Law and History Review (2025), 1–27
doi:10.1017/S0738248024000233

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY
CAMBRIDGE UNIVERSITY PRESS

ORIGINAL ARTICLE

Innovation in the Courts: Ellis and Jeffery Hart Bent in New South Wales—an Analysis of Minute Books

Paula Jane Byrne

Visiting Scholar, State Library of New South Wales, Sydney, NSW, Australia
Email: paulajanebyrne22@outlook.com

Abstract

Close reading of documents produced by the early courts in New South Wales show two young men, formerly barristers at the Northern Assizes, innovating in their court rooms. Such innovation derived from their merchant background rather than the traditions of mercy or paternalism of the Assizes. In such innovations colonial agents were empowered and could shape the workings of the courts themselves. Minutes of the court show the impact of new kinds of elites generated by wealth built on slavery on the courts in the colonies and the subsequent flowering of subcultures.

Ellis Bent and his brother Jeffery Hart Bent had both been barristers on the Northern Circuit of the Assizes in England in the early nineteenth century. They were sons of the merchant and slaver Robert Bent[1] and in following the law as a profession they were part of a group of young men of merchant and slaving background who provided the glitter and originality of the Bar in centers such as York, Lancaster, and Durham in the North of England.[2]

[1] According to the *Transatlantic Slave Database* (consulted April 12, 2013) Robert Bent and his brother Ellis appear in records of 34 slaving ventures until 1803, bearing responsibility for the purchase of 12,592 persons from West Central Africa, the Gold Coast, the Bight of Biafra, and the Gulf of Guinea and the sale of 11,557 persons in the West Indies, over a thousand people dying on their voyages. Robert Bent singly owned three slave ships leaving London Docks between 1790 and 1800. In 1807 he was listed as a member of *The Company of Merchants Trading to Africa*. Elizabeth Donnan explains that these were men who had been prominent in the slave trade and, after holding out as long as possible had made the difficult transition into other commodities. Elizabeth Donnan, *Documents Illustrative of the History of the Slave Trade to America*, Vol. II (New York: Octagon Books, 1965), 655.

[2] See also David Lemmings, *Professors of the Law, Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000), Christopher Brooks, *Lawyers, Litigation and English*

When Robert Bent suffered financial ruin the extravagant lifestyle of the Bar could no longer be supported and Ellis was forced to take up a position as Deputy Judge Advocate to the colony of New South Wales in 1809. Robert's situation worsening through his speculations, he was able to obtain the position of Puisne Judge to the new Supreme Court of New South Wales for his eldest son, Jeffery in 1813. Both brothers clashed with New South Wales Governor Macquarie over the independence and majesty of law in a penal colony and the dispute has been set out by C.H. Currey.[3] This dispute has dominated the historiography but close analysis of the records they left show they certainly did not adhere to the paternalism or mercy of the Assize courts from whence they came but innovated and experimented. This innovation mindset I suggest derived not from their acculturation into the English Bar or their involvement in the majesty of the Assizes but from their merchant background. The volumes also show the slow uptake of ideas of English rights in colonial courts of the early Macquarie era and key actors in such change were the agents and clerks of the colony.

Scholarship on the history of law in New South Wales at this time has concentrated mainly on the personalities of the Bents in their disputes with Governor Macquarie. Personality for many years was the staple of colonial historiography.[4] While there has been study of the use of law by the colonial population there has not been close analysis of the modes of recording of cases and the different hands and groups involved.[5] This paper relates to work by Alan Atkinson on the importance of recording and writing to the administration of early colonial New South Wales "the discipline of pen and ink."[6] It concentrates on two sets of volumes that were matters of life, death and impoverishment to the colonial population.

One of the byproducts of slavery was to create a group of young legal minds, as the law was favored by merchants as a profession for their sons.[7] David Lemmings describes three quarters of the English Bar as being of less than fifteen years standing in 1790.[8] David Pope has tabulated the professions of the sons of slavers and lists six men apart from Ellis and Jeffrey Hart Bent who were lawyers or barristers: Thomas Birch, Thomas Crowder Clemens, Richard Earle, John Ingram, James Parke, and Robert Welch all of whom matriculated

Society Since 1450 (London: Hambledon Press, 1998); David Pope researched the professions of sons of slavers David Pope, "The Wealth and Aspirations of Liverpool's Slave Merchants,' in *Liverpool and Transatlantic Slavery*, eds. David Richardson, Anthony Tibbles and Suzanne Schwartz (Liverpool: Liverpool University Press, 2007), 164–218.

[3] Charles H. Currey, *The Brothers Bent* (Sydney: Sydney University Press, 1968).

[4] Currey, *The Brothers Bent*; John Ritchie, *Lachlan Macquarie* (Melbourne: Melbourne University Press, 1983); David Neal, *The Rule of Law in a Penal Colony* (Melbourne: Cambridge University Press, 1991).

[5] Bruce Kercher, *Debt, Seduction and other Disasters* (Sydney: Federation Press, 1996); Paula Jane Byrne, *Criminal Law and Colonial Subject* (Cambridge: Cambridge University Press, 1993); Neal, *The Rule of Law in a Penal Colony*.

[6] Alan Atkinson, *The Europeans in Australia, Volume 1* (Melbourne: Oxford University Press, 1997), 4.

[7] Timothy Tindale Daniell, *The Lawyers* (London: Wildy and Sons, 1976), 76.

[8] Lemmings, *Professors of the Law*, 105.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

between 1781 and 1808.[9] On the Northern Assizes the Bents joined active and imaginative young men also primarily of merchant background who in the middle of the first decade of the nineteenth century were gaining accolades for their performances. The newspapers were effusive about their style and presentation. The *Leeds Intelligencer* reported on the trial at Lancaster of Thomas Lee for secreting his effects from his creditors that "several ingenious objections were taken and a masterly argument by the prisoner's counsel Mr Scarlett and Mr Littledale." The principal objections were to the proof offered on behalf of the prosecution, of the debt of the petitioning creditors, the act of bankruptcy and the technical form of the indictment in several particulars.[10] James Scarlett was the son of the Jamaican Planter Robert Scarlett and Joseph Littledale was the son of the Liverpool merchant Henry Littledale.[11] The money provided by slavery allowed the presence of such young men in the courts of England and the empire meant slavery was productive not only of commercial development based on violence and cruelty but also institutional development engendered by these empowered young men. In New South Wales it produced the innovative young Bents and their way of managing law in the colony. The specific culture of slave merchants with their "turtle frolics" and their "muslin clothed daughters" was apparent to contemporaries. Lorinda Goodwin has written of the importance of familial intimacy in business connections. The more people merchants knew the wider their sphere of influence; consequently, it was unwise to exclude anyone of wealth from their circle. This created an openness to new ideas, to innovation and a belief that the number and quality of goods owned determined the status of a person.[12]

The move away from discourse analysis and into the vagaries and confusions of the actual working of power discussed by Durba Ghosh[13] means that one would not expect these men with their distinct culture to have entirely their own way in the colony of New South Wales. Around them were numbers of clerks and agents who would themselves impact the working of the law. This paper concentrates on the Minute books of the Court of Criminal Jurisdiction and the Court of Civil Jurisdiction in New South Wales in the years from 1810 to 1815. It also refers to the Judge Advocate's Bench where Ellis Bent sat with mainly emancipist magistrates and decided with them on cases as comparison to the two courts that Ellis Bent controlled by himself. It examines not interpretations of common law or readings of statutes, but entries and what they can tell about how the courts operated during this time. The Bents created these volumes and what is recorded in them shows much of the day to day workings of law in the colony. Because such a project is not standard legal

[9] Pope, "The Wealth and Aspirations of Liverpool's Slave Merchants," 164–218.

[10] R v Thomas Lee reported in *Leeds Intelligencer*, August 5, 1805.

[11] James Scarlett first Baron Abinger, Joseph Littledale, Judge, *Oxford Dictionary of National Biography*. Oxforddnb.com consulted May 5, 2023.

[12] Lorinda B. R. Goodwin, *An Archaeology of Manners, The Polite World of the Merchant Elite of Colonial Massachusetts* (New York: Kluwer, 1999), 89, 139. Susanne Seymour and Sheryllynne Haggerty, "Slavery Connections of Brodsworth Hall, Final Report for English Heritage," October 2010 online.

[13] Durba Ghosh, "Another Set of Imperial Turns?" *The American Historical Review* 117, no. 3 (June 2012): 772–93.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

history this approach as Alpana Roy writes in her discussion of post-colonial theory and law, refuses to be "restricted by law's way of viewing itself."[14] Rather, it follows Ann Laura Stoler's method of reading "along the archival grain"[15] in order to show not structures of governance, but the impact of new kinds of elites generated by slavery on the courts in the colonies and the consequent flowering of subcultures.

Ellis Bent's interest in the commercial side of civil law and his strictures according to proof and written evidence meant that his Court of Civil Jurisdiction initially served the wealthy traders of Lower Pitt and George Street Sydney. Yet he also empowered agents because of his more complex approach to managing civil business. In turn these agents were creatively able to shift the court away from some of the strict regulating that Bent instituted and the court began to open again to persons of lower status. The statements of agents in court allow access to the several levels of dealing they associated with their appearances. Much lay behind any single case and indeed the business of the court sprawled through other arenas besides the court itself. Bent created a culture around writing and proof enormously profitable for those that could work as agents. In the Criminal Court it was these agents who introduced ideas of questioning witnesses and strengthened the idea of a defence; it was they and Jeffery Hart Bent who moved the Court closer to notions of English right in the court room. The interest in commerce and profit characterized the colonies but Ellis Bent carried with him the abrasive interest of the merchant alongside his law.

