**THE ALMORAH AFFAIR: TEA, SHIPPING AND THE COLONY**

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[59][66][67][78]altered to 22 2 14[39][78]alt to 23 2 14 [1][12][23][24][45][49][58][66][67][69][78] alt to 13 4 14 JPB

*The Almorah was seized in Sydney Cove in February 1825 by a Naval officer hunting a reward for enforcing the Tea Monopoly and urged on by Sydney merchants who did not like Government imports. He sent the ship to Calcutta and the litigation lasted five years. The tea was owned by the Colonial Government and was outside the Monopoly. There were no gains and great losses in time, money and reputation.*

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1. *THE GOVERNOR SENDS FOR FOOD SUPPLY* Thirty-five or forty years from its precarious beginning the Colony of New South Wales reached a point where its economy was self-sustaining and expanding, with successful industries and production sufficient for consumption and export, and ability to earn income and pay for imports. The Colony was approaching a point where subsidy by the British Government and Treasury would no longer be necessary and enough revenue would be generated internally; with the exception, which long continued, that the British Treasury must bear the cost of the convict system and of the Army and Naval forces. The year 1828 opened a period of economic stress and depression in trade which lasted three years or so and was quite severe. Still by about 1825 or so the Colony and its economy were well launched and their continued existence and growing prosperity could be left to the energies of the people who lived here and did not depend on continuous close observation, planning and provision of resources by government, either in Britain or in Sydney. Under the influence of continuing development and the Bigge Report the function of government was moving from the paternal exercise of authority and an underlying responsibility for food supply towards more limited control of a more complex society, closer to the developing spirit of laissez-faire.
2. A catastrophe overtook an attempt by Governor Sir Thomas Brisbane, a little after the time when such interventions were appropriate, to import food when famine was feared and to make timely provision against extreme shortage of the kind which had occurred several times early in the Colony’s history.
3. At Governor Brisbane's direction the Commissariat chartered the ship Almorah, an East Indiaman which had come from Cork to Sydney with convicts in 1824, to take Deputy Commissary John Clements to Batavia to buy foodstuffs. When the ship returned to Sydney its cargo included the foodstuffs Governor Brisbane wanted, and also other foodstuffs and supplies including tea. Captain Charles Mitchell RN of HMS Slaney, the guard ship for Sydney Harbour, seized the Almorah and in defiance of the Governor sent her to Calcutta, hoping to have her condemned and to receive a quarter of the value of the ship and cargo as a reward. This set off chains of litigation in Sydney and in Calcutta, which went on for about five or more years and did not finally establish whether the seizure was effective; until the British Government in some way persuaded all concerned to give up their claims and paid the owners of the Almorah £5000 for their freight and losses.
4. These events were a catastrophe for some people closely involved, including the owners of the ship and its Master, and several Naval officers; but it was not a disaster for the Colony because the expected famine did not occur. The Batavia voyage of the Almora and its misfortunes are a topos around which to consider some matters which controlled or greatly affected communications, shipping and freight in the Colony’s early years.
5. *THE REALITIES OF COLONIAL SHIPPING: DISTANCE* Several great realities dominated the Colony’s shipping from the first. Some of these are obvious now, but some need a little exposition. The first and greatest was the extreme distance of Sydney from sources of supply, and from the Government in London which had much more pressing concerns close at hand. Sydney was so far away and there were so few people here that arranging for ships to come here and bring people and goods was difficult and haphazard; becoming less so but remaining difficult as the economy and the population grew. In the very earliest years the only ships which came or could be expected to come were ships which the Government had chartered to bring convicts and stores: and there were no other possible means of sending passengers or freight away. In 1792 officers of the Marines chartered a vessel and sent it to Cape Town to purchase goods, and disregarded Governor Phillip's authority in doing so. For some years after this, arrivals of ships other than those sent by the Government were rare and casual. During the wars with France which began in 1792 and were almost continuous until 1815 the British Government had much more pressing claims on its attention than anything that might happen or go wrong in New South Wales. These included conflicts in Dutch possessions at the Cape and in Ceylon while the Netherlands were dominated by Napoleon, and a large War with the French in India and the Indian Ocean, which raged for several years and concluded in December 1810 with an arrangement in which the French at Mauritius were not quite defeated but agreed to withdraw, and took their ships and troops back to Europe and to the War there. (Perhaps some of these troops reached Moscow.) Events in New South Wales and the Mutiny against Governor Bligh must have been an extreme irritant but no more than an irritant to the Government when it was waging a large War east of the Cape using its land forces in India and scores of vessels of the Royal Navy and the EIC‘s navy. Small wonder that attention to affairs in the Colony was not intense.
6. *LIMITS ON THE SIZE OF SHIPS* Another large influence was the restrictions which for decades were imposed on building ships of significant size in Australia. Only large vessels which came from overseas could depart for overseas; there were no others. Building boats and small vessels for coastal navigation started very soon after settlement, but restrictions on building vessels which could travel overseas and trade with other places were carefully maintained for decades. This was imperative in a Colony where there were barely enough forces to maintain public order and there were hundreds and came to be thousands of convicts with motivation to escape, practised habits of thieving, no strong restraints of conscience and in many cases previous service in the Navy. The restriction against building large vessels was also an aspect of other influences to be mentioned.
7. *THE EAST INDIA COMPANY AND ITS MONOPOLY* A third and overwhelming influence in the early decades was the economic strength and legal privileges of the East India Company. It is not easy to grasp how powerful the Honourable Company was in the East Indies, and also in politics in Britain. The EIC had legal privileges with which it dominated all trade and communication between Britain and anywhere east of the Cape of Good Hope, and it had had these privileges for two centuries. It represented the incorporated sum of the power of many wealthy London merchants. Its hold over Government was great; it had financed the British Government through most of the Eighteenth Century, lending it money, probably enough to make the difference in the Wars of Louis XIV; and it was so important and powerful that when its dealings in India threatened its viability it could not be allowed to fail and the British Government provided finance for the EIC. The EIC’s history and privileges can be stated at great length, but to put things shortly the EIC completely controlled British shipping and trade beyond the Cape; a British ship trading there without its licence risked forfeiture of ship and cargo, and a British subject found there without the Company’s licence committed a crime for which he could be punished and sent home. Its power was so great that there do not seem to have been many instances of forfeitures of ships and cargo. The EIC encountered little defiance from British ships or subjects; this was a reflection of its complete dominance. Only ships owned by the Company or built under its licence in Britain could trade with India; ships could only be built in India and trade beyond the Cape on terms and to specifications set by the EIC. The EIC obtained from Parliament more or less whatever legislation its interests required. Among the legislated controls, which long continued, trading ships under 350 tons were simply not permitted until 1819, a size inconveniently large for the requirements of the infant but developing export trade from New South Wales.
8. Any attempt to develop shipping services with New South Wales must conform to the EIC’s wishes and the legal controls it had persuaded Parliament to impose. The EIC took no initiatives to see that New South Wales had whatever services it needed; it did not establish a presence here at any time, did not establish a shipping service and did nothing but decide whether or not to license anyone who asked for a licence and was of a mind to send a ship to New South Wales to take something there or to bring something back, issue licences and decide how much money to exact. The EIC functioned in London and in Calcutta and to obtain a licence one must deal with it at one place or the other, to the EIC’s satisfaction or not at all. Trade between Calcutta and Sydney began in 1793 and was greatly furthered by Robert Campbell whose brother was a merchant in Calcutta; so dealings for licences could take place there. On the face of the EIC’s Charter Acts until 1814, export trade from Sydney to London without the EIC’s licence was forbidden and subject to forfeiture. As the EIC was not present in Sydney it could not be asked for its licence here, so direct unlicensed export to Britain was perilous. There was at least one disaster when Robert Campbell sent the Lady Barlow to London in 1805 with a cargo of Colonial products which the EIC prevented him from landing, so that he had to re-export them, with delays and deterioration.
