

SIFTING TO THE BOTTOM OF FINANCIAL IMPROPRIETY: JUDGE WILLIS AND INSOLVENCY IN PORT PHILLIP 1841-3

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As we have seen in 2008-9, a financial crisis can re-order institutional and personal relationships, and prompt a re-evaluation of political priorities and imperatives. This was true, too, in Port Phillip in 1841-3 during John Walpole Willis' appointment as the first residential Supreme Court judge in the district. This paper examines the experience of insolvency in the young, strongly entrepreneurial community, and explores whether there was a relationship between Willis' avowal to sift to the bottom of financial impropriety and the political manoeuvres that led to his removal from office.

'Land was bought at that time- and speculation was carried to such an extent, that people not only invested their own capital, but borrowed money from others; they thus became indebted, and to pay their debts were obliged to sell their land- all were sellers and none buyers'

John Cunningham Maclaren [sic], Inspector of the Union Bank.¹

'I look upon the value of property as being intrinsically the same as when I came to the Colony; but a fictitious value was given to it by over-speculation... Yes, everything was over-rated in the Colony, and of course, the money holder over-rated the value of his money; money rose in value in proportion to other articles; facility was given to credit; people acted on that credit, and the consequence is that they are now left without their estates'

William Currie Botts, Merchant and local director of the Bank of Australasia.²

Shorn of their nineteenth-century formality, these quotes resonate with much of the commentary surrounding our current economic environment. However, they have a much earlier origin. They are part of the testimony given to the Select Committee on Monetary Confusion, which was appointed in August 1843 by the newly elected Legislative Council of New South Wales to investigate the economic situation at that time.

The 1840s was the first of the triumvirate of three great Australian depressions: 1840s, 1890s and 1930s. After the precarious start to the Sydney colony, there had been financial blips in 1810 and again in 1826. But the 1840s depression occurred during the transition from a penal colony to a free society, a process which, according to David Neal, was complete by 1842.³ Unlike the earlier setbacks in an essentially penal society with a significant convict workforce, the 1840s depression resulted in general unemployment amongst free settlers, and is thus more closely allied with the later, better remembered depressions of the 1890s and 1930s. The 1840s depression has been described as 'the great winnower'⁴ that led to widespread insolvency, unemployment, loss of money and collapse of hopes. It changed the nature and tenor of both 'good society' and commercial and pastoral endeavour in Port Phillip,⁵ altering the complexion of what was to become the new state of Victoria, even before the more profound influence of the Gold Rushes of the 1850s.

John Walpole Willis, the first Resident Judge, was appointed to Port Phillip in 1841. His two-year tenure was marked by controversy which culminated in his dismissal in 1843. This was his second experience of dismissal, having been removed from office in Upper Canada some fourteen years earlier.⁶ In this article I will explore two of the dominant issues in Port Phillip in 1843: the depression and the dismissal of the District's first Resident Judge. I will argue that these two phenomena were connected by more than being coterminous events. While not central to his dismissal, Willis' views on the events and cases emerging from the depression highlighted the issue of confidence in his administration of justice, both on the part the Government and the people, and prompted their willingness to move against him.

Co-existence does not necessarily denote a causal relationship. But, as we know from our own experience, economic crises rarely stay confined within the economic realm. An economic crisis tends to sharpen views on politics and re-order priorities. We have watched our own government choke on even uttering the words 'recession' or 'deficit', the importance placed on maintaining confidence, and 'the market' ascribed the full gamut of emotions from gloom to elation. It is a salutary reminder of the power of language, perceptions and worldview, particularly in times of economic uncertainty. The leaders of 1840s NSW were likewise attuned to the affective domain in politics. In the precarious financial and political environment of 1843 Port Phillip, Governor Gipps, his Executive Council, and Superintendent La Trobe were anxious to avoid any further 'excitement' and 'anxiety'. This imperative, along with the need to maintain 'confidence' in British justice, was tendered as one of the major justifications for Judge Willis' dismissal.

Neither the people of Port Phillip, nor Judge Willis himself, were to know the length or parameters of the economic depression in the sharp two-year period during which he dominated Port Phillip legal and public life. The depression led to unemployment amongst the labouring classes and a collapse in the price of land and stock, but its effects were most strongly marked amongst the merchants and shopkeepers in the commercial community. Particularly in Melbourne, such men engaged in a range of business and civic activities as a manifestation of their respectable status and were highly visible in the public sphere of Port Phillip society at the time. These same men were to be prominent in the popular agitation that surrounded Judge Willis' dismissal. This paper, drawing more on individual and community experiences rather than institutional perspectives,⁷ asks two related questions: How was the 1840s depression perceived and represented in the public sphere amongst 'respectable' Port Phillip inhabitants during Judge Willis' time in Port Phillip? Was this depression connected with his dismissal in 1843?

