HUMAN RIGHTS IN COLONIAL QUEENSLAND

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I INTRODUCTION

Colonial Queensland had no bill of rights, just as the State of Queensland has no bill of rights today. However, rights issues surfaced in Queensland's colonial era more frequently than many would suspect. Indeed, in the forty year period from 1860 to federation on 1 January 1901, there were numerous statutes and over 200 cases in Queensland involving what we would consider today to be rights issues. Australians were clearly inclined to address such matters when they felt they were justified in doing so. This article will present a summary of some of the most interesting and enlightening rights statutes and cases during Queensland's colonial era. A study of colonial rights statutes and cases in Queensland has not previously been undertaken, although there has been research on some individual rights in Queensland or other parts of Australia.[1]

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[1] For example, three criminal trials in colonial Queensland – one of which was Chinaman Ying Lee – were discussed in Sean Gouglas and John C Weaver, 'A Postcolonial Understanding of Law and Society: Exploring Criminal Trials in Colonial Queensland' (2003) 7(2) *Australian Journal of Legal History* 14. Race relations in colonial Queensland are also discussed in depth: Raymond Evans, Kay Saunders and Kathryn Cronin, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation and Extermination* (University of Queensland Press, 3rd ed, 1993). Some colonial criminal cases in Western Australia are discussed: Hon RD Nicholson, 'Western Australia's Early Colonial Laws: As Reported by Archdeacon Wollaston' (2000) 2 *The University of Notre Dame Australia Law Review* 1. Juries in colonial New South Wales are also discussed: John M Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3(3) *Sydney Law Review* 463. Voting rights in the 1890s for women in some colonies (but not Queensland) were briefly

The statutes and cases presented in this article are from the period of 1860 to 1900. Some of the statutes and cases would not at first glance normally be associated with rights, but in fact did involve rights issues or in some of the cases generated statements about rights by the justices. The most frequently discussed rights issues were protections for the criminally accused. However, there were also many that dealt with natural justice, as well as voting, freedom of speech and the press, religion, acquisitions, and even abortion. Each will be discussed in turn.

II RIGHTS OF THE CRIMINALLY ACCUSED

The largest number of the colonial era statutes and cases involving rights pertained to the rights of the criminally accused. A number of statutes were enacted that dealt with these issues, such as the 1867 *Act to Consolidate and Amend the Law of Evidence and Discovery at Common Law*,[2] and the 1865 *Act for Further Improving the Administration of Criminal Justice*.[3]

The application of these acts to actual fact situations in these cases speaks a great deal about how rights for the criminally accused were viewed in colonial Queensland. One early case which focused on criminal protections was the 1866 case of *R v Hennessy*[4] in which two men were tried and convicted of horse stealing. Justice Lutwyche expounded that 'a very great injustice might be occasioned by a departure' by a trial judge from rules protecting the criminally accused.[5] 'For instance, he might refuse the prisoner permission to cross-examine the witnesses for the Crown, or deny him the privilege conferred upon him by statute of being heard in his defense by counsel. These well-known legal rights would be taken

discussed: Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2nd ed, 2004) 117.

2 31 Vic No 13.

3 29 Vic No 13.

4 (1866) 1 Qd S Ct R 147.

5 (1866) 1 Qd S Ct R 148.

away from him, yet no record of it could be preserved, and...the prisoner would have no remedy'.[6]

Many other rights pertaining to the criminally accused were addressed in the cases of this era. For example, proof beyond a reasonable doubt was discussed in the 1887 case *In Re John Taylor Richardson*.[7] The accused had prepared insolvency (bankruptcy) pleadings for clients, even though he was not admitted to the bar. However, he claimed not to have charged any fee for it, and that the insolvency petition was later filed at court by a solicitor. In discussing the proof required to show whether Richardson should be held in contempt for practicing law for compensation without a license, Justice Lilley stated

> It ought to be proved by satisfactory evidence, and I think I might almost lay down the rule, for myself, that it should go beyond a reasonable doubt. The evidence in this matter ought certainly to be weightier than that required in a civil suit ... in a penal or criminal proceeding, especially a criminal, a judge lays down a different rule- he says this must be proved beyond a reasonable doubt.[8]

Because a majority of the justices recognised this standard, no order of contempt was charged against the accused.

The right of an accused to question witnesses was discussed in the 1892 case of *Burrey v Marine Board of Queensland*.[9] After a collision between two steamers, an inquiry was held to determine the cause of the accident. The third mate of one of the steamers testified at this inquiry, with no inkling that he would thereafter be sanctioned. Not long after, he received a letter from the Marine Board of Queensland stating that he was in default, and he needed to show cause why his certificate should not be suspended. A new inquiry date was set, but at this new inquiry the transcript of the

6 Ibid.
7 (1887) 3 Qd L J 58.
8 Ibid 59-60.
9 (1892) 4 Qd L J 151.

prior hearing was used and no new witnesses were called, nor did the third mate have the opportunity of calling any witnesses. Justice Harding summed up the normal procedure that should have been followed:

> In every judicial proceeding, where a man's conduct was called into question, he must be first of all charged – he must be told why he was brought there, and against what he had to defend himself. Having been properly charged, then the charging party had, by judicial evidence, to make out the case against him. That was to say, according to our law, there must be sworn testimony given in the presence of the accused, with the opportunity afforded him to cross-examine witnesses immediately after they had given their testimony. Then, and then only, if the case was made out against him, was he called upon to defend himself, and he defended himself by calling evidence of a similar kind.[10]

Justice Harding then noted that 'as this was a new inquiry, no witnesses had been examined. Consequently Burrey could not exercise the right of cross-examination'.[11] In short, 'The question was, was Burrey properly charged, and had he the opportunity of cross-examining the witness? All he had was a letter'.[12] The justices ruled that Burrey's rights had been violated, and that the Board could take no action against him.

