THE CASE OF BENJAMIN KITT

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The Kitt Case has been remembered outside Queensland only because of the constitutional questions which arose out of it. Most studies have lifted it almost completely from its political background so that the whole thing has been misunderstood or used to make quite false deductions. This paper attempts to replace the affair in its context. To do this it is as well to begin with a summary of the main features of the political crisis, before going on to a reinterpretation.

The dispute about a certain Benjamin Kitt arose immediately after the Queensland general election of May 1888. By this election, Sir Samuel Griffith's "Liberal Party," which had held power since November 1883, was turned out and the "National Party" under Sir Thomas McIlwraith took office on 13th June. The defeated Liberal Party drew most of its votes from the towns. Very approximately, it represented the majority of professional men, artisans, tradesmen and small farmers. The National Party can best be described as "the rest." On the squatter-planter-merchant base was a superstructure contrived of Irish interests, protectionists, publicans, and even one or two republicans. It is difficult to say in what their nationalism consisted, except perhaps in the case of the Irish. For most it does not seem to have gone much deeper than haphazard opposition to certain arrangements made by Griffith with Downing Street during the Colonial Conference at London in 1887. The party was national only in the rather strained sense that it collected almost every interest opposed, for various reasons, to Griffith's policy.

Meanwhile, on the 28th March, Kitt had been convicted at Townsville of stealing two pairs of boots

This article is based on the files of Queensland Governors' correspondence which His Excellency, the Governor, has very kindly made available to the Department of History of the University of Queensland. References for Governors' correspondence throughout are to titles of volumes in this series.

valued at 40/-. For that he was sentenced to three years' penal servitude. About a month after the McIlwraith ministry took office, that is, on the 11th July, the Colonial Secretary recommended, through cabinet, that the Governor, Sir Anthony Musgrave, should remit this sentence. The Governor, at the Executive Council meeting, declined to do so. The recommendation was resubmitted on the 18th July, and the Governor again refused, stating that he saw no reason to doubt that the judge and jury were right, while for him to interfere would shake the confidence of the public in the administration of justice. He felt bound to exercise the Royal Prerogative of Mercy, which was legally confided to him, according to his own conviction, but if cabinet wished he would refer the question home for the Colonial Secretary's decision.

McIlwraith summed up cabinet's case in a long letter to the Governor dated 9th August 1888. He claimed that the Governor's refusal to accept the advice of his ministers in exercising the royal prerogative was "a grave departure from the principles of responsible government." For many years past this advice had always been followed, except in capital cases where the Governor was clearly told in his instructions to act on his own judgment. McIlwraith quoted precedents in Canada and New South Wales and the opinions of such oracles in constitutional matters as Todd and Higinbotham, in an endeavour to show that the Governor must always take the advice of his ministers. In view of these precedents cabinet would decline to accept the decision of the Secretary of State for Colonies.

In his reply of the 14th August, Musgrave denied that he was bound, either in law or by custom, to follow his ministers' advice and stated that he intended to place the whole question before the Secretary of State. A further exchange added little, and on the 3rd September the Premier waited on the Governor and said that his ministry had determined to resign unless the Governor accepted their advice on the matter by the following morning. Sir Anthony remained unmoved and on the 4th McIlwraith sent in their resignation. That afternoon he laid the correspondence on the table of the Legislative Assembly, telling the House that the decision of the Secretary of State was quite immaterial and would not influence the cabinet one way or another.

Meanwhile, that morning, the Governor had sent for Griffith and asked him to form a government. Griffith, after consideration, declined on the 5th; stating that he thought the Governor should take the advice of his ministers in cases such as this, but at the same time could see no reason for their resignation while the matter was before the Secretary of State. On the same day McIlwraith notified the Governor, who had refused to accept the resignation, that he and his colleagues would not proceed with parliamentary business until their successors were appointed.(1)

The newspapers had been running the case for some time. "Figaro," the "Nationalist" newspaper, got hold of it as early as the 28th July and other papers were reporting it from the 11th August. By the 4th September the excitement throughout the colony was such that the Governor wrote that the state of affairs was "practically revolutionary."(2) It is clear now that the most vocal opinion supported McIlwraith. On the night of the 7th September a crowd estimated at seven to eight thousand marched in a torchlight procession to a point near the Houses of Parliament where a public meeting was held and the action of the Governor condemned "unanimously."(3) Throughout Queensland there were similar meetings, and telegrams and letters poured into Brisbane, mostly supporting the ministry. The deadlock was ended by a cable from the Secretary of State on the 8th September ordering the release of Kitt. The cabinet thereupon withdrew its resignation.(4)

It will be evident from this summary why studies which are based on the debates and correspondence printed in Hansard should treat the case purely at the constitutional (or personal) level. C. A. Bernays, for example, says: "Anyone familiar with the political career of Sir Thomas McIlwraith will readily understand how his impatience of criticism and his dictatorial inclinations would lead him to precipitate a crisis over a comparatively trifling matter." The issue, according to Bernays, was whether the Governor alone or the Governor-in-Council should exercise the prerogative "and it was just over that one fine point that

(1) For correspondence, see "Q.P. Debates," Vol. LV; pp. 186-194, 196. Also "V. & P. of L.A. of Q.," 1888, Vol. I; pp. 679ff., 691ff.
(2) Telegram to Secretary of State for Colonies. See his desp. No. 78, 4/9/88: "Governor's Despatches to the Secretary of State," Vol. VII.
(3) See "Evening Observer," 7/9/88.
(4) See "Q.P. Debates." Vol LV; p. 206 ff.

two obstinate men came in conflict."[5] But such an explanation only raises the wider question why such collisions with the Home Government or its agents should have occurred over functions which were previously accepted without dispute. If the question is pressed the usual answer will be that the growth of Australian national sentiment made these clashes inevitable.

