

THE JUDICIARY AND POLITICAL QUESTIONS: THE FIRST AUSTRALIAN EXPERIENCE, 1824-1825

The year 1974 marked the 150th anniversaries of the Supreme Courts of New South Wales and Tasmania, with Tasmania's Court by a margin of seven days holding the honour of being the oldest continuously functioning Superior Court in Australia¹. With these anniversaries in mind, it may not be inappropriate to recall the great controversy which surrounded conflicting decisions of the Chief Justices of the two Courts within eighteen months of their foundation. These cases concerned the right to trial by jury in the Australian colonies. At the time they were the focal point of bitter and often vituperative comment, which reflected the highly charged political atmosphere in which the decisions were handed down. In themselves, the cases have little, perhaps no, relevance to the present detailed working of the law. But to the inhabitants of New South Wales and Van Diemen's Land in 1824 and 1825 they were decisions of great moment. Down the years, these decisions may have been largely forgotten. Certainly they have never graced the pages of any series of law reports. Nevertheless, in their own way, they may help to provide us still with some guidance on the role of the courts in the protection of civil liberties and expose as clearly as many modern cases the inherent strengths and weaknesses of judicial intervention in political controversies. The contrasting judgments of Chief Justices Forbes² and Pedder³ in the jury cases of 1824⁴ and 1825⁵ suggest, in a fashion which may have parallels in the present day working of our law, that too much reliance upon judge-made law as the guardian of civil liberties and constitutional rights may sometimes give substance to the perceptive claim of Mr. Justice Frankfurter that "holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people"⁶.

For the inhabitants of Van Diemen's Land, the stage began to be set for the establishment of the Supreme Court on 15th March, 1824. The signal station at Mt. Nelson reported a ship in sight, making its way to Hobart Town with "person of consequence on board"⁷. At first, it was believed that the ship was carrying Lieutenant Governor Arthur. But the important passenger proved to be John Lewes Pedder, the first Chief Justice of Van Diemen's

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1. West, *History of Tasmania*, reprint, ed. A. G. L. Shaw, Angus and Robertson, Sydney, 1971, at 81, refers to the proclamation of the Charter of Justice of the Supreme Court of Van Diemen's Land in the "marketplace" on 7th May, 1824. The official proclamation seems, however, to have been on 21st March, 1824: Sorrell to Bathurst, 21st March, 1824, *H.R.A.*, Ser. III, Vol. IV, 126, discussed Shaw, *op. cit.*, 573 n.6. Pedder, the first Chief Justice, was sworn in on 7th May, 1824 (*ibid.*; Howell, "Pedder", *Australian Dictionary of Biography*, Vol. II, at 319) and the court was opened officially on 10th May, 1824 (*ibid.*; *Court in the Colony*, Law Society of Tasmania, Hobart, 1974, 11). The Supreme Court of New South Wales entered "on the exercise of its jurisdiction on Monday, 17th May, 1824, from which date the jurisdiction of the previous Courts came to an end": *New South Wales Charter of Justice 1824*, William Dixson Foundation, Publication No. 15, 1974, 8. See also: Currey, *Sir Francis Forbes*, Sydney, 1968, 74-75.
2. Currey, *op. cit.*
3. Howell, "Pedder", *loc. cit.*
4. *R. v. Magistrates of Sydney*.
5. *R. v. Magistrates of Hobart Town*.
6. *A.F.L. v. American Sash and Door Co.* (1949), 335 U.S. 538, 555-557.
7. *William Sorrell's Journal*, 1823-1825, entry of 15th March, 1824: quoted, *Historical MSS of Tasmania*, Univ. of Tas., 203.

Land⁸. He was not the only legal personage on board. Amongst the other passengers was Joseph Tice Gellibrand⁹, the newly appointed Attorney-General for Van Diemen's Land. Another passenger was Saxe Bannister¹⁰ who was on his way to Sydney where he was to take up the post of Attorney-General of New South Wales. Pedder was to have a long and sometimes stormy career in Van Diemen's Land, before he retired in 1854. The official careers of Gellibrand and Bannister were to be short and stormy. In less than 18 months Gellibrand was to be suspended and then dismissed from office¹¹. Not long afterwards Bannister was to find, to his chagrin, his resignation accepted with an alacrity he had not expected¹². But within the span of the official careers of all three men in Australia, short as the terms of office of the two Attorneys-General proved to be, each was to become embroiled in the first major constitutional cases in the history of this country.

The jury issue divided the exclusive and emancipist factions in the colony, as it had divided the House of Commons in 1823. Seemingly, the New South Wales Act of 1823¹³ had precluded the use of Grand Juries in the colony. In criminal cases, it was laid down that military juries alone should try those cases which were brought before the Supreme Courts of New South Wales and Van Diemen's Land¹⁴. The only concession, or so it seemed, to those who were demanding jury trial, was with respect to the trial of civil causes in the Supreme Courts. Juries of 12 could be empanelled by agreement between the parties in those cases where the litigation involved £500 or more; otherwise the court was to be assisted by two assessors in trying civil causes¹⁵. Provision had been made, however, for the establishment of Courts of Quarter Sessions¹⁶. In England these proceeded by means of Grand Jury indictment and trial by ordinary juries of twelve. But in what can only be described as a fabricated cause, set in train by the Sydney magistrate D'Arcy Wentworth¹⁷, the question whether the Sydney magistrates were required to impanel Grand and petit juries as a matter of course for the trial of free settlers at Quarter Sessions came to be tested before Chief Justice Forbes of New South Wales in *R. v. Magistrates of Sydney*¹⁸. Some months later, after public debate in Hobart Town, energetic correspondence in the *Hobart Town Gazette* and obvious reluctance by the authorities to take the formal steps to establish Quarter Sessions in Van Diemen's Land, Chief Justice Pedder, in

8. *Ibid.*

9. James, "Gellibrand", *Australian Dictionary of Biography*, Vol. II at 437.

10. Currey, *op. cit.*, 55.

11. Gellibrand's suspension and dismissal followed a secret enquiry into allegations of professional misconduct. This was presided over by Pedder in the second half of 1825. It was one of the great *causes célèbres* in the early year's of Arthur's term as Lieutenant Governor. Melville in his *History of Van Diemen's Land*, reprint, ed. Mackaness, Horwitz-Grahame, Sydney 1965. 45, claimed that few events "have caused more general public excitement, than these proceedings". *The Colonial Times* (formerly the Hobart Town Gazette), which supported Gellibrand, referred to the secret inquiry as "this most unconstitutional and truly anti-English Tribunal": 7th October, 1825 at 2, col. 1. West, *op. cit.*, 83-85, describes the circumstances surrounding Gellibrand's dismissal.

12. Bannister left New South Wales "much aggrieved" after the acceptance of his resignation: Currey, *op. cit.*, 56.

13. 4 Geo. IV c.96. A move by Sir James Mackintosh, seconded by Wilberforce, that regular criminal juries be introduced, was defeated in the House of Commons by eleven votes. *Parl. Deb.*, 2nd July, 1823, new series, IX, 1400, 1451.

14. *Ibid.*, s.8.

15. *Ibid.*, s.5.

16. Castles, *Introduction to Australian Legal History*, Law Book Co., Sydney, 1971, 64.

17. Auchmuty, "Wentworth", *Australian Dictionary of Biography* Vol. II, at 579.

18. *Sydney Gazette*, 21st October, 1824, Vol. XXII, No. 1092; *The Australian*, 21st October, 1824, Vol. I, No. 2.

*R. v. Magistrates of Hobart Town*¹⁹, was called upon to determine the same question.

The jury cases of 1824 and 1825 satisfy the basic requirements of great constitutional cases, albeit within the parameters of political and social life in the two Australian colonial capitals of the third decade of the nineteenth century. They were instigated for purposes which were part of a continuing political struggle, in much the same fashion as the great constitutional cases of the seventeenth century and those involving John Wilkes of a century or so later. The cases were decided in the heat of battle with the first truly independent newspaper in this country, *The Australian*²⁰, the organ of the emancipists in Sydney, appearing on the day Forbes' judgment was handed down. In Van Diemen's Land, the *Hobart Town Gazette* began to assert its independence more stridently, partly in response to the jury issue. As a consequence it was to fall from grace. For a few numbers, its owner, Andrew Bent²¹, was to keep the old title of his paper, despite the withdrawal of official patronage and the establishment of a rival paper of the same name, with the support of Lieutenant-Governor Arthur²². The friendship of the old *Gazette's* Editor with Attorney-General Gellibrand has been suggested, too, as one reason for Arthur's vendetta against this law officer²³.

Viewed in contemporary terms, it is hard to conceive why so much conflict was engendered over the jury issue in early Australia. Except where it still flourishes in North America, the Grand Jury, a once hallowed institution of English criminal procedure, has long been forgotten. In Australia the Grand Jury never took firm root²⁴. One reason for this seems to have been the long delays in the full introduction of jury trial in this country in criminal cases and the development of alternative methods of prosecution, in the meantime, which soon came to be accepted as the norm. The rapid decline of the Grand Jury in Australia, compared to the United States, may in part perhaps be explained by the effect of convict transportation, and official reactions to this, in the early formative years of the new legal systems established in New South Wales and Van Diemen's Land, after the New South Wales Act of 1823. Today jury trial itself has tended to fall progressively into disuse. For most practical purposes, the use of civil juries seems likely to become little more than a footnote to Australian legal history²⁵. In England and Wales, as Lord

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19. *Hobart Town Gazette*, 8th July 1825, No. 479, 3 (initial argument), 15th July, 1825, No. 480, 3-4 (judgment).
 20. Originally published by William Charles Wentworth and Dr. Robert Wardell, later by Wardell only, until his murder in 1834. It continued to be published for a time after Wardell's death. The present newspaper of the same name is not connected in any way with the first *Australian*.
 21. Pretyman, "Bent", *Australian Dictionary of Biography*, Vol. I, 87.
 22. After persisting for a short time in retaining the title *Hobart Town Gazette*, despite the publication of another newspaper with the same title, Bent changed the name of his paper to *The Colonial Times* in the latter half of 1825. For a brief description of the alleged "pirating" of the title *Hobart Town Gazette* see: Melville, *op. cit.*, 44-45. The nineteenth century historian, Bonwick, *Early Struggles of the Australian Press*, 41 claimed that it was to Bent's papers that "Australia has been indebted for its subsequent emancipation from personal rule".
 23. James, "Gellibrand", *Australian Dictionary of Biography*, Vol. I, 437.
 24. Bennett, "The Establishment of Jury Trial in New South Wales", *Sydney L.R.*, Vol. 3 (1961) 463, 482-485.
 25. The introduction of compulsory third party automobile insurance hastened the demise of civil juries in Australia: Castles "Juries and Compulsory Third Party Automobile Insurance", 31 *A.L.J.* 638. Jury trial was retained in New South Wales and Victoria for running down cases long after the abolition of jury trials in running down cases in the other States. New South Wales has since abolished civil juries in these cases.

