

THE ESTABLISHMENT OF JURY TRIAL IN NEW SOUTH WALES

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I. INTRODUCTION †

The history of jury systems in British law has only occasionally caught the fancy of legal writers. No book devoted exclusively to the subject¹ has appeared in England since *Forsyth's History of Trial by Jury* of 1852;² not so much for want of interest, but because there has been nothing "novel or profound" left to say. In New South Wales, the position differs, for the history of the local jury law, if sparingly graced with profundity, does not lack novelty. The present contribution cannot hope to remedy the entire want of a thorough-going history of juries in Australia, but it will, at least, sketch in outline the steps by which over a period of fifty years "the privilege of the Common People of the United Kingdom"³ was sought and acquired by the Colonists of New South Wales.

High authorities have disputed whether the first free settlers in New South Wales brought with them the right of jury trial.⁴ Even if they did, it served no practical purpose, for there was no place for a jury in a convict settlement and it was not until 1823 that anything approaching jury trial in its strict sense

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The following abbreviations have been used:

Bigge: J. T. Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land*, 1823.

G.D.: *New South Wales Governors' Despatches and Enclosures* (MS. and typescript copies).

H.R.A.: *Historical Records of Australia* (citing Series, Volume and page numbers).

Stephen: (Sir) Alfred Stephen, *The Constitution, Rules and Practice of the Supreme Court of New South Wales* (1843-5).

V. & P.: *Votes and Proceedings of the Parliament of New South Wales*.

¹ There have, of course, been many historical projects dealing in part with the subject, and a number of general studies of the jury system, the most recent being Sir Patrick Devlin's *Trial by Jury* (1956).

² Forsyth's *History* is not readily accessible to the public in Sydney, though there is one copy from David Scott Mitchell's collection in the Mitchell Library section of the Public Library.

³ Quoted by Devlin *op. cit.*

⁴ See, for example, *R. v. Valentine* (1871) 10 S.C.R., 133, and "The Jury System in Australia", Mr. Justice Evatt, (1936) 10 *A.L.J. Supplement*, 49 and discussion 73 *et seq.*

was granted a place in the Colony's jurisprudence. There were juries before that time, but of a different kind: they were juries summoned to coronial inquests, just as coroners had summoned juries in England over centuries beyond memory.⁵ Governor Macquarie established the office of coroner in Sydney in 1810⁶ and, as there were no statutory regulations of procedure, it was only natural that the coroner should adopt the ordinary and long-used system familiar to him and have the Sheriff summon twenty-four "good and lawful men of the Country", freed men as well as free,⁷ to constitute his jury.

II. AGITATION FOR REFORM

The idea of *complete* jury trial was in the minds of some free settlers as early as 1791.⁸ Governor Hunter expressed the view in 1812 that even before he relinquished his office in 1800, juries could practically and with advantage have been established.⁹ By 1801 Governor King was writing home of complaints and representations which had been made at miscarriages of justice due, in some part, to the want of a jury.¹⁰ The British Government, however, was not prepared even to entertain the idea "for some, nay many, years to come", apart perhaps from mixing with the military and naval officers a sprinkling of the civilian population—a measure which Hobart considered "very deserving of attention".¹¹ Governor Bligh by 1807 was able to say that "the Colony (was) so far improved that superior people . . . 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 with the Jurisprudence of the Country, either as Magistrates or Jurors".¹² While he was confident that eligible citizens for jury service were available in sufficient numbers, he was unable to recommend how the system be introduced. This deficiency Judge-Advocate Bent attempted within a few years to remedy by volleys of correspondence, inspired with reforming zeal, directed at the Colonial Office. "I should certainly advise the constitution of the Jury upon the principles of English Law", he wrote in 1810 to Under-Secretary Cooke. He had made "every enquiry in order to form

⁵ At least as early as the thirteenth century—Sir William Holdsworth, *A History of English Law* (6 ed.) 1, 85.

⁶ *H.R.A.* I/vii, 610; for verification of the summoning of coronial juries from that time see *Sydney Gazette*, 18 November 1824, 2.

⁷ Even this caused some dissension. In his evidence to Commissioner Bigge, Police Magistrate Humphries of Van Diemen's Land said:

"Q. How do you select or name Juries to act on these occasions?

A. I issue my precept to the Ch. Constable to return 24 Good and Lawful men of the Country to serve as Jurors.

Q. . . . Persons who have been convicts as well as those who have not?

A. He does.

Q. Do you never find Persons of the Latter Description object to sit and serve on the same Jury with the former?

A. I have never had such objections made to me, but I have frequently found that many of the Free people who have been summoned do not attend, and I do not think that I have power to compel them." *H.R.A.* III/iii, 285.

⁸ For example, in an anonymous letter of October, 1791, reprinted from *The Bee*, it was observed: "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", *Historical Records of New South Wales*, 2, 787.

⁹ Quoted in *H.R.A.*, I/x, 56.

¹⁰ *H.R.A.* I/iii, 245. But his was a qualified view, "to propose a promiscuous or indeed a restricted selection of jurymen from among the present inhabitants exclusive of officers, does not appear at all advisable, altho' I have no doubt but in twenty or thirty years that extension of English jurisprudence must be necessarily carried that far", *H.R.A.*, I/iv, 353.

¹¹ *H.R.A.* I/iii, 567.

¹² *H.R.A.* I/vi, 151; cf. quotation in *H.R.A.*, I/x, 57.

a correct judgment"¹³ and this convinced him that, although the time was not suitable for establishing a Grand Jury, Petty Juries of perhaps twelve members would be ideal for criminal matters. In his view also an adequate supply of respectable people could be found for the jury list and even more if convicts of long standing emancipation could be included.¹⁴ In the following year, Bent restated his ideas in similar terms to the Earl of Liverpool, but this time further recommended a Grand Jury of twenty free citizens and expressed his assurance that both juries could be empanelled from reputable persons "with much facility".¹⁵

Governor Macquarie found a good deal of sympathy for Bent's idea as it suited his emancipist policy. He decided to propose a complete revision of the administration of civil and criminal law and to include Grand and Petty Juries.¹⁶ To the proposal Bathurst ambiguously replied; "it is . . . a Question, worthy of consideration, how far in criminal cases the Trial by Jury may not be advantageously introduced".¹⁷ He doubted whether the Colony could cope with the Jury system—would there be enough competent and qualified settlers able and willing to act as jurors; would they be free from unavoidable passions and prejudices; and would the presence of convicts or emancipists make the "trial by peers" policy unworkable? To these questions the Governor was as quick to reply as distance permitted him that he still regarded jury trial as necessary for all criminal proceedings and desirable for civil causes.

It has been My Invariable Opinion that, Once a Convict has become 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, In Short, that no Retrospect Should in any Case be had to his having been a Convict. This being My decided opinion, it is hardly Necessary to add that they should take their Turn of being Jury Men in Common with Persons resident in the Colony, who have never been Convicts. On the other Hand, while a Man is under Sentence of the Law he is not eligible to be employed in any place of Trust; he is incapable of Holding a Grant of Land, and it would be highly indecorous to Employ him as a Jury Man, or in any other Public Situation of Respectability.¹⁸

He persevered in his view that the existing structure of the Court of necessity incited a "popular, if not a just, feeling" against its decisions. Bent meanwhile continued to press for the change in several despatches to Earl Bathurst, but the reply was only a precis of that sent to the Governor:

it was a matter of doubt whether, in a Society so constituted as that of New South Wales, Individuals might not bring with them into Court Passions and Prejudices ill fitted for the discharge of their duty as Jurymen, and it was also feared that, if Free Settlers (whose feelings towards Convicts and their Descendants have in many instances appeared to be but little under restraint) were to sit in Judgment on Convicts, and that too in Cases where Settlers might be parties, the principle of Jury trial that a Man should be tried by his Peers could not fairly be acted upon.¹⁹

¹³ *H.R.A.* IV/i, 49.

¹⁴ The latter class, in his opinion included some of "the most useful and opulent members of the Society here", *id.*, 50.

¹⁵ *Id.* 64; *cf.* 104.

¹⁶ *H.R.A.* I/vii, 393-4.

¹⁷ *Id.* 674.

¹⁸ *Id.* 775.

¹⁹ *H.R.A.* IV/i, 171.

By 1819 the matter had aroused public concern. A group of colonists preferred a Petition to the Prince Regent, praying that His Highness of grace and clemency might "be pleased to extend to us . . . that great and valued inheritance of our Ancestors, Trial by Jury, constituted in its Members upon the strict principles of English Law".²⁰ In the hope of avoiding the usual answer, the Petitioners urged on the Prince that their passions and prejudices had "almost entirely" softened down and were dying away. When they considered that reliable officers of the colony had indicated that enough free colonists had existed in 1800, 1807, 1811 and 1813 to form juries, they hoped they would not be thought presumptuous for suggesting 1819 as the starting time. Even the rhetoric of their final appeal failed to sway the Regent or the Colonial Office:

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.²¹

The Regent and the Colonial Office remained unmoved.

