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ARGUMENTS FOR THE SURVIVAL OF ABORIGINAL CUSTOMARY LAW IN VICTORIA: A CASENOTE ON *R v PETER* (1860) AND *R v JEMMY* (1860)

Late in 1994, Chief Justice Mason rejected the possibility that Aboriginal customary criminal law had survived colonisation. In *Walker v New South Wales*, Mason reasoned:

> In *Mabo (No 2)*, the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo (No 2)* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.[1]

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1 *Walker v New South Wales* (1994) 182 CLR 45, 50. Mason CJ quoted his own judgement in *Coe v Commonwealth* (1993) 118 ALR 193, 200, to the effect that: '*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.'
These issues are also discussed in *R v Leeton James Jacky* (1993) 63 *Aboriginal Law Bulletin* 19 and *R v Archie Glass* (1993) 63 *Aboriginal*

In argument, Counsel for New South Wales cited the well-known 1836 case *R v Murrell*, where the full court of the Supreme Court of New South Wales decided that Aborigines were bound by English law, even in cases of crimes committed among themselves.[2] Counsel also cited the lesser-known case of *R v Peter*, a case decided in Victoria in 1860.[3] In *Peter*, the Full Court of the Supreme Court of Victoria held that 'the Queen's writ runs throughout this colony, and that British law is binding on all peoples within it'.[4] Notwithstanding the generality of this decision, just one month later two of the same judges restated the rule in *R v Jemmy* with two significant qualifications: that they were not deciding the principle for all possible cases, and that Counsel should have indicated what other jurisdiction might have been named.[5] *Jemmy* was ignored in by Counsel in the High Court, as it has been ever since it was decided.[6]

The origins, arguments and outcomes of both *Peter* and *Jemmy* are examined in this paper. Both cases were poorly reported, so I have tried to expand on the arguments that were made by Counsel and exactly what it was that the judges decided by describing the context in which they were argued. If nothing else, I want to bring

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Law Bulletin 18. The arguments are also canvassed, and a similar conclusion reached in Stanley Yeo, 'Native Criminal Jurisdiction After Mabo' (1994) 6 *Current Issues in Criminal Justice* 9; 'Editorial' (1994) 18 *Criminal Law Journal* 193, esp 195 and 'Walker v New South Wales' (1995) 19 *Criminal Law Journal* 160.

2 *R v Jack Congo Murrell* (1836) 1 Legge 72.

3 *Argus*, 29 June 1860 (transcribed in the Appendix).

4 Ibid.

5 *Argus*, 7 September 1860 (transcribed in the Appendix).

6 Others have noted these cases in passing, but have never drawn attention to the qualifications suggested by the judges in *R v Jemmy*: Ross Cranston, 'The Aborigines and the Law: An Overview' (1973) 8 *University of Queensland Law Journal* 60, 63; J V Barry and G W Paton, *Introduction to the Criminal Law in Australia* (1948) 13; Harring, 'The Killing Time: A History of Aboriginal Resistance in Colonial Australia' (1994) 26 *Ottawa Law Review* 385, 406 and *Halsbury's Laws of Australia* para 5-1755, n 1. Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (1996) 73–4 mentions *Peter* and *Jemmy* in passing, but misses the significance of these cases.

these arguments and decisions to the notice of modern readers. Having placed both cases in context, I discuss why *Murrell* has dominated discussion of Aboriginal customary law while *Peter* and *Jemmy* have been forgotten. Finally, I argue that the recognition of Aboriginal customary law suggests new ways of thinking about the rule of law, which, far from threatening it, provides an opportunity to promote it.

R v PETER

Peter (also called Mun-gett) was tried before Judge Pohlman at the Melbourne Criminal Court in February 1860 for the rape of a six-year-old white girl, Isabella Garland.[7] Peter's barrister at the trial was George Mackay, known at the Bar as 'the old Doctor', who had a reputation for being 'an unrivalled "chamber" lawyer' for the learned opinions he provided.[8] Mackay drew up a plea denying that Peter was amenable to English law. The plea read in part:

> that he [Peter] ought not be compelled to answer to the said information, because he saith that he is a native aboriginal of the island of New Holland, and born out of the allegiance of our Sovereign Lady Queen Victoria, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth, and that he is one of a certain native aboriginal tribe of the said island, to wit the tribe of Ballang, dwelling and inhabiting in that part of said island at and about Ballan, in the said colony of Victoria, and that the said tribe is a sovereign and

7 In Peter's own words 'My name Peter, White Man call me that – Me Ballan Black Mun-gett': 'Aborigines Cases 1860', frame 103, Thomas Papers, Mitchell Collection, State Library of New South Wales, [hereafter ML] MSS 214/5, item 3. Being a white man, I have decided to use the name other white men used to address him. In the Prison Register (Males, No 3035, Victorian Public Record Officer, Victorian Public Record Series [hereafter VPRS] 515, unit 5) Peter is described as belonging to the Port Phillip tribe.

8 John Leonard Forde, *The Story of the Bar of Victoria* (1913) 120.

> independent tribe not in subjection to our said Lady the Queen, or to the laws of the said United Kingdom, or the dependencies thereof; and that the said Mun-gett did never become subject to, or submit himself or otherwise acknowledge allegiance to, our said lady the Queen; and that at the time when the said offence in the said information mentioned is therein supposed to have been committed, and long before that time and since, the said tribe was and still is governed by its own laws and customs. And the said Mun-gett further saith, that there is a certain Court held within and by the said tribe, and that all and singular offences of murder, rape, and other felonies committed within the said tribe by any native aboriginal of the said tribe, at the time last aforesaid, before and since, have been, were, and are, and of right ought to be, inquired of, heard, and determined in the said last-mentioned Court within the said tribe, and not in any of the Courts of the said United Kingdom, or its dependencies, or any of them, or of the said colony of Victoria, and this the said Mun-gett is ready to verify.[9]

In short, Peter asserted that he lived under an existing Aboriginal sovereignty that he had never given up, and by which sovereignty he could be tried for the crime of which he was accused. The plea was presented to the Court by Peter himself, who, when standing at the bar, drew it from under his coat.[10]

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9 *Argus* (Melbourne), 16 February 1860, 3.

10 'Guardian of the Aborigines' Weekly Report' 15 February 1860 in Registered Inward Correspondence to the Surveyor-General, Board of Land and Works, Aboriginal Affairs Records VPRS 4467, reel 4. (Thomas listed his activities for each day, so I have cited the specific date referred to, rather than the week of the report that contains the day I am citing.) An affidavit from William Thomas verifying the truth of the plea, was also submitted: *Argus*, 16 February 1860, 3.

Peter's presentation of his own plea was more than a symbolic gesture; it had been his idea to retain counsel. At his committal, Peter told the court: 'I have nothing to say. I do not know what to say.'[11] But he knew what to do. The day after Peter arrived in the Melbourne Gaol, he dictated a letter to another prisoner 'soliciting Council [*sic*] to plead his cause' and sent it to William Thomas, Guardian of the Aborigines, who was somewhat surprised to receive it.[12] How did Peter know to ask for Counsel? Certainly, Peter had been in trouble with the law before. He had been convicted at least four times, was 'often arrested for robbery', and had been sentenced at least twice to a total of sixteenth months in gaol.[13] As far as I know, Peter had never appeared before a superior court. He may have heard about the case against Tara Bobby and Billy Logan in Melbourne, just two years earlier, at which a number of Aborigines were said to have 'lounge[d] about the Court' waiting for the trial to come on.[14] Just how much further Peter's understanding of English law went is difficult to discover. When Thomas told Peter that he had secured Counsel, Thomas described Mackay as the 'Big one Wig' who was to talk for him.[15] And after Mackay failed to obtain an acquittal at the trial, Peter asked for *two* lawyers to plead with the judges for him.[16] Clearly, Peter knew that Counsel were an important part of persuading the judge of one's case. While the

11 'Statement of the Accused' in 'R v "Black Peter"' in Criminial Trial Briefs VPRS 30, unit 128, item 3/297/21.

12 Thomas, 'Report for 1860' in Thomas Papers ML MSS 214/7, frame 101. Unfortunately, I have not been able to locate the original letter.

13 Maclean to Thomas, 4 February 1860 in Thomas Papers ML MSS 214/16. Maclean recalled only one stint in prison, the other is noted in the Prison Register: Males, No 3035 VPRS 515, unit 5. Peter was convicted of larceny and damaging property.

14 'Guardian of the Aborigines' Weekly Report' 19 November 1858 in VPRS 4467, reel 4. Thomas did not identify whom these Aborigines were, but some Aborigines from Bacchus Marsh had visited Tara Bobby and Billy Logan earlier ('Guardian of the Aborigines' Weekly Report' 14 October 1858 in VPRS 4467, reel 4). Even if Peter was not one of the visitors, it is probable that he had heard of their experiences.