Hailsham has pointed out, 98% of criminal cases are now tried summarily²⁶. In Australia, we began early the process of extending summary trial into the criminal jurisdictions. For the first 35 years or so after the first British settlement, convicts and free settlers alike were tried in the same fashion for major offences, at least in theory²⁷. But after 1823, in both New South Wales and Van Diemen's Land, summary trial was provided for the trial of convicts for major offences, presaging the more extensive use of summary trial in this country.

Compared to the present day, however, in the first four decades of the nineteenth century the use of juries in both criminal and civil proceedings still ranked high in public esteem. Blackstone had described jury trial not long before as a "privilege of the highest and most beneficial nature"²⁸. The draftsmen of the United States Constitution had entrenched jury trial for criminal cases as one of the cornerstones of the American judicial system²⁹. Grand Juries seem to have begun their decline in England where reports of laxness were soon to help bring them into disrepute³⁰. But in Australia, before representative government was introduced and before the foundation of local government as we now know it, Grand Juries could sometime provide one of the few official avenues, like public meetings convened by a Sheriff, for free citizens to take an active role in the conduct of public affairs. As the records of the first Australian Grand Jury show, for example, these bodies might on occasion be prepared to act in a way which bears at least some resemblance to the role now vested in Ombudsmen in the second half of the twentieth century³¹.

With this background, it was not surprising that when the Australian colonies began the slow process of developing free institutions, jury trial and the use of Grand Juries were regarded as a key feature³². Etched in the minds of the emancipists in particular was the recent memory of trial before the old Court of Criminal Jurisdiction with its panel of six military and naval officers having the power of life or death over defendants charged with offences

26. Halsham, "Trial by Jury: is it Still Needed?": extracts from oration on the occasion of the 150th anniversary of the Supreme Court of New South Wales, *Sydney Morning Herald*, 27th May, 1974, 7.

27. Castles, *Introduction to Australian Legal History*, Ch. III.

28. Blackstone, *Commentaries*, Bk. III, Chap. 23, extracted in "Of the trial by jury" in *The Sovereignty of the Law* (ed. Jones), Macmillan, London 1973, 177.

29. U.S. Constitution, Art. III, s.2(3). See Moore, *The Jury*, W. H. Anderson, Cincinnati, 1973, esp. Chap. X.

30. In 1837, for example, notice was given of an intention to submit a bill for the abolition of Grand Juries. The reasons are set out in *Justice of the Peace*, Vol. I, 26. Other comments on the state of Grand Juries in England at the time are contained in the same volume: see at 41, 42, 55, 73, 75, 317.

31. For example see: "Grand Jury Presentment", *Sydney Gazette*, 17th February, 1826 (No. 1109) 3, col. 2. In this, the Grand Jury was critical of conditions in the debtors' prison, comments on the delay in bringing persons to trial, claims that the King's Wharf is in a state of "great decay" and "no longer answers the purpose of the community, whilst its ruinous state renders it also dangerous".

32. The connection seen at the time between the introduction of jury trial and representative government is well exemplified in the *Petition of the Exclusives*, Enc. A1, Bourke to Glenelg, 13th April, 1836, *H.R.A.*, Ser. 1, Vol. 18, 392. In this the petitioners affirm: "If they could contemplate the possibility of such a law [the existing jury law] being not only continued, but extended upon the same principles and rendered imperative in the formation of all Juries, both Civil and Criminal, as well as in the exercise of the *other* [emphasis added] important functions of a Representative Government, their minds would be harassed and borne down by the most gloomy forebodings". See also: Sweetman, *Australian Constitutional Development*, 1925, Ch. VI; Melbourne, *Early Constitutional Development in Australia*, St. Lucia, 1963, Ch. IV.

which in some cases at least would merit no more than summary trial today³³. Real and imagined abuses of this system in the eyes of the emancipists were a constant source of complaint which carried over after the reforms in the court system in 1823. The Bigge Reports³⁴ and the Act of 1823 had suggested only modest changes from the autocratic rule of the Governors which had marked the history of New South Wales up to that time. The retention of military panels to serve as jurors in criminal trials in the Supreme Court was, on the face of it, a victory for the exclusive element in the colony. The demand for jury trial therefore helped to give thrust and direction to opposition to the Bigge Reports and the Act of 1823. It was an end in itself. But it was also an important means of achieving another aim; the introduction of representative government. Unless the British authorities could agree that there were sufficient free persons to undertake jury service it was hardly likely that representative government would soon be achieved in the Australian colonies. By astutely emphasising the colonists' demands for the introduction of the English jury system, William Charles Wentworth, the articulate "native son"³⁵ and the others who supported the jury cause were engaged in an exercise which had great political significance for the Australian colonies.

Even after the regular system had become reasonably well established, with the last vestiges of the system of military juries soon to be removed, the bitterness of some of the opponents of English-style juries still lingered on, evidencing the rancorous nature of the conflict. The extremist, James Mudie, writing in his *Felonry of New South Wales*³⁶ recorded: "It would fatigue the reader to cite many instances of the brutal and criminal pertinacity with which these convict jurors have often set the law, as well as the dictates of common sense and common justice, at open and most profligate defiance". Mudie feared that emancipists would approach jury service with "inexpressible joy" when "entrusted with the character and life of a former enemy". It was, he claimed, a possible "opportunity for vengeance" on the part of emancipist jurymen³⁷. Mudie himself perhaps may have had some cause for such fears. His treatment of convicts in New South Wales was said by some to be brutal in the extreme³⁸.

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33. The alleged bias of the military members of the Court of Criminal Jurisdiction, 1788-1824, was long a source of concern to the emancipist faction in New South Wales: Castles, *op. cit.*, 36-37.
 34. *Report of the Commission of Inquiry into the State of the Colony of New South Wales* (Commons paper 448, ordered to be printed 19 June 1822; Lords paper 119, ordered to be printed 5th August, 1822); *Report of the Commission of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (Commons paper 33, ordered to be printed 21st February, 1823; Lords Paper 118, ordered to be printed 4th July, 1823); *Report of the Commission of Inquiry on the State of Agriculture in the Colony of New South Wales* (Commons paper 136, ordered to be printed 13th March, 1823; Lords paper 119, ordered to be printed 4th July, 1823). The Bigge Reports with Bibliographical Note and Index have been reprinted by the Libraries Board of South Australia in Australian Facsimile Editions.
 35. Manning Clark, *History of Australia*, Vol. II, Melbourne 1968 at 42, points out that the *Sydney Gazette* of 22nd July, 1824, reported that Wentworth, the "native son", had returned to the land of his birth. Wentworth outlined his programme for constitutional development in Australia, including the introduction of jury trial, in his *Statistical, Historical and Political Description of The Colony of New South Wales*, first published in 1819. For descriptions of Wentworth's involvement in the jury debate and related issues see: Manning Clark: *op. cit.*, Ch. 3 and 4; Melbourne, *William Charles Wentworth*, Discovery Press, Penrith, 1972.
 36. First published 1837, reprinted with preface and notes, Lansdowne Press, Melbourne 1964.
 37. *Ibid*, 134, 135-136. Sentiments like these, although in a more restrained form, were contained in the *Petition of the Exclusives*, *ante*, n.32.
 38. West, *History of Tasmania*, 459-460 records that Mudie spoke of his assigned convicts in the tone of an executioner. He refers to the "rebellion on Mudie's

A decade or so before Mudie penned his *Felonry*, however, his cause, at least for the time being, had seemed to be in the ascendancy. From 1819 onwards the emancipists had waged a strong campaign for the introduction of English-style juries in New South Wales. The call for regular juries in the Colony was not a recent phenomenon. Bennett has shown that the "idea of complete jury trial was in the minds of some free settlers as early as 1791"³⁹. Governors, including Bligh and Macquarie, had supported the claim⁴⁰. By 1819, however, there was a new sense of urgency in the debates on the jury issue. The possibility of major constitutional change was in the air with the appointment of Commissioner Bigge to inquire into affairs in the Colony. William Charles Wentworth included jury trial with a demand for representative government in his "Description of New South Wales", published in 1819⁴¹. A petition forwarded to the Prince Regent in 1819 carried the argument forward by pointing out that "Trial by Jury is a Blessing conferred by our Mother Country on all Our Sister Colonies, that the Hindus in India, the Hottentot in Africa and the Negro Slave in the West Indies, alike partake of its protection and advantage"⁴². The emancipist ex-lawyer, Edward Eagar, who had practised again for a time with the blessing of Governor Macquarie⁴³, acting as London representative of the petitioners, told the British government that the jury request of the emancipists was "the first, most important subject introduced into the Petition". Other matters, so he claimed, "were considered as merely of secondary interest and importance"⁴⁴. Bigge, however, despite entreaties like these, recommended that the full jury system "cannot yet be safely introduced"⁴⁵. The principal difficulty, as Bigge viewed it, arose "from the peculiar constitution of the society of New South Wales, and the risk to which its interests might be exposed by the unqualified admission of the inhabitants to the right of trial by jury"⁴⁶. Narrowly, by eleven votes, the House of Commons upheld Bigge's submission and seemingly excluded the operation of English-style juries, at least in criminal proceedings⁴⁷. The New South Wales Act of 1823 provided expressly for juries of seven military men to try criminal cases in the Supreme Courts. The only concession towards the emancipists seemed to be the provision which enabled regular juries to try facts in civil cases when the parties to the litigation agreed. On the face of it, the only other way in which juries might be introduced was through directives issued by the British government. Section 8 of the statute provided:

property, Castle Forbes, and the charges made of the treatment of convicts, following this event. Therry, *Reminiscences*, (Introduction by J. M. Bennett), reprint (first published 1863) Royal Australian Historical Society, Sydney University Press, 1974, has a detailed account of Mudie by the law officer, later a Judge, who defended the convicts involved in the "rebellion". Therry claimed *inter alia* that: "At 'Castle Forbes' Mudie proved himself a practical admirer of the benevolent precept 'not to spare the lash, lest the child be spoiled'". He goes on to relate that the prisoners he defended on this occasion "repeatedly declared before their trial and afterwards, that they would prefer death to being returned to the service of their late employer": *op. cit.* 67, 68.