After the death of Bent, Judge-Advocate Wylde also believed in the need for jury trial and continued to make appeals to the British authorities. He considered that a Grand Jury of fifteen members should be constituted under the control of the Governor or the Court. He was confident that free citizens drawn from new settlers and the free-born population were sufficient to ensure satisfactory jury panels, though he could not "be insensible of the peculiar general Character of our Colonial population; and under the Influence thus brought to the subject, I should not feel myself justified in at once recommending an admission to the *full and unshackled* operation *here* of the System of Jury Trial, as in the Mother Country".²² He thought jury lists could be made up in the discretion of the Governor, with advice of the Court, in such a way that, even during the first year, eligible citizens would not be called upon for service more than once annually. If this were doubted, then he maintained that British colonial law was not stringent in requiring a jury of twelve members, so that a jury of eight might be adopted.²³

III. BIGGE'S REPORT: A SET-BACK

Just when it seemed that some progress was being made, everything was undone by the reactionary Report of Commissioner J. T. Bigge. This Report was politically inspired and designed, by mis-statement if necessary, to discredit Governor Macquarie and to censure his administration. The emancipist policy was ridiculed and prospects for jury trial dismissed out of hand. The British Government, which had more important things to do, was quite happy to accept

²⁰ *H.R.A.* I/x, 57.

²¹ *Ibid.*

²² *H.R.A.* IV/i, 379.

²³ *Id.* 381; he went on to say that he considered eight a very fair number, when four currently sufficed for criminal trials.

the Report as explaining away the representations of the Governor and most of the Colony's other legal officers that juries be established. Bigge was undaunted by the Petition to the Prince Regent and expressed his opinion

that the period is not yet arrived at which the system of trial by jury can 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 institution 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.²⁴

Referring to the Petition, he remarked, without adducing any proof, that some of the signatories to it had not really understood its purpose and had given only unwitting support to the proposal.²⁵ While he admitted that he "certainly found amongst all ranks a desire to see the trial by jury introduced both in civil and criminal proceedings", he turned this to his own advantage by adding the qualification, "whenever the feelings of animosity that now separate certain classes of the inhabitants from each other should be found to have subsided".²⁶ The main-string to the Commissioner's bow was a reply he received in answer to his request for a report from Mr. Justice Barron Field upon, *inter alia*, the jury system. The Judge, piously mindful of the duty he was thereby doing to King and Country, lifted up his "humble voice against the premature emancipation of the overindulged and vicious mass of transported people".²⁷ The jury system was all very well, said Field, but quite unworkable while the local government preferred the convict to the freeman and caused a struggle for rights and privileges against those "mere creatures of pardon and indulgence, who hold and sue for property by the mere sufferance and bounty of those laws which they have violated".²⁸ Such a review gave the Commissioner some flourishing passages with which to round off his Report and to emphasize that the time for setting up juries was still far removed. He could not help agreeing with the Judge, while he felt it unnecessary to observe how entirely he dissented from the late Judge-Advocate Bent's recommendations.²⁹ Here, however, he was confronted with a serious difficulty in that Judge-Advocate Wylde was quite as insistent upon the benefits of jury trial as his predecessor had been. Bigge made it clear to Wylde what answer was expected of him—"I would request you to bear in mind both the limited means that the Colony appears even now to furnish for the Constitution of Petty Juries on the Principles and Practice of the English Law, and the Doubts that may reasonably be entertained of the success of any Project that would involve a Departure from those Principles".³⁰ Quite disobligingly the Judge-Advocate, without any doubts, recommended that there should be a Court composed of three Judges in whose determination should rest all matters of law and a jury composed of "certain respectable inhabitants" of the Colony to be appointed by the Governor and not to exceed eight at any one trial.³¹ The Commissioner could offer no answer to Wylde's proposition that "in the effective administration of criminal justice, convict jurors cannot, as a body, make a separate cause from the free" and that, if it were good enough to accept convicts as witnesses in litigation touching "the

²⁴ Bigge, 42.

²⁵ *Id.* 21. One petitioner volunteered that, although he wished for the jury system, he felt that the time was not ripe for its introduction (38).

²⁶ *Id.* 36.

²⁷ *H.R.A.* IV/i, 869.

²⁸ *Id.* 868.

²⁹ Bigge, 42.

³⁰ *H.R.A.* IV/i, 870.

³¹ *Id.* 381.

most serious, intimate and confidential concerns of the free inhabitants", it was equally proper that emancipist convicts be admitted as jurors.³² The best parry the Commissioner could manage was to say that the chairman of the meeting of petitioners and the Judge-Advocate himself had not really contemplated the granting of jury trial on different principles from those existing in England and, as emancipated convicts could not be jurors under the English practice, the suggestion that they be eligible in New South Wales could not be serious. Bigge confirmed this by the high authority of his own *ex cathedra* proposition that "all those whose terms have been remitted either by His Majesty under pardons of lower degree than that of the great seal, or by the several governors of the colony under any pardons whatever, as well as all those persons transported for offences not within the terms of the 4 Geo. I, c.11, are by law incapacitated from serving on juries".³³

By way of statistics to support the Report, the magistrates had been required to submit to the Commissioner returns of the numbers of free settlers and free born citizens in the Colony. These showed that in June, 1820, there were 242 free settlers and 87 free born citizens eligible to serve on juries. The former class, in the Commissioner's opinion, would be effectively reduced, as many of them lived out of Sydney town and, of those in Sydney, many were government officials. In any event, they were nearly all "too much elevated above the condition of the ordinary description of offenders . . . to be selected as petty jurors".³⁴ The latter class, the free born, "had but few opportunities of education in the earlier periods of the colony, and cannot be said to have had the benefit of good example to counterbalance that deficiency". In these words, all the eligible would-be jurors were dismissed and there remained only some 587 emancipated convicts to be considered. Bigge could well afford to be confident of Bathurst's reception of his Report about them—"from the description I have given of them . . . , founded as it was upon the opinions of others to whom I felt I could trust, assisted by my own observation, your Lordship will not be led to conclude that they form a class of persons from whom jurors, either for civil or criminal purposes, could generally, with propriety, be selected".³⁵ The mere service of a term of transportation was, to the Commissioner, an imperfect test of the moral capacity of an emancipist jurymen.

Bigge's Report may be tested by a letter of criticism which Edward Eager promptly penned to the Secretary of State. He challenged the idea that the original petitioners had not seriously subscribed to jury trial, pointing out that this was the main substance of the petition and had been discussed at length at the two public meetings of the petitioners. "With the exception of one retired Naval and one retired Military officer, . . . (the Petition) met with the unanimous approbation, support and Signature of every respectable Individual in the Colony."³⁶ With regard to Bigge's objection that insufficient persons of respectability were available to form juries, Eager asserted that the figures prepared by the magistrates did not include a considerable number of traders and merchants having the necessary property qualification, nor did they include eligible men from Van Diemen's Land. Moreover, on Eager's analysis, the general Census of 1820 demonstrated that the magistrates' figures were wrong and that as many as 600 men could have been called upon at that time.³⁷ Because of subsequent immigration, Eager considered that at the time of writing (1823) the number available was at least 1000, of which about four-

³² *Id.* 386.

³⁵ *Id.* 41.

³³ *Bigge.* 39.

³⁶ *H.R.A.* IV/i, 442.

³⁴ *Id.* 40.

³⁷ *Id.* 458.

fifths had never been convicts. He criticized Bigge's second major objection—that too much class distinction and party feeling existed to enable the jury system to operate impartially—by drawing attention to the united thought of many members of the community, Emigrant and Emancipist, in petitioning for jury trial. When it was considered that Emigrants eligible for jury service outnumbered Emancipists by four to one, how could it be that Emancipists sought trial by jury so particularly if the alleged feelings of animosity were so rife? "Is it consistent" he asked "with the common sense, with the common feelings of our nature, that men, uninfluenced by any object or motive, that could be beneficial to them, should, against their own interests, feelings and prosperity, seek for the establishment of that which would most surely gratify and afford triumph and power to their Enemies. My Lord it is incredible."³⁸ To the Commissioner's third objection that the inconvenience of attending on jury panels would involve the Colonists in unwarranted injury and expense, Eager conceded that jury service was generally viewed as a duty to be avoided rather than performed. But this, he fairly observed, was not peculiar to New South Wales—it existed to the same degree in England, where the expenses involved were probably greater. The people, he concluded, "naturally expect that New South Wales, a peculiarly English Colony, wherein is no admixture either of Foreigner or people of colour . . . will not now be refused that valued privilege (*sic*) of Englishmen, enjoyed in every other Colony and Dependency in the World".³⁹

IV. STATUTORY PROGRESS

The New South Wales Act of 1823 (4 Geo. IV, c.96) did little more than reflect the attitude of uncertainty which then existed in the Colony. Section 6 of the Act provided that trials of civil actions should be heard before a Judge and two assessors,⁴⁰ with the qualification that the parties could at their option apply to have the cause tried by a jury of twelve. It was also enacted that His Majesty might thereafter "cause the Trial by Jury to be further introduced and applied in such parts of New South Wales and Van Diemen's Land" as the Privy Council should recommend.⁴¹ In England, James Stephen (junior), who had been called upon to revise and settle the Bill took particular exception to Section 6, saying that "it will probably prevent the trial by jury altogether . . . in cases the most peculiarly proper for a jury . . . the wrongdoer will of course avail himself of his power to prevent a jury being convened".⁴² His views and his recommendation that the selection of the jury should be in the Judge's discretion passed unheeded.

