Journal of South Pacific Law
Volume 4 2000

SLAVING IN AUSTRALIAN COURTS: BLACKBIRDING CASES, 1869-1871

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1. INTRODUCTION

This article examines major prosecutions in New South Wales and Queensland for blackbirding practices in Melanesian waters, and early regulation under the Imperial Kidnapping Act that was meant to correct problems those prosecutions raised. It considers how legal argument and adjudication appropriated the political debate on the question whether the trade in Melanesian labour to Queensland and Fiji amounted to slaving, and whether references to slaving in Australian courts only compounded the difficulties of deterring recruiting abuses in Melanesia. It is suggested that, even though the Imperial Government conceived of the Kidnapping Act as a measure to deal with slaving, its success in Australian courts depended on its avoiding any reference to the idea of slavery in the legislation itself. This is developed in three parts. Part 1 provides the social context, introducing the trade in Melanesian labour for work in Queensland. Part 2 explores the prosecutions brought under the slave trade legislation and at common law against labour recruiters, especially those arising from incidents involving the Daphne and the Jason. It attempts to uncover the way that lawyers in these cases used arguments from the broader political debate as to whether the trade amounted to slaving. Part 3 concludes with an account of the relatively more effective regulation brought by the Kidnapping Act, with tentative suggestions as to how the arguments about slaving in Australian courts influenced the form that regulation under the Act had to take.

2. THE MELANESIAN LABOUR TRADE

Between 1863 and 1904, over 62,000 people from the Melanesian archipelagos provided the colony of Queensland with indentured labour for its emerging agricultural industries.[1] A Sydney parliamentarian and merchant, Captain Robert Towns, first arranged for a sandalwood trader operating from Tanna, Henry Ross Lewin, to recruit islanders from the Loyalty and New Hebrides Groups in 1863. They were employed at Towns' cotton plantation on the Logan River; and cotton growing, with the sheep, cattle, pearl shelling, fisheries and domestic service industries became significant employers of island labour over the next 15 years. However, the sugar plantations on the river plains around Brisbane, Maryborough, Bundaberg, Mackay, Bowen and Cairns led the demand for indentured labour over the next 40 years. From 1880, when Melanesians were restricted to employment in 'tropical and semi-tropical agriculture', island labour was effectively concentrated in the cane-fields.[2]

In the modern era, the establishing of sugar industries has almost always been condemned as a morally disreputable project. The large and intensive manual inputs required (before mechanisation) to grow sugar cane as a commercial crop meant that profitability depended on the maintenance of low labour costs. Caribbean planters could initially only make sugar growing rewarding through the use of African slave labour. Although by the latter nineteenth century, abolitionism had ended both the transatlantic slave trade and slavery in European colonies, indentured labourers (or libres engagés) were sought as an alternative: working under limited term contracts and wages but otherwise, on occasion, similar conditions to the slaves. Indentured labour also nurtured new sugar industries in Mauritius, Réunion, Natal and Hawaii.[3] Queensland was no exception, attempting under its early conservative administrations to develop plantation agriculture, experiencing labour shortages and, in any case, limited by the popular belief that Europeans were unsuited to manual work in the tropics. Parliament permitted the engagement of indentured labour from India in 1862,[4] but this failed after the Government refused to carry the costs of Indian immigration. At that point Towns turned to Melanesia and, the venture proving successful, many followed. From 1864, European planters in Fiji and, from 1865, New Caledonia would sponsor recruiting

from the same islands.[5] For Queensland, the New Hebrides, Torres and Banks Groups (that became Vanuatu) officially provided about 30,400 registered workers. The Solomons and Santa Cruz Group received more attention from the 1880s, providing about 13,300 workers. New Guinea and other islands provided about 16,200 workers, and the Loyalties about 1000. Melanesians in Queensland (excluding Torres Strait Islanders) peaked at 11,500 in 1883.[6] However, in Vanuatu the recruiting for Queensland, Fiji and New Caledonia seems to have contributed to a significant depopulation of the islands. In the period between 1860 and 1910 (when there was an estimated 60,00 inhabitants), the population at least quartered. [7]

From its beginning,[8] the debate in Queensland and New South Wales (where business had a large capital investment in the labour trade) about this trade has been conceptualised and argued in terms of slavery.[9] This is understandable: plantation agriculture, the colour and imagined African origins of Melanesian people, Britain's criticism that the Franco-Portuguese trade in libres engagés masked slaving, and the coincidence of the early period of the trade with the American Civil War naturally meant that the accusation of slave trading arose. For the best and worst motives, humanitarians (including the Anti-Slavery Society),[10] missionaries, the Royal Navy, organised labour, nascent White Australians, the liberal press, Liberal politicians in the colonies and the United Kingdom, colonial officials (including Governors of Queensland), and even Queen Victoria described the labour trade as slaving. On the other hand, conservative politicians in Queensland and, of course, the planters and merchants who undertook the trade strenuously denied the allegation.[11] For different reasons, recent academic assessments tend to dismiss it as well: the trade had appalling abuses, but thorough review of the documentary material and a more refined notion of 'slavery' show that the trade and service under indentures in Queensland did not, generally, deserve the description.[12]

I am not entering this debate. However, I do consider how useful the question of slaving was when it was raised in cases on the labour trade decided in the eastern colonies of Australia. The law was certainly a significant tool for managing the Melanesian labour trade: immigration to Queensland;[13] conditions of work;[14] labourers' return to the islands;[15] and the harsh deportations once, under the White Australia Policy, the trade was abandoned.[16] It was used in comparable, but less intensive, ways in Fiji under the Cakobau Government and, after 1874, the colonial administration.[17] However, the relevant cases were decided at the height of the recruiting abuses that took place in the islands, and which undoubtedly added weight to abolitionists' arguments that Melanesian people were being enslaved. In general, these abuses were of two kinds. First, the more prevalent abuse was the engagement of islanders who did not appreciate the nature or conditions of indentured service. This was especially so before 1875 when contact between Melanesians and Europeans was only being established, there were few returning labourers to explain the nature of service in Queensland, and interpreters were scarce. There was also blatant misrepresentation, particularly about the period of service.[18] The second abuse was physical abduction, euphemised as 'blackbird-hunting' or 'blackbirding'. This was a more generally held concern about the labour trade, even amongst planters.[19] Ross Lewin, deservedly, was the subject of blackbirding rumours from the beginning of the trade.[20] The allegations were being extended by 1868, when the French Government complained about the predations of Queensland recruiters in New Caledonia and the Loyalties.[21] Blackbirding practices included the enticing of islanders onto ships on the pretence that the crew wanted to barter or to offer them a short pleasure cruise, or ambushing villages and seizing the inhabitants. Either Lewin or his mate, John Coath, pioneered the trick of impersonating a missionary, and seizing any islanders who approached or inviting them to visit the ship's cabin. John Patteson, Anglican Bishop of Melanesia, was a common masquerade.[22] Saunders estimated that up to 1000 Melanesians officially brought into Queensland had been abducted by these methods.[23] No estimates exist for those smuggled into the colony.

