THE OFFICE OF SHERIFF

Historical Notes on its Evolution in New South Wales

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Sheriffs in England

The office of sheriff, though its nature and status have undergone much change, remains one of the oldest continuing institutions of English law. The name accredits its antiquity. It is compounded from Anglo-Saxon words meaning "shire reeve". According to Coke, "the whole realme is parted and divided into shires; and *reve* is *praefectus*, or *praepositus*; so as *shireve* is the *reve* of the shire . . . and he is called *praefectus*, because he is the chiefe officer to the king, within the shire".[1]

After the Norman Conquest the position of the sheriff was, for a time, enhanced. Holdsworth demonstrates the sheriff's rise to pre-eminence in shire administration.[2] He became the principal officer of the shire in place of the early triumvirate composed of the earldorman, the bishop, and himself. Up to the thirteenth century the sheriff's powers increased considerably. He was, as Pollock and Maitland put it, "the governor of the shire, the captain of its forces, the president of its court, a distinctively royal officer, appointed by the king, dismissible at a moment's notice, strictly accountable to the Exchequer".[3]

In the reign of Edward II the association between the shrievalty and the Crown was strengthened. Some sheriffs had enjoyed hereditary office, or life tenure, and, for the others, county election had been permitted by legislation of Edward I. According to Blackstone:

> These popular elections growing tumultuous, were put an end to by the statute 9 Edw. II st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III c. 7, 23 Hen. VI c. 8, and 21 Hen. VIII c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election. . . . The statute of Cambridge,

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[1] *First Part of the Institutes*, 168a. The history is put thus in Dalton, *The Office and Authority of Sheriffs* (London 1682) 4: "Master Cambden showeth out of Ingulphus, that Sheriffs were first ordained of King Alfred . . . who reigned about *Anno Dom.* 872. And that he first divided England into several Counties, and after caused the Counties (or Shires) to be parted into Centuries, which they now call Hundreds, and into Decimes, which they call Tythings. . . . He also divided the Governors of the Provinces (which before were called *Vice Domini*, that is, Vice Lords) into two offices, to wit, Judges, now Justices, and *Vicecomites*, that is, Sheriffs, which still retain the same name."

[2] *A History of English Law*, Vol. 1, (7th rev. ed., 1956) 6-7, and authorities there cited: and the introductory essay by Chrimes *ibid.*, 12*-13*.

[3] *The History of English Law*, Vol. 1, 533. Note also Dalton, *op. cit.* n. 1, 5.

12 Ric. II c. 2, ordains that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn in to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but only such as they shall judge to be the best and most sufficient. And the custom now is, and has been at least ever since the time of Fortescue, who was chief justice and chancellor to Henry the Sixth, that all the judges, together with the other great officers and privy counsellors, meet in the exchequer, formerly on the morrow of All Souls, but now the morrow of St. Martin yearly; and then and there the judges propose three persons, to be reported, if approved of, to the sovereign, who afterwards *pricks*,[4] that is appoints one of them to be sheriff.[5]

From the thirteenth century the power of the sheriff began a slow course of decline. A notable contribution to that decline was made by the Act 14 Edw. III st. 1 c. 7 (1340) whereunder the office could be held only on an annual basis. Despite the consistency with which his authority was stripped away as the centuries progressed, the sheriff continued to command a position of prestige. The Court of Common Pleas in 1861 confirmed Blackstone's statement that the high sheriff of each county "as the keeper of the King's peace, both by common law and special commission, . . . is the first man in the county, and superior in rank to any nobleman therein during his office".[6] But even that dignity had gone by the early years of the twentieth century.[7]

Coke, in a celebrated though narrow summary, described the sheriff as having "a threefold custodie". In the first place *vitae iusticiae*, "for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of men's lives, liberties, lands, goods, &c.". In the second place *vitae legis*, "he is, after long suits and chargeable, to make execution which is the life and fruit of the law". In the third place *vitae reipublicae* "he is *principalis conservator pacis*, within the countie, which is the life of the common wealth".[8]

Later writers, however, made a simpler, yet more specific, threefold division of the sheriff's functions. The categories they defined comprehended the ministerial, fiscal and judicial attributes of the sheriff.[9]

Into the ministerial category came the execution and return of all process issuing from the king's courts. In civil cases this extended to service of the initiating writ and, where appropriate, arrest and taking bail. In criminal matters the sheriff was responsible to arrest and imprison those charged. In all cases he was to summon and return the jury and to carry into execution the judgement of the court.

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[4] For details of the pricking ceremony see *Halsbury's Laws of England*, 3 ed., Vol. 34, 663; Derriman, *Pageantry of the Law* (London 1955), 108-109.

[5] *Commentaries*, 4 ed. (Kerr), Vol. 1, 304. For the current practice see Derriman, *op. cit.*, chapter 8.

[6] *Ex parte Fernandez* (1861) 10 CB (NS) 1 at 52 (142 ER 368.)

[7] Holdsworth, *op. cit.*, n. 2, 66 n. 1.

[8] *First Part of the Institutes*, 168a.

[9] For example, J. Impey, *The Practice of the Office of Sheriff* (4th ed. London 1817), 30-35; R. C. Sewell, *A Treatise on the Law of Sheriff* (London 1842), 7-11.

As keeper of the king's peace within his county[10] the sheriff could imprison any person breaking the peace and he was bound to pursue and arrest traitors, murderers, felons and rioters. His most powerful means of enforcing the peace was by the *posse comitatus*, to which he could summon as many men as necessary (if need be, most men aged over fifteen but not having the degree peer) to assist in the execution of the king's writs after resistance had hindered him. He had the custody and control of the county gaol, a function then "inseparable from the sheriff . . . for the sheriff, being the immediate officer of the king's courts, and answerable for escapes, and subject to amercements, ought to have the appointment of such gaolers, for whom he will answer".[11]

Amongst a large number of further ministerial attributes of the sheriff, the most important were his obligation to attend upon the judges, especially when they were on circuit, and to execute all their lawful commands. And he was bound to assist the justices of the peace for his county.