15 Thomas, 'Journal', 30 January 1860 in Thomas Papers ML MSS 214/5.

16 'Guardian of the Aborigines' Weekly Report' 15 May 1860 in VPRS 4467, reel 4.

desire for Counsel came from Peter, it is less likely that he had much to do with the argument that Mackay put for him and that he carried under his coat. His own defence – revealed in a statement to the Court after his conviction 'in very intelligible English' – and made fully to Thomas was that, while he had sexually assaulted Isabella, he had not raped her.[17]

At the time that Mackay was briefed to defend Peter, he was approaching an area of law which had gone untended for many years. It was time to reopen questions which had once been considered settled. In recent years Aborigines charged with crimes had not been defended by Counsel. Governor Hotham (appointed 1854) had struck out the provision of funds for standing Counsel for the Aborigines, which had been made since the opening of the Port Phillip Court in 1840. *Ad hoc* arrangements meant that not all Aborigines went unrepresented. In 1858, Mackay happened to enter the Court in Portland just as Judge Barry (who had been Standing Counsel for the Aborigines when he was at the Bar) was observing that Wingmaman, an Aborigine being tried for murder, was unrepresented; Mackay agreed to act.[18] Later the same year, Mackay was briefed by Thomas – who had successfully sought funds for this purpose – to defend two other Aborigines.[19] Mackay, who by 1860 had some experience defending Aborigines, appears to have been Thomas's choice for Peter.[20]

There was considerable interest in Peter's plea. The *Argus*, which asserted that it was the first case of this kind in the colony,[21] thought

17 *Herald* (Melbourne), 21 February 1860, 6 and 'Aborigines Cases 1860' in Thomas Papers ML MSS 214/5, item 3, frame 103.

18 *Portland Guardian*, 26 April 1858, 2.

19 Mackay was to be paid 5 guineas: Thomas, 'Journal', 16 September 1858 in Thomas Papers ML M55 2 A/5. See also 'Guardian of the Aborigines' Weekly Report', 16 and 17 September 1858 in VPRS 4467, reel 4.

20 Thomas to the Commissioner of Lands and Survey, 28 January 1860 in Law Department, Inward Registered Correspondence VPRS 266/P, unit 24, item 60/1455 shows that Mackay was to be paid 10 guineas for representing Peter.

21 *Argus* (Melbourne), 16 February 1860, 5.

it 'an interesting argument altogether, involving, as it does, the actual position of the ancient owners of the country which we have taken possession of'.[22] The novelty of the case also impressed the lawyers involved, and it sent them scurrying for precedents. Dr Mackay had the assistance of William Thomas, who obtained a copy 'of Mr Barry's celebrated arguments', and Judge Willis's remarks, 'on the memorable Trial of 'Bon John' [sic] an Aboriginal native in 1841.'[23] Justice Pohlman made inquiries with Chief Justice Stawell who remembered that Barry had acted in a similar case 'in the early days of the colony'.[24] And Mr Martley, for the Crown, had heard of a more recent case, where Justice Williams had refused a similar plea on the grounds that the accused had 'been for long the associate of white men and left his tribe'.[25] The one case they did not discover was *Murrell*; the issues would be argued without the legacy of this case controlling the outcome.

After legal argument about whether Peter's objection to jurisdiction could be entertained without an admission of the facts, Mr Justice Pohlman decided to hear the case against Peter subject to the issue of jurisdiction being decided by the Full Court.[26] At the trial, evidence for the prosecution came from the victim, Isabella, her

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22 *Argus* (Melbourne), 17 February 1860, 5.

23 Thomas, 'Report for 1860' in Thomas Papers ML MSS 214/7, frame 199. Thomas's excitement at finding the report is suggested by his comment in his weekly report: 'See Dr Mackay endeavour to get for the Dr the valuable arguments brought forward in Bon John's [sic] trial in 1841 – succeed', 'Guardian of the Aborigines' Weekly Report' 13 February 1860 in VPRS 4467, reel 4.

24 *Argus* (Melbourne), 21 February 1860, 6.

25 *Argus* (Melbourne), 17 February 1860, 7. The case referred to is probably the trial for murder of Old Man Billy and Young Man Billy, father and son, reported in the [Ballarat] *Star*, 26 October 1858, 2, where Mr Justice Williams declared that 'The aboriginals whatever might be the custom among themselves, were now bound by our laws'. The same report noted that Young Man Billy spoke and understood English 'very imperfectly', and Old Man Billy not at all. The defence of Old Man Billy and Young Man Billy was carried out by Mr Dunne, at the request of the Court.

26 *Argus* (Melbourne), 17 February 1860, 5 and 7; *Argus* (Melbourne), 21 February 1860, 6.

parents, the landlord of the hotel where Peter had been drinking, a woman who saw Isabella after the attack, and the doctor who examined her.[27] Isabella told the court that she had gone to the Pentland Hotel to fetch a jug for her mother to store the butter she made. As she was leaving the hotel (but was still within the town, as she was near a butcher's shop), she saw Peter, who told her that her father had told her to wait for him.[28] Peter took Isabella into a field, on the pretext of asking her what part of her father's crop he was to reap the following day; it was here that he raped her.

The only witness for the defence was William Thomas. His evidence was directed toward the possibility that Peter might have been identified by mistake and the content of Aboriginal law on rape. He deposed that Aborigines knew 'right from wrong' and that they had 'laws for almost every offence', including rape. The punishment for rape was blows to the head, administered at the discretion of the victim's father. Unlike the Whites, Aborigines did not put rapists to death.[29] Thomas's own notes show that he had tried to establish the relevant Aboriginal law:

> When black fellow violates or tries to violate, very Young child – Girls father told & men talk about it, and father breaks Young Man over head with waddie – the Child is retained by the father till big enough, and then, given to the Young Black, who tried to Ba-ket-tun-ner.[30]

A number of questions were also directed to Thomas to establish how 'civilised' Peter was.

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27 A transcript of the trial is in '1860 Peter' in Capital Case Files VPRS 264, unit 2. The depositions taken at the committal hearing can be found in 'Aborigines Cases 1860' in Thomas Papers ML MSS 214/5, item 3 and 'R v "Black Peter"' VPRS 30, unit 128, item 3-297-21.

28 'R v "Black Peter"' VPRS 30, unit 128, item 3-297-21.

29 '1860 Peter' VPRS 264, unit 2.

30 'Aborigines Cases 1860' in Thomas Papers ML MSS 214/5, item 3, frame 105. These notes follow Peter's own account of the relevant events, and may well be based on discussions with Peter.

After a 'long and patient trial which did not conclude till 6 pm', Peter was found guilty and sentenced to death.[31] Pohlman warned Peter not to 'harbour any expectations of his escaping punishment' by decision of the Full Court, adding that, on Thomas's evidence 'the prisoner would have been visited with severe punishment by his own tribe if he had been found guilty by their laws of this crime.'[32] 'See Peter to the Jail', reported Thomas, 'he is very sad'.[33]

Peter remained 'sad', 'dull' and 'sullen' in the months that followed as he waited for the hearing of the Full Court to hear his case. Peter's state of mind was not improved by the news that an Aborigine in Sydney had been executed for rape. The trial of a white man for rape in Melbourne also turned Peter's thoughts toward his own fate.[34] Peter's own observations of those around him turned into a critique of racism in the criminal justice system: '[H]e is very sensible' wrote Thomas '[and] tells me that another is waiting like him, but he says white man Death only recorded – but he Death passed on him'. Thomas's response ('I told him his crime tho' not death with Blacks, is death with the Whites') suggests that he missed the point.[35] Peter had to wait until the end of June for the point reserved to be heard.

The special case in front of the Supreme Court did not go well for Peter. The full text of Dr Mackay's argument, as reported in the *Herald*, is reproduced in the Appendix. Alluding to the three methods of colonisation referred to by Blackstone, Mackay argued

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31 'Guardian of the Aborigines' Weekly Report' 21 February 1860 in VPRS 4467, reel 4 and *Argus* (Melbourne), 21 February 1860, 6.

32 *Herald* (Melbourne), 21 February 1860, 6.

33 'Guardian of the Aborigines' Weekly Report' 21 February 1860 in VPRS 4467, reel 4.

34 Thomas, 'Journal', 8 May 1860 in Thomas Papers ML MSS 214/5.

35 Ibid 4 April 1860. For recent assessments, see Carmel Harris, 'The "Terror of the Law" as Applied to Black Rapists in Colonial Queensland' (1982) 8(2) *Hecate* 22; Ross Barber, 'Rape as a Capital Offence in Nineteenth-Century Queensland' (1975) 21 *Australian Journal of Politics and History* 31; and Jill Bavin-Mizzi, *Ravished: Sexual Violence in Victorian Australia* (1995) ch 7.

that the English were present in Victoria by 'a kind of intrusion' that did not amount to conquest, and which had not been regularised by any 'arrangement' with the Aborigines.[36] Relying on American precedent,[37] Mackay argued that this amounted to discovery, which gave no authority over the Aborigines. Nor could Peter divest himself of his allegiance.[38] This was an important point, because the argument turned on both the survival of Peter's 'tribe' and the maintenance of his separation from the white community. In the *Argus* report of the case, Peter was described as a 'half-caste', but 'on the argument it was assumed that he was a pure Aboriginal of a still-existing tribe, having a local residence apart from the white inhabitants of the colony'. Presumably, these conditions were thought necessary for Peter to maintain both that he had never acquiesced in English sovereignty and that he retained an allegiance to his tribe, in whose jurisdiction he might theoretically be tried. Mackay also pointed to the example of Ireland, where the Brehon laws had continued in the conquered provinces, and where the Irish were required actively to divest themselves of these laws to bring themselves under English law.[39] Dr Mackay concluded on a pragmatic note that seems to undermine the strength of his earlier argument:

> It might be contended, he said, that if the plea were sustained great inconvenience would be occasioned, as it would recognise the existence of a people in our midst who could assert their independence of our laws; but that he maintained could be remedied by the passing of an act giving Their Honours the power they did not now possess.[40]

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36 William Blackstone, *Commentaries on the Laws of England* (9th ed, 1783) vol 1, 107–8.

