THE RULE OF LAW IN A PENAL COLONY: LAW AND POWER IN EARLY NEW SOUTH WALES by David Neal, Cambridge University Press, 1991, xiv + 266pp, ISBN $39.95

This short but thought-provoking study analyses the early history of legal and political institutions of New South Wales, demonstrating that the "rule of law" was used as an instrument in a three-way struggle for political power between the Governors, the Exclusivists (free settlers and their descendants) and the Emancipists (former convicts and their descendants). Within the scope of "rule of law" the author includes rights of access to the courts, the institution of traditional common law procedures for trial of cases, and the observance of traditional rights of English people entrenched in the *Magna Carta*, the *Petition of Right* (1628) and the *Bill of Rights* (1689).

The predominance of convicts and former convicts in New South Wales during the first 50 years of its settlement caused severe limitations upon the rule of law. However, even within the first decade the right of convicts to sue for their property was recognised; this was contrary to English law, which considered convicted felons to have forfeited all right to litigate in the courts. As David Neal shows, prior to the grant of representative legislative institutions in 1840, the courts were the primary forum in which political issues could be contested. Recognition of a convict's right to sue was but the first step in a long struggle to secure for New South Wales the legal and constitutional rights due to English people at home.

The scarcity of trained lawyers in the colony led to the admission of pardoned convicts who had practised in England or Ireland before their conviction. Governor Lachlan Macquarie was preeminent in extending this right to Emancipists, and his successors never succeeded in displacing these practitioners. On the other hand the Exclusivists gained control of the local courts through appointments to the magistracy, and political and social status protected that monopoly of power until and beyond the grant of legislative powers in 1840. The Supreme Court, on the other hand, was composed of justices appointed in England and sent to the colony to replace the Judge Advocate's Court, which was run on court-martial lines and staffed by military or naval officers.

A major aspect of the rule of law was the introduction of jury trial in New South Wales, a topic Neal has treated less extensively elsewhere, ("Law and Authority: The Campaign for Trial by Jury in New South Wales", (1987) 8 *J Leg History* 107, at 128) and which is central to the theme of this book. Service on a jury was the first mark of acceptance as a politically credible citizen. Trial by jury, rather than by military-style courts with army or navy officers as assessors of guilt, became a rallying point for Emancipist political pressure that was applied in court argument, newspaper essays and an increasing number of petitions to the Crown. As Neal explains, this insistence upon jury trial was due to their conviction that English people had the right to such a trial, as a protection against judicial prejudice and against executive prosecutions instituted for harassment purposes. However, jury trial became the symbol for admission of emancipated convicts into full citizenship. The Emancipist party correctly perceived that, given the fact that virtually all emancipated convicts held title to land, it would not be difficult for them to qualify to vote for legislative representatives once such an assembly was

granted to the colony. Thus this became one of the most hotly debated issues in early Australian history.

One aspect of New South Wales settlement that receives special treatment is the development of law enforcement in the colony. By eighteenth century standards New South Wales was a heavily policed society, due in no small measure to the need to enforce convict discipline and to ensure order among free and pardoned settlers. In the rural areas law enforcement fell to the magistrates who employed constables to enforce the law, and relied upon flogging to coerce the unruly into obedience. In the settled areas civil police efforts adopted English methods of urban law enforcement shortly after their introduction in England. The Horse Patrol of late nineteenth century London became the Mounted Police and the Border Police in New South Wales. Professionalisation of the Sydney police followed close upon the heels of the *Peel Act* of 1829, which created the London Metropolitan Police. As proved to be the case in London, the civil police needed the assistance of military troops when disorders became general. In New South Wales as in England the citizenry were cautious in authorising expansion of police authority and organisation, since both populations feared the creation of a Frenchstyle police administration, seen as a threat to English liberty.