But it is doubtful whether this dawning sentiment of "adulthood" producing, as it undoubtedly did, a fitful desire for complete self-government or an irritation with Imperial supervision, was ever more than a favourable medium in which interested groups in the colonies struggled for, and usually gained, immediate and ulterior objectives. The sentiment of "adulthood" may explain widespread support for the colonial government concerned, but scarcely the motives of the government itself. It may always be a necessary condition but is rarely, if ever, a cause. The milestones on the road to self-government have too often been sentimentalised into monuments to Australian patriots, commemorating the victories of their long struggle with British Imperial domination. They might be described just as realistically as the tombstones under which are buried a number of enlightened but lost causes. In fact neither figure helps us much. The point is that, in almost all cases, these crises occurred only when a legitimate and accepted function of the Colonial Office or its representative became entangled in a local party political conflict.

So it is in the Kitt case. Indeed this affair is typical of many others. Thus, in the previous decade of the 'seventies, historians are confronted with the curious spectacle of the Gardiner case in New South Wales.[6] On this occasion Henry Parkes, one of the fathers of the nation, is discovered "preferring" that the reluctant Governor, Sir Hercules Robinson, should exercise the prerogative of mercy without consulting his ministers at all. "A larger share by the minister in the exercise of the prerogative of pardon, would not," he said, "in my judgment, be more satisfactory to the public."[7] His reason seems to have been that

(5) "Queensland Politics During Sixty Years"; (Brisbane, n.d.); pp. 116-7. Cf. also A. C. V. Melbourne: articles in "Daily Mail," 1927.

(6) See Parkes, Sir Henry: "Fifty Years in the Making of Australian History"; (London, 1892); p. 281 ff.

(7) "Ibid.," p. 286.

he wished to sidestep what he called "an unscrupulous party movement." It was Sir Hercules who insisted that the Governor must have Ministerial advice on applications for pardon.[8] The instructions to Governors were altered accordingly.

Or taking an illustration nearer home, Griffith is found, in 1886, insisting that the Governor must grant leave of absence to Legislative Councillors only on the advice of his ministers. His opponent, who struggled to uphold the Crown's prerogative, was a Queenslander and a henchman of McIlwraith—the temporary administrator of the Government, Sir Arthur Palmer. Palmer had been Colonial Secretary in the first McIlwraith administration and was Lady McIlwraith's brother-in-law.[9] Again, McIlwraith's party in 1887-8 had opposed and defeated the Liberal government's Naval Defence Bill in the name of independence and nationhood. The Bill provided for an Australian squadron of the Royal Navy partly maintained by colonial taxpayers in accordance with the agreement made by Griffith and other colonial representatives with the British Government at the Colonial Conference in London. Griffith was called an "Imperialist" and his bill the "Naval Tribute Bill" when the National party had an election to win. When it became expedient for them to form a coalition government with Griffith most of them swallowed his bill, entire and unadulterated, without visible difficulty.[10]

Usually it is abundantly clear that the precipating factor is an internal colonial issue. It will be argued here that although the Kitt incident became important as one of the test cases defining the relations between the Crown and Colonial administrations, the question of self-government or "responsible government" is only a part of the story. It is a consequence rather than a cause. The Kitt case can best be explained as one more skirmish in the desultory war over Kanaka labour. To make good this interpretation it will be necessary to look at the available evidence on the motives of both sides: i.e., of the Governor and of the McIlwraith ministry.

It is relatively easy to judge why Sir Anthony Musgrave acted as he did. The Governor was an in-

(8) "Ibid.," p. 290.
(9) See, e.g., Palmer to Chief Secretary, 22/9/86: "Governor's Official Letters to Various Persons," Vol. II.
(10) See "Q.P. Debates," Vol. LXIV; 7/7/91.

telligent and spirited man, near the end of a long public life and in the habit of speaking his mind. The key to his motives is to be found in a code telegram[11] and a confidential despatch,[12] both to the Secretary of State, dated the 4th September. In the former Musgrave states: "It [the recommendation for Kitt's release] is intended to clear the way for pardon of prisoners referred to in my confidential despatch of 29th December 1884." (These prisoners were six of the crew of the labour vessel "Hopeful" convicted in 1884 of the murder and kidnapping of New Guinea natives.) The confidential despatch of the 4th September reads, in part:

> "It is right to state what is tolerably well understood here that the case of Benjamin Kitt is put forward merely as a convenient test case for the purpose of establishing the principle that no matter how groundless the recommendation may be, any recommendation for pardon or mitigation of sentence made by the ministry is to have effect given to it without question by the Governor. The intention is to nullify all pretence at 'the retention of the personal decision of the Governor.' The real object in view is to pardon the convicts in the notorious 'Hopeful' case in respect of which agitation has recently been stirred up by the parties who were useful supporters of the present Government during the late general election."

Finally he wrote after the release of the prisoners:

> ". . . . I should never have regarded the case of Benjamin Kitt as of great importance, and might have given way to their recommendations after my first remonstrance, if I had not been convinced that the pertinacity with which it was pressed was intended to establish the principle that the Governor . . . . is to be a mere hand to register the decrees of his 'advisers'."[13]

Taken together these statements can only mean that the Governor refused to release Kitt, because he thought that cabinet intended later to recommend the release of the "Hopeful" prisoners and that cabinet wished first to establish the principle that these recommendations for release of prisoners must always be

(11) "Governor's Despatches to Secretary of State," Vol. VII.
(12) In "Governor's Confidential Despatches to the Secretary of State," Vol. I.
(13) To Secretary of State. No. 83. 11/9/88: "Governor's Despatches to Secretary of State," Vol. VII.

accepted. Musgrave would clearly have been more accurate if he had said that he thought cabinet wished to **prevent him** establishing the contrary principle: that such recommendations may always be rejected. It was after all usual to accept the advice of cabinet: to do so in this case could hardly constitute an important precedent. To reject it in this case most certainly would, so that strictly the initiative at first lay with the Governor. With that modification the quotations probably state accurately one, if not all, of the Governor's motives.