The cases involving the Daphne and the Jason were prosecutions for blackbirding, and are interesting for several reasons. First, they involved charges under the slave trade legislation and for common law offences. The colonial courts were therefore applying standards developed far from the location of the trade, either under imperial legislation or, where jurisdiction arose because the events occurred on a British ship, under English (and not necessarily colonial) criminal law. This made the courts a collective

forum that was more, though not completely, detached from both the mercantile and plantation interests that generated the trade and, also, the imperial lawmaker. So although in Queensland the executive and legislative policies on the Melanesian labour trade have been examined closely, the more sceptical position of the Supreme Court has been bypassed completely. Secondly, the failure of the prosecutions for slave trading is recognised as a significant reason for special imperial measures to deal with blackbirding in the Kidnapping Acts.[24] However, the legal reasons that made the slave trade legislation inapplicable to Melanesia have not yet been explored. Historians have been unaware of the significance of different legal arguments and, for that matter, have confused who argued what or why.[25] The third reason is related. The arguments submitted in these cases juridified many aspects of the public debate about slaving in the Pacific. As a result the blackbirding cases present an example of an independent reading of imperial law in the colonies and, yet, how this stimulated even further imperial intervention.

3. BLACKBIRDING PROSECUTIONS

The slave trade laws

The responsibility for policing the labour trade in the Pacific rested with the Royal Navy, which, in the 1860s, permanently stationed up to six ships in Sydney Harbour. Its powers were limited: men-of-war were only able to seize ships engaged in piracy in iure gentium, for crimes on British vessels, and for offences under the slave trade legislation. Through the 1860s the Colonial Office considered that the slave trade legislation would be adequate to address recruiting abuses in Melanesia although, treaties with other countries being limited to the Atlantic, it could only be enforced against British ships.[26] Accordingly, when naval patrols first intercepted suspected Australian blackbirders in Melanesia, the slave trade legislation was immediately raised as the justification for seizing the vessels and detaining the masters.

Great Britain's anti-slaving laws emerged in the 1770s, while British merchants still dominated American slave markets, with the recognition at common law that slaves in transit in an English port could be landed 'free'.[27] However, the nineteenth century program for abolition rested on prerogative order and legislation. The landmarks included: prohibiting the import of slaves to the Caribbean colonies wrested from France, Holland and Spain (1805); prohibiting British subjects selling slaves into foreign territories (1806); prohibiting British subjects engaging in the slave trade or importing slaves into a British colony (1807); deeming slave trading on the high seas to be piracy (1824); the abolition of slavery in all British colonies, plantations and possessions (1833); and prohibiting any British subject, wherever resident, to hold or trade in slaves (1843).[28] This program extended the imperial Parliament to the limits of its international competence, although in the 1820s it began to enlarge its powers over foreign shipping by treaty. Reforming legislation also addressed mechanical problems of enforcement; the most significant being the 'equipment clause' that appeared in treaties after 1822. The equipment clause obviated the need to show that slaves were actually found on board before a ship could be proved a slaver.[29] Without the equipment clause, naval patrols had to wait until Africans were loaded onto a ship before it could be detained. Furthermore, a slaver being observed by a patrol could escape detention by landing its slaves on the coast or tossing them overboard before being intercepted.[30] The 'equipment clause' enabled a ship to be detained and condemned if it was noticeably equipped for slaving. Usual 'signs' of a slaver included: open gratings (instead of closed hatches) to allow ventilation in the hold; extra bulkheads and large planks to fit slave decks that increased the ship's carrying capacity; irons and shackles; or supplies of food, water and matting that exceeded the needs of the crew. Efforts were made to include equipment clauses in Britain's anti-slaving treaties with other European powers and the United States between 1822 and 1862.[31] The Slave Trade Act 1839 (UK) that incorporated the Anglo-Portuguese Treaty was of general application, and included an equipment clause by which a ship was presumed to be a slaver if it was found equipped for the slave trade.[32] If a seized ship carried, say, excessive supplies of food and water, the onus in proceedings for condemning the ship was on the master or owner to prove that the supplies were used for a legal purpose.

The slave trade laws and indentured labour

The ad hoc legislative reforms of the anti-slaving program helped eventually to corner the transatlantic slave trade, but by the mid-1850s they had also deflected commercial energies into the trade in indentured

labour. Here, the application of the slave trade legislation was thought possible, but more generally doubted. The Colonial Office assumed that it could deal with the Melanesian labour trade, but this was exceptional.[33] The legislation was obviously limited to conduct that had 'slavery' as its end. Strangely, for all the legislative energy devoted to the slave trade and its exegesis in the Admiralty courts, English law never developed a definition of 'slavery' that would clarify the point.[34]

As will be seen, the New South Wales courts reached a conclusion about the status of indentured labour under the slave trade legislation in 1869. But it was only in 1880, in R v Casaca,[35] that the Privy Council held that the indentured labour trade was beyond the reach of the slave trade legislation and, by implication, that the conditions of indentured labour in the Portuguese colony of São Tomé were not slavery. Casaca was a strong decision in this respect as, when seized, the suspect ship, the Ovarense, was found fitted with shackles, a large number of water casks, and excess food and matting. It also appeared that west Africans on board had been kidnapped, to be delivered to São Tomé against their wills as 'free' contract labourers. Sir Robert Phillimore, England's leading Admiralty judge, considered that the presumption of the equipment clause was rebutted once the master showed that he was licensed by the Portuguese Government to carry indentured labour to the colony: a legal purpose. The forcing of men into indentured labour was 'a purpose other than that "of consigning the men to slavery"', and so a detention of the Ovarense under the slave trade legislation was held to be unlawful.[36]

The Daphne

However harsh, Casaca illuminates the decisions made in New South Wales 11 years earlier and at what points the reasoning in those decisions can be considered legitimate, in contemporaneous terms at least. The schooner Daphne was registered in Melbourne to a South Australian, Thomas Pritchard, who either chartered it to Ross Lewin or entered partnership with him. Lewin arranged the refitting of the ship as a recruiter, and secured a licence to carry 58 labourers into Queensland under that colony's Polynesian Labourers Act. The ship left Brisbane in February 1868, skippered by an American, John Daggett, and recruited over 100 islanders from Tanna, Erromango and Éfaté. The licensed number was taken to Brisbane, and the others remained on Tanna. There was a second voyage in 1869 that mustered 108 recruits: Loyalty and Banks islanders were added to those left on Tanna, where the Daphne arrived in March. According to Pritchard, they decided at that point that the Daphne should sail to Fiji. The motivation was twofold. Lewin's reception in Brisbane was becoming increasingly hostile. After the Daphne's first voyage, he had been prosecuted unsuccessfully for the rape of a 13-year-old Tannese girl whom he had kept as a concubine.[37] It was best he never returned. Also, in Fiji the recruiters could get £6 for each of 108 islanders, where in Queensland they could get £9 for each of only the 58 that the Daphne was permitted to carry under that colony's legislation.