As a summary of the development of legal institutions in a penal colony this work goes far to achieve its objective. Two gentle criticisms may perhaps be asserted concerning the historical method of the work. First, it is now shown how much of English political and constitutional theory was actually known and adopted in New South Wales. For a historian one of the most difficult tasks is that of tracing ideas from mother country to colony, but some generalisations can be drawn from lists of books available in the colony, from newspaper articles and other published materials, and in some instances from legal arguments made in courts or in judge's opinions. Although a full consideration of early Australian constitutional thought would be well beyond what one would expect in this study, attention to the transfer of Whig constitutional theory to the colony is warranted because of its centrality to the main thesis of the book — the rule of law.

Secondly, it would be of great value to adopt a comparative approach to New South Wales' early history and the experience of the North American colonies in the first British Empire. Demonstrably the presence of convicts and former convicts in the population played a formative role in the years before 1840, but some English precedents were adapted to local conditions in that period, and the political alignments (although drawn along lines of emancipism) seem to have operated much like American colonial parties which were formed on familial or religious connections. Jury trial and rights of English people were rallying cries of the American revolutionaries; did New South Wales derive its arguments from English materials (as Neal seems to imply) or did the contestants see the issue partially through American eyes?

Finally it should be said that this book has more than passing relevance to contemporary Australian constitutional history. The importance of courts in early New South Wales is reflected in what appears to this observer to be an unusual stress upon the independence of the judiciary. The *Bank Nationalisation Case* ((1948) 76 CLR 1400) and the *Boilermaker's Case* ((1956) 94 CLR 254, at 346) stand as recent evidence of Australian concern for court structure and procedure. On the other hand it is remarkable that jury trial of civil cases, of such practical and symbolic significance in early New South Wales, has all

but disappeared in some of the other Australian States (Hale, J, "Juries: The Western Australian Experience", (1973) 11 *WA LR* 99, at 104) seemingly following English developments rather than American preferences.

Valuable as a historical analysis of legal institutions in New South Wales before 1840, this volume also serves as a careful overview of the legal historiography of that period. It provides valuable insights for legal professionals and a new interpretation of the political history of New South Wales in its most formative period.

HERBERT A JOHNSON*

ESSAYS ON DAMAGES by P D Finn (ed), Sydney, Law Book Company Ltd, 1992, 229pp, $79.50(HC), ISBN 0 455 21169 8.

This book is part of a series of essay collections which are the products of small seminars at the Australian National University. The series to date comprises Essays on Torts, Contracts, Equity and Restitution. As noted in the preface to this volume, its predecessors were concerned, for the most part, with the shaping and development of legal doctrine. By contrast, this collection deals with a seemingly more prosaic subject, but one which represents to the practitioner the sharp end of legal doctrine. These essays are therefore a valuable contribution from eminent lawyers to an area which is somewhat neglected in Australian legal scholarship.

The volume contains nine essays. In the first Professor Waddams takes up the issue of the tension between, on the one hand, the notion that it is the duty of the court to seek, by means of an award of damages, to achieve precise *restitutio in integrum* tailored to the individual plaintiff's situation; and on the other hand, the search for rules that are clear, predictable, fair between one claimant and another, and relatively inexpensive to apply. His conclusion is that the conflict between the objective of perfect justice and pragmatic considerations of convenience and efficiency is one which can never be resolved, because a working system of law must always pay attention to the cost of the process to the parties, the court and the community at large. In the next essay Ipp J is concerned with problems and progress in remoteness of damage. He makes the case for discarding the conventional view that, in the tort of negligence, remoteness of damage is a subject for inquiry separate from that relating to liability. He submits that the separation between liability and remoteness of damage was in effect eliminated by the *Wagon Mound (No 1)*. As the notion of proximity, which is now recognised as the test for the existence of a duty of care, involves the "closeness or directness of the relationship between the particular act and the injury sustained", factors relating to the concept of remoteness of damage become part of the inquiry into proximity. He argues for a balance sheet approach to all issues of remoteness whether in tort or contract. By this he means that it should be expressly acknowledged that all relevant factors for and against liability for particular damage are to be listed and

* Hollings Professor of Constitutional Law, University of South Carolina; Visiting Fellow, Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne, 1992.