

Sorely tried

Democracy and trial by jury in New South Wales

By Ian Barker QC

Barker, Ian, 1935- .

Sorely tried : democracy and trial by jury in New South Wales.

Includes index.

ISBN 0 9751103 0 6.

Title. 1. Jury - New South Wales - History - 1788-1851. I.
(Series : Francis Forbes Lectures - 2002).

347.9440752

Foreword

Ian Barker QC's paper on the history of trial by jury in New South Wales, here published in revised form, was presented in the Banco Court of the Supreme Court of New South Wales on 28 November 2002 as the inaugural Francis Forbes Lecture.

That lecture, and the Francis Forbes Society for Australian Legal History that sponsored it, were named for Sir Francis Forbes.

Forbes, knighted upon his retirement, was the first chief justice of the Supreme Court of New South Wales, between 1824 and 1837.

At a ceremonial sitting of the court held on 17 May 1999 to mark the 175th anniversary of its first sitting in 1824, the Premier of New South Wales described Forbes as Australia's first democrat.¹ He has a substantial claim on all Australians as a founder of the rule of law in this country.

The principal biography of the great man remains Dr CH Currey's *Sir Francis Forbes; the first chief justice of the Supreme Court of New South Wales*² (out of print but readily obtainable). However, through the indefatigable work of Dr JM Bennett, we now also have *Some papers of Sir Francis Forbes* and, as one of the first volumes in Dr Bennett's *Lives of the Australian chief justices* series, *Sir Francis Forbes*. The latter work provides a short, learned account of a great lawyer. Devotees of Australian legal

history continue to owe a large debt to Dr Bennett for the range, quality and thoroughness of his scholarship.³

In his *Portraits of the chief justices of New South Wales: 1824 - 1977* Dr Bennett said of Forbes:

New South Wales was fortunate in the selection of Francis Forbes as its first Chief Justice. Not only was he a sound lawyer and a good judge, but he was also a man of strong and upright character, tempered by a conciliatory manner. Without such qualities no-one could long have presided over the administration of justice in the difficult formative years through which the Colony was then passing.

...

He was often charged with having republican sympathies, but his judicial conduct belied that. Rather, as Sir Alfred Stephen [the third Chief Justice of New South Wales] said, he was 'as a liberal, in advance of the age'. That showed in his judgments – many of which established perpetual precedents for the Colony – and in his efforts to make the law accessible to colonial society as he found it. Disliking form and ceremony he dispensed with much cumbersome English procedure and, by innovations, speeded the administration of justice. He tried to hasten the introduction of trial by jury on the English model, but with only limited success. Concerned to keep the course of the law untainted by political or partisan interests he set too much store upon his own immunity

from them, and would allow himself no extended recreation lest forces adverse to his standards became established in his absence.

So he literally worked himself to death.

...

Although recognized by the honour of a knighthood in 1837, Forbes' prodigious and ill-rewarded labours were too much taken for granted. Posterity now accords to him that recognition he would so richly have merited in his own day.⁴

In the days preceding the inaugural Francis Forbes Lecture, as on the day itself, the Banco Court rang with praise for Sir Francis. With the Supreme Court's official portrait of the Judge overseeing proceedings, on 25 July 2002 a distinguished Canadian lawyer, Professor John McLaren, delivered the inaugural Macquarie Lecture entitled, "'The judicial office...bowing to no other power but the supremacy of the law': Judges and the rule of Law in colonial Australia and Canada, 1788-1840', Forbes' successor, Chief Justice JJ Spigelman, introduced Professor McLaren's lecture and himself returned to the theme of Sir Francis when, on 20 November 2002, he delivered in the Banco Court the inaugural Australian Press Council Address, 'Foundations of the freedom of the press in Australia'.⁵

The Forbes Society was honoured, therefore, when Chief Justice Spigelman introduced Ian Barker as its

inaugural lecturer. We were also honoured by the presence of a descendant of Sir Francis Forbes, and a warm letter of support from Alistair Lockhart, the Mayor of Forbes Shire Council, a country region of New South Wales named for Chief Justice Forbes.

Ian Barker is a leading member of the Australian Bar. Admitted to practise as a solicitor in New South Wales on 11 March 1960, he practised as a barrister and solicitor in the Northern Territory between 1961 and 1980. On 7 August 1974 he was appointed Queen's Counsel for the Territory and in January 1975 joined the fledgling independent Bar of the Northern Territory (then consisting of Michael Maurice and Tom Pauling⁶). On 1 July 1978 he became the Territory's first solicitor-general, an office he held for two years. In May 1980 he was admitted to practise as a barrister of the Supreme Court of New South Wales and duly appointed Queen's Counsel. Although he moved to Sydney late in 1980 he maintained his connection with the Territory. He was a founding member of the Northern Territory Bar Association in June 1980. His career in the Territory is part of the story told by Justice Dean Mildren in *A short history of the Bar in the Northern Territory*.⁷

Elected to the Council of The New South Wales Bar Association in 1984, Ian served on the Bar Council for several terms (1984-1985, 1985-1986, 1986-1987, 1993-1994, 1994-1995, 1995-1996, 1997-1998 and 1998-1999), culminating with service as president of the Bar Association (1997-1999).

There would be few legal practitioners with the breadth of practice, combined with high responsibility, that characterises the career of Ian Barker. During his career in the Northern Territory he appeared in a wide range of matters, including homicide trials, personal injury and commercial cases, mining and liquor licensing cases, and appearances as diverse as work in the Coroner's Court and in the High Court of Australia. He was leading counsel in *R v Anunga*,⁸ and he and Tom Pauling drafted the 'Anunga Rules' for interrogating Aboriginal witnesses with the benefit of an interpreter and a 'prisoner's friend'. As solicitor-general he was responsible for negotiations with the Commonwealth about the terms of self-government for the Northern Territory, establishing and running the Territory's Department of Law and appearing in Aboriginal land claims. He appeared as prosecuting counsel in a number of conspiracy and murder trials, and he represented the Northern Territory Government in Jakarta as an observer in negotiations between Australia and Indonesia about the maritime boundary between the Territory and East Timor. After his move to Sydney in 1980 he continued to appear in a diversity of jurisdictions. He has appeared in a number of notable cases, such as the prosecution of the Chamberlains, the Anderson murder appeal, the defence of Lionel Murphy at his second trial, the Lanfranchi inquest, the Waterhouse family feud and *Marsden v Amalgamated Television Services Pty Ltd*.⁹

With all the best hallmarks of a common law silk – including a reputation as a cross-examiner – Ian’s measured laconic style suggests that he also has something of an equity practitioner in him. For many readers, the quiet ironic understatements scattered throughout his paper will leap from the page. At those points he is at his most persuasive. He appeals to common experience in an uncommon way. However, what might be thought to disqualify him as an equity practitioner is his very real passion for trial by jury, not the stuff of affidavits and interrogatories.

Even when describing, rather than analysing, the history of trial by jury in New South Wales Barker QC offers insights that his experience and standing in the legal profession render unique. He is a witness to the law in action. His strong, but measured, support for trial by jury cannot be dismissed as polemic. He is a trial lawyer equally at ease in civil, as in criminal, trials. He is an advocate accustomed to appear for prosecution or defence with equal professional commitment. He is a lawyer experienced in acting for and against governments, individuals and vested interests of all descriptions. Not much in legal practice has escaped his attention.

In scholarly essays recently edited by Professor John W Cairns and Grant McLeod,¹⁰ attention is drawn to a need to address the history of civil, no less than criminal, juries. After surveying international literature on juries, the editors make two observations that place Barker QC’s paper in context and render its publication

timely. First, they note that, although it is an institution absolutely central to the common law, there has been surprisingly little work on the civil jury in comparison with the level of interest displayed in criminal juries.¹¹ Second, they note that, although the parameters of what we today recognise as the common law were largely set in the nineteenth century, insufficient attention has been given to that century by legal historians.¹² On each of these accounts Barker QC meets the challenge. His call for community participation in the administration of justice addresses civil and criminal jurisdictions with equal concern. He links the present law with its historical roots, with an instructively Australian emphasis on the development of a democratic society in the nineteenth century.

As Ian acknowledges in his Preface, a substantial amount of work has been undertaken by many people in connection with the Forbes Lecture. On behalf of the Forbes Society we acknowledge the support of The New South Wales Bar Association and the Division of Law at Macquarie University. Those organisations joined with the Selden Society in sponsoring the lecture. Special thanks are due to the hardworking staff of the Bar Association (especially its Executive Director, Philip Selth and his staff, particularly Kathy O'Neill, Tahlia Gordon and Larissa Reid). Carol Webster of the Bar has also made an indispensable contribution to the work of the Forbes Society and the Bar Association's History Committee.

Professor Bruce Kercher and Geoff Lindsay SC,

President and Secretary respectively,
Francis Forbes Society for Australian Legal History.

Preface by the President, The New South Wales Bar Association

The civil jury is nearly extinct in New South Wales. Even its current centrality in defamation cases reflects the general programme of hedging it around. The use of juries in criminal matters is also in danger of erosion.

Ian Barker QC's monograph is a timely reminder of the attacks on the jury system by politicians on both sides of Parliament, by judges and by commentators in the media. Not all of these policies and comments display the balance and learning, or even the practical experience, that the topic deserves.

The institution of the jury should not only be defended, but the use of juries should be substantially increased, with the objective of adding both efficiency and community understanding to the conduct of trials in New South Wales.

Arguments, heard all too often, that the non-jury trial is the more efficient mode for the disposition of common law proceedings reflect an economic rationalist's viewpoint that ignores the most important player in the justice system - the wider community.

Arguments that a judge sitting in civil matters without a jury is more 'efficient' or 'cheaper' than a jury trial ignore the crucial community contribution to the

judicial system. The usual jury trial is not substantially longer, or more usually expensive, than a trial by judge alone. It certainly need not be. If the ingenuity and flair in case management and trial procedure which have characterised commercial litigation since the days of Rogers CJ Comm. Div. were re-deployed to streamline jury cases (in an age of literacy after all), hearing times would undoubtedly shrink.

The prospect of a trial by jury generally causes parties either to settle early, or to reduce the range of issues and the evidence which they put in contest. No competent counsel would dream of taking excessive technical points, or otherwise dragging out a trial, before a jury. In a practical sense, juries call lawyers to account. Trial by jury also prevents appeals from being mere second bites at the cherry.

The jury is a major community resource for the justice system. It ensures that certain standards applied in the courts reflect community standards. It ensures that the system is not dominated by the 'professionals' in the system, judges and legal practitioners. Law must never become the preserve of a secular priesthood.

The jury is not some quaint, atavistic survivor of the medieval legal world. It should be at the centre of today's litigation system.

Ian Barker's monograph is a well researched and argued (and readable) 'wake up' call for the restoration of the jury to its proper place.

Bret Walker SC

President

The New South Wales Bar Association

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The Author's preface

I am not an historian. Saying so probably disqualifies me from what I am about to undertake but I will undertake it anyway. I sometimes wish I had been an historian and not a lawyer. No matter how tumultuously historians attack each other, in the main their professional interest is in people long dead. This, it seems to me, must tend towards a placid existence.

Samuel Johnson said: 'Great abilities are not requisites for an Historian...imagination is not required in any high degree.' That may or may not be true. Some historical writings are more imagination than history. Francis Bacon said 'Histories make men wise' which, as a general proposition, is demonstrably untrue. Some men perhaps. James Joyce's concept of history is that it was a nightmare from which he was trying to awake, while Henry Ford instructed the world in 1919 that 'History is more or less bunk'.¹³

As with a lot of the rest of this paper, I did not go to original sources to learn the witty quotations of these great and wise people; I looked at the *Concise Oxford dictionary of quotations*. Much of what I have written derives from secondary sources. I record my debt to Manning Clark's *A history of Australia* and *Select documents in Australian history*; to Professor Alex Castles' *An Australian legal history*; to Mr (now Dr) John Bennett's *A history of the Supreme Court of New South Wales*, *A history of the New South Wales Bar*, Sir Francis Forbes and

Sir James Dowling, to Professor John Molony's *The native born* and his *An architect of freedom: John Hubert Plunkett in New South Wales 1832 - 1869*; to Keith Willey's *When the sky fell down*; to David Neal's *The rule of law in a penal colony*; to Robert Hughes' *The fatal shore*; to Macquarie University's *Decisions of the superior courts of New South Wales, 1788-1899*, to James McClelland's *History of New South Wales: 1728 – 1977*; to Peter Hanks' and Bryan Keon-Cohen's collection of essays *Aborigines and the law* and to Judge Greg Woods' *A history of criminal law in New South Wales: The colonial period 1788 – 1900* and to various texts, papers and newspaper reports acknowledged by footnotes. I am also grateful for the existence of the invaluable *Historical records of Australia* and the *Australian dictionary of biography*.¹⁴

I record my gratitude to Wendy Robinson QC and Carol Webster, members of the New South Wales Bar Association's History Committee, Larissa Reid, Tahlia Gordon, Jenny Hughes, Chris Winslow and Lisa Allen from the Bar Association, and Deirdre Irwin, the Librarian for Frederick Jordan Chambers, for their invaluable assistance with research, my secretary Kathy Thom for her tireless typing of many drafts, similarly my wife Penny, Philip Selth and Kathy O'Neill from the Bar Association and Geoff Lindsay SC (chair of the History Committee) for their huge contribution in editing an unruly manuscript. I am also grateful to Judge Greg Woods for reading the draft and for his suggestions.

I would like to return briefly to the work done by Professor Bruce Kercher and his colleagues at Macquarie University's Division of Law in putting on the Internet the *Decisions of the superior courts of New South Wales, 1788-1899* (www.law.mq.edu.au/scnsw). Much of the material comes from press reports of the time. Until I undertook this task I really did not know of the treasury of Australian legal history so faithfully recorded for posterity by early lawyers and journalists (some of whom, like William Charles Wentworth and Robert Wardell, were both). The university's work in this regard is of great significance to our understanding of a vital part of our heritage. I hope the work will continue. In the end, any errors in this paper are mine.

Chapter 1

Introduction

A fundamental civil right

New South Wales has the historical distinction of being the only settlement of British people who had to fight for trial by jury. The State's origins as a penal colony explain, if not justify, the British Government's initial denial (and subsequent cautious concession) to colonists of a procedural right long regarded as a substantive entitlement of a free people. In the language of the modern world, focused on civil rights, trial by jury is a fundamental right. At various times, and in various places, throughout the world it has been regarded as a 'constitutional' right.¹⁵ As a democratic society slowly emerged in the nineteenth century from what was, in form and substance, a police state the majority of colonists of New South Wales so regarded it.

Francis Forbes, the first chief justice of New South Wales (1824-1837), in whose honour this paper was presented as the inaugural 'Forbes Lecture', favoured trial by jury as an instrument of democracy. He substantially established the rule of law, opposed arbitrary executive government and protected freedom of speech in the early days of what is now one of the world's oldest democratic systems.

Some commentators might think it ironic then that, over the second half of the twentieth century, democratically

elected parliaments have seen fit, incrementally, to curtail the 'sacred right' of trial by jury in pursuit of 'efficiency' of one sort or another. What a police state – in a frontier society remote from the civilised world – could not stifle in the nineteenth century, government has suppressed in the twentieth century in the name of 'management'. Judges, in the name of case management, have lent a hand in this unfortunate process.

The administration of justice is poorer for exclusion from it of the people it serves. Unchecked by juries, judges lose a connection with their community. Unrefreshed by juries, presentation of judicial decisions as reflective of community standards may depend on a legal fiction that judges are representative of the community. Unaided and unprotected by juries, judges are easy prey to crusaders in the mass media, including arbiters of public opinion on talkback radio and judge-bashing politicians.

Without the robust independence of juries to call them to account, all branches of government (the judiciary, parliament and the executive) risk isolation from the people. Ironically, each branch of government has acquiesced in exclusion of the people from the administration of justice contemporaneously with recognition by the High Court of Australia that, since all colonial ties with Britain were severed upon enactment of the *Australia Acts* of 1986, 'the people' must now be seen as the ultimate source of power and authority in the Australian polity.¹⁶

Government cannot compensate for the loss to the administration of justice of juries by broadening the class of appointees to the judiciary – judges by any name are judges all the same. Nor can it do so by expedient resort to ‘alternative dispute resolution’ presided over (usually in private) by this or that expert. Still less can it do so by specialist tribunals established, and governed, by statutes crafted to serve vested interests, to attain cherished policy objectives or simply to limit the rights of people. The hallmark of a jury is that it can be obstinately independent, not easily compromised or controlled. Hence its vital role in a free society.

The editor of the *Australian Law Journal* was right to recently dismiss a suggestion that the criminal justice system might be more effective if assessors sat with a judge at criminal trials rather than having a judge and jury.¹⁷ The genius of the jury system is that 12 ordinary people apply commonsense and community standards to the case before them. Equality before the law is aided by committing decisions of guilt to ordinary people, not hand-picked professionals from the government of the day. The same class of people – ordinary men and women – can make an equally important contribution to civil cases.

The jury: A working definition

The relationship between juries and democracy is inherent in the very concept of a jury.

As a working definition, a jury might now be described as a body of people summoned to decide questions of fact in a judicial proceeding. However, the precise composition and role of any jury must, as in most things, depend upon context.

That point is illustrated by the fact that in this paper reference is made to various forms of ‘jury’: grand juries, petty juries, military juries, coronial juries, special juries, juries of matrons and *juries de medietate linguae*. Of these, what we generally think of as a jury today – a body of people summoned to determine questions of fact in a trial – is, in the British historical tradition, described as a ‘petty jury’ to distinguish it from a ‘grand jury’. In British tradition grand juries were required to inquire whether there was sufficient cause to call upon an accused person to answer a charge. In short, they accused a suspected offender, leaving a petty jury to try him or her. Sometimes the same jury that indicted a person was afterwards required to serve at the trial. By degrees, however, it became established that jurors who tried an accused should not be those who put him or her on trial.¹⁸ The concept of a grand jury has never been given substantive operation in New South Wales. In the present day, the work formerly done by a grand jury in England is, in New South Wales, performed by a magistrate, sitting in a committal hearing, who determines whether an accused person ought to stand trial on an indictable charge based upon evidence for that purpose led by a prosecutor, usually a public prosecutor.

The first regular use of juries in Australia was in coronial inquiries, as early as the 1790s. 'Coronial juries' were empanelled to assist the coroner in the determination of causes of death. The battle for 'trial by jury' that marked the emergence of democracy in New South Wales was a battle for a right to be tried by a 'petty' jury.¹⁹

British origins of the jury

The history of trial by jury in England up to 1788 is a vast narrative.

Like the grand jury, the origins of the petty jury are obscure. As Maitland says, 'we cannot trace this back to any positive ordinance; it makes its way into our procedure almost insensibly'.²⁰ It does however appear that a form of trial by jury for both civil and criminal causes was recognised and adopted in the Curia Regis by the time of Henry II. In criminal cases the jurors first acted as grand juries and were required to declare whether or not they suspected the accused to be guilty of the crime imputed. If they did not suspect the accused, then he or she was acquitted. If they did suspect the accused had committed the crime, the accused was then put to clear himself or herself by ordeal.²¹ This was the process seen in the assize of Clarendon in 1166. An inquest was to be made through each county and through each hundred by 12 lawful men of the hundred and by five lawful men of each township. They were bound to present to the justices all persons of evil fame who then had to submit to the test

of ordeal by fire or water. Later in the twelfth century in the assize of Northampton the 'recognitors' can be seen as a grand jury while trial by ordeal was still regarded as the only way of establishing guilt. Ordeal was abolished early in the thirteenth century and the petty jury method of trial was adopted; this seems to have been the real beginning.

But as Maitland points out, during the reign of Henry II an accused person could purchase from the king the privilege of having questions tried by an inquest of neighbours, and Magna Carta later said that 'the appellee' was to have a right to put himself upon an inquest without having to purchase this as a privilege from the king. In the evolving of the system, a person could be tried by a jury only by consent; if the accused person did not consent, the torture *peine forte et dure* then followed, until the accused person consented to trial, or died.²²

Early jurors were in effect witnesses. If a trial of a case presented difficulties the jury summoned was authorised to 'afforce', that is, add to their number so as to obtain persons who could supply the necessary information. This practice brought into prominence the difference between jurors who knew the facts in dispute and those who did not, and the afforced jurors gradually came to be separated from those who were uninformed. The uninformed jurors came to lose their original function as witnesses and to assume the character of jurors as we now know them.²³

As to civil cases, the jury system is again seen during the reign of Henry II; a grand assize was instituted as an alternative to 'the barbarous and unchristian custom of duelling'.²⁴

Unanimity: Not mere committees

Having disposed of 600 years of history in five paragraphs, let me turn to the most significant feature of the process, unanimity, so blithely ignored by those who contend for verdicts by majority, as though juries act as mere committees. The requirement of unanimity in the petty jury is explained historically by the insistence that no person should be condemned unless 12 persons concurred in finding him or her guilty.²⁵ Perhaps an underlying factor was that the law had no consistent practice for solving the difficulty caused by a jury which disagreed and social harmony, as well as prudence, dictated unanimity.²⁶ In *Cheatle v The Queen*²⁷ the High Court pointed out that the common law has, since the fourteenth century, 'consistently and unequivocally insisted upon the requirement of unanimity'; thus reflecting a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt.

In *Fittock v The Queen* McHugh J, although speaking in the context of a debate about s80 of the Constitution (the trial on indictment of any offence against any law of the Commonwealth shall be by jury) emphasised the true significance of trial by jury when he said: 'The purpose of s 80 is to protect the citizen from the executive and

judicial power of the Commonwealth by ensuring that trials on indictment will be determined by representatives of the community who are unanimous in their verdicts.’²⁸

The importance of the jury system

Judicial statements about the system are almost endless. Writing in his *Commentaries* Blackstone said:

We may here again observe, and observing we cannot but admire, how scrupulously delicate, and how impartially just the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In it’s caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shewn of malice or favour to either party.²⁹

Lord John Russell said that it was to trial by jury that the government of England owed the attachment of its people to the laws.³⁰

Lord Atkin said in 1922:

Trial by jury, except in the very limited classes of cases assigned to the Chancery Court, is an essential

principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases. Many will think that at the present time the danger of attack by powerful private organizations or by the encroachments of the executive is not diminishing. It is not without importance that the right now taken away is expressly established as part of the American constitution.³¹

Sir Frederick Jordan said of juries:

As regards serious criminal offences, I do not suppose that anyone with any knowledge and experience would contend that any other system is possible in a community settled from British stock. As regards civil matters, the advantage of the jury system is twofold. In the first place, although the lives of Judges are by no means as cloistered as people are apt to suppose, the Bench being recruited from men who have experienced the rough and tumble of life at the Bar, the combined experience of four men is likely to be greater than that of any one man.³²

Consider what New South Wales Attorney General Walker said about juries in 1977, when introducing the *Jury Bill*:

As I said in my introductory speech, the jury system aims to provide the courts with a tribunal that is both

impartial and representative of the ordinary citizen. I am sure honourable members will agree that these twin objects are laudible indeed and are worthy of strenuous efforts to ensure they are maintained. I am sure honourable members will agree, also, that present-day juries are truly impartial.³³

Upon his retirement on 11 December 2001, Priestley JA lamented the erosion of trial by jury in civil cases in New South Wales, saying:

The reason always given in support of this trend is that it is cheaper and more efficient to do away with juries. Even if this be so, of which I am not convinced, the reason misses the main point of juries, the spreading of power within the community. The more widely spread the exercise of legal power is, the healthier, it seems to me, to be.³⁴

In 1936 Dr HV Evatt said:

Perhaps the most important and most practical lesson to be learned from this review of the jury system in Australia is that every proposed alteration or modification of it should be carefully examined and, unless definitely proved to be necessary, rejected.³⁵

In New South Wales his advice has been largely ignored.

Recent comments

On 28 May 2002 the Premier of New South Wales introduced in the Legislative Assembly the *Civil Liability Bill*. The Act commenced, retrospectively, on 20 March 2002. The legislation severely limits the right of injured people to sue, and restricts the quantum of their claims when they do. It was accompanied by amendments to the *Legal Profession Act 1987* which require lawyers to assume the onus of being satisfied that a claim or defence has a reasonable prospect of success before they can provide 'a legal service' on a claim or defence. During his second reading speech Mr Carr said:

Since I released the consultation draft of the bill [on 7 May] I have met with many local government and community representatives. They have told me that the approach of the courts to public liability is unsustainable, and the Government agrees with them. We need to protect our beaches and parks. We need our roads and schools to operate free from unrealistic standards – standards imposed by the courts with hindsight and with no regard for the cost to the community.

...

We cannot go on like this. I heard reports from the local government representatives that I spoke to yesterday and from the community representatives that they know of three generations of one family living off compensation claims; that they have stories of repeat claimants; that tripping over a defective pavement is a common syndrome. As people tell stories that they put

money down on the lawyer's table and got a return from a judge dressed in Santa Claus gear, the practice will spread.³⁶

The legislation follows sweeping restrictions on the rights of people injured in motor vehicle accidents, imposed in 1998 by the *Motor Accidents (Amendment) Act* and then in 1999 by the *Motor Accidents Compensation Act*. The *Civil Liability Act 2002* was followed by the *Civil Liability (Personal Responsibility) Act 2002*, which restricts even further the right of an injured person to be compensated for personal injury.

The Government (so it says) blames judges and lawyers for the insurance crisis. Nobody in government or opposition appears to have considered whether the rise in aberrant verdicts and the diminution of jury trials in civil cases is mere coincidence.

In more recent years it was usually the defendant, almost always an insurer, who sought trial by jury. It must be at least strongly arguable that the involvement of ordinary people in the system had a moderating effect on personal injury claims. One or two jury cases cannot have brought the system to its knees. After all, it is ordinary people who use the beaches and parks the premier is so worried about and it was a single judge as recently as 1995 who in *Blake v Norris* caused much fluttering in the dovecotes by awarding an injured actor \$33.3m (set aside on appeal). The judge, Hulme J, assessed damages for personal injury at a record (for New South Wales) \$44.3m, but reduced the sum by 25 per cent for contributory negligence. And it

was a single judge who in December 2002 awarded Ernest Vairy \$5m damages against Wyong Shire Council for injuries sustained when he dived into the sea. One wonders how a jury would have viewed the case.³⁷ But successive governments have succeeded in making trial by jury in civil cases the exception. With the so-called insurance crisis they have seen their legislative chickens come home to roost; they have excluded ordinary people from the system. Juries represent community standards. They connect the justice system to the community. Whether or not they are wanted by accused people, by plaintiffs or defendants, they are objectively invaluable. Parliament has effectively divorced the community from the courts.

In his 'The state of the judicature' address to the Australian Legal Convention on 10 October 1999 Gleeson CJ saw this when, among other comments about juries, he said:

Juries, civil and criminal, represent an important point of contact between the administration of justice and the community. The jury system involves cost. Jury trials tend to be slower than trials by judge alone, and, for many people, jury service is inconvenient. Even so, the common law tradition of having disputed issues of fact determined by a jury did much to keep the courts in touch with the public, and with community standards.

The role of the jury in the administration of civil justice has greatly diminished, and in some Australian jurisdictions has virtually disappeared.³⁸

In an address to the Judicial Conference of Australia's 2002 Colloquium, Spigelman CJ pointed to the need to systematically review the options open to society to reduce insurance premiums by principled alterations to the legal system. In the process he cited a statement by Thomas JA of Queensland who said, in part:

These are some of the tools that increasingly permit unrealistic results in such cases, in both liability and quantum. Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.³⁹

In my opinion trial by jury in personal injury cases should be a prominent option amongst those referred to by Spigelman CJ.

Gleeson CJ returned to the subject in his speech to the 13th Commonwealth Law Conference on 17 April 2003. The Government of New South Wales should take account of what he said about juries:

Historically, one of the means by which the administration of justice was kept in touch with the community has been trial by jury. The jury system has been one of the most important forms of contact

between the justice system and the public it seeks to serve. In many Australian jurisdictions, in the interests of cost and efficiency, trial by jury has practically disappeared from civil justice, and there has been a trend towards increasing the range of offences that are dealt with summarily. These developments may be necessary, but they involve a cost. That cost does not appear in any set of accounts, but it is real and substantial. Community participation in the administration of justice is good for the community, and good for justice. In Australia, we have never had the English system of involvement in the administration of criminal justice by lay magistrates. Juries are the principal, and in many parts of Australia, the only, form of lay involvement in the work of the courts. Decisions to reduce their role need to take due account of all the purposes they serve.⁴⁰

Chapter 2

The early years in New South Wales, 1788 – 1828

The beginning

In spite of Henry Ford's reservations, there are some certainties in Australian history.

A problem for a paper like this is that the colony's boundaries and protectorates expanded and contracted, between 1786 and 1863.

On 22 August 1770 Captain James Cook arrived at Possession Island off the coast of Cape York. He called the eastern mainland New South Wales and claimed it for King George III. It was subsequently defined in the 1786 commission to Governor Phillip as extending from the northern extremity of Cape York, in the latitude of 10 degrees 37 minutes south, to the southern extremity in the latitude of 43 degrees 39 minutes south. It therefore included the present Tasmania, and extended westward as far as 135 degrees longitude, which commences in the south at a line to the west of the present Port Lincoln and extends north to the east of the present settlement of Maningrida in the present Northern Territory.⁴¹

In 1825 Van Diemen's Land became a separate colony. In 1825 New South Wales' western border was extended

to the present eastern border of Western Australia. In 1836 South Australia was excised from New South Wales. In 1851 Victoria went its own way and similarly Queensland in 1859. The present Northern Territory remained part of New South Wales until added to South Australia in 1863. There is some uncertainty about the early white history of New Zealand. All of Australia east of the 135th meridian including adjacent Pacific islands constituted New South Wales, but there was a vague understanding that if any authority was to be exercised over the settlers in New Zealand it would be by the Governor of New South Wales. In 1817 he was given jurisdiction to intervene in disputes between British settlers and Maoris. In 1840 New Zealand became a dependency of New South Wales, but for a few months only.⁴²

For present purposes my focus is substantially on New South Wales with its present boundaries, with some references to Port Phillip, Moreton Bay and New Zealand. The Supreme Court of New South Wales was established at Port Phillip and Moreton Bay, but never in what became the other mainland colonies or New Zealand. I do stray into the Northern Territory with some sentimental reminiscences; my excuse is that they are to do with juries, and the Todd River Valley and Port Darwin were once part of New South Wales.

The first settlement in New South Wales provided a political solution to a social problem caused by the loss of the American colonies, fear of insurrection, a high rate of crimes such as highway robbery and burglary,

the fear of the outbreak of diseases in convicts consigned to the overcrowded hulks and the manifest failure of the hulks as prisons. It was also, I think, inspired by the perhaps altruistic belief that transportation would ultimately enure to the benefit of the convict transported, in the next life if not during life on earth.

New South Wales was a penal colony, at first ruled by governors who were necessarily dictators, and whose edicts were enforced by the military. For the convicts it was a prison.

In 1831 the three judges of the Supreme Court were called upon to determine whether a convict twice attainted of capital felony, whose sentence each time had been commuted to transportation, could be a competent witness in a court of justice in the colony. Forbes CJ thought not; Stephen J and Dowling J thought otherwise.⁴³

In the course of his finding Dowling J said:

First, it is a matter of history, that until within the last ten years, New South Wales has, with few exceptions, been exclusively dedicated by the Crown, to the reception and detention as a place of punishment, and reforming of offenders against the laws of the empire. To all intents and purposes it has been treated and regarded as an extensive gaol, and most, if not all, the laws and regulations for its government have been founded on that footing. In no sense of the word has it

been, nor can it have been considered as a free Settlement and Colony of Englishmen. In this respect it has been in the lowest grade in which a society of English subjects could be placed to form a community, and differed from every other Colony under the dominion of the British Crown.⁴⁴

(The case is important in another context. The majority refused to follow the English rule that evidence would not be received from infamous witnesses. Dowling J observed that if the infamy rule were strictly applied, about three-quarters of the population would be excluded from the witness box. In 1844 the court's ruling was embodied in the statute 8 Vic No.1.)

As Robert Hughes put it, 'An unexplored continent would become a jail. The space around it, the very air and sea, the whole transparent labyrinth of the South Pacific, would become a wall 14,000 miles thick.'⁴⁵

The first convicts came in a fleet of 11 ships, including five transport ships, led by the flagship *Sirius* which entered Port Jackson on the afternoon of 26 January 1788. When they left England they carried 548 male and 188 female convicts. Forty died during the voyage.⁴⁶ The legal authority for the system was Orders in Council dated 6 and 22 December 1786 ⁴⁷ made under 24 Geo 3, c.56 (1784) (*An Act for the effectual Transportation of Felons and Other offenders...*). The offences for which they were sentenced varied from highway robbery to stealing one coffee pot. John Williams, aged 15, had stolen a cask of

liquor. Elizabeth Beckford, aged 70, had stolen 12 pounds of Gloucester cheese.⁴⁸

First juries

In *Mabo* (No. 2) Deane and Gaudron JJ restated a principle of law long accepted:

Where persons acting under the authority of the Crown established a new British Colony by settlement, they brought the common law with them. The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was 'reasonably applicable to the circumstances of the Colony'.⁴⁹

In a very limited way the first settlers did bring with them trial by jury. From the beginning the governor convened juries of 12 to try issues as coroner's courts, without any statutory authority or order, and for a period between 1824 and 1828 there were grand juries and jury trials in criminal cases in courts of quarter sessions, because of what seems to have been an accident of drafting and a perhaps generous view of the law by the first chief justice, Francis Forbes. I will come to that. And sometimes a jury of matrons was convened to try the issue of a condemned woman's asserted pregnancy. Perhaps the first trial in Australia by people not of the military was by a jury of matrons in 1789. I will return to that subject. Until 1833 there were no jury trials in the Supreme Court in criminal cases because they were legally proscribed. The jury system was not

complete in criminal cases until 1839, and in civil cases until 1844.

The governor had very great power. According to orders published in the *Sydney Gazette* between 1803 and 1810, he decided, amongst other things, times of religious observance, rights of assembly and publication, whether people could marry, whether a man was sane or not, how much men should drink, how much those victualled by the government should eat, and what should be taught in schools. He could pardon, grant tickets of leave and grant land.⁵⁰ The extent of his powers was uncertain because of the difficulty in distinguishing between executive acts and those legislative in character. Governors were subsequently given specific power to legislate on the advice of the Legislative Council, first constituted in 1825.

It is relatively easy to see the legal reasons and social imperatives which were impediments to trial by jury in the early days of the colony. A rather more complex question is why it was not achieved for the Supreme Court for over 50 years. In fact, it was not until September 1839 by an Act of Governor Gipps, acting with the advice of the Legislative Council, that the trial of criminal cases by juries of citizens was finally established (*Jury Trials Act*) and it was not until August 1844 that the trial of civil causes by juries was established (*Jury Trials Act*).

The constitutional history of New South Wales before federation was succinctly summarised by Professor GA

Wood in the introduction to Karl Cramp's *The state and federal constitutions of Australia*:

The story begins in the depths of the Nether World. It is as if a deliberate experiment was being tried to test the quality of the British race in the most unfavourable circumstances that could be invented. We have the careful selection of the unfit, a society of criminals and the government of a prison. Then, very gradually, change and progress begin. Free colonists arrive. Criminals become emancipists. The first generation passes and gradually a homogeneous British society is formed. British ideas find political expression. Despotism becomes limited and tempered by growing respect to Public Opinion. Martial Law gives way to the Jury. The Press becomes free. The Governor is instructed to act with a Council of Notables. To these, at a later date, are added a majority of elected representatives of the people, and at last a constitution is established by which the colonists obtained full rights of self-government.⁵¹

No right to juries

Going ahead briefly to 1871, an interesting historical insight was provided by the Supreme Court in *The Queen v Valentine*.⁵² It was argued that Valentine, a native of Italy was entitled to be tried by a jury *de medietate linguae* on a charge of perjury. Mr Darley,⁵³ counsel for the prisoner, argued that the right to such a trial arrived with the original colonists because it was the product of the Act 28 Ed III, c.13 (1354), which first

gave foreigners a right to a jury *de medietate linguae* in England.

The statute, called *The Statute of Ordinance of the Staples*, was passed for the protection and advancement of English trade and to encourage the resort of foreigners to the established staples, or markets, for the purchase of articles the produce of England. Disputes could be settled by juries one-half of which were to be foreigners if a foreigner was a party.

The Supreme Court was unimpressed by Darley's arguments. Solicitor - General William Windeyer ⁵⁴ (not untouched by a popular prejudice which found its way into the White Australia policy), argued, successfully, that the statute of Edward III 'always was and still is totally inapplicable to the circumstances of this colony. It was a merely local law, passed for a particular purpose, viz., the encouragement of foreign merchants to trade in certain English markets, and at a time when only Christians resorted to England for traffic. There is no necessity for such a law in these days, and here, where a large proportion of the aliens consisted of Chinese and other heathens.' ⁵⁵

Chief Justice Stephen said:

But Englishmen bring with them to a new country no portion of the statute law, other than such as is suited to their condition and circumstances; and until at all events its acquisition of a Legislature in 1824 New South Wales was mainly a penal settlement. ...

however, trial by jury properly so called never existed here, as a right, either in criminal or civil cases until long after the passing (in 1828) of the 9th Geo IV, c.83. Both by that statute, indeed, and its predecessor the 4th Geo IV, c.96, as by all the previous statutes affecting this colony, that mode of trial was rendered impossible – and therefore in effect withheld or taken away – by the substitution for it of a system of trial, in civil cases by two assessors and in criminal by seven military or naval officers.⁵⁶

(He was not right in saying trial by jury properly so called never existed until after 1828, because there were Quarter Sessions trials in New South Wales between 1824 and 1828.)

Hargrave J⁵⁷ was of a contrary view, expressed equally robustly, saying, amongst other things:

We read there (Blackstone's Commentaries Vol.2 Chapter 23) that trial by jury is founded on the old common law of England as confirmed and secured to us all by the celebrated 43rd section of Magna Carta and the 29th section of the Charter of Henry III.... If this court therefore, were to hold that 'trial by jury' in this colony rests, as law, only on the Colonial Jury Acts we should be ignoring all the common law rules and maxims as to juries besides ignoring Magna Carta and the Charter of Henry III as entirely without application to the colony.⁵⁸

In the view of Faucett J,⁵⁹ the Court of Criminal Judicature established in 1787, constituted by six military officers and the Judge Advocate, did not in any way form a jury. He was of the opinion that the whole course of imperial legislation on the subject of juries *de mediatate linguae* was 'utterly inconsistent with the existence of such a right as is now claimed'.⁶⁰

As Dr Bennett observed, even if the first free settlers did bring with them the right of trial by jury, it served no practical purpose for there was no place for a jury in a convict settlement.⁶¹ The problems with the argument that trial by jury was a right brought by the first settlers are (at least) twofold: firstly, Phillip's commission was expressly to the contrary, and secondly, the practical difficulty of empanelling a jury would have been, at first, insuperable. But that did not remain so.

The First Charter of Justice, 1787

Governor Phillip came armed with the king's warrant, being letters patent for the charter for the establishment of a Court of Civil Jurisdiction and a Court of Criminal Jurisdiction. The latter had been authorised by the statute which authorised the establishment of the colony, 27 Geo 3, c.2 (1787).⁶² The letters patent are often called the First Charter of Justice.⁶³

The Court of Civil Jurisdiction was to consist of the Judge Advocate for the time being 'together with two fit and proper persons, inhabiting the said place' to be appointed by the governor. It was given jurisdiction to

hear and determine in a summary way all pleas concerning lands, debt, accounts, contracts, trespasses and all other personal pleas. It could grant probates, administer intestacies and was empowered to coerce the appearance of people and to enforce its judgments. An appeal lay to the governor and then to the king in council if the subject matter exceeded the value of £300.