39. Bennett, *The Establishment of Jury Trial in New South Wales*, 464.

40. *Ibid.*, 465-466.

41. *Ante*, n.35.

42. *A Petition for the Redress of Grievances*, Enclosure, Macquarie to Bathurst, 22nd March, 1819, H.R.A. Ser. I Vol. X at 58.

43. McLachlan, "Eager", *Australian Dictionary of Biography*, Vol. I, 343.

44. Eagar to Bathurst, London, 3rd April, 1823, H.R.A. Series IV, Vol. I, 441 at 441-442.

45. *Report of the Commission of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land*, 51.

46. *Id.*

47. *Ante*, n.13.

“ . . . That it shall and may be lawful for His Majesty, His Heirs and Successors, by an order to be by him or them issued with the advice of His or their Privy Council, at any time or times hereafter, to cause the trial by jury to be further introduced and applied in such parts of New South Wales and Van Diemen's Land, and their respective dependencies, at such time, in such cases, and with, under and subject to such rules, modifications, and limitations in respect thereof, as to His Majesty, His Heirs and Successors, shall seem meet, and as shall be specified in any such order in council in that behalf.”

The opponents of jury trial in Australia, however, had not counted on the resourcefulness and ingenuity of the emancipist faction in New South Wales. Nor, perhaps, had they weighed in the balance the essentially liberal sympathies of Saxe Bannister and more particularly Francis Forbes, the first Chief Justice of New South Wales. Although the Act of 1823 had seemingly frustrated the demand for the full system of English jury trial in Australia it had, at the same time, opened up for the first time, new possibilities for what McWhinney has described as the indirect judicial review of legislative action⁴⁸. The newly established Supreme Courts of New South Wales and Van Diemen's Land were endowed with many of the same powers and functions as the Superior Courts at Westminster⁴⁹. Most importantly, in this regard, the jurisdiction to consider applications for the issue of prerogative writs was now given to the two Supreme Courts⁵⁰. Prior to 1823, the first Supreme Court of New South Wales, established in 1814⁵¹ had not perhaps been entirely bereft of a role in ordering the constitutional life of the Colony. In secret correspondence, Judge Barron Field⁵² had once warned Governor Macquarie that the imposition of taxing imposts without Parliamentary fiat was unconstitutional and he would be constrained to declare such taxes to be illegal if the matter was tested in Court⁵³. Field's decision to follow *Bullock v. Dodds*⁵⁴ to deny former convicts the right to bring civil actions, contrary to his own former practice, was not without constitutional significance⁵⁵. Certainly, the anger it engendered pointed to the political significance attached to this decision⁵⁶. But, at best, the role of the old Supreme Court as an arbiter of constitutional affairs was

48. McWhinney, *Judicial Review in the English Speaking World*, Toronto, 1960, 13.

49. Castles, *op. cit.*, 59-61.

50. *Ibid.*, 69-70.

51. *Ibid.*, 44-45.

52. Field to Macquarie, 24th February, 1818, Enclosure, Field to Goulburn, 13th November, 1818; *H.R.A.*, Ser. IV Vol. I, 322.

53. When the Law Officers agreed with Field's opinion an Act of Indemnity had to be passed to remedy the situation: Castles *op. cit.*, 120-122.

54. (1819) 2 B. and Ald. 257.

55. In *Eagar v. De Mestre*, 1820, Field held that convicts attaint, who had not received a General Pardon under the Great Seal of England, were not entitled to sue in a Court of Justice, give evidence or take property by way of grant or purchase. Prior to this decision, however, the Judge had held that unless the record of a conviction was obtained from Britain then no objection could be taken to the status of a litigant. Field gave public notice of this decree in arranging for the printing of a note in the *Sydney Gazette* (29th August, 1818) on the admission of evidence from convicts in the Supreme Court. See: *H.R.A.*, Ser. IV, Vol. I, 945-6 n.208. Prior to *Eagar v. DeMestre*, Field had avoided further conflict on the matter by refusing to allow litigants to obtain the necessary adjournment of 12 months or more which would have been required to obtain conviction records from Britain: Field to Bathurst, 15th January, 1823, *H.R.A.*, Ser. IV, Vol. I, 424. See also: Allars, "Barron Field: His Association with New South Wales", *Journal of the Royal Australian Historical Society*, Vol. 53, 73 at 186-187.

56. Melbourne, *Early Constitutional Development in Australia*, 73; *Eagar* to Bathurst, 3rd April, 1823, *H.R.A.*, Ser. IV, Vol. I, 463.

minimal. Its authority in this regard did not extend to the style of direct confrontation made possible through the use of the prerogative writs.

On the face of it, the prime instigator of the first move to bring the jury issue into the Courts was D'Arcy Wentworth. Wentworth seems to have had his first experience of the law when he was tried and acquitted on charges of highway robbery in 1787 and 1789. He had then been despatched to Australia as a surgeon, with what seem to have been the warm blessings of his family. In New South Wales he not only prospered, becoming one of the largest land-owners in the colony by 1820⁵⁷, but he had long experience in the working of the law in the colony before the Act of 1823. He had served as a Magistrate for many years, and was for a time Superintendent of Police⁵⁸. It has been noted, too, not without cause, that when a syndicate involving Wentworth had the monopoly of importing spirits, in return for building Sydney Hospital, Wentworth's activities as a licensing magistrate could hardly be described as seeking to set limits on the sale of hard liquor in the colony⁵⁹. Like many of those self-educated in the law at the time it may well have been that D'Arcy Wentworth himself saw a possible loophole in the Act of 1823 which might at least enable Grand and petit juries to be empanelled for the working of the Courts of Quarter Sessions. At the same time, the fact that his son, William Charles, had just returned to the colony after completing the requirements for admission to the Bar may open up the strong possibility that the first "native son" to be admitted to legal practice in Australia could well have had a hand in planning the move. In a small colonial outpost, where the leaders in the community tended to come into regular contact with each other, it is perhaps not stretching conjecture too far to suspect also that others may have played their part in "setting up" the first major constitutional case in Australian history.

Documents now in the Mitchell Library show how a foundation was set to test the possibility of introducing jury trial in Quarter Sessions. Soon after official provision was made for the establishment of Quarter Sessions in Sydney, and magistrates were selected to sit on the bench, D'Arcy Wentworth and John Oxley, representing these magistrates, wrote to Governor Brisbane raising queries on the procedures the new court should follow. They indicated doubt and concern on the interpretation of the New South Wales Act of 1823, particularly as it related to the use of juries. The Magistrates acknowledged that section 8, on the face of it, seemed to exclude the further use of juries in the colony except at the direction of the British government. But the Magistrates indicated that doubt could perhaps be cast on the all embracing effect of this when attention was paid to section 19 of the same Act, the clause which made specific provision for the working of Courts of Quarter Sessions in New South Wales and Van Diemen's Land. Section 19 laid it down expressly that convicts could be tried summarily before Courts of Quarter Sessions. But, as the Magistrates pointed out, no directions were

57. Auchmuty, *op. cit.*, 579.

58. *Ibid.*, 580-581.

59. Bigge's "Confidential Report on Wentworth", Bigge to Bathurst, 7th February, 1823, *The Evidence of the Bigge Reports* (Selected and Edited by John Ritchie), Vol. I, Heineman, Melbourne 1971, 183. As Bigge recorded: "I am led to infer that this Branch of Police [Licensing] was not administered with strictness, and that the interest that Mr. Wentworth openly took in the Sale of Spirits, and which he took no pains to disguise, even in the Town of Sydney, had had considerable influence in encouraging the unlicensed Vendors of Spirits to proceed in that course with impunity".

given on the method to be used for the trial of free persons before these tribunals⁶⁰.

Within two days of the date of this letter, Attorney-General Bannister had prepared an opinion on the issue for Governor Brisbane. He advised "that it will be proper to assemble juries for the Quarter Sessions under that Act (New South Wales Act, 1823)". He agreed that there were difficulties in reconciling sections 8 and 19. But he asserted: ". . . it would be unsound construction to destroy the plain meaning of the clause B [Section 19] of an Act of Parliament, by qualifying it with another Clause A [Section 8] if unconnected with it, particularly where, as in this instance, the words of the clause A, may be satisfied by reference to fewer parts of the Act"⁶¹. A little more than a month later Bannister re-affirmed his view even more unequivocally, claiming now that

" . . . the Courts of Quarter Sessions cannot be legally held without appointing a Jury and that is imperative upon the Magistrates to convene, through the instrumentality of the Sheriff, Grand and Petit juries, for the trial of all such cases are usually brought before similar tribunals in England, regard being had, in bringing forward such cases to the condition and circumstances of the Colony"⁶².

In the meantime, however, it had become apparent that John Stephen⁶³, the Solicitor-General, did not agree with Bannister's views⁶⁴. Faced with conflicting advice from his senior law officers, Governor Brisbane took steps to have the matter placed before Chief Justice Forbes, although initially he had recommended the use of the regular English jury system at Quarter Sessions for the trial of free settlers⁶⁵. The Governor wrote to D'Arcy Wentworth suggesting that the conflict should be resolved by seeking a "judicial decision upon the construction of the clause of the Act relating to the Court of Sessions, and settling the jurisdiction, and future proceedings of that Court"⁶⁶. On the motion of Attorney-General Bannister, proceedings for *mandamus* were then instituted in the Supreme Court with the Solicitor-General acting, in theory at least, on behalf of the Magistrates of Sydney.

The arguments of the law officers before the Chief Justice largely traversed again the opinions they had expressed previously on the jury question. Bannister concentrated on section 19 of the Act of 1823, referring especially to the distinction made between the summary trial of convicts and the trial of free persons at Quarter Sessions. He could hardly deny that convicts could be tried without Grand jury indictment and trial by petit jury. But in the case of free persons, so he affirmed, *Magna Carta*, which operated as part of the received law of the colony, forbade any other mode of trial except by jury,

60. Wentworth, Oxley to Brisbane, 4th August, 1824: *Forbes Papers* A741 (Mitchell Library), 3.

61. Opinion of Saxe Bannister, 6th August, 1824: *Forbes Papers*, 9.

62. Opinion of Saxe Bannister, 17th August, 1824: *Forbes Papers*, 17.

63. Currey, "John Stephen", *Australian Dictionary of Biography*, Vol. II, 476.

64. Stephen to Wentworth, 7th September, 1824: *Wentworth Papers* A.W.81 (Mitchell Library), Letter 2. Stephen placed special emphasis on his interpretation of s.19 of the Act of 1823, stating: "It does not appear to me that there is anything in the words of the above clause [s.19] from which it can be inferred that the Legislature intended that Juries should be summoned as in England to try causes at the Court of Sessions".

