants to Australia. A large proportion of them were men who had been influenced by the reform and revolutionary movements in Europe, or had even been part of them: English chartists, Irish repealers, and participants of the many European upheavals of 1848. So far, the colonies had only been granted a partly representative government. They soon set themselves to the task of bringing about fully responsible government. New South Wales pioneered this under the leadership of William Wentworth. This had been his life's work, and he was to see many of his hopes realised.

In 1852, the Legislative Council was expanded to 54 members, and the Executive Council (which included the Governor) was separated from the Legislative Council and the judiciary. For the first time in the colony's life, the Governor was no longer a part of the legislature. In June, a committee of the Council was appointed with William Wentworth as chairman, to prepare a constitution. It was to be as closely as possible a copy of the British constitution, and to make it closer still, Wentworth suggested the establishment of a hereditary Upper House, similar to the House of Lords.

The committee recommended a Lower House of 50 members elected on a £10 property franchise, and a nominated Upper House consisting of members of a hereditary colonial peerage. The rural bias of the proposed Lower House and Wentworth's grand idea of a peerage were vigorously opposed in Sydney by the press and speakers on nearly every side of politics and social opinion. The bill when eventually passed by the Legislative Council in August 1853 provided for a Council with no hereditary principle at all. The New South Wales Constitution Act was taken to England by Wentworth and the Colonial Secretary Edward Deas Thomson so that they could watch over its progress though the Commons. Thomson had represented Governor Fitzroy throughout the drafting of the Constitution, due to the Governor's lack of interest in colonial politics.

Figure 30: Edward Deas Thomson

New South Wales takes the reins of government

The British parliament thought that the NSW Constitution bill went too far towards self-government. However, it was approved by the parliament in 1856 after amendments were made. There would be a Legislative Assembly to be elected on a broad property franchise, and a nominated Legislative Council. The qualification to vote was possession of freehold property worth at least £100, or paying at least £10 per annum rent, or who paid £40 per annum board and lodging. Nomination to the Council was for life, and was made by the Governor acting on the advice of his ministers. New South Wales was given wide powers over domestic matters, including revenue raising and the sale of Crown land. Britain still retained the power to veto colonial legislation.

This Act conferred a Constitution on the colony of New South Wales and established the first basic and enduring institutions of parliamentary democracy in Australia. William Wentworth had the satisfaction of seeing his new Constitution become law. This was despite the deletion of his safeguard against rash amendments to it, an Upper House of hereditary peers.

While "responsible government" was not specifically mentioned in the 1855 Act, this was clearly intended, so that Ministers of State were drawn from elected members of parliament and were not unelected officials as before. Ministers could be dismissed from office if they lost the confidence of parliament. This was new because those with power were responsible only to those who voted them there, and not to that unelected representative of the Crown, the Governor. This was the essence of responsible government. The first Premier and Colonial Secretary under responsible government was Stuart Alexander Donaldson, whose government took office in June 1856.

By the time of the first Legislative Assembly in 1856, the citizens of New South Wales had seen the Legislative Council operate for 13 years, and they were very conversant with the politics of electorates and with parliamentary institutions. An existing feature was the constant, detailed and often ruthless examination of the actions of the Government which had been in operation since the first partially-representative Council in 1843. The novelty in 1855 was the creation of a house of review. The old Legislative Council transformed itself fairly easily into the new Legislative Assembly, with very similar practices and procedures to those developed in the earlier era. This continuity was symbolised by the use of the same Council chambers in Macquarie Street by the Assembly. A new chamber was built for the Upper House.

William Wentworth, having seen his life's work achieved, spent his remaining days in England, except for a brief return to Sydney in 1861-2, when he was asked to preside over the Legislative Council during a political crisis. He preserved his reputation more by staying away from the political fray at home, where inevitably he would have tried to stop the democratic tide. He died in March 1872, and his body was brought to Sydney, where he was buried at Vaucluse after a state funeral in 1873. More than any other man, Wentworth secured our fundamental liberties and nationhood. Contradictory in some ways and often misunderstood, especially when he seemed more like an exclusivist as he aged, he often looked backward to the British landed gentry of the previous century, but with this sense of history behind him he built for the future.