The letters patent recited that the Act authorised the governor to convene:

a Court of Judicature for the Trial and Punishment of all such Outrages and Misbehaviours, as, if Committed within this Realm would be deemed and taken according to the Laws of this Realm to be Treason or Misprision thereof, Felony or Misdemeanour, which Court shall consist of the Judge Advocate to be appointed in and for such places, together with Six Officers of His Majesty's Forces by Sea or Land, which Court shall proceed to try such Offenders by calling such Offenders respectively before that Court, and causing the Charge against him, her or them to be read over, which Charge shall always be reduced into Writing, and shall be Exhibited to the Court by the Judge Advocate and by Examining Witnesses, upon Oath to be Administered by such Court, as well for as against such Offenders respectively; and afterwards adjudging by the Opinion of the Major part of the persons composing such Court that the party accused is or is not (as the Case shall appear to them) guilty of the Charge, and by pronouncing Judgment therein (as upon a Conviction by Verdict) of Death, if the Offence

be Capital, or of such Corporal punishment not extending to Capital punishment, as to the said Court shall seem meet; and, in Cases not Capital, by pronouncing Judgment of such Corporal punishment not extending to Life or limb as to the said Court shall seem meet.⁶⁴

A provost marshal was authorised to enforce sentences.

Sentence of death could not be passed unless five members of the court should concur; if they did not so concur, the case had to be transmitted to the king.

Punishments were harsh. For offences not capital, the commonest was flogging (although not, it seems for women).⁶⁵ Refinements such as being nailed by one's ears to the pillory, burning on the hand, starvation diets and being chained in close confinement were not uncommon. The first court was convened on 30 January 1788 to try a convict for abusing some soldiers and striking one. He was convicted and sentenced to 150 lashes with a cat of nine tails.⁶⁶ Hangings were public and often. The following is taken from the *Australian* of 21 October 1828: ⁶⁷ It serves to remind us of the condition of New South Wales' society in the early nineteenth century (albeit two charters removed from the letters patent of 1787):

EXECUTION

Monday morning witnessed the awful and disgraceful exit of nine unhappy culprits from this world by the

hands of the common hangman, from the execution drop in rear of the body of the gaol. Frequent as these spectacles are and have been after every Criminal Assize, the circumstance of so considerable a number, drew together a more considerable crowd than perhaps had ever before attended as spectators on the like occasion in Sydney.... The oldest among them did not exceed thirty years, there was scarcely one amongst the culprit group but had ties of kindred or association to be severed from. The culprit Troy was not only a husband but a father, the father of five children, and had been for some time a house-holder in Sydney. The anguish attendant on the last parting meeting between this wretched man and his wife and children, is said to be indescribable. Troy expressed a wish that neither his wife, children, or friends' should be witnesses of his disgraceful death. ...

On a concerted signal from the Sheriff, the hangman withdrew the spring sustaining the fatal drop board – the culprits fell to the length of their ropes, and after some moments struggling ceased to have any concern with the affairs of this world. After being suspended the usual time the nine bodies were lowered and disposed to the coffins laying beneath, Bradley's being conveyed away on a bier by his friends.

Hangings attracted many spectators. At least 10,000 people are said to have watched the execution of John Knatchbull at Darlinghurst on 13 February 1844.⁶⁸ Public hangings were abolished in 1855.

When the colony began, the death sentence was imposed for offences which attracted the penalty in England. In 1823 an English statute ⁶⁹ allowed a judge to record the death penalty rather than impose it except in cases of murder. Over the nineteenth century the death penalty was gradually abolished for a substantial number of offences, the New South Wales legislature adopting much of the English reform Acts.⁷⁰ The death sentence in New South Wales was abolished in 1955 for all offences except piracy and treason and some other Commonwealth offences.⁷¹ Piracy no longer attracted the death penalty in New South Wales after the passing of the *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985*. The death penalty for all Commonwealth offences was abolished by the *Death Penalty Abolition Act 1973*.

The first Criminal 'Court' had all the trappings of a military court martial. There was no judge, but a judge advocate. The first two judge advocates were not lawyers. There was no jury, but a tribunal of military officers. There was no grand jury to consider in the first place whether there was a case. The judge advocate was both prosecutor and one of the decision makers. He was subject to the directions of the governor and any other superior officer.⁷² It is arguable that in its way that the Court of Criminal Jurisdiction, although not comprised of juries, was not much worse in its treatment of people than the criminal courts of England, which by the nineteenth century had some 200 capital offences on the statute book.⁷³ Whatever one's view, the

Act did at least provide a form of due process to act outside of which was illegal. But this formality did not always prevent those in authority from acting illegally. For example, in 1804 many of the 'Vinegar Hill' rebels were summarily shot or hanged without trial.⁷⁴

Witnesses as well as prisoners could be flogged. Flogging witnesses it seems, was an ordinary result of investigations when they did not end in convictions in Hobart Town. As late as 1823, Deputy Judge Advocate Wylde⁷⁵ at Hobart peremptorily ordered a witness to be taken outside and given 100 lashes, presumably for contempt.⁷⁶ Such a process in the courts of New South Wales in 2003 would, I think, wonderfully concentrate the minds of witnesses, although it would probably become more difficult to serve subpoenas.

The Second Charter of Justice, 1814

In 1814 new civil courts were constituted under letters patent, sometimes referred to as the Second Charter of Justice. The charter, sealed on 4 February 1814, came into force on 12 August 1814.⁷⁷ The letters patent, like those of 1787 (insofar as they authorised the establishing of courts of civil jurisdiction), were granted entirely without statutory authority. The new charter did not materially affect the criminal process, except that it made governors, lieutenant governors, judge advocates, judges and deputy judge advocates justices of the peace, with the same powers as English justices.

The letters patent expressed that 'in order to provide for the better Administration of Civil Justice within our said Colony of New So. Wales' there were created three Courts of Civil Judicature, being: 'The Governor's Court', 'The Supreme Court' and the 'Lt. Governor's Court'. The Governor's Court was to consist of the Judge Advocate together with two persons appointed by the governor. The Supreme Court was to consist of a judge to be appointed by commission together with two magistrates appointed by the governor. The Lieutenant Governor's Court was to consist of the Deputy Judge Advocate of Van Diemen's Land together with two persons inhabiting Van Diemen's Land appointed by the Lieutenant Governor of Van Diemen's Land.

The Governor's Court was given civil jurisdiction in matters where the sum in dispute did not exceed £50. The Supreme Court was constituted a court of record and given much the same jurisdiction as the former Court of Civil Jurisdiction as well as jurisdiction in equity, 'except where the Cause of Action shall not exceed £50'. Appeals lay to the governor if the judge differed from the magistrates, or if the matter at issue exceeded £300, and thence to the Privy Council if the amount involved exceeded £3000.

Authorising the creation of a Supreme Court was one thing. Establishing it was another. Governor Macquarie's request for funds for an imposing 'Court House and Town Hall under the same roof' which would cost £6000 was rejected by Earl Bathurst. The Secretary of State saw no need for a building beyond the

temporary expedients already in use. His reasons were that 'there is not any intention at present of remodelling the Courts of Justice, or introducing the Trial by Jury (upon which Suppositions your Recommendation of a new Court House is principally founded)'.⁷⁸

On 7 February 1814 Jeffrey Hart Bent, the brother of the third judge advocate Ellis Bent, was appointed the first judge of the Supreme Court.⁷⁹ The court did not function for two years. Bent complained that the only place for a court in New South Wales was a room 20 feet square, also used as an office and records room, 'destitute of every convenience'.⁸⁰ He did not get on with Macquarie and is described by Professor Castles as a person of 'selfrighteous pomposity'⁸¹ which, as he was a barrister of ten years standing turned judge, was perhaps not to be entirely unexpected. He refused to sit with the lay magistrates because they would have permitted three ex-convict lawyers to practise in the court (George Crossley, Edward Eagar and George Chartres).⁸² He thereby effectively rendered the court impotent. He was fined £2 for refusing to pay a road toll and refused to pay the fine, claiming he had the same immunity as the sovereign. He was finally recalled in 1817 and replaced by Barron Field, who managed to breathe some life into the court. He seems to have been an indifferent lawyer and a bad poet.⁸³

The Third Charter of Justice, 1824

Constitution of the Supreme Court

The New South Wales Act of 1823 (4 Geo 4, c.96) authorised the establishment of the first Legislative Council, to consist of five, six or seven persons, appointed by the Crown. The governor, acting with the council's advice, was given power to make laws for the peace, welfare and good government of the colony, such laws not being repugnant to the laws of England (s24). Five members, including Francis Forbes, were nominated to the first council; it convened for the first time on 25 August 1824. By the *Australian Courts Act* of 1828 (9 Geo 4, c.83) the council was expanded to not more than 15, nor less than 10, nominated by the king. The first democratically elected council sat in 1843.

The *New South Wales Act*, besides giving us the beginnings of a parliament, authorised the Third Charter of Justice. The charter was approved and sealed on 13 October 1823 and proclaimed on 17 May 1824.⁸⁴ The Act made temporary enactments, made permanent by the Act of 1828. It provided for the establishing of the supreme courts of New South Wales and Van Diemen's Land. The Supreme Court of New South Wales was to be constituted by a chief justice, the king being given the power to augment the number of judges to three. The court was to have cognisance of all pleas, civil, criminal and mixed, in New South Wales and islands and territories, as fully as the courts at Westminster. It was a Court of Oyer and Terminer and General Gaol Delivery.

Clause VIII of the 1824 charter appointed the 'Trusty and well beloved Francis Forbes Esquire to be the first

chief justice of the said Supreme Court of New South Wales the said Francis Forbes being a Barrister in England of five years standing and upwards'. Forbes was sworn in on 17 May 1824.

Section 3 of the *New South Wales Act* gave the court jurisdiction to hear and determine all treasons, piracies, felonies, robberies, murders, conspiracies and other offences, including those committed in places where the Admiral had power, and New Zealand. Section 4 directed that all crimes, misdemeanours and offences would be prosecuted by information in the name of the attorney general or other person appointed by the governor, and all issues of fact were to be tried by the judge and a 'jury' of seven commissioned officers of His Majesty's sea or land forces. The commissioned officers could be challenged 'upon the special ground of direct interest or affection'. The significant advance was that prosecutions would be brought by the attorney general and not a judge advocate, and trials would be presided over by the chief justice, who was independent of the prosecutor. Also, verdicts had to be reached unanimously, unlike verdicts of the earlier tribunal. However, the Act (and therefore the charter) brought trial by jury in criminal cases (as most people understood the term) no closer. Section 8 empowered the king with the advice of the Privy Council thereafter to 'cause the Trial by Jury to be further introduced and applied in such parts of *New South Wales* and *Van Diemen's Land* ... at such Time, in such Cases, and with, under and subject to such Rules, Modifications and

Limitations ... as to His Majesty ... shall seem meet'. But for the foreseeable future, the Act provided for the court to be a judge and seven commissioned military or naval officers for each criminal trial. The chief justice and two assessors (magistrates nominated by the governor) would sit on civil cases (s6). The magistrates could be challenged for cause (s.vi). The judge and the assessors would give the verdict; in the event of disagreement, by majority.

Civil proceedings, assessors and juries

In 1843 in his *Constitutional rules and practice of the Supreme Court* Stephen CJ wrote of assessors:

The terms 'Assessor Causes', and 'Trial by Assessors', have a strange sound to an English ear; and some explanation of them may be convenient, even to those with whom they are familiar. ... In practice, several Magistrates are appointed for this duty; and they are summoned, three for each day, as required, by The Sheriff. At or before the opening of The Court, two of them are drawn by lot; and unless objected to, are sworn, and sit throughout the day. ...

The Act provides, that The Judge, 'together with the said Assessors', shall give their Verdict, upon the matter or matters in issue; and that, in case they cannot agree, 'the Verdict of the major part of them shall be taken, and entered, as the Verdict of all'. This last provision having, in effect, rendered the concurrence of the Judge unnecessary, it is his course, after summing

up, to leave the case in the hands of The Assessors; and not to participate in their deliberations, except in the case of a difference of opinion.⁸⁵

The Act did however give the parties to civil proceedings the right to have issues of fact tried by a jury of 12 men, provided both plaintiff and defendant agreed (s6). In practice it was a provision obviously more or less useless, but it was a beginning. There was in fact one case tried by a jury by consent, under the 1823 Act, *R v Cooper*, a civil case in which the attorney general, at the suit of the king, sought the dispossession of Cooper of land near Blackwattle Swamp. With the sanction of the governor, the attorney general consented to trial by a special jury. The jury found Cooper's title had never been completed by grant but that he held the land upon the same faith as other persons in the colony. Forbes CJ recommended Mr Cooper be given a formal grant, which the governor agreed should be done. It seems to have been the first civil jury trial in New South Wales and the only one under the 1823 Act.⁸⁶ There was no local legislation regulating jury trials or providing for special juries until 1829. Forbes seems to have simply followed English procedure. We do not know just how the jurors were summoned, nor how the jury was empanelled.

Section 7 of the 1823 Act provided that no person was competent to serve on a jury if he did not possess a freehold estate of 50 acres or more of cleared land, or a dwelling or tenement of the value of at least £300.

Criminal proceedings and military juries

In a sense, the military officers comprised a sort of jury, but entrusting the fate of ordinary people to the military could scarcely be equated with trial by a jury of one's peers. However, the *New South Wales Act* did talk about trial by a *jury* of seven commissioned officers (s4), and press reports of cases at the time refer to such panels as 'juries'. For example, the *Sydney Gazette* of 19 August 1824 reported the proceedings in a heifer stealing case (*R v Maclousky*) in the exquisite detail of the time, recording that:

Thursday. - ...Hugh Maclousky was indicted for stealing a heifer. The indictment included three counts, describing the property as belonging to three different owners. Upon this case the Jury retired for upwards of an hour, when the Foreman returned and informed His Honour the Chief Justice, that the Members could come to no decision, and that it was not likely they would. His Honour was pleased to observe, that, in similar cases, it was usual in England for the Jury to retire to some coffee-house till they decided upon the verdict, but as no such convenience existed here, the Gentlemen could retire to their quarters; and that, most probably, by the following morning the Verdict would be returned.

Friday. - Hugh Maclousky was again placed at the bar. The Jury being called over by the Prothonotary, the Foreman stated, that the Jury could not agree, and were not all likely to agree. After some suggestions from the

Chief Justice, in which His Honour recommended an adherence to the form in the Mother Country as near as circumstances would admit, at the same time urging that the Jury must be unanimous in their verdict, the Attorney General agreed, and the prisoner after some deliberation, consented to the Jury being discharged. The prisoner hereupon was discharged. In justice to the prisoner we think it necessary to subjoin, that the Attorney General informed the Court, he was now possessed of such information as to satisfy his mind that the prisoner was *Not Guilty* of the offence with which he had been charged.⁸⁷

In 1832 in *R v Sullivan* counsel argued that if the military jury could not agree, they should only be released if the prisoner were discharged from the information. In the process of considering the point, the chief justice said:

Although in common parlance and popular phraseology the seven Commissioned officers nominated by the Governor for the trial of crimes and misdemeanours committed in New South Wales, are called a jury, upon the erroneous supposition that they are to all legal intendment, a jury, according to the ancient institution of that admirable tribunal in the Mother Country, yet it requires very little consideration, in order to shew that it has very few if any of the incidents of a jury strictly and properly so called, and understood by the law of England.

The legislature of the Imperial Parliament of the United Kingdom has created a peculiar tribunal for the trial of

issues of fact in the criminal jurisdiction, of the Supreme Court wholly unknown and unprecedented in the Mother Country. ... there is a want of keeping with, nay an absolute departure from the well known incidents of trial by jury understood and cherished by the British subjects. They are nominated by the governor, they are not challengeable to the array, nay they are challengeable to the poll, only in the solitary case of direct interest or affection. The magical number 12, is not to be found, as the qualification of this anomalous institution. It is limited to seven, which at once marks down, all the ideas associated by an Englishman with the concurrent unanimity of a jury of twelve, before his prospects, liberty or life can be put in jeopardy.

Necessity forced the conclusion that the 'jury' had to be discharged without verdict. As Forbes pointed out:

Suppose the gentlemen in this instance, had been constrained into concurrence in an unanimous verdict, by imprisonment, loss of rest, meat, drink and candle light, of what value would their verdict be, whether guilty or not guilty. These gentlemen informed the court upon their oaths, that they could never agree. It came then to a mere question of human endurance and suffering, for if the judge had confined the gentlemen until some of them dropped from fatigue or physical incapacity to endure, hunger, thirst, and cold, he must at last have been driven to the necessity of discharging them, without delivering a verdict, and causing the prisoner to be remanded for trial by another set of

officers. In this country we have not the alternative provided by the ancient practice of the common law, by which it has been held that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. Here we have no circuit towns – the jurisdiction of the Supreme Court is coextensive with the whole of New South Wales, and certainly it would very inconvenient for the judge to carry the quasi jury home to his own house, and see them perishing under his eye, without being permitted to show them the hospitality of even bread & water.⁸⁸

Judicial activism: Jury trials in quarter sessions

Whilst military officers continued to constitute a sort of jury in Supreme Court criminal trials, real jury trials were held for awhile in courts of quarter sessions, it seems almost by accident.

The legislation under discussion talks at different times of ‘courts of sessions’, ‘courts of general and quarter sessions’ and ‘courts of general quarter sessions’. In New South Wales courts of sessions came to be known as either courts of quarter sessions or courts of petty sessions. Section 19 of the *New South Wales Act* enabled the governor to appoint courts of general or quarter sessions, which would have power to try offences both summarily and on information. They would take cognisance of:

- all matters and things cognisable in such courts in England;
- all crimes and misdemeanours not punishable with death, committed by any felons or other offenders transported to New South Wales and whose sentences had not expired or been remitted;
- all crimes and misdemeanours committed on board any ship during the voyage to New South Wales;
- all complaints made of drunkenness, disobedience of orders, neglect of work, absconding, desertion, abusive language to employers or overseers, insubordination or other turbulent or disorderly conduct.

For the more serious offences the courts could extend the period of transportation, order transportation within New South Wales or imprisonment for up to three years. Other offences were punishable by whipping or other corporal punishment (not extending to privation of life or member) and hard labour.

But the Act did not say how the courts of quarter sessions were to be constituted.

In England in the nineteenth century the Court of General Quarter Sessions was a court that had to be held in each county once in every quarter of the year; an institution going back at least as far as Edward III.⁸⁹ The court, said Serjeant Stephen (in his *New commentaries*), was constituted by two or more justices who had jurisdiction to try all 'felonies and trespasses whatsoever committed within the county; but it was never usual to try in this court any greater offences than small felonies'.⁹⁰ Jury trials were customary for offences the subject of indictments.

In 1824 the governor issued a proclamation appointing times and places for the holding of courts of sessions and directed the magistrates of Sydney to convene the courts, but they did not know how to do it. The question arising was should the justices assemble juries to try cases in quarter sessions? The imperial and local legislation were silent on the issue. The justices turned to the governor for assistance, and he referred the problem to the law officers.

On 14 October 1824 in *R v The Magistrates of Sydney* Forbes CJ heard argument from the attorney general, Saxe Bannister,⁹¹ seeking mandamus against the magistrates directing them to summon jurors. He argued that as no mode of trial had been prescribed, trial by jury must prevail as the only legal mode of trying facts. Solicitor-General John Stephen⁹² represented the magistrates and put the opposing view: if the legislature had intended trial by jury it would have said so, and the view of Parliament could be

deduced from the mode of trial prescribed for the Supreme Court.

The *Australian* records that the chief justice agreed that 'it was clearly the intention of the Legislature to restrain the Trial by Jury in the Supreme Court, until such time as His Majesty in Council should deem it expedient to introduce it'. However, he was firmly of the view that trial in courts of sessions should be by jury, saying 'the nature of the original settlement of the colony brings it within that class to which I have assigned it; namely, a colony in which the English law prevails, as the birthright of the subject, and the bond of allegiance between the colonists and their sovereign. ... It would not merely be against the express language of *Magna Charta* to try free British subjects without the common right of a Jury, but against the whole Law and Constitution of England'.⁹³

Thus were jury trials established (temporarily) in courts of quarter sessions; not by legislation or royal charter but by judicial declaration. Forbes' judgment may well be the first Australian manifestation of the dreaded judicial activism the subject of current debate. It is at least doubtful that Heydon J would approve the reasoning process whereby Forbes reached his conclusion.⁹⁴ Professor Castles describes it as the first major constitutional case in Australian history.⁹⁵ An interesting aspect of the decision, if it is right, is that, absent the specific provision for military tribunals in Phillip's commission, trial by jury would have been the right of anyone standing trial, from the beginning. This

seems to have been the view of Hargrave J in *The Queen v Valentine*.⁹⁶

Jury trials commenced in the quarter sessions in 1824.⁹⁷ There was no local legislation governing the manner of summoning and empanelling jurors. Again, Forbes must have followed the English practice. Both grand and petty juries were empanelled and the governor reported his view that there was great improvement in the administration of justice by the system which had been found to fulfil every expectation which had been formed of it.⁹⁸ The magistrates praised the system, at the same time excluding all emancipists from the list of jurors.⁹⁹ The public favoured it. The first Chairman of Quarter Sessions, John Stephen, said it worked well. The English reaction was to legislate to require trial by military officers in both Supreme Court and Quarter Sessions when the *Australian Courts Act* was enacted on 25 July 1828.

The failure of the magistrates to include the names of former convict emancipists in the jury lists was the subject of several applications for mandamus which failed, not because of the merits of the cases, but procedurally. In *R v Sheriff of New South Wales* in 1825, in response to argument by the solicitor-general about procedure, the applicant's counsel, WC Wentworth, is reported to have said:

he was sorry to see such pitiful points of form resorted to, to effect a delay in the decision of a great public question, in which the great mass of the community

were interested deeply ---- a question which had caused so much anxiety throughout the Colony. The question could not be protracted above a week or a fortnight ---- and eventually the right of the emancipists must be conceded.

The editor of this entry on the *Decisions of the superior courts* web site notes about the case:

This is another in a series of cases in which emancipated convicts sought to have trial by jury, and to be added to the jury lists. Their opponents, the exclusives, wanted the colony's government and courts free of the taint of convicts, and dragged their feet on every point of the jury question.¹⁰⁰

Australian Courts Act of 1828

Section 5 of the *Australian Courts Act* confirmed that until further provisions were made for jury trial, criminal trials in the Supreme Court would be by one or more judges and seven commissioned officers of His Majesty's Sea and Land Forces whether on full or half-pay. Section 7 confirmed the power to convene courts of session, but denied trial by jury by providing that the proceedings of such courts 'shall be conducted, and the Judgments thereof pronounced ... according to such and the like Law and Usage as is hereinbefore directed with respect to the Trial of Persons prosecuted before the said Supreme Courts of Judicature of *New South Wales* and *Van Diemen's Land* respectively'.

So the military continued to reign supreme. The only glimmer of light was s10 of the Act which empowered His Majesty, by order issued with the advice of the Privy Council and the advice of the Legislative Council of New South Wales, to 'extend and apply the Form and Manner of proceeding by Grand and Petit Juries' in the presentment and trial of crimes, misdemeanours, issues, matters and things properly cognisable by juries.

Beginning of civil jury trials

As to civil cases in the Supreme Court, s8 of the *Australian Courts Act* of 1828 enabled trial by jury on the application of either party at the judge's discretion. This was the real beginning of civil jury trials even though not by right. It was left to local legislation to make laws regulating civil jury trials. Cases not tried by juries would be tried by a judge and two assessors as before.

The first trial under the new system was *Hall v Rossi and Others* in 1830, an action by the editor of the *Sydney Monitor* for malicious prosecution. Dowling J felt moved to tell the jury:

Accustomed as I have been from earliest infancy to reverence as holy, all the institutions of my native land, I cannot refrain, as a man, from congratulating you gentlemen upon the inoculation of this great Southern continent with an institution – the proudest, the most useful, the most venerated of all that the freest nation on earth can boast; but even as a Judge – (the frigid expositor of the law), I cannot abstain from hailing with

gratulation the introduction of a system which places the Judges of this Court upon a proper constitutional footing with their fellow subjects in the sacred Temple of Justice. I doubt not that you gentlemen, and every subject of the Crown in this country justly appreciate this important epoch, involving in some degree as it does the interests of the British people in this territory, and influencing as it undoubtedly must, the character of those generations of mankind who shall successively inhabit the shores of Australasia. 'Tis in this latter point of view that this event claims to be signalized with something like enthusiastic celebration. No less interest, however, is attachable to it in the present age, from its importing, on the one hand, the parental solicitude of His Majesty for the welfare of his people in all climates; and on the other, the ameliorated character of the inhabitants of this distant settlement. Of the former, no doubt could ever have been entertained by any man born under the sway of the British sceptre; - the latter must, and I sincerely hope and expect, will be confirmed by the manner in which this sacred institution shall be received and preserved.¹⁰¹

Unfortunately, in New South Wales by 1965 in civil cases the sacred institution was not so sacred, and is now not sacred at all. In fact, some seem to consider it profane.

Chapter 3

Jury trials established by local legislation, 1829 - 1844

Trial by jury as of right in the full sense in criminal cases was eventually achieved in 1839 by New South Wales legislation. In civil cases it was achieved in 1844. Trial by jury was opposed by the silvertails in the local Legislative Council. The history of the opposition to it is dealt with separately,¹⁰² but I will try to deal briefly with the local laws to 1844.

Juries for Civil Issues Act of 1829

The first New South Wales Act dealing with juries was the *Juries for Civil Issues Act* of 1829, concerned only with civil cases. It lapsed after two years. The Act regulated the constitution of juries, reciting s8 of the Imperial Act of 1828. It provided for trials by juries of 12 men (s1). Whether or not a particular case would be tried by a jury was determined by a judge. The Act exposes the then prevailing views about who in the colony was fit to try issues of fact in civil cases, who was exempt, and who was unfit. Those considered suitable (s2) were every man between 21 and 60 residing in Sydney or within 22 measured miles from the obelisk in Macquarie Place who had:

- a clear income arising out of lands, houses or other real estate of at least £30 per annum, or

- a clear personal estate of the value of at least £300.

Those who could be exempted (s3) included all persons holding office under government, military and naval officers on full pay, licensed pilots and masters of vessels employed in the service of the Crown, schoolmasters and parish clerks. Those disqualified (ss4 and 5) were men:

- not being natural-born subjects of the king; or
- who were attainted of treason or felony or convicted of infamous crime (unless pardoned); or
- who were convicted again after the expiration of their sentences.

Amongst other things, the Act provided for the publication of jury lists and their correction by justices in special petty sessions and for trial (if ordered) by 12 jurors selected by ballot. The Superintendent of Police in the towns of Sydney and Parramatta and the Bench of magistrates in the town of Liverpool were required to prepare lists of 'men of good fame and repute' which were to be affixed to the principal doors of the courthouses and every public place of religious worship (ss6 and 7). Anecdotes at the time suggest the lists would have attracted a wider audience if affixed to the doors of licensed public houses.

Section 20 provided for the trial of issues by a special jury; the qualifications to sit as a special juror were themselves special. I deal later with special juries.

By s16, a juror would be paid two shillings per day if he lived within two miles of Sydney, five shillings per day if he lived more than two miles from Sydney and eight pence per mile for every mile he should reside beyond the limits of Sydney. Special jurors fared rather better, being paid 15 shillings for the trial of a special issue (s27). Subornation of jurors was declared a criminal offence (s31). Prospective jurors' qualifications were published. The prescribed form of list had a column 'nature of qualification'. The Act gave the following example:

FORM OF RETURN, OR LIST, REFERED TO.			
<p>_____</p> <p>The List of all Men within the District or Town of</p> <p>liable to serve on Juries</p>			
District or Place; in Towns,	Christian and Surname	Title, Quality, Calling,	Nature of Qualification.

add the Name of the Street.	at full length.	or Business.	
Parramatta, } Macquarie- street. }	Adams, John	Esquire,	Freehold, One Hundred Pounds per Annum
Sydney; } George- street. }	Bowles, James	Grocer,	Four Hundred Pounds of Personal Estate

A.B.

Superintendent of Police, or

Magistrate for

So, a man's ownership of land, or income, became public property. It was not an era when people were unduly troubled by notions of privacy or the need for privacy legislation.

In 1828, in the despatch from Sir George Murray, Secretary of State for the Colonies, Governor Darling was told that the new Legislative Council should be required to report on the expediency of altering the law on the composition of juries and the 'specific alterations which it would be most desirable to make'.¹⁰³ Darling's contribution to the constitution of trial by jury in the colony was the 1829 Act (made necessary to give proper effect to s8 of the *Australian Courts Act* of 1828). Darling (1824 – 1830) was opposed to the notion of trial by jury in criminal cases in the colony. He was recalled in October 1831 and in December 1831 was replaced by Bourke (1831 – 1837), who was Irish and decidedly more liberal than Darling.¹⁰⁴ Bourke was an active supporter

of jury trials and urged the Legislative Council to pass the 1832 and 1833 Acts.

Order in Council of 1830 and Jury Trials Act of 1832

On 28 June 1830 King George IV made an Order in Council, pursuant to s10 of the Act of 1828, authorising the governors of New South Wales and Van Diemen's Land, with the advice of the respective legislative councils, 'to extend and apply the form and manner of proceeding by Grand and Petit Juries' at such place as the governor and council should seem meet. Pursuant to the order, ss40, 41 and 42 of the *Jury Trials Act* of 1832 were enacted, dealing with criminal trials. The rest of the Act dealt with civil juries. It was in 1830 therefore that the Government of Great Britain permitted the colony to make up its own mind about trial by jury in criminal cases.

For the first time, provision was made, albeit in a limited way, for trial by jury in Supreme Court criminal cases. The Act said that if it appeared to the court that the governor, or any member of the Executive Council of the colony, was the person against whom the offence was committed, or had any personal interest in the result of the prosecution; or if the personal interest or reputation of any officer of the army or navy, or the interest and reputation of either of those bodies was involved, or would be affected by the result, then trial would be by a jury of 12 'civil inhabitants of the said Colony'. Probably, the catalyst for the Act was

Governor Darling's personal onslaught on the local press. I will come to that.

As to civil juries, the Act provided that when the court awarded trial by jury, the jury would consist of 12 persons (s1) (but only men were competent to be jurors). Trial by a judge and assessors as provided for by s8 of the *Australian Courts Act* of 1828 remained as the alternative, at the judge's discretion. An interesting change was made to the law relating to those disqualified from jury service. Whereas the 1829 Act disqualified a man convicted of treason or felony or infamous crimes unless pardoned, the 1832 Act extended the exception to those whose full period of sentence had expired, whether or not he had been pardoned (s4).

Courts of Sessions – Acts of 1829 and 1830

The courts of sessions appointed by the governor in 1824 were established permanently on 19 February 1829 by the *Quarter Sessions and Summary Jurisdiction Act*.

A second 1829 Act, the *General and Quarter Sessions Act*, provided that courts of general and quarter session would be held at the following places:

County of Argyle

Cookbundoon

Goulburn

Plains

Inverary

County of Bathurst

County of Camden

Creek

or Kiarma

County of Cumberland

Water

Campbelltown

Ferry

County of Gloucester

Stephens

River at Maitland

Plains

Plains

Bathurst

Bong-Bong

Shoal-Haven

Stonequarry-

Wollongong

Bringelly

Brisbane

Liverpool

Parramatta

Penrith

Sydney

Windsor

Wiseman's

Carrabeen

Port

Hunter's

Merton

Newcastle

Paterson's

Patrick's

Luskintyre

County of Londonderry	Segenhoe
Valley	Wellington
County of Westmoreland	Cox's River
	Emu Plains
County of St Vincent	Mount
Elrington	
	Narrigo
	Ulladolla
	north bank
	of the River
	Manning

The Act is an interesting measure of the spread of white settlement by 1829. Some towns are now only history. Some have changed their names. Section 3 of the Act confirmed the summary jurisdiction of the courts to deal with offences not punishable by death committed by any felon transported to the colony whose term of sentence had not expired or been remitted, and complaints made against such offenders for drunkenness, disobedience of orders, neglect, abusive language or other disorderly conduct. As to those who were not transported felons, they would be 'tried before the said Courts of General and Quarter Sessions and seven Commissioned Officers of His Majesty's sea and land forces' (s4).

Section 5 recited that 'it is expedient that a person possessing competent knowledge of the law should be appointed to act as Chairman of the several Courts of Quarter Sessions'. The justices of the districts of

Sydney, Parramatta, Windsor, Campbelltown and Maitland were required to assemble at their respective courthouses on the second Tuesday in October 1829 at 12:00 pm to nominate the chairman for each district. This procedure was to be followed yearly (ss5 and 6).

The *General and Quarter Sessions Act* of 1829 was amended in 1830 by the *Quarter Sessions Act*. It made felons convicted of transportable offences in New South Wales or removed to New South Wales from Van Diemen's Land the same as felons transported to New South Wales, that is to say, they could be dealt with by courts of sessions in their summary jurisdiction. In exercising summary jurisdiction the courts would be constituted by any two or more justices of the peace (ss1 and 2).

The Sessions Acts of 1829 were repealed in 1832 by the *Offenders Punishment and Justices Summary Jurisdiction Act*. Section 14 provided for courts of general quarter sessions to be now held at Sydney, Parramatta, Campbelltown, Windsor, Maitland and Bathurst, and such other places as the governor appointed, 'and at no other place whatsoever'. The Act (s16) provided for courts of petty sessions, to be constituted by two justices, to deal summarily with offences such as those within the summary jurisdiction of the courts of quarter sessions.

The Act is a grim reminder that New South Wales in 1832 was still largely ruled as a penal settlement. Any person who arrived as a transported felon and was

convicted in the Supreme Court or any court of quarter sessions could be sentenced to suffer punishment according to the law of England, or, if a male, be kept to labour in irons on the roads or public works of the colony; or if a female be imprisoned and kept to labour in any gaol or factory for three years (s3).

The native born, or free settler, could not for a first offence be sent to a penal settlement within New South Wales but could be transported to some other place beyond the seas; and if the offender were then found at large in the colony before the term of transportation expired, he or she was liable to be sent to any penal settlement for life. Settlement commandants and supervisors were authorised to act as justices and inflict punishment according to the governor's regulations (s7). Road surveyors were entrusted with jurisdiction to 'hold a Court from time to time' and then and there punish a convict for offences such as neglect of work or drunkenness, by whipping for up to 50 lashes to be inflicted by a constable or other person appointed for the purpose (s28). An offender under sentence of transportation found guilty of pilfering from a master or mistress was liable to 50 lashes and for a second offence 100 lashes. Other punishments included imprisonment, the treadmill, labour in irons and solitary confinement (s18). A convict harbouring a runaway convict was liable to 100 lashes or 12 months in irons on the roads (s25). And any person harbouring a housebreaker was liable to suffer death (s13). It is discomfoting reading.

Jury Trials Act of 1833

Under the *Jury Trials Act* of 1833, for the first time the law granted a right to trial by jury in criminal cases in the Supreme Court of New South Wales and the courts of quarter sessions. Section 2 provided:

That all and every issues and issue of fact joined on any information which shall be exhibited in the Supreme Court against any person or persons for any crime misdemeanour or offence shall be tried by a jury of twelve of the inhabitants of the said Colony provided any such person or persons shall be desirous of having any such issues or issue of fact so tried and shall declare such his her or their desire upon being arraigned upon any such information in the said Court ...

The accused person therefore had a right to elect trial by a jury of 12 citizens, or a panel of seven military or naval officers. Section 9 enabled the attorney general, any prosecutor or a defendant to have a special jury try any issue joined on the information, except for treason or felony. Trial by juries of 12 in courts of quarter sessions was made possible (for some) in the same way as in the Supreme Court. The summary jurisdiction of the courts was preserved in respect of 'crimes misdemeanors and other offences not punishable with death which have been or shall be committed by transported felons or other offenders whose sentences have not expired or been remitted' (s12).

Section 27 excluded from the right to trial by jury anyone tried before a court at a place which was a place

to which offenders convicted in New South Wales may be sent or transported. The emancipists slipped back to 1829; they again required a pardon to be eligible for jury service (s3).

David Neal makes the interesting observation that after the 1833 Act was enacted, defendants still chose trial by the military panel in 38 per cent of Supreme Court cases and 68 per cent in Quarter Sessions cases.¹⁰⁵ In his opinion to the governor in April 1836 Forbes said of this phenomenon: 'I have observed that in cases of aggravated violence against the settlers, which, from the depositions appeared to be desperate, the accused parties have elected a Military Jury, probably from some vague hope of finding mercy at the hands of gentlemen disconnected with the Colonists, while in cases where a conflict of testimony was to be set up as a defence, the probability of twelve persons being of different opinions upon the credit of witnesses was greater than that of seven, and consequently there was a better chance of acquittal. I will not venture to affirm that this has always entered into the calculation of the parties accused, but on some occasions I have distinctly discerned its operation.'¹⁰⁶

The Act did not affect civil trials.

Sundry Acts of 1835 – 1839

The *Jury Trials Acts* of 1835 and 1836 extended the 1832 *Jury Trials Act* to 30 June 1837. Section 2 of the 1836 Act gave to justices assembled in petty sessions the

unfettered right to strike from the jury lists the name of any man they considered to be of 'bad fame or of dishonest life or conduct or of immoral character or repute'. I deal later with the significance of the 'bad fame' provision.

The *Quarter Sessions Act* of 1838 provided for juries of 12 to try cases in courts of quarter sessions to be held at Melbourne and Port Macquarie (both well-known New South Wales country towns) in the same way as in the Supreme Court, except for prosecutions dealt with summarily, and every qualified man living within 50 miles of either town was liable for jury service.

The colony of New South Wales finally caught up with England with the enactment of the *Jury Trials Act* on 20 September 1839. The preamble to the Act noted that:

And whereas the said Colony hath of late years greatly increased in population and a sufficient number of respectable persons qualified to act as jurors is to be found in all parts of the said Colony where juries are required it is deemed expedient that the trial of offences by a jury of seven Commissioned Officers as aforesaid should be dispensed with in the said Colony.

Sections 1 and 2 made trial by juries of 12 the only system of trial in criminal cases in the Supreme Court and Quarter Sessions from 31 October 1839, except for offences within the summary jurisdiction of the sessions courts. The compiling of jury lists, summonsing and empanelling of jurors, and challenges were to be as

prescribed by the *Jury Act* of 1832. This had the effect of restoring the emancipists to their 1832 position: that is, they were eligible to serve as jurors if pardoned, or if their full terms of transportation had expired.

Administration of Justice Act of 1840

The appointment of new judges

The *Administration of Justice Act* of 1840 enabled the governor to appoint two more judges to the Supreme Court, to appoint persons in whose names prosecutions could be brought at Port Phillip and New Zealand (pending the establishment of grand juries) and to establish circuit courts (constituted by a Supreme Court judge).¹⁰⁷ In civil cases the right to trial by jury in the Supreme Court remained at the discretion of the judge.

Establishment of circuit courts

The *Administration of Justice Act* of 1840 Act recited that:

whereas the population and settlement of the Colony of New South Wales have greatly increased and extended since the passing of the said Act of the ninth year of King George IV and Her Majesty's Islands of New Zealand have been annexed to New South Wales and now form a part of the Territory dependent on the Government thereof by reason whereof and of the distance of those Islands and of the District of Port Phillip from Sydney the Supreme Court of New South Wales as at present constituted has become inadequate

to the discharge of the whole judicial business of the said Colony and its Dependencies and it has therefore become necessary that Circuits should be established and that the Judges of the said Supreme Court should no longer be as at present limited to three.

The Act empowered the governor by proclamation to direct circuit courts to be held in such towns or places as he saw fit, every such court to be constituted by a judge of the Supreme Court with jurisdiction coextensive with that exercised by the Supreme Court: ss16 and 17. New Zealand escaped on 3 May 1841. The Treaty of Waitangi was signed on 6 February 1840, eight months before New South Wales legislation provided for a circuit court in New Zealand. It never sat.

The circuit courts, although constituted by judges of the Supreme Court, were not part of the Supreme Court.