At the same time jury trial in name only was accorded to criminal cases; the jury to be constituted by seven commissioned army or navy officers. No civilian person was eligible to serve. The officers did not appear to appreciate the distinction, though the suggestion that their services be remunerated at "half a Guinea *per diem*" somewhat modified their lack of enthusiasm.⁴³ Even though there were some initial problems, Governor Brisbane by 1825 applauded the extent to which jury trial had been taken—"even among the few who were known to be unfavourable to the introduction of Trial By Jury, since the first shock of prejudice has been overcome, it has been silently gaining ground"—

³⁸ *Id.* 466.

⁴⁰ For a review of the duties of assessors see *Stephen*, 51.

⁴¹ S.8.

⁴² *Stephen to Horton*, 23 March 1825, *id.* 603.

³⁹ *Id.* 475.

Stephen, 51.

⁴³ *H.R.A.* IV/i, 478.

and asserted that there were "not a dozen Individuals in the whole Colony", who would openly oppose the granting of jury trial as in the United Kingdom.⁴⁴

By the same Act, s.19, it was laid down that Courts of General or Quarter Sessions should be convened when proclaimed by the Governor. Brisbane promptly issued his proclamation in obedience to which the magistrates assembled and proceeded without empanelling juries; it being their opinion that, because the Act omitted to mention trial by jury, the system was not to operate. The Attorney-General thereupon took out a Rule *Nisi* calling on the Sydney magistrates to show cause why a mandamus should not issue to command them to proceed with their Sessions and summon juries to attend. The Attorney-General personally argued on the hearing of the Rule that the Act had established Courts of Sessions without specifying their procedure, so the law and practice of England should apply. Trial by jury, being a necessary constituent of such Courts in England, should accordingly be adopted in the Colony. On the other hand, the Solicitor-General pleaded that Sessions, not being common law Courts, were restricted to the constitution prescribed in the enabling Act. He asserted that the omission of jury trial was deliberate and part of the English policy of withholding the complete system from the Colony. Forbes, C.J. agreed that the English legislature intended to restrain jury trial in the Supreme Court, but he did not think this extended by implication to the Sessions.⁴⁵ He held that juries were essential to Courts of Sessions in order that they might take cognizance of breaches of the peace and he took the chance to make a much wider remark in favour of jury trial—"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".⁴⁶ He issued a mandamus as result of which a complete system of civil jury trial, including Grand and Petty Juries, was set in motion at the Quarter Sessions level.⁴⁷ The Justices resolved to prepare jury lists containing "those names only, with regard to whom no question could be supposed to arise on the principle of exclusion of certain classes, which has so much embarrassed the subject of juries".⁴⁸ After twelve months the Governor confidently reported the "great improvement in the administration of justice" by the system, which had "been found to fulfil every expectation which had been formed of it".⁴⁹ Jury trial was operating in the Sessions⁵⁰ a few months

⁴⁴ *H.R.A.* I/xi, 893.

⁴⁵ With this, Barron Field (who had by that time left the Colony) entirely disagreed: "I think he would have drawn more judgment in deciding the . . . Question, with the Solicitor, & not with the Attorney, General. In one word, I think the Judge was wrong. The legislature never contemplated juries at sessions", Field to Marsden, 18 May 1825, Marsden Papers (A1992), 1, 440.*

⁴⁶ *Sydney Gazette*, 21 October 1824, 3. The *Gazette* in its issue for 23 June 1825 criticized *The Australian* for its attitude to the Chief Justice's view.

⁴⁷ With this should be contrasted the decision of Pedder, J. in Van Diemen's Land Court. *The Australian* caustically remarked of Pedder's view: "The learned Judge seemed to have some notion floating in his mind, that because the Colony did not enjoy the Trial by Jury before the late Act amending the Courts of Justice, and because the late Act did not give Trial by Jury, therefore the Colony cannot now be in possession of that institution . . . It is only necessary to recollect that the law regulating the Courts previous to the late Act, was repealed by that Act, and it is not to be enquired in this case what the Act has given, but what it had not taken away", 25 August 1825, 3.

⁴⁸ *Sydney Gazette*, 21 October 1824, 3.

⁴⁹ *H.R.A.* I/xi, 893.

⁵⁰ Accordingly, the assertion by Stephen, C.J., in *R. v. Valentine* (*supra*) that "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., cap 83" must be read with caution. Likewise the section "The First Australian Jury" in Mr. Justice Evatt's paper "The Jury System in Australia", *supra*.

before Dr. Wardell was heard in January, 1825, expressing "his gratification in being permitted to address the first Jury ever impanelled, in a Civil Court in New South Wales—especially as he was engaged in a good cause".⁵¹

The magistrates soon declared themselves highly satisfied with the operation of the system—a set of remarkably similar reports being submitted to the Governor from Sydney, Liverpool, Windsor and Parramatta.⁵² The Sydney and Liverpool magistrates strongly urged the complete extension of jury trial. Judge Stephen, who had been the Chairman of Sessions at all of the districts, found in local juries "as much attention to regularity and regard to their duty, as in any Juries in England or in any part of His Majesty's Dominions".⁵³ He felt that the minds of the rising generation would certainly be enlightened by still wider use of juries—a step by which he also thought to ensure the general "satisfaction and happiness" of the community. However, his views, those of the magistrates and indeed of the public at large were still ineffective, as the Secretary for Colonies demonstrated in his further remonstrances to the Governor: "to propose at once the sudden and unmodified system of Trial by Jury, as practiced (*sic*) 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".⁵⁴ In the light of this instruction and of the more liberal provisions instituted by a contemporary English Act for regulating Special Juries, whereby convicts with free pardons were made eligible jurors, the Executive Council of New South Wales made the following decisions:⁵⁵

1. It was a settled point of law that an attainted or convicted person would be restored by free pardon to competency for jury service.
2. It was not yet expedient to declare this as the law in New South Wales.
3. There should be a high property qualification for jurors.
4. That there should be Grand Juries.
5. In criminal trials there should be a jury of twelve—six being officers or magistrates and six being local inhabitants returned by the Sheriff.
6. In civil trials there should be a jury of twelve at the parties' option as then existing.

The Council's proposals were not wide enough for most of the colonists and many prominent citizens continued a campaign for jury trial. The Chief Justice wrote to the Colonial Secretary that it was widely conceded that the Colony was ready for a complete jury system and, in his opinion, this should be brought under the guidance of local, rather than English authorities.⁵⁶ W. C. Wentworth decried the makeshift substitutes for jury trial as, "the rude experiments of rude times",⁵⁷ and the diners at a dinner in commemoration of the First Fleet drank the toast "Trial by Jury in its most unlimited extent" with "three times three" and the strains of the Tyrolese Song of Liberty.⁵⁸ At a similar dinner in 1827 Wentworth was heard complaining of the Government's inactivity and saying of the rights of jury trial that "nothing but the most urgent necessity could, for one moment, justify the withholding them from any British Colony. They belonged as much to the people as the Crown belonged to the King".⁵⁹ In Van Diemen's Land William Gellibrand, speaking to a Peti-

⁵¹ *Sydney Gazette*, 17 February 1825, 2.

⁵² *Id.* 896.

⁵³ *Id.* 521.

⁵⁴ *Sydney Gazette*, 28 January 1826, 3 (1).

⁵⁵ *Ibid.*

⁵⁶ *Id.* 27 January 1827, 2 (4).

⁵⁷ *H.R.A.* I/xi, 894 *et seq.*

⁵⁸ Bathurst to Darling, *H.R.A.*, I/xii, 84.