37 Citing 3 *Kent's Commentaries* 461 and *Johnson v Mackintosh* (1823) 8 Wheaton 543.

38 Citing 'the case of *Lopez v Burslem* (1843) 4 Moore PC 300' and *R v Antonio De Parade* (1807) 1 Taunton 27.

39 For a modern assessment of the survival of Brehon law, see Geoffrey Hand, *English Law in Ireland 1290–1324* (1967) 188.

40 *The Queen v Peter, Herald* (Melbourne), 29 June 1860, 6.

The Crown was not even called upon to reply. The conviction was upheld, with the Court holding that 'the Queen's writ runs throughout this colony, and that British law is binding on all peoples within it'.[41] Chief Justice Stawell simply asserted that 'their position as British judges' meant that they could not accept limitations on their power and that there could not be 'an *imperium in imperio*.'[42] Justice Molesworth argued that 'the possession of the colony by the British was by a sort of insinuation of themselves, and intimidation amounting almost to conquest'.[43] Nevertheless, he did not draw the conclusion as Blackstone's *Commentaries* would have suggested that, as an 'almost' conquered people, Aboriginal people retained their own laws until expressly over-ruled by their conquerors.[44] He held that the Court had a duty to protect British subjects, and rejected the American example, asserting that jurisdiction had been asserted over the 'natives'. Although Molesworth had studied and practised in Ireland, he did not refer to the argument Mackay made from Irish precedent.[45] Citing the additional example of the West Indies, Molesworth declared that jurisdiction was asserted over 'many African natives who had been brought there involuntarily as slaves.'[46] Having made the fine distinction between conquest and 'intimidation amounting almost to conquest', Molesworth failed to distinguish between the legal rights of indigenous people and displaced slaves. Comparing Aborigines with French or American immigrants to Victoria, Molesworth suggested that it 'was a different matter, how far the aborigines might hold allegiance to the Queen, but so long as the aboriginal was protected by the law, he was also to be held amenable to the law'.[47] He did not explain why he drew this distinction, but he may have been thinking of cases *inter se*. Justice Barry made this point expressly:

41 *R v Peter, Argus*, 29 June 1860, 6.
42 *The Queen v Peter, Herald* (Melbourne), 29 June 1860, 6.
43 Ibid.
44 Blackstone, above n 36, 108. Blackstone allowed one exception: those laws 'against the law of God, as in the case of an infidel country'.
45 5 *Australian Dictionary of Biography* 264.
46 *The Queen v Peter, Herald* (Melbourne), 29 June 1860, 6.
47 Ibid.

> If there were any grounds for doubt as to the jurisdiction of the Court in cases where aborigines inflicted injuries on others, or the right of aborigines to have those cases tried amongst themselves, it would be straining amenity to an unreasonable extent to say that they might commit attacks upon other portions of the population without being answerable to the Court.[48]

It was a point that would come to be decided in the near future.

Peter's conviction was upheld, but he was not executed. The Executive Council commuted the sentence to imprisonment with hard labour, the first three years in irons.[49] As Peter was going to Pentridge, Thomas gave him advice on how to conduct himself in prison: 'Peter takes my advice (but is crafty)' reflected Thomas.[50] Peter survived ten years , the first five months in irons and the rest in trouble regularly for smoking, disobedience, and other minor offences. After ten years he received a ticket-of-leave and disappeared from official surveillance, remaining 'illegally at large'. There is some evidence that Peter returned to his country.[51]

Some months after Peter's conviction, Thomas recorded that he had had an quite startling discussion with Dr Mackay, who told Thomas

> that Judge Pohlman tells him [Mackay] that the London Law Times had a note of Peters trial Feby last – says Dr Mackay is right & Court wrong – Dr

48 Ibid.

49 Minutes of the Executive Council, 9 July 1860 (VPRS 1080, unit 6).

50 Thomas, 'Journal', 21 July 1860 in Thomas Papers ML MSS 214/5.

51 Prison Register – Males, No 5160 VPRS 515, unit 8. One oblique annotation suggests that Peter had returned to Bacchus Marsh, rather than reporting to the Mornington Police station as he was meant to. Peter's disappearance is noted on the Prison Register, and also in the *Police Gazette*, 11 July 1871. He had held his ticket of leave for less than five months before disappearing.

> Mackay says, he is going to present memorial to ... [the] *Privy Council*.[52]

As far as I am aware, no appeal was ever made to the Privy Council, but the reference remains intriguing.[53] Thomas's notes do not make it clear *who* thought that the court was wrong. The only reference I was able to find in the *Law Times* is a reprint of an article from the *Argus* that shows no preference for Mackay's argument.[54] Could it be Pohlman – the trial judge in Peter's case – who thought that *Peter* was wrongly decided? When Mackay raised the point at the trial, Pohlman had 'suggested that ample time should be taken for consideration of the matter'.[55] If he did think *Peter* was wrongly decided, he kept his opinion to himself in *Jemmy* when Pohlman was, himself, on the Full Court.

R v JEMMY

Just one month after Peter's case was heard by the Full Court, Jemmy (or Jimmy) was tried in the Castlemaine Circuit Court for the murder of his Aboriginal wife, Betsy. Counsel for Jemmy (Mr Leech, acting at the instance of the Crown[56]) objected to the jurisdiction of the court because it was a crime *inter se*. Reserving the point for the Full Court, the trial went ahead, with the only eyewitness evidence coming from Buckley, an Aboriginal witness 'in full European costume'.[57] Buckley was drinking with Jemmy and Betsy – they drank three bottles of gin between them, with Betsy drinking from a glass – when Jemmy suddenly picked up a

52 'Aborigines Cases 1860', 7 October 1860, in Thomas Papers ML MSS 214/5, frame 102.

53 There is no mention of the case in the Appeals from Supreme Court to the High Court of Australia [and Privy Council] Register, 1854–1957 VPRS 5510.

54 *Law Times* (London), 21 April 1860, 69.

55 *Herald* (Melbourne), 17 February 1860, 7.

56 Annotation on 'R v Jemmy an Aboriginal' VPRS 30, unit 135, item 3-335-7.

57 *Mount Alexander Mail* (Castlemaine), 1 August 1860, 2.

stick and struck his wife.[58] Buckley told him 'not to beat Betsy', and attacked Jemmy himself, but Jemmy continued to strike Betsy with a stick 'as thick and long' as a man's arm.[59] Betsy died the next morning.[60] At the trial, Jemmy was found guilty of manslaughter and sentenced to a single year's imprisonment, subject to the decision of the Full Court on the issue of jurisdiction.[61]

Jemmy was represented in front of the Full Court by Travers Adamson, a one-time Crown Prosecutor, editor of the *Acts and Ordinances in Force in Victoria* and an 'able criminal lawyer'.[62] Adamson immediately distinguished Jemmy's case from Peter's on the basis that Jemmy had killed another Aboriginal. Adamson argued that, while a sovereign *could* impose new laws on 'territory held by conquest or occupation', in the case of Victoria the Crown had tacitly allowed pre-existing laws to survive 'in their operation to the race which before was subject to them'.[63] For an example of another jurisdiction where customary law had survived alongside English common law, he followed Mackay and cited the survival of Brehon law in Ireland under the English Crown. Adamson also cited the survival of Indian law in the United States, referring to the famous Cherokee cases.[64] Adamson also referred to Chancellor

58 Ibid. Buckley's evidence at the committal was the same, and is recorded in 'R v Jemmy an Aboriginal' VPRS 30, unit 135, item 3-335-7.

59 Buckley's evidence in 'R v Jemmy an Aboriginal' VPRS 30, unit 135, item 3-335-7, where it is more lucidly reported than at the trial (*Mount Alexander Mail* (Castlemaine), 1 August 1860, 2).

60 Inquest held upon the body of Betsy an Aboriginal VPRS 24, unit 90, item 1860/38 female.

61 *Argus* (Melbourne), 2 August 1860, 5

62 Forde, above n 8, 115; 3 *Australian Dictionary of Biography* 18.

63 *R v Jemmy Argus* (Melbourne) 7 September 1860, 6 (transcribed in the Appendix). The case is also reported in the *Herald* (Melbourne), 7 September 1860, 6, but neither the arguments of counsel nor the decision of the court are reported at any length.