Circuit courts in New South Wales ¹⁰⁸

Before the Act of 1840 the Supreme Court went on circuit, against the wishes of the Colonial Office, which saw the process as too expensive. In 1829 a judge sat at Campbelltown, Windsor and Maitland. The Colonial Office did not further permit circuits until 1840 when the *Administration of Justice Act* was passed. An exception was made for the trial of bushrangers in 1830 at Bathurst and the Hunter Valley, and a visit to Norfolk Island in 1833.

The first circuit courts held pursuant to the 1840 Act were constituted by Burton J ¹⁰⁹ in 1841 at Maitland and Bathurst. Expense remained a problem, at least to the Colonial Office, which objected in particular to the cost of unnecessary ceremony and dinners. In 1849 a royal commission inquiry into the workings of the Supreme Court recommended that the convening of circuits be increased from twice to three-yearly. It recommended there be circuits at Parramatta, Yass and Murrurundi or Tamworth. Between 1868 and 1872 circuit courts were established at Albury, Tamworth, Yass and Mudgee, and in 1874 at Dubbo and Grafton.

Holding circuit courts caused considerable difficulty for the judges, because of the limited number of judges and the amount of time spent travelling. For example, in 1888 Darley J went to Deniliquin on circuit. He complained that he spent four days and four nights travelling to and from the town, and found one case in the list which took two and a half hours to try.

Circuit courts in 'Greater New South Wales' ¹¹⁰

Port Phillip

The first settlement at Port Phillip was abandoned in 1804. In 1835 Governor Bourke was authorised to permit official settlements in the region. It became open for settlement in September 1836. Serious criminal cases and civil cases from Port Phillip were tried in Sydney. I commend Castles' entertaining account of early law enforcement at Port Phillip; it is beyond the scope of this

paper. By the early 1840s there was increasing agitation for the Supreme Court to be established at Port Phillip. It took at least 14 days of constant riding to reach Sydney, after which the parties and witnesses might have to wait up to two months before the case was heard.

After the 1840 Act a resident Supreme Court judge was appointed to Port Phillip, the first being John Walpole Willis. He was appointed in 1841 and removed from office in 1843 after a tumultuous reign involving constant conflict with the legal profession, and the press.

¹¹¹

Victoria became a separate colony in 1851.

Moreton Bay

On 13 May 1850 a New South Wales Supreme Court judge, Roger Therry, sat as a circuit court for the first time at Moreton Bay.¹¹² The sittings were devoted entirely to criminal trials – murder, six cases of burglary, one of horse stealing, robbery with firearms and stealing. Therry gave an address to mark the occasion saying, amongst other things, that the people of the northern districts were entitled to have the administration of the law brought near to their home, (instead of having to go to Sydney for trials). He said that directly or indirectly all crime was traceable to intoxication.

In December 1852 the *Moreton Bay Judge Act* was enacted to enable the governor from time to time to appoint a barrister to act as judge of the Circuit court at Brisbane. In 1855 a further *Moreton Bay Judge Act* provided for the appointment of a fourth judge of the Supreme Court, whose duties included sitting at Moreton Bay until the appointment of a resident judge. The *Moreton Bay Supreme Court Act* of 1857 established a permanent Supreme Court at Moreton Bay, with a resident judge. Queensland became a separate colony in 1859.

Subsequent abolition of separate circuit courts

The *Supreme Court and Circuit Courts Act 1900* provided for circuit courts in much the same way as the Act of 1840. The governor was empowered to create circuit districts (Part IV). Part IV of the 1900 Act was repealed by s6 of the *Supreme Court and Circuit Courts (Amendment) Act 1912*. The latter Act provided that the governor by proclamation could notify cities, towns and places as circuit towns and might direct court sittings at such places, and any judge of the Supreme Court could sit or exercise jurisdiction in any place in New South Wales. The circuit courts therefore ceased to be separate from the Supreme Court.

The Act of 1912 enabled the Supreme Court to sit where and when it liked, in New South Wales. The chief justice determines circuits to be gazetted, and hearings can be specially fixed outside gazetted circuits when necessary. In 2002, for example, circuits were gazetted for the Central West region, Northern Rivers regions, Riverina

regions, Newcastle, Wollongong and Goulburn. Circuits were not found necessary for Broken Hill and the Northern Tablelands. The Court of Criminal Appeal sat outside Sydney for the first time, at Newcastle, in February 1999. It has since sat at Wagga Wagga and Dubbo.

Jury Trials Acts of 1840 and 1841

The *Jury Trials Act* of 1840 enacted that criminal and civil trials in circuit courts were to be by juries of 12, and trials at Port Phillip and New Zealand in the Supreme Court and Quarter Sessions were also to be tried by juries of 12 (ss1 and 18).¹¹³ The granting of jury trials at the discretion of the judge appears to have remained in respect of courts elsewhere. However, in 1841 the right to trial by jury in circuit courts in civil cases was removed by s3 of the *Jury Trials Act*. Trial by jury was affirmed in criminal cases, but in civil cases it was to be at the discretion of the trial judge and, except where trial by jury was ordered, the mode of trial remained by a judge and two assessors (s5).

Jury Trials Act of 1844

The right to have civil causes tried by jury was finally declared on 2 August 1844 by the *Jury Trials Act* of 1844. From 31 August 1844 in all actions at law in the Supreme Court trial by assessors was abolished and trials were to be before a judge by a jury of four persons qualified as special jurors. The court could order a jury of 12 from 'amongst the class of special jurors or of

common jurors or in cases to be tried on Circuit partly from each class’.

Following the English tradition, those qualifying as special jurors were seen as superior people, being identified in the *Jury Trials Act* of 1832 (s24) as:

every man described in the said juror’s book as an Esquire or person of higher degree or as a Justice of the Peace, or as a merchant (such merchant not keeping a retail shop) or as a bank director ...

Retail shopkeepers were, however, suitable for common jury service, whilst not quite making it as special jurors. The inclusion of bank directors was not merely a recognition of the standing of bank directors in society. There were in fact former convicts who had shaken free of their antecedents and had become wealthy and respected men of commerce, some directors of banks. Their inclusion in the Act was one of Bourke’s ways of increasing the prospects of emancipated convicts serving on juries.¹¹⁴

For the avoidance of doubt (it seems) a later Act, the *Jury Laws Act* of 1854 permitted justices correcting jury lists to designate as an Esquire every person who by courtesy was ordinarily so designated although not entitled at law to be so designated.

The 1844 *Jury Trials Act* was the start of civil jury trials by right in the Supreme Court, even if usually only by a jury of four. Section 4 of the Act provided for majority

verdicts. If no agreement could be reached within six hours, a verdict could be given by three-fourths of the panel. If three-fourths of the panel could not reach agreement within 12 hours, the jury had to be discharged.

Providing for four jurors was not without controversy. In his article 'The New South Wales jury of four persons', Mr Henchman said:

Various systems of trial by jury had been suggested and discussed. At one stage it seems [then Attorney General Alfred] Stephen suggested a general reduction of all juries to seven, but this in 1834 provoked much opposition Public meetings were called, there was controversy in the newspapers, and a deputation visited the Governor protesting loudly that the number twelve and the principle of unanimity were fundamentals of the civil and criminal jury system. The form of civil jury ultimately adopted – four with an option of twelve – was probably a compromise to satisfy conflicting views. Of the working of the jury of four in Van Diemen's Land, Stephen, writing later in his *Constitution, Rules and Practice of the Supreme Court of New South Wales* [1834], said: 'It has been found that the smaller number of jury men in by far the greater number of cases, answer every purpose for which a jury is required; and juries of twelve are only resorted to occasionally.'¹¹⁵

The right to trial by jury in civil cases did not extend to suits in the Supreme Court in its equitable jurisdiction.

¹¹⁶ The jurisdiction was conferred by s9 of *The New South Wales Act* of 1823 but from the beginning was administered separately from the common law jurisdiction, and by judge alone. This practice was confirmed by *The Administration of Justice Act* of 1840, and obtained until the *Supreme Court Act 1970* gave the court jurisdiction to administer rules of common law and equity concurrently (s57), from 1972.

The sovereigns and John Norton

The legislation up to 1844 spanned the reigns, or parts of them, of four sovereigns: George III, George IV, William IV and Victoria. It is of marginal relevance (perhaps none) but I cannot forbear from a brief reference to John Norton's ¹¹⁷ opinion of each, offered in the *Truth* of 27 September 1896 (if only to show how respectful is the approach to the monarchy by twenty-first century republicans). George III, he said was 'a madman half his time, and when he was sane he was more dangerous to the State than when he was insane'. George IV was 'the biggest blackguard, the greatest liar, the foulest adulterer, the most infamous swindler, and impudent turf blackleg or welsher, that the world has ever seen'. William IV, nicknamed 'Silly Billy', was a cross between 'a wild ass and a mad bull'. Victoria, on the other hand, was a 'podgy-figured, sulky-faced little German woman, whose ugly statue at the top of King-Street sagaciously keeps one eye on the Mint, while with the other she ogles the still uglier statue of ALBERT THE GOOD, a few paces across the road, in the garb and posture that is suggestive neither of decency in attire nor

decorum in attitude'. Victoria, he went on, was 'this flabby, fat and flatulent looking scion and successor of the most ignoble line of the ROYAL GEORGES'. Her reign, he said, had this advantage, that as long as Victoria was on the throne, it kept off the throne 'her rascal of a turf-swindling, card-sharping, wife-debauching, boozing rowdy of a son, ALBERT EDWARD, PRINCE OF WALES'.

For those and other such muted criticisms of royalty, Norton was tried for seditious libel in the

Supreme Court. The jury disagreed. The proceedings were reported in *Truth* in minute detail.

Some of the above was reproduced by Cyril Pearl in *Wild men of Sydney*.¹¹⁸

Chapter 4

Agitation for juries, 1788-1844

The social setting

Let us go back to 1788 to 1844. So much for the legislation. Why did it take so long?

There is no doubt that the wayward reputation of the colony and its deep social divisions in the early nineteenth century were serious impediments to the establishing of a fair legal system which included trial by jury. Indeed, it took some time for the colony to attain any sort of social respectability, at least in the eyes of the British Government. The population grew quickly, and mere population numbers were themselves an inadequate reason to deny trial by jury, at least by 1810. The early New South Wales settlers were not all convicts. In 1788, 28 native white Australians were born, all the children of convict mothers.¹¹⁹ By 1803 the first of the white native born were 15 years old and the white native born were about 1100 in an overall white population of some 7000.¹²⁰ By 1810 there were five main settlements on the mainland: Sydney, Parramatta, the Hawkesbury, Camden and the penal settlement at Coal River (later Newcastle). The white population (excluding Van Diemen's Land) was now over 10,000, of which 13.7 per cent were convicts and nearly 3000 were children.¹²¹ At the census of New South Wales taken in 1828, the white population was 36,598 of whom 20,930 were free.¹²² There were 9000 native born. Less than 10

per cent of them were born of parents who had come free to the colony. However, after Macquarie's time, the children of convicts were regularly treated with the same discrimination and opprobrium as their parents.¹²³ By 1828 the white native born were double the number of free immigrants.¹²⁴ By 1836 there were 49,000 free persons in the colony, including 17,000 who had been convicts.¹²⁵ By 1841 the total white population had reached 131,000.¹²⁶

An indication of the social standing of the early native born was that they came to be called 'currency lads', 'currency lasses' and sometimes simply 'the currency', names apparently first applied to them in print in the *Gazette* on 13 September 1822. The origin seems to have been Macquarie's proclamation on 23 November 1816 that the Government had always forbidden the circulation of any currency other than English sterling. There were in fact many local currencies, including rum, which were officially considered inferior to sterling and to be avoided. Hence the native born came to be seen in the same category. It was a derogatory term strongly implying that those born in Australia were of lesser value than those born in the home country.¹²⁷

Aborigines were either not part of white society, or were on its fringe. I deal later with Aborigines.

By the early nineteenth century New South Wales had a fairly clearly defined social hierarchy. At the bottom of the heap were the convicts and, if they counted at all, the Aborigines. Next up the ladder were the emancipists,

that is, former convicts whose terms of transportation had expired or who had been pardoned but who still bore the stigmata of having been transported to the colony. Above them were the children born in the colony whether of convict parents or free citizens. Above them were the military officers, the merchants and the free immigrants, all mainly English. They were known as 'exclusives', a term commonly used to refer to those who had no personal, social or political connection with convicts or transportation. (It is important to remember, as David Neal points out, that by 1819 wealthy emancipists controlled the commerce of the colony. However, they were still emancipists.¹²⁸)

Phillip left Sydney in 1792. There followed almost three years of rule by officers of the New South Wales Corps, before the arrival of Governor Hunter in September 1795. During this period officers and men of the Corps were given special treatment, receiving large grants of land and favourable treatment with rations. The system sowed the seeds of continuing conflict between successive governors and members of the Corps, resulting in the Rum Rebellion on 26 January 1808 which ousted Governor Bligh.¹²⁹

There are many published views of visiting Englishmen, particularly clergymen, about the degeneracy of the community. The Reverend Johnson's church was burnt down in 1793. In the same year three members of the London Missionary Society arrived in Sydney and one of them was murdered by a soldier to whom he had lent a sum of money. The others concluded that they had

encountered a populace of 'Corinthian Degeneracy' who were 'sunk in the grossest profanity and debauchery'. They reported to London that the prevailing levels of 'Adultery, Fornication, Theft, Drunkenness, Extortion, Violence and Uncleaness of every Kind' proved that the Christian God had no place in the hearts and minds of most of the citizens of Sydney Town.¹³⁰

From the beginning, an obstacle to the introduction of a jury system was the problem of the admission of emancipists to jury service, a proposition not to be contemplated by free settlers who had not been convicts and who were not the children of convicts. I will deal with the subject later in more detail.

Illiteracy was a problem in the early colony. Schoolteachers were rare and schools were rarer. Various religious and private tutoring institutions grew, but the spread of settlements from 1805 meant that many children did not attend school.¹³¹

An acute problem, too complex to do more than mention it here, was the way land was granted. All land was vested in the Crown and only the socially acceptable received generous land grants. In 1828 Governor Darling, in a decision exemplifying the social discrimination of the time, decided to grant 1280 acres of land to 'young ladies of the best families' in 'the higher circles of society' on their marriage to 'gentlemen resident in the Colony'.¹³² In 1826 the Church of England was granted one-seventh of the total land of New South Wales. The grant was largely ineffective,

partly because very little land in the colony had been surveyed. It was accompanied by attempts to establish the Church of England as a state church, a constitutional development abandoned in 1836.¹³³

In the early years, the Church of England was the religion imposed on all inhabitants of the colony. In the 1840s New South Wales was still called a Protestant colony despite Archbishop Polding's claim that there were 60,000 Catholics under his care.¹³⁴ It appears that convicts and emancipists were generally hostile, or at least indifferent, to organised religion.¹³⁵

The Irish convicts were a caste below other convicts, and Catholics generally had a social standing about equal to the emancipists. Racism and bigotry penetrated the highest levels of colonial society. The official Anglican chaplain in 1807, the Reverend Samuel Marsden, informed his superiors in London:

The number of Catholic convicts is very great in the Settlement; and those in general composed of the lowest Class of the Irish nation; who are the most wild ignorant and savage Race that were ever favoured with the Light of Civilization; men that have been familiar with Robberies Murders and every horrid Crime from their Infancy. ... The Toleration of the Catholic Religion would not only be dangerous to the present Inhabitants; and to the Government; but also to the rising Generation. [Were] the toleration of the catholic religion strictly prohibited, N.S.Wales would soon become a Protestant Country.¹³⁶

The end of the convict era in 1840 created problems of labour. The greater part of the Irish who had come to New South Wales were convicts and were therefore at society's lowest level. If they were to come as free immigrants it was unthinkable that they would stand on an equal footing with free immigrants from England and Scotland. In 1840 the *Herald* described the Irish as 'low, depraved and bigoted classes' as well as 'mere Popish serfs'. The *Gazette* was in favour of coolie labour but drew the line at Irish Catholics. The *Gazette* said that New South Wales was 'a Protestant Colony' in which property was 'almost *exclusively* possessed by persons who are not Papists' and it was fitting that it remain as such. The Catholic church was not a Christian church and 'Ireland should find "hives" for her "swarms" elsewhere'.¹³⁷

John Dunmore Lang¹³⁸ told Earl Grey, Secretary of State for the Colonies, that 'the real object' of Irish female immigration was 'simply to supply Roman Catholic wives for the English and Scotch protestants of the humbler classes in Australia, and thereby to romanize the Australian colonies through the artful and thoroughly Jesuitical device of mixed marriages'. In 1841 Lang published a pamphlet stating, amongst other things, that Ireland was 'a grand nursery or university of crime and criminals' whilst the Irish immigrants were 'the most ignorant, the most superstitious, and the very lowest in the scale of European civilization'. Doctor Alexander Thompson¹³⁹ said that the Irish were both intellectually inferior to the Aborigines as well as utterly

useless. In 1846 the *Australian* stated that three Scottish or English labourers or shepherds were as good as seven Irish or ten coolies, hastening to add 'We mean no offence in this to the Irish as a nation'.¹⁴⁰

As to New South Wales society generally, in 1827 Peter Cunningham, naval surgeon and author, said 'Australia was the only country in the world which you are ashamed to confess to having visited'. Cunningham went on to say that it often happened that old acquaintances from the British Isles would sometimes meet accidentally in a Sydney street but that they were reluctant to even shake hands until they had ascertained whether one or the other had been transported.¹⁴¹ In the late 1820s Edward Smith Hall, editor of the *Sydney Monitor*, said: 'The people of New South Wales are a poor grovelling race whose spirit has gone – the scourge and the fetters and the dungeons and the Australian inquisition have reduced them to a level with the Negro – they are no longer Britons but Australians.'¹⁴²

A view of the native born was put by a visiting French historian Jules Della Pilorgerie, in 1836 who observed they were 'a new generation two thirds made up of bastards raised at the public expense'.¹⁴³ In the same year Charles Darwin visited Sydney. He said quite a lot in praise of the colony but he duly left, saying: 'Nothing but rather sharp necessity should compel me to emigrate.'¹⁴⁴ In London in 1838 the Molesworth Committee came to the conclusion that transportation had proved unable to reform criminals, and created society's 'most thoroughly depraved' and that 'a state of

morality worse than that of any other community in the world' existed in Australia.¹⁴⁵

The wonder is that the colony was ever given the right to trial by jury.

Pressure for jury trials before 1818

An example of early agitation for trial by jury in New South Wales is an anonymous letter in October 1791 published in *The Bee* in which it was said: 'A reform of government (if this country is continued) is much wanted; but nothing can be so truly acceptable as freedom and a trial by jury in all cases.'¹⁴⁶

In 1801 Governor King wrote to London about many complaints and representations which had been made concerning 'misunderstandings in the administration of justice' due, in some part, to the all military composition of the court. He suggested the inclusion of officers of the civil establishment. But he believed the 'general class of inhabitants of the colony' would not allow 'an indiscriminate trial by jury for some, nay many, years to come'.¹⁴⁷ Nothing came of his suggestion about expanding the composition of the tribunals.

In 1803 Jeremy Bentham wrote a pamphlet pleading for a constitution for New South Wales, demonstrating that the laws governing the colony were in breach of Magna Carta, the Petition of Right, habeas corpus and the Bill of Rights.¹⁴⁸

In 1808 a petition to Governor Bligh signed by 800 settlers called for reforms to the court system. Bligh wrote to William Windham, the Colonial Secretary, saying that the colony was 'so far improved that superior people now look with concern on the Civil and Criminal Courts as established by the Patent, and are particularly desirous that the Military may have nothing to do in the Jurisprudence of the Country, either as Magistrates or Jurors; the present Judge-Advocate they consider a very unfit person to correct errors or narrowly to search after the truth; the semblance also to Courts Martial is become irksome.'¹⁴⁹ He might as well not have written.

But there were obvious acute problems, in spite of the apparently sanguine view of Bligh. The colony was racked by maladministration, corruption and the abuse of power by the New South Wales Corps, including powerful landowners such as John Macarthur.¹⁵⁰ Bligh's attempt to stem the rum trade, his confrontation with Johnston and Macarthur, his overthrow on 26 January 1808, the farcical 'trial' of Macarthur by six military officers directed to try him for sedition, and the conduct of Deputy Judge Advocate Richard Atkins,¹⁵¹ who was both corrupt and drunken, were not in combination calculated to lead Westminster to the belief that the community of New South Wales was sufficiently stable and mature to maintain the institution of jury trials. The paradox is that all these things also pointed to the need to get the system away from the military.¹⁵²

In 1810 Deputy Judge Advocate Ellis Bent in a letter to the Colonial Under-Secretary advocated the constitution of juries upon 'the principles of the English law'. The jury should consist of 12 persons 'who came out free and from those who had obtained their pardon for a considerable time, or whose sentences were expired, and were respectable in their conduct and situation'. If the selection of jurors 'were confined to that class of persons which has come out free, many would be excluded who are now among the most useful and opulent Members of the Society here'.¹⁵³ But the 'exclusives' in New South Wales quickly gained the ascendancy and could not abide the thought of trial by the socially inferior, as we shall see. There were also pragmatic political reasons for keeping former convicts out of any part of government, including the justice system.

Governor Macquarie expressed the radical view that once a convict became a free man he should in all respects be considered on a footing with every other man in the colony 'according to his Rank in Life and Character' and that such men should take their turn as jurors in common with people who have never been convicts. He was of the view that there should be trial by jury in both civil and criminal cases.¹⁵⁴ He even went as far as to invite emancipists into his society and have them dine at his table. This had the long-term consequence that under Governor Brisbane (1821-1825) the emancipists were deliberately excluded from any form of association at an official level, from the holding

of public office and from intruding into the higher social ranks. Even in 1835, during the rule of the liberally minded Governor Bourke, when an emancipist applied to enrol his two daughters at an establishment for young ladies at Newcastle the principal of the school told him that she could not accept the enrolment as it would give offence to others, as well as do injury to herself.¹⁵⁵

Governor Macquarie had enthusiastically sought trial by jury, but on 23 November 1812 the response of the Colonial Secretary, Earl Bathurst, to Macquarie was more cautious:

It is however a Question, worthy of consideration, how far in criminal cases the Trial by Jury may not be advantageously introduced. It is not necessary to dilate on the beneficial effects to be derived by that System of dispensing Justice, but before it is adopted in New So. Wales it is very necessary gravely to consider how far the peculiar constitution of that Society of men will allow of the application of the British Constitution. Are there settlers in number Sufficient, capable, and willing, to undertake the duties? In a Society so restricted, is there not reason to apprehend that they may unavoidably bring with them passions and prejudices which will ill dispose them to discharge the functions of Jurymen? The great principal [sic] of that excellent Institution is that men should be tried by their Peers. Would that principal [sic] be fairly acted upon, if Free Settlers were to sit in Judgement on Convicts and that too in cases where Free Settlers might be a

Party? Would it be prudent to allow Convicts to act as Jurymen? Would their admission satisfy free Settlers? Would not their exclusion, &c., be considered as an invidious mark placed upon the Convicts, and be at variance with the great Principle upon which the institution itself is founded?¹⁵⁶

But the division was political as well as social. As David Neal puts it:

The principal contest between Exclusives and Emancipists was fought over civic status: whether political power would be exercised solely by an oligarchy based on respectability and non-convict associations, or whether emancipation restored a person to all the rights of a free-born Briton. Whether the issue was the right of emancipists to become magistrates, to have standing to sue, to be able to serve on juries, to be able to practise as lawyers, or eventually to vote for colonial assemblies, the underlying issue was the same: civic status and the exercise of the political power consequent on that status. Emancipists and Exclusives fought these battles bitterly through the colonial courts.¹⁵⁷

And -

But important as juries may have been in guaranteeing the independence of the courts, trial by jury took on an additional dimension in New South Wales. By 1819, wealthy emancipists controlled the commerce of the colony and they wanted the political power to go with

it. The right to serve on juries symbolised citizenship and for the Emancipists that was the crucial issue. It explains why trial by jury stood at the head of the Emancipists' first-ever petition to the king, why they sent an agent to London to represent them on the question and why it continued to be a burning political issue for them over the next two decades.

The Exclusives, on the other hand, regarded themselves as the only class fit to exercise political power in the colony; the idea that emancipists might sit in judgment over those who had come free, much less that they might vote and stand for office, appalled them. Both factions in the colony recognised the political significance of the jury issue, even though their arguments were framed in terms of a debate over its judicial significance and practicality. The clearest proof of this may be found in James Macarthur's 1836 manifesto on behalf of the Exclusives. Abandoning the earlier opposition to jury trial, he argued that those with a convict record were unfit to take a place on such an important institution as the jury.¹⁵⁸

The Colonial Office communications to the early governors on the subject were to the effect that New South Wales' society was not ready for juries. The attitude of the British Government and the opposition to any suggestion of trial by jury stemmed, at least in part, from the intention of the government to maintain the colony as a place of imprisonment, and therefore a place of repression. For example, there was a letter from Earl

Bathurst to Deputy Judge Advocate Ellis Bent in 1815 who wrote that the colony:

did not appear to H. M's Government sufficiently advanced to admit of withdrawing that appearance of Military Restraint, which had been found necessary on it's first formation, and which the Composition of it's Population had rendered it indispensable Subsequently to maintain. The Continuance therefore of a Judicial officer, who bore a Commission exclusively Military, and who, tho' a Military officer, was by the Charter placed above the Civil Judge appeared to have many advantages with a View to the Maintenance of that due Subordination in the Settlement upon which it's welfare depends.¹⁵⁹

Manning Clark perceived this when he wrote of New South Wales society as he saw it in 1816:

All the rules and regulations of the society were designed to protect the few against the evil machinations of the many: the use of passes to proceed from one settlement to another; the restriction of movement after sounding taptow; control of firearms; orders against inflammatory libels, and seditious assemblies; punishments for hiding convicts and deserters; orders against forgery, perjury and gambling; punishments for vagrants and idlers; general musters of the population; formation of loyal associations; provisions for watchmen and town police; the forbidding of loitering on the wharf; even the denying of rumours of a settlement beyond the

mountains. Here, indeed, was a society in a state of siege, with human depravity in the attack, and force, terror, fear, spying, prying, rumour and meddling the weapons for its defence.¹⁶⁰

The Bigge report

In 1818 the British Government appointed John Thomas Bigge, a London barrister, and former Chief Justice of the West Indies, to inquire into British policy in New South Wales. His instructions were to examine all the laws and regulations in the colony, everything connected with its administration, the superintendence of and reform of convicts, and the state of the civil, judicial and ecclesiastical establishment. He concentrated the major part of his investigation on the condition in New South Wales in the years 1810-1820. He spent 17 months in New South Wales and made three reports to Parliament during 1822-1823.¹⁶¹

Bigge's second report related to the judicial establishments of New South Wales and Van Diemen's Land. His sympathies were with the exclusives. He advised against trial by jury saying, in part, the time had not yet come:

at which the system of trial by jury [could] be safely or advantageously introduced into the civil and criminal proceedings of the Colony. The best means of advancing that period will be found in the encouragement and improvement of the institutions for the education of the rising generation, in affording the

means of their early separation from the vicious habits and bad example of their parents, and from giving the most liberal and marked encouragement to their enterprises and industry.¹⁶²

As Dr Bennett has observed, the Bigge report 'sealed the fate of jury trial for a generation'.¹⁶³

The Bigge report was clearly flawed and biased against the ordinary people of the colony and in particular the emancipists. William Charles Wentworth, by then prominent in the colony as a barrister and agitator for trial by jury, accused Bigge of having raked together 'all the dirt and filth, all the scandal, calumnies and lies that were ever circulated in the colony'.¹⁶⁴

The Bigge report led to the passing of the *New South Wales Act* of 1823. Francis Forbes, at that time one of the counsel to the Colonial Office, was directed by the British Government to draft legislation to give effect to some of Bigge's recommendations.

In 1819 a group of colonists preferred a petition to the Prince Regent praying for trial by jury to be instituted in New South Wales saying, with some passion:

when Your Petitioners consider that Trial by Jury is a Blessing conferred by our Mother Country on all our Sister Colonies, that the Hindoo in India, the Hottentot in Africa, and the Negro Slave in the West Indies, alike partake of its protection and advantages, We do most humbly hope that We, the Inhabitants of this Colony,

Englishmen, the Sons of Englishmen, with all the habits and feelings of Englishmen, will not be deemed unworthy of that great Blessing and suffered to remain the solitary exception within the wide range of British Rule and Dominion to the enjoyment of that great safeguard of British rights and British Subjects.¹⁶⁵

The petition gathered 1260 signatures, including those of prominent emancipists. Macquarie endorsed the petitioners' claims. The Regent and Colonial Office remained unmoved.¹⁶⁶

William Charles Wentworth was a significant advocate for trial by jury. He was born on the ship *Surprise* near Norfolk Island on 13 August 1790, his parents being D'Arcy Wentworth, who narrowly escaped transportation for highway robbery in 1789, and a convict, Catherine Crowley.¹⁶⁷ D'arcy Wentworth was on his way to Norfolk Island to take up the position of acting assistant surgeon. He later became a Sydney magistrate.

When he was 13, Wentworth was sent to school in England. He was called to the English Bar in 1822. He applied to the Colonial Office for the position of attorney general of New South Wales but the application was rejected. The Colonial Secretary, Alexander McLeay, was moved to say that Wentworth was 'an infamous Blackguard, and in every respect worthy of his birth ... being the Son of an Irish Highwayman by a Convict Whore'. Such insults led Wentworth to become a crusader on behalf of the native born and he became a

declared enemy of the exclusives' clique whom he called 'the yellow snakes of the Colony'.¹⁶⁸ In 1819 he published his *Statistical, historical, and political description of the colony of New South Wales*, which called for trial by jury, and was a significant contribution to the emancipists' cause. In his book Wentworth said (of the exclusives):

The covert aim of these men is to convert the ignominy of the great body of the people into an hereditary deformity. They would hand it down from father to son, and raise an eternal barrier of separation between their offspring, and the offspring of the unfortunate convict. They would establish distinctions which may serve hereafter to divide the colonists into *castes*; and although none among them dares publicly avow that future generations should be punished for the crimes of their progenitors, yet such are their private sentiments; and they would have the present race branded with disqualifications, not more for the sake of pampering their own vanity, than with a view to reflect disgrace on the offspring of the disfranchised parent, and thus cast on their own children and descendants that future splendour and importance, which they consider to be their present peculiar and distinguishing characteristics.¹⁶⁹

Colonial Office opposition

Following Forbes' 1824 judgment and the introduction of juries in quarter sessions courts, and the agitation for a continuance of the system, Earl Bathurst, said with

some asperity, in a letter to Darling dated 12 December 1825:

To propose at once the sudden and unmodified system of Trial by Jury, as practiced in this Country, is what I should not be prepared to sanction, nor should I expect, at this early period, that such a proposition would meet with the unqualified assent of the Executive Council of your Government.¹⁷⁰

Clearly, the fight was far from won.

In October 1825 the emancipists presented a petition as part of the address of farewell to Sir Thomas Brisbane (1821 – 1825).¹⁷¹ Part of it was as follows:

While we are bidding Your Excellency farewell, we feel that we can entirely rely upon your watchfulness to embrace all opportunities which may offer, on your return, of suggesting to His Majesty's Government the pressing necessity which exists for the immediate establishment, in this Colony, in all their plenitude, of those two fundamental principles of the British Constitution, *Trial by Jury* and *Taxation by Representation*.

...

The inhabitants of New South Wales, composed exclusively of British-born subjects and their descendants, now amount to nearly fifty thousand: A population exceeding the entire white population of

the Colonies in the West Indies; and, as far as good morals are necessary for the enjoyment of enlarged Civil Rights, Your Excellency's extensive acquaintance with the other Colonies must have convinced you that we will excel them all in this great particular. The orderly state of Sydney, although a sea-port, the great attention and encouragement which schools and religious Societies receive from all classes, and the peace and order of our streets on the Sabbath day, all demonstrate that the seeds of Religion and good morals have taken deep root in Australia.

We will not, however, hide it from the Representative of Our most Gracious Sovereign that there are Colonists of rank and wealth here, and of very great influence at home, who are inimical to the establishment in New South Wales of the British Constitution. These persons were also unfriendly to the late substitution of English Law, in the place of the arbitrary Regulations of preceding Governors. But the history of every institution, which has eminently blessed mankind, will shew the impolicy of withholding a great and general benefit, until those for whom it is calculated should be unanimous in their petition to obtain it. ¹⁷²

Executive Council resolution, 1827

In 1827 the colony's Executive Council resolved:

1. It was assumed that it was settled law that a person

attainted or convicted of felony is restored by a free pardon to the legal competency for jury service.

2. It was inexpedient to raise such a question in New South Wales.
3. As a security for the personal competency of a potential juror. A considerable amount of property in land or stock held by persons of good character should be the criterion.
4. That there should be grand juries.
5. In criminal trials there should be a jury of 12 – six being officers or magistrates and six being inhabitants returned by the Sheriff.
6. In civil trials there should be a jury of 12 at the parties' option, otherwise by 2 Assessors.¹⁷³

There followed increased pressure for trial by jury as the system operated in England. Chief Justice Forbes wrote to the Colonial Office saying the colony had advanced to a state 'to fit it for' trial by jury.¹⁷⁴ WC Wentworth continued a leader in the activity. He decried the makeshift substitute for a jury trial as 'the rude experiments of rude times'.¹⁷⁵ There were speeches, petitions and publications. As we have seen, the English reaction was to legislate to preserve the status quo of trial by military officers as part of the *Australian Courts Act* of 1828.

The Order in Council of 28 June 1830¹⁷⁶ was not welcomed by the Legislative Council. To the exclusives, any extension to the jury system was the thin end of the emancipists' wedge. The Colonial Secretary, Viscount Goderich, told Governor Darling, who no doubt welcomed the news: 'I am not prepared to direct any further alteration for the present in the ordinary system of trial observed in New South Wales.'¹⁷⁷

Forbes' views

Forbes CJ remained a strong advocate for trial by jury. In 1830, in response to a request from Governor Darling and the Secretary of State, Sir George Murray, he stated his views thus (in part):

The propriety of the verdicts of the Military Juries, has never been questions [sic], to my knowledge, in any cases of felony, or ordinary misdemeanour. But I apprehend that mere correctness in finding their

verdict, form but one and that not the primary virtue of trial by jury, -- The essence of this mode of trial, consists in its entire exemption from all supposable means of influence and in the consent of public opinion -- To secure these objects, the Jury lists are made up of the whole of the middling classes of the community; the Jurors are returned from the County, where the act is laid: the panel, in every cause, is formed by ballot, and is open to challenge, for the smallest degree of presumable bias, either in the Jurors themselves, or in the Officer who returns them -- A jury composed of Officers of the Army or Navy, wants these essential qualities of a common Jury -- they are a small body in the State; they are governed by a code of laws, peculiar to themselves; they have not that community of interest and feelings with the accused, that reciprocity of rights and obligations in the society to which they belong, which is essential to the notion of peers or equals, as they are understood in a legal sense, and which givens [sic] such peculiar force to the verdict of the Country, as the finding of a jury is emphatically called. They are nominated also by their commanding Officer, who is at the same time the head of the civil government, and they are not liable to be objected to, except upon the ground of direct interest in the event of the trial. From these causes, as well as from a strong national prepossession in favour of trial by Jury, I have found that the better order of inhabitants have shewn as much repugnancy to be tried by a Jury of Officers, for a Civil Offence, as Gentlemen of the Army would probably

evince at being tried, upon a military charge by a Jury of civilians,

....

As a practical question, arising out of the peculiar state of society here, I have formed an opinion after much experience, that there are sufficient materials for forming Juries in this colony: ¹⁷⁸

Libel prosecutions

Francis Forbes was, for the age, a liberal thinker. This was far more than could be said for Governor Darling, who arrived in the colony on 17 December 1825. By the time his reign started there was a flourishing local press. Two forceful and competent lawyers, Wentworth and Wardell, started the *Australian* on 14 October 1824. They used the newspaper to promote colonial nationalism including trial by jury, and in the process criticised Darling. The *Sydney Monitor* was published by Edward Smith Hall, who constantly criticised Darling for his repressive approach to the government of the colony.

The Colonial Office saw the need to curb the New South Wales press and Darling was instructed to legislate to that end. His problem seems to have been an inability to see beyond his function as a military governor, and in particular, to see the vitally important division between his functions and the responsibilities of the chief justice. In April 1827 Darling attempted to have the Legislative Council legislate to enable the governor to licence

newspapers (and to withdraw the licences at his pleasure) and then to impose stamp duty on each newspaper. Section 29 of the *New South Wales Act* of 1823 required that no law should be laid by the governor before the Legislative Council unless the chief justice had given a certificate that the proposed law was not repugnant to the laws of England and was consistent with such laws. Forbes declined to give such a certificate in respect of either Bill, thereby, it seems, enraging the governor. The bitter but highly significant constitutional dispute between the governor and the chief justice is outside the ambit of this paper. It is dealt with by Dr Bennett in his biography of Forbes.¹⁷⁹

On 3 August 1827 Wardell in the *Australian* attacked one of Darling's orders, in the process calling him an ignorant and obstinate man. Denied the weapon of licensing or taxing the sale of newspapers, Darling determined to prosecute. He directed that Wardell be charged with seditious libel. In September 1827 Wardell was tried before two judges, Forbes CJ and Stephen J, and seven of Darling's commissioned officers. The jury of officers could not agree, and were discharged upon the attorney general undertaking not to prosecute further for the same offence. The ugly nature of the proceedings was made manifest by the terms of a government order, in which Darling threatened retribution upon the officers who declined to convict.¹⁸⁰

The result of Wardell's trial further aggravated Darling, who directed another prosecution of Wardell for ridiculing Darling by some sarcastic comments in the

Australian. Wardell was tried again, in December 1827. He was represented by Wentworth, who unsuccessfully sought to challenge the whole military jury as being subject to the control and direction of Darling as their Commander in Chief. Forbes directed an acquittal on one count and the jury failed to agree on the rest.¹⁸¹

Wardell seems to have been without fear. He survived two duels, one with Attorney General Bannister and one with Darling's aide-de-camp. On 7 September 1834 he was murdered by bushrangers whom he rather rashly confronted while riding on his estate at Petersham.¹⁸²

Mr Hall, the editor of the *Sydney Monitor*, was prosecuted perhaps a dozen times for criminal and seditious libel, frequently convicted and sent to gaol, from where he wrote further material considered libellous and for which he received further gaol sentences. The prosecutions are significant in Australian history partly because they were part of a governor's determination to deny the colony freedom of expression. More importantly (at least for present purposes), they led indirectly to trial by jury and the exclusion of the military from the process. The cases make entertaining reading, including Hall's prosecution in 1828 for traducing the Archdeacon of Sydney, Thomas Hobbes Scott.¹⁸³ He said (amongst other things) the archdeacon was not a man of peace, after Hall was dispossessed of a pew in which he was accustomed, with his daughters, to worship. Apparently, the archdeacon thought it was too near the governor's pew. Dowling J, who had views

rather less liberal than Forbes, instructed the military jury that a libel against a clergyman was:

highly injurious to society, by tending to bring scandal upon religion itself, and thereby to dissolve the sacred bonds which bind man to man; but above all, as a paramount consideration, to weaken man's confidence in the divine attributes of his Maker.¹⁸⁴

Hall was convicted. He was fined, the archdeacon having requested he be shown leniency. In his remarks on sentence Dowling J betrayed his anxiety about the Colonial Office view of New South Wales society and its newspapers:

It is a matter of notoriety that the eyes of the British public, but more especially of His Majesty's Home Government, are intently fixed upon the transactions of this remote settlement; and to every man who truly regards the interests of this fifth great portion of the globe, it cannot but be a subject of anxiety, that the loyalty, patriotism, and integrity of the great body of the community should be estimated by the character of the public press. Judging from the general tone of this powerful vehicle of public opinion, marked as it has been, in too many instances, by great indiscretion, little hope can be entertained that the community of this settlement, now emerging rapidly from the cloud of penal obscurity, will enjoy the radiant advantage of His Majesty's paternal protection, or attract the sanguine popularity and sympathy of the British public.¹⁸⁵

In 1829 Hall was prosecuted for criminal libel against Governor Darling.¹⁸⁶ As usual, the governor was the commanding officer of the military, and six members of the 'jury' were commissioned military officers. Hall was convicted and sentenced to nine months imprisonment. Cases like this, and Wardell's trials, made it blindingly obvious there had to be change. They undoubtedly led to s40 of the *Jury Trials Act* of 1832 which permitted jury trial if the governor or the military had a personal interest in the outcome. Darling sponsored further legislation to restrict the freedom of the press. It was disallowed by the Colonial Office and formally repealed in 1831 by the *Slander and Libel Act*.¹⁸⁷ Darling was recalled in 1831. He left the colony on 22 October. The *Monitor* said: 'He's off. The reign of terror ended.'¹⁸⁸

Chief Justice Spigelman's paper *Foundations of the freedom of the press in Australia*, delivered as the inaugural Australian Press Council Address deals in more detail with the three way collision between the governor, the judiciary and the press in early New South Wales.¹⁸⁹

Governor Bourke and the Jury Acts of 1832 and 1833

The *Jury Acts* of 1832 and 1833 were a result in large measure of the influence of Governor Bourke, who left England, he told Viscount Howick, the Under-Secretary for the Colonies, with 'a strong bias in my mind

towards the adoption of the Jury system to as great an extent as circumstances will permit'.¹⁹⁰

In opening the Legislative Council on 19 January 1832 Bourke told the council it was necessary to pass the 1832 Bill without delay. He had consulted with the judges and the legal profession. 'I am led to believe', he said, 'that the time has arrived, at which the trial of all Criminal Issues may be advantageously committed to Civil Jurors'.¹⁹¹ Bourke favoured the inclusion of emancipated convicts on juries. But the notion was strongly opposed by the Legislative Council, all the members of which (except the governor) had been approved by Darling. For example, the merchant, pastoralist and politician Robert Campbell opposed jury trials for fear that decent subjects would be 'exposed to the degradation of being brought in association, day after day, In the Jury Box, with the refuse of the Goals [sic] and Hulks of the Mother Country'.¹⁹² Bourke was aptly described by Clark as a 'Whig Governor amidst High Tory counsellors'.¹⁹³

In a letter to the Colonial Office Bourke observed that the Bill was opposed by six out of seven of the unofficial members of the Legislative Council, and by the archdeacon. He concluded that the opposition to the passing of the law was on the part of those who desired the entire disenfranchisement of the emancipists.¹⁹⁴ The disqualification of men of 'bad fame' in the 1832 Act made it more or less impossible for anyone who had been a convict from serving on juries. The bad fame disqualification does not appear in the 1833 Act, which

was a concession to the governor for the watered down form of the legislation. The 1833 Act almost marked the end of the fight, but not quite. The citizen could have trial by jury and the emancipists had the right to serve as jurors.