If this is so, two questions at once arise: Why should Musgrave be prepared to go to such lengths to establish his right to refuse to release the "Hopeful" prisoners? Secondly, why should he not wait for the real issue to arise—the actual recommendation for the release of the "Hopeful" prisoners—before making a stand?

The first question is not hard to answer. The "Hopeful" case had been in Sir Anthony's own words "a very bad one."(14) The Chief Justice, who tried the six men late in 1884, stated that "the evil deeds of the prisoners had involved unauthorised warfare, murder and all the characteristics of piracy and slave-hunting."(15) Griffith's government, which was of course hostile to the Kanaka trade, immediately appointed a Royal Commission to investigate the "Hopeful" and five other ships which had been recruiting in New Guinea waters. In its report of April 1885 no ship was given a clean bill. The mildest finding was that the natives on one did not understand their contract (to "work in sugar" in Queensland for three years). In all other cases the Commission found that the natives had been kidnapped or fraudulently recruited. "The history of the cruise of the 'Hopeful'," the Commission reported, "is one long record of deceit, cruel treachery, deliberate kidnapping and cold-blooded murder."(16) Mainly on the strength of the "Hopeful" trial and of this report, the Liberal Government brought down an act in September prohibiting the introduction of Kanakas after the 31st December 1890.(17) Afterwards it became pretty clear that the Crown case at the trial rested mainly on the

(14) To Erskine, 6/10/84: "Governor's Official Letters to Various Persons," Vol. II.
(15) Quoted Musgrave to Secretary of State, Conf., 4/9/88: "Governor's Confidential Despatches to Secretary of State," Vol. I.
(16) Printed in "V. & P. of L.A. of Q.," 1885, Vol. II; p. 797 et seq.
(17) "The Pacific Island Labour Act of 1880 Amendment Act," 49 Vic., No. 17.

testimony of a brace of rogues. As to the Royal Commission, evidence soon began to build up suggesting that some of the natives had not been deceived by the recruiters, but had themselves deceived the commissioners.[18] Every piece of evidence which threw doubt on the justice of the convictions, or on the commissioners' findings, was, in the rough logic of politics, an argument against Griffith's Kanaka prohibition Act, based largely on that trial and those findings. By the time that McIlwraith was in, the trial, the Commission and the Act were hopelessly identified.[19] A "retrial" of the case in the Executive Council, resulting in pardon by the Governor, would be a retrospective vindication of the labour trade and a lever to overthrow the Kanaka prohibition Act.

Now Musgrave was not merely convinced that these men were justly convicted, but was an inveterate enemy of the whole labour trade. One despatch gives a fair sample of his opinion. In March 1886 he described Queensland to the Secretary of State as

> "a comparatively uneducated community which has shown itself notably regardless of the commonest rights of humanity in respect of the black native tribes within its own territory—to say nothing of what has been disclosed of the Kanaka labour trade. Nothing in the history of the slave trade or slavery in the West Indies is more shocking than occurrences which have taken place in Queensland within the last ten or fifteen years. The display of popular feeling and sympathy with the criminals which I witnessed last year in the case of men most justly condemned to death for barbarous murders in what was nothing less than a slave hunting expedition on the coast of New Guinea is a thing not easily to be forgotten and it is far from creditable to the colony."[20]

Clearly then the Governor was determined to resist the release of the "Hopeful" prisoners not only on the merits of the case, but also because he feared that it would clear the way for the reopening of what he had

(18) See, e.g., speech by Philp: "Q.P. Debates," Vol. LIX; 18/10/89, pp. 2295-6.
(19) e.g., "Evening Observer," 31/7/88, Leader, said: ". . . the gentlemen who are getting up this [Hopeful] agitation are doing their best to re ive" the black labour question.
(20) 11/3/86, Conf.: "Governor's Confidential Despatches to Secretary of State," Vol. I.

always believed was "little better than a slave trade."[21]

The second question is more complicated. It is not easy at first to see why the Governor should not wait for the "Hopeful" case to arise before establishing his right to refuse his ministers' advice. Possibly he thought that if he chose his ground on an issue in which no local political question was obviously involved he would be upheld by the Secretary of State, since he clearly had the legal right to refuse assent. If so, a clear precedent would be established and the reprieve of these men would be impossible while he remained Governor.

Musgrave obviously bargained without the noisy public support for McIlwraith which was aroused when the Kitt case came out into the open. On the 4th September he told the Secretary of State: "I should have no doubt at all that the judgment of the Governor in these cases would be approved by the community at large if only his authority to decide is upheld by H.M. Government."[22] But in fact the Griffith party was caught in a cleft stick and maintained a painful silence in the House during the debates of the next few days, while the Liberal newspapers were obviously embarrassed: opposed to the National party on one ground but reluctant to give open support to the Governor on the other under circumstances which would only provide fresh evidence of their "Imperialism." Because of the lack of local support the Secretary of State had no option by the 8th September but to instruct the Governor to withdraw.