Lewin remained on Tanna. The Daphne sailed on to Levuka, on Ovalau, and was met there by a man-of-war: HMS Rosario, on patrol from Sydney. Rosario's captain, George Palmer, had served on west African patrols and thought that the Daphne looked much like a transatlantic slaver, excepting the irons. The sleeping quarters had no bedding or matting. The ship was crowded. The islanders appeared undernourished. Although Pritchard produced the Queensland licences, the ship itself did not comply with the Queensland legislation and had not been carrying the food, clothing or supplies for the passengers that it required. The licences were made out to Lewin, who was not there, and showed that the Daphne was to take 58 labourers west to Brisbane when it had taken 108 east to Levuka. Palmer later testified that his suspicions were really aroused by the references to Lewin on the Queensland licences, as he had learned of Ross Lewin as a 'man-stealer and a kidnapper'.[38] He concluded that the Daphne was a slaver, detained Pritchard and Daggett, and had them taken with the Daphne to Sydney.[39] The islanders were placed under the care of Sir John Thurston, the resident British consul in Levuka.

The Daphne: prosecution for piracy

The charges of slaving brought against Pritchard and Daggett in the Sydney Water Police Court were dismissed, as was the action to have the Daphne condemned in the Vice-Admiralty Court. A bench that, after some challenge,[40] ultimately comprised Water Police Magistrate Cloete and Mr A Learmonth JP had to determine whether Daggett and Pritchard could be tried under section 9 of the Slave Trade Act 1824 (UK), which made it piracy to carry people - knowingly and wilfully - by sea to another place for the

purpose of using them as slaves. At the committal, defence counsel William Bede Dalley had the better of the Crown prosecutor, Richard Windeyer, who had only been briefed the night before.[41] Questioning from both concentrated on whether the islanders had willingly boarded the ship, or consented to the 're-engagement' from Queensland to Fiji.[42] While this addressed the undercurrent of blackbirding to these events, it was insufficient for the charge of slaving. Windeyer had to produce evidence that labouring conditions in Fiji constituted slavery, and on this point he adduced very little. In evidence Palmer admitted that he did not know how much labourers were paid in Fiji, and that rations differed considerably between plantations. He thought that the engagements were generally for two years, and had been told by Thurston, the British consul, that labourers were returned 'punctually' at the expense of the planter once their employment expired. His lieutenant, Richard Bingham, said that he knew nothing of the supply of labour in Fiji, except that there was no regulation of labour conditions there.[43] The only evidence that came close to supporting the charge of slave trading was Palmer's testimony that Daggett had explained to him that he had come to Levuka because they could get a higher price for the islanders there than in Queensland. [44]

The committal turned on that point. Dalley argued that there was no case to answer, as to establish piracy under the slave trade legislation there had to be proof both that the islanders had been removed to Levuka for use as slaves and that this had been done knowingly and wilfully. Windeyer accepted that, but argued briefly that the islanders were treated as slaves as soon as Daggett nominated the price he would get for them in Levuka.[45] On Friday 28 June, Cloete and Learmonth ruled that Daggett would not be committed to trial for piracy. The same followed for Pritchard. This is an understandable result, given that the evidence that the recruiters were 'selling' the islanders to planters in Fiji was at best ambiguous. Still, the reasons that the court gave are more doubtful. First, the court found no evidence that the islanders had been brought on board the Daphne by illegal means like seduction or compulsion. Secondly, the court found that there was no evidence that Daggett deported the islanders to a place where they would be dealt with as slaves: 'as the place where they were taken was not a slave country'.[46] Strictly, neither conclusion should have properly defeated charges of slave trading. Forcible abduction might help to establish treatment as slaves, but the absence of 'seduction or compulsion' at the time men boarded the recruiting vessel did not preclude a finding of enslavement. Further, the finding that Fiji 'was not a slave country' did not rule out the possibility that the islanders could be dealt with as slaves, as it was recognised under slave trade legislation that slavery could still be conducted illegally where it was prohibited.[47] The court did not address evidence that some of the islanders' re-engagement to Fiji occurred without any real understanding that this meant a redirection to Fiji, and that the documents recording this were backdated. It also did not consider the significance of the payment that Daggett, Pritchard and Lewin were to receive from the planters. Cloete and Learmonth did recognise that the Daphne incident showed irregularities under the Queensland legislation (under which they had no jurisdiction). However, Fiji had a resident British consul and local merchants had not established a slave trade.[48]

The action to condemn the Daphne

Legally, the significance of the magistrates' decision not to commit Daggett and Pritchard to trial should not be overestimated. However, it was paralleled and extended in the more influential decision of the Vice-Admiralty Court in Palmer's proceedings under the slave trade legislation to have the Daphne condemned. The judge commissary in the Sydney Vice-Admiralty Court was the Chief Justice, Sir Alfred Stephen, a sober and respected legal technician and reformer.[49] Here, Palmer's lawyers thought there would be fewer evidential problems, as the equipment clause was available.[50] Evidence was submitted to the court in August 1869, but even before legal argument was heard on 24 September Stephen doubted that much could come of the allegations. Sometime in late August, he sent a note to Sir William Manning - Palmer's lawyer – hinting that Palmer should reconsider the action for condemning the ship. At that stage of the proceedings Stephen did not think that the evidence established that the islanders were taken on board the Daphne as slaves, or would be sold into slavery. He wrote that '[i]t will not be enough to show that artifice has been used, or even falsehood told, to induce the natives to enter into the agreements or contracts mentioned ... The captor will have substantially to prove that the natives were going to be passed into a state of real slavery by those who had taken them on board the "Daphne", or were to be put in a state really amounting to slavery, and in violation of the agreement, and against their will'.[51] Stephen evaded a positive definition of slavery for these purposes. Palmer rightly understood that the Chief Justice

was concluding that it would not constitute slavery for a merchant to sell islanders to a planter at a nominated sum per head, even if he had enticed islanders to board the ship by tricks or deception.[52] But Palmer persisted. As expected, Stephen dismissed the action on 24 September without requiring Pritchard's and Daggett's barrister to respond to Manning's argument that the Daphne was a slaver.[53] However, his reasons had changed, and he delivered a stronger judgment against Palmer than the letter to Manning had foreshadowed.

Stephen had been associated with the Clapham Sect, and into the 1870s remained personally opposed to the labour trade.[54] In the Daphne, he censured Pritchard and Daggett for their moral recklessness.[55] That was nevertheless not enough to make it slaving, and there was nothing to prove that the islanders were treated as slaves in Fiji. Stephen thought it significant that there was a British consul at Levuka, and that many islanders were aware of the labouring conditions in Fiji. In general, he thought that they returned home once the indentures expired. Evidence that planters on Ovalau paid the recruiters a sum per head for Melanesian labour and that there were islanders who were unable to secure a return passage home was recounted without comment. All of this could pass, especially since the evidence presented for condemnation was the same as the evidence presented in the Water Police Court for piracy. However, unlike the magistrates Stephen had to deal with the effect of the equipment clause. The fact that the Daphne had provision for a large number of passengers was enough under the equipment clause for the presumption of slaving to arise. That did not necessarily guarantee the condemnation of the vessel. Pritchard and Daggett only had to rebut the presumption by showing that the fittings were used on the voyage for a legal purpose and, by this time, the Chief Justice had accepted that the market for Melanesian labour in Fiji was lawful.