Legal historians have seen Bent as introducing English orthodoxy to the colony and this was so in strictly legal terms.[16] His courts, however, did not mirror the culture of the Assizes from whence he came. His criminal court was slow to allow cross examination from the prisoner, a move away from the mercy of the Assizes where defendants were more likely to be represented by barristers and there was close questioning of witnesses, core aspects of English rights.[17] Bent's Civil Court was tailored for the wealthy of the colony. These were distinct ways of managing law. The new Imperial history meant that colonial and British identity, ideas, or authority were no longer seen as deriving from metropole to colony but emerging from refractions, mirrors, and disconnects.[18] This study of Ellis and Jeffery Hart Bent in considering

[14] Alpana Roy, "Postcolonial Theory and Law, a Critical Introduction," *Adelaide Law Review* 29 (2008): 315–57.

[15] Ann Laura Stoler, "Colonial Archives and the Arts of Governance or the Content in the Form," in *Refiguring the Archive*, eds. Carolyn Hamilton, Verne Harris and Michele Pickover (Cape Town: David Phillip, 2012), 83–102.

[16] Bruce Kercher, *An Unruly Child, A History of Law in Australia* (Sydney: Allen and Unwin), 1995, 49.

[17] Peter King, *Crime, Justice and Discretion in England* (Oxford: Oxford University Press, 2003).

[18] Tillman W. Nechtman, *Nabobs, Empire and Identity in Eighteenth Century Britain* (Cambridge: Cambridge University Press, 2010); Kathleen Wilson, *The Sense of the People, Politics, Culture and Imperialism in England, 1715–1785* (Cambridge: Cambridge University Press, 1998); David Lambert and Alan Lester, *Colonial Lives Across the British Empire, Imperial Careering in the Long Nineteenth Century* (Cambridge: Cambridge University Press, 2006); Zoe Laidlaw, *Colonial Connections* (Manchester: Manchester University Press, 2005); Toby Barnard, *A New Anatomy of Ireland, The*

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

their management of the courts may be seen to tailor with the perspectives of the new Imperial history in that the ways the Bent's managed law were themselves refractions of colonization and international trade. This paper also suggests that particular and diverse groups of administrators shaped the colonies according to their own cultures, whether it involved the stylishness of the merchant or the rigorous Methodism of a gaoler. These different cultures or ways of being tangled and conflicted across Empire and their influences might have been fleeting or long lasting. No one person shapes a system but that system is made up of skirmishes and the day-to-day working of the law in New South Wales during the tenure of the Bents is one example of how power operates, through the structuring of an institution by culturally influenced individual choice and creative utilization of these structures by subcultures.

The Civil Court

The most detailed exploration of civil law in the early colony of New South Wales has been undertaken by Bruce Kercher. He discovered considerable divergences from English law in colonial practice in the Court of Civil Jurisdiction from its inception. He also established Ellis Bent's adherence to English orthodoxy but also his willingness to adapt to colonial exigencies. Bent instituted a term of eight days for debts to be paid as ordered by the court and there was to be no payment in kind, a considerable divergence from earlier practice and harsh for many debtors.[19] Though there was a Court of Appeal Macquarie softened Bent's orders that debts be paid immediately only five times in the period according to Kercher and deferred to Bent's decisions in all but three cases during the entire period of the court.[20] While Bent tolerated the presence of women traders in the Civil Court as litigants he restricted the appearances of the wives of free men apart from Elizabeth Macarthur whose husband was absent from the colony.[21] Bent sought to limit the number of cases deriving from the rebellion against Bligh and there were few personal actions brought before his court and he heard only one defamation action and that was unsuccessful.[22] The court under Bent became more concerned with aspects of commercial life. This understanding of the law, however, does not derive entirely from the climate of the Northern Assizes where civil cases were often what Bent would see as trivial. *Storey v Eagle (1802)* for example involved a breach of promise case between a washerwoman and a man who courted her by coming to stand by her washtub.

Irish Protestants, 1649–1770 (New Haven: Yale University Press, 2003); Alan Lester, "Imperial Networks, Creating Identities in Nineteenth Century South Africa and Britain," in *The New Imperial Histories Reader*, ed. Stephen Howe (New York: Oxford University Press 2010), 139–55; Roger N. Buckley, *The British Army in the West Indies* (Miami: University of Florida Press 1998); Simon Gikandi, *Maps of Englishness, Writing Identity, the Culture of Colonialism* (New York: Columbia, 1996); Linda Colley, *Britons* (New Haven: Yale University Press, 2009).

[19] Kercher, *Debt, Seduction and other Disasters*, 197.

[20] Kercher, *Debt Seduction and Other Disasters*, 95.

[21] Kercher, *Debt Seduction and Other Disasters*, 88.

[22] Kercher, *Debt Seduction and Other Disasters*, 104.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

The Jury decided for the plaintiff and awarded £50.[23] While there were remarkably clever cases brought by agents in order to enclose land, whole villages came to the Northern Assizes to give evidence of their "ancient ties" to the land in support of such enclosure.[24] In this way Bent might be seen not only as adhering to the strictures of law in his management of the Civil Court in New South Wales, but also as creating a far more commercially minded court than that which existed on the Assizes. This was his own innovation and I would argue it was the work of a merchant's son.

Unlike the Court of Criminal Jurisdiction Jeffery Hart Bent appears to have no input into the Minutes of the Civil Court. The Court of Civil Jurisdiction ended in 1815 and was expected to be immediately replaced by the Supreme Court under the charge of Jeffery Hart Bent but Jeffery refused to hold the court if it was to admit emancipist attorneys. Ellis Bent had told George Crossley that he allowed him only to appear in Court as attorney because there was no-one else. Crossley and Eagar "being well aware that they could not even with decency apply to me thought proper to...petition the Governor to interfere on their behalf." The Governor wrote a letter to the Supreme Court recommending the petitions from those ex-convicts hoping to practise as attorneys.[25] Jeffery Hart Bent explained that the two magistrates who sat with him in the Supreme Court of Criminal Jurisdiction, Broughton and Riley wanted the ex-convicts to be recognized as attorneys. The Governor requested a Report from Bent who wrote of Macquarie, "his interference was most improper and I sincerely believe was the cause of all the differences which have arisen."[26] "In the meantime Copies of the Correspondence between the Governor and myself had been given from the Secretary's office and industriously circulated by George Crossley who had publickly declared the Governor was on his side."[27]

Jeffery Hart Bent realizing that the two magistrates were going to harangue him in the new Supreme Court declined attending at all.[28] A "Meeting of Inhabitants" derided Hart Bent's behavior. A petition was drawn up and taken about by Crossley, Eagar and Chartres. The Governor decided the names on the petition were not "respectable enough" in Hart Bent's words. Attempts to gain more signatures failed. Ellis Bent as Judge Advocate held a court which stated it would not accept ex-convict attorneys and Jeffery Hart Bent closed the Supreme Court,[29] which would remain closed until the arrival of Judge Wylde in the colony in 1816.[30] In England a Commission of Inquiry was

[23] Storey v Eagle reported in *Morning Post*, August 16, 1802.

[24] Duke of Norfolk v Hill esq, reported in *Morning Post*, September 4, 1804. Sir Geo Cook, Bart., vCook reported in *Morning Post*, September 18, 1802.

[25] Ellis Bent to Bathurst, July 1, 1815, *Historical Records of Australia*, ed. Frederick Watson (Canberra: Commonwealth and Parliamentary Library, 1914) hereafter HRA, IV, I, 139.

[26] Jeffery Hart Bent to Bathurst, July 1, 1815, *HRA*, IV, 1, 153.

[27] Jeffery Hart Bent to Bathurst, July 1, 1815, *HRA*, IV, 1, 155.

[28] Jeffery Hart Bent to Bathurst, July 1, 1815, *HRA*, IV, I, 157.

[29] Jeffery Hart Bent to Bathurst, July 1, 1815, *HRA*, IV, 1, 157.

[30] Jeffery Hart Bent to Bathurst, November 4, 1815, *HRA*, IV, I, 168.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

decided upon.[31] The dispute has been allowed to influence readings of what had occurred in the courts themselves, they present a far more complex story.

The Minute books of the Civil Court under Ellis Bent are examined here for the status of litigants, the appearance of agents and ideas of proof and writing. Together they show of the subcultures of the court under Bent's time as Judge Advocate and inadvertently produced by him in the new commercial and merchant approach he brought to the colony. These subcultures were apparent in the Criminal Court but it was the Civil Court that engendered them.

Litigants

That the population of New South Wales had quite a different opinion of what the civil law was in comparison to the perspective of their new Judge Advocate is apparent in Bent's early letters from the colony. He referred to the earlier custom of hearing small debts before a Magistrates' Bench. "The Bench till my time had assumed itself the cognizance of small debts, and decided upon hearing the parties themselves but I guide myself by the Patent which expressly declares that all pleas of debt and personal pleas shall be decided by the Civil Court."[32]

Though Macquarie thwarted this wish by allowing the Magistrates' Benches to hear minor civil cases it remained a fact that to attend the Civil Court required the payment of fees, unlike the Magistrates' Bench and, as Bruce Kercher shows, Bent therefore culled numbers of approaches to the Civil Court.[33] Also there were very few civil cases heard before the Judge Advocates Bench or the Police Magistrates Bench in Sydney suggesting that most were channelled to the new more exacting Civil Court.[34] Fees were the major source of income for Bent's clerk William Fleming who received one shilling for each writ. Bent himself hoped for the same amount Atkins, his predecessor obtained.[35] After Bent's first Civil Court Bent was able to write to his brother Jeffery that for entering each cause he received 5d and the same for each verdict. He hoped to make £600 a year from this. Bent did, as Bruce Kercher has written, refine the habits and customs that had developed around the Civil Law in the colony.[36] The court records show however gradual relaxation of his strictures through the imaginative interventions of clerks.