The fiscal duties of the sheriff were derived from his station as the king's bailiff. So he looked to all interests of the Crown in matters of land, rents, fines, forfeitures and the like, and he seized to the king's use the goods of attainted felons, outlawed persons, wards, idiots and others to whom the law or circumstances, by denying title, attracted the king's "parental" authority.

He had also a limited judicial authority that had to be exercised personally, not by delegation to his officers. In particular, he had power to hear causes in his county court when forty shillings or less was the sum in dispute. These, and other minor judicial functions, were a mere shadow of the extensive powers sheriffs had once enjoyed in their own court—the tourn—which had become obsolete by the sixteenth or seventeenth centuries. That was symptomatic of a consistent pattern. All of the powers that have just been mentioned, although they continued to make an impressive list well into the nineteenth century after which they were further reduced, were insignificant when measured against the stature of the office in the middle ages.

The Sheriff in New South Wales

The office of sheriff, in a form even more attenuated than that then prevailing in England, emerged in New South Wales in 1824. Before that time service and execution of the process of the colony's various courts had been the responsibility of an officer called the provost marshal. In 1811 his scale of fees indicated that he served subpoenas for one shilling, served writs for from thirteen to twenty-two shillings depending on the sum in dispute, and levied execution for a percentage of the sale.[12]

George Alexander had been appointed provost marshal to sail with the First Fleet but, as he withdrew at the last moment, Governor Phillip on 26 January 1788 commissioned Midshipman Henry Brewer[13] in his place.[14] Phillip described him as "a very useful person who acts as Provost Martial . . . ,

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[10] Dalton, *op. cit.* n. 1, 5, observed in this connexion: "The Sheriff then, as his name purports him to be the Keeper or Governour of the County, so to this day his Patent is, *Commissimus tibi custodiam Comitatus;* And thereby he hath not only the charge or keeping of the King's rights of his Crown within his County, but also the keeping of the Peace."

[11] Sewell, *op. cit.* n. 9, 7, on the authority of Coke.

[12] *Historical Records of Australia* Series I Vol. VII, 453 (references to this work will be hereafter cited *HRA* with series, volume and page following). Cf. an earlier fee order in *Sydney Gazette*, 3 March 1805, 1.

[13] *Australian Dictionary of Biography*, Vol. 1, 149.

[14] *HRA* I/I, 190, 396, 722 n. 31.

and who likewise superintends the different works going on".[15] By the time of Governor Hunter's arrival, Brewer's health had so failed that the duties of his office, "in this country very considerable", could not be performed. Hunter appointed Thomas Smyth, who had been "bred in the Army and served long in his Majesty's marine corps", to succeed Brewer.[16]

The notorious convict—latterly solicitor, George Crossley,[17] recovered a verdict against Smyth before the Civil Court in 1803 for trespass in entering his house by force and seizing movable effects in satisfaction of a civil judgement recovered against Crossley by d'Arcy Wentworth. Crossley, by forgery and the testimony of false witnesses, alleged—and the Civil Court accepted—that the execution was void for being levied on a Sunday, although it had in fact been levied on a Saturday. Governor King reversed the verdict against Smyth and visited upon Crossley "all costs attending this vexatious litigious suit".[18] Later provost marshals and sheriffs were at times to escape less fortunately from the onerous risks of their office.[19]

In 1804 Smyth died, the *Sydney Gazette* remarking that he "was uniformly respected for his humanity in acquitting himself of the duties of his office; the generosity and benevolence of his heart; the affability of his manners, and the placidity of his disposition".[20] They were indeed good qualities for a man of his station to have.

Briefly, Garnham Blaxcell[21] held the position until displaced by William Gore who arrived in 1806 bearing the king's commission as colonial provost marshal.[22] Gore was neither well enough paid, nor sufficiently able, to cope with the problems that went with his post. Paradoxically he was himself imprisoned for debt and, although he was sufficiently enterprising to escape from custody, his financial embarrassments, aggravated by the needs of his large family, brought the office not merely into disrepute, but to a standstill as well. The members of the Governor's and "Supreme" Courts accused him of having made false returns, and of conducting his duties in a "tardy, oppressive and inefficient manner".[23] They recommended his removal, a course acted upon by the Governor and confirmed by the Colonial Office.[24] John Thomas Campbell,[25] Governor Macquarie's secretary, then became the last provost marshal of New South Wales. The fees of the office were simultaneously reduced. But even Commissioner Bigge,[26] though no friend of Campbell's, had to admit that the reduction was too severe "considering the responsibility of the office . . . , and the difficulty of finding competent persons in New South Wales to perform the subordinate duties with integrity".[27]

James Stephen, junior, principal architect of legal reforms effected for New South Wales in 1823, was responsible for transplanting there the office of sheriff. Throughout the colonies there had been complaints that "provost

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[15] *Id.*, 35.
[16] *Id.*, 601.
[17] *Australian Dictionary of Biography*, Vol. 1, 262.
[18] *HRA* I/IV, 582, 588.
[19] The office is still onerous—Supreme Court Rules, 1970, Part 62, rule 4. *Brasyer* v. *Maclean* (1875) LR 6 PC, 398.
[20] 23 December 1804, 2.
[21] *Australian Dictionary of Biography*, Vol. 1, 115.
[22] *Id.*, 459; *HRA* IV/I, 43.
[23] *HRA* I/X, 41.
[24] *Id.*, 294.
[25] *Australian Dictionary of Biography*, Vol. 1, 199.
[26] *Ibid.*, 99.
[27] *Report on the Judicial Establishments of New South Wales and Van Diemen's Land*, ordered to be printed (House of Commons) 7 July 1823, 12.