However, Pritchard's and Daggett's lawyer was not called on to argue any defence, let alone to rebut the presumption of the equipment clause. Stephen dismissed Palmer's action against the Daphne for other reasons. Significantly, he concluded that the Slave Trade Act 1839 did not apply in the South Pacific:

... that enactment ... was passed in respect of vessels found in very different latitudes, and under very different circumstances, from those in question here. On various parts of the coast of Africa, from which negro slaves were brought, and of the coasts of America to which they were usually taken, a vessel occasionally was discovered having not one single slave, or the traces of one on board, yet with fittings up, and quantities and kinds of food, showing unmistakably her employment; that human beings, and presumably negroes, had been or were to be her cargo. Passengers of any kind did not exist in those regions.... But it is absurd to imagine, that the enactment was intended or could operate to compel a Court, against the strongest evidence and in violation of the truth, to pronounce a trading vessel in these seas a slaver, because she had on board, with the necessary fittings, an improper number of passengers; they being free labourers expressly engaged as such ... .[56]

The proceedings were therefore dismissed, purely on legal grounds.

The effect of the Daphne

Stephen's letter to Manning and, to an extent, his judgment in the Daphne were portents of Sir Robert Phillimore's assessment of the indentured labour trade in Casaca. The slave trade legislation did not proscribe man-stealing, if the captives, however unwilling, were destined to be employed for a fixed term and were promised some payment. That result would have been enough for the Imperial Government to introduce special measures for blackbirding, but in the Daphne the Chief Justice went further and doubted the operation of slave trade legislation in the region altogether. It was reported and publicised in other Australian colonies in those terms.[57] This developed conclusions reached earlier in the Water Police Court, but the reasoning was heterodox. In both courts the language used paralleled a prominent argument used by planters and conservatives that the trade to Queensland could not be slaving as slavery could not exist in a British colony. As Saunders stressed, this conflated two distinct questions: the ideal that the law sought to achieve, and the actual abuses it was intended to eliminate.[58] The law was used to establish fact. The magistrates concluded that the islanders on the Daphne were not destined for enslavement because Fiji was a free territory, a British consul lived there and, a complete non sequitur, Sydney merchants had not established a slave trade. Stephen merely declared, without analysis, that the slave trade legislation was not intended to presume that a vessel in Melanesia was a slaver merely because it

was equipped to carry more passengers than the law allowed. Again, emphasis was placed on the residence of a British consul in Fiji. In a more sophisticated way, therefore, the judgment rested this doubt that the Slave Trade Act could apply in the South Pacific on the assertion that there was no slave trade there. For Stephen it was an uncharacteristically adventurous conclusion, and overlooked technical features of the legislation.[59] However, it had strategic significance. Merely dismissing Palmer's action on the evidential ground that, in the Daphne, conditions in Fiji were not shown to constitute slavery still might invite prosecutions where the evidence differed, and Stephen himself would hear cases where the evidence did differ. The legal conclusion that slave trade legislation did not apply in the Pacific should have silenced allegations of slaving in the courts completely. With one eccentric exception in Queensland, that is precisely what the Daphne achieved.

Common law offences

The failure of the prosecution for slaving in the Daphne led colonial authorities to rely on more conventional offences of the English criminal law, which could apply if the events occurred on a British ship.[60] This was necessarily the case for charges of homicide. In May 1869 Albert Hovell, master of the Young Australian, and his mate Rangi were sentenced to death in Sydney for the murder of three Paamans, and in December 1872 two crew from the Carl were convicted of manslaughter as a result of a massacre off Bougainville.[61] A petition secured mercy for Hovell and Rangi, but the Young Australian convictions absorbed the public in Sydney throughout mid-1869, invigorated the slavery question, and magnified the significance attached to the Daphne prosecutions that began in the next month.[62] The change in prosecutorial policy in cases where no killing was alleged came with R v Longmuir. The schooner Challenge was seized in Levuka in May 1871, after the consul learned of two incidents of attempted abduction off Vanua Lava and in the Torres Islands. His intention was to prosecute the master, Alexander Longmuir, under the slave trade legislation. However, the New South Wales Attorney-General, Sir James Martin, recommended that Longmuir be prosecuted for assault and that no proceedings be brought to have the ship condemned. Even if Longmuir's intentions could be proved, the decision in the Daphne had resolved that indentured labour in Fiji did not amount to slavery. So, Longmuir was committed to trial for assault. He was convicted on two counts, and sentenced to three years imprisonment.[63]

Lewin's earlier prosecution for rape and the Young Australian case raised legal points about the admissibility of islanders' evidence,[64] but the common law cases brought no other important legal developments. R v Coath[65] did, as it saw the Supreme Court of Queensland articulate the common law of kidnapping to meet the problem of 'man-stealing' in Melanesia. This was also the first significant decision on blackbirding in the colony that had caused the problem. Ironically, Coath shows that the arguments that the labour trade amounted to slaving received a more sympathetic hearing from the Queensland judges.

The Jason

The prosecution in Coath arose from the voyage of the schooner Jason from Maryborough to Tanna, Nguna and Epi in the summer of 1870 and 1871. The Jason had raised suspicions on its return to Maryborough in March 1871, after a Presbyterian missionary on Nguna claimed that the Jason's crew had tried to abduct two Ngunan women and a man. Later, one of the Jason's crew recounted that John Coath, the ship's captain (who had served under Lewin), arranged the abduction in January 1871 of two men from Tanna, and in February of nine men from a canoe off Epi. These men were landed at Maryborough. However, nothing came of these allegations until after the Jason's second voyage to the New Hebrides in April 1871. This time the ship was carrying a government agent, John Meiklejohn, a respected Maryborough sugar planter. Witnessing the abduction of nine men and a boy off Ambrym, Meiklejohn had protested to Coath, only to be threatened with a pistol. He was handcuffed to a ring-bolt in the hold and, with the captured Ambrymese, ultimately spent five weeks there. Only on the day before docking in Maryborough was Meiklejohn released, and he was found by friends in a mentally deranged state. Investigations followed, and eventually led to Coath's prosecution for kidnapping and assault for the abductions during the first voyage. There were similar charges for the capture of the Ambrymese during the second voyage, but the key witness, Meiklejohn, was so incoherent that they were withdrawn.[66]

However, at trial in Brisbane Coath was convicted on the charge of kidnapping the nine Epinese and was sentenced by Mr Justice Alfred Lutwyche to five years imprisonment and a £50 fine.

Lutwyche had directed the jurors that the charge of kidnapping would be proved if they were satisfied that any of the nine islanders were brought on board the Jason or detained there against their wills, and then carried away to another place. In December 1871, Charles Lilley QC, Coath's barrister, had a case stated to the whole Supreme Court. The court only had two judges: so Lutwyche himself and the Chief Justice, Sir James Cockle, heard the reference.[67]

The Jason defence: saved, not stolen

Lilley's argument was unfettered British supremacism: the Epinese had been saved, not stolen.[68] They were landed as free men in a British colony and under the protection of English law.