⁵⁹ *H.R.A.*, IV/i, 749.

tion for complete right of jury trial, asserted that the objects sought by the petitioners were "as essential to our security as they are necessary to our happiness. Every man has a right and ought to be tried by his equals".⁶⁰ The popular feeling was vouched for in another petition by the gentry which protested against the existing system, as "essentially Anti-English in its principles and operation", and sought "to be liberated from all disfranchisements".⁶¹ The petitioners relied on the comparatively good results in the operation of jury trial at the Sessions for over two years, compared to the position in the Supreme Court where a jury had been empanelled only once over a period of three years. They felt they had the strongest reasons to urge His Majesty "to restore a privilege, which in this case would be avowedly necessary to revive among them those English feelings and predilections, which a thirty-nine years deprivation of it must . . . have so nearly extinguished".⁶² The whole issue, being so controversial, was frequently canvassed in the Press, vigorous propaganda being disseminated alike for Emigrants and Emancipists.⁶³

All these efforts did produce a mild turn of activity in England in the form of the Administration of Justice Act (9 Geo. IV, c. 83) of 1828.⁶⁴ This almost completely preserved the *status quo*, except that the Governor-in-Council was empowered to "extend and apply" the form and manner of proceeding by Grand and Petty Juries⁶⁵ and to fix "the qualifications, numbers and summonses . . . and all other rules for (the) constitution of juries".⁶⁶ "We say," read *The Gazette* in commentary upon this measure, "if the Colonists are to have Trial by Jury at all, why not grant it at once from Parliament? . . . So as we get Trial by Jury, we shall not be careful whether it is obtained through the Home or the Colonial Government — but have it we most unquestionably ought."⁶⁷

Local legislation was introduced in New South Wales and Van Diemen's Land in pursuance of the powers in 9 Geo. IV, c. 83, but the juries so constituted were of quite different kinds. In New South Wales the sequence of legislation began in 1829 under 10 Geo. IV, No. 8, "An Act for regulating the constitution of Juries for the Trial of Civil Issues in the Supreme Court". This measure, however, sustained in substance the existing law so that trial by a jury of twelve was still confined to civil issues, at the election of the parties and with the approval of the Court. In the following year some inconsequential amendments were made by 11 Geo. IV, No. 2. At the same time, the British Government felt bound to make a slight relaxation, though without conceding that there had been any change from "the anomalous condition of society in that Settlement (which) would have deprived the Trial by Jury of its essential character".⁶⁸ The chief reason for the concession was the continued protest at the form of criminal juries, which created the risk of junior officers follow-

⁶⁰ *Id.* 31 March 1827, 3 (3): cf. *The Australian*, 31 March 1827, 3-4.

⁶¹ *H.R.A.*, I/xiii, 51 at 53.

⁶² *Ibid.*

⁶³ *The Monitor* expressed the Emancipist point of view; the *Sydney Gazette* embraced the Emigrant cause in a large number of editorials all tending to the conclusions that "juries should be comprised of respectability as well as of freedom" 29 September 1825, 2, but that, granted this, "Trial by Jury is the cardinal desideratum that Australia needs—without it the Colonists will not, and in fact cannot be satisfied", 14 July 1828, 2.

⁶⁴ The jury system had meanwhile been in suspense, almost twelve months having elapsed since the temporary provisions of the existing Statutes had expired.

⁶⁵ S. 10.

⁶⁶ S. 8.

⁶⁷ 14 November 1827, 2.

⁶⁸ *H.R.A.* I/xv, 395. Sir George Murray added this qualification, "as the free population shall increase and bear a greater proportion to the Convicts, I trust that it will be found practicable gradually to extend the power of Juries, until the Law of England in this respect shall entirely supersede the system which has been substituted for it".

ing, or perhaps being deliberately led by, their seniors in giving verdicts.⁶⁹ The concession took the form of an Order in Council of 28th June, 1830, authorizing the Legislative Council to "extend and apply the form and manner of proceeding by grand and petty juries" at such times and subject to such limitations and rules as the Council should see fit. This was the last thing the Legislative Council had in mind, its members being strongly opposed to the Emancipists and very reluctant to make any allowances where convicts or former convicts were concerned. Viscount Goderich told Governor Darling that he entirely agreed with the Council's views on the undesirability of extending the jury system and declared "I am not prepared to direct any further alteration for the present in the ordinary system of trial observed in New South Wales".⁷⁰ The Act 10 Geo. IV, No. 8, which was limited to expire in December, 1831, was allowed to lapse.

V. THE GRADUAL ATTAINMENT OF JURY TRIAL

It was at this stage that a very determined force in the form of Governor Bourke entered the Colonial arena to do battle with the Council.⁷¹ In opening Parliament for the 1832 session, he said: "it becomes . . . necessary to pass without delay the Bill now laid before you. It is prepared in the same form, and, with a few verbal amendments, is the same in effect, as that which went through the Committee last year. It would have been gratifying to me to have introduced a Bill which should have extended still further the form of Trial by Petit Juries in this Colony. From the information I have obtained from the Judges of the Supreme Court and other persons of the profession of the law,⁷² whose practice and habits enable them to form correct opinions on such a subject, I am led to believe, that the time has arrived, at which the trial of all Criminal Issues may be advantageously committed to Civil Juries".⁷³ The Council, in generous mood, but not without a heated session,⁷⁴ agreed to the Bill which was enacted as 2 Wil. IV, No. 3. This prescribed that trials of all civil matters were to be heard before a civil jury of *twelve*, subject to the rules and practice of the Courts of Record at Westminster. Every male resident in

⁶⁹ "I am persuaded that neither yourself nor any other officer, who might be called to administer the Government of New South Wales, would use the influence connected with that trust for the purpose of controlling the verdict of a Military Jury . . . For these reasons, an Order of His Majesty in Council, founded on the 10th Section of the Statute, ninth Geo. 4th cap. 83, will shortly be issued", *id.* 396.

⁷⁰ *H.R.A.* I/xvi, 223.

⁷¹ Bourke was prepared for this battle, even before leaving England: "Your Lordship is right in supposing I left England with a strong bias in my mind towards the adoption of the Jury system to as great an extent as circumstances will permit", Bourke to Howick, *H.R.A.* I/xvi, 542 *cf.* *H.R.A.* I/xvii, 213.

⁷² "Finding upon my arrival that the substitution of Civil for Military Juries in criminal cases continued to be much desired by the great majority of free People in the Colony, I endeavoured to ascertain whether such substitution was likely to endanger the due administration of Justice, or whether the Colony had attained that state of society, which would safely admit of forming Petit Juries for the trial of Criminal Issues as is practised in England. Upon consulting with the Judges, I found them unanimous and strenuous in asserting the safety and propriety of trying such Issues by Civil Juries. Nearly the whole profession of the Law is of the same opinion and is joined by many of the best informed Persons, both in official and private life. On the other hand many Persons in the Councils, whose sentiments are entitled to great respect, are of a contrary opinion", Bourke to Viscount Goderich, *H.R.A.* I/xvii, 515.

⁷³ *V. & P.* (1832) 1.

⁷⁴ *G.D.* A1213, 445.*

the County of Cumberland, subject to exemptions, aged between twenty-one and sixty and having real estate producing income of at least thirty pounds annually, or personal estate worth three hundred pounds was a competent juror. For service he was to be paid at a daily rate of two shillings or, if he lived more than two miles from the Court, five shillings, with a travelling fee of eightpence per mile.⁷⁵ Esquires or persons of higher degree, Justices of the Peace, merchants or bank directors were eligible to serve as Special Jurors at fifteen shillings daily.⁷⁶ All jurors were liable to penalty for non-attendance. The Act went on to make material changes in relation to criminal trials. In all prosecutions for crimes, misdemeanours or offences, the accused had the option and the onus of showing that

the Governor or any Member of the Executive Council of the said Colony . . . is the person against whom such offence or offences is or are alleged to have been committed or has any personal interest in the result of such prosecution or that the personal interest or reputation of any officer on the station of the said Colony or the interest or reputation of either of these bodies generally is involved in such prosecution or will be affected by its result.⁷⁷

If he did so, he would be tried by a jury of twelve civil inhabitants of the Colony.⁷⁸ A slight extension was made in trials of issues of fact arising out of informations for crimes, misdemeanours or offences, by which the accused, on being arraigned, could at his election have those issues of fact tried by a jury of twelve.⁷⁹

The enactment of this measure is surprising in the light of the vigorous anti-Emancipist policy of the Council; though there was a fairly strong indication that the British Government had already ratified complete jury trial for the Colony. In June of 1832 Bulwer presented to the Commons the colonists' petition for jury trial, but the motion that a select committee be appointed to investigate the matter was dropped when Viscount Howick stated to the House that, because of Governor Bourke's favourable reports, jury trial would be introduced comprehensively by 1833. However, the Viscount's promise went no further and when in 1833 it became clear that the British Government had lapsed back into inactivity, the Legislative Council of New South Wales felt that it could assert its influence against the Governor. His proposal for a new Bill was cut away with amendments and he found himself under the necessity of "opposing measures apparently dictated more by private or party feeling than by a comprehensive view of the public advantage",⁸⁰ in order to justify his own assurance that "the establishment of Trial by Jury was desired by a

⁷⁵ "Now, the common jurors receive only 2s. *per diem* for their attendance, and are fined for non-attendance in ordinary cases (where their default can be easily supplied) in sums varying from 40s. to £5 each. But in special jury cases, independently of the contempt, there is often a serious delay of justice, and sometimes its final defeat, with serious expense to the injured party; yet, notwithstanding, their Honors the Judges frequently inflict *only* a penalty of £5 upon an absent special juror. In the case of "*Cox v. Robertson*", Mr. Justice Stephen awarded this last mentioned fine against the absentees, but the Attorney-General, who was counsel for one of the parties, intimated that this fine would prove ineffectual for the default, his Honour increased it to £10, the highest fine he was empowered to award", *The Australian*, 17 March 1840, 2.

⁷⁶ "One or more of the Directors are of the Class termed *Emancipists*, and, though Gentlemen who came out free do not refuse to associate with Emancipists in the direction of gainful concern, they deemed it contamination to Sit in the Same Jury Box with them", Bourke to Goderich, *H.R.A.* I/xvi, 564.

⁷⁷ S.40.

⁷⁸ This was preserved and continued in 1833 by 4 Wil. IV Nos. 12 and 13.