It is important to begin by considering the particular nature of the Port Phillip District. Port Phillip was entrepreneurial from its inception. The District was settled illegally in a pincer movement up from Van Diemen's Land where the lack of new grazing land forced up prices; and down from Sydney where graziers had burst beyond the limits of the Middle District. Simon Ville has identified three categories of entrepreneurs featured in early colonial Australia.⁸ First, ex-convicts and emancipists, denied the conventional routes to achievement, saw business as a legitimate route to recognition. Second, government officials - particularly in the establishment years of a colony - had access to a regular income and were not prevented from private activity, and indeed, were encouraged to take a founding role in development of the community.⁹ Third, colonial merchants, often from Britain or India, brought with them their accumulated experience of previous success, market information, and capital and credit links with their overseas partners and agents. All three groups were represented amongst the early settlers of Port Phillip. From 1839 onward they were bolstered by a fourth group which rode the swell of migration in search of opportunity - some 11,500 assisted and 2,000 independent immigrants to Port Phillip by 1842.¹⁰ Predominantly urban dwellers, these immigrants brought with them the 'intellectual baggage' of the most advanced market system on its time. They had experienced the restructuring of the British economy and were aware enough of the parts of the system to embrace private enterprise and a market economy.¹¹

Port Phillip was a new colony, six hundred miles from Sydney. It suffered the makeshift arrangements of all new frontier settlements, including the lack of currency, and the ubiquity and visibility of a small number of people fulfilling a range of public roles. Almost from its inception, there had been demands for a Resident Judge. The increasing size of the settlement, the rapid development of its commercial sector, and the expense of shipping accused criminals and their witnesses to Sydney for trial in the Supreme Court all highlighted the importance of access to Supreme Court services. Port Phillip was not to be deflected from its demands by Governor Gipps' offer of circuit court provision, comparable to that of the Bathurst district. Like other frontier societies, Port Phillip's residents were preoccupied with law and order, and they knew the importance of the permanent and public visibility of the law and all the paraphernalia of a Supreme Court.¹² Justice Willis' appointment as Resident Judge cemented the legal foundations of property ownership and commercial activity and marked the official recognition of this hitherto illegal settlement.

For the first six years at least, Port Phillip was a boom district, born of and exemplifying the flood of British investment through settler capitalism.¹³ Land speculation was rife. Everybody, as S. J. Roberts noted a hundred years later, seemed to have too much money.¹⁴ In 1839, John Fawkner bought land at outlying Pascoe Vale for little more than £2 an acre: the next year he sold the best blocks for an average price of £70 an acre.¹⁵ Charles Ebdon paid £136 for three town lots in Collins Street, which he later sold for £10,244 commenting: 'I fear I am becoming disgustingly rich'.¹⁶ The influx of population, the resultant demand for housing, commercial and transport infrastructure, the development of banking and legal structures, the launching of ambitious joint-stock enterprises - all this financial activity stemmed from, and led to, a burst of optimism, confidence and civic pride.

Economic historians have debated the timing and contribution of international and local factors to the 1840s depression. Brian Fitzpatrick, while acknowledging local factors, asserted that the paramount cause was external, flowing from the decision of the Bank of England to increase its discount rate on 9 May 1839.¹⁷ S. J. Butlin, however, saw the depression as a response to bad news by British investors, refuting Fitzpatrick's emphasis on the British monetary panic of May 1839 by pointing to the continued influx of British capital to Australia up until mid-1842.¹⁸ Dyster also located the depression within the external British financial environment, but conceptualized it as a 'rational' market response, rather than a cause.¹⁹ Rather than looking to external causes, S. J. Butlin pointed to internal market forces within the Australian colonies themselves, a point made earlier by Kenyon who noted that once land was stocked up with sheep, there was no sale for the natural increase in flocks, and that prices no longer covered the labour costs of shepherding.²⁰ Roberts acknowledged all these factors, but also noted Governor Gipps' own actions in withdrawing the government deposits from the sale of land from the banks, albeit as an 'accessory' rather than primary cause.²¹

Economic historians may be able to ascribe fixed starting and closing dates to an economic depression after the event, but they are less apparent at the time. The first clear public reference to the economic depression was in the *Sydney Herald* on 21 December 1840. Six weeks later Gipps mentioned it in a despatch to the Colonial Office, prefaced almost nonchalantly by the comment: 'There is, I believe, only one subject of interest on which I shall have occasion to touch'.²² The grain merchants and flour millers noticed the downturn first, as grain prices slumped from 11s. to 6s.11d per bushel in September 1840 after reaching a drought-affected height of £1 2s. a year earlier.²³ Merchants found themselves forced to shift cargoes of imported goods from port-to-port in a desperate search for buyers.²⁴ The British banks 'put the screw' on the merchants; the merchants in turn called in their debts.

In the midst of economic uncertainty, it is never quite clear when the bottom of the market has been reached. The exception might be the auctioneers, who in 1842 asserted in their inimical way, that 'the *crisis* of the depression is past' and that 'those who neglect the opportunitie [sic], which, from the state of things are now within their reach, will yet have reason to regret their procrastination'.²⁵

Despite the certainty of the real estate fraternity, Gipps revealed his own inability to perceive the parameters of the financial turbulence. Acting on advice from the Legislative Council's Immigration Committee, and Dr A. Thomson in Geelong that there would soon be a labour shortage, Gipps requested the resumption of immigration in mid 1842, only to rescind his request to the Colonial Office a few months later.²⁶ It would seem that February-December 1843 were the darkest months of this 'economic nightmare, with everything breaking down in almost unbelievable failure'.²⁷