9. *THE EAST INDIA COMPANY AND ITS POLITICAL POWER* The disparity in the relative importance of the EIC and its affairs, and the Colony of New South Wales and its affairs is hard to depict: the disproportion cannot be exaggerated. The EIC’s power and position were a presence in Sydney although the EIC itself was absent: officers of Government from Governors down took care to respect its interests and to avoid its attention, well knowing the power it had in London. The EIC had its own Government in Calcutta and its wealthy and influential directors and merchants in London, and Parliamentary members in both Houses well known to be dedicated to its interests and active in their advancement; and had continuing, practically day to day access to high officers of government over its interests and concerns in India. The interests of New South Wales were considered only when the mind of someone in Government could be turned to them, the primary concern being the economic advantages, which were great, flowing from sending convicts to New South Wales more or less to look after themselves rather than be expensively imprisoned at home. There was almost no attention in Parliamentary circles to advancing the Colony and its interests; a Committee in 1812 and another in 1819, responses to complaints and troubles. It is said that a Bill came before the House of Commons in 1806 to regulate shipping, still in the context of control by the EIC; but there was no legislation. Indeed, hardly any legislation referred to New Holland or New South Wales at all until 1819 late in the tenure of Governor Macquarie, when legislation began to be passed to remedy unauthorised actions of governors and Government. A statute in 1787 authorised its Criminal Court; a statute in 1812 changed the law for the enforcement of debts; and it seems that there was no other legislation until 1819.
10. *NAVIGATION ACTS AND FOREIGN SHIPS* Another large influence on Colonial shipping was the control over foreign shipping under a long succession of enactments known as the Navigation Acts, first enacted in the time of Oliver Cromwell and continuing until 1849; by their terms these prevented ships other than British ships from trading with British Colonies. Enforcement of the Navigation Acts was a concern of the British Government, not of the EIC which had all the legislation it needed for the protection of its own interests. The EIC’s legislation did not bind United States trading ships; the Navigation Acts did. Resentment of the Navigation Acts and their impact on North American ports and trade was one of the grievances which led to the American Revolution. The independence of the United States freed their trading vessels to go where they pleased in the Indian Ocean and the Pacific, in particular to China to trade in tea, which they soon began to do; their exemption from the EIC’s controls was reflected (as it had to be) in the Jay Treaty of 1794.The Jay Treaty relaxed the Navigation Acts by opening up many British ports to United States vessels and trade, but Sydney was not one of them. Foreign trading vessels began to appear in Sydney Harbour at some time before 1800; they breached the Navigation Acts by appearing at all, and they breached the EIC’s commercial interests, most acutely when they brought tea from Canton in China, the only place where tea could then be obtained. For 20 years or so there was no Government intervention to stop United States vessels from trading to Sydney and many did; it seems that there were more than 50 trading visits over the years. It was difficult enough to get any shipping to come to Sydney or for any trade to take place, and the appearance out of the blue of United States ships with goods to sell worked against practical monopolies which Army officers and merchants in Sydney attempted to maintain. In the years of war, disorder and disruption there was nothing to be gained by excluding neutrals including Americans. The War of 1812 complicated this liberality. When the quarter-century of wars ended in 1815 the British Government regained its concern for enforcement of the Navigation Acts, and enforcement continued until the Navigation Acts were finally repealed in 1849. Concessions were legislated for the trading ships of friendly foreign states, and these enabled some to visit Sydney.
11. *THE SHIPS* The Almorah, a merchant ship of 416 tons, was built in Selby, Yorkshire in 1817 and brought convicts to Australia in that year. Later it was chartered to the EIC, and later still was licensed by the EIC for private trade in India. In 1824 it brought women convicts and some free settlers from Cork to Sydney, and arrived in Port Jackson on 20 August 1824. Its owner was then Matthew Boyd and its Captain was George Hay Boyd.
12. HMS Slaney was a wooden sloop built in 1813. Captain Charles Mitchell RN commanded the Slaney from 1824 until January 1826. Lieutenant Bathurst Matthews RN was second in command. From 1824 it served on the Indian Station, in the Burma War in 1824 and then in Ceylon and various posts. The Slaney arrived in Sydney on 16 December 1824 as the guard ship and left in 1825, probably late in that year. In 1827 the ship returned to Woolwich and was paid off in May 1827.
13. *GOVERNOR BRISBANE FEARS AND FORESEES* In August 1824 Governor Brisbane felt great concern about an impending food shortage. He was told by D’Arcy Wentworth, Superintendent of Police and Magistrate, that wheat was selling at 30 shillings per bushel and even up to 50 shillings; there had been a long-continued drought, the next harvest was months away in November and December, and the Governor feared that the crop would be impaired. (In a letter written on 24 March 1825 Francis Forbes CJ said that the price of wheat in 1824 varied from 4 shillings to 25 shillings.) The Government was responsible for keeping the Commissariat stocked and for supplying food for some thousands of people who were entitled to draw on it: officials, soldiers and convicts. The Governor foresaw that a shortage of wheat would bring large expense to the Crown and perhaps could not be overcome. Thirty shillings a bushel was a huge price for wheat; late in Governor Macquarie’s tenure the Commissariat had paid wheat farmers 10 shillings per bushel as an encouragement to production. Since then paternal elements in Government decisions had been reduced in the spirit of the Bigge Report; wheat prices varied greatly in any year according to supply and demand.
14. *THE COMMISSARIAT* The Commissariat is best understood as the Government store. It began as an extension on shore of a ship’s purser’s responsibilities, but it soon became a large organisation through which needs for supply and purchase of products and services were met, for the Government and its officers, soldiers and convicts and also, less so as time passed, for the inhabitants generally. It was often poorly staffed as most of the people available to work in it were convicts: an endless source of frauds, thefts, scandals and self-interested deals by staff, and by officers who soon became wealthy. Before there was a bank the Commissariat had some of the functions of a bank and its receipts for goods it had purchased circulated as currency. In 1815 a reorganisation placed the operations of the Commissariat and the appointment of its officers under the control of the British Treasury and not as before of the Governor. The Commissariat had a nominal connection with the Army but was actually controlled by the Treasury, and its officers had powers which the Governor did not control, including authority to raise funds for its operations by bills drawn on the Treasury in London.
15. *IMPORT AND SEIZURE* Governor Brisbane told Deputy Commissary General William Wemyss to charter a vessel to bring a cargo of rice and flour from Batavia, the nearest supply port. His written instruction was to obtain "rice, flour, &c". Wemyss obtained tenders from ships in Port Jackson; the Almorah made the best tender and was immediately available as its convicts and passengers had been discharged by 1 September. The Almorah sailed for Batavia on 10 September 1824 taking Assistant Deputy Commissary John Clements, and returned to Sydney on 17 February 1825. On the following day Captain Charles Mitchell of HMS Slaney the guard ship sent Lieutenant Matthews and marines on board the Almorah in Sydney Cove, seized the ship and locked her cargo down, and (not until asked why) reported to the Governor that there were 300 quarter chests of tea, 106,000 silver dollars, 288 bags of sugar and 480 bushels or bags of wheat in the cargo. It is suggested in several places including Forbes’ letter to Wilmot-Horton of 24 March 1825, without any clear detail, that the project of seizing the ship had been put before Captain Mitchell by merchants in Sydney who saw its cargo and the import of food and dollars as very adverse to their interests.
16. The Governor expressed surprise to Wemyss that anything other than rice and flour had been purchased and told Wemyss that he had done more than he had been authorised to do; Wemyss responded that he was fully borne out by his Instructions, which came from the Treasury in London, and showed the Instructions to the Governor. Everything purchased for the Government in Batavia had been paid for by Treasury bills issued by the Commissariat (and not by the Governor) and discounted in Batavia. Tea, sugar and wheat formed a large proportion of the cargo. The Governor accepted that all these goods had been purchased by the Crown and that he should claim the Crown’s right of ownership. Also on board were some things which had been purchased on behalf of Governor Brisbane himself, presumably by Clements; six cases of wine and some spices, seeds and plants.
17. *BAD POLITICS* The Governor’s arrangements to import food were unpopular and were bad politics: resented by wheat producers because it would limit prices for their product, and resented by merchants because they felt that it was for them and not the Government to respond to shortages, by trade and by importation if necessary, and to profit from the trade if they could. By the time the Almorah arrived the expected famine had not occurred and there was sufficient food available on the market. The harvest proved adequate although not ample and when the Almorah returned from Batavia the Governor’s project did not have friends or supporters except in the Commissariat.