65. On 9th August, 1824, Governor Brisbane's Secretary had written to Wentworth stating: "He [the Governor] considers it will be proper to assemble juries for the Quarter Sessions under that Act [1823]": *Forbes Papers*, 15.

66. Letter of 28th September, 1824: *Forbes Papers*, 31.

unless this had been expressly taken away by Statute. Section 19, so Bannister asserted, had not taken away the right of free persons to jury trial; otherwise the effect of the section would be negated, as it made a distinction between the modes of trial to be used for convicts and free persons. John Stephen, on the other hand, understandably concentrated in his argument on the over-all intent of the Act of 1823, as he viewed it. He pointed out that the Act had clearly set out in several ways to vary the methods of trial which were to be used in the Colony. He instanced the three methods available in the Supreme Court, as an example of this. As far as section 19 was concerned, this, too, so Stephen argued, also exemplified the intent of the legislature to vary the modes of trial in New South Wales, compared to the existing practice in England. Convicts could be tried summarily. As far as free persons were concerned it could hardly be assumed, given the general import of the legislation, that a mode of trial was to be permitted at Quarter Sessions which would not be operative in the Supreme Court. To add further weight to his argument, Stephen pointed out that as Courts of Quarter Sessions were unknown to the common law their powers could only be derived from Acts of Parliament⁶⁷.

On 14th October, 1824, Chief Justice Forbes handed down his judgment in the jury case. Whether by accident or design, the first number of Australia's first independent newspaper, *The Australian*, appeared on the same day, published by William Charles Wentworth and his friend and fellow barrister, Dr. Robert Wardell⁶⁸, who had been passed over in favour of Saxe Bannister, for the Attorney-Generalship of the Colony. The paper had been established, as Melbourne has recorded "to form and influence public opinion of the colony"⁶⁹. Although the first number was too late for a report of Forbes' judgment, the second issue, like the edition of the *Sydney Gazette* on the same day, gave a full account of the jury case. The journalists of today would no doubt have lingered long and perhaps exclusively on the atmosphere in the courtroom, recording the reactions of the emancipists and others who presumably gathered there to hear the delivery of the judgment by the Chief Justice. Both newspapers followed the journalistic traditions of the day, however, reporting soberly and carefully the details of Forbes' opinion and no record seems to have survived of the immediate public opinion to the decision. No doubt reflecting the legal training of its publishers, the *Australian* paid, on balance, closer attention to the law and most particularly the cases cited by the Chief Justice. Even so, both newspapers confined their attention to giving full and what must be presumed to be reasonably accurate reports of the formal proceedings.

Forbes' judgments, upholding Bannister's submission, making the order absolute to issue *mandamus* against the Magistrates of Sydney, and then requiring them to empanel grand and petit juries for the trial of free settlers, was a careful blending of technical legal argument with a final flourish appealing to *Magna Carta* as the ultimate justification for his decision. Technically, his argument fell broadly into five sections. *First*, the Chief Justice laid a foundation for the application of common law principles of British Constitutional Law in New South Wales by holding that the Colony was a settled colony. *Secondly*, as a consequence of this, he affirmed that the preroga-

67. *Sydney Gazette*, 21 October, 1824, Vol. XXII, No. 1092, 2; *The Australian*, 21 October, 1824, Vol. I, No. 2, 3.

68. Currey, "Robert Wardell", *Australian Dictionary of Biography*, Vol. II, 570.

69. Melbourne, *William Charles Wentworth*, 44

tives of the Crown, including the power to establish courts, extended to the establishment of Courts of Quarter Sessions. On the establishment of such courts, the Justices, he affirmed, were invested with the authority to do all such acts as a Justice of the Peace in England could do, so far as the circumstances and conditions of the colony might require. *Thirdly*, he deduced from this that where a Governor had been vested with the prerogative authority to appoint justices of the peace, and acted to convene justices in Quarter Sessions, justices would, in the absence of statutory directives to the contrary, be required to follow English practice. *Fourthly*, on the assumption that Governors of New South Wales could have acted to establish Courts of Quarter Sessions, before the New South Wales Act of 1823, in which grand and petit juries would have been a necessary concomitant, the Chief Justice examined the Act to determine whether it now excluded the use of grand and petit juries in the conduct of these proceedings. Section 19, he contended, did not do this. It simply retained the right of the Governor to make a policy decision to call justices together in Courts of Quarter Sessions as far as the trial of free persons was concerned. This was confirmed, so the Chief Justice went on, by the way in which, in contrast, detailed provision was made for the summary trial of convicts in Courts of Quarter Sessions. Not only did section 19, in the Chief Justice's opinion, therefore confirm that juries were required for the trial of free persons, he found also that the earlier references in the Act to jury trial were concerned with the Supreme Court. As a consequence these earlier clauses should not, by way of analogy, be permitted to influence the situation relating to the Courts of Quarter Sessions. *Fifthly*, paying, it would seem, some service to the phrase in section 19, "so far as the circumstances and condition of the said Colony shall require and admit" the Chief Justice acknowledged that if problems ensued with the use of juries, it was either within the power of the Crown to refuse to initiate proceedings in Quarter Sessions or for proceedings from these courts to be removed to the Supreme Court by way of *certiorari*⁷⁰.

A more broadly based underpinning for Forbes' interpretation of the Act of 1823 seems, however, to have emerged only late in his judgment. *Magna Carta*, as one commentator has observed, provided for centuries "an undefined and all embracing authority that took the place of a constitution"⁷¹ in the scheme of English government. In theory, the old fundamental law, of which the Great Charter formed an essential part, was replaced by the British "constitution", wrought out of the political settlement enshrined in the Glorious Revolution of 1689⁷². The supremacy of Parliament and later responsible government became the essence of the new constitutional system. But it was to the old, rather than the new, that Forbes returned in his judgment as the means of giving the final imprimatur to his judicial view on the jury question. Summing up, he affirmed:

"... if the Courts of Session cannot proceed by juries, they cannot take cognizance of any cases, in which free members of the colonies are parties. It would not merely be against the express language of *Magna Carta*, to try British subjects, without the common right of jury, but against the whole law and constitution of England"⁷³.

70. *Sydney Gazette, The Australian, op. cit.*

71. William H. Dunham, Jr., "Magna Carta and British Constitutionalism", in *The Great Charter*, New York, 1965, 20.

72. *Ibid.*, 21.

73. *Sydney Gazette, The Australian, op. cit.*

Although Van Diemen's Land was formally still part of New South Wales, and was to remain so until the end of 1825⁷⁴, Forbes' judgment was not applicable in the southern region of the Colony. For one thing, no steps had been taken to institute Courts of Quarter Sessions there. More importantly, a separate jurisdiction was vested in the Supreme Court of Van Diemen's Land, which would be the appropriate venue for testing the same issue, if and when Courts of Quarter Sessions were established in Van Diemen's Land under the Act of 1823. The chief authority over Van Diemen's Land still rested in Governor Brisbane in Sydney. It was not until later that the first official steps were taken to move in the direction of creating both Courts of Requests and Courts of Quarter Sessions in the southern region⁷⁵.

In the meantime, the Magistrates of Sydney acted on Forbes' judgment with the empanelling of both Grand and petit juries for the conduct of their proceedings. The *Australian* understandably welcomed Forbes' judgment warmly. The *Sydney Gazette*, too, which had long chafed under official censorship, began to show signs of the loosening of government control in response to the publication of its rival. Both papers were soon to show close interest as the focus of attention on the jury question turned to Van Diemen's Land. Clearly, the exclusives in the colony were far from satisfied, however, with the outcome of the litigation. The papers of the Reverend Samuel Marsden for 1824-5 show that that doughty cleric and magistrate had quickly entered into correspondence with Barron Field, the judge of the old Supreme Court, no doubt pouring out his views on Forbes' decision. Field, in his turn, showed, not surprisingly, little sympathy for Forbes' judgment. He wrote to Marsden that he believed Forbes "could have shown more judgment in deciding the Quarter Sessions Jury Question, with the Solicitor and not with the Attorney-General". "In one word", so Field wrote, "I think the judge was wrong". Field warned that he saw "the spark beginning to kindle . . . it is a fine triumph to get the jury introduced at all . . . in good time Wardell and Wentworth will get convicts in at last"⁷⁶.

More than six months elapsed from the time of Forbes' decision until the formal proclamation was published in Van Diemen's Land that Courts of Quarter Sessions should be convened there. The proclamation itself was formally signed by Governor Brisbane in January 1825⁷⁷. But Lieutenant-Governor Arthur did not publish it until the last week in April⁷⁸. Arthur had been made well aware of the possibility of juries being convened for Quarter

74. Proclamation of the Independence of Van Diemen's Land, 3rd December, 1825: *H.R.A.*, Sec. III, Vol. V, 11.

75. In a communication from Governor Brisbane to Lieutenant-Governor Arthur, dated 21st December, 1824, the Governor of New South Wales presaged the creation of Courts of Quarter Sessions in Van Diemen's Land, forwarding the rules of the Court in Sydney and suggesting they "do not require any special adaptation to Van Diemen's Land": *Papers of Sir George Arthur*, Vol. VI, A2166 (Mitchell Library). Earlier Arthur and Brisbane had corresponded on the payment of the Chairman of Quarter Sessions in Hobart Town and on other aspects relating to the establishment of Quarter Sessions in Van Diemen's Land: Brisbane to Arthur, 16th December, 1824: *ibid.*

76. Field to Marsden, 21st November, 1824; *Marsden Papers*, Vol I, Letters to the Reverend Samuel Marsden, 1794 to 1837, C.Y.A. 1992, 453 at 454 (Mitchell Library).

77. The delay in publishing the proclamation cannot be explained by the slowness of communication between Sydney and Hobart Town. Lieutenant-Governor Arthur had received it by mid January 1825. He requested an opinion on it from Attorney-General Gellibrand on 22nd February, 1825; Arthur to Gellibrand, 22nd February, 1825, Sub-Enclosure No. 5; Bathurst to Arthur, 23rd May, 1826: *H.R.A.* Series III, Vol. V, 245.