64 *Cherokee Nation v Georgia* (1831) 5 Peters 1 and *Worcester v Georgia* (1832) 6 Peters 515. The *Age* (Melbourne), 7 September 1860, 6 notes that *Johnson v Mackintosh* (1823) 8 Wheatley/Wheaton 543 was also cited. See generally, Sidney L Harring, *Crow Dog's Case: American*

Kent's commentary on these, and other American cases. Summarising the relevant principles, Kent had written:

> [T]he several local governments ... never regarded the Indian nations within their territorial domains as subjects, or members of the body politic, and amenable individually to their jurisdiction. They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government, and while residing within their own territories, owing no allegiance to the municipal laws of the whites.[65]

Adamson concluded that the onus lay on the Crown to demonstrate that Jemmy's immunity from English jurisdiction had been removed, and that it had not done so. In argument, Adamson was apparently asked by the Bench whether the Aborigines had ever 'disavowed their subjection to the British'? Adamson replied, somewhat offhandedly, that it had been 'confined to stealing sheep, and spearing a few of the owners'.[66]

Following Adamson before the Full Court was Dr Sewell, *amicus curiae*. Sewell was an eminent Victorian Barrister who retired from reading law at the University of Melbourne after students complained that he kept missing lectures.[67] He argued a similar case to Adamson's 'from the analogy of such cases as the Normans who subsided under the Anglo-Saxon law'. Prior to emigrating to

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Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century (1994).

65 James Kent, *Commentaries on American Law* (7th ed, 1851) 467.

66 *R v Jemmy Age,* 7 September 1860, 6. The *Age* report of the case gives the general impression that the Court did not take Adamson's argument very seriously, although this is the only major point of difference with the *Argus* report.

67 Ruth Campbell, *A History of the Melbourne Law School, 1857 to 1973* (1973) 6. See also 17 *Dictionary of National Biography* 1226.

Victoria, Sewell had edited the *Gesta Stephani*, a medieval chronicle, for the English Historical Society. While this particular publication gives little indication about the direction of Sewell's argument, it is clear that he knew the period well.[68] Sewell knew what his fellow Barristers were saying about customary Aboriginal law too. Sewell had argued two months earlier in defence of Governor and Billy in the Supreme Court in Geelong (before Justice Pohlman) that both accused and the victim were members of

> a certain independent Tribe of Aboriginal Natives of the Colony and subject to the said tribe – and that they never were naturalized by the laws of nor were they subjects of England nor did they in any way owe allegiance to her Majesty the Queen of Victoria.[69]

Sewell managed to have this point reserved for the consideration of the Full Court, and argued it in Jemmy's case, presumably, as a way of having the two cases heard together.

Sewell was not the only Member of the Bar to follow Mackay's lead in *Peter*. Defending 'Campbell', an Aborigine accused of murdering his wife, Mary Ann, one week after Billy and Governor's case, Lyttleton Bayley, who had previously been Attorney-General of New South Wales[70]

> said that it was still an undecided question whether the Supreme Court had jurisdiction in crimes committed by the aborigines *inter se*. He did not

68 Ricardus Clarke Sewell, *Gesta Stephani Regis Anglorum, Et Dueis Normannorum* (1846).

69 Although the plea has not survived in full, it appears to be very similar to the one drawn by Mackay in Peter's case. 'Aborigines Cases 1860' in Thomas Papers ML MSS 214/5, frame 121. Unfortunately, Thomas's transcription of Sewell's plea is not completely extant. Sewell's reservation of the question relating to jurisdiction is referred to in the report of the case in the *Geelong Advertiser* (Geelong), 12 July 1860, 2. The newspaper report does not detail the substance of Sewell's plea.

70 Forde, above n 8, 166, 242–3.

> believe they were responsible to laws, in the making of which they were not allowed to take part; the blacks had laws and customs of their own, and though they beat their wives in the most brutal manner, it did not appear that they were subject under those customs to any punishment, and if death resulted from such brutal excess, it did not appear clear that our laws should be brought into force against them. The blacks were people of no minds [*sic*],[71] they lived in a state of perfect independence, and, however they may act among themselves, it would be necessary for the Crown Prosecutor to prove the jurisdiction of the Court.[72]

Interestingly, this analysis was made in Bayley's closing remarks to the jury, as he attempted to persuade them of the injustice of returning a guilty verdict on the basis of lack of jurisdiction, rather than waiting for the Full Court to decide the issue. Bayley continued his analysis as follows:

> If a murder had taken place among blacks hundreds of miles from the habitations of civilized people, would the guilty party, to whom both the English tongue and the English laws were unknown, be amenable to those laws? [A]nd if not, there was no more reason why a black who was as ignorant as if he had had no communication with the whites, and by whom the English laws were not understood, should be tried under them for an act committed among their own people, who were governed by their own customs.[73]

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71 This should probably read 'a people of nomads'. It is not the only mistake; the reporter refers to the legal textbook called 'Archibold Reading', when 'Archbold's Pleadings' was what was meant.

72 *Times* (Ballarat), 19 July 1860, 3.

73 Ibid.

Campbell was found not guilty, so the argument about jurisdiction became irrelevant. We will never know whether the jury took Bayley's hints about the lack of jurisdiction into consideration. But his arguments demonstrate the ways that a colonial barrister conceptualised the issue of jurisdiction in cases concerning Aborigines.

As these examples show, the arguments made by counsel for the survival of Aboriginal customary law ranged from sophisticated legal analysis of precedent to off-the-cuff oration based on beliefs about the customs of the uncivilised. Before discussing the outcome of Jemmy's case, it is worthwhile examining the context of ideas about Aboriginal law in which the decision was made. William Thomas clearly thought that the problem of crimes *inter se* was an important one and that the solution was some form of legal pluralism. After a series of *inter se* killings in 1852 led to a review of the law, Thomas objected that executing Aborigines for such crimes meant 'arrogating the most intrusive and arbitrary power'. He argued that executing Aborigines for crimes committed while enforcing Aboriginal law was the equivalent 'virtually no less than hanging the Judge – at all events the sheriff' in the English system. Thomas warned that any such executions could turn the condemned into martyrs to their tribes.[74]

Thomas had long been of the opinion that Aborigines should not be tried for cases committed *inter se*. In 1839 – three years after *Murrell* – Thomas had asked Attorney-General Plunkett for an opinion on the amenability of Aborigines to English law in cases of homicide *inter se*. Plunkett had replied that they were not subject to English law.[75] Judge Willis's famous judgement in *Bonjon* came to

74 Thomas to Colonial Secretary, 13 September 1852 in Colonial Secretary's Office, Inward Registered Correspondence, VPRS 1189, unit 20, item 52/3540.

75 This is Thomas's account of the advice in Thomas to the President of Land and Works 30 October 1858 in 'The Aborigines. Correspondence on the Subject of Crimes Committed by the Natives Inter Se, with an Opinion of the Attorney General' in Victoria, *Votes and Proceedings of the Legislative Council*, Session 1858-9, A5. I have not been able to

effectively the same decision, although, since the charges were withdrawn, the case did not have to be finally decided.[76] In 1852 Thomas had received an opinion from the law officers – including Sir William Stawell – that homicides carried out in obedience to 'laws and customs known only to the natives themselves ... could not be dealt with by our laws'.[77] (Thomas overlooked the fact that both Stawell and Croke thought it *desirable* that Aborigines be subject to White law. They argued that, since Aboriginal evidence was inadmissible, and convictions unlikely to have any impact on Aboriginal behaviour, trying Aborigines would be of little use.[78]) At least one magistrate acknowledged in 1858 that Aborigines had 'never been amenable to the law for such [*inter se*] offences during the last seven years.'[79] The same year, Thomas had obtained an opinion from the Attorney-General, H S Chapman, to the effect that homicides *inter se* were *not* subject to English law

> so far as the native tribes living together and wholly apart from Europeans are concerned. So long as they continue in their original condition, possibly having usages of their own sanctioning such homicides, they are not amenable to our laws; but where any of the Aborigines have abandoned their tribes, and are living among the European population under the protection of our laws, they are also subject to those

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locate a copy of this advice. If Thomas's account of the advice is correct, then this is further evidence that the reported version of this decision did not reflect the decision of the court: see also Reynolds, above n 6, 63.

76 *Port Phillip Patriot*, 20 September 1841.

77 Thomas to the President of Land and Works 30 October 1858 in 'The Aborigines. Correspondence on the Subject of Crimes Committed by the Natives Inter Se, with an Opinion of the Attorney General' in Victoria, *Votes and Proceedings of the Legislative Council*, Session 1858-9, A5.

78 Stawell and Croke to Colonial Secretary 10 October 1852 in VPRS 1189, unit 20, item 52/3999.

79 Report of the Select Committee of the Legislative Council on the Aborigines, in Victoria, *Votes and Proceedings of the Legislative Council*, Session 1858-9, D8 36.

> laws, and consequently to the jurisdiction of our tribunals.[80]

Chapman was, nevertheless, keen to have the point clarified by the Full Court. The principle that homicides committed in the performance of customary law were not amenable to English law was a weakening of the more general principle relating to *inter se* cases, but it did acknowledge the survival of customary law.