18. There were several reasons for Governor Brisbane to feel concern. One was that a great deal more money had been spent and a great deal more food had been purchased than in his mind he had authorised; about £30,000, and different goods to those he thought were needed. Importing tea, sugar and wheat at Government expense was against the interests of merchants in Sydney and was bound to cause trouble: annoying the merchants was a bad thing to do in the politics of the Colony, and the Governor did not wish to do that. If any money was to be made by discounting Treasury bills and using the proceeds to import silver dollars it might as well be made by a subject of the King in Sydney rather than by some Dutchman in Batavia. Importing a huge sum in silver dollars and altering the amount of currency the Commissariat could put in circulation could devalue the dollars already in circulation and affect the local economy. Far more alarming was the import of tea, in which the EIC had a trading monopoly breaches of which were punishable by forfeiture of ships and cargo. The tea had been purchased in the Netherlands East Indies and not in a place where the EIC functioned, and had probably been obtained by the Dutch company the VOC from Canton without any involvement licence or profit of the EIC. Any prudent Government officer, Governor or not, knew not to tread on the Honourable Company’s toes. In short, Governor Brisbane felt that Wemyss had not respected the Governor’s authority and had spent far more money than he should in ways that were not appropriate. These concerns were not justified as Wemyss actually had the Treasury’s authority to issue the bills, to buy goods and to choose what to buy, and he also had responsibility for issuing stores including food and tea for some thousands of people entitled to draw from the Commissariat.
19. Governor Brisbane took an adverse view of Wemyss and expressed it several times. In a letter to Under Secretary Wilmot-Horton on 24 March 1825 he complained that Wemyss’ conduct had brought the Governor into conflict with him and said there was a sufficient case for the Treasury to remove Wemyss: he had suggested to Wemyss that he should go to London to explain himself. Governor Brisbane said that he believed Wemyss was an honest man but "… He is full of weakness, caprice and malevolence, and his sending near £30,000 of Treasury bills for negociation to Batavia, when the premium was nearly the same here, establishes these allegations pretty strongly. Add to this He never deigns to consult me or even acquaint me of his intentions; this has justly incurred Him the odium of all the merchants here…" This view was not shared by the British Treasury which regarded Wemyss as having acted within authority and done so honestly.
20. *TEA: WHAT WAS IN THE CARGO?* The real source of danger was the tea. Various sources give different accounts of how much tea there was on the ship. Governor Brisbane said that he was first told that there were 300 quarter chests of tea on board, later that there were 53 chests more; and later accounts of the events give different quantities. Mitchell said in an affidavit in R v Mitchell [No 2] [1825] NSWKR 4; [1825] NSWSupC 30 that the Crown claimed that he had taken 288 baskets of sugar, 481 mats of wheat, 5620 bags of rice, 300 quarter chests of tea and 53 chests of specie. It is strange that the 53 chests now were said to contain specie meaning dollars: the Governor said he had been told there were 53 extra chests of tea. Mitchell did not refer to the presence of two classes of tea, Commissariat and private, and he did not say what cargo actually was on the ship: showing that he did not know these things. Privately-ownrd tea would have been a justification for seizure of the ship even if it was not known when the seizure took place that it was on board. If he had known about additional tea he would have relied on it. He did not in fact know what he had taken. A search for precision as to what was in the cargo can only be disappointed. There are differing statements about who had purchased the additional tea; sometimes said to be the Captain, sometimes the supercargo Thomas who was employed by the owners of the ship, sometimes the Commissary officer, presumably Clements or Wemyss. It is also not clear when it was discovered that there was additional tea on board; and Captain Mitchell did his own position harm by refusing to allow a careful examination of the cargo, which would have made it plain at an early stage that the Government’s tea was not the only tea on board. The writer has not found any assertion in official reports, newspapers or anywhere else which would suggest that anyone in Sydney knew while the Almorah was there that the tea owned by the Government was not the only tea on board. (An odd Press report seems to mean that there was a tiger on board, although this was not clearly stated.)
21. *CAPTAIN MITCHELL’S MOTIVES AND BEHAVIOUR* There can be no doubt that Captain Mitchell's motives in seizing the ship and its cargo, and in maintaining a firm hold on them and sending them off to Calcutta, were entirely mercenary. The EIC did not employ him and had not asked him to enforce its Monopoly. According to the EIC's statutes any British ship trading in tea east of the Cape of Good Hope without the EIC’s licence was liable to forfeiture; and with it all cargo on board: not only the non-complying tea. The King’s Courts in London and the Supreme Court at Calcutta had power to decide whether there had been an effective forfeiture, and if there had been the captor was entitled to one quarter of the value of the ship and cargo as a reward. In other parts of the World and in then recent times Naval officers made fortunes from captures. In times of war enemy merchant ships and neutral ships carrying contraband were liable to forfeiture as prizes, and the rewards awarded by Prize Courts to Naval officers who captured them and to their crews could make them rich. Where the Royal Navy combated the Slave Trade in the Atlantic large rewards were available on the capture and forfeiture of slave ships and other property. The prospect of obtaining rewards of these kinds was a driving force for energy and endeavour in the Royal Navy. It does not seem that there were many seizures or forfeitures under the EIC’s legislation; or if there were they have left little trace. The profits to be made while complying with the EIC’s rights satisfied many. Captain Mitchell's officers and crew may well have seen the seizure as giving them prospects of sharing rewards and riches, and given their loyalty accordingly.
22. At this distance of time it seems plain that Captain Mitchell was hot-headed and wrongly advised in seizing the ship and all its cargo and defying the Governor; viewed from this distance it seems plain that the EIC’s monopoly in tea did not bind the Crown and that there were several reasons why the Government’s tea, still less the Government’s other cargo if not the ship itself, were not liable the forfeiture. Although this appears quite plain in retrospect from a later century, there were years of litigation in Calcutta on the validity of the forfeiture and there does not seem to have been a final decision until all litigation was resolved by agreement.
23. Captain Mitchell was remarkably intransigent and behaved as if he had no understanding that a challenge to the validity of his seizure might have some merits. His behaviour suggests that his lawyers in Sydney did not tell him to be cautious or could not make him understand the need. All in all Captain Mitchell's legal advisers Dr Robert Wardell and William Charles Wentworth distinguished themselves considerably in this affair, but not in a favourable sense. They did not or could not steer their client away from trouble, one of the things a lawyer should try to do. Captain Mitchell refused to let officers of Government on board to examine the cargo and establish what was there, or to remove the Government’s property. He refused to make an agreement with the Governor in which Treasury bills covering the value of the cargo would be set aside as security for any entitlement of Captain Mitchell and the ship and cargo would be released. According to The Australian newspaper the proposal considered was that the cargo except the tea should be landed and that Treasury bills to the value of the cargo should be placed in the hands of the Colonial Treasurer. In other words the Government was negotiating for possession of the cargo which it owned, other than the tea, and not for possession of the ship. Mitchell took the position that enough money to provide security should be deposited in a bank, presumably in his own name, to await the outcome; taking this position was much the same as asserting that he did not trust the Governor actually to produce the Treasury bills which were to be set aside when the time came. On the morning of Tuesday 1 March Mitchell sent the Almorah from Sydney Cove further down Port Jackson to Point Piper where it was more difficult to reach and closer to the sea at Sydney Heads, and further away from the guns on Dawes’ Point. (One source says he sent it to Garden Island and Forbes CJ said in his letter to Wilmot Horton of 24 March 1825 “… the Almorah was removed from the harbour to the entrance of the port.”)
24. *A WARRANT TO SEARCH FOR THE GOVERNMENT’S CARGO* Captain Mitchell did other things which were even more rash. As the Governor had not made any sensible arrangement with Captain Mitchell after days of negotiations, he told the Attorney General Saxe Bannister to obtain a warrant which would authorise him to inspect the cargo; and the Attorney General did obtain a warrant issued by D’Arcy Wentworth a Justice of the Peace, with the object of inspecting and retaining the Government’s cargo. The Governor also sent a written message to Captain Mitchell telling him that the Governor had ordered the Attorney General to proceed on board the Almorah and claim the Crown property on board her, and told Captain Mitchell “… I have to desire that you will issue your orders that no violence be used on the occasion by the officers and men of HM Ship Slaney, in charge of her.”
25. Attorney General Bannister, who has left a poor reputation as a lawyer and the general impression that he was not capable of determined action, gave the Governor written advice on 5 March 1825 (HRA Series 1 volume 11 page 535) that the cargo including the tea and the dollars belonged to the Crown from the time they were purchased, that the King was not bound by the EIC’s statutes which gave the EIC privileges against the King’s subjects and not against the King ; that the prohibition in the legislation was against trading and that what had taken place was not trading but supply. The written advice confirmed what Bannister had thought and said from the beginning of the affair. Looking backwards from this distance it does not seem that there can be any doubt that this advice was correct. The advice was not given with knowledge that there was tea on board in addition to the Government’s tea. The advice given related to the cargo owned by the Government and seems incontrovertible.