78. *Supplement to the Hobart Town Gazette*, 29 April 1825 (No. 469), 1, cols. 2-4.

Sessions before Forbes' decision in *R. v. Magistrates of Sydney*; Gellibrand had made some references to jury trial in his first address to the newly constituted Supreme Court. Soon after, he expressly drew Arthur's attention to s.19 of the New South Wales Act, pointing to difficulties which he believed were inherent in construing the section⁷⁹. Later, in response to an express request from the Lieutenant-Governor⁸⁰, he prepared some "observations upon the Act of Parliament"⁸¹. Although there are signs of vacillation in these and his later comments on the issue, Gellibrand's conclusions pointed to a *via media*. He seems to have gone part way with Bannister and Forbes in maintaining the view that in the existing state of the law in New South Wales Quarter Sessions could not try free persons without juries. But in the absence of further government action Quarter Sessions could probably not operate at all, at least as far as the trial of free persons was concerned. What seems to have been required, in Gellibrand's view, was an Order-in-Council under s.8 of the Act of 1823 or some other form of government directive, perhaps through an Act of the Legislative Council, before free persons could be tried at Quarter Sessions⁸².

Pedder, too, had been drawn into discussions on the issue. In February 1825 he referred to a private conversation with Arthur on the matter and wrote: "upon the course of proceeding in the Sessions I fear some difficulties may arise of the nature which I hinted at in a conversation I formerly had the honour of holding with you on this subject". Pedder noted that Brisbane's proclamation had cautiously avoided directing the justices to proceed by way of indictment. This, at least, so the Chief Justice confirmed, avoided the need to prejudge "the important question of the necessity for the intervention of Grand jury". At the same time, Pedder doubted whether it would be possible to avoid some confrontation on the jury question, once the Sessions were established, even if the Crown took steps to keep the trial of free settlers away from these tribunals. As he commented: "I do not see how any private person can be hindered from prosecuting if he thinks fit for an offence cognizable in these courts"⁸³.

While officialdom delayed, the pro-jury faction in Van Diemen's Land was far from idle. The year 1825 was an important one for the development of press freedom in Australia; in Van Diemen's Land, no less than on the mainland. In 1824, the letters of "A Colonist" had appeared in the *Hobart Town Gazette* attacking the administration of the Colony. They had been written by Robert Lathropp Murray, once an officer in Wellington's Peninsula army, but now a convicted bigamist who had once served as an employee of D'Arcy Wentworth as clerk and constable of the Sydney bench⁸⁴. Murray's

79. Attorney-General Gellibrand to Lieutenant-Governor Arthur, 29th May, 1824, Sub-Enclosure No. 1; Bathurst to Arthur, 23rd May, 1826: *H.R.A.*, Series III, Vol. V, 237. West, *op. cit.*, 81 says that in his opening speech in the Supreme Court Gellibrand "eulogised the jurisprudence of his country, and especially trial by jury".

80. Attorney-General Gellibrand to Lieutenant-Governor Arthur, Sub-Enclosure No. 2; Bathurst to Arthur, 23rd May, 1826: *ibid.*, 242.

81. Sub-Enclosure No. 3, Bathurst to Arthur, 23rd May, 1826: *ibid.*, 242.

82. Gellibrand wrote a second opinion on Quarter Sessions in February 1825; Attorney-General Gellibrand to Lieutenant-Governor Arthur, 22 February 1825; Bathurst to Arthur: *ibid.*, 245.

83. Chief Justice Pedder to Lieutenant-Governor Arthur, 11 February 1825: *Papers of Sir George Arthur*, Letters of Chief Justice Pedder I, 1821-1831. A2169 (Mitchell Library).

84. Murray, "Robert William Felton Lathrop Murray", *Australian Dictionary of Biography*, Vol. II, 272.

writings helped to set the tone for a more critical appraisal of the administration and the *Gazette* opened its correspondence columns to discussion on the jury issue. Compared to New South Wales, the battle for press freedom in Van Diemen's Land was to be much more hard fought⁸⁵. But in the first half of 1825, before the press was to receive the full weight of Arthur's manoeuvrings against it, the *Hobart Town Gazette* (supported by *The Australian* in Sydney) was to bring the jury issue well to the fore.

Ostensibly, official secrecy seems to have surrounded Brisbane's decision to institute Courts of Quarter Sessions in Van Diemen's Land. In January, however, the correspondence columns of the *Gazette* began to warm to the jury issue. "Q" wrote to the paper expressing the hope that it would set its "readers right, and not allow the Quarter Sessions hoax to obtain credit, thereby giving rise to expectations here, which under the present Act of Parliament cannot legally be established here"⁸⁶. In the following issue of the paper, "Common Sense" entered the lists with a broadside against "Q", suggesting that the anonymous writer of the earlier letter was not a resident of Van Diemen's Land and should therefore not interfere in the business of the colony. As "Common Sense" affirmed, adapting Shakespeare to serve his cause, "I know my Q without a prompter". "Q", so it was asserted, was "a wondrously facetious gentleman who is pleased to indulge us by descanting upon a subject which he evidently does not understand"⁸⁷. While Arthur continued to ponder on the situation, calling for additional advice from Gellibrand and discussing the matter with Pedder, other correspondents entered the fray. "Observer" wrote to the *Gazette*: "If the establishment of the Quarter Sessions is a hoax, which I am not yet inclined to believe, what is to become of the very able decision of Chief Justice Forbes on this Question"⁸⁸. Undismayed, "Q" returned to the conflict, joining issue with "Common Sense"⁸⁹ while "Observer" pointedly reminded Arthur: "No tidings yet of the Quarter Sessions . . ."⁹⁰.

By March of 1825 it must have become clear to Lieutenant Governor Arthur that it was going to be difficult to avoid a judicial hearing, if and when Quarter Sessions were established in Van Diemen's Land. No further official action had been forthcoming after Gellibrand suggested that a firm directive should be given either by the British government or from some other official source. Pedder had confirmed that doubts existed on the interpretation of the Act of 1823. In February, the Attorney-General had penned another opinion in which he considered, at Arthur's request, the implications of Forbes' judgment in October. While continuing to disagree with Forbes' approach to the question, he affirmed that it was "very desirable that the judgment of the Supreme Court of Van Diemen's Land should be obtained

85. For attempts at curbing freedom of the press in both Van Diemen's Land and New South Wales see: Currey, *Sir Francis Forbes*, Chap. XIX, "The Act for Regulating the Publication of Newspapers". For an admittedly biased view of Lieutenant-Governor Arthur's pursuit of Andrew Bent of the *Hobart Town Gazette* and his convictions for libel see: Melville, *The History of Van Diemen's Land*, 44. Melville, himself a newspaper editor, was fined and imprisoned in the Hobart Town Gaol in 1835 and wrote his History while detained there: *ibid.*, at 8 (Introduction).

86. *Hobart Town Gazette*, 28th January, 1825, Vol. 10, No. 456, 3.

87. *Hobart Town Gazette*, 4th February, 1825, Vol. 10, No. 457, 3.

88. *Hobart Town Gazette*, 11th February, 1825, Vol. 10, No. 458, 3.

89. *Hobart Town Gazette*, 25th February, 1825, Vol. 10, No. 460, 3.

90. *Ibid.*

by a motion for *Mandamus*⁹¹. It was not until the last week in April, however, that Brisbane's proclamation was published finally in the *Hobart Town Gazette* requiring the convening of Courts of Quarter Sessions in the southern region of the Colony. In the same issue of the paper, three justices announced that a "General Quarter Session of the Peace in and for Van Diemen's Land" would be held at the Court House in Hobart Town on the following Monday⁹².

The pro-jury faction responded quickly to the announcement. The *Hobart Town Gazette* itself extolled jury trial on the same day that Brisbane's proclamation was published. The paper did not refer expressly to the possibility of jury trial at Quarter Sessions but the import of its remarks was clear. It praised the limited introduction of civil jury trial in the Supreme Court and went on: ". . . we hope to escape animadversion for requiring as British subjects, the inestimable privilege of trial by jury". Further on, the leading article reminded the paper's readers that it did not want its "pen to be misconstrued to convey even the slightest reprobation of that truly respectable class which at present most conscientiously, we doubt not, represents a Jury in our Court of Civil Judicature". But, so the editorial affirmed, the newspaper wished to protect "the public from any inconvenience or injury which may be apprehended as likely to arise through the want of trial by jury—a trial which has nobly immortalised our native country, and which we hope will be forthwith established in all its colonies, of course we mean exclusively in all where a sufficient number of respectable parties can, as in Hobart Town, be nominated"⁹³.

Soon the jury issue was stirred up in an even more clearcut fashion as the paper opened its columns to a correspondent who described himself as "Peter Clod", a self-proclaimed "plain man". Clod's letter, which was to be partly republished in *The Australian*⁹⁴, began disarmingly by saying that the anonymous writer wished "to understand the present plan of trial by what is called Quarter Sessions, and which appears to me the Old Bench of Magistrates revived". "In England", so Clod pointed out, "whenever the Quarter Sessions are held, I have been accustomed, together with my neighbour in that part of the country where I resided, to be summoned as a jurymen . . . However, I went into court and I saw plenty of justices but no jury". After referring to the introduction of jury trials at Quarter Sessions in Sydney, Clod went on:

"No, Mr. Editor, what I want to know is this, both colonies are governed by the same laws, which I am told originate in the same Act of Parliament. If therefore the people at Sydney have juries, and we have none here, there is a blunder somewhere. It would not be pretty to suppose that Judge Forbes and Counsellors Wentworth and Wardell, and Stephen and Carter, and all the other 'wigs' are wrong, and as to venturing to blame our own great folks, why that would be worse than 'Groggy the Bellman's' letter about the purser and the pork. But what I want to know, how it happens that there are juries at Sydney and none here. I believe, Mr. Editor, that not one of your correspondents, not even the long tailed devil himself has ever ventured to say a word against the advantages of that institution, which every man who has

91. Attorney-General Gellibrand to Lieutenant-Governor Arthur, 22nd February, 1825. Sub-Enclosure No. 6, Bathurst to Arthur, 23rd May, 1826: *H.R.A.*, Series III, Vol. V, 245 at 247.

92. *Hobart Town Gazette*, 29th April, 1825, Vol. 10, No. 469, 1.

93. *Ibid.*, 2.