The moment these islanders touched the deck of an English vessel they were free, and had a right to habeas corpus. They were landed at Maryborough and allowed to land free .... [69]

Lilley argued that, at common law, kidnapping only occurs when a person is taken from the protection of English law or is concealed in a British dominion and effectively deprived of the protection of English law. The precise opposite had occurred in this case: '[i]t is no offence to go to islands inhabited by a savage and barbarous people, and to bring these people into the protection of English law.'[70] Lilley was necessarily suggesting that blackbirding practices were, as a rule, lawful, and that the Epinese benefited from them.[71] This argument depended on the free status that the islanders were recognised as having in Queensland, and side-tracked Lilley into submissions on the question of slavery. Dredd Scott[72] was cited, as was the Daphne. It also assumed, without elaboration, that peoples in the New Hebrides and the Fijis were not 'free', at least not in the sense that 'free' status was recognised by Europeans. Had the Jason taken the men to Fiji, a kidnapping would have occurred because they would have been taken from a British vessel where they were 'free' and landed in a place that was not (in 1871) in the British dominions. [73]

The Attorney-General, John Bramston, replied with a simple argument. Kidnapping occurs when there is a 'violation of that personal liberty which the law of England recognises in every man',[74] and this personal liberty was recognised wherever a person was, and whoever the person was. Undoubtedly Lilley's was a dangerous argument and, as Bramston reminded the court, discounted the damage done to the public generally when abduction is permitted. If accepted, blackbirding would be endorsed by the common law, and what little disincentive the criminal law currently was to the recruiters would vanish. However, Lilley was right in one respect. There was no precedent for the conviction.[75] Coath was a novel case, and the court had to explore the policies beneath the law of kidnapping to uphold the conviction. There was also the problem that the colony lacked adequate legal resources, as the only cases that its leading counsel could cite to the court were both decided in 1683, and neither concerned the law of kidnapping.[76] The Chief Justice openly speculated as to what the common law had been, and what it now was.[77]

Lilley had actually reforged an old slaver's argument. In Queensland, supporters of the labour trade would claim well into the twentieth century that, irrespective of how Melanesians were brought to the colony, the civilising influence of the more advanced European world could, by long exposure to it, only improve them.[78] This, perhaps unwisely, had been borrowed from the ante-bellum South. It was often claimed that African slaves lived better as the property of a benevolent planter who would educate and Christianise them, than in their original barbarism without hope of salvation.[79] Lilley distorted this already distorted paternalism. Unable to contest the jury's finding that the Epinese had been captured and taken involuntarily to Queensland, he could only invert the usual legal construction that this was putting free men under restraint. Enslaved men were being freed. Although the argument drew on contemporary European images of Melanesia as a place where life was brutal and short and where men were still in chains, no one was convinced that the technical availability of habeas corpus on a colonial blackbirder made it a better place for an islander than Epi or Fiji. The argument's overreaching defeated itself. Cockle was led to believe that Coath really was slave trading, and Lutwyche did not even deign to respond.

Cockle on the Jason: slaving in the South Seas

It was not a court that exemplified doctrinal purity, and Lilley's submissions on slavery led Cockle into an unusual approach to the question of kidnapping. A celebrated mathematician and Fellow of the Royal Society, he had been appointed Chief Justice because he was a 'gentleman rather than a mere lawyer'[80] and his judgment shows both qualities. Cockle denied that the point should be decided upon emotional grounds, but delivered an affecting, extemporaneous judgment: describing an old, captive Epinese man weeping for his relatives on shore, and the cries of those who had lost him. He deprecated a callous crew more concerned to catch the islanders on board than to help one who risked a swim to shore.[81] It just seemed wrong.

> [W]e must consider whether one subject of Her Majesty is at liberty to fit out a vessel to sail amongst these apparently savage and guideless islanders, and seize them and appropriate their property as appears to have been done in this case.[82]

That intuition was reinforced by the matters of public policy that Bramston had submitted to the court. So, again denying that the court could create an offence where one was not already recognised at common law, the Chief Justice thought that he could consider the consequences if the conviction were quashed.[83] However, he eventually did consider the legality of Coath's conviction and, in this connection, did so almost entirely by reference to the law of slavery. 'I think that the cases decided upon the point of slavery are valuable and important.'[84] He recognised that enslavement had been practised in the transatlantic trade, and that even English courts had recognised persons as slaves if slavery were legal where they lived. This was where Queensland's poor legal resources failed him as Cockle could only hypothesise whether slavery had in the past been lawful, or unlawful but undeterred. At this point, he seems to respond to Lilley's assumption that the status of Melanesians was not 'free'. Irrespective of whether the law had recognised slavery, Cockle thought that where the liberty of any person was involved any submission that they could lawfully be placed under restraint had to be examined carefully.[85] He could find no right to do so. Then, the Chief Justice blended his moral indignation with a presumption against enslaved status, humanitarian concerns and the colony's commercial interests:

> This [labour] trade is carried on across the highway through which much of the commerce of these parts passes ...; and if once amongst these nations an opinion should get abroad that our law proceeded upon principles so inhuman that their rights could be violated with impunity by any man who may choose to sally forth to outrage them, I say that the safety of commerce itself and the blessings it maintains ... would be endangered; and I think that in saying this I am only drawing an inference that the Common Law itself would draw.[86]

In short, Cockle held that Coath's conviction for kidnapping should stand because he should not be permitted to enslave islanders.

Lutwyche on the Jason: kidnapping and piracy

The Chief Justice admitted that he only had 'a general view of the case', and so far as the technicalities of the law of kidnapping were concerned deferred to Lutwyche's opinion.[87] Unsurprisingly, Lutwyche thought that the directions he gave at trial were correct. He addressed the offence of kidnapping directly, with only the slightest allusion to the question of enslavement. Long known as a pugnacious liberal egalitarian,[88] Lutwyche held that islanders 'have a right to liberty, which is inherent in all human beings, although at times that inherent right has been taken away by force'.[89] It followed that it must also be assumed that the Epinese had the status of freemen when they were captured, and so it could not be argued that any restraint applied by the Jason's crew was lawful. Lutwyche thought that one form of kidnapping involved the stealing and removal of any human being, not merely British subjects. Coath might have been a novel case, but it was easily an example of this kind of kidnapping. The conviction therefore should be upheld.[90]

For the times, R v Coath represents a tough assessment of a European labour recruiter. The Chief Justice had equated Coath's conduct with slave trading, and Lutwyche, in a postscript to his judgment,[91] had

hinted that Coath should have been prosecuted for piracy. The Government was not so inclined, and Bramston himself, after interviewing the Epinese at Maryborough, eventually recommended that Coath be pardoned. R v Coath was nevertheless a singular precedent, was the most severe judgment made for blackbirding before the Kidnapping Act, and supported Lilley's own harsh sentences for kidnapping (and murder) in the Hopeful case in 1884.[92] It was also the last appearance of the slaving question in an Australian court. Though idiosyncratic, Sir James Cockle's judgment suggests that prosecutions for slaving may have been received differently in his own Vice-Admiralty Court in Brisbane. However, the Kidnapping Act was passed within a year. Action against blackbirding practices would then take, for the Australian colonies, a more acceptable form and, I suggest, a more effective one.