Conclusion

When the British government sent out the First Fleet to Botany Bay in 1787, its only thought was to start relieving the pressure on the overcrowded prison ships and gaols, a critical problem after the Americans threw the British out in 1766 and refused to take any more convicts. What Arthur Phillip and his charges found was a harsh unfamiliar environment, infertile soil, a hostile indigenous population, no skilled tradesmen, and a large number of undocumented convicts to feed and keep in order. What they brought with them to administer the fledgling colony was a stack of English law books, a primitive justice system with a military tribunal run by an unqualified Marine officer, a Commission from the King giving the Governor wide-ranging powers to play it by ear as he saw fit, and not much else.

If the Secretary of State for the Colonies thought this was a sensible way of establishing a permanent self-sustaining colony on the other side of the world, he was lucky not to be in Port Jackson in the early years to witness the dire struggle to survive. Phillip had to quickly identify any convicts with useful skills, and then try to establish farms, construct buildings and a hospital and explore the land. He wasn't helped when Britain sent out more convicts at an increasing rate.

There were early signs that some things would be different in New South Wales when two First Fleet convicts were allowed to sue the ship's captain for loss of goods during transportation, contrary to the law of felony attaint. Other legal restrictions like property ownership and qualification to give testimony in court were also ignored when it became apparent that they were not feasible in the unusual environment of a penal colony. Local custom was soon established that convicts would be treated more like free citizens than they would in Britain for the colony to function properly. The problem was that the contradictions between English law and local practice were not reconciled for a long time, and illustrated more than anything else the complete lack of real planning prior to the social experiment that was New South Wales. The British were very slow to acknowledge the absurdity of imposing all of their law in an environment where much of it was not applicable.

The Governors realised before long that some of the ablest and most useful people in the colony were either convicts or emancipated convicts, often transported for trivial crimes or simply for political dissent. It was noted in Macquarie's time that the reforming effect of hard work, better food and living conditions and separation from old criminal haunts was remarkable. The more far-sighted Governors like King and Macquarie promoted or encouraged former convicts to return to their place in society, believing that they could make valuable contributions to the development of the colony if motivated to do so. Unfortunately, these reforming efforts met strong resistance from the British class system which also disembarked with the military officers (the traditional ruling classes) and the newly-rich graziers and merchants (the new colonial ruling classes – the bunyip aristocracy). These represented the exclusivists, who wanted all the power and wealth for themselves.

A struggle for power and status ensued between exclusivists and emancipists, beginning during Macquarie's time, diminishing only after the end of transportation in 1840 and finally ending when the interests of both groups came together by the time of responsible government in 1856. The class struggle was probably best illustrated by the long campaign for the replacement of the military-style juries with civilian juries and the acceptance of former convicts to serve on them. This was not achieved in civil trials until the 1830s, and then in criminal trials in the 1840s.

The final struggle in the development of the colony was to persuade Britain that it was able to govern itself. The long process of reducing the powers of the autocratic Governors started in 1823 with the establishment of a small Legislative Council of nominated government officials. This was steadily expanded, and prominent landowners and merchants were appointed to broaden the range of opinions represented. Despite the hopes of the Colonial Office, almost all appointees to the Council were exclusivists, so the wish to give a wider voice to the Council was not realised. It was only after transportation ended in 1840 that progress was made towards an elected government. The first step was a partly-elected Council in 1843, which included the first emancipist to be elected to office. The final step was the establishment of a completely elected Assembly and an appointed Council in 1855. At this point, the former convicts had achieved all their aims of representation in juries and in parliament, and were living with no legal or civil restrictions.