Reaction overcome

In 1836 the exclusives renewed the conflict by two petitions, one to the king and one to the House of Commons. The petition to the king contained the following (in part):

Your petitioners beg most humbly to submit to Your Majesty that, notwithstanding the Colony exhibits the marks of Agricultural, Commercial and Financial prosperity, to an extraordinary and unexampled degree, this flourishing condition of its affairs is unhappily counterbalanced by a lamentable depravity of manners, and by the fearful prevalence of crime, arising amongst other causes from the increased and increasing difficulty, as the towns become more populous and the community extends over a wider surface, of keeping up an effective system of Police for the prevention or punishment of crime, and the consequent relaxation of discipline amongst the convict population; from the inadequacy of the means of religious and moral instruction; and more than all from the continual influx of transported criminals, without a sufficient number of free emigrants of virtuous and industrious habits to check the contaminating influence, and infuse a better tone into society. ... That,

by the provisions of the Colonial Jury Law, individuals having undergone sentence of transportation for their crimes and other ignominious punishments, as well as persons of bad repute and low standing in society, have been placed as Jurors upon the same footing with Magistrates and men of unblemished reputation, a measure which, your petitioners are informed, was attempted merely as an experiment, and the failure of which, they have reason to believe, is now universally admitted. If they could contemplate the possibility of such a law being not only continued, but extended upon the same principles and rendered imperative in the formation of all Juries, both Civil and Criminal, as well as in the exercise of the other important functions of a Representative Government, their minds would be harassed and borne down by the most gloomy forebodings.¹⁹⁵

The *Sydney Herald* was resolutely opposed to jury trials in criminal cases, and constantly attacked the notion that emancipists could serve as jurors. The *Herald* was in constant conflict with the colony's second attorney general, John Hubert Plunkett, who was a strong supporter of trial by jury. In 1838 Plunkett successfully moved to extend the 1833 Act in the face of the published opinion of some colonists that 'it was a judicial monstrosity which has never yet been paralleled in any other part of the world'.¹⁹⁶

The Act of 1839 which established trial by jury in all indictable criminal cases was introduced at the urging of the new chief justice, James Dowling, and was passed

with the active support of Plunkett and Governor Gipps. The roles of Dowling, Plunkett and Gipps in the struggle for trial by jury are recounted in Professor Molony's biography of Plunkett, *An architect of freedom: John Hubert Plunkett in New South Wales 1832 -1869*.

Driven by drink

The opposition of the exclusives remained an obstacle to the practical working of the jury system. In the Sydney list of jurors returned in January 1839 there were 145 emancipists and 153 publicans amongst the names. The *Herald* said there would still be an ample sufficiency of jurors if emancipists and publicans were summarily dismissed from the list. In session after session 'gentlemen of respectability' were fined for not turning up when summoned as jurors because, as the *Herald* put it, 'they do not like certain associations in the jury box'. The suspect associations, besides emancipists and publicans, included an English-born Negro admitted to jury service in 1840. The *Herald's* contribution to racial harmony was to say: 'Is it not revolting to go into a British Court of Law and see Negroes sitting in a jury box?' Apart from their colour, there could be 'no confidence in their intelligence and discrimination'.¹⁹⁷

The citizens of Sydney have always had amongst their number a dedicated community of enthusiastic drinkers. It was perhaps more so in the early nineteenth century, or was at least more obvious, but intoxication was another problem for the orderly running of jury trials. Plunkett said drunkenness was 'the crying vice of

the Colony' and blamed publicans for the problem. People summoned as jurors, as well as witnesses, were not infrequently drunk. A problem may have been finding 12 men all of whom at the one time were sober. In May 1840 two surgeons called as witnesses in a case were gaoled for contempt because they were drunk to the point of incoherence. Spectators were not immune from the vice. It was reported in the *Herald* on 6 May 1840 that:

On Monday forenoon while a trial was going on before Judge Willis, a person in a state of intoxication fell asleep on the middle row of seats and thinking he was in a grog shop, suddenly shouted out, 'Bring us another pint, you B----r'.

He was sent away for seven days to contemplate the virtues of temperance.¹⁹⁸

Somehow the introduction of the jury system survived the combined forces of social, sectarian and racial discrimination and ordinary human stupidity arrayed against it.

Chapter 5

Aborigines: (In)equality before the law

Aborigines and society

They are part of jury history. By and large they have been part of those tried, rather than the triers. In the first period relevant to this paper (1788-1844) and for long thereafter they were, at most, on the fringe of New South Wales society.

Instructions to Phillip on 25 April 1787 included the following adjuration:

You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.¹⁹⁹

How many Aborigines lived in the then New South Wales was entirely unknown to Phillip, and not possible to determine now. What is known is that very soon after the arrival of the First Fleet smallpox killed probably half of all Aborigines in the vicinity of Port Jackson. The disease was introduced by either La

Perouse or the first English fleet and did not die out until about 1845.²⁰⁰

From the beginning, European attitudes to the Aborigine varied from friendly to homicidal. Some early writings were not flattering. In 1804 the *Sydney Gazette* said of Aborigines:

They are no less remarkable for perfidy to each other than ingratitude to the settlers, who by constantly contributing to their support and endeavouring to maintain a friendly intercourse, have done the highest credit to themselves and the British Nation. ... no set of people in the known world were ever so totally destitute as these are of industry and ingenuity, or whose innate indolence rendered them so wretchedly inattentive to the very means of subsistence.²⁰¹

The prevailing attitude to the first Australians in the nineteenth century is perhaps exemplified in a lecture given in about 1842 by prominent barrister Richard Windeyer,²⁰² the handwritten draft of which is in the Mitchell Library. It is hard to read. From the lecture Professor Reynolds obtained the title of his book, *This whispering in our hearts*.²⁰³

Windeyer called his lecture 'On the rights of Aborigines of Australia'. Dealing with criticism of the Crown for ignoring the rights of Aborigines, he said:

in short, the rights alleged to be encroached upon by Britain in the establishment of the various colonies [are

those?] which promise to render their continental state the abode of civilisation and Christianity, instead of a track for the roaming of a few scattered savages.

Windeyer cited the Reverend Mr Gunther, a Church of England missionary, as saying:

I have had particular opportunities to become acquainted with the nature of the absurd laws, the vile and superstitious practices of the Aborigines and the unbounded sway which the old men exercise over their people.

Warming to his subject, Windeyer went on to say:

The Aborigines exercise the liberty not only of destroying but of eating their children. That cannibalism exists throughout the length and breadth of Australia is generally known. ...

A hideous but true picture of the human mind unenlightened by religion or education – without knowledge of responsibility to God or to man.

Does it not shock common sense for us when told that we have no right to interfere with such atrocities, passing as they do under our very eyes? Is it not a perversion to call them laws? Do the customs of the Aborigines come within the definition? The mere statement of them is an answer to the question.

But then it is said that supposing, as we are here, we have a right to abolish their customs and impose our

own upon the natives but we have no right to take their land. The objection begs the whole question, which is whether the land is theirs? The fallacy of the philanthropists is reproaching the British government with infringement of the Aboriginal laws considered in the assumption that that they have laws.

He did arrive at a solution, consistent with his view of Christian duty:

How is that our minds are not satisfied? What causes this whispering in the bottom of our hearts? Conscience? What wantest thou? Am I my brother's keeper? The more vile, the more wretched we have these [?] the Aboriginal, the more imperatively is the duty cast upon us by fit means of education to make him conscious of the dignity, the holiness of the Mind he shares with ourselves.²⁰⁴

So much for the Aborigine and society.

Murders at Myall Creek test the jury system

No matter what the current debate between historians, it is beyond doubt that as the Europeans moved inland they necessarily advanced into Aboriginal land, which led to lethal clashes and the killing of both whites and blacks. An infamous example was the massacre of about 28 black people at Myall Creek, north of Bingara, in June 1838. It was one of a number of related massacres, this one committed under particularly gruesome

circumstances. The events severely tested the fledgling jury system.

On 15 November 1838 11 men were tried for the murder of one of the dead Aborigines. A jury acquitted them after deliberating for 15 minutes. The trial was preceded by a virulent anti-black campaign by the *Sydney Herald* which appears to have affected the result. The men were remanded for a further trial for other murders arising out of the same incidents. On 26 November 1838 seven were indicted on 20 further counts, including the murder of a male and female Aboriginal child by shooting, and the murder of an Aboriginal man by shooting, cutting with a sword, and casting into a fire. The men sought an adjournment so their counsel could read the information, which Burton J thought was quite reasonable. The attorney general wanted an adjournment anyway, because of publicity and bias displayed by the press, and foreshadowed an application for an order restraining the press from publishing anything more relating to the case. (The *Sydney Herald* had exhorted acquittals, no matter what the evidence.)

This may be the first occasion in New South Wales on which the Crown contemplated seeking an order prohibiting publication of court proceedings. Burton expressed his faith in the jury system. The report in the *Australian* on 27 November 1838 read:

Mr Justice Burton said, that the Attorney-General could take what course he thought proper, but he would

advise him not to be hasty in his application, nor in the course he intended to adopt. For in his [Mr Justice Burton's] opinion, he thought, and he said so with confidence, that the course of public justice would never be perverted when a case came before a Jury and a Judge of New South Wales. He thought there was too much honour in the Supreme Court of New South Wales, to ever bias a case that might come before the Court. He hoped, and not only hoped, but could assert, that the Judges, as well as the Juries, were never biassed by any thing that occurred out of doors, in the decision of a case; and he felt with pleasure that the administration of justice was safe in the Bench and Jury of New South Wales. However wicked persons might attempt, by their writings, to sway the course of justice, he would never admit that the moral stated [sic] of the Colony was so bad as had been represented, and that the course of justice could be perverted by any thing that was said out of the doors of the Court.

The prisoners pleaded a demurrer to five counts upon the premise that they were uncertain; that is to say, the name and sex of each murdered child could not be assigned to one or the other. The problem was that the bodies were badly burnt and it was not possible to determine the sex of either. 'It is material' said counsel, that 'a person should be aware of what he is accused, and law itself does not presume that an aboriginal black child means an aboriginal black female child'.

It is not an argument I would care to run today, but it was treated seriously. The men also pleaded *autrefois*

acquit, contending that the murders for which they had been acquitted were the same murders for which they were now to be tried. The demurrer was overruled. It is interesting to twenty-first century practitioners that a jury was empanelled to try the issue whether the plea of *autrefois* was good. The real issue was whether it was possible to identify the deceased people as people different from those the subject of the first trial.

The jury found for the Crown on the issue of *autrefois acquit*. The men were then tried. The jury returned after retiring for 45 minutes and the foreman delivered a verdict of not guilty in respect of each prisoner. What then followed must have caused a certain tension in the forensic atmosphere. As the *Australian* laconically reported it on 1 December 1838:

A Juror stated to the Court that the foreman had made a mistake, and had not delivered the verdict of the Jury, which was Guilty on the first five counts – Not Guilty on the other fifteen counts.

This verdict was recorded, and the prisoners were remanded.

On 5 December 1838 the men moved in arrest of judgment, on the point reserved at the trial; having been acquitted at the first trial of the murder of Aboriginal Charley, they were improperly convicted on the other counts for the murder of a black unknown. Appeals from jury verdicts did not then exist.²⁰⁵ The submissions

fell on unreceptive ears and the men were sentenced to death.

Burton's remarks on passing sentence were reported by the *Australian* on 6 December 1838 thus (in part):

This massacre was committed upon a poor defenceless tribe of blacks, dragged away from their fires at which they were seated, resting secure in the protection of one of the prisoners; unsuspecting harm, they were surrounded by a body of horsemen, twelve or thirteen in number, from whom they fled to the hut, which proved the mesh of destruction. In that hut, the prisoners, unmoved by the tears, groans, and sighs, bound them with cords, fathers and mothers, and children, indiscriminately, and carried them away to a short distance, when the scene of slaughter commenced, and stopped not, until all were extirminated [sic], with the exception of one woman. His Honor did not mention these circumstances to add to the agony of that moment, but to pourtray [sic] to those standing around the horrors which attended this merciless proceeding, in order, if possible, to avert similar consequences hereafter. He could not hope to reach, but he hoped that others would reach, that the grace of God would reach the hearts of men who could, without remorse, sacrifice fathers, mothers, and infants, in one swoop, without any cause for excitement.

The *Sydney Gazette* that same day (6 December 1838) said of Burton's remarks on sentence:

Time will not admit of our giving more than the foregoing brief outline of Judge Burton's speech on passing sentence, during the delivery of which the judge was deeply affected – to tears. His Honor was listened to with the deepest attention by a crowded court; and we trust that the remarks which fell from the Bench will have the effect they were intended to produce on the audience – of showing them that the black man, like the white man, has a soul to be saved, and that any outrage on the former by the latter, will be as soon avenged, as would be an outrage on the white man by the black savage.

The seven were hanged on 18 December 1838.

The cases were fully reported in the *Sydney Gazette* and the *Australian*. They are all conveniently reproduced by Macquarie University's Division of Law in its *Decisions of the superior courts* as *R v Kilmeister (No.1)* and *R v Kilmeister and Others (No.2)*. They are interesting for a number of reasons, or so it seems to me. They show an early jury grappling with unpleasant facts and being prepared to convict in the face of a hostile public (even if the foreman was a little dim). They show a judiciary determined to see a fair trial, and counsel on both sides both competent and energetic. They show judges attempting to break down the barriers between black and white. Not least of all, they show the keen eye for detail possessed by nineteenth-century journalists.

However, a shameful truth cannot be hidden, which is that there were other such massacres both before and

after the Myall Creek tragedy. Probably the most infamous example was the killing of a large number of Aborigines by Major Nunn and mounted police at Snodgrass Lagoon – later Waterloo Creek.²⁰⁶ No charges were laid and long after the Myall Creek trials the attorney general appears to have taken the view that it would be useless to entrust white juries with the trial of crimes against Aborigines.²⁰⁷

An interesting sequel to the Kilmeister trials was the prosecution in February 1839 of three others for the Myall Creek murders: *R v Lamb, Toulouse and Palliser*. An essential Crown witness was an Aborigine called Davey. The law of evidence of the era required a witness to be competent to take an oath, which required a belief in God and the possibility of eternal damnation. Perhaps fortunately for the prisoners, Davey, while ‘a very intelligent lad’, had been too short a time under tuition ‘to be enabled to judge of what might be accomplished’. The attorney general referred to another Aborigine, a man named McGill who had been several times before the court and ‘who had been educated and in fact reared amongst the Missionaries’ but was not competent to give evidence, ‘having no belief in a future state of rewards and punishments’. Such a condition would disqualify more than a few witnesses in 2003. The Crown threw in the towel. Dowling CJ addressed the prisoners. His remarks (in part) were reported as follows:

The fortuitous circumstances which had relieved them from being tried at this sessions, for the wilful murder

of the blacks, for which their associates had already suffered the extreme penalty of the law, was fortunate for them in an earthly sense, as he hoped that it would have a lasting and salutary effect on their lives. But for the circumstances alluded to, it was more than probable that more sacrifices of life must have been made to public justice; and he earnestly entreated the prisoners, if they were not brought to justice at some future time, to repent, and endeavour to atone for what there was too probable belief they had been guilty of. It was true that a Jury of the country had, upon one occasion, declared by their verdict that they were not guilty of the crime imputed to them, and that verdict was returned upon the sacred oath to Almighty God, of the Jury, that they would administer impartial justice. He (His Honor) had too much veneration for that tribunal to doubt for one moment the impartiality of that verdict, which had been condemned by some. If there had been any cause for fault, it had been atoned for, and it had been a very fortunate issue for the prisoners, and ought to [be] a lasting lesson to them.²⁰⁸

Aboriginal customary law

An early debate about Aboriginal customary law arose in 1836 in *R v Murrell and Bummaree*. Counsel for an Aborigine charged with the murder of another Aborigine unsuccessfully argued the Supreme Court had no jurisdiction over crimes committed by Aborigines on each other. Counsel contended that Aborigines were governed by their own immemorial customs and usages and were independent of British

criminal jurisdiction. They were not bound, he argued, by laws which gave them no protection. The prisoner entered a special plea to this effect. It firstly found favour with Forbes CJ, according to the following press report:

At the opening of the Court this morning, the Chief Justice gave it as his opinion that the plea put in by Mr Sydney Stephen on the part of the Aborigine accused of the murder of one of their tribe was perfectly just; as for any acts of violence committed by the natives against each other, even if it amounted to death, they were subject to the custom of their own laws; the plea put in was not what is commonly called a plea in abatement, he was aware of no insufficiency therein, and it must have been got up at great trouble by the learned counsel. The subject was one which called for the earnest attention of the legislature, yet he thought that in the present case the better way would be to try the general issue, and he pledged himself on the part of the court that the accused should have the advantage of any objection that might arise.²⁰⁹

The matter was referred to the Full Court on 11 April 1836 (Forbes CJ, Dowling and Burton JJ). Forbes changed his mind, saying the court were unanimously of opinion that the plea put in to the information in the case must be overruled. Burton J read a judgment in which the others concurred, saying, in part:

But I am of opinion that the greatest possible inconvenience and scandal to this community would

be consequent if it were to be holden by this Court that it has no Jurisdiction in such a case as the present – to be holden in fact that crimes of murder and others of almost equal enormity may be committed by those people in our Streets without restraint so they be committed only upon one another! & that our laws are no sanctuary to them.²¹⁰

This was the last day on which Francis Forbes sat as Chief Justice of New South Wales.

In the event, Murrell and Bummaree were acquitted.

In 1841 at Port Phillip, Willis J in *R v Bonjon* took a contrary view and refused to proceed with the trial of Bonjon also charged with murdering another Aborigine. He held that the Aborigines of New South Wales were a domestic dependent nation, internally self-governing, like the American Indians. The mere introduction of the common law and the courts was not enough to extinguish Aboriginal customs and tradition; this could be achieved only by statute, or conquest, or the cession of jurisdiction by treaty. Willis' view was at odds with those of the other judges, and Governor Gipps. Willis sought the views of the Crown's law officers in London. James Stephen said in a minute that the matter had been decided and the law officers should not be invited to interfere in the deliberations of the colonial judiciary.²¹¹

From 26 January 1788 Aborigines have been liable to (and entitled to the protection of) the criminal law of New South Wales. As *Halsbury's laws of Australia* puts it,

‘All Aboriginal persons became subjects of the king and liable to the law when the British Crown established the colony of New South Wales’.²¹²

In 1947 possession of property as a qualification for jury service yielded to the mere entitlement to vote. Until after 1967 most Aborigines qualified under neither rule. Both before and after federation the Aborigines of New South Wales (and the rest of the continent) were not included in any census, and s127 of the Commonwealth Constitution ensured that they would not be reckoned amongst the numbers of people in the Commonwealth, until it was repealed in 1967.

Before 1947 not many Aborigines would have met the property qualification, and for a long time after 1947 most were unlikely to be on the electoral roll. But from 26 January 1788 they were liable to be tried according to the criminal justice system, eventually by juries.

It is, I think, generally accepted by reasonable people, that from the beginning of New South Wales the protection afforded Aborigines by British law was often more illusory than real.

An Aborigine on trial is not entitled as of right to have Aborigines on the jury, although in 1981 in the District Court, Martin J discharged a jury when the Crown stood aside all Aboriginal members of the jury panel.²¹³

Chapter 6

Aspects of trial by jury

It is not possible in one paper such as this to adequately trace all the history of jury trials in New South Wales from their establishment. The history includes countless anecdotes about the behaviour of jurors, judges, lawyers, journalists and politicians. Behind significant amendments to the statute law lies a treasury of agitation, insult, reports, minutes and parliamentary speeches. I can do the exercise only in outline, by reference to various aspects of jury service.

Qualification as a juror

Eligibility for jury service in New South Wales was first enacted before there were any juries. Section 6 of the *New South Wales Act* of 1823 permitted jury trials in civil causes if each party agreed. Section 7 of the 1823 Act required a potential juror to possess a freehold estate of 50 acres or more of cleared land, or a freehold dwelling or tenement worth £300 or more, situated in New South Wales.

The notion that the only worthwhile judges of fact were men, and men of property at that, persisted until 1947.

Section 8 of the *Australian Courts Act* of 1828 gave either party to a civil cause the right to apply for trial by jury, the matter being in the discretion of the trial judge. The qualifications, numbers and summoning of jurors was

left to local legislation, being a general law or ordinance passed by the governor with the advice of the Legislative Council.

The first New South Wales Jury Act (*Juries for Civil Issues Act* of 1829), dealing only with civil claims, varied the qualification provision of the imperial *New South Wales Act* of 1823 by substituting an income from real estate of £30 for ownership of 50 acres of cleared land. Sections 4 and 5 specifically disqualified men not natural-born subjects, or who were attainted by treason or felony or convicted of any crime that was infamous. At the same time s6 prescribed jury lists of 'men of good fame and repute'.

In the 1829 Act, convicts had to be pardoned to qualify (s4). Then by the 1832 Act they were qualified if the full term of the transportation order had expired (s4). This provision was not in the 1833 Act but reappeared in s1 of the 1839 Act. The 1832 Act excluded men twice convicted of any treason, felony or infamous offence, and every man of bad fame, dishonest life or conduct, or of immoral character or repute. I have already referred to the significance of the 'bad fame' provision, which was not in the 1833 Act.²¹⁴ The 1832 and 1833 Acts provided for the settling of jury lists by superintendents of police and magistrates, and enabled them to strike from the lists those disqualified and those disabled by 'lunacy, inability of mind, deafness, blindness or other permanent infirmity' (ss8 and 16) but not for any other specific reasons.

Under the *Jury Trials Act* of 1836, however, although the disqualification provisions remained unchanged, a discretion was expressly conferred on the justices assembled in petty sessions to correct jury lists to strike from the lists the name of 'every man of bad fame or of dishonest life or conduct or of immoral character or repute' (s2). This may have been due to Justice Burton's unfavourable (and long) opinion to the governor in April 1836 about the workings of the jury system in which he said that persons very low in respectability and character were qualified to serve as jurymen. He was concerned that 'a large proportion of the persons who have appeared and served, are Publicans'. As to the property requirement, he said:

Respecting the qualifications arising from property, the possession of such an amount as is specified in the Act, affords no criterion in this Colony, where property is notoriously accumulated by every variety of dishonest means, of the respectability and trustworthiness of the possessor of it, and that criterion which in a community differently constituted from the present, where property is scarce amongst a large and reputable class of persons, may form a safe guide to the eligibility of a Juror as placing him above temptation, wholly fails in a community like this, lacking honesty, but abounding in property.²¹⁵

(I must say, in my experience anyway, possession of valuable property still does not necessarily denote honesty in the possessor.)

The other two judges, the attorney general and the solicitor-general did not agree with Burton. Forbes concluded his opinion by saying:

I am aware it is frequently asserted, that the introduction of Trial by Jury has not answered the ends of justice; but I believe this opinion is entertained, chiefly among persons who have not attended the Courts, and who express themselves upon the authority of report; and I also believe that the objections which are felt to this constitutional form of trial, are partly political; but principally arise from the unwillingness of the upper classes of the inhabitants to be drawn so frequently from their private affairs to attend an irksome and painful duty in the Courts. An objection which I admit is very natural, and which, unfortunately must continue to be felt, until the institution of Circuit Courts shall relieve them from a considerable portion of this duty. In short, my decided opinion is, that Trial by Jury in this Colony has been deferred too long.²¹⁶

Looked at with twenty century eyes, it does seem odd for the law to have prescribed with some precision the factors which disqualified a man from jury service, at the same time leaving it to justices of the peace to decide that he could not serve because he was of immoral repute. But, in spite of Bourke's efforts it was a weapon of discrimination. A man whose name was struck from the list had a right to be heard, but his remedy beyond that was doubtful, as the mandamus cases showed.

The *Jurors and Juries Consolidation Act* of 1847 re-enacted the property requirement for jury service, and the disqualification provisions, without provision for an emancipist whose term of transportation had expired but who had not been pardoned. By this time of course transportation of convicts to New South Wales had stopped (in 1840).²¹⁷ A man was disqualified:

- if he was not a natural-born subject,
- if he was attainted of treason or felony or convicted of infamous crime unless pardoned, or
- twice convicted of treason, felony or infamous crime (s3).

But s8 re-enacted the right of justices in session to strike from the list the names of all men of bad fame or of immoral character and repute. The list of those qualified to be special jurors was extended to include members of the Council of the City of Sydney or Town of Melbourne (s10).

To serve on a jury one had to be a man above the age of 21 (s1). Section 2 of the 1847 Act exempted (upon application) a long list of people including men over the age of 60, all persons holding offices under the Department of Customs and Colonial Distilleries, the Surveyor General, the Treasury Audit Office, the Post Officer, the Mayors, Town Clerks and Principal Surveyors of Sydney and Melbourne, ministers of religion, barristers, solicitors and proctors, physicians,

surgeons, apothecaries and druggists, schoolmasters, parish clerks, managing directors, managers, cashiers and tellers.

Entrenched in the legislation through the nineteenth and early twentieth centuries were notions of class and the importance of position in the community. Such notions are still alive and well, but it is not so common these days to see them given statutory recognition. It was seen most clearly in the provision for special juries. Another example is this. The 1847 Act allowed jurors two shillings and six pence per day and four pence a mile each way for travelling (s31). However, if a juror made the journey by ship, his allowance was limited to 'the actual amount of the steerage or cabin passage money payable according to the station in life of the juror'. The Act does not tell us how the station in life of a juror was to be assessed.

In 1851 barristers' clerks became entitled to exemption: s7 of the *Jury Laws Consolidation Act*. Two interesting changes were wrought by the *Jury Laws Amendment Act* (No. 2) of 1876. By s3 those qualified as special jurors were every man in the juror's list described as:

- a justice of the peace
- lessee of the Crown
- banker
- bank director
- merchant
- accountant
- engineer

- manager of a station
- broker
- chemist or druggist
- warehouseman
- commission agent
- architect
- as the owner of land or tenements of the yearly value of £100.

Retail grocers, it seems, had arrived (they were not excluded as before from 'Merchant') and an income of £100 from property was sufficient for the legislature to overlook one's social inferiority or imperfections.

The other interesting change was that a person not a natural-born subject of the queen became eligible for jury service if he had obtained letters of denization, or been naturalised or who being an alien by birth had resided in the colony seven years or upwards (s10). Denization, according to Mr Ogilvie's 1879 dictionary, was the act of making one a denizen, subject or citizen.

²¹⁸ I do not know to what extent in 1876, letters of denization fell short of naturalisation.

The first New South Wales Jury Act of the twentieth century, and the first after federation, was the *Jury Act* of 1901. The property and disqualification provisions (ss3 and 4) remained as before and at the same time the justices correcting the jury list were directed to strike off the names of all men of bad fame or immoral character and repute (s14). It was a provision which must have presented quite fascinating problems. For example,

what of the merchant or warehouseman living with a woman to whom he was not married? What if the £300 was invested in a house of ill fame? The subject of juries was re-visited in detail by the *Jury Act 1912*. It did not alter the property qualification, or disqualification provisions, and those of immoral repute remained beyond the pale (if the justices correcting the jury list knew about the repute) (ss3, 4 and 13).

By the *Jury (Amendment) Act 1918* the list of exempted classes was extended to include commercial travellers who lived in Sydney, but travelled outside the Sydney jury district, and mining managers and under-managers of mines employing not less than ten men. The Act was assented to on 3 December 1918, three weeks after the end of the Great War. I wonder why the war did not have a more significant effect on jury legislation. One answer I suppose is that those serving in the armed forces were exempt by reason of the *Jury Exemption Act 1905* (Cth).²¹⁹ In 1924 the *Jury (Amendment) Act* added dentists and employees of any State of the Commonwealth other than New South Wales to the list of those entitled to exemption. The list of those eligible to be special jurors remained the same.

Jury (Amendment) Act 1947 and women jurors

The year 1947 brought highly significant changes, reflecting changing social attitudes. The *Jury (Amendment) Act* was assented to on 19 December 1947. The Second World War ended for Australia with the Japanese surrender on 14 August 1945. The war was a

vast social upheaval that was the genesis of many changes, including the community attitude to women. At least by 1947 the legislature was prepared to recognise that women were sufficiently equipped intellectually to make rational judgments about disputed issues of fact. Section 3A of the Act as amended in 1947 gave to every woman entitled to be enrolled as an elector the right to notify the chief constable of her police district that she wanted to serve as a juror, whereupon she was qualified and liable to serve. Section 3A (2) gave the same women the right to give notice discontinuing their qualification and liability, which would then discontinue.

The qualification provision for men (s3 as amended) abandoned requirements of property or income and made every man who was entitled to be enrolled as an elector qualified and liable to serve on juries. The prohibition against those not natural-born subjects was altogether removed.

Curiously, the power to exclude the perceived immoral was retained; the only amendment to the striking off provision was that the exercise would be undertaken by a stipendiary magistrate, and he could also strike off the names of people who, by the nature of their calling, were liable to suffer undue hardship if called to serve as jurors, or whose call to serve as jurors would occasion undue public inconvenience.

Special juries passed into history: s4 (1) (c).

As to women, on 13 November 1947 Attorney General Martin ²²⁰ told Parliament that: 'The first and most vital amendment is that this Bill proposes to permit women to serve on juries, as is the case in Queensland, Eire, Alberta, South Africa and New Zealand.'

But the administration was not quite ready. Mr Martin said that because of *accommodation difficulties* the provision would not take effect just yet. When asked 'What is wrong with the present accommodation?' the attorney general clearly thought the matter too sensitive to be discussed publicly. He said: 'As will be appreciated by the hon. member, without going into unnecessary detail, there are certain accommodation difficulties. I think the hon. member is sufficiently aware of those difficulties.' As we will see, the 'certain accommodation difficulties' assumed quite profound significance.

As to the property provision, Mr Martin said the Government felt the practice of excluding the less well to do from jury service could not be supported. He thought special juries were an anachronism dating from the fifteenth century and could not be supported on any logical principle. ²²¹ Mr Treatt supported the provision for women jurors but was apprehensive about the vast extension of the franchise to the not so well off. He said that when the field from which jurors are to be drawn is wider and deeper, that 'enlarges the number of desirable persons and inevitably the numbers of less desirable persons who may take a seat on a jury'.²²²

The press sought the views of prominent barristers about permitting women to be jurors, some of which were published in the *Sydney Morning Herald* of 18 July 1947. They are an interesting commentary on social attitudes of the time. The men quoted were giants of the Bar.

WR Dovey KC ²²³ gave the proposal guarded support. He said:

The proposal of women jurors is all right in principle, but I do not know how it will work in practice. It seems to work in England.

I can visualise many cases in which it would be embarrassing for the Judge, counsel, and the jury. Those cases frequently come before the Criminal Court. In some cases where women are concerned as the victims a woman juror may have a better appreciation of the case than a man. Even then it might be embarrassing for the woman juror.

JE Cassidy KC ²²⁴ was less positive. He said he looked forward, with some misgivings, to a barrister's capacity to handle a mixed panel. He said: 'I feel that only in a very restricted class of case can women really strengthen a jury.'

JW Shand KC ²²⁵ was more direct. He said: 'I do not think that women are fitted to be on a jury under any circumstance. I do not think they are temperamentally suited.'

The Bar at the time was not overloaded with women. There were two out of 321 practising barristers. I do not know what Mr Shand's views were about women barristers, but history has shown that the introduction of women to the jury system has, without doubt, enured to its benefit.

Administration of Justice Act 1968

The Act made women eligible and liable to serve as jurors without request, subject to this, that a woman could by notice to the chief constable of her police district elect not to serve on juries. The chief constable could not be required to include the name of a woman on a jury list unless he was given notice by the Sheriff that he was to include women in the list and he was satisfied that the woman concerned had been made aware of her right to elect not to serve. This had the effect of excluding many women from jury rolls, notwithstanding the 1947 legislation.

The Jury Acts from 1912 were repealed by the *Jury Act 1977*. Today, by virtue of s5 every person enrolled as an elector for the Legislative Assembly is qualified and liable to serve as a juror.

Women and accommodation

By 1977 (30 years after the *Jury (Amendment) Act 1947* entitled women to serve as jurors) the 1947 Act had been given only partial application. The real nature of the *accommodation difficulties* which embarrassed the attorney

general in 1947 was at last exposed in Mr Walker's second reading speech on 24 February 1977:

No less important than the overhaul of the enrolment process is the provision in the bill to ensure that women will be able to make an equal contribution as jurors. The Jury (Amendment) Act of 1947 provided for women to serve on juries in New South Wales. However, service was optional and women in fact had to apply to be included on a jury roll. In 1968 the Administration of Justice Act provided that those qualified would be included on a roll and could claim exemption as of right by lodging a notice with the officer in charge of police. Although this was some improvement it did not go far enough and was further restricted by application to a number of prescribed districts only – twenty-nine districts out of a total of sixty-nine – and the first of these was not prescribed until late in 1972.

The reason, we are told, for not extending this right to women throughout the State was, to quote a former Attorney-General, Sir Kenneth McCaw,²²⁶ accommodation problems. This was Sir Kenneth's delicate euphemism for no lavatories. In these days of equality of status there is no good reason why men and women jurors cannot use the same toilet, provided it is clean and tidy. Though minor alterations are being made to a number of court houses to provide separate toilets for men and women, this Government does not intend to stand by and, in about eight or ten jury districts, prohibit women from undertaking this most

important duty, merely because they might not have a separate toilet. The bill will ensure that women will be able to serve on an equal basis with men, apart from an exemption as of right for women who are pregnant.²²⁷

It appears that separate lavatories for women jurors were beyond the scope of the State's budgets for 30 years. The laudable object of the 1947 Act was not realised until a further perceived change in social attitudes permitted unisex toilets. One can never be certain of the true nature of the forces underlying social reform, but it is obvious that for a long time women were deliberately prevented from exercising their statutory right to serve as jurors.

Schedules 1, 2 and 3 of the *Jury Act 1977* respectively distinguish between those disqualified, those ineligible and those who can claim exemption as of right. The Act has been since amended. As of now disqualification extends to a person who in the last ten years has served a term of imprisonment (not merely for failure to pay fine), a person who in the last three years has been found guilty of an offence and detained in a juvenile detention centre (not merely for failure to pay a fine) and a person currently bound by an order made pursuant to a criminal charge or conviction (not including an order for compensation).

The ineligible include the governor, judicial officers, parliamentarians, legal practitioners and those unable to read English. A reputation for immorality is no longer a bar. Persons who may claim exemption include vowed

members of religious orders, dentists and medical practitioners, mine managers, persons at least 70 years old, and women (provided they are pregnant).

Jury lists and summoning jurors

Between 1829 and 2002 the franchise has expanded dramatically, with consequential administrative changes. I have already touched upon the subject in the discussion about qualifications of jurors.

Juries for Civil Issues Act of 1829

By the *Juries for Civil Issues Act* of 1829, in each year lists of all men of good fame and repute were prepared by the superintendents of police in Sydney and Parramatta and the bench of magistrates in Liverpool. The lists were affixed to the doors of courthouses and churches. Special petty sessions were then held to correct the lists. People aggrieved by the corrections could be heard by the justices. The settled lists were sent to the Sheriff who entered the names in alphabetical order in a jury book, a copy of which was given to the clerk of the Supreme Court. When the court issued a writ of *venire facias*, the Sheriff would summon the number of men required, being not more than 36 nor less than 18 (ss6-12). The names of special juries were put in a Special Jurors List, separate from common jurors.

The *Jury Trials Act* of 1832 extended the area from which jurors were drawn to the whole County of Cumberland. The 1833 *Jury Trials Act* brought in men residing within

30 miles from Maitland or Bathurst as jurors for quarter sessions courts (s13). Similar provision was made in the 1838 Quarter Sessions Act for courts of quarter sessions at Melbourne and Port Macquarie. The *Jury Trials Acts* of 1840 and 1841 extended the franchise to men in the towns or district where the court would sit on circuit (later including Moreton Bay) and in 1846 the *Jury Trials Act* provided that no person who lived more than 30 miles from Berrima could be required to undertake jury service at Berrima.

Jurors districts: Jurors and Juries Consolidation Act of 1847

The *Jurors and Juries Consolidation Act* of 1847 consolidated the earlier Acts dealing with juries, and re-wrote the process. Every man in the colony with the necessary income or property qualifications was liable for jury service (subject to the provisions for disqualification and exemption) (s1).

The colony was divided into jurors' districts, being:

- the Sydney jurors' district, which was the Police District of Sydney
- the Parramatta jurors' district, which was the County of Cumberland
- the jurors' district for every other town or place at which a court had or would be appointed to sit, which was a circuit of 30 miles around every such town or place (provided that if the 30 mile circuits around two such towns or places were

partially identical then the jurors' districts would be bounded by a straight line between the points of intersection of the circuits) (s4).

The clerk of petty sessions in the police district which encompassed each jury district was required in the first week in August in each year to notify the chief constable that he was required to make a list of all men in the jurors' district who were liable to serve on juries (s5). The chief constable's duty then was to make out the list in alphabetical order (by 15 September) and affix it to the principal doors of the courthouses (not churches any more) with a notice stating objections to the list would be heard by the justices in October (ss6 and 7). The clerks of petty sessions convened special petty sessions for the first Tuesday in October for correcting the lists. The corrected list was sent to the Sheriff, who then made out the jurors' book, together with the special jurors' list (s10).