Perhaps Musgrave, then, simply miscalculated his chances of success; but this seems doubtful in view of his long and wide experience. Another explanation is arguable. It is probable that the Governor had not only the "Hopeful" case in mind but also the wider issue of the government of British New Guinea. When the Kitt case arose the annexation was imminent and final arrangements were being made for its administration. By June 1888 the general framework of the territory's government had been drafted. The Administrator of British New Guinea was to act under the instructions of the Governor of Queensland, who was to consult his

(21) Musgrave to Erskine, 9/2/84: "Governor's Official Letters to Various Persons." Vol. II.

(22) "Governor's Confidential Despatches to Secretary of State." Vol. I.

Council in all matters connected with it. This was the very arrangement that Musgrave had campaigned against for years. In the despatch of March 1886, already quoted, he claimed that any such arrangement would "practically place the Administrator . . . directly in subjection to the Council" of a colony where the moral tone of the mass of the people was so low that its politicians would wink at almost any abuse. The recruiters could use New Guinea to supply black labour and the British Government would be helpless to intervene. "This," he said, "is what the sugar planters of Queensland and their capitalist supporters in Victoria have been struggling for all along, from the time of Sir Thomas McIlwraith's first action in the matter."

In October 1887 he again protested against what he called the "evident intention" of the British Government to hand over substantial control to the Queensland Government, and asked for a careful definition of his authority vis-à-vis the Council, since he anticipated the return to power shortly of the McIlwraith party. This party included, he said, those anxious to use New Guinea as "a preserve to furnish black labour for the Queensland sugar plantations" and "those who persistently closed their eyes to the revolting cruelties of the Queensland labour traffic."[23] In confidential despatches of 10th September 1887 and 30th March and 22nd June 1888[24] he stated that he had not been reassured on these matters and would refuse to take up his duties unless his status and authority were clearly defined. The last of these despatches, it should be noted, is dated just a little less than three weeks before the Kitt case began.

As if to confirm his fears the black labour question was reopened just at the time of the first recommendation for the release of Kitt. On the 9th July, two days before the recommendation was made, the "Telegraph" in a leader gave prominence to a rumour that the McIlwraith Government was going to repeal the Kanaka prohibition Act. The fact that Hume Black, the representative of the northern planters and an avowed champion of black labour, was in his cabinet was a fair indication, the "Telegraph" thought, that the rumour would become fact. The next day the "Observer," which supported McIlwraith, reviewed the

(23) To Secretary of State, 20/10/87, Conf. "Ibid."
(24) "Ibid."

history of the New Guinea Protectorate and came to the conclusion that it had been a "miserable fiasco." Burns, Philp & Co. had lost heavily there and so had many another planter and trader. Queensland ought to make sure that she got a profit out of the territory in return for the £15,000 bill for the cost of administration. Again on the 13th July, two days after the first recommendation for the release of Kitt, Mr. Swallow, head of the firm of Swallow and Ariell, Melbourne biscuit manufacturers, and one of the firm of Swallow and Derham, sugar planters of Cairns, published a scheme in the "Courier" for recruiting in New Guinea. This, Mr. Swallow said, was becoming imperative since the Chinese were to be excluded soon and Griffith's Act prohibiting the recruiting of Islanders would come into force at the end of 1890. New Guinea recruiting could be supervised by the administrator and the Queensland Government and therefore would be free of abuse.

Now, whatever the precise legal position, and it was an extraordinarily tangled one, there can be no question that the Queenslanders assumed that their elected representatives were to control New Guinea through their Executive Council.[25] The Governor, who had been kept in almost complete ignorance of the negotiations, had drawn the attention of the Colonial Office to this assumption many times in the past year,[26] but as far as he was aware the position had not been clarified by late June 1888. He was afraid, whatever the Colonial Office protested to the contrary, that the draft Letters Patent, Commission and Royal Instructions erecting the actual machinery of administration and soon to come into force, would in fact confirm that assumption—that New Guinea was to be largely in the hands of the Governor-in-Council. If this meant that the Queensland cabinet could override the Governor, the situation in Musgrave's view would not only be deplorable politically, but, for technical reasons which do not concern us here, would be actually illegal.

He could not fail then, to see the dispute about Kitt, which arose early in the following month, in the light of the New Guinea situation. There was little perceptible difference between his status in exercising

(25) See, e.g., "Courier," 9/9/87, Leader. Hume Black: "Q.P. Debates," Vol. LIII, 1887; pp. 1114-5.

(26) Particularly in his despatch to Secretary of State, 10/9/87, Conf.: "Governor's Confidential Despatches to Secretary of State," Vol. I.

the Prerogative of Pardon and his status in exercising control over the Administrator of New Guinea. In both cases his instructions directed him to consult with the Executive Council. If he bowed to the doctrine that "consult" must always mean "accept the advice of" then he would in fact give the cabinet of Queensland predominant power over New Guinea. The Governor would be the Imperial rubber stamp approving the acts of the Queensland ministry.