4. THE KIDNAPPING ACT

After his decision in the Daphne, Sir Alfred Stephen made 'a hasty suggestion' that the slave trade legislation be amended, deeming a kidnapped person to be a slave. He was nevertheless concerned about the harshness of the penalties for slaving, and over time revised this opinion.[93] As early as 1862, the Imperial Government had a draft bill addressing any slave trading in the Pacific and, in 1870, had refined clauses that could deal with kidnapping. The Daphne showed that special legislation was required, but the immediate stimulus for imperial intervention was the murder of Bishop Patteson at Nukapu in the Santa Cruz Group, on 20 September 1871. The state of Patteson's body strongly suggested that his death had been payback for the stealing of five boys from the island by blackbirders who had impersonated the bishop.[94] Public reaction was strong, in the Australian colonies and the United Kingdom. At a public meeting in Sydney Stephen, though still cautious about blaming the recruiters, demanded close regulation of recruiting vessels and enhanced powers for the navy to seize noncompliant ships.[95] The Kidnapping Act did that, though in more exacting terms than Stephen would think prudent.

The stated purpose of the Act was to protect 'natives of islands in the Pacific Ocean, not being in Her Majesty's dominions, nor within the jurisdiction of any civilized power'.[96] This effectively excluded islanders from New Caledonia, the Loyalties, and the continental side of Torres Strait that had been annexed to Queensland in May 1872.[97] Despite its name, the Kidnapping Act's central prohibition was on the carrying of islanders on a British ship unless they were its crew or the master had lodged a £500 bond and was licensed by a Governor or consul. The Act also addressed abduction, whether by deception or force, and included an appropriate equipment clause.[98] There were enhanced powers to seize British ships suspected of being engaged in any of these offences or, again, equipped to carry them out. The Vice-Admiralty courts had powers to condemn ships that were involved in unlawful carrying or abduction.[99]

Initially at least,[100] it was envisaged that the responsibility for interpreting the Kidnapping Act would rest with the Australasian courts,[101] and it took little time for them to show how rigorous the legislation was. In early 1873 pearling vessels were vacating Torres Strait, having been warned that HMS Basilisk was being sent there to deal with labour practices in the pearl shelling industry. However, between Cardwell and Cape York Basilisk's captain, John Moresby, seized four pearlers on which he found Melanesian divers, and evidence of blackbirding and unpaid service.[102] Three actions under the Kidnapping Act followed.

In defending proceedings for the forfeiture of the Crishna in the Brisbane Vice-Admiralty Court, Samuel Griffith argued that offences under the Act required an intention to carry islanders unlawfully and, so far as the owners of the ship were concerned, knowledge that islanders were being carried unlawfully.[103] The argument borrowed from WB Dalley's successful submissions in the committal proceedings in the Daphne, Griffith analogising loosely from adjudication on the slave trade legislation.[104] But the judge commissary, Sir James Cockle, reached the extraordinary conclusion that mens rea was not an element of the offence. A conviction would be entered where the ship was merely carrying islanders.[105] Three months later in Sydney, Sir Alfred Stephen's decisions in actions for forfeiture of the Melanie[106] and the Challenge[107] (already impugned in Longmuir) proceeded on the same assumption that no element of intention was required to commit the offence of unlawful carrying. This evidently perturbed Stephen and, while ordering both ships to be condemned, he recommended that the Government restore them to the

owners.[108] Ultimately, the Privy Council annulled both orders on the grounds that Stephen had used 'retrospective evidence' and that the masters had proved an intention to obtain licences. The Crishna remained condemned.[109]

The passage of the Kidnapping Act did not resolve the political question whether the labour trade was slaving. If Queen Victoria's speech from the throne in 1872 is any indication, the Imperial Government planned the Act as a measure to deal with '[t]he Slave Trade, and practices scarcely to be distinguished from Slave Trading.'[110] However, legislation that was effective to deal with blackbirding had to immunise legal argument and adjudication from the question of slavery altogether. This was especially so while the leading advocate for the case that the labour trade was not slaving was the leading Admiralty judge in the Pacific, Sir Alfred Stephen. His role in this connection is significant, in that he tried to have Palmer drop the case for condemnation of the Daphne and, eventually, decided against him on the basis of his own researches and without any assistance from defence counsel. I do not suggest that the degree of personal initiative Stephen took in dealing with the action against the Daphne was untoward, or that Palmer's case should have succeeded. However, Stephen's doubts that the slave trade legislation had any operation in the Pacific rested on tenuous grounds. These doubts may have represented an unwillingness to admit that there was any trade approaching slaving within New South Wales' sphere of influence, or an effort to depoliticise prosecutions of the emotive slaving question altogether. This may also explain Stephen's feeling that the Kidnapping Act was heavy-handed and, oddly for a judge so notorious for harsh sentencing,[111] his appeals for executive leniency in the Melanie and the Challenge.

There was some evidence in the Melanie, the Challenge and the Crishna that islanders had been abducted, and were working without pay and, perhaps, for indefinite periods.[112] These might have been stronger cases for slave trading prosecutions, but the Daphne ensured that the slave trade legislation would not be raised. To secure convictions for blackbirding, the question of slaving had to be avoided in the courts. As Coath showed, the language of kidnapping provided that opportunity. Leaving labouring conditions in Queensland to one side, the problem in the islands was physical abduction or enticement and the problem in the courts was proving that. Certainly, the effectiveness of the Kidnapping Act was helped by lessons learned in legislating on transatlantic slaving. The offence of unlawful carrying extended the logic of the equipment clause, and treated an unlicensed ship as a blackbirder merely because Melanesians were found on board. Equally, however, its effectiveness also depended on removing structural weaknesses in the slave trade legislation: the prohibition was on a mere carrying of islanders (irrespective of its purpose), and it was strictly imposed. So, while the Imperial Government considered the Kidnapping Act as a measure to address a slave trade, the scrupulous avoidance of any reference to slavery in the legislation itself removed prosecutions from the politics of slaving completely. This may not have been the law that Sir Alfred Stephen wanted, but he was right in that, so far as blackbirding cases in court were concerned, it was better not to talk about slaving at all.

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Endnotes:

[1]. Parnaby, OW, Britain and the Labour Trade in the Southwest Pacific, 1964, Durham NC: Duke University Press, 203.

[2]. Galloway, JH, The Sugar Cane Industry, 1989, Cambridge: Cambridge University Press, 234; Queensland Cane Growers' Council, Sugar Country, 1965, Brisbane: QCGC, 13-14. For the employment restrictions, see s 7 Pacific Island Labourers Act 1880 (Qld) (44 Vic no 17); s 10 Pacific Island Labourers Act Amendment Act 1884 (Qld) (47 Vic no 12). For a popular history of the trade, see Docker, EW, The Blackbirders, 1970, London: Angus and Robertson.

[3]. Galloway, The Sugar Cane Industry, above, 11-18, 218-228.

[4]. Section 1, Indian Labourers Act 1862 (Qld) (26 Vic no 5).

[5]. Parnaby, Britain and the Labour Trade, above, 29-32, 51-54; Shineberg, D, 'Oceanian Labour Trade to New Caledonia: 1865-1930', (1995) 18 Pacific Studies 1; Siegel, J, 'Origins of Pacific Islands Labourers in Fiji', (1985) 20 Journal of Pacific History 42. For an account of the labour trade from islands in the eastern Pacific to Peru, which was accompanied by similar abuses, see Maude, HE, Slavers in Paradise: The Peruvian Labour Trade in Polynesia, 1862-1864, 1981, Canberra: Australian National University Press.