When a jury was required the judge would issue a precept requiring the Sheriff to summon jurors (a general precept, a special jury precept or a common jury precept according to what was required) and the Sheriff would summon the number required. A general jury precept was issued for criminal cases and required the attendances of not more than 48 nor less than 36 jurors. A special or common jury precept was for civil cases and required the attendance of not less than twice nor more than three times the number of jurors to be empanelled.

Section 1 of the *Jury Laws Amendment Act (No. 2)* Act of 1876 enabled the governor in council to extend a jury district to 50 miles from where a court was going to sit, if the list of jurors did not exceed 200.

Jury laws were rewritten by the *Jury Act 1901*. Jurors' districts were now Sydney, which was the Sydney police district, and all places within a distance of 12 miles from the Town Hall. Other jurors' districts were every other police district for the town or place where any court would be appointed to sit. If a list contained less than 200 names, the governor could extend the jurors' district as far as he liked (ss8 and 9). The procedure for compiling the lists and jurors' books was substantially unchanged (except for extension of the classes of people entitled to be special jurors) (s21). Jury precepts remained much the same, but it seems if a person summoned lived beyond 20 miles from the place of trial he was not required to obey the summons (s40). For the first time, the persons to be summoned were chosen by lot, the names being drawn by the Sheriff from a rotating ballot box which the Sheriff was required to rotate for one minute at least (s45).

The *Jury (Amendment) Act 1902* took jury districts out of police districts, except for Sydney. The Parramatta district was all the County of Cumberland 'without the said Sydney police district and radius of twelve miles from the Sydney Town Hall' (s2). The jurors' district for every other town or place at which a court was appointed to sit was the land within a radius of 30 miles from each such town or place. But a juror who lived

within two districts was only liable to serve at the court nearest his residence (s3).

Under the *Jury (Amendment) Act 1905* jurors' districts, including the city of Sydney, became the land within such radius from the court house of each city, town or place as the governor by notification in the *Gazette* might fix. The radius had to be not less than ten miles. This was re-enacted in s8 of the *Jury Act 1912*. Under this Act, again the chief constable of the police district in which the town or place was situated had the responsibility of preparing the jury list for the jurors' district, and the process of compiling and correcting the lists remained much the same. General, special and common jury precepts remained (ss32-34) and the manner of drawing by lot those to be summoned (s43). If a court was appointed to sit in a town or place the clerk of petty sessions was required by s15 to transmit a copy of the jury list to the Sheriff. If a district court was to sit, a copy was given to the judge. By s46, when the Sheriff was determining who should be summoned for jury service, those who had attended pursuant to a jury summons, or had served as jurors, were excluded from further service until the names in the jurors' book (or special jurors' list) had been exhausted.

The *Jury (Amendment) Act 1924* repealed the ten miles radius provision (s2). The Act introduced a new procedure for compiling special jurors' lists. The effect of the new s15 (1A) was:

- (a) If the Supreme Court was appointed to be held at a town or place, before giving the jury list to the Sheriff the clerk of petty sessions was required to mark in red ink the letter 'S' against the name of every person on the jury list qualified as a special juror.
- (b) The names so marked constituted the special jurors' list for the jurors' districts.
- (c) The new provision did not apply to the jurors' district of Sydney.

A new s17 made provision for a jurors' book for Sydney, including a special jurors' list. It seems that the difference between the provision for the Sydney district, and others, was because the courts in Sydney sat continually and the process did not have to await the appointing of a court sitting.

As we have seen, the *Jury (Amendment) Act 1947* extended the franchise to every man and woman entitled to be enrolled as an elector (with some qualifications in respect of women). Special jurors and special jurors' lists were abolished. Listing procedures remained more or less the same.

Jury Act 1977

The 1912 Act was repealed by the *Jury Act 1977*. The new Act declared there should be a jury district for each sittings of the Supreme Court or District Court for the

trial of any criminal or civil proceedings; a jury district should comprise such electoral districts or subdivisions as were prescribed: s9. The Sheriff was required to prepare a jury roll for each district, at least once every three years, based upon the roll of electors. The police were no longer involved in preparing jury lists.

Computers entered the scene.

The Sheriff was required to prepare a draft jury roll by randomly selecting a sufficient number of people to provide (after deletion of those not qualified or who claimed exemption) the number of persons required to serve as jurors for the next ensuing jury period (the period during which the jury roll for the district remained in force). The selection could be made by computer (s12).

The Sheriff would then send a notice to each person on the draft roll telling him or her of the fact and requiring the person to inform the Sheriff if the person was disqualified or ineligible or claimed exemption (s13). The Sheriff then amended the roll according to the information provided, if the Sheriff determined it should be amended. A person aggrieved because the person's name was not removed could appeal to a magistrate, whose decision was final and conclusive (s15).

A general jury precept requiring the Sheriff to summon juries could be issued by a Supreme Court judge or the Prothonotary, a District Court registrar or clerk of the

peace, or a coroner (s23). The number summoned was not to exceed the number required to ensure a sufficient number after allowance for the full right of challenge or, in the case of coronial inquests, not more than 12 unless special circumstances required more (s24). The Sheriff then selected at random the number of jurors required and could use a computer to make the selection (s26).

The Act introduced jury pools, which, in effect, required the random selection of people to be part of a pool of potential jurors who, if summoned, were required to attend in response to the summons for up to five consecutive days. The object was to ensure the attendance of sufficient jurors for multiple cases.

There have been a number of amendments to the *Jury Act* between 1977 and now. However, the provision for jury districts remains substantially the same. As to jury rolls, the Sheriff is now required to prepare supplementary rolls for each district, each 12 months, by random selection from the electoral rolls. The number selected must be sufficient to provide the number of persons required as jurors. The names on the supplementary rolls are in due course added to the jury rolls. Jury pools went with the *Jury Amendment Act 1996*.

The Sheriff must notify each person whose name is on the supplementary roll informing the person that he or she is to be included on the jury roll and requiring the person to complete a questionnaire if the person is disqualified, or ineligible, or claims exemption. The Sheriff then compiles the roll as before. A person

aggrieved by a determination of the Sheriff may appeal to a magistrate, whose decision is final and conclusive (s15). A sufficient number of jurors are summoned in each jury district for the trial of criminal and civil proceedings in the Supreme Court and District Court, and for coronial inquests. They are selected at random. The selection may be (and obviously is) by computer (s25).

Summary conscription of jurors (Praying a tales)

A statute of Henry VIII (35 Hen VIII, c.6 (1543)) and subsequent statutes, empowered a judge at the prayer of either party (in civil or criminal cases) to award a *tales de circumstantibus* of persons present in court, to be joined to other jurors to try the cause.²²⁸ The idea was that if the jury panel were inadequate, or exhausted by challenges, sufficient onlookers would be compulsorily assigned to the panel until a sufficient number of talesmen was empanelled.

The practice became part of the law of New South Wales with the first (1829) Jury Act (*Juries for Civil Issues Act*). Section 15 said that if a sufficient number of jurors were not in attendance:

it shall be competent to either party to the cause to pray a *tales* and the Court or Judges may then command the Sheriff, or his deputy, forthwith to summon as many good and lawful men of the by-standers (being qualified and liable as jurors aforesaid) as shall be

sufficient to make up a full jury for the trial of such cause as aforesaid.

'Bystanders' were not restricted to those present in court.

The same provision was enacted in the 1832 *Jury Trials Act*, for both common and special juries (ss18 and 28). It appeared in the 1833 *Jury Trials Act* (s11) in a different form, and was thereafter a part of New South Wales law in civil and criminal jury cases until 1977. It was referred to in various acts between 1832 and 1912.²²⁹

There are examples of the process in action in New South Wales. For example, in 1932 in *R v Corbett* it is reported that 17 men were tried together for obstructing police in the execution of their duty. A panel of 96 jurors was summoned. The defence peremptorily challenged 73. The Crown had two stood aside, and some did not attend. The consequence was that the whole panel was exhausted before all the accused had exercised their right of challenge, and only six jurors were in the jury box.

The Crown prayed a tales, the judge so ordered, and the sheriff found some more jurors in an adjoining court. The six new jurors were added to the panel, but the judge refused further peremptory challenges. Sixteen of the men were convicted; the convictions were quashed on appeal because the men were denied the further challenges. In the process Street CJ made some

acerbic comments about what he saw as an abuse of the right of challenge:

I agree with the learned Chairman of Quarter Sessions in thinking that the right of peremptory challenge was intended to be exercised with common-sense, and I agree in thinking that what took place in this case was an abuse of that right. What was done suggests that it was not done in *bona fide* exercise of the right given by the Jury Act, but was done for the purpose of delaying and obstructing the administration of justice. I hope that such an exhibition of what the learned Chairman called gross folly will not be seen again in our Courts. The very liberal right of peremptory challenge conferred by our Jury Act upon accused persons was intended for their *bona fide* protection, and if it is to be abused in this way and turned to improper uses the matter may need reconsideration at the hands of the Legislature. We have, however, to deal with the law as it is and I do not think that the course taken of depriving of their rights those of the accused men who had not exhausted their right of peremptory challenge, was permissible.²³⁰

Sadly, the right to pray for tales was abolished by the *Jury Act 1977*. Section 51 says that if there are not enough jurors, the trial can be adjourned, or jurors who were summoned to another court but not required, would be called in to make up the numbers.

It is not hard to see the difficulty, indeed open hostility, the process could cause. I do not know how it worked

in practice in recent years, if at all. I have never seen it. The attorney general told the Legislative Assembly:

Clause 51 removes a great injustice from the jury system. Sections 57(2) and 59(3) of the present Act allow 'praying a tales' where there are insufficient jurors to complete a ballot. 'Praying a tales' permits the court to command any person in the street outside the court to come forward and present himself for jury service. In this way people are snatched from their business without warning. For a long time the Government has felt this to be too great an imposition upon the rights of the ordinary citizen to go freely about his business.²³¹

Challenges

Challenges for cause

Challenges evolved as challenges to the array and challenges to the polls. A challenge to the array is a challenge to the whole panel, for the reason that the officer summoning the jury is a party to the suit or related by blood or affinity to either of the parties, or alternatively there are circumstances which create a probability of suspicion or bias or partiality in the returning officer. Such challenges are still recognised by the *Jury Act 1977* (s41) but in practice are seldom heard of. There was a Northern Territory case in 1983 (*R v Diack*) when Nader J upheld a challenge to the array where the sheriff had summoned jurors in a way that resulted in a panel of 47 women and 29 men, from a

population in Darwin which had a preponderance of men. It was easier to summon women than men. The judge upheld the challenge because the procedure adopted was in breach of the *Juries Act 1962* (NT) and there was a possibility of bias in the returning officer.²³²

A challenge to the polls is a challenge to an individual juror and includes challenges for cause, and peremptory challenges. Both have long been recognised in New South Wales jury legislation.

Peremptory challenges are dealt with separately. According to Sir Edward Coke,²³³ challenges to the polls for cause could be classed as:

<i>propter affectum</i>	a well grounded suspicion of bias or partiality
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<i>propter delictum</i>	where a juror had been convicted of an offence that affects his credit
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<i>propter defectum</i>	some defect in the person's capacity to be a juror
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<i>propter honoris</i>	where a lord of parliament was
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In 2003 a proposed juror can be challenged for cause on the premise that the person is not qualified to serve, has some personal defect rendering him incapable of discharging his duty as a juror, is not impartial, has served on another jury in respect of the same matter, or has been convicted of an infamous crime.²³⁴ The right to challenge for cause was identified by the High Court in 1989 in *Murphy v The Queen* as one of the means of ensuring a fair trial in the face of sensational press publicity.²³⁵ The case concerned the intense publicity surrounding the death of Anita Cobby and the arrest and committal of those charged with her murder.

Two of the justices said:

It is fundamental that, for an accused to have a fair trial, the jury should reach its verdict by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source. However, the might of media publicity in 'sensational' cases makes such a pristine approach virtually impossible. Recognizing this, the courts have used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have

heard outside the courtroom and the machinery of challenge for cause.²³⁶

Challenges for cause have (I think) passed into desuetude in New South Wales. Apart from the obvious tactical danger of upsetting a juror with an unsuccessful challenge, jurors are now entirely anonymous, so how does one ever know whether or not the person will be impartial? The only circumstances where it might be seen to be a practical step is where publicity has been so manifestly prejudicial that the judgment of any potential juror might be affected (such was the argument in the *Murphy* case). But it is a difficult argument to run.

It is an interesting subject, a right still available but seldom used.²³⁷

Peremptory challenges

In 1895 in his *New commentaries* Stephen (drawing on Blackstone) observed that in 'criminal cases, or at least in cases of felony, there is allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all – which is called a *peremptory* challenge, – a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous'. Stephen says there were two reasons for peremptory challenges. Firstly, it was necessary that a prisoner when put to his defence should have a good opinion of his jury, the want of which 'might totally disconcert him' and, secondly, if he

failed in a challenge to a juror for cause, the bare questioning of the juror may 'provoke resentment'.

He said the common law settled on 35 challenges in criminal cases because it was fully sufficient to allow the most timorous man to challenge through mere caprice. If there were no limit, an accused person could avoid trial altogether. But in England, by 6 Geo 4, c.50, (1825) s29, no person arraigned for murder or felony could be admitted to any peremptory challenge above 20.²³⁸

Civil juries – Supreme Court

Governor Darling's *Juries for Civil Issues Act* of 1829 dealing with Supreme Court civil juries was the first New South Wales statute governing the procedures for the qualification summoning and empanelling of jurors. It refers in a rather oblique way to the right of challenge and on first reading appears to make the right without limit. According to ss9 and 14, the following were to be written on a separate piece of cardboard or paper in respect of each common juror:

- his name;
- residence;
- titles;
- qualifications; and
- place of abode.

The pieces of cardboard or paper were then to be put in a box and the Chief Clerk would 'draw therefrom until

twelve men appear, who are not objected to or challenged’.

But s1 provided that the jury ‘shall be subject to such and the like Rules and Manner of Proceeding, as are observed upon the Trial of any Issue of Fact joined in His Majesty’s Courts of Record at Westminster, so far as the same may not be specially provided for in this Act’, and in England the only permitted challenges to civil jurors were for cause. For a reason which escapes me, the 1829 Act did permit a form of peremptory challenges to special jurors, although not to common jurors.

As to special jurors, 48 names were drawn, and each party could strike 15 names from the list. The jury of 12 was drawn from the 80 names remaining (s13). Similar provisions appear in the 1832 *Jury Trials Act*.

The *Jury Trials Act* of 1844 introduced trial by jury in all civil cases at law in the Supreme Court. It provided for all such actions to be tried by juries of four, with a right to apply for a jury of 12. It gave a limited right of peremptory challenge. The effect of ss8 and 9 was that when the names of twice the number of required jurors were drawn, the list was given first to the plaintiff’s counsel who could strike off one-fourth of the names in the list and the defendant’s counsel could then do likewise. The names remaining, or the first four (or 12 if ordered) constituted the jury. The right to challenge 15 special jurors was thereby abolished. This procedure

was reaffirmed by s62 of the *Jury Act 1901* and s60 of the *Jury Act 1912*.

The procedure changed in 1947. Section 60 was amended so that each party could strike from the names a number of names equal to one-half of the number of the jury to be empanelled (therefore, two or six): s5 (z), *Jury (Amendment) Act 1947*. The practice was confirmed by s49 of the *Jury Act 1977*.

In 1997 the law changed. Instead of striking names off a list, the jury had to be challenged in the same way as in criminal cases: that is, when the juror 'has been called to the book to be sworn': *Jury Amendment Act 1997*. This was part of the process whereby jurors became entitled to complete anonymity.

Civil juries – District Court

The *District Courts Act* of 1858 became law on 12 November 1858. The governor with the advice of the Executive Council was empowered to establish district courts and divide the colony into districts for the purpose. Various statutes providing for the Chairman of Quarter Sessions were repealed. Thereafter, district court judges were appointed chairmen of quarter sessions from time to time and presided as Quarter Sessions judges at jury trials for any felony or misdemeanour not punishable with death (s25).

In civil cases the court was given jurisdiction where the amount at issue did not exceed £200 (s7). A jury of four

could be summoned on the application of either party where the amount claimed exceeded £20 (ss49 and 56). The Act is silent as to challenges, the intention presumably being to restrict challenges in civil cases to challenges for cause. Criminal cases continued to be governed by the *Jurors and Juries Consolidation Act* of 1847.

The *District Courts Act 1901* conferred jurisdiction in civil cases where the amount claimed did not exceed £200 and by s76, a party was entitled to seek trial by jury if the amount claimed exceeded £20. There were to be four jurymen, and challenges were restricted to challenges for cause (s80).

The 1901 Act was repealed by the *District Courts Act 1912*. The right to jury trial by a jury of four in actions involving more than £20 was re-enacted in s90. However, peremptory challenges were provided for in the same way as the old Supreme Court practice, that is, a challenge to one-fourth of the number of jurors on the list: s95. This changed in 1955 to one-half of the number of jurors to be empanelled: s5 (a) (iii), *District Court (Amendment) Act 1955*.

By the *Jury Act 1977* as amended in 1999 by the *Courts Legislation Act 1999*, each party to civil proceedings to be tried by jury has the number of peremptory challenges equal to one-half the number of jurors required to constitute the jury for trial.

Criminal juries

Peremptory challenges to military officers as jurors were not permitted. The *New South Wales Act* of 1823 (s4) permitted a limited challenge to a military or naval officer 'upon the special ground of a direct interest or affection'. Section 6 enabled a challenge for cause to the magistrate assessors who sat with the chief justice in civil cases. On 25 January 1808 John Macarthur was indicted for sedition. He objected to Judge Advocate Atkins sitting with the military officers. His objection was, in part, that Atkins owed him money. The objection had no legal substance but was sufficiently disruptive of the proceedings to delay the trial, and the rebellion against Bligh was effected on the following day. The case against Macarthur and the rebellion are of great historical significance but beyond the scope of this paper.²³⁹

It is recorded that in 1827 one Housland peremptorily challenged military officers at his trial, but the challenges were disallowed by Forbes CJ as not being competent in a trial by military officers.²⁴⁰ Also, (as I have mentioned) in 1827 WC Wentworth tried unsuccessfully to challenge the whole military panel in *Wardell's* case, upon the manifestly reasonable ground that the prosecution had been directed by Governor Darling, who was their commanding officer.²⁴¹ His problem was that the challenge was without any foundation in law.

The *Jury Trials Act* of 1832, which first permitted criminal court juries in its limited way, seems to have preserved the common law right of challenge in

criminal cases by saying nothing about it. Another view is that s42 enabled 15 challenges in all cases by providing that the procedure would be the same as the trial of civil issues by a special jury. I am not sure. An interesting aspect of the 1833 *Jury Trials Act* is this. During the confrontation between Bourke and the council, the Clerk, Edward Deas Thomson,²⁴² suggested to the governor that while emancipists should be qualified to serve as jurors, it should be the right of every free man to challenge an emancipist for cause, *propter delictum* (that is, where the proposed juror has been convicted of an offence that might affect his credit). Bourke rejected the proposal, because all former convicts had necessarily been convicted of wrong doing.²⁴³ The *Jury Trials Act* of 1833 specifically declared the right of challenge to be the same as in cases in the Courts of Westminster (s6). That is, it was restricted to cases of felony.

By the *Jurors and Juries Consolidation Act* of 1847 the number of challenges was restricted to 20 (s24) following the English legislation. The Crown had no right of peremptory challenge, but the Act recognised 'the power of any court to order any juror to stand by until the panel shall be gone through at the prayer of those prosecuting for the Crown as has been heretofore accustomed': (s24, following the old English practise). According to Archbold, ²⁴⁴ an old practice entitled the Crown to ask that a juror should stand by, that is, to postpone consideration of the cause of challenge until the panel had been gone through and it appeared there

would be jurors enough to try the defendant, citing an 1837 case of *R v Parry*.²⁴⁵

The Crown's right to have jurors stood aside obtained until it was abolished by s43 (2) of the *Jury Act 1977*.

In 1901 the right of peremptory challenge became permitted in cases of misdemeanour as in felony, but the number of challenges was restricted to eight unless the offence charged was capital, when the right to 20 challenges remained. The Crown was given the same right: s57, *Jury Act 1901*. These provisions were re-enacted (as to capital offences and murder) in the consolidated *Jury Act 1912* (s55) and the *Jury Act 1977* (s42).²⁴⁶

In 1986 the New South Wales Law Reform Commission by majority recommended that peremptory challenges in all cases be reduced to three. The commission said this would 'allow both parties to take steps to remove bias, without going so far as to enable them to select the jury of their choice'. The commission noted the change in the law relating to murder since 1955 when the death penalty for murder was abolished. Mandatory life sentences were replaced by a discretion to impose a lesser sentence. The commission said this change in the law made it necessary to re-examine the rule relating to peremptory challenges. They did not consider the rules of criminal procedure should differ depending whether the charge was murder or some other serious offence. They were satisfied that the exercise of a large number

of peremptory challenges could adversely affect the representative character of the jury.²⁴⁷

The recommendation was accepted with some enthusiasm by the Government, leading to the *Jury (Amendment) Act 1987*. The amended s42 reduced the number of peremptory challenges to three in all criminal proceedings. Attorney General Sheahan felt able to say:

However, when that selection process reaches the court, it may be influenced significantly by the parties through the use of peremptory challenges. At present, in murder trials each party is allowed to challenge twenty jurors without showing cause, and eight jurors in other criminal trials. The origin of this challenge was to enable the accused to remove bias and secure an impartial jury. In fact, the challenge is now put to the opposite use: jurors are systematically challenged with the intention of introducing bias to achieve the desired verdict. In short, challenges are used in an attempt to skew the representatives of the jury. Thus, by way of example, peremptory challenges have been used by the defence to secure all male juries in rape trials, by the prosecution in a case in Bourke in 1981 to secure an all white jury where the accused was an Aborigine, and an all male jury in the trial of Gloria Hill who was accused of murdering her husband.²⁴⁸

In 1988 a new s42 of the *Jury Act 1977* was enacted by the *Statute Law (Miscellaneous Provisions) Act* to permit any number of peremptory challenges (even though the

right to challenge is exhausted), provided it is done by agreement of the Crown and all persons prosecuted. I have not heard of the procedure being used.

The right of peremptory challenge was criticised well before 1987. In 1864 the *Sydney Morning Herald* disapproved of the acquittal by a jury of the bushranger Frank Gardiner. On 12 July 1864 the editor had much to say of the proceedings, with particular reference to the right to challenge. The editorial included this:

We shall not impute to the persons who were entrusted with the preliminary steps in the prosecution of GARDINER, an intention to screen him from the consequences of his crime, because we do not believe it existed. We cannot, however, but perceive that he has been most fortunate.

We propose to point out in this article how everything has been set in hostile array against public justice – whether in design or through inadvertence – whether by the perversion or the abuse of the law – whether by the failure of jurors to perform their obvious duty or by the stumbling-blocks cast in their way in its discharge.

...

Those friends of order and justice who were in Court saw how the right of challenge could be perverted. If any man appeared looking more respectable than another, or whose character was thought to be too reputable to be trusted, he was immediately

challenged. That there was not scope for a jury entirely in harmony with the defence may, we trust, be taken as a sign that society is not wholly gone.

And on 12 August 1864 the *Sydney Morning Herald* printed a long letter from *Civis* which attacked the process, saying it should be limited to six peremptory challenges. The writer directed a broadside at what he (or she) perceived to be abuse of the process, saying, in part:

Practically, it is almost equivalent to allowing him to select the twelve worst jurymen on the list, ... A juror in good broad-cloth and clean linen is 'most intolerable and not to be endured;' a flash-looking *gent*, or one with an air of coarse ruffianism, or (best of all) a fellow with a grog-bepainted nose, is hailed as a god-send.

I have seen jurors with grog-bepainted noses. I have to say the phenomenon does not necessarily bespeak a disposition to acquit.

Anonymity of jurors

A significant development in relatively recent years is the protection of a juror's anonymity. It is now an offence:

- (1) to inspect, or make available for inspection, a panel or card prepared for the purposes of the *Jury Act* by the Sheriff (s67A);

- (2) to wilfully publish or disclose information likely to lead to the identification of a juror or former juror in a particular trial or inquest (unless by consent) (s68);
- (3) to solicit information from a juror or former juror for the purpose of obtaining information on the deliberations of a jury (s 68A);
- (4) if a juror, wilfully to disclose during a trial or inquest information on the deliberations of the jury (s68B).

Radio talkback identity John Laws felt the impact of s 68A when he was convicted of soliciting information from a juror during a telephone discussion which was broadcast live. On 5 September 2000 he was given a 15 month suspended sentence by Wood J, the Chief Judge at Common Law.

Jurors now remain truly anonymous, at least to the parties. Each person summoned is allocated an identification number and the person is to be addressed or referred to only by that number when at the court (s29). The jury is selected by ballot, but numbers and not names are drawn from the ballot box (ss48, 49 and 50).

In New South Wales an accused person has never had a right to see a copy of the jury panel before trial except by order, unless charged with treason. This was the old

English practice as outlined by Blackstone ²⁴⁹ and was so decided by the Supreme Court in 1927 in *R v Baum*. ²⁵⁰ In 1947 sub-section 50(2) was inserted in the *Crimes Act 1900* which forbade any person inspecting the jury panel either before or during trial, unless by order.

The early New South Wales legislation dealing with civil juries provided for names and particulars to be drawn from a box: s14, *Juries for Civil Issues Act* of 1829. In the case of special juries, where a right of challenging 15 jurors was given to each side, each man summoned was given a number. Forty eight numbers were drawn, after which the Sheriff prepared for each party a list of names corresponding to the numbers. The challenges were to named men.

The 1844 Act for civil juries required that names of jurors on the list be given to each side so that each could strike one-fourth from the list (s9). In criminal cases, names were drawn from a box, according to the English practise, from the first criminal jury Act of 1832 (the *Jury Trials Act*). With the *Jury Act 1901* the practise in criminal and civil cases remained unaltered; jurors were identified by name (ss59 and 62). The practice continued after the *Jury Act 1912* was enacted (ss57 and 60) and the *Jury Act 1977* (ss48 and 49). However, the 1977 Act introduced the offence of publishing material which might identify a juror or the juror's address (s68). The 1987 amendments made it an offence to inspect, or make available for inspection, the panel annexed to a jury precept (s67A) and introduced the offences of soliciting information from a juror and wilfully

disclosing information on the deliberations of a jury (ss68A and 68B).

It had long been the law before 1987, and remains so, that only in extraordinary circumstances would the court receive evidence of what happened in the jury room. For example, once a verdict has been given and recorded it is not open to an individual juror to challenge or impugn it. In 1988 in a Bathurst case the Court of Criminal Appeal did receive evidence about one aspect of a jury's deliberations, which was that a Sheriff's officer had intruded into their cogitations by giving helpful hints about what the verdict should be. The court quashed the conviction.²⁵¹

The 1977 Act permitted a party to civil proceedings to inspect or obtain a copy of the panel annexed to a jury precept (containing the names of those summoned) (s40 (2)). But inspection of the panel was prohibited by the s67A (1) introduced by the *Jury Amendment Act 1996*; s40 was repealed in 1997.

The *Jury Amendment Act 1997* introduced the identification by number system, and the procedure for challenging jurors in civil cases changed. Lists of names were no longer to be given to the parties. Numbers were to be drawn from the box and the challenge made orally, in the same way as peremptory challenges were made in criminal cases.

According to Attorney General Shaw in his second reading speech, the reason for the legislation was the

large number of complaints he had received from former jurors who were alarmed at having their identities disclosed in serious criminal cases, and some had been threatened. The New South Wales Jury Task Force, chaired by Abadee J, had also recommended that the practice of calling out jurors' names in open court be reviewed.²⁵²

The result of all this is that in criminal cases the accused person has the right to challenge three people who are identified by number and of whom the accused knows nothing and has no way of finding out beyond making an instantaneous assessment before the juror is sworn. The right of peremptory challenge has been rendered almost useless. In civil cases, it does not matter much because juries are now a rarity.

Refreshments for jurors

As the High Court observed in *Cheatle v The Queen*,²⁵³ the right of a trial judge to discharge a jury by reason of inability to agree on a verdict was not authoritatively established in England until 1866. At one time jurors in an assize court who could not agree were carried around in a wagon as the judge moved on, until they did agree. They were kept without meat or drink, fire or candle until they were starved or frozen into agreement. There is an oft quoted anecdote, possibly apocryphal, about Maule J. A bailiff having been sworn to take in charge the jury 'without meat drink or fire' asked the judge if he might give a thirsty jurymen a glass of water. The judge responded by saying: 'Water!

well it's not meat, and I should not call it drink; yes, you may.'²⁵⁴

Blackstone put it thus:

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire, if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. ... And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.²⁵⁵

At some stage jurors began to be able to sustain themselves at their own expense. Forbes CJ saw that as a possible problem when he agonised about whether a

military jury which could not agree could be discharged. In 1832 in *The King v Sullivan* he said this:

Cases may, possibly, but I am sure are not likely to arise, in which a juror may go into the box with his pockets stuffed with viands, determined to starve out his fellows into compliance with his preconceived impressions upon a case which he may be called upon to try.²⁵⁶

In England, in a socially enlightened Act, the right of a juror to spend the juror's money on sustenance found statutory form in s15 of the *Juries Act 1974*. It says: 'Jurors, after being sworn, may, in the discretion of the court, be allowed reasonable refreshment at their own expense.'

In New South Wales, s7 of the *Jury Laws Amendment Act (No.2) of 1876* empowered every judge in his discretion to order any refreshment, not being fermented or spirituous liquor, to be supplied to any jury at any time after such jury was empanelled. This followed a recommendation in the 1871 report of the first Law Reform Commission.²⁵⁷ Section 66 of the *Jury Act 1901* was more adventurous:

The Court or Judge on any trial may order to be supplied to the jury-

(a) in a criminal case, whether of felony or misdemeanour, such reasonable refreshment as the Court or Judge thinks fit;

(b) in any other case, any refreshment not being fermented or spirituous liquor,

at any time after the jury have been impanelled and sworn, and notwithstanding that they have retired to consider of their verdict.

One may readily infer that a judge was thereafter authorised to provide fermented or spirituous liquor to a criminal court jury if the judge thought that was reasonable refreshment. Civil juries did not need it. Personally, if I had to serve on a criminal court jury and listen to advocates like me I would demand liquor. The provision was amended in 1947 when, with some delicacy, 'permit' was substituted for 'order'. In the *Jury Act 1977* the discrimination against jurors trying civil causes seems to have ended. Section 55 enables the court on any trial or a coroner holding any inquest to permit the jury to be supplied with such refreshments as it, he or she thinks fit, whether or not it includes liquor. That remains the law. Attorney General Walker told the Legislative Assembly, when introducing the Bill, that: 'The present Act discriminates against civil juries in that they are not permitted to be given alcohol. There would seem to be no good reason for the retention of such a prohibition.'²⁵⁸

Permitting jurors to have liquor during their deliberations has been known to cause difficulties. The potential for trouble is less so now that the practice is not to lock juries up. But in 1991 the Court of Criminal Appeal quashed convictions for fraud because two

jurors became drunk while drinking with the sheriff's officers. The jury had been confined for the night. Gleeson CJ observed that, whilst it was common practice for jurors with the approval of the judge to be permitted to consume a modest amount of alcohol, it seemed that, at least in relation to two female jurors 'the consumption of alcohol, with the active encouragement and assistance of the two sheriff's officers, got out of hand'. It seems that the two women stayed up until 2:00 am drinking with the court officers. They became quite drunk and one was physically ill. The court held that the circumstances caused a miscarriage of justice.²⁵⁹ So in the end the jurors avoided neither intemperance nor delay.

Release and discharge of jurors

In New South Wales the evolution of the release and discharge of jurors, and the reduction of jury numbers, seems to be as follows.

By the *Jury Trials Act* of 1844 (s4), *Jury Act* 1901 (ss68) and 1912 (ss66) a jury hearing a civil case could give a majority verdict of three-fourths if they could not reach unanimity after six hours. If three-fourths could not agree after 12 hours, they were to be discharged. The times were reduced to four hours and six hours by the *Jury (Amendment) Act* 1947 (ss5 dd (i) and (ii)). In criminal jury trials in New South Wales unanimity has always been required. The *Jury Acts* of 1901 (s67) and 1912 (s65) empowered the judge to discharge a criminal jury after 12 hours if they could not agree. The time was

reduced to six hours by the *Jury (Amendment) Act 1947* (s5 (dd) (ii)).

The old rule was that a jury trying a felony could not separate until verdict. In 1924 the *Jury Act 1912* was amended by s34 of the *Crimes (Amendment) Act 1924* adding s27 (3) which allowed a judge to permit a jury to separate at any time before they considered their verdict, in cases of felony (but not murder or treason). In 1929 the *Jury Act 1912* was further amended by inserting s27A which permitted the jury number to be reduced to ten, by consent of both sides. In civil cases, the number could be reduced to three or, if a jury of 12, to ten: *Jury (Amendment) Act 1947*, inserting s30A in the 1912 Act. The *Jury Act 1977* permitted the jury in criminal proceedings to separate at any time before retiring to consider their verdict (s54) (unless the judge otherwise ordered) and they could be discharged after six hours if unable to agree (s56).

The present position is that a jury in a criminal case shall be permitted to separate at any time before they retire to consider their verdict, unless the court otherwise orders, and may, if the court orders, be permitted to separate at any time after they retire to consider their verdict (s54). Their number can be reduced to ten without consent, and to eight by consent if the trial has been going for at least two months (s22).

The practice now is to permit juries to separate during each adjournment and overnight, even after they have retired to consider their verdict. It is not uncommon for

a jury to take several days to reach unanimity and judges are much more reluctant than in previous times to discharge juries upon early intimations that they cannot agree. The jury must not be subjected to pressure by the trial judge and each juror must remain free to give the case undivided consideration. The High Court formulated an appropriate direction where a jury is having difficulty reaching unanimity. It has become customary to give such a direction if the jury are out for an extended period.²⁶⁰

In the event of a juror being released during a luncheon adjournment, he or she is entitled to a magnanimous refreshment allowance of \$5.50: *Jury Regulations 1999*, regulation 7; schedule 2.

Being sequestered with 11 strangers could be difficult. In his opinion to the governor in 1836, Burton J wrote with some warmth about what a juror told him privately after a trial in which a young man was acquitted:

The Jury remained locked up the whole night, during which, my informant stated, there was much foul and disgusting language and next morning he and those who agreed with him in opinion, yielded to the others rather than continue to be so associated; he further stated, that in his opinion, no greater punishment can be inflicted upon a respectable person, than to be shut up with such people for a few hours, or at all events for the night; and that no consideration would induce him again to serve on a Jury with them, a determination

which I have abundant reason to believe influences many like respectable persons in this community.²⁶¹

Chapter 7

The course of a criminal trial ²⁶²

Evidence for the defence

Ancient English law denied not only the right of counsel in capital cases, but the right of the prisoner to call witnesses in the prisoner's defence. This wholly unreasonable principle was ameliorated by an edict of Queen Mary I (who, according to Blackstone, was capable of humane and generous sentiments until she married Philip of Spain).²⁶³

A practice grew of examining witnesses for the prisoner, but not on oath. Therefore, juries gave less credit to defence witnesses than witnesses for the Crown. Sir Edward Coke protested at the 'tyrannical practice'. In 1607, in the Bill for ending hostilities between England and Scotland, the Commons insisted on a clause enabling Englishmen tried for felonies committed in Scotland to call sworn evidence in their defence. The Bill was carried despite opposition from the Crown and House of Lords. Finally, in 1702 by the statute 1 Ann st.2 c.9 it was provided that in all cases of treason and felony witnesses for the prisoner should be examined on oath.²⁶⁴ It had long been the right of a person tried for a misdemeanour to call sworn witnesses for the defence.²⁶⁵

The right came to New South Wales for people tried by the military tribunals (the Court of Criminal Judicature)

established by the First Charter of Justice of 2 April 1787, which provided:

And it is Our further Will and pleasure that Our said Court of Criminal Jurisdiction shall proceed to try all Offenders by calling them respectively before such Court and causing the Charge or Charges against him, her or them respectively, when reduced into Writing and exhibited by Our Judge Advocate to be read over to such Offender or Offenders respectively, and by Examining Witnesses, upon Oath to be Administered by the said Court of Criminal Jurisdiction, as well for as against such Offenders respectively ... ²⁶⁶

The *New South Wales Act* of 1823 continued the practice by requiring that all matters of law arising in the course of the trial should be 'determined in the Manner by Law established on the Trial of Persons indicted in any Court of record in *England*' (s4).

Much the same provision was part of s5 of the *Australian Courts Act* of 1828. The right to call sworn evidence of witnesses (not the accused) became entrenched in New South Wales criminal procedure by the statutes from 1833 onwards, which could not be repugnant to the laws of England but had to be consistent with them. This was the position, in legal theory anyway, until the passing of the Commonwealth *Australia Act* on 2 March 1986. In this context also relevant are the *Colonial Laws Validity Act* 1865 and the *Statute of Westminster* 1931. However, the general

application of British statutes to New South Wales is beyond the scope of this paper.

Evidence by the accused person was another matter. Old practice allowed the accused to plead his or her case orally, in person, but the accused person was not allowed counsel in treason trials until 1695 or felony trials until 1836.²⁶⁷ The effect of this was that the person on trial was able to say whatever he or she wanted about the evidence and the law, but not on oath. The accused was not permitted to give evidence. Neither was a party to a civil cause. The theory underlying this state of affairs is what Wigmore describes as a syllogism, both premises of which were fallacious although accepted in the 1700s as axioms of truth: 'Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore, such persons should be totally excluded.'²⁶⁸

Wigmore noted that Starkie said in *Evidence* (1824):

The law will not receive the evidence of any person, even under the sanction of an oath, who has an interest in giving the proposed evidence, and consequently whose interest conflicts with his duty.

The rule, Starkie had said, 'was founded on the known infirmities of human nature'. In 1827 Bentham trenchantly and incisively exposed the fallacies in his

Rationale of judicial evidence, part of which can also be found in Wigmore.²⁶⁹ In 1843 *Lord Denman's Act* enabled all persons previously disqualified by crime or interest to give evidence, except parties on the record or their spouses. The right was extended to the parties to a civil action in 1846 (county courts) and in 1851 (superior courts) and by 1869 the parties to a civil action, and their spouses, were competent witnesses in the action.²⁷⁰ Such changes found their way into New South Wales law by the *Evidence Law Act* of 1852 and the *Evidence Law Act* of 1858.

But an accused person and his or her spouse continued incompetent as witnesses in the accused's own defence (with some exceptions) until 1898 in England.²⁷¹ In New South Wales the right was first conferred in 1882 by the *Evidence in Summary Convictions Act* which permitted a defendant in a summary case to be sworn as a witness. Then in 1883 s351 of the *Criminal Law Amendment Act* enabled an accused person on indictment to give evidence in his or her defence on an issue where the burden of proof was on the accused. The defect was cured altogether in 1891 by s6 of the *Criminal Law and Evidence Amendment Act* which made an accused person and the spouse of an accused person competent witnesses. This was repeated in the *Crimes Act 1900*, s407.

The unsworn statement

The right of the accused to make an unsworn statement was as old as the prohibition against the accused giving

sworn evidence. Old procedure dictated that, if the person was represented by counsel, the statement could be made at the conclusion of counsel's speech, subject to a right of reply by the Crown.²⁷²

The right to make an unsworn statement appeared in New South Wales legislative form in 1883 in the *Criminal Law Amendment Act*. It was re-enacted in 1900 in s405 of the *Crimes Act*. The practice in New South Wales was for the accused person to make the statement before counsel's address. The law remained unchanged until 1994, when the right was taken away in respect of all people charged after 10 June 1994.