[31] Currey, *The Brothers Bent*, 80.

[32] Ellis Bent to Jeffery Hart Bent, March 9, 1810, in Paula Jane Byrne, *Judge Advocate Ellis Bent, Letters and Diaries 1809–1811* (Melbourne: Desert Pea, 2012), 143.

[33] Kercher, *Debt and Other Seductions*, 46.

[34] 16 cases between 1810 and 1815 a tiny fraction of civil cases are minor cases. Two of these were decided to be outside the jurisdiction of the court. One involving an Aboriginal man, Merute's claim for wages and clothes against James Underwood was sent by the Governor to the Court, Judge Advocate's Bench October 9, 1811 State Records of New South Wales hereafter SR SZ 773; as was Stephen Thorn and others, marines, against Miles Holding of the *Perseverance* Judge Advocate's Bench June 6, 1812 SR SZ 773. Merute was successful, Thorn and others were not.

[35] Ellis Bent to Jeffery Hart Bent, March 9, 1810, in Byrne, *Judge Advocate Ellis Bent, Letters and Diaries 1809–1811*, 144.

[36] Kercher, *Debt and Other Seductions*, 47.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Bent recounted his first Civil Court, "I have issued upwards of 150 writs, to the amount of £50,000. Some of them have however been settled. The trying of these actions will give me an immense amount of trouble—for there are neither Attornies nor pleadings, nothing to define the specific course of action, and to prevent parties themselves from entering into desultory statements. And then the parties themselves are never satisfied and always think they must be right."[37]

By the time the sessions opened Bent had 251 cases. The Minute books show 375 cases between March and September 1810. These he managed with the help of William Fleming. In Court Bent sat with Alexander Riley and George Palmer, later Charles Hook, Richard Jones and Garnham Blaxcell, all merchants. All of these men were also litigants, though Bent does not say they left the Court for decisions concerning their own cases.

Wealthy traders brought 172 cases, roughly half of the court's purview, during March to September 1810. Of these litigants, Henry Kable's business was in difficulty, but David Bevan seems simply litigious as does Andrew Thompson. This group with its concentration around Pitt Street and the wharves in Sydney had money. The rest of the Court's activity involved single cases but litigants were primarily from the same background. This was a wealthy man's court. The wealthy brought 89 cases in early 1811, nearly half of 210 cases in total from this volume. There were more single cases during this term and cases began to be more complex, with persons denying the debt or part of it. In late 1811 the same group of people appeared as litigants and the focus was still the wealthy area of the wharves and George or High and Pitt Street. But the poorer end of town, the Rocks publicans and dealers begin to appear. In this late 1811 volume also, there were more contested cases and we get a closer insight into the economic life of the colony. Edward Quin appeared here as litigant and he appeared as "Agent" in single cases when the defendant did not appear. Quin was the only agent that appeared in the early sessions of the court. Though George Crossley was a litigant for false imprisonment by the former revolutionary government and in many other cases involving debt until 1812 his name did not appear as a representative in court. This is despite Ellis Bent referring to him as "the cidevant attorney" in 1810 in a letter to Jeffery and as we shall see, his considerable assistance to Henry Kable in drawing up cases and seeing them into court.[38]

In this late 1811 volume also, there were more contested cases and we get a closer insight into the economic life of the colony, the court was slowly opening up to less wealthy litigants and the mechanism by which it did this was through the artfulness of agents, clerks, and attorneys.

[37] Ellis Bent to Jeffery Hart Bent, May 2, 1810, Byrne, *Judge Advocate Ellis Bent, Letters and Diaries 1809–1811*, 144.

[38] Ellis Bent to Jeffery Hart Bent, May 2, 1810, Byrne, *Judge Advocate Ellis Bent, Letters and Diaries 1809–1811*, 160.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Agents

Ellis Bent gave a history of the agents of the colony to Earl Bathurst in 1815

> George Crossley was struck off the Rolls of the Court of the King's Bench and transported to the colony for perjury, a crime particularly obnoxious in one of his profession and abhorrent to the feelings of those concerned in the administration of justice. Eagar has been transported here within the last six years for forgery and has never, as I can learn, been admitted as an Attorney of any Court. And Chartres has been sent here for a species of *crimen falsi* within the last five years and at the moment keeps a public house and both are still here under sentence of the law. As to Crossley I must add that I believe him to be a most unprincipled and dangerous man, and, from strict observance of his conduct in the course of his practise before me, I consider him unfit for the situation of an attorney; neither of them has ever been admitted into the Society of Gentlemen, or been considered as such; indeed Chartres keeps a common publick-house.[39]

To these persons we must add Edward Quin, and Michael Robinson former clerk to Judge Advocate Richard Dore.[40] There was a considerable cross between clerk and agent in the court. Patrick McMahon was clerk to the Provost Marshall yet he also acted alone as agent in the court.

The volumes of the Civil Court refer to agents and attorneys in an erratic manner throughout the period. Though George Crossley was a litigant for false imprisonment by the former revolutionary government and in many other cases involving debt until 1812 his name only appears as a representative in court only once in 1811.[41] This is despite, as stated, Ellis Bent referring to him as "the cidevant attorney" in 1810.

For 1813 and 1814 it is impossible to imagine the workings of the court without the appearances of Edward Eagar and George Crossley "on behalf of the plaintiff" or "on behalf of the defendant."[42] In these cases the status of Crossley and Eagar was not recorded. Earlier in 1813 Crossley appears for John Jamieson "under regular power of Attorney."[43] In 1814, however, a case reads "George Crossley appears for the defendant under a power of Attorney which is exhibited to the court."[44] This may indicate some of the difficulties surrounding Crossley in 1814, but it shows a sensitivity to language around

[39] Ellis Bent to Bathurst, July 1, 1815, *HRA* IV I, 188.

[40] Kercher, *Debt and Other Seductions*, 80.

[41] Matthew Kearns against John Palmer, 159, SR 5/1106.

[42] Volume SR 5/1110—November 1813 to July 1814—Case numbered: Crossley, 1, 2, 3, 6, 7, 11, 39, 40, 41, 42, 44, 45, 46, 48, 51, 53, 56, 60, 65, 66, 67, 68, 235, 274, 396, Eagar, 39, 40, 41, 42, 46, 48, 50, 65, 66, 68, 227, 234, 463.

[43] John Jamieson, esq. executor of the will of Thomas Jamieson, 24, SR 5/1109.

[44] William Watkins, George Lane, and John Thomas Williams, Master of the ship Brittania, 274, SR 5/1110.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

which the political dispute over "emancipist Attorneys" appeared. This was heralded by Ellis Bent's rule in 1812

> IT is Ordered, that from henceforth no Person usually resident in the Territory of New South Wales shall be allowed to appear in this Court, on Behalf of any Plaintiff or Plaintiffs, Defendant or Defendants whatsoever, in any Action, suit, or Petition now depending, or which hereafter may be commenced or depending in this Court, or shall, be allowed to practise in any Manner as an Attorney in this Court, without the special Permission of this Court; and also unless he shall first exhibit some Instrument in Writing, duly executed by the Person in whose Behalf he shall be so authorised to appear, and shall further lodge with the Chief Clerk of the said Court; a Certificate in Writing,to be signed by the Secretary of HIS EXCELLENCY[45]

Following this Edward Eagar advertised that he had "been attained to act as an 'Attorney' in the Court of Civil Jurisprudence." By 1813 he advertised "Edward Eagar, Attorney."[46] Rather than being loosely used the word "Attorney" takes on a distinct political meaning in the colony where it did not in the court itself.

The court seems far happier referring to "Agents" and Crossley and Eagar appear as "Agents" in many more cases than they do as "Attorneys."[47] They, however, were far from alone in this calling of agent. Edward Quin dominates the early volumes of the Civil Court and Patrick McMahon, George Jubb, George Chartres, Michael Robinson appear as "Agents" in other cases.[48] They were described with the word "by," for example "the said Plaintiff now appears by Patrick McMahon and the said defendant by Edward Quin."[49] All of these men were employed elsewhere as clerks, all were ex-convicts and they were present in the Civil Court until that Court was suspended by Jeffery Hart Bent. John Oxley also appears "under power of Attorney" in 1813.[50] The loose term of "Agent" incorporates women. "Mrs Bell" was "wife and agent" of Archibald Bell[51] and Ann Redmond for her husband.[52] In the press the word "Attorney" was used to indicate the taking of responsibility for financial affairs. George Chartres advertised in 1812

[45] *Sydney Gazette*, October 17, 1812.

[46] *Sydney Gazette*, April 17, 1813; October 16, 1813.

[47] In 1811 George Crossley appears as Attorney in one case—Matthew Kearns against John Palmer, 159, SR 5/1106; In 1813 and 1814 he appears "under power of Attorney" 24, 347 SR 5/1109, 46, 274 SR 5/1111.

[48] Patrick McMahon, 1814: 275, Michael Robinson 1814, 51, 231, Edward Quin, 1814, 280, George Chartres, 1814, 206.

[49] William Hall against Elizabeth Guest, 191, SR 5/1106. Note at times the word "and" appears rather than "against"—the referencing follows the manuscripts in case titles.

[50] John Oxley, 37, SR 5/1110.

[51] Simeon Lord against Archibald Bell, 163, SR 5/1106.