⁷⁹ 2 Wil. IV No. 3, s. 2.

⁸⁰ *G.D.*, A1211, 1217.*

great majority of the Inhabitants of New South Wales, and that it might be introduced not only with safety but advantage".⁸¹ Bourke's own account of the passage of the "Bill for regulating the Constitution of Juries and for the Trial of Issues in certain cases in the Supreme Court" exemplifies the problems which confronted him:

the Bill was opposed by six out of seven of the unofficial members and by the Archdeacon. It would, as I have reason to believe, have received a negative from one if not two Official Members had I not agreed to an alternative, proposed and supported by the unofficial members, by which the option should be left to the accused party to be tried either by a Military Jury as heretofore or by a Jury of twelve Inhabitants. In consequence of this concession the opposition intended to be made by the Official Members to the 3rd or disqualification clause was withdrawn.⁸²

The resulting 4 Wil. IV, No. 12⁸³ in these circumstances did little more than extend the period of operation of the existing law. Not without justification, the Governor complained to the Secretary of State:

I greatly lament to have again to bring under the notice of His Majesty's Government the serious embarrassment I sustain for want of the instructions which I have earnestly solicited on the subject of Trial by Jury . . . I have been obliged to propose to the Council the renewal for a year of the measure of 1833, with a few alterations, remotely, if at all, affecting the matter at issue between the Parties who divide the Colony.⁸⁴

It was at this period that Van Diemen's Land broke away from the legislation of New South Wales in enacting a most significant Statute—5 Wil. IV, No. 11 (1834). The Act completely abolished the office of assessor in civil cases and made provision for trial by a jury of *four* special jurors—either party to have the option of demanding a jury of twelve. This was a compromise between long usage and the opinion of Alfred Stephen (who drew up the Bill)⁸⁵ that twelve was too large a number to be practical in a small Colony.⁸⁶ The number which he chose was quite arbitrary, though it no doubt bore in mind the need for a three-fourths majority verdict, which was further permitted by the Act, failing agreement by the jurors within six hours.⁸⁷ Reviewing the posi-

⁸¹ *Id.* 1015.*

⁸² *Id.* 1017.*

⁸³ "An Act for regulating the Constitution of Juries and for the Trial of Issues in certain cases in the Supreme Court of New South Wales".

⁸⁴ Despatch of 21 June 1835, *G.D.*, A1213, 444.*

⁸⁵ Stephen is entitled to full credit for the Bill. Lt. Governor Arthur was quite opposed to the idea—"I confess I am disposed to entertain an opinion by no means favourable of Civil Juries generally, and to regard the further extension of the privilege with considerable apprehension", Letter of Colonel George Arthur (A1962)* 65; "I sincerely wish I could fall into your view of the subject, but, I consider that whilst one half of the Community is composed of Convicts it is not equitable to leave them to the mercy of the other half with such feelings as I have too often seen excited", *id.* 87: the Secretary of State for the Colonies had, by contrast, indicated the desirability of establishing the jury system but in conjunction with Governor Bourke "in order that similar measures may be simultaneously adopted in both Colonies", *id.* 91.

⁸⁶ "Would it not be just as satisfactory, to refer such cases to *six* or to *four*? Will it not be worth while, thereby to save the time of the twenty or thirty persons, who must otherwise, on each day of sitting be abstracted from their business?" *V. & P.* (1840), 177.

⁸⁷ "This is a clause which has no precedent in British law, and applies not only to the new Jury of four; but also to the Jury of twelve, to be returned under it, so that this principle now governs the trial of all civil cases in this colony". *Sydney Morning Herald*, 30 October 1844, 2. The innovation barely passed into law, meeting with decided opposition in the Council and being carried only by the Chairman's casting vote—*id.* 25 July 1844, 2. The *Herald* was in the ranks of the objectors; "the original error of this absurd, mischievous, and (in some respects) wicked system, in the supposition that the *concurrent* opinions of the whole number of jurors are necessary for the satisfactory administration of justice; for when this proposition is once taken for granted, the present consequences or others equally to be deprecated, follow as a matter of course", *id.* 29 July 1844, 2 (2).

tion in 1843, Stephen asserted: "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, in fact, only resorted to occasionally".⁸⁸

The idea of four jurors had no appeal in New South Wales for many years and the most that the Legislative Council would do was cautiously to continue the existing law in annual steps over a long period.⁸⁹ Bourke was intensely annoyed at the Council's attitude and wrote many despatches to England appealing for approval to his policy. The Colonial Office gave him ambiguous, dilatory replies, assuring him that the matter was receiving "much consideration" and that "it must not . . . be supposed that this important question has been lost sight of":⁹⁰ yet nothing was done. The whole issue virtually stood still, so far as the legislature was concerned, between 1833 and 1844, apart from the enactment of 3 Vic. No. 11 in 1839,⁹¹ by which military juries were at last abolished.⁹² That Act also established once-for-all that criminal prosecutions would be on the information of the Attorney-General⁹³ and that criminal issues of fact would be tried by a jury of twelve. The Statute represented a singularly prompt action by the Council, considering that only in the previous year Chief Justice Dowling had reported that

The idea of majority decisions and small juries had been proposed in Cunningham's *Two Years in New South Wales* and quoted with a commentary in the *Sydney Gazette* of 14 March 1828, 2.

⁸⁸ Stephen 216.

⁸⁹ The sequence of Statutes was 2 Wil. IV No. 3, 4 Wil. IV Nos. 12 and 13, 5 Wil. IV No. 25, 6 Wil. IV No. 15, 7 Wil. IV No. 9, 1 Vic. No. 1, 3 Vic. No. 25, 5 Vic. No. 4, 5 Vic. No. 25, 7 Vic. No. 29, 8 Vic. No. 4, 9 Vic. No. 32, 11 Vic. No. 20. The following Statutes relating to the Circuit Courts may also be noted: 4 Vic. No. 28, 5 Vic. No. 4 and 6 Vic. No. 17.

⁹⁰ G.D., A1272, 790.*

⁹¹ This Act was also important in that it gave a statutory basis to jury trial in the Courts of Sessions. More specific provisions for the Quarter Sessions Courts for the districts of Melbourne, Port Macquarie and Berrima were made by 2 Vic. No. 4, 2 Vic. No. 5 and 3 Vic. No. 17. The juries of the Quarter Sessions had critics. A correspondent in the *Sydney Gazette*, 24 January 1829, 4, said "we have now had considerable experience of the Jury system in the Quarter Sessions' Court, and it has become obvious, and that to its warmest advocates of its introduction, that it has totally failed". The *Gazette* itself observed, 10 February 1829, 2, "Trial by Jury, if not pure, is a mere mockery—a mask beneath which the foulest acts might be committed under the semblance of impartiality. As the practice has hitherto stood, the lists of Jurors were made out by the district constables, who were thus rendered sole arbiters of the description of persons to be returned, inasmuch as their lists were never submitted to that revision by the Magistrates in Sessions which, by law, it is necessary they should undergo, even in England. Such a system, in a Colony like this, was calculated to bring about the most crying evils". Against this, a correspondent in *The Australian* asserted "If I refer to the juries of the Quarter Sessions, not one session of which I have been absent from since they have been established at Windsor, I am firmly of the opinion we should have more intelligent men, and men of equal probity on these juries, if the jurisdiction was extended to *respectable Emancipists*", 31 January 1827, 2. As late as 1840, the *Sydney Morning Herald* published a criticism of the Juries in Quarter Sessions, but this was evidently false. Chairman W. M. Manning said, "Upon a comparison which I made from four years' circuit experience in England, of the majority of the common juries in England with the same class in this Colony, I do not hesitate in giving preferences to the latter; for in honesty I believe them to be equal, and in intelligence I know them to be superior. I certainly cannot say that I have never had reason to be dissatisfied with the verdicts returned, on the contrary, cases have occurred in which I have been quite unable to divine by what course of reasoning the Juries have arrived at their conclusions, but this observation applies with equal force to military as to civil juries, and still more strongly to the majority of common juries in England", *The Australian*, 29 September 1840, 2. This was confirmed by the Attorney-General who considered that such juries had "discharged their duties in as intelligent as conscientious a manner, judging from their verdicts, as I have ever seen in the mother country or elsewhere" *ibid.*

⁹² Notes "J.S." to Gairdner: "To a measure of so popular a character I presume it would be vain to object, especially as almost all of the local Authorities seem to have concurred in it . . . My own opinion is that the mode of Trial which has thus been abolished, has but one real objection, and that is its name and unpopularity, which however, in cases of this kind, is a very weighty and perhaps a conclusive objection". See G.D., A1267-19, 2428 item 11.*

⁹³ This was the death knell of the Grand Jury in New South Wales, *infra* p. 482.