In 1985 the New South Wales Law Reform Commission recommended that the unsworn statement be retained, subject to qualifications. The commission's view was the right should be extended to summary proceedings.²⁷³ But by 1994 the Government was under increasing pressure by victims' lobby groups, and the dock statement was an easy political target. The Hon John Hannafor MLC, the attorney general, homed in on it saying:

The testing of evidence in cross-examination is the basis of all criminal trials in our adversarial system of law. However, the truth of assertions made by an accused to the jury in a dock statement cannot be tested by cross-examination. In abolishing the right to make dock statements, it is aimed to remove the existing unchecked process whereby an accused can make unchallenged allegations and attacks on the character

of witnesses and victims. The accused will be prevented from ambushing the prosecution's case by introducing material which is not subject to cross-examination.²⁷⁴

The law relating to the onus of proof seems not to have intruded into the Government's deliberations.

In concluding the debate the attorney general became more impassioned, saying that the council's:

debate on dock statements raised issues that go to the very heart of the system of justice in New South Wales. This Government has moved to abolish the right of accused criminals to give from the dock unsworn, untested and unaccountable evidence. I thank those members of the Government who rose to speak in the interests of victims of crime in this State.²⁷⁵

It is not easy to see what the issue had to do with victims of crime, except politically. Compelling contrary arguments were presented in parliament, such as by the Hon BH Vaughan in the Legislative Council when he said:

Dock statements are just one of the range of protections for what people describe as the less able or the disadvantaged in society. There is considerable anecdotal evidence to suggest that people with less than average education or literacy levels, that is, people lacking a complete command of the English language or those with mild intellectual disability, completely

confused by their surroundings, may feel some pressure to inappropriately agree with skilful prosecution, thereby incriminating themselves. Therefore, if accused do not give sworn evidence, their sole means of expressing themselves to a jury is lost. As Mr Justice Isaacs explained in *Rex v. McMillan*:

The accused may be a nervous or weak type person who may be easily overborne by a strong cross-examiner into saying things which may put an adverse complexion on his evidence.

An innocent person, therefore, may give the impression of lying as a result of nervousness or ignorance. This also applies to Aboriginal Australians.²⁷⁶

However, the unsworn statement passed into history.

Comment on an accused's silence

In 1898 the *Accused Persons' Evidence Act* was enacted, providing in s1 that 'It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf'. The provision was re-enacted in a different form in s407 (2) of the *Crimes Act 1900* which proscribed comment by the judge or crown counsel upon the failure of an accused person or wife or husband of an accused person gave evidence.

The 1898 legislation followed a decision by the Full Court in 1893 that inferences could be drawn and comment made when a person accused of a felony did not give evidence in his defence: *R v Kops*.²⁷⁷ The position provided for by the *Crimes Act* in 1900 obtained until 1 September 1995 when the *Evidence Act 1995* became law. Section 20 (2) allows a judge or any party (other than the prosecutor) to comment on the failure of the defendant on trial for an indictable offence to give evidence. But the comment (unless made by another defendant) must not suggest the defendant failed to give evidence because the defendant believed he or she was guilty.

The section has provoked lengthy debate, perhaps settled by the High Court in *Azzopardi v The Queen*. The court reconciled, or tried to reconcile, two earlier decisions.²⁷⁸ The court's conclusion in *Azzopardi* was that it had to be a rare and exceptional case which would permit such comment and, even then, the judge must exercise considerable caution. Such a case will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. A comment will never be warranted merely because the accused has failed to contradict some aspect of the case for the prosecution.²⁷⁹

Representation by counsel

The early history of New South Wales practitioners is fully dealt with in Dr Bennett's *A history of the New South*

Wales Bar.²⁸⁰ The 1824 Charter of Justice (clause X) provided:

...And we do hereby authorize and empower the said Supreme Court of New South Wales to approve admit and enrol such and so many persons having been admitted Barristers at Law or Advocates in Great Britain or Ireland or having been admitted Writers Attornies or Solicitors in one of our Courts at Westminster Dublin or Edinburgh or having been admitted as Proctors in any Ecclesiastical Court in England to act as well in the character of Barristers and Advocates as of Proctors Attornies and Solicitors in the said Court and which persons so approved admitted and enrolled as aforesaid shall be and are hereby authorized to appear and plead and act for the Suitors of the said Court subject always to be removed by the said Court from their station therein upon reasonable cause: and we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the Supreme Court of New South for or on behalf of such Suitors or any of them Provided always and we do ordain and declare that in case there shall not be a sufficient number of such Barristers at Law Advocates Writers Attornies Solicitors and Proctors within the said Colony competent and willing to appear and act for the Suitors of the said Court then and in that case the said Supreme Court of New South Wales shall and is hereby authorized to admit as many other fit and proper persons to appear and act as Barristers Advocates Proctors Attornies and Solicitors

as may be necessary according to such general rules and qualifications as the said Court shall for that purpose make and establish Provided that the said Court shall not admit any person to act in any or either of the characters aforesaid who hath been by due course of Law convicted of any crime which according to any law now in force in England would disqualify him from appearing or acting in any of our Courts of Record at Westminster.²⁸¹

The charter gave counsel a right of appearance in the Supreme Court, and, as we shall see, this was extended to summary courts in 1839. The old common law permitted counsel to represent a prisoner tried for a misdemeanour but not treason or felony, unless some point of law arose which required argument. From 1695 the *Treason Act* allowed a person on trial for high treason to be represented by counsel and in 1836 in England the *Trials for Felonies Act*, usually called the *Prisoners' Counsel Act*, permitted persons tried for felonies, misdemeanours and summary offences to make full answer and defence by counsel. The reason for the old rule as articulated by Coke was that 'the evidence to convict a prisoner should be so manifest as it cannot be contradicted'.²⁸² Therefore, so the argument seemed to go, counsel were unnecessary because nothing could be done to help the prisoner.

In 1836 the Secretary of State for the Colonies, Lord Glenelg, instructed Governor Bourke to 'take measures for extending to the Colony under your Government' the provisions of the *Prisoners Counsel Act*.²⁸³ Bourke

was slow in acting on the instruction and in 1839 the issue came before the Supreme Court on the application of the first native-born solicitor, George Robert Nichols.²⁸⁴ Nichols sought mandamus to compel magistrates to permit him to represent clients charged with criminal offences. The court made the order, although contrary to the common law and unsupported by any local statute. Dowling CJ said:

The right of being heard by counsel, it is not disputed, is inherent in every party amenable to the jurisdiction of superior Courts of Justice, and was only limited until lately in Criminal Courts, to the extent of restraining the advocate from addressing the jury on the evidence. The temperate and orderly proceedings of every tribunal obviously requires the concession of this privilege, independently of the higher considerations of impartial justice. I am unable to discover any sound reason for making any distinction in principle between a superior and an inferior Court, in the all important duty of administering justice.²⁸⁵

The Nichols issue was limited to courts of summary jurisdiction but the ruling put beyond argument the right to be represented in any prosecution, including sessions courts. Like Forbes' decision in *R v The Magistrates of Sydney* in 1824, the decision does bear some of the stigmata of the judicial activism which now so concerns Heydon J and readers of *Quadrant*.²⁸⁶

The de facto adoption in New South Wales of the *Prisoners' Counsel Act* of 1836 removed any doubt

whether, notwithstanding the 1824 Charter of Justice, the old rules about representation in felony and misdemeanour trials had any relevance in New South Wales. It also established the right of counsel to address the court in felony case, thitherto only done by leave. Whatever the legal merits of the decision in the *Nichols* case, the right to legal representation was confirmed by the *Defence on Trials for Felony Act* of 1840, which adopted the English Act of 1836.

Speeches by counsel

The early history of speeches by counsel is traced by Woods.²⁸⁷ But before the 1839 *Nichols* decision counsel for persons accused of misdemeanours could make a speech at the end of the Crown case. If the accused called evidence, the prosecution was able to make a closing speech. In trials for felony, before 1839 counsel for the defence could not make a speech to the jury unless given a dispensation. In 1857 the *Common Law Procedure Act* (dealing with civil cases) provided (ss58 – 60) as follows:

58. In every action the defendant's counsel may reserve his address to the jury if he thinks fit so to do until the close of the evidence for the defendant and the right to reply shall be the same as at present.
59. When the address to the jury on the part of the defendant is reserved as aforesaid the evidence

in reply if any on the part of the plaintiff must be given before such address.

60. In cases where the counsel for the defendant begins the counsel for the plaintiff shall be entitled to reserve his address to the jury in like manner and subject to the same conditions as hereinbefore provided with respect to the counsel for the defendant.

The 1857 Act was amended in 1861 to give defence counsel in criminal cases the right to make a speech after all the evidence.²⁸⁸ The prosecution retained a right of reply if the defence called evidence. But later practice gave the Crown the right of reply in all circumstances.²⁸⁹

In New South Wales now, because of ss97 and 98 of the *Criminal Procedure Act 1986*, the defence may make an opening address after the crown prosecutor's opening address, and then immediately before calling defence evidence. Defence counsel may address at the end of the evidence after the crown prosecutor. This right was first conferred by the *Crimes (Amendment) Act 1983*. The procedure as to opening addresses follows the recommendations of the New South Wales Law Reform Commission in its March 1986 report 'The jury in a criminal trial'. I do not know whether the practice as to closing addresses since 1986 has resulted in more or less convictions. Having the last say is an attractive proposition to defence counsel; it does not necessarily increase the chance of acquittal.

Barristers and solicitors

The divided profession was formally established on 1 November 1834.²⁹⁰ Solicitors could not appear in the Supreme Court.

In 1834 the Bathurst magistrates purported to make a rule excluding solicitors from appearing before them in the Court of Quarter Sessions. Then in about 1839 the Bar of New South Wales took objection before the Sydney Quarter Sessions to the right of appearance sometimes given to solicitors. The justices were inclined to make a rule excluding solicitors but referred the issue to the Supreme Court.

In fact, the Court of Quarter Sessions had no power to make any such rule until 1840, when it was so empowered by the *Administration of Justice Act*.

In January 1841 the Bar sought a rule from a full bench of Quarter Sessions' magistrates that only barristers could appear in Quarter Sessions cases. The court made a rule which excluded all attorneys from practising at quarter sessions, with the exception of Mr Nichols 'who should have the right of election, as to whether he would act in the capacity of an advocate, or that of a solicitor'. A general rule prohibiting solicitors from appearing in country quarter sessions was made in 1842.²⁹¹

In 1849 New South Wales followed England and enacted the *Administration of Criminal Justice Act* which

enabled attorneys to practise at quarter sessions. In 1892 the *Legal Practitioners Act* gave every solicitor a right of audience in all courts in all matters in which he acted as a solicitor. In 1987 the right was extended to a solicitor instructed by the solicitor on the record.²⁹² The fusion, then division of the profession, and the exclusivity demanded by barristers, was the cause of much bitterness in the colony. It is dealt with in detail by Dr Bennett in his *A history of solicitors in New South Wales*.

Fitness to plead

A part of jury history is the practice of empanelling a jury to determine whether an accused person is fit to plead, where there is a doubt about the issue. The common law test of fitness to plead includes such requirements as the ability to understand the charge, to plead to the charge, to exercise the right of challenge, to understand generally the nature of the proceedings and the substantial effect of the evidence, and to make a defence.²⁹³ The practice of having the issue determined by a jury was long recognised by the common law. For example, Blackstone tells us that 'if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury'.²⁹⁴ In 1847 in England in *The Queen v James Derryhouse* it was held that a prisoner said to be insane must be brought to the court to have the matter determined by a jury, unless that would be dangerous. The following exchange took place between crown counsel and the judge:

Burke – By the statute 3 & 4 Vict., the Secretary of State can detain a prisoner in a lunatic asylum until he be in a fit state to be brought before the Court.

Patterson J – What is that statute? If justices of the peace were to pronounce upon a prisoner's insanity, a door might be opened to the most grievous abuses. The proper tribunal to determine if he is in a state to take his trial is a jury of his country. If, indeed, a prisoner laboured under infectious fever, or if he be a confirmed lunatic, it would be dangerous to bring him into court; but the old constitutional mode of doing business is to put the prisoner forward, examine a witness with reference to his state of mind, and leave the jury to determine.²⁹⁵

In New South Wales in 1824 in *R v Charland* Forbes CJ directed a military jury that there was no defence of insanity known to the law. As Woods points out, Forbes' direction overlooked the decision in *Hadfield* in England in 1800.²⁹⁶ But in following the famous decision of the House of Lords in the *McNaghten* case in March 1843,²⁹⁷ in December 1843 the newly expanded Legislative Council enacted the *Dangerous Lunatics Act*²⁹⁸ which recognised insanity as a defence and provided that a person acquitted because of insanity might be held in indeterminate detention at the governor's pleasure. It said nothing about how a person's fitness to plead was to be determined, but it seems New South Wales followed the English practice of referring the issue to a jury empanelled for the purpose²⁹⁹ until express provision was made by statute in 1958 in the

Mental Health Act (s23). The English practice was first enshrined in legislation in 1800 in the *Criminal Lunatics Act*.³⁰⁰ Trial of the question by jury is provided for in the current *Mental Health (Criminal Procedure) Act 1990*, ss11 (or by judge alone at the accused's election: s11A). The issue cannot be raised at committal, except for Commonwealth offences. Section 20 B (1) of the *Crimes Act 1914* (Cth) requires a magistrate to refer the issue to the court to which the proceedings would have gone if the person had been committed for trial. If the person has been committed for trial and issue arises, it must be determined by the court: s20B (3). The issue in Commonwealth offences is whether the accused is 'fit to be tried'; the definition includes 'fit to plead': s16. If a trial takes place where the accused is not fit to plead there has been a fundamental failure in the trial process, no matter what the evidence proves.³⁰¹

The High Court held in 1994 that in the case of Commonwealth offences it was appropriate for the issue of fitness to plead to be determined by a jury: 'Historically, fitness to plead and to be tried has been a question determined by a jury.'³⁰² In 1998 in a Northern Territory case (*Ebatarinja v Deland and Others*) the High Court confirmed that the question of an accused person's fitness to plead is to be determined by a jury empanelled for that purpose. The court held that it was not a matter to be investigated by a magistrate at committal, at the same time ruling that a magistrate had no jurisdiction under Northern Territory law to hear committal proceedings if the defendant was incapable

of understanding them.³⁰³ This is the position in New South Wales.³⁰⁴

Chapter 8

Particular types of juries

Coronial juries

The office of coroner is an ancient incident of the common law, of equal antiquity with the sheriff. By statute 4 of Edward I, coroners were charged with inquiring into the manner of death of a person slain, or who died suddenly, or in prison. The coroner had to sit at the very place where the death happened, and his inquiry was made by a jury from the neighbouring towns. This English practice was followed in early New South Wales without any statutory mandate.³⁰⁵

Professor Castles tells us that ‘Incomplete as they are, the records in the New South Wales Archives confirm that the first regular use of juries in Australia began in relation to coronial inquiries before the end of the eighteenth century. In two inquests in 1796 before Thomas Smyth, who is described as coroner, juries of twelve men were empanelled to assist the coroner in determining the causes of death. The “twelve good and lawful men” as they were described, who had elected a foreman in each case, proceeded to bring in verdicts in the traditional way. Juries seemed to have been similarly empanelled in Van Diemen’s Land from its early years.’³⁰⁶

Smyth was one of the first of the coroners, appointed by the governor under his commission. In August 1806

Governor Bligh appointed William Gore ³⁰⁷ to be a coroner as well as provost marshal. By 1811 there were two coroners in Van Diemen's Land and juries of 12 seemed to have become an accepted feature of coroner's courts ³⁰⁸ both there and on the mainland.

On 17 September 1847 ³⁰⁹ coroner's juries seem to find their first statutory recognition. They did not require the qualifications of other jurors, unless the coroner was holding an inquiry pursuant to a writ of inquiry issued under the Great Seal of the Colony. Coroners could take inquests and inquiries by jurors of the same description as they had been thitherto used and accustomed to. In the discretion of the coroner, he could swear a jury of any number not less than five, 'in thinly populated districts' (s34).

By the *Coroners Act 1912* the coroner's jury was abolished except that a jury of six could sit on coroners' inquisitions if a request for a jury was made by a relative of the deceased, or the secretary of any society or organisation of which the deceased was a member at the time of his death, or if the Minister of Justice so ordered (s5). The *Jury Act 1977* (s21) enacted that the jury in any coronial inquest should consist of six persons returned and selected in accordance with the Act. That remains substantially the position, except that the State Coroner may direct that an inquest be held before a coroner with a jury. In the case of an inquest concerning a death in a mining accident in the Broken Hill jury district, a coroner's jury shall consist of six persons summoned in accordance with the regulations: *Jury (Coroners)*

Amendment Act 1980 and not pursuant to the *Jury Act 1977*. I am not sure about the origins of this provision, except that in his second reading speech in presenting the *Jury (Coroners) Amendment Bill* to the Legislative Assembly on 26 March 1980 Attorney General Landa said that:

due to the special contingencies of mining operations in or around Broken Hill, juries are to be summoned in accordance with appropriate regulations and not pursuant to the *Jury Act, 1977*. These provisions simply restore the position which prevailed at Broken Hill for 90-odd years until repealed by the *Jury Act, 1977*.³¹⁰

Grand juries

The origins of grand juries are obscured by the mists of history. Maitland suggests the institution may be traceable to Anglo Saxon law at the time of King Ethelred. A more recognisable form of grand jury is seen in the time of the Norman kings, such as the assizes of Henry II where the presentation of crimes by 12 men representing each hundred was made a regular and permanent procedure.³¹¹ The system of accusation by grand juries was clearly established by the time of Richard I. The grand jury had to consist of not less than 12 and not more than 23 men. They were required to inquire whether there was sufficient cause to call upon the party accused to answer the accusation, and a finding against the accused had to be by at least 12.³¹² The evidence was presented to the grand jury by

justices, whose duty it was to investigate allegations of criminal behaviour, in the absence of an organised police force.

Grand juries were contemplated by s8 of the *Australian Courts Act* of 1828. They were authorised by the king in council by his order of 28 June 1830. But they were never constituted in New South Wales after 1828. The *Juries Act* of 1833 also established that prosecutions would be on the information of the attorney general (s1), (consistently with s5 of the *Australian Courts Act* of 1828) and grand juries were therefore not required to commit a suspect for trial.

It is interesting that the Acts of 1840 and 1841 both continued to contemplate grand juries. The 1841 *Jury Trials Act*, making further provision for circuit courts, provided in s10 that:

all crimes and offences which have been and are respectively cognizable in the said several Circuit Courts shall *until the constitution of grand juries within the said Colony* continue to be so cognizable. [My emphasis]

Some grand juries were in fact constituted between 1824 and 1828, following the uncertainty about courts of sessions after the *New South Wales Act* of 1823. There is direct reference to two grand juries, each declining to find a bill, in *Rowe v Wilson*, 28 November 1825.³¹³ They were empanelled wherever the Quarter Session Court sat, including Sydney, Windsor and Parramatta.

However, they did not become entrenched in the system. They continued in England until 1848 when the *Indictable Offences Act* (the *Jervis Act*) required depositions to be taken by justices, who made the preliminary examination. By this stage an organised police force had been created. In England they were abolished finally by statute in 1933.

Probably, the Colonial Office became convinced that the grand jury was not an institution appropriate to the colony by the bitter dispute between Dr HG Douglass and the Macarthurs. Governor Brisbane exonerated Douglass from allegations made against him by Samuel Marsden who was aligned with the Macarthurs. Hannibal Macarthur pursued the fight by using his position as foreman of the grand jury at Parramatta. Under his influence the jury indicted Douglass and two other justices for imposing an illegal sentence, which was the daily flogging of a convict until he disclosed the whereabouts of stolen goods. On Forbes' advice, the governor referred the matter to the Legislative Council which found many precedents for such sentences, including some imposed by Marsden and Macarthur. Forbes proposed an Act of indemnity, because it was apparent that the practice of illegal flogging dated back to the beginning of the colony. The Act was passed in 1825.³¹⁴

In 1834 Alfred Stephen, later chief justice, deplored the discretion given to the attorney general, and proposed to the lieutenant governor that there should be grand juries of 13. His proposal was rejected.³¹⁵

Support for grand juries continued in the colony; Attorney General Plunkett was an advocate for their constitution. In 1837 he laid indictments against two magistrates called Donnison and Bean for cattle stealing, and said in court that he hoped that grand juries would soon be introduced into the colony. The exclusives thought the prosecutions were instigated for an ulterior purpose, and on 11 May 1837 the *Herald* found itself arguing for the introduction of grand juries because it did not approve of the attorney general's unfettered right to start prosecutions. The powers of the attorney general were summed up by his critics (as stated in the *Herald*) under six headings:

1. Putting any man in the dock without counsel.
2. Trying the man on his own indictment.
3. Knowing the panel of jurymen for each day.
4. Consequently trying the man by what jury he pleased.
5. Addressing the jury for the prosecution.
6. Addressing the jury in reply to the defence of the prisoner.³¹⁶

In 1850 the *Justices of the Peace (Adopting) Act* introduced the English committal procedure to New South Wales.

In 1858 Francis Forbes' son unsuccessfully moved in the Legislative Council for reintroduction of grand juries. Attorney General Wise ³¹⁷ and Sir Alfred Stephen (having 24 years before argued that grand juries should be introduced) combined to defeat the attempt. In 1859 Daniel Deniehy ³¹⁸ tried to interest the Government in the subject, without success. In 1895 the redoubtable John Norton stood for the Legislative Assembly, advocating a programme of law reform which included an appeal court to replace the Privy Council, a public defender and the grand jury 'on the grand old English plan'. ³¹⁹ He was unsuccessful. I do not think the introduction of grand juries has since been pursued in New South Wales, at least with any enthusiasm.

It has long been held that an information by the attorney general stood in the place of an indictment found by a grand jury.³²⁰ So far as I am aware, no grand jury was constituted in New South Wales after 1828. The history of committal proceedings was outlined by Dawson J in 1989 in *Grassby v The Queen*.³²¹

Special juries

According to Stephen, writing about the old English practice in *New commentaries* in 1895:

it is in the option, either of plaintiff or defendant, to have the cause tried by a *special* jury; viz., a jury consisting of persons who (being on the jurors' book) are of a certain station in society; viz., esquires or persons of higher degree, or bankers or merchants; or

who shall occupy a house or other premises of a certain rateable value. And to provide for *country* causes to be tried by special jury, the sheriff is further directed to summon a sufficient number of special jurymen, to try all of such causes at the then approaching assizes ...³²²

And he notes that in criminal trials in the Queen's Bench Division trial may, by leave of the court, be before a special jury.³²³ The special jury seems to have evolved in England to deal with commercial litigation under the influence of Lord Mansfield when reforming the mercantile law.³²⁴

The first reference to special juries in New South Wales is in the 1829 *Juries for Civil Issues Act*. Section 20 provided that the judge should direct the summoning of a special jury upon the request of either party. Section 21 identified the superior classes of persons who would constitute such a jury. Special juries became of practical importance when the right to jury trial in civil cases arrived in the form of the 1844 *Jury Trials Act*, because the jury of four was to consist of jurors qualified according to law as special jurors. Before then however, one or other party to a civil case more often than not sought a special jury. In his opinion to the governor on 12 April 1836 Dowling J noted that between 15 March 1830 and 15 March 1836 there were 80 civil jury trials heard before him, of which 52 were tried by special juries.

It is not easy to see why juries hearing civil causes should be of higher degree than those trying criminal

cases, but that was the English system. However, by s9 of the *Jury Trials Act* of 1833 the Crown or defence were entitled to a special jury if the defendant sought trial by jury under s2 (except for treason or felony). That right obtained until it was qualified in the 1851 *Jury Laws Consolidation Act*. Section 8 of that Act recited that 'it has been found to be unduly burdensome to Special Jurors in the District of Sydney to attend as Jurors in Courts of General and Quarter Sessions as well as the Supreme Court' and therefore no person whose name was on the special jury list for Sydney was liable to attend as a juror unless summoned under a special jury precept.

There is a view that special juries performed a useful function, particularly in civil commercial cases. Being drawn from a class of people with mercantile experience, they had particular expertise not possessed by many common jurors. As Professor Castles put it in an article lamenting the passing of the Australian civil jury:

The democratic zeal which helped to remove distinction between special and ordinary civil juries, with seemingly the only exception in Tasmania, also discarded a process which could be utilised to bring special expertise, virtually the role of assessors with commercial or other experience, into the ordering of legal proceedings.

The long-term consequences of this can be seen in many ways. It has assisted, for example, in the making of demands for other means to deal with commercial

and other disputes with roots in Australia going back into the nineteenth-century.³²⁵

Jurors empanelled pursuant to s56 of the *District Courts Act* of 1858 could in the judge's discretion be qualified as special jurors (s51) and they were provided for in the *District Courts Act 1912* (s93). Special juries were abolished by the *Jury (Amendment) Act 1947*.

Criminal conversation and matrimonial causes

The dissolution of marriages was once 'the privilege of the very rich'.³²⁶ This was because until 1857 in England the only way to have a marriage dissolved was by a private Act of Parliament. Until the nineteenth century that was a procedure only open to men, because a precondition was to succeed in an action for damages for criminal conversation, which was available only to men. Professor Fleming said, with a certain asperity (after a discussion about the tort of enticement):

Even more offensive to the modern mind is a husband's claim of damages for mere adultery, since it purports to compensate him for being cuckolded without even having lost his wife. Yet this is precisely what the common law offered him in the action of criminal conversation which did not necessitate proof that he had lost his wife's society and cohabitation. The object of the action was to maintain the purity of married life, to protect the honour of the husband and his family and incidentally to serve as a deterrent to would-be adulterers.³²⁷

The first New South Wales Act allowing divorce was the *Matrimonial Causes Act* of 1873 which commenced on 1 July 1873. Before that, divorce in New South Wales was more or less impossible (although in 1853 WC Wentworth successfully moved for a private bill to grant a divorce).³²⁸

The *New South Wales Act* of 1823 contained no provision for divorce. This was intentional, Earl Bathurst said, in a despatch to Governor Darling in August 1825.³²⁹ One reason seems to have been the desire of the Government to encourage marriages to help stabilise the social life of the colonies. But as Castles records, matrimonial break-ups were not uncommon in early New South Wales and the ties were sometimes publicly broken in unconventional fashion. For example, the *Hobart Town Gazette* of 1 March 1817 reported the auction sale of a wife by a 'Hibernian whose finances were rather low'. She was said to be in no way prepossessing in appearance but 'to the amazement of all present she was sold and delivered to a settler for one gallon rum and 20 ewes'.³³⁰

The *Matrimonial Causes Act* of 1873 gave the Supreme Court jurisdiction in respect of divorces *a mensa et thoro* (from bed and board; the sort of order made by the ecclesiastical courts, being for judicial separation), nullity of marriage, dissolution of marriage, restitution of conjugal rights and jactitation of marriage (s2).³³¹ Questions of fact were to be determined by judge or jury, at the court's discretion (s6). In suits alleging adultery, either party could insist on trial by jury (s23).

The Act did not provide for the number of jurors. Presumably trials by jury in matrimonial causes under the 1873 Act were governed by the *Jurors and Juries Consolidation Act* of 1847 in its application to civil juries. However the *Matrimonial Causes Act Amendment Act* of 1884 provided for special juries of 12, with a right in each party to strike six names from the jury list. The jury list was to contain the names of 48 special jurors (or more if there was more than one co-respondent on the record).

The *Divorce Procedure Amendment Act* of 1886 decreed that in any suit where a decree of dissolution of marriage was sought, any party to the suit might require contested matters of fact to be tried by a jury. The procedure was that established by the 1884 Act.

The *Matrimonial Causes Act* of 1899 (s92) abolished criminal conversation as a separate tort. However, a husband could still claim damages against a co-respondent in a suit for dissolution of marriage. The right was denied to wives until the coming into operation of the *Matrimonial Causes Act* 1959 (Cth).

An example of a trial by jury of 12 after the 1884 Act is *McGarry v McGarry and Pike*.³³² The case was tried before Darley CJ and a jury of 12. The co-respondent Pike had filed an answer denying adultery but did not appear at the hearing. The chief justice directed the jury that the absence of the co-respondent meant they had to treat him as if he were guilty, and must find damages against him, even if they found that the respondent Mrs

McGarry had not committed adultery with him. He seems to have acknowledged this was a wondrous state of affairs by reminding the jury they could award damages of one farthing. Probably the most famous (at least the most colourful) divorce case tried by a New South Wales jury started in Sydney in 1900. A test cricketer turned bookmaker called Arthur Coningham took proceedings for divorce naming as co-respondent (and claiming damages from) the Rev Dr Denis Francis O'Haran. Father O'Haran was an Irish-born Catholic priest and the administrator of St Mary's Cathedral. The case kept Sydney spellbound for months. It was reported in the press in salacious detail in the style of the day. The allegations were tried twice. The first jury disagreed and the second found for Dr O'Haran. The case is recounted by Cyril Pearl in *Wild men of Sydney*.³³³

The *District Courts (Amendment) Act 1905* (s14) enabled the Supreme Court to remit to a District Court any question of fact arising in any proceedings under the *Matrimonial Causes Act* of 1899, to be tried by a judge or jury. If remitted for trial by jury, the jury would consist of 12 special jurors; the jury would be empanelled, and challenges permitted, as in the Supreme Court. In 1959 the Commonwealth *Matrimonial Causes Act* took over the field, and matrimonial causes were thereafter tried by judge alone.³³⁴

Jurisdiction in matrimonial causes was assumed by the federal Family Court of Australia in 1975 by virtue of the *Family Law Act 1975* (Cth).

Juries of matrons

I do not know how often juries of matrons were constituted in New South Wales, but I dutifully record that such a jury assembled in Sydney on 22 February 1834 before Justice Burton after a young convict woman called Sarah McGregor, upon being sentenced to death for murder, pleaded she was pregnant. It is recorded that:

His Honour observed, that the prisoner having pleaded pregnancy in rescue of execution, sentence of which was pronounced against her on Saturday, a jury of matrons had been summoned; and directed that they should be sworn forthwith. Mrs. Curtis (forewoman), Mrs. Leburne, Mrs. M. Byrne, Mrs. S. Byrne, Mrs. Gordon, Mrs. Chandler, Mrs. Bolton, Mrs. Levey, Mrs. Bayley, Mrs. Hawthorn, Mrs. Carroll, and Mrs. Dowling, were then sworn to 'seareh [sic] and try the prisoner at the bar, whether she was with child or not; and thereof a true verdict to give, according to their skill and understanding'.

His Honour having told them that they were sworn to try the simple fact, whether or not the prisoner was *enceinte*, they [sic] withdrew to the jury-room, where the prisoner was sent to them, and in about half an hour returned into Court, with a verdict that 'the prisoner was with child, but not with *quick* child.' In answer to some questions from the Court, the forewoman observed, that it would require a fortnight or three weeks to decide the case. His Honour then

told the jury that unaccustomed as they were to public duties of this nature, they had returned a verdict which the Court could not receive. They had better therefore again retire, and take into their consideration, whether the prisoner was pregnant *at all* or no; - if the former, they would humanely give her the benefit of any doubt they might entertain. After a further absence of about 20 minutes, the jury returned into Court, finding that '*to the best of their opinion, she was not with child.*' His Honour having thanked them for their attendance, and informed them that an order would be made out of their expenses, they were discharged.³³⁵

There seems to have been real doubt about the cause of death of the man said to have been murdered (although there was evidence of an assault), and the death sentence imposed on Sarah McGregor was commuted to three years imprisonment. There was some collateral fall out. A woman called Ann Sheridan was placed in the stocks for six hours for getting drunk and using violent language to one of the matrons.³³⁶

On 28 February 1834 the *Australian* proclaimed Sarah McGregor's jury of matrons as the first in the colony. However, in Professor Castles' 1990 article 'Now and then',³³⁷ he writes of a convict called Anne Davis, convicted in 1789 of entering a dwelling-house and stealing clothing. The clothes were sufficiently valuable as to make it a capital offence. She declared she was pregnant. As Deputy Judge Advocate David Collins,³³⁸ who presided over the trial, later wrote, 'twelve of the discreetest women among the convicts' were enlisted to

serve on a jury of matrons to determine the issue. They took Anne Davis away for their investigations. The official record relates that, on their return to the court, 'the Foreman [sic] delivered in their Verdict that the Prisoner at the Bar was not with child'.

Anne Davis was hanged on the following Monday.

I can find no record of an earlier jury of matrons in New South Wales. Whatever else she achieved in life, Anne Davis was, it seems, the first woman in Australia to have requested the empanelling of a jury of matrons. In fact, the trial of the question whether Anne Davis was pregnant was probably the first trial in Australia by a tribunal of civilians. Anne Davis was also the first woman hanged in New South Wales.

As to the origin of juries of matrons, Stephen tells us, in another of his dissertations about the merciful law of England:

Reprieves may also be *ex necessitate legis*; as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*; and which was recognized by the laws of *antient* Rome, and has been the accepted law of England since the very first memorials of our law. In case this plea be made in stay of execution, the judge directs a jury of twelve matrons (or discreet women) to inquire the fact; and if they bring in their

verdict *quick with child* (for, barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed generally till the next session; and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and has been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause; for she may now be executed before the child is quick in the womb, and shall not (by her own incontinence) evade the sentence of the law.³³⁹

So becoming pregnant a second time was not worth the trouble.

According to Professor JH Baker, a finding of pregnancy by a jury of matrons was not uncommon in England, even if supported by negligible evidence.³⁴⁰ I do not know whether New South Wales has any statistics directed to the issue.

Chapter 9

Criticisms of judges

These days, lawyers sometimes complain, with good reason, about press attacks on judges (and sometimes juries). But such attacks do seem restrained, when looked at in light of the writings of newspaper editors in earlier times. There is, I think, much less to criticise now. But let me give you some examples of earlier writings:

On 29 April 1842 the *Sydney Morning Herald* offered its readers a blasting criticism of Willis J, the Supreme Court judge at Port Phillip. Willis had summarily punished a newspaper editor called Arden for contempt of court by fining him £300 and sentencing him to 12 months imprisonment. The governor remitted the sentence.

The *Herald's* complaint was that Willis had sentenced the defendant without trial, in response to a newspaper article criticising the judge. Amongst other things, the editor said:

We therefore charge this Port Phillip Judge with the crime ... of having *passed sentence without trial* – of having punished a free British subject for an unproven offence – of having abused the powers lodged in his hands for constitutional purposes, by employing them in resenting a personal affront upon himself.

He then went on to describe the judge's conduct as an 'aggravated display of his own wretched animus'.

The *Herald's* editorial concluded:

1. To sum up the case in a few words, its particulars were as follows:-
2. The party arraigned – Mr. Editor ARDEN.
3. The offence charged – a libel upon Mr. Justice JOHN WALPOLE WILLIS.
4. The presiding Judge – Mr. Justice JOHN WALPOLE WILLIS !
5. The Jury impannelled – Mr. Justice JOHN WALPOLE WILLIS !!
6. The prosecuting officer – Mr. Justice JOHN WALPOLE WILLIS!!!
7. The counsel against the prisoner – Mr. Justice JOHN WALPOLE WILLIS !!!!
8. The verdict returned by this impartial jury – *Guilty!!!!*
9. The sentence pronounced by this impartial Judge – A fine of THREE HUNDRED POUNDS, and TWELVE MONTHS' IMPRISONMENT !!!!!.

Willis J was removed from office in the following year.

In 1886 11 youths were tried for the rape of a young woman at Moore Park, before Windeyer J. The trial was widely regarded as farcical, because of Windeyer's bias against the prisoners and the oppressive manner in which he ran the trial. Two were acquitted, four hanged and the rest served ten years after being reprieved. The *Truth* on 29 November 1896 reminded readers of the trial judge's 'morose and murderous will'. The editorial went on to say:

The facts of the trial, together with WINDEYER'S conduct in keeping the jury sitting all night, after a protracted trial of four days, and compelling counsel to commence their addresses to the jury after midnight, and to continue them until nearly 4 o'clock in the morning; his monstrous summing up and almost diabolical determination to prevent as far as possible, the exercise of the Royal prerogative of mercy are too indelibly engraven on the public mind to call for recapitulation. So, too, his brutal sentence of penal servitude and floggings on SWEETMAN, the cabman, who drove the strumpet to Moore Park, and WINDEYER'S subsequent sudden and judicious 'scoot' on a holiday trip to Europe need no recalling.

Windeyer's summing up is recorded in detail in the *Sydney Morning Herald* of 29 November 1886. It was certainly one sided. He positively slavered when sentencing the youths, saying, in part:

Prisoners, you have been convicted of a most atrocious crime, a crime so horrible that every lover of his country must feel it is a disgrace to our civilisation. I am glad to find that this case has been tried by a jury that has had the intelligence to see through the perjury on perjury that has been committed on your behalf ... It is terrible to think that we should have amongst us in this city a class worse than savages, lower in their instincts than the brutes below us. ... I warn you to prepare for death. No hope of mercy can I extend to you. Be sure no weakness of the Executive, no maudlin feeling of pity, will save you from the death you so richly deserve. ... be sure no pity will be extended to you; ... I advise you to prepare to meet your Maker ... remember that your time is short. The recommendation to mercy which the jury have made in your favour it will be my duty to convey to the Executive.

The report noted that the prisoners appeared unnerved by the sentences.

A poignant sequel to the convictions and sentences of death was a letter to the *Sydney Morning Herald*, published on 31 December 1886. It was from M Sheppard, a juror at the rape trial, who said, in part:

At the outset I must say that I have not the slightest sympathy for such cowardly ruffians, but I am of opinion that the jurors' recommendation to mercy should be given effect to, especially when I tell you that recommendation was the means of our being able to

return a verdict. I firmly believe that if all the jurymen were convinced that the recommendation to mercy would be thrown overboard that we would not have been able to agree that night, if at all ...

An example of a later press campaign against a judge was the pursuit of District Court Judge Docker.³⁴¹ *Truth* was in the vanguard, but other publications, including the *Bulletin*, were as virulent.

On 7 November 1896 the *Bulletin* observed that Docker (obviously sitting in quarter sessions) had caused juries to sit for 18 hours continuously and not rising until 3.45a.m. The *Bulletin* went on:

After the gross scandals incidental to the reign of the unspeakable Judge WINDEYER, surely the people of N. S. Wales do not contemplate setting up a tinpot imitation of the man from Tomago! ...

Judges know, or should know, that the hearing of a criminal charge is not for the convenience of the jurors, is not for the convenience of the judge, but is for the extension of a fair trial to the accused. There are three courses open -

- a) to dismiss or otherwise regulate Mr. Docker;
- b) to pass an eight hour sitting Bill with regard to criminal trials;

- c) to enact that in cases where juries are being Dockered, they shall, at intervals of four hours during every night-sitting, receive hypodermic injections of cocaine sufficient to brace them up for the occasion.

During 1896 to 1898 *Truth* had such bylines as:

Docker's Doings ... Quarter Sessions Scandals. BY A TINPOT IMITATOR And Unworthy Successor of Sir William Windeyer.

DOWN WITH DOCKER! THAT'S how we speak of this subsidiary judicial snob and tin-pot autocrat ...

DOWN WITH DOCKER. MORE JUDICIAL MADNESS. Crazy Crankiness from the Bench. Derogatory Dodderings by Docker

DINGO DOCKER. . MAKES HIMSELF MORE KINDS OF AN ASS. His Zoological and Entomological Eruption ³⁴²

The most direct attack was probably in *Truth* on 17 April 1898 when Norton devoted an entire page to an open letter to Judge Docker. It included:

I propose to prove circumstantially, and without circumlocution, that you are ... utterly unfit for you position ...

Your consistent conduct on the subordinate Bench has been alternately that of an idiot and a brutal, bewigged bully. Some of your judicial *obiter dicta* – the obstreperous observations of an ignorant, irascible jury rater [ranter?] – would seem to indicate that a padded-room at Callan Park would be a fit and proper abiding place for you ...