The ability to avoid self-incriminating statements was affirmed in the 1878 case of *Attorney General v Simpson*.[13] In this case the defendant refused to answer many of the interrogatories submitted to him by the Attorney-General. Justice Lilley noted that such a refusal was proper in light of 'the general rule that a man can protect himself from answering any matter that may subject him to pains, penalties, or forfeiture'.[14] The defendant's refusal to answer was sustained.

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[10] Ibid 152.
[11] Ibid 153.
[12] Ibid.
[13] (1878) 1(3) Qd L R (Beor) 19.
[14] Ibid 27.

The right to a speedy trial was discussed in the 1860 case of *R v King*.[15] William King was arrested in Brisbane on suspicion of having murdered a man in New South Wales. Because of the extraterritorial nature of the case, Justice Lutwyche ordered King to be discharged. He commented on how arrests of this kind were handled in that day if they were based on criminal conduct in another colony:

> Is a man, then, to be arrested and committed to gaol in this colony because the constable has received information which leads him to suspect that his prisoner was concerned in some felony at Delhi or British Columbia? And, if committed to gaol, how long is he to be kept there? ... Is he to abide in gaol until the authorities of some distant portion of the Empire have been communicated with, and have signified their intention to remove him at the first convenient opportunity? Common sense, which is very often found in the closest alliance with the law of England, revolts at the suggestion of imprisoning a man for twelve or eighteen months before trial.[16]

Excessive or cruel punishments were also dealt with in the cases. For example, in the 1892 case of *Bilby v Hartley*,[17] a sheep shearer was convicted of intimidation because he threatened other shearers with bodily harm if they did not contribute to a fund he was collecting. Pursuant to statute, the fine he was given upon conviction would subject him to six months imprisonment if he was unable to pay it. However, the act under which he was convicted allowed imprisonment for a maximum of three months. The Chief Justice noted that 'the magistrates imposed an excessive fine, which might have exposed the defendant Bilby to excessive imprisonment'.[18] The conviction was allowed to stand, but the fine was reduced to be commensurate with a three month prison sentence if unpaid.

The general right of a party to put forth evidence in his defense even in civil cases was discussed in the 1895 case of *Mulholland v*

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15 (1860) 1 Qd S Ct R 1.
16 Ibid 3.
17 (1892) 4 Qd L J 137.
18 Ibid 142.

King.[19] This was a contract case in which a contract for boarding a tenant was violated on the grounds that the boarder had allegedly committed immoral acts with the Landlord's servant. Justice Griffith noted that

> After the evidence in support of the defendant's case had been given, the plaintiff offered evidence in reply to show that he had not been guilty of the immorality alleged. That was rejected by the learned judge on the ground that the plaintiff had been already cross-examined on the point. Now there is a great difference between a man answering questions under cross-examination, and putting his own case forward for himself. The fact that a plaintiff has been cross-examined on a matter of defence raised by the defendant does not prevent him from making his own case in reply ... a plaintiff is not precluded from making a case in reply merely because he had been previously cross-examined on the matter.[20]

The right of a prisoner to the unfettered assistance of counsel was affirmed in the 1881 decision *In Re Minnis*.[21] A lawyer named Swanwick applied to Justice Harding 'for a rule calling upon the sheriff of Queensland to show cause why he (Mr. Justice Harding) should not order the keeper of Her Majestys Gaol to permit Swanwick to interview Micheal Minnis (then in gaol on a charge of murder) at all reasonable hours up to the day of his trial without the presence of the said gaoler or other officials'.[22] Since Swanwick felt compelled to bring such a request and framed it as an order to show cause, it appears that he had previously been denied access to his client by the jailer. The order was granted.