marshal", the title most commonly used, had objectionable military associations.[28] So, in New South Wales, there would be an experiment. A sheriff would be appointed. His functions were to be "exactly analogous to those of the sheriffs in English counties".[29]

In Stephen's plan, the sheriff's duties fell into three divisions. First, concerning criminal proceedings, he was to keep in custody until trial all persons charged, making on the first day of every term a return to the Supreme Court of all prisoners held. He was also to carry into execution any sentence, including capital sentences, pronounced by the court. Second, on the civil side, he was to serve all process that required an appearance in court; he was to arrest those to be held to bail; and he was to levy execution on the goods and lands of those who failed to satisfy the judgements of the court. Third, in revenue matters, he was to superintend all inquiries about Crown property, to seize all escheated property, and to preside at inquests concerning damage to such public domain as river banks and Crown lands.

Stephen also intended that the sheriff concurrently discharge the duties of coroner, but in practice these offices were separately occupied. He also intended that the sheriff act as Admiralty marshal, a course observed then and since.

On 22 January 1824 Earl Bathurst, Secretary of State for the Colonies, wrote a despatch, no doubt of Stephen's composition, to Governor Brisbane. He announced the appointment of John Mackaness as the first sheriff, and set out Stephen's ideas of the role of the office, "not . . . as an accurate specification of the duties to be executed by the individual, but merely as a general summary for your guidance".[30]

Otherwise, one had to seek out the sheriff's functions from the common law augmented a little by the English legislative instruments issued for the colony in 1823. Of first importance was the so-called "New South Wales Act", 4 Geo. IV c. 96, which authorized the king by letters patent to constitute, *inter alia*, a Supreme Court (sec. 1), and to define the duties of various court officials including "the Sheriff, Provost Marshal and other ministerial officers" (sec. 17). The letters patent, now commonly called the third Charter of Justice, were issued on 13 October 1823, and pursued the definition to some extent, but left most of the sheriff's powers and duties to be distilled from the common law.

The Charter of Justice

Section 11 of the charter,[31] in the first place, reposed the appointment of a sheriff in the hands of the Governor.[32] On appointment, the sheriff was to take the oath of allegiance before the Governor,[33] and to hold office for twelve months thereafter. A casual vacancy, as we might now term it, was to be filled by the Governor's making another appointment for the remainder

[28] *HRA* I/XIX, 561.
[29] *HRA* IV/I, 485, 495.
[30] *HRA* I/XI, 200.
[31] The text of the Charter may be found in *HRA* IV/I, 509; in an edition published by the Library of New South Wales; in *Imperial Acts and Documents Relating to New South Wales* published by the N.S.W. Law Reform Commission; and in other sources.
[32] In *Ward* v. *Murphy* (1937) 38 SR 85 at 101-102, Davidson, J., expressed the view that the sheriff was still appointed under the Charter of Justice. But it seems much more likely that the relative portion of section 11 of the Charter was impliedly repealed by section 37 of the "Constitution Act 17 Vic. No. 41", the statute given effect to by the authority of 18 & 19 Vict. c. 54. That section vested the appointment of all public officers under the government in the Governor in Council, a position now found in section 47 of the Constitution Act, 1902.
[33] The practice now is for the sheriff to take the oaths of allegiance and of office pursuant to the Oaths Act, 1900, before the Chief Justice.

of that year of service. Unlike the position in England, a retiring sheriff could at once be reappointed for a further twelve months, and in practice the early sheriffs of New South Wales generally continued in office on a year-to-year basis. As to the sheriff's duties, the charter ordained only that:

> The said Sheriff and his successors shall, by themselves or their sufficient deputies (to be by them appointed and duly authorized under their respective hands and seals, and for whom he and they shall be responsible during his or their continuance in such office) execute, and the said Sheriff and his said deputies are hereby authorized to execute all the Writs, Summonses, Rules, Orders, Warrants, Commands, and Process of the said Supreme Court of New South Wales, and make return of the same, together with the manner of the execution thereof, to the Supreme Court of New South Wales; and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff by the said Supreme Court . . . or by the Chief Justice of the said Court.

In the second place, section 11 required the Governor, when selecting a person to occupy the position of sheriff, to "conform himself to such directions as may from time to time be given in that behalf by us, our Heirs and Successors, through one of our or their Principal Secretaries of State". That requirement was to be tested by litigation under circumstances that will be mentioned later.[34]

Section 12 of the Charter of Justice enabled the Supreme Court to appoint "some other fit person" to take the sheriff's place so that court process might be executed where the sheriff was related to the parties to proceedings, or was disqualified "by reason of any good cause of challenge which would be allowed against any sheriff in England".[35]

Section 13 of the Charter enabled the Supreme Court to order service of its process by deputation in another case: where service was to be effected outside territorial limits fixed by the court, beyond which the sheriff was not to be compelled or compellable to go.[36] In such a case the sheriff would grant his special warrant to the person effecting service, but was said to be relieved of liability for the acts of that person.[37] Such a provision was one in which the colonial office of sheriff differed distinctly from its English model.[38] The effect of the Charter in that respect, according to Alfred Stephen, C.J., was to make it mandatory that the sheriff or his deputies, not the parties themselves, execute the writs and process of the Supreme Court. He thought it "a serious question" whether service by a solicitor or a solicitor's clerk might be challenged on that account.[39]

So the office began on these somewhat sketchy foundations. Some practical difficulties in the Charter were remedied and some of the gaps in defining the sheriff's authority were filled by legislation or by rules of court. But at no

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[34] The requirement protected the Colonial Office's patronage. See *Ex parte Chung* (1861) Legge 1458 discussed below.