the time is arrived for abolishing the distinction between Civil and Military Juries, in the administration of the Criminal Justice of the Colony. The alternative given, by the local law, to the accused, of electing to be tried either by a jury of seven officers in Her Majesty's Navy or Army Service, or by a jury of twelve Civil Inhabitants is a cumbersome, expensive, and unsatisfactory piece of machinery, and not now necessary for the due administration of Justice. As a matter of history, I know, that the alternative was retained in the Jury Law of the Colony to satisfy the scruples of many well-meaning persons who entertained doubts of the moral eligibility of the Civil Inhabitants to exercise the functions of Jurors. . . . It is clear, in my opinion, as a matter of experience, that the inherent imperfections of the trial by Jury, as a mode of administering Justice, cannot be guarded against, by the continuance of the Anti-British anomaly of a Military commission of seven officers to try Criminals in an English Court of Justice. The state of Society in New South Wales, both in point of numbers and moral eligibility is now so auspicious, that there is no necessity for this party-coloured system.⁹⁴

In this opinion Mr. Justice Willis, contrary to his usual style, concurred.⁹⁵

There was certainly no reason for the government to entertain any doubts as to what the community thought in the 1830's about the merits of the jury system. The decade had started with yet another petition (this prepared by Sir John Jamison) being preferred to the House of Commons.⁹⁶ The Petitioners, bearing in mind their enormous rate of taxation—five pounds per head of free citizens on the average—and the Colony's handsome public revenue of £102,577, concluded that "a people sufficiently ripe for taxation to such an extent, are also sufficiently matured to know how best to impose their own burdens".⁹⁷ W. C. Wentworth was there to say his piece, as he always was, and he attacked the existing system with warmth:

some of the verdicts which had lately been pronounced, contrary to the expectations of the audience, and of the defendant himself, fully shewed the necessity of Trial by an indifferently chosen Jury; for Military Officers were, in spite of their consciences, by education, habits, and a sort of principle of obedience, apt to look chiefly to the will of their Commanding Officer, and to view the ordinary occurrences of civil life, with eyes of military discipline.⁹⁸

Before the decade had ended, three further petitions were organized, two on behalf of the gentry, Emigrants and "Free Inhabitants" objecting to jury trial, and a counter-petition organized by the Emancipists. These petitions were submitted to the King and Commons in 1836. Those on behalf of the gentry protested that persons of bad repute and of low standing had been placed as jurors on the same level as magistrates and citizens of unblemished character.

⁹⁴ *V. & P.* (1840) 165.

⁹⁵ *Ibid.* "Military Juries have not yet been abolished, but I am decidedly of opinion that they are no longer requisite. Prisoners have now their option of being tried either by a Civil or a Military Jury. I mean prisoners in the Supreme Court, and such prisoners at the Court of Quarter Sessions as have not the misfortune to be Convicts, for although a Convict if tried for the very same offence in the Supreme Court, would have the inestimable benefit of trial by Jury; yet if tried at the Quarter Sessions, he would be *summarily dealt with*. An anomaly, to say the least, which cannot in my opinion be too soon eradicated from the Local Law".

⁹⁶ For the text of the petition, which was approved at a public meeting on 9 February 1830 see *The Australian*, 10 February 1830, 2.

⁹⁷ *Ibid.*

⁹⁸ *Id.* (4). "Here the Sheriff interrupted Mr. W., praying that he would not indulge in further reflections of this sort."

as well as at variance with its practice." They felt that while the jury laws in "This," they conceived, "to be repugnant to the spirit of the law of England, the Colony had been intended to elevate the tone of public feeling, the result had been quite the reverse and that the whole experiment had failed. James MacArthur in support of the Emigrant cause published a book *New South Wales its Present State and Future Prospects* dealing at length with the petitions against jury trial and concluding "it may be safely asserted, that no mischievous effects would be likely to arise to the emancipated convicts, by their exclusion generally from the judgment seat, and from political power".⁹⁹ He recalled that in the Supreme Court sessions of May, 1836, the Acting Attorney-General had to "resort to peremptory challenge to get rid of improper characters from the jury box".¹⁰⁰ Military juries, so he said, even if objectionable, were by comparison infinitely preferable to civil juries¹⁰¹ for, if the former suffered by want of local experience and too much concern that every scruple of doubt be removed from their minds, the latter suffered by want of good character and, even though they had local experience, they could not apply it to advantage. It was no answer, he insisted, that the law admitting emancipists was also law in England:

the very same law which in one community may be a blessing, in another differently constituted, may be the scourge of society. If the practical effect of the jury law in this country were to compose juries of materials similar to those which now bring disgrace upon the jury system in New South Wales, and from a continuance of which, the respectable colonists dread the most pernicious consequences to the colony, so foul a stain upon the national character would not be suffered to exist even for a day.¹⁰²

In summary, the gentry could not agree that the jury system as it existed in the Colony was even similar to that in England:

the jury system is so completely interwoven with the habits of the people of this country, and the machinery by which it is regulated has from immemorial custom become so perfect, that it is by no means surprising the difficulties which impede its operation in a state of society entirely different, should be overlooked. Englishmen naturally enough imagine that *trial by jury* bears within itself, as a matter of course, the best security for justice, without reflecting that the composition of the jury is a most material point to be attended to.¹⁰³

As if there had been a turning of the tide, the Emigrants' petitions did not succeed, and for two sound reasons. First, they represented a minority;

if public opinion is to be judged of by a comparison of the number of signatures attached to Petitions of an opposite tendency, the Counter Petition which is to be presented to the House of Commons by Mr. Bulwer, must be declared to speak the sentiments of the People of New South Wales. It reckons, as I am informed, nearly six thousand signatures, whilst those which I now transmit, do not count four hundred.¹⁰⁴

⁹⁹ *Op. cit.* (1837) 107.

¹⁰⁰ *Id.* 92.

¹⁰¹ *Id.* 100. Bourke himself acknowledged the sense of this, but for different reasons: "this concession will . . . be strongly contested in the Legislative Council, and should it be denied, it will, in my opinion, be more advisable to revert to Military Juries altogether, until the formation of a Legislative Body, representing more fully the opinions of the People, shall be in readiness to decide the question". *G.D.*, A1213, 447.*

¹⁰² MacArthur *op. cit.* 96.

¹⁰³ *Id.* 108.

¹⁰⁴ Gipps to Glenelg, 25 July 1836, *G.D.* 1267-5, 770.

Secondly, they were untrue, as Governor Bourke demonstrated; "the Petitions marked A having misstated the fact as to the sentiments of those who introduced the Colonial Act for the institution of the Juries composed of the Civil Inhabitants, I thought it proper to enquire of the Judges and Crown Lawyers whether the verdicts of Civil Juries in New South Wales had or had not answered the ends of Justice".¹⁰⁵ The answer of the Judges was a vindication of the Governor and the reception accorded this report was proof of an increasing respect in the colonial community for judicial opinion. The Governor had "every reason to think that the nearly unanimous opinion of the Law Functionaries, together with the improvement of the Jury Lists, is rapidly moderating the hostility with which the introduction of Civil Juries on a British foundation has been hitherto regarded by a part of this community".¹⁰⁶ Chief Justice Forbes was satisfied that the current verdicts of juries in civil cases answered the ends of law and justice and he was convinced that those who took the opposite view, were inspired by political motives, had not attended the Courts, or were merely loath "to be drawn from their private affairs to attend an irksome and painful duty in the Court".¹⁰⁷ On the criminal side, he was also generally satisfied with the verdicts; he conceded that at times improper persons had been included in these juries "but the fault (was) not in the law".¹⁰⁸ Dowling, J., considered that the local system would "not bear a very disadvantageous comparison with that in the Mother Country" and had not been aware of "a single perverse verdict" during his term of office.¹⁰⁹ The Attorney-General and the Solicitor-General did not recollect any case in which there had been a verdict decidedly wrong, unless for merely evidentiary reasons going to the credit of witnesses.¹¹⁰ The only dissenting voice was that of Burton, J., who adopted Emigrant disapproval of Emancipists, coupled with agreement with the principle of extending jury trial;

I have . . . no doubt from all I have seen and known of the resources of this Colony in the number of its respectable inhabitants, that there are abundant for the establishment of the Jury system here, upon a basis which must command the respect and confidence of all classes, and I know no reason why Juries in New South Wales should not and cannot be constituted of men equally *omni exceptione majores*, as in any country in the world; but I know of many reasons why they should be so constituted here more especially than any other, if (which, however, I do not admit) the principle can any where be departed from, and the administration of Justice committed to other hands.¹¹¹

Some of Burton's statements were even more forthright:

I have had occasion . . . to be convinced of the existence amongst the Jury of an improper prejudice in favour of the party accused. In one case, a native of the Colony and the son of the publican was the party charged, and in the course of the trial, three of the Jurymen, who were also publicans, manifested by their gestures, their observations, and by the questions they put, such a pre-disposition in his favour, as caused me, in summing up, to address myself strongly to them upon the danger and wickedness of such a predisposition, that, if it had existed, it was abandoned, and the prisoner, as to whose guilt there could, I think be no reasonable doubt, was convicted.¹¹²

He considered that the jury system had failed for want of being held in ven-

¹⁰⁵ *H.R.A.* I/xviii, 392.

¹⁰⁶ *Id.* 438.

¹⁰⁷ *V. & P.* 1836, (Consolidated Volume 1824-1837) 465.

¹⁰⁸ *Id.* 467.

¹⁰⁹ *Id.* 472.