This seems to be the force of his confidential despatch of 18th August 1888,[27] in which he again attacks these "proceedings which undoubtedly have the effect of placing the possession under the control of the Government of Queensland." A postscript to that despatch reads: "The present temper of local government upon the subject of the Royal Prerogative of Pardon—in respect of which they dispute the right of the Queen's representative to any independent judgment and virtually declare the severance of the Colony from all control of any kind on the part of the Crown or Government of Great Britain, renders it the more necessary that the Governor of Queensland, who is directed to consult the ministry of Queensland in all things with regard to New Guinea should understand distinctly what is his legal authority and status with regard to that possession." When later, in a despatch already quoted,[28] he says that he might have given way on the Kitt case, after a first remonstrance, had he not been convinced that the case was pressed to establish the principle "that the Governor is not supposed to be entitled to an opinion in the administration of the Government over which he presides. . . . ," it is more than feasible that he had in mind not only the Government of Queensland but also the Government of New Guinea. Whether or not the "Hopeful" case could wait, the New Guinea "instruments" would shortly go into force and the matter was urgent. His position then was this. If he won the Kitt case he would loosen the hold of the Queensland ministry over the territory, and would probably be in a position to frustrate any attempts to recruit labour there. If he lost, at least he would have demonstrated, with a force that his most heated arguments could never carry, the

(27) "Ibid."
(28) To Secretary of State, 11/9/88, No. 83: "Governor's Despatches to Secretary of State," Vol VII.

utter powerlessness of the Governor to curb the local ministry in its dealings with New Guinea under the proposed arrangement.[29]

It is reasonable, therefore, to conclude that the Governor refused to release Kitt because he wished to prevent the release of the "Hopeful" convicts, with all that the release would imply. Further, it is likely that he refused to release Kitt also because he feared that New Guinea would pass under the direct control of the Queensland cabinet and hoped to prevent this.

If the Governor acted for the reasons suggested, it is still possible, of course, that McIlwraith and his colleagues were mainly concerned with the "constitutional" issue: that is, they may have wanted to prevent an autocratic Governor from overstepping what they thought were accepted canons of "responsible" government. In turning to estimate the motives of McIlwraith's cabinet, however, we are faced with an obvious difficulty in the lack of direct evidence. If members of the cabinet left any confidential records or correspondence on the subject these have not been found. The most that can be done is to assemble the "circumstantial" evidence which might answer the two obvious questions: Was McIlwraith's government at the time of the Kitt case, committed to release the "Hopeful" prisoners? If so, was this their main reason for insisting on the release of Kitt?[30]

To explain the National party's policy towards the "Hopeful" prisoners it is necessary to go back to the party's tactics in the election of 1888. After the redistribution of seats under the Electoral Districts Act of 1887, it is useful to divide Queensland into two groups of electorates on a line running roughly from Maryborough to Goondiwindi. In the huge area North and West of the line there were now thirty-eight seats (counting Burrum). Grazing and sugar, with their satellite interests, would win most of these for the McIlwraith party, but certainly not all. In the event, the Liberals held only five seats—Burke, which took in the Croydon and Woolgar goldfields (two seats), the mining electorate of Charters Towers (two seats) and

(29) See also Musgrave to Secretary of State, 15/10/88, Secret: "Governor's Confidential Despatches to Secretary of State," Vol. I, in which he attempted to drive home the lesson.

(30) The question whether McIlwraith also had an eye on the New Guinea administration is left aside. What little evidence there is suggests that both political parties simply assumed that the Queensland Government (i.e., cabinet) would control the territory.

Cairns (one seat). This was better than McIlwraith could reasonably have expected. In the corner south-east of the line there were thirty-four seats (counting Maryborough), twelve of them in Brisbane. Most of this area had been solidly Liberal in 1883 and McIlwraith would need some seats here to give him a clear win. He himself stood for North Brisbane opposite Griffith. To gain any substantial vote in the area his party was compelled to somersault and promise categorically not to reintroduce black labour and to exclude the Chinese, whatever his planter or squatter supporters thought of the matter. As it turned out he collected a fine bag; twelve seats in the area, five of them in metropolitan electorates, and one of them in the Liberal stronghold of Fortitude Valley. Griffith later said that McIlwraith had engineered this landslide by the simple device of taking over the Liberal policy, particularly on coloured labour.

As one might expect, then, the attitude of the "Nationalist" candidates towards the "Hopeful" case during the election campaign was fairly cautious, at any rate at first. McIlwraith began by stating in his published manifesto to the electors of North Brisbane[31] that the New Guinea scandal in which the "Hopeful" had been prominent was the fault of the Griffith government which had licensed the vessels to recruit there. His own government had never allowed labour ships to go to New Guinea. In his first address to his constituents on 16th March he said: "The atrocities brought to light when these vessels came in shocked the whole civilized world." He went on to say with more force than elegance that ". . . . the account given by the Royal Commission was something horrifying." Again the argument was that the Liberal government had been responsible.[32] But by 12th April he admitted in answer to a question that he ". . . would favour further inquiry into the 'Hopeful' case, if more evidence were forthcoming."[33] On the 26th his attitude is clearer: "With regard to liberating the 'Hopeful' prisoners the matter should be carefully deliberated, and all the information that could be got should be obtained. There was a great deal worthy of investigation and it would have his instant attention as soon as

(31) "Courier," 14/3/88.
(32) "Ibid.," 13/4/88.
(33) "Ibid.," 13/4/88.

he got into office."[34] The "Telegraph," no doubt assuming that it would be unpopular, emphasised this answer in a column called "Election Points": "Do you know?—That Sir Thomas will attend to the 'Hopeful' case 'as soon as I get into office'." Evidently McIlwraith was uncertain of the city's temper on the subject and was feeling his way.

The supporters of Sir Thomas were less guarded. Mr. T. Logan addressed the electors of Toowong on the 7th May. "He considered the present punishment very inhuman, unnatural and un-Christianlike. He thought that the 'Hopeful' prisoners had suffered long enough and it was time mercy was extended to them. He supposed the Premier read his Bible, yet he stiffened his neck and hardened his heart and allowed those people to waste their life in prison, almost in irons. . ."[35] (Mr. Logan was not returned.) Mr. Cooper, speaking the following day at Red Hill said:

> "With reference to the 'Hopeful' prisoners he considered that it was no tragedy at all for which they were condemned, seeing that the kanakas were in the habit of trying to murder the white crews. In this case the white men were convicted and the white man had no means of redress at all. . ."[36]

Mr. Cooper expressed himself similarly on other occasions. Mr. Burton at Fortitude Valley[37] and Mr. Swanwick at Woolloongabba[38] also advocated release.