[6]. Parnaby, Britain and the Labour Trade, above, 201, 203.

[7]. Parnaby, Britain and the Labour Trade, above, 54-55, 210-204; Corris, P, Passage, Port and Plantation, 1973, Melbourne: Melbourne University Press, 24-44.

[8]. North Australian, 20 August 1863, 2; Courier, 22 August 1863, 4.

[9]. Saunders, K, 'Uncertain Bondage: An Analysis of Indentured Labour in Queensland to 1907, with Particular Reference to the Melanesian Servants', 1974, Brisbane: Unpublished PhD Thesis, University of Queensland, 1.

[10]. See, eg, Anti-Slavery Reporter, June 1883, 162-164.

[11]. Saunders, 'Uncertain Bondage', above, 1-8; Saunders, K (ed), Indentured Labour in the British Empire, 1834-1920, 1984, London: Croom Helm, 183.

[12]. For a recent summary, see Moore, C, 'The Historiography of Immigrant Melanesians in Australia', (1992) 15 Pacific Studies 61, 62-63.

[13]. Sections 16 and 24, Polynesian Labourers Act 1868 (Qld) (31 Vic no 47) indirectly limited the numbers of Melanesians able to enter the colony, by restricting the number of islanders any ship could carry. See also, s 11, Pacific Island Labourers Act Amendment Act 1885 (Qld) (49 Vic no 17); s 3, Pacific Island Labourers (Extension) Act 1892 (Qld) (55 Vic no 38).

[14]. Sections 6, 8-9, 11, Forms D, G, I, Polynesian Labourers Act 1868 (Qld); Paul v Buttenshaw (1877) 1(2) Beor 4; s 2, 7 and 10, Pacific Island Labourers Act 1880 (Qld) (44 Vic no 17) and ss 2, 10, Pacific Island Labourers Act Amendment Act 1884 (Qld) (47 Vic no 12); Young v Smyth (1884) 6 QLJ 73; Hornbrook v Hyne (1897) 8 QLJ 17.

[15]. Three years became the standard engagement: s 6 Polynesian Labourers Act 1868 (Qld).

[16]. Section 11, Pacific Island Labourers Act Amendment Act 1885 (Qld) (49 Vic no 17); s 3, Pacific Island Labourers (Extension) Act 1892 (Qld) (55 Vic no 38); Pacific Island Labourers Act 1901 (Cth); Pacific Island Labourers Act 1906 (Cth); Robtelmes v Brenan (1906) 4 CLR 394.

[17]. Cakobau 8, 14 December 1871; Cakobau 34, 23 July 1872; Fiji Government Gazette, 4, 14 October 1874; Confirmation Ordinance 1875 (no 1); Polynesian Immigrants Ordinance 1876 (Fiji) (no 24); Immigration Ordinance 1877 (Fiji) (no 11).

[18]. Cf R v The Owners of the Forest King (1884) 2 QLJ 50.

[19]. For example, Brisbane Courier, 30 October 1871, 7.

[20]. North Australian, 20 August 1863, 2; 28 January 1865, 2; Courier, 22 August 1863, 4. Lewin had already been recruiting in Polynesia for the Peruvian trade: Maude, Slavers in Paradise, above, 113.

[21]. Parnaby, Britain and the Labour Trade, above, 58; Saunders, Indentured Labour, above, 58-59.

[22]. Docker, The Blackbirders, above, 47-48; Saunders, 'Uncertain Bondage', above, 58-59.

[23]. Saunders, 'Uncertain Bondage', above, 71-86; Evans, R, Saunders, K, & Cronin, K, Race Relations in Colonial Queensland, 1993, Brisbane: University of Queensland Press, 167-168.

[24]. Docker, The Blackbirders, above, 68; Parnaby, Britain and the Labour Trade, above, 18.

[25]. For example, Saunders, K, Workers in Bondage: The Origins and Bases of Unfree Labour in Queensland, 1824-1916, 1982, Brisbane: University of Queensland Press, 21.

[26]. Parnaby, Britain and the Labour Trade, above, 15; Ward, WEF, The Royal Navy and the Slavers, 1969, London: Allen and Unwin, 22-37.

[27]. Somerset v Stewart (1772) Lofft 1, 98 ER 499; see also Shanley v Harvey (1762) 2 Eden 126, 28 ER 844; Miers, S, Britain and the Ending of the Slave Trade, 1975, New York: Africana Publishing Company, 3.

[28]. Slave Trade Act 1806 (UK) (46 Geo 3 c 52); s 1, Abolition Act 1807 (UK) (47 Geo 3 c 36); s 9, Slave Trade Act 1824 (UK) (5 Geo 4 c 113); s 12, Slavery Abolition Act 1833 (UK) (3 & 4 Will 4 c 73); s 1, Slave Trade Act 1843 (6 & 7 Vic c 98); cf Santos v Illidge (1860) 8 CB (NS) 861, 141 ER 1404. Slave trading was not piracy under international law, impeding the Royal Navy's ability to deal with foreign slavers: Le Louis (1817) 2 Dods 210, 165 ER 1464; R v Serva, The Felicidade (1845) 1 Den 104, 169 ER 169; Buron v Denman (1848) 2 Ex 167, 154 ER 450. For a comprehensive view of the legislation, see Phillimore, R, Commentaries upon International Law, 3rd ed, 1879, London: Butterworths, I, 402-442.

[29]. Cf The Fortuna (1811) 1 Dods 81, 165 ER 1240.

[30]. Miers, Britain and the Ending of the Slave Trade, above, 14.

[31]. Fischer, H, 'The Suppression of Slavery in International Law', (1950) 3 ILQ 28 at 43-48; Ward, The Royal Navy and the Slavers, above, 119-121.

[32]. Section 4, Slave Trade Act 1839 (UK); see, eg, Casanova v The Queen and Dunlop, The Ricardo Schmidt (1866) LR 1 PC 268 at 279-280.

[33]. Miers, Britain and the Ending of the Slave Trade, above, 28-29.

[34]. Somerset v Stewart (1772) Lofft 1 at 19, 98 ER 499 at 510.

[35]. (1880) 5 App Cas 548.

[36]. R v Casaca (1880) 5 App Cas 548 at 561.

[37]. Brisbane Courier, 26 December 1868; 5 January 1869, 2-3; 12 January 1869, 3; 13 January 1869, 2; 13 January 1869, 3; 16 January 1869, 5.

[38]. Sydney Morning Herald, 25 June 1869, 5.

[39]. Sydney Morning Herald, 16 June 1869, 7; 5 June 1869, 6.

[40]. Sydney Morning Herald, 25 June 1869, 5.

[41]. Palmer, G, Kidnapping in the South Seas, 1871, Edinburgh: Edmonstone & Douglas, 131-2.

[42]. Sydney Morning Herald, 26 June 1869, 7.

[43]. Sydney Morning Herald, 25 June 1869, 5.

[44]. Sydney Morning Herald, 23 June 1869, 5.

[45]. Sydney Morning Herald, 26 June 1869, 7.