It was estimated at the time that of 1,000 men involved in trade and commerce in Port Phillip, 277 became insolvent between February 1842 and August 1844.²⁸ Lists of insolvencies published at intervals in the *Sydney Herald* for NSW as a whole show the following breakdown, giving the lie to the popular myth that brewery-owners never go broke:

Merchants, shopkeepers etc.	153
Settlers, farmers, graziers	78
Professional workers	44
Other craftsmen	59
Clerks	44
Publicans and brewers	42
Gentlemen	31
Miscellaneous	74
Unstated	24

Table 1. Insolvency by occupational group²⁹

It is not surprising that merchants were so heavily represented. Banks did not make direct loans to settlers on mortgage: instead they used merchants as their middlemen and credit-checkers. Because of the shortage of currency, merchants bought up bills of exchange and promissory notes at a discount, and then presented them to the banks. The banks were happy to have merchants act as buffers between them and the more unreliable settlers. As George Richard Griffiths Esq, who had been with both the Bank of Australasia and the Union Bank testified to the Select Committee on Monetary Confusion: 'I believe the object of discounting mercantile bills in preference to settlers, is, that the Bank believes the merchants are better acquainted with the resources of the settler than the Bank can possibly be...'³⁰

The testimony given to the Select Committee on Monetary Confusion of 1843 gives us an insight into the official attitudes towards this financial depression. William Hamilton Hart, the Superintendent of the Bank of Australasia identified a cyclical and moral dimension:

*I think that in all countries, but more especially in young Colonies, there must be over-speculation, which will produce periods of great excitement, followed by those of corresponding depression, as has been and now is the case in this Colony...I think there may have been extraordinary temptation and extraordinary folly on both sides; and if people have shewn a want of proper precaution, they deserve to, and will suffer for it.*³¹

Reflecting the attitudes towards the role of government and officialdom current at the time, the Government was not seen to be responsible for alleviating distress. As William Currie Botts, merchant and local director of the Bank of Australasia noted: 'I think it must be the work of time; I do not see that any measure, which could be adopted, would produce that effect, it must be the work of economy and time.'³² Nonetheless, both Governor Gipps and Superintendent La Trobe instituted limited and poorly-paid relief

work on government projects during 1842, employing 350 married men out of the population of about 8,000 to build roads and dams,³³ a step even more remarkable given Gipps' ongoing anxiety to avoid the fate of Colonel Gawler of South Australia, who was dismissed for extravagance.³⁴

Official enquiries conducted at the time, and economists' explanations after the event provide an abstract, rather dispassionate perspective on financial events. At the time however, and amongst people who were living through this financial turmoil, consciousness of the wider financial crisis could be manifested in small, concrete ways. Front page newspaper columns that a year earlier had been filled with effusive advertisements for land auctions, complete with champagne and marquees, were now filled with dour Insolvency Court notices of creditors' meetings. Large tables showing the names of insolvents and their progress through the insolvency process were published regularly in the newspapers. Government land sales were suspended for four years, and land was sold for a fraction of its purchase price at forced sales. In January 1843 the Port Phillip Bank failed, fifteen months after moving into its grand double-storied white stone building in Collins Street, visible for miles. Proudly local, its directors were all Port Phillip men and its collapse rippled through the community. Many of those who failed were personally known to members of the 'respectable' entrepreneurial class. The banks' requirement for the endorsement of two names on each Bill of Exchange meant that the downfall of one endorser brought the other's affairs under investigation as financial embarrassment spread from one merchant to another.³⁵ As well as personal insolvencies, a string of the social clubs and institutions patronized by the 'respectable' men of good society failed, including the Turf Club, the Port Phillip Club and the Private Quarterly Assemblies.³⁶ It was felt that the financial situation struck at the very identity of Port Phillip, and particularly Melbourne, itself:

*Melbourne is no longer Melbourne. No money, no credit, no trade, nothing but failures- the Sheriff's Officer is the only active man in the community. Even the lawyers can scarcely succeed in getting paid. Land is worthless, and cattle and sheep little better.*³⁷

Financial embarrassment extended into family and domestic relationships as well. Georgiana McCrae's diary entry of April 7 1843 captures the urgency and precariousness of her husband's situation:

Me voila san sou! Mais non sans soucis' ['Here I am without a sou, but not without a care!'] Mrs Derrett called for her accompt- & I had to borrow the 4 sovs (out of the purse dear Aunt Fanny netted for me-) given by her to each of the Boys 'to purchase an Acre of land each' but their Papa never could make the investment en bloc- no sooner had I paid off Mrs Derrett, than Mr Mackenzie, the Clerk, came out with a note from Mr McCrae desiring me to 'Send every pound shilling & sou that I could muster!' by bearer. Sent 3 good promissory notes two for £9.10 each- and one for £30- & another for £27-. In the evg I learnt that owing to Mr Montgomery having advocated the claim of Donovan, the builder of the new Union Bank premises (in accordance with Mr McLaggan the Architects' Report) Thos. Elder Boyd- the manager of the Bank- sends to give Montgomery & McCrae warning that 'unless they pay £160 before 12. to-day he shall summon them' thus forcing Mr McCrae to discount Bills he had set apart for Tradesmen's accompts, besides, compelling him to give a Bill for £30- to make up the amount- as no money is to be had at this time from any of the Clients in or near Melbourne. The scarcity of Cash in town is quite remarkable- It is said- that Cashmore. No 1 Collins St. East- is the only man in town who can give you the full change of a five pound note!³⁸