The 1892 case of *R v Horrocks*[23] affirmed that evidence obtained by deceit is not admissible against the accused. In this case, when the accused was arrested he asked the arresting constable whether human blood could be distinguished from any other blood, and the constable said 'yes'. This was an untrue statement. The question was

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19 (1895) 6 Qd L J 268.
20 Ibid 269.
21 (1881) 1 Qd L J 56.
22 Ibid.
23 (1892) 4 Qd L J 218.

whether subsequent statements by the accused were admissible in evidence. Justice Harding said they were not, and noted that

> It would be well if all constables and others in control of a prisoner would give the statutory caution to him upon taking him over from another's charge ... I hold that such evidence must be struck out as occurring subsequent to an untrue representation, and that the onus is thrown on the Crown of rebutting the presumption that the subsequent statements of the prisoner were induced by the representation.[24]

The necessity of probable cause for a search warrant was discussed in the 1898 case of *Bridgeman v Macalister*.[25] A justice of the peace issued a warrant to search for tickets that were said to have been unlawfully obtained. The party that was searched then brought an action for trespass, asserting that the warrant was not well grounded. The court agreed. Justice Griffith stated

> The only allegation of fact here is an allegation of suspicion that something is concealed. There must be more than that--reasonable grounds must be shown for that suspicion, and also reasonable ground for suspicion that the property has been unlawfully obtained. As I have pointed out, the only definite statement of fact is a statement of the deponent's suspicion that this property was concealed there ... for which he gave no relevant reason whatever.[26]

In sum, the most frequently invoked rights in the colonial Queensland cases pertained to rights of the criminally accused. Courts repeatedly protected such rights from incursion, acknowledging that the rights of the accused were to be carefully safeguarded.

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[24] Ibid.
[25] (1898) 8 Qd L J 151.
[26] Ibid 153.

III NATURAL JUSTICE

The topic of natural justice surfaced repeatedly in colonial Queensland. For example, in an 1878 letter to the editor in the Brisbane Courier, the writer stated that natural justice was 'an elementary principle of British law in force in this colony'.[27] He then complained that a new law against Pacific islanders ('kanakas', as they were then known) was a violation of natural justice. He stated:

> Let us suppose that the Premier, after his usual rash manner, were to prepare and carry through the Legislature a bill fixing what trades and professions each of us should follow, and making it a crime that we should follow any other, would not that be contrary to natural justice? Or, if he had not courage for so bold an act, suppose he confined his bill to Frenchmen and Germans, would not this be equally an infringement of natural justice! How then can it become justice when applied to the Kanaka?[28]

Several cases also dealt with natural justice. For example, in the 1882 libel case of *O'Kane v Sellheim and Others*,[29] Justice Lilley noted that 'It is a principle of natural justice, as well as of law, that a man must know of what he is accused before he can be called upon to answer it. There was a failure to observe this elementary rule in this instance'.[30] This was because the libelous 'words complained of should have been set out' in the Information, but were not. Notwithstanding that failure, the lower court 'proceeded to hear the case upon an information which gave the defendant no knowledge of the offence or misconduct imputed to him. He thus had no opportunity to shape his defense, or to sift the evidence of the witnesses against him'.[31] Accordingly, further action against him for the alleged libel was prohibited.

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[27] 'Natural Justice and the New Kanaka Bill', Letter to the Editor, *The Brisbane Courier*, 28 June 1878, 3.
[28] Ibid.
[29] (1882) 1 Qd L J 85.
[30] Ibid 87.
[31] Ibid.

Five years later, Justice Lilley repeated his concern for the preservation of natural justice in the 1887 case *In Re Application of Johan Hummel*.[32] In this case the captain of the barque 'Wisteria' had his certificate as master mariner cancelled by the Marine Board of Queensland. Justice Lilley noted that 'It is a principle of natural justice, that before a man can suffer penal or other consequences, he must have a specific charge brought against him ... there was no jurisdiction here because the Board had no charge before them'.[33] Justices Harding and Mein agreed, and Justice Mein further noted that 'It appears to me to be contrary to the principles of natural justice that a man should be found guilty, and suffer punishment for misconduct with which he has not been specifically charged, and in respect of which he has not had an opportunity of defending himself on a formal trial or inquiry'.[34] No further action by the board was allowed against the accused.

An example of a civil law natural justice case was the 1892 case of *British and Australasian Trust & Loan Co v McCarthy*.[35] In this case a worker obtained judgement from his employer for unpaid wages, then executed on his employer's property when payment of the wages was not made. However, at this same time the Trust and Loan Company as mortgagee took possession of the property pursuant to their mortgage. They had not been notified of the worker's claim or execution on the land. Justice Lilley stated, 'it cannot be disputed for a single moment, that before the land or liberty of a man can be affected, and before his goods can be seized by legal process, he must first be heard. This is the old rule, not only of law but of natural justice'.[36] He concluded by noting 'it is clear that under any interpretation of the law a man must be heard. I cannot in any way see that the legislature intended to exclude that rule, alike of reason, of natural justice, and of law'.[37] The execution for wages was therefore not allowed to proceed.

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32 (1887) 3 Qd L J 50.
33 Ibid 51.
34 Ibid 52.
35 (1892) 4 Qd L J 194.
36 Ibid 196.
37 Ibid.