94. *The Australian*, 30th June, 1825, No. 35, 2.

been reared in England, and has the feelings of an Englishman, must love and venerate; because although seven red coats, fine showy looking blades, cut a great dash in the Jury box, my old English notions make me prefer Twelve good jolly settlers, or even shopkeepers 'in a small way' (no offence I hope Mr. Editor). But I think those who are used to balance the scales in one shop, are not bad hands at balancing them in another. I wish some of our great performers would touch on the subject a little, and give the poor naval officer and some other worthy fellows a little breath"⁹⁵.

"Peter Clod", while professing the simplicity of a "plain man", was obviously well informed, however, on a division of opinion between the Governor's advisers which had become apparent in recent months. His reference to Alfred Stephen, the Solicitor-General, as a supporter of the Forbes' view on the jury question, was an accurate report of the situation. Stephen, a future Chief Justice of New South Wales and son of John Stephen, the younger Stephen's counterpart in Sydney, was soon to demonstrate his dissent from his father's viewpoint. On 5th July, 1825, he was to follow Saxe Bannister's path in arguing in the Supreme Court of Van Diemen's Land for a writ of *mandamus* to order the Magistrates of Hobart Town to convene grand and petit juries for the trial of free settlers at Quarter Sessions. As on the mainland, the Magistrates themselves were willing parties to the hearing. The Proceedings before Pedder were "arranged" so that an official and binding ruling could be made to guide the magistrates on the procedures they should follow. The rule was obtained, as Pedder was to confirm later, "upon the affidavits of several persons, which state certain matters requiring the interference of a Grand Jury". The Magistrates took no steps to appoint a Grand Jury and the rule was then obtained, as Pedder described it, in form against the magistrates but "in point of fact, this is a contrivance, originating in them, in order to have justice done in the instances referred to, as speedily and satisfactorily as possible; and with this object they have considered it proper to contrive the present application"⁹⁶.

At the hearing, Stephen was opposed by Attorney-General Gellibrand. The arguments were lengthy and, for the most part, covered the same ground traversed by counsel in the Supreme Court of New South Wales. From the report of these proceedings it is clear that Pedder took a lively interest in the chief points, as he viewed them, and attempted successfully to give no clear indication of the way his decision would go. At the conclusion of the arguments the Chief Justice summed up "the impressions which as at present advised are upon my mind". Fundamentally, he affirmed, the case turned on whether section 19 of the Act of 1823 was to be treated as standing alone. If it was to be treated as the "whole Act" as far as Courts of Quarter Sessions were concerned then there could be no doubt that Grand and petit juries would be required. On the other hand, if there was doubt about the meaning of s.19 and reference was to be made to other clauses in the statute then Pedder indicated that he would be constrained to hold that juries could only be introduced for the trial of free settlers at Quarter Sessions with an Order-in-Council made under the terms of s.8. After these remarks, the Chief Justice indicated that he would reserve his final judgment until a later day⁹⁷.

95. *Hobart Town Gazette*, 27th May, 1825, Vol. 10, No. 473, 4.

96. *Hobart Town Gazette*, 22nd July, 1825, Vol. 10, No. 481, 3.

97. *Hobart Town Gazette*, 7th July, 1825, Vol. 10, No. 479, 3.

Seven days later the storm broke for the pro-jury faction in Van Diemen's Land. The Chief Justice delivered his judgment in which he refused to follow Forbes' decision. The reverberations were to sound around Van Diemen's Land. But they were soon to be felt, too, in Sydney where *The Australian* in particular was to attack angrily the professional competence of the Chief Justice of Van Diemen's Land even before the full details of the decision had been considered by its editors. It may well be, too, that Pedder's decision in *R. v. Magistrates of Hobart Town* was to contribute to Forbes' attitude to his counterpart in Van Diemen's Land. Some years later, when Pedder had supported a newspaper licensing law in Van Diemen's Land, in direct contradiction to Forbes' views⁹⁸, the Chief Justice of New South Wales wrote: "I should earnestly suggest the withholding of jury trial there for a time . . . I am sure he [Pedder] would find it impossible to guide the juries in his Court"⁹⁹.

Despite the vituperation and scorn which was heaped upon Pedder by the pro-jury faction at the time, his judgment was, at least on the face of it, hardly as aberrational as many of these critics claimed. On several fundamental points there was in fact basic agreement between the two Chief Justices. Pedder agreed with Forbes that New South Wales was a settled colony and the Crown had always possessed the prerogative power to establish Courts of Quarter Sessions, in the absence of any legislative directive to the contrary. He confirmed Forbes' view that if the Crown had created such Courts between 1788 and 1823 both Grand and petit juries would have been required. As he wrote: ". . . if they proceeded at all they must have proceeded according to the Common Law unless an Act otherwise restrained them". Ultimately, it was at the level of the means to be adopted in the interpretation of the essentially ambiguous s.19 of the Act of 1823 that Forbes and Pedder parted ways. Forbes resolved the problem not, in the last analysis, by reference to other clauses in the same Act but by taking the higher ground of calling in aid fundamental constitutional principles as he viewed them. Pedder, on the other hand, stayed within the four corners of the Act of 1823, applying basic rules of statutory construction to reach his conclusion. As far as section 19 was concerned, Pedder did not consider that it contained "clear and intelligible" words leading to the conclusion that jury trial was required in the case of free settlers; a contention with which Forbes was not in fundamental disagreement. The point of departure between the two Chief Justices came at the level of determining the methodology to be used in resolving this difficulty. In the absence of clear guidance on the mode of trial for free persons under s.19 Pedder sought guidance from the other clauses in the Statute to resolve the ambiguity. As a result, to Pedder, clause 8 became a focal point for his examination of the situation. As he then went on to state:

"We now come to the powers given to the King to establish juries. I consider it would be an absolute attempt to repeal this clause, if Juries were now to be established . . . we have an Act of Parliament, establishing an order of things quite at variance with the common law. Now, if we were to anticipate the clause by which the King is authorised to establish Juries, when he may think fit, there would be nothing left . . . for the King to do. The whole thing would then be in operation, and what would be the result. Why a plain and positive

98. *Supra* n.85.

99. Forbes to Wilmot Horton, 6th February, 1827: *Private Letters of Chief Justice Forbes to Wilmot Horton*, typed transcripts, A1819 (Mitchell Library), 89.

Act of Parliament, with times, places and things, plainly and positively set down and prescribed, would be defeated by the single act of a Governor of this Colony—an idea too monstrous to be entertained for a moment. Can it be supported that when the words of this Act were written, that nothing was meant thereby, because there is an implication of silence in another place; and that therefore plain, express, intelligible words are to be put away”¹⁰⁰.

The conflict between this judgment and Forbes’ decision was never resolved in any form of appeal. But the judgment of history can be harsh, particularly in cases of great constitutional moment, when a decision is taken to support a cause which seems to run counter to the trend of history at the time. As Howell has remarked, Pedder’s decision soon led to the Chief Justice being labelled as a member of the “government party” in Van Diemen’s Land¹⁰¹. *The Australian* newspaper of 1825 greeted the judgment with the style of invective which carries its message strongly down the years. It described the decision as a “syllogistic fallacy which any lawyer of six days standing at the bar, or even a six dinner student could, without profound reflection remove”¹⁰². West, in his *History of Tasmania* virtually apologised for Pedder. He pointed out: “That the decision of our supreme court was a more correct interpretation of the intentions of Parliament, is scarcely to be doubted, but the words of the Act did not necessarily extinguish a common law right, and the intention of legislators is not law. The decision of Forbes was more agreeable to Englishmen, though scarcely compatible with conditions of the country”¹⁰³. Currey in his biography of Forbes states simply, without any examination of Pedder’s judgment, that “Forbes construction of the section [section 19] of the New South Wales Act, 1823 . . . was in strict accord with the principles of legal interpretation . . .”¹⁰⁴. Bennett in his article *The Establishment of Jury Trial in New South Wales* contrasts the two decisions, but without any detailed examination other than by referring to criticisms of Pedder contained in *The Australian*¹⁰⁵. More recently, a thesis submitted to the University of Sydney has supported Forbes’ conclusions¹⁰⁶. On balance, it would seem then that Pedder’s decision has tended to fare badly, whether through direct criticism or benign neglect. This is not surprising. Constitutional litigation carried on in the midst of acrimonious public debate stands to be judged very often by its political import. Forbes’ judgment was undoubtedly “more agreeable to Englishmen”, or at least to those who were fighting for constitutional reform in Australia in the nineteenth century. On the other hand, Pedder’s greatest sin perhaps was that he reached a conclusion which was anathema to those who supported a populist cause of the time; a cause which understandably has tended to be most favoured by those of later

100. *Hobart Town Gazette*, 22nd July, 1825, Vol. 10, No. 481, 3 at 4.

101. Howell, *Australian Dictionary of Biography*, Vol. II, 319.

102. *The Australian*, 25th August 1825, No. 46, 2. The papers went on to suggest that as Van Diemen’s Land was still a “dependency” of New South Wales it might be possible for the decision of Pedder to be taken on appeal to the Governor of New South Wales, advised by the Chief Justice of New South Wales. In the following issue the newspaper returned to the fray. Describing Pedder’s decision as “extraordinary” it stated it “recurred” to the decision “with a view to examining most minutely the merits of the arguments, if arguments they can be called, employed by the judge in delivering judgment”: *The Australian*, 1st September, 1825, No. 47, 2.

103. West, *op. cit.*, 83.

104. Currey, *Sir Francis Forbes*, 116.

105. Bennett, *op. cit.*, 470.

106. McLaughlin, *The Magistracy of New South Wales*, 252-258.

generations who have considered the political situation in Australia in the first half of the nineteenth century.

Viewed after a lapse of 150 years, it may well be, however, that we should not be quick to make simple judgments on the correctness or otherwise of the jury decisions of 1824 and 1825. Rather, it may well be that we should recognize these cases as models; illustrating the style of conflicting results which can be expected when Courts are called upon to determine essentially political questions, without adequate guidance from constitutional instruments or the legislative or administrative organs of government. From the documentary evidence, it is clear that in New South Wales in 1824 and again in Van Diemen's Land in 1825 neither the legislative nor executive authorities were prepared to take an open, public stand on the jury question relating to Quarter Sessions, once it was raised by D'Arcy Wentworth. It is clear, too, that although the British government of the day was well aware of the complications and difficulties created by the conflicting decisions, it was not prepared to exercise its undoubted authority to clarify the situation, at least in the short term. Forbes himself, three and a half months before Pedder's decision, had written to Under Secretary Wilmot-Horton on the matter. He referred to his jury decision as an "experiment". He argued that this had succeeded. But significantly he went on to recommend that the introduction of juries with Quarter Sessions in Van Diemen's Land should be delayed until the pleasure of the government "may be done"¹⁰⁷. But the close vote in the Commons on the jury question in 1823¹⁰⁸ had demonstrated already the delicate balance there between conflicting political forces on this and other issues relating to Australia. No immediate action resulted. As a consequence, the Courts were called upon to decide what the Legal Adviser to the Colonial Officer, James Stephen, Jr., was later to describe candidly as "rather a matter of general policy than of law"¹⁰⁹.