Thomas suggested to members of the 1858 Select Committee on the Aborigines that they take up the issue of Aboriginal crimes committed *inter se*.[81] The Committee declined to follow Thomas's advice, but the letter they sent seeking information on the Aborigines did include a series of questions on 'Government and Laws'. The 'circular letter' the Committee sent included questions on the style of Aboriginal government, the kinds of laws they had, how they were made, observed and enforced, how their judiciary was constituted and how punishments were carried out. The answers received by the Committee were varied in the extreme. Mr Shuter at Bacchus Marsh (who, incidentally, had convicted Peter on more than one occasion[82]) replied that these questions were irrelevant; while William Thomas gave careful answers to each one. The Select Committee also asked a very curious question in the section on 'Social Relations': 'What kind of relationship, by written treaty or otherwise, subsists between the nation and other nations, civilized or not?' Thomas answered that there was a kind of 'confederacy', constituted mainly through intermarriage, between the five tribes nearest to Melbourne. While the significance of the use of the word 'nation' to describe Aboriginal groups is unclear, the questions asked by the Committee do suggest that they

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80 Opinion of H S Chapman 8 November 1858 in 'The Aborigines. Correspondence on the Subject of Crimes Committed by the Natives Inter Se, with an Opinion of the Attorney General', in Victoria, *Votes and Proceedings of the Legislative Council*, Session 1858-9, A5.

81 'Report of the Select Committee of the Legislative Council on the Aborigines' in Victoria, *Votes and Proceedings of the Legislative Council*, Session 1858-9, D8, 2-3 and 100.

82 Prison Register , Males, No 3035 VPRS 515, unit 5.

considered the legal and political organisation of Aborigines was relevant to their inquiry.

As these examples show, politicians, barristers, magistrates, law officers and Attorneys-General all had doubts about the extent to which Anglo-Australian law could, or should, be enforced against Aborigines. The arguments presented to the Full Court in Jemmy's case, learned and based on a long understanding of the law relating to crimes *inter se* though they were, were to no avail. As in *Peter*, the counsel for the crown was not called upon to address the Court. Chief Justice Stawell re-affirmed *Peter* and asserted that the jurisdiction of the Supreme Court ran throughout the Colony, regardless of the race of the victim. He then added an interesting qualification: 'It is not intended to decide that in no case might there be a concession to a subject race of immunity from the laws of the conquerors living among them.' What 'concessions' there might be he did not say.

The only other Judge hearing *Jemmy* whose comments were reported was Barry. He rejected the argument that Aborigines could be considered a dependent domestic nation in the terms suggested by American law:

> as the aboriginals had never been recognized as a separate nation here, but on the contrary, in respect to the celebrated Batman contract, the Crown had distinctly refused to recognize it.[83]

But, as Barry realised, this was not the only basis for the argument. 'This is virtually a plea to the jurisdiction', declared Barry, who pointed out that it had not been suggested 'what other jurisdiction could be named, so as to "give a better writ"'. To understand Barry's position, we need to re-visit *Bonjon*, where Barry had been counsel 19 years before. The case of Bonjon, an Aborigine accused of murdering Yammowing, another Aborigine in 1841, is well

83 *R v Jemmy*, *Age*, 7 September 1860, 6.

known.[84] Addressing the issue of jurisdiction, Barry argued that the occupancy of Port Phillip by the colonisers could:

> confer no authority whatsoever over the aboriginal inhabitants as subjects, unless there be some treaty or compact, or public demonstration of some kind on the part of the natives, by which they testify their desire to come beneath the yoke of the law.

Barry then went further. He could prove, he said, that the Aborigines had a jurisdiction of their own in which they took notice of acts of violence by members of one tribe against another. The Native Protectors could prove, claimed Barry, that 'amongst them do exist final and determined regulations for the maintenance of their civil polity'. It was irrelevant that the *content* of their laws differed from those of the English, and he went on to cite examples from Exodus, and from German, Irish and Saxon legal history where the penalty for murder was not death.

Barry then turned to refute the argument that two separate jurisdictions could not co-exist in the same place. He cited *Mostyn v Fabrigas*, in which the accused was said to be entitled to choose between Spanish and English law,[85] and cited the existence of Brehon law in Ireland, French law in Canada, Dutch law at the Cape of Good Hope, and (referring expressly to Willis's own experience) Danish civil law in British Guiana. The two laws – British and Aboriginal – could, Barry said, both exist in the one place.

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84 All quotations from *Port Phillip Patriot*, 20 September 1841. I have preferred the spelling of Aboriginal names of this account too. See also: *Port Phillip Gazette*, 18 September 1841 (Bon John). *Bonjon* is discussed in John Hookey, 'Settlement and Sovereignty', in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (1984) 1–18 and most works on Aborigines and colonial legal order. For a historical discussion, see Susanne Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip' (1987) 88 *Historical Studies* 313.

85 *Mostyn v Fabrigas* (1774) 1 Cowp 161; 98 ER 1021. Spanish law had, in this case, been secured for the Minorquians by treaty.

Following Willis's famous oration on the case, it was adjourned to the following day. In a stroke of luck for Barry, 'a most singular coincidence' occurred. Willis announced that he had been informed by Robinson, the Chief Protector of the Aborigines, that two days before Bonjon's trial had begun, a trial for murder had taken place within Melbourne's Aboriginal community. 'The criminals', said Willis, 'stood a certain distance from the relatives of the deceased, who threw a certain number of spears at them.' Chief Protector Robinson and Assistant-Protector Thomas were both present. Thomas then gave a description of Aboriginal justice in the case of homicide and concluded: 'The natives have a complete system of government among themselves, and have various punishments for almost every species of crime they commit.' This was exactly what Barry had argued. Just as he had said, the Protectors could prove the existence of law among the Aborigines. Returning to *Jemmy*, this must surely be the evidence that Barry was looking for when he criticised Counsel for not showing what other jurisdiction could be named. And this suggests that Barry still adhered to the argument he had made as Counsel all those years ago.[86] If this interpretation of Barry's judgement in Jemmy is corrct, then each of the Judges on the Court appear to have had reservations about the complete extinction of Aboriginal customary law.[87] How did this uncertainty get lost, and what has been the significance of this loss?

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86 Barry's decision in *In re Neddy Monkey* (1861) 1 Wyatt & Webb Reps (L) 40, 41 that 'The Court cannot take judicial notice of the religious ceremonies and rites of these people, and cannot, without evidence of their marriage ceremonies, assume the fact of marriage' turns on the need for *evidence* of marriage rites and their significance in Aboriginal society, not on their inadmissibility. It is completely consistent with the argument being made here. For a general discussion of Barry's work as standing counsel for the Aborigines, see Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (1995) 52–7, and 152–6 for his continued interest in Aboriginal culture.

87 I have not been able to locate a report of Mr Justice Pohlman's decision in this case, but his comments to Dr Mackay, quoted earlier, and his role as trial Judge in sending the issue of jurisdiction to the Full Court twice suggests that he was not convinced that Aboriginal customary law had been extinguished. As trial judge in *Peter*, Pohlman had 'suggested that

MURRELL AND THE MAKING OF LEGAL MEMORY

In *Peter* and *Jemmy* the Victorian Supreme Court announced its own doctrine concerning Aboriginal customary criminal law. This doctrine may not have been vastly different from *Murrell*, but, unlike *Murrell*, *Jemmy* left the door open for future reconsideration of customary law.[88] Why has *Jemmy* been forgotten, and what is the significance of this lapse of legal memory? The question is made all the more puzzling because *Peter* and *Jemmy* were both noted in the *Australian Digest*, immediately following *Murrell*. Although these cases were not digested under the title 'Aborigines' until the second edition in 1967, they had appeared together in a division of the title 'Criminal Law' in the first edition in 1936.[89] Interestingly, *Jemmy* was digested without the qualifications I have stressed in this paper. Since *Jemmy* was never reprinted in a series of law reports it appears that few, if any, lawyers have ever bothered to check the original report, and the qualifications have been ignored. *Murrell*, by contrast, was reprinted from the *Sydney Gazette* in Legge's *Reports* in 1896 and has enjoyed the status of being a settled decision ever since.

Murrell was certainly not given the prominence in Victoria that it has subsequently acquired. No one referred to it in either *Peter* or *Jemmy*. In the absence of disciplinary tools – digests and law reports – memory was one means for recalling similar cases. Not surprisingly, this use of memory favoured cases that were either local or recent. The absence of the tools of legal memory was also

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ample time should be taken for consideration of the matter': *Herald*, 17 February 1860, 7). He also adjudicated over the trial of Governor and Billy: *Geelong Advertiser*, 12 July 1860, 2.

88 Bruce Kercher, 'Subjects or Aliens? The Legal Position of Aborigines in the New South Wales Supreme Court, 1824–1836', unpublished paper, Law and History Conference, Melbourne, 1998 has argued that *Legge's* published report of *Murrell* does not accurately report the decision of the court, let alone the tenor of other contemporary unreported cases on the subject.

89 1 *Australian Digest*, 'Aborigines' [3] (2nd ed, 1963); 5 *Australian Digest*, 'Criminal Law' [33] (1st ed, 1936).

conducive to creative and variant legal opinions.[90] *Jemmy* is just one example. *Bonjon* was argued at greater length, and perhaps with greater insight, than any of the cases on Aboriginal customary law since. But, because the decision in *Bonjon* contradicted *Murrell*, it had been regarded as merely one of the 'curiosities of Australian history'.[91] Legal memory is made in Law Reports, not in newspapers. The ways that *Bonjon*, *Jemmy* and *Peter* were argued suggest that the canonical status of law reports is a relatively new phenomenon.