This scrambling for cash at the domestic level was replicated at the broader community level amongst a group of twelve Melbourne investors dubbed 'The Twelve Apostles' by the journalist Edmund Finn writing as 'Garryowen' in his rather quirky memoir of early Melbourne.³⁹ Several of their names, immortalized in the suburbs and streets of Melbourne, are still familiar today:

1. William Frederick Augustus Rucker, Merchant
2. Thomas Herbert Power, Auctioneer
3. John Pascoe Fawkner, Landholder
4. Alexander McKillop, Settler
5. John Moffat Chisholm, Landowne
6. John Hunter Patterson, Landowner
7. James Purves, Landowner
8. John Maude Woolley, Settler
9. Abraham Abrahams, Merchant
10. Jonathan Binns Were, Merchant
11. Horatio Nelson Carrington, Solicitor
12. Patricius William Welsh, Merchant.

In October 1841 these twelve men, prominent in public life, agreed to become liable jointly and severally for the £10,000 debt that one of their number, William Rucker, had run up with the British-owned Union Bank. When the founding local manager of the Union Bank, William Highett was replaced by the more ruthless T. E. Boyd, the debt was called in, Rucker was forced to declare himself insolvent and the Twelve Apostles were called upon to cover his debt.

All Twelve Apostles suffered short-term embarrassment because of this arrangement: some recovered, others did not. John Hunter Patterson fell back on the £500 he still had in Van Diemens Land to tide him over,⁴⁰ J. B. Were recovered his fortune, lost it again and yet is commemorated as the founder of one of the largest financial services companies in Australia today.⁴¹ Others, like Thomas Power and John Pascoe Fawkner, later became long-serving politicians in the Victorian Government. But the outcome was less happy for others. Alexander McKillop has been immortalized in his daughter's hagiographies as the father whose recklessness plunged Blessed Mary MacKillop and her siblings into childhood poverty.⁴² Whatever else occurred during his life, his trajectory and that of his family was changed forever by his involvement with the Twelve Apostles.

While the practice of acting as guarantors for a loan was not unusual or illegal, the Twelve Apostles 'ring' does seem to have several dubious aspects. Rucker's property was nominally assessed at being worth £40,000 and realized £50,000 at sale, yet Finn claims 'by a curiously peculiar arrangement, the 'Holy Brotherhood' were rendered jointly and individually liable to the Union Bank of Australasia [sic] not for the sum claimed but for £10,000 each or £120,000'.⁴³ Finn characterized the participants, despite their social prominence, as all 'neck deep in other speculations, mostly of a risky character.' Mr. D. C. McArthur, Manager of the Bank of Australasia was concerned enough to caution all his customers against involvement with the scheme.⁴⁴ Long after the event, Finn revealed that on the eve of signing the deed, one of the Twelve had arranged a pre-nuptial settlement of all his property on an 'attractive spinster' governess residing nearby, unbeknown to his fellow Apostles who were unaware that they were co-signing with 'a man of straw'. On the evening of 'doomsday' he formalized the settlement by a hasty wedding ceremony, thus avoiding his liabilities.⁴⁵ John Fawkner, one of the disgruntled participants, later publicly accused the

former bank manager, William Highett, of colluding with Rucker in order to protect his own reputation and finances. Highett lured them, Fawkner claimed, with 'flattery and falsehoods' by assuring them that he would, himself, have provided security for Rucker's debts had he not been traveling abroad.⁴⁶ Nor is it clear what connection existed - if any - between William Rucker, who had established the Melbourne branch of the Derwent Bank in February 1838, and bank manager Highett whose Union Bank took over the Derwent agency eight months later, as all records of the takeover negotiations have been lost.⁴⁷

Knowledge of these irregularities emerged from the multiple court cases that followed the unraveling of the arrangement in the years afterwards. The action of guaranteeing another's loan was not exceptional, but the nature of the membership of the 'ring' was. At the time – and even today - the prominence and visibility of most of the men involved was striking. They represented the wide diversity of entrepreneurial public men of Port Phillip who acted as settlers, merchants, attorneys, architects, auctioneers - sometimes combining several roles simultaneously. It is possible to trace contacts between several individuals: for example, Purves, Welsh and Power were all auctioneers; McKillop, Chisholm and Carrington all attended the Melbourne Debating Club. Although individuals knew other individuals within the twelve, there is no unifying role or organization that links them together as a group. Their individual contacts, however, reached into practically every aspect of the public sphere of Port Phillip society: the press, churches, politics, the law and commerce. This is emblematic of how respectability, trust and status were intertwined in Port Phillip, as indeed it was in other colonies and amongst the men and women of the English middle classes of the first half of the nineteenth century generally.⁴⁸ As active members of multiple public institutions - the church building committees, the Mechanics Institute, juries, chambers of commerce - men displayed and assessed civic commitment, personal integrity and potential creditworthiness among their fellow members.⁴⁹ This knowledge and judgment of a man's reputation and worth – both personally and financially - developed through proximity and social and business contact. The banks tapped this knowledge through their reliance on merchants as buffers to screen the creditworthiness of settlers. The British banks, although controlled from London, drew on the on-the-spot intelligence of their local board of directors, despite the fact that the directors were themselves tightly embroiled within the commercial affairs of the District through their own roles as merchants and auctioneers.⁵⁰