This has largely been the story of two men, whose efforts were critical to the achievement of citizenship for the emancipists. Edward Eagar was an Irish attorney who was sentenced to death for forgery, then transported to New South Wales where his convict background ruined his legal practice and later his trading business. From these experiences, he became Australia's first liberal agitator, finally achieving legal and civil rights for his fellow emancipists. William Charles Wentworth was not a convict, but his mother was, and his father, a native of Ireland, barely avoided becoming one. From an early age, he imagined himself leading Australia towards the freedoms and institutions enjoyed by British citizens, and prepared himself for his life's work with a legal education in England. He had the satisfaction of seeing his dreams realised in the latter part of his life when trial by jury and representative government were established in the colony.

Notes

1. Britain ran its large colonial empire with the policy of mercantilism. Under this policy, the government controlled foreign trade. It involved policies such as trade monopolies within the empire, enforced by the powerful Royal Navy. The Navy regularly patrolled waters controlled by monopolies such as the East India Company, seizing any foreign ships that were trading in the area and selling the ships and their cargo.
2. By the end of the war, the French left North America, but Britain was left very short of cash. The British government tried to tax the Americans to refill their coffers, claiming they had rid America of the French. They brought in the Stamp Act of 1765 which directly taxed American colonists to help pay for the war. The planned taxes were on virtually every transaction. However, the Americans complained that they had no say in the new tax.
3. The enclosure movement ended the ancient practice of arable farming in open fields in which peasants had traditional rights to work the land in common. Starting on a small scale in the sixteenth century and peaking by the middle seventeenth century, land was fenced off and belonged only to the owner. The peasants had to then work for the owner and be paid for their labour. This was one of the most controversial events in Britain's economic history, and represented a consolidation of power and wealth by the landed gentry.
4. Property crime seemed to increase throughout the early stages of the Industrial Revolution, as new opportunities arose, such as large warehouses full of goods, newly established banks full of money, and goods lying around in transit while being moved around. In addition, factory workers were basically paid as little as possible by factory owners, just enough so that they had to keep coming to work in order to be fed, housed and clothed.
5. Life on board the hulks was appalling. Disease spread quickly due to the poor standard of hygiene. Little medical attention was given to the sick, who were not separated from the healthy. Prisoners slept fettered in cramped quarters. The mortality rate on the hulks was typically around 30%. Between 1776 and 1795, nearly 2,000 of the 6,000 prisoners on board the hulks died.
6. The prison hulks continued in use until the government responded to prison reformers and anti-transportation lobbyists by building model prisons such as Pentonville, Brixton and Chatham to replace them. The era of the hulks finally ended when one of them, the *Defense,* burned down off Woolwich docks in 1857.
7. Six of the ships were convict transports (*Alexander*, *Charlotte*, *Friendship*, *Lady Penrhyn*, *Prince of Wales*, and *Scarborough*), three ships were food and supply transports (*Golden Grove, Fishburn*, and *Borrowdale*), and two were Naval escorts (HMS *Sirius* and HMS *Supply*). Most residents of Sydney will be familiar with these names, as they are the names of many of the passenger ferries plying the daily routes in Sydney Harbour.
8. Attributed to George Barrington, pickpocket and author, in the Prologue at the opening of the Sydney Playhouse on 16 January 1796
9. Leroy, Paul Edwin, *Edward Eagar, the Champion of Rights,* c1962.
10. The British government intended that the marines who accompanied the early convict fleets would be the permanent military presence in the colony, but many of them weren't happy in New South Wales, especially their testy and un-cooperative commandant Major Robert Ross. So a military Corps was assembled in England to replace them. The posting was unpopular, so as an inducement to enlist, officers were promised grants of land when they arrived in the colony.