In the 1893 case of *Ex Parte Strachan,*[38] even the right to drink liquor was protected from violations of natural justice. In this case a man brought an objection to an order forbidding anyone from serving him 'intoxicating liquor'.[39] His wife had obtained the order under the Licensing Act, but had done so ex parte. In quashing the order, Justice Harding noted 'I take it to be one of the strongest principles of British law, and one of the highest privileges Englishmen enjoy under it, that a man cannot be deprived of his liberty of person or reputation unless there has been a judicial inquiry, legal under the law'.[40] Harding observed that in order to make an order like the one in question, a magistrate would need to find out whether the man 'by the excessive use of liquor [did] misspend, waste or lessen his estate', or 'injure or endanger his health, or the health of any other person'.[41] Finding such things would necessitate a judicial inquiry, and 'a result of that judicial inquiry might be to prejudice in the present instance the liberty of John Strachan; therefore I think he was entitled to be present'.[42] Justice Harding noted a recent British case in which a private club could not oust a member without holding a judicial inquiry and giving the ousted member a chance to be heard.[43]

Many other cases could be cited in which the right of natural justice was invoked by the courts. The bench in this era was very much aware of the right of all men to be heard when any accusation or penalty was asserted against them, and to have the opportunity to respond to all such claims. Notwithstanding the lack of an entrenched bill of rights during this era, the right of natural justice continued to be protected.

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38 (1893) 5 Qd L J 45.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid. The case was *Smith v The Queen* (1882) 3 Ap Ca 314.

IV VOTING

Queensland's strict voting laws were specified in the 1874 *Act to Amend the laws relating to Parliamentary Elections*.[44] The courts strictly construed this act, occasionally invalidating an election for failure to follow proper procedures. For example, in the 1875 case of *R v Heal*,[45] the presiding officer left the election hall to lower officials for over an hour during the election, and the returning officer failed to sign some of the ballots. The justices acknowledged that there was no evidence of fraud, but nonetheless noted the seriousness of these violations of statute. They ruled that the election was bad and had to be re-held. Justice Cockle stated that 'this matter is the more important because, probably, the most important question of the day is the mode of ascertaining the opinions of the citizens with regard to whom they consider the best men to represent their interests'.[46] Justice Lilley concurred that 'it is a question of such serious importance that it seems to me, although we are absolutely sure that the result was entirely free from corrupt conduct or influence of any kind, yet the mode of conducting the election must be according to the statutory provisions laid down for guidance in these matters'.[47]

The seriousness of following proper procedures in voting cases was repeated in the 1889 case of *R v Kelley and Others*.[48] Notices of an upcoming resolution vote had not been given as required by statute, but the election was held anyway. Once more, the justices invalidated the election and said it had to be done over. Justice Lilley stated

> Now, it is a preliminary to the poll and of the very essence of the authority to take it, that the ratepayers should have previous notice in the manner prescribed by the statute. If this be omitted or imperfectly given in any essential detail, the returning officer who takes the poll does so without authority, and all his after acts are

[44] 38 Vic no 6.
[45] (1875) 4 Qd S Ct R 104.
[46] Ibid 108.
[47] Ibid 109-110.
[48] (1889) 3 Qd L J 153.

> tainted with the original illegality ... no action of the licensing authority will cure the illegality of the returning officer's proceedings, and of the poll.[49]

Strict interpretation of voting laws was once again affirmed in the 1899 case *In Re Electoral Judges of Barcoo, Ex Parte Collins*.[50] A voter's name had been stricken from the electoral roll since he had moved from his house. However, it was clear that he still resided in the district, and the statute did not say he had to stay at the same address, as the electoral judges had assumed, but allowed him to still vote if he resided in the district. The court issued a writ of mandamus that his name was to be restored to the electoral roll. Justice Griffith noted 'It appears, then, in this case, that the applicant has been dispossessed of a franchise to which he is entitled'.[51] While the electoral judges normally had power to decide questions of fact relating to who could vote, they did not have 'jurisdiction to deprive a man of the franchise without any evidence'[52] as occurred here.

Sometimes the strict interpretation of voting cases could lead to somewhat comical questions being raised in court. One example is the 1892 case of *Wilkins v Ridley*.[53] The office of Representative Ridley was contested on the basis that he had not submitted his nomination paper to the return officer before 4 o'clock as required by the statute. In the course of hearing the case, it was noted that 'Ridley was seen approaching the Board office at half-a-minute to 4 o'clock'.[54] Justice Real then asked, 'Is there any provision about what clock is to be used? All watches or clocks don't agree'.[55] Justice Lilley ruled that the election would stand absent evidence by the claimant that the submission was after 4 o'clock. He stated 'you must prove the true time. As the time in dispute is so short, we think

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[49] Ibid 156.
[50] (1899) 9 Qd L J 111.
[51] Ibid 114.
[52] Ibid.
[53] (1892) 4 Qd L J 191.
[54] Ibid 192.
[55] Ibid.

it necessary that the true time taken by observation of the sun should be shown'.[56]

The issue in the 1886 case of *The Queen v Beattie*[57] was whether an illiterate voter could vote by marking his ballot with an 'X'. Apparently these 'X' votes had not been counted by the election officer, which determined the outcome of the election. Justice Lilley noted that 'there is nothing in the statute that by necessary implication would justify us in disfranchising persons who are unable to write their names'.[58] When it was complained that a vote by an illiterate required a witness, and the signer and necessary witness could both be the same person signing 'X' to both, the court pointed out that the traditional way to do a 'mark' signature of this kind was for the witness to write, 'John Smith, his mark', which obviously could not be done by an illiterate witness.[59] Accordingly, the 'X' votes were counted, which meant that Beattie was removed from office and his challenger was allowed to take his seat.