26. *MUSKET FIRE* The actions of Governor Brisbane and his Attorney General were not directed at taking possession of the ship. Bannister and Clements took the warrant down Port Jackson by boat, with the Chief Constable Mr Dunn and several others. On their first approach Lieutenant Matthews, who had been placed in command of the Almorah by Captain Mitchell, told Bannister that he would sink his boat, and the Marines on board the Almorah fired muskets into the water around the boat. Bannister saw that he was being prevented from coming aboard the ship and returned towards Sydney Cove, to the sound of three cheers from Lieutenant Matthews and his Marines. Some time soon afterwards Bannister saw Captain Mitchell, apparently both of them in boats on the Harbour, and told Mitchell that he was preparing to go to the Almorah a second time; Mitchell said that Bannister had better not go on board the Almorah. When Bannister went back to the Almorah he was fired at again, and could see water splashing up from musket balls near his boat. Once again he had to withdraw. Someone told The Australian that Matthews did not know who was in the boat and that the muskets were firing blank cartridges: neither story was likely and neither would excuse what happened if true.
27. Governor Brisbane decided that he should not do any more, although he could have assembled soldiers and boats and swarmed the Almorah, but only at the risks of loss of life and conflict between the Navy and the Army; he was not prepared to take these risks.
28. Governor Brisbane’s commission designated him as Captain General of New South Wales. He did not frame any of his communications to Captain Mitchell as a clear military or Naval order, disobedience of which would have been mutiny; it does not seem to have occurred or to have been suggested to him that he should act in that way.
29. *THE ALMORAH SAILS FOR CALCUTTA* Captain Mitchell sent the Almorah to sea under Lieutenant Matthews with some of the Slaney’s crew. The Almorah sailed at night without Port Clearance or any ordinary formalities, and cleared the Heads about 3.00 am on Wednesday 2 March. Captain Boyd left with the Almorah; the rest of the Almorah’s crew were turned out of the ship and left in Sydney, after being held as prisoners for about ten days. Captain Mitchell refused to allow Clements to travel on the Almorah to Calcutta where plainly enough he was needed to defend proceedings to condemn the ship and its cargo. Governor Brisbane soon sent Mr Goodsir a Commissary officer to Calcutta on another ship, and also sent a request to the Governor General of India that Lieutenant Matthews be ordered to return to Sydney to stand trial. It does not seem that he ever did return.
30. Lieutenant Matthews sailed the Almorah to Madras and then to Calcutta. Lieutenant Matthews’ preparations for departure did not include obtaining a power-of-attorney from Captain Mitchell which he would need in Calcutta to bring proceedings on Captain Mitchell's behalf. He was at least as rash as Captain Mitchell, as he had been present and in charge when the Marines fired at Bannister's boat and gave three cheers, and he took the Almorah on a voyage to Calcutta months away, when his authority to do so depended entirely on the validity of the seizure and he was at risk of paying damages to all interested in her. Matthews was unable to bring proceedings for forfeiture in Calcutta in Mitchell’s name, and Captain James John Gordon Bremer RN of HMS Tamar seized the Almorah at Calcutta, commenced proceedings there for forfeiture for bringing tea into Calcutta and asserted that he did so for Captain Mitchell’s benefit.
31. *WHERE WAS THE COURT?* Captain Mitchell took the position that he had been advised by Attorney General Bannister that there was no court in Sydney which could determine the validity of the forfeiture. On 22 February 1825 early in the controversy Bannister asserted in a letter to Mitchell: “… we have not in New South Wales any tribunal by which a case of this sort can be tried…;” this is probably what Mitchell spoke of as the Attorney General's advice. What Bannister then said was important because it could be used to explain and perhaps to excuse sending the Almorah to Calcutta. The statement appears in a hostile letter of demand; Mitchell’s counsel put this letter into evidence in R v Mitchell [No 2]. Bannister’s written advice to the Governor on 5 March 1825 assumed that proceedings would be conducted in Calcutta. Bannister did not advise Mitchell or act for him, as a Crown Law officer might ordinarily have done when a Navy commander needed legal advice; at an early point Governor Brisbane called for his Attorney General's advice and Bannister acted to protect the Crown’s property interest in the cargo. So too did Solicitor General John Stephen. Mitchell consulted and was advised by Dr Robert Wardell and William Charles Wentworth, the only two barristers in private practice; although they sometimes appeared in opposing interests they were closely associated, among other ways as proprietors and editors of The Australian newspaper which published highly coloured partisan stories about the events which one or both of them had probably written. Conducting their cases in the Press as well as in Court was not commendable professional conduct.
32. *A PUBLIC MEETING* On 1 March 1825 nine prominent inhabitants called on the Sheriff to convene a meeting to consider the propriety of petitioning Parliament on the importations on the Almorah. On 3 March the Sheriff declined on the ground that the proposal was not sufficiently specific. The names of the persons who requisitioned this meeting could stand as a list of prominent merchants and other people in Sydney: Sir John Jameson, Gregory Blaxland, JT Campbell, W Walker, Robert Johnston, WC Wentworth, (Captain) Thomas Raine, T W Winder and John Dickson.
33. *ARRESTS AND LAWSUITS IN SYDNEY* A number of lawsuits in Sydney arose out of the affair. On Tuesday 1 March when Bannister returned to town after his boat trips he prosecuted Mitchell and Matthews on Information for offences against Lord Ellenborough’s Act, commonly called the Malicious Shooting Act 1803, and later charged them with other offences; a Press report says there were seven counts. The Sheriff arrested Mitchell that evening at the Sydney Hotel on a Bench Warrant issued by Forbes CJ; he was released on bail and Sir John Jamieson and Captain Raine were his sureties.(The Australian said that the bail was for £30000, but the correct amount was £2000.) Lieutenant Matthews may have been on shore out of uniform that evening, but he was not arrested and he left Sydney in the dead of night. As Mitchell was charged as an accessory to an offence with which Matthews was charged as principal, Mitchell could not be put on trial until process of outlawry established that Matthews could not be put on trial.
34. This opened five or more years of litigation, the end of which has not been clearly traced. Mitchell’s views of those (whoever they were) who persuaded him to seize the Almorah cannot have been generous. Within one or two days Bannister sued Mitchell in the King’s name for damages for trespass to property of the Crown on the ship, and Mitchell was arrested again on civil process. Mitchell sued Wemyss and Clements for a huge sum, said to be £70000, double the estimated value of the Almorah and her cargo, as penalty for breach of the Tea Monopoly, and obtained an order of Forbes CJ for their arrest on an allegation that they were about to quit the Colony. On Tuesday 9 March Forbes CJ heard motions to discharge them all on bail, and on the Chief Justice's recommendation and after two hours discussion it was arranged that both Mitchell and the Commissary officers should be released on common bail, that is, without other persons as sureties.
35. Mitchell’s trial took place on 19 April 1825: R v Mitchell (No 1) [1825] NSW Sup C 15. The trial was reported in The Australian newspaper of 21 April 1825, owned and written by Wardell and Wentworth who were Mitchell's Counsel at the trial. Captain Mitchell was charged with misdemeanours of aiding and abetting Matthews in false imprisonment of Captain Boyd, Clements, Thomas the supercargo and a seaman by detaining them on the Almorah against their consent on 28 February. He was also charged with aiding and abetting Matthews in assaulting and endangering the lives of Bannister and several others by firing on them with loaded muskets. A third charge was assembling others on 1 March tumultuously and with arms to hinder and obstruct justice. Only one or two of seven charges proceeded to decision. The jury was composed of seven commissioned officers.