11. Grose took a laissez-faire approach to his administration, allowing his officers to run the farming and administrative activities. He was very different from Phillip, who had kept a close personal watch over the whole settlement. He placed great trust in the officer farmers, assuming they would develop the resources of the colony to the benefit of all. His time as acting Governor saw a great increase in private farming to the detriment of public farming, as he thought that Phillip's approach of government-led farming had not met the colony's needs to date.
12. Samuel Terry arrived in June 1801, having been transported for seven years for stealing 400 pairs of stockings. Early on, he worked in a stonemason's gang for Samuel Marsden and, as an indication of those unusual times, was both flogged for laziness and rewarded for hard work. His sentence expired in 1807, but before this, he had been a private soldier, a self-employed stonemason and had set up a shop at Parramatta. By 1809, he had a farm on the Hawkesbury. In March 1810, he married Rosetta Marsh, a widowed innkeeper, and a woman of some importance.
13. William Redfern arrived in December 1801. A qualified surgeon, he was a naval surgeon's mate when he was sentenced to death, commuted to transportation, for a minor part in the mutiny of sailors of the Royal Navy in 1797over better pay and conditions. As a convict, Redfern did not have any evidence of his medical qualifications on his arrival. Subsequently, he was examined in medical knowledge by a panel of qualified surgeons and became the first doctor to receive Australian medical qualifications. For this, he can rightly be called the father of Australian medicine.
14. He had survived the infamous mutiny on the *Bounty* at Tahiti in April 1789 by navigating a small boat of loyal crew members almost 6,000 kilometres to Timor. He brought to the colony an extremely hot temper, an ability to swear well and vigorously, and an obsession with obeying the orders of his superiors, often at the expense of the feelings or well-being of his fellows.
15. New South Wales Courts Act 1787 (27 Geo III C.2).
16. Molony, John, *Australia, Our Heritage*, Melbourne, 2005.
17. Castlereagh to Macquarie, 14/5/1809, *Historical Records of Australia VII*, p. 143.
18. Scott, Ernest, *A Short History of Australia*, 1916, p. 76.
19. Two of the 46th Regiment's officers were sympathetic to the emancipists, however: Lieutenant John Cliffe Watts was an Irish military officer and architect, and in time he designed some of the first permanent buildings in Sydney, including the military hospital that became Fort Street High School, and is now the headquarters of the National Trust of New South Wales. He was loyal to the Governor's emancipist policies, immigrated to South Australia in 1840, and became Post-Master General there. Also, Major Henry Colden Antill of the 73rd Regiment decided to stay in New South Wales after his regiment was replaced. He became a close friend of Redfern, and a firm supporter of the emancipist cause.
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23. Eagar to Bathurst, 3 April 1823, HRA, Series 1 Vol. 4, pp 483-464.
24. New South Wales Act (1823) 4 Geo IV C. 96.
25. R. v. The Magistrates of Sydney [1824], Supreme Court of New South Wales, Forbes C.J., 14 October 1824.
26. R. v. Sheriff of NSW [1825], Supreme Court of New South Wales, Forbes C.J., 10 January 1825.
27. R. v. Cooper [1825], Supreme Court of New South Wales, Forbes C.J., 12 February 1825.
28. The Australian Courts Act (1828), 9 Geo IV C.83.
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38. Jury Trials Act (No. 2) 1844 No. 10a.
39. Jurors and Juries Consolidation Act 1847 No. 20a.
40. Blackstone, W (1765), *Commentaries on the Laws of England*, Book IV, Chapter 7), Oxford.
41. Forfeiture Act of 1870 (33 and 34 Vict c. 23).
42. Transportation Act 1824 (5 Geo IV c. 84)
43. Punishment of Death, etc. Act 1832, 2 & 3 Wm. 4, c. 62, known as Lord Wynford's Act.
44. Offenders Punishment and Justices Summary Jurisdiction Act 1832 (3 Will IV No. 3.
45. Case reported in the *Sydney Herald* on 5 December 1833.
46. Britain: The Evidence Act 1843 (6 & 7 Vict. c. 85), New South Wales: Law of Evidence Act 1844 (8 Vic. no. 1).
47. The Transportation Act 1843 (6 Vict. c. 7).
48. Forfeiture Act of 1870 (33 and 34 Vict c. 23).
49. Clune D., *The Development of Legislative Institutions in NSW 1823 – 1843,* p. 80.
50. *The Sydney Gazette and New South Wales Advertiser*, 26 August 1824.
51. *Australian Dictionary of Biography*, John Thomas Campbell entry.
52. Clune D., *The Development of Legislative Institutions in NSW 1823 – 1843,* p. 85.
53. Clune D., *The Development of Legislative Institutions in NSW 1823 – 1843,* p. 85.
54. The Reform Act, more correctly called the Representation of the People Act 1832 (2 & 3 Will IV c. 45), introduced wide-ranging changes to the British electoral system. Included was a property qualification for electors that resulted in about one in six adult men being eligible to vote.
55. Scott, Ernest, *A Short History of Australia*, 1916, p. 121.
56. Rebellions in Canada in 1837-8 between ethnic French and English settlers resulted in the Whig politician John Lambton (the Earl of Durham) being sent out to investigate the causes of the unrest and make recommendations. The conclusions of his report relating to the ethnic question were controversial (as he essentially blamed the French settlers for being stuck in the past), but those pertaining to self-government were used as a model for political change in other British colonies.
57. Australian Constitution Act 1842 (5 & 6 Vict. c. 76).
58. The term “bunyip aristocracy” was coined by the journalist and politician Daniel Deniehy in a speech the Victoria Theatre in Sydney in 1853. Deniehy, the son of Irish convict parents, was a strong advocate of extended democracy in the emerging political systems of the colony. He used the term while satirising Wentworth’s dream of a colonial version of the House of Lords.