In light of the strictness in which voting cases were interpreted, parties contesting an election needed to make sure that they were themselves on safe ground before bringing their challenge. For example, in the 1900 case of *The Queen (on the relation of J Hodel) v Craddock*,[60] Hodel sought to oust Craddock from his office as member of the Townsville Harbour Board, on the basis that his nomination did not meet the technical requirements. The court denied the claim because Hodel himself was technically not entitled to vote for this board, and therefore could not bring the challenge.

In sum, the justices in colonial Queensland strictly interpreted voting statutes, sometimes invalidating elections for technical deficiencies. The strict enforcement of statutes by the judiciary in such cases probably exceeded that of almost any other kind of case.

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56 Ibid.
57 (1886) 2 Qd L J 109.
58 Ibid 111.
59 Ibid 112.
60 (1900) 10 Qd L J 63.

This was justified on the importance of the people being able to vote with assurance that all voting procedures had been properly followed.

V RELIGION

There were several colonial statutes that dealt with religious matters such as the 1861 *Act to Facilitate the Incorporation of Religious Educational and Charitable Institutions,*[61] or the 1877 *Act to Prevent and Punish Disorderly Conduct in Places of Religious Worship*.[62] One particularly interesting act originally adopted in New South Wales in 1841 and retained in Queensland's Statute books as late as 1881, was the *Act to Prohibit Shooting for Sport Pleasure or Profit on Sunday*.[63] This act commences with the following observation which was very much in keeping with the times, but would not be relevant today: 'Whereas the practice of shooting on the Lord's Day at pigeon matches and for pleasure or profit greatly prevails in some parts of the colony to the manifest dishonor of religion and whereas it is expedient to prohibit so scandalous and indecent a practice …'[64] The Act then goes on to strictly prohibit shooting and the bearing of arms on Sunday, other than in self-defense.

There were no cases on colonial Queensland that pertained directly to the traditional right of free exercise of religion. Notwithstanding this, there are a few cases that are instructive in how the right to practice religion was viewed legally at the time.

The earliest of the religion cases was *Long v Rawlins*[65] in 1874. In this case, Long was excommunicated from the Baptist church. He nevertheless showed up on Sunday and was forcibly restrained from

[61] 25 Vic No 19.
[62] 41 Vic No 4.
[63] 5 Vic No 6.
[64] Ibid.
[65] (1874) 4 Qd S Ct R 86.

entering the church house by a person named Rawlins. The court found that the church allowed all members of the public to attend its services, whether they were members or not, and therefore Rawlins had no basis to keep Long out. Accordingly, Long's suit against Rawlins for assault was successful. Interestingly, the court refused to say when a person could be legitimately kept out of a church house, observing only that it was up to the church to decide.

Another religious case occurred in 1892, *In Re Emily Ann & Lillian McCrohon*.[66] This case involved the religious upbringing of children whose parents had both died. The mother had belonged to the Church of England, while the father was catholic. The court affirmed its neutrality in religious matters while ordering a catholic upbringing for the children, in these words:

> This court is by law absolutely neutral on distinctive doctrines of religion as between the various sects. We do not decide whether one form of faith is better than another, or the best of all. But the law is clear; children must be brought up in the religion of the father, unless he has expressed a wish that they should be otherwise instructed.[67]

A final religion case from this era was the 1898 case of *R v Craine*.[68] In this case a juror said he had no religious belief but was willing to take an oath. The court ruled that he was disqualified under the Jury Act because of this lack of religious belief. While noting that a recent law had been passed in England allowing atheists to take the oath and to act as jurors, the court stated that such a law had not yet been enacted in Queensland. The court derived the need for religious belief of jurors as follows

> The 7th section of the principal Jury Act requires notice of the jury lists to be affixed on the door of every church, chapel, and place of religious worship in the jury district. This implies that jurors attend places of religious worship and presumably have a religious belief. The form of jurors' oath 'So help you God', given in The Oaths Act, s. 22, and of affirmations (ss. 17, 18, 19), clearly apply only to

[66] (1892) 4 Qd L J 202.
[67] Ibid 202.
[68] (1898) 9 Qd L J 47.

> persons having a religious belief ... On these grounds I think the juror is not competent.[69]

The religion cases of the era show a respect for differing religious beliefs of the populace. It is probable that if the Supreme Court had been called upon to decide a case involving the free exercise of religion, it would have sustained such a right.