[52] Mary McDonough against John Redman, 206, SR 5/1106,

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

> G CHARTRES informs the Public, that Conveyancing and Special Pleading are transacted by him, at his Office, No. 11, O'Connell-street; the former embracing and comprising the various Forms of leasing, assigning, transferring, or mortgaging, landed, or other Property of Deed; and the latter that of Statements, Cases, Petitions, Appeals, and Affidavits for the Court of Civil Jurisdiction, High Court of Appeal, and before the King in Council with Instructions for the necessary Proofs in Support thereof; and such other preliminary Professional Assistance rendered for the Prosecution or Defence of Suits, instituted either at Law or in Equity in this Territory, as may appear expedient and requisite.[53]

He mentioned neither the word Agent nor the word Attorney in this advertisement. The activity of agents extended far outside courtroom activity, they were active in the wheeling and dealing that surrounded settlements and payments of money.

Proof and Writing

Ellis Bent, unlike Richard Atkins before him, required proof of debt or agreement before he would admit a case to the Civil Court and this created considerable difficulties for a population unused to keeping or being able to read records. Henry Kable, one of the colony's major merchants, was unable to read or write but he perhaps understood "figures." George Crossley brought Kable to court in 1814 for non-payment of fees. Thomas Watson, clerk to Crossley stated of Kable, "I never saw him write anything but his name, I was always of the opinion that he could write nothing but his name: I always thought he could not read writing—I was in his employ for some considerable time—I often read his notes for him—sometimes me, sometimes Archer, whoever happened to be present."[54]

The work behind the 1810 cases were explained by Crossley's clerk, Watson, "In that year a great deal of business was done for the defendant [Henry Kable]—I mean law business—writing and attending court—we have been up at night and day at times. There were writings sent out to be copied for defendant—Mr Crossley paid for the copies."[55]

Crossley managed a great deal in preparation for court days and employed two clerks for this work as well as sending out work to copying clerks who would have been paid by the number of words copied. The Civil Court created industries around itself with its new requirement of writing and proof and the lesser lights such as Robinson, Chartres, and Jubb would have obtained work in writing agreements suitable for the court room. Writing indeed empowered some people over others. Crossley claimed £710.0.8 in his case against Kable for "attendance in the business of defendant as Attorneys and Agents, for divers journeys and attendances." Crossley obtained judgment in his favor

[53] *Sydney Gazette*, October 10, 1812.
[54] George Crossley and Henry Kable, James Underwood, 2, SR 5/1111.
[55] George Crossley and Henry Kable, James Underwood, 2, SR 5/1111.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

and received £407.16.6 and £19.15.10 costs. Clerks working for the Provost Marshall could be employed in small tasks for private individuals. Patrick McMahon for instance was employed by Mary McDonough "to present a note drawn by Plaintiff for payment."[56] Such work was carried on alongside the official work of the Provost Marshall in seizing goods or serving writs and these separate activities would have widened the meaning of the Civil Court among the populace. Before one even attended court there were all kinds of debt-related business going on. Patrick McMahon later appeared as witness against Mary McDonough, explaining exactly what she had said when confronted by the note for payment. Double dealing like this would not make the clerks popular among members of the colony's small traders and possibly contributed to McMahon's mysterious death in 1816.[57]

A person who could not read the notes he or she obtained had some difficulty when seeking redress in the courts and this emphasis on writing and reading increased during the life of Ellis Bent's Civil Court. It helped to have a person who either remembered being a witness to an agreement or who could swear to handwriting and the word of these people was quickly accepted by the court as proof of transaction. Such proof became so habitual that the records of the court became very sketchy, sometimes not even giving the name of the person who "proved" the transaction. Quite handily a number of clerks to the Provost Marshall, Robert Reid, and Richard Ridge among them could always "prove" a debt, either because they had witnessed the original agreement which may not have survived or because they asked the defendant if the debt was just.[58] No-one seemed to contradict the "proof." These clerks were "on oath" and their word was enough. So, dealings with these clerks would replace to some extent the need for accurate records. Clerks did not appear without obtaining fees so these cases would have been profitable to them. It was, however, an ingenious response to Bent's requirements for proof and it created considerable income for these clerks and this was the beginning of the opening of the court to persons that were not wealthy.

In 1811 the court became obsessed by handwriting and its veracity and the veracity of "paper writing" itself. In earlier cases it was sufficient to "admit" the debt which one did in two ways—by appearing and admitting or paying an Agent to come to court and admit with you, or by not appearing at all and thereby forfeiting the debt through the Provost Marshall. In Simeon

[56] Patrick Boyling and Mary McDonough, 207, SR 5/1106.

[57] Inquest into the death of Patrick McMahon, Colonial Secretary Papers SR Reel 6031.

[58] Clerks as witnesses: "subsequent promise of payment also proved by Edward Quin," 109, SR 5/1106, "writ proved on the oath of Lawrence May and Thomas Biggers," 162, SR 5/1105, "proved to be the handwriting of defendant on oath of James John Grant," 164, SR 5/1107, "sale and delivery of goods being proved on the oath of Robert Reid," 167, SR 5/1105, "exhibited and proved on oath of Robert Reid," 168, SR 5/1105, "note proved to be just by the oath of Edward Lamb," 179, SR 5/1105, "note duly proved on oath of John Archer," 180, SR 5/1105, "note exhibited proved on oath of Edward Lamb," 182, SR 5/1105, "proved on oath of Alexander McGuire," 183, SR 5/1105, "proved by clerk of the court G.M. Woodhouse," 195, SR 5/1105, "proved on oath of Reuben Euther," 197, SR 5/1105, "account proved oath of Richard Reid," 219, SR 5/1105, "oath of Richard Ridge" 237, SR 5/1105, "proved," 2, 3, 5, 7, 8.9.10, 11.12, 13, 14, 15, SR 5/1106.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Lord against Peter Hodges for £134.13.6 of goods sold and delivered the defendant Hodges did not appear. "Plaintiff produces a written allowance of the defendant to enter up Judgement of the above sum the same being justly due to the plaintiff which is duly proved upon the oath of Alexander McGuire subscribing witness thereto."[59]

All of Simeon Lord's cases that session contained such elaborate wording and witnessing.[60] Such wording requires the services of clerks as witnesses and so, as has been argued for eighteenth century solicitors and barristers,[61] these colonial agents also had an interest in making cases more complex. Handwriting began to be investigated. Mary Weir brought John Holt to court for £16.0.0. The court stated, "The only evidence now produced was two papers in writing one of which was perfectly illegible and the other appears to be a note for £8 signed John Holt. [The court] Direct the plaintiff to be non-suited."[62] When William Jenkins brought William Stewart to court in 1811 Jenkins' carter, Charles Curtis stated that "I used to set down on a piece of waste paper the quantities [of bread, flour, biscuit] delivered as above and Mr Jenkins used to copy them into his book. I was living with Mr Jenkins during the whole period of that running account I was not a servant but occasionally employed by Mr Jenkins...I do not know what became of the pieces of paper."[63]

Mr Jenkins kept no account and said to a servant of Mr Stewart's, Cornelius Gorman's "for God's sake keep yours" because he owed Simeon Lord some money and "he was afraid Mr Lord would capias him and that he must capias defendant [Stewart] if he would not come to a settlement." Cornelius Gorman told him to come and settle but Jenkins did not come and Stewart had gone to Port Dalrymple. In this case the court found in favor of Jenkins as Cornelius Gorman admitted to part of the debt. Jenkins' anxiety over keeping records related to his court appearance and it was the keeping of records which was the focus of the case.

"Proving" rent and land transactions were also difficult. In October 1811 John Jones of Windsor brought suit against Charles Thomas also of Windsor. The agreement had taken place in 1796, but "on searching the Registry no such Minute books is found by the Court." A series of witnesses gave evidence. Thomas Rickerby said he "wrote the paper writing," John Boulton also referred to "paper writing." William Fleming, clerk of the court gave evidence that he knew "Mr Atkins handwriting and the figures and letters Rd No 93 are his handwriting—it was his custom to make such a certificate of Registry without entering name or date."[64] The rule was dismissed by the Civil Court.

Edward Quin gives some idea of how agents overheard conversations and gave advice in his description of his dealings in 1811 with Mary Louisa

[59] Simeon Lord esq. against Peter Hodges, 193, SR 5/1105.
[60] 195–98, SR 5/1105.
[61] Lemmings, *Professors of the Law*, 118; Brooks, *Lawyers, Litigation and English Society Since 1450*, 22.
[62] Mary Weir against John Holt, 19, SR 5/1106.
[63] William Jenkins against William Stewart, 65, SR 5/1106.
[64] John Jones and Charles Thomas, 222, SR 5/1106.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Snowden who wanted £17.19.6 for board and lodging from Rosetta Lovett, "Some time ago, since the death of Mr Snowden I was at the Judge Advocate's Office—I saw Mrs Snowden applying for a distress warrant against defendant's goods, she got it. Shortly after the same day the defendant [Rosa Lovett] came up to the office and applied to Mr Fleming the clerk to intercede with Mrs Snowden and not to sell her goods. Mr Fleming said the Plaintiff was then pushed by Mrs Skinner and defendant also made application to me."[65]

Quin demonstrated the role of the clerk in giving advice and the variety of approaches made to the Judge Advocate's office. Fleming said Mrs Snowden would not have applied for a warrant of distress unless she was being pressured by Mrs Skinner to pay another debt owed by her to Mrs Skinner. There was some hope of Mrs Snowden changing her mind.