36. Evidence was given by the first mate and other crew members of the Almorah about events on the evening of 28 February when the people named in the charge requested Matthews to be allowed to go ashore and were positively refused. Next morning the vessel was taken down Harbour near Garden Island and surrounded by boats with men armed with tomahawks; there were marines with loaded muskets on the poop of the Almorah. A boat was seen passing Bennelong Point and Matthew said "That is the boat." As the boat came within hail it was warned off and Matthews ordered the marines to fire wide. The boat came on again and the marines were ordered to fire near the boat. The boat came nearer and there was a third discharge of muskets. The boat withdrew and Matthews ordered three cheers which the marines gave. Mitchell came on board about an hour afterwards; Mitchell's boat had been fired at and warned off as were other boats which approached and had not hoisted the Blue Peter. Mitchell told Matthews "You have done your duty." The defence called the Slaney's carpenter who said that Matthews had ordered the crew to prevent all boats from touching the ship and shove them off, and that the marines could have hit the boat if they chose to do so. A marine sergeant gave evidence that Matthews told the marines to fire wide. It is notable that the evidence did not suggest that the Marines fired blanks, but that they fired wide. The jury retired for 20 minutes and acquitted Mitchell. There seems to have been little basis for finding that he aided or abetted Matthews in ordering the marines to fire.
37. R v Mitchell [No 2] related to the damages claim brought by the Attorney General for the Crown for trespass to the cargo and detinue in which Mitchell was arrested on mesne process. On 1 August 1825 Forbes CJ heard an application by Mitchell for a stay of proceedings until the outcome of the claim in the court at Calcutta. Forbes CJ refused the stay. The outcome of the damages claim by the Crown against Mitchell is not reported but it seems unlikely that the Crown obtained a damages award in New South Wales.
38. Mitchell also sued Robert Howe editor and publisher of the Sydney Gazette for a libel published on 3 March 1825 in a news report in extravagant language severely critical of Mitchell: Mitchell v Howe [1825] NSWSupC 49. The defence did not include an assertion that the criticism was true. At the trial on 8 October 1825 Mitchell succeeded and the damages awarded were £50. The Chief Justice said that the Assessors had given such low damages because they were convinced that Mitchell's character could not possibly sustain any injury from such a publication.
39. Mitchell prosecuted Howe for criminal libel over the same publication. The Australian reported proceedings heard on 18 April in which Howe was charged with criminal libel against Matthews. Matthews applied for leave to file a criminal Information and this was opposed; judgment was reserved. The rule was later (see The Australian 2 June 1825) made absolute meaning that leave to file the Information was granted. This prosecution does not seem to have come to trial.
40. On Thursday 2 June 1825 the Sydney Gazette reported an application apparently made about 31 May by Captain Mitchell for an order requiring D'Arcy Wentworth to produce the warrant dated 1 March 1825 for inspection with a view instituting a civil action against D'Arcy Wentworth for issuing the warrant. It seems that there were no further proceedings in the Supreme Court on this claim. The idea of suing the Magistrate seems far-fetched: if the warrant were invalid for some reason there had been no search, Mitchell was not on the ship and there can have been no loss or damage.
41. *STRONG WORDS IN THE PRESS* Two newspapers were published in Sydney in 1825: The Sydney Gazette owned and edited by Robert Howe and The Australian owned and edited by Dr Wardell and WC Wentworth. The newspapers took strong opposite positions on whether or not anything should have been imported and whether or not the seizure of the Almorah was effective, and much comment was poorly informed and vividly bitter. Reports of legal proceedings were sometimes extravagantly partisan. They made assertions about the law applicable to the seizure, particularly strange assertions in the Sydney Gazette; but showed no advertence to the terms of the EIC's legislation about liability to forfeiture or about jurisdiction of courts. There was no reference in the Press or anywhere else to the Charter Act of 1793 and its provisions about jurisdiction over seizures. They seem to have shared the assumption that the validity of the seizure must be decided by a Vice-Admiralty Court, like a Prize case. Forbes made a passing reference to the EIC legislation in a private letter to Wilmot-Horton 24 March 1825 but did not consider it in any detail.
42. On 24 February 1825 The Australian made an extravagant attack on the decision to import food, showing confidence that there was public feeling against the decision. The Governor was mocked over the loss of his wine. An article in The Sydney Gazette on 3 March suggested that recent rain had improved food supplies, but that there had been a long drought, the maize crop was disappointing and this would affect meat prices later in the year; and predicted a shortage of rice. It said “… We know the tide of public opinion is against us.” The Australian printed a long article on 10 March attacking the conduct of Wemyss and Bannister, and its grounds for criticising Bannister for suing Mitchell were extravagant and verged on the irrational. The article suggested that Captain Mitchell had very wide support and that that many gentlemen and merchants were ready to give bail when he was arrested in the civil proceedings; and asserted that twenty respectable merchants and inhabitants had joined in giving bail. The Sydney Gazette mocked this assertion. The Sydney Gazette repeatedly returned to a theme of offensive denigrations of Wardell and Wentworth.
43. The bitter edge of these publications sometimes became extreme. Howe became liable to pay Mitchell's costs of the application for leave to file a Criminal Information. Wentworth sent a bill for £38 3s costs to Howe's solicitor Mr Allen, and the Master of the Supreme Court taxed the bill down to £14 8s 6d. The Sydney Gazette published items rejoicing in Wentworth’s discomfiture, including a complete copy of the bill. The Sydney Gazette also published several letters generally supporting the Government's position, anonymous letters or signed only with initials. A correspondent F S made wide ranging and slightly odd comments on the controversy. A second letter from F S was published and Dr Wardell then wrote to Francis Shortt, Wardell's client in some proceedings which had been pending for eight months, and refused to act for him any further. Wentworth refused to act further for a client named LH Halloren for similar reasons. The Sydney Gazette trumpeted these events.
44. Shortt made some interesting assertions, and others of less value. He contended that the case of the Lady Flora in 1819 was in point: that ship was seized by the Collector of Customs at Cape Town for having tea on board and released by the court in Cape Town, affirmed on appeal by the Privy Council. Enquiries of the Privy Council Office have not identified this decision. Shortt also asserted that”… some years back our supplies of tea have been chiefly furnished by Americans and that the proceeds (deducting large and tempting profits acquired on that article by speculators) going to the pockets of citizens of the United States!”
45. *NEWS FROM CALCUTTA* Later in 1825 and in 1826 there were trickles of unreliable news from Calcutta which largely proved to be incorrect. A letter from Calcutta written about July and published in the Colonial Times of Hobart on 2 December 1825 asserted that the Almorah was not to be condemned in India and was to proceed to Europe under Lieutenant Matthews. It also said that Captain Boyd and Goodsir were to be sued on behalf of the EIC for penalties amounting to £80,000. The Sydney Gazette on 9 December 1825 published brief notes of news from Calcutta to the effect that the court there had not decided litigation about the Almorah, that Captain Boyd had been sued by Captain Bremer for Rs. 1,400,000 and was held on bail, and that Lieutenant Matthews was about to be held on bail in an action of trover against the seizors.
46. In March 1826 there were several publications to the effect that the Almorah had been condemned and sold and that Captain Mitchell had recovered £5000 prize money. The Australian of 12 April 1826 stated that the facts had been found by a court in Calcutta and a special case had been framed for decision by the judges in England. A few more reports and contradictory rumours were published. It seems that some arrangement had been made under which the Almorah was no longer under arrest and was carrying freight between Calcutta and Rangoon.
47. *THE TWELVE JUDGES* The Sydney Gazette on 9 August 1826 printed a scrambled account suggesting that there was to be a final decision in England. The Sydney Gazette of 25 January 1828 reported “ The twelve Judges have given their opinion in reference to the case of the Almorah" and went on to say that the judges stated that no governor of a British colony is bound by the East India Company’s statutes or Charter and that the whole property appertaining to the Almorah had been ordered to be returned, and that Mitchell and Bremer had been recalled home from India; and that the Treasury had ordered the Admiralty to proceed against Mitchell and Bremer for their part in the affair. The article purported to quote from unidentified official papers and did not say how their contents were known. (“The Twelve Judges” was a conventional term which referred to all the judges of the Common Law Courts at Westminster: there had once been twelve but at that stage of history there were actually more than twelve.)
48. What was referred to as the opinion of the twelve judges has not been traced. It cannot be identified with any known appeal to the Privy Council. The language used suggests that the court in Calcutta may have stated a case for the opinion of the English judges, but no power to state such a case has been identified. The origins of the assertions in this article are unknown and mysterious.