None of these outspoken gentlemen were returned, but it was clear that they were expressing the opinion at least of an influential section of the National party, if not of the Brisbane electors. The impression seems to have been widespread that the party as a whole stood for release. The editor of "Figaro," an ardent supporter of McIlwraith, wrote on the 21st July: "I have every confidence that Premier McIlwraith and his government will satisfy to the full the promises they made respecting these shameful convictions and they are as fully pledged to do that which is right and just for the 'Hopeful' martyrs as is 'Figaro'."[39] In the following year, a Mr. Hunter got up in the House and

(34) "Telegraph," 27/4/88. The "Courier" reported him less fully and with a different emphasis on this point.
(35) "Telegraph," 8/5/88.
(36) "Ibid.," 9/5/88.
(37) "Ibid.," 10/5/88.
(38) "Ibid.," 12/5/88.
(39) Sub-leader.

said: ". . . the present Government party when they came before the country two years ago pledged themselves if they were returned to release the 'Hopeful' prisoners."(40) The statement was not denied. Whatever the members of the party had or had not specifically said, they undoubtedly gave the impression that they favoured release.

Further they must have intended to give that impression. On polling day in North Brisbane, McIlwraith allowed the balcony of his committee room to be adorned with a large placard depicting the prisoners fettered and behind bars, appealing in vain to Griffith for release. Again, during the election campaign a pamphlet on the case called "Facts to Know" was circulated in Brisbane. Some of the accusations against Griffith read:

> "That the trial of McNeil [sic] and Williams was conducted in a manner utterly at variance with fair play, justice and humanity. That the evidence of cannibals, tutored for the purpose of criminating the prisoners, was utterly worthless, and should never have been admitted in a question involving the life of a white man . . . . That these facts were so well understood by the people of Brisbane that they determined to hold a monster meeting to protest against the vindictive and harsh measures adopted by the Premier with regard to the 'Hopeful' prisoners."(41)

If these "facts" were correct there could, of course, be no question about the necessity for immediate release. Now the significant thing is this. Griffith quoted the tract in full in the House on the 15th August, and in reply McIlwraith said: "I am not responsible for it. I read it now in print for the first time, but I am prepared to justify the 'facts'—every one of them that the hon. gentleman has called abominable falsehoods. . . . I take up the position of justifying everything the hon. gentleman has referred to."(42)

Indeed McIlwraith would have found it hard to adopt any other attitude. About eighteen of his party in the House, including three out of eight ministers, can be said to have represented the planter interest. One of these was Robert Philp (of Burns Philp), who

(40) "Q.P. Debates," Vol. LIX, 1889; p. 2299.
(41) See "Ibid.," Vol. LV, 1888; p. 20.
(42) "Ibid."; p. 25.

had been part owner of the "Hopeful" in 1883. Another, A. S. Cowley, had been manager of "Hamleigh" plantation near Ingham, employing natives from the "Lizzie," one of the six ships investigated by the Royal Commission of 1885. The report of the Commission had made it appear that Cowley had "coached" and intimidated the boys to give false evidence before the Commissioners at "Hamleigh."(43) But even apart from the sugar interests, many of the squatters and merchants in his party obviously favoured release.

In view of all this, it seems clear that at the time of the Kitt case the "National" administration was tacitly committed to the release of the "Hopeful" men.

To give a definite answer to the second question on the cabinet's motives, i.e., to decide whether cabinet insisted on the release of Kitt mainly to ensure the release of the "Hopeful" men, is not possible. The difficult word is "mainly.'

Obviously it could be argued that the first recommendation for Kitt's release was made on the merits of the case. There had been protests against the severity of the sentence at the time, and the question had come before the Colonial Secretary in Griffith's government, just before it went out of office. He had made enquiries about the man's previous character, and had been informed that nothing was known against Kitt by the local police before his conviction. The new administration considered this testimony important. Although the judge gave the opinion that Kitt had been guilty of numerous thefts on other occasions, McIlwraith claimed that no evidence supporting this conclusion appeared in the judge's notes.(44) In view of this there was undoubtedly a strong case for recommending release on the ground that the sentence was too severe. Certainly the Governor had not scrupled in the past to release prisoners either against the opinion of the judge or, more often, without getting the judge's opinion at all.(45)

Cabinet could argue, then, that the judge had been too severe, if not prejudiced. This could reasonably

(43) The manager of the C.S.R.'s "Victoria" plantation (also near Ingham), where most of the recruits from the "Hopeful" were employed, was E. Cowley. I have not been able to discover whether he was a relation.

(44) See "Q.P. Debates," Vol. LV, 1888; p. 188.