The clerks knew of the history of debts and the complexities of the colony's financial dealings are displayed in the solution to Lovett's problem. The debt was resolved, not by Quin, but by James Platt, who cohabited with Rosetta Lovett. With the consent of Mrs Snowden, who lived in the front of the house while Lovett lived in the back, they could "raise the money" owed to Mrs Skinner by "mortgaging the house to Frazer." Upon that being resolved "Mrs Snowden burnt the assignment and the warrant of distress" and "£20 was got from Frazer and £7 was to be paid in interest for six months." The debt came due and Mrs Snowden then sought the original money from Rosetta Lovett. James Platt, however, no longer cohabited with Rosetta Lovett—when he did, he had, he said, nearly discharged the debt by "things" given to Mrs Snowden. He produced a list of goods; all of the articles had been paid. The court accepted the list and Rosetta Lovett was only to pay £5.8.5. Rituals such as burning the assignment and the warrant of distress wiped financial records. The notes, being read and burned, would bring the dispute to resolution. However, another lot of writing, a list, was produced—though there was no indication of a witness or proof of the list of "things" being true—the logic of writing was valued by the court. It was management of writing that mattered and clerks and agents were efficient at this.

The opportunities provided by the Civil Court may not only have involved clerks or agents with an astute eye for business. That there was much more happening beneath the surface interactions of the court was suggested by Cornelius Gorman who appeared in a case against his employer William Stewart in 1811 for butcher's meat, "Cornelius Gorman—I know nothing of an account between the Plaintiff and defendant before 1807—the witness now making use of the most indecent and profane expressions was ordered to be committed to the custody of Sydney gaol."[66]

Though Mary Howarth could "not read writing," she recognized the handwriting of Thomas Jennings "perfectly well" and she was present when Jennings gave Samuel Pugh six ten-pound promissory notes. Her evidence as witness along with the notes themselves meant that Pugh obtained £60 in

[65] Mary Louisa Snowden executrix of the late Julian Snowden against Rosetta Lovett, 17, SR 5/1107.

[66] Matthew Kearns against William Stewart, 66, SR 5/1106.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

damages from Jennings in October 1811.[67] Similarly Ann Wilson could say that Christopher Airey of Seven Hills "wrote the note produced in my presence."[68] Thomas Biggers could say that notes of 1808 were "drawn in Mr Kearn's room."[69]

Clerks and Business

Agents and clerks conducted business from their houses, not from the government offices in which they were employed. Visits were made in the morning and at night, so clerks were really working at all hours not just the "hours of work" specified for government offices. Since many clerks and agents were publicans they could be seen at their public houses. Alexander McGuire explained in 1814

> I know Mr Henry Kable I recollect being present at a conversation between the defendant Kable and Edward Quin as near as I can recollect it was about 31 May 1812 at Quin's house in Sydney. Kable came to Mr Quin's house for me to assist to copy papers for him to lay before the court the following July—Kable said I had better go with him to Mr Crossley—Quin then asked Kable if he meant to have another turn at Mr Lord—Kable said yes, but that old man (meaning Crossley) would not take it in handwriting until he had settled with him for his former accounts. He said he expected Mr Lord wanted to take everything from him, but it was better to give part of it to the *Lawyers* than let his *Lordship* take the whole—Quin was shaving himself in the bedroom Kable was going backwards and forwards and said he had settled with Mr Crossley, that it was a very large bill, more than a hundred pounds.[70]

The "Lawyers" as a particular group were essential to the workings of the Courts and this was recognized by those members of the court who rejected Jeffery Hart Bent's notion of excluding emancipists from the courts and who continued to support Crossley and Eagar.[71] These clerks, also, were essential to the workings of the court and indeed to credit and debt in the colony. They had to continue their practices of presenting debts to be paid without the court in the year it took for the dispute between the Bents and Governor Macquarie to resolve in the recall of Jeffery Hart Bent.

The Civil Court under Ellis Bent did introduce restrictive practices involving proof and writing but the colony was able to absorb these requirements into a new industry of "paper writing" and advice and "oath" which empowered clerks and agents. The complex world they administered of writ, agreement, and assignment was deliberately so.

[67] Samuel Pugh against Thomas Jennings, 196, SR 5/1106.
[68] John James against Christopher Airey, 198, SR 5/1106.
[69] Matthew Kearns and James Elder, 200, SR 5/1106.
[70] George Crossley and Henry Kable, James Underwood, 2, SR 5/1111.
[71] Ellis Bent to Bathurst, July 1, 1815, *HRA*, IV, I, 139.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

The Civil Court under Bent created a new space for itself in the colony of New South Wales but it also engendered and produced cultures around writing, proof, and oaths. In the realm of conflict and dispute the court extricated itself from the informalities of the earlier court and it may have been such extrication that resulted in the rapaciousness of the colonial agent with his paper writings.

The Criminal Court

To his great embarrassment Judge Advocate Ellis Bent was prosecutor, advisor to the defendant or suitor and Judge in the Civil and Criminal courts of the colony until his death in 1815. He was also Registrar. His task was lightened when he dispensed with the duties of the ill trained George Woodcock, nephew of Joseph Banks early in 1810 in favor of an ex-convict William Fleming, former clerk to Judge Advocate Richard Atkins. Fleming also had a public house and so was closely linked to the flow of credit and debt and house transfer in Sydney. He was to become central to the purview of the courts as Bent administered them. Record books of the Criminal court from 1810 to 1815 seem disorderly in comparison to those of the Civil Court, indicating perhaps Ellis Bent's enthusiasm for the proper recording of civil cases. The Minute books of the Criminal Court, in their disorderliness, show Bent coming to terms with the nature of the colony and its punishment system. They also show a slow and agent led emergence of the idea of a vocal defendant. A major section of the Minute books were in Bent's own hand and in 1814–1815 it seems that Jeffery Hart Bent took minutes and played some part in making the practice of the Criminal court more sophisticated, his presence has not been recognized by legal historians.[72]

From reliable accounts the Court itself was a small room attached to the jail until 1812 and after that point, according to Currey an inadequate room attached to the new house of Ellis Bent.[73] This was referred to in notices for both the Criminal and Civil Courts as "The Judge Advocate's Office" and it is where both civil and criminal cases were held.[74] The size and poor ventilation of the courtroom at the side of the house was given as one of the reasons for Ellis Bent's final illness and his death in 1815, it was a room of twenty feet square piled with the legal records of the colony.[75] Further support for the cramped nature of the courtroom can be ascertained by the way its space was managed. The court was "cleared" for deliberation by the six military officers. They did not retire to another space. In 1813 the minutes noted "witnesses on each side are ordered to withdraw and remain in attendance on

[72] Currey, *The Brothers Bent*, focuses on the struggle between Jeffery Hart Bent and Macquarie and Jeffery's refusal to sit in the Supreme Court. Later historians have followed Currey's lead, Kercher, *An Unruly Child*.

[73] Currey, *The Brothers Bent*, 50, 71.

[74] *Sydney Gazette*, December 22, 1810.

[75] Jeffery Hart Bent to Macquarie, December 16, 1814, *HRA*, IV, I, 116.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

the outside of the court"[76] indicating there was not another room for this purpose or an antechamber.

The Jury consisted of six military officers. It is unclear if they sat or stood in court. Ellis Bent did not comment on furniture in the room next to the gaol or next to his house, but the Minutes state "the prisoner is called to the bar" indicating there was a specific place where defendants stood. Bent described the "cap" he placed on his head when delivering the death sentence[77] and so some forms were closely followed. The court was held at quarterly intervals, there were groups of trials with the same six military officers in attendance. The membership of the jury changed at every new sitting of the court so that many officers would have been inexperienced. How seriously officers took the court is open to conjecture. In 1811 they found many of the accused "not guilty" and this seems to be a kind of slight against Bent, either because of his predilection for the death sentence on arrival or because of his association with emancipists.[78] Military juries did not have to be unanimous and Bent notes when they were not, convictions were secured by majority vote (see Supplementary Table 1). This meant the accused was at a considerable disadvantage in the colony of New South Wales. The *Gazette*, however, reports Jury "retirement times" and these, when reported, range from an hour to three hours, so that majority vote was hard fought for it seems.[79]

Most of the trials in the early court of 1810 had no cross examination of witnesses and no defence (see Supplementary Table 1). The Judge Advocate summed up the cases according to one account in the *Sydney Gazette* but how he summed up is not recorded in the minutes.[80] There was a speech by the Judge Advocate at the time of sentencing, usually reported, and Ellis Bent, unlike those who followed him, concentrated on explaining points of law as if he were educating the colonists in law itself.[81]

The Minute Book of the Criminal Court

The Minute Book of the Court of Criminal Jurisdiction contains two basic shifts in the way the court operated. From 1810 to May 1811 there were very few defences, written or spoken given in court and only one instance of a question being asked by the defendant, meaning the idea of a defence was minimal. From May 1811 agents appeared in the court though they were not named and from that time defences appeared and cross examination on behalf of

[76] The King v Archibald McNaughton and Phillip Connor, July 31, 1813, Court of Criminal Jurisdiction Minutes, hereafter CCJ, SR, 2390. Note "The King v" rather than "R v" appears on all criminal cases from this period in the colony's history—the referencing follows the early colonial convention.

[77] Ellis Bent to Jeffery Hart Bent, May 2, 1810, in Byrne, *Judge Advocate Ellis Bent, Letters and Diaries 1809–1811*, 156.

[78] Sessions of May 1811, four persons found guilty, five not guilty, SR 2390.

[79] The King v Archibald McNaughton and Philip Connor, Sydney Gazette, July 17, 1813; Byrne, *Criminal Law and Colonial Subject*, 273–74.