As a result, where Courts are, in essence, called upon to make decisions which are more in the nature of legislative acts, rather than the determination of particular controversies, it may not be surprising that conflicting but equally sustainable conclusions may be reached, at least in legal terms. The evolutionary character of English law, which we have inherited in part, provides essentially conflicting strains, gathered from different eras in constitutional history. These may enable different options to be exercised, with the value judgments which lead to choices in such circumstances. In 1824 and 1825 these options may, on balance, have been greater than they are today, given the attitude that Acts of Parliament then could still sometimes be more openly regarded as interfering with what was regarded as the symmetry of the common law. Nevertheless, the contrasting decisions of Forbes and Pedder may well be regarded as illustrating the working of a system of constitutional law which still provides means for such judicial decision making.

107. Chief Justice Forbes to Under-Secretary Horton, 24th March, 1825: *H.R.A.*, Series IV, Vol. 1, 584 at 584-5.

108. *Supra* n.47.

109. J. Stephen, Jr., to Under Secretary Hay, 1st April, 1826; Enclosure, Under Secretary Hay to Lieutenant-Governor Arthur, 23rd May, 1826: *H.R.A.*, Series III, Volume V, 265 at 270. In this same Memorandum, Stephen who had worked with Forbes in the drafting of the New South Wales Act, 1823, claimed that the Governor with the assistance of the Chief Justice had been empowered to establish rules for trials at Quarter Sessions under s.21. In the absence of any Rule on the subject Stephen affirmed that juries were "indispensable" for the trial of free persons at Quarter Sessions: *id.*

The phrase "strict constructionist" is not without ambiguity. It does, however, in generally understandable terms, describe one of the options which may be selected in dealing with the style of issue raised in the jury cases. Pedder's judgment falls into this category. The Chief Justice of Van Diemen's Land showed no radical departure from the canons of statutory construction in his approach to the jury question. If anything, he was more meticulous in his technical approach to the Act of 1823 and its interpretation. In constitutional terms, his judgment could be regarded as accepting the basic responsibility of the legislative and executive organs of government to order the working of the court system in Australia in the mid-1820's. Forbes, on the other hand, seems to have chosen deliberately to take an approach which, above all, may be described as epitomising an activist, interventionist role by the judiciary in the working of the system of government.

Neither of these approaches, and graduations between them, were precluded in the mid-1820's. There were good precedents for both. Both may still be seen in operation today, perhaps most obviously in the field of Administrative Law¹¹⁰. It is not always easy, however, to discern the elements which contribute to the selection of the available options. But here again it may well be that the jury decisions can provide us with at least some clues on the working of these selection processes. The background, the experience, the status, temperament, and political prelections of Pedder and Forbes cannot be ignored in any assessment of the jury cases. There were many contrasts between the two men, which their careers demonstrate, which help to point to the differing approaches they took in dealing with the jury question. In 1824, Forbes was approaching the summit of his career. Pedder, on the other hand, had just received his first judicial appointment after being called to the bar only in 1820. In an age when Colonial judges lacked tenure and patronage was a fact of official life, Forbes was well placed to have the ear of decision makers in Whitehall. He corresponded regularly with James Stephen, Jr. at the Colonial Office and Under Secretary Wilmot-Horton¹¹¹. He had helped to draft the New South Wales Act of 1823 and was well aware of the political machinations and problems surrounding it¹¹². Pedder, on the other hand, was, in many ways, a surprising choice for the Chief Justiceship of Van Diemen's Land. He received the appointment with academic and professional references over competitors who had aristocratic patronage which more normally led to such appointments¹¹³. In these circumstances, Pedder could hardly be blamed if he was less adventurous than his counterpart in New South Wales. Pedder, too, had practised at the Chancery Bar. Forbes, the colonial-born judge, was much more a creature of the common law, impatient with the delays of equity and eschewing it, as far as possible, in the working of the Supreme Court of New South Wales¹¹⁴. Pedder seems, characteristically, and perhaps because of this background of Chancery practice, to have been much more

110. Cases such as *Roberts v. Hopwood* [1925] A.C. 578, *Franklin v. Minister for Town and Country Planning* [1948] A.C. 702 and *Anisimnic Ltd. v. Foreign Compensation Commission* [1969] 2 W.L.R. 163 help to illustrate this.

111. "Robert Wilmot Horton", *Australian Dictionary of Biography*, Vol. 1, 554.

112. Currey, *Sir Francis Forbes*, Ch. III and IV.

113. Howell, *Australian Dictionary of Biography*, Vol. II, 319.

114. Bennett in *A History of the Supreme Court of New South Wales*, Sydney, 1974 at 94, points out, for example, that "Chief Justice Forbes and his judicial colleagues did not share the appetite for equity which the Bents and Barron Field had displayed". Bennett also points out that in 1827 Forbes wrote: "In an early stage of society there is comparatively but little occasion for resorting to a Court of Equity": *ibid.*

meticulous in his attention to detail and often slow in reaching conclusions¹¹⁵, in the time honoured fashion of Chancery at the time. His breadth of knowledge of the working of the law, particularly in a colonial environment, did not bear comparison with Forbes, at least in 1825. In April he had been forced to write to Lieutenant-Governor Arthur on a matter which he said “will never cease to be a matter of the most painful reflection to me”¹¹⁶. Two convicted prisoners had been hanged after trials before Pedder, under a statute which the New South Wales authorities had suggested did not apply in Australia. At the time, action had been stayed in similar cases in New South Wales. Pedder, however, as he admitted himself, had acted without looking into the Act and its peculiar wording¹¹⁷.

A manuscript volume of judgments by Chief Justice Forbes, delivered during his period as Chief Justice of Newfoundland¹¹⁸, which is now in the Mitchell Library, helps, perhaps as much as anything else, to give a clear insight into Forbes’ approach to the judicial function at least in a colonial environment. It seems from these that Forbes aspired to a style of law making role which he may well have regarded as necessary in a colonial situation where the other law-making bodies may not have had the capacity nor the ability to come to terms with local conditions. On occasion, for example, Forbes was well prepared to modify or reject the application of the common law on grounds which may have had some justification under the terms the British legislation applying to Newfoundland¹¹⁹. In the hands of another judge, however, decisions like these could have just as easily gone the other way.

Although Forbes was almost certainly not the “Republican” which his enemies claimed him to be¹²⁰, he seems to have had much more of the independent liberal spirit in him, compared to Pedder. Pedder certainly was not unconscious of nor un-sympathetic to the trials and tribulations of the convict population of Van Diemen’s Land. As Howell has recorded: “In many cases, and often with difficulty he succeeded in persuading the lieutenant

115. In 1827, for example, Lieutenant-Governor Arthur remarked that he had been anxious to receive a report from Pedder on the proposed changes to the New South Wales Act, 1823. As he wrote: “As I conclude Lord Bathurst will be very desirous to receive Mr. Pedder’s Report, I have anxiously pressed him for it, and am greatly disappointed at not having received it . . . he informs me it is quite impossible: he has found difficulties in some points of law, which have grown up under the consideration of the subject, which demand still further research, and his time during the last three months has been almost incessantly occupied”. Lieutenant-Governor Arthur to Under Secretary Hay, 23rd March, 1827: *H.R.A. Series III, Vol. V*, 689. See also: Howell, *Australian Dictionary of Biography*, Vol. II, 320.

116. Chief Justice Pedder to Lieutenant-Governor Arthur, 9th April, 1825: *Papers of Sir George Arthur*, Letters of Chief Justice Pedder I, 1821-1831, A2169 (Mitchell Library).

117. *Ibid.*

118. *Decisions of the Supreme Court of Judicature in cases connected with Trade and Fisheries of Newfoundland during the time of Francis Forbes, Esq., Chief Justice*, A740 (Mitchell Library).

119. In *Williams v. Williams and Others* (A740, 76), the Chief Justice held that a “simple tenure” recognized by custom in Newfoundland “is best adapted to an infant settlement” (*ibid.* at 78). In *Newman v. Meagher and Others* (A740, 166), Forbes held that the customary law of Newfoundland did not require a lessee of a house or other buildings to restore the premises if they were destroyed by fire, even if a lease contained a general covenant on the lessee to repair. The Chief Justice claimed: “There are circumstances of radical difference between houses situated in England and this Island, which cannot but be taken into account in collecting the intention of the parties to a Lease”.

120. Currey, “Francis Forbes”, *Australian Dictionary of Biography*, Vol. I, 392.

governor to pardon prisoners or commute their sentences"¹²¹. But, in political terms, Forbes, partly no doubt because of his own colonial origins, had a much more liberal disposition towards the way colonial life should evolve. Several years after the jury cases, the essential differences between Forbes and Pedder, in this regard, were to be strongly underlined in the conflict over moves in both New South Wales and Van Diemen's Land to impose licensing laws on the press. While Forbes, in much the same fashion as in *R. v. Magistrates of Sydney*, determined that aspects of the law were repugnant to British constitutional principles, Pedder found himself in opposition again to his counterpart in New South Wales on this issue¹²². As the surrounding records show, the doctrine of repugnancy, at least in the manifestation provided for in the New South Wales Act of 1823, could hardly be regarded as calling for the strict exercise of legal principle. Saxe Bannister, in the commentary he wrote on New South Wales on his way back to England¹²³ certainly regarded the notion of repugnancy at the time, under the Act, as largely being political in its import¹²⁴. Forbes, in exercising the power to deny certification of laws passed by the Legislative Council as being repugnant to the laws of England once described his use of this power as in the way of being "the Lords' House" in the governmental structure of the Colony¹²⁵.

But the jury cases of the mid 1820's may be relevant to the present not only in the way they help to show the style of factors which can effect decision making when the courts are called upon to decide essentially political questions without reasonably discernible parameters being set by constitutional instruments or other means. The aftermath of these decisions also helps, at least in some ways, to show the dangers which are inherent in too much reliance being placed upon judicial decision making as a means of political change. It helps to illustrate how the exercise of political authority through judicial decision making cannot be, in many cases, a substitute for political action, whether through the exercise of legislative or administrative authority.