¹¹⁰ *Id.* 471.

¹⁰⁸ *Ibid.*

¹¹² *Id.* 468.

eration and respect,¹¹³ and for a want of confidence in juries on the part of the civilian population, borne out by the unwillingness of people of good character to become jurors because of "the circumstances that very low and disreputable persons (were) qualified and liable to serve".¹¹⁴ Sir Francis Forbes could not agree with these representations and his handwritten criticisms remain in the margin to his printed copy of Burton's opinion.¹¹⁵ Forbes closed the debate with this resume of the Emigrants' petitions; "in defence of the Colonial Jury Act, I beg to say that it does require proof at least, that the nominee for the Jury lists is not of bad repute . . . if persons of low disreputable character have been left on the Jury lists, the fault is not in the law, but in the negligent manner in which it has been executed".¹¹⁶ Not without satisfaction, the Governor tabled the lawyers' opinions in the Legislative Council—"under such favourable impressions, a comprehensive measure extending to the colonists the full benefit of the English system, would have been proposed to you, but . . . the hope of receiving some definitive communication of the views of His Majesty's Government . . . lead me to prefer at this time, a short renewal of the present jury law".¹¹⁷ Bourke did not remain in the Colony long enough to see the fulfilment of his ideals and the years after his departure were rather reactionary as his successor, Governor Gipps, was by no means so enthusiastic about general jury trial. While Gipps reluctantly had to concede in 1836 that "it can not I believe be denied that a vast majority of the Colonists capable of forming sound opinions desire the Establishment of Trial by Jury",¹¹⁸ he was probably pleased by the unequivocal reply that changes in the juries, more particularly petty juries, could not be contemplated.¹¹⁹

So the matter remained until Alfred Stephen, speaking with new found authority as a Judge of the Supreme Court, turned his attention to promoting the method of jury trial which he had fostered in Van Diemen's Land.¹²⁰ With this in mind he wrote to the Governor in 1840, saying,

the system now in operation, for the trial of Civil Issues, by a Judge and two Assessors, is in my opinion, both practically and on constitutional grounds undesirable. But, as the number of Causes usually disposed of by Assessors, hitherto, is very great, and Actions at Law are, within my own experience, largely on the increase, I am afraid that the transfer of this

¹¹³ He considered this "betrayed on the part of the Colonial Legislature itself" because of the choice of a Military Jury left to the accused pursuant to 4 Wil. IV No. 12, inferring that the civil jury was not entitled to entire confidence, *ibid.*

¹¹⁴ He gave a further illustration of this in the following terms; "the Jury retired to consider their verdict, and my informant entered the retiring-room about the third or fourth, and found one of the Jury, who had already entered, lying on the table on his back with his arms folded who said, 'Well, my mind is made up'. Another followed, and immediately lay down on the floor, saying, 'My mind is made up': and when all got into the room the Jury were talking about indifferent matters concerning their own business for about twenty minutes, when the foreman called their attention to the case, and said 'Come, gentlemen, let us to business'; when they repeated, 'their minds were made up' . . . 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". *id.* 471. The Emigrants made great capital of this—MacArthur *op. cit.* 123.

¹¹⁵ *Forbes' Papers*, A745, 133.*

¹¹⁶ *Id.* A745, 133.*

¹¹⁷ Quoted with commentary by MacArthur, *op. cit.* 87.

¹¹⁸ *G.D.*, A1267-5, 770.*

¹¹⁹ Normanby to Gipps, *V. & P.* (1840) 158.

¹²⁰ A system "which had been found to work so well that it was thought by some its provisions might be adopted in this Colony with advantage", *Sydney Morning Herald*, 7 June 1844, 3.

duty to Juries, if Twelve men are to sit on each, will be extremely inconvenient, and by no means popular. For, to form such a Jury Panel, thirty-six, or forty-eight Individuals must be taken from their Homes. It may therefore well be considered, whether there be any sound reason why a Jury should, in such cases, consist of that number. Is it at all a necessary consequence, because the cases spoken of are withdrawn from, practically, the cognizance of *two* Gentlemen, that, therefore, they must, of course be submitted to *twelve*?¹²¹

Again, in 1843, he submitted his views to more public notice in his *Supreme Court Practice*:

a consolidation of the several Jury Acts, is an object much to be desired. Some well devised system should be adopted, and made permanent. Amendments, and renewals, of any Act, so numerous as those to which we have been referring, are extremely objectionable; and to the practitioner, indeed, are serious evils. Should Trial by Jury be introduced, without limitation, to the exclusion of that by Assessors, it may be worth consideration whether, in ordinary cases, a less number than *twelve* Jurors will not be desirable.¹²²

Stephen's efforts had their result in 8 Vic. No. 4 (1844), an Act introduced by Windeyer "to amend the Laws regulating Trial by Jury in New South Wales in so far as they relate to the Trial of Civil Causes". This abolished trial by assessors and made provision for juries of four persons, qualified as Special Jurors, in all civil cases relating to the trial of issues of fact and the assessment or computation of damages or other sums of money recoverable in actions at law. The parties were left with the option of seeking a jury of twelve. The Bill had not been without opposition,

upon the reading of the first clause, by which it was proposed to substitute a jury of four persons for the two assessors generally appointed for the trial of short causes, the Attorney-General opposed the clause as printed, on the ground that no body other than the usual jury should be designated by that term, and that the proposed tribunal of four should still retain the designation of assessors. After some conversation, however, the clause was adopted as it then stood.¹²³

Even this was only a temporary measure and had to be renewed by 9 Vic. No. 32 before public opinion prevailed in having the confused and complex mass of jury laws consolidated and made permanent by "An Act to amend the Laws relative to Jurors and Juries in New South Wales" (11 Vic. No. 20) of 1847. This Act, after acknowledging that existing Statutes were "numerous and for the most part temporary", rendered all men (subject to exemptions¹²⁴ and disqualifications)¹²⁵ over the age of twenty-one years resident in the Colony and having an annual income of at least thirty pounds or real or personal estate worth three hundred pounds liable to serve on civil or criminal juries.¹²⁶ A special jury list was retained¹²⁷ to include persons of the degree of esquire or higher, Justices of the Peace, bank directors and Councillors of the city of Sydney or town of Melbourne. Provision was made for the issue of general jury precepts¹²⁸ and special and common jury precepts.¹²⁹ General jury precepts

¹²¹ *V. & P.* (1840) 177.

¹²² At 53. This was also in accord with popular opinion exemplified for instance in the *Sydney Morning Herald*, 30th October 1844, 2; "we may be permitted to observe, when we see the confusion in which the Jury Law is now involved, from the number of Acts that relate to it, that the sooner a new and comprehensive measure is introduced, the better will it be for the public welfare".

¹²³ *Id.* 25 July, 1844, 2.

¹²⁴ S. 2.

¹²⁵ S. 3.

¹²⁶ S. 1.

¹²⁷ S. 10.

¹²⁸ S. 12.

¹²⁹ S. 13.

could be issued by the Chief Justice or the Chairman of the Courts of Sessions commanding the Sheriff to summon¹³⁰ not more than forty-eight nor less than thirty-six "good and lawful men" for jury service. Special and common jury precepts could be issued only by the Chief Justice and related exclusively to the Supreme Court and Circuit Courts. These required the Sheriff to summon not less than twice, nor more than three times, the number of men required for service—depending on whether a special jury of four or twelve, or a common jury of twelve was sought. Criminal special juries could be summoned on the application of the Attorney-General.¹³¹ In the case of adjudications of crimes and misdemeanours, trial was to be by a jury of twelve, subject to the rules, regulations and manner of proceeding observed in the Court of Queen's Bench in England.¹³² Civil trials were to be before one or more Judges and a special jury of four,¹³³ unless either of the parties applied for a jury of twelve.¹³⁴ Where these modes of proceeding were unsuitable trial was to be governed by the rules applicable to actions at law in the Courts of Westminster on a trial at *Nisi Prius*.

So the long agitation for full rights of jury trial came to an end in this the ultimate achievement. It represented not merely a triumph at the party level, but rather the result of outstanding individual leadership and work by a few personalities—Macquarie, Ellis Bent, Forbes, Bourke and Stephen. The jury system has in the twentieth century become so much an ordinary part of the law of New South Wales that it is very much taken for granted. It should be remembered that, in its historical introduction to this country, the trial by jury was "the privilege of the common people" no more than it had been in medieval England, but an institution granted of grace rather than of right.

VI. A NOTE ON THE GRAND JURY IN NEW SOUTH WALES

One of the most curious exhibits in the "legal museum" of New South Wales is the Grand Jury. This institution never operated in the Supreme Court, but was authorized in the Courts of Sessions of the Peace by the mandamus issued by Forbes, C.J., in October, 1824.¹³⁵ Under the then existing jurisdiction of the Sessions it was really necessary that there should be such a jury composed of local inhabitants who could from their own knowledge present breaches of the peace and other matters requiring the Court's attention to its notice. The duties of the jury, as applied in the Colony, were succinctly summarized by William Foster in addressing a Grand Jury in April, 1828:

Grand Jurors are assembled for the purpose of informing the Court of such matters requiring its interposition, as come within their own knowledge, either from the examination of witnesses, or from their own personal observation. If their information be derived from the examination of witnesses, the matter then becomes a subject for an indictment, if from their own knowledge, a presentment. I should observe, however, that in England,

¹³⁰ S. 15.