(45) McIlwraith stated that during Musgrave's administration the Governor had remitted 169 sentences. Of these 111 were tried in the Supreme or District Courts. Of these the judge's report was obtained in only 56 cases. Of these 36 were remitted or pardoned against the opinion of the judge: "Ibid.": p. 189.

explain their insistence up to a point, but hardly their resignation without hearing the Secretary of State's decision. They would scarcely be prepared to bring the government of the colony to a standstill simply to free Kitt, when the Secretary of State might order his release in a few days. McIlwraith himself argued throughout that the question of the release of Kitt was not in itself important. "Hon. members," he told the House, "must not be under the delusion that this is a mere quarrel about the remission of a sentence or the pardoning of a prisoner." (46)

It is still plausible, however, that cabinet, having opened the case on its merits, would carry insistence to the limit simply on constitutional grounds. This in effect was McIlwraith's explanation. Moreover, the platform of the "Australian National Party" which was adopted just after McIlwraith took office, appears to support this argument. The motto of the party was to be "Alliance, not Dependence." The first objects of the party were—

"1. The cultivation of an Australian national spirit.
2. The Federation of the Australian colonies into a United Dominion with provision for a system of Australian national defence.
3. The energetic vindication and protection of the civil and political liberties, rights and obligations of the people, and the adoption of the principle that laws passed by the Australian Legislature shall not require Imperial sanction to render them operative." (47)

On the surface the conduct of McIlwraith's ministry would seem to flow naturally from this source. Their action on the Kitt case could be considered an obvious extension of object number three.

But a closer scrutiny brings out certain angular features which do not fit happily into this picture of a Nationalist Party vindicating or protecting colonial legislative autonomy. On the 10th August, when the Kitt case was already fairly well advanced, McIlwraith stated the opinion of his ministry on certain proposed amendments to the Letters Patent and Royal Instructions to the Governors of self-governing colonies. These amended regulations had been circulated in draft form for the criticism of the governments concerned before

(46) "Ibid."; p. 194.
(47) Printed "Evening Observer," 20/6/88.

being issued. The amended "instruments" still left the Governor the clear legal right to reject his ministers' advice in cases such as Kitt's. The ministers, McIlwraith wrote,

> "are not prepared to suggest any alterations of the drafts provided that it be understood that the provisions of these Instruments shall not be so construed as to interfere with the conditions of responsible government which I take to be that the Governor shall consult with the Executive Council in all matters appertaining to the government of the Colony, **and shall in all things follow their advice**, except when it may appear to him in any case that Imperial interests or the interests of any other of Her Majesty's colonies would be materially prejudiced thereby." (48)

The puzzle is that they declined, in the middle of the Kitt case, to ask for an amendment which would lay down in black and white the principle they claimed to be defending. McIlwraith had told Musgrave the day before that the Governor's refusal to accept his Council's advice was "a grave departure from the principles of responsible government." Why did he not take this opportunity to request a legal barrier preventing such departures in the future? It can hardly be urged that this is simply an example of the traditional British reluctance to have political powers and functions too closely defined. The definition which McIlwraith pressed for in the memorandum was close and rigid enough in all conscience: it would mean the total prevention of any independent action by the Governor in internal colonial matters. And if the Governor should be rigidly bound by an understanding, why not by specific instructions? The answer seems to be that cabinet had no wish to prohibit such departures **in the future**, but only while the National party held power.

McIlwraith made his attitude plainer in the House. For example, on the 11th September he explained to the (no doubt slightly confused) members:

> "I have never quarrelled with the position the Governor takes up—that he has full power to do what he likes in the way of rejecting any advice. I never quarrelled about that. In fact I wrote a letter about a month ago to His Excellency, saying

(48) To Musgrave, 10/8/88: "Local Official Letters to the Governor," Vol. LVIA. Black letters mine.

> that I thought he ought to have that power, because we do not know when an extravagant Minister might give some extravagant advice that it would be the Governor's duty to reject. But if he rejects advice he must take the consequences. He ought to have the power, and I have never disputed that; but what I do quarrel with is that His Excellency should exercise that power himself and still retain his Ministry. He has no right to the advice of Ministers whose advice he rejects." (49)

It is no doubt true that a pedantic logical consistency, which Emerson is said to have deplored, is rarely a weakness of politicians. Yet it is hard to find the wider harmony in these statements. Indeed, when the smoke of contradiction clears, it is seen that the purely "constitutional" explanation for cabinet's course of action is in shreds. The case was not fought after all, it seems, to establish that the Governor must always accept the advice of his ministers. On the contrary, McIlwraith specifically said, at last, that he did not want that principle adopted. In any case he had rejected in advance the decision of the Colonial Office, the only authority which could alter the Governor's instructions. Again, he and his colleagues could hardly have been asserting that the cabinet must resign if the Governor did not accept his ministers' advice. Obviously cabinet was always free to resign and would do so if it thought the matter sufficiently important, and in any case, McIlwraith could hardly have intended to dictate the tactics of future cabinets. Finally, to establish the rule that the Governor, if he did not wish to take his ministers' advice, must dismiss them and get others whose advice he was prepared to take, would be pointless. The ministers themselves could, if they wished, produce precisely the same result by resigning.

It is thus hard to see that the McIlwraith cabinet wished to lay down, protect or vindicate any constitutional principle, in the sense of either a conventional or written rule limiting or defining future practice. Their action boils down to a simple assertion of the National party's power and intention to compel the Governor to follow their cabinet's advice on questions of pardon; or, in plainer terms, to force Musgrave to release whatever prisoners they wished. With fifty-four seats in a

(49) "Q.P. Debates," Vol. LV: p. 209.

House of seventy-two they could do this easily without establishing a general rule which might prove inconvenient if the party were, at some future time, in opposition when the ministers of the day chose to give the Governor "extravagant" advice.

We are thus forced back, for want of any other feasible explanation, to consider the Governor's version of cabinet's motives. Here there is more evidence. It is not clear when cabinet began to consider the release of the "Hopeful" prisoners, but probably it was, as McIlwraith had promised, as soon as he got into office. Governor Norman, in February 1890, said that the "Hopeful" case had been under consideration by the government "for the last twenty months," i.e. from June 1888.(50) Whether this was so or not, it is certain that the agitation for their release was reopened just about the time when the Kitt case began.