You are one of the opprobrious spawn of the old Convict System; and would, had not Providence delayed your advent to this world in order to curse our Courts, have made an admirable member of the military rum-selling mob of martinets who mercilessly murdered, by the mockery of judicial process, men and women at the triangles and on the gallows. Your bullyings of counsel defending prisoners, your browbeatings of juries, your brutal behaviour towards prisoners, innocent and guilty alike, but more often towards the innocent, mark you out as a man devoid of all decency, and as a Judge whose vagaries would disgrace a Jack-Pudding.

And so on.

The 1811 *Dictionary of the vulgar tongue* tells us that a Jack Pudding was a jester to a mountebank.³⁴³

Cyril Pearl reproduced some of the above, and more, in *Wild men of Sydney*.³⁴⁴ The point of it all here is that the press had a healthy contempt for judges who corrupted the jury system by sitting oppressive hours, by entering the arena and bullying juries, witnesses and counsel and

by trying to force verdicts according to their own perceptions. It must have had a beneficial effect in the long run.

However, a newspaper attack for a different reason occurred much earlier, on 13 November 1839 when the *Sydney Herald* accused Chief Justice Dowling of dealing too leniently with two men accused of attempting to rape a woman called Catherine Byrne. The men were convicted of common assault and sentenced to a year in irons. The press approach was not entirely different from press attitudes to judges in the twenty-first century except perhaps less restrained. It was part of a fusillade by several newspapers. The *Herald* said:

That murder and something worse than murder were intended there is little reason to doubt, but no, says His Honour the Chief Justice, after one of his usual displays of forensic balderdash – bad logic – and threadbare casuistry, this is a mere case of common assault.³⁴⁵

Chapter 10

The Australian Constitution, section 80

Section 80 of the Australian Constitution is the only guarantee we have that trial by jury in criminal cases will be retained in Australia, and then only for a class of offence – against any law of the Commonwealth – and then only for those offences the Commonwealth Parliament from time to time decrees shall be indictable. Section 80 reads:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

During the Australasian Federal Convention debates in Melbourne in 1898 that preceded adoption of the Constitution the following exchange occurred:

MR. HIGGINS. – But why should we make it a matter for the Constitution, which cannot be affected by anything the Federal Parliament may do, that there shall be a jury for the trial of any indictable offence?

MR. WISE. – Because it is a safeguard of liberty.

MR. HIGGINS. – If the honourable member were speaking a hundred years ago he might have expected his remark to be applauded when he spoke of trial by jury as being a necessary safeguard of liberty.

MR. WISE. – I am speaking of modern times and in view of the decisions of Courts of Equity.

MR. HIGGINS. – ... It would be, in the mouth of any one else but my honourable and learned friend, mere clap-trap to say that trial by jury was a safeguard of liberty at the present time. I agree that it is as well to have a jury in criminal cases; I should like to see the system preserved in such cases. But that is not the issue. The issue is whether we are to stereotype this in the Constitution, and to say, no matter what changes may come about in legal procedure and in the mode of dealing with crimes, that we must have a jury, and that nothing but a change in the Constitution can bring about an alteration. I can tell honourable members that under a similar provision in the American Constitution there has been a great deal of embarrassment, because they have not been able to alter the criminal procedure in order to suit the exigencies of modern times.³⁴⁶

Higgins lost the argument.

Writing in 1901, Quick and Garran in *The annotated Constitution of the Australian Commonwealth* said of s80 (citing American authorities):

This provision guarantees not merely the form of trial by jury, but all the substantial elements of trial by jury, as they exist at common law. ... 'Unanimity was one of the peculiar and essential conditions of trial by jury at the common law. No authorities are needed to sustain this proposition.' ... 'Trial by jury, in the primary and usual sense of the term at common law and the American Constitution, is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts ... '... A jury means a jury composed, as at common law, of twelve men.'³⁴⁷

The High Court held in *Cheatle v The Queen* that s80 precluded a verdict otherwise than the unanimous decision of the jury; various State laws (not New South Wales) permitting majority verdicts are of no effect in trials for federal offences. The court said:

It follows from what has been said above that history, principle and authority combine to compel the conclusion that s80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by the agreement or consensus of all the jurors. That being so, s57 of the Juries Act 1927 (S.A.) cannot, consistently with s80, operate to authorise the conviction of either of the appellants by a majority verdict. Their convictions were unconstitutional and must be set aside.³⁴⁸

Notwithstanding the decision in *Cheatle*, the High Court held in *Brownlee v The Queen*³⁴⁹ that a provision whereby a jury could be reduced from 12 to ten during a trial was not contrary to s80, but three of the justices said there was much force in the contention that a reduction below ten jurors is not permissible. Therefore a trial of a federal offence when the jury is reduced to eight (a possibility under *Jury Act* s22 (a) (iii)) may well be unconstitutional. A trial by a jury which includes reserve jurors does not contravene s80, even if jurors in excess of twelve are ultimately excluded from the panel by ballot.³⁵⁰

The perceived weakness in s80 is that 'trial on indictment' on the face of the words extends only to those offences the Commonwealth Parliament determines should be indictable. It may be an unlikely contingency, but the section could be avoided altogether by Parliament declaring all Commonwealth offences to be triable summarily.

Mr Isaacs pointed out in the Melbourne Convention that:

it is within the power of the Parliament to say what shall be an indictable offence and what shall not. The Parliament could, if it chose, say that murder was not an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury.³⁵¹

In *Kingswell v The Queen* the majority in the High Court said:

Section 80 says nothing as to the manner in which an offence is to be defined. Since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence. That fact that s80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express. It has been held that s80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily. This result has been criticized, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled.³⁵²

Brennan and Deane JJ wrote strong dissenting opinions.³⁵³

Kingswell was considered by the High Court in *Cheng v The Queen*, but the court (by majority) declined to reopen the issue. In his dissenting judgment Kirby J, with some feeling, surveyed the court's approach to s80 since *Cheatle*, saying:

Then the earlier formalism returned. The most recent decisions on s 80, whilst sometimes containing a passing nod to the view of the section as a fundamental guarantee of the Constitution, have confined its operation to an ineffective hortation. The old view, it

seems, is, for a time, to prevail again. The logic and necessity of giving a constitutional effect to s 80 is to be rejected. Whereas other provisions of Ch 111 are strictly invoked to strike down beneficial national legislation or to invalidate longstanding national practice, s 80 of the Constitution is, it would appear, to be viewed as a withered “guarantee” of no substantive use to those facing trial for federal offences in Australian courts. It might just as well not have been included in the Constitution. ... I reject a turning back to such a sterile opinion about its requirements³⁵⁴

So we have s80 for what it is worth.

Chapter 11

The erosion of trial by jury

Whither trial by jury?

Section 28 of the *Jury Act 1901* affirmed the right of trial by juries of 12 in criminal cases in the Supreme Court, the circuit courts and courts of quarter sessions. That remains to this day in the Supreme Court and District Court. Circuit courts were abolished in 1912.³⁵⁵ Quarter sessions courts were abolished by the *District Courts 1973 Act* and the criminal jurisdiction thitherto exercised by them was assigned to the District Court created by the 1973 Act (ss166 and 167). Trial by juries of four in civil cases in the Supreme Court (with the right to seek trial by 12) was affirmed by ss30 and 31 of the *Jury Act 1901*. The right in civil cases remained unaffected by the *Jury Act 1947* and was provided for as of right in the District Courts Acts in civil cases until 1987 (except for motor vehicle accident cases in which juries were effectively abolished in 1968). From 1900 in civil cases a jury could be dispensed with by consent of both parties: s3, *Supreme Court Procedure Act 1900*.

In New South Wales the first erosion of trial by jury in civil cases came in 1965. The Askin Government tried to abolish jury trials in motor vehicle accident cases, clearly influenced by the late Justice Gordon Wallace. He presented a paper to the 12th Legal Convention, later published in the *Australian Law Journal*,³⁵⁶ called 'Speedier justice (and trial by ambush)'. Wallace

agitated for the abolition of juries in civil cases because of delays in getting cases to trial. Alternatively, he argued for modification of the system, for the same reason. '[O]rdinary litigation', he said, 'has almost disappeared from our Supreme Court. Over 96 per cent of cases listed for trial are accident cases.' In light of the recent controversies about curtailment of common law rights for the personally injured, he in fact presented a persuasive argument for retention of juries, with an anecdotal example intended to support the argument for abolition. But his argument pointed to their conservatism in damages awards. He said:

The jury system is notoriously (and unarguably) time wasting and expensive. ... the tendency to call too many expert witnesses (such as doctors) and to question them with a wealth of detail for the jury's benefit all add enormously to time and cost. In a jury action before me the other day seven medical specialists were called and the jury's verdict was £885 (£700 general damages).³⁵⁷

The 1965 legislation was amended in the Legislative Council, so that s5 required a party to a Supreme Court action for damages arising from a motor vehicle accident to give notice within 21 days (or such extended period as the court allowed) that the party required a jury; otherwise trial would be by judge alone. The right to a trial by jury was nonetheless retained.

In 1968 the same Government succeeded, in a further attack, with s4 of the *Administration of Justice Act*, which

excluded juries from motor vehicle cases. In his second reading speech, Attorney General McCaw effectively begged the entire question by arguing that motor vehicle cases were really too simple for juries; they required no more than a finding of liability and an assessment of damages. He said:

The Government has no intention of destroying or even attacking the jury system. Juries have traditionally belonged, first, to the criminal courts and second, to the courts in which the issues raise questions of character, honour, integrity or reputation. Those are the traditional kinds of cases in which juries are used and ought to be used for the hearing. None of those questions is involved in motor accident cases, in which two mechanical questions have to be answered. Did someone drive a motor vehicle negligently? If so, how much compensation should the victim get? There is no question of character, honour, integrity or reputation. Every juryman knows that if he finds in favour of the plaintiff, it is not the defendant personally who will pay. We have gone beyond that stage long ago.³⁵⁸

It was almost as though issues of credit were unknown in running down cases.

The Act extended the prohibition to the District Court. The issue then became discretionary in the Supreme Court in 1970 and the District Court in 1973 by the *Supreme Court Act 1970* and the *District Courts Act 1973* respectively.

The proposed changes in 1965, as with every subsequent proposal to extinguish or erode the right of trial by jury in civil cases, were opposed by The New South Wales Bar Association. The association published a 50 page statement entitled *Your right to a jury trial*, which was compiled largely by the late Harold Glass QC (later Judge of Appeal). The paper is a comprehensive defence of the jury as a necessary institution in civil cases. Its central thesis is this:

The question is whether our legal system should be 'reformed' by the substantial abolition of trial by jury in the Supreme Court of N.S.W. It is our belief that none of the profound social changes of our times has in any way undermined the importance and value of trial by jury to the community and the litigant. If anything, its value as a civic right and democratic safeguard has increased as the structure of modern society has grown more complex. It and the franchise provide the best insurance the citizen can have against the undue encroachment of power.³⁵⁹

The *District Court Act 1973* restricted the right to apply for a jury trial in the District Court to cases in which more than \$100 was claimed (s78). In 1984 that amount was increased from \$100 to \$5000: *District Court (Procedure) Amendment Act 1984*. In 1987 the court was given a general discretion to order all or any questions of fact to be tried without a jury: *District Court Act 1987*, s79A, notwithstanding s78. That remains the case in the District Court. There is no right to jury trial in civil cases. The matter is one of judicial discretion which

must be exercised having regard to the circumstances of the particular case. The 1987 Act significantly eroded the right of trial by jury.

The *Supreme Court Act 1970* provided (in summary):

1. Subject to ss86, 87 and 88, proceedings would be tried without a jury unless otherwise ordered (s85).
2. Common law claims (except under ss87 or 88) would be tried by jury if any party filed a requisition (s86).
3. Common law claims involving:
 - fraud;
 - defamation;
 - malicious prosecution;
 - false imprisonment;
 - seduction; or
 - breach of promise of marriage,

would be tried by a jury (s88).

4. Claims arising out of motor vehicle accidents could be tried by jury on application, but only in the discretion of the court. If all parties applied, trial by jury would be ordered (s87). As Kirby P said in *Pambula District Hospital v Herriman*:³⁶⁰

By s87 it is provided, in effect, that normally running down cases will not be tried with a jury unless all parties consent or unless the court on the application of one party so orders. As is well-known, in practice, all parties do not so consent and orders for the trial of such cases with a jury are rarely, if ever, made.

Notwithstanding ss86 and 87, under s89 the court was empowered to dispense with a jury where:

- prolonged examination of documents or scientific or local investigation was required and could not conveniently be made with a jury;
- the proceedings were in the commercial list; and
- all parties consented.

Further, issues of fact on a defence arising under the *Workers Compensation Act 1926* were to be tried without a jury.

The right which has survived has been in spite of successive governments.

In 1987 s89 was amended by s3 of the *Supreme Court (Amendment) Act* to give the court power to dispense with a jury notwithstanding the other jury sections. The effect was that the only right to a civil jury trial was in respect of s88 cases (fraud, defamation, malicious prosecution, seduction and breach of promise of

marriage). The latter two causes of action can be excluded as having any practical application.

Actions for seduction, are, I think, now rare. The cause of action derived from the seduction of a servant whose master was thereby deprived of her services, however slight the services may have been. The servant could be the daughter of the master. It is probably another irrelevancy, but there is something mildly whimsical about the judgments of the Full Court in 1867 in *Potter v Linden*.³⁶¹ Mr Linden was held liable to pay damages of £50 because Mary Ann Potter was waylaid by him when she was on her way to buy her parents some rum. She was delayed for two hours in that errand by the amorous Mr Linden. She was late delivering the rum. The judgments do not disclose how the parents coped with the delay beyond suing Mr Linden. I hope there was enough rum in the house to see them through the crisis. They were hard times.

Breach of promise of marriage was abolished as a cause of action by s111A (1) of the *Marriage Act 1961* (Cth).

The 1987 amendment to the *Supreme Court Act* followed a decision by Clarke J in *Peck v Email Limited*,³⁶² which was an asbestos claim. The defendant filed a requisition for jury. The plaintiff wanted to dispense with a jury because there was going to be a prolonged examination of documents and scientific examination.

The judge dispensed with a jury because of the scientific issues, but he concluded his judgment by saying:

I would make this final observation. I am informed that there are a large number of cases presently awaiting trial in which the plaintiffs are dying or very ill. In most of these cases the defendants have applied for juries. As I have said the pressures of the business of the Court make it extremely difficult for the Court to provide expeditious jury trials for the concerned parties. It is far easier to order urgent hearings for trial by a judge alone given the greater flexibility of this mode of trial and the judge's ability to adjourn the case from time to time. In these circumstances there is a need, it seems to me, for judges of this Court to be given an unfettered discretion to order trial by judge alone, except in respect of proceedings to which s88 applies, to accommodate cases in need of an urgent hearing.³⁶³

In introducing the Bill in September to amend s89, Attorney General Sheahan referred to Clarke J's comments in his second reading speech. He said:

These bills are primarily intended to give the courts the discretion that Mr Justice Clarke was seeking in this case, and which judges in the other Australian States now possess. As I have already explained, the courts of New South Wales are alone in not having a broad discretion to dispense with civil juries where that would be in the interests of justice, so His Honour's request is entirely reasonable. There are quite a few cases pending in the Supreme Court's jury list in which the plaintiffs are suffering from asbestosis or similar fatal diseases where life expectancy is very short. In

those cases, the choice by defendants of trial by jury is seriously hampering the courts' ability to get cases on before plaintiffs are either unable to withstand the rigours of a court hearing, or in extreme cases, before plaintiffs actually die.³⁶⁴

Mr Dowd, the opposition spokesman on legal affairs, said:

In view of the pressures exerted to remove juries, and the consequent problems of that, these measures are a responsible amendment. They will give a judge discretion to remove a jury. Little guidance is given in the proposed amendments as to the circumstances in which, that should apply. One of my parliamentary colleagues expressed the view that a judge will travel to a country town and realize he will not get through all the work and will dispense with the juries in order to do so. In my view that is not a proper exercise of judicial discretion to remove a jury. If that were to happen, that District Court judge or Supreme Court judge would be taken on appeal by one of the litigants. In that way some principles would be laid down.³⁶⁵

There is a touch of irony in the fact that on 23 May 1989 the *Dust Diseases Tribunal Act* became law and the reason for the concern of Clarke J disappeared. But that Act itself constituted a major erosion of trial by jury in civil cases.

Then along came *Pambula District Hospital v Herriman*.³⁶⁶ The plaintiff claimed she had suffered brain damage

because of the hospital's negligence. She requisitioned a jury and then sought an order that the jury be dispensed with. The defendant objected on the premise that it would have sought a jury had the plaintiff not done so. Cole J ordered trial by judge alone. The defendant was granted leave to appeal because judges were approaching in different ways the determination of whether cases should be tried by jury. The appeal was treated as though the appellant had requisitioned a jury.

Cole J dispensed with a jury on the premises the case would be shorter, there would be a saving of costs to the plaintiff, there could be discussions with counsel about an appropriate range of damages and the reasons for judgment would be published.

Kirby P noted that the normal rule in the court, including the Common Law Division, was that proceedings should be tried without a jury: s85 (1) but that was subject to the qualifications introduced by ss86, 87 and 88. Orders for jury trial in motor vehicle accident cases under s87 were rarely, if ever, made. How should the discretion under s89 be exercised? Section 89 derived from an English rule of court made in 1933, giving a judge a discretion to dispense with a jury. In the view of Kirby P, it was wrong to take account of universal characteristics of jury trials, or the fact that other cases were waiting to be heard. The matter had to be determined by considerations specific to the case under consideration.

Kirby P said:

In the present case, it is at least arguable that against the background of the controversies which arose in 1965, when the effective removal of juries from running down cases was introduced, Parliament moved here with care and sensitivity to the time-honoured right to jury trial. It will be remembered that the Attorney-General specifically denied an intention generally to abolish jury trials. Therefore, the suggestion of the unreasonable, unjust or inefficient consequence of a jury trial in a particular case or in a collection of cases does, not, of itself warrant a search for a different construction.³⁶⁷

Samuels JA gave encouragement to further amendment to the *Supreme Court Act* (and further erosion of trial by jury) by saying:

Before leaving the case I add that I understand the frustration which has led some judges to dispense with juries upon grounds which I regard, with respect, as incorrect. Delays in the trial lists have reach intolerable proportions. Innovative methods of trial may offer a solution. It would hardly be an innovation to contemplate a further amendment to the Act adopting the wider discretion available in England, and allowing judges a discretion, on applications by parties, to order trial with jury or trial by judge alone. I commend consideration of the matter to those concerned with reform of the law in New South Wales.³⁶⁸

Commencing in 1990, successive governments laid siege to civil juries. In November 1990 Mr Greiner's

Liberal/National Party Government introduced the *Courts Legislation (Civil Procedure) Amendment Bill*. Relying on the *Pambula District Hospital* case, Attorney General Dowd said:

In making this recommendation for legislative change, the court expressed strong support on policy grounds for substantially limiting the right to a jury in civil matters. It acknowledged the many general advantages of having civil matters heard by a judge alone, and recognised that delays in the jury list have reach intolerable proportions.³⁶⁹

The effect of the relevant clauses of the Bill, if they became law, would have been to abolish trial by jury in most civil cases. The Bill was amended in the Legislative Council by the deletion of the offending clauses.

In March 1991 the Government tried it again, with the *Courts Legislation (Civil Procedure) Amendment Bill*, another Bill designed to restrict jury trials in civil actions by giving judges a wide discretion to order trial by judge alone. The intention of the Bill was to require all civil actions to be tried without a jury, at the same time giving the court a discretion in cases of fraud, defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage (still), or where the court considered the interests of justice required a jury.

Mr Dowd, still attorney general, told the Legislative Assembly:

The resolution of civil disputes is consuming large and increasing amounts of society's resources. The jury list components of the civil justice system requires a disproportionately higher application of resources, not simply to support the jury system administratively but to cover also the costs of additional hearing time required for jury trials. The use of juries to hear a relatively small but time consuming and costly number of civil claims must now be considered a luxury, the continuation of which must have a deleterious effect on other components of the civil justice system. The logical response of the executive to this realisation in recent years has been to increase the jury requisition fee quite substantially. However, this has had the unfortunate effect of further exacerbating the general inequality between litigants in personal injury cases, because it makes the right to a jury trial dependent on the ability of the party to pay for the right. The inconvenience and monetary loss to jurors who are compelled to adjudicate private disputes is also relevant. Jury fees are not, for the most part, sufficient to compensate jurors for lost working time and inconvenience. This financial loss and inconvenience is imposed on individual members of the public by the insistence of certain litigants on exercising a right to have a private controversy resolved by a jury without any demonstration that the public thereby benefits in terms of enhanced administration and delivery of justice.³⁷⁰

The last sentence begged the whole question. The Bill was defeated.

A further attempt was made in 1994 with the *Courts Legislation (Civil Procedure) Amendment Bill*. It was again defeated. In the Legislative Council the Hon RD Dyer said:

I have a sense of déjà vu in speaking on this measure this evening because it is the third such attempt by the Government to abolish civil juries except in a limited class of cases.³⁷¹

In 2001 Mr Carr's Labor Government returned to the attack, again relying on the *Pambula District Hospital* case. Attorney General Debus introduced the *Courts Legislation Amendment (Civil Juries) Bill*. Speaking in the Legislative Assembly on 28 November 2001 he said (in brief summary):

- the purpose of the Bill was to provide that civil cases (except defamation) be tried without juries unless the court otherwise orders;
- jury trials can be more costly and cause other cases to be delayed;
- a party seeking a jury should show a special need;
- what would be a special need would depend on the particular circumstances of each case;

- it is likely juries will be employed in civil actions involving questions of fraud or even major issues of credibility; and
- people serving on juries can be inconvenienced and suffer financial loss.³⁷²

Mr Debus referred to the *Pambula District Hospital* case in justification of the Bill but the catalyst was a jury decision in February 2001 in the *Hogan* case whereby a plaintiff was awarded \$2.9m damages (including interest) against the trustees of his old school, for beatings inflicted on him as a child by a teacher.³⁷³ The case had excited the *Sydney Morning Herald's* editor, who wrote on 17 February 2001:

The State Government should move without hesitation to end the role of juries in assessing civil damages. The award by a jury this week of \$2.5million in damages... is clearly aberrant. But it is also representative of the dangers of absurd results in such cases. Whatever might now follow from an appeal in this particular case, the matter cannot be left at that. It calls for change in the law.

The *Sydney Morning Herald*, of course, has its own axe to grind concerning jury trials, because of its humiliation in the two *Carson* cases, where juries found against the newspaper for two articles published in 1987 and 1988.³⁷⁴ However, it is more than coincidental that the 2001 amendment should have followed to the *Hogan* case. On 31 October 2001 the verdict was set aside by the Court of

Appeal.³⁷⁵ On 27 March 2003 a new jury, considering only the quantum of damages, awarded Hogan \$1.2 million, plus interest.

Clearly, the object of the Bill was to restrict almost altogether the prospect of obtaining trial by jury in civil cases except defamation.

The Opposition supported the Bill. The shadow attorney general, Mr Hartcher, said:

In the history of development of the common law the role of the jury is one of enormous significance and dates back even earlier than the Norman Conquest, which revolutionised England and the English legal system. It is not incumbent on us today to detail the history of juries. This bill does not abolish juries in civil jurisdictions. It simply requires that there be a special need before a jury can be empanelled in a civil matter, other than in some civil jurisdictions such as motor accident claims, for which juries were abolished some years ago. The bill provides for juries to continue in defamation proceedings.³⁷⁶

Mr Hartcher said he thought the *Hogan* verdict 'was so gross as to merit some investigation of the role of juries'.³⁷⁷ The colossal assessment in *Blake v Norris*³⁷⁸ by a single judge seems to have escaped Parliament's attention.

In my view it is idle to assert that the law can require a litigant in civil proceedings to show a special need for a jury and at the same time say trial by jury in civil cases

has not been abolished. For all intents and purposes, with a few exceptions, it has.³⁷⁹

The Act commenced on 18 January 2002. It inserted s76A in the *District Court Act 1973* and s85 in the *Supreme Court Act 1970*. Each has the effect of proscribing jury trials in civil proceedings unless the court is satisfied that the interests of justice require that the action be tried by a jury. How does one convince a judge that it would be unjust for a judge and not a jury to try such a case?

Defamation

Until 1 January 1995 juries decided all the issues which went to trial in defamation cases, including whether defences were established and the assessment of damages. The *Defamation (Amendment) Act 1994* introduced s7A into the *Defamation Act 1974* and thereby turned the process into an odd hybrid whereby a jury determines whether the publication complained of carries the imputations alleged and whether it is defamatory. If the jury finds for the plaintiff on those issues they are then discharged and defences (such as justification) and damages are determined by the judge alone.³⁸⁰

Introduction of the legislation was influenced by the verdicts awarded in 1991 against John Fairfax and Sons Ltd at the suit of a solicitor called Carson. Carson sued John Fairfax for damages for defamation following publication of two articles in the *Sydney Morning Herald*, written by the journalist John Slee. The first jury

awarded Carson a total of \$600,000. In 1992 the verdict was set aside as excessive.³⁸¹ The case went back to trial before another jury. This time (1994) the jury awarded Carson \$1.3m, a little over twice the first verdict. The case was then settled.

Whatever else the *Carson* cases show, they demonstrate that lawyers are more popular in the community than journalists.

In 1992 the Government tried to remove juries from the assessment of damages in defamation cases with the *Defamation Bill 1992*. The provision was specifically rejected by the Legislation Committee of Parliament which examined the Bill; it recommended that juries retain this function and that methods of avoiding inappropriate awards be explored, such as by suitable directions to juries, and placing a cap on general damages. On 4 November 1992 the issue was referred to the New South Wales Law Reform Commission, which released a discussion paper in August 1993 raising three options for discussion: trial by judge alone; retain juries to decide only whether the imputations are conveyed, and are defamatory; and retain juries to decide all issues of fact including damages.³⁸²

Notwithstanding the verdict in *Carson v Fairfax* and some other unprecedented verdicts, the commission was of the view that 'Available empirical evidence suggests that awards of damages by juries are not generally excessive'. The commission then noted that the complexity of the procedure in defamation trials is greatly increased by the

division of function between judge and jury and that the common law and the *Defamation Act 1974* create a 'patchwork' of different issues to be decided by each'.³⁸³ There is not room in this paper for an adequate discussion about the arcane procedure surrounding defamation cases in New South Wales, but the Law Reform Commission said in its discussion paper: 'It is primarily these practical considerations, rather than the size of jury awards, which lead the commission to suggest that juries be removed from defamation trials.'³⁸⁴

The Government did not wait for the report of the Law Reform Commission, which was published in September 1995³⁸⁵. On 29 November 1994 the Government introduced the *Defamation Amendment Bill*. The Bill was introduced by Mr Hartcher, then Minister for the Environment. In his second reading speech Mr Hartcher said:

The suggestion might be made that defamation law reforms at this juncture are inappropriate and that the Government ought not to pre-empt the recommendations of the Law Reform Commission ...

He went on to say, just a little elliptically:

The strength of the Law Reform Commission lies in its independence. That independence prevents the Government from dictating compliance with a timetable that would compromise the commission's work towards achieving a consultative basis for comprehensive defamation law reform. It is in that

context that the present bill has been framed. The bill accommodates essential reforms to defamation law while anticipating to some extent what the commission may recommend.³⁸⁶

The consequence was the enactment of s7A by the *Defamation (Amendment) Act 1994* which gave us our present strange procedure. Juries are excluded from a large part of the process but not, it seems, because their verdicts were generally too high. But the displeasure of John Fairfax and Sons Ltd about the *Carson* cases was not without relevance to the introduction of the 1994 Act.

By the time the Law Reform Commission published its report in September 1995, s7A had become law. The commission observed that:

The socio-political role of the jury is founded on the notion of the jury as an appropriate barometer of public opinion to determine whether the matter in question is defamatory and, if it is, what amount of damages should be awarded. From a historical perspective, the role of the jury in defamation matters is intrinsically bound up with the protection of free speech, with juries figuring as watchdogs of democratic rights against unrepresentative governments. After the passage in England of *Fox's Libel Act* of 1792, the jury's increased role in libel cases was seen as among the central principles of freedom of speech and freedom of the press, with the people through their surrogate the jury determining how much could be said. Notwithstanding changes in political climate, the

Parliament of New South Wales apparently continues to perceive advantages in having certain aspects of defamation actions determined by a cross-section of the community rather than by judges alone.³⁸⁷

But the aspects for determination by juries are, as the commission said, now severely restricted.³⁸⁸

The end of civil juries

So much for the sacred institution. The pity of it is that the Government is prepared to disregard entirely the significant part which should be, and once was, played by ordinary citizens in the workings of the judicial arm of government. A large part of the population has been excluded from undertaking what, in the past, has been seen to be a civic duty of great significance. Yet like Mr Dowd in 1991 the attorney general in 2002 seriously advanced as a reason for restricting jury trials, that it was inconvenient for people to serve as jurors.

It must be observed that in England trial by jury in civil cases is now rarely seen. Before 1883, whenever an issue of fact arose, a jury had to be convened. From 1883 a new rule of procedure allowed the court a discretion to order trial by judge alone, which led to a reduction in the use of juries from 90 per cent to 50 per cent of cases. After 1933 the mode of trial was in the court's unfettered discretion. By 1965 jury trials had fallen to 2 per cent; the Court of Appeal held that except where the right to a jury was by statute, a jury should be used only in

exceptional cases. This was confirmed by the House of Lords in 1973.³⁸⁹

I do not see the present English view of civil juries as relevant to Australia.

The encroachment of summary criminal trials

Summary offences were not known to the common law, unless in the case of contempts.

As Stephen put it:

Now by a *summary* proceeding, is meant principally such a proceeding as is directed by Act of Parliament, - for the common law is a stranger to it, unless in the case of contempts, - for the conviction of particular offenders, and for the infliction of the penalties imposed by the Act. In a summary proceeding, there is no jury, but the party accused is either acquitted or condemned, according to the opinion of the particular judge or judges appointed by the Act, - an institution which is designed for the greater ease of the subject, by doing the offender speedy justice, and without harassing the freeholders with frequent attendances to try every minute offence.³⁹⁰

If the justices found an offence was a fit subject for indictment they could not determine the case summarily.

From the beginning of the colony of New South Wales, minor offences ranging from less serious assaults to

drunkenness and failing to work hard enough in a road gang were tried summarily, some instant (such as by road gang supervisors). As we have seen, the early courts of general and quarter sessions were given summary jurisdiction to deal with transported felons. Courts of petty sessions were established in 1832 by Act 3 Will IV, No.4 (s16) which made two or more justices sitting in open court (but not as a court of general quarter sessions) a court of petty sessions. They were given jurisdiction to deal with misdemeanours, pilfering from a master or mistress, simple larcenies to the value of £5, and other minor offences by any felon still under transportation. Many less serious offences later found their way into myriad statutes, such as the *Police Act* of 1833, the *Vagrancy Act* of 1835, the *Dog and Goat Act* of 1898, the *Police Offences Act 1901*, and, more recently, the *Summary Offences Act 1988*.

The *Criminal Law and Evidence Amendment Act* of 1891 (s18) gave justices the jurisdiction to try some indictable offences by consent, provided the subject matter did not amount to £20. Their jurisdiction was extended by *Crimes Act 1900* s476 (and subsequent amendments) to deal with the indictable offences mentioned in s477, where a defendant consented to summary trial even if the justice was of opinion there was sufficient evidence to put the defendant on trial, provided the subject matter did not amount to £250 (later \$500). Section 477 laid out a large number of indictable offences which could be dealt with summarily by consent. The list was added to by successive amendments to the *Crimes Act*

but remained a matter requiring the consent of the defendant.

The procedure is now prescribed by Division 3 of Part 2 of the *Criminal Procedure Act 1986*. There are two classes of indictable offences which must be dealt with by magistrates:

1. Those listed in Table 1 to Schedule 1 unless the prosecuting authority or the defendant elect to have a trial on indictment (s20 (1)).
2. Those listed in Table 2 to Schedule 1 unless the prosecuting authority elects to have a trial on indictment (s20 (2)).

Table 1 lists a great many offences created by some 15 statutes.

Table 2 also has a wide scope. The Director of Public Prosecutions can prosecute summarily or on indictment various offences against the *Crimes Act 1900*, *Firearms Act 1996*, *Drug Misuse and Trafficking Act 1988*, *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*.

All this clearly weakens trial by jury as a procedural right. Many offences can be indictable or not, at the election of the Director of Public Prosecutions.

In 1986 the New South Wales Law Reform Commission in its report 'The jury in a criminal trial' noted that:

the range of cases in which a jury is not necessarily required has increased gradually over the years but more rapidly in recent times. ...

Those who are unfamiliar with the criminal justice system in practice may be unaware of the small proportion of cases which are actually heard by juries. The jury as an institution is, nevertheless, an important component of the criminal justice system.³⁹¹

The fact is, as the report shows, by 1986 in New South Wales about 1 per cent of criminal cases were decided by juries.³⁹²

As to Commonwealth offences, the *Crimes Act 1914* (Cth) tells us:

- offences with a penalty of more than 12 months' imprisonment are indictable unless the contrary intention appears (s4G);
- offences with a penalty not exceeding ten years may be dealt with summarily with the consent of both sides, but the court can impose a maximum sentence of only two years (s4J);
- a court of summary jurisdiction may at the request of the prosecutor deal with an indictable offence if the offence relates to property whose value does not exceed \$500 (s4J).

In New South Wales an accused person in criminal proceedings in the Supreme Court or District Court may

now elect to be tried by a judge alone, with the consent of the Director of Public Prosecutions: *Criminal Procedure Act 1986*, s16. The judge may make any finding that could have been made by a jury (s17). Another example of summary trial by consent is provided by the *Supreme Court (Summary Jurisdiction) Act 1967* which, on application by the attorney general or the Director of Public Prosecutions, with the defendant's consent, would enable trial before a judge alone of various charges of attempting to commit, or conspiracy to commit, offences, as listed in the Tenth Schedule to the *Crimes Act 1900*. This is the effect of *Crimes Act 1900*, ss475A and 475B.

These are little used provisions.

But there are many serious offences created by regulatory statutes such as (for example) the *Marine Pollution Act 1987* and a host of others, triable summarily without consent by (for example) a judge of the Land and Environment Court. A statute creating an offence can prescribe the mode of trial and the citizen has no right to insist on trial otherwise. The Land and Environment Court is in large part a court of criminal jurisdiction which tries serious statutory crimes, always by a judge alone. So is the Industrial Relations Commission, when trying offences alleged against the *Occupational Health and Safety Act 1983*.

Chapter 12

Conclusion

In the paper 'Jury management in New South Wales' Associate Professor Findlay and others observed:

Recent debates over the appropriateness of jury decision-making within particular trial situations have exposed an expectation that the jury will provide a check on the technicality and exclusiveness of the law, and balance the enormous power given to a judge. A healthy suspicion of the law and lawyers has always been a feature of community attitudes to criminal justice in this State, and the jury remains a necessary and powerful symbol of trial by the people and for the people.

All this talk of expectations, common as these are in tone and direction, is not to suggest that juries themselves are above criticism, even if their decisions are beyond scrutiny. Particularly in the wake of controversial trials, such as that of Joh Bjelke-Petersen in Queensland, or when juries are discharged without reaching a verdict in long, complex and expensive trials, questions are asked about whether, and how, juries are appropriate to modern criminal justice. Assumptions that the jury is impartial, representative and independent and that a jury trial will ensure a fair trial for any accused person have been called into question.³⁹³

The assumption cannot be made of every jury, for they are comprised of human beings. But neither can the assumption be made of every judge, and the odds against impartiality in 12 people (or for that matter, four) selected at random, are probably longer than the odds against impartiality in one person, who is part of the system.

Historically, juries could if they chose ameliorate the severity of the law by acting perversely. It was not necessarily a bad thing. Sometimes they ignored evidence, knowing a conviction would send the accused to the gallows. Sometimes they would undervalue goods stolen, in the face of evidence to the contrary, to save the accused. Sometimes they would find a woman pregnant, upon negligible evidence, to save her from automatic execution.³⁹⁴ (I deal elsewhere with juries of matrons.)

I am not advocating that juries should feel free to act perversely. I suggest however that their occasional preparedness to do so may amount to a declaration of independence from legal form and technicality or from an overbearing judge or prosecutor. But as Heydon J says in his paper on 'judicial activism', juries, unlike judges, have 'very little room for activism'.³⁹⁵ Which, one would think, should make them less inclined than judges to be adventurous.

Much of my experience of criminal court juries was in Alice Springs and Darwin, which I suppose is outside the scope of this paper. However, juries generally tend

to be robust and independent in their negotiations, wherever they are. Perhaps I will be forgiven for quoting a passage from Jon Faine's book, *Lawyers in the Alice*. It is actually from an interview with me in 1993.

An interesting memory I have is when the Commonwealth did decide to amend the Northern Territory *Supreme Court Act* to provide for [jury] trials on indictment; it was a sort of catching up with section 80 of the Constitution. But true to form, the Attorney-General's Department, who in those days would have had difficulty successfully raffling more than one fowl at a time in a pub, had forgotten to review the jury roll. So at the first sittings after the Act was changed, we had a jury panel of 20 with about 15 cases, and we had to have a jury for each case. I think I was in about nine of these cases and we had the same jury each time, the same smiling faces.

In capital cases they used to lock the jury up overnight, and the venue for the lockup was the Riverside Hotel. A lot of the jurors used to think they were in some sort of heaven being incarcerated compulsorily in licensed premises overnight, and they'd come into court in the morning with eyes like beagles. They were very interesting days. I remember the door of the jury room bursting open one day and one of the jurors was punched through it by the foreman – there'd been some minor disagreement. He was dragged back again and then they reached unanimity not long after.³⁹⁶

Another entertaining occasion followed success in six consecutive trials. I should have retired from the law at that stage. At the seventh trial my client was convicted. That afternoon the local paper, the *Centralian Advocate* emerged, with an editorial which went something like this: 'Six acquittals then a conviction! Being tried by an Alice Springs jury is like buying a lottery ticket.' The jury panel responded by sending a note to the judge (Bridge J) that they refused to sit any further until the editor apologised. The editor did, and the sittings continued. The judge directed that the matter be referred to the Commonwealth attorney-general for consideration of contempt proceedings. That was in about 1963; I gather the Department is still looking at the issue.

Juries may sometimes deliver a verdict which is wrong. That does not often happen. In criminal cases it is difficult to criticise a jury for a verdict of not guilty. If a conviction is later called into question the issue is whether the conviction was open to them on the evidence (aside from grounds of appeal such as the wrongful reception of evidence or misdirection). If a conviction is open to a jury on the evidence, and if they convict, they are not to be criticised because some other evidence emerges after the trial which shows the verdict to have been wrong. The *Chamberlain* case is a good example.³⁹⁷ The jury convicted on the evidence properly before them. It was open to them to convict or acquit; the Federal Court and the High Court said so. What

emerged later put a different complexion on the case, but that did not make the jury's verdict a bad one.

In my opinion juries are less likely than judges to cause miscarriages of justice in either criminal or civil trials.

New South Wales has the historical distinction of being the only settlement of British people who had to fight for trial by jury. Governments who take it away, bit by bit, pay little regard to history. Trial by jury is becoming more and more a procedure prescribed for the most serious offences. In civil cases it is becoming an historical curiosity. This state of affairs is contrary to the public interest. If we want to preserve the jury as an institution we should protect it more carefully.

Endnotes

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Sorely tried

- ¹⁵ J McLaren, “‘The judicial office ... bowing to no other power but the supremacy of law’: Judges and the rule of law in colonial Australia and Canada, 1788 – 1840’ (Inaugural Macquarie Lecture, Supreme Court of NSW, Banco Court, 25 July 2002); JJ Spigelman, ‘Foundations of the freedom of the press in Australia’, (2003) 23 *Aust Bar Rev* 89 at 96 – 97.