VI FREE SPEECH AND PRESS

Regulation of the press was undertaken quite early in Australia's history. Most of Queensland's press-related acts pertaining to libel and slander were enacted much earlier in New South Wales. One such act with a particularly long and very descriptive title was the 1827 NSW *Act for Preventing the Mischiefs arising from the Printing and Publishing Newspapers and Papers of a like nature by persons not known and of the regulating the Printing and Publication of such papers in other respects and also for Restraining the Abuses arising from the publication of Blasphemous and Seditious Libels*.[70]

Like the statutes, the few cases dealing with the press and free speech during this era mostly had to do with libel suits, in which a newspaper was sued for printing libelous material. One such case was the 1881 case of *Perkins v 'The Evangelical Standard'*.[71] In this case, an editorial letter made what by today's standard was a mild statement about the Plaintiff, Perkins: 'Pat Perkins, a thorough bigot and disciple of James O'Quinn. The sooner the colony is rid of such creatures, the better for morality and religion'.[72] Justice Lilley noted that the question was 'whether the defendant had exceeded the right which every man in the community has to make a fair comment

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69 Ibid.
70 8 Geo IV No 2.
71 (1881) 1 Qd L J 43.
72 Ibid.

upon the public acts of public men'.[73] He felt the lower court's judgment in favor of Perkins was right, and that libel had occurred. Justice Pring concurred, noting '... the jury found that, while there was a privilege in discussing the public acts of public men, that the defendant in this case had exceeded that privilege'.

A review of the cases suggests that free speech in colonial Queensland may not have been as closely safeguarded as the right to vote or practice religion, or the rights of the criminally accused. For example, in the 1879 case *In Re The Publisher of the 'Northern Argus' Newspaper,*[74] the subject of libel were several of the justices themselves. The issue involved a contemporary case which was highly emotional, *MacDonald v Tulley,*[75] in which the government had taken away a sheep run. Among other things, the justices had ruled in that case that an instruction to the jury on damages was bad, and a new jury had to be called to determine damages. The justices believed the article was an attempt to influence this new jury, since it asserted that several of the justices were politically motivated. As Justice Harding noted, 'one of the grave imputations there is, that we have political judges, and that when a government case comes on for consideration the people of the colony cannot obtain justice here'.[76] Justice Lilley, one of the justices accused in the article, stated

> It would be, I think, a grave scandal if judges were to be called upon to enter into the public press to defend their judgments, motives, and characters against anonymous writers. No one would be less disposed to interfere with the just influence of the press than I am. Large privileges have necessarily been conceded to it from its great general public usefulness, but if that indulgence--for it is nothing else, is to pass into absolute license, and our fellow colonists are publicly told that no confidence can be placed in the judges who are moved by corrupt motives--for that is the effect of the article--that license may become a serious evil, and our administration of justice would be intolerable because ineffectual.[77]

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[73] Ibid.
[74] (1879) 1 Qd L J Sup 37.
[75] (1879) 1 Qd L J Sup 21.
[76] *In Re The Publisher of the 'Northern Argus' Newspaper* (1879) 1 Qd L J Sup 39-40.
[77] Ibid 38.

All of the justices agreed that the editor of 'The Argus' should be found in contempt and fined, but not jailed. In commenting on what he saw as the motive for the article, Justice Harding stated

> I think the article is written with the view of inducing the jurors to discredit those judges and to discredit the judge who would direct them as to the law on the re-assessment of damages ... It tells them to discredit the law which the judge shall give them. That is a grievous dereliction of duty on the part of the press, and in my judgment if the action required it deserves punishment, and no light punishment either. But their honors have in this case, with the dignity which they uphold and have upheld in this colony for so many years, said that they pass it over, consequently I pass it over also.[78]

In 1897, a fairly similar case occurred. In *R v Murphy and Hobart,*[79] an application was filed by a solicitor for the Attorney-General to show cause why an Information should not be filed against a newspaper for publishing derogatory statements against three justices of the peace. The court simply ruled that the defamation statute does not apply to the crown in such a case as this, and the application was denied. Hence, the right of freedom of the press may have ascended in the years intervening since the *Argus* case.

One of the more unusual cases involving the press was the 1887 case of *Swanwick v Mills.*[80] The newspaper had run the following seemingly innocuous ad, at least by today's standards: 'Lost, from 46, Charlotte Street, black and tan terrier pup. Finder handsomely rewarded; no questions asked'. Swanwick sued Mills as printer and publisher of 'The Telegraph' as having violated s 107 of the Larceny Act which forbade such an advertisement where it was stated 'no questions asked'. As Justice Lilley stated, the purpose of the requirement was 'to stop persons from encouraging others to publish these advertisements, announcing that they are willing to compound a felony'.[81] The court ruled it was not even necessary to prove that

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78 Ibid 40.
79 (1897) 8 Qd L J 63.
80 3 Qd L J 12.
81 Ibid 14.

the dog was lost or stolen; it was enough that the ad had been published in 'The Telegraph'. Additionally, since Mills was both the printer *and* publisher of 'The Telegraph' and the statute provided a £50 penalty for both, he was compelled to pay £100! It is certain that he never published an ad like that again.

In sum, most of the free speech and press cases dealt with libel suits. The libelous statements were generally mild by today's standards, but were nonetheless found offensive. This included libel against the courts. Freedom of speech and of the press appears therefore to have been less carefully safeguarded. Probably more change has occurred since that era in respect to this right than any of the others dealt with in this article.

VII ACQUISITIONS

Some acts in Queensland dealt with acquisitions. For example, the *Crown Lands Act 1869* required compensation for any improvements made to crown lands by a person receiving the grant, if it was later rescinded.[82] *The Public Works Lands Resumption Act 1878* was a modified adoption of the UK's Land Clauses Consolidation Act 1845, which dealt specifically and at length with acquisitions.[83]

There were only a few cases in Queensland's colonial era that dealt with acquisitions of property and whether a property owner could receive compensation when such occurred. The cases generally said that compensation was only granted if the relevant statute provided for it.