[80] *Sydney Gazette*, July 2, 1810;

[81] Byrne, *Criminal Law and Colonial Subject*, 181.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

the prisoner were asked. This shift was agent led. Agents were named only in two cases and they were referred to as agents and not Attorneys but from this period the court opened up to ideas of English rights and this only declined when the dispute over emancipist Attorneys appeared in 1814.

Minutes were in three hands, the first, is that of George Woodcock, the second William Fleming and most of the Minute book is in Ellis Bent's own handwriting even though a clerk of the court was mentioned.[82] The change in handwriting could be presumed to herald another way of recording except that alteration does not coincide with handwriting change. The first "question by prisoner" appears on February 12, 1811, indicating diligent recording. There are no accounts of cross examination by prisoners before this date and no cross examination in other cases until one in May 1811. These entries indicate that these minutes accurately reflected what was said in court and prisoner questioning in the early years of Bent's court was minimal.[83]

Written Defences

From the beginning of Bent's time in 1810 there were references to "written defences" read out by the clerk of the court. Some of these survive for a later period and they addressed points of law, the character of those who prosecuted and the character of the defendant.[84] They have been thought by legal historians to replace the defence agent or counsel. They were read out before defence witnesses were called. While their content might be said to replace a defence summing up of a case they were also included in cases where there *was* an agent and also in cases where there *was* defence counsel (see Supplementary Table 1). This makes them distinct and important documents. From 1810 cases from Hobart were those most likely to have written defences and Terence Flynn's involved a legal technicality—the victim had made a statement before he died and it was signed by Mr Knopwood and his clerk but not the dying man. The deposition, it claimed, was never read to the defendant and so was inadmissible as a deposition "under the statute of Phillip and Mary."[85] The written defence was read out by the clerk of the court. There was someone in Hobart giving legal advice. Terence Flynn was not successful and was sentenced to death. Written defences also appeared before the Judge Advocate's Bench beginning in 1811 in two separate cases involving the making and selling of spirits.[86] Business connections between agents and publicans were close and the defences may have been encouraged by agents.

[82] Handwriting changes: George Woodcock to possibly William Fleming, October 11, 1811, CCJ, SR 2390.

[83] The King v John Shea, May 27, 1811, CCJ, SR 2390.

[84] Byrne, *Criminal Law and Colonial Subject*, 181.

[85] The King v Terence Flynn, May 31, 1810, CCJ SR 2390.

[86] Michael Bourne January 12, 1811 and Robert Whitmore and Mary Turley, February 2, 1811, Judge Advocate's Bench SR SZ 772.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Spoken Defences

Spoken defences began quite early before the Judge Advocate's Bench in June 1810 where John Coffee said he was "unable to do the work" his master wanted.[87] He was regarded as insolent but spoken defences appeared more often after this point. In the Criminal Court spoken defences appeared at the end of 1810 where they resulted in a not guilty verdict in four cases but did not begin to become common until May 1811, a year after Bent's court had been operating. William Thompson said he bought his spy glass from a man who had since died; John Fitzwilliams had climbed in a window to wake a friend; Joseph Mackinley had lost his way home, he called out "where was he" and was taken up by a constable; Mary Joyce alias Badman had been drinking what she thought was free spirits all night when suddenly asked for payment and the washing she had in her charge belonging to an officer was kept by her creditor. Robert Campbell simply said he knew nothing about any stolen linen; Margaret Skinner was brought to court because there was a dispute over money she was paid for sex. Isaac West said he had given 50/- in charge of his accuser and received nothing back for it.[88]

Defence Witnesses

Ellis Bent's Court of Criminal Jurisdiction heard witnesses for the defence but when there were no defence witnesses, and these were primarily character witnesses, it was noted that the accused claimed they were innocent "but produced no witnesses"[89] as if this was a negative. Producing witnesses of your own increased chances of being found not guilty.[90] Colonial gentlemen were

[87] John Coffee, June 9, 1810, Judge Advocate's Bench SR SZ771.

[88] The King v William Thompson, May 6, 1811 found Not Guilty; The King v John Fitzwillaims May 6, 1811 found Not Guilty; The King v Joseph Mackinley May 6, 1811 found Not Guilty; The King v Mary Joyce alias Mary Badman, May 6, 1811 found Not Guilty; The King v Robert Campbell May 6, 1811 found Not Guilty; The King v Margaret Skinner May 6, 1811 found Guilty; The King v Isaac West May 6, 1811 found Not Guilty, SR 2390.

[89] E.g. The King v Michael Bryant, May 27, 1810, The King v Barbara Sutherland, October 22, 1810, The King v Patrick McLew, October 22, 1810, The King v James Cobb, October 22, 1810, SR 2390.

[90] Co-accused in Supplementary Table 1 who provided witnesses were likely to be found Not Guilty; in 1810 of the fourteen Not Guilty verdicts for the year, five involved the prosecutor not appearing in court, four involved defence witnesses, four involved detailed long defences by the accused, and one involved no defence. In 1811 of two Not Guilty verdicts one person had defence witnesses and the other had a long defence statement; In 1812 of the nine persons found Not Guilty one had no prosecutor, five had defence witnesses, two were soldiers who appear to be favored by the Jury, and in one case the defendant was Not Guilty because the Information document did not apply. In 1813 when agents were clearly present there were sixteen Not Guilty verdicts the Judge Advocate said he could not produce strong evidence in five cases, in one case the prosecutor could not legally be a witness because he had an interest in proving an order was not made by him, there was clearly a defence agent in four cases, there was an approver who could not be believed in one case, the testimony contradicted in one case, four cases involved witnesses for the defence. Of ten found Not Guilty in 1815 there was no-one to prosecute in three cases, agents were acting for the defence in two cases, there was a defence witness in three cases and a long defence statement in one, in the other case the prisoner cross examined. In 1815 of nine cases four were stopped because

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

always in the criminal court as character witnesses for defendants. Even if they had little to say in the defendant's favor, they still made the journey to the court and waited their turn to give defence evidence. Samuel Marsden, John Jamieson, Robert Cartwright, Simeon Lord appeared regularly to testify they knew defendants. In these ways the New South Wales Criminal Court under Ellis Bent came closest to the formalities of the Assizes, this was a link to deference.

Cross Examination and Agents

Ellis Bent bemoaned the informality of the New South Wales Courts and suggested that the six officers also participated in such disrespect. Yet the marked absence of prisoner cross examination in the early Bent criminal court does suggest that prisoners were unwilling to speak and intimidated by the process. Cross examination "by the prisoner" only appeared in numbers of cases when Edward Eagar, ex-convict Attorney, began to be active in the colony's legal landscape in 1812 and it may be Eagar was in court advising at this point (see Supplementary Table 1). Certainly "cross examination by the prisoner" become more technical in 1813 when George Crossley, ex-convict Attorney, was noted as present in the court. In 1815 a defendant spoke in his own defence and stated that he "was charged by a wrong name." The wording of indictments had become a plaything of the attorneys of the empire until the 1850s but in this case Ellis Bent overruled this defence saying it was "merely formal and not made in the proper time."[91] The prisoner may well have learned such a strategy Newgate style where courts were play acted and prisoners schooled but also he may well have sought and paid for the advice of a clerk or agent.[92] The Judge Advocate's Bench had two cases that do not fit this pattern. One where there was cross examination by the prisoner and both cases had defence witnesses. The first was in 1810 where the overseer of the Government tailors, William Bassett, was charged with embezzling government cloth. His cross examination in court implicated Isaac Nichols the Principal Superintendent but he later apologized through his defence witness, saying that Nichols was entirely uninvolved. He was sentenced to 50 lashes and hard labor in the gaol gang.[93] In August 1810 Benjamin Panter and Ralph Nicholson appeared for killing and eating a pig that had run into a rented house their road gang was staying in. Two soldiers of the 73rd Regiment who were also in the gang and staying in the house said they saw "no pig" and they were believed and the case dismissed but when entrails were found by a child Benjamin Panter was brought back to court and put into the gaol

there was no point continuing with the evidence, two defendants had agents, one had witnesses and one involved an elaborate defence statement. CCJ SR 2390.

[91] The King v James Smith, June 21, 1815, CCJ SR 2390.

[92] Newgate: Michele Field and Timothy Millet, *Convict Love Tokens* (Adelaide: Wakefield, 1998); Robert Hughes, *The Fatal Shore* (London: Penguin, 1986), 175, Indictments: Eugene Schofield Georgeson, *By What Authority, Criminal Law in Colonial New South Wales*, 2nd ed. (Melbourne: Scholarly Publishing, 2020), 125.

[93] William Bassett, October 6, 1810, Judge Advocate's Bench SR SZ771;

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

gang "till further notice."[94] These were high profile cases where overseers, superintendents and the 73rd were involved, so advice of some kind was taken. The Bench however routinely notes in 1810 that "the prisoner made no defence and called no witnesses" as if space were made for defences.