Into this intricate financial environment, then, we need to place Justice John Walpole Willis. A forceful, fiercely intelligent equity lawyer, his position as sole Resident Judge placed him at the heart of the financial crisis. His appointment to Port Phillip was initially welcomed as a brake on unscrupulous financial behaviour. As the agent James Graham wrote on the Judge's arrival: 'His Honour Judge Willis has arrived among us and I trust will do a great deal of good in purging the community of many black sheep who have had their swing too long here.'⁵¹ Even the *Port Phillip Herald*, which was to retain its critical stance towards him to the end, initially celebrated his appointment:

*We hail the arrival of the first Judge with no small degree of pleasure, as the introducer of a new era into the monetary affairs of our province, and should he be the means of effecting as much good as is anticipated, his appointment will indeed be a blessing to our country of no small magnitude.*⁵²

His presence at the centre of the legal system was all-encompassing. He appointed his close friend William Verner as Commissioner of the Insolvency Court; he heard the few fraudulent insolvency cases that arose in the Criminal Court jurisdiction himself, and he tried all the civil actions that often preceded the eventual capitulation into insolvency.⁵³ These civil cases, and equity cases when they occurred, gave him scope to widen his investigations to untangle the cases before him. His addresses to juries and harangues from the Bench gave him a platform to express his opinions about the economy, the moral perils of speculation and the failure of the monetary system. He even published some of these addresses in pamphlet form.⁵⁴ Willis publicly opposed the Insolvency Act drafted by his brother judge, Justice Burton, on Dutch-Roman rather than British principles of the time.⁵⁵ This Act, with its emphasis on efficiency rather than punishment,

distributed the debtor's assets and allowed them to resume business quickly while protecting creditors - an approach that predated later English changes but was derided by the press, with some justification, as 'Burton's Purge in Whitewash Hall'.⁵⁶ Willis' public criticisms were vocal and wide-ranging: the low rate of recovery for creditors; the speed of forced sales; the requirement for documentation to be sent to Sydney; the Act's repugnancy to English law, and its unsuitability for a new pastoral and agricultural economy.⁵⁷ However, these criticisms could also be framed as part of his ongoing quest for his own court's independence from Sydney's oversight, and his own professional rivalry and one-upmanship with the Sydney judges. Such open detraction highlighted dissension between the judges in the crafting of legislation and resonated with the calls for Separation in the Port Phillip District more generally.

In many ways, the times suited Judge Willis. The precarious financial situation of Port Phillip heightened his prominence in the public affairs of the day. His supporters - both at the time, and later - saw him as vigilant, exacting and principled. He was, as J. V. Barry was to describe him in his *Australian Dictionary of Biography* entry, 'an able lawyer, honest and fearless, and alert to prevent fraud and oppression...[and]..it must in fairness be said that often his censures were justified'.⁵⁸

But, as 'Garryowen' (Finn) noted, the cases thrown up by the financial crisis were 'just the kind of work that suited the temperament of Judge Willis - a fresh arena in which to stir up strife, make mischief and pitch into any unfortunate who incurred his displeasure.'⁵⁹ There were many in Port Phillip who had suffered Willis' strongly personalized attacks from the bench in the past: editors of the newspapers, members of the bar and legal fraternity generally, government officials and private individuals. As Barry noted, 'once involved in a controversy, his methods were dubious'.⁶⁰ Having been alerted to financial impropriety, often through small details in tangentially-related insolvency cases, he repeatedly expressed his willingness to 'sift this matter to the bottom'.⁶¹ This took him beyond the case immediately at hand and launched him into a broader crusade to stamp out what he saw to be chicanery and sharp practice. This went right to the top. Willis argued that insolvency was attributed to speculation; speculation was linked with corruption amongst government officials; and government officials were identified as a direct cause of the financial distress facing Port Phillip at the time. In an address to the jury in October 1842, after enumerating the various origins of the depression, Judge Willis referred:

*last, but not least, to the pernicious practice, in my opinion, of Government officers, even of those in very high and responsible situations, that I could name, speculating or engaging either openly or covertly in lands, farms, stations, sheep, cattle, horses, shares in joint stock companies and merchandise; either for themselves or for their relatives or friends or for all;- a practice tending, I conceive, to distract the attention of a public officer from his public duty, to lower such officer in public estimation, to prevent his creditors or those complaining of his dealings proceeding for redress with the same freedom at least as with regard to others; and should his speculations fail, involving not himself alone, but that Government which he served (and ought to have solely served), in difficulties and disgrace.*⁶²

It was true that government officials had speculated in land; some prospered, others fell victim to the same financial distress as the rest of the community. But this was not, as he intimated, an illegal activity, or 'Old Corruption' reborn in a new colony. Superintendent La Trobe felt himself and his officers directly implicated by the accusations. For Governor Gipps, this political challenge to government authority was one step too far. After years of judicial squabbling and an ongoing stream of complaints about Judge Willis' lack of judicial temper, irritability, partiality and eccentricity, Gipps was emboldened to act. A warning was issued to Willis in February 1843, citing the 'great excitement' caused by the Resident Judge's actions and the need to restore confidence in the administration of justice.⁶³ In June 1843 Willis was notified that he had been removed from office, effective immediately.