[35] *Corn* v. *Paslow* (44 Eliz. I) Cro. Eliz. 894 (78 ER 1117) is an example of such a challenge. These provisions of the Charter greatly abbreviated the English practice in this respect, about which see *Bacon's Abridgement* (7 ed. 1832) Vol. 7, at 201. See now Jury Act, 1912, s. 42.

[36] For the modern practice see Supreme Court Rules, 1970, part 62, rule 2.

[37] A. Stephen, *The Constitution, Rules, and Practice of the Supreme Court of New South Wales* (Sydney 1843-5) 61, found it difficult to discern how the sheriff would be so absolved.

[38] *Ryan* v. *Howell* (1848) Legge 470 at 472-3.

[39] Stephen *op. cit.* n. 37, 60.

stage was there any codified statement of the sheriff's duties. And there is none today.

Early Sheriffs

Mackaness, the first sheriff, was appointed on the recommendation of the then Chief Justice of the King's Bench. As sheriff he was paid the substantial salary of £1000 because, as James Stephen, junior, had explained: "He will have much to do. He will, unavoidably be in the receipt of much property, and he will have to bear a heavy responsibility".[40] Being thus set apart, Mackaness suffered from an inflated estimate of his own importance. "He is a good natured man", wrote Chief Justice Forbes, "but sometimes a little misguided in his views of his office; he supposes himself to be here exactly what the Sheriff of a county is in England . . . The high sheriff of New South Wales, in imitation of his superiors, supposes that he is like an English high Sheriff . . . I think Mr. Mackaness has taken a wrong view of his office and his obligations".[41] The view of James Stephen, junior, that the colonial sheriff's functions were to be "exactly analogous to those of the sheriffs in English counties", was well known to Mackaness. When, for a variety of reasons, he came into conflict with Governor Darling, he defended himself vigorously:

> My Lord Bathurst's instructions and Mr. W. Horton's were that I should on all occasions act as I would do, if I was Sheriff of an English County. I may perhaps, in your Excellency's opinion, have too strictly adhered to these instructions. . . . As a Sheriff of an English County is responsible only to His Majesty's Court of King's Bench, I have certainly considered myself only answerable to the Supreme Court. Had my Lord Bathurst instructed me to have followed your Excellency's directions as Governor of the Colony, I would cheerfully have obeyed them, and I should have been relieved from much anxiety and responsibility in modelling the duties of a Sheriff of an English County to the state and condition of this Colony.[42]

But the Colonial Office had already rebuked Mackaness for having assumed in his correspondence with the Governor "a style . . . according so little with that respect, which is due towards His Majesty's Representative from all those officers who may fill employments under the Crown".[43] His insistence upon status was to be his undoing.

There were two sources of conflict between Mackaness and the Governor. One was Mackaness' resistance to instructions that he superintend the gaol.[44] The Colonial Office suggested that the court make rules upon the subject, but saw fit to disallow the rules when made because they imposed liabilities on the public purse. In his determination not to become a gaol inspector Mackaness for a time prevailed, but his immediate successors had to fulfil those duties under direction of the Governor. As Doctor C. H. Currey summed up the consequences: "The Sheriff had thus to obey, in effect, two masters: the

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[40] *HRA* IV/I, 524. Because of the express reference to a provost marshsal in 4 Geo. IV c. 96, Mackaness quite improperly represented that he occupied that office as well. His claim on that account for additional salary was disallowed, *HRA* I/XIII, 582.

[41] *HRA* IV/I, 713-4.

[42] *HRA* I/XIII, 640-1.

[43] *Id.*, 583.

[44] *Id.*, 168, 583. For the view of William Carter, later acting sheriff, that the sheriff was obliged by received English statutes to accept responsibility for the gaols see *id.*, 174. Mackaness' resistance was not complete—Sheriff's Letter Book NSW State Archives (NSWA) 4/6650 *passim*: gaol returns 1829-31 NSWA 2/2121.

Supreme Court in respect of judicial proceedings, and the Governor, speaking through the Colonial Secretary, in respect of the superintendence of the prisons".[45]

The other source of conflict was Mackaness' zest for playing politics. It has been said that he "early became addicted to attending radical political meetings in and around London".[46] In Sydney he readily accepted invitations to be chairman of contentious public meetings, and his sympathy for "emancipists" (those who, having come out as convicts, had served out their sentences) was manifest. Governor Darling, no champion of the emancipists, was incensed by what he saw as Mackaness' disloyalty and "general conduct which has been highly unbecoming an officer of the Government".[47] As the sheriff's appointment ran only from year to year, Darling disembarrassed himself of Mackaness by allowing his term to lapse at the end of 1827.

In his place William Carter, Master of the Supreme Court, was temporarily installed.[48] Carter did not last for long as sheriff, and found it a thankless unrewarding post. Through imprudence he had come into conflict with Chief Justice Forbes who, having been obliged against his own inclination to tolerate him as Master, thought ill of him.[49]

For all that, one cannot but feel sorry for Carter. The rules of court made his role as sheriff almost impossible of fulfilment. He was obliged to be in attendance before the court from its sitting until its rising.[50] During that time he could perform no other duties, so they had to be delegated to the under sheriff who, as the recipient of a paltry salary, did not much trouble himself about doing his work well.[51] Although constrained to delegate in this way, Carter received no relief from personal liability. During his brief acting term sixteen actions were brought against him for things done in his name as sheriff. Most were decided in his favour, but the consequences of any negligence, personal or vicarious, were severe. On one occasion, for instance, he was "saddled with one hundred pounds debt and costs" when he failed to prove service in Newcastle of process that he had sent up by packet boat.[52] "I solemnly declare", he wrote to the Governor, "that, if the office of sheriff was offered to me tomorrow, I would not accept it with a salary less

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[45] *Sir Francis Forbes* (Sydney 1968), 112.