¹³¹ S. 18.

¹³² S. 17.

¹³³ S. 20.

¹³⁴ S. 21.

¹³⁵ *Supra*, 470. Note also the early recommendations of Bent quoted *supra* 464-65 and of Wylde, *H.R.A.* IV/i, 378.

many things are liable to indictment which are not so here. . . . There are here no assessments; the same obligations do not exist nor is any party liable to be indicted if such matters are neglected; consequently, they are not within the province of a Grand Jury to present. Perhaps the best mode of ascertaining what comes properly within the province of a Grand Jury to present, would be to enquire whether any party is liable to be indicted for the non-performance of that which, in their opinion, is necessary to be remedied.¹³⁶

As if in premonition of its blighted career, the Grand Jury was given a bad start in Sydney.¹³⁷ The first Grand Jurors assembled at Court on 1st November, 1824, by 9.00 a.m. The Court gates were not opened to them until 10.00 and the magistrates failed to appear until 12.24. Even then, the Chairman had mislaid "an important document" which constrained him to adjourn the Sessions to the following day. However, the Jurors were compensated on 2nd November, when, amidst copious quotations from Blackstone and Bacon, the Chairman, John Stephen, apprised them:

You are met, for the first time, in this Colony, to exercise the functions of a Grand Jury . . . I am happy, Gentlemen, in seeing impanelled, upon this important occasion, so numerous and respectable a Grand Jury; and I hope, that the proceedings of this Session will evince, that the time is now arrived when the Constitutional privilege of Trial by Jury may be exercised, in all our Courts, with the same beneficial effects as have resulted from it, for ages past, in the land of our forefathers.¹³⁸

The immediate impressions of the system were favourable: Foster, in 1828, considered it working "better, indeed, than I should have supposed had I not witnessed it".¹³⁹ The *Sydney Gazette* was in favour of retaining the Grand Jury and dispensing with the Petty Jury:

monstrous evils . . . might be prevented, if some of the present grand jurors even were only permitted to mingle with the petty jury. For the ends of justice, we say, let a few of the gentlemen descend, so that something in the shape of equity may be administered; we have no notion of witnessing 30 or 40 gentlemen in the grand jury, whilst the Sheriff is obliged to strain every nerve to find any number of free men to supply the petty jury.¹⁴⁰

The Grand Jury in a party-ridden community soon became discredited. Its presentments hurt too many important feelings and the ensuing hostilities only led to its disrepute.¹⁴¹ Many of the jurors themselves felt disinclined to continue their attendance.¹⁴² As instance of the attitude with which the Grand Jury was regarded was W. C. Wentworth's letter to the Attorney-General in 1825:

I have to request that you will be pleased to file a criminal Information in the Supreme Court against the members of the late Grand Jury at Parramatta for the publication of their presentment to the Quarter Sessions: and I beg leave to be informed whether in the event of my being able to prove

¹³⁶ *Sydney Gazette*, 16 April 1828, 3.

¹³⁷ *Id.* 4 November 1824, 2.

¹³⁸ *Ibid.*

¹³⁹ *Id.* 16 April 1828, 3.

¹⁴⁰ Editorial of 29 July 1826, 2; *cf.* 15 January 1829, 2.

¹⁴¹ Witness Foster's note of warning; "it is important that this tribunal should not create an alarm, or give ground for censure, by interfering in matters not strictly within its jurisdiction", *Sydney Gazette*, *loc. cit.*

¹⁴² *H.R.A.* I/xi, 896.

that this publication was made in the Sydney Gazette by their procurant, you will file an information for libel of my framing, leaving the prosecution of it to me on behalf of the parties aggrieved by the publication. You are probably aware that the late Grand Jury at Sydney have already thrown out a bill which I submitted to them at the instance of my clients for the same offence. It was not likely that a nice point of libel should be understood by a body of this description, particularly when it had reference to the act of another body of precisely similar description.¹⁴³

In an atmosphere of this kind, the Grand Jury system by 1830 had been allowed to lapse¹⁴⁴ and was so tenuously remembered a decade later that Willis, J. could remark: "There has hitherto, I believe, been no permanent provision for proceeding by Grand Juries. I say, 'permanent provision', because I have heard a vague rumour of a Grand Jury having once been assembled, but whether for the Supreme Court, or Court of Quarter Sessions I am unable to state; neither do I know the reason why this system has been temporarily discontinued".¹⁴⁵ By 1833 it was already stated to be one of the points of distinction between local and English law that no Grand Jury operated in the Colony.¹⁴⁶

Somewhat inconsistently, there was a long continued campaign for the introduction of the Grand Jury in the Supreme Court. The Executive Council in 1826 minuted that "there should be Grand Juries, composed of the most respectable Inhabitants, in like manner as in England".¹⁴⁷ It was seriously suggested as a criticism of the Jury Bill of 1833 that it should have allowed the Grand Jury to be introduced before the Petty Jury.¹⁴⁸ The most vigorous enthusiasts for this method of trial were the Judges of the Supreme Court: Dowling, C.J. formally recommended it in 1838¹⁴⁹ and 1840.¹⁵⁰ Willis, J. had an even wider proposal:

The enquiries I have made . . . leave me no reason to doubt that Grand Juries might with great advantage be introduced into both Courts. . . . I see no absolute necessity that the Grand Jury should, for the present at least, be composed of more than twelve and less than twenty-four as in England, and I think a Grand Jury of five, or even three, would be greatly preferable to entrusting that duty solely, as is now the case, to the Attorney-General, who also unites in his own person the Offices of sole Public Prosecutor, and Chief Legal Adviser of the Executive.¹⁵¹

Alfred Stephen agreed that the institution of Grand Juries would "relieve the Attorney-General from a very large and onerous part of his present multifarious duties";¹⁵² while Dowling actively opposed the vesting of such wide powers in the hands of the Attorney-General: "nothing but a well grounded apprehension, that, in the Infancy of the Colony, Justice would not be properly

¹⁴³ W. C. Wentworth's *Legal Letter Book*, A1440, 165.*

¹⁴⁴ "We regret the temporary withdrawal of our Grand Jurors, but let Justice weep, and villains go unpunished, rather than witness the continuance of a Petty Jury system, which has given universal dissatisfaction", *Sydney Gazette*, 15 January 1829, 2; cf. *H.R.A.* I/xi, 893. And see Murray to Darling, *H.R.A.* I/xiv, 394.

¹⁴⁵ *V. & P.* (1840) 174.

¹⁴⁶ Bourke to Stanley, 19 September 1833, *G.D.*, A1211, 1020.

¹⁴⁷ *H.R.A.* I/xii, 521.

¹⁴⁸ *G.D.*, A1211, 1149.*

¹⁴⁹ *V. & P.* (1840) 165.

¹⁵⁰ *Id.* 159, "the Institution of the Grand and Petty Jury System . . . should now be adopted, constituting such Gentlemen as are now eligible as Special Jurors, to be qualified to act as Grand Jurymen".

¹⁵¹ *Id.* 174.

¹⁵² *Id.* 177.

administered by such a system, could warrant the substitution of an Attorney-General in the place of a Grand Jury, and arm him with the enormous discretion of determining on his own personal responsibility, in what cases he should, or should not, set the law in motion".¹⁵³ Despite this united body of opinion, Governor Gipps, by a remarkable feat of conjuring thought it right to state to the British Government in 1841 "that on a full consideration of the subject, and after consultation with the Judges, and Law Officers of the Crown, it did not seem to me that the Colony is as yet in a state, in which Grand Juries could be advantageously established, and . . . therefore the measure was not brought forward".¹⁵⁴ That was an end of the matter: unlike the Petty Jury system, the Grand Jury commanded no popular militant support, nor any individual champion. On the contrary, most people were somewhat sceptical of its virtues as the *Sydney Morning Herald* revealed in its last editorial on the subject—

some persons are inclined to rank amongst the "grievances" of New South Wales, the withholding from it of the institution of Grand Jury. We have for some time been disposed to entertain the contrary opinion, not indeed on the ground that the Attorney-General performs the duties of Grand Jury with sufficient fairness—although we give the learned gentleman full credit for doing so—but because we think it questionable whether Grand Juries are really essential to the due administration of justice, and whether in point of fact they do subserve the interests of the public.¹⁵⁵

It was for this reason that the temporary expedient in the equally temporary Act 9 Geo. IV, c. 96, committing the prosecution of offences to the suit of the Attorney-General, came to be retained as a permanent feature of the local law.

¹⁵³ *Id.* 165. *The Australian* took issue on this; "it is proper that the law should hereupon remain unaltered, and that the duties of Public Prosecutor should remain, at present, in the hands of one fit and qualified person, rather than be vested in a Grand Jury", 1 October 1840, 2.

¹⁵⁴ *G.D.*, A1267-6, 1306.

¹⁵⁵ 1 November 1844, 2.