The importance of forgetting *Jemmy* and *Bonjon*, is that the illusion is created that there was judicial unanimity about the extinction of Aboriginal customary criminial law. Clearly, this was not the case. Nor was Victoria the only place where doubts survived about the extinguishment of Aboriginal sovereignty.[92] *Murrell* was not the end of discussion over Aboriginal customary law – it was soon forgotten – and nor did it represent legal consensus on the issue. The other consequence of forgetting *Jemmy* is that Aboriginal legal practice has been all but erased from Anglo-Australian legal memory. I will not vouch for the value of the accounts of Aboriginal law given in the colonial courts as ethnography, but they do show early colonial lawyers, Judges and Aboriginal Protectors attempting to come to grips with the content and practice of Aboriginal customary law. And when Barry was on the court that decided *Jemmy*, he had not forgotten. Aboriginal legal practice has been completely excluded from legal memory, although it is clear that it was present in the minds of colonial lawyers.[93]

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90 For a discussion of colonial legal creativity, see Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995).

91 *Milirrpum v Nabalco* (1971) 17 FLR 141, 262.

92 See the cases discussed in Reynolds, above n 6, ch 4. Alex Castles, *An Australian Legal History* (1982) ch 18 and S D Lendrum, 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26.

93 See the possibilities raised by Chips Mackinolty and Paddy Wainburranga, 'Too Many Captain Cooks' in Tony Swain and Deborah Bird Rose (eds), *Aboriginal Australians and Christian Missions: Ethnographic and Historical Studies* (1988) 355–60 and Deborah Bird Rose, 'The Saga of Captain Cook: Morality in Aboriginal and European

WHIGS, HUNTERS AND GATHERERS: COLONISATION AND THE RULE OF LAW

The fact that legal authority for the survival of Aboriginal customary criminal law survives only outside law reports is one reason why it has been forgotten. Another is the fear that the recognition of customary law would compromise the rule of law in Australia. This is a thread that we find running from *Murrell* in 1836 right through to *Walker* in 1994.[94] Using some of the observations made in the discussion of Aboriginal customary law in colonial Victoria and the debate over the rule of law in eighteenth-century England, I want to suggest a different way of approaching the rule of law.

In the famous concluding passages of *Whigs and Hunters*, E P Thompson argued that, despite the obvious influence of class in the legal system,

> the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is ... a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-

Law' (1984) 2 *Australian Aboriginal Studies* 24. For commentary, see Rosemary Hunter, 'Aboriginal Histories, Australian Histories, and the Law' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996) 1–16.

94 'If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe': *R v Jack Congo Murrell* (1836) 1 Legge 72, 73. 'It is a basic principle that all people should stand equal before the law': *Walker v New South Wales* (1994) 182 CLR 45, 49. And 'The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated': ibid 50.

> bound procedures, and to disarm ourselves before power.[95]

Despite claiming that the rule of law was an 'unqualified human good', Thompson had some reservations about how far he could push the idea out of the context of the eighteenth century, and even more reservations about how far it could be taken out of the British context. He wrote:

> In a context of gross class inequalities, the equity of the law must always be in some part sham. Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. For this law has found its way to a good many parts of the globe. But even here the rules and the rhetoric have imposed some inhibitions upon the imperial power.[96]

When Thompson examined how this worked in relation to the law of property in colonial contexts he saw how limited those inhibitions on power could be.[97] In relation to land law, Thompson stresses the ways in which the law functioned as a tool of colonisation, turning property rights into something that could be bought and sold by the colonisers. In relation to property, the law worked against indigenous property rights more often than it supported them.

But what of the criminal law? Australian critics have pointed out how the criminal law failed to protect Aboriginal people from violence, or even to avenge their deaths at the hands of colonists.[98]

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95 E P Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975) 266.

96 Ibid 266.

97 E P Thompson, *Customs in Common* (1993) 164–75.

98 Susanne Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip 1841–1851' (1987) 88 *Historical Studies* 313; David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) 78–80 and Kercher, above n 90, ch 1.

This failure stemmed, at least in part, from the failure of the law to admit Aboriginal evidence, and so must be seen as a *part* of the colonial legal system. But perhaps the greatest failure was the failure to recognise Aboriginal customary law. By refusing to see Aboriginal law working in parallel with white law (at least officially), Australian Judges and politicians created a system of law that was simply imposed on Aboriginal people and which had little legitimacy to act for Aboriginal people.

For Thompson and others the question of whether law had any legitimacy among the poor has been a crucial one. The debate over just how broadly English society participated in the legal system, and to what extent belief in the rule of law can be implied from the utilisation of law, goes on.[99] Unlike the eighteenth-century poor who, in Thompson's account, argued for their rights as freeborn Englishmen and argued over the content of law, not the use of law *per se*, we have little evidence of what Aborigines thought of British justice. There are a number of examples of Aboriginal use of colonial legal structures in their own interests.[100] Peter certainly

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99 See especially the ongoing debate between Douglas Hay, 'Property, Authority and the Criminal Law', in Douglas Hay *et al* (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975) 17–63; Douglas Hay, 'The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century', in J S Cockburn and Thomas A Green (eds), *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (1988) 305–57 and Douglas Hay and Francis G Snyder, 'Using the Criminal Law, 1750–1850: Policing, Private Prosecution and the State', in Douglas Hay and Francis G Snyder (eds), *Policing and Prosecution in Britain 1750–1850* (1989) 3–52. Compare Peter King, 'Decision Makers and Decision Making in the English Criminal Law 1750–1800', (1984) 27 *Historical Journal* 25; King, 'Illiterate Plebeians, Easily Misled': Jury Composition, Experience, and Behavior in Essex, 1735–1815', in Cockburn and Green (eds), *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (1988) 254–304 and Peter King, 'Punishing Assault: The Transformation of Attitudes in the English Courts,' 27 (1996) *Journal of Interdisciplinary History* 43.

100 Barry Bridges, 'The Extension of English Law to the Aborigines for Offences Committed *Inter Se*, 1829–1842', (1973) 59 *Journal of the Royal Australian Historical Society* 264, 265, 267. There are some

had some understanding of the rituals of the criminal law, and also understood the distinction between the 'passing' of a sentence of death and the 'recording' of death. His knowledge of the law appears to have been exceptional. Other cases show that most Aborigines had little idea of how the courts worked. Wingmaman, for example, tried to defend himself when being committed by the magistrate, but his answers became increasingly confused and eventually he lapsed into silence.[101] But even if colonial law was made available to Aborigines, as the appointment of Counsel attempted to do, they still required a basic understanding of how the courts worked and what they could do in order to direct proceedings effectively. No matter how effectively the law was administered, legitimacy could never be acquired this way; colonial law would always remain a purely imposed law.

The arguments for the survival of Aboriginal customary law outlined in this paper show colonial lawyers and judges wrestling with the problem of the legitimate exercise of legal power over Aborigines. One argument that was made repeatedly was that the Aborigines to be tried in Victorian courts were already under a system of laws. This was the key to Barry's several opinions and it was the premise that led barristers to ask whether Aborigines

examples in Ian MacFarlane and Myrna Deverall, *'My heart is breaking': A Joint Guide to Records about Aboriginal People in the Public Record Office of Victoria and the Australian Archives, Victorian Regional Office* (1993) 103–4, 107; Bain Attwood, *The Making of the Aborigines* (1989) 109 and Kercher, above n 90, 3–4. Compare also David Philips, 'Sex, Race, Violence and the Criminal Law in Colonial Victoria: An Anatomy of a Rape Case in 1888' (1987) 52 *Labour History* 30 also (slightly modified) in David Philips and Susanne Davies (eds), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (1994) 97–122; Gary Highland, 'Aborigines, Europeans and the Criminal Law: Two Trials at the Northern Supreme Court, Townsville, April 1888' (1990) 14 *Aboriginal History* 182 and Highland, 'A Tangle of Paradoxes: Race, Justice and Criminal Law in North Queensland, 1882–1894' in David Philips and Susanne Davies (eds), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (1994) 123–140.

101 'Queen v Wingmerman [sic] an Aboriginal Native' VPRS 30, unit 88, item 3-51-7. For another example, see the *Ballarat Star*, 19 July 1860.

claiming to be under customary law continued to live a traditional life, or whether they lived within the white community. (Peter's case demonstrates the difficulties that this dichotomy creates.) Trying Aborigines who were subject to customary law in Victorian Courts created the risk of an Aborigine being tried twice for the same crime, and also interfered with an existing rule of law. As late as 1860, colonial lawyers sensed the existence of Aboriginal sovereignties. The best example of this is the reluctance to punish Aborigines whose actions in carrying out customary laws brought them before the Victorian courts; it was a reluctance based on the belief that the performance of customary law was in conformity to legitimate Aboriginal authority.

Another theme in the arguments of counsel was that Aborigines had not had any part in the making of white laws, and that they should therefore not be subject to them. Taken to its logical conclusion, this was an argument for a universal suffrage, but it seems unlikely that this is what was intended. It is more likely that counsel was thinking of the absence of Aborigines from the civic life of the White community, including participation in the courts. Magistrates' courts in the nineteenth century suggest were was still open to the community at large and were still relatively informal. Cases were brought by victims, who told their stories and argued for justice on their own terms.[102] Courts were places where one's sense of right could be asserted.