49. *COUNSEL’S OPINION FOR THE TREASURY* Lord Bathurst sent Governor Darling Despatch number 92 dated 12 November 1826 (HRA Series 1 volume 14 page 674) forwarding the report of the King’s Proctor to the Treasury of 10 August 1826 with Counsel's Opinion. The Opinion is set out a length at HRA 675. Counsel were not named but the Treasury Proctor said they were the King’s Advocate, the Attorney General and the Solicitor General: a strong team. Counsel's Opinion turned entirely on the presence in the cargo of 24 half chests of tea shipped on board by the Master or the purser at Batavia. Counsel took it for granted that the part of the cargo which was owned by the Crown was not forfeited. In Counsel’s opinion the presence of the additional 24 half chests made the vessel liable to forfeiture, and there was no basis for an order, in effect a waiver, by the Commissioners of Customs and in any event their waiver would not affect the rights of the EIC.
50. The Sydney Gazette of 24 January 1827 published a letter from a London correspondent dated 30 August 1826 giving the effect of this Opinion.
51. The Sydney Gazette of 15 August 1827 printed the Opinion at length. The Gazette went on to claim that its position about the exemption of Government property from forfeiture had been justified. In this article it is suggested that the 24 half chests of tea were known to be on board before the Almorah left Sydney, or possibly before it was seized; however their presence is not referred to in any of the documents the writer has seen from February, March or even later in 1825. The article went on with triumphant expressions about the losses which it expected that Captain Mitchell and Captain Bremer had incurred.
52. On Friday, 17 August 1827 an article in The Sydney Gazette triumphed over what was said to be the result of the Opinion published on the 15th. The article suggested, without giving a source, that the persons who had seen the 24 half chests “…when put to the test, could not tell whether they contained saw-dust or lawyers wigs." It went on to assert that the EIC declined any interference in the business and referred the parties to the courts of law, and would not take on itself to interfere with Lieutenant Matthews and the Almorah.
53. Counsel's Opinion contains the earliest reference to there being additional tea not the property of the Crown on the ship which the writer has found. In particular it is striking that when on trial Captain Mitchell did not bring it forward as a justification for the seizure. In all discussion including highly tendentious Press articles in Sydney in 1825, there was no suggestion that tea other than that purchased by Clements for the Government was on board. The Australian tried to start the hare running that the whole venture of chartering the Almorah and buying food and tea was a private venture and nothing to do with the Commissariat; if a real ground of forfeiture had been known this desperate fiction would not have seen print. It seems likely that the additional tea was only discovered when the vessel reached Calcutta. An independent survey of ship and cargo would probably be required by a court early in forfeiture proceedings.
54. *TAKING EVIDENCE ON COMMISSION FOR CALCUTTA* The Australian of 24 January 1827 reported that interrogatories to the several parties in Sydney had reached the Colony. Governor Darling in his Despatch to the Colonial Secretary of 20 March 1828 (HRA Series 1 volume 14 page 3) reported that a Commission from the Supreme Court of Calcutta for providing evidence had been acted on in October 1827 and that the proceedings under the Commission had been forwarded to the Chief Secretary at Calcutta on 2 December. William Foster who was admitted to practice as a barrister on 14 August 1827 conducted the Commission for the Crown as Acting Solicitor General. His Bill included charges totalling £46 14s for attendances in October 1827 including attending at proceedings under the Commission for 6 days (HRA Series 1 volume 14 page 75.) The depositions taken at the Commission if located would be a useful source.
55. The Sydney Gazette of 3 September 1829 published a Government Notice setting out the revenue and receipts of the Treasury of New South Wales 1828 and included the following receipt: Law expenses in the case of the Almorah refunded by the Deputy Commissary General £45 14s
56. The Sydney Gazette of 10 August 1830 reported that the ship Bombay had on board about 90,000 dollars for the Sydney Government, the proceeds of the Almorah.
57. *THE TREASURY APPROVES OF THE PURCHASES* The Treasury’s view that Wemyss had acted properly and that Governor Brisbane’s criticisms should not be accepted became known after Brisbane had left the Colony. In Despatch number 33 of 30 December 1825 (HRA Series 1 volume 12 page 130) Lord Bathurst directed Governor Darling that he was to accept decisions of Commissary officers to import dollars or stores, that stores were to be applied only for public service and were not be sold without the Governor's special authority: the Governor was to allow private commerce to operate unimpeded. Lord Bathurst enclosed Treasury communications approving of Wemyss’ and Clements’ purchases of dollars and tea. Wemyss did not return to England as Governor Brisbane suggested: he was not prepared to leave without permission from the Treasury. Both Governor Brisbane and Wemyss sent reports dealing with what Brisbane had instructed Wemyss to do; Brisbane was adamant that he had not authorised purchase of tea nor mentioned it, while Wemyss was adamant that Brisbane had done so. The Treasury did not treat this difference as important because Wemyss had the Treasury's written authority to purchase tea at his discretion, and it was clear that he needed tea to issue from the stores to many people entitled to draw on the stores. Treasury officers gave a list of the persons whose ration entitlements included tea (at HRA 135): Civil Officers and Constables with their Wives and Children; Convicts; Artificers and Labourers; Surveyor General, full Party under him by order of the Governor; General Hospital; Settlers; The Governor; Commissariat at Bathurst, in small quantities, to whom the quantity, issued in the quarter ending 24th June, 1824, amounted to 7936lbs… the Tea in question was not intended for Sale. These figures suggest that the Commissariat needed more than fourteen tons of tea a year, so it is not surprising that Wemyss’ mind turned to an opportunity to buy some.
58. Treasury officers carefully examined the conduct of Wemyss and Clements and decided that both had acted honestly and in accordance with authority that Treasury had given, and with good effect in the interests of the Government. After loading the food he had purchased in Batavia and before purchasing tea, Clements obtained a report by the Surveyor to Government and to Lloyds there which indicated that the ship would still be seaworthy if it loaded about another 30 tons, so that further load would not upset the trim of the vessel; the purchase and loading of the tea was no secret but was clear to other British officials in Batavia and Clements reported it in correspondence he sent from Batavia to the Treasury. There was no indication that either Commissariat officer was seeking some private advantage in importing tea, or in any other way. The Treasury report seems to show that it was appropriate for Clements to buy 300 half chests and that the fact that he bought 11 quarter chests in excess of 300 was not significant.
59. *GOVERNOR BRISBANE’S CAREER* Governor Brisbane had liberal views and policies but little success in Colonial politics. He had had a long career in the Army but not in administration. He had no representative assembly to voice public opinion: the Legislative Council was composed only of public officers. He was not given loyal support by his Colonial Secretary Goulburn, and conflict between them led Earl Bathurst to lose patience with them both. Brisbane was recalled by Despatch dated 1 December 1824 and left office on 1 December 1825. His Attorney General Bannister was not notably able and was prone to personal conflicts, including wounding exchanges with other counsel in the courtroom. By the time his authority was openly defied in the Almorah affair Brisbane was receiving fierce criticism contending that he had upset the economy of the Colony, and he alienated Sydney's merchants, Naval officers, Commissariat officers and the lawyers who published The Australian newspaper. His interpretation of the conduct of business by Wemyss was rejected by the Treasury. A Farewell Address of 21 October 1825 from free inhabitants expressed warm good feeling for Brisbane and his administration: a Petition from the Exclusives said that the opinions and sentiments in the Farewell Address were fallacious and unfounded. His tenure of office did not end well.
60. Brisbane was replaced by Governor Ralph Darling who took office on 19 December 1825. Darling was a far more difficult and combative person than Brisbane: those who had opposed Brisbane may have reflected on the aphorism "Be careful what you wish for."
61. *ATTORNEY GENERAL BANNISTER’S CAREER* SaxeBannister's career drained away to nothing. His greatest good fortune was that he missed Dr Wardell when he fired at him in a duel. Solicitor General Stephen was elevated to the Supreme Court over Bannister in August 1825. Bannister annoyed Governor Darling greatly and Darling accepted a resignation which Bannister had proffered symbolically while seeking increased remuneration. Bannister left New South Wales in October 1826 after his duel and several other bizarre events. He appeared in person to prosecute Robert Howe of the Sydney Gazette for criminal libel against Bannister: astonishingly, WC Wentworth appeared for Howe. Bannister was oddly clothed, spoke so strangely that he seemed deranged, saw Howe acquitted and left one or two days later, for half a century with little employment.