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[82] 33 Vic No 10. See *The Queensland Statutes* (1889), 1129 (however, there was no compensation for fences more than 14 years old. New fences were depreciated based on their age, so that only a partial compensation was granted).

[83] Douglas Brown, *Land Acquisition* (Lexis Nexis, 1st ed, 1972) 14.

The earliest case of this kind was *Hobbs v Brisbane*[84] in 1876. The city of Brisbane adjusted the level of a road, which impacted the value of adjacent property. Because the Municipal Institutions Act of 1864 did not provide for compensation in such cases, none was granted. Justice Cockle noted that

> No doubt something has been suffered by the plaintiff which he may well deem a serious injury. But it was for the legislature to consider that; and, although the omission by the legislature to make any provision for compensation in such cases as this might induce the court to look more cautiously into the interpretation of the Act, yet the absence of a compensation clause would hardly justify a tribunal in materially varying the construction which they would otherwise put on a given passage.[85]

Twenty years later, similar thinking still prevailed in the Supreme Court. In the 1896 case *In Re Matter of the Real Property Acts, and in the Matter of Kellett's Grant*,[86] Justice Griffith stated bluntly, 'our duty is to see what the legislature has actually enacted, and give effect to it. We are not concerned with the propriety of the enactment. If the legislature has said in explicit language that the land of one man may be taken for the benefit of another without compensation, all we have to do is to give effect to it'.[87] In this case, the court ruled that the Crown could grant an abandoned road to a private party, even though the original owner of the road before its dedication to the public use was still registered as the title owner.

However, the courts were willing to grant compensation when there was a sufficiently clear way to do so. This is seen in the 1899 case of *Kerr v Scott*.[88] In this case the Municipality of Maryborough raised a street along Kerr's land, which resulted in standing water accumulating on the land thereafter. Then Maryborough brought a nuisance suit against Kerr under *The Health Act of 1884* for 'suffering' standing water to exist on his land. The court noted the

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84 (1876) 4 Qd S Ct R 214.
85 Ibid 217.
86 (1896) 7 Qd L J 10.
87 Ibid 13.
88 (1899) 9 Qd L J 193.

injustice of the situation, observing that 'the complainants, being primarily responsible for what they call a nuisance, cannot be allowed to invoke the law to punish a person who has done nothing but sit still, looking on while they do the injury, and ask that he be fined for their misconduct'.[89] The court found no nuisance. Regarding an acquisition, the court said

> The legislature may, no doubt, pass a law imposing such a liability upon the owners of land, but ordinarily when powers are given to local authorities which may operate to the detriment of individuals, some provision is made for compensation ... it is quite contrary to all canons of construction to hold that a heavy pecuniary liability is imposed upon private persons without compensation, unless it is done in express language.[90]

A case closely related to acquisitions was the 1880 case of *Municipal Council of Rockhampton v Bennett*.[91] Rockhampton enacted a new rate schedule pertaining to Bennett's unoccupied land. The schedule had retroactive effect, thereby forcing Bennett to pay rates going all the way back to the 1860s. The court denied the old rates, and gave the general rule regarding retroactive laws as follows:

> Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation; and also that when the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear.[92]

In sum, the acquisition cases of this era indicate that the strict requirements of the act of acquisition had to be followed, even if the result appeared to be unjust.

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89 Ibid 196.
90 Ibid 195.
91 (1880) 1 Qd L J 25.
92 Ibid 26.

VIII OTHER CASES OF INTEREST

There were a number of other rights statutes and cases in colonial Queensland that presented interesting or unusual aspects of law, or which yielded unusual results. These cases ranged from abortion to Chinese immigration. Many of them are summarised briefly below.

Part of an 1865 Act regarding offenses against the person dealt with the subject of abortion. Anyone convicted of attempting an abortion or assisting them in that attempt was guilty of a felony, with a maximum penalty of life imprisonment.[93] As for cases, only one case in colonial Queensland dealt strictly with abortion. This was the 1896 case of *R v Chambers and Another*.[94] In this case, Thomas Chambers and Jane Brooks were charged with 'procuring abortion'.[95] The Information was faulty however, since the date of their abortion was mistakenly identified as being in the upcoming November, rather than the prior November which was the actual date. The question of whether this would void the proceedings against them was reserved, but never arose since they were subsequently found not guilty by the trial court. No details of their case or why they were not found guilty are provided.

Infanticide was covered by the same statute. Anyone who concealed the death of a child – regardless of the cause of death – could be found guilty of misdemeanor and imprisoned for up to two years. As for cases, there were two closely related cases of infanticide during this era, each with a different result. In the 1888 case of *R v Knack*,[96] Ellen Knack was charged with three counts of infanticide. Rather amazingly, she was acquitted, in part because the names and genders of the three infants were unknown. On the other hand, in the 1885 case of *R v Judge*,[97] the conviction of one count of

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93 *An Act to Consolidate and Amend the Statute Law of Queensland Relating to Offenses Against the Person, 1865*, 29 Vic No 11.
94 (1896) 7 Qd L J 64.
95 Ibid .
96 (1888) 3 Qd L J 101.
97 (1885) 2 Qd L J 61.

infanticide against Anne Judge was allowed to stand. The court stated that the identification of the infant in the Information as 'name unknown' would be fatal to the conviction unless there was evidence the child was illegitimate. The woman was married, and normally a child is presumed to be legitimate and take the name of his father. However, because she admitted the child's father was not her husband, the conviction was not disturbed.