Appendix 1 – Early arrivals in the colony

Governor Phillip's era

James Bloodworth was a brickmaker and builder who arrived as a convict in the First Fleet. Phillip immediately appointed him master bricklayer in the colony and set him to work. In the absence of any architects, he was mainly responsible for the design of Australia's first buildings, although some of the better educated officers must have had some knowledge of architecture. He made great efforts to teach others the trade of bricklaying, at a time when most convicts were known for being rebellious and doing as little work as possible.

A shortage of proper mortar was a major difficulty, and Bloodsworth improvised by burning shells to obtain lime to mix with mud. He was able to construct a number of serviceable buildings, including the first government house, which lasted from 1788 to 1845, and the storehouse at King's Wharf.

James Ruse arrived as a convict in the First Fleet, and applied for a land grant at the end of his sentence in 1789, claiming that he was bred for farming. He was the first ex-convict to ask for a land grant in the colony, and Phillip was willing to assist him with a small allotment and provisions at Parramatta, partly to see how long it would take for an ex-convict to become self-sufficient.

By 1791, he was able to support himself and his wife by hard work and an enlightened approach to making the best of limited resources. This encouraged Phillip by showing not only that an ex-convict could successfully return to his profession after serving his sentence, but also that a small landholder could maintain himself in the colony.

John Irving was a surgeon who arrived in the First Fleet as a convict, and on landing in Port Jackson was immediately employed as an assistant at the hospital, having demonstrated his medical ability during the voyage. In February 1790, he became the first convict in the colony to be emancipated, due to his good work and conduct.

John Macarthur, son of a draper from Plymouth, arrived as a lieutenant in the New South Wales Corps in June 1790, hoping for rapid promotion and a return to England. He was energetically ambitious, and by 1793 had extensive control over the colony's basic resources as regimental paymaster, and inspector of public works.

Orders for regimental victuals were being placed with his brother in Plymouth, and along with his fellow officers, he started commercial speculation in the colony. His original 100 acre grant in Parramatta was soon doubled, and he was promoted to captain in May 1795.

Simeon Lord arrived in August 1791 after being convicted as a 19-year-old for stealing a considerable quantity of cloth. A sympathetic jury valued the goods at only 10 pence, resulting in seven years transportation. He was emancipated early and seemed to start his business career working from inside the New South Wales Corps activities of dealing in spirits and other goods bought in bulk by the officers.

He gradually built up his business and reputation as a wholesale merchant and as a general agent for captains bringing shiploads of goods to Sydney. In time, he made efforts to get permission to import and export goods directly, in order to bypass the Corps officers' trading monopoly.

Isaac Nichols arrived in the colony as a convict in October 1791. After a few years, his ability and diligence resulted in an appointment as overseer of the convict gangs working around Sydney. Despite getting into more trouble after arrival, he was one of the ex-convicts who took full advantage of the economic possibilities in the colony, increasing his land holdings to 1,400 acres, building a substantial house and establishing a shipyard.