62. *LAWSUITS IN CALCUTTA* Several lawsuits were carried on in the Supreme Court at Calcutta, and it seems that none was ever disposed of by decision on its merits. Dr Currey said (“Sir Francis Forbes…” page 134) that the Court of Vice-Admiralty in Calcutta: “[a]ccording to Saxe Bannister…adjudged the seizure to be illegal…” but no detail of this judgment or context of Bannister’s assertion was given: Bannister was not an objective source and there was room for different conclusions about whether seizure or cargo and of ship was lawful. If there were any outcomes, the array of possible outcomes is rather wide as the interests of the seizors (and there were two) were opposed to different interests and rights of the Colonial Government, the owners of the ship and even possibly the owner of the additional tea. At some time not stated, possibly in 1828 or 1829, the principal parties Captain Bremer and the owners of the Almorah settled by each abandoning all claims and the representatives of the Government in Calcutta paid each side something towards their costs. Arrangements for realising and holding the value of cargo and for securing the value of the ship must then have ended. It would follow that the value of the cargo, or what was left under the control of the Court in Calcutta, was returned to the Colonial Government in Sydney. This may explain the Commissariat’s being in funds in 1828 to pay the Colonial Government‘s legal expenses from 1825; and may explain the brief newspaper reference to money being brought to Sydney on the Bombay in 1830. However no details have been ascertained; as in Sydney, several lawsuits in Calcutta disappear from view without a clear account of how they were disposed of.
63. The outcomes of claims against Captain Mitchell and Lieutenant Matthews are not known.
64. *THE TREASURY SETTLED WITH THE OWNERS OF THE ALMORAH* When they were rid of Captain Bremer the owners of the Almorah addressed themselves to the British and Colonial Governments; their ship had performed the Charter and earned the freight to Batavia and back but they had never been paid, and Captain Mitchell and Captain Bremer had not shown that their interventions were justified. The Treasury received claims from the owners and decided to settle by paying them £5000. The reasoning underlying this was set out in a Report by the King’s Proctor to the Lords of the Treasury dated 30 June 1831; an extract was tabled in the House of Commons on 18 April 1832.
65. In his Report the King's Proctor accepted that there was no court of competent jurisdiction in New South Wales. He reported that various proceedings were carried on in Calcutta and their final result was a compromise with the sanction of the Law Officers of the Crown at Calcutta; the cargo was restored to the Government and the ship to the owners, and the Government paid some compensation for expenses incurred in the prosecution. Then the owners applied for compensation and the claim was investigated by the Treasury. The Treasury had decided in a minute of 9 November 1826 to protect the owner of the ship. The King's Advocate had given the opinion that the owner was in no degree privy to the acts of either the Master or the supercargo and should receive compensation. (The supercargo was Thomas who was employed by the owners.) The King's Proctor did not express any conclusion about whether the Master or Clements had been involved in loading privately-owned tea, and advice was given on the footing that the owner was not so involved. Freight £2502 had been earnt and the owners’ law and other expenses of £2096 1s 3d should be met. Other claims should not be met in full but it was advisable to give the owners £5000 as a full compensation for all losses. The Treasury accepted this advice.
66. *THE COMMITTEE OF SUPPLY WAS NOT HAPPY* The £5000 became a contested item in the Appropriation Bill discussed by the House of Commons in Committee of Supply on 13 April 1832 (HC Deb13 April 1832 vol 12 cc466-495). A Member named Dixon who had been in Sydney in 1825 asked for an explanation. Mr Thomas Spring Rice one of the Secretaries of the Treasury gave a confused explanation. He referred to Captain Mitchell as Captain Melville and he said that the Almorah went to Manila and did not mention Batavia. He told the Committee that the Commissary had taken 34 chests of tea on board on his own account. This was the first and only assertion that Clements was responsible for the privately-owned tea. It seems likely that Secretary Spring Rice confused the supercargo with the Commissary Officer; the King’s Proctor’s report referred to the supercargo. Spring Rice said that there were 24 boxes of specie (other sources say 53) and that there were 34 extra chests of tea (other sources say 24 half chests.) Spring Rice said that the 34 chests had been put on board by the Government officer and the Captain had nothing whatever to do with it, and also said that Captain Mitchell was not aware of this part of the cargo nor was the Governor. Spring Rice said that there had been proceedings in the Admiralty Court at Calcutta by Captain Bremer against the owners for condemnation of the vessel and by the owners against Bremer for an illegal seizure and "it was at last mutually agreed between the parties, that all proceedings in these suits should cease on both sides, and that one party should abandon the seizure and the other the action to try the legality of it.” Spring Rice said that Captain Mitchell had acted with considerable indiscretion and that the Treasury had decided to direct proceedings against him to recover the Crown’s losses. Later Spring Rice said that the action at Calcutta had been compromised: "… Captain Bremer was not justified in acting as he did, although it was clear that the Captain of the Almorah been guilty of an irregularity which made it extremely improbable that the owners of the vessel could have obtained a decision against the Naval Officer.” (He had earlier said that the Captain had had nothing to do with it. Perhaps he was thinking of the supercargo.)
67. It is not surprising that these explanations did not satisfy all Members of the Committee in 1832, the tumultuous year of the Reform Bill. Seven Members took part in the discussion; their observations were diffuse but included that it was the owners, not the Government who should sue Captain Mitchell. Spring Rice said that Members could have access to the voluminous papers at the Treasury, and the vote was postponed. Presumably as a result of this discussion, an extract of the Report of 30 June 1831 was tabled five days later. No further discussion has been found on a search of Hansard, but the £5000 item was approved in some way and appears in section 17 of the Appropriation Act 1832, 2 & 3 Wm 4 c 126.
68. *THE ALMORAH AFFAIR FADES AWAY* This is the last trace of litigation and official involvement in the Almorah seizure which the writer has found thus far. The affair began in great drama and ended without a bang but with many whimpers and a rambling inaccurate explanation to the House of Commons Committee by Secretary Spring Rice, who later became Chancellor of the Exchequer and did not distinguish himself there: after a few years he was sent away with a peerage. Many questions are left hanging. Was Clements actually implicated in evading the EIC monopoly? Was Captain Boyd or the supercargo Thomas implicated? Did the Treasury sue Captain Mitchell or Captain Bremer and what came of that? Did any harm befall Lieutenant Matthews for his wild behaviour in ordering the Marines to fire as the Attorney General approached and give three cheers as he left? Why did the Treasury decide on 9 November 1826 to give its support to the owners? Did the EIC take any part in the litigation, or try to stop it? Is it correct (as a newspaper suggested) that the EIC did not support the seizure and proclaimed that it would return anything awarded to it to the Colonial Government? This seems inherently likely as the EIC faced a Parliamentary contest over the further renewal of its Monopoly in 1833, would not welcome conflict with the British Government or any Colony and had far more at stake than it would gain from any penalty on endeavours to feed those dependent on a Colonial Government. When 1833 came renewal of the Tea Monopoly by the Reform Parliament was a lost cause, beyond all hope. There is a great deal more to be discovered by a scholar who is willing and able to spend some months, perhaps years, in London researching records of the British Treasury, the British Navy and the EIC; more precise accounts of the events could be found, as the Treasury and the EIC were both assiduous bureaucracies. There must be or have been a mass of files and papers about Treasury’s considering the conduct of Governor Brisbane and of Wemyss and Clements: the Treasury’s decision on 26th November 1826 to support the ship owners: the decision to assist settlement of litigation by paying something towards the costs of both sides: the decision to settle with the owners for £5000: dealing with opposition in the Committee of Supply: suing Mitchell after paying the £5000. Treasury papers or EIC papers and reports may show what if any decisions actually were reached by the Court in Calcutta and what lies behind the Press references to the Twelve Judges. It is likely that reports from the EIC’s officers in Calcutta dealt with events in the litigation in detail. Further searches may show who found out about the additional tea, when and where it was found and who put it on the ship. Admiralty papers may show the careers and vicissitudes of the Naval officers who were parties to the seizures. This paper is the best account the writer can give on the resources available to him in Sydney.
69. *FIRST EXCURSUS.WHETHER THE CROWN WAS BOUND BY THE TEA MONOPOLY.* It is notable that in their Opinion Counsel took it for granted that tea owned by the Government was not liable to forfeiture, and did not discuss their reasons for thinking this. This is much the same as the position Attorney General Bannister took from the beginning; it was obvious that Crown property was not involved in forfeiture legislation. It seems likely that any life the controversy and the claim to seizure had after the ship reached Calcutta and its cargo was properly inspected, which the Court there would certainly have required, related to the presence of the additional tea. It seems worth while to state some reasons why in the writer's view the assumption was correct.