[46] *Australian Dictionary of Biography*, Vol. 2, 169.

[47] *HRA* I/XIII, 638.

[48] *Id.*, 648. Carter's absorbing career included service as first Master of the Court, first Master in Equity and first Registrar General: with bouts of insolvency intervening. It is odd that so significant a figure in our early legal history received no notice in nineteenth century biographical dictionaries nor in the *Australian Dictionary of Biography*.

[49] *HRA* I/XIII, 432, 480.

[50] This was by analogy to English assize practice of which Dalton, *op. cit.* n. 1, wrote (at 369): "The High Sheriffs themselves of every shire are in person to attend upon the Justices or Judges of the Assizes and Gaol delivery in (and through) their Circuits, and shall give their attendance for the due executing of the Commandments and Precepts of the said Judges in matters concerning the execution of their offices and ministration of justice. . . . And the Judges of Assize may fine the High Sheriff, and any other said officers, if they fail either in their attendance, or for any other negligence, misbehaviour, or misdemeanour, in their office, before them." A requirement reminiscent of this was taken across into section 37 of 11 Vic. No. 20, and is still found in section 8 of the Sheriff Act, 1900. The matter was, in early times, covered by rule of court, Stephen, *op. cit.* n. 37, 61.

[51] Governor Darling therefore recommended that the post of under sheriff be abolished *HRA* I/XIV, 84; but the suggestion was obviously not practical, *id.*, 627.

[52] *HRA* I/XV, 293-4. It appears that his defence was undertaken by a lawyer who charged him no fee, *id.*, 290. Problems such as those arising in this case were substantially overcome by the Jury Trials Act, 5 Vic. No. 4 (1841) whereunder, by section 11, the Governor was empowered to appoint district sheriffs. Note also Sheriff Act, 1843, sec. 2.

than two thousand pounds per annum. . . . When the accounts of my office are finally closed, my losses or expenses as sheriff will not be less than four hundred pounds, or, in other words, I shall have received six hundred instead of one thousand pounds for the performance of a high, most painful and most responsible public situation". The government refused his request to be compensated.[53]

Sheriff Macquoid

Carter had no regrets when the Colonial Office, exercising its gift of patronage, appointed Thomas Macquoid to the permanent office of sheriff. The new nominee was said to have been "long accustomed to discharge the duties of a sheriff" in India and elsewhere.[54] With that experience he must have wondered greatly at his change of fortune on surveying his new office in February 1829. The colony was in depressed times conducive to litigation and bankruptcy proceedings. Since the beginning of that year over 700 summonses alone had come into the sheriff's hands for attention. But the staff consisted only of "the Under Sheriff and a clerk named William Flynn, who is a prisoner".[55] The sheriff and under sheriff being more often out of the public office than in it, those calling on business had to deal with the convict clerk whom Macquoid thought to be neither efficient nor trustworthy.

Somewhat grudgingly the government agreed to appoint a proper clerk at an annual salary of £100.[56] But Sheriff Macquoid was not yet satisfied. Like Mackaness he was mindful of his status. It grieved him that his name had not been selected from the "admixture of the highest class of civil servants with the most respectable of the landed proprietors" to be a member of the Legislative Council. His "friends at home" had led him to believe that such a distinction would be almost automatic.[57]

Worse than that, "no notice whatever" had been taken of the sheriff in the colonial table of precedence. Macquoid contended that he should rank next after the judges. Disclaiming "all private feeling" and urging his views "simply on public grounds", he wrote to Sir George Murray, Secretary of State for the Colonies:

> Considering the high rank in his County, which the Constitution confers on the ancient office of Sheriff, and the place in society which that officer has heretofore held in this colony, I feel justified in presuming that his name not appearing in the List of Precedency has been occasioned rather by inadvertence, or perhaps from an idea that the order of precedence in England has sufficiently defined his rank than from any intention to lessen his respectability. But, as unpleasant doubts may possibly arise hereafter, it cannot be viewed otherwise than as a point of natural and honourable ambition with me that the office should not in my hands be permitted to deteriorate or to sink into insignificance.[58]

Governor Darling, who found in his new sheriff gentlemanly qualities that were favourable to the government and removed from all taint of emancipist sympathy, warmly supported this disinterested solicitation. "He is a person of experience", he assured Sir George Murray, "and his character and deportment are such as cannot fail to make a very useful impression on the community".[59]

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[53] *HRA* I/XV, 435.
[54] *HRA* I/XIV, 243.
[55] *Id.*, 662.
[56] *HRA* I/XV, 103.
[57] *Id.*, 287.
[58] *Ibid.*
[59] *Id.*, 286.

Few were gratified by Murray's decision that the sheriff should rank next after members of the Legislative Council in colonial precedence—at the foot of the express list.[60]

But the Colonial Office could not agree to strenuous representations by Macquoid for an increased salary. These Darling had also supported with "very much pleasure" adverting to Macquoid's "zeal in the performance of his laborious duties" which entitled him to "the unqualified approbation of this Government and to its warmest commendation".[61] And certainly Macquoid had a fair case. In 1825 the total of writs passing through the sheriff's office had been 556: the fees from the office were just over £111. In each succeeding year the business and fees had increased and, for the first ten months of 1829 the total of writs had been 2226, the fees over £1330. On the criminal side there had been a substantial increase also in executing the death sentence.[62] Beyond these statistics, he referred to the manifold and great responsibilities attaching to the office:

> the constant and necessary attendance which the sheriff is obliged to give either in person or by deputy in the courts when sitting, the insecurity of the gaols, unavoidable in the present state of the Colony; the great and daily increasing extent of, it may be said, undefined territory, over which the population is very thinly spread, rendering more difficult and hazardous, from the character of the inhabitants than in any European country, the due execution of the court's process; the late Jury Bill which imposes new and onerous duties on the Sheriff; and the late establishment of the Circuit Courts; all of which obviously either much increase the Sheriff's responsibility or add to his present duties.[63]

With the departure of Governor Darling, Macquoid's prospects of advancement waned and, after ten years of decline, his career was to end disastrously. Even naming his house "Goderich Lodge" in honour of Viscount Goderich, the then Secretary of State for the Colonies, produced no change in his favour.[64] By 1832 the Colonial Treasury had been drawn upon to indemnify him against damages and costs of nearly £680 resulting from his unlawful detention of persons mistakenly thought to be runaway convicts from the Swan River.[65]

Governor Bourke had little time for Macquoid. He admitted him to be "an excellent gentleman of high character and respectability", but criticized him for leaving so much of his responsibilities to his deputy and for "not infrequently incur[ring] losses by actions at law". Bourke hoped that the Colonial Office would open the way for a new appointment, nominating "some person bred to the Law of an active hustling turn, and who will not be above discharging most of the duty himself".[66] The Colonial Office did not, however, wish to interfere.

Under Governor Gipps, Macquoid revived his hopes about precedence. But that Governor felt the sheriff to have enjoyed a higher place than he should have occupied. Notwithstanding that "the office of Sheriff may perhaps

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[60] *Id.*, 576; *HRA* I/XVI, 768; *HRA* I/XVII, 131. Mackaness and his supporters thought he was placed too low: those public law officers who had no place in the order of precedence thought that Mackaness deserved no place there either.
[61] *HRA* I/XV, 289.
[62] *Id.*, 290.
[63] *Id.*, 291.
[64] *HRA* I/XVI, 769.
[65] *Id.*, 679.
[66] *HRA* I/XVII, 131.

be considered one of more importance in New South Wales than in any other colony, not only on account of the extent of our prisons, but also of the greater number of criminals, who unfortunately incur the extreme penalty of the law", Gipps felt that the sheriff should rank below the attorney general.[67]

One of the grounds for Macquoid's persistence was his claim to be an "ancient and constitutional officer of the Crown, the High Sheriff of a colony purely English".[68] The Colonial Office resolved that all parties be disabused of that notion. Despite the analogy that James Stephen, junior, had drawn in 1823 between the English and the colonial shrievalty, the position henceforth must be understood differently. Lord Glenelg settled the matter in a despatch to Governor Gipps:

> The title of Sheriff, though adopted in New South Wales as the most appropriate which could be found for describing the duties of the officer who bears it, is still in certain respects inapplicable. It was never designed to place him in the position or to delegate to him all the duties or to invest him with the rank of the High Sheriff in an English County. The corresponding office in a large proportion of the other colonies is designated by the title of Provost Marshal, to which, however, objection having been made on the ground of its apparent relation to military, rather than to civil duties, the term Sheriff was substituted in the New South Wales Charter of Justice. But, the Sheriff of that Colony, being never designed to occupy any other place than that of the Executive Officer of the court, it would be attended with much practical inconvenience to ascribe to him an official rank, which might be supposed to recognize pretensions of a different kind.[69]

Macquoid attempted to seek a review of the case, arguing vigorously for the status that had become an obsession with him.[70] The Colonial Office closed the correspondence coldly.[71] Macquoid could not reconcile himself to the result. Fretting about it aggravated the financial worries that seemed always to accompany his office. Soon he was deep in a state of mental depression and serious insolvency. In a "fit of temporary insanity" he committed suicide in October 1841.[72] His bankrupt estate, and the fact that he had failed to give the prescribed security for the due discharge of his duties stimulated review of the nature and future of the office.

Statutory Changes

The first colonial enactment concerned exclusively with the sheriff was 7 Vic. No. 13 "An Act for regulating the Appointment and Duties of Sheriff in New South Wales". It became law on 8 December 1843. By section 1 it provided that the sheriff should henceforth be appointed by the Governor,[73]

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[67] *HRA* I/XIX, 339. As Dickinson, J., put the matter in *R.* v. *Lang* (1851) Legge at 693: "The office of Sheriff here is so essentially different to the office of Sheriff at home."

[68] HRA I/XIX, 340.

[69] *Id.*, 561. The standing of the office, as expressed by Cheeke, J., in *Brasyer* v. *Maclean* (1874) 12 SCR (L) 206 at 232, is analogous: "The relative duties of the Sheriff in England and the Sheriff here . . . are different entirely in position. One has higher duties imposed upon him than the other. One receives certain large emoluments in fees by the hands of the Under-sheriff—the other enjoys a fixed salary. Still their ministerial duties on the execution of the process of their respective courts appear to me similar. . . . In my opinion . . . the legal liability of the Sheriff in this Colony is equally applicable to the Sheriffs in England in the execution of the process of their individual Courts."

[70] *HRA* I/XX, 87-88.

[71] *Id.*, 373.

[72] *HRA* I/XXI, 570-572.

[73] Since the Constitution Act 1855 (18 & 19 Vict. c. 54) the appointment has been by the Governor-in-Council, but see note 32.

to hold office "during pleasure"[74] not from year to year. The section contained an implied power of removal.[75] It repealed the portion of the Charter of Justice which required the Governor in this respect to yield to instructions from the Colonial Office.

A consequence of section 1 was that a deputy or under sheriff could be appointed by the sheriff for the duration of his own tenure. As Dickinson, J., put it in *R.* v. *Lang*: "The law of England has declared that where the Sheriff is appointed for one year, the deputy's appointment is co-existent with the Sheriff's. . . . The Under-Sheriff [in New South Wales] is nothing more than the Sheriff's deputy".[76] It should be emphasized, however, that in present parlance the style "under sheriff" is reserved for the principal assistant to the sheriff at his court office. The style "deputy sheriff" is now accorded to designated members of the public in country districts whose duty it is to attend upon and render administrative assistance to judges when conducting circuits.