In the short term, Pedder's decision, and the continued refusal of the appropriate legislative and judicial authorities to take decisive action on the jury question led to what must have been close to an intolerable burden being placed on the court system in Van Diemen's Land. The establishment of Quarter Sessions was intended to relieve the Supreme Court of some of its workload in its criminal jurisdiction. Even with the fully fledged operation of Quarter Sessions the load on Pedder would have been great. As Bonwick has recorded, in Van Diemen's Land in the mid 1820's in the course of some six or seven years, the Rev. Dr. Bedford alone attended the execution of from 300 to 400 criminals¹²⁶. In addition to presiding in criminal cases, Pedder also sat of course in other jurisdictions. In 1826, the indefatigable diarist, the Rev. Robert Knopwood¹²⁷, who had declined the first Chairmanship of

121. Howell, "John Lewes Pedder", *ibid.*, Vol. II, 319 at 320.

122. *Supra* n.85.

123. *Statements and Documents Relating to Proceedings in New South Wales*, Bridekirk, Capetown, 1827.

124. *Op. cit.*, Part III.

125. Chief Justice Forbes to Wilmot Horton, 1st June, 1827, *Private Letters to Wilmot Horton*, A1819 (Mitchell Library), 192.

126. Bonwick, *The Bushrangers*, Facsimile of the original 1856 edition, Fuller's Bookshop, Hobart, 1967, 5.

127. "Robert Knopwood", *Australian Dictionary of Biography*, Vol. II, 66. See also Hookey, *The Chaplain*, Fuller's Bookshop, Hobart, 1970.

Quarter Sessions because of ill-health¹²⁸, described a long session on the Bench with Pedder and Gellibrand. They had sat, so he recorded, from 10 a.m. to midnight and had "only one biscuit apiece and not a drop to drink"¹²⁹. To burdens like these, however, the decision in *R. v. Magistrates of Hobart Town* soon added new problems for the administration of justice. Commenting on the situation in 1826, in a letter to Arthur, Alfred Stephen affirmed that free persons at least were not being tried at Quarter Sessions because of the judicial conflict between Forbes and Pedder and the failure of the government to take action to deal with the situation. As a consequence, so Stephen wrote, "the Sessions has been of trivial relief to the Supreme Court". He reported that there were delays in bringing people to trial, crowding in the gaol and "the most trifling case of assault or other misdemeanour by a free man can be disposed of only in the Supreme Court, where the expenses of the trial, the bringing over of witnesses, and the necessity for adhering to the established forms of indictments, are so many impediments in the way of cheap and substantial justice"¹³⁰.

The longer term impact of the jury decisions on the development of the law in Australia is, for the most part, very much a matter of speculation, at least on the basis of the research which has so far been carried out. Certainly, the Australian Courts Act of 1828¹³¹ demonstrated the truism that judicial intervention, *Magna Carta* to the contrary notwithstanding, was no substitute for legislative or administrative action on the jury issue. The first "experiment" with English-style grand and petit juries in New South Wales was relatively shortlived. The Act of 1828 laid it down that the future regulation of jury trial was to be in the hands of the Legislative Councils of the Australian colonies and it was to be more than a decade after that before military juries were to be abolished finally. It remains, however, to determine whether the jury cases of 1824 and 1825 contributed to the more rapid decline of juries in Australia, compared to North America, for example, and whether the short-lived use of juries in New South Wales may have developed attitudes, particularly among opponents to jury trial, which not only may have delayed the full introduction of jury trial for many more years but affected the working of the jury system as it was introduced finally in New South Wales and Van Diemen's Land between 1828 and 1842¹³². As late as 1836, for example, there remained a marked division on the Supreme Court of New South Wales on the desirability of jury trial in the Colony. In April, the Judges of the Supreme Court were asked to report to the government whether jury verdicts "answered the end of law and justice" in the Colony. The replies of the judges to this request indicate that Forbes was, as ever, convinced that

128. Hudspeth, *Introduction to the Diaries of Rev. Robert Knopwood, A.M.*, 59 (Diary entry 16th May, 1825). Interestingly, the first person tried at Quarter Sessions was Knopwood's gardener. He was sentenced to three years at Macquarie Harbour for forging and uttering.

129. *Ibid.* at 64 (Diary entry 26th July, 1826).

130. Solicitor-General Stephen to Lieutenant-Governor Arthur, 9th October, 1826; Enclosure, Lieutenant-Governor Arthur to Under Secretary Hay, 15th November, 1826: *H.R.A.*, Series III, Vol. V, 421 at 430-1. Records in the Tasmanian Archives confirm this situation. The surviving records of conviction in Quarter Sessions in the years between 1825 and 1830, when the Court was revived as a court of general jurisdiction, were as follows: 41 (1825), 8 (1826), 5 (1827), 3 (1828): Tasmanian Archives, EC 4/1. *The Colonial Times* of 14th May, 1830, in discussing the proposed revival of the Courts of Quarter Sessions affirmed that the "almost overwhelming burden" on the Supreme Court is to be relieved by the re-establishment of the Court of Quarter Sessions.

131. 9 Geo. IV, c.83.

132. Bennett, "The Establishment of Jury Trial in New South Wales", *loc. cit.* at 463.

the use of juries in the Colony had been successful. He commented on the unwillingness of the "upper classes of the inhabitants to be drawn so frequently from their private affairs to attend an irksome and painful duty in the Courts". But, so he affirmed: ". . . my decided opinion is, that Trial by Jury in the colony has been deferred too long"¹³³. Dowling J. agreed with the Chief Justice¹³⁴. Burton J., on the other hand, was violently opposed to the full introduction of jury trial. His views echoed the style of sentiments which the opponents of jury trial had claimed had been a characteristic of the use of juries in Quarter Sessions between 1824 and 1828. Burton affirmed that "a want of confidence in the Juries of this Colony is entertained on the part of the civil inhabitants". He decried the use of publicans on juries and gave vent to his feelings in this outburst:

"The keepers of the low public houses in Sydney, which form the greater number, are chiefly persons who have been transported to this Colony, or are married to Convicts, many of them are notorious drunkards, obscene persons, fighters, gamblers, receivers of stolen goods, receivers and harborers of thieves, and of the most depraved of both sexes. They exist upon the vices of the lower orders, and inasmuch as there are no licensed pawnbrokers in Sydney, there are in fact pawnbrokers, but not as frequently occurs in other countries, upon occasion of some temporary pressure upon the poor, for some necessary of life, but for intoxicating liquor"¹³⁵.

In the light of comments like these, it would not be surprising if the divisions of opinion on jury trial in the Supreme Court, no less than similar divisions in the public demesne, led to compromises in the reliance placed on the use of jury trial and on the eligibility for jury service which may well have had long term influences on the working of the Australian legal system.

In conclusion, it should be pointed out, that these comments on the dangers inherent in reliance upon judicial decision making in dealing with essentially political questions should not be taken to imply that Courts should not be called upon to play an essentially arbitral role in dealing with such matters. Such a role must of necessity involve an element of law making if only to transpose a phrase of the eminent American constitutionalist, Philip Kurland, because the courts must determine "the shape in which a statute is imposed"¹³⁶. But as Mr. Justice Frankfurter demonstrated in his dissenting judgment in the *Tennessee Voting Case*¹³⁷, and on other occasions, a great judge, with deeply ingrained liberal attitudes, might nevertheless balk at the prospect of broadening the judicial role to such an extent that it becomes not merely an adjunct of the political process but the intended mainspring of political action.

133. *Forbes Papers*, "Trial by Jury", A741 (Mitchell Library), 98/4. The letter requesting the opinions of the Judges is contained in the same papers: A741, 94, McLeay to Judges of the Supreme Court.

134. *Ibid.*, 99.

135. Burton J's. reply was written on 30th April, 1836: A741 (Mitchell Library), 99. The copy of Burton's letter in the Forbes papers contains side comments of the Chief Justice. The quoted comment is at A741/99(13). The papers contain also returns on persons tried at Quarter Sessions, distinguishing convicts tried summarily from persons tried by military and civilian juries. The figures for 1835, for example, demonstrate seemingly a *better chance of acquittal (but not overwhelmingly better)* before civilian juries.

136. Kurland, *Politics, the Constitution and the Warren Court*, Chicago, 1970, 69.

137. *Baker v. Carr*, 369 U.S. 186 (1962).

In his personal comments and judgments¹³⁸, Frankfurter made clear the risks implicit in setting too widely the parameters of judicial intervention in political controversies. If the bounds of judicial action are set too broadly, with judicial decision-making trespassing too deliberately upon legislative and even administrative functions, this could, at worst, threaten the long-term acceptance of the judicial function as an essential concomitant of government. Even without this, the pursuit of political goals may breed forms of reaction threatening the stability of the judicial function. Rather, as Frankfurter once affirmed, the pursuit of "civilised ends" with "modest goals, uncompromisingly pursued"¹³⁹. The history of our law, at least from the seventeenth century, and even with the imposition of a written Constitution which requires judicial interpretation, should also underline the importance of another pertinent, if somewhat irreverent comment which Frankfurter made: "If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place"¹⁴⁰. More circumspectly, but no less potently, Friedman in his *History of American Law* argues: "In a society with many rough, contentious holders of power, at war with each other, the court can affect power relations only slowly and subtly. Otherwise a delicate balance is upset"¹⁴¹. Historically, it was one of the great feats of the common law that it was generally able to maintain this balance. The survival of courts does not of course depend on this. But the survival of the judicial role as one of the accepted checks in the balancing of conflicting political interests may well be called into question if judicial law making moves away too assertively from its traditional function.

138. *Felix Frankfurter Reminisces*, New York, 1960, and *Of Law and Men, Papers and Addresses of Felix Frankfurter*, New York 1956, provide many examples of Frankfurter's personal views on the role of courts. Kurland *op. cit.*, is, in many ways, a seminal exposition of the same approach. Kurland's important collection of Frankfurter judgments in *Mr. Justice Frankfurter and the Constitution* (ed. Kurland), Chicago 1971, provides abundant evidence, too, of Frankfurter's application of his views as a member of the U.S. Supreme Court.

139. *Of Law and Men*, 29.

140. *Ibid.*

141. Friedman, *A History of American Law*, New York, 1973, 19.