70. The first reason is that, as a general approach to legislation, even more likely to be taken of Eighteenth Century legislation than in the present, legislation does not bind the Crown unless by an express provision or necessary implication from its terms. The general subject of all the EIC’s legislation was giving effect to a grant which the Crown had made to the EIC in Tudor times of an exclusive right to trade. Its subject was the Crown disposing of what its subjects might do; in Tudor and Eighteenth Century thinking, limiting what the Crown might be entitled to do would rarely occur, and would not occur without the most explicit language.
71. A second reason is that while the language used in the large mass of EIC legislation is not uniform, their prohibitions and permissions are directed at the EIC and British subjects, in language at which does not include either permitting or forbidding the King from doing anything. This is particularly clear in the Charter Act 1823.
72. A third reason is that the subject of legislation is trade and traffic, specifically in tea. Purchasing tea from a merchant in Batavia and then taking it to Sydney for the purpose of using it to make one’s breakfast, or of giving it to one’s household or issuing it out of store to the many persons whom the Commissariat had obligations to supply, does not fall within the concept of trade and traffic; the merchant is trading, the purchaser, acquiring for his own use and not for further sale, is not. Forbes CJ was aware of the importance of this approach and in his private letter to Wilmot-Horton he referred to The Swift (1813) 1 Dodson 320, 165 English Reports 1325 where Lord Stowell took much this view on a case under the Navigation Acts relating to the movement of food, military stores, from one Colony to another when the Navigation Acts forbad intercolonial trade: see Dodson 339-340, ER 1334.
73. *SECOND EXCURSUS.VICE-ADMIRALTY JURISDICTION.* The shared view of lawyers in Sydney seems to have been that if there had been a Vice-Admiralty Court in Sydney it would have had jurisdiction to decide whether the seizure of the Almorah was effective and whether the ship had been forfeited; ownership of ships was a classic subject of Admiralty jurisdiction. Forbes’ mind went to the subject in his letter to Wilmot-Horton of 24 March 1825, not a formal expression of opinion as a judgment would be. He referred to the statute 4 Geo 4 c 80, assented to on 18 July 1823,a late Charter Act which consolidated statutes on trade within the limits of the EIC’s Charter. Forbes noted that that Act continued penalties (which included forfeiture) imposed by 33 Geo 3 c 52 and 53 Geo 3 c 155. He did not pursue the subject to a conclusion. James Stephen, counsel to the Colonial Office in London advised later in 1825 that it was not clear whether a Commission had established a Vice-Admiralty jurisdiction in the Colony: Vice-Admiralty jurisdiction was not conferred by the New South Wales Act 1823.The late Dr CH Currey and Dr JM Bennett have published views about whether there was then a Vice-Admiralty court in Sydney. Dr Currey concluded that in fact there was no Vice-Admiralty Court in New South Wales (see his work “Sir Francis Forbes…” page 133) because Judge Wylde had been the only person commissioned as its judge and he had left Sydney on 8 February 1825. Dr Bennett in his “History of the Supreme Court of New South Wales” at page 159 contends, compellingly, that Governor Brisbane had a commission which authorised him to hold the Vice-Admiralty Court and to appoint a deputy, and could have appointed Forbes. A commission appointing Forbes was issued in London late in 1825, when the Almorah was long gone.
74. The minds of those who have published views have gone, as did those of many at the time of the events, to Admiralty and Vice-Admiralty jurisdiction because it was there that claims for forfeitures of ships and cargoes and for rewards were almost always decided; such claims could arise under the Navigation Acts and in Prize Law during Naval wars and under statutes dealing with the Slave Trade.
75. In the writer's view the Supreme Court probably did have jurisdiction to determine any such claim, and jurisdiction to do so was not limited to courts which had Admiralty jurisdiction; they may have been excluded. A claim of forfeiture under the EIC’s legislation was not a Prize case. The huge almost indigestible mass of legislation about the EIC made provisions for forfeiture a number of times; it seems that whenever the Monopoly was extended by a Charter Act there was a forfeiture provision; earlier provisions to similar effect were not expressly repealed, but it may be that they were impliedly repealed.
76. The Charter Act of 1793, 33 Geo 3 c 52 mentioned by Forbes, by s 140 provided in mandatory language that cases of forfeiture were to be sued for and adjudged in the King’s Courts of Record at Westminster and in three courts in India including the Supreme Court at Calcutta. Section 140 did not expressly authorise or forbid their adjudication by Admiralty and Vice Admiralty Courts; it did not refer them. (The Court of Admiralty in London was a court of record, but it was not at Westminster. Westminster was the location of the three Common Law Courts. The Supreme Court at Fort William had Vice-Admiralty jurisdiction conferred by its statute; it may well have treated forfeiture cases under s 140 as Vice-Admiralty cases, but it was not obliged to do so.) An available reading is that s 140 conferred jurisdiction to enforce section 140 exclusively on the courts it named, so that other courts were not authorised to determine such cases; were not so authorised merely because they had Admiralty jurisdiction. All the jurisdiction of the courts at Westminster was conferred on the Supreme Court of New South Wales by section 2 of the New South Wales Act 1823 and the Charter under it. In the writer’s opinion the better view is that by this conferral the Supreme Court of New South Wales had jurisdiction to determine a claim under s 140, whether or not it had Admiralty jurisdiction. If this should be correct the Almorah need not have gone to Calcutta. The alternate reading is that s 140 did not confer jurisdiction but assumed it existed and mandated access to the courts it named, impliedly forbidding access to any other courts. No-one is known to have made or decided this contention at the time.
77. *THIRD EXCURSUS. THE CHARTER ACTS IN FORCE IN 1825.* The Charter Act of 1813 opened up trade beyond the Cape to British subjects and British shipping, except that the EIC retained its monopoly on trade with China and on trade in tea; there were some continuing restrictions and the EIC’s licensing control over shipping, presence of British subjects and many other matters continued. In 1823 another Charter Act, 4 G 4 c 80, repealed the provisions of the Charter Act 1813 which regulated trade and five other statutes passed in the interim, and re-enacted, restated and consolidated their provisions, with some liberalisations. Section 6 made it unlawful for a ship to proceed to a port between the Indus River and Malacca without the EIC’s licence: the restricted area was very extensive but far less than the previous restricted area, all the world from Cape to Cape. Earlier provisions which gave the EIC licensing power over engaging in trade or even being present in the East Indies were continued. The form of Section 2 is important: "… it shall be lawful for any of His Majesty's Subjects… to carry on Trade and Traffic in any Goods, Wares or Merchandise, except Tea,…any thing in any Act or Acts of Parliament, or in any Charter of the said Company, to the contrary notwithstanding." Section 2 took the place of any previous enactment restricting trade and traffic. Importantly it was cast as a statement of what it was lawful for the King’s subjects to do; and this form shows the understanding that the King did not need Parliament to state what it was lawful for the King to do: that existing restrictions and Section 2 itself did not relate to any control over what it was lawful to the King to do. Section 9 enacted (in form as a proviso) that the Act was not to permit trade with China or trade in tea in terms of what the King’s subjects were authorised to do, again showing the assumption that the rights of the King were not involved.
78. Section 17 continued the operation of much of the Charter Act 1793, 33 G3 c 52 and provided for its provisions relating to clandestine and illicit trade "… to apply to all Ships and Vessels of his Majesty's Subjects sailing or being found within the Limits of the said Company's Charter…" The provisions of the Charter Act 1793 dealing with seizure and condemnation of vessels, rewards to seizors and the courts in which proceedings were to be brought were still in force in 1825; these included section 140. The power of seizure was limited by section 133 to officers of the EIC and persons specially authorised by its Court of Directors. These apparently continuing effects of the Charter Act 1793 are not known to have been noticed or discussed at the time of the events. It is unlikely that Captain Mitchell was authorised under section 133: it seems possible that Captain Bremer was, and that this explains his intervention when the Almorah reached Calcutta. A comment published three years later (The Australian 28 April 1828 page 3) gave an account of what Mitchell’s counsel had argued at his trial which echoed the terms of section 140 and so suggested that counsel had relied on that section: but reports contemporaneous with the trial did not refer to that section or echo its terms. Ungenerous as it is to say so, it does seem likely that the publishers of the Australian had found out about the provisions of s.140 in the intervening years through hearing something of the proceedings in Calcutta.

---------------------------------------------------------------------------------------------------------The Hon John P Bryson QC is a retired Judge of Appeal of the Supreme Court of New South Wales.