[46]. Sydney Morning Herald, 29 June 1869, 2.

[47]. For example, s 4, Slave Trade Act 1843 (UK).

[48]. Sydney Morning Herald, 29 June 1869, 2.

[49]. Australian Dictionary of Biography ('ADB'), 1976, Melbourne: Melbourne University Press, VI, 180-187.

[50]. Section 4, Slave Trade Act 1839 (UK).

[51]. Palmer, Kidnapping in the South Seas, above, 146.

[52]. Palmer, Kidnapping in the South Seas, above, 147.

[53]. The Daphne (1869) 10 SCR (NSW) (L) 37.

[54]. ADB, above, VI, 180; Sydney Morning Herald, 15 November 1871, 5.

[55]. The Daphne (1869) 10 SCR (NSW) (L) 37 at 44-45, 54-55.

[56]. Ibid, 46-47.

[57]. See the marginal note in the report, ibid, 37; R v Coath (1871) 2 QSCR 178 at 180.

[58]. Saunders, 'Uncertain Bondage', above, 6-7.

[59]. The 1839 Act certainly referred to peculiarities of the transatlantic trade: the transport of African peoples, the carrying of flour of Brazil, maize, and Indian corn. On the other hand, it also envisaged slaving activity in the northern and southern hemispheres, 'others' (not Africans) being trafficked as slaves, and that Admiralty courts in England and all British colonies would deal with charges of slaving: ss 1-3, 4, Slave Trade Act 1839 (UK).

[60]. R v Allen (1837) 1 Mood 494, 168 ER 1357; R v Anderson (1868) LR 1 CCR 161.

[61]. Sydney Morning Herald, 26 May 1869, 2; 27 May 1869, 2; 23 June 1869, 2; 24 June 1869, 2; The Argus, 20 December 1872, 6; 21 December 1872, Supplement 1-2.

[62]. Petition reprinted, Sydney Morning Herald, 28 June 1869, 8; 22 May 1869, 4; 31 May 1869, 4.

[63]. R v Longmuir, Central Criminal Court, Sydney Morning Herald, 3 August 1871, 3; Holthouse, H, Cannibal Cargoes, 1969, Adelaide: Rigby, 57-60.

[64]. Brisbane Courier, 12 January 1869, 3; Sydney Morning Herald, 23 June 1869, 2; 24 June 1869, 2.

[65]. (1871) 2 QSCR 178.

[66]. Brisbane Courier, 30 October 1871, 7.

[67]. R v Coath (1871) 2 QSCR 178.

[68]. As a Liberal, Lilley may not have sympathised with the argument. As Chief Justice in 1884, Lilley created immense public controversy by sentencing two crew from the Hopeful to death for the murder of a boy in the Engineer Group, and another five to life imprisonment for kidnapping: ADB, above, V, 86-88.

[69]. R v Coath (1871) 2 QSCR 178 at 180.

[70]. Ibid, 179.

[71]. Ibid.

[72]. Dredd Scott v Sanford 19 US 393 (1857).

[73]. R v Coath (1871) 2 QSCR 178 at 180.

[74]. Ibid.

[75]. Ibid, 179.

[76]. R v Lord Grey (1683) 2 Show KB 218, 89 ER 900; Turbet v Dassigney (1683) 2 Show KB 221, 89 ER 902.

[77]. R v Coath (1871) 2 QSCR 178 at 183.

[78]. Molesworth, BH, 'The History of Kanaka Labour in Queensland', 1917, Brisbane: Unpublished MA Thesis, University of Queensland, 48-50, 98.

[79]. Faust, DG, The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1981, Baton Rouge: Louisiana State University Press, 1981, 165-7.

[80]. ADB, above, III, 435-436; McPherson, BH, The Supreme Court of Queensland 1859-1960; History, Jurisdiction, Procedure, 1989, Sydney: Butterworths, 37.

[81]. R v Coath (1871) 2 QSCR 178 at 181-2.

[82]. Ibid.

[83]. Ibid.

[84]. Ibid, 184.

[85]. Ibid, 183-184.

[86]. Ibid, 184.

[87]. Ibid.

[88]. ADB, above, V, 109-112.

[89]. R v Coath (1871) 2 QSCR 178 at 185.

[90]. Ibid, 184-185.

[91]. Ibid, 185-186.

[92]. Brisbane Courier, 5 December 1884, 6; 8 December 1884, 5. The accused were indicted under the Kidnapping Act 1872 (UK), but Lilley CJ also referred to the common law offence of kidnapping in his directions.

[93]. Stephen to Earl of Belmore, 10 July 1869, reprinted in Palmer, Kidnapping in the South Seas, above, 199-202.

[94]. Parnaby, Britain and the Labour Trade, above, 7-12, 17, 24-26.

[95]. Sydney Morning Herald, 15 November 1871, 5.

[96]. Preamble, Kidnapping Act 1872 (UK) (35 & 36 Vic c 19).

[97]. Letters Patent, 30 May 1872; R v Gomez (1880) 5 QSCR 189; R v The Crishna (1873) 3 SCR 131 at 138; R v Vos (1895) 6 QLJ 215.

[98]. Sections 3, 4 & 9, Kidnapping Act 1872 (UK); R v The Owners of the Forest King (1884) 2 QLJ 50; R v Vos (1895) 6 QLJ 215.

[99]. Sections 6 & 16-17, Kidnapping Act 1872 (UK).

[100]. That is, until ss 4-5, Kidnapping Act 1875 (UK) (38 & 39 Vic c 51) extended jurisdiction to the High Court of Admiralty and other Vice-Admiralty Courts: R v Weaver (1889) 3 Fiji LR 8.

[101]. Sections 9, 12-13, Kidnapping Act 1872 (UK).

[102]. Moresby, J, Discoveries & Surveys in New Guinea and the D'Entrecasteaux Islands, 1876, London: Murray, 120-124.

[103]. R v The Crishna (1873) 3 SCR 131 at 135-137, 138, 139.

[104]. Barton v R, The Winwick (1840) 2 Moo PC 18 at 32-33; 12 ER 909 at 914; Hocquard v R, The Newport (1858) 11 Moo PC 155; 14 ER 654.

[105]. R v The Crishna (1873) 3 SCR 131 at 136, 138.

[106]. R v The Melanie (1873) 12 SCR (NSW)(L) 97.

[107]. The Challenge (1873) 12 SCR (NSW)(L) 127.

[108]. R v The Melanie (1873) 12 SCR (NSW)(L) 97 at 126; The Challenge (1873) 12 SCR (NSW)(L) 127 at 134.

[109]. Moresby, Discoveries, above, 123, 125. Eight years later, the English Court of Appeal held in Burns v Nowell (1880) 5 QBD 444 that the Act did not apply in indistinguishable circumstances where a ship was detained, without a licence and bond, a few miles from Simbo in the course of returning islanders engaged in bêche-de-mer fishing to their homes.

[110]. Hansard's Parliamentary Debates, 3rd Series, 1872, London: Cornelius Buck, CCIX, 3-4 (6 February 1872).

[111]. ADB, above, VI, 183.

[112]. Moresby, Discoveries, above, 120-124.