Andrew Thompson arrived as a convict in February 1792, having been transported for fourteen years for theft of some cloth as a sixteen-year-old. He joined the police force in the Windsor area in 1793, quickly rose to chief constable, and gradually accumulated land by grant and purchase.

In the period up to Bligh's arrival in 1808, Thompson built four ships and became the largest grain grower and wealthiest settler in New South Wales. His rapid rise to wealth showed the government attitude to ex-convicts from the early days, as those with enterprise and ability were encouraged to take part in the commercial development of the little colony in the absence of free settlers.

Mary Reibey arrived in the colony in October 1792 as thirteen-year-old Mary Haydock, sentenced to seven years transportation for horse-stealing. In September 1794, she married the free settler Thomas Reibey, who she had met on the way out. He was an astute trader who kept out of the constant squabbles between the colonists and the Governors, and was probably the first trader who was not part of the military circle.

Thomas Reibey died in April 1811, and his business partner Edward Wills died a month later, leaving Mary in complete control of a large number of business concerns. She already had a good knowledge of the businesses as her husband's long-term assistant, and soon became very prosperous in the tough school of competition with American, Indian and Chinese traders.

Reverend Samuel Marsden arrived in March 1794 to take up a position as assistant to the colonial chaplain Richard Johnson. He was the son of a Yorkshire blacksmith, and had met the abolitionist politician William Wilberforce while in his twenties, who recommended him for the position in the colony.

Though he had no farming background, Marsden quickly committed himself to farming, eventually accumulating 1,730 acres with over 1,000 sheep and other stock. He specialised in the strong Suffolk breeds, which were more immediately valuable in the colony than the fine-fleeced merinos imported by John Macarthur. He became a large wool producer, but was not an innovator like Macarthur.

Marsden was in time accused of avarice because of his large landholdings and trade interests, and that he was of being too occupied in money-making enterprises and not enough in attending to his spiritual duties. However, this was partly because an appointment as magistrate kept him away from the church much of the time.

Governor Hunter's era

Michael Massey Robinson arrived as a convict in May 1798. He was a practising lawyer, and had been transported for writing slanderous satirical poetry, and for blackmailing one of the subjects of his satire. He may have been the first qualified lawyer to live in New South Wales. He was conditionally pardoned two weeks after his arrival, and became the secretary of Richard Dore, the new deputy judge-advocate who replaced David Collins. Dore was basically a legal clerk, and had no training as a lawyer.

William Hutchinson arrived as a convict in 1799. In Sydney, he was convicted of theft from the government stores, and sent to Norfolk Island. He was soon appointed overseer of government stock, and eventually superintendent of convicts. He acquired considerable property on Norfolk Island, which he increased by trade, mainly by selling pork to the government. Back in Sydney, he was to become one of the leaders in the campaign for fuller civil rights for emancipists.

George Crossley arrived in July 1799 as a convict, having practised law in London for 24 years. He was to become a controversial and notorious figure in the life of the colony over the next twenty years. Frequently chased by creditors for money owed, he worked as an attorney in Sydney. While not allowed to plead directly in court because of his convict past, he advised several high profile clients on legal matters over the years, and for some years he was the most experienced legal professional in the colony.

Reverend Henry Fulton arrived in January 1800 as a convict, transported for his involvement in the Irish Rebellion of 1798. The departure of the principal chaplain Reverend Richard Johnston allowed Fulton to resume his profession in New South Wales. He was conditionally pardoned in February 1800, and sent to work in Norfolk Island.

Later he stood in for Samuel Marsden when he was away in England on leave, and served on the Civil Court and the Commission of the Peace. Some years later, he was to become a prominent member of the various campaigns for emancipist rights.

James Meehan arrived in the colony as a convict in February 1800, transported, like Henry Fulton, for his part in the Irish Rebellion of 1798. He was assigned as a servant to the acting surveyor-general Charles Grimes in April 1800, and accompanied Grimes on several surveying expeditions. Conditionally pardoned soon after 1803, he surveyed farms for grantees throughout the colony.