"Figaro" raised the matter on the 7th July 1888. The following issue on the 21st stated that numerous letters were reaching the editor "pleading the sad cause of the 'Hopeful' prisoners." A week later someone had given the editor full information on the dispute over Kitt, which was reproduced in a leader condemning Musgrave. The sub-leader was in support of a petition to the Governor praying for the release of the "Hopeful" men. On the 27th a Committee was formed to direct the campaign in support of this petition. The committee, consisting entirely of National party supporters, held a series of meetings beginning on the 4th of August and running up to the time of Kitt's release.

At the first meeting, a Mr. H. Loader said:

> "He thought that the Governor could not do otherwise than extend his clemency to the prisoners. . . . So far, however, Sir Anthony Musgrave had not shown much clemency of spirit, more particularly in regard to the man who, in the North, was sentenced to three years' imprisonment for stealing two pairs of boots; and if he were afraid to extend his clemency in the case of the 'Hopeful' prisoners, then the people of Queensland must look out for someone else who would." (51)

(50) To Secretary of State, 22/2/90. Conf.: "Governor's Confidential Despatches to Secretary of State." Vol. I.
(51) "Courier," 6/8/88.

The two issues, the Kitt case and the "Hopeful" petition developed together, and were reported and discussed side by side in the newspapers. The "Telegraph," as well as Mr. Loader and others, stated the obvious conclusion. "Speaking plainly," it said, "the way was to be prepared [by the Kitt case] for dealing with the 'Hopeful' prisoners."(52) The connection seemed to be confirmed by a torchlight demonstration for Kitt's release on the night of the 7th September.(53) The chairman at the public meeting following the procession that night was Alderman Galloway (merchant), member of the Council of the National party, and honorary treasurer of the Committee for the release of the "Hopeful" prisoners. Among the eight speakers were: Mr. Cribb (merchant), National party candidate for Ipswich and chairman of the public meeting of the 4th August to petition for release of the "Hopeful" prisoners; H. Burton, honorary secretary of the "Hopeful" committee; W. Widdop (merchant), and Joshua Bailey (merchant), prominent members of that Committee. "It were wilful stupidity," the "Telegraph" said the next day "to affect not to see what much of the Kitt agitation means."

Griffith had evidently come to a similar conclusion. He could not support the Governor on the question of the release of Kitt, but said in the House that he could see no reason whatever for the resignation of the Government. At the same time he advised Musgrave in a memorandum that ministers' recommendations for release or remission of sentence should always be taken unless

"1. Imperial interests or policy are involved; or
2. The offence is one against the laws of the Empire, which may chance to have been tried in a local court; or
3. He is of opinion that the proposed action is an abuse of the prerogative which he ought not to allow."(54)

(52) 5/9/88, Leader. See also 7/9/88, 10/9/88. In his desp., Conf., 4/9/88, Musgrave wrote: "The article which I enclose extracted from a Maryborough paper is only one amongst others but which alludes a little more distinctly than some to the obvious connection between the case of Benjamin Kitt and that of the 'Hopeful' prisoners." There is no copy of the enclosure and no marginal reference. Probably the cutting was from the "Wide Bay & Burnett News." Files for this period are not available in the Brisbane Libraries or in the Mitchell Library, Sydney.

(53) For account see "Evening Observer," 7/9/88.

(54) Printed "Q.P. Debates," Vol. LV; p. 207.

The second proviso introduces a principle so bizarre and ingenious that it seems to have been deliberately framed as a loophole with a specific case in mind. The future Chief Justice of Australia was not unacquainted with constitutional law and one must suspect that he discovered this "principle" with an eye on the "Hopeful" prisoners who were, in fact, tried under "Imperial" law in local courts.(55)

Evidently many people saw a direct connection between the two cases. Certainly, an influential wing of the National party was chiefly interested in Kitt's release as a necessary means to the release of the others. It appears, however, that cabinet later preferred to postpone the recommendation for release of the "Hopeful" prisoners. Despite the fact that a petition bearing nearly thirty thousand signatures was presented on the 15th October, cabinet, for another fifteen months, resisted the pressure of its own party in the House to release the men or table the papers. Possibly the ministry wished to let the Kitt case subside before making the recommendation. Whatever the reason, there can be little doubt that cabinet was anxious to release the men, and the recommendation was finally made, and accepted by Musgrave's successor, in February 1890. The reopening of the Kanaka trade two years later is, of course, another, though not perhaps a disconnected, story.

The evidence on the question of cabinet's motives is far from complete and, while it suggests that Musgrave's explanation was right, does not prove it. Certain conclusions, however, appear to be established: Cabinet did not force the release of Kitt mainly because they thought Kitt's sentence was unjust, nor did they wish to alter the existing constitution. The most prominent supporters of McIlwraith's ministry in the Kitt case were influential in the National party and were leaders of the campaign to release the "Hopeful" men. The Liberal newspapers, and possibly Griffith, as well as the Governor, suspected that the ministers were using the Kitt case to clear the way for release of the "Hopeful" men. Finally, cabinet's action is fully consistent with this view, but quite inconsistent with their own professed motives.

(55) Cf. Norman to Secretary of State, 22/2/90. Conf.: "Governor's Confidential Despatches to Secretary of State," Vol. I. Norman was duly puzzled by this exotic doctrine.

Looking over the whole affair it is clear that the Kitt case was not an attempt on the part of a united colony or of a nationalist party inspired by the spirit of independence, mounting self-confidence or patriotism, to throw off one more Imperial control. The evidence suggests that it can only be explained as a struggle between Sir Anthony Musgrave and certain colonial interests over the Kanaka labour trade and its relation to New Guinea.