A case involving women's rights also deserves mention. In 1890 Parliament enacted the *Married Women's Property Act*[98] which increased the property ownership rights of women across the colony. This law apparently had an impact on how other acts were interpreted, as seen in the 1891 case of *R v Johnson*.[99] In this case a woman left the colony within 4 months of a petition of insolvency under the Insolvency Act, taking property with her. Such an early departure was a felony under the Insolvency Act. The court acknowledged that under the former law her conviction would not have occurred because of the old rule that a married woman was presumed to obey the direction of her husband, and therefore 'was not altogether a free agent'.[100] But the laws had changed, as Justice Harding noted, and she was not acquitted:

> That presumption does not apply in cases of this sort. These women have fought for their rights. Now they have got them and must suffer like men. It is just as well for women to know that, having demanded and obtained the rights of men, they are subject to the same penalties in the event of their transgressing the law. A year ago an offence of this nature was not a crime under the law, but the legislature had now placed women in the same position as men, and they have to suffer accordingly.[101]

One case with a sad and nearly unbelievable result should also be acknowledged. This was the 1897 case of *R v Moody*.[102] In this case, Moody acknowledged and pleaded guilty, and was convicted of

98 54 Vic No 9.
99 (1891) 4 Qd L J 130.
100 Ibid 131.
101 Ibid.
102 (1897) 8 Qd L J 102.

carnal knowledge with a boy under the age of 11. The justices granted an acquittal because they said the statute as written required the injured party (the boy) to be capable of adult sexual activity.

Chinese immigration was addressed in 1877 in the *Act to Regulate the Immigration of Chinese and to make provision against their becoming a charge on the colony*.[103] This Act specified that ships were allowed to carry only one Chinese passenger for every 10 tons of tonnage. The 1883 case of *Drake v Thornton*[104] applied this law, assessing a penalty for every Chinese passenger above that number. None of the creative excuses asserted by the ship owners were accepted by the court. Counsel for the Attorney-General asserted openly that the purpose of the legislation was that 'the Legislature wanted to make it very difficult for Chinese to come here'.[105]

Corporal punishment of students was the subject of the 1894 case of *Smith v O'Byrne*.[106] A headmistress was convicted for rapping a nine-year-old girl four times on the hands and wrist, due to the girl's 'continued neglect of home lessons, after previous warning and punishment'.[107] The court quashed the conviction, considering the entire affair to be a trifling matter. The court noted the rule in England that a teacher 'may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition – that it is moderate and reasonable'.[108]

Several of the Queensland colonial rights cases dealt with islanders brought against their will to Australia to be used as slaves,

[103] 41 Vic No 8.
[104] (1883) 1 Qd L J 159.
[105] Ibid 160.
[106] (1894) 5 Qd L J 126.
[107] Ibid 127.
[108] Ibid. The court referred to the British case of *R v Hopley* (1860) 2 F&F 202.

contrary to an Act in 1880 designed to protect them.[109] One such case occurring in 1871 was *R v Coath*.[110] Nine islanders were taken against their will from their islands. The accusation was therefore one of kidnapping. Counsel for the accused made the creative argument that the islanders were better off for having been brought to Australia, noting that 'the moment these islanders touched the deck of an English vessel they were free, and had a right of habeas corpus'.[111] The Justices did not agree, and sustained the conviction for kidnapping. Justice Lutwyche noted that 'one form of kidnapping is stealing and carrying away a ma – not any British subject, not any civilised man, but any human being – man, woman, or child ... They have a right to liberty, which is inherent in all human beings, although at times that inherent right has been taken away by force'.[112]

IX CONCLUSION

Many statutes and cases in colonial Queensland dealt with rights issues. While the Colony of Queensland did not have an entrenched bill of rights, their parliament nonetheless frequently legislated regarding rights issues. Likewise, claimants did not hold back in bringing their rights cases before the courts. They believed they were entitled to the rights of all Englishmen, and that the courts would protect them. The most frequently legislated and litigated rights issues were protections for the criminally accused. However, other rights issues were also frequently the focus of legislation or cases, including natural justice, voting, free speech and press, religion, acquisitions, and a host of other issues. With a few notable exceptions, the Parliament and Supreme Court of Queensland consistently acted to safeguard the rights of those who were harmed. Although it was a different era, most rights were revered and protected just as they are today.

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[109] *An Act to make provision for Regulating and Controlling the Introduction and Treatment of Labourers from the Pacific Islands, 1880*, 44 Vic No 17.
[110] (1871) 2 Qd S Ct R 178.
[111] Ibid 180.
[112] Ibid 184-85.