Meehan did not involve himself in emancipist campaigns, but became a shining example of an ex-convict who made the most of opportunities that presented themselves in the fields of surveying and public administration, and who was able to make an important contribution to the development of the growing colony.

Governor King's era

Samuel Terry arrived in 1801, having been convicted of theft when he was a labourer in Manchester and transported for seven years. While still serving his sentence, he was a private soldier, self-employed stone mason and set up a shop in Parramatta. By 1815, he had prospered rapidly for some years, with an inn, store, and a farm, and also by speculation in city and country properties. By 1820, he held more mortgages in value than the Bank of New South Wales, and had almost exactly half of all land held by ex-convicts. How he accumulated wealth is not clear, but at first it was by frugality and shrewdness, but after this, there were rumours of unscrupulous behaviour.

By the late 1820s, he was increasingly associated with the political aspirations of the ex-convicts. He helped to organise petitions during this time for trial by jury and a house of assembly. He and his wife may be seen in hindsight as two able, determined early colonists who wanted to reverse their unfavourable early fortunes, and succeeded.

Governor Bligh's era

William Fleming arrived in 1809, having been sentenced to life in Wexford, Ireland in 1807. He was an attorney by profession, and after arrival, he practised law in the Court of Criminal Jurisdiction in Sydney.

Governor Macquarie's era

Edward Eagar arrived in 1811, having been sentenced to death in Ireland for forging a bill of exchange, later commuted to transportation for life. On arrival, he was immediately assigned to teach the children of a clergyman, then in 1812 helped to form the Methodist church in the colony.

He also helped to found other institutions such as the Sydney Benevolent Society, the Royal Women's Hospital in Paddington, the British and Foreign Bible Society and the Bank of New South Wales. He suffered setbacks that led him to become the colony's first liberal political agitator, such as being prevented from serving on the Bank as a director, practising law, then when working as a merchant in the Pacific.

He made a major contribution to gaining the civil and legal rights of colonists, and of former convicts in particular.

Robert Cooper arrived in 1813**,** after being sentenced to 14 years transportation for receiving stolen goods valued at £3,000, having unsuccessfully argued in court that he already had several convictions for smuggling to prove that he wasn't a common thief! He became a shop owner, a part-owner of a ship and an auctioneer.

By 1827, he was operating a distillery, then established a brewery, and had many other business interests, which was common in those entrepreneurial times. In about 1824 he built Juniper Hall in Paddington (named after the main ingredient of his gin distillery), one of the finest houses in the colony that survives today. He was not involved in emancipist campaigns, but did stand (unsuccessfully) for the first elections held in 1843.

William Bland arrived in 1814, transported for seven years after killing a man in a duel in India, where he was a naval surgeon. Pardoned in 1815, he operated a flourishing medical practice in Sydney. He took a major part in public life, including a long association with the Benevolent Society, the Sydney College, and the Sydney School of Arts.

He was politically active from the first meetings of the emancipists in 1821, and took part in all the important public campaigns for emancipists and colonists rights, including in the formation of the Australian Patriotic Association in 1835. He became the first former convict elected to the new Legislative Assembly in 1843.

A flamboyant figure in Sydney, he had a basically argumentative disposition, quarrelling in parliament and in the press with numerous men over a long time, but he is recognised today for his ability as a surgeon, his selfless interest in the sick and poor, and for the time and energy he devoted to establishing the two basic rights of trial by jury and representative government in the colony.

Francis Greenway arrived in 1814 as an experienced and talented architect, after being sentenced to death, commuted to fourteen years transportation, for forging a document. He was allowed much freedom, because he started private practice almost immediately. By 1816, he was working on government projects as civil architect. These included major works such as the Macquarie Lighthouse at Watson's Bay, the Hyde Park Barracks, and St James Church in the city.

Greenway had a difficult personality, arrogant and quick to take offence. He quarrelled tactlessly with everyone he dealt with, and by the late 1820s could not find work in the colony. Despite this, his contribution to the built environment was unmatched in his time, and the graceful sandstone buildings he completed are his legacy.