The importance of the courts and the rule of law in the absence of representative political institutions is one of the themes of David Neal's *The Rule of Law in a Penal Colony*.[103] Yet Neal emphasises the importance of what might broadly be called 'procedural fairness' as the key to the rule of law:

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102 See Jennifer Davis, 'A Poor Man's System of Justice: The London Police Courts in the Second Half of the 19th Century' (1984) 27 *Historical Journal* 309 and Paula Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (1993).

103 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) esp ch 3.

> the rule of law has at least three elements: general rules laid down in advance, rational argument from those principles to particular cases, and, at least in a developed form, a legal system independent of the executive for adjudication of disputes involving the general rules.[104]

Both magistrates' justice and, I suspect, Aboriginal customary law, will have trouble meeting these standards. Are we to believe that the rule of law existed only in the superior courts? Without denying the importance of this version of the rule of law, there is, I suggest, another sense in which the rule of law implies both access to and participation in the law. This conception of the rule of law invokes the requirement of popular legitimacy, which can only come from participation. The refusal of colonial courts to recognise its legitimacy of Aboriginal customary law, despite its differences to White law in both content and procedure, meant that Aborigines were forced into a system in which few could participate meaningfully. The injustice that this created was recognised in colonial Victoria, in part by the provision of standing counsel, William Thomas's frequent minutes to government and by the assertions of counsel representing Aborigines. The solution, being discussed seriously as late as 1860, was to recognise Aboriginal customary law as a part of the common law.

CONCLUSION

> Away then with the babblings of ignorance and hypocrisy, and let reason and truth alone prevail.[105]

The subjection of Aboriginal people to English law was thrown into question for a few months after Peter's trial while the limits of the law were renegotiated. Accepting limitations to legal power is

104 Ibid 67.

105 Mr Justice Willis, 'Address to the Jury in the case of Bob and Jack, 20 December 1841' 8 *British Parliamentary Papers, Colonies Australia* 198, 201

fundamental to the rule of law. Mr Justice Willis expressed this idea elegantly in *Bonjon*:

> I believe it to be the duty of a judge fearlessly and honestly, yet with all due care and circumspection, to extend to its utmost verge his judicial authority when occasion shall require; but I believe it equally to be his duty to abstain from its exercise when any reasonable doubt can be entertained of his jurisdiction. The fair and lovely face of justice, if urged beyond her legal boundary, assumes the loathsome and distorted features of tyranny and guilt.[106]

The failure to observe limits to the jurisdiction of Anglo-Australian criminal law has distorted the rule of law in Australia. Colonisation placed the law in a situation of unique inequity. Not only were indigenous peoples unable to participate fully in Anglo-Australian law, their own systems of law were generally not recognised as having any legitimacy by the colonisers.

One of the results of *Peter*, and Thomas's repeated requests for the appointment of Counsel in particular cases, was the restoration of legal representation to Aborigines, administered through the new Central Board for Aborigines.[107] The impact of this new policy on the trials of Aboriginal people is yet to be investigated: only two more cases concerning Aborigines were reported in Victorian Law Reports to the end of the nineteenth century, but the real impact is

106 *Port Phillip Patriot*, 20 September 1841.

107 Central Board Appointed to Watch Over the Interests of Aborigines, Minutes, 7 June 1860 to 29 July 1861, Australian Archives B314X2, item 1; Central Board Appointed to Watch Over the Interests of Aborigines Rough Draft of Minutes, 7 June 1860 to 13 May 1861, Australian Archives B335, item 1 and *First Report of the Central Board Appointed to Watch Over the Interests of Aborigines in the Colony of Victoria* (1861) 7, Victoria, *Votes and Proceedings of the Legislative Council* (1861–2) vol 3, no 39.

likely to have been at trial rather than in superior courts.[108] But as Attwood and McGrath have shown, it was from the 1860s that the missions began to subject Aboriginal people to new forms of surveillance and control, which were more intrusive than formal legal controls.[109] The establishment of the Central Board for Aborigines in 1860 helped create formal legal equality, at least within the arena of imposed white law, while at the same time constructing a social system that undermined it. Whether a colonial interest in applying English law to Aboriginal social life also increased after 1860 awaits further investigation. If it did, then Peter's request for counsel may have had the opposite effect than the one he, and those representing him, intended.

In recent native title cases, the High Court has incorporated a new understanding of Australian history into the common law.[110] What I am suggesting is something slightly different. I have argued in this paper that the inclusion of *Murrell* in the canon of Australian law to the exclusion of other cases, particularly *Jemmy* and *Bonjon* (a case which had an influence on *Jemmy* through Mr Justice Barry), has resulted from the way in which each was published, not the authority they held at the time they were decided or their inherent persuasiveness. As Henry Reynolds has shown, the view of native

108 John McCorquodale, *Aborigines and the Law: A Digest* (1987) 225. Roger Douglas and Kathy Laster, 'A Matter of Life and Death: The Decision to Execute in Victoria, 1842–1967' (1991) 24 *Australian and New Zealand Journal of Criminology* 144 found few differences between the outcomes of cases involving Aborigines and those involving non-Aborigines, and this may be a sign of the effectiveness of the provision of legal representation.

109 Attwood, 'The Making of the Aborigines' and Ann McGrath, 'Colonialism, Crime and Civilisation' (1993) 12 *Australian Cultural History* 100 and Ann McGrath, 'A National Story' in Ann McGrath (ed), *Contested Ground: Australian Aborigines under the British Crown* (1995) 27–40. See also Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994) ch 6; M F Christie, *Aborigines in Colonial Victoria 1835–86* (1979) ch 7, and Peggy Brock, 'Protecting Colonial Interests: Aborigines and Criminal Justice,' (1997) 53 *Journal of Australian Studies* 120.

110 Lee Godden, 'Wik: Legal Memory and History' (1997) 6 *Griffith Law Review* 122.

title taken by the High Court in *Mabo* represents a partial remembering of views from the 1830s and 1840s.[111] It is time to remember *Jemmy*, and the doubts over exclusive English sovereignty from whence it came. While this will not be a complete answer to Mason's assertion that 'English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it', such remembering shows that the question cannot be answered easily.[112] A significant body of colonial legal opinion, and the implications of *dicta* in *Jemmy* left Aboriginal people to their own justice in cases between themselves. Far from fracturing the skeleton of Australian law, a timely recollection of the legal history of customary law can promote the rule of law in Australia. To impose a rule on others who were already ruling themselves was no application of the rule of law. Plurality of laws need not be the end of 'fair and lovely face of justice'; rather, they can be its fulfilment.

APPENDIX

The Queen v Peter, An Aboriginal, Herald, 29 June 1860, 6[113]

Dr Mackay, who appeared for the convict, stated that this case came before the Court on a special plea questioning the jurisdiction of the Court to try a native aboriginal of the colony. Peter was convicted at the February Criminal Sessions, of violating a girl under ten years of age. The objection to the jurisdiction of the Court was raised at the trial, and was reserved for the full Court; but it had been considered preferable to try the question by a special case, proceeding on a plea that the Court had no jurisdiction because the convict was a native aboriginal of New Holland, and was born out of the allegiance of the Queen, that he belonged to the separate and independent tribe of Ballan, that he never acknowledged the allegiance of the Queen, that the tribe had its own laws and

111 Henry Reynolds, *The Law of the Land* (1987).

112 *Walker v New South Wales* (1994) 182 CLR 45, 50.

113 Dr Mackay's argument is reported in the *Herald* as one continuous paragraph. Emphasis has been added to the names of cases for clarity.

customs, and had a law for the punishment of such a crime as he was convicted of.

The learned gentleman then observed that the question had previously been raised in the case of *Wingleman*,[114] a native, who was tried for the murder of another native, and the case of *Tar Bobby*[115] for the murder of a white man. As both of these cases broke down, the question did not come to be tried.

The plea here was the same as in the case of the *Queen v Kinloch*, reported in 4 Chitty's Criminal Law, 505, and 2 Starkey's Criminal Pleas, 790, and Foster's Criminal Pleas, 15.[116] Charles Alexander Kinloch, of Kinloch, Scotland, was out in the rebellion of 1745. He was tried for high treason before the King's Bench under a special Act of Parliament, for the trial in England of the adherents of the Pretender. The Court held that the birth, residence, and apprehension of Kinloch in Scotland were immaterial, as the case was not one of common law, but of high treason. The plea was consequently over-ruled. But there was this difference between the present case and that of *Kinloch*, namely, that Kinloch was always a subject of George the Second, was born in allegiance to him, and was born in a portion of the kingdom that owed allegiance to the King. The form of the plea was not however affected.

There were only three ways by which a nation could acquire jurisdiction over foreigners, especially savages, and these were by purchase, conquest and discovery. As regarded the jurisdiction of England, the case of the aborigines of Australia was analogous to

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114 Reported as *R v Wingmaman, Portland Guardian*, 26 April 1858, 2. Mr Justice Barry directed an acquittal because there was insufficient evidence. Mackay, who entered the court just as the prosecution of Wingmaman began, agreed to Barry's request that someone defend the prisoner Mackay's submission on the jurisdiction of the court was not referred to in the *Portland Guardian* report of the case.

115 *R v Tarra Bobby and Billy Logan*, *Argus*, 20 November 1858, 6 was dismissed because Aboriginal witnesses vital to the prosecution's case could not be located.