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- ¹⁶ M Kirby, *Through the world's eye*, Sydney, 2000; G Lindsay and C Webster (eds.), *No mere mouthpiece*, Sydney, 2002, pp. 24 – 25.
- ¹⁷ (2000) 74 ALJ 796.
- ¹⁸ WJV Windeyer, *Lectures on legal history*, 2nd rev. ed., Sydney, 1957, p. 67.
- ¹⁹ In chapter 8 more detailed observations are made about coronial, grand and special juries and juries of matrons. A jury *de medietate linguae* gets a passing reference in chapter 2. Sadly, the military juries that characterised the early years of a penal colony are mentioned throughout the text. It should not be thought, however, that colonists universally disapproved of military juries. The fact that they did not do so explains, in part, the slow adoption of trial by jury in the colony.
- ²⁰ FW Maitland, *The constitutional history of England*, Cambridge, 1955, p. 128.
- ²¹ FA Inderwick, *The king's peace: A historical sketch of the English law courts*, New York, 1895, pp. 60 - 62.
- ²² Maitland, pp. 130-131.
- ²³ HV Evatt, 'The jury system in Australia', (1936) 10 ALJ (Suppl.), p. 49.
- ²⁴ Sir William Blackstone, *Commentaries on the laws of England*, 16th ed., London, 1825, vol. 3, p. 351.
- ²⁵ Evatt, 'The jury system', p. 55.
- ²⁶ Windeyer, p. 61.
- ²⁷ *Cheatle v The Queen* (1993) 177 CLR 541 at 550.

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- ²⁸ (2003) 77 ALJR 961 at 964.
- ²⁹ Blackstone, *Commentaries*, vol. 3, p. 365.
- ³⁰ Cited Evatt, 'The jury system', p. 66.
- ³¹ *Ford v Blurton* (1922) 38 TLR 801 at 805, cited Evatt, 'The jury system', p. 71.
- ³² Cited Evatt, 'The jury system', p. 72.
- ³³ NSW Legislative Assembly (hereafter LA), *Hansard*, 24 Feb. 1977, pp. 4474 - 5.
- ³⁴ Justice LJ Priestley, remarks made on the occasion of his retirement as a Judge of the Supreme Court of New South Wales, 11 December 2001.
- ³⁵ Evatt, 'The jury system', p. 72.
- ³⁶ LA *Hansard*, 28 May 2002, pp. 2085-6.
- ³⁷ *Norris v Blake* (No. 2) (1997) 41 NSWLR 49; *Vairy v Wyong Shire Council* [2002] NSWSC 881. The \$5m damages were then reduced by Bell J by 25 per cent for contributory negligence. The council is considering appealing the decision.
- ³⁸ AM Gleeson, 'The state of the judiciary', (2000) 74 ALJ 147 at 154.
- ³⁹ JJ Spigelman, 'Negligence: the last outpost of the welfare state', (2002) 76 ALJ 432 at 436.

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- ⁴⁰ AM Gleeson, 'The state of the judicature', An address to the 13th Commonwealth Law Conference, Melbourne, 17 April 2003, www.highcourt.gov.au/speeches/cj/cj_stateof.htm.
- ⁴¹ *Historical records of New South Wales* (hereafter cited as *HRNSW*), vol.1, part 2, p. 24.
- ⁴² KR Cramp, *The state and federal constitutions of Australia*, Sydney, 1914, pp. 3-7.
- ⁴³ For Forbes, see CH Currey, *Sir Francis Forbes: The first chief justice of the Supreme Court of New South Wales*, Sydney, 1968; JM Bennett (ed.), *Some papers of Sir Francis Forbes: First chief justice in Australia*, Sydney, 1998; JM Bennett, *Lives of the Australian chief justices: Sir Francis Forbes, first chief justice of New South Wales 1823 – 1837*, Sydney, 2001; and 1 ADB at pp. 392-399; for Stephen 2 ADB at 476-478; for Dowling JM Bennett, *Lives of the Australian chief justices: Sir James Dowling, second chief justice of New South Wales 1837- 1844*, Sydney, 2001, 1 ADB at pp. 317 -320.
- ⁴⁴ *R v Farrell, Dingle and Woodward*, *Sydney Gazette*, 30 July 1831, *Decisions of the superior courts*.
- ⁴⁵ Hughes, p. 1.
- ⁴⁶ Hughes, p. 83.
- ⁴⁷ The Order of 6 December 1786 is at *HRNSW*, vol. 1, pt.2, pp. 30-31.
- ⁴⁸ McClelland, *History of NSW*, pp. 8 and 19.
- ⁴⁹ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 79.
- ⁵⁰ Clark, *A history of Australia*, vol.1, pp. 254-255.
- ⁵¹ Cramp, p. xiv.

- ⁵² (1871) 10 SCR 113.
- ⁵³ 4 *ADB* at pp. 17-19.
- ⁵⁴ 6 *ADB* at pp. 420 -422.
- ⁵⁵ (1871) 10 SCR 113 at 117.
- ⁵⁶ (1871) 10 SCR 113 at 121-122.
- ⁵⁷ 4 *ADB* at pp. 345-346.
- ⁵⁸ (1871) 10 SCR 113 at 130-131.
- ⁵⁹ 4 *ADB* at pp. 157-158.
- ⁶⁰ (1871) 10 SCR 113 at 136.
- ⁶¹ JM Bennett, 'The establishment of jury trial in New South Wales', (1959 -1961) 3 *Sydney Law Review* 463.
- ⁶² *HRA*, iv, i, 3.
- ⁶³ *HRA*, iv, i, 6.
- ⁶⁴ *HRA*, iv, i, 9.
- ⁶⁵ Woods, p. 25.
- ⁶⁶ LA Whitfield, *Founders of the law in Australia*, Sydney, 1971, pp. 4 -5.
- ⁶⁷ *R v Troy & Bradley*, *Australian*, 21 Oct. 1828, *Decisions of the superior courts*.
- ⁶⁸ C Roderick, *John Knatchbull: From quarterback to gallows*, Sydney, 1963.

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- ⁶⁹ *The Judgement of Death Act*, 4 Geo 4, c.48, sec.1.
- ⁷⁰ Woods, ch. 8. *An Act to Regulate the Execution of Criminals 1855*, see also Woods, pp. 162-163.
- ⁷¹ *Piracy Punishment Act 1902; Commonwealth Crimes Act 1914; Crimes (Amendment) Act 1955*.
- ⁷² Judge Advocate Collins' commission, cited Woods, p. 22.
- ⁷³ Castles, *History*, pp. 55 – 60.
- ⁷⁴ Hughes, pp. 190-194.
- ⁷⁵ 2 *ADB* at pp. 627-629.
- ⁷⁶ Castles, *History*, p. 64.
- ⁷⁷ *HRA*, iv, i, 77 – 94.
- ⁷⁸ *HRA*, i, viii, 391, 178, 643.
- ⁷⁹ CH Currey, *The brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent*, Sydney, 1968. See also 1 *ADB* at pp. 87-92.
- ⁸⁰ *HRA*, iv, i, 94; see also 1, viii, 659 (note 32).
- ⁸¹ Castles, *History*, p. 106.
- ⁸² 1 *ADB* at pp. 262-263, 343-344 and 218-219.
- ⁸³ 1 *ADB* at pp. 373 -376.
- ⁸⁴ *HRA*, iv, i, 509.

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- ⁸⁵ Cited PH Henchman, 'The New South Wales jury of four persons', (1959) 33 ALJ 235 at 236.
- ⁸⁶ *R v Cooper, Australian*, 24 Feb.1825, *Decisions of the superior courts*.
- ⁸⁷ *R v Macclousky, Sydney Gazette*, 19 Aug. 1824, *Decisions of the superior courts*.
- ⁸⁸ *R v Sullivan*, October 1832, 'Proceedings of the Supreme Court', vol. 75, Archives Office of New South Wales 2/3258, *Decisions of the superior courts*.
- ⁸⁹ *Keen v The Queen* (1847) 2 Cox CCC 341.
- ⁹⁰ Stephen, *Commentaries on the laws of England*, London, 1895, vol. IV, p. 280.
- ⁹¹ 1 ADB at pp. 55-56.
- ⁹² 2 ADB at pp. 476-478.
- ⁹³ *R v The Magistrates of Sydney, Australian*, 21 Oct.1824, *Decisions of the superior courts*.
- ⁹⁴ JD Heydon, 'Judicial activism and the death of the rule of law', *Quadrant*, Jan.-Feb. 2003, p. 9, reproduced (with Justice Heydon's citations of authority) in (2003) 23 *Aust Bar Rev* 110.
- ⁹⁵ Castles, *History*, pp. 185-186.
- ⁹⁶ (1871) 10 SCR 113.
- ⁹⁷ Bennett, 'The establishment of jury trial in New South Wales', p. 470.
- ⁹⁸ *Ibid*, p. 469.

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- ⁹⁹ The expression 'emancipists' and its correlative 'exclusives' are explained in Chapter 4.
- ¹⁰⁰ *R v Sheriff of New South Wales, Australian*, 13 Jan. 1825, *Decisions of the superior courts*.
- ¹⁰¹ *Hall v Rossi and Others, Sydney Gazette*, 16 March 1830, *Decisions of the superior courts*.
- ¹⁰² See Chapter 4.
- ¹⁰³ *HRA*, i, xiv, 260.
- ¹⁰⁴ For Darling see 1 *ADB* at pp. 282-286 and B H Fletcher, *Ralph Darling: A Governor maligned*, Melbourne, 1984; for Bourke 1 *ADB* at pp. 128-133 and H King, *Richard Bourke*, Melbourne, 1971.
- ¹⁰⁵ Neal, p. 185.
- ¹⁰⁶ Chief Justice Forbes to Colonial Secretary McLeay, 12 April 1836 concerning whether the verdicts of juries in criminal and civil cases had 'answered the ends of Justice', *Sydney Herald*, 16 June 1836, *Decisions of the superior courts*.
- ¹⁰⁷ The drafting and implementation of the *Administration of Justice Act* of 1840 was attended by hot controversy between the judges of the Supreme Court, centered on Willis J. See Bennett, *Sir James Dowling*, pp. 118 – 131.
- ¹⁰⁸ Bennett, *A history of the Supreme Court of New South Wales*, pp. 75 – 80.
- ¹⁰⁹ 1 *ADB* at pp. 184-186.
- ¹¹⁰ Castles, *History*, pp. 228-241.

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- ¹¹¹ 2 *ADB* at pp. 602-604.
- ¹¹² 2 *ADB* at pp. 512-514.
- ¹¹³ The reference to New Zealand was repealed on 23 February 1843 by the *Jury Trials Act* of 1843, New Zealand by then being a separate colony.
- ¹¹⁴ SG Foster, *Colonial improver: Edward Deas Thomson 1800 - 1879*, Melbourne, 1978, p. 30; Woods, pp. 66 -67.
- ¹¹⁵ PH Henchman, 'The New South Wales jury of four persons', (1959) 33 *ALJ* 235 at 236.
- ¹¹⁶ This reflected English practice. There was no jury in the Court of Chancery. It had no power to summon a jury. Sometimes it would send an issue of fact to be tried in a court of common law by jury. Usually a judge determined all questions, both of fact and of law: Maitland, p. 468. Winds of change blew in mid-nineteenth century England. The *Chancery Procedure Act* of 1852, the *Common Law Procedure Act* of 1854, *Lord Cairns Act* of 1858, the *Chancery Regulation Act* of 1862 (*Sir John Rolt's Act*) and the *Supreme Court of Judicature Acts* of 1873 and 1875 progressively assimilated the administration of law and equity. In NSW all but the last legislation was faithfully embraced; a 'Judicature Act' system was not embraced until 1 July 1972. See P Taylor, 'Three decades of change in the Supreme Court' in Lindsay and Webster (eds.) *No mere mouthpiece*, p. 172 n.2 and p. 173 n. 5. The implications of that system for the development of equitable principles still provoke passion: e.g., *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, subsequently reported at (2003) 44 *ACSR* 390, reviewed (2003) 23 *Aust Bar Rev* at 212. Although equity judges, as such, have not embraced trial by jury they include amongst their number supporters of jury trials in criminal cases. See, for example, Justice PW Young, 'Assessors', (2000) 74 *ALJ* 796.

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- ¹¹⁷ 11 *ADB* at pp. 41-42.
- ¹¹⁸ C Pearl, *Wild men of Sydney*, Melbourne, 1965 reprint.
- ¹¹⁹ Molony, p. 11.
- ¹²⁰ Molony, p. 28.
- ¹²¹ Clark, *A history of Australia*, vol.1, p. 236.
- ¹²² Clark, *A history of Australia*, vol. 2, p. 153.
- ¹²³ Molony, p. 51.
- ¹²⁴ Molony, p. 7.
- ¹²⁵ Castles, *History*, p. 32.
- ¹²⁶ Molony, p. 78.
- ¹²⁷ Molony, p. 26.
- ¹²⁸ Neal, pp. 168 – 169.
- ¹²⁹ Castles, *History*, p. 38.
- ¹³⁰ Molony, p. 37.
- ¹³¹ Molony, p. 36.
- ¹³² Molony, p. 52.
- ¹³³ Molony, pp. 52-53.
- ¹³⁴ Molony, p. 86; 2 *ADB* at pp. 340 – 347.
- ¹³⁵ Molony, p. 86.

- ¹³⁶ Molony, pp. 87-88; 2 *ADB* at pp. 207 -212.
- ¹³⁷ Molony, pp. 163 - 165
- ¹³⁸ 2 *ADB* at pp. 76 – 83.
- ¹³⁹ 2 *ADB* at pp. 522 – 523.
- ¹⁴⁰ Molony, pp. 165 - 66.
- ¹⁴¹ Molony, p. 71; 1 *ADB* at pp. 267 – 268.
- ¹⁴² Molony, p. 51; 1 *ADB* at pp. 500 -501.
- ¹⁴³ Molony, p. 24.
- ¹⁴⁴ Molony, pp. 132-133.
- ¹⁴⁵ Molony, p. 160.
- ¹⁴⁶ *HRNSW*, vol. 2, p. 787.
- ¹⁴⁷ *HRA*, i, iii, 245.
- ¹⁴⁸ Jeremy Bentham, *A plea for the constitution*, London, 1803. Extracts of the pamphlet are at *HRA*, iv, i, 883.
- ¹⁴⁹ *HRA*, i, vi, 151.
- ¹⁵⁰ 2 *ADB* at pp. 153 – 159. Macarthur was both an officer and a landowner.
- ¹⁵¹ 1 *ADB* at pp. 38-40.
- ¹⁵² H V Evatt, *Rum Rebellion*, Sydney, 1938; Woods, ch. 3.
- ¹⁵³ *HRA*, iv, i, 49 - 50.

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- ¹⁵⁴ HRA, i, vii, 775, 393 - 394.
- ¹⁵⁵ Molony, p. 41.
- ¹⁵⁶ HRA i, vii, 674.
- ¹⁵⁷ Neal, p. 99.
- ¹⁵⁸ Neal, pp. 168-169.
- ¹⁵⁹ HRA, iv, i, 171.
- ¹⁶⁰ Clark, *A history of Australia*, vol.1, p. 244-245.
- ¹⁶¹ J Ritchie, *Punishment and profit: The reports of Commissioner John Bigge on the colonies of New South Wales and Van Diemen's Land, 1822-1823; Their origins, nature and significance*, Melbourne, 1970; J Ritchie (ed.), *The evidence to the Bigge reports* (2 vols.), Melbourne, 1971; 1 ADB at pp. 99-101.
- ¹⁶² Cited Bennett, *A history of the Supreme Court of New South Wales*, p. 81.
- ¹⁶³ Bennett, *A history of the Supreme Court of New South Wales*, p. 81.
- ¹⁶⁴ WC Wentworth, *Statistical account of the British settlements in Australasia*, London, 1824, cited J Ritchie, *The evidence to the Bigge reports*, vol. 1, p. xiii.
- ¹⁶⁵ HRA, i, x, 57 - 58.
- ¹⁶⁶ Bennett, 'The establishment of jury trial in New South Wales', p. 466.

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- ¹⁶⁷ Molony, pp. 94-95; see also J Ritchie, *The Wentworths: Father and son*, Melbourne, 1977; 2 *ADB* at pp. 582-589.
- ¹⁶⁸ Molony, pp. 134-135.
- ¹⁶⁹ *Statistical, historical and political description of the colony of New South Wales and its independent settlements in Van Diemen's Land*, London, 1819, pp. 348-349 (Adelaide, 1978 facsimile reprint).
- ¹⁷⁰ *HRA*, i, xii, 84.
- ¹⁷¹ 1 *ADB* at pp. 151 – 155.
- ¹⁷² *HRA*, iv, i, 629 – 630.
- ¹⁷³ *HRA*, i, xii, 521- 522.
- ¹⁷⁴ *HRA*, iv, i, 749.
- ¹⁷⁵ *Sydney Gazette*, 28 Jan. 1826, cited Bennett, 'The establishment of jury trial in New South Wales', p. 471.
- ¹⁷⁶ By this Order in Council the British Government first authorised the colonists to make up their own minds about trial by jury in criminal cases: See Chapter 3 above.
- ¹⁷⁷ *HRA*, i, xvi, 223.
- ¹⁷⁸ Forbes CJ to Governor Darling 13 Sept.1830, Chief Justice's Letter Book, Archives Office of NSW, 4/6651, reproduced in notes to (1829) *R v Hall* (No.4) , *Decisions of the superior courts*.
- ¹⁷⁹ Bennett, *Lives of the Australian chief justices: Sir Francis Forbes*, Ch. 7.

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- 180 *R v Wardell* (No.3), 1827, *Decisions of the superior courts*.
- 181 *R v Wardell* (No.2), 1827, *R v Wardell* (No.3), 1827, *Decisions of the superior courts*; Woods, pp. 53-57.
- 182 An account of Wardell's life and death and the trial of his murderers is given by Geoff Lindsay SC in Lindsay & Webster (eds.), *No mere mouthpiece*, pp. 4-6.; see also 2 ADB at pp. 570 – 572.
- 183 2 ADB at pp. 431 – 433.
- 184 *R v Hall* (No. 2), *Australian*, 1 Oct.1828, *Decisions of the superior courts*.
- 185 *R v Hall* (No.2) (1828) *Sydney Gazette*, 13 Jan 1829, *Decisions of the superior courts*.
- 186 *R v Hall* (No.6), *Australian*, 23 Dec.1829, *Decisions of the superior courts*. At this time Hall was being peppered with criminal libel prosecutions. Two days after his trial for libelling Darling, Hall was up on a similar charge in respect of a publication concerning Colonial Secretary Alexander McLeay – for which he received a further six months in the Sydney gaol. See *R v Hall* (No.8), *Australian*, 31 Dec. 1829, *Sydney Gazette*, 5 Jan. 1830, *Australian*, 17 March 1830, *Decisions of the superior courts*.
- 187 Woods, p. 56.
- 188 Clark, *A history of Australia*, vol.2, p. 108.
- 189 (2003) 23 *Aust Bar Rev* 89.
- 190 HRA, i, xvi, 543.
- 191 *LC Votes and Proceedings*, No. 1, 19 January 1832.

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- ¹⁹² HRA, i, xvii, 238. See 1 ADB at pp. 202-206.
- ¹⁹³ Clark, *History*, vol. 2, p. 179.
- ¹⁹⁴ HRA, i, xvii, 215.
- ¹⁹⁵ HRA, i, xviii, 393-394.
- ¹⁹⁶ *Sydney Herald*, 14 June 1838, cited Molony, *An architect of freedom*, p. 112.
- ¹⁹⁷ Cited Molony, *An architect of freedom* p. 114
- ¹⁹⁸ *Ibid*, pp. 114 – 115.
- ¹⁹⁹ HRA i, i, 13 - 14.
- ²⁰⁰ HRA, i, i, 145, 744 - 745 (note 118) and Willey, pp. 72 – 75.
- ²⁰¹ Molony, p. 99.
- ²⁰² 2 ADB at pp. 615-617.
- ²⁰³ H Reynolds, *This whispering in our hearts*, Sydney, 1998. See pp. 18-21 concerning Windeyer.
- ²⁰⁴ Mitchell Library, CY reel 528.
- ²⁰⁵ Not until enactment of the *Criminal Appeal Act 1912* did the law in NSW provide a procedure for appeals against jury decisions on the facts of the case. There were limited procedures for review of legal errors, but the common law long regarded the finality of a jury verdict on the facts as an important constitutional principle: Woods, pp. 253 -254.
- ²⁰⁶ R Milliss, *Waterloo Creek, The Australia Day massacre of 1838, George Gipps and the British conquest of New South Wales*,

University of New South Wales Press paperback edition, Sydney, 1994.

- ²⁰⁷ See, e.g., Milliss, p. 679, citing *Herald*, 23 Sept. 1839 report of statement by Attorney General Plunkett to Legislative Council, 20 Sept. 1839; Woods, p. 96. For Plunkett, see 2 ADB at pp. 337-340 and JN Molony, *An architect of freedom: John Hubert Plunkett in New South Wales 1832 – 1869*, Canberra, 1973.
- ²⁰⁸ *R v Lamb, Toulouse and Palliser*, *Australian*, 16 Feb. 1839, *Decisions of the superior courts*.
- ²⁰⁹ *R v Murrell and Bummaree*, *Australian*, 9 Feb. 1836, *Decisions of the superior courts*.
- ²¹⁰ *R v Murrell and Bummaree*, Supreme Court miscellaneous correspondence relating to Aborigines, State Records of NSW 5/1161, pp. 210-216, *Decisions of the superior courts*.
- ²¹¹ Hanks & Keon-Cohen, pp. 4 – 8.
- ²¹² *Halsbury's laws of Australia*, vol.1 (1), para. 5-1755.
- ²¹³ *Halsbury's laws of Australia*, vol.1 (1), para. 5-1775.
- ²¹⁴ See Chapter 4 above.
- ²¹⁵ *Opinion on juries*, *Sydney Herald*, 20 June 1836, *Decisions of the superior courts*.
- ²¹⁶ *Opinion on juries*, *Sydney Herald*, 16 June 1836, *Decisions of the superior courts*.
- ²¹⁷ The last convicts transported to Sydney arrived on 18 November 1840: Hughes, p. 497.

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- ²¹⁸ J Ogilvie, *The comprehensive English dictionary: Explanatory, pronouncing, & etymological*, London, 1879.
- ²¹⁹ *The present Commonwealth Act (Jury Exemption Act 1965)* exempts members of the Defence Forces and members of the Reserve rendering full-time service.
- ²²⁰ 15 *ADB* at pp. 313-314.
- ²²¹ *LA Hansard*, 13 Nov. 1947, pp. 1120 - 1121.
- ²²² *LA Hansard*, 13 Nov. 1947, p. 1126.
- ²²³ 14 *ADB* at p. 24.
- ²²⁴ 13 *ADB* at pp. 387-388.
- ²²⁵ 16 *ADB* at pp. 216-217.
- ²²⁶ This should have been a reference to Mr Martin.
- ²²⁷ *LA Hansard*, 24 Feb. 1977, pp. 4476-4477.
- ²²⁸ Blackstone, *Commentaries*, vol. 3, p. 364.
- ²²⁹ See *Jury Trials Act* of 1840, s4; *Jurors and Juries Consolidation Act* of 1847, s23; *Jury Act* 1901, s59; *Jury Act* 1912, s57.
- ²³⁰ *R v Corbett & Ors* (1932) 49 WN (NSW) 52.
- ²³¹ *LA Hansard*, 24 Feb. 1977, p. 4484.
- ²³² (1983) 69 FLR 268.
- ²³³ Stephen, *Commentaries*, vol. III, pp 566 - 569.
- ²³⁴ *Murphy v The Queen* (1989) 167 CLR 94 at 101-102.

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- ²³⁵ *Murphy v The Queen* (1988) 167 CLR 94.
- ²³⁶ *Ibid*, Mason CJ and Toohey J at 98-99.
- ²³⁷ LA McCrimmon, 'Challenging a potential juror for cause: Resuscitation or requiem?', (2000) 23 (1) *UNSW Law Journal* 127.
- ²³⁸ Stephen, *Commentaries*, vol. IV, pp. 377-379. *Juries Act* of 1825.
- ²³⁹ See Evatt, *Rum rebellion*.
- ²⁴⁰ Woods, p. 68, n.19.
- ²⁴¹ See Chapter 5 above.
- ²⁴² 2 *ADB* at pp. 523 – 527.
- ²⁴³ Foster, *Colonial improver*, p. 31; Woods, pp. 68 – 69.
- ²⁴⁴ *Archbold's Pleading, evidence & practice*, 25th ed., London, 1918, p. 183.
- ²⁴⁵ *R v Parry* (1837) 7 Car & P 836 at 837- 838; 73 ER 364 at 365.
- ²⁴⁶ In 1871 the first Law Reform Commission had recommended challenges be restricted to eight, with 12 in capital cases. Until 1901 Parliament declined to change the law: see Woods, pp. 257 – 258. The only capital offence remaining in 1977 was piracy.
- ²⁴⁷ NSW Law Reform Commission, *Criminal procedure - The jury in a criminal trial*, Report, LRC 48, March 1986, pp. 50-56 (at p. 54).
- ²⁴⁸ LA *Hansard*, 19 Nov. 1987, p. 16524.

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- 249 Blackstone, *Commentaries*, vol. 4, pp. 351 – 352.
- 250 *R v Baum* (1927) 44 WN (NSW) 136.
- 251 *R v Emmett & Masland* (1988) 14 NSWLR 327.
- 252 New South Wales Legislative Council (hereafter LC), *Hansard*, 9 April 1997, pp. 7260 -7262.
- 253 *Cheatle v The Queen* (1993) 177 CLR 541 at 551.
- 254 Evatt, 'The jury system in Australia', p. 55.
- 255 Blackstone, *Commentaries*, vol. 3, p. 375.
- 256 *R v Sullivan*, Oct. 1832, Dowling J, Proceedings of the Supreme Court, Archives Office of NSW, 2/3258, *Decisions of the superior courts*.
- 257 See also Woods, ch. 17.
- 258 LA *Hansard*, 24 Feb. 1977, p. 4484.
- 259 *R v Davies* (1991) 53 A Crim R 122.
- 260 *Black v The Queen* (1993) 179 CLR 44.
- 261 *Opinion on juries*, *Sydney Herald*, 20 June 1836, *Decisions of the superior courts*.
- 262 The dynamics of a nineteenth-century criminal trial in England are explained in DJA Cairns, *Advocacy and the making of the adversarial criminal trial*, Oxford, 1988. The law and practice in NSW are explained in Woods, *A history of criminal law in New South Wales*. A classic Australian example of an accused person precluded by law from

giving evidence in his own defence is found in J H Phillips, *The trial of Ned Kelly*, Sydney, 1987, p. 69.

263 Blackstone, *Commentaries*, vol. 4, p. 358.

264 Blackstone *Commentaries*, vol. 4, pp. 359-360.

265 *Kenny's Outlines of criminal law*, 17th ed., Cambridge, 1958, p. 110.

266 HRA, iv, I, 10.

267 7 & 8 Will III, c.3 (*Treason Act*, 1695); 6 & 7 Will IV, c.114 (1836).

268 JH Wigmore, *Evidence in trials at common law* (Chadbourn revision), Boston, 1979, vol. 2, p. 810.

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271 *Criminal Evidence Act*, 61 & 62 Vic ch.36 (1898)

272 *R v Shimmin* (1882) XV (15) Cox CC 122.

273 NSW Law Reform Commission, *Criminal procedure - Unsworn statements of accused persons*. Report, LRC 45, Oct. 1985.

274 LC Hansard, 13 April 1994, p1082.

275 LC Hansard, 20 April 1994, p. 1424.

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- 277 (1893) 14 NSWLR 150; see the discussion in Woods, ch. 26.
- 278 *Weissensteiner v The Queen* (1993) 178 CLR 217 and *RPS v The Queen* (2000) 199 CLR 620.
- 279 *Azzopardi v The Queen* (2001) 205 CLR 50 at 74.
- 280 JM Bennett, *A history of the New South Wales Bar*, Sydney, 1969.
- 281 HRA, iv, i, p. 509 at pp. 512 – 513.
- 282 Cited Stephen, *Commentaries*, vol. IV, p. 380.
- 283 HRA, I, xviii, p. 526.
- 284 5 ADB at pp. 335 – 336.
- 285 *Ex parte Nichols* (1839) 1 Legge 123 at 126; see also Bennett, *Sir James Dowling*, pp. 140 – 143.
- 286 Heydon, 'Judicial activism and the death of the rule of law'.
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- 288 24 Vic No. 6 (*Criminal Trials Act*); also known as the *Common Law Procedure (Amendment) Act*.
- 289 J Bishop, *Criminal procedure*, Sydney, 1983, p. 258; *R v Studley-Ruxton* (CCA NSW, 3 Dec. 1954), *R v Patterson* (1869) 8 SCR (NSW) 298.
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- ²⁹² *Legal Profession Act 1987*, s18.
- ²⁹³ *R v Presser* [1958] VR 45 at 48.
- ²⁹⁴ Blackstone, *Commentaries*, vol. 4, p. 25.
- ²⁹⁵ *The Queen v James Dwerryhouse* (1847) 2 Cox CC 446.
- ²⁹⁶ *R v Charland*, *Sydney Gazette*, 26 Aug. 1824; *R v Hadfield* (1800) 27 St. Tr. (NS) 1281; Woods, p. 154.
- ²⁹⁷ *McNaghten's Case* [1843] 10 Cl. and F. 200; 8 ER 718.
- ²⁹⁸ See Woods, pp. 155 – 158.
- ²⁹⁹ CE Weigall & RJ McKay, *Hamilton and Addison, Criminal law and procedure: New South Wales*, 6th ed., 1956, p. 347.
- ³⁰⁰ 39 & 40 Geo 3, c. 94; Archbold, p. 166.
- ³⁰¹ *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA (28 May 2003), unreported, per Heydon J at paras. 115 and 132.
- ³⁰² *Kesavarajah v The Queen* (1994) 181 CLR 230 at 243.
- ³⁰³ *Ebatarinja v Deland and Others* (1998) 194 CLR 444 at 455.
- ³⁰⁴ If the verdict is that a person is unfit to plead, the issue is referred to the Mental Health Tribunal. The procedure is prescribed by ss14, 16 (2) and 18 of the *Mental Health (Criminal Procedure) Act 1990*.
- ³⁰⁵ Blackstone, *Commentaries*, vol. 1, pp. 347-348.

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- 306 Castles, *History*, p. 84.
- 307 1 *ADB* at pp. 459-460.
- 308 Castles, *History*, pp. 84 - 85.
- 309 11 Vic No. 20.
- 310 LA *Hansard*, 26 March 1980, pp. 5876-5877.
- 311 Maitland, pp. 127 – 128.
- 312 Stephen, *Commentaries*, vol. IV, pp. 323-325.
- 313 *Rowe v Wilson*, *Sydney Gazette*, 5 Dec.1825, 12 Jan. 1826, 4 Feb.1826, *Decisions of the superior courts*.
- 314 Woods, pp. 170 -172; Clark, *A history of Australia*, vol. 2, pp. 24- 26. For Douglass, see 1 *ADB* at pp. 314-316; Hannibal Macarthur 2 *ADB* at pp. 147-149.
- 315 Alfred Stephen's Letter Book, vol 1, pp. 197-203, A669 Mitchell Library, cited Castles, p. 178.
- 316 Molony, *An architect of freedom*, pp. 108 – 109.
- 317 6 *ADB* at pp. 427-429.
- 318 4 *ADB* at pp. 44-46
- 319 Pearl, p. 83.
- 320 *Ex parte Narme: Re Leong Wen Joe* (1928) 45 WN (NSW) 78 at 79; *Commonwealth Life Assurance Society v Smith* (1937) 59 CLR 527 at 531; *Barton v The Queen* (1980) 147 CLR 75 at 92-93.
- 321 *Grassby v The Queen* (1989) 168 CLR 1 at 11-15.

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- 322 Stephen, *Commentaries*, vol. III, p. 561.
- 323 Stephen, *Commentaries*, vol. IV, p. 375.
- 324 W Holdsworth, *A history of English law*, London, 1966 reprint, vol. VII, pp. 44-45.
- 325 Castles, 'Now and then', (1990) 64 ALJ 505 at p. 510.
- 326 Holdsworth, vol. 1, p. 623; see also Castles, *History*, pp. 139 – 140.
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- 328 Bennett, *A history of the Supreme Court of New South Wales*, pp. 144 – 145.
- 329 HRA, i, xii, 56.
- 330 Castles, *History*, pp. 141 – 142.
- 331 'Jactitation': a decree prohibiting a person from falsely giving out that the person was married to the petitioner.
- 332 (1887) 3 WN (NSW) 129.
- 333 Pearl, pp. 135-158.
- 334 *Matrimonial Causes Act 1959*, s119.
- 335 *R v McGregor and Maloney*, *Sydney Gazette*, 25 Feb. 1834, *Decisions of the superior courts*.
- 336 Note 4 to *R v McGregor and Maloney*, *Australian*, 28 Feb. 1834, *Decisions of the superior courts*.
- 337 Castles, 'Now and then', pp. 505 – 507.

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- 339 Stephen, *Commentaries*, vol. IV, pp. 419 – 420.
- 340 JH Baker, *An introduction to English legal history*, 4th ed., London, 2002, p. 517.
- 341 8 *ADB* at pp. 312-313.
- 342 *Truth*, 6 Dec. 1896; 20 March 1898; 29 May 1898; 7 Aug. 1898.
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- 344 Pearl, pp. 127 – 129.
- 345 *Sydney Herald*, 13 Nov. 1839 as cited by Bennett in *Sir James Dowling*, p. 162.
- 346 *Official record of the debates of the Australasian federal convention: Third session* (Melbourne, 20 January – 17 March 1898), vol. 1, p. 351 (31 January 1898).
- 347 J Quick & RR Garran, *The annotated Constitution of the Australian Commonwealth*, Sydney, 1901, p. 810.
- 348 *Cheatle v The Queen* (1993) 177 CLR 541 at 562.
- 349 (2001) 207 CLR 278.
- 350 *Fittock v The Queen*, (2003) ALJR 961; *Ng v The Queen*, (2003) ALJR 967.

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- 352 *Kingswell v The Queen* (1985) 159 CLR 264 at 276 - 277.
- 353 *Ibid*, at 285 and 296.
- 354 *Cheng v The Queen*, (2000) 203 CLR 248 at 307- 308.
- 355 *Supreme Court and Circuit Courts (Amendment) Act 1912*.
- 356 Justice Gordon Wallace, 'Speedier justice (and trial by ambush)', (1961) 35 ALJ 124.
- 357 *Ibid*, p. 130.
- 358 LA *Hansard*, 27 March 1968, p. 100.
- 359 Statement of the Bar Council of the New South Wales Bar Association, *Your right to a jury trial*, Sydney, 1965, p. 1
- 360 (1988) 14 NSWLR 387 at 391.
- 361 *Potter v Linden* (1867) 6 SCR 351.
- 362 *Peck v Email Limited* (1987) 8 NSWLR 430.
- 363 *Peck v Email Limited* (1987) 8 NSWLR 430 at 435.
- 364 LA *Hansard*, 16 Sept. 1987, p. 13658.
- 365 LA *Hansard*, 23 Sept. 1987, p. 14098.
- 366 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387.
- 367 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 404.

³⁶⁸ *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 414-415.

³⁶⁹ *LA Hansard*, 29 Nov. 1990, p. 11556.

³⁷⁰ *LA Hansard*, 14 March 1991, pp. 1024- 1025.

³⁷¹ *LC Hansard*, 11 May 1994, p. 2264.

³⁷² *LA Hansard*, 28 Nov. 2001, pp. 19038-19040.

³⁷³ In *Hogan* (February 2001) a jury awarded the plaintiff \$2.9m damages (including interest) against the trustees of his old school, for twice being strapped on the hand when a student 17 years previously. On 31 October 2001 the verdict was set aside by the Court of Appeal and a new trial as to damages ordered: *Trustees of the Roman Catholic Church for the Diocese of Sydney v Hogan* [2001] NSWCA 381.

Hogan v Trustees of the Roman Catholic Church for the Diocese of Sydney, NSW Supreme Court, 15 Feb. 2001.

In the *Waverley Council* case (May 2002), a jury awarded the plaintiff \$3.75m damages (the original award of \$5 million was reduced by \$1.25m because of contributory negligence). The plaintiff, Guy Swain, a paraplegic, sued the council for injuries suffered when he hit his head on a sandbar while diving under a wave while swimming between surf life-saving flags at Bondi Beach in November 1997. Swain claimed the council was negligent for failing to warn of the sandbar or of any danger in using the beach. A jury awarded damages of \$5m, reduced to \$3.75m, because of contributory negligence. A stay of proceedings on the judgment pending an appeal was granted: [2002] NSWCA 240. On 3 April 2003 the Court of Appeal by majority upheld the Waverley Municipal Council's appeal; Swain

was ordered to pay costs: *Waverley Municipal Council v Swain* [2003] NSWCA 61.

³⁷⁴ See *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

³⁷⁵ *Trustees of the Roman Catholic Church for the Diocese of Sydney v Hogan* [2001] NSWCA 381.

³⁷⁶ *LA Hansard*, 6 Dec. 2001, p. 19795.

³⁷⁷ *Ibid*, p. 19796.

³⁷⁸ *Norris v Blake (No. 2)* (1997) 41 NSWLR 49.

³⁷⁹ The legal profession strongly opposed the legislation. See, for example, the remarks by the Law Society of New South Wales and Peter Semmler QC quoted by Mr Hartcher during the debate (*LA Hansard*, 6 Dec. 2001, pp. 19795 – 19797) and the attorney general's advice to the House that 'The Bar Association has argued that the attainment of quicker and cheaper adjudication of disputes could be enhanced by more, not less, frequent use of juries. It has argued that sensible advocates will not risk trying a jury's patience by needlessly wasting time. It has argued that case management techniques should make use of this capacity to combine an advocate's brevity and the jury's rapid, and virtually inscrutable, decisions': *LA Hansard*, 6 Dec. 2001, p. 19800.

³⁸⁰ See the Government's second reading speech for the *Defamation (Amendment) Bill 1994*; *LA Hansard*, 29 Nov. 1994, pp. 5901 – 5903 (Mr Hartcher, Minister for the Environment).

³⁸¹ *Carson v John Fairfax & Sons Ltd*, *Carson v Slee* (1991) 24 NSWLR 259 and (1992) 178 CLR 44.

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- 382 NSW Law Reform Commission Discussion Paper 32,
Defamation, August 1993, p. 69.
- 383 *Ibid*, p. 70.
- 384 *Ibid*, p. 73.
- 385 NSW Law Reform Commission Report 75., *Defamation*,
September 1995.
- 386 LA *Hansard*, 29 Nov. 1994, pp. 5901 – 5902.
- 387 NSW Law Reform Commission Report 75, p. 40.
- 388 *Ibid*, p. 41.
- 389 JA Jolowicz, *On civil procedure*, Cambridge, 2000, pp. 377-
378; *Ward v James* [1966] 1 QB 273, *Williams v Beesley* [1973] 1
WLR 1295.
- 390 *Stephen Commentaries*, vol. IV. p. 292.
- 391 NSW Law Reform Commission, *Criminal procedure - The
jury in a criminal trial*, Report, LRC 48, March 1986, pp. 18-
19.
- 392 *Ibid*, p. 18.
- 393 M Findlay et al, *Jury management in New South Wales*,
Australian Institute of Judicial Administration, Carlton
South , Victoria, 1994, p. 2.
- 394 See, for example, Baker, *An introduction to English legal
history*, p. 517.

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- ³⁹⁵ Heydon, 'Judicial activism and the death of the rule of law', p. 11.
- ³⁹⁶ J Faine, *Lawyers in the Alice: Aboriginals and whitefellas' law*, Sydney, 1993, p. 11.
- ³⁹⁷ Royal Commission of Inquiry into Chamberlain convictions: Report of the Commissioner, The Hon Mr Justice T R Morling, 22 May 1987; *Chamberlain v The Queen (No.2)* (1983) 72 FLR 1; *Chamberlain v The Queen (No. 2)* (1984) 153 CLR 521.