Solomon Levey arrived in 1815, after being sentenced to transportation for seven years for being an accessory to theft. In the same year, he was soon dealing in real estate and supplying the government store with goods. He received an absolute pardon in 1819 and prospered as store-keeper, ship-broker and agent.

In 1825, he went into business with Daniel Cooper. The company of Cooper & Levey operated in many emerging fields of business and had a large share of the colony's economy. In 1826, Levey went to London to open an office there, and to raise money for the business. His triumphant and prosperous return to England was thought to have triggered Australia's first wave of free migrants.

He died in London. He was a man of upright character and great kindness. He was a shrewd pioneer businessman and capable financier, a forward-thinking economist, and a great immigration agent for the colony.

Daniel Cooper arrived in 1816, having been convicted of theft in Chester and sentenced to transportation for life. He was pardoned conditionally in 1818, and absolutely in 1821. In the same year, he partnered William Hutchinson and Samuel Terry in the Waterloo Company, which expanded from flour-milling to general merchandising. In 1825, he and Solomon Levey became the sole owners of the company, which had a spectacular success, particularly because both were ex-convicts.

From early on, he served on committees with a wide range of objectives, and took an active part in the long campaign to have ex-convicts serve on juries.

Lancelot Iredale arrived in 1816. An ironmonger, he was convicted of stealing four iron bolts and sentenced to seven years transportation. In Sydney, he worked as a blacksmith while serving his sentence. Pardoned in 1820, he established the firm Iredale & Co (ironmongers). This firm became Nock & Kirby, then BBC Hardware, and finally Bunnings Hardware.

Not much is recorded about Iredale's life outside his work, but he was a public benefactor, as he paid for the construction of the Wesleyan Chapel building in Surry Hills in 1845.

Appendix 2 – Early Governors of New South Wales

Arthur Phillip	January 1788 – December 1792
Francis Grose	December 1792 – December 1794
William Paterson	December 1794 – September 1795
John Hunter	September 1795 – September 1800
Philip Gidley King	September 1800 – August 1806
William Bligh	August 1806 – January 1808
Lachlan Macquarie	January 1810 – December 1821
Sir Thomas Brisbane	December 1821 – December 1825
Ralph Darling	December 1825 – October 1831
Richard Bourke	December 1831 – December 1837
Sir George Gipps	February 1838 – July 1846
Sir Charles Fitzroy	August 1846 – January 1855
William Denison	January 1855 – January 1861

Francis Grose and William Paterson served as Lieutenant-Governors after Phillip's early departure with illness, until John Hunter's arrival.

After William Bligh's deposition in 1808, various New South Wales Corps officers ran the colony until Lachlan Macquarie's arrival in 1810.

Appendix 3 – British Secretaries of State for the Colonies

Lord Hobart	March 1801 – May 1804
Earl Camden	May 1804 – July 1805
Viscount Castlereagh	July 1805 – February 1806 and March 1807 to February 1809
Earl of Liverpool	November 1809 – June 1812
Earl Bathurst	June 1812 – April 1827
Viscount Goderich	April 1827 – September 1827 and November 1830 to April 1833
William Huskisson	September 1827 – May 1828
Sir George Murray	May 1828 – November 1830
Edward Stanley	April 1833 – June 1834
Thomas Spring Rice	June 1834 – November 1834
Earl of Aberdeen	December 1834 – April 1835
Lord Glenelg	April 1835 – February 1839
Marquess of Normanby	February 1839 – August 1839
Lord John Russell	August 1839 – August 1841
Lord Stanley	August 1841 – December 1845
William Ewart Gladstone	December 1845 – June 1846
Earl Grey	June 1846 – February 1852
Sir John Pakington	February 1852 – December 1852
Duke of Newcastle	December 1852 – June 1854

These British cabinet ministers were the direct superiors to the Governors in the colony, and so were closely involved with its development. Their names are liberally sprinkled around the maps of the country to this day.

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