What, then is the connection between the economic depression of the 1840s and Judge Willis' dismissal? Willis was not dismissed because of the financial crisis, but rather for a combination of political and interpersonal factors.⁶⁴ The depression did, however, change the political environment in which he operated in three ways. First, the economic depression evoked widespread anxiety, at both individual and government level, about the pervasiveness of Willis' power. Widespread insolvency gave Judge Willis even more prominence in the community than he already had, and there were many who praised his vigilance and thoroughness in the court cases that came before him. However, there was an increasing number of men harbored reservations about his pursuit of individuals, and saw him as over-zealous, obsessive and vindictive. The interlinked nature of financial transactions in Port Phillip opened all men to his exposure. In such an environment, public men who otherwise might not have been concerned about his unpredictability and irritability, could fall under his scrutiny. They lost confidence, not so much in what Judge Willis had done in the past, but what he might do in the future - to them.

Second, the anxiety evoked in this financial turmoil took on a political edge. Such men knew how to exert political pressure - as did Judge Willis' supporters - on La Trobe at the local level, who in turn appealed to his superior Governor Gipps. Gipps now could act. It was generally acknowledged - even among his supporters - that Willis was contentious, irascible, unable to work with his superiors and generally lacking 'the judicial temperament'.⁶⁵ Willis' superiors, fellow judges, bar, and government officers had suffered his lack of judicial courtesy and cantankerousness for years, as something that had to be endured and managed.⁶⁶ But personality traits were not, in themselves, grounds for dismissal. The significance of the financial depression was that politically-active, 'respectable' men, unnerved by the possibility that the spreading financial disorder could bring them under the purview of the Judge, channeled their anxiety into political action. Their political pressure, along with that of Willis' supporters, provided a spur for decisive action to bolster the authority of the local government.

Third, La Trobe and his highest government officials were under attack, through Willis' pursuit of financial impropriety in the cases brought before his court as part of the wider financial crisis. This had the potential to destabilize confidence in the local government more broadly. The political imperative to maintain the authority of the government merged with the pressure exerted by politically-active men who lacked confidence in the Judge's administration of justice. The personal had indeed become political.

It might be expected that there would be a correlation between those interrogated by him in his court and those who campaigned most strongly for his removal. However, taking the Twelve Apostles as a sample, it is not so clear-cut. Of the Twelve Apostles, John Fawkner remained his most steadfast, vocal supporter; five other Apostles came out publicly at meetings and signed multiple petitions to call for his removal, and we know nothing of the stance of the other six. How are we to interpret this? The position of his most proactive adherent, John Fawkner, had been compromised by a loan that he had contracted with Judge Willis through a third party as part of the financial arrangements over ownership of the *Port Phillip Patriot*.⁶⁷ Although both Fawkner and Willis denied any undue influence, this newspaper provided unfailing editorial support and spearheaded the popular movement in support of Judge Willis. On the other hand, the most vocal antagonist against Judge Willis was the solicitor Horatio Nelson Carrington, whose animosity was piqued from the opening days of the Supreme Court at Melbourne. He clashed repeatedly with Judge Willis throughout his time in Port Phillip over a range of judicial and professional matters, unrelated to this additional financial embarrassment. While Fawkner and Carrington represented the two extremes of response to Judge Willis, the public opposition to Judge Willis by J. B. Were, Alexander McKillop, John Maude Woolley and P. W. Welsh is perhaps the most telling. Given that Justice Willis was the only judge in Port Phillip, and that any of them could have faced him through any number of civil or insolvency cases in play at the time, it would have been wiser to say nothing. Their presence at anti-Willis meetings and signatures on anti-Willis petitions could have rebounded on them severely. Their decision to make such a public stance in such circumstances is significant.

The 1840s depression heightened the anxiety and profoundly changed the perspectives and lifestories of many individual Port Phillip inhabitants. It was, however, framed largely in terms of the personal consequences of speculation, rather than a government problem with political solutions. But Judge Willis went further. He conflated insolvency with speculation, and speculation with sharp-dealing and, in the case of local officials, extrapolated it further to government impropriety. He was determined to 'sift to the bottom' of financial misbehaviour, and the civil and equity trials that came before him gave him untrammelled scope to investigate links and dubious dealings. The reliance on networks, reputation and trust at a time of financial embarrassment brought the affairs of nearly every merchant, trader and investor within his purview. The perception that he was engaged on a zealous personal crusade or mission to expose shady practice at all levels of society, further elevated this anxiety both among individuals and the government itself. Once the personal had become political, the willingness to act against the first Resident Judge gained ground.