Apart from George Crossley in one case, and Edward Eagar in another and William Fleming in another, agents did not appear by name in the minutes of the Criminal court.[95] They did not appear at all in the Judge Advocate's Bench. Agent presence in the Criminal court may be ascertained by the phrase recorded "questioned on behalf of the prisoner." This was not Bent himself because he often responded with "questioned by the Court." From 1813 there is reference to "cross examination" of witnesses and this is sometimes "on behalf of the prisoner" so agents were active at this point. More importantly, the presence of these agents in 1813 and 1814 meant that Ellis Bent recommended Not Guilty verdicts because he could not sustain a prosecution or because the Information, the formal document accompanying the case, was inaccurate or the evidence would not sustain a case.[96] During the dispute over "emancipist Attorneys" begun after Jeffery arrived in the colony there was marked decline in records of questioning by agents and the arrival of the Barrister Moore into the courtroom in 1814 was noted and his presence as "counsel" noted.[97]

The language concerning agents used in the Minute book is far more precise than Australian historians have been in their loose descriptor "ex-convict attorneys" or "emancipist attorneys."[98] The term "agent" was used for Crossley, Eagar, and Fleming in court. They were certainly not "Attorneys" and, indeed it seems that Ellis Bent tolerated them rather than welcomed their presence. In *The King vs Thomas Mahony and Peter Condon* in March 1813, "The prisoners thro' their agent William Fleming apply to the Court to postpone this trial until the morrow, which the court overrule as contrary to all precedent."[99] All agents charged for their services which they advertised in the *Gazette* and soldiers seemed to avail themselves of such services in cases concerning them.[100]

[94] Benjamin Panter and Ralph Wilkinson, August 11 and 18, 1810, Judge Advocate's Bench, SZ771.

[95] The King v Thomas Mahony and Peter Condon, March 22, 1813, CCJ, SR 2390, William Fleming representing, The King v Archibald McNaughten, Phillip Connor, July 16, 1813, CCJ SR 2390. George Crossley representing.

[96] The King v William Sherwin and Edward Wright, The King v James Pass and Mary McDonough, The King v Andrew Ford, The King v Thomas Plumb 1813, The King v George Storr, 1814, The King v Elizabeth Fielding 1815—all had no evidence to support the case, SR 2390.

[97] "Cross examined by Mr William Moore for the prisoner," The King v John Styles and Thomas Prosser, June 23, 1815, CCJ SR 2390.

[98] E.g. John Dunmore Lang perhaps was the first to use the term "Emancipist Attorney," in John Dunmore Lang, *An Historical and Statistical Account of New South Wales* (London: The British Library, 1852), 125. See also Kercher, *Debt Seduction and Other Disasters*, 61; Sarah McKibbon, Libby Connors and Marcus Harmes, *A Legal History for Australia* (London: Bloomsbury 2021); Stuart Macintyre, *A Concise History of Australia* (Cambridge: Cambridge University Press, 1999), 48;

[99] The King v Thomas Mahony and Peter Condon, March 22, 1813, CCJ, SR 2390.

[100] Justin Cahill, "Subject-hood and 'rights' in early NSW," ANZLHS Paper, 2019.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

Agents were the major drivers in the idea of a defence and there was not an inherent sense of rights expressed by prisoners in the court room during the tenure of Ellis Bent. This is important in establishing the history of the shape of court room argument and in noting the divergence of New South Wales from the Assizes from whence Bent had recently arrived. For Barristers Assize cases were opportunity to show skill and impress in the tight culture of the Bar and the Bench. Decisions as to guilt or innocence were made by the petit jury after listening to the arguments of defence and prosecution and prisoners were more likely to be represented. The variation in sentencing showed Judicial discretion.[101] None of this culture was apparent in Ellis Bent's management of his court room and that there was no mention of this in colonial criticism means that Atkins' bench had operated in a similar manner. That the court could be fairer is suggested by Jeffery Hart Bent's alteration to the way the court operated.

Jeffery Hart Bent

Jeffery Hart Bent was certainly present in the Criminal court in 1814 and 1815 after he refused to hold the first session of the Supreme Court. In comparison to his brother, the Criminal court was fairer in his time as minute taker as if Jeffery were asking cross examination. There is evidence of cross examination and answers, "by the look of the lamp it was lighted" says Mary Levi in June 1815, as if she was being questioned on how light it was when she identified a thief.[102] "I saw my shawl on some woman in the market before I saw it in the market" says Margaret Sullivan, also in June 1815, as if she is being asked about the details of stolen property.[103] "I did not see her face" says Hannah Whitelock, as if she was interrupted and asked precisely that.[104] All of the processes of the accused asking cross examination of witnesses, of having them asked for him or her by an unidentified agent or "Mr Moore," or by having this close request for detail in 1815 by Jeffery Hart Bent increased the chance of being found not guilty as Supplementary Table 1 shows. It is important to note that the presence of Moore as a barrister in court introduced a small part of the atmosphere of the Assizes and its competition and that this may have influenced the way the court worked.

Records from 1814 clearly show the influence of Jeffery Hart Bent whose predilection for public whipping with the cat o' nine tails derived most certainly from a shipboard past.[105] The pillory appears as another public

[101] Maurice C. Cottu, *On the Administration of Justice in England*, Vol. 2 (London: R. Stevens, 1822); King, *Crime, Justice and Discretion*, 2.

[102] The King v Thomas Rourke and Antonio La Rosa, June 27, 1815, CCJ, SR 2390.

[103] The King v Francis Kelly, June 27, 1815, CCJ, SR 2390.

[104] The King v Margaret Ingle alias Margaret Fitzgerald, June 30, 1815, CCJ SR 2390.

[105] Hart Bent wrote a diary while on board the convict transport by which he travelled to New South Wales. He shows considerable knowledge of shipping and ships which indicates he spent time on board his father's vessels. See Susan Lotacki and Walter Lotacki, *A Stormy Passage* (Brisbane: self-published, 2011). This closely adheres to the original manuscript in the National Library of Australia.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

punishment, most often for women Jeffery Hart Bent remarked on its power on board the *Broxenbury*.[106] The new fashionable solitary confinement, deriving as Shaw shows from prison reformers[107] was in Sydney combined with diets of bread and water for months at a time. From December 1814 prisoners found guilty were sentenced at the end of the session and there was considerable thought put into the sentencing process. Rather than grouped according to their offence with co-offenders they were grouped according to a logic related to the severity of the offence, "Patrick Berry, Thomas Rourke, Antonio La Rosa—simple larceny imprisoned Gaol Newcastle kept at hard labour in the gaol gang for four years."[108]

Such a process regularized sentencing as Supplementary Table 1 shows, similar offenders receive the same sentence. The sentencing at the end of the sessions applied to all of those who did not receive the death penalty, which was immediate. The regularizing of sentences made them more "scientific." This was the influence of Jeffery Hart Bent.

The court has sometimes been considered as a continuation of Richard Atkins approachable Court of Criminal Jurisdiction—a "woman's judge," an enlightened and fair man.[109] This argument cannot be made of the early Ellis Bent's tight and closed court with few cross examination asked and few defences given and the apparent slow flowering of ideas of defence with the strong influence of Eagar, Crossley, Fleming, and others that remain unnamed in the minutes of the court, those composers of written defences.

Both Bruce Kercher and Jennie Jeppeson have discussed the idea of attaint in the colony. The colony's vibrant economic life would have been virtually impossible if such a "civil death" affected convict traders in an environment where gentlemen could not be involved in trade and the legalities associated with it.[110] Also, the documents concerning sentencing—indents—were not regularly sent to New South Wales, only some offences carried attaint and it was impossible to tell who was affected and who was not.[111] Jeppeson stresses the word "attaint" was rarely used in colonial records.[112]

Any notion of attaint does not appear in the early records of the Criminal Court. Minutes do not even specify if the defendant was an ex-convict, a convict, or a free person. Colonial indictments specify only "yeoman," "labourer" or "spinster" for example, as did an English indictment. From 1810 to 1812 the court was thus a great leveller in the identification of the status of defendants. Ideas of recidivism belong to historians alone. However, Ellis Bent underwent a change of perspective in 1812 when the word "prisoner" or "free" is written beside the name of the accused. In 1813 some research was undertaken and

[106] Lotacki and Lotacki, *A Stormy Passage*.

[107] Alan G. L. Shaw, *Convicts and the Colonies* (London: Faber, 1966), 19.

[108] The King v Patrick Berry, Thomas Rourke, Antonio La Rosa, July 4, 1815, CCJ SR 2390.

[109] Alan Atkinson, "Richard Atkins The Woman's Judge," *Journal of Australian Colonial History* 1, no. 1 (2018): 115–42.

[110] Kercher, *An Unruly Child*, Jennie Jeppeson, "Tried and Attainted, Convict Attainder as a useful tool for historical understanding," conference paper ANZLHS Conference 2019.

[111] Macquarie to Bathurst, *HRA*, August 21, 1801, February 22, 1806, March 13, 1816.

[112] Jeppeson. See also Kercher, *An Unruly Child*, 32.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

in the column beside the minutes the defendant's status was recorded. Beside Francis McDonald's name "transported for life" was recorded,[113] James Coogan had also been "transported for life"[114] as had Thomas Thorpe.[115] John Deveraux had "free by servitude" crossed out and replaced by "transported for life" in the column beside his name.[116] A Hobart case had George Watts as "free" and William Clarke, William Field, and Thomas Garsland as "Transports," though for what period is not specified.[117] Their designations were given beside their name in the Minutes, not recorded in the column. Richard Ruff was "free by servitude" in the column of the Minutes in March 1814.[118] Ann Triades was "a free woman."[119] Such entries were irregular and interspersed among cases where the status in relation to the convict system was not given at all. In one case "unknown" appears in the column.[120] Convict indents were far from complete and information, particularly from Ireland was inadequate.[121] Ellis Bent would have to go to the Colonial Secretary for such information, but the lack of ship details seems to indicate he did not. Rather, he seems to have found out this information, erratic as it was, elsewhere. He perhaps asked his clerks. The status of defendants thus becomes an issue before Jeffery Hart Bent arrived in the colony in early 1814 and so it was a concern of Ellis Bent's alone. Ellis knew his brother was coming and would be senior to him in position and so perhaps it was in response to a wish to seem efficient. But no, Jeffery Hart Bent, in his management of the Minutes dispenses with such a concern and does not appear at all to be concerned with the prior status of defendants. Jeffery has always been thought to be the "dour" professor of the tainted blood of the ex-convict[122] but in these Minutes he expressed no interest in such a matter.