By 1856 rules of court had been made requiring deputy sheriffs to be appointed at Bathurst, Campbelltown, Goulburn, Maitland, Muswellbrook, Parramatta, Brisbane, and at such other places as the sheriff should think fit.[77] Thereafter appointments were regularly made at other circuit towns.

Section 5 of the Act obviously owed its existence to the defalcations of Macquoid. It laid down that the sheriff, by bond or recognizance, must give security for the due performance of his duties in such a sum as the government might prescribe. At the same time, the sheriff was relieved from some of the perils of his office. By section 3 of the Act the sheriff was to be liable only in damages should a debtor in execution escape from custody. Before the Act, the sheriff had been liable for the amount of the debt owed by the defaulter as well as for damages.

Another source of relief was found in section 2 of the Act. Thereunder a Judge of the Supreme Court might direct the execution of process to be effected by some person other than the sheriff. Such a person was commonly called a special bailiff.[78] The sheriff bore no responsibility for the acts or omissions of special bailiffs.[79] That concession was of value in lessening at least some of the liabilities attaching to the office. It did, however, create unusual problems in practice, as for instance, when a competition arose

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[74] See now the Sheriff Act, 1900, s. 3 which is displaced in practice by the provisions of the Public Service Act, 1902.

[75] *Per* Stephen, C.J., *Ex parte Chung* (1861) Legge 1458 at 1458-9.

[76] (1851) Legge at 693. Governor Gipps in 1845 had propounded the extraordinary opinion that "the office of under sheriff was not one recognized by law", *HRA* I/XXVI, 726.

[77] Anon. (Sir A. Stephen) *Supreme Court Practice: The Rules of Court and Enactments Affecting Actions and Other Proceedings at Law* (Sydney 1856) 50.

[78] Special bailiffs in New South Wales differed significantly from those in England. As Blackstone, *op. cit.* n. 5 at 308, wrote: "Bailiffs, or sheriff's officers, are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making executions, it is now usual to join special bailiffs with them, who are generally mean persons employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being answerable for the misdemeanours of these bailiffs, 'when acting under his authority', they are therefore usually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs, which the common people have corrupted into a much more homely appellation".

[79] Stephen, *The Constitution Rules and Practice of the Supreme Court* (Sydney 1843-5), 86.

between special bailiffs acting for rival creditors.[80]

Section 2 was carried across into part III of the consolidating Sheriff Act, 1900, but the appointment of special bailiffs seems now to be obsolete, not having been put into effect for at least thirty years.

The Sheriff Act, 1900, consolidated principally the Act of 1843 and the Sheriff's Fees Act, 1887. Apart from that consolidation, which is of little substance, there has been no definitive legislation in New South Wales concerning the office of sheriff.

A responsible and risky office

It had proved to be a daunting task to find a competent person willing to take the place that Sheriff Macquoid had vacated so precipitately. For one thing, it was well known that his financial embarrassment stemmed largely from the colonial government's sloth in meeting the expenses of the office.[81] Macquoid, very foolishly, had kept the office going by advances from his own pocket. Charles Windeyer and J. R. Brenan, police magistrates of Sydney, were asked by Governor Gipps to act in an interim capacity, but they declined "on the ground of the extreme responsibility and risk of the office".[82] William Hustler of the Bar was eventually induced briefly to give up his practice and assume the sheriff's duties. He acted in that role for a little over a year until the arrival of the Colonial Office's last nominee, Adolphus William Young.

Young turned out to be troublesome. He stood successfully for election to the Legislative Council, making plain in the House his independent views often at variance from the policies of Governor Gipps. Of that the Secretary of State for the Colonies disapproved and indicated that, if Young declined to support the Governor in the Council, he would have to yield up his commission as sheriff.[83] Surprisingly, Young instead resigned from the Council. He lasted as sheriff only for a few years, finding his duties " 'everywhere of an invidious and responsible character . . . attended with peculiar and unusual difficulties'. Some of his accounts were questioned by the British Treasury and he resigned in November 1849, receiving from the Judges of the Supreme Court very warm commendations for his 'integrity, discretion and ability' ".[84]

On 1 December 1849 Gilbert Eliott became sheriff for a brief term that ended on 3 January 1854 when the Governor made his last personal appointment of a sheriff pursuant to the Charter of Justice.[85] The appointee, John O'Neil Brenan, fell out with the executive government, and the Colonial Secretary purported to remove him from office in 1861. His successor George Richard Uhr was appointed by the Governor-in-Council on 17 April 1861.

The removal and new appointment became the subject of a contest in *Ex parte Chung* (1861)[86] where, on behalf of a prisoner under sentence of death, a writ of *habeas corpus* was sought alleging that Uhr was not the sheriff, or alternatively a *quo warranto* was sought requiring Uhr to demonstrate his authority for holding the office. The argument for the prisoner was that Brenan was appointed by the Governor under the Charter of Justice and in conformity with directions from the Secretary of State for the Colonies:

[80] *Barclay* v. *Manby* (1862) 1 SCR (L) 352.
[81] Sheriff's Letter Book 1841-50 NSWA 4/6656, 21.
[82] *HRA* I/XXI, 571.
[83] *HRA* I/XXIV, 163.
[84] *Australian Dictionary of Biography*, Vol. 2, 633.
[85] Or so the present writer contends: but see *Ward* v. *Murphy* (1937) 38 SR 85 at 101-102, referred to in n. 32.
[86] (1861) Legge 1458.