Endnotes

- 1 Legislative Council New South Wales Parliament, "Votes and Proceedings of the Legislative Council (Microfilm)," (Government Printing Office, 1846), 13 September 1843.
- 2 Ibid., 20 September 1843. I have adopted the official titles that witnesses themselves provided to the Select Committee on Monetary Confusion as the basis for their expertise.
- 3 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), 58. In a series of exchanges in *Historical Studies* (22) in 1987, John Hirst and David Neal debated the usefulness of a singular date to mark this transition.
- 4 Barrie Dyster, "Prosperity, Prostration, Prudence: Business and Investment in Sydney 1838-1851," in *Wealth and Progress: Studies in Australian Business History*, ed. David S Macmillan Alan Birch (Sydney: Angus and Robertson, 1967), 60.
- 5 Paul de Serville, *Port Phillip Gentlemen and Good Society in Melbourne before the Gold Rushes* (Melbourne: Oxford University Press, 1980), 156-69.
- 6 Harold F. Behan, *Mr. Justice J.W. Willis: With Particular Reference to His Period as First Resident Judge in Port Phillip, 1841-1843* (Glen Iris, Vic.: H.F. Behan, 1979), 1-40.
- 7 Descriptions and explanations of the Depression in terms of the financial system can be found in S.J. Butlin, *Foundations of the Australian Monetary System 1788-1851* (Carlton, Victoria: Melbourne University Press., 1953). and Barrie Dyster, "The 1840s Depression Revisited," *Australian Historical Studies* 25, no. 101 (1993). The perspective of the banking system, particularly that of the English banks, can be found in S.J. Butlin, *Australia and New Zealand Bank: The Bank of Australasia and the Union Bank of Australia Limited 1828-1951* (London: Longmans, 1961).
- 8 Simon P Ville, "Business Development in Colonial Australia," *Australian Economic History Review* 38, no. 1 (1998).
- 9 Noel Butlin, *Forming a Colonial Economy* (Cambridge: Cambridge University Press, 1994), 108.; Martin Sullivan, *Men and Women of Port Phillip* (Sydney: Hale and Iremonger, 1985), 67-86.
- 10 A.G.L. Shaw, *A History of the Port Phillip District: Victoria before Separation* (Melbourne: Melbourne University Press, 1996 (2003)), 146.
- 11 Butlin, *Forming a Colonial Economy*, 107.
- 12 *Port Phillip Herald*, 26 June 1840.
- 13 Jim McAloon, "Gentlemanly Capitalism and Settler Capitalists: Imperialism, Dependent Development and Colonial Wealth in the South Island of New Zealand," *Australian Economic History Review* 42, no. 2 (2002).
- 14 Stephen J. Roberts, *The Squatting Age in Australia 1835-1847* (Parkville: Melbourne University Press, 1935), 188.
- 15 Shaw, *A History of the Port Phillip District: Victoria before Separation*, 163.
- 16 Ibid., 72.
- 17 Brian Fitzpatrick, *The British Empire in Australia 1834-1939* (South Melbourne: Macmillan of Australia, 1969), 71-72.
- 18 Butlin, *Foundations of the Australian Monetary System 1788-1851*, 318.
- 19 Dyster, "The 1840s Depression Revisited," 607.
- 20 A. S. Kenyon, "The Port Phillip Boom and Its Results," *The Royal Australian Historical Society Journal and Proceedings* xii, no. iv (1926): 221.
- 21 Roberts, *The Squatting Age in Australia 1835-1847*, 199.
- 22 Gipps to Russell, 1 Feb 1841, HRA, I, xxi, 198-200, cited in Butlin, *Foundations of the Australian Monetary System 1788-1851*, 320.
- 23 Ibid.