It is difficult to tell where cross examination to *witnesses* concerning their status came from in the court room. The 46th Regiment vowed on board ship not to associate with emancipists in New South Wales. The 73rd Regiment dominated the Jury until the session of March 1814 where the 46th began to serve. Witnesses began to give their status in their evidence after that point. Andrew Kane was "free" in the case against William Brodie, Sydney gentleman and Robert Campbell, Sydney, gentlemen who were, it was noted in the column "both free."[123] William Ashton was a "prisoner" in the case against John Smith and Joseph Richman, who were both "free by

[113] The King v Francis McDonald, August 30, 1813, CCJ SR 2390.
[114] The King v James Coogan, September 1, 1813, CCJ SR 2390.
[115] The King v Thomas Thorpre, September 2, 1813, CCJ SR 2390.
[116] The King v John Deveraux, September 27, 1813, CCJ SR 2390.
[117] The King v George Watts, William Clarke, William Field and Thomas Garsland, September 29, 1813, CCJ 2390.
[118] The King v Richard Ruff, March 23, 1814, CCJ SR 2390.
[119] The King v James Goff and Ann Triades, March 28, 1814, CCJ SR 2390.
[120] The King v Francis Barry, Richard Dowling, March 24, 1814, in column of the minute book—"Barry unknown, Dowling transported 14 years 1798."
[121] *HRA* IV, 1, August 21, 1801, February 22, 1806, March 13, 1816.
[122] Currey, *The Brothers Bent*, 80.
[123] The King v William Brodie and Robert Campbell, March 21, 1814, CCJ SR 2390.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

servitude."[124] James Cunningham felt it necessary to state "I am a free man" in his case against Caleb Wilson whose status was not given.[125] As the 46th got used to the colony perhaps, such designations appeared less often. James Smith in June 1815 was a "laborer" when he was charged by Edward Lamb "clerk to Mr Brooks" with theft.[126] Yet in the same month we find Ann Ferryman saying in her case against William King for rape "I live at Golden Grove, it is a farm belonging to Mr Hutchinson near Sydney. I am not a free woman I am a prisoner."[127] This was a result of questioning; she was giving her residence and position rather than her status when it seems she was interrupted—it was not enough to say she was "not free" the questioner needed her to state she was a prisoner. This was in the time of Jeffery Hart Bent's minute taking and his close questioning as to carnal connection and whether it had taken place led to the acquittal of King.

If allowed to describe themselves witnesses invariably give their residence and whether they rented the "whole house" or not and they gave their employment "government man," "publican," or "shopkeeper." This was the dynamic of the colony and there was little the 46th could do to change it. The Bents showed a disposition to enquire into status in relation to the convict system only briefly and it may have been a response to political developments where Macquarie was increasingly criticized for consorting with ex-convicts or it may have been a brief appearance of concern for the notion of recidivism or attaint. These were not resilient notions in the colony at this point.

Politics made an appearance in the court among those agents who asked cross examination of witnesses. George Crossley represented two officers of the 73rd in the case of the murder of Richard Holness, Sydney tradesman. The officers were in "colored clothes" but they were recognized after harassing Holness' servant girl. They attacked and killed Holness who was defending the girl. A witness, Mr John Ballard, Master of the *Samarang* gave evidence that he went into the house of Richard Holness after his death, "The witness is asked whether he heard any persons making use of invections against the 73rd Regiment. The Judge Advocate objects to the question in its general shape. Some conversation ensued the result of which was that the witness was withdrawn."[128] Crossley was referring to the low opinion held of the Regiment by the inhabitants of Sydney and was trying to shape the 73rd's defence of its own. Only two members of the jury were not of the 73rd Regiment, Major George Alexander Gordon and Lt William Lawson of the Royal Veteran's Company. The jury found the Officers not guilty of murder but guilty of killing and slaying. Crossley was successful in his hint to the jury.

In 1813 in a case involving officers who assaulted a constable William Cox esquire was to give evidence on behalf of the officers when he was asked "What passed between you and Governor Macquarie on this subject? The

[124] The King v John Smith and Joseph Richman, March 25, 1814, CCJ SR 2390.
[125] The King v Caleb Wilson, March 28, 1814, CCJ SR 2390.
[126] The King v James Smith, June 21, 1815, CCJ SR 2390.
[127] The King v William King, June 22, 1815, CCJ SR 2390.
[128] The King v Archibald McNaughten, Phillip Connor, July 16, 1813, CCJ SR 2390.

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

court overrule this question."[129] Again, the Agent wished to draw wider implications for the Jury, Macquarie was commander of the 73rd and was expected to support his regiment which he had begun to tire of doing.[130] The officers were found not guilty.

While the courtroom as physical surround was certainly drawn into political debate concerning a tainted governor who built only for his cronies and not for the law, events in the courtroom, particularly in the heightened tensions of 1814 and 1815, rarely reflected that political warfare. Nor did officers of the 46th show disdain for convict defendants in those years. Ellis Bent appears to waver in his assessment of the need to record the convict status of defendants, even if he was capable of doing so efficiently.

Conclusion

Two young men of slaving background, emerging out of the vibrant culture of the Northern Assizes were able to shape and influence the meaning of law in the colony of New South Wales. It was this merchant culture that strongly influenced the reach and purview of the Civil Court, a culture that valued wealth as a signifier of status over access to the courts by all. At the same time the court's restrictions on proof and writing strengthened the role of agents who created a significant industry around "paper writing." These agents also sought to influence Criminal law, simply by their being present in the court and giving advice. The move to a fairer court, however, was also assisted by Jeffery Hart Bent in his use of questioning in the court room.

In terms of colonial history this paper has shown the relative unimportance of terms like "convict" or "free" in the management of the court rooms of the colony in the time they were under the charge of Ellis and Jeffery Hart Bent. There were attempts to implement the terms by Ellis Bent but the convict indents were far from adequate. Australian History has favored definitions of "emancipist" and "free" but very little attention has been paid to these categories as definitions of people undergoing process at law. "Free" became a stronger category of the convict system in the 1820s in New South Wales, with a set of policing structures under Captain Rossi to accompany it and it was a word used by ordinary people to resist police. Freedom brought new oppressions.[131] "Free" was also a global status, applied in different ways by different actors, as an administrative category and a word related to the rhetoric of liberty. One needed an apparatus to appeal to or to impose. That apparatus may in fact have worked against the rhetoric of freedom used by the enslaved or bonded despite them being declared "free."[132] The term "freedom" is, as

[129] The King v William Seton, Thomas Tate, John Ballard and Thomas Woodford, May 27, 1813, CCJ SR 2390.

[130] Ritchie, *Lachlan Macquarie*, 25.

[131] Byrne, *Criminal Law and Colonial Subject*, 169–70.

[132] Ira Berlin, Steven Hahn and Steven F. Miller, "The Terrain of Freedom: The Struggle Over the Meaning of Free Labour in the U.S. South," *History Workshop Journal* 22, no. 1 (1986): 108–30; Kate Ekama, "Precarious Freedom: Manumission in Eighteenth Century Columbo," *Journal of Social History* 54, no. 1 (2020): 88–108; Susan Dwyer Amussen, *Caribbean Exchanges, Slavery and The*

https://doi.org/10.1017/S0738248024000233 Published online by Cambridge University Press

John Donoghue writes, mutable and historically transient.[133] Without an efficient system of recording and transferring records the word "free" flounders, as it did in the Bent's courts.

What made the Assizes so vibrant was the injection of new young talent like that of the Bents. This new talent was made possible by the profits of slavery and was thus engendered by slavery itself. Innovations which drew New South Wales closer to English law effectively created a subculture of agents and attorneys who themselves were active in influencing the shape the law took in the courts. This is one of the refractions of slavery, one of the warps in the world of the early empire. It shows how change is inadvertently engendered and suggests that the practice of slavery inherently influenced other institutions and those subject to them.

Supplementary material. The supplementary material for this article can be found at https://doi.org/10.1017/S0738248024000233.

Acknowledgements. This paper forms part of a much larger study of the Bent Famly and the Globe, begun at the University of New England. This section was given as a paper at the ANZLHS conference of 2020 and I am grateful to Prue Vines for her assistance in making my attendance possible in those difficult times. I thank Isabella Anderson for her enthusiasm for this work. I would like to thank the readers of this article for their advice.

Dr Paula Jane Byrne is author of *Criminal Law and Colonial Subject* (Cambridge 1993) and *Judge Advocate Ellis Bent, Letters and Diaries* (Desert Pea 2012). She has lectured in Australian and Aboriginal History at Macquarie University, Murdoch University, and the Australian National University and taught at the University of New South Wales and Western Sydney University. She has held research positions at Sydney University, ANU, and the University of New England. At present she is a Visiting Scholar at the State Library of New South Wales <paulajanebyrne22@outlook.com>.

Transformation of English Society 1640–1700 (Chapel Hill: University of North Carolina Press, 2007), 60–74.

[133] John Donoghue, "Transatlantic Discourses of Freedom and Slavery during the English Revolution," Storica Mente, online, consulted January 13, 2024.

Cite this article: Paula Jane Byrne, "Innovation in the Courts: Ellis and Jeffery Hart Bent in New South Wales—an Analysis of Minute Books," *Law and History Review* (2025): 1–27. https://doi.org/10.1017/S0738248024000233