Uhr was not. Section 37 of the First Schedule to 18 & 19 Vict. c. 54, the New South Wales Constitution Act 1855, although vesting in the Governor-in-Council the appointment of "all public officers under the Government of the Colony hereafter to become vacant or to be created" had no operation on existing offices.

Stephen, C.J., acknowledged that the form employed to remove Brenan was equivocal, but held that it was not fatally defective:

> The Governor had power, he thought, to remove *any* officer holding office during pleasure. At all events he had power to remove this officer. The section relied upon in the Charter of Justice—that the Governor should act in conformity with instructions from the Secretary of State—was merely directory. The Governor might disobey it at the risk of his office. But the Legislature had received ample power to deal with provisions in the Charter of Justice, and by the Sheriff's Act the office of Sheriff was made one to be held at the appointment of the Governor during pleasure. This repealed the section of the Charter of Justice relied upon, and left the matter wholly in the hands of the Governor. The Queen had nothing to do with the appointment or removal of the Sheriff. But even were it an appointment by the Crown the Governor would have, by law and by usage, the full power—as representing the Crown—of removal.[87]

From Uhr's time onwards the office of sheriff continued in a more settled manner, and it is beyond the scope of this note to pursue further the contributions of individual sheriffs. But, as the information is not readily accessible, sheriffs from Responsible Government to the present day, and the years during which they held office, are set out in the following list:

John O'Neil Brenan (in office at Responsible Government)	1861
George Richard Uhr	1861-1864
Harold Maclean	1864-1874[88]
Charles Cowper, jr.	1874-1896
Cecil Edmunds Bridgewater Maybury	1896-1917
Charles Richard Walsh	1917-1920[89]
Walter William Crockford	1920-1925
George Francis Murphy	1925-1939
Harry Charles Lester	1939-1945
Roland Oliver Elliott	1945-1960
Donald Mercer Richardson	1960-1968
Thomas Alexander Woodward	1968-1974
George Francis Hanson	1974-[90]

The evolution of the office of sheriff in New South Wales has continued the same pattern of declining power that has attended the English office since the middle ages. Beyond the differences in official status, the reasons here are

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[87] At 1458-1459.

[88] He was appointed Inspector General of Prisons in 1865 in conjunction with the office of sheriff. But the two offices were severed in 1874 and he then became the first Comptroller General of Prisons.

[89] Walsh was gazetted to hold the office jointly with that of Prothonotary—*N.S.W. Government Gazette*, 24 August 1917, 4834. He acquired and, probably for the last time in the State, wore on ceremonial occasions the full court uniform of sheriff. The uniform is preserved in the collection of the Museum of Applied Arts and Sciences, Sydney.

[90] The writer is indebted to Mr. Hanson for assistance in compiling this list.

basically to be found in the early use of the military to help in maintaining the king's peace amongst the colony's civilian population; in the rapid emergence of a substantial police force; and in the establishment of a separate government authority to superintend and manage gaols and prisoners.

Medieval ideas of "self help" in preserving the peace did not in any organized way become part of the order of things in New South Wales. There appear to be no instances of the hue and cry being raised in New South Wales for the pursuit of fugitive offenders, nor does there seem to be any record of the sheriff's convening the *posse comitatus* in the colony. The ends that might have been accomplished by those means were attained rather by the efforts of soldiers and police.[91]

With the appointment of a comptroller-general of prisons in 1874 the sheriff's responsibilities concerning gaols came to an end, apart from seeing to the execution of capital punishment. But that, mercifully, was also a waning function. Indeed, virtually all of the sheriff's powers on the criminal side have either become obsolete or have been vested in other hands. He still notionally has authority over prisoners who are not yet sentenced, but in practice such persons are ordinarily in police custody. His last remaining duty of substance in criminal proceedings is the summoning of jurors.

An important function of the sheriff for many years was the charge and superintendence of the State's court houses. That has latterly been transferred to other custodians and the sheriff now retains only the oversight of the Supreme Court House in Sydney and of the court house at Darlinghurst.

Although the Supreme Court Act, 1970, made no provision concerning the office of sheriff, it is conceivable that future reforms in court administration may substantially change, or even abolish, the shrievalty. Such a prognosis in no way reflects, nor is it intended to reflect, upon holders of the office or the discharge of their duties.[92] But it would be unrealistic, given the consistency of the historical decline in the powers of the sheriff, to suppose that the office is destined to last indefinitely in its present form.

The office of sheriff is especially vulnerable because its scope in New South Wales is so ill-defined. That one should be expected to delve, often in obscure corners, into the Charter of Justice, the Sheriff Act, the Constitution Act, the Jury Act, the Public Service Act, other statutes, the common law, and rules of court, in order to piece together some notion of who the sheriff is and what he does, is a state of things scarcely creditable to the law. The duties and authority of the under sheriff are even more obscure. Unravelling knots like this may be fascinating for students of history but cannot commend itself to practising lawyers and court administrators.

It is an object of this historical review to suggest that the time is long overdue for an express statement, within a new Sheriff Act or elsewhere in the statute book, of the role and powers within our community of the sheriff and his department. When that is done, the future place of the sheriff in the administration of justice may be better assessed.

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[91] L. A. Whitfeld, *Founders of the Law in Australia* (Sydney 1971) 84, suggests that the method used to serve the Speaker's warrant in the Tasmanian constitutional *cause célèbre Fenton* v. *Hampton*, (1858) 11 Moo. P.C. 347 (14 ER 727), "was an attempt to resort to a *posse comitatus*". The analogy is interesting; but that remedy surely did not extend to parliamentary process?

[92] For a commentary on aspects of the modern functions of the Sheriff's Department see S. Cuddy, "The Sheriff's Door is Still Open" (1974) 12 *Law Society Journal* (N.S.W.), 239.