- 24 Dyster, "The 1840s Depression Revisited," 603.
- 25 *Port Phillip Herald*, 22 April 1842.
- 26 Shaw, *A History of the Port Phillip District: Victoria before Separation*, 152.
- 27 Roberts, *The Squatting Age in Australia 1835-1847*, 193.
- 28 Shaw, *A History of the Port Phillip District: Victoria before Separation*, 166.
- 29 Butlin, *Foundations of the Australian Monetary System 1788-1851*, fn.19 p323.
- 30 New South Wales Parliament, "Votes and Proceedings of the Legislative Council (Microfilm)." 15 September 1843.
- 31 *Ibid.* 12 Sept 1843 Testimony of William Hamilton Hart.
- 32 *Ibid.* 20 September 1843
- 33 Shaw, *A History of the Port Phillip District: Victoria before Separation*, 148.
- 34 Gipps to La Trobe 11 February 1841 A.G.L. Shaw, ed., *Gipps-La Trobe Correspondence 1839-1846* (Carlton: Melbourne University Press, 1989), 60.
- 35 New South Wales Parliament 'Votes and Proceedings' Testimony of Mr Samuel Lyons, auctioneer, 21 Sept 1843.
- 36 Serville, *Port Phillip Gentlemen and Good Society in Melbourne before the Gold Rushes*, 157.
- 37 Russell, March 1843 cited in Roberts, *The Squatting Age in Australia 1835-1847*, 192.
- 38 Hugh McCrae, ed., *Georgiana's Journal* (Sydney: Angus and Robertson, 1966), 92.
- 39 Edmund Finn, *The Chronicles of Early Melbourne, 1835 to 1852 : Historical, Anecdotal and Personal / By "Garryowen"*, Centennial edition ed. (Melbourne: Fergusson and Mitchell, 1888). 82,707-10,744, 956,966,991,992
- 40 Thomas Francis Bride, ed., *Letters from Victorian Pioneers* (Melbourne: Heinemann, 1969), 158.
- 41 J. B. Were, *The House of Were 1839-54* (Melbourne: J. B. Were & Sons, 1954).
- 42 Victor Feehan and Ann MacDonell, *In Search of Alexander Mackillop* (Doncaster, Victoria: St Joseph Publications, 1994).
- 43 Finn, *The Chronicles of Early Melbourne, 1835 to 1852 : Historical, Anecdotal and Personal / By "Garryowen"*, 708.
- 44 *Ibid.*, 706.
- 45 *Ibid.*, 708.
- 46 John P. Fawcner, Original Correspondence, *Port Phillip Patriot* 9 February 1843
- 47 Butlin, *Australia and New Zealand Bank: The Bank of Australasia and the Union Bank of Australia Limited 1828-1951*, 60. Butlin on p. 60 describes Highett as the bank's cashier. However, as he also points out on p. 15, 17 and facing p.83, the terms contemporary terms 'cashier' and 'manager' were used interchangeably. The people of Port Phillip and Highett himself used the term 'manager'.
- 48 Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class* (London: Routledge, 1987).
- 49 *Ibid.*, 208.
- 50 Butlin, *Australia and New Zealand Bank: The Bank of Australasia and the Union Bank of Australia Limited 1828-1951*, 62,63.
- 51 James Graham to Stuart Donaldson (Sydney) 16 March 1841 cited in Sally Graham, ed., *Pioneer Merchant: The Letters of James Graham 1839-54* (South Yarra, Victoria: Hyland House, 1985), 74.
- 52 *Port Phillip Herald* 12 March 1841
- 53 Paul R Mullaly, *Crime in the Port Phillip District 1835-51* (Melbourne: Hybrid Publishers, 2008). Mullaly p. 721 points out that despite the public outcry about the activities of insolvents in the Port Phillip district during the 1840s, only two cases of fraudulent insolvency reached the criminal trial stage during Willis' time.
- 54 Gipps to Stanley 12 November 1842 HRA I, xxii, p.351
- 55 Kenneth G Allars, "Sir William Westbrooke Burton," *Royal Australian Historical Society Journal and Proceedings* XXXVII, no. V (1951), J. M. Bennett, *A History of the Supreme Court of New South Wales* (Sydney: The Law Book Company Limited, 1974), 114-18.
- 56 Butlin, *Foundations of the Australian Monetary System 1788-1851*, 322, Bruce Kercher, *An Unruly Child: A History of Law in Australia* (St Leonards NSW: Allen & Unwin, 1995), 112-18. Butlin p.323 fn 18 suggests that there was a 'general belief, substantially correct, that the Act favoured the debtor to the point where the dishonest and improvident could successfully cheat their creditors.'
- 57 *Port Phillip Herald* 4 and 13 October 1842, 13 Jan 1843; 26 August 1842; 2 Sept 1842, *Port Phillip Patriot* 17 Oct 1842; *Port Phillip Herald* 7 June 1842, 19 August 1842.
- 58 John V. Barry, "'Willis, John Walpole (1793 - 1877)'" in *Australian Dictionary of Biography* (Melbourne: Melbourne University Press, 1967). Online Edition, Copyright 2006, updated continuously, ISSN 1833-7538, published by Australian National University, <http://www.adb.online.anu.edu.au/biogs/A020546b.htm> Accessed 16 May 2009.
- 59 Finn, *The Chronicles of Early Melbourne, 1835 to 1852 : Historical, Anecdotal and Personal / By "Garryowen"*, 90, Mullaly, *Crime in the Port Phillip District 1835-51*, 23. Mullaly p.23 notes that most of the controversies Willis was involved in arose in relation to civil litigation, rather than criminal trials.

- 60 Barry, "'Willis, John Walpole (1793 - 1877)'"
- 61 *Port Phillip Herald* 26 April 1842.
- 62 Address to the jury, *Port Phillip Patriot* 17 October 1842.
- 63 Extract from the Minutes of the Proceedings of the Executive Council on 21 Dec 1842 and 16, 17 and 20 January 1843. NSW Governor's Despatches Vol 49 ML A138 Annexure A.
- 64 Janine Rizzetti, "Judging Boundaries: Justice Willis, Local Politics and Imperial Justice," *Australian Historical Studies* 40, no. 3 (2009).(forthcoming)
- 65 Barry, "'Willis, John Walpole (1793 - 1877)'"
- 66 Indeed, Gipps (who had himself struggled with Willis' behaviour) advised the less experienced La Trobe 'I am rather disposed to think you will find yourself on more comfortable Terms with the Judge, after having quarreled with him than you were before'. Gipps to La Trobe 1 Oct 1842, Shaw, ed., *Gipps-La Trobe Correspondence 1839-1846*, 171.
- 67 C. P. Billot, *The Life and Times of John Pascoe Fawkner* (Melbourne: Hyland House, 1985), 250-53.

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