116 *The Case of Alexander Kinloch and Charles Kinloch* (1746) Fost 16; 168 ER 9.

those of the red men of North America before there was any treaty for the cessation [sic] of land. In 3 Kent's Commentaries, 461, it was set forth that the authority of Europeans was that of discoverers of an uncivilised country, and was good only against other Europeans who might follow, but gave no authority over the aborigines. In *Johnson and Mackintosh*, 8 Wheatley [sic],[117] it was stated that the English courts had no authority to deal with the Indians independent of treaty, compact, or purchase.

Now in this case there was no arrangement between the Government and the natives. Here there was no conquest, treaty, compact, or purchase, but there was discovery; and the presence of the English here was by a kind of intrusion. Wherever Britons went they carried with them British law as regarded themselves, but not as regarded the natives of the country they inhabited, unless there had been purchase or conquest. If Peter had gone on board an English ship, or had emigrated to England, and committed the offence there, he would have been amenable to English laws, but here it was the reverse – the English having come to the country of which the convict was a native.

The learned gentleman then alluded to the case of *Lopez*,[118] a Portuguese seaman on board a British vessel, to show that it was not competent for the native of a country to divest himself of his allegiance; and the case of the *King v De Parade*, reported in Taunton 27.[119]

He also pointed out, that so late as the time of William III, the King's writ would not run across the Shannon, and the inhabitants of Ireland beyond that river remained unconquered. Only three of the provinces of Ireland were conquered, and in them the Brehon laws remained in force until the people their own act, by a meeting

117 *Johnson v McIntosh* (1823) 8 Wheaton 543.

118 *Lopez v Burslem* (1843) 4 Moore PC 300.

119 *R v Antonio Depardo* (1807) 1 Taunt 26; 127 ER 739 where a Spanish prisoner of war had been tried in the Old Bailey for a murder committed while he was a volunteer on an East India ship in China. Although no judgement was given in the case, Depardo was released.

at Lismore, abrogated the Brehon laws, and placed themselves under the English laws.

It might be contended, he said, that if the plea were sustained great inconvenience would be occasioned, as it would recognise the existence of a people in our midst who could assert their independence of our laws; but that he maintained could be remedied by the passing of an act giving Their Honours the power they did not now possess.

The Solicitor-General was about the reply, but was informed by the Court that it was unnecessary for him to do so.

The Chief Justice held that Britain had become possessed of this country; and though by a process that scarcely deserved the name of conquest, yet this colony of Victoria was as much subject to the laws of England as any other portion of the British possessions, or England itself. To admit that the Court had no jurisdiction over an aboriginal native because he belonged to an independent tribe, would be to admit that there were two sets of independent powers in the colony in opposition to each other, and that British judges were to be restricted by the alleged laws of the native tribes. There could not be an *imperium in imperio*. One of the parties must be subject; and were the Court to admit the plea, they would be ignoring their position as British judges. He thought the case submitted to the Court must be answered in the affirmative, and that the aboriginal was properly tried in the Supreme Court of the colony.

Mr Justice Barry was of the same opinion. In this case the offence was committed on an Englishwoman, owing not local or partial, but full allegiance to Her Majesty. If there were any grounds for doubt as to the jurisdiction of the Court in cases where aborigines inflicted injuries on others, or the right of aborigines to have those cases tried amongst themselves, it would be straining amenity to an unreasonable extent to say that they might commit attacks upon other portions of the population without being answerable to the Court.

Mr Justice Molesworth considered that the possession of the colony by the British was by a sort of insinuation of themselves, and intimidation amounting almost to conquest, and it had been held that as soon as the Queen acquired possession of a country, all British subjects were to be protected according to British laws. He did not see why British subjects should not be protected against the aborigines, as well as against the French, the Americans, or the people of other nations in the colony. It was a different matter, how far the aborigines might hold allegiance to the Queen, but so long as the aboriginal was protected by the law, he was also to be held amenable to the law. When authority was assumed in America, criminal jurisdiction was maintained over the natives, for it was considered that possession was taken of the people as well as of the territory, and made them alike subject to their protection This principle was observed even in the case of the West India Islands, in which there were many African natives who had been brought there involuntarily as slaves.

The plea was accordingly over-ruled, and the case dismissed.

***The Queen v Peter*, *Argus*, 29 June 1860, 6**

[Before Chief Justice Sir William Stawell, Mr Justice Barry, and Mr Justice Molesworth]

This was a special case, reserved on the trial and conviction of Peter, a black fellow, at the Criminal Sittings. The prisoner was a half-caste native; but on the argument it was assumed that he was a pure Aboriginal of a still-existing tribe, having a local residence apart from the white inhabitants of the colony. The point was, whether Peter was amenable to British laws or amenable only to the assumed laws or customs and tribunals of his tribe.

DR MACKAY argued the case for the prisoner.

THE COURT did not call on the Solicitor-General for any reply; but held that the Queen's writ runs throughout this colony, and that

British law is binding on all peoples within it; and that the conviction was good.

***The Queen v Jemmy (One of the Aborigines)*, *Argus* 7 September 1860, 6**

[Before Chief Justice Sir William Stawell, Justice Sir Redmond Barry, and Mr Justice Pohlman]

This was a special case, reserved by Mr Justice Molesworth at the late Criminal Sittings of the Circuit Court at Castlemaine.

The prisoner was placed on his trial for the murder of an Aboriginal woman, his lubra, and, subject to the point of law now argued, was found guilty of manslaughter, and sentenced to one year's imprisonment. The point reserved by the learned judge was whether, in the absence of evidence that either of these natives had become civilized, or had changed their habits or modes of life so as to be supposed voluntarily to have subjected themselves to British laws, the prisoner was liable to the jurisdiction of the Court.

Mr Wright appeared for the Crown; Mr Adamson for the prisoner.

Mr ADAMSON. – This case is distinguishable from that of *Reg v Peter*, decided in this court last term, inasmuch as here both the slayer and the deceased were natives. It must be conceded that if the sovereign *de facto* should impose laws upon a territory held by conquest or occupation those laws would be binding, and would supersede the laws previously in force. But it is competent for such a sovereign to sanction the pre-existing laws, and to continue them in their operation to the race which before was subject to them. And this may be done tacitly. Such was the case of Ireland, with regard to the Brehon law. Then there are the American cases and authorities, having reference to the native Indians. He cited *Worcester v The State of Georgia*, 6 Peters U S Rep. 515;[120] The

120 (1832) 6 Peters 515; 31US 515.

Cherokee Nation v The State of Georgia, 5 Peters, 1;[121] 3 Kent's Commentaries, 460, to show that in cases of dependence or qualified subjection, the subject or dependent race may retain their immunity from the jurisdiction of the courts of the dominant race. Was that so in this case? The *onus* lay upon the Crown to have shown that it was not so. But the case negatived the offer of any evidence on this point.

Dr SEWELL, as amicus curiae, having procured a similar point to be reserved, stated that he should argue from the analogy of such cases as the Normans who subsided under the Anglo-Saxon law.

Mr WRIGHT, for the Crown, was not called on.

The CHIEF JUSTICE. – This case must be held to be governed by *Reg v Peters*. It makes no difference whether the victim were an English-woman or a native. The jurisdiction of the court is supreme, in fact, throughout the colony, and with regard to all persons in it. It is not intended to decide that in no case might there be a concession to a subject race of immunity from the laws of the conquerors living among them.

Sir REDMOND BARRY. – This is virtually a plea to the jurisdiction. it is not suggested what other jurisdiction could be named, so as to 'give a better writ.'

The conviction was affirmed.

***In re The Queen v Jemmy (an aboriginal)*, *Age*, 7 September 1860, 6**

This was a special case reserved by Mr Justice Molesworth at the Castlemaine Circuit Court. One of the aboriginals had been murdered by another, the Jemmy in question, and it had been contended at the trial, when the man was found guilty, that the law of the colony could not be made to apply to the aboriginals, who

121 (1831) 5 Peters 1; 30 US 1.

were governed by their own laws and customs, to which only were they amenable. Mr Wright now appeared in support of the conviction and Mr Adamson for the prisoner. Mr Adamson contended that the case of those blacks was analogous to that of the Cherokee Indians, quoted in Kent's Commentaries, vol. 3, where it was held that the nation having been admitted by the State of Georgia to be an independent nation, the United States Government could not make them amenable to their laws. Sir Redmond Barry scarcely thought this an analogous case, as the aboriginals had never been recognized as a separate nation here, but on the contrary, in respect to the celebrated Batman contract, the Crown had distinctly refused to recognize it. We may observe that at the very outset of the case, the Chief Justice asked if there was anything to be said in support of the points reserved, and therefore in his argument the learned counsel was laboring under a disadvantage. Amongst the books cited were Peters' American Reports, and *Johnson v Mackintosh*, 8 Wheaton [sic].[122] In the course of his observations, Mr Adamson remarked, in reply to a question of whether the aboriginals in the colony had ever disavowed their subjection to the British, that any such opposition appeared to have been confined to stealing sheep, and spearing a few of the owners. The Bench would not call upon Mr Wright to reply, but unhesitatingly affirmed the conviction.

122 *Johnson v McIntosh* (1823) 8 Wheaton 543.